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## PUTTING EQUALITY TO A VOTE: INDIVIDUAL RIGHTS, JUDICIAL ELECTIONS, AND THE ARKANSAS SUPREME COURT

*Billy Corriher\**

### I. INTRODUCTION

The U.S. Supreme Court recently determined that an Arkansas Supreme Court decision “denied married same-sex couples access to the ‘constellations of benefits . . . linked to marriage,’” quoting its 2015 marriage equality ruling.<sup>1</sup> The High Court overruled the state supreme court and struck down an Arkansas law treating same-sex couples differently with respect to their children’s birth certificates.<sup>2</sup> As the Court’s per curiam decision recognized, the ruling in *Obergefell v. Hodges* said that states may not “exclude same-sex couples from civil marriage on the same terms and conditions,” including “birth and death certificates.”<sup>3</sup> The Arkansas Supreme Court’s handling of marriage equality and another civil rights issue that was controversial in Arkansas—school desegregation—exemplifies how elected judges can limit individual rights in the face of political pressure.<sup>4</sup> An appointed Arkansas Supreme Court would be more likely to defend individual rights from violation by the government than an elected court.

Studies have found evidence that judges respond to political pressure.<sup>5</sup> In fact, multiple studies have found that supreme courts elected in expensive, politicized judicial elections exhibit these trends, including rulings

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1. *Pavan v. Smith*, 137 S. Ct. 2075, 2078 (2017) (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015)).

2. *Id.* at 2078–79.

3. *Id.* at 2078 (quoting *Obergefell*, 135 S. Ct. at 2601).

4. See *infra* Part II.

5. See Joanna M. Shepherd, *The Influence of Retention Politics on Judges’ Voting*, 38 J. LEGAL STUD. 169, 169–71 (2009) (a study by Prof. Joanna Shepherd of a data set of state supreme court decisions from 1995 to 1998 found evidence to support “the widespread belief that judges respond to political pressure in an effort to be reelected or reappointed.” She concluded that voters’ political leanings were strongly associated with judges’ voting records, but “the voting of judges who do not face pressure from retention politics—judges with permanent tenure and judges in their last term before mandatory retirement—does not reflect the political preferences of the same groups” of voters).

against LGBT rights, criminal defendants, and plaintiffs in tort cases.<sup>6</sup> At the federal level, framers like Alexander Hamilton argued for an independent judiciary to counter political pressure.<sup>7</sup> Some of the studies on elected judges confirm Hamilton's view on judicial selection by showing that judges who are not facing reelection or reappointment do not exhibit the same tendencies as those who want another term on the bench.<sup>8</sup> Federal judges are on the bench for life or until their retirement because judges who never have to be reappointed or reelected can make decisions based solely on the law and the facts.<sup>9</sup>

Federal judges, who are insulated from political pressure, led the way in the fights for marriage equality and racially-integrated schools in Arkansas, even if their rulings were not popular in the state.<sup>10</sup> The elected Arkansas Supreme Court, in contrast, has generally stayed in lockstep with public opinion and the political branches on high profile civil rights issues, avoiding rulings that would have been controversial among voters.<sup>11</sup> The state supreme court acceded to the state's attempts to limit or delay the implementation of the U.S. Supreme Court's rulings in *Brown v. Board of Education*<sup>12</sup> and *Obergefell v. Hodges*.<sup>13</sup>

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6. See, e.g., Eric Lesh, *Justice Out of Balance: How the Election of Judges and the Stunning Lack of Diversity on State Courts Threaten LGBT Rights*, LAMBDA LEGAL (2016), [http://www.lambdalegal.org/sites/default/files/justiceoutofbalance\\_final\\_rev1\\_2.pdf](http://www.lambdalegal.org/sites/default/files/justiceoutofbalance_final_rev1_2.pdf); Joanna Shepherd & Michael S. Kang, *Skewed Justice: Citizens United, Television Advertising and State Supreme Court Justices' Decisions in Criminal Cases*, SKEWED JUSTICE (2014), <http://skewedjustice.org/>; Billy Corriher, *No Justice for the Injured: Big Business Is Funneling Campaign Cash to Judges who Allow Corporate Wrongdoers to Escape Accountability*, CTR. FOR AM. PROGRESS (2013), <https://cdn.americanprogress.org/wp-content/uploads/2013/05/NoJusticeforInjured.pdf>.

7. THE FEDERALIST NO. 78 (Alexander Hamilton).

8. Some studies have found changes in judges' voting behavior as their reelection nears. See Michael Kang and Joanna Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69, 75 (2011) (a study by Professors Joanna Shepherd and Michael Kang found correlations between contributions from business groups and rulings in favor of businesses, but "when elected judges are serving their last term before mandatory retirement, their favoring of business litigants essentially disappears."); See also Melissa Hall, *Constituent Influence in State Supreme Courts: Conceptual Notes and a Case Study*, 49 J. OF POLITICS, 1117, 1117-24 (1986) (concluding that judges facing reelection pressure are less likely to dissent in high profile cases if their views are inconsistent with their voters' views).

9. U.S. CONST. art. III, § 1.

10. See *infra* Part II.

11. Univ. of Ark., *The Arkansas Poll* (2017), <https://fulbright.uark.edu/departments/political-science/partners/arkansas-poll.php>; Julie Ray, *Reflections on the "Trouble in Little Rock," Part II*, GALLUP NEWS (Mar. 4, 2003), <http://news.gallup.com/poll/7900/reflections-trouble-little-rock-part.aspx>.

12. 347 U.S. 483 (1954)

13. 135 S. Ct. 2584. See *infra* Part II.

As Arkansas struggled against the desegregation of its schools, Justice Jim Johnson fought to preserve white supremacy,<sup>14</sup> and his colleagues on the state supreme court acquiesced to the political branches' efforts to delay complying with *Brown*.<sup>15</sup> Ultimately, the U.S. Supreme Court intervened in *Cooper v. Aaron* to end Arkansas' obstinacy,<sup>16</sup> with the backing of President Dwight Eisenhower's National Guard troops.<sup>17</sup>

More recently, the Arkansas Supreme Court's record on LGBT rights has been disappointing, to say the least. An Arkansas justice admitted that his court delayed ruling in a 2014 same-sex marriage case because of the political implications,<sup>18</sup> and the court in 2016 ruled that a mother had no right to be listed on her child's birth certificate, along with her wife.<sup>19</sup> The Arkansas Supreme Court ruled that the state could continue treating same-sex couples differently,<sup>20</sup> but the U.S. Supreme Court recently overturned this decision.<sup>21</sup> As in *Cooper* half-a-century earlier, the High Court instructed state officials to implement its groundbreaking civil rights ruling.<sup>22</sup>

In contrast, federal courts have enforced individual constitutional rights, even when a political majority in the state objects.<sup>23</sup> The legal battles over civil rights in Arkansas shed light on the political pressure that can influence elected judges. Hamilton said that without an independent judiciary that can check political majorities, all of the Constitution's "particular rights or privileges would amount to nothing."<sup>24</sup> When judges must be reelected to keep their jobs, constitutional values like justice and equality are left solely in the hands of a political majority. Elected judges, therefore, cannot serve the counter-majoritarian role that the system of separation of powers sometimes requires.<sup>25</sup>

14. Gene Lyons, *Racist "Justice" Is Dead, but not Gone*, SALON (Feb. 17, 2010), [http://www.salon.com/2010/02/18/justice\\_4/](http://www.salon.com/2010/02/18/justice_4/).

15. *Garrett v. Faubus*, 230 Ark. 445, 446–48, 323 S.W.2d 877, 877–78 (1959).

16. *Cooper v. Aaron*, 358 U.S. 1 (1958).

17. Exec. Order No. 10730, 22 Fed. Reg. 7628 (Sept. 24, 1957).

18. *Ex-Justice: Arkansas Supreme Court Voted to Strike Gay Marriage Ban, Withheld Ruling*, ARKANSAS NEWS (Nov. 10, 2015), <http://www.arkansasnews.com/news/arkansas/ex-justice-state-supreme-court-voted-strike-ban-gay-marriage-held-ruling>.

