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# AMENDMENT 7 REFERENDUM: POWER TO THE PEOPLE

Victor A. Fleming\*

## INTRODUCTION

In *North Little Rock v. Gorman*<sup>1</sup> the Arkansas Supreme Court held that an ordinance passed by a city council increasing the rates charged for electricity sold by the city is a legislative measure rather than an administrative measure and consequently is subject to referendum under amendment 7 of the Arkansas Constitution.<sup>2</sup> The court seemingly ignored cases on point from other jurisdictions<sup>3</sup> and instead took a minority position on this issue of first impression in Arkansas.

The impact of *Gorman* cannot be fully realized from a mere reading of the majority opinion<sup>4</sup> nor the somewhat more enlightened concurring opinion.<sup>5</sup> *Gorman* looms as an important decision in the

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1. 264 Ark. 150, 568 S.W.2d 481 (1978).

2. Amendment 7 of the Arkansas Constitution reserves legislative powers to the people on both the state and municipal levels. Broadly defined, the power of initiative is the citizens' power to place a measure on the ballot by collecting signatures on petitions favoring placement of the proposal on the ballot. Conversely, the referendum power involves similar petitioning action which results in having a measure placed on the ballot for the purpose of repealing it.

In pertinent part, amendment 7 reads as follows: "The . . . referendum powers of the people are hereby further reserved to the local voters of each municipality . . . as to all local, special and municipal legislation of every character in and for their respective municipalities . . . ." The referendum power is invoked when "fifteen per cent of the legal voters shall petition for [a] special election" on an ordinance. ARK. CONST. amend 7.

Not all ordinances passed by a city council are subject to referendum. To be referred an ordinance must be *legislative* in character as opposed to *administrative*. *Greenlee v. Munn*, 262 Ark. 663, 559 S.W.2d 928 (1978); *Scroggins v. Kerr*, 217 Ark. 137, 228 S.W.2d 995 (1950). See generally 5 E. McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS §§ 16.48-16.70 (1969 & Supp. 1977).

3. *E.g.*, *Aurora v. Zwerdinger*, 571 P.2d 1074 (Colo. 1977) (ordinance raising rates for municipally-owned water utility held not subject to referendum under constitutional provision similar to amendment 7); *Hoover v. Carpenter*, 188 Neb. 405, 197 N.W.2d 11 (1972) (ordinance raising rates for municipally-owned electric utility held not subject to referendum under statute reserving referendum power on "any ordinance or other measure"). These and other cases are discussed more fully at pp. 74-75 *infra*.

4. See *North Little Rock v. Gorman*, 264 Ark. 150, 153-55, 568 S.W.2d 481, 482-86 (1978).

5. *Id.* at 159-61, 568 S.W.2d at 486-87 (Fogleman, J., concurring).

area of municipal law; therefore, this article will attempt an expository analysis of the case.

## I. HISTORICAL PERSPECTIVE

North Little Rock is authorized by statute to own and operate an electric distribution system.<sup>6</sup> In 1959 an ordinance was passed by the North Little Rock City Council for the construction of extensions and improvements to the city-owned electric system and the issuance of bonds to finance the proposed changes.<sup>7</sup> In that ordinance the city covenanted to increase electric rates whenever necessary to operate the electric department and to satisfy bonded indebtedness.<sup>8</sup> It also provided that "[a]ny surplus in the electric revenue fund, after making full provision for the other funds hereinabove provided for, may be used at the option of the city . . . for any lawful municipal purpose."<sup>9</sup>

Electric revenue has historically been a major source of funding for the North Little Rock general fund.<sup>10</sup> In the five years immediately preceding the *Gorman* litigation, the average portion of total electric revenue transferred to the general fund for general municipal purposes was 15.7%.<sup>11</sup> The amount of total electric revenue scheduled to be transferred in 1978 was approximately 10%, or \$2,150,000.<sup>12</sup>

Pursuant to Act 740 of 1977,<sup>13</sup> the North Little Rock City Council created a commission to operate its electric distribution system,<sup>14</sup> giving to it near-plenary power with regard to wholesale purchases of electricity and management of the electric department.<sup>15</sup> In that ordinance, however, the council specifically retained the "responsibility of adopting ordinances establishing rate schedules

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6. See ARK. STAT. ANN. § 19-2319 (1968).

7. N. Little Rock, Ark., Ordinance 2926 (July 2, 1959).

8. *Id.* §§ 4, 5.

9. *Id.* § 12.

10. One of the exhibits introduced in the lower court litigation in chancery was a chart which indicated the amounts of total electric revenue, total general fund revenue, and electric revenue transferred to the general fund for each of the years 1970 to 1977, inclusive. The percentage of total electric revenues transferred had decreased from 26.6% in 1970 to 11.5% in 1977, although the total amount transferred had increased from \$1,650,000 in 1970 to \$2,025,000 in 1977. Both the percentage and amount, however, were less in 1977 than in either of the two immediately preceding years. See Transcript at 114, *North Little Rock v. Gorman*, 264 Ark. 150, 568, 568 S.W.2d 481 (1978) [hereinafter cited as *Gorman* Transcript].

11. *Id.*

12. *Id.* at 167.

13. ARK. STAT. ANN. § 19-3934 (Cum. Supp. 1977).

14. N. Little Rock, Ark., Ordinance 4755 (May 9, 1977).

15. *Id.* §§ 1, 4, 5.

for customer classes of the North Little Rock Electric Department."<sup>16</sup>

Less than two months after the creation of the North Little Rock Electric Commission, the rate for wholesale electricity purchased by the city from Arkansas Power and Light Company increased \$1,800,000 annually.<sup>17</sup> The Electric Commission immediately recommended a rate increase to the city council for its retail customers.<sup>18</sup> Subsequently, the council passed Ordinance 4798,<sup>19</sup> which increased the retail rates being charged by the city to a level sufficient to offset the wholesale rate increase.

Pursuant to amendment 7 of the Arkansas Constitution,<sup>20</sup> a drive was begun to collect enough signatures on a petition to request a referendum on Ordinance 4798.<sup>21</sup> The referendum drive was successful,<sup>22</sup> and no challenge was made to the referendum petitions or to the right of the petitioners to demand a referendum. A special election was called by the city council, and the ordinance effecting the rate increase was soundly defeated.<sup>23</sup> Faced with the legal issue and administrative problem of the effect of the repeal of a rate increase, the city council, in a special meeting held less than a week after the referendum, retroactively readopted the electric rates existing prior to enactment of Ordinance 4798.<sup>24</sup>

For the next six weeks the City operated on a severely diminished income. During this time a proposed budget was drafted based on the assumption that the general fund would contain 30% less money in 1978 because of the lower rates.<sup>25</sup> This proposed budget included numerous layoffs of employees and a severe funding reduction in several areas of municipal government.<sup>26</sup> Believing that the

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16. *Id.* § 8.

17. "On July 2, 1977, the Federal Power Commission approved an increase in rates for wholesale power sold by Arkansas Power and Light Company to the City of North Little Rock in the amount of \$1.8 million annually." *North Little Rock v. Gorman*, 264 Ark. 150, 153, 568 S.W.2d 481, 482 (1978).

18. *Id.*

19. *N. Little Rock, Ark., Ordinance 4798*. (July 25, 1977). *See also* Gorman transcript, *supra* note 10, at 163.

20. *See* note 2 *supra*.

21. *See* Arkansas Gazette, Aug. 6, 1977, at 16A, col. 2.

22. "Subsequently [*sic*] to the enactment of Ordinance Number 4798, petitions were filed with the City Clerk requesting a referendum . . ." *North Little Rock v. Gorman*, 264 Ark. 150, 153-54, 568 S.W.2d 481, 483 (1978).

23. *Id.* at 154, 568 S.W.2d at 483. *See* Arkansas Gazette, November 16, 1977, at 1A, col.

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24. *N. Little Rock, Ark., Ordinance 4824* (Nov. 21, 1977).

