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2001

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JUDICIAL SUPERMAJORITIES AND THE VALIDITY OF STATUTES:

HOW *MAPP* BECAME A FOURTH AMENDMENT LANDMARK INSTEAD OF A FIRST AMENDMENT FOOTNOTE

Jonathan L. Entin[†]

*Mapp v. Ohio*¹ is justifiably known as a landmark of constitutional criminal procedure. In that case, the United States Supreme Court applied the Exclusionary Rule to the states: the prosecution may not use evidence obtained through an unlawful search and seizure. As Justice Harlan complained in dissent and as other contributors to this symposium explain, that issue was peripheral to the arguments when the case was heard in the Supreme Court.² Dollree Mapp did explicitly argue in the state courts that the police had violated her Fourth Amendment rights when they forced their way into her home and seized the evidence that provided the basis for her conviction under the Ohio obscenity statute.³ But even in the state courts, the Fourth Amendment took a back seat to other contentions.

Mapp advanced two arguments relating to the obscenity statute. On the facts, she claimed that she did not have possession or control of the books and pictures as required by the statute. She contended that those materials belonged to a roomer who had left before the end of his lease and that she had simply packed them away until he returned for his belongings. The Ohio Supreme Court rejected this fact-based defense.⁴

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¹ 367 U.S. 643 (1961).

² See *id.* at 673 (Harlan, J., joined by Frankfurter & Whittaker, JJ., dissenting). See also Dennis D. Dorin, *Marshaling Mapp: Justice Tom Clark's Role in Mapp v. Ohio's Extension of the Exclusionary Rule to State Searches and Seizures*, 52 CASE W. RES. L. REV. 401 (2001); Lewis Katz, *Mapp After Forty Years: Its Impact on Race in America*, 52 CASE W. RES. L. REV. 471 (2001).

³ See *State v. Mapp*, 166 N.E.2d 387, 389 (Ohio 1960).

⁴ See *id.* (holding that Mapp had the obscene materials within her possession or under her control within the meaning of the Ohio obscenity statute).

Her other argument was that the obscenity statute was unconstitutional because it effectively criminalized simple possession of obscene materials and therefore was analogous to the law that was struck down in *Smith v. California*.⁵ This argument had more resonance with the Ohio Supreme Court: four justices endorsed Mapp's position about the validity of the statute.⁶ Unhappily for the defendant, that was not sufficient to prevail on her First Amendment defense. At the time, the Ohio Constitution contained the following provision:

No law shall be held unconstitutional and void by the supreme court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void.⁷

The court contained seven members, so four votes for invalidity were not enough.⁸ Accordingly, the obscenity law was adjudged constitutional by a three-to-four margin.

Mapp is not the only instance in which this supermajority requirement resulted in a minority judgment of constitutionality. This article examines that unusual provision, which was adopted in 1912 and repealed in 1968. The Ohio restriction on judicial review is not simply a footnote to *Mapp*, which alone might make it an appropriate subject for inclusion in a retrospective discussion of a landmark case.⁹

⁵ 361 U.S. 147 (1959) (invalidating an obscenity law that did not require the defendant to know the contents of the materials at issue).

⁶ See *Mapp*, 166 N.E.2d at 391 ("In the opinion of Judges Taft, Bell, Herbert and Peck, the portion of Section 2905.34, Revised Code, upon which defendant's conviction was based, is constitutionally invalid, and, for that reason, the judgment of the Court of Appeals should be reversed.").

⁷ OHIO CONST. art. IV, § 2 (repealed 1968).

⁸ Two of the four justices who thought the obscenity statute violated the First Amendment also believed, as a matter of state constitutional law, that the unlawfully seized evidence should have been suppressed. See *Mapp*, 166 N.E.2d at 391-94 (Herbert, J., joined by Bell, J., dissenting). The other two justices believed that Ohio precedent made clear that unlawfully seized evidence was admissible. See *id.* at 389-90. The three justices who thought the obscenity law comported with the First Amendment offered no explanation for their conclusion.

⁹ The contemporaneous commentary on *Mapp* either ignored the supermajority requirement or mentioned it only in passing. For commentary ignoring the requirement, see, e.g., Recent Case, 74 HARV. L. REV. 779 (1961); *The Supreme Court, 1960 Term: Leading Cases*, 75 HARV. L. REV. 40, 152 (1961). For commentary mentioning the requirement only in passing, see, e.g., Jack G. Day & Bernard A. Berkman, *Search and Seizure and the Exclusionary Rule: A Re-Examination in the Wake of Mapp v. Ohio*, 13 W. RES. L. REV. 56, 57 n.4 (1961); Recent Development, *Wolf v. Colorado Overruled: Exclusionary Rule Extended to States*, 23 OHIO ST. L.J. 147, 147 n.3 (1962). See also Bruce L. Newman, Note, *Constitutional Law—The Problem With Obscenity*, 11 W. RES. L. REV. 669, 677 (1960); Melvin H. Reifin, Editorial Note, *The Constitutionality of Obscenity Laws: U.S. and Ohio*, 31 U. CIN. L. REV. 285, 292 & n.51 (1962).

It is significant for several other reasons that bear on major jurisprudential themes. For one thing, the Ohio provision inspired a few other states to require supermajorities for their courts to invalidate legislation, and two of those provisions are still in effect. For another, critics of the United States Supreme Court during the New Deal pointed to Ohio's approach as one way to limit judicial activism. Finally, the Ohio provision goes to the heart of debates over the role of courts and legislatures in a democratic society, an argument that dates to the American founding and promises never to end.

I. THE ADOPTION OF THE SUPERMAJORITY RULE

Ohio's supermajority requirement for invalidating laws was proposed by a 1912 constitutional convention. The convention was held pursuant to a provision under which Buckeye State voters decide every twenty years whether to convene such a meeting.¹⁰ Support for holding a convention came from an improbable confluence of conservative business interests that wanted to change the tax system and progressives trying to adopt the initiative and referendum as well as other reforms.¹¹ The progressives were particularly upset with a series of Ohio Supreme Court rulings that invalidated statutes authorizing mechanics' liens,¹² providing for an eight-hour day for employees on public works projects,¹³ and regulating abusive bulk sales,¹⁴ as well as other decisions narrowly construing worker-protection statutes¹⁵ and

¹⁰ See OHIO CONST. art. XVI, §3. This provision was included in the Ohio Constitution of 1851, which with its amendments remains in force. Originally the vote on holding a convention was to occur every twenty years after 1851. The convention that proposed the supermajority requirement put forward another amendment, which the voters approved, that called for conducting the vote on holding a convention every twenty years after 1912. The electorate has decided against holding another convention since 1912.

¹¹ See HOYT LANDON WARNER, *PROGRESSIVISM IN OHIO 1897-1917*, at 295-96 (1964); Lloyd Luther Sponholtz, *Progressivism in Microcosm: An Analysis of the Political Forces at Work in the Ohio Constitutional Convention of 1912*, at 18-23 (1969) (unpublished Ph.D. dissertation, University of Pittsburgh) (on file with author).

¹² See *Palmer v. Tingle*, 45 N.E. 313 (Ohio 1896).

¹³ See *City of Cleveland v. Clements Bros. Constr. Co.*, 65 N.E. 885 (Ohio 1902). See also *In re Preston*, 59 N.E. 101 (Ohio 1900) (striking down, on freedom of contract grounds, a law requiring that mined coal be weighed in a manner that favored employees over employers).

¹⁴ See *Williams & Thomas Co. v. Preslo*, 95 N.E. 900 (Ohio 1911); *Miller v. Crawford*, 71 N.E. 631 (Ohio 1904). The legislature had responded to *Miller v. Crawford* by enacting a new law that was designed to address the supreme court's objections, but the court held fast to its position in *Williams & Thomas*.

¹⁵ See, e.g., *Morris Coal Co. v. Donley*, 76 N.E. 945 (Ohio 1906); *Jacobs v. Fuller & Hutsinpill Co.*, 65 N.E. 617 (Ohio 1902). *Jacobs* was especially controversial because it involved a claim by a 15-year-old who lost his right arm while assigned to a dangerous job in violation of a child labor statute.

invoking the fellow-servant rule,¹⁶ contributory negligence,¹⁷ and assumption of the risk¹⁸ against the claims of workers.¹⁹ The cases seemed entirely consistent with U.S. Supreme Court decisions like *Lochner v. New York*,²⁰ which had fueled widespread opposition. Building on that dissatisfaction, Theodore Roosevelt addressed the convention on February 21, denouncing *Lochner* and other rulings that struck down reform measures,²¹ and proposing what he called the "recall" of unpopular judicial decisions by the electorate.²² About three weeks later, on March 12, William Jennings Bryan supported a

¹⁶ See, e.g., *Lake Shore & M.S. Ry. Co. v. Burtscher*, 78 N.E. 1129 (Ohio 1906) (per curiam); *Cleveland, L. & W. Ry. Co. v. Shanower*, 71 N.E. 279 (Ohio 1904); *Kelly Island Lime & Transp. Co. v. Pachuta*, 69 N.E. 988 (Ohio 1904).

¹⁷ See, e.g., *Cincinnati Gas & Elec. Co. v. Archdeacon*, 88 N.E. 125 (Ohio 1909); *Davis v. Turner*, 68 N.E. 819 (Ohio 1903).

¹⁸ See, e.g., *Lima Elec. Ry. & Light Co. v. Hicks*, 84 N.E. 1129 (Ohio 1907) (per curiam); *Cincinnati Gas & Elec. Co. v. Johnston*, 81 N.E. 155 (Ohio 1907); *Davis v. Somers-Cambridge Co.*, 79 N.E. 233 (Ohio 1906).