19. *Smith v. Pavan*, 2016 Ark. 437, at \*18, 505 S.W.3d 169, 181 (2016), *judgment rev'd*, 137 S. Ct. 2075 (2017) (the court upheld an Arkansas law that requires a husband to be automatically listed as a parent on a birth certificate, though there is no such presumption for wives of women who give birth).

20. *Id.*

21. *See Pavan*, 137 S. Ct. 2075.

22. Petition for Writ of Certiorari, *Pavan*, 137 S. Ct. 2075 (No. 16-992), *available at* <http://www.scotusblog.com/wp-content/uploads/2017/03/16-992-cert-petition.pdf>.

23. *See supra* note 11.

24. Hamilton, *supra* note 7.

25. Joanna Shepherd & Michael S. Kang, *Judging Judicial Elections*, 114 Mich. L. REV. 929, 939 (2016).

Part II of this essay discusses two examples of the Arkansas Supreme Court failing to protect constitutional rights in the face of political pressure, contrasting the state judiciary's role with that of the federal courts in enforcing constitutional rights to marriage equality and to integrated public schools.<sup>26</sup> Part III then acknowledges that, in recent years, the Arkansas Supreme Court has broadly interpreted the right to jury trial in civil cases and other related provisions of the state constitution.<sup>27</sup> However, healthcare providers and other special interests critical of these rulings are funding the campaigns of supreme court candidates that they prefer.<sup>28</sup> Part III also discusses how these special interests are using "soft on crime" attack ads to elect their preferred judges, and how the rights of criminal defendants may be caught in the crossfire.<sup>29</sup> The essay concludes in Part IV by arguing that Arkansas's highest court should be chosen in a way that maximizes its independence from political pressure.<sup>30</sup> This would help to ensure that judges are not chosen based on their political acumen or ability to attract campaign contributors. The Arkansas Bar has proposed a system in which justices are appointed by an independent commission, based on qualifications, for a single term.<sup>31</sup> Arkansas should adopt this amendment. It would give justices the independence needed to protect individual rights and check the power of the political branches.

## II. BOWING UNDER POLITICAL PRESSURE

### A. The Judiciary's Role in Desegregating Little Rock's Schools

History views Arkansas Governor Orval Faubus in a harsh light, due to his attempts to stop school desegregation in the late 1950s.<sup>32</sup> Behind the scenes, Arkansas Supreme Court Justice Jim Johnson played a crucial role

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26. See *infra* Part II.

27. See *infra* Part III. See, e.g., *Lake View Sch. Dist. No. 25 v. Huckabee*, 370 Ark. 139, 257 S.W.3d 879 (2007) (assessing the legislature's compliance with rulings that it was not providing a constitutionally adequate education to some school districts); *Bayer CropScience LP v. Schafer*, 2011 Ark. 518, 385 S.W.3d 822 (2011) (striking down a limit on punitive damages awards).

28. Billy Corriher, *Koch Brothers and D.C. Conservatives Spending Big on Nonpartisan State Supreme Court Races*, CTR. FOR AM. PROGRESS (August 2014), [https://cdn.americanprogress.org/wp-content/uploads/2014/08/Stat\\_eSupremeCourtsv2.pdf](https://cdn.americanprogress.org/wp-content/uploads/2014/08/Stat_eSupremeCourtsv2.pdf).

29. See *infra* Part III.

30. See *infra* Part IV.

31. See TASK FORCE ON MAINTAINING A FAIR AND IMPARTIAL JUDICIARY, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON MAINTAINING A FAIR AND IMPARTIAL JUDICIARY 13 (2016).

32. See *Cooper v. Aaron*, 358 U.S. 1 (1958); *Little Rock Nine*, HIST., <http://www.history.com/topics/black-history/central-high-school-integration> (last visited Feb. 15, 2017).

in pushing the governor towards his infamous, hardline stance.<sup>33</sup> Before he joined the court in 1958, Justice Johnson drafted a state constitutional amendment that rejected the *Brown* decision and sought to preserve a racist education system.<sup>34</sup> Justice Johnson also won a seat in the state legislature in 1950, and soon after, he brought the White Citizens' Council to Arkansas.<sup>35</sup> The future justice actually challenged the governor in 1956, criticizing Faubus for not opposing integration strongly enough.<sup>36</sup> Governor Faubus kept his seat, but Justice Johnson's popularity as a gubernatorial candidate may have played a key role in pushing the governor to oppose racial integration. Justice Johnson even claimed that he fed the governor false information about a mob planning to converge on Little Rock's Central High School as it was desegregating.<sup>37</sup> Governor Faubus used the perceived threat of violence—by mobs or students—to justify closing schools in the 1958-59 school year, under authority he had just been granted by the state legislature.<sup>38</sup>

Justice Johnson was elected to the supreme court in 1958.<sup>39</sup> During his tenure, the Arkansas Supreme Court's approach to desegregation was similar to that of the governor, and it may have reflected the prevailing sentiment among white voters.<sup>40</sup> In *Garrett v. Faubus*, the court upheld the law allowing the governor to close schools.<sup>41</sup> The majority's opinion commented on *Brown*: "We deeply deplore the fact that the Supreme Court of the United States did not follow the clear legal precedents announced in *Plessy v. Ferguson*."<sup>42</sup> The court said that *Plessy* "must have been reassuring to the people for nearly fifty years."<sup>43</sup> The justices acknowledged that it must respect the *Brown* decision, but it upheld a law that it acknowledged was "intended to slow the implementation of integration . . . until a lawful way could be devised to escape it entirely."<sup>44</sup>

33. Lyons, *supra* note 14.

34. KEN GORMLEY, *THE DEATH OF AMERICAN VIRTUE: CLINTON V. STARR* 100-01 (2010).

35. John Kirk, *The Election that Changed Arkansas Politics*, *ARK. TIMES* (March 28, 2012), <https://www.arktimes.com/arkansas/the-election-that-changed-arkansas-politics/Content?oid=2140398>.

36. *Id.*; JOE CONASON & GENE LYONS, *THE HUNTING OF THE PRESIDENT: THE TEN-YEAR CAMPAIGN TO DESTROY BILL AND HILLARY CLINTON* 68-69 (2000).

37. Lyons, *supra* note 14.

38. *Garrett v. Faubus*, 230 Ark. 445, 446-48, 323 S.W.2d 877, 877-78 (1959).

39. Editorial, *What's at Stake When Judges Become Politicians*, *ARK. DEMOCRAT-GAZETTE*, Apr. 26, 2006.

40. *Garrett*, 230 Ark. at 454, 323 S.W.2d at 881; Ray, *supra* note 11.

41. *Garrett*, 230 Ark. at 450, 323 S.W.2d at 879.

42. *Id.* at 450, 323 S.W.2d at 879.

43. *Id.* at 454, 323 S.W.2d at 881.

44. *Id.* at 453, 323 S.W.2d at 881.

The court in several passages mentions voters' opposition to integration. A year after Justice Johnson's election, the court said, "we take judicial notice of numerous elections where the people have expressed their feelings in no uncertain terms."<sup>45</sup> Integration was described by the *Garrett* court as "a social problem fraught with frightening consequences in the minds of many people."<sup>46</sup> The court said that the course of desegregation "can be better charted by those closest to the people affected and therefore better acquainted with local conditions."<sup>47</sup> The justices said that Arkansans would prefer this to "being forced into acceptance . . . by a few people who are far removed from the scene and who, they feel, are not sympathetic or understanding."<sup>48</sup> One concurring justice warned that integration would lead to "extracurricular activities involving social contacts," including sports and school dances.<sup>49</sup>

Justice Johnson joined in a colleague's dissent that also criticized *Brown* but found that the school-closings law violated the state constitution.<sup>50</sup> The dissent seemed to take pride in Arkansas's defiance of *Brown*: "There began in the Southern States—of which Arkansas is proud to be a part—a determining and never-to-be-ended campaign to prevent racial integration in the public schools."<sup>51</sup>

The federal courts, however, strived to implement *Brown* and rejected the state's attempt to delay desegregation.<sup>52</sup> In the fall of 1957, two days after a state judge issued a temporary restraining order to stop the integration of Central High, a federal judge overruled this decision and enjoined the plaintiff seeking the order.<sup>53</sup> The Eighth Circuit U.S. Court of Appeals affirmed the federal judge's ruling.<sup>54</sup>

In its landmark *Cooper v. Aaron* decision, the U.S. Supreme Court rejected Arkansas's effort to thwart desegregation and harshly criticized the state's elected officials for attempting to avoid implementing *Brown*.<sup>55</sup> "The constitutional rights of children . . . can neither be nullified openly and directly . . . nor nullified indirectly . . . through evasive schemes for segregation."<sup>56</sup> The Court acknowledged that violence had erupted, but it blamed the state's elected officials for inflaming racial tensions. "The constitutional

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45. *Id.* at 459, 323 S.W.2d at 884.

