



CSU
College of Law Library

2014

Supplemental Pay or Supplemental Power?: Why the Ohio General Assembly's Compensation Structure Unconstitutionally Centralizes Power in the General Assembly Leadership

Frank Camardo

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/clevstlrev>



Part of the [Constitutional Law Commons](#), and the [State and Local Government Law Commons](#)
How does access to this work benefit you? Let us know!

Recommended Citation

Note, Supplemental Pay or Supplemental Power?: Why the Ohio General Assembly's Compensation Structure Unconstitutionally Centralizes Power in the General Assembly Leadership, 63 Clev. St. L. Rev. 269 (2014)

This Note is brought to you for free and open access by the Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

**SUPPLEMENTAL PAY OR SUPPLEMENTAL
POWER?: WHY THE OHIO GENERAL ASSEMBLY’S
COMPENSATION STRUCTURE
UNCONSTITUTIONALLY CENTRALIZES POWER
IN THE GENERAL ASSEMBLY LEADERSHIP**

FRANK CAMARDO*

I.	INTRODUCTION	270
II.	IDENTIFYING AND EXPLAINING THE CONSTITUTIONAL BASIS FOR OHIO’S GENERAL ASSEMBLY COMMITTEE COMPENSATION SYSTEM.....	272
	A. <i>Structure of the Ohio General Assembly</i>	272
	B. <i>A Brief History and Purpose of Legislative Committees</i>	273
	C. <i>Cases interpreting Article II, Section 31</i>	275
	D. <i>The Sister Provision: Article II, Section 20</i>	276
	E. <i>The Enactment of Ohio Revised Code Section 101.27</i>	277
	F. <i>Financial Persuasion: The Crack in the System</i>	279
III.	OHIO’S COMMITTEE COMPENSATION STRUCTURE VIOLATES ARTICLE II, SECTION 31	280
	A. <i>Constitutionality under Boyd and Ferguson</i>	280
	1. <i>Boyd’s simple guidance: No changes to compensation shall take place</i>	281
	2. <i>Failing the Fixed Compensation requirement under State ex rel. Harbage v. Ferguson</i>	281
	3. <i>Supplemental pay is an unconstitutional perquisite under Article II, Section 31</i>	284
	B. <i>Unconstitutionality under Article II, Section 20</i>	284
	C. <i>The current system must change to increase independent representation and deliberative democracy in the General Assembly</i>	286
	1. <i>The leadership’s control over supplemental compensation suppresses dissenting opinions of committee members.</i>	287

* Cleveland-Marshall College of Law, J.D. Candidate, 2015. Thank you to my family and friends for their continued support throughout law school. Special thanks to my parents, Frank and Vicki Camardo, for putting me on the right track and to Ainsley Bodi for keeping me there.

2. The committee system is rife with improper influence over committee members.....	288
3. Improper influence through financial persuasion can never be too small	290
IV. PROPOSAL FOR CHANGE	291
A. <i>All members of the General Assembly should be paid equally</i>	291
B. <i>Require a majority vote to appoint and remove committee members</i>	291
C. <i>Tax-Payer suit challenging § 101.27(A)(4) may be the only plausible option</i>	293
V. UPHOLDING OHIO’S CONSTITUTION REQUIRES ACTION ON THE PART OF OHIO’S CITIZENS.....	294

I. INTRODUCTION

In 2011, during the tumultuous debate over Ohio Senate Bill 5 (SB 5) and its proposal to curtail Ohio’s pension funds, State Senator William Seitz was chairman of the Senate Government and Oversight Committee. Seitz was a vocal critic of SB 5 and one of only six Republicans to vote against his party’s heavily-supported bill.¹ SB 5 passed in the Ohio Senate by a vote of 17-16.² For his part in opposing the bill’s narrow success, Seitz was removed from his committee chairmanship by Senate President Tom Niehaus.³ This was not the first time Seitz was removed from a committee chairmanship for opposing SB 5. Earlier in 2011, “Niehaus took Seitz off the Senate Insurance, Commerce and Labor Committee to make sure it would approve SB 5. Niehaus replaced Seitz with a pro-SB 5 senator and the committee voted 7-5 in favor of SB 5.”⁴ When Ohio General Assembly committee chairpersons are stripped of their chairmanship, they not only lose their chair, but also the supplemental salary tied to being a chairperson.⁵ So when Seitz was twice removed as a committee chairman for voicing his concerns about a controversial piece of legislation, he was stripped of what amounts to \$6,500 in supplemental salary.⁶ Far worse than the monetary loss for Senator Seitz, though, was the Senate President’s ability to effectively silence the citizens of Ohio from voicing their concerns and raising opposition to this controversial legislation through their elected representative. Such unilateral action to suppress meaningful opposition in

¹ Joe Guillen, *Republican Senate Bill 5 Critic Removed from Committee Post*, THE PLAIN DEALER (Apr. 6, 2011), http://www.cleveland.com/open/index.ssf/2011/04/republican_senate_bill_5_criti.html.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ See OHIO REV. CODE ANN. § 101.27 (West 2013) (setting out the compensation structure for the General Assembly and certain committee members).

⁶ See § 101.27(A)(4). Chairpersons of standing committees receive \$6,500 annually in supplemental compensation.

committee voting has become commonplace in Ohio due to the structure of its legislative committee system.

In the Ohio House and Senate, committee chairpersons and other select members of legislative committees receive a supplemental salary, in addition to their base legislator pay, for their service on the committee.⁷ The Ohio Constitution, however, mandates that legislator pay be fixed by law (hereinafter “Fixed Compensation Provision”) and that no changes to compensation take place during the term (hereinafter “No Change Provision”).⁸ Because the Speaker of the House and the Senate President have the power to discretionarily appoint and remove committee chairpersons during the term,⁹ compensation necessarily changes during the term of a removed chairperson. Such in-term changes violate the Ohio Constitution.¹⁰

Further, this compensation structure¹¹ incentivizes committee chairpersons to vote in lock-step with General Assembly leaders¹² for fear of losing their supplemental salary. Committee chairpersons must decide either to vote with the leadership and keep their supplemental pay or oppose the leadership and be removed from the chair. In each circumstance, the chairperson is deprived of the opportunity to make an unbiased decision. As a result, power is centralized in the General Assembly leaders. To limit this centralization of power, the committee compensation

⁷ *Id.* (setting out the supplemental salaries for the standing committees in the Ohio House and Senate). Under § 101.27(A)(1), base salary for legislators was \$60,584 in 2013.

⁸ OHIO CONST. art. II, § 31. “The members and officers of the general assembly shall receive a fixed compensation, to be prescribed by law, and no other allowance or perquisites, either in the payment of postage or otherwise; and no change in their compensation shall take effect during their term of office.” *Id.*

⁹ Ohio House Rule 13.

The Speaker shall name all committees and subcommittees, and shall appoint all members and chairmen thereto. The Speaker shall appoint members to a standing committee so that its membership is proportional to the partisan composition of the House. The chairman and the vice-chairman of the Finance and Appropriations Committee shall not be included in making this calculation.

Id.

Ohio Senate Rule 20. “The President shall designate a chairperson and vice-chairperson as well as a ranking minority member for each committee.” *Id.*

¹⁰ OHIO CONST. art. II, § 31. This article analyzes the constitutionality of the committee chair compensation structure in terms of two distinct prohibitions contained in Article II, Section 31. The first prohibition mandates that legislator compensation be fixed by law with no other allowances or perquisites. The second prohibition forbids any changes to compensation from taking effect during the legislator’s term in office. I argue that the committee compensation structure violates both of these prohibitions. Although, should a claim be brought under either of these arguments, the stronger argument is likely that the mid-term removal of chairpersons violates the prohibition of in-term compensation changes.

¹¹ For purposes of this article, the use of the term “committee compensation structure” refers to the supplemental payments for certain committee members authorized under R.C. § 101.27, in combination with the House and Senate rules that allow General Assembly leaders to discretionarily appoint and remove committee chairpersons.

¹² This article uses the phrase “General Assembly leaders” to refer to the Speaker of the House and the President of the Senate.

structure should be declared unconstitutional for violating the constitutional mandate that compensation be fixed with no changes during the term. Further, this Note shows that the General Assembly leaders' ability to control the salary of committee chairpersons reduces independent thought and deliberation among legislators when considering controversial legislation.

This Note proceeds in five parts. Part II of the Note discusses Article II, Section 31 of the Ohio Constitution and the structure of the Ohio General Assembly's committee system. Part II also discusses two cases that examined and explained the provisions of Article II, Section 31.¹³ Part II examines Article II, Section 20, an analogous constitutional provision to Article II, Section 31. Finally, Part II discusses the introduction of the current committee chairperson compensation structure that was codified in Ohio Revised Code section 101.27.

Part III of this Note argues that Ohio's General Assembly committee compensation structure is unconstitutional under Article II, Section 31 of the Ohio Constitution. Part III also addresses the constitutionality of the committee compensation system under a related constitutional provision, Article II, Section 20. Part III further argues that the current compensation structure for committee chairpersons improperly centralizes power in General Assembly leaders. Part IV outlines a proposal that modifies committee chair compensation to limit the influence of General Assembly leaders and satisfies Article II, Section 31. Part V offers a conclusion to the Note that encourages Ohio citizens to demand change in the General Assembly.

