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POST-AMENDMENT 80 JUDICIAL POLITICS IN ARKANSAS: HAVE THE CHANGES UNDERMINED THE ARGUMENT FOR SELECTION BY APPOINTMENT?

*Jay Barth**

I. INTRODUCTION

As one Arkansas Bar Association leader argued in promoting the successful campaign for Amendment 80, the amendment “kind of brings the courts into the 20th century.”¹ Ratified by the people in the final days of that century, the modernizing effects of Amendment 80 are seen most clearly in its significant overhaul to the structure of the state’s court system.² But the advocates of Amendment 80 reforms also argued that a shift away from partisan elections for almost all judges in the state would also modernize the courts by lessening the public perception that judgeships are overtly “political” offices. As we move towards the fourth election cycle for judges since the passage of Amendment 80, it is now time to begin to ask whether the alteration in the selection process for judges has created real reform that undermines the argument for judicial selection by appointment, or if the alteration has only marginally altered the rules of the same electoral game.

II. THE ELECTIVE SYSTEM FOR ARKANSAS JUDGES

A. Origin of Arkansas’s Elective System

Although Arkansas judges were originally appointed—first by the legislature, later by the governor—by 1864 Arkansas had opted for popular election, a method modified during Reconstruction years but resoundingly reconfirmed in the 1874 constitution and sustained since. In a slight tempering of the Jacksonian spirit, elective terms for some judges are lengthier than

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1. Mark Waller, *Combine Courts, Jurists Propose*, *ARK. DEMOCRAT-GAZETTE*, March 15, 1990, at B1 (quoting Sidney McCollum, co-chair of the Arkansas Bar Association’s committee on the amendment).

2. For an overview of these changes to the state’s judicial system, see DIANE D. BLAIR & JAY BARTH, *ARKANSAS POLITICS AND GOVERNMENT: DO THE PEOPLE RULE?* 225–35 (University of Nebraska Press 2d ed., 2005).

those of most other elected officials: eight years for supreme court and court of appeals justices; six years for circuit judges; and four years for district judges. Unlike many other states, however, where the trend in recent decades has been toward “merit selection,”³ the Amendment 80 reform retained a totally elected judiciary. Amendment 80, however, significantly altered the election process. Rather than the partisan elections of the past (with judges having to obtain a party nomination before moving on to the general election), all judges now run in a nonpartisan election at the time of the party primaries. If no candidate receives a majority of the vote at that time, then the top two finishers face off months later in the November general election.

Indeed, according to one analysis, Arkansas has the most elected state judiciary in the nation—i.e., the highest percentage of judges who first reach the bench through election rather than appointment. Although twenty-two states still elect most of their judges (seven in partisan elections, fifteen in nonpartisan elections), in many of these states political custom promotes the practice of judges resigning shortly before their terms expire. The governor, therefore, may appoint a successor, who then runs for re-election with all the advantages of incumbency. Indeed, a majority of elective judges around the country initially reached the bench through gubernatorial selection rather than through the “normal” process of election.⁴

What makes this ruse impossible in Arkansas is a constitutional amendment *prohibiting* a judicial appointee from running for election for that office to which he or she was appointed. Only one other state has such a prohibition. Amendment 29 to the Arkansas Constitution, proposed by popular initiative and adopted by fifty-two percent of the voters in 1938, contains several provisions designed to prevent a variety of political abuses that had become commonplace and was not aimed exclusively, or even primarily, at the judicial branch. Still, because it clearly prohibits any person appointed to the United States Senate or to any “elective state, district, circuit, county and township office” from being eligible “to appointment or election to succeed himself.”⁵ As a result, Arkansas has the most “democrat-

3. The most common merit system employed by other states is a gubernatorial appointment chosen from a list recommended by a judicial selection committee, followed by a “retention” election.

4. On the percentages of elected judges, see JOHN PAUL RYAN, ALLAN ASHMAN, BRUCE D. SALES, & SANDRA SHANE-DUBOW, *AMERICAN TRIAL JUDGES* 122 (1980). For judicial selection methods in the fifty states, see Melinda Gann Hall, *State Courts: Politics and the Judicial Process*, in *POLITICS IN THE AMERICAN STATES* 229–55 (Virginia Gray & Russell L. Hanson eds.) 9th Ed. (2008). On the appointment of “elective” judges, see Henry R. Glick, *Courts: Politics and the Judicial Process*, in *POLITICS IN THE AMERICAN STATES* 232–66 (Virginia Gray, Russell L. Hanson, & Herbert Jacob eds.) 7th Ed. (1999).

5. ARK. CONST. amend. 29, § 2.

ic” judiciary of any in the nation.⁶ Moreover, as discussed in the pages that follow, the trend has been towards solidifying rather than undermining the spirit of Amendment 29 in the new century.

B. The Rationale for an Elective Judiciary

The rationale for an elective judiciary is anchored in arguments that it offers more popular and participatory process than the allegedly more closed, secretive, and elitist appointive method. Because judges make decisions with profound consequences for citizens’ well-being, the argument follows that citizens should be capable of selecting judges who are sensitive to popular preferences and values. Furthermore, elections make it possible for citizens to hold judges accountable for the quality of their performance and their fidelity to the public trust.

