

# “Communities of Interest:”

An Analysis of Redistricting Litigation from 2010-2018

By

Darshan Patel

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## Introduction

In the 1995 landmark case *Miller v. Johnson*, Georgia's congressional redistricting plan was challenged under the claim that it violated the Equal Protection Clause by improperly separating voters on the basis of race.<sup>1</sup> The Supreme Court, while striking down the plan, utilized a new term of art in the election law field--"communities of interest"[COI].<sup>2</sup> Since the introduction of this new concept, the term "communities of interest" reappears year after year in redistricting litigation across the nation. Despite such repeated appearance, the high Court provides little guidance in defining what COI are, an action which leaves it to the circuit courts and the state legislative bodies. Nearly half of the states maintain either constitutional or statutory provisions that narrow down the broad range of COI, in order to establish guidance for their redistricting bodies.<sup>3</sup> Normally, when redistricting guidelines are discussed, they are thoroughly researched by political scientists, sociologists, and mathematicians; however, there has been relatively little academic attention on the effects of COI in litigation. This lack of research exists, because even with state guidance and Supreme Court rules, COI remain enigmatic. First off, I hypothesize that the requirements that constitute a COI are an observable

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<sup>1</sup> *Miller v. Johnson* 515 U.S. 900 (1995) at 903-904.

<sup>2</sup> *Id.*, at 919.

<sup>3</sup> "Communities of Interest - Brennan Center for Justice."

<https://www.brennancenter.org/sites/default/files/analysis/6%20Communities%20of%20Interest.pdf>. States, however, have differed on how they define a COI. For example, Idaho's statutory definition includes COIs in a more geographic context by requiring the "preserv[ation] traditional neighborhoods and local communities of interest," while Hawaii focuses more on the homogeneity of constituents by avoiding larger districts where there are "substantially different socio-economic interests." Furthermore, another interesting difference is how the California state constitution is the only one to explicitly say what a COI *cannot* be: "[COI] shall not include relationships with political parties, incumbents, or political candidates." The reference to "nearly half" of the states is based on the twenty-four states that have included provisions as of November of 2010.

similarity between two communities such that they have similar interests and that this similarity cannot *only* be race. Furthermore, I hypothesize that COI have relatively little effect on challenging a redistricting plan but carry weight in defending one.

The importance of this inquiry in the surrounding context of election law cannot be overstated. Election law rather severely limits standing to pursue litigation against legislative reapportionment, meaning that there are only a certain number of ways to challenge a given redistricted map. There traditionally have been only ten types of challenges to a state map.<sup>4</sup> Three of these categories (nesting, multi-member, and floterial) are quite specific and only apply to a narrow set of cases, a characteristic which essentially leaves only seven challenges left. Another one of these challenge types--political gerrymandering-- and the potential for metrics to measure it have recently garnered the media's attention with the Supreme Court taking up high profile redistricting cases. However, what largely goes unnoticed by the public and media is the fact that there are still other ways to challenge a state map. Some of these vectors--like contiguity and compactness--have been examined by political scientists and mathematicians to the point where there are dozens of formulas that have been devised to measure them. On the other hand, chief among those challenges that are neglected, even amongst the academic community, are communities of interest. This paper will attempt to distill the closest possible definition of COI through the Supreme Court's comments, and then try to measure the actual effect of COI in redistricting litigation.

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<sup>4</sup> "Where the lines are drawn - All About Redistricting - Loyola Law School."  
<http://redistricting.lls.edu/where-state.php>.

## Literature Review

Looking towards the literature regarding COI that does exist, one can see that most works boil down into discussing three main topics: the definition of COI, how to conceptualize COI, and how to differentiate between COI.

At the onset, the most agreement on this topic lies in the definition of COI. This agreement specifically rests on the idea that there is no formal definition of what a COI is. Some authors explain this absence by referring to the lack of an objective definition<sup>5</sup> or the overall vagueness of the definition and the challenges that it presents<sup>6</sup>. Authors, like Brunell, even go as far to refer to COI as being the “most ephemeral” of all of the redistricting criteria<sup>7</sup>. Extending the uncertainty to any potential factor based definition, Shelley explains that even with all of the factors that have been proposed to define COI, there is still no universal agreement on which criteria should be included<sup>8</sup>.

In lieu of having a concrete definition or finite criteria, scholars have begun to approach COI differently--through the next component of the literature--first figuring out *how* COI should

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<sup>5</sup> See McDonald, Michael P. “Regulating Redistricting.” *PS: Political Science & Politics* 40, no. 4 (October 2007): 675–79; and Makse, Todd. “Defining ‘Communities of Interest’ in Redistricting Through Initiative Voting.” *Election Law Journal*, 2012.

<sup>6</sup> Kogan, Vladimir, and Eric McGhee. “Redistricting California: An Evaluation of the Citizens Commission Final Plans.” *California Journal of Politics and Policy* 4, no. 1 (2012).

<sup>7</sup> “Rethinking Redistricting: How Drawing Uncompetitive Districts Eliminates Gerrymanders, Enhances Representation, and Improves Attitudes toward Congress.” *PS: Political Science and Politics*, 2006, 79.

<sup>8</sup> “Communities of interest and redistricting in the 1990s.” *Geography, Representation and Redistricting*, eds. F. M. Shelley, G. R. Webster and J. I. Leib. Syracuse University Press, Syracuse, NY(1998) .

be drawn. Makse argues that the theories on how to conceptualize and draw COI exist on a spectrum that extends from one end of territory based COI to the other end of commonality based ones<sup>9</sup>. Other scholars identify the same dichotomy though they refer to it in different terminology<sup>10</sup>.

