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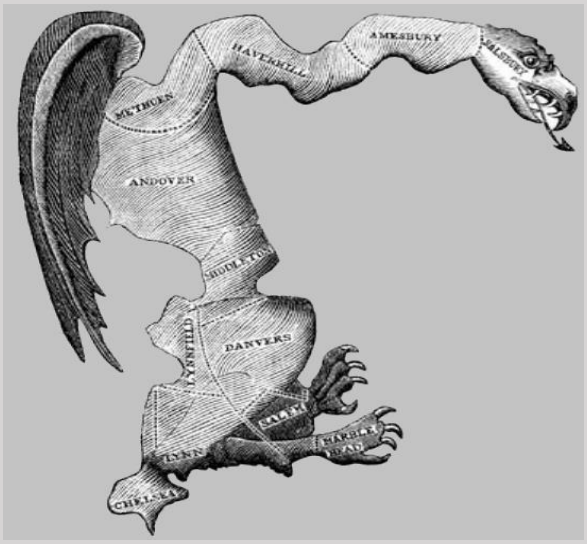
a cura di Lorenzo Spadacini

ENHANCING EFFECTIVENESS OF DEMOCRATIC REPRESENTATION

CONSTITUENCIES AND EQUALITY OF THE VOTE WITHIN DIFFERENT ELECTORAL SYSTEMS AND FORMS OF GOVERNMENT



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Enhancing effectiveness of democratic representation
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within different electoral systems and forms of government

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A CURA DI LORENZO SPADACINI

ENHANCING EFFECTIVENESS OF DEMOCRATIC REPRESENTATION
DISTRICTS AND EQUALITY OF THE VOTE WITHIN DIFFERENT ELECTORAL SYSTEMS AND FORMS OF GOVERNMENT *

SUMMARY

* All contributions are subject to a peer review process according to the journal's regulations.

LORENZO SPADACINI

Introduction

Political representation in Western Democracies has suffered from a lack of effectiveness since the first years of the new millennium[1]*: proof of this is, on the one hand, the emergence, up everywhere, of eccentric political formations compared to the traditional ones*[2]*, and, on the other, the fall in electoral participation*[3]*. The reasons have been identified mainly in the extra-legal field and, specifically, in the diffusion of neo-liberal economic and social policies since the 1980s*[4].

Nevertheless, it is possible to isolate strictly juridical and specifically national-level factors that have exacerbated the crisis in the Italian context[5]*. Usually, scholarship focuses on the different electoral formulas with which the institutional system has experimented; in fact, political representation and the electoral system are widely studied themes by Italian constitutionalists. Indeed, numerous studies have focused on the analysis of the various electoral systems*[6]*, on the constitutional principles laid down by the Constitution on the subject of voting*[7]*, on the relationship between electoral law and political parties*[8] *and on that between political representation and electoral legislation*[9]*, as well as on the impact of the electoral system on the parliamentary forms of Government*[10]*. Although with some diversity*[11]*, it has been shown in these studies that the Italian Constitution is rather open to different solutions regarding the electoral mechanism to be adopted*[12]*.*

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[1] L. DIAMOND, *Facing Up to the Democratic Recession*, in *Journal of Democracy*, n. 1/2015.

[2] Though its meaning in the democratic dynamic is contentious: J. MANSBRIDGE & S. MACEDO, *Populism and Democratic Theory*, in *Annual Review of Law and Social Science*, 2019.

[3] T. JEROENSE & N. SPIERINGS, *Political participation profiles, in West European Politics*, 2022.

[4] F. FUKUYAMA, *Liberalism and Its Discontents*, New York, 2022.

[5] M. VOLPI, *Crisi della rappresentanza e della partecipazione politica*, in N. Zanon, F. Biondi (eds.), *Percorsi e vicende attuali della rappresentanza e della responsabilità politica*, Milano, 2001.

[6] L. TRUCCO, *Democrazie elettorali e stato costituzionale*, Torino, 2011; M. RUBECHI, *Il diritto di voto. Profili costituzionali e prospettive evolutive*, Torino, 2016; A. VUOLO, *La legge elettorale. Decisione politica, controlli, produzione giurisprudenziale*, Napoli, 2017.

[7] On freedom, equality, secrecy: C. PINELLI, *"Non sai che il voto è segreto?". L'affermazione di un principio costituzionale e delle sue garanzie*, in *Il Politico*, n. 1/1996.

[8] P. RIDOLA, *Partiti politici*, in *Enciclopedia italiana*, V Appendice, 1978-1992, Istituto dell'Enciclopedia italiana, Roma, 1994 and V. ONIDA, *Per una riforma elettorale che consenta l'evoluzione del sistema politico*, in Aa.Vv., *La riforma elettorale*, Firenze, 2007.

[9] M. LUCIANI, *Il voto e la democrazia. La questione delle riforme elettorali in Italia*, Roma, 1991.

[10] F. LANCHESTER, *Sistemi elettorali e forma di governo*, Bologna, 1981.

[11] C. LAVAGNA, *Il sistema elettorale nella Costituzione italiana*, in *Rivista trimestrale di diritto pubblico*, n. 3/1952 and G. AZZARITI, *Rappresentanza politica e stabilità del Governo: due piani da non sovrapporre*, in Aa.Vv., *La riforma elettorale*, cit.

[12] S. CECCANTI, *Sistema elettorale: un buon trasformatore di energia o una macchina fotografica?* in *Quaderni costituzionali*, n. 1/2011 and A. BARBERA, *La nuova legge elettorale e la «forma di governo» parlamentare*, in *Quaderni costituzionali*, n. 3/2015.

In particular, our legal system has experienced an exceptional dynamism of electoral legislation[13]*, which lies at the very core of the building of political representation: indeed, various electoral formulas have been experimented within a short time, having combined proportional and majority components in many different ways*[14]*. Italian constitutionalist scholarship and case law have approached this process mostly by focusing on how to achieve a proper balance between the instances of representativeness and those of governability*[15] *that the electoral system should be geared towards. On this specific issue, therefore, the scientific literature has produced solid, albeit not always convergent, assessments*[16]*.*

However, the effectiveness of representation must be considered and pursued even beyond the question of which electoral formula to choose[17]*. As stated above, the Italian Constitution does not impose either one formula or the other and, therefore, within our legal system, this choice is the result of an eminently political assessment, albeit must respect other constitutional principles which are relevant although not as specific as in other constitutional systems (this is the case, for example, of constitutionalizing the proportional formula in Spain).*

On a purely theoretical level, a sharper focus on the effectiveness of representation, with the aim of enhancing the effectiveness of democratic institutions, would require that its constitutional dimension be constructed in a relatively new way compared to the traditional one, or, at least, reconsidering the relationship between the two components of the concept. From this standpoint, indeed, the conceptualization of political representation on the legal ground has been twofold[18]*. On the one side, it has mostly been conceived as a system that, since the beginning of the liberal representation*[19]*, is eminently aimed at the identification of the individual to be appointed to the political office. On the other hand, it has been conceived, especially in the Anglo-Saxon context, as a mechanism hinged on the permanent relationship*

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[13] F. LANCHESTER, *La Costituzione sotto sforzo. Tra ipercinetismo elettorale e supplenza degli organi costituzionali di garanzia*, Padova, 2020.

[14] C. DE FIORES, *Rappresentanza politica e sistemi elettorali in Italia*, in *Costituzionalismo.it*, n. 3/2007 and L. ELIA, *Riflessioni sui sistemi elettorali. Intervento al Seminario di Astrid "La riforma elettorale e il referendum"*, in *Astrid*, 2007.

[15] M. CROZIER & S.P. HUNTINGTON & J, WATANUKI, *The Crisis of Democracy: On the Governability of Democracies*, 1975.

[16] A. BARBERA, *La rappresentanza politica: un mito in declino?* in *Quaderni costituzionali*, n. 4/2008 and M. DOGLIANI, *La rappresentanza politica nello Stato costituzionale*, in *Questione Giustizia*, n. 4/2014.

[17] G.C. De Martin & Z. Witkowski & P. Gambale & E. Grigio (eds.), *Le evoluzioni della legislazione elettorale «di contorno» in Europa*, Padova, 2011 and R. BORRELLO, *La legislazione elettorale di contorno*, in *Nomos*, n. 2/2022.

[18] P. RIDOLA, *Partiti politici*, cit.

[19] E. BURKE, *Speeches at His Arrival at Bristol and at the Conclusion of the Pool* (1771), in R.B. McDowell, W.B. Todd (eds.), *The Writings and Speeches of Edmund Burke*, Vol. 9: I: *The Revolutionary War, 1794-1797*, *II: Ireland*, Oxford, 1991.

established between the voter and the elected[20]*. Based on this second approach, which should be further emphasized, the crucial factor in assessing the effectiveness of democratic institutions lies in the system's ability to ensure that elected representatives can be called to account vis-à-vis the electorate*[21].

Accountability is a pillar of representation meant like a relationship since only elected officials who can be called to account will be prompted to engage in a genuinely dialectical and responsive attitude towards those represented[22]*, throughout the representative relationship and not only at the moment of holding office.*

Preserving the electorate's support during a mandate, in fact, is of vital importance in the electoral relationship if the latter is conceived as a mechanism that does not end with the vote. In this sense, representation must be considered within the entire electoral cycle, which includes the phases of election, mandate exercise, and re-election (or non-confirmation). In this perspective, hence, the adherence to a conception of representation as real and not solely virtual implies that the moment of the election is not deemed to be exhaustive nor the most relevant in the light of conferring democratic legitimacy on political institutions. Nevertheless, the precise moments of election and re-election are still crucial because they are the legal instruments by which the electors can call the representatives to accountability; so, in any case, based on adherence to a conception of representation that stresses the elements of the electoral relationship and its real dimension, the transparency and inclusive capacity of electoral mechanisms take on a peculiar value.

Transparency plays a prominent role in the accountability mechanism. The latter performs better as far as the representative relationship is not made opaque by malicious factors, such as seats slipping, which may affect the evaluation of the performance of the MP's. This point is developed in this issue in the articles in Part II by Marco Podetta, from a legal perspective, and by Paolo Feltrin, Serena Menoncello, and Giuseppe Ieraci, from a political-quantitative perspective.

If accountability and transparency are two key factors for the effective functioning of representation, then it must be agreed that other elements, in addition to those already studied by doctrine, deserve to be carefully considered. In fact, there are several additional aspects related to electoral legislation that, considered both individually and jointly, impact significantly on these issues, on which, nevertheless, there seems to be a lack of in-depth study within the framework of Italian legal doctrine. Although scholarship has traditionally addressed the general issue of political representation[23]*, there seem to be no comprehensive studies on the processes leading*

[20] G. SARTORI, *La rappresentanza politica*, in *Studi Politici*, n. 4/1957; in addition, see the contribution of L. TRUCCO in this issue regarding that point.

[21] H.F. PITKIN, *The concept of representation*, Berkley, 1967.

[22] H. EULAU & P.D. KARPS, *Le componenti della responsività*, in D. Fisichella, (eds.), *La rappresentanza politica*, Milano, 1983.

[23] G.U. RESCIGNO, *La responsabilità politica*, Milano, 1967; G. FERRARA, *Rappresentanza e governo nazionale*, in *Democrazia e diritto*, n. 6/1988; C. DE FIORES, *Rappresentanza politica e sistemi elettorali in*

to the determination of electoral constituencies and the impact of electoral legislation on the allocation of seats – both matters that can cause representation to be less effective, thus making it difficult for voters to enforce accountability of those elected.

In fact, the current electoral system appears to be lacking in transparency (on this issue see the paper of Rebecca Green and Lucas Della Ventura; for the transparency of the Italian process, see my Article in Part I), starting with the functioning of the technical board, intended for the design of the multi-member constituencies (for proportional election) and single-member constituencies (for first-past-the-post election) by which deputies and senators are elected.

Regarding the determination of constituencies, two types of problems can be identified.

The first one concerns the method by which boundary constituencies are delimited. According to current Italian legislation, constituencies are determined by the Government, with the support of a Commission appointed by the Government itself (in this issue, see my Article in Part I as well as Alessandra Ferrara's; moreover, in particular Alessandra Mazzola's paper addresses the issue with reference with the problem of the new method of the census, and Daniele Casanova in Part I addresses the issue of the revision of the electoral districts in relation with the principle of equality)[24]. The works of the aforementioned Commission are not public, apparently in violation of the standards of independence required by the Venice Commission and, implicitly, also by the Italian Constitution. In this way, the risk, however, is that of a partisan determination of the constituencies, the so-called gerrymandering.[25] Instead, at a comparative level, there are many examples of different and more transparent procedures in boundary constituency determination which involve more independent bodies, as well as cases of popular consultancies.[26] One interesting case is presented in this special issue by Michael Pal. Through the study of the law of other contemporary democracies, the research aims to examine how other States determine electoral constituencies and to investigate the role of independent Commissions, including how they are appointed and how they function, and the role of the Government and of the Parliament within this type of process. This serves to identify the optimal way to ensure that the determination of electoral constituencies is impartial (from the point of view of the resident population included in each electoral district and ensuring the socio-political-cultural-economic homogeneity of constituencies). Since there is a lack of academic elaboration on these topics and there is no comparative survey of the

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Italia, cit.; and N. URBINATI, *Lo scettro senza re. Partecipazione e rappresentanza nelle democrazie moderne*, Roma, 2009.

[24] D. CASANOVA, *La delega legislativa per la determinazione dei collegi elettorali: profili critici di metodo e di merito,* in *Costituzionalismo.it*, n. 1/2018.

[25] N. SEABROOK, *One Person, One Vote: A Surprising History of Gerrymandering in America*, New York, 2022, to which in this special issue Part II is dedicated.

[26] R.J. JOHNSTON, C.J. PATTIE, *From the Organic to the Arithmetic: New Redistricting/redistribution Rules for the UK*, in *Election Law Journal: Rules, Politics and Policy*, n. 11/2012.

different experiences, it is deemed useful to identify the most suitable solution in order to make this essential moment transparent, participatory and non-partisan.

Secondly, the issue intends to analyse the extent to which the application of the Italian constituency system can affect the territorial distribution of representation.[27] *Particularly, when the electoral system provides different territorial levels for the allocation of seats (so-called multilevel electoral systems, like, for example, the German and Italian ones), it can occur that the final allocation of seats is different from the number of seats that the constituencies would be entitled to on the basis of the population size (so-called "seats slipping").*[28] *As for the Chamber of Deputies and the Senate in Italy, this phenomenon causes several problems since voters elect representatives who are not running for office in their electoral district. First of all, it raises issues in terms of transparency. Voters, in fact, do not know who they have elected, thus being deprived of the effectiveness of the choice of representatives and, consequently, they cannot control the second ones and enforce their accountability.*[29] *Moreover, it also has a negative impact on the right to be elected because candidates do not know which voters have elected them.*[30] *At the methodological level, it is first necessary to conduct an empirical analysis of the so-called "seats slipping" phenomenon in the two elections in which Parliament was elected under the current electoral (2018 and 2022), to understand when and how often a such phenomenon occurs, and to figure out if there are possible alternative systems to avoid it.*

The purpose of this special issue of the Consulta OnLine magazine is precisely to try to contribute to filling this gap in Italian doctrine. To this end, the work could only take a comparative approach: in other legal systems, especially those with a well-established tradition of single-member majoritarian constituencies, the issue of electoral districting is extensively studied. Therefore, ample space has been given to the experiences of the United States and Canada. In this regard, the articles by Rebecca Green and Lucas Della Ventura and Michael Pal are relevant. However, considering that our electoral system does not adopt first-past-the-post except for a limited number of seats, space has also been given to the German experience, where a mixed electoral system has been consolidated since the post-World War II period, the performance of which is judged positively by most commentators and to this extent

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[27] I. CIOLLI, *Il territorio rappresentato. Profili costituzionali*, Napoli, 2010.

[28] G.P. FERRI, *Nuovi e vecchi problemi del sistema di elezione dei parlamentari europei: l'assegnazione dei seggi attribuiti con i resti e lo «spostamento» dei seggi da una circoscrizione all'altra*, in *Giurisprudenza costituzionale*, n. 4/2010; C. PINELLI, *Eguaglianza del voto e ripartizione dei seggi tra circoscrizioni*, in *Giurisprudenza costituzionale*, n. 4/2010; and G. TARLI BARBIERI, *Lo «slittamento dei seggi» dopo la sentenza n. 35/2017*, in *Quaderni costituzionali*, n. 3/2017.

[29] L. SPADACINI, *L'Italicum di fronte al comma 4 dell'art. 56 Cost. Tra radicamento territoriale della rappresentanza e principio di uguaglianza*, in *Nomos*, n. 2/2016 and M. PODETTA, *"Rappresentatività" e "governabilità" nel Rosatellum-bis*, in A. Carminati (ed.), *Rappresentanza e governabilità. La (complicata) sorte della democrazia occidentale*, Napoli, 2020.

[30] D. CASANOVA, *Eguaglianza del voto e sistemi elettorali. I limiti costituzionali alla discrezionalità legislativa*, Napoli, 2020.

Fabian Michl's and Matthias Rossi's articles are relevant. Furthermore, since the topic requires expertise beyond the legal field, scholars of political science and geographers, as well as a member of the task force of Istat engaged in the production of Italian electoral maps, have been associated with the work (this is the case of Alessandra Ferrara, Paolo Feltrin, Serena Menoncello and Giuseppe Ieraci's papers in this issue).

The work hosted by the magazine in this issue was preceded by a Conference held in Brescia, at the Department of Law, on November 9, 2023.

This special issue of the magazine thus hosts the development of the proceedings initiated at that conference and stands as a milestone within the framework of the Prin-Pnrr "Enhancing effectiveness of democratic representation through transparency and accountability in Italy: neglected aspects of electoral mechanisms and their jurisdictional guarantees" (Principal Investigator: Prof. Andrea Pertici, University of Pisa).

For this hospitality, heartfelt gratitude must be extended to the editorial board of the magazine. In this regard, the volume is divided into four parts. The first part specifically concerns the methods of drawing electoral districts. The second part addresses the more specific theme of Gerrymandering and the relationship between districting and minority representation in both the USA and Italy (for this regard see the articles in the Part II of this issue by Lara Trucco, Rachele Bizzari, Arianna Carminati, Marco Podetta and Daniele Casanova). The Part III contextualizes the issue of single-member districting within mixed legislations, highlighting its peculiarities. Finally, the Part IV hosts a section that covers a topic beyond the focus of the volume. It questions whether, given the challenges of representative democracies based on electoral mechanisms, it makes sense to develop alternative forms of popular involvement in political decision-making. These subjects are developed by Francesco Pallante, Nadia Maccabiani and me.

PART I
HOW TO DELINEATE ELECTORAL CONSTITUENCIES

Daniele Casanova[*]

Drawing Electoral Districts and Ensuring Equal Representation: A Comparative Study of Electoral District in Italy and the United States[**]

SUMMARY: 1. Vote equality and determination of electoral districts. – 2. The Italian model: expansive thresholds established by the law and substantial discretion. – 3. The U.S. model: case-by-case evaluation, elevated discretion, and the important role of the Supreme Court for mathematical equality. – 4. Which model? Case-by-case evaluation or legislative range delimitation? A constitutionally oriented response. – 5. Conclusion. A new model for ensuring equality in the Italian constitutional System: low threshold established by law and minimal discretion.

ABSTRACT: ***This article aims to investigate the issue of vote equality and the determination of electoral districts, particularly those electing a single representative. Through an analysis of the current electoral legislation in Italy, this article seeks to highlight potential issues of constitutional illegitimacy in the criteria set by the legislature for delineating electoral districts. Subsequently, it compares the Italian model with the U.S. model, which, through a series of Supreme Court decisions, has seen greater protection of citizen equality. Finally, this article explores possible solutions for the Italian constitutional system and attempts to propose a different legislative model to facilitate compliance with the constitutional principle of vote equality.***

1. *Vote equality and determination of electoral districts*

The principle of the equality of the vote, expressly provided for by Article 48 of the Italian Constitution, has been framed by scholars into two different principles: the equality of the vote "on entry" and the equality of the vote "on exit".

As for the equality of the vote "on entry", it is synonymous with equality among voters when the right to vote is effectively exercised. From the perspective of the electoral process, this assumption implies that the minimum interpretation of the term "equality" is that each citizen should be entrusted with only one vote, or, in some cases (such as a mixed electoral system), an equal number of votes among all citizens.

Moreover, this principle dictates that each of these votes cannot assume a different value based on the subjective qualities of the voter. In this regard, the first limit stemming from the constitutional order would be the prohibition of employing instruments such as plural voting – that is, granting a voter the possibility to cast a

[*] Tenured Assistant Professor of Public Law, University of Brescia.

[**] This contribution is subject to a peer review process according to the Journal's Regulations.

greater number of votes compared to other voters – or multiple voting, allowing a voter to vote multiple times in different electoral districts[1].

The equality of the vote "on exit" pertains to a category where the voter's choice transcends the concept of mere "numerical value" and acquires the significance of "effective value", materializing as the equality of votes in electoral results. This second aspect has been the focal point of Italian electoral research and has given rise to significant divisions in legal doctrine. Scholars are divided between those who reject the existence of the constitutional principle of equality of the vote "on exit" in the legal system[2] and those, especially in the past, who believed that the principle articulated in Article 48 of the Constitution must be interpreted to ensure effective equality of votes at the conclusion of the electoral competition. This interpretation is closely tied to the constitutional necessity for adopting a proportional electoral system[3].

Beyond the dichotomy between equality "on entry" and equality "on exit", the consolidation of the constitutional principle of equality of the vote must also consider the opportunity for all citizens to possess an equal capacity for representation in Parliament, regardless of their place of residence within the national territory.

This is primarily influenced by the methods used to allocate seats in electoral districts and the criteria for determining such districts, based on the assumption that every electoral system is generally structured around a territorial division of the State.

For citizens to be fairly represented, it is essential that the allocation of seats in electoral districts guarantees equal opportunity for voters in different districts to be represented in Parliament before casting their votes. This ensures that some individuals do not have the potential to be represented by a greater number of deputies than others. In other words, it aims to avoid a situation where one elected representative could potentially represent a larger portion of the electorate than other representatives[4].

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[1] Regarding this minimum meaning of the equality of the vote, which translates into the impossibility of foreseeing forms of multiple or unequal voting, see E. GROSSO, *Art. 48*, in R. BIFULCO, A. CELOTTO, M. OLIVETTI (ed. by), *Commentario alla Costituzione*, v. I, UTET, Torino, 2006, 969 ff.

[2] See M. LUCIANI, *Il voto e la democrazia*, *Il voto e la democrazia*. *La questione delle riforme elettorali in Italia*, Editori Riuniti, Roma, 1991, 48 ff.

[3] See C. LAVAGNA, *Il sistema elettorale nella Costituzione italiana*, in *Rivista trimestrale di diritto pubblico*, n. 3, 849 ff.

[4] See A. ROUX, P. TERNEYRE, *Principio d'eguaglianza e diritto di voto*, 398. As highlighted by L. TRUCCO, *Contributo allo studio del diritto elettorale. I. Fondamenti teorici e profili normativi*, Giappichelli, Torino, 2013, 25, when assigning the same number of seats to districts with significant demographic differences or opting for an unequal distribution of seats in demographically equivalent districts, there is an issue concerning the equality of citizens. According to E. CATELANI, *Riforme costituzionali: procedere in modo organico o puntuale?*, in *Federalismi.it*, 2020, 21, the presence of substantial disparity in the representativeness of voters among various districts jeopardizes the effectiveness of the principle of the equality of votes. G. FERRARA, *Gli atti costituzionali*, Giappichelli, Torino, 2009, 28, also suggests that to ensure vote equality, the seat distribution should be organized so that each districts contains a similar number of voters, at least when the vote is cast.

In essence, when applying this principle to the delineation of electoral districts and the allocation of seats, it should entail that the numerical consistency of the population per seat is not excessively unequal. The underlying concept is that: to ensure equal representational capacity, each representative should represent the same number of citizens. For example, if one representative represents 100,000 citizens in a particular territory, the same ratio should apply to other elected representatives.

In this regard, a distinction is necessary between electoral districts that elect a single representative and electoral districts that elect multiple representatives.

For districts electing multiple representatives, it is not necessary for them to be composed of the same number of residents or voters. However, there must be a proportional distribution of representatives. For instance, if a district with 120,000 residents is entitled to elect three representatives and another district with 360,000 residents has the right to elect nine, there is no violation of the principle of equal treatment of voters. In both cases, there would be one representative for every 40,000 residents, even though one electoral district would have a population three times higher than the other.

This principle is well-defined in Article 56 of the Italian Constitution, which states that: «The number of deputies is four hundred, eight of whom are elected in the Foreign constituency» and «the allocation of seats among the constituencies, except for the number of seats assigned to the Foreign constituency, is carried out by dividing the number of inhabitants of the Republic, as resulting from the latest general population census, by three hundred ninety-two and distributing the seats in proportion to the population of each constituency, based on whole quotients and the highest remainders».

As can be seen from the table below – which shows the seats allocated in the last elections in October 2022 – the number of citizens per seat in Italian constituencies do not perfectly correspond.

Allocation of seats in Italian constituencies (Chambers of deputy 2022 election)			
Constituency	*Residents*	*Seats*	*Residents per seat*
Piemonte 1	2,247,780	15	149,852
Piemonte 2	2,116,136	14	151,153
Lombardia 1	3,805,895	25	152,236
Lombardia 2	2,088,579	14	149,184
Lombardia 3	2,175,099	14	155,364
Lombardia 4	1,634,578	11	148,598
Veneto 1	1,932,447	13	148,650
Veneto 2	2,923,457	19	153,866
Friuli-Venezia Giulia	1,220,291	8	152,536
Liguria	1,570,694	10	157,069
Emilia-Romagna	4,342,135	29	149,729
Toscana	3,672,202	24	153,008
Umbria	884,268	6	147,378
Marche	1,541,319	10	154,132
Lazio 1	3,622,611	24	150,942
Lazio 2	1,880,275	12	156,690
Abruzzo	1,307,309	9	145,257
Molise	313,660	2	156,830
Campania 1	3,054,956	20	152,748
Campania 2	2,711,854	18	150,659
Puglia	4,052,566	27	150,095
Basilicata	578,036	4	144,509
Calabria	1,959,050	13	150,095
Sicilia 1	2,365,463	15	157,698
Sicilia 2	2,637,441	17	155,144
Sardegna	1,639,362	11	149,033
Valle d'Aosta	126,806	1	126,906
Trentino-Alto Adige	1,029,475	7	147,068
Total	**59,433,744**	**392**	**151,617**

The table reveals, for instance, that the number of citizens per seat varies from 126,906 for the Valle d'Aosta constituency to 157,698 for the Sicilia 2 constituency. This variation, which might seem to somewhat violate the principle of equality, appears to be justified primarily by Article 56 of the Constitution.

Equally, in the United States, art. 1, sec 2 of the Constitution mandates that seats be distributed proportionally among the States based on the resident population. In this case as well, therefore, the population per seat is not perfectly coincident across all States. After the latest census (2020), the average population per federal representative is 761,169 inhabitants. At the state level, the distribution ranges from a

minimum of 542,704 inhabitants per representative in Montana to a maximum of 990,837 inhabitants per representative in Delaware[5].

In conclusion, Article 1, Section 2, and the XIV Amendment of the U.S. Constitution, along with Article 56 of the Italian Constitution, allow for such deviation through the provision of proportional seat distribution among States or electoral constituencies[6].

Returning to the Italian system, it is necessary to emphasize that when dealing with single-member electoral districts, the directive derived from Article 56 of the Constitution does not seem inherently sufficient to guarantee equality among voters.

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[5] See the report "*2020 Census Apportionment Results. Table 1. Apportionment Population and Number of Representatives by State*" prepared by United States Census Bureau (*census.com*).

[6] However, it would still be essential to open a discussion regarding the proportional electoral formula used to allocate seats to constituencies. In fact, there are proportional electoral formulas that can either advantage or disadvantage "larger" and "smaller" constituencies, implying that the adopted electoral formula is not inconsequential in terms of the final seat distribution. In this regard, one can think of significant debate that arose in the United States regarding the choice of a proportional formula to allocate seats to States based on population. From the perspective of the adopted mathematical formula, the United States has undergone evolution over time. Initially, when the number of representatives was not fixed in the Constitution but simply provided that "the number of representatives shall not exceed one for every thirty thousand [inhabitants]," Congress preliminarily set the population number for each representative. Once this number was established, the Jefferson method of the greatest divisors without recovering the remainders was initially used. Later (1840-1850), the Webster method of "principal fractions" was introduced, where seats were assigned based on whole quotients, with an additional seat when the remainder exceeded half of the quotient. Between 1850 and 1900, the Vinton (or Hamilton) method was employed. Since 1911, after the introduction of a fixed number of representatives (initially set at 433 with a 1911 Bill and 435 with the Reapportionment Act of 1929), other mathematical methods have been used. Initially, there was a return to Webster's principal fractions method. Since 1940, the Hill method of equal proportions has been introduced, which is the currently used mathematical method. With this formula, after assigning one seat to each state, the seats are distributed using the classic quotient method, and subsequently, an additional seat is anticipated through rounding according to the geometric mean of the remainders. For an analysis of the evolution, types of formulas adopted, and their potentially diverse implications for the number of seats assigned to states, see M. LI CALZI, *Aritmetica per la Costituzione: la ripartizione dei seggi al Senato*, in M. EMMER (ed. by), *Matematica e Cultura* 2008, Springer, Milano, 2008, 151 ff. Additionally, the work of G.G. SZIPRO, *La matematica della democrazia. Voti, seggi e parlamenti da Platone ai giorni nostri,* Bollati Boringhieri, Torino, 2013, 120 ff., provides insights into this topic. It is also interesting to note the analytical investigation conducted by R. CROCKER, *The House of Representatives Apportionment Formula: An Analysis of Proposals for Change and Their Impact on States*, in *Congressional Research Servic*e, 2016, 4 ff., where a compelling diagram illustrates the different number of seats that would have been allocated to federated states following the 2010 census if alternative mathematical methods experimented with throughout U.S. history had been used. This latter work empirically demonstrates that the mathematical formula is not entirely impartial, as certain states would be advantaged or disadvantaged in terms of the number of representatives to be elected to the U.S. House of Representatives. Due to this, following the 1990 census, the state of Montana attempted a judicial appeal. The Supreme Court, in *United States Department of Commerce v. Montana*, 503 U.S. 442 (1992), declared that the Hill method of equal proportions does not violate the Constitution. Furthermore, the Court emphasized that, based on numerous scientific studies cited, this method provides the fairest and most equitable distribution of seats among states.

Solely applying Article 56 would imply that, in the case of a national territory divided into single-member districts (equivalent to the seats in the Chamber of Deputies), these districts could be quite different from each other. In the scenario of a national territory divided into 392 single-member districts, the average for each district would be 151,517 inhabitants. With the proportional distribution and the highest remainders outlined in Article 56 of the Constitution, it would be possible – hypothetically – to establish an electoral district of approximately 226,000 inhabitants and another of about 76,500.

This would result in one district being three times larger in terms of population compared to the other. From this example, which illustrates the potential creation of significantly diverse electoral districts, Article 56 of the Constitution appears insufficient to correctly regulate the determination of electoral districts. It is necessary to reference other constitutional principles; these principles can only be the equality of the vote envisaged by Article 48 of the Constitution and the general equality principle outlined in Article 3 of the Constitution.

In the same way, even in the United States, to ensure a distribution of territory into single-member districts within individual States, it is not sufficient to rely solely on Article 1 of the Constitution[7]; it is also necessary to invoke the Equal Protection Clause in the XIV Amendment[8].

As mentioned in the introduction, from the principle of the equality of the vote – which in doctrine has been translated into the phrase “one man, one vote” or “one vote, one value” – it should follow that the numerical consistency of different electoral districts is not excessively unequal.

But how to determine the meaning of “not excessively unequal”? As you can see, there can be various models. The first, the Italian one, is accomplished by establishing a threshold set by law; the second, the U.S. model, involves granting discretion to the entity responsible for determining seats but, in this case, with close judicial oversight of this activity. However, what needs to be verified is whether these models (as they are actually adopted in the two States) are sufficient to ensure a correct and complete equality among voters.

[7] In which specific details are not provided regarding the geographical distribution of state territories or how single-member districts should be created.

[8] See paragraph 3.

2. *The Italian model: expansive thresholds established by the law and substantial discretion*

The Italian electoral system, introduced with Law No. 165 of 2017 and subsequent Law No. 51 of 2019[9], is a mixed electoral system. Under this system, 3/8 of the seats are allocated in single-member electoral districts (using the first-past-the-post system), while the remaining 5/8 are assigned through a proportional method calculated at the national level (for the Chamber of deputies) and at the regional level (for the Senate).

From a territorial distribution perspective, some seats are assigned within single-member districts, while the remaining seats are allocated within multi-member districts, which elect from 3 to 8 deputies each (for the Chambers of deputies) and from 2 to 8 senator (for the Senate).

All these districts, both single-member and multi-member, are established within 28 sub-national electoral constituencies (for the Chambers of deputy) and 20 regional constituencies (for the Senate). These constituencies are territorial spaces without candidates; they serve solely as spaces in which the single-member and multi-member districts are determined, with some relevance in the allocation of seats to political forces. In this sense, the constituency functions exclusively as a territorial space where seats are "transferred" following the national-level determination of the quantity of seats allocated to each political force. From here, the seats are then assigned in the various multi-member electoral districts within the constituency.[10]

The delimitation of electoral district boundaries is entrusted to the government, which, with the support of a Commission, is tasked with approving a legislative decree containing the determination of electoral districts. Regarding the identification of single-member and multi-member electoral districts, the law has established a series of criteria and guiding principles to instruct the government on the methods of determining the districts[11].

There are two categories of indications in the law.

Concerning "territorial" representation, the law established for the Chamber that in the delineation of single-member and multi-member districts, the coherence of each district must be ensured, considering the administrative units and, if necessary, local

[9] It has simply implemented the electoral law following the constitutional reform (Constitutional Law No. 1 of 2020) that envisaged the reduction in the number of parliamentarians (from 630 to 400 deputies and from 315 to 200 senators).

[10] For these aspects and their possible negative implications concerning voter equality and the unconstitutionality of the current electoral system, see M. PODETTA, *The Delimitation of Multi-Member Districts in Italy: Political and Territorial Mis-Representativeness*, in this issue.

[11] Regarding the procedure for the determination and approval of electoral districts, refer to L. SPADACINI, *Constitutional needs for the Italian process of drawing electoral districts: a more independent Commission, less partisanship, and greater transparency and participation*, in this issue.

systems[12]. Furthermore, consideration must be given to the economic, social, and historical-cultural homogeneity of the districts. Finally, it is envisaged that, as a rule, single-member and multi-member districts cannot divide municipal territory, except in cases where municipalities, due to their demographic size, include multiple districts within them[13].

As for the demographic component of districts, Law No. 165 of 2017 specifies that electoral districts should be formed in a manner ensuring that the demographic composition falls within a total population deviation of 20% compared to the average population of districts in the constituency.

This provision seems to be the most problematic; with this limit, electoral districts may contain significantly different population quantities.

According to the current electoral law, for example, for the 2022 election in the Lombardia 3 constituency (which roughly includes the provinces of Brescia and Bergamo), the average size of electoral districts is 435,020 inhabitants. A district of 348,016 and one of 522,024 could be constituted, with a difference of almost 200,000 inhabitants and a 50% increase from the smallest to the largest district.

Considering this situation, it appears challenging to believe that equality among residents located in different electoral districts within the same constituency is achieved[14].

The violation of the principle of equality seems even more evident when correlating districts placed in different electoral constituencies.

Indeed, as has been observed, Italian electoral legislation stipulates that the inequality among districts (20% either above or below the average population of districts) must be assessed based on the average population of the districts within the electoral constituency, not on the average population of constituencies nationwide.

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[12] Local systems are territorial units (610 areas) created purely for statistical purposes, aggregating the territory of municipalities based on daily commuting patterns between the place of residence and work for the population.

[13] In the delineation of electoral districts for the Senate election, the same characteristics are required, with the distinction that, for reasons not apparent, the requirements related to administrative units and local systems are absent in that case (see art. 3, sec, 3).

[14] In this regard, refer to M. COSULICH, *Il tramonto dell'eguaglianza (del voto). Considerazioni critiche sulla legge n. 165 del 2017*, in *Critica del diritto*, n. 2/2017, 30, which highlights that in this way, it is possible to define districts within the same constituency that differ by up to 40% of the population. The author considered that as a «marked – and unconstitutional – demographic disparity among single-member districts». Similarly, see S. TROILO, *Audizione presso la I Commissione permanente della Camera dei deputati in merito alla proposta di legge cost. A.C. n. 1585 e alla proposta A.C. n. 1616, concernenti la riduzione del numero dei parlamentari e conseguenti modifiche alla legislazione elettorale*, in *Forum di Quaderni costituzionali*, 2019, 9; A. APOSTOLI, *Il c.d. Rosatellum-bis. Alcune prime considerazioni*, in *Osservatorio costituzionale*, n. 3/2017, 3 ff.; L. SPADACINI, *La proposta di riforma elettorale all'attenzione del Senato: alcuni dubbi di illegittimità costituzionale*, in *Nomos*, n. 3/2017, 2 ff.; G. TARLI BARBIERI, *L'infinito riformismo elettorale tra aporie giuridiche e dilemmi costituzionali*, in *Federalismi.it*, n. 1/2018, 23.

This implies that, given the existing disparity among the averages of different constituencies, there can be a much greater distortion between an electoral district in one constituency (let's call it X) and one in another constituency (let's call it Y) than what is tolerated by the law within each individual constituency.

Based on the principles and guiding criteria outlined in the law, the smallest district in the Molise constituency could be comprised of 308,256 inhabitants, while the most populous district in the Piemonte constituency could consist of 539,467 inhabitants. This would result in a population disparity of approximately 75% from the smallest to the largest district – well beyond the range tolerated by the law between the least populous and most populous districts within the same constituency.

If these examples demonstrate a violation of the principle of equality, it is even more pronounced when considering certain "special" constituencies. This includes constituencies composed of a single electoral district (such as in the Molise and Valle d'Aosta constituencies) or the constituencies where the quota of elected representatives in single-member and multi-member districts differs from the rest of the national territory (as is the case in the Trentino-Alto Adige constituency, where 4 deputies are elected in single-member districts and 3 in multi-member districts).

In the above-mentioned Piemonte 1 constituency, one single-member district could have 539,467 inhabitants; in Valle d'Aosta the only district is composed of 126,806 inhabitants; and Trentino-Alto Adige's district could comprise 205,895 inhabitants. Consequently, there would be a deviation in population between the smallest and largest districts of approximately of 162% in the latter and 325% in the former.

Ultimately, one should question the reasonableness of a percentage deviation that does not consider the demographic composition of all electoral districts in the nation but only those within an additional territorial delineation (the electoral constituencies) whose boundaries are defined by the legislature.

If the equality of the vote concerns all voters, divided into different territorial components of the State, it is problematic to distinguish them based on a third subdivision of the territory, especially when, as in the current electoral legislation, it serves only as a "transmission link" between the national constituency (where the electoral formula is applied) and the multi-member and single-member districts (where candidates run for election), thus not having a distinct function of its own.

For this purpose, it should be noted that in other legal systems, such as the United States and the United Kingdom, the percentage of deviation refers to the districts within a single State or individual Nations, but in such cases, it is quite different. Those territories, indeed, are entities with their own autonomous legitimacy, history, homogeneity, etc., and they are not territories created solely for electoral purposes, as is the case with Italian constituencies.

In the Italian constitutional system, the allocation of districts within sub-national constituencies is inevitable for Senate elections. This is because representatives are

elected within each Region in accordance with Article 57 of the Constitution[15]. Consequently, the parameter of the average population of the districts within the regional constituency has its own intrinsic reasonableness. From this perspective, voters should be placed in a condition of parity "only" with other voters residing and voting in the same Region. While this solution is correct for the Senate election, it is, in any case, more problematic for the reasons mentioned, regarding the Chamber of Deputies.

In conclusion, there is a broader consideration concerning multi-member districts that goes beyond the scope of this work, particularly in relation to single-member districts.

For these as well, the "20% rule" and all the other criteria used in determining single-member districts are applicable. Additionally, these multi-member districts are formed through the aggregation of single-member districts.

In this case, the issue is not about the difference in population.

Firstly, in the presence of multi-member districts, the legislature should not be concerned with specifying a maximum percentage limit for the difference in the composition of multi-member districts. This is because the varied number of seats assigned should depend on their overall population[16].

Secondly, to ensure a better representation of citizens within a specific territory, the legislature should lean towards a system of identifying multi-member electoral districts that correspond to the entire territory of existing administrative entities within the State (such as regions or provinces, or unions of provinces).

This approach would, on the one hand, provide a certain weight to the representation of political communities already present in the state's territory. On the other hand, it could help avoid the risk of constituencies being formed in a way that could advantage a political force or intentionally discriminate against groups of citizens.

3. *The U.S. model: case-by-case evaluation, elevated discretion, and the important role of the Supreme Court for mathematical equality.*

In the United States, in the absence of a law establishing the structure of electoral districts, it has been the Supreme Court that, through its jurisprudence of electoral cases, explicitly affirmed that the requirement for electoral districts to be equal in terms of population deriving from the Equal protection Clause as stipulated in the Fourteenth Amendment.

[15]It expressly provides that «The Senate of the Republic is elected on a regional basis». Furthermore, it is established that no Region can have fewer than three representatives, and the Molise and Valle d'Aosta regions are each represented by a single senator.

[16] See paragraph 1.

From this perspective, it is interesting to analyze some judgments concerning electoral districts for federal and state elections to understand how the principle of equality has been interpreted and what exceptions may be applied to such a principle.

The initiation of the extensive U.S. case law occurred with the *Baker v. Carr*[17], in which the Supreme Court affirmed the justiciability of political electoral rights regarding the definition of electoral districts. In this judgment, the U.S. Supreme Court did not delve into the merits but only addressed the possibility that an alleged violation of the equality principle could find redress before the judicial power. After determining justiciability of legislative districting, the Court did not prescribe constitutionally-imposed criterion to follow in determining the districts, nor did it instruct the trial judge on the equitable remedy to use to resolve the dispute[18].

In this regard, the Court limited itself to stating that: «We conclude that the complaint's allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision. The right asserted is within the reach of judicial protection under the Fourteenth Amendment»[19].

The opening to judicial recourse in electoral matters, inaugurated in 1962, led the Supreme Court to two significant rulings in the immediately following years. In the first ruling (*Wesberry v. Sanders*)[20], the Court directly challenged the legitimacy of the unequal demographic composition of individual state districts for the election of the federal House of Representatives.

In the case brought before the Court, which concerned the electoral districts for congressional elections in the State of Georgia, the petitioners alleged that in their district (Fifth Congressional District), the population was «two or three times» greater than the population in other districts within the State. In this ruling, the Court, while acknowledging the issue of legitimacy, did not primarily and exclusively rely on the violation of the Equal Protection Clause as stipulated in the Fourteenth Amendment.

In this case, the Supreme Court tied the illegitimacy of the electoral district design to the violation of the provision in Article I, Section 2 of the federal Constitution, which stipulates that the distribution of representatives in the U.S. House of Representatives must be made in proportion to the population residing in the States. Furthermore, the Supreme Court, through an examination of the debates leading to the approval of the U.S. Constitution, attempted to demonstrate that the Founding Fathers had intended to use the expression «chosen […] by the people» to ensure the equality of citizens in the election of representatives to the U.S. House of Representatives.

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[17] 369 U.S. 186 (1962). On the judgment, see the commentary by J.B. ATLESON, *The Aftermath of Baker v. Carr. An Adventure in Judicial Experimentation*, in *California Law Review*, v. 51/1963, 535 ff.

[18] G. BOGNETTI, *Malapportionment ideale democratico e potere giudiziario nell'evoluzione costituzionale degli Stati Uniti*, Giuffrè, Milano, 1966, 82.

[19] 369 U.S. 186, 237 (1962).

[20] 376 U.S. 1 (1964).

According to the justices, this equality cannot be limited to the distribution of representatives among the States (based on the population residing therein) but must necessarily be extended to the demographic parity within each territorial division within the federated State itself[21].

Although the line of reasoning employed by the justices primarily leveraged the first article of the U.S. Constitution, the most significant aspect of this ruling lies in providing a decisive interpretation of the relationship between representation and equality. According to the Supreme Court, equal representation for an equal number of people is «the fundamental goal for the House of Representatives»[22], because for the Founders the House of Representatives […] was to represent the people as individuals, and on a basis of complete equality for each voter»[23].

From this assertion, it does not necessarily follow that there must be perfect mathematical parity in every electoral district within an individual State (perhaps an unattainable goal). However, there is «no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people»[24].

The ruling imposes a significant limitation on the discretion of the legislature in electoral matters, which State legislatures had extensively abused via malapportionment until that moment[25]. There was a risk that the Court could declare numerous State legislation on the redrawing of electoral districts, which exhibited levels of inequality like those found in this initial case brought before the highest judicial body of the state, as illegitimate.

While in this decision, the Court seemed to underestimate the Equal Protection Clause provided by the XIV Amendment, in *Reynolds v. Sims*, also issued in 1964[26], the

[21] On this point, it is interesting to note the dissenting opinion of Justice Harlan, who presents a reading of the constitutional debates entirely different concerning both Article 1 of the second section of the U.S. Constitution and the Fourteenth Amendment. According to Justice Harlan, the combined provisions of the two would not encompass the issue of the distribution of seats in the electoral districts of each individual State. Similarly, some scholars have criticized this aspect of the Court's decision. For example, P.B. KURLAND, *Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*, in *Harvard Law Review*, 1964, 146 f., strongly opposed the Supreme Court's approach, characterizing it as an attempt to "rewrite history" to support its decision.

[22] 376 U.S. 1, 18.

[23] 376 U.S. 1, 14.

[24] 376 U.S. 1, 18.

[25] In this regard, refer to the data concerning the percentages of malapportionment in different States in 1964 reported by G. SCHUBERT, C. PRESS, *Measuring Malapportionment*, in *The American Political Science Review*, n. 2/1964, 320 ff., which highlight cases of extreme inequality, especially concerning districts for the election of State's legislative assemblies. This issue was also emphasized by Justice Harlan, who, in Wesberry, explicitly stated, in dissent, that if the Supreme Court's conclusion were correct, electoral districts in most other States would be considered unconstitutional when evaluated using the same standard applied to the Georgia case.

[26] 377 U.S. 533 (1964). Also, consider the rulings issued on the same day, still concerning the distribution of seats for the elections of the legislative assemblies: the State of New York, *WMCA v. Lomenzo*, 377 U.S. 633 (see M. EDELMAN, *Democratic Theories and the Constitution*, State University of New York Press, Albany, 1984, 141 f.); the State of Maryland, *Maryland Committee for Fair*

Supreme Court anchored its decision directly to the principle of «equal representation for equal number of voters»[27]. The Equal Protection Clause of the XIV Amendment[28], was used to reject the territorial division of the State of Alabama, which only partially considered the population residing in the electoral districts. In fact, the state law specified that each county within the State had the right to at least one representative in the lower chamber of state legislature. And for the Senate, it was stipulated that no county could be divided into two separate electoral districts.

The essence of the decision can be expressed in the words used by Justice Warren in the majority opinion, who clearly indicated the line to follow regarding parliamentary political representation: «Legislators represent people, not trees or acres» and «Legislators are elected by voters, not by farms or cities or economic interests»[29].

The nature of electoral law and equality, according to the Supreme Court, should be traced back to an individual representation perspective that emerges only by «taking the equality of the rights of individuals as a reference point»[30]. The individual is the holder of the political right to vote. It is from this premise that the Supreme Court identified the scope of the principle of equality in the rules for the division of state territory: «The weight of a citizen's vote cannot be made to depend on where he lives [...]. A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm. This is the clear and strong command of our Constitution's Equal Protection Clause». For these reasons, the population criterion is necessarily «the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies»[31].

Representation v. Tawes, 377 U.S. 656 (see C.A. ANZALONE, *Supreme Court Cases on Political Representation*, *1787-2001,* Routledge, New York, 2015, 159 ff.); the State of Virginia*, Davis v. Mann*, 377 U.S. 678 (see J. DINAN, *The Virginia State Constitution*, Oxford University Press, New York, 2014, 98); the State of Colorado, *Lucas v. Colorado General Assembly of the State*, 377 U.S. 713 and the State of Delaware, *Roman v. Sincock*, 377 U.S. 695 (see C.E. HOFFECKER, B.E. BENSON, *The Development of Costitutionalism in Delaware*, in G.E. CONNOR, C.W. HAMMONS (ed. by), *The Constitutionalism of American States*, University of Missouri Press, Columbia, 2008, 181). Specifically, in the mentioned case in the text and in the case of Delaware, the Supreme Court ruled out the possibility that the state Senate, if directly elected, could be represented in the same manner as the federal Senate, as the counties «*never have had those aspects of sovereignty which the States possessed when our federal system of government was adopted*» (*Roman v. Sincock*, 377 U.S. 695, 709).

[27] 377 U.S. 533, 560-561.

[28] In general, for the Equal Protection Clause, reference is made to the work of. W.D. ARIZA, *Enforcing the Equal Protection Clause: Congressional Power, Judicial Doctrine, and Constitutional Law*, New York University Press, New York, 2016.

[29] 377 U.S. 533, 662.

[30] G. CHIARA, *Titolarità del voto e fondamenti costituzionali di libertà ed eguaglianza*, Giuffrè, Milano, 2004, 189.

[31] 377 U.S. 533, 567-568. The Supreme Court, in its reasoning, added that this interpretation essentially stems from Lincoln's vision of democracy: «government of the people, by the people, [and] for the people».

In the matter of the ruling in *Reynold v. Sims*, the Supreme Court did not, however, demand from the States a perfect mathematical equality in the composition of state districts[32], but acknowledged the existence of legitimate reasons that can limit the principle of proportionality in the formation of the electoral district.

These purposes, which the legislature can reasonably pursue, may include maintaining the integrity of different political subdivisions or the need to establish compact and contiguous districts[33]. Population equality, however, cannot be constrained by considerations of a historical nature, economic interests of various cities and counties, or a social or political group. These are all reasons that fail to demonstrate the legitimacy of deviating from the principle of equal population in each electoral district because «Citizens, not history or economic interests, cast votes»[34].

Furthermore, in the rationale, the Supreme Court began to differentiate cases of electoral districting for State House of Representatives elections from that of the federal Congress. According to the judges, in State House of Representatives elections, where there are generally more electoral districts, the legislature is not precluded from using "political subdivision lines" (meaning following the boundaries of counties or cities) to a greater extent than what might be deemed permissible in designing districts for federal elections. In federal elections, the number of electoral districts is inevitably lower for each State[35].

While in the examined rulings, the Supreme Court did not specify any maximum limit of demographic deviation between districts, in the 1969 ruling *Kirkpatrick v. Preisler*[36], the Supreme Court introduced for the first time the concept of the "range of deviation" concerning the average population quotient within an electoral district[37]. The case pertained to the electoral districts for the U.S. House of Representatives election provided by the State of Missouri, which had been reformulated by the legislature based on the 1960 census. The demographic variation in the composition of the districts was minimal, reaching a maximum of 3.13% excess and 3.84% deficiency compared to the ideal population average for each district.

The main argument put forth by the Missouri legislature in defense of the redistricting plan was based on the notion that the population variance between

[32] On the contrary, the Court has stated that «We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement» (377 U.S. 533, 577).

[33] 377 U.S. 533, 570: «A consideration that appears to be of more substance in justifying some deviations from population-based representation in State legislatures is that of insuring some voice to political subdivisions, as political subdivisions». The decision was made without the judges conducting specific mathematical evaluations, as it was sufficient for declaring the illegitimacy that the legislator did not use only the parameter of population in determining the boundaries of the electoral districts.

[34] 377 U.S. 533, 578-580.

[35] 377 U.S. 533, 577.

[36] 394 U.S. 526 (1969).

[37] A. RUSSO, *Collegi elettorali ed eguaglianza del voto. Un'indagine sulle principali democrazie stabilizzate*, Giuffrè, Milano, 2008, 115.

districts was so minimal that it did not need justification, as it fell within the principle of "as nearly as practicable".

However, in its rationale, the Supreme Court interpreted its precedents differently. The Court stated that there is no level of demographic inequality, no matter how minimal, in the composition of districts that can be considered inherently legitimate. According to the Court, the "as nearly as practicable" principle cannot be assessed without regard to the circumstances of each case[38]. In this way, the Court rejected the idea that there could be a minimum threshold of inequality that is always deemed reasonable. Instead, the population imbalance in the composition of the State's electoral districts and its potential acceptable justifications must be evaluated on a case-by-case basis[39].

In the specific case addressed by the Supreme Court, the population variations among the various U.S. Congressional districts, though minimal, were not adequately justified by the state legislature. In fact, the State of Missouri justified its seat distribution plan by asserting that the electoral districts had been divided to represent various economic and social interests in the Congress. However, according to the Court, these interests cannot impact the principle of «equal representation for equal number of people». The Court emphatically restated that «[N]either history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation»[40].

Ultimately, for the judges, the standard to assess the legitimacy of the distribution of electoral districts within States is not a fixed quantitative matter but rather a tool that «permits only the limited population variances which are unavoidable despite a good faith effort to achieve absolute equality, or for which justification is shown» [41].

The justifications that a state can adopt to legitimize such disparities are not explicitly mentioned by the Court. However, in the 1969 ruling *Wells v. Rockefeller*[42], the Supreme Court rejected the idea that equality could be limited to avoid dividing districts and "breaking up" socially, politically, or economically homogeneous territories[43].

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[38] 394 U. S. 526, 530.

[39] The Supreme Court, in fact, asserts that: «*The extent to which equality may practicably be achieved may differ from State to State and from district to district*» (394 U.S. 526, 530-531).

[40] 394 U.S. 526, 530-535.

[41] 394 U.S. 526, 531.

[42] 394 U.S. 542 (1969).

[43] 394 U.S. 542, 546. In this case, the State of New York in 1968 had divided the state into seven homogeneous regions to determine 36 of the 46 districts in which the State was to be divided. Each of these regions was then subdivided into districts with substantially identical populations. Overall, the most populous district contained 435,880 inhabitants (6.488% more than the average population), while the smallest district had 382,277 inhabitants (6.608% below the average), with a maximum distance between the two districts just over 13%. According to the Court, they did not achieve a minimal variation "as nearly as practicable" because the legislature did not demonstrate the necessity of resorting to the formation of the seven homogeneous regions, and it was therefore inconsequential that the districts within them had equal populations. Regarding the decision, M.E. JEWELL, *Commentary*, in

Building on these precedents, the 1983 ruling *Karcher v. Dagget* is not surprising[44]. In this case, the Supreme Court invoked the violation of the equality principle in the distribution of districts for the U.S. House of Representatives election carried out by the State of New Jersey following the 1980 census, with a maximum disparity of just 0.6984%[45]. The Court, while reaffirming that equal representation does not necessarily require identical populations in districts, upheld the District Court's ruling of illegitimacy, which had identified a lack of arguments against structuring the districts to make them even more equal. In this case as well, the Court admitted the possibility of deviating from the principle of perfect population parity for each district only if legislative policies are applied consistently[46] although it did not explicitly indicate the justifications for demographic disparities or when they should be deemed reasonable[47].

From the Supreme Court rulings, it is evident that the population criterion is the first, though not the only, principle in the matter of the distribution of electoral districts within a state[48]. The Court has underlined on multiple occasions the possibility of deviations from perfect numerical equality in district composition when other interests deserving protection are present. However, regarding the federal House of Representatives election, such protections have rarely been accepted by the judges as legitimate reasons for even minor deviations from demographic congruence between districts.

Conversely, the United States Supreme Court has adopted a less rigid stance when it comes to state legislative districting plans[49]. While the *Reynolds v. Sims* already indicated a difference in evaluating natural boundaries of districts for national

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N.W. POLSBY (ed. by), *Reapportionment in the 1970s*, University of California Press, Berkeley, 1971, 47, observes that «most curious part of the Court's opinion in the […] Wells cases in the refusal to permit deviations in population equality in order to follow county and municipal boundaries». This decision, in fact, raises an issue concerning the lack of balance between the administrative boundaries of local communities and an equal population within electoral districts.

[44] 462 U.S. 725 (1983). For a commentary on the decision, refer to W.B. POWERS, *Karcher v. Daggett: The Supreme Court Draws the Line on Malapportionment and Gerrymandering in Congressional Redistricting*, in *Indiana Law Review*, v. 17/1984, 631 ff.

[45] The most populous district was indeed composed of 527,472 inhabitants, while the least populous had 523,789 inhabitants.

[46] 394 U.S. 542, 548.

[47] See J. SUZUKI, *Constitutional Calculus: The Math of Justice and the Myth of Common Sense*, John Hopkins University Press, Baltimore, 2015, 88. On the commented judgment, also see R.M. SMITH, *Liberalism and American Constitutional Law*, Harvard University Press, London, 1985, 133 ff. and R.K. STAVINSKI, *Mandate of Equipopulous Congressional Districting: Karcher v. Dagge*tt, in *Boston College Law Review*, n. 2/1985, 563 ff.

[48] See R.W. BEHRMAN, *Equal or Effective Representation: Redistricting Jurisprudence in Canada and the United States*, in *The American Journal of Legal History*, n. 2/2011, 287.

[49] M. ALTMAN, *Traditional Districting Principles: Judicial Myths vs. Reality*, in *Social Science History*, n. 2/1988 160, believes that «In the courts, many types of districts have been attacked, but congressional districts have undergone particularly close recent scrutiny by the Supreme Court».

parliaments, a 1973 ruling, *Mahan v. Howell*[50], highlighted a clear distinction in the Court's approach towards determining state legislative districts in individual States.

The case involved the modification of a redistricting plan for the election of the state legislative districts in Virginia. The original plan contained a population deviation of 16% between the most populous and least populous districts. The district court, in response to the petitioners' request, had reduced the maximum percentile population deviation between the electoral districts of the state to 10%[51]. The significance of the Supreme Court's ruling lies in its assertion that the state court should not have applied the principles established in previous cases concerning US Congressional districts, particularly those adopted in *Kirkpatrick* and *Wells*[52].

According to the Supreme Court, the lower Court should have adhered to the principles outlined in *Reynolds v. Sims*. In this specific case, the 16% difference between the districts was deemed legitimate, as the legislature had sufficiently justified this discrepancy by the goal of not disrupting the administrative territories in the state, particularly by keeping counties and cities united. For the Supreme Court, these needs were considered a reasonable political objective and not in conflict with the Fourteenth Amendment. However, *Mahan v. Howell* did not overturn the one-man, one-vote principle but simply allows the Court greater flexibility in the scrutiny of legitimacy, including factors other than population[53].

The reasons that can legitimize a limitation of the equal population principle in the case of districts for the election of the State parliament are diverse. The Court had mentioned these reasons in a previous decision (*Swann v. Adams*)[54], reiterating that disparities between various districts can be justified by considerations of state policy, such as the integrity of political subdivisions, the maintenance of compactness and

[50] 410 U.S. 315 (1973).

[51] It should be noted that it is typical of decisions by U.S. jurists, regarding the identification of electoral district boundaries, to directly intervene by regulating the territorial division within the judgment. This possibility was expressly recognized by the Supreme Court in *Parsons v. Buckley*, 379 U.S. 359 (1965), in which the justices declared that if the state (in this case, Vermont) had not made efforts to implement a proper seat distribution in compliance with the principle of equality, the district court should have replaced the legislature in determining and designing the electoral districts. To further protect voter equality, the Supreme Court also introduced another method to ensure compliance by the legislature. In some rulings, judges have recognized the power of district courts to "sterilize" the powers of the State legislature to ordinary administration only, thus indirectly compelling the political power to act to restore the boundaries of electoral districts in accordance with the principle of one man, one vote. In this sense, the *Fortson v. Toombs*, 379 U.S. 621 (1965), in which the Supreme Court affirmed the effects of an injunction issued by the district court of Georgia, is noteworthy.

[52] The Supreme Court had already foreshadowed, albeit cautiously, this principle in the *Abate v. Mundt*, 403 U.S. 182 (1971).

[53] See C. HYLAND, *Constitutional Law - Mahan v. Howell - Forward or Backward for the One Man-One Vote Rule*, in *DePaul Law Review*, n. 4/1973, 934, who adds that «As in other reapportionment decisions, the Court looked at the particular facts in this case and refused to establish a single standard to be applied uniformly in all cases dealing with reapportionment».

[54] 385 U.S. 440 (1967).

contiguity in districts, or to preserve natural or historical boundaries present in the State[55].

Within the differentiation between congressional districts and state districts, a new line of Supreme Court jurisprudence emerged in 1973 with the *White v. Regester*[56]. In this case, the Court did not invalidate the redistricting plan for the Texas state legislature, which had a maximum deviation of 9.9% between the most populous and least populous district. The Supreme Court deemed the district court's declaration of illegitimacy, based on the appellants' failure to prove a violation of the equal protection clause, to be erroneous[57]. In this ruling, the burden of proof was reversed. Unlike previous cases where the state had to demonstrate compliance with the equality principle, here, the burden was on the appellants to prove a violation of the one-man, one-vote principle.

The Supreme Court seems to have treated cases differently. In *Mahan v. Howell*, the Court demanded a reasonable and justifiable explanation from the state to legitimize the 16% population imbalance in electoral districts. However, in subsequent cases, the Court resolved the issue in favor of the state without requiring the legislature to demonstrate the reasonableness of the demographic imbalances. This suggests the emergence of a "quantitative principle" in the Supreme Court to evaluate territorial division into electoral districts differently.

The Supreme Court has not denied this principle and has acknowledged, in subsequent decisions, to apply a different constitutional scrutiny for population disparities below 10%. The first mention of this principle is attributed to Justice Brennan, who drafted a joint dissenting opinion in 1973 for the cases *White v. Regester* and *Gaffney v. Cummings*[58]. In these opinions, Justice Brennan, opposing the decision,

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[55] 385 U.S. 440, 444. For a more in-depth commentary on the judgment by Italian doctrine, see I. CIOLLI, *Il territorio rappresentato. Profili costituzionali*, Jovene, Napoli, 2010, 118, note 104.

[56] 412 U.S. 755 (1973).

[57] See E.B. FOLEY, M.J. PITTS, J.A. DOUGLAS, *Election Law and Litigation: The Judicial Regulation of Politics*, Kluwer, New York, 2014, 197.

[58] See R.J. VAN DER VELDE, *One Person-One Vote Round III: Challenges to the 1980 Redistricting*, in *Cleveland State Law Review*, 1984, 588. The dissenting opinion drafted by Justice Brennan was also joined by Justices Douglas and Marshall. In *Gaffney v. Cummings*, 412 U.S. 772, the Supreme Court did not require the legislature to provide specific justifications to legitimize the disproportion in the composition of districts in the State of Connecticut, which was a maximum of 1.9% for House electoral districts and 7.8% for Senate districts. The justices were content with a justification aimed at ensuring greater political fairness between the two major political parties. According to the Supreme Court: «The record abounds with evidence, and it is frankly admitted by those who prepared the plan, that virtually every Senate and House district line was drawn with the conscious intent to create a districting plan that would achieve a rough approximation of the state-wide political strengths of the Democratic and Republican Parties, the only two parties in the State large enough to elect legislators from discernible geographic areas» (412 U.S. 735, 752). According to H.A. SCARROW, *Partisan Gerrymandering. Invidious or Benevolent? Gaffney v. Cummings and Its Aftermath*, in *The Journal of Politics*, n. 3/1982, 810 ff., the justification invoked by the legislature can be classified as a case of positive gerrymandering since the redrawing of districts aimed at promoting a "more equal" representation between political parties, albeit at the expense of the demographic proportionality of the districts.

cited a 1971 *Abate v. Mundt*[59], where the Court deemed constitutional a maximum disparity of 11.9% in the composition of districts for the election of the Board of Supervisors of Rockland County, New York[60], only after requesting reasonable justifications from the legislature[61]. According to Justice Brennan, it seems that for the majority of the Court, the quantity of disparity, identified by the judge as the 10% threshold, is significant[62].

Justice Brennan's words have left a mark in the subsequent Supreme Court's case law, which acknowledged a true "Ten-Percent Rule"[63]. This rule is not so much seen as a strict parameter to differentiate the legitimacy or illegitimacy of disparities but rather to shift the burden of proof between the parties.

However, it is only in a decision handed down in 1973, *Connor v. Finch*[64], concerning the distribution of districts for the election of the representative Assemblies of Mississippi, that an explicit reference to the 10% deviation appears in the majority opinion: «The maximum population deviations of 16.5% in the Senate districts and 19.3% in the House districts can hardly be characterized *as de minimis*; they substantially exceed the "under-10" deviations the Court has previously considered to be of *prima facie* constitutional validity only in the context of legislatively enacted

[59] 403 U.S. 182.

[60] Note that the Supreme Court, in the previous case *Hadley v. Junior College District of Metropolitan Kansas City*, 397 U.S. 50 (1970), had expanded the scrutiny of legitimacy to any type of "political" election, establishing that «whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election». On the Court's openness to scrutinize the proper determination of electoral districts for any type of election, see S. INGBERG, *Elections*, in K. L. HALL, J. W. ELY, J. B. GROSSMAN (ed. by), *The Oxford Companion to the Supreme Court of the United States*, Oxford University Press, Oxford, 2005, 288 ff.

[61] *Abate v. Mundt*, 403 U.S. 182 (1971). In this case, which, however, does not concern a legislative assembly but a plural elective body with essentially coordinating functions between the County and the City, the Supreme Court held that the redistricting plan did not violate the equal protection clause. The decision was largely based on the long tradition of city-based elections that had characterized the entity in question. Additionally, the Court found that the redistricting plan presented by the State did not provide a proven advantage to some political interests or geographic areas.

[62] Presumably, the 10% threshold derives from the circumstance that in the case *White v. Regester*, a disproportion of 9.9% between the demographically largest and smallest district had been declared legitimate. The 10% threshold, therefore, simply arises from an observation that the justices made regarding the Supreme Court's applied practice and not from a reasoned argument based on a well-defined theoretical position. Here are Justice Brennan's words: «one can reasonably surmise that a line has been drawn at 10% deviations in excess of that amount are apparently acceptable only on a showing of justification by the State, deviations less than that amount require no justification whatsoever» (412 U.S. 755, 777).

[63] J.G. HEBERT, P.M. SMITH, M.E. VANDENBERG, M.B. DESANCTIS, *The Realist's Guide to. Avoiding the Legal Pitfalls*, ABA, New York, 2010, 9.

[64] 431 U.S. 407 (1977).

apportionments»[65]. In the case examined, however, according to the Court, the state legislature failed to sufficiently justify such demographic distortion, leading to the declaration of illegitimacy of the seat distribution within the State.

In a subsequent case in 1983 (*Brown v. Thomson*), however, the Court seems to give yet a new interpretation to its own precedents: «Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. A plan with larger disparities in population, however, creates a *prima facie* case of discrimination and therefore must be justified by the State»[66], almost suggesting that below 10%, the population difference within districts is to be considered always and, in any case, constitutional.

This "Ten-percent Rule" has been applied in all subsequent cases of territorial subdivision for the purpose of electing state assemblies, where the attempts of the plaintiffs to demonstrate before the Supreme Court a violation of the equality principle when the disparity between districts was less than 10% have always been in vain[67].

There are, however, some rulings from district courts that have declared disparities of less than 10% illegitimate because the plaintiffs were able to demonstrate that the territorial division had been carried out arbitrarily and discriminatorily[68]. At the same time, it is virtually impossible for states to find justifications that would allow the Supreme Court to legitimize deviations exceeding 10%. For example, in the case *Chapman v. Meier*[69], the Court again declared the design of the districts for the election of the North Dakota Senate illegitimate. The trial judge, in 1965, had directly drawn up a plan for the distribution of districts following the declaration of illegitimacy two years earlier[70]. The judge had justified the divergences in the composition of the districts he had designed based on the territorial peculiarities of the State, divided by the Missouri River, and on the need to preserve existing political territories[71]. However, the Supreme Court deemed that these arguments were not convincing and sufficiently demonstrated to admit a population deviation that reached peaks exceeding 20%.[72].

[65] 431 U.S. 407, 418. For this reason, and since the legislature had failed to provide valid arguments to demonstrate that they had not violated the principle of equality, the Supreme Court declared the seat distribution plan illegitimate.

[66] 462 U.S. 835, 842-843 (1983). For this judgment see also at note 76.

[67] Indeed, there are no Supreme Court rulings that have declared as unconstitutional a case of inequality lower than 10%.

[68] In this regard, for example, the ruling of the District Court of Illinois, *Hulme v. Madison County* (188 F, Sup2d, 1041 of 2001), in which a maximum disproportion of 9.3% among districts was declared illegitimate.

[69] 420 U.S. 1 (1975).

[70] *See* C.A. ANZALONE, *Supreme Court Cases on Political Representation*, *1787-2001,* Routledge, New York, 2015, 219 ff.

[71] 420 U.S. 1, 24.

[72] 420 U.S. 1, 24.

In only one other case (apart from the previous Mahan), *Unger v. Manchin*[73], the Supreme Court has clearly allowed a demographic distribution exceeding 10% among electoral districts. In this ruling, the Supreme Court upheld a decision from the West Virginia District Court (*Deem v. Manchin*) [74]. The district judge had legitimized a deviation of 10.92% in the districts for the Senate election, referring in this case as well to justifications of continuity and territorial affinity and the possibility of keeping political subdivisions united[75].

Indeed, a strict interpretation of the "Ten-percent Rule" suggests that there is no theoretical limit beyond which the Supreme Court must declare the distribution of seats illegitimate. However, the Court itself has shown reluctance in admitting deviations beyond this threshold. This implies that general territorial reasons are not capable of significantly undermining proportionality in the composition of electoral districts – even for state elections – without negatively affecting what seems to be the constitutionally most relevant principle: voter equality achieved through an equal demographic composition of electoral districts[76].

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[73] 536. U.S. 935 (2002).

[74] *U.S. District Court for the Northern District of West Virginia*, 188 F. Sup2d 651, 656.

[75] See J.G HEBERT, P.M. SMITH, M.E. VANDENBERG, M.B. DESANCTIS, *The Realist's Guide to. Avoiding the Legal Pitfalls*, ABA, New York, 2010, 12.

[76] However, there is a decision of the Supreme Court that seems to contradict the rest of the case law. In the 1983 case *Brown v. Thomson* (462 U.S. 835), the Supreme Court appeared to depart from its previous rulings as it validated a redistricting plan in which there was an 89% difference in population between the most populous and least populous districts for the election of the Wyoming House of representative. This extreme inequality was due to the circumstance that the Wyoming Constitution mandated each county in the state to constitute an electoral district, even if, based on its population, it did not qualify for representation. This way, one county (Niobrara County) was entitled to one senator with only 2,924 inhabitants, compared to a state-wide average of 7,337 inhabitants per elected. To understand the reasons of the Court, it should be noted that the petitioners were not challenging a general improper delimitation of districts but aimed to have only the provision of the state constitution that granted representation to that small county with fewer than three thousand inhabitants declared illegitimate. Therefore, the Supreme Court did not properly delve into the issue of the practice of malapportionment but merely declared the allocation of that seat was not illegitimate. This is because, even if the representative from Niobrara County were eliminated and the county merged with another area, «the average deviation would be 13%, and the maximum deviation 66%» (462 U.S. 835, 836). The difficulty of aligning this decision with the previous jurisprudence is expressed even more openly by two justices in the concurring opinion. They admitted that if the redistricting plan had been challenged as a whole, they would have voted in favor of its illegitimacy because it implemented a disparity among voters in different districts that was certainly illegitimate (see. R.B. KEITER, *The Wyoming State Constitution*, Oxford University Press, Oxford, 2017, 122; N. REDLICH, J.B. ATTANASIO, J. K. GOLDSTEIN, *Understanding Constitutional Law*, LexisNexis, New York, 2012. 495). Scholars have justified this decision by arguing that such disparity was only permissible in Wyoming because its state constitution mandated the allocation of the seat to that county. Therefore, the deviation was deemed necessary to avoid depriving that territory of representation (see J.G. HEBERT, P.M. SMITH, M.E. VANDENBERG, M.B. DESANCTIS, *The Realist's Guide to. Avoiding the Legal Pitfalls*, ABA, New York, 2010. 10 f.; C.H. BACKSTROM, L. ROBINS, *The Supreme Court Prohibits Gerrymandering: A Gain or a Loss for the States?*, in *Publius: The Journal of Federalism*, n. 3/1986, 102). As a partial confirmation of this, it should be noted that, a decade later, the United States District Court for the District of Wyoming, in the *Gorin v. Karpan* (775 F. Sup. 1430)

For U.S. congressional elections, the Supreme Court has never legitimized discrepancies, even minimal ones motivated by maintaining pre-existing political boundaries within the state. In rulings related to state assemblies, however, the same Court, which had been hesitant to define an "always" legitimate quota in congressional district cases, eases this rigidity by easily legitimizing deviations below 10%.

The rigid "mathematical idealism" enforced by the Supreme Court has significantly influenced the actions of states in determining electoral districts. As evident from the table below, concerning the distribution of electoral districts carried out by states following the 2020 census, in no State electing more than one representative to Congress has a deviation greater than 1% been recorded between the most and least populated district. In 37 states, between the largest and smallest district is zero[77].

The flexibility demonstrated by the Court with the "Ten per-cent Rule" for the state legislative districts has allowed states greater leeway in identifying electoral districts for the election of those assemblies. This became evident in the redrawing of electoral districts following the latest census.

Population per seat for the election of the U.S House of Representatives, State House, and State Senate. Census of 2020						
State	*U.S House of rep.*		*State House*		*State Senate*	
	Ideal district	*Overall Range %*	*Ideal district*	*Overall Range %*	*Ideal district*	*Overall Range %*
Alabama	717,754	0	47,850	9.95	143,551	9.97
Alaska	*One deputy*		18,335	7.48	36,670	4.53
Arizona	794,611	0	238,383	8.89	238,383	8.89
Arkansas	752,881	0.09	30,115	6.85	86,044	5.49
California	760,066	0	494,043	9.88	988,086	9.87
Colorado	721,714	0	88,826	4.93	164,963	4.99
Connecticut	721,189	0	23,865	8.41	100,099	9.99
Delaware	*One deputy*		24,137	9.79	47,124	9.28

declared unconstitutional, for a violation of the Fourteenth Amendment, the disparity in population among districts following the 1991 census, which reached peaks of 83%, once again due to the constitutional guarantee of one representative per county. To do so, the District Court also deemed illegitimate the constitutional provision of Wyoming, wherein it mandated one representative for each county, as this provision would not allow for the full realization of the equality principle outlined in the Federal Constitution.

[77] The data is reported in the document "2020 Redistricting Deviation" published by the National Conference of State Legislatures (available on the organization's website). For confirmation that the process of delineating electoral districts has been influenced by previous judicial decisions, one can also refer to the data related to the electoral districts established following the 2000 census (document "Designing PL 94-171 Redistricting Data for the Year 2010 Census," curated by the U.S. Census Bureau) and the 2010 census (as indicated in the document "2010 Redistricting Deviation" curated by the National Conference of State Legislatures). In these documents, a similar situation can be observed concerning the last two censuses.

Population per seat for the election of the U.S House of Representatives, State House, and State Senate. Census of 2020						
State	*U.S House of rep.*		*State House*		*State Senate*	
	Ideal district	*Overall Range %*	*Ideal district*	*Overall Range %*	*Ideal district*	*Overall Range %*
Florida	769,221	0	179,485	4.75	538,455	1.92
Georgia	765,136	0	59,511	2.74	191,284	2.01
Hawaii	727,636	0.34	26,432	14.69	53,922	43.03
Idaho	919,553	0	52,546	5.84	52,546	5.84
Illinois	753,677	0	108,581	0.48	217,161	0.37
Indiana	753,948	0	67,855	1.90	135,711	3.92
Iowa	797,592	0.01	31,904	1.75	63,807	1.56
Kansas	734,470	0	23,503	7.53	73,447	7.35
Kentucky	750,973	0	45,058	9.71	118,575	9.94
Louisiana	776,293	0.01	44,360	9.80	119,430	9.87
Maine	681,180	0	9,022	9.83	38,925	9.45
Maryland	771,925	0	43,797	7.93	131,392	7.89
Massachusetts	781,102	0	43,937	9.82	175,748	9.97
Michigan	775,179	0.14	91,612	4.96	265,193	4.78
Minnesota	713,312	0	42,586	1.96	85,172	1.89
Mississippi	740,320	0	24,273	9.91	56,948	9.94
Missouri	769,364	0	37,760	5.98	181,027	5.89
Montana	542,113	0	10,827	7.17	21,654	6.98
Nebraska	653,835	0	40,031	9.01	*Absent*	
Nevada	776,154	0	73,919	4.69	147,839	3.95
New Hamp.	688,765	0	3,444	9.90	57,397	7.98
New Jersey	773,585	0	232,075	6.35	232,075	6.35
New Mexico	705,841	0	30,250	9.84	50,417	9.59
New York	776,971	0	134,626	9.97	320,537	3.85
North Car.	745,671	0	86,995	9.85	208,788	9.95
North Dakota	*One deputy*		8,288	9.87	16,576	9.97
Ohio	786,630	0	119,186	9.95	357,559	9.63
Oklahoma	791,871	0	39,202	4.08	82,487	4.87
Oregon	706,209	0	70,621	1.96	141,242	1.84
Pennsylvania	764,865	0	64,053	8.65	260,054	8.11
Rhode Island	548,690	0.22	14,632	9.75	28,878	12.92
S. Carolina	731,204	0	41,278	4.99	111,270	9.95
South Dakota	*One deputy*		12,667	14.34	25,333	12.81
Tennessee	767,871	0	69,806	9.90	209,419	6.17
Texas	766,987	0	194,303	9.98	940,178	6.13
Utah	817,904	0	43,622	8.69	112,814	3.56
Vermont	*One deputy*		4,287	16.65	21,436	4.69
Virginia	784,672	0	86,314	4.92	215,785	4.69
Washington	770,528	0	157,251	0.25	157,251	0.25
West Virginia	896,858	0.18	17,937	9.92	105,513	9.85
Wisconsin	736,715	0	59,533	0.76	178,598	0.57
Wyoming	*One deputy*		9,304	10.96	18,608	10.54

On that occasion, almost all states – excluding both legislative assemblies of Hawaii, South Dakota, Wyoming, Vermont state senate districts, and Rhode Island state senate districts[78] – formed electoral districts in such a way that the deviation between the most and least populated district is not more than 10%. This limit seems increasingly to be one that the Supreme Court deems consistent with the Constitution.

The decisions of the Supreme Court, particularly in rulings concerning congressional districting, have sometimes been criticized by scholars. This is because it has been argued that using political-administrative divisions, even at the expense of lesser demographic equality, would be entirely appropriate. This is especially to prevent the "gerrymandering", implemented to favor or disfavor a specific political force or social group[79], because requiring that electoral districts be perfectly coincident from a demographic perspective could indeed facilitate the creation of "fraudulent" electoral districts by the majority political force[80].

Furthermore, the Supreme Court has been criticized for consistently excluding from its equipopulation rulings the protection of social groups, especially minorities, which may deserve greater protection even at the expense of proportionality in the demographic composition of the district[81]. It should be emphasized that even in rulings favoring the protection of racial minorities, the Court has never allowed greater inequality to be granted to keep that minority cohesive. The parameters used have always been those of demographic equality and the territorial rationality of the electoral district. For example, an electoral district aimed at protecting a racial

[78] The case of Hawaii, where there is approximately a 14% disproportionality among the districts for the House election and 43% for the Senate, is justified by scholars due to the geographical peculiarity of the State, which is composed of many islands. On the Hawaii case, see M. MAY, G. MONCRIEF, *Reapportionment and Redistricting in the West*, in G. MONCRIEF (edit by), *Reapportionment and Redistricting in the West*, Lexington books, New York, 2011, 6. The high disproportionality among the districts, which has never been the subject of judicial appeals, is attributed to Hawaii's state constitution, which, for the distribution of seats, mandates the creation of four "island units" to which a minimum of two representatives in the Senate and three representatives in the House must be guaranteed (see A. LEE, *The Hawaii State Constitution*, Oxford University Press, New York, 2011, 110).

[79] In this regard, G.E. BAKER, *The Reapportionment Revolution. Representation, Political Power, and the Supreme Court*, Random House, New York, 1966, 269 ff. R.K. STAVINSKI, *Mandate of Equipopulous Congressional Districting: Karcher v. Dagge*tt, in *Boston College Law Review*, n. 2/1985, 598 ff., notws that the stringent scrutiny of legitimacy carried out by the Court in cases of congressional districts has the consequence of encouraging judicial appeals both concerning demographic composition and artifice in the delineation of the electoral district.

[80] Even the Supreme Court itself has proven to be attentive to the issue. In the 1964 case of *Reynolds v. Sims*, Justice Warren, in the majority opinion, warned that: «Indiscriminate district without any regard for political subdivisions or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering» (377 U.S. 533, 578-579).

[81] See G. M. HAYDEN, *The False Promise of One Person, One Vote*, in *Michigan Law Review*, n. 2/2003, 213 ff., which criticizes (266) the approach of the Court, and in part also of the doctrine, for distinctly separating various issues related to electoral law without adopting a comprehensive approach to the issues concerning this right.

minority has been deemed illegitimate if it was not territorially compact[82] or so «irregular and bizarre in shape that it rationally cannot be understood as anything other than an effort to segregate voters based on race»[83].

In conclusion, in U.S. case law, the predominant goal is ensuring an equipopulous electoral districts. The protection of administrative boundaries and the representation of political communities or minorities are considered important but must be balanced while keeping the focus on the goal of demographic equality in electoral districts.

4. *Which model? Case-by-Case evaluation or legislative range delimitation? A constitutionally oriented response.*

From the analysis of cases in Italy and the United States, two models can be identified.

The first, the Italian model, is to establish by law a maximum limit of difference between electoral districts. If, as has been attempted to demonstrate, the limit imposed by the Italian legislature with Law 165/2017 seems to be unconstitutional because it is excessively high, there are other legal systems that employ the same mechanism but with different percentages.

This is the case in the United Kingdom, where the maximum deviation in electoral districts' demographic density (referring to voters, not the resident population) is set at 5% above or below the average demographic size of districts in each Home Nation.

In effect, the establishment of a tolerance threshold for demographic deviations in electoral districts is a common practice. This principle has also been adopted in some previous Italian electoral legislation, such as the predominantly majoritarian mixed electoral system of 1993, where a tolerance threshold of 10% in excess or deficiency was set concerning the average population of constituencies. In this regard, the Venice Commission, in its Code of Good Practice in Electoral Matters, has provided guidelines on the equality of votes and recommended that, in the case of electoral laws with single-member district, «The permissible departure from the norm should not be more than 10%, and should certainly not exceed 15% except in special circumstances (protection of a concentrated minority, sparsely populated administrative entity)».

The second model, the United States model, involves no legislative rule, case-by-case evaluation by the bodies responsible for forming districts, and significant influence from the Supreme Court, which has established strict equipopulation rules, especially for congressional districts.

Even though we are starting from two different models, it must be emphasized that the principle of equality suggests that, in determining single-member electoral districts, they should be constituted in a way that is as similar as possible. Additionally, in both models, it has been observed that in no case is the principle of equality

[82] *Bush v. Vera*, 517 U.S. 952 (1996)

[83] *Miller v. Johnson*, 515 U.S. 900 (1995).

interpreted as an absolute principle of demographic parity of electoral districts, as there may be other factors contributing to the allocation of seats.

Starting from these two premises, the question is as follows: how far can the possibility of partially derogating from the rule of "formal" equality in the demographic size of the district in favor of "internal" equality within electoral districts be pushed?

Essentially, it seems possible to argue that the limitation of the principle of an equal number of citizens per representative can only occur when other needs are involved, including certainly the principles of "territorial" representation identified by legislative rules and court decisions. These principles, under certain conditions, can lead to a limitation of the principle of an equal number of citizens in electoral districts.

Indeed, there emerges an interpretation of the equality principle that is not merely "formal" because it also involves equality among voters within the same electoral district. This allows a political community to be represented in Parliament, avoiding the exclusion of a part of that political community from representation. If this part were to merge into another district, it might be excluded from the possibility of having a "voice" in Parliament.

Even in the presence of these potential principles, it seems challenging to clearly define the point of discrimination between a disparity in the composition of districts that can be considered legitimate and one that should be deemed unconstitutional.

What seems to emerge from the Italian experience (and from the English one) is that the derogation from the principle of equality is considered permissible if it can be confined within a minimum and maximum level of disparity deemed acceptable by the legislature.

However, the tolerability levels are so heterogeneous (20% in one case and 5% in the other) that the issue arises of identifying what this limit is (assuming it can be identified) within which there is no violation of equality among citizens.

From this perspective, however, it is complex and perhaps unnecessary to make a prediction about the legitimacy of such a threshold. Evaluating the constitutionality, only in theory, of a numerical limit imposed by the law can lead to entirely ephemeral results. Essentially, what is meant is that setting a maximum threshold *ex lege* (however "small" it may be) might not be sufficient to ensure equality because the identification of a threshold, below which a particular territorial subdivision should be considered correct, would still be arbitrary.

This does not mean that the legislator cannot establish a limit beforehand, but this limit is not sufficient to guarantee respect for equality among voters.

In comparison, the U.S. model requires that compliance with the principle of equality for each territorial subdivision be evaluated on a case-by-case basis. This is why the point of reasonableness imposed by the U.S. Supreme Court, "as nearly as possible," to be assessed in the specific case, seems more consistent with a vision of equality among citizens.

Certainly, insisting that districts be "roughly" identical in population is sometimes an excessively formalistic demand of the equality principle: if elections occur at a time

distant from the collection of demographic data, the equality sought with "identical" districts is achieved only in theory. In fact, if the population and voters are constantly changing, what appears equal today may not be so in 5, 6, 7 years, etc.

Beyond this aspect, an example can be useful to specify what has just been argued. Let's consider the case where two single-member electoral districts must be drawn by merging the territory of four homogeneous municipalities in terms of politics, economics, and society, with respective numbers of citizens being 65,000/60,000/35,000 and 37,000. This is within a constituency where the average number of voters per district is 100,000, and the legislature has set a 5% tolerance, either above or below the average number of voters within the districts (or in which it has provided, according to the clause derived from the U.S. Supreme Court, that districts should be "as equal as possible").

<table>
<tr><td rowspan="2">Municipality A
60,000 inhabitants</td><td>Municipality B
35,000 inhabitants</td><td rowspan="2">Municipality D
65,000
inhabitants</td></tr>
<tr><td>Municipality C
37,000 inhabitants</td></tr>
</table>

The principle of territorial continuity of electoral districts in this scenario would allow only two alternatives for combining the municipal territories to form an electoral district, which are shown in the following table.

Case 1	
District	**Inhabitants**
A+B	97,000
C+D	100,000

Case 2	
District	**Inhabitants**
A+C	102,000
D+B	95,000

In the provided simple example, all possible combinations of merging municipal territories can adhere to the hypothetical 5% tolerance above or below the average. However, the combination A+B (-3%) and D+C (0) offers the best protection for the voter. Conversely, the alternative combination, despite producing a minimal gap (+2% and -5%), does not result in the least disparity in the composition of the two districts.

This example seems useful to demonstrate that it is not necessarily the position of a numerical limit, however small it may be, that ensures voters are placed in conditions of equality in the electoral process, but rather, a comprehensive evaluation is necessary.

At the same time, the example serves to demonstrate that determining districts "as similar as possible" is not necessarily the best solution.

Indeed, if the four municipalities were not all socially, economically, and politically homogeneous, it might provide greater assurance for voter equality if the union of the municipalities occurred in a different manner, even at the expense of the best mathematical equality.

Certainly, this operation becomes much more complex when it is necessary to arrive at the division of administrative territories, such as in our system regions, provinces, and municipalities, and even when it is necessary to proceed with their (partial) merger. The activity of breaking down the territory, however, is undoubtedly essential when a single administrative territory or their simple union is not sufficient to guarantee a correct realization of electoral equality: the need to keep the political community settled in a territory united cannot excessively impact the composition of the electoral district.

Even in these cases, a case-by-case evaluation would be preferable, allowing for an assessment of the specific situation of each electoral district and determining whether a certain deviation in the demographic composition of the electoral district is indeed reasonable or not. In other cases, it might be more useful for shaping political representation that unites a political community in a certain territory, for example, having a municipality included in one electoral district (thereby increasing the number of inhabitants in that district), rather than being placed in another district (with greater population equality) because it is more socially/politically/economically aligned with the territories on which the first electoral district rests. This operation, always to be evaluated case by case, should not, however, lead to an excessive difference between the population of one district and that of another, otherwise, a violation of the principle of equality would be entirely evident.

In conclusion, therefore, an ideal model could be one of a case-by-case evaluation, which does not have mathematical equality as its sole element but also considers factors of representativeness of voters located in a specific territory of the state.

5. *Conclusion. A new model for ensuring equality in the Italian Constitutional System: low threshold established by law and minimal discretion*

Considering the reflections presented in the previous paragraph, numerous issues emerge. The constitutional principles at stake are essentially two: the principle of equality and the principle of representativeness of the Parliament.

Nevertheless, one can attempt to hypothesize an “ideal” model that could be used in the Italian constitutional system to better ensure (certainly better than today!) the equality of citizens.

In this sense, the United States model seems impractical.

First, due to the extreme difficulty in imagining that the issue of redistricting could reach the Constitutional Court legislative rules are preferable.

Second, the U.S. model (especially for the U.S. House of Representative) can be criticized on several fronts[84] for being excessively focused on the formal idea of an equal number of inhabitants for each electoral district.

[84] See paragraph 3.

From this, the following Italian best practice could be hypothesized for drawing the single-member district[85]:

1. Establish a relatively low legal threshold (5% compared to the average of districts?), above which the determination is always unconstitutional.
2. Establish that, within this threshold, the rule should be to follow the principle that districts should be as equal as possible in terms of population, and any deviation from this principle must be justified by the homogeneity of the district, measured through:
    a. The necessity to avoid dividing a municipal territory or a neighborhood in large cities.
    b. The need to keep within a district the territories of municipalities in the same province.
    c. Other reasons of a political, economic, or social nature that can justify a greater homogeneity of the political community encompassed within the district.

To conduct a thorough analysis that considers all variables at play, two conditions are necessary.

First, the delineation of electoral districts, requiring careful evaluation for each district, should strive to be as balanced as possible. This can only be achieved through a process that involves an independent body as the main protagonist, ensuring that the activity is as impartial[86] as possible and, perhaps, more participatory, allowing citizens to express their opinions on their electoral constituencies.

Secondly, it is essential for the body responsible for determining the electoral districts to meticulously justify its choices, explaining the reasons behind its decisions and, if possible, presenting various available alternatives and the reasons why specific solutions were favored over others.

[85] For multi-member districts, on the other hand, there should be no rules for their determination, as they should correspond to existing administrative territories.

[86] See L. SPADACINI, *Constitutional needs for the Italian process of drawing electoral districts: a more independent Commission, less partisanship, and greater transparency and participation*, in this issue.

Rebecca Green and Lucas Della Ventura*

Comparative Redistricting Transparency**

SUMMARY: 1. *Introduction*; Part I – 1. Different Redistricting Models; Part II – 1. *What is Redistricting Transparency?*; 1.1 *Assessing delimitation transparency*; 1.2 *Downsides of delimitation transparency*; Part III – 1. *Delimitation Transparency: Comparative Approaches*; 2. United States; 2.1 *Political system of representation*; 2.2 *Redistricting & Census Legal Authorities*; 2.3 *Transparency in Procedure*; 3. *Canada*; 3.1 *Political system of representation*; 3.2 *Redistricting & Census Legal Authorities*; 3.3 *Redistricting Body Composition*; 3.4 *Transparency in Procedure*; 4. *Mexico*; 4.1 *Political system of representation*; 4.2 *Redistricting & Census Legal Authorities*; 4.3 *Redistricting Body Composition*; 4.4 *Transparency in Procedure*; 5. *New Zealand*; 5.1 *Political system of representation*; 5.2 *Redistricting & Census Legal Authorities*; 5.3 *Redistricting Body Composition*; 5.4 *Transparency in Procedure*; 6. *India*; 6.1 *Political system of representation;* 6.2 *Redistricting & Census Legal Authorities*; 6.3 *Redistricting Body Composition*; 6.4 *Transparency in Procedure*; 7. *Italy*; 7.1 *Political system of representation*; 7.2 *Redistricting & Census Legal Authorities*; 7.3 *Commission composition*; Part IV – 1. *Lessons Learned*; 2. *Conclusion*.

ABSTRACT: ***The degree to which legislative redistricting generates controversy differs markedly between representative models internationally. Intuitively, line drawing in polities that feature multi-member districts and/or proportional representation generates less political furor than in jurisdictions with majority districts in which legislative line-drawing decisions translate more directly into political power. Delimitation in jurisdictions featuring first-past-the-post, single-member districts typically host the most pitched redistricting battles. Across the globe, political wrangling over the process of redistricting in such jurisdictions concerns two key aspects of line drawing: malapportionment (the equality of population between districts) and line-drawer discretion. Transparency in the redistricting process can provide critical oversight and accountability. In some countries, strict open meetings and public input laws guide the process; affirmative rules mandate transparency. Members of the public know when redistricting will take place, who will be part of the redistricting process, and are provided an opportunity to examine draft maps and provide input before they are finalized. In other jurisdictions, even those where line drawing***

* Rebecca Green is Associate Professor of Law; Co-Director of the Election Law Program, William & Mary Law School (USA). Lucas Della Ventura is Election Law Fellow, William & Mary Law School (USA), JD '2024. The authors would like to thank sincerely those who shared the intricacies of their country's processes with us: Professor Alejandro Trelles of Brandeis University (an expert in Mexico's redistricting process); Professor Michael Pal of the University of Ottowa, Canada; John Marshall, Elections Saskatchewan; Professor Lorenzo Spadacini of Brescia University in Brescia, Italy; and Chad Vickery, Vice President of Global Strategy and Technical Leadership at the International Federation Election Systems who generously put us in touch with many of the experts consulted. Rebecca would additionally like to thank Lorenzo Spadacini and his kind colleagues for being such welcoming and generous hosts during her stay in beautiful Brescia.