To begin with, although many open judicial seats produce a genuine contest, many more draw only one “contestant,” who is then “elected” by acclamation. Elections to the court of appeals, for example, were held for the first time in 1980; in only four of the six districts did more than one candidate file, and, for the twenty years between its creation and the end of the century, there were only five other primary or general election challenges in elections for the court despite the doubling of its size. Similarly, responses to a survey of circuit and chancery judges in the mid-1980s indicated that nearly half (twenty-eight of fifty-nine) were first “elected” to their position without a contest.⁷

This basic trend has continued after Amendment 80’s implementation. In 2002, seven of the twenty-five open judgeships were “won” without a challenge.⁸ In 2004 and 2006, competitive races were more regular when there was no incumbent candidate—there was electoral competition in eight of the nine circuit court races without an incumbent during those two cycles. When a position on the court of appeals opened in a northeast Arkansas district in 2006, however, only one candidate filed for the position.

The chances of a contest are reduced even more dramatically when an incumbent judge seeks reelection. It is extremely uncommon for a sitting

6. The most publicized provisions of Amendment 29 were those requiring an absolute majority rather than a plurality for primary victory, those prohibiting the governor or his relatives from assuming any vacated office, and those placing restrictions on nomination by party convention. The Arkansas Bar Association was distressed by Governor Futrell’s appointment of C. E. Johnson as chief justice and supported this amendment along with a 1937 law prohibiting judges from participating in any campaign other than their own.

7. On September 16, 1985, questionnaires were mailed to sixty-seven circuit and chancery judges and fifty-nine responses were received. Questionnaires and tabulated responses, hereafter cited as “Judicial Questionnaire,” are in the author’s possession.

8. Data calculated by author from election information maintained by Arkansas Secretary of State Elections Division.

judge to draw an opponent, and defeat of an incumbent judge is the rarest occurrence in Arkansas politics. Incumbent supreme court justices were defeated only three times in the twentieth century, all in highly unusual circumstances, and successful challenges are even more infrequent at lower levels. From 1972 through 2000, fewer than ten general jurisdiction judges lost their seats to challengers. The first election cycle of the nonpartisan election era, 2002, both illustrates and reaffirms previous findings about the political safety of incumbent judges: of the seventy-two sitting judges who ran for re-election, only six faced challenges, and all six won solid victories. Since that time, of the twenty-five sitting judges at the circuit and appellate levels running for reelection, only two have been challenged (unsuccessfully) —one supreme court justice and one circuit judge.⁹

This nearly routine reelection of most judges may well reflect popular satisfaction with incumbents, but it also reflects the hesitancy of practicing lawyers to challenge an incumbent judge. The chance of victory is slim, and the penalty for a lawyer who must continue practicing in the court of a judge he or she attempted to remove from the bench can be severe. Even supporting the losing candidate in a judicial contest is risky business for a lawyer. As one attorney recently noted, "I've heard horror stories about judges who win tacking their defeated opponent's ads up on the wall, and those who signed it being on a 'hit list' [for unfavorable treatment]." As another lawyer noted, "If you strike at the king, you must strike to kill."¹⁰

Because the electorate is so likely to support the incumbent against a challenger, judges seeking reelection always use "Judge" before their name on the ballot and, in the rare event of challenge, emphasize their incumbency in all advertisements: for example, "Circuit Judge Paul Jameson IS A TRIAL JUDGE NOW. Keep a proven, working trial judge at work on the job. Let the work of the court proceed without interruption. Re-elect Judge Paul Jameson."¹¹ The insistent, almost frantic tone of this particular pitch was due to the fact that the challenger in this instance, having served as an appointed judge on the court of appeals, was also entitled to run with

9. The 1936, 1938, and 1958 defeats of incumbent supreme court justices are discussed in CALVIN R. LEDBETTER, JR., *THE ARKANSAS SUPREME COURT: 1958-59* (1961) (unpublished Ph.D. dissertation, Northwestern University). Other data was compiled by author from Arkansas election returns. On the fierce judicial lobbying for advantageous apportionment schemes, see George Bentley, *Judicial Panel Recommends Rearrangement*, *ARK. GAZETTE*, Oct. 12, 1975, and Ernest Dumas, *Redistricting Plan Dropped*, *ARK. GAZETTE*, Sept. 23, 1976.

10. Anthony Moser, *Lawyer Urges Judicial Reform in Wake of Traffic Judge Scam*, *ARK. DEMOCRAT*, Oct. 31, 1985 (quoting Raymond Abramson in James B. Blair classroom lecture).

11. Judge Jameson's advertisement in *Northwest Arkansas Times*, May 25, 1980.

“Judge” before his name on the ballot, thus creating potential confusion for the electorate.¹²

Because polling research indicates that using “Judge” before a candidate’s name is worth an automatic twenty percent of the votes, any candidates who can legitimately attach this appellation do so and feature pictures of their robed selves in all advertising.¹³ It is certainly no accident that the single office that circuit judges most frequently hold preceding their election to the general jurisdiction bench is that of district judge. Furthermore, over one-quarter of all elected district judges sitting in 2002 had received an appointment to a general jurisdiction judgeship prior to their first successful race for the bench (with many others receiving other judicial appointments). In addition, it has been common for an appellate court judge to gain a position through appointment soon before an election and then run for an open seat on the same court in that election, thus skirting the prohibitions in Amendment 29. What this practice suggests is that even in Arkansas’s “purely elective” system, appointments have traditionally been extensively parlayed into electoral success.¹⁴

The rules related to pre-election appointments of this sort, however, have changed since the passage of Amendment 80 in a way that will limit the benefits of such appointments. A 2001 legislative action means that only candidates who have been *elected* to a judgeship are able to use the title on the ballot. They remain able to tout the experience (and their title) in their campaigns. Because the research that has been done centers on the potency of the word “Judge” on the ballot rather than a candidate’s campaigning on their having been a “judge,” it is unclear at this writing how much bang this more limited benefit is bringing appointed Arkansas judges as they run for different positions.

