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# Community of Interest Methodology and Public Testimony

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# Community of Interest Methodology and Public Testimony

Karin Mac Donald\* and Bruce E. Cain\*\*

*In an effort to insulate the redistricting process from legislative influence, California’s voters approved Propositions 11 and 20, giving the Independent Citizen Commission the task of drawing the district boundaries for the Congress, the State Assembly, the State Senate, and Board of Equalization. The California Citizens Redistricting Commission proactively sought public input, asking Californians to tell them about the economic and social interests that bound their community together, where their community was located, and why it should be kept together in the interest of fair and effective representation. The language of article XXI, section 2 of the California Constitution was explicit with respect to the priority of neutral criteria: respect for the “geographic integrity” of any “local neighborhood” or “local community of interest” as well as city and county borders was listed fourth, right after the federal criteria of equal population, Voting Rights Act compliance, and geographic continuity. This Article evaluates the value of this approach and makes recommendations to improve the ways in which public input is solicited and utilized in the redistricting process. The central arguments are that: (1) purely quantitative and objective data approaches cannot substitute for qualitative testimony, (2) the amount of public input can be staggering and requires considerable efforts to process, and (3) community of interest considerations still have to be traded off with other redistricting criteria.*

Introduction .....	610
I. Objective and Subjective Approaches to Communities of Interest .....	612
A. Communities of Interest.....	612
B. The Emergence of Independent Redistricting Commissions.....	614
C. Public Testimony .....	615
D. Methods of Data Analysis.....	616

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E. The American Community Survey Used as Redistricting Data .....	619
II. Establishing Communities of Interest Through Public Testimony .....	623
A. Where Testimony Mattered .....	628
B. The Compatibility of Communities of Interest and Other Formal Criteria .....	633
Conclusion.....	635

## INTRODUCTION

The novelties of any redistricting cycle can take many forms—shifts in judicial doctrine,<sup>1</sup> evolving political conditions,<sup>2</sup> technical refinements,<sup>3</sup> or institutional innovations.<sup>4</sup> Sometimes what seems new is actually old, only repackaged or embedded in a different political or institutional context. In the 2011 redistricting cycle, traditional formal criteria—such as respect for local community boundaries, compactness, and community of interest considerations—gained new prominence as a consequence of two important institutional developments: the evolution of increasingly independent redistricting commissions (IRCs) and the expanding role of public testimony.

The connection between these two developments and the new emphasis on communities of interest (COIs) and public testimony is not merely coincidental.

1. Given the Supreme Court's reputation for following precedent, it is remarkable that the various phases of modern American redistricting are more marked by sharp shifts in judicial doctrine than any sudden change in political conditions. Court decisions have dictated the frequency of redistricting, *Baker v. Carr*, 369 U.S. 186, 197–98 (1962), the permissible structure of state bicameralism, *Reynolds v. Sims*, 377 U.S. 533, 568 (1964), and the standards for determining racial discriminatory effects, *Thornburg v. Gingles*, 478 U.S. 30, 58–61 (1986). Sometimes the Court's decisions have cut off trends, as in the *Shaw* line of cases. *Shaw v. Reno*, 509 U.S. 630, 630–31 (1993) (holding that electoral redistricting based on race must pass strict scrutiny); *see also* *Hunt v. Cromartie*, 526 U.S. 541, 541–42 (1999) (holding that there was insufficient evidence of racial motive behind North Carolina's congressional redistricting plan for the district court to have granted summary judgment); *Abrams v. Johnson*, 521 U.S. 74 (1997) (finding that Georgia redistricting plan did not violate the Equal Protection Clause); *Bush v. Vera*, 517 U.S. 952, 954–55 (1996) (holding that a Texas redistricting plan failed strict scrutiny); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Miller v. Johnson*, 515 U.S. 900, 900–02 (1995) (applying the Court's holding in *Shaw* to find a redistricting policy in Georgia unconstitutional). We covered the historical phases of redistricting trends in Bruce E. Cain, Karin Mac Donald & Michael McDonald, *From the Last Generation of Reform to the Next*, in *DEMOCRACY IN THE STATES: EXPERIMENTS IN ELECTION REFORM 199, 199–209* (Bruce E. Cain, Todd Donovan & Caroline Tolbert eds., 2008).

2. Bipartisan gerrymanders were regarded more favorably in the less partisan 1970s than they have become in the current period of high polarization and frequent divided government. For an example of how courts viewed gerrymandering in state legislative districts during the less partisan era, *see Gaffney v. Cummings*, 412 U.S. 735, 752–54 (1973).

3. *See* Micah Altman, Karin Mac Donald & Michael McDonald, *From Crayons to Computers: The Evolution of Computer Use in Redistricting*, 23 *SOC. SCI. COMPUTER REV.* 334, 335 (2005).

4. *See* Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 *YALE L.J.* 1808, 1812–13 (2012) (analyzing the effectiveness of independent redistricting commissions as institutional reform).

The central premise of the IRC model is that incumbent influence over the redrawing of district lines is an inherent conflict of interest that must be eliminated to the greatest degree possible in order to achieve a fair and neutral process.<sup>5</sup> Given that a finite number of commission members cannot possibly reflect all the nuanced, varied interests that arise in a large state redistricting, public input is critical to providing line-drawing guidance. In particular, the California Citizens Redistricting Commission (CRC, or the Commission), took unprecedented steps to become publicly transparent and to solicit residents' written and in-person testimony.<sup>6</sup> While their efforts were largely well received, a few critics have raised questions about the CRC approach. Some allege that the testimony that the CRC heard was stacked by a coordinated political effort and biased towards liberal and Democratic interests.<sup>7</sup> Others have argued that objective approaches to determining community of interest should be given more play.<sup>8</sup>

In the following sections of this Article, we will assess the role of public testimony and COI approaches to make three points. First, purely quantitative measures of community of interest cannot supplant qualitative public testimony. Aside from the various problems associated with creating accurate measures and turning them into quantitative standards, public testimony gives a better snapshot of what matters to voters, residents, and communities at a given time and place. If the goal is to reflect public interests and not merely to constrain line drawing in some seemingly neutral manner, public testimony is critical. Second, public testimony can easily overwhelm the redistricting process and sometimes provides conflicting interpretations. A sincere and earnest effort to determine the public's interests in redistricting requires finding ways to process large amounts of information rapidly, examining the feasibility of competing proposals, and managing public expectations about the ability to satisfy everyone's demands. Lastly, community of interest considerations, however they are determined, must be traded off with other criteria. The more specific the ordering of criteria set out in state constitutions and laws, the easier the guidelines for commissioners to follow.

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5. *Id.* at 1817–21.

6. *Id.* at 1826–27.

7. See Olga Pierce & Jeff Larson, *How Democrats Fooled California's Redistricting Commission*, PROPUBLICA (Dec. 21, 2011), <http://www.propublica.org/article/how-democrats-fooled-californias-redistricting-commission>.

8. The foremost proponent of this is Nicholas Stephanopoulos, who has argued for objective community of interest standards in a trilogy of articles. See Nicholas O. Stephanopoulos, *Communities and the California Commission*, 23 STAN. L. & POL'Y REV. 281, 284–89 (2012) [hereinafter Stephanopoulos, *Communities and the California Commission*]; Nicholas O. Stephanopoulos, *Redistricting and the Territorial Community*, 160 U. PA. L. REV. 1379, 1385–86 (2012) [hereinafter Stephanopoulos, *Redistricting and the Territorial Community*]; Nicholas O. Stephanopoulos, *Spatial Diversity*, 125 HARV. L. REV. 1903, 1949 n.217 (2012).

## I. OBJECTIVE AND SUBJECTIVE APPROACHES TO COMMUNITIES OF INTEREST

Redistricting standards fall into two basic types: (1) formal criteria focuses largely on the shape, size, racial, and socioeconomic composition of the districts and (2) fairness outcome measures such as proportionality and seats-vote symmetry.<sup>9</sup> The case for formal criteria has always been made on two levels: their intrinsic worth and their indirect value in constraining efforts to draw lines that intentionally and unfairly favor one party or group over others. Some formal criteria are easily measured and relatively uncontroversial—for example, that district boundaries must be contiguous (connected at all points) and have equal populations.<sup>10</sup> By comparison, COI considerations—the expectation that districts be composed of “cognizable” common interests—are harder to identify a priori because there is a subjective component to the interests and boundaries of a given COI. The “interest” in a COI is not merely a clustering of some measurable social or economic characteristic. Residents in that area have to perceive and acknowledge that a social, cultural, or economic interest is politically relevant. COI geography is ultimately subjective as well. The boundaries of an interest “community” do not usually coincide neatly with government jurisdictions or follow fixed, uniform patterns. Even advocates of better quantitative COI measures concede that perception matters with respect to identifying COIs.<sup>11</sup>

*A. Communities of Interest*

The idea that communities of interest matter in a good redistricting process is certainly not novel. COIs have been part of the mix in scholarly redistricting discussions for decades.<sup>12</sup> COIs are recognized in five state constitutions and seven other state statutes.<sup>13</sup> COIs have also long been important in local government redistricting.<sup>14</sup> In California, COI was specifically mentioned in the Master’s reports in 1973 and 1991:

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9. There was a vigorous debate over the merits of formal criteria in the 1980s. *See, e.g.*, Bruce E. Cain, *Simple vs. Complex: Criteria for Partisan Gerrymandering: A Comment on Niemi and Grofman*, 33 UCLA L. REV. 213, 214–16 (1985); Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 79–93 (1985); Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. REV. 1, 12–35 (1985).