¹⁹ Other cases narrowed the scope of employer liability in workplace tort cases. See, e.g., *Cincinnati, H. & D. Ry. Co. v. Frye*, 88 N.E. 642 (Ohio 1909); *New York, C. & St. L. R. Co. v. Ropp*, 81 N.E. 748 (Ohio 1907); *Northern Ohio Ry. Co. v. Rigby*, 68 N.E. 1046 (Ohio 1903). Another controversial ruling held that a railroad was not liable for the injuries suffered by children who played with their unattended turntables. See *Wheeling & Lake Erie R. Co. v. Harvey*, 83 N.E. 66 (Ohio 1907).

²⁰ 198 U.S. 45 (1905) (invalidating, on freedom of contract grounds, a law that limited the working hours of bakers). See also *Adair v. United States*, 208 U.S. 161 (1908) (striking down a law that forbade employers from prohibiting workers to join unions); *The Employers' Liability Cases*, 207 U.S. 463 (1908) (invalidating a worker's compensation program for employees of railroads and other common carriers). Compare *Loewe v. Lawlor*, 208 U.S. 274 (1908) (holding that a secondary boycott by a labor union violated the antitrust laws), with *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (holding that the antitrust laws did not apply to the Sugar Trust, which controlled ninety-five percent of the market, because manufacturing was not subject to federal regulation under the Commerce Clause).

²¹ Roosevelt was particularly upset about a recent ruling that invalidated the worker's compensation statute in his home state of New York. See *Ives v. South Buffalo Ry. Co.*, 94 N.E. 431 (N.Y. 1911); GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 210, 212-14 (1994). The day after *Ives* was handed down, 146 female employees were killed in the Triangle Shirtwaist fire in New York City. See WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937*, at 47 (1994). Roosevelt also denounced the rulings that struck down the federal income tax. See *Pollock v. Farmers' Loan & Trust Co.* 157 U.S. 429 (1895), 158 U.S. 601 (1895).

²² See Address of Theodore Roosevelt, *PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO* 378, 384-86 (1912) [hereinafter *PROCEEDINGS*]. Roosevelt's speech refined and amplified suggestions that he had been advancing more tentatively over the previous year and a half. See ROSS, *supra* note 21, at 131-36. His remarks stimulated a controversy that endured throughout the presidential election campaign that year. See *id.* at 137-51. Only Colorado adopted his suggestion for the recall of judicial decisions, see *id.* at 152, and the state supreme court invalidated the scheme. See *People v. Max*, 198 P. 150 (Colo. 1921) (state constitutional claims); *People v. Western Union Tel. Co.*, 198 P. 146 (Colo. 1921) (federal constitutional claims).

less drastic approach that would require a unanimous vote for a court to invalidate a law.²³

Even before Roosevelt and Bryan spoke, Cincinnati delegate Hiram D. Peck on January 31 had introduced Proposal No. 184, which contained among its provisions to streamline the state's judiciary the unanimity provision that Bryan had endorsed.²⁴ The proposal was promptly referred to the Committee on Judiciary and Bill of Rights, which Peck chaired.²⁵ As reported from the committee, Proposal No. 184 provided:

[N]o statute adopted by the general assembly shall be held unconstitutional and void except by the concurrence of all the judges of the supreme court.²⁶

This unanimity requirement was part of a larger package designed to streamline what had become an antediluvian judicial structure. Under the 1851 constitution as amended in 1883, the six-member supreme court sat atop a pyramid of circuit courts and a bewildering array of trial and specialized courts. This unwieldy arrangement led to numerous difficulties. For example, the supreme court was nearly three years behind on its docket.²⁷ This resulted partly from the court's expansive appellate jurisdiction, which enabled litigants to obtain review of circuit court judgments as a matter of right,²⁸ and partly from its operating procedures: the tribunal ordinarily sat in panels of three but had to reconsider en banc all cases in which the panel was divided or in which the constitutionality of a federal or state statute was questioned.²⁹ Peck's proposed solution was to redefine the court's appellate jurisdiction and assign most review of trial courts to the newly named court of appeals, which replaced the circuit courts.³⁰ The thrust of the changes was to promote the concept of "one trial and one review."³¹ At the same time, Proposal No. 184 left

²³ See William J. Bryan, Address on the Subject of "The People's Law," PROCEEDINGS, *supra* note 22, at 663, 669-70.

²⁴ See *id.* at 143-44.

²⁵ See *id.* at 146.

²⁶ *Id.* at 1028.

²⁷ See 1 A HISTORY OF THE COURTS AND LAWYERS OF OHIO 153 (Carrington T. Marshall ed., 1934) [hereinafter MARSHALL].

²⁸ Peck described the circuit courts, which reviewed decisions of the various trial courts, as "only a sieve through which everyone goes to the supreme court." PROCEEDINGS, *supra* note 22, at 1026.

²⁹ See 1 MARSHALL, *supra* note 27, at 223.

³⁰ See *id.* at 154.

³¹ Francis J. Amer, *The Growth and Development of the Ohio Judicial System*, in 1

one feature of the supreme court intact: despite widespread concern about tie votes in a six-member tribunal, the size of the court was unchanged in the original draft. Instead, the draft provided that an equal division would result in the affirmance of the judgment below.³²

The unanimity requirement consumed much of the five days of debate when the Committee on Judiciary and Bill of Rights brought the proposal to the floor. The issue was joined almost immediately between those who believed that the Ohio Supreme Court had overstepped its bounds by striking down innovative laws designed to deal with modern developments and those who viewed the judiciary as simply doing its traditional job of assuring that statutes comported with the state and federal constitutions.

Peck began on April 3 by conceding that the idea of unanimity was controversial but complained: "There have been too many judgments that have been made by the [supreme] court which seem to the people not well grounded, in view of existing circumstances, and which operate as stumbling blocks to progress, upsetting statutes which were desirable in themselves"³³ Delegate William Worthington, another Cincinnati lawyer, responded that the proposal was "at war with the very theory of jurisprudence."³⁴ Delegate James W. Halfhill, a lawyer from Lima, raised another objection that would be a recurring theme of critics, that the requirement of a unanimous vote would give too much power to a single justice: "Do you not think that this is making too much of a certainty and too much of the dominance of one man on the court?"³⁵ Peck shot back that the current situation, under which the court could invalidate a law by a three-to-two vote, already gave one person too much power.³⁶

The flavor of the arguments is revealed by the following exchange between two other lawyer delegates, Humphrey Jones of Bloomingburg and D.F. Anderson of Youngstown, during the third day of debate on April 9:

MARSHALL, *supra* note 27, at 181, 207.

³² Peck explained that the drafters left the size of the court unchanged to deflect criticism that "the lawyers were creating new offices for themselves to fill," a charge that contributed to the defeat of recommendations by the previous constitutional convention in 1874. PROCEEDINGS, *supra* note 22, at 1027. He expressed willingness to accept a seven-member high court if the delegates preferred an odd number, though. *See id.*

³³ *Id.* at 1028.

³⁴ *Id.* at 1048. Both Peck and Worthington were judges. *See* WARNER, *supra* note 11, at 312.

³⁵ PROCEEDINGS, *supra* note 22, at 1029.

³⁶ *See id.*

Mr. JONES: Suppose you have a case in the common pleas court where the common pleas judge holds the law unconstitutional, and the court of appeals also holds it unconstitutional. Now you go to the supreme court of six judges, and five of them declare it unconstitutional. Do you think it the right thing to let that one man in the supreme court defeat the judgment of the five members of the supreme court, the three circuit judges [of the court of appeals], and the common pleas judge?

Mr. ANDERSON: You didn't start back far enough. Where did the act come from?

Mr. JONES: Do you think it right to let one member of the supreme court, by his individual judgment, defeat the judgment of the other nine judges that the law was unconstitutional?

Mr. ANDERSON: You didn't start back far enough. In the first place, take the house of representatives. We presume there are a number of lawyers elected to the house, and we presume they are moderately well posted in the law It may be a violent presumption, but we will presume for the sake of argument that they are, and those lawyers give their best efforts to framing the law. Then from the house of representatives the act goes to the senate, and we will presume the senate has a like proportion of lawyers, who give their best attention to the consideration of the proposed law. And the house and senate pass it and then it goes to the governor . . . and then we will presume that the governor, after careful consideration, does not veto it but approves it, and of course if there is any question concerning the constitutionality of the law he will ask the advice of his attorney general.³⁷

Jones and other critics worried that an obstinate, willful, or corrupt judge would vote to uphold improper laws, whereas Anderson and other supporters of unanimity believed that elected officials had an independent obligation to determine whether legislation satisfied constitutional requirements and that those determinations were entitled to more deference than the judiciary had accorded them. The

³⁷ *Id.* at 1090-91.

debate spilled over to a fourth day, with advocates of judicial review invoking Chief Justice Marshall's opinion in *Marbury v. Madison*³⁸ and supporters of the unanimity requirement sometimes implying that they opposed giving courts the power to overturn statutes at all.³⁹ Peck repudiated that extreme position, though, explaining: "[Judicial review] is part of our system and we are not trying to take it away by this proposal. . . . The question is, how many judges should it require in order to declare an act unconstitutional?"⁴⁰

Much of the debate focused on the proposal's details rather than on the legitimacy of judicial review. For example, Peck quickly agreed to drop "adopted by the general assembly" when one delegate pointed out that the proposal's language would not cover legislation passed by the people through initiative and referendum, which was one of the major reforms to come out of the convention.⁴¹ Delegate Frank Taggart of Wooster offered a substitute proposal providing for a seven-member supreme court that could declare laws unconstitutional with the support of at least five justices. This smaller supermajority requirement recognized the legitimacy of complaints about judicial overreaching while avoiding the pitfalls of giving one justice an effective veto. "There you have one more than a majority and it gives additional moral force and effect," Taggart explained.⁴² Peck did not respond immediately.

