

## **ARTICLE XI**

### **APPORTIONMENT**

Article XI concerns the apportionment of seats in the Ohio General Assembly. This article was included in the 1851 Ohio Constitution to prevent gerrymandering, a common practice in the first fifty years of statehood. Under the 1802 Constitution, the General Assembly had almost unfettered control over the apportionment of seats in the Ohio house and senate, and the apportionment of seats in the legislature was largely dependent on the party in power (State ex rel. Herbert v. Bricker, 1942: 508-09).<sup>1</sup>

The adoption of this article in 1851 placed the General Assembly's power to apportion seats in the hands of a board consisting of the governor, the state auditor, and the secretary of state. The system of apportionment that resulted from the 1851 Constitution was characterized by legislative districts drawn along county lines, and an amendment to section approved in 1903 provided "that each county shall have [at least] one representative."

Every section in this article was revised in a major overhaul in 1967 in response to a series of U.S. Supreme Court cases beginning with Baker v. Carr (1962) in which the Court first allowed private challenges to the drawing of state legislative districts.<sup>2</sup> In Reynolds v. Sims (1964) and other cases challenging state apportionment plans, the U.S. Supreme Court held that state legislative districts had to have substantially equivalent populations to satisfy the "one person, one vote" principle required by the Equal Protection Clause of the Fourteenth Amendment. From 1903 to 1967, Ohio's system of apportionment divided districts along county lines and guaranteed each county at least one representative regardless of population. One week after Reynolds was decided, the U.S. Supreme Court in Nolan v. Rhodes (1964) effectively held that Ohio's apportionment plan violated the Fourteenth Amendment.

As a result of the 1967 amendments to this article, Ohio house and senate districts must be substantially equal in population (sections 3 and 4), although preference is still given to drawing districts along county lines (see sections 7–11).

#### **SECTION 1 Persons responsible for apportionment of state for members of General Assembly**

The governor, auditor of state, secretary of state, one person chosen by the speaker of the House of Representatives and the leader in the Senate of the political party of which the speaker is a member, and one person chosen by the legislative leaders in the two houses of the major political party of which the speaker is not a member shall be the persons responsible for the apportionment of this state for members of the General Assembly.

Such persons, or a majority of their number, shall meet and establish in the manner prescribed in this Article the boundaries for each of ninety-nine House of

Representative districts and thirty-three Senate districts. Such meeting shall convene on a date designated by the governor between August 1 and October 1 in the year one thousand nine hundred seventy-one and every tenth year thereafter. The governor shall give such persons two weeks advance notice of the date, time, and place of such meeting.

The governor shall cause the apportionment to be published no later than October 5 of the year in which it is made, in such manner as provided by law.

Adopted in 1967, section 1 sets forth the general framework for the apportionment of seats in the General Assembly. This section calls for the creation of 99 house districts and 33 senate districts every ten years according to boundaries set by a five-member apportionment board composed of the governor, auditor, secretary of state, one person of the political party of the speaker of the house chosen by the speaker of the house and the leader of the senate, and one person chosen by the speaker of the house and leader of the senate of the political party of which the speaker is not a member. The guidelines for dividing the state into districts are in the remaining sections of this article.

Former versions of section 1 (the original version adopted in 1851 and the version amended in 1956) did not divide the house or the senate into a specific number of districts. Instead, they created a “ratio of representation,” or apportionment ratio, equal to one one-hundredth of the population of state determined by the last federal census. That ratio was then used to determine the number of districts on a county-by-county basis.

## **SECTION 2 Method of apportionment of state for members of General Assembly**

The apportionment of this state for members of the General Assembly shall be made in the following manner: The whole population of the state, as determined by the federal decennial census or, if such is unavailable, such other basis as the General Assembly may direct, shall be divided by the number “ninety-nine” and the quotient shall be the ratio of representation in the House of Representatives for ten years next succeeding such apportionment. The whole population of the state as determined by the federal decennial census or, if such is unavailable, such other basis as the General Assembly may direct, shall be divided by the number “thirty-three” and the quotient shall be the ratio of representation in the Senate for ten years next succeeding such apportionment.