10. Although there has been a vigorous debate over using adjusted versus unadjusted census data for several decades, the major population-related issue in the last two redistricting cycles centered more on whether to use VAP or CVAP numbers when accounting for minority populations under the VRA. Nathaniel Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32 CARDOZO L. REV. 755, 778 (2011).

11. Stephanopoulos acknowledges that territorial communities have a “third element, a feeling of communal affiliation” that is “subjective in nature.” Stephanopoulos, *Redistricting and the Territorial Community*, *supra* note 8, at 1430.

12. An early proponent of this approach was geographer Richard Morrill. *See, e.g.*, Richard L. Morrill, *Redistricting, Region and Representation*, 6 POL. GEOGRAPHY Q. 241, 251–53 (1987).

13. Stephanopoulos, *Redistricting and the Territorial Community*, *supra* note 8, at 1424–25.

14. *See* Bruce E. Cain & David A. Hopkins, *Mapmaking at the Grassroots: The Legal and Political Issues of Local Redistricting*, 1 ELECTION L.J. 515, 527–29 (2002).

[S]ocial and economic interests common to the population of an area which are probable subjects of legislative action . . . should be considered in determining whether the area should be included within or excluded from a proposed district in order that all of the citizens of the district might be represented reasonably, fairly and effectively.<sup>15</sup>

The Masters wording reveals very clearly that community of interest has always been a territorial concept (i.e., a defined area with certain common economic, social, or cultural interests).<sup>16</sup>

The rationale for COI-based districts derives implicitly from a delegate view of representation. In the delegate conception, the representative's job is to advocate for the majority interests and preferences of constituents residing within the boundaries of a given district or territorial jurisdiction. In the trustee version, the representative makes a best judgment about a policy's merits and in the virtual representation model, the representative advocates for supra-territorial interests such as a political parties, classes, or organizations. District composition matters little for the trustee or virtual models, but potentially a great deal in the delegate case. It is easier for representatives to advocate for constituents who have widely shared attributes and a greater sense of kinship.

On the voter side, COIs can facilitate grassroots electoral coordination and encourage higher levels of civic involvement and participation when they coincide with local networks.<sup>17</sup> Whatever the advantages of COI, it is important to realize that it is linked to a particular form of democratic representation (i.e., the representative as delegate), not to a core democratic concept. For this reason, it is more appropriately a matter for state regulation, not constitutional doctrine.

Apart from its intrinsic merits, the community of interest approach also indirectly limits line drawers' discretion to skew the lines in favor of particular groups, incumbents, or parties. Limiting options to those with plausible COI rationale, some believe, is the best way to achieve a fair redistricting plan, or at

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15. *Legislature v. Reinecke*, 516 P.2d 6, 16 (Cal. 1973).

16. In distinguishing his terminology of territorial community from COI, Stephanopoulos states:

I [prefer] the term "territorial community" instead of the more common "community of interest" because of certain connotations that the latter phrase has acquired. For one thing, a community of interest does not have to be spatially bounded, meaning that it coexists uneasily with the American system of geographic districting. In addition, a community of interest can be deemed to arise on the basis of any common concern, making the term notably imprecise and malleable. With its strong geographic valence and emphasis on the full array of interests and affiliations that people share, the concept of a territorial community seems substantially more determinate.

Stephanopoulos, *Redistricting and the Territorial Community*, *supra* note 8, at 1431–32 (footnote omitted).

The term Stephanopoulos uses, "territorial community," really refers to the technique of factor analyzing census and other data to determine COI clusters. As such, it is one specific way of attempting to determine COI.

17. See Stephanopoulos, *Communities and the California Commission*, *supra* note 8, at 288.

least, one that minimizes bias significantly.<sup>18</sup> In its dual functionality, COI is like other formal criteria such as compactness and respect for city or county lines. Since any one of the formal criteria, including COI, can be manipulated under certain circumstances for party or group benefit, the reform trend has been to layer as many formal constraints on the process as possible. However, the more redistricting criteria in play, the more important the trade-off between conflicting criteria becomes. A sensible answer, adopted in California, is to provide a listing in order of priority.<sup>19</sup> It is unclear whether all the supporters of Propositions 11 and 20 that created the CRC understood the implications of ordering criteria, as some CRC proponents who wanted more “electoral competition” were apparently later dismayed at the attention paid to COI testimony.

### B. *The Emergence of Independent Redistricting Commissions*

While the COI concept is not novel, the emergence of independent redistricting commissions has given it more prominence. IRCs are the culmination of a reform effort aimed initially at reducing, and more recently at eliminating, the conflicts of interest that incumbent legislators have when drawing district boundaries for themselves.<sup>20</sup> Commissions vary in their degree of separation from incumbent legislators and other political officials, but independent citizen commissions define the far end of the degree of separation continuum.<sup>21</sup>

IRCs in general are primarily defined by what they are not—entities controlled by incumbents and politicians—as opposed to what they are supposed to be. The ambiguity of their role gives rise to different possible interpretations. One interpretation is that citizen commissioners should act as neutral decision makers, much as the courts do when they are forced to devise plans as the redistricting agent of last resort. Courts and court masters do not take extensive testimony or rely on public definitions of COI. This conception of the impartial arbiter suggests that the citizen commissioner adheres strictly to constitutional and statutory guidelines and balances redistricting criteria trade-offs in a neutral, evenhanded fashion behind the judicial veil of above-the-fray legitimacy. The legitimacy of this approach hinges on all parties buying into the belief that legal and professional norms of impartiality will ultimately prevail. In practice, the losers in judicially imposed redistricting plans often read bias into the final outcomes.<sup>22</sup>

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18. Morrill, *supra* note 12, at 248.

19. See CAL. CONST. art. XXI, § 2(d)(1)–2(d)(6).

20. Cain, *supra* note 4, at 1826–27.

21. *Id.* at 1818, 1844.

22. Nathaniel Persily notes:

Rarely will everyone involved in redistricting litigation agree that a court-drawn plan is “fair.” By looking at the partisan data while constructing its plan, however, a court might be better able to avoid the accusation that its plan is severely biased (in its effects, if not its intent) against one of the parties.

Another less frequently practiced variant of the impartiality model is the neutral tie breaker<sup>23</sup>—someone who judges between the merits of competing plans submitted to them or who takes public suggestions and transparently melds them into a finished map product.<sup>24</sup> Here too perceptions matter and losers will tend to read partisan intent into unfavorable outcomes.

The Arizona and California IRCs however are more amalgamations rather than exemplars of any one decision-making model. On the one hand, commissioners were vetted closely (especially in California) for conflict of interest problems and excessive partisanship, but at the same time there was a conscious effort to pick commissioners who reflected the state as a whole, implying a representation model as well. For example, the CRC structure balanced the numbers of Democrats, Republicans, and Independents on the Commission and put in place voting rules that required bipartisan agreement. Some commission advocates hoped that the presence of independents would give the commissions a perception of more neutrality, at least between the two parties. While critics in both Arizona<sup>25</sup> and California<sup>26</sup> questioned the partisan neutrality of the independent members, for the most part, if not completely neutral, they formed a centrist bloc that straddled party lines.

The public was encouraged in both California and Arizona to submit plans for districts or even the entire state, but while the commissioners took public suggestions seriously, they developed their own ideas and plans. The effects of submitted statewide plans were primarily indirect. The basic architecture was developed at the CRC and staff end, but other proposals framed the discussion of what was possible, particularly submissions by the civil rights groups (due to the threat of potential litigation). Most of the testimony the CRC received initially were comments about local COIs, and then later reactions to specific lines proposed and posted online for public viewing.

### C. Public Testimony

Determining COI through public testimony can be expensive and raises questions about selectivity bias. The CRC set up meetings throughout the state to hear testimony on what people in different parts of the state thought were the geographic communities that needed to be kept together (i.e., not divided by a district boundary) and which surrounding areas had the most common interests.<sup>27</sup>

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Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*, 73 GEO. WASH. L. REV. 1131, 1164 (2005).

23. This is the model used in New Jersey's politician commission system. Mark J. Magyar, *Redistricting Reform in New Jersey 1* (Friends of Local Gov't Policy Paper Series Vol. 3 No.4, 2011), available at [http://www.njlmef.org/policy-papers/FoLG\\_v3\\_4\\_Magyar.pdf](http://www.njlmef.org/policy-papers/FoLG_v3_4_Magyar.pdf).

24. *Id.*

25. Cain, *supra* note 4, at 1831–32.

26. *Id.* at 1826–27.

27. Stephanopoulos, *Communities and the California Commission*, *supra* note 8, at 288–89.

It is no small logistical matter to transport staff and commission members around a large state, advertise widely, do outreach to groups and individuals who might otherwise be under-represented, and then collect and post the material with a short turnaround time. It is far cheaper to draw lines behind closed doors with minimal public input.

A common criticism of public testimony is the danger of selectivity bias. Studies of public testimony generally suggest that the people who show up to observe and testify at public hearings can be a biased sample of the total population.<sup>28</sup> Inevitably, redistricting hearings attract some types of constituents more than others. It is a relatively technical subject that precludes many citizens from participating. Well-organized neighborhoods, civil rights lawyers, and local political officials will have more knowledge and interest in the proceedings than the average citizen. Outreach and publicity can improve awareness, but, in the end, redistricting tends to appeal to the political hard core. It was alleged in California that the testimony was biased further by an organized attempt to recruit local activists and party officials to testify before the Commission.<sup>29</sup>

Whether that was true, it is fair to say that commissioners have to weigh the source of the information they receive as they evaluate the merits of a particular COI claim.

