

COLLANA DI STUDI

9

edited by
TANIA GROPPI
VALENTINA CARLINO
GIAMMARIA MILANI

Framing and Diagnosing
Constitutional Degradation:
A Comparative Perspective

2022

CONSULTA ONLINE

**Framing and Diagnosing Constitutional Degradation:
A Comparative Perspective**

Edited by Tania Groppi, Valentina Carlino and Giammaria Milani

Collana di studi di Consulta OnLine

9

This book collects the proceedings of the workshop “**Framing and Diagnosing Constitutional Degradation**”, held at Certosa di Pontignano (Siena, Italy) on June 21st and 22nd, 2021.

Both the workshop and this book are funded within the PRIN 2017 project “**Framing and Diagnosing Constitutional Degradation**” (Principal Investigator Professor Tania Groppi).

Agosto 2022

ISBN: 978-88-945618-8-3

Editore Consulta OnLine - CF 90078670107

Via Balbi 22 - 16126 Genova

info@giurcost.org

TABLE OF CONTENTS

TANIA GROPPI, VALENTINA CARLINO AND GIAMMARIA MILANI	VII
<i>Preface</i>	

Part I

The Processes of Constitutional Degradation

MARIO PERINI	
<i>Introduction</i>	3
GIANMARIO DEMURO	
<i>Populism and Constitutional Degradation</i>	5
CARLA BASSU	
<i>The rule of law to the test</i>	7
GIACOMO GIORGINI PIGNATIELLO	
<i>Transformative Constitutionalism and Constitutional Courts in the European Legal Space. Germany and Italy in a Comparative Perspective</i>	11
MICOL PIGNATARO	
<i>Constitutional Degradation in a Time of Coronavirus: Reflecting on Governmental Accountability in the United Kingdom and Italy</i>	21
ANDREA VERNATA	
<i>Governing Bodies and Representative Assemblies: time for a new balance?</i>	32
GIUSEPPE NAGLIERI	
<i>Overturing the Pillars of Democratic Representation Trough Modern Technology-Based Partisan Gerrymandering</i>	39

Part II

A Global Comparative Perspective on Constitutional Degradation

PIER LUIGI PETRILLO	
<i>A Global Comparative Perspective on Constitutional Degradation. An Introduction</i>	51
IBRAHIM KABOGLU	
<i>The Republic of Turkey: the end of Constitutionalism or of Constitutional Democracy?</i>	55
DIANA MARIA CASTANO VARGAS	
<i>Constitutional Regressions: the Prism of Indicators in the Colombian State</i>	63
LIDIA BONIFATI	
<i>Constitutional Design v. Constitutional Degradation: Strengthening the Rule of Law in Bosnia-Herzegovina</i>	83

THIAGO BURCKHART	
<i>Constitutional Degradation and the Protection of Cultural Rights in Brazil: Deconstitutionalization and Institutional Deregulation</i>	93
VALENTINA CARLINO	
<i>Undemocratic Threats in the African context: which lesson to be learned from the Benin turning?</i>	101
FERDINANDO LA PLACA	
<i>Constitutional Degradation: a Comparative Overview</i>	111
GIACOMO SALVADORI	
<i>When the Judiciary gives weight to words. Italy and Spain compared on the repression of dissent</i>	121
FEDERICO SPAGNOLI	
<i>The Process of Constitutional Degradation in Spain. The Catalan Secession Crisis and the Scottish “precedent”</i>	131
EVIS GARUNJA	
<i>The Effects of Vetting Process on Constitutional Changes of Albanian Judiciary System</i>	141
Part III	
Institutional Arrangements which Can Protect Liberal Democracy	
IRENE SPIGNO	
<i>Introduction</i>	153
YLENIA MARIA CITINO	
<i>Comparing Constitutional Provisions Regarding Parliamentary Opposition. An Introductory Note</i>	157
ILARIA DE CESARE	
<i>Constitutional Degradation and the Italian Parliament. How can the Centrality of the Representative Body in the Italian Legal System be preserved?</i>	167
MARCO BRUNO FORNACIARI	
<i>Involution of the Constitutional Order and the Role of the Highest Courts: a Comparative Perspective</i>	177
MAYRA ANGÉLICA RODRÍGUEZ AVALOS	
<i>In defense of the Constitution: Judicial Autonomy and the Crusade of Judiciary in Mexico</i>	185
FRANCESCO ALBERTO SANTULLI	
<i>The Italian Crisis of Political Parties as a Phenomenon of Constitutional Degradation: what is to be done? Thinking about the electoral law</i>	193