A second attempt to limit the power of judicial appointment as a parlay into election came in 2005, as the General Assembly passed a law that would have barred those appointed as a judge from seeking a judgeship within the same judicial division. Ultimately, an appointed circuit judge seeking to run for another position successfully challenged the law, as the state Supreme Court said that the alteration of the rules violated the clear provisions of Amendment 29.¹⁵

12. *Id.*

13. Interestingly, Judge Berlin Jones of Pine Bluff did not run with this label when running for re-election in 2004.

14. See Ernest Dumas, *The Strange World of Appellate Judgeship Elections*, ARK. GAZETTE, Apr. 22, 1984. Data on career paths of district judges collected by author from the biographical data files maintained by the Administrative Office of the Courts.

15. See Rob Moritz, *Bill on Judicial Elections Approved*, ARK. NEWS BUREAU, Mar. 19, 2005; Rob Moritz, *Supreme Court Asked to Uphold Circuit Court Ruling*, ARK. NEWS BUREAU, February 17, 2006.

III. ISSUES IMPACTING THE ELECTIVE SYSTEM

A. Judicial Elections: Partisan or Not?

As was the case before Amendment 80, the utility of elections as an instrument of popular influence on the judiciary remains somewhat stifled by the frequency with which only one candidate seeks the office, the infrequency with which incumbent judges are challenged, and the fact that many non-incumbent candidates have presented themselves as incumbents to the electorate by using "Judge" before their name on the ballot or in their campaigns. Of course, when all candidates run as "Judge" (as in the three-man race for the open associate supreme court justiceship in 2004) or when none uses that label (as in the two-man race for an open associate supreme court justiceship in 1998), the electorate must rely on other clues. What other factors enter into the judicial selection process, and do they enhance or further weaken the "popular accountability" rationale for an elective judiciary?

As noted, until the passage of Amendment 80 all judicial contests in Arkansas were partisan. Thus, most current judges in Arkansas were first elected with a Democratic party label, and this likely will remain the case through the first couple of decades of this century. Because studies demonstrate that there are in fact measurable policy differences between Democratic and Republican state judges and that those differences are in the direction that party affiliation might logically predict (that is, Democratic judges are more likely to find for the tenant in landlord-tenant cases, for the employee in employee injury cases, for the administrative agency in business regulation cases, and so on), the party label might seem to have offered some useful guidance to the electorate in these judges' initial elections. Such was not the case in Arkansas through the era of partisan judicial elections.¹⁶

Because of the Republican party's difficulty in fielding candidates and because fielding judicial candidates was not the party's priority, Republicanism had not trickled down the ballot to judicial elections by the time of Amendment 80's passage.¹⁷ In 2000, for instance, of twenty-one appellate and general jurisdiction judgeships on the ballot, Republicans were able to field candidates in only five of the races (and three of these were appellate court judges whom Republican Governor Mike Huckabee had first appointed and who ran unsuccessfully against other "judges" for different appellate seats). Indeed, through the partisan election cycle of 2000, only six Republicans sought a supreme court position in the twentieth century (the

16. See Stuart Nagel, *Political Party Affiliation and Judges' Decisions*, 55 AM. POL. SCI. REV. 843-51 (1961); Sidney Ulmer, *The Political Party Variable on the Michigan Supreme Court*, 11 JOURNAL OF PUBLIC LAW 352-62 (1962).

17. In the late 1990s, the executive director of the GOP explained that "Most of the Republican lawyers are just starting their practices."

first being the same Jim Johnson who had run six times previously for office as a Democrat and once as a candidate of the White Citizens Council, in 1984). At the general jurisdiction level, between 1990 and 2000 there were only twenty-nine general election contests with Republican candidates, compared with sixty-eight Democratic primary contests; the vast majority of those GOP candidacies came when new judgeships were created and were feeble efforts. Whatever clarifying utility the party label may have in a competitive two-party state, in Arkansas almost all viable judicial contests that took place before Amendment 80 were within the Democratic primary.

