A Shield Becomes a Sword: Defining and Deploying a Constitutional Theory for Communities of Interest in Political Redistricting

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I. INTRODUCTION

Every ten years following the census, the boundaries of every congressional, state legislative, and city councilmanic districts are redrawn to make them equal in population, pursuant to Article I and Amendment XIV of the U.S. Constitution.[1]

The Supreme Court of the United States requires that districts be redrawn to encompass communities of common interest.[2] About twenty states and several municipalities also require that congressional, state legislative, and city councilmanic districts are drawn to preserve communities of interest.[3] *Communities of common interest* was originally deployed as a defense to preserve minority-opportunity districts drawn in accordance with the Voting Rights Act.[4] Today, it has shifted to an affirmative redistricting criterion. It was a shield that has become a sword.

The Court has defined communities of interest as groupings of people who have similar values, shared interests, or common characteristics.[5] Yet this legal standard is still vague in application. Few scholars have studied communities of interest.[6] Some advocates have toyed with the idea of using the legal concept of communities of interest to affirmatively draw districts that give racial and ethnic minority groups representation.[7] This article will apply a legal theory to define and deploy this concept.

This article will first give an overview of the constitutional law of redistricting.[8] Second, it will review recent malapportionment and redistricting cases. Many cases involved special masters where judges required them to preserve communities of interest in redrawn voting districts. Third, it will survey various efforts by political scientists to define a "community," "neighborhood," and a "community of common interest."

Fourth and most substantively, I will offer a constitutional legal standard to define a community of interest. Then, I will offer a strategy to deploy this legal theory in redistricting, both at the outset during the public participation phase and in litigation. Both can democratize the process. As an example, the strategy will recount the Asian American Legal Defense and Education Fund's redistricting strategy where local residents defined their own communities of interests.[9] While there are some challenges in enforcing this standard in litigation, my theory will offer a way through the quandary that can ensure racial and ethnic minorities enjoy meaningful representation.

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1 *See* U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. amend. XIV, § 2.

2 *See* Miller v. Johnson, 515 U.S. 900, 920 (1995).

3 JUSTIN LEVITT, COMMUNITIES OF INTEREST, BRENNAN CENTER FOR JUSTICE, 1 (updated Nov. 2010), https://www.brennancenter.org/sites/default/files/legacy/Democracy/09%20Communities%20of%20Interest.pdf, *archived at* https://perma.cc/B6VY-VMZD.

4 *See, e.g.*, Diaz v. Silver, 978 F. Supp. 96, 109 (E.D.N.Y.), *aff'd mem.*, 118 S. Ct. 36 (1997).

5 *Miller*, 515 U.S. at 916.

6 Only a few legal scholars have studied communities of interest, the most prominent is Professor James A. Gardner, James A. Gardner, *Foreword: Representation Without Party: Lessons from State Constitutional Attempts to Control Gerrymandering*, 37 RUTGERS L.J. 881, 934-38 (2006). Social scientists who have studied and tried to define communities of interest include Paul Ong at UCLA; Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 87 (1985); T.M. Guterbock, *Community of Interest: Its Definition, Measurement and Assessment,"* SOC. PRAC. REV. 1(2), 88-104 (1990); TARRY HUM, REDISTRICTING AND THE NEW DEMOGRAPHICS: DEFINING "COMMUNITIES OF INTEREST" IN NEW YORK CITY (2002); Benjamin Forest, *Information Sovereignty and GIS: The Evolution of "Communities of Interest" in Political Redistricting*, 23 POL. GEO. 425, 446 (2004).

7 TARRY HUM, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, ASIAN NEIGHBORHOODS IN NEW YORK CITY: LOCATING BOUNDARIES AND COMMON INTERESTS 25 (2002).

8 *See* Shaw v. Reno, 509 U.S. 630 (1993).

9 HUM, *supra* note 7.

Fifth, this article will offer a conclusion to guide lawmakers, advocates, and redistricting attorneys as they prepare for the 2021 redistricting cycle.

II. BACKGROUND TO REDISTRICTING

A. Apportionment and Redistricting

Every ten years, following the decennial census,[10] the 435 congressional seats are apportioned among the fifty states.[11] Then census data[12] is used to redraw the boundaries of local councilmanic, state legislative, and congressional districts to make them equal in population.[13]

Redistricting is largely a political process, guided by a few legal principles. Congressional and state legislative districts are usually redrawn by state legislatures.[14] City councils redraw new city council districts. Sometimes, redistricting is vested in an independent redistricting commission.[15]

This process had allowed for the redrawing of districts that were unfair "gerrymanders" which gave minority political parties, or racial groups, unfair disadvantages in electing representatives.[16] There were many instances where districts unfairly gave the majority political party or incumbents unfair advantages, or disadvantages, in electing a representative.[17] In one example in New York in 2001, the residence of a challenger was intentionally placed outside of an incumbent's district boundaries so that he could not enter the race in the future elections.[18] In another example in Texas in 2002, when Republicans won control of the state legislature,[19] the lawmakers embarked on another round of redistricting to create more republican-leaning districts and dismantle districts that elected Democrats.[20]

Election reformers and scholars have argued that district-drawing should be taken out of the hands of those who would run for those districts and have pressed for expanded independent redistricting commissions.[21] "Nineteen states have adopted some form of independent redistricting commissions."[22] "Despite a plethora of models for redistricting commissions, no consensus has emerged as to what constitutes the best model."[23] Some election reformers have discovered that it is not whether redistricting

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10 *See* U.S. CONST. art. I, § 2, cl. 3; 13 U.S.C. § 141(a) (1994).

11 *See* U.S. CONST. art. I, § 2, cl. 3; 2 U.S.C. § 2(a), (b) (1996).

12 *See* 2 U.S.C. § 2c (1994).

13 The principle of "one person, one vote" applies to congressional districts under Article I, *see* Wesberry v. Sanders, 376 U.S. 1, 7-8 (1964); and for state and local legislative districts under the 14th Amendment, *see* Reynolds v. Sims, 377 U.S. 533, 579 (1964).

14 Peter S. Wattson, *How to Draw Redistricting Plans That Will Stand Up in Court*, Sept. 26, 2010, http://www.ncsl.org/documents/legismgt/Watson_Redistricting_Plans.pdf (citing NAT'L CONF. OF ST. LEGISLATURES, LIMITS ON GERRYMANDERS app. C, D (2009)), *archived at* https://perma.cc/DG9T-YUP9.

15 Christopher S. Elmendorf, *Representation Reinforcement Through Advisory Commissions: The Case of Election Law*, 80 N.Y.U. L. REV. 1366, 1387-90 (2005).

16 *See, e.g.*, United States v. Hays, 515 U.S. 737 (1995); Miller v. Johnson, 515 U.S. 900, 911 (1995).

17 *See generally Hays*, 515 U.S. at 737; *Miller*, 515 U.S. at 900.

18 Jonathan P. Hicks, *In District Lines Critics See Albany Protecting Its Own*, N.Y. TIMES, Nov. 2, 2004, at B4.

19 Ralph Blumenthal, *After Bitter Fight, Texas Senate Redraws Congressional Districts*, N.Y. TIMES, Oct. 13, 2003, at A1.

20 David Barboza & Carl Hulse, *Texas' Republicans Fume; Democrats Remain AWOL*, N.Y. TIMES, May 14, 2003, at A17; Associated Press, *National Briefing Southwest: Texas: Democrats on the Run Again*, N.Y. TIMES, July 29, 2003, at A18; League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006).

21 A number of scholars have also written about the benefits, drawbacks, and unintended consequences of independent redistricting commissions (IRCs). *See* Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 ELECTION L.J. 179, 212 (2003); Stevens F. Huefner, *Don't Just Make Redistricters More Accountable to the People, Make Them The People*, 5 DUKE F. CONT. LAW & PUB. POL'Y 37, 51-52 (2010); Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 641-45 (2002) (arguing for insulating redistricting from politics and that redistricting by elected officials is *per se* unconstitutional); Gary King & Robert X. Browning, *Democratic Representation and Partisan Bias in Congressional Elections*, 81 AM. POL. SCI. REV. 1251 (1987). *But see* Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 667 (2002). *But see* David G. Oedel, Allen K. Lynch, Sean E. Mulholland & Neil T. Edwards, *Does the Introduction of Independent Redistricting Reduce Congressional Partisanship?*, 54 VILL. L. REV. 57, 68-80 (2009) (citing David Oedel, Mercer Study (2007) (unpublished study) (on file with Mercer University School of Law Furman Smith Law Library)).

22 David Schultz, *Regulating the Political Thicket: Congress, the Courts, and State Reapportionment Commissions*, 3 CHARLESTON L. REV. 107, 137 (2008). *See* JUSTIN LEVITT & BETHANY FOSTER, BRENNAN CENTER FOR JUSTICE, A CITIZEN'S GUIDE TO REDISTRICTING 20-22, 28-35 (2008) (reviewing commissions).

23 Schultz, *supra* note 22, at 138.

is done by independent redistricting commissions, but more important is the goal, which should be to preserve communities of interest.[24] This author has argued that independent redistricting commissions are essentially inconsequential for communities of color.[25]

Concurrent with partisan shenanigans, redistricting is also an opportunity to enhance the meaningful representation of traditionally underrepresented groups.[26] This could include the drawing of more minority-opportunity districts in which minority populations constitute majorities of the districts' overall populations,[27] or where the minority populations are less than a majority but large enough to influence the outcome of an election.[28]

There are only a few restrictions in the redrawing of districts. Foremost, districts must be equal in population[29] and they cannot intentionally discriminate against minority voters, pursuant to the Constitution and the Voting Rights Act.[30] After these obligatory federal requirements, most states[31] and localities also require that districts be reasonably compact[32] and "contiguous."[33] The borders should follow natural geographical and political boundaries, such that they do not cross bodies of water, or divide cities and counties.[34] They should not displace incumbents.[35] Finally, they should encompass "communities of common interest,"[36] groupings of people who have similar values, shared interests, or common characteristics.[37] The Supreme Court of the United States has held these as "traditional redistricting criteria" to which all districts must encompass.[38]

Some states also require that new districts preserve the core of prior districts[39] or that districts for the lower house of the state legislature nest within larger districts for the upper house, called "nesting."[40]

B. Voting Rights Act – Minority Vote Dilution

The Voting Rights Act guards against the dilution of minority voting strength in redistricting, either intentionally or in effect.[41] The most well-known has been the fragmenting, or cracking,[42] of a large minority population enclave so that they their aggregated votes were divided between two or more districts and they

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24 Susan Lerner & Sean Coffey, *How to Salvage N.Y. Redistricting Reform*, TIMESUNION (Sept. 21, 2011, 12:20 AM), https://www.timesunion.com/opinion/article/How-to-salvage-N-Y-redistricting-reform-2180826.php, archived at https://perma.cc/WY97-QS64; Schultz, *supra* note 22, at 137-138.

25 Glenn D. Magpantay, *So Much Huff and Puff: Whether Independent Redistricting Commissions Are Inconsequential for Communities of Color*, 16 UCLA ASIAN PAC. AMER. L.J. 4, 6 (2011).

26 Glenn D. Magpantay, *Asian American Voting Rights and Representation: A Perspective from the Northeast*, 28 FORDHAM URB. L. REV. 739, 758 (2001).

27 For a fuller discussion of the need for majority-minority districts to promote minority representation *see* Janai S. Nelson, *White Challengers, Black Majorities: Reconciling Competition in Majority-Minority Districts with the Promise of the Voting Rights Act*, 95 GEO. L.J. 1287 (2007).

28 *See also* Bartlett v. Strickland, 556 U.S. 1 (2009).

29 42 U.S.C. § 1973 (1994); Karcher v. Daggett, 462 U.S. 725, 727-28, 732, 741 (1983); Wesberry v. Sanders, 376 U.S. 1, 7-8 (1964); Baker v. Carr, 369 U.S. 186, 198-208 (1962).

30 Shaw v. Hunt, 517 U.S. 899, 915 (1996).

31 See NAT. CONF. OF STAT. LEGISLATURES, REDISTRICTING LAW 2000, 75-76 tbl.5 (1999) (reviewing states which also mandate constitutionally or statutorily compactness, contiguity, preservation of political subdivisions, preservation of communities of interest, incumbency protection, and preserving the core of prior districts).

32 *See* Bush v. Vera, 517 U.S. 952, 959-60 (1996); Shaw v. Reno, 509 U.S. 630, 647 (1993); DeWitt v. Wilson, 856 F. Supp. 1409, 1414 (E.D. Cal. 1994), *aff'd*, 515 U.S. 1170 (1995).

33 *Shaw*, 509 U.S. at 647; Miller v. Johnson, 515 U.S. 900, 906 (1995).

34 *Shaw*, 509 U.S. at 647; Abrams v. Johnson, 521 U.S. 74 (1997).

35 *See Abrams*, 521 U.S. at 98.

36 *Miller*, 515 U.S. at 919-20; *Abrams*, 521 U.S. at 74.

37 League of United Latin Am. Citizens v. Perry, 548 U. S. 399, 435 (2006); *Miller*, 515 U.S. at 915-16.

38 *Miller*, 515 U.S. at 915-16.

39 *See Abrams*, 521 U.S. at 98.

40 Levitt, *supra* note 22, at 64.

41 *See* 42 U.S.C. § 1973(a), (b) (1994).

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

could never elect a candidate of their choice.[43] Had the geographic area been kept whole the minority population would have been able to elect a minority candidate to represent them.

The federal Voting Rights Act prohibits this intentional form of minority vote dilution, as well as other redistricting schemes that may, in effect, deny racial and ethnic minority political representation.[44]

The Act compels the drawing of majority–minority districts when certain "preconditions" exist, as illustrated in *Thornburg v. Gingles*.[45] The minority community has to: (1) be sufficiently numerous and compact to form a majority in a single district; (2) be politically cohesive, in that members of the minority group tend to vote alike; and (3) suffer from racially polarized voting in which the white majority votes as a bloc so as to routinely defeat the minority group's preferred candidate.[46]

In *Bartlett v. Strickland*, the Court clarified that under the first *Gingles* prong, if the minority group does not comprise at least a 51% majority district population, then there is no Voting Rights Act infraction, and thereby no obligation to keep racial minorities together.[47] In effect, *Bartlett* held that there is no obligation to draw minority-influenced districts.

Adhering to these principles, a watershed of new majority-minority voting districts across the Nation were drawn at the local, state, and federal levels after the 1991 redistricting.[48] The effort was highly successful, especially for African-Americans and Latinos.[49] Fourteen states adopted congressional redistricting plans that doubled the number of congressional majority-minority districts from twenty-six to fifty-two.[50] Eleven states created sixteen new majority-Black districts, and six states added eleven new majority-Latino districts.[51]

However, these redistricting criteria set a threshold that denied some racial and ethnic groups—largely due to insufficient size or geographic dispersion—the ability of gaining representation through majority–minority districts.[52] Nevertheless, with aggressive enforcement of the Voting Rights Act, communities of color made significant gains before 2000.[53]

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43 Gomillion v. Lightfoot, 364 U.S. 339 (1960).

44 *See, e.g.*, Voinovich v. Quilter, 507 U.S. 146, 153-54, (1993) (prohibiting "packing" where the minority group is over-concentrated into one district where they be fairly drawn into two).

45 *Gingles*, 478 U.S. at 48-52. The landmark *Gingles* case defined how the Voting Rights Act would remedy minority vote dilution by compelling the drawing of majority-minority districts that gave racial and ethnic minorities opportunities to elect candidates of their choice.

46 *See id.* at 50-52, 55. The minority community also had to suffer from racial discrimination under the totality of the circumstances. Justice Stevens held that this analysis is conducted by a review of "objective factors" codified in the Senate Report accompanying the Voting Rights Act. *See id.* at 36-37, 44 (quoting S. Rep. No. 417, 97th Cong., 2nd Sess. 28).

47 *Id.* at 50-52, 55; Bartlett v. Strickland, 556 U.S. 1 (2009).

48 Fourteen states adopted congressional redistricting plans that doubled the number of congressional majority-minority districts from twenty-six to fifty-two. *See* Bush v. Vera, 517 U.S. 952, 1041 n.37 & 38 (1996) (Stevens, J., dissenting).