MARCO ANTONIO SIMONELLI
The People's Watchdog. Safeguarding Democracy via Media Independence **201**

GIULIA VASINO
De-constructing and Re-building Procedural Standards: New Trends in the Current Stage of the Italian Constitutional Review of Legislation **209**

Part IV **European Integration and Constitutional Degradation**

FRANCESCO CLEMENTI
First Constitutional essentials first. An introduction to the Panel "European integration and Constitutional degradation" **221**

JOSEP MARIA CASTELLÀ ANDREU
Judicial Independence and the Rule of Law According to the Venice Commission **225**

STEFANO BARGIACCHI
The Accountability Public Finances in a Democratic Degradation Framework: the Case of Hungary. Is everything OK if the austerity acquis is (more or less) respected? **239**

LUCA DELL'ATTI
The Neo-liberal Twist of European Integration as a Degradation of Social Constitutionalism. Counter-trends in the Management of the Pandemic **245**

SIMONE GIANELLO
The European Convention on Human Rights as a tool for the protection of the rule of law (articles 17 and 18 ECHR) **253**

PIETRO MASALA
Emerging Collective Implications of Personal Data Processing: challenges and responses in the European context **263**

OMAR MAKIMOV PALLOTTA
Fighting Europarties' Democratic Backsliding: Arguments for a Multilevel Approach **273**

PAOLA PANNIA
Excluded from Guarantees, Excluded from the Community. "Institutional Uncertainty" in the Migration Domain as a Symptom of "Constitutional Degradation" **281**

Elenco delle Autrici e degli Autori **291**

Giuseppe Naglieri*
**Overturning the Pillars of Democratic Representation Trough Modern
Technology-Based Partisan Gerrymandering****

ABSTRACT: In July 2019, the Supreme Court has definitely shut the door of the federal courts to partisan gerrymandering: it found the question to be non-justiciable under the political question doctrine, since the impossibility of finding a judicially manageable standard. The reasoning of the majority opinion overrode the impact of modern partisan gerrymandering on the american democracy: electoral maps are today the outcome of an intensive profiling work of the electorate, made by collecting and cross-checking an enormous amount of data through a massive use of technological sophistication, so that the majority party can secure itself districts with an almost certain pre-determined winner. Thus, technology becomes the tool to schedule and maximize electoral outcomes, overturning the very same essence of representative democracy. The fact that the Supreme Court refused to provide remedy to this manifest breach of the Constitution leaves open the debate about the alternative ways to stop it and the effects on the constitutional order.

SUMMARY: 1. Modern partisan gerrymandering as factor of constitutional degradation. – 2. Beyond a desire for proportional representation: Rucho’s approach to modern partisan gerrymandering. – 3. A self-limiting enterprise? Resisting wave election through data access, micro-targeting, and voter behavior prediction. 4. Polarization, lack of accountability, voter dilution. – 5. State law as remedy: new paths and new challenges towards a third generation of partisans.

1. Modern partisan gerrymandering as factor of constitutional degradation

In their “*How to save a Constitutional democracy*”, Tom Ginsburg and Aziz Huq, identify three functionally intertwined elements under which a country can truly define itself as a liberal constitutional democracy.

The first among these is the presence of a democratic electoral system after which the losing sides concedes power to the winning side¹. Following Schumpeter's argument, the authors believe that free and fair elections entail the genuine possibility of alteration of the actual political power: that means that whenever the electoral system is inelastic to the choices of the electorate and does not allow his choices to affect the distribution of political power, the democratic nature of the constitutional system is at risk.

As it is unanimously believed, partisan gerrymandering ultimately makes as many electoral districts as possible non-competitive, allowing partisans to remain in power, thus degrading the value of the vote and jeopardize its freedom and equality: electoral outcomes in most states show that despite significant shifts in votes at the state level, the number of seats gained remains biased in favor of the partisan’s party. As will be shown, this process of distortion of the electoral process is made even more serious by the use of modern technologies and carries consequences not only on the individual right to vote, but on the integrity of constitutional democracy overall: modern partisan gerrymandering can therefore be properly qualified as a factor of constitutional degradation.

