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The Supreme Court in Rucho v. Common Cause *held that the issue of partisan gerrymandering—that is, the drawing of political districts in a way that favors the party in power—presented a political question that was outside the competency of the courts to solve, at least through constitutional law. This article argues that* Rucho *does not close the door to judicial action in the face of partisan gerrymandering but instead closes the door only to the remedy proposed in the case. As with practically all major constitutional cases in recent memory, the* Rucho *plaintiffs were seeking relief that was equitable in nature: they were asking for the courts to order the relevant state legislatures to redraw their district maps and, if the legislatures refused, for the courts to draw new maps themselves. This article takes the position that it was this framing of the case that caused the Court to throw up its hands and declare the issue to be one for the political branches to solve.* Rucho *should not present a barrier to plaintiffs seeking to sue individual mapdrawers for money damages for maliciously denying them the full right to vote.*

While there traditionally has been no judicial recourse to challenge district maps as being unfair, there is a long line of authority for suing at law, rather than at equity—that is, suing for money damages rather than for specific performance—individuals who abuse their positions of power to harm specific people, including to keep people from voting. Additionally, private suits against individual mapdrawers for money

* I would like to thank the editors of the Santa Clara Law Review for their help with this article.

damages would not suffer from the same concerns that led the court in Rucho *to conclude that there was no judicially manageable standard for judging the fairness of, and potentially redrawing, district maps.*

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I. INTRODUCTION

The Supreme Court in *Rucho v. Common Cause* held that the issue of partisan gerrymandering—the drawing of political districts in a way that favors the party in power—presented a political question that was outside the competency of the courts to solve, at least through constitutional law.[1] The Court noted that state constitutions and statutes provided additional

1. Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

guidance for state courts in determining whether a district was legally drawn and suggested that Congress could do the same.[2] Until then, however, the Court explained there was no standard derivable from neutral, judicial principles that could adequately address the problem.[3]

Since then, there have been significant efforts to get Congress to pass voting rights legislation, including restrictions on partisan gerrymandering.[4] But so far, none have succeeded. This article argues that *Rucho* does not close the door to judicial action in the face of partisan gerrymandering but instead closes the door only to the remedy proposed in the case.

As with practically all major constitutional cases in recent memory, the *Rucho* plaintiffs were seeking relief that was equitable: they were asking for the courts to order the relevant state legislatures to redraw their district maps and, if the legislatures refused, for the courts to draw new maps themselves.[5] This article takes the position that this framing of the case caused the Court to throw up its hands and declare the issue to be one for the political branches to solve. *Rucho* should not present a barrier to plaintiffs seeking to sue individual mapdrawers for money damages for maliciously denying them the full right to vote.

In *Rucho*, Chief Justice Roberts, writing for a Court divided five-to-four, explained that traditionally the courts did not stop political gerrymandering, suggesting that the courts should not start now.[6] But he also went through each suggested constitutional hook for remedying partisan gerrymandering and explained why this did not present a workable standard.[7] The core argument was that there simply was no way for a court to judge the fairness of a districting scheme without importing standards of fairness that were not

2. *Id.* at 2507-08.

3. *Id.* at 2498-502.

4. *See* For the People Act of 2021, H.R. 1, 117th Cong. tit. II.E (2021). The For the People Act addressed gerrymandering only in Congressional districts. It did not address gerrymandering in state legislature districts.

5. *See Rucho*, 139 S. Ct. at 2491-93 (discussing litigation before three-judge district courts, which ultimately resulted in the courts enjoining future use of the district maps).

6. *Id.* at 2494-96.

7. *Id.* at 2502-06.

grounded in the Constitution or common law.[8] Without guidance from Congress, a court did not have the tools to judge, and perhaps even draw, a map. Section I of this article briefly discusses successful constitutional challenges to practices similar to partisan gerrymandering and then goes through the reasons why the *Rucho* Court rejected extensions of each.

While there traditionally has been no judicial recourse to challenge district maps as being unfair, there is a long line of authority for suing at law, rather than at equity—suing for money damages rather than for specific performance—individuals who abuse their positions of power to harm specific people, including to keep people from voting. The House of Lords first recognized what would become the intentional tort of misfeasance in public office in the 1703 voting rights case of *Ashby v. White*.[9] Nineteenth-century case law from the Supreme Court sets out the elements of this tort, and recent case law from the House of Lords further develops its nuances.[10] The Supreme Court has consistently recognized the availability of a constitutional tort for deprivation of the right to vote based on *Ashby v. White*.[11] Section II of this article outlines this authority.

A suit at law for money damages against individual mapdrawers for maliciously diluting the right to vote would not suffer the legal infirmities that the requests for equitable relief at issue in *Rucho* suffered. The courts would not need to start from scratch when developing guiding principles because there is a common law answer. And courts could stay out of the arena of judging maps based on different notions of fairness: the relevant question would be whether each person who drew the maps acted maliciously, as opposed to the fairness of the map, and the outcome would be an exchange of money, rather than redrawing the map. Although suits for misfeasance in public office would not immediately fix a gerrymander, they would add a powerful disincentive against

8. *Id.* at 2499-502.

9. Ashby v. White (1703) 1 Eng. Rep. 417, 1 Bro. P.C. 62.

10. *See* South v. Maryland *ex rel.* Pottle, 59 U.S. 396, 402-03 (1855); Three Rivers District Council v. Governor of The Bank of England [2000] 2 W.L.R. 1220 (HL).

11. *See, e.g.*, Nixon v. Herndon, 273 U.S. 536, 540 (1927); Lane v. Wilson, 307 U.S. 268, 273 (1939); Carey v. Piphus, 435 U.S. 247, 264 n.22 (1978); Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 311 n.14 (1986).

participation in gerrymandering. Section III of this article outlines why the tort of misfeasance in public office passes the tests the Court in *Rucho* concluded barred equitable relief and the potential uses of the tort.

II. THE THEORIES FOR ATTACKING PARTISAN GERRYMANDERING AND *RUCHO*'S REJECTION OF THEM

A. The requirement of one person, one vote derived from Article I, Section 2, Clause 1 and the Equal Protection Clause

To understand the different possibilities for legal recourse for partisan gerrymandering, a little background information is necessary. Starting with the most basic, the Constitution requires that the number of representatives each state has in the House of Representatives be apportioned based on the states' populations, measured by a census that occurs every ten years.[12] It also provides that "[t]he Times, Places and Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . ."[13] In 1842, Congress passed a law requiring that all representatives be chosen from single-member districts, rather than at-large voting.[14] Similarly, every state and most local governments have governmental bodies consisting of representatives from single-member districts.

In 1872, Congress required that all federal congressional districts "contain[] as nearly as practicable an equal number of

12. U.S. CONST. amend. XIV, § 2 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed."); *id.* art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. 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 be Law direct."), *superseded in part by id.* amend XIV, § 2.

13. *Id.* art. I, § 4, cl. 1.

14. Rucho v. Common Cause, 139 S. Ct. 2484, 2495 (2019) (citing Apportionment Act of 1842, ch. 47, 5 Stat. 491 (codified as amended at 2 U.S.C. § 2c (2018))).

inhabitants,"[15] and most state constitutions contained a similar requirement for at least one house of the state legislature.[16] The early twentieth century, however, marked a major shift in the population of the United States from a predominantly rural to a predominantly urban country. In order to maintain the power of the rural populations, many states' legislatures simply ignored their state constitutions' requirements, refusing to update the state legislative districts and leaving in place the districts based on the 1900 census.[17] Congress did reapportion seats in the House of Representatives after the 1910 census but then joined the states in refusing to do so after the 1920 census.[18] To prevent this from happening again, Congress, in the Reapportionment Act of 1929, set forth a permanent reapportionment formula to eliminate the need for decennial apportionment acts, but the 1929 Act did not include the requirement that federal districts have equal populations.[19]

By the 1960s, both state and federal districts varied tremendously in size from district to district, and the Supreme Court decided to get involved. In 1962 the Court held in *Baker v. Carr* that unequal state districts could be an equal protection violation.[20] In 1964, the Court held in *Weberry v. Sanders* that Article I, Section 2, Clause 1's requirement that "[t]he House of Representatives shall be composed of Members chosen every second Year *by the People* of the several States" "mean[t] that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."[21] The Court would later interpret "as nearly as is practicable" to require a "good-faith effort to achieve precise mathematical

15. Apportionment Act of 1872, Ch. 11, § 2, 17 Stat. 28; *see also Rucho*, 139 S. Ct. at 2495.

16. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 537-40 (1964) (discussing the Alabama Constitution's requirements for districts in the state senate and house of representatives); Baker v. Carr, 369 U.S. 186, 188-89 (1962) (discussing the Tennessee Constitution's requirements for districts in the state senate and house of representative).

17. *See, e.g.*, *Baker*, 369 U.S. at 189-94.

18. *See* Act of Aug. 8, 1911, ch. 5, 37 Stat. 13; *1920 Overview*, U.S. CENSUS BUREAU, https://www.census.gov/history/www/through_the_decades/overview/1920.html (last visited Aug. 16, 2020).

19. Act of June 18, 1929, ch. 28, 46 Stat. 21; *see also 1920 Overview*, *supra* note 18.

20. *Baker*, 369 U.S. 186.

21. Wesberry v. Sanders, 376 U.S. 1, 3, 7-8 (1964) (emphasis added).

equality."[22] Also in 1964, the Court decided *Reynolds v. Sims* which held that for state and local districts, the Equal Protection Clause also required a standard of approximately one person, one vote—although there was a little more flexibility than with federal districts.[23] Later cases clarified that a total deviation between the largest and smallest district of less than ten percent is presumptively valid and above ten percent, presumptively invalid.[24] The Court succinctly explained its reasoning in *Reynolds*: "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."[25]

Although the concept of vote dilution and the one-person, one-vote rule arose because state and federal legislatures refused to do their job while redistricting, these doctrines have been applied apart from the legislative districting arena in ways that have profoundly affected the country. In *Bush v. Gore*, the Supreme Court ruled that Florida's recount procedures for the presidential election constituted vote dilution because "the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another."[26] To be constitutional, the recount would need "specific rules designed to ensure uniform treatment."[27]

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22. Kirkpatrick v. Preisler, 394 U.S. 526, 530-31 (1969).

23. Reynolds v. Sims, 377 U.S. 533, 578 (1964).

24. White v. Regester, 412 U.S. 755, 763-64 (1973); Gaffney v. Cummings, 412 U.S. 772, 776-77 (1973) (Brennan, J., concurring in part and dissenting in part); Connor v. Finch, 431 U.S. 407, 418 (1977).

25. *Reynolds*, 377 U.S. at 555.

26. Bush v. Gore, 531 U.S. 98, 106 (2000).

27. *Id.* The Court, of course, then went on to issue an extremely controversial remedy that, in the opinion of this author, exceeded the role of the Court. Instead of remanding to the Florida courts for further proceedings consistent with its opinion, which would be the normal course of action and which Justice Breyer suggested in his dissent, the Court ended the recount and ordered the initial election tally certified. *Id.* at 110-11; *id.* at 146-47 (Breyer, J., dissenting). It did so because (1) the Florida Supreme Court had previously said it was the intent of the Florida legislature that the state "participat[e] fully in the federal election process," (2) 3 U.S.C. § 5 provided that a final decision on state electors had to be made by December 12 in order for Congress to treat that decision as "conclusive" when counting the electoral votes, and (3) no recount that would be constitutionally up to snuff could be completed by December 12. *Id.* at 110 (majority opinion) (alteration in original) (quoting Palm Beach Canvassing Bd. v. Harris, 772 So. 2d 1220, 1237 (Fla. 2000)).

B. Cracking and packing: the problem one-person-one-vote does not solve

While the one-person, one-vote cases took care of the simplest form of vote dilution—different population sizes—it did not eliminate strategic districting for political gain and indeed may have enhanced the ability to do so. In opposing a rule of strict mathematical equality, Justice Harlan argued,

> [T]he Court's exclusive concentration upon arithmetic blinds it to the realities of the political process . . . . The fact of the matter is that the rule of absolute equality is perfectly compatible with "gerrymandering" of the worst sort. A computer may grind out district lines which can totally frustrate the popular will on an overwhelming number of critical issues. The legislature must do more than satisfy one man, one vote; it must create a structure

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The court concluded its opinion by saying

> None are more conscious of the vital limits on judicial authority than are the Members of this Court …. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.

Id. at 111. But while the Court was forced to answer the vote-dilution question, it was not forced to issue the sweeping remedy that it did. And the Court's remedy went beyond its power.

In order to reach that remedy, the Court needed to interpret what the Florida Legislature would have wanted in this situation. Determining the intent of the Florida Legislature is the province of the Florida Supreme Court unless such a determination goes "beyond what a fair reading provide[s]" and a person harmed by the interpretation "could not fairly be deemed to have been apprised of" it. *See id.* at 114-15 (Rehnquist, C.J., concurring) (quoting NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 457 (1958)). It is far from clear that the Florida Legislature would definitely want to meet the December 12 deadline at all costs. Certifying an election by December 12 simply attaches "conclusive" status to the resulting electoral votes when Congress ultimately counts all the votes. But Congress does not first count the votes until January 6, 3 U.S.C. § 15 (2018); the new president does not assume the office until January 20, U.S. CONST. amend. XX, § 1; and there are provisions in place for a temporary acting president if one is not selected until even later, *id.* § 3; 3 U.S.C. § 19 (2018). It is entirely possible that the Florida Legislature would be okay with a date later than December 12 if the alternative was not to have a recount at all. Indeed, the Florida Legislature never mentioned 3 U.S.C. § 5, and it was the Florida Supreme Court that assumed legislative intent that the state "participat[e] fully in the federal election process." *Bush*, 531 U.S. at 110. The Florida Supreme Court was the proper court to determine whether to continue the recount although it meant non-conclusive electoral votes or to end the recount. The Supreme Court's remedy, therefore, significantly overstepped its authority, treading on powers vested to the Florida Supreme Court. None of this, however, calls into question the Court's invocation of the vote dilution principle in the case.

