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## Partisan Gerrymandering: The Promise and Limits of State Court Judicial Review

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# PARTISAN GERRYMANDERING: THE PROMISE AND LIMITS OF STATE COURT JUDICIAL REVIEW

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*In 2021, the Oregon Legislature succeeded in redrawing the state’s legislative and congressional districts, but the new redistricting plans were immediately challenged in state court as partisan gerrymanders. The Oregon Supreme Court rejected the challenge to the state legislative map, but its analysis, which accorded significant deference to the legislature’s choices, raised more questions than answers about the appropriate level of scrutiny for state redistricting plans. A special, five-judge court likewise rejected the gerrymandering challenge to the congressional map, and, while its analysis was less deferential, its decision also left unanswered the fundamental question regarding at what point a redistricting plan becomes an impermissible gerrymander. Both decisions, then, highlight the difficulty for state courts to police partisan gerrymandering. This Article concludes by examining some of the reasons for the Oregon courts’ deferential approach to reviewing redistricting plans and offers several recommendations for future reform – recommendations that apply equally to other states whose redistricting process and legal framework governing redistricting share similarities with Oregon’s.*

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## I. INTRODUCTION

Every ten years, states across the country must redraw their state legislative and congressional districts—a task that is politically challenging even in the best of years. The 2021 redistricting cycle, though, was more politically fraught than usual thanks to two U.S. Supreme Court decisions in the past decade. In 2013, in *Shelby County v. Holder*, the Court struck down the coverage formula for the 1965 Voting Rights Act, thereby allowing states previously subject to preclearance under Section Five of the Act to make changes to their election laws, including redistricting plans, without pre-enforcement review by the Department of Justice or federal court.<sup>1</sup> Then, in 2019, in *Rucho v. Common Cause*, the Court held that claims of partisan gerrymandering were non-justiciable, thereby removing the threat of a federal court challenge to a redistricting plan adopted by any state no matter how unfairly partisan the plan is.<sup>2</sup> Freed from significant federal oversight or threat of federal court litigation, many states across the country predictably exploited their newfound freedom to adopt redistricting plans to favor the dominant party in the state. From New York, to Ohio, to North Carolina, to Texas, to Oregon, state legislatures under the control of one party rammed through redistricting plans that favored the electoral prospects of the dominant party, whether it be the Republicans in Ohio and Texas or the Democrats in New York and Oregon. Indeed, the desire for partisan gain was truly bipartisan, with both parties seeking to exploit their advantage in those states under their control.

Unlike the U.S. Supreme Court, though, state courts in several of the states proved willing to scrutinize the partisan fairness of the plans. In particular, courts in Ohio, North Carolina, and New York invalidated redistricting plans adopted by their state legislatures as illegal partisan gerrymanders.<sup>3</sup> In the wake

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1. *Shelby County v. Holder*, 570 U.S. 529, 557 (2013).

2. *Rucho v. Common Cause*, 139 S.Ct. 2484, 2506–07 (2019).

3. *See generally, e.g.*, *Harkenrider v. Hochul*, 197 N.E.3d 437 (N.Y. 2022) (invalidating state legislative and congressional plans); *League of Women Voters v. Ohio Redistricting Comm’n.*, 192

of these decisions, the *New York Times* singled out and praised state courts for policing the redistricting process, declaring that state courts “have become a primary firewall against gerrymandering.”<sup>4</sup>

As this Article recounts, however, not every state has a legal framework empowering its state judiciary to assume and perform that role. This Article examines the 2021 redistricting process and the judicial review of it in Oregon. In 2021, after a slight delay caused by the COVID pandemic, the Oregon Legislature undertook and completed the redistricting task, adopting new plans for the State House of Representatives, State Senate, and Oregon’s newly-expanded, six-member congressional delegation.<sup>5</sup> With Democrats solidly in control of the Oregon House, Senate, and Governor’s office, Republicans were predictably upset with the resulting plans, which they dismissed as partisan gerrymanders designed to augment Democrat control of the State Legislature and congressional delegation. Within just a couple of weeks of the Governor signing the new redistricting plans into law, a group of Oregon Republicans filed suit to challenge the legality of the plans. And barely a month later—as required by the hyper-accelerated timeline for judicial review of redistricting plans imposed by state law—the Oregon courts rejected the challenges and upheld both the state legislative and congressional plans as adopted.<sup>6</sup>

This Article examines the 2021 redistricting cycle and especially the two Oregon judicial decisions upholding the redistricting plans. As we shall see, the Republicans’ claims of partisan gerrymandering and incumbency protection were overblown, but the two courts adjudicating those claims failed to identify exactly where Oregon law draws the line between permissible partisanship in the redistricting process and impermissible gerrymandering. As such, their rulings that the plans were not gerrymanders seemed at least incomplete, if not profoundly flawed—if the courts could not identify what qualified as a gerrymander, how could they be so certain that the actual plans were not such? More fundamentally, in contrast to state courts elsewhere, the Oregon courts demonstrated a striking unwillingness to scrutinize redistricting plans for partisan fairness, and, while some of that judicial hesitancy is understandable

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N.E.3d 379 (Ohio 2022) (invalidating state legislative redistricting plan); *Adams v. DeWine*, 195 N.E.3d 74 (Ohio 2022) (invalidating congressional redistricting plan); *Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022) (invalidating state legislative redistricting plan).

4. Nick Corasaniti & Reid J. Epstein, *As Both Parties Gerrymander Furiously, State Courts Block the Way*, N.Y. TIMES (Apr. 2, 2022), <https://www.nytimes.com/2022/04/02/us/politics/congressional-maps-gerrymandering-midterms.html> [https://perma.cc/Y2M3-PZ39].

5. See generally 2021–2022 Or. Laws 2291 (congressional districts); 2021–2022 Or. Laws 2313 (state legislative districts).

6. *Sheehan v. Or. Leg. Assembly.*, 499 P.3d 1267, 1273 (Or. 2021); *Clarno v. Fagan*, No. 21CV40180 (Or. Cir. Ct. Nov. 24, 2021) (Opinion of the Special Judicial Panel).

given the incredibly short timeline in which the Oregon courts must operate, the 2021 judicial decisions exposed significant weaknesses in Oregon's legal framework for reviewing the constitutionality of redistricting plans—weaknesses that are shared by several other states across the country. For that reason, the Oregon experience offers a cautionary lesson for those, like the *New York Times*, who believe that judicial review by state courts is a panacea for partisan gerrymandering. State courts can perform that task, but only if state law provides a sufficient foundation, both substantively and procedurally, for such review.

Part II of this Article briefly lays out the legal regime governing the drawing of legislative and congressional districts in the state and how the 2021 Legislature undertook the redistricting task this past year. Part III analyzes the Oregon Supreme Court's decision upholding the state legislative plan in *Sheehan v. Oregon Legislative Assembly*. Part IV assesses the Special Judicial Panel's decision upholding the congressional plan in *Clarno v. Fagan*. Finally, Part V lays out three proposed reforms—two procedural and one substantive—to address the weaknesses in the legal framework governing redistricting exposed by the *Sheehan* and *Clarno* decisions. Specifically, Part V calls for the timeline for pre-election judicial review of redistricting plans to be extended, for post-election review to be expressly authorized, and for the ban on partisan gerrymandering and incumbency protection to be revised to be made more precise, including by identifying the metrics by which to judge the partisan fairness of plan and the threshold at which permissible bias becomes impermissible gerrymandering.

In short, if state courts, in Oregon or elsewhere, are to be expected to police the redistricting process to guard against partisan gerrymandering and other redistricting abuses, the legal framework for such review must be sufficiently robust to enable that type of searching review. Otherwise, as the Oregon experience illuminates, the confidence placed in state courts will prove misplaced, and the hope that partisan gamesmanship can be constrained through judicial review will be dashed.

## II. THE 2021 REDISTRICTING CYCLE

Article IV, Section 6 of the Oregon Constitution specifies that the Legislature shall redraw state legislative district lines once every ten years following the U.S. Census.<sup>7</sup> The constitution sets a July 1st deadline for the Legislature to adopt a new districting plan, but, because of the COVID pandemic in 2020 and the resulting delay by the U.S. Census Bureau in

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7. OR. CONST. art. IV, § 6(1).

delivering the necessary census data to the states, the Oregon Supreme Court extended the deadline for state legislative redistricting to September 27, 2021.<sup>8</sup> If the Legislature failed to enact a plan by that date, the task of drawing the state legislative districts would fall to the Secretary of State, Democrat Shemia Fagan, as provided for in Article IV, Section 6(3).<sup>9</sup>

The process for drawing the federal congressional districts is slightly different. The U.S. Constitution entrusts the task of drawing the congressional districts to the state legislature in the first instance,<sup>10</sup> but, unlike with state legislative districting, the Oregon Constitution is silent regarding the process for drafting a congressional districting plan. By state statute, the Oregon Legislature must ordinarily adopt a congressional districting plan by July 1st, but, again due to the COVID-caused delay in receiving the census data, the Legislature pushed back that deadline for itself until September 27th—the same deadline as for the state legislative plan.<sup>11</sup> Significantly, if the Oregon Legislature failed to enact a plan before that date, the task would not have fallen to the Secretary of State as it would with regard to state legislative districts. Rather, it would have been up to a federal or state court to draw the congressional district lines—the use of the Secretary of State as a fallback for redistricting if the Legislature fails to enact a plan applies only to state legislative redistricting plans, not congressional plans.<sup>12</sup>

For both state legislative and congressional districts, then, there are a number of guidelines, some more stringent than others, regarding how such districts are to be drawn. The U.S. Constitution requires districts to have equal populations and not be drawn in a way in which race plays a predominant role

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8. *Kotek v. Fagan*, 484 P.3d 1058, app. 2 at 1068 (Or. 2021). For a critical review of the *Kotek* decision, see Norman R. Williams, *Legislative Redistricting in the Time of Covid*, 25 LEWIS & CLARK L. REV. 953 (2021).

9. OR. CONST. art. IV, § 6(3).

10. U.S. CONST. art. I, § 4 (“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.”).

11. OR. REV. STAT. § 188.125(2)(b)(A) (2021); S.B. 259, 81st Leg. Assemb., Reg. Sess. (Or. 2021).

12. See OR. CONST. art. IV, § 6(3)(a) (applying only to state legislative redistricting); Dirk VanderHart, *Oregon Lawmakers Pass Plans for New Political Maps, After Republicans End Boycott*, OPB (Sept. 27, 2021), <https://www.opb.org/article/2021/09/27/oregon-resdistricting-vote-republicans-democrats-quorum-political-maps/> [<https://perma.cc/BV98-4XTH>] (“If lawmakers had failed to pass a new congressional plan, the job would have gone to a panel of five judges selected by Oregon Supreme Court Chief Justice Martha Walters.”).

in the district's contours.<sup>13</sup> The federal Voting Rights Act, in turn, forbids states from drawing district boundaries in ways that have the purpose or effect of diluting the voting power of racial or ethnic minorities.<sup>14</sup> Aside from those constraints, which address only population and race, federal law leaves it to the states to decide for themselves how to draw their legislative and congressional district lines.

As for state law, the Oregon Constitution is largely silent regarding how district boundaries are to be drawn.<sup>15</sup> As a result, the principal limitations on redistricting in Oregon—including, most notably, the ban on partisan gerrymandering—are contained only in a state statute. That statute, which was adopted by the Legislature in 1979, provides:

- (1) Each district, as nearly as practicable, shall:
  - (a) Be contiguous;
  - (b) Be of equal population;
  - (c) Utilize existing geographic or political boundaries;
  - (d) Not divide communities of common interest; and
  - (e) Be connected by transportation links.
- (2) No district shall be drawn for the purpose of favoring any political party, incumbent legislator or other person.
- (3) No district shall be drawn for the purpose of diluting the voting strength of any language or ethnic minority group.<sup>16</sup>

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13. See *Reynolds v. Sims*, 377 U.S. 533 (1964); *Shaw v. Hunt*, 517 U.S. 899 (1996). The Federal Constitution does not require perfect population equality among state legislative districts, allowing the least populous and most populous district in a plan to have a population disparity of up to 10%. See, e.g., *Brown v. Thompson*, 462 U.S. 835, 842 (1983); *White v. Regester*, 412 U.S. 755, 764 (1973) (upholding state legislative districting plan with 9.9% maximum deviation); *Mahan v. Howell*, 410 U.S. 315, 334 (1973) (upholding plan with 16.4% maximum deviation). Federal congressional districts, however, must typically have a population deviation of less than 1%. Compare *Karcher v. Daggett*, 462 U.S. 725, 728 (1983) (invalidating congressional plan with 0.69% maximum deviation), with *Tennant v. Jefferson Cty. Comm'n*, 567 U.S. 758, 761 (2012) (upholding congressional plan with 0.79% maximum deviation).

14. 52 U.S.C. § 10301.

15. Article IV, Section 6 requires that legislators be apportioned according to population, which implies that districts have roughly equal populations, and Article IV, Section 7 confirms this requirement by expressly providing that legislative districts have “substantially equal” populations. OR. CONST. art. IV, §§ 6, 7. Those provisions duplicate and overlap with the federal, equal-protection-based mandate. Article IV, Section 6 also requires that Oregon Senate districts be composed of two House districts, and Article IV, Section 7 requires that legislative districts be composed of contiguous territory. *Id.* Otherwise, aside from the foregoing equal population and contiguity requirements, the constitution is silent regarding how the districts are to be drawn. Article IV, Section 7 provides that senatorial districts cannot split counties, but the Oregon Supreme Court has held that requirement is no longer enforceable since it cannot be reconciled with the equal population mandate imposed by the U.S. Constitution. *Hovet v. Myers*, 489 P.2d 684, 689 (Or. 1971).

16. OR. REV. STAT. § 188.010 (2021).

There are, however, several limitations to the redistricting criteria statute. Former Oregon Supreme Court Justice Jack Landau has written that, in his view, the redistricting statute does not bind the Legislature—that the 1979 Legislature cannot limit or restrict by statute a future Legislature regarding how district lines are drawn.<sup>17</sup> And, even if Justice Landau is wrong and the statute does apply to the Legislature (as its text clearly demonstrates the 1979 Legislature sought to do), the statute itself requires compliance with the enumerated criteria only “as nearly as practicable”—a proviso that the Oregon Supreme Court has repeatedly emphasized to justify deferring to the decisions made regarding where district borders are drawn.<sup>18</sup> As we shall see in Parts III and IV, the Oregon courts therefore accord the Legislature a great degree of latitude regarding where to draw district boundaries.

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As one might expect given the stakes involved, the 2021 redistricting cycle was a politically contentious one. Democrats held a 18–12 majority in the

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17. Jack L. Landau, Legislative Entrenchment and the Oregon Constitution 4 (unpublished manuscript) (on file with author). In *Sheehan v. Oregon Legislative Assembly*, the Oregon Supreme Court acknowledged this question but refused to answer it, holding that, because the 2021 redistricting plan did not in fact violate the 1979 statute, the Court did not need to address it and would only need to do so if and when a legislatively-enacted plan did in fact violate one or more of the 1979 redistricting criteria. 499 P.3d 1267, 1273 (Or. 2021). Admittedly, the question is a difficult one—either the 1979 statute is functionally useless with regard to legislatively-drafted redistricting plans, promising Oregon voters something the Court is incapable of delivering, or the 1979 Legislature has bound future Legislatures without going through the popular ratification process for state constitutional amendments. Either view has its difficulties. One, intermediate possibility is that the 1986 constitutional amendment to Article IV, Section 6 raised the 1979 statute to “super statute” status, requiring a future legislature to expressly exempt its redistricting plan from the 1979 statute’s constraints—i.e., unless the redistricting plan itself expressly declared its exemption from the 1979 statute’s reach, the Court should and could review the plan for compliance with the redistricting criteria. Cf. Administrative Procedure Act, 5 U.S.C. § 559 (“Subsequent statute may not be held to supersede or modify this subchapter . . . except to the extent that it does so expressly.”). Such an interpretation of the 1979 statute’s enforceability would avoid rendering the statute meaningless or, alternatively, quasi-constitutional in stature. Indeed, elsewhere in its opinion, the *Sheehan* Court itself treated a different redistricting statute—the 2015 public hearings statute (OR. REV. STAT. § 188.016)—as presumptively binding the 2021 Legislature but as having been expressly waived for the 2021 redistricting cycle. *Sheehan*, 499 P.3d at 1273. If the 2015 public hearings statute binds the Legislature unless it expressly exempts itself from it, so too should the 1979 redistricting statute.

18. *Ater v. Keisling*, 819 P.2d 296, 300 (Or. 1991); *Hartung v. Bradbury*, 33 P.3d 972, 980–81 (Or. 2001).



Senate and a 37–23 majority in the House.<sup>19</sup> With the Governorship also held by a Democrat, it was clear that the redistricting process would be led and controlled by the Democrats. After receiving the U.S. census data in August 2021, the Legislature’s redistricting committees went to work drafting new plans. The Democrats’ initial plans, especially the congressional plan, predictably angered Republicans, who demanded changes be made to both plans.<sup>20</sup> In the hopes of mollifying some Republicans, Democrats agreed to modify their congressional plan to make two of the six congressional districts more competitive and therefore more to the Republicans’ liking.<sup>21</sup> Republicans in the House of Representatives, however, did not find the changes sufficient, and they initially refused to appear at the Capitol, leaving the House without a quorum and therefore unable to pass the two redistricting plans.<sup>22</sup>

Frustrated with the Republican obstructionism, Democratic leaders announced that they were prepared to adjourn the emergency session and leave the redistricting process to Secretary of State Fagan (for the state legislative plan) and the courts (for the congressional plan).<sup>23</sup> The prospect that Secretary of State Fagan would end up redrawing their district boundaries, presumably in ways worse for them than the legislatively-proposed plan, prompted House Republicans to return to their seats on September 27th, the deadline imposed by the Oregon Supreme Court for adopting a redistricting plan. With just hours to spare before the deadline expired, the Oregon Legislature passed and Governor Kate Brown signed into law two redistricting bills, one redrawing the state legislative districts, both House and Senate, and one redrawing the state’s

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19. *Chronological List of Oregon Legislators from 1841 to Present*, OR. STATE. LEG. [https://www.oregonlegislature.gov/legislators-chronological#InplviewHasha45235b0-3916-4349-b757-c022e935c77d=SortField%3DChron\\_x002d\\_Legislator-SortDir%3DAsc-WebPartID%3D%7BA45235B0--3916--4349--B757--C022E935C77D%7D](https://www.oregonlegislature.gov/legislators-chronological#InplviewHasha45235b0-3916-4349-b757-c022e935c77d=SortField%3DChron_x002d_Legislator-SortDir%3DAsc-WebPartID%3D%7BA45235B0--3916--4349--B757--C022E935C77D%7D) [<https://perma.cc/F4DQ-XX4U>] (last visited May 6, 2023).

20. Hillary Borrud, *Oregon’s Redistricting Maps Official, After Lawmakers Pass Them, Gov. Kate Brown Signs Off*, OREGONIAN (Sept. 27, 2021), <https://www.oregonlive.com/politics/2021/09/oregon-legislature-passes-new-legislative-and-congressional-redistricting-plans-sends-to-gov-kate-brown-for-signature.html> [<https://perma.cc/NQ67-9WGH>].

21. Hillary Borrud, *Oregon Lawmakers Running Out of Time on Redistricting*, OREGONIAN (Sep. 25, 2021), <https://www.oregonlive.com/politics/2021/09/oregon-lawmakers-running-out-of-time-on-redistricting.html> [<https://perma.cc/8TGU-226T>].

22. *Id.*

23. *Id.*

congressional districts.<sup>24</sup> The vote was largely along party lines, but the Legislature had succeeded in passing the two bills.<sup>25</sup>

The ink was barely dry on the new redistricting bills before lawsuits challenging the two plans were filed. Just two weeks after the Legislature enacted the bills, four prominent Oregon Republicans, including a past Secretary of State, Bev Clarno, filed suit in a state trial court challenging the congressional districting map adopted by the Legislature.<sup>26</sup> Though they initially asserted that the congressional district boundaries had been drawn in ways that violated several of the non-political districting criteria listed in the Oregon redistricting statute, they subsequently dropped those claims and focused their efforts on proving that the plan was a partisan gerrymander in violation of ORS § 188.010(2).<sup>27</sup> According to the Republicans, Democrats were likely to win five of the six seats, which, so the Republicans argued, was inconsistent with “Oregon’s political landscape” which “could not possibly justify such a stark difference in Democrat and Republican congressional outcomes.”<sup>28</sup>

Meanwhile, a couple of weeks later, two different petitions challenging the state legislative redistricting plan were filed with the Oregon Supreme Court. In one of the petitions—*Sheehan v. Oregon Legislative Assembly*—two voters from the Portland area challenged the entire legislative plan, both for the House and the Senate, as a partisan gerrymander favoring the Democrats, again in violation of ORS § 188.010(2).<sup>29</sup> In the other petition—*Calderwood v. Oregon Legislative Assembly*—two voters in Lane county attacked the boundary between just two House districts in Eugene on the ground that they were drawn to protect a Democratic incumbent state senator from a primary challenge by Democratic Representative Marty Wilde.<sup>30</sup> In short, the core of both lawsuits

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24. Borrud, *supra* note 20.

