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**REDISTRICTING LITIGATION AND THE DELEGATION  
OF DEMOCRATIC DESIGN**

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*The power to redraw electoral lines is the power to design elections. Enormous significance therefore attaches to any delegation of redistricting authority. Yet in every jurisdiction in the country, the power to redistrict has been delegated to a varied collection of actors whose participation largely has escaped academic attention. They are as ubiquitous as they are overlooked: they are the redistricting litigants. These actors' participation in the process leads to a startling form of redistricting. Though the majority of these litigants are not elected, appointed, or in any way vetted by the electorate at large, they are empowered to affect electoral lines in deliberate and politically consequential ways; to affect the rights of non-parties without providing class-action protections or other defenses; and to exploit a procedural regime that, due to the time pressures of the election cycle, becomes warped in ways that give litigants significant leverage to advance their own agendas. These features reflect a regime developed not through deliberate design, but rather through the accidental effects of judicial intervention. This Article responds to the persistent gap in the literature by revealing the unacknowledged power of redistricting litigants. It identifies the concerns their participation raises with respect to the outcomes, efficiency, and legitimacy of the redistricting process, and it concludes with a discussion of targeted reforms. These reforms include institutional adjustments meant to reduce reliance on litigants and procedural changes meant to give greater voice to non-parties.*

#### INTRODUCTION

Redistricting has a technical definition: the redrawing of electoral district boundaries. Yet scholars often describe the practice in far more colorful terms. Redistricting is the “bloodsport of politics,”<sup>1</sup> an opportunity for “political players [to] game the system,”<sup>2</sup> or, simply, “war.”<sup>3</sup> These characterizations attempt to capture what the definition lacks, which is an acknowledgment that the drawing of electoral boundaries has profound political and practical implications. The power to redistrict is the power to affect fundamental democratic design, for elections are influenced, and even decided by, the shape

<sup>1</sup> T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588, 588 (1993).

<sup>2</sup> Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808, 1836 (2012).

<sup>3</sup> Nicholas O. Stephanopoulos, *Redistricting and the Territorial Community*, 160 U. PA. L. REV. 1379, 1381 (2012) (referring to the “redistricting wars”).

of particular districts.<sup>4</sup> The understandable result is intense academic scrutiny directed at which individuals and institutions should be empowered to redistrict. To this end, scholars have debated the relative merits of courts over legislatures,<sup>5</sup> legislatures over commissions,<sup>6</sup> and commissions over courts,<sup>7</sup> among other formulations.<sup>8</sup> An emerging body of scholarship – a burgeoning “new election law institutionalism” – has advanced these debates even further.<sup>9</sup>

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<sup>4</sup> See *infra* note 21.

<sup>5</sup> Compare, e.g., Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 643-45 (2002) (“[T]he Court should forbid ex ante the participation of self-interested insiders [such as legislators] in the redistricting process, instead of trying to police redistricting outcomes ex post.”); Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 83 (2004) (“Courts should not be idealized as institutional guarantors against inevitable democratic pathologies, but they are the primary American institution capable under current circumstances of addressing the central structural problem of self-entrenchment.”), with Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 680-81 (2002) (rejecting Professor Issacharoff’s thesis and arguing instead that redistricting should be conducted by the “admittedly self-interested but more accountable political bodies”). For other works exploring the choice between courts and legislatures, see, for example, Michael A. Carvin & Louis K. Fisher, *A “Legislative Task”: Why Four Types of Redistricting Challenges Are Not, or Should Not Be, Recognized by Courts*, 4 ELECTION L.J. 2, 42-43 (2005), and Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 578 (2004).

<sup>6</sup> Compare, e.g., Persily, *supra* note 5, at 678-79 (“[A]ssuming that we could find a philosopher king whom we could trust both to develop and to apply neutral redistricting principles, we should still hesitate to embrace such a method for determining the building blocks of legislative representation. . . . Through redistricting, legislatures not only make the tough value-laden decisions as to how communities should be represented, but they create service relationships between representatives and constituents that fit into larger public policy programs.”), with Issacharoff, *supra* note 5, at 644 (“Various approaches to nonpartisan redistricting, such as blue-ribbon commissions, panels of retired judges, and Iowa’s computer-based models, recommend themselves as viable alternatives to the pro-incumbent status quo.”). See generally Heather K. Gerken, *The Double-Edged Sword of Independence: Inoculating Electoral Reform Commissions Against Everyday Politics*, 6 ELECTION L.J. 184, 184 (2007).

<sup>7</sup> See, e.g., Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1611 (1999).

<sup>8</sup> See, e.g., Justin Levitt, *Weighing the Potential of Citizen Redistricting*, 44 LOYOLA L.A. L. REV. 513, 522-42 (2011) (analyzing alternatives to incumbent control of the redistricting process); see also JUSTIN LEVITT, BRENNAN CTR. FOR JUSTICE, A CITIZEN’S GUIDE TO REDISTRICTING 23 (2010) [hereinafter LEVITT, CITIZEN’S GUIDE], available at [http://brennan.3cdn.net/cdefaa72f3179649cb\\_pqm6b404v.pdf](http://brennan.3cdn.net/cdefaa72f3179649cb_pqm6b404v.pdf) (describing proposals in which “computers draw the lines using automated algorithms,” or “members of the public [submit] plans to be judged purely on quantitative criteria”).

<sup>9</sup> See Cain, *supra* note 2, at 1843.

These discussions are of tremendous value. But they are incomplete. Despite their foundation in institutional competence and design, they fail to take into adequate account – and often fail even to acknowledge – the pivotal role played each redistricting cycle by a separate set of agents: the redistricting litigants.<sup>10</sup> Members of this group are empowered, in every jurisdiction across the country, to affect electoral lines in ways that are legally sanctioned and politically consequential. Yet their participation attracts almost no sustained scholarly attention.

A more careful look at litigants' influence over redistricting confirms the timeliness and importance of exploring the implications of this phenomenon. As of the date that members of the 113th Congress – including many elected pursuant to the most recent round of redistricting – were sworn in, nearly 200 redistricting-related cases had been filed following the 2010 Census.<sup>11</sup> This litigation already had had an enormous effect on democratic design across the country, as courts in over a dozen states had rejected plans that were designed, whether recently or in a prior redistricting cycle, by state legislatures or redistricting commissions, and within that set, over half had redrawn the district lines themselves.<sup>12</sup> And the effect was far from finished: some sixty cases still remained active.<sup>13</sup>

A more careful look at how litigants have driven and otherwise affected this process reveals a host of questions and concerns. Although redistricting litigants benefit from a significant delegation of redistricting authority, most of these actors are never elected, appointed, or in any way vetted by the electorate at large. Their participation in redistricting is transparent only in the most nominal sense. Litigants nevertheless enjoy a privileged position in the redistricting process, one that accords them a procedural regime accommodating of their preferences, even when that accommodation affects redistricting outcomes; an ability to affect the rights of non-parties without providing protections that would be required in a class-action setting; and an unusual jumble of timing-based rules that gives redistricting litigants significant leverage to advance their own agendas. The consequences of such participation are far-reaching, as nearly all redistricting-related reforms implicitly rely on litigants for implementation or enforcement, and reliance on these actors may compromise the very purpose of such efforts. Litigant participation also raises difficult questions of legitimacy, questions that cannot be adequately considered, much less addressed, without critical scrutiny.

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<sup>10</sup> By “agent,” this Article means to refer to “[s]omething that produces an effect,” not necessarily “[o]ne who is authorized to act for or in place of another.” BLACK’S LAW DICTIONARY 72 (9th ed. 2009).

<sup>11</sup> Justin Levitt, *Litigation in the 2010 Cycle*, ALL ABOUT REDISTRICTING, <http://redistricting.ils.edu/cases.php> (last visited Jan. 3, 2013).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

Despite these concerns, a gap in the literature is perhaps to be expected. Litigation over matters of public importance is hardly unusual, and, as a result, it may not be clear why redistricting litigants should warrant special attention, particularly when many of the features of redistricting litigation have analogs in other litigation contexts. Moreover, not all scholarship ignores redistricting litigants; some simply conflates litigants with the courts before which they appear. This conflation has a certain logic to it: litigants cannot affect district lines directly but instead must do so through judicial mediators. With election law scholars already analyzing the participation of courts in the redistricting process, perhaps there is no need to subject redistricting litigants to separate scrutiny.

This Article fights against such conclusions. It seeks to reveal how the practice of litigating as redistricting, which has evolved into a form of litigation highly susceptible to procedural manipulation, has created a type of redistricting that grants profound power to those who choose to litigate. In so doing, this Article rejects any understanding of the redistricting process that understands the influence of litigants to be somehow negated or neutralized by the involvement of courts.<sup>14</sup> It recognizes, moreover, that many of the defining features of redistricting litigation – which are, in certain respects, analogous to those characterizing other problematic forms of litigation – nevertheless reflect some of the most startling effects of applying the trans-substantive norm of civil procedure to extraordinary causes of action.<sup>15</sup> These effects stem in part from what is at stake. Redistricting through litigation has far-reaching and even multiplied effects on the public interest, as challenges to state-imposed redistricting regimes affect the composition of the legislatures that enact future statutes. Moreover, these effects are neither rare nor random, arising at unpredictable times in an unpredictable fashion. Redistricting litigation instead occurs with clocklike regularity every redistricting cycle,<sup>16</sup> with jurisdictions across the country relying on this form of litigation to ensure legality and simply when necessary to overcome legislative deadlock.<sup>17</sup> In other words, the effects of redistricting litigation are profound – and predictably so.

In exploring the implications of these observations, this Article initiates the project of subjecting litigant participation in redistricting to the scrutiny it warrants. Part I begins with an introduction of redistricting litigants. It identifies several traits that best characterize these actors, a group whose composition is heterogeneous, ad hoc, and largely self-selected. It situates

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<sup>14</sup> Quite to the contrary, redistricting litigants exercise important control over the judicial actors meant to mediate their participation. *See infra* Part II.A.1.b-c, A.3.

<sup>15</sup> *Cf.* David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 373 (2010) (“The pressures of complexity and specialization, among other developments, have imperiled the trans-substantivity principle as a bulwark of federal civil procedure.”).

<sup>16</sup> *See infra* note 64 and accompanying text.

<sup>17</sup> *See infra* Part I.B.2.

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these actors as critical participants in the redistricting process but as virtual non-entities in the existing literature. After identifying the stakes implicated by this unusual combination, Part I confirms that litigant participation will become no less critical to the redistricting process in the foreseeable future. The delegation of authority to litigants instead promises to remain as central to the redistricting process as it has been for now half a century.<sup>18</sup>

Part II reveals the consequences. It demonstrates how the delegation of authority operates through a form of litigation subject to significant control by litigants. At the outset, redistricting through litigation offers a flexible and forgiving regime to those electing to litigate, with a standing doctrine able to accommodate anyone – that is, anyone of sufficient resources and adequate motivation – wishing to participate in the redistricting process; a venue regime that provides extraordinary rewards for parties trying to secure a preferred judge; and flexibility in claim selection that permits litigants to set the courts' agendas in powerful and consequential ways. Yet at the same time redistricting litigation is so hospitable to litigants, it offers remarkably few protections to non-litigants. A striking example of aggregative litigation packaged as an individual lawsuit, redistricting litigation seems like the sort that should be subjected to class-action-style protections. But it is not. Compounding this neglect of non-parties is a shifting regime of legal standards that courts have developed in response to the exigencies of the election cycle. This unusual compression of civil procedure gives litigants significant control over several fundamental aspects of the process, including the balance of power among redistricting agents, the standards for relief, and the timing of court-imposed remedies.

Combined, these features produce a procedural regime ripe for manipulation by litigants. This, in turn, produces an unexpected form of redistricting – one that grants sweeping power to actors who are not representative of the general electorate and that requires them to exercise power through opaque and indirect means. These features reflect a redistricting regime developed not through deliberate effort, but rather through the accidental effects of judicial intervention. It reveals a startling model of democratic design.

Such a regime raises normative concerns. Part III identifies the questions that litigant participation raises with respect to fundamental qualities of the redistricting process, including its outcomes, efficiency, and legitimacy. These concerns urge a more thoughtful delegation of democratic design. To this end, the Article discusses potential reforms that may help to advance two general goals: improved representativeness and reduced opportunity for procedural manipulation by litigants. At the forefront of these proposals are institutional adjustments meant to reduce reliance on litigants and procedural changes meant to give greater voice to non-parties. These discussions, which

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<sup>18</sup> See *Baker v. Carr*, 369 U.S. 186, 237 (1962) (holding for the first time that plaintiffs challenging legislative reapportionment had presented a justiciable claim).

come fifty years after the Supreme Court first transformed litigants into agents of redistricting,<sup>19</sup> are long overdue.

### I. INTRODUCING THE REDISTRICTING LITIGANTS

Identifying the agents of redistricting – including the litigants who play such a pivotal role – is critical, at the very outset, because redistricting matters, and it matters who redistricts. When asserted at a high level of generality, these broad propositions elicit little controversy. Indeed, it has become “a core understanding in American politics . . . that geographically districted elections are subject to ends-oriented manipulation.”<sup>20</sup> Perhaps the most vivid illustration occurs when an election outcome is unmistakably affected by the shape of electoral districts,<sup>21</sup> although often the effect is more subtle. Even when districts have equal populations, “[t]he choice to draw a district line one way, not another, always carries some consequence for politics.”<sup>22</sup> In short, different maps generate different elections. And different elections have at least the potential to generate different politicians.<sup>23</sup> It therefore matters how electoral maps are drawn – and, by extension, who is empowered to do the drawing.

The identity of the map-drawers matters for at least two reasons. First, the task of redistricting is in no sense ministerial. Quite to the contrary, redistricting requires the exercise of enormous discretion, with maps generally susceptible to numerous variations, each with its own set of electoral

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<sup>19</sup> *See id.*

<sup>20</sup> Issacharoff, *supra* note 5, at 595.

<sup>21</sup> *See, e.g.,* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 466 (2006) (Stevens, J., dissenting) (describing how, under one district plan, if members of a given political party won 50% of the statewide vote, they would be likely to win twenty of thirty-two congressional seats, whereas, under another plan, they would be likely to win only sixteen); Vieth v. Jubelirer, 541 U.S. 267, 358-59 (2004) (Breyer, J., dissenting) (“Given a fairly large state population with a fairly large congressional delegation, districts assigned so as to be perfectly random in respect to politics would translate a small shift in political sentiment, say a shift from 51% Republican to 49% Republican, into a seismic shift in the makeup of the legislative delegation, say from 100% Republican to 100% Democrat.”); Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2553-54 (1997) (“Recent cases now document in microscopic detail the astonishing precision with which redistricters can carve up individual precincts and distribute them between districts with confidence concerning the racial and partisan consequences.”).

<sup>22</sup> *Vieth*, 541 U.S. at 343 (Souter, J., dissenting).

<sup>23</sup> The shape of electoral districts can affect which politicians get elected. *See supra* note 21. It has also been suggested that the shape of electoral districts can affect how politicians then govern. *See, e.g.,* Shaw v. Reno, 509 U.S. 630, 648 (1993) (“When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole.”).

consequences.<sup>24</sup> There is, as a result, almost always the potential for those in charge of redistricting meaningfully to affect district boundaries. Second, the legitimacy of the redistricting process may depend in part on who is empowered to draw the electoral maps.<sup>25</sup> This legitimacy (or lack of legitimacy) may go so far as to affect those elected pursuant to those maps,<sup>26</sup> in which case the identity of the map-drawers takes on even greater importance.

These concerns are reflected in a voluminous literature debating the relative merits of empowering certain actors over others.<sup>27</sup> Yet as discussed in more detail below,<sup>28</sup> the existing scholarship has overlooked a critical group of participants: the thousands of individuals who have affected district maps through resort to litigation. The redistricting process accommodates, and even relies on, these litigants to ensure the timely implementation of district lines. While it is true that these agents cannot directly change map lines, but rather must act by influencing those who are so empowered, they nevertheless are able to exercise significant control over redistricting through efforts that are authorized and facilitated by the legal system itself.

The following discussion, which introduces redistricting litigants and provides an overview of the redistricting process, helps to situate litigants in this regime and to confirm the pivotal role they play.

#### A. *Who the Redistricting Litigants Are*

Redistricting litigants – a term this Article uses broadly to include not only the parties nominally named in litigation, but also those operating (often behind the scenes) to control, fund, or otherwise drive redistricting litigation – share certain definitional commonalities.<sup>29</sup> They all pursue the same ultimate

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<sup>24</sup> See Micah Altman, *The Computational Complexity of Automated Redistricting: Is Automation the Answer?*, 23 RUTGERS COMPUTER & TECH. L.J. 81, 98 (1997) (“For even a small number of census tracts and districts, the number of possible districting arrangements is enormous.”).

<sup>25</sup> Legitimacy, in this context, may be understood as reflecting various meanings, including the public’s perceived obligation to, and support of, legal authority. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 27-28 (1990). This Article, which seeks to raise questions of legitimacy as they relate to the participation of litigants in the redistricting process, does not go so far as to answer these difficult inquiries. An excellent exploration and critique of the use of legitimacy-based arguments in the field of election law can be found in Christopher S. Elmendorf, *Empirical Legitimacy and Election Law*, in RACE, REFORM, AND REGULATORY INSTITUTIONS: RECURRING PUZZLES IN AMERICAN DEMOCRACY 117 (Heather K. Gerken, Guy Uriel E. Charles & Michael S. Kang eds., 2011).

<sup>26</sup> See Issacharoff, *supra* note 5, at 605-06 (describing certain Supreme Court cases as “ground[ing] the legitimacy of the exercise of governmental power in the fairness and propriety of the electoral process itself”).

<sup>27</sup> See *infra* notes 91-96 and accompanying text.

<sup>28</sup> See *infra* Part I.C.

<sup>29</sup> The term “redistricting litigants,” for purposes of this Article, at times encompasses a particularly important class of individuals exercising control over the litigation: the lawyers.



goal: to affect the shape of electoral districts. They all must act through a judicial mediator, as they lack authority to draw district lines directly. What is more, as this Article seeks to reveal, they all enjoy a privileged role in the redistricting process, for they all operate within a legal system that accommodates, facilitates, and even relies on their efforts when determining district lines.<sup>30</sup>

Beyond these broad generalities, however, redistricting litigants can be difficult to describe. As a strictly formal matter, of course, litigants are quickly recognized; their names are a matter of public record, and they generally are suing in their capacity as voters in the districts they are challenging, for it is this quality that most reliably accords them standing.<sup>31</sup> Beyond these informational tidbits, however, there is little in the public sphere that describes the nature of redistricting litigants or identifies their motivations. This lack of transparency is in part due to lax disclosure regimes. Redistricting litigants face no set requirement that they inform the court, much less the public, about the motivations or the funding behind their lawsuits. Transparency also tends to be undermined by the rules for getting into court. In order to secure standing, redistricting litigants normally must reside in the district they seek to challenge.<sup>32</sup> While this requirement might seem to impose a significant limitation on which parties get to participate in redistricting litigation, it in fact is easily circumvented by those willing to find litigant proxies.<sup>33</sup> In a sense, therefore, the standing requirements create an incentive for actors to participate in redistricting litigation at one degree removed, through an arrangement whereby voters in the relevant district serve as the nominal litigants. This two-tiered arrangement means that the minimal information contained in the complaints is at best incomplete.