25. Gorman Transcript, *supra* note 10, at 173-75.

26. *Id.*

electorate would be appeased if their electric rates were only raised to the level of their neighbors in other cities,<sup>27</sup> the City Council enacted Ordinance 4835 in December 1977. This ordinance adopted, as exactly as possible, the currently existing retail rates being charged by Arkansas Power and Light Company to consumers in cities similar in size to North Little Rock.<sup>28</sup>

Within thirty days, referendum petitions again were filed with a sufficient number of signatures to require a referendum on Ordinance 4835 and the new rate schedules adopted therein.<sup>29</sup> The City Clerk certified the petition as containing a sufficient number of signatures.<sup>30</sup>

## II. ANATOMY OF THE LAWSUIT

### A. *Chancery Court Proceedings*

Before the City Council had taken any action on the referendum petition filed against Ordinance 4835,<sup>31</sup> a class action lawsuit was filed in Pulaski County Chancery Court by certain citizens and customers of the North Little Rock Electric Department against the City, the Mayor and Aldermen, the North Little Rock Utilities Accounting Commission, the Director of the North Little Rock Utilities Accounting Department, and the City Treasurer.<sup>32</sup> The complaint, as amended, alleged that the action of the city council, in raising the electric rates so soon after a rate increase had been defeated by popular vote, was "capricious and dilatory and will result in hardship to the . . . members of the class";<sup>33</sup> that the

27. See *id.* at 193, where the testimony of the alderman who had sponsored Ordinance 4835 is recorded as follows: "I got the impression that the people felt . . . the rates were unfair . . . , and the only way we could come up with what we felt . . . was a fair rate was to come up with rates . . . equal to what other people in the area were paying."

28. N. Little Rock, Ark., Ordinance 4835 (Dec. 27, 1977). That ordinance provided "[t]hat it is the specific intent of the City Council to adopt the Arkansas Public Service Commission's approved rate schedule for Arkansas Power and Light Company, reflected in Docket No. U-2762, on April 8, 1977, except as they may be modified or deleted to coincide with the North Little Rock system." *Id.* § 1.

29. *North Little Rock v. Gorman*, 264 Ark. 150, 154, 568 S.W.2d 481, 483 (1978).

30. Letter from Jackie C. Neil, N. Little Rock City Clerk and Collector, to Mayor Eddie Powell (Jan. 30, 1978).

Amendment 7 of the Arkansas Constitution requires that "[t]he sufficiency of all local petitions shall be decided in the first instance by the . . . city clerk . . . , subject to review by the Chancery Court."

31. The petitions were filed January 24; the next regular city council meeting was scheduled for February 13; the lawsuit was filed February 2, 1978.

32. *North Little Rock v. Gorman*, 264 Ark. 150, 154 568 S.W.2d 481, 483 (1978). See Gorman Transcript, *supra* note 10, at 2.

33. Gorman Transcript, *supra* note 10, at 4.

amount by which the rates were increased constituted an illegal tax;<sup>34</sup> and that the emergency clause<sup>35</sup> of Ordinance 4835 was "inadequate and gives no indication as to the existence of an emergency and further, that no such emergency existed . . . ."<sup>36</sup> The plaintiffs requested that the City be enjoined from using the money "collected as a result of the . . . increase . . . until such time as a referendum can be had";<sup>37</sup> that the City be required "to escrow such monies as represents said increase into an interest-bearing bank account carrying legal interest until after the outcome of said referendum";<sup>38</sup> that, if the referendum were successful, the City be required to refund the amount of the increase;<sup>39</sup> and that the Mayor and City Council "be ordered and directed to proceed forthwith with a time certain for the referendum."<sup>40</sup>

Before the defendants (the City) answered the complaint, a

34. *Id.* at 23. In Arkansas the authority of a city of the first class to tax is derived from ARK. STAT. ANN. §§ 19-1042 to 1046 (Cum. Supp. 1977). Thus, if the electric rates constituted taxation not authorized by the statutes, then it would be illegal. This issue was touched on by the chancellor, who ruled the rates were "in effect taxation." Gorman Transcript, *supra* note 10, at 143-44.

35. An ordinance with an emergency clause takes effect immediately or whenever specified in the ordinance. An ordinance without an emergency clause "cannot go into effect until the time fixed by the council for referendums (30 to 90 days [as specified in Arkansas Constitution amendment 7]) has expired." Arkansas Municipal League, Handbook for Arkansas Municipal Officials 198 (1977). Amendment 7 provides as follows:

If it shall be necessary for the preservation of the public peace, health and safety that a measure shall become effective without delay, such necessity shall be stated in one section, and if upon a yea and nay vote . . . two-thirds of all the members elected to city or town councils, shall vote upon separate roll call in favor of the measure going into immediate operation, such emergency measure shall become effective without delay. It shall be necessary, however, to state the fact which constitutes the emergency.

Essentially, an emergency clause "makes a finding of fact that an emergency exists in the opinion of the city council, and hence, establishes the reason for the [ordinance] becoming effective immediately." Arkansas Municipal League, *supra*, at 201. The emergency clause of Ordinance 4835 read as follows:

The City Council is of the opinion that it is essential that the provisions of this ordinance be implemented immediately to provide against deleting vital city services, and to insure that all steps are taken to provide fair and just calculations for all customers of the North Little Rock Electric Department. THEREFORE, an emergency is declared to exist and this ordinance being essential for the protection of the public peace, health and safety shall be in full force and effect beginning January 1, 1978. And such new electric rates incorporated herein shall be billed under a prorata formula to effectively provide that as near as possible, all consumption of electricity from and after January 1, 1978, shall be billed at these new rates.

36. Gorman Transcript, *supra* note 10, at 24.

37. *Id.* at 4.

38. *Id.*

39. *Id.* at 4-5.

40. *Id.* at 5.

petition to intervene was filed by several North Little Rock policemen and firemen.<sup>41</sup> Intervention was granted,<sup>42</sup> and the intervenors filed an answer and complaint in intervention.<sup>43</sup> The intervenors' complaint alleged "that the adoption of Ordinance No. 4835 . . . was not an exercise by the city of its legislative authority and that, therefore, as a matter of law, the ordinance cannot be referred to the voters pursuant to . . . amendment 7 . . . ." <sup>44</sup> The intervenors prayed that the relief sought by the plaintiffs be denied, that the ordinance be declared administrative rather than legislative,<sup>45</sup> and that the City be enjoined from referring the ordinance to the voters.<sup>46</sup>

The City demurred to the complaint<sup>47</sup> and filed a counterclaim, requesting a declaratory judgment as to whether Ordinance 4835 was subject to referendum.<sup>48</sup> The plaintiffs filed a general denial to the complaint in intervention<sup>49</sup> but never filed a reply to the City's counterclaim.

A hearing was held at which testimony was taken from the North Little Rock Mayor and the Alderman who had sponsored Ordinance 4835.<sup>50</sup> Testimony was also taken from the nominal plaintiff who purported to represent the class and from an additional plaintiff.<sup>51</sup> At the end of the testimony, the court ordered the attorneys to submit briefs.<sup>52</sup>

On April 7, 1978, a decree was rendered in which Ordinance 4835 was declared to be "legislative in nature in that it produces revenue, separate and apart from the needs for the operation of the electrical department in its complete operation; such aspect of Ordinance No. 4835 is in effect taxation and Ordinance No. 4835 should

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41. *Id.* at 7-9.

42. *Id.* at 10-11.

43. *Id.* at 12-15.

44. *Id.* at 13.

45. *Id.* at 13-14.

46. *Id.* at 14.

47. *Id.* at 17.

48. *Id.* at 18.

49. *Id.* at 20-21.

50. *Id.* at 150-94.

51. *Id.* at 194-210.