25. The new state legislative and congressional district maps are available at the Oregon State Legislature’s redistricting website: <https://www.oregonlegislature.gov/redistricting> [<https://perma.cc/TE4T-LQVB>].

26. Petition, at 1–3, *Clarno v. Fagan*, No. 21CV40180 (Or. Cir. Ct. Nov. 24, 2021).

27. OR. REV. STAT. § 188.010(2) (2021); Motion to Dismiss Petitioners’ Fourth Claim for Relief with Prejudice at 1, *Clarno v. Fagan*, No. 21CV40180 (Or. Cir. Ct. Nov. 24, 2021) (available at [https://vhdsfh2oms2wcnsvk7sdv3so.blob.core.windows.net/thearp-media/documents/MTD\\_Ps\\_4th\\_Claim\\_for\\_Relief\\_10.29.21\\_ufMhVDM.pdf](https://vhdsfh2oms2wcnsvk7sdv3so.blob.core.windows.net/thearp-media/documents/MTD_Ps_4th_Claim_for_Relief_10.29.21_ufMhVDM.pdf) [<https://perma.cc/2XEF-97BK>]).

28. Petition, *supra* note 26, at 1–3.

29. Petitioners’ Opening Brief, at 6, *Sheehan v. Or. Legis. Assembly*, 499 P.3d 1267 (Or. 2021) (No. S068991).

30. Petitioners’ Brief in Support of Petition to Review Plan of Reapportionment made by Oregon Legislative Assembly, at 2–6, *Sheehan v. Or. Legis. Assembly*, 499 P.3d 1267 (Or. 2021) (No. S068989).

was that the Democratic-controlled Legislature had adopted redistricting plans that were unfairly partisan and therefore violated ORS § 188.010(2)'s ban on redistricting plans adopted with "the purpose of favoring any political party [or] incumbent legislator."

Before turning to the decisions in the two cases, it is important to note how novel these lawsuits were for Oregon. Charges of undue partisanship and incumbency protection in the redistricting process were nothing new—even as early as 1887, Oregon legislators were accusing one another of excessive partisanship and incumbency protection,<sup>31</sup> but the Oregon courts had adjudicated a partisan gerrymandering claim only once, and they had never adjudicated an incumbency protection claim. Moreover, the lone partisan gerrymandering case decided by the Oregon Supreme Court offered little guidance regarding how to evaluate partisan gerrymandering claims. In 2001, in *Hartung v. Bradbury*, the Oregon Supreme Court had rejected a partisan gerrymandering challenge, holding that the mere fact that the plan had the *effect* of favoring one party (specifically, that party was likely pick up seats that would have remained with the other party under the old plan) was insufficient to prove an illegal, partisan motive.<sup>32</sup> The Court, however, did not explain what sort of evidence would be sufficient to prove an illegal gerrymander.

Nor would federal law provide any guidance for the Oregon courts in 2021. In 2019 in *Rucho v. Common Cause*, the U.S. Supreme Court had ruled that claims of partisan gerrymandering were non-justiciable.<sup>33</sup> As the U.S. Supreme Court reasoned, political considerations inevitably shape and affect the redistricting process.<sup>34</sup> Thus, in the Court's view, the critical question becomes where to draw the line between permissible partisanship and impermissible gerrymandering: At what point does a Legislature's consideration of the partisan complexion of the various districts in a redistricting plan become a gerrymander? The U.S. Supreme Court in *Rucho* thought the task of answering that question so difficult as to make partisan gerrymandering claims non-justiciable in the federal courts.<sup>35</sup> And, as for incumbency protection, the U.S. Supreme Court had long treated that as a *legitimate* redistricting consideration.<sup>36</sup>

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31. See NORMAN R. WILLIAMS, *CONSTRUCTING A DEMOCRACY: THE HISTORY, LAW, AND POLITICS OF REDISTRICTING IN OREGON* (forthcoming 2023) (monograph at ch. 1) (copy on file with author).

32. *Hartung v. Bradbury*, 33 P.3d 972, 987 (Or. 2001).

33. *Rucho v. Common Cause*, 139 S.Ct. 2484, 2506–07 (2019).

34. *Id.* at 2497.

35. *Id.*

36. See *Bush v. Vera*, 517 U.S. 952, 964 (1996); *Karcher v. Daggett*, 462 U.S. 725, 740 (1983).

In short, in 2021, the Oregon courts adjudicating the partisan gerrymandering and incumbency protection claims in *Clarno* and *Sheehan* would have their work cut out for them. Federal law and judicial decisions provided absolutely no help in adjudicating either of those claims. Meanwhile, the Oregon courts had never adjudicated a claim of undue incumbency protection before, and the Oregon Supreme Court's discussion of partisan gerrymandering in *Hartung* offered virtually no guidance regarding where the line was between permissible partisanship and impermissible gerrymandering. The Oregon courts in 2021 would be crossing new terrain, and, as we shall see, they struggled to find their way across it.

### III. *SHEEHAN V. OREGON LEGISLATIVE ASSEMBLY*: THE CHALLENGE TO THE STATE LEGISLATIVE PLAN

The first decision to come down was in the lawsuit challenging the state legislative plan. In a unanimous decision released in late November in *Sheehan v. Oregon Legislative Assembly*, the Oregon Supreme Court upheld the state legislative plan in its entirety.<sup>37</sup> The Supreme Court's opinion was authored by Justice Chris Garrett, who had been a legislator a decade earlier and who had co-chaired the 2011 Legislature's redistricting committee.<sup>38</sup> As such, Garrett was no stranger to the redistricting process.

Justice Garrett began his opinion for the Court by making clear at the outset that the Supreme Court would not second-guess decisions made by the Legislature regarding where to draw district boundaries. Rather, as Justice Garrett noted, the Court would employ a highly deferential standard of review, which, in practice, would impose a high bar for litigants seeking to overturn the redistricting plan:

This court has long recognized that the foregoing constitutional and statutory provisions confer broad discretion on the legislature to devise a reapportionment plan. In reviewing a reapportionment plan enacted by the Legislative Assembly, this court will not substitute its own judgment about the wisdom of the plan. With respect to challenges based on ORS 188.010, we will void the Legislative Assembly's plan only if we can say, based on the record, that that body "either did not consider one or more criteria [set out in ORS 188.010] or, having considered them all, made a choice or choices that no reasonable [reapportioning body] would have made." The party challenging a reapportionment plan under ORS 188.010

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37. *Sheehan v. Or. Legis. Assembly*, 499 P.3d 1267, 1270 (Or. 2021).

38. *Hon. Chris Garrett*, WILLAMETTE UNIV., <https://willamette.edu/law/faculty/profiles/garrett/index.html> [<https://perma.cc/4R9P-868L>] (last visited Jan. 27, 2023).

has the burden to show that one of those circumstances—that the Legislative Assembly failed to consider the statutory criteria or made a choice that no reasonable legislature would make—is present.<sup>39</sup>

In short, the burden for the voters challenging the 2021 plan was a high one, and, as Garrett would explain, it was not one that they had met.

*A. Sheehan v. Oregon Legislative Assembly: The Partisan Gerrymandering Claim*

The *Sheehan* petition challenged the entire legislative districting plan as a partisan gerrymander in favor of the Democrats, in violation of ORS § 188.010(2). In fairness to the Oregon Supreme Court’s cursory treatment of it, the *Sheehan* petitioners’ partisan gerrymandering claim was incredibly under-developed. The *Sheehan* petitioners presented no direct evidence regarding the Legislature’s purpose—they did not submit, for instance, any affidavit or other evidence regarding what individual legislators had said about the redistricting plan. Nor did they present any political-science-based evidence regarding the partisan bias of the plans. Rather, the *Sheehan* petitioners sought to establish an illicit partisan purpose by looking to the process used by the Legislature’s redistricting committees and the fact that some districts had large partisan imbalances. Specifically, the voters claimed that the new map was largely based on the prior 2011 redistricting plan, which therefore favored incumbents in their view, and that the redistricting committees had largely ignored plans submitted by the public, such as theirs.<sup>40</sup> The petition also listed the partisan voter registration advantage of a variety of House districts in several cities across the state, from which they inferred that improper partisanship must have been the explanation for why some districts had a large Democratic voter advantage while other, neighboring districts had a large Republican voter advantage.<sup>41</sup>

The Supreme Court made quick work of each of these points, concluding that none of the asserted flaws in the plan made out a case of a forbidden partisan gerrymander. In the Court’s view, the fact that the 2021 redistricting plan followed many of the district borders from the 2011 plan—a plan shepherded through the Legislature by then-Representative Garrett—was

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39. *Sheehan*, 499 P.3d at 1270 (citation omitted) (quoting *Hartung v. Bradbury*, 33 P.3d 972, 987 (Or. 2001)).

40. Petitioners’ Opening Brief, *supra* note 29, at 6.

41. *Id.* at 7–8.

powerful evidence of its validity, not invalidity, since the 2011 plan had not been challenged as a gerrymander.<sup>42</sup> As now-Justice Garrett noted for the Court,

The fact that the same statutory criteria existed in 2011, when the current district boundaries were adopted, as exist now, and the additional fact that, in many areas, there has been little change in the meantime with respect to those criteria, tends plausibly to explain why many of the lines that divide districts have remained the same.<sup>43</sup>

As for the Republicans' assertion that the Democratic Legislature had refused to consider redistricting plans proposed by the public, the Court noted that was not true as a factual matter.<sup>44</sup> Participants in the public hearings had not been prohibited from testifying about non-committee maps but only told to "please focus on" the committee maps—an instruction that the Court viewed as an imminently reasonable and permissible use of the committee's limited time to hear oral testimony.<sup>45</sup> Moreover, the committees accepted written comments from the public regarding all of the plans submitted to the committees.<sup>46</sup> Last but not least, the fact that some House districts leaned Republican while others leaned Democratic in the state's metropolitan areas was hardly evidence of a forbidden partisan gerrymander.<sup>47</sup> As the Court viewed it, the *Sheehan* petitioners' "relatively superficial discussion of a few legislative districts" did not establish that "those districts—much less the entire map, which is what petitioners challenge—were drawn for an unlawful purpose."<sup>48</sup>

In short, the Supreme Court confined its analysis to the evidence and arguments made by the Republican petitioners, which it dismissed as insufficient. The Court made no effort to engage in its own assessment of the partisan fairness of the redistricting plan, nor did it attempt to answer more generally the question where the line was between permissible partisanship and impermissible gerrymandering. Wherever that line was, the *Sheehan* petitioners had not demonstrated that the Legislature had crossed it, which was all that the Court viewed itself as having to decide.

That analytical omission was both striking and unnecessary. That the redistricting plan was a relatively fair one would have been easy for the Court to establish. The non-partisan Campaign Legal Center scores the partisanship of redistricting plans nationwide using four different statistical measures of the

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42. *Sheehan*, 499 P.3d at 1271.

43. *Id.*

44. *Id.* at 1272.

45. *Id.* at 1272 n.6.

46. *Id.* at 1272.

47. *Id.*

48. *Id.*

partisan fairness of a redistricting plan. Using those four measures, the CLC concluded that Oregon's state legislative plan was a balanced plan.<sup>49</sup> For instance, while the Oregon House plan had a predicted efficiency gap of 0.9% in favor of the Democrats—itsself an insignificant level of bias—the plan had a tiny bias in favor of the Republicans when judged by other metrics—i.e., it was essentially a wash with no significant favoritism of one of the parties.<sup>50</sup> The Oregon Senate plan was slightly more biased in favor of the Democrats—it had a predicted efficiency gap of 3% in favor of the Democrats<sup>51</sup>—but that was likewise a minor level of bias. There is no perfectly neutral redistricting plan; every plan has some level of bias in it. Thus, the critical question becomes identifying at what point any bias has reached such a large level as to be indicative of a gerrymander. For instance, Missouri only views an efficiency gap of 15% or more as indicative of a gerrymander, and the academic authors of the efficiency gap metric only view an efficiency gap of 8% or greater as problematic.<sup>52</sup> In short, the Oregon state legislative redistricting plan was not a partisan gerrymander, but, strangely, the Oregon Supreme Court did not say so, only that the Republican challengers had failed to show that it was a gerrymander.<sup>53</sup>

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49. *Oregon State House Plan SB 882*, PLANSORE (Oct. 13, 2021), <https://planscore.org/plan.html?20211013T090713.921029388Z> [<https://perma.cc/V95X-DRET>];

50. *See id.*

51. *Id.*

52. MO. CONST. art. III, § 3(b)(5); Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 877 (2015).

53. The Court's unwillingness to address at what point a redistricting plan becomes a gerrymander contrasted markedly with its willingness elsewhere in the opinion to unnecessarily address a minor, remedial point. To remedy the claimed partisan illegality of the redistricting plan, the *Sheehan* petitioners had asked the Supreme Court to adopt a different districting map called the "Equitable Map Oregon." *Sheehan*, 499 P.3d at 1270. Before even turning to the merits of the *Sheehan* petition, however, the Oregon Supreme Court rejected that request, holding that its role was confined to adjudicating the validity of the Legislature's plan, leaving it to the Secretary of State "at least in the first instance" to decide how to correct whatever errors the court found in the Legislature's plan. *Id.* at 1271 n.2. The Court was clearly right that the Oregon Constitution requires the Secretary of State, not the Court itself, to redraft a redistricting plan if and when the Legislature's plan is invalidated by the Court, *see* OR. CONST. art. IV, § 6(2)(c), but there was absolutely no need for the Court to reach that point—its determination just pages later in its opinion that the 2021 plan was valid obviated any need to reach the remedial issue and rendered its statements on that matter pure dicta. The Court was obviously interested in answering for the future the question regarding what is the proper process for remedying an illegal defect in a redistricting plan, but it would have been far more helpful for the Court to have answered for the future the question regarding what makes for a partisan gerrymander. That it chose to unnecessarily answer the former, minor question demonstrates that it was not the fear of engaging in dicta that drove its refusal to answer the latter, more significant question.

*B. Calderwood v. Oregon Legislative Assembly: The Incumbency Protection Claim*

Unlike the *Sheehan* petition, which challenged the entire statewide district plan, the *Calderwood* petition focused just on the border between House Districts 8 and 12 in Eugene, which the petition alleged had been drawn to disfavor Democratic Representative Marty Wilde. Wilde himself did not formally join the suit, which was brought by two voters in Wilde's district.<sup>54</sup> Nevertheless, Wilde's support for the suit was clear—he submitted a declaration in support of the suit.

As had the *Kotek* litigation earlier in the spring, the lawsuit revealed a schism in the state Democratic party. Wilde was a Democrat, and Democrats had controlled the Legislature that had adopted the new redistricting plan. In short, Wilde was objecting to how his own party had treated him—that Democratic leaders had drawn the House districts in Eugene in a manner to favor someone else over him. In that respect, Wilde joined a long list of legislators throughout Oregon's history who claimed that they had been treated unfairly by their own party, which had chosen to favor a different faction or group of legislators in the redistricting plan.<sup>55</sup> Republicans predictably pounced on the opportunity to exploit this division within the Democratic party. The lawyers hired by the *Calderwood* petitioners included a former Republican legislator and a Chicago-based attorney who the national Republican party had used to bring redistricting challenges on behalf of Republicans nationwide.<sup>56</sup> In fact, they were the same two lawyers who had been hired by Republicans to challenge the congressional redistricting plan.

The Republicans who brought the suit on Wilde's behalf, though, struggled to identify just exactly how Wilde's treatment at the hands of his own party's leadership violated Oregon law. Significantly, they did not claim that Wilde had been targeted for elimination from the Legislature by redrawing his House district in unfavorable ways. While Wilde's original district, as drawn under the 2011 plan, had a substantial Democratic registered voter advantage, Wilde's new district (House District 12) would have a tiny Republican advantage and

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54. Petitioners' Brief in Support of Petition to Review Plan of Reapportionment made by Oregon Legislative Assembly, *supra* note 30, at 2–3. Rep. Wilde's Declaration in support of the suit was filed as Attachment D to the Petitioners' Brief. Declaration of Representative Marty Wilde, attach. D, *Sheehan v. Or. Legis. Assembly*, 499 P.3d 1267 (Or. 2021) (No. S068989).

55. See WILLIAMS, *supra* note 31, monograph at ch. 2.

56. *The Oregonian: Republicans Sue to Block Democrats' 'Obvious, Extreme, Partisan Gerrymander' of Oregon Congressional Districts*, OREGON.GOP (Oct. 12, 2021), <https://oregon.gop/2021/10/the-oregonian-republicans-sue-to-block-democrats-obvious-extreme-partisan-gerrymander-of-oregon-congressional-districts/> [https://perma.cc/MGM6-8ZVY].



would therefore be competitive but Republican-leaning.<sup>57</sup> It therefore looked like the Democratic leadership was trying to get rid of Wilde.<sup>58</sup> Claiming that Wilde had been targeted for elimination from the Legislature, while most likely true as a factual matter, though, would not constitute a violation of the statute, which only forbids plans that “favor” a particular incumbent legislator, not ones that “disfavor” or “discriminate against” him.<sup>59</sup> And, while ousting a Democratic legislator by intentionally including him in a new, Republican-leaning district could be said to favor the Republicans, making that claim would have undermined the Republican party’s narrative that the 2021 plan was a Democratic gerrymander, which the Republican lawyers were not about to do.

Instead, the two voters (and their Republican lawyers) claimed that the two House districts in southeast Eugene had been drawn to protect Democratic Senator Floyd Prozanski from a primary challenge by Wilde the following year.<sup>60</sup> Prozanski lived near the University of Oregon in the center of Eugene and was included in House District 8; Wilde, who lived in the suburban, southeastern portion of Eugene, was located in House District 12 (and therefore a different Senate district than Prozanski).<sup>61</sup> Wilde would therefore be unable to challenge Prozanski in the Democratic primary, which Wilde and the Republicans claimed had been done at the insistence of the Senate Democratic leadership to protect Prozanski.<sup>62</sup> In short, rather than claiming that Wilde had been intentionally placed in a Republican district so as to oust him from the Legislature, the Republicans recharacterized the problem as one of incumbent protection—that the Democratic leadership was favoring Prozanski over Wilde.

The Supreme Court, however, rejected Wilde’s claims. Before turning to the Court’s analysis, it is important to note that the *Calderwood* petition did not present the typical incumbent protection scenario. First and most obviously, Wilde was not a Senator. Allegations of incumbency protection typically arise in situations where districts have been drawn so that two incumbents *of the*

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57. OR. ELECTIONS DIV., OR. SEC’Y OF STATE, MARCH 2022 VOTER REGISTRATION 6 (2022), <https://sos.oregon.gov/elections/Documents/registration/2022-March.pdf> [https://perma.cc/E67Z-M8HB]. Indeed, in the 2022 elections, the Republican candidate for District 12 defeated the Democratic candidate, Michelle Emmons (Wilde had not run for reelection), by 15 percentage points.

58. Rachel Monahan, *Oregon Democrats Redrew One of Their Own Out of His District—When He Couldn’t Defend Himself*, WILLAMETTE WEEK, (Oct. 13, 2021), <https://www.wweek.com/news/state/2021/10/13/oregon-democrats-redrew-one-of-their-own-out-of-his-districtwhen-he-couldnt-defend-himself> [https://perma.cc/YU44-AX3A].

59. OR. REV. STAT. § 188.010(2) (2021).

60. Petitioners’ Brief in Support of Petition to Review Plan of Reapportionment made by Oregon Legislative Assembly, *supra* note 30, at 9–10.

61. Hillary Borrud, *Two Lane County House Districts Challenged*, OREGONIAN, Oct. 28, 2021, at A4.

62. *Id.*

*same house* were not included in the same district.<sup>63</sup> It had been Oregon Secretary of State Clay Myers' attempt in 1971 to protect incumbents from the same house that had given rise to the 1979 statute's prohibition on incumbent-protection redistricting stratagems.<sup>64</sup> Not only was Wilde not a Senator, but Prozanski's Senate district actually did include another Democratic Senator, Lee Beyer, as a result of the redrawing of district boundaries.<sup>65</sup> Admittedly, there were indications that Beyer was planning to retire at the end of his term,<sup>66</sup> but the Democratic leadership could not know for certain whether Beyer would in fact do so when time came to decide whether to run for reelection. Thus, the fact that Beyer and Prozanski had been placed in the same Senate district was certainly some evidence that the Legislature was not in fact drawing district lines to protect Prozanski from a primary challenge.