Morill explains that territory based COI ought to be drawn to include a locational basis, labeling COI the “most geographical” of the traditional redistricting criteria<sup>11</sup>. This refers to areas which are bounded by physical distinctions like jurisdiction and media markets. Makse outlines a few benefits from having geographical COI. First, he identifies that there is potential historical and cultural importance with going along traditional lines within the community<sup>12</sup>. This importance can signify a possible interdependence between individuals in the given community, through societal based divisions. Moreover, another potential benefit is that geographically drawing districts increases the chances of both suburban and urban neighborhoods being included in the same district. As a result of having these two groups in one area, the district would inherently become more competitive<sup>13</sup>. Empirically, there is support for the idea that the inclusion of COI leads to more competitive districts. Forgette et al. finds that on average there is

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<sup>9</sup> “Defining ‘Communities of Interest’ in Redistricting Through Initiative Voting.” *Election Law Journal*, 2012.

<sup>10</sup> See Forgette, Richard, Andrew Garner, and John Winkle. “Do Redistricting Principles and Practices Affect U.S. State Legislative Electoral Competition?” *State Politics and Policy Quarterly* 9, no. 2 (2009): 155 referring to “existing political or geographic boundaries” and “racial and ethnic communities”; and Leib, Jonathan I. “Communities of Interest and Minority Districting after Miller v. Johnson.” *Political Geography* 17, no. 6 (1998): 688 referring to ‘most geographical’ and ‘transcendent community’ *internal citations omitted*

<sup>11</sup> “Political Redistricting and Geographic Theory.” Association of American Geographers, Washington, DC. 1981: 251

<sup>12</sup> “Defining ‘Communities of Interest’ in Redistricting Through Initiative Voting.” *Election Law Journal*, 2012.

<sup>13</sup> *Ibid.*

a seven percent decrease in the probability of an uncontested seat in state that utilize COI in their redistricting process<sup>14</sup>. The percent increases to ten for states that *require* the protection of COI<sup>15</sup>. Another practical benefit is that there appears to be some judicial support for territorial COIs. Based off of the opinions in *Miller*, *Shaw*, and *Bush v. Vera*, Leib<sup>16</sup>, Barabas, and Jerit<sup>17</sup> conclude that the Supreme Court has a preference for the objectivity of the geographical approach to drawing COI. Stephanopoulos extends this use of territorial reasoning to a few state courts that have upheld districts in Alaska, Colorado, and Oregon<sup>18</sup>.

Contrasting, the commonality approach emphasizes that COI should have a similarity in ideology, economic interests, or socioeconomic status instead of geography. As Maske explains, this approach largely addresses two complaints with the territorial based system. First, the geography focused model overlooks the possibility that historical and cultural divides are irrational in their inception and have largely no bearing on the political viewpoints of a given community<sup>19</sup>. Second, the territorial approach assumes that voters *want* to have a more competitive district, as opposed to a less competitive or non-contested one<sup>20</sup>. The commonality approaches, Makse claims solves these issues inherently, as well as empirically.<sup>21</sup>

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<sup>14</sup>“Do Redistricting Principles and Practices Affect U.S. State Legislative Electoral Competition?”: 162

<sup>15</sup>*Ibid.*

<sup>16</sup> “Communities of Interest and Minority Districting after *Miller v. Jonson*.” *Political Geography* 17, no. 6 (1998): 690

<sup>17</sup>“Redistricting Principles and Racial Representation.” *State Politics and Policy Quarterly*, 2004, 416.

<sup>18</sup>“Spatial Diversity.” *Harvard Law Review* 125, no. 8 (June 2012): 1929. See references to *In re 2001 Redistricting Cases*, 44 P.3d 141, 145 (Alaska 2002), *Beauprez v. Avalos*, 42 P.3d 642, 652 (Colo. 2002), and *Hartung v. Bardbury*, 33 P.3d 972, 981 (Or. 2001)

<sup>19</sup>Makse, Todd. “Defining ‘Communities of Interest’ in Redistricting Through Initiative Voting.” *Election Law Journal*, 2012.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*



Before delving into the specifics of different types of the commonality approaches to COI, it is necessary to first understand the desirability and implications of having competitive districts for elections. As mentioned previously some scholars like Forgette et al. believe that having a competitive district is desirable<sup>22</sup>. The desirability is based off of a market based assumption about the reality of elections. One can imagine a district in which there is an almost even population of liberals and conservatives. On the campaign trail, there is one liberal candidate who is earning a large Democrat vote and one conservative who has that of the Republicans. In order to win the election, one candidate might compromise on some issues to swing the moderate voters of the other side. This compromise is the market-based desirability of having a competitive district like in territorial COI--politicians having to alter a product (policy platform) to increase demand (win the election).

However, there are also those who believe that having non-competitive districts is even more desirable. This idea is based off on the notion that if an entire community has the same general policy interests, it is more likely that the representative of that district will share those same sentiments. In the realm of competitive districts, by nature, the losing party will likely not achieve their policy goals and potentially become dissatisfied with their representation<sup>23</sup>; to some scholars this is undesirable for a variety of reasons. For instance, McDonald sees COI as wholly incompatible with competitive districts, because at its essence COI are supposed to have shared interests not the disparate ones required in competitive districts<sup>24</sup>. Boles and Dean provide three

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<sup>22</sup>“Do Redistricting Principles and Practices Affect U.S. State Legislative Electoral Competition?”

<sup>23</sup>Buchler, Justin. “Competition, representation, and Redistricting: The Case against Competitive Congressional Districts.” *Journal of Theoretical Politics* 17, no. 4: 431-463.

<sup>24</sup>“Drawing the Line on District Competition.” *PS: Political Science & Politics* 39, no. 01 (January 2006): 91–94.

principal reasons why having non-competitive districts is beneficial: homogeneity promotes effective representation, intergroup fighting is quelled, and feelings of community and participation are increased<sup>25</sup>. In this sense, one can see that based on an individual's given expectations on what elections *should* do, there is no unanimous agreement on whether competitive districts are ideal.