Adopted in 1967, section 2 describes the method of apportioning seats in the General Assembly. The former version of this section, as amended in 1903, mandated that each county was entitled to at least one representative and that additional representatives, if required, were apportioned according to the following formula based on the ratio established by section 1 at that time (population of the state divided by one hundred): Counties with populations equal to one-half of the designated ratio (0.5% of the state’s population) were entitled to one representative; counties with populations equal to one and three-fourths of the ratio were entitled to two representatives; counties with three times the ratio were entitled to three and so on. Based on that formula and the requirement that every county have a representative, the old system of

apportionment gave a distinct advantage to people in rural counties with small populations. For example, in 1960 the state's population was 9,706,397, and the ratio of representation under former section 1 equaled 97,064. As a result, counties with less than 169,862 inhabitants (ratio times one and three-fourths) were entitled to a single representative. Since every county had to have a representative, counties with populations less than but close to 169,862 were treated the same as counties with much smaller populations. Thus, in 1960 Vinton County with a population of 10,274 and Springfield County with a population of 131,440 both had one representative (Nolan v. Rhodes, (1963): 956-57).

In 1964, the U.S. Supreme Court effectively struck down the 1960 apportionment plan and a number of provisions of Article XI as inconsistent with the "one person, one vote" principle of Reynolds v. Sims, *supra*. (See Nolan v. Rhodes, (1964: 585). In Nolan, the Supreme Court reversed and remanded a federal district court decision upholding the 1960 apportionment plan. The Supreme Court ordered the district court to render a decision consistent with Reynolds v. Sims, and on remand, the district court specifically found Ohio's apportionment plan and a number of provisions of Article XI unconstitutional.

In response to Nolan, the General Assembly proposed a constitutional amendment in 1965 that the voters rejected. Subsequently, the General Assembly proposed a second amendment to revise Article XI, and the voters in 1967 approved a revision in section 2 under which each county was no longer entitled to have a representative. Instead, the state's population is divided by 99 (the number of seats in the Ohio house of representatives) to determine the representation ratio in the house and by 33 (the number of seats in the senate) to determine the representation ratio for the state senate. These ratios represent the "ideal populations" of house and senate districts and are used to determine permissible district population ranges (see sections 2 and 3).

### **SECTION 3 Population of each House of Representatives district**

The population of each House of Representatives district shall be substantially equal to the ratio of representation in the House of Representatives, as provided in section 2 of this Article, and in no event shall any House of Representatives district contain a population of less than ninety-five per cent nor more than one hundred five per cent of the ratio of representation in the House of Representatives, except in those instances where reasonable effort is made to avoid dividing a county in accordance with section 9 of this Article.

Adopted in 1967, this section contains the permissible population range for house districts. It provides that the population of each house district must be substantially equal to the house representation ratio (i.e., the "ideal" house district population), which is 1/99 of the population of the state at the last federal census. Section 3 permits districts to vary from the house representation ratio, but no house district can have a population less than 95 percent or greater than 105 percent of the ideal district size except to avoid dividing certain counties into more than one district (see section 9).

This section imposes a permissible deviation range of ten percent on individual districts, but because of the exception in Article XI, section 9, the "total" or "maximum" deviation

between the districts with the highest and lowest populations can exceed ten percent giving rise to a potential equal protection violation. In Voinovich v. Quilter (1993), the U.S. Supreme Court held that the apportionment plan following the 1990 census gave rise to a prima facie violation of equal protection because the total deviation between districts exceeded ten percent. Under that plan, the largest house district had a deviation of 104.91% of the representation ratio and the smallest district had a deviation of 91.10%, which was permissible under the section 9 county exception, for a total deviation of 13.81% (104.91% minus 91.10%). Although the Court noted that the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution allowed minor differences in total deviations, it returned the case to the district court for a ruling on whether the deviation was rationally related to the state policy of preserving county borders and on whether the total deviation exceeded constitutional limits. On remand, the district court upheld the plan finding that it was rationally related to the state policy of preserving county borders embodied in sections 9 and 10 of this article and that the total deviation of 13.81% did not exceed federal constitutional limits (Quilter v. Voinovich, 1994).<sup>3</sup>

#### **SECTION 4 Population in each Senate district**

The population of each Senate district shall be substantially equal to the ratio of representation in the Senate, as provided in section 2 of this Article, and in no event shall any Senate district contain a population of less than ninety-five per cent nor more than one hundred five per cent of the ratio of representation in the senate as determined pursuant to this Article.

This section is the senate equivalent of section 3. Adopted in 1967, it calls for the use of the senate representation ratio established in section 2 (1/33 of the state population determined at the last federal census) and the 95/105 percent deviation range permitted under section 3.