49 *See* Frank Parker, *The Constitutionality of Racial Redistricting: A Critique of Shaw v. Reno*, 3 D.C. L. REV. 1, 2 (1995) (citing Press Release, U.S. Dep't of Commerce News, U.S. Bureau of the Census, No. of Cong. Districts with Black or Hispanic Majorities Doubles, Census Bureau Says, Revised, (Mar. 24, 1993); *Black-and-Hispanic-Majority Districts*, CQ WKLY. REP., July 10, 1993). Some conservative commentators argue that majority-minority districts are not needed to achieve minority representation. *See, e.g.*, Abigail Thernstrom, *Voting Rights: Another Affirmative Action Mess*, 43 UCLA L. REV. 2031 (1996). They point out that people of color are elected from both majority-white and majority-minority districts. *See id.* However, supporters of majority-minority districts counter that nearly every African American member of the U.S. House of Representatives is elected from a district with a majority-black population. *See* Brenda Wright, *Voting Rights: Yes: Toward a Politics of Inclusion*, 79 A.B.A. J. 44 (1993).

50 *See Bush*, 517 U.S. at 1041 nn.37 & 38 (Stevens, J., dissenting).

51 Parker, *supra* note 49, at 2-3 n.5.

52 *See, e.g.*, Diaz v. Silver, 978 F. Supp. 96, 129 n.22 (E.D.N.Y. 1997), *aff'd mem.*, 118 S. Ct. 36 (1997) (citing Thornburg v. Gingles, 478 U.S. 30, 50 (1986) (holding that Asians were not large enough and too geographically dispersed to meet the *Gingles* preconditions, at least insofar as to draw a majority-Asian district, using 1990 census data)); U.S. COMM'N ON CIV. RIGHTS, CIVIL RIGHTS ISSUES FACING ASIAN AMERICANS IN THE 1990S 159 (1992). *See also*, Magpantay, *supra* note 25, at 739, for a discussion of Asian opportunity districts and the *Gingles* limitations.

53 William D. Hicks, Carl E. Klarner, Seth C. McKee & Daniel A. Smith, *Revisiting Majority-Minority Districts and Black Representation*, 71 POL. RES. Q. 408, 408-23 (2017). Admittedly, the Voting Rights Act is under Constitutional attack from the Supreme Court of the United States. The gains compelled by the Act in the 1990s were questions by the Court and a new line of cases emerged that curtailed the redrawing of majority-minority districts under Shaw v. Reno, 509 U.S. 630 (1993) and Miller v. Johnson, 515 U.S. 900 (1995). More recently, although the Court upheld the enforcement provisions of the Act, the Justices questioning signals the Court's unease with provisions of the Act. *See* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009). However, advocates are resigned to still fully deploy the Act to preserve minority representation and the U.S Department of Justice has said that they can "'chew gum and walk at the same time,' that they can enforce the Voting Rights Act and defend its constitutionality as well." Julie Fernandes, Deputy Assistant Attorney General, Civil Rights Division, U.S Department of Justice, remarks at NAACP LDF Redistricting Seminar, Arlie House, Warrenton, VA, Oct. 8, 2010.

C. Fourteenth Amendment – *Shaw* Claim

Throughout the 1990s, the Court further cut back on redistricting that enfranchised communities of color.[54] Beginning with the 1992 landmark decision in *Shaw v. Reno*,[55] the Court announced for the first time that white voters could assert a claim of voter discrimination under the Equal Protection Clause when drawn into a majority–minority voting district.[56]

In *Shaw v. Reno*,[57] white plaintiffs challenged North Carolina's majority–minority congressional district. The Court found that the redistricting plan "concentrated a dispersed minority population in a single district by disregarding traditional districting principles such as compactness, contiguity, and respect for political subdivisions."[58] In justifying its opinion, the majority held that a majority–minority district,

> [b]ears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes.[59]

The Court held that the district at issue was so "bizarre" and "irregular in shape" that its shape could not be rationally understood as anything other than racial gerrymandering, which was impermissible under the Constitution.[60]

In *Miller v. Johnson*,[61] the Court followed and elaborated on *Shaw*.[62] The Court held that shape was an important consideration in redistricting because it could demonstrate that "race for its own sake, and not other districting principles, was the legislature's *dominant* and *controlling* rationale in drawing its district lines."[63] The majority commented that when a state redistricts, it may be aware of race, but its consideration of race cannot *predominate* the process.[64] To successfully challenge the district, "a plaintiff must prove that

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54 The modern voting rights cases should not be surprising in light of the Court's conservative colorblind jurisprudence, most notably revealed in its anti-affirmative action cases, such as Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995). *See* Linda Greenhouse, *In Step on Racial Policy*, N.Y. TIMES, June 14, 1995, at A1. For a fuller discussion of the Court's colorblindness jurisprudence via education, business and redistricting, see Frank R. Parker, *The Damaging Consequences of the Rehnquist Court's Commitment to Color-Blindness Versus Racial Justice*, 45 AM. U. L. REV. 763 (1996).

55 *See Shaw*, 509 U.S. at 630.

56 *Id.* at 649-50. *Contra* United Jewish Orgs. v. Carey, 430 U.S. 144, 150-66 (1977) (holding that white voters may not challenge a districting plan that includes majority-minority districts to promote minority representation). Justice Sandra Day O'Connor's reasoning in *Shaw* was quite remarkable. First, she likened districts that gave racial and ethnic minorities representation to "political apartheid." *Shaw*, 509 U.S. at 647-49. Second, she intimated that minority representatives were somehow ineffective in representing white voters. *See id.* at 647-49, 656-58. Third, she placed higher standards and strict scrutiny on districts giving minorities increased representation, but such standards are seldom applied to majority-white districts. *See id.* at 653-56; Bush v. Vera, 517 U.S. 952, 1035 (Stevens, J., dissenting). Fourth, the when a person of color is elected from an ugly shaped district, that districts shape is now a matter of constitutional inquiry. *See Shaw*, 509 U.S. at 649-50; *see also* Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483 (1993). In *Shaw*, O'Connor described the district as "bizarre" in its shape. *Shaw*, 509 U.S. at 649-50. But in drawing districts, a multitude of factors and considerations come into play. Non-square and non-cyclical shapes are destined. *See* Pildes & Niemi, *supra*, at 483; Daniel D. Polsby, *Ugly: An Inquiry Into the Problems of Racial Gerrymandering Under the Voting Rights Act*, 92 MICH. L. REV. 652 (1993). For a Court whose jurisprudence is supposedly "colorblind," its decisions render an exacerbation of color differentials and the insurgence of racial disenfranchisement under the law.

57 *See Shaw*, 509 U.S. at 630.

58 *Id.* at 647-49.

59 *Id.* Justice David Souter criticized the O'Connor for likening the district to political apartheid much later in *Bush v. Vera*. *See Bush*, 516 U.S. at 1035 (1995) (Souter, J., dissenting). He stated that in segregation, as in apartheid, there was the subjugation of a class of people based on race, a badge of inferiority is placed upon them. *See id.* at 1053-57 (Souter, J., dissenting). In the challenged districts, none of these intentions were present. *See id.* There was only an intention to give racial minorities representation. *See id.* Further, no inferiority message was conveyed to the white communities outside of the district. *See id.* (Souter, J., dissenting).

60 *Shaw*, 509 U.S. at 649-50. Racial gerrymandering occurs during the process of redistricting. *See id.* It is when the state intentionally separates voters into difference districts on the basis of race, and that the separation lacks sufficient justification. *See id.*

61 Miller v. Johnson, 515 U.S. 900, 915-16 (1995).

62 *Id.* at 911-12.

63 *Id.* (emphasis added).

64 *Id.* at 915-16.

the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations."[65]

In *Miller*, the Court noted the shape of the district in question was not completely bizarre.[66] The Court held, however, that while "compactness and contiguity" were maintained in the districting process, they were subordinated to racial objectives.[67] The Court also stated that there was not even any community interest represented by the district's makeup outside of race.[68] The true inquiry was whether the consideration of race was *predominant* in the districting process.[69] Shape only served an evidentiary function in this inquiry.[70]

The Court concluded that race could *not* be the predominant criterion in redrawing voting districts.[71] The Court clarified that in this analysis, the consideration of race is allowed, but could not subordinate "traditional districting criteria" such as compactness, contiguity, respect for geographic and political boundaries, and preservation of communities of interest.[72]

Thus, without more, the intentional drawing of majority–minority districts, even with the benevolent intention of enfranchising minority voters, and even when they met the *Gingles* preconditions, was deemed unconstitutional.[73] Majority–minority voting districts in North Carolina, Georgia, Louisiana, Texas, Florida, New York, and Virginia were struck down under *Shaw* and *Miller*.[74]

One way out of this quandary of taking race into account, but not by too much, is that challenged minority-opportunity districts could be upheld if they were shown to encompass communities of common interest.[75] This became a new strategy in redistricting.[76] Asian-Americans in New York have successfully used the community of interest strategy to defend a majority–minority voting district in *Diaz v. Silver*.[77]

Moreover, as redistricting has moved more into litigation, communities of interest have become an affirmative way to give meaningful representation to underrepresented groups. The challenge here, which this article aims to illuminate, is how to define a community of interest, in terms of its interests and spatial boundaries. American democracy is based on a premise that territory or geography is a proxy for group interest.[78] But modern communication systems, transportation, and heightened mobility have disrupted the truth of this premise. Political interests are often shared by a community, not necessarily a specific territory. This article will explore these concepts.

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65 *Id.*

66 *Id.* at 917-18.

67 *Id.*

68 *Id.* at 919-20.

69 *Id.* at 915-16.

70 *See id.*

71 *See* Shaw v. Reno, 509 U.S. 630 (1993); *Miller*, 515 U.S. at 915-16.

72 *See Miller*, 515 U.S. at 915-16.

73 *Id.* at 927.

74 *See Shaw*, 509 U.S. at 630 (North Carolina.); *Miller*, 515 U.S. at 900 (Georgia); Hays v. Louisiana, 936 F. Supp. 360, 371-72 (W.D. La.) (per curiam), *appeals dismissed as moot*, 116 S. Ct. 2542 (1996) (Louisiana); Bush v. Vera, 517 U.S. 952 (1996) (Texas); Johnson v. Mortham, 926 F. Supp. 1460 (N.D. Fla. 1996) (Florida); Diaz v. Silver, 978 F. Supp. 96 (E.D.N.Y.), *aff'd mem.*, 118 S. Ct. 36, (1997) (New York); Moon v. Meadows, 952 F. Supp. 1141 (E.D. Va.), *aff'd, mem.*, 117 S. Ct. 2501 (1997) (Virginia). In Illinois, a majority-minority voting district was challenged, however it survived the Court's scrutiny. *See* King v. State Bd. of Elections, 979 F. Supp. 582 (N.D. Ill.), *vacated mem.*, 117 S. Ct. 429 (1996), *remanded to*, 979 F. Supp. 619 (N.D. Ill. 1997), *aff'd*, 118 S. Ct. 877 (1998).

75 *See Shaw*, 509 U.S. at 648.

76 *Id.*

77 *See* Diaz v. Silver, 978 F. Supp. 96 (E.D.N.Y. 1997), *aff'd mem.*, 118 S. Ct. 36 (1997).

78 Gardner, *supra* note 6, 934-38 (2006) (discussing "Territorial Representation as Interest Representation").

III. COMMUNITIES OF INTEREST: THEORY

A. The Legal Requirement

Over twenty states and countless municipalities require that new districts preserve communities of common interest in redistricting.[79] The state constitutions of Alabama,[80] Alaska,[81] Arizona,[82] Colorado,[83] Hawaii,[84] New York,[85] and Oklahoma[86] require the preservation of communities of interest in redistricting. State statutes in California,[87] Hawaii,[88] Idaho,[89] Maine,[90] Massachusetts,[91] Michigan,[92] Oregon,[93] South Dakota,[94] Utah,[95] Vermont,[96] Washington,[97] West Virginia,[98] and Wisconsin[99] require the same. State redistricting guidelines in Arkansas,[100] Georgia,[101] Kansas,[102] Kentucky,[103] Minnesota,[104] Mississippi,[105]

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79 JUSTIN LEVITT & BETHANY FOSTER, BRENNAN CENTER FOR JUSTICE, A CITIZEN'S GUIDE TO REDISTRICTING 20-22, 28-35 (2008). For a comprehensive summary of the redistricting requirements for each state, see Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 87 (1985).

80 ALASKA CONST. art. IX, §§ 198-200.

81 ALASKA CONST. art. VI, § 6 (new districts shall contain "as nearly as practicable a relatively integrated socio-economic area").

82 ARIZ. CONST. art. 4, pt. 2, § 1.

83 COLO. CONST. art. V, § 47 (requiring that "communities of interest, including ethnic, cultural, economic, trade area, geographic, and demo-graphic factors, shall be preserved within a single [state legislative] district wherever possible").

84 HAW. CONST. art. IV, § 6 (consideration of socio-economic interests).

85 N.Y. CONST. art. III, §§ 4-5.

86 OKLA. CONST. art. 5, § 9A (in drawing districts for state senate, economic and political interests shall be considered).

87 CAROL OJEDA-KIMBROUGH, EUGENE LEE & YEN LING SHEK, UCLA ASIAN AM. STUDIES CTR., THE ASIAN AMERICANS REDISTRICTING PROJECT: LEGAL BACKGROUND OF THE "COMMUNITY OF COMMON INTEREST" REQUIREMENT, 8 (2009), https://www.academia.edu/2381684/The_Asian_Americans_Redistricting_Project, *archived at* https://perma.cc/B69Q-VUR3.

88 HAW. REV. STAT. ANN. § 25-2(b)(6) (LexisNexis 2019) (directing apportionment commission to avoid "submergence of an area in a larger [congressional] district wherein substantially different socio-economic interests pre-dominate").

89 IDAHO CONST. art. III, § 5; IDAHO CODE § 72-1506 (2019).

90 ME. REV. STAT. ANN. tit. 21-A, § 1206-A (1995) (apportionment commission shall "give weight to the interests of local communities when making district boundary decisions").

91 MASS. GEN. LAWS ANN. ch. 43, § 131 (2019) (city council districts "shall be drawn with a view toward preserving the integrity of existing neighborhoods"). *See* Latino Political Action Comm., Inc. v. City of Boston, 609 F. Supp. 739 (D. Mass. 1985) (upholding Boston's council district plan), aff'd, 784 F.2d 409 (1st Cir. 1986).

92 MICH. CONST. art. IV, § 6, as amended Nov. 6, 2018; MICH. COMP. LAWS §§ 3.63 (2000), 4.261 (1997), 4.261a (1997).

93 OR. REV. STAT. ANN. § 188.010(1)(d) (2017) (district lines should be drawn so that they do not "divide communities of common interest").

94 S.D. CONST. art. III, § 5; S.D. CODIFIED LAWS § 2-2-41 (2012).

95 UTAH CODE ANN. § 20A-19-201 (LexisNexis 2018).

96 VT. STAT. ANN. tit. 17, § 1903(b)(2) (1992) (districts for state legislature shall recognize and maintain "patterns of geography, social interaction, trade, political ties and common interests" insofar as possible).

97 WASH. REV. CODE ANN. § 44.05.090(2)(a) (LexisNexis 2019) (district lines should coincide with areas recognized as communities of interest).

98 W. VA. CODE ANN. § 1-2-1(c)(5) (2011) (in crossing county lines, the legislature should take into account the "community of interests of the people involved").

99 WIS. STAT. ANN. § 4.001(3) (2003) ("to the very limited extent that precise population equality is unattainable," statutes reflect "good faith effort to apportion the legislature giving due consideration to... communities of interest").

100 *Redistricting Criteria Approved by the Courts*, ARK. BD. OF APPORTIONMENT, http://www.arkansasredistricting.org/redistricting-criteria (last visited Mar. 19, 2018), *archived at* https://perma.cc/K2TB-WDFG.

101 GA. CONST. art. III, § 2, ¶ II; GA. H. LEGIS. & CONG. REAPPORTIONMENT COMM., 2011-2012 GUIDELINES H. LEGIS. & CONG. REAPPORTIONMENT COMM.

102 KAN. CONST. art. 10, § 1; KAN. LEGIS. RESEARCH DEPT., GUIDELINES & CRITERIA 2012 KAN. CONG. & LEGIS. REDISTRICTING, Jan. 9, 2012.