II. IDENTIFYING AND EXPLAINING THE CONSTITUTIONAL BASIS FOR OHIO'S GENERAL ASSEMBLY COMMITTEE COMPENSATION SYSTEM

The Framers of the Ohio Constitution placed explicit limits on legislator compensation. Article II, Section 31 of the Ohio Constitution states, "[t]he members and officers of the general assembly shall receive a fixed compensation, to be prescribed by law, and no other allowance or perquisites, either in the payment of postage or otherwise; and no change in their compensation shall take effect during their term of office."¹⁴ No litigation has occurred regarding the constitutionality of the committee compensation system. Ohio courts, however, have interpreted Article II, Section 31 in constitutional challenges to state statutes that authorized travel expenses and mileage reimbursement for legislators.¹⁵

A. Structure of the Ohio General Assembly

Like the majority of state legislatures, the Ohio General Assembly is composed of the House of Representatives and the Senate,¹⁶ presided over by the Speaker of the House and the President of the Senate, respectively.¹⁷ Each chamber is

¹³ *State ex rel. Boyd v. Tracy*, 190 N.E. 463 (Ohio 1934); *State ex rel. Harbage v. Ferguson*, 36 N.E.2d 500 (Ohio Ct. App. 1941).

¹⁴ OHIO CONST. art. II, § 31.

¹⁵ *See Boyd*, 190 N.E. at 463 (Ohio 1934); *Harbage*, 36 N.E.2d at 500.

¹⁶ OHIO CONST. art. II § 1. "The legislative power of the state shall be vested in a General Assembly consisting of a Senate and House of Representatives . . ." *Id.*

¹⁷ OHIO CONST. art. II § 7.

empowered to create its own rules.¹⁸ Both chambers used this power to establish the committee system.¹⁹ Under these rules, the Speaker of the House and President of the Senate (hereinafter “General Assembly leaders”) are empowered to name all committees and subcommittees in their respective chambers, as well as the members and chairpersons of those committees.²⁰ Currently, the House maintains nineteen standing committees,²¹ and the Senate maintains seventeen standing committees.²² Members of committees and subcommittees serve at the pleasure of the General Assembly leaders and may be removed from their chair at any time.²³

B. A Brief History and Purpose of Legislative Committees

The origin of legislative committees in the United States dates back to the first years of Congress. During the formative years of Congress, both houses relied on temporary select committees to establish rules of procedure.²⁴ In 1789, the United States House of Representatives temporarily established the Select Committee on Rules.²⁵ The Select Committee on Rules, however, was not the first standing

The mode of organizing each House of the general assembly shall be prescribed by law. Each House, except as otherwise provided in this Constitution, shall choose its own officers. The presiding officer in the Senate shall be designated as president of the Senate and in the House of Representatives as speaker of the House of Representatives. Each House shall determine its own rules of proceeding.

Id.

¹⁸ *Id.*

¹⁹ Ohio House Rule 13. “The Speaker shall name all committees and subcommittees, and shall appoint all members and chairmen thereto.” *Id.*; Ohio Senate Rule 19. “At as early a date as practicable after the organization of the Senate, the President of the Senate, by message, shall name and appoint members to standing committees and any standing subcommittees.” *Id.*

²⁰ Ohio House Rule 13; Ohio Senate Rule 20 “The President shall designate a chairperson and vice-chairperson as well as a ranking minority member for each committee.” *Id.*

²¹ The Ohio House of Representatives 130th General Assembly: Standing Committees, THE OHIO HOUSE OF REPRESENTATIVES, <http://www.ohiohouse.gov/committee/standing-committees> (last visited Oct. 1, 2013).

²² The Ohio Senate 130th General Assembly: Senate Standing Committees, THE OHIO SENATE, <http://www.ohiosenate.gov/committee/senate-standing-committees> (last visited Oct. 1, 2013).

²³ Ohio House Rule 13; Ohio Senate Rule 20.

²⁴ Senate Committees, Chapter 5-The Formative Years, UNITED STATES SENATE, <http://www.senate.gov/artandhistory/history/common/briefing/Committees.htm#5> (last visited Feb. 4, 2014) (“Prior to 1816, the Senate relied on temporary select committees, the first of which was appointed on April 7, 1789, to draw up Senate rules of procedure.”); Historical Highlights: The Creation of the formal House Rules and the House Rules Committee, HISTORY, ART, ARCHIVES UNITED STATES HOUSE OF REPRESENTATIVES, <http://history.house.gov/HistoricalHighlight/Detail/15032392020?ret=True> (last visited Feb. 4, 2014).

²⁵ Historical Highlights: The Creation of the formal House Rules and the House Rules Committee, HISTORY, ART, ARCHIVES UNITED STATES HOUSE OF REPRESENTATIVES, <http://history.house.gov/HistoricalHighlight/Detail/15032392020?ret=True> (last visited Feb. 4,

committee named in Congress. That honor belongs to the House Committee on Ways and Means, established as a select committee on July 24, 1789 and named as a standing committee in 1795.²⁶ The Senate did not establish standing committees until 1816, twenty-seven years after its formation.²⁷ From that point forward, as the size of the country rapidly grew, committees took on greater importance carrying out the business of Congress.²⁸

Today, legislative committees are the main avenue through which Congress and state legislatures propose and enact legislation.²⁹ Committee members play an important role in setting policy directives, serving “as agenda-setters, determining to a significant degree which issues Congress will consider.”³⁰ The committee system also “enables members to develop specialized knowledge of the matters under their jurisdiction.”³¹ “Once an issue is placed on the agenda, committee members expend time and resources drafting bills in markup sessions.”³²

Committee members therefore find themselves on the front-line of proposing and drafting the legislation that eventually makes its way to the floor for a vote. It is the committee chairperson, however, who often plays the role of final arbiter for bills coming out of committee.³³ It is this power that prompted then-Professor Woodrow

2014)(“The Select Committee on Rules was the first—and arguably the most powerful—select committee ever created by the House, but it did not become a permanent standing body until 1880.”).

²⁶ Historical Highlights, The Committee on Ways and Means, HISTORY, ART, ARCHIVES UNITED STATES HOUSE OF REPRESENTATIVES, <http://history.house.gov/HistoricalHighlight/Detail/37061?ret=True> (last visited on Feb. 4, 2014) (“The Committee on Ways and Means is the oldest standing committee in the United States House of Representatives. Created as a select committee in the 1st Congress (1789-1791) on this date, the Committee on Ways and Means became a standing committee in the 4th Congress (1795-1797).”).

²⁷ Senate Committees, Chapter 5-The Formative Years, UNITED STATES SENATE, <http://www.senate.gov/artandhistory/history/common/briefing/Committees.htm#5> (last visited Feb. 4, 2014) (“During the second session of the Fourteenth Congress, meeting in December 1816, the Senate agreed to create eleven permanent standing committees . . .”).

²⁸ *Id.* (“The significance of the change from temporary to permanent committees was perhaps little realized at the time. But this was a decisive moment in the institution’s history. The sheer mass and complexity of the Senate’s growing responsibilities demanded the division of labor and specialization that a permanent committee system offered.”).

²⁹ *Id.* “Committees are essential to the effective operation of legislative bodies.”

³⁰ Brian D. Feinstein, *Congressional Government Rebooted: Randomized Committee Assignments and Legislative Capacity*, 7 HARV. L. & POL’Y REV. 139, 146 (2013).

³¹ Senate Committees, Chapter 5-The Formative Years, UNITED STATES SENATE, <http://www.senate.gov/artandhistory/history/common/briefing/Committees.htm#5> (last visited Feb. 4, 2014).

³² Feinstein, *supra* note 30, at 146.

³³ See Michael Edmund O’Neill, *A Legislative Scorecard for the United States Senate: Evaluating Legislative Productivity*, 36 J. LEGIS. 297, 299-300 (2010) (“A more junior member who is nevertheless a prolific author of legislation may not see any of his bills moved if he fails to command the ear of the appropriate committee chairman.”).

Wilson to admonish committee chairmen as “committee barons.”³⁴ The United States House of Representatives has experienced waves of reform efforts to limit the power of committee chairpersons, struggling to balance power between committee chairs and the Speaker of the House.³⁵ As this Note will show, Ohio’s General Assembly committee system skews the balance of power in favor of House and Senate leadership once-and-for-all. As a result, Ohio’s legislative process suffers.

C. Cases interpreting Article II, Section 31

Though no court has examined this precise issue, courts have interpreted the Ohio constitutional provision governing legislator pay. In *State ex rel. Boyd v. Tracy*, the Ohio Supreme Court held unconstitutional a statute providing for the travel expenses of legislators who attend special sessions of the General Assembly because the statute violated Article II, Section 31.³⁶ In reaching its holding, the court noted, “[t]he General Assembly has full power to fix compensation for its members, but it must be a *fixed* compensation, not an ephemeral one, but *no change in their compensation shall take effect during their term of office.*”³⁷ While the court invalidated the statute, it did not clarify which provision of Article II, Section 31 the statute violated—either the No Change provision or the Fixed Compensation provision.³⁸

Seven years after *Boyd*, an Ohio appeals court clarified *Boyd’s* holding. The court found the *Boyd* statute was invalid because it was “in violation of that part of the provision of Section 31, Article II, which states: ‘and no change in their compensation shall take effect during their term of office.’”³⁹ In that case, *State ex rel. Harbage v. Ferguson*, the court upheld the constitutionality of a statute

³⁴ WOODROW WILSON, *CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS* 92 (1885).