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translates directly to political power, maps are created largely in secret. The process may take place behind closed doors with final maps published for public consumption just before—or even after—they are finalized. This article examines circumstances in which redistricting transparency is most consequential to political power, what transparency methods redistricting bodies in such countries rely upon to secure the legitimacy of their work, and what can be learned from comparing different approaches to redistricting transparency. For purposes of this study, the authors review redistricting processes and transparency mechanisms in six countries: the United States, Canada, Mexico, New Zealand, India, and Italy.

1. *Introduction*

In most jurisdictions around the world that delineate political boundaries for election contests, some form of redistricting unfolds to account for population change.[1] As delimitation practices have evolved and modernized, an underexamined question is the degree to which such processes are conducted transparently. As this paper explores, delimitation transparency practices differ substantially worldwide.

The United States, in which each state draws lines for its legislative seats in the U.S. House of Representatives, provides an example of a country in which line drawing can be mired in secrecy. In a particularly extreme example, majority legislators in the U.S. state of Wisconsin—who enjoyed total control over line drawing in 2010, drew maps in a hotel room, allowing only same-party legislators to enter upon signing a confidentiality agreement.[2] Wisconsin's secrecy in delimiting electoral boundaries arguably helped fuel a full decade of litigation over its lines.[3] Indeed, horse-trading in smoky back rooms had been the norm in U.S. redistricting nationwide until relatively recently. Prompted by reformers, several U.S. states enable members of the public to oversee and participate in redistricting (to varying degrees).[4]

Transparency is widely heralded as a good-government value. International bodies routinely tout transparency as a key measure of democratic accountability and functioning rule of law. This is no less true of redistricting transparency. Transparency figures prominently, for example, in Council of Europe's Venice Commission boundary delimitation guidelines:

> Boundary delimitation should take place in a transparent and consistent manner, established by a law that also regulates the frequency of

[1] This article uses "redistricting" and "delimitation" interchangeably to refer to "the process by which lines on maps get drawn partitioning a territory into a set of discrete electoral constituencies from which one or more representatives are to be elected." REDISTRICTING IN COMPARATIVE PERSPECTIVE 3 (Lisa Handley & Bernard Grofman eds., 2008).

[2] Rebecca Green, *Redistricting Transparency and Litigation*, 71 SYRACUSE L. REV. 1121, 1122-23 (2021) (exploring the connection between redistricting transparency and litigation).

[3] *See id*.

[4] *Id*.

> reviewing boundaries. The delimitation process should take place at least one year before an election. Like all crucial elements of electoral law, the delimitation of constituencies should be adopted after extensive public consultations with all relevant stakeholders. This should make it legitimate for both stakeholders and voters.[5]

Yet international consensus in support of redistricting transparency has not translated into a set of common practices among delineation bodies internationally in large part because of wide divergences between countries' political norms and practices. Shrouded redistricting processes are routinely used to benefit a subset of society through partisan gerrymandering.[6] Transparency measures offer a window into how representative power in a country is distributed, allowing the public to know when and how partisan gerrymandering, or other forms of redistricting abuse, is occurring.

Direct comparisons between different countries' approaches to transparency are complicated by multiple variables. First and foremost, delimitation in many countries is not a politically-fraught exercise, particularly where multi-member districts or proportional representation (PR) extricate drawing lines from political power.[7] In countries with these representational features, line drawing is generally a technocratic and uneventful exercise leading to little if any public pressure for access to the process (or even public knowledge the process is happening). In countries with single-member districts featuring first-past-the-post (FPTP) elections, redistricting is more likely politically-fraught.

A second variable is who draws the lines. In most countries, those who stand to benefit from line-drawing decisions are prohibited from direct participation in line drawing decisions. The threat of political manipulation or self-dealing is thus reduced (at least facially), lessening—or even eliminating—public clamor to access proceedings.[8]

A third variable explaining why redistricting in some countries may arouse greater public pressure on the process relates to the degree of its impact on racial or ethnic minority voting rights. The delimitation process commonly dilutes the political power

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[5] *Report on Constituency Delineation and Seat Allocation*, VENICE COMMISSION (2017).

[6] Michael Pal describes partisan gerrymandering as the "deliberate design of electoral boundaries in order to maximize the competitive advantage for one political party or candidate against others." Michael Pal, *The Fractured Right to Vote: Democracy, Discretion, and Designing Electoral Districts*, 61:2 MCGILL L. J., 1, 5-6 (2015).

[7] Ferran Martinez i Coma & Ignacio Lago, *Gerrymandering in comparative perspective*, 24 PARTY POLITICS 99, 102 (2018) ("Through regression analysis, we have shown that majoritarian systems are more prone to gerrymandering than mixed-member and PR systems. When majoritarian systems are employed in large countries, gerrymandering is exacerbated.").

[8] This is true, of course, only to the extent that political players have not captured technocratic or commission control.

of racial or ethnic minorities.[9] Countries in which this has historically been a problem often feature legal mechanisms to police minority vote dilution. Efforts to enforce these protections lead to public pressure and/or litigation seeking line-drawing transparency.

A final variable impacting the degree of public pressure for redistricting transparency is the degree of discretion line drawers possess. Generally speaking, whoever draws the lines must follow a set of criteria that either permit line drawers to manipulate lines to advantage political actors or limits their discretion to do so. In jurisdictions where line drawers have a great degree of discretion, the possibility to engage in abuses of the process is higher. Where discretion is strictly limited, at least arguably, room for mischief is limited.[10] Calls for greater transparency are thus more likely the greater discretion line drawers are afforded.

Having established variables that impact the extent of public pressure on line drawing bodies to open their processes to public glare, we turn next to whether transparency mechanisms are incorporated into the delimitation process. If so, what are common features of transparency mechanisms employed internationally? What lessons can be learned from surveying delimitation transparency practices—particularly in countries in which manipulation of maps for political gain exists? Part I examines different redistricting models, setting a baseline for comparison. Part II discusses what transparency is and how the degree of transparency in the line drawing process might be assessed. Part III reviews redistricting transparency practices in six countries that feature at least some degree of single-member districting with first-past-the-post elections. And finally, Part IV offers lessons learned from this comparison.

[9] Minority voting rights protections in the redistricting process in U.S. law provide an example. *See e.g.*, Voting Rights Act, 52 U.S.C. § 10101.

[10] As an example, in jurisdictions requiring line drawers to follow existing political boundaries, less mischief is likely. Interestingly, tolerance for malapportionment provides one example where increased discretion does not necessarily correlate with less political manipulation. The United States requires exact population equality between U.S. congressional districts. Reynolds v. Sims, 377 U.S. 533 (1964). Yet the United States is home to some of the most egregious partisan gerrymandering worldwide. Guided by the Vienna Convention's 10-15 percent allowable population deviation, many European countries see relatively less partisan gerrymandering of lines because, in part, higher allowable deviation enables greater reliance on more neutral criteria such as following existing political boundaries. Micah Altman, *Traditional Districting Principles: Judicial Myths vs. Reality*, 22 SOCIAL SCIENCE HISTORY 159, 188 (1998), https://www.jstor.org/stable/1171534; Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard against Partisan Gerrymandering*, 9 YALE L. & POL'Y REV. 301, 303 (1991).

PART I

1. *Different Redistricting Models*

Cross-national appraisals of redistricting processes risk comparing apples to oranges (and pears and bananas). The tremendous variation among political infrastructures and representative mechanisms could stop short any effort to compare processes. This Part examines contexts where delimitation practices for national representative bodies matters, where members of the public have a vested interest in overseeing the process, and where transparency measures can play a role in preventing (or at least exposing) line-drawing abuses.

Many countries assign delimitation of the national legislature to an independent national election management body or to a commission formed for the process of drawing district lines.[11] In the United States, only nine states vest congressional redistricting authority in a body other than the state legislature.[12] While independent delimitation commissions are the norm internationally, some commissions nevertheless incorporate political actors directly into commission membership as a means of "inoculating" the process.[13] As seen in countries like New Zealand and Canada, channeling political involvement and feedback into the line drawing can prove beneficial to transparency and overall redistricting fairness.[14] Of the six countries examined here, three use specially-designated commissions, two rely on existing administrative bodies, while U.S. state processes are, so to speak, all over the map.

Malapportionment, which occurs when electoral districts feature large population disparities,[15] is tolerated to varying degrees internationally. U.S. law prohibits malapportionment in national and subnational legislatures.[16] The United States is an outlier in this sense.[17] Of the countries surveyed here, New Zealand, which allows for 5% deviation between districts, comes closest to the United States in its intolerance

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[11] LISA HANDLEY ET AL., DELIMITATION EQUITY PROJECT RESOURCE GUIDE 20 (IFES 2006); Alejandro Trelles et al., *How Does Redistricting Matter? Evidence from a Quasi-Experimental Setting in Mexico* (Apr. 5, 2022) ("According to the Ace Electoral Knowledge Network, approximately two-thirds (107 out of 165) of the countries that redraw electoral geography do so through a de jure independent electoral management body (EMB) or through a specialized electoral boundary commission.").

[12] *See Redistricting Commissions*, BALLOTPEDIA.

[13] Borrowing the term "inoculation" here from Dean Heather Gerken. *See* Heather K. Gerken, *The Double-Edged Sword of Independence: Inoculating Electoral Reform Commissions Against Everyday Politics*, 6 ELECTION L. J. 184, 184 (2007).

[14] *Infra* Part III.

[15] *Boundary Delimitation*, ACE PROJECT.

[16] Reynolds v. Sims, 377 U.S. 533 (1964). Subsequent case law requires U.S. congressional districts to be composed of almost of exact equal populations but allows greater population deviation in state legislative districts. Karcher v. Daggett, 462 U.S. 725 (1983).

[17] *See e.g.*, Samuels and Snyder, "The Value of a Vote: Malapportionment in Comparative Perspective," BRITISH JOURNAL OF POLITICAL SCIENCE 31:4 (2001); STEVE BICKERSTAFF, ELECTION SYSTEMS AND GERRYMANDERING WORLDWIDE 34 (2020).

for malapportionment. Other countries examined here range from having no deviation standard to Canada's 25% deviation standard.[18] In most countries, some degree of malapportionment is permissible to account for geographic features or existing political boundaries. Gross malapportionment may violate a "central tenet of democracy namely, that all voters should be able to cast a vote of equal weight."[19]

Population deviation is widely understood to allow map drawers more discretion to meet their objectives, whether adhering to legal mandates, following political boundaries, or gerrymandering to attain partisan advantage. This can take the form of active malapportionment (when a boundary authority makes the conscious decision to draw constituencies that vary dramatically in population) or passive malapportionment (avoiding the periodic redrawing of boundaries).[20] Population deviation rules are thus an essential component to understanding redistricting transparency.

With these general redistricting features in mind, Part II steps back, asking what transparency in redistricting is and why redistricting transparency matters.

PART II

1. *What is Redistricting Transparency?*

Government transparency is widely viewed as a democratic pillar. Political theorists have long counseled that in a democracy citizenry must be adequately informed about government actors and institutions to hold elected officials accountable at the voting

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[18] Canada's redistricting rules even allow for exceptions beyond its 25% standard where it is deemed necessary. *Canada: Representation in Parliament*, ACE PROJECT.

[19] *Guiding Principles*, ACE PROJECT. This concept is reflected in standards developed by the Organization for Security and Cooperation in Europe (OSCE) and by the UN Committee on Human Rights (UNCHR):

> The delineation of constituencies in which elections are conducted must preserve the equality of voting rights by providing approximately the same ratio of voters to elected representatives for each district. Existing administrative divisions or other relevant factors (including of a historical, demographic, or geographical nature) may be reflected in election districts, provided the design of the districts is consistent with the equality of voting and fair representation for different groups in society. (OSCE, 'Inventory of OSCE Commitments and Other Principles for Democratic Elections')"
>
> The principle of one person, one vote must apply, and within the framework of each State's electoral system, the vote of one elector should be equal to the vote of another. The drawing of electoral boundaries and the method of allocating votes should not distort the distribution of voters or discriminate against any group and should not exclude or restrict unreasonably the right of citizens to choose their representatives freely. (UN Committee on Human Rights, General Comment 25, 'The Right to Participate in Public Affairs, Voting Rights and the Right to Equal Access to Public Service')."

[20] LISA HANDLEY, CHALLENGING THE NORMS AND STANDARDS OF ELECTION ADMINISTRATION 63 (IFES 2007).

booth.[21] The goal of transparency in a liberal democracy is to compel the "state to give an account of itself to its public and ... justify its actions to the individual and community."[22]

For present purposes, redistricting transparency is understood as measures taken to provide members of the public a means to access, observe and participate in the line drawing process.[23] More specifically, redistricting transparency enables members of the public to understand the process and its trade-offs, to oversee and impact decisions line drawers make during the process, to assess for themselves whether the process has been conducted fairly, and to evaluate whether the maps produced are fair. Transparency measures enable the public to hold line drawers accountable.

Transparency can be understood in structural and substantive terms. As used here, *structural* transparency refers to the ability of the public to know when and how redistricting will occur. Important components of structural transparency include set dates for census taking and set dates for the redistricting process, including when it must begin, end, and when the new maps will take effect. Irregular, haphazard timing of line drawing fuels the ability of strategic actors to stop, delay or strategically time redistribution processes for political advantage or otherwise obscure the process.[24] Set, legally-mandated intervals enable the public a benchmark to meaningfully engage the line drawing process. Other structural transparency components include set redistricting criteria, set redistricting body composition (achieved through rules-based nominating procedures), and detailed and clear constitutional and/or statutory rules underpinning the redistricting process.

Substantive transparency concerns the line drawing itself and what mechanisms, if any, the public has to follow the line drawer's pen. Mechanisms that grant the public the ability to meaningfully oversee and participate in line drawing include (but are not limited to): public access to redistricting data in accessible formats; publicly-available information about legal constraints and rules that govern the line drawing process; publication of draft maps; public hearings and other public input mechanisms (e.g.,

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[21] James Madison famously cautioned that, "[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both." *Letter from James Madison to W.T. Barry* (Aug. 4, 1822), *in* THE COMPLETE MADISON: HIS BASIC WRITINGS 337 (Saul K. Padover ed., 1953).

[22] Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 897 (2006).

[23] Alejandro Trelles et al., *No Accountability Without Transparency and Consistency: Evaluating Mexico's Redistricting-by-Formula*, 22 ELECTION L. J. 80, 82 (Mar. 17 2023) ("Transparency: The steps of a process are publicly available before, during, and after a decision is made. This includes preparation, planning, discussions, and execution. Rules are clearly explained, justified, and made publicly available prior to their enforcement, including relevant constitutional articles, statutory codes, regulations, administrative agreements, and even informal practices. Evidence relevant to the operation of the process is made publicly available in a timely fashion, including inputs (e.g., data), actions (e.g., proposals and evaluations), and outputs (e.g., winning plans).").

[24] *See* Thomas Ehrhard, *Le découpage electoral des circonscriptions législatives: le parlement hors jeu?*, POUVOIRS (2013).

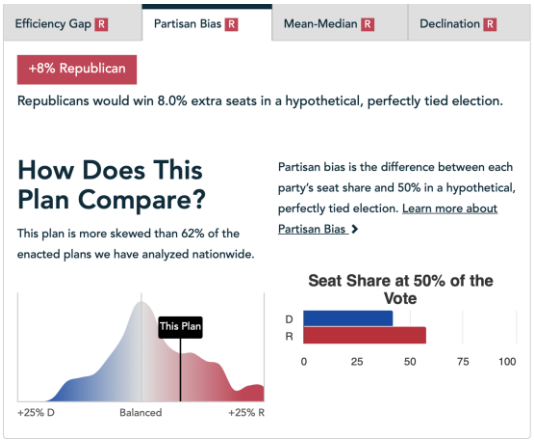
online portals); and explanations provided by map drawers justifying why the lines were drawn as they were.

Importantly, substantive transparency measures depend on some degree of public awareness. Delimitation is a wonky subject. In many democracies, redistricting is far enough away from the headlines that the public is largely unaware of its existence, let alone its significance. Even in countries in which delimitation battles rage, the details or their impacts fail to hit the mainstream. That said, in some countries—especially those where line drawing decisions translate directly into political power—popular recognition of the importance of delimitation as a precursor to effective democratic voice is increasing, as is public pressure to open the process to public view.

Information/data accessibility is key to substantive transparency. The availability of census data, map drawing software, and digestible primers on the law and criteria that govern the line drawing process have a direct impact on transparency. Because delimitation is highly technical and involves the participation of experts with particularized knowledge, making a complex process accessible to the public can be an enormous challenge. Until recently, with the entrance delimitation software, achieving meaningful delimitation transparency was quite difficult. Numerous tools now enable a level of public understanding of and participation in the delimitation process not previously possible.

In the United States, during the 2020 redistricting round, free and publicly-available tools enabled members of the public to gauge the fairness of proposed maps with unprecedented ease. A website called Planscore provides one example of a tool allowing any member of the public to upload a proposed map and evaluate maps' fairness. By way of illustration, Figure 1 depicts a Planscore measure of partisan fairness of Wisconsin's 2022 U.S. congressional map.

Figure 1. Planscore 2022 Wisconsin U.S. congressional example[25]



[25] Depicting Planscore's partisan bias measure in Wisconsin's 2022 U.S. Congressional map. Other online tools available to assist Americans in understanding and evaluating state and federal legislative districting proposals include the Princeton Gerrymandering Project, All About Redistricting.

Meaningful delimitation transparency requires public education and tools to assist members of the public in engaging the process.

Some elements of both structural and substantive transparency are more difficult to measure than others. For example, what constitutes detailed and unambiguous legal authorities? Must the entire redistricting process be mandated by public positive law? Similarly, what constitutes an adequate public explanation of the line drawing process? How much detail must map drawers provide in justifying their lines for full transparency to be achieved? Here we seek to highlight different ways countries have navigated these difficult questions.

1.1 *Assessing delimitation transparency*

With these variables in mind, identifying metrics to assess the degree of delimitation transparency is a challenge. In 2012, a U.S. organization called the Center for Public Integrity (CPI) introduced the following list of questions as its basis for a grading system that rated the transparency of U.S. state line drawing processes:

- Are public meetings held on the redistricting process?
- Are public hearings held to solicit input on new district maps?
- Are schedules of these meeting and/or hearings available to the public (in advance)?
- Does the government accept redistricting plans submitted by the public?
- Does the government make a redistricting website or online source of redistricting information available to the public?

This set of metrics provides a helpful starting point. For purposes of the present study, drawing from the discussion above, we add two more to address structural transparency concerns:

- Is the national census undertaken at regular intervals?
- Does line drawing occur at set, predetermined intervals?

These criteria: regular intervals; the existence of public meetings; the ability of members of the public to provide input; the advance publication of delimitation body meeting times; and the degree to which online delimitation resources are available will inform the comparisons provided in Part III.

1.2 *Downsides of delimitation transparency*

It is worth pausing to consider whether transparency in delimitation is an unmitigated good. Scholars have begun to examine government transparency's

downsides.[26] Reasons to be skeptical of transparency in line drawing are multiple. First, injecting transparency mechanisms can lead to inefficiencies and heightened cost. It takes time and resources to integrate transparency into delimitation processes.

Another critique of transparency in line drawing is that public glare hinders the push and pull needed to draw maps. U.S. scholar Jonathan Rauch argues convincingly that transparency can rob the deliberative process of the breathing space needed to make deals and seek compromise.[27] Bureaucrats, experts, and political parties may be better equipped to counterbalance each other without public glare.[28]

And finally, well-financed interests can manipulate public participation and input mechanisms.[29] In practice, only groups with sufficient sophistication and resources will follow and engage in the delimitation process. Such groups may seek outsized influence, distorting public input processes. Florida witnessed a version of this phenomenon during the 2010 cycle. A newly-added provision of the Florida constitution banning partisan gerrymandering required a court to examine political influence in the process.[30] Judge Terry Lewis found that, among other abuses, well-funded political operatives had seeded public comment forums with people posing as "interested citizens" to advance a specific political agenda.[31]

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[26] *See e.g.*, Lawrence Lessig, *Against Transparency*, NEW REPUBLIC (Oct. 9, 2009) (noting concern that transparency in the digital age, "will simply push any faith in our political system over the cliff"); Pierre Rosanvallon, COUNTER-DEMOCRACY: POLITICS IN AN AGE OF DISTRUST 259 (Arthur Goldhammer trans., 2008) (arguing transparency "engenders the very disillusionment it was intended to overcome"); Christina Garsten & Monica Lindh de Montoya, *Introduction: Examining the Politics of Transparency*, in TRANSPARENCY IN A NEW GLOBAL ORDER: UNVEILING ORGANIZATIONAL VISIONS 7 (Christina Garsten & Monica Lindh de Montoya eds., 2008); ("[O]ne may wonder whether [formal transparency] measures do not in fact serve to amplify a sense of insecurity and mistrust, rather than to ease uncertainty and restore trust.").

See JONATHAN RAUCH, POLITICAL REALISM: HOW HACKS, MACHINES, BIG MONEY, AND BACK-ROOM DEALS CAN STRENGTHEN AMERICAN DEMOCRACY 21 (Brookings 2015), ("We live in a world of second and often third choices, and in order to govern one must make decisions and engage in practices which look bad up close and are hard to defend in public but which, nonetheless, seem to be the best alternative at the time."). *See also* Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 WM. & MARY L. REV. 221, 224 (2003) (in the context of debating legislative privilege, discussing the benefits of "freeing legislators to deliberate more candidly and creatively among themselves and their staff by granting them fuller autonomy and allowing them to preserve confidences where desired.").

[28] *See infra* 4. Mexico.

[29] Bruce E. Cain, *The Transparency Paradox*, 11 AM. INTEREST 26, 28 (2015) ("If interest groups ... capture the public comment and participation opportunities, it exacerbates the problems that come with having so many veto points.").

[30] FLA. CONST., art. III, §§20-21.

[31] Romo v. Detzner, 2nd Jud. Cir. Leon County, Fla (July 10, 2014) (noting that, "[a] group of Republican political consultants or operatives did in fact conspire to manipulate and influence the redistricting process. They accomplished this by writing scripts for and organizing groups of people to attend the public hearings to advocate for adoption of certain components or characteristics in the maps, and by submitting maps and partial maps through the public process, all with the intention of obtaining enacted maps for the State House and Senate and for Congress that would favor the Republican Party.").

Proceeding with a healthy skepticism of the ability of transparency mechanisms to deliver fairness and accountability, Part III examines the degree of structural and substantive transparency measures in six countries: the United States, Canada, Mexico, Italy, New Zealand and India.

PART III

1. *Delimitation Transparency: Comparative Approaches*

The discussion below analyzes delimitation transparency in the United States, Canada, Mexico, Italy, New Zealand, and India. These six countries supply geographic diversity. Each of these countries also feature at least partial use of single-member districts with first-past the-post representation. We begin our analysis with the North American continent, starting with the birthplace of "gerrymandering," the United States, moving north across the border to Canada, and then south to Mexico. In continental Europe, Italy provides an example of a country with a complex representational mix. Lastly, the world's largest democracy, India, and a pioneer in redistricting, New Zealand, were selected to round out this small survey. Analysis of each country starts with a brief overview of the system of representation in its national legislature, then provides a thumbnail description of the line drawing process for that body, and finally describes transparency features (or lack thereof) within each country's process.

The findings from each country examined below can be summarized by Table 1 below. As the United States differs from state to state with respect to all metrics (except set dates for census and redistricting, which are regular and set by law), the United States is excluded from this chart.

Table 1. Redistricting transparency comparison

Transparency Metric	Canada	Mexico	New Zealand	India	Italy
Set dates for census	X	X	X	X	X
Set dates for redistricting	X	X	X	-	-
Public Meetings	X	-	X	X	-
Meeting schedules publicly available	X	-	X	X	-
Publication of draft maps	X	-	X	X	-
Opportunity for general public input	X	-	X	X	-
Online sources of redistricting information provided	X	-	X	X	-

2. United States

2.1 *Political system of representation*

The United States is a federal republic with a national legislature comprised of the U.S. House of Representatives and the Senate. The four-hundred thirty-five members of the U.S. House of Representatives are elected from single-member, first-past-the-post elections. The U.S. Senate consists of 100 members with two senators per state, irrespective of state population.

2.2 *Redistricting & Census Legal Authorities*

Seats in the House of Representatives are allocated to states proportionate to state population, keyed to the decennial U.S. Census mandated in Article I Section II of the U.S. Constitution. The U.S. Constitution delegates to states the power to draw lines for U.S. House of Representative districts.[32] In 39 states, state legislatures draw legislative lines for U.S. congressional seats. In ten states (including Virginia's hybrid model), independent commissions limit direct participation of elected officials in drawing legislative lines.[33] For U.S. congressional districts, U.S. law prohibits malapportionment beyond a 1% deviation. In practice, maps commonly feature 0% population deviation.[34]

2.3 *Transparency in Procedure*

A full accounting of transparency measures employed by state redistricting bodies is not possible here given wide variation among U.S. state processes.[35] Generally speaking, most processes feature set intervals for line drawing, public meetings, advanced publication of meeting times, and some online redistricting resources.[36] That said, some states go far further than others in providing meaningful transparency. In states with independent redistricting commissions, transparency is prioritized. Michigan provides an example. In 2018, Michigan voters, through the Michigan constitution's direct democracy mechanism, amended the state constitution to

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[32] U.S. CONST., art. I, § 4.

[33] As for the remaining states, as of the 2020 U.S. Census, the populations in Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont, Wyoming are not large enough to merit more than one district for the House of Representatives. *Who Draws the Lines*, ALL ABOUT REDISTRICTING (LOYOLA LAW SCHOOL).

[34] National Conference of State Legislatures, *2020 Redistricting Deviation Table* (Nov. 9, 2023).

[35] For further information on state redistricting procedures, see ALL ABOUT REDISTRICTING *supra* note 34.

[36] Baker v. Carr, 369 U.S. 186 (1962).

remove line drawing power from its legislature and install an independent redistricting commission. The constitutional amendment establishing the new commission featured multiple affirmative transparency mechanisms, including requiring public meetings throughout the state to educate the public about the work of the commission; publication of draft maps—including supporting data—for public evaluation and input; avenues of public input before and during the process; and prohibitions preventing commissioners from discussing maps in closed-door sessions.[37] Though not perfect,[38] Michigan's 2020 redistricting round was the most transparent in its history.

In some U.S. states, transparency mechanisms are minimal. Particularly in states where legislatures draw the lines, line drawing decisions may occur largely out of public view. In some states, legislative privilege prevents post-hoc access to records relating to the line drawing process.[39] Yet even states where legislatures draw the lines, greater public awareness of political manipulation of the redistricting process has resulted in increased pressure for greater transparency; lawsuits (sometimes spanning throughout the ensuing decade) are a regular feature of the redistricting process in many U.S. states.

3. *Canada*

3.1 *Political system of representation*

Canada's political system, which draws heavily from the United Kingdom's,[40] is a constitutional monarchy with a parliamentary system of government. The Governor in Council, which declares the effectiveness of the final maps, consists of Canada's Prime Minister and the Cabinet.[41]

Parliament is composed of the Senate and the House of Commons. The Senate is filled by appointment; the House of Commons consists of 338 members who are elected by Canadian citizens. Each member of the House of Commons represents an electoral district, also known as a "riding."[42] There are 338 districts. Canada's districts all rely on first past the post, single member districting in which the candidate with the highest number of votes wins a seat in the House of Commons.[43]

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[37] *See* MICH. CONST., art. IV, §§ 6(8)-(11).

[38] Detroit News, Inc. v. Indep. Citizens Redistricting Comm'n, 508 Mich. 399 (2021) (holding, *inter alia*, state constitutional redistricting transparency requirements trump commissioners' assertions of attorney-client privilege).

[39] Rebecca Green, *Redistricting Transparency*, 59 WM & MARY L. REV. 1787, 1800-1803 (2018).

[40] *Canada's Political System*, ELECTIONS CANADA.

[41] *Cabinet*, CANADA.

[42] *Id.*

[43] *Id.*

3.2 *Redistricting & Census Legal Authorities*

Canada's Parliament passed the Electoral Boundaries Redistribution Act (EBRA) of 1964 seeking to model its redistribution model on Australia's reforms to reduce partisan influence and to "increase the public's awareness of and involvement in the redistribution process."[44] The EBRA created the independent commission model and enables the public to present suggestions and objections to the commission's redistribution proposals.

The Chief Statistician, a nonpartisan civil servant who heads Statistics Canada, releases population data for each province following its national census. In accordance with the Statistics Act, Statistics Canada conducts a national census every five years in years ending in 1 and 6.[45] Canadian law requires redistricting after each decennial census ending in 1. At such time, Canada's Chief Election Officer receives the data and distributes it to each province. The distribution of seats for the House of Commons is based on a clearly-established representation formula contained in the Constitution Act of 1867.[46] Canada allows for malapportionment deviation of plus or minus 25 percent from the quotient. A commission may exceed this limit "extraordinary circumstances."[47]

3.3 *Redistricting Body Composition*

Within six months of the first day of the month the decennial census is taken or within 60 days after publication of the census, whichever is sooner, provincial commissions must be established by the Governor in Council.[48] In each province in Canada, an independent electoral boundary commission is responsible for redistributing seats.

Each of the ten commissions is composed of three members. Each commission is chaired by a judge appointed by the chief justice of the province and has two other members appointed by the Speaker of the House of Commons.[49] The Speaker may not appoint a member of the Senate or House of Commons or a member of a legislative assembly or legislative council of a province.[50] Beyond that limitation, there are no

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[44] *Canada: Representation in Parliament*, ACE PROJECT.

[45] *Appendix 1.1 – Legislation*, STATISTICS CANADA.

[46] *See id;* Canada's representation formula, ELECTIONS CANADA; Handley & Grofman, *supra* note 1 at 12-13.

[47] *Canada: Representation in Parliament*, ACE PROJECT.

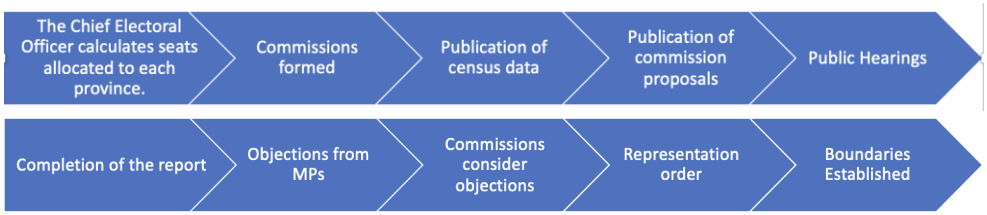
[48] RSC 1985, c E-3, s. 3 [EBRA]; FEDERAL ELECTORAL DISTRICTS REDISTRIBUTION 2022.

[49] Anthony J. Gaughan, *To End Gerrymandering: The Canadian Model for Reforming the Congressional Redistricting Process in the United States*, 41 CAP. U. L. REV. 999, 1053 (2013) ("Canadian judges are not elected, and thus their involvement underscores the nonpolitical nature of the commissions.").

[50] RSC 1985, c E-3, s. 10.

restrictions on who the Speaker may appoint or required justifications of their appointments. Elections Canada, the administrative body responsible for administering Canada's elections, often submits a list of recommended appointees.[51] Generally, university professors or non-elected staff in legislative assemblies serve as commissioners.[52]

3.4 *Transparency in Procedure*



Each commission develops a boundary proposal for its province. While the EBRA sets out population equality as the major purpose of design,[53] the EBRA also requires commissions to consider communities of interest and "manageable geographic size[s] for districts in sparsely populated, rural or northern regions of the province."[54] Great discretion is afforded to commissions in selecting which factors to emphasize, leading at times to disparities between provinces in the weight afforded to each factor.[55]

Proposed maps are published in the *Canada Gazette* and at least one newspaper of general circulation. Such notices include the time and place of public hearings.[56] In preparing the proposal, commissions must, "with all reasonable dispatch," set out their reasoning for dividing the districts as they did.[57] Each commission must hold at least one public hearing at least 30 days after the publication of its proposal.[58] Local jurisdictions, political parties, members of Parliament (MPs), candidates for Parliament, political activists, local commercial and nonprofit organizations, and other interested citizens have all offered comments on proposed federal redistribution plans.[59]

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[51] Handley & Grofman, *supra* note 1 at 13.

[52] *Canada: Representation in Parliament*, ACE PROJECT.

[53] RSC 1985, c E-3, s 15(1)(a).

[54] RSC 1985, c E-3, s 15(1)(b).

[55] Michael Pal, *The Fractured Right to Vote: Democracy, Discretion, and Designing Electoral Districts*, 61:2 MCGILL L. J., 1, 8-9 (2015); Handley & Grofman, *supra* note 1 at 17.

[56] R.S., 1985, c. E-3, s. 19.

[57] R.S., 1985, c. E-3, s. 14.

[58] Aaron Wherry, *Some MPs are unhappy with new riding maps — luckily, it's not up to them to decide*, CBC (Aug. 25, 2022).

[59] *Canada: Representation in Parliament*, ACE PROJECT.

Within ten months from the date that the chairperson received the census, each commission must submit a report to the House of Commons.[60] MPs may then file written objections with the designated parliamentary committee. These objections must be signed by at least 10 MPs.[61] The commission then considers the objections and submits the final report to the Speaker of the House of Commons through the Chief Election Officer. Commissions are not required to change lines in response to public comments or objections, maintaining their independence in delineating electoral districts.

Next, commissions submit a finalized report, known as a "representation order," to the Prime Minister. Within five days, the Governor in Council "shall by proclamation declare the representation order to be in force."[62] In a sense, the districts are returned to political actors at this stage. However, this stage has been interpreted by past Canadian governments to be procedural. There is no record of the Governor in Council ever failing to declare a representation order to be in force or seeking to amend a representation order.

Canada's most recent redistribution commenced in October 2021 and was completed in October 2023. The new districts go into effect on the first dissolution of Parliament that occurs, at least seven months after the day the districts were finalized.[63]

Canada's redistricting process is characterized by explicit legislative mandates for the procedural aspects of redistricting that afford broad substantive discretion to its independent commissions. Canada builds substantive transparency measures into its process, though for the most part Canada's political culture has not produced heavy public pressure on the redistricting process or litigation involving its lines.

4. *Mexico*

4.1 *Political system of representation*

Mexico, a federal republic, has a bicameral Congress comprised of the Chamber of Deputies, elected for three-year terms, and the Senate, elected to six year terms.[64] Both chambers are elected through mixed-member electoral systems, using FPTP and [Party] List PR."[65] Mexico's mixed systems allows it to achieve a high degree of

[60] R.S., 1985, c. E-3, s. 20.

[61] "In 2012, for instance, the 13 Conservative MPs in Saskatchewan objected when the province's commission decided to eliminate some blended urban-rural ridings around Regina and Saskatoon."Wherry, *supra* note 59.

[62] R.S., 1985, c. E-3, s. 25.

[63] *Timeline for the Redistribution of Federal Electoral Districts,* FEDERAL ELECTORAL DISTRICTS REDISTRIBUTION 2022.

[64] *Mexico: Democratization Through Electoral Reform*, ACE PROJECT.

[65] *Mexico: Democratization Through Electoral Reform*, ACE PROJECT.

proportionality between votes and seats.[66] For comparison sake, discussion here focuses on line drawing for the single member districts of the Chamber of Deputies (senators in Mexico are elected in multi-member districts).

In the Chamber of Deputies, 300 members are elected by plurality vote in single-member constituencies; 200 members are elected through a closed-list proportional representation system.[67] The 300 FPTP seats are apportioned to the 32 Mexican states in proportion to population, with the restriction that no state can have fewer than two seats.

4.2 *Redistricting & Census Legal Authorities*

An autonomous agency has conducted the census regularly since 1900 in every year ending in 0.[68] However, Mexico's constitution does not mandate a redrawing of electoral boundaries every 10 years.[69] Mexico's constitution establishes two agencies responsible for undertaking the census and redistricting, its National Institute of Statistics and Geography (INEGI) and its federal agency responsible for administering elections, the National Electoral Institute (INE), respectively.[70] Mexico has no set malapportionment deviation standard. In practice, the INE has set internal standards that have varied between 10-15%.[71]

4.3 Redistricting *Body Composition*

Mexico's redistricting authority is delegated to the INE, a formally independent electoral management body headed by a non-partisan executive multimember board known as the *Consejo General* (CG).[72] The CG is composed of eleven board members with voting powers, as well as party and legislative representatives from every registered party that do not have voting power. The CG appoints a Technical Committee (TC), chaired by the executive director of the registry of voters and composed of external experts in areas such as demography, cartography, statistics, optimization, and indigenous populations. The TC is responsible for producing

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[66] *The Mexican Electoral System*, INSTITUTE NACIONAL ELECTORAL.

[67] *United Mexican States*, IFES ELECTION GUIDE.

[68] *Subsistema de Información Demográfica y Social*, INEGI.

[69] Article 53 of Mexico's constitution states "that whenever the decision to redraw districts is taken by the federal electoral authority, this activity should be performed in accordance with the available information produced by the latest population census." *See* CPEUM, art. 53; Handley & Grofman, *supra* note 1 at 47.

[70] CPEUM, art. 26; art. 41, V, § B.

[71] Trelles et al., *supra* note 23, at 83. at 83.

[72] INE is delegated broad authority in its statutory mandate, la Ley General de Instituciones y Procedimientos Electorales (LEGIPE); Plan de trabajo.

congressional map blueprints for every state according to a computer algorithm using an explicit scoring function.[73] The TC is responsible for national and local line drawing.

4.4 *Transparency in Procedure*

The INE implements Mexico's constitutional mandate for "maximum transparency and objectivity."[74] The institution's guiding principle of "*maxima publicidad* (maximum transparency)'' states that INE guarantees that "all actions and information—unless it is restricted by law—will be made publicly available." As described below, the accessibility and transparency provided to the public have largely failed to reach this objective in reality.[75]

Mexico has fully embraced computer algorithms to assist line drawing. The INE employs expert cartographers who rely on an automated redistricting algorithm to generate congressional map blueprints.

The TC begins by producing a first scenario map, using an algorithm that takes into account a set of weighted criteria, such as population, geometric compactness, transportation time within the district, geographic continuity, and geographic criteria.[76] Once the preliminary map is drawn, parties can formulate counter proposals to the computer-generated district lines. Counter proposals may be adopted if they objectively improve upon the computer-generated solutions. Brandeis University Professor Alejandro Trelles summarizes the process succinctly:

> First, the TC produces the ''first scenario'' map for each state using an in-house optimization process. The committee defines the type of optimization algorithm to be used, the number and type of restrictions included in the cost function, and assigns the weight that each measure will receive (with a cost function, lowest-scoring plans are considered ''best''). Then, political parties represented within INE's national and local oversight commissions, respectively known as Comisión Nacional de Vigilancia (CNV) and Comisiones Locales de Vigilancia (CLVs, one for each of 32 states), can propose alternative plans.

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[73] Trelles et al., *supra* note 23, at 81.

[74] *Id.* at 81. ("The institution's guiding principle of 'maxima publicidad (maximum transparency)'' states that INE will guarantee that "all actions and information—unless it is restricted by law—will be made publicly available.").

[75] *Id.* at 96.

[76] *Criterios y Reglas Operativas para la Distritación Nacional 2021-2023*, INE.

> As the parties formulate counter-proposals to the machine-generated map, they are constrained by the scoring function—the TC is ostensibly bound to adopt the plan that scores best. Third, the TC then evaluates all suggested plans and selects a ''second scenario'' from among the first scenario and the parties' counter-proposals. Fourth, the parties are invited a second time to present counter-proposals. Finally, the committee then evaluates all suggested plans—from among the set of plans that includes the second scenario and second-round counter-proposals, selects a final scenario, and recommends it to the board for adoption.[77]

Maps are given mathematical scores. The TC will typically adopt best-scoring map. An exception known as "criterion 8" allows the TC to consider "suboptimal scoring plans proposed by the political parties" if the parties unanimously endorse a proposed plan.[78]

Mexico's redistricting process does not include a role for the general public to submit input. Only after the process is complete is the public provided the data and statistics that would allow it to technically check the TC's work.[79] Redistricting software is made available only to the political parties and the TC during the redistricting process. The technical redistricting process remains largely inaccessible to citizens or external actors, and is difficult for scholars or even redistricting specialists to comprehend after the fact.[80]

Mexico's process features no public hearings. The closest analog are limited public consultations with indigenous communities after the algorithm-generated districts are created. Still, indigenous groups consulted are not given access to the partisan plan proposals or to the software used by parties to formulate counter-proposals during the different stages of the process.[81] Rather, accountability depends on the institutional roles of the CNV and CLVs, which are composed of the political parties themselves.[82] Party involvement within the CNV and CLV, as well as at the CG level, ensures (in

[77] Trelles et al., *supra* note 23, at 86 ("Overall, we find that: (i) the core information necessary to evaluate the consistency of rules and outcomes is not available to the public, (ii) the information that is made available is not readily discoverable in a single repository, (iii) the necessary information to understand the decision- making within the process is—partially—made available only ex-post, and (iv) not all core information is available in accessible formats facilitating the evaluation of the consistency between rules and outcomes.")

[78] *See id.* at 84.

[79] *Id*. at 85.

[80] *Id*. at 87, 96.

[81] Id. at 88.

[82] Atribuciones de la Comisión Nacional de Vigilancia, INE; *Plan de Trabajo del proyecto de la Distritación Nacional 2021-2023*, INE; Trelles et al., *supra* note 23, at 96 ("We believe that these agency deficiencies are not significant because in Mexico's electoral management system political parties are well served by playing an active monitoring role in redistricting. That is, the inclusion of parties as oversight agents seems to be working quite well within Mexico's electoral bureaucracy… This partisan accountability system, however, is restricted to parties and bureaucrats in a closed door environment.")

principle) that wide ranging interests are represented. Line drawing disputes are resolved within the INE structure or resolved before a tribunal specialized in election matters known as the *Tribunal Electoral del Poder Judicial de la Federación* (TEPJF).[83]

In sum, Mexico's reliance on mapping software and algorithmic decision making seeks to trim the process of political mischief. This may in part explain why Mexico touts transparency as a core value in redistricting but in practice incorporates few public substantive transparency measures.

5. *New Zealand*

5.1 *Political system of representation*

New Zealand is a constitutional monarchy with a parliamentary system of government. In parliament, a unicameral legislature, there are 120 members of the House of Representatives. Its mixed member proportional electoral system is styled after the German system and seeks to reduce the representation distortions emanating from single member district systems through use of a party list system.[84] Of the 120 seats, 72 members are elected from single member districts.[85] Single member districts are divided into two types: General and Māori (the largest indigenous population in New Zealand comprising approximately 17 percent of New Zealand's population).[86] In the last redistricting cycle in 2018, 7 of the 72 districts were Māori districts.[87]

5.2 *Redistricting & Census Legal Authorities*

Authority for New Zealand's redistricting process is clearly delineated in the Electoral Act of 1993. This legislation provides that the census, undertaken every five years, triggers the redistricting process.[88] The redistricting process must be completed within a tight timeframe of six months.[89] In turn, the Electoral Act requires that as soon as possible after each periodical census, the commission, the Government

[83] Disputes at this body are not common.

[84] *New Zealand: Drawing Electoral Districts to Guarantee Minority Representation*, ACE PROJECT.

[85] The number of South Island general seats are fixed at 16 but the North Island general seats and Māori seats are calculated prior to each boundary review using statutory formula in sections 35 and 45 of the Electoral Act.

[86] *See* ACE PROJECT, *supra* note 85; *Māori population estimates: At 30 June 2023*, STATS NZ.

[87] REPRESENTATION COMMITTEE, *NZ Electorate Boundary Review* (2020).

[88] Data and Statistics Act 2022. A longer delay may occur when the census occurs in the same year as the general election, as the boundary review cannot start in the same year as a general election.

[89] *See* Handley & Grofman, *supra* note 1 at 33.

Statistician, and the Surveyor-General must commence the redistricting process.[90] The Act allows for a malapportionment deviation from the quota not exceeding 5%.[91] New Zealand's five year cycle is a rapid pace in comparison to the other countries discussed here.[92]

5.3 *Redistricting Body Composition*

Known as the Representation Commission, New Zealand's Commission is composed of the following seven individuals:

a) Surveyor-General;
b) Government Statistician;
c) Chief Electoral Officer;
d) Chairperson of the Local Government Commission;
e) Two persons (not being public servants directly concerned with the administration of this Act or members of the House of Representatives), appointed by the Governor-General by Order in Council, on the nomination of the House of Representatives, as members of the Commission, 1 of those members nominated to represent the Government and 1 to represent the Opposition;
f) One person (not being a public servant directly concerned with the administration of this Act or a member of the House of Representatives), appointed as a member of the Commission by the Governor-General by Order in Council, on the nomination of the members of the Commission who hold office under paragraph (a) or paragraph (b) or paragraph (c) or paragraph (e), or a majority of them, to be the Chair- person of the Commission.

In this seven-member statutory body, four of the members are members of the public service and two members are appointed by the Governor-General, following nomination by parliament. This structure guarantees representation of the ruling Government and the opposition.[93] The seventh member serves as the Chairperson and

[90] Electoral Act of 1993, Part 3, §35.

[91] *Id*. at §36; DAVID BUTLER & BRUCE CAIN, CONGRESSIONAL REDISTRICTING: COMPARATIVE AND THEORIES PERSPECTIVES (1992) (New Zealand's 5% deviation standard is one of the closest to the U.S.' one person, one vote standard.) The quota is relevant for determining the number of electorates, which is calculated by the Government Statistician. As each district cannot exceed the quota, malapportionment may trigger adjustments to the number of electorates.

[92] *See* Handley & Grofman, *supra* note 1 at 30.

[93] *Id.* at 31-32 ("The role of the two appointed commissioners is open to various interpretations. Some define it as liaising between the commission and politicians— facilitating direct access to the leaders of the parliamentary parties they represent, consulting with parties and politicians and conveying party information to the commission, and ensuring that the whole process is open and democratic. Others tend to see the appointed commissioners more as advocates for their respective parties (although not to the extent that they are openly partisan), who bring a different perspective to the debating table and who add credibility to the commission's eventual decisions.").

is nominated by the other member of the Commission. The Governor-General appoints the seventh member from this list of nominees. Since 1956, this chairperson has always been a member of the judiciary.

For Māori districts, New Zealand alters the commission to increase Māori participation by adding the chief executive of Te Puni Kokiri (the New Zealand government's principal policy advisor on Māori wellbeing and development) and two appointed persons to represent the Government and Opposition who are Māori.[94]

New Zealand's Representation Council (RC) is notable in that it does seek to establish a "nonpartisan commission," an objective that has been criticized by scholars such as Bruce Cain and Robert Dixon.[95] Instead, it establishes a type of bipartisan commission, in which the partisans consist of a minority of the commission. This allows the RC to extract the benefits of partisan involvement, while avoiding some of the more problematic practices of redistricting, such as zero-sum gamesmanship and political stalemates.

5.4 *Transparency in Procedure*

Before commencing their duties, the Commission allows the political parties and independent MPs to make private submissions.[96] As the provisional boundaries prepared by the Surveyor-General have not been presented to the Commission at this point, "the submissions tend to focus on how each party thinks the rules of redistribution should be interpreted," such as which criteria should take priority when coming into conflict with others.[97] Once the Representation Commission commences formal deliberations, it must publish its final redistribution plan within six months.[98]

The Commission is required to take into consideration criteria such as, existing boundaries of the General electorate, communities of interest, facilities of communications, topographical features, and any projected variation in the General

[94] Electoral Act of 1993, Part 3, §28.

[95] *See* Handley and Grofman, *supra* note 1 at 38.

[96] Electoral Act of 1993, Part 3, §34, §43. The Commission is responsible for deciding how it conducts its business and therefore future commissions could open the submission process to the public as part of the redistricting process.

[97] *See* ACE PROJECT, *supra* note 85.

[98] *See* REPRESENTATION COMMISSION, *supra* note 88, at 2.

electoral population of those electorates during their life.[99] In addition, and uniquely in this study, the RC is required to give consideration to a separate set of criteria for Māori electorate boundaries.[100]

New Zealand's public comment process is particularly noteworthy for providing multiple forums for public comment and accessibility. Once the RC maps (and summaries of reasons) are released, an objection period is opened.[101] The proposed districts are published and distributed for public display in libraries, council offices, Electoral Commission offices, and Te Puni Kōkiri regional offices. Nationwide advertising is conducted, announcing the release. Avenues include online, print, out-of-home (e.g. street posters), and radio announcement. Interactive maps are published, in which citizens can compare the old maps to newly- proposed draft maps.

Objections may be submitted online or in print.[102] All objections are published followed by a counter-objection stage opened the following day.[103] Objections and counter-objections can come from a variety of sources: political parties, individual MPs, statutory and ad hoc authorities, community groups, individual electors and, occasionally, administrators involved in running elections.[104] During the submission process, individuals, parties and organizations may participate and their participation is publicly disclosed. After closing the counter-objection stage, public hearings are held across New Zealand.[105] The Commission's proposed boundaries are then reconsidered. In practice, after the objection process closes, the RC has avoided making changes that have not subject to objection or counter-objection.[106] The RC then publishes its final report, the plan becomes final and unchallengeable. New Zealand's redistricting process is then complete.

New Zealand's process is notable both for its formalized inclusion of objection and counter-objection rounds, for its explicit inclusion of its Māori population formally in the process, and the degree to which its procedures formally encourage and enable substantive transparency.

[99] Beyond population equality, there is no "clear-cut order of priority" among the remaining criteria. *See* Handley & Grofman, *supra* note 1 at 36.

[100] *See* REPRESENTATION COMMISSION, *supra* note 88, at 13.; Electoral Act of 1993, 45(6).

[101] *See* REPRESENTATION COMMISSION, *supra* note 88, at 14.

[102] *Id.* at 14 (noting that 332 individual objections were submitted in 2019; 248 of those were related to the proposed boundaries).

[103] *Id.* (noting that 106 counter-objections were submitted in 2020, 88 of those relating the proposed boundaries boundaries).

[104] *See* ACE PROJECT, *supra* note 85.

[105] *See* REPRESENTATION COMMISSION, *supra* note 88, at 14 (There were 36 oral submissions in 2020).

[106] *See* REPRESENTATION COMMISSION, *supra* note 88, at 13.

6. India

6.1 *Political system of representation*

India's system of governance is a federal parliamentary republic loosely modeled on the British parliament system. The parliament consists of an upper and lower house (the Rajya Sabha and Lok Sabha).[107] Rajya Sabha members are chosen by state legislatures.[108] The 543 members of the Lok Sabha are elected directly by Indians through FPTP elections in single member electoral constituencies.[109] The number of seats in the Lok Sabha have been capped since 1976, ostensibly due to family planning policies and a fear of rewarding states that failed to adhere to these policies with more representation, even as India has seen explosive population growth since then.[110] Some scholars argue that family planning justifications are "smokescreen[s] for more direct political considerations."[111]

The freeze is currently scheduled to be lifted in 2026, although debates between northern and southern states on the best path forward persist.[112]

6.2 *Redistricting & Census Legal Authorities*

India's constitution guarantees its citizens proportional representation through Article 81, which provides that each state must receive seats in proportion to its population and must allocate those seats to constituencies of roughly equal size.[113]

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[107] Gareth Price, *Democracy in India*, CHATHAM HOUSE (Apr. 7, 2022).

[108] Shruti Rajagopalan, *Demography, Delimitation, and Democracy*, SUBSTACK: GET DOWN AND SHRUTI (July 7, 2023) ("Article 80 capped the maximum number of Rajya Sabha (upper house/council of states) members from states at 238, with an additional 12 members designated for functional representation or nomination. However, the most interesting aspect of Indian bicameralism is that the original constitution allowed for no malapportionment in either house of Parliament. It required that Rajya Sabha members from states also be chosen by the state legislature 'in accordance with the system of proportional representation by means of the single transferable vote.' This differs from other systems, like the U.S., where each state, irrespective of population, gets the same number of electoral seats in the upper house, e.g. two Senate seats per U.S. state.").

[109] Lakshmi Iyer & Maya Reddy, *Redrawing the Lines: Did Political Incumbents Influence Electoral Redistricting in the World's Largest Democracy?* (Working Paper), HARVARD BUSINESS SCHOOL (Dec. 19, 2013); *India – First Past the Post on a Grand Scale*, ACE PROJECT.

[110] Sanjay Kumar, *Fourth Delimitation Commission: Old and New Issues*, ECONOMIC AND POLITICAL WEEKLY (Mar. 22, 2003).

[111] *See* Handley and Grofman, *supra* note 1 at 87.

[112] Ishadrita Lahiri, *How census-based delimitation for Lok Sabha seats could shake up politics & disadvantage south*, THE PRINT (Dec. 29,2022).

[113] Milan Vaishnav & Jamie Hintson, *India's emerging crisis of representation*, IDEAS FOR INDIA (May 29, 2019).

This provision approximates the one person, one vote principle.[114] Article 82 subsequently calls for the reallocation of seats after every census based on updated population figures. This provision aside, redistricting has occurred irregularly.

The Census Act of 1948 does not "bind the government to conduct the Census on a particular date or to release its data in a notified period."[115] In practice, India has conducted its census in the second year of each decade (i.e., years ending in 1).[116] Notably, the Indian government postponed the most recent census in 2021 in light of the COVID-19 pandemic. The release of India's census has not automatically triggered the redistricting process historically. Article 82 requires that redistricting take place after completion of the census, but this requirement does not go into effect until after 2026.[117]

The details of the redistricting process and great discretion are left in the hands of Parliament through the passage of Delimitation Commission Acts.[118] India's Parliament has enacted four Delimitation Commission Acts since India's founding, including the Acts of 1952, 1962, 1972 and 2002. However, India has not reallocated seats between states since 1972, leading to widespread malapportionment at present.[119] In delaying redistricting cycles in the past, India's parliament has explicitly referenced family planning as a cause for postponing redistricting.[120]

As India has not yet passed a Delimitation Commission Act for its next round of redistricting, India's current delimitation process and transparency measures embedded within cannot be determined. As a consequence, India's structural redistricting transparency is notably lacking; how it unfolds remains in the hands of India's political actors. Examining past delimitation commissions provides some insight into what the next delimitation commission might look like for the world's largest democracy.

In 2002, parliament passed the 84th Amendment to India's constitution, continuing the delimitation freeze in place since 1972.[121] The 84th Amendment postponed a fresh

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[114] Ursula Daxecker,*Unequal votes, unequal violence: Malapportionment and election violence in India*, 57 JOURNAL OF PEACE RESEARCH, 156, 157-170 (2020).

[115] Diksha Munja, *Explained | The delay in the decennial Census*, THE HINDU (Jan. 9, 2023).

[116] *See* India's Census Act of 1948.

[117] INDIA CONST., art. 82.

[118] *See* Handley & Grofman, *supra* note 1 at 76 ("The Indian Constitution lays down certain ground rules for delimitation, but leaves the actual practical details for Parliament to decide, leaving the system vulnerable to political interference and accusations of partiality.")

[119] *See* Vaishnav & Hintson, *supra* note 114; Shruti Rajagopalan, *Demography, Delimitation, and Democracy*, SUBSTACK: GET DOWN AND SHRUTI (July 7, 2023), ("At the extremes: In Bihar, one Member of Parliament (MP) represents approximately 3.1 million citizens. An Uttar Pradesh MP represents approximately 2.96 million citizens. A Tamil Nadu MP represents approximately 1.97 million citizens. And a Kerala MP represents approximately 1.75 million citizens.").

[120]*See* Vaishnav & Hintson, *supra* note 114.

[121] *See* The Constitution (Eighty-fourth Amendment) Act, 2001; Handley and Grofman, *supra* note 1 at 90 ("The Eighty-fourth Amendment has no transparent rationale, and the proposed justification for the change is so clearly flawed that it is tantamount to a constitutional fraud.").

round of redistricting until the next decennial census, after 2026 (likely to occur in 2031).[122] In 2003, the 87th Amendment paved the way for limited redistricting to take place based on the 2001 census, permitting district lines to change within states to equalize populations and to "re-demarcate the electoral constituencies to be reserved for the Scheduled Castes (SC) and the Scheduled Tribes (ST) in proportion to their increased population share."[123] However, this last redistricting cycle did not change the allocation of seats between states, only allowing for redistricting within each state using the seats allocated from 1973. Commentors have noted that, assuming no intervening fix, by 2031 "the population figures used to allot parliamentary seats to each state will be six decades old."[124]

6.3 *Redistricting Body Composition*

The 2003 redistricting commission in each state of India was comprised of a former Supreme Court judge, the Chief Election Commissioner of India, and the State Election Commissioner of the state concerned.[125] The central government appoints the state Supreme Court judge, while each state's governor appoints a State Election Commissioner.[126] In addition, 2003 state commissions each included ten "associate members" representing local political interests. These members included five members from the state legislature and five from the national parliament representing that state. Associate members possessed no voting rights on the commission. In some respects, including associate members served as a transparency mechanism in itself. Commission membership, including the associate members and State Election Commissioner, includes members with state-specific knowledge and local political interests. State commissions are commonly referred to as Delimitation Commissions.[127]

6.4 *Transparency in Procedure*

The Delimitation Act of 2002 set out factors for state commissions to consider including, compactness, ease of communication and "public convenience," and

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[122] *See* Vaishnav & Hintson, *supra* note 114.

[123] Lakshmi Iyer & Maya Reddy, *Redrawing the Lines: Did Political Incumbents Influence Electoral Redistricting in the World's Largest Democracy?* (Working Paper), HARVARD BUSINESS SCHOOL (Dec. 19, 2013); *Reapportionment and Redistricting in other Countries*, ROSE INSTITUTE OF STATE AND LOCAL GOVERNMENT, at 6, 8; *See* Handley & Grofman, *supra* note 1 at 75-76.

[124] *See* Vaishnav & Hintson, *supra* note 114.

[125] The Delimitation Act, 2002, Section 3.

[126] *Id.*

[127] *Changing Face of Electoral India: Delimitation 2008*, DELIMITATION COMMISSION OF INDIA.

maintenance of existing administrative and electoral lines.[128] These broad principles and the absence of a requirement for further explanation of why lines were drawn as they were demonstrates the lack of an important element of transparency.[129] Neither the Act or India's constitution set forth a permitted population deviation standard between constituencies. That said, in the 2002 round, state commissions purportedly set out for themselves a permissible 10% deviation, allowing for exceptions.[130]

The 2002 Act also broadly delineated a public hearing process. First, associate members of the commission were permitted to publish dissenting opinions in conjunction with the published proposal for the delimitation of constituencies. Upon publishing the proposal in state newspapers, the commission would "consider all objections and suggestions which may have been received by it before the date so specified, and for the purpose of such consideration, hold one or more public sittings at such place or places in each State as it thinks fit."[131] The Delimitation Commission began its work in July of 2002 and finished in May of 2008.[132] The Delimitation Commission reported holding 130 public sittings in 24 States in India in which approximately 7,200 people addressed the Commission and about 122,000 people attended.[133] It also reported revising its proposals following public demand.[134] The 2002 Act enabled India's president to then order the new delimitation of constituencies into force.[135] Per the Indian Constitution, the new maps cannot be challenged in court.[136]

While India's redistricting transparency scores low on structural transparency mechanisms given the irregularity in timing, substantive transparency mechanisms were at least present in the 2002 round. Perhaps the most unique feature of India's 2002 round, namely the inclusion of non-voting partisan "associates" in its commission, provides a degree of inoculative transparency that could serve as a useful model.

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[128] The Delimitation Act, 2002, Section 9 ("(a) all constituencies shall, as far as practicable, be geographically compact areas, and in delimiting them regard shall be had to physical features, existing boundaries of administrative units, facilities of communication and public convenience; (b) every assembly constituency shall be so delimited as to fall wholly within one parliamentary constituency; (c) constituencies in which seats are reserved for the Scheduled Castes shall be distributed in different parts of the State and located, as far as practicable, in those areas where the proportion of their population to the total is comparatively large; and (d) constituencies in which seats are reserved for the Scheduled Tribes shall, as far as practicable, be located in areas where the proportion of their population to the total is the largest.").

[129] Sanjay Kumar, *Fourth Delimitation Commission: Old and New Issues*, *Economic and Political Weekly* (Mar. 22, 2003).

[130] Sanjay Kumar, *The Fourth Delimitation: An Evaluation*, ECONOMIC AND POLITICAL WEEKLY (Jan. 17, 2009).

[131] Ritika Chopra, Explained: Why Lok Sabha is still 543, *The Indian Express* (Oct. 14, 2019).

[132] *Id*.

[133] *Changing Face of Electoral India: Delimitation 2008*, DELIMITATION COMMISSION OF INDIA.

[134] *Id.*

[135] INDIA CONST., art. 82, 170.

[136] INDIA CONST., art. 243ZG, Bar to interference by courts in electoral matters.

7. *Italy*

7.1 *Political system of representation*

Italy is a parliamentary republic with a multiparty system. Italy's Bicameral Parliament is comprised of the Chamber of Deputies and the Senate. The Chamber of Deputies has 400 members; the Senate has 200 members. Italy employs a mixed electoral system of FPTP single-member majority and Party List proportional representation.[137] Italy also employs a mixed system of single member and multi member districts. Approximately 5/8 or 62.5% of all districts (245 MPs and 122 senators) are elected through proportional representation. The remaining 3/8 or 37.5% (147 MPs and 74 senators) are elected using first-past-the-post in single-member constituencies in which voters elect an individual representative.[138]

7.2 *Redistricting & Census Legal Authorities*

Article 56 of the Italian Constitution requires that the division of seats in the Chamber of Deputies will be obtained "by dividing the number of inhabitants of the Republic, as shown by the latest general census of the population, by 392 and by then distributing the seats in proportion to the population in every electoral district."[139] In relation to the Senate, Article 57 requires that the division among Regions be "made in proportion to the population of the Regions as per the latest general census, on the basis of whole shares and highest remainders." [140]

In the past, Italian law required that its national census be conducted on a decennial basis.[141] On October 18, 2012, the Italian Parliament passed a decree law requiring an annual census.[142] Italy did not conduct its first annual census under this new requirement until 2018.[143] In practice, Italy has not drawn new districts following each annual census; redistricting timing has instead been driven by factors associated

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[137] A. D'Andrea, L. Spadacini, *The Structure of Parliament*, in V. ONIDA (ET AL.), CONSTITUTIONAL LAW IN ITALY 121-131 (2021).

[138] Marie Pouzadoux, *How does the Italian electoral system work?*, LE MONDE, (Sep. 24, 2022.)

[139] Eight seats are distributed globally in order to provide the many Italians living outside the country representation.

[140] ITALY CONST., art. 57.

[141] Alessandra Mazzola, *The Revision of Electoral Districts in Italy: the New Permanent Census System within the Framework of Constitutional Provisions on Representation*, Spadacini FASCICOLO SPECIALE N. 1 (2024).

[142] Art. 3, Decree-law No. 179 of 2010.

[143] Alessandra Mazzola, *The Revision of Electoral Districts in Italy: the New Permanent Census System within the Framework of Constitutional Provisions on Representation*, Spadacini FASCICOLO SPECIALE N. 1 (2024); Lorenzo Spadacini, *Constitutional needs for the Italian process of drawing electoral districts: a more independent Commission, less partisanship, and greater transparency and participation*, Spadacini FASCICOLO SPECIALE N. 1 (2024).

with the extreme volatility of electoral legislation. Italy has not followed the automatic constitutional trigger requiring redistricting following the census. Instead, Parliament has sporadically passed laws to initiate redistricting (see Table 2). From 2005 until 2017, Italy's electoral laws did not provide for single-member districts. In 2017, following the approval of a new law, single-member districts were quickly drawn based on 2011 data. In 2020, a new electoral law reduced the total number of parliamentarians, along with the number of single-member districts. Italy's redistricting commission redrew electoral boundaries to account for this shift in 2021, using 2011 data.

Table 2. Italy's Legislative Redistricting, 2000-2024

Year Redistricting Took Place	Reason for drawing/not drawing new map
2003	New maps proposed according to official publication of 2001 census, but new maps never approved because single member districts abolished by new electoral law in 2005
2015	New maps enacted according a new 2005 electoral law on the basis of 2011 census, but never applied because law declared unconstitutional
2017	New electoral law approved in 2017; redistricting completed based on 2011 census data
2020	Reduction of the number of MPs. New redistricting based on 2011 census
2023	Official publication of 2021 census; new maps, approved by Commission, not yet approved by Parliament (as of date of publication)

District line drawing has not occurred in regular cycles. However, on January 29, 2024, Italy's Parliament clarified that redistricting will not follow each annual census, but will instead be conducted during years ending in 1 and 6 (i.e., every five years).[144]

As this description reveals, district line drawing in Italy's recent history has not occurred in regular, predictable cycles. Italy has seen long periods with static districts, leading to progressively worse malapportionment, such as between 1948 to 1993.[145]

7.3 *Commission composition*

The Italian government, comprised of the president of the Council of Ministers and other ministers, appoints every three years a delimitation Commission consisting of ten people who are experts in geography, statistics, political science, and

[144] Art. 2 § 1 Decree-law n. 7 of 2024.

[145] Lorenzo Spadacini, *Constitutional needs for the Italian process of drawing electoral districts: a more independent Commission, less partisanship, and greater transparency and participation*, Spadacini FASCICOLO SPECIALE N. 1 (2024).

constitutional law.[146] The Commission is chaired by the head of the Italian National Institute of Statistics (ISTAT). A task force of ISTAT experts provides technical support to the Commission. The Commission draws electoral boundaries on the basis of technical data gathered during the last census conducted. Rather than serving as a n independent body separate from Government and Parliament, the Commission serves as part of Government (i.e., the executive branch).[147]

The Commission follows a set of rules required by law that set forth principles that are formally binding on the Commission's work but allow it a great deal of discretion.[148] For example, malapportionment deviation cannot exceed 20%.[149] However, the criteria are generalized as to allow line drawers to wade above this limit.[150] During the line drawing process, neither Commission members nor ISTAT staff formally consult with political bodies or other constituencies.

After the Commission finalizes its maps, it submits a report to the Government. The Government then has an opportunity to make changes and send its revised maps to the Parliament. The Parliament is not able to suggest or make changes unilaterally, but members of Italy's Parliament and Government may then collaborate on alterations. The process leaves room for the Government to make changes. This occurred during the constituency delineation conducted in 2017. As for the subsequent exercise (2020), the Government did not amend the map proposed by the commission, except for a very minor change advised by Parliament to a multimember district in Rome[151] In the recent past, line drawing decisions have not drawn contention.[152]

Italy's ISTAT has no formal outlet for public participation in the line drawing process and does not publish draft maps or seek public input prior to adoption. Publication of the final report occurs after electoral maps have been finalized, if at all. No set rules dictate that final reports be made public. In practice, the Government sometimes

[146] *Id*. ("First and foremost, the new regulatory framework establishing the procedure for drawing electoral districts reiterates a pattern already criticized and present in all previous experiences: namely, it places the Government at the centre in the appointment of the member of the Commission. In this regard, the adopted scheme confirms the structure of the 2015 law, abandoning the one adopted in the 1993 legislation, which was much more convincing in terms of guaranteeing independence.")

[147] *Id*.

[148] *Id*.

[149] Daniele Casanova, *Representation of Linguistic Minorities and Drawing Electoral Districts in Italy*, Spadacini FASCICOLO SPECIALE N. 1 (2024).

[150] Spadacini *supra* note 145 ("The extension of these criteria - without differentiation - to uninominal constituencies effectively attests to the generality of the criteria themselves. It is evident that if they were genuinely binding criteria, they could not be applied indiscriminately to constituencies so diverse in demographic consistency and function, such as uninominal compared to plurinominal ones.").

[151] XVIII Legislatura, Resoconto sommario n. 206 del 10/12/2020, Prima Commissione permanente.

[152] According to Spadacini, the absence, up to now, of significant scientific contributions on the subject underscores in itself the lack of substantial objections and specific attention regarding the topic.

makes the Commission's final report public.[153] In other instances, the final report is not published or otherwise circulated publicly.[154]

Italy's redistricting process is technocratic and largely insulated from politics. Perhaps because single-member districting makes up only a minority of districts in Italy's Parliament, rapid changes to electoral law and political representation in Italy, in addition to political party fragmentation resulting from Italy's political culture and history, public pressure on Italy's redistricting process has been minimal. Despite shortcomings with respect to both structural and substantive redistricting transparency, Italy's process has thus far escaped both public criticism and calls for reform.

[153] *See* Commissione di esperti nominata con DPCM del 15 novembre 2017 e successive modifiche e integrazioni (DPCM del 5 dicembre 2019 e DPCM del 13 gennaio 2020) in base all'art. 3 della legge n. 165 del 3 novembre 2017 «Delega al Governo per la determinazione dei collegi uninominali e dei collegi plurinominali», *Proposta dei collegi uninominali e plurinominali per la Camera dei deputati e il Senato della Repubblica*, 13 novembre 2020.

[154] Spadacini, *supra* note 145 ("The maps produced by the Commission in 2017 and 2023 have not been subjected to any form of publicity by the Government. With reference to the 2017 maps, they only became public upon the Government's request for parliamentary opinion. As of 2023, to date, the Government has not yet informed Parliament of the matter, so the maps, completed by the Commission in December 2023, have never become public… From these perspectives, indeed, the Italian procedure has proved to be quite disappointing. The work of the independent Commission is carried out behind closed doors. Neither stakeholders nor members of Parliament are allowed. The Commission concludes its work without any discussion with either institutions or civil society. It delivers its work to the Government, which then submits it to Parliament. Regarding objections that may be raised in Parliament, the Commission has no further say. At this stage, parliamentary requests for amendment are subject to political evaluation, with no provision for access to the technical and neutral instance that the commission should represent.").

PART IV

1. *Lessons Learned*

As discussed in Part I, differences in political representation schemes, public awareness of and pressure on the line drawing process, and unique political histories make direct comparisons of redistricting transparency challenging. Still a few essential points and innovative transparency mechanisms appear to hold promise.

India and Italy's experiences underscore the importance of structural transparency. India provides a reminder of how legal mechanisms (and rule of law norms) can be leveraged to prevent political actors from postponing the line drawing process (in India's case, for decades).[155]

In the case of Italy, chaotic and irregular intervals—combined with rapid changes to electoral laws—have effectively shielded the line drawing process from public scrutiny (and awareness).

Even when political norms generate structural transparency in practice, legal mandates help ensure—regardless of political circumstance—that structural redistricting transparency goals are achieved. Legally-regularized redistricting cycles provide the public a key precursor to oversight.

New Zealand and Canada's legal mandates requiring line drawing bodies to provide reasoning supporting line drawing decisions provide a second helpful takeaway. All countries examined in this study have set criteria guiding line drawers.

Public oversight and participation are enhanced when line drawers enunciate the criteria taken into account when drawing lines. Such a record enables members of the public engage the process, particularly if such reasoning is provided before maps are finalized and while members of the public still have the opportunity to weigh in. In the United States, notably few state processes include such "reasoning transparency" mandates.[156]

Canada and New Zealand's substantive transparency features stand out in not only providing process visibility to the public, but implementing measures to inform the public of how electoral district lines are redrawn. By law, these countries provide draft

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[155] *See also* Karuti Kanyinga, *Kenya: Democracy and Political Participation,* OPEN SOCIETY FOUNDATIONS (2014).

[156] California provides an example. The California state constitution requires that its commission "…shall issue, with each of the four final maps, a report that explains the basis on which the commission made its decisions in achieving compliance with the criteria listed in subdivision (d) and shall include definitions of the terms and standards used in drawing each final map." CAL. CONST. ART. XXI, § 2(h). Additionally, when U.S. courts draw the lines (in situations where line drawers have failed to draw maps or maps fail to comply with the law), special masters routinely issue detailed explanations of their line drawing decisions. Such reports provide helpful examples of how published reasoning should look. *See e.g.*, Bethune-Hill v. Virginia State Bd. of Elections, 368 F. Supp. 3d 872, 876 (E.D. Va. 2019) (referencing Special Master Report in that litigation).

maps to the public, publicize and provide an opportunity for citizens to submit input on draft maps, and formally enable adverse political actors to engage in the process. New Zealand goes a step further, organizing the hearing process into multiple steps with explicit objection and counter-objection phases to allow differing public perspectives to interact and debate differences of opinion. New Zealand's substantive redistricting transparency mechanisms are also notable in their mandated public accessibility through online portals and digital media.

The discussion here has proceeded with underlying assumptions that transparency provides a measure of legitimacy in the redistricting process and that transparency may rein in political manipulation of the process.

Mexico, and in some respects Italy, offer an alternative perspective. In both countries, the public at large does not participate either by accessing draft maps or providing feedback at hearings. In Mexico, the process builds in adversarial party actors at different levels of the redistricting process to check each other and prevent abuses.[157] In Mexico, in the hands of technical bureaucrats armed with expertise and technologically-advanced tools, the resulting maps are widely heralded as exemplary.[158]

In Italy, in recent rounds, maps produced process cause few waves due to a marked lack of structural transparency, little to no process transparency, combined with rapid changes to electoral law. Even though these forces combine to steer Italy's process under the radar, the lack of political impact of line drawing (given the limited number of single member districts and the wide population deviation allowance) is the most likely reason for the lack of public clamor for access.

Redistricting litigation, a common feature of the process in countries like the United States, may also have an impact on structural and substantive transparency. While courts may provide a measure of oversight to prevent legislative abuses of the redistricting process, countries like Mexico, Canada, India and New Zealand build in adversarial mechanisms within redistricting processes.

Further, some countries like India and New Zealand provide no mechanism for involvement of courts in redistricting.[159] For their part, Mexico and Canada experience very little litigation in comparison to the United States.[160]

While the effect of litigation on redistricting transparency deserves more study, adversarialism built into redistricting processes in countries studied here offer intriguing alternatives.

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[157] Akin to adversarial mechanisms explored by one of the authors in election administration generally. *See* Rebecca Green, *Adversarial Election Administration*, 101 N. C.L. REV. 1077 (2023).

[158] Trelles et al., *supra* note 23, at 81.

[159] INDIA CONST., art. 243ZG; Handley & Grofman, *supra* note 1 at 31.

[160] *Major Court Cases Relating to the Federal Electoral Legislation*, Elections Canada.

2. *Conclusion*

A comparison of select countries' redistricting transparency practices reveals useful lessons. The absence of transparency and public engagement in the redistricting process does not necessarily portend manipulated maps. Nonetheless, the benefits of transparency in redistricting such as public legitimacy, diversity of perspectives, and meaningful civic engagement are only attainable by providing both structural and substantive transparency to citizens of representative democracies.

Michael Pal*

The Canadian Model for Electoral District Design: Challenges and Adaptation

SUMMARY: 1. Introduction. – 2. Federalism and Electoral Districts: Distribution of Seats to the Provinces. – 3. Electoral Boundary Commissions. – 4. Exercising Commission Discretion: Population Equality and Minority Representation. – 5. Indigenous Peoples and Representation in Canadian Legislatures. – 6. Conclusion.

ABSTRACT: ***This paper examines the "Canadian model" for electoral district design. Districts are a fundamental "building block" of democracy, particularly in single-member plurality electoral systems. The Canadian model has several distinct features that make it relatively unique among global democracies in its approach to electoral district design. It serves as a relevant comparator for other parliamentary systems and for democracies that incorporate geographic districts into their electoral systems, whether in single-member plurality or mixed-member proportional systems.***

1. *Introduction*

This paper considers the "Canadian model" for electoral district design. Districts are a "building block" of democracy, particularly in single member plurality electoral systems.[1] The Canadian model has a number of distinct features that make it relatively unique among the community of democracies globally for how it approaches electoral district design. The Canadian model is a relevant comparator for other parliamentary systems as well as democracies that have geographic districts as part of their electoral system, whether in single member plurality or mixed member proportional systems. The basic elements of the Canadian model can be set out relatively succinctly, though there is a significant degree of instability below the surface of long-standing constitutional and legal rules.

First, Canada's federal constitutional structure has profoundly shaped the design of electoral districts in the House of Commons. The Constitution of Canada dictates through a series of rules minimum representation for each province in the House.[2]

* Associate Professor, Faculty of Common Law, University of Ottawa.

[1] J. C. COURTNEY, *Commissioned Ridings: Designing Canada's Electoral Districts* (McGill-Queen's University Press, 2001) at 4.

[2] See the *Constitution Act, 1982,* s. 41(b) (requiring the unanimous consent of Parliament and the provinces to alter the rule that each province has at least the same number of Members of Parliament as it has Senators) and s. 42(1)(b) (the principle of the proportionate representation of the provinces); and the *Constitution Act, 1867,* s. 51(1) (the representation formula assigning seats to the provinces in the House) and s. 51(1) rule 2 (providing that no province can have fewer Members of Parliament than in 2023).

Despite the existence of the federal Senate, which is designed in theory to represent the regions,[3] the Constitution assigns districts in the House on the basis of representation by population as well as regional representation. The House grows periodically after each decennial census as Canada's total population increases. The total number of seats in the House are then redistributed among the provinces as their relative populations fluctuate.[4] This dynamic results in under-representation of the largest provinces, urban voters, and racial minorities as a group, given long-standing population distribution patterns.[5] This model has raised complex questions around constitutional amendment and whether the provinces should have a say in the distribution of ridings, which arise whenever the formula for assigning seats in the House is altered by Parliament.[6]

Second, since the "electoral boundary revolution" of 1964, independent, non-partisan electoral boundary commissions conduct redistricting.[7] Once the seats in the House are assigned to the provinces, these commissions then set the boundaries of each constituency. There is one Commission per province to determine federal districts in that jurisdiction,[8] with the Chair being a sitting judge.[9] The Commissions have been largely successful at eliminating the partisan gerrymandering that had been endemic in Canada prior to 1964. They have been less capable at meeting other foundational commitments of electoral districting, such as voter equality and meaningful minority representation as discussed below.

Third, Canada is an outlier globally among single member plurality systems for allowing significant departures from the principle of "representation by population," also known as "voter equality" or "one person, one vote." The relevant federal legislation that directs the work of the boundary commissions permits deviations from population equality by 25% or more in the normal course of redistricting.[10] In undefined "extraordinary circumstances,"[11] unlimited greater deviations are possible,

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[3] *Reference re Senate Reform,* 2014 SCC 32 at paras 13-20 and 54-67.

[4] *Constitution Act, 1982,* s. 51(1): The number of the members of the House of Commons and the representation of the provinces therein shall on the completion of each decennial census, be readjusted….

[5] M. PAL and S. CHOUDHRY, *Is Every Ballot Equal? Visible Minority Vote Dilution in Canada* (2007) *choices* 1; M. PAL and S. CHOUDHRY, *Still Not Equal? Visible Minority Vote Dilution in Canada* (2014) 8:1 *Canadian Political Science Review* 85; B. FOREST, *Electoral Redistricting and Minority Political Representation in Canada and the United States* (2012) 56:3 *Canadian Geographer* 318; A. SPITZER, *Reconciling Shared Rule: Liberal Theory, Electoral-Districting Law and 'National Group' Representation in Canada'* (2018) 51:2 *Canadian Journal of Political Science* 447.

[6] M. PAL, *Fair Representation in the House of Commons* (2015) *Journal of Parliamentary and Political Law.*

[7] K. CARTY, *The Electoral Boundary Revolution in Canada* (1985) 15:3 *American Review of Canadian Studies* 273.

[8] *Electoral Boundaries Readjustment Act,* R.S.C. 1985, c. E-3, s.3(1) (*EBRA*).

[9] *EBRA,* s. 5(1).

[10] *EBRA,* s. 15(2).

[11] *Ibid.*

at the discretion of the boundary commission. While the use of the extraordinary circumstances clause is diminishing over time, Canadian districts still depart from representation by population to a far greater extent that districts in democracies with single-member plurality systems, such as the United State, United Kingdom, or Australia, or those with mixed member plurality systems, such as Germany or New Zealand.

This article proceeds as follows. Section II sets out how seats in the House of Commons are distributed among the provinces of Canada. It connects the constitutional rules that govern the redistribution of seats to broader principles of federalism.

Section III considers in detail one of the more successful parts of the Canadian model, namely the independent and non-partisan electoral boundary commissions that design electoral districts. This section investigates their history, their legal powers, the procedures that they use to engage in public consultation, their composition, and their evolving role.

Section IV assesses the main constitutional and legal issues in the design of Canadian electoral districts: 1) representation by population; and 2) minority representation. This section addresses the case law interpreting the right to vote in s.3 of the *Canadian Charter of Rights and Freedoms.* It looks in particular at the jurisprudence permitting wide deviation from representation by population or voter equality. It also sets out and analyzes the relatively sparse case law on minority representation.

Section V engages with one of the fundamental challenges for the Canadian model going forward, namely the failure to provide for the effective representation of Indigenous Peoples. It considers the history of failed reform proposals and some recent steps taken to address the problem by boundary commissions.

Section VI concludes by assessing the likely evolution of the Canadian model and speculates on what direction it may take given broader concerns about democracy.

2. *Federalism and Electoral Districts: Distribution of Seats to the Provinces*

Canada's federal character has deeply shaped the design of electoral districts in the House of Commons. This fact has been constant since Confederation in 1867. The design of federal electoral districts in Canada operates within the broader system of the apportionment of ridings or seats in the House of Commons to the provinces. This process is called in Canadian terms electoral district "redistribution," as opposed to redistricting or the design of district boundaries. The distribution of seats to the provinces is shaped by a number of constitutional rules, namely 1) the representation formula, 2) the "grandfather clause," and 2) the "Senate floor" rule. The different constitutional status of each of these three rules means they have varying degrees of entrenchment in the Constitution. This uncertainty has generated ongoing

constitutional politics in the federation about the legitimate process for changing the rules.

The formula for apportioning seats in the House to the provinces is contained in s.51(1) of the *Constitution Act, 1867.* The formula is a relatively complex one that translates the population of each province into a specific number of seats in the House based on six different factors. This formula has been changed multiple times since Confederation in 1867.[12] These changes have nearly always been made to protect the representation of the less populous provinces. This practice stems from the fact that representation of the provinces in the House of Commons is a zero sum game, as they divide a set number of seats up among themselves.

The formula was most recently changed in 2011 by the *Fair Representation Act* under the government of Prime Minister Stephen Harper.[13] The *Fair Representation Act* kept the allotment of seats to the less populous provinces constant, but increased the size of the House of Commons from 308 to 338. The 30 new seats went to Ontario, Quebec, Alberta, and British Columbia, which are the largest provinces by population. The *Fair Representation Act* therefore marked a departure from the politics of most of the previous changes to the formula. The less populous provinces kept their number of seats constant. They did not lose seats in an absolute sense. Yet their number of representatives in Ottawa is now relatively less weighty than it was before as the complement of Members of Parliament ("MP's") for the largest provinces has grown.

The formula in s. 51(1) of the *Constitution Act, 1867* is in turn shaped by two additional constitutional rules. The grandfather clause ensures that no province can have fewer MP's than it had during a previous Parliamentary session. The rule was first introduced in 1915. In recent decades, the rule was that no province could have fewer MP's than it did in 1985. The Liberal government of Justin Trudeau in 2022 amended the grandfather clause so as to prevent Quebec from losing one seat in the House in the upcoming redistribution.[14] As a result, the grandfather clause provides that no province can have fewer MP's than it had in 2022 during the 43rd Parliament. Quebec will keep its 78 MP's rather than go down to 77.

These changes were vociferously opposed by MP's in Toronto, Canada's largest city, which saw its complement of ridings reduced from 25 to 24.[15] There is no direct causal relationship between the province of Quebec gaining a seat because of a change to the grandfather clause and Toronto losing one. Toronto lost a seat to a suburban region in its province of Ontario that saw rapid population growth. This change was

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[12] J. C. COURTNEY, *Commissioned Ridings,* Chapter 2, Electoral Districts in a Federal State; R. A. WILLIAMS, *Canada's System of Representation in Crisis: The '279 Formula' and Federal Electoral Redistribution* (2005) 35 *American Review of Canadian Studies* 99; ANDREW SANCTON, *Eroding Representation by Population in the Canadian House of Commons: The Representation Act, 1985* (1990) 23 *Canadian Journal of Political Science* 441.

[13] *Fair Representation Act,* S.C. 2011, c. 26.

[14] *An Act to Amend the Constitution Act, 1867 (electoral representation)* passed on June 23, 2022.

[15] A. WHERRY, *Some MPs are Unhappy with the New Riding Maps – Luckily, It's Not Up to Them to Decide*, CBC.ca, August 25, 2022.

unconnected to Quebec's number of seats in the House. Yet the contrast generated political ill will.

The second constitutional rule is the "Senate floor." Under the Senate floor rule, representation in the House of Commons is tied to the number of representatives a province has in the Senate.[16] Senate representation is assigned by region, with an allotment to each province within a region. The distribution of Senate seats generally favours the provinces that entered into Confederation early on, namely Ontario and Quebec and the Maritime provinces. As a result, the Senate floor protects the representation in the House of New Brunswick, Nova Scotia, and Prince Edward Island. The province of Newfoundland and Labrador entered into Confederation at a later date, but also benefits from the Senate floor rule.

One of the perennial features of debate around the redistribution of seats to the provinces is around the correct procedure for constitutional amendment. The procedures for amendment of the text of the Constitution of Canada are listed in Part V of the *Constitution Act, 1982.* Part V sets out multiple procedures tied to specific provisions or legal powers. Under the Canadian Constitution, there is no requirement for a referendum to amend the text. The most difficult procedure to meet is unanimous consent as required by s.41, where Parliament and the 10 provincial legislatures must all agree. The Senate floor rule is set out specifically in Part V as requiring the unanimous consent of Parliament and the provincial legislatures to change.[17]

The representation formula and the grandfather clause, by contrast, are not specifically tied to any particular formula. This imprecision has lead to uncertainty as to the appropriate amendment procedure that is applicable. As a result, there have been multiple disputes between the federal and provincial orders of government as to which component units of the federation must consent to any changes.

The federal government has contended that it maintains the legal authority to unilaterally amend the text of the Constitution that sets out the representation formula and grandfather clause in s. 51(1) of the *Constitution Act, 1982*. It argues that s.44 of the *Constitution Act, 1982,* which provides for unilateral amendment of the text by Parliament in some narrow circumstances, applies. Section 44 states that, "Subject to sections 41 and 42 [other provisions on amendment], Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons." The federal government takes the view that the representation formula and grandfather clause are "in relation to the executive government of Canada or of the Senate and House of

[16] Section 41(b) of the *Constitution Act, 1982* protects the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force.

[17] Section 41(b), *Constitution Act, 1982.* The number of seats each province or region has in the Senate is in turn locked in through s. 42(1)(c), where 7 provinces with at least 50% of the population of Canada pursuant to s.38(1) must agree along with Parliament to any changes to Senate representation.

Commons," which puts them within the scope of s.44. If this view is correct, then Parliament can pass legislation that changes the text of the representation formula and grandfather clause in the Constitution unilaterally without needing the consent of the provincial legislatures.

The provinces have at various times since the amendment procedures were introduced in 1982 challenged the view that Parliament can act unilaterally to change provincial representation in the House. The Premiers naturally view their number of representatives in the federal House of Commons in Ottawa as among the matters of utmost importance as they seek to attain favourable policies and programs for their province. The resulting disputes have been political, however, rather than finding their way into court.[18] As a result, the constitutionality of unilateral amendment has not been definitively resolved.

A recent case on constitutional amendment, the *Reference re Senate Reform*,[19] raised some doubt as to whether unilateral amendment would be seen as constitutional. Calls for Senate reform and even abolition of the institution have been constants of Canadian politics nearly since 1867. At issue in the *Reference* were proposals to substantially reform the Senate.[20] The Senate is an anachronism in an established democracy, with Senators appointed rather than elected, a property requirement for Senators, an out of date formula for assigning seats in the Senate to the regions, and substantial formal legal authority that it exercises relatively rarely. The proposals for reform included introducing Senate elections, term limits, eliminating the property requirement for membership, and, even, abolishing the institution entirely.

The Supreme Court of Canada held that any significant change to the Senate could not be done unilaterally by Parliament pursuant to s.44, even if the text of that provision on its face applies to the Senate.[21] The "architecture"[22] of the Constitution assumes the existence of the Senate and its powers are protected by Part V. Any reforms that significantly alter the "nature and role"[23] of the Senate require either unanimous consent pursuant to s.41 of the *Constitution Act, 1982* or the consent of 7 provinces comprising at least 50% of Canada's total population (which is known as the 7/50 formula), according to s.38(1).

While the *Reference re Senate Reform* did not opine directly on the redistribution of seats in the House of Commons, that practice sits alongside Senate reform as the other significant matter over which Parliament has traditionally claimed unilateral

[18] There is one notable exception, though this case largely interpreted the guarantee of proportionate representation for the provinces in the House. See *Campbell v. Canada (A.G.),* 1988 CanLII 3043 BCCA.

[19] *Reference re Senate Reform,* 2014 SCC 32.

[20] See the *Reference re Senate Reform* at paras 64-70 regarding Senate elections and constitutional amendment.

[21] *Reference re Senate Reform* at para 70.

[22] *Reference re Senate Reform* at para 70.

[23] *Reference re Senate Reform* at paras 48, 51-52.

amendment power. One could therefore plausibly read the *Reference* as limiting the scope of the s.44 unilateral amendment power. Section 44 should be read "narrowly" wrote the majority, because of the history of the provision, but largely due to the fact that unilateral amendment by Parliament is in contradiction to the federal nature of Canada.[24]

Federalism entails guarantees of representation in the center for the provinces, held the Court. Unilateral amendment unsettles that expectation and allows Parliament to substantially affect provincial interests without their input. If the Senate cannot be altered pursuant to s.44, then it is logical to wonder whether the Court would allow s.44 to be used as justification for altering representation in the House.[25]

Constitutional politics in Canada is beset by the problem of "constructive unamendability."[26] In theory, any provision in the Canadian Constitution can be amended, as long as the proper formula is used and the necessary consent attained. There are no explicit constitutional eternity clauses. In practice, any amendment requiring the unanimous consent of the provinces or even one falling under the 7/50 rule are unattainable under current political cleavages. The amendments to the text of the Constitution since the introduction of the amendment procedures in Part V in 1982 have largely been unilateral, with Parliament acting alone,[27] or bilateral,[28] where Parliament needs only to agree with a single province directly affected by the change.[29] When the Court held that Senate abolition requires unanimous consent, that holding effectively ended hopes of eliminating the Upper House. No politician has seriously raised the issue since then as a realistic policy proposal.

If the representation formula and grandfather clause require provincial consent to change, then change will not occur. Such stasis would be a disaster for Canadian politics, as the formula would not be updated as the population grows and shifts over time. This policy concern makes it likely that the Supreme Court would allow at least

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[24] *Reference re Senate Reform* at paras 48, 51-52.

[25] In a related case, the *Supreme Court Act Reference,* the Supreme Court also narrowed the unilateral federal amendment power in relation to federal courts. The authority in question was under s.101 of the *Constitution Act, 1867,* rather than s.44 of the *Constitution Act, 1982,* but the overall emphasis was the same. Changes to federal institutions that can affect the interests of the provinces may require provincial consent.

[26] R. ALBERT, *Constructive Unamendability in Canada and the United States* (2014) 67 *Supreme Court Law Review*.

[27] W. NEWMAN, *Constitutional Amendment by Legislation* in Emmett MacFarlane, ed, *Constitutional Amendment in Canada* (University of Toronto Press, 2016).

[28] G. TREMBLAY, L*a portée élargie de la procedure bilatérale de modification de la Constitution du Canada* (2020) 11:58 *Revue générale de droit* 416. Quebec has recently attempted to use the unilateral provincial procedure to amend its own provincial constitution to purport to amend the federal Constitution. The legality of these attempts is in doubt: see E. MACFARLANE, *Provincial Constitutions, the Amending Formula, and Unilateral Amendments to the Constitution of Canada: An Analysis of Quebec's Bil*l 96 (2023) 60:3 *Osgoode Hall Law Journal* 654.

[29] See generally, E. MACFARLANE, ed, *Constitutional Amendment in Canada* (University of Toronto Press, 2016).

some scope for a unilateral s.44 amendment, though perhaps with some additional constraints to respect provincial interests and minimum conditions of representation.

In the latest redistribution of seats implemented in 2024, the number of seats in the House of Commons will rise from 338 to 343. This modest increase in seats does not substantially alter representation in the House, though it does provide some additional representation for the most populous provinces and regions within them. The formula will apply once again after the 2031 Census of population, where another modest increase in the size of the House is likely to occur again absent constitutional amendment of the representation formula. While these modest changes have kept the political temperature down, it seems likely that there will be continued conflict between the federal and provincial governments over the particular impact of these shifts in the member in the House. These disputes will occur in the shadow of the rigid amendment procedures and the uncertainty as to the scope of the unilateral federal amendment power in relation to the redistribution of seats.