46. *Id.* at 458, 323 S.W.2d at 884.

47. *Garrett*, 230 Ark. at 456, 323 S.W.2d at 882.

48. *Id.* at 458, 323 S.W.2d at 884.

49. *Id.* at 470–71, 323 S.W.2d at 890–91 (Robinson, J., concurring).

50. *Id.* at 482–83, 323 S.W.2d at 896–97 (McFaddin, J., dissenting).

51. *Id.* at 482, 323 S.W.2d at 897.

52. *See Cooper v. Aaron*, 358 U.S. 1 (1958).

53. *Thomason v. Cooper*, 254 F.2d 808, 809–10 (8th Cir. 1958).

54. *Id.* at 811.

55. *Cooper*, 358 U.S. at 4.

56. *Id.* at 17.

rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature.”<sup>57</sup> The school board in Little Rock told the Court that all three branches of Arkansas’s government opposed desegregation.<sup>58</sup> The Court responded: “No state . . . judicial officer can war against the Constitution without violating his undertaking to support it.”<sup>59</sup> It is a bedrock of our federalist system that state government officials cannot defy federal court orders.<sup>60</sup>

A comparison of the *Cooper* and *Garrett* decisions highlights the differences in how the state and federal courts dealt with desegregation in Arkansas. The state’s judiciary sanctioned the political branches’ attempt to delay integration and perhaps “escape it entirely.”<sup>61</sup> Justice Johnson even claimed that he played a pivotal role in pushing the governor to defy the federal courts.<sup>62</sup> But federal judges, who are largely insulated from political pressure, ordered Southern states to allow black and white children to attend school together.<sup>63</sup>

After he left the state supreme court, Justice Johnson went on to manage the Arkansas campaign of segregationist presidential candidate George Wallace.<sup>64</sup> When “Justice Jim” Johnson ran against Republican Governor Winthrop Rockefeller in 1966, he publicized rumors that Rockefeller was gay.<sup>65</sup>

## B. State Supreme Court Abdicates Its Role in Marriage Equality

In 2014, an Arkansas state judge struck down the state constitution’s ban on same-sex marriage as violating the U.S. Constitution.<sup>66</sup> Pulaski County Circuit Court Judge Chris Piazza compared the marriage amendment to the ban on interracial marriage struck down by the U.S. Supreme Court in the 1967 *Loving v. Virginia* case<sup>67</sup>:

It has been over forty years since Mildred Loving was given the right to marry the person of her choice. The hatred and fears have long since

57. *Id.* at 16.

58. *Id.* at 15.

59. *Id.* at 18.

60. U.S. CONST. art. VI, § 2.

61. *Garrett v. Faubus*, 230 Ark. 445, 453, 323 S.W.2d 877, 881 (1959).

62. Lyons, *supra* note 14.

63. See generally JACK BASS, UNLIKELY HEROES (1990).

64. Garrick Feldman, *Justice Jim Fought Tough Final Battle*, LEADER (Feb. 17, 2010), <https://www.arkansasleader.com/articles/top-story-justice-jim-fought-tough-final-battle/>.

65. BILL CLINTON, MY LIFE 114 (2004).

66. Order Granting Summary Judgement in favor of the Plaintiffs and Finding Act 144 of 1997 and Amendment 83 Unconstitutional at 8, *Wright v. State*, 2014 WL 1908815 (No. 60CV-13-2662).

67. *Id.*



vanished and she and her husband lived full lives together; so it will be for the same-sex couples. It is time to let that beacon of freedom shine brighter on all our brothers and sisters. We will be stronger for it.<sup>68</sup>

Within three days of the decision, 169 same-sex couples applied for marriage licenses in Pulaski County, which includes Little Rock.<sup>69</sup> Local media reported that the first couple married was Shelly Butler, 51, and Susan Barr, 48, who had been together for “nearly 30 years after first meeting at Southern Arkansas University.”<sup>70</sup> “Today means the world,” Butler said. “It’s a long time coming.”<sup>71</sup>

Social conservatives, including former Arkansas Gov. Mike Huckabee, called for Judge Piazza’s impeachment,<sup>72</sup> and several legislators actually discussed the possibility.<sup>73</sup> One state representative criticized Judge Piazza for contradicting the will of voters, who approved the state constitution’s ban on same-sex marriage in 2004.<sup>74</sup> “This is a clear example where the will of the people has been trampled by one judge,” he said, “[i]t is very disappointing . . . when someone like an activist judge thinks their will is greater than the majority of our state.”<sup>75</sup>

The Supreme Court of Arkansas quickly put the order on hold as it considered the appeal.<sup>76</sup> When two new justices joined the court in January 2015,<sup>77</sup> the court somehow ruled that the additions to the bench required the plaintiffs to bring a new appeal.<sup>78</sup> In a public letter, Chief Justice Jim Hannah claimed the legal issue was “created out of whole cloth” to delay the

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68. *Id.* at 9.

69. Gavin Lesnick, *Same-sex Couples Marry in Pulaski County; McDaniel Seeks Stay*, ARK.ONLINE (May 12, 2014), <http://www.arkansasonline.com/news/2014/may/12/crowd-gathers-pulaski-county-issues-first-same-sex/>.

70. *Id.*

71. *Id.*

72. Mario Trujillo, *Huckabee Wants Judge Impeached After Gay Marriage Ruling*, HILL (May 12, 2014), <http://thehill.com/blogs/blog-briefing-room/205887-huckabee-wants-judge-impeached-after-gay-marriage-ruling>.

73. The City Wire Staff, *Calls for Judge Piazza Impeachment Follow Gay Marriage Ruling*, TALK BUS. & POL. (May 10, 2014), <http://talkbusiness.net/2014/05/calls-for-judge-piazza-impeachment-follow-gay-marriage-ruling/#.U3KUrfldXh4>.

74. *Id.*

75. *Id.*

76. Paresh Dave, *Arkansas Supreme Court Ruling Leaves Uncertainty on Gay Marriage*, L.A. TIMES (May 14, 2014), <http://www.latimes.com/nation/nationnow/la-na-nn-arkansas-stay-gay-marriage-licenses-20140514-story.html>.

77. Max Brantley, *The New Arkansas Supreme Court, with Female Majority, Takes the Bench; One Drops Potential Hint on Marriage Case*, ARK. TIMES: ARK. BLOG (January 6, 2015, 2:03 PM), <https://www.arktimes.com/ArkansasBlog/archives/2015/01/06/the-new-arkansas-supreme-court-takes-the-bench-one-drops-potential-hint-on-marriage-case>.

78. *Smith v. Wright*, 2015 Ark. 189, at \*7, 461 S.W.3d 687, 692 (2015).

court's decision.<sup>79</sup> Justices Hannah and Paul Danielson recused themselves.<sup>80</sup> Justice Danielson said that he could not ethically be "complicit in machinations which have the effect of depriving justice to any party before this court."<sup>81</sup> When Justice Donald Corbin retired from the bench in 2015, he admitted that the court had voted 6-1 in 2014 to affirm Judge Piazza's decision and strike down the same-sex marriage ban.<sup>82</sup> He said the legal issues were clear, particularly the argument that the ban violated the U.S. Constitution.<sup>83</sup> "It was a tough political issue, but legally it was a cakewalk. Anybody who knows anything about the law or had any training whatsoever as a constitutional lawyer would know that," he said.<sup>84</sup> Justice Corbin confirmed that the justices were contacted by legislators and social conservative groups who pressured them to overturn Judge Piazza's decision.<sup>85</sup> The state Judicial Discipline and Disability Commission investigated the delay but did not conclude that ethics rules were violated.<sup>86</sup>

Hundreds of Arkansas couples had to wait to vindicate their constitutional right to marry<sup>87</sup> because the Arkansas Supreme Court was worried about the politics surrounding marriage equality. The state supreme court dismissed the case as moot after the U.S. Supreme Court brought marriage equality to the entire nation in 2015.<sup>88</sup>

Since then, the Arkansas Supreme Court has stopped hesitating in cases involving LGBT rights; the court has instead ruled against the rights of same-sex couples in two decisions.<sup>89</sup> In December 2016, the court ruled that the state could continue treating same-sex couples differently, when it comes to the birth certificates of their children.<sup>90</sup>

79. *Id.* at \*8, 461 S.W.3d at 693.