The objective position argues that COIs can best be determined by looking for clusters of census indicators or other data. The most prominent proponent of this view in recent years is Professor Nicholas Stephanopoulos who in a trilogy of articles proposes a territorial communities method:

[E]lectorate districts should be required to correspond to underlying territorial communities. To the extent possible, the boundaries of districts and organic geographic communities should be required to coincide—and the courts should be prepared to intervene when communities are unnecessarily fused, fragmented, or subverted, and the state can offer no reasonable explanation for the communal disruption.<sup>30</sup>

The allure of an objective COI approach is clear. The time and money spent on gathering citizen testimony could be avoided if COIs can be determined by statistical procedures. Is this hope realistic?

#### *D. Methods of Data Analysis*

The method of territorial community relies on a statistical procedure called factor analysis—a statistical algorithm that identifies clusters of data indicators that are assumed to be generated by underlying unmeasured variables—in this

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28. See, for instance, Kevin M. Leyden, *Interest Group Testimony and Resources at Congressional Hearings*, 20 LEGIS. STUD. Q. 431, 435–37 (1995), for evidence that groups with resources tend to appear more often at public hearings.

29. See Pierce & Larson, *supra* note 7.

30. Stephanopoulos, *Redistricting and the Territorial Community*, *supra* note 8, at 1384–85.

case, territorial communities.<sup>31</sup> For his study of California, Professor Stephanopoulos uses both the Census Bureau's American Community Survey (ACS) and a second data set of votes on statewide popular initiative measures.<sup>32</sup> With the ACS data, he found that "the factor with the greatest explanatory power is a joint measure of socioeconomic status and Hispanic ethnicity" that distinguished tracts of "wealthy, well-educated, white professionals" from tracts with "poorer, less educated Hispanics working in blue-collar fields."<sup>33</sup> The other factors, in order, were marital status, race, sprawl, and age.<sup>34</sup> With the initiative data, the factors he discovered were fiscal policy preferences, socio-cultural issues, and Native American gaming. Stephanopoulos defines his measure of district homogeneity as the standard deviation of the census tracts' scores weighted by the variance explained by each factor.<sup>35</sup>

The basic intuition of this territorial communities approach can be described simply. COIs are clusters of objective indicators. Good districts are composed of similar census tracts as identified by the factor measures (i.e., deviate the least in their scores). The greater the homogeneity of various tracts in a district, the better the redistricting design. The territorial community vision of representation is first-order homogeneity offset by second-order heterogeneity: demographically similar people are grouped together into districts but with wide variation across districts in the types of interests represented.<sup>36</sup> In general, there is nothing wrong with this view of representation. However, the relevant question is not its legitimacy but whether it should be mandated as the baseline standard by state or federal courts.

In terms of its inherent merits, homogeneous districts are not clearly superior or intrinsically more democratic than heterogeneous districts. Indeed this question parallels the issues of perspective in the at large versus single member district system debate. The U.S. Progressive movement in the early twentieth century moved to at large districts to weaken neighborhood parochialism and machine politics and to incentivize a jurisdiction wide perspective. Mandating or even legally prioritizing homogeneous districts would preclude any future efforts to balance parochial area with jurisdiction-wide perspectives. Proponents of more competition in U.S. politics would also lose a potential tool. While competitive seats can be socioeconomically homogeneous, it is more common to make a seat competitive by blending different types of constituents. If a territorial community approach were adopted as a judicial standard, it would preclude other equally valid approaches to electoral design.

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31. See HARRY H. HARMAN, MODERN FACTOR ANALYSIS 3–6 (3d rev. ed. 1976).

32. Stephanopoulos, *Communities and the California Commission*, *supra* note 8, at 289–90. This violates the CRC pledge to ignore political data. Pierce & Larson, *supra* note 7.

33. Stephanopoulos, *Communities and the California Commission*, *supra* note 8, at 291.

34. *Id.* at 290.

35. *Id.* at 291.

36. *Id.* at 283, 289–93.

In addition, just because people share census attributes does not mean they perceive political commonality. Political agendas can shift rapidly between elections or slowly over time from economic issues to social issues: being a homeowner might be more important in one election, but being a Catholic may matter in another. Census data are not collected for the purpose of tracking current policy concerns. Imputing political importance to variables chosen for the purpose of demographic accounting can be misleading, which is perhaps why Stephanopoulos experimented with his initiative data.<sup>37</sup> Still, there is no escaping the selection bias problem. The initiative data set is likely skewed towards issues that could not be resolved in the legislature or that were able to attract enough resources to qualify for the ballot. Implying political identity from objective data is problematic unless the real goal is not better representation per se but to prevent gerrymandering.

So perhaps the real purpose is gerrymander prevention. That is to say, the real justification of this approach might be to lock in a district building methodology that makes intentional bias more difficult. But is the territorial community method easier to use, less vulnerable to potential manipulation and more likely to produce “fair results”? Stephanopoulos cites evidence that suggests this might be so, but since none of these studies used his territorial community method and traditional COI criteria are often used in conjunction with other formal criteria, it is hard to say for sure.<sup>38</sup> In our experience, there is no foolproof way to eliminate bias and manipulation. Some formal redistricting criteria are better for certain groups than others. Compactness rewards ghettoized groups more than dispersed ones. City and county lines help local government officials who want to move up the electoral pecking order. Communities of interest sorted on income and race might be more protective of Hispanics than some Asian groups.

Skillful line drawers can operate effectively within formal constraints to achieve their goals even if some options are taken off the table by the existence of formal constraints. When *Karcher v. Daggett* ushered in the norm of zero population deviation congressional districts,<sup>39</sup> the effect on partisan and racial bias was minimal.<sup>40</sup> Similarly, compact lines and respect for local jurisdiction lines do not eliminate biases and differential effects completely. Bear in mind that these other formal criteria are more simply measured than territorial communities. Technical complexity can open the door to more manipulation. Factor scores can be weighted differently or computed using different combinations of variables. State or regional scores might vary from national ones. Similarity scores in general

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37. *Id.* at 283, 290–91.

38. Stephanopoulos, *Redistricting and the Territorial Community*, *supra* note 8, at 1422, 1444–46.

39. *Karcher v. Daggett*, 462 U.S. 725, 765 (1983).

40. Burt Neuborne, *Felix Frankfurter's Revenge: An Accidental Democracy Built by Judges*, 35 N.Y.U. REV. L. & SOC. CHANGE 602, 629–31 (2011).

suffer from scale discrepancies: similarities that appear at one measurement level can differ from those at another.<sup>41</sup>

In the end, for all these reasons, objective COI approaches such as the territorial community method are at best supplements to public testimony, certainly not a substitute. There is a tendency in the redistricting field to fetishize measures. Given the many criteria that apply to redistricting, the line-drawing process is inevitably a balancing act between competing values and criteria. Measures such as seat-vote curves, compactness scores, city and county split reports, or even objective COI scores can be useful tools for monitoring the effects that different options produce. The problem arises when measures are turned into standards. The temptation is to think that any one measure can be the ultimate standard of fairness that encompasses all the other concerns. The reality is the trade-offs have to be decided at some point: early if the criteria are ordered by law or later if done by bargaining among members of a redistricting entity.

#### *E. The American Community Survey Used as Redistricting Data*

Leaving aside for the moment the question of Stephanopoulos's specific territorial method, there is the equally important question of the data that the CRC, or indeed any citizen commission, could have used to prepare itself for drawing district boundaries in 2011. The ACS was ostensibly a logical choice, but closer examination reveals several problems with using ACS data for redistricting purposes such as incompatible units of analysis, outdated data, and limited variable availability. We begin with a little background about the ACS.

After the census of 2000 finished its data collection, the long form that had been sent out to one out of every six households was discontinued, and questions that had previously been asked on that form were moved to a new instrument: the American Community Survey, or ACS.<sup>42</sup> Data collected by the ACS include social, economic, housing, and demographic variables.<sup>43</sup> The ACS was fully implemented in 2005 and now employs a rolling sample of about 2.9 million households per year, as compared to the once per decade sample that received the census long form.<sup>44</sup>

The general idea of moving from the long form to the ACS was well received by the census data user community. Now rather than a once per decade data

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41. See S. Openshaw, *Ecological Fallacies and the Analysis of Areal Census Data*, 16 ENVIRONMENTAL AND PLANNING A 17 (1984).

42. U.S. CENSUS BUREAU, A COMPASS FOR UNDERSTANDING AND USING AMERICAN COMMUNITY SURVEY DATA: WHAT GENERAL USERS NEED TO KNOW 1 (2008), available at <http://www.census.gov/acs/www/Downloads/handbooks/ACSGeneralHandbook.pdf>.

43. *Id.*

44. *Initial Addresses and Sample Selected and Final Interviews*, U.S. CENSUS BUREAU, AM. CMTY. SURVEY, [http://www.census.gov/acs/www/methodology/sample\\_size\\_data](http://www.census.gov/acs/www/methodology/sample_size_data) (last visited May 30, 2013). Between 2000 and 2004, the annual sample size was considerably smaller with 742,209–890,698 housing units selected. *Id.*

collection effort that would result in quickly outdated data, especially toward the end of the decade, the ACS would be able to release updated and more current data sets annually prior to the release of the next scheduled census of 2010.<sup>45</sup> In theory, this would give the line-drawing community a forewarning of what they would be facing when the PL94-171 data were finally released, initiating the start of redistricting activities.

The redistricting community looked at this data collection policy change with skeptical curiosity; the Census Bureau had never before been able to produce any data other than population and racial counts in time for line drawing,<sup>46</sup> but with the shifts in legal doctrine that seemingly discouraged the exclusive reliance on race and ethnicity,<sup>47</sup> there was greater interest than in the past in additional nonracial data that could be used to guide the construction of districts on all levels. Skepticism increased when the census bureau posted the ACS units of analysis and the data ranges that would be released in time for redistricting.