³⁵ Craig D. Margolis, *House Out of Order: Committee Reform in the Modern House of Representatives*, 11 J.L. & POL. 273, 275 (1995). (“Ever since the development of the standing committee system, the House has been marked by competition between the speaker and the committees, and by fluctuating periods of centralization and fragmentation of political power. The history of committee reform comprises a series of attempts to restore equilibrium when either the speaker or the committees have gained undue influence over the people’s House.”).

³⁶ *State ex rel. Boyd v. Tracy*, 190 N.E. 463 (Ohio 1934). The statute in question provided \$4 per day for legislators traveling to the State House for special meetings.

³⁷ *Id.* at 466.

³⁸ See OHIO CONST. art. II § 31. While the court was unclear as to which provision the statute violated, the court did specifically consider the validity of the statute under both clauses as respondent’s counsel argued against constitutionality of both clauses. The court noted:

[c]ounsel for respondent insist that House Bill No. 4 is unconstitutional, for the reason that, in effect, it either increases the compensation of the members of the Ninetieth General Assembly, including the relator, during their terms of office, or grants to them an ‘allowance’ for expenses, in direct violation of the provisions of section 31, article II, of the Constitution of Ohio.

Boyd, 190 N.E. at 466.

³⁹ *State ex rel. Harbage v. Ferguson*, 36 N.E.2d 500, 504 (Ohio Ct. App. 1941).

providing for mileage reimbursement for legislators traveling to the State House.⁴⁰ To reach its conclusion, the court reviewed the mileage reimbursement statute for repugnancy to both the Fixed Compensation provision and the No Change provision of Article II, Section 31.⁴¹ In the process of finding that mileage reimbursement is not an unconstitutional allowance or perquisite, the court defined ‘perquisite’ as “something *gained* from a place of employment *over and above the ordinary salary* or fixed wages for services rendered; especially a fee allowed by law to an officer for a specific service.”⁴²

D. The Sister Provision: Article II, Section 20

The Ohio Constitution similarly restricts mid-term compensation changes for elected state officials.⁴³ Article II, Section 20 states, “The General Assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished.”⁴⁴ Given that this provision applies to most elected officials⁴⁵, the scope of this has been litigated significantly more than its state legislature analog.⁴⁶ The Ohio Supreme Court considers Article II, Section 20 and Article II, Section 31 to be analogous, drawing parallels between the two provisions.⁴⁷

In *Schultz v. Garrett*, the Ohio Supreme Court upheld an in-term salary increase for a clerk of a municipal court.⁴⁸ In upholding the increase, the court stated,

⁴⁰ *Id.* The statute “provided . . . a travel allowance of five cents per mile each way each week to and from their homes, to be paid the member during the session of the body, and have appropriated money for the payment of such traveling expenses.” *Id.* at 501.

⁴¹ *Id.* at 502-05.

⁴² *Id.* at 503.

⁴³ OHIO CONST. art. II, § 20 (“The general assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished.”).

⁴⁴ *Id.*

⁴⁵ *See* OHIO CONST. art. II, § 20. This section applies to all state officers not provided for in other sections of the constitution. Accordingly, all municipal officials fall under the purview of Article II, Section 20.

⁴⁶ *See, e.g.,* *Schultz v. Garrett*, 451 N.E.2d 794 (Ohio 1983); *State ex rel. Edgecomb v. Rosen*, 279 N.E.2d 870 (Ohio 1972).

⁴⁷ *See State ex rel. Artmayer v. Bd. of Trs. of Delhi Twp.*, 330 N.E.2d 684, 686 (Ohio 1975) (citing *State ex rel. Boyd v. Tracy*, 190 N.E. 463, 468 (Ohio 1934)). This case is interpreting Article II, Section 20. (“[C]an the number of dollars payable to an incumbent of a public office be increased by the enactment of a statute during his term of office?” *State, ex rel. Boyd, v. Tracy* (1934). That statement is equally applicable to cases arising under Section 20, Article II.”)

⁴⁸ *Schultz*, 451 N.E.2d at 796 (explaining that the municipal clerk’s salary was statutorily fixed based on a percentage of county clerks’ salary, which was also statutorily fixed. When the legislature amended the statute to allow for an increase in the county clerks’ salary, a municipal clerk sued to have his salary increased based on the corresponding increase in county clerk salary).

When a statute setting forth the formula for the compensation of an officer is effective before the commencement of the officer's term, any salary increase which results from a change in one of the factors used by the statute to calculate the compensation is payable to the officer. Such an increase is not in conflict with Section 20, Article II of the Constitution when paid to the officer while in term.⁴⁹

Schultz limits the constitutional prohibition to compensation changes that "are the result of direct legislative action on the section(s) of the Revised Code which are the basis of the officers' salaries."⁵⁰

In *State ex rel. Parsons v. Ferguson*, however, the court invalidated the mid-term commencement of health insurance payments for elected officials.⁵¹ There, the legislature passed a statute allowing county commissioners to pay for county employees' health insurance premiums.⁵² Three years following the enactment of the statute, the county commissioners of Madison County passed a resolution to pay for employees' health insurance,⁵³ however, the resolution was passed seven days into the plaintiffs' terms.⁵⁴ The court held that the payments were an impermissible mid-term change in compensation.⁵⁵

E. The Enactment of Ohio Revised Code Section 101.27

Following early constitutional challenges to legislator compensation, the General Assembly codified its compensation structure in section 101.27.⁵⁶ Under the statute, legislators currently receive a base compensation of \$60,584 per year.⁵⁷ The statute

⁴⁹ *Id.* at 797-98.

⁵⁰ *Id.* ("Section 20, Article II of the Constitution forbids the granting of in-term salary increases to officers when such changes are the result of direct legislative action on the section(s) of the Revised Code which are the basis of the officers' salaries.")

⁵¹ *State ex rel. Parsons v. Ferguson*, 348 N.E.2d 692, 694 (Ohio 1976).

⁵² *Id.* at 693 ("R.C. 305.171, effective September 23, 1969, authorized boards of county commissioners to pay for group medical and hospital plans for county officers and employees.")

⁵³ *Id.* ("On January 8, 1973, the Board of Commissioners of Madison County adopted a resolution appropriating funds to pay the premiums for such a plan. The first payment was made on February 2, 1973.")

⁵⁴ *Id.* ("The appellants are the prosecuting attorney and the recorder of Madison County. Both were elected for terms of office beginning on January 1, 1973.")

⁵⁵ *Id.* at 694.

Both appellants began their elective terms on January 1, 1973. Since the resolution of the county commissioners authorizing the health insurance plan and approving the payment of premiums was not adopted until January 8, 1973, seven days after the commencement of appellants' terms of office, the payments should not have been made on their behalf.

Id.

⁵⁶ OHIO REV. CODE ANN. § 101.27(A)(4) (West 2013).

⁵⁷ *A Guidebook for Ohio Legislators*, OHIO LEGISLATIVE SERVICE COMMISSION 25 (2013), <http://www.lsc.state.oh.us/guidebook/chapter3.pdf>.

also provides that supplemental compensation be paid to legislators serving as committee chairpersons as well as other select committee members.⁵⁸ Currently, the chairpersons of the Finance committees in both the House and Senate receive a \$10,000 supplemental payment,⁵⁹ while the chairpersons of the remaining standing committees receive supplemental payments of \$6,500.⁶⁰ The statute further provides for supplemental payments to the chairpersons of subcommittees, the vice-chairpersons of finance subcommittees, the ranking minority members of finance committees, and the ranking minority members of standing committees.⁶¹ No member may receive more than one supplemental payment per term, however, regardless of the number of committees or subcommittees they serve on.⁶²

Today, a majority of legislators receive some form of supplemental compensation for committee service.⁶³ Of the ninety-nine members of the Ohio

⁵⁸ § 101.27(A)(4).

The chairperson of the finance committee of each house shall receive an additional sum of ten thousand dollars annually. The chairperson of each standing committee of each house other than the finance committee shall receive an additional sum of six thousand five hundred dollars annually. The chairperson of each standing subcommittee of a finance committee shall receive an additional sum of six thousand five hundred dollars annually. The vice-chairperson of the finance committee of each house shall receive an additional sum of five thousand five hundred dollars annually. The ranking minority member of the finance committee of each house shall receive an additional sum of six thousand five hundred dollars annually. The ranking minority member of each standing subcommittee of a finance committee shall receive an additional sum of five thousand dollars annually. The chairperson of each standing subcommittee of each house other than a standing subcommittee of the finance committee shall receive an additional sum of five thousand dollars annually. The vice-chairperson and ranking minority member of each standing committee of each house other than the finance committee shall each receive an additional sum of five thousand dollars annually. Except for the ranking minority member of each standing subcommittee of a finance committee, the ranking minority member of each standing subcommittee of each house shall receive an additional sum of two thousand five hundred dollars annually.

