Can You Ever Beat the Board? Challenges to Legislative Reapportionment in Ohio After Wilson v. Kasich

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I. INTRODUCTION

The legislative reapportionment process has long been one of the most controversial elements of our representative form of government. Rare is the apportionment plan that goes unchallenged by those adversely affected by a new district configuration. And while some principles of reapportionment, like the one person, one vote rule and the recognition of an injury based on racial gerrymandering, place protective restrictions on the process, one much-maligned abuse remains in full force in most states—political gerrymandering. The persistence of political gerrymandering is variously attributed to the zero-sum nature of the political process, the historical American emphasis on the community over the party, and the lack of judicially manageable

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* I would like to thank Professor Michael Solimine for his invaluable guidance during the research and writing process.

1. See James A. Gardner, Foreword: Representation Without Party: Lessons from State Constitutional Attempts to Control Gerrymandering, 37 Rutgers L.J. 881, 887 (2006) [hereinafter Gardner, Representation Without Party] (“American state legislatures have a long history of gerrymandering; the practice got its name, after all, from an 1812 districting plan designed by Republicans to keep the Massachusetts state senate from falling into Federalist hands.”).

2. See James A. Gardner, How to Do Things with Boundaries: Redistricting and the Construction of Politics, 11 Election L.J. 399, 399 (2012) [hereinafter Gardner, Things with Boundaries] (“Litigation over districting plans enacted following the 2010 census has erupted in at least half the states.”).

3. Gray v. Sanders, 372 U.S. 368, 381 (1963) (“The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.”); Reynolds v. Sims, 377 U.S. 533, 560–61 (1964) (“[T]he fundamental principle of representative government in this country is one of equal representation for equal numbers of people.”).

4. Shaw v. Reno, 509 U.S. 630, 649 (1993) (“[A] plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation . . . rationally cannot be understood as anything other than an effort to separate voters . . . on the basis of race.”).

5. Gardner, Representation Without Party, supra note 1, at 885–86 (“State legislatures . . . seem to redistrict with increasing boldness, barely bothering to disguise efforts to secure partisan advantage.”).

6. L. Sandy Maisel et al., The Impact of Redistricting on Candidate Emergence, in PARTY LINES: COMPETITION, PARTISANSHIP, AND CONGRESSIONAL REDISTRICTING 31, 46 (Thomas E. Mann & Bruce E. Cain eds., 2005) (“The redistricting processes currently used in most of the states . . . are dominated either by political parties or by incumbents; neither favors more competition. Parties want to reduce the number of seats in which they must wage expensive campaigns. Incumbents do not want to lose.”).

standards in reviewing alleged political abuses in reapportionment. Nonetheless, many states have made efforts to curb partisan-influenced redistricting through constitutional mandates of political neutrality and the creation of independent redistricting commissions.

Like many states, Ohio's history is rife with controversial apportionment plans and with federal- and state-level challenges to new apportionment schemes. One of the most recent and noteworthy of these challenges, Wilson v. Kasich, was decided by the Supreme Court of Ohio on November 27, 2012. The relators in Wilson v. Kasich, Ohio voters who claimed that the apportionment board had failed to follow constitutional mandates in redrawing the Ohio General Assembly districts, argued that the 2012 apportionment plan violated Article XI of the Ohio Constitution and was drawn for partisan gain.

Wilson v. Kasich is a significant Ohio decision for two key reasons. First, it established a burden of unconstitutional beyond a reasonable doubt for challenges to apportionment board decisions. Second, it...

8. See Vieth v. Jubelirer, 541 U.S. 267, 306-07 (Kennedy, J., concurring in the judgment) (“When presented with a claim of injury from partisan gerrymandering, courts are confronted with two obstacles. First is the lack of comprehensive and neutral principles for drawing electoral boundaries . . . [s]econd is the absence of rules to limit and confine judicial intervention.”).

9. DEL. CONST. art. 2, § 2A (“Each new Representative District shall, insofar as possible . . . not be so created as to unduly favor any person or political party.”); FLA. CONST. art. III, § 21 (“No apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent.”); HAW. CONST. art. 4, § 6 (“No district shall be so drawn as to unduly favor a person or political faction.”); WASH. CONST. art. 2, § 43 (“The commission’s plan shall not be drawn purposely to favor or discriminate against any political party or group.”).

10. Justin Levitt, A Citizen’s Guide to Redistricting, BRENNAN CENTER FOR JUSTICE (2010) (“Six states draw their legislative districts using independent commissions of individuals who are not themselves legislators or other public officials.”); but see James A. Gardner, Voting and Elections, in STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY, VOLUME 3, at 145, 163 (G. Alan Tarr & Robert F. Williams eds., 2006) (“It is not clear . . . that allocating redistricting authority to commissions will solve the problem of partisan gerrymandering.”) and Bruce E. Cain, Redistricting Commissions: A Better Political Buffer?, 121 YALE L.J. 1808, 1834-35 (2012) [hereinafter Cain, Redistricting Commissions] (“There are several common flaws in . . . independent citizen commission designs that are particularly problematic in an era of heightened partisanship . . . . [C]ommissions [a]re explicitly balanced in their membership, but there [i]s no specific provision or guidelines about the technical and legal staff they would employ.”).


14. Id. at 6.
maintained a disjunctive view of Article XI of the Ohio Constitution, thereby allowing the apportionment board to violate certain provisions of the article so long as it does so in furtherance of others.

This Casenote considers both the legal soundness and the future implications of the court's holdings in *Wilson v. Kasich*. Part II provides a background to the reapportionment process in Ohio, including an explanation of the relevant federal and state constitutional requirements. Part III addresses the Supreme Court of Ohio's decision in *Wilson v. Kasich*. Part IV analyzes the decision, considering the strength of the court's reasoning and the ramifications the decision may have for future reapportionments. Finally, Part V concludes that the court's adoption of an unconstitutional beyond a reasonable doubt standard and the court's effective blessing of constitutional violations by the apportionment board will create serious hurdles to potentially meritorious reapportionment challenges in the future.

II. THE REAPPORTIONMENT PROCESS

A. Federal Requirements for Reapportionment

Federal courts exert relatively little control over legislative redistricting by the states.15 However, the Voting Rights Act (VRA) and federal case law have restricted the power of states to redistrict in two areas: racial gerrymandering and malapportionment.16

The VRA prevents any voting "standard, practice, or procedure" from denying or abridging "the right of any citizen . . . to vote on account of race or color."17 In the years following the VRA, the United States Supreme Court held that the VRA and the Fifteenth Amendment prevented legislative reapportionment from diluting or abridging the voting rights of minorities.18 In recent years, as the Court has taken a more conservative stance on affirmative-action-type schemes,19 and as

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15. Chapman v. Meier, 420 U.S. 1, 27 (1975) ("Reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court."); see also Gardner, Things with Boundaries, supra note 2, at 399.