Line drawing for most jurisdictions begins as soon as the Census Bureau releases the PL94-171 short form block level data in the spring of the year ending with “one.”<sup>48</sup> In the spring of 2011, the only data available from the ACS were the 2005–2009 five-year tract level sample (and for some variables on the block group level as well), a 2007–2009 three-year sample for populations of 20,000 and above, and a 2009 one-year sample that was available for populations of 65,000 and above.<sup>49</sup> The first data set, while reasonably up to date, was problematic with respect to geography. The second and third data sets could not be used due to their inadequate coverage and large unit of analysis. Leaving aside the challenge of describing communities of interest and neighborhoods accurately, the extreme accuracy required by the population deviation standards for congressional districts necessitates the use of block level data.<sup>50</sup> But the smallest unit of analysis on which the ACS is released is the block group level, and some variables were available on the census tract level only.<sup>51</sup> Moreover, because the ACS relies on a rolling sample

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45. U.S. CENSUS BUREAU, *supra* note 42, at 3–4.

46. During previous redistricting cycles, only the PL94-171 data were available for line drawing. The socioeconomic variables from the long form were typically not released until the year ending with “three,” thus making them available for litigation but not for the construction of districts.

47. See cases cited *supra* n.1 (beginning with *Shaw v. Reno*, 509 U.S. 630 (1993)). The PL94-171 data, which is the result of the census short form that every household receives in the decennial census, only collects total population, voting age, race, ethnicity, and housing units. This dataset is used to construct lines. *The P.L. 94-171 Summary File and Race and Ethnicity Variables*, THE REDISTRICTING GRP. AT BERKELEY LAW, <http://redistrictinggroup.org/redistricting/data-sources-and-variables/race-and-ethnicity-variables/the-p-l-94-171-summary-file-and-race-and-ethnicity-variables> (last visited May 30, 2013).

48. U.S. CENSUS BUREAU, DESIGNING P.L. 94-171 REDISTRICTING DATA FOR THE YEAR 2010 CENSUS 6–7 (2004), available at <http://www.census.gov/rdo/pdf/DesignPL94-171.pdf>.

49. U.S. CENSUS BUREAU, *supra* note 42, at 3 tbl. 2.

50. See *Wesberry v. Sanders*, 376 U.S. 1, 7 (1964).

51. U.S. CENSUS BUREAU, *supra* note 42, at 3, A-2.

rather than a 100% count like the short form,<sup>52</sup> there are some data suppression issues, especially for very small population subgroups. This means in practice that for some variables, the data set will show zero population in some tracts and block groups when in fact there is population there.

A second problem with using the ACS in the 2011 California redistricting is related to outdated information in the sample. This is best illustrated by the Citizen Voting Age Population (CVAP) variable, an increasingly crucial piece of data for evaluating section 5 and section 2 of the Voting Rights Act compliance.<sup>53</sup> Respondents surveyed in any of the five years of the ACS sample effectively do not age in the data set: that is, a person who was seventeen years old when she responded in 2005 would still be reported at that age at the time of the data release in 2010. This is potentially problematic for relatively younger groups such as Latino and Asian populations as their Voting Age Population (VAP) numbers will be underestimated by this data set due to the “lack-of-aging” sampling feature.<sup>54</sup>

For California, this presented a particular challenge because of the presence of Voting Rights Act (VRA) section 2 seats that needed, since *Bartlett v. Strickland*,<sup>55</sup> to be drawn with a minimum of fifty percent of the Citizen Voting Age Population. But it was also problematic for COI Assessment in 2011 because much of the data in the five-year, 2005–2009, dataset were based on information that had become outdated by rapidly changing conditions. Consider the fact that in 2005, real estate in California was booming, buyers were purchasing properties at the top of the market and moving to newly developed suburbs, leaving their rentals in urban areas behind. Unemployment figures in mid-June were at 5.4% and business, including the technology industry was doing well. But, five years later, in June of 2009, California’s unemployment was at 11.5%,<sup>56</sup> the foreclosure crisis was in full swing making many homeowners renters again, and the economy had tanked!<sup>57</sup> The underlying assumption of an objective indicator COI approach to redistricting is the existence of some level of history and stability during the duration of the proposed new district’s term; therefore, in order to be a community of interest, there has to be some shared past that will continue into the future. There also has to be the presence of common, stable denominators of that

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52. *Id.* at 3.

53. CAL. CITIZENS REDISTRICTING COMM’N, FINAL REPORT ON 2011 REDISTRICTING 14–15 (Aug. 15, 2011), [http://wedrawthelines.ca.gov/downloads/meeting\\_handouts\\_082011/crc\\_20110815\\_2final\\_report.pdf](http://wedrawthelines.ca.gov/downloads/meeting_handouts_082011/crc_20110815_2final_report.pdf).

54. The problems with the ACS CVAP data are discussed in detail in JORGE CHAPA ET AL., THE CHIEF JUSTICE EARL WARREN INST. ON LAW AND SOC. POLICY, ESTIMATING CITIZEN VOTING AGE POPULATION 5–9 (2011), available at [http://www.law.berkeley.edu/files/Redistricting\\_PolicyBrief4\\_forWeb.pdf](http://www.law.berkeley.edu/files/Redistricting_PolicyBrief4_forWeb.pdf).

55. *Bartlett v. Strickland*, 556 U.S. 1, 1 (2009).

56. *Local Area Unemployment Statistics*, U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, <http://data.bls.gov/timeseries/lasst06000003> (last visited May 30, 2013).

57. *Foreclosure Activity Increases 81 Percent in 2008*, REALTYTRAC (Jan. 15, 2009), <http://www.realtytrac.com/content/press-releases/foreclosure-activity-increases-81-percent-in-2008-4551>.

interest that are described accurately at the appropriate geographic unit. The kind of volatility California experienced in the period leading up to the 2011 redistricting made the ACS unusable for that reason and purpose.

The third ACS issue is the weak correspondence between the ACS variables and the way residents perceive and define their COIs and neighborhoods. Using ACS variables for COI definition is essentially a top-down approach that presumes the definition of a community of interest or neighborhood.<sup>58</sup> Aggregated income or economic data do not necessarily translate into the perceived collective interests of a group, community, or neighborhood. Table 1 contains an analysis of 12,425 records of written input to the Commission and shows that none of the most frequently mentioned COI themes<sup>59</sup> were found in the ACS data.<sup>60</sup>

As discussed earlier, Stephanopoulos attempts to remedy the weakness of ACS data by supplementing it with voting results on initiative measures.<sup>61</sup> However, California's Proposition 11 specifically prohibits the use of certain types of political data in the definition of communities of interest,<sup>62</sup> including relationships with political parties. Frequently, voting on initiatives is a proxy for party identification in California. For example, voting for Proposition 8, the elimination of same-sex marriage initiative, showed that Democrats were more likely to be opposed than Republicans<sup>63</sup> and that counties with higher Democratic voter registration voted in higher numbers against the measure.<sup>64</sup> The California Citizens Redistricting Commission decided early on to broaden the letter of the law and not use any political data unless required for VRA assessment purposes.<sup>65</sup> Clearly, this aspect of Stephanopoulos's territorial communities method could not have been used by this Commission.

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58. In redistricting hearings, neighborhoods are sometimes described by residents as identical to communities of interest, i.e. they can share the same boundaries. See Stephanopoulos, *Communities and the California Commission*, *supra* note 8, at 283.

59. The counts in Table 1 are approximate. They are compiled by counting the terms listed in three coded categories: "Economic community of interest," "Social community of interest," and "Reason for staying together." There are some duplicates among the categories and the categories themselves may not be mutually exclusive. For further explanations of the data used in Table 1, see CAL. CITIZENS REDISTRICTING COMM'N, *supra* note 53, at 4–5.

60. For explanations of variables and definitions of terms in the 2009 ACS, see generally, U.S. CENSUS BUREAU, AM. CMTY. SURVEY: SURVEY METHODOLOGY MAIN [http://www.census.gov/acs/www/methodology/methodology\\_main](http://www.census.gov/acs/www/methodology/methodology_main) (last visited May 30, 2013).

61. See *supra* Part D.

62. "Communities of interest shall not include relationships with political parties, incumbents, or political candidates." CAL. CONST. art. XXI, § 2(d)(4).

63. *Exit Polls*, CNN.COM, <http://edition.cnn.com/ELECTION/2008/results/polls/#val=CAI01p1> (last modified Nov. 5, 2008, 2:34 PM).

64. See *California Proposition 8: Results*, WIKIPEDIA, THE FREE ENCYCLOPEDIA, [http://en.wikipedia.org/wiki/California\\_Proposition\\_8#Results](http://en.wikipedia.org/wiki/California_Proposition_8#Results) (last visited May 30, 2013) ("Republicans were more likely to have supported the measure than were Democrats.").

65. See Stephanopoulos, *Communities and the California Commission*, *supra* note 8, at 289 n.51.

**Table 1:** Frequency of COI Definitions

<b>Community of Interest Definition</b>	<b>Count</b>
Environmental concerns	495
Common culture/cultural community	440
Recreation	251
Fire danger/services	220
Ethnic community	164
High-tech industry	104
Aerospace industry	97
Religious community	62
Air quality	38

## II. ESTABLISHING COMMUNITIES OF INTEREST THROUGH PUBLIC TESTIMONY

California's implementation of Propositions 11 and 20 has been called an "experiment in participatory democracy,"<sup>66</sup> and with thousands of attendees at dozens of hearings that the Commission held throughout California, along with over 20,000 comments that were submitted in writing and more than 2000 comments that were provided in person during hearings, this statement seems to ring true. But did the CRC in fact pay attention to the public's requests and implement them where possible, or was this an empty exercise? We argue that the California Citizens Redistricting Commission did listen to the testimony, evaluate it, instruct its consultants to consider it<sup>67</sup> when drawing "visualizations,"<sup>68</sup> and used public input extensively during live-line drawing sessions to make decisions on where lines should go.

