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ARKANSAS’S TRADITION OF POPULAR CONSTITUTIONAL ACTIVISM AND THE ASCENDANCY OF THE ARKANSAS SUPREME COURT

Jerald A. Sharum*

REGNAT POPULUS—“THE PEOPLE RULE”

STATE MOTTO OF ARKANSAS

I. INTRODUCTION

Some have recently opined that the use of state constitutional law is still in its infancy in Arkansas. Indeed, it is apparent that, unlike most other states in the modern era, Arkansas’s highest court has not been a great source of new constitutional law—except, perhaps, until very recently. Instead, the people of Arkansas have traditionally been the true masters of constitutional law as the source of governmental authority and as direct and frequent participants in the development of constitutional law through the amendment process.

In fact, throughout the history of Arkansas the people have used constitutional amendments passed through ballot initiatives to vigilantly modify the restrictions on state government as well as the specific levels of protection afforded to individuals by the Arkansas Constitution. Through this hands-on approach, the people of Arkansas have attempted to ensure that the government does not go too far afield from the will of the people by helping to create a constitutional framework that allows the people to provide all of the protections and government limitations that they require


2. Id. at 886.

3. This is in contrast to the role of the people in other state constitutions that merely establish the people as the theoretical source of governmental authority. See, e.g., N.Y. CONST. pmbl. By contrast, the Arkansas Constitution was not only established by the power of the people, it also was established to expressly vest all political power with the people. Compare id., and ARK. CONST. pmbl., with ARK. CONST. art. II, § 1.

4. See infra Part II.
without waiting for or wanting the courts or the legislature to do it for them. I term this brand of active participation in constitutional law as popular constitutional activism.\(^5\)

This tradition, however, appears to be changing. Over the last forty years, the level of the people's participation has markedly declined, falling from its highest levels in the 1950s to its lowest levels in the years leading to 2006.\(^6\) As this period also generally corresponds to what I argue is the increasing role that the Arkansas Supreme Court has taken in state constitutional law and the political forum, I ask the following question: to what extent has Arkansas's tradition of popular constitutional activism been affected by this changing role? I conclude that the ascendancy of the Arkansas Supreme Court negatively affected\(^7\) Arkansas's long history of, but decreasing reliance in, popular involvement in the constitutional process by providing an alternative means of controlling state action and depressing the use of the people's primary instrument for effecting constitutional change: the popular initiative.

To reach these conclusions, the remainder of this article presents a three-part analysis that systematically examines the impact that the Arkansas Supreme Court has had on Arkansas's tradition of popular constitutional activism. First, Part II of this article describes the development of popular constitutional activism from its earliest beginnings during the genesis of Arkansas's current constitution in 1874 to the use of initiative-based constitutional amendments in the modern era as an essential instrument of constitutional change. Next, Part III statistically quantifies the entire development of popular constitutional activism from 1912 to 2006 and specifically examines the period from 1984 to 2006 to extract information.

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5. Popular constitutional activism is not an oxymoron. Although many detractors of constitutional activism have defined “activism” as actions, principally by the courts, that deviate from majoritarian social norms, I do not use the activism term of art in that way. See, e.g., Daniel Kiel, Hypocrisy Rules in Legislating from the Bench, COM. APPEAL (Memphis, Tenn.), Jan. 12, 2006, at B5. Constitutional activism, at its base, is simply the use of a constitution to an end. I intentionally articulate this term using this rather generic definition because of the negative connotation that constitutional activism has taken in legal literature and popular culture over the past thirty years in part because of the antimajoritarian impact (or anti-individual impact depending on your point of view) that constitutional activism, particularly vis-à-vis “judicial activism,” is believed to have. My focus here is not to examine constitutional activism in any broader context than that of exploring how the people of Arkansas have uniquely and actively used and continue to use their constitution.