> which will in fact as well as theory be responsive to the sentiments of the community.[28]

Today computers allow mapdrawers to design districts on a household-by-household basis and to create thousands of possible maps from which to choose a map that is likely to produce the best results for their party.[29]

The processes by which mapdrawers shape districts toward a favorable overall map are called "cracking" and "packing."[30] "Cracking means dividing a party's supporters among multiple districts so that they fall short of a majority in each one. Packing means concentrating one party's backers in a few districts that they win by overwhelming margins."[31] By cracking and packing districts, and with the help of computer technology, parties can produce legislatures with makeups that in no way mirror the populations they serve.[32]

C. Racial Gerrymanders Violating Equal Protection

Many of the most extreme gerrymanders can be struck down for being based on race. Cracking and packing that "rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race" is unconstitutional.[33] In these cases, however, states often use data showing that race and party coincide to argue that a gerrymander was not based on race and was instead

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28. Kirkpatrick v. Preisler, 394 U.S. 526, 542, 551 (1969) (Harlan, J., dissenting).

29. *See id.*; Gill v. Whitford, 138 S. Ct. 1916, 1936 (2018) (Kagan, J., concurring) (discussing computer simulations); Vieth v. Jubelier, 541 U.S. 267, 312-13 (2004) (Kennedy, J., concurring in judgment) (same).

30. *Gill*, 138 S. Ct. at 1924 (majority opinion).

31. *Id.*

32. *See id.* at 1936 (Kagan, J., concurring) (discussing computer simulations); *Vieth*, 541 U.S. at 312-13 (Kennedy, J., concurring in judgment) (same).

33. Shaw v. Reno, 509 U.S. 630, 649 (1993); *see also id.* at 646-47 ("In some exceptional cases, a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to 'segregat[e] . . . voters' on the basis of race. *Gomillion*, in which a tortured municipal boundary line was drawn to exclude black voters, was such a case. So, too, would be a case in which a State concentrated a dispersed minority population in a single district by disregarding traditional districting principles such as compactness, contiguity, and respect for political subdivisions." (omission in original) (quoting Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960))).

based on party.[34] Of course, not all partisan gerrymanders will be racially motivated.

D. Rucho v. Common Cause

In *Rucho v. Common Cause* the Supreme Court held that suits to enjoin partisan gerrymandering were nonjusticiable.[35] Chief Justice Roberts, writing for a Court divided five-to-four, explained that "partisan gerrymandering claims present political questions beyond the reach of the federal courts"[36] because there are no "constitutional directive[s] or legal standards to guide [courts] in the exercise of such authority."[37]

Understanding why the Court concluded no workable standard existed in the context of equitable relief is crucial for determining whether a workable standard for legal relief can be found. This subsection traces *Rucho*'s reasoning so that the same analysis may be applied to the standard proposed later in this article.

Rucho concerned challenges to districting plans in North Carolina and Maryland.[38] In 2016 the Republican-controlled legislature of North Carolina drew maps it believed "would produce a congressional delegation of ten Republicans and three Democrats."[39] This was despite the fact that as recently as 2012 "Democratic congressional candidates had received more votes on a statewide basis than Republican candidates."[40] Legislators were frank about the reason for the map they promulgated: one of the chairs of the redistricting committee explained, "I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country."[41] He did "not believe it [would be]

34. *See generally* Richard L. Hasen, *Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases*, 59 WM. & MARY L. REV. 1837 (2018).

35. Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

36. *Id.* at 2506-07.

37. *Id.* at 2508.

38. *Id.* at 2491-93.

39. *Id.* at 2491 (citing Common Cause v. Rucho, 318 F. Supp. 3d 777, 807-08 (M.D.N.C. 2018)).

40. *Id.* (quoting *Common Cause*, 318 F. Supp. 3d at 808).

41. *Rucho*, 139 S. Ct. at 2491 (quoting *Common Cause*, 318 F. Supp. 3d at 809).

possible to draw a map with 11 Republicans and 2 Democrats."[42]

An expert for the challengers to the North Carolina plan had a computer randomly generate 3000 possible maps that complied with all the districting criteria North Carolina chose to use except for the criterion of partisan advantage.[43] Of those maps, all 3000 would have resulted in at least one more Democratic House member, and 77% of the maps would have resulted in three or four more Democratic House members.[44] Another expert used more generalized criteria for district-making to produce 24,518 maps, of which over 99% would have resulted in at least one more Democrat and over 70% would have resulted in two or three more.[45] The three-judge district court enjoined North Carolina from using this map in any election after the November 2018 election.[46]

In 2011 the Democratic-controlled legislature of Maryland produced a map that it believed would produce seven Democratic House members and one Republican House member, as opposed to the six-to-two distribution that existed at the time.[47] The Democratic Governor of the state later testified this was his goal when he appointed the redistricting committee.[48] To do this, the legislature moved about 360,000 voters out of Maryland's sixth congressional district and moved about 350,000 new voters in.[49] This resulted in about 66,000 fewer registered Republicans in the district and about 24,000 more registered Democrats.[50] In 2012, the first congressional election to use the new map, district voters replaced a Republican congressman with a Democrat, and Democrats have held the seat since.[51] The three-judge district court enjoined Maryland from using this map in future elections and

42. *Id.* (alteration in original) (quoting *Common Cause*, 318 F. Supp. 3d at 808).
43. *Id.* at 2518 (Kagan, J., dissenting).
44. *Id.* (citing *Common Cause*, 318 F. Supp. 3d at 875-76, 894).
45. *Id.* (citing *Common Cause*, 318 F. Supp. 3d at 893-94).
46. *Id.* at 2492-93 (majority opinion).
47. *Rucho*, 139 S. Ct. at 2493 (citing Benisek v. Lamone, 348 F. Supp. 3d 493, 502 (D. Md. 2018)).
48. *Id.* (citing *Benisek*, 348 F. Supp. 3d at 502).
49. *Id.*
50. *Id.* (citing *Benisek*, 348 F. Supp. 3d at 499-501).
51. *Id.*

ordered the legislature to create a new plan for use starting in the 2020 election.[52]

After relaying the facts in the two cases, Chief Justice Roberts discussed the nature of the political question doctrine.[53] Some cases, he explained, present a political question and are therefore said to be nonjusticiable because they are "outside the courts' competence and therefore beyond the courts' jurisdiction."[54] One of the reasons a claim might be nonjusticiable under the political question doctrine is that courts "lack 'judicially discoverable and manageable standards for resolving [it].'"[55] The question before the Court was "whether such claims are claims of *legal* right, resolvable according to *legal* principles, or political questions that must find their resolution elsewhere."[56]

In concluding that partisan gerrymandering claims could not be resolved according to legal principles, the Chief Justice recounted how political gerrymandering had been widespread since the early days of the Republic—including noting the term "gerrymander" itself dated back to 1812 when Massachusetts Governor Elbridge Gerry signed off on a district that looked like a salamander.[57] He noted that Article I, Section 4, Clause 1 of the Constitution gives the state legislatures power over the "Times, Places and Manner of holding Elections" while reserving to Congress the power to "make or alter" any such regulations[58] and that Alexander Hamilton in Federalist 59 suggested such power was lodged wholly in the state legislatures and Congress.[59] "At no point," Chief Justice Roberts opined, "was there a suggestion that the federal courts

52. *Id.*
53. *Rucho*, 139 S. Ct. at 2493-94.
54. *Id.* at 2494 (citing Baker v. Carr, 369 U.S. 186, 217 (1962)).
55. *Id.* (quoting *Baker*, 369 U.S. at 217).
56. *Id.*
57. *Id.* at 2494-95.
58. *Id.* at 2495 (quoting U.S. CONST. art I, § 4, cl. 1).
59. *Rucho*, 139 S. Ct. at 2496 ("[I]t will . . . not be denied that a discretionary power over elections ought to exist somewhere. It will, I presume, be as readily conceded that there were only three ways in which this power could have been reasonably modified and disposed: that it must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter, and ultimately in the former." (omission in original) (quoting THE FEDERALIST NO. 59, at 362 (Alexander Hamilton) (Clinton Rossiter ed., 1961))).

had a role to play. Nor was there any indication that the Framers had ever heard of courts doing such a thing."[60]

Although Chief Justice Roberts said "the history is not irrelevant," he did not base his ruling on an explicit constitutional delegation of power to other governmental entities.[61] As the Chief Justice recounted, the Court had concluded that districting issues were justiciable in two different lines of cases—districts with unequal populations and racial gerrymanders.[62] Chief Justice Roberts explained these are justiciable because they can be decided based on basic equal protection principles—one person, one vote and no racial discrimination.[63] But there is no easy, objective standard in partisan gerrymandering cases because "while it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, 'a jurisdiction may engage in constitutional political gerrymandering.'"[64] "To hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities."[65] The question was not whether partisanship played a role in districting, it was whether such partisanship went too far.[66] And this question simply could not be answered in an objective, apolitical manner.

Chief Justice Roberts then surveyed the possible standards for judging partisan gerrymandering and concluded none were workable.[67] To be justiciable, Chief Justice Roberts explained, a standard would have to satisfy the constraints laid out in Justice Kennedy's concurrence on the subject fifteen years before: "Any standard for resolving [partisan gerrymandering] claims must be grounded in a 'limited and precise rationale' and be 'clear, manageable, and politically neutral.'"[68]

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60. *Id.*
61. *Id.* at 2496.
62. *Id.* at 2495-96.
63. *Id.* at 2496-97.
64. *Id.* at 2497 (quoting Hunt v. Cromartie, 526 U.S. 541, 551 (1999)).
65. *Rucho*, 139 S. Ct. at 2497.
66. *Id.* (quoting Vieth v. Jubelier, 541 U.S. 267, 296 (2004) (plurality opinion)).
67. *Id.* at 2498-506.
68. *Id.* at 2498 (quoting *Vieth*, 541 U.S. at 306-08 (Kennedy, J., concurring in judgment)).

As an initial point, the Constitution does not require proportional representation. According to the Chief Justice, "[p]artisan gerrymandering claims invariably sound in a desire for proportional representation,"[69] where "the greater the departure from proportionality, the more suspect an apportionment plan becomes."[70] But case law and antebellum history reveal there is no such rule.[71]

Chief Justice Roberts thus construed the arguments of challengers to the districting plan as "ask[ing] the courts to make their own political judgment about how much representation particular political parties *deserve*—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end" based on some notion of fairness.[72] But fairness is not a "judicially manageable standard."[73] First of all, it is not clear what is fair in districting.[74] Is it making more competitive districts?[75] Not necessarily: "If all or most of the districts are competitive . . . even a narrow statewide preference for either party would produce an overwhelming majority for the winning party."[76] But the solution also can't be found "by yielding to the gravitational pull of proportionality and engaging in cracking and packing, to ensure each party its 'appropriate' share of 'safe' seats" because "[s]uch an approach . . . comes at the expense of competitive districts and of individuals in districts allocated to the opposing party."[77] So "perhaps fairness should be measured by adherence to 'traditional' districting criteria,

69. *Id.* at 2499.

70. *Id.* (quoting Davis v. Bandemer, 478 U.S. 109, 159 (1986) (O'Connor, J., concurring in judgment)).

71. *Rucho*, 139 S. Ct. at 2499. Chief Justice Roberts cited to the fact that "[f]or more than 50 years after the ratification of the Constitution, many States elected their congressional representatives through at-large or 'general ticket' elections" that often meant every representative from the state would be of one party. *Id.* (citing ERIK J. ENGSTROM, PARTISAN GERRYMANDERING AND THE CONSTRUCTION OF AMERICAN DEMOCRACY 43-51 (2013)). Congress required single-member districts in 1842 "not out of a general sense of fairness, but instead a (mis)calculation by the Whigs that such a change would improve their electoral prospects." *Id.* (citing ENGSTROM, *supra* note 71, at 43-44).

72. *Id.*

73. *Id.* (quoting *Vieth*, 541 U.S. at 291 (plurality opinion)).

74. *Id.* at 2500.

75. *Id.*

76. *Id.* (alterations in original) (quoting Davis v. Bandemer, 478 U.S. 109, 130 (1986) (plurality opinion)).