52. The court approved a briefing schedule that had previously been agreed upon by the attorneys of record. *Id.* at 211-14. Eight days after this hearing, several parties filed a motion in which they alleged that they were members of the class of plaintiffs and that the briefing schedule approved by the court was unreasonably long in light of state law and court rules. *Id.* at 29-33. Therefore, the movants requested an acceleration of the briefing schedule. A hearing was held on the motion, and a shorter briefing schedule was approved by the court. *Id.* at 215-31. Over two weeks after that hearing, the court entered an order allowing the new movants "to act as party plaintiffs in this cause of action." *Id.* at 116.

be submitted by referendum to the people."<sup>53</sup> The Major and Aldermen were "directed to call an election and refer Ordinance No. 4835 to the people."<sup>54</sup> Four days later, the intervenors filed notice of appeal.<sup>55</sup> The City subsequently filed notice of appeal as well.<sup>56</sup>

### B. Circuit Court Proceedings

While the losing parties in the chancery litigation were filing their respective notices of appeal, a mandamus<sup>57</sup> action was filed in Pulaski County Circuit Court by R. E. Bruce, a tax-paying resident voter of North Little Rock, against the Mayor and Aldermen.<sup>58</sup> Essentially, the complaint alleged that the defendants had neglected to submit Ordinance 4835 for referendum as demanded by the filed petitions;<sup>59</sup> that the plaintiff Bruce, being one of the petitioners, was entitled to have the referendum called;<sup>60</sup> and that mandamus was the appropriate remedy to require the Mayor and City Council to call a special election forthwith on the ordinance.<sup>61</sup> In its answer, the City denied that mandamus was appropriate<sup>62</sup> because of the pendency of the *Gorman* appeal.<sup>63</sup>

After a hearing<sup>64</sup> and the submission of briefs by counsel, judgment was entered for the defendants,<sup>65</sup> the court finding that until the *Gorman* appeal was resolved, there would be no certainty of Bruce's right to have a writ of mandamus issued. The court stated, however, that "in the event the Chancery court's ruling is affirmed, the city of North Little Rock should be prepared to immediately set

53. *Id.* at 143-44.

54. *Id.* at 144.

55. *Id.* at 146-47.

56. *Id.* at 149a.

57. A writ of mandamus is a circuit court order "granted upon the petition of an aggrieved party or the State when the public interest is affected, commanding an executive, judicial or ministerial officer to perform an act, or omit to do an act, the performance or . . . omission . . . of which is enjoined by law." ARK. STAT. ANN. § 33-102 (1962). Although the statute, as written, purports to vest mandamus jurisdiction in chancery as well as in circuit, this provision was held unconstitutional under article 7, sections 11 & 15, of the Arkansas Constitution in *Nethercutt v. Pulaski County Special School Dist.*, 248 Ark. 143, 450 S.W.2d 777 (1970).

58. *Bruce v. Powell*, Pulaski County Circuit No. 78-2123, *rev'd sub nom.* *North Little Rock v. Gorman*, 264 Ark. 150, 568 S.W.2d 481 (1978).

59. Transcript at 2, *Bruce v. Powell*, *rev'd sub nom.* *North Little Rock v. Gorman*, 264 Ark. 150, 568 S.W.2d 481 (1978) [hereinafter cited as *Bruce Transcript*].

60. *Id.* at 1-2.

61. *Id.* at 2-3.

62. *Id.* at 15.

63. *Id.* at 15-16.

64. *Id.* at 29-43.

65. *Id.* at 27-28.



the election to be held within a reasonably prompt period of time."<sup>66</sup> Bruce immediately filed notice of appeal<sup>67</sup> and then moved that the Arkansas Supreme Court advance the case on its docket, abbreviate the normal briefing schedule, and allow counsel to utilize typewritten briefs.<sup>68</sup> The City, responding to Bruce's motion, requested both an advanced briefing schedule and a consolidation of the chancery appeal with the circuit appeal, based on the fact that the two cases arose "out of the same operative facts" and that resolution of one was dependent upon the outcome of the other.<sup>69</sup> The case was advanced on the docket, typewritten briefs were allowed, and the motion to consolidate was granted.<sup>70</sup>

### III. THE APPELLATE STRUGGLE

#### A. *The City's Argument*

On appeal both the City and the intervening firemen and policemen argued vigorously that rate making for a municipally owned utility was administrative action rather than legislative action and was therefore not subject to referendum.<sup>71</sup> The City's argument was based on several grounds.

During the month that the *Gorman* litigation arose, the Arkansas Supreme Court decided *Greenlee v. Munn*,<sup>72</sup> in which an ordinance appointing a person to a municipal civil service commission was held to be administrative in nature and thus not subject to referendum.<sup>73</sup> Citing *Scroggins v. Kerr*,<sup>74</sup> the court noted that "not all ordinances enacted by a city council [are] subject to the referen-

66. *Id.* at 28.

67. *Id.* at 25. Both the judgment and the notice of appeal were dated May 22, 1978.

68. Bruce's motion was filed with the supreme court on May 31, 1978. Normally, an appellant may take as long as from 130 days to seven months and forty days to file his abstract and brief. The appellee then has thirty days to file his brief, whereafter the appellant has fifteen days to file a reply brief. ARK. STAT. ANN. § 27-2127.1 (Cum. Supp. 1977); ARK. SUP. CT. R. 7(a), (b) & (c). Normally, briefs must be printed. ARK. SUP. CT. R. 8(a).

69. The City's response and motion to consolidate was filed with the supreme court on June 1, 1978. There are no written rules of the Arkansas Supreme Court on the consolidation of cases for appeal.

70. This action was taken at a hearing before the Arkansas Supreme Court on June 5, 1978. The appellants in each case were given fourteen days to file abstracts and briefs. The appellees in turn were given seven days to file briefs. Appellants then had three days to file reply briefs.

71. See Abstract and Brief for Appellants City of N. Little Rock at 48-66 [hereinafter cited as City's *Gorman* Brief] and Abstract and Brief for Appellants Don Gilbert at 46-54, *North Little Rock v. Gorman*, 264 Ark. 150, 568 S.W.2d 481 (1978).

72. 262 Ark. 663, 559 S.W.2d 928 (1978).

73. *Id.* at 666, 559 S.W.2d at 930.

74. 217 Ark. 137, 228 S.W.2d 995 (1950).

dum provision of amendment 7.”<sup>75</sup> Writing for a unanimous court in *Scroggins*, Justice Leflar had enunciated a test for distinguishing administrative ordinances from legislative ordinances: “The crucial test for determining what is legislative and what is administrative is whether the ordinance is one making a new law, or one executing a law already in existence.”<sup>76</sup> He further stated, that

if there is a law already enacted which authorizes the very action provided for by a later resolution or ordinance, then there is no right to have a referendum on the new measure. It is not a new law, but only a procedural device for administering an old law. The right of referendum should have been exercised when the original measure, the enactment that put the law on the books, was newly adopted.<sup>77</sup>

In *Scroggins* the ordinance under consideration authorized the execution of a contract for the construction of low-rent housing, and there were no previous ordinances or statutes authorizing this action. Therefore, it was held to be legislative and thus subject to referendum.<sup>78</sup> In *Greenlee*, however, the court found that the method of appointing civil service commissioners by ordinance was authorized by state statute<sup>79</sup> and by a previous city ordinance.<sup>80</sup> Therefore, the ordinance was held to be administrative under the *Scroggins* test and not subject to referendum.<sup>81</sup>

In *Gorman* the City stressed to the court the statutory authority of North Little Rock to own and operate its electric distribution system and sell electricity at a profit.<sup>82</sup> The court was referred to the

75. *Greenlee v. Munn*, 262 Ark. 663, 666, 559 S.W.2d 928, 929 (1978).

76. *Scroggins v. Kerr*, 217 Ark. 137, 143, 228 S.W.2d 995, 998 (1950).

77. *Id.* at 145, 228 S.W.2d at 999 (citing and discussing *Burdick v. San Diego*, 29 Cal. App. 2d 565, 84 P.2d 1064 (1938), wherein a referendum was denied on an ordinance which triggered construction of a building that had been authorized and planned in previous ordinances).

78. *Id.* at 145-46, 228 S.W.2d at 999-1000.

79. Appointment of local civil service commissioners by ordinance is authorized in ARK. STAT. ANN. § 19-1601.1 (1968).

80. Pine Bluff, Ark., Ordinance 2994 (Aug. 16, 1949). In the words of Justice Fogleman, “Ordinance No. 4591 was authorized, not only by Act 326 of 1949, but, *more significantly*, by Ordinance No. 2994. Under *Scroggins*, the time for referendum was the time of the enactment of Ordinance No. 2994, the new law, pursuant to which Ordinance No. 4591, the procedural device, was enacted.” *Greenlee v. Munn*, 262 Ark. 663, 666, 559 S.W.2d 928, 930 (1978) (emphasis added).