3. *Electoral Boundary Commissions*

a) A Brief History of Electoral Boundary Commissions in Canada

Constituency boundaries have been a topic of perennial and intense political contestation.[30] While the initial boundaries were set out in the *Constitution Act, 1867,* Parliament possessed the inherent authority to determine electoral boundaries. It wielded this authority with impunity. Canada's first Prime Minister, Sir John A. McDonald, led egregious gerrymandering in the early years of Confederation.[31] Partisan considerations, including patronage, and the interests of MP's and political parties rather than those of the public were the dominant factors in decision-making about electoral boundaries.

Promises of reforms to the process were frequently made in speeches in the House of Commons from the earliest days of Confederation, particularly by opposition figures. Frequently, however, the high-minded rhetoric of these interventions floundered against unyielding political reality. Once in government, former opposition members who had formerly had a zeal for reform lost the courage of their convictions once they were given the opportunity to direct the gerrymandering. A similar story could be told in most provincial legislatures.

Early innovation around redistricting processes at arms-length from the legislature came from the provinces. They in turn had modelled their efforts on Australia's early independent commissions.[32] Finally in 1964 Parliament passed federal legislation

[30] J. C. COURTNEY, *Commissioned Ridings,* at 3-8.
[31] J. C. COURTNEY, *Commissioned Ridings,* Chapter 5, Drawing the Map.
[32] J. C. COURTNEY, *Commissioned Ridings,* Chapter 4: Going Down Under: Canada Looks to Australia.

creating an independent redistricting process.[33] For federal ridings, each province would have an independent commission to determine their boundaries. While some of the details around the composition of the commissions, the procedure for them to follow, and the criteria for them to consider have been amended, the basic framework in the *Electoral Boundaries Readjustment Act* remains the same.[34] An independent institution sets electoral boundaries.

While the reform movement in most of the provinces was slower than among the first movers, Manitoba and Saskatchewan, after Parliament adopted the independent commission model in 1964 all the provinces eventually followed suit. Currently, federal, provincial, and territorial districts are all designed by independent commissions.[35]

b) Composition

Given that commissions are designed to be non-partisan and independent from government and Parliament, the composition of the commissions is of paramount importance. To the extent that the institution is supposed to operate independently, those appointed to the commission must be *perceived* to be independent and *actually* act in an independent fashion. Commissioners must also be perceived to be and to actually behave as non-partisans without bias for or against parties, candidates, and leaders.

The federal model pursuant to the *Electoral Boundaries Readjustment Act* is of 3 members for each commission, with the Chair being a judge in the province.[36] Earlier versions of the federal legislation had the post of "Representation Commissioner" who sat on each of the provincial commissions. That post no longer exists.[37] Under the current legislation there is no overlap across the 10 provincial commissions. The Chair is chosen by the Chief Justice of the province and the other two members are appointed by the Speaker of the House of Commons. The perceived and (ideally) actual independence of the judiciary are borrowed by the commission in service of its task. For provincial redistricting, commissions often follow a similar set of rules around composition, with either 3 or 5 members. The Chief Electoral Officer of the province often sits on the provincial commission along with a judge.[38] The independence and

[33] K. CARTY, *Electoral Boundary Revolution*.

[34] *EBRA,* R.S.C. 1985, c. E-3, ss.4-12.

[35] There is some variation. Ontario, for example, copies the federal boundaries and makes them the provincial ones as well. It has subsequently deviated from those boundaries in a small number of ridings, particularly in the North, but the vast majority of the map is the same federally as provincially in Ontario.

[36] *EBRA* at ss.4-5.

[37] M. PAL, *The Fractured Right to Vote: Democracy, Discretion, and Designing Electoral Districts* (2015) 61:2 *McGill Law Journal* 1 at 41; J. C. COURTNEY, *Commissioned Ridings* at 58.

[38] See for example British Columbia's *Electoral Boundaries Commission Act,* R.S.B.C. 1996, Chapter 107, setting out a three-member commission including the provincial Chief Electoral Officer in s. 2(1).

impartiality of the judiciary but also the electoral management body are therefore lent to the commission.

The weakest point in the process is likely to be around the two appointments made by the Speaker. The Speaker is an MP who was nearly always elected in their own riding as the representative of a political party. As Speaker, the individual is expected to act on behalf of the House and to set partisan considerations aside. The degree of non-partisanship of the Speaker is an unwritten constitutional convention rather than required by a statute or specific constitutional text. The convention is reflected to some degree in the House's procedures and Standing Orders. The Speaker is therefore required by the House's own rules to be independent and impartial and could in theory be sanctioned by the House for making partisan appointments. In practice, there are few immediate constraints on the Speaker's appointment power.

The suitability of having a judge chair the commission is also at odds with some underlying constitutional principles. Boundary commissions are administrative bodies that are creatures of the executive in the separation of powers between the executive, legislature, and judiciary. It violates a strict understanding of the separation of powers to have a member of the courts run an executive body. Canada has never adhered to a strict understanding of the separation of powers, however, which is evident in a number of practices. There is a long history of judges acting on executive institutions, for example, such as Royal Commissions or Commissions of Inquiry. Members of the political executive, namely the Prime Minister and Cabinet, also sit as MP's in the House of Commons to take another example.

The more serious concern around the role of judges in the process is that electoral boundary commissions inevitably make decisions with a political impact. Shifting boundaries or eliminating ridings can have catastrophic effects on the political career of a candidate, MP, cabinet minister, or even Prime Minister. There is often widespread public discussion and critique of boundaries. Through their involvement in the boundary commission, the individual judge and perhaps even the judiciary more broadly risk being dragged into partisan disputes or having their impartiality questioned. The effects on the judiciary may be long-lasting in such a scenario.

There may also be a lack of fit between judges in general and the particular role of Chair of a commission. Commissions solicit feedback and respond to community concerns. Judges are experts at interpreting and applying the law, which is helpful given the rich matrix of statutes, conventions, and constitutional rules applicable to commissions. Judges manage courtrooms and the machinery behind them and in that sense have expertise to run the commission and to chair meetings and hearings. Judges, however, are not experts in public consultation. They may lack the skill necessary to generate legitimacy for the commission's work, which requires a degree of communications and politics with which they may be unfamiliar. While overall the role of judges has been important in generating a culture of impartiality, it has not always proved the most practical given the multi-faceted demands on electoral boundary commissions.

c) The Constitutional Status of Electoral Boundary Commissions

Many of the public functions viewed as necessary for a healthy democracy have been "constitutionalized" in new or significantly amended constitutions post-World War II. The majority of constitutions now, for example, create and empower an election commission.[39] Election commissions are generally tasked with delivering the election operationally, but also with administering and enforcing electoral legislation and regulation.

In some of these constitutional systems, it is the election commissions that has responsibility for electoral district design.[40] Sometimes a separate redistricting or electoral boundaries commission is established by the constitution. In either scenario, the institution conducting redistricting is one that is afforded constitutional protection from regular legislative majorities and from day to day interference by the executive. The political branches may still have some levers over independent commissions of various kinds, including for example by manipulating funding or by changing electoral statutes that are applied by the commission. Constitutional amendment can be used against commissions. But important parts of the electoral process operate independently of the political branches in many constitutional orders.

Like many Westminster democracies including Australia, New Zealand, and the United Kingdom itself, Canada's Constitution does not explicitly empower an independent election or redistricting commission. In practice these systems have highly independent and non-partisan commissions, but that is a function of statutory law and political culture rather than constitutional dictate. Canada's failure to constitutionally protect election and redistricting commissions in the text is more notable than in Australia, which has an older constitution, and New Zealand and the United Kingdom, which do not have written constitutions. Canada's Constitution was amended dramatically in 1982, with the introduction of the *Charter of Rights and Freedoms,* new constitutional amendment procedures in Part V of the *Constitution Act, 1982,* and rights for Indigenous Peoples and protection for treaty rights in s.35. These amendments did not include constitutionalizing the functions of election administration or redistricting. In this respect, the 1982 Constitution is already behind the times.

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[39] See S. CHERNYKH, Z. ELKINS, T. MELTON, and T. GINSBURG, *Constitutions and Election Management* in P. Norris, R. Frank, and F. Martinez i Coma, eds., *Advancing Electoral Integrity* (Oxford University Press, 2014); M. PAL, *Electoral Management Bodies as a Fourth Branch of Government* (2016) 21 *Review of Constitutional Studies*; MARK TUSHNET, *The New Fourth Branch* (Cambridge University Press, 2021); R. DIXON and M. TUSHNET, *Constitutional Democracy and Election Commission: Reflections from Asia* (2021) *Asian Journal of Comparative Law*, Supplement S1.

[40] See for example the influential Kenyan Constitution's creation of an Independent Electoral and Boundaries Commission. Article 88 assigns it powers over election administration, typical of an election commission, but also over boundary delimitation in s. 4(c).

It is notable post-1982 that the Canadian courts have declined to read any constitutional status for redistricting commissions into the broad language of the *Charter* around democratic rights. The main relevant provisions are s.3, the right to vote, and s.2(b), freedom of political expression. Both are worded abstractly and could in theory sustain an interpretation that required independent and non-partisan redistricting commissions. The courts have read many background conditions into the right to vote in s.3 of the *Charter,* as long as they further the "meaningful participation" of voters.[41] Discriminatory treatment in law of small political parties, for example, was struck down by the Supreme Court in *Figueroa* for violating s.3 on this doctrine, despite the text saying nothing directly about the issue.

The Canadian courts have repeatedly taken the view in widely varying political contexts, however, that there is *no* constitutional requirement that redistricting must be carried out by commissions. Redistricting is a "delegated legislative function,"[42] that previously resided within the legislature's purview. If the power to redistrict is granted to a commission by a legislature, it can still be taken away under Canadian law. Significant manipulations of commission's composition and process to favour the government of the day were at the root of the leading case on electoral boundaries under the *Charter,* the *Reference re Provincial Electoral Boundaries (Saskatchewan).*[43] The majority did not view these intrusions into the independent process as rising to a constitutional harm. The concurrence in the case more bluntly stated the doctrine that s.3 of the *Charter* does not impose commissions. The lower courts have upheld that view expressed in the concurrence. Neither commissions nor an independent process of some other kind are constitutionally mandated.[44]

As a result, the independent process is enshrined in statute, the *EBRA,* but does not have protection directly from the text of the Constitution of Canada or from the courts. Legislatures have the legal authority to pass statutes to interrupt a boundary drawing process, to disband a commission, to change its composition, or to alter the criteria that the commission is bound to apply. There has been one recent example where interference by the executive with an independent commission was seen as rising to a constitutional violation. That outcome was mainly tied to deficiencies in minority representation in the electoral map, however, and interference by the executive in the middle of the commission's process.[45] The "electoral boundary revolution" moved redistricting away from the self-interested, smoke-filled backrooms of legislatures. The courts current doctrine is that Parliament and the provincial legislatures could ultimately take back that authority if they choose to do so. The

[41] See *Figueroa v. Canada (A.G.),* 2003 SCC 37, imposing a meaningful participation standard.

[42] *Jennings c. Commission de la representation électorale du Québec,* 2020 QCCS 1035 (CanLII) (Superior Court of QC).

[43] [1991] 2 SCR 158.

[44] *Ref re Final Report of the Electoral Boundaries Commission,* 2017 NSCA 10.

[45] *Ref re Final Report of the Electoral Boundaries Commission,* 2017 NSCA 10.

"electoral boundary revolution" that moved Canada to redistricting by independent, non-partisan commissions therefore rests on unstable constitutional ground.

d) Consultation Process

All boundary commissions in Canada are required by law to engage in public consultation. The federal *Electoral Boundaries Readjustment Act* sets out the procedure to be followed by federal commissions in conducting redistricting. An initial report and map must be produced (s.14(2)), followed by public consultations (ss.19-20), and then a second report to be filed with a Standing Committee of the House of Commons (s.21). MP's are given the opportunity to object to the map (s. 22) and the objections are referred to the electoral boundary commission for a response (s. 23(1)). A similar process exists in most provinces, with two reports to be completed within a set timeline and consultation in-between them.

This framework means that federal commissions produce a draft map prior to public consultations. They are given the opportunity to amend the map after hearing from the public and interested stakeholders. MP's are permitted to appear at these public hearings and to make representations, even though they have a second opportunity in the House once the report is tabled there. According to research by John Courtney, most presentations to commissions push for deviations from voter parity in order to better represent particular communities.[46] Public submissions tend to ignore the relevant constitutional and statutory rules, such as representation by population. The commissions are then left to balance these claims for representation against their legal duties as well as the assertions of other groups. These various considerations and obligations may run counter to one another.

A number of concerns have been raised about the consultation process or similar ones adopted at the provincial level for their commissions. The federal legislation requires "at least one" public consultation must be held by each commission (s.19(1)). This minimum requirement falls below the practice of most commissions, which choose to hold multiple consultations and often engage in direct outreach to groups affected by boundary changes. It also means that if the minimum requirement only is followed, then a single hearing is unlikely to provide all who are interested the chance to present, especially in a jurisdiction that is geographically large like many Canadian provinces.

In *Denny v Federal Electoral Boundary Commission for the Province of Nova Scotia,* the Eskasoni First Nation and the local MP objected to new boundaries that divided up Indigenous Mi'kmaq communities. The MP objected in Parliament on substantive grounds, alleging a breach of various statutory and constitutional obligations given the negative impact on Eskasoni, but also breaches of procedural fairness and a duty to consult. The Commission held hearings, but none were in the affected Eskasoni community and no outreach was done to Indigenous Peoples in the province. In its

[46] J. C. COURTNEY, *Commissioned Ridings,* Chapter 7, Participation, Objections, and Delays.

response to the objections tabled in Parliament, the Commission stated that it was only legally obliged to hold one consultation and that it had no duty to consult affected groups.[47] The Commission took this view despite the fact that while its initial map had no changes to the relevant ridings, the map produced in its second and final report made the shifts in the map to which Eskasoni objected. In other words, the changes were made in the report produced after consultations. As a result, there was no consultation process after the consequential change.

At issue in a recent Quebec case was whether the fact that a commission followed the process set out in a statute was sufficient to discharge its legal duties around consultation. In *Jennings c. Commission de la representation électorale du Québec,*[48] the potential merging of two majority Anglophone ridings was contested. The commission proposed a merger, backed off after public protest, but then went back to the original proposal after a heated debate in the National Assembly of Quebec. It produced three reports in total. No consultations were held by the commission between the second and third reports.

The claimants in *Jennings* alleged that the commission breached procedural fairness by not having a new round of consultations prior to its final report. The Superior Court found instead that the commission's interpretation of its own authority as set out in the Quebec *Elections Act* was reasonable. It was under no legal obligation to have a new round of consultations. The Court opined that it is *likely,* though not necessarily determinative, for a commission to meet its obligations to the public by following the statute. The decision in Quebec on consultation is another example of courts treating boundary-making as a "delegated legislative function" where the legislature's dictates found in the statute are supreme.

e) Performance

There is a general consensus about the institutional performance in the aggregate of Canada's independent boundary commissions since the "electoral boundary revolution" of 1964. First, commissions have largely acted independently. They have largely been free of interference by the executive and legislature, with the caveat that the political branches of government have at times exercised the remaining discretion that it has to influence the process. Overall, however, the commissions can be said to have behaved independently.

Second, the commissions have been admirably non-partisan. The Canadian model where commissions are chaired by a sitting or retired justice has been important in setting a non-partisan framework. Appointees to fill the other positions have largely been seen as impartial, with some exceptions. Most importantly, the performance of the commissions has tended to have been viewed as largely non-partisan. While there

[47] FEDERAL ELECTORAL BOUNDARIES COMMISSION FOR THE PROVINCE OF NOVA SCOTIA, *Final Report – Addendum* (2023).

[48] 2020 QCCS 1035 (CanLII) (Superior Court of QC).

have been some allegations of gerrymandering, these have tended to be at the provincial not federal level and are relatively rare in the last two decades.

Third, the commissions have often adopted widely varying interpretations of their legal duties.[49] The wide discretion granted to commissions is necessary for them to fulfill their function given the dramatically differing contexts among the provinces, between urban and rural areas, and so on. That discretion in combination with vague constitutional standards and a lack of case law or agreed upon definitions for terms such as "communities of interest," however, has contributed to similarly situated voters being treated differently depending on the approach of the commission. This variability poses challenges for the right to vote. The exercise of the discretion held by the commissions is addressed in the next section in relation to population equality and minority representation.

4. *Exercising Commission Discretion: Population Equality and Minority Representation*

Population equality is a foundational element of electoral boundary design in all democracies. Constitutions or election laws typically dictate that electoral districts must have as close to identical populations as is practical, or set some acceptable range of variance. The principle behind such rules is that of voter equality, also known as one person, one vote or as representation by population. Voter equality stipulates that given the equal stake of each individual in a democracy, each electoral district should have the same population. Otherwise, the votes of some are worth more than the votes of others. The principle of one person, one vote is strictly adhered to in the United States, where Chief Justice Warren in *Reynolds v. Sims* famously opined that, "legislators represent people, not trees…".[50]

Canada has developed along a very different trajectory. The Canadian model is an outlier internationally for permitting large deviations from representation by population. The electoral boundary revolution of 1964 largely eliminated gerrymandering, but did not change the practice from Confederation onwards of districts with massive deviations from representation by population. While the U.S. made a clean break from the U.K. history of "rotten boroughs," where some districts had much smaller and others much larger populations, Canada has not done so.

a) The Right to Vote in Section 3 of the *Charter*

The population of electoral districts in Canada is subject to constitutional review pursuant to the right to vote in s.3 of the *Canadian Charter of Rights and Freedom.* The

[49] See M. PAL, *The Fractured Right to Vote*.
[50] *Reynolds v. Sims,* 377 U.S. 533 (1964).

first case heard by the Supreme Court of Canada on s.3 of the *Charter* was on disputed electoral boundaries, which occurred in 1991. The case, the *Reference re Provincial Electoral Boundaries (Saskatchewan),*[51] remains the only case on provincial boundaries heard by the Supreme Court. The Supreme Court has never heard a case challenging the constitutionality of federal electoral districts in the era of the *Charter,* which stems from 1982.

In the *Reference,* the Supreme Court introduced the doctrine which still applies in all electoral boundaries cases, namely the requirement under s.3 of "effective representation." The *Reference* was a challenge to Saskatchewan's provincial electoral boundaries. The government of Premier Grant Devine was scandal-ridden and facing a difficult upcoming general election. The government sought to alter its electoral fortunes by constraining the decisions of the electoral boundary commission. It's goal was to enhance the voting power of its support base in rural areas of the province. The legislation challenged in the case imposed a map that deviated to a greater extent from representation by population than the previous map.[52]

The Supreme Court had an opportunity to have its Canadian version of a *Reynolds v. Sims* or *Baker v. Carr*[53] moment. It could have definitively pronounced on the break that the *Charter* and the right to vote in s.3 had made from the previous tradition of permitting deviations from representation by population. Canadian political history was replete with instances of deviations, some of which could be justified by Canada's large geography and the need to represent remote and isolated communities. Many deviations, however, were tied to gerrymandering or the preference for rural over urban voters.

The Supreme Court of Canada, however, took a very different approach. Rather than imposing one person, one vote as in the U.S., the Canadian Court interpreted s.3 as requiring a different standard, namely "effective representation." Under this doctrine, voter parity or equality is the primary criterion and starting point for constitutional review of districts. The effective representation standard means that ridings are not required, however, to have the same total population. Deviations from representation by population are permitted as long as they lead to more effective representation.

Under the effective representation standard, decision-makers must consider first relative parity of voting power, but then also countervailing factors including "geography, community history, community interests and minority representation" so that "our legislative assemblies effectively represent the diversity of our social mosaic."[54] The primacy of voter equality in the Court's analysis suggests that some deviations would be seen as excessive under s.3 and the doctrine of effective

[51] [1991] 2 SCR 158.

[52] M. CARTER, *Ambiguous Constitutional Standards and the Right to Vote* (2011) 2 *JPPL* 309 at 320-321; M. PAL, *Breakdowns* at 301.

[53] 369 US 186 (1962).

[54] *Reference re Provincial Electoral Boundaries* at pg. 184.

representation. The Court declined, however, to set out numbers constituting specific constitutionally permitted or impermissible amounts of deviation.

The Supreme Court's method of constitutional interpretation was a break in the case from its general approach. Canadian courts have typically adopted a "living tree" method closely tied to purposive interpretation of constitutional text.[55] The "living tree" has dominated interpretation in the *Charter*-era. In the Saskatchewan *Reference,* however, the Court's majority adopted a more originalist type of analysis. At odds with its holdings about other *Charter* provisions, the majority held that s.3 was *not* intended to depart from the pre-1982 political and legal status quo. The majority emphasized the Canadian link to British constitutional history to hold that s.3 could not be interpreted as intending to adopt the U.S. one person, one vote standard. As deviations from representation by population were permitted pre-1982, in line with British tradition, so should they permitted under the *Charter,* reasoned the majority.

The *Reference* has been significantly criticized for failing to impose representation by population under s.3.[56] As a practical matter, boundary commissions have tended to stick more closely to population equality since the *Reference,* even if large deviations are still commonplace. The case appears to have signalled to commissions that population concerns must be taken into account, even if deviation is allowed. In particular, extreme deviations from representation by population in remote, Northern ridings remain, but are less common than prior to the *Reference.* Significant gaps between urban and rural representation, however, are standard, with implications for the voting rights of minority groups within cities. Urban voters remain under-represented overall in federal elections in comparison to rural voters, according to their proportions of the general population.

The only other electoral boundaries case heard by the Supreme Court under the *Charter* involved disputed municipal electoral districts (known as "wards") in the City of Toronto. In *City of Toronto v. Ontario (A.G.),*[57] the Court held that municipal districts are not subject to the effective representation standard because municipal elections are not subject to s.3. This holding reinforced that effective representation is the applicable standard for federal and provincial districts, even in stating that it does not apply for municipal boundaries.

Subsequent case law in lower courts and regarding provincial and territorial elections have filled in some of the detail missing from the Supreme Court's doctrine

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[55] *Hunter v Southam,* [1984] 2 S.C.R. 145 at 155; *Edwards v. A.G. Canada,* [1930] AC 124; P. OLIVER, *Enduring Metaphors: The Persons Case and the Living Tree* (2022) 48:1 *Queen's Law Journal* 44; A. KAVANAGH, *The Idea of a Living Constitution* (2003) 16 *Canadian Journal of Law and Jurisprudence* 55. But see B. MILLER, *Origin Myth: The Persons Case, the Living Tree and the New Originalism* in G. Huscroft and B. Miller, eds., *The Challenge of Originalism: Theories of Constitutional Interpretation* (Cambridge University Press, 2011).

[56] B. STUDNIBERG, *Politics Masquerading as Principles: Representation by Population in Canada* (2008) 34 *Queen's Law Journal* 611.

[57] 2021 SCC 34.

of effective representation. Yet the central question of "How much deviation from representation by population is permitted under s.3 of the *Charter*?" has never been conclusively determined. As a result, electoral statutes have taken the place of constitutional doctrine in determining the quantum of permissible deviations and acceptable reasons from departing from representation by population.

b) The Federal Statute

Given the lack of precision in the constitutional doctrine, the federal *Electoral Boundaries Readjustment Act* (*EBRA*) has taken on outsized importance. The statute provides that deviations from representation by population can be up to 25 above or below the average population of a federal riding in a province.[58] In extraordinary or exceptional circumstances, an unlimited additional deviation is permitted.

This provision of the statute has the benefit of supplying at least a baseline number for permissible deviations. The courts have on occasion identified a broad consensus in Canada accepting 25% deviations as acceptable.[59] In *City of Yellowknife v. Commissioner of the NWT,* a trial court found that where deviations are within 25%, a lower threshold is required to justify deviations.[60] In other words, it is easier to establish that deviations within the 25% range are lawful and constitutional than those outside that range. An earlier challenge in 1999 in the Northwest Territories (NWT) had struck down ridings under-representing the City of Yellowknife, at least partly because the absolute deviation exceeded the 25% threshold.[61] *City of Yellowknife* in 2015 upheld them because the 25% range was respected, even if the districts were very close to the upper end of the range.

The 25% range, however, is large in comparison to other jurisdictions. The extraordinary circumstances clause means even that wide range set out in s.15 of the *EBRA* does not set the maximum deviation. The United States insists on nearly exact voter parity. Other democracies use 5%, 10%, or up to 15%. Even in Canada, the alleged consensus in favour of a 25% range as legitimate is also difficult to observe in fact. Many Canadian provinces adopt a 5% or 10% maximum deviation.[62]

In practice, since the *Reference re Provincial Electoral Boundaries,* the electoral boundary commissions have generally stuck more closely to representation by population than they had before. The use of the extraordinary circumstances clause to justify deviations beyond 25% has diminished in frequency, though it is still in place for some northern or remote districts where there is plausible justification for its use. In other words, in clarifying that voter equality is the primary criteria for redistricting, the

[58] *EBRA,* s. 15(2).

[59] *Charlottetown (City of) v. Prince Edward Island,* 1998 CanLII 6192 (PEISCAD) at para 56; *City of Yellowknife v. Commissioner of NWT,* 2015 NWTSC 51 CanLII at paras 37-38.

[60] *City of Yellowknife* at para 40.

[61] *Friends of Democracy v. Northwest Territories (A.G.),* [1999] N.W.T.J. No. 28.

[62] M. PAL, *Breakdowns in the Democratic Process and the Law of Canadian Democracy* (2011) 57: 2 *McGill Law Journal* 299.

Reference had some meaningful impact in moving toward representation by population.

Some commissions have also informally adopted 5% or 10% as their targets for maximum deviation. There is some tension between an administrative body adopting its own range when its governing statute sets a specific number. There is some question as to whether a commission informally adopting a lower maximum deviation breaches the administrative law doctrine against decision-makers unduly "fettering" their own discretion.[63] Fettering occurs when a decision-maker self-imposes rigid rules curbing its own discretion in a manner that "preclude[s] the possibility that the decision maker may deviate from normal practice in light of particular fact."[64] Future legal claims against maps that stick closely to representation by population are likely to raise the issue of fettering.

While commission have tended to narrow the deviations seen in federal electoral maps over the last 3 decades, many decision-makers still view any deviation within the 25% range as acceptable. Some maps have therefore deviated significantly from representation by population, even if not to the same extent as in the pre-*Charter* era. The effective representation doctrine has seemed to some boundary commissions as providing a licence to deviate from strict population equality.

EBRA does set out specific criteria that can justify deviations. These include geography, the history of a district, communities of interest, and other criteria. Notably, the list in the *EBRA* does not specifically include the representation of minorities or Indigenous Peoples. Geography provides a legitimate reason for departing from population equality. Many districts in Canada are larger in geography than multiple European countries. The vague set of criteria in combination with the 25% range, however, have generally been taken as permission to over-represent rural communities at the expense of urban voters.[65]

The constitutional rules on the distribution of seats in the House means that the smaller provinces have federal electoral districts with much lower populations than the largest provinces. Districts in Ontario, Quebec, Alberta, and British Columbia are much larger in terms of population than those in the other 6 provinces. The redistribution of seats therefore contributes to deviations from representation by population. The design of district boundaries within each province compounds this inequality by assigning much lower populations to rural districts. These lower populations inevitably lead to larger populations in urban districts and some suburban ones. In other words, there are more rural districts than the rural population alone would warrant in all of the provinces. These patterns have a direct impact on the relative weight of rural versus urban voting power. By over-representing rural voters at the expense of urban and suburban ones, federal boundary commissions have

[63] *Maple Lodge Farms Ltd. v. Canada,* [1982] 2 SCR 2.

[64] *Thamotharem v. Canada (Minister of Citizenship and Immigration),* 2007 FCA 198 at para 78; *Stemijo Investments Ltd. v. Canada (Attorney General),* 2011 FCA 299.

[65] M. PAL and S. CHOUDHRY, *Is Every Ballot Equal?*

exacerbated the inequalities generated by the distribution of seats and continued the pre-*Charter* practice of favouring some interests in the design of the electoral map.

c) Minority Representation

Facilitating minority representation stands alongside voter equality as a foundational element in electoral district design. Some constitutional systems take such matters away from the general process of district design through the provision of guaranteed seats for minority groups within the legislature. For example, India reserves seats in the lower house or *Lok Sabha* for scheduled castes and tribes.[66] New Zealand has a separate electoral list for Maori voters.[67] Another approach is to provide a minimum number of "majority-minority" districts,[68] as occurs in the United States, though the jurisprudence on racial representation is often-changing.[69] Canada has no such constitutional system of special electorates, reserved seats, or required majority-minority districts.

There are two primary mechanisms through which minority representation enters into Canadian redistricting. First, the *Saskatchewan Reference* accepted that the impact of electoral boundaries on minority communities was a relevant and legitimate consideration under s.3 of the *Charter.* Commissions can therefore take into account the impact on minority groups of drawing lines on the electoral map to address the "effective representation" of those communities. At times, the presence of minority communities will lead to lines being drawn differently than they would have been drawn otherwise, with districts produced that adhere to representation by population. The *Reference* also accepted a range of factors as justifying deviations from voter equality, including representing the "social mosaic." Ensuring the effective representation of minority communities can therefore sometimes lead to commissions deviating from voter equality in order to accommodate them.

For example, a series of provincial electoral boundary commissions in Nova Scotia created majority-minority districts with small populations relative to others in the province to enhance the effective representation of minority communities. These commissions identified the minority Acadian (francophone) community as a group whose interests were not being recognized by the majority. Their distinct political

[66] W. SINGER, *A Seat at the Table: Reservations and Representation in India's Electoral System* (2012) 11:2 *Election Law Journal: Rules, Politics and Policy* 202.

[67] A. GEDDIS, *A Dual Track Democracy? The Symbolic Role of the Māori Seats in New Zealand's Electoral System* (2006) 5:4 *Election Law Journal: Rules, Politics and Policy* 347.

[68] S.N ANSOLABEHERE and N. PERSILY, *Testing* Shaw v Reno*: Do Majority-Minority Districts Cause Expressive Harms?* (2018) 90 *NYU Law Review* 1040.

[69] See *Barrett v. Strickland,* 556 U.S. 1 (2009), for example.

interests therefore compelled the commissions to create majority Acadian districts or Acadian influence districts.[70]

Second, the federal *EBRA* requires that commissions take into account "communities of interest."[71] The statute provides no specification as to which groups constitute "communities of interest." There was some debate in Parliament in the 1990's and 2000's as to possible amendments to the *EBRA* that would have clarified the term. These debates saw competing definitions and amendments but were never passed. There has also never been a comprehensive judicial definition of "communities of interest." As a result, boundary commissions have considerable discretion around interpreting the term in the statute. This extensive discretion means that commissions have leeway to conclude whether a group is a community of interest and, if so, whether the presence of a community of interest compels a change in the electoral boundaries to ensure their effective representation.

This extensive discretion causes problems on its own, as commissions adopt competing views of communities of interest. Some boundary commissions embrace a broad definition of community of interest, including racial, ethnic, religious, and others, and have used their discretion to prioritize the design of districts that enhance minority representation.[72] Boundary commissions in the province of Ontario, for example, frequently take into account the presence of minority communities in Canada's largest, Toronto.

Other boundary commissions reject entirely the legitimacy of considering racial or ethnic communities, on the theory that citizenship is the sole relevant category to consider. Still other commissions reject demographic or sociological diversity as relevant, but accept geographical categories such as rural, urban, and suburban voters as legitimate to consider. As a result of this spectrum of views, stemming originally from the lack of definition in the statute, boundary drawing occurs in very different ways across the country. This lack of consistency is troubling given that a single statute, the *EBRA,* and the *Charter* itself are supposed to govern all boundary commissions. Some minority voters are communities of interest, while others are not, despite having similar claims. This inconsistency is hard to reconcile with the idea of the equal treatment of voters.

There is some judicial authority interpreting the *EBRA* that holds that boundary commissions are required to take into account community of interest concerns under some conditions and that respecting minority groups can require deviations from representation by population. In *Raîche v Canada (AG),* 2004 FC 679, the Federal Court found that the New Brunswick Federal Electoral Boundary Commission in the 2002 redistribution breached the *EBRA* by failing to adequately consider the interests of the

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[70] J. SMITH & R. G. LANDES, *Entitlement Versus Variance Models in the Determination of Canadian Electoral Boundaries* (1998) 17 *International Journal of Canadian Studies* 19. See also J. C. COURTNEY, *Commissioned Ridings* at 225–31 for an analysis of the maps and what led to them.

[71] *EBRA,* s. 15.

[72] I develop this argument in more detail in M. PAL, *The Fractured Right to Vote*.

Acadian minority francophone linguistic community. The linguistic minority objected to the proposed boundaries primarily because they were to be moved from a riding represented by a francophone MP to a riding represented by a unilingual, Anglophone MP.

In *Denny,* discussed above in the section on consultation, a Mi'kmaq First Nation objected to the decision to create two new ridings in Cape Breton, Nova Scotia. The new boundaries would separate different Mi'kmaq communities from one another, divide the largest of these communities from the major city in the area (Sydney), move the largest community away from the riding that has a Member of Parliament who is from the First Nation, and put the Mi'kmaq in ridings with voters likely to be hostile to their political interests. The effective representation of Mi'kmaq voters was arguably harmed because their voting power was diluted and the quality of their representation was likely diminished.[73] The claimants are asserting that they are simply asking for the same consideration that was given to francophone minorities in *Raîche* and other cases. The case is likely to be an important development in the law.

In *Reference re the Final Report of the Electoral Boundaries Commission,*[74] the Court of Appeal for Nova Scotia considered the constitutionality of the provincial legislature preventing a boundary commission from creating majority-minority districts. In 1992, three ridings with majority or significant populations of the francophone linguistic minority Acadians had been created. These districts of Clare, Argyle, and Richmond deviated dramatically from representation by population as they had populations well below the average. The districts were deliberately designed to enhance the effective representation of Acadians. The districts were kept for the 2002 electoral map. For the 2012 redistricting, the Terms of Reference of the electoral boundaries commission were drafted by the legislature to prohibit such deviations from representation by population.

In conflict with the Terms of Reference, the boundaries commission recommended keeping the three districts. It justified this recommendation by arguing that the maintenance of the three districts was compelled by the right to vote in s.3 of the *Charter* and the effective representation doctrine. The Attorney General viewed the commission's report as in contradiction to its Terms of Reference and communicated that another report should be prepared. The commission ultimately acquiesced and recommended removing the three districts under pressure from the Attorney General. The legislature implemented those new recommendations in a statute.

The Court of Appeal for Nova Scotia found that the statute implementing the new boundaries was an unconstitutional violation of the right to vote in the *Charter.* The Court of Appeal found a procedural breach of s.3. The Court held that s.3 does not require independent, non-partisan boundary commissions. If such institutions are in place, however, then it is a breach of s.3 for the executive and legislature to interfere in the commission's independent work. By preventing the commission from

[73] Court documents on file with the author.

[74] 2017 NSCA 10 (CanLII).

recommending its true or authentic views, the Attorney General and ultimately the statute had breached the right to vote in s.3. The Court did not hold that effective representation required the preservation of the ridings of Clare, Argyle, and Richmond. The Court was clearly sympathetic, however, to the legal and political claims of the minority. The case can be read as interpreting s.3 to require a fair process that respects the interests of minority communities.

5. *Indigenous Peoples and Representation in Canadian Legislatures*

The representation of Indigenous Peoples, whose societies pre-date the arrival of European settlers in what is now Canada, in Canadian institutions is an important current topic. Canada had a long and sorry history of denying the right to vote to Indigenous voters. Votes by Indigenous Peoples helped shape the outcome in some ridings in early elections in what became Canada in 1897, 1891, and 1896, before onerous restrictions were imposed in 1898.[75] Explicit bans on voting were finally removed only in 1960 by the government of Prime Minister John Diefenbaker.[76]

A variety of constitutional reform proposals have attempted to enhance the representation of Indigenous Peoples in Parliament. The last major attempt to amend the Constitution wholesale was the Charlottetown Accord, which is worthy of consideration here. The Accord would have recognized a third constitutionally entrenched Indigenous order of government, alongside the federal and provincial ones, but would have also entrenched representation within the central government. The Upper House was the focus. Section 9 of the Accord would have created special seats for Indigenous peoples in the Senate and provided a veto over matters relating to Indigenous Peoples. Part of the logic of the Senate as the locus for the proposal was that as the House of Commons was designed on the basis of representation by population, the Upper House could act as a counter-weight for Indigenous Peoples that could not hope to constitute a political majority. The Charlottetown Accord was defeated in a referendum in 1991 and its proposals therefore did not become law.

Other proposals have tried to fill in the gap caused by the failure to implement the reforms in the Accord.[77] The Royal Commission on Aboriginal Peoples (RCAP) in 1996 made 440 total recommendations across a vast range of subject matter. One of its

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[75] C. KIRKBY, *Reconstituting Canada: The Enfranchisement and Disenfranchisement of 'Indians,' circa 1837-1900* (2019) 69:4 *University of Toronto Law Journal* 497 at 497-98.

[76] *The Act to Amend the Canada Elections Act*, SC 1960, c.7 s. 1. The right was extended in provincial elections in Quebec in 1969 (*An Act to Amend the Election Act*, SQ 1969, c.13, §1), in Ontario in 1954 (*An Act to Amend the Election Act* S.O 1954), and in British Columbia in 1949 (*Provincial Elections Act Amendments Act, 1949, S*.B.C. 1949, c. 19, ss. 2, 3).

[77] See R. WATTS, *Federal Systems and Accommodation of Distinct Groups: A Comparative Survey of Institutional Arrangements for aboriginal Peoples,* Queen's University, 1998; P. NIEMCZAK, *Aboriginal Political Representation: a Review of Several Jurisdictions*, Library of Parliament, Ottawa, Revised 1999.

central proposals was for an Indigenous Parliament.[78] This Parliament would have served as a third legislative body with a veto over matters related directly to Indigenous Peoples. Indigenous representation also factored into the broader debates about electoral system reform.[79] The federal government recently considered alternative electoral systems and the majority of provinces also did so in the 2000's.[80] Scholars and government reports have long-identified the failure of boundary commissions operating within the existing electoral system to recognize Indigenous groups as forming "communities of interest" as contributing to their under-representation.[81]

The central issue in the debates around electoral reform was about whether to replace the single member plurality (SMP) electoral system with some form of proportional representation (PR). The geographic constituencies used in Canada under SMP favour concentrated populations. PR systems provide opportunities for groups that are not geographically concentrated to aggregate their preferences and increase their influence. The possibility that PR or a mixed system would enhance Indigenous representation was raised at a number of levels.[82] PR might facilitate the creation of an Indigenous Peoples political party, or improve the chances of Indigenous candidates running for office by encouraging or requiring parties to include them on the party lists from which MP's would be selected.[83]

New approaches to district design have opened up possibilities for Indigenous representation in the House that are consistent with a goal of political reconciliation.[84] One leading example is the Far North Electoral Boundaries Commission (FNEBC) for the Province of Ontario.[85] The FNEBC was tasked with recommending the addition of at least 1 and no more than 2 new ridings in the Far North of Ontario and the readjustment of the existing boundaries. It was created as part of a joint Indigenous and Ontario approach. A majority of 3 out of 5 Commissioners were Indigenous,

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[78] ROYAL COMMISSION ON ABORIGINAL PEOPLES, *Final Report,* Vol. 2, Chapter 3: Resetting the Relationship.

[79] R. MILLEN, ed, *Aboriginal Peoples and Electoral Reform in Canada,* Vol. 9 of the Research Studies of the for the Royal Commission on Electoral Reform and Party Financing (Toronto: Dundurn Press, 1991).

[80] A. BLAIS, *To Keep or to Change First Past the Post? The Politics of Electoral Reform* (Oxford: Oxford University Press, 2008).

[81] D. SMALL, *Enhancing Aboriginal Representation Within the Existing System of Redistricting* in D. Small, ed, *Drawing the Map: Equality and Efficacy of the Vote in Canadian Electoral Boundary Reform,* Vol 11 of the Research Studies of the Royal Commission on Electoral Reform and Party Financing (Toronto: Dundurn Press, 1991) 307.

[82] M.A WILLIAMS, *Indigenous Representation, Self-Determination, and Electoral Reform* in A. POTTER, D. WEINSTOCK, and P. LOEWEN, *Should We Change How We Vote? Evaluating Canada's Electoral System* (Montreal: McGill-Queen's University Press, 2016) 126.

[83] T. SCHOULS, *Aboriginal Peoples and Electoral Reform in Canada: Differentiated Representation Versus Voter Equality* (1996) *Canadian Journal of Political Science*; B. TANGUAY and S. BITTLE, *Parliament as a Mirror to the Nation: Promoting Diversity in Representation through Electoral Reform* (2005) Can Issues 61.

[84] J. SCHMIDT, *Aboriginal Representation in Government : A Comparative Examination* (Ottawa: Law Commission of Canada, 2003).

[85] *Representation Act, 2015,* S.O. 2015, c. 31 Sched 1.

including the Chair. Indigenous political representatives from were consulted in the choice of Commissioners from those communities and there were public hearings about the Commission's proposals.

The Commission acted pursuant to a provincial statute, but one that explicitly included "Indigenous representation" as a criterion to consider. The end result was a recommendation to create Ontario's first Indigenous majority district. The FNEBC attracted some criticism for not creating a second Indigenous majority riding in the Northeast of the province.[86] The Ontario Legislative Assembly unanimously passed a bill in 2017 that largely takes on the FNEBC's recommendations.[87] The FNEBC suggested that the Legislative Assembly consider guaranteed representation, but relied on a model of contiguous districts. The FNEBC offers a model if used federally for enhancing Indigenous participation in electoral district design that also suggests increased opportunity for communities to select a representative of their choice.

An option within this model would be for electoral district boundaries to follow the lines of the relevant treaty with the Crown. The Canadian Crown has signed many treaties with Indigenous Peoples, which are recognized as constitutional documents by virtue of s.35 of the *Constitution Act, 1982*. "Treaty federalism" would function as a basis for political representation in this approach. James Youngblood Henderson argues that a true nation to nation relationship must be based in treaties and that electoral districts should reflect this fact.[88] There are some practical concerns with this model since many treaties apply to enormous amounts of territory with varying populations. The FNEBC considered but ultimately did not pursue to align electoral district and treaty boundaries. This choice was dictated by the reality that the ensuing districts following treaty lines would have been of unmanageable size for the number of representatives allotted by the *Representation Act, 2015.*[89] There may also be principled opposition to including treaties with the Crown as the basis for electoral divisions as being counter to a nation to nation relationship. The FNEBC reported that it heard divergent views on this topic in its consultations.[90] The possibility that treaties could be the basis for electoral boundaries, however, as a gesture of respect and to foster adherence to the treaty boundaries as political lines, remains.[91]

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[86] S. NANJI, '*A Missed Opportunity for our People': Indigenous Leaders Urge Province to Revisit Electoral Map, Toronto Star,* October 7, 2017.

[87] *Representation Statute Law Amendment Act,* S.O. 2017. C. 18.

[88] J. YOUNGBLOOD HENDERSON, *Empowering Treaty Federalism* (1994) 58:241 *Saskatchewan Law Review* 243.

[89] Far North Electoral Boundaries Commission for the Province of Ontario (FNEBC), *Final Report* (Ministry of the Attorney General, 2017).

[90] *Ibid*.

[91] J. YOUNGBLOOD HENDERSON, *Empowering Treaty Federalism*.

6. *Conclusion*

The Canadian model has remained largely stable for several decades. The seminal moments in its evolution can be easily pinpointed. The electoral boundary revolution in 1964 bringing in independent commissions ended the dark period of flagrant gerrymandering that had prevailed from 1867. The *Saskatchewan Reference* in 1991 interpreted the right to vote in the context of electoral boundaries and, in doing so, made the fateful choice to adopt the effective representation standard rather than one person, one vote.

The weaknesses of the Canadian model are difficult to avoid in the current political and legal moment. These concerns center around 1) democratic decline; 2) the continuing tensions of federalism; and 3) the contradictions and imprecision of the effective representation standard.

Concerns about the quality of democracy in new but also established democracies have coalesced into palpable and legitimate fears of democratic decline. It is a difficult moment for democracy globally. One of the recurring features of countries experiencing decline are attacks on independent institutions, the undermining of entities that can hold executives accountable, and the rewriting of election laws to entrench incumbents.[92] All of these trends suggest that electoral boundary commissions are potential targets by populists, would-be authoritarians, or leaders hostile to meaningful political competition.

Canada is not immune from these broader trends.[93] Populist governments have, for example, adopted the extreme majoritarianism made possible by the notwithstanding clause in s.33 of the *Charter.* Section 33 permits legislatures to pass laws even if they violate some of the guarantees of rights and freedoms in the *Charter.* Governments had largely been reluctant to use this power, given public perception that s.33 was in contradiction with the general spirit of rights protection that animated the other provisions of the enduringly-popular *Charter.*

The failure of the constitution of 1982 to protect the existence and powers of independent commissions may prove consequential. In the face of a federal government disinclined to accept the recommendations of a non-partisan, arms-length commission on a matter as fundamental to their political prospects as the boundaries of electoral districts, there may be little support provided by the Constitution of Canada or by the courts interpreting it.

Canada has a Constitution that is among the hardest in the world to amend. The lack of clarity around whether the redistribution of seats in the House of Commons can

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[92] A. HUQ and T. GINSBURG, *How to Lose a Constitutional Democracy* (2017) 65 *UCLA Law Review*; K. LANE SCHEPPELE, *Autocratic Legalism* (2018) 85 *U of Chicago Law Review* 545; M. A. Graber, S. Levinson, and M. Tushnet, eds., *Constitutional Democracy in Crisis?* (Oxford University Press 2018).

[93] See R. ALBERT and M. PAL, *The Democratic Resilience of the Canadian Constitution* in S. Levinson, and M. Tushnet, eds., *Constitutional Democracy in Crisis,* Chapter 8; R. MAILEY, *The Notwithstanding Clause and the New Populism* (2019) 28:4 *Constitutional Forum* 9.

be done by Parliament unilaterally or whether provincial consent is required is likely to be untenable in the long run. The consequences for the provinces are serious. If a Parliament and government sought to abuse its unilateral authority in this area, a constitutional crisis could ensue. Even absent such abusive constitutionalism, Parliament's assertion of unilateral authority is a continuous irritant for the provinces.

As a result, it remains possible that a case will be brought which results in the Supreme Court declaring that the provinces must agree to future changes to representation in the House. The Court has favoured the provinces in a similar case involving Senate reform, where it held that provincial consent is needed and Parliament cannot act unilaterally. In such a scenario, it will be politically and practically difficult for the necessary degree of consensus to be achieved. Such an outcome would be disastrous for democratic legitimacy, as the already weak adherence to representation by population in Canada would further erode if the representation formula cannot be updated.

Finally, the contradictions of the effective representation standard are inescapable. The standard has its benefits. It allows for truly remote and Northern constituencies to have a say that they would otherwise not have. It provides flexibility for boundary commissions, which have to balance a variety of different considerations. Yet it has generated weak adherence to the foundational principle of representation by population and led to uneven treatment of minority communities. The courts will likely be called on to clarify what obligations boundary commissions have to enhance minority voting power within the effective representation standard. They will also likely have to decide on an acceptable range of deviation in the form of a precise number. The *Saskatchewan Reference* had deliberately declined to do so. That situation is increasingly untenable.

The stability of the Canadian model is under pressure given the evolution of democracy and global threats to its preservation, Canada's own constitutional particularities, and the failings of the Supreme Court's approach to interpreting the right to vote.

FABIAN MICHL*

Electoral Districts in Germany

SUMMARY: 1. Electoral System. – 2. Redistricting. – 3. Gerrymandering. – 4. Conclusion.

ABSTRACT*: This paper explores the role of electoral districts in the German Mixed-Member Proportional System from the viewpoint of constitutional law[1]. As this role is highly contingent on the design of the electoral system, in a first step, the paper outlines the basic structure of Bundestag elections and locates district voting therein. From this will emerge that district voting does not have an impact on the relative strength of parties in the German Bundestag. Despite this—in comparison to majoritarian systems—diminished importance of electoral districts, German electoral law subjects the process of redistricting to detailed regulation. The paper will analyse these substantive and procedural requirements in detail and show that, taken together with the diminished importance of district voting, they minimize the risk of partisan Gerrymandering in Germany. The conclusion will sum up the results and hint at the underlying reasons for the German mixed-member system, rooted in constitutional history and the specific German conception of party democracy.*

1. *Electoral System*

As early as the 1950s, German electoral law experts classified the Bundestag elections as "personalized proportional representation" *(personalisierte Verhältniswahl)*[2]. By contrast, international scholarship has characterized it as a mixed-member system[3]. This classification accounts better for the fact that one part of the members of the German Bundestag is elected by relative majority in single-seat districts, while the other part is chosen from closed party lists according to proportional representation (PR). Thus, the Bundestag's membership consists indeed of a mix of "district" and "list" MPs, although German constitutional law does not distinguish between these categories[4]. Despite this mixed composition of the

* Junior Professor of Public Law and the Law of Politics, Leipzig University, Germany.

[1] For the political science perspective see, among others, T. ZITTEL, *Electoral Systems in Context*: Germany, in E. S. HERRON ET AL. *The Oxford Handbook of Electoral Systems*, Oxford, 2017, 781–802, esp. 794–796.

[2] *"Grundlagen eines deutschen Wahlrechts" Bericht der vom Bundesinnenministerium eingesetzten Wahlrechtskommission*, 1955, 21, referring to the Election Acts of 1949 and 1953. The Federal Constitutional Court (Case No. 2 BvR 9/56 (July 3, 1957) = BVerfGE 7, 63 (74)) applied this classification to the Federal Elections Act of 1956 which described itself as a PR system "combined with personal election".

[3] M. S. SHUGART, M. P. WATTENBERG, *Introduction*, in ID., *Mixed-Member Electoral Systems*, 2000, 1.

[4] On the contrary, art. 38 sect. 1 of the Basic Law guarantees the equality of all MPs who represent

Bundestag, district voting plays only a minor role in German power politics. Never in the 75 years of the Federal Republic has it determined the outcome of an election. Never has it decided the formation of the next Federal Government. The reason for this minor importance of district voting lies in the PR nature of the German electoral system. The proportional allocation of seats to the competing political parties has been the guiding principle of the Federal Elections Act (FEA) since its adoption in 1956[5], as it had been the maxim of its predecessors, the Election Acts of 1949 and 1953. The FEA implements PR by a complicated procedure of seat allocation which has been fundamentally reformed in 2023. As this procedure is crucial for the understanding of the role of district voting in Germany, in what follows, I shall give an overview of its past and present design.

Until 2023, the FEA stipulated that the Bundestag should, in principle, consist of 598 members. Half of the members shall be elected from nominations in single-seat districts, the other half from Land nominations (Land lists). Both the district nominations and the Land nominations are submitted by the political parties. Independent nominations were admissible in the districts, but meaningless in practice. Since the second Bundestag election in 1953, no independent candidate has ever been elected or even came close to a relative majority of votes. In practical terms, Bundestag elections have always been party elections. Yet voters can split their party preference, as the FEA provides them with two votes—the "first vote" for electing a district candidate (nominal vote) in one of the 299 electoral districts and the "second vote" for electing a Land list (list vote). In the electoral districts, candidates with a relative majority of first votes are considered elected. For the distribution of seats among the parties' Land lists, the second votes cast for the respective lists are added together at the national level. Then, the seats are distributed in a three-step arithmetic operation. First, the total number of 598 seats—nota bene, not only the remaining 299 seats!—are allocated to the 16 Länder based on their respective population proportion. Second, the number of seats of each Land are allocated to the respective Land lists based on their share of second votes[6]. However, this calculation does not produce the definitive number of seats allocated to each Land list. Rather, in a third step, the district seats won by the respective party's candidates in the respective Land are subtracted from the party's contingent of seats allocated according to the "second vote". This subtraction is the crucial link between district and list elections, guaranteeing the PR nature of the whole system.

Initially, the efficacy of this PR mechanism was limited as parties could win more district seats than they were entitled to by their second vote share. The original FEA of 1956 left them these seats as so-called surplus seats *(Überhangmandate)* without compensation for the other parties. As a result, the total number of seats increased.

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the "whole people" *(Vertreter des ganzen Volkes)*.

[5] Bundeswahlgesetz (Federal Elections Act), BGBl. I 1956, 383.

[6] Since 2008, the allocation has been based on the Sainte-Laguë method. Before, the FEA had employed D'Hondt (1956–1985) and Hare (1985–2008).

Thanks to the two-and-a-half party system (CDU/CSU, SPD, FDP), such surplus seats had been a rare phenomenon in the "Bonn" Republic. In most Bundestag elections, the second vote shares of the major parties (CDU/CSU and SPD) were big enough to justify their district seats from a PR perspective. The FEA's 5 % threshold kept small parties out of the Bundestag and lead to a considerable concentration of votes. Even the emergence of the Green party in the 1980s had no significant impact on this balance, as the Greens' first election results were moderate. After reunification in 1990, another small party, the PDS (later renamed "the Left"), entered the scene. The PDS' meagre result of 4,4 % in the 1994 elections activated a special provision of the FEA which had almost been forgotten—the "basic seat clause" which exempted parties from the 5 % threshold if they won three district seats. In this case, the party not only kept its district seats, but was also considered in the distribution of list seats. Hence, the PDS, having won four district seats in 1994, sent another 26 list candidates to the Bundestag. Suddenly, district voting gained national importance[7].

In the "Berlin" Republic, as PR shares of the two major parties were on a steady decline, the number of surplus seats was rising considerably: from 6 in 1990 to 24 in 2009. In 2012, the Federal Constitutional Court (FCC) decided that, under the principle of electoral equality, surplus seats were acceptable only as far as they did not infringe upon the "fundamental nature" of the electoral system as a PR system[8]. The Court drew the line at half the size of the seats required for establishing a party group in the Bundestag which, back then, corresponded to 15 seats. Over-complying with this requirement, the legislator decided that, from the 2013 elections onwards, all surplus seats should be compensated by additional seats for the other parties *(Ausgleichsmandate)*. As a result, the Bundestag grew bigger and bigger, reaching a first peak in 2017, when 46 surplus seats had to be compensated by 65 additional seats. By then, the party system had undergone further differentiation with the emergence of the right-wing populist party AfD. A half-hearted reform of the Grand Coalition (CDU/CSU and SPD) which slightly limited the compensation of surplus seats did not put an end to the Bundestag's overgrowth. On the contrary, in the 2021 elections, 34 surplus seats were compensated by 104 additional seats, raising the total number of seats to 736. From then on, the Bundestag was the world's biggest democratically elected parliament—a questionable record, not only from the budgetary perspective, but also, and more importantly, regarding its functioning as a "working parliament"[9]. Scholars and politicians widely agreed that another reform was inevitable and that this reform needed to tackle the distorting effects of district voting. How this should be done, however, was highly disputed between the parties.

[7] For the current state of the German party system see D. F. PATTON, *The 'Old Five': The Bonn Parties in the Berlin Republic*, in K. LARRES, et al., *The Oxford Handbook of German Politics*, 2022, 216-233; H. PAUTZ, *Germany´s Political Parties – the Newcomers*, *ibid*. 234-248.

[8] FCC Case No. 2 BvF 3/11, 2 BvR 2670/11, 2 BvE 9/11 (July 25, 2012) = BVerfGE 131, 316.

[9] Cf. S. S. SCHÜTTEMEYER, S. T. SIEFKEN, *The German Bundestag: Core Institution in a Parliamentary Democracy*, in K. LARRES et al., *The Oxford Handbook of German Politics*, 2022, 174.

In 2023, the parties of the Ampel ("traffic light") coalition (SPD, Greens, FDP) agreed on a radical solution. They wanted to get rid of the surplus seats for good. To this end, they introduced the principle of "second vote cover". From now on, parties receive only the number of district seats that is covered by the second votes cast for them. Thus, the second vote share sets a strict limit for the seats allocated to each party. District wins exceeding the second vote share are no longer considered and, importantly, do no longer create surplus seats. Rather, the respective districts are not (as such) represented by a directly elected MP. To minimize the risk of "orphaned" districts, the reformers have raised the total number of seats to 630, reducing the portion of district seats to 47,5 percent. Under the reformed FEA, the seats are distributed among the parties as follows. In a first step, the total number of seats (630) is distributed to the parties on the federal level based on their second vote share by the Sainte-Laguë method ("top-level distribution"—*Oberverteilung*). In a second step, the seats are distributed internally, that is, among the Land lists of each party, applying the same method ("sub-level distribution"—*Unterverteilung*).

The sub-level distribution determines the number of seats allocated to each party in each Land. What remains to be clarified is which of the party's candidates are elected. In line with the German electoral tradition, the reformed FEA prioritizes, in principle, the results of district voting. If the party's seat share according to the top-level and sub-level distribution is congruent with the number of its district winners, only the district winners receive seats, and the list candidates are ignored. If the party's seat share exceeds the number of its district winners, the remaining seats are allocated to the list candidates according to the pre-determined order on the List. If, however, the contingent is smaller than the number of district winners, the new "procedure of second vote cover" *(Verfahren der Zweitstimmendeckung)* kicks in. It ranks the district winners according to their share of first vote in the respective districts and allocates the party's seats in the order of this ranking. As soon as the party's seat contingent is exhausted, the remaining district winners come away empty-handed.

The electoral law reform of 2023 has altered the nature of district voting in Germany. Before the reform, receiving a plurality of first votes in an electoral district was tantamount to winning the district seat. Thus, district voting provided the winners with a seat in the Bundestag, although it did not have an impact on the Bundestag's party-political composition due to the electoral system's PR orientation. The PR principle did not directly affect the outcome of district voting, but merely compensated for its distorting effects, if needed, by increasing the number of seats in the Bundestag. After the reform, however, the very outcome of district voting depends on the PR principle. The reformed FEA states this dependence explicitly: "A party candidate … is elected if he receives a plurality of first votes and is allocated a seat in the procedure of second vote cover" (sect. 6 subsect. 1). Thus, to be elected the district candidate depends on the success of his or her party in the PR part of the electoral system. District winners do no longer win seats, but merely conditional

prospects of a seat[10]. Whether these prospects are fulfilled or disappointed, is not decided by district voting, but by the second vote elections on the federal and Länder levels. From a technical point of view, district candidacies create some sort of horizontal lists taking priority over the (vertical) Land lists of the same party. By contrast to typical horizontal lists[11], district candidates must, however, receive a relative majority in order to be prioritized and, if necessary, ranked.

Not only did the electoral law reform change the nature of district voting but it also eliminated their possible impacts on the 5 % threshold. Since 1956, parties with a second vote share smaller than five percent had been exempted from the threshold if they had won at least three district seats. Due to its interference with the principle of electoral equality, this so-called "basic seat clause" was highly disputed among constitutional law scholars, but generously accepted by the FCC. The Court held that, in assessing the "integrative power" of a party, the legislator is not limited to the party's PR results but may also consider its successes in the district voting[12]. During the reform discussion of 2023 this tenet of German electoral law has become precarious. On the one hand, the reformers downgraded the importance of district voting by subduing them completely to the PR principle. On the other hand, they initially maintained the basic seat clause which was only justifiable by arguing with the specific importance of district wins. This performative contradiction exposed the whole reform project to criticism[13]. As the reformers realized the problem, they reacted again quite radically, cancelling the basic seat clause altogether. This reaction had a tang of party politics, as the only parties that had a (vital) interest in the basic seat clause belonged to the opposition, namely the Left Party and the Bavarian CSU. Meanwhile, the CSU, the Bavarian Government, and an NGO have appealed to the FCC whose decision is to be expected in due course[14].

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[10] F. MICHL, J. MITTROP, *Farewell to "Personenwahl"*, in *Verfassungsblog*, 2023/1/19,.

[11] Cf. K. BRAUNIAS, *Das parlamentarische Wahlrecht*, vol. II, 1932, 218: "The horizontal list does not appear as a list, as there are voting districts in each of which individual candidates are nominated. However, as the seats are not allocated in this voting districts but in a larger constituency, the individual candidates of the same party form a certain unit, which we shall call a horizontal list" (my translation).

[12] FCC Case No. 2 BvC 3/96 (April 10, 1997) = BVerfGE 95, 408 (422).

[13] F. MICHL, J. MITTROP, *Farewell to "Personenwahl"*, in *Verfassungsblog*, 2023/1/19. Our argument was taken up by S. SCHMAHL, *Schriftliche Stellungnahme für die Öffentliche Anhörung des Ausschusses für Inneres und Heimat des Deutschen Bundestages am 6. Februar 2023*, 2023/2/5, 20(4)171 G, 5, one of the experts in the legislative process nominated by the CDU/CSU group who found the basic seat clause "constitutionally dubious".

[14] The litigation representatives of the CSU and the Bavarian Government published the gist of their pleadings: K.-A. SCHWARZ, *Strukturbrüche im Wahlrecht? – zur Wahlrechtsreform der so genannten Ampel-Koalition*, in *Bayerische Verwaltungsblätter*, 2023, 833–841, and M. MÖSTL, *Die wahlgleichheitsrechtlichen Anforderungen der Mehrheitswahl und ihre Bedeutung für die Wahlrechtsreform der Ampelkoalition*, in *Bayerische Verwaltungsblätter*,, 2024, 1–13. For the scholarly discussion cf., among others, B. GRZESZICK, *Gleichheit der Wahl und Wahlrechtssystem*, in *Neue Zeitschrift für Verwaltungsrecht*, 2023, 286–292, S. SCHÖNBERGER, *Sturm im Wasserglas: Das neue Bundeswahlgesetz auf dem Prüfstand der Verfassung*, in *Neue Zeitschrift für Verwaltungsrecht*, 2023, 785–791, and T. GROß, *Die Fünf-Prozent-Klausel – Das Hauptproblem der Wahlrechtsreform*, in *Neue Zeitschrift für*

2. *Redistricting*

Despite the diminished importance of district voting in the German Mixed-Member PR—in comparison to majoritarian systems—, redistricting is subject to a rather strict legal regulation. The 299 electoral districts are delimited in an annex to the FEA sharing its legal status as a piece of federal legislation. Thus, redistricting which takes place in the run-up of each Bundestag election requires a formal amendment of the FEA, involving both the Bundestag and the Bundesrat as the representative body of the Länder at the federal level. Most of the technical work is carried out by an impartial expert committee, while the political decisions are taken by the parties of the coalition governments, among the party groups in the Bundestag and the representatives of the Länder governments in the Bundesrat. In what follows, I shall give an overview of the substantive requirements for redistricting, before outlining the redistricting procedure[15].

Most of the substantive requirements for redistricting are set out in sect. 3 subsect. 1 of the FEA. One can distinguish territorial from population requirements. The first territorial requirement refers to the Länder boundaries which shall be respected. This stipulation is technically indispensable as district seats are allocated to the parties at the Länder level. Indirectly, it also reflects the Basic Law's commitment to federalism (art. 20 sect. 1), although the FCC has clarified that the legislator is merely entitled, not obliged to consider Länder concerns when designing the legal system[16]. The constitutional principle of the federal state therefore makes no special demands on the electoral system for the Bundestag as a unitary constitutional body.

The second territorial requirement demands that every electoral district should form a coherent area. However, it allows for exceptions required, for example, by irregular Länder boundaries, in particular, exclaves and enclaves. The requirement of a coherent area reflects the widespread conception of electoral districts as "entities" consisting of both a coherent territory and a cohesive part of the population. The territorial coherence enables the district MPs to care for the needs of the district population. However, the conception of electoral districts as an "entity" should not be exaggerated. According to art. 38 sect. 1 of the Basic Law, the members of the Bundestag shall be representatives of the whole people. This constitutional principle rules out every substantial subdivision of the people and every substantial distinction between "district" and "list" MPs. From a normative point of view, there can be no such thing as "district representation"[17], and, from an empirical point of view, "list" MPs care as much for the needs of their districts as "district" MPs[18].

Verwaltungsrecht, 2023, 1282–1286.

[15] For more details see J. HAHLEN, *§ 3*, in W. SCHREIBER, *BWahlG – Kommentar,* 11th, 2021.

[16] FCC Case No. 2 BvF 1/21, Rn. 200 (November 29, 2023).

[17] Cf. S. PERNICE-WARNKE, *Zur Bedeutung der Wahlkreiseinteilung*, in *Neue Zeitschrift für Verwaltungsrecht,* 2024, 33.

[18] Cf. T. ZITTEL, D. NYHUIS, M. BAUMANN, *Geographic Representation in Party-Dominated Legislatures*, in *Legislative Studies Quarterly*, 2019, 681–711; T. GSCHWEND, T. ZITTEL, *Who brings home the Pork?* in *Party*

The third territorial guideline demands that the boundaries of the municipalities, rural and urban districts should be respected, wherever possible. This requirement reflects the territorial organisation of the public authorities that prepare and organize the elections. More importantly, it considers the organizational structure of the political parties which are, by law, required to have regional and/or local branches (sect. 7 subsect. 1 of the Political Parties Act)[19]. In most parties, the lowest organizational level is the local association *(Ortsverein/Ortsverband)* which usually corresponds to the territory of a rural municipality or an urban district. Crucial for the Bundestag elections are the district associations *(Kreisverband/Unterbezirk)*, ranking usually at the next level, which nominate the district candidates—either in members' assemblies or in delegates' assemblies (sect. 21 subsect. 1 FEA). Although it is inevitable that the electoral districts do not always correspond to every party's structure, respecting the municipal and administrative boundaries in the redistricting process minimizes deviations. It also promotes the perception of the electoral district as an "entity" based on "historical" boundaries. Despite several territorial reforms during the last decades, in principle, municipal and administrative boundaries are more stable than boundaries of electoral districts. Thus, they can serve as a reliable basic structure for the "electoral map", which is not really a map, but a table made up of three columns. The first column indicates the number of the district, the second its name, and the third its territory referring to the names of administrative districts, municipalities, and, if required, their subdivisions.

The fourth territorial guideline is not laid down in the FEA but derived from the FCC's controversial judgment on surplus seats of 1997—the decision was taken with 4:4 votes. The half of the judges supporting the decision held that the closer personal relationship of district representatives to the district in which they were elected required a certain continuity in the territorial structure of the district: "It would be contrary to the principles of democratic representation if electoral districts were constantly subject to change."[20] The reference to the "principles of democratic representation" appears exaggerated in a constitutional system where there is no "district representation", but only representation of the whole people. In a later decision, the Court did not refer to it again, but it re-affirmed the concept of territorial continuity[21], at least, as a reason that can justify deviations from the population requirements.

The FEA's population requirements protect the electoral equality of both voters and candidates. The first requirement stipulates that the number of districts in the Länder shall correspond to the population proportion as far as possible. Thus, contrary to

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Politics, 2018, 488–500.

[19] For party organization see T. POGUNKTE, *Parties in a Legalistic Culture: The Case of Germany*, in R. S. KATZ, P. MAIR, *How Parties Organize*, 1994, 185–215.

[20] FCC Case No. 2 BvF 1/95 (April 10, 1997) = BVerfGE 95, 335 (364).

[21] FCC Case No. 2 BvC 3/11 (January 31, 2012) = BVerfGE 130, 212 (228 f.).

historical electoral laws[22], the Länder are not allocated a fixed seat contingent, but "give away" and "receive" districts depending on demographic changes. The number of districts due to every Land is determined by the Sainte-Laguë method.

The second population requirement regulates the size of the individual districts. It sets out that the population of a district should not deviate from the average district population by more than 15 percent in either direction. Deviations exceeding this margin of tolerance can, however, be justified by territorial reasons, especially, the requirement to respect administrative and municipal boundaries and the principle of district continuity. Since the latter principle was established by the FCC, the legislature has, as a rule, refrained from redrawing the electoral map in case of deviations within 15 to 25 percent[23]. If the deviation is, however, greater than 25 percent, the FEA requires redistricting, without any exception. Initially, the FEA accepted deviations up to 33 1/3 percent. However, in its 1997 decision on surplus seats, the FCC found this broad margin incompatible with electoral equality, based on a legal comparison with Ireland, France, and Canada[24]. In future, beginning with the 2029 elections, the margins of tolerance will be reduced even further to 10 % and 15 % respectively, following the recommendations of the Venice Commission[25].

It is important to note that the population requirements do not refer to the entire population, but only to the number of German citizens with a permanent residence in the district. This reaffirms the constitutional principle that there can be no such thing as "district representation" (including the foreign nationals living in the district), but only representation of the whole people which—according to the interpretation of the FCC—is made up exclusively by the German citizens[26]. However, the population figure

[22] The Federal (Imperial) Elections Act of 1866/1871, the Imperial Elections Act of 1918 as well as the (Federal) Elections Acts of 1949 and 1953 contained fixed seat contingents for the Länder and/or (Prussian) Provinces, while the Imperial Elections Act of 1920 was based on the so-called "automatic" PR system, resulting in a variable membership of the Reichstag.

[23] Entwurf eines Siebzehnten Gesetzes zur Änderung des Bundeswahlgesetzes, 2004/12/14, Deutscher Bundestag, doc. 15/4492, 56; Entwurf eines Achtzehnten Gesetzes zur Änderung des Bundeswahlgesetzes, 2007/12/11, Deutscher Bundestag, doc. 16/7462, 59; Entwurf eines Zwanzigsten Gesetzes zur Änderung des Bundeswahlgesetzes, 2012/1/17, Deutscher Bundestag, doc. 17/8350, 62; Entwurf eines … Gesetzes zur Änderung des Bundeswahlgesetzes, 2016/3/15, Deutscher Bundestag, doc. 18/7873, 74; Entwurf eines Vierundzwanzigsten Gesetzes zur Änderung des Bundeswahlgesetzes, 2020/5/5, Deutscher Bundestag, doc. 19/18968, 94; Entwurf eines Gesetzes zur Änderung des Bundeswahlgesetzes, 2023/10/17, Deutscher Bundestag, doc. 20/8867, 5; critical analysis: F. BUNSCHUH, *Praxis und rechtliche Überprüfung der Wahlkreisziehung*, in *Deutsches Verwaltungsblatt* 2024, 91.

[24] FCC Case No. 2 BvF 1/95 (April 10, 1997) = BVerfGE 95, 335 (364.). The underlying expert statement was provided by the Max Planck Institute for Comparative Public Law and International Law and published as *Wahlkreiseinteilung in westlichen europäischen Demokratien, den USA und Kanada*, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht,* 1997, 633–674.

[25] *Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report*, Opinion No. 190/2002, 16; for a further reduction argues S. PERNICE-WARNKE, *Zur Bedeutung der Wahlkreiseinteilung*, in *Neue Zeitschrift für Verwaltungsrecht,* 2024, 31–35.

[26] FCC Case No. 2 BvF 2/89, 2 BvF 6/89 (October 10, 1990) = BVerfGE 83, 37; FCC Case No. 2 BvF 3/89 (October 10, 1990) = BVerfGE 83, 60.

does not only count in Germans entitled to vote—the voting age is 18—, but also minors. The FCC accepts this generalization, as long as the proportion of minors in the German population differs only insignificantly from region to region. According to the Court, the inclusion of minors is therefore unobjectionable as long as the German resident population is approximately proportional to the number of eligible voters. Only if there are more than insignificant deviations between the population and the number of eligible voters may redistricting be necessary[27]. The Court placed the legislator under the duty to regularly review the proportion. In practice, this duty is fulfilled by comparative calculations in the reports of the Electoral District Commission.

The FEA charges the Electoral District Commission (EDC) with reporting changes of the population figures and suggesting if and which district boundaries should be redrawn. The EDC is a non-partisan expert committee whose members are appointed by the Federal President as the so-called *pouvoir neutre* of the German constitution[28]. It shall consist of the President of the Federal Statistical Office, a Judge from the Federal Administrative Court, and five other members who are, in practice, civil servants nominated by the Länder governments via the Bundesrat. Usually, they are recruited from the electoral law departments of the Länder ministries of the interior. The Bundesrat has made it a point to nominate representatives of those Länder that are predicted to be most affected by the redistricting process but also reflects the party-political composition of the Länder governments. Following its own rules of proceeding, the EDC is headed by a chairperson elected by the members of the EDC. By custom, the members always elect the President of the Federal Statistical Office who is, in practice, also appointed Federal Returning Officer. Because of this personal union, the chairperson of the Commission is not always a trained lawyer, but often an economist or a mathematician, which fits the EDC's task of assessing the population figures.

The EDC sits in non-public meetings and does not directly consult political parties, administrative agencies, municipalities or even the public. It invites, however, a representative of the electoral law department of the Federal Ministry of the Interior to participate in the meetings. The Länder governments and the Federal Minister of the Interior can give statements on the future delineation of electoral districts. The EDC asks the Länder governments to report the positions of the regional branches of the political parties represented in the Bundestag in their statements[29]. In addition, the EDC may consult external experts, but, as far as one can tell from its reports, it rarely does[30]. The time schedule for the EDC's work is defined by the FEA. Within 15 months of the beginning of the legislative term, the EDC shall submit its report which is

[27] FCC Case No. 2 BvC 3/11 (January 31, 2012) = BVerfGE 130, 212 (230 et seq).

[28] For this conception cf. T. STEIN, *Der Bundespräsident als "pouvoir neutre"?* in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2009, 249–256.

[29] Bundestag, doc. 20/5200, 8.

[30] For instance, the last two reports (Bundestag, doc. 19/7500 and Bundestag, doc. 20/5200) do not mention the involvement of external experts.

based on the decisions of the majority. A minority of three members may give a dissenting opinion.

The EDC submits its report to the Federal Ministry of the Interior which shall forward it immediately to the Bundestag and publish a note in the Federal Bulletin. This is the first time that the public is officially made aware of the redistricting plans. In the Bundestag, the report is not dealt with as a draft law, but rather as a briefing. Until 2002, this briefing was discussed in the Bundestag Committee of Internal Affairs which then called on the Federal Government to introduce a bill. Since 2007, the report has, however, been debated only among the coalition parties which ask the Federal Ministry of the Interior to provide them with a so-called drafting guidance. This drafting guidance reflects the wishes of the coalition parties and forms the basis of the draft law which is eventually introduced in the Bundestag by the coalition party groups. Formally, the opposition parties are not involved in the drafting process until the bill is being discussed in the Bundestag and its Committee of Internal Affairs. However, if they are part of a Land government, they may have already had an opportunity to make their views heard in the EDC. In any case, the opposition parties can present their interests in the meetings of the Committee of Internal Affairs, although the committee adopts its recommendations for the plenary by majoritarian vote. The plenary session, as the last step of the legislative procedure in the Bundestag, only serves to publicly express the various opinions on the new electoral map and to formally adopt the law[31].

After having been adopted by the Bundestag, the redistricting law is forwarded to the Bundesrat which represents the Länder via representatives of the Länder governments. The powers of the "Länder chamber" in matters of electoral legislation are, however, limited. The Bundesrat may call on a joint committee for further discussion consisting of an equal number of members of the Bundestag and the Bundesrat. After the discussions of the joint committee have been concluded, the Bundesrat can object to the redistricting act. Yet, this objection is not tantamount to a veto but can be overruled by the Bundestag by a majority of its members. If two thirds of the Bundesrat's votes objected to the law, the Bundestag equally requires a two-thirds majority for effectively overruling the objections. However, as far as apparent, that has never happened in the case of a redistricting law.

3. *Gerrymandering*

Thanks to the design of the German electoral system, there are almost no incentives for manipulating electoral boundaries for partisan reasons[32].

[31] The most recent redistricting law was adopted by 382 to 276 votes with 12 abstentions. The affirmative votes came from the coalition parties (SPD, Greens, FDP), while the opposition (CDU/CSU, AfD, and two left-wing groups) voted against..

[32] For an in-depth analysis of Gerrymandering in Germany see R. KAISER, F. MICHL, *Wer hat Angst vorm*

Gerrymandering just makes no sense in a system where district voting has no impact on the parliament's party-political composition. Even before the electoral law reform of 2023 that abolished the last party-political implication of district voting by cancelling the basic seat clause, there was hardly any evidence for deliberate manipulations of the electoral map. This does, however, not mean that the redistricting process is completely de-politicized and consensual. As district voting has a bearing on the personal-political composition of the Bundestag, many MPs have a vital (self-)interest in how the district boundaries are drawn. Most likely, this interest will be growing in the aftermath of the 2023 reform[33], which transformed the district candidacies into prioritized horizontal lists. To rank high on that list, district candidates need to increase their personal vote share which is contingent on the make-up of the district. For example, candidates of the CSU receive higher vote shares in rural than in urban districts, while the opposite holds true for candidates of the SPD and the Greens.

In the most recent redistricting process, this conflict of interests caused a heated debate about a new district in Bavaria that was set up because of demographic changes[34]. As two existing rural districts around the city of Augsburg deviated from the average population by more than 25 percent, the redistricting plan of the coalition parties carved out a new district from their territory, while adding some peripheral parts of the existing urban district of Augsburg. In the 2021 election, this urban district was won by the CSU candidate. Second came the Greens' candidate—a prominent politician—who received her best results in the central parts of the district. Prognostically, her personal results will improve in the next elections because conservative peripheral parts have been ceded to the new rural district. The head of the CDU/CSU party group and opposition leader in the Bundestag, commented on the redistricting as follows[35]: "What the Americans have been doing for 30 years with their so-called 'Gerrymandering' has led to democracy no longer functioning properly there. The Traffic Light Coalition is now doing exactly the same thing in Germany—cutting a constituency to the advantage of one of its own MPs. This is causing serious damage to democracy."

Of course, comparing the case of Augsburg to Gerrymandering in the US is grossly misleading, as the district election in Augsburg will have no effect on the party-political composition of the next Bundestag, whatever its outcome. Yet the episode shows the importance politicians attribute to district voting for personal-political and symbolic reasons. It is the coloring of the electoral map that matters to German parties. The CSU (blue), claiming to represent the whole of Bavaria at the federal level, has a vested interest in a blue-only Bavarian electoral map. As the days are over when the CSU won

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Gerrymander? Manipulative Wahlkreiszuschnitte in Deutschland, in *Jahrbuch des Öffentlichen Rechts der Gegenwart* 67 (2019), 51-106.

[33] Cf. S. PERNICE-WARNKE, *Zur Bedeutung der Wahlkreiseinteilung*, in *Neue Zeitschrift für Verwaltungsrecht*, 2024, 31–35.

[34] S. KLENNER, *Streit über Wahlkreise*, in *Frankfurter Allgemeine Zeitung*, 2024/2/1, 2.

[35] Quoted by R. ROSSMANN, *So darf es nicht weitergehen*, in *Süddeutsche Zeitung*, 2024/1/31, 4 (my translation).

all electoral districts in Bavaria, it at least wants to limit the number of green dots on the map. On the other hand, the Greens wooing the progressive urban electorate want to make their strongholds be seen. Although such considerations may of course influence the decision-makers when drawing electoral boundaries, they are not tantamount to partisan Gerrymandering. That is why German courts, when confronted with suspected "Gerrymanders" in Länder elections, have taken a rather self-restrained stance. The Constitutional Court of Rhineland-Palatinate—the only German court that has ever employed the term "Gerrymandering"—held that only evident manipulations of district boundaries based on an analysis of previous voting behaviour by the respective parliamentary majority violate the principle of electoral equality. Regarding the disputed electoral map, it found that such manipulations were possible, but not evident[36]. For the future, it obliged the legislator to give reasons for the delimitation of electoral districts so that the electoral map can be assessed more effectively. Of course, these reasons are readily available as changing population figures provide enough arguments to make a case for this or that delimitation[37]. In the end, redistricting is a genuinely political undertaking whose result the judiciary can scrutinize only to a limited extent—even in Germany with its powerful constitutional courts.

4. *Conclusion*

This paper has shown that district voting plays only a minor role in the German electoral system, even more so after the reform of 2023. Their diminished importance—in comparison to majoritarian systems—and the legal regulation of the redistricting process minimize the risk of manipulative delimitations. Although the reproach of "Gerrymandering" is part of the political rhetoric in Germany, there is no danger that electoral maps will determine the party-political outcome of the Bundestag elections. This result provokes the question why there is district voting at all, in particular, as empirical research has shown that there is hardly any difference in the responsiveness of "district" and "list" MPs, denouncing the "stronger link" between district MPs and their voters as a myth[38]. The answer to this question is twofold, referring to both the history of the electoral system and the structure of political parties in Germany. From a historical perspective, district voting is part of a compromise, formed in the 1950s, between the CDU/CSU's demand for a first-past-the-post system following the British example and the strict insistence of SPD and FDP

[36] Verfassungsgerichtshof Rheinland-Pfalz Case No. VGH 14/15 (October 30, 2015).

[37] R. KAISER, F. MICHL, *Wer hat Angst vorm Gerrymander? Manipulative Wahlkreiszuschnitte in Deutschland*, in *Jahrbuch des Öffentlichen Rechts der Gegenwart*, 2019, 101; more optimistic: F. BUNSCHUH, *Praxis und rechtliche Überprüfung der Wahlkreisziehung*, in *Deutsches Verwaltungsblatt*, 2024, 88.

[38] T. GSCHWEND, *Zum Mythos des Direktmandates aus Sicht der Wählerinnen und Wähler, in Verfassungsblog*, 2023/2/06,.

on PR[39]. Evidently, the Union parties drew the short straw, as the system is PR in its nature. From the very beginning, electoral districts in Germany were no more than a tired imitation of British constituencies. The German language does not even have a proper word to indicate the personal link between district MPs and the population of their districts. While Westminster MPs confidently refer to their "constituents", Bundestag MPs must resort to lengthy periphrases, such as "the population in my electoral district"[40].

From the perspective of the structure and functions of political parties in Germany, it makes, however, sense to divide the country into small electoral districts. According to art. 21 of the Basic Law, political parties shall participate in the formation of the political will of the people. Traditionally, parties in Germany rely on a broad membership. The Basic Law requires these "member parties" to organize their internal structure in conformity with democratic principles. Thus, constitutional law demands that party-internal decisions be made from the bottom up. This includes the nomination of candidates as the first and foremost task of party organizations in the formation of the political will of the people. The single-seat districts of the FEA contribute to this bottom-up structure, splitting up the parties' memberships into 299 suborganizations each of which chooses one candidate. In this local nomination process, the influence of the individual party member is considerably higher than in composing the Land lists for the PR element. Although party elites will often try to influence the outcome of nomination assemblies, in the end, it is the party base that—directly or, in case of delegate assemblies, indirectly—decides on who is running for the party in the district. This provides a strong incentive for party members to get involved in local party structures and to support their local candidate in the election campaign. By activating the individual party members, district voting stabilizes representative democracy in Germany, which is still a model for a functioning "party democracy". This may compensate for their minor importance in the electoral system and the actual elections.

[39] S. E. SCARROW, *Germany: The Mixed-Member System as a Political Compromise*, in M. S. SHUGART, M. P. WATTENBERG, *Mixed-Member Electoral Systems*, 2000, 55–69, for a detailed analysis of the origins see E. H. M. LANGE, *Wahlrecht und Innenpolitik*, 1975.

[40] For example, H. C. Ströbele (Greens): "Ich spreche hier … für die Bevölkerung in meinem Wahlkreis in der Mitte Berlins", in the minutes of the 9th Plenary session of the 17th electoral period on 3 December 2009, 677.

Lorenzo Spadacini*

Constitutional needs for the Italian process of drawing electoral districts: a more independent Commission, less partisanship, and greater transparency and participation**

SUMMARY: 1. District and constituencies: explicit and implicit constitutional principles and rules. – 2. The limited importance of the design of single-member constituencies until 1993. – 3. The constituency drawing system from 1993 to 2005. – 4. From the abolition of the single-member districts in 2005 to the need to design small multi-member districts in the electoral law, which was never implemented, in 2015. – 5. The current legislation on single-member district introduced in 2017 and still in force in light of the applied practice. – 6. How to make the procedure for producing electoral maps more compliant with the Constitution: a more independent technical commission; a timelier procedure; greater transparency and participation.

ABSTRACT: ***This article delves into the constitutional imperatives guiding the process of drawing electoral districts in Italy, advocating for reforms to ensure a more independent commission, reduced partisanship, and greater transparency and participation. Beginning with an exploration of explicit constitutional principles and rules governing seat allocation, the paper traces the historical evolution of constituency drawing systems, from the initial era of single-member constituencies within a proportional system to contemporary legislation on single-member first past the post districts (even within a mixed electoral system). Highlighting the shortcomings of past and present approaches, this article argues for procedural reforms aimed at enhancing compliance with constitutional principles. The conclusion underscores the importance of transparency and participation in mitigating inherent biases in electoral geography, emphasizing the need for procedural fairness even when substantive solutions remain elusive. By prioritizing the technical and non-partisan nature of the boundary commission, expediting the production of electoral constituencies, and bolstering participation and transparency measures, the article proposes a framework aligned with both Italian and international best practices, as endorsed by the Venice Commission.***

1. *District and constituencies: explicit and implicit constitutional principles and rules*

The Italian Constitution does not provide for a specific electoral system. Consequently, Italy has experienced a sort of electoral hyperactivity[1], oscillating between proportional and majority systems, sometimes including only multi-member

* Associate Professor of Public Law, University of Brescia.

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[1] According to Fulco Lanchester, it would have been, literally, a case of electoral "hyperkinetism" (F. LANCHESTER, *La costituzione sotto sforzo. Tra ipercinetismo elettorale e supplenza degli organi costituzionali di garanzia*, CEDAM, Padova 2020).

districts, other times also incorporating single-member constituencies, as is the case for a portion of seats in the Chamber of Deputies and the Senate today[2]. Essentially, lacking a consolidated electoral tradition, there are no specific constitutional provisions concerning the design of single-member constituencies, which inherently require careful considerations to prevent the electoral outcome from being perceived by the public as unjust or unrepresentative. In fact, the Constitution limits itself to establishing certain overarching principles, some concerning the equality of voting[3], while others stem from democratic principles, the representative nature of democracy, or – perhaps – the parliamentary system of government.

Alongside these general principles, the Constitution instead establishes few specific rules. Among them, rules about the distribution of seats among the different territories of the country have specific relevance. For the Senate of the Republic, it is envisaged that the electoral system must be region-based, and the 196 seats to be elected at the national level (4 are reserved for Italians abroad) are distributed among the regions in proportion to the population. However, a minimum number of seats are guaranteed for less populous regions. For the Chamber of Deputies, it is envisaged that the national territory is divided into subnational constituencies to which seats must be allocated in proportion to the population. However, the Constitution does not specify the relevant subnational constituencies for the distribution of seats in the Chamber of Deputies. It has always been the sub-constitutional legislation that determines the subnational constituencies for seat distribution. They have always coincided with the regional territory, except for the more populous regions, which are divided into multiple constituencies[4]. In the Senate, however, given the mentioned rule of the "regional basis" of the electoral system, the constituencies coincide with the 20 regions. Both with reference to the Chamber of Deputies and the Senate, the Constitution specifies the representative data of the population to be considered for the allocation of seats to subnational constituencies: what matters is indeed the latest general census.

These rules are not difficult to apply. In fact, it is sufficient that, when elections are called, the data from the latest general population census is verified, and the seats are distributed among the various subnational constituencies as prescribed by law or the Constitution through a simple mathematical operation.

If an electoral law were to be adopted that provides for the division of the territory into constituencies and the distribution of seats within them based on single-member

[2] For a short description in English of the Italian bicameral system and the history of the electoral legislation, see A. D'ANDREA, L. SPADACINI, *The Structure of Parliament*, in V. ONIDA (et al.), *Constitutional Law in Italy*, Wolters Kluwer, *Alphen aan den Rijn*, 2021, 121-131.

[3] Art. 3

[4] This is the case in Piedmont, Veneto, Lazio, Campania, and Sicily, divided in two constituencies each, and Lombardy, now divided into 4 different constituencies. In truth, based on the data from the latest census, the population of Emilia-Romagna, consisting of a single sub-national district, has surpassed that of Piedmont, divided into two districts. This constitutes an interesting peculiarity, although it does not seem to have relevance in terms of the constitutionality of the current distribution.

districts (as was the case with the electoral law of 1993), it would then be necessary to proceed concretely with such division and distribution. To this end, an independent commission, separate from the Government and Parliament, should be identified to carry out this distribution transparently [5].

There are no explicit constitutional principles on this matter, probably also because the constitutional charter does not provide any indications - not even in general terms - on electoral law; however, it is possible to derive some general principles in this regard, such as:

a) The democratic principle and the attribution of sovereignty to the people (Article 1): from this perspective, the effective implementation of the democratic principle and the constitutional attribution of sovereignty to the people can only demand that the electoral system allows the chambers to make decisions that genuinely reflect the will of the people, as a necessary precondition for the exercise of its sovereignty. This means ensuring that the system of representation fulfils its function: allowing public decisions, mostly made through representative assemblies, to be realistically attributed to popular sovereignty[6]. The construction of a single-member constituency system on a partisan basis, indeed, would clearly hinder the realization of such mechanisms for the fulfilment of the democratic principle and the attribution of sovereignty to the people[7];

b) The equality of citizens (Article 3) as well as of voters (Article 48): from this second perspective, a partisan constituency system would inevitably end up contradicting the equality of citizens and voters because, in constituencies resulting from partisan choices, some voters are empowered with a greater weight in their vote while others' votes effectively carry less weight. Moreover, in the Italian legal system, the principle of formal equality (which might be considered respected even in the case of voting based on partisan constituencies) is not sufficient, given that it is well known

[5] Indeed, the need for an independent commission quickly emerged in the homeland of majoritarian single-member districts. On this point, see R.J. JOHNSTON, *Redistricting by Independent Commissions: A Perspective from Britain*, in *Annals of the Association of American Geographers*, Vol. 72, No. 4 (Dec., 1982), 457-470, and R.L. MORRIL, Political Redistricting, Washington: Association of American Geographers, 1981.

[6] Regarding this, it has been emphasized that if the electoral system is the instrument for creating political representation, it is essential to focus on the 'place of representation,' namely the place where the interests of the parties (representative and represented) meet. This function is performed by electoral districts because the political relationship between representative and represented can only be established within a specific territorial space. The choice to focus on the electoral district is due to the fact that it serves as the place where the interests of voters and the elected representatives in the district converge. The place where representation is founded is, therefore, where candidates present themselves to voters and where the voter physically casts their vote, thus choosing their political representative. See D. CASANOVA, *Eguaglianza del voto e sistemi elettorali*. *Profili costituzionali*, in *Rivista del Gruppo di Pisa,* 1/2019.[7] D. W. RAE, *The political consequences of electoral laws*, New Haven, Yale University Press, 1971.

[7] D. W. RAE, *The political consequences of electoral laws*, New Haven, Yale University Press, 1971.

that Article 3 of the Constitution enshrines the principle of equality in both formal and substantive terms.

c) The constitutional provisions regarding the allocation of seats to sub-national constituencies and regions – constituting the constitutionalizing of a mathematical formula – withdraw this function from the ordinary legislator, indicating the sensitivity of the matter: if the Constitution is concerned about equality among voters, both individually and as voters located in a territory, to the extent of constitutionalizing mathematical formulas for the allocation of seats among constituencies, we can reasonably imagine that the constitutional domain of this matter is limited to the distribution of seats among constituencies and does not necessarily extend to the system of designing constituencies. The answer to this question seems evident, especially when considering that the allocation of seats among constituencies has much less decisive effects in terms of the effectiveness of the aforementioned principles than the design of single-member constituencies, at least where these operate according to the "first past the post" rule. Furthermore, these mathematical rules allow ensuring the most accurate territorial distribution of representation, in guarantee of the principle of equality among citizens (Article 3 of the Constitution) and, especially, of the equality of the vote (Article 48 of the Constitution).

Based on this approach, therefore, we should consider implicit in Italian constitutional principles what is explicitly stated, without formal legally-binding value, in the Code of Good Practice in Electoral Matters of the European Commission for Democracy through Law (Venice Commission), adopted in 2002[8]. With specific reference to the case of the redrawing of electoral constituencies, it is specified that the "new arrangement should not exhibit partisanship, hence be impartial; should not disadvantage national minorities; should take into account an opinion expressed by an independent commission, preferably including a geographer, a sociologist, a balanced representation of political parties, and, if applicable, representatives of national minorities [...] Subsequently, Parliament will decide based on the proposals of the commission, with a possibility of a single appeal."

These principles are reiterated and detailed in the "Report on Constituency Delineation and Seat Allocation," adopted by the Venice Commission in December 2017[9]. Regarding the framework for defining electoral constituencies, the Report highlights that the most relevant international standard to apply is that of the equality

[8] European Commission for Democracy through Law (Venice Commission), "Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report," adopted by the Venice Commission during its 52nd session (Venice, October 18-19, 2002).[9] European Commission for Democracy through Law (Venice Commission), "*Report on constituency delineation and seat allocation*", adopted by the Council for Democratic Elections at its 60th meeting (Venice, 7 December 2017) and by the Venice Commission at its 113th Plenary Session (Venice, 8-9 December 2017).

[9] European Commission for Democracy through Law (Venice Commission), "*Report on constituency delineation and seat allocation*", adopted by the Council for Democratic Elections at its 60th meeting (Venice, 7 December 2017) and by the Venice Commission at its 113th Plenary Session (Venice, 8-9 December 2017).

of voting power, as defined by the Code of Good Practice in Electoral Matters. According to this standard, the equality of the vote implies that each voter normally has the right to one vote only, and each voter's vote must have the same value.

Regarding procedural safeguards, the Report specifies that the delimitation of electoral boundaries should be carried out transparently and consistently, established by a law that also regulates the frequency of the revision of these boundaries. Furthermore, the concrete delimitation of electoral constituencies should occur following extensive public consultations with all stakeholders, legitimizing it in the eyes of both stakeholders and voters[10].

