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## Communities of Interest in Colorado Redistricting

David Willner

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# COMMUNITIES OF INTEREST IN COLORADO REDISTRICTING

David Willner\*

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## INTRODUCTION

Every ten years, states redraw their congressional district boundaries following the results of the U.S. Census. This important process determines the boundaries of districts that will be represented in Congress. As a result, district boundaries selected through the redistricting process can directly impact future congressional elections and the subsequent representation of citizens' concerns in Congress. If districts are drawn to favor one political party over another, certain sections of the population may see their political power diminished and thus be less fairly represented in Congress. For that reason, the foundational goal of congressional redistricting should be fair and effective representation of all citizens.<sup>1</sup> In pursuit of that goal, states and courts have developed criteria to assist in drawing and evaluating fair congressional districts. The preservation of communities of interest is one such criterion embodied in Colorado law.<sup>2</sup>

Traditionally, communities of interest in Colorado have been defined as "distinctive units which share common concerns with respect to one or more identifiable features such as geography, demography, ethnicity, culture, socio-economic status, or trade."<sup>3</sup> In 2018, Colorado voters passed a ballot initiative that widely expanded the definition of communities of interest. Communities of interest may now encompass "any group" that "shares one or more substantial interests that may be the subject of federal legislative action."<sup>4</sup>

Although Colorado voters have embraced an expanded definition of communities of interest and mandated its use among several other redistricting criteria, future independent redistricting commissions should be wary of relying too heavily on the criterion. For reasons explained in this Article, of all the redistricting criteria historically used in Colorado and included in the Colorado Constitution, the communities of interest criterion presents the gravest threat to ensuring that redistricting is conducted in a fair and nonpartisan manner.

The communities of interest criterion has been regularly criticized for its vagueness and lack of a definable standard. In

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1. *Carstens v. Lamm*, 543 F. Supp. 68, 79 (D. Colo. 1982) (citing *Reynolds v. Sims*, 377 U.S. 533, 565–66 (1964)).

2. COLO. CONST. art. V, § 44(3)(b).

3. *Carstens*, 543 F. Supp. at 91.

4. COLO. CONST. art. V, § 44(3)(b).

the legislative apportionment setting (that is, redistricting of the state legislature), Colorado courts have made it clear that communities of interest should be given less consideration than other criteria such as compactness, contiguity, and respect for political subdivisions.<sup>5</sup> Courts in other states have likewise recognized the troublesome nature of such a broad redistricting criterion. For example, Maryland's highest court noted that using communities of interest in redistricting is particularly problematic because "the number of such communities is virtually unlimited and no reasonable standard could possibly be devised to afford them recognition in the formulation of districts."<sup>6</sup> The Brennan Center for Justice has remarked that "defining particular communities of interest can be notoriously fuzzy, because shared interests may be either vague or specific, and because people both move locations and change their interests over time."<sup>7</sup> Other critics have decried communities of interest as the "most ephemeral" of all the redistricting criteria.<sup>8</sup> Subjective criteria are particularly problematic in the redistricting context because they leave mapmaking bodies susceptible to manipulation by political groups. Lacking any meaningful constraints on what

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5. See, e.g., *In re* Reapportionment of the Colo. Gen. Assembly, 647 P.2d 191, 194 (Colo. 1982) ("[M]aintenance of communities of interest is the least weighty of the [reapportionment] requirements . . ."); *id.* at 206 (Lohr, J., concurring) (noting that the Colorado Reapportionment Commission's argument "reflects an impermissible preference for maintenance of perceived communities of interest over the constitutionally preferred value of maintaining counties whole"); *In re* Reapportionment of the Colo. Gen. Assembly, 647 P.2d 209, 210–11 (Colo. 1982) (explaining that the communities of interest criterion is the least important in the hierarchy of criteria for measuring the adequacy of a reapportionment plan under the Colorado Constitution); *In re* Reapportionment of the Colo. Gen. Assembly, 828 P.2d 185, 194 (Colo. 1992) ("The least weighty constitutional consideration is the preservation wherever possible of communities of interest, including ethnic, cultural, economic, trade area, geographic, and demographic factors.") (internal citations omitted); *In re* Reapportionment of the Colo. Gen. Assembly, 828 P.2d 213, 217 (Colo. 1992) (Quinn, J., dissenting) ("It is undisputed that the most important constitutional requirement under Article V, section 47 of the Colorado Constitution is equality of population. Next in order of importance is compactness, and last is the preservation of the communities of interest.") (internal citations omitted); *In re* Reapportionment of the Colo. Gen. Assembly, 332 P.3d 108, 111 (Colo. 2011) ("The remaining criteria, compactness and preservation of communities of interest, are subordinate to compliance with section 47(2).").

6. *Matter of Legislative Districting of State*, 475 A.2d 428, 445 (Md. 1984).

7. Justin Levitt, *A Citizen's Guide to Redistricting*, BRENNAN CTR. FOR JUST., 1, 56 (Nov. 29, 2010).

8. Thomas L. Brunell, *Rethinking Redistricting: How Drawing Uncompetitive Districts Eliminates Gerrymanders, Enhances Representation, and Improves Attitudes Toward Congress*, 39 PS: POL. SCI. & POLS. 77, 79 (2006).

constitutes a community of interest, incumbents and political strategists can visualize how a district should be drawn to best suit their political goals and then identify an issue that unites people within those boundaries and call it a community of interest.<sup>9</sup>

Despite its inherent danger to the political independence of the redistricting process, courts have increasingly used the communities of interest criterion to resolve congressional redistricting cases in Colorado, particularly during the most recent redistricting cycle in 2011.<sup>10</sup> In its 2011 decision selecting a redistricting map, the Denver District Court went so far as to declare that “no factor is more important than a district’s communities of interest.”<sup>11</sup> The increased reliance by courts on the communities of interest criterion is antithetical to the recent goal of Colorado voters to make congressional districting more independent because the criterion allows for political interests to infiltrate the redistricting process. Voters made it clear when they passed Amendment Y in 2018 that they do not want self-interested legislators or unelected judges deciding how the state’s congressional districts should be drawn.<sup>12</sup> The amendment established an independent commission for congressional redistricting in the hopes that future redistricting would lead to fairer and more effective representation.<sup>13</sup>

The communities of interest criterion is a threat to that goal. Future independent redistricting commissions in Colorado should be skeptical of recognizing new communities of interest because the criterion is prone to abuse due to its lack of a definable standard, inherent subjectivity, vulnerability to political

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9. For instance, during the 2011 Colorado redistricting trial, Democrats argued that pine beetle infestation was one of several communities of interest that justified moving the more conservative Larimer County within the same congressional district as the more liberal Boulder County. See Peter Marcus, *Redistricting Trial Underway in Denver*, COLO. POLITICS (Oct. 17, 2011), [https://www.coloradopolitics.com/news/redistricting-trial-underway-in-denver/article\\_241b94dd-9c21-5cce-839c-5ad31b2b9ef1.html](https://www.coloradopolitics.com/news/redistricting-trial-underway-in-denver/article_241b94dd-9c21-5cce-839c-5ad31b2b9ef1.html) [<https://perma.cc/KGA5-7L5H>] (“Much of the ensuing witness testimony over the course of the week focused on . . . whether pine beetle infestation in the mountains can be considered an interest needing common congressional representation.”).

10. See *Moreno v. Gessler*, No. 11CV3461, 2011 WL 8614878 (Denver Dist. Ct. Nov. 10, 2011).

11. *Id.* at \*21.

12. Amendment Y, L. 2018, at 3082–94 (amending COLO CONST. art. V, § 44).

13. COLO. GEN. ASSEMBLY, AMENDMENT Y PACKET: FINAL DRAFT (2018), [https://leg.colorado.gov/sites/default/files/initiative%2520referendum\\_final%20draft%20packet%20-%20amendment%20y.pdf](https://leg.colorado.gov/sites/default/files/initiative%2520referendum_final%20draft%20packet%20-%20amendment%20y.pdf) [<https://perma.cc/R357-FVD8>].

manipulation, and potential for disrupting the stability of an electorate.

Part I of this Article will provide background on redistricting in Colorado, including an overview of recent developments regarding the establishment of an independent commission. Part II will describe the two federal constitutional requirements for redistricting and then explore the state-specific redistricting criteria used in Colorado. Part III includes a geographic profile of the distinct regions of Colorado and then delves into an examination of how communities of interest have been increasingly used in Colorado redistricting during three of the past four redistricting cycles. Part IV of this Article will critique the use of communities of interest and focus on the arbitrariness inherent in such a vague criterion, the potential for political manipulation of the process of identifying communities of interest, how certain federal interests may be better represented by multiple members of Congress, and how stability should be encouraged in redistricting. This Article will ultimately conclude that the recently established independent commission should avoid recognizing newfound communities of interest due to the redistricting criterion's subjectivity and malleability and should instead seek to preserve only well-established communities of interest in Colorado to the extent required by the Colorado Constitution.

## I. REDISTRICTING OVERVIEW

Redistricting is the process of redrawing United States congressional district boundaries to reflect growth patterns and population shifts within a state. In Colorado and many other states, state legislatures have historically been responsible for redrawing congressional district boundaries every ten years to reflect population changes documented by the Census.<sup>14</sup> The process traditionally consists of the state legislature passing a bill describing the new congressional boundaries.<sup>15</sup> In Colorado, the General Assembly typically solicits input from the public

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14. *Who Draws the Maps? Legislative and Congressional Redistricting*, BRENNAN CTR. FOR JUST. (Jan. 30, 2019), <https://www.brennancenter.org/our-work/research-reports/who-draws-maps-legislative-and-congressional-redistricting> [<https://perma.cc/FZW7-HG6B>].

15. See *Carstens v. Lamm*, 543 F. Supp. 68, 71 (D. Colo. 1982); *Avalos v. Davidson*, No. 01-CV-2897, 2002 WL 1895406, at \*1 (Denver Dist. Ct. Jan. 25, 2002).

through hearings held across the state. For instance, in 2011, the General Assembly commissioned the Joint Select Committee on Redistricting and tasked the Committee with evaluating proposed maps for redistricting, soliciting public feedback on the redistricting process, and making recommendations to the General Assembly about which maps best complied with the redistricting criteria.<sup>16</sup>

Throughout Colorado's history, the General Assembly has repeatedly failed to comply with its duty to redistrict.<sup>17</sup> Redistricting efforts are often stalled by political disagreements, both between political parties and within them. The failure of the General Assembly to agree upon a redistricting plan typically results in intervention by the courts. In three of the past four redistricting cycles (1981, 2001, and 2011), Colorado courts have inherited the burden of selecting or drawing an appropriate redistricting plan—a tedious process where a court must choose a map that strictly complies with federal constitutional requirements and best balances state-specific criteria.<sup>18</sup> In 1982, the federal district court in Colorado made the extraordinary decision to draw its own redistricting map after concluding that none of the submitted plans satisfied the requisite criteria for ensuring fair and effective representation.<sup>19</sup>

In 2018, Colorado voters overwhelmingly approved a ballot initiative that changed the landscape of Colorado redistricting.<sup>20</sup>

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16. Colo. Legis. Council Staff, *A Citizen's Guide to Congressional Redistricting* (Feb. 28, 2011), <https://www.colorado.gov/pacific/sites/default/files/BrochureCongressional.pdf> [<https://perma.cc/FFK3-UGCU>].

17. In 2003, the Colorado Supreme Court described how frequently the General Assembly has failed to agree upon a redistricting plan: “[Since 1876] the legislature ha[s] only redistricted six times when it should have done so thirteen times. The legislature has been so reluctant to draw new districts that it allowed at-large elections for newly created seats in 1902–1912. And it did not act at all during the four decades between 1921 and 1964. This reluctance to redistrict is even more significant in light of the fact that state political control has changed hands many times over the years. Since 1915, when the Colorado session laws began listing the party affiliation for the state legislators, political control of the General Assembly and governorship has been in the hands of a single political party quite often. The state was entirely in Republican hands in 1915–16, 1921–22, 1925–26, 1943–46, 1951–54, 1963–64, 1967–74, 1999–2000, and 2003. And Colorado was controlled by Democrats in 1917–18, 1933–38, and 1957–62. Yet [between] 1915 [and 2003], the General Assembly only redistricted four times: 1921, 1964, 1971, and 1992.” *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1239–40 (Colo. 2003).

18. See *infra* Section III.B.

19. *Carstens*, 543 F. Supp. at 79.

20. Colo. Sec'y of State, *2018 General Election Results*, <https://www.sos.state.co.us/pubs/elections/Results/Abstract/2018/general/amendProp>.

Amendment Y established an independent commission responsible for drawing the boundaries for U.S. congressional districts within the state.<sup>21</sup> The commission will be composed of twelve citizens, divided evenly among the two largest political parties in the state and unaffiliated voters.<sup>22</sup> Members of the independent commission will be selected by a panel of retired judges after being filtered through a lottery system.<sup>23</sup> There is no requirement that the commissioners be familiar with the redistricting process, though they must be registered electors who voted in the previous two general elections in Colorado.<sup>24</sup>

Amendment Y was passed with the following express purpose:

[To create an] inclusive and meaningful congressional redistricting process that provides the public with the ability to be heard as redistricting maps are drawn, to be able to watch the witnesses who deliver testimony and the redistricting commission's deliberations, and to have their written comments considered before any proposed map is voted upon by the commission as the final map.<sup>25</sup>

To support that purpose, the independent commission will organize hearings to provide opportunities for public comment. These hearings will serve an integral role in the new redistricting structure, and the commission must be fully transparent throughout the process.<sup>26</sup>

By placing mapmaking responsibilities fully within the hands of an independent commission, Amendment Y effectively removed Colorado courts from the redistricting process. Although the Colorado Supreme Court is constitutionally required to review the final redistricting plan and ensure that the process and criteria mandated by the Colorado Constitution were properly followed, the court does not have the power to make

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html [<https://perma.cc/AK22-QYZF>].