* PhD in *Principi giuridici e istituzioni tra mercati globali e diritti fondamentali*, Department of Law, University of Bari; PhD in *Ciencias jurídicas y sociales*, Faculty of Law, University of Málaga.

** This work has been subjected to blind peer review.

¹ T. GINSBURG, A. HUQ, *How to save a Constitutional democracy*, Chicago, 2018, 10.

2. Beyond a desire for proportional representation: Rucho's approach to modern partisan gerrymandering

In the 2016 congressional elections, the average margin of victory in the constituencies of the House of Representatives stood at 37.1 percent²: the winning candidate, Democrat or Republican, won the seat with an average of almost 70 percent of the vote³. Of 435 single-member races, 33 ended with a margin close to 10 percent, and only 17 ended with a margin equal to or less than 5 percent⁴: in 9 out of 10 constituencies, the election results were clear even before the vote.

In the same elections, aggregate data at the national level show that with 49.1 percent of the popular vote, the Republicans won 241 seats, compared to 194 for the Democrats, who had also reached 48 percent of the votes cast⁵. If we look at the elections of 2014, the data appear to be roughly comparable⁶, leading to the conclusion that, in that cycle, only 14 constituencies were truly competitive⁷.

Election data at the state level reveal a scenario, if possible, even more biased: in 2012, in Pennsylvania, the Democrats won only 5 seats out of the 18 in the lower house, compared to 51 percent of the statewide popular vote; in 2014 in Maryland, the Democrats won 87 percent of the seats in the lower house, compared to a modest 57 percent of the popular vote; the same discrepancies revive in the most recent elections in Indiana, Kansas, Michigan, North Carolina, Ohio, Oklahoma, Virginia, Wisconsin and Wyoming⁸.

Despite these alarming evidence showing significant distortions in the electoral process, the Supreme Court in July 2019⁹, has definitely shut the door of federal courts to partisan gerrymandering: it found the question to be nonjusticiable under the political question doctrine, since the impossibility of finding a judicially manageable standard. The reasoning of the majority opinion, mostly grounded on the formalist arguments of justice Scalia in *Vieth*, overrode the impact of modern partisan gerrymandering both on the fundamental rights of the individuals and on the constitutional order as a whole. Basically, the Court applies to modern partisan gerrymandering the same standards of forty years ago: through a brilliant use of historical elements dating back to the proto-republican phase and several opinions issued in the past by the Court, Chief Justice Roberts places at the center of the arguments against justiciability, a supposed "desire for a proportional representation" that any case of partisan gerrymandering seems to reveal: «Partisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of

² B. KLASS, *Gerrymandering is the biggest obstacle to genuine democracy in the United States. So why is no one protesting?*, *Washington Post*, 10 February 2017, *cit.* in Mc.K. CUNNINGHAM, *Gerrymandering and conceit: the Supreme Court's conflict with itself*, in *Hastings L. J.*, August 2018, 69(6), 1514.

³ B. KLASS, *Gerrymandering is the biggest obstacle*, *cit.*

⁴ B. KLASS, *Gerrymandering is the biggest obstacle*, *cit.*

⁵ Ballotpedia, *United States House of Representatives Election*, 2016: http://ballotpedia.org/UnitedStatesHouse-ofRepresentativeselections,_2016.

⁶ R. BALLHAUS, *Deep Loss by Democrats Obscures Party's Numbers Problem*, *Wall St. Journal*, 24 November 2014, <http://blogs.wsj.com/washwire/2014/11/24/loss-bydemocrats-obscures-partys-numbers-problem/>.

⁷ D. DE SILVER, *For most voters, congressional elections offer little drama*, Pew Research Center, 3 November 2014, <http://www.pewresearch.org/fact-tank/2014/11/03/for-most-voters-congressionalelections-offer-little-drama/>.

⁸ N. STEPHANOPOULOS, E. MCGHEE, *Partisan gerrymandering and the efficiency gap*, in *Univ. Cal. L.R.*, 2015, 82, 837.