17. 42 U.S.C. § 1973(a) (2013). Although this Part of the Casenote discusses federal requirements generally, note that Ohio is not covered by § 5 of the VRA, nor was § 2 invoked by the relators in *Wilson v. Kasich*.

18. See Beer v. United States, 425 U.S. 130, 141 (1976) ("[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.").

the evils addressed by the VRA (particularly § 5) have arguably dissipated, the Court has defined racial gerrymandering as the use of any race-based classifications in reapportionment, regardless of whether the apportionment plan is meant to be a remedial one.

The problem of malapportionment has been addressed by the now-famous one person, one vote rule, which requires that the portion of representation given electoral districts substantially relates to the percentage of the population contained in those districts. The U.S. Supreme Court has held that "[a] plan with larger disparities in population [than 10%] creates a prima facie case of discrimination and therefore must be justified by the State." However, Ohio and other states allow an even smaller deviance than the federal case law.

Notwithstanding these significant reapportionment principles, there is a conspicuous absence of federal guidelines with respect to political gerrymandering. Although a plurality of the Supreme Court held in Davis v. Bandemer that political gerrymandering affords a justiciable cause of action, a plurality of the Court later held in Vieth v. Jubelirer that political gerrymandering claims are nonjusticiable under the political-question doctrine. And three dissenters in Vieth "proposed

v. Bollinger, 539 U.S. 244, 249 (2003); Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013).


21. Shaw v. Reno, 509 U.S. 630, 657 (1993) ("Racial classifications of any sort pose the risk of lasting harm to our society... racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters."). (emphasis added); see also ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 230-31 (1987) ("Courts... have neglected the statute's focus on fair process and come close to embracing the principle of group rights to proportionate officeholding.").

22. See Baker v. Carr, 369 U.S. 186, 208 (1962) (A citizen's right to vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution."); Gray v. Sanders, 372 U.S. 368 (1963); Reynolds v. Sims, 377 U.S. 533 (1964).

23. See, e.g., 84 OHIO JUR. 3D STATE OF OHIO § 15 (2012) ([T]he United States Constitution requires that state legislative districts, or persons-per-legislator, be of nearly equal population so that each person's vote may be given equal weight.").


25. OHIO CONST. art. XI, § 3; COLO. CONST. art. V, § 46.


28. Vieth v. Jubelirer, 541 U.S. 267, 281 (2004); see also MICHAEL DIMINO ET AL., VOTING RIGHTS AND ELECTION LAW 103 (2010) ("Under certain circumstances, federal and state courts will refuse to reach the merits of cases properly before them, on the basis that the case presents a 'political question' more properly resolved in the other branches of government.").

https://scholarship.law.uc.edu/uclr/vol82/iss3/9
separate (and conflicting) approaches for determining when gerrymanders cross the constitutional line."

So while the entire Court apparently acknowledges that political gerrymandering can be impermissible, \[1382\] "the Court's attempts to decide . . . when power is unfairly distributed among parties . . . has foundered on its inability to agree on a normative baseline of fair power distribution from which deviations might be measured." \[399\] For this reason, allegations of pure political gerrymandering (without some other legal or constitutional violation) are more frequently brought in state courts where, in states that disallow politically motivated reapportionment, they tend to fare much better. \[104\]

**B. Reapportionment in Ohio**

Article XI of the Ohio Constitution governs reapportionment of state legislative districts. \[182\] Before 1851, Ohio’s legislative districts were drawn by the General Assembly itself, "with the result that oftentimes political advantage was sought to be gained by the party in power." \[377\] At least partly in response to the proliferation of gerrymandering, the Constitution of 1851 created an apportionment board whose reapportionment decisions were not subject to legislative approval. \[377\] In 1967, Ohio voters adopted the current version of Article XI, which imported principles of one person, one vote, by setting the maximum population deviation to plus or minus 5% in legislative districts. \[241\]

Five members comprise Ohio’s apportionment board: (1) the Governor, (2) the State Auditor, (3) the Secretary of State, (4) "one person chosen by the [S]peaker of the House of Representatives and the leader in the Senate of the political party of which the [S]peaker is a member," and (5) "one person chosen by the legislative leaders in the two houses of the major political party of which the [S]peaker is not a member." Following each decennial census, the apportionment board

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29. Stephanopoulos, Redistricting, supra note 7, at 1382.
30. Vieth, 541 U.S. at 316 (2004) (Kennedy, J., concurring in the judgment) ("I do not understand the plurality to conclude that partisan gerrymandering that disfavors one party is permissible. Indeed, the plurality seems to acknowledge it is not.").
32. See DIMINO ET AL., supra note 28, at 104.
33. OHIO CONST. art. XI.
35. See 84 OHIO JUR. 3D STATE OF OHIO § 16 (2012) ("The purpose was to place legislative apportionment in the hands of a separate board not subject to the control of the General Assembly.").
36. OHIO CONST. art. XI, § 3 (however, pursuant to § 10(B), when a whole county would have a variance of only 20% if made into a district, the county "may be designated a representative district"); see also Mark A. Gabis, One Person, One Vote, 5 N. KY. L. REV. 241, 263–69 (1978).
37. OHIO CONST. art. XI, § 1. The members of the apportionment board that adopted the plan.
“shall convene . . . between August 1 and October 1” and adopt a plan of apportionment to be published by the Governor “no later than October 5 of the year.”

To determine the target population of each district, § 2 provides that “the whole population of the state . . . shall be divided by the number ‘ninety-nine’ [the number of House districts in the state] and the quotient shall be the ratio of representation in the House of Representatives.” Likewise, the ratio of representation for the Senate is determined by dividing the whole state population by thirty-three.

Section 3 of the Article (or “the proportionality provision”) enshrines the principle of one person, one vote by mandating that no district may deviate from the ratio of representation established under § 2 by more than 5% (except where an entire county is being preserved as a district, in which case there is an acceptable deviation of plus or minus 10%).

The first clause of § 7(A) (or “the contiguity provision”) provides that every house district “shall be compact and composed of contiguous territory” and bounded by a “single non-intersecting continuous line.” In its simplest form, reapportionment is designating those counties whose populations fall within the acceptable variance (either singly or in combination) as house districts under the second clause of § 7(A) (or “the whole-county provision”). Where it is not possible to create a district out of one or more whole counties, counties may be divided under § 7(B) (or “the county-division provision”) as long as districts are “formed by combining areas of governmental units.”

challenged in Wilson v. Kasich were, in order described above: (1) John Kasich, (2) David Yost, (3) Jon Husted, (4) Thomas Niehaus, and (5) Armond Budish.