Despite such challenges, one can make an educated guess about the composition of litigants in any given lawsuit. Usually, those most likely to be appearing before a judge – either directly or through a litigant proxy – are those with significant financial backing and the most directly at stake. This tends to include major political parties, prominent interest groups, and, if the stakes are high enough, an individual legislator or some splinter faction from a political party. Parsing through the litigants in select cases tends to confirm this intuition.<sup>34</sup>

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Lawyers necessarily are implicated, for example, whenever the Article discusses litigation strategies. While this Article generally does not differentiate among these different classes of “litigants” (that is, among the nominal litigants, those operating behind the scenes, and the lawyers who represent either or both of them), the ways in which these actors’ interests overlap and diverge is an underexplored topic that warrants further analysis.

<sup>30</sup> For an overview, see *infra* Part I.B.

<sup>31</sup> See, e.g., *United States v. Hays*, 515 U.S. 737, 744-45 (1995).

<sup>32</sup> See *infra* note 109 and accompanying text.

<sup>33</sup> See *infra* notes 111-14 and accompanying text.

<sup>34</sup> See, e.g., Kathleen M. Sullivan & Pamela S. Karlan, *The Elysian Fields of the Law*, 57

It also is possible to classify redistricting litigants in terms that are more general but still revealing. To this end, the composition of this group can be described as heterogeneous, ad hoc, and, for the most part, self-selected. As a closer examination of these traits confirms, there is little reason to conclude that this group represents all the interests implicated by redistricting.

At the outset, redistricting litigants as a group are heterogeneous with respect to their affiliations, motivations, and levels of competence. A redistricting plaintiff, for example, may be associated with any number of groups, including political parties, political factions, minority groups, or other interest groups. Occasionally, a plaintiff will proceed on his own behalf, as may be the case with respect to individual politicians or other civic-minded individuals. On the defense side, a redistricting litigant normally proceeds in his or her capacity as a state actor (frequently, as secretary of state, the official whom most redistricting litigants are required by law to sue).<sup>35</sup> Even on the defense side, however, there is meaningful diversity: there very well may be outside parties – such as political parties or interest groups – driving litigation nominally pursued by a state actor.<sup>36</sup>

Given the diversity of affiliations, it is perhaps not surprising that redistricting litigants, as a group, also are heterogeneous in their motivations. At the highest level of generality, redistricting litigants want to affect electoral lines, and they tend to be driven by discrete concerns, often relating to a certain politician, cause, or political party. Beyond this, however, litigants on both the plaintiffs' side and the defense side tend to have complex motivations, sometimes seemingly at odds with the positions they take in their cases. This is due in part to the inherent complexity of redistricting litigation. Many of the legal issues, forms of proof, and predictions regarding electoral consequences are extraordinarily complicated. As a result, it often is necessary for litigants to rely not on ideological preferences or party platforms, but rather on lawyers and data experts to determine which legal positions to advance. Coupled with the intricate political dances and shifting alliances that dictate the particular goals litigants decide to pursue, the result is that legal positions may shift in the course of a single redistricting cycle; litigants affiliated with the same political

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STAN. L. REV. 695, 710 (2004) (“Even if the plaintiffs themselves are not political activists – and often they are – the lawsuits are nearly always financed and run by political parties.”). *But see* Robinson O. Everett, *Redistricting in North Carolina – A Personal Perspective*, 79 N.C. L. REV. 1301, 1315 (2000) (describing litigation brought by individuals not affiliated with established political actors). *See generally* STEVE BICKERSTAFF, *LINES IN THE SAND: CONGRESSIONAL REDISTRICTING IN TEXAS AND THE DOWNFALL OF TOM DELAY* (2007) (describing political players involved in redistricting in Texas).

<sup>35</sup> Occasionally, the government itself even might serve as a litigant, as when the United States sues to enforce federal law or a state sues the federal government to receive the preclearance required by the Voting Rights Act. *See* 42 U.S.C. §§ 1973-1973aa-6 (2006).

<sup>36</sup> *See, e.g.*, BICKERSTAFF, *supra* note 34 (describing efforts by Republican national politicians, including Congressman Tom DeLay, to design and defend a mid-cycle redistricting of the state's congressional districts).

party may take opposite legal positions in different jurisdictions; and parties may take positions that appear contrary to type. A Republican-backed group, for example, might decide to join individual Democratic legislators in advocating for certain majority-minority districts, given the possibility of constructing a map that shields both the individual legislators and Republican incumbents.<sup>37</sup> The legal positions taken during litigation are only loose proxies for a litigant's more complicated underlying motivations.

Finally, there is significant diversity in litigants' levels of competence. Some are represented by preeminent experts in the field, lawyers and specialists with decades of redistricting experience. Others proceed pro se. There is, moreover, evidence to suggest that large amounts of money recently have been poured into groups funding redistricting litigation and other redistricting efforts.<sup>38</sup> Yet not all litigants benefit from this funding.<sup>39</sup> As a result of these discrepancies, courtroom adversaries may be mismatched in competence.

The diversity among litigants should not, however, be mistaken for an organized attempt to ensure broad representation. That would imply a centralized system that does not exist. This absence goes to the second central trait defining redistricting litigants: the ad hoc nature of their composition. Beyond the requirement that certain state actors be named as defendants, there is virtually no regulation affecting whose interests are represented.<sup>40</sup> The scope of representation instead is a result of case-by-case decisionmaking by potential litigants. Determinations regarding who will serve as redistricting litigants, in other words, are not driven in any systematic fashion; they instead are a reflection of decentralized decisionmaking by a disparate collection of individuals and organizations. Although this ad hoc approach to representation may be typical in certain forms of civil litigation, it deviates from the approach employed in other prominent forms of litigation (such as that used in class actions),<sup>41</sup> it reflects a markedly lenient set of standing rules,<sup>42</sup> and it takes on a particular significance in the redistricting context.<sup>43</sup>

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<sup>37</sup> See, e.g., Olga Pierce et al., *The Hidden Hands in Redistricting: Corporations and Other Powerful Interests*, PROPUBLICA (Sept. 23, 2011, 8:03 AM), <http://www.propublica.org/article/hidden-hands-in-redistricting-corporations-special-interests>.

<sup>38</sup> See, e.g., Cynthia Burton, *Center for a Better New Jersey Funding Is a Mystery*, PHILA. INQUIRER (Feb. 15, 2011), [http://articles.philly.com/2011-02-15/news/28536244\\_1\\_a\\_pportionment-commission-redrawing-district-boundaries](http://articles.philly.com/2011-02-15/news/28536244_1_a_pportionment-commission-redrawing-district-boundaries); Pierce et al., *supra* note 37.

<sup>39</sup> See, e.g., Everett, *supra* note 34, at 1315 (describing financial difficulties encountered in litigation against a state).

<sup>40</sup> As discussed below, although standing doctrines exist, they have little practical effect. See *infra* notes 109-14 and accompanying text.

<sup>41</sup> See *infra* Part II.A.2.

<sup>42</sup> See *infra* Part II.A.1.a.

<sup>43</sup> See *infra* Part II.B.

This, in turn, relates to the final central trait of redistricting litigants, which is that they are, for the most part, self-selected. Like most plaintiffs, redistricting plaintiffs choose whether to join a lawsuit, and that decision is entirely voluntary. In the redistricting context, this means that the conversion from a non-participant to an important agent of redistricting is based on a litigant's own initiative, not because the law affirmatively has assigned the litigant this role.<sup>44</sup> There is, as a corollary, no public selection process or vetting of those who choose to participate.<sup>45</sup> There is not even any requirement of transparency with respect to these actors.<sup>46</sup> While there are exceptions – most prominently, with respect to certain state actors, who often are required to participate in the process as defendants<sup>47</sup> – the majority of redistricting litigants are private parties whose roles in the process are entirely voluntary and self-directed.<sup>48</sup>

These three traits – heterogeneity, an ad hoc approach to representation, and self-selection – define redistricting litigants. The result is a group of participants that tends to represent not the electorate at large, but rather the interests of established political actors, such as major political parties and prominent interest groups. These are the actors who have been empowered to take on the quintessentially public task of redistricting.

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<sup>44</sup> In a very broad sense, of course, the law *has* assigned private litigants a role by granting them standing to bring suit or intervene. This observation, while valid, fails to take into account more subtle differences. Members of the private-litigant group have been assigned no special role in the redistricting process (beyond their undifferentiated status as voters), and they become participants in the redistricting process only if they voluntarily elect to be.

<sup>45</sup> The rare candid account by a redistricting litigant helps to illustrate this phenomenon. *See, e.g.*, Everett, *supra* note 34, at 1305 n.23, 1310 n.51, 1311 n.54 (describing litigants in a prominent redistricting case as: a law professor spearheading the case on his own initiative; that professor's colleague, son, and secretary; and one "public-spirited Durham citizen"); *cf. id.* at 1316 n.71 (referring to certain nominal litigants as "persons sponsored by the organizations involved").

<sup>46</sup> *See supra* notes 31-33 and accompanying text.

<sup>47</sup> *See supra* note 35 (noting that the government on occasion also will serve as a litigant).

<sup>48</sup> Nearly all redistricting plaintiffs are private parties (as those are the ones most likely to have both standing and the motivation to sue), and in most redistricting lawsuits, the plaintiffs greatly outnumber the defendants. In the litigation challenging district lines in Texas, for example, there were, at one point, over fifty named plaintiffs, nearly all suing in their individual capacities, and only seven named defendants, all being sued in their official capacities. *See* Order at 1, *Perez v. Texas*, No. 11-CA-360 (W.D. Tex. Aug. 31, 2011), available at [https://docs.google.com/file/d/0BxeOfQQnUr\\_gNWixZmU1M2EtNDVhNS00ZmI1LWFmMTktZWZmNmU1YmQ4MmMy/edit?hl=en](https://docs.google.com/file/d/0BxeOfQQnUr_gNWixZmU1M2EtNDVhNS00ZmI1LWFmMTktZWZmNmU1YmQ4MmMy/edit?hl=en).

B. *What the Redistricting Litigants Do*

Although there is significant variation in the claims, strategies, and procedural maneuvers adopted by redistricting litigants, these actors all operate within the same legal framework. The nature of their involvement therefore can be understood through a description of how the redistricting process unfolds. As discussed in more detail below, redistricting litigants engage in an important form of redistricting by participating in civil litigation, and they do so during a particular stage of the process: what this Article refers to as “fallback redistricting.”

1. The Primary Tier of Redistricting Agents

In every jurisdiction, redistricting can be understood as a two-step process, one that begins with the commencement of a “primary” form of redistricting and that ends once all forms of “fallback” redistricting have been exhausted. On the most fundamental level, what distinguishes these two forms of redistricting is the identity of the agent engaged in redistricting. Litigants represent one such agent, and their involvement in the process marks an indispensable form of fallback redistricting. Notwithstanding the significant variations among jurisdictions engaged in redistricting, this two-step framework, and the role of litigants within it, holds true for all.

Identifying the primary tier of redistricting agents is relatively straightforward. In each jurisdiction, the law expressly empowers a certain set of actors to redistrict in the first instance. By definition, membership in this preferred set is limited to those who are empowered by law to design district lines that, in the absence of illegality, take precedence over all others. This Article refers to this group as the “primary tier” of redistricting agents, and their control over the process is significant.<sup>49</sup>

Prototypical members of the primary tier of redistricting agents are state legislatures. These are the bodies normally empowered to enact the statutes that set statewide district lines.<sup>50</sup> In a minority of jurisdictions, state law has replaced state legislatures with redistricting boards or commissions.<sup>51</sup>

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<sup>49</sup> For congressional elections, there is an even higher tier of primary redistricting agents: the federal government. Article I, Section 4 of the U.S. Constitution grants Congress the authority to override any state regulations relating to congressional elections. U.S. CONST. art. 1, § 4. This added complexity does not change the basic framework, however, not least of all because Article I, Section 4 expressly relies on state legislatures to control redistricting in the absence of congressional action. *Id.*

<sup>50</sup> In Alabama, for example, the state constitution expressly vests the state legislature with authority to draw statewide electoral maps. ALA. CONST. art. IX, §§ 198-200. It is true that in Alabama, as in many other states, the governor retains the ability to veto redistricting legislation. *Id.* § 125. Although gubernatorial participation somewhat complicates the role of legislatures as primary redistricting agents, it does not alter their status.

<sup>51</sup> See generally LEVITT, CITIZEN’S GUIDE, *supra* note 8, at 20-36. Within these categories, there are important distinctions. *Id.* In California, for example, primary

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Regardless of the particular form the primary agent takes, however, a fundamental consistency remains: in each jurisdiction some set of agents enjoys a preferred position in the redistricting process, which means that any district lines they draw will govern, taking precedence over all other lines.

This power, while significant, is subject to an important limitation. If the lines drawn by primary redistricting agents fail to comply with certain legal restrictions, then other redistricting agents become empowered to alter them.<sup>52</sup> These legal restrictions, which are identified in more detail below,<sup>53</sup> are both statutory and constitutional, both state-based and federal. These restrictions are not, however, self-enforcing, and the remedies for their violation are not self-defining. To the contrary, the task of enforcing these restrictions, and designing remedies for their violation, falls on a distinct set of actors. It is at this stage of the process that the next tier of redistricting agents wields its influence.

## 2. The Fallback Tier of Redistricting Agents

Primary redistricting agents do not always succeed in fulfilling their mandate, which is to draw legal district lines.<sup>54</sup> When they fail, the law delegates to a different set of redistricting agents the ability to fill the gap – that is, to design lines that will govern elections.<sup>55</sup> Members of this latter group serve, in a sense, as fallback redistricting agents, and this Article therefore refers to them as members of the “fallback tier.”<sup>56</sup>

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redistricting is now conducted by the fourteen commission members selected to serve on the state’s “Citizens Redistricting Commission.” See CAL. CONST. art. 21, §§ 1-3; see also *Vandermost v. Bowen*, 269 P.3d 446, 455-56 (Cal. 2012) (describing the commission).

<sup>52</sup> These alterations can occur either directly, through courts redrawing the maps themselves, or indirectly, through courts requiring that the primary redistricting agents make certain changes. See *infra* notes 67-72 and accompanying text. In addition, district lines can be rejected or replaced through a separate mechanism in states that permits voter initiatives or referenda. Although redistricting through direct voter action presents interesting issues relating to process, outcomes, and legitimacy, the phenomenon is beyond the scope of this Article.

<sup>53</sup> See *infra* notes 74-82 and accompanying text.

<sup>54</sup> For a discussion of this mandate, see *infra* note 63 and accompanying text.

<sup>55</sup> For a discussion of precisely what “law” empowers these agents, see *infra* notes 58, 60 and accompanying text.

<sup>56</sup> This Article does not employ the term “fallback tier” either to imply passivity on the part of its members or indicate a strict separation of roles between fallback and primary redistricting agents. Members of the fallback tier actually may be one factor contributing to the failure of primary redistricting agents to draw legal district lines. (Fallback-tier agents might, for example, exert influence on primary-tier agents through the threat of litigation creating legislative gridlock.) This Article instead relies on the term “fallback tier” because it helps to illustrate the shifting stages that characterize redistricting in the United States. To this end, it should be noted that fallback redistricting is distinct from the legislative practice of incorporating “fallback” provisions into statutes to take effect if some original statutory

Precisely what “law” effects this delegation of power derives from multiple sources and to some extent depends on the jurisdiction. A straightforward illustration exists in Illinois. The state constitution initially empowers the legislature to draw certain districts following each decennial census conducted by the federal government.<sup>57</sup> If the legislature fails to enact a plan by a given date, however, the constitution shifts power to a “Legislative Redistricting Commission.”<sup>58</sup> In other words, the commission becomes empowered to draw lines when – and only when – the primary redistricting agents have failed to complete the redistricting task.

While the Illinois Legislative Redistricting Commission provides a clear illustration of a fallback redistricting agent, commissions are hardly the most prominent of these actors.<sup>59</sup> Instead, the delegation of authority falls most commonly, and most importantly, to the courts. In every jurisdiction across the country, and with respect to every district map, courts are poised to serve as fallback redistricting agents.<sup>60</sup> Necessarily accompanying these judicial actors are the litigants. It is in this capacity that litigants serve as critical – indeed, indispensable – fallback redistricting agents.

Fallback redistricting as a significant phenomenon has emerged largely as a result of *Baker v. Carr* and its progeny.<sup>61</sup> It is, in other words, largely a result of the Supreme Court’s justiciability holdings, which, among other things, introduced a new class of redistricting agents into the redistricting process. The full effect of these precedents is even more dramatic. Through these decisions,

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provision is later invalidated. See Michael C. Dorf, *Fallback Law*, 107 COLUM. L. REV. 303, 304 (2007). The two phenomena nevertheless share fundamental similarities. Most important, both respond to the threat of judicial review and invalidation by empowering a court or other legally designated body, acting within a certain set of legally imposed constraints, to respond to and remedy legal deficiencies. Viewed at a sufficiently high level of generality, fallback redistricting in this sense may be considered a subset of what Professor Dorf has termed “fallback law.” *Cf. id.* at 310.

<sup>57</sup> ILL. CONST. art. IV, § 3(b).

<sup>58</sup> *See id.*

<sup>59</sup> Relatively few states have regimes analogous to that of Illinois. See LEVITT, CITIZEN’S GUIDE, *supra* note 8, at 21.

<sup>60</sup> The law granting courts this power derives in part from state constitutions and statutes and in part from federal law. In Pennsylvania, for example, the state constitution expressly permits challenges to be brought in the state supreme court and thereby empowers the court, and therefore litigants, to engage in fallback redistricting. PA. CONST. art. II, § 17(d). In numerous jurisdictions, general grants of jurisdiction permit the same – that is, they permit litigants and state courts to engage in fallback redistricting through litigation and adjudication of redistricting lawsuits. See, e.g., TEX. CONST. art. 5, § 3. The federal government also provides an important source of law empowering the fallback tier of redistricting actors. Most prominently, federal law – as a result of precedents such as *Baker v. Carr*, 369 U.S. 186 (1962), and its progeny – permits litigants and federal courts to engage in fallback redistricting through litigation and adjudication of federal redistricting lawsuits.

<sup>61</sup> *Baker*, 369 U.S. at 201.

the Supreme Court has imposed a periodic redistricting mandate that prohibits primary redistricting agents from avoiding the threat of fallback redistricting simply by refusing to act.<sup>62</sup> More specifically, the Supreme Court's equal representation jurisprudence effectively requires that district lines be redrawn after each delivery of federal census data,<sup>63</sup> and any failure by a primary redistricting agent to comply with this affirmative mandate creates an opportunity and need for fallback redistricting. Fallback redistricting has become in this sense an integral, and routine, part of the process – and one that, in its current form, depends heavily on both courts and litigants. Although the latter's role in the process tends to be conflated with that of the courts, these sets of actors, and the effects they have on the process, are distinct.

a. *Courts as Fallback Redistricting Agents*

The role of courts in redistricting is extensive. As one scholar puts it, “[e]very 10 years, redistricting litigation joins death and taxes as one of life’s certainties.”<sup>64</sup> The landscape helps to explain why: in every jurisdiction across the country, some combination of state and federal courts is potentially empowered to alter district lines when, in response to the decennial census, primary agents have failed to enact a legal map into law. The Supreme Court has referred to this phenomenon as “judicial redistricting,”<sup>65</sup> and it occurs with regularity.<sup>66</sup>

A court alters district lines – that is, engages in fallback redistricting – through one of two mechanisms. The first mechanism is analogous, in a loose sense, to an appellate court’s remand, and it is the mechanism a court normally is required to employ, at least initially, in the redistricting context.<sup>67</sup> When employing this mechanism, the court enjoins use of existing district lines, identifies the legal restrictions it concludes require such action, and then provides primary redistricting agents an opportunity to redraw the district lines in a manner consistent with those same legal restrictions.<sup>68</sup> Although the court

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<sup>62</sup> This quality differentiates fallback redistricting from more traditional forms of fallback law. *See supra* note 56.