Since it was clear that “Democrats” would be elected to judgeships whether elections were partisan or nonpartisan, why did the state Democratic party fight so ferociously in the legislature against nonpartisan elections for judges? Although arguments about voters needing the information provided by party labels were voiced, these were undeniably window-dressing for the real reason: dollars and cents. The dozens of Democratic judges who filed each election cycle (most to simply return to their existing job) provided hundreds of thousands of dollars in filing fees to the party. Although necessary to help offset the cost of party-run primaries after 1995 (when the state took over all primary election administration), this became money that could be used for party-building activities to the Democrats’ advantage and the state Republican party’s disadvantage. Despite the majority party’s successful opposition in previous legislative sessions, nonpartisanship in judicial elections—long advocated by judicial reformers in the state as shown by its inclusion in rejected modern constitutions—was included in the draft of Amendment 80 that voters approved. In addition, the Code of Judicial Conduct was altered after the amendment’s passage to prohibit the use of party endorsements in a race. Before the point in time when party labeling would mean much in these elections, therefore, Amendment 80 removed this cue from the ballot in Arkansas.¹⁸

Although the partisan cue is gone from judicial elections in the state, partisan dynamics still matter greatly in shaping judicial outcomes. The reason for this importance is that the first round of voting occurs at the time of the party primaries and all judicial elections are decided in this round unless more than two candidates run for the seat. In Arkansas, May elections are

18. See Elizabeth Caldwell and Rachel O’Neal, *Tucker Backs Move to Make Elections of Judges Nonpartisan*, ARK. DEMOCRAT-GAZETTE, Jan. 13, 1994; Elizabeth Caldwell, *Vote Keeps Judge Races Partisan*, ARK. DEMOCRAT-GAZETTE, Apr. 7, 1995; Elizabeth Caldwell and Kevin Freking, *Senate Defeats Bill Amid GOP Grumbles*, ARK. DEMOCRAT-GAZETTE, Jan. 29, 1997; David Robinson, *Democratic Party Pledges Fight Against Nonpartisan Judicial Elections*, THE MORNING NEWS OF NORTHWEST ARKANSAS, Jan. 14, 1999 (discussing Democratic legislative opposition to nonpartisan elections across several sessions). See also Traci Shurley, *Hold the Politics: Would-Be Judges Peruse New Rules*, ARK. DEMOCRAT-GAZETTE, Nov. 23, 2001 (discussing the first elections after Amendment 80).

those in which participants remain disproportionately Democratic in their primary preferences. For the 2006 primary, for instance, 277,220 votes were cast in the Democratic primary for lieutenant governor; only 62,868 votes were cast in the Republican primary for the same office. Thus, the overwhelming majority of the 310,195 Arkansans who voted for an open state supreme court position had voted in a Democratic primary only moments earlier. This means that judicial candidates who are most at home in Democratic circles (judicial candidates may still appear at party meetings to seek votes, for instance) and in making appeals to Democratic constituency groups are going to remain advantaged in Arkansas for the foreseeable future.

In addition to these partisan implications of the post-Amendment 80 judicial election system, the timing of judicial elections means that those candidates who have to compete in a runoff election in November essentially run an entirely separate second campaign six months following their first evaluation by Arkansas voters. Moreover, their candidacies are considered by an entirely different (and substantially larger) group of voters in November. In 2004, for instance, 291,888 voters cast votes in the first round, three-person race for a position on the state supreme court. Six months later, the top two finishers in the first round were considered by an electorate well over twice as large (842,796 voters). In a circuit court race in 2006 almost exactly twice as many voters voted in the November race as in the May primary. It is troubling indeed that the peculiarities of election turnout patterns are nearly as important as the attributes of candidates and their campaigns in shaping outcomes in post-Amendment 80 judicial politics in Arkansas.

B. Judicial Campaigns and Free Speech

Just as party is no longer present as an explicit cue for Arkansas voters in judicial campaigns, also absent is a clear picture of the political and social views and values that accompany the assorted candidates to the bench and would inform their actions there. This is because the commentary supporting Canon 5A of the official Code of Judicial Conduct states that a candidate for judicial office shall not “make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; [or] make statements that commit or appear to commit the candidates with respect to cases, controversies or issues that are likely to come before the court”¹⁹

In *Republican Party of Minnesota v. White*²⁰—the broad 2002 United States Supreme Court ruling deeming such rules as violations of candidates’

19. ARK. CODE OF JUDICIAL CONDUCT 5A, cmt.

20. 536 U.S. 765 (2002).

free speech rights—however, means that Arkansas’s code will eventually be modified. At present, the issue is under study. A follow-up 2005 decision by the Eighth Circuit Court of Appeals in another Minnesota case further expanded judges’ free expression rights, overturning Minnesota’s ban on judges publicly stating their political party.²¹ This prohibition remains in the Arkansas judicial canon. Although rules such as those struck down undoubtedly have served as an important and valuable assurance of perceived impartiality on the bench, as the majority opinion in the 2002 United States Supreme Court case noted, they are somewhat contradictory to the rationale for an elective judiciary.²²

Even before the *White* decision, the canon had occasionally been ignored. In 1984, for example, in two races for the Arkansas Supreme Court the candidates who were trailing demanded that the frontrunners take stands on such issues as pornography, school consolidation, and capital punishment, and also challenged them to issue debates, and advertised their own issue positions. In neither instance, however, were the frontrunners goaded into discussing more than their qualifications for office or their views on judicial reform.²³

Since the *White* ruling, some Arkansas judicial candidates have been more willing to introduce issues into the debate during elections. During his campaign for supreme court justice in 2004, Collins Kilgore touted his authoring, as a circuit judge, of the landmark *Lake View* decision deeming Arkansas’s schools inadequate and inequitable. District Judge Roger Harrod, a candidate for the supreme court in 2006, publicly stated his disapproval of the supreme court’s ruling in the *Lake View* case, which was still pending at the time of his unsuccessful campaign against an incumbent justice. Although avoiding discussions about pending cases, Court of Appeals Judge Wendell Griffen has become the most ardent advocates of judicial speech during campaigns, writing recently that “honest speech by judges and judicial candidates about disputed political and legal subjects which does not concern pending or impending litigation and litigants is protected by the First Amendment from prior restraint by the government.”²⁴ Griffen

21. *Republican Party of Minn. v. White*, 416 F.3d 738 (2005).