The CRC received trainings on redistricting issues from various experts,<sup>69</sup>

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66. *CA Redistricting Commission—the New Lottery!*, MITCHELL KAPOR FOUND., <http://blog.mkf.org/2010/02/06/ca-redistricting-commission-the-new-lottery> (last visited June 29, 2013).

67. See *In the Matter of Full Commission Business Meeting*, CAL. CITIZENS REDISTRICTING COMM'N 10 (May 6, 2011), available at [http://wedrawthelines.ca.gov/downloads/transcripts/201105/transcripts\\_20110506\\_sana.pdf](http://wedrawthelines.ca.gov/downloads/transcripts/201105/transcripts_20110506_sana.pdf) [hereinafter *Full Commission Business Meeting*] (recalling line drawing instructions to consultants).

68. The Commission wanted to make clear to the public that consultants were never drawing maps without Commission input. When consultants developed potential district options based on Commission direction but not during a public hearing, the resulting plans were called "visualizations," rather than "proposals" or "drafts." *Visualizations: Working Draft*, CAL. CITIZENS REDISTRICTING COMM'N, <http://wedrawthelines.ca.gov/visualizations-working-draft.html> (last visited June 30, 2013).

69. Experts included Justin Levitt (Loyola Law School), Ana Henderson (Berkeley Law), Hans Johnson (Public Policy Institute of California), and Karin Mac Donald (Statewide Database, UC

and the ranked criteria, their interpretation, and their implementation were covered from different angles.

Many of the groups involved in the drafting of Proposition 11, including the League of Women Voters and California Common Cause, testified in different Commission meetings about the importance of hearing directly from California residents about their communities and also urged the Commission not to prioritize city and county boundaries over neighborhoods and communities of interest.<sup>70</sup> There was a grave concern among good government groups that criterion four—which lists cities, counties, neighborhoods, and communities of interest, and was intended to give the same weight to each—would be misinterpreted by the Commission and that the simple-to-implement formal jurisdictional boundaries would be prioritized instead. In California, as well as in many other states, city and county boundaries in densely populated urban areas often become blurred to residents, and frequently there is little distinction between those that live on one side of one street that happen to be in a different jurisdiction from their neighbors.<sup>71</sup> The drafters of Proposition 11 wanted to give the Commission the flexibility to acknowledge these situations and preserve communities of interests that cut across formal jurisdictional boundaries. Voting rights groups such as the Mexican American Legal Defense and Educational Fund (MALDEF) and the Asian Pacific American Legal Center (APALC) in collaboration with the Coalition of Asian Pacific Americans for Fair Redistricting (CAPAFR) also urged the Commission repeatedly to pay attention to their communities' testimony, and to weigh it highly against other criteria.<sup>72</sup> MALDEF, APALC, and CAPAFR were among the groups that conducted outreach and training campaigns in the communities they serve.<sup>73</sup> While these three groups had different strategies and resources for outreach, the message to their communities

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Berkeley). See, e.g., *Full Commission Business Meeting*, *supra* note 67, at 30; (mentioning that “Ms. Macdonald” wanted a whole day with the Commission for training); *In the Matter of Full Commission Line-Drawing Meeting, Vol. I* CAL. CITIZENS REDISTRICTING COMM’N 40 (June 7, 2011), available at [http://wedrawthelines.ca.gov/downloads/transcripts/201106/transcripts\\_20110607\\_sacto\\_vol1.pdf](http://wedrawthelines.ca.gov/downloads/transcripts/201106/transcripts_20110607_sacto_vol1.pdf) [hereinafter *Full Commission Line-Drawing Meeting, Volume I*].

70. See, e.g., *In the Matter of Commission Public Outreach*, CAL. CITIZENS REDISTRICTING COMM’N 216 (Feb. 26, 2011), available at [http://wedrawthelines.ca.gov/downloads/transcripts/201102/commissionpublicoutreach\\_20110226.pdf](http://wedrawthelines.ca.gov/downloads/transcripts/201102/commissionpublicoutreach_20110226.pdf). In its testimony at the CRC Public Outreach Hearing on February 26, 2011, the League of Conservation Voters asked the CRC to “please consider communities of people and their common interests, then create districts that represent the best interests of those communities, of course. Look beyond the existing city and county boundaries . . .” *Id.*

71. See Appendix Map A.

72. Press Release, Asian Pacific American Legal Center, Asian American Civil Rights Groups Oppose Prop. 11 Redistricting Initiative (Sept. 4, 2008), available at <http://www.caasf.org/2008/09/asian-american-civil-rights-groups-oppose-prop-11-redistricting-initiative-joint-press-release>.

73. *Latinos Needed to Apply to California’s New Citizens Redistricting Commission*, MALDEF, [http://maldef.org/voting\\_rights/public\\_policy/new\\_citizens\\_redistricting\\_commission](http://maldef.org/voting_rights/public_policy/new_citizens_redistricting_commission) (last visited June 29, 2013).

was the same: organize, define your community of interest, and tell the Commission about it so it can be taken into consideration.<sup>74</sup>

The commissioners discussed the information received during public meetings and decided on a plan of action for criterion four,<sup>75</sup> based on the logic that had been presented by experts and by good government and voting rights groups:

1. While census geography could be used to assess where city and county boundaries are located, it did not contain neighborhood or community of interest boundaries, thus for those criteria, the CRC would have to find alternative geographic data sources.<sup>76</sup>

2. Available census variables were of limited use for the assessment of communities of interest because those that might be of use were either outdated or on a unit of analysis that was too large to make a distinction. There were no other data sources available that defined either neighborhoods<sup>77</sup> or communities of interest for the State of California.

The Commission members decided to fill in the data gaps by asking Californians to provide the missing information by defining their community of interest and neighborhood boundaries and submitting them to the CRC for consideration.<sup>78</sup> To make clear what they needed, the commissioners utilized a “community of interest” explanatory handout developed by Berkeley Law’s Redistricting Group.<sup>79</sup>

Later, the Commission developed its own participation handout that briefly explained the criteria and asked public speakers to comment on specific points.<sup>80</sup>

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74. *Asians Urged to Apply for Redistricting Commission*, NEW AM. MEDIA, <http://newamerica.media.org/2010/02/asians-urged-to-apply-for-redistricting-commission.php> (last visited June 29, 2013).

75. “The geographic integrity of any city, county, city and county, local neighborhood, or local community of interest shall be respected in a manner that minimizes their division to the extent possible without violating the requirements of any of the preceding subdivisions.” CAL. CONST. art. XXI, § 2(d)(4).

76. *Full Commission Business Meeting*, *supra* note 67, at 10–11.

77. The CRC attempted to collect “official” neighborhood boundaries for jurisdictions where such boundaries were available, including Los Angeles and San Francisco. These boundaries were heavily debated and modified during line drawing. For San Francisco, for example, different sets of official boundaries were located from different city departments and a decision had to be made about which ones to adopt. Changes to the adopted boundaries were made based on public input. *See In the Matter of Commission Public Outreach*, CAL. CITIZENS REDISTRICTING COMM’N 52 (Feb. 26, 2011), [http://wedrawthelines.ca.gov/downloads/transcripts/201102/commissionpublicoutreach\\_20110226.pdf](http://wedrawthelines.ca.gov/downloads/transcripts/201102/commissionpublicoutreach_20110226.pdf) (transcribing Steven A. Ochoa’s comments on the need for “maps and descriptive written information” in line drawing).

78. *Full Commission Business Meeting*, *supra* note 67, at 26.

79. *See California Redistricting Criterion: Communities of Interest (COI)*, THE REDISTRICTING GRP. AT BERKELEY LAW, [http://redistrictinggroup.org/wp-content/uploads/2011/04/Communities-of-Interest\\_2pagehandout\\_byTRGBL.pdf](http://redistrictinggroup.org/wp-content/uploads/2011/04/Communities-of-Interest_2pagehandout_byTRGBL.pdf).

80. The Commission’s worksheet had space for speakers to fill in the criteria that defined their communities of interest. *See* CAL. CITIZENS REDISTRICTING COMM’N, PUBLIC INPUT HEARINGS,

Commissioners also gave verbal explanations at the beginning of the initial set of public input hearings to make sure that participants' testimony would render usable information.<sup>81</sup> Both the handouts and the verbal explanations made it clear that the Commission wanted to know (a) geographic boundaries for the neighborhood or community of interest; (b) the community's interests, (i.e., variables that defined it within the law); and (c) why it should be kept together (i.e., relevance of the community of interest for the redistricting).<sup>82</sup>

The CRC received hundreds of verbal descriptions of communities of interest and neighborhoods<sup>83</sup> and thousands of written submissions with detailed descriptions. Many public speakers provided hard copy maps along with their testimony that outlined the boundaries in question. Some speakers were the only voice for their community while others had organized groups of speakers<sup>84</sup> that came forward to make similar points. In some meetings, multiple residents from adjacent communities that had not communicated beforehand, or even knew each other, testified in agreement that their communities were a COI.<sup>85</sup>

The Commission's technical consultant had one team member in each meeting who summarized each public comment into a spreadsheet. A numbered code was created for every speaker, and supporting information or exhibits that were provided by speakers were likewise coded so they could be referenced along with the respective testimony. The public hearing database was updated at each input hearing and made available to the commissioners in spreadsheet format and in PDF format to the public. At the conclusion of the hearings, there were 2365 comments in the public hearing database, and 1385 of them specifically addressed COIs.<sup>86</sup>

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available at [http://wedrawthelines.ca.gov/downloads/meeting\\_handouts\\_062011/learnmore\\_20110614\\_worksheet.pdf](http://wedrawthelines.ca.gov/downloads/meeting_handouts_062011/learnmore_20110614_worksheet.pdf) (asking those surveyed questions such as: "What bonds the community?," "Where is your community located?," and "Why should the community be kept together?").

