
NOTES

PARTISAN GERRYMANDERING AND THE QUALIFICATIONS CLAUSE

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INTRODUCTION

Every ten years state legislatures redraw congressional districts in their states based on the results of the federal census. State legislatures draw these districts to favor the majority party controlling the legislature. More often than not, legislatures will gerrymander the districts to favor the current majority

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party, “packing” the opposition into as few districts as possible, or alternatively “cracking” the opposition into numerous districts to dilute the opposition’s voting power.¹ This results in oddly shaped districts that combine municipalities with little common linkage. The use of gerrymandering by state legislatures to influence a party’s success in congressional elections is not a new phenomenon. However, technological changes have improved a legislature’s ability to identify sympathetic voters and turned gerrymandering into a science.² In addition, the relatively recent polarization of the Democratic and Republican parties and the evolution of mass media have exacerbated the consequences of gerrymandering. Gerrymandered districts lead to less democratic institutions and more polarized representatives. The combination of these factors undermines Congress’s ability to function. This dysfunction was in full view when the federal government shut down in 2013.

Those harmed by gerrymandering have sought legal action to create districts more reflective of the communities that make up the region. The Supreme Court has heard two major partisan gerrymandering claims.³ In these cases, litigants allege that their gerrymandered district violates the Equal Protection Clause and that the gerrymander is therefore unconstitutional.⁴ The Supreme Court’s jurisprudence on this subject, however, has caused much confusion for both litigants and lower courts. First, the Supreme Court has divided on whether courts can even hear gerrymandering claims or if gerrymandering is instead a non-justiciable political question.⁵ Second, among the justices who find gerrymandering claims to be justiciable, disagreement has arisen as to what standard can appropriately determine that the gerrymander violated the Constitution.⁶ The standard the Court developed is an intent and effects test:

¹ See Donald Ostdiek, *Congressional Redistricting and District Typologies*, 57 J. POL. 533, 534 (1995) (explaining different techniques of how to gerrymander a district to favor one party).

² See John N. Friedman & Richard T. Holden, *The Rising Incumbent Reelection Rate: What’s Gerrymandering Got to Do with It?*, 71 J. POL. 593, 595-96 (2009) (contrasting the difficulties in drawing congressional districts in the 1970s with the ease of drawing districts today via computer programs).

³ See *Vieth v. Jubelirer*, 541 U.S. 267 (2004); *Davis v. Bandemer*, 478 U.S. 109 (1986). Partisan gerrymandering refers specifically to gerrymandering based solely on party identification as opposed to race.

⁴ See *Bandemer*, 478 U.S. at 133 (plurality opinion) (holding that “an equal protection violation may be found only where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively”).

⁵ See *id.* at 121-27 (revisiting varied, prior rulings dealing with the justiciability of political gerrymandering claims); *id.* at 147 (O’Connor, J., concurring in the judgment) (“The Equal Protection Clause does not supply judicially manageable standards for resolving purely political gerrymandering claims, and no group right to an equal share of political power was ever intended by the Framers of the Fourteenth Amendment.”).

⁶ See *Vieth*, 541 U.S. at 306, 307-08 (Kennedy, J., concurring in the judgment); *id.* at 317 (Stevens, J., dissenting); *id.* at 343-55 (Souter, J., dissenting); *id.* at 355-68 (Breyer, J.,

litigants must establish that those drawing the district intended to gerrymander the district, and that the litigants suffered the effect of this gerrymander.⁷ While the test may seem simple, multiple justices have disagreed about how to prove the effect of the gerrymander; that is, how a party can show that a gerrymandered district has harmed the litigant.⁸

Judicial standards for gerrymandering create problems for the courts because voters' political preferences are not static. Proving the exact reason why one candidate won and another lost may be impossible. Furthermore, if a candidate loses despite running in a district gerrymandered for his party, then litigants will be unable to show that the gerrymander had any actual effect.

This Note argues that the Qualifications Clause, instead of the Equal Protection Clause, provides a stronger basis for showing that gerrymandered districts violate the Constitution. When a state uses partisan gerrymandering to create districts in which only the chosen party can win, the state effectively creates an additional qualification requiring that the candidate for Congress be a member of the chosen party. The Supreme Court has held that the states cannot create qualifications beyond those enumerated in the Qualifications Clause of the Constitution. Thus, to the extent that a district gerrymandered along partisan lines creates effective qualifications for members of Congress, that district violates the Qualifications Clause and is unconstitutional. The Qualifications Clause provides a stronger basis because unlike the Equal Protection Clause, the Constitution permits no discretion to the states in managing the qualifications of members of Congress.

Part I of this Note explores the signs that a state has gerrymandered its congressional districts and the subsequent consequences of that gerrymandering. Part II summarizes the history of partisan gerrymandering claims and identifies the current state of the law. Part III discusses how courts have applied the Qualifications Clause to state-created qualifications, as well as the standards that courts have developed when evaluating claims that state action violates the Qualifications Clause. Part IV applies these standards to districts gerrymandered along partisan lines to show that partisan gerrymandering violates the Qualifications Clause and is therefore unconstitutional.

dissenting). See also *Bandemer* at 138-43 (plurality opinion); *id.* at 161 (Powell, J., concurring in part, dissenting in part); *infra* Part II.

⁷ *Bandemer*, 478 U.S. at 127 (plurality opinion) (“[I]n order to succeed the *Bandemer* plaintiffs were required to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group.”).

⁸ See *infra* Part III (explaining the multitude of tests that have been put forth to show the discriminatory effect of gerrymandering).

I. BACKGROUND

A. *Signs of Gerrymandered Districts*

Throughout the 2012 election cycle, Congress suffered from long-term low approval ratings.⁹ In August 2012, just three months before the congressional election, Gallup released a poll showing a congressional approval rating of 10%, tying the lowest approval rating Gallup had recorded at that time.¹⁰ Comparatively, Congress's average approval rating since 1974 has been around 34%.¹¹ One would imagine that such low approval ratings would lead to major turnover in Congress.¹² Despite these low approval ratings, only eight seats in the House of Representatives actually changed parties, and the Republican Party maintained control of the House.¹³ Moreover, 90% of House members seeking reelection in 2012 were reelected.¹⁴ While a 90% reelection rate is in line with the long-term trend, one would expect a much larger change in party seats given Congress's low approval ratings.¹⁵

⁹ See Lydia Saad, *Congress Approval at 18%, Stuck in Long-Term Low Streak*, GALLUP (Nov. 26, 2012), <http://www.gallup.com/poll/158948/congress-approval-stuck-long-term-low-streak.aspx>, archived at <http://perma.cc/66WW-CSX9> (“At 18%, Congress approval remains squarely in the center of the low range seen since 2010, which is also low by long-term standards, since 1974.”); Jeffrey M. Jones, *Congress’ Approval Poised to Be Lowest in an Election Year*, GALLUP (Sept. 14, 2012), <http://www.gallup.com/poll/157475/congress-approval-poised-lowest-election-year.aspx>, archived at <http://perma.cc/3EUN-NE79> (revealing the 13% approval rating of Congress as the lowest Gallup has measured so late in an election year).

¹⁰ Unsurprisingly, the earlier recording of 10% approval occurred in February 2012. Frank Newport, *Congress Approval Ties All-Time Low at 10%*, GALLUP (Aug. 14, 2012), <http://www.gallup.com/poll/156662/congress-approval-ties-time-low.aspx>.

¹¹ Saad, *supra* note 9.

¹² See, e.g., *id.* (“According to a recent Gallup analysis, in presidential and midterm election years when Congress’ job approval rating just prior to the election was below 30%, a relatively high number of seats typically changed hands from one party to the other in the U.S. House.”).

¹³ KAREN L. HAAS, CLERK OF THE HOUSE OF REPRESENTATIVES, STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF NOVEMBER 6, 2012, at 74, available at http://clerk.house.gov/member_info/electionInfo/2012election.pdf, archived at <http://perma.cc/SSB2-EJSK>.

¹⁴ Greg Giroux, *Voters Throw Bums in While Holding Congress in Disdain*, BLOOMBERG (Dec. 13, 2012, 12:00 AM), <http://www.bloomberg.com/news/2012-12-13/voters-throw-bums-in-while-disdaining-congress-bgov-barometer.html> (acknowledging that but for redistricting based on population shifts the reelection rate would have been even higher, but also explaining that partisan gerrymandering was likely responsible for a ten-term Pennsylvania Democrat losing his seat to a political newcomer).

¹⁵ Because the reelection rate depends on the number of congressmen running for reelection, there may be years in which Congress has both a high reelection rate and a large turnover (the word “large” is not that descriptive as a 31-seat party change is still less than a 10% change). For example, in 2006, Congress had a 94% reelection rate, yet Democrats

A major problem with relying on Congress's overall approval ratings as an indicator of an election's likely outcome is that poll respondents are asked their opinions of Congress as a whole, but may only vote for their own representative. While respondents may give Congress low approval ratings, they generally respond more favorably when asked specifically about their own representative.¹⁶ Despite an overwhelming majority of Americans disapproving of Congress, each individual member of Congress is insulated from the majority view and only answerable to his or her constituents. Partisan gerrymandering takes advantage of this level of insulation to ensure that the favored party will be able to maintain a Congressional seat.

The 2012 U.S. House election results further emphasize this disconnect. Nationwide, Democratic candidates for the House of Representatives received 60 million votes in total, 1.5 million more than Republican candidates.¹⁷ Nevertheless, Republican candidates won 234 House seats to the Democrats' 201.¹⁸ Although Democrats won 51% of the popular vote, they only won about 48% of the seats in Congress.¹⁹ In five states, the party that won a majority of the Congressional votes did not win the majority of Congressional seats.²⁰ In North Carolina, Democrats won 51% percent of the votes cast between Democrats and Republicans but won only 4 of the 13 Congressional seats.²¹ Unsurprisingly, the Republican Party controlled both houses of the North Carolina General Assembly during the redistricting for the 2012 election.

While the 2012 election may be an outlier,²² in certain states the popular vote and the congressional result are regularly discordant. For example, in Florida in 2008, Republicans won 52% of the congressional popular vote

gained a net of 31 seats, largely based on incumbents who did not seek reelection. See HAAS, *supra* note 13, at 74; *Reelection Rates over the Years*, OPENSECRETS.ORG (last visited Nov. 1, 2014), <https://www.opensecrets.org/bigpicture/reelect.php>, archived at <http://perma.cc/3M3X-XRKC>.

¹⁶ See Chris Cillizza, *People Hate Congress. But Most Incumbents Get Re-elected. What Gives?*, WASH. POST THE FIX (May 9, 2013, 11:29 AM), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/05/09/people-hate-congress-but-most-incumbents-get-re-elected-what-gives/>, archived at <http://perma.cc/5QQRV-RTTW>.