38. Id.
39. OHIO CONST. art. XI, § 2.
40. Id.
41. Id. § 3 (“The population of each . . . district shall be substantially equal to the ratio of representation in the House . . . and in no event shall any . . . district contain a population of less than ninety-five per cent nor more than one hundred five per cent of the ratio of representation . . . except in those instances where reasonable effort is made to avoid dividing a county in accordance with section 9.”); see also id. §§ 9 and 10(B).
42. Id. § 7(A).
43. Id. § 7(A) (“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.”); id. § 9 (“In those instances where the population of a county is not less than ninety percent nor more than one hundred ten percent of the ratio of representation . . . reasonable effort shall be made to create a . . . district consisting of the whole county.”); id. § 10(A) (“Each county containing population substantially equal to one ratio of representation . . . but in no event less than ninety-five per cent nor more than one hundred five per cent of the ratio shall be designated a representative district.”) (emphasis added); id. § 10(B) (“Each county containing population between ninety and ninety-five percent of the ratio or between one hundred five and one hundred ten per cent of the ratio may be designated a representative district.”) (emphasis added).
44. Id. § 7(B) (“Where the requirements of section 3 . . . cannot feasibly be attained by forming a district from a whole county or counties, such district shall be formed by combining the areas of
though, when a county is divided it may have only as many districts wholly within its boundaries as it has ratios of representation under § 2. Where it is not possible to create a district without dividing a governmental unit, § 7(C) (or "the unit-division provision") provides that only one governmental unit may be divided between any two districts. Under § 7(D) (or "the district-preservation provision"), the apportionment board shall also adopt boundaries established in the previous apportionment plan "to the extent reasonably consistent with the requirements of section 3."  

III. Wilson v. Kasich

Unlike federal courts, whose authority to hear reapportionment cases is controlled by the prudential, political-question barrier, the Supreme Court of Ohio is vested with "exclusive, original jurisdiction in all cases arising under" Article XI of the Ohio Constitution. Thus, the Supreme Court of Ohio is not kept from reaching the merits of suits brought under Article XI for the same reasons that federal courts might be. The relators in Wilson v. Kasich argued both that the apportionment board "flouted Article XI's requirements" and that it did so for improper, politically motivated reasons. Part A discusses the facts and procedure of the case. Part B details the court's resolution of the issues presented.

45. Id. § 8 ("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."); see also id. § 10(C).

46. Id. § 7(C).

47. Id. § 7(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."). How this provision affects the operation of the other provisions will be discussed at length below.


49. OHIO CONST. art. XI, § 13 (emphasis added).

50. See Dimino et al., supra note 28, at 104 ("[T]he [political-question] doctrine has been applied less robustly by many state courts, in part because state constitutions are typically much longer and more detailed than the Federal Constitution, and seem to call for more judicial interpretation and application of those provisions."); see also David Schultz, Redistricting and the New Judicial Federalism: Reapportionment Litigation Under State Constitutions, 37 RUTGERS L.J. 1087, 1132 (2006) ("As the federal courts either retreat from redistricting issues, are unable to resolve political gerrymandering questions, or are throwing the issues of malapportionment back to states . . . state constitutions appear to be becoming more important tools for resolving legal disputes.").

51. Complaint, supra note 13, at 6.
A. Facts and Procedural History

In accordance with Article XI, § 1, the apportionment board and its joint secretaries began meeting in early August 2011 to plan a new apportionment scheme for Ohio’s General Assembly.52 After over a month of meetings, the board approved an apportionment plan on September 28, 2011, with a vote of 4 to 1 (along party lines).53 Communications among the board members and the joint secretaries revealed that the reapportionment process had been highly (albeit rationally) politicized.54 Secretary Mann distributed “political indexes” for each house district from the previous reapportionment that served as a metric for redrawing the districts in a way favorable to Republican politicians.55 Secretary Mann described the indexes to the board members, explaining that “[p]reviously to retain a 50+ seat majority under 2008 Presidential year conditions, we had to win all seats above a 49.14%; now we only have to hold 50 or more seats that are 50.94% or better.”56 In an email between the secretaries, Secretary Mann stated that Democrats “hold 6 of our 50%+ seats . . . at least they do now.”57 In yet another communication between the board secretaries, Secretary DiRossi noted that “we have made significant improvements to many [House districts] on this list . . . [h]opefully saving millions over the coming years.”58 Both board secretaries subsequently acknowledged that the political indexes could “affect future elections.”59

In January 2012, the relators brought suit against the four Republican members of the apportionment board.60 The relators sought “a declaration that the decennial apportionment plan adopted by [the board]
is invalid under Article XI and the Open Meetings Act and a prohibitory injunction preventing respondents from conducting elections using the state legislative districts set forth in the plan. The relators argued that the apportionment board, as a “public body” under Ohio’s Sunshine Act, violated its duty to “take official action and to conduct all deliberations . . . only in open meetings.” Furthermore, the relators argued that the board intentionally violated the dictates of Article XI for impermissible, political reasons.

On February 17, 2012, the Supreme Court of Ohio dismissed the relators’ Open Meetings Act claim for lack of subject matter jurisdiction and held that the relators’ request for an injunction was barred by laches. Then, on March 2, 2012, the court entered an order requiring the parties to file briefs responding to four questions: (1) whether the court has jurisdiction notwithstanding the fact that the relators brought suit against only four of the five members of the apportionment board; (2) whether the Ohio Constitution mandates political neutrality; (3) what is the burden of proof in establishing that an action by the apportionment board is unconstitutional; and (4) whether tension exists among the provisions of Article XI and how those tensions ought to be reconciled. These are the issues the court resolved in Wilson v. Kasich.

B. The Majority Opinion

Justice O’Donnell wrote the court’s majority opinion in Wilson v. Kasich. After providing a general description of the reapportionment process, outlining the facts of the case, and noting that reapportionment is an inherently political process, Justice O’Donnell answered the

61. Wilson, 981 N.E.2d at 818.
63. Complaint, supra note 13, at 6.
64. Wilson v. Kasich, 963 N.E.2d 1282, 1283 (Ohio 2012) (“[W]ithout the applicability of Article XI, Section 13 to relators’ open-meetings claim, we lack jurisdiction over this claim for declaratory and injunctive relief.”).
65. Id. at 1284; see also State ex rel. Newell v. Tuscarawas Cnty. Bd. of Elections, 757 N.E.2d 1135, 1138 (Ohio 2001) (“A relator seeking extraordinary relief in an election-related matter bears the burden of establishing that the relator acted with the required diligence, and if the relator fails to do so, laches may bar the action.”).
67. Wilson, 981 N.E.2d at 817.
68. Id. (“Apportionment is primarily a political and legislative process . . . and as a result, both courts and scholars have universally agreed that politics cannot be divorced from the process.”) (internal quotation marks omitted). Saying that reapportionment is inherently political, however, is not the same as acknowledging that the state constitution sanctions politically motivated reapportionment; presumably, Justice O’Donnell would agree that states like Delaware and Florida have removed politics
major questions presented to the parties for briefing.