81. *Full Commission Business Meeting*, *supra* note 67, at 5.

82. *Id.*

83. For examples of testimony on video transcript, see generally *Video Archive: Citizens Redistricting Commission Meeting Viewer*, CAL. CITIZENS REDISTRICTING COMMISSION, <http://wedrawthelines.ca.gov/viewer.html> (last modified June 21, 2012).

84. For video of the meeting in Bakersfield on April 14, 2011, see *Video: Apr. 14, 2011, Bakersfield*, CAL. CITIZENS REDISTRICTING COMM'N, <http://wedrawthelines.ca.gov/video-archive-april-14-2011.html> (showing testimony from multiple members of Asian and Pacific Islander organizations associated with CAPAFR regarding the Hmong COI).

85. See, e.g., *Video: June 19, 2011, San Bernardino*, CAL. CITIZENS REDISTRICTING COMM'N, <http://wedrawthelines.ca.gov/video-archive-june-19-2011-san-bernardino.html> (containing testimony from nine residents of the San Bernardino mountain communities of Crestline, Lake Arrowhead, Cedar Pines Park, and Running Springs, explaining that their small communities are a COI based on common school district, isolation, fire danger, etc., and requesting that said communities be kept together, particularly in the assembly and senate districts).

86. The Commission also heard from speakers during open forum at their business meetings.

Public input was also collected outside of public hearings. The Commission accepted written input via e-mail, mail, phone, and a web form on the CRC website.<sup>87</sup>

E-mailed comments and those that came in through the website were immediately forwarded to the commissioners' e-mail accounts. All submissions were also posted to the website, which required the removal of identifying information by CRC staff. CRC staff was also tasked with creating unique identifiers for each submission so that a separate public input database could be constructed by consultants that would allow for coding of comments and searching of public input during line-drawing sessions.

Though there were frequent trainings by the redistricting consultants to ensure accuracy, CRC staff continued to struggle with applying the proper codes to submissions. CRC staff also had tremendous problems keeping the submissions organized and getting them to the consultants in a timely manner or at all. Consultants had to sift through dozens of folders that contained duplicate submissions, had the wrong file names attached, and were not properly redacted. Three separate quality control processes by consultants to randomly check the public input sent to them for coding against what was posted on the website showed discrepancies. The effort to clean up the public input data set and make it usable for the Commission took tremendous effort by the entire consulting team, but, even so, there were still shortcomings.

While the Commission officially reports receiving over 20,000 written comments,<sup>88</sup> the public input database we used for the statistics in this Article only has 12,425 records. Some of this discrepancy arises from the decision the CRC made to not have public comments coded after a certain date,<sup>89</sup> because the backlog was too high and because redacting, naming, and coding could not have been completed during the time the Commission had to construct its final maps. In the days before the Commission finalized the maps, there were up to 500 written submissions received daily by CRC staff. The commissioners nevertheless decided to read all submissions after the coding cut-off date in order to be able to take that input into consideration. It is also likely that Commission staff counted many duplicate submissions, which then factored into the total,<sup>90</sup> and possibly also

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87. See *Contact Page*, CAL. CITIZENS REDISTRICTING COMM'N, <http://wedrawthelines.ca.gov/contact.html> (last visited May 30, 2013).

88. For a summary of input collected, see CAL. CITIZENS REDISTRICTING COMM'N, FINAL REPORT ON 2011 REDISTRICTING 5 (Aug. 15, 2011), [http://wedrawthelines.ca.gov/downloads/meeting\\_handouts\\_082011/crc\\_20110815\\_2final\\_report.pdf](http://wedrawthelines.ca.gov/downloads/meeting_handouts_082011/crc_20110815_2final_report.pdf).

89. Input received by July 25 was coded and is part of the dataset analyzed.

90. For an example of duplicated records, see *Public Comments: May 2011*, CAL. CITIZENS REDISTRICTING COMM'N, <http://wedrawthelines.ca.gov/public-comments-may-2011.html> (last modified May 31, 2011) (containing two links to comments by user "Distasio"); see also Kathleen P. Distasio, *Public Comment to CRC—May 20th, 2011 Santa Rosa, CA*, CAL. CITIZENS REDISTRICTING

counted public input by speakers during hearings if it was accompanied by a written transcript of their testimony, as separate written public input.

A preliminary analysis of the 12,425 records analyzed shows that 7138 specifically address communities of interest. Many more imply COI but are not explicit. At least 4237 comments outlined economic COI and a minimum of 1792 addressed social COI.<sup>91</sup>

#### *A. Where Testimony Mattered*

Community of interest testimony affected the lines for all district types throughout California. The Commission took a district-by-district approach in creating its plans. For each district, commissioners would debate the testimony they had received and then build the district while complying with higher ranked criteria.<sup>92</sup> We can broadly classify the types of instances in which COI testimony mattered into several categories: affinities between neighboring communities, related population growth outside the boundaries of an incorporated city, discrepancies between neighborhoods and census designations, and interests not covered by data like ACS.

The first category, affinities between neighboring communities, is well illustrated by testimony received at the CRC's Santa Rosa hearing, which revealed that Marin County residents in large numbers did not want to share a district with San Francisco.<sup>93</sup> The summary of the public hearing comments reads: "Many Marin residents would like Marin County to be in a district with Sonoma County and include Santa Rosa if possible. . . ."<sup>94</sup> There were many written submissions that made the same points.<sup>95</sup> At subsequent hearings, speakers commented on the

COMM'N (May 22, 2011, 4:12 PM), available at [http://wedrawthelines.ca.gov/downloads/public-comments-201105/public\\_comment\\_8marin\\_20110522\\_distasio.pdf](http://wedrawthelines.ca.gov/downloads/public-comments-201105/public_comment_8marin_20110522_distasio.pdf).

91. This dataset has not been cleaned. Coding asked for a box to be checked for social or economic COI mentioned, but this was not always done. The actual numbers are likely much higher.

92. CAL. CITIZENS REDISTRICTING COMMISSION, *supra* note 88, at 7–25.

93. For video transcript of the Santa Rosa hearing, see, *Video Archive: May 20, 2011, Santa Rosa*, CAL. CITIZENS REDISTRICTING COMM'N, <http://wedrawthelines.ca.gov/video-archive-may-20-2011-santa-rosa.html>.

94. For a summary of public comments and a regional "wrap-up" document, see generally *Region VII, VIII Wrap-up*, CAL. CITIZENS REDISTRICTING COMM'N 2 (May 26, 2011), available at [http://wedrawthelines.ca.gov/downloads/meeting\\_handouts\\_may2011/handouts\\_20110527\\_q2\\_7\\_8.pdf](http://wedrawthelines.ca.gov/downloads/meeting_handouts_may2011/handouts_20110527_q2_7_8.pdf).

95. See, e.g., Joan Caviness, *Public Comment on Redistricting of the North Bay*, CAL. CITIZENS REDISTRICTING COMM'N (May 21, 2011, 11:04 PM), available at [http://wedrawthelines.ca.gov/downloads/public-comments-201105/public\\_comment\\_8marin\\_20110521\\_caviness.pdf](http://wedrawthelines.ca.gov/downloads/public-comments-201105/public_comment_8marin_20110521_caviness.pdf); Distasio, *supra* note 90; Kathleen Doyle & Charles Kiene, *Public Comment on Proposition 20*, CAL. CITIZENS REDISTRICTING COMM'N (May 22, 2011), available at [http://wedrawthelines.ca.gov/downloads/public-comments-201105/public\\_comment\\_8marin\\_20110522\\_joint.pdf](http://wedrawthelines.ca.gov/downloads/public-comments-201105/public_comment_8marin_20110522_joint.pdf); Comment from Wendy Friefeld, *Public Comment on Redistricting—Marin and Sonoma Counties*, CAL. CITIZENS REDISTRICTING COMM'N (May 22, 2011, 9:56 PM), available at [http://wedrawthelines.ca.gov/downloads/public-comments-201105/public\\_comment\\_8marin\\_20110522\\_friefeld.pdf](http://wedrawthelines.ca.gov/downloads/public-comments-201105/public_comment_8marin_20110522_friefeld.pdf); Nancy & Carleton Prince, *Public Comment on Marin and Sonoma Counties*, CAL. CITIZENS REDISTRICTING COMM'N (May 22, 2011 6:06

rural similarities of the areas, including the presence of dairy farming industries.<sup>96</sup> In their numerous written submissions, Marin residents suggested that the area's rural and suburban character fostered a family- and outdoor-oriented lifestyle that shared similar concerns about watersheds and the 101 freeway.<sup>97</sup> There was also written testimony about the similarities of the small cities of Petaluma and Cotati.<sup>98</sup>

The resulting assembly district is described by the Commission as follows in its final report:

AD 10 consists of the entire county of Marin and extends north to include communities in southern Sonoma County including part of Santa Rosa to achieve population equality. It keeps whole the sister cities of Petaluma, Cotati, and Sebastopol. This district is characterized by suburban and rural areas including a significant dairy industry.<sup>99</sup>

Another area in which COI testimony proved influential was in identifying spillover population that is located outside the boundaries of a city or county but shares a common interest with that jurisdiction. A good illustration of this is the population that surrounds the city of Santa Clarita. Map 1 shows population density in blue dots in and around Santa Clarita.