Id.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* Chairmen of non-finance subcommittees receive a \$5,000 supplemental payment. Chairmen of standing finance subcommittees receive \$6,500. Finance committee vice-chairmen receive \$5,000. Ranking minority members of finance committees receive \$6,500, and \$5,000 for finance subcommittees. Ranking minority members of standing committees receive \$2,500.

⁶² *Id.* No member may receive more than one additional sum for serving as chairperson, vice-chairperson, or ranking minority member of a standing committee or standing subcommittee, regardless of the number of standing committees or standing subcommittees on which the member serves as chairperson, vice-chairperson, or ranking minority member.

⁶³ The Ohio Senate 130th General Assembly: Senate Standing Committees, <http://www.ohiosenate.gov/Assets/CommitteeMembers/committee.pdf> (last visited Oct. 1, 2013); The Ohio House of Representatives 130th General Assembly: Standing Committees, <http://www.ohiohouse.gov/committee/standing-committees> (last visited Oct. 1, 2013).

House, section 101.27(A)(4) authorizes supplemental payments for seventy-three members.⁶⁴ In the Senate, every member of the thirty-three member body has the opportunity to receive supplemental compensation under section 101.27(A)(4).⁶⁵ This was not always the case, however. Enacted in 1953, Ohio Revised Code section 101.27 originally provided only for the compensation of general members.⁶⁶ The statute did authorize supplemental payments for some members elected to leadership roles, but not for members serving on committees.⁶⁷ It was not until 1973 that the legislature authorized supplemental compensation for committee chairpersons.⁶⁸

F. Financial Persuasion: The Crack in the System

While General Assembly rules allow leaders to discretionarily replace chairpersons, perhaps the most questionable exercise of this power involves the removal of dissenting chairpersons. During the early 1990s, Vernal G. Riffe Jr. served as the Speaker of the House. Speaker Riffe was a known proponent of such removals. One newspaper noted, “[i]n the past, Riffe has removed Democrats from committee chairmanships because they broke with the caucus position in floor votes.”⁶⁹ This practice has become well-established in both houses of the General Assembly. During floor voting on the controversial 2011 bill to curtail collective bargaining in Ohio, Senator Bill Seitz, one of only six republicans to vote against the bill, was removed as chair of the Senate Government and Oversight Committee by Senate President Tom Niehaus.⁷⁰ Earlier that year, in prior committee voting on the same bill, “Niehaus took Seitz off the Senate Insurance, Commerce and Labor Committee to make sure it would approve SB 5. Niehaus replaced Seitz with a pro-SB 5 senator and the committee voted 7-5 in favor of SB 5.”⁷¹

Under section 101.27, all legislators are paid in equal monthly installments.⁷² These monthly installments include the pro-rated monthly installments of

⁶⁴ The House currently maintains 19 standing committees, 7 Finance subcommittees, and 1 additional subcommittee. For each of the 19 standing committees, O.R.C. § 101.27 authorizes 3 committee members to receive supplemental compensation, totaling 57 members. For each of the 7 Finance subcommittees, 2 members receive supplemental payments under section 101.27, totaling 14 members. The remaining subcommittee has 2 members receiving supplemental payments. Of the 99 members of the Ohio House, 73 members are authorized to receive some form of supplemental payment. § 101.27(A)(4).

⁶⁵ With 17 standing committees and 4 subcommittees, every member of the 33 member Senate has the opportunity to receive supplemental compensation. *Id.*

⁶⁶ OHIO REV. CODE ANN. § 101.27(A)(1) (HeinOnline through 1953).

⁶⁷ *Id.*

⁶⁸ H.B. 578, 110th Gen. Assemb., Reg. Sess. (Ohio 1953) (“Chairmen of all standing committees of both houses and the majority and minority whips of the House of Representatives and the minority whip of the senate shall receive an additional sum of seven hundred and fifty dollars annually.”).

⁶⁹ Lee Leonard, *Session Canceled Over Bill, Not Speaking Fees, Says Riffe*, COLUMBUS DISPATCH, Sept. 30, 1993, available at 1993 WLNR 4985453.

⁷⁰ See *supra* note 1.

⁷¹ *Id.*

⁷² OHIO REV. CODE ANN. § 101.27(A)(1) (West 2013). “Such salaries shall be paid in equal

supplemental payments. When a committee chairperson or other recipient of supplemental payments under section 101.27 is removed from his or her chair, the monthly installments of the supplemental compensation cease the day the chairperson is removed.⁷³ So, when Senator Seitz was removed as chairman of the Senate Government and Oversight Committee, his monthly compensation decreased from \$5,590.31⁷⁴ to the base General Assembly payment of \$5,048.64.⁷⁵ Senator Seitz is but one of many examples of dissenting chairpersons being removed to further the leaders' agenda.

III. OHIO'S COMMITTEE COMPENSATION STRUCTURE VIOLATES ARTICLE II, SECTION 31

This Note argues that the Ohio General Assembly's committee compensation structure violates Article II, Section 31 of the Ohio Constitution. When a chairperson is removed from his seat mid-term, he immediately loses his supplemental pay. As a result, the mid-term removal of a chairperson causes an unconstitutional in-term change in his compensation. Further, the committee compensation structure violates the constitutional requirement that legislator pay be fixed with no allowances or perquisites.⁷⁶ Exacerbating the constitutionality issues, the committee compensation structure inordinately centralizes power in the General Assembly leaders. To limit this power, the committee compensation structure must be declared unconstitutional.

A. Constitutionality under Boyd and Ferguson

As discussed above, no Ohio cases have dealt with this specific issue.⁷⁷ The courts have, however, interpreted the constitutional provision in regards to statutes authorizing payment for mileage reimbursement and travel expenses.⁷⁸ These cases establish key principals necessary to understand the limits of the constitutional provision.

monthly installments during such term. All monthly payments shall be made on or before the fifth day of each month." *Id.*

⁷³ Ohio House Rule 14(b) "The Speaker shall employ all employees of the House and shall see that they satisfactorily perform their respective duties. All employees of the House are at will employees, and shall serve at the pleasure of the Speaker. A terminated employee's compensation ceases on the day the termination takes effect."; Ohio Senate Rule 20.

⁷⁴ State Employee Salary Data, OHIO DEP'T OF ADMIN. SERVS. (April 23, 2011), <http://das.ohio.gov/Divisions/HumanResources/HRDOCBPolicy/StateEmployeeData/StateEmployeeSalaries.aspx>.

⁷⁵ State Employee Salary Data, OHIO DEP'T OF ADMIN. SERVS. (June 18, 2011), <http://das.ohio.gov/Divisions/HumanResources/HRDOCBPolicy/StateEmployeeData/StateEmployeeSalaries.aspx>.

⁷⁶ OHIO CONST. art. II, § 31. "The members and officers of the general assembly shall receive a fixed compensation, to be prescribed by law, and no other allowance or perquisites . . . shall take effect during their term." *Id.*

⁷⁷ See *infra* Section II.B.

⁷⁸ See *State ex rel. Boyd v. Tracy*, 190 N.E.2d 463, 467 (Ohio 1934); *State ex rel. Harbage v. Ferguson*, 36 N.E.2d 500 (Ohio Ct. App. 1941).

1. *Boyd's* simple guidance: No changes to compensation shall take place

A strict reading of *Boyd* renders this issue somewhat trivial. In that case, the court held, “[t]he General Assembly has full power to fix compensation for its members, but it must be a *fixed* compensation, not an ephemeral one, but *no change in their compensation shall take effect during their term of office.*”⁷⁹ Under a strict textual reading of the constitutional provision, and bolstered by *Boyd's* holding, any mid-term change in compensation, regardless of the reason, violates the constitution. Therefore, when a committee chairperson’s compensation is reduced as a result of being removed as chair, such change in compensation takes effect during his term and violates the constitution.

While *Boyd* more closely addressed the provision prohibiting mid-term change in compensation, the case also illustrates how committee chair compensation fails the Fixed Compensation provision.⁸⁰ Taking section 101.27 in conjunction with House Rule 13 and Senate Rule 20, committee compensation seems more “ephemeral” than fixed. Section 101.27, on its face, fixes the compensation of all General Assembly members and committee chairs. Alone the statute would likely survive a constitutional challenge, but the General Assembly leaders’ powers under the rules to discretionarily remove chairpersons leaves their compensation unpredictable and potentially short-lived throughout their term.⁸¹ The statute’s effects must be considered in the universe in which it operates. Here, that universe includes the removal powers of the General Assembly leadership. Viewing the compensation structure as a whole, mid-term salary adjustments run afoul of *Boyd's* admonition of ephemeral compensation.⁸²

Boyd's guidance only extends so far, though. The case dealt specifically with compensation changes as a result of a statute *enacted* mid-term, rather than compensation changes resulting from statutes and rules enacted prior to the start of the term. Later, this Note discusses the effect that previously enacted statutes have on the constitutionality of mid-term compensation changes of State officers under an analogous constitutional provision, Article II, Section 20.