103 KY. CONST. § 33; KY. INTERIM J. COMM. STATE GOV'T, SUBCOMM. REDISTRICTING, CRITERIA & STANDARDS CONG. REDISTRICTING, July 11, 1991.

104 MINN. CONST. art. IV, §§ 2-3; MINN. STAT. § 2.91; Hippert v. Ritchie, No. A11-152 (Minn. Special Redistricting Panel Nov. 4, 2011) (Order Stating Redistricting Principles & Requirements for Plan Submissions).

105 MISS. CODE ANN. § 5-3-101 (1981); STANDING J. LEGIS. COMM. REAPPORTIONMENT & STANDING J. CONG. REDISTRICTING COMM., CRITERIA LEGIS. & CONG. REDISTRICTING, Apr. 5, 2012; Analysis of Factors Considered, Smith v. Hosemann, No. 3:01-cv-855 (S.D. Miss., Dec. 19, 2011).

Nevada,[106] New Mexico,[107] North Carolina,[108] Oklahoma,[109] South Carolina,[110] Virginia,[111] and Wyoming[112] also require the preservation of communities of interest in redistricting, be it state legislative or congressional redistricting. Despite the widespread adoption of this requirement, most states fail to define communities of interest thoroughly.[113]

B. A Theory of a Community of Interest

The Supreme Court of the United States defined "communities of interest"[114] as groupings of people with "actual shared interests"[115] and/or common socio-economic characteristics.[116] Yet this concept can still be vague and therefore difficult to apply. While there may be easier ways to identify socio-economic characteristics, identifying similar values and shared interests with spatial boundaries can be more difficult. Advocates and voting rights attorneys have employed novel techniques in working with community groups to explore this idea in redistricting.

1. "Neighborhoods" + "Communities" = "Communities of Common Interest"

The concepts of neighborhoods, communities, and communities of common interest are often invoked in redistricting, and often confused. A neighborhood is typically defined externally and assigned, whereas a community is internally defined and self-defined.[117] Neighborhoods are spatially bounded while communities may not have a common locality.[118] The law then incoporates both neighborhoods and communities into a community of common interest.

i. Neighborhood

"Defining the concept of *neighborhood* has [long] been the subject of interest among [political science] scholars, urban planners, sociologists, and geographers."[119] Definitions can vary based on the types and functions of neighborhoods.[120] Municipal planning agencies often enumerate and define their city's

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106 NEV. CONST. art. 4, § 5; N.R.S. Ch. 304, App.; Order Re: Redistricting, Guy v. Miller, No. 11-OC-42-1B (1st Jud. Dist., Carson City Sept. 21, 2011).

107 N.M. STAT. ANN. §§ 2-7C-3 (1991), 2-8D-2 (2002); LEGIS. COUNCIL, GUIDELINES DEV. STATE & CONG. REDISTRICTING PLANS, Jan. 17, 2011.

108 N.C. CONST. art. II, §§ 3, 5; S. COMM. REDISTRICTING & H. SELECT COMM. REDISTRICTING, N.C. HOUSE AND SENATE PLANS CRITERIA, Aug. 10, 2017; J. SELECT COMM. CONG. REDISTRICTING, N.C. CONG. PLAN CRITERIA, Feb. 16, 2016.

109 OKLA. CONST. art. 5, § 9A; H. REDISTRICTING COMM., 2011 REDISTRICTING COMM. GUIDELINES REDISTRICTING, Feb. 14, 2011.

110 S. JUD. COMM., 2011 REDISTRICTING GUIDELINES, Apr. 13, 2011; S.C. H.R.. JUD. COMM. ELECTION LAWS SUBCOMM., 2011 GUIDELINES & CRITERIA CONG. & LEGIS. REDISTRICTING, Apr. 28, 2011.

111 VA. CONST. art. II, § 6; VA. CODE ANN. § 24.2-305 (2001); H. Res. 1, Leg. Sess. (Va. 2011); S. Res. 1, Leg. Sess. (Va. 2011); Cong. Res. 1, Leg. Sess. (Va. 2015).

112 WYO. CONST. art. 3, §§ 3, 49; Memorandum from State of Wyo. Leg. to Joint Corps., Elections & Political Subdivisions Interim Comm. (Apr. 13, 2011).

113 Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 87 (1985) (providing a comprehensive summary of the apportionment factors considered by each state).

114 Miller v. Johnson, 515 U.S. 900, 915-16 (1995).

115 *Id.*

116 *See* Diaz v. Silver, 978 F. Supp. 96 (E.D.N.Y. 1997), *aff'd mem.*, 118 S. Ct. 36 (1997) (No. 95-CV-2591).

117 *See generally* Deborah G. Martin, *Enacting Neighborhood*, URBAN GEOGRAPHY, 361 (2003).

118 *Id.* at 367.

119 OJEDA-KIMBROUGH ET AL., *supra* note 87, at 8.

120 Martin, *supra* note 117, at 363.

neighborhoods.[121] In general, neighborhoods are "sites of daily life and social interaction."[122]

"In defining a neighborhood, clearly stated geographic units such as census tracts, zip codes, political districts, school districts, service areas, or municipalities are used to denote boundaries."[123] "These boundaries [can] expand [(more Chinese people moving into a Chinatown)] or contract [(such as through gentrification)] over time, as drawn by municipalities."[124] "Administrative agencies can set fixed boundaries."[125] Yet, "individual perception of where their neighborhood begins and ends may likewise shrink or expand depending on context, personal experience, and other factors including their socio-economic status, educational attainment, and whether they are recent immigrants or not."[126] One set of scholar activists concluded that, "in general, residents who are more educated, higher income, not recent immigrants, and with more social ties in their neighborhood are more likely to say that their neighborhood is a larger area than other respondents."[127] Residents may also "unofficially" designate an identity or character with their perceived neighborhood, with or without city action, based on what residents perceive their neighborhood to be.[128]

ii. Community

Not all neighborhoods are communities. Examples can be "suburban areas where residents do not know their neighbors and share little if any social interaction with other residents."[129]

"While neighborhoods are the physical areas where social interaction can take place, a community is made up of people organized around common values and social cohesion, sometimes within a shared geographical location; for example, a local neighborhood, suburb, village, town, city, or region."[130]

Sometimes, communities can be geographically identified where a community is synonymous with a neighborhood.[131] The most notable examples are the neighborhood-communities of Chinatowns–whether it be in Los Angeles, New York, or San Francisco– these are areas "where new immigrants and long-time residents share the same space along with the institutions that support the relationship of its members; institutions such as churches, schools and civic organizations, important indicators of 'community.'"[132]

A geographic community may also be racially or ethnically diverse. For example, the bulk of the population of Koreatown in Los Angeles is made up of Latino-, South Asian-, and Korean-Americans.[133]

Modern transportation systems, technological advances, and globalization have encouraged the formation of "communities that function without having to be in the same location."[134] These include

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121 *See, e.g., New York City Department of City Planning, New York: A City of Neighborhoods,* DEP'T CITY PLAN., https://www1.nyc.gov/site/planning/data-maps/city-neighborhoods.page (last visited Dec. 12, 2019), *archieved at* https://perma.cc/VNE2-NEQ8; San Francisco Planning Department, Elements of a Great Neighborhood, CITY & COUNCIL SAN FRANCISCO PLAN. DEP'T, https://sfgov.org/sfplanningarchive/eight-elements-great-neighborhoodhttps://sfgov.org/sfplanningarchive/eight-elements-great-neighborhood (last visited Dec. 12, 2019), *archieved at* https://perma.cc/CDH7-P5KH; LOS ANGELES, DEP'T NEIGHBORHOOD EMPOWERMENT, https://empowerla.org/department/ (last visited Dec. 12, 2019), *archieved at* https://perma.cc/Z4AD-CRNJ.
While these Departments sometimes do not explicitly define of the term "neighborhood," one could infer from the context that neighborhood refers to a place within the larger city where people reside, work, or recreate. OJEDA-KIMBROUGH ET AL., *supra* note 87, at 8.

122 Martin, *supra* note 119, at 365.

123 OJEDA-KIMBROUGH ET AL., *supra* note 87, at 8 (citing NARAYAN SASTRY, ANNE R. PEBLEY & MICHELA ZONTA, NEIGHBORHOOD DEFINITIONS AND THE SPATIAL DIMENSION OF DAILY LIFE IN LOS ANGELES, (Labor and Population Program Working Paper Series 03-02, RAND Publications 2002); Guo, J. Y. & Bhat, C. R., *Operationalizing the Concept of Neighborhood: Application to Residential Location Choice Analysis*, JOURNAL OF TRANSPORT GEOGRAPHY, 15, 31-45 (2007)).

124 OJEDA-KIMBROUGH, *supra* note 87, at 8.

125 *Id.*

126 *Id.*

127 *Id.*

128 *Id.*

129 *Id.*at 9.

130 *Id.*

131 *Id.*

132 *Id.* (citing REVITALIZING URBAN NEIGHBORHOODS 9 (W. Dennis Keating et al. eds.,1996); *see also* PETER KWONG, THE NEW CHINATOWN (rev. ed. 1996).

133 OJEDA-KIMBROUGH ET AL., *supra* note 87, at 9.

134 *Id.*

communities sharing the same culture, identity, or need. For example, there is a community of Filipino-American physicians in the Greater New York Area,[135] or those who are hearing impaired share the same experiences, needs, "and identity while not necessarily residing in the same neighborhood."[136] The LGBT community is oftentimes anchored at an LGBT residential or business enclave, but usually its members are more geographically dispersed.[137] Some would argue that "[a]nother example is the Asian-American community, a community of people from different countries of origin but formed out of a shared identity and needs shaped by external or structural conditions in American society including racism and residential segregation."[138]

iii. Community of Common Interest

In a legal context, communities that are spatially defined that also share common values or political interests are communities of common interest.[139] Some neighborhoods can be communities of common interest, and sometimes communities of common interest transcend neighborhoods.[140] "Geographically defined communities can include neighborhoods that are historical preservation areas, ethnic and cultural enclaves, [and] economic and business districts," for example.[141]

In redistricting, those who draw districts sometimes (and perhaps should always) base their determination of which neighborhoods will be kept whole based on social science evidence.[142] "When communities of interest are divided into several different districts, the residents of the area can face significant challenges to having their needs and interests addressed."[143]

"What constitutes an "interest" for the purpose of communities of common interest in redistricting is varied."[144]

> In defining a possible community of interest, one could refer to the census, demographic studies, surveys, or political information to assess what social and economic characteristics community members share, such as: income levels; educational backgrounds; housing patterns and living conditions (urban, suburban, rural); cultural and language backgrounds; employment and economic patterns"; how community residents are employed; the economic base of the community; health and environmental conditions; and issues of concern raised with their representative (concerns about crime, education, etc.).[145]

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135 Kevin L. Nadal & the Filipino-American Nat'l Historical Soc'y Metro. N.Y. Chapter, Images of America: Filipinos in New York City 92 (2015).

136 OJEDA-KIMBROUGH, *supra* note 87 at 9.

137 Darren Rosenblum, *Geographically Sexual?: Advancing Lesbian and Gay Interests Through Proportional Representation*, 31 HARV. C.R.-C.L. L. REV. 119, 125 (1996).

138 OJEDA-KIMBROUGH ET AL., *supra* note 87 at 9.

139 *Id.*

140 *Id.* One scholar, UCLA Urban Planning Professor Paul Ong, has "proposed four conceptual approaches to defining 'communities of interest' based on a variety of social science disciplines including political science, sociology, urban planning, and economics. The concepts below offer potential approaches and rationales, to the degree that it motivates the residents of a neighborhood to take collective action, to defining what are 'communities of common interest':

- a community of limited liability - concerns about crime and public safety, health and environmental conditions and how a community stands to lose as a group;
- a community of opportunities - where one immigrant community (e.g., Asian) share interests with other immigrant communities—Latino, African American, Caribbean in an after-school program for all children of the neighborhood;
- a community of shared institutions - community, religious & civic organizations, schools; and,
- a community bound by common goods – where everyone can share the benefits of the neighborhood; for example, fresh air, a public park." *Id.* at 10 (citing TARRY HUM, REDISTRICTING AND THE NEW DEMOGRAPHICS: DEFINING "COMMUNITIES OF INTEREST" IN NEW YORK CITY (2002)).

141 OJEDA-KIMBROUGH ET AL, *supra* note 87 at 9.

142 *Id.* at 10.

143 *Id.*

144 *Id.*

145 *Id.*

"While the concept of 'community of interest' has legal implications in the political redistricting process, how this concept is applied to protect minority voting rights and political representation has" been used infrequently.[146]

2. Objective Data to Identify a Community of Interest

The concept of community refers to some type of connection—social connections in terms of informal networks among friends and kin; functional connections pertaining to consumption, production, and the exchange of goods and services; cultural connections expressed through religious practices or ethnic identity; or circumstantial connections reflected in economic status or lifestyles.[147]

Communities of interest can be defined by many different criteria:

- Census data, taken through the American Community Survey,[148] can be used to identify people who share common traits or characteristics based on[149]: socio-economic status,[150] education,[151] employment and economic characteristics,[152] health,[153] religion,[154] ethnicity,[155] and housing characteristics.[156]
- Geography can demonstrate riparian interests or interests because of mountainous terrain. People living alongside a seashore or lake have different interests than those who live inland.

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146 *Id.*

147 *Id.* at 9 (citing Chaskin, Robert J., *Defining Neighborhood: History, Theory, and Practice*. The Chapin Hall Center for Children, University of Chicago (1995)).

148 U.S. CENSUS BUREAU, *American Community Survey*, U.S. CENSUS BUREAU, https://www.census.gov/programs-surveys/acs/guidance/subjects.html (last visited Sept. 4, 2019), *archieved at* https://perma.cc/Z9B3-RL3X.

149 For an excellent step-by-step guide in how to use ACS data, see Univ. of Cal., Los Angeles – Redistricting Workgroup, *The Asian Americans Redistricting Project: Accessing Secondary Data*, UCLA ASIAN AMERICAN STUDIES CTR. 12-16 (2009), https://www.academia.edu/2381684/The_Asian_Americans_Redistricting_Project, *archived at* https://perma.cc/4TW9-7ECL.

150 Basic demographic questions asked on the American Community Survey (ACS), are: age, sex, race/ethnicity, and family relationship (married, roommate, partner, child, grandparent). Social characteristics asked are: ancestry, citizenship, year of entry, disability, fertility, grandparents as caregivers, language, marital status and marital history, place of birth, residence one year ago (migration), and veteran status. U.S. CENSUS BUREAU, *supra* note 148.

For redistricting, *see, e.g.*, Lawyer v. Dep't of Justice, 521 U.S. 567, 581-82 (1997) (affirming the lower court's finding that a "predominantly urban, low-income population" could constitute a community of interest); Miller v. Johnson, 515 U.S. 900, 919 (1995) (evidence of "fractured ... social, and economic interests" refuted contention that district contained a community of interest); *see also* Chen v. City of Houston, 206 F.3d 502, 513 (5th Cir. 2000) (suggesting that satisfactory evidence of socio-economic status could demonstrate the existence of a community of interest, but finding that the plaintiffs did not provide it); Session v. Perry, 298 F. Supp. 2d 451, 512 (E.D. Tex.) (three-judge panel) (finding "evidence of differences in socio-economic status" was properly, though not persuasively, deployed to undermine the existence of a community of interest), vacated and remanded sub nom. Henderson v. Perry, 543 U.S. 941 (2004).

151 Other social characteristics about education asked on the ACS are: educational attainment, field of degree, and school enrollment. U.S. CENSUS BUREAU, *supra* note 148.

For redistricting, *see, e.g.*, Theriot v. Parish of Jefferson, 185 F.3d 477, 486 (5th Cir. 1999) (concluding that "less-educated" citizens comprised a community of interest on the basis of "common social and economic needs"); Session v. Perry, 298 F. Supp. 2d at 512 (finding "evidence of differences in ... education" was properly, though not persuasively, deployed to undermine the existence of a community of interest).

152 Economic characteristics asked on the ACS are: class of worker, employment status, health insurance coverage, income and earnings, industry, commuting to work, occupation, poverty, work status, and public assistance (food stamps). U.S. CENSUS BUREAU, *supra* note 148.