<sup>63</sup> *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 568 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964); Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1705 (1993). In a number of jurisdictions, state law independently requires redistricting on a set timetable. *See, e.g.*, VA. CONST. art. II, § 6.

<sup>64</sup> Justin Levitt, *Ten Lawyers Leaping: A New Year’s Redistricting Review*, ALL ABOUT REDISTRICTING (Jan. 3, 2012), <http://redistricting.lls.edu/>.

<sup>65</sup> *Grove v. Emison*, 507 U.S. 25, 34 (1993).

<sup>66</sup> *See supra* note 12 and accompanying text; *see also* Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1688-90 (1993) (“[In 1980] roughly one-third of all redistricting was done either directly by federal courts or under the injunctive authority of the courts.”).

<sup>67</sup> *See, e.g.*, *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978).

<sup>68</sup> *Id.*



in this circumstance is not directly drawing district lines, it is doing so indirectly. The court has affected the shape of the district lines, and it has done so in its capacity as a fallback redistricting agent.

The second mechanism is more direct than the first. Here, the court issues an order in which it has drawn the district lines itself.<sup>69</sup> It is in this circumstance that court involvement in the redistricting process is truly unmistakable, as certain districts – or even an entire map – are pure judicial creations. Though this second mechanism is disfavored, to be employed only when the first mechanism will not produce a legal district map in time for an election,<sup>70</sup> its use in redistricting is not unusual.<sup>71</sup> A recent example came in Nevada in 2011, where the state legislature had deadlocked and therefore failed to satisfy the equal representation mandate. In response, a state court issued an order completely redrawing congressional and legislative maps.<sup>72</sup>

A decree of this sort helps to illustrate the profound influence courts have over the redistricting process. Courts nevertheless do face important limitations on their ability to employ these redistricting mechanisms. Importantly, courts are empowered to affect district lines only insofar as the primary redistricting agents have failed to enact a legal map.<sup>73</sup> To the extent that the legal deficiency is based on federal law, there are “essentially seven substantive constraints on the apportionment process,”<sup>74</sup> which may be summarized as follows. The Fourteenth Amendment requires that each plan (1) comply with the equal representation principle;<sup>75</sup>(2) not purposefully discriminate against racial minorities;<sup>76</sup> (3) not “subordinate” what the Supreme Court has called “traditional race-neutral districting principles” to racial considerations unless that subordination can survive strict scrutiny;<sup>77</sup> and (4) in theory, at least, avoid

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<sup>69</sup> See, e.g., *In re* Petition of Reapportionment Comm’n, No. SC 18907, at \*1 (Conn. Sup. Ct. 2012), available at [http://www.jud.ct.gov/external/news/SC18907\\_021012.pdf](http://www.jud.ct.gov/external/news/SC18907_021012.pdf) (ordering that a court-drawn plan of congressional districting “shall have the full force of law”).

<sup>70</sup> *Wise*, 437 U.S. at 540.

<sup>71</sup> See Issacharoff, *supra* note 66, at 1688-90.

<sup>72</sup> See Order Adopting and Approving Special Masters’ Report and Redistricting Maps as Modified by the Court at 3-4, *Guy v. Miller*, No. 11-OC-00042-1B (Nev. Dist. Ct. Oct. 27, 2011).

<sup>73</sup> As discussed above, members of the fallback tier may contribute to such failures in certain circumstances. See *supra* note 56.

<sup>74</sup> Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731, 733 (1998).

<sup>75</sup> See *Reynolds v. Sims*, 377 U.S. 533, 568 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964).

<sup>76</sup> See, e.g., *Rybicki v. State Bd. of Elections*, 574 F. Supp. 1082, 1108 (N.D. Ill. 1982) (three-judge court); see also, e.g., *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971); cf. *Gomillion v. Lightfoot*, 364 U.S. 339, 347-48 (1960).

<sup>77</sup> *Shaw v. Reno*, 509 U.S. 630, 649 (1993).

excessive political gerrymandering.<sup>78</sup> Federal statutory law in turn requires that a plan (5) not result in a dilution of minority voting strength (a “section 2” claim);<sup>79</sup> (6) in certain jurisdictions, not reduce minority voting strength as compared to prior levels (a “section 5” claim);<sup>80</sup> and (7) in congressional races, not use multi-member districts.<sup>81</sup> Depending on the jurisdiction, there also may be restrictions set forth in state law.<sup>82</sup> For a court to redraw map lines, it must cite one of these restrictions as justification. This may not be difficult, however, particularly when a jurisdiction violates the equal representation principle by simply failing to redistrict.<sup>83</sup>

A second set of limitations relates to the criteria courts are permitted to consider when redrawing a map. A court normally may not, for example, redistrict for partisan ends,<sup>84</sup> but rather must apply “neutral” criteria when drafting plans.<sup>85</sup> It must take into account the preferences and policies of the primary redistricting agents whenever possible,<sup>86</sup> and it normally must comply

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<sup>78</sup> *Davis v. Bandemer*, 478 U.S. 109, 125 (1986); Karlan, *supra* note 74, at 733; *see also* *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring).

<sup>79</sup> *See* 42 U.S.C. § 1973 (2006). This is frequently referred to as a “Section 2” claim as it derives from section 2 of the Voting Rights Act of 1965.

<sup>80</sup> *See* 42 U.S.C. § 1973c. This is frequently referred to as a “Section 5” claim as it derives from section 5 of the Voting Rights Act of 1965.

<sup>81</sup> Karlan, *supra* note 74, at 733-34; *see also* 2 U.S.C. § 2c (2006).

<sup>82</sup> In Florida, for example, voters recently enacted by initiative a number of strict constraints on both state legislative and congressional redistricting, with one of the most prominent of the new rules prohibiting the drawing of any district with “the intent to favor or disfavor a political party or an incumbent.” FLA. CONST. art. III, § 20; *see also id.* § 21.

<sup>83</sup> After each decennial census, jurisdictions are required to redistrict pursuant to the equal representation principle recognized in *Wesberry v. Sanders*, 376 U.S. 1 (1964), and its progeny. These cases, which require that certain district populations be nearly equal in population, have created a regime whereby even slight population shifts – which as a practical matter are inevitable in the span of a decade – turn a jurisdiction’s failure to redistrict once every ten years into an easily proven constitutional violation.

<sup>84</sup> *See, e.g., Maestas v. Hall*, 274 P.3d 66, 76-77 (N.M. 2012) (“Despite our discomfort with political considerations, we conclude that when New Mexico courts are required to draw a redistricting map, they must do so with the appearance of and actual neutrality. The courts should not select a plan that seeks partisan advantage.”); *see also Wyche v. Madison Parish Police Jury*, 635 F.2d 1151, 1160 (5th Cir. 1981) (“[A] court is forbidden to take into account the purely political considerations that might be appropriate for legislative bodies.”).

<sup>85</sup> *See, e.g., Smith v. Clark*, 189 F. Supp. 2d 529, 540 (S.D. Miss. 2002) (“In addition to the constitutional and statutory criteria, federal redistricting courts generally apply neutral factors, including compactness, contiguity, and respect for historical local political boundaries, in drafting congressional redistricting plans.”).

<sup>86</sup> *See, e.g., Perry v. Perez*, 132 S. Ct. 934, 941 (2012) (“[A] district court should take guidance from the State’s recently enacted plan in drafting an interim plan. . . . This Court has observed before that ‘faced with the necessity of drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying’ a state

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with all the constitutional and statutory mandates that also constrain primary redistricting agents.<sup>87</sup> Despite these limitations, courts retain considerable discretion in determining how to redraw map lines.

Perhaps most fundamentally, however, courts' involvement in redistricting is profoundly limited by the ubiquitous set of actors already mentioned. These are the redistricting litigants, whose control over the process is as fundamental as it has been overlooked.

b. *Litigants as Fallback Redistricting Agents*

Courts may be the most conspicuous of fallback redistricting agents, but they do not – indeed, they cannot – act alone. Rather, courts depend on litigants. As a result, litigants exercise enormous influence over the redistricting process, particularly once it has reached the fallback phase.

To some degree, litigants' influence over the process is a predictable and necessary consequence of the “litigant-driven model of American civil adjudication.”<sup>88</sup> Indeed, many of the ways litigants exercise their influence can be inferred from the civil rules: at the very outset of a case, a redistricting litigant makes a monumental decision – where to file suit – that very well may affect the map that ultimately becomes law. Throughout the litigation, similar actions work to affect the process and influence the outcome. The litigant decides which claims to bring and which to ignore, which claims to defend and which to concede, which intervention motions to challenge and which to support, which evidence to proffer and which to disregard, which maps to challenge and which to propose, and even something as deceptively simple as which dates should be included in a proposed scheduling order. The examples are hardly comprehensive, as redistricting litigants make decisions throughout the life of a lawsuit in their efforts to affect district lines.

These decisions, and the legal mechanisms through which litigants effectuate them, may appear unremarkable to those familiar with civil litigation. Yet the influence that litigants have in a courtroom has particular consequences in the context of redistricting. These qualities, which are discussed in detail in Part II, confirm the privileged position that litigants play in the redistricting process.

In short, redistricting litigants – that is, those who litigate for the purpose of affecting the shape of electoral districts – serve as critical participants in the fallback phase of redistricting. The fallback phase, in turn, serves as a critical stage of each jurisdiction's redistricting regime. Redistricting litigants in this sense have become more than litigants. They have become powerful, legally sanctioned agents of redistricting.

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plan . . . ‘to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act.’” (quoting *Abrams v. Johnson*, 521 U.S. 74, 79 (1997)).

<sup>87</sup> See *supra* notes 74-82 and accompanying text.

<sup>88</sup> Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 UCLA L. REV. 705, 722 n.66 (2004).

C. *Where Redistricting Litigants Fit into the Current Conception of the Redistricting Process*

Given the importance of litigants in contemporary redistricting, one would expect to find a robust body of literature examining redistricting litigants and their participation. Yet one finds very little. With rare exception, the scholarly accounts either ignore litigants or conflate them with the courts before which they appear.<sup>89</sup> Even courts, which must interact with these actors, rarely flag the extent to which the judicial system relies on litigant participation, examine the potential for procedural manipulation, or otherwise acknowledge the role that litigants play. Rather, both scholars and courts tend to proceed as though litigants are non-entities in the redistricting process, even as these actors exercise such a pivotal role.<sup>90</sup>

It is nevertheless true that scholars have studied extensively the substantive standards governing redistricting, particularly as those standards are, or should be, applied by the courts. Indeed, “[a] major theme of election law scholarship over the last decade has been that judicial oversight of the devices of democracy is desirable to foster adequate political competition,”<sup>91</sup> and even

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<sup>89</sup> With respect to the exceptions, Professor Karlan has provided one of the starkest acknowledgements to date of litigants’ influence over the redistricting process. Identifying certain “opportunities for procedural manipulation” that exist in redistricting litigation, she concludes that “the Voting Rights Act is ripe for partisan capture.” Karlan, *supra* note 63, at 1733; *see also id.* at 1726-29 (discussing forum selection). Professor Cox has alluded to a similar dynamic, citing “partisan adjudication and partisan capture of the litigation process” as a concern in the context of proposing certain procedural reforms. Adam Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751, 800 (2004). Other scholars, such as Professor Buchman, have approached the issue from a political scientist’s perspective, questioning the institutional capacity of redistricting courts by studying, among other things, the implications of litigant control over courts’ “policy-making agenda.” JEREMY BUCHMAN, *DRAWING LINES IN QUICKSAND* 91 (2003). A number of scholars have analyzed the effect of litigant participation on a more general level or in other contexts. *See, e.g.*, Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CALIF. L. REV. 1457, 1490, 1497, 1514 (2003) (discussing the theory that “litigants, rather than judges, drive judicial outcomes,” and ultimately concluding that “[w]hile it is very possible, and even likely, that strategic litigant decisions may influence the outcome of some cases, those cases appear to be isolated and infrequent”); David M. Driesen, *Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 CORNELL L. REV. 808, 865-66 (2004) (discussing the effect of litigant injury on public law outcomes and touching briefly on standing in the redistricting context); Peters, *supra* note 88 (addressing litigant speech intended to influence court decisions). This Article seeks to draw upon and advance these scholarly accounts.

<sup>90</sup> It is true that scholarship directed at other forms of litigation, including so-called “public law litigation,” at times pays closer attention to the role that litigants play. Yet the existing literature in these fields fails to analyze the specific nature and implications of redistricting-related challenges, and as such it does not adequately capture the particular phenomenon that is redistricting litigation.

<sup>91</sup> Richard L. Hasen, *Judges as Political Regulators: Evidence and Options for*

today many scholars “continue to urge the courts to intervene more deeply” as they advance new refinements of the relevant standards.<sup>92</sup> These works, while tremendously valuable, nevertheless tend to forgo sustained analysis into the procedural and practical implications of the court proceedings they envision. An increasingly robust body of literature has delved deeper, examining not only the substance but also the procedures of redistricting litigation.<sup>93</sup> Meanwhile, a “new generation of legal scholars” has been challenging a premise that underlies many of these works – that is, that the courts have the ability “to act as [a] neutral redistricting referee”<sup>94</sup> – as part of the movement termed the “New Institutionalism.”<sup>95</sup> Throughout these debates, scholars have questioned whether, and to what extent, courts should take precedence over alternative institutions (or vice versa) in designing and supervising elections.<sup>96</sup>

These discussions – at once tackling issues of democratic design, legitimacy, and institutional competence, all in the highly charged and consequential context of redistricting – have helped to illuminate the significance of who redistricts and are otherwise of great value. They nevertheless remain incomplete, for they tend to ignore the critical role that litigants play throughout the process. This means, for example, that they analyze courts’ decisions to “enter the judicial thicket” without recognizing that litigants, and not courts, are the ones initially making such decisions.<sup>97</sup>

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*Institutional Change*, in RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS 101, 101 (Guy-Uriel E. Charles, Heather K. Gerken & Michael S. Kang eds., 2011); *see also*, e.g., Issacharoff, *supra* note 5, at 594; Persily, *supra* note 5, at 650.

<sup>92</sup> Cain, *supra* note 2, at 1811.

<sup>93</sup> *See, e.g.*, BUCHMAN, *supra* note 89, at 1; Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 1 (2008) [hereinafter Cox & Miles, *Judging the VRA*]; Adam B. Cox & Thomas J. Miles, *Judicial Ideology and the Transformation of Voting Rights Jurisprudence*, 75 U. CHI. L. REV. 1493, 1493-94, 1527-35 (2008) [hereinafter Cox & Miles, *Judicial Ideology*] (setting forth empirical data relating to the significance of who redistricts, in the context of judicial redistricting); Karlan, *supra* note 74, at 733; Karlan, *supra* note 63, at 1705; Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*, 73 GEO. WASH. L. REV. 1131, 1146-47 (2005) (providing a practical guide for courts charged with redistricting); Michael E. Solimine, *Institutional Process, Agenda Setting, and the Development of Election Law on the Supreme Court*, 68 OHIO ST. L.J. 767 (2007) (discussing unusual procedures implicated by election law cases).

<sup>94</sup> Cain, *supra* note 2, at 1811.

<sup>95</sup> *See* Richard L. Hasen, *Election Administration Reform and the New Institutionalism*, 98 CALIF. L. REV. 1075, 1076 (2010) (“Faced with little action by the courts and Congress, some election law scholars, whom I dub ‘New Institutionalists,’ have turned to institutional design.”).

<sup>96</sup> *See supra* notes 5-9 and accompanying text.

<sup>97</sup> *See, e.g.*, Issacharoff, *supra* note 5, at 595 (“While the Court’s willingness to enter the ‘political thicket’ was of tremendous jurisprudential significance, the underlying insight was hardly a great conceptual breakthrough.”); *see also id.* (describing courts’ “oversight of the political arena” without mentioning litigants).

They subject redistricting precedents to critical analysis without reflecting on how each decision is inexorably intertwined with litigants' actions, arguments, and strategic choices – and, moreover, how each of these precedents is dependent on litigants for its continued enforcement.<sup>98</sup> They propose reforms – often, ironically, in an effort to divorce redistricting from self-interested manipulation or partisan control – that can be implemented only through the courts, and therefore only through the initiative of litigants who themselves are self-interested and often have partisan ties.<sup>99</sup> In short, they pay insufficient attention to redistricting litigants, who, as a result, have managed to secure a position in the current conception of the redistricting process that drastically underestimates their influence and spares them critical scrutiny.

D. *Why Understanding the Role of Litigants Matters*

The preceding discussion has identified the central observation motivating this Article's analysis: litigants are important and distinct agents of redistricting, upon whom the process relies, who are capable of affecting redistricting in deliberate and potentially outcome-determinative ways. What the discussion has yet to address, at least directly, is why these observations matter. The remainder of this Article aims to provide an answer to precisely this question. Before delving into such detail, however, it is helpful to provide an overview of what is at stake.

Stated succinctly, understanding the role that litigants play in redistricting is significant for everyone involved. It certainly is important for scholars, as litigants' role in the process is an essential part of understanding how redistricting operates in the United States. And the importance of recognizing litigants' role in the process extends beyond the descriptive; it is equally vital for the normative and prescriptive reasons identified below.

Indeed, understanding the role of litigants is essential to those committed to reform. Perhaps most critically, this is because nearly all redistricting-related reforms implicitly rely on litigants for implementation or enforcement. This is almost certainly true when the suggested reform is meant to be administered through the courts. Yet nearly all types of reforms rely on litigants at least as backstops; if the primary redistricting agents fail to comply with the relevant rule, recourse normally is obtainable through litigation. Litigant influence in this sense will affect the nature and effectiveness of a proposed reform, and it may even undermine its purpose. If the goal of a reform is “to ensure the competitive vitality of the political process,”<sup>100</sup> for example, it is, at best, problematic to advocate for a court-driven reform that necessarily relies on litigants – who, as discussed above, tend to be associated with particular

<sup>98</sup> See, e.g., Stephanopoulos, *supra* note 3, at 1384-85.

<sup>99</sup> See, e.g., Issacharoff, *supra* note 5, at 595; Persily, *supra* note 5, at 650.

<sup>100</sup> Issacharoff, *supra* note 5, at 597.

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political parties or interest groups and may lack incentives to increase electoral competition – for implementation.<sup>101</sup>

Understanding the role that litigants play also is critical for judges, who serve as central agents of fallback redistricting. These are the individuals empowered to administer the redistricting regimes that rely so heavily on litigant participation. An awareness of the ways in which litigants affect the process is a prerequisite to courts being able to respond (or compensate) as appropriate.

Finally, understanding the role of litigants is vital to everyone – including every voter and constituent – with a personal stake in the redistricting process. This is not only because litigant participation can affect redistricting outcomes; it is also because litigant participation raises difficult questions of legitimacy.<sup>102</sup>

In short, the participation of litigants in the redistricting process is important for all involved parties. And it will be for some time, for under no realistic scenario will litigant participation become less critical to the redistricting process in the foreseeable future. Reforms currently under consideration will not change the fundamental dynamic; as noted above, most reforms actually rely on litigants for implementation or enforcement, and, tellingly, even reforms designed to decrease the opportunities for litigation may not have “lessened the odds of redistricting-related litigation or the sore-loser incentive to try to get a better plan out of the courts.”<sup>103</sup> Nor are the courts poised to fundamentally alter the status quo. It is true that the courts’ resolution of certain cases and legal controversies may affect the types of substantive claims that redistricting litigants bring. Yet none of these doctrinal developments has even the potential to undermine the central role that litigants play in the process, particularly in light of the litigation sure to follow any new constitutional holdings and the very real possibility of state law restrictions on the redistricting process.<sup>104</sup> With the stakes in mind, it is time to turn to the implications: to the curious regime that has resulted from this delegation of redistricting authority.