¹⁷ See HAAS, *supra* note 13, at 73.

¹⁸ See *id.*

¹⁹ See *id.* I have excluded votes for parties other than the Democrats and Republicans to create a clearer picture. These third-party votes amounted to less than four percent of the total votes cast.

²⁰ The five states were Arizona, Michigan, North Carolina, Pennsylvania, and Wisconsin. Sam Wang, Op-Ed., *The Great Gerrymander of 2012*, N.Y. TIMES, Feb. 3, 2013, at SR1. Democrats were not alone in suffering this voter disconnect: Democrats controlled the redistricting in Illinois, effectively "wasting about 70,000 Republican votes." *Id.*

²¹ *Id.*

²² *Id.* (explaining that this is only the second time since World War II that the minority party in Congress won a majority of the popular vote).

statewide but won 60% of the congressional seats.²³ In 2004, Florida Republicans won 61% of the statewide congressional vote but won 72% of the congressional seats.²⁴ While first-past-the-post²⁵ single-member district elections often lead to disproportion between the popular vote and number of congressional seats won,²⁶ the number of congressional seats that Florida has suggests that the disproportion should be slight.²⁷

This problem is not unique to Florida. Ohio frequently has a statewide congressional popular vote disproportionate to the number of seats won.²⁸

²³ See LORRAINE C. MILLER, CLERK OF THE HOUSE OF REPRESENTATIVES, STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF NOVEMBER 4, 2008, at 13-15, available at http://clerk.house.gov/member_info/electionInfo/2008election.pdf, archived at <http://perma.cc/3ES6-JE53> (calculations by author).

²⁴ See JEFF TRANDAHL, CLERK OF THE HOUSE OF REPRESENTATIVES, STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF NOVEMBER 2, 2004, at 13-15, available at http://clerk.house.gov/member_info/electionInfo/2004election.pdf, archived at <http://perma.cc/DFP5-FUH4> (calculations by author).

²⁵ Under a first past the post electoral system, “the candidate with the most votes wins, the party that wins most seats (almost always) forms the government, and the governing party gets to make public policy until the next election.” André Blais, *Introduction to TO KEEP OR TO CHANGE FIRST PAST THE POST?: THE POLITICS OF ELECTORAL REFORM 1* (André Blais ed., 2008).

²⁶ A precise coordination between percentage of popular vote and percentage of number of seats is impossible because a state has a limited number of seats that must go to the winner of the individual district. For example, in a state with three districts, a party can win 100%, 66%, 33% or none of the seats. Thus, even if the popular vote is 55% to 45%, the closest reflection of that would be the majority party controlling two-thirds of the seats.

²⁷ In 2010, voters in Florida passed a constitutional amendment designed to end gerrymandering. FLA. CONST. art. III, § 20 (attempting to establish neutral districting guidelines by mandating, “districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries”). Known as Amendment 6, the amendment prohibits the legislature from drawing districts in order to favor a particular party or incumbent. *Id.* After new districts were drawn based on the 2010 census, Fair Districts of Florida brought suit alleging that the districts violated Amendment 6 by favoring a particular party and incumbents, but the group was prevented from deposing legislators who drew the districts based on legislative privilege. *Fla. House of Representatives v. Romo*, 113 So. 3d 117, 123-24 (Fla. Dist. Ct. App. 2013), *overruled by* *League of Women Voters v. Fla. House of Representatives*, 132 So. 3d 135 (Fla. 2013) (holding that ensuring compliance with state gerrymandering amendment does not overrule or outweigh the interest of preserving legislative privilege). The Florida Supreme Court reversed the lower court’s initial decision, allowing the depositions. *League of Women Voters*, 132 So. 3d at 154. Nevertheless, one can imagine a similar issue arising in other states and preventing the enforcement of a constitutional amendment prohibiting gerrymandering.

²⁸ See HAAS, *supra* note 13, at 51; LORRAINE C. MILLER, CLERK OF THE HOUSE OF REPRESENTATIVES, STATISTICS OF THE CONGRESSIONAL ELECTION OF NOVEMBER 6, 2006, at 36, available at http://clerk.house.gov/member_info/electionInfo/2006election.pdf, archived at <http://perma.cc/F4TA-BNTH>; TRANDAHL, *supra* note 24.

Indeed, in 2012, Republicans won 51% of the congressional statewide popular vote but 75% of the congressional seats.²⁹ Like Florida, Ohio's large number of congressional seats suggests that the disproportion between the popular vote and number of congressional seats won should be smaller than it actually is.

An even starker disproportion arises when one compares the number of seats won to the statewide presidential popular vote. For example, in 2008, Florida and Ohio both had more statewide votes for then-Senator Barack Obama, the Democratic presidential candidate (and election winner), than Senator John McCain, the Republican presidential candidate.³⁰ Though voters often base their votes for president on different criteria than their votes for their congresspersons,³¹ the evidence nevertheless helps provide a clearer picture of the voter preferences within that state. For example, when looking only at congressional elections, the data may not reflect important advantages that incumbents have built-in, such as name recognition³² or greater campaign fundraising ability.³³ Conversely, when mapmakers draw new congressional districts, they tend to consider more of the raw data of party registration and census information while placing less emphasis on difficult-to-quantify factors like name recognition.³⁴ Thus, the congressional boundaries are often drawn without considering some of the advantages that incumbent congresspersons already have. Ohio and Florida are only two examples of the popular vote substantially differing from the number of seats a party wins. Unfortunately, this problem affects many of the large swing states.

²⁹ See HAAS, *supra* note 13, at 48.

³⁰ See MILLER, *supra* note 23, 50-51 (presenting data on the 2008 presidential popular vote and congressional popular vote of Florida and Ohio).

³¹ See R. Michael Alvarez & Matthew M. Schousen, *Policy Moderation or Conflicting Expectations?: Testing the Intentional Models of Split-Ticket Voting*, 21 AM. POL. Q. 410, 428 (1993) ("Using probit models to determine the relative importance of national issues for presidential and House elections, we find that national issues are statistically important in presidential elections but not influential in House elections.").

³² Thomas E. Mann & Raymond E. Wolfinger, *Candidates and Parties in Congressional Elections*, 74 AM. POL. SCI. REV. 617, 626 (1980) ("Incumbents have an enormous advantage over challengers, not because the voters' decision rules are rigged in their favor, but rather because they are more visible and more attractive.").

³³ See Jonathan S. Krasno, Donald Philip Green & Jonathan A. Cowden, *The Dynamics of Campaign Fundraising in House Elections*, 56 J. POL. 459, 461 (1994) ("We find that incumbents raise more money than challengers from the earliest reporting period, and their advantage grows wider as the election approaches. Even when challenger receipts reach their peak, incumbents continue to outdo them—by a greater dollar margin than in any other reporting period.").

³⁴ Micah Altman, Karin MacDonald, & Michael McDonald, *From Crayons to Computers: The Evolution of Computer Use in Redistricting*, 23 SOC. SCI. COMPUTER REV. 334, 339 (2005) ("Redistricting often involves integration and analysis of additional data including voter registration statistics and election returns.").

B. *Consequences of Gerrymandering*

Gerrymandered districts create less responsive members of Congress. When the number of seats a party controls in Congress does not align with nationwide preference, Congress's policies and actions will often not align with nationwide policy preferences. A key example of this is the government shutdown of 2013. Although 80% of the American public³⁵ opposed using a government shutdown as a means of negotiating, the shutdown nevertheless ensued. Moreover, the Republican Party, which controlled the House, immediately received more of the blame for the government shutdown, as compared to the President and the Senate, both held by the Democratic Party.³⁶ Despite the clear policy preferences of the American public, the shutdown continued well after the release of these polls.

In a well-functioning democracy, elected bodies seek to satisfy the policy preferences of the majority of voters in order to secure reelection. When an elected representative's district has been gerrymandered, however, the representative has no incentive to satisfy the policy preferences of the majority of voters; he or she only answers to constituents, who have been selected purposely not to align with the majority of the nation's voters. In addition, partisan gerrymandering polarizes the ideological positions of U.S. Representatives. By creating relatively safe seats for representatives, the only true competition a representative faces is during the primary election.³⁷ In order to satisfy primary voters, candidates will have to take more extreme positions than they would otherwise take during the general election.³⁸

³⁵ See Sarah Dutton, Jennifer De Pinto, Anthony Salvanto, & Fred Backus, *Government Shutdown Threat Unacceptable, Poll Says*, CBS NEWS (Sept. 29, 2013, 4:27 PM), http://www.cbsnews.com/8301-250_162-57604487/government-shutdown-threat-unacceptable-poll-says/, archived at <http://perma.cc/MH2E-TQBL>.

³⁶ See *NBC News/Wall Street Journal Survey*, NBC NEWS/WALL ST. J., 12 (Oct. 7-9, 2013), http://msnbcmedia.msn.com/i/MSNBC/Sections/A_Politics/_Today_Stories_Teases/Oct_poll.pdf, archived at <http://perma.cc/8MYA-8A3B> (finding that close to twice as many respondents thought the Republican Party was to blame compared to the number who blamed President Obama); Calvin Woodard & Jennifer Agiesta, *Poll: GOP Gets the Blame in Shutdown*, YAHOO! NEWS, (Oct. 9, 2013, 4:44 AM), <http://news.yahoo.com/poll-gop-gets-blame-shutdown-072856768--finance.html>, archived at <http://perma.cc/9QJ9-MUKA> (citing a poll that found 62% of respondents blamed the Republican Party for the shutdown).

³⁷ See THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* 12 (2006) ("With the overwhelming majority of House seats safe for one party or the other, new and returning members are naturally most reflective of and responsive to their primary constituencies, the only realistic locus of potential opposition, which usually are dominated by those at the ideological extreme.").

³⁸ See *id.* (discussing the growth of "two rival teams, whose internal unity and ideological polarization are deeply embedded in the body politic"); David W. Brady, Hahrie Han & Jeremy Pope, *Primary Elections and Candidate Ideology: Out of Step with the*

Candidates facing legitimate opposition in both their primary and general elections will have a dilemma of satisfying primary voters and alienating more moderate general election voters, or conversely satisfying general election voters at the risk of losing the primary election.³⁹ Gerrymandering eliminates this dilemma and allows representatives to focus only on appeasing primary voters.

Polarization negatively affects the political process because it reduces the incentive to compromise. Political compromise leads to a more productive government and allows representatives to return home to their districts touting the legislative accomplishments they achieved. While such a result might satisfy moderate election voters,⁴⁰ it has little effect on primary voters with more extreme policy views. Thus, the country has lurched from crisis to crisis, from the “fiscal cliff” in 2011 to the government shutdown in 2013, because House members are punished rather than rewarded for compromising with the opposition.