80. *Id.*, 461 S.W.3d at 693.

81. Andrew Demillo, *Danielson not Seeking Reelection on Arkansas Supreme Court*, WASH. TIMES (May 26, 2015), <http://www.washingtontimes.com/news/2015/may/26/danielson-not-seeking-re-election-on-arkansas-supr/>.

82. Interview by Ernest Dumas with Justice Donald L. Corbin, Arkansas Supreme Court, in Hot Springs, Arkansas (July 27, 2015).

83. *Id.*

84. *Id.*

85. *Id.*

86. Max Brantley, *Judicial Discipline Panel Clears Supreme Court of Misconduct Complaint in Marriage Case*, ARK. TIMES: ARK. BLOG (Sept. 16, 2015 4:15 PM), <https://www.arktimes.com/ArkansasBlog/archives/2015/09/16/judicial-discipline-panel-clears-supreme-court-of-misconduct-complaint-in-marriage-case>.

87. *Id.*

88. *Smith v. Wright*, 2015 Ark. 298 (2015).

89. *Smith v. Pavan*, 2016 Ark. 437, 505 S.W.3d 169 (2016), *rev'd*, 137 S. Ct. 2075 (2017); *Protect Fayetteville v. City of Fayetteville*, 2017 Ark. 49, 510 S.W.3d 258 (2017).

90. *Smith*, 2016 Ark. at \*19, 505 S.W.3d at 182.

Marisa and Terrah Pavan were married in New Hampshire in 2011, and they had a child in Arkansas in May 2015, just months before *Obergefell*.<sup>91</sup> The Arkansas Department of Health refused to put Marisa's name on the child's birth certificate, along with Terrah, who gave birth.<sup>92</sup> If Marisa had been a man, state law would have required that he be listed on the birth certificate.<sup>93</sup>

The Pavans and two other lesbian couples sued the state.<sup>94</sup> Judge Timothy Fox ruled in their favor and ordered the state to treat same-sex couples the same as opposite-sex couples with respect to birth certificates.<sup>95</sup> The Arkansas Supreme Court overruled that decision and rejected the argument that *Obergefell* required the state to stop limiting its presumption of parentage to men who are married to women who give birth.<sup>96</sup> In an opinion by Justice Josephine Hart, the court also found that the disparate treatment of lesbian couples was justified by the state's need for accurate records of biological parents for public health purposes, even though husbands are automatically listed on birth certificates regardless of biological parentage.<sup>97</sup> Two of the justices also admonished Judge Fox for suggesting, in their words, "that if this court granted the stay, then it would deprive persons of their constitutional rights, and that this court previously had deprived people of their constitutional rights in a separate matter."<sup>98</sup>

In *Obergefell*, the U.S. Supreme Court ruled that the Constitution protects the right of same-sex couples to marry "on the same terms as accorded to couples of the opposite sex."<sup>99</sup> The Court ruled that bans on same-sex marriage violated the Equal Protection Clause and the Due Process Clause.<sup>100</sup> Justice Anthony Kennedy's opinion emphasized the harm to same-sex couples and their children when states treat them differently:

This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them

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91. *Id.* at \*2, 505 S.W.3d at 172.

92. *Id.*

93. State law says that husbands are automatically listed as the parents on a birth certificate. *Id.* at \*11, 505 S.W.3d at 177–78.

94. *Id.* at \*3, 505 S.W.3d at 173.

95. *Id.* at \*3–4, 505 S.W.3d at 173.

96. *Smith*, 2016 Ark. at \*19, 505 S.W.3d at 182.

97. *Id.* at \*18, 505 S.W.3d at 181.

98. *Id.* at \*20, 505 S.W.3d at 182.

99. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015).

100. *Id.* at 2604–05.

out of a central institution of the Nation's society. Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest.<sup>101</sup>

Justice Kennedy's language clearly appears broad enough to cover issues like birth certificates. The Court even included a list of the benefits associated with marriage, a list that included birth certificates.<sup>102</sup> The Arkansas Supreme Court disregards this language by noting that *Obergefell* mentions birth certificates "only once."<sup>103</sup> The plaintiff, Jim Obergefell, was seeking to have his name listed on his husband's death certificate, and a plaintiff couple from Tennessee was seeking to have their parental rights reflect their marriage.<sup>104</sup> As in the school desegregation cases, the Arkansas Supreme Court twisted the language of the U.S. Supreme Court to limit the reach of a historic civil rights ruling.<sup>105</sup>

Justice Danielson's dissent emphasized Kennedy's concern about stigmatizing the children of same-sex couples and the stability of such families.<sup>106</sup> He argued that birth certificates were clearly included in *Obergefell*'s language about the benefits associated with marriage.<sup>107</sup> Chief Justice Howard Brill's dissent included the comment, "Regardless of personal values and regardless of a belief that the United States Supreme Court may have wrongfully decided a legal issue, all are bound by the law of the land."<sup>108</sup> Justice Rhonda Wood agreed that states cannot constitutionally deny same-sex couples the benefits to marital status, which include equal access to birth certificates.<sup>109</sup>

Justice Wood did, however, argue that the court should vacate Judge Fox's order and give the state more time to comply, due to "the fluid nature of everyone's reaction to the same-sex marriage decision and the State's understandably evolving response to it."<sup>110</sup> Justice Wood implored the state legislature to amend state law to comply with *Obergefell*.<sup>111</sup> Her dissent said that "states must comprehensively review their laws so that married same-

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101. *Id.* at 2601–02.

102. *Id.* at 2601.

103. *Smith*, 2016 Ark. at \*10, 505 S.W.3d at 176.

104. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594–95 (2015).

105. *Garrett v. Faubus*, 230 Ark. 445, 446, 323 S.W.2d 877, 877 (1959).

106. *Smith*, 2016 Ark. at \*35, 505 S.W.3d at 190 (Danielson, J., dissenting)

107. *Id.*

108. *Id.* at \*27, 505 S.W.3d at 185–86 (Brill, J., dissenting).

109. *Id.* at \*32–33, 505 S.W.3d at 188–89 (Wood, J., dissenting).

110. *Id.* at \*28, 505 S.W.3d at 186.

111. *Id.* at \*32, 505 S.W.3d at 188–89.

sex couples and opposite-sex couples receive the same benefits of marriage, in light of . . . *Obergefell v. Hodges*.”<sup>112</sup> Justice Kennedy’s opinion, however, made clear that “individuals need not await legislative action before asserting a fundamental right.”<sup>113</sup> He said this is true, “even if the broader public disagrees and even if the legislature refuses to act.”<sup>114</sup>

In February 2017, the Arkansas Supreme Court struck down a Fayetteville civil rights law that prohibited discrimination against LGBT people in housing, employment, or public accommodations.<sup>115</sup> The court cited a state law barring local civil rights ordinances,<sup>116</sup> one of only three in the U.S., including North Carolina’s notorious H.B. 2.<sup>117</sup>

Just a few years ago, in 2011, the court unanimously struck down a state ban on adoption by same-sex couples.<sup>118</sup> The court said that the ban violated a state constitutional right to privacy: “the entire privilege afforded by law to have children in the home, whether adopted or foster children, is denied to cohabiting sexual partners. In both situations, the penalty imposed is a considerable burden on the right to intimacy in the home free from invasive government scrutiny.”<sup>119</sup>

Why has the court taken a turn against LGBT rights? In the same time frame, elections for the Arkansas Supreme Court have become more contested and much more expensive.<sup>120</sup> The court now includes more justices who were supported by conservative groups like the Law Enforcement Alliance of America, a nonprofit linked to the National Rifle Association that does not disclose its donors.<sup>121</sup> The 2014 election saw the first attack ads in

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112. *Smith*, 2016 Ark. at \*28, 505 S.W.3d at 186 (Wood, J., dissenting).