Five days later, on the afternoon of April 9, Edmund King, a lawyer from Sandusky and a strong critic of the unanimity requirement, asked Peck about the full reach of the proposal. King wondered whether a single supreme court justice could effectively reverse a unanimous court of appeals judgment holding a statute unconstitutional.⁴³ Peck then responded to Taggart's alternative by offering a

³⁸ 5 U.S. (1 Cranch) 137 (1803). See, e.g., PROCEEDINGS, *supra* note 22, at 1110 (remarks of Delegate Edmund B. King) (observing that "[a] court would be no longer a court" if it refused to determine the constitutionality of a statute when that question was "properly presented before it").

³⁹ See, e.g., PROCEEDINGS, *supra* note 22, at 1079 (remarks of Delegate Stanley E. Bowdle) (characterizing judicial review as "[t]his usurpation of power"). One delegate, Cleveland carpenter Harry D. Thomas, offered an amendment that would have prohibited the supreme court from declaring any measure unconstitutional. See *id.* at 1101. See also *id.* at 1117 (remarks of Delegate Thomas) (denouncing the court for "practically nullif[y]ing every safety law made for the protection of workers in this state by their decisions on assumed risk, contributory negligence and fellow-servant rule"). That idea was quietly tabled the next day. See *id.* at 1129.

⁴⁰ See *id.* at 1125.

⁴¹ See *id.* at 1028.

⁴² *Id.* at 1065.

⁴³ See *id.* at 1128.

revised version that left the supreme court as a six-member body but allowed a five-person majority to invalidate a law.⁴⁴

The next morning Peck conceded that an across-the-board unanimity rule "would be not workable" in the situation King posited.⁴⁵ Accordingly, the Cincinnati produced yet another refinement: the supreme court would have to be unanimous to strike down a law "[i]n any case wherein the judgment of the court of appeals is reversed";⁴⁶ it would take only a simple majority to affirm a court of appeals judgment of invalidity.⁴⁷ He also made clear that the unanimity rule would not apply to cases arising under the supreme court's original jurisdiction.⁴⁸

Now, however, another objection arose. S.A. Hoskins, a Wapakoneta lawyer, questioned the practicality of unanimity because not all justices could participate in every case. The illness or recusal of one member would, under Peck's proposal, preclude the court from invalidating a law on constitutional grounds, at least when the court of appeals had upheld the measure. Hoskins therefore proposed to require that "all but one" justice go along with a finding of unconstitutionality. He explained: "Some one man on the court may have an accident. He may be run over, or he may be sick and disabled. . . . If we can not trust five of our supreme judges to pronounce a decision on any proposition we are entertaining a very small opinion of them."⁴⁹

After some additional questions, John D. Fackler of East Cleveland offered a reworted supermajority clause:

No law shall be held unconstitutional and void by the supreme court without the concurrence of all but one of the judges sitting in the case, except in affirming a judgment of the court of appeals declaring a law unconstitutional and void.⁵⁰

⁴⁴ See *id.* at 1130.

⁴⁵ *Id.* at 1141.

⁴⁶ *Id.* at 1140.

⁴⁷ See *id.*

⁴⁸ See *id.* at 1142. At this point D.F. Anderson, perhaps the strongest proponent of unanimity, lamented the limited scope of the requirement: it would apply only when the supreme court reversed a court of appeals judgment upholding a law's constitutionality, not when the lower court had found a law unconstitutional or when cases began in the supreme court. "That is not much of a reform," he remarked. Peck replied: "That is all we can get." *Id.*

⁴⁹ *Id.* at 1143.

⁵⁰ *Id.* at 1145.

This language embodied King's concern about giving one justice an effective veto over affirming a court of appeals judgment of invalidity, which Peck had already accepted. Fackler's amendment actually went beyond Hoskins' concern about a single justice's absence effectively preventing the high court from reversing the court of appeals and striking down a law. The "all but one" provision sufficed to address that problem; limiting the focus to the justices "sitting in the case" effectively lowered the supermajority requirement, implying that the votes of all but two members could hold a law unconstitutional if one justice dissented and another did not participate. Nevertheless, Peck accepted Fackler's wording as a friendly amendment.⁵¹ Perhaps more surprising, Anderson, the most vocal proponent of unanimity when the debate began, also supported Fackler's language.⁵² Fackler apparently realized the problem with his amendment, because a little later he offered a revised version that deleted the "sitting in the case" phrase. As revised, his amendment now provided:

No law shall be held unconstitutional and void by the supreme court without the concurrence of all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void.⁵³

The delegates approved this version by a vote of 94-5.⁵⁴ That afternoon the question of the size of the supreme court arose once more. George W. Knight, a law professor at Ohio State University, proposed increasing the court to seven members. This would, he explained, prevent the confusion that might arise if two courts of appeals disagreed on a law's constitutionality and the supreme court divided three-to-three, which according to another provision of the proposal meant that both judgments would be affirmed.⁵⁵ Peck responded that this situation was extremely unlikely to arise and repeated his earlier wish to avoid giving comfort to critics who might object to the creation of new judgeships.⁵⁶ After some further desultory discussion,

⁵¹ See *id.*

⁵² See *id.*

⁵³ *Id.* at 1147.

⁵⁴ *Id.*

⁵⁵ See *id.* at 1158; *supra* text accompanying note 32.

⁵⁶ See PROCEEDINGS, *supra* note 22, at 1159; *supra* note 32. Peck added that he opposed reducing the court to five members because that would force the ouster of a sitting judge, which might also engender voter opposition. See PROCEEDINGS, *supra* note 22, at 1159.

Knight's amendment and several others were tabled and Proposal No. 184 was approved on second reading, 78-28.⁵⁷

Seven weeks later, on May 27, the proposal returned to the floor for third reading. Delegate Taggart, who had opposed the measure on second reading, renewed his suggestion for a seven-member court consisting of a chief justice and six others.⁵⁸ Unlike Professor Knight, who had favored seven justices to minimize the likelihood of tie votes, Taggart explained that the court needed a chief justice. The 1851 constitution made no separate provision for such a position.⁵⁹ Taggart argued that the chief justice would have important supervisory and administrative responsibilities over the entire judicial branch. Establishing the position of chief justice as a constitutional office would help the supreme court and improve the efficiency of the judiciary throughout the state.⁶⁰ This time Peck agreed, noting that he regarded a chief justice as "very desirable."⁶¹

Meanwhile, the supermajority requirement for declaring laws unconstitutional was changed stylistically by the addition of the words "at least" before "all but one." The final version read as follows:

No law shall be held unconstitutional and void by the supreme court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void.⁶²

This version was supported on third reading by a vote of 97-5.⁶³ Four days later, on May 31, it returned to the floor unchanged from the Committee on Arrangements and Phraseology and was formally endorsed by a tally of 93-6.⁶⁴ On September 3, the voters narrowly approved the entire package of changes in the judicial system, including the supermajority requirement, by a 52-48 percent margin.⁶⁵ That

⁵⁷ PROCEEDINGS, *supra* note 22, at 1163.

⁵⁸ *See id.* at 1832; *supra* text accompanying note 42.

⁵⁹ *See* 1 MARSHALL, *supra* note 27, at 222-23. Implementing the 1883 constitutional amendment, the legislature had defined the position of chief justice in terms of seniority: the six-member tribunal was divided into two panels of three, with the senior member of each panel presiding and the more senior of those designated as chief justice of the entire court when it sat *en banc*. *See* Amer, *supra* note 31, at 206.

⁶⁰ *See* PROCEEDINGS, *supra* note 22, at 1832.

⁶¹ *Id.*

⁶² *Id.* at 1833.

⁶³ *Id.*

⁶⁴ *Id.* at 1957.

⁶⁵ The popular vote was 264,922 in favor and 244,375 against. *Id.* at 2112. This proposal would have lost without strong support in urban counties in Northeast Ohio. *See* Sponholtz, *supra* note 11, at 244-45.

provision would remain on the books for more than half a century before its many problems led to its repeal.

II. THE SUPERMAJORITY RULE IN ACTION

As approved by the voters, the supermajority requirement applied to all cases within the Ohio Supreme Court's original jurisdiction and to those cases within its appellate jurisdiction in which the court of appeals had upheld the constitutionality of the law at issue. The requirement did not apply, however, when the supreme court was reviewing a court of appeals decision holding a law unconstitutional. The requirement's terms left open several important questions: What was a "law"? What did it mean to say that the supreme court "held" a law "unconstitutional and void"? What were lower courts to do when a majority, but less than the requisite supermajority, concluded that a law was unconstitutional? All of these questions would arise in due course. In the end, although the supermajority requirement generated principled opposition,⁶⁶ it was ultimately done in as much by some entirely foreseeable practical difficulties as by renewed appreciation of the value of judicial review. Perhaps the most troublesome problem related to the exception for laws that had been found unconstitutional by the court of appeals, which held out the prospect that the validity of a statute would turn on what a lower court had decided.

To the extent that the supermajority requirement was intended to remind the supreme court that the people wanted the judiciary to show greater deference to the legislature, the message came through loud and clear. In one of the first post-1912 cases challenging the constitutionality of a statute, Chief Justice Hugh Nichols observed that the new requirement "reminded [us] that [the power of judicial review] should be exercised with the greatest possible care and reserve."⁶⁷ It is difficult to assess the extent to which the provision ac-

⁶⁶ Delegate David J. Nye, an Elyria lawyer, told the convention that a simple majority vote should suffice for the supreme court to find a law unconstitutional and warned that the supermajority requirement was "wrong in principle and wrong in practice." PROCEEDINGS, *supra* note 22, at 1145. Outside Ohio, one commentator denounced the requirement only a few weeks after the voters approved it, expressing the hope that "no other state will follow the example of Ohio by limiting the scope of judicial power" and that the Buckeye State would soon rethink this foolish experiment in legislative omnipotence. Everett P. Wheeler, *The New Constitution of Ohio—Power of Courts to Review Acts of the Legislatures*, 75 CENT. L.J. 437, 442 (1912). Wheeler accompanied his denunciation of the new provision with a blast at "ambulance chasers" who were cluttering up the judicial system with tort cases they handled on a contingency basis. *See id.* at 441-42. As evidence of the need for judicial control of legislatures, he cited the Reconstruction Era and noted approvingly that the withdrawal of federal troops from the former Confederacy allowed "the white people of those states . . . to manage their affairs in their own way." *Id.* at 440.