## II. THE POWER DELEGATED TO THESE LITIGANTS AND THE CURIOUS REGIME THAT RESULTS

In the United States, the task of developing enforceable electoral lines has been delegated, in significant part, to the ad hoc, heterogeneous, and largely self-selected group of actors known as redistricting litigants. This Part presents the case for why the delegation matters. Forced through the mold of civil

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<sup>101</sup> For discussion of reforms that take into account litigant influence, see *infra* Part III.B.

<sup>102</sup> See *infra* text accompanying note 230.

<sup>103</sup> Cain, *supra* note 2, at 1812 (discussing independent citizen commissions).

<sup>104</sup> See generally Nicholas Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail*, 23 J.L. & POL. 331, 333 (2007); *supra* note 82.

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litigation, this delegation has created a form of redistricting that is highly susceptible to litigant manipulation. It has, in other words, created a form of redistricting that grants profound – albeit thus far largely unacknowledged – power to those who choose to litigate.

A. *A Curious Form of Litigation*

There is much about the practice of litigating as redistricting that is remarkable. The power delegated to redistricting litigants has direct effects on democratic design. These effects are jurisdiction-wide, as redistricting courts are empowered to fashion unusually broad and intrusive remedies even as they are expected to rely on a handful of litigants to represent the interests of an entire electorate. The redistricting process from start to finish is profoundly politicized, what scholars have called “politics pure, fraught with the capacity for self-dealing and cynical manipulation,”<sup>105</sup> and it is one that leads to fierce battles between political parties as well as acute concerns over federalism and separation of powers.<sup>106</sup> The act of redistricting through the courts is all this and more – yet it is exercised not through a specialized set of procedures, but rather through the traditional mechanisms of civil litigation.

This combination has led to a litigant-empowering process of redistricting that is manifested most prominently through three defining features: (1) the flexible and forgiving regime it offers to those electing to litigate; (2) its failure to protect the interests of non-parties; and (3) a shifting regime of legal standards that has developed in response to the exigencies of the election cycle. Individually, each of these features has significant effects on the way redistricting litigation unfolds. Combined, they produce a redistricting regime that is ripe for litigant control.

1. The Warm Embrace of Litigants

Redistricting is nothing if not hospitable to litigants. It invites them in; it offers them power; it forgives their bad manners. In part, the arrangement is an unavoidable consequence of jurisdictions’ heavy dependence on litigants as agents of fallback redistricting. By delegating so much, redistricting regimes in the United States ensure that litigants will enjoy a prominent seat at the table. Yet it is the way these litigants are treated – the favorable treatment they receive, even within the litigant-centered world of civil litigation – that characterizes redistricting litigation as particularly accommodating of litigants.

Several doctrines provide powerful illustrations of this dynamic. The doctrines of standing and forum selection, for example, operate and interact in ways that privilege redistricting litigants, giving them significant flexibility and power as they work toward the redistricting outcomes they desire. Likewise, the power associated with claim selection, a formidable source of

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<sup>105</sup> Aleinikoff & Issacharoff, *supra* note 1, at 588.

<sup>106</sup> Among other things, “court-drawn plans can present one of the most intense interbranch conflicts that our constitutional system allows.” Persily, *supra* note 93, at 1146.



influence available to nearly any litigant, is in certain respects magnified in the redistricting context. Each of these doctrines is addressed in turn.

a. *Standing*

In the redistricting context, standing doctrine is a legal maladroitness, frequently criticized and seemingly unable to do anything well. It makes little sense as a conceptual matter.<sup>107</sup> It often is unclear in application.<sup>108</sup> And, perhaps most important, it fails to impose practical constraints on any reasonably sophisticated party wishing to litigate a redistricting case. It is this last characteristic that most favors litigants.

It is true that to establish standing in federal court, a redistricting litigant normally, though not always, must reside as a voter in the jurisdiction he or she is seeking to challenge.<sup>109</sup> As a doctrinal matter, the theory behind this rule appears to be that if a voter is placed in an unlawfully drawn district, that voter personally suffers harms associated with that unlawfulness.<sup>110</sup> While this residence-related limitation might be significant in the abstract, it has almost no effect in practice. This is because, for any given claim, a vast number of individuals fit the bill. Millions of voters might have standing to bring a routine equal-representation challenge in response to a state's failure to redistrict; a smaller number of voters – but one still in the tens or hundreds of thousands – might have standing to bring a district-specific challenge in most other jurisdictions. What is more, even those without standing are not, as a practical matter, precluded from advancing a claim: if a party wishes to participate in redistricting litigation, that party can do so simply by locating a geographically eligible voter willing to serve as a stand-in. This task is made relatively straightforward – at least, for any moderately sophisticated party – by the enormous number of individuals with standing to assert a given claim. An interest group headquartered in Washington, D.C., for example, easily can participate in a legal challenge to electoral districts in Alabama, Utah, or California; it simply must find a group member, or any other individual sympathetic to the group's cause, who lives in the relevant district and is willing to serve as the nominal litigant. There is little risk or downside for the litigant volunteer, who has no practical risk of counterclaims and presumably is indemnified for all possible costs. This is not a hypothetical arrangement

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<sup>107</sup> See, e.g., Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276 (1998).

<sup>108</sup> See, e.g., Saul Zipkin, *Democratic Standing*, 26 J.L. & POL. 179, 180-85 (2011).

<sup>109</sup> See, e.g., *United States v. Hays*, 515 U.S. 737, 745 (1995). See generally Zipkin, *supra* note 108, at 180. Exceptions to this residence requirement include circumstances where the plaintiffs “can show ‘specific evidence’ that they ‘personally’ were subject to a racial classification,” see *id.* at 193 (quoting *Hays*, 515 U.S. at 745), or when the plaintiff brings certain types of vote-dilution claims, see Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1690 (2001).

<sup>110</sup> See, e.g., *Hays*, 515 U.S. at 744-45.

dreamed up by theorists; the practice, though difficult to monitor, appears to be routine.<sup>111</sup>

What this means, as a practical matter, is that the courthouse doors are open to anyone wishing to participate in redistricting litigation, so long as that party is able and willing to incur the costs of litigation and, where necessary, to coordinate with a geographically convenient third party. While analogs may exist in other contexts,<sup>112</sup> such a regime remains procedurally unusual. The legal barriers imposed by the standing doctrines normally do have real practical effects, even in the more flexible realm of impact litigation: they make it difficult, for example, for an environmental organization to challenge a regulation affecting endangered species across the world,<sup>113</sup> and they make it virtually impossible for a taxpayer to challenge certain executive actions taken in alleged violation of the First Amendment.<sup>114</sup> In more routine matters, they impose significant barriers for any litigant hoping to pursue sweeping forms of relief. What they fail to do is limit, in any meaningful sense, who participates in redistricting litigation. And it is in this sense that redistricting litigation proves, right at the outset of a case, quite hospitable to litigants.

b. *Forum Selection*

The advantages of the flexible standing regime extend beyond the opening of courthouse doors. The standing doctrines, coupled with traditional venue rules, also create a particularly plaintiff-friendly system for determining who will serve as the judicial mediator in this system of fallback redistricting. These doctrines combine, in other words, to empower redistricting plaintiffs wishing to select a judge through forum selection.

For purposes of this discussion, forum selection refers to decisions made by litigants concerning where to litigate when more than one forum is legally available. For redistricting litigants, the selection normally is confined to a particular state: plaintiffs challenging New York's electoral districts, for example, must file their lawsuits in federal or state court in New York. In determining the significance of this practice, it may be helpful to think of litigants attempting to secure not a given forum, but rather a given *judge*. This is because, in the redistricting context, the most important consequence of the exercise is its effect on the likelihood that certain judges will adjudicate the case – in other words, that certain judges will serve as the fallback-tier

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<sup>111</sup> See *supra* note 34 and accompanying text.

<sup>112</sup> See, e.g., Brief for the Federal Respondent at 28, *Taylor v. Sturgell*, 553 U.S. 880 (2008) (No. 07-371) (arguing that in public right cases “the number of plaintiffs with standing is potentially limitless” (internal quotation marks omitted)).

<sup>113</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-67 (1992) (holding that environmental-litigation plaintiffs failed to satisfy Article III's injury-in-fact requirement).

<sup>114</sup> *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 600 (2007) (discussing the difficulties taxpayers face in establishing standing to bring Establishment Clause claims).

redistricting agents empowered to mediate between the litigants and the maps they seek to affect.

Of course, for selection among forums potentially to make a difference, it must be true that courts are neither fungible nor perceived to be fungible. At least when stated at a high level of generality, these empirical assertions appear to be sound. Few would defend the proposition that courts, or judges, are perfectly interchangeable, and such an understanding is confirmed in the redistricting context through empirical studies as well as by the perception of courts held by lawyers, commentators, and the general public.<sup>115</sup> While natural experiments are hard to come by – as it is rare for multiple courts to be litigating substantially identical lawsuits – the occasional unfolding of parallel lawsuits has confirmed that different courts may indeed reach different redistricting outcomes.<sup>116</sup> Selecting forum, in other words, does appear to affect the ultimate outcome in redistricting suits – which means that it affects electoral lines.

So, then, to what extent are redistricting litigants able to select their forums? The short answer is that while certain limitations do exist, redistricting litigants (or, more specifically, plaintiffs) are otherwise able to exercise close to unfettered control over which judges will adjudicate their claims.

Texas serves as a particularly helpful model. Its last two decades of redistricting illustrate vividly the ease with which redistricting litigants can

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<sup>115</sup> See, e.g., Cain, *supra* note 2, at 1836; Cox & Miles, *Judicial Ideology*, *supra* note 93, at 1493-94 (identifying scholarship supporting the conclusions that “Democratic appointees were more likely than Republican appointees to vote for liability” under a key provision of the Voting Rights Act and that “a judge’s race had an even greater effect than partisanship on the likelihood of favoring liability”); Persily, *supra* note 93, at 1146 (“Courts vary considerably in how and when they draw their maps, whom they get to help them, who will have input into the process and when, and whether they will make changes to a plan once it is released. . . . The choice of different procedures can have a dramatic impact on the final plan that emerges.”). A recent illustration of how judges can be popularly portrayed in the context of redistricting emerges from Pennsylvania. In the lead-up to the 2009 elections, “the political parties emphasized the critical need to win the [open seat on the state supreme court] because of the upcoming legislative redistricting process that [would] likely end up before the Supreme Court.” Shira J. Goodman et al., *What’s More Important: Electing Judges or Judicial Independence? It’s Time for Pennsylvania to Choose Judicial Independence*, 48 DUQ. L. REV. 859, 868-69 (2010); see also, e.g., *id.* at 868 n.27 (“Lt. Gov. Joe Scarnati’s letter to fellow Republicans . . . was unusually blunt. ‘Control of the Supreme Court is on the ballot this year . . . and you know the courts play a key role in finalizing redistricting maps that will set the political landscape for the next decade.’”). After the election, one newspaper described the results as follows: “Orie Melvin Wins . . . . The GOP will control state’s Supreme Court after bitter race.” *Id.* at 868 (internal quotation marks omitted) (quoting Debra Todd, *Lady Justice Is Nonpartisan*, PITTSBURGH POST-GAZETTE, Nov. 23, 2009, at B7)).

<sup>116</sup> See, e.g., *Grove v. Emison*, 507 U.S. 25, 27-28, 37-38 (1993) (describing different results reached by state and federal courts adjudicating redistricting challenges that, in relevant part, were identical).

select a preferred forum. In 2001, legislative deadlock left in place an old district map, which failed to apportion Texas's population equally among districts as required by law.<sup>117</sup> As a result, litigants challenged the map based on the equal representation doctrine in at least seven separate forums, including four separate state courts.<sup>118</sup> According to the Texas Supreme Court, each of these four state courts was a viable forum for litigating the underlying redistricting claims.<sup>119</sup> Though the court pointedly bemoaned the lack of "adequate procedures for judicial administration to prevent undesirable forum-shopping" that already had become endemic in redistricting litigation,<sup>120</sup> it nevertheless felt compelled to reward the practice. The court concluded that venue would be dictated by whichever forum-selecting party had timed its filing properly and, in that sense, had won the race to the courthouse.<sup>121</sup>

The pointed comments by the Texas Supreme Court did little to bring reform in Texas, and the result was predictable. In 2011 the state saw litigants file similar redistricting challenges in eight different forums – for a combined *fourteen* competing lawsuits – all before the legislature even had enacted the congressional map being challenged.<sup>122</sup> The situation was again criticized from the bench, as a federal district judge bemoaned the "forum shopping" reflected by the "filing of patently ridiculous actions months before there is a redistricting plan [to] which to object."<sup>123</sup>

At both the state and federal level, Texas's forum-selection regime produces startling results, but it is no anomaly. To the contrary, it exemplifies the way forum is determined in many jurisdictions.<sup>124</sup> As such, the regime confirms that

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<sup>117</sup> *Perry v. Del Rio*, 66 S.W.3d 239, 242-43 (Tex. 2001).

<sup>118</sup> *See id.* at 242-43, 243 n.10.

<sup>119</sup> *Id.* at 252-56.

<sup>120</sup> *Id.* at 243-44.

<sup>121</sup> *Id.* at 253.

<sup>122</sup> *See Rodriguez v. Perry*, No. A-11-CA-451, 2011 WL 3209075, at \*1 (W.D. Tex. July 27, 2011) (Yeakel, J., dissenting).

<sup>123</sup> *Id.* at \*3.

<sup>124</sup> *See, e.g.*, OHIO R. CIV. P. 3(B)(1), (6); IND. R. TRIAL P. 75(A); *see also, e.g.*, R.I. GEN. LAWS ANN. § 9-4-3 (permitting suit to be brought in any jurisdiction "in which some one of the plaintiffs or defendants shall dwell"); N.Y. UNCONSOL. LAW § 4221 (McKinney) (providing that, upon the petition of any citizen, "[a]n apportionment by the legislature shall be subject to review" by the state trial courts but failing to impose any limitation as to which trial court may conduct this review other than that it be "where any . . . petitioner resides"). An exception comes in Minnesota, which has responded to its own generally applicable venue regime with a judicially developed practice of appointing a multi-judge panel to hear redistricting cases. After a lawsuit is filed in Minnesota state court but before there has been any determination on the merits, a party petitions the Chief Justice, who then appoints the multi-judge panel. This practice effectively negates any effect of forum selection within the state. *See, e.g.*, *Hippert v. Ritchie*, 813 N.W.2d 374 (Minn. Spec. Redistricting Panel 2012) (drawing lines following the 2010 Census); *Zachman v. Kiffmeyer*, No. C0-01-160 (Minn. Spec. Redistricting Panel Mar. 19, 2002) (same, for the 2000 Census).

redistricting litigants often can, in effect, disregard the limits imposed by the venue statutes and simply select the forum most likely to secure a preferred judge. While this may not be a unique ability – insofar as litigants in certain other litigation contexts may encounter similarly little difficulty in circumventing venue-related restrictions<sup>125</sup> – the analogs do not detract from the fact that forum-selection regimes permit litigants to dictate a fundamental feature of fallback redistricting and, moreover, that this degree of control remains outside the norm for most civil litigants.

At a fundamental level, this regime reflects a direct but unintended consequence of relying on a trans-substantive approach to civil procedure. More specifically, the regime is a result of the application of general venue rules to the unusual sorts of claims that drive redistricting lawsuits. A discussion of the relevant legal doctrines helps to explain how this works. There are three scenarios in which redistricting litigants face the possibility of selecting a forum: (1) when selecting a forum within the federal system, (2) when selecting a forum within the state system, and (3) when selecting between the federal and state systems. It is in the first two scenarios that redistricting litigants exercise the most significant control. The federal regime illustrates why.

In federal court the generally applicable venue statute applies to redistricting lawsuits. Venue therefore is appropriate in “a judicial district where any defendant resides” or “a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred.”<sup>126</sup> With respect to the prototypical redistricting claim – a statewide equal representation claim – litigants and most courts have interpreted this venue statute to permit, at a minimum, filings in the judicial district where the state government sits (that is, “where [the] defendant resides”), as well as filings in any judicial district where an electoral district is overpopulated as compared to the state average.<sup>127</sup> A creative set of litigants might expand the options even further by arguing that because statewide redistricting necessarily affects lines across the entire state, a “substantial part” of the events giving rise to an equal representation claim occurs in every district in the state, and so venue would be proper in *any* district.<sup>128</sup> Even if a court were to reject this more aggressive application of the

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<sup>125</sup> See, e.g., Todd J. Zywicki, *Is Forum Shopping Corrupting America’s Bankruptcy Courts?*, 94 GEO. L.J. 1141 (2006).

<sup>126</sup> 28 U.S.C. § 1391(b) (2006).

<sup>127</sup> See, e.g., *Clark v. Marx*, No. 11-2149, 2012 WL 41926, at \*6 (W.D. La. Jan. 9, 2012); *Molinari v. Bloomberg*, No. CV-08-4539, 2008 WL 5412433, at \*5-6 (E.D.N.Y. Dec. 22, 2008). The latter set of venues – that is, any judicial district where an electoral district is overpopulated as compared to the state average – is available under the theory that a substantial part of the events or omissions giving rise to the redistricting claim occurred in that same district. *Id.* at \*5.

<sup>128</sup> As one court put it, “the effects of the redistricting legislation challenged in this case will be ‘profoundly felt’ in practically every voting district throughout the State of Texas.” *Thomas v. Bush*, No. H-95-0237, slip op. at 7-8 (S.D. Tex. Mar. 28, 1995) (rejecting this

venue statute, a motivated litigant should be able to secure venue in a given district through other means – including by adding a separate claim more closely associated with a particular electoral district contained in that judicial district.<sup>129</sup> In short, the application of the federal venue statute tends to permit filing of federal redistricting claims *anywhere in the state*. Federal redistricting litigants in this sense exercise a formidable power over who will adjudicate their case – and therefore who will serve as the agent meant to mediate their participation in the process.

An analogous pattern also holds in many state-court systems. This is because many American jurisdictions likewise depend on generally applicable venue statutes for some or all redistricting challenges.<sup>130</sup> It is in these jurisdictions that litigants tend to enjoy wide latitude in selecting a forum. This is true in Texas, for example, where state redistricting litigants proceed under a general venue statute that is analogous to the federal statute.<sup>131</sup> As in federal court, therefore, a litigant in Texas state court has a good chance of being able to file suit anywhere in the state, and thereby increase his or her odds of securing a preferred judge.

Two sets of caveats should be acknowledged. At the outset, it is true that redistricting litigants select a *forum*; they do not select a judge. As a result, litigants will not always be able to secure a preferred judge simply by strategically selecting a forum. This distinction, while important, should not be overstated. Forum selection and judge selection are closely related. By securing a forum, a plaintiff normally ensures that the case will be heard by one of a certain set of judges.<sup>132</sup>

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theory of venue on the ground that it would make the venue statute “lose all meaning”).

<sup>129</sup> The venue argument, in that case, would not be based on overpopulation, but rather that “a substantial part of the events or omissions” giving rise to the district-specific claim occurred in the district in question. Adding district-specific claims is also how a plaintiff might attempt to secure a preferred forum in the absence of a statewide equal-representation claim.