Despite this section's mandatory language, the Ohio Supreme Court has held that the 95/105 deviation range did not have to be satisfied if it meant violating other provisions of Article XI (Voinovich v. Ferguson, 1992). In Ferguson, the court upheld the apportionment of a district that had a population below the permissible range. Senate District 32 contained only 93.99 percent of the senate representation ratio because of geographical constraints imposed by sections 9 and 11 of this article. Under section 9, when a population of a county is at least ninety percent of the ratio of representation a reasonable effort must be made to create a house district containing the whole county. Under section 11, counties having less than one senate ratio of representation but at least one house seat can only be a part of one senate district. The Ohio Supreme Court ruled the apportionment of District 32 "was unavoidable because irreconcilable conflicts with Sections 9 and 11 . . . prevented adding population from adjacent territory" (*Ibid.*, 200). According to the court, public officials were not required to correct one constitutional problem by violating others.

#### **SECTION 5 Representation**

Each House of Representatives district shall be entitled to a single representative in each General Assembly. Every Senate district shall be entitled to a single

senator in each General Assembly.

This section, which was added to the constitution with the reorganization of Article XI in 1967, establishes single-member districts. It allots a single representative to each house district and a single senator to each senate district. Before 1967, Ohio had a “curious combination of single-member and multiple-member districts” with the most populated counties having more than one state representative and more than one state senator.<sup>4</sup> In 1950, for example, Cuyahoga County, which consisted of a single house and senate district, elected six senators and eighteen representatives at large.<sup>5</sup>

## **SECTION 6 Creation of district boundaries; change at end of decennial period**

District boundaries established pursuant to this Article shall not be changed until the ensuing federal decennial census and the ensuing apportionment or as provided in section 13 of this Article, notwithstanding the fact that boundaries of political subdivisions or city wards within the district may be changed during that time. District boundaries shall be created by using the boundaries of political subdivisions and city wards as they exist at the time of the federal decennial census on which the apportionment is based, or such other basis as the General Assembly has directed.

Adopted in 1967, section 6 requires house and senate district boundaries to be drawn according to the boundaries of political subdivisions and city wards. This section also mandates that house and senate district boundaries cannot be changed until the next federal census even if the boundaries of political subdivisions and city wards change in the interim.

## **SECTION 6a Repealed**

This section, adopted in 1956 and repealed in 1967, allowed for additional senate seats if the population of a senate district exceeded a certain threshold.

## **SECTION 7 Boundary lines of House of Representatives districts**

(A) Every House of Representatives district shall be compact and composed of contiguous territory, and the boundary of each district shall be a single nonintersecting continuous line. To the extent consistent with the requirements of section 3 of this Article, the boundary lines of districts shall be so drawn as to delineate an area containing one or more whole counties.

(B) Where the requirements of section 3 of this Article cannot feasibly be attained by forming a district from a whole county or counties, such district shall be formed by combining the areas of governmental units giving preference in the order named to counties, townships, municipalities, and city wards.

(C) Where the requirements of section 3 of this Article cannot feasibly be attained by combining the areas of governmental units as prescribed in division (B) of this

section, only one such unit may be divided between two districts, giving preference in the selection of a unit for division to a township, a city ward, a city, and a village in the order named.

(D) In making a new apportionment, district boundaries established by the preceding apportionment shall be adopted to the extent reasonably consistent with the requirements of section 3 of this Article.

Adopted in 1967, section 7 contains four subsections dealing with the composition of legislative districts. Under subsection (A), every house district must be compact and contiguous, and to the extent consistent with the requirements of section 3, must be drawn to contain one or more whole counties. If districts cannot be made out of a whole county or counties consistent with section 3, then districts must be combined from local government units beginning with counties and then, in order, townships, municipalities and city wards (subsection (B)). If combining government units according to subsection (B) cannot feasibly be attained consistent with section 3 and local government units must be divided, subsection (C) requires that preference be given to dividing townships first and then, in order, city wards, cities and finally villages. To the extent reasonably consistent with section 3, new apportionments must follow the district boundaries already in existence (subsection (D)).

## **SECTION 8 Determination of number of House of Representatives districts within each county**

A county having at least one House of Representatives ratio of representation shall have as many House of Representatives districts wholly within the boundaries of the county as it has whole ratios of representation. Any fraction of the population in excess of a whole ratio shall be a part of only one adjoining House of Representatives district.

The number of whole ratios of representation for a county shall be determined by dividing the population of the county by the ratio of representation for the House of Representatives determined under section 2 of this Article.