81. *Greenlee v. Munn*, 262 Ark. 663, 666, 559 S.W.2d 928, 930 (1978).

82. Authority to purchase electricity at wholesale and sell it to consumers at retail is granted to cities by ARK. STAT. ANN. § 19-2318 (1968). Numerous statutes authorize specific uses for municipal utility revenues. See ARK. STAT. ANN. §§ 19-3901 to 3903, -3929, -3931 to 3933 (1968), cited in City’s *Gorman* Brief, *supra* note 71, at 51. Further, cities are statutorily

ordinances which specifically authorized the city council to set rates and to transfer surplus electric revenue to the general fund.<sup>83</sup> The City urged upon the court the Arkansas Home Rule Act<sup>84</sup> which provides that a city "may exercise any function . . . not in conflict with state law" over "the definition, use and control of surplus revenues of municipally owned utilities."<sup>85</sup>

Furthermore, the City emphasized the loss of nearly \$2,000,000 in general fund revenue which would be occasioned by the repeal of Ordinance 4835,<sup>86</sup> stressing in this regard the words of Justice Leflar, that "[t]o allow [the referendum] to be invoked to annul or delay executive conduct would destroy the efficiency necessary to the successful administration of the business affairs of a city."<sup>87</sup> The essence of the argument was that to allow the voters to repeal a utility rate increase when utility revenues were vital to managing the city "would be to sanction a situation in which the referendum could be invoked to frustrate the efficient management and administration of a city."<sup>88</sup>

Several cases were cited from other jurisdictions<sup>89</sup> which had

authorized to use surplus utility revenues in any manner not in conflict with state law. ARK. STAT. ANN. § 19-1043 (Cum. Supp. 1977), *cited in* City's Gorman Brief, *supra*, at 69-70.

83. N. Little Rock, Ark., Ordinance 2926 (July 2, 1959); N. Little Rock, Ark., Ordinance 4755 (May 9, 1977), *cited in* City's Gorman Brief, *supra* note 71, at 51-52. The latter ordinance should have been particularly persuasive, as it retained for the city council the authority to set rates, discussed the necessity of "revenue to be derived from the customers of the . . . electric department to be used for general municipal purposes as transfers to the . . . general fund," and provided that the money to be designated for the general fund "may take such form . . . as the city council deems appropriate."

84. ARK. STAT. ANN. §§ 19-1042 to 1046 (Cum. Supp. 1977), *cited in* City's Gorman Brief, *supra* note 71, at 69-70.

85. ARK. STAT. ANN. § 19-1043 (Cum. Supp. 1977).

86. City's Gorman Brief, *supra* note 1, at 57-60; *see also* note 10 *supra*.

87. *Scroggins v. Kerr*, 217 Ark. 137, 143, 228 S.W.2d 995, 998 (1950). A similar sentiment was reiterated in *Greenlee v. Munn*, 262 Ark. 663, 668, 559 S.W.2d 928, 930 (1978): "Certainly, the people in adopting Amendment 7 . . . did not intend that it be so broad in scope as to frustrate administrative action essential to efficient administration of the city's affairs . . . ."

88. City's Gorman Brief, *supra* note 71, at 61.

89. *Aurora v. Zwerdinger*, 571 P.2d 1074 (Colo. 1977) (ordinance raising rates for municipally owned water utility held not subject to referendum); *Hoover v. Carpenter*, 188 Neb. 405, 197 N.W.2d 11 (1972) (ordinance raising rates for municipally owned electric utility held not subject to referendum); *Whitehead v. H & C Dev. Co.*, 204 Va. 144, 129 S.E.2d 691 (1963) (referendum provision in city charter held inapplicable in utility rate matter), *cited in* City's Gorman Brief, *supra* note 71, at 51-57, 63-64. *See also* *State v. St. Petersburg*, 61 So. 2d 416 (Fla. 1952) (referendum not allowed on ordinance increasing sewer rates); *In re Mitchell's Petition*, 44 Ill. App. 2d 361, 194 N.E.2d 560 (1963) (no initiative or referendum on water rate ordinance); *In re Norman Initiative Petitions*, 534 P.2d 3 (Okla. 1975) (no initiative allowed for adoption of rates or rate restrictions for city owned and operated utility); *Haas v. Pomeroy*, 50 Wash. 2d 23, 308 P.2d 684 (1957) (no referendum on water rate increase).

held, under referendum provisions similar to amendment 7,<sup>90</sup> that rate making by a city council for a municipally owned utility was administrative action not subject to referendum. For example, the Colorado Supreme Court, under a nearly identical constitutional provision and using the same test employed in *Greenlee v. Munn*<sup>91</sup> and *Scroggins v. Kerr*,<sup>92</sup> held that utility rate ordinances do not enact new law but merely execute existing law by changing an expense factor involved in operating a utility.<sup>93</sup> Similarly, the Virginia Supreme Court of Appeals focused on the fact that it is impossible for the general public to be able to make an intelligent appraisal of all the data involved in a rate determination and refused to allow a referendum on a rate matter where to do so would have been to sanction harassment of local officials in their executive duties.<sup>94</sup> The Nebraska Supreme Court's approach was to examine six factors, five of which it found to "point" away from "the right of referendum."<sup>95</sup>

As an additional basis for argument, the City cited Act 164 of 1977,<sup>96</sup> which vested all rate making authority for nonmunicipally owned public utilities in the Arkansas Public Service Commission. The gist of this argument was that if rate making were truly legislative then it could not have been delegated to an administrative agency by the legislature in light of the "well settled" principle of administrative law that "the authority to legislate cannot be delegated" (emphasis in original).<sup>97</sup> The City's reliance upon Act 164

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90. For example, "Referendum powers . . . are . . . reserved to the . . . voters of every city, town and municipality as to all local, special and municipal legislation of every character in or for their respective municipalities." COLO. CONST. art. 75, § 1. Compare the language of amendment 7 of the Arkansas Constitution quoted in note 2, *supra*.

91. 262 Ark. 663, 559 S.W.2d 928 (1978).

92. 217 Ark. 137, 228 S.W.2d 995 (1950).

93. *Aurora v. Zwerdinger*, 571 P.2d 1074 (Colo. 1977).

94. *Whitehead v. H & C Dev. Co.*, 204 Va. 144, 129 S.E.2d 691 (1963).

95. *Hoover v. Carpenter*, 188 Neb. 405, 407-08, 197 N.W.2d 11, 13 (1972). The court looked at

(1) the number of electors affected; (2) the existence of revenue bonds; (3) the temporal nature of the ordinance; (4) the statutory authority of the Power Review Board; (5) the need for expertise to determine the reasonableness of rates; and (6) the fairness of our denying or upholding the right of referendum. Only the first consideration points toward the right of referendum. The others point the opposite way.

*Id.*

96. ARK. STAT. ANN. §§ 73-202a, -202b (Cum. Supp. 1977).

97. City's Gorman Brief, *supra* note 71, at 66 (citing *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *McArthur v. Smallwood*, 225 Ark. 328, 281 S.W.2d 428 (1955)). The City argued that "it is manifest from Act 164 that the essence of ratemaking is administrative rather than legislative because all authority with respect thereto is delegated to an administrative agency." *Id.*

seemed well founded, especially in view of certain language in the Act which completely precludes the possibility that referendum or initiative powers can be exercised in relation to the utilities to which the Act applies: "Cities and towns in this State shall have no authority acting either through their governing bodies or by the initiative of their citizens to assume or exercise any jurisdiction or authority to fix and determine rates charged in Arkansas by electric, gas, or telephone public utilities."<sup>98</sup>

The City made three main arguments on appeal. First, it contended that mandamus was inappropriate because Bruce's "specific legal right" to have the referendum called had not been established.<sup>99</sup> Second, the City argued that the act of setting a date for a referendum election was discretionary in nature and that mandamus "is appropriate only when the . . . public body is called upon to perform a plain and specific duty required by law and requiring no exercise of discretion whatever and no official judgment."<sup>100</sup> In support of this second argument, the City cited an Arkansas case<sup>101</sup> with strikingly similar procedural facts wherein mandamus was sought to require a municipal governing body to call an election which had been petitioned for, in accordance with the law. Mandamus in that case was denied.<sup>102</sup> Third, the City contended that

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98. ARK. STAT. ANN. § 73-202b (Cum. Supp. 1977). Given that North Little Rock was charging the same rates as Arkansas Power and Light Company, another section of the Act is appropos:

The General Assembly determined that the existing procedures whereby rates described in this Act may be determined and fixed by the cities and towns of the State of Arkansas acting through their governing bodies or by the initiative of their citizens have resulted in a multiplicity of rate determination proceedings and forums which are costly and inefficient, have created conflicts between the rates charged in different cities and towns for the same services thus establishing unreasonable preferences to certain citizens, and have discriminated unfairly against the citizens of certain cities and towns to the detriment and at the expense of those citizens and the citizens of the entire state of Arkansas.