⁶⁷ State *ex rel.* Turner v. United States Fid. & Guar. Co., 117 N.E. 232, 234 (Ohio 1917).

tually affected decisions, however, because the Ohio Supreme Court rarely invoked the supermajority provision as a basis for deferring to the legislature.⁶⁸

The first case in which the supermajority provision clearly affected the outcome was *Barker v. City of Akron*.⁶⁹ In this 1918 decision, four justices believed that a state law requiring counties to pay the cost of municipal special elections was unconstitutional.⁷⁰ Because the court of appeals had upheld the law's validity, it took six justices to overturn the measure. Accordingly, the minority of three justices effectively prevailed, and the court was obliged to affirm the lower court's judgment.⁷¹

It took another four years for the Ohio Supreme Court to muster a six-justice majority to invalidate a law that the court of appeals had upheld, but even that case revealed some unanticipated complexities. The 1922 ruling in *Morton v. State*⁷² struck down a law that prohibited a criminal defendant who was in custody from deposing out-of-state material witnesses who would not be available to testify at trial. The statute permitted defendants who were not in custody to conduct such out-of-state depositions. Four justices subscribed to an opinion holding the statute unconstitutional and requiring that the defendant be permitted to conduct his out-of-state depositions.⁷³ Two other justices noted their agreement that the statute unconstitutionally denied equal protection to in-custody defendants but concluded that the defendant was not entitled to conduct his depositions.⁷⁴ On this basis, the majority opinion claimed that the requisite six justices "concurr[ed] in the [statute's] unconstitutionality,"⁷⁵ although another member characterized the situation as "a plain concession on the part

⁶⁸ Only a handful of cases in the first quarter-century after the supermajority requirement was adopted seem to have been affected by its provisions, but analysis of voting patterns cannot give a complete picture because the court might not explicitly acknowledge the requirement's impact in some cases. See Katherine B. Fite & Louis Baruch Rubinstein, *Curbing the Supreme Court—State Experiences and Federal Proposals*, 35 MICH. L. REV. 762, 774 (1937).

⁶⁹ 121 N.E. 646 (Ohio 1918) (per curiam).

⁷⁰ The law exempted counties from paying for municipal general elections. See W. Roland Maddox, *Minority Control of Court Decisions in Ohio*, 24 AM. POL. SCI. REV. 638, 639 (1930).

⁷¹ See *Barker*, 121 N.E. at 646.

⁷² 138 N.E. 45 (Ohio 1922).

⁷³ See *id.* at 47-48.

⁷⁴ One justice explained that the defendant had failed to show that his witnesses could not testify at trial. See *id.* at 49 (Wanamaker, J., dissenting). The other did not explain his reasoning. See *id.* at 48 (Johnson, J., concurring in the first proposition of the syllabus [finding the statute unconstitutional] but not in the judgment).

⁷⁵ *Id.* at 47.

of two of the judges" designed to get around the supermajority requirement.⁷⁶

At times the court tried to evade the supermajority requirement. For example, in *Patten v. Aluminum Castings Co.*,⁷⁷ a five-member majority voted to overturn a judgment for an employee who had been badly injured in a fall from a defective scaffold. At issue was a statute imposing liability on employers who provided defective scaffolding. If the statute were valid, its violation permitted the employee to recover in tort; if not, he could only obtain a smaller worker's compensation award. Three members of the court concluded that the scaffolding statute was not a "lawful requirement" within the meaning of the Worker's Compensation Clause of the Ohio Constitution because it was impermissibly vague.⁷⁸ Two other justices agreed that the employee could not recover in tort but emphasized that they were expressing no view on the statute's validity.⁷⁹ One of the concurring members, Chief Justice Carrington Marshall, warned that the lead opinion had effectively invalidated the scaffolding law without once using the word "unconstitutional" in a clear attempt to circumvent the supermajority requirement.⁸⁰

In a sense, *Patten* had a limited impact because its specific holding about the definition of a "lawful requirement" was overruled the following year.⁸¹ But Chief Justice Marshall's warning proved prophetic in another sense. He noted that the courts of appeals had reached conflicting conclusions about whether various statutes were lawful requirements for worker's compensation purposes. This held out the prospect that the number of votes required for the supreme court to overturn those statutes would depend on what each court of appeals had concluded. His prediction was soon vindicated in a series of worker's compensation cases, although not ones dealing with the meaning of lawful requirements. Meanwhile, the problem also arose in another area where it would take a decade to unsnarl.

⁷⁶ Bd. of Educ. v. City of Columbus, 160 N.E. 902, 904 (Ohio 1928). This opinion was written by Chief Justice Carrington Marshall, who had dissented in *Morton*. See *Morton*, 138 N.E. at 48 (Marshall, C.J., dissenting).

⁷⁷ 136 N.E. 426 (Ohio 1922).

⁷⁸ See *id.* at 428.

⁷⁹ See *id.* at 431 (Hough, J., concurring) ("I know of no reason by which the constitutionality of the act can be assailed."); *id.* at 432 (Marshall, C.J., dissenting) ("I concur in the judgment . . . solely upon the ground that there is no evidence shown by the record to support the verdict [against the employer].").

⁸⁰ *Id.* at 436 (Marshall, C.J., dissenting).

⁸¹ See *Ohio Automatic Sprinkler Co. v. Fender*, 141 N.E. 269, 277 (Ohio 1923).

The importance of the court of appeals first became painfully apparent in the field of worker's compensation, which was one of the main areas of contention leading to the adoption of the supermajority requirement. In the 1923 case of *DeWitt v. State ex rel. Crabbe*,⁸² two members of the court upheld a statute that imposed a fifty percent penalty against deadbeat employers. The statute gave employers the option of paying premiums to the state worker's compensation fund or promptly paying the full amount of any worker's compensation award to an injured employee; the fifty percent assessment applied if the employer chose neither option.⁸³ Five justices believed that the penalty provision violated state and federal guarantees of due process and equal protection,⁸⁴ but the supermajority requirement meant that the contrary views of the two minority members prevailed.⁸⁵ In a sense, this ruling vindicated the progressive reformers who believed that the supermajority requirement would make it more difficult for the supreme court to strike down worker-protection laws. But this victory proved to be short-lived. Other courts of appeals declined to follow the judgment in *DeWitt*, choosing instead to endorse the majority view. Five years later, in *State ex rel. Bredwell v. Hershner*,⁸⁶ a six-to-one majority held that the fifty percent penalty was in fact unconstitutional, thereby effectively overruling *DeWitt*.⁸⁷

These cases highlighted a major problem with the supermajority requirement. The exception allowing a simple majority of the supreme court to declare a law unconstitutional when the court of appeals had reached the same conclusion left open the prospect that the number of votes required for the supreme court to strike down a law would vary depending on what conclusion the lower court had reached. *DeWitt* demonstrated that this entirely foreseeable situation was more than hypothetical. *Hershner* resolved the problem with regard to the fifty percent penalty statute, but the underlying difficulty of varying majorities remained unabated.

The problem had arisen again even before *Hershner* was decided. This time it appeared in connection with a statute that required municipalities to provide free water service to public schools. In *City of*

⁸² 141 N.E. 551 (Ohio 1923).

⁸³ See *id.* at 554-55.

⁸⁴ See *id.* at 557.

⁸⁵ See *id.*

⁸⁶ 161 N.E. 334 (Ohio 1928).

⁸⁷ See *id.* at 335. The supreme court reversed the court of appeals on another issue, however. The lower court erroneously overturned the entire judgment rather than simply setting aside the fifty percent penalty, so the supreme court reinstated the award without the penalty. See *id.* at 335-36.

East Cleveland v. Board of Education,⁸⁸ five justices concluded that the free-water law was unconstitutional.⁸⁹ Because the court of appeals had upheld the statute, the supermajority requirement applied and required affirmance on a two-to-five vote. This situation was so disconcerting that Chief Justice Marshall began his dissenting opinion by paraphrasing the opening sentence of the Declaration of Independence to complain about the "separate though inferior station to which the amendment of 1912 has consigned" the majority.⁹⁰ Three years later, after a different court of appeals had invalidated the same statute despite the minority judgment in *City of East Cleveland*, the five-member majority this time prevailed: in *Board of Education v. City of Columbus*⁹¹ the free-water statute was struck down by a five-to-two vote. Chief Justice Marshall, writing again for the majority but this time in an opinion announcing the judgment, explained that the two cases were "in every essential detail identical" and that the court's personnel had not changed in the interim.⁹² Although the syllabus in the *Columbus* case purported to overrule *City of East Cleveland*,⁹³ the opinion more accurately described the real situation: the free-water law was unconstitutional in Columbus but constitutional in East Cleveland, an absurdity directly attributable to the supermajority requirement and its peculiar exception.⁹⁴ The immediate problem was

⁸⁸ 148 N.E. 350 (Ohio 1925).

⁸⁹ See *id.* at 350 ("[t]here being less [*sic*] than six judges" who regard the law as unconstitutional); *id.* at 354 (Marshall, C.J., joined by Matthias, Allen, Kinkade & Robinson, JJ., dissenting) ("In the opinion of the majority of this court, [the law] should be declared to be unconstitutional . . .").