Understanding that non-competitive elections can also be desirable, there are three main ideology-based COI that try to maximize the lack of competition. First, Makse introduces the idea that COI should be determined by the precinct-level outcomes on a variety of statewide initiatives<sup>26</sup>. The first purported benefit of this system is that it recommends a “specific, objective, affirmative” foundation for drawing boundaries, as opposed to a check-list of standards to meet<sup>27</sup>. Furthermore, Makse argues that it generally outputs a small set of possible solutions that make it theoretically much more immune to gerrymandering since these solutions already take policy outcome and population variance into consideration<sup>28</sup>. As a result, districts are created in order to maximize the amount of similar interests between the individuals living in the community. All together, this would reduce the competition in the elections, since it is more likely that the elected representative will share the same view as constituents on most policy issues.

Brunell takes Makse's model and pushes it one step further. In Maske's methodology, he notes that the issues in the statewide initiatives, that were later tiered for importance, were not

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<sup>25</sup>“‘Communities of Interest’ in Legislative Redistricting.” *State Government* 58, no. 3 (1985): 101–4.

<sup>26</sup>“Defining ‘Communities of Interest’ in Redistricting Through Initiative Voting.” *Election Law Journal*, 2012.

<sup>27</sup>*Ibid.*

<sup>28</sup>*Ibid.*

chosen in order to intentionally split conservatives and liberals--though he admits that there were correlated<sup>29</sup>. However, Brunell posits that COI should be entirely made up of partisanship--either liberal district or conservative one<sup>30</sup>. By doing so, he hopes that the resulting precincts will minimize the number of individuals who are dissatisfied with their representative.<sup>31</sup> The intended benefits of this model are the same as that of the statewide initiative approach, except this method is intentionally more extreme in terms of the political polarization of districts to achieve its end goal of minimum dissatisfaction.

Finally, Leib argues that in the early 1990s the Department of Justice pursued a different conception of COI--one that reflected only racial and ethnic communities as a commonality<sup>32</sup>. McDonald extends this theory from just the Department of Justice to also applying to the states in the era of the 2000s<sup>33</sup>. The focus on racial and ethnic ties is intended to bring out the shared history, culture, and group identity of the community<sup>34</sup>. These factors are supposed to look past geographic locations and socioeconomic status, in an attempt to universally connect these minority groups; that is why these are also called “transcendent communities.”<sup>35</sup> Kelley explains that these communities are “based upon improvisation...constantly challenged to ‘make a way

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<sup>29</sup> *Ibid.*

<sup>30</sup> “Rethinking Redistricting: How Drawing Uncompetitive Districts Eliminates Gerrymanders, Enhances Representation, and Improves Attitudes toward Congress.” *PS: Political Science and Politics*, 2006, 77.

<sup>31</sup> *Ibid.*

<sup>32</sup> “‘Communities of Interest’ in Legislative Redistricting.” *State Government* 58, no. 3 (1985): 101–4.

<sup>33</sup> “Regulating Redistricting.” *PS: Political Science & Politics* 40, no. 4 (October 2007): 675–79.

<sup>34</sup> “‘Communities of Interest’ in Legislative Redistricting.” *State Government* 58, no. 3 (1985): 101–4.

<sup>35</sup> Kelly, L.A. “Race and place: geographic and transcendent community in the post-Shaw era. *Vanderbilt Law Review*, 49 (1996): 227-308”

out of no way.”<sup>36</sup> Here, instead of looking for a consistent and evolving set of policy outlooks like in the statewide initiative model, the “transcendent communities” approach seeks to reduce competition through race serving as an indicator of policy outlooks. All together, the statewide initiative model, the hyper-partisan approach, and the race based method exemplify the commonality end of the spectrum for COI, through decreasing the competition in each of their respective districts.

After looking at the spectrum of territory and commonality based COI, the last facet of the scholarly research considers what methods there are to distinguish what are genuine COI as opposed to simply partisan groupings. One system of thought is based on the compactness requirement of district, meaning that districts cannot be highly spatially diverse. Stephanopolous posits that this is the method used by state courts when redistricting bodies are required to implement protections for COI<sup>37</sup>. Specifically, he cites Alaska, Colorado, and Vermont as three of the states whose courts have invalidated redistricting for high spatial diversity<sup>38</sup>.

Another way of assessment is an algorithm based approach like Chen and Rodden put forth. This method suggests that by using a simple algorithm that would include all necessary and relevant factors (economic status, markets, etc.), one can simulate the potential maps that follow the given redistricting guidelines with weights assigned to each criterion<sup>39</sup>. With a small highly constrained set of maps, redistricting bodies are able to compare those to the actual

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<sup>36</sup>Kelly, L.A. “Race and place: Race and place: defining a community in the post-Shaw era. Paper presented at the Annual Meeting of the Association of American Geographers (1995)

<sup>37</sup>“Spatial Diversity.” *Harvard Law Review* 125, no. 8 (June 2012).

<sup>38</sup> *Id.*, at 1929; see references to *Hicksel v. Se. Conference*, 846 P.2d 38, 51 (Alaska 1992), *In re Reapportionment of Colo. Gen. ASsembly*, 647 P.2d 209, 212 (Colo 1982), and *In re Apportionment of Towns of Hartland, Windsor & W. Windsor*, 624 A.2d 323, 331 (Vt. 1993)

<sup>39</sup>“Cutting Through the Thicket: Redistricting Simulations and the Detection of Partisan Gerrymanders.” *Election Law Journal* 14 (November 4, 2015): 331

proposed map. The discrepancies between the possible COI in those computer generated maps and those in the actual proposed map, demonstrate that there is no “legitimate interest” on behalf of the legislature using to justify these COI that are not in the simulated maps<sup>40</sup>. However, this method itself has drawn two major criticisms. Primarily, opponents argue that by relying on computer simulation of ideal maps and GIS mapping for COI, the method ignores the potential of COI that cannot be mapped but nonetheless affect the community as a whole<sup>41</sup>. The other argument against this proposal is that this method is much less effective over a long period of time, as socioeconomic and demographic feature change<sup>42</sup>.