21. COLO. CONST. art. V, §§ 44, 46. Amendment Z, passed alongside Amendment Y, created a separate independent commission responsible for redistricting the state legislature.

22. *Id.* § 44.1.

23. *Id.* § 44.1(5)–(8).

24. *Id.* § 44.1.

25. *Id.* § 44(1)(f).

26. *Id.* § 44.4.



changes to the submitted map.<sup>27</sup> If the supreme court concludes that the submitted plan “constitutes an abuse of discretion in applying or failing to apply the [constitutional] criteria,” the supreme court is required to return the plan to the commission with its reasons for disapproval.<sup>28</sup>

Prior to the passage of Amendment Y, supporters of the amendment made it clear that they believed that the establishment of an independent commission will remove politics and partisanship from the redistricting process.<sup>29</sup> The Amendment bars politicians and lobbyists from serving on the independent commission, and approval of the final map requires a supermajority vote of the commission, including at least two commissioners unaffiliated with any political party.<sup>30</sup>

Furthermore, supporters claimed that the Amendment will make the redistricting process more transparent and provide greater opportunity for public participation.<sup>31</sup> Under the new structure, supporters argued that all Coloradans will be able to engage in the process because the commission must conduct public hearings throughout the state. Supporters further contended that requiring the redistricting process to occur in public will allow Coloradans to see and understand exactly how their districts are drawn.<sup>32</sup>

Opponents of the amendment countered that deferring responsibility for redistricting to unelected commissioners who do not have to answer to Colorado voters will take accountability out of the process.<sup>33</sup> Furthermore, although removing politically experienced people from the process helps to promote greater independence and less partisanship, it could also take away the people with arguably the greatest knowledge of the communities of interest within a jurisdiction.<sup>34</sup> If the commission ends up

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27. *Id.* § 44.5(1).

28. *Id.* § 44.5(3).

29. Colo. Pub. Radio Staff, *Colorado Amendments Y & Z, Independent Panels for Redistricting, Have Passed*, CPR NEWS (Nov. 7, 2018), <https://www.cpr.org/2018/11/07/colorado-amendments-y-z-independent-panels-for-redistricting-have-passed/> [<https://perma.cc/KXX5-6FCZ>].

30. COLO. GEN. ASSEMBLY, *supra* note 13.

31. *Id.* at 4.

32. *Id.*

33. *Id.* at 5.

34. Stephen J. Malone, *Recognizing Communities of Interest in a Legislative Apportionment Plan*, 83 VA. L. REV. 461, 478 (1997) (“Elected representatives often have lived in the community for years and have spent years campaigning for the

including people with no relevant experience or a lack of familiarity with the diversity of interests spanning across Colorado, the end result could be a map with arbitrary or haphazardly drawn boundaries.

Regardless of whether the legislature or an independent commission is responsible for drawing new district boundaries, decisions about how to assess and weigh the various redistricting criteria will significantly influence the mapmaking process and be the driving force behind the ultimate determination of district boundaries. The following Part provides a discussion of the federal constitutional redistricting criteria and the state-specific criteria currently used in Colorado.

## II. REDISTRICTING CRITERIA

### A. *Federal Constitutional Redistricting Requirements*

For much of American history, states have been free to draw their U.S. congressional districts however they want without the looming threat that their redistricting plans might be declared unconstitutional by the federal courts.<sup>35</sup> The Elections Clause of the Constitution expressly grants states the power to determine the time, place, and manner of congressional elections, subject to limitations imposed by Congress.<sup>36</sup> The Supreme Court has, therefore, historically set aside election issues as questions that only the states or Congress can resolve.<sup>37</sup>

With no federal redistricting standards or threat of enforcement, many states historically chose to not redistrict at all.<sup>38</sup> Over time, this abstention led to extremely disproportionate

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support of various groups. As a result, most representatives recognize and understand the constituencies and interests within their districts.”).

35. *Evenwel v. Abbott*, 136 S. Ct. 1120, 1123 (2016) (“This Court long resisted any role in overseeing the process by which States draw legislative districts.”); *Rucho v. Common Cause*, 139 S. Ct. 2484, 2496 (2019) (“Early on, doubts were raised about the competence of the federal courts to resolve those questions.”).

36. U.S. CONST. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”).

37. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

38. *Evenwel*, 136 S. Ct. at 1123 (“Judicial abstention left pervasive malapportionment unchecked.”).

districts as populations grew and shifted.<sup>39</sup> For example, Colorado's General Assembly did not modify or draw any new congressional districts between 1921 and 1964.<sup>40</sup> As a result, Colorado's four congressional districts in 1964 ranged in population from 195,551 to 653,954, which meant that one person's vote in the smallest district was worth over three times the vote of someone in the largest district.<sup>41</sup>

In addition to disproportionality, the absence of redistricting standards also historically fostered unabashed gerrymandering.<sup>42</sup> Gerrymandering is the practice of manipulating the boundaries of a district so as to favor one party over another. Egregious acts of gerrymandering can be readily found in any era of American history,<sup>43</sup> including the present day.<sup>44</sup> Nevertheless, the Supreme Court recently reaffirmed its longstanding precedent that "partisan gerrymandering claims present political questions beyond the reach of the federal courts."<sup>45</sup> Part of the Court's justification was the lack of a "judicially discernible and manageable standard" for evaluating partisan gerrymandering claims.<sup>46</sup> The federal judiciary will only weigh in on gerrymandering claims when a standard exists that is grounded in a "limited and precise rationale" and is "clear, manageable, and politically neutral."<sup>47</sup>

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39. *Id.* ("In the opening half of the 20th century, there was a massive population shift away from rural areas and toward suburban and urban communities. Nevertheless, many States ran elections into the early 1960's based on maps drawn to equalize each district's population as it was composed around 1900. Other States used maps allocating a certain number of legislators to each county regardless of its population. These schemes left many rural districts significantly underpopulated in comparison with urban and suburban districts. But rural legislators who benefited from malapportionment had scant incentive to adopt new maps that might put them out of office.")

40. *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1233 (Colo. 2003).

41. *Id.*

42. *See Vieth v. Jubelirer*, 541 U.S. 267, 274–77 (2004) (providing historical examples of gerrymandering in early American history).

43. *See id.* The term itself derives from Massachusetts Governor Elbridge Gerry's infamous approval of an 1812 redistricting plan that drew one district in an irregular shape resembling a salamander. Erick Trickey, *Where Did the Term "Gerrymander" Come From?*, SMITHSONIAN MAG. (July 20, 2017), <https://www.smithsonianmag.com/history/where-did-term-gerrymander-come-180964118/> [https://perma.cc/RB36-66EA].

44. *See, e.g., Rucho v. Common Cause*, 139 S. Ct. 2484, 2491 (2019).

45. *Id.* at 2506.

46. *Vieth*, 541 U.S. at 306.

47. *Rucho*, 139 S. Ct. at 2498 (citing *Vieth*, 541 U.S. at 306–08).

Although federal courts generally decline to decide redistricting cases on the merits under the belief that such issues are better left to the political branches or the states, two federal constitutional redistricting criteria have emerged under the Supreme Court's equal protection jurisprudence. The Court has determined that federal courts may intervene in redistricting cases when states either violate the one-person, one-vote principle embedded in the Constitution or draw districts in a way that dilutes the voting strength of racial minorities.<sup>48</sup>

### 1. One Person, One Vote

In a series of landmark cases during the early 1960s, Chief Justice Earl Warren and the Supreme Court cemented the principle of "one person, one vote" as a constitutional requirement for redistricting and reapportionment under the Equal Protection Clause of the Fourteenth Amendment.

In the first case of the series, *Wesberry v. Sanders*, the Supreme Court held that the constitutionality of congressional districts was a question that could be decided by the courts.<sup>49</sup> In that case, the Court struck down a Georgia redistricting plan as unconstitutional due to the severe population imbalance among the districts.<sup>50</sup> The Court held that the command of Article I, Section 2 of the Constitution that representatives be chosen "by the People of the several States" means that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."<sup>51</sup>

Shortly after *Wesberry* was decided, the Supreme Court fully established the one-person, one-vote principle in *Reynolds v. Sims*.<sup>52</sup> In *Reynolds*, the Supreme Court struck down unequally populated state legislative districts in Alabama (and, in a companion case decided on the same day, the Court also struck down legislative districts in Colorado, among other states) as violative of the Equal Protection Clause.<sup>53</sup> The Court held that

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48. *Id.* at 2495–96 (citing *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Shaw v. Reno*, 509 U.S. 630 (1993)).

49. *Wesberry*, 376 U.S. at 6.

50. *Id.* at 2, 7–8 ("[T]his inequality of population means that the Fifth District's Congressman has to represent from two to three times as many people as do Congressmen from some of the other Georgia districts.")

51. *Id.* (emphasis added).

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

53. *Id.* at 578–79.

state legislative districts must be drawn such that they are “substantially equal in population.”<sup>54</sup> “The overriding objective,” Chief Justice Warren’s majority opinion said, “must be substantial equality among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the state.”<sup>55</sup> This principle of equality of population in redistricting was thereafter known as “one person, one vote.”<sup>56</sup>

Although the Supreme Court has asserted that the one-person, one-vote principle is “relatively easy to administer as a matter of math,”<sup>57</sup> voters have routinely challenged state methods for implementing the requirement.<sup>58</sup> Additionally, while “states must draw congressional districts with populations as close to perfect equality as possible,”<sup>59</sup> the Supreme Court has permitted jurisdictions to deviate from perfect population equality to accommodate other redistricting criteria such as preserving the integrity of political subdivisions, maintaining communities of interest, and creating geographic compactness.<sup>60</sup> The Court has even held that population deviations of up to 10 percent presumptively comply with the one-person, one-vote rule for state legislature reapportionment.<sup>61</sup>

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54. *Id.* at 567 n.44.

55. *Id.* at 579.

56. Chief Justice Warren reasoned in *Reynolds* that “[l]egislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.” *Id.* at 562.

57. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2501 (2019).

58. For example, in *Evenwel v. Abbott*, 136 S. Ct. 1120, 1123 (2016), Texas voter-plaintiffs challenged Texas’s method for apportioning state senate districts based on total population. The plaintiffs argued that using total population violated the Equal Protection Clause by discriminating against voters in districts with low immigrant populations by giving voters in districts with significant immigrant populations a disproportionately weighted vote. Instead of total population, the plaintiffs argued that Texas should use the registered voter population to comply with the one-person, one-vote principle. A unanimous Supreme Court rejected this argument and held that total population is a permissible, but not exclusive, metric for calculating compliance with the one-person, one-vote mandate.

59. *Id.* at 1124 (citing *Kirkpatrick v. Preisler*, 394 U.S. 526, 530–31 (1969)).

60. *Id.* (citing *Brown v. Thomson*, 462 U.S. 835, 842–43 (1983)).

61. *Id.* (citing *Mahan v. Howell*, 410 U.S. 315, 329 (1973) (approving a state legislative map with a population deviation of 16% to accommodate the state’s interest in “maintaining the integrity of political subdivision lines,” but cautioning that this deviation “may well approach tolerable limits”)).

## 2. Non-Dilution of Minority Voting Strength

In addition to satisfying the one-person, one-vote principle, states must conduct redistricting in compliance with the Voting Rights Act of 1965 (“VRA”), which expressly prohibits drawing districts in a manner that dilutes the votes of racial minorities.<sup>62</sup> In 1982, Congress amended Section 2 to make it clear that evidence of discriminatory intent by redistricting bodies is not required to show a violation of the VRA.<sup>63</sup> Rather, discriminatory effect alone can be sufficient to prove a violation. In *Thornburg v. Gingles*, the Supreme Court held that, under Section 2 of the VRA, states may not employ an electoral practice or structure that results in members of a protected group having less opportunity than other members of the electorate to participate in the election process.<sup>64</sup> In *Thornburg*, the Supreme Court struck down a North Carolina redistricting plan that apportioned “politically cohesive groups of black voters” into districts where blocs of white voters would always be able to defeat candidates presumably preferred by groups of black voters.<sup>65</sup> Because the redistricting plan had the discriminatory effect of diluting the votes of black citizens, the Court held that North Carolina violated the VRA.<sup>66</sup>

States may also violate the Equal Protection Clause of the Fourteenth Amendment when they draw districts based on the stereotypical idea that minority groups in different geographic areas should be joined together in the same district because they supposedly share the same interests.<sup>67</sup> In *Shaw v. Reno*, the Supreme Court once again struck down a North Carolina redistricting plan because the map was “so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the

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62. 42 U.S.C. § 1973.

63. *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986) (citing S. Rep. No. 97-417, at 28 (1982)).

64. *Id.* at 63.

65. *Id.* at 80.