Adopted in 1967, section 8 mandates that any fraction above a whole ratio of representation within a county shall be made part of an adjoining house district. The formula for determining whole ratios for county representation is to divide the population of the county by the ratio established for house districts under section 2.

## **SECTION 9 When population of county is fraction of ratio of representation**

In those instances where the population of a county is not less than ninety per cent nor more than one hundred ten per cent of the ratio of representation in the House of Representatives, reasonable effort shall be made to create a House of Representatives district consisting of the whole county.

Adopted in 1967, section 9 provides that a reasonable effort be made to create house districts composed of whole counties where a county's population is not less than 90 percent or greater than 110 percent of the ratio established for house districts under section 2.

## **SECTION 10 Creation and numbering of House of Representatives districts**

The standards prescribed in sections 3, 7, 8, and 9 of this Article shall govern the establishment of House of Representatives districts, which shall be created and numbered in the following order to the extent that such order is consistent with the foregoing standards:

- (A) Each county containing population substantially equal to one ratio of representation in the House of Representatives, as provided in section 2 of this Article, but in no event less than ninety-five per cent of the ratio nor more than one hundred five per cent of the ratio shall be designated a representative district.
- (B) Each county containing population between ninety and ninety-five per cent of the ratio or between one hundred five and one hundred ten per cent of the ratio may be designated a representative district.
- (C) Proceeding in succession from the largest to the smallest, each remaining county containing more than one whole ratio of representation shall be divided into House of Representatives districts. Any remaining territory within such county containing a fraction of one whole ratio of representation shall be included in one representative district by combining it with adjoining territory outside the county.
- (D) The remaining territory of the state shall be combined into representative districts.

Adopted in 1967, section 10 prescribes the method for creating house districts subject to the population requirement of section 3 and the preference for creating districts out of whole counties in sections 7–9. According to subsection (A), each county having a population within the 95/105 deviation range established under section 3 must be made into its own house district. Subsection (B) allows, but does not require, counties with a population ratio between 90-95 percent or 105-110 to be made into a single district. Under subsection (C), the remaining counties, proceeding from the largest to the smallest, must be divided into the appropriate number of districts and any remaining territory must be combined with adjoining territory outside the county to form a district. Finally, under subsection (D), the remaining territory of the state is to be combined into one or more districts.<sup>6</sup>

## **SECTION 11 Senate districts**

Senate districts shall be composed of three contiguous House of Representatives districts. A county having at least one whole Senate ratio of representation shall have as many Senate districts wholly within the boundaries of the county as it has whole Senate ratios of representation. Any fraction of the population in excess of a whole ratio shall be a part of only one adjoining Senate district. Counties

having less than one Senate ratio of representation, but at least one House of Representatives ratio of representation shall be part of only one Senate district.

The number of whole ratios of representation for a county shall be determined by dividing the population of the county by the ratio of representation in the Senate determined under section 2 of this Article.

Senate districts shall be numbered from one through thirty-three and as provided in section 12 of this Article.

Adopted in 1967, section 11 governs the drawing of senate districts. It provides that each senate district must be made from three contiguous house districts and favors senate districts drawn within county borders. Each county having a population greater than the senate representation ratio (1/33 of the population of the state) must contain as many senate districts as "whole" ratios of representation. The number of whole ratios of representation for a county is determined by dividing the county's population by 1/33 of the population of the state and discarding the remainder. The remainder or excess population can then only be part of one adjoining senate district. Counties having populations less than one senate ratio of representation but more than one house district can also only be a part of one senate district.<sup>7</sup>

## **SECTION 12 Change in boundaries of Senate districts**

At any time the boundaries of Senate districts are changed in any plan of apportionment made pursuant to any provision of this Article, a senator whose term will not expire within two years of the time the plan of apportionment is made shall represent, for the remainder of the term for which he was elected, the Senate district which contains the largest portion of the population of the district from which he was elected, and the district shall be given the number of the district from which the senator was elected. If more than one senator whose term will not so expire would represent the same district by following the provisions of this section, the persons responsible for apportionment, by a majority of their number, shall designate which senator shall represent the district and shall designate which district the other senator or senators shall represent for the balance of their term or terms.

Adopted in 1967, section 12 provides for senate representation in the event there is a change in district boundaries before a senator's four year term expires. If the senator at the time the district boundaries are changed has two or more years remaining on his or her term, the senator shall represent the new district that contains the largest portion of the population of the former district. If the change results in more than one senator representing the same district, the persons responsible for apportionment, the Ohio Apportionment Board (see section 1), by majority vote shall designate which senators will represent which district for the remainder of their terms.