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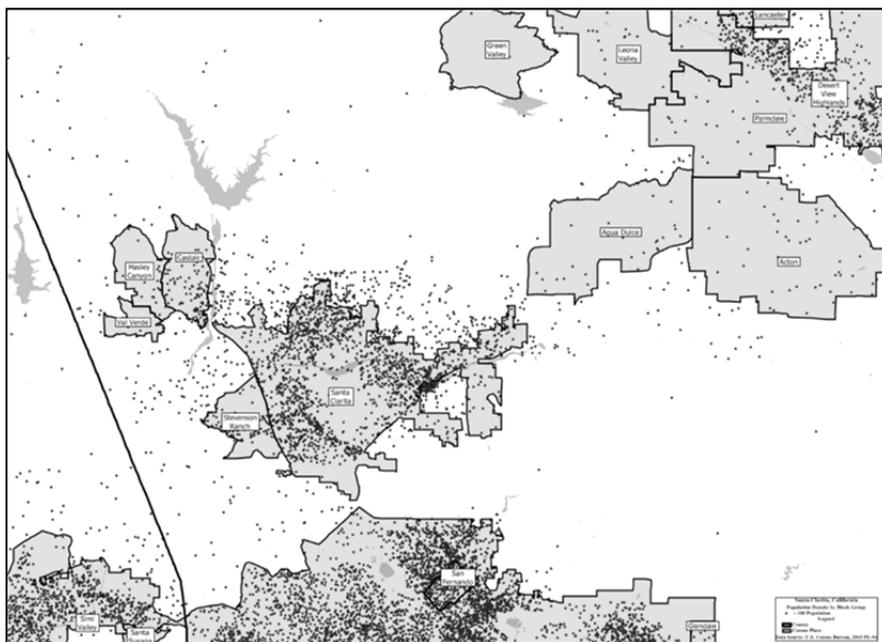
PM), available at [http://wedrawthelines.ca.gov/downloads/public-comments-201105/public\\_comment\\_8marin\\_20110522\\_prince.pdf](http://wedrawthelines.ca.gov/downloads/public-comments-201105/public_comment_8marin_20110522_prince.pdf); Barbara Rauberto, *Redistricting Comments*, CAL. CITIZENS REDISTRICTING COMM'N (May 22, 2011, 1:43 PM), available at [http://wedrawthelines.ca.gov/downloads/public-comments-201105/public\\_comment\\_8marin\\_20110522\\_rauber.pdf](http://wedrawthelines.ca.gov/downloads/public-comments-201105/public_comment_8marin_20110522_rauber.pdf).

96. See, e.g., *Video: Feed One from June 27, 2011 Public Input Hearing*, CAL. CITIZENS REDISTRICTING COMM'N, <http://wedrawthelines.ca.gov/video-archive-june-27-2011-san-francisco.html>.

97. See *supra* note 95 and accompanying text.

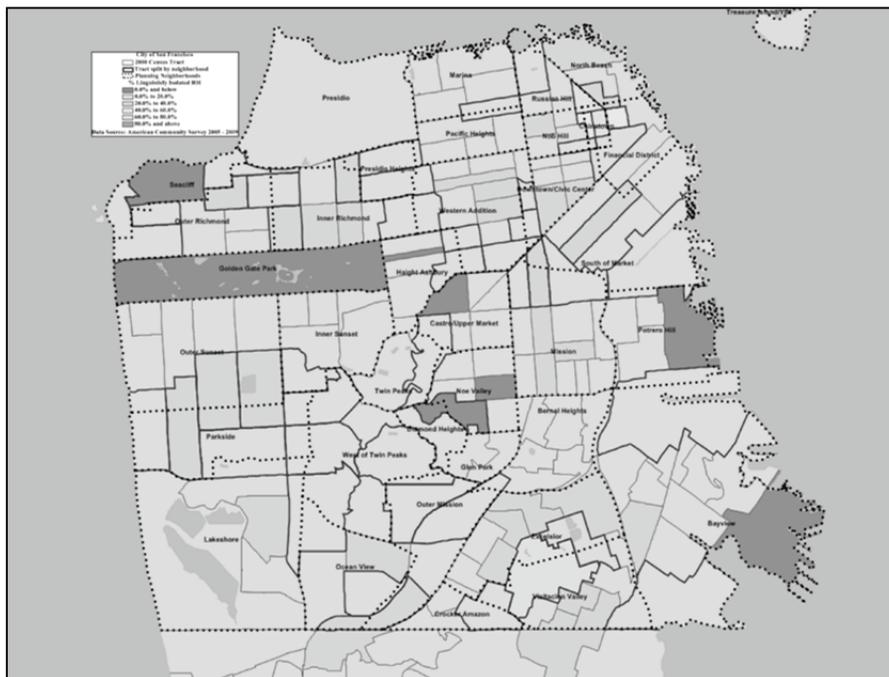
98. See Heidi Rhymes, *Public Comment: Redistricting for Petaluma*, CAL. CITIZENS REDISTRICTING COMM'N (May 22, 2011 6:20 PM), available at [http://wedrawthelines.ca.gov/downloads/public-comments-201105/public\\_comment\\_8sonoma\\_20110522\\_rhymes.pdf](http://wedrawthelines.ca.gov/downloads/public-comments-201105/public_comment_8sonoma_20110522_rhymes.pdf) (“Petaluma is far more a part of [Sonoma County] than of Marin . . .”).

99. CAL. CITIZENS REDISTRICTING COMM'N, *supra* note 88, at 29–30.

**Map 1: Population Density in Santa Clarita and Surrounding Area**

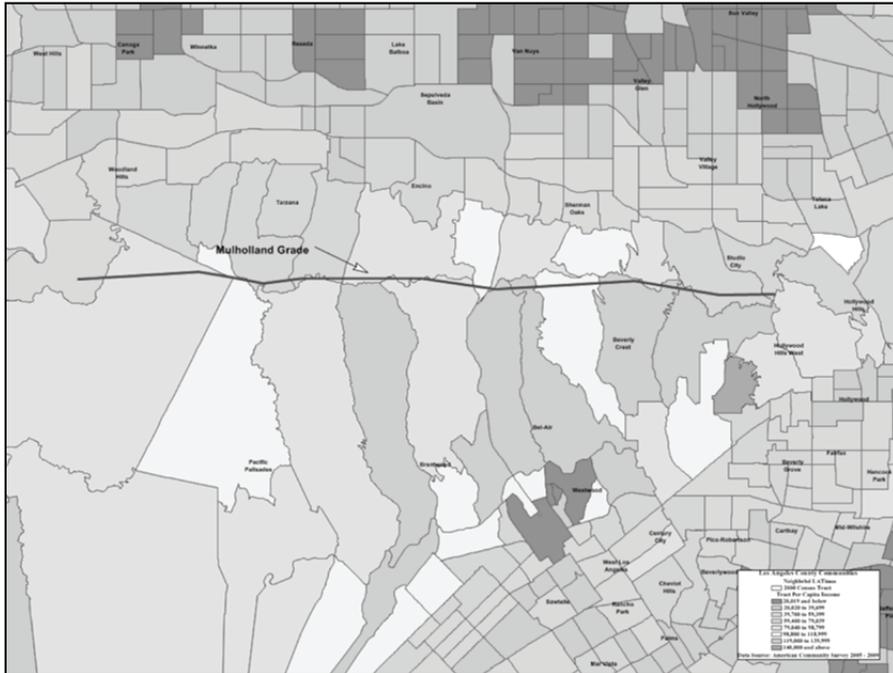
The city had a significant population density surrounding its official boundary, most notably along its northern and southeastern boundaries. At the Antelope Valley and San Fernando hearings, the Commission received testimony from Santa Clarita residents requesting the inclusion of these areas within a district with Santa Clarita. They testified that these unincorporated county residents attend the same schools, work and go to church in similar places, and shop in Santa Clarita. Moreover, they said it was very likely that the city would annex these areas in the near future. Testimony also indicated that there were new housing developments planned in unincorporated county adjacent to the city.

Another aspect of COI testimony is ascertaining where neighborhoods differ from census units. Clearly, if a neighborhood does not follow block group or tract lines, the census unit based information from the ACS will be mismatched with COI perceptions. Such was clearly the case in San Francisco, as shown in Map 2.

**Map 2:** Census Units and Neighborhood Divisions in San Francisco

Neighborhoods matter a lot in San Francisco's politics at almost every level. But at least forty-nine of San Francisco's 176 census tracts are split by the city's neighborhoods. Once again, a statistical procedure aggregating areas based on census tracts would not be able to capture those neighborhood units.

Finally, there are parts of California where the socioeconomic profile is either irrelevant or so invariant that ACS information is basically unhelpful. Map 3 shows the Hollywood-Beverly Hills and southern San Fernando Valley (Tarzana, Encino, Sherman Oaks, and Studio City) areas.

**Map 3:** Hollywood-Beverly Hills and Southern San Fernando Valley Areas

Judging from the map it is a consistently well-to-do area. But the CRC received overwhelming testimony regarding the distinction between communities and their interests in the San Fernando Valley as opposed to the Los Angeles Basin communities. The two COIs are geographically delineated by the Mulholland grade/Santa Monica Mountains. On the northern side of the grade is the San Fernando Valley and on the southern side of the grade is the Los Angeles Basin. According to the ACS data, communities on either side of the grade appear to be demographically and socially similar, but the testimony received by the Commission during their public input process characterized the Mulholland grade as the “Great Wall of China” between these Los Angeles regions. Additionally, the Commission received compelling testimony regarding the fire hazard in the Hollywood Hills on the Los Angeles Basin side of the grade that does not exist on the San Fernando Valley side. The fire hazard on the Los Angeles Basin side is due to the exposure to seasonal Santa Ana winds and does not exist to the same degree on the San Fernando Valley side of the grade. Due to the extensive issues around wildfire hazards, fire prevention, and fire services, the communities in the Hollywood Hills requested that they not be placed in an “over the hill” district with the San Fernando Valley given their need for a representative dedicated to assisting them with fire abatement and prevention issues.