1977 Ark. Acts 164, § 3.

99. "The party applying for a writ of mandamus 'must show a specific legal right, and the absence of any other legal remedy to induce the court to award it. It follows, therefore, that without such a showing the court would not be warranted in awarding the writ.'" Brief for Appellees at 8-9, *Bruce v. Powell, rev'd sub nom. North Little Rock v. Gorman*, 264 Ark. 150, 568 S.W.2d 481 (1978) [hereinafter cited as *City's Bruce Brief*] (quoting *Goings v. Mills*, 1 Ark. 11, 17 (1837)).

100. *Id.* at 10 (citing *Willeford v. State*, 43 Ark. 62 (1884)).

101. *Miller v. Tatum*, 170 Ark. 152, 279 S.W. 1002 (1926).

102. *Id.* at 153-62, 279 S.W. at 1003-06. Voters had filed petitions for a recall election, aimed at two of the city's three commissioners. In a suit filed by citizens to prevent the election, a temporary injunction was issued to restrain the calling of the election. Upon the advice of the city attorney, the city commissioners voted against calling the election. Immediately thereafter, the chancery proceedings were dismissed. Mandamus to force the recall

Bruce, in the circuit court proceeding, was seeking to establish his right to have a referendum called and not to enforce a previously established right.<sup>103</sup>

### B. Arguments Against The City

Both sets of appellees in *Gorman* and the appellant in *Bruce* argued that rate making was legislative in nature.<sup>104</sup> Reliance was placed on a number of older cases which had in fact said in various contexts that rate making by a municipality was legislative.<sup>105</sup>

election was sought and granted in circuit court, it being alleged that the two commissioners sought to be recalled had conspired in the previous chancery court action to have themselves restrained from calling the election. The court reversed. Although it was plain to the Supreme Court that "the chancery court had no jurisdiction of the subject matter of that litigation," the trial court's finding that an injunction was in force and that the commissioners had been advised by the city attorney they would be in contempt if they called the election was accepted. The court stated

that mandamus will not lie to control an officer in the performance of a discretionary act nor to control the discretion of an officer in the performance of his duty where such discretion is vested by law, but will only lie to compel an officer to exercise his discretion where he has refused to act at all.

*Id.* at 160, 279 S.W. at 1005.

103. City's Bruce Brief, *supra* note 99, at 16. The City insisted that [b]efore a writ of mandamus may be issued, the circuit court must find that the petitioner has a "clear and certain legal right to the relief or remedy sought by the writ; and . . . the right to the writ must be clear, undoubted and unequivocal, so as not to admit of any reasonable controversy."

*Id.* (quoting *Naylor v. Goza*, 232 Ark. 515, 518, 338 S.W.2d 923, 925 (1960)). The thrust of the City's contention was that the right of Bruce to have the referendum called was not clearly established. In support of this contention, the city set forth a condensed version of the argument it was making as appellant from chancery court.

There were other points raised by the City as appellant from chancery, but the foregoing text and notes essentially condense the arguments relating to the merits of the respective lawsuits. For example, a good deal of the City's *Gorman* Brief, *supra* note 71, challenged the chancellor's ruling that the ordinance provided for "taxation." See City's *Gorman* Brief, *supra*, at 67-77. Also, in a bizarre twist of circumstances, the City in its reply brief in *Gorman* and in its Bruce Brief, *supra* note 99, was obliged to argue that a reversal in *Gorman* should not be based on jurisdictional grounds. See Reply Brief for Appellants at 12-14, *North Little Rock v. Gorman*, 262 Ark. 150, 568 S.W.2d 481 (1978) [hereinafter cited as City's Reply Brief]; City's Bruce Brief, *supra*, at 19-24.

104. See Brief of Appellee/Intervenors at 5-17 [hereinafter cited as *Holman Gorman Brief*] and Brief for Appellees *passim*, *North Little Rock v. Gorman*, 264 Ark. 150, 568 S.W.2d 481 (1978).

105. *Lawrence v. Jones*, 228 Ark. 1136, 1141, 313 S.W.2d 228, 231 (1958) ("Rate making being a legislative act, unless the city council has acted arbitrarily and unreasonably . . ., there is a *prima facie* presumption in favor of their correctness . . ."); *Carpenter v. Paragould*, 198 Ark. 454, 461, 128 S.W.2d 980, 983-84 (1939) (ordinance authorizing construction of sewer system and establishing sewer rates held to be "distinctly legislative"); *Southern Cities Dist. Co. v. Carter*, 184 Ark. 4, 11, 44 S.W.2d 362, 365, *cert. denied*, 285 U.S. 525 (1931) (in referendum context the following dictum appears: "The making of rates is an act legislative and not judicial in kind within the meaning of [amendment 7]").

The case most nearly on point was *Southern Cities Distributing Co. v. Carter*.<sup>106</sup> *Southern Cities* concerned a privately owned utility which had requested a rate increase from the Texarkana City Council for natural gas supplied to residents. The council granted the increase by passage of a resolution.<sup>107</sup> Referendum petitions were filed against the resolution. The measure was held to be subject to referendum, primarily on the ground that it amounted to an enlargement of Southern Cities' franchise.<sup>108</sup> Franchise enlargements are specifically mentioned by amendment 7 as being subject to referendum.<sup>109</sup> The *Southern Cities* court, however, also stated that the "making or fixing of rates is an act legislative and not judicial in kind within the meaning of this constitutional amendment."<sup>110</sup>

Addressing the *Scroggins-Greenlee* test, the City's opponents argued for a narrow construction.<sup>111</sup> To expand the "scope of the *Greenlee* case," they said "would require the people to refer initial proposals on a theory that any later action is administrative in order not to run the risk of being helpless when later expansions (or changes) become oppressive. In order to prevent absolute chaos, the *Greenlee* decision must be very narrowly construed . . . ."<sup>112</sup> The argument was for power, power to the people, to the voters. The plea was that the people be allowed to vote on "oppressive" matters,

106. 184 Ark. 4, 44 S.W.2d 362, cert. denied, 285 U.S. 525 (1931), cited in Holman Gorman Brief, *supra* note 104, at 5.

107. *Southern Cities Dist. Co. v. Carter*, 184 Ark. 4, 5, 44 S.W.2d 362, 363, cert. denied, 285 U.S. 525 (1931).

108. *Id.* at 10-11, 44 S.W.2d at 365.

109. Amendment 7 of the Arkansas Constitution provides that any "extension, enlargement, grant, or conveyance of a franchise . . . whether . . . by . . . ordinance, resolution or otherwise, shall be subject to referendum . . . ." After setting forth that language the court said "[s]uch language necessarily includes a resolution of the city council granting an increase of rates to the public utility for supplying and distributing gas to the people of the city under its contractual rights to do so, being but an extension or enlargement of its franchise." *Southern Cities Dist. Co. v. Carter*, 184 Ark. 4, 10-11, 44 S.W.2d 362, 365 (1931).