⁹⁰ *Id.* at 352 (Marshall, C.J., dissenting). The full passage reads:

When in the course of human events it becomes necessary for the majority of the Supreme Court of Ohio to differ from the judgment pronounced by the minority, and to assume the separate though inferior station to which the amendment of 1912 has consigned them, a decent respect to the opinions of the bench and bar of the state requires that they should declare the causes which impel them to the separation.

Id. at 352-53.

⁹¹ 160 N.E. 902 (Ohio 1928).

⁹² *Id.* at 902.

⁹³ See *id.* (syllabus ¶ 1) ("That portion of [the law] which prohibits a city or village or waterworks department thereof from making a charge for supplying water for the use of the public school building or other public buildings . . . is unconstitutional and void.").

⁹⁴ See *id.* at 903 (describing the resulting state of affairs as a "deplorable situation"). In fact, the whole affair was even more bizarre than the text suggests. After losing its initial challenge to the free-water law, the City of East Cleveland contrived to bring a second challenge in a different court. Although its first suit went to the Ohio Court of Appeals for the Eighth District, which upheld the law, city authorities somehow managed to get the second case heard by the Ohio Court of Appeals for the Ninth District, which ordinarily lacked jurisdiction over cases arising in Cuyahoga County and which likewise upheld the law. See *id.* at 902-03. The City of Columbus, which was located in a different appellate district, filed its challenge in an admitted effort "to make effective the opinion of a majority of the Supreme Court" in the *East Cleveland*

resolved in 1935, ten years after *City of East Cleveland*, when six justices subscribed to a per curiam opinion invalidating the free-water law.⁹⁵

Two other problems with the supermajority requirement also emerged. One concerned its application to municipal ordinances. The court got hopelessly tangled up in this problem in two 1927 cases. In *Fullwood v. City of Canton*,⁹⁶ five justices thought that a particular ordinance was unconstitutional, and three justices believed that the supermajority requirement did not apply to local ordinances.⁹⁷ This meant that four members thought that a simple majority could invalidate the ordinance, but those four members split evenly over the validity of the particular ordinance. Because two of the four justices who believed that a simple majority was sufficient also believed that the particular ordinance was valid, they refused to subscribe to a ruling of invalidity.⁹⁸ Throwing up its collective hands in confusion, the supreme court simply affirmed the court of appeals judgment upholding the ordinance.⁹⁹ A similarly puzzling division occurred later that same year in *Meyers v. Copelan*,¹⁰⁰ resulting in a judgment upholding the validity of a Cincinnati ordinance that forbade jewelry auctions. This time four justices thought the ordinance unconstitutional, but three of those four also believed that the supermajority requirement applied to local ordinances.¹⁰¹ Because the court of appeals had upheld the ordinance,¹⁰² there were not enough votes to strike it down.¹⁰³ Seven years later, on rehearing in *Village of Brewster v. Hill*,¹⁰⁴ the court unanimously held that the supermajority requirement did not apply to municipal ordinances.¹⁰⁵

case. *Id.* at 903.

⁹⁵ See *Bd. of Educ. v. Village of Willard*, 199 N.E. 74 (Ohio 1935) (per curiam). In this case the court of appeals had followed the *Columbus* decision, which meant that the supreme court in affirming needed only four votes. The unanimous ruling by the six participating justices was not technically necessary but sufficed once and for all to inter the free-water statute.

⁹⁶ 158 N.E. 171 (Ohio) (per curiam), *error dismissed*, 275 U.S. 484 (1927). Although the opinion is silent on the matter, the ordinance reportedly dealt with the licensing of electricians. See Robert L. Hausser, *Limiting the Voting Power of the Supreme Court: Procedure in the States*, 5 OHIO ST. L.J. 54, 77 (1938).

⁹⁷ See *Fullwood*, 158 N.E. at 172.

⁹⁸ See *id.*

⁹⁹ See *id.* at 171-72.

¹⁰⁰ 160 N.E. 855 (Ohio 1927) (per curiam).

¹⁰¹ See *id.* at 855-56.

¹⁰² See *id.* at 855.

¹⁰³ See *id.* at 856.

¹⁰⁴ 191 N.E. 366 (Ohio 1934).

¹⁰⁵ The court based its conclusion on the 1912 convention's repeated use of the word "law"

The other problem with the supermajority requirement concerned nonparticipating judges, an issue that had generated discussion at the 1912 convention.¹⁰⁶ It quickly became apparent that it would be nearly impossible to invalidate a law with less than a full bench. The absence of three members in the 1922 case of *McBride v. White Motor Co.*¹⁰⁷ immediately doomed a challenge to the constitutionality of a state law that prohibited Ohio taxpayers from deducting federal tax payments on their state tax returns.¹⁰⁸ Similarly, in *Royal Green Coach Co. v. Public Utilities Commission*,¹⁰⁹ an original action seeking judicial review of an agency decision refusing to authorize new bus service between the cities of Dayton and Hamilton, one justice did not sit.¹¹⁰ This meant that the remaining six justices would have to agree that the regulatory statute at issue was unconstitutional in order for the challenge to succeed. In fact, only one justice sympathized with the constitutional argument, but he conceded that none of his colleagues agreed with him.¹¹¹

Meanwhile, the court continued occasionally to invoke the supermajority requirement to uphold the constitutionality of laws that most justices regarded as invalid. For example, in *State ex rel. Jones v. Zangerle*,¹¹² a three-to-four vote upheld a statute that increased the per diem payment to judges sitting by assignment outside their home jurisdiction. The Cuyahoga County auditor refused to pay the higher amount to a visiting judge because of a constitutional prohibition against increasing judicial salaries during their term of office. The visiting judge had been elected before the higher per diem was enacted.¹¹³ Three justices believed that the law increasing per diem

to refer to measures enacted by the legislature and by its use of the word "statute" in explanation of the supermajority requirement provided to voters, but the opinion did not refer to the actual convention debates. See *id.* at 367. The entire problem might have been avoided had anyone examined the debates, which demonstrated that the word "law" was substituted for "statute adopted by the general assembly" out of concern that a simple majority could invalidate a measure adopted by initiative. See *supra* note 41 and accompanying text.

¹⁰⁶ See *supra* notes 49-54 and accompanying text.

¹⁰⁷ 140 N.E. 942 (Ohio 1922) (per curiam).

¹⁰⁸ The four participating justices split two-to-two on the question, although only one of those who regarded the provision as unconstitutional noted a formal dissenting vote. See *id.* at 942.

¹⁰⁹ 143 N.E. 547 (Ohio 1924).

¹¹⁰ See *id.* at 549.

¹¹¹ See *id.* at 547-48. The court went on to hold unanimously that the record contained no evidence that the agency had abused its discretion in deciding not to grant the challenger a certificate to operate bus service between the two cities. See *id.* at 548-49.

¹¹² 159 N.E. 564 (Ohio 1927).

¹¹³ See *id.* at 564.

payments to visiting judges was valid because the state's Emoluments Clause applied to regular salaries but not to payments for special assignments.¹¹⁴ This minority vote was enough to sustain the increased per diem, because the case arose as an original action so that the supermajority requirement applied if the measure were to be struck down.¹¹⁵ A similar three-to-four vote in another original action, *State ex rel. Williams v. Industrial Commission of Ohio*,¹¹⁶ upheld a law authorizing payments to injured employees of insolvent employers who were unable to pay worker's compensation premiums to the state. Four justices thought this scheme was unconstitutional, but once more the supermajority requirement allowed the minority who saw the measure as permissible to prevail.¹¹⁷

The supermajority controversy persisted through the 1920s, with matters coming to a head in Chief Justice Marshall's majority opinion in the *Columbus* case. He denounced the provision as "destroy[ing]" what he called "the most important function of courts of last resort": to reconcile conflicting rulings by lower courts.¹¹⁸ Marshall devoted several more pages to denouncing the 1912 measure,¹¹⁹ but much of the steam went out of the debate in 1930 after the U.S. Supreme Court rejected a federal constitutional challenge to the supermajority requirement. In *Ohio ex rel. Bryant v. Akron Metropolitan Park District*,¹²⁰ Chief Justice Hughes wrote for a unanimous Court in turning aside taxpayer objections to the state's procedures for creating and maintaining public parks. The Ohio Supreme Court, by a two-to-five

¹¹⁴ See *id.* at 565.

¹¹⁵ See *id.*

¹¹⁶ 156 N.E. 101 (Ohio 1927).

¹¹⁷ See *id.* at 102, 104. Sometimes a minority invoked the supermajority requirement in cases where it did not seem to apply. For example, two justices concluded that it would be unconstitutional to permit a referendum on an administrative reorganization act that had been passed as an emergency measure because the 1912 amendments exempted emergency measures from referendum procedures. See *State ex rel. Durbin v. Smith*, 133 N.E. 457, 460 (Ohio 1921) (per curiam). A taxpayer sought a referendum because he regarded the emergency justifications as spurious. See *id.* at 457. The fundamental issue was the extent to which courts must accept a legislative emergency declaration at face value. See *id.* at 461; *id.* at 462 (Marshall, C.J., dissenting). Although this issue might have been couched in constitutional terms, see *id.* at 469 (Johnson, J., dissenting); *id.* at 474 (Wanamaker, J., dissenting), it need not have been, see *id.* at 463 (Marshall, J., dissenting) ("The constitutionality of the [statute] is not an issue in this controversy."). The same result occurred in a companion case. See *State ex rel. Burke v. Smith*, 133 N.E. 480 (Ohio 1921) (per curiam) (denying relief for the reasons set forth in *Durbin*).

¹¹⁸ Bd. of Educ. v. City of Columbus, 160 N.E. 902, 903 (Ohio 1928).

¹¹⁹ See *id.* at 903-05 ("This amendment to the Ohio Constitution is without a parallel in any state in the Union.").