For redistricting, *see, e.g.*, *Theriot*, 185 F.3d at 486 (citizens "more often unemployed" than voters in other districts comprised a community of interest on the basis of "common social and economic needs"); *Session*, 298 F. Supp. 2d at 512 (finding "evidence of differences in ... employment" relevant to existence of a community of interest).

153 *Session*, 298 F. Supp. 2d at 512 (finding "evidence of differences in ... health" relevant to existence of a community of interest).

154 *See, e.g.*, Kelley v. Bennett, 96 F. Supp. 2d 1301, 1321 (M.D. Ala. 2000) (three-judge panel) ("There are no doubt religious, class, and social communities of interest that cross county lines and whose protection might be a legitimate consideration in districting decisions."), vacated on other grounds sub nom. Sinkfield v. Kelley, 531 U.S. 28 (2000) (per curiam).

155 *See, e.g.*, Barnett v. City of Chicago, 141 F.3d 699, 704 (7th Cir. 1998) (assuming that Latinos comprise a community of interest); Meza v. Galvin, 322 F. Supp. 2d 52, 75 (D. Mass. 2004) (three-judge panel) ("the Hispanic community" can comprise "an ethnically-based community of interest").

156 Housing characteristics asked on the ACS are: house-heating fuel, kitchen facilities, owner statistics, plumbing facilities, renter statistics, rooms and bedrooms, telephone service, tenure, units in structure, value of home, vehicles available, year householder moved into unit, year structure built. U.S. CENSUS BUREAU, *supra* note 148.

- City Planning data can reveal housing stock, housing character (high-rise condominium, co-operative apartments, apartment renters, single-family detached houses), water usage, traffic and public transportation, land use and zoning, or historic.[157]
- Community definitions can be collected through community feedback through surveying community residents to define their community and common interests.[158]

Other data sources can define a community of interest. Immigration data can demonstrate country of birth and migration settlement patterns.[159] Election return can demonstrate political behavior and if voters vote more Republican or Democrat.[160] One commentator has argued that school districts are communities of interest.[161] Another commentator has argued that media markets help define a community of interest.[162] One scholar has argued that counties and political subdivisions are, in and of themselves, communities of interest.[163]

Social scientists often refer to these as "secondary data"—information attained from an external source—as opposed to primary data, which is attained through conducting surveys and interviews directly.[164]

Elected officials themselves "also may be knowledgeable, albeit self-interested, sources for" identifying communities of interest.[165] Elected officials often have lived in the community for years and have spent years campaigning for the support of various groups.[166] "As a result, most representatives recognize and understand the constituencies and interests within their districts."[167]

Each one of these has a different ability to be comparative. Census data, geography, city planning data, and school data are generally well accepted. They are politically neutral. Advocates and their opponents can cite the same sources to make their points best in favor of their positions. Census data and school data can show socio-economic characteristics, but geography and city planning data are proxies for shared interests.[168] Generally, people who live in rental apartments have different needs and concerns than homeowners. The former may be more concerned with sanitation and landlord accountability, where the latter may be more concerned with property taxes.

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157 *See, e.g.*, NYC DEP'T OF CITY PLANNING, *Community District Needs*, Manhattan, (Nov. 9, 2019), https://communityprofiles.planning.nyc.gov *archived* at https://perma.cc/7C39-82DF.

158 TARRY HUM, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, ASIAN NEIGHBORHOODS IN NEW YORK CITY: LOCATING BOUNDARIES AND COMMON INTERESTS 4-5 (2002); MacDonald, Karin. 1998. "Preparing for Redistricting in 2001 – Communities Define Their Interests." Unpublished Paper presented at 1998 Annual Meeting of the American Political Science Association, Boston at 2.

159 U.S. CENSUS BUREAU, *supra* note 148.

160 Miller v. Johnson, 515 U.S. 919-20 (1995) (evidence of "fractured political ... interests" refuted contention that district contained a community of interest).

161 Aaron J. Saiger, *The School District Boundary Problem*, 42 URB. LAW. 495 (2010).

162 *See generally* Jason C. Miller, *Community as a Redistricting Principle: Consulting Media Markets in Drawing District Lines*, 86 IND. L.J. SUPPLEMENT 1, 3 (2010).

163 James A. Gardner, *Foreword: Representation without Party: Lessons from State Constitutional Attempts to Control Gerrymandering*, 37 RUTGERS L.J. 881, 939 (2006) ("First, the inhabitants of a county or similar local government unit share a common local economy and economic life. Second, county residents participate together in the public life of a shared unit of political and governmental administration"). *But see* People ex rel. Burris v. Ryan, 588 N.E.2d 1023, 1028 (Ill. 1991) ("Boundary lines of villages, townships, counties and cities do not necessarily reveal communities of interest."), cert. denied, 504 U.S. 973 (1992).

164 Univ. of Cal., Los Angeles – Redistricting Workgroup, *supra* note 149.

165 Stephen J. Malone, Note, *Recognizing Communities of Interest in a Legislative Apportionment Plan*, 83 VA. L. REV. 461, 478 (1997) (citing Bush v. Vera, 116 S. Ct. 1941, 1985-86 (1996) (Stevens, J., dissenting)).

166 *Id.* For example, U.S. Representative Earl Hillard of Alabama explained that his irregularly-shaped district contains a community of interest composed of bi-racial, lower-income residents:

> The poor part of my cities are basically black areas, but most of the whites in Alabama who are poor live in my district also because I represent quite a large rural area and there are quite a few rural whites who are poor. . . . I don't have to worry about race because it's not an issue with me because if I look out for the poor, I automatically look out for the majority interest of the people in my district. A majority of the black interest and a majority of the white interest.

Id. (citation omitted)

167 *Id.*

168 *See* LEVITT, *supra* note 22, at 54.

Identifying "actual shared interests" is more challenging in that it is characteristically more subjective. One model was developed that uses community feedback through surveying community residents to define their community and common interests.[169] These are political values.

While neighborhoods are spatial entities, their boundaries can be subjective and influenced by various social factors including gender, race, ethnicity, economic class, and age.[170] The fairly limited research available on race and neighborhood definition has almost exclusively focused on African-Americans.[171]

3. Communities Defining their Communities of Interest

The Asian American Legal Defense and Education Fund ("AALDEF") commissioned two studies, in 2000[172] and 2010,[173] that had community residents define their own neighborhood boundaries and community interests.[174] The innovative study was modeled on a 1998 study of Oakland, California conducted by Karin Mac Donald at the University of California, Berkeley and described in an unpublished paper titled, "Preparing for Redistricting in 2001 – Communities Define Their Interests."[175]

Similar to Mac Donald's research objective, AALDEF's study sought to determine if "distinctive and coherent neighborhood interests and geographical boundaries" define Asian-American communities.[176] With a similar goal to gather information about neighborhood definitions and issues, this study surveyed community stakeholders providing a timely venue for local residents and grassroots institutions to articulate and define neighborhood concerns, interests, and spatial boundaries in the context of redistricting and political representation.[177] AALDEF modified and expanded Mac Donald's survey in several ways to make it applicable in New York City and relevant for Asian-Americans.[178]

In AALDEF's 2000 study, more than four hundred and fifty community stakeholders were surveyed, in several Asian languages and dialects, about their neighborhoods.[179] The study identified areas in Manhattan, Brooklyn, and Queens where Asian-Americans shared common interests.[180] AALDEF repeated a smaller and narrower version of the study for the upcoming redistricting cycle after the 2010 census.[181]

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169 *See* HUM, *supra* note 7 (citing MacDonald, Karin. 1998. "Preparing for Redistricting in 2001 – Communities Define Their Interests." Unpublished Paper presented at 1998 Annual Meeting of the American Political Science Association, Boston). *See also* Univ. of Cal., Los Angeles – Redistricting Workgroup, *supra* note 149.

170 HUM, supra note 7, at 4 (citing Chaskin, Robert J., *Defining Neighborhood: History, Theory, and Practice*. The Chapin Hall Center for Children, University of Chicago (1995)).

171 *Id.* For example, in Jonathan Winburn's book, *The Realities of Redistricting: Following the Rules and Limiting Gerrymandering in State Legislative Redistricting*, Winburn does not study communities of interest and presents no evidence of their effectiveness as anti-gerrymandering constraints, even though he discusses two of the five states studied. Richard L. Engstrom, *Partisan Gerrymandering and State Legislative Districts*, 8 ELECTION L.J. 227 (2009).

172 HUM, *supra* note 7, at 25.

173 ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, Asian American Communities of Interest Survey (2012).

174 *Id.*

175 *Id.* at *3* (citing MacDonald, Karin. 1998. "Preparing for Redistricting in 2001 – Communities Define Their Interests." Unpublished Paper presented at 1998 Annual Meeting of the American Political Science Association, Boston). For a helpful methodology of survey development, implementation, and coding, see University of California, Los Angeles – Redistricting Workgroup, *The Asian Americans Redistricting Project: Conducting Stakeholder Surveys*, UCLA Asian American Studies Center (2009), available at http://www.aasc.ucla.edu/policy/Stakeholder_Final(2).pdf

176 ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, *supra* note 173, at 3 (citing MacDonald, Karin. 1998. "Preparing for Redistricting in 2001 – Communities Define Their Interests." Unpublished Paper presented at 1998 Annual Meeting of the American Political Science Association, Boston at 2).

177 *Id.*

178 *Id.*

179 *Id.*

180 *Id.*

181 *New York State Legislative Task Force for Demographic Research and Reapportionment: Queens Public Hearing Before LATFOR*, 245 (N.Y. September 7, 2011) [hereinafter N.Y. Task Force Hearings] https://latfor.state.ny.us/docs/20020313/queens.html, *archived at* https://perma.cc/Y7HR-NSPH, (statement of Jerry Vattamala, Staff Attorney, Asian American Legal Defense and Education Fund).

Respondents were asked about: neighborhood concerns and issues; neighborhood boundaries; neighborhood differences; and similar neighborhoods.[182]

In the study, AALDEF asked respondents "about the most common concerns and issues in their neighborhoods."[183] Respondents identified an array of issues, and several common themes emerged.[184] The study reviewed these issues and the top five neighborhood concerns reflecting the issues of greatest consensus for each neighborhood area.[185] Shared concerns about neighborhood quality, public safety, education, and housing were common to all Asian neighborhoods.[186]

Because in redistricting, communities of common interests must be reflected within geographic boundaries, surveyors asked respondents to draw the borders of their neighborhoods on a map.[187] In identifying a core neighborhood area of greatest agreement among survey respondents, the study reduced the multiple boundaries by locating those boundaries that constituted the most significant north, south, east, and west borders.[188]

Respondents were asked, "How is the area that is outside your neighborhood boundaries different from your neighborhood?"[189] The responses to this open-ended question included: race and ethnic composition, economic differences, culture and language, neighborhood quality, housing, land use, political differences, history and social issues, physical characteristics, and familiarity.[190]

In some instances, the Asian-American communities of interest may not be sufficiently large enough to constitute an entire district, and adjacent areas may not share similar interests. Thus, the study asked respondents to identify neighborhoods that were "similar" in terms of residential composition and/or issues and concerns.[191]

In AALDEF's 2010 study, AALDEF again met with community groups across New York City, asking them to draw their neighborhood boundaries on a map and to identify the most common concerns and issues in their neighborhoods.[192]

> Many of the communities . . . had concerns regarding immigration, language-assistance, social services, health care, and workers' rights. . . . [T]hese shared concerns centered on daily neighborhood quality issues as well as neighborhood institutions that provide opportunities for education, employment, social services, immigrant rights, and economic justice. Lastly, groups were asked to identify the surrounding neighborhoods that were most similar and the most different to their neighborhood.[193]

It was an iterative process. AALDEF identified the Asian-American communities of interest that should not be divided as new districts were to be drawn.[194]

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182 ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, ASIAN AMERICAN COMMUNITIES OF INTEREST SURVEY IN NEW YORK CITY, 3 (2011).

183 *Id.*

184 *Id.*

185 *Id.*

186 *Id.*

187 *Asian American Communities of Interest Survey in New York City*, *supra* note 182, at 3.

188 *Id.*

189 *Id.*

190 *Id.*

191 *Id.*

192 N.Y. Task Force Hearings, *supra* note 181 (statement of Jerry Vattamala, Staff Attorney, Asian American Legal Defense and Education Fund).

193 *Id.*

194 *Id.*

C. A Community of Interest Theory in Redistricting

During the redistricting hearings before the New York State Legislative Task Force for Demographic Research and Reappointment (LATFOR), the entity which redraws district boundaries for the state legislature and Congress,[195] community advocates argued that communities of common interest needed to be maintained and kept whole. To assert this, they had to define and present them.

1. The Identified Asian-American Communities of Interest

The Asian American Legal Defense and Education Fund (AALDEF) submitted their study that identified Asian-American communities of interest to keep whole in the following four neighborhood examples[196]:

i. Flushing and Bayside, Queens

"The Chinese-American population in Flushing is mostly from Taiwan."[197] "Many of the immigrant population are limited English-proficient and there is a need for language assistance."[198] "The neighborhoods of Flushing and Bayside share many common interests, such as the need for language assistance, immigration issues, and reliance on public transportation, and they should be grouped together into the same legislative district when possible."[199] Bayside is home to a large Korean-American community.[200] Bayside is a residential neighborhood where most people own their homes.[201] Bayside retains many close cultural and economic ties to neighboring Flushing and should be grouped together into the same legislative district whenever possible.

ii. Richmond Hill/South Ozone Park, Queens

Richmond Hill and South Ozone Park are a single neighborhood comprised of mainly Bangladeshis, Indians, Sikhs, and Indo-Caribbeans.[202] The residents are homeowners and the neighborhood is zoned for single and multi-family homes.[203] There are many extended families living together, reflective of their communities "back home" in South Asia and the South Asian Indo-Caribbean communities.[204] Most residents are dependent upon public transportation and utilize the A train and J train subway lines for transportation services.[205] There are a high number of senior citizens that reside in Richmond Hill, but the only senior center is in Ozone Park on Sutter Avenue.[206] There is only one park in Richmond Hill, Phil Rizutto "Scooter Park" (formerly Smokey Oval Park).[207] There is no other space for recreation in Richmond Hill.

The neighborhood of South Jamaica, east of the Van Wyck Expressway, should not be grouped with Richmond Hill and South Ozone Park because: the home property values are significantly less; the

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195 N.Y. CODE ANN. art 5-A, § 83-m (2010); N.Y. Task Force Hearings *supra* note 181 (statement of Jerry Vattamala, Staff Attorney, Asian American Legal Defense and Education Fund).

196 N.Y. Task Force Hearings, *supra* note 181 (statement of Jerry Vattamala, Staff Attorney, Asian American Legal Defense and Education Fund).

197 *Id.*

198 *Id.*

199 *Id.*

200 *Asian American Communities of Interest Survey in New York City*, *supra* note 182, at 5.

201 *Id.*

202 *Id.* at 10.

203 *Id.*

204 *Id.*

205 ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, *supra* note 173, at 10.

206 *Id.*

207 *Id.*

high school population is not comprised of students from any of Richmond Hill's or South Ozone Park's middle schools; the population in South Jamaica is not comprised of many immigrants like Richmond Hill/South Ozone Park; and the population of South Jamaica is mostly African-American who have settled in that neighborhood for a long time and who rely on different public transportation lines, mainly the E train subway line to Jamaica Center.[208]

iii. Chinatown/Lower East Side,Manhattan

Many residents in Chinatown and the Lower East Side are foreign born.[209] Because many of these recent immigrants are limited English proficient, they often encounter language barriers and have specific language needs.[210] Most of the residents in Chinatown are Chinese-Americans while residents in the Lower East Side are Chinese-Americans and Latino.[211] Residents in the neighborhood live in rented government housing projects and small tenement buildings.[212] The Latino and Chinese residents have similar low-income levels, perform many of the same low- wage, unskilled jobs and share similar education levels (high school level or less).[213] Residents rely mainly on public transportation, including the 6, B, Q, D, N, R, and F train subway lines, as well as the M15 and M22 buses.[214]

The neighborhood of the Lower East Side is most similar to Chinatown and should be grouped together with Chinatown in the same legislative district when possible because residents share a similar socio-economic status, housing, and have many similar common interests. The neighborhoods of Tribeca and SoHo should not be grouped with Chinatown because those neighborhoods are of a vastly different socio-economic status and have drastically higher income levels.

iv. Sunset Park, Brooklyn

Sunset Park is home to a largely Chinese and Latino population, as well as a South Asian population.[215] The Chinese population speaks Cantonese and is very similar to the Chinese community in Manhattan's Chinatown.[216] Many of the residents are young, have small children, and live in subdivided housing.[217] Many of the residents are working class and not professionals.[218] Many of the new Fujianese immigrants are moving into residences along the D and N train subway lines.[219]

v. Survey Shortcomings

It is important to note that there were some challenges in this study. Some neighborhood boundaries were nested.[220] The concept of "nested" neighborhoods recognizes that clusters of people may share a common identity and interests, although they may not necessarily be contiguous since "the boundaries of

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208 *Id.* at 11.
209 *Id.* at 14.
210 ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, *supra* note 173, at 14.
211 *Id.* at 15, 16.
212 *Id.* at 15.
213 *Id.* at 16.
214 *Id.* at 15.
215 ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, *supra* note 173, at 12.
216 *Id.*
217 *Id.*
218 *Id.*
219 *Id.*
220 HUM, supra note 7, at 5.

nesting neighborhoods are not easily contained within one another."[221] In one example, the neighborhood of Jackson Heights appeared wholly within a larger neighborhood referred to as Elmhurst.[222]

Community members sometimes had difficulty in understanding the purpose of the exercise. Some would say that, "my community is where all the Chinese are." Respondents would then try to identity the demographic data and comport with that.[223] Sometimes they were unable to comprehend political redistricting, which can be a difficult concept to comprehend when one is beginning to understand American structures of democracy and method of voting.