22. See Austin Gelder, *Ruling Imperils Gags on Judicial Candidates*, ARK. DEMOCRAT-GAZETTE, July 1, 2002 (discussing the relationship between the 2002 ruling and the Arkansas Code of Judicial Conduct).

23. See, e.g., *Court Candidate Blasts Opponent for Refusal to Discuss Key Issues*, ARK. DEMOCRAT, June 12, 1984; Bob Sanders, *Voters Must Know Views of Judicial Candidates*, ARK. GAZETTE, July 10, 1984; Stephen Buel, *‘Philosopher’ Johnson Vies with ‘Reformer’ Holt for High Court*, ARK. DEMOCRAT, Oct. 7, 1984; Stephen Buel, *Johnson Challenges Holt to Debate*, ARK. DEMOCRAT, Oct. 21, 1984. See also Editorial, *Judge Candidates*, ARK. DEMOCRAT, Dec. 15, 1985.

24. *Free Speech*, Arkansas Blog, <http://www.arktimes.com/blogs/arkansasblog> (Jan. 4, 2008).

has come under fire for some of his public pronouncements as a sitting judge, including comments made during his two campaigns for the supreme court (in 2004 and 2006), and has faced investigations by the Arkansas Judicial Discipline and Disability Commission.²⁵

Although these examples—particularly the disputes involving Griffen—have received much attention, it is important to recognize the degree to which the overwhelming majority of candidates for judge, particularly at the trial court level, assiduously avoid any conversation about issues while on the campaign trail. In doing so, they often specifically cite their respect for the canon. Moreover, it is important to note that there has yet to be a race in which more than one candidate has engaged in a lively discussion of issues of the sort discussed by Griffen. Therefore, there has yet to be a true issue-based “campaign” for judge in the state. The canon may ultimately be heavily edited, but the tradition of avoiding issues in judicial races in Arkansas still has some time left in it, although it will inevitably erode when judicial candidates begin to show success at the ballot box through the discussion of substantive matters.

C. The Importance of Name Recognition

With party label now absent from ballots and debates on issues deemed inappropriate by canon and tradition, on what basis does the electorate choose between competing candidates? The factors that seemed most relevant before Amendment 80 appear to maintain their status across recent election cycles. One hypothesis is that “name recognition is all, and the candidate with a short, comfortable-sounding name, easily remembered, has a decisive advantage.” Certainly the historical rosters of supreme court justices display an exceptional number of names such as Smith, Brown, and Jones, and few names of more than two syllables. Robert A. Leflar, for example, remained convinced that the more familiar, American-sounding name of his 1942 opponent (R. W. Robins) was highly advantageous to the latter. The short-name theory has no explanatory value, however, when all candidates have equally succinct ones (for example, Hays or Brown; Purtle or Harmon; Newbern, Bentley, or Sanders).²⁶

Perhaps more important than a short name is a familiar name, especially one with judicial connotations. The name recognition value that comes from previous office holding is clearly important for election to the general

25. *Id.*

26. Doug Smith, *Supreme Court: Short Name Helps*, ARK. GAZETTE, Oct. 26, 1977 (interviewing Leflar, who also acknowledged that Robins’s chairmanship of the state Democratic party and lopsided margins in the machine counties were influential, as was the fact that most of the young lawyers Leflar had recruited among his former students suddenly abandoned the race to participate in World War II).

jurisdiction bench: only sixteen of 105 circuit judges in office in 2003, for whom such information was available, had never held previous public office. The remainder had been either a municipal or other type of judge, prosecuting attorney, deputy prosecutor, city attorney, state representative, or school board member, and many had served in several positions.

A prominent name can often assure victory to a judgeship without opposition. When former Congressman Ray Thornton (who represented both the Fourth and Second congressional districts at different points in time) decided to seek an associate justice spot in 1996, he was unopposed. One observer said, "We don't know how good a judge Ray Thornton will be, but we do know he's Ray Thornton." Although no relation to the man who first appointed her to office, the Clinton last name (her first married name) was clearly beneficial to Judge Annabelle Clinton in her early races in the late 1980s. She has continued to prominently display that last name on the ballot and on campaign materials, including an unopposed elevation to the Arkansas Supreme Court in 1998 after becoming Annabelle Clinton Imber.

Interestingly, according to a survey of incumbent judges in 1985, over one-fourth had a close relative who had served on the bench. Chief Justice Jack Holt, Jr., elected in 1984, followed both an uncle and a cousin to the supreme court bench. Family ties did not, however, assist the race of Griffin Smith, Jr. (son of Chief Justice Griffin Smith, who served from 1937 to 1955) against an incumbent justice in 1988, nor Eugene Harris's attempt in 1980 to secure the chief justiceship that his father held from 1957 to 1969.