II. HISTORY OF PARTISAN GERRYMANDERING CLAIMS

The gerrymandering claims the Supreme Court has heard can generally be divided into two broad categories: race-based gerrymanders and purely partisan-based gerrymanders.⁴¹ Unsurprisingly, the Court has been more

Primary Electorate, 32 LEGIS. STUD. Q. 79, 98 (2007) (“Low turnout in primary elections creates the conditions necessary for a small group of ideologically extreme voters to have a greater impact.”).

³⁹ See Brady, Han & Pope, *supra* note 38, at 99 (discussing this “dilemma between primary constituencies and general-election constituencies” at great length).

⁴⁰ See Joe Klein, *Middle of the Road*, TIME (Oct. 24, 2011), <http://content.time.com/time/magazine/article/0,9171,2096838,00.html> (quoting an interviewee as lamenting, “We can’t seem to have a reasonable conversation about anything anymore, and it reaches right down here to our neighborhood.”). The 2013 government shutdown illustrates the division between the average voter and the primary voter: although only 48% of self-identifying Republicans approved of the government shutdown, 57% of self-identifying “Tea Party” members approved of the government shutdown. See Sarah Dutton, Jennifer De Pinto, Anthony Salvanto & Fred Backus, *Poll: Americans Not Happy About Shutdown; More Blame GOP*, CBS NEWS (Oct. 3, 2013, 10:37 AM), <http://www.cbsnews.com/news/poll-americans-not-happy-about-shutdown-more-blame-gop/>, archived at <http://perma.cc/6ZPE-D37E>.

⁴¹ This distinction might seem somewhat arbitrary given that identification as African American or Hispanic is strongly correlated with identifying oneself as a Democrat. *Partisan Polarization Surges in Bush, Obama Years: Section 9: Trends in Party Affiliation*. PEW RES. CENTER (June 4, 2012), <http://www.people-press.org/2012/06/04/section-9-trends-in-party-affiliation/> (finding that a majority of African American and Hispanic voters align with or lean toward the Democratic party as compared to the Republican Party). Nevertheless, this Note focuses on broader efforts to gerrymander districts for partisan reasons and ignores the specific tactics legislators use to help draw the partisan lines (including using race as a factor).

sensitive to Equal Protection Claims against racial gerrymanders⁴² than partisan gerrymanders. The Supreme Court has heard two major cases that dealt solely with partisan gerrymandering claims. These cases deal with two issues: whether partisan gerrymandering claims brought under the Equal Protection Clause are justiciable, and if so, what standard can accurately determine whether a given legislative district violates the Constitution. This section summarizes the two cases (as well as a more recent, non-racial gerrymander case) and analyzes the difficulty in developing a standard under the Equal Protection Clause.

A. *Davis v. Bandemer*

The first case to address partisan gerrymandering claims was *Davis v. Bandemer*.⁴³ In *Bandemer*, the Supreme Court held that partisan gerrymandering claims are justiciable under the Equal Protection Clause.⁴⁴ *Bandemer* involved the question of whether Indiana's Republican-controlled legislature had improperly gerrymandered state legislative districts after the 1980 census. In 1982, the first election based on the new districts, Democratic state representative candidates won 51.9% of the vote but only 43 out of 100 seats.⁴⁵ More specifically, Democratic candidates in two counties divided into multi-member districts "drew 46.6% of the vote, but only 3 of the 21 House seats [for those counties] were filled by Democrats."⁴⁶

The *Bandemer* Court decided that partisan gerrymandering claims are justiciable by reconciling the different directions of past decisions.⁴⁷ Although the Supreme Court had previously found gerrymandering claims to be justiciable,⁴⁸ it had also affirmed many lower court decisions that rejected purely partisan gerrymandering claims based on justiciability.⁴⁹ The Court resolved this discrepancy by stating that "[i]t is not at all unusual for the Court

⁴² See, e.g., *Baker v. Carr*, 369 U.S. 186, 237 (1962) (finding redistricting claims under the Equal Protection Clause justiciable). The Court has even found unconstitutional racial gerrymandering when the district was designed in accordance with the Justice Department to promote minority representation in Congress. *Shaw v. Hunt*, 517 U.S. 899, 918 (1996) (holding that compliance with antidiscrimination laws does not justify race-based redistricting).

⁴³ 478 U.S. 109 (1986).

⁴⁴ *Id.* at 119 ("Our past decisions also make clear that even where there is no population deviation among the districts, racial gerrymandering presents a justiciable equal protection claim.").

⁴⁵ *Id.* at 115.

⁴⁶ *Id.*

⁴⁷ *Id.* at 118-21 (summarizing past gerrymandering cases).

⁴⁸ See, e.g., *Baker v. Carr*, 369 U.S. 186, 237 (1962) ("We conclude that the complaint's allegations of a denial of equal protection present a justiciable constitutional cause of action.").

⁴⁹ See *Bandemer*, 478 U.S. at 119-21.

to find it appropriate to give full consideration to a question that has been the subject of previous summary action.”⁵⁰ Justice O’Connor and two other justices concurred only in the judgment, arguing that gerrymandering claims based on purely partisan reasons were not justiciable.⁵¹

After determining that partisan gerrymandering claims were in fact justiciable questions, the Court then needed to develop a standard to judge whether a gerrymandered district violated the Constitution. This task proved difficult, as Justice White was only able to attract a plurality of the justices for his standard. The plurality held that the “plaintiffs were required to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group.”⁵² As long as a legislature had done the redistricting, the Court would assume that intentional discrimination against an identifiable political group would be easy to prove.⁵³ Thus, proving discriminatory effect is where litigants would fight the true legal battle.

Justice White rejected the argument that an adverse effect on proportional voting influence satisfied the effect requirement, and relied on precedent that reapportionment does not require proportional representation.⁵⁴ Instead, the plurality held that “unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter’s or a group of voters’ influence on the political process as a whole.”⁵⁵ Plaintiffs must therefore provide “evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.”⁵⁶ Under this standard, the plaintiffs in *Bandemer* could not show that the legislature had unconstitutionally gerrymandered their districts because only one election had occurred since the redistricting.⁵⁷

⁵⁰ *Id.* at 119 (quoting *Washington v. Yakima Indian Nation*, 439 U.S. 463, 477 n.20 (1979)).

⁵¹ *Id.* at 146 (O’Connor, J., concurring in the judgment).

⁵² *Id.* at 127 (plurality opinion) (citing *City of Mobile v. Bolden*, 446 U.S. 55, 67-68 (1980)).

⁵³ *Id.* at 129 (stating that if legislature has done the redistricting, it should be easy to prove “that the likely political consequences of the reapportionment were intended”).

⁵⁴ *Id.* at 129-34 (suggesting that proving “a prima facie case of illegal discrimination in reapportionment requires a showing of more than a de minimis effect”).

⁵⁵ *Id.* at 132.

⁵⁶ *Id.* at 133.

⁵⁷ *Id.* at 135 (“Relying on a single election to prove unconstitutional discrimination is unsatisfactory.”). In his dissent, Justice Powell cites data from the 1984 election showing that the district winners still dramatically differed from the popular vote. *Id.* at 182-83 (Powell, J., concurring in part and dissenting in part) (observing that Democrats received 42.3% of the popular vote yet only 7 out of 25 Senate seats). Justice White dismisses this data because it was not brought before the district court, and because the discrepancy between the number of districts won and the popular vote was less than that of the 1982 election. *Id.* at 140 n.18 (plurality opinion) (noting that the data “exhibited less of a

In terms of a legal standard, requiring litigants to suffer a continued burden makes sense as a single election cycle has too many variables to definitively show that gerrymandering caused the election outcome. Conversely, if there has been a constitutional violation, requiring litigants to continue to suffer the violation seems like a perverse result. Ultimately, the proposed legal standard reflects the issue of whether justiciability under the Equal Protection Clause can be severed from developing a standard to analyze the district. Justice O'Connor concurred only in the judgment for this reason.⁵⁸ She rejected the standard because it was "unmanageable and arbitrary" and would likely rely on the same proportionality question that Justice White himself purported to reject.⁵⁹

B. *Vieth v. Jubelirer*

The criticisms of Justice White's standard carried the day when the Supreme Court next revisited the issue of partisan gerrymandering in *Vieth v. Jubelirer*.⁶⁰ Democratic voters brought an Equal Protection claim against the Commonwealth of Pennsylvania and its executive and legislative officers based on the congressional districts the Republican controlled General Assembly had drawn.⁶¹ A majority of the Court rejected Justice White's *Bandemer* standard for identifying an unconstitutional gerrymander.⁶² But again, the question of justiciability divided the court. The four conservative justices argued that gerrymandering was purely a political question inappropriate for courts to entertain, while the four liberal justices argued that gerrymandering was a question appropriately before the courts based on the Equal Protection Clause.

discrepancy between Democratic votes cast and Democratic representatives elected than did the 1982 results (5% as opposed to 8%)."). This raises the question of how "continued" the voters' frustration must be before the Court will recognize discriminatory effect.

⁵⁸ *Id.* at 147-50 (O'Connor, J., concurring in the judgment) (expressing doubt as to whether the court can assess these claims "without being forced to make a nonjudicial policy determination or to resort to a standard that is not judicially manageable").

⁵⁹ *Id.* at 155 ("In my view, this standard will over time either prove unmanageable and arbitrary or else evolve towards some loose form of proportionality."). Justice O'Connor also dissented because the Equal Protection Clause provides protection only for individuals and not groups, such as the political groups who alleged harm when their chosen candidate lost. *Id.* at 155 (alleging that the Court "confers greater rights on powerful political groups than on individuals; [and] that cannot be the meaning of the Equal Protection Clause").

⁶⁰ 541 U.S. 267 (2004).

⁶¹ *Id.* at 273 (plurality opinion).

⁶² *Id.* at 281 ("[W]e must conclude that political gerrymandering claims are nonjusticiable and that *Bandemer* was wrongly decided."). Indeed, even looking at the dissenting opinions, none of the justices were content to keep Justice White's standard. *Id.* at 317, 339 (Stevens, J., dissenting); *id.* at 343, 345 (Souter, J., dissenting); *id.* at 355 (Breyer, J., dissenting). As will shortly be addressed, there might have been other reasons that three of the dissenting justices developed their own standards.