77. *Rucho*, 139 S. Ct. at 2500.

such as maintaining political subdivisions, keeping communities of interest together, and protecting incumbents."[78]

> But protecting incumbents, for example, enshrines a particular partisan distribution. And the "natural political geography" of a State—such as the fact that urban electoral districts are often dominated by one political party—can itself lead to inherently packed districts . . . . [T]raditional criteria such as compactness and contiguity "cannot promise political neutrality when used as the basis for relief. Instead, it seems, a decision under these standards would unavoidably have significant political effect, whether intended or not."[79]

According to Chief Justice Roberts, "[t]here are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral"; deciding which standard is fair is a political and not a legal question.[80]

Even assuming that an apolitical definition of fairness is reachable, the next question—"How much is too much?"—is also problematic.[81]

> If compliance with traditional districting criteria is the fairness touchstone, for example, how much deviation from those criteria is constitutionally acceptable and how should mapdrawers prioritize competing criteria? Should a court "reverse gerrymander" other parts of a State to counteract "natural" gerrymandering caused, for example, by the urban concentration of one party? If a districting plan protected half of the incumbents but redistricted the rest into head to head races, would that be constitutional? A court would have to rank the relative importance of those traditional criteria and weigh how much deviation from each to allow.
>
> If a court instead focused on the respective number of seats in the legislature, it would have to decide the ideal number of seats for each party and determine at what point deviation from that balance went too far. If a 5-3 allocation corresponds most closely to statewide vote totals, is a 6-2

78. *Id.*

79. *Id.* (quoting Vieth v. Jubelier, 541 U.S. 267, 308-09 (2004) (Kennedy, J., concurring in judgment)).

80. *Id.*

81. *Id.* at 2501.

> allocation permissible, given that legislatures have the authority to engage in a certain degree of partisan gerrymandering? Which seats should be packed and which cracked? Or if the goal is as many competitive districts as possible, how close does the split need to be for the district to be considered competitive? Presumably not all districts could qualify, so how to choose?[82]

Neither the unequal population cases nor the racial discrimination cases answer this question because each has a definitive standard—one person, one vote and no racial discrimination.[83] One person, one vote applies only to constituent representation; it does not apply to parties.[84] And partisan objectives, unlike racist objectives, are acceptable, at least to some degree.[85] Long story short, it would be very difficult to find a test for when partisan gerrymandering went too far. Chief Justice Roberts then went through the tests used by the district courts and the test proposed by the dissent, finding each inapt.

Intentional Vote Dilution. The District Court for the Middle District of North Carolina applied a three-part test to determine whether each district of North Carolina's plan violated the Equal Protection Clause.[86] Plaintiffs had to show (1) "that a legislative mapdrawer's predominant purpose in drawing the lines of a particular district was to 'subordinated adherents of one political party and entrench a rival party in power'"[87] and (2)

> that the dilution of the votes of supporters of a disfavored party in a particular district—by virtue of cracking or packing—is likely to persist in subsequent elections such that an elected representative from the favored party in the district will not feel a need to be responsive to constituents who support the disfavored party.[88]

This established a prima facie showing of partisan vote dilution; the burden then shifted to the defendants "to prove

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82. *Id.*

83. *Rucho*, 139 S. Ct. at 2501.

84. *Id.* (quoting Gill v. Whitford, 138 S. Ct. 1916, 1933 (2018)).

85. *Id.* at 2502 (quoting Shaw v. Reno, 509 U.S. 630, 650 (1993)).

86. *Id.* (citing Common Cause v. Rucho, 318 F. Supp. 3d 777, 923 (M.D.N.C. 2018)).

87. *Id.* (quoting *Common Cause*, 318 F. Supp. 3d at 865 (quoting Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2658 (2015))).

88. *Id.* (quoting *Common Cause*, 318 F. Supp. 3d at 867).

that the discriminatory effects are 'attributable to a legitimate state interest or other neutral explanation.'"[89]

According to Chief Justice Roberts, the "predominant intent" prong does not work because it is not improper to base line-drawing on partisanship, and "[a] permissible intent—securing partisan advantage—does not become constitutionally impermissible . . . when that permissible intent 'predominates.'"[90] The second prong—"that vote dilution 'is likely to persist' to such a degree that the elected representative will feel free to ignore the concerns of the supporters of the minority party"—requires findings that are just not possible to make with any degree of certainty.[91] "Judges not only have to pick the winner—they have to beat the point spread."[92] Accordingly, it too was improper. Finally, the third prong, allowing the defendants to show a legitimate objective, was redundant because the first prong already required a showing that partisanship predominated.[93] Thus, the test failed.

First Amendment Right to Associate. It had been suggested, including by Justice Kennedy, that partisan gerrymandering might violate "the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views."[94] Both district courts adopted this reasoning and applied a three-part test to determine whether the proposed districts violated the First Amendment.[95] The plaintiffs had to show: (1) "proof of intent to burden individuals based on their voting history or party affiliation"; (2) "an actual burden on political speech or associational rights"; and (3) "a causal link between the invidious intent and actual burden."[96] This test also failed. Chief Justice Roberts first explained that

89. *Rucho*, 139 S. Ct. at 2501 (quoting *Common Cause*, 318 F. Supp. 3d at 868).

90. *Id.* at 2502-03.

91. *Id.* at 2503 (quoting *Common Cause*, 318 F. Supp. 3d at 867).

92. *Id.*

93. *Id.* at 2504.

94. Vieth v. Jubelier, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring in judgment).

95. *Rucho*, 139 S. Ct. at 2504.

96. *Id.* (citing *Common Cause*, 318 F. Supp. 3d at 929; Benisek v. Lamone, 348 F. Supp. 3d 493, 522 (D. Md. 2018)).

no one was being stopped from speaking or associating.[97] The first prong did not work because it prohibited any level of partisanship in the process.[98] And the second and third prongs did not fix this problem.[99] The district courts found an actual burden because the parties had problems fundraising, attracting candidates and volunteers, campaigning, and mobilizing voters in the gerrymandered districts because of the voters' "sense of disenfranchisement."[100] But this again just begged the question "How much is too much?": "How much of a decline in voter engagement is enough to constitute a First Amendment burden? How many door knocks must go unanswered? How many petitions unsigned? How many calls for volunteers unheeded?"[101]

There just was no "clear" and "manageable" standard.[102]

Neutral Baseline. Justice Kagan, writing for the four dissenters, "propose[d] using a State's own districting criteria as a neutral baseline from which to measure how extreme a partisan gerrymander is."[103] Experts could use computers to generate thousands of possible maps, allowing an objective measure of how gerrymandered a plan was.[104] This is, of course, the exact type of expert testimony that was presented in the North Carolina case.

Chief Justice Roberts rejected this test as well. First, he argued:

> [I]t does not make sense to use criteria that will vary from State to State and year to year as the baseline for determining whether a gerrymander violates the Federal Constitution. The degree of partisan advantage that the Constitution tolerates should not turn on criteria offered by the gerrymanderers themselves. It is easy to imagine how different criteria could move the median map toward different partisan distributions. As a result, the same map

97. *Id.*
98. *Id.* at 2504-05.
99. *Id.*
100. *Id.* at 2504 (quoting *Common Cause*, 318 F. Supp. 3d at 932; *Benisek*, 348 F. Supp. 3d at 523-24).
101. *Rucho*, 139 S. Ct. at 2504.
102. *Id.* at 2505.
103. *Id.*
104. *Id.*

> could be constitutional or not depending solely on what the mapmakers said they set out to do.[105]

This alone showed that this test is "indeterminate and arbitrary."[106] Further, this test, like other tests, did not answer the crucial question "How much is too much?": "Would twenty percent away from the median map be okay? Forty percent? Sixty percent? Why or why not? . . . The dissent's answer says it all: 'This much is too much.' That is not even trying to articulate a standard or rule."[107]

In response to Justice Kagan's point that "courts all the time make judgments about the substantiality of harm without reducing them to particular percentages,"[108] Chief Justice Roberts explained, "But those instances typically involve constitutional or statutory provisions or common law confining and guiding the exercise of judicial discretion."[109] Judges either "beg[i]n with a significant body of law about what constituted a legal violation" or "draw meaning from related provisions or statutory context."[110] There is, explained Chief Justice Roberts, no common law standard or textual context or even common experience by which to determine when there is "substantial deviation from a median map."[111] "The only provision in the Constitution that specifically addresses the matter assigns it to the political branches."[112]

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105. *Id.*
106. *Id.*
107. *Rucho*, 139 S. Ct. at 2505 (internal citation omitted).
108. *Id.* at 2522 (Kagan, J., dissenting).
109. *Id.* at 2505 (majority opinion).
110. *Id.* at 2506.
111. *Id.*
112. *Id.* This author does not find Chief Justice Roberts's position on the "How much is too much?" question particularly compelling. The Supreme Court ruled in 1962 in *Baker v. Carr* that Equal Protection Clause claims of vote dilution based on unequal *state* legislature districts did not present a political question and were justiciable. 369 U.S. 186. The *Baker* Court did not consider what the standard for finding an Equal Protection violation based on vote dilution might be. It stated only that "[j]udical standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action." *Id.* at 226. The Court ruled similarly in 1964 in *Wesberry v. Sanders*, announcing that claims of vote dilution based on unequal *federal* congressional districts were justiciable under Article I, Section 2 of the Constitution. 376 U.S. at 6. The only standard the Court announced was its holding that "the command of Art. I, § 2, that Representatives be chosen 'by the People of the several States'

Article I, Section 2 and the Elections Clause of Article I, Section 4, Clause 1. Finally, the North Carolina district court,

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means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Id.* at 7-8 (footnotes omitted). It made no effort to define further "as nearly as practicable." *Id.* at 24 (Harlan, J., dissenting). Later in 1964 in *Reynolds v. Sims* the Court adopted one-person, one-vote for Equal Protection claims about *state* districts. 377 U.S. at 558. But it explained that "[s]omewhat more flexibility [was] constitutionally permissible with respect to state legislative apportionment than in congressional districting." *Id.* at 578. Again, the Court did not appear to be too concerned about the exact standards, saying, "Lower courts can and assuredly will work out more concrete and specific standards for evaluating state legislative apportionment schemes in the context of actual litigation. For the present, we deem it expedient not to attempt to spell out any precise constitutional tests." *Id.* In 1969 in *Kirkpatrick v. Preisler* the Court answered the "How much is too much?" question for *federal* districting, holding that the "as nearly as practicable" standard "requires that the State make a good-faith effort to achieve precise mathematical equality." 394 U.S. at 530-31. And it was not until 1973 in *White v. Regester* that the Court strongly suggested, and 1977 in *Connor v. Finch* that the Court explicitly recognized, an answer to the "How much is too much?" question for *state* maps: total deviation between largest and smallest district of less than ten percent is presumptively valid under the Equal Protection Clause. *White*, 412 U.S. at 763-64 (1973); *id.* at 776-77 (Brennan, J., concurring in part and dissenting in part); *Connor*, 431 U.S. at 418. The ten-percent rule of thumb announced in *White* and *Connor* was adopted after many case-specific decisions by the Court over the decade-plus since it opened the floodgates to such litigation in *Baker*.

The Supreme Court decided each of these vote dilution cases over vigorous dissents. Justice Harlan in *Wesberry*, for example, asked a series of "How much is too much?"-type questions:

> How great a difference between the populations of various districts within a State is tolerable? Is the standard an absolute or relative one, and if the latter to what is the difference in population to be related? Does the number of districts within the State have any relevance? Is the number of voters or the number of inhabitants controlling? Is the relevant statistic the greatest disparity between any two districts in the State or the average departure from the average population per district, or a little of both? May the State consider factors such as area or natural boundaries (rivers, mountain ranges) which are plainly relevant to the practicability of effective representation? There is an obvious lack of criteria for answering questions such as these, which points up the impropriety of the Court's whole-hearted but heavy-footed entrance into the political arena.

376 U.S. at 21 n.4 (Harlan, J., dissenting).

All this is to say that the Supreme Court did in the vote dilution cases everything that Chief Justice Roberts said in *Rucho* that it could not do in political gerrymandering cases. It decided justiciability without announcing a clear standard. It announced the one-person, one-vote norm—a norm with no common law antecedents where the only specific constitutional provision pointed to the political branches—without saying how far from it a state was allowed to stray. And, after significant case-by-case adjudication, it ultimately adopted arbitrary lines. Chief Justice Roberts's how-much-isms are therefore not terribly convincing.

in what Chief Justice Roberts called a "novel approach," concluded that North Carolina's map violated both Article I, Section 2—"The House of Representatives shall be composed of Members chosen every second Year by the People of the several States"—and the Elections Clause of Article I, Section 4, Clause 1—"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter suchRegulations . . . ."[113] The Court explained that "the Elections Clause did not empower State legislatures to disfavor the interests of supporters of a particular candidate or party in drawing congressional districts"[114] and "that partisan gerrymandering infringes the right of 'the People' to select their representatives."[115]

Chief Justice Roberts summarily rejected this analysis on two grounds. First, the plurality in *Vieth v. Jubelirer* had rejected it without comment by the rest of the Justices.[116] And second, a sentence in the district court's 181-page opinion about "the core principle of [our] republican government"[117] showed the court's ruling was "more properly grounded in the Guarantee Clause of Article IV, § 4," which by longstanding precedent "does not provide the basis for a justiciable claim."[118]

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113. Rucho v. Common Cause, 139 S. Ct. 2484, 2506 (2019).

114. *Id.* (quoting Common Cause v. Rucho, 318 F. Supp. 3d 777, 937 (M.D.N.C. 2018)).

115. *Id.* (quoting *Common Cause*, 318 F. Supp. 3d at 938-40).

116. *Id.* (citing Vieth v. Jubelier, 541 U.S. 267, 305 (2004) (plurality opinion)).

117. *Id.* (alteration in original) (quoting *Common Cause*, 318 F. Supp. 3d at 940).