110. *Id.* at 11 (citing *Keller v. Potomac Elec. Power Co.*, 261 U.S. 428 (1923); *Bacon v. Rutland R.R.*, 232 U.S. 134 (1913); *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908); *Coal District Power Co. v. Booneville*, 161 Ark. 638, 256 S.W. 871 (1923); *Van Buren Water Co. v. Van Buren*, 152 Ark. 83, 237 S.W. 696 (1922); *Clear Creek Oil & Gas Co. v. Ft. Smith Spelter Co.*, 148 Ark. 260, 230 S.W. 897 (1921)). The legislative-administrative distinction was not raised. Further, none of the cases cited by the court in support of its statement were referendum cases; they all involved judicial review of action taken by administrative bodies. In fact, one of the cases cited by the City, *Whitehead v. H & C Dev. Co.*, 204 Va. 144, 129 S.E.2d 691 (1963) specifically had rejected an argument that *Prentis* supported the conclusion that rate making is legislative in a referendum context. The fact pattern that gave rise to the litigation in *Southern Cities* is now precluded by Act 164 of 1977 (ARK. STAT. ANN. §§ 73-2202a, -202b (Cum. Supp. 1977)); see notes 96-98, *supra*.

111. Holman Gorman Brief, *supra* note 104, at 11-12.

112. *Id.*

whether they were new laws or not: "The people have a right to decide what they will pay for, what they are willing to pay for, and how much they are willing to pay."<sup>113</sup>

In a surprise move, the intervening plaintiffs-appellees from chancery argued that the chancellor should have dismissed the lower court proceedings *sua sponte* for lack of jurisdiction.<sup>114</sup> Bruce, in his appeal from circuit, used the same argument.<sup>115</sup> Calling the basic controversy "an election contest" involving mere "political rights" as opposed to property rights, and, equating mandatory injunctive relief to a writ of mandamus,<sup>116</sup> the City's opponents contended that the entire lawsuit should have taken place in circuit rather than chancery.

### III. THE SUPREME COURT'S DECISION

#### A. *The Chancery Case*

The chancery appeal was dismissed "for want of jurisdiction."<sup>117</sup> In so ruling, the court did not explain why an allegation of illegal taxation in the amended chancery complaint<sup>118</sup> did not confer jurisdiction upon the chancery court,<sup>119</sup> since chancery has jurisdic-

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113. *Id.* at 16.

114. *Id.* at 17-19. The theme of this argument was three-fold: (1) Under amendment 7 of the Arkansas Constitution chancery court jurisdiction is limited to a review of the city clerk's determination of the referendum petition's "sufficiency." There had been no challenge in this regard; therefore, the chancery court was without jurisdiction. *Id.* at 17-18. (2) A determination of whether an ordinance is subject to referendum is "an election contest," and "chancery courts do not have jurisdiction to decide an election contest." *Id.* at 17 (quoting *Rich v. Walker*, 237 Ark. 586, 587, 374 S.W.2d 476, 478 (1964)). (3) The relief requested in chancery was in the nature of a mandatory injunction; a mandatory injunction under such circumstances is tantamount to mandamus, which may not be issued by a chancery court. *Id.* at 18 (citing *Nethercutt v. Pulaski County Special School Dist.*, 248 Ark. 143, 450 S.W.2d 777 (1970)).

115. Abstract and Brief for Appellant at 18, 27, 28, 30, *Bruce v. Powell, rev'd sub nom. North Little Rock v. Gorman*, 264 Ark. Adv. Sh. 150, 568 S.W.2d 481 (1978) [hereinafter cited as *Bruce Brief*].

116. Notwithstanding the language of ARK. STAT. ANN. § 33-102 (1962), a chancery court is without jurisdiction to issue mandamus. *Nethercutt v. Pulaski County Special School Dist.*, 248 Ark. 143, 450 S.W.2d 777 (1970). See note 57, *supra*.

117. *North Little Rock v. Gorman*, 264 Ark. 150, 157, 568 S.W.2d 481, 484 (1978).

118. *Gorman Transcript, supra* note 10, at 23; see note 34, *supra*.

119. The court did not address the City's argument that the plaintiff's allegation that the new rates constituted illegal taxation rendered chancery jurisdiction appropriate, thus validating a declaratory judgment on the subject matter. City's Reply Brief, *supra* note 103, at 13. The court implied that the City's attorney "and counsel for plaintiffs . . . recognized the jurisdictional problem, but sought to confer jurisdictional status on the chancery court by asking the chancery court to declare the rights of the parties" and held that the chancellor was without jurisdiction to render the declaratory judgment because "the subject matter is



tion to enjoin illegal tax measures.<sup>120</sup> In view of the fact that the chancellor's ruling declared the rates to be "in effect taxation,"<sup>121</sup> the dismissal of the chancery appeal does not seem justified.

Further, the court declared that "essentially political rights as distinguished from property rights" were involved and that the "vindication of one's political rights must be sought in . . . circuit court."<sup>122</sup> But no explanation was offered as to why the prospective loss to the City of nearly \$2,000,000 in general fund revenue was a mere "political right" and not a "property right."<sup>123</sup>

### B. *The Circuit Case*

In resolving the appeal from circuit in favor of power to the people, the court began by quoting from amendment 7, emphasizing that referendum powers apply to "municipal legislation of every character."<sup>124</sup> Relying upon *Scroggins v. Kerr*<sup>125</sup> and *Greenlee v. Munn*,<sup>126</sup> the court observed that not all ordinances are "municipal legislation" and that "the test resorted to in determining whether any . . . ordinance is legislative or administrative is to determine whether the proposition is one that makes a new law or . . . [executes] a law already in existence."<sup>127</sup> The court then addressed the "pivotal question": "Does Ordinance Number 4835 prescribe a new law, policy, or plan . . . [,] or is it one that executes a law or

not cognizable in a court of equity." *North Little Rock v. Gorman*, 264 Ark. 150, 156, 568 S.W.2d 481, 484 (1978).

120. ARK. STAT. ANN. § 32-106 (1962). See also *Harrison v. Norton*, 104 Ark. 16, 148 S.W. 497 (1912), cited in City's reply Brief, *supra* note 103, at 13. Further, there is no question that chancery courts can issue declaratory judgments where the declaration's subject matter is within equity jurisdiction. *Jackson v. Smith*, 236 Ark. 419, 366 S.W.2d 278 (1963).

121. *Gorman* Transcript, *supra* note 10, at 144.

122. *North Little Rock v. Gorman*, 264 Ark. 150, 156, 568 S.W.2d 481, 484 (1978) (citing *Catlett v. Republican Party*, 242 Ark. 283, 413 S.W.2d 651 (1967)). The facts in *Catlett* were vastly different from the facts in *Gorman*. In *Catlett* a declaratory judgment was sought on election conduct statutes. There is language in the opinion which indicates that "matters of public taxation" should be litigated in chancery. *Catlett v. Republican Party*, 242 Ark. 283, 285, 413 S.W.2d 651, 653 (1967) (quoting *Miller v. Tatum*, 170 Ark. 152, 279 S.W. 1002 (1926)).

123. The court said that under amendment 7 of the Arkansas Constitution "it is well settled that chancery courts . . . have jurisdiction only to review the action of a . . . city clerk in determining the sufficiency of [referendum] petitions . . ." *North Little Rock v. Gorman*, 264 Ark. 150, 156, 568 S.W.2d 481, 484 (1978). The court stated that the sufficiency of the petitions had not been challenged, and did not address the City's administrative-legislative argument that the ordinance's referrability constituted a challenge to the petition. City's Bruce Brief, *supra* note 99, at 20.

124. *North Little Rock v. Gorman*, 264 Ark. 150, 157, 568 S.W.2d 481, 484-85 (1978).

125. 217 Ark. 137, 228 S.W.2d 995 (1950).

126. 262 Ark. 663, 559 S.W.2d 928 (1978).

127. *North Little Rock v. Gorman*, 264 Ark. 150, 157, 568 S.W.2d 481, 485 (1978).

plan already in existence?"<sup>128</sup> The court summarized the City's argument "that the history of rate making authority by the City . . . dictates a finding that Ordinance Number 4835 is administrative in nature and, therefore, is no[t] subject to the referendum provisions of the Constitution."<sup>129</sup>

The court acknowledged the statutes which authorize a city to own and operate an electric distribution system<sup>130</sup> and to establish a commission to manage such a system.<sup>131</sup> The court further acknowledged the ordinance which created an electric commission for North Little Rock and retained for the City Council the authority to set rates.<sup>132</sup> Thus, the court stated the City's argument was essentially that the enactment of rates by the adoption of Ordinance 4835 "was merely the administration" of the statutes and ordinance previously mentioned.<sup>133</sup>

At this point the court seemed to be on the verge of ruling in favor of the City. There had been no refutation of the points of law argued by the City. However, Justice Howard apparently injected some new criteria into the legislative-administrative distinguishing test. These criteria are difficult to pinpoint in the opinion because the reasoning is somewhat elusive.