⁹ *Rucho v. Common Cause*, 588 U.S. __ 2019.

political power and influence» but also «Partisan gerrymandering claims invariably sound in a desire for proportional representation». As Justice O’Connor put it, such claims are based on «a conviction that the greater the departure from proportionality, the more suspect an apportionment plan becomes»¹⁰. Using the words of Sandra O’Connor in her dissenting opinion in *Bandemer*, the Chief Justice affirms that in this kind of cases, implicitly or explicitly, the unconstitutionality of a districting map is assumed for the sole reason of making more difficult for a party to transform its support on a state basis into seats, so assuming that the greater the deviation from proportionality, the more suspect the redistricting plan becomes.

To the contrary, the majority of the Court in *Rucho* affirms that «partisan gerrymandering is nothing new in American politics, nor is frustration with it, since the practice was known in the Colonies prior to Independence, and the Framers were familiar with it at the time of the drafting and ratification of the Constitution»¹¹. Indeed, the history of partisan gerrymandering is the history of American politics and its modern constitutional law: forty years of litigation in federal and state courts demonstrate the difficulty of addressing a problem on which, fundamentally, the integrity of democracy depends.

When *Bandemer* was issued, justice O’Connor claimed that «political gerrymandering is a self-limiting enterprise because a swing in overall voting strength will tend to cost the legislative majority more and more seats as the gerrymander becomes more ambitious»¹², meaning that a wave election would have corrected the distortions of partisan gerrymandering on political representation, without the necessity of judicial intervention: such a phenomenon could certainly be solved by the electorate or the parties themselves.

As the amicus curiae brief submitted to the Court in *Rucho* wisely points out¹³, when Justice O’Connor wrote, Pac-Man was still a popular video game and Microsoft had just released its first Windows, meaning that the technology available at the time did not even remotely allow political parties to access the massive amount of data available, which, with the support of sophisticated software and the calculus capacity of today's processors, makes it possible nowadays to profile and predict the behavior of voters in order to draw maps suitable for preserving lasting parliamentary majorities for the following electoral cycles; not by chance, yesterday's gerrymandering is now called – ironically compared to today's precise mapmaking operations – “*dummymandering*” to highlight the imprecision and randomness of the results obtainable with the then existing techniques¹⁴: before partisans had access to powerful computers, huge data sets, individual-level data, advanced software, and the latest social science, their gerrymandering efforts were sometimes prone to failure. In past years, an overly ambitious gerrymander could fail to preserve legislative control for the majority line-drawing party if it misjudged the probable margin of victory or defeat in each district¹⁵.

¹⁰ *Cfr. Rucho*, 588 U.S. cit., 16.

¹¹ *Cfr. Rucho*, 588 U.S. cit., 8.

¹² *Davis v. Bandemer*, 478 U.S. 109 (1986), ‘O Connor concurring.

¹³ *Rucho briefs for political science professors as amici curiae*, 2018, 2.

¹⁴ P. GALDERISI (eds.), *The Art of the Dummymander: The Impact of Recent Redistrictings on the Partisan Makeup of Southern House Seats, in Redistricting in the New Millennium*, 183-84.

¹⁵ «Old-time efforts, based on little more than guesses, sometimes led to so-called dummymanders: gerrymanders that went spectacularly wrong», *Cfr. Rucho* 588 U.S., cit., Kagan dissenting, 9.

3. *A self-limiting enterprise? Resisting wave election through data access, micro-targeting, and voter behavior prediction.*

As has been mentioned, electoral maps are today the result of an intense activity of electorate profiling¹⁶. Collecting and crossing enormous quantities of data coming from the internet such preferences and posts on social networks, online purchases, subscriptions to magazines and forums, with all the types of data already available from public records, like residence, family income, elections for which registration to the electoral rolls is required, party affiliation, ethnicity, it is possible to reach a prediction of electoral preferences that is almost infallible, allowing the majority party in the state legislature to draw maps with electoral constituencies with a pre-determined winner and thus to guarantee by algorithms, artificial parliamentary majorities even for more than a decade. Technology thus becomes an instrument to program and maximize the electoral result, subverting the core of representative democracy¹⁷. Free and fair elections guarantee the popular derivation of powers and the periodic control of the elected by the voters, but an unscrupulous use of technology at the service of party interests in redistricting completely overturns this principle: instead of appearing before the electorate and being accountable for his actions, the candidate is able, through new and aggressive practices of gerrymandering, to accurately select his electorate in order to ensure re-election¹⁸.