<sup>130</sup> A non-exhaustive list of jurisdictions without any redistricting-specific venue statutes includes Arizona, Georgia, Indiana, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, Rhode Island, Texas, Virginia, and West Virginia. A number of other jurisdictions have redistricting-specific venue rules that apply only to certain types of challenges or district maps. *See, e.g.*, N.J. CONST. art. II, § 2, ¶ 7; OHIO CONST. art. XI, § 13.

<sup>131</sup> This statute provides for venue in Texas state courts “in the county in which all or a substantial part of the events or omissions giving rise to the claim occurred” or in the county where the defendant either resides or has its principal office. TEX. CIV. PRAC. & REM. CODE ANN. § 15.002 (West 2002).

<sup>132</sup> If a plaintiff were to file suit in New York’s New York County, for example, he or she is ensuring that the case will be heard by one of eight particular trial court judges (and, consequently, not by any of the trial court judges from the other sixty-one judicial counties across the state). Depending on local rules and orders, a litigant may be able to narrow such a group down even further. For example, if a case were filed in the Austin Division of the Western District of Texas while a certain jurisdiction-wide order had been in effect, litigants

It likewise is true that in both the state and the federal systems there are several important limitations on the ability of redistricting plaintiffs to dictate venue. Three warrant particular mention. First, litigants tend to enjoy relatively little control with respect to whether a given redistricting claim ultimately will be adjudicated in the state or federal court system. This limitation derives from a confused combination of judicially created doctrines and federal statutes.<sup>133</sup> The jumble of rules does not, however, prevent a truly motivated plaintiff – that is, one willing to sacrifice otherwise available claims simply to secure forum – from ensuring the case will proceed in either the state or federal system. It likewise does not impede litigants’ ability to select a forum *within* either of the two parallel systems.

The second major limitation applies only to federal courts, as it derives from a federal statute requiring that many, though not all, redistricting cases be heard by a three-judge panel.<sup>134</sup> The first member of this three-judge panel is the judge to which the case originally is assigned.<sup>135</sup> Litigants triggering the three-judge-panel statute are therefore able – through forum selection – to affect who will serve as the first panel judge. The second two judges, by contrast, are selected by the chief judge of the circuit in which the case is being brought, and litigants have no formal mechanism to influence the chief judge’s decisions. As such, the effect of forum selection in the federal courts is muted by the panel statute. Still, the effect is by no means eradicated. Among other things, certain aspects of a judge’s identity, including his or her partisan affiliation, are likely to affect how the other judges on the panel adjudicate the case.<sup>136</sup>

The final major limitation applies only to certain state jurisdictions. This limitation stems from narrowly applicable laws that dictate forum specifically

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would be assured that the case would be assigned to one of three judges based on certain percentage calculations. *See* Amended Order Assigning the Business of the Court, Western District of Texas (filed Dec. 6, 2010), *available at* <http://www.txwd.uscourts.gov/rules/stdor/d/district/botc.pdf>.

<sup>133</sup> Most prominently, various authorities prevent federal courts from adjudicating certain state redistricting claims. For example, the “*Grove* doctrine” requires that federal courts in particular circumstances defer adjudication of federal redistricting claims to state courts. *See* *Grove v. Emison*, 507 U.S. 25, 33-34 (1993). In addition, a defendant normally can remove a case, including one involving redistricting-related claims, from state to federal court, so long as it originally could have been filed in federal district court. *See, e.g.,* *Yatauro v. Mangano*, No. 11-CV-3079, 2011 WL 2610562, at \*2 (E.D.N.Y. July 1, 2011); *see also* 28 U.S.C. § 1441(a) (2006).

<sup>134</sup> 28 U.S.C. § 2284(a) (“A district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.”).

<sup>135</sup> *Id.* § 2284(b)(1).

<sup>136</sup> *See* Cox & Miles, *Judging the VRA*, *supra* note 93, at 25-29, 34-37 (providing evidence that “panel effects” have strong influence in redistricting litigation).

for redistricting-related lawsuits.<sup>137</sup> Where such a law applies, it has a profound effect – and one that warrants special attention for those interested in reform.

While each of the state jurisdictions has its own venue regime, they can be separated into two broad categories: states that have laws specifically dictating forum for redistricting lawsuits, and states that do not. The range of state-court choices available to a redistricting litigant tends to depend, more than anything, on this particular distinction. While, as noted above, many jurisdictions depend on generally applicable venue statutes for redistricting challenges, a surprisingly high percentage do have redistricting-specific venue rules.<sup>138</sup> Of these jurisdictions, many require redistricting challenges to go directly to the state supreme court.<sup>139</sup> In a smaller number of states, redistricting-related claims are funneled to a particular trial court.<sup>140</sup> These constitutional and statutory provisions do not completely eliminate forum selection, given, among other things, the possibility that a particular challenge will proceed in the federal system.<sup>141</sup> Nevertheless, each regime significantly reduces the forum-selection opportunities litigants otherwise might have.

Combined, these three major limitations on forum selection – limitations that funnel cases into either the state or federal court system; that require a three-judge panel in various federal lawsuits; and that, in certain states, force litigants to comply with redistricting-specific venue rules – do constrain litigants in certain respects. Yet they apply only in certain jurisdictions and only under certain, limited circumstances.

Otherwise, the normal constraints on litigants' ability to select venue – constraints that reduce the potency of forum selection in many other forms of litigation – prove ineffectual in the redistricting context. One constraint relates

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<sup>137</sup> See, e.g., ALA. CODE § 29-1-2.5(a) (“Any legal action which contests the validity of any redistricting or reapportionment plan, or any portion of any such plan, for the state Senate, state House of Representatives, United States Congress, State Board of Education, or any other statewide redistricting or reapportionment plan, or portion of any other statewide plan, enacted by the Legislature, shall be commenced in the Circuit Court of Montgomery County.”).

<sup>138</sup> More than twenty states, including those identified below, have some redistricting-specific venue rule on the books. See *infra* notes 139-40 and accompanying text. Often, these rules apply only to certain types of challenges or maps. See, e.g., *Brown v. Butterworth*, 831 So. 2d 683 (Fla. Dist. Ct. App. 2002) (explaining that a certain provision of the Florida Constitution – one that requires that review of certain district maps be conducted by the Florida Supreme Court – “is limited to claims of facial invalidity involving the one-person, one-vote principle as well as the specific districting requirements of the state constitution” but that “[a]ll as-applied constitutional and VRA challenges . . . must be brought in a court of competent jurisdiction,” which includes the state’s circuit courts); see also FLA. CONST. art. III, § 16.

<sup>139</sup> See CAL. CONST. art. XXI, § 3; WASH. CONST. art. II, § 43; VT. STAT. ANN. tit. 17, § 1909 (2002).

<sup>140</sup> See ALA. CODE § 29-1-2.5 (LexisNexis 2003); N.C. GEN. STAT. § 1-267.1 (2011).

<sup>141</sup> See *supra* notes 126-29, 133 and accompanying text.



to flexibility (or, at least, a particular type of flexibility<sup>142</sup>) in claim selection. In standard litigation, it often is not possible for a litigant, seeking simply to secure venue, to identify a non-frivolous claim closely associated with a particular judicial district. Yet for redistricting litigants this rarely poses a challenge. In part, this is due to the ease with which redistricting litigants can circumvent the standing rules,<sup>143</sup> and in part it is a consequence of the number of electoral districts normally contained in a single judicial district. Texas, for example, has only 4 federal judicial districts, which collectively contain 36 congressional electoral districts, 150 state house districts, and 31 state senate districts.<sup>144</sup> Numbers of this sort make it even easier to identify a claim associated with a particular judicial district. As a result, redistricting litigants find themselves unable to include a venue-securing claim only in the rarest of cases.

A second constraint relates to appellate review. At least in theory, appellate review should mute the effects of forum selection. This is because the practice helps to ensure uniformity among lower-court outcomes, so that a litigant's ability to secure a preferred forum – and, by extension, a preferred judge – should not affect the ultimate result. While the unifying effect of appellate review is easily overstated,<sup>145</sup> that effect is, in at least one important respect, particularly weak in the redistricting context. This is because appellate courts give significant deference to trial court findings of fact,<sup>146</sup> and redistricting litigation is exceptionally fact intensive, involving “unusually complex factual patterns.”<sup>147</sup> It is in this respect that a trial court's redistricting rulings are more likely to survive appellate review.

In short, redistricting plaintiffs, with the aim of affecting the shape of district lines, enjoy a venue regime that is quite accommodating of their

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<sup>142</sup> It is true that redistricting litigants do face significant *substantive* constraints with respect to which claims they may bring. See *infra* note 152 and accompanying text. Yet they encounter few procedural constraints, and this latter flexibility is what facilitates forum selection.

<sup>143</sup> See *supra* Part II.A.1.a.

<sup>144</sup> 28 U.S.C. § 133 (2006); *Texas State Senate Districts*, TEX. REDISTRICTING, <http://gis1.tlc.state.tx.us/?PlanHeader=PLANs172> (last visited Jan. 15, 2013); *Texas Congressional Districts*, TEX. REDISTRICTING, <http://gis1.tlc.state.tx.us/?PlanHeader=PLANc235> (last visited Jan. 15, 2013); *Texas State House Districts*, TEX. REDISTRICTING, <http://gis1.tlc.state.tx.us/?PlanHeader=PLANh309> (last visited Jan. 15, 2013).

<sup>145</sup> The unifying effect of appellate review is muted by a number of factors, including overcrowded dockets, failures by litigants to adequately present an appeal (or even to bring an appeal), and appellate deference to trial court findings of fact.

<sup>146</sup> Normally, findings of fact are reviewed for clear error. In some courts, the deference is even greater; in Texas, for example, the state supreme court lacks jurisdiction to review “questions of fact” in cases on review from the courts of appeals. See, e.g., *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 73 (Tex. 1997) (Hecht, J., concurring in the judgment).

<sup>147</sup> *Westwego Citizens for Better Gov't v. City of Westwego*, 872 F.2d 1201, 1203 (5th Cir. 1989) (quoting *Velasquez v. City of Abilene*, 725 F.2d 1017, 1020 (5th Cir. 1984)).

preferences and therefore that facilitates their efforts to secure a preferred judge. It is a profound power to wield over the redistricting process.

c. *Claim Selection*

Where forum selection might be characterized as transfers of authority among potential redistricting agents, claim selection might be characterized as the setting of the courts' agendas.<sup>148</sup> Through this second powerful mechanism, litigants are again able to exercise significant control over the redistricting process.

The source of this empowerment is, in a sense, straightforward: like all courts, redistricting courts normally can act only in response to a lawsuit.<sup>149</sup> So despite the tendency of scholars to refer to redistricting adjudications as court-driven phenomena – as forms of “judicial oversight,” as “intervention” by the courts, or the like – it actually is the litigants, and not the courts, making initial decisions concerning whether to intervene. And even when a litigant does challenge a district map, that decision does not permit a court to consider every possible legal challenge.<sup>150</sup> Rather, the litigants are the ones who identify the specific challenges to bring and the specific districts to challenge. As a result, even if district lines are unlawful, they will control elections unless and until some litigant decides to bring an on-point challenge.<sup>151</sup>

It is true that redistricting litigants face *substantive* constraints with respect to what challenges they can bring, as the universe of recognized redistricting-related claims is far from extensive.<sup>152</sup> But within the universe of recognized causes of action, numerous precedents illustrate both the ability of redistricting

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<sup>148</sup> For political theorists, the term “agenda setting,” applied in the election context, generally refers to an “attempt by those who structure the rules concerning presentation of questions to voters to create pathways that favor one or another outcome.” Issacharoff, *supra* note 5, at 595 (citing KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963)). Redistricting litigants use claim selection to achieve analogous ends. This analogy therefore casts the redistricting litigant in an appropriate but perhaps surprising role: as one who structures the rules.

<sup>149</sup> See, e.g., *Holt v. 2011 Legislative Reapportionment Comm'n*, 38 A.3d 711, 735 (Pa. 2012) (“The Constitution neither authorizes nor requires this Court to engage in its own *de novo* review of redistricting plans in order to assure that all constitutional commands have been satisfied.”).

<sup>150</sup> *Id.*

<sup>151</sup> There are limited exceptions to this regime. See *infra* notes 252-53 and accompanying text (discussing Florida’s litigation-forcing provisions and section 5 of the Voting Rights Act). And it is true that the mere existence of legal mandates, particularly when coupled with the threat of litigation, has some deterrent effect.

<sup>152</sup> See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (refusing to permit a political gerrymandering challenge to go forward); Issacharoff, *supra* note 5, at 630-31 (“One of the perverse consequences of the absence of any real constitutional vigilance over partisan gerrymandering is that litigants must squeeze all claims of improper manipulation of redistricting into the suffocating category of race.”).

litigants to use claim selection to set courts' agendas and the significance this power has in the context of redistricting. The Supreme Court's recent decision in *Perry v. Perez* provides a particularly helpful example.<sup>153</sup> In *Perry*, the district court had drawn and attempted to implement interim maps for an upcoming election.<sup>154</sup> On expedited review, the Supreme Court reversed.<sup>155</sup> Explaining that the district court had failed to take into sufficient account the maps drawn by the state legislature, the Supreme Court noted that the district court on remand would be required "of course, . . . not to incorporate into the interim plan any legal defects in the state plan."<sup>156</sup> The Supreme Court then quickly confirmed that the possible range of "legal defects" is defined *not* by the court's independent review, but rather by the "challenges" brought by litigants.<sup>157</sup> It even clarified that the rule applies with respect to claims where the *defendant* bears the burden of establishing a map's legality.<sup>158</sup> The Court, in other words, confirmed that a court normally should avoid considering any legal challenge beyond those raised by the parties – even when the legality of electoral lines is at stake.

Another striking example of agenda setting comes in the context of political-gerrymandering claims. Justice Kennedy's controlling opinion in *Vieth v. Jubelirer* is notable for its insistence on limiting the scope of its holding not only to the specific claims advanced by the litigants and their amici, but also to their specific legal theories.<sup>159</sup> Justice Kennedy emphasized, in rejecting the plaintiffs' claims, that the Court "should adjudicate only what is in the papers before [it],"<sup>160</sup> and his opinion expressly left open the possibility that "in another case a standard might emerge."<sup>161</sup> Justice Kennedy's approach has provoked criticism: as Justice Scalia asserted in the plurality opinion, "it is *our* job, not the plaintiffs', to explicate the standard that makes the facts alleged by the plaintiffs adequate or inadequate to state a claim."<sup>162</sup> Yet even the criticism confirms the central role played by litigants: under Justice Scalia's conception, it still remains the redistricting plaintiffs' job to decide which claims to bring and which facts to allege.

*Perry* and *Vieth* illustrate ways in which redistricting litigants limit the scope of court intervention by choosing not to raise certain types of claims. The corollary – that litigants can expand the scope of court intervention by

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<sup>153</sup> *Perry v. Perez*, 132 S. Ct. 934, 940 (2012).

<sup>154</sup> *Id.* at 940.

<sup>155</sup> *Id.* at 944.

<sup>156</sup> *Id.* at 941.

<sup>157</sup> *Id.* at 942.

<sup>158</sup> *Id.* at 944.

<sup>159</sup> *Vieth v. Jubelirer*, 541 U.S. 267, 307-17 (2004) (Kennedy, J., concurring in the judgment).

<sup>160</sup> *Id.* at 313.

<sup>161</sup> *Id.* at 312.

<sup>162</sup> *Id.* at 301 (plurality opinion).

raising additional claims – is no less important. This influence becomes particularly clear when litigants successfully prosecute a novel claim. An illustration of this phenomenon emerged in the context of racial gerrymandering. In *Shaw v. Reno*,<sup>163</sup> the Supreme Court introduced a new doctrine into the redistricting canon. Its decision directly affected the district maps that would govern congressional elections in North Carolina and set an important precedent that would alter current and future maps across the country. Ultimately, however, the Supreme Court did not break this new legal ground without litigant assistance; to the contrary, it was the decision by five North Carolina residents to bring the novel claim that gave the court the power to articulate this “entirely new cause of action.”<sup>164</sup> The majority acknowledged as much: an “understanding of the nature of appellants’ claim [was] critical to [its] resolution of the case.”<sup>165</sup>

In short, claim selection is a powerful tool in the context of redistricting. It potentially determines which legal standards will be enforced with respect to which electoral districts, and it directly affects the balance of power between agents empowered to draw district lines. Given the stakes, it is a profound power potentially available to redistricting litigants.

Yet the procedural rules do little to mitigate this phenomenon. To the contrary, while certain judicially created doctrines – such as doctrines relating to standing and laches – normally impose limits on litigants’ abilities to engage in claim selection, these doctrines tend to have little bite in redistricting litigation. The permissive nature of the federal standing doctrine already has been discussed,<sup>166</sup> and its application is no less forgiving in the context of claim selection. The flexible standing doctrine, in other words, circumvents standing-related barriers that otherwise might affect litigants’ abilities to select claims.

The distinct doctrine of laches likewise has been applied in the redistricting context in a largely ineffectual fashion. This doctrine, which “penalizes a litigant for negligent or willful failure to assert his rights” through dismissal of that litigant’s otherwise meritorious claim, normally is a formidable doctrine governing lawsuits in equity.<sup>167</sup> And in theory, “[t]he defense applies to redistricting cases as it does to any other.”<sup>168</sup> Yet when adjudicating redistricting cases, many courts have expressed reluctance in applying the

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<sup>163</sup> 509 U.S. 630, 649 (1993).

<sup>164</sup> *Id.* at 659 (White, J., dissenting).

<sup>165</sup> *Id.* at 641 (majority opinion).

<sup>166</sup> *See supra* Part II.A.1.a.

<sup>167</sup> *Perry v. Judd*, 840 F. Supp. 2d 945, 953 (E.D. Va. 2012) (internal quotation marks omitted) (quoting *Valmor Prods. Co. v. Standard Prods. Corp.*, 464 F.2d 200, 204 (1st Cir. 1972)).

<sup>168</sup> *Arizona Minority Coal. for Fair Redistricting v. Arizona Indep. Redistricting Comm’n*, 366 F. Supp. 2d 887, 908 (D. Ariz. 2005). *But see infra* note 174 (discussing the limited holding of this case).

doctrine.<sup>169</sup> Even when plaintiffs have sought to challenge a district plan years after it was first put in place, courts have rejected laches defenses based on various grounds, including the “ongoing nature of the violation,”<sup>170</sup> that redistricting challenges are distinguishable from “challenges to specific election procedures made after the election process had begun,”<sup>171</sup> because intervening Supreme Court opinions “created a new ballgame,”<sup>172</sup> or even because “[f]rom a political standpoint the delay . . . [was] understandable.”<sup>173</sup> Others have gone so far as to conclude that the doctrine simply does not apply to certain types of redistricting claims.<sup>174</sup>

In short, the doctrines of standing and laches lack the force they have in other contexts. These doctrinal shortcomings, coupled with the high degree of flexibility normally accorded to parties selecting claims, grant litigants a robust ability to determine which district lines are potentially subject to judicial redistricting. It is by using this mechanism of claim selection that redistricting litigants – not redistricting courts, not primary redistricting agents, and not the electorate at large – are able to set the courts’ agendas in powerful and consequential ways.

## 2. The Neglect of an Unrepresented Class

At the same time that redistricting litigation is so hospitable to litigants, it offers few protections to non-litigants. Initially, this may seem unremarkable: civil litigation rarely protects those not appearing in court. Yet this default rule flips – most prominently, in the class-action setting – when non-litigants will

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<sup>169</sup> See, e.g., *Garza v. Cnty. of L.A.*, 918 F.2d 763, 772 (9th Cir. 1990); *Blackmoon v. Charles Mix Cnty.*, 386 F. Supp. 2d 1108, 1115 (D.S.D. 2005); *Jeffers v. Clinton*, 730 F. Supp. 196, 203 (E.D. Ark. 1989).