The unsuccessful Harris race challenges another generalization—that an eye-catching nickname has strong voter appeal. Eugene ("Kayo") Harris was not a winner, nor were Charles A. ("Charlie") Brown or W. H. ("Sonny") Dillahunty in 1980, nor Wilbur C. ("Dub") Bentley in 1984. Another "Dub" (W.H. Arnold), however, won the chief justiceship in 1996.²⁷

The familiar phenomenon of "friends and neighbors" is obviously influential in judicial races. Candidates in statewide races generally will receive the strongest support in their home counties or areas. Harris's major strength came from his chancery district in 1980, for example, and John Harmon's strength came from those counties where his father-in-law, a former state senator, had political influence. In the 1996 race for chief justice, winner "Dub" Arnold ran up huge margins around his southwest Arkansas home, including eighty-seven percent in his home county. Albeit by smaller margins, his opponent found success in the counties around his Delta birthplace and his northwest Arkansas residence. Familiarity, however, can also breed displeasure: the Pulaski County prosecutor "Dub" Bentley got only twenty-three percent of the Pulaski County vote in his supreme court bid in

27. Philip L. Dubois, *The Significance of Voting Cues in State Supreme Court Elections*, 13 LAW & SOC'Y REV. 757 (Spring 1979) (advancing the "nickname" theory).

1984. In the 2004 race for supreme court justice, a mirror of “friends and neighbors” voting kicked in. Pulaski County Circuit Judge Collins Kilgore touted his role in deciding the landmark *Lake View* school funding decision in the May preferential primary. But in both that race and in the November runoff, Kilgore was punished by voters in more rural enclaves where schools had been threatened by consolidation as a result of the debate prompted by that ruling.

D. The Influence of Interest Groups and Attorney Support

Generally, interest-group endorsements are most influential in less visible races. For instance, although organized labor has experienced its difficulties in the electoral arena in the modern era, labor-endorsed candidates for the supreme court have been much more successful than not in recent decades, and at least one victory (John Purtle’s in 1978 over Otis Turner, who had the backing of the bar) has been largely attributed to labor’s active exertions. Labor’s role has been even more important in general jurisdiction judicial races. Perhaps for this reason, organized labor has staunchly supported the elective method. Through 2006, however, other interest groups have yet to play the role that they have played in neighboring states of running independent advertising in judicial races, typically attack-oriented material discussing matters not normally allowed by judicial canons. It seems inevitable, however, that such election techniques will eventually enter the airwaves of Arkansas.²⁸

At present, the most consequential organized interest is assumed to be the state’s lawyers. The most frequently employed newspaper advertisement in judicial races is the one featuring long lists of lawyers’ names or signatures endorsing the candidate—for example, “Over 100 Area Lawyers Support the Re-election of Charles Williams, Fayetteville Municipal Judge.” On the Sunday before an election, the statewide newspaper has page after page of ads such as that run by Jack Holt, Jr., in 1984 which listed the names of nearly seven hundred lawyers and bore a simple message: “Those of us who are members of the legal community believe that there’s only one candidate who has the skills, determination, experience and temperament to be our Chief Justice.”²⁹

As was the case in decades past, candidates for statewide office begin their campaigns by attempting to secure commitments of support and activity from lawyers in each county, hoping that they will spread the word to

28. Telephone Interview by Diane Blair with J. Bill Becker, President, Arkansas State AFL-CIO (Sept. 30, 1985); Anthony Champagne, Address at the Symposium on Judicial Campaign Conduct and The First Amendment: Television Ads in Judicial Campaigns (2002).

29. Williams advertisement in NORTHWEST ARK. TIMES, May 25, 1980; Holt advertisement in ARK. GAZETTE, Nov. 4, 1984.

their clients and others with whom they have influence. Often they begin communication with their cadre of classmates from law school, a communication system enhanced by the fact that Arkansas had only one law school until 1975, when the Little Rock campus became a separate institution. Of the present nineteen supreme court justices and court of appeals judges, only three attended an out-of-state law school. Nearly nine in ten of the general jurisdiction judges as of 2003 had a law degree from either the Fayetteville (67.8%) or Little Rock (18.3%) law schools. Furthermore, according to a mid-1980s survey, most (forty-three of fifty-nine) indicated that they were very or moderately active in the state bar and even more (fifty-two of fifty-nine) stated that they were active in local bar association activities prior to their elections.³⁰

What has changed over the decades is the cost of seeking judicial office, which has ranged from \$10,000 or \$15,000 in a contested statewide race in the 1940s, to at least \$250,000 in the 1990s and 2000s (the record was over \$600,000 spent in a 1990 Supreme Court race). General jurisdiction judges with contested elections increasingly spend six-figure sums in their campaigns (the most expensive being in Little Rock-based districts where television is now regularly used and races tend to be significantly more costly in general). Here, perhaps, is where support from the legal community is most consequential. With some exceptions, and excepting the lawyer-candidates themselves who tend to fund large amounts of trial court races, the most constant source of the money in judicial races comes from other lawyers, and because large sums are necessary to run a competitive race, judicial candidates who cannot get financial backing from the bar face something of a silent veto. Here also may be the most disturbing aspect of an elective judiciary. The sight during an election year of judicial candidates scurrying from one law office to another in search of support and contributions inevitably diminishes the ideal image of a totally independent, unobligated, and uncompromised judiciary.³¹

The judicial canons state, "A candidate shall not personally solicit or accept campaign contributions."³² Nevertheless, there is no secrecy about who has (and has not) contributed. Individual contributions must be reported, and larger contributors are then identified in newspaper accounts.