66. *Id.*

67. *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (“A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin . . . 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.”).

racess for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification.”<sup>68</sup>

To determine whether particular district boundaries are drawn based on race, federal courts rely on a “predominant intent” inquiry.<sup>69</sup> If a court determines that race was the state’s dominant and controlling rationale in drawing district lines, then the court will apply strict scrutiny because “race-based decisionmaking is inherently suspect.”<sup>70</sup> Under strict scrutiny, a race-based redistricting plan can only be sustained if it is narrowly tailored to achieve a compelling state interest,<sup>71</sup> a requirement that is difficult to satisfy.<sup>72</sup>

### *B. State-Specific Redistricting Criteria*

Beyond the federal requirements of one person, one vote and compliance with the VRA, states are free to develop their own criteria to aid in the redrawing of congressional districts. Colorado’s state constitutional guidance for redistricting was last amended via Amendment Y in 2018.<sup>73</sup> The amendment lays out the following criteria that the independent redistricting commission must follow when drawing congressional district boundaries:

(1) In adopting a congressional redistricting plan, the commission shall:

(a) Make a good-faith effort to achieve precise mathematical population equality between districts, justifying each variance, no matter how small, as required by the Constitution of the United States. Districts must be composed of contiguous geographic areas;

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68. *Id.* at 642.

69. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2502 (2019) (citing *Miller v. Johnson*, 515 U.S. 900, 916 (1995)).

70. *Id.*

71. *Id.* at 920–22.

72. *See, e.g., Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 279 (2015); *Navajo Nation v. San Juan Cty.*, 929 F.3d 1270, 1282 (10th Cir. 2019).

73. Amendment Y, L. 2018, at 3082–94 (amending COLO. CONST. art. V, § 44).

(b) Comply with the federal “Voting Rights Act of 1965”, 52 U.S.C. sec. 50301, as amended.

(2) (a) As much as is reasonably possible, the commission’s plan must preserve whole communities of interest and whole political subdivisions, such as counties, cities, and towns.

(b) Districts must be as compact as is reasonably possible.

(3) (a) Thereafter, the commission shall, to the extent possible, maximize the number of politically competitive districts.

The Colorado Constitution does not say how much weight should be given to each criterion. Only contiguity is mandated—the other criteria must be considered “[a]s much as is reasonably possible” or “to the extent possible.”<sup>74</sup>

### 1. Contiguity

As early as the Apportionment Act of 1842, Congress stated its desire for congressional districts to be composed of “contiguous territory.”<sup>75</sup> Contiguity, which in the Colorado Constitution is included in the section requiring compliance with the one-person, one-vote rule,<sup>76</sup> requires that “no part of one district be completely separated from any other part of the same district.”<sup>77</sup> Though not a federal constitutional requirement, the contiguity requirement has been incorporated into redistricting criteria by most states.<sup>78</sup>

Contiguity and other traditional redistricting criteria, such as compactness and respect for political subdivisions, have long

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74. COLO. CONST. art. V, § 44.3(2)–(3)(a).

75. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2495 (2019).

76. COLO. CONST. art. V, § 44.3(1)(a).

77. *Carstens v. Lamm*, 543 F. Supp. 68, 88 (D. Colo. 1982) (internal citation omitted).

78. “Contiguity is the most common rule imposed by the states: by state constitution, statute, or guideline, 49 states require at least one chamber’s state legislative districts to be contiguous. 23 states have similarly declared that their congressional districts will be contiguous. (The smaller number reflects the fact that few states have any express legal constraints on congressional districting. In practice, the vast majority of congressional districts . . . will be drawn to be contiguous.)” Justin Levitt, *All About Redistricting*, LOYOLA L. SCH., <http://redistricting.lls.edu/where-state.php#contiguity> (last visited Feb. 5, 2020) [<https://perma.cc/Q59K-ZLD2>].



been considered important not because they are required by the U.S. Constitution<sup>79</sup> but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered—typically along racial lines.<sup>80</sup> Redistricting plans designed to favor a specific political party will often discount these objective redistricting criteria, which explains why such plans often lead to irregularly shaped districts. As Justice Stevens described, “One need not use Justice Stewart’s classic definition of obscenity—‘I know it when I see it’—as an ultimate standard for judging the constitutionality of a gerrymander to recognize that dramatically irregular shapes may have sufficient probative force to call for an explanation.”<sup>81</sup>

## 2. Preserve Whole Political Subdivisions

Like contiguity, the preservation of political subdivisions, which includes counties, cities, and towns, is also considered to be a relatively objective criterion because it follows the existing boundaries of designated political areas. The preservation of political boundaries is critical in redistricting because “the sense of community derived from established governmental units tends to foster effective representation.”<sup>82</sup>

Maintaining consistent city and county boundaries for redistricting purposes promotes better representation, because people tend to identify their community as the city or county that they live in. Failing to preserve political subdivisions in redistricting can easily lead to confusion among voters if residents of the same city or county are in different congressional districts.<sup>83</sup>

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79. *Gaffney v. Cummings*, 412 U.S. 735, 752 n.18 (1973) (“[C]ompactness or attractiveness has never been held to constitute an independent federal constitutional requirement for state legislative districts.”).

80. *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

81. *Karcher v. Daggett*, 462 U.S. 725, 755 (1983) (Stevens, J., concurring).

82. *Carstens*, 543 F. Supp. at 88. See also *In re* Reapportionment of the Colo. Gen. Assembly, 45 P.3d 1237, 1248 (Colo. 2002) (“A direct line of accountability between citizens, their elected city councils and county commissioners, and their elected state representatives is at the heart of responsive government in Colorado and is built into the county-oriented design of the Constitution’s reapportionment provisions.”).

83. See, e.g., James Call, *Leon: A County Divided by Redistricting*, TALLAHASSEE DEMOCRAT (July 9, 2016) (“‘Why my neighborhood,’ asked Fiorey. ‘That’s interesting. This is mid-town, almost in downtown Tallahassee. What do we have to do with a county that is two hours away and in a different time zone?’”); Kevin Diaz, *New Prague: A Town Divided – by Congressional Districts*, STAR TRIB. (Feb. 27, 2012) (“Main Street has been the unifying social hub of New Prague since

Drawing congressional district boundaries through cities or counties can also undermine the “ability of constituencies to organize effectively” if it is unclear where one district ends and another begins.<sup>84</sup>

### 3. Political Competitiveness

Another criterion used in Colorado redistricting is political competitiveness. The Colorado Constitution defines “competitive” in the redistricting context as “having a reasonable potential for the party affiliation of the district’s representative to change at least once between federal decennial censuses. Competitiveness may be measured by factors such as a proposed district’s past election results, a proposed district’s political party registration data, and evidence-based analyses of proposed districts.”<sup>85</sup>

Maintaining the competitiveness of a district is important because it provides for the election of accountable and responsive representatives.<sup>86</sup> The theory is that representatives are less likely to ignore the needs and preferences of their voter bloc if their reelection is not preordained. However, some critics argue that fostering competitiveness in redistricting leads to a more disgruntled electorate because “crack[ing] ideologically congruent voters into separate districts . . . has the effect of increasing the absolute number of voters who will be unhappy with the outcome and dissatisfied with their representative.”<sup>87</sup> Opponents of the criterion, therefore, contend that rather than encouraging political competitiveness in redistricting, mapmakers should instead “pack” districts with voters belonging to the same political party to increase the satisfaction of the electorate.<sup>88</sup> Colorado,

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the farm town was settled in the mid-19th century . . . . Now the main drag will be the dividing line between two congressional districts . . . .”); Sam Ruland, *York County Is Divided Into Two Congressional Districts: Find If You’re in 10th or 11th*, YORK DAILY REC. (Nov. 5, 2018) (“York County is divided by congressional districts. And for many residents, this may cause some confusion when heading to the polls Tuesday for Election Day.”).

84. *Carstens*, 543 F. Supp. at 88.

85. COLO. CONST. art. V, § 44.3(3)(d).

86. *Hall v. Moreno*, 270 P.3d 961, 973 (Colo. 2012); see also Kevin Grantham & Steve Fenberg, *A Colorado Solution to Improve Representation and Increase Competitiveness in Our Elections*, DENVER POST (Apr. 20, 2018) (“More competitive districts will force politicians to work to earn the support of more voters . . .”).

87. Brunell, *supra* note 8, at 77.

88. *Id.*

like many other states, does not subscribe to this view and instead encourages political competitiveness within districts.<sup>89</sup>

#### 4. Compactness

Compactness means keeping each congressional district as tight as possible.<sup>90</sup> Like contiguity, the criterion focuses mainly on the geographic shape of the district rather than the substantive aspects of representation.<sup>91</sup> States and courts have historically struggled to elucidate a clear standard for measuring compactness, often relying on the belief that the degree of compactness should be obvious to the reasonable observer. While no clear standard has emerged, states have employed various mathematical methods to evaluate compactness. One method is to “determine the smallest circle into which the district can be circumscribed and to compare the ratio of the area inside the circle to the area of the circle itself.”<sup>92</sup> The closer these figures come to a one-to-one ratio, the more compact the district will be. Another method is to compare the aggregate linear distance of the boundaries of each district.<sup>93</sup>

Compactness is important because it increases the opportunities for more effective representation by concentrating a representative’s constituency in an easily accessible area.<sup>94</sup> However, compactness must often be sacrificed in areas that are sparsely populated in order to comply with the one-person, one-vote requirement. In Colorado, for instance, it is “next to impossible to have each district compact” due to the heavily imbalanced population dispersion across the state.<sup>95</sup>

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89. COLO. CONST. art. V, § 44.3(3)(a).

90. *Carstens v. Lamm*, 543 F. Supp. 68, 87 (D. Colo. 1982).

91. *Id.*

92. *Id.* (quoting American Bar Association Special Committee on Election Law and Voter Participation, *Congressional Redistricting* 13 (1981)).

93. *Id.* at 87 n.49.

94. *Id.* at 87.

95. *Avalos v. Davidson*, No. 01-CV-2897, 2002 WL 1895406 at \*2 (Denver Dist. Ct. Jan. 25, 2002).

## III. COMMUNITIES OF INTEREST IN COLORADO REDISTRICTING

In addition to considering contiguity, political subdivisions, compactness, and political competitiveness, the Colorado Constitution requires that “[a]s much as is reasonably possible, the commission’s [redistricting] plan must preserve whole communities of interest . . . .”<sup>96</sup> The idea behind communities of interest is that grouping like-minded and similarly situated populations together helps to create cohesive districts organized around ethnic, cultural, economic, trade area, geographic, and demographic similarities.<sup>97</sup> Organizing districts around shared interests and values is intended to ensure that “the diversity of interests among the population is reflected in the legislature.”<sup>98</sup>

In theory, the communities of interest criterion should promote inclusivity and greater representation in the political process. In practice, however, the inherent subjectivity and practical difficulties of identifying such communities outweigh the good intentions behind the establishment of the criterion. For example, the use of communities of interest has been criticized as a means for bypassing restrictions on race-based redistricting by concentrating minorities into a single district and effectively limiting their representation.<sup>99</sup> Other redistricting principles such as compactness, contiguity, and respect for political subdivisions can be measured objectively, either mathematically by ratios and formulas, or simply by looking at a proposed map and comparing boundaries.<sup>100</sup> Communities of interest, however, lack any discoverable and manageable standards, and they are often identified on an ad hoc basis.<sup>101</sup>

While proponents of the use of communities of interest contend that communities of interest can readily be identified through aggregating public testimony and community outreach,

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96. COLO. CONST. art. V, § 44.3(2)(a).

97. *Hall v. Moreno*, 270 P.3d 961, 971 (Colo. 2012).

98. *Malone*, *supra* note 34, at 465–67.

99. *See id.* at 480. *See also* *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (“A reapportionment plan that includes in one district individuals who belong to the same race . . . and who may have little in common with one another but the color of their skin . . . 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.”).

100. *Malone*, *supra* note 34, at 483.

101. *Id.*

these methods potentially open the door to partisan influence in redistricting.<sup>102</sup> A federal district court in Illinois rejected arguments that communities of interest should be used in a redistricting case, explaining that any incumbent could come up with a community of interest argument to preserve his or her district.<sup>103</sup>

We find the [communities of interest] concept both subjective and elusive of principled application. For example, the [] plaintiffs contend that the character of the present 22nd Congressional District . . . should be maintained because of its ethnic and socio-economic homogeneity, as well as the economic predominance of mining and forestry industries in the region. By comparison, the present 19th Congressional District purportedly preserved in the Rosebrook 17th district should be preserved because it is a “microcosm of the nation.” The Rosebrook plaintiffs ask that we preserve the present 22nd Congressional District so as not to disturb its homogeneity and the present 19th Congressional District so as to maintain its distinctive diversity. The Rosebrook plaintiffs appear to advance another concept that has no limits.

The community of interest concept could be employed in every congressional district across the country in which a congressional incumbent feels threatened by an impending redistricting. We need look no further than the present case for evidence that supports this conclusion. We have received affidavits from most members of the Illinois congressional delegation asserting, in essence, that their districts possess unique characteristics or combinations of characteristics that deserve special consideration in the redistricting process. No doubt this is true for each district in Illinois and across the nation.<sup>104</sup>

A 2019 guide to redistricting in Michigan points out that “communities of interest is an area where the [Independent Citizens Redistricting] Commission is susceptible to manipulation” because “incumbents and political parties may attempt to

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102. See *infra* Section IV.B.

103. *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 660 (N.D. Ill. 1991).