Proof of the durability of the results of modern partisan gerrymandering are the 2018 mid-term elections: significant swings in the popular vote in 2018 brought no electoral shifts in states with gerrymandered districts, demonstrating low responsiveness to voter preferences, and despite a significant increase in popular support, democratic candidates generally failed to gain congressional and state legislature seats in states with Republican gerrymanders. In 2018 congressional elections, Democrats won the popular vote nationwide by an 8.6 percent margin over Republicans¹⁹, and despite such a margin of popular vote victory, election results in many districts were inelastic to electoral preferences: as the percentage of the vote for Democratic candidates increased, the distribution of seats in gerrymandered districts remained unchanged from previous election cycles, even if some studies show that a one percent increase in nationwide votes for a party should, in a responsive map, result in a two percent change in seats for that party²⁰

Still, regarding statewide elections it is worth comparing the election results in Wisconsin, Ohio, Michigan, and North Carolina with those of Pennsylvania, where the State Supreme Court had declared in February 2018 the unconstitutionality of the previous electoral maps and accordingly supervised a new redistricting. It is evident that with a new map, in Pennsylvania, the Democrats won nine seats out of eighteen with 55.5% of the statewide

¹⁶ D. DALEY, *The House the GOP Built: How Republicans Used Soft Money, Big Data, and High-Tech Mapping to Take Control of Congress and Increase Partisanship*, N.Y. Magazine, Apr. 24, 2016, <https://nymag.com/intelligencer/2016/04/gopshouse-seats-are-safe-heres-why.html>.

¹⁷ W. K. TAM CHO, *Technology-Enabled Coin Flips for Judging Partisan Gerrymandering*, in *South. Cal. L.R. Postscript*, n. 93 del 2019.

¹⁸ *Rucho v. Common Cause*, 585, US__2019, Kagan dissenting.

¹⁹ H. ENTEN, *Latest House results confirm 2018 wasn't a blue wave. It was a blue tsunami*, CNN Politics, Dec. 6, 2018, <https://cnn.it/2QxAHb5>.

²⁰ M. P. McDONALD, *Seats to Votes Ratios in the United States* (2009) (unpublished paper) (on file with the Jack W. Peltason Center for the Study of Democracy at the University of California, Irvine), <http://bit.ly/2EhMB0B>.

vote²¹, while in North Carolina, for example, despite having a majority in the statewide popular vote, the Democrats won only three of the thirteen congressional seats on the ballot, the same number of seats they had won in previous years²².

According to some scholars, there are three phenomena that allow modern partisan gerrymanders to resist wave election, not all present in prior redistricting cycles: first partisan affiliation (self-identification with a party) and voter behavior are nowadays highly stable and predictable, making the partisan affiliation of voters a dependable trait on which mapmakers can rely; second, a wealth of granular voter data now available to mapmakers enables them to predict voter behavior with an unprecedented degree of accuracy; third, new and advanced statistical and map drawing applications enable partisans to translate voting data and analysis into districts that maximize partisan advantage²³.

As a general matter—and despite suggestions to the contrary—the partisan identity of voters is highly stable, and mapmakers can use data about partisan identity to predict voter behavior with a very high degree of confidence from election to election²⁴. Social science research shows that voters are “socialized” into a particular party at an early age, and partisan affiliation tends to harden in early adulthood. Once formed, these “identities are enduring features of citizens’ self-conceptions”, and “remain intact during peaks and lulls in party competition”²⁵. And an individual’s partisan identification is, on average, more enduring and stable than his or her core values or positions on political issues. Partisan attachment is a stronger predictor of voting behavior than gender, class, religion, and often race²⁶. Thus, the distribution of partisan identities among the electorate «provides powerful clues as to how elections will be decided».²⁷ In recent years, the predictive power of partisan identity has only increased; based on an analysis of American National Election Studies time-series data conducted in 2015, the «observed rate of Americans voting for a different party across successive presidential elections has never been lower», indicating that each party has a reliable and predictable «base of party support that is less responsive to short-term forces»²⁸.