Others did not understand the differences between "a community," "a community of common interest," and "a neighborhood." Minority communities tend to understand "communities" as non-contiguous or linear areas based on identity. They understand "neighborhoods" as contiguous, two-dimensional spatial areas that can be bounded by streets and landmarks. A community of common interest falls somewhere between these two extremes.

Notwithstanding these few shortcomings, once defined, the application of AALDEF's spatially defined communities of interest was reasonably easy to apply. Granted, not all communities of interest could be kept whole. Spatially defined communities of interest were not voting district proposals and so they did not have equal population, the first and more pronounced redistricting criterion. Some areas were geographically large and would encompass multiple state legislative districts. Others were smaller areas that needed to be brought together with other neighborhoods within larger congressional districts. The defined community of interest was used for plan analysis, where redistricting plans or specific district proposals can be measured against the boundary lines drawn.

1. Applying the Asian-American Communities of Interest

AALDEF submitted its report and neighborhood boundaries for consideration by LATFOR[224] as well as federal court.[225] These areas did not wholly correspond to race; they were communities where race and ethnicity were one factor of commonality.[226]

Once these areas were drawn, there were many benefits.[227] It could easily show how a current district's boundaries divided the community, splitting it into different districts.[228] It gave guidance to AALDEF's and other mappers, so when they would develop a redistricting plan they had guides for areas to keep whole.[229] Moreover, it offered the organization a neutral way to conduct plan analysis.[230] Once redistricting proposals came out of the commission, or even competing plans from other organizations, those plans could be judged based on the integrity of the Asian-American communities of interest.[231]

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221 *Id.* at 5 (citing Chaskin, Robert J., *Defining Neighborhood: History, Theory, and Practice*. The Chapin Hall Center for Children, University of Chicago 14 (1995)).

222 *Hearing on Congressional and State Legislative Redistricting before the New York State Legislative Task Force for Demographic Research and Reapportionment*, Queens Borough Hall 24 (N.Y. March 13, 2002) (statement of Genaro Herrera, La Gran Alianza de Queens).

223 Miller v. Johnson, 515 U.S. 900, 937-46 (1995) (Ginsburg, J., dissenting) ("But ethnicity itself can tie people together, as volumes of social science literature have documented--even people with divergent economic interests. For this reason, ethnicity is a significant force in political life.").

224 *Hearing on Congressional and Legislative Redistricting before the New York State Legislative Task Force for Demographic Research and Reapportionment*, Queens Borough Hall, 47, (N.Y. March 13, 2002) (Hearing Statement of Glenn D. Magpantay, Asian American Legal Defense and Education Fund Staff Attorney).

225 Rodriguez v. Pataki, 308 F. Supp. 2d 346 (2004), AALDEF Submiss. to the Spec. Master (May 6, 2002) as Rodriguez v. Pataki, 02 CV 0618 (RMB).

226 *Asian American Communities of Interest Survey in New York City*, *supra* note 182, at 1, 3.

227 *See id.*

228 *Id.*

229 *See id.*

230 *Hearing on Congressional and State Legislative Redistricting before the New York State Legislative Task Force for Demographic Research and Reapportionment*, Queens Borough Hall 52 (N.Y. March 13, 2002) (statement of James Wu, Asian American Legal Defense and Education Fund Representative).

231 ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, *supra* note 173, at 16.

This effort has democratized the redistricting process. Moreover, the simple exercises in conducting the survey itself necessitated the explanation of redistricting.[232] More people understood the process after the survey was conducted.[233]

The Court has defined communities of interest as groupings of people who have similar values, shared interests, or common characteristics.[234] There is an ancillary benefit to drawing districts based on community of interest.[235] They promote that coalition building with other traditionally disenfranchised communities is necessary.[236] Community of interest encourages Asian-Americans, African-Americans, and Latinos to work together.[237] Additionally, there may be some similar interests with multi-racial groups, such as lesbian/gay/bisexual/transgender, low-income, or working-class communities. Common interests should be explored with the broad goal of ensuring the redistricting process is fair for all underrepresented communities.

IV. COMMUNITIES OF INTEREST: IN PRACTICE

In redistricting, minority voting rights advocates have used the concept of communities of interest to defend minority-opportunity districts from legal challenge.[238] It has been an effective shield. But a new strategy emerged to affirmatively wield the concept of communities of interest as a sword. Here, advocates affirmatively draw districts that encompass coherent and spatially defined communities of interest to give communities meaningful political representation, which also results in a possible minority-opportunity voting district.[239]

A. Communities of Interest as a Shield

Drawing districts based on communities of interest has been used to overcome constitutional challenges to minority-opportunity districts.[240] Asian-Americans have successfully used the community of interest strategy to defend minority-opportunity voting districts.[241]

Diaz v. Silver was a successful challenge to New York's 12th Congressional District.[242] That district was originally drawn as a majority-Latino district, which is currently represented by the first Puerto Rican-born member of Congress, Nydia Velásquez.[243] Representative Velásquez has long championed the interest of immigrants, the poor, and non-English speakers.[244] The district was a little more than 54% percent

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232 *Id.* at 1.

233 *See id.* at 3.

234 Miller v. Johnson, 515 U.S. 900, 915-16 (1995).

235 *Id.* at 933 (O'Connor, J., concurring).

236 ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, *supra* note 173, at 16.

237 *See, e.g.*, Margaret Fung, *A District Like a Mosaic*, N.Y. Newsday, Apr. 12, 1991, at 60 (discussing common interests between Chinese immigrants in Chinatown with Latino immigrants in the Lower East Side).

238 *See* Diaz v. Silver, 978 F. Supp. 96 (E.D.N.Y. 1997), *aff'd mem.*, 118 S. Ct. 36 (1997).

239 *Id.* at 117.

240 Frank Adams, *Why Legislative Findings can Pad-Lock Redistricting Plans in Racial-Gerrymandering Cases*, 39 J. MARSHALL L. REV. 1371, 1379 (2006) (using as an example the City of Houston's 1997 successful redistricting efforts, which were affirmed by the U.S. Court of Appeals for the Fifth Circuit); Darren Rosenblum, *Overcoming "Stigmas": Lesbian and Gay Districts and Black Electoral Empowerment*, 39 HOW. L.J. 149, 197 (1995).

241 *See* ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, *supra* note 173.

242 *See* Diaz v. Silver, 978 F. Supp. 98, 117 (E.D.N.Y. 1997), *aff'd mem.*, 118 S. Ct. 36 (1997).

243 Richard, J. Levy, *Boundaries in Dispute*, N.Y. TIMES (Feb. 27, 1997) (graphical chart and map display) (sourcing Congressional Quarterly (based on 1980 and 1990 census data)) https://www.nytimes.com/1997/02/27/nyregfon/court-outlaws-new-york-district-drawn-up-to-aid-hispanic-voters.html, *archived at* https://perma.cc/XX3A-5S4Y; Nydia Velazquez, Biography, VELAZQUEZ.HOUSE.GOV (Nov. 6, 2019), https://velazquez.house.gov/about/full-biography, *archived at* https://perma.cc/57N4-XBBW.

244 Velazquez, *supra* note 243.

Latino,[245] but 21% percent of the population was Asian.[246] So when the district was challenged under *Shaw*,[247] Asian-Americans intervened as parties in the suit to protect the district.[248]

The Asian intervenors argued that the Asian-American community in the district, which lived in Manhattan's Chinatown and Brooklyn's Sunset Park, constituted a single "community of interest" because they shared common socio-economic characteristics.[249] They were not only Asian-Americans, but they were specifically Chinese.[250] They spoke a common Chinese dialect (Cantonese), read Chinese-language newspapers, were employed in low-wage industries, had low levels of formal U.S. education, rented their homes, rode the same subway lines, and were immigrants and naturalized citizens.[251] This was true of the Asian-Americans in Manhattan's Chinatown, but also of Asian-Americans in Brooklyn's Sunset Park.[252] The two neighborhoods were not contiguous.[253]

But they were a single community of interest.[254] They were connected by the N/R subway lines, as well as provided van lines.[255] Residents in Sunset Park worked in Chinatown.[256] There were also many private and municipal health and social service agencies serving both neighborhoods.[257]

Race was simply one of many factors considered in drawing the district lines.[258] The court accepted this argument, holding that Asian-Americans in the 12th Congressional District were a single community of interest, and should be kept together within the district.[259] In so holding, the court allowed the district to be a constitutionally permissible Asian-influence district.[260]

However, the court did not accept the main arguments by the State or Latino parties, which also tried to defend the district.[261] The court held that the consideration of race, at least for the Latino community, predominated in the original drawing of the district pursuant to *Shaw* and *Miller*.[262] Thus, the court compelled the state to redraw the district's boundaries.[263] When the legislature redrew the district, it reduced the Latino population, but kept the Asian-American communities together.[264] Accordingly, the district became a multi-racial, minority-opportunity district, where 40% of the residents are Latino and 20% are Asian-American.[265] The court accepted the new plan and the Supreme Court summarily affirmed the new district lines.[266] Congressmember Velásquez still represents the district, and she still champions the interest of immigrants, the poor, and non-English speakers.[267] Through the district, Asian-Americans have enjoyed the meaningful representation of their interests.[268]

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245 *See* Levy, *supra* note 243.
246 *See id.*
247 *Id.*
248 *See* Diaz v. Silver, 978 F. Supp. 98, 101-02 (E.D.N.Y. 1997) (citing AALDEF Mem. Support Intervention, at 1).
249 *See* Affidavit of Defendant-Intervenor Peter Lau at ¶¶ 46-55; Affidavit of Defendant-Intervenor John Kuo Wei Tchen ¶¶ 9-38, Diaz v. Silver, 978 F. Supp. 96 (E.D.N.Y. 1997), *aff'd mem.*, 118 S. Ct. 36 (1997) (No. 95-CV-2591).
250 *Id.* at 102.
251 *See id.*
252 *Id.* at 102.
253 *Id.* at 118.
254 *Id.* at 102.
255 *See Asian American Communities of Interest Survey in New York City*, *supra* note 182, at 12, 15.
256 Lau Aff. at ¶¶ 46-55; Wei Tchen Aff. ¶¶ 9-38; *See Silver*, 978 F. Supp. 96.
257 *See id.*
258 *See* Mem. in Opp. to Pl. Mot. for Summ. Judgment, of Defendant-Intervenor Peter Lau, John Kuo Wei Tchen, Michael Shin, Diaz v. Silver, 978 F. Supp. 96 (E.D.N.Y. 1997), *aff'd mem.*, 118 S. Ct. 36 (1997) (No. 95-CV-2591).
259 *See* Diaz v. Silver, 978 F. Supp. 96, 123-24 (E.D.N.Y. 1997), *aff'd mem.*, 118 S. Ct. 36 (1997).
260 *Id.*
261 The State and Latino parties argued that *Shaw* and *Miller* did not apply; that if they did apply, race was not a predominant criterion in redrawing the district; and that even if race was a significant criterion in drawing the district, the district still survived strict scrutiny. *See* Diaz v. Silver, 978 F. Supp. 96, 117-24, 130 (E.D.N.Y. 1997), *aff'd mem.*, 118 S. Ct. 36 (1997).
262 *Id.* at 121-22.
263 *Id.* at 131.
264 *See* Levy, *supra* note 243.
265 *See id.*
266 *See* Diaz v. Silver, 55 U.S. 801 (1997), *aff'd mem.*, 118 S. Ct. 36 (1997).
267 Velazquez, *supra* note 243.
268 *See id.*

This successful defensive strategy can inform affirmative redistricting.[269] The court rulings and litigation strategy have been hailed as a way to reconcile the *Shaw* decisions with the goal of safeguarding and increasing the meaningful political representation of Asian-Americans and other racial and ethnic minorities.[270]

Drawing districts on the basis of Asian-American communities of interest is not simply a legal fiction nor a proxy for race.[271] Asian-American communities of interest can be viewed as smaller subsets of the Asian-American community. Race and ethnicity, along with income level, educational level, English ability, and other socio-economic characteristics, in addition to external factors, must be used to prove that specific Asian-American communities are communities of interest.[272]

Moreover, a state must actually consider communities of interest at the time districts are drawn rather than simply reciting them later as pretext.[273] Courts will search the record to ensure that the legislature actually had data or other evidence of communities of interest *ex ante*.[274] The objective is to ensure that evidence of communities of interest, rather than race, genuinely must motivate the placement of district lines.[275] States cannot simply claim that communities of interest determine the district shapes when, in fact, the district lines are really drawn to group voters by race.[276] Communities of interest cannot be recited *ex post* to save an apportionment plan if they are merely pretext.[277]

Drawing new districts that encompass communities of interest is a shield to defend against liability under the Voting Rights Act. The next inquiry is drawing districts on the basis of communities of interest and wielding it as a sword.

B. Communities of Interest as a Sword

1. Adherence through State and Local Redistricting Mandates

As discussed above, over twenty states and countless municipalities require the presentation of communities of common interest in redistricting.[278] If new districts break up definable communities of interest, can the redistricting plan be challenged for violating this principle? After reviewing the law of various states, I will offer New York as a case study given that this issue is directly on point.

The New York City Charter enumerates a set of prioritized criteria for redistricting the City Council.[279] Those criteria in descending order of importance, are[280]: (1) districts must be equal in population;[281] (2) "fair and effective representation of racial and language minority groups in New York City which are protected by the . . . [V]oting [R]ights [A]ct";[282] (3) "district lines shall keep intact neighborhoods and communities with established ties of common interest and association, whether

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269 *See* J. GERALD HEBERT, ET AL., THE REALISTS' GUIDE TO REDISTRICTING: AVOIDING THE LEGAL PITFALLS 23, 35 (1st ed. 2000) (citing Growe v. Emison, 507 U.S. 25, 41 (1993)). The authors note that the Supreme Court has never addressed the question whether multi-racial majority-minority districts are compelled under the Voting Rights Act to remedy past racial discrimination.

270 Miller v. Johnson, 515 U.S. 900, 905 (1995).

271 There must be "some common ["tangible"] thread of relevant interests" among the community members. *Miller*, 515 U.S. at 920.

272 *See* Lawyer v. Dep't of Justice, 521 U.S. 567, 581-82 (1997). Another supportive method to prove the existence of a community of interest could be subjective, when the racial or ethnic group, which already shares some socio-economic characteristics, "regard themselves as a community." *See id.*

273 Malone, *supra* note 165 at 474.

274 *Id.* at 473

275 *Id.*

276 *Id.*

277 *Id.*

278 JUSTIN LEVITT & BETHANY FOSTER, BRENNAN CENTER FOR JUSTICE, A CITIZEN'S GUIDE TO REDISTRICTING 20-22, 28-35 (2008) (reviewing commissions).