1. Political Neutrality

After quickly disposing of the jurisdictional issue, the majority proceeded to ascertain whether the Ohio Constitution prohibits political considerations in reapportionment. The court stated that its "primary concern...is to determine the intent of the electorate in adopting" Article XI by examining the text of the article. The majority held that political neutrality was not explicitly required by the text of Article XI; indeed, by its terms, Article XI does not even require "politically competitive districts or representational fairness." Justice O'Donnell compared the language of the Ohio Constitution to those state constitutions that do explicitly mandate political neutrality, finding that states intending to restrict political considerations "specify in either constitutional or statutory language that no apportionment plan shall be drawn with the intent of favoring or disadvantaging a political party." Thus, the majority concluded, Article XI "does not prevent the board from considering partisan factors."

Nonetheless, the court acknowledged that "political considerations cannot override the requirements of Article XI." Because the article neither forbids nor condones consideration of partisan factors, the predominating concern must be adherence to the constitutional requirements of reapportionment.

2. Burden of Proof

"Although a board's apportionment plan is not a statute," the majority held, "the same general principle applies to resolving relators' attack on the constitutionality of the apportionment plan as that which applied to attacks on...statutes." This is because: (1) the duty to reapportion from the reapportionment process by operation of law. More on this infra Part III.B.2.

69. The majority held that while "it remains better practice in this type of action to name the board and all its members as parties," the fact that only four of the five board members were made parties was not fatal to the action. Wilson, 981 N.E.2d at 819.

70. Id. at 820.

71. Id.

72. Id. (citing In re Senate Joint Resolution of Legislative Apportionment, 83 So. 3d 597 (Fla. 2012)); see also supra note 9.

73. Wilson, 981 N.E.2d at 820.

74. Id. (emphasis added).

75. Id.

76. Id. at 821.
was "previously conferred on the General Assembly;"\textsuperscript{77} (2) there is a
general presumption that public officers perform their duties "in a
regular and lawful manner;"\textsuperscript{78} (3) Ohio voters took the authority to
apportion from the General Assembly and gave it to the apportionment
board, which evidences a greater degree of trust in the board;\textsuperscript{79} and, (4)
many other jurisdictions have given legislative-type deference to
reapportionment decisions.\textsuperscript{80}

For these reasons, the majority held that the proper burden of proof
for challenging Ohio apportionment board decisions is for the "one
challenging the constitutionality of an apportionment plan...to
establish that the plan is unconstitutional beyond a reasonable doubt."\textsuperscript{81}

3. Article XI

With the beyond a reasonable doubt standard as guidance, the
majority proceeded to consider the constitutionality of the challenged
apportionment plan. The court acknowledged, as the respondents had
frankly admitted, that violations of the letter of Article XI occurred.\textsuperscript{82}
However, the court began its discussion of Article XI's different
provisions by noting that the article "vests the apportionment board with
considerable discretion in formulating an appropriate plan."\textsuperscript{83}
According to the majority, the broad, discretionary language of Article
XI allows the board to make its own decisions in reconciling potentially
conflicting provisions.\textsuperscript{84} As the majority noted, Article XI itself
provides no clear guidance for dealing with provisions that are in
tension with one another. Instead, the board is given the power to
follow certain constitutional dictates, even at the expense of violating
others, if it would be impossible to honor each and every requirement
under Article XI.\textsuperscript{85}

Under the majority's reading of Article XI, while the county-division
and unit-division provisions are fallbacks to the whole-county and
county-division provisions respectively, the district-preservation

\textsuperscript{77} Id.
\textsuperscript{78} Id. (citing Skaggs v. Brunner, 900 N.E.2d 982 (Ohio 2008)); see also 42 OHIO JUR. 3D
EVIDENCE AND WITNESSES § 118 (2012).
\textsuperscript{79} Wilson, 981 N.E.2d at 821.
\textsuperscript{80} Id. at 822 (citing Parella v. Montalbano, 899 A.2d 1226 (R.I. 2006); Logan v. O'Neill, 448
A.2d 1306 (Conn. 1982); McClure v. Sec'y of the Commonwealth, 766 N.E.2d 847 (Mass. 2002); In re
Wolpoff, 600 N.E.2d 191 (N.Y. 1992)).
\textsuperscript{81} Id. (emphasis added).
\textsuperscript{82} Id. at 825.
\textsuperscript{83} Id. at 824 (citing OHIO CONST. art. XI, §§ 3, 7(A)-(D)).
\textsuperscript{84} Id. at 825.
\textsuperscript{85} Id.
provision is a separate and coequal constitutional mandate that “boundaries established by the preceding apportionment . . . be adopted to the extent reasonably consistent with the requirements of section 3."86 Therefore, the board might have to choose between maintaining the status quo at the expense of violating the geographical requirements of § 7(A)–(C) or redrawing districts to honor § 7(A)–(C) at the expense of disrupting the status quo under the district-preservation provision.87

Given the broad discretion wielded by the apportionment board, and the highly deferential standard of review, the majority refused to “order respondents to correct the alleged violations of Sections 7(A), (B), and (C) by committing a violation of Section 7(D).”88

The majority went even further, however, and held that the discretionary, “to the extent reasonably consistent with . . . section 3” language of the district-preservation provision “confers the authority on the apportionment board to adopt district boundaries that are not identical to those used in the prior apportionment.”89 Thus, according to the court, not only is the district-preservation provision coequal with § 7(A)–(C), but the “discretionary language” of the provision entitles the apportionment board to “readopt” district boundaries that did not technically exist in the first place.90

So while the majority acknowledged that the reapportionment divided counties seventy-four times, and governmental units many times as well, it was not willing to hold that the apportionment board had violated the Ohio Constitution beyond a reasonable doubt or to require the board to correct its “alleged” violations of §§ 7 and 10.91 The court held that the relators failed to meet their heavy burden of proving that the Constitution had been violated because (1) the relators’ arguments rested on an incorrect interpretation of Article XI, § 7,92 (2) it is irrelevant whether a “better” apportionment plan exists so long as the apportionment plan adopted does not violate the Constitution,93 and (3)

86. Ohio Const. art. XI, § 7(D).
87. Wilson, 981 N.E.2d at 825. One major point of contention was the division of noncontiguous local governmental units, or units whose boundaries are not single, contiguous lines. The relators argued that § 7(A)–(C) applied to such units, whereas the respondents argued that noncontiguous units had historically been treated differently from contiguous units. The majority sided with the respondents, pointing out that “the division of noncontiguous governmental units [is] accomplished by local officials through annexation rather than by the board through apportionment.” Id. at 825. Thus, the majority was not willing to hold the apportionment board responsible for dividing that which had already been divided.
88. Id. at 826.
89. Id. (emphasis added).
90. Id.
91. Id.
92. Id.
93. Id.
the relators’ expert evidence was “conclusory” and “unreliable.”