7. In the context of the statistical analysis presented in this article, unless otherwise stated, positive and negative characterizations only reflect the mathematical relationship between popular constitutional activism and the factor or factors that affect it. Thus, a positive relationship simply means that an increase in the factor relates to an increase in popular constitutional activism (and vice versa), and a negative relationship means that an increase in the factor relates to a decrease in popular constitutional activism.
related to the impact of the Arkansas Supreme Court’s increasing role in Arkansas’s state constitutional process. Finally, Part IV of this article examines the Arkansas Supreme Court’s ascendancy into the state constitutional process during the last four decades to provide a causal explanation for why popular constitutional activism has declined over time.

II. THE RISE OF THE PEOPLE AS MASTERS OF CONSTITUTIONAL LAW

Arkansas, like all other states, has a constitution that defines the scope of the state government’s power and fundamental rights enjoyed by the people. Unlike in many if not most other states, however, the participation of the people in Arkansas has extended far beyond merely adopting a static constitution and allowing state courts to organically develop state constitutional jurisprudence from that core document or relying on the legislature to propose amendments to it. Although Arkansas courts have certainly had occasion to interpret Arkansas’s state constitutional law, the people have historically taken an active role in both developing Arkansas’s current constitution and continuing to amend that constitution in the years that followed by way of initiative-based amendments.

I argue that in analyzing Arkansas’s modern constitutional tradition, which has seen no wholesale constitutional revisions since 1874, the incidence of these initiative-based amendments represent the best measure of the level of popular constitutional activism expressed by the people. I base this argument on four key characteristics of Arkansas’s constitutional tradition. First, the people specifically developed the current constitution to center power with the people by imposing severe limitations on the powers of state government. Second, this allocation of power prevented the government from being able to effectively function or meet the increasing demands of a modern society. Third, constitutional amendments have been the only way to allow the state government to attend to the people’s growing demands. And fourth, the people of Arkansas have actively and frequently used their power to initiate constitutional amendments to meet these demands independent of the legislature and, until recently, to a greater extent than the courts.

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8. For an excellent primer on Arkansas’s political and constitutional history, see DIANE D. BLAIR & JAY BARTH, ARKANSAS POLITICS AND GOVERNMENT (2d ed. 2005).
9. See infra Part II.A.
10. See infra Part II.A.1.
11. See infra Part II.A.2.a.
12. See infra Part II.A.2.b.
13. See infra Part II.B.
A. The Beginnings of Popular Constitutional Activism

Arkansas's modern constitutional traditions trace back to its fifth and current constitution, the Constitution of 1874, because it provides the framework for all subsequent development in state constitutional law. The circumstances surrounding the 1874 Constitution's formation and the motivations of its framers provide essential context to the subsequent development of popular constitutional activism in Arkansas because of the impact of the constitution's limitations on the powers and operations of government and the government's corresponding inability to meet the needs of modern society as a result of those limitations. Moreover, this context appears to inform the view of Arkansans on their role over the government, especially with respect to controlling the latter directly through constitutional amendment. For "[f]raming a... constitution does not merely limit the power of government; rather it is a positive expression of the people's values, goals, and aspirations."  

I will therefore begin our story with a review of Arkansas's constitutional history.

1. A Primer on Arkansas's Constitutional History

Prior to the 1874 Constitution, popular rule was hardly the norm in Arkansas. Yet, the beginnings of popular participation in the state constitutional process were evident even before Arkansas became a state. In 1833, some three years before Arkansas entered the Union, many Arkansans were interested in Arkansas becoming a state.  

There was also, however, strong opposition at the time because the admission of Arkansas as a slave state would unbalance the equal representation of slave states and nonslave states in the United States Senate that was established by the Missouri Compromise of 1821.  

As the people became impatient waiting for Congress to begin the statehood process, "the territorial legislature passed a bill providing for the election of delegates to a constitutional convention."  

Even though Arkansas's territorial governor refused to sign the act that would authorize the convention, the convention was allowed to move forward because the United States Attorney General recognized that the right of the people to "assemble and to petition the government" included the power to convene a constitutional convention.