104. *Id.* (emphasis omitted).

manipulate public input to create advantageous districts.”<sup>105</sup> Inexperienced commissioners may have a difficult time distinguishing “genuine community concerns from political self-dealing.”<sup>106</sup>

Despite the vagueness of the criterion’s definition and the difficulties of fair implementation, the Colorado General Assembly and Colorado courts have increasingly used communities of interest in drawing congressional district boundaries. Colorado courts have typically followed the definition of communities of interest laid out in the seminal redistricting case *Carstens v. Lamm*:<sup>107</sup> “Communities of interest” represent distinctive units which share common concerns with respect to one or more identifiable features such as geography, demography, ethnicity, culture, socio-economic status, or trade.<sup>108</sup> In 2018, Article V, Section 46 of the Colorado Constitution was amended to further define “community of interest” and list what should be considered in evaluating the criterion:

(I) “Community of interest” means any group in Colorado that shares one or more substantial interests that may be the subject of federal legislative action, is composed of a reasonably proximate population, and thus should be considered for inclusion within a single district for purposes of ensuring its fair and effective representation.

(II) Such interests include but are not limited to matters reflecting:

(A) Shared public policy concerns of urban, rural, agricultural, industrial, or trade areas; and

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105. WOODROW WILSON SCH. OF PUB. & INT’L AFF., Princeton Univ., A COMMISSIONER’S GUIDE TO REDISTRICTING IN MICHIGAN 31, 33 (Feb. 2019).

106. *Id.* at 33.

107. 543 F. Supp. at 91.

108. In addition to the *Carstens* definition, courts have also followed similar statutory guidance that existed prior to the establishment of the independent redistricting commission, which was laid out in C.R.S. § 2-1-102 (repealed 2020): when evaluating whether a congressional district has been established in accordance with the Colorado Constitution, courts may look at whether communities of interest have been preserved, which includes “ethnic, cultural, economic, trade area, geographic, and demographic factors.” The *Carstens* and statutory definitions, though vague, are actually more thorough and precise than the definitions used by many other states. See Malone, *supra* note 34, at 465–67.

(B) Shared public policy concerns such as education, employment, environment, public health, transportation, water needs and supplies, and issues of demonstrable regional significance.

(III) Groups that may comprise a community of interest include racial, ethnic, and language minority groups, subject to . . . protect[i]ons] against the denial or abridgement of the right to vote due to a person's race or language minority group.

(IV) "Community of interest" does not include relationships with political parties, incumbents, or political candidates.<sup>109</sup>

Under the new definition, a community of interest could essentially be any group with a concern that has the potential to be remotely addressed by federal legislation. This expanded definition is a far cry from how communities of interest have traditionally been recognized and considered for redistricting purposes in Colorado. In the past, courts and legislatures have sought to preserve only well-established communities of interest that are inextricably linked to Colorado's regional differences when making redistricting decisions.<sup>110</sup> Except for the past two redistricting cycles,<sup>111</sup> courts and legislatures have historically not recognized new or fleeting communities for the purpose of redrawing district boundaries.<sup>112</sup>

The following Section will provide a brief description of the five principal geographic regions of Colorado, then explain how these regions and their distinct regional concerns have been preserved in redistricting through the communities of interest criterion. The Section concludes with an in-depth look at three specific redistricting cycles in Colorado that highlight how the identification and inclusion of different communities of interest has expanded through each cycle.

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109. COLO. CONST. art. V, § 46(b). As of this writing, it is not yet clear what impact the new definition of communities of interest will have on Colorado redistricting as it will not be used until the 2021 redistricting cycle.

110. See *infra* Section III.A–B.

111. See *infra* Section III.B.1–III.B.2.

112. See, e.g., *Carstens*, 543 F. Supp. at 94.

### A. Colorado Regional Profile

In many ways, Colorado is a microcosm of America due to its diverse geography and demography.<sup>113</sup> Throughout its history, political issues have often been framed in geographical terms,<sup>114</sup> as the vast differences in geography are often the source of differing political concerns.

Five distinct regions are generally recognized in Colorado: (1) eastern plains, (2) western slope, (3) San Luis Valley, (4) front range, and (5) Denver.<sup>115</sup> Each of these regions can be readily identified by most Coloradans.

The eastern third of Colorado is often referred to as the “eastern plains” area.<sup>116</sup> It contains Colorado’s portion of the Great Plains,<sup>117</sup> the vast, flat area that stretches across the middle of the United States from Texas to Canada. The region has flat plains and rolling prairies which gradually rise to the foothills of the Rocky Mountains.<sup>118</sup> The eastern plains area is divided by two shallow river valleys, the Arkansas and South Platte, which have long provided a water supply to the semiarid region.<sup>119</sup> The region is sparsely populated and many residents live in small farming communities.<sup>120</sup>

The western third of Colorado is commonly referred to as the “western slope,” which includes the area west of the

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113. In *Hall v. Moreno*, Chief Justice Bender noted that redistricting in Colorado is especially complicated due to the “depth and variety of Colorado’s local and regional interests.” 270 P.3d 961, 963 (Colo. 2012). He explained how Colorado “serves as a microcosm of our diverse and great nation, with its rich diversity of cultures and ethnicities, its eclectic and sharply-contrasting geographic features, its broad economic and recreational pursuits, and its combination of rural and urban populations.” *Id.*

114. CARL ABBOTT ET AL., COLORADO: A HISTORY OF THE CENTENNIAL STATE 328 (5th ed. 1982).

115. THE FIVE STATES OF COLORADO (HaveyPro Cinema 2004), [www.havey-pro.com/product/five-states-of-colorado/](http://www.havey-pro.com/product/five-states-of-colorado/) [<https://perma.cc/B2BK-ZYH8>].

116. *Carstens*, 543 F. Supp. at 83.

117. R. Douglas Hurt, *Colorado’s Great Plains*, COLO. ENCYCL., <https://coloradoencyclopedia.org/article/colorado%E2%80%99s-great-plains> [<https://perma.cc/2G3J-DJSZ>].

118. *Id.*

119. *Id.*

120. See Kevin Simpson & Jennifer Brown, *Colorado Divide: Seismic Shifts Create Rural-Urban Chasm in the Culture, Economy and Politics of the State*, DENVER POST (July 21, 2017), <https://www.denverpost.com/2017/07/21/colorado-divide-rural-urban-chasm/> [<https://perma.cc/W7AD-R5TB>].



Continental Divide,<sup>121</sup> the hydrological divide of the continent that winds its way through the Rocky Mountains. The western slope contains most of the state's mountain ranges;<sup>122</sup> its physical geography consists of "alpine terrain interspersed with wide valleys, rugged canyons, high plateaus and deep basins."<sup>123</sup> The region contains over 30 percent of Colorado's land but only about 10 percent of the population.<sup>124</sup> The western slope holds most of the state's natural resources, including nearly 70 percent of the state's water.<sup>125</sup> The fact that "most of the state's natural resources lie on Colorado's west side while most of its residents live in the east has led to tension and conflict, especially over the topic of water diversion."<sup>126</sup> The economy of the western slope is largely based on energy extraction, tourism, and ranching.<sup>127</sup> The western slope also contains some of the best ski areas in the world, including Aspen, Crested Butte, Vail, Telluride, and Steamboat Springs. A significant portion of the region's population lives in and around Grand Junction, a city in far western Colorado.<sup>128</sup>

The San Luis Valley is a high desert valley in southern Colorado.<sup>129</sup> Bordered on three sides by mountain ranges and traversed by the Rio Grande River, the state's largest valley is

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121. Duane Vandebusch, *Western Slope*, COLO. ENCYCL., <https://coloradoencyclopedia.org/article/western-slope> (last visited Aug. 18, 2020) [<https://perma.cc/5LUS-4C9P>].

122. THE FIVE STATES OF COLORADO, *supra* note 115.

123. *Carstens v. Lamm*, 543 F. Supp. 68, 84 (D. Colo. 1982).

124. Vandebusch, *supra* note 121; Brooke Fox, *Western Slope Economy*, 80 COLO. BUS. REV., Nov. 2014, at 1, (2014), [https://www.colorado.edu/business/sites/default/files/attached-files/CBR\\_Nov\\_2014.pdf](https://www.colorado.edu/business/sites/default/files/attached-files/CBR_Nov_2014.pdf) [<https://perma.cc/AK2M-8K4C>].

125. Vandebusch, *supra* note 121.

126. *Id.*; see also Tina Xu & Gia Austin, *Thirty-Fifth Annual American Bar Association Water Law Conference*, 20 U. DENV. WATER L. REV. 440, 441 (2017) ("[T]ension between the two regions is exacerbated by Colorado's geographical dichotomy as the western regions of Colorado has a low population and is primarily rural agricultural, and the eastern regions of Colorado has a high population and is generally urban. Furthermore, the urban population in the eastern regions of Colorado has increased drastically in recent years. Such a growth puts pressure on the state to allocate enough water to supply the urban populations. This kind of water allocation negatively impacts water rights holders residing in western Colorado. The political battle between the agricultural west and the urban east is constant and greatly affects statewide water use planning and conservation efforts.").

127. Vandebusch, *supra* note 121.

128. *Carstens*, 543 F. Supp. at 84.

129. Encyclopedia Staff, *San Luis Valley*, COLO. ENCYCL., <https://coloradoencyclopedia.org/article/san-luis-valley> (last visited Aug. 19, 2020) [<https://perma.cc/9HL7-MGWL>].

known for its unique—often referred to as “mystic”<sup>130</sup>—landscape as well as its rich cultural history.<sup>131</sup> Centuries of occupation and settlement in the San Luis Valley by Native American, Hispanic, and European travelers have resulted in the region having one of the state’s most diverse populations.<sup>132</sup> Agriculture is the most common means of securing a livelihood in the valley.<sup>133</sup> As it has throughout the history of the San Luis Valley, the region’s isolation serves as a barrier to further economic development and growth.<sup>134</sup>

The area known as the “front range” is a narrow strip of the eastern front range of the Rocky Mountains. The region is the urban corridor of Colorado, containing nearly all of the state’s major population centers, including Denver, Colorado Springs, Boulder, and Fort Collins. The ten most populous counties of Colorado (Denver, El Paso, Arapahoe, Jefferson, Adams, Larimer, Douglas, Boulder, Weld, Pueblo)<sup>135</sup> are all located on the front range, containing approximately 70 percent of the population of the state. The area continues to receive an influx of out-of-state residents and is the largest source of the 14.5 percent increase in the state’s population since the 2010 Census.<sup>136</sup>

Even though Denver is located within the front range region, the metropolitan area is often recognized as its own region in Colorado. In addition to being the largest and most populous city in the state and serving as the state capital, Denver is also the cultural, economic, political, and social center of Colorado.<sup>137</sup>

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130. See, e.g., *Mystic San Luis Valley*, COLO. TOURISM OFFICE, <https://www.colorado.com/region/mystic-san-luis-valley> [<https://perma.cc/W2GD-7DCT>]; see also Jessica Hughes, *Your Guide to the San Luis Valley*, UNCOVER COLO. (Jan. 7, 2020), <https://www.uncovercolorado.com/san-luis-valley-colorado/> [<https://perma.cc/ZHF2-W4RQ>].

131. Encyclopedia Staff, *supra* note 129.

132. *Id.*

133. *Id.*

134. *Id.*

135. COLO. DEMOGRAPHICS, CUBIT, COLORADO COUNTIES BY POPULATION, (last updated July 1, 2019), [https://www.colorado-demographics.com/counties\\_by\\_population](https://www.colorado-demographics.com/counties_by_population) [<https://perma.cc/9KS9-Q239>].

136. U.S. CENSUS BUREAU, QUICK FACTS: COLORADO, (last updated July 1, 2019), <https://www.census.gov/quickfacts/fact/table/CO,US/PT045219> [<https://perma.cc/VW9W-K38D>].

137. Thomas J. Noel, *Denver*, COLO. ENCYCL., <https://coloradoencyclopedia.org/article/Denver> [<https://perma.cc/TDH7-UV97>]; see also THE FIVE STATES OF COLORADO, *supra* note 115.

*B. Communities of Interest in Congressional Redistricting*

Due to their distinct characteristics and unique regional concerns, the five regions of Colorado have historically been recognized in congressional redistricting through the communities of interest criterion.<sup>138</sup> While the front range is too populous to be contained in its own congressional district (doing so would make compliance with the one-person, one-vote requirement impossible), past redistricting bodies have attempted to keep the capital city of Denver and its surrounding county in a single congressional district, partly as an attempt to preserve political boundaries and partly because Denver has been called its own community of interest.<sup>139</sup>

Each of these communities of interest has historically been taken into consideration in Colorado congressional redistricting. Three of Colorado's four past redistricting cycles (1981, 2001, and 2011) have been resolved through the court system with a judge ultimately drawing or selecting a new state redistricting map.<sup>140</sup> In each of those cycles, the respective court utilized the communities of interest criterion in deciding whether a map was constitutionally or statutorily valid.<sup>141</sup> When deciding upon a redistricting map in 1981, the court only took into account the well-established and "most important" communities of interest in Colorado: the eastern plains, the western slope, the San Luis Valley with Pueblo, and the consolidated City and County of Denver.<sup>142</sup> In 2001 and 2011, however, courts were more willing to recognize new communities of interest in order to redraw district lines.<sup>143</sup> The following Sections detail how communities of interest were utilized in redistricting by each court.

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138. See *Carstens v. Lamm*, 543 F. Supp. 68, 91, 94 (D. Colo. 1982); *Moreno v. Gessler*, No. 11-CV-3461, 2011 WL 8614878, at \*2, \*8, \*9 (Denver Dist. Ct. Nov. 10, 2011); *Avalos v. Davidson*, No. 01-CV-2897, 2002 WL 1895406, at \*4-5 (Denver Dist. Ct. Jan. 25, 2002).