Overall, it is clear that the bulk of the literature regarding COI can be broken down into these three components: definition, conceptual differences, and evaluative differences. Each of these topics represents a unique characteristic that contributes in the ambiguity. For instance, by not having a clear definition, COI are open to much more abstract definition and varying approaches as to the purpose of COI evidenced through the debate over the interplay between COI and competitiveness. More than ambiguity, these three concepts have practical implications as well, an attribute that will become apparent through the analysis of the cases. However, the largest pitfall in all of the research is the lack of empirical evidence to justify these claims. Indeed, some of the authors like Leib 98, Barabas and Jerit 2004, and Stephanopoulos 2012 employ citations to three or four Supreme Court and state court cases to justify court acceptance

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<sup>40</sup>*Ibid.*

<sup>41</sup>Forest, Benjamin. “Information Sovereignty and GIS: The Evolution of ‘Communities of Interest’ in Political Redistricting.” *Political Geography* 23 (2004): 425-51

<sup>42</sup>Kogan, Vladimir, and Eric McGhee. “Redistricting California: An Evaluation of the Citizens Commission Final Plans.” *California Journal of Politics and Policy* 4, no. 1 (2012)

of certain COI, yet this falls short of actually enumerating which COI courts favor and showing what the impact of COI is in litigation.

### Research Design

In order to fill this knowledge gap, through my research design, I try to answer the following two questions: what is the definition of “communities of interest” and what was the effect of “communities of interest” on redistricting litigation from January 1, 2010 through December 31, 2018. Specifically in the latter, I look at whether or not COI was argued for more on plaintiff or defense at the state and federal levels and what if any impact this had on the outcome of the case. In regards to the first question of inquiry, I hypothesize that COI can be any grouping with a distinct similarity as long as race is not the only similarity. To the second question, I hypothesize that COI would be more likely to have an impact on the outcome when used on the defense as opposed to the plaintiff.

#### **Question 1: What is the definition of COI?**

To evaluate this question, I followed a rather straightforward methodology that started with a search on online resources. First, I used WestLaw and inputted “communities of interest” and “redistricting” into the engine. This yielded 249 cases, I then limited my search to only cases from the Supreme Court of the United States. The purpose behind this is that although lower federal courts may expand more on how they treat COI, only the High Court’s decisions are binding on *all* courts--though I will address some of the robust lower court decisions on COI later.

Second, I read through the literature on COI to see if there were any cases that were not yielded in my search. Seeing that the cases outputted by WestLaw included all of those in the literature, I began to formulate the methods for the next question.

**Question 2: What was the effect of COI on redistricting litigation from 2010- 2018?**

In order to measure this, I treated Loyola Law Professor Justin Levitt's site All About Redistricting--especially the page entitled "Litigation in the 2010 cycle"--as a true and accurate collection of all of the redistricting cases from January 1, 2010 to December 31, 2018.<sup>43</sup> This site organizes all of the federal and state cases regarding redistricting. In an online correspondence, Professor Levitt described his methodology as to how he collects all of these cases. For federal cases, he maintains a subscription to a service that notifies him whenever there is a case filed in federal court regarding "voting rights" or "elections."<sup>44</sup> Alternatively for state cases, the professor relies on a ticker that notifies him of news articles about redistricting; thereafter he searches for the specific cases. As he acknowledges himself, the discrepancy--between the ease of collecting federal case data compared to that of states'--makes collecting some state cases "considerably harder."<sup>45</sup> Naturally, this may cause doubt in the validity of the overall conclusions as the sample itself may not be complete representation of every case; however, I will discuss this limitation further in my discussion of the resulting data.

With a total representation of all cases regarding redistricting, it was necessary to whittle down the wide swath of cases. Redistricting litigation as a general matter encompasses a wide variety of topics from ballot initiatives, to the authority of redistricting commissions, to the actual validity to election maps--only the last of which is relevant to the inquiry at hand. Moreover, courts, especially those higher in the federal circuits, tend to dismiss cases on procedural grounds instead of answering the merits of such cases. Such dismissals were still

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<sup>43</sup> "Litigation in the 2010 cycle - All About Redistricting - Loyola Law School."  
<http://redistricting.lls.edu/cases.php>. Accessed 5 Feb. 2019.

<sup>44</sup> Levitt, Justin. "All About Redistricting." E-mail message to author. December 18, 2018.

<sup>45</sup> *Ibid.*



included in the professor's website, and thus must be excluded. Overall, I excluded cases from my research sample on five bases:

1. Cases which were voluntarily dismissed by plaintiffs,
2. Cases that were dismissed based on filing fees, remanded for jurisdictional issues, or otherwise not decided on the merits,
3. Cases that did not specifically discuss the validity of a redistricting map,
4. Cases that were not decided with published opinions by the end of December 31, 2018,
5. Cases that were consolidated, except for the main case for which the opinion was at issue.

The first four of these exclusionary factors mainly pertain to limiting the overall sample to be an accurate depiction of only those cases which dealt with maps in the given time frame, while the final one was to simply avoid multiple countings of the same case (since all of those other cases are necessarily bound to the same outcome).

The independent variable for this hypothesis was the inclusion of COI in either the pleadings or the merits briefs. Professor Levitt's site conveniently places links for most of the Complaints, Answer to the Complaints, and Merits Briefs on his website under each case.<sup>46</sup> But in the event that such links were not available on the site, I would use WestLaw, HeinOnline, and Lexis Uni(formerly known as LexisNexis) to find such documents, respectively. For some of the state cases, I was unable to find the pleadings, and in such cases I assumed that the final opinion's summary of each sides arguments as an accurate representation of such arguments.

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<sup>46</sup> "Litigation in the 2010 cycle - All About Redistricting - Loyola Law School." <http://redistricting.lls.edu/cases.php>. Accessed 6 Feb. 2019.

The dependent variable in the hypothesis is the outcome of each case. Luckily, I was able to find at least the opinions for each of the cases in the sample. One benefit for analyzing court cases, is that it is much easier to discern what influenced the outcome of a decision, as judges write opinions explaining their rationale. However one would be naive to simply assume that there are no external factors that influence an outcome. Indeed, factors like group dynamics and external perception can affect a judge's opinion without necessarily being reflected in the opinion<sup>47</sup>. Nevertheless, these external factors are not relevant to the inquiry at hand, so it is not necessary to include them. Moreover, it is a modest presupposition to assume that the arguments from both sides judge purports to be influenced by are, in reality, those which actually influenced her.