Today’s mapmakers have access to more voter data about partisan affiliation than they did just a few years ago. Data gathering has become so precise that voters can be individually targeted with customized messages. Data brokers like Civis Analytics advertise their ability to create a “scientific understanding of the voter” to calculate the “likelihood for a certain behavior of a voter based on multiple characteristics like income, age, and geography”. Data brokers are experienced in creating “augmented voter files,” or extensive public and commercial datasets of voter data. These voter files combine traditional voter registration records with substantial additional information, such as «data from frequent-buyer cards at supermarkets and pharmacies, hunting and fishing license registries, catalog and magazine subscription lists, membership rolls from unions, professional associations, and advocacy

²¹ S. H. WANG, *Pennsylvania 2018 Detailed Results*, Princeton Gerrymandering Project, <http://bit.ly/2BVrm4a>.

²² M. ASTOR, K.K. LAI, *What’s Stronger Than a Blue Wave? Gerrymandered Districts*, N.Y. Times, Nov. 29, 2018, <https://nyti.ms/2Stpx3T>.

²³ *Rucho briefs for political science professors as amici curiae*, 2018, 15.

²⁴ B. SCHAFFNER, S. ANSOLABEHRE, *2010-2014 Cooperative Congressional Election Study Panel Survey (Version 10)*, Harvard Dataverse (June 10, 2015), <http://bit.ly/2BUbeA5>.

²⁵ D. P. GREEN, B.L. PALMQUIST, E. SCHICKLER, *Partisan Hearts and Minds*, New Haven, 2002, 4-5.

²⁶ D. P. GREEN, B.L. PALMQUIST, E. SCHICKLER, *Partisan Hearts and Minds*, cit., 3.

²⁷ D. P. GREEN, B.L. PALMQUIST, E. SCHICKLER, *Partisan Stability: Evidence from Aggregate Data*, in R.G. NIEMI, H. F. WEISBERG (eds.), *Controversies in Voting Behavior*, Washington, 2001, 4th ed, 356.

²⁸ C. D. SMIDT, *Polarization and the Decline of the American Floating Voter*, in *Am. J. Pol. Sci.*, 2017, 61(365), 379-81.

groups». The 2018 elections demonstrate the power of using voter records, data, social media and even credit reports to micro-target and track voters. The 2018 election was marked by unprecedented use of social media information to predict and influence voter behavior²⁹. During the 2018 Georgia governor's race, for example, candidate Stacey Abrams eschewed traditional, broad targeting tactics, choosing instead to target an "untapped market" of 90,000 voters that her campaign identified as "persuadable" based on collected data³⁰. The quantity and granularity of publicly available voter data, and improvements in data analytics, will allow mapmakers to assess and predict partisan affiliation at both the individual and aggregate levels more accurately than ever. Data broker Civis Analytics correctly forecasted the winner in 383 out of 394 contested races (97%) in 2018 and its estimate of the national popular vote was accurate to within tenths of a percent³¹.

4. Polarization, lack of accountability, voter dilution

Partisan gerrymanders create "safe" districts for parties, with the result that the composition of state legislatures becomes more polarized: drawing a small number of districts the opposing party will win by lopsided margins and draw a large number of districts the redistricting party will win by narrower margins creates an overwhelming number of safe districts, with the gerrymandering party guaranteed to win in a majority of districts and the other party guaranteed to win in a minority.

Therefore, candidates in safe, gerrymandered districts will only need and will entirely bound to appeal to primary voters, who tend to be farther from the ideological center and once a candidate is selected as the party's standard-bearer, he need not and do not temper his views³².

The absence of competitive districts thus leads to legislators who do not reflect the ideological preferences of the people they represent. If we consider a district composed of 60% Republicans and 40% Democrats, who reliably vote for their respective parties, to win the Republican primary, a candidate need only win votes from just over 30% of the total voters and since cross-party voting is relatively uncommon, the smart candidate understands that his political fortunes depend exclusively on responsiveness to the 30% needed to win the primary.

Just as candidates in a gerrymandered district have little incentive to appeal to moderate voters in general elections, legislators in a gerrymandered State also have little incentive to cooperate with the opposing party or to endorse more moderate policies once they are in office, at the extent that in many States, earning a reputation for bipartisanship is the surest way to lose the next primary: that lack of bipartisanship means that representatives from the minority party— and, therefore, their constituents—are shut out of the legislative process³³.

²⁹ S. SHANE, S. FRENKEL, *Russian 2016 Influence Operation Targeted African- Americans on Social Media*, N.Y. Times, Dec. 17, 2018, <https://nyti.ms/2SsqlpR>.