*B. The Compatibility of Communities of Interest and Other Formal Criteria*

As discussed earlier, communities of interest share the fourth criterion in the California Constitution with cities, counties, cities and counties, and neighborhoods.<sup>100</sup> In the Commission's final report, criterion four is referred to as the "geographic integrity" criterion,<sup>101</sup> and all entities listed therein (cities, counties, COIs, etc.) were ostensibly given the same weight. However, the final report makes clear that when these geographic criteria were in conflict, the Commission tipped the balance on the side of the COIs.<sup>102</sup>

Compactness is the fifth ranked redistricting criterion in the California Constitution, below population equality, the VRA, contiguity, and geographic integrity of jurisdictions including communities of interest.<sup>103</sup>

Compactness is not as easily implemented as it would seem especially when the preservation of other geographies, such as city boundaries is a higher ranked criterion. Many California cities are anything but compact; they have strange shapes, non-city areas within the city, and frequently there are disconnected outlying areas that are part of the city, that have to be picked up in line drawing to unify the jurisdiction and that render the shape even less compact.<sup>104</sup> In early hearings, the Commission repeatedly heard from one of its voting rights attorneys about the importance of compactness, leaving commissioners with the clear impression that he prioritized compactness over the higher ranked criteria.<sup>105</sup> He linked compactness with contiguity, a higher ranked criterion, and diminished the importance of communities of interest.<sup>106</sup> A joint group of good-government organizations took issue with this view and urged the Commission to apply the criteria as they were defined and ranked by the constitution, not its attorneys.<sup>107</sup> A number of sharply worded letters were submitted to the CRC by groups including

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100. CAL. CONST. art. XXI, § 2(d)(4).

101. See CAL. CITIZENS REDISTRICTING COMM'N, *supra* note 88, at 23.

102. *Id.* at 24 ("When those same-level criteria were in conflict and could not be simultaneously satisfied, the Commission chose the configuration that best reflected the shared interests of the community.").

103. CAL. CONST. art. XXI § 2(d)(5).

104. See, for example, the city boundaries of Fresno and Bakersfield.

105. *Full Commission Business Meeting*, *supra* note 67, at 26 ("[I]f the districts [drawn by the CRC] . . . look compact and seem to comply with everything, there's not going to be much advantage to . . . trying to challenge the districts or hav[ing] a referendum . . ."); *Full Commission Line-Drawing Meeting, Volume II: Meeting Before the Cal. Citizens Redistricting Commission*, CAL. CITIZENS REDISTRICTING COMM'N 52 (June 7, 2011 1:23 PM), available at [http://wedrawthelines.ca.gov/downloads/transcripts/201106/transcripts\\_20110607\\_sacto\\_vol2.pdf](http://wedrawthelines.ca.gov/downloads/transcripts/201106/transcripts_20110607_sacto_vol2.pdf) [hereinafter *Full Commission Line-Drawing Meeting, Volume II*] ("[N]esting is a lower criteria than compactness.").

106. For a discussion about how compactness presents an issue for a district that is drawn to combine communities of interest, see *Full Commission Line-Drawing Meeting, Volume II*, *supra* note 105, at 21–22.

107. For testimony by Cressman about VRA attorneys' presentation about criteria and VRA attorneys' false ranking of criteria, see *Full Commission Line-Drawing Meeting, Volume I*, *supra* note 69, at 36–37.

those that were part of the collaborative coalition that drafted the initiative,<sup>108</sup> urging the Commission to follow the constitution and educating them about the VRA attorneys' misinterpretation of the criteria.<sup>109</sup>

After hearing repeatedly from these various groups and speakers about the problems with VRA counsel's guidance regarding the compactness requirement, the Commission concluded that the compactness criterion only had to be considered if it did not conflict with the higher ranked criteria.<sup>110</sup> Satisfying all the higher ranked criteria, especially criterion four in light of the voluminous public input, was a feat in and of itself; by the time compactness could have been considered, the lines were for the most part set in place so that little further modification was possible. However, the early guidance by VRA counsel did leave its mark on some of the districts in the end. In particular the Anaheim–Santa Ana senate district, about which there had been voluminous public testimony about the two cities constituting a community of interest.<sup>111</sup> The CRC was advised by its VRA attorney that it could not combine this community of interest because the City of Orange separated the two jurisdictions, and thus the lines would not be compact enough to constitute a community of interest.<sup>112</sup> In the end, the two

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108. Steven Reyes and Kathay Feng (Executive Director of Common Cause California), two of the authors of Proposition 11, wrote a letter to the CRC educating the Commission about errors in VRA counsel's presentation and materials regarding criteria ranking and application. Letter from Steven Reyes & Kathay Feng, Exec. Dir., Common Cause Cal., to Cal. Citizens Redistricting Comm'n 4, (June 2, 2011), available at [http://wedrawthelines.ca.gov/downloads/public-comments-201106/public\\_comment\\_20110602\\_4.pdf](http://wedrawthelines.ca.gov/downloads/public-comments-201106/public_comment_20110602_4.pdf) (discussing "contiguity" and "compactness").

109. A letter by the African American Redistricting Collaborative summarizes the previously submitted letters and notes the dates on which they were submitted or read into the public record. Letter from Afr. Am. Redistricting Collaborative to Cal. Citizens Redistricting Comm'n 2–3 (July 7, 2011), available at [http://wedrawthelines.ca.gov/downloads/meeting\\_handouts\\_072011/handouts\\_20110708\\_sacto.pdf](http://wedrawthelines.ca.gov/downloads/meeting_handouts_072011/handouts_20110708_sacto.pdf). Item 5 outlines the concern about the application of compactness with respect to the application of the Voting Rights Act. *Id.* at 3.

110. See CAL. CITIZENS REDISTRICTING COMM'N, *supra* note 88, at 24.

111. For examples of videotaped testimony, see speakers 10, 12, 18, 27, 31, and 55, among others, testifying in *Video Archive: May 6, 2011, Santa Ana Feed Six*, CAL. CITIZENS REDISTRICTING COMM'N, <http://wedrawthelines.ca.gov/video-archive-may-6-2011-santa-ana.html> (testifying about keeping Santa Ana and Anaheim together due to their COI).

112. Interestingly, the same attorney referenced past redistricting by the "Special Masters" frequently and held their maps up as an example that the Commission should strive to achieve. The Special Masters, however, created a combined Santa Ana and Anaheim district in 1991 by combining the two cities through Garden Grove explicitly to maximize the Latino population in the districts. The same architecture was maintained in the 2001 districts. For more information on Assembly District 69, see *Report and Recommendations of the Special Masters on Reapportionment*, BERKELEY INST. OF GOVERNMENTAL STUD. (Dec. 9, 1991), <http://igs-web.lscrttest.com/library/research/quickhelp/policy/redistricting/reapp90-report/final-V-A.html>. For a district map of Assembly District 69, see *Map of California Assembly District 69*, STATEWIDE DATABASE, <http://statewidedatabase.org/info/ad01maps/AD692001.jpg> (last visited May 30, 2013). For more information on Senate District 34, see *Report and Recommendations of the Special Masters on Reapportionment*, *supra*. For a district map of Senate District 34, see *Map of California Senate District 34*, STATEWIDE DATABASE, <http://statewidedatabase.org/info/sd01maps/SD342001.jpg> (last visited May 30, 2013). For information on Congressional District 46, see *Report and Recommendations of the Special Masters on Reapportionment*, *supra*. For a district

areas were combined in a VRA section 2 district for the assembly,<sup>113</sup> but they were split, for the most part, in the senate district.<sup>114</sup>

#### CONCLUSION

While we reject the idea that objective indicators, especially those derived from the ACS, are an adequate substitute for public testimony and we endorse the construction of COIs based on how residents perceive them, we leave open the possibility that creative and thoughtful quantitative data collection can supplement a redistricting effort. The problem is the time and expense of adding this task to the many others already on the shoulders of citizen commissions and their staff. It is a massive task to collect and organize the plans, COIs, suggestions, and objections the public submits. But if public participation is to mean anything, these submissions must be taken seriously. This is by far the most important challenge for the next round of citizen redistricting. Perhaps, the collection of relevant data can be crowdsourced, or the onus be placed on those who testify to present more evidence for their arguments. But we see little or no value in using outdated and incomplete census tract data to create so-called territorial communities as a substitute for real COIs.

The temptation to eliminate the political balancing of different interests by formula or computational methods does not eliminate the political decision: it simply pre-decides it by the assumptions of the measures. And to make any one criterion—competitiveness, seat-votes symmetry, or territorial community—the primary baseline for drawing lines simply fetishizes useful measures and creates arbitrary standards. It does not eliminate political judgment; it imposes it. If that is what a community wants to do, then so be it. But it should not be something that the courts do to the community in the name of political impartiality.

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map of Congressional District 46, see *Map of California State Congressional District 46*, STATEWIDE DATABASE, <http://statewidedatabase.org/info/cd01maps/CD462001.jpg> (last visited May 30, 2013).

113. For a description of Assembly District 69, see CAL. CITIZENS REDISTRICTING COMM'N, *supra* note 88, at 40.

114. *Id.* at 50.

Appendix:

**Map A:** County Boundaries of Contra Costa and Alameda Along the El Cerrito (Contra Costa County) and Albany (Alameda County) Borders, City and Boundary Lines of Emeryville and Berkeley Along the Oakland Border