2. Failing the Fixed Compensation requirement under *State ex rel. Harbage v. Ferguson*

The *Ferguson* case reexamined the constitutionality of statutes providing for legislators’ travel expenses. Here, the court focused only on the Fixed Compensation provision.⁸³ This time, however, the court held that mileage reimbursement was not an unconstitutional perquisite or allowance.⁸⁴ *Ferguson* concluded that mileage payments, though necessarily different for each member because of their varying

⁷⁹ *Boyd*, 190 N.E.2d at 465.

⁸⁰ *Id.* “[T]he General Assembly has full power to fix compensation for its members, but it must be a *fixed* compensation, not an ephemeral one.” *Id.* at 466.

⁸¹ EPHEMERAL: That is in existence, power, favour, popularity, etc. for a short time only; short lived; transitory 5 THE OXFORD ENGLISH DICTIONARY 322 (2d ed. 1989).

⁸² This argument that the committee compensation structure violates the Fixed Compensation structure is furthered in Part III.A.2.

⁸³ *Harbage*, 36 N.E.2d at 503.

⁸⁴ *Id.* at 506.

distances from the state house, did not violate the Fixed Compensation provision because the payments were “a part of the compensation” and not a perquisite or allowance.⁸⁵ The court reconciled the fact that the statute created differences in compensation among members by stating,

the provision is of uniform operation as it appeals uniformly to all members who are equidistant from Columbus . . . we may still preserve the constitutionality of the act by holding that the provisions as to the mileage is in fact a part of the compensation, and the fact that the final payment to a member of the Legislature shall depend upon the distance from which he may live to the seat of government does not render the act unconstitutional.⁸⁶

This holding seems to validate the current committee compensation system under the Fixed Compensation requirement. Here, the statute and its supplemental compensation apply uniformly to all members who are appointed to a section 101.27(A)(4)-compensated position, but any analogy to committee compensation fails because *Ferguson* cannot reconcile the effect that House and Senate Rules have on the fixed nature of the compensation.

Section 101.27 does not operate in a vacuum. Its effects on committee compensation must be considered in the context of the entire General Assembly committee system. When General Assembly leaders exercise their appointment and removal powers⁸⁷, compensation necessarily becomes non-uniform because of the subjective nature of the leaders’ appointments and removals. Each member is uniformly subject to the same possibility of appointment or removal, but the subjective exercise of appointment and removal powers renders the committee chairpersons’ compensation non-uniform as to each other. Such non-uniformity leaves supplemental compensation looking more like unconstitutional allowances or perquisites.

Ferguson’s uniformity requirement becomes clear when considering the objectivity of the statute in question. In *Ferguson*, legislators who lived equidistant

⁸⁵ *Id.*

⁸⁶ *Id.*

If this provision gives a different compensation to the different members of the Legislature, it may be difficult to say how it can be reconciled with constitutional provisions. However, we are of the opinion that the provision is of uniform operation as it appeals uniformly to all members who are equidistant from Columbus. In view of the duty imposed upon us to sustain an act of the Legislature, where not hopelessly repugnant to the Constitutional provisions, we arrive at the conclusion that if we were wrong in our former statement that the mileage is but a reimbursement, we may still preserve the constitutionality of the act by holding that the provisions as to the mileage is in fact a part of the compensation, and the fact that the final payment to a member of the Legislature shall depend upon the distance from which he may live to the seat of government does not render the act unconstitutional.

Id.

⁸⁷ See Ohio House Rule 13; Ohio Senate Rule 20. Both rules empower their respective chamber leader to appoint and remove committee chairpersons at-will.

from Columbus would be compensated the same under the statute.⁸⁸ This allowed for uniform compensation among the legislators based on an objective determination of their distance from the Statehouse. Here, however, compensation under section 101.27 is determined subjectively based on the discretion of the General Assembly leaders. For example, under *Ferguson*, two legislators who both live fifty miles from the statehouse would each receive \$2.50 per trip.⁸⁹ Here, two committee chairpersons appointed to standing committees at the same time would each theoretically receive \$6,500 in supplemental compensation throughout the year,⁹⁰ but Chairperson One may be removed three months into the job, while Chairperson Two continues on to receive the full-year's worth of supplemental compensation. The subjective nature of determining which legislators will serve as chair and how long a legislator will serve as chair necessarily means compensation is not fixed because the statute cannot "appeal uniformly to all members."⁹¹

This subjectivity engendered in the system by the General Assembly's procedural rules makes it impossible to determine what a legislator's total compensation will be in a given year without first reading the minds of the General Assembly leaders. Compensation cannot be uniform throughout the legislature, and therefore cannot be fixed, if the calculation of that compensation cannot be independently verified by each legislator. Without this ability to independently calculate and verify compensation, it is impossible to know whether compensation truly is fixed throughout the legislature. For example, the *Ferguson* statute allowed for each member to independently calculate their total compensation for the year simply by multiplying their distance in miles from the statehouse by the mileage reimbursement value.⁹² Here, however, committee members cannot calculate their total yearly compensation without first knowing what decisions the leadership will make regarding their future on the committee. *Ferguson's* broad definition of fixed compensation is certainly not so broad as to include a compensation system that requires extrasensory perception simply to determine whether legislators are being uniformly compensated. Taken as a whole, the committee compensation structure fails to fix the compensation of committee members in an objective and uniform manner. Therefore, the compensation structure fails the fixed compensation standard set out in *Ferguson*.

⁸⁸ *Harbage*, 36 N.E.2d at 503.

⁸⁹ *Id.* at 501. "Each member shall receive a *travel allowance* of five cents a mile each way for mileage once a week during the session from and to his place of residence." *Id.*

⁹⁰ See OHIO REV. CODE ANN. § 101.27(A)(1) (West 2013).

⁹¹ See *Harbage*, 36 N.E.2d at 506.

⁹² Under the statute, legislators received five cents per mile traveled from their home to the statehouse. With this information, each legislator could independently calculate his or her total compensation. Though each legislator would likely end up with a different value for total compensation based on their varying distances from Columbus, they would at least be able to verify, by determining each other's distance traveled, that no legislator received any compensation above what the statute approved. This ensures that no legislator may receive an allowance or perquisite for his or her service, falling outside the scope of the fixed compensation provision. See *id.*

3. Supplemental pay is an unconstitutional perquisite under Article II, Section 31

Further, *Ferguson's* elaboration on the meaning of perquisite in Article II, Section 31 places supplemental committee compensation squarely within the perquisite prohibition. The court defined perquisites as “something *gained* from a place of employment *over and above the ordinary salary* or fixed wages for services rendered; especially a fee allowed by law to an officer for a specific service.”⁹³ Considering that each member of the Senate currently receives supplemental pay under section 101.27,⁹⁴ it is hard to see how the additional pay is not a “profit . . . secured by the officer out of the office he occupies in addition to his fixed compensation.”⁹⁵ The vast number of committees and committee positions in the Senate necessarily requires that each of the thirty-three members of the Senate serve in one of the roles that receive supplemental compensation.⁹⁶ Therefore, service in such a role is an essential component of the general services required of a State Senator. In the House, seventy-three members of the ninety-nine member chamber receive supplemental payments.⁹⁷ While section 101.27 may have once served the purpose of compensating those who worked at a level above general members, the vast expansion of the number of legislative committees, and the accompanying increase in committee members, has obviated the need for additional payments for those serving on committees. When the committee system necessarily requires almost every member of the General Assembly to serve in supplemental compensation positions, it seems hard to justify this compensation as payments for services rendered above those required of general members. Rather, these payments now represent compensation for simply doing what is required of a modern-day General Assembly legislator. Committee supplemental compensation, then, “is something gained . . . over and above the ordinary salary of fixed wages for services rendered.”⁹⁸ Certainly in the Senate, and likely in the House, supplemental compensation violates the constitutional prohibition against perquisites.

B. Unconstitutionality under Article II, Section 20

The Ohio Supreme Court's Article II, Section 20 jurisprudence lends significant support to invalidating the committee compensation system under Article II, Section 31. In *Schultz v. Garrett*, the court upheld an in-term compensation change for a

⁹³ *Harbage*, 36 N.E.2d at 503 (The court made an initial finding that the mileage payments were not prerequisites, as the payments merely reimbursed members for their actual expenses).

⁹⁴ The Ohio Senate 130th General Assembly: Senate Standing Committees' Members, THE OHIO SENATE, <http://www.ohiosenate.gov/Assets/CommitteeMembers/committee.pdf> (last visited Oct. 1, 2013); § 101.27(A)(4).

⁹⁵ *Harbage*, 36 N.E.2d at 503. “All the definitions contemplate a *profit* to be secured by the officer out of the office he occupies in addition to his fixed compensation.” *Id.*

⁹⁶ Given that there are only thirty-three members of the Senate and seventeen standing committees, and that the statute authorizes supplemental compensation for committee chairs, ranking minority members, and subcommittee chairmen; each member serves in at least one of the roles that receives supplemental compensation. *See* § 101.27(A)(4).