Second, even if an incumbent protection claim could be made out by alleging that a Senate district was drawn to exclude a viable challenge from someone else (Representative, Mayor, private person), that someone else would ordinarily have previously been located in the same district as the incumbent supposedly being protected. Wilde and Prozanski, however, did not live in the same district.<sup>67</sup> Critically, under the 2011 redistricting plan, Wilde lived in the Senate district next door to Prozanski's.

Wilde's incumbent protection claim, then, was truly a novel one. At root, Wilde and the two voters were arguing that Wilde's neighborhood should have been moved *into* Prozanski's district, thereby enabling Wilde to challenge Prozanski. Of course, there could be any number of reasons why the Legislature chose not to move Wilde's neighborhood into Prozanski's district, but, according to Wilde, it was only done so as to protect Prozanski.<sup>68</sup> Putting aside

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63. *Cf.* *Bush v. Vera*, 517 U.S. 952, 964 (1996) (describing incumbent protection as effort to ensure that two incumbents are not paired in same district).

64. *See WILLIAMS, supra* note 31, monograph at ch. 2. An early version of the 1979 redistricting criteria statute had expressly required such favoritism and had banned redistricting plans that placed two incumbents in the same district because, as the author of the provision, Senator Dell Isham, explained, "putting two incumbents in the same district . . . would be disenfranchising people [who] should have the opportunity to re-elect their representative." Oregon Legislature, 1979 Regular Session, Minutes of the Senate Committee on Elections 1 (April 10, 1979) (copy on file with author). When Common Cause and others objected to that incumbent-protecting provision, it was replaced with the current language. That legislative history denotes a concern that incumbents of the same house not be intentionally kept in different districts, not a more general ban on any redistricting plan that could be said to favor some incumbent somehow.

65. Monahan, *supra* note 58.

66. *Id.*

67. Petitioners' Brief in Support of Petition to Review Plan of Reapportionment made by Oregon Legislative Assembly, *supra* note 30, at 9–10.

68. Declaration of Representative Marty Wilde, *supra* note 54, at 6.

the factual implausibility of that claim—did the popular, almost-20-year incumbent Prozanski really fear a challenge from Wilde, who had barely won reelection in 2020 in a heavily-Democratic district<sup>69</sup>—allowing a non-resident to challenge the failure of the Legislature to move their neighborhood into a different district to enable them to challenge a different incumbent would open the door to incumbent protection claims with regard to *every* districting decision. If Wilde’s claim were valid, any and every district boundary could then be challenged by some disgruntled prospective candidate from outside the district who would rather have had her district drawn to enable her to challenge the unpopular incumbent next door rather than the popular one in their district. That would especially be true where, as was the case with Wilde, the disgruntled prospective candidate knew that they couldn’t win in their own district because of its partisan composition.<sup>70</sup>

Conceivably, one might try to avoid the foregoing problem and argue that an incumbent protection claim can be raised by a non-resident where (and only where) there was some *obligation* for the Legislature to move their neighborhood into the district with the allegedly protected incumbent. In that scenario, the Legislature’s refusal to honor that obligation *might* reflect an intent to protect an incumbent in the neighboring district, but the problem with this more limited approach is that the Legislature’s decision not to move the putative challenger into the incumbent’s district might also be based on other neutral districting reasons. Allowing someone who had never resided in the incumbent’s district to challenge a plan on this basis would therefore require the court to tease out why the Legislature had not in fact chosen to move the putative challenger’s neighborhood into the incumbent’s district.

It is at this point in the logical chain that the Oregon Supreme Court began its analysis and found Wilde’s objection lacking. Whether or not ORS § 188.010(2) could be stretched to include incumbent protection claims asserted by non-residents who had never lived in the allegedly protected incumbent’s district, Wilde had failed to show that it was incumbent-protection

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69. In the 2020 general election, Wilde had defeated his Republican challenger by only 1,600 votes out of almost 38,000 cast. In the 2018 general election, Prozanski had defeated his Republican challenger by over 13,500 votes out of 65,000 cast. In fact, as it would turn out, the popular Prozanski would run unopposed in the both the Democratic and Republican parties’ primary election, and, as the nominee of both major parties, he would run unopposed in the general election in 2022.

70. Wilde’s new Senate District, District 6, would have a substantial Republican voter registration advantage (more than 15%) and be highly unlikely to elect a Democrat. OR. ELECTIONS DIV., *supra* note 57, at 5. Sure enough, in the 2022 elections, the Republican candidate swept District 6 by over 30 percentage points.

rather than some other districting criteria that had prompted the Legislature to refuse to move Wilde's neighborhood into Prozanski's district.<sup>71</sup>

According to Wilde, the Legislature's incumbent-protection motive was clear because the *first* redistricting plan proposed in early September by the Democratic members of the House redistricting committee—so-called “Plan A”—placed both Prozanski and him in the same district.<sup>72</sup> Of course, as the Supreme Court observed, the fact that the original redistricting plan had placed Wilde and Prozanski in the same district was powerful evidence that the legislative leadership was *not* trying to protect Prozanski from a challenge by Wilde.<sup>73</sup> If the Legislature was trying to protect Prozanski from a challenge from Wilde, why did it put the two of them together in the same district in the initial redistricting plan?

More importantly, Prozanski's neighborhood was relocated to a different district (District 8) at Wilde's insistence! As the Supreme Court emphasized, when Plan A was released, Wilde had objected to the plan and had encouraged Eugene residents to testify in the redistricting committee's public hearings in early September against that proposal, because, in Wilde's view, the plan improperly divided the University of Oregon campus and surrounding neighborhood among three House districts.<sup>74</sup> Wilde and his constituents persuaded the redistricting committee to redraw the House maps so that all of the University area was included in one House district (District 8), but that change meant that Prozanski, who lived near the university campus, was therefore moved into House District 8, which therefore meant Senate District 4.<sup>75</sup> In short, it was at Wilde's insistence—not Prozanski's, not the Senate leadership's—that Prozanski was moved into a different House and therefore different Senate district. Or, to put the point more generally, Prozanski had been moved to a different district not to protect him from a challenge from Wilde but because Wilde had insisted that Prozanski's university-area neighborhood be included in the same district as the rest of the university—i.e., that the university community of common interest be respected. Wilde's own course of action demonstrated that it was another districting principle—respect for a community of common interest—rather than incumbent-protection that led to Prozanski and Wilde finding themselves in different districts. As the Supreme Court summarized it,

Wilde's home precinct was simply left behind in the area that

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71. Sheehan v. Or. Legis. Assembly, 499 P.3d 1267, 1278 (Or. 2021).

72. *Id.*

73. *Id.*

74. *Id.* at 1277–78.

75. *Id.* at 1277.

became House District 12 when areas around it were shifted to House District 8 along a line whose proximity to Wilde's home does not seem remarkable, given that its purpose was to exclude the University community, to the north of Wilde's residence, from the district.<sup>76</sup>

To be sure, after Wilde saw the revisions to Plan A, which placed Prozanski in a different district, Wilde asked for yet another set of revisions to be made to the plan, which would have moved his neighborhood into House District 8 and therefore Senate District 4 with Prozanski. As the Supreme Court noted, however, there was no obligation for the Legislature to accede to Wilde's request in that regard.<sup>77</sup> In the Supreme Court's view, the legislators, "having already made substantial changes to House District 8 in response to public concerns, and acting within significant time constraints, were disinclined to make further changes based on the particularized concerns of Representative Wilde."<sup>78</sup> It was the short time constraints of the emergency session and revision fatigue, not incumbency protection, that accounted for the Legislature's refusal to undertake yet another round of revisions and only for Wilde's benefit at that. Wilde's incumbency-protection claim was dead.

### *C. Non-Political Districting Claims under ORS § 188.010(1)*

Last but not least, the two *Calderwood* voters argued that Wilde's neighborhood should have been moved into House District 8 so as to comply with the various, non-political districting criteria listed in ORS § 188.010(1). In particular, the voters argued that House District 12, as drawn, violated the community of common interest, geographic boundaries, and transportation link redistricting criteria.<sup>79</sup> The Court, however, repeated that, under its deferential standard of review, the Legislature need only consider each redistricting criteria and show that its ultimate choices among the criteria was not one that no reasonable Legislature would make.<sup>80</sup> Moreover, the Court further noted that "ORS 188.010(1) requires the Legislative Assembly to consider the listed criteria for 'each district'—not to justify every decision about a district's boundaries in terms of the criteria."<sup>81</sup> In other words, not each and every facet of a district's boundaries had to be justified as a reasonable balance of the various criteria, only that the district as a whole be shown to have been drawn with a due consideration of all the criteria.

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76. *Id.* at 1278.

77. *Id.*

78. *Id.*

79. *Id.* at 1273–74.

80. *Id.* at 1276.

81. *Id.* at 1276 n.10.

So framed, the Court had little trouble upholding the border between House Districts 8 and 12. As it noted, “the Legislative Assembly did ‘consider’ all the required factors in designing those districts, even if it did not optimize all the factors in every decision.”<sup>82</sup> Moreover, it was not persuaded that the ultimate districting plan was one no reasonable Legislature would make. For instance, the *Calderwood* petitioners alleged that House District 12 improperly included territory on both sides of the interstate freeway, I-5. Even if interstate freeways could qualify as a “geographic or political boundary” for purposes of ORS § 188.010(1)(c)—a threshold point that the Court did not address—the Supreme Court did not view I-5 as a critical boundary in the Eugene area.<sup>83</sup> “Interstate 5,” the Court concluded, “has no independent political significance and, as the Legislative Assembly points out, it does not feature prominently as a district line in most of the rest of the plan enacted by SB 882.”<sup>84</sup> Indeed, the Court could have added that Wilde’s district had long included areas on both sides of the freeway and that Wilde’s own proposed alternative map still had House District 12 crossing I-5 in both the north and south areas of the district—a submission utterly at odds with the notion that I-5 was an important feature that the Legislature should have treated as an impermeable districting barrier.

Likewise, there was no merit to the *Calderwood* petitioners’ community of common interest claim, which was predicated on the fact that Wilde’s neighborhood was in the city of Eugene, while most of the rest of District 12 in which his neighborhood had been put was comprised of the rural area outside Eugene. According to Wilde, his neighborhood shared more in common with the university area near downtown Eugene than the rural area outside the city.<sup>85</sup> Of course, the original Plan A had included Wilde’s neighborhood with a portion of the university area, but Wilde had objected to that plan precisely on the ground that the university area was its own community of interest. Wilde’s own redistricting campaign just a month earlier therefore undermined the notion that the university area was a community of common interest with the surrounding suburban neighborhoods. Indeed, Wilde’s neighborhood was a suburban, fairly wealthy portion of southeastern Eugene, filled with doctors, lawyers, and other professionals; the university area was, well, a university area filled with college students and university staff who differed significantly from the suburban professionals in Wilde’s neighborhood.<sup>86</sup> The two areas shared little in common.

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82. *Id.* at 1276.

83. *Id.*

84. *Id.*

85. Declaration of Representative Marty Wilde, *supra* note 54, at 7.

86. *See Sheehan*, 499 P.3d at 1275.

For that reason, Wilde and the two voters tried to shift the focus of their argument—it was not that Wilde’s neighborhood shared much in common with the university area but rather that Wilde’s suburban neighborhood didn’t share all that much in common with the rural areas of Lane County with which it was joined in District 12. The Supreme Court, however, summarily rejected that assertion, noting that southeastern Eugene had long been included in a district with rural parts of Lane county.<sup>87</sup> Indeed, that was Wilde’s very district under the 2011 redistricting plan! More generally, for decades, House districts throughout the state had routinely combined urban and suburban areas, or suburban and rural areas, or even all three types of areas. Stated differently, ORS § 188.010(1)(d) did not give rural voters a right to a district composed exclusively of rural areas any more than urban voters had a right to a district composed exclusively of urban neighborhoods.<sup>88</sup> Moreover, with respect to Wilde’s district in particular, the Court observed that the Eugene school district likewise extended beyond the city limits and included rural areas outside the city, thereby making it appropriate to include both suburban and rural areas in District 12. “[T]he Legislative Assembly,” the Court declared, “could reasonably consider the Eugene School District catchment area as an area of commonality and take that into consideration in drawing the district lines (as it suggests it did).”<sup>89</sup>

Last but not least in this regard, the *Calderwood* petitioners argued that House District 12 violated the transportation link criterion of ORS § 188.010(1)(e) because there was no mass transit service, bike lanes, or walking paths from Wilde’s suburban neighborhood to the rural areas and towns in the district.<sup>90</sup> The Oregon Supreme Court, however, found this objection so frivolous that it didn’t even address it. In *Hartung*, the Oregon Supreme Court had read the transportation link criterion as requiring only that there be roads connecting residents in one part of a district with residents in another part<sup>91</sup>—a requirement that was conspicuously satisfied with respect to House District 12.

At the end of the day, Wilde would have preferred that his neighborhood be included in House District 8 rather than District 12, but redistricting always upsets some voters and pleases others. There is no perfect redistricting plan, and, as the Supreme Court repeatedly emphasized, the 1979 redistricting statute gave the Legislature ample latitude to choose among the various redistricting

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87. *Id.*

88. OR. REV. STAT. § 188.010(1)(d) (2021).

89. *Sheehan*, 499 P.3d at 1276.

90. *Id.* at 1274.

91. *Hartung v. Bradbury*, 33 P.3d 972, 985 (Or. 2001).

criteria. Wilde repeatedly insisted that his neighborhood could be relocated to District 8 without having to make major changes elsewhere in the district, but that was beside the point in the Court's view. Any and every district could be redrawn to include this neighborhood or that apartment building in a different district. Lines have to be drawn somewhere, and while Wilde would have preferred the Legislature to have drawn the District 8 and 12 boundary a few hundred yards further east, someone else likely would have preferred it be drawn a few hundred yards further west, and—here's the rub—that person could have equally claimed like Wilde that the Legislature could have drawn that boundary further west without difficulty. Wilde was no different than any voter who disliked how their district was drawn, but, as the Court viewed it, ORS § 188.010 didn't guarantee residents the district of their dreams. As the Supreme Court tersely put it, "other possible configurations of the two districts might have been preferable to some observers. But that is not the standard by which this court evaluates a challenge under ORS 188.010."<sup>92</sup> The 2021 state legislative redistricting plans were valid.

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As events would bear out, the Republicans' claims that the plans were a pro-Democratic gerrymander proved false. In the 2022 elections, Republicans picked up seats in both the Oregon House and Senate. In the Senate, Democrats won twelve of the sixteen Senate races up for grabs that year, but that was a victory for Republicans since most of the Senate seats up for election in 2022 were from districts in which Democrats held a significant registration advantage. Most of the Republican-leaning Senate districts would not be up for election until 2024, so the 2022 results meant that Republicans picked up a Senate seat they did not previously have. In the House, Democrats won thirty-five seats and Republicans twenty-five seats, with Republicans gaining two seats as a result. Admittedly, the efficiency gap in the contested Senate races was 12.58% in favor of the Democrats, but that number was inflated by the fact that so many more Democratic-leaning districts than Republican-leaning districts were up for election that year. More revealingly, in the House where all sixty seats were up for election, the efficiency gap was a paltry 1.28% in favor of the Democrats. Despite their predictions to the contrary during the Supreme Court litigation, Republicans ended up doing fairly well under the 2021 redistricting plans.

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92. *Sheehan*, 499 P.3d at 1277.



The 2021 state legislative redistricting plan had proven not to be the pro-Democratic gerrymander that Republicans had alleged, but what are we to make of the Oregon Supreme Court's decision—what does it tell us about the redistricting process and the judicial review of it for the future? Wilde's incumbent protection challenge bordered on the frivolous, and the Court's explanation as to why was both clear and provided at least some guidance for future Legislatures—i.e., the Legislature need not move an incumbent legislator into a district with another incumbent when the former objected to an early version of the plan that did place them in the same district. Not so with respect to the partisan gerrymandering challenge, though. There, the Court was content to hold that the voters had failed to establish that the plan was a partisan gerrymander, not that the plan was in fact fair from a partisan perspective. Those may seem to be the same thing, but they are in fact dramatically different holdings—saying the prosecution failed to prove that OJ Simpson murdered his wife is very different than saying that OJ was in fact innocent.

To be sure, courts often engage in such judicial minimalism, addressing only the arguments made by the parties and no more.<sup>93</sup> Redistricting, though, presents an exception where, in my view, it would have been better for the Court to say more than just the Republicans had not proven their case. The *Sheehan* decision as written left future Legislatures (and Oregon voters) with little guidance regarding where the boundary between permissible partisanship and impermissible gerrymandering is. While Oregon voters now know a little more about what sort of evidence doesn't establish a gerrymander—i.e., pointing to the fact some districts lean Republican while others lean Democratic is insufficient—the *Sheehan* decision still leaves everyone guessing as to what sort of evidence *is* sufficient to establish the existence of a gerrymander. Moreover, given how few redistricting cases arise—usually just one or two in every ten-year redistricting cycle and sometimes not even that—the courts have far fewer opportunities to build a robust body of decisions to fill this interpretative void and, through multiple decisions, provide clear guidance to the Legislature and voters.<sup>94</sup> Where each step in building the legal framework takes ten years or longer, judicial minimalism and its closely related cousin, judicial incrementalism, come dangerously close to judicial abdication.

In fairness, the Court's caution is understandable—redistricting obviously involves a politically sensitive contest for partisan advantage in which the Court

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93. For a general discussion of the adjudicative strategy, see CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).

94. *Cf.* Cass R. Sunstein, *Beyond Judicial Minimalism*, 43 *TULSA L. REV.* 825, 838 (2008) (noting that judicial minimalism may be inappropriate where there is a need for legal clarity and that “[i]f judges are concerned with the costs of decisions and the costs of errors, they will often find themselves settling on wide rules”).

does not want to be seen as taking sides<sup>95</sup>—but it is for precisely that reason that the Court’s say-as-little-as-possible approach is problematic. Under the Court’s minimalist approach, a Legislature will only discover where the line between permissible partisanship and impermissible gerrymander is when its redistricting plan is invalidated for crossing that line. Perhaps that’s just desserts for that future *Legislature*, which by definition will have acted in a sufficiently brazen partisan manner as to trigger the Court’s ire, but it will surely not immunize that future *Court* from being accused of taking sides in the partisan battle and being chastised for announcing and enforcing a rule whose existence could not have been known by the Legislature in advance. In my view, it would be far better instead for the Court to announce where the line is in advance of that problematic case so as to give future Legislatures and voters at least some idea as to where Oregon draws the line with regard to partisan gerrymandering. If and when it becomes necessary for the Oregon Supreme Court in some future case to enforce that previously-announced rule and strike down a redistricting plan, no one could claim to be surprised or accuse the Court of acting strategically and settling on a particular rule so as to favor one of the current combatants for political power.

The Oregon Supreme Court’s minimalist approach also is unnecessary in the redistricting context for another reason. Not only could the Court have easily established the partisan fairness of the 2021 state legislative plan,<sup>96</sup> the ban on partisan gerrymandering is only statutory in nature, which reduces the potential that a judicial misstep will haunt state law for decades to come. The appeal of judicial minimalism is at its apex in constitutional cases, where a judicial mistake—a misinterpretation of the underlying constitutional rule—is difficult for voters to correct. For judges drawn to judicial minimalism, it is better to stay silent rather than engage in dicta that misconstrues some constitutional provision. Oregon’s ban on partisan gerrymandering, however, is only statutory in nature. That poses a problem about the ban’s efficacy—a future Legislature could repeal it or exempt its redistricting plan from compliance with it—but its statutory nature also minimizes any concerns about judicial error or over-reach in laying out a gerrymandering rule for the future. If a future Legislature disagreed with the Court’s interpretation of the 1979 prohibition on partisan gerrymandering, it could simply amend the statute to overturn the Court’s interpretation. Yes, the same could be said for the *Sheehan* Court’s minimalist approach—that a future Legislature could amend the 1979 statute to overturn the *Sheehan* Court’s actual, see-no-evil holding—but that

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95. See *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (holding malapportionment challenge was non-justiciable and urging courts to avoid this “political thicket”).