<sup>170</sup> *Garza*, 918 F.2d at 772; see also, e.g., *Jeffers*, 730 F. Supp. at 202.

<sup>171</sup> *Pac for Middle Am. v. State Bd. of Elections*, No. 95 C 827, 1995 WL 571887, at \*5 (N.D. Ill. Sept. 22, 1995).

<sup>172</sup> *Id.* at \*4.

<sup>173</sup> *Rojas v. Moriarty*, No. 91-1113-CV-W-6, 1994 WL 114669, at \*2 n.1 (W.D. Mo. Mar. 25, 1994).

<sup>174</sup> See, e.g., *Shapiro v. State*, 336 F. Supp. 1205, 1210 (D. Md. 1972) (questioning whether it ever would be “proper to dismiss a suit on the ground of laches and thus forever bar an appropriate judicial inquiry into the merits of an otherwise properly alleged cause of action based on ‘racial gerrymandering’ of congressional districts”); cf. *Jeffers*, 730 F. Supp. at 203 (“We will not say to these plaintiffs, ‘Wait for another census. The time is not yet ripe.’ They have heard these words too many times in the past.”). It is true that the doctrine is not entirely dead: occasionally, courts have rejected redistricting claims based on laches. Yet even in these instances, courts generally invoke the doctrine only when it appears the claim has no potential to affect an actual election, or, at most, when the claim, if successful and somehow adjudicated in time, could affect only one rapidly approaching election before the decennial redistricting mandate would restart the litigation clock. See, e.g., *White v. Daniel*, 909 F.2d 99, 103 (4th Cir. 1990); *Arizona Minority Coal. for Fair Redistricting v. Arizona Indep. Redistricting Comm’n*, 366 F. Supp. 2d 887, 907-09 (D. Ariz. 2005).

be bound by the court's decision. In such a scenario, litigants and courts normally owe some duty to the affected non-parties.

As a practical matter, redistricting litigation in many respects falls into this same category. Voters across an entire jurisdiction are affected in a profound and irreversible way when a court requires that an election go forward pursuant to an altered electoral map. Moreover, in light of the principles of *stare decisis*, the claims normally cannot be relitigated.<sup>175</sup> And even if they could be, the realities of the election cycle mean that at least one election is likely to have occurred before the next round of challenges can be heard.

Yet redistricting litigation fails to trigger protections analogous to those provided in the class-action context.<sup>176</sup> There is no requirement that the legal representation be adequate; there is no inquiry into whether the plaintiffs' claims are typical; potential conflicts between attorneys and nonlitigants are never explored; and no one acts as a fiduciary. Given the permissiveness of such a regime, it comes as little surprise that few litigants elect to pursue the procedurally more cumbersome route required by a class action, a decision made even more sensible – at least, from a plaintiff's perspective – once it is recognized that the advantages of bringing a class action, including the ability to avoid mootness challenges and to seek far-reaching claims and remedies, are available to individual redistricting litigants simply as a matter of course.<sup>177</sup>

These tensions signal the procedurally problematic nature of redistricting litigation. Indeed, redistricting litigation displays many of the same traits as another particularly difficult form of litigation: litigation defined by what Professor Nagareda has termed “embedded aggregation.”<sup>178</sup> In each manifestation of embedded aggregation,

a doctrinal feature of what is ostensibly individual litigation – the scope of the right of action asserted, the nature of the remedy sought, or the character of the wrong alleged – gives rise to demands for the suit to bind nonparties in some fashion, beyond the ordinary *stare decisis* effect that any case might exert. . . . An aggregate dimension, in short, is

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<sup>175</sup> See, e.g., *Holt v. 2011 Legislative Reapportionment Comm'n*, 38 A.3d 711, 736 & n.24 (Pa. 2012) (referring to the “bedrock rule of jurisprudence involving precedent and *stare decisis*” that precludes litigants from challenging redistricting plans based on some “materially indistinguishable challenge” that already was raised and rejected in a prior decision).

<sup>176</sup> While it is true that some litigants do bring redistricting claims as class actions, that is the exception. See, e.g., *Newman v. Hunt*, 787 F. Supp. 193 (M.D. Ala. 1992); *Ramos v. Illinois*, 781 F. Supp. 1353 (N.D. Ill. 1991).

<sup>177</sup> See *infra* Part II.A.3 (discussing the ways that procedural rules shift in response to the exigencies of the election cycle, which facilitates the resolution of claims before they become moot); *supra* text accompanying note 143-144 (discussing flexibility in claim selection); *supra* notes 67-72, 185 and accompanying text (discussing scope of remedy).

<sup>178</sup> Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105, 1108 (2010).

“embedded” doctrinally within what appears to be an individual lawsuit.<sup>179</sup>

As Professor Nagareda defines the phenomenon, “[a] situation of embedded aggregation arises whenever any of [the three doctrinal features identified above] extends beyond the plaintiff in an individual lawsuit.”<sup>180</sup> In redistricting litigation – a form of litigation that Professor Nagareda does not address, despite its aggregative features – all three of these doctrinal features extend well beyond the individual plaintiff.

The first feature concerns the scope of the right of action asserted. An example is the Freedom of Information Act, “a federal statute that confers an undifferentiated right upon ‘any person’ to request the disclosure of ‘records’ held by the federal government” and therefore that has a “universe of potential claimants . . . without legal limits.”<sup>181</sup> In redistricting cases, the scope of the right of action likewise has an “extraordinary breadth.”<sup>182</sup> As discussed above, for example, it is routine for millions of voters to have undifferentiated equal representation claims.<sup>183</sup> And once the possibility of litigant proxies is taken into account, the universe of potential claimants, at least as a practical matter, is similarly without legal limits.

The second feature identified by Professor Nagareda addresses the “remedy the plaintiff seeks,” with the “important distinction concern[ing] the divisibility

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<sup>179</sup> *Id.* at 1105-09. Whether redistricting litigation satisfies the definition of embedded aggregation provided by Professor Nagareda turns on whether redistricting-related demands to bind non-parties are coterminous with what his Article refers to as “ordinary stare decisis.” Certainly there have been, in the redistricting context, demands to bind non-parties outside the context of stare decisis. *See, e.g.*, *Johnson v. Mortham*, 915 F. Supp. 1529, 1557 (N.D. Fla. 1995) (identifying the defendant’s argument that “plaintiffs are collaterally estopped from bringing this suit because they could have intervened in, and prosecuted their claims in, the earlier case,” but rejecting this argument in light of intervening changes in the law and factual circumstances). It nevertheless remains true that redistricting-related precedents become binding on non-parties primarily through the operation of stare decisis. Still, the application of this doctrine in the context of redistricting has sweeping effects across entire populations, and there are, as a practical matter, other ways in which non-litigants are bound: once an election takes place pursuant to a particular court order, for example, it cannot be undone even by a successful subsequent redistricting-related challenge. In any event, whether this all constitutes the “ordinary stare decisis effect” for purposes of defining embedded aggregation seems less important than recognizing that, in the redistricting context, non-parties are predictably and profoundly affected by party activity. Indeed, as Professor Nagareda himself acknowledges, while his primary concerns extend beyond the “routine operation” of the stare decisis doctrine, his discussions do “not turn on any absolute, categorical separation between embedded aggregation and stare decisis.” Nagareda, *supra* note 178, at 1116 n.39.

<sup>180</sup> Nagareda, *supra* note 178, at 1112.

<sup>181</sup> *Id.* at 1109.

<sup>182</sup> *Id.* at 1117 (discussing the scope of the right under the Freedom of Information Act).

<sup>183</sup> *See supra* notes 109-11 and accompanying text.

of the remedy – whether it is such that the court could, as a practical matter, afford it to the plaintiff at hand without affecting the application or availability of the same remedy to other persons who are nonparties to the plaintiff's lawsuit."<sup>184</sup> Redistricting litigation again provides a robust illustration of this feature, as the remedies in redistricting litigation are both sweeping and indivisible. Indeed, it is standard practice for a court hearing a successful equal representation challenge to redraw the entire map, not simply the districts in which the plaintiffs are residing.<sup>185</sup> Indeed, as a purely logistical matter, it may be impossible to redraw one district line without affecting many others. In any event, come election time, there can be only one map governing the proceedings.

The final feature relates to “the nature of the underlying wrong that a civil lawsuit alleges,” where “the important question is whether the wrong is of such a nature as to affect a multitude of persons.”<sup>186</sup> Once again, redistricting provides a clear example of the phenomenon. The underlying wrong – the failure of the primary redistricting agents to redistrict pursuant to law – affects, at a minimum, every voter within the relevant district.

In short, redistricting litigation tends to affect non-parties in ways that, in certain important respects, track class actions and other forms of aggregative litigation, embedded or otherwise – and therefore that would seem to make it a leading candidate for class-action-type protections. But it does not trigger these protections. The uncomfortable tension becomes stark when litigants occasionally *do* choose to bring redistricting claims as class actions,<sup>187</sup> and, even more tellingly, when they include allegations relating to class-action requirements, such as typicality and adequacy, but fail actually to seek class-action certification.<sup>188</sup> The latter form of pleading serves no legal purpose. It instead reveals litigants' anxiety over the nature of redistricting litigation.

The anxiety is appropriate. Tellingly, of the three examples identified in Professor Nagareda's explication of embedded aggregation, only two have been subjected to court review, and in both cases the Supreme Court refused to sanction the relevant practice. Citing concerns over fairness and due process,

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<sup>184</sup> Nagareda, *supra* note 178, at 1118.

<sup>185</sup> Recently in New York, for example, a federal court hearing challenges related to the 2010 cycle redrew districts across the state even though the plaintiffs and interveners in the case resided in fewer than a dozen of the state's sixty-two counties. Only one challenger, a resident of Tompkins County, resided outside the southeast part of the state, and none resided in Western New York, the North Country, or the Adirondacks. *See* Opinion and Order, *Favors v. Cuomo*, No. 11-CV-5632, 2012 WL 928223 (E.D.N.Y. Mar. 19, 2012). Various filings submitted in the litigation by the over thirty plaintiffs and interveners include information about the residence of each. These filings are available at <https://www.nyed.uscourts.gov/11-5632.cfm> and are on file with the author.

<sup>186</sup> Nagareda, *supra* note 178, at 1120.

<sup>187</sup> *See supra* note 176.

<sup>188</sup> *See* Complaint at 6, *Hippert v. Ritchie*, No. 11-cv-00093 (D. Minn. filed Jan. 21, 2011); Complaint at 2, *Britton v. Ritchie*, No. 11-cv-00093 (D. Minn. filed Jan. 12, 2011).



the Court “ultimately limit[ed] what an individual lawsuit may do out of concern that the lawsuit would otherwise operate as a de facto class action.”<sup>189</sup> In other words, the Court pushed back on courts seeking to permit forms of embedded aggregation. By contrast, in the Supreme Court’s most recent forays into redistricting, nowhere were questions of aggregation and representation even raised.<sup>190</sup>

In short, redistricting litigation not only fails to protect the interests of non-parties; it does so in a way that, in other contexts, has triggered calls for serious procedural protections. For non-litigant voters, therefore, there continue to be no formal protections as redistricting litigation unfolds. And, as discussed above, there is little reason to think all interests are being adequately represented in the cases at bar. The upshot is a particular form of litigation – not a conventional one-on-one lawsuit, not a class action – that accords great power to those who elect to litigate.

### 3. Election Exigencies and Procedural Oddities

A final defining feature of redistricting litigation is its dramatic procedural response to the exigencies of the election cycle. In the redistricting context, the pressures of timing have produced a shifting regime of legal standards, one that creates an unusual compression of civil procedure. Litigants aware of such shifts in procedure can employ various techniques to affect the likelihood of triggering this alternative legal regime. Combined with the other distinctive features of redistricting litigation, these procedural oddities make redistricting litigation even more conducive to manipulation by litigants.

At its core, the shifting regime of legal standards relates to timing. Timing is critical in the redistricting context; it is hardly an exaggeration to state that “election-related dates drive redistricting litigation.”<sup>191</sup> The election cycle renders deadlines in redistricting litigation notoriously tight, with redistricting courts routinely required to adjudicate complicated and fact-intensive challenges under “severe time constraints.”<sup>192</sup> These pressures exist in part because elections cannot be put indefinitely on hold.<sup>193</sup> The intense time

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<sup>189</sup> Nagareda, *supra* note 178, at 1121 (discussing *Taylor v. Sturgell*, 553 U.S. 880 (2008), and *Philip Morris USA v. Williams*, 549 U.S. 346 (2007)).

<sup>190</sup> *Tennant v. Jefferson Cnty. Comm’n*, 133 S. Ct. 3 (2012); *Perry v. Perez*, 132 S. Ct. 934 (2012).

<sup>191</sup> BRUCE M. CLARKE & ROBERT TIMOTHY REAGAN, FED. JUDICIAL CTR., REDISTRICTING LITIGATION: AN OVERVIEW OF LEGAL, STATISTICAL, AND CASE-MANAGEMENT ISSUES 65 (2002); *see also* Persily, *supra* note 93, at 1146-47 (describing the “series of frenzied twenty-four-hour days that often precede a court-drawn plan”).

<sup>192</sup> Supplemental Opinion at 10, *Perry v. Perez*, No. 11-CA-360, 2011 U.S. Dist. LEXIS 155601 (Dec. 2, 2011), *overruled on other grounds by* *Perry v. Perez*, 132 S. Ct. 934 (2012); *see also, e.g.*, *Grove v. Emison*, 507 U.S. 25, 35 (1993).

<sup>193</sup> This is true even though courts do have a limited ability to delay certain elections. *See, e.g.*, *Gonzalez v. Monterey Cnty.*, 808 F. Supp. 727, 733 (N.D. Cal. 1992) (delaying special election to permit primary redistricting agents time to “consider the competing

pressures associated with the election cycle also alter the ways in which courts adjudicate cases. At a certain point, time constraints require an expediting of the proceedings – even if it means changing important procedural rules. It is in this context that the importance of timing becomes unmistakable.

To ensure that district lines, even temporary ones, are in place for each election, the procedural rules governing redistricting lawsuits temporarily change in response to time constraints. They do so by shifting power among redistricting agents, by altering the standards for relief, and by affecting the timing of relief.

The most drastic changes resulting from time pressure concern the balance of power among agents drawing electoral lines. A sufficient delay in state-court proceedings, for example, shifts power away from state courts. This is a result of the so-called *Grove* doctrine, which normally requires that federal courts defer from ruling on certain redistricting claims if litigation is still pending in state court.<sup>194</sup> This rule is important for a host of reasons; among other things, it dictates which set of judges, federal or state, will be adjudicating the relevant case. This limitation on the federal courts evaporates, however, if it appears the state court will not reach a timely ruling.<sup>195</sup> In other words, sufficient delay permits – indeed, requires – a federal court that otherwise would stay its proceedings to engage in judicial redistricting. Those dissatisfied with state-court proceedings can benefit profoundly from the shift in forum.<sup>196</sup>

There is an analogous shift in power away from state legislatures. As elections draw nearer, the ability, willingness, and obligation of courts to defer to primary redistricting agents all decrease. Normally, if a court concludes that a legislatively enacted map suffers from some legal flaw, it must provide the legislature time to remedy that map before it will implement a court-drawn version.<sup>197</sup> If, however, the court concludes that, in light of election-related deadlines, there is not enough time for the legislature to act, it will bypass this step and directly implement a court-drawn map.<sup>198</sup> The California Supreme Court's description of its predicament after the 1980 redistricting cycle is illustrative:

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interests in [the] case”).

<sup>194</sup> *Grove*, 507 U.S. at 37.

<sup>195</sup> *Id.* at 36 (“[The District Court] of course . . . would have been justified in adopting its own plan if it had been apparent that the state court . . . would not develop a redistricting plan in time for the primaries.”); *see also, e.g.,* *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm’n*, 366 F. Supp. 2d 887, 900 (2005).

<sup>196</sup> Indeed, *Grove* itself demonstrated the outcome-determinative effects that this shift in forum can have on an electoral map. 507 U.S. at 28-31 (describing different results reached by state and federal courts adjudicating redistricting challenges that, in relevant part, were identical).

<sup>197</sup> *See, e.g.,* *Branch v. Smith*, 538 U.S. 254, 261-62 (2003).

<sup>198</sup> *Id.* at 265; *see also* *Smith v. Clark*, 189 F. Supp. 2d. 529, 536 (S.D. Miss. 2002).

The options available to the court are limited. Were time constraints less pressing, the court might consider requesting the Legislature to develop an interim plan. However, the June primary is less than five months away. . . . [N]o new districts could be put into effect in time to inform the electorate and the candidates of their districts before the primary election.<sup>199</sup>

Those challenging the work of primary redistricting agents can, through this changed approach, profit from delay.

Finally, time pressures can shift power away from appellate courts, thereby increasing the power of trial courts in a manner that magnifies the effect of forum selection. Normally, a trial court judgment addressing a matter as inexorably intertwined with the public interest as redistricting would be a logical candidate for a stay pending appellate review.<sup>200</sup> When elections are imminent, however, there may not be enough time for such protections, and, when that occurs, trial court redistricting decisions are generally the ones that control. It is as a result of this reality that the Supreme Court has expressly acknowledged the “improbability of completing judicial review before the necessary deadline for a new redistricting scheme.”<sup>201</sup> Litigants preferring the composition of a particular trial court bench to the appellate court bench – a reasonable distinction, particularly where judiciaries appear politicized – therefore benefit from dragging their heels.

A second category of timing-related transformations relates to the standards for relief. The Supreme Court recently concluded that when elections are sufficiently close in time and a legislatively enacted redistricting plan faces challenges under the Constitution or section 2 of the Voting Rights Act, the district court is both empowered and required to redraw the map in a manner that responds to those challenges if the plaintiffs have shown a mere “likelihood of success on the merits.”<sup>202</sup> While this is a “familiar standard,”<sup>203</sup> one normally applicable when plaintiffs are seeking a preliminary

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<sup>199</sup> *Assembly of the State v. Deukmejian*, 639 P.2d 939, 951 (Cal. 1982). The posture of this case was unusual, and it resulted, in effect, in a court-drawn plan that was identical to a legislatively enacted plan. *Id.* at 961. The court’s discussion nevertheless provides helpful insight into the effects of time pressures.

<sup>200</sup> *See, e.g., Nken v. Holder*, 556 U.S. 418, 434 (2009) (identifying the four factors governing the grant of a stay pending appeal as “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies” (internal quotation marks omitted)).

<sup>201</sup> *Grove*, 507 U.S. at 35.

<sup>202</sup> *Perry v. Perez*, 132 S. Ct. 934, 942 (2012) (“Where a State’s plan faces challenges under the Constitution or § 2 of the Voting Rights Act, a district court should still be guided by that plan, except to the extent those legal challenges are shown to have a likelihood of success on the merits.”).

<sup>203</sup> *Id.*

injunction,<sup>204</sup> its familiarity does not detract from the fact that the standards for relief have shifted as a result of time pressures. The shift becomes even starker in the context of certain types of challenges related to section 5 of the Voting Rights Act, an unusual provision that, among other things, shifts the burden to the state to prove the validity of a district map.<sup>205</sup> Under certain circumstances related to the timing of an approaching election, the standard for challenges related to section 5 is not one of success on the merits, or even likelihood of success on the merits, but rather one of “reasonable probability.”<sup>206</sup> In short, the standards for proving violations, and therefore for replacing legislatively drawn lines with judicially drawn lines, change as an election draws nearer.