¹²⁰ 281 U.S. 74 (1930), *aff'g* *State ex rel. Bryant v. Akron Metro. Park Dist.*, 166 N.E. 407 (Ohio 1929).

vote, upheld the constitutionality of the statutes at issue.¹²¹ Hughes first rebuffed a due process challenge to the supermajority requirement on the theory that the Fourteenth Amendment does not ordinarily mandate any right to appeal from a fundamentally fair lower court proceeding.¹²² He also dismissed an equal protection argument by noting that the challengers had failed to show that similarly situated Ohioans had been treated differently: although the East Cleveland and Columbus cases demonstrated the possibility of conflicting rulings about the same statute, there had been no such conflict in connection with the park-district law, so it was premature to address an issue that might not ultimately entail a federal constitutional violation.¹²³

The U.S. Supreme Court never again addressed the validity of Ohio's supermajority requirement.¹²⁴ The legal controversy abated to some extent for a time, although debate continued in academic journals in the wake of *Bryant*.¹²⁵ The requirement also attracted attention during the New Deal disputes that culminated in President Franklin D. Roosevelt's abortive Court-packing scheme.¹²⁶

But the supermajority requirement did not go away. It remained on the books and sporadically affected the outcome of cases. After a hiatus of more than a dozen years, the Ohio Supreme Court struck down a sloppily drafted liquor-control measure in *State v. Chester*.¹²⁷ At issue was a provision prohibiting public possession of "an opened bottle, flask or container."¹²⁸ An earlier phrase in the same provision forbade possession of "an opened bottle, flask or container, contain-

¹²¹ See *Ohio ex rel. Bryant*, 281 U.S. at 77; *State ex rel. Bryant*, 166 N.E. at 415.

¹²² See *Ohio ex rel. Bryant*, 281 U.S. at 80.

¹²³ See *id.* at 80-81.

¹²⁴ See *Gottlieb v. Mahoning Valley Sanitary Dist.*, 281 U.S. 770 (1930), *dismissing appeal from Shook v. Mahoning Valley Sanitary Dist.*, 166 N.E. 415 (Ohio 1929) (rejecting constitutional challenges to a statutory scheme analogous to the park-district law based on many of the same arguments that were presented in the park cases).

¹²⁵ See, e.g., Carl L. Meier, *Power of the Ohio Supreme Court to Declare Laws Unconstitutional*, 5 U. CIN. L. REV. 293 (1931) (criticizing the requirement); Edwin O. Stene, *Is There Minority Control of Court Decisions in Ohio?*, 9 U. CIN. L. REV. 23 (1935) (offering qualified support for the requirement); Harvey Walker, *Need for Constitutional Revision in Ohio*, 4 U. CIN. L. REV. 339, 348 (1930) (urging repeal of the requirement). Scholarly criticism continued in later years. See, e.g., Warren Cunningham, *The Judiciary in Ohio*, 20 U. CIN. L. REV. 239, 260 (1951).

¹²⁶ See, e.g., Fite & Rubinstein, *supra* note 68, at 773-79; Osmond K. Fraenkel, *What Can Be Done About the Constitution and the Supreme Court?*, 37 COLUM. L. REV. 212, 222-23 (1937); Hausser, *supra* note 96, at 56-84. The Ohio rule also figured in the debate over Senator William E. Borah's unsuccessful 1923 proposal to require a seven-justice majority for the U.S. Supreme Court to hold an act of Congress unconstitutional. See ROSS, *supra* note 21, at 225-26; see generally *id.* at 218-32.

¹²⁷ 42 N.E.2d 993 (Ohio 1942).

¹²⁸ *Id.* at 994-95.

ing intoxicating liquor, in a state liquor store.”¹²⁹ Four of the six participating justices concluded that the omission of the qualifying phrase “containing intoxicating liquor” from the public-possession clause rendered that clause unconstitutional.¹³⁰ The other two justices treated the omission as a slip of the legislative pen and, like the court of appeals, construed the public-possession provision narrowly to cover only intoxicants. That was enough for the minority to prevail, so the public-possession law was upheld on a two-to-four vote.¹³¹

The absence of one justice in *Chester* meant that the six participating justices would have had to agree unanimously that the statute was unconstitutional. As *McBride* showed two decades earlier,¹³² the lack of a full bench could prevent the supreme court from invalidating an unconstitutional law. This situation finally received serious attention soon after *Chester* was decided, although it is not clear that this case was the impetus for change. In 1943, the Judicial Council of Ohio recommended that Article IV, Section 2 of the Ohio Constitution be amended to allow a court of appeals judge to sit by designation whenever a member of the Ohio Supreme Court was “unable, by reason of illness, disability, disqualification, or other cause,” to participate in a case.¹³³ The principal rationale for this recommendation was the need to provide litigants with a full bench to avoid the prospect of three-to-three deadlocks, a phenomenon that had occurred thirteen times between 1932 and 1942.¹³⁴ The recommendation went on to note that failing to replace justices who could not hear a case placed an “unfair burden” on appellants challenging the validity of statutes, particularly when more than one justice did not participate.¹³⁵ The voters approved this change in 1944, but it did not address the critics’ other concerns nor did it end the phenomenon of minority decisions upholding the constitutionality of challenged laws.

The early 1950s produced a spate of new decisions under the supermajority provision. In *University of Cincinnati v. Board of Tax Appeals*,¹³⁶ five justices concluded that two statutes exempting real estate owned by educational institutions from property taxes were invalid because they conferred a broader exemption than was consti-

¹²⁹ *Id.* at 994 (emphasis added).

¹³⁰ *See id.* at 999 (Hart, J., joined by Turner, Matthias & Zimmerman, JJ., dissenting).

¹³¹ *See id.* at 995.

¹³² *See supra* notes 107-08 and accompanying text.

¹³³ SIXTH REPORT OF THE JUDICIAL COUNCIL OF OHIO TO THE GENERAL ASSEMBLY OF OHIO 16 (1943).

¹³⁴ *See id.* at 16-17.

¹³⁵ *Id.* at 17.

¹³⁶ 91 N.E.2d 502 (Ohio 1950).

tutionally permissible.¹³⁷ The constitutional provision dealt with "public school houses," whereas the statutes exempted income received by educational institutions and public school districts. Two justices questioned the wisdom of the statutes but found no constitutional infirmity.¹³⁸ Accordingly, the supermajority requirement meant that the laws were upheld by a two-to-five vote.¹³⁹

Another minority vote upheld a statute exempting certain municipal police and fire personnel from worker's compensation coverage in *State ex rel. English v. Industrial Commission*.¹⁴⁰ The statute denied worker's compensation to police officers and firefighters who were eligible for pensions;¹⁴¹ the injured firefighter was receiving more from his pension than he would have gotten from worker's compensation.¹⁴² Although the precise vote was not indicated, the court in its initial ruling and again on rehearing said that a majority, but fewer than six justices, believed the law was unconstitutional and that this was insufficient to overturn the law.¹⁴³

Similarly, in *State ex rel. Steer v. Baber*,¹⁴⁴ the court invoked the supermajority rule to uphold a provision that required an administrator's consent before a person at least seventy years old could be committed to a state mental health institution.¹⁴⁵ It is not clear that the rule affected this decision, however, as only three justices agreed that the provision in question conferred unfettered discretion or arbitrary administrative authority.¹⁴⁶

Then in *Grandle v. Rhodes*,¹⁴⁷ the court first invoked and then avoided the supermajority requirement. At issue was an appropriation from the Highway Improvement Fund for preliminary studies on a project to build a parking garage beneath the state capitol.¹⁴⁸ When the case was first argued, the court viewed the controlling issue as being whether the appropriation for planning a parking garage was for constitutionally required highway purposes. Four justices concluded

¹³⁷ See *id.* at 503-04.

¹³⁸ See *id.* at 504 (opinion of Stewart & Taft, JJ.).

¹³⁹ See *id.*

¹⁴⁰ 115 N.E.2d 395 (Ohio 1953), *adhered to on reh'g*, 117 N.E.2d 22 (Ohio 1954).

¹⁴¹ See *id.* at 396 (opinion of Taft, J.).

¹⁴² See *id.* at 395.

¹⁴³ See *id.* at 396; *State ex rel. English*, 117 N.E.2d at 23.

¹⁴⁴ 118 N.E.2d 530 (Ohio 1954) (per curiam).

¹⁴⁵ See *id.* at 531.

¹⁴⁶ See *id.* (Stewart, J., joined by Weygandt, C.J., and Middleton, J., dissenting).

¹⁴⁷ 139 N.E.2d 328 (Ohio 1956) (per curiam), *rev'd per curiam on reh'g*, 140 N.E.2d 897 (Ohio 1957).

¹⁴⁸ See *Grandle*, 139 N.E.2d at 328.

that the appropriation was unconstitutional,¹⁴⁹ but three others disagreed. Because fewer than six justices thought there was a constitutional problem, the challenge to the appropriation failed.¹⁵⁰ On rehearing, the court determined that the supermajority requirement was never triggered because the appropriation was not for "statutory highway purposes" and hence did not authorize the expenditure of Highway Improvement Fund money for the project.¹⁵¹ Despite an apoplectic (and now solitary) dissent objecting to this feat of legerdemain in a case where the legal arguments at every stage had focused on the constitutional issue,¹⁵² a five-to-one vote upheld the challenge to the use of the highway fund but permitted the use of other revenue for the preliminary garage studies.¹⁵³

The final 1950s case presented one last problem with the supermajority requirement, that of determining when a law has been declared unconstitutional. In *R.K.O. Radio Pictures, Inc. v. Department of Education*,¹⁵⁴ the court divided five-to-two on this question. At issue was the Ohio Motion Picture Censorship Act, which required state approval before movies could be shown. The Ohio Supreme Court upheld this scheme in *Superior Films, Inc. v. Department of Education*,¹⁵⁵ which affirmed the censorship division's refusal to permit the showing of the film version of Richard Wright's *Native Son* and other movies. The U.S. Supreme Court summarily reversed that judgment in a one-sentence ruling that cited its 1952 decision invalidating a similar New York statute.¹⁵⁶ Other distributors quickly challenged the denial of permits to show their movies, arguing that the U.S. Supreme Court's summary reversal in *Superior Films* had invalidated Ohio's censorship law. A five-judge majority of the Ohio Supreme Court agreed with this claim but noted that the lack of a sixth vote prevented the state court from holding the law unconstitutional.¹⁵⁷ Two justices resisted the conclusion that *Superior Films* had nullified the statute, contending that the grounds for that summary disposition were ambiguous.¹⁵⁸ The majority opinion avoided the pos-

¹⁴⁹ See *id.* at 329-30 (Bell, J., joined by Hart, Zimmerman & Stewart, JJ., dissenting).