16. Blair & Barth, supra note 8, at 8; Goss, supra note 15, at 1.
18. Id.
Energized by this newfound power, delegates were sent to Arkansas’s first Constitutional Convention in early 1836 and drafted the 1836 Constitution. Unlike later constitutions, the 1836 Constitution became effective immediately upon Arkansas’s admission to the Union later that same year—and notably without a vote by the people.

The 1836 Constitution was a general document styled after the Federal Constitution. It did not contain the level of detailed and exacting provisions for salaries, procedures, and taxation that would characterize the 1874 Constitution and its amendments. In the years following its adoption, however, a number of amendments to the 1836 Constitution were ratified that began to ever-so-slightly introduce more detail to such areas as banking regulation, court and jurisdiction management, and judicial elections. With these amendments, the 1836 Constitution made great improvements to the State; the political system, on the other hand, remained unstable because of the increasing stratification of power and the state’s increasing reliance on slavery.

There were also concerns over the centralized control that had developed with those already in power during this initial constitution-making effort. A large portion of the population, mostly settlers in the northern and western regions of Arkansas, feared that plantation owners in the southern and eastern regions of Arkansas who controlled the state government at the time would manipulate the process to keep themselves in power. This not-so-quiet distrust of those in power has remained a staple of Arkansas politics and a driving force in Arkansas’s popular constitutional activism.

In 1861, Arkansas adopted a new constitution as it joined the Confederacy in civil war. This document contained essentially the same general provisions as the 1836 Constitution with only relatively minor revisions to safeguard the institution of slavery and to associate itself and the state with the “Confederate States of America.” The tumultuous times

19. Id. at 1–2.
23. Id. at 2–3.
24. See id. at 3.
25. Id. at 2; see also Leflar, supra note 20, at 188.
26. Goss, supra note 15, at 2; see also Leflar, supra note 20, at 188.
28. Id. at 4; see also BLAIR & BARTH, supra note 8, at 136.
resulting from the Civil War left the people scrambling to retake control of their state, both from the Confederates in power and from the federal military rule that followed the Civil War, and return Arkansas to the Union.29

Following President Lincoln’s Amnesty Proclamation in 1863, twenty-four counties sent delegates to Arkansas’s third constitutional convention.30 The people overwhelmingly approved the convention’s proposed constitution in 1864 in an effort to re-enter the Union.31 Like the 1861 Constitution, the 1864 Constitution was nearly identical to the 1836 Constitution, containing few significant changes.32 In elections held contemporaneously with the adoption of the 1864 Constitution, “pro-Union supporters swept the election,” ousting the Confederate powerful from control of the State.33 At this point, although Arkansas had not yet been readmitted to the Union, “[t]he state government appeared ethically honest[,] . . . fiscally responsible,” and ready to govern.34

The period of relative peace and progress following the adoption of the 1864 Constitution, however, was interrupted in 1867 when Congress passed the Reconstruction Act.35 The Act dissolved the state governments of rebel states and instituted federal military control.36 The federal government was also empowered to “abolish, modify, control, [and] supersede” the Arkansas state government until Arkansas adopted a “constitution of government in conformity with the Constitution of the United States in all respects,” was admitted back into the Union, and was granted representation in Congress.37

In response, voters in Arkansas approved holding a fourth constitutional convention in 1868 with the goal of “destroy[ing] white supremacy and . . . weaken[ing] political leaders with Confederate ties.”38 The new constitution was approved in the spring of 1868, and Arkansas was admitted back into the Union on June 22, 1868.39 Under this constitution, the powers of government were expanded in many respects and articulated in some detail.40

30. Id. at 4.
31. Id. at 5.
32. Id. at 4–5 (noting that the few significant changes included the abolition of slavery and a declaration securing franchise rights for all males); Blair & Barth, supra note 8, at 136.
34. Id. at 5–6.
36. Id. § 6, 14 Stat. at 429.
37. Id. §§ 5–6, 14 Stat. at 429.
39. Id. at 7.
40. See id. at 6–7. For example, “[m]any new offices were created, and a Governor was given broad appointive power.” Id. at 6. No money, however, could be spent out of the state
Political infighting, however, soon led to a corrupt legislature and outright abuses of power and financial irresponsibility. Kay Collett Goss recounted some of these problems in her reference guide to the current Arkansas Constitution:

The corrupt legislature spent millions of dollars on fictitious railroads, levees, buildings that were never constructed, special commissions, and phantom projects. The state debt thus increased by 400 percent, with only a few public improvements to show for the increased expenditures.