All of this filtered out over half of the cases listed on the website, an action which brought the size of the sample down from 240 to 93. From these 93, there was a simple process to categorize and extract the proper data from each. First, I would start by writing down the general characteristics of the cases: Citation Number, Year, and Highest Court. Then, in an effort to find the distinction between state and federal cases I took note of whether or not the Supreme Court of the United States had granted certiorari, what circuit applied (state cases were left blank in this section), whether the Complaint challenged a Congressional district, a state one, or both, which state the suit originated in, and finally whether or not the challenge was successful.

After this, I divided the cases by the ten types of challenges to maps by simply entering a "0" or "1" if they applied.<sup>48</sup> Next, I looked at the type of COI used in each case. If the case

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<sup>47</sup>Baum, Lawrence. "What Judges Want: Judges' Goals and Judicial Behavior" *Political Research Quarterly* 47, no. 3 (1994): 762.

<sup>48</sup> "Where the lines are drawn - All About Redistricting - Loyola Law School." <http://redistricting.lls.edu/where.php>. Accessed 6 Feb. 2019. Professor Levitt lists the ten criteria

received a “1”--meaning that in the Complaint or briefs COI were mentioned--I looked to see what general category it fell into like: geographic, industry, or race (all cases not containing a COI on the plaintiff side received a “0” in this section). Next I would look at whether or not COI were used as for a defense in the case, once again with a binary response for inclusion. I repeated the process of categorizing the type of defensive COI and all cases not containing COI in defense pleads received a “0” in the categorization. Finally, I looked at whether COI was in the opinion, was it “pro plaintiff,” and was it “pro defense.” All three of these columns were treated with the same binary indications as before. It is worth noting that I do not naturally assume the opinion as being *either* “pro plaintiff” or “pro defense.” Indeed there are cases in which COI are pleaded but do not show up in the opinion, cases which COI appear in the opinion but not in either of the pleadings, and cases in which both sides argue COI and it appears in the opinion. To handle all of this, I treated “COI in Opinion,” “Pro Plaintiff,” and “Pro Defense” as three separate categories to account for all possibilities--including the event that the court’s rationale was in favor of both defense and plaintiff COI.

However, these simple categories alone were not sufficient to cover the range of cases from all the states throughout this range. For example, the Florida Supreme Court automatically reviews any redistricting plan, as mandated by the Florida state constitution.<sup>49</sup> In such cases, I

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as: Race and Ethnicity, Equal Population, Contiguity, Political Boundaries, Compactness, Political Outcomes, Nesting, Multi-Member, Floterial, and Communities of Interest. In deciding what necessarily constitutes each of these categories I used the definitions he provides. A large majority of the cases consisted of arguments that matched multiple of these claims. In such cases, I included a “1” for every type of argument that it included.

<sup>49</sup> *In re: State Joint Resolution of Legislative Apportionment 1176*, 37 Fla. L. Weekly S181 (Fla. March. 9, 2012) citing Art. III, § 16(c), Fla. Const.

[https://www.floridasupremecourt.org/content/download/242482/2139721/Filed\\_03-09-2012\\_Opinion.pdf](https://www.floridasupremecourt.org/content/download/242482/2139721/Filed_03-09-2012_Opinion.pdf)

coded the plaintiff arguments as all of the arguments against the map that the court addressed. Additionally, there was a Mississippi case wherein which the court drew a map due to the legislature's inability to pass a map within the given time limit.<sup>50</sup> The case arose from a motion from the Mississippi Executive Republican Committee to the court for it to amend its previous implementation of the aforementioned map.<sup>51</sup>

Figure 1 is a rather simple display of the percent of cases that included each of the ten criteria mentioned previously as part of the challenge to the map and the overall likelihood of success. Figure 2 is a COI specific table where I look at the number of the cases that included COI and then the distribution of those used on the plaintiff and defense sides. Finally, Figure 3 is a representation of how many of the cases included COI in the opinion, how many times it was in favor of the plaintiff, and how many times it was in favor of the defense.

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<sup>50</sup> *Smith v. Hosemann*, 852 F.Supp.2d 757 (2011)

<http://redistricting.lls.edu/files/MS%20smith%2020111230%20opinion.pdf>

<sup>51</sup> *Ibid.*

**Figure 1: Distribution of Types of Challenges**

Total Number of Cases	93
Successful Challenge	32.26%
Equal Population	52.69%
Race and Ethnicity	24.73%
Contiguity	12.90%
Political Boundaries	38.71%
Compactness	33.33%
Political Outcomes	27.96%
Nesting	0
Multi-Member	2.15%
Floterial	1.07%
Communities of Interest	20.43%

**Figure 2: Frequency of COI in Pleadings/Briefs**

Number of Cases including COI on either Plaintiff or Defense	Number of times COI on Plaintiff	Number of times COI on Defense	Number of times COI appeared on both sides of the case
28	19	21	12

**Figure 3: COI in Judicial Opinion**

Number of Judicial Opinions containing COI	Number of Opinions in favor of Plaintiff COI	Number of Opinions in favor of Defense COI	Number of Opinions containing COI without it appearing in Pleadings/Briefs
22	1	8	5

## Results

### **Question 1: What is the definition of COI?**

Starting with the High Court’s guidance, unsurprisingly it is still rather murky as to what are and are not a COI. Over the course of eleven years, the Court published the only three cases that deal with COI in redistricting: *Miller v. Johnson*, *Bush v. Vera*, and *League of United Latin American Citizens v. Perry (LULAC)*. However, in these cases it expounded upon a variety of factors which could help define what are “shared interests.”<sup>52</sup> These elements include: socioeconomic status, race, education, employment, health, urban character, common media, and major transportation lines.<sup>53</sup>

Most controversial of these elements (and present in each of the Supreme Court’s COI cases) is undoubtedly race. Indeed, the Court has explained that race may be a factor so long as it is not the *only* factor.<sup>54</sup> In the first case of this trilogy, *Miller*, Justice Kennedy reasoned that the state’s redistricting plan could not be “rescued [from claims of race-based decision making] by mere recitation of purported communities of interest.”<sup>55</sup> This logic stemmed from the analysis that the communities in question, which used race as a defining community characteristic, differed substantially in political, social, and economic interests. The Court found that these differences were significant enough to establish that the community did not necessarily share the same legislative outcomes. As such, they did not sufficiently constitute COI. However, the

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<sup>52</sup> *Miller v. Johnson*, 515 U.S. 900 (1995) at 916 explaining that these communities must be of “actual shared interests.”