Justice Howard stated that the City's argument was "interesting and at first blush seems plausible," but he went on to say that he was "not persuaded that this argument comes to grips with an element contained in the rate making process that clearly and unequivocally makes Ordinance No. 4835 legislative as opposed to administrative."<sup>134</sup> He described this "element" as follows:

First, the Council expressly reserved the power in Ordinance Number [4755] to enact ordinances establishing rate schedules for electric service; and, secondly, Ordinance Number 4835 was enacted for the expressed purpose of producing revenue for the City's General Fund as opposed to generating funds for the operation of the electric department. Moreover, it has been conceded . . . that the rate increase proposed under Ordinance Number 4835 is designed to benefit the City's General Fund. Under these circumstances, . . . having duly complied with [amendment 7], the peo-

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128. *Id.* at 158, 568 S.W.2d at 485.

129. *Id.*

130. ARK. STAT. ANN. § 19-2318 (1968).

131. ARK. STAT. ANN. § 19-3934 to 3938 (Cum. Supp. 1977).

132. N. Little Rock, Ark., Ordinance 4755 (May 9, 1977).

133. North Little Rock v. Gorman, 264 Ark. 150, 158, 568 S.W.2d 481, 485 (1978).

134. *Id.*

ple . . . should be afforded an opportunity to voice their approval or disapproval of the proposition.<sup>135</sup>

The court's conclusion was that Bruce was entitled to mandamus requiring the city council to call the election, calling the council's duty in this regard "clearly a ministerial responsibility."<sup>136</sup>

The "element" which, according to the court, the City's argument did not come to grips with but which "clearly and unequivocally" categorizes an ordinance fixing electric rates as legislative rather than administrative seems, from Justice Howard's language, to be composed of three elements: (1) a specific reservation of authority to fix rates by the city council; (2) the intent to produce revenue for general municipal purposes as well as for electric department operation; and (3) the intent to incorporate into the rate structure a sufficient surplus to benefit the general fund.

As to specific reservation of authority to fix rates, the fact that the city council specifically reserved rate making power to itself in Ordinance 4755 did not create any new authority for the council but merely expressed its intention not to transfer the rate making authority to the electric commission.<sup>137</sup> But, even if it were assumed that the ordinance did *create* that authority, the time for referendum on that ordinance had long since expired when Ordinance 4835 was enacted effecting a rate increase.<sup>138</sup> In other words, when the new set of rates was adopted, there was law already on the books authorizing the adoption of rates by ordinance of the City Council. The prior case law had distinctly stated that if a measure sought to be referred was authorized by law already in effect, then such a measure was to be considered administrative and not subject to referendum.<sup>139</sup> The court never dealt with the fact that rate making by ordinance was in fact authorized by state law and local ordinances.<sup>140</sup>

The second and third elements listed previously are really components of one element, that being the fact that the North Little Rock electric rates were designed to yield a sufficient surplus so that a significant amount of money could be transferred to the general fund to be used for general municipal purposes. The court stated

135. *Id.* at 158-59, 568 S.W.2d at 485.

136. *Id.*

137. *See* N. Little Rock, Ark., Ordinance 4755 (May 9, 1977).

138. Ordinance 4755 was enacted May 9, 1977, and Ordinance 4835 on December 27, 1977.

139. *See, e.g.,* Greenlee v. Munn, 262 Ark. 663, 559 S.W.2d 928 (1978); Scroggins v. Kerr, 217 Ark. 137, 228 S.W.2d 995 (1950).

140. North Little Rock v. Gorman, 264 Ark. 150, 157, 568 S.W.2d 481, 485 (1978).

that the determinative question in the case was whether the ordinance sought to be referred prescribed new law or policy or executed law or policy already being followed.<sup>141</sup> The court had previously noted that the City had historically relied upon substantial amounts of revenue from electric rates in order to fund its general budget.<sup>142</sup> Further, there was never any refutation by the City's opponents that the very concept of the transfer of electric department revenue to the general fund for general municipal purposes was an integral part of the City's financial history and authorized by the Arkansas Home Rule Act.<sup>143</sup> The concept of this transfer, or the generation of a surplus to facilitate it, appears to be the legislative evil which the court was determined to let the people vote on, notwithstanding the fact that it was authorized by law already on the books.

It is difficult to discover in the decision any new principles of law with respect to municipal corporations vis-a-vis the citizens' right of referendum. The result in *Gorman* is diametrically opposed to cases from other jurisdictions<sup>144</sup> whose black letter concepts in this area of law are the same as those in Arkansas. The court, however, neither cited any of these cases nor attempted to distinguish them. Nor did the court address the City's argument regarding Act 164 of 1977<sup>145</sup> which delegated rate making authority for nonmunicipally owned utilities to the Arkansas Public Service Commission, an administrative agency.

In summary, the reasoning of the majority opinion seems largely to rest upon ipse dixit. The outcome does not seem justified in light of the very law cited by the court as controlling. The injection of new "element" into the legislative-administrative distinction made the difference, although this element, when analyzed, seems to place the issue back into the purview of the previously established judicial test which would seem to have required the opposite result.

### C. *The Concurring Opinion*

Justice Fogleman filed a separate opinion, concurring on "the narrow grounds on which the opinion is based," stating these to be the retention by the city council of "the sole responsibility for rate making when it turned the operation of the electrical distribution

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141. *Id.* at 158, 568 S.W.2d at 485.

142. *Id.* at 153 n.2, 568 S.W.2d at 482-83 n.2.

143. See ARK. STAT. ANN. § 19-1043 (Cum. Supp. 1977) (cities "may exercise any function . . . not in conflict with state law" over "the definition, use and control of surplus revenues of municipally owned utilities"), cited in City's *Gorman* Brief, *supra* note 71, at 70.

144. See cases cited note 89, *supra*.

145. ARK. STAT. ANN. §§ 73-202a. -202b (Cum. Supp. 1977).

system over to an independent commission" and the concession by all "that a major objective in the rate making by ordinance was to insure a definite surplus or profit for definite municipal purposes."<sup>146</sup> He agreed with the City that a municipally owned utility may be operated for a profit and cited various statutes which authorize different uses for the surplus income generated by the utility.<sup>147</sup> Yet, without addressing the *Scroggins-Greenlee* administrative-legislative distinguishing test, he adhered to the proposition that "[r]ate making for a franchised utility has always been considered to be a legislative function" and that "[t]here is really little difference in rate making for a municipally owned utility operated by an independent commission."<sup>148</sup>

There are two disturbing aspects of the concurring opinion. In one portion, Justice Fogleman seemed to state that a type of subterfuge on the part of the City might have insulated the rate making function against the referendum power of the people: "It seems quite possible that the rate making process for a municipally owned utility can be performed in a manner in which the commission controlling and operating it acts administratively."<sup>149</sup> He suggested that the council might limit its role to one of "reviewing or approving or disapproving rates fixed by a commission" and surmised that in such circumstances, "it might well be that it could be said to act quasi-judicially."<sup>150</sup> In setting forth these suggestions, Justice Fogleman did not explain why rate making, if it is truly legislative, may be delegated by the legislature to a commission which could perform the same function administratively.<sup>151</sup>

Perhaps the most disturbing aspect of the opinion, however, is that it comes very close to addressing one of the City's key arguments, yet fails to do so. The City had argued that rate making may be "legislative and not judicial"<sup>152</sup> in the context of judicial review and yet be *administrative and not legislative* in the context of the

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146. *North Little Rock v. Gorman*, 264 Ark. 150, 159-60, 568 S.W.2d 481, 486 (1978) (Fogleman, J., concurring).