## **SECTION 13 Jurisdiction of Supreme Court, effect of determination of unconstitutionality; apportionment**

The Supreme Court of Ohio shall have exclusive, original jurisdiction in all cases arising under this Article. In the event that any section of this constitution relating to apportionment or any plan of apportionment made by the persons responsible for apportionment, by a majority of their number, is determined to be invalid by either the Supreme Court of Ohio, or Supreme Court of the United States, then notwithstanding any other provisions of this Constitution, the persons responsible for apportionment by a majority of their number shall ascertain and determine a plan of apportionment in conformity with such provisions of this constitution as are then valid, including establishing terms of office and election of members of the General Assembly from districts designated in the plan, to be used until the next regular apportionment in conformity with such provisions of this constitution as are then valid.

Notwithstanding any provision of this constitution or any law regarding the residence of senators and representatives, a plan of apportionment made pursuant to this section shall allow thirty days for persons to change residence in order to be eligible for election.

The governor shall give the persons responsible for apportionment two weeks advance written notice of the date, time, and place of any meeting held pursuant to this section.

Adopted in 1967, section 13 provides that the Ohio Supreme Court has original jurisdiction in matters concerning Article XI. This section also provides that if the Ohio Supreme Court or the U.S. Supreme Court holds one or more of the sections of this article invalid or invalidates the then existing apportionment plan, a majority of the persons responsible for apportionment (*i.e.*, a majority of the Ohio Apportionment Board) must establish a new plan in line with the valid sections of Article XI.

#### **SECTION 14 District boundaries until January 1, 1973**

The boundaries of House of Representatives districts and Senate districts from which representatives and senators were elected to the 107th General Assembly shall be the boundaries of House of Representatives and Senate districts until January 1, 1973, and representatives and senators elected in the general election in 1966 shall hold office for the terms to which they were elected. In the event all or any part of this apportionment plan is held invalid prior to the general election in the year 1970, the persons responsible for apportionment by a majority of their number shall ascertain and determine a plan of apportionment to be effective until January 1, 1973, in accordance with section 13 of this Article.

Adopted in 1967, section 14 called for the carrying over of state legislative boundaries in existence prior to the November 1967 election on a new Article XI and provided for an interim plain if the apportionment plan existing at that time had been found unconstitutional before the 1970 general election.

## **SECTION 15 Severability provisions**

The various provisions of this Article XI are intended to be severable, and the invalidity of one or more of such provisions shall not affect the validity of the remaining provisions.

Adopted in 1967, section 156 makes the provisions of Article XI severable in case courts hold certain provisions unconstitutional. Section 15 gives constitutional status to the holding of the Ohio Supreme Court in State ex rel. King v. Rhodes (1967), in which the court held that the provisions of Article XI that were not found unconstitutional by a federal district court were severable from the unconstitutional provisions.

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1. Ibid.
  2. See Thomas R. Swisher, ed., Ohio Constitution Handbook (Cleveland: Banks-Baldwin Publishing Co., 1990), 427.
  3. The federal district court in Quilter v. Voinovich also upheld a 10.54% total deviation of senate districts resulting from the redistricting of Senate District 32 (see commentary to section 4).
  4. David Kind, "The Ohio General Assembly," in Harvey Walker, ed., An Analysis and Appraisal of the Ohio State Constitution 1851-1951 (Cincinnati: Stephen H. Wilder Foundation, 1951), 21-22.
  5. Ibid., 22.
  6. For a map of Ohio house districts adopted following the 2000 census, see Ohio Secretary of State, "Ohio House Districts Map," <<http://www.state.oh.us/sos//HouseDistricts02.htm>>, (17 July 2002). For a color map, see National Committee for an Effective Congress, "State House Map," <<http://www.ncec.org/redistricting/ OHsh02map.pdf>>, (17 July 2002).
  7. For a map of Ohio senate districts adopted following the 2000 census, see Ohio Secretary of State, "Ohio House Districts Map," <[http://www.state.oh.us/sos//Senate\\_Districts02.htm](http://www.state.oh.us/sos//Senate_Districts02.htm)>, (17 July 2002). For a color map, see National Committee for an Effective Congress, "State House Map," <<http://www.ncec.org/redistricting/ OHss02map.pdf>>, (17 July 2002).