139. *Carstens*, 543 F. Supp. at 94-95; *Moreno*, 2011 WL 8614878, at \*2-3; *Avalos*, 2002 WL 1895406, at \*4, \*9.

140. See *Carstens*, 543 F. Supp. at 68; *Moreno*, 2011 WL 8614878, at \*1; *Avalos*, 2002 WL 1895406, at \*1.

141. *Carstens*, 543 F. Supp. at 94; *infra* notes 189-202.

142. *Carstens*, 543 F. Supp. at 94.

143. See table *infra* at 36-37 and notes 189-202.

1. 1981 Redistricting Cycle: *Carstens v. Lamm*

In 1981, disagreements in the Colorado General Assembly over the selection of a redistricting plan led to litigation in federal district court, culminating in the landmark redistricting case *Carstens v. Lamm*.<sup>144</sup>

Before turning to the courts, the Colorado General Assembly attempted to pass its own redistricting plan in accordance with its constitutional duty.<sup>145</sup> A plan eventually passed both Republican-controlled houses of the General Assembly but was immediately vetoed by Democratic Governor Richard Lamm.<sup>146</sup> In his veto message, Governor Lamm urged the General Assembly to set aside partisan political considerations and develop a "fairer and more responsible plan for congressional redistricting."<sup>147</sup> Over the next five months, the governor and General Assembly attempted to come up with a redistricting plan that was amenable to both political parties.<sup>148</sup> However, after several rounds of negotiations, the governor and General Assembly reluctantly conceded that "there was no hope of reaching a compromise."<sup>149</sup> A group of citizens subsequently filed a lawsuit against Governor Lamm in federal district court asking the court to select a congressional redistricting plan for the State of Colorado.<sup>150</sup>

During the course of the litigation, the district court received and considered many redistricting maps that purported to favor and disfavor particular redistricting criteria.<sup>151</sup> The plaintiffs contested the court's consideration of non-constitutional criteria entirely, including communities of interest, arguing that there are "internal conflicts inherent in such criteria which make their use subjective and impractical."<sup>152</sup> The court found those arguments unpersuasive, due in part to the fact that the increased use of technology in redistricting has made it

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144. *Carstens*, 543 F. Supp. at 72-73.

145. *Id.* at 72 ("Under the provisions of both federal and state law, the primary responsibility for drawing new congressional districts lies with the State Legislature, subject to the approval of the Governor.").

146. *Id.* at 73.

147. *Id.* (quoting Governor Lamm's Veto Message from H.B. 1615, dated June 12, 1981).

148. *Id.*

149. *Id.* at 75.

150. *Id.* at 73-74.

151. *Id.* at 89-93.

152. *Id.* at 83.

relatively easy for all maps to meet the two federal constitutional criteria; therefore, the court needed additional criteria to choose a plan.<sup>153</sup>

The court eventually decided that each of the submitted maps failed to satisfy enough of the redistricting criteria to meet the requirements of Colorado law.<sup>154</sup> One map in particular was rejected because of its disproportionate focus on the communities of interest criterion at the expense of other criteria, including population deviation and preservation of political boundaries.<sup>155</sup> The court noted, "While we believe that communities of interest are an important factor in drawing fair and effective congressional districts, we are not prepared to recognize this criterion to the exclusion of all others."<sup>156</sup>

Instead of reluctantly approving one of the submitted maps, the court decided to draw its own map at the conclusion of the case.<sup>157</sup> The court took a cautious approach to communities of interest and primarily considered well-established communities of interest when discussing the criterion.<sup>158</sup> For example, the district court recognized that there was substantial agreement among the drafters of the various plans that the eastern plains and western slope were well-established communities of interest and therefore should be preserved as much as possible.<sup>159</sup> Unfortunately, the sparse populations of both regions required that the districts include portions of more populous areas in order to achieve population equality.<sup>160</sup> The court remarked that grouping mountainous or plains areas with front range counties should be minimized as much as possible due to the distinct political interests driven by the unique geography of each area.<sup>161</sup>

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153. *Id.* at 82.

154. *Id.* at 93.

155. *Id.* at 91-92.

156. *Id.* at 92.

157. *Id.* at 93.

158. *See id.* at 94.

159. *Id.* at 91.

160. *Id.* at 88, 91.

161. *Id.* Western slope residents have long feared that their voices will be drowned out if their region is included in the same district as a populous front range city. *See, e.g., Interests Not the Same*, LOUISVILLE TIMES (May 1, 1964) ("We have been surprised at some of the proposals, but none seems more ridiculous than placing Boulder and the northeastern counties in the fourth district. We realize the reason for redistricting is to equalize population, but mutual interest should be taken into account. Western Slope problems are not the same as those in Boulder [C]ounty. Whether lead[e]rs wish to admit it or not, Boulder [C]ounty's interest is tied with Denver and its metropolitan area.").

For this reason, the court rejected one map because it drew the western slope district to include a portion of every major front range county.<sup>162</sup> This was problematic, the court explained, because the “people east of the Continental Divide have some very different concerns which frequently conflict with those of the people who reside on the western slope,” such as “transmountain diversion of water from the western slope to the eastern front range.”<sup>163</sup>

During the hearings, the parties went back and forth about which district Pueblo<sup>164</sup> should be placed in.<sup>165</sup> The court relied on the lack of shared communities of interest between Pueblo and El Paso County (Pueblo was industrial, while El Paso County contained a more technical community; both counties also had different housing growth rates) to find that Pueblo should not be included in the same district as El Paso County.<sup>166</sup> The court found that it was more appropriate for Pueblo to be included with the San Luis Valley (part of the western slope district) because together they constituted a community of interest due to the strong traditional ethnic, cultural, and religious similarities, and shared trade, employment, education, and health resources and facilities.<sup>167</sup> Additionally, Pueblo was not experiencing rapid growth at the time, so the city’s water requirements were relatively stable and thus would not lead to conflict with the western slope community.<sup>168</sup>

In the court’s final plan that would become Colorado’s new redistricting map,<sup>169</sup> it ended up recognizing four important communities of interest: eastern plains, western slope, Pueblo and the San Luis Valley, and a consolidated City and County of

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162. *Carstens*, 543 F. Supp. at 91.

163. *Id.* at 91 & n.63.

164. Pueblo is the southernmost major Colorado city along the heavily populated I-25 corridor. It is technically located in the front range region, but it shares close historical and cultural ties with the San Luis Valley.

165. *Carstens*, 543 F. Supp. at 92.

166. *Id.*

167. *Id.* at 92 n.67.

168. *Id.* at 92.

169. For a look at the final 1982 congressional map, visit: *United States Congressional Districts in Colorado: 1983–1992*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Colorado%27s\\_congressional\\_districts#/media/File:United\\_States\\_Congressional\\_Districts\\_in\\_Colorado,\\_1983\\_-\\_1992.tif](https://en.wikipedia.org/wiki/Colorado%27s_congressional_districts#/media/File:United_States_Congressional_Districts_in_Colorado,_1983_-_1992.tif) [<https://perma.cc/R45D-AW3K>] (last visited Aug. 29, 2020); Jeffrey B. Lewis et al., *United States Congressional District Shapefiles*, <http://cdmaps.polisci.ucla.edu/> (last visited Aug. 29, 2020) [<https://perma.cc/4ZHK-ZE7D>].

Denver.<sup>170</sup> The court focused on the long history of farming in the eastern plains; water, energy, and environmental concerns of the western slope; the natural affinity between Pueblo and the San Luis Valley; and the unique urban concerns of Denver as compared to the surrounding suburban municipalities.<sup>171</sup> By only focusing on four well-established and easily recognized communities in its redistricting plan, the *Carstens* court limited the potential abuse of the communities of interest criterion.

## 2. 2001 Redistricting Cycle: *Avalos v. Davidson*<sup>172</sup>

The 2001 redistricting cycle presented new challenges due in large part to the fact that Colorado received a seventh congressional seat and thus would need to draw an entirely new district.<sup>173</sup> The difficulty of creating a new map that would satisfy the requisite criteria proved to be too large a task for the Colorado General Assembly as it again failed to agree upon a redistricting plan that would pass constitutional scrutiny, prompting intervention by the courts once more.<sup>174</sup> Like the *Carstens* court, the Denver District Court in 2002 considered over a dozen plans and heard public testimony regarding Colorado's geography, ethnic communities, trade and political history, and theories of voter performance.<sup>175</sup> In deciding on a redistricting plan, the court largely followed the criteria set forth in *Carstens*.<sup>176</sup>

In its discussion of communities of interest, the court began by noting the inherent problem with the criterion.<sup>177</sup> “[W]hen a congressional district must consist of 614,000 people, approximately, it is impossible to draw a district in which every person

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170. *Carstens*, 543 F. Supp. at 94.

171. *Id.* at 96–97.

172. Note: During the 1991–1992 redistricting cycle, the Colorado General Assembly successfully passed a redistricting plan. See *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1240 (Colo. 2003) (noting that since 1915, “the General Assembly only redistricted four times: 1921, 1964, 1971, and 1992”). Because there is no related court opinion and there are limited resources available detailing how a plan was selected and whether communities of interest were discussed, this Article will not analyze the 1991–1992 redistricting cycle.

173. See *Avalos v. Davidson*, No. 01-CV-2897, 2002 WL 1895406, at \*1 (Denver Dist. Ct. Jan. 25, 2002).

174. See *id.*

175. *Beuprez v. Avalos*, 42 P.3d 642, 646 (Colo. 2002) (citing *Avalos*, 2002 WL 1895406).

176. *Avalos*, 2002 WL 1895406, at \*2.

177. *Id.* at \*3.

in the district shares all the same community of interest with every other person in the district . . . the Court may only use its best judgment . . .”<sup>178</sup> As in *Carstens*, the court recognized the eastern plains, western slope, Pueblo and the San Luis Valley, and the City and County of Denver as well-established communities of interest.<sup>179</sup> The court rejected multiple maps for failing to keep the western slope and eastern plains consolidated in their respective congressional districts.<sup>180</sup>

However, unlike the *Carstens* court, the *Avalos* court identified a community of interest that was not well-established in prior redistricting cycles. In Congressional District 2 (“CD2”),<sup>181</sup> the court recognized Rocky Flats as a community of interest.<sup>182</sup> Rocky Flats was a federal manufacturing complex located between Denver and Boulder that produced nuclear weapons parts from the 1950s to the 1980s.<sup>183</sup> The Department of Energy decommissioned the plant and directed the cleanup of the site through the late 1990s and early 2000s.<sup>184</sup> At the time of the 2001 redistricting cycle, many Coloradans, particularly those living in the surrounding areas, were worried about surface contamination and other environmental problems caused by Rocky Flats Plant over the preceding decades.<sup>185</sup> Many concerned citizens wanted federal legislation passed to complete the cleanup of the area and turn the former complex into a wildlife refuge.<sup>186</sup> As a result, local municipalities formed a coalition to advocate for federal funds to assist in the cleanup of the Rocky Flats site.<sup>187</sup>

The recognition of Rocky Flats as a community of interest marked a shift in the use of communities of interest in Colorado redistricting. Rather than focus only on the historically well-

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178. *Id.*

179. *Id.* at \*4–5.

180. *Id.* at \*11, \*13.

181. At the time of *Avalos*, CD2 encompassed Boulder and the northwestern suburbs of Denver including Northglenn, Thornton, and Westminster.

182. *Avalos*, 2002 WL 1895406, at \*4.

183. Len Ackland, *Rocky Flats Nuclear Facility*, COLO. ENCYCL., <https://coloradoencyclopedia.org/article/rocky-flats-nuclear-facility> (last visited Aug. 19, 2020) [<https://perma.cc/89ZD-VHYW>].

184. *See id.*

185. *See generally* John E. Till et al., *Risks to the Public from Historical Releases of Radionuclides and Chemicals at the Rocky Flats Environmental Technology Site*, J. EXPOSURE SCI. & ENV'T EPIDEMIOLOGY 12, 355–72 (2002).

186. *See* Amy G. Partain, *Udall Listens to Constituents*, LOUISVILLE TIMES (Apr. 4, 2001).

187. *See* *Hall v. Moreno*, 270 P.3d 961, 972 (Colo. 2012).



established and readily identifiable communities of interest in redrawing congressional districts as the *Carstens* court did,<sup>188</sup> the *Avalos* court identified an isolated issue as a community of interest for redistricting purposes.<sup>189</sup> In doing so, the court sacrificed the preservation of political boundaries in CD2 in order to keep the Rocky Flats community of interest together in one district.<sup>190</sup> While Rocky Flats was undoubtedly an important issue requiring federal assistance, the identification of Rocky Flats as a community of interest established a precedent that a single issue of federal concern was enough to constitute a community of interest, an idea that the Colorado Supreme Court would endorse during the next redistricting cycle.<sup>191</sup>

The court also recognized various transportation corridors as constituting communities of interest.<sup>192</sup> For example, the court found that the I-70 corridor<sup>193</sup> connecting the Denver metropolitan area with the ski areas of Summit, Eagle, and Grand Counties and the US-36 corridor connecting Boulder to Denver were communities of interest.<sup>194</sup> On the other hand, the court rejected one map because it joined Pueblo with Colorado Springs in part based on their connection via I-25.<sup>195</sup> The court reasoned that although the two cities shared a common transportation corridor, as well as certain media markets, they lacked any other significant similarities that could justify calling them a community of interest.<sup>196</sup> The court did not provide any further detail about why some transportation corridors were significant enough to be considered communities of interest while others were not.<sup>197</sup> The court's treatment of transportation corridors is

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188. *Carstens v. Lamm*, 543 F. Supp. 68, 94 (D. Colo. 1982).