118. *Id.* It is this author's opinion that Chief Justice Roberts's treatment of the Article I, Section 2 claim is inadequate. First of all, reliance on *Vieth* is dubious at best. The *Vieth* plurality would have held what the *Rucho* Court ultimately did hold, that all partisan gerrymandering claims grounded in any constitutional provisions are nonjusticiable political questions. 541 U.S. at 277 (plurality opinion). The other Justices were not willing to come to that conclusion. *See id.* at 306-16 (Kennedy, J., concurring in judgment); *id.* at 317-42 (Stevens, J., dissenting); *id.* at 343-54 (Souter, J., dissenting); *id.* at 355-68 (Breyer, J., dissenting). The *Vieth* plurality came to its conclusion because of "a lack of judicially discoverable and manageable standards for resolving [the issue]." *Id.* at 277-78 (plurality opinion) (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)). That is to say, the *Vieth* plurality analyzed potential standards—standards that would or would not work regardless of the constitutional clause being invoked. And while the plurality would have concluded there were no workable standards, the majority of the Court was not willing to do so. Thus, *Vieth* did not answer the question whether some Article I provision could provide a foothold for regulating partisan gerrymandering if a judicially manageable standard existed.

Chief Justice Roberts stressed that the Court "does not condone excessive partisan gerrymandering" and that the people were not without remedies.[119] Then, attempting to end the opinion on a hopeful note, the Chief Justice pointed to multiple recently enacted state constitutional amendments and to multiple bills introduced in Congress to deal with the problem of partisan gerrymandering.[120] Such political action, he said, is the appropriate remedy for such an inherently political problem.[121]

Switching to the Guarantee Clause is similarly suspect. The Guarantee Clause concerns state governance. *See* U.S. CONST. art. I, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . . ."); Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912) (concerning the republican nature of state ballot initiatives), *cited in Rucho*, 139 S. Ct. at 2506. But the Supreme Court has long held that "[t]he right to vote for members of the Congress of the United States is not derived merely from the constitution and laws of the State in which they are chosen, but has its foundation in the Constitution of the United States." Wiley v. Sinkler, 179 U.S. 58, 62 (1900). Indeed, Congress may even pass criminal laws prohibiting interference with Congressional elections because "[t]he office [of a member of Congress], if it be properly called an office, is created by [the U.S.] Constitution and by that alone." *Ex Parte* Yarbrough, 110 U.S. 651, 663 (1884). "That a government *whose essential character is republican* . . . has no power by appropriate laws to secure this election from the influence of violence, of corruption, and of fraud, is a proposition so startling as to arrest attention and demand the gravest consideration." *Id.* at 657 (emphasis added). It is far from clear that the district court's ruling was actually more properly grounded in the Guarantee Clause and therefore nonjusticiable.

And the district court's Article I, Section 2 ruling, at least, is backed by considerable precedent. The Supreme Court in *Wesberry v. Sanders* concluded this section required the one-person, one-vote principle in Congressional elections: "We hold that, construed in its historical context, the command of Art. I, § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." 376 U.S. at 7-8.

> To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected "by the People," a principle tenaciously fought for and established at the Constitutional Convention.

Id. at 8. It is certainly at least arguable that extreme partisan gerrymanders make "a vote . . . worth more in one district than in another" and therefore violate Article I, Section 2, as construed in *Wesberry*.

While claims based on Article I, Section 2—like claims based on other constitutional provisions—were doomed to fail Chief Justice Roberts's "How much is too much" requirement, the Chief Justice did a disservice to the argument in dispatching of it the way he did.

119. *Rucho*, 139 S. Ct. at 2507.

120. *Id.* at 2507-08.

121. *Id.*

Writing in dissent, Justice Kagan tried to capture the enormity of the gerrymandering problem and the radical nature of the Court's decision not to fix it.[122] She began her dissent saying, "For the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities."[123] Throughout the opinion she noted the broad agreement that extreme gerrymandering violates the Constitution:

> Though different Justices have described the constitutional harm in diverse ways, nearly all have agreed on this much: Extreme partisan gerrymandering (as happened in North Carolina and Maryland) violates the Constitution. *See, e.g.*, *Vieth*, 541 U. S., at 293 (plurality opinion) ("[A]n excessive injection of politics [in districting] is unlawful" (emphasis deleted)); *id.* at 316 (opinion of Kennedy, J.) ("[P]artisan gerrymandering that disfavors one party is [im]permissible"); *id.* at 362 (Breyer, J., dissenting) (Gerrymandering causing political "entrenchment" is a "violat[ion of] the Constitution's Equal Protection Clause"); *Davis*, 478 U. S. 109, 132 (plurality opinion) ("[U]nconstitutional discrimination" occurs "when the electoral system is arranged in a manner that will consistently degrade [a voter's] influence on the political process"); *id.* at 165 (Powell, J., concurring) ("Unconstitutional gerrymandering" occurs when "the boundaries of the voting districts have been distorted deliberately" to deprive voters of "an equal opportunity to participate in the State's legislative processes").[124]

Justices and indeed the Court have spoken out against gerrymandering in the harshest terms, saying that "[a]t its most extreme . . . the practice amounts to 'rigging elections'" and that "[t]he 'core principle of republican government' . . . is 'that the voters should choose their representatives, not the other way around.'"[125]

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122. *Id.* at 2509 (Kagan, J., dissenting).

123. *Id.* at 2509.

124. *Id.* at 2514-15.

125. *Rucho*, 139 S. Ct. at 2512 (Kagan, J., dissenting) (first quoting Vieth v. Jubelier, 541 U.S. 267, 317 (2004) (Kennedy, J., concurring in judgment); then quoting Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2677 (2015)).

Justice Kagan also noted "[t]he majority dispute[d] none of this,"[126] even conceding "that gerrymandering is 'incompatible with democratic principles,'"[127] and accepting the "principle that each person must have an equal say in the election of representatives."[128]

> So the only way to understand the majority's opinion is as follows: In the face of grievous harm to democratic governance and flagrant infringements on individuals' rights—in the face of escalating partisan manipulation whose compatibility with this Nation's values and law no one defends—the majority declines to provide any remedy. For the first time in this Nation's history, the majority declares that it can do nothing about an acknowledged constitutional violation because it has searched high and low and cannot find a workable legal standard to apply.[129]

After outlining and defending her proposed standard, which has already been discussed, Justice Kagan concluded on this fairly extraordinary note:

> Of all times to abandon the Court's duty to declare the law, this was not the one. The practices challenged in these cases imperil our system of government. Part of the Court's role in that system is to defend its foundations. None is more important than free and fair elections. With respect but deep sadness, I dissent.[130]

III. THE COMMON LAW AND CONSTITUTIONAL TORTS DERIVED FROM *ASHBY V. WHITE*

A. Giles v. Harris, Nixon v. Herndon, and Lane v. Wilson

The Supreme Court's decision in *Rucho* immediately drew comparison to the Court's 1903 case of *Giles v. Harris*.[131] *Giles* involved a suit by a black man on behalf of himself "and on behalf of more than five thousand negroes, citizens of the County of Montgomery, Alabama, similarly situated and circumstanced as himself" alleging that the board of registrars

126. *Id.*
127. *Id.* (quoting *id.* at 2506 (majority opinion)).
128. *Id.* at 2515 (Kagan, J., dissenting) (quoting *id.* at 2501 (majority opinion)).
129. *Id.* at 2515 (Kagan, J., dissenting).
130. *Id.* at 2525.
131. Eric Foner, *The Supreme Court is in Danger of Again Becoming 'the Grave of Liberty*,' NATION (July 1, 2019), https://www.thenation.com/article/eric-foner-supreme-court-john-roberts/.

of the county refused to register him to vote because of his race.[132] He argued both that he should have been registered under the voter registration scheme in the new Alabama Constitution and that the constitution's scheme violated the Fourteenth and Fifteenth Amendments.[133] He sought equitable relief, requesting the courts order the board to register him and the others who were similarly situated to vote.[134] The Supreme Court ruled six to three that the courts could not give him this remedy.

The opinion of the Court, written by a newly appointed Oliver Wendell Holmes, followed much the same reasoning as the Court's opinion in *Rucho*. The relief Giles sought was logically impossible and went beyond the realm of the courts. His best course of action to get registered to vote was to use the political process and not the courts.

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132. Giles v. Harris, 189 U.S. 475, 482 (1903).

133. *Id.* The president of the 1901 Alabama Constitutional Convention explained in his opening statement to the convention, "And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State." *1901 Alabama Constitutional Convention* 8, ALA. LEGISLATURE, https://www.legislature.state.al.us/aliswww/history/constitutions/1901/proceedings/1901_proceedings_vol1/day2.html (last visited Jan. 6, 2023) (statement of John B. Knox, President, Alabama Constitutional Convention). The constitution required all voters who were not exempted by current law and were between 21 and 45 years old to pay a poll tax of $1.50 each year. ALA. CONST. art. VIII, § 194. The constitution required that a voter pay every year's poll tax dating back to 1901 in order to vote. *Id.* § 178. All citizens who (1) had served in the military, (2) were descended from someone who served in the military, or (3) were "of good character and . . . understood the duties and obligations of citizenship under a republican form of government" could become permanently registered to vote before December 20, 1902. *Id.* § 180. Starting in 1903, voters would need to prove they could either (1) read and write the English language and had been employed for the last year or (2) owned property in the state that was either at least 40 acres or worth at least $3,000 and had paid all taxes on the property. *Id.* § 181. In order to register, a voter would also have to provide under oath where he lived and worked during the prior five years. *Id.* § 188. And if a vote was challenged, it could be counted only if the voter swore that the challenge was untrue. *Id.* § 185. Finally, the constitution prohibited from voting anyone convicted of most crimes and people "convicted as a vagrant or tramp." *Id.* § 182.

Giles applied to become a registered voter in March 1902 under the good character provision but was denied. *Giles*, 189 U.S. at 483. He therefore did not have the benefit of registration for life and would need to meet the much more onerous requirements of post-1903 applicants for registration. *Id.* He claimed the denial of his application was because of his race and that over 5,000 other black men in the county's applications were similarly denied because of their race. *Id.* He also argued the entire scheme was unconstitutional. *Id.*

134. *Giles*, 189 U.S. at 482-83.

First, Justice Holmes explained, the relief that Giles sought was logically inconsistent with his position:

> [T]he plaintiff alleges that the whole registration scheme of the Alabama Constitution is a fraud upon the Constitution of the United States, and asks us to declare it void. But, of course, he could not maintain a bill for a mere declaration in the air. He does not try to do so, but asks to be registered as a party qualified under the void instrument. If, then, we accept the conclusion which it is the chief purpose of the bill to maintain, how can we make the court a party to the unlawful scheme by accepting it and adding another voter to its fraudulent lists? . . . We must accept or reject them. It is impossible simply to shut our eyes, put the plaintiff on the lists, be they honest or fraudulent, and leave the determination of the fundamental question for the future.[135]

Giles, explained Justice Holmes, was trapped in a paradox. If everything Alabama had done was constitutional, then he was not injured. And if Alabama's voter registration lists were unconstitutional, then they should not exist at all and a court ordering more people onto them would simply add to the magnitude of the constitutional problem.

Second, the relief Giles was requesting was practically impossible. Traditionally, Justice Holmes explained, "proceedings in equity have not embraced a remedy for political wrongs."[136] However, the Court was "dealing with a new and extraordinary situation" and was therefore "unwilling to stop short" and base its decision solely on the traditional limits of equity.[137] But the realities in the case "strikingly reinforce[d] the argument that equity [could not] undertake now, any more than it ha[d] in the past, to enforce political rights."[138]

> The bill imports that the great mass of the white population intends to keep the blacks from voting. To meet such an intent, something more than ordering the plaintiff's name to be inscribed upon the lists of 1902 will be needed. If the conspiracy and the intent exist, a name on a piece of paper will not defeat them. Unless we are prepared to supervise

135. *Id.* at 486-87.
136. *Id.* at 486 (citing Green v. Mills, 69 F. 852 (4th Cir. 1895)).
137. *Id.*
138. *Id.* at 487.

> the voting in that state by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form. Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a state and the state itself, must be given by them or by the legislative and political department of the government of the United States.[139]

The courts simply did not have the ability to stop such a complex scheme of voter suppression. Giles's problem was political in nature, and he needed to go to the political branches.

So was Justice Kagan wrong in *Rucho* when she said, "For the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities"?[140] After all, Justice Holmes hardly minced his words in saying the Court was powerless to take on such widespread voter suppression. And the *Giles* court therefore never considered whether any actions by Montgomery County officials or any provisions of the Alabama Constitution were unconstitutional. Just as in *Rucho*, the Court directed Giles to the political branches.

But Giles filed a bill in equity.[141] And the Court ruled he had no equitable remedy available to him.[142] Giles did not file an action at law, so the Court did not consider whether such an action could succeed. But the Court's opinion suggested that it could.

The county board of registrars argued the federal courts did not have jurisdiction in the case, and the trial court dismissed the case for lack of jurisdiction.[143] The Court therefore had to address jurisdiction before it could consider the justiciability question. And at the time, there was an amount in controversy requirement of $2,000 for federal question jurisdiction, leading the Court to note, "We have recognized, too, that the deprivation of a man's political and social rights properly may be alleged to involve damage to that

139. *Id.* at 488.

140. Rucho v. Common Cause, 139 S. Ct. 2484, 2509 (2019) (Kagan, J., dissenting).

141. *Giles*, 189 U.S. at 482.

142. *Id.* at 486-88.