Justice Kennedy, however, stayed on the fence. He rejected the plaintiffs' specific gerrymandering claims but also rejected that a workable standard to judge partisan gerrymandering claims could never exist.⁶³ Broadly, Justice Kennedy declared the impropriety of using redistricting to impose burdens on a group's representational rights and states that a gerrymander could violate the law if classifications "were applied in an invidious manner or in a way unrelated to any legitimate legislative objective."⁶⁴ He would have denied relief in this case, however, because drawing political boundaries inherently involves politics and a standard had not yet been developed to show when a legislator imposed an excessive burden on a group's representational rights.⁶⁵

On the other hand, Justice Kennedy imagined a future for gerrymandering claims in two different ways. First, he argued that the First Amendment provides sounder legal basis than the Equal Protection Clause because partisan gerrymandering inhibits the representational rights of individuals based on their political classification.⁶⁶ Second, he pointed out that "new technologies may produce new methods of analysis that make more evident the precise nature of the burdens gerrymanders impose on the representational rights of voters and parties."⁶⁷

Ultimately, Justice Kennedy appears to take up the mantle of Justice White from *Bandemer*. Both opined on the improper use of gerrymandering to limit the political power of an opposing group, but both seem paralyzed by the prospect of remedying this wrong. Justice White acknowledged that courts would have difficulty applying his standard⁶⁸ while Justice Kennedy seeks undiscovered technology to determine whether gerrymandering denies voters "fair and effective representation."⁶⁹ In reality, Justices Kennedy and White may simply be troubled that any remedy would itself rely on political considerations and end up causing more harm to the political process than the districts at stake.

⁶³ *Id.* at 308, 311 (Kennedy, J., concurring in the judgment) ("In this case, we have not overcome these obstacles to determining that the challenged districting violated appellants rights. . . . That no such standard has emerged in this case should not be taken to prove that none will emerge in the future.").

⁶⁴ *Id.* at 307.

⁶⁵ *Id.* ("With uncertain limits, intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility.").

⁶⁶ *Id.* at 315.

⁶⁷ *Id.* at 312-13. For a discussion of the flaws of these two approaches, see *infra* Part IV.D.

⁶⁸ *Davis v. Bandemer*, 478 U.S. 109, 142-43 (1986) (plurality opinion) ("Determining when an electoral system has been 'arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole,'—is of necessity a difficult inquiry." (internal citation omitted)).

⁶⁹ *Vieth*, 541 U.S. at 312-13 (Kennedy, J., concurring in the judgment) (referring to new technologies as "both a threat and a promise").

As mentioned, the four dissenting justices in *Vieth* produced three different standards to evaluate whether gerrymandering a district along partisan lines violates the constitution. As Justice Kennedy is the crucial vote in determining whether a workable standard exists, the different standards the dissenting justices produced could be seen as attempts to convince Justice Kennedy that the Court could fashion a standard that would provide relief for the circumstances. Nevertheless, the variety of standards rejected by a majority of the court (the plurality and Justice Kennedy) has reinforced to lower courts that no workable standard does in fact exist.⁷⁰

C. LULAC

Although Justice Kennedy argued that a district would be unconstitutional if drawn invidiously or without any legitimate legislative objective, he never defined the scope of such assertion. In other words, he did not explain what would qualify as an invidious classification in the context of gerrymandering, nor did he explain how to determine whether legitimate legislative objectives exist for a given district. Surely, if litigants could show that the State had drawn the district with the sole purpose of disadvantaging the minority party, then this would qualify as an invidious application as this is not a legitimate legislative objective. Because reapportionment is constitutionally mandated and districts must be redrawn to account for population shifts, however, legislators will always have more than one reason to draw a district in a certain way. On the other hand, if a state were to reapportion a second time within the decade, then the reapportionment would not be constitutionally mandated. Presumably, litigants would then be able to show that the state redrew the districts for the sole purpose of disadvantaging the minority party. The Supreme Court actually addressed this issue in *League of United Latin American Citizens v. Perry (LULAC)*,⁷¹ yet Justice Kennedy still found legitimate legislative objectives and found the districts constitutionally valid.

LULAC did not advance any new standards or even address the question of justiciability.⁷² Instead, the partisan gerrymandering claim was limited to the question of whether a mid-decade redistricting was unconstitutional because the sole motivation for redistricting was to disadvantage a political party.⁷³

⁷⁰ See *Radogno v. Ill. State Bd. of Elections*, No. 1:11-cv-04884, 2011 WL 5868225, at *2-5 (N.D. Ill. Nov. 22, 2011), *summarily aff'd*, 133 S. Ct 103 (2012) (rejecting plaintiffs' new standard to judge an allegedly gerrymandered district and summarizing the standards the Supreme Court has heard and ultimately rejected).

⁷¹ 548 U.S. 399, 423 (2006) (“[W]e disagree with appellants’ view that a legislature’s decision to override a valid, court-drawn plan mid-decade is sufficiently suspect to give shape to a reliable standard for identifying unconstitutional political gerrymanders.”).

⁷² *Id.* at 492 (Roberts, C.J., concurring in part and dissenting in part) (“The question whether any such standard exists—that is, whether a challenge to a political gerrymander presents a justiciable case or controversy—has not been argued in these cases.”).

⁷³ *Id.* at 416-18 (plurality opinion) (“The sole-intent standard offered here is no more

LULAC does not add a new standard but it does further illustrate Justice Kennedy's conflicted position; he continues to support the justiciability of partisan gerrymandering claims but does not articulate his vision for a standard to evaluate such claims.⁷⁴

Justice Kennedy did not address the question of justiciability but moved straight to evaluating appellants' standard.⁷⁵ Although the courts below did not address the question of justiciability either, the Supreme Court clearly has the authority to address this question.⁷⁶ Justice Kennedy argued that appellants have not put forth a successful claim because "a successful claim attempting to identify unconstitutional acts of partisan gerrymandering must do what appellants' sole-motivation theory explicitly disavows: show a burden, as measured by a reliable standard, on the complainants' representational rights."⁷⁷ As Justice Scalia later pointed out, however, Justice Kennedy "conclude[d] that appellants have failed to state a claim as to political gerrymandering, without ever articulating what the elements of such a claim consist of."⁷⁸ In other words, Justice Kennedy never explained what "reliable standard" would measure the burden on complainant's representational rights. Instead, he relied on the fact that proportional representation under the challenged plan was actually more in line with statewide vote than the previous map.

Much of the problem with partisan gerrymandering claims is summed up in Justice Scalia's plurality opinion in *Vieth*: "Political affiliation is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line."⁷⁹ This raises the question: Just how immutable are political party preferences, and how immutable do they need to be for the Court to recognize an unconstitutional

compelling when it is linked to the circumstance that Plan 1374C is mid-decennial legislation.").

⁷⁴ *Id.* at 414-23. (declining to revisit the question of justiciability but finding no acceptable standard by which to judge the gerrymandering claim).

⁷⁵ *Id.* at 414 ("We do not revisit the justiciability holding but do proceed to examine whether appellants' claims offer the Court a manageable, reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution.").

⁷⁶ Consider Justice Scalia's opinion dissenting from Part II of Justice Kennedy's opinion. *Id.* at 511 (Scalia, J., concurring in part and dissenting in part) ("As I have previously expressed, claims of unconstitutional partisan gerrymandering do not present a justiciable case or controversy.").

⁷⁷ *Id.* at 418 (plurality opinion).

⁷⁸ *Id.* at 511 (Scalia, J., concurring in part and dissenting in part).

⁷⁹ *Vieth v. Jubelirer*, 541 U.S. 267, 287 (2004) (plurality opinion). Justice Scalia adds: "We dare say (and hope) that the political party which puts forward an utterly incompetent candidate will lose even in its registration stronghold." *Id.* What constitutes an incompetent political candidate is itself subject to many interpretations. However, Justice Scalia implicitly raises the question if gerrymandering can ever be proven when a "safe" candidate is embroiled in an ugly scandal and loses an election. See *infra* note 167.

gerrymander? Based on the current configuration of the Court and the past cases, the Equal Protection Clause seems like a poor vehicle to rectify districts that have been gerrymandered on partisan lines that have burdened a group of citizens.

III. THE QUALIFICATIONS CLAUSE

The Qualifications Clause states, “No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.”⁸⁰ Unlike the Equal Protection Clause, there is no balancing test performed when a state (or Congress) adds a qualification beyond those enumerated by the Constitution.⁸¹ The primary legal issue arising from the Qualifications Clause had been whether the requirements announced in the Constitution are the only requirements a candidate for Congress must satisfy, or if additional qualifications could be added. The Supreme Court addressed this issue first in *Powell v. McCormack*⁸² with regard to Congress’s ability to add qualifications, and then in *U.S. Term Limits, Inc. v. Thornton*⁸³ announcing that the Constitution’s qualifications are the sole qualifications a member of Congress must satisfy.⁸⁴

The Supreme Court, however, has never defined what actually constitutes a “qualification.”⁸⁵ This question has arisen in regard to district residency requirements,⁸⁶ “resign to run” laws that require a state officeholder to resign before running for a federal office,⁸⁷ and congressional term limits.⁸⁸ These

⁸⁰ U.S. CONST. art. I, § 2, cl. 2.

⁸¹ See Daniel Hays Lowenstein, *Are Congressional Term Limits Constitutional?* 18 HARV. J.L. & PUB. POL’Y 1, 7 (1994) (“If term limits establish a qualification for Congress that states are not authorized to enact, then they are unconstitutional, no matter how compelling the arguments for such limits may be.”).

⁸² 395 U.S. 486, 550 (1969) (“[I]n judging the qualifications of its members Congress is limited to the standing qualifications prescribed in the Constitution.”).

⁸³ 514 U.S. 779 (1995).

⁸⁴ See *id.* at 783 (“Allowing individual States to adopt their own qualifications for congressional service would be inconsistent with the Framers’ vision of a uniform National Legislature representing the people of the United States.”); *Powell*, 395 U.S. at 547 (“[W]hat evidence we have of Congress’ early understanding confirms our conclusion that the House is without power to exclude any member-elect who meets the Constitution’s requirements for membership.”).

⁸⁵ See, e.g., *U.S. Term Limits*, at 829 (“We need not decide whether petitioners’ narrow understanding of qualifications is correct . . .”).

⁸⁶ See, e.g., *Hellmann v. Collier*, 141 A.2d 908, 912 (Md. 1958) (holding that requiring a candidate for election to the House of Representatives to reside in the district where he seeks election “contravenes Article I, Sec. 2, Cl. 2 of the Constitution of the United States, and is, therefore, unconstitutional and void”).