¹⁵⁰ See *id.* at 329.

¹⁵¹ See *Grandle*, 140 N.E.2d at 897-98.

¹⁵² See *id.* at 899-900 (Weygandt, C.J., dissenting).

¹⁵³ See *id.* at 898.

¹⁵⁴ 122 N.E.2d 769 (Ohio 1954).

¹⁵⁵ 112 N.E.2d 311 (Ohio 1953).

¹⁵⁶ *Superior Films, Inc. v. Dep't of Educ.*, 346 U.S. 587 (1954) (per curiam) (citing *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952)).

¹⁵⁷ See *R.K.O. Radio Pictures, Inc.*, 122 N.E.2d at 771.

¹⁵⁸ See *id.* at 772 (Weygandt, C.J., dissenting); *id.* at 775 (Hart, J., dissenting).

sibility of a minority veto by determining that, because the U.S. Supreme Court's ruling was binding, a censorship order that was based on the controversial statute could not have been proper.¹⁵⁹

III. THE DEMISE OF THE SUPERMAJORITY RULE

In short, by the time *Mapp* reached the Ohio Supreme Court, many problems with the supermajority requirement had become clear. The court had struggled to define what "laws" were covered by the requirement, faced the difficulty of deciding constitutional challenges with less than a full bench, divided over what it meant to say that a law had been "held" unconstitutional, tried to avoid the requirement when possible, and faced the disconcerting possibility that laws would be valid in some places but void in others due to the differing attitudes of the courts of appeals. Some of these problems had been resolved. The court got out of its self-imposed predicament about municipal ordinances, and the 1944 amendment provided for a full bench when disability or recusal forced one or more justices not to sit in particular cases. But nothing had been done to address the prospect of inconsistent rulings, a prospect that should have been obvious to Peck and the other 1912 convention delegates when they added the exception to the supermajority requirement for cases in which the court of appeals had also found a law unconstitutional. Finally, the prospects for invalidating the requirement were bleak. The U.S. Supreme Court had turned aside a federal constitutional challenge thirty years earlier in *Bryant*, and no case had arisen to test the possibility left open in that case that inconsistent rulings in different appellate districts might violate the Equal Protection Clause.

For all the controversy *Mapp* generated, that decision did not undermine the supermajority rule. Shortly after the Ohio Supreme Court failed to invalidate the obscenity statute, another criminal defendant sought to enjoin enforcement of the statute. In *Toth v. Gilbert*,¹⁶⁰ a three-judge federal district court denied the injunction. The court refused to intervene in a pending state prosecution, explaining that there were no grounds to assume the state courts' inadequacy in addressing First Amendment issues¹⁶¹ and noting the possibility of review by the U.S. Supreme Court if necessary.¹⁶²

¹⁵⁹ See *id.* at 771.

¹⁶⁰ 184 F. Supp. 163 (N.D. Ohio 1960) (3-judge court).

¹⁶¹ See *id.* at 168.

¹⁶² See *id.* at 170.

There were two last episodes in the supermajority saga before the requirement was laid to rest. One dealt with highway funding. In *State ex rel. Lynch v. Rhodes*,¹⁶³ a four-member majority concluded that the sale of certificates of obligation to finance highway projects were state debts that violated constitutional provisions regulating the incurrence of debts.¹⁶⁴ Because three other justices disagreed, the constitutional challenge failed on a three-to-four vote.¹⁶⁵

The last episode involved Ohio's fair-trade laws, which allowed manufacturers to require their products to be sold at minimum prices despite the desire of some retailers to offer discounts. After the state supreme court invalidated one fair-trade statute in 1958,¹⁶⁶ the legislature enacted a new statute that sought to address the defects of the original. In *Hudson Distributors, Inc. v. Upjohn Co.*,¹⁶⁷ a four-member majority of the supreme court concluded that the new law contained the same constitutional defects as did the old.¹⁶⁸ Three of their colleagues disagreed, resulting in another three-to-four ruling upholding the validity of a statute.¹⁶⁹ The U.S. Supreme Court affirmed on the basis of a federal statute authorizing state fair-trade laws.¹⁷⁰ Justice Goldberg's opinion in an eight-to-one decision alluded to Ohio's supermajority requirement but attached no special significance to it.¹⁷¹ But this did not end the fair-trade story. As with the free-water law three decades earlier,¹⁷² some lower courts held the new fair-trade law invalid under the Ohio Constitution.¹⁷³ Accordingly, the law was valid in some parts of the state but not in others. The supreme court finally resolved the matter in a four-to-three decision upholding the statute in *Olin Mathieson Chemical Corp. v. Ontario Store of Price Hill, Inc.*¹⁷⁴

The supermajority requirement was repealed on May 7, 1968, when the voters approved the Modern Courts Amendment to the Ohio Constitution. This proposal substantially revised Article IV, the judiciary chapter, to reorganize the court system and rationalize the be-

¹⁶³ 208 N.E.2d 906 (Ohio 1965) (per curiam).

¹⁶⁴ See *id.* at 911 (Taft, C.J., joined by Zimmerman, Matthias & O'Neill, JJ.).

¹⁶⁵ See *id.* at 906.

¹⁶⁶ See *Union Carbide & Carbon Corp. v. Bargain Fair, Inc.*, 147 N.E.2d 481 (Ohio 1958).

¹⁶⁷ 190 N.E.2d 460 (Ohio 1963).

¹⁶⁸ See *id.* at 466 (Zimmerman, J., joined by Matthias, O'Neill & Gibson, JJ., dissenting).

¹⁶⁹ See *id.* at 465-66 (Griffith, J., joined by Taft, C.J., and Herbert, J.).

¹⁷⁰ See *Hudson Distribs., Inc. v. Eli Lilly & Co.*, 377 U.S. 386 (1964).

¹⁷¹ See *id.* at 388 & n.3.

¹⁷² See *supra* notes 88-95 and accompanying text.

¹⁷³ See, e.g., *Bulova Watch Co. v. Ontario Store*, 176 N.E.2d 527 (Ohio C.P. 1961).

¹⁷⁴ 223 N.E.2d 592 (Ohio 1967).

wildering set of tribunals below the courts of appeals.¹⁷⁵ Eliminating the supermajority requirement was little more than a footnote to the larger project, and the repeal provoked almost no debate.¹⁷⁶ Just over a month after the vote, the supreme court in *City of Euclid v. Heaton*¹⁷⁷ held that the repeal had taken effect immediately.¹⁷⁸

CONCLUSION

The demise of Ohio's supermajority requirement suggests that this well-intentioned experiment was at best a noble failure, at worst a disaster that endured far too long. Proponents viewed the requirement as a way to protect progressive reforms against a hostile judiciary. To a degree—but only to a degree—the proponents were correct. Some worker's compensation laws survived because the court lacked the necessary six votes to overturn them. A good example is *Williams*, in which a three-member minority was able to uphold a law providing compensation to employees of insolvent companies.¹⁷⁹ Other worker victories were more ambiguous, though. The fifty percent penalty provision that was upheld in *DeWitt* survived only because two justices voted to sustain it against five who regarded it as unconstitutional.¹⁸⁰ Only five years later, one of the two justices in the minority was replaced by a new judge who sided with the majority, providing the crucial sixth vote to invalidate the fifty percent penalty provision in *Hershner*.¹⁸¹ And even when there were at least two justices sympathetic to worker interests, a creative majority could evade the six-vote requirement by statutory construction, as *Patten* shows.¹⁸²

These cases suggest that the supermajority requirement made it more difficult for the Ohio Supreme Court to invalidate legislation. There might also have been cases in which the court, without explicitly addressing the requirement, interpreted statutes narrowly to avoid a potential constitutional issue. No evidence supporting this hypothesis has come to light, however.

In any event, judicial deference to the legislature is not always desirable. Later rulings like *R.K.O.* and *Mapp* suggest that the super-

¹⁷⁵ See generally William W. Milligan & James E. Pohlman, *The 1968 Modern Courts Amendment to the Ohio Constitution*, 29 OHIO ST. L.J. 811 (1968).

¹⁷⁶ See *id.* at 845-46.

¹⁷⁷ 238 N.E.2d 790 (Ohio 1968).

¹⁷⁸ *Id.* at 796.

¹⁷⁹ See *supra* notes 116-17 and accompanying text.

¹⁸⁰ See *supra* notes 82-85 and accompanying text.

¹⁸¹ See *supra* notes 86-87 and accompanying text.