279 N.Y. CITY, N.Y., CITY CHARTER ch. 2-A, § 51(a) (2001).

280 N.Y. CITY, N.Y., CITY CHARTER ch. 2-A, § 52(1) (2001).

281 N.Y. CITY, N.Y., CITY CHARTER ch. 2-A, § 52(1)(a) (2001) (stating that the maximum population difference between most and least populous district is 10% of the average district population, "according to figures available from the most recent decennial census.").

282 N.Y. CITY, N.Y., CITY CHARTER ch. 2-A, § 52(1)(b) (2001).

historical, racial, economic, ethnic, religious or other";[283] (4) area compactness;[284] (5) limits on borough/county crossings;[285] (6) no intentional dilution of a political party's voting strength;[286] (7) perimeter compactness;[287] (8) contiguity;[288] and (9) if necessitated, allowable borough/county crossings.[289]

These criteria "shall apply ... to the maximum extent practicable" in the redrawing of new City Council districts.[290] The third most important mandate to maintain "neighborhoods and communities with established ties of common interest and association"[291] is the community of interest requirement in redistricting the New York City Council.[292]

But while this is required, the legal enforceability of this requirement wains.[293] Enforceability would be through an Article 78 proceeding.[294] Specifically, the argument would be that the Commission's final districting plan was "made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion."[295]

In general, a City Council District that does not meet statutory criteria that must be applied "as practicable" is void.[296] In *Badillo v. Katz*, the New York Supreme Court struck down two of the City Council's planned thirty-three "councilmanic" districts.[297] It held that those districts did not meet the statutory criteria of being contiguous, convenient, and compact.[298] But it dismissed similar challenges to other districts, and rejected all challenges that the districts failed to provide adequate racial and ethnic representation.[299]

If a district fails to meet the as is "practicable" criteria in order to comply with another statutory redistricting requirement—or a policy implementing such a requirement—then the district is not void.[300] In *Brooklyn Heights Association v. Macchiarola*, the Court of Appeals rejected an Article 78 challenge to a redrawn, majority-Latino City Council district.[301] The Commission had connected a pocket of Latinos to the district through use of several "census blocks"—the smallest geographic units of population provided by the federal Census Bureau.[302] Petitioners argued that by including one of these blocks in the new District 78, the Commission failed to preserve the integrity of Brooklyn Heights, in violation of Section 52(1)'s third-ranked priority.[303] They argued that this problem could be solved, without affecting District 78's Latino majority or its contiguity, by splitting Census Block No. 105.[304] But the Court held that the Commission's decision not to split census blocks was a reasonable interpretation of the Charter requirement that the Commission base its plan on Census Bureau data.[305] This requirement trumped the application of Section 52(1)'s criteria, to which the Charter "did not impose strict adherence."[306]

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283 N.Y. CITY, N.Y., CITY CHARTER ch. 2-A, § 52(1)(c) (2001).
284 N.Y. CITY, N.Y., CITY CHARTER ch. 2-A, § 52(1)(d) (2001).
285 N.Y. CITY, N.Y., CITY CHARTER ch. 2-A, § 52(1)(e) (2001).
286 N.Y. CITY, N.Y., CITY CHARTER ch. 2-A, § 52(1)(f) (2001).
287 N.Y. CITY, N.Y., CITY CHARTER ch. 2-A, § 52(1)(g) (2001).
288 N.Y. CITY, N.Y., CITY CHARTER ch. 2-A, § 52(2) (2001).
289 N.Y. CITY, N.Y., CITY CHARTER ch. 2-A, § 52(3) (2001).
290 N.Y. CITY, N.Y., CITY CHARTER ch. 2-A, § 52(1) (2001).
291 N.Y. CITY, N.Y., CITY CHARTER ch. 2-A, § 52(1)(c) (2001).
292 *Id.*
293 *See generally* Memorandum from Matthew Ahn and Andrew Dunlap to Glenn Magpantay, AALDEF, RE: Potential For Success Of Voting Rights Act And New York State Law Claims, May 27, 2003.
294 *See* N.Y. C.P.L.R. § 7801 *et seq* (CONSOL. 1909).
295 N.Y. C.P.L.R. § 7803(3) (CONSOL. 1909).
296 Badillo v. Katz, 343 N.Y.S.2d 451, 461 (N.Y. Sup. Ct. 1973), *aff'd* 41 A.D. 829 (N.Y. App. Div. 1973), *aff'd* 32 N.Y.2d 825 (1973).
297 *Id.*
298 *Id.* at 459.
299 *Id.* at 458.
300 Brooklyn Heights Assoc. v. Macchiarola, 82 N.Y.2d 101, 101 (1993).
301 *Id.* at 106.
302 *Id.* at 104-05.
303 *Id.* at 105.
304 *Id.*
305 *Id.* at 106.
306 *Id.*

This is a very low standard of review. Although districts must keep communities of common interest together, if they are not breaking up a community of interest it will only be disturbed if its decision was neither arbitrary nor capricious. This evidences the courts' recognition that redistricting is a series of political choices.

2. Adherence through Litigation via Special Masters

The 2010 Census reported a large increase in the minority population of the United States which then resulted in several new minority-opportunity districts being drawn.[307] Many of these districts were drawn pursuant to litigation.[308] Most federal circuits handled redistricting cases, and in seven states judges appointed special masters to assist them in the redrawing of voting districts.[309] Special masters are typically appointed in complex litigation.[310] They are appointed with the consent of the parties, often have technical expertise, and can manage an expert staff to make recommendation to the court.[311] The appointment of special masters in redistricting cases is common.[312] However, the new and widespread development in the 2011 round of redistricting is that judges appointed them to redraw districts that applied traditional redistricting criteria, as mandated by the Supreme Court of the United States, and explicitly ordered them to draw districts that encompassed communities of common interest.[313] This was the case in Alabama,[314] California,[315] Georgia,[316] Louisiana,[317] Michigan,[318] and Nevada.[319] Occasionally, courts themselves have redrawn the districts without the reliance on special masters, and there too they have ensured that districts preserved communities of common interest, such as in New York,[320] Minnesota,[321] Mississippi,[322] and New Jersey.[323]

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307 *E.g.*, William D. Hicks, Carl E. Klarner, Seth C. McKee & Daniel A. Smith, *Revisiting Majority-Minority Districts and Black Representation*, 71 POLITICAL RESEARCH QUARTERLY, 408, 408-23 (2017).

308 *See, e.g.*, Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1257 (2015); Cooper v. Harris, 137 S. Ct. 1455, 1463 (2017).

309 Fed. R. Civ. P. 53(a)(1)(B)(ii) (stating how Special masters are appointed).

310 Fed. R. Civ. P. 53(a)(1)(B)(i).

311 Fed. R. Civ. P. 53(b)(1)(b)(2)(D)(c)(1)(A)(B)(C).

312 *See, e.g.*, Rodriguez v. Pataki, 207 F. Supp. 2d 123, 125 (S.D.N.Y. 2002); *In re* 2012 Legislative Districting of the State, 80 A.3d 1073, 1077 (Md. 2012); *In re* Legislative Districting of State, 805 A.2d 292, 322 (Md. 2002); *In re* Mehfoud, 927 F.2d 596, at *2 (4th Cir. 1991) (unpublished table decision); Greig v. St. Martinville, No. 6:00-cv-00603, 2001 WL 34895961 (W.D. La. Sept. 28, 2001); No. 91cv00146, Dkt. 23 (N.D. Miss. June 14, 1993); *In re* Apportionment of State Legislature, 478 N.W.2d 437, 437 (1991); N.A.A.C.P., Inc. v. Austin, 857 F. Supp. 560, 564 (E.D. Mich. 1994); LeRoux v. Secretary of State, 640 N.W.2d 849, 851 (Mich. 2002); Quilter v. Voinovich, 794 F. Supp. 756, 757-758 (N.D. Ohio 1992); Harper v. Chicago Heights, No. 1:87-cv-5112, 2006 U.S. Dist. LEXIS 5025 (N.D. Ill. Nov. 8, 2004) (order docketing report of special master); State *ex rel.* Reynolds v. Zimmerman, 126 N.W.2d 551, 555 (Wis. 1964); Legislature v. Reinecke, 10 Cal. 3d 396, 400 (Cal. 1973); Hickel v. Se. Conference, 846 P.2d 38, 43, 64 (Alaska 1992); Navajo Nation v. Ariz. Indep. Redistricting Comm'n, 230 F. Supp. 2d 998, 1002-1003 (D. Ariz. 2002); Guy v. Miller, No. 11-OC-00042-1B, 2011 Nev. Dist. LEXIS 32 (D. Nev. Carson City filed February 24, 2011); Dillard v. Greensboro, 956 F. Supp. 1576, 1579 (M.D. Ala. 1997); Dillard, 946 F. Supp. 946, 949 (M.D. Ala. Nov. 7, 1996) (order appointing special master); Larios v. Cox, 306 F. Supp. 2d 1212, 1213 (2004); *Accord* Essex v. Kobach, F. Supp. 2d 1069 (D. Kan. 2012) (appointed a "technical advisor"); *But see*, e.g., Peterson v. Borst, 786 N.E.2d 668, 669 (Ind. 2003); Radanovich v. Bowen, No. 2:11-cv-09786-SVW-PJW, 2012 WL 13012647 (Cal. 2012 filed September 29, 2011). The specific order is available at http://redistricting.lls.edu/cases.php#NV, *archived at* https://perma.cc/594D-2X5D.

313 *But see*, *In re* Petition of Reapportionment Comm'n, 303 Conn. 798, 798 (2012) (order directing special master). The significant filings in this case can be accessed at the following website: http://redistricting.lls.edu/states-CT.php, *archived at* https://perma.cc/HQ6V-A4G4 (court did not provide for the protection of communities of interest as being a consideration that the special master should weigh in his deliberations).

314 Dillard v. Greensboro, 956 F. Supp. 1576, 1579-1582 (M.D. Ala. 1997).

315 Legislature v. Reinecke, 10 Cal. 3d 396, 400, 408, 412 (Cal. 1973).

316 Larios v. Cox, 306 F. Supp. 2d 1212, 1213 (2004).

317 Greig v. St. Martinville, No. 6:00-cv-00603, 2001 WL 34895961, at ¶ 12 (W.D. La. Sept. 28, 2001).

318 In re Apportionment of the State Legislature 1992, 486 N.W.2d 639, 645 (Mich. 1992).

319 Guy v. Miller, No. 11-OC-00042-1B, 2011 Nev. Dist. LEXIS 32, at *6 (D. Nev. Carson City October 14, 2011).

320 Rodriguez v. Pataki, 207 F. Supp. 2d 123, 125 (S.D.N.Y. 2002).

321 Zachman v. Kiffmeyer, No. C0-01-160, at *3-5 (Minn. Spec. Redistricting Panel Mar. 19, 2002) (Final Order Adopting a Legislative Redistricting Plan), https://www.leg.state.mn.us/webcontent/lrl/guides/Redistricting/2000/ZachmanvKiffmeyer_2001_LegislativePlanFinal.pdf.

322 Smith v. Hosemann, 852 F. Supp. 2d 757, 767 (S.D. Miss. 2011).

323 Gonzalez v. N. J. Appointment Comm'n, No. MER-L-1173-11, at *19 (N.J. Super. Ct., Mercer Cty. August 31, 2011).

This specific charge to special masters, authorized by the Supreme Court and mandated by judges overseeing redistricting cases, shifted the communities of interest standard to become a powerful affirmative redistricting requirement. The effects were tremendous.

i. Alabama

In the latter half of the twentieth century, the Alabama State Legislature refused to reapportion for more than sixty years.[324] As a result, the Alabama courts historically imposed several redistricting plans.[325] On a few occasions, the courts relied on appointed experts or special masters to resolve disputes.[326]

In *Dillard v. City of Greensboro*, a special master was appointed to recommend a redistricting plan for the City of Greensboro that did not violate the Voting Rights Act.[327] As special master, the Honorable Richard M. Gervase reviewed the record and transcripts in the case, including all proposed redistricting plans, all filings, and all correspondence.[328] Special master Gervase was also provided with "explicit instructions on the legal standards and criteria to be used in drawing up a districting plan."[329] He also conducted on-site assessments of the "geographical and social boundaries and neighborhoods" of the City of Greensboro.[330] Then, he filed an initial report with his recommendations with the court; the City of Greensboro filed objections in response, arguing that protecting incumbents is a legitimate factor to consider in redistricting.[331] Special master Gervase then reviewed briefs filed by both parties and found that incumbency protection is a legitimate factor, albeit subordinate to the traditional redistricting factors, such as the preservation of communities of interest.[332] He submitted a supplemental report and recommended a second plan that the court ultimately approved and adopted.[333]

In drafting a redistricting plan, special master Gervase first attempted to define and protect communities of interest.[334] He found that the City of Greensboro's "relatively small population" made it harder to identify "district-size communities of interest or neighborhoods" that exist in larger cities.[335] Rather, he believed that the communities of interest, to the extent that they existed in Greensboro, were divided at the "block or subdivision level."[336] Thus, he looked to physical boundaries, such as highways and main thoroughfares, to identify communities of interest in Greensboro.[337]

ii. Georgia

In 2004, Georgia appointed a special master to draw an interim redistricting plan related to the 2000 census redistricting process.[338] In *Larios v. Cox*, the Northern District of Georgia rejected the state legislative plans and imposed its own interim plan recommended by a special master when the legislature

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324 Sims v. Amos, 336 F. Supp. 924, 930 (M.D. Ala. 1972).

325 *See, e.g.*, Burton v. Hobbie, 543 F. Supp. 235, 238 (M.D. Ala. 1982) (finding that the court was obligated to order an interim redistricting plan); Sims v. Amos, 336 F. Supp. 924, 940 (M.D. Ala 1972) (finding that the legislature had "more than adequate time" to adopt a redistricting plan and "every reasonable opportunity to perform its duty" and adopting the plaintiffs' redistricting plan).

326 Montiel v. Davis, 215 F. Supp. 2d 1279, 1284, 1287 (S.D. Ala. 2002) (upholding redistricting plan and rejecting claims that the state house and senate districts violated the one-person, one-vote constitutional requirement or resulted from racial gerrymandering); Rice v. English, 835 So. 2d 157, 167-68 (Ala. 2002) (upholding redistricting plans and rejecting claims that the plans violated the one-person, one-vote standard required by the state constitution).

327 Dillard v. Greensboro, 946 F. Supp. 946, 949 (M.D. Ala. 1996).

328 *Id.*

329 *Id.*

330 *Dillard*, 956 F. Supp. 1576, 1579 (M.D. Ala. 1997).

331 *Id.* at 1581.

332 *Id.* at 1580.

333 *Id.* at 1581-82.

334 *Id. at* 1579.

335 *Dillard*, 956 F. Supp. 1576, 1579 (M.D. Ala. 1997).