....

Tax assessors were appointed by the governor and were given a percentage of the taxes levied as an incentive to raise assessments levels. 41

Direct political power-grabs were also rampant during this period. For example, after a state court ruled that the election of Elisha Baxter as governor was invalid, Joseph Brooks occupied and fortified the state capitol. 42 The situation was resolved only when President Ulysses S. Grant intervened and declared Baxter the governor. 43 As a result of such abuses and the high taxes characteristic of this period “spawned deep resentment[]” in the people of Arkansas toward those who abuse their government power, and as the government spun more and more out of control and away from the needs of the people, the people increasingly “clamored for honest administration, a new constitution, and a chance to gain control of their state government.” 44

This wide dissatisfaction manifested itself in Arkansas’s fifth constitutional convention, the Constitutional Convention of 1874, and would result in the last major wholesale change in Arkansas’s governing document, namely, the passage of the Constitution of 1874. The Convention delegates specifically focused their attention on the “areas most abused by the treasury without an appropriation, and all bills that would raise state revenues would have to come from each house of the General Assembly. Id. at 6–7. The state government was also given the power to organize and restrict the financial affairs of local governments. Id.

41. Id. at 7 (footnote omitted).
42. Id.
43. Id.
44. Goss, supra note 15, at 7.
Radicals during . . . Reconstruction: taxation, elections, patronage, length of terms, public credit, and debt."\(^{45}\)

In adopting the new constitution, the generalized constitutions adopted first in 1836 and then readopted in 1861 and 1864 were found to be insufficient, in the view of the people, precisely because of their inability to control government and, more importantly, government abuses against the people. “[D]istrust of government was the theme,” writes Goss of the 1874 Constitution, “and detailed provisions abounded to prevent misunderstanding the convention’s intentions to preclude the misuse of any powers granted [to the government by the people].”\(^{46}\)

Following thirty-eight tumultuous years of near-continuous constitutional revision that saw four increasingly democratic constitutions amid increasing levels of popular participation in the constitutional process, the people of Arkansas overwhelmingly adopted the 1874 Constitution as a final check on Reconstruction-era abuses by the government.\(^{47}\) In one broad stroke, the power that had become so strongly centralized in Arkansas in the elite and the powerful, and increasingly kept away from the people during much of the nineteenth century leading up to the Reconstruction, was broken apart.

The passage of the 1874 Constitution reflected the prevailing view at the time that a “passive, low-tax, inactive state government was far preferable to an interventionist and expensive one” that the people could not control.\(^{48}\) This view continued well into the next century, but it gradually began to shift as modern demands on government began to test the limits of the 1874 Constitution.

2. Constitutional Baseline and the Limits of the 1874 Constitution

The limits imposed by the 1874 Constitution form the basis for the second and third key characteristics of Arkansas’s constitutional tradition that makes the incidence of initiative-based amendments the best measure of popular constitutional activism. Indeed, because of the limits imposed by the 1874 Constitution’s allocation of power, constitutional amendments

\(^{45}\). Id. at 8.
\(^{46}\). Id.
\(^{47}\). See BLAIR & BARTH, supra note 8, at 136–39 (noting that the 1874 Constitution was authorized and ratified by the people by a vote of 76,453 to 24,807 and came as the people’s chosen solution to the abuses of power and unchecked wastes that characterized the years leading up to 1874).
\(^{48}\). Id. at 10–11.
were the only way to allow the state government to attend to the people’s growing needs.