<sup>53</sup> *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006) at 432-445

<sup>54</sup> *Id* at 433. “a State may not “assum[e] from a group of voters’ race that they ‘think alike, share the same political interests, and will prefer the same candidates at the polls.’ ” *Miller, supra*, at 920, 115 S.Ct. 2475 (quoting *Shaw v. Reno*, 509 U.S. 630, 647, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993))” internal citations included

<sup>55</sup> *Miller v. Johnson*, 515 U.S. 900 (1995) at 920

Court, unsurprisingly, did not provide an explicit definition of what COI are. This failure of the Court to create a threshold test led to yet another case just one year later.

This time, in *Bush v. Vera*, the Court had to assess the validity of a Texas redistricting plan that drew three new districts for congressional seats. Here, the Texas legislature argued that race was not the only factor as there were characteristics which linked these communities: namely “a consistently urban character and...common media sources throughout, and that its tentacles include several major transportation lines.”<sup>56</sup> At first glance, this would seem to meet the vague bar set in the preceding case, being that race is not the only factor; however, a divided court found differently. In the plurality opinion written by Justice O’Connor and joined by Chief Justice Rehnquist and Justice Kennedy, the trio determined that there was “no basis in the record for displacing the District Court’s conclusion that race predominated over [those race-neutral factors].”<sup>57</sup> Here, one can see a splitting of the Court’s viewpoint on this issue. Though not the majority opinion, this plurality purports the true basis of what determines a COI: not whether race was the *only* factor, but whether it was the *predominant* factor.

The discussion of the district at issue in *Perry*, which provides the most clear illustration of the Supreme Court’s most recent assessment of race, furthers this *predominant* factor test. In this case, the Texas state legislature’s 2003 redistricting map faced a challenge alleging it violated §2 of the Voting Rights Act [VRA] by impermissibly diluting the Latino vote.<sup>58</sup> Overall, the Court only struck down a portion of the map as a violation of the VRA, but in its discussion the Court provided great insight. Specifically, the Court noted that the newly formed

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<sup>56</sup> *Bush v. Vera*, 517 U.S. 952 (1996) at 964

<sup>57</sup> *Ibid.*

<sup>58</sup> *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006)

Latino-majority district could not possibly be reflecting a legitimate COI because the district itself attempted to connect two Latino communities that were hundreds of miles apart.<sup>59</sup> Moreover, these communities failed to show any similarities in the variety of possible factors mentioned earlier that could have provided this was indeed a COI, so race must have been the predominant factor.<sup>60</sup> It is in this context that one can see how the Court's distinguishes. A community of interest *can* be any group of individuals that share some sort of measurable similarities that would affect their legislative outlook, as long as race is not the *predominant* factor.

As a result, my hypothesis was indeed incorrect. I thought that the test would only stop at the non-race-only limit. But the reality of the predominant factor test is that it plays a large practical role--not just lofty language in an abstract theory. State legislatures or independent redistricting commissions, tasked with the responsibility of redistricting, face an increased burden regarding the role race-based factors.

## **Question 2: What was the effect of COI on redistricting litigation from 2010-2018?**

At the onset, we see that COI played a role in a significant amount of the challenges to various redistricted maps--being included in approximately 20% of all plaintiff arguments. As a result, COI is the sixth most frequent argument, following Equal Population, Political Boundaries, Compactness, Political Outcomes, and Race and Ethnicity respectively. Also generally speaking, challenges to redistricting have not been successful during this 2010-2018 time frame, with under  $\frac{1}{3}$  of cases ending in favor of the plaintiffs.

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<sup>59</sup>*Ibid.*

<sup>60</sup>*Id.* at 432 and 441.



Looking specifically at the distribution between plaintiff and defense, we see a relative close split plaintiff at 19 and defense at 21--out of the total 28 cases that used COI on either side. However, the gap between the two deeply widens when considering the number of opinions that contained COI. Out of these 28 judicial works, only 1 was in favor of plaintiff COI while 8 were in supportive of defense COI.

Turning towards the dimension of federal circuits (excluding the DC Circuit and Federal Circuit), one finds there is some favorability towards COI claims. To be clear, the references to the circuits herein do not refer specifically to the highest court in each (e.g, the Ninth Court Court of Appeals), but rather they refer only to the federal courts within its geographical jurisdiction and those that are bound by its precedent. With that in mind, the First, Second, Third, Sixth, Eighth, and Tenth Circuits did not deal with a case that regarded COI in the redistricting sense. The Fourth Circuit appears relatively balanced with a slightly higher correlation of increased wins on behalf of the defense than on the plaintiff. In total, the Fourth Circuit saw six appearances of the term COI on either side. Plaintiffs prevailed in the courts' rulings three out of the six times COI was used, but defendants won four out of the six times they used COI. Contrasting to the relative balance of the Fourth Circuit, the Fifth Circuit shows a much clearer pattern. Twice, COI was used on behalf of the plaintiffs, and both times they were victorious, while the defense used COI three times and lost all three. Moving towards the Seventh Circuit, one sees an even ratio of 2:1 for the amount of times either side used COI to the amount of victories they enjoyed in those cases. Plaintiff argued COI four times, with two victories; defense argued the same twice, with one win. The Ninth Circuit leans more in the direction of the defense with victories for both times the defense used COI, while plaintiffs suffered a defeat the

one time they did. Finally the courts in the Eleventh Circuit purport a rather even balance with one use on the plaintiff corresponding to one victory, and one use on the defense corresponding to a loss.