189. See *Avalos v. Davidson*, No. 01-CV-2897, 2002 WL 1895406, at \*4 (Denver Dist. Ct. Jan. 25, 2002).

190. The City of Arvada was split into two districts to maintain the Rocky Flats community of interest in CD2. *Id.*; *Beauprez v. Avalos*, 42 P.3d 642, 652 (Colo. 2002).

191. See *Hall*, 270 P.3d at 976.

192. *Avalos*, 2002 WL 1895406, at \*12.

193. *Id.*

194. *Id.* at \*4.

195. *Id.* at \*11.

196. *Id.* ("This Court has strong views that there does not exist a community of interest between El Paso County and Pueblo County. It is true that the city of Pueblo and the city of Colorado Springs are close together and are bound together by I-25. It is also true that certain media markets are shared by Colorado Springs and Pueblo. That ends all community of interest between Pueblo and Colorado Springs. They are two unique and very different cities.")

197. See *id.*

but one example of how the communities of interest criterion is essentially an exercise of discretion in practice.

In the end, the district court adopted a map that complied with federal constitutional requirements and purportedly represented the best efforts at balancing state-specific redistricting criteria.<sup>198</sup> The Colorado Supreme Court eventually upheld the district court's adoption of the redistricting plan, noting that the selection process undertaken by the court was "thorough, inclusive, and non-partisan."<sup>199</sup>

### 3. 2011 Redistricting Cycle: *Moreno v. Gessler*

Ten years after the *Avalos* decision, the courts again had to intervene to finalize the state redistricting plan. While the results of the 2010 Census did not produce a change in the number of congressional seats in Colorado, uneven population growth and movement across districts meant that boundaries needed to be redrawn to comply with the one-person, one-vote requirement of the U.S. Constitution.<sup>200</sup> In 2011, the Colorado General Assembly once again failed to enact legislation to correct the malapportionment of districts, so lawsuits were filed asking the court to decide upon a new congressional district map for Colorado.<sup>201</sup>

As in previous redistricting cycles, the district court received numerous maps from a variety of different parties.<sup>202</sup> The court ultimately decided upon the so-called "Moreno/South map" because, according to the court, that map "best reflect[ed] communities of interest as they [then] exist[ed], while retaining compactness of districts, preserving as many political subdivisions

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198. For a look at the 2002 congressional map, visit: *United States Congressional Districts in Colorado: 2003–2013*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Colorado%27s\\_congressional\\_districts#/media/File:United\\_States\\_Congressional\\_Districts\\_in\\_Colorado,\\_2003\\_-\\_2013.tif](https://en.wikipedia.org/wiki/Colorado%27s_congressional_districts#/media/File:United_States_Congressional_Districts_in_Colorado,_2003_-_2013.tif) (last visited Aug. 29, 2020) [<https://perma.cc/87PG-DVWW>]; Jeffrey B. Lewis et al., *supra* note 169.

199. *Beauprez v. Avalos*, 42 P.3d 642, 647 (Colo. 2002).

200. U.S. CONST. art. I, § 2. *See Reynolds v. Sims*, 377 U.S. 533, 568 (1964).

201. *See Moreno v. Gessler*, No. 11-CV-3461, 2011 WL 8614878, at \*1 (Denver Dist. Ct. Nov. 10, 2011).

202. Maps were submitted by the two primary groups of plaintiffs ("Hall plaintiffs" and "Moreno plaintiffs") as well as Douglas County, City of Aurora, Club 20 (advocacy group for the western slope), Bill Thiebaut (longtime Colorado legislator), and the Colorado Latino Forum and Hispanic Bar Association. Several groups submitted multiple proposed maps. *Id.* at \*22–28.

as practical and disrupting prior district lines only as was absolutely necessary in order to best utilize all statutory factors.”<sup>203</sup>

In *Moreno*, the court departed from the approach used by courts in previous redistricting cycles. Rather than using a balancing test approach and weighing all the state-specific redistricting criteria as equally as possible,<sup>204</sup> the court considered the communities of interest criterion above all other state-specific criteria, a clear departure from *Carstens*.<sup>205</sup> The court flat out rejected one map because it failed to consider communities of interest at all, explaining that “[o]f the discretionary factors specifically listed in the statute, the Court finds that no factor is more important than a district’s communities of interest.”<sup>206</sup> The court made no mention of the communities of interest criterion’s inherent subjectivity or that by considering certain communities of interest and ignoring others in drawing districts, the court is essentially deciding which communities it considers to be important and which ones it does not.<sup>207</sup>

In the run-up to the 2011 redistricting cycle, the Joint Select Committee on Redistricting conducted public hearings in each congressional district around the state to gather testimony for crafting a redistricting plan.<sup>208</sup> Many of the hearings included testimony from citizens about what they considered to be an important community of interest for redistricting.<sup>209</sup> At least

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203. *Id.* at \*2.

204. At the time of the court’s decision, C.R.S. § 2-1-102(1)(b) provided that a court “[m]ay, without weight to any factor, utilized factors including but not limited to: (I) The preservation of political subdivisions such as counties, cities, and towns . . . ; (II) The preservation of communities of interest, including ethnic, cultural, economic, trade area, geographic, and demographic factors; (III) The compactness of each congressional district; and (IV) The minimization of disruption of prior district lines.”

205. *Moreno*, 2011 WL 8614878, at \*21. *Cf.* *Carstens v. Lamm*, 543 F. Supp. 68, 92 (D. Colo. 1982) (“While we believe that communities of interest are an important factor in drawing fair and effective congressional districts, we are not prepared to recognize this criterion to the exclusion of all others.”).

206. *Moreno*, 2011 WL 8614878, at \*21.

207. *See id.*

208. *See* Legislative Council Staff, *supra* note 16.

209. *See* COMM. ON J. SELECT COMM. ON REDISTRICTING, STAFF SUMMARY OF MEETING IN LOVELAND (Colo. Feb. 26, 2011), <https://www.colorado.gov/pacific/sites/default/files/11Redistricting0226Summary.pdf> [<https://perma.cc/ZDU2-V28N>]; COMM. ON J. SELECT COMM. ON REDISTRICTING, STAFF SUMMARY OF MEETING IN DENVER (Colo. 2011), <https://www.colorado.gov/pacific/sites/default/files/11Redistricting0228Summary.pdf> [<https://perma.cc/CVE9-VG6D>]; COMM. ON J. SELECT COMM. ON REDISTRICTING, STAFF SUMMARY OF MEETING IN JEFFERSON COUNTY (Colo. Mar. 3, 2011), <https://www.colorado.gov/pacific/sites/default/files/11Redistricting0303Summary.pdf> [<https://perma.cc/7FZX-ZV8K>]; COMM. ON J. SELECT

several dozen communities of interest were mentioned during the course of the hearings.<sup>210</sup>

Based largely on this public testimony, the district court identified thirty-one communities of interest in its *Moreno* opinion<sup>211</sup>—compared to only thirteen communities of interest mentioned just nine years earlier in the *Avalos* opinion.<sup>212</sup> Though some of the differences can likely be attributed to the greater detail in the *Moreno* opinion, it is clear that communities of interest played a much more significant role in *Moreno* than in *Avalos*. The *Avalos* court analyzed communities of interest as having the same weight and importance as the other state criteria while the *Moreno* court's discussion of communities of interest dominated the opinion with little discussion of the other criteria.<sup>213</sup> As a result, the *Moreno* court recognized numerous communities of interest that had never before been considered for redistricting purposes.<sup>214</sup> The following table compares the identification of communities of interest between the two opinions:

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COMM. ON REDISTRICTING, STAFF SUMMARY OF MEETING IN COLORADO SPRINGS (Colo. Mar. 9, 2011), <https://www.colorado.gov/pacific/sites/default/files/11Redistricting0309Summary.pdf> [<https://perma.cc/44YZ-XQQV>]; COMM. ON J. SELECT COMM. ON REDISTRICTING, STAFF SUMMARY OF MEETING IN DOUGLAS COUNTY (Colo. Mar. 14, 2011), <https://www.colorado.gov/pacific/sites/default/files/11Redistricting0314Summary.pdf> [<https://perma.cc/Z5LT-JAN2>]; COMM. ON J. SELECT COMM. ON REDISTRICTING, STAFF SUMMARY OF MEETING IN BOULDER (Colo. Mar. 15, 2011), <https://www.colorado.gov/pacific/sites/default/files/11Redistricting0315Summary.pdf> [<https://perma.cc/W3M4-3294>]; COMM. ON J. SELECT COMM. ON REDISTRICTING, STAFF SUMMARY OF MEETING IN GRAND JUNCTION (Colo. Mar. 19, 2011), <https://www.colorado.gov/pacific/sites/default/files/11Redistricting0319Summary.pdf> [<https://perma.cc/DW7M-EVHA>].

210. The following communities of interest were mentioned in the written minutes taken from the seven public hearings across the state: Denver Health System, Denver International Airport, transportation projects, homeless shelters, Anschutz Medical Campus, Latino Community, I-70 corridor, tourism industry, education/school districts, Continental Divide, "open space issues," water issues, energy issues, pine beetle infestation, entrepreneurs with at-home offices, recreation as a quality of life issue, people with "strong environmental outlooks," Denver Tech Center, Colorado State University as a land grant agricultural college, eastern plains, military interests, ski resorts, public lands, Mountain West, Denver media, Denver commuters, veterans of the Western Slope, mineral extraction, ranching, western slope, and water basins. *See supra* note 209 and accompanying citations.

211. *Moreno*, 2011 WL 8614878, at \*2–15.

212. *Avalos v. Davidson*, No. 01-CV-2897, 2002 WL 1895406, at \*3–7 (Denver Dist. Ct. Jan. 25, 2002).

213. *Compare Avalos*, 2002 WL 1895406, at \*4–7, *with Moreno*, 2011 WL 8614878, at \*3–9, \*13–14, \*21–23, \*27, \*35.

214. It is also significant that the thirty-one communities of interest identified by the *Moreno* court did not include all of the communities mentioned during the

District	Communities of interest recognized in <i>Avalos v. Davidson</i> (2002)	Communities of interest recognized in <i>Moreno v. Gessler</i> (2011)
CD1	(1) City and County of Denver <sup>215</sup>	(1) City and County of Denver; (2) certain areas south of Denver that are contiguous, share transportation corridors, and have similar housing and economic base as Denver <sup>216</sup>
CD2	(1) Rocky Flats; (2) I-70 corridor; (3) US-36 corridor <sup>217</sup>	(1) higher education; (2) high-tech industry and related small businesses; (3) bark beetle infestation; (4) I-70 corridor; (5) Rocky Mountain National Park; (6) US-36 and Highway 287 transportation corridors <sup>218</sup>
CD3	(1) western slope; (2) water protection; (3) San Luis Valley and Pueblo <sup>219</sup>	(1) western slope; (2) water; (3) tourism; (4) public lands; (5) Roaring Fork Valley; (6) farming and ranching; (7) mining and energy production; (8) San Luis Valley and Pueblo; (9) mountain Latino community <sup>220</sup>
CD4	(1) eastern plains; (2) agriculture; (3) Larimer County and Weld County <sup>221</sup>	(1) eastern plains; (2) oil and gas development along the Niobrara oil play; (3) water supply and demand conditions; (4) drought; (5) agriculture; (6) alternative energy; (7) equine industry <sup>222</sup>
CD5	(1) military interests <sup>223</sup>	(1) military installations; (2) transportation corridors <sup>224</sup>
CD6	(1) suburban communities; (2) Aurora <sup>225</sup>	(1) exurban communities; (2) E-470 beltway; (3) growth and development of Aurora <sup>226</sup>
CD7	None identified in opinion <sup>227</sup>	(1) "first ring suburbs"; (2) National Renewable Energy Laboratory <sup>228</sup>

public hearings, which means that the court identified some communities as being important for redistricting while discounting others raised by the public.

215. *Avalos*, 2002 WL 1895406, at \*4.

216. *Moreno*, 2011 WL 8614878, at \*3.

217. *Avalos*, 2002 WL 1895406, at \*4.

218. *Moreno*, 2011 WL 8614878, at \*3.

219. *Avalos*, 2002 WL 1895406, at \*5.

220. *Moreno*, 2011 WL 8614878, at \*8-9.

221. *Avalos*, 2002 WL 1895406, at \*6.

222. *Moreno*, 2011 WL 8614878, at \*9.

223. *Avalos*, 2002 WL 1895406, at \*6.

224. *Moreno*, 2011 WL 8614878, at \*13.

225. *Avalos*, 2002 WL 1895406, at \*7.

226. *Moreno*, 2011 WL 8614878, at \*13.

227. The *Avalos* court acknowledged that CD7, Colorado's newest congressional district at the time of the opinion, is "an extremely cut-up district" as it surrounds "the City and County of Denver on the west, the north, and the east." Denver's annexation of a part of Adams County for the purpose of building Denver International Airport caused the boundaries of Denver to become very irregular. The court appears to rely mostly on county boundaries and minority population considerations in analyzing the adherence of CD7's map to the redistricting criteria. *Avalos*, 2002 WL 1895406, at \*7.

228. *Moreno*, 2011 WL 8614878, at \*14.

As in *Carstens* and *Avalos*, the district court in 2011 continued to recognize the eastern plains, western slope, Pueblo and the San Luis Valley, and the City and County of Denver as well-established communities of interest.<sup>229</sup> However, unlike those courts, the *Moreno* court recognized dozens of new communities of interest that had never before been used in congressional re-districting.<sup>230</sup> Based on those newly recognized communities, the court made drastic changes to the existing congressional map.