⁹⁷ *See supra* note 64 and accompanying text.

⁹⁸ *Harbage*, 36 N.E.2d at 503.

municipal clerk of court because the change was the result of legislative action affecting a factor of the compensation formula used to determine the clerk's salary.⁹⁹ In *State ex rel. Parsons v. Ferguson*, the court invalidated an in-term compensation increase that resulted from three county commissioners' decision, based on a previously-enacted statute, to provide for additional compensation for employees in the form of health insurance premiums.¹⁰⁰ In these cases, the distinction can be drawn in terms of how the compensation change comes to take effect. When compensation changes as the result of the legislature enacting or amending a statute that is a part of the overall formula of the compensation statute¹⁰¹ in question, the compensation increase is valid.¹⁰² Where the legislature has already enacted the relevant compensation statute, however, and an authorized official later takes action under that statute to increase compensation mid-term, the change is invalid.¹⁰³

Mid-term changes to committee members' compensation falls squarely within the latter category of prohibited compensation changes. Section 101.27 is currently enacted and authorizes certain committee members to receive additional compensation.¹⁰⁴ The General Assembly leaders then take action under the statute and the chamber rules to appoint the relevant committee members. Such appointments result in mid-term compensation changes for the appointed committee

⁹⁹ *Schultz v. Garrett*, 451 N.E.2d 794 (Ohio 1983).

When a statute setting forth the formula for the compensation of an officer is effective before the commencement of the officer's term, any salary increase which results from a change in one of the factors used by the statute to calculate the compensation is payable to the officer. Such increase is not in conflict with Section 20, Article II of the Constitution when paid to the officer while in term.

Id. at 797-98.

¹⁰⁰ *State ex rel. Parsons v. Ferguson*, 348 N.E.2d 692, 694 (Ohio 1976).

Both appellants began their elective terms on January 1, 1973. Since the resolution of the county commissioners authorizing the health insurance plan and approving the payment of premiums was not adopted until January 8, 1973, seven days after the commencement of appellants' terms of office, the payments should not have been made on their behalf.

Id.

¹⁰¹ For purposes of this article, "compensation statute" refers to the relevant statute that authorizes the compensation being challenged. For example, in *State ex rel. Parsons v. Ferguson*, the "compensation statute" is OHIO REV. CODE ANN. § 305.171 (West 2013).

¹⁰² *See Schultz*, 451 N.E.2d at 796.

¹⁰³ *See Parsons*, 348 N.E.2d at 694. "R.C. 305.171, effective September 23, 1969, authorized boards of county commissioners to pay for group medical and hospital plans for county officers and employees. On January 8, 1973, the Board of Commissioners of Madison County adopted a resolution appropriating funds to pay the premiums for such a plan." *Id.* The court held that the payments made on January 8, 1973, seven days into the petitioners' terms, resulted in unconstitutional mid-term changes in compensation. Note here, that the County Commissioners were authorized by statute to make these payments prior to the decision to issue the payments. But the Commissioners' actions under the statute to make the payments mid-term resulted in unconstitutional mid-term changes in salary. *Id.* at 693.

¹⁰⁴ *See* OHIO REV. CODE ANN. § 101.27(A)(4) (West 2013).

members. The increased compensation does not result “from a change in one of the factors used by the statute to calculate the compensation.”¹⁰⁵ Indeed, the only factor used to determine committee compensation is section 101.27. The decision to appoint and remove committee members changes nothing about the statute itself. Rather, like in *Parsons*, the increased compensation is the result of direct action by those authorized under section 101.27 to affect compensation. Therefore, under *Parsons*, these compensation changes, though authorized under section 101.27, result in an unconstitutional in-term change in compensation.

C. The current system must change to increase independent representation and deliberative democracy in the General Assembly

Much debate surrounds the appropriate level of committee involvement in legislatures and the efficacy of procedural rules in our representative form of government. Woodrow Wilson once said of the congressional committee system, “I know not how better to describe our form of government in a single phrase than by calling it a government by the chairmen of the Standing Committees of Congress.”¹⁰⁶ Congressman Gerald B.H. Solomon characterized Congress’ procedural rules and its committee system as restricting deliberative democracy.¹⁰⁷ Congressman Solomon defined deliberative democracy as “an ideal representative, or republican, form of government. True deliberative democracy allows the full and free airing of conflicting opinions and ideas on legislative policies through hearings, debates, and amendments.”¹⁰⁸ Former House Speaker Sam Rayburn described the concept of deliberative democracy specifically in the context of Congress: “It is in the Congress that the varied needs and interests of the people find expression. It is in the Congress that out of the clash of contending opinions is forged the democratic unity of a democratic people.”¹⁰⁹ Over the course of time, as the nation and our government increased in size, new procedural rules were instituted in Congress to address the problems that come with greater membership.¹¹⁰ These rules, however, brought with

¹⁰⁵ *Schultz v. Garrett*, 451 N.E.2d 794, 796 (Ohio 1983).

¹⁰⁶ WILSON, *supra* note 34, at 82. Wilson was one of the most outspoken critics of the committee system. Wilson once said of the comparison between the House and its committees:

The House sits, not for serious discussion, but to sanction the conclusions of its Committees as rapidly as possible. It legislates in its committee-rooms; not by the determinations of majorities, but by the resolutions of specially-commissioned minorities; so that it is not far from the truth to say that Congress in session is congress on public exhibition, while Congress in its committee-room is Congress at work.

Id.

¹⁰⁷ Congressman Gerald B.H. Solomon & Donald R. Wolfensberger, *The Decline of Deliberative Democracy in the House and Proposals For Reform*, 31 HARV. J. ON LEGIS. 321 (1994).

¹⁰⁸ *Id.* at 323.

¹⁰⁹ *Id.*

¹¹⁰ *See id.* at 328-29.

them the adverse effect of reducing meaningful debate and compromise in Congress.¹¹¹

1. The leadership's control over supplemental compensation suppresses dissenting opinions of committee members.

The Ohio General Assembly's unique procedural rules serve only to exacerbate the well-established problems that plague the United States Congress. In particular, the rule that allows General Assembly leaders to discretionarily appoint and remove committee chairpersons most undermines the principles of deliberative democracy and representative leadership. Under Ohio's framework, committee chairpersons are beholden to the leadership because the leadership can take away the chair as quickly as they gave it. Chairpersons are cognizant of the fact that the leadership need not offer a reason for removing them from the chair. As such, Chairpersons must constantly balance the possibility of being removed from their chair as a result of voting opposite the leadership against their own personal beliefs about what would be best for the citizens of Ohio. While a chairperson may fervently disagree with the leadership's position on a given piece of legislation, he may nevertheless decide to vote with the leadership on that matter because he may believe he can better serve his constituents in future matters by keeping his chair rather than fighting the leadership and being removed.¹¹² Chairpersons must essentially adopt a "live to fight another day" mentality.

The end result is a system where each house's leader wields immense power over the topics of debate and, indeed, the debate itself. Congressman Solomon noted that, (substituting Ohio's committee system for congress), "Rather than providing for the free exchange of conflicting opinions, resulting in an improved legislative product, [Ohio's committee system] now serve[s] to restrict debate rather than enhance it."¹¹³ When committee chairpersons cannot confidently raise arguments against legislation set out by the leadership, there is no chance for the legislation to be improved through any meaningful discussion or debate. What we are left with is legislation that was not properly vetted through the very committees that were designed to carefully consider and debate bills in an effort to improve that legislation. Dissenting opinions are an essential part of a well-functioning democracy.¹¹⁴ Procedural rules that serve to restrict dissent and debate therefore serve only to delude the effectiveness of democracy.

¹¹¹ *Id.* at 321.

¹¹² A cynical observer may believe that chairpersons will not vote against the leadership in such situations because the legislator is afraid of losing political power by being removed as chair. While I do not fully endorse this belief, there is certainly a possibility that political maneuverings play a role in the voting strategy of many committee chairpersons.

¹¹³ Solomon & Wolfensberger, *supra* note 107, at 321-22.

¹¹⁴ *See id.* at 323.

It is out of the airing of conflicting opinions in hearings, debates, and conferences that a people's Congress comes to decisions that command the respect of a free and democratic people. Not all measures which emerge from the Congress are perfect, not by any means, but there are very few which are not improved as a result of discussion, debate, and amendment.

Id.

Further, Ohio's electorate is ill-served by allowing one person to quash any dissent by committee chairs and members. Our form of representative government requires that the constituency be able to rely on their chosen representatives to offer full-throated defenses of the interests of the people who elected them. When elected representatives are hand-cuffed from making objections to legislation that may affect their constituents, the system fails to offer the best method for operating a government.