113. *Obergefell*, 135 S. Ct. at 2605.

114. *Id.*

115. *Protect Fayetteville v. City of Fayetteville*, 2017 Ark. 49, at \*9–10, 510 S.W.3d 258, 263.

116. *Id.* at \*9, 510 S.W.3d at 263.

117. Robin Fretwell Wilson, *The Nonsense About Bathrooms: How Purported Concerns over Safety Block LGBT Nondiscrimination Laws and Obscure Real Religious Liberty Concerns*, 20 LEWIS & CLARK L. REV. 1373, 1380 (2017).

118. *Ark. Dep’t of Human Services v. Cole*, 2011 Ark. 145, at \*27, 380 S.W.3d 429, 443 (2011).

119. *Id.* at \*14–15, 380 S.W.3d at 437.

120. In 2014, more than \$500,000 was spent during an election for three seats on the Arkansas Supreme Court, and it was “the first time outside groups funded TV spending in recent history.” SCOTT GREYTAK ET AL., *BANKROLLING THE BENCH: THE NEW POLITICS OF JUDICIAL ELECTIONS 2013-14* 66 (Laurie Kinney ed., 2015). The 2016 Arkansas Supreme Court election saw nearly five times as much spending—\$2.4 million—and a large portion of that was spending a Washington, D.C.-based group that does not disclose its donors. ALICIA BANNON ET AL., *BANKROLLING THE BENCH: THE NEW POLITICS OF JUDICIAL ELECTIONS 2015-16* 13, 42 (2017).

121. *Id.*; Benjamin Hardy, *Dark Money, National Review and the Arkansas Supreme Court Race*, ARK. TIMES: ARK. BLOG, (Feb. 17, 2016, 11:38 AM), <https://www.arktimes.com/>

an Arkansas Supreme Court race,<sup>122</sup> and as Justice Corbin’s comments made clear, the justices are well aware of the political risks involved in ruling for LGBT rights in this political climate.<sup>123</sup>

A report from Lambda Legal examined 127 state supreme court rulings in LGBT rights cases from 2003 to 2015.<sup>124</sup> The report found that elected state supreme courts were less likely to protect LGBT rights.<sup>125</sup> Lambda Legal said its results suggest that this “can be attributed to ideological factors playing a larger role in shaping judges’ decisions in these courts.”<sup>126</sup> Lambda Legal concluded:

Each day, thousands of elected judges in state courts across the country make decisions that could cost them their jobs if the law requires a ruling that is unpopular enough to anger a majority of voters or inspire special interest attacks. This threat is particularly acute when counter-majoritarian constitutional rights are at stake, including those of LGBT people. If judges can’t safeguard the rights of vulnerable minorities without fear of retaliation, that dynamic renders our constitutional right to due process extremely vulnerable.<sup>127</sup>

Arkansas’s high court is not alone. Other supreme court justices in conservative states have either defied or tested the limits of marriage equality rulings. Justices in Louisiana and Mississippi dissented when their colleagues voted to apply *Obergefell* to their state’s marriage laws.<sup>128</sup> Chief Justice Roy Moore of the Alabama Supreme Court was removed from office—for a second time—for defying federal court orders.<sup>129</sup> This time around, Chief Justice Moore was removed for ordering Alabama judges to defy a federal court ruling that struck down the state’s ban on same-sex marriage.<sup>130</sup> Chief Justice Moore was elected on an anti-LGBT platform in

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ArkansasBlog/archives/2016/02/17/dark-money-national-review-and-the-arkansas-supreme-court-race\_

122. GREYTAK, *supra* note 120.

123. Interview, *supra* note 82.

124. See Lesh, *supra* note 6.

125. *Id.* at 21.

126. *Id.*

127. *Id.* at 15.

128. Billy Corriher, *A Handful of Elected State Judges Continue to Deny Marriage Equality*, CTR. FOR AM. PROGRESS (Dec. 1, 2015), <https://www.americanprogress.org/issues/courts/reports/2015/12/01/126270/a-handful-of-elected-state-judges-continue-to-deny-marriage-equality/>.

129. *Moore v. Alabama Judicial Inquiry Comm’n*, No. 1160002, 2017 WL 1403696, at \*17 (Ala. Apr. 19, 2017).

130. *Id.* at \*12.

2012.<sup>131</sup> In Iowa, the elected supreme court unanimously struck down the state's same-sex marriage ban in 2009,<sup>132</sup> and three justices paid a political price—being thrown off the court in the 2010 election.<sup>133</sup>

In Arkansas and some other states with elected judges, it is up to federal judges to fully realize the promise of marriage equality. Some jurisdictions are still treating married LGBT couples differently two years after *Obergefell*.

### III. POLITICIZED AND EXPENSIVE JUDICIAL ELECTIONS

#### A. Arkansas Supreme Court Protects Right to Jury Trial

Teresa Broussard sued her healthcare providers for severe complications following surgery to have her thyroid glands removed in 2006.<sup>134</sup> She experienced swelling, pain, and what she thought was a burn on her neck and chest: “Broussard described the tissue at the incision as tough and leathery, and she said that black and purplish lines soon appeared that increased over time.”<sup>135</sup> Broussard was released from the hospital but returned a week later, after the burn spread and the resulting pain grew more intense.<sup>136</sup> She said that “dead and sloughing tissue developed at her neck and chest,” and she had to have skin removed and replaced with grafts.<sup>137</sup>

Broussard's lawsuit was dismissed under an Arkansas “tort reform” law that required patients who file medical malpractice lawsuits to provide expert testimony from “a medical care provider of the same specialty as the defendant.”<sup>138</sup> The Arkansas Supreme Court struck down the law in 2012, holding that the statute was “procedural law” and not “substantive law” that defines legal rights or obligations.<sup>139</sup> The court said that “procedural law prescribes ‘the steps for having a right or duty judicially enforced,’”<sup>140</sup> and

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131. Tim Murphy, *8 Candidates We Can't Believe Are Actually Going to Win*, MOTHER JONES (Nov. 6, 2012), <http://www.motherjones.com/politics/2012/11/kerry-bentivolio-michael-grimm-candidates-actually-winning/>.

132. *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009).

133. A. G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES (Nov. 3, 2010), <http://www.nytimes.com/2010/11/04/us/politics/04judges.html?partner=rss&emc=rss>.

134. *Broussard v. St. Edward Mercy Health Sys., Inc.*, 2012 Ark. 14, at \*3, 386 S.W.3d 385, 387 (2012).

135. *Id.* at \*2, 386 S.W.3d at 387.

136. *Id.*

137. *Id.*

138. *Id.* at \*7, 386 S.W.3d at 389.

139. *Id.*, 386 S.W.3d at 389–90.

140. *Broussard*, 2012 Ark. at \*5, 386 S.W.3d at 389 (citing *Johnson v. Rockwell Automation, Inc.*, Ark. 241 at \*8, 308 S.W.3d 135, 141 (2009) (quoting *Summerville v. Thrower*, 369 Ark. 231, 237, 253 S.W.3d 415, 419–20 (2007))).

such rules “lie solely within the province of this court.”<sup>141</sup> The court also noted that the law established the qualifications that an expert witness must possess, which is a decision for trial courts.<sup>142</sup> The amendment violated the state constitution’s separation-of-powers provisions, as well as “the inherent authority of the courts to protect . . . the rights of the litigants.”<sup>143</sup>

The court struck down another “tort reform” provision in a 2011 lawsuit by 12 farmers who sued the manufacturer of an experimental strain of genetically modified rice.<sup>144</sup> After the rice invaded other crops, several countries banned American rice, and the European Union imposed strict testing requirements.<sup>145</sup> Rice exports dropped dramatically, and the farmers sued for lost revenue and punitive damages.<sup>146</sup> The defendant corporation made more than \$1 billion in profits that year, and the trial court imposed \$42 million in punitive damages.<sup>147</sup> A state law, however, limited punitive damages to around \$1 million, unless the defendant intentionally harmed the plaintiff.<sup>148</sup> The Arkansas Supreme Court ruled that the punitive damages limit violated a provision of the state constitution that says, “no law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property” except for workers compensation laws.<sup>149</sup>

The right to a jury trial is a foundational principle of American democracy.<sup>150</sup> The U.S. Constitution and most state constitutions include a right to a jury trial in civil cases in which the damages exceed a certain threshold.<sup>151</sup> The Seventh Amendment to the U.S. Constitution says the right to a jury trial “shall be preserved” in cases involving damages greater than twenty dollars.<sup>152</sup> The constitutions of Arkansas and most other states use stronger language in stating that “the right of trial by jury shall remain inviolate.”<sup>153</sup>

The Framers of the U.S. Constitution recognized the importance of this right. The Revolutionary-era colonists, facing prosecutions for violating British laws in which they had no say, turned to jury nullification as a means

141. *Id.* at \*5, 386 S.W.3d at 389.