The Report also states that those responsible for defining electoral boundaries must be independent and impartial, ensuring that the criteria for seat allocation comply with international or European standards. It emphasizes that recommendations from authorities tasked with delineating electoral boundaries should be followed by the government or national legislators, and the procedure should be precisely defined by law so that the process remains the same regardless of the entity responsible for drawing district boundaries. The report notes the necessity for all political parties to have access to the process due to its political implications.

In essence, I would consider the recommendations of the Venice Commission as explicit expressions of constitutional principles indirectly deducible from the Italian constitution itself. However, some clarifications can be made.

First, compared to the framework outlined by the Venice Commission, the Italian legal system would better address the need to avoid partisanship in the design of electoral constituencies by placing greater emphasis on the role of the independent commission rather than the Parliament. The Venice Commission's recommendation that the procedure be ultimately decided by the Parliament is quite understandable insofar as it is aimed at preventing the procedure from being entrusted to the Government. In this sense, concerning the 1993 regulation, the provision stating that constituencies are adopted by a government act should be criticized. Compared to this solution, assigning the procedure to Parliament would undoubtedly be an improvement. However, it still would not be sufficiently safeguarding, as entrusting the decision to Parliament through the normal legislative procedure would hand the decision to the political majority pro tempore. As will be discussed later, it would not be possible to imagine a procedure that assigns the decision to the independent commission, except for parliamentary corrections adopted by a supermajority (i.e., with the agreement of both the majority and the opposition, excluding handing the process to the parliamentary majority).

[10] See paragraph 19 of the aforementioned report by the Venice Commission: « Boundary delimitation should take place in a transparent and consistent manner, established by a law that also regulates the frequency of reviewing boundaries. The delimitation process should take place at least one year before an election. Like all crucial elements of electoral law, the delimitation of constituencies should be adopted after extensive public consultations with all relevant stakeholders. This should make it legitimate for both stakeholders and voters».

Second, the other specification, concerning the recommendations of the Venice Commission relates to the recommended presence of parties in the independent commission, as well as national minorities. Regarding the presence of parties in the independent commission, indeed, given their participation in other phases of the procedure, it should not be considered absolutely necessary. On the contrary, the presence in the commission of experts specialized in issues related to minorities or the addition of one or two individuals appointed by the legislative assemblies of local entities with minority representation could be considered useful in order to truly establish an independent commission capable of effectively ensuring the protection of minorities in the construction of constituency maps.

In any case, if, as specified, the recommendations of the Venice Commission can be considered indicative of Italian constitutional principles, these considerations should be formulated regarding the legislative framework of procedure for producing constituency maps adopted in 1993: 1) It is an experience complying with the parameters set by the Venice Commission, where it stipulates that the process be guided by an independent commission; 2) The attribution, in the initial application, of the final decision to the Government does not meet the required standard; 3)The attribution, for subsequent applications, of the final decision to Parliament still exposes the procedure to partisan manoeuvres and increases the likelihood that it may not succeed (the approval of the bill, in fact, is not subject to deadlines, and there is no guarantee that a majority to approve it will be found).

2. *The limited importance of the design of single-member constituencies until 1993*

These provisions did not pose problems of application as long as the proportional representation system was in force[11]. Under this system, no special commission was required for the design of subnational constituencies, since they were established by law and the seats were allocated to each of them based on the latest available census data every time elections were called. This was entirely true, without the need for specific details, for the Chamber of Deputies.

However, for the Senate of the Republic, the proportional representation system in place from 1948 to 1993 involved dividing the territory of each regional constituency into single-member districts (although the distribution of seats was then done proportionally). In essence, each regional constituency was divided into as many single-member districts as the MPs it had to elect. Candidates submitted their nominations at the level of the single-member district, but only the candidate who obtained at least 65% of the votes in the district was elected. In fact, this condition occurred extremely rarely. All or virtually all other seats were distributed among the parties within the regional constituency according to a proportional system. To

[11] To delve into the development of Italian electoral laws since 1948, consult C. FUSARO, *Party System Developments and Electoral Legislation in Italy (1948-2009)*, in Bulletin of Italian Politics, 1/2009, 49-68.

allocate the unassigned seats (virtually all of them), the votes of the unelected candidates in the various single-member districts were summed, thus obtaining the electoral figure for each party at the regional level (given by the sum of the votes of all its unelected candidates in the districts). Based on these electoral figures, the seats in the constituency not yet assigned (which was almost always the case) were allocated to individual parties proportionally. Finally, having determined the number of seats for each party, the seats of each party were assigned within the districts according to the order of decreasing percentage that the party's candidates had obtained in the various single-member districts. As it is evident, these single-member districts did not produce a system with the usual characteristics of majoritarian single-member electoral systems. Nevertheless, it was still a system that required the design of single-member districts.

These districts, for the 1948 elections, were established by the Ministry of the Interior, after consulting a parliamentary commission especially established for the electoral law. Thus, no specific independent commission operated for the design of these districts.

These districts from 1948, however, were not updated until 1993.

This led to a progressive malapportionment in the distribution of the number of single-member districts within the different regional constituencies but without major issues in the proportional distribution of seats among parties. In fact, the number of elected members in the Senate gradually increased from 237 to 315. In this way, no regional constituency ever had fewer seats than the single-member districts designed within it, although in some regional constituencies, the percentage of single-member districts compared to the number of seats to be assigned in the regional constituency became much higher than in others.

Nevertheless, since almost no candidate surpassed the aforementioned threshold of 65%, almost all seats were allocated at the regional constituency level, where all votes have equal weight. Therefore, the inertia in redesigning the single member districts did not prejudice the equality of votes. Furthermore, since the seats were instead allocated to regional constituencies based on the latest available census data, the distribution of senators among the different regional territories also occurred fairly, despite the aforementioned inertia in redesigning single-member districts.

3. *The constituency drawing system from 1993 to 2005*

In 1993, an electoral law mostly based on a majoritarian system was adopted for both the Chambers. In particular, according to this new law, 75% of the seats in the Senate and the same percentage for the Chamber of Deputies had to be elected through the first-past-the-post system in single-member districts. The remaining 25%

of seats were allocated based on a proportional representation system[12]. Thus, the districts for the Senate were finally reconfigured, and new single-member electoral districts for the Chamber of Deputies were established.

To carry out this operation, Law August 4, 1993, no. 276, art. 7, provided the following:

a) The Government prepares a draft legislative decree based on the indications formulated, within two months of its establishment, by a commission appointed by the Presidents of the Chamber of Deputies and the Senate of the Republic, based on principles and guiding criteria legislatively set[13]. The commission is composed of the president of the National Institute of Statistics, who presides over it, and ten university professors or other experts in matters relevant to the tasks the commission is called upon to perform (paragraph 2).

b) The draft legislative decree, accompanied by the opinions expressed within fifteen days of its submission by the regional councils and those of the autonomous provinces on the recommendations of the expert commission, before its approval by the Council of Ministers, is transmitted to the Chambers for the purpose of expressing the opinion by the relevant permanent committees. If the draft deviates from the proposals of the expert commission, the government must explain the reasons to the Chambers; the opinion must be expressed within twenty days of receiving the draft. If the decree does not conform to parliamentary opinion, the government, simultaneously with the publication of the decree, must send to Parliament a report containing adequate justification.

c) At the beginning of each legislature, the Presidents of the Chamber of Deputies and the Senate of the Republic appoint the commission for the

[12] On the electoral law reform see: R. S. KATZ, *Reforming the Italian Electoral Law, 1993*, in M. SOBERG SHUGART, and M. P. WATTENBERG (eds.), *Mixed-Member Electoral Systems: The Best of Both Worlds?*, *Comparative Politics*, Oxford Academic, Oxford, 2003.

[13] The principles and guiding criteria were substantially the following:

a) The coherence of the territorial basin of each constituency must be guaranteed, taking into account the economic, social, and historical-cultural characteristics of the territory;

b) Constituencies must be formed by a continuous territory, except in cases where the territory includes island portions;

c) Constituencies cannot divide municipal territory, except for municipalities that, due to their demographic size, encompass multiple constituencies within them. In such cases, if possible, the municipal territory must be divided into constituencies formed within the same municipality or the same metropolitan area;

d) In areas where recognized linguistic minorities are present, the size and delimitation of constituencies must facilitate their access to representation, even deviating from the other principles and criteria. For this purpose, the aforementioned minorities must be included in the smallest number of constituencies;

e) The population of each constituency can deviate from the average population of the constituencies in the region by no more than ten percent, either in excess or in deficiency.

verification and revision of electoral constituencies, composed as provided in paragraph 2. After each general population census (and whenever deemed necessary), the commission formulates indications for the revision of constituencies, according to the legislative criteria, and reports them to the Presidents of the Chambers[14].

The mentioned law, therefore, envisaged two procedures to be applied. In the case of the first application of the law, the procedure involved a legislative delegation to the government to be exercised within four months. In subsequent cases, particularly following the release of a new general population census, the procedure was not precisely indicated.

In fact, since, according to Article 76 of the Italian Constitution, the delegation of legislative powers to the government could not be made permanently but only for a defined period, it follows that the Commission for constituencies would have had to formulate a proposal that, in some way, would have become a draft law to be submitted to the Chambers. Therefore, the Chambers would have had to employ the usual ordinary legislative procedure. It is clear, however, that, in anticipation of the new general population census, the Parliament could have granted the Government a new specific delegation for a determined term to avoid the ordinary parliamentary procedure.

Indeed, this eventuality would have arisen in 2003, following the publication of the 2001 census data[15]. However, the electoral law was once again amended in 2005, when single-member districts were entirely abolished. The new electoral law No. 270 of December 21, 2005, in fact, envisaged a system in which all seats were allocated within subnational constituencies, using a proportional method albeit with the addition of a majority bonus. This new system, therefore, abolished the single-member districts both in the Chamber of Deputies (where they had existed since 1993) and in the Senate (where they had been in place since the first Senate election in 1948).

In essence, in this initial case of constituency drawing, recourse was made to an independent commission, whose level of independence can be deemed sufficient. This is evidenced by: a) The technical qualifications required for the commissioners; b) The non-partisan appointment: at that time, the presidents of the Chamber and Senate were representatives of the majority and opposition, starting from an agreement

[14] The law also took care to specify that the revision of constituencies was also carried out in the case of a constitutional amendment concerning the number of parliamentarians (paragraph 4).

[15] Following the publication in 2003 of the data related to the general population census of October 21, 2001, the Presidents of the Chambers had appointed the members of the Commission for the verification and revision of the electoral constituencies provided for by Article 7, paragraph 6, of Law No. 277 of August 4, 1993, and Article 7, paragraph 4, of Law No. 276 of August 4, 1993. During the proceedings, to make it clear that new elections could be held if the President of the Republic dissolved the Chambers, the Government issued Decree Law 64/2005 to regulate, on a transitional basis, the determination of the constituencies in the event of early elections. This decree-law was never applied because in the meantime, the approval of a new electoral law, No. 270 of December 21, 2005, intervened, abandoning the system that provided for constituencies.

among political forces that was upheld from 1976 to 1994 (it was, therefore, in force at the time of the appointment of the first commission for the drawing of districts but would no longer be respected from the election of subsequent chambers); c) The parliamentary nature of the body from which the appointments originated.

Nevertheless, the independent nature of the Commission was contradicted by other elements of the procedure: 1) at least in the initial application phase, although the formal act of adopting the constituencies had the force of law, it was still a legislative decree, i.e., an act issued by the Government; 2) the government had to submit the proposal of the independent commission to the opinion of the Chambers, but once it obtained the opinion of the Chambers, it could follow it while also modifying the content of the commission's proposal; moreover, the government was not even required to adhere to the opinion of the Chambers, as it could deviate from it with the sole obligation to justify the reasons (but without any body being authorized to scrutinize the reasonableness of the justifications); 3) for applications subsequent to the first, the proposal of the independent commission would have ended up as a bill to be subjected to the ordinary legislative procedure; in this case, therefore, the proposals of the independent commission would have been at the mercy of the parliamentary majority in office, which, in the legislative procedure, could have modified them at will without any need to justify the choices[16] (in the Italian context, moreover, it would have been practically impossible to activate a constitutional review of the constituency drawing).

Essentially, this initial regulation of the drawing of single-member electoral constituencies was characterized by: 1) the presence of a technical commission established with sufficient guarantees of independence; 2) an overall procedure that paradoxically seemed to subordinate the decisions of the independent commission either (a) to the government in the initial application procedure or (b) to the Parliament (and hence its majority pro tempore) in subsequent applications.

4. *From the abolition of the single-member districts in 2005 to the need to design small multi-member districts in the electoral law, which was never implemented, in 2015*

As already mentioned, the legislation on the design of electoral constituencies introduced in 1993 was repealed in 2005 and replaced by a proportional electoral system with a majority bonus and without any single-member constituencies[17]. It is an electoral law under which elections were held for the political elections of 2006 and

[16] This is the system traditionally used in the United States, which critics suggest has proven to be ineffective. Reference: L. HARDY, A. HESLOP, and S. ANDERSON (eds.), *Reapportionment Politics*, Sage Publications, Beverly Hills, 1981, 21.

[17] See: C. FUSARO, *Party system developments and electoral legislation in Italy (1948-2009)*, cit., 49-68; G. PASQUINO, *Tricks and Treats: The 2005 Italian Electoral Law and Its Consequences*, in *South European Society and Politics*, vol. 12, 2007, 79-93; A. RENWICK, C. HANRETTY, and D. HINE, *Partisan self-interest and electoral reform: The new Italian electoral law of 2005*, in *Electoral Studies*, 4/2009, 437-447.

2013. The results of the 2013 elections made the constitutional illegitimacy of such legislation evident. Indeed, at least in the Chamber of Deputies, despite being proportional, it automatically guaranteed 55% of the seats to the coalition that nationally obtained the most votes. In the 2013 elections, this seat bonus was granted to the center-left coalition, which with 29.55% of the votes (compared to 29.18% for the center-right and 25.56% for the Five Star Movement) obtained 340 seats (compared to the 124 of the center-right and the 108 of the Five Star Movement). Therefore, the Constitutional Court, with judgment No. 1 of 2014, declared the existing electoral law unconstitutional, leaving in place a completely proportional electoral law, without a majority bonus[18].

Following the Constitutional Court's ruling, and in anticipation of an associated constitutional reform that never came into effect (rejected by a popular referendum[19]), a new electoral law was approved, known as the law of May 6, 2015, No. 52, commonly referred to as the Italicum[20].

The law provided for a proportional system and reinstated the majority bonus previously rejected by the Court with a variation. It would have been awarded to the most voted list if it had obtained at least 40% of the votes. Otherwise, a national runoff would have been held between the two most voted lists. The winning list in the second round would have obtained 55% of the seats (even if it had been admitted to the second round with a very low percentage). This new electoral system envisaged that the subnational constituencies into which the Italian territory is divided (regional for the Senate and regional or subregional for the Chamber of Deputies) would be subdivided into smaller multi-member constituencies.

The new law, although it did not provide for single-member constituencies, still required the delineation of multi-member constituencies not predetermined by law. To this end, the Government was delegated to adopt, within ninety days from the date of entry into force of the law, a legislative decree for the determination of multi-member constituencies within each subnational constituency, based on principles and guiding criteria established by the law[21].

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[18] On judgment number 1/2014 of the Constitutional Court, in English see: A. BARAGGIA and L.P. VANONI, *The Italian Electoral Law Saga: Judicial Activism or Judicial Subsidiarity?*, in *Sant'Anna Legal Studies*, *STALS Research Paper*, 2/2017; A. PIN and E. LONGO, *Don't Waste Your Vote (Again!). The Italian Constitutional Court's Decision on Election Laws: An Episode of Strict Comparative Scrutiny*, in *ICON·S Working Paper – Conference Proceedings Series*, 1(10)/ 2015, 44

[19] See: G. PASQUINO and M. VALBRUZZI, *Italy says no: the 2016 constitutional referendum and its consequences*, in *Journal of Modern Italian Studies*, 2/2017, 145-162.

[20] See: G. PASQUINO, *Italy has yet another electoral law*, in *Contemporary Italian Politics*, 3/2015, 293-300.

[21] The main principles and guiding criteria that the Government's legislative decree had to comply with (article 4, paragraph 1) include:

a) The population of each constituency may deviate from the average population of the constituencies in the subnational constituency by no more than 20 percent in excess or in deficiency;

b) The coherence of the territorial basin of each constituency has to be guaranteed, and, normally, its socio-economic and historical-cultural homogeneity, as well as the continuity of the territory of each

For the preparation of the draft legislative decree, the Government relies on a Commission composed of the President of the National Institute of Statistics, who chairs it, and ten experts in matters related to the tasks that the Commission is called to carry out, without any additional costs.

The draft legislative decree had to be transmitted to the Chambers within forty-five days from the date of entry into force of the electoral law, for the purpose of obtaining the opinion from the relevant standing committees within twenty-five days from the receipt of the draft. If the decree did not conform to the parliamentary opinion, the law required Government, simultaneously with the publication of the decree, to send Parliament a report containing adequate justification.

These rules for the delineation of constituencies, compared to the arrangement of 1993, contained a key innovation: the appointment of the members of the Independent Commission was entrusted to the Presidents of the Chambers, in a context where one was representative of the majority and the other of the opposition. In the new arrangement, however, the appointment of the Commission members was entirely entrusted to the Government. It is clear that this new arrangement did not guarantee the independence of the Commission tasked with producing the map of the constituencies. Conversely, the most criticized features of the 1993 scheme were retained, namely the attribution of the final decision to the Government, rather than to Parliament, regarding the proposal provided by the commission.

In any case, in January 2017, the Constitutional Court declared the runoff provided for by the new electoral law unconstitutional[22], leaving the possible majority bonus for the list that should obtain 40% of the valid votes in the first (and only) round. Therefore, the parliamentary majority decided to completely amend the law[23], with the consequence that the multi-member constituencies designed according to the described scheme were never used.

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constituency, without dividing the municipal territory, except in the case of municipalities that, due to their demographic size, include multiple constituencies.

c) In areas where recognized linguistic minorities are present, the delimitation of constituencies, even in derogation from the principles and criteria indicated by the law, must take into account the need to facilitate their inclusion in the fewest possible number of constituencies;

d) Each multi-member constituency normally corresponds to the territorial extension of a province, as delimited at the date of entry into force of this law, or is determined by the merger of different provinces, provided they are contiguous.

[22] Also on judgment number 35/2017 of the Constitutional Court, see P. FARAGUNA, '*Do You Ever Have One of Those Days When Everything Seems Unconstitutional?': The Italian Constitutional Court Strikes Down the Electoral Law Once Again: Italian Constitutional Court Judgment of 9 February 2017 No. 35*, in *European Constitutional Law Review*, 4/2017, 778-792; E. STRADELLA, *Italy after the Constitutional Referendum: Legal and Political Scenarios, from the Public Debate to the 'Electoral Question'*, in *Italian Law Journal*, special issue.

[23] For a general assessment of the rather chaotic evolution of electoral legislation, see: F. CLEMENTI, *The Italian constitution after seventy years between referenda, electoral laws and institutional reform: a past that does not pass?*, in *Journal of Modern Italian Studies*, 3/2019, 415-426.

5. *The current legislation on single-member district introduced in 2017 and still in force in light of the applied practice*

The current legislation on constituencies was introduced in 2017 and has provided a peculiar mixed electoral system: 5/8 of the seats in both chambers are allocated proportionally, while the remaining 3/8 are allocated in single-member first past the post constituencies[24].

For the delineation of these districts, a new procedure and body were again established; in particular, the commission was assigned another function: to create multi-member constituencies. In fact, the 28 electoral subnational constituencies for the Chamber of Deputies and the 20 regional constituencies for the Senate were required to be subdivided internally into smaller multi-member electoral districts that allocate a number of seats less than 8: therefore, 21 of the 28 Chamber constituencies would be further divided, as well as 9 of the 20 regional Senate constituencies. Within these small multi-member constituencies, the single-member constituencies are delineated, in which parliamentarians are elected using the first-past-the-post system. Essentially, therefore, the territorial area of the multi-member constituencies must consist of the assembly of two or more whole single-member constituencies. This operation of identifying these smaller multi-member electoral constituencies is also delegated to the Commission, together with the task of identifying the single-member constituencies that, when assembled, effectively give rise to the multi-member constituencies[25].

[24] A. CHIARAMONTE, and R. D'ALIMONTE, *The new Italian electoral system and its effects on strategic coordination and disproportionality*, in *Italian Political Science*, 1/2018, 8–18.

[25] However, this attribution is problematic. In fact, the way this provision is structured, for the Chamber, could violate Article 56 of the Constitution, which establishes the modalities of seat distribution among subnational constituencies. What are indeed the subnational constituencies referred to in Article 56 of the Constitution? I think they are the electoral divisions within which candidates are presented and where voters cast their votes. In the subnational constituencies, indeed, there are no candidates because candidacies are presented either at the level of the single-member district or at the level of the smaller multi-member districts. Similarly, the voter chooses among the candidates in their single-member district and among the lists competing for seats in the multi-member district within which their single-member constituency is located. The major 28 constituencies, in fact, have a completely marginal role in the dynamics of the new electoral law. They only serve to contain shifts of seats from one territorial area to another, as is better clarified by the reports of M. PODETTA, *The Delimitation of Multi-Member Districts in Italy: Political and Territorial Mis-Representativeness*; P. FELTRIN, S. MENONCELLO, G. IERACI, *Causes and Possible Remedies for the "Slipping Seats" Phenomenon: An Empirical Analysis*; D. CASANOVA, *Drawing Electoral Districts and Ensuring Equal Representation: A Comparative Study of Electoral District in Italy and the United States*, in this issue. But if this is the case, the constituencies referred to in Article 56 are instead the multi-member districts and not the subnational constituencies, which have a purely virtual nature. If this were so, the number of seats to be allocated to each constituency should be calculated using the method indicated by Article 56 and not with the currently provided methods.

The legislative framework concerning the Commission for the electoral districts currently in operation seems to present numerous aspects in contrast with the principles established by the Venice Commission, which - as mentioned - provide explicit elaboration of constitutional principles present in the Italian Constitution, even though they must be specified and detailed as described previously.

Let's look at the specifics.

The Commission of experts, established under Article 3, paragraph 3 of Law No. 165 of 2017, is the body the Government relies on for the determination of electoral districts[26]. According to paragraph 6 of the aforementioned law, the Commission is appointed by the Government every three years, and it is tasked with providing recommendations to the government for the revision of districts based on the results of the general population census[27], according to the criteria outlined in the same law, largely reproduced from the previous law, which never came into effect but only provided for plurinominal constituencies. The extension of these criteria - without differentiation - to uninominal constituencies effectively attests to the generality of the criteria themselves. It is evident that if they were genuinely binding criteria, they could not be applied indiscriminately to constituencies so diverse in demographic consistency and function, such as uninominal compared to plurinominal ones[28].

As in the legislation of 1993, even in that of 2017, the procedure for producing the districts is twofold: a) in the case of the first application of the law; b) in subsequent cases. In the case of the first application of the law (a), the procedure involved a

[26] Article 3, paragraph 3: For the purpose of drafting the draft legislative decree, the Government makes use of a commission composed of the president of the National Institute of Statistics, who chairs it, and ten experts in matters relevant to the tasks that the commission is called upon to perform.

[27] Article 3, paragraph 6: The Government updates the composition of the commission every three years. The commission, in relation to the results of the general population census, provides indications for the revision of the single-member and multi-member constituencies, according to the criteria set out by the law, and reports them to the Government. For the revision of the single-member and multi-member constituencies, the Government presents a bill to the Chambers." In implementing this provision, the first composition of the Commission was updated by a decree of the Prime Minister dated March 18, 2022.

[28] Here is a summary of the main criteria established by the law:

a) The population of each uninominal and plurinominal constituency may deviate from the average population of the uninominal and plurinominal constituencies of the district by no more than 20 percent excess or deficiency.

b) In the formation of uninominal and plurinominal constituencies, the coherence of the territorial basin of each constituency is guaranteed, considering the administrative units on which they are based and, as a rule, its homogeneity in terms of socio-economic aspects and historical-cultural characteristics, as well as the continuity of the territory of each constituency, except in cases where the territory itself includes island portions.

c) Uninominal and plurinominal constituencies, as a rule, cannot divide municipal territory, except for municipalities which, due to their demographic size, include multiple constituencies within them.

d) In areas where recognized linguistic minorities are present, constituency delimitation, even in derogation from the guiding principles and criteria of the law, must consider the need to facilitate their inclusion in the fewest possible constituencies.

legislative delegation to the government. For future applications (b), according to Article 76 of the Italian Constitution which requires the delegation of legislative powers to the government be only for a defined period, the Chambers must employ the usual ordinary legislative procedure[29].

The first procedure was used to create the single-member districts used for the 2018 political elections[30]. However, a redesign of the districts soon became necessary.

Indeed, constitutional law number 1 of 2020, which came into effect after a popular referendum, mandated a reduction in the number of parliamentarians by more than one-third[31]. Consequently, it was necessary to proportionally reduce the number of single-member districts, which, according to the law, had to remain in the same proportions as previously established (i.e., 3/8 of the members of each chamber). In this scenario, however, a special law[32] stipulated to proceed according to the scheme that involves legislative delegation, granting the Government a specific delegation for this particular occasion[33]. Therefore, scheme (b) which envisions resorting to the ordinary procedure was not employed even in the second application of the district redesign system.

Certainly, the timelines of ordinary legislation would have been incompatible with the need to have the new single-member districts in place in time for the reduction in the number of parliamentarians to take effect. This reduction, in fact, would have been operative for the subsequent elections (scheduled for 2023 but actually held early in September 2022). According to the Constitution, when the President of the Republic dissolves the Chambers, he distributes the parliamentary seats among the regions (in the Senate) and the subnational constituencies (in the Chamber of Deputies), based on the latest published general census. It follows that, to avoid problems, in the Italian constitutional system, the map of the districts must always be updated. Furthermore, based on the law, he distributes the seats among the smaller multi-member constituencies designed within the subnational districts.

This exercise of redesigning the electoral districts, carried out in 2022 by the Commission based on the latest published general census, namely that of 2011. Thus, when the new census relating to the 2021 population was published in 2023, the need for a new redesign of the electoral districts became evident. The Commission addressed this in December 2023, delivering a new proposal to the Government. However, in this case, since a new ad hoc legislative delegation has not been approved,

[29] In essence, the 2017 law specifies the procedure that the 1993 law did not explicitly indicate but that one had to necessarily deduce from the system. Indeed, according to Article 3, paragraph 6 of Law No. 165 of 2017, "For the revision of the uninominal and plurinominal constituencies, the Government presents a bill to the Chambers".

[30] Legislative Decree No. 189 of December 12, 2017.

[31] See: M. CALAMO SPECCHIA, *The Future of Parliamentary Democracy in Italy Post-Referendum 2020. Suggestions from Comparative Constitutional Law*, in *Cogito-Multidisciplinary research Journal*, 2/2021, 77-98.

[32] Article 3 of Law No. 51 of 2019.

[33] Legislative Decree No. 177 of 2020.

the ordinary legislative procedure must be employed for the first time. Therefore, at the moment, we are awaiting the bill that the Government should submit to the Chambers. This is an urgent requirement because, in the event of an early dissolution of the Chambers, the electoral districts drawn up based on the 2011 census data are currently in force, while the Constitution requires the Head of State to allocate seats among the constituencies based on the 2021 data.

Of course, it is always possible for Parliament to grant a new delegation to the Government on a temporary basis. In that case, however, the delegation would concern a proposal already formulated by the Commission and – not now, but presumably at the time when the delegation would be approved – made known to the parliamentarians through the bill deposited with the Chambers by the Government. This makes the process of adopting the electoral districts more problematic. In fact, it is difficult to imagine that, once the Commission's proposal is known, parliamentarians from the majority will delegate the operation to the Government without conditioning modification of their own electoral district.

First and foremost, the new regulatory framework establishing the procedure for drawing electoral districts reiterates a pattern already criticized and present in all previous iterations: namely, it places the Government at the centre in the appointment of the member of the Commission. In this regard, the adopted scheme confirms the structure of the 2015 law, abandoning the one adopted in the 1993 legislation, which was much more convincing in terms of guaranteeing independence.

Even the role played by the Commission, at least as configured by Law No. 165 of 2017, does not have the centrality that was recognized by 1993 Laws No. 276 and No. 277 when it was formally tasked with indicating to the Government a division of the territory, and the Executive had to provide reasons to the Chambers to deviate from it. In the current configuration, however, the Commission performs a mere "support" role to the Government, which therefore appears to be the dominant force in the process. Indeed, with reference to the first exercise of producing the constituencies (during the Gentiloni Government in 2017/18), the Government modified the proposal of the Commission even before submitting it to the Chambers, demonstrating that if the Government wants, the Commission can be relegated to an ancillary role.

It is worth noting, however, that the need for neutrality and impartiality in the process of delineating the constituencies has been considered with particular attention in the adoption of the latest Legislative Decree No. 177 of 2020, currently in force (although it needs updating as it is based on census data from 2011); in that context, the Government interpreted its role solely as a guarantor of the process. This is apparent in at least three ways. First, the initial Commission, appointed by a center-left government, was not removed by the subsequent government (the Conte 1 Government, which excluded from its majority all the political forces that had supported the previous Government), except for one replacement due to resignation. Second, when the Commission expired, the new Government in office (the Conte 2 Government, composed of a majority that now included the center-left along with the

5 Star Movement), essentially confirmed the previous Commission, with few replacements, mostly justified by gender-balance reasons within the Commission. Third, the same government (Conte 2) merely limited itself to transmitting the choices of the panel of experts to Parliament and ensuring that the modifications proposed solely by the competent parliamentary committees were incorporated into the legislative decree. In this case, moreover, the Commission's proposal, untouched by the Government, received only one suggestion from the Chambers, regarding a minor issue related to the plurinominal constituencies (without any modification, therefore, concerning the boundaries of the uninominal ones), which the Government accepted without hesitation.

Nevertheless, this self-restrained attitude of the Government has been a voluntary choice. The guarantees of independence of the process that the Constitution requires should find coverage in the law.

Furthermore, the current process of drawing the electoral districts retains all the other highlighted flaws: there is no guarantee of certainty in the timing of their renewal, and it is entirely lacking in terms of involving minorities and even more so in terms of the transparency of the procedure.

6. *How to make the procedure for producing electoral maps more compliant with the Constitution: a more independent technical commission; a timelier procedure; greater transparency and participation*

Based on this reconstruction of the constitutional requirements for the redrawing process of electoral districts and on the basis of the accumulated experience recounted in the preceding paragraphs, it is possible to seek remedies aimed at improving the current procedure. In particular, the procedures established therein are certainly capable of improvement to enhance guarantees of transparency and participation, considered essential but lacking in the Italian current arrangement. Similarly, a lack of independence has emerged in the appointment procedures of the commission.

In fact, it is evident that based on these procedures, the allocation of constituencies is adopted through legislative decrees, based on the indications provided to the Government by the Expert Commission, and is essentially entrusted to the Government with full autonomy, with the possibility of disregarding the opinions of the competent parliamentary committees, albeit with the obligation to justify the reasons in a specific report to Parliament.

Moreover, since 2015 (Italicum law), the Expert Commission has been appointed by the government, contrary to the requirements of independence and neutrality. Also, the role played by the Commission, at least as configured by law No. 165 of 2017, does not have the centrality that had been recognized by laws No. 276 and No. 277 of 1993, when it was formally tasked with indicating to the Government a division of the

territory, and the Executive had to indicate the reasons to the Chambers if it deviated from it. In the currently prevailing configuration, instead, the Commission performs a mere "support" activity to the Government, which therefore appears to be the dominant force in the procedure.

By way of reform, the appointment of members of the technical commission should not be of governmental origin but should be referred to the parliamentary sphere and entrusted to a vote by a qualified two-thirds majority of each of the Constitutional Affairs Committees of the Chamber of Deputies and the Senate. With this method, the appointment of the body would be removed from the will of the political forces of the majority alone, as the involvement of the opposition is essential. Indeed, what would be replicated is the bipartisan appointment system that was set up in 1993, entrusting the appointment of members to the Presidents of the two Houses (in a period during which the presidents of the Chambers, by convention, were agreed upon jointly by the majority and the opposition). With the demise of this convention, the supermajority of two-thirds of votes in favour in the two relevant parliamentary committees seems to be the best surrogate for the rule according to which the appointment was attributed to the Presidents of the Houses[34].

Specifically, the Permanent Commission for the revision of electoral districts should be composed – as it is now – by the President of the National Institute of Statistics, who chairs it, and by ten experts of recognized independence and proven competence in the following fields: statistics, economic and political geography, constitutional law, and political science[35]. It is clear, indeed, that the technical requirements to be met by the appointed individuals must be strengthened, to prevent the appointment of members to the two commissions, although aimed at enhancing the bipartisan nature of the appointment, from becoming politicized.

The members of the Commission should be elected for a longer period (every six years, perhaps), five by the Constitutional Affairs Committee of the Chamber of Deputies and five by the Constitutional Affairs Committee of the Senate of the Republic, by a two-thirds majority of their respective members. Commission members

[34] The importance of genuinely independent commissions in the electoral boundary drawing process and their removal from the sphere of political control by parliamentary or government majorities is well demonstrated by the Canadian experience. In Canada, such a move was adopted in 1964 and was dubbed the "electoral boundary revolution" by RK Carty in "The Electoral Boundary Revolution in Canada" (1985) 15:3 Am Rev Can Stud 273. These reforms eliminated gerrymandering, "an impressive feat given how much that practice had been a staple of Canadian politics since Confederation," as stated by Michael Pal. (2015) 61:2 McGill LJ 231 — (2015) 61:2 RD McGill 2). The same observation is also evidenced by the American experience, which, in order to address the issue, increasingly resorts to the introduction of independent commissions. See: Bruce E Cain, “Redistricting Commissions: A Better Political Buffer?” (2012) 121:7 Yale LJ 1808 at 1812–21; D Theodore Rave, “Politicians as Fiduciaries” (2013) 126:3 Harv L Rev 671 at 680, n 38, 729–35; Nicholas O Stephanopoulos, “Our Electoral Exceptionalism” (2013) 80:2 U Chicago L Rev 769 at 778–80.

[35] As for the permanent nature of the revision that should now be required, I refer to A. MAZZOLA, *The Revision of Electoral Districts in Italy: the New Permanent Census System within the Framework of Constitutional Provisions on Representation*, in this issue.

should be appointed by decree agreed upon by the presidents of the Senate of the Republic and the Chamber of Deputies. The members should remain in office until the appointment of new members, thus ensuring continuity in the revision process. These are a series of provisions aimed at increasing the level of independence and preventing the Commission from consistently operating even in cases where agreement between the majority and the opposition for its renewal proves to be complicated.

In addition, it is necessary to reconsider the legislative rank of the act currently used to produce electoral geographies.

In concrete experience, the process of defining electoral constituencies initiated since 1993, with the so-called Mattarellum electoral law - except for the period when electoral law No. 270 of 2005 was in force, which did not provide for single member districts - then with the law 165 of 2017 and, most recently, with law No. 51 of 2019, has been to use legislative delegation, although, with reference to the update required by the new census of 2021, the Government seems inclined to resort to the default rule, namely the use of ordinary legislative procedure (unless the Government's attitude is merely due to negligence).

Whether using the legislative delegation system or employing the ordinary legislative procedure, the issue of the timeliness of renewing the single-member districts and the need to avoid partisan influence in the creation of electoral maps are not guaranteed. In fact, both ordinary laws and legislative decrees are not obligatory acts, so it is always possible that the process of producing districts may be interrupted and not completed on time. Moreover, both procedures are subject to the majority rule, which allows for the dominance, in decision-making, of the political majority of the moment.

Therefore, given the impracticality of determining districts through legislation and the impossibility of a "permanent delegation," a different rank (sub-legislative) should be attributed to the measure that redefines district boundaries, similar to that of the act determining the number of seats allocated to subnational constituencies in accordance with Articles 56 and 57 of the Constitution.

In other words, the new electoral districts should be determined by the same decree of the President of the Republic that, at each call of the electoral assemblies, provides for the allocation of seats. The issue of lowering the source to a secondary level is not incompatible with the constitutional system. In electoral matters, there is no absolute legislative reserve but a relative one, which allows us to argue that the transition of the normative instrument for the production of districts from the primary to the secondary source does not encounter formal admissibility obstacles, provided that the law further specifies and refines the criteria to be followed in the production of districts.

In essence, for the act establishing the districts to be timely, it must become obligatory. This requires that it does not have legislative rank, as acts of such rank are by their nature discretionary in their adoption. The point then becomes to adopt a

system that does not resort to legislation but that does not sacrifice the role of Parliament.

In this light, the procedure should formalize a process centred in the parliamentary sphere with the involvement of the opposition, even though the procedure does not culminate in an act of legislative rank. The Government should be limited to deliberating the proposals of the expert commission, appointed by a supermajority in the parliamentary committees, in the Council of Ministers, with only the modifications unanimously approved by the relevant parliamentary committees themselves by, again, a supermajority. This arrangement would place Parliament at the center of the division of the territory into electoral districts, without governmental interference, without subjecting the entire process to the will of the majority alone.

More in particular, regarding the procedure for defining districts, the proposal of the expert commission should only be subject to modification by parliamentary committees, to which the final decision on the choices made should belong. They would have the opportunity to request only specific and unanimous changes, which would then be mandatory included in the Council of Ministers' deliberation. For such changes, a qualified two-thirds majority of the members would be required. This way, the participation of all political forces, and not just the majority, in the political decision concerning the territorial boundaries of electoral districts would be ensured.

More specifically, the procedure should include the following steps: within a term from the publication of the results of the permanent census of the resident population as reported by the most recent available publication of the National Institute of Statistics, even if not published in the Official Gazette of the Italian Republic, the Commission presents to Parliament a proposal for the revision of electoral districts, consisting of tables determining, for the Chamber of Deputies and the Senate of the Republic, the single-member districts including the names of the municipalities or sub-municipal areas included in each district as well as the tables determining the multi-member districts with the indication of the single-member districts included in each of them. The proposal should be accompanied by a Report that gives an account of the activities carried out and the reasons supporting the proposed solutions.

Upon proposal by the Prime Minister and the Minister of the Interior, the Council of Ministers deliberates the approval of the tables proposed by the Commission with only the possible modifications approved by both parliamentary committees, by a two-thirds majority of the members, and transmitted to the Government within thirty days from the date of receipt of the same tables, also ensuring publication on the institutional website of the Government.

And finally, there is a need to intervene to improve transparency and public participation regarding the procedure for producing electoral districts[36].

[36] R. GREEN, *Redistricting transparency & litigation*, in *Syracuse Law Review*, 71/2021, 1121-1177 refers the importance of a transparent drawing of electoral districts in producing more equal constituencies.

From these perspectives, indeed, the Italian procedure has proved to be quite disappointing. The work of the independent Commission is carried out behind closed doors. Neither stakeholders nor members of Parliament are allowed. The Commission concludes its work without any discussion with either institutions or civil society. It delivers its work to the Government, which then submits it to Parliament. Regarding objections that may be raised in Parliament, the Commission has no further say. At this stage, parliamentary requests for amendment are subject to political evaluation, with no provision for access to the technical and neutral instance that the commission should represent.

For the sake of completeness, it is worth noting two positive signals regarding the production of electoral constituencies following the reduction in the number of parliamentarians in 2021. Unlike the case with the decree of 2018 and the ongoing procedure for renewal based on new census data, on this occasion, the Government at least published the entire report along with its related databases as soon as the Commission delivered it, making all the material produced available to the public. Additionally, in the Prime Ministerial Decree renewing the Independent Commission, it is provided for the first time that the Commission, if it deems it necessary, especially in doubtful cases, could resort to consulting stakeholders before choosing among several abstractly possible options. Despite this positive innovation, it is worth noting that the commission has never utilized it, thereby demonstrating a greater openness to transparency and participation by the Government (Conte 2) that established the rule but not among the members of the Commission.

Furthermore, openness to transparency and participation is a constant feature of all best practices at the international level, as extensively demonstrated, in the case of Canada, by Michael Pal's work[37], and more generally by the research of Rebecca

[37] Each Canadian Commission, in particular, consults Canadians through public hearings and examines objections from parliamentarians; for further information, see The Role and Structure of Elections Canada. In particular, the Commission publishes proposals (including new maps) in the Canada Gazette and on its website, and advertises them in newspapers. Simultaneously, it invites Canadians to submit comments and opinions in public hearings, which may also be attended by Members of the House of Commons. These hearings provide an opportunity to participate in the electoral map redrawing process and are usually held at various locations across the provinces. Anyone wishing to contribute their ideas must inform the Commission in writing within 23 days of the publication of the proposals. For more information on the origin of the provisions on public participation, please refer to the History of Representation in the House of Commons of Canada section on the official website of Elections Canada. After the hearings, the Commissions decide whether changes are needed to their initial proposals. They then prepare their reports and provide them to the Chief Electoral Officer of Canada, who forwards them to the Speaker of the House of Commons for presentation. Members of the House of Commons have 30 days to review the reports and lodge objections with a designated Committee of the House. This Committee then has 30 sitting days to review the proposed maps in light of the objections received from Members of Parliament. The objections, committee proceedings, and evidence obtained are sent to the Chief Electoral Officer and referred back to the relevant Commission, which must consider and decide on them within 30 days. The Commission may modify its report accordingly if deemed necessary.

Green[38], who also highlights the New Zealand case. Significant attention to transparency has also been devoted to the constituency boundary review system employed in the United Kingdom[39].

Most importantly, the most compelling reason to increase transparency and participation in the constituency updating procedure lies in the fact that, substantively, it is always challenging to achieve optimal electoral geography—namely, one that does not inherently favour or disadvantage any of the contenders. Indeed, the myth of nonpartisan line drawing in the production of electoral constituencies has long been discussed[40]. However, while obtaining the best solution substantively may be complicated, what can reasonably be achieved is procedural fairness. A more transparent and participatory procedure can compensate procedurally for what is not guaranteed substantively. Through a process that clearly brings all interests at stake into play and forces process actors to dialectically justify their choices, a more transparent and participatory procedure can level the playing field. Essentially, therefore, opting for a participatory and transparent procedure aligns with enhancing the technical and bipartisan aspect in configuring the composition and role of the technical Commission.

In summary, placing greater emphasis on the technical and non-partisan nature of the Commission, adopting procedures that ensure timeliness in the production of electoral constituencies, and implementing measures to increase participation and

[38] The process of electoral boundary review varies from state to state, differing both in terms of the entities entrusted with it and the methods by which it is carried out. Typically, all states involve some form of stakeholder participation, including:

Identifying local communities: Many states require consideration of "communities of interest" in the redistricting process. Since such communities can be difficult to identify and locate, public involvement is crucial. Members of local communities can assist by delineating boundaries that should be maintained within the same district or identifying appropriate locations for potential division. Stakeholders can agree on community boundaries through town hall meetings, community forums, and with the assistance of non-profit organizations, often using simple technologies.

Participating in public hearings: Many states hold public hearings as part of the redistricting process. The schedules for these hearings are often published on dedicated websites.

Submitting community maps: During public hearings, and sometimes in a separate process, it may be possible to submit maps, including those of individual communities, to the entity responsible for redrawing boundaries. These maps may be accompanied by petitions supporting the proposed boundaries and can serve as useful references for authorities. In case of disputes, courts may use them as a guide. No particular formalities are required for map submissions; it may be sufficient to draw boundaries with pen and paper or use online tools, such as those developed by the Independent Redistricting Commission of California.

Additionally, stakeholders can utilize media coverage of the redistricting process by submitting comments, articles, or letters to the editor on aspects they consider relevant and impactful to their communities.

[39] HOUSE OF COMMONS LIBRARY, *Constituency boundary reviews and the number of MPs*, November 20, 2023.

[40] P. J. TAYLOR, and G. GUDGIN, *The myth of non-partisan cartography*, Urban Studies, 1976, 13-25; G. GUDGIN, and P. J. TAYLOR, *Seats, votes and the spatial organisation of elections*, Pion, London, 1979; P. J. TAYLOR, and R. J. JOHNSTON, *Geography of elections*, Holmes and Meyer, New York, 1979, Chapter 7-8.

transparency appear to be the most suitable measures, in light of both Italian and foreign experiences, to ensure better effectiveness of the constitutional principles underlying the matter. Particularly, these measures can be articulated in accordance with the recommendations of the Venice Commission.

Alessandra Ferrara[*]

Drawing electoral geographies. The case of frozen criteria in Italian electoral law[**]

SUMMARY: 1. Introduction. – 2. Some preliminary procedural elements for the successful drafting of electoral geographies. – 3. Drawing of one- or multi-member districts. Applicability of the geo-statistical criteria set forth by the law. – 4. Drawing of multi-member districts. Applicability of the criterion relating to the number of seats. – 5. Conclusions.

ABSTRACT: ***This work examines various aspects of electoral geography drafting, with a specific focus on geo-statistical criteria and seat distribution. Following a general introduction, it presents some preliminary procedural elements necessary for the proper delineation of electoral districts. It then analyzes the applicable criteria for defining single or multi-member districts, according to current regulations. Subsequently, attention shifts to the subdivision of multi-member districts and the applicability of the criterion related to the number of seats.***

1. *Introduction*

The national voting system (parliamentary elections), in its current form (Law No. 165/2017, the so-called "Rosatellum-bis") is a mixed system that provides for the election of parliamentary representatives partly by the majority method (first-past-the-post), in one-member districts, and partly by the proportional method, in multi-member districts. The number of elective seats is set by the Constitution and, as a result of the Constitutional Reform dated 19 October 2020, was decreased by about 1/3, reducing the number of deputies from 630 to 400 and elective senators from 315 to 200[1]. Based on the number of seats due to each electoral district, the electoral law sets criteria (numerical and geographical) for the drawing of electoral districts. The first law that provided for the draw of districts involving an experts Commission was implemented in 1993 (the so-called "Mattarellum"[2]). Since then, the main elements affecting the draft of electoral geographies have on one side remained largely the same, as far as the defining principles and criteria, and on the other side have been substantially altered due to the legislative developments, with both changes in the number of electoral districts/seats and in the shares of seats to be allocated by majority or proportional method. Over time, the combination of these disjointed elements has led to critical issues in the application of the law as well as in the

[*] Research Director in Istat, Directorate for Environmental and Territorial Statistics.

[**] This contribution is subject to a peer review process according to the Journal's Regulations.

[1] There can be a small number of life senators outside of the scope of this analysis.

[2] Law No. 276 and Law No. 277, both dated 4 August 1993.

interpretation of the legal framework itself. The following paragraphs will address the critical points related to the draw of electoral districts, starting with a digression on some relevant procedural elements.

The purpose of this brief paper is to share, with expert in different fields and with various views on the topic of electoral districts, some of the factors related to the complex operation of drawing electoral geographies. The above issue seems to be of minor interest compared to the choice of voting system or the electoral outcomes, but in fact, as will be explained, has serious implications for both.

2. *Some preliminary procedural elements for the successful drafting of electoral geographies*

A first element of interest concerns *the experts Commission* called upon to draft a proposal for electoral geographies; specific regard is given to its appointment and the operational methods that allows for its work. Since 1993, electoral laws provided for the involvement of a Commission composed of 10 experts (generally geographers, demographers, political science experts, jurists, statisticians, methodologists, sociologists, technicians in the relevant subject area) and chaired by the president of the National Institute of Statistics (Istat) for the purpose of drafting a proposal for electoral geographies.

In the electoral law known as "Mattarellum", the appointment of the Commission was under the Presidents of the Parliamentary Chambers (to be reappointed at the beginning of each legislature), in order to guarantee the impartiality and pluralism of its work, while it subsequently passed to the Government, which grant it a three-year, renewable, term, starting with the law known as "Rosatellum-bis" (since 2017 and up to the present). There is no need to stress the importance of the independence to be granted to this Commission[3] and/or its bipartisan composition[4].

[3] In addition to the Commission's independence, other elements to be considered in guaranteeing the impartiality of the final draw of the districts arise from the appointment process and the subsequent government's power to amend the proposal electoral geographies. The *Rosatellum bis* states that the Government can either take up the proposal in forwarding it to the relevant Parliamentary Commission or, before, make its own comments. Following the approval of the proposal, or the request for possible amendments by the Parliamentary Commissions, the Government can choose whether to adopt it or reject it, in this case stating its reasons in a report that it issues along with the draft decree establishing the new electoral districts.

[4] See L. Spadacini (2017), La proposta di riforma elettorale e i suoi profili di illegittimità costituzionale, audizione informale in tema di riforma elettorale al Senato della Repubblica 1ª Commissione permanente (Affari costituzionali, Affari della Presidenza del Consiglio e dell'Interno, Ordinamento generale dello Stato e della Pubblica Amministrazione), giovedì 19 ottobre 2017, 8-9 and, for a commentary review on Law No. 165/2017, which also covers the issue of the impartiality of the Commission, D. CASANOVA, *La delega legislativa per la determinazione dei collegi elettorali: profili critici di metodo e di merito*, in Costituzionalismo.it, n. 1/2018.

Originally, the economic resources needed for the Commission's functioning were supposed to be drawn from Istat's budget, subsequently (from 2015 onward) the appointing Prime Minister's Decree always stated that the Commission shall operate without costs for public finances. This initially led to the practice of having a technical-scientific group implemented by Istat in support of the Commission, with the task of ensuring the technical tooling and processing of all the geographic layers and statistical databases needed to draw the districts. The above-mentioned practice was only formalized in 2022[5] when its official implementation as a dedicated task force[6] was laid down. This practice is not unique and differs in the various legal systems where it is applied; in the UK (which has a well-established majoritarian electoral tradition[7]), for instance, far greater care (also in terms of dedicated human and financial resources) is guaranteed by the legislator to ensure the appointment and operability of independent Commissions in charge of the drafting and updating of electoral geographies[8].

The issue of the amount of time granted to the Commission in order to draft the proposed geographies deserves a separate thread. Given the frequency of the updating of election laws in our country and the fact that the approval of the provisions, especially in 2015 and 2017, occurred very close to the election deadline (contrary to every legal recommendation on the matter)[9], the amount of time the Commissions were made available for their activities has frequently been very limited (to the extent of being impossible to meet the deadlines)[10], to the detriment of the development of orderly and thoughtful work. However, among changes in the regulatory framework and electoral districts (including the introduction of the Overseas District in 2000) and the updating of the census database, the Commissions have operated by drafting new proposal of electoral geographies in October 2005 and July 2015 (in both cases not applied)[11], in November 2017 and December 2020, and

[5] Prime Minister's Decree 18 march 2022.

[6] Since 2003, the author has headed this team, which provides support to the Commission in submitting a new proposal for electoral districts.

[7] See UK Boundary Commissions and a cross-country comparative examination.

[88] A. AGOSTA, *Elezioni e territorio: i collegi uninominali tra storia legislativa e nuova disciplina elettorale*, in M. Luciani, M. Volpi (eds.), *Riforme elettorali*, La Terza, Roma-Bari, 1995, 195

[9] VENICE COMMISSION, *Code of good practice in electoral matters*, 25 CDL-AD(2002)023rev2-cor-e, 2002, 25.

[10] For the 2017 proposal, it was necessary to activate a technical working group (Prime Minister's Decree dated 23 October 2017), pending the appointment of the Commission (Prime Minister's Decree dated 17 November 2017) required by law, with the task of arranging the preliminary investigation preparatory to the Commission's activity. The latter formally only operated for one week, a totally insufficient amount of time to ensure the complex of work in the absence of the prodromic activity of the working group, and in any case with no time commensurate with its tasks, which was bound to the release of the proposal by 21 November 2017.

[11] In 2005 because of the switch to a pure proportional electoral system and in 2015 because it was in application of an electoral law substantially connected with the Constitutional Reform (so-called "Renzi-Boschi"), which was later not adopted after the 2016 popular referendum.

the current Commission has just completed the drafting of the new one (5 new and meaningful different electoral geographies, the latest 3 in less than 7 years).

A second issue, mentioned above, relates to electoral constituencies. The Commission is not vested with the drafting and possible updating of the constituencies, which are pre-determined by the laws, but is affected by their variation in number and geography in terms of seat distribution.

There are currently 28 constituencies for the Chamber of deputies and 20 for the Senate of the Republic[12].

The amendment introduced by Law No. 165/2017, which increased the Chamber constituencies by one unit, forming four instead of three of them in Lombardy, and changed the boundaries of Latium 1 and 2 and Sicily 1 and 2 constituencies (with substantial population reduction in the case of Latium 1), effectively resulted[13] in the allocation of one more seat for the whole of Lombardy Chamber constituencies (in detail, 2 more seats to be elected in multi-member districts and 1 less in one-member constituency), in the reduction of 3 seats in Latium 1 (2 to be allocated in multi-member districts and 1 in one-member constituency) all to benefit the Latium 2 district (which currently includes part of the Rome metropolitan area, as well as the other four Latium provinces), and, due to the mechanism of population remainders (see below, par. 3), in changes that also affected constituencies not directly concerned by the amendments: Sardinia lose 1 seat in multi-member district and Calabria, with unchanged seats, "gained" 1 one-member district and lose a seat to be elected by proportional system.

On the other hand, the amendment affecting the two Sicilian constituencies (limited to a single municipality) had no effect in the respective distribution of seats in the Chamber.

Given the substantial differences that can result in terms of seats allocation from changes in the number and/or geography of constituencies, it would seem reasonable

[12] From 1948 to 1993, the subdivision of the national territory into constituencies for the purpose of electing the Chamber of deputies echoed the one first adopted in 1946 with the election of the Constituent Assembly: the national territory was divided into 32 constituencies, each comprising one or more provinces. Subsequently, first the Mattarella Law (No. 276/1993 and No. 277/1993) and then the Calderoli Law (No. 270/2005) split national territory into 27 constituencies (each formed by the union of whole provinces), to which the Overseas constituency was added since 2000. Starting from 2017, the "Rosatellum-bis" (Law No.165/2017) splits the national territory into 28 constituencies (plus Overseas), and the territory of the metropolitan cities of Milan and Rome, as well as the provinces of Bergamo, Brescia, and Caltanissetta, is distributed over more than one constituency. For the election of the Senate of the Republic, there have always been 20 constituencies and they coincide with the territories of the administrative regions.

[13] The allotment simulation is carried out by comparing the current scenario (4 sub-national constituencies in Lombardy; Lazio 1 including only part of the metropolitan area of Rome; municipality of Niscemi in Sicily 2 constituency) and the previous situation (3 sub-national constituencies in Lombardy; Lazio 1 coinciding with the entire metropolitan area of Rome; municipality of Niscemi in Sicily 1 constituency), applying the reduction in the number of seats provided by the 2020 Constitutional Reform and by using the 2021 census population data.

to introduce a criterion, e.g., demographic, to evaluate whenever their re-determination is appropriate or necessary, without incurring the suspicion of gerrymandering[14] operations.

Still exemplifying and considering the current scenario, in addition to Lombardy (9.943.004 inhabitants as of the 2021 census) divided into four constituencies, five regions are divided into two sub-national constituencies (Piedmont, Veneto, Latium, Campania and Sicily) with a population range varying from 5.714.882 total inhabitants in Latium to 4.256.350 inhabitants in Piedmont. It turns out that the Emilia-Romagna Region (4.425.366 inhabitants), although its population is higher than that of Piedmont by almost 170.000 inhabitants[15], has a single constituency, outlining a potential discrepancy due to the lack of an explicit criterion underlying the constitutions' definition.

Likewise, as the law provides that, when a new census population is available, electoral geographies should be updated in order to verify their compliance with the parameters required, it would also seem appropriate to submit to the same "maintenance practice" the geography of the electoral sub-national constituencies[16] .

One final remark on constituencies relates to the number of seats, which is determined through the application of the "*method of integer quotients and highest remainders*" to census population data (as per the most recent Istat publication in the form of a decree of the President of the Italian Republic). T

he population of each constituency is divided by the national ratio (total population/total seats, taking into account the specific provisions set by the Constitution for the election of the Senate) and each is then allocated with the (whole) number of seats resulting from the application of the ratio.

The remaining seats are thereafter allocated, upon full allotment, to the constituencies with the highest remainders in the ratio calculation According to the law, the President of the Republic allocates the number of seats due to each electoral constituency by Presidential Decree issued before each political election.

Although the Constitution (Art. 56 and 57) indicates the method of allocation, the electoral laws do not identify the body that proceeds to a simulation of the distribution among the constituencies of all seats, and, among each constituency, calculating how many one-member districts and, by difference, how many seats has to be allocated in multi-member districts, even though this operation is crucial and preparatory

[14] The expression means the practice of drawing boundaries in electoral geographies specifically to the purpose of yield an outcome, in this case a possible predetermination of the distribution of seats among constituencies.

[15] In 2017, based on the latest available 2011 census population, Piedmont's population exceeded Emilia-Romagna's one by nearly 22.000.

[16] It should also be noted that the number of constituencies, within each region, affects both the likelihood of seat allocation (in favor of the smaller ones - and thus also the more segmented regions - due to the distribution system based on higher remainders), and, politically, the chances of the smaller parties to gain a seat (to their detriment in the demographically smaller constituencies, also due to the method of seat allocation in the proportional distribution as provided by the electoral law).

(prodromal?) to the formation of the proposed electoral districts. In the existing mixed electoral system, in order to guarantee the presidential prerogative, a suitable electoral geography (in terms of identification of both one and multi-member districts for each Chamber) must be available at all times to enable voting. However (as detailed below), it cannot be determined without a numerical simulation of the number of seats allocated to each district.

The burden of such simulation is not specified in any normative reference as it's not clear who should be in charge of it.

In the last few years various players have informally applied themselves: research offices of the Chambers, Government departments, the Commission itself with the support of the Istat technical group, and, to the author's knowledge, no inconveniences have occurred[17]

Before turning to the specific examination of how the districts are drawn, it is suggested that, in a future reformulation of the relevant legislation, the allocation issue is explicitly clarified for the sake of an organic and transparent drafting process, specifying the role and tasks of each actor involved.

3. *Drawing of one- or multi-member districts. Applicability of the geo-statistical criteria set forth by the law*

In contrast to the regulatory developments affecting what has been addressed so far (appointment and support for the expert Commission's activities, timeline set for the drafting of the proposal of new electoral geographies, change in the number and boundaries of electoral districts, change in the number of elective seats), the current electoral laws refers to principles and criteria which have remained very stable over time with regards to the drawing of the districts.

Firstly, it is pointed out that the evaluation of such an approach cannot be positive since it seems short-sighted to assume that it is possible to govern with frozen rules in a greatly changed framework.

In particular, the number of one-member districts to be defined in the Chamber and the Senate (Table 1) has decreased from 475 and 232 (Mattarella Law dated 1993) to 147 and 74 (current electoral law[18], which provided for the reduction of the number of MPs), respectively.

[17] Even though in 2003, when updating the electoral districts of the Mattarella Law (following the publication of the 2001 census population and the introduction of the Overseas District) there was a lively debate within the experts Commission, of which the Constitutional Affairs Commission of the Chamber was invested. At that time, the updated proposal for new districts was forwarded by the Commission, albeit without unanimity in the interpretation of the seats to be allocated to each constituency. The electoral geographies were then not adopted because a different electoral system was adopted (Calderoli law No. 270/2005) providing for a pure proportional system, despite a majority bonus).

[18] Law No. 165/2017 with application of Law No. 51/2019 and Constitutional Reform dated 19

Table 1 - Seats number (total, in one- and in multi-member districts), national ratios, multi-member districts number by Electoral laws and Chamber of Italian Parliament

ELECTORAL LAWS	SEATS									
	TOTAL				in SINGLE-MEMBER DISTRICTS		in MULTI-MEMBER DISTRICTS			
	Chamber of deputies		Senate of the Republic		Chamber of deputies	Senate of the Republic	Chamber of deputes		Senate of the Republic	
	No.	National ratio (inhab.)	No.	National ratio (inhab.)	No.	No.	No.	Multi-member Districts (No.)	No.	Multi-member Districts (No.)
Mattarella Law (No. 276/1993; 277/1993)	630	90.124	315	180.248	475	232	155	-	83	-
Rosato Law (No. 165/2017)	618	96.171	309	192.342	232	116	386	63	193	33
Rosato Law + Law No. 51/2019	392	151.617	196	303.233	147	74	245	49	122	26
+ Constitutional Reform Law No.1/2020	392	150.587	196	301.174	147	74	245	(a)	122	(a)

(a) Under approval.

This greatly affects the average size of the districts to be outlined (in geographic and demographic terms). Over the 30-year period considered, the national quotient for the allocation of total seats grows from about 90.000 to 150.000 inhabitants in the Chamber of deputies and from 180.000 to just over 301.000 inhabitants in the Senate (+67%); the theoretical average size of the one-member districts of the two parliamentary chambers rises from less than 120.000 to more than 400.000 inhabitants and from less than 250.000 to nearly 800.000 inhabitants, respectively.

As a matter of fact, considerably larger areas are being drawn for which the applicability and adherence to the criteria originally set in the 1993 law is becoming more diluted over time.

Examining in detail the geo-demographic principles and criteria (Table 2), the only relevant change introduced over time relates to the allowable distance from the inhabitant value of each district in a constituency compared to the average population value of the districts in the same constituency (*criterion 1* in the table).

This value doubles from +/-10% (1993's thresholds) to +/-20% (thresholds considered in the present electoral law).

October 2020.

Table 2 - Law No. 165/2017 and Law No. 276/1993 and 177/1993, comparing districts' drawing criteria

Districts Single-Member (S) Multi-Member (M)	Criteria (Law No. 165/2017)		Chamber of deputies	Senate of the Republic	Criteria (Law No. 276/1993 - Chamber Law No.277/1993 - Senato)
S and M	1	Allowable deviation from the population mean value in each district of the same constituency = +/- 20%	Mandatory		+- 10%
S and M	2	"Ensuring the consistency of the territorial basin"	Mandatory		Unchanged
S and M	3	"Considering the administrative units layers on which [the districts] are located and the Local Labour System"	Mandatory	-	Districts would not normally be composed of municipalities belonging to different provinces
S and M	4	"Ensuring homogenety in the economic-social aspects and historical-cultural characteristics of the districts"	As a rule	As a rule	Unchanged
S and M	5	"Do not to divide a single municipality/city in multiple districts"	As a rule		It specifies the need of drafting single-municipality district or, where necessary, to include in the city district other municipalities belonging to the same province.
S and M	6	"Inclusion of each recognized linguistic minorities in as few constituencies as possible"	Possible application as an exception to the other criteria		Allowable deviation from the population mean value in each district of the same constituency = +/- 15%
S	7	"Consistency with Senato 1993 electoral geographies in the new drawing of Chamber districts"	The condition does not occur	-	-

Changing this parameter only seems to result in a "coarseness in definition", also risking significant distortions on the citizens' equivalence of the vote: as it is allowed to draw in the same constituency one district with a population up to 20% higher than the average and another up to 20% lower, it is assumed that, in the same constituency, for the election of a representative in the first one-member district will be necessary to get the vote of about 50% more electors compared to what would be required for the second one. Moreover, since the averaging applies within each constituency, the demographic delta between different districts nationwide could be even larger[19]. Undoubtedly, those who have to deal with district' drafting have higher degrees of freedom, and this indirectly increases the chances that districts may be drafted in a non-neutral way. Criterion 1 is mandatory (no derogation from it is allowed, except when there are linguistic minorities - see below).

Moving on according to the order of criteria stated in the law, "ensuring the consistency of the territorial basin" (*criterion 2*) firstly involves the definition of what the lawmaker means by this wording (useful, but not simple). Over time the Commissions have considered different factors, all of geographical nature, tracing the assessment back to the shape and the internal accessibility of each district (the local

[19] Also on this see the guidelines of VENICE COMMISSION, *Code of good practice in electoral matters*, 7.

administrative units – LAU – belonging to, with respect to a LAU considered to be the core of the constituency). Other geographical homogeneity characteristics were excluded (e.g., urban/rural predominance, degree of population density, etc.). All of the above was done considering that a district represents a "social place" where people's lives are carried on, certain services must be guaranteed and community needs are expressed[20]. Therefore, it does not seem useful to distinguish places solely by physical characteristics, investigating instead the possibilities of gravitation, or otherwise the functional relationships between different places. The proposed indicators (sometimes used in a complementary form, sometimes exclusively) give an account of the "relational potential" of any given area. The shape of constituency, which has to be kept compact, potentially comparable to that of a polygon defined by isochrones of travel times, also guarantees from the application of gerrymandering practices (previously mentioned).

In *criterion 3* the above finds other underlining in "the need to consider the administrative units layers on which [the constituencies] are located and the Local Labour System – SLL"[21]. Adherence to the administrative units on which the constituencies are located (which is inexplicably provided only for Chamber constituencies in "Rosatellum-bis") also relates back to the concept of accountability of mps' action in these areas.[22] It should be noted that in the "Rosatellum-bis", which followed the approval of Law No. 56/2014 so-called "Delrio" regarding the rearrangement of the provinces, there is no explicit reference to provinces and metropolitan areas (CM) in the setting out of the criteria and guiding principles for the drafting of electoral constituencies (unlike in the Mattarella Laws of 1993 where it was provided that constituencies would not normally be composed of municipalities

[20] This approach appears to be in agreement with the sociological theory proposed by E. Durkheim, according to which the voter is not regarded as an individual independent of the community in which he or she lives, works and operates, but on the contrary, it is asserted that this very belonging conditions his or her actions. Durkheim places the voter in relation to his or her district, understood as "a constituted, homogeneous group, permanent one that does not materialize for a single instant just for the day of voting. In this case every individual opinion, since it is formed in the bosom of a collectivity, has something collective. E. DURKHEIM (1890–1900), *Lezioni di sociologia. Per una politica giusta*,1950, trad. it., 1973. Orthotes Editrice, 2016, 107.

[21] Labour Market Areas or Local Labour Systems (SLL in Italian) are sub-regional areas where the bulk of the labour force lives and works, and where establishments can find the main part of the labour force necessary to occupy the offered jobs, based on urban areas and their commuter hinterland. Outlined from census data, have no legal status. However, they give an alternate view of urban life as their boundaries are tied not to arbitrary administrative limits but socio-economic ties. See ISTAT, *Labour Market Areas*, 2019.

[22] On the topic of provinces considered as identity places of communities and other forms of association involving municipalities see C. BACCETTI, *Il capo espiatorio. La Provincia nell'evoluzione del Sistema politico italiano*, in *Istituzioni del federalismo*, n. 2/2014, 7-11; F. Spalla (ed.), *Accorpamenti comunali e riassetto dei sistemi di governo locale*, nota 2-2021 *Fondazione Giandomenico Romagnosi*; G.C. Ricciardi, A. Venturi (eds.) *La riorganizzazione territoriale e funzionale dell'Area vasta. Riflessioni teoriche, esperienze e proposte applicative a partire dal caso della Regione Lombardia*, Giappichelli, 2018.

belonging to different provinces). On the other hand, Prime Minister's Decree dated 18 March 2022 contains some clarifications which explicitly call out the need to take the above-mentioned administrative levels into account. In fact, it makes explicit to "prioritize solutions that keep intact provinces/metropolitan areas, SLL, other sub-provincial territorial division established by local governments for general purposes, mountain communities, unions of municipalities or aggregates of the aforementioned partitions". Thus, it is foreseen to consider unitarily territorial division that fall within the same administrative context (e.g., for service delivery) and local systems, by their own definition places where people's daily lives are related (functional areas defined by systematic home-work/study travel). The increased demographic size of the constituencies facilitates in many cases the compliance to provincial limits in the drafting of one-member Chamber constituencies and the Commissions have always maximally sought it in the drafting of multi-member districts too. It remains to be answered whether it is preferable to bring the upstream criterion to prevail in the drafting of one-member districts or to make this parameter prevail in the drafting of multi-member districts by making them coincide with entire provinces and given by the sum of inter-provincial one-member districts.

Although not formally foreseen as a criterion[23] (except partially in the seventh criterion in the chart above, the application of which, moreover, does not occur in practice) the Commissions have also always taken into account the respect of previous electoral geographies and the *consistency between the geography of the Chamber and Senate districts*, always in order to respect the integrity of the "social places" (above mentioned) over time established and ensure *consistency between electoral base for the election of the two parliamentary chambers*.

The main critical issue in the practice of drawing districts is the application of *criterion 4*, both theoretically, where a hypothetical homogeneity is assumed to be sought in the economic-social aspects and historical-cultural characteristics of the delimited areas, as well as in concrete, where this is to be sought for districts that, in the case of one-member Chamber and Senate, now have an average size of around 400 and 800 thousand inhabitants, respectively, and, in the case of multi-member districts, well in excess of one million (often overlapping the entire electoral subnational constituency).

Several factors complicate the applicability of this criterion given the internal inhomogeneity of demographic partitions of such a size (in terms of economic-social and historical-cultural characteristics); conceptually, Commissions have interpreted the legislator's intent as referring to the search of relative uniformity between different districts (in the same subnational constituency) with non-polarized distribution of the degree of heterogeneity.

A second factor limiting the applicability of the criterion is operationally provided by the availability of databases of high spatial detail, suitable for "profiling"[24] places (and

[23] But it is recalled as an operative practice in the Prime Minister's Decree dated 18 March 2022.

[24] Statistical tools for measuring uniformity, on the other hand, is available, and several test on

the populations that inhabit them). In practice, only the availability of variables by census enumeration districts (the maximum statistical-territorial disaggregation that can theoretically be used to recreate even sub-municipal districts) can enable the application of such analyses. Apart from the background question (did the legislator wish for the effective socio-economic "profiling" of the electoral body for the drafting of internally homogeneous districts?) for which no unequivocal answer has been obtained from the debates held in Commission, in practice, such sophisticated studies require substantial time and resources, as well as a data update referring to a year not too far from the one of the geographical proposal they are supposed to contribute to. Given the combination of (a) the chronic lack of the first two factors (resulting from the regulatory framework that does not provide for allocating resources to the Commission's activities); (b) the periodicity, every ten years, of the census data that the law has so far required to be used[25]; (c) the subsequent necessary dilution of specific homogeneous contexts in large heterogeneous districts[26], in the most recent formulations of new electoral geographies (2017, 2020) it was decided not to proceed with the development of analysis based on 2011 census variables referred to the territorial base of census enumeration districts.

On the contrary, the Commission considered it more useful not to fragment small areas with common characteristics (where identifiable) into different districts. Where common cultural-historical characterization arises (e.g., historical regions, areas economically linked to the specificity of local products, contexts qualified by identifying marks of local identities, urban neighbourhoods of common era of building etc.) efforts have been done to preserve their integrity, albeit within wider, necessarily uneven, districts. With specific regard to large cities (*criterion 5*)[27], where it is necessary to deviate from the criterion of not splitting a municipality into multiple districts, the legislator has lowered the constraints indicated in 1993, when it stated that in the case of cities to be split, single-municipality districts should be formed as a priority (where municipality means the administrative subunit in which cities are divided for administrative purposes). This guidance, which has failed in subsequent regulatory propositions, has nevertheless been applied where possible by Commissions even though, as often noted, municipalities directly bordering the urban

methods have been explored.

[25] In this regard, the recent DL of 29 January 2024 introduces important novelties and reduces the periodicity of the update of districts (based on permanent census data) to five years.

[26] A further proposal was to measure the "relative" uniformity of the defined districts by comparing it with that of the province(s)/metropolitan cities that most closely resembles each district (this is because, as already seen, the law indicates that districts should be drawn respecting the boundaries of administrative units on which they are located). Even this approach was later scrapped as a result of the strong multidimensional heterogeneity, measured *ex ante*, that characterizes the provinces and metropolitan cities themselves.

[27] Based on the 2011 and 2021 census population, under current electoral law, in order to meet the demographic thresholds, it is necessary to split into more than one Chamber one-member district Turin, Milan, Genoa, Rome, Naples and Palermo. To comply with the same parameter, it is necessary to split into more than one Senate one-member district Milan, Rome and also Genoa.

pole generally have greater affinities with the adjacent urban suburbs of the pole than the suburbs themselves have with more central areas of the same municipality. Commission's interpretation was to give first priority to the consistency of the districts' boundaries with those of the large cities, by containing as much as possible the number of districts including portions of a municipality and other whole municipalities (in any case limiting their inclusion in the urban constituency) in order not to dilute (where possible) the vote of the portion of the pole municipality mainly represented.

Finally the last, *criterion 6*, is valid in drawing of both single and multi-member districts, and introduces specifications, even as an exception to the other criteria stated, to facilitate the inclusion of each recognized linguistic minorities in as few districts as possible.

Set aside the special case of Bolzano/Bozen province, the only recognized linguistic minority in the national case is the Slovenian one, in the Friuli-Venezia Giulia constituency[28]. The choice was to apply the statutory criterion, verifying that the inclusion of municipalities with a marginally represented minority would not result in a "paradoxical dilution effect" of the concentration of the Slovenian-speaking population within the district that predominantly includes it.

Summarizing the various items discussed in this paragraph, it emerges that the major critical issue is the persistence of guiding criteria not updated in accordance with the growing demographic size of the districts to draw. It appears that a thoughtful evaluation of the legislator in this regard is necessary nowadays. While operationally and on the basis of its expertise, the Commission may consider which priority should be given to respect the boundaries of different (sometimes conflicting) administrative and functional areas, to make explicit a demographic parameter in order to ensure the balance of population distribution among districts (even if the wide range of permissible thresholds were not to be affected) would be useful[29]. The Commissions adopted the coefficient of variation[30] as an indicator of the goodness of the

[28] In the autonomous provinces of Trento and Bolzano we have more language groups, equally recognized (not minorities); their distribution appears territorially concentrated in certain areas. In this case, the Commissions have operated according to the general criterion of not subdividing areas where these specific concentrations occur, although within broad districts where language groups are found to be co-existing.

[29] In any case, it should be noted that the need to proceed with the design of multi-member districts by sum of one-member ones (as examined in the next paragraph), according to the mechanism set by the law, may paradoxically conflict with the design of demographically balanced one-member districts. At least in drawing of one-member districts, a hint of the criterion of equitable-distribution of population (containment of the deviation from the average) can be found in the Prime Minister's Decree dated 18 March 2022.

[30] The coefficient of variation (CV) is a non-dimensional index; it shows the extent of variability in relation to the mean of the population and allows comparison of the range of phenomena measured in different units or orders of magnitude. The CV is defined as the ratio of the standard deviation to the mean. The range of variation (between 0 and 100 if it is expressed as a percentage) makes it immediately clear that the closer the value of the coefficient of variation calculated for districts' population in a constituency is to the upper limit (100), the greater the variability of the population

demographic balance for the proposed districts in each constituency, basically self-selecting a criterion able to balance possible distortions derived from meeting the demographic thresholds only.

The Commission has often made choices, particularly on the priorities to be imposed in the application sequence of the criteria, in all those cases where they, considered in different order, would produce conflicting geographical results. For instance, this occurs by jointly pursuing compliance with different territorial partitions (functional, administrative, electoral, etc.) that are not consistent with each other (such as local systems, unions of municipalities or historical districts).

Upon adopting a general *modus operandi* and implementing it into a replicable procedure, the Commission worked to maintain consistency in its application across all districts (justifying only limited exceptions, when deemed necessary).

4. *Drawing of multi-member districts. Applicability of the criterion relating to the number of seats*

The drawing of multi-member districts (by sum of one-member districts) is a part of the work in charge of the expert Commission as of 2017, with the first application of the so-called "Rosatellum-bis" (electoral law still in effect). The law states that in each constituency multi-member districts shall be formed by the sum of whole and contiguous one-member districts, applying all the same criteria as for the drawing of the latter. However, in this case, the number of multi-member districts is not predetermined, and the law only lays down the number of seats that can be allocated by providing that each of them, on the basis of the resident population, shall be granted with "a number of seats determined by the sum of the one-member districts belonging to and an additional number of seats, in principle, not less than 3 and not more than 8, so that the number of multi-member districts in which fewer seats than the average value are allocated is minimal"[31]. On this point, the interpretation of the rule has long been controversial: in 2017 and 2020 the approach was to determine a national average of the seats attributable to each multi-member constituency[32] and, with respect to this value which *only* considered the seats to be allocated by proportional method, to draft the constituencies by minimizing those with fewer than the average number of seats.

Prime Minister's Decree dated 18 March 2022 introduces a different interpretation of the provision specifying that it should be firstly checked whether a single numerical determination of the multi-member constituencies was allowable. In the case there

distribution among districts.

[31] Literal translation of a principle stated in the Law No. 165/2017, Article 3(1b) and 3(2b) which, in the author's opinion, might be better defined by the lawmaker.

[32] Calculated as 6 for the Chamber constituencies [(3+8)/2 rounded up to the next higher unit] and 5 for the Senate constituencies [(2+8)/2]

was more than one, the Decree states that the average value of the allocated seats for each possible geography of multi-member districts by constituency should be computed, considering *the sum of the one-member and multi-member district's seats* and dividing this sum by the number of multi-member districts to be drafted, "preferring among the possible scenarios the one that would make minimum the number of multi-member districts with total number of allocated seats lower than the average value"[33].

Exemplifying, for scenario 1, if as a result of the application of seat allocation (as outlined in paragraph 1) in Chamber district X are allocated 15 total seats, of which 5 to be elected in one-member districts and 10 (by difference) to be allocated by the proportional method, it will be possible to form only two multi-member districts (the number of proportional seats in each cannot be less than 3 nor more than 8 by law). Therefore, a single one multi-member district would have too many seats, while it is not geographically possible to draft more than two, since each one must result from the sum of one-member districts (at least two). Accordingly, out of the two multi-member districts one will be constituted by combination of 2 of the 5 one-member districts defined and the other by union of the remaining 3. Therefore, the multi-member districts are formed after drawing the 5 one-member ones (respecting the legal criteria described in the previous paragraph) and ignoring options that would lead to the drafting of 5 districts all of approximately equivalent population's size (see the paradox earlier mentioned) since necessarily their allocation in multi-member districts will be asymmetrical (otherwise it might incur the non-compliance with the population thresholds of the forming multi-member districts[34]). The number of the multi-member districts of constituency X is uniquely 2 and no further choices need to be made. They are formed by the sum of the 5 one-member constituencies and, then, by the allocation of the 10 seats to be elected by proportional method[35].

Moving on to the case of two possible numerical solutions for determining the multi-member districts, let us assume that in Chamber Y constituency are allocated 19 total seats, of which 7 in one-member districts and 12 to be allocated by proportional method; due to the combination of minimum number of one-member districts to be aggregated (at list 2) and the number of seats that can be allocated (between 3 and 8) it is possible to form 2 or 3 multi-member districts with two possible theoretical distributions of the total number of the seats: in the first case (2 multi member-districts geography) 8 seats allocated in the first district (3 seats in one-member districts plus 5 proportional seats) and 11 in the second one (4+7, respectively), while in the case of a 3 multi-member geography 5 (2+3), 6 (2+4) and 8 (3+5) seats allocated

[33] Law No. 165/2017 Article 3(1)(b) and Article 3(2)(b)

[34] The population of which, applying the same criterion 1 valid for one-member districts, shall not exceed the range of +/-20% of constituencies average value. The average in this case is given by the value of the population divided by 2 districts, as many as the number of multi-member districts to draw.

[35] The allocation is performed as follows: first calculating how many total seats each multi-member district is entitled to in proportion to its population and, secondly, deducting the seats allocated in the one-member districts.

respectively. In the 2 multi-member districts geography, there will be one district with total number of seats lower than the average value (19/2=9.5); in the 3 multi-member districts geography (provided by a theoretical distribution of seats based on the resident population of each district) there will be 2 out of 3 districts with number of seats lower than the average district value (19/3=6.3). Therefore, in this case the choice of geography to be adopted should fall on the 2 multi-member districts scenario (provided that all other criteria are met).

The Commissions that have acted on the last three occasions have been oriented to let the geographic criterion 3 (respecting the administrative limits of metropolitan cities and provinces) also prevail (particularly in the formation of multi-member districts) over the numeric criterion of minimizing multi-member districts with less than the average number of seats. In the cases above, therefore, with reasonable probability, following the examination of alternative geographies, the choice would have fallen on the one that guaranteed the geographic criterion of respecting provinces/metropolitan areas and, only if both met the criterion, on the 2 multi-member districts geography which also guaranteed the "principle of minimization"[36].

Regarding multi-member districts, the statistical parameter that seems suitable for assessing the goodness of the defined geographies, following the evolution of the interpretation of the law, is the index measuring the average population for each seat[37]. This measure could help to keep the principle of equality between districts under control in terms of the ratio between expressed representation and electors.

5.*Conclusions*

In light of the above, the complex nature of defining electoral geographies is evident.

In order to support the Commission's activities, in addition to the solid knowledge of the territories guaranteed by the experts, it is necessary to collect and make available a database including all the geographic layers useful for characterizing the territories and explicating the physical constraints[38]; the human functional relationships, the administrative supra and sub municipal partitions to be considered;

[36] This paper, which deals with the independent geographic drawing of districts, is not addressing other organizational or political evaluations, which can be traced, for instance, to the need for political parties to collect signatures for the presentation of lists in each different multi-member district or the number of candidates that the parties themselves can collectively express in each district, which is limited by law to 4 in each multi-member districts. However, the geographical and numerical choices above described have repercussions for these and (author's opinion) it is doubtful that the lawmaker considered the overall implications of applying the criteria set forth.

[37] Total seats per multi-member district, including that allocated in the belonging single–member districts.

[38] Such as physical geography, hydrography, transportation infrastructure, protected areas, etc.

the perimeter of already established electoral base (current and/or historical electoral geographies, “the social places” as mentioned in paragraph 3, etc.).

Besides that, if it is deemed useful and feasible[39], a set of indicators would be helpful in verifying compliance of electoral geographies with the principles and criteria stated in the law. In order to implement this database, it is necessary to clarify the unambiguously interpretable definitions proposed in the criteria such as that of “spatial/territorial basin coherence” and “homogeneity in socio-economic, demographic and cultural-historical terms”, specifying whether this is to be sought *within* each district or *between* them, in the above-mentioned sense of homogeneous distribution of the different population characteristics, rather than the search for their exclusive fragmentation in homogeneous group.

Due to the reported difficulties in the provision of alphanumeric databases, the Commission have to choose whether to draw districts based *ex ante* on statistical indicators[40], or (as general practice to date) to formulate geographically[41] a set of possible solutions and, once chosen the better ones, submit them for comparative verification, by considering a small set of indicators particularly focusing in the equidistribution of population among districts (especially in case of one-member districts) and the population average value for each seat (especially in case of multi-member districts).

The expertise of Commission is a non-substitutable factor, as demonstrated by the failure inability, at least so far, to implement algorithms that automatically return coherent proposals of electoral geographies. However, it is clear that a regulatory framework as consistent as possible to the current scenario (in term of number of seats) and unambiguously interpretable would be of great support to ensure the best outcome of the work.

It also seems necessary to point out, completing the assessment on critical issues and in compliance with the Constitution, the anomaly caused by the lack of a certain defining criterion for the setting of number and boundaries of electoral districts, which could ensure the balanced relationship between electors and representatives, returning comparable partitions nationwide and providing for the need of their periodic review and possible updating[42].

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[39] Critical point to consider are adequacy of the geographic scale to which data are available end the timing of updating the alphanumeric database.

[40] Applying statistical techniques of multi-variate analysis.

[41] Taking into account the above-mentioned set of geographic layers in compliance with the parameters called out in the law.

[42] The implementation of this criterion obviously refers to the Chamber’s constituencies. In the Senate, the inhomogeneity between regions is already taken into account in the Constitution’s provisions aimed at ensuring an adequate number of representatives for each one. However, even in this case, it became evident how the reduction in the number of parliamentary representatives resulted, among other things, in potential critical issues concerning the chances of effectively gaining seats for smaller parties in regions with lower population size. This topic is beyond the scope of this paper and, in the case, should be brought back to the broader evaluation of redrafting of the geographical electoral base (currently on a regional base) for the Senate of the Republic.

Lastly, besides the point-by-point analisys of the criteria, the question remains open as to whether it is possible to proceed with an accurate implementation of the same, providing the appropriate resources for the execution of a geographical partitioning process which, as per the above, appears to be quite complex. An in-depth discussion of the issue seems unpostponable to ensure the availability of adequate resources in terms of expertise, database, analytical tools and time available, overcoming the practice of updating electoral laws close to elections and the irrational belief that the process of drafting electoral geographies can be carried out without any additional burden on the administration. Because of the significant output that the definition of electoral geographies may entail in terms of the distortions of our legal system, starting with the applicability of the constitutional dictate that provides for system capable of representing the electoral body as faithfully as possible, it would seem that the law maker has to undertake such a delicate process by clarifying points of more complex interpretation and allocating specific resources to it.

Alessandra Mazzola[*]

The Revision of Electoral Districts in Italy: the New Permanent Census System within the Framework of Constitutional Provisions on Representation[**]

SUMMARY: 1. Brief Reflections on Political Representation and Equality in the Design of Electoral Constituencies. – 2. The Delineation of Electoral District Boundaries from the Constitutional Assembly to the 2018 Reform. – 3. The new Permanent Census System and the Requirement to Consistently Revise Electoral Constituencies.

ABSTRACT: ***This paper offers brief reflections on the intricate relationship between political representation and equality within the framework of electoral constituency design. It examines the historical evolution of delineating electoral district boundaries, tracing the process from the Constitutional Assembly to the recent reforms of 2018. Special attention is given to the introduction of the new Permanent Census System and the consequent necessity for consistent revision of electoral constituencies. Through critical analysis and historical context, this study sheds light on the complexities inherent in ensuring equitable representation within electoral systems.***

1. *Brief Reflections on Political Representation Equality in the Design of Electoral Constituencies*

The democratic-representative principle constitutes the foundation of both the form of government and the form of the State as declared also from Article 1, § 2, of the Italian Constitution, which states that sovereignty belongs to the people and is sanctioned by universal suffrage (Art. 48, § 1, Italian Constitution).

The operation of translating abstract principle into concrete norms is not easy because it presupposes an electoral mechanism that allows everyone to be involved in the exercise of sovereignty. This mechanism must also ensure that each vote carries the same weight, preventing either over-representation or under-representation of some electors or group of them, as established by Article 48, § 2, of the Italian Constitution.

The rules governing the conversion of votes into seats, and thus determining the composition of the Chambers, must conform to the principles of equality and representativeness of the people. Furthermore, Constitutional Court, given the significance of parliamentary representativeness as a core element of popular sovereignty, has affirmed that achieving the most accurate political representation of

[*] Post-doctoral Research fellow in Public Law, University of Brescia.

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the electorate necessitates an electoral system with minimal distortion, ensuring adherence to the principle of equality in translating votes into seats.[1]

The proper functioning of the representative system depends, then, on the choice of the electoral system, which determines the extent of distortion in the "fiction" of the institution of political representation[2]. To achieve this, it is necessary to identify a mechanism for converting votes into seats that best ensures the freedom and equality of citizens considering the political diversity among them. It is also crucial that this system reflects, with a sufficient degree of precision, the political orientation of the diverse body of voters. In order to ensure the effectiveness of political representation, institutions require more than being composed by people selected according to the mere expression of voter preferences for individuals capable of holding public office. The aim is to ensure the effective alignment of political ideologies between voters and elected representatives through ongoing dialogue for the entire duration of the elected official's mandate, otherwise democracy would be consumed only on election day (quoting Rousseau). Political representation forms a cyclical relationship that begins with electors selecting candidates, followed by elected conveying their political objectives and compromises back to the electors, thus fostering mutual understanding. It is necessary to have a mechanism capable of translating the electorate's will –votes – into seats. However, it is equally necessary for this representation to return from institutional seats to the constituencies (i.e., the people) from which the representative connection originated.

The electoral mechanisms employed by representative bodies of the people serve as the means through which political representation is established. Consequently, it becomes imperative to examine the various implications of the concept of representative democracy, beginning with the importance of focusing on the "site of representation". This site, whether considered a moment or a place within institutions, is where the political will of the electorate finds expression.[3]

In essence, establishing political representation requires it to be linked to a specific location; in fact, our system divides the territory into constituencies to facilitate the conversion of votes into seats. This operation is essential for enhancing the representative relationship, whereby the residents of an area articulate their needs. These needs must be addressed through institutional activities, primarily carried out

[1] Italian Constitutional court, judgment no. 1 of 2014 § 3.1 *Cons. dir*.

[2] As argued by H. KELSEN, *Essenza e valore della democrazia*, trad. it. A. Carrino (ed.), Giappichelli, Torino, 2004, 7.

[3] D. CASANOVA, *Eguaglianza del voto e sistemi elettorali. Profili costituzionali*, in Rivista del Gruppo di Pisa, 1/2019, 95 argued that the issue of political elections, and more precisely, electoral systems of representative bodies of the entire populace, being the instrument through which political representation is created, is the *conditio sine qua non* for reflecting on the various implications of the concept of representative democracy and requires to focus attention on the "place of representation" as an institutional moment where the interests of the parties converge. See also ID., *Eguaglianza del voto e sistemi elettorali. I limiti costituzionali alla discrezionalità legislativa*, Editoriale scientifica, Napoli, 2020, 54-59.

by the Government and Parliament. Consequently, fostering political convergence becomes necessary, a process facilitated through parliamentary debate and the engagement between the majority and minority on the issues at hand.[4]

So, the Italian legal system divides the territory into constituencies to ensure adherence to the representative principle. Moreover, this division allows for the distribution of seats across multiple constituencies, bringing voters closer to candidates and facilitating voters' choice among them. Simultaneously, it maintains a vital connection between the voters and the candidates.[5]

For this reason, voters cannot be considered merely as individual units but rather as integral parts of a larger entity: the electorate; so that the will of the constituency, and not that of individual voters, is externally relevant and effective[6]. To maintain a contiguous relationship between voters and elected representatives, the Constitutional provision to divide the territory into electoral constituencies is reinforced by the additional indication that the residents in those constituencies form an electoral district tasked with selecting as many representatives as there are seats assigned to that constituency in proportion to its population. The voter's ballot cannot be reduced to a mere numerical value; rather, it represents a dynamic value, embodying the principle of actual equality among votes following the electoral outcome. Furthermore, the allocation of seats to constituencies is not arbitrary, as it directly impacts the degree of proportionality achieved in the electoral outcome, influenced by the electoral formula employed[7].

The formula provided for in the Constitution, although it may seem like a mere mathematical equation, in fact, underpins the guarantee of respect for democratic and representative principles, strengthening the constitutional provision for the division of the territory into constituencies. These are rules that, according to the Constitutional Charter, are indispensable for ensuring the principle of equality among voters, as they aim to fulfill the demographic principle[8]. Furthermore, these rules also serve to ensure the equality of elected representatives, as each holds equal value within parliamentary

[4] B. GUASTAFERRO, *Territorial Representation in Unitary States. Reforming National Legislatures in Italy and in the United Kingdom,* in Italian Journal of Public Law, 1/2019, 147-195 shows that in unitary states (though composite), formal opposition between political representation and territorial representation is very strong, yet it ultimately amounts to nothing because representatives are in service of the nation. See also I. CIOLLI, *Il territorio rappresentato. Profili costituzionali*, Jovene, Napoli, 2010, 41-42.

[5] In particular, concerning the division of the territory into constituencies and the guarantee of the freedom of choice for the voter, see M. RUBECHI, *Il diritto di voto. Profili costituzionali e prospettive evolutive*, Giappichelli, Torino, 2016, 121.

[6] T. MARTINES, *Art. 56-58*, in G. Branca (ed.), *Commentario della Costituzione*, *Le Camere*, I, Zanichelli editore-Il Foro italiano, Bologna-Roma, 1984, 76.

[7] About electoral college and constituency see L. PRETI, *Diritto elettorale politico*, Giuffrè, Milano, 1957, 219 and A. RUSSO, *Collegi elettorali ed eguaglianza del voto. Un'indagine sulle principali democrazie stabilizzate*, Giuffrè, Milano, 1998, 7.

[8] It is necessary to observe that, with reference to the Senate of the Republic, the principle of equality also satisfies territorial equality because of the allocation of seats reserved for the Molise and Valle d'Aosta regions (Article 57 § paragraph of the Constitution).

chambers and is vested with the same functions[9]. This "circular" relationship of equality between voters and elected representatives also fulfills a demographic principle, as a specific manifestation of the democratic principle. It is believed that, at least formally, this was well specified by the mathematical rule outlined in Articles 56 - 57 of the Italian Constitution before the 1963 reform. These articles stipulated that the Chamber of Deputies be composed of "one deputy for every eighty thousand inhabitants or fraction exceeding forty thousand", while for the Senate, "each Region [was] assigned one senator for every two hundred thousand inhabitants or fraction exceeding one hundred thousand".[10]

2. *The Delineation of Electoral District Boundaries from the Constitutional Assembly to the 2018 Reform*

Articles 56 - 57 of the Italian Constitution establish the procedure for distribution of seats among the constituencies designated to elect members of the Chamber of Deputies and among the Regions or Autonomous Provinces for the election of the Senate of the Republic.[11] This distribution is carried out by dividing the country's population according to the latest general population census.

[9] See Fabian Michl, *Electoral Districts in Germany*, in this issue.