Much like the federal courts, there are a large portion of the states did not confront challenges of COI. In fact a majority<sup>61</sup> of the states did not face a COI challenge that fell within the parameters of this sample. On the face, it may seem jarring that only eight states have heard cases involving COI over the past decade; however, this is not unsurprising considering that by law all constitutional challenges (i.e, the vast majority of cases) are to be heard by a federal three judge panel<sup>62</sup> and are open to direct appeal to the Supreme Court<sup>63</sup>. Yet when looking at the cases that do exist at the state-court level, there is a clear distinction in favor of COI use on the defense. Out of the five cases that COI was used on defense, only one ended with a loss. On the other hand, out of the five times state court plaintiffs used COI, only one was met with success. Focusing in at the state level, one sees that plaintiffs, using COI, received an undesirable outcome in Pennsylvania, Missouri, and Florida. The one time plaintiff COI resulted in a victory in state court was in the Alaskan Supreme Court<sup>64</sup>. Defendants who used COI were victorious in Florida, West Virginia, Virginia, and Pennsylvania, while only suffering one defeat in Colorado.

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<sup>61</sup> Maine, New Hampshire, Rhode Island, New Jersey, Maryland, North Carolina, South Carolina, Louisiana, Mississippi, Texas, Kentucky, Ohio, Michigan, Tennessee, Illinois, Wisconsin, Arkansas, Minnesota, Arizona, California, Hawaii, Idaho, Nevada, Kansas, New Mexico, Alabama, Connecticut, Delaware, Georgia, Indiana, Iowa, Massachusetts, Montana, Nebraska, New York, North Dakota, Oregon, South Dakota, Utah, Vermont, Washington, and Wyoming (42 out of 50)

<sup>62</sup> 28 U.S. Code § 2284 (1984)

<sup>63</sup> 28 U.S. Code § 1253 (1948)

<sup>64</sup>*In re 2011 Redistricting Cases (was Riley v. Alaska Redistricting Board)*, No. 4FA-11-02209CI(Alaska Super. Ct., 4th Dist.), and Nos. S-14441, S-14721 & S-15201 (Alaska Sup. Ct.)

Unlike the circuits which overall have a relatively even balance (despite its slightly leaning towards defense), state courts have a much more apparent preference for the justification of maps by COI. In this light, my second hypothesis seems to be correct, that COI is more influential when used on the defense as opposed to plaintiff, as evidenced through its effects on the outcome in cases ranging from 2010-2018.

### **Additional Findings:**

Throughout this process, there were a variety of unanticipated but nonetheless notable results. One interesting finding was that in *Miller, Bush v. Vera*, and *LULAC* the majority opinions were written by the same “conservative” voting bloc. Each of these decisions, dealing with the use of race in redistricting, presents hypothetical challenges to the longevity of racial COI. One potential challenge is the unworkability of this highly ambiguous line of when using race is “too much.” In *Janus v. American Federation of State, County, and Municipal Employees*, the Court held that the workability of a case with others related to it is one factor the Court takes into consideration when deciding whether to overturn constitutional precedent<sup>65</sup>. However, it seems rather unlikely that the Court would take the large step in overturning a term after using it in three separate cases.

Turning attention towards the types of COI that both sides have utilized, we see that the academic literature appreciates the variety of types that exist and have been argued. Indeed, the spectrum of territorial and commonality based COI, that Makse 2012 proffers, is seen in practicality<sup>66</sup>. Race was specifically mentioned as the basis of COI four times in plaintiff

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<sup>65</sup>585 US \_ (2018)

<sup>66</sup>“Defining ‘Communities of Interest’ in Redistricting Through Initiative Voting.” *Election Law Journal*.

proceedings and seven times in defense proceedings, an occurrence which Leib 98<sup>67</sup> and McDonald 07<sup>68</sup> would not be surprised by. With this, race tops the list for the most common COI type. Yet there were still a variety of other arguments as well. For instance, there were three plaintiff COI that regarded specifically the geography of the COI, two that argued COI as the preservation of cities, towns, and other government units, one that argued farm voters formed a COI and one that argued common transportation routes formed a COI. Defense COI experienced a similarly diverse range of categorizations from preserving prior-districting plans, to geographic features, to urban centers.

When assessing which specific types of COI were approved by the courts and which were not, there seems to be no “go-to” category. Indeed even race and ethnicity, though appearing substantially more than the next highest category only had two courts explicitly support the racial or ethnic COI in their opinion--once on plaintiff and once on defense<sup>69</sup>. Preserving prior representation and prior districting plans were similarly recognized positively twice--again once on plaintiff and once on defense<sup>70</sup>. Next, following county lines and geographic features also received one recognition each, both on the defense<sup>71</sup>.

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<sup>67</sup>“Communities of Interest and Minority Districting after *Miller v. Johnson*” *Political Geography* 17, no. 6: 683–99.

<sup>68</sup>“Regulating Redistricting.” *PS: Political Science & Politics* 40, no. 4: 675-79

<sup>69</sup>For support of plaintiff COI see *Baldus v. Brennan*. No. 2:11-cv-00562 (E.D. Wis.) referring to Native American COI; for support of defense COI see *Harris v. Arizona Indep. Redist. Comm.* 578 U.S. \_\_ (2016).

<sup>70</sup>For support of plaintiff COI see *Baldus v. Brennan*. No. 2:11-cv-00562 (E.D. Wis.) referring to preserving historical representation; for support of defense see *In re: Petitions for Review Challenging the Final 2011 Reapportionment Plan Dated June 8, 2012*, Nos. 126-134-MM-2012 and Nos. 39-42-WM-2012 (Pa. Sup. Ct.).

<sup>71</sup> For support of county lines see *State of West Virginia Ex. Rel. v. Tennant* No. 11-1405, 11-1447, 11-1516, 11-1517, 11-1525 (2012); for support of geographic features see *Kostick v. Nago*. 134 S.Ct. 1001 (2014).