147. *Id.* at 160-61, 568 S.W.2d at 486 (citing ARK. STAT. ANN. §§ 19-3901, -3931 (1968) (authorizing payment of bonded indebtedness of certain improvement districts; authorizing use for off-street parking facilities, sanitation facilities, hospital facilities, public park buildings, improvements and facilities, auditoriums, convention centers, streets and roadways and airport improvement facilities).

148. *Id.* at 160, 568 S.W.2d at 186.

149. *Id.* at 161, 568 S.W.2d at 486.

150. *Id.*

151. See cases cited note 97, *supra*.

152. See *Southern Cities Dist. Co. v. Carter*, 184 Ark. 4, 11, 44 S.W.2d 362, 365, *cert. denied*, 285 U.S. 525 (1931).

amendment 7 referendum power.<sup>153</sup> Reliance was placed upon *Scroggins v. Kerr*<sup>154</sup> which had specifically said that "the sense in which the word 'legislation' is used in [the amendment 7] connection is not always the same as that in which it is used in other contexts. Conduct allowed as 'legislative' in character for one purpose may be deemed 'not legislative' for some other and different purpose."<sup>155</sup> Justice Fogleman's assertion that the City Council could have reserved to itself a quasi-judicial review function after delegating rate making authority to a commission would have been the ideal context in which to address that particular argument of the City.

#### IV. THE AFTERMATH

In the wake of the Arkansas Supreme Court's ruling, the North Little Rock City Council set the date for the referendum as September 12, 1978.<sup>156</sup> In what was to be one of the most heated political struggles of the election year, it is ironic that no candidates were vying for office.

Both sides began to organize. The man who brought the original lawsuit in chancery formed a "Committee for Lower Electric Rates."<sup>157</sup> The Major of North Little Rock issued blanket invitations to electric rate opponents and the citizenry at large to meet with him so that he might explain city finances and the electric rate structure.<sup>158</sup> The North Little Rock weekly newspaper emphasized that the rates in North Little Rock were the same as in other cities, taking the stance that there was no need for lower rates.<sup>159</sup>

As election day drew near, the campaign intensified. On the streets, the opposition to Ordinance 4835 carried signs and protested their high electric bills. City officials and others in favor of the higher rates stressed the cutback in city services that would be necessary if the rates were rolled back. These assertions were called "scare tactics" by the opposition, who said that the "fat" in the city's budget should be trimmed. These and other aspects of the

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153. City's Reply Brief, *supra* note 103, at 5-6 (citing *Scroggins v. Keer*, 217 Ark. 137, 144, 228 S.W.2d 995, 999 (1950)).

154. 217 Ark. 137, 228 S.W.2d 995 (1950).

155. *Id.* at 144, 228 S.W.2d at 999.

156. See N. Little Rock, Ark., Resolution 1549 (July 24, 1978).

157. N. Little Rock Times, July 27, 1978, at 1A, col. 1.

158. N. Little Rock Times, Aug. 17, 1978, at 1A, col. 1.

159. Editorial, *Referendum Comes at a Dangerous Time*, N. Little Rock Times, July 27, 1978, at 4A, col. 1.

debate filled the newspapers daily.<sup>160</sup>

On September 12, 1978, the rate opponents carried the day by a margin of 5,451 to 4,182,<sup>161</sup> a margin which left some city officials saying that they needed just one more referendum in order to convince the voters of the soundness of their position. Nevertheless, the time had come to revise the budget. In a few days, the council enacted a series of budgetary decreases amounting to some \$380,000 for the balance of the calendar year 1978 alone.<sup>162</sup> Included in these measures were the layoffs of several dozen employees and the reduction of funding to various departments and agencies that were dependent upon general fund revenue.<sup>163</sup> Among the employees terminated were twenty-one school crossing guards,<sup>164</sup> as well as several policemen and firemen.<sup>165</sup> One fire station had to be closed.<sup>166</sup> Eighty percent of the budgeted funds for the parks and recreation department were cut from the remaining three months' budget.<sup>167</sup>

Perhaps in response to Justice Fogleman's suggestion that delegation of the rate making power would insulate the rate making function from referendum, a plan was introduced to the council to allow the electric commission to take over that responsibility.<sup>168</sup> As of this writing, however, no such plan has been adopted.

*North Little Rock v. Gorman*<sup>169</sup> looms ominous for the cities of Arkansas which must depend on surplus utility revenue as a means of generating revenue to run themselves. The practical effect, if the

160. See Woodruff, *11th-Hour Appeal Made by Powell on Electric Rates*, Arkansas Gazette, Sept. 12, 1978, at 5A, col. 1; Woodruff, *Officials Predict Grim Aftermath if Rates Rejected*, Arkansas Gazette, September 8, 1978, at 7A, col. 1; Blotzer, *Powell Says Rate Defeat Would Devastate NLR*, Arkansas Democrat, Sept. 9, 1978, at 7A, Col. 2; Editorial, *Don't Risk Return of 'Dogtown'*, N. Little Rock Times, Sept. 7, 1978, at 4A, col. 1; Blotzer, *NLR Electric Vote: Yes or No, You Lose*, Arkansas Democrat, Sept. 3, 1978, at 14A, col. 4.

161. See Woodruff, *NLR Voters Ignore Powell's Warnings, Reject Electric Rates*, Arkansas Gazette, Sept. 13, 1978, at 1A, col. 8.

162. See Woodruff, *Council Follows Powell Lead, Cuts Budget \$380,000*, Arkansas Gazette, Sept. 26, 1978, at 3A, col. 1.

163. See Woodruff, *Paring of Parks Department Budget Will Affect More than Recreation*, Arkansas Gazette, Sept. 29, 1978, at 6A, col. 1; Woodruff, *Employees Told of Layoffs After Council's Budget Cut*, Arkansas Gazette, Sept. 27, 1978, at 10A, col. 1.

164. See Woodruff, *Mayor Seeking CETA Positions for 23 Fireman*, Arkansas Gazette, Sept. 28, 1978, at 6A, col. 1.

165. *Id.* See also Blotzer, *NLR Workers Have Hardest Time in No-Win Situation*, Arkansas Democrat, Oct. 1, 1978, at 4A, col. 1.

166. See Woodruff, *Six Talk About Issues at Unannounced Meet with Five Candidates*, Arkansas Gazette, Oct. 15, 1978, at 4A, col. 7.

167. Woodruff, *Paring of Parks Department Will Affect More Than Recreation*, *supra* note 162, at 6A, col. 1.

168. See Woodruff, *Plan Allowing Panel to Set Rates Offered*, Arkansas Gazette, Sept. 23, 1978, at 10A, col. 6.

169. 264 Ark. Adv. Sh. 150, 568 S.W.2d 481 (1978).

case is to be taken literally, is that everytime a rate increase is enacted beyond the bare minimum to operate the particular utility, it will be deemed legislation which is subject to referendum under amendment 7.

Amendment 7 provides a means for a legislative veto of the people's voice in this regard and specifies that measures approved by the people may be overturned by a two-thirds vote of the city council.<sup>170</sup> Presumably, such action on the part of the council would put an end to a particular measure, although this was not tested in the *Gorman* situation. The point, nevertheless, is that the court's ruling seems to allow the matter of adopting rates sufficient to meet the needs for which they are intended to become a game of political badminton, with the rate ordinance serving as the shuttlecock. In that *Gorman* construes the Constitution, more than a mere legislative act from the General Assembly is needed to overcome its impact. Perhaps the delegates to the Constitutional Convention will take the *Gorman* situation into account when they are drafting a proposed successor to amendment 7.

The difficult question will probably remain unanswered: What was the reason for the Arkansas Supreme Court's decision in *Gorman*? It may be speculated that the court followed somewhat of a nationwide trend toward allowing the people to vote on measures that involve taxation, such as California's Proposition 13 and a recent proposal in Arkansas to do away with sales tax on food and drugs.<sup>171</sup> Unfortunately, the holding does not seem to be rooted in the law which should have governed, but rather springs from Justice Howard's new "element," which, as has been demonstrated, is slightly elusive.

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170. ARK. CONST. amend. 7.

171. Proposed amendment 59, defeated in November 7, 1978, general election.