[10] In this way E. BETTINELLI, *Elezioni politiche*, in *Digesto delle discipline pubblicistiche*, V, UTET, Torino, 1990, 487; M. SALERNO, *Art. 56*, in V. Crisafulli, L. Paladin (eds.), *Commentario breve alla Costituzione*, CEDAM, Padova, 1990, 365; C. FUSARO, M. RUBECHI, *Art. 56*, in R. Bifulco, A. Celotto, M. Olivetti (eds.), *Commentario alla Costituzione*, II, UTET, Torino, 2006, 1141; C. FUSARO, M. RUBECHI, *Art. 57*, in R. Bifulco, A. Celotto, M. Olivetti (eds.), *Commentario alla Costituzione*, II, cit., 1152-1153 and M. SALERNO, *Art. 57*, in V. Crisafulli, L. Paladin (ed.), *Commentario breve alla Costituzione*, cit., 368. It is important to consider, for instance, that according to the Spanish Constitution, the Senate – the territorial representative chamber – is elected based on the representation of inhabitants rather than residents. Article 69 paragraph 5 Spanish Constitution: «Las Comunidades Autónomas designarán además un Senador y otro más por cada millón de habitantes de su respectivo territorio […]», but Article 68 paragraph 2 Spanish Constitution (for the Congreso de los Diputados) refers to the population (población), a generic term, which must be detailed by the electoral law. Therefore, a distinction is made between the representation of territories, the "Comunidades Autónomas", and that of the electorate.

[11] This provision was introduced in the Article 56 of the Italian Constitution by Constitutional Law No. 2 of 1963, which establishes two principles. One pertains to the fixed number of deputies, the other concerns the designation of electoral constituencies, and so a physical, determined, and delimited place to attribute political representation. However, this innovation is more apparent than real, as the original formulation considers the reference to constituencies to be implicit. The norm specifying one deputy for every eighty thousand inhabitants or fraction exceeding forty thousand presupposed the need to divide the territory into constituencies for the distribution of seats. Allocating a seat for each fraction between forty and eighty thousand inhabitants would have been redundant, as a failure to distribute seats based on constituencies would have necessitated a national-level distribution. Consequently, the fraction exceeding forty thousand inhabitants could only have been one, implying the exclusive assignment of a single deputy. This principle is supported by Electoral Law for the Chamber of Deputies No. 26 of 1948, wherein the number of inhabitants in each constituency was divided by eighty thousand, and for each fraction exceeding forty thousand, an additional seat was assigned. On this topic and for this theory see

Indeed, the Consolidated Texts of laws containing rules for elections to the two Chambers of Parliament establish that population data are made public through the most recent official disclosure by the Istituto Nazionale di Statistica (ISTAT). These data become effective and acquire legal value through publication in the Gazzetta Ufficiale della Repubblica by means of the President of the Republic decree at least according to the relevant sub-constitutional provisions. The President of the Republic decree is issued upon the proposal of the Minister of the Interior, following the deliberation of the Council of Ministers, simultaneously with the decree convening the elections (Article 3, Presidential Decree No. 361 of 1957, and Article 1, § 1, Legislative Decree No. 533 of 1993).

Constitutional rules also establish how the legislature should distribute seats within constituencies because they stipulate that the distribution of seats must be based on the latest published general population census. However, Article 2 of Decree law No. 7 of 2024 has established that for electoral and referendum purposes, the results of the continuous population census are considered every five years. This provision raises some doubts about the possibility for the legislature to arbitrarily decide whether only the publication in the Gazzetta Ufficiale della Repubblica italiana is binding (as would be inferred from the referred provision) or if any type of official publication, including that of ISTAT, is valid.

Articles 56 - 57 of the Constitution, indeed, refer to "the latest general population census" without specifying formalities regarding its publicity. This raises doubts about constitutional legitimacy because there appears to be a discrepancy between the constitutional provision (referring to the latest general population census) and the regulatory data that revise the census discipline annually. The legislature introduced a rule according to which census data are updated every five years for electoral purposes, potentially arbitrarily; this choice may be driven by the length of time required for designing single-member districts.

However, this difficulty could be addressed by implementing continuous updates of the districts, considering that annual shifts are minimal and therefore do not necessitate overly complex organizational structures. This is because seat distribution based on demographic size guarantees voting equality. Nevertheless, a delay in updating, compared to the pace set by the Constitution, leads to a compression of voter equality. Therefore, this principle clarifies that what matters is not the form of census publication, but rather the reliability of the data it provides.

Constitutional rules also mandate that the legislature allocate seats among different constituencies. However, if the relationship between voters and elected officials within a single national constituency is compromised, it may lead to significant territorial imbalances in representation. This could result in several electoral districts being

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E. BETTINELLI, *Elezioni politiche*, cit., 489-490; M. ESPOSITO, *Le circoscrizioni elettorali come elemento costitutivo della configurazione della rappresentanza politica*, in *Giur. cost.*, 3/2011, 2585 and L. SPADACINI, *L'Italicum di fronte al comma 4 dell'art. 56 Cost. tra radicamento territoriale della rappresentanza e principio di uguaglianza*, in Nomos, 2/2016, 18-20.

effectively deprived of the opportunity to elect a parliamentarian[12]. Without this allocation at the territorial level, there is a risk of assigning a greater number of seats in constituencies with higher voter turnout, potentially distorting or compromising the principle of representation, at least as conceptualized in these constitutional provisions. This scenario could occur because territories with fewer inhabitants may be over-represented, and vice versa. This becomes particularly apparent when considering voter abstention, as less populated areas with higher voter turnout may be more represented than more populated areas where the abstention rate is higher. The declared equal weight of constituencies is, in practice, distorted by various variables that can affect the representative relationship.

For instance, distributing seats at the local level ensures that constituencies with the same number of inhabitants but different levels of abstentionism are still assigned an equal number of representatives.[13] In particular, the distribution of seats starting from smaller territorial entities, such as constituencies, should prevent the underrepresentation of residents in parliamentary chambers in areas where the level of abstentionism is higher compared to areas where participation to suffrage is higher. To strengthen this guarantee – namely to exclude the overrepresentation of constituencies where the number of non-voting residents is higher (especially minors under the age of eighteen and foreigners) – one could opt for a seat distribution method based not on the number of residents but on the number of registered voters in the respective electoral lists.

This approach could also reduce virtual representation, which is intended to be minimized through the establishment of constituencies. The guarantee of equality among individuals and equal voting, as specified in the constitution regarding the division of territory into constituencies, clarifies its effects through a representation that is not virtual. The constitutional emphasis on constituencies not only aims to bring voters and elected officials closer but also ensures that areas with a high number of foreigners or minors under eighteen, or with a higher rate of abstention, are not underrepresented in parliamentary composition compared to areas with higher voter turnout.[14]

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[12] See M. LUCIANI, *Governo (forme di)* (voce), in *Enciclopedia del diritto*, Annali III, Giuffrè, Roma 2010, 685 nt. 283; A. RUSSO, *Collegi elettorali ed eguaglianza del voto*, cit., 24; L. SPADACINI, *L'Italicum di fronte al comma 4 dell'art. 56 Cost. tra radicamento territoriale della rappresentanza e principio di uguaglianza*, cit., 6; D. CASANOVA, *Eguaglianza del voto e sistemi elettorali. I limiti costituzionali alla discrezionalità legislativa*, cit., 323 nt. 81.

[13] See I. CIOLLI, *Il territorio rappresentato*, cit., 104.

[14] In relation to the impact of the foreign population on the total population, refer the reflection of V. PIERGIGLI, *Premio di maggioranza ed eguaglianza del voto. Osservazioni a margine della sentenza Corte cost. 1/2014*, in IANUS, 10/2014 44; but see also L. SPADACINI, *L'Italicum di fronte al comma 4 dell'art. 56 Cost. tra radicamento territoriale della rappresentanza e principio di uguaglianza*, cit., 22-23 nt. 65 and D. CASANOVA, *Eguaglianza del voto e sistemi elettorali. I limiti costituzionali alla discrezionalità legislativa*, cit., 91-92.

If representatives were not elected within a sufficiently large constituency, voters might struggle when choosing candidates, making it difficult to establish an adequate representative relationship between the voters and the elected representatives.[15] For this purpose, Article 56, § 4 of the Italian Constitution indicates a fundamental democratic element as it illustrates and allows the constitutional organization of the people through the constituencies, specifying in the census the indispensable prerequisite for proceeding with the distribution of seats[16].

The decennial census of the population was replaced by the permanent census through Article 3 of Decree law No. 179 of 2010. This regulation stipulates that data be collected through population sample and processed annually by the Istituto Nazionale di Statistica. The implementation of this regulatory provision was carried out by Article 1, § 2 of the Prime Minister's decree of May 12, 2016. It specified that ISTAT must employ statistical methods in accordance with the technical criteria indicated by Article 4, § 1, Regulation (EC) No. 763 of July 9, 2008.

The ISTAT Council has specified that the objective of the permanent census is to maintain a high level of classification detail traditionally guaranteed by the decennial census for a set of fundamental variables (of a demographic, social, and economic nature). The permanent census, by increasing the temporal frequency of the information produced and the promptness of its dissemination, appears as reliable as those of the decennial censuses carried out until 2011 (this is deduced directly from the statement of the ISTAT Council).

Therefore, the new method should be considered suitable to meet the needs indicated by Articles 56 - 57 of the Italian Constitution, particularly regarding the distribution of seats. One could even argue that the data resulting from the permanent census are more reliable than those from an investigation conducted every ten years, as they provide a more recent and therefore clearer snapshot of the population data. Indeed, the shorter temporal discrepancy between the population survey and seat distribution should ensure better satisfaction of the principle of equal suffrage, especially in the outgoing phase. Hence, it is challenging to comprehend the rationale behind not synchronizing the frequency of constituency revision with that of the census. Conversely, such alignment would indeed ensure the preservation of voter equality. Practical obstacles, such as the time and resources required for annual constituency revisions, do not seem to present valid arguments for compromising, either entirely or partially, the guarantee of voter equality.

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[15] A. RUSSO, *Collegi elettorali ed eguaglianza del voto*, cit., 25; M. ESPOSITO, *Le circoscrizioni elettorali come elemento costitutivo della configurazione della rappresentanza politica*, cit., 2582; L. SPADACINI, *L'Italicum di fronte al comma 4 dell'art. 56 Cost. tra radicamento territoriale della rappresentanza e principio di uguaglianza*, cit., 22 and M. RUBECHI, *Il diritto di voto*, cit., 120 ff.

[16] About the significance of the census in electoral procedures, it suffices to note that since 1861 (with the exceptions of 1891 and 1941), this calculation has been conducted in the first year of each decade. The most recent decennial census was convened by Article 50 of the Decree law No. 78 of 2010. It took place in 2011. So, since 2021, the continuous census has come into effect.

3. *Given the Permanent Census, there is a Probable Requirement to Consistently Revise Electoral Constituencies*

The delineation of electoral constituencies enables votes translating into seats; therefore, it appears essential to readjust electoral boundaries following the annual update of census data. This is supported by the fact that the permanent census is more reliable than the decennial census.

The annual revision of electoral boundaries, informed by census data updated by the end of December, seems moreover constitutionally mandated by Articles 56 - 57 of the Italian Constitution, which refer to the "latest general population census". The continuous adaptation of electoral constituencies based on changes in census results is considered crucial to uphold the principle of equal suffrage, as well as to preserve values such as timeliness, impartiality, and transparency in the procedures for updating electoral geography.

The decade to which data census refers inevitably causes a certain misalignment between real and institutional data. It is not a coincidence that the results of the 2021 census, published in January 2023, compared to those of the 2011 census, show an increase in population in eight constituencies[17], leading to the redistribution of five seats.[18] The same phenomenon occurs in the Senate of the Republic. Indeed, the 2021 census data highlight an increase in population in three regions and in the two Autonomous Provinces[19]. This increase necessitated the redistribution of two seats.[20] These data support both the constitution and the political necessity of designing electoral geography based on the most recent available numbers, so as to ensure the representative principle and the principle of equal suffrage.

The necessity for the electoral constituency boundaries to reflect the most recent available data suggests some alternatives to the current model for seat distribution, given that census data change every year.[21] If certain constituencies were to receive a lower number of seats than proportionally due to them, voters in that constituency would be underrepresented while voters in another constituency would be overrepresented. This could compromise the principle of equality, as some voters would have disproportionately greater weight and political influence than others. If electoral geography were revised in tandem with the update of census data, seat distribution should be able to ensure the closest approximation of the population size,

[17] Three constituencies in Lombardia, two constituencies in Lazio, the constituencies to the Emilia-Romagna and those to Trentino-Alto Adige.

[18] Preciseley, two more seats are allocated to Lombardy 1 and one more each to Lombardy 3, Lazio 1 and 2, while one seat is lost by the constituencies of Abruzzo, Calabria, Campania 2, Puglia, and Sardinia.

[19] The regions are Emilia-Romagna, Lazio and Lombardia and the Autonomous Provinces are Trento and Bolzano.

[20] In particular, an additional seat should be allocated to Lombardia, and one seat should be subtracted from Sicilia.

[21] This theory is supported by the study conducted by the Camera dei deputati, Il censimento 2021 e la legislazione elettorale, aprile 2023, 29-30 e 33-34.

thus avoiding overly distortive effects between the secret ballot and its transformation into seats. However, it should be noted that annual census data would result in minimal shifts of constituencies, as it is likely that the population does not migrate massively from one place to another, causing significant changes every year.

In any case, it is necessary to understand what the best method could be for designing the constituencies in accordance with the continuous census rule. It is worth mentioning the presumed illegitimacy of Decree law No. 7 of 2024, which appears to conflict with Articles 56 - 57 of the Italian Constitution (i.e., referring to the latest general population census) and with Article 3 of Decree law No. 179 of 2012 (i.e., the continuous census rule) because the decree law stipulates that census data for electoral purposes hold a five-year validity, likely in an arbitrary manner compared to the constitutional and regulatory provisions.

It is worth noting that since 1993 (and except for the electoral law No. 270 of 2005), the legislature has employed the technique of legislative delegation to design electoral constituencies[22]. According to Article 3 of the law No. 165 of 2017 – reaffirmed by Article 3, § 3, of the law No. 51 of 2019 – the revision of electoral constituencies occurs through a bill presented by the Government to the Chambers, based on the indications provided by the Commission of experts.[23] Considering the data resulting from the latest general population census, this Commission offers the Government the necessary guidance for the revision of the constituencies, and the Government then submits a bill to the Chambers (Article 3, § 6, of Law No. 165 of 2017).

The system employed with the decennial census seems unsuitable for use with the permanent census because such legislation appears too slow for the new method of annual population counting. Legislative delegation doesn't appear to be a viable solution, as Article 76 of the Constitution imposes a time limit within which the legislative decree must be adopted, preventing a "perpetual delegation" to the Executive to perform this task. A solution for drawing constituencies boundaries in line with the permanent census could involve entrusting a Commission of experts, already responsible for appointing electoral constituencies, with the task of presenting a

[22] On this point, reference is made to the reconstruction provided by L. SPADACINI, *Constitutional needs for the Italian process of drawing electoral districts: a more independent Commission, less partisanship, and greater transparency and participation*, in this issue.

[23] This Commission is composed of the President of ISTAT and ten experts in electoral mechanisms. This Commission should be updated every three years by the Government, as affirmed by Article 3, third paragraph, of law No. 165 of 2017. The Expert Commission should also incorporate measures to ensure the impartiality of its members, beginning with their appointment in a way that establishes a technical and impartial body (regarding the importance of a transparent drawing of electoral districts in producing more equal constituencies and how this situation doesn't lead to judicial interventions, refer to R. GREEN, *Redistricting transparency & litigation*, in Syracuse Law Review, 71/2021, 1121-1177 that examines the judicial assessments of electoral maps following the U.S. census in 2010). This could be achieved by their appointment through a qualified majority vote in Parliament. The impartiality of the body is indeed influenced by the criteria adopted for delineating constituencies, as well as the nature of its relationship with the body responsible for designing electoral geography (the Government).

report to Parliament outlining changes to the single-member and multi-member constituencies of the Chambers.

Such a mechanism is used in Canada, where electoral districts are drawn by an independent commission that has significant decision-making power.[24] Indeed, the Chamber has the right to raise objections to decisions made by the commission, particularly regarding the way constituencies are delineated; the commissions must consider the objections, though they are not obliged to accept them[25]. The proclamation of the redistribution of boundaries occurs through the representation order issued by Canada's Governor in Council.[26]

An independent commission for the drawing of electoral constituencies is also provided for in the United Kingdom; the Parliamentary Constituencies Act 1986 establishes the legal framework for the review of electoral boundaries. This act served as a consolidation measure, bringing together prior enactments without introducing any amendments. The provisions in the act have subsequently been modified, in 2011 and 2020. The 2011 legislation provides four independent Boundary Commissions, each dedicated to a specific part of the UK, along with defining their membership. The Chair of each Commission is the Speaker of the House of Commons but, conventionally, the Speaker doesn't participate in the Reviews.[27] Furthermore, in United Kingdom the drawing of electoral constituencies carried out by the Boundary Commission has always been approved by law (a formal law); instead, for the first time, with the Parliamentary Constituencies Act 2020, the law containing the constituency boundaries was not approved (most likely because, concurrently, the reduction of Members of Parliament from 650 to 600 would have been approved).[28]

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[24] For an analysis of the Canadian model and the difference compared to the American system, where political actors dominate redistricting, see C. P. HOFFMAN, *The Gerrymander and the Commission: Drawing Electoral Districts in the United States and Canada*, in Manitoba Law Journal, 2/2006, 331-359. See also Rebecca Green and Lucas Della Ventura, *Comparative Redistricting Transparency*, in this issue.

[25] M. BOSC and A. GAGNON (eds.), *House of Commons Procedure and Practice*, Éditions Yvons Blais, Montreal, 2017, 177-178. Following each census – which occurs every ten years – there are changes in the number of electoral districts and their boundaries to accommodate population changes and growth. For the drawing of electoral boundaries, ten independent commissions are established, one in each province, to propose new boundaries, consult citizens, and create the new electoral map for their province. On this point, reference is made to the observation by Michael Pal, *The Canadian Model of Electoral District Design: Challenges and* Adaptation, in this issue.

[26] M. BOSC and A. GAGNON (eds.), *House of Commons Procedure and Practice*, cit., 163-254, spec. 174-178. See also ELECTORAL BOUNDARIES COMMISSION, Final Report, April 3, 2023 and the Canadian website Redistribution Federal Electoral Districts.

[27] See HOUSE OF COMMONS LIBRARY, Constituency boundary reviews and the number of MPs, November 20, 2023, 10-16.

[28] See the Parliamentary Constituencies Act 2020 and the commentary on the act on the Boundary Commission for England's website. According to doctrine, consider R. JOHNSTON, C., PATTIE and D. ROSSITER, *Boundaries in Limbo: Why the Government Cannot Decide How Many MPs there should be*, in The London School of Economics and Political Science, May 2019 and N. JOHNSTON, *Parliamentary boundary reviews: public consultations*, in House of commons library Briefing paper, 22 October 2020. See also G.

The Canadian and British examples demonstrate that if a panel of experts were entrusted with the task of continuously updating both multi-member and, particularly, single-member districts based on census data, it would be feasible to maintain up-to-date electoral boundaries swiftly. This process could be carried out without compromising the effectiveness of representation or delaying the possibility of holding elections shortly thereafter.

Indeed, if the revision of constituencies doesn't take place as quickly as possible and, therefore, doesn't reflect the most recent census data, there could be a violation of Articles 56 and 57 of the Constitution, leading to an alteration of the representative principles and equality of the vote. If the distribution of seats were based on data that doesn't accurately reflect the population, the vote of each voter would have different effects in electoral representation, accentuating the distortion of the electoral mechanism.[29]

The relationships between these institutional entities could be regulated by specifying that the Commission submit the report with the revision of constituencies to the Council of Ministers. The Government could modify the proposal, provided such modification is supported by adequate and publicly-disclosed reasoning. This way, the Government should be subjected to a control by parliamentarians and citizens, especially voters. The proposal for modifying the electoral boundaries by the Expert Commission implies that the revision must be based on objective reasons rather than political considerations. The Executive wouldn't be the institution actively involved in the design of constituencies, but rather "the final and predominantly formal drafter of an act derived from a complex procedural process", avoiding the possibility of favoring the majority that supports it in the subsequent electoral round.[30]

The update of seats to be assigned to constituencies, as elaborated by the Expert Commission and approved and/or revised by the Council of Ministers, could be published in the same decree of the President of the Republic that announces the allocation of seats in constituencies and multi-member constituencies.

To advocate for the possibility of electoral boundaries being approved and disclosed through a secondary source, namely the decree of the President of the Republic, it is deemed necessary to offer some observations regarding the statutory reservation established by Article 72 of the Italian Constitution regarding electoral affairs. The provision stipulates that the electoral law must be approved by the entire Parliament,

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CARAVALE, *Gli Mps restano 650: Il* Parliamentary Constituencies Act 2020 *contro la riduzione del numero dei parlamentari del Regno Unito*, in Nomos, 3/2020, spec. 13-17.

[29] This could lead to a greater overrepresentation of the winning party or coalition and, conversely, an underrepresentation of the political forces that didn't win (or reverse).

[30] See A. AGOSTA, *Elezioni e territorio: i collegi uninominali tra storia legislativa e nuova disciplina elettorale*, in M. LUCIANI, M. VOLPI (eds.), *Riforme elettorali*, Laterza, Roma-Bari, 1995, 174 and L. SPADACINI, *La proposta di riforma elettorale all'attenzione del Senato: alcuni dubbi di legittimità costituzionale*, Audizione informale presso la Prima Commissione permanente del Senato della Repubblica, 8 ff.

rather than by a "smart" commission[31]. However, in practice, things diverge significantly, to the extent that one can identify on various occasions the intervention of a source of law of secondary rank in electoral matters rather than that of the law.

The regulation by a source subordinate to the law, even within the limits it establishes, is believed to have not caused any detriment in terms of protection or effectiveness in the intricate process of translating votes into seats. This has also been established by paragraph 67 of the *Code of Good Practice in Electoral Matters*, according to which "electoral law should normally have the rank of statute law", but it doesn't exclude that "rules implementation, in particular those on technical questions and matters of detail, can nevertheless be in the form of regulations". The constant updating of multi-member and single-member districts following the results of the ongoing census should be, if not a purely technical matter, an act to be removed from the discretion (political) of the panel of experts.

Acknowledging that in electoral matters legislative reservation can be relative[32], it could be argued that the revision of electoral constituencies and, consequently, the allocation of seats to each constituency, can take place through a source of law of secondary rank as already occurs. The electoral law must anticipate this option and specify the methods and techniques of intervention by the Commission of experts called to design the electoral constituencies, specifying the limits, or ensuring that the Commission works exclusively based on census data without the margin to favor (or penalize) one political faction or another.

Alongside this possible "general rule" regarding the perpetual revision of electoral boundaries, a transitional regulation should be provided in case of the early dissolution of the Chambers because a delay between data publication and constituency restructuring is unavoidable, even within the framework proposed here, which has minimal effects and is likely only hypothetical. In this scenario, it would be necessary to proceed with the distribution of seats even without the most recent census data or, if available, before the Experts' Commission has had (or has) time to update the electoral boundaries.

Initially, it's important to reaffirm that the shifting of constituencies is minimal precisely because census data are updated annually, not every ten years. Indeed, the slight shifting of electoral boundaries underscores the need for ongoing electoral geography revision. Moving one or two constituencies is far more simple and quicker than completely restarting every ten years.

[31] According to some scholars, this can be inferred from the so-called assembly reserve, while according to others, it stems directly from the law reserve. Refer to V. CRISAFULLI, *Lezioni di diritto costituzionale*, I, CEDAM, Padova, 1978, 216 and A. RUGGERI, *Gerarchia, competenza e qualità nel sistema costituzionale delle fonti normative*, Giuffrè, Milano, 1977, 149.

[32] The term "relative legislative reserve" refers to the legal principle whereby the Constitution provides that the general regulation of precisely identified matters is the prerogative of primary sources (which involve the active involvement of Parliament), while detailed regulation is delegated to secondary sources, namely governmental regulations.

If it were necessary to proceed with the drawing of electoral districts without updated data available or if the panel of experts lacks time to proceed with the drawing of single-member districts, two alternatives can be identified. It could be possible to proceed with the allocation of constituencies using census data from the previous year,[33] or the distribution of seats could be carried out according to the most recent census results.

Alternatively, while maintaining the number of single-member and multi-member constituencies, a redistribution of seats could be carried out using the at-large method without creating new electoral constituencies.[34] In this circumstance, it could be considered to utilize single-member constituencies designed based on the data from the previous census then adjusting the number of seats to be distributed proportionally within the multi-member constituencies, in accordance with the number of seats indicated by the decree of the President of the Republic. This decree, based on the latest census data, establishes the overall number of multi-member constituencies.

If census data indicate that the number of seats assigned to a constituency exceeds the number of constituencies, additional representatives would be elected either at large or proportionally within the constituency. Conversely, if the number of representatives to be elected within the constituency is fewer than the number of electoral constituencies, all seats would be allocated using the at-large method[35],

[33] This is the proposed by the article 1 of the decree of the President of the Republic on January 20, 2023.

[34] The at-large method is described in the *Code of Laws of the United States of America*, *"United State Code" Title 2, Chapter 1, Section 2a*; this provision states that "[…] if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large […]"..

[35] In this regard, it should also be noted that the advantages of the at-large election system include the likelihood that these districts will prioritize achieving the best outcomes for the entire community rather than catering to specific demands from particular segments and (See T. DONOVAN and H. SMITH, *Proportional representation in local elections: a review*, in Washington State Institute for Public Policy, December 1994, III; S. HOFER, C. HUANG and R. MURRAY, *The Trade-Offs between At-Large and Single-Member Districts*, in Hobby School of Public Affairs White Paper Series, 14/2018, 2). It has been demonstrated that substantive representation is more prevalent in at-large systems, especially benefiting the wealthiest and most connected individuals in the community (K. J. MEIER, E. G. JUENKE, R. D. WRINKLE and J. L. POLINARD, *Structural Choices and Representational Biases: The Post-Election Color of Representation*, in *American Journal of Political Science*, 4/2005, 758-768; P. K. ENNS, C. WLEZIEN (eds.), *Who Gets Represented?*, Russel Sage Foundation, New York, 2011; M. GILENS and B. I. PAGE, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, in *Perspectives on Politics*, 3/2014, 564-581). Furthermore, at-large systems contribute to enhancing gender diversity in representation, leading to an increased number of women being elected (J. TROUNSTINE and M. E. VALDINI, *The Context Matters: The Effects of Single-Member versus At-Large Districts on City Council Diversity*, in *American Journal of Political Science*, 3/2008, 554-569. It was also demonstrated that «people of color are less likely to be elected in AL systems because the votes of racial minorities are diluted in elections that cover a broader area» (*Ivi*, 560). «Unlike racial diversity, gender diversity among the population is stable across geography» (S. HOFER, C. HUANG and R. MURRAY, *The Trade-Offs between At-Large and Single-Member Districts*, cit., p. 3), making the at-large system more effective in ensuring gender

wherein the seats of the constituency would be redistributed proportionally across the entire district.

In accordance with the constitutional provisions outlined in Articles 56 – 57 of the Italian Constitution, it is therefore believed that the annual population census fully complies with these requirements. However, regulatory innovation necessitates some practical adjustments, particularly regarding the functioning of the electoral districts commission, which must now operate on a permanent basis. The objections that may arise, especially concerning the perceived sluggishness of the commission's work in designing electoral boundaries, do not appear to be sufficiently robust or well-founded. Any annual changes in census results, presumed to be minimal, lead to quicker turnaround times for the electoral districts commission, resulting in lower costs as well. It must be reiterated, finally, that Decree law No. 7 of 2024, which stipulates that the results of the permanent census are used for electoral purposes only every five years (in the first and sixth year of each decade), seems to contradict Articles 56 - 57 of the Italian Constitution. This discrepancy appears unreasonable as it lacks justification by any necessity, whether practical or otherwise, that could justify non-compliance with the rule established by the constitutional provisions.

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equality. It is also important to specify that in the United States, at-large elections were popular for local elections, particularly as a means to enable a white majority voting bloc to prevent black citizens from selecting representatives of their choice in local governments. The landscape of racial diversity and representation underwent significant changes in 1965 through the Voting Rights Act (VRA). Initially, the inclusion of language permitting judicial review of efforts to dilute the votes of minorities in areas with a history of disenfranchising minority voters played a role in steering communities away from at-large systems. However, court decisions weakened this language in the late 1970s. By 1980, courts had established that racial minorities needed to demonstrate that a contested election structure was intentionally designed or maintained to diminish minority voting power. The reauthorization of the VRA in 1982 altered this standard from racial intent to effects-based vote dilution, increasing the likelihood of success for minority challenges. The 1986 *Thornburg v. Gingles* ruling introduced a faster and simpler process for addressing vote dilution, leading to widespread shifts from at-large elections to single-member (SM) elections, achieved through both legal action and legislative changes (M. J. KOSTERLITZ, *Thornburg v. Gingles: The Supreme Court's New Test for Analyzing Minority Vote Dilution*, in Catholic University Law Review, 2/1986, 531-563; C. DAVIDSON, *The Voting Rights Act: A Brief History*, in B. Grofman, C. Davidson (eds.), *Controversies in Minority Voting: The Voting Rights Act in Perspective*, Brooking Institution Press, Washington, 1992, 7-34). «Although the courts would later reverse course on some aspects of the VRA, the legacy of the rulings in the 1980s has become the status quo» (S. HOFER, C. HUANG and R. MURRAY, *The Trade-Offs between At-Large and Single-Member Districts*, cit., 3). In particular, with the *Thornburg v. Gingles* decision, the U.S. Supreme Court has defined legal standards that establish «when and how at-large election plans (and to a lesser extent, single-member districts) constitute a violation» of the Voting Rights Act by diluting minority voting strength. The Supreme Court established a three preconditions to establish vote dilution: that «the minority is large enough to compose a majority in a potential single-member district»; that the minority be politically cohesive; and that «the majority [consistently] votes as a bloc to defeat minority candidates» (T. DONOVAN and H. SMITH, *Proportional representation in local elections: a review*, cit., 8).

PART II
GERRYMANDERING AND MINORITIES

Lara Trucco[*]

Political and Judicial Representation in Gerrymandering: *un esquisse*

ABSTRACT: ***The essay concisely focuses on the approach to 'good design' of constituencies in the context of political representation. From this perspective, it conducts a comparison between the Anglo-Saxon political framework and the European one, highlighting how different historical experiences have influenced and led to distinct political and judicial conceptions of "gerrymandering".***

1. The concept of "representation" is one of the most debated topics in human and social sciences.

Among other factors, this is due to its vagueness, being a concept which can be "filled" with the most varied meanings. As matter of fact, there is a vast literature that offers many different definitions of this elusive concept (A. Pitkin, D. Fisichella).

In the Word Reference Vocabulary, "representation" is defined as "the act of representing, or the "state of being represented". It means that political representation could be defined as the activity of making citizens' voices, opinions, and perspectives "present" in the places in which processes of discussing and choice are carried out.

This definition is neutral. It is not able to acknowledge the capacity of the concept to express something more than mere representation, that is, the "representative common will" (E. J. Sieyès) of the entire society as an organic unitary body.

In other terms, this definition is not able to express the "added value" consisting of the capacity of the concept of political representation to convey the idea of the "the unity of those who are represented". This idea means that the outcome of the representative decision is distinguished from the "real common will" given by the mere sum of the will of every single social component.

It will likely become apparent from the discussion below that it is not fortuitous that unlike in Anglo-Saxon legal culture there has been a notable inclination on the old continent to enrich meanings from a linguistic perspective. This is evident in how linguistic terms are coined in response to emerging needs. Indeed, it is possible to argue that the Italian language offers a better expression of this *quid pluris*, distinguishing the simple concept of "rappresentazione" from the more complex concept of "rappresentanza" (both can be translated as "representation", which yet does not catch the differences expressed by the Italian language), specifically declined as "rappresentanza politica" (political representation).

2. From an historical point of view, individual suffrage marked an important shift, as

[*] Full Professor of Constitutional Law, University of Genova.

it gave a great contribution to boost the idea of political representation. In fact, "*la pratique du vote*" was able to enhance the expression of the political will of each voter.

Thus, in a historical framework – that of the Liberal age – were individuals struggled to take part in political life, the suffrage has become the focus of the political scene as the basis of the representation of the individual as a citizen and then of all citizens as "the people".

Yet it is widely known that, during the Liberal age, citizenship was granted on a census basis and that, consequently, a very small part of the population enjoyed the right to vote. However, it was exactly in this historical period that unitary idea of "political representation" came into play. From a general perspective, the restricted suffrage implied the risk of generating an atomistic imagine of the State-community "*réduite à une somme d'individus*", whilst the ambition was to create an organic and unitary political entity.

To prevent this risk, it was necessary to give a concrete value to the expression of the vote. Specifically, the suffrage needed to be transformed into an effective tool to give shape to a representation of the society as a product of the human determination of the whole society. Notably, this was possible also thanks to the resort to the translation approach, inherited from canon law.

From another perspective, the concept of political representation led to overcome the idea of parliaments as mere meetings of delegates, in favour of their conception as representative bodies. Hence, parliaments started to be conceived as fully-fledged "mirrors of the nation". So, the right to vote produced a radical change in the placement of parliaments: from bodies of society, accredited, but not integrated into the State itself, they were transformed into "internal bodies", belonging to the state itself and constituting a substantive part of it, with the function of transforming the will of the state community into law. The consequence: a different balance between the powers, which ultimately led to the shift from constitutional monarchy into a parliamentary form of government, emblematic of the transformation described above.

3. During the nineteenth century, on the Old continent it was possible to observe an extension of the electorate that produced a weakening of the relationship between representative and represented bodies. These dynamics were exacerbated by the universal suffrage.

In some cases, this trend led to an abstract (and ambiguous) ideal of national sovereignty, with the consequence that representation was eradicated from civil society and transformed into something that lacked any element of concreteness.

In this perspective, it is comprehensible that single individuals felt the substantive insignificance of their contribution, as voters, to political life.

Some further events and distortions of mechanisms developed during the Liberal age had the effect of further weakening the consistency of political representation.

Reference is, for example, the establishment of indirect electoral systems for the parliaments elections, considered to be able to destroy "one of the greatest advantages of representative government: that is the capacity to establish frequent relations between the different classes of society" (B. Constant).

The weakening of the political representation to a "minimal" consistency resulted in the departure from the objective to implement the principle of "popular sovereignty", made concrete in Jean Jacques Rousseau's warning – according to whom «at the moment when a person allows representation of himself, he is no longer free; indeed he no longer exists» – and enshrined in the 1793 French Constitution, providing that "*le peuple souverain est universalité des citoyens français*".

4. During the 19th century, the productive exchange between European legal cultures of common and civil law and the emerging American constitutionalism, facilitated by rapid advancements in communication technologies, highlighted significant differences in the conception of "political representation": "substantial" in the United States and "formal" on the Old continent. These differences laid the foundations for two different developments in matter on both sides of the Atlantic which continue to influence the related political systems (*amplius*, F. Michjl).

In the context of a State entity aspired to become "omnivorous" was established a technical meaning of political representation. This meaning was functional to the "*anéantissement*" of ancient social and territorial bodies as the individual representation of delegated, which were still deeply ingrained in the eclectic and complex articulation of the medieval era.

The "scientific" approach, namely the application of the concept of equality in its mathematical sense, played a central role in the dynamics that led to the establishment and subsequent evolution of the modern State. Specifically, this approach was instrumental in shaping a geometrically flat form for the "generalization of objective law, defining the sphere of State power uniformly and comprehensively in relation to all those who were subject to that sovereign power.

The State made itself as the creator of the rules governing from top to bottom the political representation.

In the realm of private relationships, this operation was instrumental in addressing the need for greater legal certainty in the economic environment. In addition, in the public context, it proved functional in asserting the absolutist dominion of the nation-State. In this regard, during the liberal era, the concept of citizenship tied to wealth (citizenship by census) significantly influenced the notion of political representation.

As known, by applying such a criterion, only a small segment of the population gained substantial status. The divide between formal procedures and the essence of social identity, which aimed in abstractly manner to form a people, alongside the apparently inclusive nature of electoral participation processes, introduced ambiguity into the concept of democracy and eroded its ability to reflect the values, aspirations,

and needs of the populace (Italy serves as an illustrative example).

In this regard, discussions have arisen regarding *élections sans électeurs*, pinpointing in this democratic deficiency the "original sin" of the European constitutionalism, which leaned more towards liberalism than democracy.

5. In the Old continent the granting of political rights was an exceptional occurrence, why characterized by a top-down approach, whereby such rights were conferred from the authorities to the citizens.

The concept of political representation focused on abstractly considered and mathematically shaped data. By contrast, on the other side of the Atlantic the memorable events of the American colonies, intricately tied to the social virginity of those lands, fostered a disposition favourable to the emergence of a common identity spirit devoted to securing independence from the motherland and, even prior to that, to the recognition of suffrage for all colonists indiscriminately. Thus, the typically European phenomenon of the enlarged suffrage emerged, serving in other lands as the spontaneous inception for the concrete realization of the principle of popular sovereignty.

Tocqueville writes: «In Europe we are at a loss how to judge the true character and the more permanent propensities of democracy, because in Europe two conflicting principles exist, and we do not know what to attribute to the principles themselves, and what to refer to the passions which they bring into collision. Such, however, is not the case in America. The people reigns without any obstacle, and it has no perils to dread and no injuries to avenge. In America, democracy is swayed by its own free propensities; its course is natural and its activity is unrestrained; the United States consequently afford the most favourable opportunity of studying its real character» (A. de Tocqueville).

In this context, the concern of the founding fathers in the new continent "to guarantee pluralism through the federal republic" would have led to the development of a pragmatic conception of the representative instrument, cantered on the territory.

6. In the Anglo-Saxon tradition, constituencies were seen as a bottom-up expression of collective interests, representing bodies of local communities such as countries (which encompassed rural areas) and boroughs (encompassing villages and urban centres).

This tradition finds its origins in the early Middle Ages, when monarchs summoned the individuals to parliament, and these delegates were tasked with representing their respective communitas, in a largely autonomous manner of the numerical size of the political-institutional entity they represented.

This experience has remained resilient, as these identities have remained deeply ingrained in the fabric of social organization, upheld by their own strength and

legitimacy. So on English land, even into the latter half of the 19th century, there was widespread belief that the sole custodians of sovereignty and, consequently, of electoral rights, were the ancient moral people: counties and villages. The interests of certain wealthy lords, entrenched in perpetual corporations, further solidified this perspective (pocket and rotten boroughs could not be abolished until 1885).

In this context, the notion of representing the constituency in its organic structure prevailed, irrespective of its demographic characteristics. Proponents of the spontaneous development of democratic norms favour this approach within society. Conversely, it is opposed by those who argue that such a system makes it challenging to ensure social order due to the fragmentation of the social tissue that comes from it.

7. During the Convention, Franklin stated that «if a representation entirely proportional to the population had been accepted, the freedom of the small States would have been in danger; whereas, if equality of votes had been allowed, the influence of the large states would have been jeopardized».

As history recalls, the solution was to grant legislative power to a Parliament consisting of two Chambers: a House of Representatives originally composed of one elected member for every fourty thousand inhabitants (later amended to “one for every thirty thousand”, as per Section II of Article 1 of the US Constitution); and a Senate, where each State – irrespective of its population size – was equally represented. On this basis, in the United States, political representation immediately became the product of political contention, particularly among the various levels of territorial representation and government. This original character has persisted over time. So today we observe that the republic was initially structured to ensure that representation struck a delicate balance between the people’s will and the independent judgment of certain wise and ambitious elites.

With this in mind, the view that gerrymandering is wrong solely due to how it frustrates the democratic will (the standard argument) «is undoubtedly insufficient when viewed through the lens of American political thought» (*amplius*, J. Rubel, 2).

In fact, given its potential utility in navigating the political dynamics at play, malapportionment could be viewed as a potentially useful tool for achieving some semblance of balance. As James Madison writes: «to secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed». Madison goes on to state that «A republic… promises the cure for which we are seeking whereas a pure democracy […] can admit of no cure for the mischiefs of faction» (*Federalist*).

8.The preceding discussions provide motivation for prejudicially considering malapportionment as electoral fraud within the electoral culture of the Old Continent.

More in general, this has led to a presumption of legitimacy regarding electoral system mechanisms calibrated to mathematical parameters, while other forms of fraud have been given comparatively little consideration.

In this perspective, a constituency design aiming for a fair distribution of seats must allocate seats based on a mathematical criterion proportional to the chosen demographic index (typically the number of inhabitants).

The "representation quotient" (defined as the ratio between the number of inhabitants and available seats) must ensure a strongly egalitarian "one man, one vote" principle, meaning it should essentially be consistent across all constituencies to ensure an equal weight of each vote (see *amplius* D. CASANOVA, M. ROSSI on this issue). From which the mentioned presumption that in the continental electoral tradition the malapportionment represents an obstacle to genuine and healthy democracy, always and in any case.

However, it has been cautioned that the arguments presented thus far have overlooked certain uses of constituency design that contribute to strengthening American democracy. «We ought not write off gerrymandering too quickly» it has been observed (J. Rubel, 4).

The underlying notion of the Founders - particularly Hamilton - was that politics, and the underlying political dynamics, should play a key role in this matter. Thus, the significance of those in power to shape electoral districts, with perhaps a limited "arbitral" role for the Courts, to ensure that state and federal interventions remain within their respective competencies.

Significantly, at the core of Hamilton's pursuit of the Federal principle is the notion that state legislatures should have control over one chamber, while the national government should have control over the other.

Therefore, granting state legislatures the authority to influence the outcome of congressional elections may be viewed as an instrument for the restoration of state legislative influence over national elections, within the framework of a predominantly political dialogue.

This turns the malapportionment in a new positive light.

However, if there's an upfront political agreement with competitors on how to distribute political representation, it may not be deemed illegal. In other scenarios, the breach of the representation quotient signals something abnormal but doesn't necessarily indicate fraud, just as adhering to the representation quotient doesn't guarantee the absence of fraud (as evident in *Bethune v. Virginia*, 2017).

In this sense, the Supreme Court agrees that the courts because both, no competencies and standard for deciding them existed could not adjudicate claims of political gerrymandering (see *Vieth v. Jubelirer*, 2004).

Separation of the Electoral Power between Politics and Judges		
Year	**Case-law**	**Electoral power**
1946	Colegrove v. Green	Political power
1962	Backer v. Carr	Judicial power
1964	Wesberry v. Sanders	Judicial power
1964	Reynolds v. Sim	Judicial power
1973	Gaffney v. Cummings	Political power
1986	Davis v. Bandemer	Judicial power
1993	Shaw v. Reno	Judicial power*
2004	Vieth v. Jubelirer	Political power
2017	Bethune v. Virginia	Judicial power
2017	Cooper v. Harris	Judicial power *
2019	Rucho v. Common	Political power
2022	Harper vs. Hall	Judicial power
2023	Moore v. Harper	judicial power
		* Racial gerrymandering

9. Today, a sceptical attitude keeps alive within the electoral culture of the United States regarding the equivalence of breaching the "representation quotient" with electoral fraud. This scepticism has endured, especially among individuals with strong ideological convictions on the subject (see A. FERRARA on this issue).

Primarily, this perspective acknowledges that gerrymandering fraud can occur within well-drawn constituency boundaries; hence the importance of the redistricting transparency (see *amplius* R. GREEN and L. DELLA VENTURA on this issue). Then, it underscores the fluidity of electoral choices within democratic frameworks because voter preferences must be able to change over time. Thus, the absence of shifts can suggest a certain entrenched voting inclination within specific territories. Moreover, this sceptical view neglects the political dimension of the issue. Finally, it overlooks the possibility that affected populations may still perceive it as "right".

On the other hand, absolute faith in considering the representation quotient as the sole criterion for the validity of procedures fails to acknowledge the complexity of electoral dynamics, the fluidity of voter behaviour, and the nuanced perceptions of fairness within different communities. Specifically, it overlooks the importance of ensuring not only technical accuracy but also the legitimacy of the electoral process itself perceived by citizens.

From this standpoint, the malapportionment crosses into gerrymandering when it's deliberately aimed at infringing upon the fundamental rights of certain groups, as seen in cases of racial gerrymandering (about the racial gerrymandering, see R. BIZZARI, and A. CARMINATI on this issue).

All of this has led to the emphasis that «political gerrymandering has been difficult to define» and that «there has been considerable ambiguity about how it should be

treated by the courts» (A.J. McGann, C.A. Smith, M. Latner, A. Keena, 19).

It is indubitable that the political approach necessitates a high level of democratic maturity to operate effectively. Specifically, it relies on the willingness of political factions to engage in dialogue and embrace alternation in representative and governing bodies, as well as in the delineation of electoral constituencies. It remains crucial to recognize that in contexts prioritizing political autonomy, such autonomy should not equate to arbitrariness. In this regard, the U.S. Supreme Court rejected the "independent state legislature doctrine", which asserts that the authority to regulate elections rests solely with state legislatures without oversight from the judiciary (see *Moore v. Harper*).

10. Therefore, in a mature democracy, the necessity for judicial intervention in electoral processes reflects a breakdown or inadequacy in the political process. This is because institutions and actors should effectively address issues related to electoral fairness and representation exclusively in a political view.

When judicial intervention becomes necessary, it can suggest a failure of the political branches to adequately fulfil their responsibilities or adhere to democratic principles. If such interventions become frequent or systemic, it may indicate deeper flaws in the democratic system, such as insufficient checks and balances, inadequate protection of fundamental rights, or a lack of political will to address underlying issues.

On a different but connected profile, the lack of the judicial review can also be a symptom of the inability to uphold democratic values and guarantee fairness, being equally a symptom of an immature democracy. In fact, in a healthy democracy, the independent judiciary power plays a crucial role as a check on the power of other branches of government and as a protector of individual rights and the rule of law. The lack of any mechanism of oversight of elections by a judicial review can contribute to a perception of injustice (as happened for a long time in Italy[1]). Moreover, it undermines

[1] For a long time in Italy, there was a lack of judicial review overseeing parliamentary elections by an impartial body, concerning both procedure and the electoral system. The Italian Constitution stipulates that "Each House must verify the credentials of its members and the causes of ineligibility and incompatibility that may arise at a later stage" (Article 66), and this provision has been broadly interpreted. Consequently, no judge was established to carry out this delicate task other than the Houses of Parliament themselves (as a matter of principle affected by conflict of interest).

Focusing on the procedural level aspect, with the decision no. 48/2021, our Constitutional Court affirmed a restrictive approach to the 'verification of powers,' limiting its effects to disputes related to the validation of the admission titles of the elected. Such a decision correlated with an expansion of the protection of political rights by ordinary judges in pre-election disputes, particularly concerning the admission of lists or candidates. About the mechanisms of the electoral law, in the judgement no. 1/2014, a significant precedent was set when a judge deemed the electoral legislation incompatible with the genuineness of political representation; this because voters were not given the opportunity to express any voting preference (as stipulated by law no. 240 of 2005). Subsequently, in the decision no. 35/2017, the principles established in the earlier decision were further solidified. In fact, it was reaffirmed the principle which states that the electoral system must not compromise the heart of the

public trust in democratic institutions and erodes the legitimacy of the electoral process.

In conclusion, both frequent judicial intervention and the absence of any electoral oversight can be cause for concern, as a symptom of dysfunction within the political process or institutional relations. This has led to the delegitimization of representation and the representativeness of Parliament itself (*amplius*, P. FELTRIN, S. MENONCELLO e G. IERACI on this issue).

In today's globalized world, it remains challenging to refute the opinions expressed in the past, which lamented the electorate's difficulty in asserting its political identity; as those who viewed elections merely as mechanisms aimed at mechanically generating the political power itself.

Various obstacles continually obstructed the "substantial" and the "procedural" dimensions of democracy, impeding the effective functioning of political institutions and legal mechanisms. These impediments had devastating implications on the political representation as the goal.

In response to this context, alternative proposals have emerged. For instance, there have been calls for a return to forms of direct democracy. Advocates argue that direct democracy is essential to ensure the participation of every citizen in public affairs management, facilitate more effective decentralization of powers, and reform traditionally conservative bodies such as upper chambers (*amplius*, L. SPADACINI, F. PALLANTE, and N. MACCABIANI on this issue).

Additionally, there are proponents of introducing renewed forms of techno-political representation. They believe that the formation of parliamentary bodies based on a tendency toward a mathematician egalitarianism has stripped parliaments of both motivation and expertise needed to enact sound legislation.

11. It can be assumed that the exclusive use of quantitative indices of purely mathematical nature or those derived from the judiciary leads to substantially anonymous outcomes. This is the first reason why such approaches do not exhaust the range of solutions that can contribute to improving the quality of political representation. Therefore, there is an opportunity to adopt criteria for the expression of 'mixed' parliamentary representation, which can consider, as much as possible, the complexity of voices in today's multicultural society (*amplius*, see M. PAL on this Issue).

Historical and comparative analysis (as highlighted by A. MAZZOLA and M. PODETTA on this issue), often emphasizes the significance in defining constituencies to considering qualitative (so-called identitarian) indices (such as linguistic, geographic, and historical factors), alongside quantitative criteria (such as the representation quotient and the electoral formula). Indeed, sometimes employing a 'mixed' method is not only

system of representative democracy (and the parliamentary form of government) set out in the Constitution; additionally, the Court emphasized that "free zones" cannot exist without judicial oversight (as provided in the law no. 52 of 2015).

appropriate but also necessary to uphold social and territorial cohesion, which are essential components of contemporary states in today's globalized world.

In this view, particularly attention is drawn to the 'exceptions' provided for by constitutional norms, such as the existence of 'foreign constituencies' and the allocation of 'special' seats in regions like Molise, Valle d'Aosta/*Vallée d'Aoste*, and Trentino-Alto Adige/*Südtirol*, as well as provisions for linguistic minorities.

12. Looking to the law, the qualitative "identitarian" parameters are relevant in constituencies design. They must take into account by the independent commission of experts. (*amplius*, L. Spadacini). According to those (Decree no. 177 of 2020, article 1), each single-member constituency within a region is included in a multi-member constituency. Additionally, the population of each single-member constituency and each multi-member constituency may deviate from the average population of their respective constituencies by no more than 20 percent in excess or deficiency. Furthermore, in forming single-member and multi-member constituencies, the decree ensures the coherence of the territorial basin of each constituency, as well as its homogeneity under economic, social, and historical-cultural aspects, and the continuity of its territory, except in cases where insular portions are included. Additionally, single-member and multi-member constituencies generally cannot divide municipal territory, except for municipalities with multiple constituencies due to their demographic size. In areas with recognized linguistic minorities, the delimitation of constituencies must consider the need to facilitate their inclusion in the fewest possible number of constituencies, even if it deviates from the guiding principles and criteria outlined in the same decree.

But further exploration also on these issues will be featured in the forthcoming essays (*amplius*, M. PODETTA, D. CASANOVA).

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Rachele Bizzari[*]

Towards 2024 Elections: Racial Gerrymandering in the Latest U.S. Supreme Court's Rulings[**]

SUMMARY: 1. Introduction. – 2. A quality census as a necessary premise of fair representation. – 3. The legal background: how the Supreme Court weakened the protection of minority voting rights in *Shelby County v. Holder* and *Brnovich v. Democratic National Committee*. – 3.1. Past discrimination, federal preclearance, and *Shelby County v. Holder*. – 3.2. *Brnovich v. Democratic National Committee*: a further blow to the Voting Rights Act. – 4. *Allen v. Milligan*: a tentative victory for minority voting rights. – 4.1. Act I: the challenged congressional redistricting map of Alabama and the State's emergency application to the Supreme Court. – 4.2. Act II: an unexpected win for the Voting Rights Act, and an even more unexpected reaction from Alabama. – 5. Final remarks: what does the future hold?

ABSTRACT*: Last June, the U.S. Supreme Court upheld a claim brought under Section 2 of the Voting Rights Act of 1965 against the congressional redistricting plan of Alabama, thus securing a significant victory for minority voting rights. The ruling was met with surprise by public opinion, as in the last few years the United States have witnessed a progressive weakening of voting rights, often to the detriment of communities of color. This paper aims to provide an analysis of the Supreme Court's decision in Allen v. Milligan and its follow-up, considering the contextual and legal background in which the current redistricting litigation takes place. Indeed, the 2020 census occurred in a political climate characterized by undue meddling from the Trump administration, and by the targeting of irregular immigrants, which resulted in a higher undercount of historically undercounted groups. Furthermore, for the first time in nearly sixty years, voters had to deal with a redistricting cycle shaped by the consequences of controversial rulings such as Shelby County v. Holder and Brnovich v. Democratic National Committee. Although in Allen v. Milligan the Supreme Court ultimately allowed for the drawing of a second majority-Black district, it is still too early to assess whether the Court's commitment to Section 2 of the Voting Rights Act will last in the future.*

1. *Introduction*

Last June, the Supreme Court of the United States issued its ruling in *Allen v. Milligan*[1], a case concerning the congressional redistricting map of Alabama, that had

[*] Ph.D. student in *Teoria dei diritti fondamentali, giustizia costituzionale, comparazione giuridica, diritto e religione*, University of Pisa.

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[1] *Allen v. Milligan*, 599 U.S. ___ (2023). Later, on June 27, 2023, the Court issued its decision in

been challenged by voters and non-profit organizations for racial gerrymandering under Section 2 of the Voting Rights Act of 1965.

As of now, redistricting litigation is particularly intense at both state and federal level. Indeed, it has been almost three years since the results of the 2020 census were released by the U.S. Census Bureau, and, as the 2024 elections approach, congressional and legislative redistricting plans are still challenged across the Nation.

The latest redistricting cycle took place under rather particular circumstances.

In fact, the 2020 census was characterized by Trump administration's unprecedented attempts to interfere with the decennial population count. Documents released by *The New York Times* and obtained by the *Brennan Center for Justice* through a public records lawsuit filed under the Freedom of Information Act revealed an «unusually, high degree of engagement» by the U.S. Department of Commerce, even in technical matters such as counting methodologies[2]. Nevertheless, the 2020 census results showed that southern States have become both more racially and politically diverse, thus posing a threat to the long-standing political status quo.

Furthermore, the 2020 redistricting cycle and subsequent litigation have been affected by the weakening of the Voting Rights Act of 1965 in the Supreme Court's rulings *Shelby County v. Holder*[3] and *Brnovich v. Democratic National Committee*[4]. Indeed, States previously subject to preclearance were free to pass into law gerrymandered maps that diluted minority voting power, and redistricting plan challengers had to deal with a narrow interpretation of Section 2 of the Voting Rights Act as well.

Therefore, this paper provides an analysis of *Allen v. Milligan*, in the wake of a political and legal context characterized by both polarization and social fragmentation. First, the article offers an evaluation of the 2020 census and its outcome to gather its

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Moore v. Harper, 600 U.S. ___ (2023), ruling that state courts can review partisan gerrymandering under state law. According to the majority, «the Elections Clause does not vest exclusive and independent authority in state legislatures to set the rules regarding federal elections». Therefore, «when state legislatures prescribe the rules concerning federal elections, they remain subject to the ordinary exercise of state judicial review». In 2019, the Supreme Court ruled that partisan gerrymandering claims are not a justiciable question for federal courts; see *Rucho v. Common Cause*, 588 U.S. ___ (2019). However, back in 2022, the North Carolina Supreme Court found the State's congressional redistricting plan to be excessively partisan under state law. On *Moore v. Harper* see, e.g., C. COOPER, *Moore v. Harper and the Consequential Effects of the Independent State Legislature Theory*, in *Fordham Law Voting Rights and Democracy Forum*, 1/2023, 133-150; B. FAIN, *Moore v. Harper: The Independent State Legislature Theory and the Court at the Brink*, in *Duke Journal of Constitutional Law & Public Policy Sidebar*, 18/2023, 293-322; C. SERPOLLA, *La pronuncia Moore v. Harper e la fragilità recente della democrazia statunitense*, in *DPCE Online*, 3/2023, 3077-3089; D. ZECCA, *Legislazione elettorale e judicial review, tra diritto costituzionale statale e federale, in Moore v. Harper*, in *Quaderni Costituzionali*, 3/2023, 655-658.

[2] See M. WINES, *2020 Census Memo Cites 'Unprecedented' Meddling by Trump Administration*, in *The New York Times* January 15, 2022, and K. PERCIVAL, *Documents Reveal Trump Administration's 'Unprecedented' Attempts to Influence 2020 Census*, January 25, 2022, available at Brennan Center.

[3] *Shelby County v. Holder*, 570 U.S. 529 (2013).

[4] *Brnovich v. Democratic National Committee*, 594 U.S. ___ (2021).

problematics with reference to minority voters. Second, it provides a brief insight into the legal framework as shaped by the Supreme Court's rulings. Finally, it examines the congressional redistricting plan of Alabama and its challenge in federal courts, touching upon which entities are in charge of redrawing congressional districts, policy considerations on the Supreme Court's legitimacy, and the Justices' ideological leanings. Indeed, although *Allen v. Milligan* was welcomed as a significant victory for minority voting rights, the Voting Rights Act faces new threats as redistricting litigation is still ongoing, and the Supreme Court is about to rule on the relationship between race and politics in the drawing of congressional and state legislative boundaries.

2. *A quality census as a necessary premise of fair representation*

Article 1, Section 2 of the United States Constitution provides for a mandatory national census, which has to take place once a decade[5]. On the one hand, the census is instrumental to reapportionment, as its results determine the number of seats each State will have in the House of Representatives for the next ten years. On the other, upon findings from the census, each State draws the lines for both its congressional and state legislative districts. For some States, redistricting may be necessary to account for the House of Representatives seats gained or lost because of population change. However, States with more than one congressional district generally proceed to redistricting in order to ensure that the population is equally distributed in each district, according to the principle «*one person, one vote*»[6].

[5] See Article 1, Section 2 of the U.S. Constitution («Representatives and direct taxes shall be apportioned among the several States [..] according to their respective numbers. The actual Enumeration shall be made within three Years after the first meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative [..]»).

[6] With its decision in *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court established that redistricting questions are justiciable under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. Later, in *Wesberry v. Sanders*, 376 U.S. 1 (1964) the Court held that the Constitution requires that «as nearly as is practicable one person's vote in a congressional election is to be worth as much as another's». That same year, in *Reynolds v. Sims*, 377 U.S. 533 (1964) the Supreme Court extended the «*one person, one vote*» principle to electoral districts of state legislatures. Most recently, the Court held that the doctrine allows States to use their entire population, including non-registered voters, to draw legislative districts; see *Evenwel v. Abbott*, 578 U.S. 54 (2016). It is worth mentioning that the principle «*one person, one vote*» does not require mathematical perfection. Indeed, the Constitution allows deviations when they are justified by «legitimate considerations incident to the effectuation of a rational state policy», such as compactness and contiguity (*Shaw v. Reno*, 509 U. S. 630, 647 (1993)), maintaining the integrity of political subdivisions (*Mahan v. Howell*, 410 U. S. 315, 328 (1973)), and maintaining the competitive balance among political parties (*Gaffney v. Cummings*, 412 U. S. 735, 752 (1973)). A minor deviation from mathematical equality – i.e., an apportionment plan with a maximum population deviation under 10%. – is not a *prima facie* case of discrimination under the Fourteenth Amendment, and it does not require justification by the State. See, e.g., *Brown v. Thomson*,

The latest census was held in 2020, in the midst of the Covid-19 pandemic. Indeed, the publication of the results was delayed until April 2021[7]. As a consequence of the change in population, the States of California, Illinois, Michigan, New York, Ohio, Pennsylvania, and West Virginia lost one seat. On the contrary, Colorado, Florida, Montana, North Carolina, and Oregon gained one seat, while Texas gained two seats.

The quality of the 2020 census has been the subject of media and public attention[8]. Although no census has ever produced a perfect count, the coronavirus pandemic caused an unprecedented disruption of services and operations. The U.S. Census Bureau's analysis of the results released in March 2022 revealed that the 2020 census overcounted population in Delaware, Hawaii, Massachusetts, Minnesota, New York, Ohio, Rhode Island, and Utah, and undercounted population in Florida, Illinois, Mississippi, Tennessee, and Texas[9]. More significantly, the study of the results showed that the Black population, the American Indian or Alaska Native population on reservations and the Hispanic population were all undercounted. On the contrary, White Non-Hispanics and Asians turned out to be overcounted. Although the census usually undercounts minorities, in 2020 the discrepancies were higher than in 2010 – especially for Hispanics[10]. Furthermore, it is worth mentioning that Hispanic or Latino and Middle Eastern or North African are response options to the census question about ethnicity, not race[11]. Surveys conducted by the *Pew Research Center* showed that Latinos expressed difficulties in filling out the questionnaire, as the two-parted question provided by the Bureau does not reflect well how they perceive their own identity[12].

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462 U.S. 835 (1983), and more recently *Harris v. Arizona Independent Redistricting Commission*, 578 U.S. 253 (2016). On the subject see, e.g., S. LEVINSON, *One Person, One Vote: A Mantra in Need of Meaning*, in *North Carolina Law Review*, 4/2002, 1269-1298; G. M. HAYDEN, *The False Promise of One Person, One Vote*, in *Michigan Law Review*, 2/2003, 213-267; P. S. KARLAN, *Reapportionment, Nonapportionment, and Recovering Some Lost History of One Person, One Vote*, in *William & Mary Law Review*, 5/2018, 1921-1960.

[7] See U.S. Census Bureau, *2020 Census Apportionment Results*, April 26, 2021.

[8] See, e.g., T. BAHRAMPOUR, *2020 Census undercounted Latinos, Blacks and Native Americans, bureau estimates show*, in *The Washington Post* March 10, 2022; M. WINES – M. CRAMER, *2020 Census Undercounted Hispanic, Black and Native American Residents*, in *The New York Times* March 10, 2022; and D. COHN – J. S. PASSEL, *Key facts about the quality of the 2020 Census*, June 8, 2022, available at Pew Research Center.

[9] See U.S. Census Bureau, *Post-Enumeration Survey and Demographic Analysis Help Evaluate 2020 Census Results*, March 10, 2022.

[10] *Ibid.*

[11] The Biden administration is currently considering combining questions about race and ethnicity into one. See *Initial Proposals for Updating OMB's Race and Ethnicity Statistical Standards*, 88 Fed. Reg. 5375 (January 27, 2023).

[12] See D. COHN – A. BROWN – M. H. LOPEZ, *Black and Hispanic Americans See Their Origins as Central to Who They Are, Less So for White Adults*, May 14, 2021, available at Pew Research Center. See also L. NOE-BUSTAMANTE *et al.*, *Measuring the racial identity of Latinos*, November 4, 2021, available at Pew Research Center.

Research shows that certain demographic groups are less likely to fill out the census form due to confusion, distress, and fear over racism and immigration status[13]. These concerns were exacerbated by the political climate and by President Donald Trump's proposal to add a citizenship question on the census questionnaire sent to all households. Such attempt was halted by the Supreme Court in *Department of Commerce v. New York*[14]. In a decision authored by Chief Justice Roberts, with the other Justices concurring and dissenting in part, the Court held that the Enumeration Clause enables Congress, and by extension the Secretary of Commerce, to inquire about citizenship on the census form, but found the decision to introduce a citizenship question inadequately explained. On that occasion, the need to promptly proceed with the printing of questionnaires put a stop to litigation. Nevertheless, the Court's ruling opened up to a strategy that may in fact undermine representation of minorities and immigrants to favor conservative political forces.

Furthermore, the Supreme Court allowed Trump administration to terminate the census before its scheduled end date[15]. The Government managed to cut short counting by two weeks alleging that otherwise the Census Bureau would not be able to meet the December 31 statutory deadline to report the census results to the President of the United States[16]. Justice Sonia Sotomayor dissented, stressing the changing

[13] See U.S. Census Bureau, *2020 Census Barriers, Attitudes, and Motivators Study Survey Report. A New Design for the 21st Century*, January 24, 2019.

[14] *Department of Commerce v. New York*, 588 U.S. ___ (2019).

[15] *Ross v. National Urban League*, 592 U.S. ___ (2020). As an emergency stay – i.e., an emergency measure taken by the Supreme Court at the request of an unsuccessful party in a case pending before the lower courts – the ruling was part of the so-called Supreme Court's shadow docket. In addition to emergency stays, the shadow docket includes orders granting or denying writs of certiorari, and orders dealing with timelines and procedural issues. The shadow docket represents a departure from the ordinary procedure. Indeed, in the merits cases that comprise the regular docket, parties file briefs and take part in oral arguments before the Court, whose decision will be published months after the hearing. *Amici curiae* may submit briefs as well, and may be allowed to participate in oral arguments. On the contrary, in the case of the shadow docket, the Supreme Court issues a short order on the sole basis of the briefs presented by the plaintiff and the defendant. Although the shadow docket goes back in time, its use has increased significantly in the last few years due to the *modus operandi* of Trump administration and the coronavirus pandemic. See, e.g., W. BAUDE, *Foreword: The Supreme Court's Shadow Docket*, in *New York University Journal of Law and Liberty*, 1/2015, 1-47; S. I. VLADECK, *The Solicitor General and the Shadow Docket*, in *Harvard Law Review*, 1/2019, 123-163; B. P. MCDONALD, *SCOTUS's Shadiest Shadow Docket*, in *Wake Forest Law Review*, 5/2021, 1021-1102. For a comprehensive analysis of the shadow docket see also S. I. VLADECK, *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic*, New York, 2023.

[16] See 13 U.S.C. § 141(b) («The tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States»). The decision to end counting before the scheduled deadline was part of Donald Trump's strategy to gain control of census numbers by the end of 2020. Indeed, in July 2020 the President issued a memorandum for the Secretary of Commerce, which announced the administration's intent to exclude from the population count, «to the extent practicable», aliens who were not in a lawful immigration status under the Immigration and Nationality Act. The policy announcement actually

attitude of the administration towards the issue: «Meeting the deadline at the expense of the accuracy of the census is not a cost worth paying», wrote Sotomayor, «especially when the Government has failed to show why it could not bear the lesser cost of expending more resources to meet the deadline or continuing its prior efforts to seek an extension from Congress»[17]. Thus, the Justice warned against «the harms associated with an inaccurate census» which are both «avoidable and intolerable»[18]. Indeed, it cannot be excluded that Trump administration's strategy may have led to an even more imprecise count of historically undercounted groups.

Therefore, an inaccurate census can ultimately result in severe consequences for the following decade in terms of fair distribution of congressional seats, drawing of voting districts, and allocation of federal resources for Medicare, Medicaid, schools, roads, and other public services.

3. *The legal background: how the Supreme Court weakened the protection of minority voting rights in* Shelby County v. Holder *and* Brnovich v. Democratic National Committee

3.1. *Past discrimination, federal preclearance, and* Shelby County v. Holder

Shelby County v. Holder is considered to be the major Supreme Court's ruling on voting rights of the last few years[19].

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led to challenges from state and local governments, which reached the Supreme Court in *Trump v. New York*, 592 U.S. ___ (2020). The Supreme Court vacated the District Court's judgment and remanded the case with instructions to dismiss for lack of jurisdiction, as the case was «riddled with contingencies and speculation» that impeded judicial review. Within weeks of the Supreme Court's ruling in *Ross v. National Urban League*, the Director of the Census Bureau Steve Dillingham announced that anomalies had been discovered during post-collection processing. In a press release issued on December 2, 2020, the Bureau informed the public that the estimated date in which apportionment data would be completed remained in flux. Indeed, in a following press release issued on December 30, 2020, the Census Bureau declared that it would fail to meet the statutory deadline.

[17] 592 U.S. ___ (2020) (Sotomayor J., dissenting).

[18] 592 U.S. ___ (2020) (Sotomayor J., dissenting).

[19] 570 U.S. 529 (2013). Back in 2009, in *Northwest Austin Municipal Utility District No. 1 v. Holder*, 557 U.S. 193 (2009), an unanimous Supreme Court expressed serious concerns about the Voting Rights Act's continued constitutionality. The majority observed that «the Act imposes current burdens and must be justified by current needs», and concluded that, although «distinction can be justified in some cases», «[..] a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets». On *Shelby County v. Holder* see, e.g., S. R. BAGENSTOS, *Universalism and Civil Rights (with Notes on Voting Rights after Shelby)*, in *The Yale Law Journal*, 8/2014, 2838-2876; J. BLACKSHER – L. GUINIER, *Free at Last: Rejecting Equal Sovereignty and Restoring the Constitutional Right to Vote Shelby County v. Holder*, in *Harvard Law & Policy Review*, 1/2014, 39-70; J. GREENBAUM – A. MARTINSON – S. GILL, *Shelby County v. Holder: When the Rational Becomes Irrational*, in *Howard Law Journal*, 3/2014, 811-868; B. BALDWIN, *Backsliding: The United States Supreme Court, Shelby County v. Holder and the Dismantling of Voting*

The case dealt with the constitutionality of Sections 4 and 5 of the Voting Rights Act of 1965 – a landmark piece of legislation signed into law by President Lyndon B. Johnson at the height of the civil rights movement in order to expand the protections afforded by the Fifteenth Amendment to the United States Constitution[20]. The Act contains general provisions, which apply nationwide, and special provisions, which apply to those States and local governments with a substantial history of racial discrimination. Most significantly, Section 5 requires covered jurisdictions to receive federal approval – known as preclearance – before implementing changes to election laws.

Covered jurisdictions used to be identified through the coverage formula provided by Section 4 of the Act. Initially, States and local governments subject to special provisions were those which maintained on November 1, 1964, any literacy test or other devices as a prerequisite for voting or registration for voting, and had less than 50 percent voter registration or turnout in the 1964 presidential election. The coverage formula was later extended by Congress in 1970[21] and in 1975[22] – with reference, respectively, to November 1968 and November 1972 as the relevant date for the maintenance of a voting test or device, and the levels of voter turnout and electoral participation. In 1982[23] and 2006[24] Congress reauthorized the Act for twenty-five years each time, but without altering the coverage formula.

Thus, at the time of the Supreme Court's ruling, Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia were covered as a whole. Section 5 of the Act also applied to counties in California, Florida, New York, North Carolina, and South Dakota, and to a couple of townships in Michigan.

In a majority opinion authored by Chief Justice Roberts, and joined by Justices Scalia, Kennedy, Thomas, and Alito, the Court held Section 4 of the Voting Rights Act unconstitutional, ruling that its coverage formula could no longer be used to determine jurisdictions subject to preclearance. According to the majority, «the formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned nationwide for over 40 years. And voter registration and turnout numbers in the covered States have risen dramatically in the years since»[25]. Nevertheless, «the coverage formula that

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Rights Act of 1965, in *Berkeley Journal of African-American Law & Policy*, 2/2015, 251-262; G. E. CHARLES – L. FUENTES-ROHWER, *The Voting Rights Act in Winter: The Death of a Superstatute*, in *Iowa Law Review*, 4/2015, 1389-1440. On the subject see also C.S. BULLOCK – R.K. GADDIE – J. J. WERT, *The Rise and Fall of the Voting Rights Act*, Norman, Oklahoma, 2016.

[20] Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, «an Act to enforce the Fifteenth Amendment to the Constitution of the United States and for other purposes».

[21] Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314.

[22] Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400.

[23] Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131.

[24] Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577.

[25] 570 U.S. 529, 551 (2013).

Congress reauthorized in 2006 ignores these developments, keeping the focus on decades-old data relevant to decades-old problems, rather than current data reflecting current needs»[26].

The effects of *Shelby County v. Holder* were immediate: within hours of the ruling, jurisdictions that were previously covered by federal preclearance announced plans to adopt new laws that would restrict access to the ballot, with a major impact on minority communities[27]. ID laws[28], the restriction of early in-person voting[29], and the closure of polling places[30] are just some of the techniques employed by lawmakers which disproportionately burden Black voters and other minorities. According to data provided by the *Brennan Center for Justice*, more than half of the States have passed 94 restrictive voting laws – one third of which was enacted in States formerly covered by Section 4 of the Voting Rights Act[31]. These efforts have significantly increased after Donald Trump's allegations of fraud in the 2020 presidential election[32].

It is worth mentioning that the Court did not rule on the constitutionality of Section 5. However, as a result of the decision, no jurisdiction will be subject to preclearance

[26] 570 U.S. 529, 553 (2013).

[27] See, e.g., S. B. BILLINGS – N. BRAUN – D. B. JONES – Y. SHI, *Disparate Racial Impacts of Shelby County v. Holder on Voter Turnout*, Institute of Labor Economics, 2022.

[28] For instance, immediately after the ruling in *Shelby County v. Holder*, IDs laws were enacted in Texas, Alabama, and Mississippi. Texas' Senate Bill 14 – which was first enacted in 2011, but rejected by the federal government through preclearance – was considered to be the strictest voter photo ID law of the Nation. With the professed aim to prevent voter fraud, the law required voters to provide government-issued photo IDs to cast an in-person ballot. The federal courts found S.B. 14 to be unconstitutional under the Fourteenth and the Fifteenth Amendments to the U.S. Constitution, and illegal under Section 2 of the Voting Rights Act. See *Veasey v. Abbott*, 71 F. Supp. 3d 627 (S.D. Tex, 2014), *Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015), *reh'g en banc granted*, 815 F.3d 958 (5th Cir. 2016), and *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016). On the contrary, Alabama's House Bill 19 was upheld by both the District Court and the Court of Appeals for the Eleventh Circuit; see *Greater Birmingham Ministries v. Merrill*, 284 F. Supp. 3d 1253 (N.D. Ala. 2018), and *Greater Birmingham Ministries v. Sec'y of State of Ala.*, 966 F.3d 1202 (11th Cir. 2020). The case of Mississippi differs from Texas and Alabama as ID requirements were introduced in the Constitution. Indeed, in 2011, voters approved a referendum that would require individuals to show a government-issued photo ID before casting a ballot. The measure was waiting for federal preclearance at the time of *Shelby County v. Holder*, and was implemented after the ruling.

[29] Mississippi, Alabama, and New Hampshire do not offer early in-person voting. Although most States allow early in-person voting, its effectiveness depends on the length of voting periods, the start and end dates, and the ability of voters to cast a ballot on the weekend. For instance, Georgia's Senate Bill 202 made Sunday voting optional, thus impacting movements like *Souls to the Polls*.

[30] See, e.g., The Leadership Conference Education Fund, *Democracy Diverted: Polling Place Closures and the Right to Vote*, September 2019, available at The Leadership Conference on Civil and Human Rights; E. CANTONI, *A Precinct Too Far: Turnout and Voting Costs*, in *American Economic Journal: Applied Economics*, 1/2020, 61-85; T. C. MCINERNEY *et al.*, *Alabama After Shelby v. Holder: Polling Place Changes and Access to Polling Place Information*, in *Journal of Policy Practice and Research*, 4/2020, 165-177.

[31] See J. SINGH – S. CARTER, *States Have Added Nearly 100 Restrictive Laws since SCOTUS Gutted the Voting Rights Act 10 Years Ago*, June 23, 2023, available at Brennan Center.

[32] See *infra* § 3.2.

until Congress enacts a new coverage formula. Indeed, as of 2014 several bills have been introduced by liberals both in the House of Representatives and the Senate to restore the Voting Rights Act[33], as part of a wider effort to strengthen voting rights[34].

Most recently, Democrats introduced the John R. Lewis Voting Rights Advancement Act of 2021[35]. The bill established that a State would be subject to preclearance for a ten-year period if (i) fifteen or more voting rights violations occurred in the State during the previous twenty-five calendar years; or (ii) ten or more voting rights violations occurred in the State during the previous twenty-five calendar years, at least one of which was committed by the State itself as opposed to a political subdivision within the State; or (iii) three or more voting rights violations occurred in the State during the previous twenty-five calendar years, and the State itself administers the elections in the State or in political subdivisions in which the voting rights violations occurred.

Furthermore, the bill provided for the coverage of any political subdivision if three or more voting rights violations occurred in the subdivision during the previous twenty-five calendar years.

The bill passed the House in a 219-212 straight party-line vote, but failed in the Senate where the Democratic Party received the sole support of Republican Senator for Alaska Lisa Murkowski[36]. This past September, on the occasion of National Voter Registration Day, the Representative for Alabama Terri Sewell introduced the John R. Lewis Voting Rights Advancement Act again, which was promptly cosponsored by all 215 representatives of the Democratic Party[37].

On the same day, the bill was referred to the House Committee on the Judiciary, which is currently led by republicans, thus making it unlikely for the John R. Lewis Voting Rights Advancement Act to become law.

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[33] See Voting Rights Advancement Act of 2015, H.R. 2867, 114th Cong. (2015-2016) and S. 1659, 114th Cong. (2015-2016); Voting Rights Advancement Act of 2017, H.R. 2978, 115th Cong. (2017-2018) and S. 1419, 115th Cong. (2017-2018); Voting Rights Advancement Act of 2019, H.R. 4, 116th Cong. (2019-2020); John Lewis Voting Rights Advancement Act of 2020, S. 4263, 116th Cong. (2019-2020).

[34] More recently, see For the People Act of 2019, H.R. 1, 116th Cong. (2019-2020) and S. 949, 116th Cong. (2019-2020); For the People Act of 2021, H.R. 1, 117th Cong. (2021-2022) and S. 2093, 117th Cong. (2021-2022); Freedom to Vote Act, H.R. 5746, 117th Cong. (2021-2022) and S. 2747, 117th Cong. (2021-2022); Freedom to Vote Act, H.R. 11, 118th Cong. (2023-2024), S. 2344, 118th Cong. (2023-2024) and S. 1, 118th Cong. (2023-2024).

[35] John R. Lewis Voting Rights Advancement Act, H.R. 4, 117th Cong. (2021-2022), «an Act to amend the Voting Rights Act of 1965 to revise the criteria for determining which States and political subdivisions are subject to section 4 of the Act, and for other purposes».

[36] See John R. Lewis Voting Rights Advancement Act, S. 4, 117th Cong. (2021-2022), «an Act to amend the Voting Rights Act of 1965 to revise the criteria for determining which States and political subdivisions are subject to section 4 of the Act, and for other purposes».

[37] John R. Lewis Voting Rights Advancement Act, H.R. 14, 118th Cong. (2023-2024), «an Act to amend the Voting Rights Act of 1965 to revise the criteria for determining which States and political subdivisions are subject to section 4 of the Act, and for other purposes».

3.2. Brnovich v. Democratic National Committee*: a further blow to the Voting Rights Act*

A further blow to the Voting Rights Act came from the 2021 Supreme Court's ruling in *Brnovich v. Democratic National Committee*[38].

The case concerned with Section 2 of the Act, which prohibits voting practices or procedures that result in a «denial or abridgement of the right of any citizen of the United States to vote» on the basis of race, color, or membership in a language minority group, defining these practices as those that leave minorities with «less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice»[39]. Section 2 applies nationwide, and does not provide for an expiration date. Thus, while Section 5 «prevents nothing but backsliding, and preclearance [..] affirms nothing but the absence of backsliding»[40], Section 2 protects against «discrimination more generally»[41]. Indeed, in the past, Section 2 had been employed mostly with respect to claims of dilution of minority voting rights caused by gerrymandered redistricting maps. However, after *Shelby County v. Holder*, it became the primary mechanism to challenge retrogressive voting practices and procedures that Section 5 would have previously blocked[42].

In a 6-3 decision, the conservative supermajority reversed the Court of Appeals for the Ninth Circuit's ruling and held that Arizona's ban on ballot collection and out-of-

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[38] 594 U.S. ___ (2021). On this judgment see, e.g., M. KANG, *The Post-Trump Rightward Lurch in Election Law*, in *Stanford Law Review Online*, 74/2021, 55-66; A. NAVA, *Brnovich v. Democratic National Committee: Examining Section 2 of the Voting Rights Act*, in *Duke Journal of Constitutional Law and Public Policy Sidebar*, 6/2021, 277-295; M. WAMSER, *Voting Rights at the Intersection of Electoral Legislation and Judicial Theories of Democracy: Lessons Learned from Brnovich v. Democratic National Committee*, in *Temple Law Review*, 2/2023, 371-410.

[39] See 52 U.S.C. § 10301. In *City of Mobile v. Bolden*, 446 U.S. 55 (1980), the Supreme Court held that Section 2 as originally enacted restated the prohibitions already contained in the Fifteenth Amendment to the Constitution, thus concluding that a racially discriminatory intent was necessary to establish a claim of voting discrimination. Two years later, Congress enacted the Voting Rights Act Amendments of 1982, which both reauthorized Section 5 for twenty-five years and amended Section 2, prohibiting any law that has a discriminatory effect regardless of whether the law was enacted or maintained for a discriminatory purpose. Compare Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, and Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131. See e.g., F. R. PARKER, *The "Results" Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, in *Virginia Law Review*, 4/1983, 715-764. The Court later applied Section 2 as amended in *Thornburg v. Gingles*, 478 U.S. 30 (1986), establishing a three-part test to prove that vote dilution has occurred in a district. Therefore, a minority group has to demonstrate that (a) it is large and compact enough to elect a representative of its choice; (b) it is politically cohesive; and (c) that the majority group votes as a bloc to defeat the minority group's favorite candidate.

[40] *Reno v. Bossier Parish School Board*, 528 U.S. 320, 335 (2000).

[41] 528 U.S. 320, 334 (2000).

[42] See, e.g., E. D. KATZ, *Section 2 After Section 5: Voting Rights and the Race to the Bottom*, in *William & Mary Law Review*, 5/2018, 1961-1991.

precinct voting did not violate Section 2 of the Voting Rights Act, and that House Bill 203 had not been enacted with a racially discriminatory purpose[43].

Most significantly, the majority opinion by Justice Alito provided five «guideposts» that courts should consider when evaluating complaints under Section 2 of the Voting Rights Act: (a) the size of the burden imposed by the challenged voting rule: since «voting takes time and, for almost everyone, some travel», the burden must be considerable to constitute discrimination. Thus, «mere inconvenience is insufficient» to prove a violation of Section 2; (b) the extent to which a voting rule departs from what standard practice was before 1982, when Section 2 was amended by Congress to prohibit any discriminatory law regardless of discriminatory intent; (c) the size of disparities produced by the challenged law on members of minority group; (d) the voting opportunities provided by the State's entire system of voting; (e) lastly, the reasons the State wants to impose a particular voting rule[44]. In this regard, Justice Alito explicitly mentioned the prevention of fraud as a «strong and entirely legitimate state interest». After Donald Trump's false allegations of election fraud in the 2020 presidential election, such a reference cannot pass unnoticed as three-in-ten Americans still believe that President Joe Biden did not win the election fairly[45]. Although no evidence of systemic election fraud was found, these claims clearly produced a corrosive effect on trust in the election system[46], and fueled legislation which imposed new burdens on voting rights[47].

It is worth mentioning that the majority assured the list provided was not exhaustive, and it was not to be considered as a test. However, a comprehensive

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[43] Arizona's law provides that if a voter votes in the wrong precinct, his vote will not be counted. Moreover, House Bill 2023 banned third-party ballot collection, thus making it a crime for any person other than a postal worker, an election official, or a voter's caregiver, family member, or household member to knowingly collect an early ballot.

[44] See 594 U.S. ___ (2021).

[45] See Monmouth University Poll, *National: Most Say Fundamental Rights under Threat*, June 20, 2023, available at Polling Institute of Monmouth University.

[46] See N. BERLINSKI *et al.*, *The Effects of Unsubstantiated Claims of Voter Fraud on Confidence in Elections*, in *Journal of Experimental Political Science*, 10/2023, 34-39. On this matter, R. L. HASEN, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, in *Harvard Law Review Forum*, 6/2022, 265-301 observes that such statements «persist despite all reliable evidence that voter fraud in the contemporary United States is rare and that when such fraud occurs it tends to happen on a small scale that does not tip the result of elections». According to the Author, fraud claims may also be employed to justify subverting future elections.

[47] Indeed, in her dissenting opinion Justice Kagan observed that the state's interest in preventing fraud is «easy to assert groundlessly or pretextually in voting discrimination cases», and recalled how in the past «election officials have asserted anti-fraud interests in using voter suppression laws». In fact, after the 2020 presidential election, States such Georgia, Florida, and Texas enacted new laws which restricted access to mail voting, drop boxes, and assistance for voters with disabilities, thus validating Trump's false claims. See, e.g., W. WILDER – K. FRIEL, *5 State Laws Based on Voter Fraud Myths that Will Hamper Future Elections*, July 7, 2022, available at Brennan Center. Following fraud claims, lawmakers have considered an increase in election surveillance as well. On this matter, see R. GREEN, *Election Surveillance*, in *Wake Forest Law Review*, 2/2022, 289-352.

consideration of the circumstances suggests that in the future it will be more difficult for plaintiffs to assert violations of voting rights under Section 2 of the Voting Rights Act.

Indeed, this is the position adopted by the dissenting Justices in an opinion authored by Justice Elena Kagan. According to the liberals, the majority tragically ignored the broad language of Section 2 of the Act and, fearing that the statute as written by Congress would invalidate too many state laws, carved «a list of mostly made-up factors, at odds with Section 2 itself». Recalling how the Court has already weakened the protections afforded by the Act in *Shelby County v. Holder*, Kagan concluded: «this Court has no right to remake Section 2. Maybe some think that vote suppression is a relic of history – and so the need for a potent Section 2 has come and gone. But Congress gets to make that call. Because it has not done so, this Court's duty is to apply the law»[48].

4. Allen v. Milligan*: a tentative victory for minority voting rights*

4.1. *Act I: the challenged congressional redistricting map of Alabama and the State's emergency application to the Supreme Court*

The implications of *Shelby County v. Holder* found further confirmation following the 2020 census, when the first redistricting cycle without the enforcement of Section 5 of the Voting Rights Act in nearly sixty years took place.

Indeed, previously covered jurisdictions have taken advantage of the new legal framework by drawing congressional lines which dilute the voting power of Black people, Latinos, Asian Americans, and Pacific Islanders. Whereas these maps used to be subject to federal approval, they have now to be challenged and litigated in courts. In fact, cases of racial gerrymandering have been brought before state and federal courts against the redistricting plans of Georgia[49], Louisiana[50], Texas[51], and South Carolina[52]. State legislative redistricting maps have been contested as well[53].

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[48] 594 U.S. ___ (2021) (Kagan, J., dissenting).

[49] See *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, No. 1:21-CV-5337 (N.D. Ga. Dec. 30, 2021) – which was heard with *Pendergrass v. Raffensperger*, No. 1:21-CV-5339 (N.D. Ga. Dec. 30, 2021) and *Grant v. Raffensperger*, No. 1:22-CV-122 (N.D. Ga. Jan. 11, 2022) – and *Georgia State Conference of the NAACP v. State of Georgia*, No. 1:21-CV-5338 (N.D. Ga. Dec. 30, 2021), which was consolidated with *Common Cause v. Raffensperger*, No. 1:22-CV-90 (N.D. Ga. Jan. 7, 2022). On October 26, 2023, District Judge Steve C. Jones found in *Alpha Phi Alpha Fraternity Inc. v. Raffensperger* that the congressional and state legislative redistricting maps of Georgia violated the Voting Rights Act, and ordered the Legislature to redraw a new plan by December 8, 2023, with additional majority-Black districts in the area of Atlanta, and in and around Macon-Bibb. The General Assembly of Georgia complied, and the new plan was later approved by Judge Jones. The new map is not without criticism: the Republican-controlled Legislature increased the majority-Black districts by erasing the district held by the Democratic Representative Lucy McBath, who is supported by a coalition of Black, Latino and Asian voters. On November 1, 2023, a three-judge panel for the U.S. District Court for the Northern District of Georgia

This is also the case of Alabama, which had been covered by the special provisions of the Voting Rights Act since 1965. Thus, the congressional redistricting plan enacted in 2021 was the first one in nearly sixty years to be adopted without preclearance. As is most States, the Alabama Legislature is responsible for drawing both congressional and state legislative district boundaries[54]. The redistricting plan must be approved with a majority vote in each chamber, and it is subject to a veto by the Governor. Hence, a Republican- or Democratic-controlled legislature can influence

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ordered *Common Cause v. Raffensperger*, whose trial was set to begin on November 13, 2023, to be stayed until appeals in *Alpha Phi Alpha Fraternity Inc. v. Raffensperger* are resolved.

[50] See *Robinson v. Ardoin*, No. 3:22-CV-211 (M.D. La. March 30, 2022), consolidated with *Galmon v. Ardoin*, No. 3:22-CV-214 (M.D. La. March 30, 2022), and *Nairne v. Ardoin*, No. 3:22-CV-178 (M.D. La. March 14, 2022). On June 28, 2022, the Supreme Court stayed the lower court's injunction and agreed to hear the case, thus allowing the contested plan to be used in the 2022 House of Representatives Elections; see *Ardoin v. Robinson*, 597 U.S. ___ (2022). After its decision in *Allen v. Milligan*, the Court lifted its stay and dismissed the writ of certiorari before judgment as improvidently granted; see *Ardoin v. Robinson*, 599 U.S. ___ (2023). Therefore, litigation proceeded before the Court of Appeals for the Fifth Circuit, which recently canceled the lower court's hearing scheduled to begin on October 3, 2023, in which District Judge Shelly Dick was to approve a congressional redistricting map with two majority-Black districts. Plaintiffs filed an emergency application to the U.S. Supreme Court, which denied the stay; see *Ardoin v. Robinson*, 601 U.S. ___ (2023). On November 10, 2023, a three-judge panel for the U.S. Court of Appeals for the Fifth Circuit affirmed the lower court judgment that found that the Louisiana's map likely violated the Voting Rights Act as it diluted the power of Black voters, and ordered the Legislature to draw an alternative plan by January 15, 2024. Later, the deadline was extended to January 30, 2024.

[51] See *League of United Latin Am. Citizens v. Abbott*, No. 3:21-CV-259 (W.D. Tex. Oct. 18, 2021) which was consolidated with several pending challenges to Texas' redistricting maps: *Wilson v. Texas*, No. 1:21-CV-943 (W.D. Tex. Oct. 18, 2021); *Voto Latino v. Scott*, No. 1:21-CV-965 (W.D. Tex. Oct. 25, 2021); *Mexican Am. Legislative Caucus v. Texas*, No. 1:21-CV-988 (W.D. Tex. Nov. 3, 2021); *Brooks v. Abbott*, No. 1:21-CV-991 (W.D. Tex. Nov. 3, 2021); *Fair Maps Texas Action Comm. v. Abbott*, No. 1:21-CV-1038 (W.D. Tex. Nov. 16, 2021); *Texas State Conf. of the NAACP v. Abbott*, No. 1:21-CV-1006 (W.D. Tex. Nov. 5, 2021); *United States v. Texas*, No. 3:21-CV-299 (W.D. Tex. Dec. 6, 2021); *Fisher v. Scott*, No. 3:21-CV-306 (W.D. Tex. Dec. 13, 2021); and *Escobar v. Abbott*, No. 3:22-CV-22 (W.D. Tex. Jan. 12, 2022). As of now, the Texas redistricting case remains delayed because of dispute between the parties over access to documents.

[52] See *The South Carolina State Conference of the NAACP v. Alexander*, No. 3:21-CV-3302 (D.S.C. Oct. 12, 2021). The defendants have filed an appeal to the Supreme Court, and on May 15, 2023, the Court noted probable jurisdiction; see *Alexander v. The South Carolina State Conference of the NAACP*, 598 U.S ___ (2023). The Justices held oral arguments on October 11, 2023.

[53] See, e.g., *Stone v. Merrill*, No. 2:21-CV-1531 (N.D. Ala. Nov. 15, 2021), *Skagway Borough v. The Alaska Redistricting Board*, No. 1JU-21–00944CI (Alaska Super. Ct. Dec. 10, 2021), *The Arkansas State Conference NAACP v. The Arkansas Board of Apportionment*, No. 4:21-CV-1239 (E.D. Ark. Dec. 29, 2021), *Grant v. Raffensperger*, No. 1:22-CV-122 (N.D. Ga. Jan. 11, 2022), and *United Congress of Community and Religious Organizations v. Illinois State Board of Elections*, No. 1:21-CV-5512 (N.D. Ill. Oct. 15, 2021).

[54] Washington, California, Arizona, Idaho, and Michigan have an independent commission in charge of drawing congressional district boundaries. Hawaii and New Jersey use a politician commission instead. In Iowa, congressional and state legislative district lines are drawn by the legislature subject to gubernatorial veto; however, input comes from a non-partisan advisory body – guided by a bi-partisan advisory committee – that drafts up to three maps, which the legislature can accept or reject.

where the lines are drawn and give the party an advantage. At present, the Republican Party holds the majority in both the House of Representatives and the Senate, and Governor Kay Ivey is a member of the Republican Party as well.

On November 4, 2021, the Governor of Alabama signed into law a new congressional map, providing for only one district out of seven in which Black voters constituted a majority[55], as it has been since 1992 when the State was ordered by federal courts to create a majority-Black district[56].

The resulting map largely resembled the one enacted after the 2010 census. However, in the last decade, Alabama showed an increase in racial and ethnic diversity: according to data provided by the Census Bureau, the Diversity Index – which measures the chance that two people chosen at random will be from different racial and ethnic groups – increased from 48.1 to 53.1 percent[57]. Indeed, the number of non-Hispanic White declined, and people identifying as being of a different race, a mixture of races, or of Hispanic descent increased. Most significantly, population who identifies as Black or African American alone or in combination now comprises almost 27.2 percent of the total population[58]. Subtle changes were registered also in terms of population distribution across the country: Black population remains the majority in eleven counties in the southwest, but significant percentages are also recorded in the central south and in the southeast, across the so-called Black Belt[59].

Thus, the congressional redistricting map was challenged in federal court by registered voters, the NAACP Alabama State Conference, and the multi-faith non-profit organization Greater Birmingham Ministries[60]. Plaintiffs argued that the plan violated Section 2 of the Voting Rights Act as it packed Black voters in one district, thus reducing their voting power in the other ones. In other words, the effect of the redistricting map as enacted by the Alabama legislature was to minimize the number of districts in which Black people could elect their candidates of choice. Thus, claimants believed that, according to the demography results from the 2020 census, Black voters were entitled to a second majority-minority district.