Finally, throughout the process there was some data on the interaction between COI and the Voting Rights Act. Before *Shelby County*,<sup>72</sup> a variety of states were required to either seek preclearance from the Department of Justice or clearance from the District Court for the District of Columbia in order to implement any redistricting plans. Over the time frame, there were eleven such cases where states requested preclearance from the court. As a general matter, these cases were not included in the over 93 count, since they were voluntarily dismissed once the Department of Justice granted preclearance. Out of the states that petitioned the court for relief, the only state to use COI in their pleadings was South Carolina. In both separate pleadings for the congressional redistricting plan and the state legislative ones, the state government argued that their plans respected COI. This is notable, because South Carolina law does not compel the redistricting body to take COI into consideration, only that it “should attempt”<sup>73</sup> to preserve them. But nonetheless, in both cases in which South Carolina did use COI, they were ultimately granted preclearance by the DOJ.

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<sup>72</sup> 570 U.S. 529 (2013)

<sup>73</sup>“Communities of Interest - Brennan Center for Justice.”

<https://www.brennancenter.org/sites/default/files/analysis/6%20Communities%20of%20Interest.pdf>.

## Discussion

In total, this endeavor has resulted with a finite set of cases throughout the 2010s that have deal with redistricting COI. More than that, these cases have shown the practical and empirical implications of using COI in redistricting litigation. The data revealed that as a general matter the use of COI favored defendants more than plaintiffs--though plaintiff COI cases have still been successful. Supreme Court rules are vague but still show that any given COI can be justified through any commonality--so long as race is not the predominant factor.

Yet it goes without saying that these findings do have their own limitations. The small time frame and sample size may cause concern in some. However, the limitations on case selection (like excluding cases based on procedural grounds or voluntary dismissal) only serve to have a better representation of the actual number of cases that went to trial and that were decided based on the merits. Moreover, the time limit--which indeed does not give the larger picture of the development--allows a honed in view of the most recent status of COI in federal and state court. Another limitation is how this project looks at correlations instead of causation. It would be reckless and highly misleading for any project to do otherwise and argue that the sheer use of COI will guarantee a certain case outcome. Yet this project does address a more specific causal mechanism by using judicial opinions as a descriptor of the judicial logic behind the opinions.

Past these limitations, there are some modest assumptions undertaken for simply the feasibility of this project. For instance, this project assumes that Professor Levitt's website is an accurate depiction of the redistricting cases from 2010 to December of 2018. However, worries about this assumption would be largely misplaced. While state cases are admittedly harder to find, federal cases regarding redistricting subject to consistent and accessible publishing.

Furthermore, while state cases are especially harder to find over time, the recency of the time frame and the constant ticker that Professor Levitt aid in the full collection of state cases on his website. Finally, this project assumes that opinions are true representations of the factors that actually decide a case. While it is true that group dynamics and external factors that affect the decision making process are not usually written in the opinion, that does not necessitate that the factors that are explicitly listed in the opinion did not impact the outcome of the case. Indeed, this project does not even purport to assume that COI are the *only* factor in the decision making process, but rather that it is *a* factor in the decision making process.

Despite these assumptions, this project fills knowledge gaps in literature. On the face value, this project extends off of Leib 98 and Barabas and Jerit 04 by showing that not only does the Supreme Court accept territorial based COI, state courts and federal courts have not deviated from this precedent since. Moreover, it expands the previous conception of the commonality based approach by showing that race alone is not the only commonality that can be used to draw districts; education levels and economic outcomes can also be the basis of shared interests. But most importantly, this project is one of the only enumerations of the outcomes of COI redistricting litigation at the lower court level. Some authors (like McDonald 07 or Stephanopoulos 2012) have made pointed claims regarding the existence and outcome of specific types of COI, but they have failed to provide empirical evidence for the outcome of all cases that include COI over time.

### Conclusion

Undeniably as a whole, election law is vague and typically differential to the legislators. However, the rules in place provide a rough sketch of the boundaries guide the election law process, specifically in the redistricting context. As seen though the Supreme Court may promulgate abstract terms, the enforcement of that standard takes place in the federal and state courts. It is certainly possible for these rules regarding COI to change soon. Just this term, the Supreme Court has granted certiorari to high profile political gerrymandering cases like *Rucho v. Common Cause*<sup>74</sup> that will undeniably have implications on the use of COI. If the Court uses that case to foreclose *Vieth*'s<sup>75</sup> declaration of a potential metric for determining political gerrymandering, it is possible that the partisan based COI that Brunell 06 imagines will become the lay of the land.

In the opposite direction, the House of Representatives recently passed H.R.1 or the For the People Act of 2019, which lays out specific requirements for COI. Particularly, all states would be required to take into consideration the maximization of COI with the explicit definition that COI are not to include relationships with parties or individual candidates<sup>76</sup>. Though this bill has little chance of surviving a Senate vote, it is informative nonetheless. It shows that COI are prominent enough that Congressional leaders want to exercise some control over it, as opposed to just leaving it up to the interpretation of the judiciary.

Overall, I hope this project starts an empirical based discussion on the use of certain redistricting challenges and how they fair in both state and federal court. This project shows

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<sup>74</sup> Docket No. 18-422

<sup>75</sup> *Vieth v. Jubelirer*, 541 U.S. 267 (2004)

<sup>76</sup> 116th Congress. (2019)



some fundamental findings as to the nature of COI. First, COI is subject to a predominant factor rest for the admissibility of racially motivated decisions. Second, COI have more weight on defense claims than on plaintiff ones. I hope that the next step in this realm of redistricting research is to assess the use of certain challenges over a longer period of time--perhaps by comparing the use decade by decade. It is unlikely that after using COI in three cases the Supreme Court will ultimately foreclose its use in the future, so it would almost certainly benefit the larger community understand the subtleties of COI if there were more attention on them. Nonetheless, in the end this paper only reinforced the prevailing notion that COI are ambiguous and need more focus and research on them.

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