96. See *supra* text accompanying note 49.

would require the Legislature to agree to increase the limitations on itself. Future legislatures are likely happy to have a toothless ban on partisan gerrymandering because it enables them to have their cake and eat it too—to adopt partisan redistricting plans but then claim that their plan is not a gerrymander because the Court did not strike it down. As a consequence, it would be far better for the Supreme Court to take the 1979 Legislature at its word and inject some meaning into the current statutory ban on partisan gerrymandering rather than await further guidance from the Legislature, which may never happen. If a future Legislature wants to dilute or change the Court’s content-giving interpretation, it can do so (and explain to Oregon voters why it did so). In short, the Court’s judicial minimalist instincts led the Court unnecessarily to miss an important opportunity to clarify the scope of Oregon’s ban on partisan gerrymandering.

More fundamentally, the *Sheehan* decision raises an important question about the efficacy of judicial review in policing the redistricting process: Can state courts truly prevent partisan gerrymandering from taking place? The answer to that question depends critically on whether the judicial review is meaningful or only perfunctory. In both New York and Ohio, for example, the review undertaken by the courts was clearly searching. To be sure, the New York Court of Appeals paid lip service to the principle that legislatively-enacted redistricting plans are entitled to a “strong presumption of constitutionality,” but it coupled that maxim with the equal and opposite principle that the court was duty-bound to enforce “the plain intent of the Constitution and a disregard of its spirit and the purpose for which express limitations are included therein,” which it then found had been violated by the Legislature.<sup>97</sup> Likewise, the Ohio Supreme Court acknowledged the “strong presumption of constitutionality” afforded redistricting plans, but it expressly rejected the notion that it had to defer to the Legislature’s understanding of the legal requirements regarding redistricting.<sup>98</sup> In both cases, the resulting review was comprehensive and meaningful—as it would be expected before a court strikes down a legislatively-enacted redistricting plan as invalid.

Unlike the New York and Ohio courts, though, the Oregon Supreme Court in *Sheehan* approached its task with notable caution. The Oregon Supreme Court emphasized that the Legislature was entitled to deference, which it construed as requiring challengers to prove that “no reasonable Legislature” would have adopted the redistricting plan that it did.<sup>99</sup> There was no mention of a counter-vailing need to enforce legal constraints on the redistricting process

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97. *Harkenrider v. Hochul*, 197 N.E.3d 437, 445 (N.Y. 2022).

98. *Adams v. DeWine*, 195 N.E.3d 74, 81 (Ohio 2022).

99. *Sheehan v. Oregon Legislative Assembly*, 499 P.3d 1267, 1270 (Or. 2021).

or of limitations on the presumption of good faith accorded the Legislature's redistricting choices—it would be deference all the way down. So framed, the Court's resulting review was quick and took up only a few paragraphs of analysis. Perhaps that is all the Oregon Republicans' "superficial" arguments deserved,<sup>100</sup> but the contrast with the New York and Ohio courts is still striking. In Part V, we discuss some of the reasons why the Oregon Supreme Court's review was so deferential and what voters in Oregon and other states that share a similar legal framework could do to change it if they want their state's courts to police against partisan gerrymandering, but, for present purposes, it is sufficient to emphasize that deference is the antithesis of scrutiny. As such, the availability of judicial review is no panacea if the resulting review is perfunctory.

#### IV. *CLARNO V. FAGAN*: THE CHALLENGE TO THE CONGRESSIONAL PLAN

If *Sheehan* was an example of deference-fueled judicial minimalism, *Clarno* was an exercise of somewhat confusing scrutiny. Unlike legal challenges to state legislative redistricting plans, which can be heard on direct review by the Oregon Supreme Court, challenges to congressional redistricting plans must begin in a state circuit court in Oregon. Under a new statute enacted in 2013, such challenges must be heard by a special five-judge panel composed of one judge drawn from each of the state's congressional districts.<sup>101</sup> The geographic dispersion requirement was intended to prevent forum shopping by litigants and a repeat of the 2001 redistricting cycle, when Democratic voters rushed to the Multnomah circuit court in Democratic-heavy Portland in order to ensure that it, rather than a circuit court in a more Republican friendly county, drew the congressional plan.<sup>102</sup>

As noted above, shortly after the 2021 Legislature adopted the congressional redistricting plan in September 2021, a group of Republican voters, including a former Secretary of State, invoked the new statute and filed suit challenging the congressional plan as a partisan gerrymander. The required five-judge Special Judicial Panel (SJP) was promptly named by the Oregon Supreme Court Chief Justice,<sup>103</sup> along with a Special Master, who held an evidentiary hearing and proposed findings of fact for the five-judge SJP.

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100. *Id.* at 1272.

101. OR. REV. STAT. § 188.125(2)(a), (6) (2021).

102. WILLIAMS, *supra* note 31, monograph at ch.7.

103. Order Appointing Special Judicial Panel to Decide Petitions Filed Under Oregon Laws 2021, Chapter 419, *Clarno v. Fagan*, No. 21CV40180 (Or. Cir. Ct. Nov. 24, 2021) [<https://perma.cc/3A93-X33C>] (available at <https://cdm17027.contentdm.oclc.org/digital/collection/>

Early in the litigation, the Presiding Judge of the SJP made what would become an important decision regarding what evidence could be introduced to establish the existence of a partisan gerrymander. Soon after the suit was filed, the Republican petitioners sought subpoenas to depose several legislators and obtain documents and details of legislative communications regarding the congressional redistricting plan.<sup>104</sup> The Presiding Judge, however, quashed the subpoenas, ruling that legislators could not be deposed regarding their legislative duties due to the legislative privilege granted legislators under the Oregon Constitution's legislative debate clause.<sup>105</sup> That privilege, the Presiding Judge ruled, also extended to any conversations that a legislator may have had with private individuals regarding legislative matters.<sup>106</sup> As a result, the Republican petitioners would not be able to depose and cross-examine legislative leaders regarding their understanding of or their motivations in enacting the redistricting plan. Moreover, several weeks later at the evidentiary hearing conducted by the Special Master, the Republicans sought to introduce the *voluntary* testimony of a Republican legislator regarding what he had been told by other legislators regarding the considerations shaping the redistricting plan.<sup>107</sup> Following the expansive interpretation of the legislative privilege clause adopted by the Presiding Judge, the Special Master refused to admit even that voluntarily-offered testimony.<sup>108</sup> The Special Master reasoned that allowing the Republican legislator to testify what Democratic legislators had told him would require those other legislators to waive their legislative privilege to rebut the testimony, which, so the Special Master concluded, would be inconsistent with the legislative privilege in the first place.<sup>109</sup> In short, with

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p17027coll10/id/921/rec/1 [https://perma.cc/HN7Q-8WPC]). The Hon. Mary James was appointed the presiding officer of the five-judge special judicial panel. *Id.* The other judges were Hon. Paula Brownhill, Hon. William Cramer, Hon. Kathrine Tennyson, and Hon. Richard Barron. *Id.*

104. Special Master's Recommended Findings of Fact and Report, at 6, *Clarno v. Fagan*, No. 21CV40180 (Or. Cir. Ct. Nov. 24, 2021) [hereinafter Special Master's Report].

105. Order on Legislative Assembly's Motion to Quash; Protective Order, at 2, *Clarno v. Fagan*, No. 21CV40180 (Or. Cir. Ct. Nov. 24, 2021) (first citing OR. CONST. art. IV, § 9; and then citing *Oregon v. Babson*, 326 P.3d 559 (Or. 2014)). In *Babson*, the Oregon Supreme Court held that the Debate Clause shielded legislators from being questioned about communications associated with the performance of legislative functions, such as the enactment of legislation. *Oregon v. Babson*, 326 P.3d 559, 582 (Or. 2014).

106. Order on Legislative Assembly's Motion to Quash; Protective Order, *supra* note 105, at 2.

107. Special Master's Report, *supra* note 104, at 5–12.

108. *Id.* at 11–12.

109. *Id.* at 5–12. The Oregon Supreme Court's *Babson* ruling only held that legislators could not be *compelled* by judicial process to answer questions about their communications related to their legislative duties. Whether the Debate Clause should be read to ban voluntary testimony was not decided by the Supreme Court. *Cf.* *United States v. McDade*, 28 F.3d 283, 294 (3d Cir. 1994) (“The

testimony from legislators barred, any illicit partisan motive would have to be established by some other means or evidence.

With no direct evidence of partisan purpose admissible, the Republicans turned instead to attempting to prove that the plan on its face was a partisan gerrymander. To support that claim, they offered as evidence the testimony of a political scientist, Dr. Thomas Brunell, who concluded that, based on several statistical measurements of partisan bias, the 2021 congressional districting plan significantly favored the Democrats.<sup>110</sup> In response, the Democrats offered the testimony of three other political scientists, each of who defended the plan as having only a tiny bias in favor of the Democrats as judged under various statistical metrics.<sup>111</sup> The evidentiary hearing thus became akin to a political science department faculty colloquium, with each side's experts invoking different statistical measurements and data to justify polar opposite conclusions regarding the propriety of the Oregon congressional map. Following the hearing, the Special Master rejected the Republicans' claim that the plan was a Democratic gerrymander, concluding that Dr. Brunell's methodological approach was not sound and that, while the congressional plan had a small bias in favor of the Democrats, that bias was too small to amount to a forbidden gerrymander.<sup>112</sup>

Two days after the Oregon Supreme Court released its decision in *Sheehan*, the five-judge SJP issued its decision upholding the congressional redistricting plan. The SJP adopted the Special Master's recommended findings of fact and concluded that the Legislature had not drawn the districts in violation of Oregon's ban on partisan gerrymandering.<sup>113</sup> Dutifully, the SJP noted that Legislature was due some deference—that its redistricting plan “is entitled to be respected if possible” and that a court was not entitled to substitute its judgment about the wisdom of the plan.<sup>114</sup> As the SJP's ensuing analysis would lay out, however, the SJP's conception of the deference due the Legislature was far different from that of the Supreme Court in *Sheehan*. The SJP would not undertake its own open-ended, *sua sponte* review of the partisan fairness of the plan, but neither by the same token would it confine its review solely to the specific arguments made by the challengers. Rather, it sought to answer the ultimate question: was the 2021 congressional redistricting plan a partisan

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[Speech and Debate] Clause protects a member of Congress from being ‘questioned,’ and a member is not ‘questioned’ when he or she chooses to offer rebuttal evidence of legislative acts.”).

110. Declaration of Professor Thomas L. Brunell in Support of Petition, at 2, *Clarno v. Fagan*, No. 21CV40180 (Or. Cir. Ct. Nov. 24, 2021).

111. Special Master's Report, *supra* note 104, at 78–89.

112. *Id.* at 85, 89–91.

113. *Clarno v. Fagan*, No. 21CV40180, slip op. at 2 (Or. Cir. Ct. Nov. 24, 2021).

114. *Id.* at 3.

gerrymander? And, while its analysis on that point was not as clear as one could hope, at least it viewed its task as answering that question.

At first, much like the *Sheehan* Court, the SJP turned to the various arguments and evidence proffered by the Republicans, explaining why each of them failed to prove the existence of an impermissible partisan purpose. For instance, the Republicans had put particular emphasis on the fact that the Legislature had adopted the plan on a party-line vote, but the SJP was not prepared to infer anything about the Legislature's motivations simply because the two parties disagreed. To attribute any significance to the party-line vote, the SJP explained, "would vest in the minority party absolute control of whether a plan will be presumed to unlawfully favor a political party. A minority party could simply vote against any plan along party lines, regardless of the merits of the plan, and thereby create a presumption of improper purpose."<sup>115</sup>

The Republicans had also pointed to the fact that the heavily-Democratic city of Portland was split among four of the congressional districts, which, so the argument went, showed an effort to make the three suburban districts surrounding Portland more Democratic-leaning as a result. As the SJP noted, however, portions of Portland had been included in three of the districts since 1991, making the 2021 plan's division of Portland among multiple districts hardly probative of an illicit partisan purpose.<sup>116</sup> Moreover, as the SJP also noted, two of the four districts in the new plan contained very few voters from Portland. "While over two-thirds of the population (67%) reside in District 3 and nearly one quarter (24%) resides in District 1," the SJP observed, "the other two districts include only 8.2% of Portland, and .5%, respectively."<sup>117</sup> Such "small and diminutive shares of Portland voters," the SJP continued, were unlikely to "make a difference in elections."<sup>118</sup>

Nor was the SJP troubled by the fact that the mid-Willamette-Valley Fifth District crossed the Cascade mountain range and included the city of Bend in central Oregon in it. As the SJP pointed out, prior congressional redistricting plans had similarly crossed the mountain range and included territory and voters on both sides of the range.<sup>119</sup> The SJP could have added that the Cascade Divide, upon which the Republicans were relying, had not existed since the

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115. *Id.* at 8. *But see* *Harkenrider v. Hochul*, 197 N.E.3d 437, 453 (N.Y. 2022) (holding that party-line vote was evidence of partisan purpose).

116. *Clarno*, No. 21CV40180, slip op. at 8.

117. *Id.* at 9. Multnomah county itself was split only among three of the districts, but because the City of Portland and Multnomah County boundaries are not coterminous—there are a couple of Portland neighborhoods located in Washington county—the Sixth District included those handful of Washington-county-located Portland homes.

118. *Id.*

119. *Id.*

1941 redistricting plan—the 1965 plan (and every plan since) had created congressional districts that crossed the Cascade mountain range.<sup>120</sup> In fairness to the Republicans, including Bend in the Fifth District thereby required the eastern Oregon Second District to include more territory and voters in southwestern Oregon—i.e., with three districts now crossing the mountains, the 2021 plan gave less emphasis to the Cascade range than had prior plans—but the Republicans never came to grips with the fact that, with Oregon now possessing six congressional seats as a result of congressional reapportionment in 2021, it was inevitable that geographic features that had been important and easily followed when the state had only three or four districts early in the 20th century would become less prominent in the 21st century, when the state had six districts.

Last, the SJP turned its attention to whether the redistricting plan unduly favored the Democrats in effect. This argument squarely presented the questions left unanswered by the Oregon Supreme Court in *Hartung* and *Sheehan* regarding how to measure the partisan effect of a plan and at what point any bias in favor of one of the parties became so great as to constitute an impermissible gerrymander. As such, the SJP found itself in an unenviable position. The various political scientists retained as expert witnesses in the case disputed amongst themselves what was the appropriate measure of partisan bias, and the Oregon Supreme Court had given no guidance regarding which, if any, measure of such bias was the correct one to use. The SJP would have to make its own selection among the proffered metrics and without the benefit of much time to do so.

As we shall see, the panel’s discussion of the statistical measures of partisan bias was somewhat confusing. At the outset of its discussion of partisan bias, the SJP expressly credited and rested its ruling on the testimony of one of the Democrats’ expert witness, political scientist Dr. Paul Gronke, who had relied on four different measures of partisan bias: the efficiency gap, declination, partisan symmetry, and mean-median ratio.<sup>121</sup> Each are statistical measurements of the level of bias in favor of one of the parties in a redistricting plan, and, because of their centrality to the SJP’s ruling, it is important to take a moment to explain each of them, especially the efficiency gap, which played a central role in the SJP’s ruling.

The efficiency gap is a measure of the extent to which a plan either packs a particular party’s voters into some districts in which they are a super-majority or cracks them among multiple districts in which they are a minority so as to

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120. See WILLIAMS, *supra* note 31, monograph at ch. 7.

121. Declaration of Paul Gronke, at 5, *Clarno v. Fagan*, No. 21CV40180 (Or. Cir. Ct. Nov. 24, 2021).



minimize that party's number of seats in the legislature.<sup>122</sup> The key inquiry under this metric is how many wasted votes are cast by each party's voters. Wasted votes are defined as any votes cast for the losing candidate (a measure of cracking) *plus* any votes cast for the winning candidate in excess of the bare majority needed to win (a measure of packing).<sup>123</sup>

To illustrate, let's take a simple example involving a hypothetical state with 1,000 voters (600 Democrats and 400 Republicans) and ten congressional districts. Suppose the congressional districts are drawn in such a manner as to divide the Democrats and Republicans evenly among the ten districts (i.e., 60 Democrats and 40 Republicans in each district). This seems pretty biased against the Republicans—if the people all vote in a party-line manner, all ten congressional seats will be won by the Democrats—but the efficiency gap allows us to measure in an objective manner the scale of the bias in this hypothetical plan rather than just rely on intuition about its partisan fairness. In this scenario, all 400 Republican votes will be wasted (because they are all cast for the losing candidate in each district), but the Democrats have wasted votes too—they only need 51 votes to win in each district, so 9 Democratic votes in each district are wasted. Statewide, therefore, Democrats have 90 wasted votes (9 from each of the 10 districts). Thus, Republicans cast 310 more wasted votes than Democrats, which, in a contest with 1,000 total votes cast, translates into an efficiency gap of 31%—i.e., the efficiency gap is the difference in wasted votes cast for each party's candidates divided by the total number of votes cast statewide.

That efficiency gap can then be translated into how many seats the favored party received because of the systemic packing and cracking of the other party's voters. To do so, the efficiency gap is multiplied by the number of seats up for election, which in this hypothetical results in an efficiency gap of 3.1 seats, meaning that Democrats won 3.1 more seats than they would have received if there was no efficiency gap. For congressional redistricting, the two academic authors of the efficiency gap suggest that it is only when a plan favors one party by two or more seats that the efficiency gap is presumptively indicative of a gerrymander, which then imposes on the state the burden of proving that its redistricting plan was actually driven by non-political considerations rather than a desire for partisan gain for the favored party.<sup>124</sup> Thus, confirming our

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122. Stephanopoulos & McGhee, *supra* note 52, at 850–51.

123. *Id.* at 851.

124. *Id.* at 886 n.193, 887–88. For state legislative races, however, they suggest a percentage-based threshold of 8%. Notice that, for Stephanopoulos and McGhee, exceeding that threshold makes the redistricting plan only presumptively a gerrymander, not conclusively so. When the efficiency gap exceeds that threshold, the burden switches to the state to defend its plan as based on non-partisan considerations.

intuition, this hypothetical redistricting plan in which Republicans fail to be able to win any of the ten congressional seats in a state in which they constitute 40% of the electorate is presumptively a gerrymander, and, employing that presumption, the burden would then shift to the state to prove that non-political redistricting considerations rather than partisanship accounted for the district boundaries being drawn the way they were.

Another important metric used by Dr. Gronke was the partisan symmetry of the plan. Here, the key inquiry is what number of seats each party would receive if they equally split the vote statewide.<sup>125</sup> For instance, let's take our hypothetical state of 1,000 voters again, but now suppose that 100 of those Democrats cast their ballot for a Republican candidate—i.e., the Republicans and Democrats split their vote 50/50 statewide, 500 for each. Suppose further that, given how the districts were drawn, Democrats will win six of the ten congressional districts, with Republicans winning only four seats. In that case, the plan is asymmetrical since Democrats win two more seats than Republicans win despite the fact that each party received the same number of votes statewide. The more seats one party wins in an evenly-divided election versus the other party, the more likely a gerrymander is at play. A perfectly politically neutral plan would have each party in an evenly-divided election winning 50% of the seats.<sup>126</sup>

This same analysis can be performed more systematically for all possible election outcomes, not just evenly-divided elections. For every possible election voter split—i.e., 50/50, 51/49, 52/48, etc., etc.—political scientists can estimate how many seats each party would win with a given share of the statewide vote, thereby producing a seats-votes curve. If there is a significant difference between those curves for each party, that would be evidence of a bias in the plan. For instance, if Democrats would win 8 seats with 55% of the vote but Republicans would only win 5 seats if they received 55% of the vote, that would show that the plan is biased in favor of the Democrats.

Last but not least are the mean-median and declination ratios, both of which, like the efficiency gap, measure the extent to which voters of one party are more systemically packed into or cracked among districts. The mean-median ratio compares a party's mean (average) vote share in all districts to its median vote share (i.e., its share of the vote in the median district), with a large ratio indicating a gerrymander (i.e., a plan with no partisan bias should have a

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125. Declaration of Paul Gronke, *supra* note 121, at 5.

126. Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering after LULAC v. Perry*, 6 ELECTION L. J. 1, 24 (2007).