⁸⁷ See, e.g., *Joyner v. Mofford*, 706 F.2d 1523, 1531 (9th Cir. 1983) (holding that requiring a state official to resign or remove himself from his state position before running

“quasi-qualifications” present a problem for courts because they are often designed in such a way as to allow the possibility of the otherwise restricted candidate to nevertheless win.⁸⁹ Thus, courts have often used common sense standards and judged the constitutionality of the restrictions based on the facts of the particular case.⁹⁰

A. *History of the Qualifications Clause*

According to the Founding Fathers, the Qualifications Clause created the only requirements that a congressional candidate needed to satisfy.⁹¹ Alexander Hamilton, in *The Federalist No. 60*, stated that “[t]he qualifications of the persons who may choose or be chosen, . . . are defined and fixed in the Constitution, and are unalterable by the legislature.”⁹² James Madison argued that by limiting a candidate’s qualifications to these three basic requirements, the Constitution encouraged a more inclusive government, regardless of creed, profession, age, or wealth.⁹³

Later, Justice Joseph Story addressed the Qualifications Clause in his treatise, *Commentaries on the Constitution*.⁹⁴ He, too, interpreted the clause to

for a federal position does not impose an additional “qualification on candidates for Congress because it does not prevent an elected state officeholder from running for federal office”); *Signorelli v. Evans*, 637 F.2d 853, 863 (2d Cir. 1980) (finding that requiring state judges to resign prior to running for Congress “has, in a sense, indirectly added a qualification for Congressional office, [yet] it has not violated the Constitution”).

⁸⁸ See *U.S. Term Limits*, 514 U.S. at 783 (“Allowing individual States to adopt their own qualifications for congressional service would be inconsistent with the Framers’ vision If the qualifications set forth in the text of the Constitution are to be changed, that text must be amended.”).

⁸⁹ See, e.g., Sean R. Sullivan, Note, *A Term Limit by Any Other Name?: The Constitutionality of State-Enacted Ballot Access Restrictions on Incumbent Members of Congress*, 56 U. PITT. L. REV. 845, 862 (1995) (“A state-enacted quasi-term limit would not conflict with the *Powell* Court’s reading of the Qualifications Clauses because voters still would be free to choose an affected incumbent as their representative.”).

⁹⁰ See *infra* Part III.B.

⁹¹ See, e.g., *Powell v. McCormack*, 395 U.S. 486, 548 (1969) (“[T]he intention of the Framers, to the extent it can be determined, . . . persuade[s] us that the Constitution does not vest in the Congress a discretionary power to [add additional congressional candidacy qualifications] by a majority vote.”).

⁹² THE FEDERALIST NO. 60, at 369 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

⁹³ THE FEDERALIST NO. 52, *supra* note 92, at 323-24 (James Madison) (“Under these reasonable limitations, the door of this part of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith.”).

⁹⁴ 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES BEFORE THE ADOPTION OF THE CONSTITUTION 460 (Melville Madison Bigelow, 5th ed., William S. Hein & Co. 1994) (1891) (discussing the Qualifications Clause and the pertinent inquiry of states’ ability to supplement the enumerated qualifications for congressional

preclude additional qualifications made by the states.⁹⁵ If a state legislature could add qualifications, then it “may require that none but a Deist, a Catholic . . . or a Universalist shall be a representative.”⁹⁶ Justice Story voiced a concern that if a state could create additional qualifications, it might create such restrictions upon candidates as would actually harm the interests of the union.⁹⁷

In *Powell v. McCormack*, the Supreme Court finally weighed in by holding that the qualifications in the Constitution were exhaustive; Congress could not add additional qualifications.⁹⁸ In Congressman Powell’s case, this meant that Congress could not exclude a member of Congress from taking his seat despite ethics violations found against Powell during the previous Congress.⁹⁹

Thus, the answer to the question of whether states could add qualifications beyond those required in the Constitution seemed clearly to be no. Nevertheless, throughout the nation’s history, states have added various restrictions affecting who can hold congressional office.¹⁰⁰ Some of these were struck down,¹⁰¹ while others have been upheld.¹⁰² The most recent example involves the campaign to impose congressional term limits without explicitly creating an additional qualification. The election ballot provided states with a way to do this. As discussed in *U.S. Term Limits*, for example, Arkansas passed a state constitutional amendment that prohibited House candidates who

candidacy).

⁹⁵ See *id.* at 461 (“It would seem but fair reasoning, upon the plainest principles of interpretation, that when the Constitution established certain qualifications as necessary for office, it meant to exclude all others as prerequisites.”).

⁹⁶ *Id.* at 460.

⁹⁷ *Id.* (“If a State legislature has authority to pass laws to this effect, they may impose any other qualifications beyond those provided by the Constitution, however inconvenient, restrictive, or even mischievous they may be to the interests of the Union.”).

⁹⁸ *Powell v. McCormack*, 395 U.S. 486, 550 (1969) (“[I]n judging the qualifications of its members Congress is limited to the standing qualifications prescribed in the Constitution.”).

⁹⁹ *Id.* at 489 (finding that “the House could exclude [Powell] only if it found he failed to meet the standing requirements of age, citizenship, and residence contained in Art. I, § 2, of the Constitution,” and thus that the House unconstitutionally excluded him from Congress based on ethics violations).

¹⁰⁰ See, e.g., *id.* at 541-47 (recounting Congress’s reasoning behind various attempts, beginning in 1807, to prevent an elected member from taking his seat).

¹⁰¹ See, e.g., *Hellmann v. Collier*, 141 A.2d 908, 912 (Md. 1958) (holding unconstitutional a statute requiring every candidate for election to Congress to reside in the district the candidate seeks to represent because it violates the Qualifications Clause).

¹⁰² See, e.g., *Signorelli v. Evans*, 103 F.2d 853, 863 (2d Cir. 1980) (“[New York] has not violated the Constitution because the purpose of the challenged provisions is to protect the integrity of a branch of state government by the same principle of incompatibility that the Constitution itself has endorsed for the national government.”).

had already served three terms from appearing on the ballot.¹⁰³ These candidates could still hold office, but they would have to win by a majority of voters writing in their names.¹⁰⁴ In this way, Arkansas argued that it had not created an actual qualification.¹⁰⁵ The Supreme Court rejected this argument and found the Arkansas amendment to be an invalid additional qualification.¹⁰⁶

B. *Quasi-Qualifications*

While the Supreme Court has heard very few cases specifically on the Qualifications Clause, a number of lower courts have heard challenges to state laws that allegedly violated the Qualifications Clause. These cases dealt primarily with resign-to-run laws, in which state law required incumbent state officeholders to resign before filing and running for Congress. These incumbent officeholders then challenged the laws as violating the Qualifications Clause. The Supreme Court decisions that heard Qualifications Clause claims gave less attention to the ambiguity surrounding whether the state law was in fact a qualification, and thus provide a slightly less clear standard than the circuit court standard.

1. The *Signorelli* Standard & Resign to Run Laws

In *Signorelli v. Evans*,¹⁰⁷ the Second Circuit upheld New York's resign to run law but acknowledged that the law functioned indirectly as an additional requirement beyond the Constitution's requirements.¹⁰⁸ While still an active state judge, Judge Signorelli intended to run for Congress.¹⁰⁹ New York state law, however, prohibited its judges from engaging in political activity.¹¹⁰ The Court recognized that simply claiming that Judge Signorelli had the choice of resigning to run was a weak argument.¹¹¹ Regardless of whether Judge

¹⁰³ See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783 (1995).

¹⁰⁴ See *id.* at 828 (“[The amendment] merely provides that certain Senators and Representatives shall not be certified as candidates and shall not have their names appear on the ballot. They may run as write-in candidates and, if elected, they may serve.”).

¹⁰⁵ See *id.* at 830 (“[Arkansas] argue[s] that the possibility of a write-in campaign creates a real possibility for victory, especially for an entrenched incumbent.”).

¹⁰⁶ See discussion *infra* Part IV.A.

¹⁰⁷ 637 F.2d 853 (2d Cir. 1980).

¹⁰⁸ *Id.* at 863 (“Though New York has, in a sense, indirectly added a qualification for Congressional office, it has not violated the Constitution . . .”).

¹⁰⁹ *Id.* at 855.

¹¹⁰ *Id.* (“[A]ppellant was confronted by three provisions of New York law that required his resignation from judicial office before taking even the most preliminary steps toward obtaining his party’s nomination.”).

¹¹¹ *Id.* at 858-59 (“The fact that Signorelli has it within his power, by his own choosing, to satisfy this fourth requirement [of not being a state judge] does not answer his objection that the requirement is an additional qualification beyond the trio specified in the Constitution.”).

Signorelli had this choice, the law still created an additional qualification: not being an incumbent state officeholder. Indeed, state laws requiring that a congressional candidate reside in the district he or she represents have consistently been rejected as unconstitutionally imposing an additional qualification.¹¹² In these cases, congressional candidates likewise had the choice of moving to the district if they did not already reside there. The Second Circuit distinguished the residency requirements from the resign to run laws based on the intent of the laws.¹¹³ The residency requirements “aimed solely at eligibility for Congressional office,” while resign-to-run laws “aimed at the judicial office, a local government subject on which New York’s regulatory authority is plenary.”¹¹⁴

On the other hand, the Second Circuit acknowledged the risk that a State might abuse its ability to regulate occupations in this way.¹¹⁵ For example, a State may use this method to require “lawyers to resign from the bar or business executives to resign corporate offices prior to seeking public office.”¹¹⁶ Thus, the Second Circuit distinguished between a state barring a range of occupations as violating the Framers’ intent in having a broad choice of representatives, and a state regulating a public office upon which its authority is plenary.¹¹⁷

*Joyner v. Mofford*¹¹⁸ elaborated on the rule *Signorelli* established.¹¹⁹ The appellant in *Joyner* cited many state court opinions that held laws barring public officeholders from qualifying for Congress as unconstitutional.¹²⁰

¹¹² *Id.* at 859 (referring to cases in which courts refused to uphold additional residency requirements imposed by states on congressional candidates because states neither have authority to tell people where to live nor to establish additional qualifications for congressional candidacy).

¹¹³ *Id.* (“As to [statutes indirectly adding a congressional requirement], the legislative purpose controls. Similarly, here, it can be argued that New York’s purpose is to regulate the judicial office that Signorelli holds, not the Congressional office he seeks.”).

¹¹⁴ *Id.*

¹¹⁵ *See id.* (“There is a distinct risk, however, that this line of argument [based on regulation within state authority] proves too much . . .”).

¹¹⁶ *Id.*

¹¹⁷ *Id.* (“We believe there is a distinction to be drawn between restrictions upon a broad range of occupations, . . . and restrictions upon specified state offices peculiarly within the essential regulatory authority of the states.”).

¹¹⁸ 706 F.2d 1523 (9th Cir. 1983).

¹¹⁹ *Id.* at 1530 (quoting *Signorelli*, 637 F.2d at 859) (“First, *Signorelli* does not stand for the proposition that the only acceptable ‘resign to run’ statutes are those that apply to judges. Instead, the *Signorelli* court distinguished between regulations which are constitutionally permissible because they affect ‘specified state offices peculiarly within the essential regulatory authority of the states,’ and statutes placing ‘restrictions upon a broad range of occupations,’ which are constitutionally suspect.”).