¹⁸² See *supra* notes 77-80 and accompanying text.

majority requirement made it more difficult to sustain civil liberties claims, particularly those involving the First Amendment. The Ohio Supreme Court's *Mapp* ruling, in which only four justices regarded the obscenity law as unconstitutional, graphically illustrates the point. Only because of the supermajority requirement did *Dollree Mapp* lose in the state courts.¹⁸³ But *R.K.O.* also suggests the fragility of First Amendment claims under a system that was promoted by an earlier group of progressives. Had it not been for the U.S. Supreme Court, the Ohio movie censorship law would have remained on the books even longer than it did because only five Ohio justices saw the scheme as constitutionally troublesome.¹⁸⁴

The worker's compensation cases suggest that the real problem was never the number of votes required to declare a law unconstitutional but rather the composition of the judiciary. If the members of the supreme court were chosen by a process that favored employer interests, a supermajority requirement could have only limited value. Yet the system of electing judges has become firmly entrenched despite persistent criticism that some form of merit selection would produce a better and more enlightened judiciary.¹⁸⁵

Meanwhile, the difficulty in deciding whether municipal ordinances were subject to the supermajority requirement and the complications arising from the absence of a full bench might be taken as evidence of deeper problems with the requirement.¹⁸⁶ Both of those situations were addressed after some delay, the former by the supreme court and the latter through a constitutional amendment.¹⁸⁷

Perhaps the most disturbing problem was the exception for cases in which the supreme court affirmed a court of appeals judgment of unconstitutionality, because this provision held out the real possibility of inconsistent decisions in different appellate districts.¹⁸⁸ As previously remarked, the difficulties posed by the exception were entirely foreseeable when it was proposed at the 1912 constitutional conven-

¹⁸³ See *supra* notes 5-8 and accompanying text.

¹⁸⁴ See *supra* notes 157-59 and accompanying text.

¹⁸⁵ See, e.g., Francis R. Aumann, *The Selection, Tenure, Retirement and Compensation of Judges in Ohio*, 5 U. CIN. L. REV. 408 (1931); Fred J. Milligan, *The Proposed Changes in the Selection and Tenure of Judges in Ohio*, 4 OHIO ST. L.J. 157 (1938). Even the ugly 2000 supreme court election campaign has not shaken the faith of supporters of judicial elections, some of the most vociferous of whom come from organized labor. See Julie Carr Smyth, *Legislators Uninterested in Appointed Judges: Chief Justice Seeking Allies to Push Idea*, CLEV. PLAIN DEALER, Jan. 18, 2001, at 2B. For further discussion of that campaign, see Jonathan L. Entin, *Judicial Selection and Political Culture*, CAP. U. L. REV. (forthcoming).

¹⁸⁶ See *supra* notes 96-111 and accompanying text.

¹⁸⁷ See *supra* notes 103-05 & 133-35 and accompanying text.

¹⁸⁸ See *supra* notes 86-95 & 173-74 and accompanying text.

tion.¹⁸⁹ This problem could easily have been remedied by a further amendment like the 1944 change authorizing the use of court of appeals judges sitting by designation to provide a full supreme court bench when necessary, but it never was. Instead, this relatively minor feature became a lightning rod for criticism of the whole supermajority idea.¹⁹⁰

Things need not have turned out that way. The Ohio experiment attracted attention around the country when it was adopted, as well as during the New Deal. Two other states adopted similar proposals within a few years of Ohio's action. North Dakota amended its constitution in 1918 to require the concurrence of four of the five justices for the state supreme court to invalidate a law.¹⁹¹ Two years later Nebraska adopted a five-vote requirement for its seven-member supreme court to declare a law unconstitutional.¹⁹² North Dakota's provision has generated almost no controversy. The supermajority provision has come into play in only half a dozen reported decisions, and supreme court justices have accepted the requirement without apparent complaint.¹⁹³ The Nebraska requirement did not affect a decision for nearly half a century after its adoption. The first case in which the requirement actually applied was decided in 1968.¹⁹⁴ Several more cases followed in short order.¹⁹⁵ Those rulings prompted criticism and

¹⁸⁹ See *supra* notes 45-46, 94 & 118 and accompanying text.

¹⁹⁰ See Fite & Rubinstein, *supra* note 68, at 776.

¹⁹¹ See N.D. CONST. art. IV, § 89 (repealed and reenacted as N.D. CONST. art. VI, § 4 (1976)). See generally Herbert L. Meschke & Ted Smith, *The North Dakota Supreme Court: A Century of Advances*, 76 N.D. L. REV. 217, 247-48 (2000).

¹⁹² See NEB. CONST. art. V, § 2.

¹⁹³ Judicial acquiescence was apparent in the very first case affected by the supermajority requirement. See *Daly v. Beery*, 178 N.W. 104, 111 (N.D. 1920) (Birdzell, J.) (noting the need to concur in the disposition due to the supermajority rule and stating that the court must "respect it as a part of the fundamental law"). For other cases in which the North Dakota Supreme Court has applied the supermajority rule without objection, see *Haney v. North Dakota Workers Comp. Bureau*, 518 N.W.2d 195 (N.D. 1994) (rejecting an equal protection challenge to the exclusion of farm laborers from worker's compensation); *Bismarck Pub. Sch. Dist. v. State*, 511 N.W.2d 247 (N.D. 1994) (rejecting a challenge to the state's system of financing public education); *State ex rel. Mason v. Baker*, 288 N.W. 202 (N.D. 1939) (rejecting a challenge to the creation of a commission to revise the state code); *State ex rel. Sathre v. Bd. of Univ. and Sch. Lands*, 262 N.W. 60 (N.D. 1935) (rejecting a challenge to a law authorizing discounting of interest due on loans made by the agency administering the state's school trust fund); *Wilson v. City of Fargo*, 186 N.W. 263 (N.D. 1921) (rejecting a challenge to a measure providing for popular vote to override tax limits).

¹⁹⁴ See *In re Cavitt*, 157 N.W.2d 171 (Neb. 1968) (rejecting a challenge to a compulsory sterilization statute for institutionalized mental patients), *appeal dismissed sub nom. Cavitt v. Nebraska*, 396 U.S. 996 (1970).

¹⁹⁵ See *DeBacker v. Brainard*, 161 N.W.2d 508 (Neb. 1968) (rejecting a constitutional challenge to juvenile court statute), *appeal dismissed*, 396 U.S. 28 (1969); *State ex rel. Belker v. Bd. of Educ. Lands and Funds*, 171 N.W.2d 156 (Neb. 1969) (rejecting a challenge to the validity of a statute authorizing the sale of land held in trust for public schools), *adhered to on reh'g*,

a proposal to repeal the supermajority requirement.¹⁹⁶ The proposal was not adopted, and the supermajority requirement remains on the books, where it has affected only one subsequent decision.¹⁹⁷

Only one other state considered a supermajority rule during the Progressive era; Minnesota decided against such a requirement in 1914.¹⁹⁸ It is difficult to know whether the unpopularity of this approach stems from Ohio's unfortunate experience or from a general appreciation for at least the principle of judicial review, if not the outcome of every case. It remains unclear whether such a requirement offends any federal constitutional provision. The only time since *Bryant* that the U.S. Supreme Court considered a supermajority rule came in the 1979 case of *Torres v. Puerto Rico*,¹⁹⁹ which avoided passing on the validity of a Puerto Rican constitutional provision requiring an absolute majority of the commonwealth's eight-member supreme court to invalidate a statute. The case arose from a warrantless arrest and search at the San Juan airport. By a four-to-three vote the Puerto Rico Supreme Court ruled that the search was improper, but five votes were required to overturn the local law under which the search had occurred, so the law remained valid.²⁰⁰ The U.S. Supreme Court reversed, concluding that, regardless of the validity of the supermajority requirement, the search made in pursuance of the statute indeed violated the Fourth Amendment.²⁰¹

This most recent development reminds us that supermajority requirements are more plausibly evaluated as a matter of wisdom or policy than as matters of federal constitutional command. The unpopularity of supermajority provisions is reflected in the complete absence of support for the idea not only at the state level but also at the federal level. This is particularly noteworthy during a period of narrow division on the U.S. Supreme Court on such contentious mat-

175 N.W.2d 63 (Neb.), *cert. denied sub nom. Belker v. Bd. of Educ. Lands and Funds*, 400 U.S. 806 (1970); *DeBacker v. Sigler*, 175 N.W.2d 912 (Neb. 1970) (rejecting a constitutional challenge to the state's system of classifying juvenile offenders), *appeal dismissed*, 401 U.S. 926 (1971).

¹⁹⁶ See Paul W. Madgett, Comment, *The "Five-Judge" Rule in Nebraska*, 2 CREIGHTON L. REV. 329 (1969); William Jay Riley, Comment, *To Require That a Majority of the Supreme Court Determine the Outcome of Any Case Before It*, 50 NEB. L. REV. 622 (1971).

¹⁹⁷ See *State ex rel. Spire v. Beermann*, 455 N.W.2d 749 (Neb. 1990) (upholding by a three-to-four vote a statute transferring a state college into the state university system).

¹⁹⁸ See Hausser, *supra* note 96, at 55 n.3.

¹⁹⁹ 442 U.S. 465 (1979).

²⁰⁰ See *id.* at 467-68.

²⁰¹ See *id.* at 468 n.2, 471. See also *id.* at 474 n.*, 475 (Brennan, J., joined by Stewart, Marshall & Blackmun, JJ., concurring in the judgment).

ters as abortion, affirmative action, and federalism. Ohio's experience suggests that the advantages of such an approach are marginal at best. Perhaps the requirement of more than a simple majority to invalidate a law promotes greater judicial deference to legislatures. At the same time, the Ohio approach demonstrates the serious problems that can arise from poorly considered provisions. As John Marshall reminded us, "it is a *constitution* we are expounding."²⁰² Perhaps we should hesitate to tinker with it too drastically.

Meanwhile, let us return to Dollree Mapp. We cannot say that her case contributed significantly to the demise of the supermajority requirement. Still, hers was one of the last cases in which the requirement played any role. It affected only when and on what theory she would be released. Without the requirement, the state supreme court surely would have invalidated the obscenity law that she was charged with violating. Instead, she had to await the U.S. Supreme Court's decision applying the Exclusionary Rule to the states and finding the search that led to her arrest to have been unlawful. Without the fruits of that search, the authorities had no basis to prosecute her.

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McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (first emphasis added).