A final effect of time pressure relates to what one court has referred to as “the timing of relief.”<sup>207</sup> If a court concludes that, on account of time pressures, it would not be practicable for a jurisdiction to implement certain legally required changes prior to an election, the court may be willing to postpone the implementation of some or all of those changes. A federal court in Pennsylvania recently relied on these principles, for example, when it refused to redraw district lines and ordered that the jurisdiction instead rely on maps drawn over ten years earlier.<sup>208</sup> Although the older maps were clearly invalid in light of the equal representation doctrine,<sup>209</sup> the court explained that there are “‘certain circumstances, such as where an impending election is imminent and a State’s election machinery is already in progress,’ in which a court may withhold the granting of relief, even if the existing apportionment scheme is found to be invalid.”<sup>210</sup> Were the time pressure less severe, the requested relief – in this instance, an altered district map – almost certainly would have been available.

In these three important respects – relating to the balance of power among redistricting agents, the standards for relief, and the timing of court-imposed remedies – the rules in redistricting litigation transform as an election draws

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<sup>204</sup> *Id.*

<sup>205</sup> 42 U.S.C. § 1973c(a) (2006).

<sup>206</sup> See *Perry*, 132 S. Ct. at 942. (“And by ‘reasonable probability’ this Court means in this context that the § 5 challenge is not insubstantial.”). This standard arose out of a procedurally complicated line of litigation that involved two sets of parallel federal proceedings and a court tasked with imposing an interim map without the benefit of recently pre-cleared district lines. The procedural complications presented in this case, while extensive, would not have necessitated a shift in the procedural rules had there been enough time for the courts to adjudicate the relevant claims. It is worth noting that this particular shift in the standards can assist defendants as well as plaintiffs. By relying on this standard, a jurisdiction defending its map may be able to circumvent (or, at least, delay) the full brunt of the section 5 preclearance requirement.

<sup>207</sup> *Pileggi v. Aichele*, 843 F. Supp. 2d 584, 593 (E.D. Pa. 2012) (citing *Reynolds v. Sims*, 377 U.S. 533, 585 (1964)).

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 589.

<sup>210</sup> *Id.* at 593 (quoting *Reynolds*, 377 U.S. at 585).

closer. These temporary changes have lasting effects: even if the rules eventually are restored and the maps eventually redrawn, interim maps govern interim elections. The elections held in North Carolina in the 1990s provide a vivid illustration of the consequences. In early 1992 plaintiffs filed a lawsuit challenging the state's newly drawn congressional districts.<sup>211</sup> Although the challenges ultimately were successful, it took over six years for the litigation to affect the congressional maps actually used in an election. In other words, a district plan later held to be unconstitutional governed North Carolina's elections in 1992, 1994, and 1996, and for those constitutional violations there was no retroactive remedy to be had.<sup>212</sup>

The temporary changes also are unusual. While it is true that the standards for any sort of court-ordered relief do change in response to certain timing pressures – as, for example, when a litigant pursues preliminary relief and must establish a mere likelihood of success on the merits – the multifaceted compression of civil procedure that occurs in the redistricting context is highly atypical. The scope of all the changes, the lasting effects of interim relief, and the predictability of the timing crunch combine to create a date-dependent legal regime that shifts in significant ways as an election draws nearer.

The predictability matters, for these temporary changes are susceptible to manipulation by litigants. Litigants can speed up or slow down litigation by, among other things, filing (or declining to file) time-consuming motions, adjusting discovery demands, and carefully scheduling the filing of their claims. They also can simply ask: litigants routinely propose scheduling orders and petition courts for extensions or expedition of time.<sup>213</sup> It is by employing these tools that redistricting litigants can work to trigger shifts in the legal

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<sup>211</sup> Daniel P. Tokaji, *Representation & Raceblindness: The Story of Shaw v. Reno*, in RACE LAW STORIES 513, 516 (Rachel F. Moran & Devon W. Carbado eds., 2008); see also *Shaw v. Hunt*, 517 U.S. 899, 901-02 (1996); *Shaw v. Reno*, 509 U.S. 630, 655-56 (1993).

<sup>212</sup> Tokaji, *supra* note 211, at 532. It was not until 1998 – and not until the case had made two trips to the Supreme Court – that an election was held pursuant to a plan altered in response to the legal challenge. *Id.* at 516-35. Even this was not the end of the litigation. Related challenges went back to the Supreme Court another two times before the start of the next cycle (that is, before the 2000 census data was released). See *id.* at 534 (“For the fourth time in eight years of litigation over North Carolina’s congressional districts, the Supreme Court had reversed the three-judge district court.”).

<sup>213</sup> See, e.g., Letter to the Court, *Favors v. Cuomo*, No. 11-Civ.-5632 (E.D.N.Y. Dec. 8, 2011), available at <https://ecf.nyed.uscourts.gov/dropbox/324457/1.11.cv.5632.6528965.0.pdf> (requesting extension of time); Joint Advisory to the Court Regarding Submission of Proposed Interim Court Ordered Plans, *Davis v. Perry*, No. 5:11-cv-00360, at \*3 (W.D. Tex. Oct. 28, 2011), available at [https://docs.google.com/file/d/0BxeOfQQnUr\\_gZDYyNDFjYmYtM2Y1Zi00OTJhLWI1MGItYjY0MmM3YzQ4MzZh/edit](https://docs.google.com/file/d/0BxeOfQQnUr_gZDYyNDFjYmYtM2Y1Zi00OTJhLWI1MGItYjY0MmM3YzQ4MzZh/edit) (setting forth parties’ proposed lengths of time and dates for hearings); see also Order, *Perry*, No. 5:11-cv-00360 (W.D. Tex. Nov. 8, 2011), available at [https://docs.google.com/file/d/0BxeOfQQnUr\\_gMjk2NzkzZjItNWl3Ni00YmQ0LTkzMjItYjYzNzM0NTAzYmNi/edit?pli=1](https://docs.google.com/file/d/0BxeOfQQnUr_gMjk2NzkzZjItNWl3Ni00YmQ0LTkzMjItYjYzNzM0NTAzYmNi/edit?pli=1) (requesting from the parties briefing on whether a trial should proceed or be delayed).

standards and take advantage of the procedural oddities characterizing redistricting litigation.<sup>214</sup>

It is therefore not surprising to find examples of redistricting litigants trying to manipulate timing – or at least accusing each other of the same. The parties before the Supreme Court in the redistricting case that recently came out of Texas, for example, all pointed fingers at one another with respect to the perceived delay: lawyers for the state accused others of delaying proceedings through “interventions and discovery opposed by the State of Texas,”<sup>215</sup> while lawyers for other parties accused Texas of causing delay through “dilatatory litigation choices,” such as “insist[ing] on pursuing summary judgment” and refusing to agree to a “quick trial date.”<sup>216</sup> Even the district court judges acknowledged the control over timing exercised by these litigants,<sup>217</sup> and theirs is far from the only judicial commentary on the subject. Judges occasionally criticize redistricting litigants for perceived delay tactics,<sup>218</sup> and on somewhat rarer occasion compliment parties for their efforts in streamlining litigation.<sup>219</sup>

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<sup>214</sup> It is true that there are limitations on what litigants can control. These limitations may be practical, strategic, a byproduct of the adversarial method, or a result of courts’ case-management tools. *See, e.g.*, CLARKE & REAGAN, *supra* note 191, at 65-71. Litigants nevertheless retain significant influence over the timing of litigation.

<sup>215</sup> Emergency Application for Stay of Interlocutory Order Directing Implementation of Interim Texas House of Representatives Redistricting Plan Pending Appeal to the United States Supreme Court at 4, *Perry v. Perez*, 132 S. Ct. 934 (2012) (No. 11A536); *see also Abbott Accuses DOJ of Stalling; DOJ Fires Back*, TEX. REDISTRICTING & ELECTION L. (Dec. 1, 2011, 9:59 PM), <http://txredistricting.org/post/13621218808/abbott-accuses-doj-of-stalling-doj-fires-back>.

<sup>216</sup> Joint Response of Rodriguez Respondents et al. in Opposition to Texas’s Emergency Application for Stay & Injunction at 4, 24, *Perry*, 132 S. Ct. 934 (No. 11A536).

<sup>217</sup> *See* Respondents Texas Latino Redistricting Task Force et al. Joint Brief in Opposition to Emergency Application for Stay of Interlocutory Order Directing Implementation of Interim Congressional Redistricting Plan Pending Appeal to the United States Supreme Court, *Perry*, 132 S. Ct. 934 (No. 11A536) (quoting the district court in a related case as stating, with respect to scheduling issues, that “at the moment it’s Texas’ lawsuit and Texas’ motion for summary judgment, and that’s what we’re scheduling” (quoting Transcript of Telephonic Conference at 33-34, *Texas v. United States*, No. 1:11-cv-01303 (D.D.C. 2012)). Later, in the original case, the three-judge panel issued an order emphasizing the need for the parties to cooperate to get a timely map in place: “It is the Court’s desire to have redistricting plans in place for an April primary and all parties must continue their negotiations to assist the Court in accomplishing that task.” Order, *Perez v. Texas*, 2012 WL 4094933 (W.D. Tex. 2012) (No. 11-CA-360).

<sup>218</sup> *See, e.g.*, *Baldus v. Members of the Wisconsin Gov’t Accountability Bd.*, 843 F. Supp. 2d 955, 960 (E.D. Wis. 2012) (referring to the “the sandbagging, hide-the-ball trial tactics that continue to be employed” and asserting that “[n]either this Court, the parties in the case, nor Wisconsin’s citizens have the interest or time to endure the litigation tactics being used by public officials or their private counsel”); *cf. Badham v. U.S. Dist. Court*, 721 F.2d 1170, 1174 (9th Cir. 1983) (“Defendants argue that the Republicans themselves have been guilty of delay and have not pursued diligently their claims in state court. They

The commentary by these judges provides further support for the conclusion that litigants tend to have significant control over the timing of litigation. Particularly in the redistricting context, where time pressures change the rules that govern redistricting litigation, this control over timing can serve as a powerful strategic tool. These changes in the rules unquestionably affect the process and have the potential to affect the lines themselves.

In short, a defining feature of redistricting litigation is the unusual compression of civil procedure that begins as an election approaches and that encourages procedural manipulation. This attribute, coupled with the regime's accommodation of litigants and its neglect of nonparties, together make the larger point: litigating as redistricting – far from being the purely court-dominated practice that the literature would suggest – is highly susceptible to litigant control. This, in turn, makes for a remarkable form of redistricting.

#### B. *A Curious Form of Redistricting*

Redistricting litigants, as explained above, benefit from a significant delegation of authority by a system that relies on them as critical agents of fallback redistricting. This, in turn, produces a form of redistricting that is remarkable in at least three fundamental respects. Namely, the regime relies on actors who are not representative of the general electorate; it grants them a staggering amount of power; and it requires that these actors exercise their power through opaque and indirect means.

Litigating is a remarkable form of redistricting, perhaps most significantly, because of its reliance on a group of actors that is in no sense representative of the electorate as a whole. In the context of redistricting, this is unusual. Other redistricting agents – members of state legislatures, commission members, and even judges – are in some sense representative of the communities they serve; each has either been elected or appointed by those who have been elected. Not so with redistricting litigants. Quite to the contrary, the composition of this group is defined by the particular collection of traits identified above,<sup>220</sup> and as such, the litigants behind any given lawsuit are unlikely to be representative of the electorate. Rather, they are, in all likelihood, representative of major political parties, prominent interest groups, and others with significant financial backing and the most directly at stake. The result is a reliance on actors who, at best, lack incentives to represent broad interests and who tend to

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contend further that absent such delaying tactics, the Republicans would have already had a swift resolution of their state law claims in state court. The argument is premature.”).

<sup>219</sup> *Navajo Nation v. Arizona Indep. Redistricting Comm’n*, 230 F. Supp. 2d 998, 1016 n.23 (D. Ariz. 2002) (“The Court commends the attorneys and parties for working diligently, cooperatively, and with ingenuity to narrow the issues regarding the DOJ’s objections and for compromising on an interim plan for the 2002 elections. What was initially anticipated to be lengthy litigation was significantly diminished by [various actions taken by the litigants and in particular the DOJ].”).

<sup>220</sup> See *supra* Part I.A.

favor certain results. It is no coincidence, for example, that redistricting litigants sometimes are able to reach a “political compromise” that “partition[s] the state so as to lock in the political status quo ante.”<sup>221</sup> Moreover, those likely to benefit the most from this form of redistricting are, ironically enough, those who failed to achieve majority rule in the relevant jurisdiction. As Professor Cain has explained, it is predictably the losers who initiate litigation:

In particular, redistricting is bedeviled by the sore loser problem: because new district lines can determine the electoral fates of candidates, political parties, and interest groups, it is usually worth their time and effort to overturn a plan that they do not like for the uncertain prospect of something better.<sup>222</sup>

The composition of this non-representative group helps to explain the concern – voiced periodically by the few who have acknowledged the role litigants might play in redistricting – that redistricting litigation may be subject to “partisan capture.”<sup>223</sup>

The effects of this lack of representativeness are then compounded, in this strange form of redistricting, by a systemic failure to protect non-litigants. As discussed above, though entire electorates are affected in a profound way by the actions of the redistricting litigants, no formal mechanism ensures their interests will be taken into account. While the opaque nature of the redistricting litigants makes it difficult to identify exactly whose interests are being ignored, perhaps the most obvious target are those who would benefit from a “competitive electoral process.”<sup>224</sup> Litigants often have an incentive to reach mutually beneficial compromises – either explicitly, through settlement, or implicitly, through a bilateral decision not to bring certain claims – that favor the political status quo. Such a result is particularly troubling to those “commit[ted] to the competitive integrity of the political process as an indispensable guarantor of democratic constitutionalism.”<sup>225</sup>

It is true that the involvement of the courts, which are both more representative and more transparent than are litigants, helps to counteract the power exercised by the latter group. But it far from erases it. Particularly when litigants exercise so much control over the courts themselves, it is difficult to escape the conclusion that significant redistricting power has been delegated in a manner that fails to protect all affected parties.

This underscores another reason why litigating is a remarkable form of redistricting: namely, redistricting litigants are given a staggering amount of power. The various powers exercised by redistricting litigants throughout the

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<sup>221</sup> Issacharoff, *supra* note 5, at 598, 600 (discussing *Gaffney v. Cummings*, 412 U.S. 735 (1973), which the author sharply criticizes as “insult[ing] [] the competitiveness of the process resulting from the ability of insiders to lessen competitive pressures”).

<sup>222</sup> Cain, *supra* note 2, at 1836.

<sup>223</sup> See Cox, *supra* note 89, at 800; Karlan, *supra* note 63, at 1733.

<sup>224</sup> Issacharoff, *supra* note 5, at 615.

<sup>225</sup> *Id.* (describing the “political markets” approach).



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life of a lawsuit – and even before, through the threat of litigation, and after, through the precedential effects of a decision – combine to create a regime in which the participation of litigants, taken in sum, plays a profoundly consequential role in redistricting. Certain manifestations of their influence (as illustrated, for example, through the mechanisms of forum selection, claim selection, and manipulation of timing)<sup>226</sup> confirm the reach of this power.

It nevertheless does remain difficult to determine precisely the degree of influence that a litigant has over a case. This uncertainty, in turn, relates to a third remarkable quality of litigating as redistricting. The power litigants exercise often must be employed through opaque and indirect means. Forum selection is one example of this phenomenon. Another example is the ability litigants have to manipulate timing and thereby to trigger the shift in rules that depends on timing. These complicated legal mechanisms are both difficult to measure and hard to explain to a layperson, thereby compounding the transparency problems already affecting this form of redistricting. The indirect nature of these processes also ensures that the results will not always be what are intended. If nothing else, the divide between the desired outcomes and the means employed adds a significant degree of randomness into the process.

In short, litigating presents a strange model for redistricting. It delegates significant authority to a non-representative group of actors, and it requires that they employ their power in ways that are opaque and indirect. It is a form of redistricting that leads to serious normative concerns.

### III. A TROUBLING DELEGATION

The delegation of authority to redistricting litigants, described in detail above, is complicated and consequential. It is also deeply troubling. Its more problematic qualities threaten to undermine the quality of the outcomes, efficiency, and legitimacy of the redistricting process. Combined, these concerns suggest a regime in need of examination and, quite possibly, reform. This Part, which explores the normative implications of litigant participation in the redistricting process, concludes with a discussion of reforms that, if adopted, may help to achieve a more sensible delegation of democratic design.

#### A. *The Normative Implications of Litigant Participation*

The participation of litigants threatens to jeopardize several fundamental aspects of the redistricting process, including the quality of its outcomes. As discussed above, the delegation of authority to litigants permits these actors, to a significant though somewhat unpredictable extent, to control the district lines that ultimately govern elections. Litigants exercise this control through techniques as broad as refusing to bring challenges that do not advance their interests, and as subtle as delaying litigation in the hopes of triggering a more favorable set of rules. Does this influence tend to produce better redistricting

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<sup>226</sup> See *supra* Part II.A.

outcomes? To answer this question in full, one must engage in the difficult, or perhaps impossible, project of determining a normative baseline for redistricting maps. Yet even taking litigant redistricting on its own terms indicates cause for concern. Litigants' power to redistrict stems from their ability to enforce constitutional and statutory rules.<sup>227</sup> As a result, to defend litigant participation in redistricting, one might argue that litigant participation improves redistricting outcomes by making the outcomes more consistent with governing legal standards.

Surely this occurs to some extent. There is, in other words, a persuasive argument to be made that the participation of litigants tends to produce maps that are at least somewhat more consistent with the relevant legal standards than are maps produced in their absence. The approach nevertheless has a number of potential defects in the manner in which litigants work toward this end. At the outset, there is little reason to believe that litigants' interests necessarily align with those of the electorate at large. As such, there is little reason to believe that litigants will make decisions likely to produce the maps most consistent with the governing legal standards, rather than most likely to achieve their preferred outcomes. Forum, for example, is selected not to secure the most competent judge, but rather the most favorable; claims are selected not in response to a neutral assessment of the merits, but rather in light of the practical needs of clients. With respect to matters of timing, such concerns grow even more acute: timing-related mechanisms have the potential to undermine, rather than promote, the enforcement of legal norms through reliance on interim maps, abbreviated appellate review, and relaxed legal standards governing relief. These examples are merely illustrative. Throughout the redistricting process, litigants rely on tools that, at best, do not fit perfectly the ends they may be meant to accomplish and, at worst, are subversive. To the extent redistricting litigation is characterized by these more negative qualities – a lack of representativeness, subjectivity to procedural manipulation, and a certain degree of randomness – it is difficult to conclude that this approach is likely to produce the most normatively desirable maps.

Many of these considerations also lead to a second normative concern, relating to efficiency. By relying so heavily on litigants (particularly where litigation is the only form of fallback redistricting), jurisdictions force redistricting to proceed through the mechanisms of civil litigation, which is many things, but rarely efficient.<sup>228</sup> To the contrary, litigation is notoriously

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<sup>227</sup> Indeed, it is not obvious how these rules would be enforced in their absence. Even when scholars debate how best to enforce these standards, the discussions normally concern the type of challenges litigants should bring, not whether litigants should participate at all. See, e.g., Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases: Baker v. Carr and its Progeny*, 80 N.C. L. REV. 1411, 1418 (2002); Issacharoff & Karlan, *supra* note 107, at 2292; Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 103 (2000).