Compare all of this with Congress, where chairpersons are elected by party caucuses, and thus are beholden to no one individual.¹¹⁵ As a result, Congressional committee chairs are free to vote against or openly question Congressional leadership if the chair disagrees with a given bill. Dissenting chairs need not worry that the Speaker will remove them, for they have the protection of like-minded legislators who would fight, in the form of their vote, to keep the chairperson from being removed. While by no means the model that Ohio should strive to be, Congress's committee system offers a better opportunity to realize James Madison's description of the ideal representative government: "[T]o refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations."¹¹⁶

2. The committee system is rife with improper influence over committee members

Alone, the centralization of power in General Assembly leadership is enough to call for a change to Ohio's committee system, but the leaders' power is even greater because of the influence they wield over the chairperson's salary. Rather than serving the best interests of their constituents, committee chairpersons are pressured to appease the leadership at threat of losing their chair and financial livelihood along with it. Take, for example, the chairperson of the House Finance Committee. Under section 101.27, the finance chair receives \$10,000 in supplemental compensation.¹¹⁷ This \$10,000 represents a 16.5% increase in salary for the finance chair.¹¹⁸ With supplemental compensation forming a substantial percentage of her overall salary, the finance chair is pressured into appeasing the Speaker of the House at risk of being removed and suffering a substantial decrease in income. This system

¹¹⁵ Ohio House Rule 10.5(a)(1). "The standing committees specified in clause 1 shall be elected by the House within seven calendar days after the commencement of each Congress, from nominations submitted by the respective party caucus or conference."); Ohio Senate Rule 24.1

In the appointment of the standing committees, or to fill vacancies thereon, the Senate, unless otherwise ordered, shall by resolution appoint the chairman of each such committee and the other members thereof. On demand of any Senator, a separate vote shall be had on the appointment of the chairman of any such committee and on the appointment of the other members thereof.

Id.

¹¹⁶ THE FEDERALIST NO. 10 (James Madison).

¹¹⁷ OHIO REV. CODE ANN. § 101.27(A)(4) (West 2013).

¹¹⁸ *See id.* At a base legislative salary of \$60,584, an additional \$10,000 dollars represents an increase of 16.51% over top of the base salary.

inevitably creates an employer-employee relationship between the finance chair and the Speaker of the House. Because of the Speaker's removal powers, the ultimate decision of what legislation comes out of the finance committee rests with the Speaker rather than the chairperson. If the Speaker learns that the chair plans to vote opposite of how the Speaker wants her to vote, the Speaker simply removes the chair and replaces her with someone who will vote according to the Speaker's wishes.¹¹⁹ This causes the finance chair to constantly consider how the Speaker would have her vote in a given situation, for failure to do so may prove to be a costly, \$10,000 decision. As a result, the Speaker assumes what is essentially the role of the boss, having a disproportionately large voice in how the very influential finance committee is operated.

Representative government requires legislators to be first and foremost accountable to the citizens who elected them.¹²⁰ Conditioning a legislator's overall compensation on one General Assembly leader's satisfaction with his or her voting record creates an improper motivation for legislators to appease the leadership rather than the constituents. The deleterious effect on Ohio's democracy caused by the current committee compensation system is comparable to the many problems of campaign finance and lobbying.¹²¹ For campaign finance, the concern has long been the presence of political quid pro quo. In *Buckley v. Valeo*, the Supreme Court recognized the effect that large donations can have in a representative democracy, stating, "[t]o the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined."¹²² Similar concerns are often raised in regards to lobbying. "In cases dating back to the nineteenth century, the Court has expressed concern about the corrupting effects of 'the influence and exertions of the lobby agent to bring about the passage of a law.'"¹²³

It is no long stretch to see that the problems raised by both campaign finance and lobbying are present in Ohio's committee compensation system. Sitting committee

¹¹⁹ For a real life example, refer to Senator Bill Seitz's removal from his chairmanship during committee debate over Senate Bill 5 in 2011. Seitz was a vocal critic of the bill, and represented the swing vote for whether the bill would make it out of committee. Rather than allowing Seitz to vote, Speaker William Batchelder, a proponent of the bill, removed Seitz from his chair and replaced him with a pro-Senate Bill 5 senator. The bill then passed through the committee with a 7-5 vote. See Guillen, *supra* note 1.

¹²⁰ See THE FEDERALIST NO. 57 (James Madison).

The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess the most wisdom to discern, and most virtue to pursue the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust.

Id.

¹²¹ See Richard Briffault, *Lobbying and Campaign Finance: Separate and Together*, 19 STAN. L. & POL'Y REV. 105, 108 (2008). "Campaign finance and lobbying also raise concerns about improper influence, or corruption, that is, the danger that government officials will make decisions based on their own private benefit – whether to aid their reelection efforts or to add to their personal wealth – rather than the public interest." *Id.*

¹²² *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976).

¹²³ Briffault, *supra* note 121, at 108 (citing *Trist v. Child*, 88 U.S. 441, 451 (1874)).

chairs can keep their supplemental compensation, and new legislators may be appointed to a chairmanship, so long as they agree to vote in lock-step with the leadership—the quintessential quid pro quo. The General Assembly leadership essentially act as lobbyists, influencing committee members’ votes with threats of removal or promises of a promotion to the chair. The presence of improper influence in campaign finance and lobbying was enough for the federal government to step in and heavily regulate these areas.¹²⁴ So too should Ohio move to cure the improper influences plaguing its committee compensation system.

3. Improper influence through financial persuasion can never be too small

A possible argument could be made that the amount of money at stake for a removed committee member is not enough to entice a reasonable legislator into changing his or her vote, but this argument misses the point. Our form of representative government is dependent upon trust between the constituency and those they choose to represent them.¹²⁵ Any incentive, no matter how small, for a representative to serve the interests of any party other than the general public creates a chink in the armor of our republican government. If even one legislator has been influenced to vote opposite his convictions for fear of losing his supplemental compensation, then this compensation system has served to undermine the integrity of Ohio’s representative democracy.

Further, while there may not always be a large amount of money at stake for legislators facing removal, it is inappropriate to leave this system in place simply because the majority of legislators may not be fazed by losing a couple of thousand dollars from their salary. A republican government is built on the precept that those most willing and capable of serving the people have the opportunity to do so, not just those who are most financially able.¹²⁶ By conditioning overall compensation of committee members on the approval of the General Assembly leaders, legislators of more modest means will invariably feel the greatest pressure to appease the leadership, for these legislators will more greatly feel the effects of the loss of supplemental compensation.¹²⁷ Such legislators’ voices are effectively stifled,

¹²⁴ *Id.* “Both campaign finance and lobbying are also regulated not simply because of the possibility of actual corruption but because of the potentially demoralizing effects on public confidence in government of the ‘appearance of corruption’ attributable to unrestricted contributions or the ‘direct access to elected representatives’ enjoyed by lobbyists.” *Id.* (citations omitted).

¹²⁵ George A. Nation III, *We the People: The Consent of the Governed in the Twenty-First Century: The People’s Unalienable Right to Make Law*, 4 DREXEL L. REV. 319, 329 (2012). “The very heart of a representative democracy is the accountability of elected politicians to the voters.” *Id.*

¹²⁶ THE FEDERALIST NO. 10 (James Madison).

In the next place, as each representative will be chosen by a greater number of citizens in the large than in the small republic, it will be more difficult for unworthy candidates to practice with success the vicious arts by which elections are too often carried and, the suffrages of the people being more free, will be more likely to center in men who possess the most attractive merit and the most diffusive and established characters.

Id.

¹²⁷ Consider a legislator in the Ohio House who serves as chair of the Finance Committee. The legislator’s overall compensation is \$70,584 (\$60,584 in base salary, and \$10,000 in

allowing the leadership to push through bills without any meaningful consideration or debate. Overall, Ohio's system works to undermine the principles of American government; "that the two houses should serve as forums for the free exchange of ideas and proposals, producing legislation that reflects the will of the people and accomplishes important goals."¹²⁸

IV. PROPOSAL FOR CHANGE

Ohio's committee compensation structure must change. Not only does it violate the Ohio Constitution, but the compensation structure also reduces the free-flow of ideas and restricts meaningful debate. To resolve these issues, I propose that section 101.27(A)(4) be amended to eliminate supplemental payments for committee members. Further, I propose that the General Assembly rules be amended to allow each chamber to approve committee appointments and removals by majority vote. A tax-payer suit, however, may be the only plausible way to create real change in the committee system.¹²⁹

A. All members of the General Assembly should be paid equally

As noted above, nearly all members of the General Assembly receive some amount of supplemental compensation.¹³⁰ What once may have been considered fair to provide supplemental compensation for members serving in committee positions, the need for such compensation is greatly diminished, if not rendered obsolete, by the ever-increasing size of the committee system. When nearly all members are required to perform some committee functions, the simple and logical fix is to pay all members equally.¹³¹ This is the compensation structure in Congress.¹³²

B. Require a majority vote to appoint and remove committee members

Further, the General Assembly should institute a rule requiring a majority vote of the chamber to appoint and remove committee chairpersons. Such a rule redistributes power to the elected representatives, allowing the peoples' voice to be heard when

supplemental salary). Suppose this legislator has three young children and a wife who only works part-time in order to care for their kids. This family lives in rural Ohio and comes from modest means. The loss of his \$10,000 supplemental salary would certainly be felt by this family. As a result, this legislator must think long and hard before voting opposite the Speaker on a controversial bill. Such considerations should never have to cross this legislator's mind.