¹²⁰ *Id.* at 1528-29 (citing *State ex rel. Pickrell v. Senner*, 375 P.2d 728 (Ariz. 1962) (en banc); *State ex rel. Santini v. Swackhamer*, 521 P.2d 568 (Nev. 1974); *Lowe v. Fowler*, 240

Though these cases seem to undermine *Signorelli*'s rule granting states power to regulate their public offices, the Ninth Circuit reconciled these cases with *Signorelli* and other opinions that upheld resign-to-run laws. The Ninth Circuit distinguished statutes that disqualify incumbent officeholders from resign-to-run laws based on the fact that resign-to-run laws reflected the State's power over its public offices, while statutes that barred an officeholder's candidacy simply went to candidate eligibility.¹²¹ The effects of the two types of laws are the same, and a potential candidate could easily satisfy either iteration; for instance, an incumbent seeking a congressional seat need only resign from his current position to run. Nevertheless, as *Signorelli* pointed out, whether a potential candidate can satisfy the qualification is not relevant to the inquiry.¹²² The only inquiry, under *Signorelli*, is whether the qualification "deal[s] with a subject within traditional state authority."¹²³

The Supreme Court has not gone into such depth when discussing ambiguous qualifications, or quasi-qualifications. *Storer v. Brown*¹²⁴ and *U.S. Term Limits, Inc. v. Thornton* dealt with claims that a State had imposed an additional qualification. In *Storer*, petitioners challenged a California law requiring independent candidates for Congress to collect approximately 325,000 signatures in a 24-day period as being so onerous as to bar independent candidates from Congress.¹²⁵ The Court limited its discussion of the Qualifications Clause to a single footnote and rejected petitioners' argument as "wholly without merit."¹²⁶ In dismissing petitioners' argument, the Court pointed out that the procedures for independent candidates were comparable to those in the primary elections that major party candidates must

S.E.2d 70 (Ga. 1977)).

¹²¹ *Id.* at 1529 (differentiating "state laws which do not disqualify a state officeholder from running for federal office [with those] . . . which require the officeholder to resign or be removed from the state office should he seek election to Congress").

¹²² *Signorelli*, 637 F.2d at 858-59 ("The fact that *Signorelli* has it within his power, by his own choosing, to satisfy this fourth requirement does not answer his objection that the requirement is an additional qualification beyond the exclusive trio specified by the Constitution.").

¹²³ *Id.* at 859.

¹²⁴ 415 U.S. 724, 740 (1974) ("[I]t is a substantial requirement; and if the additional likelihood is, as it seems to us to be, that the total signatures required will amount to a substantially higher percentage of the available pool than the 5% stipulated in the statute, the constitutional claim asserted by Hall is not frivolous.").

¹²⁵ *Id.* at 726-28 (describing Appellants' plight in obtaining ballot positions as a result of California's Election Code provisions, including the signature requirement). The Court found this burden not to be high after explaining that "at the rate of 13,542 [signatures] per day . . . 1,000 canvassers could perform the task if each gathered 14 signers a day." *Id.* at 740. The Court did not address whether it is reasonable to expect an independent candidate to have access to 1,000 canvassers to perform such a task.

¹²⁶ *Id.* at 746 n.16 (1974).

win.¹²⁷ The Court had much more to say about the Qualifications Clause in *U.S. Term Limits*.

2. The *U.S. Term Limits* Standard

The Supreme Court took up the question of whether the states have the power to add or alter the qualifications of a member of Congress in *U.S. Term Limits, Inc. v. Thornton*.¹²⁸ Arkansas voters had passed a constitutional amendment prohibiting candidates who had already served three terms in the House or two terms in the Senate from being certified on the ballot.¹²⁹ In a 5-4 opinion, the Court held that the Framers intended the Constitution to be the exclusive source of qualifications.¹³⁰ The Court discussed the Qualifications Clause alongside the Elections Clause, finding that both served the same policy rationale.¹³¹ The Framers were concerned with the States' ability to undermine the federal government by excluding entire classes of candidates.¹³²

One of the more important aspects of the holding in *U.S. Term Limits* addressed the question of whether Arkansas's constitutional amendment did in fact create an additional qualification. Petitioners argued that the amendment did not create an additional qualification because the amendment only prevented long-serving candidates from being certified while still allowing them to win elections via write-in ballot.¹³³ The *U.S. Term Limits* Court distinguished the statute in *Storer v. Brown* as not adding additional qualifications because it merely added procedures analogous to existing procedures for major party candidates.¹³⁴

Unfortunately, the Court did not actually define what it considers to be a qualification.¹³⁵ Instead, it looked at the intent and effect of Arkansas's

¹²⁷ *Id.* (“The non-affiliation requirement no more establishes an additional requirement for the office of Representative than the requirement that the candidate win the primary to secure a place on the general ballot or otherwise demonstrate substantial community support.”).

¹²⁸ 514 U.S. 779, 788 (1995).

¹²⁹ *Id.* at 783 (“Today’s cases present a challenge to an amendment to the Arkansas State Constitution that prohibits the name of an otherwise-eligible candidate for Congress from appearing on the general election ballot if that candidate has already served three terms in the House of Representatives or two terms in the Senate.”).

¹³⁰ *Id.*

¹³¹ *Id.* at 832-35 (highlighting the scope of power granted under the Elections Clause as limited solely to procedural control, as opposed to adding candidacy qualifications, to maintain balance within Congress).

¹³² *Id.* at 832-33.

¹³³ *Id.* at 828.

¹³⁴ *Id.* at 828-29. (quoting *Storer v. Brown*, 415 U.S. 724, 746 n.16 (1974)) (“We concluded that the California Code ‘no more establishes an additional requirement for the office of Representative than the requirement that the candidate win the primary to secure a place on the general ballot’”).

¹³⁵ *Id.* at 829 (“We need not decide whether petitioners’ narrow understanding of

constitutional amendment to determine if it indirectly denied constitutional rights.¹³⁶ The preamble, as well as other provisions of the amendment, satisfied the intent requirement, while the elections data for successful write-in candidates satisfied the effect requirement.¹³⁷ The Court conceded that refusal to certify long-term candidates does not actually prohibit candidates but the amendment nevertheless “ma[d]e it significantly more difficult for the barred candidate to win the election.”¹³⁸ This formulation of satisfying the effect prong of the Court’s test seems to be much lower than the “effect” evidence required in gerrymandering cases.¹³⁹

Moreover, much of the Court’s opinion and Justice Kennedy’s concurrence is punctuated with evidence about the Framers’ intent for an open and egalitarian political system. Disregarding the distinction between who imposes the additional qualification, Congress or the States, the Court wrote, “The egalitarian ideal, so valued by the Framers, is thus compromised to the same degree by additional qualifications imposed by States as by those imposed by Congress.”¹⁴⁰ Indeed, “state-imposed qualifications, . . . undermine the . . . idea . . . that an aspect of sovereignty is the right of the people to vote for whom they wish.”¹⁴¹ Justice Kennedy adds that “[n]othing in the Constitution or The Federalist Papers, however, supports the idea of state interference with the most basic relation between the National Government and its citizens, the selection of legislative representatives.”¹⁴² Such strong language could be interpreted as a majority of the Court denouncing partisan gerrymandering, for example, because of its effect on otherwise eligible candidates despite the Court’s inability to find a workable judicial standard.¹⁴³ Regardless, the Court

qualifications is correct because, even if it is, Amendment 73 may not stand.”).

¹³⁶ *Id.* The test the court applied here is not dissimilar from the intent and effect standard that Justice White applied in *Bandemer*. See *supra* Part II (detailing the relationship between the test established in *Bandemer* and the Court’s current intent and effect test).

¹³⁷ *Id.* at 830-31.

¹³⁸ *Id.* at 831.

¹³⁹ See *Davis v. Bandemer*, 478 U.S. 109, 133 (1986) (holding that the effect prong is satisfied in gerrymandering cases only “where the electoral system *substantially* disadvantages certain voters” (emphasis added)). Indeed, the Court goes on to say that the amendment “evad[es] the requirements of the Qualifications Clauses by handicapping a class of candidates.” *U.S. Term Limits*, 514 U.S. at 831. Relying on mere handicapping, however, allows the Court to find this amendment unconstitutional while it might have otherwise required the amendment to create an outright ban.

¹⁴⁰ *U.S. Term Limits*, 514 U.S. at 820.

¹⁴¹ *Id.*

¹⁴² *Id.* at 842 (Kennedy, J., concurring).

¹⁴³ In addition to Justice Kennedy and the four dissenting justices in *Vieth*, even Justice Scalia seems to agree that partisan gerrymandering weakens the democratic process. See *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (“Much of [Justice Stevens’s] dissent is addressed to the incompatibility of severe partisan gerrymanders with democratic principles. We do not disagree with that judgment, any more than we disagree with the judgment that it

is indicating a strong preference that voters not be limited beyond Constitutional requirements in choosing a person to represent them. Despite not defining what constitutes a “qualification,” the intent and effect test the Court used could likely be applied to future cases on the Qualifications Clause.

IV. QUALIFICATIONS CLAUSE LEGAL STANDARDS & GERRYMANDERING CLAIMS

U.S. Term Limits and *Signorelli* provide two different frameworks for looking at quasi-qualifications. Under *U.S. Term Limits*, the quasi-qualification must survive an intent and effect test. If the intent is to deny a certain class of otherwise eligible candidates from serving in Congress, and the state action actually has that effect, then the state action violates the Qualifications Clause. Under *Signorelli*, the quasi-qualification must be an otherwise valid exercise over an area in which the state has plenary power, and cannot otherwise limit the eligibility of a given candidate. If either test were applied to partisan gerrymandered districts, those districts would likely be found unconstitutional.

A. U.S. Term Limits Standard Applied to Gerrymandered Districts

Though *U.S. Term Limits* does not define the parameters of a qualification, it does forbid state action “with the avowed purpose and obvious effect of evading the requirements of the Qualifications Clauses by handicapping a class of candidates. . . .”¹⁴⁴ Judged under this standard, a gerrymandered district should be found unconstitutional.

First, the intent to gerrymander and deny an otherwise eligible candidate from holding office must be shown. This raises the question of what a legislature’s intent is in drawing (or gerrymandering) a congressional district. According to Justice White in *Bandemer*, “[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended.”¹⁴⁵ This is because the legislature has ample information when drawing the districts, such as census data and party registration information.¹⁴⁶ Furthermore, many legislatures employ specialized consulting firms to analyze voter data and help draw the

would be unconstitutional for the Senate to employ, in impeachment proceedings, procedures that are incompatible with its obligation to ‘try’ impeachments The issue we have discussed is not whether severe partisan gerrymanders violate the Constitution, but whether it is for the courts to say when a violation has occurred, and to design a remedy.”)