143. *Id.* at 485-86.

amount, capable of estimation in money."[144] Thus, the court concluded,

> [W]e are not prepared to say that an action at law could not be maintained on the facts alleged in the bill. Therefore, we are not prepared to say that the decree should be affirmed on the ground that the subject matter is wholly beyond the jurisdiction of the circuit court.[145]

And in the Court's concluding sentence telling Giles that his remedy was with the political branches, the Court explicitly disclaimed application of its ruling to actions at law, saying, "*[a]part from damages to the individual*, relief from a great political wrong, if done, as alleged, by the people of a state and the state itself, must be given by them or by the legislature and political department of the government of the United States."[146]

Twenty-four years later, writing for a unanimous Court in *Nixon v. Herndon*, Justice Holmes had no problem holding that damages were available for deprivation of the right to vote based on race.[147] *Nixon* concerned a Texas statute which provided, "[I]n no event shall a negro be eligible to participate in a Democratic party primary election held in the State of Texas."[148] Texas argued successfully in the trial court that this was a political question.[149] The Supreme Court disagreed:

> The objection that the subject matter of the suit is political is little more than a play upon words. Of course the petition concerns political action but it alleges and seeks to recover for private damage. That private damage may be caused by such political action and may be recovered for in a suit at law hardly has been doubted for over two hundred years, since *Ashby v. White* and has been recognized by this Court.[150]

Twelve years later in *Lane v. Wilson*, the Supreme Court would have no problem applying this logic to a voting system

144. *Id.* at 485 (citing Wiley v. Sinkler, 179 U.S. 58 (1900); Swafford v. Templeton, 185 U.S. 487 (1902)).

145. *Id.* at 485-86 (citing Smith v. McKay, 161 U.S. 355, 358-59 (1896)).

146. *Id.* at 488 (emphasis added).

147. Nixon v. Herndon, 273 U.S. 536, 539 (1927).

148. *Id.* at 540.

149. *Id.*

150. *Id.* (first citing Ashby v. White, 92 Eng. Rep. 126 (1703), 2 Ld. Raym. 938; then citing *Giles*, 189 U.S. at 485; Wiley v. Sinkler, 179 U.S. 58, 64-65 (1900).

similar to the system at issue in *Giles*.[151] The Court, in an opinion by Justice Frankfurter, brushed away the contention that *Giles* barred the action, noting that *Giles* concerned specific performance, while the case at hand concerned money damages.[152]

B. Constitutional Torts

The actions at law in *Nixon* and *Lane* were brought under 8 U.S.C. § 43, now codified as 42 U.S.C. § 1983, as was the bill in equity in *Giles*.[153] This section provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[154]

In *Giles*, Justice Holmes "observed, in the first place, that the language of [the section] does not extend the sphere of equitable jurisdiction in respect of what shall be held an appropriate subject matter for that kind of relief."[155] Instead, the words of the statute "allow a suit in equity only when that is the proper proceeding for redress, and they refer to existing standards to determine what is a proper remedy."[156] And traditionally, equity could not right political wrongs.[157] Thus, the *Giles* court held that 42 U.S.C. § 1983 was to be interpreted with the common law in mind.[158] The *Nixon* and *Lane* Courts did not really examine the relationship of § 1983 and the common law, instead they simply rejected all the arguments against awarding damages, but the Court would later agree with and expound on Justice Holmes's reading of the section.

The Supreme Court's first major exposition of constitutional torts under the current 42 U.S.C. § 1983 came

151. Lane v. Wilson, 307 U.S. 268, 269-71 (1939).
152. *Id.*at 272-73.
153. *Id.* at 269; *Giles*, 189 U.S. at 484-86.
154. 42 U.S.C. § 1983 (2018).
155. *Giles*, 189 U.S. at 486.
156. *Id.*
157. *Id.*
158. *Id.*

in the 1961 case of *Monroe v. Pape*.[159] Justice Douglas's opinion for the Court in *Monroe* traced the section's history and purpose and determined the section's relationship with state tort law. Justice Douglas explained that 42 U.S.C. § 1983 came on the books as section 1 of the Ku Klux Klan Act of 1871,[160] which, as its name suggests, was intended to counter the terrorism that the Ku Klux Klan was inflicting in much of the country.[161] The first section of the Act, the current 42 U.S.C. § 1983, according to Justice Douglas, had "three main aims."[162] *First*, it was supposed to "override certain kinds of state laws."[163] "*Second*, it provided a remedy where state law was inadequate."[164] And *third*, and most importantly, it "was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice."[165] The Act, therefore, afforded a federal remedy regardless of whether a state remedy was also on the books and without exhaustion of possible state remedies.[166] As to interpreting the actions available under 42 U.S.C. § 1983, Justice Douglas rejected a standard of willfulness, saying the section "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."[167]

In the more-than-fifty years since *Monroe*, the Court has continued to look to the common law of torts when assessing constitutional tort liability under 42 U.S.C. § 1983. For example, the Court found absolute immunity for judges and qualified immunity for police officers based on its reading of

159. Monroe v. Pape, 365 U.S. 167 (1961), *overruled on other grounds by* Monell v. N.Y.C. Dep't of Soc. Servs., 436 U.S. 658 (1978); *see* Christina B. Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 12-14 (1980), *cited with approval in* Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 307 (1986).

160. *Monroe*, 365 U.S. at 171 (citing Ku Klux Klan Act of 1871, § 1, 17 Stat. 13).

161. *Id.* at 174.

162. *Id.* at 173.

163. *Id.*

164. *Id.* at 173.

165. *Id.* at 174; *see also id.* at 174-75 ("It was not the unavailability of state remedies but the failure of certain States to enforce the laws with an equal hand that furnished the powerful momentum behind this 'force bill.'"); *id.* at 176 ("There was, it was said, no quarrel with the state laws on the books. It was their lack of enforcement that was the nub of the difficulty.").

166. *Monroe*, 365 U.S. at 183.

167. *Id.* at 186.

common law tort immunity doctrines.[168] And, of course, tort concepts such as causation, compensable injury, and state of mind apply to constitutional torts.[169] Thus, when a tort action is the "proper proceeding for redress" based on the common law of torts, a constitutional tort is available to a person whose constitutional rights have been violated.

When it comes to the actual elements of a constitutional tort, there usually is not an analogous tort at common law.[170] But the Court has looked to the common law in determining the substantive elements of a constitutional tort, for example, defining property and liberty interests based on the common law.[171] One scholar has summarized the relationship between constitutional and common law torts saying,

> Constitutional and common law often provide protections that seem to encompass very similar interests. For example, a state may provide personal or property protection that parallels the fourth amendment's guarantee against unreasonable searches and seizures. But certain constitutional interests, such as the right to equal treatment, the right to vote, or the right to procedural due process, have no neat tort analogues.[172]

But it is not true that the right to vote has no common law analogue, and the Supreme Court has recognized this on multiple occasions.

C. Ashby v. White

When Justice Holmes denied equitable relief in *Giles*, he noted, "The traditional limits of proceedings in equity have not embraced a remedy for political wrongs."[173] But in *Nixon* tradition pointed the other way: "That private damage may be caused by such political action and may be recovered for in a suit at law hardly has been doubted for over two hundred years, since *Ashby v. White* . . . ."[174]

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168. *See* Pierson v. Ray, 386 U.S. 547 (1967).
169. Whitman, *supra* note 159, at 17-18.
170. *See id.* at 14.
171. *See id.* at 20-21 (citing Paul v. Davis, 424 U.S. 693, 710 (1976)).
172. *Id.* at 14 (footnotes omitted).
173. Giles v. Harris, 189 U.S. 475, 486 (1903) (citing Green v. Mills, 69 F. 852 (4th Cir. 1895)).
174. Nixon v. Herndon, 273 U.S. 536, 540 (1927).

In the 1978 case of *Carey v. Piphus*, the Supreme Court held that only nominal non-punitive damages could be awarded in a constitutional tort case for the deprivation of procedural due process when no actual injury is shown.[175] In a footnote, however, Justice Powell, writing for the Court, acknowledged,

> *Wayne v. Venable* and *Ashby v. White* do appear to support the award of substantial damages simply upon a showing that a plaintiff was wrongfully deprived of the right to vote. Citing *Ashby v. White*, this Court has held that actions for damages may be maintained for wrongful deprivations of the right to vote, but it has not considered the prerequisites for recovery. The common-law rule of damages for wrongful deprivations of voting rights in *Ashby v. White* would, of course, be quite relevant to the analogous question under § 1983.[176]

The Court, again through Justice Powell, addressed this possible inconsistency in 1986 in *Memphis Community School District v. Stachura* when it held that only nominal non-punitive damages could be awarded in any constitutional tort cases with no actual injury.[177] Justice Powell clarified, however, that presumed damages are "both compensatory in nature and traditionally part of the range of tort law remedies"[178]:

> Presumed damages are *substituted* for ordinary compensatory damages, not a *supplement* for an award that fully compensates the alleged injury. When a plaintiff seeks compensation for an injury that is likely to have occurred but difficult to establish, some form of presumed damages may possibly be appropriate.[179]

Justice Powell again included a long footnote about *Nixon* and *Ashby v. White*. He explained:

> *Nixon* followed a long line of cases, going back to Lord Holt's decision in *Ashby v. White* authorizing substantial money damages as compensation for persons deprived of their right to vote in particular elections. Although these

175. Carey v. Piphus, 435 U.S. 247, 267 (1978).

176. *Id.* at 264 n.22 (citing Wayne v. Venable, 260 F. 64 (8th Cir. 1919); Ashby v. White (1703) 1 Eng. Rep. 417, 1 Bro. P.C. 62; *Nixon*, 273 U.S. at 540).

177. Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299 (1986).

178. *Id.* at 311.

179. *Id.* at 310-11.

> decisions sometimes speak of damages for the value of the right to vote, their analysis shows that they involve nothing more than an award of presumed damages for a nonmonetary harm that cannot easily be quantified. "In the eyes of the law th[e] right [to vote] is so valuable that damages are presumed from the wrongful deprivation of it without evidence of actual loss of money, property, or any other valuable thing, and the amount of the damages is a question peculiarly appropriate for the determination of the jury, because each member of the jury has personal knowledge of the value of the right." The "value of the right" in the context of these decisions is the money value of the particular loss that the plaintiff suffered—a loss of which "each member of the jury has personal knowledge." It is not the value of the right to vote as a general, abstract matter, based on its role in our history or system of government.[180]

Thus, far from the right to vote having "no neat tort analogues," the Supreme Court has explicitly identified a "quite relevant" analogue and has repeatedly relied on it in its decisions—the tort first expressed in *Ashby v. White*.

So what was *Ashby v. White*? Justice Frankfurter, in his dissent in *Baker v. Carr*, described *Ashby v. White* as "a case which, in its own day, precipitated an intra-parliamentary war of major dimensions."[181] The official report of the case in the House of Lords, which is now part of the English Reports, has an asterisk at the end of the case, saying, "Scarce any judicial determination ever occasioned such a disturbance in both Houses of Parliament as the present."[182]

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180. *Id.* at 311 n.14 (alterations in original) (quoting *Wayne*, 260 F. at 66) (citing Wiley v. Sinkler, 179 U.S. 58, 65 (1900); Ashby v. White, 92 Eng. Rep. 126, 137 (1703), 2 Ld. Raym. 938, 955).

181. Baker v. Carr, 369 U.S. 186, 286 n. 14 (1962) (Frankfurter, J., dissenting). Justice Douglas, in his concurrence in *Baker*, also discussed *Ashby v. White*, first quoting Lord Chief Justice Holt's opinion in the case that

> [t]o allow this action will make publick officers more careful to observe the constitution of cities and boroughs, and not to be so partial as they commonly are in all elections, which is indeed a great and growing mischief, and tends to the prejudice of the peace of the nation

and then saying, "The same prophylactic effect will be produced here, as entrenched political regimes make other relief as illusory in this case as a petition to Parliament in As*hby v. White* would have been." *Id.* at 248 (Douglas, J., concurring).

182. Ashby v. White (1703) 1 Eng. Rep. 417, 418, 1 Bro. P.C. 62, 64.

The case concerned the parliamentary election for the parliament set to convene in February 1702.[183] Burghers in the borough of Aylesbury were entitled to elect two burgesses to represent them in the House of Commons.[184] Ashby was a burgher in Aylesbury, but at the time of the election there was a pending case seeking to remove him from the borough based on his alleged indigency.[185] The borough constables refused to allow Ashby to vote, even though he was still entitled to do so pending the outcome of the removal case.[186]

Ashby sued the constables and the jury found for him and awarded him damages, but the King's Bench ruled three to one that no action lay and ordered judgment for the constables.[187] The King's Bench essentially ruled that the case presented a political question:

> The Parliament have a peculiar right to examine the due election of their members, which is to determine whether they are elected by proper electors, such as have a right to elect: for the right of voting is the great difficulty in the determination of the due elections, and belongs to Parliament to decide.[188]

Indeed, the House of Commons saw Ashby's case as an attack on it as an institution, and it passed a resolution asserting that "it is the sole right of the commons of England, in parliament assembled . . . to examine and determine all matters relating to the right of elections of their own members," that Ashby was "guilty of a breach of the privilege of this House," and that

> whoever shall presume to commence or prosecute any action, indictment, or information, which shall bring the right of electors, or persons elected to serve in parliament, to the determination of any other jurisdiction, that that of the House of Commons . . . and all attornies, solicitors,

183. *Id.* at 417, 1 Bro. P.C. at 62.
184. *Id.*
185. *Id.* at 417, 1 Bro. P.C. at 62-63.
186. *Id.*
187. *Id.* at 417-18, 1 Bro. P.C. at 63.
188. Ashby v. White, 92 Eng. Rep. 126, 132 (1703), 2 Ld. Raym. 938, 947. (opinion of Powell, J.). The right of a parliamentary body to determine the winners of elections of its members, and by extension whether the elections were run properly, is reflected in Article I, Section 5 of the United States Constitution, which states, "[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . ."