142. *Id.*

143. *Id.* at \*7, 386 S.W.3d at 390.

144. *Bayer CropScience LP v. Schafer*, 2011 Ark. 518, at \*2, 385 S.W.3d 822, 825 (2011).

145. *Id.* at \*3, 385 S.W.3d at 826.

146. *Id.* at \*4, 385 S.W.3d at 826–27.

147. *Id.* at \*8, 385 S.W.3d at 828.

148. ARK. CODE ANN. § 16-55-208 (Repl. 2005).

149. *Bayer CropScience LP*, 2011 Ark. at \*10, 385 S.W.3d at 830; ARK. CONST. art. V, § 32.

150. See Taylor Asen, *The Jury Trial Implosion: The Decline of Trial by Jury and Its Significance for Appellate Courts*, POUND CIV. JUST. INST. (2011) (some state constitutions even describe the right to a jury trial in civil cases as “sacred”).

151. *Id.*

152. U.S. CONST. amend. VII.

153. ARK. CONST. art. II, § 7; Asen, *supra* note 150, at 4.



of protest.<sup>154</sup> John Adams said that representative government and trial by jury are the heart and lungs of liberty and that without them we have “no other fortification against being ridden like horses, fleeced like sheep, worked like cattle and fed and clothed like swine and hounds.”<sup>155</sup>

More recently, the protections afforded by the Seventh Amendment have been limited by rulings from the U.S. Supreme Court, which has ruled that the Federal Arbitration Act preempts state law.<sup>156</sup> The Court has also broadly interpreted the Federal Arbitration Act to reject many state-law defenses by consumers or patients who object to having their cases sent to arbitration, where consumer advocates argue the deck is stacked in favor of corporate defendants.<sup>157</sup> State constitutional rights to jury trial have also been limited by state supreme courts whose members were elected with campaign support or contributions from big business.<sup>158</sup>

Since these rulings against tort reform, the nursing home industry has spent millions of dollars to shape Arkansas’s appellate courts.<sup>159</sup> Nursing home CEO Michael Morton helped bankroll the 2014 campaign of Judge Mike Maggio for a seat on the Arkansas Court of Appeals, until the candidate withdrew following a series of scandals.<sup>160</sup> Judge Maggio was later convicted of bribery for accepting tens of thousands of dollars in campaign cash from Morton in exchange for reducing a verdict in favor of a family who sued after a relative died at one of Morton’s nursing homes.<sup>161</sup>

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154. Michael Saks, *Judicial Nullification*, 68 IND. L.J. 1281, 1284 (1993); Renee Lettow Lerner & Suja Thomas, *The Seventh Amendment*, NAT’L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/amendments/amendment-vii> (last visited Feb. 19, 2018).

155. JOHN ADAMS, *THE WORKS OF JOHN ADAMS* 482 (2015).

156. *See* *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

157. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (ruling that the Federal Arbitration Act preempts a California rule that an arbitration clause is unconscionable and unenforceable if it is an adhesion contract, the disputes would likely to involve small amounts of money, and the party with inferior bargaining power alleges fraud); *Kindred Nursing Centers, L. P. v. Clark*, 137 S. Ct. 1421 (2017) (holding that the Federal Arbitration Act preempts a Kentucky Supreme Court rule that an arbitration agreement violates the state constitutional right to a jury trial if it is signed by a power of attorney whose authority does not specifically include the power to consent to arbitration).

158. *See* Corriher, *supra* note 6, at 12–28.

159. Max Brantley, *Nursing Home Bribery Case Details Suspect Judicial Fund-Raising*, ARK. TIMES: ARK. BLOG (June 29, 2016, 12:38 PM), <https://www.arktimes.com/ArkansasBlog/archives/2016/06/29/nursing-home-bribery-case-filing-details-judicial-fund-raising>; Max Brantley, *Nursing Home Industry Pours Big Money into Arkansas Appellate Court Races*, ARK. TIMES; ARK. BLOG (March 12, 2014, 7:17 AM), <https://www.arktimes.com/ArkansasBlog/archives/2014/03/12/nursing-home-industry-pours-big-money-into-arkansas-appellate-court-races>.

160. *Id.*

161. *Id.*

Justice Rhonda Wood received campaign contributions from Morton and other healthcare interests in her 2014 campaign,<sup>162</sup> but she refused to recuse herself under the court's ethics rules in a lawsuit against Morton.<sup>163</sup> Justice Wood acknowledged that Morton donated \$40,000 to her campaign—more than one-quarter of the total received—but the campaign returned half of this money.<sup>164</sup> In three elections for the court of appeals and state supreme court, Justice Wood has raised around \$280,000, including more than \$90,000 from the healthcare industry, according to the National Institute on Money in State Politics.<sup>165</sup> Much of this campaign cash ultimately came from companies owned by Morton.<sup>166</sup>

Morton also contributed to an effort to amend the Arkansas Constitution to limit liability for nursing homes and other healthcare providers for medical malpractice,<sup>167</sup> though the Arkansas Supreme Court struck down the referendum.<sup>168</sup> The court found the referendum's description of the amendment was inadequate because it did not define "noneconomic damages" and did not allow it to be put before voters.<sup>169</sup> Justice Wood argued that the court did not provide enough guidance on how to draft an amendment that would pass muster.<sup>170</sup>

The Arkansas legislature passed a proposed constitutional amendment that would limit punitive and noneconomic damages in civil cases.<sup>171</sup> The amendment would also take away the Arkansas Supreme Court's authority over court rules and give it to the legislature, raising questions about the separation of powers.<sup>172</sup> This provision of the amendment would negate the ruling, discussed above, to strike down a tort reform law as infringing the Arkansas Supreme Court's rulemaking authority. The state bar proposed a competing amendment to maintain the court's rulemaking authority, require

162. *Robinson Nursing & Rehab. Ctr. v. Phillips*, 2016 Ark. 388, at \*1, 502 S.W.3d 519, 521.

163. *Id.* at \*7, 502 S.W.3d at 523.

164. *Id.* at \*2–3, 502 S.W.3d at 521.

165. National Institute on Money in State Politics, *Wood, Rhonda*, FOLLOWTHEMONEY.ORG <https://www.followthemoney.org/entity-details?eid=6566943&default=candidate> (last visited Feb. 19, 2018).

166. *Id.*

167. Benjamin Hardy, *How to Buy a Constitutional Amendment in Arkansas*, ARK. TIMES (August 11, 2016), <https://www.arktimes.com/arkansas/how-to-buy-a-constitutional-amendment-in-arkansas/Content?oid=4530474>.

168. *Wilson v. Martin*, 2016 Ark. 334, at \*2, 500 S.W.3d 160, 162.

169. *Id.* at \*10, 500 S.W.3d at 167.

170. *Id.* at \*13, 500 S.W.3d at 169 (Wood, J., concurring).

171. S.J. Res. 8, 91st Gen. Assemb., Reg. Sess. (Ark. 2017), <http://www.arkleg.state.ar.us/assembly/2017/2017R/Bills/SJR8.pdf>.

172. *Id.*

disclosure of donors to dark money groups that spend money in judicial races, and prohibit the “earmarking” of appropriations by legislators.<sup>173</sup>

As the ultimate interpreters of state constitutions, state supreme courts define the right to trial by jury. All around the country, big business groups are spending millions of dollars to elect judges who will limit the state constitutional right to a jury trial.<sup>174</sup> And in many places, trial lawyers are spending big to elect judges who will interpret it broadly.<sup>175</sup> The scope of constitutional rights should not depend on the outcome of elections—legislative or judicial.