In a lengthy *per curiam* opinion issued on January 24, 2022, the District Court found the plaintiffs likely to establish that Alabama's plan violated Section 2 of the

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[55] Ala. Code § 17-14-70 (2022).

[56] See *Wesch v. Hunt*, 785 F. Supp. 1491 (S.D. Ala. 1992), *aff'd sub nom. Camp v. Wesch*, 507 U.S. 902 (1992).

[57] U.S. Census Bureau, *ALABAMA: 2020 Census*, August 25, 2021.

[58] *Ibid.*

[59] See also T. SPENCER, *Demographic Change in Alabama, its Counties, and Cities, 2010-2020*, Public Affairs Research Council of Alabama, Birmingham, 2022, available at PARCA (Public Affairs Research Council of Alabama).

[60] Three cases were filed against the Alabama congressional redistricting map: *Singleton v. Allen*, No. 2:21-CV-1291 (N.D. Ala. Sept. 27, 2021), *Caster v. Allen*, No. 2:21-CV-1536 (N.D. Ala. Nov. 16, 2021), and *Milligan v. Allen*, No. 2:21-CV-1530 (N.D. Ala. Nov. 16, 2021). On November 23, 2021, the *Singleton* Court consolidated *Singleton* and *Milligan* «for limited purposes of preliminary injunction discovery and a preliminary injunction hearing». See *Singleton v. Merrill*, No. 2:21-CV-1291-AMM (N. D. Ala. Nov. 23, 2021).

Voting Rights Act. The three-judge panel ordered the State to draw a second majority-Black congressional district, and issued an injunction to the Secretary of State forbidding him from conducting any congressional election according to the plan[61]. Four days later, the case reached the Supreme Court, after an application for a stay or injunctive relief pending appeal was submitted to Justice Clarence Thomas, and by him referred to the Court. The application was treated as a petition for a writ of certiorari before judgment, and the Justices agreed to hear the case in the following term.

On February 7, 2022, in a 5-4 decision, the Supreme Court stayed the District Court's injunctions, thus allowing Alabama to implement its contested redistricting plan[62]. In a dissenting opinion joined by Justices Breyer and Sotomayor, Justice Kagan observed that «usually, when a litigant applies to this Court for a stay, it argues that the lower court erred under current law». However, «Alabama's application cannot be understood in that way. Accepting Alabama's contentions would rewrite decades of this Court's precedent about Section 2 of the VRA»[63]. According to the liberals, the State would also been able to redraw its congressional district lines before the next primary elections: «the State's legislature enacted its current plan in less than a week», Kagan argued, «and the legislature has all the tools necessary to draw another»[64]. This conclusion was questioned by Justice Kavanaugh in a concurring opinion joined by Justice Alito, in which the conservatives observed how «the District Court's order would require heroic efforts» that would likely «not be enough to avoid chaos and confusion»[65].

Therefore, the challenged map was used in the 2022 House of Representatives elections, which unsurprisingly saw Republicans elected in six districts, while the Democratic Party won only in the seventh, majority-Black, district.

4.2. *Act II: an unexpected win for the Voting Rights Act, and an even more unexpected reaction from Alabama*

On June 8, 2023, in a 5-4 decision, the Supreme Court upheld the lower court's ruling[66]. The majority opinion was authored by Chief Justice Roberts, who previously dissented about granting the stay, but noted that the Court's jurisprudence on Section 2 of the Voting Rights Act had resulted in «considerable disagreement and uncertainty regarding the nature and contours of a vote dilution claim»[67].

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[61] *Singleton v. Merrill*, 582 F. Supp. 3d 924 (N.D. Ala. 2022) (*per curiam*).

[62] *Merrill v. Milligan*, 595 U.S. ___ (2022). Previously, on January 27, 2022, the three-judge court denied the defendants' motion for stay pending appeal. See *Singleton v. Merrill*, No. 2:21-CV-1291-AMM (N. D. Ala. Jan. 27, 2022) (*per curiam*).

[63] 595 U.S. ___ (2022) (Kagan, J., dissenting).

[64] 595 U.S. ___ (2022) (Kagan, J., dissenting).

[65] 595 U.S. ___ (2022) (Kavanaugh, J., concurring).

[66] 599 U.S. ___ (2023).

[67] 595 U.S. ___ (2022) (Roberts, C. J., dissenting).

According to the majority, the lower court had correctly applied the three preconditions set in *Thornburg v. Gingles*[68], and properly ruled that Alabama's congressional redistricting plan likely violated the Voting Rights Act of 1965. Indeed, the plaintiffs submitted as many as eleven illustrative maps with two majority-Black districts that conformed to the equal population criterion, and contained no bizarre shapes. As noted by the District Court, there was no serious dispute that in Alabama Black voters are politically cohesive, and that White voters vote as a bloc, thus defeating in practice the minority's candidate of choice.

Most significantly, the Court rejected the State's invitation to interpret Section 2 of the Act according to the so-called race neutral benchmark theory, which would have resulted in much more difficulties in challenging redistricting plans. Indeed, Alabama argued that modern technologies should be used to determine the average number of majority-minority districts among all possible race-blind maps that could be generated through the same technology. That number becomes the benchmark, which is to be used to evaluate the contested plan: if the number of majority-minority districts in the challenged map resembles that of the benchmark, then the State plan does not result in a «denial or abridgement of the right of any citizen of the United States to vote»[69]. Under this approach, the plaintiffs would have (a) to present an alternative plan not based on race; (b) to prove that the State map deviates from the race-neutral benchmark; (c) to prove that the deviation from the benchmark is explainable only by race and not by other circumstances. According to the Chief Justice, Alabama's proposal was an «attempt to remake [..] § 2 jurisprudence anew»[70], which would fail to account for the totality of the circumstances, and which would poorly operate in practice.

Although rather straightforward, the ruling was met with surprise, especially as the conservative supermajority appeared poised to side with Alabama after oral argument. Indeed, Justice Kavanaugh was the only one among those who voted to stay the lower court's order who sided with the Chief Justice and the liberals, thus providing the decisive fifth vote[71]. Sources revealed to the CNN that a series of negotiations went on between Roberts and Kavanaugh, and the Chief Justice managed to convince his conservative colleague to support the Voting Rights Act of 1965[72].

Chief Justice Roberts' negotiations may have been dictated by the desire to preserve and protect the legitimacy of the Supreme Court. In the last few years, the Court issued a series of highly controversial judgments which have been met with

[68] 478 U.S. 30 (1986). On *Thornburg v. Gingles*, see fn. n. 39 above.

[69] See 52 U.S.C. § 10301.

[70] 599 U.S. ___ (2023).

[71] See 595 U.S. ___ (2022) (Kavanaugh, J., concurring). It should be noted that, granting the stay, Justice Kavanaugh observed that «[a]t this preliminary juncture, the underlying merits appear to be close and, at a minimum, not clearcut in favor of the plaintiffs».

[72] J. BISKUPIC, *Exclusive: How the Supreme Court's conservatives rebuffed Alabama*, September 8, 2023, available at CNN.

disfavor and criticism by civil society[73]. As of 2021, opinion polls have shown a significant drop in trust in the Supreme Court: according to the latest data provided by *Gallup*, only 41 percent of American adults approve how the Court is handling its job, and less than half of Americans have «a great deal» or «a fair amount» of confidence in the Justices[74]. Moreover, shortly after the publication of the slip opinion in *Allen v. Milligan*, the Supreme Court released two further divisive decisions: in *303 Creative LLC v. Elenis*[75] the conservative supermajority found that a Colorado anti-discrimination law violated the First Amendment's protection of free speech of a website designer who does not want to create wedding websites for same-sex couples; in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*[76] the Court invalidated race-based affirmative action programs in college admissions. Therefore, a decision that would have further weakened the voting rights of minorities would have excessively altered an already compromised political and social equilibrium.

Perhaps, more interesting than the merits of the case is its follow-up.

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[73] See, e.g., *Carson v. Makin*, 596 U.S. ___ (2022) (on separation of Church and State); *Kennedy v. Bremerton School District*, 597 U.S. ___ (2022) (on school prayer); *West Virginia v. Environmental Protection Agency*, 597 U.S. ___ (2022) (on the Clean Power Plan); *Biden v. Nebraska*, 600 U.S. ___ (2023) (on student loans). Among the most preeminent cases, see especially *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___ (2022), in which the conservative bloc overruled both *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). On *Dobbs* and its consequences see, e.g., Y. LINDGREN, *Dobbs v. Jackson Women's Health and the Post-Roe Landscape*, in *Journal of the American Academy of Matrimonial Lawyers*, 1/2022, 235-284; J. C. SUK, *A World Without Roe: The Constitutional Future of Unwanted Pregnancy*, in *William & Mary Law Review*, 2/2022, 443-524; S. STERN, *From Conciliation to Conflict: How Dobbs v. Jackson Women's Health Organization Reshapes the Supreme Court's Role in American Polarized Society*, in *Loyola University Chicago Law Journal*, 3/2023, 841-884; A. TANG, *After Dobbs: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, in *Stanford Law Review*, 5/2023, 1091-1156. In Italian scholarship see, e.g., L. RONCHETTI, *La decostituzionalizzazione in chiave populista sul corpo delle donne: è la decisione Dobbs a essere «egregiously wrong from the start»*, in *Costituzionalismo.it*, 2/2022, 32-50; A. SPERTI, *Il diritto all'aborto e il ruolo della tradizione nel controverso overruling di Roe v. Wade*, in *La Rivista "Gruppo di Pisa"*, 3/2022, 23-36; E. STRADELLA, *La decostituzionalizzazione del diritto all'aborto negli Stati Uniti: riflessioni a partire da Dobbs v. Jackson Women's Health Organization*, in *Forum di Quaderni Costituzionali*, 3/2022, 196-223; A. RIDOLFI, *«Roe and Casey are overruled». Riflessioni sulla sentenza Dobbs e sul ruolo della Corte Suprema nel sistema costituzionale statunitense*, in *Costituzionalismo.it*, 1/2023, 1-68.

[74] See M. BRENAN, *Views of Supreme Court Remains Near Record Lows*, September 29, 2023, available at *Gallup*. Public support in the Supreme Court declined in September 2021, after the majority denied the application for injunctive relief filed by some abortion clinics against Texas Senate Bill 8 of 2021, known as Texas Heartbeat Act, in *Whole Woman's Health v. Jackson*, 594 U.S. ___ (2021). See M. JONES, *Approval of U.S. Supreme Court Down to 40%, a New Low*, September 23, 2021, available at *Gallup*. The Supreme Court's ruling in *Whole Woman's Health v. Jackson* is considered to be the precursor to *Dobbs v. Jackson Women's Health Organization*. On the matter see R. BIZZARI, *La Corte Suprema torna sul tema dell'aborto. Riflessioni a margine di Whole Woman's Health v. Jackson*, in *federalismi.it*, 12/2022, 1-12.

[75] *303 Creative LLC v. Elenis*, 600 U.S. ___ (2023).

[76] *Students for Fair Admissions, Inc. v. Harvard*, 600 U.S. ___ (2023).

On June 20, 2023, a three-judge panel of the District Court for the Northern District of Alabama set July 21 as the deadline for the State to redraw and enact a congressional redistricting map with two majority-Black districts. Alabama met the deadline, but, by its own admission, it openly defied the federal court's order. Indeed, the Senate and the House of Representatives approved, and the Governor signed into law, a plan that provided for only one district out of seven in which Black voters were likely to elect a candidate of their choice. In September, the lower court ruled that the State's congressional district boundaries as drawn in July failed to create a remedy to the dilution of Black voting power. The State's clear defiance of the federal courts' rulings raised concerns among the three-judge panel. «We are deeply troubled that the State enacted a map that the State readily admits does not provide the remedy we said federal law requires. We are disturbed by the evidence that the State delayed remedial proceedings but ultimately did not even nurture the ambition to provide the required remedy. And we are stuck by the extraordinary circumstance we face. We are not aware of any other case in which a state legislature – faced with a federal court order declaring that its electoral plan unlawfully dilutes minority votes and requiring a plan that provides an additional opportunity district – responded with a plan that the state concedes does not provide that district», wrote the Court, composed of two Trump-appointed district judges and a Reagan-appointed circuit judge[77].

While the lower court appointed a Special Master to submit three potential congressional district maps for consideration by September 25, 2023, the Secretary of State of Alabama presented an emergency application for stay pending petition for writ of certiorari before judgment to Justice Clarence Thomas. In an unmotivated order, the Supreme Court denied the stay, and no dissenting opinions were noted[78]. Indeed, scholarship and civil society considered accepting the emergency application unlikely, as such action would certainly have compromised the Court's own credibility in the eyes of the public.

Furthermore, it was claimed that Alabama's challenge was prompted by the concurring opinion of Justice Kavanaugh, who joined the majority of the Court in full except for Part III-B-1. Indeed, the Associate Justice suggested that he might be open to declaring Section 2 of the Voting Rights Act unconstitutional on a similar basis to that of *Shelby County v. Holder*. Referring to the dissenting opinion of Justice Thomas, Brett Kavanaugh observed that «even if Congress in 1982 could constitutionally authorize race-based redistricting under §2 for some period of time, the authority to conduct race-based redistricting cannot extend indefinitely into the future»[79]. However, the State's emergency application made a rather poor reference to the so-

[77] *Singleton v. Allen*, No. 2:21-CV-1291-AMM (N. D. Ala. Sept. 5, 2023) (*per curiam*).

[78] *Allen v. Caster*, 600 U.S. ___ (2023).

[79] Compare 599 U.S. ___ (2023) (Kavanaugh, J., concurring in part) and 599 U.S. ___ (2023) (Thomas, J., dissenting). See also *Students for Fair Admissions, Inc. v. Harvard*, 600 U.S. ___ (2023) (Kavanaugh, J., concurring), in which the Justice reiterated his views, stating that race-based affirmative action in higher education may not extend indefinitely into the future.

called temporal argument Kavanaugh mentioned: the applicant noted that providing no expiration date for Section 2 of the Voting Rights Act «would ultimately elevate a statutory remedy for old violations of the Constitution above the Constitution itself», but eventually urged the Court to rigorously apply the conditions set in *Gingles* to conclude that the plaintiffs did not prove that the 2023 redistricting plan likely violated Section 2[80].

Nevertheless, the argument suggested by the conservative Justice left the door open for others to challenge Section 2 of the Voting Rights Act as a matter of constitutional law, thus posing a renewed threat to minority voting rights.

5. *Final remarks: what does the future hold?*

The Supreme Court's ruling in *Allen v. Milligan* has been received as an unexpected victory for minority voting rights. According to the *Brennan Center for Justice*, the case represents «a welcome departure from the Court's tendency in recent decades to scale back or even wholly eliminate voting rights protection»[81]. In the opinion of the *National Redistricting Foundation*, the decision «marks a landmark moment to move the needle in the right direction»[82]. Indeed, the consequences of the judgment have affected other racial gerrymandering litigations pending in federal courts[83]. Furthermore, shortly after its ruling, the Supreme Court lifted its stay in a case involving Louisiana's congressional map and dismissed the writ of certiorari before judgment as improvidently granted[84].

However, the fact that minority voters have now to turn to courts to obtain fair redistricting maps is problematic. Lawsuits are expensive and time-consuming. Additionally, as Justice Ruth Bader Ginsburg noted in her dissenting opinion in *Shelby County v. Holder*, «litigation occurs only after the fact, when the illegal voting scheme has already been put in place and individuals have been elected pursuant to it, thereby gaining the advantages of incumbency»[85]. In fact, in some circumstances it is unlikely that congressional redistricting maps will be redrawn in time for the 2024 election. For instance, as of now, the Texas redistricting case remains delayed because of dispute between the parties over access to documents, and the State's filing deadline for the 2024 congressional primaries passed on December 11, 2023[86].

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[80] See Emergency application for stay pending petition for writ of certiorari before judgment, *Allen v. Caster* (No. 23A241), 38-39.

[81] Y. RUDENSKI – C. LEAVERTON, *Ongoing Voting Rights Act Redistricting Litigation After SCOTUS Ruling in Allen v. Milligan*, July 5, 2023, available at Brennan Center.

[82] See *NRF Statement on Allen v. Milligan Victory*, June 8, 2023, available at National Redistricting Foundation.

[83] See, e.g., fn. nos. 49-50 above.

[84] See *Ardoin v. Robinson*, 599 U.S. ___ (2023).

[85] 570 U.S. 529, 572 (2013) (Ginsburg J., dissenting).

[86] See, e.g., A. URA, *Where Texas redistricting lawsuits stand before U.S. Supreme Court ruling in*

Delays are also likely to occur in the case of South Carolina. In January 2023, a three-judge panel found that congressional district one as redrawn after the 2020 census was an unconstitutional racial gerrymandering, as the State moved over ten thousand of Black residents from the first district to the sixth to make it a safe seat for Republicans. South Carolina appealed to the Supreme Court, which agreed to hear the case, and held oral argument on October 11, 2023. According to the order of the District Court, the deadline to submit a remedial plan is thirty days after the Supreme Court's final decision on the matter[87]. The State asked the Court to issue its ruling by January 1, 2024, but at the time of writing, no decision appears to have been made. Thus, it is likely that the judgment will be released later this spring.

The South Carolina litigation also poses a significant issue from the perspective of racial gerrymandering, as the Justices are about to rule on the correlation between race and politics in the drawing of congressional and state legislative districts. Back in 2019, the Supreme Court ruled that partisan gerrymandering claims are not justiciable as they present political questions beyond the reach of federal courts[88]. However, unraveling race from partisanship is a significant question in a system which is characterized by a racially polarized voting pattern, under which maps that limit the power of Democrats are actually maps that limit the voting power of Black voters.

The State argued that the redistricting plan was motivated only by the need to ensure «a stronger Republican tilt»[89]. According to the appellants, if the Supreme Court affirms the lower court's ruling, it would «place state legislatures in an impossible bind: it would improperly turn the purported racial effect, in a single line, of pursuing political goals and traditional criteria into racial predominance across an entire district»[90]. Thus, States would be exposed to «potential racial gerrymandering liability whenever they decline to make majority-white, modestly-majority-Republican districts majority-Democratic»[91]. To the contrary, appellees claimed that

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Alabama case, June 13, 2023, available at *The Texas Tribune*. On the Texas redistricting case see also fn. n. 51 above.

[87] *The South Carolina State Conference of the NAACP v. Alexander*, No. 3:21-CV-3302 (D.S.C. Feb. 4, 2023).

[88] *Rucho v. Common Cause*, 588 U.S. ___ (2019). On partisan gerrymandering see, e.g., E. J. ENGSTROM, *Partisan Gerrymandering and the Construction of American Democracy*, Ann Arbor, 2013 and N. R. SEABROOK, *Drawing the Lines. Constraints on Partisan Gerrymandering in U.S. Politics*, Ithaca, New York, 2017. Recent research shows that although widespread, partisan gerrymandering has limited effects at national level, as it ensures Republicans with two additional seats only on average. However, partisan bias reduces electoral competition and responsiveness to changes in the vote: as congressional redistricting maps are drawn to secure safe seats for the party's candidates, lawmakers become less responsive to voters and their needs. See C. T. KENNY *et al*., *Widespread partisan gerrymandering mostly cancels nationally, but reduces electoral competition*, in *Proceedings of the National Academy of Sciences*, 25/2023, 1-7.

[89] Jurisdictional statement, *Alexander v. The South Carolina State Conference of the NAACP* (No. 22-807), 2.

[90] *Ibid.*, 5.

[91] Brief for appellants, *Alexander v. The South Carolina State Conference of the NAACP* (No. 22-807), 6.

«predominant reliance on race is impermissible even if mapmakers used race as a proxy for politics»[92], thus asking the Supreme Court to affirm the judgment below.

During oral argument, the conservative supermajority seemed poised to embrace South Carolina's argument, and increase the burden of proof on plaintiffs in racial gerrymandering cases. Indeed, the appellants suggested an alternative map requirement, whereby to prove racial gerrymandering redistricting plan challengers should submit a different map from the one enacted that allows the legislature to pursue its partisan goal without impacting minorities. Therefore, in this perspective, *Allen v. Milligan* might represent only a small victory for minority voting rights.

[92] Motion to affirm, *Alexander v. The South Carolina State Conference of the NAACP* (No. 22-807), 2.

Arianna Carminati*

The Descending Parable of Affirmative Racial Gerrymandering in the United States**

SUMMARY: 1. Some Insights for Comparison. – 2. Racial "fair representation" and election districts. – 3. From "negative" to "affirmative" racial gerrymandering in the earliest Supreme Court's jurisprudence. – 4. The debated legitimacy of affirmative racial gerrymandering under the Equal Protection Clause. – 5. Final remarks.

ABSTRACT*: This paper explores the evolving landscape of affirmative racial gerrymandering in the United States, tracing its trajectory from early Supreme Court jurisprudence to contemporary debates surrounding its legitimacy under the Equal Protection Clause. Drawing upon insights from comparative analysis, the paper first provides a nuanced understanding of the concept within the broader context of electoral districting. It then delves into the historical transition from "negative" to "affirmative" racial gerrymandering, examining pivotal Supreme Court decisions and their implications for fair representation. Central to the discussion is an examination of the contested legitimacy of affirmative racial gerrymandering, with particular attention to its compatibility with constitutional principles of equality and non-discrimination. In conclusion, the paper offers reflections on the complexities inherent in navigating the intersection of race, representation, and electoral law in contemporary American democracy.*

1. *Some Insights for Comparison*

The process of drawing electoral district boundaries in the United States, in relation to the political representation of ethnic minorities, is a very interesting area of legal comparison.

This is primarily due to a legal system that, for well-known historical reasons, still places significant emphasis on the issue of racial discrimination and on the dynamics between the dominant non-Latino white American demographic and the diverse ethnic groups comprising the kaleidoscopic American society[1].

Secondly, this analysis prompts a domestic reflection on how the relationship between representatives and constituents is shaped by the division and grouping of

* Associate Professor of Public Law, University of Brescia.

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[1] The U.S. Census Bureau has collected data on race since the first census in 1790 and on Hispanic or Latino origin since the 1970 Census. Since the 1970s, the Census Bureau has conducted content tests to research and improve the design and function of different questions, including questions on race and ethnicity. Today, the Census Bureau collects race and ethnic data following U.S. Office of Management and Budget (OMB) guidelines, and these data are based upon self-identification. See on this topic J. PERLMANN, M. C. WATERS, *The New Race Question. How the Census Counts Multiracial Individuals*, Russell Sage Foundation, 2002; A.D. PEREZ, C. HIRSCHMAN, *The Changing Racial and Ethnic Composition of the US Population: Emerging American Identities*, in Population and Development Review, 1/2009, 1 ff.

the electoral body to determine candidate selection[2], and in relation to how the principle of equality can be applied with reference to the right to vote.

Delving into the intricacies of racial gerrymandering exposes the systemic inequalities embedded within political representation. To truly uphold the democratic principle of fair and equitable representation, it becomes imperative to not only address the overt manipulation of electoral boundaries but also to actively engage in the promotion of substantive representation. This involves going beyond mere numerical parity embedded in the principle of one man-one vote to ensure that the voices and concerns of historically marginalized communities are not only heard but also effectively advocated for within the decision-making processes.

In contexts like Italy, where formal political participation is often restricted for residents of foreign origin, the concept of substantive representation gains even more significance. Additionally, as will be attempted to highlight, linking the discussion to the principle of substantive equality in Article 3 of the Italian Constitution could provide a relevant and insightful perspective.

2. *Racial "fair representation" and election districts*

At the core of the discussion about the legitimacy of redistricting policies concerning ethnic-racial factors, lies the concept of "fair representation", which aims to assess whether a district map affords equal opportunities for various voter groups to elect their preferred candidates. As pointed out, identifying and avoiding racial gerrymandering implies making «the fatal step from mere equal *voting* to fair *representation*»[3].

In fact, this step also represents a shift from numerical equality in voting rights to advocating for proportional representation based on the *expressed* vote. Quoting Martin Shapiro: «A one-person- one-vote standard rests on a purely formal individualist theory of voting» or even «it rests on no theory of representation at all»[4]. Thus, while the principle of one-person-one-vote is rooted in nineteenth-century

[2] A. REHFELD, *The concept of Constituency. Political Representation, Democratic Legitimacy and Institutional Design*, Cambridge University Press, New York, 2005. See also N. URBINATI, M.E. WARREN, *The Concept of Representation in Contemporary Democratic Theory*, in *Annual Review of Political Science*, 1/2008, 387 ff., noting that «the idea that constituencies should be defined by territorial districts has been all but unquestioned until very recently, although it has long been recognized that initial decisions about who is included in (or excluded from) "the people" constituted the domain of democracy».

[3] M. SHAPIRO, *Gerrymandering, Unfairness, and the Supreme Court*, in *Ucla Law Review*, 1/1985, 232.

[4] M. SHAPIRO, *Gerrymandering, Unfairness, and the Supreme Court*, cit., 236. Similarly see Justice Powell's opinion in *Davis v. Bandemer*, 478 U.S. 109 (1986), 478: «The concept of "representation" necessarily applies to groups: groups of voters elect representatives, individual voters do not».

liberal political theory, where individuals were seen as the basic units of politics, twentieth century liberal theories tend to use *groups* as the basic units of politics[5].

Along this line, the right to vote has evolved to encompass a call for increased involvement of minority groups in political decision-making processes. The individual right to vote has become instrumental in pursuing broader collective representation for the group to which one belongs[6].

In a more specific vein, "racial fairness"[7] is measured by the degree to which legislators reflect the racial and ethnic make-up of the electorate[8]. This objective can be effectively pursued through designing electoral districts based on the ethnic composition of residents and the tendency of minority groups to support candidates from their own community.

In fact, as highlighted by scholars, these efforts to increase the number of minorities' officeholders are associated with *descriptive representation*, meaning having representatives who reflect the demographic characteristics of their constituents[9]. Since Pitkin's work in 1967[10], there has been a rich literature exploring the political consequences of descriptive representation concerning racial and ethnic minorities[11]. According to some scholars, descriptive representation would have

[5] «Once the conditions of equal weight and equal access to the ballot are satisfied, there is little in the way of individual rights that governs the electoral process. Attention must at this point shift to group rights to differentiate a fair from an unfair system» (T. A. ALEINIKOFF, S. ISAACHAROFF, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno,* in *Michigan Law Review*, 3/1993, 600-601).

[6] The need to consider the collective dimension of the right to vote in order to appreciate the adequacy of representation in cases of vote dilution is underlined by C. CASONATO, *Minoranze etniche e rappresentanza politica. I modelli statunitense e canadese*, Università degli Studi di Trento, Trento, 1998, 244. See Justice Souter's dissenting opinion in *Shaw v. Reno*, 509 U.S. 630 (1993), 683 noting that: «"Dilution" thus refers to the effects of districting decisions not on an individual's political power viewed in isolation, but on the political power of a group. This is the reason that the placement of given voters in a given district, even on the basis of race, does not, without more, diminish the effectiveness of the individual as a voter».

[7] The expression "racial fairness" is used by B. GROFMAN, *Criteria for Districting: A Social Science Perspective*, in *Ucla Law Review*, 1/1985, 153.

[8] K.I. BUTLER, *Racial Fairness and Traditional Districting Standards: Observations on the Impact of the Voting Rights Act on Geographic Representation*, in *South Carolina Law Review*, 4/2006, 750.

[9] D.T. CANON, *Race and Redistricting*, in *Annual Review of Political Science*, 2022, vol. 25, 510.

[10] According to Hanna Pitkin (F.H. PITKIN, *The Concept of Representation*, University of California Press, Berkeley, 1967) the elements of democratic representation may be grouped in two categories: "structural" and "substantive". The structural element deals with who and what should be represented, that is, it considers the make-up of the legislature, while the substantive element emphasizes what a representative does. Pitkin repeatedly warns that both the dimensions are necessary, and blames much confusion on theorists who hold any one element of representation as sufficient for the whole (see N. LEONEN, *Citizenship and Democracy. A Case for Proportional Representation*, Dundurn Press, Toronto, 1997, 47).

[11] D.C. BOWEN, C.J. CLARK., *Revisiting Descriptive Representation in Congress: Assessing the Effect of Race on the Constituent–Legislator Relationship*, in *Political Research Quarterly*, 3/2014, 695 ff.; C.J. CLARK, *Gaining Voice: The Causes and Consequences of Black Representation in the American States*,

inherent value, unrelated to substantive representation, stemming from the fundamental notion of being represented by someone who shares one's racial identity[12].

When considering instead the connections between descriptive and substantive representation, it is widely recognized that there isn't necessarily a direct link between the election of minority candidates and the advancement of these groups' interests. In this context, several qualitative and quantitative analyses have been conducted to explore whether and to what extent the creation of "majority-minority districts" – electoral constituencies where Black, Hispanic, or other racial or ethnic groups constitute the majority of the population[13] – genuinely enhances minority representation. Indeed, many of these studies have concluded that the ethnic and racial background effectively influences the choices of parliamentarians representing minorities, beyond their party-political affiliation[14].

Oxford University Press, Oxford 2019; J.D. GRIFFIN, B.P. NEWMAN, *Minority Report: Evaluating Political Equality in America*, University of Chicago Press, Chicago 2008. The Italian doctrine delved deeper into the topic for achieving gender-balanced representation, in an attempt to clarify if gender quotas just increase descriptive representation, or if they also produce comprehensive changes in the characteristics of those who serve in political office. See G. BRUNELLI, *Donne e politica. Quote rosa? Perché le donne in politica sono ancora così poche?*, il Mulino, Bologna, 2006; L. CARLASSARE, *La rappresentanza femminile: principi formali ed effettività*, in F. Bimbi, A. Del Re (ed.), *Genere e democrazia*, Giappichelli, Torino, 1997, 83 ff.; A. APOSTOLI, *La parità di genere nel campo "minato" della rappresentanza politica*, in *Rivista AIC*, 4/2016, 32 ff.; A. MANGIA, *Rappresentanza di «genere» e «generalità» della rappresentanza*, in R. BIN, G. BRUNELLI, A. PUGIOTTO, P. VERONESI (ed.)*, La parità dei sessi nella rappresentanza politica*, Giappichelli, Torino, 2002, 84; S. LEONE, *L'equilibrio di genere negli organi politici. Misure promozionali e principi costituzionali*, FrancoAngeli, Milano, 2013; M. CAIELLI, *Per una democrazia duale: perché il genere dei nostri rappresentanti continua ad avere importanza*, in B. PEZZINI, A. LORENZETTI (ed.), *70 anni dopo tra uguaglianza e differenza. Una riflessione sull'impatto di genere nella Costituzione e nel costituzionalismo*, Giappichelli, Torino, 2019, 93 ff. In the American doctrine, regarding gender quotas and how they can affect existing political dynamics, as well as what they might mean for women as a group, consider M.L. KROOK, F. MACKAY (eds.), *Gender, Politics and Institutions*, Palgrave Macmillan, 2011; T.D. BARNES, M.R. HOLMAN, *Gender Quotas, Women's Representation, and Legislative Diversity*, in *Political Science Faculty Publications*, 4/2020, 1271 ff.; Y.P. KEREVEL, *Empowering Women? Gender Quotas and Women's Political Careers*, in *Journal of Politics*, 4/2019, 1167 ff.; C. S. ROSENTHAL, *The Role of Gender in Descriptive Representation*, in *Political Research Quarterly*, 3/1995, 599 ff.

[12] J. MANSBRIDGE, *Should Blacks represent Blacks and women represent women? A contingent "yes"*, in *Journal of Politics*, 3/1999, 628 ff.; C.M. SWAIN, *Black Faces, Black Interests: The Representation of African Americans in Congress*, Harvard University Press, Harvard, 1993; K. TATE, *The Political Representation of Blacks in Congress: Does Race Matter?*, in *Legislative Studies Quarterly*, 4/2001, 623 ff., underscoring the value of descriptive representation in the black community; K. TATE, *Black Faces in the Mirror: African Americans and Their Representatives in the US Congress*, Princeton University Press, 2003; C.M. SWAIN, *Black Faces, Black Interests: The Representation of African Americans in Congress*, Harvard University Press, Harvard, 1993.

[13] G.M. HAYDEN, *Resolving the Dilemma of Minority Representation*, in *California Law Review*, 2004, 92(6), 1589 ff.

[14] Some scholars find intrinsic and extrinsic mechanisms linking descriptive and substantive representation. On one hand «minority candidates share a sense of common minority experiences, and

Further research has highlighted the benefits of descriptive representation by looking at the constituent–legislator relationship and how citizens experience representation[15]. In other words, descriptive representation also creates a «social meaning of "ability to rule"» for historically excluded groups and promotes the legitimacy of the political system by addressing the effects of past discrimination[16].

Taking an opposing stance, some argue that the race of representatives holds little significance, contending that racial issues are no longer central to American politics, or at least they should not be[17]. In addition, segregating political districts based on race would further exacerbate racial divisions by eliminating the need for voters or candidates to form cross-racial connections or alliances[18]. Another aspect that is criticized concerns the current validity of resorting to the category of ethno-racial identity as a basis for representation, given the complexity and fluidity of identity and the limitations of such categorizations in capturing the diverse experiences and perspectives within communities[19]. Ultimately, the notion of fair representation is quite controversial, especially because the issue of race intersects with other factors,

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feel a responsibility to represent minority voters, although this is moderated by political party»; on the other hand «electoral incentives engendered by an ethnically diverse electorate, can work through increasing prospective representatives' intrinsic motivation» so that «minority candidates standing in more ethnically diverse seats were more motivated than the ones standing in predominantly white seats» (M. SOBOLEWSKA, R. MCKEE and R. CAMPBELL, *Explaining motivation to represent: how does descriptive representation lead to substantive representation of racial and ethnic minorities?*, in *West European Politics*, 6/2018, 1237 ff.). The literature shows that descriptive representation improves minority substantive representation (see D.T. CANON, *Race, Redistricting, and Representation: The Unintended Consequences of Black Majority Districts*, University of Chicago Press, Chicago, 1999; K.L. GAMBLE, *Black Political Representation: An Examination of Legislative Activity within U.S. House Committees*, in *Legislative Studies Quarterly*, 3/2007, 421 ff.; C. GROSE, *Congress in Black and White: Race and Representation in Washington and at Home*, Cambridge University Press, Cambridge, 2001; W. WILSON, *Descriptive Representation and Latino Interest Bill Sponsorship in Congress*, in *Social Science Quarterly*, 4/2010, 1043 ff.).

[15] D.C. BOWEN, C.J. CLARK, *Revisiting Descriptive Representation in Congress: Assessing the Effect of Race on the Constituent–Legislator Relationship*, in *Political Research Quarterly*, 3/2014, 695 ff.; K. TATE, *The Political Representation of Blacks in Congress: Does Race Matter?*, cit. See also *Affirmative Action and Electoral Reform*, in *The Yale Law Journal*, 8/1981, 1814 ff., noting that the election of minority representatives encourages greater political consciousness and participation in the minority community.

[16] D.T. CANON, Race and Redistricting, cit., 628. The presence of minorities' representatives also has a beneficial impact on the rest of the population according to E.Y. RILEY, C. PETERSON, *Examining the Impact of Black Political Representation on White Racial Attitudes in Majority Black Congressional Districts*, in *Journal of Black Studies*, 7/2019, 611, who challenge the notion that having a black political representative will be associated with a decrease in negative racial attitudes among whites.

[17] A. THERNSTROM, *Whose Votes Count? Affirmative Action and Minority Voting Rights*, Harvard University Press, Harvard, 1987; A. THERNSTROM, *Voting Rights—and Wrongs: The Elusive Quest for Racially Fair Elections*, Aei Press, 2009.

[18] Regarding the bad side-effects of racial gerrymandering, see C.M. BURKE, *The Appearance of Equality: Racial Gerrymandering, Redistricting, and the Supreme Court*, Greenwood Press, Santa Barbara, 1999, 32; S.D. CASHIN, *Democracy, Race, and Multiculturalism in the Twenty-First Century: Will the Voting Rights Act Ever Be Obsolete?*, in *Wash. University Journal of Law & Policy*, 1/2006, 71 ff.

[19] D.C. LEMI, *What is a Descriptive Representative?*, in *Political Science & Politics*, 5/2022, 290.

and often the emphasis on one aspect of representation in district construction – that related to belonging to ethnic minorities – overlaps with another – particularly, that of political affiliation – producing a result that can even have perverse effects to the detriment of the substantive representation of the interests of the groups intended to be favored[20].

Indeed, all these aspects have emerged in the rich jurisprudence of the district courts and especially in the jurisprudence of the United States Supreme Court, which has examined the legitimacy of majority-minority districts. Despite attempts at systematization, the paradigm of racial fairness remains uncertain[21] and highly subject to case-by-case evaluations[22]. Such uncertainty in defining the concept of adequate representation of minorities is, in turn, at the base of not infrequent changes in the Supreme Court's orientation[23].

3. *From "negative" to "affirmative" racial gerrymandering in the earliest Supreme Court's jurisprudence*

The term racial gerrymandering simply refers to the policy of redrawing district lines to advantage one racial group of voters over another. The manipulation of district lines for racial purposes encompasses two distinct redistricting methods: one form of gerrymandering, known as "negative" racial gerrymandering, occurs when district lines are manipulated to minimize or dilute the voting strength of racial or ethnic

[20] K.W. SHOTTS, *The Effect of Majority-Minority Mandates on Partisan Gerrymandering*, in *American Journal of Political Science*, 1/2001, 120 ff. The most serious criticism of racial gerrymandering «concerns possible tradeoffs between descriptive representation of and substantive representation for the black community» for L.M. OVERBY, K.M. COSGROVE, *Unintended Consequences? Racial Redistricting and the Representation of Minority Interests*, in *Journal of Politics*, 2/1996, 541. See W.D. HICKS, C.E KLARNER, S.C. MCKEE and D.A. SMITH, *Revisiting Majority-Minority Districts and Black Representation*, in *Political Research Quarterly*, 2/2018, 420, noting that «the creation of majority-minority districts has generated an issue that crosscuts the Democratic coalition by pitting black and withe Democrats against each other».

[21] See G. KING, J. BRUCE and A. GELMAN, *Racial Fairness in Legislative Redistricting*, in P.E. PETERSON (ed.), *Classifying by Race*, Princeton University Press, Princeton, 1996, 85, remarking that there presently exists no agreed upon absolute standard of racial fairness in redistricting.

[22] While «in its malapportionment decisions, the Supreme Court has been helped by accepted measures of equal population», in gerrymandering-district cases the Court «has been hindered severely in its quest for a gerrymandering standard by lack of agreement on what constitutes "fair and effective representation"» (J. O'LOUGHLIN, *The Identification and Evaluation of Racial Gerrymandering*, in *Annals of the Association of American Geographers*, 2/1982, 165 ff.). C. CASONATO, *Minoranze etniche e rappresentanza politica*, cit., 235, emphasizes that while the principle of numerical correspondence among districts provided a generally objective basis for measuring the political equality of redistricting activities, the decision standards adopted for subsequent judgments regarding the "aesthetic" aspects of districts would prove less operational.

[23] C. CASONATO, *Minoranze etniche e rappresentanza politica*, cit., 245.

minorities[24]. The second form of gerrymandering, referred to as "affirmative" racial gerrymandering, deliberately creates "majority-minority" districts to enable minority populations to elect a candidate who represents their interests in office[25].

Early jurisprudential cases of racial gerrymandering focused on the first type of district manipulation, which was prompted by demands from black minorities to rectify contemporary disenfranchisement policies through electoral districts delineation. Dating back as early as 1960, even before the enactment of the Voting Rights Act, in the seminal case of *Gomillion v. Lightfoot*[26] the Supreme Court addressed for the first time the use of electoral districting along racial lines[27]. Here, the plaintiffs alleged that the legislature had altered the square shape of the city of Tuskegee to form «an uncouth twenty-eight-sided figure»[28] effectively excluding all blacks from the city limits in order to deprive them of their existing municipal voting rights. On that occasion, the Court held the legislation unconstitutional because it was «solely concerned with

[24] There are standard terms used in literature to describe techniques that can be employed to draw district maps that penalize minorities representation, hindering their ability to translate voting support into seats, in contrast to what might be expected from a plan drawn based on neutral principles. For example, the term "cracking" occurs when areas dominated by minorities are divided into different constituencies to dilute their electoral strength. Conversely, the term "packing" involves concentrating minorities within a few constituencies to secure overwhelming victories for the group's candidate, thereby wasting potential votes that could secure victories in other districts. The term "stacking" identifies the technique used to submerge the minority population within constituencies where whites are in the majority. A glossary that delineates all districting criteria is given by B. GROFMAN, J. CERVAS, *The Terminology of Districting*, March 30, 2020. "Qualitative dilution" through gerrymandering practices also differs from "quantitative dilution", which happens when votes receive unequal weight due to huge deviations in the population among the constituencies (P.S. KARLAN, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, in *Harvard Civil Rights-Civil Liberties Law Review*, 1/1989, 176; G.M. HAYDEN, *Resolving the Dilemma of Minority Representation*, cit., 1589 ff.). See also G.M. HAYDEN, *Refocusing on race*, in *George Washington Law Review*, 6/2005, 1258, noting that «the two most straightforward categories involve (1) numerically diluting the strength of the group's vote and (2) preventing members of the group from combining their votes in a way that results in the election of a preferred candidate».

[25] P. OKONTA, *Race-based political exclusion and social subjugation: Racial gerrymandering as a badge of slavery*, cit., 270. See also D.D. POLSBY, R.D. POPPER, *The Third Criterion: Compactness as a Procedural Safeguard against Partisan Gerrymandering*, in *Yale Law & Policy Review*, 2/1991, 301 and M. SASSON, *Shaw v. Reno: Is Remedial Racial Gerrymandering Another Victim of the Pursuit of the Color-Blind Constitution?*, in *New England Law Review*, 2/1995, 363, who divides gerrymandering into three categories: «traditional racial gerrymandering, collusive bipartisan gerrymandering, and remedial racial gerrymandering».

[26] *Gomillion v. Lightfoot*, 364 U.S. 339, 346 (1960). The case concerned a law from the State of Alabama that altered electoral boundaries for the city of Tuskegee, effectively excluding all black residents from within the city limits. According to K.I. BUTLER, *Affirmative racial gerrymandering: rhetoric and reality*, in *Cumberland Law Rev.*, 1996, vol. 26(2), 334: «*Gomillion* was clearly a "negative" use of race case».

[27] As it has been noted: «Most court decisions on gerrymandering have involved allegations of vote dilution through multimember district» (J. O'LOUGHLIN, *The Identification and Evaluation of Racial Gerrymandering*, cit.).

[28] *Gomillion v. Lightfoot*, 364 U.S. 339, 340.

segregating white and colored voters» with the aim of diminishing minority political power[29].

Notably, Justice Frankfurter's majority opinion based the ruling solely on the Fifteenth Amendment, which ensures the right to vote[30]. As highlighted by Professor Casonato, the majority of the Court distinguished between *formal* equality in access to voting (which was upheld) and *effective* equality in influence, namely in the effectiveness of voting (which was violated). However, instead of invoking the Equal Protection Clause[31], the Court later maintained that both dimensions of equality were part of the content of the right to vote taken alone. Only based on this assumption could the issue be resolved with exclusive reference to the Fifteenth Amendment[32].

In other words, the Supreme Court preferred to give a restrictive interpretation of the Equal Protection Clause of the Fourteenth Amendment and consequently broaden the interpretation of the Fifteenth Amendment, in order to encompass within the right to vote also the collective right of a specific group of voters to be adequately represented. However, in a concurring opinion, Justice Whittaker argued that there was a violation of the Fourteenth Amendment. According to him, the right to vote itself had not been violated[33], but rather the equal effectiveness of its exercise that falls under the umbrella of the Equal Protection Clause[34].

In fact, subsequent Supreme Court jurisprudence has upheld the majority interpretation, so that, while the Equal Protection Clause has been applied to malapportionment claims[35], racial redistricting decisions have continued to rely

[29] *Gomillion v. Lightfoot*, 364 U.S. 339, 341.

[30] Amendment XV (1870), Sec. 1: «The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude».

[31] The Equality Protection Clause is rooted in the Fourteenth Amendment, stating that no State shall «deny to any person within its jurisdiction the equal protection of the laws».

[32] C. CASONATO, *Minoranze etniche e rappresentanza politica*, cit., 187.

[33] «Inasmuch as no one has the right to vote in a political division, or in a local election concerning only an area in which he does not reside, it would seem to follow that one's right to vote in Division A is not abridged by a redistricting that places his residence in Division B if he there enjoys the same voting privileges as all others in that Division, even though the redistricting was done by the State for the purpose of placing a racial group of citizens in Division B, rather than A» (*Gomillion v. Lightfoot*, 364 U.S. 339, 349, Whittaker concurring).

[34] Refferring to *Brown v. Board of Education* and *Cooper v. Aaron,* he concluded that excluding such a large portion of Tuskegee's population would result in the type of segregation prohibited by the equal protection clause (see I.L. OTTO, *Constitutional Law-Municipal Redistricting: Deprivation of Right to Vote or Violation of Equal Protection*, in *Case Western Reserve Law Review*, 4/1961, 808).

[35] The Supreme Court has interpreted the Constitution to require that electoral districts within a redistricting map contain an approximately equal number of persons. See *Baker v. Carr*, 369 U.S. 186, 217 (1962); *Gray v. Sanders*, 372 U.S. 368, 381 (1963), holding that the conception of political equality means one person, one vote; *Reynolds v. Sims*, 377 U.S. 533 (1964), holding that the Equal Protection Clause presumptively mandates the equal distribution of the right to vote, when governmental offices are staffed by election. Referring to these cases, some scholars observed that: «The right to vote—a right quite possibly not intended to be covered in the Fourteenth Amendment, and protected in the Fifteenth only from racial discrimination—eventually found a home in the so-called fundamental rights

predominantly on the Fifteenth Amendment and, after 1965, on Section 2 of the Voting Rights Act[36].

Furthermore, the Fourteenth Amendment has ended up representing a *limitation*, rather than support, for the promotion of policies aimed at ensuring minorities the right to adequate representation[37], particularly through "affirmative" racial gerrymandering. Indeed, the Supreme Court has held that, in some instances, the Equal Protection Clause prevents voting rights plans designed to give, or attempt to give, an advantage to minority groups. These are incentivizing policies that many State legislators began to implement after the Voting Rights Act was passed in 1965, especially those subject to the pre-clearance mechanism of section 5 of the Act.

The use of affirmative actions in the electoral process is by itself a troubling question and a controversial topic. This arises from the notion that discrimination against minority racial groups is historically entrenched or pervasive to the extent that it necessitates measures beyond a simple non-discrimination policy[38]. The policy of maximizing the number of majority-minority voting districts has been viewed as the solution of choice[39], very close to achieving proportional representation on an ethnic basis.

State legislatures created a large number of these majority-minority districts from the end of the 1970s[40] and, prior to *Shaw* v. *Reno,* it was possible to argue that the Court had not determined the constitutional limits upon the State's use of race to "aid" minorities in districting decisions[41]. Whereas outside the specific realm of the

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strand of the Equal Protection Clause» (W.D. ARAIZA, *Enforcing the Equal Protection Clause: Congressional Power, Judicial Doctrine, and Constitutional Law*, NYU Press, New York, 2015, 52).

[36] Both quantitative vote dilution and qualitative vote dilution (for this distinction see G.M. HAYDEN, *Resolving the Dilemma of Minority Representation*, cit., 1594) may be functionally (and perhaps even theoretically) prevent members of a group from aggregating their votes in a way that elects a number of representatives of their choice in rough proportion to their share of the electorate. In practice, however, «the two types of dilution have been treated quite differently under the law» (G.M. HAYDEN, *Refocusing on race*, cit., 1258). Vote dilution of racial or ethnic minorities can also come from at-large voting schemes and multimember districts, as they tend to minimize the voting strength of minority groups by permitting the political majority to elect all representatives of the district. See *White v. Regester*, 412 U.S. 755 (1973), holding that a multimember district violates the equal protection clause when, considering the totality of the circumstances, it denies the opportunity to participate in the election process in a reliable and meaningful manner. See also *Rogers v. Lodge*, 458 U.S. 613 (1982), where the Court invalidated a multimember district on the basis of the Fourteenth Amendment, finding that elected officials were unresponsive and insensitive to the needs of the economically depressed black community.

[37] The observation come from C. CASONATO, *Minoranze etniche e rappresentanza politica*, cit., 187, nt. 187.

[38] A. DERFNER, *Pro: affirmative action in districting*, in *Policy Studies Journal*, 1981, 852.

[39] G.M. HAYDEN, *Resolving the Dilemma of Minority Representation*, cit., 1602.

[40] *Ivi*, 1591.

[41] Whereas prior cases had addressed the remedial use of race-conscious districting to alleviate proven exclusion, «the 1990s redistricting cases concerned the affirmative use of race in the quintessentially political process of dividing electoral spoils» (T.A. ALEINIKOFF, S. ISAACHAROFF, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, cit., 590).

right to vote a race conscious policy had to be narrowly tailored to serve a compelling government interest to overcome the scrutiny of the Court – regardless of whether the racial classification aimed to benefit or harm a racial group[42] – until the 1990s, the Supreme Court applied a less stringent standard of review for affirmative actions pertaining to the political representation of minorities[43].

In the most important voting rights case of the pre-Reagan Court era, *United Jewish Organizations v. Carey*[44], the Court had even approved a race-conscious district plan of the State of New York with benign effects for ethnic minorities, although it resulted in an apparent reverse discrimination effect. Indeed, the creation of new majority-minority voting districts diluted the vote of a religious minority (Hasidic Jews), whose community of some 30,000 people consequently lost the ability to elect a candidate of their choice. Comparing the two situations, the Court nonetheless assessed that the white religious minority did not suffer racial slur or stigma, as it would still be adequately represented by the preservation of white-majority districts in the rest of the country[45]. The most controversial aspect of the decision was the assumption that "white" voters shared outlooks and interests simply on the basis of their race, thus excluding other factors such as religious differences. This reasoning, as highlighted, ended up indulging in a form of race "essentialism" and, by downplaying other lines of division, seemed to allude to the political theory of "virtual representation"[46].

[42] See *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978); *City of Richmond v. J. A. Croson Co*., 488 U.S. 469 (1989). For a critical analysis rooted in the original intent doctrine, see E. SCHNAPPER, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, in *Virginia Law Rev.*, 1985, vol. 71(5), 754. According to her, the authors of the Fourteenth Amendment could not have intended that it generally prohibited affirmative actions in favor of Blacks or other disadvantaged groups. See also D.A. STRAUSS, *Affirmative Action and the Public Interest*, in *The Supreme Court Review*, 1995, 1 ff., who critically observes: «the notion that affirmative action is like discrimination against minorities is unconvincing in the abstract and, not surprisingly, the Supreme Court has not followed through on it in the design of the doctrine». In contrast see M.B. RAPPAPORT*, Originalism and the Colorblind Constitution*, in *Notre Dame Law Rev*., 2013, vol. 89(1), 71 ff.

[43] See C. CASONATO, *Minoranze etniche e rappresentanza politica*, cit., 350, noting that the other race-based remedial classifications had been already subjected to strict scrutiny.

[44] *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977).

[45] *United Jewish Organizations v. Carey*, 430 U.S. 144, 165, Justice White opinion.

[46] T.A. ALEINIKOFF, S. ISAACHAROFF, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, cit., 596. See Chief Justice Burger dissenting opinion, challenging the assumption that the legislative interests of all "whites" are even substantially identical because «"whites" category consists of a veritable galaxy of national origins, ethnic backgrounds, and religious denominations» (*United Jewish Organizations v. Carey*, 430 U.S. 144, 185). See E. CECCHERINI*, Eguaglianza del voto e rappresentatività delle minoranze:*

recenti orientamenti giurisprudenziali negli Stati Uniti, in *Quad. cost*., 2/1997, 321 ff.

4. *The debated legitimacy of affirmative racial gerrymandering under the Equal Protection Clause*

The jurisprudential turning point on affirmative racial gerrymandering arose later[47], in response to the redistricting process that followed the 1990 census. This process emphasized the creation of majority-minority districts to optimize minority voting and to comply with either Section 5 or Section 2 of the Voting Rights Act. Some of these districts possessed bizarre and fantastic shapes[48].

Under the *Shaw v. Reno* case[49] and its progeny[50], in the latter half of decade many of the majority-minority districts in the South were subsequently struck down by federal judges[51]. All these cases were promoted by white plaintiffs who did not allege any representational harm – namely, a denial or dilution of their right to vote – but rather claimed they were unfairly deprived of their equal protection rights.

According to this premise, the new jurisprudential course based its approach to the tools on a formalistic analysis of the Fourteenth Amendment. On one hand, although the original purpose of the Amendment was to protect the black community from discrimination, the broad wording of the Equal Protection Clause has led the Supreme Court to hold that all racial discrimination (including discrimination against whites, Hispanics, Asians, and Native Americans) was constitutionally suspect.

On the other hand, the Clause has been narrowly interpreted as intended to ban solely discrimination against *individuals*. In this regard, Justice O'Connor in *Shaw v. Reno* stated for the Court that the central purpose of the Equal Protection Clause «is to prevent the States from purposefully discriminating between individuals on the basis

[47] In *Shaw v. Reno* the Court applied for the first time the principles announced in *City of Richmond v. J.A. Croson co.* – namely the Fourteenth Amendment analysis of remedial legislation highly suspected to make an illegitimate uses of race – in the area of voting rights, which is «a complex and politically charged area» (M. SASSON, *Shaw v. Reno: Is Remedial Racial Gerrymandering Another Victim of the Pursuit of the Color-Blind Constitution?*, in *New England Law Review*, 1995, 357).

[48] D.H. LOWENSTEIN, *You Don't Have to Be Liberal to Hate the Racial Gerrymandering Cases*, in *Stanford Law Review*, 1998, vol. 50, 780.

[49] *Shaw v. Reno*, 509 U.S. 630 (1993).

[50] K.I. BUTLER, *Racial Fairness and Traditional Districting Standards: Observations on the Impact of the Voting Rights Act on Geographic Representation*, cit., 779. The remaining cases, collectively referred to as "*Shaw* progeny" were (I) challenges to North Carolina's congressional districts: *Shaw v. Hunt,* 517 U.S. 899 (1996), *Hunt v.Cromartie,* 526 U.S. 541 (1999), and *Easley v. Cromartie,* 532 U.S. 234 (2001); (2) a challenge to Georgia's congressional districts: *Miller v. Johnson,* 515 U.S. 900 (1995) holding that districts may violate the Equal Protection Clause of the Constitution if race was the predominant factor in their creation; and (3) a challenge to Texas's congressional districts: *Bush v. Vera,* 517 U.S. 952 (1996) holding that strict scrutiny does apply where race was the predominant factor in drawing district lines and traditional, race-neutral districting principles were subordinated to race.

[51] See the note *The Future of Majority-Minority Districts in Light of Declining Racially Polarized Voting*, in *Harvard Law Rev.*, 2003, vol. 116(7), listing majority-minority districts struck down by the Supreme Court and District Courts.

of race»[52]. And she adds: «Laws that explicitly distinguish between individuals on racial grounds fall within the core of that prohibition»[53].

Indeed, although voting-rights claims inherently involve groups, «in Shaw the Court attempted to bring voting-rights law into the new equal protection model by reconceptualizing the right at stake as pertaining to individuals, not groups»[54].

This judicial stance aligns with the American ideal of individual liberalism within the sphere of political representation. Individual liberalism values individuality and promotes equality and meritocracy. Its aim is to establish a political system where race becomes irrelevant[55].

The weakness of such an outcome lies in a distorted perception of social data by the law: a legal system and a jurisprudential approach based on the color-blind theory do not adequately address a society which in many aspects is still race-conscious[56]. With a more realistic approach, Supreme Court Justice Harry Blackmun stated in 1978: «In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently»[57].

From this perspective, ensuring the meaningful participation of racial minorities in decision-making bodies may require arrangements that come with costs in other aspects of representation. In other words: «the claim of a right of effective participation in an electoral system not only entails the recognition of an affirmative group right, but – given the zero-sum quality of representation – the claim also assumes the right to subordinate electorally some other group or groups»[58].

Therefore, a policy of affirmative action – as arrangements that permit all to participate as peers in social life[59] – is constitutionally compliant even when applied in

[52] *Shaw v. Reno*, 509 U.S. 630 (1993), 642.

[53] *Shaw v. Reno*, 509 U.S. 630 (1993), 642. See T.A. ALEINIKOFF, S. ISAACHAROFF, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, cit., 602, stressing that insofar as it focuses on another understanding of the constitutional norm based on the individual, the Court held that the Fourteenth Amendment establishes a right not to be segregated on the basis of one's race in electoral districting plans.

[54] T.A. ALEINIKOFF, S. ISAACHAROFF, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, cit., 601.

[55] See *Shaw v. Reno*, 509 U.S. 630 (1993), 657, ruling that: «Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire».

[56] C. CASONATO, *Minoranze etniche e rappresentanza politica*, cit., 350 ff. See M.P. MATTER, *The Shaw Claim: The Rise and Fall of Colorblind Jurisprudence*, in *Seattle Journal for Social Justice*, 2019, vol. 18(1), 67, considering that «jurisprudence based on the aspiration of a society where race no longer matters is, in fact, a racial act».

[57] *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978), 407.

[58] T.A. ALEINIKOFF, S. ISAACHAROFF, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, cit., 601

[59] E. SCHNAPPER, *Affirmative Action and The Legislative History of The Fourteenth Amendment*, in *Virginia Law Review*, 1985, 753 ff.

the paramount context of political representation[60]. Indeed, representation can be described as a third political dimension of justice, alongside the economic dimension of redistribution and the cultural dimension of recognition[61].

Furthermore, representation is even a *precondition* for the other dimensions of justice, as it «furnishes the stage on which struggles over distribution and recognition are played out»[62]. That's why, in a heterogeneous society – where ethnic belonging is still a source of considerable inequalities – the right to vote and the universal suffrage, taken alone, can become a mere legal fiction[63]. In this sense, the slogan "no taxation without representation", a symbol of the American democracy, with its legacy – namely the idea that citizens should have a say in the decisions that affect their lives – could be effectively updated into the formula «no redistribution or recognition without representation»[64] to reveal the sneaky new forms of virtual representation.

On the contrary, far from pursuing effective representation, the final outcome of the Supreme Court's affirmative racial gerrymandering decisions is that legislators can no longer be compelled by legal or political forces to create majority-minority districts if those districts can only be created through significant deviations from traditional districting standards. Paradoxically, these cases have had no impact on the legitimacy of bizarre districts created for nonracial (i.e. political) reasons[65].

Furthermore, in subsequent years, the Court progressively narrowed the protection afforded to minorities against voting dilution. Relief was granted to non-white plaintiffs only when the challenged districts strictly adhered to the "Gingles three-part test"[66]. Conversely, the Court rejected cases involving "influence districts", in which

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[60] D.O. BARRETT, *The Remedial Use of Race-Based Redistricting After Shaw v. Reno*, in *Indiana Law Journal*, 1/1994, 255 ff.

[61] See N. FRASER, *Re-framing Justice in a Globalizing World*, in N. FRASER, P. BOURDIEU (ed.), *(Mis)recognition, Social Inequality and Social Justice*, Routldedge, London 2007, 17 ff.

[62] N. FRASER, *Reframing Justice in a Globalizing World*, cit., 21.

[63] See N. URBINATI, M.E. WARREN, *The Concept of Representation in Contemporary Democratic Theory*, cit., 397, considering that the equality ensured by universal suffrage within nations is, simply, equality with respect to one of the very many dimensions that constitute "the people".

[64] N. FRASER, *Reframing Justice in a Globalizing World*, cit., 31. Fraser points out that «Those who suffer from misrepresentation are vulnerable to injustices of status and class. Lacking political voice, they are unable to articulate and defend their interests with respect to distribution and recognition, which in turn exacerbates their misrepresentation». The result is a vicious circle in which the three orders of injustice reinforce one another.

[65] K.I. BUTLER, *Racial Fairness and Traditional Districting Standards: Observations on the Impact of the Voting Rights Act on Geographic Representation*, cit., 776.

[66] See *Thornburg v. Gingles*, 478 U.S. 30 (1986), requiring plaintiffs to prove (1) that the minority group is sufficiently large and geographically compact; (2) that the minority group is politically cohesive; and (3) that white voters vote as a bloc and thereby typically defeat minority- preferred candidates. The role of the Gingles' framework in voting rights litigation is questioned by T.J. MILES, A.B. COX, *Judicial Ideology and the Transformation of Voting Rights Jurisprudence*, in *The University of Chicago Law Review*, 2008, 1493 ff. Recently, the Court reiterated the conditions of the Ginlges' test in *Allen v. Milligan*, 599 U. S. 1 (2023). For an in-depth discussion of the case, see R. BIZZARRI, *Towards 2024 Elections: Racial Gerrymandering in the Latest U.S. Supreme Court's Rulings*, in this issue. See also S.

racial minority groups constitute less than 50 percent of the voting population[67]. However, when combined with crossover voters, these minority groups could significantly influence electoral outcomes and shape the political behavior of elected representatives. Consequently, the dismantling of such districts, which falls outside the purview of the Voting Rights Act, could potentially diminish the political influence of minorities, curtail opportunities to elect representatives of their choice, and, ultimately, run counter to a substantive interpretation of the Equal Protection Clause.

The Court's claim to adopt a neutral approach clashes with the fact that «all districting involves making normative judgments about political outcomes»[68]. Actually, if the solution of majority-minority districting has reached an impasse, the barriers to full minority participation in the American political system continue to exist on many levels. Further solutions probably need to question «both the statutory and constitutional rules that – however well-intentioned – may stand in the way of those goals, and to not let the "Second Reconstruction" slip away before it is completed»[69].

5. *Final remarks*

The preceding analysis compels us to reflect on a theme that, despite its importance, in our legal system is rather underestimated. Conversely, the North American experience testifies that the nature of electoral districts lies at the very core of any democratic system. As Professor Stephanopoulos has observed, district boundaries implicate not only the allocation of legislative power, but also the character of participation and representation, to the extent that «what districts are like is as meaningful as who they elect»[70].

Of course, this is a more relevant issue in electoral democracies using majoritarian voting rules, which are, not incidentally, more prone to the gerrymandering practices than mixed-member and proportional ones[71]. As highlighted above, the majority-

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FILIPPI, *Allen v. Milligan: la Corte Suprema USA conferma (inaspettatamente) la propria giurisprudenza sulla Sezione 2 del VRA*, in *Diritti comparati*, 27 giugno 2023; D. ZECCA, *Lunga vita al Voting Rights Act? Criteri di redistricting, predominanza del fattore razziale ed enforcement powers del Congresso*, in *DPCE online*, 4/2023, 3787 ff.

[67] See *Bartlett v. Strickland*, *556 U.S. 1 (2009)*. On this point see J. MITCHELL, *Breaking Out of the Mold: Minority-Majority Districts and the Sustenance of White Privilege*, in *Washington Un. Journal of Law and Policy*, 2013, 244.

[68] G.M. HAYDEN, *Refocusing on race*, cit., 1264.

[69] *Ivi*, 1273.

[70] N. STEPHANOPOULOS, *Spatial Diversity*, in *Harvard Law Review*, 2012, 125, 1903 ff., emphasizing that district boundaries implicate not only the allocation of legislative power, but also the character of participation and representation. He comes to the conclusion that «When we redraw district lines, we do more than pick political winners and losers. We forge the very core of our democracy».

[71] See M. COMA FERRAN, I. LAGO, *Gerrymandering in comparative perspective*, in *Party Politics*, 2/2018, 99 ff., stressing that the literature lacks a method for measuring gerrymandering in different types of electoral systems.

minority concern itself implies a certain proportionalist interpretation of election results, as well as a preference for proportional electoral systems. Moreover, democratic theorists focused on the representation of disadvantaged groups mostly favor a proportional electoral system, because its more inclusive logic would increase the chances that disadvantaged groups would have meaningful representation[72]. Indeed, the actual inclusive capacity of proportional systems compared to single-member districts and candidate-centered voting systems is a debatable matter[73], which might be worth reconsidering, particularly in light of the Italian experience. However, this topic cannot be addressed here[74].

Secondly, the analysis conducted above enriches the reflection on the principle of substantive equality in the field of political representation, which, in our context, has predominantly developed with reference to gender representation. Indeed, the mechanism of affirmative action to address inequalities originated in the United States, and has significantly influenced the European and Italian debate[75]. But paradoxically, right in their homeland, racial affirmative action seems definitively banned from the US legal system, where the practice originated. In this regard, it has been observed that the Supreme Court from the 1990s onwards left its «well traveled path»[76] in redistricting decisions on majority-minority districts.

The Court did so in the absence of an explicit reference in the Constitution to the principle of substantive equality[77]. Conversely, in our legal system, the principle of substantive equality is embraced in par. 2 art. 3 Cost. to promote the «effective participation of all workers in the political organization […] of the Country», and it is combined with the duty of *political* solidarity, found in art. 2 Cost. Thus, the different approach of our Constitution, compared to the American one, could even more easily support, for the future, a policy of affirmative actions that impact electoral rules with the aim of ensuring the effective political participation of naturalized citizens. From this point of view, naturalized citizens should be considered as disadvantaged groups expressive of their own, peculiar, interests.

Another issue to take in consideration when attempting a comparison on the American race-conscious districting policies, is that this practice is mostly capable of

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[72] S.A. BANDUCCI, J.A. KARP, *Perceptions of Fairness and Support for Proportional Representation*, in *Political Behavior*, 3/1999, 217 ff.; D.J. AMY, *Proportional Representation and the Future of the American Party System*, in *American Review of Politics*, 1996, 371 ff.; K.L. BARBER, A *Right to Representation: Proportional Election Systems for the Twenty-first Century*, Ohio State University Press, Columbus, 2001.

[73] See C.R. BEITZ, *Political Equality: An Essay in Democratic Theory*, Princeton University Press, Princeton, 1989, arguing that «proportional representation is not an imperative of the principle of political equality in any general sense».

[74] On this contested issue see D. CASANOVA, *Eguaglianza del voto e sistemi elettorali. I limiti costituzionali alla discrezionalità legislativa*, Editoriale scientifica, Napoli, 2020, 161.

[75] A. D'ALOIA, *Discriminazioni, eguaglianza e azioni positive: il "diritto diseguale"*, in T. CASADEI (ed.), *Lessico delle discriminazioni tra società, diritto e istituzioni*, Diabasis ed., Parma, 2008, 191 ff.

[76] *Bush v. Vera*, 517 U.S. 952 (1996), 1005, Justice Stevens dissenting opinion.

[77] S. LEONE, *Costituzione americana e razza ancora allo specchio. La parabola delle* affirmative actions *nella giurisprudenza della Corte Suprema*, in *Rivista AIC*, 1/2024, 28.

enhancing the representation of geographically concentrated groups. Therefore, because in other immigration context, many ethnic and racial minorities are geographically dispersed, there is a systemic limit to the capacity of group conscious maps to approach proportionality[78].

Actually, the issue of the voting preferences of immigrants is gaining attention in Europe. Recent works explore whether current and future growth in the size of the second-generation migrant populations of Western Europe could play a significant role in shaping the left-to-right political balance. They suggest EU politicians should consider the long-term effects of immigration rather than just immediate reactions[79]. Furthermore, they note that populist right parties in Western Europe experienced a slight decline in popularity due to decreasing concern over the migrant crisis and immigration, although Italy stands out as an exception[80].

In our Country the issue of representation of new ethnic minorities is still relatively unnoticed at the moment, except for historical minorities rooted in certain territories[81]. Indeed, before addressing the issue of fair representation for emerging ethnic minorities, in light of the principle of *substantive* equality, our legal system still needs to solve the problem of recognizing the right to vote for foreigners who are permanent residents. Currently, this challenge is constrained by the narrow confines of our restrictive and unjust citizenship laws[82]. Looking ahead, it is unlikely that the matter of political representation for Italian citizens of foreign origins will be characterized in the same quantitative and qualitative terms as observed in the United

[78] M.S. WILLIAMS, *Voice, Trust, and Memory: Marginalized Groups and the Failings of Liberal Representation*, Princeton University Press, Princeton, 1998, 206.

[79] S. MORICONI, G. PERI, R. TURATI, *Are immigrants more Left leaning than Natives?*, in *National Bureau of Economic Research*, *Working Paper 30523*, September 2022; K. PILATI, L. MORALES, *Ethnic and immigrant politics vs. mainstream politics: the role of ethnic organizations in shaping the political participation of immigrant-origin individuals in Europe*, in *Ethnic and Racial Studies*, 15/2006, 2796 ff; E. DE ROOIJ, *Patterns of immigrant political participation: explaining differences in types of political participation between immigrants and the majority population in Western Europe*, in *European Sociological Review*, 4/2012, 455; R. MAXWELL, *Evaluating migrant integration: political attitudes across generations in Europe*, in *International Migration Review*, 1/2010, 25 ff.; J. ZWEIMÜLLER, A. WAGNER and M. HALLA, *Immigration and Voting for the Far Right*, in *Journal of European Economic Association*, 6/2017, 1341 ff.

[80] J. DENNISON, A. GEDDES and M. GOODWIN, *Why immigration has the potential to upend the Italian election*, in *LSE blog post*, 2018; N. PASINI, M. REGALIA, *The immigration issue in the Italian general election*, in V. CESAREO (ed.), *The Twenty-eighth Italian Report on Migrations 2022*, Fondazione ISMU ETS, 2023, 77 ff., who note that in the 2022 Italian electoral campaign the immigration issue has been assigned less weight than in past electoral seasons, but they nonetheless come to the conclusion that it is still a fundamental theme for political parties grappling with the new challenges that immigration brings.

[81] See M. PODETTA, *La Costituzione linguistica. Pluralismo e integrazione oggi*, Editoriale Scientifica, Napoli, 2023.

[82] The Italian's naturalization process is one of the strictest in Europe. See J. SAURER, *The acquisition of citizenship in the OECD countries*, *Ifo DICE Report*, 2/2017, 44 ff.; M.P. VINK, G. DE GROOT, *Citizenship attribution in Western Europe: International framework and domestic trends*, in *Journal of Ethnic and Migration Studies,* 5/2010, 713 ff.

States. Nevertheless, the journey toward achieving “racial fair representation” in our legislative bodies is only at the very beginning as it still arises in terms of preliminary respect for the “one vote-one person” rule which is rooted in the principle of *formal* equality among individuals.

Marco Podetta*

Differential Measures in Italian Electoral Legislation: A Critical Analysis of Minority Linguistic Groups Protection**

SUMMARY: 1. Limitations and Exclusions in Electoral Legislation for Minority Linguistic Groups. – 2. The questionable legitimacy of guaranteed representation regardless for some linguistic minorities. – 3. The not always indispensable provision of differential measures in favour of linguistic minorities in electoral legislation. – 4. The difficulty in correctly defining the electoral subjects to be admitted to the differential measures in application of the principle of protection of linguistic minorities. – 5. Paradoxes in differential electoral protection: exclusions and inclusions beyond linguistic minorities.

ABSTRACT: ***This article examines limitations and exclusions within electoral legislation concerning minority linguistic groups in Italy. It delves into the questionable legitimacy of guaranteed representation for certain linguistic minorities, challenges the necessity of providing regardless differential measures in electoral laws, and addresses the difficulty in accurately defining eligible electoral subjects for minority protection. The analysis also highlights paradoxical outcomes where certain provisions exclude some linguistic minorities while including unrelated political entities. Through these discussions, the article underscores the complexities and ambiguities inherent in safeguarding linguistic minorities within electoral frameworks.***

1. *Limitations and Exclusions in Electoral Legislation for Minority Linguistic Groups*

The field of electoral legislation is one of the few regulatory areas in which the Italian state legislature has taken steps to provide, in accordance with Article 6 of the Italian Constitution[1], measures in favour of minority linguistic groups, both before and after the enactment of Law no. 482/1999, which at least in its intentions represents the first (and last) attempt of intervention carried out at the central level in a systematic manner regarding the protection of linguistic minorities.

However, a careful reading of the specific provisions introduced for this purpose highlights how they are actually designed to have substantive effects only for specific minority groups, often exclusively for those same groups already admitted to the differential protection in the three Italian Alpine regions that benefit, also precisely due to the settlement of minority groups in their territory, from a special regime (Valle d'Aosta/Vallée d'Aoste, Trentino-Alto Adige/Südtirol, and Friuli-Venezia Giulia)

Indeed, in electoral legislation, the normative differentiation among minority groups is quite explicit, as formulations are often used (more or less similar and in any

* Tenured Assistant Professor of Public Law, University of Brescia.

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[1] According to which "The Republic safeguards linguistic minorities by means of appropriate measures".

case rather imprecise or confusing) that establish some advantage only for subjects or formations whose condition is related to the occurrence of certain conditions in Regions with special autonomy whose statutes provide particular protections for linguistic minorities. In this way, all allophones settled in Regions with an ordinary statute are automatically excluded, and sometimes even some of the allophone groups settled in those Regions with a special statute. Not only that, but often in these cases, the conditions for accessing an advantage are particularly burdensome (in quantitative terms), further narrowing the field of minority groups admitted to protection and sometimes even favouring only certain (essentially political) components of the same minority group.

In this sense, it is sufficient to mention the case of the current electoral law in Italy for the renewal of the Chambers[2]. Among other things[3], it provides, in particular[4], for various purposes[5], an alternative threshold – potentially more favourable – to the one generally established for lists "representative of recognized linguistic minorities, presented exclusively in a region with special autonomy whose statute or related implementing rules provide special protection for such linguistic minorities"[6].

The provision, beyond the issues concerning the not necessarily straightforward identification of what constitutes "representative lists of linguistic minorities" (see below), is explicitly designed for the latter, but not for all of them. To clarify, the

[2] The new electoral mechanisms were introduced by Law no. 165/2017, which amended the consolidated text of the laws concerning the election of the Chamber of Deputies (Decree of the President of the Republic no. 361/1957) and the consolidated text of the laws concerning the election of the Senate of the Republic (Legislative decree no. 533/1993). Subsequently, Law no. 51/2019, intervened to allow the application of those same mechanisms even with variations in the number of members of the Chambers.

[3] Among these, in addition to the provision for the allocation of the single seat at stake in both the Chamber and the Senate in Valle d'Aosta/Vallée d'Aoste in a kind of "reserved" single-member district, special consideration must be given to the peculiar number of single-member districts established in Trentino-Alto Adige/Südtirol for the election of both Chambers, in derogation from the rules ordinarily provided (see below).

[4] In addition to the possibility, in derogation of the general rules, for "parties or organized political groups representing recognized linguistic minorities, present in constituencies located in regions with special autonomy whose statute or implementing regulations provide for particular protection of such linguistic minorities", to choose in which single-member districts to run in coalition with other lists and in which not (see D.P.R. 361/1957, article 14-bis, paragraph 2); on this topic, see recently V. DESANTIS, *Elezioni parlamentari e rappresentazione delle minoranze linguistiche: questioni connesse alle ipotesi di candidature di coalizione multiple per i medesimi collegi uninominali del Trentino-Alto Adige/Südtirol*, in *Osservatorio AIC*, no. 5/2022, p. 5 ff.

[5] In particular, this is a residual criterion potentially relevant for the calculation of coalition electoral figures, as well as on multiple fronts and at multiple levels regarding the surpassing of thresholds established for accessing the distribution of seats assigned proportionally.

[6] See D.P.R. 361/1957, article 83, paragraph 1, letter c), letter e), no. 1 and no. 2, and letter g); Legislative Decree 533/1993, article 16-bis, paragraph 1, letter c) and letter e), no. 1 and no. 2, and article 17, paragraph 1, letter a) and letter b).

excluded linguistic minorities are: those not recognized[7]; those recognized but not settled in Regions with special autonomy; those recognized and settled in Regions with special autonomy, but whose statutes or implementing regulations do not provide for particular protection of linguistic minorities; those recognized and settled in Regions with special autonomy whose statutes or implementing regulations provide for particular protection of linguistic minorities, but not for their alloglot group. This testifies to the high degree of differentiation among minority groups behind the use of a formula that, however, would aim to be general and abstract, while in substance, it refers – at best[8] – to only the lists representing the "usual" and "classic" linguistic minorities presented in the aforementioned three alpine regions that benefit from a special regime (French-speaking minority in Valle d'Aosta/Vallée d'Aoste, German-speaking and Ladin-speaking minority in Trentino-Alto Adige/Südtirol, and Slovenian-speaking minority in Friuli-Venezia Giulia). Indeed, considering the particularly high level of electoral consensus required to activate the most favourable clause, identified as 20% of the votes in a region or winning a quarter of the single-member districts in the constituency (rounded up to the nearest integer), it is evident that this measure is only accessible to numerically larger linguistic minorities, thus excluding especially the Ladin and – in any case[9] – the Slovene-speaking populations. Moreover, considering that the sole seat at stake in Valle d'Aosta/Vallée d'Aoste is assigned in a single-member district "separate" from the rest of the system, it becomes clear that the aforementioned provision effectively targets only one allophone group, namely the German-speaking population in Trentino-Alto Adige/Südtirol. Going even deeper, considering the results of the political elections from 1948 to the present day, it is also understood that, in reality, the general protective measure for lists representing linguistic minorities is usable – and therefore has been designed – only for the Südtiroler Volkspartei (i.e., the political force historically representing the German-speaking population of that region), excluding other lists representing the German-speaking minority).

There are also cases in which the legislature is even more explicit in circumscribing the scope of application of measures to protect minority language groups.

[7] According to constitutional jurisprudence, recognized minorities today correspond to those listed in article 2 of Law no. 482/1999.

[8] In this regard, it should be noted that the application of this provision (as well as those established in other areas and, more or less, similarly formulated) to the Slovene-speaking linguistic minority in Friuli-Venezia Giulia is at least partly problematic. It is not subject to direct "particular protection" in the Special Statute (which merely provides in Article 3 that "In the Region, parity of rights and treatment is recognized for all citizens, regardless of the linguistic group to which they belong, with the safeguarding of their respective ethnic and cultural characteristics"), nor is it specifically protected by the relevant implementing regulations (see however Legislative Decree no. 223/2002, relating to the "transfer of functions concerning the protection of the language and culture of historical linguistic minorities in the region"), although it is subject to protection at both the national level (generally under Law no. 482/1999 and specifically under Law no. 38/2001) and the regional level (particularly under the Friuli-Venezia Giulia Regional Law no. 26/2007).

[9] See the previous note.

Particularly significant in this regard is the example concerning the electoral legislation related to the selection of the members of the European Parliament allocated to Italy. The law for the election of Italian Members of the European Parliament establishes special rules to favour the entry of candidates expressed by minority language groups into the European Parliament; however, in doing so, it refers only to "lists of candidates possibly submitted by parties or political groups representing the French-speaking minority in Valle d'Aosta, the German-speaking minority in the province of Bolzano, and the Slovenian-speaking minority in Friuli-Venezia Giulia"[10]. Therefore, all other linguistic minorities, recognized or not, are directly excluded from protection, including the Ladin minority, which is usually included in such provisions, at least from a formal point of view. However, it must also be considered that these differential rules, which mainly consist of allowing lists representing these linguistic minorities to ally with lists of political forces with a "national vocation" (thus enabling their votes to be counted together and effectively treating them as a single unified list, thereby enabling the former to "circumvent" the implicit and explicit thresholds typically set by the electoral system)[11], can effectively be "exploited", due to its numerical strength, only by one of the three mentioned language communities, namely once again the German-speaking group in Alto Adige/Südtirol. More precisely, it is exclusively exploited by the Südtiroler Volkspartei[12], being the only political force representing a linguistic minority capable of presenting candidates who receive a sufficient number of preferences to be elected. It is no coincidence that precisely this political formation – and no other representing the same or another linguistic minority[13] – has always obtained a seat in the European elections held in Italy. Moreover, it should be considered that, as if it were not enough, a seat is always effectively guaranteed to this faction, since simultaneously it is foreseen, regardless, to reserve a seat for the lists representing the three mentioned linguistic minorities, allied with lists with a "national vocation", provided that they are

[10] See Law no. 18/1979, article 12, paragraph 9.

[11] It is indeed an approach that could be considered contrary to the spirit of the principle of minority protection. Perhaps more in line with this principle would be the possibility of allowing connections between lists representing different linguistic minorities, even presented in different constituencies, accompanied by other measures to facilitate their representation (according to an approach that, moreover, emphasizes the problem of minority protection perhaps being too closely tied by law to the criterion of "territoriality", at least in some cases).

[12] As correctly highlighted also by M. COSULICH, *La rappresentanza delle minoranze linguistiche al Parlamento europeo: un altro disincanto?*, in *dirittifondamentali.it*, n. 1/2021, particularly p. 74 f., who doubts the constitutional legitimacy of the discipline in question (especially following the entry into force of Law no. 482/1999), which limits protection to only those three language groups and on which the Constitutional Court has also been called to express its opinion (see Constitutional Court, judgment no. 165/2016), although without reaching a decision (p. 73).

[13] If not for entirely fortuitous reasons due to the subsequent withdrawal of other candidates not belonging to a linguistic minority (see below note 16).

able to present a candidate who receives at least 50.000 preferences[14]: on one hand, this threshold is impossible to reach for the Slovenian minority in Friuli-Venezia Giulia (currently estimated at around 46.000 people)[15] and the Francophone minority in Valle d'Aosta/Vallée d'Aoste (the best result for a list representing this minority was in 1999 when the Union Valdôtaine gathered just under 41.000 votes, and its most voted candidate, Luciano Caveri, received fewer than 29.000 preferences)[16]; on the other hand, it is easily achievable only by the Südtiroler Volkspartei (as evidenced by the last European elections, held in May 2019, when the candidate Herbert Dorfmann, running with that list, received 100.062 preferences, that is more than twice the required amount)[17].

2. *The questionable legitimacy of guaranteed representation regardless for some linguistic minorities*

This last provision raises further concerns. In addition to the issue of the legitimacy of differential measures that effectively exclude or penalize certain minorities, or conversely, even favour only specific political components of a minority group, there is also the question of the legitimacy of rules that essentially guarantee representation to a minority component, by granting a seat even where the garnered support is truly limited. The legitimacy of these favourable measures, even taking into account the principle outlined in article 6 of the Italian Constitution, indeed appears at least dubious.

This is particularly true where a seat is not guaranteed solely based on practical considerations (such as how easily the Südtiroler Volkspartei can effectively consolidate a number of votes onto a single candidate significantly higher than the minimum required by Law no. 18/1979), but is instead automatically attributed by law to the representation of a specific minority. This is the case, for example, with the

[14] In accordance with the third paragraph of Article 22 of Law no. 18/1979. In this regard, it must also be noted that, concerning the "lists of linguistic minorities" linked with "national lists", the possibility of expressing only one preference is also established (article 14, paragraph 2); this rule inevitably foregoes the ordinary imposition of gender balance (as prescribed in the preceding paragraph) when multiple preferences are expressed (normally, it is indeed possible to express up to three preferences).

[15] Beyond D. CASANOVA, *Representation of Linguistic Minorities and Drawing Electoral Districts in Italy*, in this issue, see I. JELEN, R. LÖFFLER, P. ČEDE, E. STEINICKE, *Tra conservazione e rischio di estinzione: la minoranza etnolinguistisca slovena in Italia*, in *Bollettino della Società Geografica Italiana*, no. 1/2018, p. 95.

[16] See *www.elezionistorico.interno.gov.it*. Nevertheless, Luciano Caveri, as the first among the unelected candidates, subsequently replaced Massimo Cacciari as a Member of the European Parliament, following Cacciari's resignation (who had garnered nearly 75.000 preferences).

[17] See *www.elezionistorico.interno.gov.it*.

representation of the Ladin linguistic group guaranteed in the Provincial Council of Bolzano/Bozen by the Special Statute for Trentino-Alto Adige/Südtirol[18].

The legitimacy of legal provisions that guarantee one or more seats in a particular directly elected body to a minority group under all circumstances, apparently justifiable in relation to the application of the constitutional principle requiring protection of linguistic minorities, appears to be less certain when considering that by doing so (i.e., automatically assigning representation to a linguistic community based on the small number of its members), a potentially unreasonable discrimination is being made between that minority group and others (for whom the absence of representation is not a concern, likely – and somewhat paradoxically – precisely because of the small number of their members).

Therefore, it seems at least problematic to impose a predetermined outcome in favour of a minority group regardless of achieving a reasonable, albeit minimal, electoral result. This is because by doing so, the aim is no longer to facilitate the access to an institutional body for a minority group that, although small, is cohesive and sufficiently large to legitimately aspire to representation. Instead, it becomes a matter of guaranteeing a seat to one group – and, it is important to note, not to others – without even the need to "earn" it.

The risk is indeed that of introducing regulations that, rather than generally protecting linguistic minorities, end up producing a discriminatory effect among them. It follows that such a "right to representation" is not necessarily to be guaranteed in all circumstances, for example even in the absence of a minimum consensus.

3. *The not always indispensable provision of differential measures in favour of linguistic minorities in electoral legislation*

The last considerations lead to more general observations. It is indeed necessary to note that, although it is certainly possible and even obligatory (in the Italian legal system pursuant to article 6 of the Constitution) to admit the possibility of providing special differential measures to facilitate access to political representation for minority linguistic groups, this does not mean, however, that such measures are necessary regardless.

In particular, it is necessary to at least consider that the intrinsic characteristics of the chosen electoral system at a general level may themselves satisfy the need for protection.

More precisely, this means that the provision of electoral rules different from those ordinarily foreseen in the electoral context, besides avoiding producing unreasonable

[18] Through the provision contained in article 48, paragraph 2; this representation, by virtue of the provision of article 25, paragraph 1, which provides that the Regional Council of Trentino-Alto Adige/Südtirol is composed of the members of the Provincial Councils of Trento and Bolzano/Bozen, is also therefore guaranteed within this additional body.

discriminations among different linguistic minority groups or among different components of the same linguistic minority group, should be considered legitimate only when strictly necessary. This occurs when the application of the rules ordinarily established would essentially make it impossible or very difficult for these groups to access representation. Furthermore, intervening in derogation from the general rules should be legitimate to the smallest extent possible in relation to the protection result to be achieved, primarily because it is a matter of balancing two constitutional principles, namely the protection of minorities (as per article 6 of the Italian Constitution) and the principle of equality (of voters and their vote, as per articles 3 and 48).

The additional risk in not striking the correct balance between the two principles is the potential introduction of discrimination among different minority groups or among different components of the same minority, even through this avenue. Therefore, in light of these considerations, it becomes necessary to assess the legitimacy of derogatory measures to the general electoral framework, which traditionally in the Italian legal system are instead almost passively carried over – in more or less similar ways – during the transition from one electoral system to another.

A couple of examples can help clarify the concept.

Firstly, we can consider the derogatory regulations currently in place for the election of the Chambers in Trentino-Alto Adige/Südtirol, where (more precisely, almost exclusively in one of its two autonomous provinces, that of Bolzano/Bozen) the linguistic minority that is by far the largest among those present in Italy (German-speaking) is concentrated. Once it was conceptually decided to extend to that area the electoral regulations in force generally (over the remaining part of the territory), it was simultaneously decided to maintain in that territory a different proportion between seats assigned through proportional representation and through the majority system, in favour of the distribution of seats in single-member districts. This decision was based on the assumption that this differential measure would favour the linguistic minorities settled in the region (more accurately, the German-speaking minority settled almost exclusively in the province of Bolzano/Bozen) and would be justified precisely by the application of the principle set forth in article 6 of the Italian Constitution. However, it can be argued that the application of the ordinary rules (which at the national level foresee the allocation of 3/8 of the seats in single-member districts and the remaining 5/8 in multi-member districts) would already be sufficient to adequately protect the German-speaking minority. Moreover, this minority is so large that it can effectively compete in that territory even for the proportional share of seats allocated both in the election of the Chamber and in the election of the Senate. For this reason, the legitimacy of this exception, provided instead – albeit differently – for the election of both Chambers, appears highly questionable, although it is often noted that at least regarding the election of the Senate, the provision of seats exclusively in single-member districts in the region would be imposed by Measure 111

of the so-called "Package"[19], which established a "modification of electoral constituencies for Senate elections, in order to promote the participation in Parliament of representatives of the Italian and German linguistic groups of the province of Bolzano, in proportion to the size of the groups themselves" (according to a now widespread interpretation of the measure whose correctness seems at least questionable, given other possible readings of the provision that could arguably provide a better implementation of the linguistic protection principle expressed therein). Even more problematic is the choice to allocate more seats than necessary (according to the ordinary rules) specifically in single-member districts, which are naturally very "selective", considering that by doing so, it essentially makes it impossible for other minority components (other than the Südtiroler Volkspartei) of the same German-speaking minority to aspire to win a seat[20]. The same applies to hypothetical other minorities that could have better chances of winning a seat under ordinary rules, or more concretely, to the "minority" of Italian speakers located in the Autonomous Province of Bolzano; indeed, it is acceptable to interpret that a single-member district should not be drawn in that territory to favour the national linguistic community, which is only a minority in that province (not being, however, equatable for this reason to one of the minorities protected by article 6 of the Italian Constitution), it is equally true that the application of general rules, which would entail the allocation of some more seats proportionally, would make it less improbable for that community to access representation.

A similar argument can be made regarding the sole seat in the Chamber up for grabs in Valle d'Aosta/Vallée d'Aoste, assigned by law in a single-member district. For a political force representing a linguistic minority, particularly the French-speaking community (since it is the only one that, by size, can at least aspire to win the seat), it is nonetheless challenging to compete for the sole seat available in this manner; however, especially before the reduction in the number of parliamentarians, it could even theoretically be easier to attain a sufficient number of votes to win a seat if, with its votes, it could participate in the proportional allocation carried out – as usually happens in the current system – at the national level[21].

[19] It is an agreement negotiated by the Foreign Ministers of Italy and Austria in Copenhagen in November 1969 and subsequently approved by the two Italian Chambers and the Austrian Nationalrat (with the emblematic consent of the Südtiroler Volkspartei).

[20] Thus perpetrating what could be considered, in some respects, a sort of reverse "gerrymandering".

[21] In reference to the questionable appropriateness and even legitimacy of establishing special rules like those just described in electoral laws, also regarding the need to protect linguistic minorities in accordance with article 6 of the Italian Constitution, see also L. SPADACINI, *L'Italicum e alcune sue ulteriori criticità: la disciplina per Valle d'Aosta e Trentino Alto Adige, la distribuzione dei seggi tra i collegi e il differimento dell'applicazione della riforma*, in *Forum di Quaderni costituzionali*, 2015, p. 2 ss.

4. *The difficulty in correctly defining the electoral subjects to be admitted to the differential measures in application of the principle of protection of linguistic minorities*

In relation to what has been said so far, it is necessary to also take into account – as mentioned earlier – the problematic nature of the linguistic expressions used to identify electoral formations eligible for differential protection in accordance with the principle set forth in article 6 of the Italian Constitution. Considering the aforementioned electoral regulations, for parliamentary elections, reference is made to parties, organized political groups (or simply political groups), and lists that are "representative" of linguistic minorities; for European elections, however, reference is made to parties or political groups "expressed" by linguistic minorities. It is understood how, in these as in other cases, these are formulations with uncertain normative significance, whether considered individually or compared to each other. This is particularly true when considering the possibility of establishing cross-linguistic electoral formations, both to give voice to linguistic minorities as such (as hypothesized in the case of European elections)[22] and to express any other common political stance[23].

In any case, in addition to the – somewhat – "probatory" problem related to identifying the legitimacy to recognize the existence of the connection between an electoral formation and a linguistic minority, as well as to that of possible transversal political-electoral formations, it is also necessary to take into account the complication due to the fact that in the Italian legal system belonging to a linguistic minority is based on a voluntaristic principle. There are therefore no rigid criteria regulating membership in a linguistic minority, and in fact, with the sole exception of the Autonomous Province of Bolzano/Bozen and partly of the Autonomous Province of Trento, there are no formal forms of registration of such membership[24]. This, as is evident, makes it complicated to determine with certainty the legal scope of the aforementioned provisions.

[22] See above note 11.

[23] As in the case of the political coalition Verdi-Grüne-Verc, which, in the Province of Bolzano, brings together under the banner of environmental protection members of the Italian, German, and Ladin language groups (see M. COSULICH, *La rappresentanza delle minoranze linguistiche al Parlamento europeo: un altro disincanto?*, in *dirittifondamentali.it*, n. 1/2021, p. 75 f.).

[24] Regarding the voluntaristic principle of recognizing belonging to a minority embraced in the Italian legal system, it is interesting to note that a law of the Veneto Region, Law no. 28/2016 declared unconstitutional by Constitutional Court judgment no. 81/2018, provided in the first paragraph of article 3 for the establishment of an "aggregation of the most representative associations of entities and associations for the protection of identity" at the Regional Council, tasked with "ensuring the right to declare oneself belonging to the Venetian national minority" (see M. PODETTA, *La Costituzione linguistica. Pluralismo e integrazione oggi*, Editoriale Scientifica, Napoli, 2023, p. 135 ff.).

5. *Paradoxes in Differential Electoral Protection: Exclusions and Inclusions Beyond Linguistic Minorities*

On the other hand, in some respects even more problematic are another set of legislative provisions that, conversely, in various ways defer to the electoral "moment" and that the legislature has introduced in different legal sectors using formulations that, while ensuring differential rights, do not directly refer to political formations "expressive" or "representative" of linguistic minorities, but rather to other generic requirements linked to the electoral outcome achieved in certain geographical areas where some minorities are settled.