C. The Dissenting Opinions

Justice Pfeifer’s dissent, joined by Chief Justice O’Connor and Justice McGee Brown, attacked the majority’s adoption of an unconstitutional beyond a reasonable doubt standard. “There is no basis,” Justice Pfeifer argued, “in the Ohio Constitution, in fairness, in justice, or in political reality for this court to cloak the apportionment board’s actions with a presumption of constitutionality that can be overcome only by proof beyond a reasonable doubt.” Rather, when the drafters of Article XI created the present scheme, they clearly anticipated challenges to apportionment plans, which is shown by § 13’s vesting of original jurisdiction in the Supreme Court of Ohio and process for correcting constitutional violations by the apportionment board. It makes little sense, argued Justice Pfeifer, to put these safeguards in place if apportionment board decisions would be nearly impossible to overturn. Justice Pfeifer rejected the majority’s reasoning that the apportionment board’s membership of “public officials” is of special significance; “that public officials are presumed to have acted lawfully,” he argued, does not mean “that the constitutionality of their work product can be overcome only by proof beyond a reasonable doubt.”

Justice Pfeifer also criticized the majority’s reading of the district-preservation provision as being a separate and coequal consideration in a reapportionment decision. He argued that the district-preservation provision cannot possibly be coequal, because “a board could justify the adoption of an incumbent-protecting apportionment plan and forgo any effort to achieve compactness and minimize splits of governmental units.” If § 7(A)–(C) do not control the district-preservation provision, Justice Pfeifer argued, the court must affirm “patently unconstitutional” apportionment plans enacted pursuant to the district-preservation provision but in contravention of the rest of § 7. Although Justice Pfeifer described himself as “reluctant” to do so, he would have held that because of “serial violations of the Section 7 constitutional mandate for compactness of legislative districts and minimization of

94. Id. at 827.
95. Id. at 828 (Pfeifer, J., dissenting).
96. Id. (citing OHIO CONST. art. XI, § 13).
97. Id. at 829 (citing Skaggs v. Brunner, 900 N.E.2d 982 (Ohio 2008)).
98. Id.
99. Id.
100. Id.
Justice McGee Brown, joined by Chief Justice O'Connor, similarly criticized the criminal-case-level deference the majority gave to decisions of the apportionment board. Instead, Justice McGee Brown "would hold that once relators make a prima facie showing beyond a reasonable doubt that respondents have violated a provision ... the burden of proof shifts to respondents to justify that violation based on the avoidance of a violation of another" law.

On the proper construction of Article XI, Justice McGee Brown's dissent differed from Justice Pfeifer's. Justice McGee Brown agreed with Justice O'Donnell and the majority that the district-preservation provision is a coequal provision to § 7(A)-(C). However, she noted that the explicit command of the district-preservation provision is that "the preceding apportionment plan shall be adopted" when it would be consistent with the proportionality provision to do so. Justice McGee Brown therefore rejected the respondents' argument that the district-preservation provision allows districts to be altered "to the extent possible" to conform to the previous apportionment plan. Rather, if a district has been altered at all the apportionment board cannot justify that decision using the district-preservation provision, because the section requires that the previous district be adopted as is.

Applying her preferred standard of review, Justice McGee Brown found that the relators made a prima facie showing beyond a reasonable doubt that the whole-county and district-preservation provisions were violated; thus, the burden ought to have shifted to the respondents to justify their actions.

101. Id. at 830.
102. Id. at 832-33 (McGee Brown, J., dissenting).
103. Id. at 833. Thus, instead of having to show, beyond a reasonable doubt, that the entire apportionment plan is unconstitutional, the relators would only have to show that a constitutional violation occurred. As she notes later in her dissent, Justice McGee Brown certainly believes a constitutional violation had occurred.
104. Id. at 834. This makes it somewhat puzzling that Chief Justice O'Connor joined both dissents even though they differ significantly on an important question of law.
105. Id.
106. Id. at 838 (citing OHIO CONST. art XI, § 7(D)) (emphasis added).
107. Response of Respondents Governor John Kasich, Senate President Thomas E. Niehaus, and Auditor David Yost to Supplemental Merit Brief of Relators at 21, Wilson v. Kasich, 981 N.E.2d 814 (Ohio 2012) (No. 2012-0019) ("The only practical understanding of Section 7(D) is that new districts, to the extent possible, should be drawn, when balanced against other directives from Article XI, in light of population changes, to conform to the prior plan.").
108. Wilson, 981 N.E.2d at 835 ("By applying a malleable standard of substantial deference to previous district lines, an apportionment board could condone a myriad of violations of Article XI to achieve partisan gain.").
109. Id. at 833, 838.
IV. THE FUTURE OF REAPPORTIONMENT

The court in Wilson v. Kasich erected a nearly insurmountable barrier to challenges to apportionment board decisions and empowered the board to follow its preferred Article XI provisions while violating others. This Part of the Casenote analyzes the court’s reasoning and the future implications for reapportionment in Ohio under Wilson v. Kasich. Part A examines the soundness of imposing a burden of unconstitutional beyond a reasonable doubt upon litigants challenging an apportionment plan. Part B examines the court’s reading of Article XI and its decision to vest considerable discretion in the apportionment board when “reconciling” the article’s provisions. Part C considers the ramifications of Wilson v. Kasich and attempts to explore the outer limits of what an apportionment board might be allowed to “get away with” given the current state of the law.

A. Too Heavy of a Burden

One of the most significant and detrimental legal consequences of Wilson v. Kasich is the imposition of an inappropriately high burden of unconstitutional beyond a reasonable doubt on challenges to Ohio apportionment board decisions. Although the proper burden of proof in reapportionment cases had not been explicitly decided in Ohio (the question was only tangentially addressed in cases like Voinovich v. Ferguson) the majority of the court conclusively determined that the apportionment board’s decisions were owed the highest deference. To support this proposition, the majority cited a number of cases from jurisdictions outside of Ohio. However, most of the cases cited either do not support an unconstitutional beyond a reasonable doubt standard as unequivocally as the majority made it seem or do not arise in a jurisdiction whose reapportionment procedures are significantly similar to Ohio’s.

The majority cited Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Commission to support the

110. Id. at 822 (majority opinion).
111. Id. at 821 (citing Voinovich v. Ferguson, 586 N.E.2d 1020, 1024 (Ohio 1992) (Holmes, J., concurring)) ("[T]he apportionment made must so far violate the rules prescribed by the constitution, as to enable us to say, that what has been done is no apportionment at all, and should be wholly disregarded."). Not only did the one-page, per curiam decision in Voinovich not address the issue of burden of proof, but Justice Holmes’ opinion does not clearly support an unconstitutional beyond a reasonable doubt standard either.
contention that redistricting decisions are legislative in nature and should therefore be accorded special deference.113 Although the Arizona Supreme Court gave deference to the redistricting commission’s decision, nowhere in its opinion did the court impose a burden of unconstitutional beyond a reasonable doubt;114 instead, the court held that “when there is a reasonable, even though debatable, basis for the enactment of a [redistricting decision], we will uphold the act unless it is clearly unconstitutional.”115 While the difference may seem to be merely semantic, clear unconstitutionality is not the same as unconstitutionality beyond a reasonable doubt. For instance, one would likely not say that the burden of proof at a criminal trial is “clear guilt.”116