0% difference between the mean and median vote shares).<sup>127</sup> Declination, in turn, compares a party's mean vote share in districts it won with the other party's mean vote share in districts it won.<sup>128</sup> The greater the difference, which can be precisely measured on a graph plotting the outcome of each district race based on the vote share of the party in ascending order, the more likely a gerrymander exists.<sup>129</sup>

In endorsing Dr. Gronke's analysis, the SJP thereby implicitly endorsed these four metrics of partisan bias, upon which Dr. Gronke had relied. At the same time, the SJP also implicitly rejected the utility of a proportional representation analysis. The Republicans' expert witness, Dr. Thomas Brunell, used both a proportional representation and efficiency gap analysis to conclude that the 2021 congressional redistricting plan was a gerrymander.<sup>130</sup> For the proportionality analysis, Dr. Brunell looked at the Presidential election results in Oregon in 2012, 2016, and 2020, from which he then projected how many of the congressional seats under the 2021 plan each party would win.<sup>131</sup> Dr. Brunell calculated that, while Democrats won between 56%–58% of the statewide vote in those three Presidential contests, they would win five of the six congressional seats if the voters who voted Democratic in each of those Presidential contests also voted Democratic in the congressional races under the 2021 plan.<sup>132</sup> Democrats, Dr. Brunell concluded, would therefore hold 25%–27% more political power in the state's congressional delegation than their statewide vote total—i.e., Democrats would likely win 83% of the seats with only 56%–58% of the statewide vote, a difference of 25%–27%.<sup>133</sup>

As a matter of federal constitutional law, the U.S. Supreme Court has expressly rejected proportionality analysis. As Chief Justice John Roberts explained in *Rucho*, “[o]ur cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be.”<sup>134</sup> As Chief Justice Roberts recounted, many states in the late

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127. Michael D. McDonald & Robin E. Best, *Unfair Partisan Gerrymanders in Politics and Law: A Diagnostic Applied to Six Cases*, 14 ELECTION L. J. 312, 312–17 (2015).

128. Gregory S. Warrington, *Quantifying Gerrymandering Using the Vote Distribution*, 17 ELECTION L. J. 39, 40–41 (2018).

129. *Id.*

130. Declaration of Professor Thomas L. Brunell in Support of Petition, *supra* note 110, at 2–3, 3 Exh. 1006.

131. *Id.* at 3.

132. *Id.*

133. *Id.*

134. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2499 (2019).

eighteenth and early nineteenth century used at-large voting systems that often prevented any member of the minority party from being elected to their state's congressional delegation.<sup>135</sup> This early history, in the Chief Justice's view, negated the notion that the U.S. Constitution itself required states to use election systems that produced proportional representation for the parties.

*Rucho*, though, only speaks to what the U.S. Constitution requires—states could decide to require a degree of proportionality in their redistricting plans. Ohio, for instance, expressly makes proportionality a requirement for its state legislative redistricting plans (but not for its congressional redistricting plans).<sup>136</sup> Unlike Ohio, however, nothing in Oregon's constitution or redistricting statute expressly makes proportionality a requirement for redistricting plans in the state,<sup>137</sup> and the Special Master in *Clarno*, whose findings the SJP adopted, was not prepared to read one into the state constitution or redistricting statute. As the Special Master noted, proportional representation is a poor measure of a plan's fairness when there are only a small handful of seats at issue, such as Oregon's six-member congressional delegation.<sup>138</sup> A small number of seats can magnify the resulting calculation in a manner that negates its utility; in a state with only six congressional districts like Oregon, a win in each congressional district translates into a shift of 16% in seats won—i.e., winning four seats equals 66.6% of the total seats available but winning five seats equals 83%. With each step in the proportionality analysis moving in 16% increments, a change in the result in just one seat can radically alter the optics of the resulting calculation in a misleading fashion. Moreover, as Chief Justice Roberts had noted as well, proportionality does not take into account competitive districts.<sup>139</sup> If one or more of the seats are competitive (as was true for the 2021 Oregon plan), Republicans might do far better than predicted, thereby reducing or even eliminating any disparity between their statewide vote total and seats won. For that reason, the Special Master rejected the probative force of Dr. Brunell's proportionality calculation.

In short, by crediting Dr. Gronke's analysis and rejecting Dr. Brunell's, the SJP tacitly endorsed the use of the efficiency gap, partisan symmetry, mean-median ratio, and declination—but not proportional representation—as appropriate measures of the level of partisan bias in a redistricting plan. That

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135. *Id.*

136. OHIO CONST. art. XI, § 6(B).

137. *See* OR. CONST. art. IV, § 7.

138. Special Master's Report, *supra* note 104, at 79, 90. In that respect, it is notable that Ohio requires proportionality for its 99-member House of Representatives and its 33-member Senate but not for its smaller, 16-member congressional delegation. OHIO CONST. art. XI, § 6.

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

still left the question of what to do with these metrics. There is no such thing as a perfectly neutral redistricting plan—every plan will have some level of bias in it. The critical question, then, is: where is the line between permissible bias and impermissible gerrymander? At what point, for instance, is the partisan asymmetry of a plan so great as to indicate a gerrymander? Notably, the academic authors of the efficiency gap metric suggested such a threshold for the efficiency gap metric—two congressional seats or, for state legislative plans, an 8% efficiency gap<sup>140</sup>—but none of the political scientists who testified in the evidentiary hearing proffered a bright-line rule for the other metrics, and, as one could expect, determining the threshold at which bias becomes gerrymander under a particular metric can be highly contentious. Contrary to the academic authors of the efficiency gap, who proposed an 8% threshold for state legislative plans, Missouri, which has incorporated the efficiency gap into its state constitution, uses a 15% threshold.<sup>141</sup> What's the right line and why?

Significantly, neither the SJP nor Dr. Gronke, upon whom the SJP relied, attempted to answer this question, at least not directly. Dr. Gronke calculated the 2021 plan's efficiency gap to be 8.5%, but he did not say that such an efficiency gap was numerically too low to indicate a gerrymander, nor did he specify at what level an efficiency gap becomes so great as to constitute a gerrymander.<sup>142</sup> Rather, Dr. Gronke compared the 2021 redistricting plan's efficiency gap and declination scores to those scores for past congressional plans adopted in the state going back to 1970.<sup>143</sup> The historical comparison was of significance according to Dr. Gronke because those past plans had been adopted either by courts or by divided governments (i.e., governments in which Republicans and Democrats each controlled one of the bodies involved in the redistricting process), which, in his view, negated the likelihood that they were partisan gerrymanders.<sup>144</sup> A court or divided government, in his view, would

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140. Stephanopoulos & McGhee, *supra* note 52, at 884.

141. MO. CONST. art. III, § 3(b)(5).

142. Declaration of Paul Gronke, *supra* note 121, at 11. The predicted 8.5% efficiency gap translates into .51 seats in a six-member congressional delegation, which is well short of the two-seat threshold that Stephanopoulos and McGhee consider indicative of a gerrymander for congressional plans. Stephanopoulos & McGhee, *supra* note 52, at 884.

143. Declaration of Paul Gronke, *supra* note 121, at 11–12. Dr. Gronke did not compare the 2021 plan's partisan symmetry and mean-median ratio to past plans because, as he explained, the few number of congressional seats in Oregon made those metrics less reliable. *Id.* at 8 n.3.

144. *Id.* at 8–9. In his Declaration, Prof. Gronke contended that the 1971 congressional redistricting plan was adopted by a court. *Id.* tbl. 1 at 10. That was not true. The 1971 Legislature failed to adopt a state legislative map that year, requiring the Secretary of State to do so, but it succeeded in passing a congressional plan. See WILLIAMS, *supra* note 31, monograph at chs. 5, 7. Nevertheless, since the 1971 Legislature was divided—Democrats controlled the Senate, while Republicans

never intend to favor the Democrats, and so any bias in those plans was the unintended byproduct of the unique features of Oregon's political geography.<sup>145</sup> If the 2021 plan had less bias in it than those other plans, then it could not be a gerrymander in his view. And that is exactly what Dr. Gronke said he found: while the 2021 plan had a small bias in favor of the Democrats as revealed by the efficiency gap and declination, that bias was well within the bounds of past plans, several of which had favored Democrats to a greater degree.<sup>146</sup>

This historical comparison, however, was of debatable utility. No court had adjudicated any of the past congressional redistricting plans as *not* constituting a gerrymander, so their utility as a baseline for judging the partisan fairness of the 2021 depended entirely on the assumption that a divided government or court would not adopt an unduly partisan plan. That assumption, though, was too facile and overlooked significant features of several of the past redistricting cycles. For instance, the court-adopted plans in 1991 and 2001 had not been drawn by the judges themselves; rather, the judges simply selected among the party-drafted plans considered by the Legislature those years.<sup>147</sup> The court-adopted 2001 plan, for instance, had been drafted by the Democrats in the Legislature and had been favored by the Democratic party, which surely undermined any notion that it was a politically neutral plan. To be sure, the courts in those years had been pushed into a corner by the parties, each of which just asked for the court to select its own preferred plan, but, while that exonerated the courts of any charge of pro-Democratic partisan bias themselves, that didn't mean that the adopted plan was politically neutral. And, while it was true that the 2011 plan was adopted on a bipartisan vote of both parties in the divided Legislature, it was also true that it made few changes to the existing plan from 2001.<sup>148</sup> As such, Republican support for the 2011 plan didn't prove that it was a politically neutral plan; rather, the Republicans supported the bill because it moderated the severity of the pro-Democratic bias of the 2001 plan.<sup>149</sup> The point here is not that the 1991, 2001, and 2011 plans

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controlled the House—Prof. Gronke's use of the 1971 plan for comparison is still consistent with his underlying assumption that a partisan gerrymander is unlikely to take place when the plan is adopted by a politically-divided Legislature.

145. *Clarno v. Fagan*, No. 21CV40180, slip op. at 10 (Or. Cir. Ct. Nov. 24, 2021).

146. Declaration of Paul Gronke, *supra* note 121, at 11–14.

147. See WILLIAMS, *supra* note 31, monograph at ch. 7.

148. *Id.*, monograph at ch. 6.

149. Dr. Gronke's own analysis supports this narrative, as it showed that the 2011 plan reduced the pro-Democratic bias of the preceding plan—the efficiency gap in the 2010 election was the highest in favor of the Democrats in any election, but the 2011 plan significantly reduced it, as illustrated by the 2012 election. See Declaration of Paul Gronke, *supra* note 121, fig. 1 at 12. The 2011 plan still

were in fact illegal gerrymanders, but rather that, contrary to the assumption undergirding Dr. Gronke's historical analysis, the manner in which they were adopted did not establish that they were politically neutral plans—i.e., that the political geography of Oregon necessarily and inevitably produces some pro-Democratic bias.

Moreover, the historical comparison was far from unequivocal even on its own terms. Comparing the efficiency gap in the first election under each redistricting plan to the predicted efficiency gap in the first election under the 2021 plan,<sup>150</sup> Dr. Gronke's own analysis showed that the 2021 plan had a greater predicted Democratic bias than did either the 1971 or 1981 plans initially did.<sup>151</sup> Again, that didn't mean that the 2021 plan was a gerrymander, but it surely cut against the Dr. Gronke's conclusion that the 2021 was not one. On the other hand, the 2021 plan was slightly less biased than the court-adopted 1991 plan, which was a bipartisan, compromise plan negotiated by a special legislative committee that year and which had been favored more by the Republicans than Democrats, the latter of who had ultimately blocked its adoption by the Legislature.<sup>152</sup> The comparison to the 1991 plan, therefore, provided perhaps the best evidence of the 2021 plan's partisan fairness since the 1991 plan's pro-Democratic bias had clearly been unintentional. But, even so, the historical comparison was a mixed bag: the 2021 plan was better than the 1991 plan but worse than the 1971 and 1981 plans. So which comparison was more probative then? Neither the SJP nor Dr. Gronke attempted to say, which made their resort to the historical comparison all the more unsatisfactory.

For the partisan symmetry and mean-median ratio, Dr. Gronke did not perform a historical analysis because the small number of congressional seats in Oregon made those measures, in Dr. Gronke's view, statistically "volatile and less reliable."<sup>153</sup> Having eschewed a historical comparison of those scores,

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produced a significant efficiency gap in favor of the Democrats, thereby explaining Democratic support for the bill, but the reduction in the plan's pro-Democratic bias was sufficiently large to induce Republicans to support the 2011 plan as an improvement over the 2001 plan it was replacing.

150. Dr. Gronke's assessed the efficiency gap in each of the five elections governed by each plan during the decade it was in effect. *See Id.* fig. 1 at 12. Dr. Gronke, however, never explained why the efficiency gap in the later elections in each decade should be considered in the analysis. One might think that it is the first election after a new plan is enacted that is the best evidence of the redistricters' motivations, since whatever partisan bias exists in the plan in later elections could easily be fortuitous (i.e., the product of population migration and changes in the electorate's partisan affiliation over time). The first-election-to-first-election comparison also preserves the apples-to-apples nature of the comparison to the 2021 plan, for which the only predicted efficiency gap was to a hypothetical first election, not to all future elections in the 2020s.

151. *See id.* fig. 1 at 12.

152. WILLIAMS, *supra* note 31, monograph at ch. 8.

153. Declaration of Paul Gronke, *supra* note 121, at 8 n.3.

though, Dr. Gronke did not specify at what point partisan asymmetry or a mean-median ratio becomes so great as to be a gerrymander. Rather, as he noted, the 2021 plan actually had a slight *pro-Republican* bias as measured by those standards.<sup>154</sup> The pro-Republican bias obviated the need for Dr. Gronke to identify the relevant gerrymandering threshold—the pro-Republican bias was sufficient to undermine the Republicans’ claim that the 2021 plan was a Democratic gerrymander—but Dr. Gronke’s silence on the matter left for a future day or lawsuit exactly where those metrics point to the existence of an illegal gerrymander.

Relying on Dr. Gronke’s four-metric analysis, then, the SJP concluded that the small bias in favor of Democrats “is likely attributable to Oregon’s unique political geography” and “is not the result of partisan machinations, since this same bias can be measured in maps enacted by the judiciary and bipartisan majorities of the Legislative Assembly—which are unlikely to enact congressional plans for political advantage.”<sup>155</sup> The 2021 congressional redistricting plan did not, in the SJP’s view, have an impermissibly large partisan bias.

The SJP then turned its attention to the Republicans’ proffered alternative rule—that any plan with an efficiency gap of greater than 7% is per se indicative of an illegal gerrymander. Before diving into the SJP’s analysis of the Republicans’ alternative rule, it will be helpful to describe how political scientists perform the statistical analyses of new redistricting plans, because understanding that process will help us make sense of the SJP’s rejection of the Republicans’ proffered rule.

The difficulty confronting political scientists in performing the foregoing statistical examinations of the partisan fairness of a new redistricting plan is that, by definition, the electoral consequences of a new redistricting plan are impossible to know for certain—at the time courts are engaging in the judicial review of a newly adopted redistricting plan, there has been no election under the new plan, which will not go into effect until the next election. It won’t be until the 2022 election, for instance, that we will know whether, say, the new Sixth Congressional District is a safely Democratic, marginally Democratic, competitive, marginally Republican, or safely Republican seat (and, even then, the 2022 election may not be fully representative of the partisan valence of the

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154. *Id.* at 14–15; see also *Oregon Congressional Plan SB 881A*, PLANSCORE (Oct. 20, 2021), <https://planscore.campaignlegal.org/plan.html?20211021T003712.166583681Z> [<https://perma.cc/D8HW-3D9Y>].

155. *Clarno v. Fagan*, No. 21CV40180, slip op. at 10 (Or. Cir. Ct. Nov. 24, 2021) (emphasis omitted).



district, if, for example, Republicans turn out in much higher or lower numbers than usual).

In the absence of an actual election to illuminate the partisan valence of a particular district, political scientists have to predict how voters in the new district will vote. To do so, they rely on detailed election databases that compile the actual election results in past elections in the state. These databases contain election results at the precinct level for past elections—e.g., in the 2018 Oregon Governor’s election, there were 1,102 cast for the Democratic candidate and 490 votes cast for the Republican candidate in Precinct 310 in Marion County.<sup>156</sup> Such precinct-by-precinct, office-by-office, election-by-election data can provide the basis for estimating just how many Democratic and Republican votes are likely to be cast in each precinct in a future election. In fact, such databases can be more reliable than party voter registration numbers because these databases can illuminate how non-affiliated and minor party voters vote in races where there is only a Republican and Democrat on the ballot (the typical circumstance in congressional elections). These databases of past election results can therefore provide a basis for estimating just how many Republican and Democratic *votes* in a particular area are likely to be cast. Following passage of a new redistricting plan, then, the new plan’s district boundaries can then be analyzed in light of this past-election data to determine whether, say, Congressional District 1 as drawn in the new redistricting plan is likely to be won by the Republican or Democratic candidate—and, so on and so on for each district in the plan. Okay, so far, so good—let’s return to the SJP’s discussion of the Republicans’ proposed 7% efficiency gap rule.

Initially, the Republicans’ expert political scientist, Dr. Brunell, calculated the 2021 redistricting plan to have an efficiency gap of 19.85% in favor of the Democrats—a distressingly high figure.<sup>157</sup> Dr. Brunell’s calculation, though, used only the 2012, 2016, and 2020 Presidential elections to predict the likely election outcome in the six congressional districts.<sup>158</sup> At the evidentiary hearing before the Special Master, Dr. Brunell conceded that if other, past statewide elections, such as those for Governor and Secretary of State and those in non-Presidential election years like 2014 and 2018, were included in estimating the likely vote distribution in the state, his efficiency gap calculation would change.<sup>159</sup> His exclusion of other past election results therefore made him look

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156. *2018 General Election Precinct Level Results by County*, OR. SEC’Y OF STATE <http://records.sos.state.or.us/ORSOSWebDrawer/RecordHtml/7132820> [https://perma.cc/FMQ4-W3K9] (last visited May 6, 2023).

157. Declaration of Professor Thomas L. Brunell in Support of Petition, *supra* note 110, at 3, 8 Exh. 1006.

158. *Id.*

159. *See* Special Master’s Report, *supra* note 104, at 91.

like he was cherry-picking the data to exacerbate the magnitude of the efficiency gap. When Brunell recalculated the efficiency gap by reference to all statewide races between 2012 and 2020, the efficiency gap dropped to only 7.76%—a figure even smaller than that found by the Democrats’ political scientist, Dr. Gronke.<sup>160</sup> That would translate into a seat bias of only 0.46 seats—not even a full congressional seat and well short of the two-seat threshold that the academic authors of the efficiency gap believe to be indicative of a gerrymander. The Republicans’ lawyers, though, cleverly proposed that any efficiency gap greater than 7% was per se indicative of a gerrymander—a proposed rule that conveniently matched what their expert had found the second time around.

The SJP was not persuaded, and it was especially troubled by the fact that Dr. Brunell’s calculation of the efficiency gap could vary so much depending on which past elections were used to estimate future voter behavior. Its analysis of the problem with Dr. Brunell’s testimony, though, was confusing. The SJP’s analysis and conclusion on this point is worth quoting in full:

Even if we were tempted to adopt the efficiency gap analysis as the basis for determining whether a map has an impermissible partisan effect, we cannot conclude from the record what the appropriate inputs ought to be. That is, must an efficiency gap analysis include all statewide races from the prior decade? Should only U.S. Congressional races be considered? Or only Governor’s races? Are some election results simply “outliers” that should be thrown out? Other shortcomings of relying on the efficiency gap analysis exist, particularly in a state with fewer than seven electoral districts. Respondent and Intervenor’s experts agreed. They demonstrated that the metric is easily manipulated, dependent on the types of past election results that measure vote distribution which go into the calculation of votes that do not contribute to an election win between the two parties.<sup>161</sup>

To be sure, Dr. Brunell initially appeared to be cherry-picking the data to magnify the size of the efficiency gap, but the SJP had just a few pages earlier in its opinion credited Dr. Gronke’s analysis, which expressly relied upon (and predominantly so) an efficiency gap analysis based on a similar prediction of future voting behavior under the new map. Adding to the confusion, the SJP then announced that the partisan symmetry metric, which played only a small

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160. Supplemental Declaration of Professor Thomas L. Brunell at 3, *Clarno v. Fagan*, No. 21CV40180 (Or. Cir. Ct. Oct. 28, 2021); Special Master’s Report, *supra* note 104, at 91.

161. *Clarno v. Fagan*, No. 21CV40180, slip op. at 12 (Or. Cir. Ct. Nov. 24, 2021) (citations omitted).

part in Dr. Gronke's analysis, was "the most commonly accepted standard in political science to judge the partisan fairness of voting districts."<sup>162</sup> And adding yet further confusion to the matter, the SJP then declared that it "should consider multiple metrics for measuring partisan effect rather than relying on one imprecise metric."<sup>163</sup> Wait, what? Which is it? Partisan symmetry or "multiple metrics?" And, if the latter, is the efficiency gap one of those metrics?