> counsellors, serjeants at law, soliciting, prosecuting, or pleading in any such case, are guilty of a high breach of the privilege of this House.[189]

Despite the House of Commons' outrage, Ashby appealed the King's Bench judgment to the House of Lords, and the House of Lords reversed, agreeing with Lord Chief Justice Holt's Queen's Bench dissenting opinion.[190] Lord Chief Justice Holt opined,

> [E]very man, that is to give his vote on the election of members to serve in Parliament, has a several and particular right in his private capacity, as a citizen or burgess. And surely it cannot be said, that this is so inconsiderable a right, as to apply that maxim to it, *de minimis non curat lex* [the law does not concern itself with trifles]. . . .
>
> . . . .
>
> . . . If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal. . . . The right of voting is a right in the plaintiff by the common law, and consequently he shall maintain an action for the obstruction of it.[191]

The House of Lord's decision to allow the cause of action in *Ashby v. White* established the precedent that public officials could be sued for the deprivation of the vote. As has been explored, such tort liability is foundational for determining constitutional tort liability in voter discrimination cases. And as will be explored next, *Ashby v. White* has also developed into the more general tort of misfeasance in public office.

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189. *Ashby*, 1 Eng. Rep. at 418-19, 1 Bro. P.C. at 64-65.

190. *Id.* at 418, 1 Bro. P.C. at 64. The Supreme Court cited to the House of Lord's ruling in *Ashby v. White* over the protestations of the House of Commons when it held that the judiciary and not the House of Representatives determines the scope of House Privileges. Tenney v. Brandhove, 341 U.S. 367, 376-77 (1951) ("The House of Commons' claim of power to establish the limits of its privilege has been little more than a pretense since *Ashby v. White*." (citing *Ashby*, 92 Eng. Rep. 126, 2 Ld. Raym. 938)).

191. *Ashby*, 92 Eng. Rep. at 135-36, 2 Ld. Raym. at 953-54 (opinion of Holt, L.C.J.); *de minimis non curat lex*, BLACK'S LAW DICTIONARY (11th ed. 2019).

D. The tort of misfeasance in public office

The House of Lords decided in *Ashby v. White* that there was a cause of action against government officials for the malicious denial of the right to vote. It did not take long before this cause of action expanded to include the denial of other rights. This tort is now known as the tort of misfeasance in public office.

The United States Supreme Court recognized the tort of misfeasance in public office in an 1855 case, stating,

> It is an undisputed principle of the common law, that for a breach of a public duty, an officer is punishable by indictment; but where he acts ministerially, and is bound to render certain services to individuals, for a compensation in fees or salary, he is liable for acts of misfeasance or non-feasance to the party who is injured by them.[192]

The Court surveyed the case law and listed the elements of the cause of action: "1. '[T]he plaintiff had a right or privilege. 2. That, by the act of the officer, he was hindered from the enjoyment of it.' 3. By the finding of the jury the act was done maliciously."[193]

In 2000 in *Three Rivers District Council v. Governor of the Bank of England*, the House of Lords reflected on nearly 300 years of the tort.[194] In his opinion, Lord Steyn considered "[t]he matrix of the tort."[195] He explained that "[t]he tort of misfeasance in public office is an exception to 'the general rule that, if conduct is presumptively unlawful, a good motive will not exonerate the defendant, and that, if conduct is lawful apart from motive, a bad motive will not make him liable.'" [196] According to Lord Steyn, "[t]he rationale of the tort is that in a legal system based on the rule of law executive or administrative power 'may be exercised only for the public good' and not for ulterior and improper purposes."[197]

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192. South v. Maryland *ex rel.* Pottle, 59 U.S. 396, 402-03 (1855).

193. *Id.* at 403.

194. Three Rivers District Council v. Governor of The Bank of England [2000] 2 W.L.R. 1220 (HL).

195. *Id.* at 1230 (opinion of Lord Steyn).

196. *Id.* (quoting W.V.H. ROGERS, WINFIELD & JOLOWICZ ON TORT 55 (15th ed. 1998).

197. *Id.* (quoting Jones v. Swansea City Counsel [1990] 1 W.L.R. 54, 85 (HL) (opinion of Nourse, L.J.)).

Lord Hobhouse similarly differentiated the tort of misfeasance in public office from other torts. "Typically," he explained, "a tort involves the invasion by the defendant of some legally protected right of the plaintiff, for example, trespass to property or trespass to the person."[198] In these cases, "the belief of the defendant as to the legality of what he did is irrelevant."[199] "The subject matter of the tort of misfeasance in public office," Lord Hobhouse explained, "operates in the area left unoccupied by [other torts'] limits."[200] The tort "applies to the holder of public office who does not honestly believe that what he is doing is lawful, hence the statement that bad faith or abuse of power is at the heart of this tort" and where the plaintiff's financial loss is a result of the defendant's bad faith, "hence the use of such expressions as 'targeted malice.'"[201]

Lord Millett characterized the tort as "an intentional tort which can be committed only by a public official."[202] "[T]he core concept," he said, "is an abuse of power," which "in turn involves other concepts, such as dishonesty, bad faith, and improper purpose," all of which are "subjective states of mind."[203] The tort is not available in the case of deliberate excess of power, or a deliberate breach of authority done "in the honest belief that it is for the benefit of those in whose interest [the public official] is bound to act."[204] It is available only in the case of an "abuse of a power granted for the benefit of and therefore held in trust for the general public."[205]

The law lords discussed extensively what was necessary to prove the all-important third element of maliciousness. Lord Steyn was of the view that "[t]he case law reveals two different forms of liability for misfeasance in public office."[206] First is "the case of targeted malice by a public officer i.e. conduct specifically intended to injure a person or persons. This type

198. *Id.* at 1268 (opinion of Lord Hobhouse of Woodborough).
199. *Id.*
200. *Three Rivers District Council*, 2 W.L.R. at 1268 (opinion of Lord Hobhouse of Woodborough).
201. *Id.*
202. *Id.* at 1273 (opinion of Lord Millett).
203. *Id.*
204. *Id* at 1274.
205. *Id.*
206. *Three Rivers District Council*, 2 W.L.R. at 1231 (opinion of Lord Steyn).

of case involves bad faith in the sense of the exercise of public power for an improper or ulterior motive."[207] Second is the case "where a public officer acts knowing that he has no power to do the act complained of and that the act will probably injure the plaintiff. It involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful."[208] It is, Lord Steyn explained, still one tort and not two separate torts because of "the unifying element of conduct amounting to an abuse of power accompanied by subjective bad faith," but there are, he believed, two distinct theories of proving the tort.[209]

Lord Hutton also saw the tort as having these two "limbs."[210] He cautioned, however, "that the second limb of the tort cannot be viewed in isolation from the first limb and that the concept of targeted malice which is the underlying principle of the first limb exercises a restrictive effect on the ambit of the second limb."[211] "[I]f a person acts deliberately, knowing that his action will injure another person, he must be taken to intend the consequences and is equated with the person who acts with the intent to cause injury."[212] This is the full extent of the second "limb": liability cannot arise without knowledge that it will probably injure the plaintiff.[213] Objective foreseeability is not enough: "[I]t must be proved that the public officer himself foresaw the probability of damage, or was reckless as to the harm which is likely to ensue . . . ."[214] "[T]he second limb of the tort is a species of malice, and . . . the requirement for malice is satisfied where the public officer knows that the abuse of power will cause injury, or is recklessly indifferent or deliberately blind to the likely injury."[215]

Lord Hutton also stressed that "dishonesty," or acting "in bad faith," was "a necessary ingredient of the tort."[216] Normally, a finding of knowledge of unlawfulness and probability of injury is enough to prove bad faith, but in the

207. *Id.* at 1231.
208. *Id.*
209. *Id.* at 1231 (citing Bourgoin v. Ministry of Agriculture, Fisheries and Food [1986] Q.B. 716).
210. *Id.* at 1262 (opinion of Lord Hutton).
211. *Id.* at 1262.
212. *Three Rivers District Council*, 2 W.L.R. at 1262 (opinion of Lord Hutton).
213. *Id.*
214. *Id.* at 1265.
215. *Id.* at 1263.
216. *Id.* at 1266.

exceptional case where bad faith was not established despite showing knowledge of unlawfulness and probable injury, the action would fail.[217]

Lord Hobhouse—although "in substantial agreement with the views expressed by [his] noble and learned friends, Lord Steyn and Lord Hutton"[218]—did not adopt the binary regime for proving malice.[219] To him, the tort boiled down to one primary feature: "The official must have dishonestly exceeded his powers and he must thereby have caused loss to the plaintiff which has the requisite connection with his dishonest state of mind."[220] First, "[t]he relevant act (or omission . . .) must be unlawful," either in the sense of "a straightforward breach of the relevant statutory provisions" or in the sense of "acting in excess of the powers granted or for an improper purpose."[221] Lord Hobhouse believed this test was "the same as or similar to that used in judicial review."[222] Second, the official "must be shown either to have known that he was acting unlawfully or to have willfully disregarded the risk that his act was unlawful."[223] In either case, the official's actions "could be described as bad faith or dishonest."[224]

Lord Hobhouse's third requirement could be proved by showing any of *three* "limbs."[225] First, a plaintiff might show "targeted malice"—that is, show "the official does the act intentionally with the *purpose* of causing loss to the plaintiff, being a person who is at the time identified or identifiable."[226] This showing, in and of itself, establishes dishonesty.[227]

Second, a plaintiff might show "untargeted malice"—that is, establish "the official does the act intentionally being aware that it will in the ordinary course directly cause loss to the plaintiff or an identifiable class to which the plaintiff

217. *Id.*
218. *Three Rivers District Council*, 2 W.L.R. at 1267 (opinion of Lord Hobhouse of Woodborough).
219. *Id.* at 267-68.
220. *Id.* at 1268.
221. *Id.* at 1269.
222. *Id.*
223. *Id.*
224. *Three Rivers District Council*, 2 W.L.R. at 1269 (opinion of Lord Hobhouse of Woodborough).
225. *Id.*
226. *Id.*
227. *Id.*

belongs."[228] Demonstrating untargeted malice still requires showing actual awareness but of "a certain consequence [that] will follow as a result of the act unless something out of the ordinary intervenes" rather than "of an existing fact or an inevitable certainty."[229] Although the intent of injury is not shown, dishonesty is still established.[230]

Finally, a plaintiff might show "reckless untargeted malice"—that "the official does the act intentionally being aware that it risks directly causing loss to the plaintiff or an identifiable class to which the plaintiff belongs and the official willfully disregards that risk."[231] While Lord Hobhouse referred to this state of mind as "subjective recklessness," he acknowledged that it was more commonly called something along the lines of "blind disregard" or "wilful disregard."[232] The official must know "there is a risk of loss involved in the intended act" and must choose "wilfully to disregard that risk."[233]

Finally, Lord Millett characterized himself as "in full agreement" with Lord Steyn and Lord Hutton.[234] But he did not agree with the two-limb "formulation."[235] Instead, he believed that misfeasance in public office is simply an intentional tort and "the two limbs are merely different ways in which the necessary element of intention is established. In the first limb it is established by evidence; in the second by inference."[236]

> The rationale underlying the first limb is straightforward. Every power granted to a public official is granted for a public purpose. For him to exercise it for his own private purposes, whether out of spite, malice, revenge, or merely self-advancement, is an abuse of the power. It is immaterial in such a case whether the official exceeds his powers or acts according to the letter of the power. His

228. *Id.*
229. *Id.*
230. *Three Rivers District Council*, 2 W.L.R. at 1269-70 (opinion of Lord Hobhouse of Woodborough).
231. *Id.* at 1270.
232. *Id.*
233. *Id.*
234. *Id.* at 1273 (opinion of Lord Millett).
235. *Id.* at 1274.
236. *Three Rivers District Council*, 2 W.L.R. at 1273-74 (opinion of Lord Millet).

> deliberate use of the power of his office to injure the plaintiff takes his conduct outside the power, constitutes an abuse of the power, and satisfies any possible requirements of proximity and causation.