In addition, the composition of Arizona’s redistricting commission is starkly different from that of Ohio’s apportionment board.117 The Arizona redistricting commission is comprised of five members, no more than two of whom can be affiliated with the same party, and none of whom can “have been appointed to, elected to, or a candidate for any other public office” within the previous three years.118 The diverse makeup of Arizona’s independent commission therefore suggests that deference is not only appropriate but also necessary to ensure that the commission is free to carry out its constitutionally appointed function.119

The Wilson v. Kasich majority also cited Parella v. Montalbano, which unequivocally held that the redistricting plan at issue had to be proved unconstitutional beyond a reasonable doubt.120 However, unlike in Ohio, Rhode Island’s General Assembly itself enacts the redistricting plans for the state’s house and senate districts.121 The same is true for

113.  Id. at 821.
115.  Id. at 684 (internal quotation marks omitted).
116.  SIXTH CIRCUIT PATTERN CRIMINAL JURY INSTRUCTIONS 1.03(5) (2009), available at http://www.rid.uscourts.gov/menu/judges/jurycharges/OtherPJ/6th%20Circuit%20Patterns%20Criminal%20Jury%20Instructions.pdf (“Proof beyond a reasonable doubt means proof which is so convincing that you would not hesitate to rely and act on it in making the most important decisions in your own lives.”); see also PAUL C. GIANNELLI & BARBARA ROOK SNYDER, 1 BALDWIN’S OH. PRAC. EVID. § 301.3 (2012) (“The ‘beyond a reasonable doubt’ standard is the most difficult standard to satisfy and is used almost exclusively in criminal cases.”).
117.  ARIZ. CONST. art IV, part II, § 1(3).
118.  Id.
119.  See Cain, Redistricting Commissions, supra note 10, at 1830.
120.  Parella v. Montalbano, 899 A.2d 1226, 1233 (R.I. 2006) (“Because redistricting is a legislative function . . . the trial justice was correct in allocating this time-honored burden of proof—beyond a reasonable doubt—to the plaintiffs, who were challenging the constitutionality of the Senate redistricting plan.”).
121.  R.I. CONST. art. VII, § 1 and art. VIII, § 1. The reapportionment at issue in Parella was performed by a special commission and adopted by the General Assembly because of “complicated and
reapportionment in Massachusetts and New York—jurisdictions from which the Supreme Court of Ohio cited additional cases to support its holding.\(^\text{122}\) And in Connecticut, a bipartisan reapportionment committee creates a plan that is adopted by the general assembly.\(^\text{123}\) The need to defer to a “legislative” redistricting decision is clearer in states where the state legislature enacts apportionment plans, as the amount of deference owed the duly elected representatives of the people is an easier question than the amount owed to a five-person board in which one party is disproportionately represented.\(^\text{124}\) Indeed, the U.S. Supreme Court has affirmed the legislative nature of redistricting determinations in cases where a state legislature itself has adopted an apportionment plan.\(^\text{125}\) The legislative nature of the apportionment board’s decisions, and thus the need for a very high level of deference to those decisions, is far more dubious than in cases where an apportionment plan is enacted by a state’s general assembly.

To the extent that legislative deference is premised on the notion that “in a democratic form of government, policy decisions should be made by th[ose] . . . who are accountable to the people through elections,”\(^\text{126}\) it is not clear that the apportionment board’s members are entitled to this presumption. Given that no member of the apportionment board is directly placed in that position by public selection, it would be more appropriate to characterize the members, for the purposes of reapportionment, as public officers. As Justice Pfeifer noted in his dissent, the mere fact that public officers are presumed to act lawfully does not mean that their actions must be proved unconstitutional beyond a reasonable doubt.\(^\text{127}\)

Ohio’s apportionment board is comprised of three state executive officers and (at most) two state legislators.\(^\text{128}\) So while redistricting may problematic" issues that arose out of Rhode Island’s 1994 government-reduction measures, which “eliminated approximately one-quarter of the seats in the General Assembly.” Parella, 899 A.2d at 1230.

\(^{122}\) Massachusetts Const. art. Cl, § 1; McClure v. Sec’y of the Commonwealth, 766 N.E.2d 847, 856 (Mass. 2002) (“[P]laintiffs must carry their burden of demonstrating beyond a reasonable doubt that the departures they complain of are ‘unreasonable.’”); N.Y. Const. art. III, § 5; In re Wolpoff, 600 N.E.2d 191, 194 (N.Y. 1992).

\(^{123}\) Conn. Const. art. 3, § 6; Logan v. O’Neill, 448 A.2d 1306, 1310 (Conn. 1982) (“There is a presumption of constitutionality which attaches to a statutory enactment; the burden which rests upon a party asserting its invalidity is to establish that it is unconstitutional beyond a reasonable doubt.”).

\(^{124}\) The apportionment board is not necessarily a reflection of the legislative will, as three executive officers who may be elected by narrow margins represent 60% of the voting power on the board (which in turn has the power to affect the outcome of future elections).


\(^{126}\) F. Andrew Hessick, Rethinking the Presumption of Constitutionality, 85 Notre Dame L. Rev. 1447, 1469 (2010).


\(^{128}\) Ohio Const. art. XI, § 1. Although the two remaining members of the board will most
be traditionally legislative, characterizing the decisions of the board as legislation akin to that passed by the general assembly is disingenuous. If one characterizes it instead as the action of public officers, then presuming "that public officials... have acted lawfully" could mean nothing more than that the burden of proof rests on the challenger.\textsuperscript{129}

Furthermore, contrary to the majority's reasoning, the fact that the power to reapportion was transferred from the general assembly to the apportionment board in 1851 does not mean that both entities are entitled to the same amount of deference.\textsuperscript{130} In fact, if the amendment represented the electorate's response to how difficult it was to attack or reverse legislative reapportionments, it would make little sense to give the exact same presumption of validity to a much smaller group of people. And given that a majority of the board will necessarily be comprised of politically motivated actors (the governor, the state auditor, and the secretary of state), it would be pointless for an electorate concerned that "political advantage was sought to be gained by the party in power" to give wide deference to a five-person board containing no fewer than three politicians.\textsuperscript{131} There is no evidence that when the electorate transferred the task of reapportionment to the apportionment board it meant to also transfer legislative-type deference to the board's decisions.

A more appropriate standard in this context is that used in New Hampshire, where a court "will not hold [an apportionment plan] to be unconstitutional unless a clear and substantial conflict exists between it and the constitution."\textsuperscript{132} This is similar to Justice McGee Brown's preferred burden of requiring challengers to make a "prima facie showing beyond a reasonable doubt" that a constitutional violation has occurred and then shifting the burden to the apportionment board.\textsuperscript{133} In both instances, the challengers must show that the reapportionment decision is in conflict with the constitutional requirements—not that an entire plan and its justifications are unconstitutional beyond a reasonable doubt.\textsuperscript{134}

\textsuperscript{129.} \textit{Wilson}, 981 N.E.2d at 829.

\textsuperscript{130.} See id. at 828.