The SJP's analysis of the problem with Dr. Brunell's testimony was confusing and reflected a lack of understanding regarding how political scientists evaluate the partisan fairness of new redistricting plans. Every statistical metric—efficiency gap, partisan symmetry, declination, mean-median ratio—requires political scientists to forecast future election results under the new redistricting plan, and, as described above, those forecasts rely upon past election data. It is the 2021 congressional map whose political effect is under review, and to assess what is likely to happen in the future necessarily requires this process of estimation based on past election results. In fact, the partisan symmetry measure, which the SJP endorsed, actually requires an even more debatable (and therefore potentially manipulable) estimation process: after looking at past election outcomes, the partisan symmetry metric requires a political scientist to infer from that past election data the vote outcomes in the various congressional districts if Republicans and Democrats each received 50% of the vote statewide, which requires the political scientist to figure out how to adjust the actual vote outcomes in various areas of the state to reach that hypothetical 50/50 statewide election split. In other words, the partisan symmetry metric requires the projection of an election that has never happened and is in fact unlikely ever to happen in the future. To put the point more generally, if the SJP were really worried that political scientists could manipulate which past elections were included in their statistical analysis, that wouldn't just condemn the efficiency gap—it would condemn each and every statistical approach for assessing the partisan fairness of new redistricting plans that have yet to go into effect, which was clearly not the SJP's intent given its express endorsement of partisan symmetry and "multiple metrics."

To be sure, Dr. Brunell had selectively limited his initial past election analysis to just three Presidential elections rather than all statewide elections in the past decade, but that does not impugn the validity of the efficiency gap or any other metric in principle. Courts will necessarily have to assess whether a political scientist has included all of the pertinent elections in their database and therefore made a reliable estimation of future election results. As the evidentiary hearing in *Clarno* itself demonstrated, that task is not beyond the

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162. *Id.*

163. *Id.*

ability of the courts to perform.<sup>164</sup> If one expert only uses three Presidential elections while a different expert uses all of the past statewide election results in the past decade, the court can reasonably infer that, unless there is some explanation for why including some past election results would undermine the predictive power of the database, the latter is a more reliable predictor of future election results than the former. That’s what evidentiary hearings are for. Or, to put the point slightly differently, just because Dr. Brunell looked to be cherry-picking his data doesn’t mean that the efficiency gap in principle is untrustworthy or unreliable, nor does it mean that courts are incapable of sussing out such statistical manipulation. To the contrary, the Special Master in *Clarno* successfully did so.

So, then, what should we make of the SJP’s dismissal of the Republicans’ proffered 7% efficiency gap rule? I think the better reading of the SJP’s opinion is not that any statistical measure of partisan fairness based on past election results is unreliable—the SJP did, after all, credit Dr. Gronke’s statistical analysis, which heavily relied on an efficiency gap score for the 2021 plan as estimated based on past election results. Rather, later in its opinion, the SJP noted that “no other court has adopted this per se test.”<sup>165</sup> This is the better ground for rejecting the Republicans’ proffered 7% per se rule. The only state supreme court to embrace anything close to the Oregon Republicans’ proffered rule was the North Carolina Supreme Court, which in 2022 *after* the *Clarno* decision, endorsed a 7% standard as establishing a safe harbor—that any plan with less than a 7% efficiency gap is per se valid.<sup>166</sup> Notably, though, even the North Carolina Supreme Court did not endorse the converse of the safe harbor threshold and say that any plan with an efficiency gap of 7% or greater was presumptively a gerrymander, let alone per se one.<sup>167</sup> Likewise, the academic authors of the efficiency gap view their almost-as-low 8% threshold as evidence only of a presumptive gerrymander, not condemning the plan per se but only requiring states to rebut the inference that their redistricting plans were drawn so as to favor one of the parties.<sup>168</sup> In short, the Republicans’ 7% per se rule was both unprecedented and too crude a tool to deploy. That was the better ground for the SJP’s ruling and should have ended the matter.

In any event, having rejected the Republican’s 7% rule, the SJP then returned to the ultimate question whether the 2021 redistricting plan had an impermissible partisan effect that demonstrated a violation of ORS

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164. Special Master’s Report, *supra* note 104, at 91.

165. *Clarno*, No. 21CV40180, slip op. at 12.

166. Harper v. Hall, 868 S.E.2d 499, 548 (N.C. 2022).

167. *Id.* at 548–49.

168. Stephanopoulos & McGhee, *supra* note 52, at 891.

§ 188.010(2). The SJP's holding could not be more clear on that point: "The weight of the expert evidence indicates that the enacted reapportionment plan does not have an impermissible partisan effect. Using well established metrics, the enacted map is well within the range of partisan symmetry and fairness measures produced by historic maps of Oregon's congressional districts."<sup>169</sup> The congressional redistricting plan was valid.

The SJP's ruling in *Clarno* contrasts in several ways from the Supreme Court's decision in *Sheehan*. First and foremost, the SJP, perhaps because it was composed of trial judges, not appellate Justices, offered the litigants the opportunity to amass and present detailed evidence regarding the redistricting plan's partisan effect. Second, most of the SJP's opinion focused on whether the congressional plan had an unfair partisan bias. That focus on effect was inevitable once the SJP and Special Master ruled out examining individual legislators regarding the Legislature's purpose in adopting the redistricting plan, but it was still a significant improvement from *Sheehan*, which gave no indication as to how a partisan gerrymander could be proved. Third and perhaps most importantly, while the SJP gave dutiful lip service to the need to accord deference to the Legislature's plan (as commanded by Oregon Supreme Court precedent), its actual analysis did not have any of the hallmarks of such deference. Rather, the SJP sought to answer whether the redistricting plan had an impermissibly large partisan bias, and in answering that question, it did not resort to deference-driven bromides about respecting the Legislature's choices or faulting the challengers for not proving that no "reasonable" Legislature would have done the same. The SJP *scrutinized* the plan's partisan fairness and seemingly did so without placing any thumb on the scale in favor or against the plan's validity.

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169. *Clarno*, No. 21CV40180, slip op. at 12–13. In addition to their partisan gerrymandering claim under OR. REV. STAT. § 188.010(2), the Republicans also argued that the congressional redistricting plan violated several provisions of the Oregon Constitution, which, the Republicans argued, also forbade partisan gerrymanders. See Petition, *supra* note 26, at 12–15. Specifically, the Republicans pointed to Article I, Section 8 (freedom of expression); Article I, Section 20 (equal privileges and immunities); Article I, Section 26 (freedom of assembly); and, Article II, Section 1 (free and equal elections). See *id.* None of those provisions expressly ban gerrymandering, and the Oregon Supreme Court has yet to construe any of the cited constitutional provisions as banning partisan gerrymandering. The SJP was willing to assume that those provisions banned gerrymandering, but it viewed the constitutional ban as identical to the statutory ban, and, therefore, the constitutional challenges failed for the same reason that the statutory challenge did: "All parties agree that the test for either of these [constitutional] claims is a partisan purpose plus effects test. Having reached the conclusion that Petitioners have failed to meet their burden of proof as to partisan purpose or effect [under ORS § 188.010(2)], the SJP dismisses both of Petitioners' constitutional claims without further discussion." *Clarno*, No. 21CV40180, slip op. at 13.

At the same time, though, *Clarno*'s discussion left many unanswered questions. Which statistical measurements of partisan bias are valid? Were any of the metrics predominant and more probative than the others? And, for each statistical measure, what was the threshold at which permissible bias became impermissible gerrymandering? The SJP ruled out a per se 7% efficiency gap rule, but it gave no indication where the line was: 8%? 10%? 15%? Even if the SJP did not want to articulate a bright-line test and settle on a specific, numerical rule, it could have given some guidance regarding at what point a particular level of bias for each metric starts to become problematic. *Clarno* still left future Legislatures and voters uncertain as to the line between permissible partisan bias and impermissible partisan gerrymander.

Somewhat surprisingly, the Republicans chose not to appeal the SJP's ruling to the Oregon Supreme Court. The Republicans evidently believed any such appeal was futile. The Supreme Court's decision in *Sheehan*, which had been released just two days before the SJP's ruling, indicated that the Supreme Court was not all that interested in rigorously scrutinizing redistricting plans to ferret out improper partisan gerrymandering. The SJP's analysis had its weaknesses, but it was unlikely that the Oregon Supreme Court would reach the opposite conclusion and conclude that the congressional redistricting plan was in fact a partisan gerrymander. As such, the Republicans saw little reason to appeal. The 2021 redistricting cycle was finally at a close.

As with the state legislative plan, the 2022 elections confirmed the SJP's ruling that the plan was not a pro-Democratic gerrymander. Contrary to their expectations, Republicans won two of the six seats, including the redrawn Fifth District where Democratic voters had ousted their seven-term, moderate incumbent in the May primary election in favor of a progressive Democrat, who then went on to lose the general election in the semi-competitive district.<sup>170</sup> Even though Democrats won four of the six seats with only 54.31% of the statewide vote, the efficiency gap in the congressional races turned out to be just 6.06% in favor of the Democrats—a level of bias that was lower than what both the Republicans' and Democrats' political scientists had predicted and that was not problematic even under the Republicans' own proffered 7% rule. As with the State Legislature, Republicans would comprise a minority of the state's congressional delegation, but, under the new redistricting plan, they had succeeded in winning a second congressional district in the otherwise Democratic-leaning state for the first time since 1994.

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170. Gillian Flaccus, *GOP's Chavez-DeRemer Flips Oregon 5th Congressional District*, AP NEWS (Nov. 13, 2022), <https://apnews.com/article/2022-midterm-elections-oregon-portland-kurt-schrader-e4eae33bf92e466cd56ad25bce7f2e7c> [<https://perma.cc/6P5U-9ZWQ>].

## V. LESSONS FOR THE FUTURE

Both the Oregon Supreme Court in *Sheehan* and the SJP in *Clarno* reached the right result in upholding the state legislative and congressional redistricting plans, respectively, against partisan gerrymandering challenges. That said, the 2021 redistricting litigation illuminated several weaknesses in the current legal framework governing redistricting in Oregon—weaknesses that are shared by several other states. As the Oregon experience illustrated, for courts to perform the task of policing the redistricting process to prevent partisan gerrymandering and other redistricting abuses, there are several features of the legal framework governing redistricting that must be true—in the absence of these features, state courts, like those in Oregon in 2021, will struggle to assess the partisan fairness of a newly adopted redistricting plan. Most notably, courts must have sufficient time and data to assess the partisan fairness of a redistricting plan, and state law should ideally provide some minimal level of guidance regarding the line separating permissible partisanship from impermissible gerrymandering. The absence of these features plagued the Oregon courts' consideration of the partisan gerrymandering challenges to the 2021 redistricting plans. For states that hope for their judiciary to police the redistricting process, then, it is critical to ensure that the underlying legal framework governing redistricting and its judicial review by the state courts is up to the task.

*A. Extending the Timeline for Judicial Review*

In Oregon, due to hyper-accelerated deadlines imposed by state law, the Oregon Supreme Court and SJP's decision-making processes were incredibly rushed in *Sheehan* and *Clarno*, respectively. The Oregon Legislature adopted the two redistricting plans on September 27th.<sup>171</sup> Potential litigants then had less than a month to decide whether to challenge the new plans and assemble the factual predicates for their challenge.<sup>172</sup> In *Sheehan* (the challenge to the state legislative plan), the petitioners filed their challenge on October 25th, the last day challenges could be filed.<sup>173</sup> The State then had only until November 8<sup>th</sup> to file its response, and the Supreme Court itself issued its ruling, as required under state law, on November 22nd.<sup>174</sup> As required by state law, the entire

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171. *2021 Redistricting Process Complete*, OR. STATE LEGIS., <https://www.oregonlegislature.gov/redistricting> [<https://perma.cc/SZ6N-PV4T>].

172. *Kotek v. Fagan*, 484 P.3d 1058, 1067 (Or. 2021).

173. Petitioners' Opening Brief, *supra* note 29, at 2.

174. *See Sheehan v. Or. Legis. Assembly*, 499 P.3d 1267, 1269 n.1 (Or. 2021). Those accelerated timelines were not unique to the COVID-impacted 2021 redistricting cycle: In a normal year unaffected by COVID, any judicial challenge to a state legislative redistricting adopted by the Legislature must

litigation—from filing of initial challenge to Supreme Court ruling—had to take place in less than a month.<sup>175</sup>

The timeline for adjudication was only slightly less compressed in *Clarno*. The petition challenging the redistricting plan was filed on October 11th; the Special Master conducted the evidentiary hearing on October 27th and 28th; the Special Master filed his 92-page report and recommended findings of fact on November 5th; the SJP heard oral argument on the case on November 16th; and, the SJP issued its final ruling on November 24th.<sup>176</sup> The *Clarno* litigation, which included a two-day evidentiary hearing and two stages of adjudication (one before the Special Master and one before the SJP), took barely over six weeks from initial petition to final decision.

To get a sense of just how rushed the Oregon proceedings were, contrast them with those in several other states. In Ohio, the redistricting commission adopted a state legislative plan on September 16th; petitions challenging the plan were filed in less than two weeks with the Ohio Supreme Court; the parties were allowed to conduct discovery, submit evidence, and file briefs with the Court over the next few weeks; the Court conducted an oral argument on December 8th and, following supplemental briefing, the Court issued its decision on January 12th.<sup>177</sup> All told, the Ohio litigation consumed three and a half months. In New York, the Legislature adopted the redistricting plans on February 3rd; a challenge to the plans was filed that same day in the state trial court; the trial court allowed discovery, conducted a trial, and issued its decision at the end of March; the state's intermediate appellate court issued its decision

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be filed on or before August 1st—just one month after the Legislature's deadline of July 1st for adopting the plan—and the Supreme Court's initial judicial review of the plan completed by September 1st, the date by which it must decide if the plan is valid or not. OR. CONST. art. IV, § 6(2)(a)–(b). If the Court determines that the plan is not valid, it then has two more weeks to issue a decision invalidating the plan. OR. CONST. art. IV, § 6(2)(c).

175. *Kotek*, 484 P.3d at 1067.

176. *See Clarno v. Fagan*, AM. REDISTRICTING PROJECT (Nov. 24, 2021), <https://thearp.org/litigation/clarno-v-fagan/> [<https://perma.cc/7FM7-LBYK>]. Again, this rushed timeline for review of a congressional plan is not unique to the COVID-impacted 2021 redistricting cycle: In a normal year unaffected by COVID, by state statute, a petition for judicial review of a congressional plan must be filed by August 1st, and the SJP must decide whether to uphold a legislatively-adopted congressional plan by September 1st. OR. REV. STAT. § 188.125(2), (9)(a) (2021). Again, the statute gives the court additional time to issue its opinion if it is invalidating the Legislature's plan, but an order upholding the plan must be issued by September 1st, which then becomes the operative deadline for the court to decide whether it is upholding or invalidating the plan. There is then a hyper-accelerated process for appealing the circuit court's decision directly to the Oregon Supreme Court, which must complete its review by December 15th. OR. REV. STAT. § 188.125(12)(d), (13)(e).

177. *See generally* *League of Women Voters of Ohio v. Ohio Redistricting Comm'n.*, 192 N.E.3d 379 (Ohio 2022).



on April 21st; and the state's highest court—the Court of Appeals—issued its ruling on April 27th. The New York litigation consumed almost three months.

As one can imagine, these accelerated timelines can create real problems for the lawyers attempting to assemble the necessary factual and evidentiary predicate for challenging a redistricting plan as a partisan gerrymander. For instance, in some states, such as Florida (but not Oregon after *Clarno*),<sup>178</sup> litigants can prove an illicit partisan purpose by examining and cross-examining state legislators involved in crafting the redistricting plan.<sup>179</sup> Notably, though, conducting the necessary type of discovery and deposing the relevant legislators takes time. The same is true for voter registration data, which can be used to calculate the partisan valence of each district in the new redistricting plan (i.e., District 1 has this many Republicans, Democrats, and non-affiliated voters, etc., etc.). In Oregon, however, the voter registration data for the legislative districts created under the new plan is not made available to the public until the following March (i.e., March 2022)<sup>180</sup>—four months *after* judicial review must be completed in the state, and therefore well after the point at which such registration data could be used in the litigation.

As discussed above, political scientists have compiled very detailed computer databases of past election results from which they can predict likely future results under the new redistricting plan. As the *Clarno* litigation revealed, though, performing that type of analysis takes time and can typically be done only by expert political scientists, not ordinary voters. Moreover, some of the measures of partisan fairness—most notably, the partisan symmetry metric, which asks how many districts each party would win if the statewide vote were hypothetically split 50/50—require political scientists to take a further step and adjust the data in each precinct. For instance, the statewide vote in Oregon often produces a 58/42 split between Democrats and Republicans, so, to reach a hypothetical 50/50 split in the statewide vote as required by the partisan symmetry metric, the political scientists have to adjust the vote totals in each precinct to reduce the Democratic votes and increase the Republican votes to produce that hypothetical 50/50 election. That task can be done, but it involves a complex process of adjusting the vote totals in each precinct (i.e., it's not a

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178. See *supra* text accompanying notes 105–09.

179. *E.g.*, *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 371, 388 (Fla. 2015).

180. See *Election Statistics: Voter Registration by Month and Year*, OR. SEC'Y OF STATE, <https://sos.oregon.gov/elections/pages/electionsstatistics.aspx#march-2022> [<https://perma.cc/5TGR-H9NB>] (last visited May 6, 2023).

simple “just add 300 Republican votes to Precinct 1, delete 500 Democratic votes from Precinct 2, and we’re good” sort of thing).<sup>181</sup>

These accelerated timelines also impact the ability of the courts to consider the relevant evidence and legal arguments of counsel in reaching their decisions and then explaining their decisions to the public. One cannot help but suspect that some of the shortcomings in both the *Sheehan* and *Clarno* decisions were the product of the incredibly compressed time limits for the litigation. Had the SJP in *Clarno* had more time to evaluate the Special Master’s report and all the testimony in the record, for instance, perhaps it would not have displayed such confusion regarding what statistical metric to use and how political scientists estimate future election results.

The point is not that courts are incapable of assessing the partisan fairness of a redistricting plan unless they are given months to do so—courts will do the best they can given the circumstances—nor is the point that had the Oregon courts taken longer, they would have reached a different result and invalidated the redistricting plans—the two redistricting plans were not partisan gerrymanders. Rather, it is that hyper-accelerated decision-making limits the courts’ ability to assemble the requisite information that they need, give adequate consideration to what the evidence shows and the legal arguments entail, and draft opinions that clearly explain their ruling and give clear guidance for future legislatures and voters regarding what would make a redistricting plan invalid. In this respect, it is useful to remember that the U.S. Supreme Court’s decision in *Bush v. Gore*<sup>182</sup>—a decision that was issued just a few days after the Florida Supreme Court ordered a statewide recount—has been criticized as the byproduct of overly rushed decision-making.<sup>183</sup>

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181. Political scientists and legal scholars typically employ the “uniform partisan swing” assumption as part of this adjustment. *See, e.g.,* Nicholas O. Stephanopoulos, *Spatial Diversity*, 125 HARV. L. REV. 1903, 1963–64 (2020). In Oregon, for example, Democrats on average have won 58% of the statewide vote in contested, statewide races. Thus, to reach a hypothetical 50/50 election, Democrats would have to receive 8% fewer votes statewide and Republicans 8% more. Employing the uniform swing assumption, each precinct’s vote is adjusted to increase the Republican votes 8% and reduce the Democratic vote 8%. Thus, if Precinct 310 in Marion County’s average vote share for Democrats was 69.2%, *see supra* text accompanying note 156, that precinct’s Democratic vote share would be reduced to 61.2%, and so on for every precinct in the state. As others have noted, however, actual election results often show disparities among precincts—e.g., in an election where Republicans win 60% of the statewide vote versus their usual 58%, not every precinct would witness exactly a 2% increase in the Republican vote share. *See Grofman & King, supra* note 126, at 11. Thus, political scientists Grofman and King propose an alternative, “approximate uniform partisan swing” assumption instead. *Id.* at 12.

182. *See Bush v. Gore*, 531 U.S. 98, 100 (2001).

183. *See, e.g.,* CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 62–63 (2001).

So what can be done to ensure that courts have sufficient time to conduct a thorough and real analysis of the partisan fairness of a new redistricting plan? The answer is two-fold, involving both pre-election and post-election review.

i. Pre-election Review.

Several states, including Oregon, expressly authorize courts to review a new redistricting plan prior to it going into effect. Indeed, every state allows such pre-election review in the sense that any voter can ordinarily file suit to challenge a redistricting plan immediately after it's adopted. Hence, when we talk about pre-election review, what we really mean is whether the pre-election review must be *completed* prior to the election—i.e., is there a legally prescribed timeline requiring the court to complete its review before the new election season has begun under the new plan.