Although numerous communities of interest were taken into account for drawing or making changes to each district's boundaries, the *Moreno* court made the most significant changes to the existing CD2 based on communities of interest.<sup>231</sup> In 2001, the *Avalos* court had recognized three communities of interest in CD2: Rocky Flats, I-70 corridor, and US-36 corridor.<sup>232</sup> In 2011, the *Moreno* court recognized six communities of interest in the same district: the higher education community (including both University of Colorado Boulder and Colorado State University in Fort Collins),<sup>233</sup> the high-tech industry and related small businesses, forest health issues arising from the bark beetle infestation, the I-70 corridor with its tourism and recreation focus, Rocky Mountain National Park, and the US-36 and Highway 287 transportation corridors.<sup>234</sup> The *Moreno* court pointed out that the Rocky Flats cleanup was no longer a community of interest because the cleanup of the site had been mostly completed by 2005.<sup>235</sup>

Based on these newly recognized communities of interest in CD2, the court approved changes to the district's boundaries.<sup>236</sup>

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229. *Id.* at \*2, \*8, \*9.

230. *See id.* at \*3, \*8-9, \*13-14.

231. *Id.* at \*3-9.

232. *Avalos*, 2002 WL 1895406, at \*4.

233. The court focused on the need for federal funding as the basis for the community of interest between CU and CSU. At first glance, it would seem as if CU and CSU would benefit from having separate representation if they are competing for federal funding. In *Carstens v. Lamm*, the court made it clear that a "competitive atmosphere" is "contrary to the concept of communities of interest." 543 F. Supp. 68, 72 (D. Colo. 1982). Recognizing this conflict, the *Moreno* court made it clear that "there is no evidence in the record that the two universities compete with one another for any notable federal grants." 2011 WL 8614878, at \*5.

234. *Moreno*, 2011 WL 8614878, at \*3.

235. *Id.* at \*4.

236. *Id.* at \*3-4.

The most consequential decision was to move Larimer County to CD2 from CD4.<sup>237</sup> For the forty years prior to the 2011 cycle, Larimer County had been part of CD4.<sup>238</sup> The *Avalos* court, ten years earlier, even recognized how important it was to keep Larimer County in CD4:

Testimony has established that Larimer County and Weld County have much in common. A number of people work in Larimer County and live in Weld County and vice versa. For the last 20 years Larimer and Weld Counties have been joined in the same congressional district. It is extremely important in recognizing community of interest to put the people of Weld and Larimer Counties together in the Fourth Congressional District.<sup>239</sup>

In 2011, the court completely reversed direction and identified new communities of interest to justify why Larimer County should be part of CD2<sup>240</sup> with the more liberal Boulder County instead of CD4 with the more conservative Weld County. Those shared communities of interest included higher education, health care, technology, Rocky Mountain National Park, and bark beetle activity which has led to forest devastation and safety issues such as “the hazard of trees falling on people while they are hiking, camping, fishing or skiing in the forest.”<sup>241</sup>

The court failed to mention that many of these shared interests had existed long before 2011<sup>242</sup> yet had not been deemed communities of interest for the purposes of redistricting. Missing from the court’s analysis was that minimizing disruption of prior district lines is supposed to be given the same statutory weight

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237. See *Hall v. Moreno*, 270 P.3d 961, 977 (Colo. 2012).

238. See *United States Congressional Districts in Colorado: 1983–1992*, *supra* note 169; *United States Congressional Districts in Colorado: 1993–2002*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Colorado%27s\\_congressional\\_districts#/media/File:United\\_States\\_Congressional\\_Districts\\_in\\_Colorado,\\_1993\\_-\\_2002.tif](https://en.wikipedia.org/wiki/Colorado%27s_congressional_districts#/media/File:United_States_Congressional_Districts_in_Colorado,_1993_-_2002.tif) [<https://perma.cc/4TRL-HWUT>] (last visited Nov. 23, 2020); *United States Congressional Districts in Colorado: 2003–2013*, *supra* note 198.

239. *Avalos v. Davidson*, No. 01 CV 2897, 2002 WL 1895406, at \*6 (Denver Dist. Ct. Jan. 25, 2002).

240. *Moreno*, 2011 WL 8614878, at \*6–8.

241. *Id.* at \*4–8.

242. For instance, Rocky Mountain National Park was created in 1915 and has attracted visitors from across the country ever since. The University of Colorado Boulder and Colorado State University have been the flagship Colorado universities since they were established in the 1870s.

as preserving communities of interest.<sup>243</sup> By moving Larimer County into a completely new congressional district, the court disrupted community and political relationships that undeniably took years of community engagement to develop.<sup>244</sup> In her dissent to the Colorado Supreme Court's decision upholding the district court's redistricting plan, then-Justice Allison Eid noted that "[t]he district court's plan in this case moves nearly one-third of Colorado's total population—almost 1.4 million people—to a different congressional district."<sup>245</sup> She explained that such a dramatic shift in district lines may be required when there is an addition (or loss) of a congressional seat, but that in the 2011 redistricting cycle, Colorado did not gain or lose any congressional seats.<sup>246</sup>

In the majority opinion of *Hall v. Moreno*, Chief Justice Michael Bender dismissed Justice Eid's concerns and applauded the district court for "placing its concern for present communities of interest above a mechanistic attempt to minimize the disruption of existing district boundaries."<sup>247</sup> In doing so, the majority did not recognize the important point that identifying new and potentially fleeting communities of interest that may not exist by the next redistricting cycle ignores the reality that "district lines, once drawn, reflect and encourage important relationships among constituents, community leaders, and the congressional representative surrounding particular issues—relationships that are lost when district lines change, or in this case, shift dramatically."<sup>248</sup>

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243. *Hall v. Moreno*, 270 P.3d 961, 984–85 (Colo. 2012) (Eid, J., dissenting).

244. The political implications of redrawing CD2 and CD4 were described in a 2011 *Denver Post* article: "Under the new congressional map, Larimer County—where active voter registration is 37 percent Republican, 28 percent Democrat and 33 percent unaffiliated—goes from the 4th Congressional District, now represented by Republican Cory Gardner, to the 2nd, represented by Democrat Jared Polis. Douglas County—where the voter tally is 51 percent GOP, 20 percent Democrat and 28 percent unaffiliated—would go from Republican Mike Coffman's 6th to the 4th. Meanwhile, rural areas of Adams and Arapahoe counties would move from Democrat Ed Perlmutter's 7th and 6th congressional districts to the 4th. The mix of Adams County voters is about 36 percent Democrat, 31 percent Republican and 31 percent unaffiliated. In Arapahoe, it's 33 percent Democrat, 37 percent Republican, and 28 percent unaffiliated." Tim Hoover, *Judge Rules in Favor of Democratic Map in Colorado Redistricting*, THE DENVER POST (Nov. 10, 2011), <https://www.denverpost.com/2011/11/10/judge-rules-in-favor-of-democratic-map-in-colorado-redistricting/> [https://perma.cc/9RHA-FY4E].

245. *Hall*, 270 P.3d at 983.

246. *Id.*

247. *Id.* at 976.

248. *Id.* at 985 (Eid, J., dissenting).



The final approved map from *Moreno* established Colorado's congressional boundaries through 2021.<sup>249</sup> The *Moreno* decision may have been the last time that a court in Colorado has to choose a redistricting map, because in 2018 Colorado voters passed Amendment Y, establishing the Independent Redistricting Commission.<sup>250</sup> In 2021, the newly established independent commission will for the first time be responsible for creating the next decade's congressional map, likely with the addition of a congressional seat. While the independent commission must consider communities of interest in accordance with the state constitution, it should not elevate the criterion above the other more objective redistricting criteria. Additionally, future commissions should be hesitant to recognize new communities of interest due to the inherent dangers of the criterion to the independence of the redistricting process, as explained in the following Section.

#### IV. PROBLEMS WITH THE COMMUNITIES OF INTEREST CRITERION

The following section details the specific dangers to fair and effective representation associated with the communities of interest criterion.

##### A. *Subjectivity and Discretion*

Unlike the relatively objective state-redistricting criteria such as contiguity and preservation of political subdivisions, identifying communities of interest for redistricting purposes is largely an exercise of discretion. State legislatures and courts have developed methods for objectively measuring contiguity, compactness, and preservation of political boundaries.<sup>251</sup> Communities of interest, on the other hand, have no objective means of being measured. As a redistricting guide published by the Brennan Center for Justice explained, "In practice, defining

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249. For a look at the final 2011 congressional map, visit: *United States Congressional Districts in Colorado: 2013-present*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Colorado%27s\\_congressional\\_districts#/media/File:United\\_States\\_Congressional\\_Districts\\_in\\_Colorado,\\_since\\_2013.tif](https://en.wikipedia.org/wiki/Colorado%27s_congressional_districts#/media/File:United_States_Congressional_Districts_in_Colorado,_since_2013.tif) (last visited Aug. 29, 2020) [<https://perma.cc/2TQE-5BW6>]; Lewis et al., *supra* note 169.

250. Amendment Y, L. 2018, at 3082–94 (amending COLO CONST. art. V, § 44); Colo. Pub. Radio Staff, *supra* note 29.

251. See *infra* Section III.B.1, III.B.3.

particular communities of interest can be notoriously fuzzy, because shared interests may be either vague or specific, and because people both move locations and change their interests over time.”<sup>252</sup> At the end of the day, the decision-maker, be it an independent commission, legislature, or court, gets to decide, based on its own opinion, which communities they believe are important enough to take into consideration when redrawing a district’s boundaries and which ones are not.

This problem is evident in the difference between the 2002 and 2011 redistricting opinions. In 2002, the *Avalos* court discussed thirteen communities of interest, most of which have long been recognized in Colorado redistricting and are well established in the eyes of most Coloradans.<sup>253</sup> Just nine years later, the *Moreno* court identified thirty-one communities of interest in the same seven districts.<sup>254</sup> Notably, those thirty-one communities of interest did not include all of the communities mentioned during the public hearings, which means that the court identified some communities as being important for redistricting while discounting others raised by the public.

With no objective standard and such a broad definition in the Colorado Constitution, there is no meaningful way to delineate the outermost boundaries of what can be considered a community of interest. For instance, in her dissenting opinion in *Hall*, Justice Eid criticized the majority’s heavy reliance on the communities of interest criterion, explaining that “[i]t is undoubtedly possible to draw similarities in interest between virtually any two geographic points in Colorado.”<sup>255</sup>

By extending the meaning of community of interest from those well-established communities in Colorado (e.g., western slope, eastern plains) to any community containing “one or more substantial interests that may be the subject of federal legislative action,”<sup>256</sup> the door is left open for essentially limitless identifications of such communities. This is particularly problematic in congressional redistricting, where partisan interests and gerrymandering attempts have historically hidden behind the guise of legitimate redistricting criteria. The redistricting commission

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252. Levitt, *supra* note 7, at 56.

253. *Avalos v. Davidson*, No. 01CV2897, 2002 WL 1895406, at \*3–7 (Denver Dist. Ct. 2002).

254. *Moreno v. Gessler*, No. 11CV3461, 2011 WL 8614878, at \*2–15 (Denver Dist. Ct. 2011).

255. *Hall v. Moreno*, 270 P.3d 961, 985 (Colo. 2012) (Eid, J., dissenting).

256. COLO. CONST. art. V, § 44(3)(b)(I).

may think that it is creating a map based on neutral criteria when in actuality it is effectuating the political goals of a particular party that is clever enough to disguise its desired district boundaries as preserving communities of interest.

Courts in other states have recognized the troublesome nature of such a broad redistricting criterion. For example, a Maryland court noted that using communities of interest in redistricting is particularly problematic because “the number of such communities is virtually unlimited and no reasonable standard could possibly be devised to afford them recognition in the formulation of districts.”<sup>257</sup> This inability to devise a reliable standard has led some political scientists to call communities of interest the “most ephemeral” of all the redistricting criteria.<sup>258</sup>

When considering which redistricting criteria to favor in redrawing district boundaries, future Colorado independent redistricting commissioners should be especially cautious when looking at communities of interest. Commissioners should be aware that they are making inherently subjective decisions when deciding which communities should be considered for redistricting purposes and which ones should not. The other, more neutral, criteria, such as compactness and preservation of political subdivisions, are more protected from partisan influence due largely to their inherent objectivity and limits on discretion. Therefore, commissioners should favor those criteria over communities of interest.

### *B. Manipulation of the Process*

Colorado is moving toward a redistricting process that is intended to be more independent and less partisan. Amendment Y was passed with the hope that an independent commission would draw districts based on neutral principles isolated from political interests.<sup>259</sup> The increased recognition of changing communities of interest is a threat to this goal, as the process of selecting which communities of interest should be taken into account when drawing district boundaries is vulnerable to

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257. *Matter of Legislative Districting of State*, 475 A.2d 428, 445 (Md. 1984).

258. Brunell, *supra* note 8, at 79.

259. Corey Hutchins, *The Hight Court Punted on Partisan Gerrymandering. Colorado's New Redistricting Laws Could Offer a Model for The Nation*, COLO. INDEP. (July 5, 2019), <https://www.coloradoindependent.com/2019/07/05/colorado-redistricting-gerrymandering/> [https://perma.cc/3LZQ-SS66].

manipulation by self-interested political parties or other partisan groups.