\textsuperscript{131.} Herbert v. Bricker, 41 N.E.2d 377, 382 (1942); see also Gardner, \textit{Voting and Elections}, supra note 10, at 163 ("The political forces organizing legislatures may well reappear in redistricting commissions.").

\textsuperscript{132.} N.H. Health Care Ass'n v. Governor, 13 A.3d 145, 152 (N.H. 2011) (internal quotation marks omitted). Note also that this was the level of deference given to the state legislature—not an independent apportionment board.

\textsuperscript{133.} \textit{Wilson}, 981 N.E.2d at 833 (McGee Brown, J., dissenting).

\textsuperscript{134.} Id.
The Supreme Court of Ohio’s role in Article XI reapportionment decisions also calls into question the beyond a reasonable doubt standard. Article XI, § 13 makes the supreme court the sole arbiter of litigation between the apportionment board and challengers of its decisions. In a similar context, the Supreme Court of Florida held that because:

[i]t is this Court’s duty, given to it by the citizens of Florida, to enforce adherence to the constitutional requirements and to declare a redistricting plan that does not comply with those standards constitutionally invalid...[w]e reject the assertions...that a challenger must prove facial invalidity beyond a reasonable doubt.135

Although the review processes in Ohio and Florida are not identical, it is significant that the drafters of Article XI made the Supreme Court of Ohio the watchdog of the constitutional validity of apportionment plans. In this sense, the majority’s handwringing over separation of powers concerns is misplaced. The fact that Article XI makes the court an integral part of reapportionment cuts against the need for such a high level of deference to the board’s decisions. As Justice Pfeifer noted in dissent, “Article XI, Section 13 of the Ohio Constitution places on this court the duty to answer [allegations of unconstitutionality] without deference to either party.”136 The majority’s ruling thus unduly aggrandizes the apportionment board’s power to make reapportionment decisions and minimizes the court’s own function to rule on the constitutionality of apportionment plans.

B. Resolving Conflicting Mandates


One of the most troubling issues in Wilson v. Kasich was the apparent tension among Article XI’s provisions.137 This tension is particularly interesting in light of the theoretical foundations of these provisions.138

The conflict among the provisions might be summed up as competing interests in community-based representation, voter equality, and

135. In re Senate Joint Resolution of Legislative Apportionment 1176, 83 So.3d 597, 607 (Fla. 2012). Florida is different from Ohio, however, in that the Florida Supreme Court is constitutionally mandated to pass on the validity of every apportionment plan drawn by the General Assembly. FLA. CONST. art. III, § 16(c).


137. Id. at 818 (majority opinion) (“[W]e ordered the parties to file supplemental briefs addressing...[whether] tension exist[s] among sections 3, 7, and 10 of Article XI of the Ohio Constitution.”).

138. Stephanopoulos, Redistricting, supra note 7, at 1390.
continuity. Sections 7(A)–(C) and 10 could be described as protecting geographical integrity. Historically, “American jurisdictions agreed that territorial communities existed and ought to be represented as such in the legislature.” On the other hand, the proportionality provision, which imposes strict one person, one vote requirements, stands for the proposition that all voters are created equal. Further still, the district-preservation provision attempts to impose a measure of continuity on the reapportionment process. The apportionment board is therefore given the potentially impossible task of maintaining the integrity of counties and governmental units, ensuring that each district hews to the equal representation requirements of the proportionality provision, and preserving the preexisting district boundaries. But “[i]n almost all areas, communities [are] not equipopulous, meaning that the only way to comply with the one-person, one-vote rule [i]s to countenance their wholesale disruption,” and the constant fluctuation in district populations can make compliance with the district-preservation provision particularly difficult.

This is not to say that the apportionment board should violate the Ohio Constitution with impunity; it is merely to note that resolving the tension among Article XI’s provisions will necessarily lead to choosing one normative view of the reapportionment process over another. The question, then, is who ought to be making a choice so foundational to representative governance.

2. The Apportionment Board as Decision Maker

The problems with imposing an extremely high burden of proof discussed in Part IV.A are further exacerbated by the court’s resolution of Article XI’s tensions and essential redefinition of ‘unconstitutionality.’ In most instances, an action that violates the letter of a constitutional provision is unconstitutional. However, the court held in Wilson v. Kasich that a technical violation of Article XI, § 7 does not by itself establish unconstitutionality beyond a reasonable doubt. Instead, violations of § 7(A)–(C) do not establish unconstitutionality if the district-preservation provision is not violated. Furthermore, based on the majority’s construction of the district-preservation provision, the apportionment board is not required to adopt a preexisting district

139. Id. at 1408.
140. Id. at 1412.
141. BLACK’S LAW DICTIONARY 1561 (8th ed. 2004) (defining “unconstitutional” as “[c]ontrary to or in conflict with a constitution”).
142. Wilson, 981 N.E.2d at 825.
143. Id.
boundary as is—the board still complies with the provision even when it reshapes the boundary, so long as its efforts are “reasonably consistent with ... section 3.”144 This is how the court has resolved the inherent tensions within Article XI, § 7: it has given to the apportionment board the power to choose how it would like to follow these constitutional mandates.

Under the majority’s reading of Article XI, the proportionality provision is the only obvious constraint on the apportionment board’s wide discretion in adopting redistricting plans. All the provisions of § 7 are still premised on compliance with the proportionality provision.145 However, the relators in Wilson v. Kasich could not allege violations of the proportionality provision, because the apportionment plan was commendably meticulous in its adherence to that provision.146 Beyond proportionality, however, the Supreme Court of Ohio’s construction of § 7’s provisions leaves the apportionment board with immense and practically unreviewable authority to reapportion. Not only is the apportionment board entitled to violate the whole-county, county-division, and unit-division provisions as long as it complies with the district-preservation provision, but “compliance” with the district-preservation provision does not literally mean that a district must be preserved.147 This reading of the Ohio Constitution, coupled with imposing the highest possible burden on challengers of decennial apportionment plans, untethers the apportionment board from strict compliance with any mandate other than the proportionality provision and leaves Article XI virtually toothless.

C. Establishing Unconstitutionality

In the wake of Wilson v. Kasich, what would an unconstitutional apportionment plan look like? Answering this question obviously calls for speculation, because the decision rested on a specific set of facts and was argued before a court whose composition had already changed less than six months later. Nonetheless, certain generalizations can be made by examining the principles set forth in the court’s decision in order to

144. Id. at 826 (internal quotation marks omitted).
145. OHIO CONST. art. XI, § 7(A) (“To the extent consistent with the requirements of section 3 . . . .”); id. § 7(B) and (C) (“Where the requirements of section 3 of this Article cannot feasibly be attained . . . .”); id. § 7(D) (“[T]o the extent reasonably consistent with the requirements of section 3 . . . .”).
147. Wilson, 981 N.E.2d at 826 (holding that the apportionment board has “the authority . . . to adopt district boundaries that are not identical to those used in the prior apportionment” when applying § 7(D)).
explore the outer limits of the apportionment board’s authority in a post-\textit{Wilson v. Kasich} Ohio.