The rationale of the second limb is not so transparent. The element of knowledge which it involves is, in my opinion, a means of establishing the necessary intention, not a substitute for it. But intention does not have to be proved by positive evidence. It can be inferred. Proof that the official concerned knew that he had no power to act as he did and that his conduct would injure the plaintiff is only the first step in establishing the tort. But it may and will usually be enough for the necessary intention, and therefore of the requisite state of mind, to be inferred. The question is: why did the official act as he did if he knew or suspected that he had no power to do so and that his conduct would injure the plaintiff? As Oliver L.J. said in *Bourgoin S.A. v. Ministry of Agriculture, Fisheries and Food*:

> 'If an act is done deliberately and with knowledge of its consequences, I do not think that the actor can sensibly say that he did not "intend" the consequences or that the act was not "aimed" at the person who, it is known, will suffer loss.'
>
> As that case demonstrates, the inference cannot be rebutted by showing that the official acted not for his own personal purposes but for the benefit of other members of the public. An official must not knowingly exceed his powers in order to promote some public benefit at the expense of the plaintiff.[237]

In casting the tort in this manner, Lord Hutton provides perhaps the simplest formulation for what must be proved under each "limb":

> If the plaintiff can establish the official's subjective intention to exercise the power of his office in order to cause his injury, he does not need to establish that the official exceeded the terms of the powers conferred upon him. If, on the other hand, the plaintiff can establish that the official appreciated that he was acting in excess of the powers conferred upon him and that his conduct would cause injury to the plaintiff, the inference that he acted

237. *Id.* at 1274 (quoting Bourgoin v. Ministry of Agriculture, Fisheries and Food [1986] Q.B. 716, 777) (opinion of Oliver, L.J.)) (citation omitted).

> dishonestly or for an improper purpose will be exceedingly difficult and usually impossible to rebut.[238]

Lord Hutton considered the concept of "intention" to include "subjective recklessness."[239] As to foreseeability, Lord Hutton again reduced the issue to standard tort principles, stating his belief that the official must actually foresee the consequences of his actions but that this may be proved through "[t]he principle . . . that a man is presumed to intend the natural and probable consequences of his actions."[240]

IV. POSSIBLE LEGAL LIABILITY AFTER RUCHO BASED ON *ASHBY V. WHITE*

So now to the question this article seeks to explore: is there an action in tort for extreme partisan gerrymandering? To answer this question, we much first determine whether *Rucho* forecloses such a tort. It does not.

The challengers to the Maryland and North Carolina districting plans sought equitable relief—injunctions on the use of the districting plans in future elections and orders to fashion new, less gerrymandered plans.[241] The *Rucho* Court's ruling that there was no justiciable claim is necessarily limited to the circumstances of the *Rucho* case. In the strictest sense, any wording in the Court's opinion that is not necessary to decide the case is dictum, and any wording implying that the opinion forecloses legal, in addition to equitable, relief is not binding precedent.

At the same time, though, reasoning that would apply to legal as well as equitable relief is the reasoning of the Court and will presumably continue to be the position of the Court. So, the question is whether Chief Justice Roberts's reasoning was specific to equitable relief or if it applies equally to all relief.

A. History

After discussing the facts of the North Carolina and Maryland cases, Chief Justice Roberts looked at the history of

238. *Id.* at 1275.
239. *Id.*
240. *Id.* at 1275.
241. Rucho v. Common Cause, 139 S. Ct. 2484, 2487-88 (2019).

gerrymandering and the law's response to it. Indeed, Chief Justice Roberts in *Rucho* in 2019 viewed the relevance of history to the justiciability question in much the same way that Justice Holmes did in *Giles* in 1903. Chief Justice Roberts rejected the argument that the long history of districting being left to political branches without more necessitated the conclusion that political gerrymandering claims were nonjusticiable, but, he said, "[T]he history is not irrelevant."[242] Justice Holmes acknowledged, "The traditional limits of proceeding in equity have not embraced a remedy for political wrongs. But we cannot forget that we are dealing with a new and extraordinary situation, and we are unwilling to stop short of the final considerations which seem to us to dispose of the case."[243] History is relevant, but not conclusive.

So what is the history of an action at law in this type of case? History favors such an action. First, as Justice Holmes explained in *Giles* and *Nixon*, "The traditional limits of proceedings in equity have not embraced a remedy for political wrongs."[244] But "[t]hat private damage may be caused by such political action and may be recovered for in a suit at law hardly has been doubted for over two hundred years, since *Ashby v. White*, and has been recognized by this Court."[245] Thus, using the simplest metric—general legal tradition—a party could not receive equitable relief for political gerrymandering, as the Court held in *Rucho*, but could for legal relief.

Zeroing in on the history that Chief Justice Roberts considered, that of districting itself, further supports this point. The Chief Justice explained, "At no point was there a suggestion that the federal courts had a role to play. Nor was there any indication that the Framers had ever heard of courts doing such a thing."[246] But for actions at law to right private wrongs done by politically motivated officials, the Framers most certainly *had* heard of such a thing. *Ashby v. White* received considerable attention in its day. By the time of the Constitutional Convention, the tort was fairly well established. And in addition to recognizing the tort, the case was significant

242. *Id.* at 2495-96.

243. Giles v. Harris, 189 U.S. 475, 486 (1903) (citing Green v. Mills, 69 F. 852 (4th Cir. 1895)).

244. *Id.*

245. Nixon v. Herndon, 273 U.S. 536, 540 (1927).

246. *Rucho*, 139 S. Ct. at 2496.

in setting out the limits of parliamentary privileges, which would certainly be of interest to the Framers.[247]

Finally, there are *Giles* and *Nixon* themselves. Both cases were written by Oliver Wendell Holmes, the father of modern tort law, and were issued before the boom in cases that occurred with the innovations of the Warren Court. The conclusion in these cases that there was a constitutional tort, but not equitable relief, for intricate discrimination schemes in voting itself represents historical practice and supports a tort for partisan gerrymandering.

B. The Court's Reasoning in Rucho

But Chief Justice Roberts in *Rucho* did not base his decision on history and tradition. Instead, he concluded there was no "limited and precise rationale" that produced a "clear, manageable, and politically neutral" standard.[248] Of course, a legal action would be hard to prosecute if all the reasoning in *Rucho* applied equally to legal relief. But much of what the Chief Justice expressed as frustration with the lack of definite standards is actually frustration with providing equitable relief.

Quoting concurring opinions in past cases, Chief Justice Roberts explained that "[t]he opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States" and that "the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process."[249] The Chief Justice concluded that "federal courts are not equipped to apportion political power as a matter of fairness . . . ."[250]

Even if a standard for fairness could be found, it is unclear, Chief Justice Roberts explained, how much deviation should be

247. *Cf.* Tenney v. Brandhove, 341 U.S. 367, 376-77 (1951) (citing Ashby v. White, 92 Eng. Rep. 126 (1703), 2 Ld. Raym. 938, in concluding that the judiciary and not the House of Representatives determined the scope of House privileges).

248. *Rucho*, 139 S. Ct. at 2488 (quoting Vieth v. Jubelier, 541 U.S. 267, 306-08 (2004) (Kennedy, J., concurring in judgment)).

249. *Id.* at 2498 (alteration in original) (first quoting Davis v. Bandemer, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring in judgment); then quoting *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in judgment)).

250. *Id.* at 2499.

allowed *and what should be done to remedy the problem*: "Should a court 'reverse gerrymander' other parts of a State to counteract 'natural' gerrymandering caused, for example, by the urban concentration of one party?"[251] If trying to approximate proportional representation, he wondered, "Which seats should be packed and which cracked?"[252]

Chief Justice Roberts's statements in his opinion for the Court show his concern with how a court would engage in mapmaking—that is, what its equitable relief would look like. His parade of horribles responded to concerns about the political nature of "the *drawing* of electoral boundaries"[253]—worries that courts were not "equipped to *apportion* political power"[254] through "the *correction* of all election district lines drawn for partisan reasons . . . ."[255] There simply would not be neutral standards that could justify how a court decided to crack and pack a "reverse gerrymander."[256] These concerns arise only if a court plans to issue an equitable remedy. A different calculus—one the court has not done—is necessary if all that is sought are money damages from individuals.

C. Legal Basis

The *Rucho* Court and past courts have considered two separate constitutional underpinnings for claims of unconstitutional partisan gerrymandering—vote dilution and freedom of association. The latter appears to have been rejected by the Court in *Rucho*. Before proceeding to the "How much is too much?" question, Chief Justice Roberts noted, "To begin, there are no restrictions on speech, association, or any other First Amendment activities in the districting plans at issue. The plaintiffs are free to engage in those activities no matter what the effect of a plan may be on their district."[257] All findings of the actual burden on election activities were based

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251. *Id.* at 2501.
252. *Id.*
253. *Id.* at 2498 (emphasis added) (quoting *Davis*, 478 U.S. at 145 (O'Connor, J., concurring)).
254. *Rucho*, 139 S. Ct. at 2499 (emphasis added).
255. *Id.* at 2498 (emphasis added) (quoting Vieth v. Jubelier, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring in judgment)).
256. *Id.* at 2501.
257. *Id.* at 2504.

on "slight anecdotal evidence."[258] Even if these statements did not conclusively reject the First Amendment theory, such claims would be the claims of parties and candidates, not voters, and thus would not have a clear tort-law analogue.

Chief Justice Roberts also criticized the vote dilution theory. The Chief Justice explained:

> "[V]ote dilution" in the one-person, one-vote cases refers to the idea that each vote must carry equal weight. In other words, each representative must be accountable to (approximately) the same number of constituents. That requirement does not extend to political parties. It does not mean that each party must be influential in proportion to its number of supporters. As we stated unanimously in *Gill*, "this Court is not responsible for vindicating generalized partisan preferences. The Court's constitutionally prescribed role is to vindicate the individual rights of the people appearing before it."[259]

But this criticism does not dispatch with the vote dilution theory entirely. First, the above passage comes directly after explaining that unlike one-person, one-vote claims, "the Constitution supplies no objective measure for assessing whether a districting map treats a political party fairly."[260] And Chief Justice Roberts's stated reason for ultimately rejecting vote-dilution claims was the lack of a manageable standard.[261] Even if taken as law (the quoted passage is technically dictum because it was not the rationale for the outcome of the case, but five Justices signed onto the opinion that includes it) Chief Justice Roberts's criticisms appear to limit only *who* can bring the action. Political parties have no right to any type of representation.[262] But individuals do have a right not to have their vote diluted. If state officials—using party-affiliation or individuals' voting habits—use gerrymandering in a way that makes person A's vote count less than person B, then person A would still seem to have an individual right that could be vindicated in the courts, assuming there is a clear legal standard for doing so.

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258. *Id.*
259. *Id.* at 2501 (quoting Gill v. Whitford, 138 S. Ct. 1916, 1933 (2018).
260. *Rucho*, 139 S. Ct. at 2501.
261. *Id.*
262. *Id.*

"[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."[263]

As Justice Kagan recognized in dissent, most Justices who have considered partisan gerrymandering have concluded that it is unconstitutional. Further, the Court has denounced partisan gerrymandering as tantamount to "rigging elections."[264] And the case law makes clear that there is a constitutional tort for deprivation of the right to vote—the tort based on *Ashby v. White*, the tort of misfeasance in public office.

D. Legal Standard

Chief Justice Roberts ultimately rejected the claims of the election challengers in North Carolina and Maryland because there was no "limited and precise rationale" that established a "clear, manageable, and politically neutral" standard.[265] Any action at law would have to establish such a rationale and standard.

So what is the standard for the constitutional tort in this case? It is the standard that the Supreme Court once described as "an undisputed principle of the common law."[266] It is the standard that is recognized as the standard one in English law today.[267] This tort provides the standard that did not exist for equitable relief.

The tort of misfeasance in public office and its standard requirement of malice exists to fill the exact gaps which Chief Justice Roberts identified.

> The tort of misfeasance in public office is an exception to "the general rule . . . that, if conduct is lawful apart from motive, a bad motive will not make him liable." The rationale of the tort is that in a legal system based on the rule of law executive or administrative power "may be

263. Reynolds v. Sims, 377 U.S. 533, 555 (1964).

264. *Rucho*, 139 S. Ct. at 2512 (Kagan, J., dissenting) (quoting Vieth v. Jubelier, 541 U.S. 267, 317 (2004) (Kennedy, J., concurring)).

265. *Id.* at 2500-02 (majority opinion).

266. South v. Maryland *ex rel.* Pottle, 59 U.S. 396, 402-03 (1855).

267. Three Rivers District Council v. Governor of The Bank of England [2000] 2 W.L.R. 1220 (HL).

> exercised only for the public good" and not for ulterior and improper purposes.[268]

For a finding of malice "[i]t is immaterial . . . whether the official exceeds his powers or acts according to the letter of the power. His deliberate use of the power of his office to injure the plaintiff takes his conduct outside the power [and] constitutes an abuse of power."[269] The malice requirement therefore addresses the issue of acceptable versus unacceptable partisanship. Even though partisanship is a legal consideration—and may even be the predominant consideration—the common law forbids acting in an official capacity out of malice. This is the missing standard. (It is also worth noting that malice was a traditional *mens rea*.)[270]

Chief Justice Roberts had two primary problems with each standard proposed in *Rucho*. First, no standard was politically neutral. There just was no neutral map against which all other maps could be compared. And second, once selecting a standard, there was no way to determine how far from that standard district drawers could stray. The intentional tort of misfeasance in public office gets around both these concerns.

The misfeasance tort is a simple intentional tort.[271] One or more natural person plaintiffs sue one or more natural person defendants for compensation for an injury caused by the defendant's intentional acts. Politics only comes into play to the extent political officials did the alleged harm in a highly politicized process.[272] It is a private lawsuit for private damages.[273] There is no need to determine the ideal theory of

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268. *Id.* at 1230 (opinion of Lord Steyn) (first quoting W.V.H. ROGERS, WINFIELD & JOLOWICZ ON TORT 55 (15th ed. 1998); then quoting Jones v. Swansea City Counsel [1990] 1 W.L.R. 54, 85 (HL) (opinion of Nourse, L.J.))

269. *Id.* at 1274 (opinion of Lord Millet).