This allocation of power has two principal features: tight controls placed on the state government, and a limited power to change the constitution needed to loosen those controls. These features found voice in the 1874 Constitution as responses by the framers of the constitution to the abuses of power and the widespread distrust of those in power that characterized Arkansas’s early constitutional history. Moreover, the framers used these features to center political power with the people and situate the people as a check on the power of the state government and a key player in the constitutional process.

a. The people’s tight leash

The first key feature of the 1874 Constitution relevant to a discussion of popular constitutional activism is the strict control that the people hold over the government. This control is articulated in nineteen separate articles, using 261 individual provisions and nearly 60,000 words. Indeed, beginning with the first words of the 1874 Constitution, the people affirmed the centrality of popular sovereignty and gave thanks for “the privilege of choosing [their] own form of government.” The importance of the people is even more forcefully declared in the first section of article II’s declaration of rights: “All political power is inherent in the people.” These themes permeate each of the succeeding provisions of the Constitution.

The first substantive article of the 1874 Constitution is article II, the Declaration of Rights. As its designation would suggest, this article

49. See infra Part II.A.2.a.
50. See infra Part II.A.2.b.
51. See supra Part II.A.1.
52. BLAIR & BARTH, supra note 8, at 138; Goss, supra note 15, at 8. While the 1874 Constitution contains nearly ten times the number of words of the Federal Constitution, it is by no means the longest or the most detailed among state constitutions. BLAIR & BARTH, supra note 8, at 138. For example, the current New York Constitution stretches across twenty articles and contains over 180 active provisions. N.Y. CONST. New York’s constitution also covers in great detail many of the same areas as the Arkansas Constitution, including provisions on individual rights, taxation, and the coordinate branches of government. Id. That said, the level of detail and complexity of the Arkansas Constitution are still remarkable, especially in light of the people’s direct use of detailed and complex restrictions on government through the amendment process.
53. ARK. CONST. pmbl.; see also Goss, supra note 15, at 25.
54. ARK. CONST. art. II, § 1.
55. By contrast, no real mention of the powers of government is made in the preamble or the first three articles of the 1874 Constitution.
pronounces specific rights and powers reserved to and for the people. First among these rights is the right of the people to "alter, reform or abolish the [government] in such manner as they may think proper." Thus, the framers made the very existence of the state government directly subject to the power of the people. Moreover, the state government was instituted explicitly to protect the rights of the people and was empowered only with such powers as the people allowed.

Article II also provides an important restriction on government. Similar to the Tenth Amendment to the Federal Constitution, section 29 provides that all of the rights and powers established with the people, including unenumerated rights, are "excepted out of the general powers of the government and shall forever remain inviolate." Courts have held that this provision requires that the people must ratify any act affecting the constitution, ensuring that the power to modify the constitution is exclusively vested with the people. For example, in Pryor v. Lowe, the Arkansas Supreme Court invalidated a statute limiting the scope of constitutional conventions because the statute was not ratified by the people. The court stated that "any limitation upon the exercise of the power by the General Assembly, without a ratification thereof by the electorate, is prohibited by [article II, section 29]" specifically because constitutional conventions derive their power from the people, and that power is excepted under section 29 from the power of the government to modify or restrict. Conversely, in Priest v. Polk, the Arkansas Supreme Court sustained a legislative act's call for a convention precisely because the act provided that the people must ratify the call for the convention by vote.

56. Ark. Const. art. II, §§ 1–29. Section 29 ensures that the specificity of the rights mentioned in article II should not be construed to be an exhaustive list of the powers reserved by the people, but rather a list of those rights that the framers thought best to express explicitly. See id. § 29.

57. Id. § 1.

58. Id. § 2. Article II goes on to enumerate specific other rights of the people in a wide variety of areas. These areas include racial equality, the right to bear arms, free press, trial by jury, punishments, speedy and public trials, habeas corpus, searches of citizens, imprisonment, privileges and immunities, antitrust protections, property ownership and takings, taxation, eminent domain, religion and religious free exercise, and slavery prohibitions. Id. §§ 1–28.