First, future reapportionments can unarguably take political considerations into account. If there was still any question before \textit{Wilson v. Kasich}, there certainly isn’t anymore. Based on a fair reading of Article XI’s plain language, the court looked past the many “smoking-gun” communications among the secretaries and board members indicating that boundary lines were being drawn for partisan gain. Instead, the court held that political considerations are only unconstitutional when they “override the requirements of Article XI.”

Given that \textit{Wilson v. Kasich} was apparently not even a close case on this issue (neither Justice Pfeifer nor Justice McGee Brown criticized the court’s political-neutrality holding in their dissents), for a future reapportionment to be struck down on political gerrymandering grounds it would have to be outright flagrant. And since the court could not possibly determine whether political considerations overrode constitutional requirements by looking at the subjective intent of the apportionment board, it seems that an impermissibly political reapportionment would have to be patently illegal or unconstitutional as well. For good or ill, this renders political-motivation challenges to apportionment plans virtually worthless, as the challenges would most likely have to be accompanied by additional allegations that would suffice individually (such as racial gerrymandering or obvious Article XI violations).

Second, future reapportionments must follow at least one of the mandates of § 7—geographical integrity under § 7(A)–(C) or district continuity under § 7(D). Because the court held that it would “not order respondents to correct the alleged violations of Sections 7(A), (B), and (C) by committing a violation of Section 7(D),” presumably some part of § 7 must be followed. The apportionment board could therefore follow the mandates of the district-preservation provision at the expense of compliance with § 7(A)–(C), or vice versa, but it could not fail to comply with any portion of Article XI, § 7.

Less clear, however, is how much latitude the court’s construction of the district-preservation provision will give future apportionment boards. The court held that compliance with the district-preservation provision does not require that districts be adopted in the precise form they took in the previous apportionment scheme as long as the “readopted” districts are “reasonably consistent” with the proportionality provision. Unfortunately, the court does not attempt

\begin{itemize}
\item 148. \textit{Id.} at 820.
\item 149. \textit{Id.} at 826.
\item 150. \textit{Id.}
\end{itemize}
to define the boundaries of this discretion. Future challengers must struggle with the question: how dissimilar is too dissimilar under the district-preservation provision? Given that alterations to any one district’s boundaries would necessarily lead to changes in at least two districts (after all, the difference would have to be accounted for elsewhere), one would hope that significant deviations from the prior reapportionment could not be protected by the district-preservation provision. However, all the court says is that new districts adopted under the district-preservation provision need not be “identical” to their predecessor districts.  

A particularly troubling aspect of this wide discretion is its potential impact on one of the most fundamental mandates of reapportionment: the contiguity provision contained in the first clause of § 7(A). Read literally, the court’s decision allows violations of § 7(A) if these violations are incidental to compliance with the district-preservation provision. However, as discussed above, the district-preservation provision was read to include a measure of discretion so that strict preservation of districts is not mandatory. Would it be theoretically possible, then, for an apportionment board to “readopt” a district under the district-preservation provision but, in its discretion, alter it so that it is not “composed of contiguous territory” or not bounded by “a single non-intersecting continuous line”? This may seem preposterous, but while such a configuration may be prima facie unconstitutional, the standard is unconstitutional beyond a reasonable doubt; and the court has already held that alleged violations of § 7(A) are not unconstitutional beyond a reasonable doubt when they are a consequence of compliance with certain other provisions.

Third, future reapportionments must follow the proportionality provision. This seems to be the only hard-and-fast rule discussed by the Court in Wilson v. Kasich. Although the apportionment board has the discretion to follow certain Article XI provisions at the expense of others, every provision is premised on compliance with the proportionality provision. Indeed, failure to comply with the proportionality provision might also constitute a violation of the one person, one vote rule and would be actionable in federal courts as well.

151. Id.
152. OHIO CONST. art. XI, § 7(A) (“Every House of Representatives district shall be compact and composed of contiguous territory, and the boundary of each district shall be a single non-intersecting continuous line.”).
153. Wilson, 981 N.E.2d at 825.
154. Id. at 826.
155. OHIO CONST. art. XI, § 7(A).
156. Wilson, 981 N.E.2d at 826.
as state court. In addition, while the beyond a reasonable doubt standard is extremely deferential, it would be much easier to establish unconstitutionality with quantifiable data. Whereas compliance with the district-preservation provision after Wilson v. Kasich may be an amorphous concept, compliance with the proportionality provision is a matter of mathematics: each district is either within the allowable variance from the ratio of representation or it is not. It therefore appears that one of the most obvious ways future reapportionments will be deemed unconstitutional is if they fail to comply with the proportionality provision.

Finally, future reapportionments must be susceptible to proof beyond a reasonable doubt that they are unconstitutional. For all the reasons discussed above, this will be a difficult burden to meet in most cases—particularly when the alleged constitutional violations occur in a context where the apportionment board is given considerable discretion, such as § 7. As Wilson v. Kasich shows, in some instances a violation of the letter of the Ohio Constitution will not be sufficient. So, on top of all everything else, future apportionment board decisions will only be unconstitutional under the Ohio Constitution when they are found to be unconstitutional beyond a reasonable doubt.

V. CONCLUSION: THE UNMOORED APPORTIONMENT BOARD

The five public officials who comprise the apportionment board decided the composition of Ohio's House and Senate districts for the next decade. Although their decision was not subject to legislative approval, it was accorded the same deference as an enactment of the duly elected, 132-member general assembly. Furthermore, these five people and their successors (who may well have different political affiliations ten years from now) were given the authority to choose how they would comply with certain provisions of the Ohio Constitution. Thus, their apportionment schemes are protected by the highest presumption of constitutionality, and what it means for one of their decisions to be unconstitutional in the first instance may be based on context rather than the letter of the Ohio Constitution.158


158. Interestingly, notwithstanding the clear problems with Ohio's current reapportionment system (problems that have been exacerbated by the Supreme Court of Ohio's decision in Wilson v. Kasich), a 2012 ballot measure that proposed the creation of "a 12-member citizens commission to draw new districts" was overwhelmingly defeated by Ohio voters. No on Issue 2, AKRON BEACON JOURNAL ONLINE (Oct. 6, 2012, 9:16 PM), http://www.ohio.com/editorial/editorials/no-on-issue-2-1.339927; see also State Issue 2: Redistricting Proposal: November 6, 2012 Official Results, available at http://www.sos.state.oh.us/SOS/elections/Research/electResultsMain/
The court's decision in *Wilson v. Kasich* enshrined this scheme and cast serious doubt on the viability of future challenges to apportionment board decisions. The court abdicated its constitutionally appointed function to scrutinize challenged apportionment board decisions and created a regime where only blatant constitutional violations are susceptible to attack. Only time and future challenges to apportionment plans will reveal the true scope of *Wilson v. Kasich*. For now it appears that, except in the most egregious of circumstances, you can almost never beat the board.