## B. “Tough on Crime” Ads Create Pressure in Criminal Cases

Criminal defense attorney Tim Cullen ran for a seat on the Arkansas Supreme Court in 2014, and he faced a vicious attack ad from a dark money group based in Washington, D.C.<sup>176</sup> The ad featured an eerie black-and-white image of an empty playground, and it claimed that Cullen had called child pornography a “victimless crime.”<sup>177</sup> Other states have seen similar attack ads, and they often tie a judge or candidate to child sexual abuse.<sup>178</sup> Recent studies suggest that as trial lawyers and big business fight political battles over state supreme courts, criminal defendants can get caught in the crossfire.<sup>179</sup>

A 2013 study from the Center for American Progress (CAP) examined rulings in criminal cases by seven supreme courts that had recently experienced their first election in which more than \$3 million was spent.<sup>180</sup> The study examined rulings in criminal cases within five years before and after each court’s first \$3 million election.<sup>181</sup> In three of these states, the courts’

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173. Andrew DeMillo, *Analysis: “Tort Reform” Measure May Face Ballot Competition*, WASH. TIMES (June 10, 2017), <http://www.washingtontimes.com/news/2017/jun/10/analysis-tort-reform-measure-may-face-ballot-compe/>.

174. See Billy Corriher, *Big Business Is Still Dominating State Supreme Courts*, CTR. FOR AM. PROGRESS (Sept. 2016), <https://cdn.americanprogress.org/wp-content/uploads/2016/09/01095715/BigBusinessStateSupremeCourts-report.pdf>.

175. *Id.* at 15.

176. *Buying Time 2014 – Arkansas*, BRENNAN CTR. FOR JUST. (May 13, 2014), <https://www.brennancenter.org/analysis/buying-time-2014-arkansas>.

177. *STSUPCT\_AR\_LEAA\_YOUNG\_VICTIMS*, BRENNAN CTR. FOR JUST., [https://www.brennancenter.org/sites/default/files/analysis/Buying\\_Time/STSUPCT\\_AR\\_LEAA\\_YOUNG\\_VICTIMS.PDF](https://www.brennancenter.org/sites/default/files/analysis/Buying_Time/STSUPCT_AR_LEAA_YOUNG_VICTIMS.PDF) (last visited Feb. 19, 2018).

178. KATE BERRY, *HOW JUDICIAL ELECTIONS IMPACT CRIMINAL CASES 3–5* (2015).

179. *Id.* at 7–9 (summarizing studies on how attack ads can impact rulings in criminal cases).

180. See Billy Corriher, *Criminals and Campaign Cash*, CTR. FOR AM. PROGRESS (Oct. 2013), <https://cdn.americanprogress.org/wp-content/uploads/2013/10/CampaignCriminalCash-6.pdf>.

181. *Id.*

percentage of rulings against criminal defendants peaked during the big-money election years, even though these elections resulted in no change in the membership of the courts.<sup>182</sup>

The CAP study found that the Illinois Supreme Court's percentage of rulings against defendants jumped 18 percent in 2004, as millions of dollars' worth of ads flooded the state.<sup>183</sup> One television ad featured actors portraying criminals describing their grisly crimes, chuckling about them, and stating that one of the supreme court candidates had set them free.<sup>184</sup> The percentage of rulings against defendants dropped in 2005.<sup>185</sup> The court saw a similar peak during the 2000 election.<sup>186</sup> In 2006, the high courts in Washington and Georgia saw their first multimillion-dollar elections, and the study found a similar, though smaller, peak in rulings against defendants.<sup>187</sup> Some of the other courts in the study experienced a change in membership, and the peaks came after more conservative justices joined the courts.<sup>188</sup>

Studies from Professor Joanna Shepherd and others have found similar trends in states with big-money supreme court elections.<sup>189</sup> A 2014 study by Shepherd and Kang examined rulings in criminal cases from 32 states from 2008 to 2013.<sup>190</sup> The study found a correlation between the number of ads in judicial elections and rulings against criminal defendants.<sup>191</sup> It also found that,

Justices in states whose bans on corporate and union spending on elections were struck down by *Citizens United* were less likely to vote in favor of criminal defendants than they were before the decision . . . . In these states, the removal of those prohibitions after *Citizens United* is associated with, on average, a 7 percent decrease in justices' voting in favor of criminal defendants.<sup>192</sup>

There is no evidence that such trends are occurring in Arkansas, but that could change as attack ads become more common. The court has recently found itself at the center of a controversy surrounding the death penalty. In April 2017, the state planned to carry out eight executions over two

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182. *Id.* at 1.

183. *Id.* at 12.

184. *Id.* at 13.

185. *Id.* at 12.

186. Corriher, *supra* note 180, at 12.

187. *Id.* at 16–19.

188. *Id.* at 20–23.

189. See BERRY, *supra* note 178 (the Brennan Center for Justice in 2015 reviewed several studies on the relationship between judicial elections or judicial campaign spending and rulings in criminal cases).

190. See Shepherd & Kang, *supra* note 6.

191. *Id.*

192. *Id.*

weeks, before its lethal injection drugs expired, but the Arkansas Supreme Court halted two of the executions.<sup>193</sup> When the court's order came down, a federal court and Pulaski County Judge Wendell Griffen had effectively halted the other executions.<sup>194</sup> Judge Griffen had ruled in favor of a pharmaceutical manufacturer which claimed that the state had obtained the drugs for the lethal injections by improper means, and he ordered the state to return the drugs.<sup>195</sup>

Judge Griffen was admonished and removed from all death penalty cases by the state supreme court for participating in a death penalty protest on the same day that he entered the order.<sup>196</sup> Some perceived the judge as playing the part of an inmate in a mock execution.<sup>197</sup> Judge Griffen argued that the state supreme court made its decision without giving him an opportunity to defend his conduct.<sup>198</sup> The judge, who is also a pastor, described the event as "a Good Friday prayer vigil with other members of my church congregation."<sup>199</sup> As with Judge Piazza, some legislators tried to build support for impeaching Judge Griffen.<sup>200</sup>

#### IV. CONCLUSION

The current method of choosing Arkansas Supreme Court justices does not allow the judicial branch to protect individual rights in the face of political pressure to do otherwise. This system is not fair to Arkansas' LGBT citizens, nor to the criminal defendants who could become fodder for "soft on crime" campaign ads. Like some other elected officials in the state, Ar-

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193. Mark Berman, *Arkansas Execution Called off After Supreme Court Denies Challenge*, WASH. POST (April 18, 2017), [https://www.washingtonpost.com/news/post-nation/wp/2017/04/17/arkansas-fights-to-carry-out-unprecedented-wave-of-executions/?utm\\_term=.68f1b0ffd645](https://www.washingtonpost.com/news/post-nation/wp/2017/04/17/arkansas-fights-to-carry-out-unprecedented-wave-of-executions/?utm_term=.68f1b0ffd645).

194. *Id.*

195. In re Pulaski Cty. Circuit Court, 2017 Ark. LEXIS 154 at \*3 (2017) (Kemp, J., dissenting).

196. *Id.* at \*1.

197. Liliana Segura, *Arkansas Justice: Racism, Torture, and a Botched Execution*, INTERCEPT (Nov. 12, 2017), <https://theintercept.com/2017/11/12/arkansas-death-row-executions-kenneth-williams/>.

198. David Koon, *Griffen Asks Probe of Ark. Supreme Court and AG's Office Conduct*, ARK. TIMES: ARK. BLOG (April 26, 2017, 4:49 PM), <https://www.arktimes.com/ArkansasBlog/archives/2017/04/26/griffen-asks-judicial-discipline-committee-on-prof-conduct-to-investigate-ark-supreme-court-and-ag-s-office-conduct>.

199. Wendell Griffen, *Meaning What We Claim*, JUST. IS A VERB (May 3, 2017), <http://wendellgriffen.blogspot.com/2017/05/meaning-what-we-claim.html>.

200. Max Brantley, *Trent Garner Tries to Stir Impeachment Movement Against Wendell Griffen*, ARK. TIMES: ARK. BLOG (May 1, 2017, 1:33 PM), <https://www.arktimes.com/ArkansasBlog/archives/2017/05/01/trent-garner-tries-to-stir-impeachment-movement-against-wendell-griffen>.

kansas Supreme Court justices stood in the way of efforts to desegregate schools and ensure equality for LGBT couples.