¹²⁸ Solomon & Wolfensberger, *supra* note 107, at 321.

¹²⁹ For a taxpayer suit to have standing, a removed committee chairperson would likely have to join the suit as the lead plaintiff. Under Ohio's common law, taxpayers must demonstrate injury-in-fact different from the injury of a general taxpayer. A removed committee chairperson would be able to demonstrate such an injury.

¹³⁰ See *supra* Part II.A.2. All but twenty-six members of the one hundred thirty-two-member body serve in positions that receive supplemental compensation.

¹³¹ The simple solution would be to increase the base salary for legislators by \$4,000. Such an increase would reflect the additional work most members will perform at some point during their term. \$4,000 is also a rough weighted-average of the current supplemental salaries being paid.

¹³² IDA S. BRUDNICK, CONG. RESEARCH SERV., RL30064, CONGRESSIONAL SALARIES AND ALLOWANCES 1 (2013).

selecting the powerful “little legislatures.”¹³³ The United States House and Senate currently employ appointment mechanisms that incorporates chamber-wide elections. In the Senate, committee members are appointed through party caucuses.¹³⁴ Members select their desired committee placements, and each parties’ conference then creates a roster of proposed committee placements to be put to a vote.¹³⁵ The House employs a similar appointment-process, with each party using a “committee on committees” to prepare an assignment slate of prospective committee members that must be submitted to the full chamber for approval.¹³⁶

I propose that the Ohio General Assembly adopt a similar committee appointment and removal process as that of Congress. The benefits of adopting such a system would be two-fold. First, power will redistributed away from the leadership and back to the chambers as wholes. No longer could the leadership unilaterally quash committee debate by removing dissenting committee members. As a result, proposed legislation will receive full and unadulterated debate, increasing the level of deliberative democracy in the legislature.

Second, because of the term-limits placed on General Assembly legislators, Ohio’s committee selection process will avoid the problems associated with seniority-based selection that affects Congress. Congressional Seniority plays a large

¹³³ WILSON, *supra* note 34.

¹³⁴ Senate Committees, Chapter 3-Committee Membership, UNITED STATES SENATE, <http://www.senate.gov/artandhistory/history/common/briefing/Committees.htm#5> (last visited Feb. 4, 2014).

¹³⁵ *Id.*

[P]arty conferences convene before the start of each new Congress to elect leaders and determine committee assignments. Each party conference appoints a “committee on committees” to prepare a roster of members it wishes named to the party’s specifically allotted committee seats. The percentage of a party’s representation within the Senate determines the percentage of seats it will gain on each committee, although exact numbers are subject to negotiation between party floor leaders.

Id.

¹³⁶ *Committee FAQs: How are the members of the standing committees selected?*, OFFICE OF THE CLERK UNITED STATES HOUSE OF REPRESENTATIVES, http://clerk.house.gov/committee_info/commfaq.aspx.

Each of the two principle [sic] parties in the House is responsible for the assigning its members to committees, and at the first stage, each party uses a committee on committees to make the initial recommendations for assignments. At the beginning of the new Congress, Members express preferences for assignment to the appropriate committee on committees. Most incumbents prefer to remain on the same committees so as not to forfeit expertise and committee seniority. These committees on committees then match preferences with committee slots, following certain guidelines designed in part to distribute assignments fairly. They then prepare and approve an assignment slate for each committee, and submit all slates to the appropriate full party conference for approval. Approval at this second stage often is granted easily, but the conferences have procedures for disapproving recommended Members and nominating others in their stead. Finally, at the third stage, each committee submits its slate to the pertinent full Chamber for approval, which is generally granted.

Id.

role in the selection of committee members and chairpersons. Incumbent congressmen “prefer to remain on the same committees so as not to forfeit expertise and committee seniority.”¹³⁷ Seniority therefore heavily factors into the selection of committee chairpersons.¹³⁸ Some argue that as a result of seniority’s influence on committee selections, constituents are deprived of a meaningful choice at the ballot box because replacing a senior representative with a new face results in that district losing its representative power on committee.¹³⁹

Ohio will avoid these problems because state legislators are limited to a total of eight years in the House and Senate.¹⁴⁰ Therefore, senior legislators will not be able to wholly subsume the power lost by the leadership. Instead, Ohio’s legislators will have the opportunity to apportion the powers of committee membership as they see fit. Considering Woodrow Wilson’s admonition of the power of committees¹⁴¹, it is only proper that the peoples’ representatives be heard when selecting chairpersons. The General Assembly needs to act on this problem now and not waste tax-payer money litigating the issue later.

C. Tax-Payer suit challenging § 101.27(A)(4) may be the only plausible option

Striking down section 101.27(A)(4) is likely the only plausible route to changing the committee compensation structure. The General Assembly is unlikely to take up this issue itself. If history tells us anything, it is that those in power do not let it go without a fight. Additionally, a change to the House rules requires a majority of its members’ approval,¹⁴² and Senate rules require three-fifths of the elected

¹³⁷ *Id.*

¹³⁸ Dan Goldstein & Richard Scamell, *Congressional Seniority and Unequal Representation: A Proposal for Reform*, 51 TEX. L. REV. 722, 722 (1973).

¹³⁹ For a more thorough examination of this problem, see *Id.* at 723. “As their representatives do not hesitate to emphasize, election of a challenger will necessarily result in sacrifice of the incumbent’s seniority-based power. If voters wish powerful representation, they must reelect the incumbent.”

¹⁴⁰ *The Term Limited States*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/about-state-legislatures/chart-of-term-limits-states.aspx> (last visited Feb. 6, 2014). For an argument that term-limits have actually hurt Ohio’s General Assembly, see Darrel Rowland, *Support for Ohio term limits vanishing*, COLUMBUS DISPATCH (Apr. 7, 2013), <http://www.dispatch.com/content/stories/local/2013/04/07/support-for-term-limits-vanishing.html>. Opponents of term limits argue that the legislature loses power to the executive branch because legislators are not around long enough to gain institutional memory, whereas the members of the executive branch are not term limited. *Id.*

But a term-limited legislature has upset the balance of power in state government, the Medina Republican said. ‘There’s no question that the governor and the cabinet members have a ton more power than they did.’ Batchelder recalled how veteran committee chairmen used to educate cabinet members, especially in more-technical areas such as insurance and utilities. But now, it’s the appointed officials, not those elected by the people, with the knowledge — and thus the power.

Id. (citation omitted).

¹⁴¹ WILSON, *supra* note 34.

¹⁴² Ohio House Rule 114.

Senators to change.¹⁴³ Neither chamber would be likely to achieve the necessary votes to change the rules as such a proposal would experience extreme resistance from General Assembly leaders and general members.¹⁴⁴ Further, any legislative change to committee compensation would require a bill to make it through the very committees that General Assembly leaders exercise so much power over.¹⁴⁵ Therefore, a tax-payer suit challenging the supplemental payment provision section 101.27(A)(4) may be the only way to correct the woes of Ohio's committee compensation structure.

V. UPHOLDING OHIO'S CONSTITUTION REQUIRES ACTION ON THE PART OF
OHIO'S CITIZENS

The Ohio General Assembly's committee compensation structure must change if the legislative body is to represent its citizens as envisioned by the Constitution's Framers. General Assembly leaders wield financial leverage over committee chairpersons to shape legislation in the leaders' favor. Allowing the leaders to exercise their power in this manner defeats a key tenant of representative democracy: that each citizen should be vigorously and independently represented by his or her elected official. Ohio's citizens are disserved when General Assembly political maneuverings are given teeth in the form of financial leverage. The only winners under the current compensation structure are the General Assembly leaders. Ohio

The rules of the House may be amended. A member who desires to amend the rules shall prepare a resolution that sets forth the proposed amendment and file it with the Clerk in a number of copies to be determined by the Clerk. The Speaker or presiding officer shall announce the resolution at the next session of the House at which bills are given third consideration, and shall refer the resolution to the Committee on Rules and Reference. A majority of all members elected shall be required for the adoption of the resolution.

Id.

¹⁴³ Ohio Senate Rule 96.

These rules shall not be altered except after due notice of the intention of alteration; and no rule shall be altered, except by a three-fifths vote of the senators elected. Any of these rules may be suspended by a three-fifths vote of the members elected, excepting rules which specifically require otherwise.

Id.

¹⁴⁴ The argument could be made that general members and sitting chairpersons would favor changing the rules to prohibit discretionary removals. But history seems to work against this argument, as each chamber votes on these rules at the beginning of each session and no change has ever been contemplated. Further, general members may favor the current system because they have a greater probability of being appointed to a chairpersonship if the sitting chairpersons can be removed at any time and replaced, rather than having to wait for the term to end for any changes to be made.

¹⁴⁵ Should such a bill be introduced in committee, the General Assembly leader can exercise his power to remove the sitting chairperson and replace her with a chairperson that is hostile to the idea of change. This type of maneuvering is exactly why the committee structure must change; bills that are controversial or contrary to the interests of General Assembly leaders are killed in committee without a full hearing of the issue.

citizens must stand up and exercise their rights as taxpayers, should the General Assembly unwisely fail to timely resolve this issue.