Supporters of the communities of interest criterion contend that communities of interest can easily be identified through public hearings held throughout the state in the run-up to the redistricting cycle.<sup>260</sup> However, public hearings, the ideal democratic mechanism in theory, can often be a forum for political strategists to surreptitiously lay the groundwork for districts to be drawn in their favor. Under the guise of preserving a community of interest, partisan actors can strategize as to which districts need to be redrawn in their favor and then testify at public hearings as to some community of interest that would be protected by the redrawing of the district in that fashion.

For example, two investigations conducted by ProPublica in 2011 illustrate the nature of the public hearing problem in redistricting.<sup>261</sup> In Colorado and California, two states that rely heavily on public testimony for determining communities of interest, the state Democratic Party and Republican Party were accused of enlisting local voters and groups to testify in support of district configurations that favored their respective parties.<sup>262</sup>

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260. See, e.g., Levitt, *supra* note 78 (“Communities of interest are notoriously difficult to identify concretely—there is no one road map that redistricting entities can buy to see where communities of interest are located. This is where the public comes in. Members of local communities can assist those in charge of the process by mapping out the boundaries of local communities that should be kept together within a district . . . . Through community forums and town meetings, and with the assistance of nonprofit organizations that serve the local community, members of the public can agree on the boundaries of their own communities of interest, with technology no more sophisticated than a road map and a permanent marker.”). See also Levitt, *supra* note 7, at 56 (“Others have sought to facilitate the articulation of more precise communities of interest through public testimony helping to define the nature and footprint of specific local communities.”).

261. Lois Beckett, *Colorado Redistricting Had Inside Help*, PROPUBLICA (Feb. 9, 2012), <https://www.propublica.org/article/kumbaya-to-confrontation-colorado-redistricting-started-with-best-intention> [<https://perma.cc/9RWG-EZKC>]; Olga Pierce & Jeff Larson, *How Democrats Fooled California's Redistricting Commission*, PROPUBLICA (Dec. 21, 2011), <https://www.propublica.org/article/how-democrats-fooled-californias-redistricting-commission> [<https://perma.cc/T8GK-SXLV>].

262. Beckett, *supra* note 261 (“But in Colorado, as elsewhere, public hearings often were conducted in code, with citizens lining up to describe various ‘communities of interest’ that would help one party and harm the other.”); Pierce & Larson, *supra* note 261 (“Democrats surreptitiously enlisted local voters, elected officials, labor unions and community groups to testify in support of configurations that coincided with the party’s interests. When they appeared before the commission, those groups identified themselves as ordinary Californians and did not disclose their ties to the party. One woman who purported to represent the Asian community of the San Gabriel Valley was actually a lobbyist who grew up in rural Idaho,

Members of the public who testified often failed to disclose their affiliation with a party and instead presented themselves simply as members of the community or concerned citizens.<sup>263</sup> One disillusioned member of Colorado's 2011 redistricting commission noted that "[m]uch of the public testimony he heard seemed to have been manufactured by Democrats and Republicans to justify highly partisan lines."<sup>264</sup> Rob Witwer, another member of the Colorado commission and a former Republican state legislator, lamented, "When parties are trying to manipulate a commission, the best way to do it is by starting where you want to end up, figuring out where you want the lines to be at the end and reverse-engineering it . . . and figuring out what 'community of interest' testimony serves that purpose."<sup>265</sup> The chairman of the redistricting commission, Mario Carrera, a media executive and an independent voter, told ProPublica that he believed "at least 80 percent of the public testimony the commission had heard was manufactured."<sup>266</sup> Arnold Salazar, a Democratic commissioner, said, "Probably 99.9 percent was manufactured."<sup>267</sup>

In addition to politically manufactured testimony, future Colorado independent commissions should also be mindful that the nature of public hearings biases results toward groups of people who attend and participate in public hearings. Latent or less vocal communities of interest can be drowned out by more politically experienced and strategic communities that attend such hearings. Other communities will never have their voices heard at all. The upshot of the process is that by choosing one community of interest to unify in a district, the commission may end up dividing another.

Therefore, although public hearings will be held and maps will be drawn based in part on the testimony of citizens, future independent commissions should be aware that public hearings

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and lives in Sacramento."); Olga Pierce et al., *Answering Your Questions on Our California Redistricting Story*, PROPUBLICA (Dec. 23, 2011), <https://www.propublica.org/article/answering-your-questions-on-our-california-redistricting-story> [https://perma.cc/4FGN-KWSU] (explaining that Republicans also tried to influence California's redistricting commission but that they "were far less organized or effective than Democrats.").

263. Pierce & Larson, *supra* note 261.

264. Beckett, *supra* note 261.

265. *Id.*

266. *Id.* Other members of the commission "estimated the amount of 'manufactured' testimony as 30 percent to more than 90 percent." *Id.*

267. *Id.*

are vulnerable to manipulation and may exclude some communities entirely.

### C. *Singular Representation*

Another basis of support for communities of interest is the idea that singular representation of an important federal issue is preferred because one representative can focus all of their attention on that issue and therefore achieve better results. Trial court testimony during the 2011 redistricting cycle demonstrated that

if an important issue is divided across multiple districts, it is likely to receive diffuse and unfocused attention from the multiple representatives it affects, as each is pulled in other directions by the many other issues confronting their districts. However, if a discrete and unique issue is placed in one district, that representative may familiarize herself with the complexities of the issue and the stakeholders it affects.<sup>268</sup>

While there are advantages to having a single member of Congress dedicated to an issue, such as a unified approach, having multiple members of Congress dedicated to the same issue also has its advantages. First, it is inevitable that many issues of federal concern will cross district lines, and members of Congress are already adept at coordinating their efforts to resolve an issue affecting multiple districts. Second, having two representatives instead of one speaking up for the same issue in Congress will likely lead to greater support and mobilization for that issue.<sup>269</sup>

Take the Rocky Flats cleanup, for example. In *Hall*, the Colorado Supreme Court points to the success of the Rocky Flats cleanup as an illustration of how unifying a district around a single-issue community of interest can lead to effective representation in Congress.<sup>270</sup> An alternative perspective is that the Rocky Flats cleanup is a success story that resulted from the collective efforts of numerous members of Congress from Colorado

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268. *Hall v. Moreno*, 270 P.3d 961, 971 (Colo. 2012).

269. The Brennan Center has even noted that a sizable community may *prefer* to be split across multiple districts in order to extend its influence in Congress. Levitt, *supra* note 7, at 56.

270. *Hall*, 270 P.3d at 972.

speaking out on the issue. For instance, when Congressman Mark Udall introduced the Rocky Flats National Wildlife Refuge Act of 2001,<sup>271</sup> the U.S. Representatives from Colorado's CD1, CD4, CD5, and CD6 signed on as co-sponsors of the bill,<sup>272</sup> indicating their concern for the issue<sup>273</sup> and willingness to support their fellow Coloradan. Notably, the bill was passed in December 2001, a month *before* the court decided *Avalos* and recognized Rocky Flats as a community of interest. Of course, the districts represented by Mark Udall and the other representatives from Colorado who helped get the legislation passed were drawn a decade earlier—long before Rocky Flats was identified as a community of interest for redistricting purposes.

While having a single member of Congress may guard against “diffuse and unfocused attention” on an issue, it is certainly not always the case. Important issues, such as transportation funding and water rights, typically affect multiple congressional districts and therefore may benefit from increased representation in Congress. Cordoning off a significant federal issue into a single district may therefore have the unintended effect of undermining a stronger representation of that particular issue.

#### D. Stability

In *Hall*, the Colorado Supreme Court noted:

Unlike the preservation of political subdivisions, which are relatively static . . . the myriad ways to define communities of interest regularly evolve . . . [p]ragmatically, this allows for the dissolution of old communities of interest and the

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271. Rocky Flats National Wildlife Refuge Act of 2001, H.R. 812, 107th Congress (2001).

272. Cosponsors: H.R. 812 (107th Cong. 2001), <https://www.congress.gov/bill/107th-congress/house-bill/812/cosponsors?searchResultViewType=expanded> [<https://perma.cc/9W2M-RMZJ>].

273. MICHELLE LAWRENCE ET AL., BD. OF DIRS., ROCKY FLATS COAL. OF LOCAL GOV'TS, COALITION SUPPORTS ROCKY FLATS CLEANUP AND WILDLIFE REFUGE BILL, (June 2001) [http://www.rockyflatssc.org/rfclog\\_board\\_policies/Newspaper%20Op-Ed%20supporting%20Natl%20Wildlife%20Refuge%206.01.pdf](http://www.rockyflatssc.org/rfclog_board_policies/Newspaper%20Op-Ed%20supporting%20Natl%20Wildlife%20Refuge%206.01.pdf) [<https://perma.cc/HDA5-WZXE>] (“The Coalition applauds Sen. Allard and Rep. Udall’s commitment and leadership in cleaning up and protecting Rocky Flats for future generations. We also applaud Governor Owens, Attorney General Salazar, and the entire Colorado congressional delegation for their support of this important legislation.”).

recognition of emerging communities of interest as the state's demographics continue to shift and change.<sup>274</sup>

The idea that district boundaries should constantly change and evolve goes against the U.S. Supreme Court's proposition that stability in redistricting is in many ways essential to the democratic process.<sup>275</sup> Maintaining stable district boundaries promotes more effective representation and fosters constituent engagement in the electoral process by promoting relationships with political contenders.<sup>276</sup> Conversely, recognizing new communities of interest every decade leads to the disruption of congressional districts and creates confusion and a lack of trust in the system. It also inhibits the ability of members of Congress to form lasting relationships with their constituents and of future congressional candidates to mobilize voters and plan for future campaigns.

Aside from the four historically recognized communities of interest in Colorado,<sup>277</sup> future independent commissions should be cautious in their approach to identifying communities of interest. By focusing only on well-established communities of interest and refusing to recognize new communities of interest that may be veiled attempts to redraw district boundaries in a partisan manner, future independent commissions will be able to comply with the Colorado Constitution without harming the independence of the redistricting process.

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274. *Hall*, 270 P.3d at 972.

275. *Reynolds v. Sims*, 377 U.S. 533, 583 (1964) ("Limitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative."); Samuel Issacharoff, *Supreme Court Destabilization of Single-Member Districts*, 1995 U. CHI. LEGAL F. 205, 235 (1995).

276. *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1228 (Colo. 2003) ("When the boundaries of a district are stable, the district's representative or any hopeful contenders can build relationships with the constituents in that district.").

277. The four historically recognized communities of interest in Colorado that are well established and will remain important in Colorado for the foreseeable future are: eastern plains, western slope, consolidated City and County of Denver, and San Luis Valley with Pueblo. Numerous state general assemblies and courts have consistently noted the importance of these communities in redistricting and have attempted to preserve them to the extent possible. Although, while these communities of interest have long been recognized in Colorado, they have not always been contained in their own congressional district. For instance, in the 1970s, the western slope was split in half, with the southern half in CD3 and the northern half in CD4. See ASSOCIATED PRESS, *Redistricting Splits W. Slope*, GOLDEN DAILY TRANSCRIPT, May 12, 1972.



Another reason to favor stable communities of interest over those that are more likely to rise and fall over a shorter period of time is that redistricting occurs once every decade. If an entire congressional district is drawn to accommodate a single community of interest, then the community should exist for at least ten years, otherwise the cohesiveness of the district will be diminished as soon as the interest is resolved. Although Rocky Flats was an important issue when redistricting was finalized in 2002, most of the cleanup was complete by 2005. That left six more years before the next redistricting cycle where a member of Congress represented a district drawn around a singular issue after the issue had been resolved. Furthermore, once the issue is resolved, the problem during the ensuing redistricting cycle then becomes whether it is better for the electorate to redraw the district back to its prior boundaries or leave the current boundaries in place for stability's sake; or, the district could be completely redrawn based on a newly identified community of interest. By focusing on a singular issue to define a community of interest, Colorado risks destabilizing the entire redistricting process over multiple cycles, leaving voters confused as to who represents them and who they share a community with, and leaving members of Congress less able to provide fair and effective representation. Therefore, communities of interest should remain constant to the extent practicable.

## CONCLUSION

The purpose of congressional redistricting is to achieve fair and effective representation. The process is fair when it balances the various neutral, state-specific criteria and limits the discretion of the mapmaker. The communities of interest criterion has shifted from being one among several redistricting criteria given equal weight to the most important criterion used by Colorado courts in evaluating redistricting plans. The recognition of communities of interest will always be, at some level, based on the decision-maker's own evaluation of which communities they consider important for redistricting and which ones they do not.

If the goal of Coloradans is to transition to a more independent and less political redistricting process, then future independent commissions should not elevate the communities of interest criterion over the other more objective redistricting criteria. If future independent commissions do rely on communities of

interest to redraw district boundaries, then they should favor well-established communities of interest over new ones because well-established communities of interest are less likely to be vehicles through which incumbents and political parties attempt to redraw district boundaries in their favor. With a more independent redistricting process, enlisting local voters and groups to testify about their supposed community of interest may be one of the last remaining avenues for political parties to influence the drawing of congressional districts in their favor, as was shown during the last redistricting cycle in 2011. Redistricting commissions should rely more on objective criteria such as contiguity, compactness, and preservation of political subdivisions that do not raise the same risks of manipulation by self-interested political actors.

For these reasons, future independent commissions should therefore avoid recognizing newfound communities of interest due to the redistricting criterion's subjectivity and malleability and should instead seek to preserve only well-established communities of interest in Colorado to the extent required by the Colorado Constitution. In doing this, future commissions will better support an independent redistricting process and further fairer and more effective representation.

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