¹⁴⁴ *U.S. Term Limits*, 514 U.S. at 831.

¹⁴⁵ *Davis v. Bandemer*, 478 U.S. 109, 129 & n.11 (1986).

¹⁴⁶ See *Information Required to Draw Electoral Districts*, ACE: THE ELECTORAL KNOWLEDGE NETWORK, <http://aceproject.org/ace-en/topics/bd/bdc/bdc01/onePage>, archived at <http://perma.cc/K4X9-SRH2> (last visited Jan. 22, 2012) (providing information on “boundary delimitation” and the technology and case studies relied upon in proper districting processes).

congressional districts.¹⁴⁷ The testimony of legislators who draw the maps, or employees of these consulting firms, should be sufficient to prove the legislature's intention in causing the political consequences of a given map.¹⁴⁸

Justice Scalia, however, does not share Justice White's position that a legislature's intent to gerrymander can be proven so easily.¹⁴⁹ For example, how can one clearly show that partisan intent outweighed legitimate considerations such as contiguity or compactness? Since *Vieth*, however, a number of states have passed constitutional amendments that require states to draw compact districts that utilize existing geographic or political boundaries.¹⁵⁰ Showing that a legislature drew a district that does not conform to such standards should likely be sufficient to show intent. Moreover, Justice Scalia was discussing "predominant intent" in *Vieth*, a higher standard to satisfy than the intent element Justice White used in his respective analysis.¹⁵¹

The more difficult aspect of the test is proving that a gerrymandered district has the effect of handicapping a class of candidates. When looking at ballot access in *U.S. Term Limits*, the Court did not require that write-in candidates could never win.¹⁵² That winning would be "significantly more difficult" for

¹⁴⁷ See, e.g., Olga Pierce, Jeff Larson, & Lois Beckett, *The Hidden Hands in Redistricting: Corporations and Other Powerful Interests*, PROPUBLICA (Sept. 23, 2011, 9:03 AM), <http://www.propublica.org/article/hidden-hands-in-redistricting-corporations-special-interests>, archived at <http://perma.cc/Z94M-3DG7> (providing an "in-depth examination of how powerful players are turning to increasingly sophisticated tools and techniques [such as hiring consulting firms] to game the redistricting process").

¹⁴⁸ This assumes that legislative privilege would not prevent legislators from testifying. See *supra* note 27 (discussing proceedings related to Florida's Amendment 6 and the ultimate decision that legislative privilege does not prevent legislators from being deposed).

¹⁴⁹ *Vieth v. Jubelirer*, 541 U.S. 267, 286 (2004) ("Moreover, the fact that partisan districting is a lawful and common practice means that there is almost *always* room for an election-impeding lawsuit contending that partisan advantage was the predominant motivation; not so for claims of racial gerrymandering."). Justice Scalia here is begging the question by not distinguishing between gerrymandering and partisan districting, and claiming that partisan districting is legal before he proceeds through appellant's suggested standard to determine constitutionality. See *id.*

¹⁵⁰ See, e.g., ARIZ. CONST. art. IV, pt. 2, § 1, cl. 14 ("To the extent practicable, district lines shall use visible geographic features, city, town and county boundaries, and undivided census tracts . . ."); FLA. CONST. art. III, § 20 ("[D]istricts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.").

¹⁵¹ *Vieth*, 541 U.S. at 284 ("As compared with the *Bandemer* plurality's test of mere intent to disadvantage the plaintiff's group, this proposal seemingly makes the standard more difficult to meet—but only at the expense of making the standard more indeterminate.").

¹⁵² *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 830 (1995) (holding that regardless of candidates' possibility of victory, the amendment still adds an unconstitutional qualification because "we are advised by the state court that there is nothing more than a faint glimmer of possibility that the excluded candidate will win").

the long-serving incumbent was sufficient to satisfy the Court's effect test.¹⁵³ In finding the write-in option too restrictive, the Court relied not only on past legal decisions¹⁵⁴ but also elections data.¹⁵⁵ Thus, presumably elections data could be used in showing the effect of a gerrymandered district on a candidate from an opposing party. The strongest evidence would likely come from election results data before and after redistricting. In addition, the election results data should show the significant difficulty for a candidate to win when the district was drawn with the intent that candidates from that party not be able to win.¹⁵⁶ For example, in North Carolina in 2012, it should not be difficult to prove that gerrymandering substantially harmed Democratic candidates when they won 51% of the votes cast statewide but a minority of the state's seats.¹⁵⁷

While relying on data about voter registration and demographic spread may not capture the variables unique to an individual race, such as a publicized scandal surrounding a candidate, the data need not require the losing party to actually lose every election; merely making winning significantly more difficult for a candidate from a given party should be sufficient to satisfy the effect test under *U.S. Term Limits*.¹⁵⁸

B. Signorelli Standard Applied to Gerrymandered Districts

Under the standard put forth in *Signorelli*, gerrymandered districts would also be found unconstitutional, though this standard may be more difficult to satisfy than *U.S. Term Limits*' intent and effect test. Here, the relevant inquiry is whether the state aimed solely at eligibility or if it aimed at regulating an area of traditional state authority. While the Ninth Circuit in *Signorelli* uses

¹⁵³ *Id.* at 831 ("But even if petitioners are correct that incumbents may occasionally win reelection as write-in candidates, there is no denying that the ballot restrictions will make it significantly more difficult for the barred candidate to win the election.").

¹⁵⁴ *Id.* at 831 n.45 (discussing prior cases that highlight the very limited chance of victory for write-in candidates).

¹⁵⁵ *Id.* at 830 n.43 ("In over 20,000 House elections since the turn of the century, only 5 have been won by write-in candidates.").

¹⁵⁶ See *supra* Part II (discussing previous gerrymandering claims while implicitly highlighting the value of statistical information illustrating the discriminatory effects of gerrymandering in succeeding on claims).

¹⁵⁷ See *supra* notes 20-21 and accompanying text (discussing the disparity between a majority of popular votes and congressional seats awarded to each party in a handful of states, including North Carolina, in 2012). One of the criticisms of using such data is that statewide voting totals are substantially affected by the natural demographics of where Democratic and Republican voters choose to live. See *infra* Part IV.E for a discussion of this issue.

¹⁵⁸ See *U.S. Term Limits*, 514 U.S. at 831 (conceding that candidates may still be elected under the write-in restriction, but still holding that "an amendment with the avowed purpose and obvious effect of evading the requirements of the Qualifications Clauses by handicapping a class of candidates cannot stand").

different descriptions of what restrictions the state can impose,¹⁵⁹ implicit in this discussion is the intent of the state regulation.¹⁶⁰ Clearly, drawing congressional districts is a subject within traditional state authority.¹⁶¹ In contrast, states must not abuse this authority to impose restrictions on congressional candidates.¹⁶² For example, if the real goal of the state-issued restriction is to limit the eligibility of a specific class of candidates, then the State has abused its authority. Thus, on a case-by-case basis, the court must determine whether the State has abused its authority.¹⁶³

Whether a State has abused its authority by gerrymandering a district to disadvantage a particular party may also depend on the court hearing the case. Given that the Ninth Circuit invokes the Framers' intention for broad, unencumbered choice of elected representatives,¹⁶⁴ it would likely find gerrymandering an abuse of state authority. Other courts, however, may find that gerrymandering is simply an acceptable, and unavoidable, use of state power in drawing congressional districts.¹⁶⁵ Indeed, the determination would

¹⁵⁹ *Signorelli v. Evans*, 657 F.2d 853, 859 (1980) (“We believe there is a distinction to be drawn between restrictions upon a broad range of occupations, which, if attempted, would indirectly impose added requirements for Congressional office upon large categories of people, and restrictions upon specified state offices peculiarly within the essential regulatory authority of the states.”). For example, the issue at hand in *Signorelli* was specifically the judicial office, a local government entity. The court declared that restrictions involving subjects within traditional state authority would not be found unconstitutional. *Id.* The court did not further elaborate on what subjects specifically were within traditional state authority.

¹⁶⁰ *Id.* (“As to [statutes indirectly adding a congressional requirement], the legislative purpose controls. Similarly, here, it can be argued that New York’s purpose is to regulate the judicial office that *Signorelli* holds, not the Congressional office he seeks.”).

¹⁶¹ U.S. CONST., art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”).

¹⁶² *See Signorelli*, 637 F.2d at 859 (holding restrictions that “conflict with the expressed intent of the Framers to maintain broad public choice of elected representatives” are outside the state’s regulatory power to impose).

¹⁶³ *See id.* (“The risk of using regulatory authority in an unconstitutional manner does not mean that its use in this case offends the Constitution.”). The court then went into depth analogizing New York’s law to the Constitution’s Incompatibility Clause. *See id.* at 859-63 (highlighting similarity between the Incompatibility Clause, which prevents a person from holding a seat in Congress and another federal office simultaneously, to limiting a congressional candidate’s eligibility based on being a state officeholder already).

¹⁶⁴ *Id.* at 859 (“But such a sweeping elimination of broad categories of people from those eligible for election would conflict with the expressed intent of the Framers to maintain broad public choice of elected representatives.”).

¹⁶⁵ *See Vieth v. Jubelirer*, 541 U.S. 267, 274-77 (2004) (discussing the evolution of gerrymandering in the United States, beginning with the framing and remedies provided in the Constitution, to its recognition as a force in the 1840s and thereafter). Justice Scalia’s history of gerrymandering in the United States, for example, recalling Patrick Henry’s

likely turn on the facts of each individual case as well. When a district has a particularly odd shape, or towns are divided in unnatural places, which in turn leads to discordant proportional representation, a court may be more inclined to find that the state abused its authority in drawing that district.

C. *Equal Protection Clause and Qualifications Clause*

Proportional representation, one of the major issues in gerrymandering cases brought under the Equal Protection Clause, would not hamper a gerrymandering claim under the Qualifications Clause. That is because the inquiry under the Equal Protection Clause dramatically differs from that of the Qualifications Clause. When a gerrymandered district is challenged under the Equal Protection Clause, the court asks, “Were the rights of voters abridged because their chosen candidate did not win?” Essentially, claimants would be arguing that a gerrymandered district has burdened their representational rights. This leads to problems of showing that a given group’s rights have been burdened without relying on a standard that uses proportional representation. Both *Vieth* and *Bandemer* reject the idea that the Equal Protection Clause creates a constitutional right to proportional representation.¹⁶⁶

Under the Qualifications Clause, the court asks, “Has an otherwise eligible candidate for Congress been denied her seat in Congress because of an additional requirement?” This inquiry looks at the right of the candidate as opposed to the right of the voters. If the candidate could show the State drew the congressional district with the purpose of denying her a seat, then there has been a constitutional violation. The issue of proportional representation is irrelevant to this inquiry. Moreover, this approach also narrows the factual issues before the court, as the inquiry is limited to a specific district and candidate who lost.¹⁶⁷ While, of course, close cases would still exist and fail to

attempt to gerrymander Thomas Jefferson out of the first Congress, implies that such use of gerrymandering is not an abuse of state authority. *Id.* at 274 (“The political gerrymander remained alive and well (though not yet known by the name) at the time of the framing.”).