The outcome produced by this type of provisions is indeed paradoxical, as it not only automatically excludes several allophone groups (also recognized by law) settled in other geographical areas but, conversely, admits to the differential protection even political entities not belonging to any linguistic minority that have presented themselves in those territorial divisions.

These are formulations that seem to stem once again from the careless and clumsy use of legal language by the legislature, which is dragged with more or less significant changes from one electoral legislation – broadly understood – to another. This tendency is also related to the trend of maintaining and reproducing over time, regardless of the effects and therefore the scope (and legitimacy) of differential measures intended in theory for the protection of linguistic minorities.

Certainly, in some cases, to avoid reaching those paradoxical consequences mentioned earlier, such provisions may perhaps be subject to a constitutionally oriented interpretation, relying for this purpose on a double parameter: other categories of subjects could therefore be excluded from protection both because they do not fall within the scope of article 6 and because the extension of such measures in their favour is to be considered unreasonable under article 3 of the Italian Constitution.

However, it is by no means guaranteed that such an operation is always possible or straightforward to accomplish, considering furthermore that in some cases it might be possible to attempt to find a legitimate rationale for extending the scope of protective measures. In other cases, the completion of this interpretative operation is entirely excluded, as the text explicitly confirms the intention to include subjects not belonging to linguistic minorities in the differential protection.

In this case as well, it is useful to provide a couple of examples.

The first example concerns a provision inserted in the 1974 law on public funding for political parties[25], which initially (in its article 1, paragraph 4) provided that, in derogation from the ordinarily established requirements, parties and political formations that "participated with their own symbol in the elections for the Chamber of Deputies and obtained at least a quotient in regions whose special statute provides

[25] Law no. 195/1974, which was subject over the years to numerous legislative events modifying, integrating, and repealing it.

for a particular protection of linguistic minorities" were also entitled to the contribution. As can be seen, although the provision in question was presumably intended to protect political formations represented by linguistic minorities (or, more accurately, only some of them, when not, according to the perspective described above, essentially only one of them, namely the German-speaking one "personified" in substance by the Südtiroler Volkspartei), based on the consideration that they, due to their peculiarity, do not have dimensions comparable to those of political formations with a national vocation, formally it was actually aimed at all parties or political formations, therefore eventually also those not representative of linguistic minorities, that satisfied the other concurrently established requirements.

Indeed, in this case, the incriminated provision could perhaps have been subject to constitutionally oriented interpretation as outlined above, although, as mentioned, this operation is not always feasible.

The second example concerns precisely provisions of this kind and refers to what is now paragraph eight of article 14 of the Senate Rules, which regulates the composition of parliamentary Groups. Within a framework that overall restricts compared to the past the possibility of forming Groups exempt from the minimum numerical requirement – most recently – set at six members, it maintains this possibility only for "Senators belonging to linguistic minorities recognized by law, elected in the Regions where such minorities are settled, and Senators elected in the Regions [...] with a special statute that provides for the protection of linguistic minorities" (which can form a Group composed of at least four members). The provision is therefore related to the need to protect the representation of linguistic minorities in the Senate. However, explicit eligibility for this differential treatment is not limited solely to "Senators belonging to linguistic minorities recognized by law, elected in the Regions where such minorities are settled", but also extends to all senators (even those not belonging to any linguistic minority) "elected in the Regions [...] with a special statute that provides for the protection of linguistic minorities". On one hand, therefore, it commendably extends protection at least to all senators belonging to recognized linguistic minorities (although it introduces the equally problematic issue of identifying the regions where such minorities are settled). On the other hand, however, it unexpectedly extends explicitly the potential enjoyment of the differential measure to senators not belonging to linguistic minorities but – simply – elected in a region with a special statute that provides for the protection of linguistic minorities. In short, the formation of Groups exempt from the minimum numerical requirement is authorized in favour of representing special regions, but only where linguistic minorities are protected. Moreover, the possible observation that this provision was designed with the perspective that any senator from a special region, whose statute includes measures to protect linguistic minorities, would want and could represent in any case the same members of those minority communities, even if he may not be part of them (or may even oppose them), is not convincing. Rather, this provision was probably designed to facilitate the formation of such Groups exempted from ordinary

requirements, thus facilitating the attainment of the minimum number of senators – albeit reduced – still required; on the other hand, even if this is the case, the issue of the reasonableness of such a rule remains, as well as its compliance with the principle of equality concerning the different status of senators elected in other regions (whether or not they belong to linguistic minorities).

Therefore, this is evidently another case in which the legislature has approached the issue of protecting linguistic minorities in relation with electoral rules with excessive levity. This approach, as seen, is highly questionable from multiple perspectives. It is an approach that, as seen, has always characterized the actions of the Italian legislature in this matter on multiple fronts, and that, for its various consequences described here, is highly questionable.

Daniele Casanova[*]

Representation of Linguistic Minorities and Drawing Electoral Districts in Italy[**]

SUMMARY: 1. Introduction. – 2. The rules for the determination of electoral districts in which linguistic minorities are present. – 3. How were the electoral districts determined – 3.1. The Slovenian linguistic minority in Friuli-Venezia Giulia constituency. – 3.2. The German linguistic minority in the Trentino-Alto Adige constituency.

ABSTRACT: ***The article analyzes the rules in the Italian legal system for determining single-member and multi-member electoral districts in areas with recognized linguistic minorities, with a specific focus on the Slovenian and German minorities.***

1. *Introduction*

A matter of significance that comes to the forefront when addressing the issue of electoral legislation in relation to political representation and the equality of votes concerns the protection of linguistic minorities, which receives specific recognition in Article 6 of the Italian Constitution. This article requires that «The Republic shall safeguard linguistic minorities with specific measures».

Considering this constitutional principle, the argument is made that it may be permissible (even if partially) to deviate from the principle of equality to promote – or at least not hinder – the representation of these political communities[1].

To protect the legal position of individuals who would otherwise be without political representation, there are two types of affirmative action that the legislature can take.

The first is to establish different rules regarding the electoral system to be adopted in territories where the linguistic minority is present. This could be justified if the electoral rules used in general for other territories make it difficult, or at least more challenging, for members of the linguistic minority to access representation.

The second is to establish different rules for the territories where these minorities are located concerning the constitution of electoral districts (especially for laws that provide for single-member electoral districts). In this case, the delimitation of the electoral district should be done in such a way as to keep the population belonging to the linguistic minority compact within a single or multiple territorial groupings, operating a sort of positive gerrymandering. This would prevent the "dilution" of

[*] Tenured Assistant Professor of Public Law, University of Brescia.

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[1] See A. PIZZORUSSO, *Minoranze etnico-linguistiche*, in Enciclopedia del diritto, vol. XXVI, Giuffrè, Milano, 1976, 535

members of the linguistic minority across multiple electoral districts to hinder their access to parliamentary representation.

2. *The rules for the determination of electoral districts in which linguistic minorities are present*

The current electoral law (law no. 165/2017) envisages a mixed electoral system in which 3/8 of the seats in the Chamber of Deputies and the Senate are allocated in single-member districts, and 5/8 in multi-member districts. All these districts, both single-member and multi-member, are established within 28 sub-national electoral constituencies (for the Cambers of deputy) and 20 regional constituencies (for the Senate). These constituencies are territorial spaces without candidates; they solely serve as spaces in which the single-member and multi-member districts are determined, with some relevance in the allocation of seats to political forces. In this sense, the constituency functions exclusively as a territorial space where seats are "transferred" following the national-level determination of the quantity of seats allocated to each political force[2].

The determination of electoral districts has been entrusted to the Government, which, assisted by a Commission appointed by itself[3], has established the electoral districts for the 2018 and the 2022 parliamentary elections[4].

The current electoral law outlines various guiding criteria that the Government must follow in exercising this delegation. Firstly, it is stipulated that the population of each single-member district and each multi-member district may deviate from the average population of the respective single-member and multi-member districts in the same constituency by no more than 20 percent, either in excess or in deficiency.

This last rule, which is entirely non-negotiable, is then accompanied by a series of more nuanced indications related to the need to ensure the coherence of the territorial basin of the districts, considering the administrative units on which the districts are based, and, where necessary, local systems. Finally, it is envisaged that, as a rule, the homogeneity of the districts should be guaranteed in terms of socio-economic aspects and historical-cultural characteristics, as well as the continuity of the territory of each district[5].

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[2] See M. PODETTA, *The Delimitation of Multi-Member Districts in Italy: Political and Territorial Mis-Representativeness*, in this issue.

[3] See L. SPADACINI, *Constitutional needs for the Italian process of drawing electoral districts: a more independent Commission, less partisanship, and greater transparency and participation*, in this issue.

[4] Whit a legislative decree n. 189/2017 and a legislative decree n. 177/2020.

[5] For these aspects see A. FERRARA, *Drawing electoral geographies. The case of frozen criteria in Italian electoral law*, in this issue.

Beyond the issues related to potential illegitimacy of some of these provisions[6], it should be noted that the law specifies that: «in areas where recognized linguistic minorities are present, the delimitation of districts, even in derogation of the principles and guiding criteria mentioned in this paragraph, must take into account the need to facilitate their inclusion in the smallest number of districts possible» This would imply that in the formation of electoral districts, it would be possible to deviate from all the parameters mentioned earlier, where necessary, to include members of the linguistic minority in the smallest number of electoral districts possible.

From the text of the electoral law, it seems to emerge that the need to keep members of a linguistic minority compact in the smallest number of electoral districts applies to all recognized linguistic minorities. Therefore, all linguistic minorities identified in Law No. 482 of 1999 should be taken into consideration. This law, which specifically outlines the protected linguistic minorities within the Italian constitutional framework, implements Article 6 of the Constitution. According to this law, the Italian Republic protects the language and culture of populations with Albanian, Catalan, Germanic, Greek, Slovenian, and Croatian backgrounds, as well as those who speak French, Franco-Provençal, Friulian, Ladin, Occitan, and Sardinian.

The first aspect to reflect upon is the following: what does it mean to say that the linguistic minority must be included in the fewest number of districts?

To attempt to answer this question, it is necessary to address some preliminary issues.

The first issue. Since the government is authorized to deviate from all the criteria established by the law, could it potentially design electoral districts that are very "small," encompassing only members of the linguistic minority or those capable of constituting the majority of citizens belonging to a linguistic minority within them?

At this question, one could potentially respond negatively, as the possibility to deviate from guiding principles and criteria is solely related to the need to keep members of the linguistic minority "together" and not necessarily to guarantee them a seat. On the other hand, one might also consider giving a positive answer. However, even this interpretation seems highly critical. An electoral law that allows assigning an electoral constituency to a sparsely populated linguistic minority, making that electoral constituency extremely small compared to others across the national territory, would not seem in harmony with the principle of equality. In such a case, there would be an excessive imbalance towards protecting the minority, whereas positive action to safeguard the minority should still occur within an overall balance among the constitutional principles stated in Articles 3 (equality of citizens), 48 (equality of the vote), and 6 (protection of linguistic minorities) of the Constitution.

Furthermore, making an electoral district particularly small in terms of population to protect the linguistic minority would result in the expansion – also in terms of population – of another district in the constituency (with an unjustified loss of

[6] See D. CASANOVA, *Drawing Electoral Districts and Ensuring Equal Representation: A Comparative Study of Electoral District in Italy and the United States*, in this issue.

electoral power for voters not belonging to linguistic minorities residing in that district).

The second issue. Could the government have created larger-than-average constituencies to keep the population of a linguistic minority, perhaps arranged rather heterogeneously within a territory encompassed by a district, together? In this case, the answer is very likely positive because the law clearly allows it. However, in such a situation, the risk could be to dilute the linguistic minority within a larger electoral constituency, making it difficult for those minorities to access representation rather than facilitating it.

3. *How were the electoral districts determined*

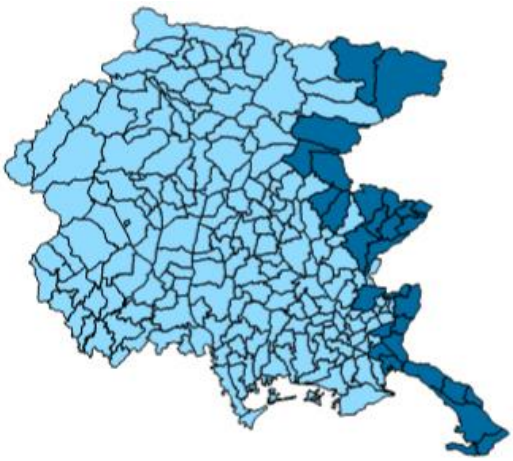
In the Commission's report that assists the Government in determining the electoral districts, it can be inferred that not all recognized linguistic minorities in Italy have been considered.

The only linguistic minority explicitly mentioned in the report is the Slovenian linguistic minority in the Friuli-Venezia Giulia Region (in the constituency corresponding to the region's borders). Apart from this, there is no reference, in any part of the report, to other linguistic minorities, even though it is suggested that an assessment may have been made in relation to the German linguistic minority in the Province of Bolzano (in the Trentino Alto-Adige constituency).It is interesting, in any case, to analyze how the Commission has worked, as it has not always respected the rules established by the law or at least not applied them fully. However, in my opinion, this ensured a better design of the electoral districts.

3.1. *The Slovenian linguistic minority in Friuli-Venezia Giulia constituency*

The first case under consideration is that of the Slovenian minority present in the Friuli-Venezia Giulia constituency, for which the law expressly provides that «one of the single-member districts is formed in a way to facilitate access to representation for candidates representing the Slovenian linguistic minority pursuant to Article 26 of Law 23/2/2001, No. 38».

1. *Linguistic minority in Friuli-Venezia Giulia*



The Slovenian linguistic minority consists of approximately 46,000 residents[7], as can be seen in

[7] See I. JELEN, R. LÖFFLER, P. ČEDE, E. STEINICKE, *Tra conservazione etno-linguistisca slovena in Italia*, in Bollettino della Società Ge number of members belonging to the linguistic minority is indeed only an estimate. Unlike what will be

the image 1, located in the eastern part of the Friuli-Venezia Giulia region in the provinces of Trieste, Gorizia, and Udine.

Of the three single-member districts in the constituency, only one is to be established to facilitate parliamentary representation for the Slovenian linguistic minority. Indeed, the Commission emphasized that the single-member district U03 «encompasses approximately 90% of the population residing in the municipalities inhabited by the Slovenian linguistic minority, which is subject to protection»[8].

A s can be observed in image 2, the electoral district indeed corresponds to the entire territory of the province of Trieste. However, the 15 municipalities of the Province of Udine, where it is estimated that citizens belonging to the Slovenian linguistic minority reside[9], are not included in the electoral district. In these 15 municipalities, approximately 10,000 out of the total 46,000 members of the linguistic minority would reside[10].

2. Electoral district in Friuli-Venezia Giulia (Chambers of deputies)

In relation to the goal established by the law, which aims to keep citizens belonging to the Slovenian linguistic minority compact within a single electoral district, the issue arises of excluding a portion of them from the U03 electoral district.

The question, therefore, is whether the commission should have included all the municipalities where there is a presence of citizens belonging to the linguistic minority in a single electoral district.

The establishment of an electoral district that included all the municipalities where these citizens reside would certainly have been closer to the goal of keeping members of the linguistic minority compact within the same electoral district.

The negative consequence of designing an electoral district in this manner would have been to increase its size in terms of population, making access to representation more challenging for members of the linguistic minority. At the same time, to form a district containing all members of the Slovenian linguistic minority, it would have been

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seen in relation to the German linguistic minority, for the Slovenian minority, this data is not recorded during the population census.

[8] See "Proposta dei collegi uninominali e plurinominali per la Camera dei deputati e il Senato della Repubblica", p. 86.

[9] A. JANEŽIČ, *La valutazione dell'applicazione delle norme di salvaguardia della legge di tutela: le difficoltà registrate e le eventuali mancanze*, in *Terza conferenza regionale sulla tutela della minoranza linguistica slovena*, 2021, p. 14.

[10] I. JELEN, R. LÖFFLER, P. ČEDE, E. STEINICKE, *Tra conservazione e rischio di estinzione: la minoranza etno-linguistisca slovena in Italia*, in *Bollettino della Società Geografica Italiana*, n. 1/2018, 95. The other approximately 36,000 residents belonging to the Slovenian linguistic minority are in the territories of the former province of Trieste (about 25,000) and the former province of Gorizia (about 11,000).

necessary to further divide the boundaries of the Province of Udine into three electoral districts.

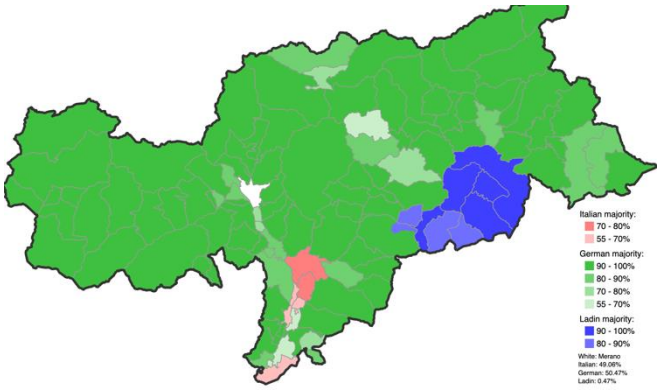
At the same time, a very formalistic interpretation of the law would likely have allowed the creation of the electoral constituency by including only the municipalities where there is a presence of the linguistic minority, However, this method of constituting the electoral district does not seem appropriate because, as mentioned in paragraph 1, a balance of different constitutional principles is needed. Especially considering the limited number of members belonging to the Slovenian linguistic minority, it seems challenging to ensure their election of a representative in Parliament.

Finally, as for this linguistic minority, there are no issues regarding the determination of multi-member districts because there is only one district in the constituency that elects deputies using the proportional representation system. The same applies to the Senate election, where in the Friuli-Venezia Giulia Region, there is one single-member district and one multi-member district, where three senators are elected using the proportional representation system.

3.2. *German linguistic minority in the Trentino-Alto Adige constituency*

The case of Trentino Alto-Adige is very different, and it is in addressing this case that the most significant interpretative challenges arise from the law, especially in the part that requires considering the need to include members of the linguistic minority in the smallest number of electoral districts.

3. *Linguistic minority in South Tyrol - Census 2021*



The condition of the Trentino-Alto Adige constituency is quite unique: it corresponds to the territory of the Trentino-Alto Adige Region, which is composed of two provinces (Trento and Bolzano). In these areas, the German linguistic minority is present almost exclusively in the Province of Bolzano. According to the results of the 2011 census, the presence of the German language in the province of Bolzano emerges as a significant phenomenon. Approximately 314,000 citizens, corresponding to about 70% of the total population of the province, are recorded as native German speakers.

This linguistic prevalence is also reflected significantly at the municipal level, with German being the majority language in 103 out of the 116 municipalities under demographic analysis (*see figure 3*)[11].

Considering that four one member districts must be established in the constituency and that the populations of the provinces of Trento and Bolzano are essentially equal (504,643 inhabitants in the first and 484,852 inhabitants in the second), it is therefore possible, in compliance with the law, to determine two one member districts within the territory of the Province of Trento and two within the territory of the Province of Bolzano, without the need to create electoral districts that would encompass territories from both provinces.

In reference to the protection of citizens belonging to the German linguistic minority, the issue therefore boils down to how to draw the two electoral districts in the Province of Bolzano, with the specific goal of safeguarding the German linguistic minority present.

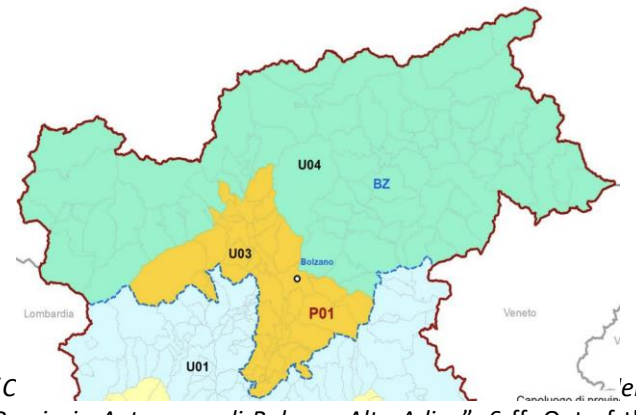
The first issue that comes to light is the following: according to the current law, is it possible to create two electoral districts where both include the linguistic minority? Alternatively, does this conflict with the legislative provision that aims to include members of the linguistic minority in the smallest number of districts?

As specified in paragraph 2, from a purely formalistic reading of the legislative provision, it appears that it could be possible to establish a large electoral district comprising at least all the municipalities where citizens belonging to the German linguistic minority are prevalent (and another comprising municipalities with an Italian linguistic majority).

Would this have been legitimate? I think not. By establishing a single electoral district that combines Italian citizens belonging to the German linguistic minority, paradoxically, the representation of the community belonging to the linguistic minority would be reduced. This would allow them to compete for only one electoral seat, when based on the resident population, they could potentially win two seats. In this way, the linguistic minority would be underrepresented.

The commission, indeed, rightly formed two electoral districts as outlined in the figure. It is noteworthy that this is the only case in which the Commission deemed it necessary to specify that some municipalities have been included in an electoral district to achieve a better balance in the

4. *Electoral district in South Tyrol*



[11] See the Astat report n. 38/2010 "*C ella consistenza dei tre gruppi linguistici della Provincia Autonoma di Bolzano-Alto Adige*", 6 ff. Out of the remaining 13 municipalities in the province of Bolzano, only 5 have an Italian linguistic majority; in the other 8, the majority is made up of members of the Ladin linguistic minority.

distribution of the population between the two districts of the province. In fact, the demographic composition of the two districts is very similar: electoral district U01 is comprised of 267,820 inhabitants, while electoral district U02 has 257,012 inhabitants.

As with the Friuli-Venezia Giulia district, in this case as well, there are no issues regarding the design of multi-member electoral districts, because there is only one in the constituency.

A different speech must always be made for Trentino-Alto Adige for the Senate election. In the constituency, six senators are assigned, all of whom are elected in single-member electoral districts using the first-past-the-post system[12].

In this case, no rule was adopted by the Parliament with Law No. 165 of 2017. The electoral districts, in fact, originate from a law dating back to 1991, through which these districts were established and have remained unchanged to this day. In short, these districts result from an agreement with Austria (Measure 111), which stipulates that for the Senate election, the districts must be constituted in a way that promotes the participation in Parliament of representatives of the Italian and German linguistic groups in the province of Bolzano, in proportion to the size of these groups.

Without delving into the merits of the matter, it is necessary to consider two factors, the first concrete and the second more theoretical.

Regarding the first factor, it must be noted that the electoral single-member district established in 1991 in the province of Bolzano appear to be quite similar from a demographic perspective (the smallest having 149,711 inhabitants, while the largest has 182,613). In contrast, the three single-member districts in the province of Trento (where there is no linguistic minority to protect) are notably heterogeneous. In fact, based on the census used for the last elections, district U01 was composed of 228,118 residents, while district U03 had 120,413. In conclusion, since there is no reason to protect linguistic minorities in the province of Trento, these districts certainly violate the principle of equality.

Regarding the second aspect, it is necessary to emphasize that voters in these six electoral districts are potentially subject to different treatment than citizens in other electoral districts. These six districts will remain fixed, and citizens could end up being either a small or, conversely, a very large number compared to what it is now, in case of an increase or decrease in the resident population within them.

[12] Therefore, here too, there are no problems with the multi-member district, which does not exist.

PART III
PROPORTIONAL REPRESENTATION AND MULTI-MEMBER DISTRICT

Matthias Rossi*

Strengthening Proportional Representation: Motives, Means and Open Questions of Electoral Law Reform in Germany

SUMMARY: 1. Premise. – 2. Introduction. – 3. Motivs. – 4. Means – 5. Constitutional assessment. – 6. Outlook.

1. *Premise*

German electoral law has often been seen as a role model internationally. Or perhaps it has seen itself as a role model because it combines the majority voting system and the proportional representation system, thus avoiding polarization and achieving a major integrative effect. In fact, it has ensured largely stable governmental relationships for around five decades. That was easy when there were only three parties represented in parliament, and it still worked when there were four parties with the Greens. However, with the emergence of the Left Party and the AfD, a right-wing party, there are currently six parties in the German Bundestag, which not only leads to difficult coalitions, but also pushes electoral law to its limits. It has been changed - i.e. modified - many times, a total of 25 times in the 20 legislative periods since the Foundation of the Federal Republik of Germany 1949.

Each change had its own reason, but it was often decisions by the Federal Constitutional Court that declared parts of the electoral law unconstitutional and demanded changes. However, there is also a structural reason for the electoral law's openness to change. Changes only require a simple majority in parliament. They therefore require neither the 2/3 majority necessary for constitutional amendments nor the approval of the Bundesrat, the second legislative body in Germany in which the government of the federal states are represented. To be honest, however, it must be admitted that most changes to electoral law have always been passed with the approval - or at least the abstention - of the opposition - so there was a commun that electoral law requires broad parliamentary approval. Referendums or similar direct-democratic elements, on the other hand, are not provided for; they do not even exist at federal level in Germany.

So, I've now covered quite a lot about German electoral law, without getting any closer to my actual topic. It removes a little bit from the main topic, because I'm not concentrating on the constituencies and the way they are determined. But there are two of us here from Germany, and my colleague Fabian Michl will go into this in more detail later and will probably also tell you why a constituency was recently transferred from one Land to another - demographic change is also taking its toll on the way

* Professor of Public and Administrative Law, European Law, and Legislative Studies, Augsburg University, Germany.

constituencies are drawn up in Germany.

And of course, my contribution is within the scope of the overall topic, because the latest electoral law reform is changing the significance of constituencies. This is why I would like to present to you the main features of the Federal electoral act that was adopted by the most recent amendment in March 2023 and which will - probably - be applied at the next election. I say probably because there are already lawsuits pending against this reform at the Federal Constitutional Court. But one thing at a time.

2. *Introduction*

As I said, Electoral law in Germany has always been characterized by the peculiarity that every voter has two votes. The first vote goes to a person. It is used to elect a member of parliament within the constituency by majority vote. The second vote goes to a party. It is used to determine how many and which persons from a list drawn up by the party enter parliament by proportional representation. By structuring the two-vote system according to the principles of "proportional representation combined with the election of individuals" – this is looselye translated the wording of the Election Act – German electoral law attempts to combine the advantages of majority voting with those of proportional representation and at the same time eliminate their disadvantages.

In the recent past, this electoral law has reached its limits. In terms of constitutional law and power politics, the question of how to deal with the possible effects of this electoral law has been and remains controversial. At the forefront of the discussion was the legal assessment of overhang mandates. They arise when a political party wins more direct mandates by majority vote than it is entitled to according to proportional representation. Because direct mandates are retained in any case under the previous electoral law, overhang mandates distort the result of proportional representation.

Since 2013, overhang mandates have therefore been compensated for by balance seats. Under this system, the other parties are also awarded additional seats until the ratio of seats in parliament corresponds to the result of the second vote election.

This mechanism has in turn led to the Bundestag growing ever larger. While it is supposed to have 598 seats according to the federal electoral act, half of which are determined by majority vote in the 299 constituencies and the other half is allocated to the political parties by proportional representation, the actual size was 631 MPs in the 18th legislative period (2013 - 2017), 709 MPs in the 19th legislative period (2017 - 2021) and even 736 MPs in the current 20th legislative period (since 2021) due to the overhang and balance seats.

There are many reasons for the emergence of overhang seats. Vote splitting will play a certain role, as the phenomenon that voters use their first vote in the constituency to vote for the candidate of a different party than the one they vote for with their second vote - a voting behavior that may not only correspond to individual

preferences, but is also wise in view of the different effects of the first and second vote, and in any case legally permissible. However one describes such volatile voter behavior, it is directly related to the second important reason for the increase in overhang seats - and consequently also in balance seats, and this is certainly the changed party landscape. The more parties run, the lower the probability that their share of second votes will exceed 50%. At the same time, it is important to remember that for a majority vote a relative majority is sufficient. The higher the number of candidates in a constituency, the lower the majority required to allocate seats. In the last election, a "majority" of 18.6% of the votes in a constituency was sufficient to obtain a seat in the Bundestag. These low approval figures clearly show that the fundamental idea that a constituency winner would represent this constituency in a particularly legitimate manner has become a myth.

3. *Motivs*

It has taken 10 years and various reminders from different presidents of the Bundestag to agree on a reform of electoral law. The external cause was in fact the further increase in the size of the Bundestag, which was criticised for several reasons.

On the surface, the problem became visible in practical terms when more and more seats had to be installed in the plenary chamber. The media were also able to illustrate the growth with corresponding images. As a result, more offices were needed in the already cramped centre of Berlin. In addition, and above all, the costs naturally increased immensely with each additional MP, without the cost increase being matched by an equivalent benefit.

On the contrary, the most important argument in favour of limiting the size of the Bundestag was its ability to function. The comparison with other countries always showed that Germany - behind China - had one of the largest parliaments in the world. Although it must be questioned whether the Bundestag's ability to function has suffered in the last two legislative periods, it cannot be denied that the Bundestag has always fulfilled its duties properly, even when smaller.

Much more important, however, is the goal of abandoning the system of overhang ´s and balancing seats. And the electoral law reform fulfils this goal by the following means.

4. *Means*

a) Fixed size of the Bundestag

First of all, the law now stipulates that the Bundestag will consist of 630 MPs in future. This is a fixed size that cannot be changed.

b) Strenghtening Proportional Representations

This is achieved through consistent adherence to proportional representation. The law now clearly stipulates that the principle of proportional representation applies to elections to the Bundestag. Only the second vote is decisive for the party-political composition of the Bundestag.

c) Relativisation of the significance of the first vote

This is inevitably accompanied by a relativisation of the significance of the first vote.

In future, therefore, no direct mandates will be awarded in the constituencies according to the system of relative majority voting. Instead, the election in the constituencies will only serve the purpose of determining the selection of candidates for the mandates to which a party is entitled according to the second vote result. A party therefore always receives as many seats as it is entitled to in percentage terms according to the second vote result. These seats are filled primarily from the contingent of constituency candidates of the party that won a relative majority in their constituency. The order of these constituency candidates is determined according to their relative first vote result in the party's state comparison.

If a political party emerges as the winner in more constituencies than it is allowed to send to the Bundestag according to the two-vote result, then those constituency winners who have achieved the relatively worst result are not taken into account. As a consequence, it can happen that a constituency is not represented in the Bundestag, we speak of orphaned constituencies.

So, Under the new electoral law, the decision that voters make in the constituency with their first vote is therefore downgraded in importance. It no longer represents an independent basis of legitimisation for the elected constituency candidate, as the maximum number of direct candidates of a party that enter the Bundestag corresponds to the share of second votes won by their party. Overhang mandates no longer arise because the "overhanging" constituency winners with the lowest percentage election result do not receive a mandate and the constituency remains unfilled. The first vote is therefore no longer an independent legitimisation instrument, but merely ensures that the constituency winner receives a mandate instead of a candidate on the list of the same party.

The main basis of legitimisation - also for seats in the constituency - will therefore be the second vote in future. In comparison to the previous electoral law, the principle of proportional representation does not only apply at a second level of equalisation of the political balance of power, but already beforehand at the level of the original allocation of seats.

d) Sperrklausel

The traditional 5% threshold continues to apply to all political parties. This means that parties only participate in the distribution of seats if they have won at least 5% of the second votes in the federal territory.

e) basic mandate clause

The so-called basic mandate clause enshrined in the previous electoral law, according to which parties that have won a seat in at least three constituencies also participate in the distribution of list mandates, has been dropped. This is consistent insofar as it would no longer have fitted into the new electoral law in this form - because seats are no longer won in the constituencies.

5*. Constitutional Assessment*

a) Gesetzlicher Gestaltungsspielraum

In the constitutional assessment of these innovations, it should first be recalled that the Basic Law deliberately places the organisation of electoral law in the hands of the ordinary legislator. The legislator therefore has considerable room for manoeuvre. In this respect, it is not path-dependent, but could even introduce a complete change of system, towards a trench electoral law or a purely proportional electoral law. The current solution is still a systemic change.

b) Veränderter Maßstab

The legislator is only bound by the principles of electoral law that are enshrined in the constitution. And these principles of electoral law have been increasingly concretised through the case law of the Federal Constitutional Court; in some cases they have been specified to such an extent that the legislator's room for manoeuvre has become ever smaller.

What is special about the clear commitment to proportional representation, however, is that the standard of constitutional law has changed along with the subject matter. By switching from a system of "proportional representation combined with personal election" to a pure system of proportional representation, the legislature has also decoupled itself from the previous case law of the Federal Constitutional Court. Or to put it another way: the Federal Constitutional Court now also has the opportunity to renew its electoral jurisprudence. This is a major liberating blow.

c) Grundmandatsklausel

The cancellation of the basic mandate clause could have dramatic consequences, including constitutional ones. This is because, according to the draft, parties only receive as many direct mandates as they are entitled to according to the share of second votes, which means that a party with less than five per cent of second votes can completely fail to enter the Bundestag, even though it has won a large number of direct mandates. At present, the new electoral law would mean that Die Linke, for example, would not be represented in the Bundestag, having currently won three constituencies and 4.9 per cent of the second votes. However, the CSU, which won 45 out of 46 Bavarian constituencies in the 2021 federal election but only achieved a dangerously low share of second votes at 5.2 per cent, is also under threat in the future.

d) Sperrklausel

Finally, it remains to be seen how the Federal Constitutional Court will rule on the retention of the blocking clause and the simultaneous abolition of the basic mandate clause. The fact is that as the number of political parties increases, so does the number of votes that are counted but do not result in a seat. In Saarland, this led to around 22% of the votes cast not making it into parliament in the last elections. This significantly impairs the legitimisation function, the representation function and the integration function.

6*. Outlook*

So to sum it up, the electoral law reform is unlikely to last long. Regardless of how (and above all when) the Federal Constitutional Court will decide on it, it is to be feared that the Conservative Party will change the electoral law again once it is involved in forming a government in the future. Of course, there is also a big question mark over this, as it will largely depend on the exact composition of the coalitions. And who knows, perhaps the next election will also show that there are not so many orphaned constituencies and that voters and parties are adapting to the changed electoral law. After all, despite the need for electoral law to adapt to a changed party landscape, the reverse is also true: voters and parties must adapt to electoral law. Electoral law must be characterised by a particular continuity if it is to fulfil its legitimising and integrating function. It should therefore have the opportunity to prove itself for more than just one legislative period.

Marco Podetta*

The Delimitation of Multi-Member Districts in Italy: Political and Territorial Mis-Representativeness**

SUMMARY: 1. The response provided by the Italian legislature to the declaration of unconstitutionality of long closed lists. – 2. The distorting effects of the electoral mechanisms introduced on the fronts of "territorial representativeness" and "political representativeness". – 3. The multiple reasons underlying the constitutional illegitimacy of the new solutions adopted. – 4. The misleading brevity of the lists provided by the electoral system and the resulting limited importance of the design of multi-member districts.

ABSTRACT: ***The Italian electoral system, following the declaration of unconstitutionality of long closed lists by the Constitutional Court, introduced medium-small multi-member districts and restricted the number of candidates per list. However, these changes have led to distortions in both territorial and political representativeness. The alteration of "territorial representativeness", primarily due to "seat shifting", affects the allocation of seats among multi-member districts based on population. This phenomenon, combined with rules for rescuing candidates, can lead to significant discrepancies between allocated and expected seats. Moreover, the electoral system induces distortions in "political representativeness", as the allocation of seats may not align with voter preferences. These distortions violate several rules. Additionally, the apparent brevity of closed lists is illusory, as voters' choices may indirectly elect candidates from other districts. Thus, despite efforts to design multi-member districts that reflect local communities, the current electoral system fails to ensure territorial and political representativeness. Given the potential for distortion, efforts should focus on minimizing these effects within the multiple constraints of district design prescribed by current legislation, within the narrow margins where this is possible.***

1. *The response provided by the Italian legislature to the declaration of unconstitutionality of long closed lists*

With judgment no. 1/2014, the Italian Constitutional Court – among other things – declared the constitutional illegitimacy of long closed lists. This refers to the mechanism in a proportional system where the number of candidates on each list is particularly high (due to the high number of seats to be allocated at the territorial level where the vote is cast), and there is no possibility for voters to express at least one preference vote. This compromises the effective knowledgeability of the candidates by the voters and, since these latter are deprived of any margin of choice in the selection

* Tenured Assistant Professor of Public Law, University of Brescia.
** This contribution is subject to a peer review process according to the Journal's Regulations.

of their representatives, it undermines the freedom of the vote from a substantive point of view (according to the Court)[1].

Given the choice to continue to provide closed lists, it is primarily for this reason that the current electoral system in Italy[2] (with regard to the seats to be allocated proportionally, i.e. 5/8 of the total)[3] provides for the allocation of seats to be distributed in medium-small multi-member districts. In fact, it provides that in each multi-member district "typically" a minimum of 2 to a maximum of 8 seats are allocated for election to the Chamber of Deputies (Chamber) and a minimum of 3 to a maximum of 8 seats for elections to the Senate of the Republic (Senate).

In addition to this, for essentially the same reasons, the legislature in 2017 also intervened in the rules regarding the presentation of candidacies. It established that in each multi-member district lists can present a minimum of 2 to a maximum of 4 candidates, even when, as is practically always the case, there are more seats available[4].

These provisions lead to others.

Regarding the choice to establish medium-small multi-member districts, it must be considered that this provision is accompanied by the legislature's decision not to abandon a solution adopted by previous systems for the election of the Chamber of Deputies. This solution is essentially linked to the allocation of a national majority bonus, which consists in uprooting the level of electoral calculations determining the final allocation of seats from the level of vote expression. Even though the current system no longer provides for the allocation of majority bonuses, the legislation maintained this provision and extended it for the first time to Senate elections[5]. Essentially, the system establishes that the calculations determining the distribution of seats are carried out at a territorial level higher than where the voters cast their

[1] Constitutional Court, judgment no. 1/2014, point 5.1 of the *Considerations of Law*.

[2] Introduced by Law no. 165/2017.

[3] The remaining 3/8 of the seats are allocated in single-member districts using the first-past-the-post system, although it should be emphasized that the two channels of access to representation are linked by virtue of the single vote that an elector can cast, which simultaneously counts for both the single-member and proportional quotas (the political forces present individual candidates in the single-member districts, which must be necessarily linked to one or more lists that compete for the proportional quota, and it is not possible to split the vote).

[4] Beyond what will be observed below, this provision is obviously problematic and of dubious constitutional legitimacy in itself, as it imposes – even at a global level – presenting a number of candidates lower than the seats at stake (see M. PODETTA, *Il c.d. Rosatellum*-bis*: liste artatamente corte ed "esaurimento" di candidati*, in *Osservatorio AIC*, no. 2/2018, p. 33 ff.

[5] It is not possible to include within this categorization the proportional allocation mechanism of seats to be carried out at the regional level established by Law No. 29/1948 for the election of the Senate in case of "inactivity" of the single-member constituencies due to failure to reach 65% of the votes by the most voted candidate, nor the proportional "recovery" system for the election of the Senate provided for by Law no. 276 of 1993.

ballots, to then be brought back to lower levels only at a later time[6]. Specifically, for the Chamber of Deputies, it is foreseen that the distribution of seats is carried out at the national level, where a result is determined and then transferred first to 27 of the 28 subnational constituencies into which the national territory is divided[7] and then to the multi-member districts into which each of these subnational constituencies is further divided; for the Senate, instead, a single transfer operation of the results determined at a higher level is envisaged, since the initial distribution of seats is made directly in each of the 19 subnational (regional) constituencies provided for[8], rather than at the national level.

As in multi-member districts the number of candidates will be lower than the seats at stake there, the legislature had to simultaneously provide for a long series of "rescue" mechanisms, since under the formula a list may be allocated a number of seats in a constituency that exceeds its available candidates. These mechanisms include the possibility of attributing the "surplus" seats to other multi-member districts and even, as a last resort, to multi-member districts of other subnational constituencies (and potentially also to other lists of the same coalition)[9].

[6] All this occurs through a systematic and repeated application of the Hamilton method, through the use of which seats are allocated not only among different electoral alliances but also among the lists belonging to the same coalition.

[7] In one of these subnational constituencies (which corresponds to the territory of the Valle d'Aosta/Vallée d'Aoste Region), indeed, a unique single-member district is constituted, in which the collected votes are not brought to the national level for the purpose of carrying out further calculations.

[8] Also for the Senate election, in the Valle d'Aosta/Vallée d'Aoste constituency a single uninominal district is indeed established for the allocation of the only seat assigned to it (as provided for by article 57, paragraph 2, of the Constitution).

[9] For the election of the Chamber, the system provides that candidates from the same list in other multi-member districts of the same subnational constituency are first recovered, preferring among these those where the list "deserves" more additional elected members (i.e., where it will have the highest remainders that have not "yielded" a seat); secondly, the unsuccessful candidates in single-member districts linked to the "exhausted" list are recovered, firstly in the single-member districts included in the reference multi-member district, then in the other single-member districts of the same subnational constituency, following the order of those who have proportionally achieved the best electoral performance; thirdly, candidates from the same list in the other multi-member districts of the other subnational constituencies are recovered, starting from the most "deserving" constituency and preferring within this the multi-member districts where the list "deserves" an additional elected member the most; fourthly, candidates from lists possibly connected in a coalition to the "exhausted" list in the multi-member districts of the original constituency are recovered, preferring among these those where the list "deserves" more additional elected members, starting, if possible, from the reference multi-member district; fifthly, unsuccessful single-member candidates linked to the "exhausted" list in the other subnational constituencies are recovered, starting from the most "deserving" one, following the order of those who have proportionally achieved the best electoral performance; sixth – and lastly – candidates from lists possibly connected in a coalition to the "exhausted" list in the multi-member districts of the other subnational constituencies are recovered, preferring among these those where it is believed the list "deserves" more additional elected members, starting from the most "deserving" subnational constituency. For the election of the Senate, the legislator has formally excluded the possibility of "rescuing" candidates from other subnational (regional) constituencies, in compliance with the provision of the first paragraph of article 57 of the

2. *The distorting effects of the electoral mechanism on "territorial representativeness" and "political representativeness"*

The provisions described above are inconsistent with each other, but the Italian electoral system provides that they operate concurrently. They allow, on the one hand, access to representation even for smaller political forces (also in relation to the low threshold set at the national level)[10] given the high number of seats available in the proportional distribution carried out at territorial levels higher than those of voter expression. On the other hand, they allow party leaders to select their elected candidates (also in relation to the possibility of making "multi-candidacies")[11] by exploiting short, closed lists.

On the representation front, however, these rules lead to a series of distortions in both the "territorial representativeness" and the "political representativeness" of the multi-member districts in which voters expresses their choices.

By "territorial representativeness" I refer to the correspondence between the number of representatives assigned to each territorial division, predetermined based on the number of inhabitants as provided for constitutionally, and the number of seats actually allocated there.

By "political representativeness" I refer to the correspondence between the expressed voting preferences of the electorate in a territorial division and the actual allocation of seats distributed there among the various electoral competitors.

The alteration of territorial representativeness is primarily due to the phenomenon of "seat shifting", where, as a result of calculations aimed at bringing back into each multi-member district the results determined by the distribution already carried out at

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Italian Constitution, which requires the Senate to be elected "on a regional basis" (although this rule is repeatedly violated by other provisions of the same electoral mechanisms and in practice it was completely disregarded during the XVII Legislature when the Senate unlawfully decided to recover a candidate from an "exhausted" list from a different subnational (regional) constituency), so – at least in theory – the "recovery" possibilities are thus lower compared to what is provided for the Chamber: the mechanism entails first recovering candidates from the same list in other multi-member districts of the same constituency, prioritizing among these those where the list "deserves" more additional elected members; secondly, unsuccessful single-member candidates linked to the "exhausted" list are recovered, initially from the single-member districts included in the reference multi-member district, then from other single-member districts of the same constituency, following the order of those who have proportionally achieved the best electoral performance; thirdly – and finally – candidates from lists possibly connected in coalition to the "exhausted" list in the multi-member districts of the same constituency are recovered, preferring among these those where it is believed the list deserves more additional elected members, starting, if possible, from the reference multi-member district.

[10] Which in particular provides that lists exceeding 3% of the votes nationwide have access to representation.

[11] It is allowed to run, in addition to a single-member district, in up to 5 different multi-member districts (in case of multiple elections in a single-member district and in one or more multi-member districts, one is considered elected in the single-member district; in case of multiple elections in multiple multi-member districts, one is considered elected in the multi-member district where its list has recorded the worst electoral performance).

a higher level (which necessitates the implementation of "adjustments" to rebalance the allocation of seats to "surplus" and "deficit" lists), in many cases there is a change in the allocation of seats assigned to each multi-member constituency based on their respective populations.

To give an idea of the scale of the phenomenon, consider, for example, that in the 2018 Chamber elections[12], it affected as many as 36 multi-member districts scattered throughout Italy, which is more than half of the total of 63 established by Legislative Decree No. 189/2017 (excluding the single-member district in Valle d'Aosta/Vallée d'Aoste). Irrespective of the subsequent operations carried out, following the adjustments, 19 multi-member districts lost a seat, 11 gained one seat, 5 gained two seats, and 1 lost two seats compared to the originally expected seat allocation based on population; in more general terms, at the conclusion of the allocation process at the multi-member districts level of the data determined by the proportional calculation conducted at the national level (passing through the intermediate level of the subnational constituencies), there were 20 underrepresented multi-member districts and 16 overrepresented ones[13].

In addition to these shifts, which are solely due to the distribution of seats among political forces, others are added, namely those connected to the application of rescue rules if a list exhausts all its candidates. These rules, as mentioned, provide for the possibility of attributing "surplus" seats not only to other multi-member district in the same subnational constituency but also to multi-member districts in other subnational constituencies.

The curious aspect lies in the fact that, while on one hand the number of seats allocated to each subnational constituency[14] can be altered (thus resulting in either their under-representation or over-representation), on the other hand, this phenomenon sometimes mitigates or even nullifies the distorting effects in terms of the territorial representativeness of the affected multi-member districts. It at times produces a rebalancing (partial or even total) between the number of originally allocated seats and the number of candidates actually elected there[15].

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[12] The 2018 elections were the first political elections held using this electoral system.

[13] The systematization of this data, with specific indication of the multi-member districts involved, is available in CAMERA DEI DEPUTATI, SERVIZIO STUDI, *La prima applicazione della legge elettorale n. 165/2017*, *Dati di sintesi*, no. 11, 26 July 2018, p. 45, where, however, the shift that in the Liguria constituency resulted in the transfer of a seat from Liguria – 1 multi-member district (reduced from 5 to 4) to Liguria – 2 multi-member district (increased from 5 to 6), as verifiable by consulting MINISTERO DELL'INTERNO, DIPARTIMENTO PER GLI AFFARI INTERNI E TERRITORIALI, *Archivio storico delle elezioni*, available at *www.elezionistorico.interno.gov.it*, is not reported.

[14] Itself determined based on the population count.

[15] In the elections for the Chamber in March 2018, this rebalancing affected 5 multi-member districts encompassed in as many subnational constituencies: the multi-member districts Piemonte 2 – 02, Lazio 1 – 01, and Campania 2 – 01 experienced a complete rebalancing, while the multi-member districts Campania 1 – 01 and Sicilia 2 – 01 saw only partial rebalancing (see the already mentioned CAMERA DEI DEPUTATI, SERVIZIO STUDI, *La prima applicazione della legge elettorale n. 165/2017*, p. 45.

An emblematic case occurred in the multi-member district of Campania 1 – 01, during the March 2018 elections. Based on population, 8 seats were supposed to be allocated; following the adjustment at the district level of national and district calculations, 10 seats were supposed to be allocated; ultimately, due to the recovery operations for exhaustion of candidates, only 7 were actually attributed. This final amount of 7 seats is lower than even the original allocation of 8.

Moreover, the effect of rebalancing territorial representation, as so narrowly understood, does not manifest systematically, as in some cases the rescue operations rather contribute to its further alteration[16].

However, even where there is an incidental effect of rebalancing territorial representativeness, the additional manipulation carried out with the rescue operations contributes to exacerbating the distortions produced by the electoral mechanisms on the side of the "political representativeness" of each multi-member district.

Furthermore, a very high degree of distortion of the political representativeness of each constituency is induced in any case by the electoral mechanisms, regardless of the necessary completion of the rescue operations mentioned, although the ordinary admission of the phenomenon of seat shifting (and thus the alteration of territorial representativeness) is precisely due to the legislator's selection of a transfer criterion at the multi-member district level of the electoral calculations carried out at a higher level, which, in "balancing the books", sacrifices territorial representativeness to try to prioritize the political success or failure of a list in a multi-member district compared to another.

It is true, in fact, that the mechanism for rebalancing seats between surplus and deficient lists, at the time of transferring electoral data from the subnational constituency level to the multi-member-district level, involves removing surplus seats from the former, subtracting them where they would be less deserved[17], and assigning the missing seats from the latter where they would be more deserved[18] (without attempting, as is done for the election of the Chamber in the transfer at the subnational constituency level of the calculations made at the national level[19], to first remove seats from surplus lists and allocate them to deficient ones within the same territorial division to maintain territorial representativeness (which inevitably results in

[16] In the elections for the Chamber in March 2018, this occurred in relation to 4 multi-member districts encompassed in 3 subnational constituencies: the multi-member districts Toscana – 03, Puglia – 03, Sicilia 2 – 02, and Sicilia 2 – 03, (see the already mentioned CAMERA DEI DEPUTATI, SERVIZIO STUDI, *La prima applicazione della legge elettorale n. 165/2017*, p. 45, where, however, there is mistakenly indicated a non-existent multi-member district Puglia – 09 instead of the multi-member district Puglia – 03).

[17] I.e., where the concerned list would obtain a seat using the lowest leftovers, proportionally to the quotient.

[18] I.e., where the concerned list possesses the largest unused leftovers, proportionally to the quotient.

[19] Where only as a last resort is the possible subtraction of a seat from a surplus list and its allocation to a deficient list in another subnational constituency admitted.

a distortion of political representativeness). However, the provision of carrying out seat allocation calculations at a level higher than where voters cast their ballots, and then subsequently transferring these outcomes at the district level, creates a disconnect between the choices made by the electorate in a specific territorial division and the distribution of seats.

For example, under the system, it is possible that in one multi-member district different political groups obtain the same number of seats even with significantly different numbers of votes. Looking again at the March 2018 elections[20], this scenario occurred in the Liguria – 02 district, where 1 seat was allocated to the Center-Left with 25.28% of the votes and to the Movimento 5 Stelle with 29.09%, but also to Liberi e Uguali with 4.90%. Liberi e Uguali therefore received the same number of seats with less than one-fifth of the votes of the Center-Left and about one-sixth of the votes of the Movimento 5 Stelle. Or, it can even happen that with fewer votes compared to another list, more seats are obtained than the latter. This situation occurred, for example, in the Marche – 01 district, where, besides 1 seat for the Center-Left with 21.74% of the votes, 3 seats were allocated to the Center-Right with 35.38% and only 2 to the Movimento 5 Stelle with 35.58%. In the Campania 2 – 03 district, besides 1 seat each for Free and Equal with 3.53% of the votes and the Center-Left with 20.16% (with almost six times fewer votes!), 4 seats were assigned to the Center-Right with 32.43% and only 3 to the Movimento 5 Stelle with 40.16%. Even more strikingly, in the Sicilia 1 – 01 district besides 2 seats for the 5 Star Movement with 46.09% of the votes, 1 seat was assigned to both the Center-Right with 31.11% and Liberi e Uguali with 4.56% (with just over one-seventh of the votes!), while none went to the Center-Left with 14.89%! Finally, it's worth mentioning the extreme case that occurred in the – only formally – multi-member district in Molise, in which the only seat up for proportional allocation was obtained by the faction (among those admitted to the seat distribution)[21] that performed the worst in that constituency, namely Liberi e Uguali, which saw its top candidate elected even though it only received 3.72% of the votes, compared to 18.14% for the Center-Left, 29.82% for the Center-Right, and 44.80% for the Movimento 5 Stelle!

[20] The data reported in the text are taken from the already cited MINISTERO DELL'INTERNO, DIPARTIMENTO PER GLI AFFARI INTERNI E TERRITORIALI, *Archivio storico delle elezioni*, and in indicating the percentage of votes collected by the coalitions, they also include the votes of the allied lists that did not contribute to bolstering the overall votes of their coalition as they did not surpass the threshold of 1% of the votes at the national level (specifically, the votes collected by "Italia Europa Insieme" and "Civica Popolare Lorenzin", part of the Center-Left coalition).

[21] Having surpassed the 3% threshold of votes at the national level.

3. *The multiple reasons underlying the constitutional illegitimacy of the new solutions adopted*

As is evident, the electoral rules that produce, or more precisely, induce the described effects of alteration on both the territorial representativeness and the political representativeness are in clear opposition to several constitutional rules.

As for the alteration of territorial representation, for Chamber elections, it is necessary first to invoke the failure to comply with article 56 of the Italian Constitution[22], according to which the contingent of seats to be assigned in each territorial division (be it formally defined as constituency or district)[23] must be established on the basis of the number of its inhabitants. This provision does not merely require respect for the proportionality between the number of inhabitants and the allocation of seats to territorial divisions before the vote. It is also aimed at preventing the distribution being altered after the vote by attributing seats based on votes received[24].

This is necessary not only to safeguard the territorial representativeness of each multi-member district and, therefore, according to the perspective taken by the Constitution, the general equality among the inhabitants of the different territorial allocations.[25] It is also specifically to ensure respect for the principle of equality of voters and their vote, as provided in articles 3[26] and 48[27] of the Italian Constitution, with regard to the quantitative consistency of parliamentary representation produced by each suffrage.

[22] According to which "The division of seats among the constituencies, with the exception of the number of seats assigned to the overseas constituency, is obtained by dividing the number of inhabitants of the Republic, as shown by the latest general census of the population, by three hundred and ninety-two and by distributing the seats in proportion to the population in every constituency, on the basis of whole shares and highest remainders".

[23] In this regard, it has indeed been correctly emphasized how the different denomination in the electoral law of "districts" compared to that of "constituencies" does not affect the necessary respect for both territorial levels of the requirement imposed by the last paragraph of article 56 of the Italian Constitution (which formally refers only to "constituencies"), also because otherwise, the legislature would only need to change the name to circumvent this provision (see L. SPADACINI, *La proposta di riforma elettorale all'attenzione del Senato: alcuni dubbi di illegittimità costituzionale*, in *Nomos*, no. 3/2017, p. 6). Moreover, in support of this interpretation, it is also possible to invoke the fact that the same distribution of seats among the various multi-member districts before the vote is based on their population.

[24] See Constitutional Court, judgment no. 35/2017, point 10.2 of the *Considerations of Law*.

[25] Even though, in fact, one could in theory reason (as has also been done) about the possible greater logic of foreseeing different solutions that, in quantifying the share of representation due to each territorial division, would give relevance to the equality of other "basins" of reference, starting for example from the number of voters in a territory, that is, those who concretely will "influence" in one direction rather than another that share of representation.

[26] That expresses the principle of equality (both formal and substantive) in general.

[27] That expresses, among other things, the principle for which the vote must be "equal".

These considerations lead to doubts also about the constitutional legitimacy of the electoral regulations concerning the Senate. While article 57 of the Italian Constitution[28] explicitly requires adherence to the principle of proportionality between the number of inhabitants and the seats at stake, specifically referring to territorial representation at the regional (or Autonomous Province) level, the principle of equality also demands that the allocation of seats to any sub-regional divisions within the regions stipulated by electoral legislation (like the multi-member districts provided for by the Italian electoral law) does not undermine this principle of proportionality[29].

At most, according to the jurisprudence of the Constitutional Court, such deviations may be allowed if they constitute "a residual hypothesis" occurring "for mathematical and random reasons"[30].

However, this is certainly not the case with the alterations in the allocation of seats, as they are not residual at all but instead represent a defining characteristic, both in terms of their frequency and the number of seats involved, under the new electoral legislation. What's worse is that these shifts are not truly "random" either, as for mathematical reasons, the "migration" of seats almost systematically occurs from smaller multi-member districts to larger ones. This is because surplus lists will likely see excess seats removed in smaller multi-member districts, while deficit lists will tend to gain missing seats in larger ones. Under "normal" conditions (meaning when the percentage of votes garnered by electoral factions entering the seat allocation[31] is roughly homogeneous across the various multi-member districts within a constituency), this process occurs consistently. For example, in the March 2018 Chamber elections, the opposite scenario occurred in only two instances, where it was not the multi-member district that was initially assigned a smaller number of seats that had to "cede"[32].

[28] According to which "The division of seats among the Regions or Autonomous Provinces, […] is made in proportion to the population of the Regions or Autonomous Provinces as shown by the latest general census, on the basis of whole shares and highest remainders".

[29] Of course, once the provision "upstream" is respected, as also contained in article 57 of the Constitution, according to which no Region or Autonomous Province may elect fewer than 3 senators, except for Molise and Valle d'Aosta/Vallée d'Aoste, which elect 2 and 1 respectively.

[30] See Constitutional Court, judgment no. 35/2017, point 10.2 of the *Considerations of Law*.

[31] Especially those of the lists that will turn out to be surplus and deficit during the electoral calculations at the constituency level, and for which seats will therefore need to be respectively subtracted and added; among these, the results of the lists that garner few votes have a particularly significant impact (which are therefore likely to be deficit lists), as it is more probable that deviations in consensus may occur, capable of influencing the final distribution of seats among the multi-member districts.

[32] Specifically, this occurred in the Emilia-Romagna constituency and the Sicilia 1 constituency. In the first case, the smallest multi-member district, Emilia-Romagna – 03, maintained its original representation quota based on population size, set at 6 seats. Although one seat was subtracted from the surplus list, Forza Italia, another seat was concurrently assigned to the deficit list, Liberi e Uguali. This adjustment was because Liberi e Uguali achieved significantly higher electoral results in that multi-member district compared to others in the same multi-member district, garnering 6.37% of the vote compared to 3.68% in Emilia-Romagna – 01, 4.02% in Emilia-Romagna – 02, and 4.09% in Emilia-

With regard to this aspect, it is worth emphasizing two points. On one hand, the possible shifts of seats from one subnational constituency to another may be considered legitimate because they occur very rarely. They are also only a residual measure applicable when it is not feasible to subtract seats from surplus lists and simultaneously allocate them to deficit ones within the same territorial division[33]. On the other hand, however, it is important to question the "tolerability" of shifts from one subnational constituency to another due to candidate exhaustion. This is especially pertinent considering that such a scenario is not so remote, primarily due to the rules introduced to limit the number of proportional representation candidacies[34], in addition to the possible occurrence of multiple candidacies.

Furthermore, these observations lead to the addition of another piece to the critical reflection on the characteristics of the Italian electoral system, linked to the fact that the reported alterations to territorial (but also political) representativeness can, to a certain extent, be induced by autonomous behaviours of the electoral competitors. In the sense that, if it is true that the shifts primarily result from the uprooting of electoral calculations from the level of vote expression and are secondarily influenced by the rules that limit the number of candidates that can be presented, so that these are systematically lower than the quantity of seats at stake in the relevant territorial allocation, it must be considered that on this latter level, the potential multi-candidacies made by the political forces also come into play, which can contribute to further shorten the (formal)[35] brevity of the lists legislatively imposed. This means that the possible alteration of territorial representativeness at the multi-member district level, but as seen also at the subnational constituency level, is to some way left – also – to the discretion of individual electoral competitors. These electoral competitors can limit or encourage the occurrence of such territorial deviations with their choices in the presentation of candidates[36].

Romagna – 04. Similarly, in the second case, the smallest multi-member district in the constituency, Sicilia 1 – 01, maintained its original representation quota based on population size, set at 4 seats. Although one seat was subtracted from the surplus list, Partito Democratico, another seat was concurrently assigned to the deficit list, Liberi e Uguali. This was because Liberi e Uguali also achieved significantly higher electoral results in that multi-member district compared to others in the same constituency, garnering 4.56% of the vote compared to 2.57% in Sicilia 1 – 02 and 2.60% in Sicilia 1 – 03. For a more comprehensive picture of this phenomenon, see P. FELTRIN, S. MENONCELLO, G. IERACI, *Causes and Possible Remedies for the "Slipping Seats" Phenomenon: An Empirical Analysis*, in this issue.

[33] Notably, during the March 2018 elections, this process did not result in the shifting of any seats from one subnational constituency to another.

[34] In this sense, reference is obviously made to the aforementioned rules for the election of the Chamber, given that at least in theory, the possibility of selecting candidates from other constituencies regarding the Senate election should be entirely excluded.

[35] See below.

[36] In this regard, we can once again take the example of what happened in the March 2018 elections, regarding in particular the election of the Chamber in the Campania 1 and Sicilia 2 subnational constituencies: if the Movimento 5 Stelle had not made multiple candidacies in the respective multi-member constituencies (especially candidates who also ran in single-member districts where they were ultimately elected), they would not have "lost" 3 seats each due to vacancies. The only list exhausted

As mentioned at the beginning, the mechanisms for the recovery of candidates in other multi-member districts (even in other subnational constituencies) in case of exhaustion of the lists also have a relevant impact on the balance of power among electoral competitors, altering them in relation to the proportion of consents collected in the different territorial allocations. It is therefore evident how autonomous optional choices made by political forces also lead to an alteration of the political representativeness of the constituencies.

On the other hand, this political representativeness is still heavily manipulated primarily due to the performance of electoral calculations at a level higher than that of the expression of the vote. This fact is exacerbated by the rather low national threshold (3%) that allows smaller political forces to be awarded seats in the calculations carried out at a higher level (where there are many seats at stake, especially so in the national constituency established for the Chamber election), with the resulting need to "make room" for them in some multi-member districts where, however, they collect votes that would be insufficient in themselves to win one of the (few) seats there available.

In any case, what is certain is that this systematic alteration of the political representativeness of the multi-member districts also stands in contrast to the principles expressed in articles 3 and 48 of the Constitution, especially in its failure to respect the equality of voters and their vote. It is true that the votes collected by the lists that are "disadvantaged" in a multi-member district are useful for the attribution of seats to the same lists in other multi-member districts, and therefore the equality of voters and their vote is preserved at the higher level that corresponds to that of the initial allocation of seats. However, this does not make the effect caused by the electoral rules any more acceptable from the perspective of constitutional legality, since it does not occur at the multi-member district level, which is the territorial level of voting expression. Moreover, the effect is quantitatively and qualitatively significant, as set out in the examples above.

Furthermore, it is worth noting that the systematic alteration of political representativeness, so that the allocation of seats in multi-member districts can completely "betray" the choices expressed by the electorate of the district itself, is also to some extent in contrast with the constitutional principles that require the vote to be personal and direct.[37] The effects produced by the ballots of some voters are determined by the ballots of others. In this framework, each voter's vote is also

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would have been the one presented in the Campania 1 - 01 subnational constituency, where, based on electoral calculations, the Movimento 5 Stelle would have been entitled to 5 seats, having at most 4 candidates available. This would have necessitated "rescuing" only one candidate, who could have been found within one of the other two multi-member districts of the subnational constituency (both in the Campania 1 – 02 and Campania 1 – 03 multi-member-districts, the Movimento 5 Stelle would have "advanced" a candidate who was not elected within the seats assigned in the respective district.

[37] As expressed in the articles 48, 56 and 57 of the Italian Constitution.

"victim" and "perpetrator" of the phenomena, in the sense that all votes of all voters are able to influence the distribution of seats in other multi-member districts[38].

4. *The misleading brevity of the lists provided by the electoral system and the resulting limited importance of the design of multi-member districts*

Taking into consideration what was said at the beginning regarding the reason why medium-small multi-member districts and closed lists with a maximum of 4 candidates were provided, it must be concluded that, paradoxically, the electoral mechanisms do not respect at all the principle enunciated by the Constitutional Court in Judgment no. 1/2014, which requires candidates to be "knowable" by the voters. If indeed the voters must be in a position to foresee what the effect of their suffrage will be when selecting candidates, it is clear that this is not made possible by the current electoral rules. The vote given to a list in multi-member district is in fact able to produce the election of a candidate from the same list (or, due to the criteria for recovery, even from another list allied to the first) in another multi-member district (even in a completely different part of the national territory). As a result, voters who express their choice are not actually voting for the candidates whose names are indicated next to the symbol of the preferred list on the ballot, but for other candidates of the same political force standing for office in another sub-territorial subdivision, all of which is unknown to them.

This fact means that, in reality, the closed lists provided for by the electoral system, far from being truly short, are actually very long, essentially composed of all the candidates presented in the various multi-member districts under the same symbol.

In this regard, a final example from the outcome of the March 2018 Chamber of Deputies elections is particularly emblematic. It concerns the "unsettling" consequences generated by a calculation error made by the Electoral Office of the Calabria subnational constituency, which involved the incorrect allocation of about four thousand votes within the Center-Right coalition. This led to a series of chain reactions that affected the election of candidates from different lists within the same coalition, not only in Calabria but also in many different subnational constituencies (and in their multi-member districts) located at opposite ends of the country, namely Trentino-Alto Adige/Südtirol, Veneto 1, Veneto 2, and Emilia-Romagna[39].

It is clear, therefore, how the choice made by the legislature to establish multi-member districts with reduced demographic size does not actually meet the

[38] Spread across the entire national territory (except Valle d'Aosta/Vallée d'Aoste) in the case of the election of the Chamber and, theoretically, distributed only within their respective regional constituency for the election of the Senate.

[39] See the Minutes of the operations carried out by the National Central Electoral Office on 20th March 2018, following the communication received from the Electoral Office of the Calabria subnational constituency regarding the aforementioned erroneous allocation of votes, available at *www.cortedicassazione.it*.

requirement to ensure a sufficiently close connection between elected representative and voters[40]. The current Italian electoral mechanisms are in fact not able to preserve the share of representation due to each local community or to respect the direction expressed by voters through the vote for representatives. The electoral system thereby fails to safeguard the principles of territorial representativeness and political representativeness.

Despite the directives for the design of multi-member districts[41], which are in line with the aim of ensuring Parliament's representativeness to the extent possible[42], the multi-member districts fail to achieve that goal[43], precisely because the electoral rules systematically alter both territorial and political representativeness.

That's why, in reality, the process of designing the multi-member districts, within the diabolic context defined by the electoral mechanisms, unfortunately assumes a limited importance compared to what it should have held.

However, considering that the smaller the multi-member districts are, the more likely the described distortive effects on the fronts of territorial and political representativeness are produced, and that designing electoral districts of different sizes usually means allowing a small district to be underrepresented while a larger one is overrepresented, within the narrow margins of manoeuvre left in this regard by the delegation to the Government for the design of the electoral districts[44], efforts should be made to at least minimize these effects.

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[40] To safeguard the "representativeness" of the Parliament as the "essential premise of Western democracy" that "constitutes […] an essential component of the democratic-constitutional principle" in which resides the "regulating principle that is resolved in the necessary legitimacy of those who perform public functions" (see A. D'ANDREA, *Rappresentatività del Parlamento e principio maggioritario*, in A. CARMINATI (ed. by), *Rappresentanza e governabilità: la (complicata) sorte della democrazia occidentale*, Editoriale Scientifica, Napoli, 2020, p. 28, who adds that "representativeness expresses the representative function of both the social body and the electorate".

[41] Contained in article 3 of Law no. 165/2017; in its paragraph 1, letter d), it is required that when designing the multi-member districts (in addition to the single-member ones), "the coherence of the territorial basin of each constituency is guaranteed, taking also into account the administrative units on which they are based, and, where necessary, the local systems, and, as a rule, its homogeneity in terms of socio-economic aspects and historical-cultural characteristics". In general, on the critical aspects of this delegation, also concerning the necessary impartiality of the body tasked with designing the multi-member districts, see L. SPADACINI, *Constitutional needs for the Italian process of drawing electoral districts: a more independent Commission, less partisanship, and greater transparency and participation*, in this issue.

[42] Not to be confused in this sense with the respect for territorial representativeness understood as the "mere" quantity of the share of representation due.

[43] If not in a strongly negative sense, in the sense that they give the voters the illusion of voting for representatives of their own territory (even showing them the names of the candidates from their muti-member district on the ballot) when in reality they have no idea for which multi-member district's candidates they are voting. Their only function seems to be giving the appearance (nothing more than that!) of respecting what was requested by the Constitutional Court in judgment no. 1/2014 regarding the necessary knowability of candidates by voters and the consequent prohibition of presenting long blocked lists.

[44] That certainly would need in turn a significant revision.

Paolo Feltrin, Serena Menoncello and Giuseppe Ieraci*

Causes and possible remedies for the "slipping seats" phenomenon: An empirical analysis**

SUMMARY: 1. Introduction to the problem; 2. The seat distribution mechanism in the electoral law for the Chamber and Senate elections; 3. Procedural causes of the "slipping seats" phenomenon; 4. The structural dimensions of seat slipping (Chamber of Deputies and Senate of the Republic, 2018 and 2022); 5. The research strategy and analysis procedures; 6. A discussion of the results; 7. First conclusions and further avenues of research.

ABSTRACT: The Italian electoral laws for elections to the Chamber of Deputies and Senate enforce two key constraints: fixed seats per territorial division based on population, and fixed seats per competing lists at the highest territorial level. The electoral system aims to match elected members with both list votes and seats allocated to lower territorial levels. Complexities arise when seat allocation occurs at multiple levels, leading to theoretical challenges of proportionality. Algorithms are used to approximate proportional representation, but issues such as "slipping seats" persist, influenced by factors like varying district populations and seat allocations. Corrective measures are proposed to address this phenomenon.

1. *Introduction to the problem*

The Italian electoral laws for the elections to the Chamber of Deputies (Lower House) and Senate (Higher House) provide for the simultaneous respect of two constraints in the procedure for transforming votes into seats: a) the number of seats set for each territorial division (subnational constituencies and multi-member districts) is fixed on the basis of the resident population at the censuses (Const., art. 56 section III; art. 57 section III and IV); b) similarly, it is fixed also the number of seats allocated to the lists competing at the highest territorial level (national in the Chamber of Deputies; regional in the Senate) according to the calculation procedure laid down by each electoral law. These two constraints fix the total numbers of seats in each House. Ultimately, the electoral system must ensure that the number of elected members corresponds to both the list votes (at the national level in the Chamber of Deputies and at the regional level in the Senate) and to the number of seats allocated to the lowest territorial level (the multi-member districts).

* Paolo Feltrin, Former Associate Professor in political science Associate Professor, University of Trieste; Serena Menoncello, Director of the Political-Electral Deparment at InNova Studi e Ricerche; Giuseppe Ieraci, Associate Professor in political science, University of Trieste.

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When the highest territorial level is also the only level at which seats are allocated, as in the case of electoral legislation for municipalities, the solution is unproblematic as it is always unambiguous. When, on the other hand, the seat allocation process is carried out at several levels - in the Chamber at three levels (national, subnational constituency, multi-member district) and in the Senate at two levels (regional constituency, multi-member district)- we are faced with the theoretical problem, explored in particular by the mathematical disciplines, of a two-dimensional and two-proportional distribution in the allocation of seats to lists and territories. The problem is further complicated by the attempt to comply with a third condition, set at a lower level of conditionality than the first two constraints indicated above, that is the respect of the exact allocation of the seats in the multi-member districts of first allocation.

There is no unambiguously defined solution to the problem, but algorithms can be used in attempts to approximate the highest level of proportionality between the votes obtained and the seats allocated (to the territories). The current electoral law (n. 165/2017), applied in the general elections of 2018 and 2022, uses an algorithm that first of all guarantees the exact allocation of seats to the lists at the national level, and then tries to minimise both the gap with respect to the number of seats envisaged in the multi-member districts and the gap in the exact allocation of seats of each list at the territorial level (subnational constituency and multi-member district). The algorithm provides for the exchange of seats between lists which obtain a surplus of seats ('surplus lists') and the ones which result penalized ('deficit lists') in the multi-member districts on the basis of the smallest and highest decimal parts of the quotient of the surplus and deficit list respectively. The procedure inevitably produces a number of cases of 'slipping seats', resulting in a 'pinball effect'.

Various algorithms have been proposed to minimise the ‘slipping seats’ effect. Without discussing the merits of the alternative proposals, we tried to identify the underlying causes of this phenomenon based on the outcomes of the 2018 and 2022 general elections. Data analysis revealed the influence of two variables: the varying population of the multi-member districts and the varying number of seats allocated to each multi-member district within the subnational constituencies. Finally, some possible corrective measures are considered in order to minimise the “slipping seats” phenomenon.

2. *The seat distribution mechanism in the electoral law for the Chamber and Senate elections*

The distribution of seats among the lists for the Chamber of Deputies election is governed by Presidential Decree 361 of 30 March 1957, 'Approval of the Consolidated Text of the Laws containing rules for the Chamber of Deputies election', as amended. The procedure for the election of MPs and the allocation of seats currently in force is that established by Law No. 165 of 3 November 2017, which introduced the so-called

'Rosatellum', a mixed electoral system that provides for the election of one-third of the MPs via the first-past-the-post system in single-member districts and of the remaining two-thirds via the proportional system in multi-member districts. The system remained unchanged even after the approval of Constitutional Law No 1 of 19 October 2020, which reduced the number of deputies from 630 to 400, although, as it is obvious, the reduction required the redrawing of both single-member and multi-member districts.[1]

The 'Rosatellum' provides for 27 regional or sub-regional constituencies in the Chamber: in 13 regions the subnational constituency boundaries coincide with those of the region; 5 regions (Piedmont, Veneto, Lazio, Campania and Sicily) are divided into 2 subnational constituencies; Lombardy alone is divided into 4 subnational constituencies. Legislative Decree No. 177 of 23 December 2020 also provided for 49 multi-member districts, which are assigned between 3 and 8 seats on the basis of population size, with the exception of Molise, which is assigned a single seat.

The distribution of seats to the lists in the proportional part takes place according to a sequential procedure. Firstly, the total seats to be allocated at the national level (that is, all the seats at the Chamber of Deputies) are distributed to the coalitions and single lists that exceed an established threshold (10% for coalitions, 3% for single lists),[2] and then to each list rallied in any given coalition. In this initial stage of the procedure, basically the number of won seats by each single list is established. The next step involves “attaching” or attributing the won seats already distributed at the national level to the subnational constituencies, something which is done again attributing them firstly to coalitions and single lists, then to each of the lists in each coalition. Finally, as a third stage in this procedure, the seats are “attached” or attributed to the multi-member districts of each subnational constituency, this time giving priority to the lists rather than the coalitions, providing obviously that the total number of seats eventually allocated to each list does not exceed the number of won seats initially determined at national and subnational constituency levels (stage one and two of the described procedure). All the stages in the allocation of seats are carried out on the basis of the natural quotient, or Hare quotient, obtained as a ratio between the sum of the valid votes cast for all the lists and the number of seats to be allocated.

[1] See Legislative Decree No. 177 of 23 December 2020, *Determination of uninominal and plurinominal electoral subnational constituencies for the election of the Chamber of Deputies and the Senate of the Republic, pursuant to Article 3 of Law No. 51 of 27 May 2019*. It may be useful to recall that the Italian electoral law sets a functional distinction between *circoscrizione elettorale* (constituency) and *collegio elettorale* (district). The national territory is hence divided in subnational constituencies (see later par. 4), and in turn each subnational constituency in districts. Finally, in each subnational constituency, according to the current Italian electoral law and so-called ‘Rosatellum’, there are both single-member (first-past-the-post) and multi-member districts.

[2] The votes of lists in coalitions that do not reach 3% but are above 1% are added together to make up the total coalition votes. The votes of single lists below 3 per cent and coalition lists below 1 per cent are not taken into account for the purposes of seat allocation. A specific threshold is provided for lists representing linguistic minorities.

This sequential procedure may determine a mis-match between the seats attributed to the list at the subnational constituency level (which is constant and fixed by law) and, in the last stage, their allocation at the multi-member district level. For example, if there are lists at the district level that by applying the natural quotient (Hare) have been allocated more seats than the total number of seats attributed to them at subnational constituency level, a surplus of seats would be determined. In this case, the exceeding seats are subtracted in the districts where they have been allocated thanks to the smallest decimal part of the quotient and allocated to the lists in the districts where they have the highest unused decimal part of the quotient. This mechanism of shifting won seats from one district to the other may alter the principle of representation, since the districts which undergo a “subtraction” of seats do not get any compensation or re-balancing. A similar system is provided for by Legislative Decree No. 533 of 20 December 1993, which regulates the Senate of the Republic election, where, however, the allocation is in two stages, first on a regional basis, as established by Article 57 of the Constitution, and then at the level of multi-member districts.

This type of distribution brings with it 'side effects' that, although mitigated through special algorithms, cannot be cancelled. This is the so-called 'slipping seats’ effect, i.e. the phenomenon whereby one or more seats, allocated by law to a district on the basis of the resident population, end up being attributed elsewhere. This occurs because the system provides for a matrix distribution that should theoretically hold three values fixed: the total number of seats allocated by law to each territory at the national, subnational constituency and multi-member district level (column marginal); the total number of seats allocated to each list at the national and subnational constituency level (row marginal); the number of seats allocated to each list at the level of each multi-member district (matrix cells). When this is not possible, due to the presence of decimal numbers, the law has chosen to favour the number of seats previously allocated to the lists, sacrificing the original distribution of seats among the multi-member districts on the basis of resident population. Through some refinements of the electoral formula, the new law managed to reduce the slipping but not eliminate it.

In 2018, in fact, there were 20 out of 386 seats attributed to a different district than the one in which they were originally allocated on the basis of resident population. In 2022, on the other hand, this phenomenon affected 16 out of 245 seats. In all these cases, the shift was caused precisely by the way the seats were allocated by law. The purpose of this paper is to investigate the causes which bring about this phenomenon and, if possible, to disclose some strategies that can be used to remedy it.

3. *Procedural causes of the “slipping seats” phenomenon*

Slipping seats between districts may occur in a number of cases. Firstly, when surplus seats allocated to lists at the subnational constituency level have to be reallocated, and there is no subnational constituency in which the deficit and surplus lists have, respectively, seats allocated as remainders and remainders to be used. Take for example two lists, A and B. List A, at the end of the subnational constituency allocation, has 2 surplus seats, which, based on the national distribution, should be allocated to List B. List A has one seat allocated as a remainder in subnational constituency 1, in which List B also has unused remainders. However, in the other subnational constituencies where List A has seats allocated as remainders, List B has no unused remainders, because it did not stand in all subnational constituencies. At this point, since it is impossible to allocate the seat in the same subnational constituency, the law states that "the surplus list is subtracted from the seats in the subnational constituencies in which it obtained them with the smallest decimal parts of the allocation quotient, and the deficit lists are consequently allocated seats in the other subnational constituencies in which they have the largest decimal parts of the allocation quotient not used" (L. 165/2017, art. 26, paragraph 1, letter g). As can be easily understood, this therefore causes a shift of one or more seats between one subnational constituency and another.

Another possible cause of seat slipping between subnational constituencies is the lack of sufficient candidates to match the number of elected members, that is of available seats. This is a consequence of the introduction of the so-called 'short lists', i.e. the condition - in the case, for example, of the Chamber of Deputies - that the number of candidates may not be less than 2 and more than 4 in multi-member districts with more than 2 seats at stake.[3] A further cause of seat slipping concerns the possibility of multiple nominations for the same candidate (up to 5 per list nationwide). In this case, there is no need to give hypothetical examples, because this actually happened in 2018, when 8 subnational constituencies experienced changes in the total number of seats, 2 received less seats than the theoretical number, 6 received more. All these cases were caused by the absence of sufficient candidates, and occurred in Campania 1 and Sicily 2 for the lists of the 5 Star Movement, which had, in both cases, 3 seats more than the available candidates. These 6 seats, based on the unused decimal parts, were allocated in Piedmont 2, Tuscany, Lazio 1, Campania 2, Apulia and Calabria. All of these subnational constituencies thus had one seat more each than provided for by the appropriate legislative decree on the basis of demographic size (Legislative Decree 189/2017). In the distribution at the multi-member district level, one last case, entirely fortuitous and unforeseeable, occurred in Liguria, where a candidate elected in a district passed away before the proclamation. Following the exhaustion of candidates in that district, a candidate was elected in the other district of the same subnational constituency.

[3] In cases where there are 1 or 2 seats, the number of candidates on the list may not be less than half, rounded up to the next higher unit, of the seats allocated to the multi-member district and may not exceed the maximum number of seats allocated to the multi-member district.

Therefore, being unable to proceed with the allocation but having to keep fixed the seats allocated at the national level to the lists, the law provides that 'the National Central Office, after appropriate communication from the Central Constituency Office, identifies the subnational constituency in which the list has the largest decimal part of the quotient not used and proceeds in turn to appropriate communication to the competent Central Constituency Office' (L. 165/2017, art. 28, paragraph 4). In the case of 2018, as many as 6 seats were subtracted from two subnational constituencies and reallocated to different subnational constituencies.

Secondly, with regard to slipping seats between multi-member districts, a first cause is once again the exhaustion of list candidates. A second cause, the one that occurs most frequently, is due to the reallocation of seats in excess of the limits set per list by the subnational constituency distribution. As we have seen, in fact, the rule does not provide for the same rigidity adopted for subnational constituencies, i.e. the search in the first instance for the same district in which to subtract and reallocate the seat, but relies on the highest decimal parts of the quotients. This results in a real 'pinball effect', where one or more seats may be subtracted from a list in one district and reassigned to another list in a different district.

4. *The structural dimensions of seat slipping (Chamber of Deputies and Senate of the Republic, 2018 and 2022)*

If we do not take into account the case of the exhaustion of candidates (and the case of sudden death), in 2018 the cases of slipping seats at the level of multi-member districts were 20 out of 386 (5.2% on the total number of seats, 5.5% if calculated only on seats in subnational constituencies with more than one multi-member district). The subnational constituencies involved were:

- Piedmont 2, with 1 seat transferred from District 2 to District 1;
- Lombardy 2, with 1 seat transferred from District 1 to District 2;
- Lombardy 3, with 1 seat transferred from District 1 to District 2;
- Lombardy 4, with 1 seat transferred from District 2 to District 1;
- Veneto 2, with 2 seats transferred from District 2 to District 3;
- Emilia-Romagna, with 1 seat transferred from District 1 to District 4;
- Tuscany, with 1 seat transferred from District 2 to District 3;
- Marche, with 1 seat transferred from District 2 to District 1;
- Lazio 1, with 1 seat transferred from District 1 to District 2;
- Campania 1, with 2 seats in total, transferred from Districts 2 and 3 to District 1;
- Campania 2, with 2 seats in total, transferred from Districts 1 and 2 to District 3;
- Puglia, with 2 seats in total, transferred from Districts 1 and 4 to District 2;
- Sicily 1, with 1 seat transferred from District 2 to District 3;
- Sicily 2, with 2 seats in total, transferred from Districts 2 and 3 to District 1;
- Sardinia, with 1 seat transferred from District 2 to District 1.

In 2022, the slipping seats were 16 out of 245 (6.5% of the total seats, 8.8% if calculated only on seats in subnational constituencies with more than one multi-member district). The subnational constituencies that experienced changes in the number of seats allocated to their districts at the end of the distribution were:
- Piedmont 1, with 1 seat transferred from District 2 to District 1;
- Piedmont 2, with 2 seats transferred from District 1 to District 2;
- Lombardy 1, with 1 seat transferred from District 1 to District 2;
- Lombardy 2, with 2 seats transferred from District 1 to District 2;
- Lombardy 3, with 1 seat transferred from District 1 to District 2;
- Veneto 2, with 1 seat transferred from District 3 to District 2;
- Emilia-Romagna, with 1 seat transferred from District 1 to District 3;
- Tuscany, with 1 seat transferred from District 2 to District 3;
- Lazio 1, with 1 seat transferred from District 3 to District 2;
- Lazio 2, with 1 seat transferred from District 1 to District 2;
- Campania 1, with 1 seat transferred from District 1 to District 2;
- Puglia, with 2 seats in total, transferred from Districts 1 and 2 to District 4;
- Sicily 2, with 1 seat transferred from District 3 to District 2.

It should be noted that in 2022, only in two subnational constituencies with more than one district (Campania 2 and Sicily 1) there were no slipping seats. In all the others, there was at least one seat slipping between one district and another.

The picture does not change with regard to the Senate. In 2018, there were 8 slipping seats out of 193 (4.1% out of the total number of seats, 5.4% when calculated on seats in regions with more than one multi-member district only). Although the percentage is low, it should be borne in mind that only in two regions (Emilia-Romagna and Puglia) out of the 9 with more than one multi-member district were there no cases of slipping seats. The seven regions with multi-member districts and recorded cases of slipping seats in 2018 were:
- Piedmont, with 1 seat transferred from District 1 to District 2;
- Lombardy, with 2 seats in total, transferred from Districts 1 and 3 to Districts 2 and 4;
- Veneto, with 1 seat transferred from District 1 to District 2;
- Tuscany, with 1 seat transferred from District 2 to District 1;
- Lazio, with 1 seat transferred from District 3 to District 1;
- Campania, with 1 seat transferred from District 2 to District 3;
- Sicily, with 1 seat transferred from District 2 to District 1.

In 2022, the slipping seats were 6 out of 122 (4.9% of the total seats, 7.3% if calculated only on seats in regions with more than one multi-member district). Again, however, the low percentage is caused by the high number of regions with only one multi-member district. Cases of slipping seats, in fact, occurred in 5 of the 7 regions divided into several districts, with the exclusion of Piedmont and Latium. The regions affected were:
- Lombardy, with 1 seat transferred from District 3 to District 2;
- Veneto, with 2 seats transferred from District 1 to District 2;

- Emilia-Romagna, with 1 seat transferred from District 1 to District 2;
- Campania, with 1 seat transferred from District 2 to District 1;
- Sicily, with 1 seat transferred from District 2 to District 1.

5. *The research strategy and analysis procedures*

As mentioned in Section 1, the electoral formula for translating votes into seats, when it is of the proportional type with multi-stage hierarchical allocation, poses a mathematical problem of optimising a biproportional allocation[4], i.e. minimising non-compliant cases. Consequently, mathematicians have set some criticisms to the current Italian electoral law and have proposed some solutions focused on the formulation of appropriate algorithms that minimise slipping seats.[5] The aim of this section is rather to explore whether the multi-member districts with cases of slipping seats in the two elections under consideration (2018 and 2022) exhibit similar characteristics. If so, further refinements of electoral legislation aimed at improving its efficiency could be suggested.

The small number of cases makes it difficult to use statistical models, and more methodological concerns would be raised because of the changes in the geography of the multi-member districts following the reduction in the number of MPs after the 2020 referendum. It should also be borne in mind, when choosing the variables to be polled, that what really matters is the relationship of each multi-member district with the other multi-member districts in the same subnational constituency, since it is only within the subnational constituencies that slipping seats occur.[6]

We have proceeded as follows:

1. for the Chamber and the Senate, all cases of multi-member districts potentially liable to seat slipping were identified (133, 95 in the Chamber and 38 in the Senate in 2018 and 2022 elections), which correspond to all the multi-member districts belonging to subnational constituencies composed of 2 or more multi-member districts;
2. the 133 multi-member districts were assigned to 3 classes: -1 for multi-member districts that gave up 1 or 2 seats (46 cases); 0 for multi-member districts that

[4] M. L. BALINSKI, G. DEMANGE, *An axiomatic approach to proportionality between matrices*, in *Mathematics of operation research*, 14/1989, 700-719.

[5] See in this regard the alternatives proposed by Simeone et al. (SERVIZIO STUDI DELLA CAMERA DEI DEPUTATI, *L'algoritmo elettorale tra rappresentanza politica e rappresentanza territoriale. Una nuova procedura di allocazione proporzionale dei seggi*, in collaborazione con F. Ricca e A. Scozzari, Roma, Camera dei deputati, 2019); A. PENNISI, *The Italian bug: A flawed procedure for bi-proportional seat allocation*, in B. Simeone, F. Pukelsheim (eds.), *Mathematics and democracy: recent advances in voting systems and collective choice*, Berlin, Springer, 2006.

[6] For example, it is not relevant to compare the turnout of a multi-member district with the national average because turnout has a high regional variability, with the consequence of being fairly homogeneous at subnational constituency level.

maintained the number of seats assigned to them (46 cases); +1 for multi-member districts that gained 1 or 2 seats (41 cases);[7]

3. the following indicators were constructed for all the multi-member districts, relating to certain variables considered potentially relevant: size of the district in terms of voters, number of seats allocated to the district, number of lists presented, turnout, percentage of votes to lists that gained seats, percentage of votes to the first party, percentage of votes to the first two parties and percentage of votes to the first three parties;

4. the indicators were in turn divided into 3 classes: +1, when a multi-member district has a value of the indicator higher than the average for its subnational constituency; 0, when it is equal to the average; -1, when its value is lower than the average. This choice is justified by the heterogeneity of the collected data, as an effort to highlight the different characteristics of the multi-member districts of each subnational constituency compared to the constituency average.

As an illustration of this methodology, take for instance the size of the district in terms of voters. The indicator was constructed by calculating the average number of electors in the districts of a subnational constituency (total electors/number of multi-member districts); the difference between the number of electors in each multi-member district and the subnational constituency average was then calculated; finally, the districts were assigned to the 3 classes mentioned above. The same method was also used for the other indicators in order to standardise the analysis and results.

6. *A discussion of the results*

Before presenting the findings of our analysis, we would like to point out that, firstly, the simulation of the seat distribution is based on the data published in the Home Office website, not on the official data of the proclamation of the representatives. It follows that some minor inconsistencies between the two data sets are possible. Secondly, our analysis is not intended to explain the phenomenon in an exhaustive manner, but rather to identify certain morphological characteristics of the districts that may be the causes of the shifting of seats. Precisely because of the characteristics of biproportional distributions, there can be no variables that alone can fully explain the phenomenon. In fact, a significant part of the explanation derives from the different distribution of votes between lists in the various districts, which determines some 'randomness' in the final allocation of seats, with the consequence that - even in very similar situations - slipping seats may occur in some cases and not in

[7] The difference in the number of multi-member districts that gained fewer seats than expected (46) and that of the districts that gained more (41) is due to the fact that 5 multi-member districts received 2 more seats, which were subtracted from two different multi-member districts of the same subnational constituency. In 2018 that happened in 4 cases (Campania 1, Campania 2, Puglia and Sicilia 2); in 2022 in only one case (Puglia).

others, solely because of differences of a few hundredths in the residual percentage figure (second decimal place). We will return to this at the end, because it is necessary to reflect on the ultimate meaning of the rule and the equality of the vote that is called into question by this mechanism.

However, as will be seen, something interesting and useful seems to emerge in the end.

Table no. 1: Number of voters, number of seats and number of lists in the Multi-member districts subject to (or not) to seat slipping.

Variables: District features		Slipping seats: -1 District that gains less seats % (a.v.)	Slipping seats: 0 Correct distribution % (a.v.)	Slipping seats: +1 District that gains more seats % (a.v.)
District size (in terms of voters)	-1 (smaller district)	73.9 (34)	60.9 (28)	14.6 (6)
	+1 (bigger district)	26.1 (12)	39.1 (18)	85.4 (35)
	Total	100.0 (46)	100.0 (46)	100.0 (41)
Number of seats	-1 (less seats)	63.0 (29)	37.0 (17)	2.4 (1)
	0 (same number of seats)	26.1 (12)	41.3 (19)	31.7 (13)
	+1 (more seats)	10.9 (5)	21.7 (10)	65.9 (27)
	Total	100.0 (46)	100.0 (46)	100.0 (41)
Number of lists	-1 (less lists)	17.4 (8)	13.0 (6)	19.5 (8)
	0 (same number of lists)	58.7 (27)	63.0 (29)	58.5 (24)
	+1 (more lists)	23.9 (11)	23.9 (11)	22.0 (9)
	Total	100.0 (46)	100.0 (46)	100.0 (41)

Source: our elaborations based on Home Office data.

The first indicator, and the one that has shown the greatest explanatory power, is the size of the district in terms of voters (Tab. 1). The multi-member districts that are assigned fewer seats than they are entitled to are those that are smaller than average in size (73.9% of cases). Similarly, 85.4% of the districts that obtain one or more extra seats are those with above-average size. Of those where the distribution is correct, 60.9% are the smallest districts. Verifying the hypothesis with the calculation of

Somers' D, a strong relationship emerges that is completely in line with the previous value (0.513).

The second indicator, largely related to the first, refers to the number of seats allocated to each multi-member district.[8] These two variables (the size of the district and the number of seats) are closely linked, to the point of almost overlapping. Of the 47 cases of multi-member districts with a lower than average number of seats, 46 fall into the class of districts with a lower than average size of voters. Similarly, 36 of the 42 districts with more seats than the subnational constituency average have the highest voter size. As might be expected, the impact of the different size between districts within the same subnational constituency proves to be influential here as well. 63% of the multi-member districts with fewer seats than they are entitled to by law are those that already had a lower number of seats than the subnational constituency average. Conversely, 65.9% of the districts with more seats than they are entitled to by law are made up of the largest districts in terms of seats (because they have a larger resident population). Verifying the hypothesis with the calculation of Somers' D, again a significant relationship emerges (0.512). A final indicator taken into consideration concerned the number of lists presented. Confirming expectations, this indicator proves to be irrelevant. The explanation of this irrelevance is simple: as a rule, the number of lists presented is always the same within all the multi-member districts of each subnational constituency and anomalous cases are very rare.