Take Oregon as an example. Since 1952, Oregon has expressly provided for pre-election review of redistricting plans and has required the Oregon Supreme Court to conclude its review of the plan in just a few weeks—under the current constitutional language by December 15th.<sup>184</sup> The obvious reason for imposing such a tight deadline is to ensure that an illegal redistricting plan does not go into effect—there will be no legislative election conducted under an illegal plan. To guarantee that such review is completed in time so as to ensure that there is a legally valid redistricting plan in place for the next legislative election, however, requires that the courts act in a very quick fashion. Just how quick is determined by other state-specific dates involving the legislative election calendar. For instance, the Oregon Constitution requires that potential candidates for legislative office be a resident of their district by January 1st of the year of the first election following redistricting (i.e., January 1, 2022),<sup>185</sup> and, because legislators (or their challengers) can find themselves in a different district in a new redistricting plan, the judicial review of the redistricting plan (and any correction thereto) must be completed in time to allow legislators or their challengers to relocate to a new district if they so want. It is this January 1st residency deadline that drives the need in Oregon for judicial review to be completed by December 15th, two weeks earlier. And, even if the January 1st residency deadline were relaxed somewhat, the primary election season begins no later than March, when candidates must file for office

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184. OR. CONST. art. IV, § 6(3).

185. OR. CONST. art. IV, § 8(1)(b). This residency requirement applies only to state legislators and does not apply to congressional candidates, who do not have to live in the district which they seek to represent. The U.S. Constitution requires only that U.S. Representatives be an inhabitant of the state from which they are elected. U.S. CONST. art. I, § 2, cl. 2. Moreover, states may not impose a district residency requirement. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 798–815 (1995) (rejecting argument that states may add qualifications for federal office).

in preparation for the May primary election.<sup>186</sup> Pre-election review cannot run into and through the summer given other election deadlines.

Federal courts conducting pre-election review are subject to a similarly constrained deadline. Under the so-called *Purcell* principle, the U.S. Supreme Court has banned federal courts from ordering changes to state election laws once the election season has begun.<sup>187</sup> As Justice Kavanaugh has explained it, *Purcell* stands for the principle that “federal district courts ordinarily should not enjoin state election laws in the period close to an election” because “[w]hen an election is close at hand, the rules of the road must be clear and settled.”<sup>188</sup>

For challenges to redistricting plans, that means that, if the federal court wants to complete its pre-election review of a redistricting plan and potentially order a new plan to be drafted if the original plan is invalid for some reason, the federal court litigation must be concluded *weeks* before the primary election season begins. In January 2022, in *Merrill v. Milligan*, a federal district court held that Alabama’s congressional redistricting plan violated the federal Voting Rights Act and ordered the state to draft a new plan. The U.S. Supreme Court, however, applied the *Purcell* principle and stayed the district court’s order, concluding that, since early voting in the primary election would begin at the end of March (i.e., *seven* weeks later), the district court’s order came too late—it left insufficient time for redrawing the congressional map in time for the 2022 congressional campaign season.<sup>189</sup> Notably, the Alabama primary was not to take place until late May, but the fact that early voting would begin in late March was sufficient for the U.S. Supreme Court to conclude that a federal court order issued in *late January* was too close to the beginning of the primary election season and that, therefore, the Legislature’s redistricting plan—a plan that the district court had ruled to be illegal under federal law—would be used for the 2022 elections at least.<sup>190</sup> Strictly speaking, *Purcell* only limits the

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186. OR. REV. STAT. § 249.037 (2021) (specifying filing deadline of seventy days prior to primary election); OR. REV. STAT. § 254.056(2) (2021) (setting date of primary election in mid-May).

187. *Purcell v. Gonzalez*, 549 U.S. 1, 5–6 (2006).

188. *Merrill v. Milligan*, 142 S. Ct. 879, 879–81 (2022) (concurring in grant of application for stays); *see also id.* at 888 (Kagan, J., dissenting from grant of application for stays) (reading *Purcell* as preventing federal courts from “changing election rules at the eleventh hour”).

189. *Id.* at 879–80 (Kavanaugh, J., concurring in the grant of applications for stays) (noting that primary election voting will begin on March 30th, which made district court’s January 24th order for a new plan to be drafted too late and close to election season).

190. There is a debate within the Court as to whether the *Purcell* principle or something analogous to it applies to state courts, at least with respect to federal elections like those for Congress. Chief Justice Roberts has read *Purcell* as limiting only the federal courts’ equitable powers. *Democratic Nat’l Comm. v. Wis. State Legis.*, 141 S. Ct. 28 (2020) (Roberts, C.J., concurring in denial of application to vacate stay). At least three other Justices, though, believe that the U.S. Constitution’s

authority of the federal courts to order the creation of a new redistricting plan too close to an election, but, since the whole point of pre-election review is to enable the court to invalidate a potentially illegal plan and order the creation of a new one, the *Purcell* principle operates as a hard (if vague) deadline for federal courts reviewing redistricting plans. A federal court that moves too slowly must leave the redistricting plan under review in place no matter how illegal it may be and may only order a new plan for the next election cycle two years away.

Given these limits, what can be done to give courts, federal or state, more time to conduct pre-election review of redistricting plans? The pre-election review process could be extended modestly in several states, but other election deadlines, some of which are constitutionally-specified, limit the amount of additional time that can be given to the courts to complete such pre-election review. For instance, Oregon's constitutionally-prescribed January 1st residency requirement would have to be pushed back or eliminated, as would its mid-March candidate filing deadline.<sup>191</sup> Yes, the mid-May Oregon primary date could likewise be pushed back,<sup>192</sup> but this illuminates the challenge confronting any state that wants to conduct its primary elections in May or June—such early primary seasons necessarily compress the time available for pre-election review. Stated more generally, there is an inevitable trade-off between the amount of time available for pre-election judicial review and the amount of time for the primary election, general election, or both campaign seasons. Extending the time for judicial review will necessarily compress the time available for the primary campaign, general campaign, or both; conversely, preserving or extending the campaign seasons will necessarily compress the time available for pre-election judicial review. It is a zero-sum game. At bare minimum, though, states should seek to give their courts as much

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delegation of authority over federal elections to state legislatures imposes some limit on state courts' ability to review state election laws governing the congressional and presidential election process, especially when they are doing so late in the election season. *Republican Party of Penn. v. Boockvar*, 141 S. Ct. 1 (2020) (Statement of Alito, J., joined by Thomas and Gorsuch, JJ.). This is the so-called "independent state legislature" doctrine, and it remains to be seen whether the Court will adopt it and, if so, whether the doctrine just limits when state courts can review state election laws (like *Purcell*) or, more expansively, whether it authorizes federal courts to review (and therefore second-guess) the merits of a state court's interpretation of its own state constitution in any case rendered at any time. *See Republican Party of Penn.*, 141 S. Ct. at 2 (Statement of Alito, J., joined by Thomas and Gorsuch, JJ.) (suggesting latter view in observing that, absent such federal court review of state court interpretation of state law, "a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election").

191. OR. CONST. art. IV, § 8; OR. REV. STAT. § 249.037(1) (2021).

192. OR. REV. STAT. § 254.056(2) (2021).

time as possible, including by moving other, unnecessarily early election deadlines back.

## ii. Post-election Review

The other solution to the problem of time-compressed judicial review is to eliminate the time compression entirely by providing for judicial review to continue through or take place after the first election under the new redistricting plan. Such post-election review takes place in other states,<sup>193</sup> and, while the obvious downside is that the disputed, maybe ultimately illegal redistricting plan goes into effect for one or more election cycles, such post-election review enables voters and the courts to take their time to engage in genuine scrutiny of the plan's partisan fairness. Indeed, such post-election review also allows the courts to have access to the best data regarding a plan's partisan fairness—namely, the actual election results in the first election under the plan. There is less need for courts engaged in post-election review to rely on the statistical estimations and predictions of future voter behavior that so worried the SJP in *Clarno*.

If a state has not undertaken pre-election review, post-election review is by definition the best and only avenue left. To be sure, voters may lose interest in challenging a redistricting plan after it has gone into effect, but, subject to ordinary statute of limitation or laches defenses, the fact that a redistricting plan has gone into effect does not preclude a post-election challenge being filed and litigated. There are, however, two potential questions associated with post-election review: (1) whether the availability of pre-election review by itself precludes post-election review (i.e., is pre-election review exclusive), and (2) if pre-election review has been undertaken, do principles of *res judicata* or *stare decisis* require the courts on post-election review to adhere to the decision rendered on pre-election review? Let's take each of those in turn.

Should pre-election review be viewed as exclusive? That is obviously up to each state, and, determining whether the provision for pre-election review should be read to exclude post-election review is a complicated question, the answer to which often requires a detailed analysis of the text and structure of the state's laws regarding judicial review. Let's take Oregon as an example of how to engage in such an analysis.

It is fairly clear—though admittedly not beyond all doubt—that pre-election review of *state legislative* redistricting plans is not exclusive in Oregon and that post-election review is therefore possible. The text of Article IV, Section 6 of the Oregon Constitution—the section authorizing pre-election

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193. *E.g.*, *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 369 (Fla. 2015).

review of such plans—does not expressly state that such review is exclusive, and the legislative history of that section shows that the Framers of the provision were interested in expanding the availability of judicial review, not contracting it.<sup>194</sup> Moreover, in 1971, the Oregon Supreme Court ruled that the pre-election, direct Supreme Court review process was not exclusive.<sup>195</sup> That 1971 decision would be conclusive were it not for the fact that, in 1986, Oregon voters amended Article IV, Section 6 to expand the scope of the Supreme Court's jurisdiction to hear all relevant challenges to state legislative redistricting plans.<sup>196</sup> The 1986 amendment's expansion of pre-election review could be read to preclude the availability of post-election review on the theory that, if litigants can raise any and all possible challenges to a redistricting plan in the Supreme Court on direct, pre-election review, such review should be treated as the exclusive avenue for judicial review and preclude later judicial challenges. Moreover, post-election review has never taken place in Oregon, though that is because no such suit has been filed, not because the courts have dismissed any such post-election challenge as untimely.<sup>197</sup> The conclusion is not beyond all doubt, but the best reading of the state constitutional language would be to permit post-election review—that the absence of any language expressly declaring pre-election review to be exclusive (either in the original 1952 amendment or the 1986 amendment), coupled with the general bias in favor of making judicial review available, counsels in favor of allowing post-election challenges to the state legislative redistricting plan.

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194. See WILLIAMS, *supra* note 31, monograph ch.4.

195. State *ex rel.* Allen v. Myers, 488 P.2d 1184, 1185 (Or. 1971). In *Allen*, the Supreme Court dismissed for lack of jurisdiction a racial vote dilution claim brought by African-Americans in the Portland area contesting the Legislature's division of the community among multiple districts. *Id.* The Court concluded that its jurisdiction under Article IV, Section 6 for direct Supreme Court review of state legislative redistricting plans did not extend to racial vote dilution claims brought under the U.S. Constitution. *Id.* The Supreme Court, however, declared that such claims could be brought in another, "appropriate" court, presumably meaning a state circuit court. *Id.* And, since state circuit courts were under no state-imposed time limit to conclude their review of any such challenge, *Allen* necessarily contemplated the possibility of post-election review.

196. OR. CONST. art. IV, § 6(2)(b) (amended 1986) (authorizing Supreme Court review of redistricting plans for compliance with "subsection (1) of this section and *all* law applicable thereto") (emphasis added).

197. The Oregon Supreme Court has reviewed state legislative redistricting plans in every redistricting cycle since 1961, save in 2011 when no judicial challenge was filed. In none of those redistricting cycles, however, did any voter subsequently challenge the validity of a state legislative redistricting plan in state court outside the pre-election, direct-Supreme-Court review process. There has been one, post-election federal court proceeding, but the jurisdiction of the federal courts is set by federal, not state law—i.e., Oregon cannot preclude post-election judicial review by the federal courts if otherwise authorized by federal law.

The opposite is true, however, for the judicial review of *congressional* redistricting plans in Oregon. In 2013, the Legislature enacted ORS § 188.125, which provides for pre-election review of congressional plans in a special, five-judge circuit court as impaneled in *Clarno*.<sup>198</sup> The statute does not expressly say that such review process is exclusive, but the history and structure of the statute clearly indicate that the Legislature thought that the pre-election review undertaken by the five-judge panel would be the sole forum for challenging congressional redistricting plans in the state.<sup>199</sup> The statute was motivated by the Legislature's desire to avoid a repeat of 2001, when Democratic voters in Portland rushed to Multnomah Circuit Court to ensure that it would be a lone judge from Multnomah and not some other, more Republican-friendly county, that would draft the new plan when the Legislature failed to do so.<sup>200</sup> The 2013 Legislature's creation of a five-judge court, with each judge drawn from a different area of the state, was clearly designed to prevent forum-shopping and ensure that a geographically-diverse bench would consider any judicial challenge to the congressional plan. Moreover, the 2013 statute only authorizes pre-election review—there is no mention of post-election review in the statute—and the five-judge SJP intended to hear challenges to the congressional plan is created only when and for a pre-election challenge—it is not a standing court continually in existence and available to hear a suit filed at any time.<sup>201</sup> Any post-election review would therefore have to take place in a single-judge circuit court proceeding in a county of the plaintiffs choosing—i.e., exactly the type of forum-shopped proceeding that the 2013 Legislature was seeking to prevent. It is inconceivable that the Legislature that adopted ORS § 188.125 wanted to enable voters to be able to avoid review by the five-judge SJP by simply waiting to bring their challenge after the first election. Given the unique structure of the SJP and the fact that it exists if and only when a pre-election suit is filed, ORS § 188.125 as currently written should be read as exclusive, thereby precluding post-election review of congressional redistricting plans by the Oregon state courts.

As a policy matter, though, precluding post-election review seems ill-advised for all the reasons noted above. Even the best, pre-election review process places courts under incredible time pressure to handle all the various, complex issues that arise in redistricting litigation, and allowing both litigants

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198. OR. REV. STAT. § 188.125(6) (2021).

199. *See* H.B. 2887, 77th Leg. Assemb., Reg. Sess. (Or. 2013) <https://olis.oregonlegislature.gov/liz/2013R1/Downloads/MeasureDocument/HB2887/Introduced> [<https://perma.cc/AH2N-JW7P>] (introducing the bill with section 2 providing for a panel of seven judges but that number was subsequently reduced to five in final version of the bill).

200. *See* WILLIAMS, *supra* note 31, monograph at ch. 6.

201. *See* OR. REV. STAT. § 188.125(6), (9)–(12) (2021).



and the courts to have more time to consider challenges to redistricting plans seems preferable to curtailing the judicial review of redistricting plans. Judicial resources are hardly being conserved in a significant fashion by precluding what would likely be just one or two post-election redistricting lawsuits per decade. Thus, in an ideal world, states should expressly authorize both pre- and post-election review of redistricting plans, and, to that end, the Oregon Legislature should therefore amend ORS § 188.125 to make clear that post-election review by the five-judge SJP is available regardless of when suit is brought.

What about the second question: if a state does conduct pre-election review, should that decision bind the courts until the next redistricting plan is adopted? This is a question of *res judicata* and *stare decisis*, respectively. Again, each state's law on those matters will differ, but, as to the former, the general answer is no: So long as it is not the same voter(s) challenging the redistricting plan, *res judicata* does not bar suits by a different party (i.e., a different voter).<sup>202</sup> Moreover, depending on the nature of the pre-election review, it is possible that a prior decision would not bar a subsequent action even by the same litigants. In *Johnson v. De Grandy*, the U.S. Supreme Court refused to apply *res judicata* to a state supreme court decision involving pre-election review of a redistricting plan because the state supreme court's pre-election review process had to take place in such a highly compressed time (30 days) and, therefore, limited the state court's ability to consider evidence-heavy claims, such as vote dilution challenges to the redistricting plan.<sup>203</sup>

The *stare decisis* question is trickier. A state supreme court will obviously be loath to revisit the legality of a redistricting plan whose validity it has already upheld just a year or two earlier. (If the court struck down the original plan, that plan is obviously dead, so *stare decisis* can only become an issue when a new suit challenging a plan already upheld is filed). *Stare decisis* is subject to several exceptions, one of which is changed circumstances—a prior decision that was premised on a specific set of facts may no longer be entitled to precedential weight once those facts have changed.<sup>204</sup> Of course, few facts upon which a

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202. See, e.g., *Cooper v. Harris*, 137 S. Ct. 1455, 1467 (2017) (holding that *res judicata* did not bar successive suit brought by plaintiff voters who were not members of civil rights organization that brought earlier suit). *But see* *McNeil v. Legis. Apportionment Comm'n*, 828 A.2d 840, 860 (N.J. 2003) (holding successive redistricting challenge barred by *res judicata* where plaintiffs were in privity with parties in prior redistricting suit).

203. *Johnson v. De Grandy*, 512 U.S. 997, 1005 (1994).

204. E.g., *Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002) (“The doctrine of *stare decisis* bends where there has been a significant change in circumstances since the adoption of the legal rule . . . .”); *Westfield Ins. Co. v. Galatis*, 797 N.E.2d 1256, 1268 (Ohio 2003) (noting that *stare decisis* does not

redistricting plan's validity depend change so substantially within the short, ten-year lifespan of a typical redistricting plan for this exception to come into play much; for that reason, the pre-election decision upholding a redistricting plan will ordinarily be entitled to significant precedential weight.

The one possible exception to this is a partisan gerrymandering claim due to the unique nature of gerrymandering litigation. Suppose that, on pre-election review, the state supreme court holds that the plan is not a gerrymander because, based on the best statistical estimations and predictions, the efficiency gap of the new plan is likely to be only, say, 7%—a level of partisan bias that the SJP in *Clarno* and most observers view as insufficient to prove a gerrymander.<sup>205</sup> Now, suppose that, after that ruling, the new plan goes into effect and that, in the first election conducted under the plan, it turns out that the efficiency gap is actually 16%—i.e., the actual election outcome demonstrated that the prior, statistical analyses had underestimated the partisan bias of the plan. In this circumstance, in my view, the state supreme court should not feel bound by its past decision, which was based on a prediction that proved to be erroneous. Of course, the court may still uphold the plan if there is other, new evidence supporting the plan's validity too, but that's the key point—the court should weigh all of the evidence anew rather than feel bound to uphold the plan simply by virtue of its prior decision.

To be sure, this approach enables repeat litigation. For instance, Republicans frustrated that the Oregon Supreme Court upheld the state legislative redistricting plan in *Sheehan* may keep bringing lawsuits challenging the plan, especially if future election results show the plan to have a greater bias in favor of Democrats than originally expected. Will redistricting litigation ever end then? The prospect of never-ending gerrymandering litigation surely appeals to no one, but this is a risk that, in my opinion, state courts should take. If a redistricting plan was incorrectly upheld based on the state court's rushed appraisal of quickly-assembled statistical projections which have now proven to be in error, a court should be willing to reconsider its past decision. Allowing a partisan gerrymander to remain in place for the remainder of the decade seems like far too high a price to pay to discourage repeat litigation. Ensuring a democratically fair election process is surely a more important value than conserving judicial resources. And, if the fear is that such repeat litigation will routinely take place when there is any change in electoral outcomes, regular principles of *stare decisis* already address that situation: the

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apply where “changes in circumstances no longer justify continued adherence to the decision”); *State v. Lopez*, 314 P.3d. 236, 242 (N.M. 2013) (noting that *stare decisis* may not apply where “changing circumstances have deprived the precedent of its original justification”).

205. See *supra* text accompanying notes 140–41, 165–68.

change in facts must be significant, not trivial,<sup>206</sup> and both federal and state courts have more than sufficient disciplinary weapons at their disposal to discourage litigants from vexatious or frivolous litigation.<sup>207</sup>

In short, state courts must be given as much time as possible for pre-election review consistent with other electoral deadlines, and they should be authorized to hear post-election challenges as well. Only in those ways can state courts fully perform the role of policing the redistricting process, especially with regard to partisan gerrymandering, that most voters hope and expect them to perform.

### *B. Defining Partisan Gerrymandering and Incumbency Protection*

In the past decade, several states—most notably, Ohio and New York—amended their state constitutions to prohibit partisan gerrymandering and created a comprehensive legal framework to govern the adoption of redistricting plans and their review.<sup>208</sup> Given that detailed legal framework, it is not all that surprising that the state courts in those states undertook a searching judicial inquiry into the partisan fairness of the redistricting plans.<sup>209</sup> To do otherwise would have made the courts appear to have been ignoring the recently expressed will of the people in their states to root out gerrymandering.