59. Id. § 29; see infra text accompanying notes 60–63 (describing the reservation of certain enumerated rights to the people).

60. See, e.g., Priest v. Polk, 322 Ark. 673, 686, 912 S.W.2d 902, 909 (1995) (observing that the people alone have the "right to reform their constitution and the people have not given that right to any branch of government").

61. 258 Ark. 188, 192, 523 S.W.2d 199, 202 (1975).

62. Id.

63. Polk, 322 Ark. at 686, 912 S.W.2d at 909.
The original 1874 Constitution also provided extensive and explicit limitations and instructions for the bare operation of a limited state government in other areas. Under all of these instructions and restrictions, the 1874 Constitution focused on providing the government with only the minimum power necessary to function, with all remaining power vested with the people.

What power that the constitution did bestow on the government was severely limited. Professors Blair and Barth summarized the oppressive nature of the 1874 Constitution like this:

[The] pervasive distrust of government is expressed in almost every section of the 1874 [Constitution]. To ensure popular control over officialdom, many offices that were previously appointive became elective, and terms were almost uniformly reduced from four to two years. This gave voters...forty-four rather than fourteen opportunities to exercise their electoral control in any four-year period. To prevent excessive and unwise law making, the legislature was limited to one sixty-day session every other year. Maximum salaries for all state and county officials were specified and fixed. Elaborate statutory detail was included on everything from the conduct of elections to the times and places of circuit court meetings and the procedures for letting state printing contracts so any state official tempted to abuse his powers had little leeway. . . . Above all, the taxing and spending powers were circumscribed with every prohibitive device imaginable. Sixty-nine of the 261 sections of the unamended

64. Articles IV through VII impose dozens of detailed limitations on the powers of each department of the state government. The other articles provide additional rules, limitations, and protections that further circumscribe both the express powers of the state government and any latitude that the state government may assert in carrying out what powers it does have. For example, article III established the original rules protecting the franchise and elections; article VIII describes the original apportionment scheme; article IX protects certain property from court-ordered seizure and provides the property rights of women; article X requires the legislature to pass laws to aid agriculture, mining, and manufacturing; article XIII prevents redefinition of counties without the consent of a majority of voters in the parts of the counties affected; article XIV makes free public education a state function; article XV provides a broad power of impeachment against all State officers and judges; and article XVI imposes extensive limits on government credit, debts, finances, salaries, and powers of taxation. article XIX further provides a veritable cornucopia of limitations ranging from a prohibition on duels for state officeholders, residence requirements for civil office holders, and penalties for office holders for failing to perform their duties, to requirements regarding “stationery, printing, paper, fuel, . . . and the printing, binding and distributing [of legislative documents].”
1874 constitution dealt with financial matters, and most in a restrictive way: local governments were severely limited in their taxing powers, state tax and appropriations measures required extraordinary majorities, and there could be no extension of credit or assumption of debt for any purposes whatsoever.\(^6\)

With such tight controls constitutionally prescribed, future variations, government power expansions (or contractions), and many social and economic services now considered essential would only be possible if the constitution were changed by amendment or complete revision.\(^6\) As a result, the power to amend the constitution became and remains a key tool for the people of Arkansas to get what they need out of government.

b. The power of constitutional change

The second key feature of the 1874 Constitution relevant to popular constitutional activism is the power to change the constitution itself. Currently, there are only two constitutionally-prescribed methods to amend the constitution: legislative proposals and popular initiatives.\(^6\) The 1874 Constitution, however, originally reserved exclusively to the legislature the power to amend the constitution through proposals that were drafted by the legislature and then submitted to the people for approval. Article XIX, section 22 of the 1874 Constitution provides that:

Either branch of the General Assembly, at a regular session thereof, may propose amendments to this Constitution; and if the same be agreed to by a majority of all members elected to each house, such proposed amendments . . . shall be submitted to the electors of the State, for approval or rejection; and if a majority of the electors voting at such election adopt such amendments, the same shall become a part of this Constitution . . . .\(^6\)

Under this provision, the legislature is empowered to propose up to three individual amendments to the constitution at a time.\(^6\) In all cases, the 1874 Constitution requires that the people must approve any and all changes made to the constitution.\(^7\) This method of submitting proposed constitutional amendments to the people remains to this day.