30. Supreme Court Justice Biographies, <http://courts.ar.us/supremecourt/index.cfm> (last visited Apr. 12, 2008). Schools of circuit court judges in office in 2003 found in 38 THE ARKANSAS LAWYER 9 (2003).

31. See James D. Gingerich and Warren Readnour, *The 1990 Arkansas Judicial Elections: Much Ado About Nothing?*, ARKANSAS LAWYER 37-41 (July 1992); Adam Weintraub, *Can Justice Remain Blind to Money?*, ARK. GAZETTE, May 14, 1990; Adam Weintraub, *Judicial Race Cost Almost \$160,000*, ARK. GAZETTE, June 29, 1990 (discussing money's role in Arkansas judicial races).

32. ARK. CODE OF JUD. CONDUCT CANON 5(C)(2).

More importantly, judicial candidates quickly learn that their contributors want to give their check directly to the candidate, not to some intermediary, and even the most principled of candidates soon bends to this reality by accompanying a campaign aide who takes the check while the candidate shakes the contributor's hand.³³

If, as most judges and lawyers assume, the bar's influence is the critical factor in judicial elections, another question has been raised about the extent to which judicial elections actually represent the voice of the people. This is an especially intriguing question, because one of the major arguments against an appointive judiciary is that it simply replaces the politics of the electoral arena with the politics of the legal community. As a former circuit judge noted, "There is nothing more political than appointments. The only problem is that you're not talking politics that involves the people any more. You're talking politics between the governor and a law firm."³⁴

It should also be noted, however, that the actual influence of the legal community may be less than is commonly assumed. Judicial elections are held simultaneously with other contests, and usually ninety percent or more of those voting for the top of the ticket express their preferences in judicial contests as well. It is difficult to imagine that any sizable proportion of the 306,520 Arkansans who voted in the 2004 election for supreme court chief justice have a lawyer, or sought a lawyer's guidance, before marking the ballot. In the most thorough test to date of bar influence in judicial elections, a survey of voters leaving the polls in a highly controversial election to the Texas Supreme Court found that only 7.6% of those who had voted had received information from an attorney.³⁵ The survey also revealed that 85.8% of those leaving the polls could not remember the name of the judicial candidate for whom they had just voted! Although this test has not been replicated in Arkansas, one poll did indicate that less than one percent of Arkansas voters could recognize the names of their supreme court justices. One scholar of state judicial systems has noted, "As long as he remains largely invisible to the public, his chances of remaining in office are excellent."³⁶ If this is true, Arkansas judges should be invincible. When attorney general Steve Clark appeared in his court to enter a plea on his felony theft charges and to request that files be sealed to protect against prejudicial publicity, the circuit judge noted: "I guess the court could say that in all the

33. Telephone Interview by Diane Blair with Associate Justice Robert Dudley, Arkansas Supreme Court, (Sept. 20, 1985); Author's own experience as a campaign manager for a general jurisdiction judicial candidate.

34. See Bentley *supra*, note 9 (quoting Judge Hendricks).

35. See Charles A. Johnson, Roger C. Shaefer, & R. Neal McKnight, *The Saliency of Judicial Elections*, 59 SOCIAL SCIENCE QUARTERLY 371-78 (1978).

36. Henry R. Glick, *The Promise and the Performance of the Missouri Plan*, 32 U. MIAMI L. REV. 509, 518 (1978).

years he's been here, the fact that I've never had my picture taken before is evidence that this case has generated significant publicity."

Perhaps because there is some doubt as to the decisive nature of bar endorsements and support, candidates for judicial office use a wide variety of campaign devices—billboards, yard signs, appearances before civic groups, and newspaper, radio, and (increasingly) television advertisements—containing an astonishing array of biographical information: that they chopped cotton, coached Little League, taught Sunday School, belong to a Masonic Lodge, organized a volunteer fire department, and married a Tri Delt. One enterprising (and successful!) candidate for the supreme court chief justiceship ran an advertisement proclaiming his endorsement by twenty-seven ex-University of Arkansas Razorback football lettermen, complete with the rampaging Razorback Hog logo. Because of the importance of a name sticking in voters' minds long enough for them to cast their ballots, recent election cycles have included bebies of memorable (for good or ill) radio jingles.³⁷

The effective cues to which a judicial electorate responds in Arkansas remain something of a mystery. What is known, however, is that in an elective judicial system, those who reach the bench must ordinarily have some political skills and some measure of name recognition in addition to whatever legal skills they may possess. In the most thorough analysis of the Arkansas Supreme Court to date, Cal Ledbetter, Jr., concluded, "Political activity and influence rather than legal ability or success as a practitioner is the decisive factor in helping one to reach the supreme court."³⁸

E. Appointive Methods: Elitist or Representative?

This is not to suggest that appointive methods inevitably produce a more distinguished bench. In fact, some of the most exhaustive research on this subject has concluded that "neither the method of selection nor the term of office seems to correlate very highly or consistently with technical competence, honesty, wisdom and other non-ideological virtues." Still, particularly problematic because of the judiciary's role in protecting the rights of minorities, it is clear that, in Arkansas at least, the elective method has not yet produced a very "representative" judiciary. Through 2006, one woman and no African Americans have been *elected* to a seat on the supreme court. In contrast, the allegedly more "elitist" appointive method had placed two women and five African Americans (including Eighth Circuit Court of Appeals appointee Lavenski Smith) on the supreme court to fill vacancies.