270. *See generally* ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 856-61 (3d ed. 1982); *id.* at 860 (explaining that malice requires "the presence of either (a) an actual intent to cause the particular harm which is produced or harm of the same general nature, or (b) the wanton and willful doing of an act with awareness of a plain and strong likelihood that such harm may result.").

271. *Three Rivers Dist.* Council, 2 W.L.R. at 1273 (opinion of Lord Millet).

272. *See* Nixon v. Herndon, 273 U.S. 536, 540 (1927) ("The objection that the subject-matter of the suit is political is little more than a play upon words. Of course the petition concerns political action but it alleges and seeks to recover for private damage.").

273. *See id.* ("That private damage may be caused by such political action and may be recovered for in a suit at law hardly has been doubted for over two hundred years, since *Ashby v. White* and has been recognized by this Court.").

districting—proportional, competitive districts, natural lines, etc.—because the allegation is harm by the individual district drawers, not by the districts themselves. Additionally, the harm is to individual members of the public, not to parties. Regardless of the map that is produced at the end and the extent to which it corresponds to various theories of political power, a district drawer's "deliberate use of the power of his office to injure the plaintiff takes his conduct outside the power, constitutes an abuse of power, and satisfies any possible requirements of proximity and causation."[274]

Of course, such subjective intent, like with all mental states, will often be difficult to prove. And, as always, circumstantial evidence may be admitted to help establish the requisite intent. In some cases, the maps produced, and how they compare with other possible maps, might be relevant circumstantial evidence for determining the map drawer's malicious intent.[275] But the maps themselves will not be on trial. The question will always remain whether the map maker intended to injure the plaintiffs.

Because plaintiffs will not be challenging the map, courts will never need to compare the map to an ideal and will never need to determine whether the map being used is too far from the ideal. Courts will be declaring no map invalid and will not be called on to draw or correct any boundaries.

E. Maliciousness is Not the Same as Predominant Purpose

At first glance, requiring malice by the mapdrawer seems similar to the predominant purpose standard the North Carolina district court adopted and Chief Justice Roberts rejected. If malice is just another name for predominant purpose, then a constitutional tort action based on the malice concept would presumably fail. It is therefore important to distinguish malice from predominant purpose.

The Chief Justice reasoned partisanship is a permissible consideration in mapdrawing and, if a purpose is permissible,

274. *Three Rivers District Council*, 2 W.L.R. at 1274 (opinion of Lord Millet).

275. *See id.* at 1275 (opinion of Lord Hutton) (explaining that, like with all intentional torts, in the tort of misfeasance in public office "a man is presumed to intend the natural and probable consequences of his actions."); Monroe v. Pape, 365 U.S. 167, 187 (1961) (explaining that what is now 42 U.S.C. § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.").

then there should be no reason why it cannot predominate.[276] A lot of partisan consideration may still be permissible. But at common law, a consideration may be permissible in certain circumstances but malicious in others:

> It is immaterial in such a case whether the official exceeds his powers or acts according to the letter of the power. His deliberate use of the power of his office to injure the plaintiff takes his conduct outside the power, constitutes an abuse of the power, and satisfies any possible requirements of proximity and causation. . . .
>
> If the plaintiff can establish the official's subjective intention to exercise the power of his office in order to cause him injury, he does not need to establish that the official exceeded the terms of the powers conferred upon him.[277]

Even though partisanship is a permissible consideration and may even be the predominant consideration, a mapdrawer still may not deliberately use the power of his office to injure the plaintiff. The question is whether there was an "abuse of power granted for the benefit of and therefore held in trust for the general public."[278] This is different from evaluating what criterion was used in arriving at the adopted map.

Misfeasance in public office, at its core, is simply an intentional tort.[279] As with all mental state requirements, intent "can be inferred."[280] Thus, while extreme partisanship alone will not be malicious, evidence of extreme partisanship, like the evidence of thousands of possible maps that existed in the North Carolina case, would be relevant to establishing the requisite mindset. Still, a finding of malice, meaning deliberate use of the power to injure, would be necessary for a tort judgment against a mapdrawer.

Malice, therefore, is not another name for predominant purpose. A predominant purpose without malice would not be outside the ambit of a mapdrawer's powers and therefore would not be enough to establish tort liability. It is the requirement of intent to cause harm, not the amount of

276. Rucho v. Common Cause, 139 S. Ct., 2484, 2502-03 (2019).
277. *Three Rivers District Council*, 2 W.L.R. at 1274 (opinion of Lord Millet).
278. *Id.*
279. *Id.* at 1274 (opinion of Millet, L.).
280. *Id.*

partisanship in the process, that establishes the malice element of the tort.

F. Inconsistency from Map to Map

A requirement of finding targeted malice before tort liability extends means that two mapdrawers producing the exact same maps could have two different verdicts against them. One might be found to have acted with targeted malice, while another might not. The mental state of the mapdrawer would be the relevant jury question.

But in *Rucho* Chief Justice Roberts held that the neutral-baseline standard advocated by Justice Kagan was "indeterminate and arbitrary" because it would "vary from State to State and year to year . . . ."[281] Does the malice standard for the constitutional tort therefore also fail as too arbitrary? The answer lies in the difference between an action at law and a bill in equity.

Those challenging the maps in *Rucho* sought to have the maps declared invalid. The ultimate judgment they sought was about the maps. And they were seeking an injunction against using the maps in the future. In such a situation, where the maps are on trial and the trial will determine whether the maps continue to be used, it is important to have consistency deriving from a neutral baseline. A map either is or is not too partisan. A standard where the same map could stay in place and be used in future elections after one trial but be struck down and redrawn after another trial would call the whole system into question. These are, after all, the maps that determine in what elections people vote. They must be permissible or not.

A constitutional tort plaintiff would seek a ruling against the mapdrawer and money damages from the mapdrawer. There would be no ruling on the permissibility of the map itself. And, regardless of the trial's outcome, the map would stay in place until the next census. There is nothing inconsistent about the findings that one mapdrawer had an improper intent while another did not.

281. *Rucho*, 139 S. Ct. at 2505.

G. How Much is Too Much?

The theme that Chief Justice Roberts kept returning to in *Rucho* was the question "How much is too much?"[282] The Chief Justice, for example, rejected Justice Kagan's proposed test partially because "substantial deviation from a median map" was too indeterminate a standard.[283] In the constitutional tort context, a finding of malice separates permissible consideration of partisan concerns from an impermissible abuse of power. It therefore serves the same function as substantiality did in Justice Kagan's proposed test: it draws the line between the permissible and impermissible. As such, the malice finding must be able to pass the test that substantiality could not.

Chief Justice Roberts responded to Justice Kagan's argument that "courts all the time make judgments about the substantiality of harm" by saying that "those instances typically involve constitutional or statutory provisions or common law confining and guiding the exercise of judicial discretion."[284] Judges either "beg[i]n with a significant body of law about what constituted a legal violation" or "draw meaning from related provisions or statutory context."[285] As an example, Chief Justice Roberts discussed the history of findings of "substantial anticompetitive effect[s]" in antitrust law.[286] "That language," he explained, "grew out of the Sherman Act, understood from the beginning to have its 'origin in the common law' and to be 'familiar in the law of this country prior to and at the time of the adoption of the [A]ct.'"[287] There was no such background to draw on for a significant deviation test.

But a very similar background does exist for the maliciousness standard. That the tort of misfeasance in public office exists, with its requirement of a malice finding, "hardly has been doubted for over [three] hundred years, since *Ashby*

282. *Id.* at 2489, 2501.
283. *Id.* at 2505-06.
284. *Id.* at 2505.
285. *Id.* at 2506.
286. *Id.* at 2505 (alteration in original) (citing *id.* at 2522 (Kagan, J., dissenting).
287. *Rucho*, 139 S. Ct. at 2505-06 (majority opinion) (alteration in original) (quoting Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 51 (1911)).

v. White."[288] The Supreme Court over 150 years ago stated the tort vindicates "an undisputed principle of common law" and that it does so by requiring a "finding of the jury [that] the act was done maliciously."[289] There is "common law confining and guiding the exercise of judicial discretion" and a "significant body of law about what constitute[s] a violation."[290] Malice therefore passes the test that substantiality failed.

H. Injury

Finally, there is no problem of establishing an injury. Chief Justice Roberts rejected the district courts' right-to-associate test partly because the requirement of "an actual burden on political speech or associational rights"—which could be proved by a showing of problems fundraising, attracting candidates and volunteers, campaigning, and mobilizing voters—had no workable standard for determining "[h]ow much of a decline in voter engagement is enough to constitute a First Amendment burden." [291] And the Chief Justice rejected the North Carolina district court's vote-dilution test partly because the requirement "that vote dilution 'is likely to persist' to such a degree that the elected representative will feel free to ignore the concerns of the supporters of the minority party" could not be made with any degree of certainty because "[j]udges not only have to pick the winner—they have to beat the point spread."[292] So what is the injury for a constitutional tort for partisan gerrymandering, and is there a definite standard?

There is significant discussion of the causation requirements for the tort of misfeasance in public office in the various opinions in *Three Rivers*. Still, such an in-depth look is unnecessary for establishing a definite standard. As Chief Justice Warren, writing for the Court, explained in *Reynolds*, "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."[293] And,

288. Nixon v. Herndon, 273 U.S. 536, 540 (1927).
289. South v. Maryland *ex rel.* Pottle, 59 U.S. 396, 402-03 (1855).
290. *Rucho*, 139 S. Ct. at 2505.
291. *Id.* at 2504 (citing Common Cause v. Rucho, 318 F. Supp. 3d 777, 929 (M.D.N.C. 2018)); Benisek v. Lamone, 348 F. Supp. 3d 493, 522-24 (D. Md. 2018)).
292. *Id.* at 2503.
293. Reynolds v. Sims, 377 U.S. 533, 555 (1964).

as Justice Powell explained in *Memphis Community School District v. Stachura*, a factfinder may presume money damages for the denial of the right to vote:

> "In the eyes of the law th[e] right [to vote] is so valuable that damages are presumed from the wrongful deprivation of it without evidence of actual loss of money, property, or any other valuable thing, and the amount of the damages is a question peculiarly appropriate for the determination of the jury, because each member of the jury has personal knowledge of the value of the right." The "value of the right" in the context of these decisions is the money value of the particular loss that the plaintiff suffered—a loss of which "each member of the jury has personal knowledge."[294]

Thus, injury is established by findings by a preponderance of the evidence that an individual had the right to vote, that the mapdrawer denied the full vote to the individual by diluting the individual's vote to some degree, and that the mapdrawer did so maliciously.[295] At that point, the factfinder may presume damages in the amount of the money value of the right lost, of which the factfinder necessarily has personal knowledge.[296]

There is no need to probe the harm that may or may not have been caused to candidates or to parties because the action is solely an action by individual voters seeking damages for wrongs to them as individuals. Thus, there need not be any probing about the amount of voter engagement. And the wrong that is being rectified is the malicious attempt to deny the vote. That is when the voter is injured unless the mapdrawer fails to do what was intended.

As far as the question of "how much dilution is too much?" goes, the answer is any dilution. Improper dilution of the vote is improper denial of the vote. The question is whether the dilution is improper, and the dilution is improper if it is done maliciously. This standard works because the actual wrong is the *malice*, so any amount of success on that malice necessitates damages. This standard also works because all that can be awarded is damages, which are presumed by the

294. Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 311 n. 14 (1986) (quoting Wayne v. Venable, 260 F. 64, 66 (8th Cir. 1919)).

295. *See* South v. Maryland *ex rel.* Pottle, 59 U.S. 396, 402-03 (1855).

296. *See Memphis Cmty. Sch. Dist.*, 477 U.S. at 311 n.14.

factfinder. The factfinder can draw on the experience of participating in the democratic process and will have actual knowledge of how much in damages to presume in each case. The more nominal the dilution, the more nominal the damages. But any dilution is a deprivation and thus an automatic injury to be rectified by some amount of damages, if the dilution was malicious.

There is no concern that factfinders will have to "beat the spread." Because the mapdrawer's malice is the wrong and the injury is to the individual voter, it does not matter whether "an elected representative from the favored party in the district will not feel a need to be responsive to constituents who support the disfavored party."[297] All that matters is whether the mapmaker has succeeded in maliciously diluting an individual's vote. Certainly, evidence can be presented on this point, and all that is required is a finding by a preponderance of the evidence that dilution occurred.

To the extent there are still doubts about the precision of this standard, those doubts should be satisfied by courts' abilities to look to two long lines of cases—misfeasance in public office cases and vote dilution cases—which explore the standard for finding an injury at great length (as well as other areas of the common law where a malice standard is used). This "significant body of law" should aid courts in answering any questions that arise.

V. CONCLUSION

Traditionally, there was no right to sue in equity to demand the right to vote. However, the Supreme Court decided to depart from this tradition and allow bills in equity to fix election wrongs in two extremely important lines of cases—the one-person, one-vote cases and racial gerrymandering cases. But in *Rucho* the Supreme Court declined to further expand the role of equity to address partisan gerrymandering.

That said, there has traditionally been a right to sue at law for money damages for denial of the right to vote, and the Supreme Court has consistently recognized this right. Thus,

297. *Rucho*, 139 S. Ct. at 2502 (quoting *Common Cause*, 318 F. Supp. 3d at 867).

even though *Rucho* forecloses the possibility of suits to redraw gerrymanders, it should not foreclose the possibility of suits for money damages for the effect of gerrymanders.