Not every state, though, has as equally a comprehensive and detailed legal framework governing redistricting. Oregon is one of them: though state law bans partisan gerrymandering, the relevant statute does not define what constitutes a forbidden gerrymander or incumbent protection plan. Rather, ORS § 188.010(2) simply bans redistricting plans drawn for “the purpose of favoring any political party [or] incumbent legislator.”<sup>210</sup> The fact that the ban is only statutory in nature is problematic enough. As former Oregon Supreme Court Justice Jack Landau has noted, a subsequent Legislature could simply exempt its new, potentially gerrymandered, redistricting plan from the statutory

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206. *E.g.*, *Puryear*, 810 So.2d at 905; *see also* *Md. Small MS4 Coal. v. Md. Dep’t of the Env’t*, 276 A.3d 573, 593 (Md. 2022) (noting that change in litigation position by agency since prior decision “does not amount to a change in circumstances significant enough to override stare decisis”).

207. 28 U.S.C. § 1651; FED. R. CIV. P. 11(b)(2) (authorizing sanctions where lawsuit’s claims are not “warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law”).

208. N.Y. CONST. art. III, § 5, 5-b; OHIO CONST. art. XI, §§ 1–10; OHIO CONST. art. XIX, §§ 1–3.

209. The presence of such a detailed legal regime is undoubtedly helpful but not necessary. The North Carolina Supreme Court inferred and then enforced a ban on partisan gerrymandering from several state constitutional provisions, such as its free elections clause. N.C. CONST., art. I, § 10; *see Harper v. Hall*, 868 S.E.2d 499, 542 (N.C. 2022).

210. OR. REV. STAT. § 188.010(2) (2021).

prohibition, a situation that the Oregon Supreme Court in *Sheehan* acknowledged as theoretically possible but did not resolve the validity of.<sup>211</sup> Equally problematically, though, ORS § 188.010(2) does not define what constitutes a forbidden partisan gerrymander or incumbent protection plan.<sup>212</sup> It is that omission that, in my view, has contributed to the Oregon courts' unwillingness to closely scrutinize redistricting plans for political gamesmanship.

The crux of the difficulty, as the U.S. Supreme Court recognized in *Rucho*, is that political considerations inevitably shape and affect the redistricting process.<sup>213</sup> Partisan affiliation is important to voters and is therefore an important element in defining relevant communities of interest for purposes of redistricting. It is therefore naïve to believe that redistricting can be performed in some entirely apolitical fashion. If partisanship inevitably shapes redistricting, that begs the question where to draw the line between permissible partisanship and impermissible gerrymandering: At what point does a Legislature's consideration of the partisan complexion of the various districts in a redistricting plan become a gerrymander? The U.S. Supreme Court in *Rucho* thought the task of answering that question so difficult as to make partisan gerrymandering claims non-justiciable in the federal courts.<sup>214</sup> The U.S. Supreme Court, however, expressly recognized that state courts, enforcing state-law-based redistricting constraints, could police against partisan

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211. *Sheehan v. Or. Legis. Assembly*, 499 P.3d 1267, 1273 (Or. 2021) (refraining from deciding whether OR. REV. STAT. § 188.010 can be used to invalidate a legislatively-enacted redistricting plan). This problem does not exist in those states where the ban on partisan gerrymandering is constitutionally rooted. For instance, the state constitutions in several states expressly ban partisan gerrymandering. *See, e.g.*, FLA. CONST. art. III, § 20(a) (“No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent . . . .”); MO. CONST. art. III, § 3(b)(5) (“Districts shall be drawn in a manner that achieves both partisan fairness and, secondarily, competitiveness . . . . ‘Partisan fairness’ means that parties shall be able to translate their popular support into legislative representation with approximately equal efficiency.”). In other states, like North Carolina and Pennsylvania, the state supreme court has inferred such a ban from other, election-related clauses in the state constitution. *League of Women Voters of Penn. v. Commonwealth*, 178 A.3d 737, 814 (Pa. 2018); *Harper v. Hall*, 868 S.E.3d 499, 540–42 (N.C. 2022). That expansive reading of such clauses is contested, though. The Wisconsin Supreme Court recently rejected it, concluding that the Wisconsin Constitution’s various elections-related clauses did not address partisan gerrymandering. *Johnson v. Wis. Elec. Comm’n*, 2021 WI 87, ¶¶ 50–65, 399 Wis. 2d 623, 655–61, 967 N.W.2d 469, 485–88. While the SJP in *Clarno* read the Oregon Constitution’s “free and equal” election clause to ban partisan gerrymandering, the Oregon Supreme Court has yet to adopt that reading of the clause.

212. *See* OR. REV. STAT. § 188.010(2) (2021).

213. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2497 (2019).

214. *Id.* at 2506–07.

gerrymandering.<sup>215</sup> That proposed remedy, though, takes us right back to the question regarding where state law draws the line.

Oregon, like many states, bans redistricting plans done with the “purpose” to favor a particular party or incumbent.<sup>216</sup> In 2001, in *Hartung v. Bradbury*, the Oregon Supreme Court emphasized that language and held that merely because the plan has the effect of favoring one of the parties does not establish that the plan’s purpose was to favor that party.<sup>217</sup> The problem with such purpose-driven inquiries is that direct evidence of such a purpose is difficult to produce. Well counseled by lawyers, legislators will rarely confess an illicit partisan motive—indeed, they typically disclaim (implausibly so) that there were any partisan or political considerations discussed.<sup>218</sup> Moreover, as the *Clarno* litigation demonstrated with respect to Oregon, legislators in some states may not be examined, voluntarily or not, regarding their understandings of or motivations regarding a redistricting plan.<sup>219</sup> If the courts are expected to engage in a purpose-oriented review of redistricting plans, though, the legislative privilege relied upon in *Clarno* needs to be rethought.<sup>220</sup> Absent the ability to collect such direct evidence of legislative purpose, any such purpose-inquiry either becomes a meaningless, toothless gesture or, also as demonstrated by *Clarno*, collapses into an effects inquiry—i.e., courts infer the legislature’s purpose from whether the effect of the plan is to unduly favor one party.

To engage in an effects analysis begs the question regarding what sort of effects are indicative of a gerrymander, and, in many states (Oregon included), the relevant state constitutional or statutory provision does not say. Some effects are clearly not probative of a gerrymander. For instance, the Oregon Supreme Court in *Hartung* was right to reject the notion that, just because some party will likely win more seats under the new plan, that is conclusive evidence

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215. *Id.* at 2507–08.

216. OR. REV. STAT. § 188.010(2) (2021).

217. *Hartung v. Bradbury*, 33 P.3d 972, 987 (Or. 2001).

218. *See, e.g.*, Monahan, *supra* note 58 (reporting statement of Rep. Salinas). Moreover, even if a legislator or two is quoted in a newspaper or other public forum about the partisan intentions motivating the plan, courts often dismiss such isolated statements as incapable of establishing that a multi-member body, such as a legislature, shared those sentiments. *E.g.*, *United States v. O’Brien*, 391 U.S. 367, 384 (1968) (“What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.”).

219. Order on Legislative Assembly’s Motion to Quash; Protective Order, *supra* note 105, at 5–7; Special Master’s Report, *supra* note 104, at 3–7.

220. *See, e.g.*, Christopher Asta, *Developing a Speech or Debate Clause Framework for Redistricting Litigation*, 89 N.Y.U. L. REV. 238, 265 (2014) (arguing that legislative privilege should not shield legislators from questioning about redistricting plans in redistricting litigation).

of a gerrymander.<sup>221</sup> Every districting plan will necessarily change the partisan composition of most, if not all, of the districts. If the Democratic party's registration numbers have increased in the past ten years, it would be expected to see that fact reflected in the districting plan. More Democrats in the state (or, better yet, in the region of the state in which the challenged district is located) would justifiably mean more Democratic-leaning districts. That would be a matter of partisan fairness, not favoritism. Conversely, scrutinizing a particular district's boundaries because it was shifted from one party's control to the other's would risk calcifying existing partisan divisions. Just because X number of districts were drawn with a Democratic voter majority in the 2011 districting plan cannot mean that the Legislature is forever bound to draw no more (or no less) than X number of Democratic-leaning districts, lest it be accused of an impermissible partisan gerrymander. The whole point of requiring the Legislature to redistrict every ten years is to have the Legislature respond to changes in the population of the state, which will include changes in the state's partisan composition, both in terms of the number of voters affiliated with a particular party and, equally importantly, their location.

The SJP in *Clarno* was similarly right to reject proportionality analysis, at least in the broad formulation used by the Republicans' expert witness who treated any departure from strict proportionality as problematic. As the U.S. Supreme Court in *Rucho* recognized, the U.S. Constitution has never been read to require proportionality, and it would be unwise to read such a requirement into state law, at least with respect to redistricting plans involving only a handful of seats.<sup>222</sup> When there are only a few seats at stake, strict proportionality is often unobtainable in practice due to various voting rules. For instance, as a party's share of the vote increases, its share of the number seats typically grows more quickly—a party that wins 52% of the vote may receive 55% of the seats, but a party that wins 63% of the vote may easily win 75% of the seats even without any gerrymandering. This is the so-called “winner's bonus.”<sup>223</sup> Moreover, strict proportionality cannot account for the treatment of non-affiliated and minor party voters, who comprise a significant percentage (sometimes well over a third) of the electorate in many states but who are routinely frozen out of legislative and congressional representation.<sup>224</sup>

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221. *Hartung*, 33 P.3d at 987.

222. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2499 (2019).

223. Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 806 n.165 (2005).

224. In Oregon, for instance, minor party and non-affiliated voters account for roughly 40% of the electorate, but the Oregon Legislature and the state's congressional delegation in 2021 was composed solely of Republican and Democratic legislators. The one Independent in the Oregon Senate was a former conservative Republican legislator who was expelled from his party's caucus for misconduct, not ideological disloyalty.

To be sure, there may be more limited versions of proportionality analysis that are worthy of consideration. For instance, if a party receives a majority of votes statewide but wins only a minority of the seats in the Legislature, that would be problematic.<sup>225</sup> That more limited version of proportionality analysis does not depend, however, on the notion that a party's share of seats in the Legislature must correspond to its share of the statewide vote total but rather draws upon majoritarian democratic theory—that a democratic government is one in which the majority governs. Republicans in *Sheehan* and *Clarno* were unable to make this particular sort of claim because Democrats win a majority of the votes cast in the state (and, therefore, appropriately receive a majority of the state legislative and congressional seats), but courts should be appropriately concerned whether legislative entrenchment is taking place—i.e., a temporarily ascendant party using its control of the redistricting process to cement its legislative majority into the future even if its popular support dwindles and its voters becomes a minority of the electorate.

Last but not least, as the *Clarno* litigation illustrated, political scientists have created a number of different statistical metrics—efficiency gap, partisan symmetry, mean-median ratio, declination—to measure to what extent a redistricting plan is biased in favor of one of the parties. As *Clarno* also revealed, though, courts struggle to identify which of these metrics, either individually or collectively, should be used. State law could and should identify which of these statistical measures are the appropriate ones to use. By way of example, the proposed For the People Act introduced in Congress in 2021 would have authorized federal courts to use all four of the foregoing metrics, plus the seats-votes curve and any other reliable metric, to assess the partisan fairness of a redistricting plan.<sup>226</sup>

Moreover, these metrics are just measures of bias; they do not by themselves indicate the threshold or line at which minor and acceptable bias becomes major and unacceptable gerrymandering. Every districting plan, even a neutral plan drawn according to traditional districting principles, will have some bias in it, so the key question for courts is where to draw the line between permissible bias and impermissible gerrymander. Missouri, for instance, sets the relevant threshold for the efficiency gap at 15%—a fairly high threshold.<sup>227</sup>

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225. Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLAL. REV. 77, 174 (1985); see also *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 419 (2006) (plurality opinion) (noting that a redistricting plan that “more closely reflects the distribution of state party power seems a less likely vehicle for partisan discrimination than one that entrenches an electoral minority.”).

226. See H.R. 1, 117th Cong., § 2403(b)(2)(B)(i), (1st Sess. 2021). The proposed act, however, was not passed, and it would have applied only to congressional redistricting plans in any event.

227. MO. CONST. art. III, § 3(b)(5).

For states with twenty or fewer U.S. Representatives, the proposed For the People Act introduced in Congress would have used a more stringent, more-than-1 congressional seat standard—i.e., is the bias so great that the favored party wins more than one congressional seat than it would under a politically neutral plan.<sup>228</sup> The SJP in *Clarno*, however, conspicuously refused to draw any such bright-line rule, preferring instead to embrace the Democrats’ historical comparison.<sup>229</sup> Such historical comparisons, though, may validate redistricting plans with more partisan unfairness than voters want, especially if one or more of the past plans were in fact gerrymanders that had not been challenged for whatever reason. Thus, state law should specify a threshold at which a redistricting plan’s bias at least presumptively indicates the existence of a gerrymander, thereby putting the state to the task of defending the plan as driven by politically neutral considerations.

Specifying which metrics to use and the threshold at which bias becomes gerrymander also would provide guidance to the Legislature where the limits to partisanship are and obviate the need for the courts to articulate those limits. Given the Oregon courts’ decisions, it is anyone’s guess what constitutes an illegal gerrymander in Oregon. To be sure, the Oregon Supreme Court could articulate such a line in a future case, but, as *Sheehan*’s minimalist and deference-filled approach to judicial review demonstrates, the justices of the Oregon Supreme Court are clearly loathe to announce any such rule for fear of being seen as taking sides in a partisan battle for legislative power. Of course, that fear, while understandable at some level, just makes matters worse, leaving everyone, the Legislature included, guessing at what point the Court might intervene. And one can be sure that if and when the Court does strike down some future redistricting plan as a gerrymander, the Legislature (or Secretary of State) will likely respond by accusing the Court of taking sides in a partisan battle and announcing a rule whose existence and contours were not known in advance. Even if the former charge were an unfair one, the latter one would have a great deal of force. Thus, rather than await the Supreme Court providing content to ORS § 188.010(2)’s ban on gerrymandering in some future, politically combustible redistricting battle, it would be better for the limits on partisan bias to be specified now so as to guide future redistricting cycles and the judicial review of them. Ex ante guidance is preferable to ex post invalidation.

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228. See H.R. 1, 117th Cong., § 2403(b)(2)(B)(i) (1st Sess. 2021). The proposed federal statute did not indicate whether the “more than one” standard meant that the bias must reach two additional seats or whether a fractional seat in excess of one (which these metrics can calculate even if it cannot result in the real world) was sufficient. *Id.*

229. See *supra* text accompanying notes 143–52.



The Oregon Supreme Court's decision in *Sheehan* also exposed the same sort of weaknesses in ORS § 188.010(2)'s ban on favoring incumbent legislators. The U.S. Supreme Court views incumbency protection as a valid redistricting concern,<sup>230</sup> and, as a practical matter, redistricting plans are regularly (and silently) drawn in such a manner as to protect incumbents from having to face one another in primary or general elections. In fact, the 2011 Oregon state legislative redistricting plan received bipartisan support in the Legislature and was not challenged in court precisely because it drew district boundaries to ensure that the vast bulk of both Republican and Democratic legislators were each placed in their own, safe district and would not have to face one another.<sup>231</sup> Like with partisanship then, a literal reading of ORS § 188.010(2)'s ban on incumbency protection seems both to ignore the prevalence of the practice and, if taken literally, to threaten to condemn every redistricting plan, which cannot have been the intention of the 1979 Legislature that enacted the ban. Yet, acknowledging the inherent limitations on any ban on incumbency protection poses the same line-drawing question as partisan gerrymandering: at what point does permissible awareness of a plan's favorable treatment of many, perhaps even most incumbents, become impermissible incumbency protection. The Oregon Supreme Court in *Sheehan* correctly rejected Representative Wilde's challenge, but it failed to give much guidance for future redistricting cycles regarding how to evaluate incumbency protection claims.<sup>232</sup> Again, there are a variety of ways to particularize the ban on incumbency protection in a more precise fashion.<sup>233</sup>

The point here is not to endorse any of the foregoing outcome- or bias-based gerrymandering or incumbency-protecting measures as the appropriate or even best one—that task would involve a much more detailed discussion of the pros and cons of each metric and is therefore better left for another day. Rather, for present purposes, the critical point is that codifying any of the foregoing objective measures of partisan bias or incumbency protection would be preferable to the status quo. As *Sheehan* powerfully illuminated, the Oregon

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230. *Bush v. Vera*, 517 U.S. 952, 964 (1996).

231. *See WILLIAMS*, *supra* note 31, at ch. 6.

232. *See Sheehan v. Or. Legis. Assembly*, 499 P.3d 1267, 1278 (Or. 2021).

233. *See, e.g.*, CAL. CONST. art. XXI, § 2(e) (banning the redistricting commission from considering the place of residence of any incumbent or likely challenger). Such “do not consider” provisions are obviously likely to be of greater value in states where redistricting is done by a commission rather than states, like Oregon, where it is the legislators themselves, at least in the first instance, who are drawing the boundaries and who therefore know where one another live. Such a ban, though, could still have value in Oregon, at least when redistricting falls to the Secretary of State. In fact, in past redistricting cycles, the Secretary has sometimes announced that he would not consider legislators' residency. *See WILLIAMS*, *supra* note 31, at ch.6.

Supreme Court is loath to assess the partisan fairness of a redistricting plan. As a result, ORS § 188.010(2) as currently written promises something that the Oregon courts are not prepared to deliver or enforce. Voters may think that the courts will strike down a redistricting plan as a forbidden partisan gerrymander or incumbent protection device, but the highly deferential approach to judicial review articulated in *Sheehan* shows that promise to be more illusory than real. Certainly, the Oregon Supreme Court has never articulated the line beyond which the Legislature (or Secretary of State) may not pass. In fairness to the courts, ORS § 188.010(2) hardly gives them much to work with—the Justices are clearly and understandably reluctant to undertake such a politically-combustible task armed only with the so-vague-as-to-be-nearly-meaningless admonition to invalidate plans adopted with the “purpose” of favoring a particular party or incumbent legislator—but that reluctance proves the point: if voters expect the courts to police against partisan gerrymandering or incumbency protection, the ban on such gerrymandering and incumbency protection needs to be made more robust.

## VI. CONCLUSION

The 2021 redistricting cycle in Oregon was a politically-fraught one, but despite the COVID pandemic and a temporary walkout by Republican Representatives, the Legislature was able to enact both a state legislative and congressional redistricting plan. Both plans, however, were immediately challenged in court by Republicans as pro-Democratic partisan gerrymanders and, with respect to one Senate district in the state legislative plan, as illegally protecting a particular Democratic incumbent legislator. Both the partisan gerrymandering and incumbent protection claims were overblown and therefore appropriately rejected by the Oregon Supreme Court and Special Judicial Panel in *Sheehan* and *Clarno*, respectively.

Nevertheless, the courts’ discussions of those claims revealed serious shortcomings in the legal framework governing the judicial review of redistricting plans in the state. Most notably, the accelerated timeline in which the courts must operate and the absence of any objective standard in ORS § 188.010(2) to evaluate the existence of undue partisanship or incumbency protection placed the courts in a difficult position. The courts responded by adopting a deferential standard of review and analyzing the partisan gerrymandering and incumbency protection claims in a minimalist fashion, rejecting the specific arguments proffered by the Republicans but failing to articulate any rule, bright-line or otherwise, for the future regarding where a redistricting plan would be invalid. As such, the 2021 redistricting cycle points to the need to reform the state’s legal framework for redistricting, especially the

judicial review of it. Otherwise, the next redistricting cycle runs the risk of encountering the same difficulties this one did.

More generally, Oregon's experience with redistricting this cycle—and especially its courts' deferential approach to assessing claims of partisan gerrymandering—illustrates the need for state law to provide for a robust, detailed legal framework governing redistricting and its judicial review. Absent sufficient time to perform their review and some guidance regarding what constitutes partisan gerrymandering under state law, state courts may be loath to intervene in what they rightly perceive as a zero-sum, partisan battle for legislative power. As Oregon's experience illuminates, deference will become the defining feature of judicial review in such circumstances. Thus, for states that want or expect their courts to police the redistricting process, the underlying legal framework for redistricting must provide a sound foundation for aggressive judicial review. Policing the redistricting process, especially with regard to partisan gerrymandering, requires that courts be armed with something more useful than vague prohibitions on “favoring one party” and be given sufficient time to develop and assess the factual record, including by providing for both pre-election and post-election review. As courts in New York, Ohio, and North Carolina demonstrated, state judiciaries are up to the task, but, equally, as the Oregon courts showed, they can only do so much (and, really, not much at all) when state law leaves them at sea and with little time to work. Judicial review can provide a meaningful check on the worst abuses in the redistricting process, but the efficacy of that check depends critically upon the legal tools, both procedural and substantive, given the courts.