336 *Id.*

337 *Id.*

338 *Larios v. Cox*, 306 F. Supp. 2d 1212, 1213 (N.D. Ga. 2004).

failed to timely submit new redistricting plans.[339] The court appointed Mr. Joseph Hatchett to serve as special master pursuant to Federal Rule of Civil Procedure 53.[340] At the time, Mr. Hatchett, a former Chief Judge of the Eleventh Circuit and former Justice of the Florida Supreme Court, led the federal and state appellate practice at the law firm of Akerman Senterfitt.[341]

Mr. Hatchett was responsible for submitting a report and recommendation, including proposed redistricting plans, that complied with the law and court guidelines.[342] The court outlined three principal criteria for Mr. Hatchett to follow: "the Constitution, the Voting Rights Act, and certain traditional and neutral principles of redistricting."[343] Mr. Hatchett was also directed to apply the state's traditional redistricting principles of "compactness, contiguity, minimizing the splits of counties, municipalities, and precincts, and *recognizing communities of interests*" as well as avoiding multi-member districts.[344] He was "strictly prohibited" from "reviewing or analyzing political data and information, including, but not limited to, prior districts' voting performance, incumbent residency, political party registration and past elections results."[345]

iii. Louisiana

In Louisiana, certain local redistricting plans generated litigation where courts have turned to the assistance of special masters.[346] The most recent round of redistricting in 2010 led to a case in which the court appointed a special master.[347] In *Toerner v. Cameron Parish Police Jury*, the court upheld the parish (similar to a county) redistricting plan as an interim, noting among other things that it respects communities of interest.[348] Going forward however, the court ordered the newly elected parish leadership (called a police jury) to work with a court-appointed special master to further reduce malapportionment.[349]

During the 2000 round of redistricting, the court in *Greig v. St. Martinville* appointed a special master to assist the court in drafting a redistricting plan for city council voting districts.[350] Although the nature of the suit and the instructions given to the special master are unclear,[351] the court granted defendant's motion to dismiss, suggesting that the plaintiffs' claims were rendered moot by the adoption of the special master's redistricting plan.[352] In praising the plan, the court noted that it incorporated traditional non-race-based redistricting principles, including "*respect[ing] traditional communities of interest* in that it does not divide between districts . . . ."[353]

iv. Nevada

Special masters were used by the Nevada courts in the 2010 redistricting cycle when the legislature failed to agree on a redistricting plan.[354] In *Guy v. Miller*, the court allowed the parties to make suggestions and objections to the appointment of the special masters.[355] Also, the parties briefed the court on the most

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339 *Larios v. Cox*, 314 F. Supp. 2d 1357, 1359 (N.D. Ga. 2004).
340 *Larios*, 306 F. Supp. 2d at 1213.
341 *Id.*
342 *Id.*
343 *Larios*, 314 F. Supp. 2d at 1360.
344 *Id.* (emphasis added).
345 *Id.* at 1361.
346 *Toerner v. Cameron Par. Police Jury*, No. 2:11-cv-1302, 2011 U.S. Dist. LEXIS 90584, at *24 (W.D. La. Aug. 15, 2011).
347 *Id.*
348 *Id.* at 23-24.
349 *Id.* at 24.
350 Greig v. St. Martinville, No. 6:00-cv-00603, 2001 WL 34895961, ¶ 4 (W.D. La. Sept. 29, 2001).
351 *Id.*
352 *Id.* (order granting motion to dismiss).
353 *Id.* at 12 (emphasis added).
354 *Guy v. Miller*, No. 11-OC-00042-1B, 2011 Nev. Dist. LEXIS 32, at *3 (D. Nev. Carson City filed October 14, 2011).
355 *Id.* at *1.

pertinent legal issues before any further instructions were given to the special masters.[356] Three special masters were appointed and were given the following criteria to guide the redistricting process: (1) create contiguous districts; (2) preserve political subdivisions; (3) *preserve communities of interest*;[357] (4) create compact and regularly shaped districts; (5) avoid contests between incumbents; and (6) comply with Voting Rights Act requirements.[358] The special masters were required to hold two public hearings and accept additional briefs and comments by any interested parties before drafting their plan.[359] After the release of the special masters' final report, parties to the litigation were given ten days to raise any objections or revisions before the court made the final determination.[360] The court held that the special masters' plan was a "reasonable application of the criteria and was in compliance with all legal requirements."[361] The special masters' plan was adopted without any further involvement from the court or the legislature.[362]

v. Maryland Exception

However, some courts have appointed special masters and required that they draw districts to preserve communities of interest, but when those redistricting plans failed to preserve communities of interest, the courts have been unwilling to order anew. For example, *Gorrell v. O'Malley* was a challenge to Maryland's congressional reapportionment where a federal court addressed Maryland's treatment of the communities of interest standard.[363] In *Gorrell*, the court dismissed a challenge to the congressional districts based on partisan gerrymandering and insufficient consideration of communities of interest.[364] Although the dismissal was affirmed for plaintiffs' lack of standing, nevertheless the reasoning in the district court's opinion gave some insight into how the communities of interest standard has been applied in Maryland.[365]

Plaintiffs claimed that the congressional reapportionment failed to respect communities of interest because it divided farmers between multiple districts.[366] The court found that although communities of interest were disrupted by the map, that disruption was not sufficient grounds to reject the map.[367] The court held that while preserving communities of interest is a legitimate goal for the state to pursue, it is not a constitutional requirement, and thus its absence alone does not render the map unconstitutional.[368] This language suggests that communities seeking to preserve unity of representation should concentrate their efforts on the political bodies drawing the maps in Maryland, as the courts may be unlikely to grant relief on those grounds. But while the result in this case seems to have engulfed the original stated requirement to preserve communities of interest, in actuality it follows other cases that a breakup of a community of interest is insufficient, alone and by itself, to undo an entire redistricting plan.

These cases in Alabama, Georgia, Louisiana, and Nevada, demonstrate how special masters not only enhanced public input and transparency in the redistricting process, but also elevated the requirement of communities of interest in newly drawn districts.

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356 *Id.* at *6-7.

357 *Id.* at *7 (the court's order stipulates that, to the extent practicable, the special masters shall avoid dividing groups of common social (e.g. educational backgrounds, housing patterns), economic (e.g. income levels, living conditions), cultural, or language characteristics) (Ct.'s order designating criteria and schedule for special masters, filed September 21, 2011).

358 *Id.* at *8-9.

359 *Id.* at *3-4.

360 *Id.* at *1-2.

361 *See id.*, (filed October 27, 2011) (final order approving the final districts) available at http://redistricting.lls.edu/cases.php#NV, *archived at* https://perma.cc/UY9R-BJ28.

362 Guy v. Miller, No. 11-OC-00042-1B, 2011 Nev. Dist. LEXIS 32, at *3 (D. Nev. Carson City filed October 14, 2011).

363 *Gorrell v. O'Malley*, No. WDQ-11-2975, 2012 WL 226919 (D. Md. 2012), *aff'd on other grounds*, No. 12-1234, 2012 WL 2855948 (4th Cir. 2012).

364 *Id.*

365 *Id.* at *3.

366 *Id.* at *3.

367 *Id.* at *3-*4.

368 *Id.*

3. Adherence through Litigation via Court-Developed Plans

Courts are not required to use outside technical assistants to redraw district boundaries.[369] Occasionally, courts themselves have redrawn the districts without the reliance on special masters. Here too, they have ensured that districts preserved communities of common interest, such as in New York,[370] Minnesota,[371] Mississippi,[372] and New Jersey.[373]

i. New York

In New York, during the 2010 congressional redistricting, competing legislative coalitions failed in the game of brinkmanship, and a federal court ultimately formulated the congressional map for the state.[374] Rather than appoint a special master as had been done in the past,[375] the court instead referred the case to a magistrate judge to redraw congressional districts.[376] In referring the case to Magistrate Judge Roanne L. Mann, the court appointed Nathaniel Persily as an expert to assist Magistrate Judge Mann in formulating the plan.[377] The court ordered the Magistrate Judge to, where possible, draw districts that preserve communities of interest.[378] Additionally, the court also authorized the magistrate judge to "consider other factors and proposals submitted by the parties, which, ... are reasonable and comport with the Constitution and applicable federal and state law."[379]

The Magistrate Judge took particular care in her "Report and Recommendation" to emphasize the transparency and inclusivity of her mapmaking process.[380]

The court solicited public comment, including non-party proposals, and accepted correspondence and other communications from interested members of the public.[381] The court held a lengthy hearing at which parties and non-parties were given the opportunity to present their views.[382] After reviewing all of these comments—written and oral—the court formulated its Recommended Plan, and, where feasible, incorporated proposed revisions that enhanced the criteria identified by the Panel.[383] The litigation surrounding the 2010 round of redistricting in New York furnished a strong precedent favoring extensive public participation in "court-drawn redistricting."[384]

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369 N.Y. CITY CHARTER ch. 2-A, § 50 (2004).

370 *Rodriguez v. Pataki*, 207 F. Supp. 2d 123, 124 (S.D.N.Y. 2002).

371 *Zachman v. Kiffmeyer*, No. C0-01-160, at 3-5 (Minn. Spec. Redistricting Panel Mar. 19, 2002) (Final Order Adopting a Legislative Redistricting Plan), http://www.mncourts.gov/documents/0/Public/Court_Information_Office/redistrictingpanel/Final_Legislative_Order.PDF., *archived at* https://perma.cc/H2AY-HGU7

372 *Id.* at *9 (emphasis added).

373 *Id.* at 49.

374 *Favors v. Cuomo*, No. 1:11-cv-05632 (E.D.N.Y. March 19, 2012).

375 *Diaz v. Silver*, 978 F. Supp. 96, 99 (E.D.N.Y. 1997); *Rodriguez v. Pataki*, 207 F. Supp. 2d 123, 124 (S.D.N.Y. 2002). (In both the 1990 and 2000 rounds of redistricting, retired United States District Judge Frederick B. Lacey was appointed as Special Master.)

376 *Rodriguez*, 207 F. Supp. 2d at 124.

377 Favors v. Cuomo, No. 1:11-cv-05632 (E.D.N.Y. March 19, 2012).

378 Order of Referral to Magistrate Judge, Favors v. Cuomo, No. 11-CV-5632 RR GEL, at 3 (E.D.N.Y. Mar. 19, 2012 (emphasis added). (By comparison, the court in the *Rodriguez* case instructed the Special Master it appointed in the 2000 round of redistricting as follows:
"adhere to and, where possible, reconcile the following guidelines:
(a) Districts shall be of substantially equal population, compact, and contiguous.
(b) The plan shall comply with 42 U.S.C. § 1973(b) and with all other applicable provisions of the Voting Rights Act.")
207 F. Supp. 2d at 125.

379 *Id.*

380 It is notable that Persily's affidavit in this case, filed with Magistrate Judge's "Report and Recommendation," highlighted some factors that the Magistrate Judge consciously chose not to consider, namely "the Recommended Plan deliberately ignores political data, such as voter registration or election return data, as well as incumbent residence ... to avoid picking favorites in its construction of districts. Persily Aff. ¶ 58, March 12, 2012.

381 Report and Recommendation, Favors v. Cuomo, No. 11-CV-5632 DLI RR, 2012 WL 928216, 41 (E.D.N.Y. Mar. 12, 2012), *report and recommendation adopted as modified*, No. 11-CV-5632 RR GEL, 2012 WL 928223 (E.D.N.Y. Mar. 19, 2012).

382 *Id.* at 21.

383 *Id.* at 48-49.

384 Opinion and Order, *Favors v. Cuomo*, No. 11-CV-5632 RR GEL, 2012 WL 928223, at *9 (E.D.N.Y. Mar. 19, 2012).

As the court instructed the magistrate judge to preserve communities of interest where possible in her plan, the court's final "Opinion and Order" contained significant language in its "Order and Referral to Magistrate Judge":

> The Court noted that "the identification of a "community of interest," a necessary first step to 'preservation,' requires insights that cannot be obtained from maps or even census figures. Such insights require an understanding of the community at issue, which can often be acquired only through direct and extensive experience with the day-to-day lives of an area's residents. . . . [C]ourts are understandably inclined to accord redistricting weight only to the preservation of obviously established and compact communities of interest. The Recommended Plan does this by respecting certain widely recognized, geographically defined communities.[385]

The basis of this article is a theory and method to identify geographically defined communities of interest for the purposes of redistricting, to which a federal court in New York gave strong credence.[386]

ii. Minnesota

In 2000, the Minnesota Supreme Court appointed a five-judge special redistricting panel (the "Special Redistricting Panel" or the "Panel") to redraw Minnesota's congressional and state legislative maps after it became apparent that the legislature might not timely enact a new redistricting plan.[387] The Panel accepted written submissions and also held a number of hearings to consider the public's thoughts on redistricting.[388] In redrawing Minnesota's congressional and state legislative districts, the Special Redistricting Panel paid special attention to maintaining communities of interest where possible. Thus, in drawing the congressional districts, the Panel acknowledged the need to recognize and account for the inherently different interests shared by each of the state's rural populations, Native-American populations, counties with affinities, and groups with similar land use interests.[389] Likewise, the Panel attempted to keep communities of interest (Native-American reservations, counties in southwest Minnesota, and the Minneapolis-St. Paul metropolitan area) intact in single state senate districts to the extent possible.[390]

After the 2010 census, the Minnesota legislature passed a redistricting plan, which the governor vetoed.[391] The Minnesota Supreme Court again appointed a special redistricting panel of judges to redraw Minnesota's congressional and legislative districts.[392] The Panel adopted a "least changes" redistricting map that took into account as much as possible issues dealing with population equality, statutory requirements regarding convenience, contiguity and compactness, and respect for minority and Native-American populations and communities of interest in the state.[393]

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385 *Id.* at 14-16. Quotations and citations omitted.

386 *Id.* at 22-23.

387 *See Zachman v. Kiffmeyer*, 629 N.W.2d 98 (Minn. 2001).

388 *Id.*

389 *Zachman v. Kiffmeyer*, No. C0-01-160, at 5-6, 9 (Minn. Spec. Redistricting Panel Mar. 19, 2002) (Final Order Adopting a Congressional Redistricting Plan), http://www.mncourts.gov/documents/CIO/redistrictingpanel/Final_Congressional_Order.PDF., *archived at* https://perma.cc/H2AY-HGU7.

407 *Id.* at 3-5.

391 Hippert v. Ritchie, 813 N.W.2d 374, 377 (Minn. Spec. Redistricting Panel 2012).

392 *Id.* at 376.

393 *Id.* at 382-85.

iii. Mississippi

During the 2011 legislative session, the Mississippi legislature failed to agree on district lines.[394] A court decided that the 2011 state legislative elections could take place within the pre-existing districts because the legislature's obligation was to redistrict the state lines by 2012.[395] The court rejected the suggestion of appointing a special master to redraw the lines.[396] Conversely, the court in *Smith v. Hosemann* drew its own maps when a suit was brought alleging that the previous maps were malapportioned in the wake of the 2010 census.[397] The Court, in describing its methodology, stated that, "[w]e have also given our best efforts in respecting the *community of interest* of each district, although we recognize we have been constrained by legal requirements from perfectly achieving this goal."[398]

iv. New Jersey

The New Jersey 2010 redistricting process was subject to two legal challenges.[399] In *Gonzalez v. New Jersey Appointment Comm'n*, a judge granted a motion to dismiss the challenge brought by Tea Party members to the legislative redistricting plan on grounds that the legislative plan did not adequately represent third-party and unaffiliated citizens.[400] The judge ruled that the map did not involve any constitutional violations or discrimination.[401] The judge also noted that preserving "communities of interest" was a valid interest for the commission to protect and would not be disturbed.[402]

When courts redraw districts or appoint special masters to redraw voting districts, the redistricting process usually becomes more transparent, public input from non-parties is accepted, and the goal of preserving communities of interest is elevated.[403] This elevation is especially critical in jurisdictions in which community of common interest is absent as a stated requirement or guidance in redistricting. In most of these states, the preservation of communities of interest is not required.[404] Courts have read in this requirement in its district drawing criteria or in its charge to special masters when redrawing district boundaries.[405] When redistricting is litigated it becomes more democratized ensuring greater meaningful representation for communities of common interest.

In effect, once in litigation, communities of common interest have become a commanding, if not mandatory, redistricting criterion. It was once a shield that has become a sword to wield.

4. Adherence through Litigation through The Voting Rights Act (Section 5)

Some advocates have tried to protect communities of interest through the enforcement provisions (Section 5) of the Voting Rights Act which prevents the retrogression of minority representation.[406]

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411 Miss. NAACP v. Barbour, No 3:11-cv-00159, 2011 WL 1870222, at *3-4 (S.D. Miss. May 16, 2011), aff'd No. 11-82 (2011).

412 *Id* at *7.

396 *Id.*

397 *Smith v. Hosemann*, No. 3:01-cv-00855, 2011 WL 6950914 (S.D. Miss. Dec. 30, 2011).

398 *Id.* at *9 (emphasis added).

399 *Gonzalez v. New Jersey Appointment Comm'n*, No. L-001173-11 (N.J. Super. Ct., Mercer Cty.) and No. C-000069-11 (N.J. Super. Ct., Ocean Cty.) (dismissed Aug. 31, 2011).

400 *Id.*

401 *Id.* at 56.

402 *Id.* at 49.

403 *See generally* N.Y.C. Districting Comm'n, Submission for Preclearance of the Final Districting Plan for the Council of the City of New York (Mar. 22, 2013).

404 Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. Rev. 77, 87 (1985).