<sup>228</sup> See, e.g., John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985) (arguing that the American system of civil litigation is inefficient as

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cumbersome, time consuming, and resource-draining. Moreover, many of these problems may be exacerbated in the context of redistricting litigation, which implicates factual and legal issues of great complexity, allows participation by anyone with sufficient resources and adequate motivation to drive the proceedings, and creates incentives for litigants to manipulate the system in potentially subversive ways. From an efficiency standpoint, redistricting through litigation appears far from ideal.

Finally, litigant influence has the potential to undermine the legitimacy of the redistricting process.<sup>229</sup> Litigation is a combative process that can encourage negative characterizations and hostile rhetoric. Moreover, litigants' reliance on what are perceived as "litigation tactics" – including manipulation of timing and the other mechanisms discussed above – seems likely to strike many observers as profoundly unfair. What is perhaps most troubling is that most redistricting litigants are self-selected. As discussed above, no official authority – not the electorate, not an elected political body, and not the courts – has selected these actors to participate in the process, much less asked them to represent any interest other than their own. To the contrary, these litigants became redistricting agents on their own initiative – generally because they were unable to achieve their ends through the politically accountable branches – and they are not in any sense expected to advance others' interests. And in many cases, it is not even clear who may be funding or otherwise controlling a litigant's participation.<sup>230</sup>

It is true that certain aspects of redistricting litigation have at least the potential to increase legitimacy. Litigants are constrained by rules and doctrines; much of their work is introduced into the public record; and the adversarial system helps to check their assertions and their arguments. Redistricting litigants nevertheless remain, for the most part, self-appointed, self-interested, and driven by motives and interests that are not transparent – all while pursuing their ends through opaque and potentially subversive means. Delegating significant authority to these actors at least threatens to undermine the legitimacy of the redistricting process.

In sum, normative concerns emerge from the participation of litigants in the redistricting process or, at least, from certain qualities of their participation. The most problematic qualities might be summarized as, first, the failure to achieve a representative body among the litigants, and, second, the ability litigants have to manipulate proceedings through procedure. The power of procedural manipulation both allows litigants to exercise control over the agents meant to mediate their participation (that is, the courts) and widens the

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compared to the German system).

<sup>229</sup> As discussed above, legitimacy in this context may reflect different meanings. *See supra* note 25. This Article, rather than seeking to resolve these difficult questions of legitimacy as they relate to the participation of litigants in the redistricting process, instead seeks to initiate the discussion.

<sup>230</sup> *See supra* text accompanying note 33.

divide between what litigants do (such as select forum) and what they seek to achieve (in the end, to influence district lines). This collection of concerns is serious. Yet just as there has been little analysis of redistricting litigants, there has been little analysis of the troubling implications. As a result, there have been, thus far, few calls for reform targeting the role that litigants play in redistricting.

B. *Toward a More Thoughtful Delegation of Democratic Design*

To address the concerns associated with redistricting litigants, it is first necessary to acknowledge the pivotal role they play, a project this Article seeks to inaugurate. The normative concerns emerging from such analysis in turn reveal that those interested in reform might seek to pursue two main goals: improved representativeness and reduced opportunities for procedural manipulation by litigants. Pursuit of these dual goals should help to address some of the most problematic qualities of litigant participation.

For jurisdictions seeking to implement reforms within the existing adjudicative framework,<sup>231</sup> there are two broad approaches that might be taken. First, jurisdictions might seek to reform existing fallback redistricting regimes by limiting the involvement of courts, thereby reducing the involvement of litigants. Second, jurisdictions might regulate the ways in which litigants participate in civil litigation. This Section provides an outline of each approach. Although neither approach would address all normative concerns raised by the role of litigants in the redistricting process, a sensible combination of the two may be an important step in that direction.

1. Reducing Reliance on Litigants

The first approach to litigant participation seeks to limit the involvement of litigants by limiting the involvement of courts. This relatively blunt tool pursues the relevant goals – representativeness and reduced manipulation – by closing off the forum in which litigants exercise the most power. The most drastic manifestation of this approach would involve a complete overruling of the precedents that have recognized redistricting as a justiciable issue. Were federal and state courts simply to refuse to adjudicate redistricting challenges (citing, for example, the political question doctrine or something similar), those decisions effectively would eliminate litigant involvement in the process.

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<sup>231</sup> One might argue that the pathologies of litigant participation in redistricting are so great that they justify a complete rejection of the American-style system of adjudication. If so, other adjudicative models – such as those characteristic of the German model – may be more appropriate in this context. Cf. Nicholas Stephanopoulos, *Our Electoral Exceptionalism*, 79 U. CHI. L. REV. (forthcoming 2013) (criticizing the model for redistricting adopted in the United States as unusually dependent on judicialization). See generally Langbein, *supra* note 228. Such analysis lies beyond the scope of this Article, which takes as a given “[o]ur lawyer-dominated system of civil procedure.” *Id.* at 823.

Half a century after the United States Supreme Court first opened its doors to redistricting litigants in *Baker v. Carr*<sup>232</sup> – a decision that Chief Justice Earl Warren would later call “the most important case of my tenure”<sup>233</sup> – it seems unrealistic to think that courts across the country would change direction so dramatically. In addition, it also seems difficult to justify such a change as an appropriate response to the problems associated with litigant participation. While it is true that removing courts from the process would effectively eliminate litigant influence, it also would entirely eliminate the backstop provided by litigant-based fallback redistricting. In the absence of some replacement, the result would be a regime whereby primary redistricting litigants would be able to draw electoral lines in legally indefensible ways – for example, with the express intent of eliminating the ability of historically disadvantaged racial groups to elect candidates of their choice – with no fear that courts would mandate revisions. This response is unsatisfying on multiple grounds. It addresses the lack of representativeness by ensuring that no one is represented as a litigant, and it takes a hammer to the problem of procedural manipulation when, as discussed below, more delicate tools may be available. In short, a refusal by courts even to entertain redistricting challenges would be too drastic a response to the particular problems associated with litigant influence in redistricting.

Two alternative reforms are more measured, and therefore may be more appropriate. First, when weighing the benefits of creating or recognizing certain causes of action, those responsible – courts, legislators, or electorates – might break from current practice and acknowledge the role litigants play in enforcing these claims. This, in turn, would encourage those in charge to take into account the costs associated with such reliance. Particularly when a cause of action is especially vulnerable to partisan capture or otherwise proves particularly problematic in the context of litigant enforcement, such considerations may counsel against the adoption of a claim that necessarily will be administered through the courts.

Second, jurisdictions that have not already done so might consider designing and empowering alternative fallback redistricting regimes. Stated otherwise, jurisdictions could design the process so that litigants and courts are no longer the exclusive agents of fallback redistricting. A minority of jurisdictions already have adopted such reforms. As discussed above, for example, the Illinois state constitution initially empowers the legislature to draw certain districts following the census.<sup>234</sup> If the legislature has failed to enact a plan by a given date, however, the constitution shifts power to a Legislative Redistricting Commission, whose members are selected by elected officials.<sup>235</sup>

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<sup>232</sup> 369 U.S. 186 (1962).

<sup>233</sup> EARL WARREN, THE MEMOIRS OF EARL WARREN 306 (1977).

<sup>234</sup> ILL. CONST. art. IV, § 3(b).

<sup>235</sup> *Id.*

By empowering alternative fallback redistricting agents of this sort, jurisdictions address a problem that occurs with regularity (and generally as a result of legislative gridlock): the failure of primary redistricting agents to redistrict in accordance with the decennial mandate. In the 2010 cycle, for example, this failure affected at least eight states and nearly two dozen electoral maps.<sup>236</sup> When such a situation arises, well-established Supreme Court precedent makes clear that the preexisting maps are unconstitutional and cannot govern elections,<sup>237</sup> and in jurisdictions where litigants and courts are the only agents empowered to engage in fallback redistricting, the task of redrawing the lines falls exclusively to them. Litigants in this circumstance exercise extraordinary influence, for the maps they target must be redrawn entirely by the courts.

When this occurs, the first backstop need not be civil litigation. Rather, an attempt to remedy the problem initially could occur via a separate fallback institution, such as that in Illinois, that is more transparent and more representative. It is true that alternative fallback redistricting regimes have their own potential to undermine the process – for example, if the proceedings occur in secrecy or the members are corrupt – but careful structuring of these regimes helps to address such concerns.<sup>238</sup> It is also true that instituting such regimes would not entirely remove litigant influence. The alternative redistricting agents also may fail to deliver a map, and even if they do, litigants still may sue. But by empowering an alternative set of redistricting agents, jurisdictions at least would minimize the chance of punting the entire redistricting project to the courts, and in this sense the jurisdictions could reduce their reliance on redistricting litigants with respect to one of the most problematic manifestations of the phenomenon.

Both of these reforms represent more moderate attempts at reducing litigant participation. As such, they represent more a measured and targeted response to the problems potentially posed by litigant influence.

## 2. Regulating Litigant Participation

A second approach to reform seeks to regulate, rather than necessarily to reduce, litigant participation. Specific changes might help to advance both of the goals identified above: improving representativeness and reducing opportunities for procedural manipulation. Each is addressed in turn.

To increase representativeness, jurisdictions might encourage a broader spectrum of individuals to participate in the litigation process. Although it would be impractical to expect throngs of new parties to file court appearances, participation by new actors very well may be realistic if jurisdictions were to permit and encourage courts to reach out to non-litigants. This has occurred, for example, in Minnesota, where the judges adjudicating redistricting

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<sup>236</sup> Levitt, *supra* note 11.

<sup>237</sup> See *supra* notes 62-63 and accompanying text.

<sup>238</sup> See generally Cain, *supra* note 2, at 1812.

challenges scheduled hearings throughout the state in an effort to hear from those not participating as litigants.<sup>239</sup> The information gathered can be particularly influential with respect to certain critical legal issues – for example, with respect to so-called communities of interest, which is a term referring to “group[s] of people concentrated in a geographic area who share similar interests and priorities” and whose presence, or lack thereof, can affect the legality of electoral maps.<sup>240</sup> The cost of participating in hearings of this sort is much lower than the cost of participating in litigation as a party. One would, as a result, expect greater participation. The approach, which helps to enhance the “voice” of non-parties,<sup>241</sup> has much to commend it.<sup>242</sup>

The term “voice,” in this context, is borrowed from class-action scholars,<sup>243</sup> and given the overlap between these forms of litigation, the connection is far from coincidental. Yet while it is tempting to try to import a series of class-action-type protections into the redistricting context, it is difficult to imagine how this translation would occur. Many of the most well-established class-action protections – which seek to ensure the numerosity of parties, the commonality of issues, the typicality of claims, and the adequacy of counsel<sup>244</sup> – are normally employed in a manner that assumes that the party in question wants to obtain class-action certification. Otherwise, there is no stick: the consequence of failing to meet the requirements is simply denial of certification. Yet as previously observed, redistricting lawsuits need not proceed as class actions, and most litigants have little incentive to pursue such an approach.<sup>245</sup> Changing *that* rule – that is, reversing the rule that redistricting lawsuits need not proceed as class actions – poses its own set of logistical and constitutional problems, particularly in situations when the failure of any party to achieve class certification would result in the use of an outdated or otherwise clearly unlawful map. In short, the class-action model fails to provide an obvious framework for reform.<sup>246</sup>

Rather than attempt to force class-action protections into the redistricting context, courts might seek to improve the representativeness of the process through more delicate means: namely, by relying more heavily on actors who

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<sup>239</sup> Amended Order Setting Public Hearing Schedule at 2, *Hippert v. Ritchie*, No. A11-152 (Minn. Spec. Redistricting Panel Sept. 13, 2011).

<sup>240</sup> LEVITT, *CITIZEN’S GUIDE* *supra* note 8, at 56.

<sup>241</sup> John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 376 & n.17 (2000).

<sup>242</sup> For similar reforms proposed in other litigation contexts, see Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1 (2011).

<sup>243</sup> See Coffee, *supra* note 241, at 376.

<sup>244</sup> See FED. R. CIV. P. 23(a).

<sup>245</sup> See *supra* notes 176-77 and accompanying text.

<sup>246</sup> This may be less disappointing than it initially appears: scholars have expressed skepticism with respect to the efficacy of most class-action protections. See, e.g., Coffee, *supra* note 241, at 371-72.

are likely to represent a broader array of interests. Courts could, for example, employ special masters and court-appointed experts in efforts to counteract the biases and interests of the litigants.<sup>247</sup> This approach has been used with apparent success in jurisdictions such as Connecticut and New York.<sup>248</sup> Courts likewise could, as necessary, appoint counsel to advocate for potentially meritorious positions that have been neglected by the parties.<sup>249</sup> Such steps would appear to constitute a measured response to the lack of representativeness affecting redistricting litigation.<sup>250</sup>

To advance the second primary goal – reducing opportunities for procedural manipulation – jurisdictions could pursue targeted reforms. Forum selection provides a straightforward example. Granting litigants the ability to select forum – that is, to influence who will serve as the judicial mediator between them and the maps they seek to change – can reward procedural manipulation in powerful ways. To counteract this effect, those interested in reform could follow the lead of the minority of jurisdictions that already have enacted redistricting-specific venue rules.<sup>251</sup> This straightforward fix significantly restricts the potential for forum-related manipulation.

Litigants' ability to set court agendas through claim selection, by contrast, poses a more challenging problem for the reform community. A potential reform nevertheless may be modeled on what this Article refers to as claim-forcing statutes. Though these are rare, claim-forcing statutes are potentially effective counterweights where they apply. In Florida, for example, the state constitution requires, with respect to certain district maps, that the Attorney General petition the state supreme court “for a declaratory judgment determining the validity of the apportionment” within fifteen days of its passage.<sup>252</sup> A narrower but more prominent example of a claim-forcing statute is section 5 of the Voting Rights Act, which requires that certain jurisdictions obtain preclearance from the federal government prior to enforcing new district maps.<sup>253</sup> With respect to the limited question of retrogression at issue in these section 5 proceedings, there is no escaping some form of federal review.

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<sup>247</sup> See Gorod, *supra* note 242 (discussing similar reforms in other litigation contexts).

<sup>248</sup> See Order Directing Special Master, *In re* Petition of Reapportionment Commission, 36 A.3d 661 (Conn. Jan. 3, 2012), available at [http://www.jud.ct.gov/external/news/SC18907\\_010312.pdf](http://www.jud.ct.gov/external/news/SC18907_010312.pdf); Persily, *supra* note 93, at 1148; Thomas Kaplan, *Unmapped: Update on New York Redistricting*, N.Y. TIMES, Feb. 27, 2012, at A21.

<sup>249</sup> Cf. *Jeffers v. Clinton*, 730 F. Supp. 196, 273-74 (E.D. Ark. 1989) (Eisele, J., dissenting) (lamenting the failure of the parties to raise a particular claim).

<sup>250</sup> It is true that the justiciability doctrines, if applied aggressively, may pose a bar to increased court involvement. See, e.g., *id.* at 274 (“Even in public-interest lawsuits such as this [redistricting lawsuit], there are limits upon the Court’s authority to *sua sponte*, take up and deal with issues it sees in the case but which the parties choose to ignore.”). It may be appropriate to apply these doctrines liberally where necessary to effectuate such reforms.

<sup>251</sup> See *supra* notes 138-40 and accompanying text.

<sup>252</sup> FLA. CONST. art. III, § 16(c).

<sup>253</sup> 42 U.S.C. § 1973c (2006); see also *Beer v. United States*, 425 U.S. 130, 141 (1976).



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Although these sorts of requirements by no means remove litigant control, they do limit the ability of redistricting litigants to pick and choose which claims will be brought before the courts.

At first blush, claim-forcing statutes may be thought simply to increase the influence of litigants by mandating that certain claims be adjudicated. Yet these requirements only make a difference with respect to claims that no party wants to raise, and, as a result, the statutes actually reduce the opportunity for procedural manipulation of the process. Litigants no longer serve as the only actors setting court agendas.

Reducing the manipulation associated with timing poses yet another challenge. The difficulty is largely logistical: speed in redistricting is more easily demanded than achieved, particularly when primary redistricting agents fundamentally disagree on which approach to take (or which politicians to favor) in redrawing district lines. In an effort to respond to the compression of civil procedure that occurs in redistricting litigation – more precisely, to avoid the aspects of this regime that prove highly vulnerable to litigant manipulation – jurisdictions nevertheless might attempt, to the extent possible, to set deadlines for redistricting that permit adequate time for litigation prior to the start of the election cycle. To provide proper incentives, jurisdictions could strip primary redistricting agents of the power to redistrict if they miss deadlines. Fallback redistricting agents, in turn, might be required to begin their own work as quickly as possible – perhaps even engaging in preliminary map-drawing and legal argument before the deadlines have passed for the primary redistricting agents.

This leads to a final, more general response to litigant influence, one that addresses the approach courts might take toward the “unwelcome obligation” of engaging in judicial redistricting.<sup>254</sup> Stated succinctly, courts adjudicating redistricting cases should consider engaging in a particularly aggressive form of case management. Deference to litigant preferences – which seems less of a priority than it might otherwise be when a court is participating in the quintessentially public task of redistricting – might be reduced, with courts more willing to act *sua sponte* in determining how the case should be run.<sup>255</sup> To the extent this sort of regime would put courts in an unusual posture, redistricting litigation seems to present a case for unusual treatment.

By embracing reforms of this sort, jurisdictions might help to minimize the control litigants have over courts, bridge the divide between what litigants do and what they seek to achieve, and otherwise counteract the potentially corrosive effects of procedural manipulation.

In sum, there are a number of reforms potentially available to those seeking to improve the litigant-dependent systems of fallback redistricting. Some seek

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<sup>254</sup> See *Connor v. Finch*, 431 U.S. 407, 415 (1977).

<sup>255</sup> Tellingly, many with first-hand experience recommend that redistricting courts engage in aggressive case management. See, e.g., CLARKE & REAGAN, *supra* note 191, at 68-71; Persily, *supra* note 93, at 1131, 1131-65.

to address the concerns raised by litigation participation by reducing it; others by regulating it. Jurisdictions should consider implementing a sensible combination of both.

#### CONCLUSION

It has been now half a century since the Supreme Court first transformed litigants into agents of redistricting. By creating a judicially based regime of fallback redistricting, *Baker v. Carr* and its progeny ensured that the process would depend on a diverse and largely self-selected group of participants to dictate many important aspects of redistricting. Litigants now affect whether, when, and how a given court will intervene.

Despite the extensive scholarly attention paid to courts' involvement in the redistricting process, litigants have not been recognized for what they are: important and distinct agents of redistricting, upon whom the process relies, who are capable of affecting redistricting in deliberate and potentially outcome-determinative ways. For all involved in the redistricting process, the dearth of analysis is a disservice, for the role of litigants must be understood and acknowledged if the redistricting process is to operate in an effective, transparent, and legitimate way.

To this end, it is important to recognize that the reliance on litigant participation is not without consequences or costs. It produces a form of litigation highly susceptible to procedural manipulation, which in turn puts in place a form of redistricting controlled in fundamental ways by those who choose to litigate. This arrangement gives rise to normative concerns. In the absence of adequate regulation, litigant participation threatens to compromise the outcomes, efficiency, and legitimacy of the redistricting process. Targeted reforms, including those meant to reduce reliance on litigants and those regulating their participation, may help to alleviate these problems.

In short, litigants are not bit players in the court-dominated supervision of elections, and they should not be treated as such. Quite to the contrary, litigants are powerful agents of redistricting, able to exercise control over the redistricting process and its outcomes, whose efforts are authorized and facilitated by the legal system itself. It therefore is critical to begin recognizing, analyzing, and better regulating this particular delegation of democratic design.