Because the U.S. Constitution is the “Supreme Law of the Land,” federal court rulings in favor of civil rights have ultimately been enforced, even when state officials resist.<sup>201</sup> Justice Johnson and the state supreme court refused to intervene when state officials tried to delay or thwart the implementation of *Brown v. Board of Education*, forcing the U.S. Supreme Court to put an end to the state’s recalcitrance. Arkansas officials have begun offering birth certificates on equal terms to all married parents, though the state and courts are still deciding how to deal with the language of the discriminatory birth certificate statute.<sup>202</sup> In *Pavan*, the High Court again made it clear that its marriage equality ruling “can neither be nullified openly and directly by state legislators or state executive or judicial officers nor nullified indirectly by them . . . .”<sup>203</sup>

In between these legal battles over civil rights, there were certainly counterexamples of the Arkansas Supreme Court interpreting state constitutional rights broadly. The court has protected the right to a jury trial, as discussed above. Though it fought to preserve segregation 50 years ago, the court has acted to bring about a more equal state education system since then. A lawsuit by the Lake View School District against the state resulted in a decades-long legal battle over the adequacy of Arkansas’s education financing system.<sup>204</sup> Despite the state’s attempts to fix education funding in the 1990s, the school district argued the state was failing to satisfy its constitutional mandate to “maintain a general, suitable and efficient system of free public schools and . . . adopt all suitable means to secure to the people the advantages and opportunities of education.”<sup>205</sup> The Arkansas Supreme Court agreed in rulings in 2002 and 2004,<sup>206</sup> and the legislature is still working towards satisfying its constitutional mandate to provide an adequate education to all of Arkansas’s children.<sup>207</sup>

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201. U.S. CONST. art. VI, § 2.

202. John Lynch, *Judge: Arkansas Birth-Certificate System Will Be Shut Down if not Fixed by Jan. 5*, ARK.ONLINE (Nov. 28, 2017), <http://www.arkansasonline.com/news/2017/nov/28/judge-fix-birth-recording-by-jan-5-2017-1/>.

203. See *Cooper v. Aaron*, 358 U.S. 17 (1958).

204. Ark. Dep’t. of Educ., *Chronology of Milestones in Lake View*, ARKANSAS.GOV (May 23, 2012), [http://www.arkansased.gov/public/userfiles/Legal/Milestones\\_in\\_Lake\\_View\\_Case\\_-\\_BLR.pdf](http://www.arkansased.gov/public/userfiles/Legal/Milestones_in_Lake_View_Case_-_BLR.pdf).

205. ARK. CONST. art. 14, § 1.

206. *Lake View School District No. 25 v. Huckabee*, 351 Ark. 31, 91 S.W.3d 472 (2002); *Lake View School District No. 25 v. Huckabee*, 385 Ark. 137, 189 S.W.3d 1 (2004).

207. Sara Whites-Koditschek, *Statehouse Standoff over Education Fund a Matter of ‘Adequacy’*, KUAR (Nov. 1, 2016), <http://ualrpublicradio.org/post/statehouse-standoff-over-education-funding-matter-adequacy#stream/0>.

Despite fairly recent rulings that could be described as progressive, special interests that want more conservative, pro-business justices are beginning to dominate spending in Arkansas Supreme Court races.<sup>208</sup> These special interests want a court that will uphold tort reform laws, even if they eviscerate the right to jury trial. To get this court, they have resorted to attack ads that pressure judges to rule against criminal defendants. Elections for the Arkansas Supreme Court have certainly become more expensive and rancorous in recent years.<sup>209</sup> The increased politicization may have contributed to the recent anti-LGBT rights rulings, and one non-ruling.<sup>210</sup> More spending means more attack ads, and presumably, a stronger desire to avoid controversial rulings.

An Arkansas Bar task force recommended a system in which a commission composes a list of three candidates from which the governor chooses a nominee, subject to Senate confirmation.<sup>211</sup> The state bar's proposal includes a single, 14-year term, similar to a proposal from the Wisconsin bar.<sup>212</sup> An American Bar Association commission in 2003 adopted the position that judges, elected or appointed, should serve a single term of at least 15 years.<sup>213</sup> Arkansas already has term limits for its state legislators, and voters in 2014 lengthened that limit to 16 years.<sup>214</sup>

Such a system would ensure that justices, once on the bench, never have to worry about being reelected or reappointed. This would give them the independence needed to protect individual rights in the face of political pressure. Former California Supreme Court Justice Otto Kaus said that facing reelection is like having a "crocodile in your bathtub" that you can try to ignore.<sup>215</sup> "You cannot forget the fact that you have a crocodile in your bathtub . . . . You keep wondering whether you're letting yourself be influenced, and you do not know. You do not know yourself that well," he said.<sup>216</sup> As an

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208. See ALICIA BANNON, CATHLEEN LISK, & PETER HARDIN, WHO PAYS FOR JUDICIAL RACES?, (2017); Eric Hananoki, *Why Media Outlets Shouldn't Take The Judicial Crisis Network Seriously*, MEDIA MATTERS (February 19, 2016), <https://www.mediamatters.org/research/2016/02/19/why-media-outlets-shouldnt-take-the-judicial-cr/208705>.

209. See Hananoki, *supra* note 208.

210. See *supra* Section II.B.

211. See TASK FORCE, *supra* note 31.

212. See STATE BAR OF WIS., JUDICIAL TASK FORCE PRELIMINARY REPORT (2013), [http://host.madison.com/judicial-task-force-preliminary-report/pdf\\_82938438-47fb-50f0-8a8a-83fe808ebba4.html](http://host.madison.com/judicial-task-force-preliminary-report/pdf_82938438-47fb-50f0-8a8a-83fe808ebba4.html).

213. AM. BAR ASSOC., COMMISSION ON THE 21ST CENTURY JUDICIARY: PRINCIPLES AND CONCLUSIONS (2003).

214. J.B. Wogan, *Arkansas Voters Approve Extended Term Limits*, GOVERNING (Nov. 5, 2014), <http://www.governing.com/topics/elections/gov-arkansas-voters-term-limits-ballot.html>.

215. Maura Dolan, *Otto Kaus Dies; Former Justice on State High Court*, L.A. TIMES (Jan. 13, 1996), [http://articles.latimes.com/1996-01-13/local/me-24215\\_1\\_state-high-court](http://articles.latimes.com/1996-01-13/local/me-24215_1_state-high-court).

216. *Id.*

example, Justice Kaus cited his ruling to uphold a controversial ballot initiative just weeks before his 1982 reelection.<sup>217</sup> Alicia Bannon of the Brennan Center for Justice recently noted:

Importantly, some of the strongest empirical evidence on how selection impacts judicial independence suggests that reselection pressures — whether through elections or appointments — pose severe challenges to fair courts. Yet, this is an area where the safeguards are almost uniformly weak. Only three states— Massachusetts, New Hampshire, and Rhode Island—have life tenure (with or without a mandatory retirement age) for judges.<sup>218</sup>

Alexander Hamilton referred to life tenure for federal judges as an “excellent barrier to the encroachments and oppressions of the representative body.”<sup>219</sup> His Federalist No. 78 argues that judicial independence is needed to guard constitutional rights from “the effects of those ill humors, which the arts of designing men . . . sometimes disseminate among the people themselves, and which . . . have a tendency . . . to occasion dangerous innovations in the government, and serious oppressions of the minority party in the community.”<sup>220</sup> He makes clear that life tenure allows judges to serve as a counter-majoritarian check but notes that “it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community.”<sup>221</sup>

The framers of the U.S. Constitution understood the need for judicial independence. In Arkansas, the system of electing judges has not afforded judges the independence needed to protect individual rights. The Arkansas bar’s proposal would grant judges much more freedom to rule as the law requires, regardless of the political consequences. Our constitutional values of justice and equality should never be put to a vote.

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217. *Id.*

218. Alicia Bannon, *Rethinking Judicial Selection*, 24 A.B.A. PROF. LAW. 1, 6–7 (2016).

219. FEDERALIST NO. 78, *supra* note 7.

220. *Id.*

221. *Id.*