³⁰ B. BARROW, *Inside Stacey Abrams' strategy to mobilize Georgia voters*, AP News, Oct. 12, 2018, <http://bit.ly/2NqslbN>.

³¹ Civis Analytics, *Data science and the midterm elections: breaking down the results*, Nov. 28, 2018, <http://bit.ly/2XpRLjB>.

³² R. H. PILDES, *The Constitutionalization of Democratic Politics*, in *Harv. L.R.*, 2004, 118(28), 114-15.

³³ A few examples of the implications of polarization: Following the redistricting in Wisconsin, Republican lawmakers enacted new rules that limit Democrats' ability to speak on legislation and refused to consider Democrat-sponsored amendments. Democrats in Ohio are not allowed to send newsletters to their constituents until Republican leaders review them, whereupon they sometimes require the removal of content critical of

This means, for the voters whose political power a partisan gerrymander aims to diminish, an inability to elect and influence legislators that lead to an exclusion from the political process: these constituents are silenced and deprived of an effective vote and voice in the legislative process, but gerrymandering causes legislators to treat even members of their own party in purely instrumental terms, moving them around the map as necessary to secure seats. This weaponization of demography robs voters of their constitutional standing and demeans their status as individuals with unique experiences, beliefs, and desires³⁴.

Given the potential subversive impact that modern gerrymandering techniques have on the democratic process, it is fair to recognize the merit of Elena Kagan's dissenting opinion, shared by Justices Ginsburg, Breyer, and Sotomayor, in which she pointed out the Court's inattention to the impact of modern technologies in redistricting, treating this aggressive and subversive contemporary form of gerrymandering in the same way as the imprecise dummymandering of the Bandemer era. Using the same arguments as Sandra O'Connor in 1986 and Scalia in 2004, the Supreme Court in *Rucho* focuses all its attention on that «desire for a proportional representation» that it believes is evident in the plaintiffs' claims, without any comprehensive view of the modern phenomenon of gerrymandering and its impact on the representative system.

As powerful as current methods are, predictive modeling and other large-scale analytical tools will become more potent in the near future. New technologies and data sources, such as augmented voter files and modern machine-learning algorithms, will make it easier for mapmakers to predict the decision-making habits of Americans in a more nuanced and accurate way than ever before. When applied to the process of redistricting, new data analysis techniques will enable partisan mapmakers to create gerrymanders that are even more biased, more durable, and more capable of withstanding the effects of “wave” election years.

5. State law as remedy: new paths and new challenges towards a third generation of partisans

The majority of the Supreme Court in *Rucho* maintains that the solution to the exacerbation of partisan gerrymandering in the American politics lies in the legislative power at the federal and state level and especially in the numerous bills introduced over time in Congress and in the state legislatures: according to the Court, this is the only constitutionally way to limit partisan gerrymandering, with no judicial invasion of the authority of the legislative power. However, it is precisely the current majorities in state legislatures that perpetuate and exacerbate the phenomenon: in 241 years, state legislatures have shown very little willingness to correct political gerrymandering, thus waiting for such an intervention means assuming that the parties may freely renounce the most effective instrument of preservation of power at their disposal. Exactly because too many owe their seats to partisan gerrymandering, the chances for self-reform, as the poor achievements in this regard attest, are very low.

Republican legislators or policies; Republican leaders also regularly prohibit Democrats from reserving committee rooms at the state capitol building for informational meetings, and refuse to publish Democrats' notes of protest in the legislative record, despite the Ohio Constitution's guarantee that protests “shall, without alteration, commitment, or delay, be entered upon the journal.” (Ohio Const. art. II, § 10). *Cfr. Gill v. Whitford Brief for Amici Curiae bipartisan group of 65 current and former state legislators in support of appellees.*

³⁴ «Partisan gerrymandering dilutes democracy by taking away a voter's ability to voice their particular beliefs to legislators who will acknowledge them». *Cfr. Miller v. Johnson*, 515 U.S. 900, 911-12 (1995).

Perhaps, then, the only way to restore a long violated constitutional rule of law is in the hands of the judiciary: through the very same technological tools used to facilitate and expand partisan gerrymandering, the courts can determine, by fair and quantitative methods, the long-chased line between legitimate and illegitimate use of the power of apportionment³⁵.