¹⁶⁶ *Id.* at 288 (“Deny it as appellants may (and do), this standard rests upon the principle that groups (or at least political-action groups) have a right to proportional representation. But the Constitution contains no such principle. It guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups.”); *Davis v. Bandemer*, 478 U.S. 109, 132 (1986) (“Thus, a group’s electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult, and a failure of proportional representation alone does not constitute impermissible discrimination under the Equal Protection Clause.”).

¹⁶⁷ While there will always be a problem of the counterfactual in gerrymandering claims, such as “would this candidate have won if the district was not drawn invidiously?”, this approach provides a narrower scope. This approach may even cabin Justice Scalia’s argument about immutable characteristics. *See supra* note 79 and accompanying text 79 (discussing the difficulty with political affiliation not being immutable in determining grounds for unconstitutional gerrymandering as preferences in locations may switch from election-to-election). By looking at the facts of a particular election after its conclusion, the

show a constitutional violation, this approach should nevertheless find violations in egregious cases, for example, when a ten-year incumbent loses to a political newcomer in a non-wave year.¹⁶⁸

D. Justice Kennedy's Alternative Solutions

Justice Kennedy is currently the crucial vote on the Supreme Court with regard to gerrymandering claims. Though he rejected the plaintiff's claims and all the suggested judicial standards in *Vieth*, he refused to accept that gerrymandering claims were nonjusticiable.¹⁶⁹ The Qualifications Clause could convince Justice Kennedy that a workable standard for judging a gerrymandered district does exist. Although Justice Kennedy suggests gerrymandering claims could be evaluated better under the First Amendment¹⁷⁰ or with more advanced technology,¹⁷¹ both of these approaches are weaker than a claim under the Qualifications Clause.

A claim under the First Amendment relies on whether the voter's right to expression of political views or right to political association has been violated by the State.¹⁷² The problem arises in showing that these rights have been burdened. First, as long as the voter could freely vote in the election, then the voter has successfully exercised his right to expression of political views.¹⁷³ The larger problem is that under the First Amendment all political views are equally protected, but not all political views will win the day at the ballot. Determining whether voters were denied their political expression by state

plausibility of a particular candidacy would likely be clearer. Specifically, looking at the candidates, the district, and local trends during the course of the election cycle, whether or not the district's voters' preferences had changed would likely be easier to answer.

¹⁶⁸ See Giroux, *supra* note 14.

¹⁶⁹ *Vieth*, 541 U.S. at 311 (Kennedy, J., concurring in the judgment) ("I would still reject the plurality's conclusions as to nonjusticiability. . . . That no such standard has emerged in this case should not be taken to prove that none will emerge in the future.").

¹⁷⁰ *Id.* at 314 ("The First Amendment may be the more relevant constitutional provision in future [partisan gerrymandering] cases After all, these allegations involve 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.").

¹⁷¹ *Id.* at 312-13 ("[T]hese new technologies may produce new methods of analysis that make more evident the precise nature of the burdens gerrymanders impose on the representational rights of voters and parties. That would facilitate court efforts to identify and remedy the burdens, with judicial intervention limited by the derived standards.").

¹⁷² Ronald A. Klain, *Success Changes Nothing: The 2006 Election Results and the Undiminished Need for a Progressive Response to Political Gerrymandering*, 1 HARV. L & PUB. POL'Y REV. 75, 86 (2007) ("[T]he government cannot discriminate against persons based on their political views because the desire to disadvantage a group for political reasons is not a legitimate governmental objective.").

¹⁷³ See *id.* at 81 ("The fact that the voters still have some power to change control of Congress shows that America remains a representative democracy in the end").

action or simply because not enough other voters shared their views, again raises the issue of proportional representation.¹⁷⁴ As Justice Scalia points out, “[t]o say that suppression of political speech (a claimed First Amendment violation) triggers strict scrutiny is not to say that failure to give political groups equal representation (a claimed equal protection violation) triggers strict scrutiny.”¹⁷⁵ Thus, the question of whether a voter’s First Amendment rights have been violated is inherently reliant on a theory of proportional representation for a gerrymandering claim to succeed.

Justice Kennedy’s desire to wait for more advanced technology is also problematic. Proprietary software already exists that compiles voter information and allows legislators to draw districts house-by-house.¹⁷⁶ Justice Kennedy’s hope is that more advanced technology will “make more evident the precise nature of the burdens gerrymanders impose on the representational rights of voters and parties.”¹⁷⁷ But technology alone cannot provide the standard to judge the district; it can only show evidence of what actually happened. For example, technology can easily show likely outcomes if hypothetical districts were proposed and these could be compared to what actually happened. Discordant results between reality and the hypothetical districts would not necessarily show a constitutional violation, though; such a determination is for the Court alone. Perhaps if technology further improves, the Court might be able to identify a clear standard that is easy to test. Given the ease in which computer programs can already draw districts based on voter registration, however, Justice Kennedy’s reliance on technology seems like a poor solution.

¹⁷⁴ Presumably, a person voting for the Green Party candidate and a person voting for the Democratic candidate both have the same right to bring a gerrymandering claim. Nevertheless, showing the gerrymander’s effect on abridging their rights would likely rely on the fact that because of state action their candidate lost. Arguing that the Democratic candidate lost because of gerrymandering will likely rely on showing that such a candidate would otherwise have won, which would likely depend on some form of proportional representation.

¹⁷⁵ See *Vieth*, 541 U.S. at 294.

¹⁷⁶ See Wang, *supra* note 20 (discussing existing software that allows legislators to draw districts and gerrymander easily); see also Dave Bradlee, DAVE’S REDISTRICTING, <http://gardow.com/davebradlee/redistricting/launchapp.html> (last visited Jan. 22, 2014) (“Dave’s Redistricting application lets you draw congressional districts the way you think they should be. It uses real data from the U.S. Census Bureau.”); Caliper, MAPITUDE FOR REDISTRICTING, <http://www.caliper.com/mtredist.htm> (last visited Jan. 22, 2014) (“The newest version [of Maptitude for Redistricting] represents a major leap forward with advanced features, the latest Census geography and data, one-button conversion of existing plans to the latest TIGER geography, new and enhanced reports, a state-of-the-art interface, open access to industry-standard file formats, interoperability with Google Maps and Google Earth, an updated manual, video tutorials, context-sensitive Help, web solutions, and more.”).

¹⁷⁷ *Vieth*, 541 U.S. at 313 (Kennedy, J., concurring in the judgment).

E. *Potential Obstacles to Qualifications Clause Approach*

Some scholars have argued that gerrymandering may occur unintentionally because “Democrats generally live in dense cities, where they are surrounded by their ideological brethren.”¹⁷⁸ However, none of these scholars argue that intentional gerrymandering does not exist;¹⁷⁹ rather, they argue that much of the Republican bias in gerrymandering may actually be unintentional. These arguments and statistics may cast doubt on the ease in proving that a legislature intentionally sought to weaken a candidate or party’s ability to win in a given district. Nevertheless, they would do little to explain why a longtime incumbent lost in a non-wave year. Moreover, unintentional gerrymandering is primarily concerned with a Republican bias and does not address when a Democrat-controlled legislature gerrymanders districts to support Democratic candidates.

Another obstacle in bringing a gerrymandering claim based on the Qualifications Clause is the idea that redistricting itself creates a qualification. The laws at question in *U.S. Term Limits* and *Signorelli* were directed explicitly at the candidate. Conversely, when a state legislature draws new congressional districts, the focus is the new boundaries that the State creates, and the new district maps say nothing of candidates or how these boundaries will affect potential candidates. However, that districts are drawn without explicitly stating anything about what kind of candidate may win within that district ignores both the obvious intent and effect of such districts. The gerrymandered districts this Note focuses on are created by political entities, which act rationally to further benefit their own interests. Requiring that the legislature or specific legislators explicitly state their intentions to gerrymander a district would unnecessarily hamper a gerrymandering claim despite the obvious intentions to gerrymander.¹⁸⁰ Thus, although the legislation that creates the new districts does not refer to potential congressional candidates,

¹⁷⁸ Thomas Towzey, Unintentional Gerrymandering: Why Location Matters in Politics 10 (Apr. 29, 2013) (unpublished honors thesis, University of South Florida) (available at <http://dspace.nelson.usf.edu/xmlui/handle/10806/10010>, archived at <http://perma.cc/GJJ4-XMD8>). See also Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q.J. POL. SCI. 239 (2013).

¹⁷⁹ See Chen & Rodden, *supra* note 178, at 240 (“One source of bias is intentional gerrymandering, whereby district maps are drawn to favor partisan or racial groups. Another source is unintentional gerrymandering, whereby one party’s voters are more geographically clustered than those of the opposing party due to residential patterns and geography.”).

¹⁸⁰ Nevertheless, in 2013, Republicans bragged about their gerrymandering success, though they did not describe their successful strategy quite so explicitly. See *Redmap 2012 Summary Report*, REPUBLICAN STATE LEADERSHIP COMMITTEE (Jan. 4, 2013), http://www.rslc.gop/redmap_2012_summary_report, archived at <http://perma.cc/D4BP-23CR> (“Drawing new district lines in states with the most redistricting activity presented the opportunity to solidify conservative policymaking at the state level and maintain a Republican stronghold in the U.S. House of Representatives for the next decade.”).

this should not be an obstacle to a successful gerrymandering claim based on the Qualifications Clause.

CONCLUSION

Partisan gerrymandering not only limits voters' representational rights but also inhibits effective governance. Past gerrymandering claims that the Supreme Court has heard have failed to produce a manageable standard that would identify a constitutional violation. This is primarily because gerrymandering claims have been based on the Equal Protection Clause. The Equal Protection Clause, however, only protects an individual's rights; it does not protect the rights of a group collectively. Thus, because the Equal Protection Clause is unconcerned with proportional representation, the Court has been unable to identify a standard that did not in some way rely on proportional representation. The Qualifications Clause, on the other hand, can provide courts with a new approach not subject to the problems of past gerrymandering claims. Using either the standard developed in *U.S. Term Limits* or *Signorelli*, a court could more easily find that a state's use of partisan gerrymandering was an abuse of its authority with the intent and effect of handicapping a class of candidates.

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