405 *Id.*

406 In 2013, The U.S. Supreme Court struck down the coverage formula (Section 4) that brought jurisdictions under Section 5 coverage. *Shelby County v. Holder*, 570 U.S. 529. But Section 5 itself has never been declared unconstitutional. Although it is not applied in force because no jurisdictions are covered, due to Shelby, its legal framework is intact. Advocates are pressing Congress to update Section 4. *See* Wendy Weiser & Alicia Bannon, *Democracy: An Election Agenda for Candidates, Activists, and Legislators*, Brennan Center for Justice at N.Y.U. Law (2018),

Advocates in New York used this strategy after the 2000 census with the New York City Districting Commission ("Districting Commission") when it redrew district boundaries for the New York City Council.[407] Under Section 5 of the Voting Rights Act, before a redistricting plan of a covered jurisdiction can take effect, it must be precleared by the U.S. Department of Justice or the U.S. District Court for the District of Columbia.[408] New York County (Manhattan) is covered under Section 5 because the county has a history of voter discrimination.[409]

Asian-American groups engaged the preclearance process with a special emphasis on Chinatown in Lower Manhattan.[410] There was insufficient population to draw a majority-Asian City Council district that met the requirements of the Voting Rights Act.[411] Since Chinatown could not be its own district, advocates pressed the Commission to the Charter's requirements to preserve community of interest to ensure some meaningful representation for Chinatown.[412]

i. Background

Before 2000, Chinatown was in a city council district with Battery Park City, Tribeca, SoHo, and the Financial District.[413] These other neighborhoods were predominantly white and economically affluent.[414] White candidates coming from these neighborhoods routinely ran in the district, and their votes always overwhelmed the votes for Asian-American candidates running from Chinatown.[415] Generally, Asian-Americans voted for Asian-American candidates and whites voted for white candidates.[416] The result was that Asian-Americans had never been represented by a candidate of their own choosing.[417]

Asian-American advocates urged for a new configuration of district boudnaires altogether, noting the history of racially polarized voting.[418] They also illustrated the stark differences between Chinatown and these four neighborhoods' income, housing, and community needs.[419]

They argued that Chinatown should have been drawn into the same district as the adjacent Lower East Side.[420] Both neighborhoods had similar socio-economic characteristics and shared several common interests and concerns.[421] They constituted a single community of interest, meeting the City Charter's third

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http://www.brennancenter.org/sites/default/files/publications/Brennan%20Center%20Solutions%202018.%20Democracy%20Agenda.pdf, *archived at* https://perma.cc/J96F-3SZA.

407 N.Y. CITY CHARTER ch. 2-A, § 50 (2004).

408 42 U.S.C. § 1973c.

409 *Id.*

410 Comment Letter from the Asian Am. Bar Association of N.Y., to U.S. Dep't of Justice, Voting Section (March 12, 2003) (on file with author) (opposing preclearance); *Redistricting of Chinatown Finalized*, SING TAO DAILY, Feb. 27, 2003 (Larry Tung, trans.), http://www.gothamgazette.com/citizen/mar03/chinese_redistricting.shtml, *archived at* https://perma.cc/LKS9-Q9FV.

411 *Thornburg v. Gingles*, 478 U.S. 30, 48-52 (1986); *Bartlett v. Strickland*, 556 U.S. 1, 1 (2009).

412 Judith Reed, *Of Boroughs, Boundaries and Bullwinkles: The Limitations of Single-Member Districts in a Multiracial Context*, 19 FORDHAM URB. L. J. 759, 772-73 (1991-1992).

413 Leland T. Saito, *Asian Pacific American Electoral and Political Power: Panel 1: The Sedimentation of Political Inequality: Charter Reform and Redistricting in New York City's Chinatown*, 1989-1991, 8 UCLA ASIAN PAC. AM. L.J. 123, 135-140 (Spr. 2002); *City Council Changes: A Disappointment*, OUTLOOK, (Asian American Legal Defense and Education Fund, New York, NY), Spring 1992, at 1; Margaret Fung, *A District Like a Mosaic*, N.Y. NEWSDAY, Apr. 12, 1991, at 60 (advocating for a City Council district that included Chinatown with the Lower East Side).

414 Leland T. Saito, *Asian Pacific American Electoral and Political Power: Panel 1: The Sedimentation of Political Inequality: Charter Reform and Redistricting in New York City's Chinatown*, 1989-1991, 8 UCLA ASIAN PAC. AM. L.J. 123, 125 (Spr. 2002).

415 *Id.*

416 Comment Letter from Margaret Fung, et al., Asian Am. Legal Def. and Educ. Fund, to Joseph Rich, U.S. Dep't of Justice, Chief of Voting Section (April 29, 2003) (on file with author) [hereinafter Fung Letter].

417 The incumbent was Alan Gerson who was elected in 2001. *Searchlight 2002 – District 1 Lower Manhattan*, GOTHAM GAZETTE (Jan. 29, 2001), https://www.gothamgazette.com/searchlight2001/dist1.html, *archived at* https://perma.cc/7HUR-UZND (reporting primary election results)

418 *See* Fung Letter, *supra* note 416.

419 *Id.*

420 Glenn D. Magpantay, Staff Att'y, Asian Am. Legal Defense and Education Fund, Statement to the New York City Districting Commission (Nov. 19, 2002).

421 *Searchlight 2002 – New York City Redistricting*, GOTHAM GAZETTE (Oct. 24, 2002), http://www.gothamgazette.com/searchlight/redistricting2.shtml, *archived at* https://perma.cc/9CBV-YMHK.

most important redistricting criterion.[422] The minority voters in the Lower East Side were Latino, with a growing number of Asian-Americans.[423] Latinos and Asians were also politically cohesive in that they voted for the same candidates for office, and those candidates were Asian-Americans from Chinatown.[424]

Advocates recounted many shared interests and concerns among the residents of Chinatown and the Lower East Side.[425] Those interests included: employment (e.g., low wages, sweatshop conditions, labor exploitation, workers' rights, and job availability); housing (e.g., lack of affordable housing, decrepit conditions, and landlord accountability for substandard conditions); immigrants (e.g., the need for more immigrant services, immigrant rights and empowerment, and immigrant alienation); education (e.g., bilingual services and teachers, English as a Second Language programs, overcrowded classes, poor education quality and performance, and vocational education and adult literacy); health (e.g., the lack of health insurance, affordable and accessible health care and health care facilities); and neighborhood quality (e.g., sanitation (particularly garbage and street cleanliness), and pollution (both air and noise)).[426]

The neighborhoods of Chinatown and the Lower East Side had "established ties of common interest and *association*" as recognized by the City Charter.[427] Common associational ties were demonstrated by the existence of services utilized by both neighborhoods, such as community health clinics, immigrant service providers, and business assistance centers.[428] These services were comprised of both municipal and private social service agencies.[429] The neighborhoods also shared ties of common association in struggles around political organizing.[430] Asian-Americans in Chinatown and Latinos in the Lower East Side worked together through advocacy groups and coalitions to press for policy changes to benefit both groups and neighborhoods.[431]

Conversely, Chinatown should not have been kept in the same City Council district with Tribeca, SoHo, Battery Park City, and the Financial District.[432] The areas were not only dissimilar in their demographic makeup, but also in their needs and concerns. For example, with regards to public safety, residents in Tribeca, SoHo, Battery Park City, and the Financial District had positive police relations, whereas residents in Chinatown and the Lower East Side suffered from police misconduct and sought greater civilian oversight.[433] Regarding economic development, Tribeca, SoHo, Battery Park City, and the Financial District sought the construction of new high-rise apartment buildings to appeal to professionals.[434] Chinatown and the Lower East Side were most concerned about gentrification, job creation, small business development, enforcement of occupational safety regulations, and labor/minimum wage laws.[435]

Chinatown and the Lower East Side should have been drawn into the same city council district. Such a district would have given residents the opportunity to be meaningfully represented by a candidate for whom they had voted. The Districting Commission instead opted to redraw districts in a way that

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422 Comment Letter from Margaret Fung, et al., Asian Am. Legal Def. and Educ. Fund, to Joseph Rich, U.S. Dep't of Justice, Chief of Voting Section (April 29, 2003) (on file with author).

423 HUM, *supra* note 7, at 25 (discussion of Lower East Side).

424 Asian Americans are politically cohesive with Latinos in District 1. Both groups make up 53.8% of the VAP in the benchmark District 1. The Commission's expert, Dr. Lisa Handley, found that in 1993 and 1997, the preferred candidate of Asian American voters was also the preferred candidate of Latino voters. *See* Submission Under Section 5 of the Voting Rights Act for Preclearance for the 2003 Final Districting Plan for The Council of the City of New York, March 31, 2003 at Appendix 1 at 16 (Dr. Lisa Handley Expert Report, 16-18).

425 *Id.*

426 HUM, *supra* note 7, at 25.

427 N.Y. CITY CHARTER ch. 2-A, § 52(1)(c) (2004) (italics added).

428 HUM, *supra* note 7.

429 Comment Letter from Margaret Fung, et al., Asian Am. Legal Def. and Educ. Fund, to Joseph Rich, U.S. Dep't of Justice, Chief of Voting Section (April 29, 2003) (on file with author).

430 *See id.*

431 *Id.*

432 *Id.*

433 These findings were documented by the neighborhoods' respective Community Boards, which are community advisory committees. Chinatown and the Lower East Side are in Community District 3. Tribeca, SoHo, Battery Park City, and the Financial District are in Community District 1. NYC Department of City Planning, *Community District Needs*, Manhattan, 2002

434 *Id.*

435 *Id.*

ensured the reelection of the current city councilmember, who was not supported by the Asian-American or Latino voters of the district.[436]

The Districting Commission redrew districts to ensure the election of current city councilmembers, and it subordinated its own Charter-mandated criteria to achieve this goal.[437] In Lower Manhattan, the district was carefully drawn around the incumbent's electoral powerbase of Tribeca and SoHo where most of his supporters resided.[438] A new configuration that adhered to the Charter's mandate to respect communities of interest would have moved the incumbent outside of the district encompassing Chinatown.[439] This would have then forced him to run against another sitting councilmember residing in Greenwich Village, a mostly white and equally affluent community.[440] To avoid such a result, the Districting Commission maintained the district boundaries most favorable to the incumbent. But this was not at all required or prompted by the City Charter.[441]

The Districting Commission deviated from the Charter's redistricting requirements in ensuring the fair and effective representation of racial minorities and keeping intact communities of common interest.[442]

The Districting Commission kept Chinatown in the same district as Battery Park City, Tribeca, SoHo, and the Financial District.[443] They broke up a community of common interest. Litigation under the City Charter had remote possibilities for success,[444] so lawyers turned to the Voting Rights Act's Section 5.[445]

ii. Voting Rights Act Section 5 Review

The Commission City Council redistricting plan had to be precleared by the U.S. Justice Department pursuant to Section 5.[446]

In preclearance, the covered county must demonstrate that the redistricting Commission does not have a retrogressive minority voting strength, that is to wit, racial and ethnic minority voters are not in a worse position to effectively exercise the electoral franchise.[447] During the preclearance period, interested individuals and community groups may review the submission and comment.[448]

In determining whether the Commission's redistricting plan had the prohibited *purpose* of weakening minority voting strength, "[t]he extent to which the plan departs from objective redistricting criteria [and] to which the plan is inconsistent with the jurisdiction's stated redistricting standards" are considered.[449]

Advocates showed how the Commission's redistricting plan in Lower Manhattan departed from objective redistricting criteria and was inconsistent with New York City's mandated redistricting

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436 *Redistricting of Chinatown Finalized*, *supra* note 410.

437 *New York City Redistricting*, *supra* note 421.

438 *Id.*

439 *Id.*

440 Combining Chinatown with the Lower East Side would not compromise the Latino power base in the Lower East Side. Asian Americans and Latinos already had a history of voting for the same candidates. The more likely outcome is the commonality of class interests would show that Chinatown resident would vote for Latino candidates probably coming from the Lower East Side.

441 *See generally* N.Y. CITY CHARTER, at ch. 2-A, § 52 (2004).

442 N.Y. CITY CHARTER, at ch. 2-A, § 52(1) (b),(c) (2004).

443 N.Y.C. Districting Comm'n, Submission for Preclearance of the Final Districting Plan for the Council of the City of New York (Mar. 22, 2013), at 29.

444 *See generally* Memorandum from Matthew Ahn and Andrew Dunlap to Glenn Magpantay, AALDEF, RE: Potential For Success Of Voting Rights Act And New York State Law Claims, May 27, 2003

445 *Favors v. Cuomo*, No. 11-CV-5632 RR GEL, 2012 WL 928223, at *1 (E.D.N.Y. Mar. 19, 2012).

446 Submission Under Section 5 of the Voting Rights Act for Preclearance for the 2003 Final Districting Plan for The Council of the City of New York, March 31, 2003.

447 N.Y.C. Districting Comm'n, Submission for Preclearance of the Final Districting Plan for the Council of the City of New York (Mar. 22, 2013), at 36.

448 Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as amended, 28 C.F.R. § 51.29 (2001) (allowing individuals and groups to make comments under Section 5).

449 28 C.F.R. § 51.59.

standards.[450] They showed how the redistricting plan did not give Asian-Americans "fair and effective representation," did not keep a community of interest whole, and improperly subordinated these to the protection of incumbents,[451] and overstated districting criteria.[452] This violated the Charter and signaled an intent to retrogress minority voting strength.

Even though explicit redistricting requirements in the City Charter[453] should have been followed, they were not and the Department of Justice did not object to the new plan.[454] Perhaps under a different set of circumstances the Department would have objected but it did not. This strategy of using the enforcement provisions (Section 5) of the Voting Rights Act to compel the preservation of the communities of interest requirement was novel but ultimately unsuccessful. It therefore seems that the strongest method to preserving of communities of interest to give communities of shared interest meaningful representation is through litigation, and especially when litigation brings in a special master or technical expert to redrew new district boundaries.

V. CONCLUSION

Drawing congressional, state legislative, or city councilmanic districts to encompass communities of common interest has always been a vague sought after, yet elusive ideal. Although the Supreme Court requires the preservation of communities of interest, redistricting is often challenging to meaningfully define, apply, and deploy.[455] Defining a community of interest is not difficult in itself. Even though it can be subjective, it can also use multiple types and sorts of objective data and information. Yet, in redistricting, it must also be spatially defined, which most other scholars have failed to tackle.

The Court has defined communities of interest as groupings of people who have similar values, shared interests, or common characteristics.[456] To apply this definition, this article has defined a legal theory, and deployment practices to concretely define and apply this requirement.

Once defined, applying a community of interest in the development of a redistricting plan can be exceedingly helpful. A spatially defined community of interest can help advocates press for an area to keep whole or identify neighborhoods to keep together or separate. It can be used for plan analysis, where redistricting plans or specific district proposals can be measured against proposed boundary lines. Communities of interest has been used to adhere to the law in both the affirmative and defensive contexts.

In the past, the concept of communities of interest has been an effective shield. The drawing of districts based on communities of interest has overcome a constitutional challenge to minority-opportunity districts. Past efforts to challenge minority-opportunity district as improper racial gerrymanders under the 14th Amendment can be deflected once it can be shown that common interests, not race alone, was the basis of a particular district.

Today, communities of interest has become a sword, especially when the redistricting process is litigated. While many state and local laws require the drawing of districts that preserve communities of common interest, these provisions are not strongly actionable. The standard of review is sometimes so low, and district drawers are allowed so much discretion, that the breaking up of a cohesive well-defined community of common interest has been permitted. However, courts adjudicating redistricting lawsuits, especially those where special masters have been appointed, have compelled districts to encompass communities of interest. Litigation, through the application of the Supreme Court's mandate, has elevated

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450 Comment Letter Under Section 5 of the Voting Rights Act for New York City Council Redistricting 2003, Regarding Submission Number: 2003-1147, to U.S. Dep't of Justice, Voting Section, from the Asian American Legal Defense and Education Fund, New York, NY, April 29, 2003.

451 *New York City Redistricting*, *supra* note 421.

452 Comment Letter Under Section 5 of the Voting Rights Act for New York City Council Redistricting 2003, Regarding Submission Number: 2003-1147, to U.S. Dep't of Justice, Voting Section, from the Asian American Legal Defense and Education Fund, New York, NY, April 29, 2003.

453 N.Y. CITY CHARTER, ch. 2-A, § 52(1)(b) (2004).

454 Submission for Preclearance of the Final Districting Plan for the Council of the City of New York, *supra* note 447 at iii.

455 Report and Recommendation, *supra* note 381 at 25-26.

456 *Id.* at 25.

the preservation of communities of interest. This has become a much more powerful strategy in ensuring the representation of communities of color in redistricting. Together, these strategies have democratized the redistricting process for all.