And if the Supreme Court's decision in *Rucho* precluded the involvement of the federal courts in this process, the same cannot be said for State courts: currently, only State supreme courts can address the issue, preventing an uncontrolled expansion of new technologies at the service of partisanship.

The events preceding and following *League of women voters of Pennsylvania v. Commonwealth of Pennsylvania*³⁶ show the viability of the state court approach: in July 2017, League of Women voters of Pennsylvania filed a lawsuit alleging that the new map introduced in 2011 by the Republican majority in the Pennsylvania legislature consisted in an unconstitutional gerrymandering. A Pennsylvania trial court held that the district lines did not violate state law, even if tended to favor Republicans. The case was appealed to the Pennsylvania State Supreme Court who struck down the existing map, saying that it “clearly, plainly and palpably” violated the state Constitution. The Court provided a timeframe in which the state legislative and executive branches could prepare new maps if they chose so. The deadline was set on February 9, 2018 but the term expired without an agreement between the Governor and the General Assembly, thus the Court released a new congressional map on February 19, 2018, to come into force for the May 15 primaries. Pennsylvania Republicans appealed to the United States Supreme Court trying to halt the enforcement of the

order, but the Court denied the request: whether the Supreme Court could ever review a partisan gerrymandering case based in state law is a question of federalism and state sovereignty. Four relevant principles rule the ability of reviewing state law decisions by the Supreme Court: (1) The Supreme Court has the final say with respect to questions of federal law; (2) the Supreme Court will not review questions of state law; (3) if it appears both federal and state law decision are present, the Supreme Court will not review the case if there is an adequate and independent state law ground; and (4) only if the basis for the state court's decision is ambiguous, the Supreme Court will assume the basis is federal, permitting review³⁷.

At a closer look, in *Rucho*, the Supreme Court itself argued that state constitutions contain provisions that can provide guidance in the mapmaking process and that broadly speaking, state law may better meet the needs of the plaintiffs: the constitutional amendments approved in Colorado and Michigan creating multimember commissions responsible in whole or in part for creating and approving district maps for congressional and state legislative districts³⁸ would prove the feasibility. Also, the provisions of Florida³⁹, Missouri⁴⁰,

³⁵ A very clear analysis of the reasons why the use of technology, and in detail a set of potential random maps developed by court-appointed experts and considering only traditional redistricting criteria, may prove to be the best tool for defining a baseline of fair apportionment beyond which the maps may bear elements of unconstitutionality, can be found in: W.K. TAM CHO, *Technology-Enabled Coin Flips*, cit., 11-27.

³⁶ *League of Women Voters of Pa. v. Commonwealth*, 174 A.3d 282 (Pa. 2018).

³⁷ C. STEWART, *State court litigation: the new war against partisan gerrymandering*, in *Mich. L.R.*, 2018, 116, 161.

³⁸ Colorado Constitution, Art. V, §§ 44, 46; Michigan Constitution, Art. IV, §6.

³⁹ See Florida Const., Art. III, §20(a): «No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent».

⁴⁰ See Missouri Const., Art. III, §3: «Districts shall be designed in a manner that achieves both partisan fairness and, secondarily, competitiveness. ‘Partisan fairness’ means that parties shall be able to translate their popular support into legislative representation with approximately equal efficiency».

Constitution, as well as the Iowa⁴¹ and Delaware⁴² Codes demonstrate that the best path to identify a judicially manageable standard is through state court litigation, by taking state constitutions and state law as a parameter. This would happen, however, at the expense of uniformity, which only the intervention of the federal judiciary would have guaranteed. Whatever the most convenient option is, the matter is as urgent as ever, as the decennial census approaches, and an aggressive third generation of political gerrymandering is on its way: «the genius of republican liberty seems to demand [...] not only that all power should be derived from the people, but that those intrusted with it should be kept in dependence on the people»⁴³ and preventing the abuse of new technologies from subverting the representative system means preserving the sovereignty of the people, and the accountability of legislators before them.

⁴¹ See Iowa Code §42.4(5) (2016): «No district shall be drawn for the purpose of favoring a political party, incumbent legislator or member of Congress, or other person or group».

⁴² See Delaware Code Ann., Tit. XXIX, §804 (2017): «no district shall be created so as to unduly favor any person or political party».

⁴³ J. MADISON, *The Federalist No. 37*, in C. ROSSITER (ed.), *The Federalist Papers*, Berkley, 2003, 223.