37. Judicial campaign circulars in author's possession; Razorback advertisement used by Richard Adkisson in *ARK. GAZETTE*, June 9, 1980.

38. LEDBETTER, *supra* note 9, at 201 (1961).

Since Amendment 80's adoption, a woman has been appointed to serve in two different supreme court positions, and an African American man has been appointed to the court of appeals. In addition, the first openly gay judge in Arkansas was appointed to a district court position to fill a vacancy in 2007.³⁹

Although females and African Americans remain underrepresented at the trial court level just as in the higher courts (and, until the dissolution of the dual court system, had faced tremendous difficulty in gaining judgeships focused on criminal matters), court rulings did open opportunities for members of those groups. The new juvenile judgeships created after the state supreme court declared the juvenile justice system unconstitutional provided open-seat judgeships in an arena in which women lawyers were more likely to have professional experience and to be perceived by voters as having special competence. In 1990 alone there were eight women candidates statewide for the newly created juvenile judgeships, and women candidates continued to have success in winning these judgeships until they lost distinctiveness after Amendment 80. More direct in its impact was a 1992 federal district court order (typically referred to as the *Hunt* decree) under the federal Voting Rights Act requiring the creation of judicial "subdistricts" within existing general jurisdiction court districts, each of which contained an African American voting age population of at least sixty percent. All told, a dozen judgeships were covered by the decree, immediately resulting in a sharp increase in the number of African American jurists in the state.⁴⁰ Identifiable juvenile courts and the judicial sub-districts remain in place after Amendment 80, so the benefits of the previous rulings to enhanced diversity on the courts remain in place.

IV. CONCLUSION

As the preceding discussion has highlighted, there have been some alterations to judicial politics in post-Amendment 80 Arkansas. Some of those changes emanate directly out of the rule changes created by the amendment, although others have been brought about through alterations to the environment that happened to have occurred in the same era (particularly the United States Supreme Court's *White* decision and the further limitation on the power of pre-election appointment to advantage candidates for open seats). Still, although there have been changes at the margins, the dynamics remain more similar than fundamentally different. Judicial elections in Arkansas are

39. STUART S. NAGEL, *COMPARING ELECTED AND APPOINTED JUDICIAL SYSTEMS* 39 (Beverly Hills, Calif.: Sage Publications, 1973).

40. Ronald Smothers, *Arkansas Plan to Promote Election of Black Judges Brings a Familiar Challenge*, N. Y. TIMES, 8 Apr. 1996, at 10 (discussing the *Hunt* decree and later failed efforts by white plaintiffs to overturn it).

still the same game, albeit one with slightly altered rules. As a result, the debate whether merit appointment or election is the better way to select judges remains unchanged and ultimately becomes a normative discussion with advocates on either side of the debate holding valid arguments.

Although critics of the elective system abound inside and outside of the legal community, there seems little likelihood that the system will be changed in the near future. Merit appointment (at least at the appellate level) was widely discussed during the judicial reform process that culminated in Amendment 80 but was ultimately rejected in the drafting of the measure. It seems that nonpartisanship is the major step that will occur in the realm of judicial selection in Arkansas for this generation.

One potential force that could promote a renewed discussion of the appointment system in the years ahead is the probability of increasingly expensive, brutal judicial elections as the twenty-first century progresses. Two recent supreme court campaigns give some feel for what may well become the norm, at least at the statewide level. In the determinative 1990 Democratic primary for an open seat on the court won by Robert Brown by just over 1000 votes over Judith Rogers, the first woman elected to an Arkansas appellate court, Arkansans experienced the most expensive and, arguably, the most vicious contest in memory. Exceeding a half-million dollars (that "drained" lawyers who provided much of those funds), the campaign was marked by televised attacks and counter-attacks about ethics, lying, sexism, absenteeism, facials and manicures, trips to the Soviet Union, and who had and had not seen the porn film "Deep Throat." Six years later, the race for chief justice race saw similar attack advertisements, this time focused on whether one candidate had made personal use of a Datsun sports car seized in a drug arrest when he was a prosecutor. It is possible that if campaigns as vicious and as costly as those for the supreme court in 1990 and 1996 do indeed become the norm—and if the demise of the judicial canons limiting the topics about which judicial candidates may communicate with voters begin to make judicial races indistinct from other legislative and executive races—a new movement for merit-based appointments may arise in the Arkansas legal community. Amendment 80 gives the legislature the explicit power to send such a merit-based proposal to the people. The question remains, however, whether the people of Arkansas, used to having the ultimate control over their justice system, will ever choose to give up that power.⁴¹

41. Interview by Diane Blair with David Malone, Senator, Arkansas General Assembly (July 3, 1990) (discussing the bar's response to the persistent contribution requests during the 1990 campaign). Bar enthusiasm for an appointive process was tempered, however, by the fact that the bar candidate, Robert Brown, succeeded in the race while the loser, Judge Judith Rogers, would have likely been the appointee to the post by Governor Clinton.