Let us now look at some indicators referring to electoral behaviour (Tab. 2). The first potentially influential indicator relates to turnout, but there does not seem to be any kind of unambiguous relationship with slipping seats and the data do not show clear signals one way or the other. The same can be said about the share of votes cast in favour of the lists that participated in the allocation of seats and, speculatively, of those excluded. Here too, the data show a slight prevalence, but not so clear-cut. In fact, in 58.5% of the districts obtaining more seats than those due, the lists which won some seats obtained a lower percentage than average, that is a sign of a greater vote dispersion towards the smaller lists. On the other hand, 56.5% of the districts that lose seats had a higher percentage of votes to the lists in competition than the rest of the subnational constituency. There is some relationship among these data, but it does not seem so strong as to support the hypothesis of any significant correlation.

However, since it is reasonable to assume that the distribution of votes to the lists in the multi-member districts is significant, a further control was made, considering the preferences expressed in favour of the most voted list, the two most voted, and finally the three most voted lists. The distribution of preferences for the most voted list and the two most voted ones did not show any significant relationship.

The results are more disclosive of some evidence when the three most voted lists were considered: 60.9% of the multi-member districts that lose at least one seat are concentrated where the percentage of votes to the three most voted lists is above

[8] The allocation of seats to each multi-member district depends on the resident population of the administrative units in each of them.

average, while the multi-member districts that obtain additional seats show - on the contrary - an above-average vote dispersion (63.4%). A possible explanation for this seemingly counter-intuitive empirical evidence could be that the higher vote dispersion produces a low number of seats allocated with whole quotients, as well as a higher number of unused although high-value residual percentages. Judging the overall process of seat allocation, these higher remainders in the multi-member districts with a high vote dispersion would explain why the transfer of surplus seats favours more this type of district then others. Testing the hypothesis with Somers' D calculation, an inverse relationship is revealed, but with a lower significance than the previous ones (-0.213). This is inevitable, considering the unavoidable approximation resulting from the use of votes of only three lists.

Table no. 2: Turnout and votes to lists in the multi-member districts subject (or not) to seat slipping.

Variables: Electoral behaviour		Slipping seats: -1 District that gains less seats % (a.v.)	0 Correct distribution % (a.v.)	+1 District that gains more seats % (a.v.)
Voter turnout	-1 (below average)	54.3 (25)	39.1 (18)	43.9 (18)
	+1 (above average)	45.7 (21)	60.9 (28)	56.1 (23)
	Total	100.0 (46)	100.0 (46)	100.0 (41)
Votes to lists that gain seats	-1 (% below average)	43.5 (20)	43.5 (20)	58.5 (24)
	+1 (% above average)	56.5 (26)	56.5 (26)	41.5 (17)
	Total	100.0 (46)	100.0 (46)	100.0 (41)
Votes to the first ranked list	-1 (% below average)	52.2 (24)	56.5 (26)	53.7 (22)
	+1 (% above average)	47.8 (22)	43.5 (20)	46.3 (19)
	Total	100.0 (46)	100.0 (46)	100.0 (41)
Votes to the first two ranked lists	-1 (% below average)	39.1 (18)	54.3 (25)	53.7 (22)
	+1 (% above average)	60.9 (28)	45.7 (21)	46.3 (19)
	Total	100.0 (46)	100.0 (46)	100.0 (41)
Votes to the first three ranked lists	-1 (% below average)	39.1 (18)	47.8 (22)	63.4 (26)
	+1 (% above average)	60.9 (28)	52.2 (24)	36.6 (15)
	Total	100.0 (46)	100.0 (46)	100.0 (41)

Source: our elaborations on Home Office data.

Our survey suggests the existence of several variables affecting the phenomenon of slipping seats. Firstly, the effect of the excessive population thresholds (+/- 20% with respect to the subnational constituency average) that the legislature has granted to the Commission for redrawing the districts should be emphasised, a circumstance that leads to possible designs of multi-member districts that can have up to a 40% gap between the most and the least populous districts.

A second relevant circumstance necessarily follows from this, namely the allocation of a non-homogeneous number of seats in the multi-member districts of the same subnational constituency. These first two structural variables are then affected by the different distribution of preferences, particularly as regards the concentration and/or fragmentation of the vote (to the first three most voted lists), with a tendency to disadvantage the districts where the concentration of the vote is greater and to advantage the more fragmented districts. In the end, the allocation of seats may perhaps appear random, a 'ping pong' or 'lottery' as it has sometimes been called, but it should be remembered that this randomness is less casual than is normally assumed and is to a very large extent linked to the combination of the three characteristics of the multi-member districts that have emerged as relevant in this analysis (different size of the multi-member districts; unevenness in the number of seats in the multi-member districts; concentration/fragmentation of the vote).

7. *First conclusions and further avenues of research*

From the analysis carried out in this paper three possible corrective measures of the slipping seats effect could be derived.

Firstly, there is a procedural issue, which concerns the method of calculation at the subnational constituency and multi-member district levels. As we have seen in the third paragraph, in the case of excess seats resulting from the process of seat allocation at the subnational constituency level, the electoral law expressly provides, as a priority, that the reallocation to the lists takes place in the same subnational constituency. It is indeed specified that the reallocation must privilege the subnational constituency in which the list with surplus seats has already been allocated some seats with decimal parts of the quotients. Moreover, the electoral law makes mandatory that at least one of the lists to which seats are still to be allocated has unused decimal parts. However, at the multi-member district level, this provision is not valid any more and only the ranking of the decimal parts becomes relevant, both to decide from which district the seat should be subtracted and to identify the district to which it should be reallocated. This is therefore the main cause of the slipping seats phenomenon. Given these effects, the question is whether it would not be better to employ the same procedure at both the subnational constituency and the district

levels, that would guarantee at least procedural consistency within the provisions of the electoral law. In all likelihood, the legislator's intention was to reward the lists that had obtained the largest share of votes in the multi-member districts. However, our analysis reveals some evident 'side effects': for instance, an excessive number of seats slipping from one district to another, as well as the circumstance that in many cases a seat is subtracted from a multi-member district only by a trifle, a few hundredths of a point, corresponding to the second decimal of the residual figure.

Secondly, yet another 'side effect' of the slipping seats phenomenon concerns the principle of vote equality. While it would seem correct to consider the largest remainders as the basis for the slipping of seats, the consequences on the relationship between votes cast and seats allocated must nevertheless be assessed. They appear more serious than is usually thought. Take as an example what happened in 2022 for the elections at the Chamber of Deputies when, employing the procedure for the allocation of seats described above, in the Piedmont 2 district the natural quotient (Hare's quotient) in the P01 multi-member district was approximately 211,000 votes compared to 84,000 in the P02 district (since the latter obtained 2 seats from the former). This is only an extreme case, but many others could be pointed out.

Thirdly, as we mentioned in Section 6, the excessively wide range in the population size of the multi-member districts (+/- 20%) and their inhomogeneity in terms of the number of seats increases the possibility of seat slipping systematically and non-randomly. The remedy in this case could be, on the one hand, to reduce the range of population fluctuation of the multi-member districts (as well as of the single-member districts), e.g. +/- 5%, or +/- 10% as it was originally (Law 277/1993); on the other hand, to increase the discretion in redrawing the multi-member districts and subnational constituencies so that they have as many equal numbers of seats as possible, avoiding odd numbers as far as possible.

Lastly, the rules for the so-called 'short lists' should be revised (by expanding them), as well as those for multiple nominations (by reducing them), so as to eliminate the slipping seats caused by the exhaustion of candidates in the lists of one or more multi-member districts.

In terms of new directions for future research, three further steps could be envisaged: (a) extending the analysis to all nine elections of the 1994-2022 phase, so as to make the empirical evidence more robust; (b) experimenting what would happen with an hypothetical seat allocation if we applied the values (percentages) of the nine elections of the period 1994-2022 with fictitious multi-member districts with equal numbers of population/voters and seats; (c) experimenting with a modification of the seat allocation procedure in multi-member districts using the one in force at the subnational constituency level.

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PART IV
BEYOND REPRESENTATIVE DEMOCRACY

Francesco Pallante*

Direct Democracy**

ABSTRACT: ***This paper argues in favor of representative democracy due to the challenges faced by democratic institutions, both on a practical level and a conceptual one. Direct democratic institutions, in particular, do not seem suitable for producing public decisions through a deliberative process capable of building compromises. Instead, they tend to produce distinctly majoritarian decisions, risking the creation of conditions for a dictatorship of the majority.***

In its pure form, democracy implies a coincidence between those who make decisions on political organization (the rulers) and those who have to obey their determinations (the ruled). From this perspective, a democracy, to be considered as such, has to be direct: if the demos (the people) does not hold the kratos (power), then there is no democracy. The people's assembly, which acts potentially with the involvement of all the citizens, is the democratic instrument par excellence. Nevertheless, in contemporary constitutions, this institution has nearly disappeared. Nowadays, the most widespread instruments of direct democracy are the referendum, the popular legislative initiative, the recall, the popular petition, and the primary elections. However, far from ensuring the people's continuous contribution in all political decisions, these forms of direct participation of citizens in democratic decision-making involve only occasional participation and involve only specific issues. On closer inspection, they presuppose an institutional system of the parliamentary type within which they can operate as possible correctives.

The opposite of democracy is representation, as emerges historically from the contrast between the ideas of Rousseau[1] and Montesquieu[2]. Representation implies a distinction, not a coincidence, between the rulers and the ruled: the representatives make decisions; the represented obey. There is no necessary implication of coincidence between representation and democracy, since representation could be not democratic.

Democratic representation – or representative democracy – is a synthesis of two opposing ideals: all the governed directly choose their rulers.

The impracticability of direct democracy in mass societies has long justified the choice of representation. However, today's information technology revolution has opened up new perspectives.

This phenomenon reached its peak worldwide with the triumph of the Five Star Movement in the 2018 Italian elections. However, its origin can be symbolically traced

* Full Professor of Constitutional Law, University of Turin.

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[1] J. J. ROUSSEAU (1762), *The Social Contract*, Book III, chapter 15.

[2] MONTESQUIEU (1762), *The Spirit of Laws*, 1748, Book II, chapter 2, and Book XI, chapter 6.

back to the political adventure undertaken in the United States almost thirty years ago by Ross Perot. The idea was to build a telematic network connecting every American citizen directly and continuously to the federal government. Thanks to this disruptive approach, Perot obtained 19 per cent of the vote in the presidential elections in 1992, becoming the most successful independent candidate in recent history.

To be honest, analysis of concrete experiments such as Germany's Piraten (Pirate Party) shows that virtual tools do not facilitate political participation; on the contrary, they reinforce the dynamics of real-life situations[3]. That is demonstrated by the phenomenon of so-called echo-chambers[4]; that is, the structuring of social media in closed environments whereby users continuously receive confirmation of their (pre)judgements by interacting exclusively with people who have the same ideas.

However, the real shortcoming of direct democracy is not practical but conceptual. As Norberto Bobbio maintained, «nothing kills democracy more than an excess of democracy»[5]. The meaning is evident: public institutions cannot operate by constantly submitting to the people decisions that cause social division. Universal suffrage determines the recognition and the affirmation of pluralism and diversity in contemporary societies, which require the careful and constant search for solutions of balance, in order to allow different political, economic, and cultural components to coexist peacefully. Indeed, the never-quite-dormant risk of political unity's dissolution into fratricidal plurality needs to be kept under control. As Giovanni Sartori argues, while direct democracy, seeing «politics as war», triggers a «zero-sum» game in which «whoever wins, wins all; whoever loses, loses everything», representative democracy, seeing «politics as negotiation», produces a «positive-sum» game in which, thanks to mediation, everyone gains something[6].

A decision taken directly by the people, even by computer vote, cannot therefore be considered genuinely democratic. The mere numerical composition of individual preferences does not build bridges between the different components of society; on the contrary, it builds walls. A system of this sort represents the tyranny of the majority, not democracy. Only through public discussion can personal opinions cease to be idiosyncrasies and become comparable in view of thought-out decisions supported by broad consensus. As Gustavo Zagrebelsky wrote, «in order for the law not to be violent and, therefore, not to contradict the very idea of law ... it is necessary to persuade the other party, the one that did not participate in determining the

[3] C. KOSCHMIEDER, *Do More Opportunities for Participation Imply More Democracy? The Case of the German Pirate Party*, in *Teoria Política,* no. 5 (2015): 32.

[4] W. QUATTROCIOCCHI, A. SCALA, C. R. SUNSTEIN, *Echo Chambers on Facebook*, in *John M. Olin Center for Law, Economics, and Business Discussion Paper,* no. 877 (2016).

[5] N. BOBBIO, *Democrazia rappresentativa e democrazia diretta*, in *Democrazia e partecipazione,* Guido Quazza Turin: Stampatori, 1978), 19–46.

[6] G. SARTORI, *Tecniche decisionali e sistema dei comitati*, in *Rivista Italiana di Scienza Politica,* n. 1/1974, 40.

content of the deliberation»[7]. This requires, at the very least, a sincere attempt at persuasion.

The Trilateral Commission's well-known 1975 report on the «excess of democracy» in Western societies was precisely against this concept[8]. The report, presented in conjunction with the explosion of the fiscal crisis of the state, revolved around the thesis that parliamentary democracy had gone too far in its efforts to satisfy citizens' numerous demands for protection; the tax burden on the richest had grown disproportionately, taking resources away from the free unfolding of economic dynamics. The proposed solution was to reduce the role of political parties. This was been done.

The result is that the dismantling of structured political formations – with a strong anti-establishment connotation, in the name of the citizen's sovereignty – has not increased the power of citizens, but has exacerbated the oligarchic tendency of political systems. Parties, deprived of activists and ideals, have lost their ability to act as instruments of mediation between society and institutions. They have turned into electoral cartels aimed at conquering power on behalf of narrow governing circles. Indeed, from the perspective of these circles, parties never had so much power: they structure political competition, conduct electoral campaigns, select elected political staff, and appoint the holders of government posts and all other public offices[9].

There is one constant that characterizes these phenomena: the idea that all individuals know what is preferable for them. It is the rhetoric of individual sovereignty, carved into the collective memory by Margaret Thatcher's lie: «society does not exist; only individuals exist»[10]. In reality, far from valuing individuals, this vision leads to the creation of a community of isolated subjects left to their own devices. Hans Kelsen anticipated the risks of breaking down society into individual monads: «It is a well-known fact that, because he is unable to achieve any appreciable influence on government, the isolated individual lacks any real political existence. Democracy is only feasible if, in order to influence the will of society, individuals integrate themselves into associations based on their various political goals. Collective bodies, wich unite the common interests of their individual members as political parties, must come to mediate between the individual and the state». From this perspective, he added, «there can be no serious doubt that efforts … to discredit political parties both theoretically and juristically constituted an ideologically veiled resistance to the realization of democracy»[11]. Sharing the same view, Robert Michels

[7] G. ZAGREBELSKY, *Intorno alla legge. Il diritto come dimensione del vivere comune*, Einaudi, Torino, 2009, 27.

[8] M. CROZIER, S. P. HUNTINGTON, J. WATANUKI, *The Crisis of Democracy: Report on the Governability of Democracies to the Trilaterial Commission*, New York University Press, New York, 1975.

[9] A. MASTROPAOLO, *Crisi dei partiti o decadimento della democrazia*, in *Costituzionalismo.it*, 23 May 2005.

[10] *Woman's Own*, 23 September 1987.

[11] H. KELSEN, *The Essence and Value of Democracy,* edited by N. Urbinati, C. Invernizzi Accetti and translated by B. Graf, Rawman & Littlefield, Lanham, 2013 (orig. ed. 1929) and H. KELSEN, *Das Problem*

observed that «democracy is inconceivable without organization» and added that organization «is the weapon given to the weak in the struggle against the strong, a struggle that can only be developed on the terrain of solidarity between associates»[12]. This is exactly what terrified Margaret Thatcher: that the weakest would draw strength from their union.

Finally, political representation remains an irreplaceable tool: insofar as they are called upon to represent the nation in its entirety, and not small groups of voters who elected them, only representatives can set themselves the objective of building consensus by identifying and realizing the general interest. Anyone else could only act in a private capacity; that is, letting their own particular interest prevail over others, even if it is supported by a numerical majority.

The presence of collective entities such as parties remains an essential instrument of political and social integration. Indeed, parties are bearers of one of many possible worldviews proposed to society as desirable political ideals. They can make available to their members a "political capital" competitive with that of parties available to those who have their own economic and cultural resources. If able to interpret their role correctly, parties operate as parts that address the whole; that is, as subjects intrinsically open to compromise. In this way, while competing with each other, they operate as instruments of unification of a social body that is increasingly varied and in danger of being torn apart. As Kelsen, again, wrote: «compromise is part of democracy's very nature». In addition: «insofar as in a democracy the contents of the legal order, too, are not determined exclusively by the interests of the majority, but are the result of a compromise between two groups, voluntary subjection of all individuals to the legal order is more easily possible than in any other political organization»[13].

This is the benchmark. Direct democracy fascinates because it gives us the illusion that we can be governed by ourselves. In reality, it exposes us to the risk of domination by an opposing majority. Representative democracy protects us from this risk, because it is the only system capable of producing collective decisions in such a way that they are «the result of the maximum of critical consensus and the minimum of imposition»[14]. If the democratic crisis stems from the failure to involve citizens in decisions that affect them, direct democracy, far from being the cure, risks embodying its most acute and conclusive phase.

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des parlamentarismus, W. Braumüller, Vienna-Leipzig, 1924.

[12] R. MICHELS, *La sociologia del partito politico nella democrazia moderna*, il Mulino, Bologna, 1966, orig. ed. 1911).

[13] H. KELSEN, *General Theory of Law and State*, New Brunswick, NJ, and London: Transaction Publications, 2006, orig. ed. 1945, 288.

[14] M. BOVERO, *Contro il governo dei peggiori. Una grammatica della democrazia*, Laterza, Roma-Bari, 2000, 54 f.

Nadia Maccabiani[*]

Knowledge and Power Between Direct and Representative Democracy[**]

SUMMARY: 1. Premise – 2. Setting the background: disintermediation as shared ambition – 3. Setting the benchmark: knowledge as public good – 4. Setting the hidden: power – 5. Setting the goal: reconciling knowledge and power – 6. Setting the means: legal safeguards – 7. A short "final" belief.

ABSTRACT: ***In a period like the one we are experiencing, where the possibility to influence and manipulate knowledge and – as a consequence – public opinion has achieved a pervasive and extended potency far beyond that of the past, some legal priorities should be set and complied with before dealing with representative as well as direct democracy. Strengthening voters' awareness is crucial, and in particular, establishing legal tenets aimed at protecting and improving their information environment. Such an implementation firstly urges for direct democracy, given its ability to produce immediate "legally binding choices" devoid of any previous formalised intermediation, made of discussions, debates and deliberation by competent representative bodies; but it equally urges for the healthiness of representative democracy.***

1. *Premise*

My intervention follows those of prof. Francesco Pallante and Dr. Riccardo Fraccaro (former Italian Minister for parliamentary relationships and direct democracy), thus it takes stock of the conclusions that they have, finally, shared.

Despite their different starting points, whether skeptical of direct democracy (prof. Pallante) or supportive of it (Dr. Fraccaro), throughout the debate they have converged on a shared perspective: direct democracy is not meant to be a replacement for representative democracy, since both of them are intended to interact for mutual improvement. It seems to me that this conclusion aligns well with the fundamental principle stated in Article 21 of the 1948 Universal Declaration of Human Rights[1], where representative and direct democracy complement one another[2].

Following this interpretation, prof. Pallante's advocacy for a genuine representative democracy, grounded on social pluralism, discussion, equality, compromise between conflicting interests and, as a consequence, fostering solidarity[3], can be complemented and integrated by the proposal of constitutional review of articles 71 and 75 of the

[*] Associate Professor of Public Law, University of Brescia.

[**] This contribution is subject to a peer review process according to the Journal's Regulations.

[1] According to Article 21 of the Universal Declaration on Human Rights «Everyone has the right to take part in the government of his country, directly or through freely chosen representatives».

[2] M.C. GRISOLIA, *Democrazia Diretta e Rappresentativa,* in *Osservatorio sulle fonti,* n. 2/2019, 2.

[3] F. PALLANTE, *Contro la democrazia diretta,* Giulio Einaudi Editore, Turin, 2020, 128-130.

Italian Constitution. This proposal was submitted during the Conte Government mandate (in which Dr. Fraccaro participated) and aimed, among other things, at introducing a legally binding referendum on a popular legislative initiative conditioned upon the non-approval of the proposal by the Parliament within a specific time-limit or its substantial modification[4].

Bearing this premise in mind, my perspective can be deemed an *a priori* stance for both representative as well as direct democracy tools. Specifically, it is intended to focus on certain legal safeguards that – especially in nowadays' digital society – should be established and reinforced to make democracy (whether direct or representative) function on the basis of voters' undistorted knowledge and awareness. This must hold *a fortiori* true when the specific goal is the enhancement of certain institutions, such as referenda, which are intended to deliver legally binding choices to the electorate. If we do not first tackle today's amplified risk that voters' opinions can be manipulated, then there may be additional risks to representative and direct democracy.

2. *Setting the background: disintermediation as shared ambition*

«The allure of direct democracy is undeniable»: this is the opening statement of prof. Pallante's book[5]. According to the Author, "cultural change" drives calls for strengthening the tools of direct democracy against traditional institutions of representative democracy. This cultural shift is characterised by a robust individualistic paradigm[6], underpinned by certain international and supra-national ideological influences[7] leading to a distrust of political parties and constitutional institutions. The Author terms this process as a disintermediation[8], resulting in the proliferation of plebiscitarian and populistic approaches[9].

Reflecting on Pallante's book, it becomes evident that delving into the realm of direct democracy poses a slippery slope. This is due to the exposure of direct

[4] A.S. No. 1089 and A.C. No. 1173, XXXVIII Legislature.

[5] F. PALLANTE, *Contro la democrazia diretta,* cit., 3.

[6] F. PALLANTE, *Contro la democrazia diretta,* cit., 35.

[7] F. PALLANTE, *Contro la democrazia diretta,* cit., 31 ff., makes reference to some signals of a certain liberal approach aimed at reducing State's intervention, such as Ronald Reagan's Inaugural Address, according to which the government is a problem and not a solution to our problems; Margaret Thatcher 1987's interview to Woman's Own, in which the Prime Minister stated that such a thing like society does not exist; the entry into force of the Maastricht Treaty; the 1975's Trilateral Report on the Crisis of Democracy.

[8] F. PALLANTE, *Contro la democrazia diretta,* cit., 74. According to the Author "disintermediation" means removing filters, simplifying steps, and breaking down barriers. Removing everything that, by intervening in the middle, prevents the two ends of the chain - economic, political, cultural - from entering into direct relationship. Technological development has been the driving force behind this phenomenon that started in the economic domain (from producer directly to consumer) and extended to the political and cultural field (from governor directly to governed, from teacher directly to student).

[9] F. PALLANTE, *Contro la democrazia diretta,* cit., 121 ff.

democracy tools to potential misuse, leading to what scholars have identified as «democratic backsliding»[10]. Various instances of this phenomenon can be cited. Notably, referenda have been wielded by Heads of State in order to consolidate their autocratic regimes, such as the cases of Turkey in 2017, Russia in 2020 and Tunisia in 2022[11]. Moreover, referenda have been employed to exploit certain people's fears, as seen in the case of Brexit. Additionally, referenda have been used to rekindle waning political consent, as evidenced by President Macron's initiative to relaunch the discussion on the review of the constitution in reference to the scope of referendum[12]. In this regard, the manipulative potential inherent in referendums is not a novel concept: it echoes what social scientists have already evidenced[13] and denounced[14]. In a few words, as emphasized once again by prof. Pallante, the power to submit the question is far more potent than the power to provide the answer[15].

Against this backdrop, the promise underlying direct democracy can't be fully realized. Direct democracy is championed for disintermediation and, as a consequence, for self-determination by people. However, as the mentioned cases illustrate, this promise of disintermediation can prove to be illusory.

In this regard, the contemporary aspirations for disintermediation have been fuelled by the internet, which has not only radically transformed the general landscape of freedom of expression and the right to information[16] but has also entered the realm of political rights through the concept of digital democracy[17]. Nevertheless, the internet has evolved over the years, and from its initially decentralized configuration, a «new middleman», aptly described by Eli Pariser, has emerged[18]. Thus, the ambition for decentralization and disintermediation is a common point between direct democracy and freedom of expression and information, but it also underlies a shared illusion. This is because new forms and channels of intermediation have taken shape and run alongside the pathways of the internet, giving rise to amplified and more subtle possibilities of influencing both freedom of expression and information, as well

[10] S. HAGGARD, R. KAUFMAN, *Backsliding: Democratic Regress in the Contemporary World*, Cambridge University Press, Cambridge, 2021.

[11] As reminded by M.A. COHENDET, *Il est plus que temps d'établir le référendum d'initiative citoyenne,* in *Le Monde,* October 11th, 2023.

[12] L. BOICHOT, *Référendum: Emmanuel Macron avance avec prudence,* in *Le Figaro,* October 5th, 2023 ; Editorial, *Le relance ambiguë du référendum,* in *Le Monde,* October 6th, 2023.

[13] C. M. KNEIER, *Misleading the Voters in Initiative and Referendum Elections in Cities*, in *DePaul Law Review*, vol. 8, n. 1/1958, 36 ff.

[14] A. LIPJHART, *Democracies: patterns of majoritarian and consensus government in 21 countries*, Yale University Press, Yale, 1984, 197 ff.

[15] F. PALLANTE, *Contro la democrazia diretta,* cit., 98.

[16] It is telling the expression "we are all journalists", see A. LAURO, *Siamo tutti giornalisti? Appunti sulla libertà di informazione nell'era social,* in *MediaLaws,* No. 2/2021, 1 ff.

[17] On the topic, P. COSTANZO, *La democrazia digitale (precauzioni per l'uso),* in *Diritto Pubblico,* No. 1/2019, 71 ff.

[18] E. PARISER, *The Filter Bubble: What the Internet is Hiding From You*, Penguin Press, New York, 2012, 59 ff.

as the subsequent exercise of political rights through direct democracy or representative democracy tools. Consequently, a preliminary response can be offered to the following question: «Whether the design of the internet will ultimately support a high degree of freedom, as was offered by the first generation of internet, or will evolve toward a system that amplifies power in the hands of the state and a concentrated class of private actors»?[19]. The risk that we are currently experiencing leans towards the latter (concentration of power in the hands of state and private actors). This is why some priorities should be set in order to protect the internet against these new and pernicious forms and channels of intermediation, influence and persuasion.

3. *Setting the Benchmark: Knowledge as Public Good*

Our starting point and baseline align with the perspective that considers «information [a]s a "public good", in a technical sense used by economists: when one person knows something, others are likely to be benefited as well»[20]. This is the reason why, traditionally, specific legal safeguard has been implemented in order to preserve independent and plural news media, since they contribute to shaping public opinion, help people to make informed choices, and play a crucial role in the correct functioning of our democratic societies[21]. According to this standpoint, information is beneficial for the public interest[22]. However, a double challenge has emerged in the face of this benchmark, leading information and knowledge to be conceived like toxic elements in our daily life.

On the one hand, it is well known that we're currently facing an «infodemic» period, originally conceptualized to refer to misinformation but later extended to a broader phenomenon, involving the overload of online information[23], without

[19] Y. BENKLER, *Degrees of Freedom, Dimensions of Power,* cit., 19.

[20] C. SUNSTEIN, *#republic – Divided democracy in the age of social media,* Princeton University Press, Princeton, 2017, 147.

[21] As stated by the European Media Freedom Act, par. 1: «independent media, and in particular news media, provide access to a plurality of views and are reliable sources of information to citizens and businesses alike. They contribute to shaping public opinion and help people and companies form views and make informed choices. They play a crucial role in preserving the integrity of the European information space and are essential for the functioning of our democratic societies and economies. With digital technologies, media services can increasingly be accessed across borders and through various means, while competition in the digital media space is increasingly international. The European Union is already a global standard setter in this field, with this proposal further strengthening and organising the European information space».

[22] For an overview of the relationship between the freedom of expression and its "social function", see I. SPADARO, *Il contrasto allo Hate Speech nell'ordinamento costituzionale globalizato,* Giappichelli, Turin, 2020, 19 ff.

[23] S. C. BRIAND, M. CINELLI et al., *Infodemics: a new challenge for public health,* in *CellPress,* No. 184/2021, 6010, underline that «Our grasp of what an ''infodemic'' is and how it happens is still shallow

distinguishing between disinformation, misinformation and malinformation[24]. In addition to this already problematic information environment, when shifting the focus to the political and electoral sphere, it is worth recalling what social sciences have stressed: most of residents in democratic countries show little interest in politics and lack a detailed knowledge of even major policy debates, consequently «they are mirrors of the parties, not masters»[25]. If this insight is translated into the "infodemic" habitat, it may result in further dangerous consequences, because information is spread to voters that are not endowed with the adequate awareness and understanding, due to their incapacity to process huge amount of data and – in any case – due to their lack of interest in politics and political issues or their superficial interest in them. These are all ingredients that make voters easier victims of disinformation and manipulative intentions.

On the other hand, today knowledge and information not only encompass media news about external factors and, broadly speaking, what is happening in the world, but they also involve in-depth knowledge of subjective habits of a single person, irrespective of her public notoriety. As highlighted by Floridi, society is experiencing a status of «inforgs» that conduct an «onlife» and are thus part of the virtual environment in which their digital identity is shaped[26]. Their online behaviour is easily tracked by cookies and other technological tools aimed at profiling people, according to their preferences and interests. Consequently, the ability to assess and foresee «aspects concerning the data subject's performance at work, economic situation, health, personal preferences or interests, reliability or behaviour, location or

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and evolving. A possible reason for the mist around the term ''infodemic'' may reside in its very nature of an intuitive umbrella term that, however, includes many ramifications ranging from communication to epidemiology and that links to several open scientific debates such as that on misinformation spreading and its effects on society… However, misinformation does not fully capture the complexity of the phenomenon, which seems to be strongly related to the evolving business model of information dissemination, currently dominated by social media. In light of this, ''infodemic'' was redefined as an overabundance of information—some accurate and some not—».

[24] M.F. COMMON, R.K. NIELSEN, *Submission to UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression – Report on disinformation*, February 15ht, 2021, that refer disinformation to «false information that is created and spread, deliberately or otherwise, to harm people, institutions and interests»; misinformation to «false or misleading information, spread without intent to harm», and malinformation to «information that is not false, but strategically used with intent to harm». According to these Authors «behaviours and forms of expression discussed under the heading disinformation often overlap with misinformation… and malinformation… and with wider discussions under the imprecise and misleading but frequently used term "fake news"», thus «the lack of conceptual clarity in defining the problem, and frequent lack of substantial agreement what exact kinds of behaviour and content are problematic, are… parts of the problems we face in addressing these problems».

[25] C.H. ACHEN, L.M. BARTELS, *Democracy for Realists: Why Elections Do Not Produce Responsive Government*, Princeton University Press, Princeton, 2017, 297.

[26] L. FLORIDI, *La quarta rivoluzione – Come l'infosfera sta trasformando il mondo,* Raffaello Cortina Ed., Milan, 2017, 45 ff.

movements»[27], has been significantly enhanced due to the combination between big data, algorithmic programmes, and computational power: the three key components of Artificial Intelligence systems[28].

The combination of both the aforementioned aspects results in a distortion of the original beneficial benchmark set for information and knowledge conceived as "public goods". It gives rise to an increased potential for manipulation, thus the implementation of additional legal tenets is required. More specifically, these legal safeguards should tackle manipulation and promote more authentic knowledge for the betterment of democratic processes. While they may not necessarily bring about a cultural change in people's relationship with the digital environment and politics, they could nonetheless prove useful.

In this context, it is not question to adopt a "paternalistic" approach that may lead to a risk of censorship and a consequent further reduction in autonomous self-determination, but rather to endow people with a series of procedural and substantial protections, edified upon fundamental principles of transparency, equality and human dignity. They are deemed to trigger and leverage people's awareness and understanding when facing information in general or politics and political choices in particular. This becomes especially relevant given the implied potential consequences for the general interest, particularly when utilizing direct democracy instruments.

4. *Setting the Hidden: Power*

Two starting points should be established, the first involves a formal definition of the concept of power and the second addresses the relationship between this latter and the previously addressed concept of knowledge (§ 3).

Regarding the former, the concept of power implies «the capacity of an entity to alter the behaviours, beliefs, outcomes, or configurations of some other entity. Power, in and of itself, is not good or bad; centralization and decentralization are not good or bad, in and of themselves»[29].

Concerning the latter, the mutual relationship between knowledge and power has been well described by M. Foucault, who highlighted the existence of disciplinary

[27] Recital No. 71 of the GDPR.

[28] For an in-depth overview of Artificial Intelligence systems, see S. RUSSELL, P. NORVIG, *Artificial intelligence – A Modern Approach*, Hoboken, 2021, 22 ff.

[29] Y. BENKLER, *Degrees of Freedom, Dimensions of Power,* cit., 20. The Author follows by precising that «Centralized power may be in the hands of the state (legitimate or authoritarian) or big companies (responsive and efficient or extractive), and decentralized power may be distributed among individuals (participating citizens, expressive users, entrepreneurs, or criminals) or loose collectives (engaged crowds or wild mobs). To imagine either that all centralized power is good and all decentralized power is criminal and mob-like, or that all decentralized power is participatory and expressive and all centralized power is extractive and authoritarian is wildly ahistorical».

institutions that play a significant role in this dynamic[30]. Consistently, our Country's Constitutional Fathers have underlined the fundamental importance of education, defining schools as essential constitutional bodies, aimed at improving knowledge[31], which forms the foundation of human development and facilitates social, economic and political participation[32].

Today, knowledge flows throughout new forms and channels that are featured by an increased "power" on people, due to the more effective possibilities of influencing their behaviours and choices[33]. These new channels and forms are embodied by both, emerging technologies and new insights delivered by behavioural sciences, that interact in a mutual supportive way, as we'll try to explain in the following.

On the one hand, the increased subjective knowledge of people and the linked ability to target them with information that are tailored to their preferences and interests, have led to phenomena like filter bubbles, echo chambers, and polarization[34]. According to evidence of social studies, people tend to seek information that confirms their existing opinions. This tendency makes them susceptible to being captured and confined within filter bubbles and echo chambers[35], which, in turn, intensify polarization between conflicting perspectives. These insulated environments hinder meaningful interactions and prevent a constructive exchange of opinions aimed at deliberation and compromise.[36]. The 2023's World Economic Forum's Global Risk Report aligns with this view, stating that «"Misinformation and disinformation" are, together, a potential accelerant to the erosion of social cohesion as well as a consequence. With the potential to destabilize trust in information and political

[30] M. FOUCAULT, *Surveiller et punir*, in M. FOUCAULT (eds.), *Oeuvres II*, Gallimard, Paris, 2015, 261 ff.

[31] P. CALAMANDREI, *Address at the III Conference of the Association for the Defense of the National School*, March 11th, 1950, in *Scuola democratica*, Rome, No. 2/1950, 1 ff.

[32] See Articles 2-3 of the Italian Constitution.

[33] For the relationship between different forms of power and freedoms, as well as the qualification of ICT as today's main filter for getting access to information, see F. PARUZZO, *I sovrani della rete. Piattaforme digitali e limiti costituzionali al potere privato,* Edizioni Scientifiche Italiane, Naples, 2022, 109 ff.

[34] The proposal for a Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising – COM(2021) 731 final, par. 1, underlines that «Personal data collected directly from citizens or derived through their online activity and behavioural profiling and other analysis are used to target political messages to citizens by directing advertisements to groups and to amplify their impact and circulation by tailoring the content and its dissemination on the basis of characteristics determined through the processing of these personal data and their analysis, all this has been observed to have specific negative effects on citizens' rights including their freedoms of opinion and of information, to make political decisions and exercise their voting rights».

[35] E. Pariser, *The Filter Bubble: What the Internet is Hiding From You*, cit., 77 ff.

[36] C. SUNSTEIN, *#republic – Divided democracy in the age of social media,* cit., 71, underlines that «social media make it easier for people to surround themselves (virtually) with the opinions of the like-minded others and insulate themselves from competing views. For this reason alone, they are a breeding ground for polarization, and potentially dangerous for both democracy and social peace».

processes, it has become a prominent tool for geopolitical agents to propagate extremist beliefs and sway elections through social media echo chambers»[37].

Against this backdrop, it goes without saying that if information has always been featured by a manipulative potential, today's technological instruments have increased such an ability. Not only because much more data about subjects is in circulation, not only because this enables deeper knowledge and understanding of human behaviour, but also because such deeper knowledge is functional to more targeted messages and information that – in turn – have higher probability to achieve and impact a person's belief, due to their customization. This heightened "power of influence" is not limited to public authorities in their relationship with citizens, it also extends to corporations providing internet services, particularly Big Techs and Gatekeepers. They too, like public authorities, they own huge amount of data about people, they own the digital tools aimed at profiling, targeting them, and shaping online information. Scholars have even started to describe them as authentic "private powers"[38]. According to this perspective, power is no longer limited within a vertical dimension, having also gained a horizontal dimension, due to the possibility of the internet service providers to shape information, public debate and – as a consequence – public opinion.

More specifically, such a situation has never occurred before, at least with such pervasiveness and amplitude: big online platforms, operating in a sensitive space (the "free marketplace of ideas"), are able to influence in such an effective and efficient way the public debate, becoming substantially and «*de facto*, a *latu senso* political power»[39].

On the other hand, and in addition, the possibility of gaining influence on people has also been supported by evidence from behavioural sciences. These sciences have demonstrated that individuals are subject to cognitive biases, leading them to rarely behave in a rational manner; they do not act like *homo economicus* but rather like *homo sapiens*. These sciences have also revealed that the implementation of specific tools (default rule, social norms, framing effect, information design, simplification) can leverage cognitive processes and guide human beings toward adopting certain choices and behaviours over others[40]. This has been described by the nudge theory which entails the possibility to gently push and steer people's behaviour towards what is deemed to align with their personal well-being from their subjective standpoint, while preserving their freedom of choice due to the absence of negative or positive sanctions (i.e., punishment or reward). This theory has given rise to the approach

[37] World Economic Forum's *Global Risk Report* – 2023, 24:

[38] O. POLLICINO, *Potere Digitale,* in M. CARTABIA, M. RUOTOLO (eds.), *Enc. del Diritto,* I tematici V, 2023, 410 ff.

[39] O. POLLICINO, *Potere Digitale,* cit., 411.

[40] For an in-dept overview of the cognitive biases that affect people and the tools elaborated by behavioural sciences in order leverage cognitive processes, see L. SIBONY, A. ALEMANNO (eds.), *Nudge and the Law – A European Perspective,* Hart Publishing, Oxford, 2015.

known as libertarian paternalism[41]. Once again, it goes without saying that the power of nudging is nowadays amplified by the digital reality. This is why scholars have begun discussing a hypernudge[42], which represents a form of nudging with increased potential due to the automatic processing of big amount of data by sophisticated algorithmic programmes. This allows for further personalizing the design of the message and enhancing its steering purposes concerning human behaviour. In this context, doctrine has identified three major features of hypernudges, enhancing traditional nudges: dynamism, predictive capacity, and hiddenness[43].

What has been briefly described above outlines the scale and scope of the risks that public opinion faces and their harmful potential for political and electoral processes, including both representative and direct democracy arenas. To underscore this point, it suffices to remind us of the Cambridge Analytica and the Brexit[44] cases in order to be aware of the efficacy of political and electoral microtargeting in shaping voters' choices[45].

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[41] R.H. THALER, C.R. SUNSTEIN, *La spinta gentile – La nuova strategia per migliorare le nostre decisioni su denaro, salute, felicità,* Feltrinelli, Milan, 2009, 11.

[42] This term was introduced by K. YEUNG, '*Hypernudge': big Data as a mode of regulation by design*, in *Information, Communication & Society*, vol. 20, No. 1/2017, 118. The Author observes that (119): « By configuring and thereby personalising the user's informational choice context, typically through algorithmic analysis of data streams from multiple sources claiming to offer predictive insights concerning the habits, preferences and interests of targeted individuals (such as those used by online consumer product recommendation engines), these nudges channel user choices in directions preferred by the choice architect through processes that are subtle, unobtrusive, yet extraordinarily powerful».

[43] S. MILLS, *Finding the Nudge,* in *Technology in Society,* vol. 71, 2022, 11 ff. The Author evidenced that not all personalised nudges are necessarily big data nudges, or indeed, hypernudges. The proper feature of hypernudge is its real-time (re)configuration and predictive capacity. The former implies «The rapidity of change, [that] represents an important distinction between nudges and hypernudges. So too does the way in which hypernudges can change». The latter, implies that a multitude of data streams are processed through «a broad, behavioural informatics infrastructure and computational resources to produce useful and actionable insights» (4).

[44] For a description of these cases and others such as Brazil and India, see F. PARUZZO, *I sovrani della rete. Piattaforme digitali e limiti costituzionali al potere privato,* cit., 45 ff.. The Author also underlines that in substance the vote reflects the sort of awareness that a person, in a certain moment, has of the daily world life, consequently it can be deemed free only when it stems from a personal comprehensive interpretation of the daily world reality.

[45] E. CATERINA, *La comunicazione elettorale sui social media tra autoregolazione e profili di diritto costituzionale,* in G. DI COSIMO (eds.), *Processi democratici e tecnologie digitali,* Giappichelli, Turin, 2023, 23, in drawing the distinction between traditional political advertising in electoral period and that on online platforms, the Author points on microtargeting as one of the main relevant differences. L. CIANCI, *Il diritto ad essere informati alla prova delle strategie di microtargeting per la comunicazione politica,* in *Nomos – Le attualità nel diritto,* No. 1/2023, 1 ff., observes that in our Country, notwithstanding the close relationship between fundamental rights such as freedom of expression, the right of information and the right to vote, some legislative provisions about online political communication still lack. The European Union has advanced a Proposal for a Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising – COM(2021) 731 final, where it has been clearly stated (recital No. 5) that «Given the power and the potential for the misuse of personal data of targeting, including through microtargeting and other advanced techniques, such techniques

In essence, as articulated by the European Commission: «our democratic systems and institutions have come increasingly under attack in recent years. The integrity of elections has come under threat, the environment in which journalists and civil society operate has deteriorated, and concerted efforts to spread false and misleading information and manipulate voters, including by foreign actors have been observed. The very freedoms we strive to uphold, like the freedom of expression, have been used in some cases to deceive and manipulate»[46]. As a consequence, «given the power and the potential for the misuse of personal data of targeting, including through microtargeting and other advanced techniques, such techniques may present particular threats to legitimate public interests, such as fairness, equal opportunities and transparency in the electoral process and the fundamental right to be informed in an objective, transparent and pluralistic way»[47].

Therefore, «in a world where much of the public debate and political advertising has moved online, we must also be prepared to act to forcefully defend our democracies. Citizens want meaningful answers to attempted manipulations of the information space, often in the form of targeted and coordinated disinformation campaigns. Europe needs greater transparency on the ways in which information is shared and managed on the internet»[48]. Consistently, the European proposal of regulation on political advertising has expressly envisaged profiling and targeted political messages as goals to be tackled.

As a result, it is the pathways that new digital powers are navigating that needs to be fixed in order to preserve the benchmark and baseline of voters' self-

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may present particular threats to legitimate public interests, such as fairness, equal opportunities and transparency in the electoral process and the fundamental right to be informed in an objective, transparent and pluralistic way».

[46] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the *European Democracy Action Plan* - COM(2020) 790 final, par. 1. The Communication also admits clearly that «The digital revolution has transformed democratic politics. Political campaigns are now run not only on the doorstep, billboards, radio waves and TV screens, but also online. This gives political actors new opportunities to reach out to voters. It also brings new opportunities for civic engagement, making it easier for some groups — in particular young people — to access information and participate in public life and democratic debate. However, the rapid growth of online campaigning and online platforms has also opened up new vulnerabilities and made it more difficult to maintain the integrity of elections, ensure a free and plural media, and protect the democratic process from disinformation and other manipulation. Digitalisation enabled new ways to finance political actors from uncontrolled sources, cyber-attacks can target critical electoral infrastructure, journalists face online harassment and hate speech, and false information and polarising messages spread rapidly through on social media, also by coordinated disinformation campaigns. The impact of some of these steps is amplified by the use of opaque algorithms controlled by widely used communication platforms» (par. 1).

[47] COM(2021) 731 final, recital No. 5.

[48] Cfr. the Communication of the European Commission, *Shaping Europe's Digital Future,* Publication Office of the European Union, Luxembourg, 2020, 6.

determination[49]. In this respect, it is pivotal to repeat that attempts to influence voters are nothing new; however, what is novel is their scale and scope, which, in turn, necessitate innovative safeguards.

5. *Setting the Goal: Reconciling Knowledge and Power*

Due to this mutual implication between knowledge and power it is evident that the interests at stake revolve around democratic processes and national sovereignty. In this respect, digital services and artificial intelligence systems work as multipliers of the connection between knowledge and power, perpetuating a vicious circle. Increased subjective knowledge strengthens the power's ability to manipulate and steer public opinion; while the proliferation of (digital) channels of power reinforces both pathways of knowledge and the subtle modes of power exercise.

Against this background, it holds true, as stated by scholars, that an enhanced digital education aimed at underpinning both digital literacy and understanding, is a crucial and initial step. This step is necessary to raise people's awareness in order to preserve, protect, and strengthen self-determination and freedom of thought, particularly concerning the functioning of democracy and democratic choices[50]. However, cultural change needs to be complemented by further actions. Given that platforms play a significant role in shaping individual self-determination, regardless of whether the player behind them is a public or private entity, [51], doctrine has called for an institutionalization of the public sphere. This institutionalization should rely upon regulations that lay down the legal tenets of communication interaction[52].

In this regard, a primary question pertains the level of such a regulatory intervention. It can't be confined to the national level, because of multiple reasons. Not only due to the inherent "architecture" of the internet itself, that spans globally; not only because internet service providers cut across national boundaries; but also because there is growing evidence of interference of foreign "powers" in all

[49] The President of the Italian Republic has also raised concerns about the risks associated with the intersection of democratic rights and artificial intelligence systems in his 2023's end-of-year address. He pointed out that «The path to be followed is paved by freely going to the polls. Not by taking part in a survey or appearing on the social media. Because exercising freedoms is what forms a democracy. And those who hold public offices – at all levels – must always ensure such freedoms. These freedoms must be independent of abusive control by those who can claim to direct public sentiment by managing artificial intelligence or power»: cfr. End of year message from the President of the Republic, Sergio Mattarella, December 31st, 2023, in https://www.quirinale.it/elementi/103913.

[50] As claimed by *Rapporto 2023. La conoscenza nel tempo della complessità. Educazione e formazione nelle democrazie del XXI secolo*, Il Mulino, Bologna, 2023.

[51] As stressed by L. AMMANNATI, *I 'signori' nell'era dell'algoritmo,* in *Diritto Pubblico,* No. 2/2021, 407, digital private powers, more specifically Big Techs, have replaced public powers in the exercise of certain functions and contribute to re-shape the public sphere.

[52] C. CARUSO, *Il tempo delle istituzioni di libertà - Piattaforme digitali, disinformazione e discorso pubblico europeo*, in *Quaderni costituzionali,* No. 3/2023, 543 ff.

democratic process in the European Union[53]. As well described by the European Parliament's resolution: «foreign interference, information manipulation and disinformation are an abuse of the fundamental freedoms of expression and information as laid down in Article 11 of the Charter and threaten these freedoms, as well as undermining democratic processes in the EU and its Member States, such as the holding of free and fair elections; whereas the objective of foreign interference is to distort or falsely represent facts, artificially inflate one-sided arguments, discredit information to degrade political discourse and ultimately undermine confidence in the electoral system and therefore in the democratic process itself»[54]. Consequently, the multifaceted and intertwined pillars on which modern constitutionalism relies upon, are at stake: not only freedom of expression and information, not only freedom of vote and the connected democratic processes, but also national sovereignty.

The European Union has proven to be aware of this, and has underlined the inadequacy of national intervention[55]: «The overall growth and particularly significant increase in relevant online services, in a context of unevenly enforced and fragmented regulation, has prompted concerns that the internal market is not currently equipped to provide political advertising to a high standard of transparency to ensure a fair and open democratic process in all Member States», due to the fact that «the cross-border nature of some of the activities, including in the online environment, creates significant challenges to purely national regulation in this domain. It is unlikely that Member States acting independently would be able to effectively address the identified problems. Moreover, the distinction between purely domestic and potentially cross-border situations is in practice difficult». Consequently, a European Union common standard should lead to beneficial results[56].

In this respect, the European Union has addressed the scale and scope of the implied issues, by introducing the comprehensive concept of «systemic risks», in the

[53] See the European Parliament resolution of 9 March 2022 on foreign interference in all democratic processes in the European Union, including disinformation (2020/2268(INI)).

[54] European Parliament resolution of 9 March 2022 on foreign interference in all democratic processes in the European Union, including disinformation (2020/2268(INI)), recital B. The following recital E, precises that «these attacks, which are part of a hybrid warfare strategy and constitute a violation of international law, mislead and deceive citizens and affect their voting behaviour, amplify divisive debates, divide, polarise and exploit the vulnerabilities of societies, promote hate speech, worsen the situation of vulnerable groups which are more likely to become victims of disinformation, distort the integrity of democratic elections and referendums, sow distrust in national governments, public authorities and the liberal democratic order and have the goal of destabilising European democracy, and therefore constitute a serious threat to EU security and sovereignty».

[55] COM(2021) 731 final, par. 1, observes that

[56] C. BERGONZINI, *"Prova a prendermi". Ecosistema digitale e consapevolezza degli utenti: uno spazio per la regolazione nazionale?,* in G. DI COSIMO (eds.), *Processi democratici e tencologie digitali,* Giappichelli, Turin, 2023, 100, claims that the adequate level of regulation for big data and algorithms is the European Union, possibly by means of direct applicable acts.

Digital Services Act[57]; as well as the concept of «high risk» for certain artificial intelligence systems, in the Artificial Intelligence Act[58].

In doing so, the DSA has identified multiple and multifaceted new «societal risks» that, beyond the dissemination of illegal content, include actual or foreseeable impact on the exercise of fundamental rights[59], *on democratic and electoral processes*, civic discourse, as well as public security, public health, physical and mental well-being and minors[60]. Thus, they have the potential to *undermine the core of democracy*[61], under different circumstances that influence their scale and scope. Firstly, they depend on the dimension of the platform or the search engine, due to the share of the European Union population that is active recipients of their services[62]. Secondly, risks not only stem from the use of online services, but also from their misuses by recipients, their design and way of functioning[63]. Thirdly, negative effects or impacts change significantly according to the number of persons affected, the potential irreversibility of the damages, or the difficulty to remedy and restore the situation prevailing prior to the potential impact[64].

In a similar way, the proposal of a Regulation on Artificial Intelligence systems[65], amended by the European Parliament, has admitted that *artificial intelligence can impact on democracy*[66] and has consequently classified "high risk" those systems that are intended to interfere with democratic processes[67].

Against this double awareness – acknowledging the scope and scale of the risks posed by the digital environment to democratic processes and the subsequent level of intervention– the European Union has embarked on its path ahead, as the following paragraph will attempt to address.

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[57] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act).

[58] Proposal for a regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (artificial intelligence act) and amending certain union legislative acts – COM(2021) 206 final.

[59] Such as human dignity, freedom of expression and information, including media freedom and pluralism, the right to private life, data protection, the right to non-discrimination, the rights of the child and consumer protection.

[60] Regulation (EU) 2022/2065, Recital No. 81-83.

[61] Ivi, Recital No. 104.

[62] Regulation (EU) 2022/2065, Recital No. 76.

[63] Ivi, Recital No. 79.

[64] Ivi, Recital No. 79.

[65] Proposal for a regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (artificial intelligence act) and amending certain union legislative acts – COM(2021) 206 final.

[66] Ive, Recital No. 1.

[67] Ivi, Recital No. 40 states as follows « *In order to address the risks of undue external interference to the right to vote enshrined in Article 39 of the Charter, and of disproportionate effects on democratic processes, democracy, and the rule of law, AI systems intended to be used to influence the outcome of an election or referendum or the voting behaviour of natural persons in the exercise of their vote in elections or referenda should be classified as high-risk AI systems.*»

6. *Setting the Means: Legal Safeguards*

As mentioned earlier, the focus of this intervention is on the mutual relationship between knowledge (information) and power, along with the resulting implications for democratic processes. Scholarly discussion has underlined the close and intertwined connection between digital services, algorithmic information, fundamental rights and electoral processes[68]. Therefore, as reiterated before, our goal is deemed to lay the basis of some "a priori" conditions for the improved functioning of both, direct and representative democracy. More specifically, this "a priori" relies upon some safeguards aimed at underpinning the basis on which voters build their opinions and consequently cast their votes.

For our specific and limited purposes, among various European initiatives, four have been selected: the Digital Market Act (DMA)[69], the Digital Services Act (DSA)[70], the proposal of Regulation on Artificial Intelligence (AIA)[71], the proposal of Regulation on political advertising[72] and the proposal called the European Media Freedom Act (EMFA)[73].

Rather than conducting a detailed examination of these acts, we will provide a brief overview of their main significant features, aligning with the goal of outlining the direction the European Union has taken to support "knowledge", the associated "political power", and the consequent democratic processes.

These acts share a minimum common denominator: their advocacy for transparency, accountability, "proceduralization" and pluralism. In this respect, it is worth recalling that such features have been defined by scholars as a new phase of digital constitutionalism in Europe[74]. A constitutionalism that is not only shaped – as in

[68] C. SCHEPISI, *Diritti fondamentali, principi democratici e rule of law: quale ruolo e quale responsabilità per gli stati nella regolazione dell'intelligenza artificiale,* in A. PAJNO, F. DONATI, A. PERRUCCI (eds.), *Intelligenza artificiale e diritto: una rivoluzione?,* vol. I, Il Mulino, Bologna, 2022, 208.

[69] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act)

[70] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act).

[71] Proposal for a regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (artificial intelligence act) and amending certain union legislative acts – COM(2021) 206 final.

[72] Proposal for a Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising – COM(2021) 731 final.

[73] Proposal for a Regulation of the European Parliament and of the Council establishing a Common Framework for Media Services in the Internal Market (European Media Freedom Act) and amending Directive 2010/13/EU, COM(2022) 457 final.

[74] G. DE GREGORIO, *Digital Constitutionalism in Europe – Reframing Rights and Powers in the Algorithmic Society,* Cambridge University Press, Cambridge, 2022, 67 ff.; O. POLLICINO, *Potere Digitale,* cit., 440. The latter significantly argues about a «due (data) process».

the past – by an axiological and substantial dimension but also by a procedural dimension[75].

In order to protect and promote transparency, the DSA mandates that very large online platforms and very large online search engines pay particular attention to how their services are used to disseminate or amplify misleading or deceptive content, including disinformation. Consequently, they are required to deploy the necessary means to diligently mitigate such systemic risks in observance of fundamental rights as well as in observance of the principle of due diligence, necessity and proportionality of the adopted remedies[76]. Additionally, online platforms that display advertising on their interfaces shall make clear for recipients that they are dealing with advertising and give all relevant information about it (included the natural or legal person on whose behalf the advertisement is presented, the person who paid for the advertisement, the main parameters used to determine the recipient to whom the advertisement is presented and, where applicable, about how to change those parameters)[77]. Moreover, online platforms that deploy recommendation systems shall set out in their terms and conditions, in plain and intelligible language, the main parameters used in such a system and the relevant options for the recipients of the service to modify or influence those main parameters[78]. These provisions are complemented by the Digital Market Act, that – in reference to gatekeepers[79] – asks for audited information about profiling techniques to be submitted to the European Commission and made publicly available[80].

[75] O. POLLICINO, *Potere Digitale,* cit., 439.

[76] Always in support of transparency and accountability, very large online platform and search engine are required to ensure public access to repositories of advertisements presented on their online interfaces to facilitate supervision and research into emerging risks determined by the distribution of advertising online, for example in relation to illegal advertisements or manipulative techniques and disinformation with a real and foreseeable negative impact on public health, public security, civil discourse, political participation and equality. These repositories include the content of advertisements, including the name of the product, service or brand and the subject matter of the advertisement, and related data on the advertiser, and, if different, the natural or legal person who paid for the advertisement, and the delivery of the advertisement, in particular where targeted advertising is concerned. This information should include both information about targeting criteria and delivery criteria (cfr. Article 39, DSA).

[77] Article 26, DSA.

[78] Article 27, DSA.

[79] The conditions to be fulfilled in order to fall under the categories of "gatekeepers" are set out by Article 3, Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

[80] As explained by recital No. 72 of the DMA, gatekeepers should provide an independently audited description of the basis upon which profiling is performed, including whether personal data and data derived from user activity in line with Regulation (EU) 2016/679 is relied on, the processing applied, the purpose for which the profile is prepared and eventually used, the duration of the profiling, the impact of such profiling on the gatekeeper's services, and the steps taken to effectively enable end users to be aware of the relevant use of such profiling, as well as steps to seek their consent or provide them with the possibility of denying or withdrawing consent. Consequently, Article 15, provides that «a gatekeeper

Furthermore, specific duties of transparency are tailored to political advertising as outlined in the relevant proposal[81]. This includes the identification of such messages in «in a clear, salient and unambiguous way… In this regard, political advertising publishers shall use efficient and prominent marking and labelling techniques that allow the political advertisement to be easily identified as such and shall ensure that the marking or labelling remains in place in the event a political advertisement is further disseminated»[82]. Information pertaining to the sponsor and the characteristics of each political advertisement must be disclosed. Additionally, when targeting and amplification techniques[83] are employed, further details should be provided to enable individuals to comprehend the underlying logic and main parameters of the technique used, as well as the utilization of third-party data and additional analytical techniques[84].

Regarding accountability obligations, the DSA takes some procedural steps mandatory for online platforms. Firstly, they are charged with the fulfilment of annual reporting duties about the moderation practices carried out[85]. Similarly, the proposal on political advertising imposes periodic reporting on political advertising services, including on the use of targeting and amplification techniques[86]. Secondly, according to the DSA, online platforms are required to follow a due process in case of notice and take down[87], provide a clear and specific statement of reasons when they impose restrictions on recipients of the services[88] and set out an internal complaint-handling

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shall submit to the Commission an independently audited description of any techniques for profiling of consumers that the gatekeeper applies to or across its core platform services ... The Commission shall transmit that audited description to the European Data Protection Board…The gatekeeper shall make publicly available an overview of the audited description referred to in paragraph 1».

[81] The proposal of regulation (COM(2021) 731 final) defines political advertising as any «message that is liable to influence the outcome of an election or referendum, legislative or regulatory process or voting behaviour should also constitute political advertising. In order to determine whether the publication or dissemination of a message is liable to influence the outcome of an election or referendum, a legislative or regulatory process or voting behaviour, account should be taken of all relevant factors such as the content of the message, the language used to convey the message, the context in which the message is conveyed, the objective of the message and the means by which the message is published or disseminated. Messages on societal or controversial issues may, as the case may be, be liable to influence the outcome of an election or referendum, a legislative or regulatory process or voting behaviour», moreover when the message is published or disseminated directly or indirectly by, for or on behalf of a political actor (see recitals No. 16-17 and Article 2).

[82] COM(2021) 731 final, Article 7.

[83] As defined by COM(2021) 731 final, recital No. 5, «Targeting or amplification techniques should be understood as techniques that are used either to address a tailored political advertisement only to a specific person or group of persons or to increase the circulation, reach or visibility of a political advertisement».

[84] COM(2021) 731 final, Article 12, par. 3.

[85] Article 15, DSA.

[86] COM(2021) 731 final, Articles 8 and 10.

[87] Article 16, DSA.

[88] Article 17, DSA. It deals with restrictions on visibility of specific items of information provided by the recipient of the service, including removal of content, disabling access to content, or demoting

system[89]. Likely, the proposal on political advertising compels advertising publishers to put in place mechanisms for notice and take down[90].

These transparency and accountability duties, charged on internet services providers are further complemented by some substantial prohibitions. Accordingly, the deployment of dark pattern online interfaces is forbidden, which encompasses practices that materially distort or impair, either on purpose or in effect, the ability of recipients of the service to make autonomous and informed choices or decisions[91]. Those practices can be used to persuade the recipients of the service to engage in unwanted behaviours or into undesired decisions, consequently such a practice is able to deceive or nudge recipients of the service, distort and impair their autonomy, decision-making, or choice by means of the structure, design or functionalities of an online interface or a part thereof[92]. Likely, the proposal of regulation on political advertising prohibits targeting or amplification techniques that involve the processing of special categories of personal data pursuant to Article 9(1) of Regulation (EU) 2016/679[93].

Due to the fact that online platforms, search engine and providers of political advertising services can deploy artificial intelligence techniques, the mentioned European acts need to be integrated with reference to the European proposal of regulation on Artificial Intelligence (Artificial Intelligence Act, AIA), finally approved in December 2023. It aims at promoting a human-centric approach to ethical and trustworthy AI in line with the Charter of Fundamental Rights of the European Union and the values on which the Union is founded, including the protection of fundamental rights, human agency and oversight, technical robustness and safety, privacy and data governance, transparency, non-discrimination, fairness and societal and environmental wellbeing[94].

Accordingly, obligations of transparency[95], traceability, registration, recording, reporting are set out and charged on programmers, developers, providers, importers,

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content; restrictions of monetary payments; suspension or termination of the provision of the service in whole or in part; suspension or termination of the recipient of the service's account.

[89] Article 20, DSA.

[90] COM(2021) 731 final, Article 9.

[91] Article 25, DSA.

[92] See Recital No. 67, DSA.

[93] The special categories of personal data laid down in Article 9, par. 1, are data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.

[94] AIA, recital No. 9a.

[95] AIA, Article 4a, par. 1, (d), states that transparency «means that AI systems shall be developed and used in a way that allows appropriate traceability and explainability, while making humans aware that they communicate or interact with an AI system as well as duly informing users of the capabilities and limitations of that AI system and affected persons about their rights». With specific reference to high-risk AI systems, Article 13, par. 1, provides that «transparency shall thereby mean that, at the time the high-risk AI system is placed on the market, all technical means available in accordance with the

deployers and users of AI systems following criteria of proportionality according to the scale of risks involved in the system itself. This is done in order to prevent a non-correct functioning that may result in discrimination or unjust decisions or assessments. Consequently, the recommender system of social media platforms that can «strongly influences safety online, *the shaping of public opinion and discourse, election and democratic processes and societal concerns*»[96] also falls under the scope of the AIA. Not only should a person interacting with such a system be informed and made aware of it, but she/he has also the right to know the underlying logic of the system (explainability). These provisions are addressed to prevent dark patterns too, due to their targeting potentiality, with specific regard to democratic processes. Moreover, the AIA deals with foundation models and deep fakes[97] reinforcing the duties of transparency[98].

Beyond these procedural obligations, the AIA, like the two previously mentioned initiatives, provides substantial safeguards, among which is the prohibition of subliminal AI practices[99]. Except when subliminal practices are deployed, AI systems aimed at influencing the outcome of an election or referendum or the voting behaviour of natural persons in the exercise of their vote are not *per se* forbidden, but they fall rather under the scope of high-risk systems, with all the underlying requirements for transparency and accountability[100].

Transparency and accountability also support pluralism, that is in turn fostered by the Digital Market Act (DMA)[101] and the European Media Freedom Act (EMFA)[102]. In this respect, as stated by the EMFA, it is not only necessary for the recipients of media

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generally acknowledged state of art are used to ensure that the AI system's output is interpretable by the provider and the user».

[96] AIA, recital No. 40b.

[97] According to Article 52, par. 3, AIA, Deep fakes are «AI system that generates or manipulates text, audio or visual content that would falsely appear to be authentic or truthful and which features depictions of people appearing to say or do things they did not say or do, without their consent».

[98] In reference to deep fakes, Article 52, par. 3, AIA provides that «Disclosure shall mean labelling the content in a way that informs that the content is inauthentic and that is clearly visible for the recipient of that content».

[99] Pursuant to Article 5, par. 1, point a), AIA, the prohibition covers «the placing on the market, putting into service or use of an AI system that deploys subliminal techniques beyond a person's consciousness or purposefully manipulative or deceptive techniques, with the objective to or the effect of materially distorting a person's or a group of persons' behaviour by appreciably impairing the person's ability to make an informed decision, thereby causing the person to take a decision that that person would not have otherwise taken in a manner that causes or is likely to cause that person, another person or group of persons significant harm».

[100] See AIA, Annex III, par. 1, point 8, point (a a).

[101] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act)

[102] Proposal for a Regulation of the European Parliament and of the Council establishing a Common Framework for Media Services in the Internal Market (European Media Freedom Act) and amending Directive 2010/13/EU, COM(2022) 457 final.

services to know with certainty who owns and is behind the news media so that they can identify and understand potential conflicts of interest which is a prerequisite for well-informed opinions and consequently for aware and active participation in democratic processes[103]; but it is also necessary to provide for rules and procedures to ensure assessment of media market concentrations that could have a significant impact on media pluralism or editorial independence[104].

7. *A short "final" belief*

Our final belief can be summarized as follows. In a period like the one we are experiencing, where the possibility to influence and manipulate knowledge and – as a consequence – public opinion, has achieved a pervasive and extended potency far beyond that of the past, priorities should be set and complied with before dealing with an enhancement of direct democracy instruments, specifically referenda, capable of delivering definitive choices to voters. Strengthening voters' awareness is crucial, and in particular, establishing legal tenets aimed at protecting and improving their information environment should take precedence. As highlighted by the European Commission: «Existing safeguards to ensure transparency and parity of resources and airtime during election campaigns are not designed for the digital environment. Online campaign tools have added potency by combining personal data and artificial intelligence with psychological profiling and complex micro-targeting techniques. Some of these tools, such as the processing of personal data, are regulated by EU law. But others are currently framed mainly by corporate terms of service, and can also escape national or regional regulation by being deployed from outside the electoral jurisdiction. Concern about the transparency and accountability of online platforms adds to the challenge of enforcing rules. Online platforms can both have news media-related activities and act as gatekeepers for online news, while not being subject to the same national rules and professional standards»[105].

This is why effective measures that enhance trust in the use of political ads, and more generally in the political debate and the integrity of the electoral process are urgently necessary. They would contribute to a higher resilience of the EU electoral system to information manipulation and interference, with consequent positive impacts on other fundamental rights, reducing the possibility of manipulation of the democratic debate and enforcing the right to be informed in an objective, transparent and pluralistic way[106].

This conclusion can enhance the foundation of both, direct democracy tools, and representative democracy. Its implementation firstly urges for direct democracy, given

[103] COM(2022) 457 final, recital No. 19.
[104] COM(2022) 457 final, recital No. 40.
[105] European Democracy Action Plan - COM(2020) 790 final, par. 1.
[106] COM(2021) 731 final, par. 3.

its ability to produce immediate “legally binding choices” devoid of any previous formalised intermediation, made of discussions, debates and deliberation by competent representative bodies; but it equally urges for the healthiness of representative democracy.

Lorenzo Spadacini*

The Participatory Potential of Direct Democracy Tools vis-à-vis the Plebiscitary Twists of Representative Democracy: The Necessity of Mutual Support**

SUMMARY: 1. Pallante's Critique of Direct Democracy – 2. The populist twist of representative democracy institutions in Italy – 3. The "reinforced" citizens' legislative initiative: A tool of direct democracy to foster dialogue and mediation.

ABSTRACT: ***This article addresses the contemporary discourse surrounding direct and representative democracy, advocating for a nuanced approach that transcends the dichotomy often presented. By examining Pallante's critique of direct democracy and the populist influence on representative democracy institutions in Italy, the paper underscores the need for a more inclusive and deliberative decision-making process. It argues that reliance solely on representative institutions may fall short in fostering genuine public participation and dialogue, highlighting the importance of mitigating centralization and elitism. Furthermore, it suggests that direct democracy mechanisms, if properly regulated to avoid plebiscitary tendencies, could complement representative democracy by invigorating parliamentary debate and promoting consensus-building. Through an exploration of the "reinforced"; citizens' legislative initiative as a potential tool for enhancing dialogue and mediation, the article posits that such initiatives could contribute to a more dynamic and engaging political landscape, ultimately strengthening democratic governance.***

1. *Pallante's Critique of Direct Democracy*

Francesco Pallante's argument in favour of representative democracy seems to be primarily based on a consideration that leads him to say that the difficulties in introducing direct democracy institutions are problematic not only on a practical level but also on a conceptual one[1]. Direct democracy institutions, that is, would not be desirable because they are incapable of producing public decisions following a deliberative process capable of building compromises. In fact, they would produce

* Associate Professor of Public Law, University of Brescia.

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[1] See F. PALLANTE, *Contro la democrazia diretta*, Einaudi, Torino, 2020, 110, according to whom the downfall of direct democracy is not just a matter of practicality but also conceptual. Recalling Hans Kelsen, the author indeed reminds us that democracy is, first and foremost, discussion, not choice; more than the outcome, the process matters. This is certainly a non-trivial assessment. Indeed, I agree that the historical critique - starting from Montesquieu - of direct democracy seems to be more practical than theoretical: modern state societies are not comparable in size to those of antiquity where the institutions of direct democracy operated. This is evident from the impossibility of gathering everyone together in a square. Or from the observation that our social organization requires all citizens to contribute to productive activities, leaving no class of individuals who can dedicate themselves full-time to politics. However, these are practical, not conceptual, challenges.

decisively majority decisions, even risking setting the conditions for the dictatorship of the majority.

I respectfully disagree with this position, not because I fail to acknowledge the expressed concern. Indeed, it is important to me that the method of producing public decisions involves a dialectical procedure capable of mobilizing all interests within society and fostering necessary compromises. My disagreement does not stem from the conception of democracy as an articulated system of compromise and dialogue, ultimately resulting in a decision attributed to the will of the people. Instead, my disagreement concerns a double bias regarding the ways useful to construct a process of public decision through confrontation: the first is that representative democracy inherently accomplishes this goal; the second is that direct democracy institutions inevitably oppose that objective. Essentially, my objection is this: first, a structured, dialogic, and participatory political decision-making process may lack substance within a representative democracy system; second, proper regulation of direct democracy institutions can mitigate plebiscitary effects[2], thereby providing the constitutional system with additional tools to achieve a satisfactory democratic framework for shaping the popular will.

In essence, I believe that poor performance of the instruments of representative democracy can indeed result in a public decision-making system that falls far short of the virtues of representative democracy[3]. A poor performance of those institutions, in fact, can lead to a plebiscitary twist of representative democracy, as I believe must be said for the current Italian constitutional system (what is achieved in practice, in disregard, circumvention, or betrayal of the constitutional text). Conversely, good constitutional discipline of direct democracy institutions can contribute to a greater realization of a participatory and consensus-based public decision-making system.

I'll attempt to develop this argument in two steps. The first concerns the current degenerate performance of the representative democracy institutions we have. The second concerns the proposal that was formulated in the last legislature to introduce a propositional referendum (or legislative initiative) in our system. In my opinion, it represents an example of how a significant direct democracy institution like the propositional referendum can be regulated in a way that gives rise to a dialogic and

[2] In a partially contrasting sense, M. LUCIANI, *Art. 75. Il referendum abrogativo*, in G. BRANCA (cur.) *Commentario della Costituzione. La formazione delle leggi*, Vol. I, 2, Zanichelli-Il foro italiano, Bologna-Roma, 2005, 138-140. The Author distinguishes between referendums and plebiscites not so much through formal elements (and therefore the concrete legal-constitutional structuring of the respective procedures), but rather based on the political context. However, the following considerations seem to suggest that there is indeed room for a constitutional discipline that reduces the risks of transforming referendums into plebiscites.

[3] Moreover, according to a thesis recently presented by I. MASSA PINTO, *Rappresentanza*, in *Rivista AIC*, n. 3/2017, 7, it is precisely this willingness to accept the arduous mechanisms of democratic representation, the political obligation, and the duties it presupposes, that is now evidently a subject of distrust.

participatory process, much less brutal than parliamentary decisions can be, as will be seen later.

2. *The populist twist of representative democracy institutions in Italy*

As for the possible populist twist[4] of representative democracy institutions[5], it is necessary to make some considerations about representation and how it is differently conceived. As a preliminary point, it is useful to make a distinction between those who conceive representation as merely a nomination to office and those who conceive it as a relationship: in the former case, reference is made to a static legal situation, in which the exercise of the voters' right to vote is aimed at gaining access to office by the elected and the substantial transfer of popular power to the representatives[6]; in the latter case, reference is made instead to the representative system understood as a dynamic legal situation based on the system of election and possible re-election of the representative. More specifically, in this sense, the relationship between voters and elected officials is not considered solely at the moment of nomination to office. This relationship, in fact, is established when the elected official takes office but continues throughout the mandate and is characterized by the constant care that the elected official has for the interests of the voters within the mediation function that he or she performs in the parliamentary circuit. This circuit is characterized, in fact, by two "flows": one "inward", because with elections, citizens elect their representatives, through whom they express their will in making public decisions during the legislature; one "outward", because based on the system of election and re-election, the elected official is, in substance, accountable for the manner in which he or she has exercised the mandate conferred upon him or her, being effectively called upon to justify to the voters the choices made in Parliament, and the voters' approval of the parliamentary choices made by him or her will make his or her eventual re-election easier.

Representation, therefore, should not be reduced to a mere system of legitimizing the transfer of decision-making power from the people to Parliament but should be valued as the best means to ensure that public decisions are reasonably attributable to the popular will. Therefore, representation should realize a circular mechanism that guarantees that public decisions are supported by consent. Representation should not, therefore, be exhausted in the nomination to office of subjects delegated to legislation, but should function as a tool that, through the election/re-election cycle, constantly connects voters with the elected officials. The latter will advance the

[4] For a recent contribution on the multifaceted and porous notion of populism in Italian literature, see A. LUCARELLI, *Populismi e rappresentanza democratica*, Editoriale Scientifica, Napoli, 2020.

[5] G. FERRAIUOLO, *La revisione della forma di governo tra noto e ignoto,* in *Diritto Pubblico Europeo – Rassegna online*, 1/2024, 14, recently discussed the concept of "populist democracy".

[6] In this case, the famous criticism made by Rousseau against the English parliamentary system holds true, accusing it of only making its subjects free on election day, while being slaves for the rest of the days (J.J. ROUSSEAU, *Il contratto sociale* [1762], Rizzoli, Milano, 1962, 116).

demands of the voters, mediating them with other elected officials in a system where a relevant role must be played by intermediary bodies of the State and of society (parties, associations, decentralized state institutions, functional autonomies, press, etc.). But the work of representatives is certainly not that of mere spokespersons: after the mediation phase, they make the decision, report to their constituents about the choice made, and justify the decision by seeking to garner consensus regarding the mediation achieved (or by opposing it when they have been excluded from the final decision). This is the phase - no less important - of legitimizing (or delegitimizing) the solution adopted in parliamentary proceedings, which - obviously - almost never has the starting position as the outcome (for each parliamentarian and for each party). In this, representation performs a function of legitimizing the political decisions taken by the institutions.

These considerations on representation emphasize its dialogical and deliberative capacity in the process of shaping popular will. At the same time, they exclude the possibility that representation can be valued for the delegation of power from the elector to the elected that it implies, namely for its necessarily "indirect" dimension. The advantages of representation cannot therefore be found - in the style of the nineteenth-century liberal state - in the withdrawal of decision-making from the many uneducated, unprepared, poor, incapable, non-male individuals, to assign it to the best, to the "elected". Conversely, one cannot criticize direct democracy instruments on the assumption that the people are not capable of making public decisions, exalting instead representative democracy as a form of "taming" the people. Moreover, from these premises, one should draw the paradoxical conclusion that the voter is able to choose their representatives through the exercise of the right to vote, based on the electoral campaign, but, at the same time, the same voter would not be able to directly make decisions that respond, in concrete terms, to their own needs and interests.

Representation, understood as a system that allows for the construction of a public decision reasonably attributable to popular sovereignty[7], however, does not always achieve its purpose. For example, if the electoral system disregards the objective of building a representative Parliament because - hypothetically - it is solely aimed at creating a majority of seats assigned ex lege to a political force, it is likely that the

[7] See I. M. PINTO, *Rappresentanza*, cit., 11., where asserts that representation is a method to justify political power. It is a concept used to address the absence of something that cannot be overcome for various reasons. It involves creating a symbolic or evocative presence of a reality that may no longer exist in its original form but is still significant and tangible through mediated means such as discourse or symbolism. According to this perspective, following in the footsteps of G. LEIBHOLZ, *Die Repräsentation in der Demokratie*, III ed., Berlin, 1973, trad. it., *La rappresentazione nella democrazia*, Giuffrè, Milano, 1989, representation is a theatrical enactment of popular sovereignty. However, even in these terms, it proves useful insofar as it is effective in producing consensus-driven decisions. On the subject, see M. DOGLIANI, *La rappresentanza politica come rappresentanza del "valore" di uno Stato concreto*, in *Democrazia e Diritto*, 2/2014, 16.

representative system will not be able to achieve political decisions supported by majority consensus in the country.

This is the situation that has occurred in Italy, essentially since 2005, when rules were introduced that completely uproot the direct elective connection between parliamentarians and the people. For this purpose, proportional systems with a majority bonus have been used, which determine the composition of parliament not based on the need for representation of the various components of which the electorate is composed, but based on a general plebiscite around the government of the community, from which the composition of Parliament follows as an ancillary consequence. This has occurred not only at the national level but continues to occur at the regional and local levels as well. Furthermore, the same constitutional reform of the form of government recently proposed by the majority is inspired by the same logic, which would even be constitutionalized.

To the mechanism of the majority bonus, the abolition of the possibility for the voter to express preferences among the candidates presented by a party in its list has been added. In this way, the leadership of parties has been further strengthened, parties that are increasingly evanescent in their social roots but increasingly “Leninist” in their internal organization, which is becoming more and more centralized.

It is clear that electoral laws of this kind deprive parliamentarians from the outset of effective representational capacity, which is a precondition for them to carry out the work of mediation and building the compromises necessary to produce a public decision that can realistically be attributed to popular sovereignty.

Now, let’s examine how decisions are actually made within Parliament, thus legitimizing its role as the primary organ of representation.

The process of legislative decision-making in our country, which takes place in Parliament where the system of mediation and compromise should be realized, has ended up in a certainly pathological state, because there has been an indiscriminate de facto substitution of the constitutionally reserved role of Parliament in favor of the Executive. This situation should not be confused with the physiological privileged position of the Government in directing political direction, typical of all parliamentary forms of government since the birth of the welfare state from the liberal state.

The real "illness" lies in the subordination of the parliamentary function to the governmental function, which can unconditionally impose itself within the representative assemblies, disregarding the procedures, limits, timings, and forms that substantiate the role of Parliament in legislative production. This leads to obvious consequences in terms of the depletion of its effective representational capacity.

Some data unequivocally demonstrate this state of parliamentary weakness, which, in a comparative perspective[8], has no equal even with respect to foreign systems

[8] Consider not only the strength of the American Congress vis-a-vis the President, but also, for example, that of the British Parliament, capable of altering the course of government in foreign policy (as in the case of Syria in 2013) or in the legislative implementation of the Brexit referendum. For a comparative analysis on the subject, refer to R. TARCHI (ed.), *Parliament and Parliamentarism in*

where the Government is considered particularly "strong", nor in cases where the Executive branch is characterized by its particular primacy.

Looking at the most recent data (Observatory on Legislation of the Chamber of Deputies, Legislation between the State, Regions, and the European Union, Report 2022-2023), in the current XIX Legislature, from October 13, 2022, to May 13, 2023, 29 ordinary laws were approved: 19 conversion laws of decree-laws (for 27 decree-laws, given the practice of so-called "Minotaur" conversions) and only 10 other ordinary laws (of which 4 were government-initiated, including the 2023 budget law), generally of little political significance (nautical homicide, anniversary of the death of Giacomo Matteotti, Parliamentary Commission of Inquiry on illicit activities related to the waste cycle, Parliamentary Commission of Inquiry on femicide).

The analysis of data is necessary because it allows us to clearly delineate the contours of the problem and thus highlight the dominance of the government over the exercise of the legislative function. This dominance is realized through the extraordinary abuse of emergency decrees, which, according to Article 77 of the Constitution, should instead represent the exception to the exercise of parliamentary legislative function. However, over time, it has progressively become not only the ordinary instrument of normative production but even the widely dominant source compared to others, and above all, compared to ordinary parliamentary law. Excluding decree-laws and budget laws, which are approved through substantially similar procedures, the law approved through a process that guarantees full parliamentary participation produces less than 14% of the total words in our system (this includes just over 200 laws, more than half of which are the ratification of international treaties).

It will be said: the abuse of emergency decrees is not a new problem. And indeed, it is not. Until 1996, it manifested itself in the form of constant production of decree-laws, in such a number and quantity as to be incompatible with the parliamentary examination times required for conversion. Thus, the practice of reiteration developed, which came to an end, as is known, through a dual intervention, each for its part, by the guarantor bodies: first, the Constitutional Court (with judgment no. 360 of 1996) and then the President of the Republic (ensuring compliance at the time of decree issuance).

However, after an initial phase, lasting until the end of the XIII legislature in 2001, during which there was a reduction in emergency decrees (handled by the Prodi I, D'Alema I and II governments as well as Amato II), we moved on to a new explosion, albeit in other forms. The number of decree-laws did indeed decrease, but there was a significant increase in the length of each decree and their progressive heterogeneity. This contraction in the number of decree-laws and their increasing length and diversity was a result of the systematic reliance on the confidence vote, enabling the

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Comparative Law. Proceedings of the Fifth Biennial Conference of the Association of Comparative and European Public Law, Rome Tre, 25th and 26th October 2018, in DPCE Online, 4/2019.

Government to secure approval from both Chambers with a single vote during the conversion period.

With regard to the last legislature (with a trend that is no different in the present one), it can be estimated that about three-quarters (approximately 75%) of the total words of the laws promulgated were approved using a confidence vote in at least one of the Chambers, and about two-thirds (approximately 66%) of them were approved with a confidence vote in both Chambers!

The estimate is reached by considering that all budget laws were approved with confidence votes in both Chambers, and the same occurred for 69% of the words in the laws converting decrees; furthermore, 84% of the words in the laws converting decrees were approved with confidence votes in at least one Chamber. These percentages were calculated with reference to the first half of the last Legislature[9] and extended, in the absence of other data, to the second half. Moreover, although confidence is placed on 60% of the decrees, this occurs always on decrees with higher normative scope.

To conclude on this first point: representative democracy institutions do not always function to ensure a participatory and mediated process of political decision-making. In the case of Italy, the detachment of representation from voters and the hollowing out of Parliament in its legislative function already render our democracy incapable of functioning as Francesco Pallante (and I) desire(s).

3. *The "reinforced" citizens' legislative initiative: A tool of direct democracy to foster dialogue and mediation*

My second argument consists of analysing the proposal for popular legislative initiative with a mandatory referendum that Parliament had begun to consider during the previous legislature but never approved. I think this is relevant because it represents an example of how a direct democracy institution can be used for participatory purposes and heralds a decision-making mechanism that is highly mediated and articulated, aimed at creating consensus and mediation to a much more satisfying extent than what occurs within the current framework of representative democracy.

3.1. *The content of the proposal*

The Constitutional law proposal introduces a form of "reinforced" citizens' legislative initiative regarding ordinary law proposal signed by at least 500,000

[9] In L. SPADACINI, *Decreto legge e alterazione del Quadro costituzionale. distorsioni del bicameralismo, degenerazione del sistema delle fonti e inefficacia dei controlli*, Cacucci, Bari, 2022.

electors. It amends article 71 of the Italian Constitution by adding four new paragraphs, after par. n. 2.

In summary, the presentation of a citizens' law proposal starts a procedure that may result in the approval of the same citizens' proposal by the Parliament within 18 months or in a referendum to decide about its approval. The referendum occurs if the Parliament has not concluded the legislative *iter* within the same period (18 months), has approved the proposal with modification, or has rejected it.

The Constitutional Court declares that the referendum does not take place if the Parliament introduces only formal or coordinating changes to the proposal and if the financial coverages are not adequate or lack of homogeneity. In any case, the referendum does not take place if the promoters' committee renounce to it. The promoters committee can in fact decide whether to accept the modifications introduced by the Parliament or, on the contrary, insist on the referendum. Therefore, the referendum is only a mere possibility. In case of referendum, the proposal approved by the Parliament is subject to promulgation if the one subject to referendum is not approved.

The Constitutional Court decides about the admissibility of the referendum based on the parameters identified by the new par. 4 of article 71 of the Constitution. In particular, the referendum is not admissible if the proposal: is not compliant with the Constitution (or rather, if it is in contrast with constitutional provisions); implies a reserved initiative; implies agreements; requires a special procedure or majority to be approved; does not have homogeneous content. Further limits concern the prohibition of the merely abrogative content as well as the obligation to indicate "suitable and homogeneous" financial coverages.

The proposal subject to a referendum is approved when it obtains the majority of the validly expressed votes, if they exceed a quarter of those entitled to vote.

In order to make the system homogeneous, with article 2 of the draft constitutional law, the above-mentioned approval quorum is also extended to the abrogative referendum, through a modification of article 75, fourth paragraph of the Constitution.

A law approved by absolute majority of both Chambers will provide for the implementation of the new article 71. The law shall regulate in particular the following aspects: the case of presentation of several proposals at the same time; the maximum number of proposals that can be presented; the method to examine and verify the financial coverages and their possible adjustment by the promoters committee; the methods to ensure equal information of the both the citizens' and the Parliament proposals and also of the current legislation; the interruption of the deadline by which the proposal has to be approved when the Chambers are dissolved.

The jurisdiction about the admissibility judgment of the citizens' proposal is assigned to the Constitutional Court. The constitutionality control takes place before the presentation of the citizens' proposal to the Parliament if at least 200.000 signatures have been collected.

The text of the proposal possibly approved by the Chambers is also subject to the admissibility judgment, which occurs after the Constitutional Court has assessed the "non formal" or "coordinating" nature of the modifications introduced by the Parliament. The parameters are the same as for the citizens' proposal. The implementation law will regulate methods and procedures for the Constitutional Court judgement.

3.2. *The dialogue between citizens and parliament that could have arisen following the constitutional proposal*

The procedure introduced by the new article 71 has not the objective of putting in opposition the Parliament on one side and citizens on the other side. On the contrary, it aims to find solutions supported by citizens through a dialogic mechanism. The real strength of the reform, in fact, lies in the establishment of a relationship between citizens and Parliament through an intense and in-depth dialogue.

The introduction of the citizens' initiative (or "propositive referendum"), on the one hand, gives citizens the new power to activate a procedure that can conclude with a referendum vote on the citizens' proposal and, on the other, enhances the role of the Parliament. The Parliament, in fact, has a period of 18 months to examine the citizens' proposal and, possibly, approve it in a different text which considers more in line with the citizens' demands than the one presented by the promoters committee.

This mechanism avoids the introduction of a system in which 500,000 signatories can submit only their own proposal to referendum consultation, thus excluding the Parliament from the decision-making circuit and limiting, de facto, the representation.

The provision according to which the Parliament has the power to approve a counter-proposal, in fact, is respectful of the role Parliament, which holds the legislative power, and, at the same time, offers the possibility of a more shared law proposal. Moreover, it is very likely that the counter-proposal of the Chambers is the result of a greater mediation and have greater citizens' support, as the parliamentary majority approves it.

You can also observe that the supposed opposition between citizens and Parliament does not exist if you look at all the conditions necessary for a citizens' proposal to be subject to referendum. The Parliament obligation to decide within 18 months by the presentation of the citizens' proposal implies that: a) a citizen's interest worthy of considerations exists, quantified by the request of 500.000 electors (note that it is the same number of signatures required for the abrogative referendum); b) the Constitutional Court has judged the proposal admissible.

It is also relevant to point out, as a further consequence of the dialogue between citizens and Parliament during 18 months, that the promoters can withdraw the proposal when they consider, at the end of the "participatory procedure", that the counter-proposal of the Parliament meets the needs underlying the citizens' proposal.

Regarding the risk of dissolution of the Chambers because of the approval of the citizens proposal, it is important to remember that the object of the referendum is a specific proposal and not the Government. An automatism between the referendum question and the governing majority does not exist. The history of referendum in Italy shows that there is no automatic consequences on the Government in charge on the life of the Parliament. However, the issue is resolved since the counter-proposal of the Parliament does not appear in the ballot.

3.3. *Time limits as a guarantee of dialogue*

The time limit of 18 months for the approval of the citizens' proposal by the Parliament is set taking into account the need to ensure adequate time for an in-depth dialogue between promoters and Parliament as well as adequate information for voters.

In reality, the referendum procedures take quite a long time (at least two and a half/ three years) and that reduces the possibility of abuses.

A relevant issue, debated in Parliament, concerns the interruption of the deadline in case of dissolution of the Chambers. The implementation law will regulate this aspect.

3.4. *The role of the promoters committee and the relevance of the renunciation*

The propositive referendum aims to create a relationship between the promoters and the Parliament based on a constructive dialogue in a legislative procedure that can conclude with a referendum (which is only a possibility). In fact: a) the Parliament can approve the proposal in a text which differs from the one presented by the promoters; b) the promoters consider whether the counter-proposal of the Parliament satisfies the citizen's requests and consequently withdraw their proposal in favour of the Parliament's one; c) if the promoters do not renounce, the electorate decides on the proposal presented by the promoters.

The mechanism adopted is based on the power of renunciation of the promoters who decide if the proposal of the Parliament meets their objectives. The choice is to leave this evaluation to the free dialectic between the parliamentary forces and the promoters committee.

The mechanism described above demonstrates that the propositive referendum does not aim at ensuring the acceptance of the citizens' proposal. On the contrary, the objective is the activation of a dialogue between the Parliament and the promoters committee on an issue raised by a fraction of the electorate, in a defined period, aimed at designing a public decision that have the maximum possible citizens' support, with the possibility of a referendum.

This can happen only if the Parliament is free to identify the most useful alternative law to gather popular support, regardless of its closeness to the citizens' proposal.

It is reasonable to argue that this new procedure in many cases may not end in a referendum. In fact, compared to the possibility of a vote with an uncertain outcome, the promoters could be encouraged to take advantage of the positive aspects provided by the parliamentary proposal.

In the light of these considerations, the role of the new institute in relation to representation can be considered not substitute or alternative – as feared by some – but supplementary; indeed, it can contribute to reinvigorate the parliamentary body towards the public opinion.

With regard to the power of renunciation, it is important to point out that the power of the committee arises from the will of the electors who signed the proposal. What is important is the dialectical process through which the parliamentary will is formed, starting from the requests that emerge in the civil society and that the committee brings in the institutional sphere. This process is purely political and relates to consensus building.

The committee's proposal is inevitably "static", crystallized at a given moment, and represents only the initial input, while the parliamentary proposal through the above-mentioned process is undoubtedly dynamic.

4. *The tools of direct democracy serve as aids to the proper functioning of representative democracy*

In conclusion, it seems to me that it is more productive to move away from what appears to be a sterile debate between direct democracy and representative democracy in abstract.

Firstly, it seems reasonable to agree that representative institutions alone are not sufficient to ensure a participatory, dialogic, and deliberative public decision-making process. For these institutions to serve this purpose, they must be maintained in a way that avoids centralization and elitism in how representation is formed. Parliament should be free to organize discourse that is open to mediation and listening to the articulations of civil society, and the relationship between political forces (even when organized into two parties or coalitions) should remain open to mediation and compromise.

Secondly, it should also be acknowledged that direct democracy institutions, not unlike those of representative democracy, can either be helpful or harmful to deliberative democracy processes depending on how they are regulated. The example provided in the text advances a hypothesis for regulating the initiative referendum capable of avoiding plebiscitary twists. It even seems to lend itself to triggering more nuanced deliberative processes in Parliament than currently occurs about the majority of legislative procedures.

In essence, it seems to me that one can conclude that the introduction of direct democracy tools, regulated in a way that mitigates plebiscitary risks, could indeed prove useful to the proper functioning of representative democracy. If well-structured, they can have the effect of revitalizing parliamentary debate, making it more complex and engaging, and thus focusing it on choices capable of building consensus and popular participation more vividly around the decisions that the political community is called upon to make.

Collaboratori del fascicolo

Rachele Bizzarri, Ph.D. student in Teoria dei diritti fondamentali, giustizia costituzionale, comparazione giuridica, diritto e religione, University of Pisa

Arianna Carminati, Associate Professor of Public Law, University of Brescia

Daniele Casanova, Tenured Assistant Professor of Public Law, University of Brescia

Lucas Della Ventura, Election Law Fellow, William & Mary Law School (USA), JD '2024

Paolo Feltrin, Former Associate Professor in political science Associate Professor, University of Trieste

Alessandra Ferrara, Research Director in Istat, Directorate for Environmental and Territorial Statistics

Rebecca Green, Associate Professor of Law; Co-Director of the Election Law Program, William & Mary Law School (USA).

Giuseppe Ieraci, Associate Professor in political science, University of Trieste

Nadia Maccabiani, Associate Professor of Public Law, University of Brescia

Alessandra Mazzola, Post-doctoral Research fellow in Public Law, University of Brescia

Serena Menoncello, Director of the Political-Electral Deparment at InNova Studi e Ricerche

Fabian Michl, Junior Professor of Public Law and the Law of Politics, Leipzig University, Germany

Michael Pal, Associate Professor, Faculty of Common Law, University of Ottawa

Francesco Pallante, Full Professor of Constitutional Law, University of Turin

Marco Podetta, Tenured Assistant Professor of Public Law, University of Brescia

Matthias Rossi, Professor of Public and Administrative Law, European Law, and Legislative Studies, Augsburg University, Germany

Lorenzo Spadacini, Associate Professor of Public Law, University of Brescia

Lara Trucco, Full Professor of Constitutional Law, University of Genova

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