\(^{65}\) BLAIR & BARTH, supra note 8, at 137.
\(^{66}\) Id. at 138.
\(^{67}\) ARK. CONST. art. V, § 1, amended by ARK. CONST. amend. XII; id. art. XIX, § 22.
\(^{68}\) ARK. CONST. art. XIX, § 22.
\(^{69}\) Id.
\(^{70}\) Id.
In 1910, the people of Arkansas created a second method of constitutional change by adopting the 1910 Initiative and Referendum Amendment. This amendment provided that "the people... reserve to themselves [the] power to propose laws and amendments to the Constitution and to enact or reject the same at polls as independent of the legislative assembly, and also reserve [the] power at their own option to approve or reject at the polls any act of the legislative assembly." Under this reservation, the people of Arkansas reserved to themselves the sovereign power to propose constitutional amendments.

Ten years later, the people adopted a new initiative and referendum amendment that superseded the 1910 Initiative and Referendum Amendment. This amendment, the 1920 Initiative and Referendum Amendment, has been seen as a reaction to the interpretation imposed on the 1910 version by the Arkansas Supreme Court that found that although the people of Arkansas as a sovereign whole had the power to initiate constitutional amendments and local legislation, local populations were not empowered to initiate local legislation. The 1920 revision addressed this

71. Brickhouse v. Hill, 167 Ark. 513, 516, 268 S.W. 865, 866 (1925); Hodges v. Dawdy, 104 Ark. 583, 587, 149 S.W. 656, 657 (1912). This amendment was originally numbered as Amendment 13 to the 1874 Constitution but was subsequently renumbered amendment 7. Cobb v. Burress, 213 Ark. 177, 181, 209 S.W.2d 694, 697 (1948).

72. Hodges, 104 Ark. at 587, 149 S.W. at 657 (quoting ARK. CONST. amend. XIII of 1910).

73. Id. at 593, 149 S.W. at 660. Hodges v. Dawdy was the first interpretation of the 1910 Initiative and Referendum Amendment. In Hodges, the Arkansas Supreme Court interpreted the amendment literally as a reservation of part of the legislative power previously conferred by the people to the General Assembly. Id. at 593–95, 149 S.W. at 660–61.

74. Cobb, 213 Ark. at 185, 209 S.W.2d at 698–99. The 1920 Initiative and Referendum Amendment received 86,360 votes for and 43,662 votes against. Brickhouse, 167 Ark. at 530, 268 S.W. at 871 (Arnold, J., concurring). The Amendment was declared lost by the Speaker of the House on January 15, 1921 (for want of the required majority of votes cast in the election), but it was held adopted by the Arkansas Supreme Court in Brickhouse. Id. at 524, 268 S.W. at 869 (majority opinion). This amendment subsequently became known as Amendment 7. Cobb, 213 Ark. at 181, 209 S.W.2d at 697. All references in this article from this point on will refer to the 1920 amendment as the 1920 Initiative and Referendum Amendment, Amendment 7, or ARK. CONST. amend. VII.

75. See, e.g., Beene v. Hutto, 194 Ark. 107, 111–12, 105 S.W.2d 530, 531 (1937) (Mehaffy, J., dissenting); see infra notes 84–90 and accompanying text (describing the popular reaction to the Arkansas Supreme Court’s interpretation of the 1910 Initiative and Referendum Amendment). Despite language in the amendment, omitted above, that suggested that the "people of each municipality [and] each county" had the power to "initiate and enact local legislation," the court in Hodges held that "the amendment... does not confer power on the voters of a municipality or county, apart from the other people of the state, to initiate any kind of legislation." Hodges, 104 Ark. at 598, 149 S.W. at 662 (describing the Arkansas Supreme Court’s interpretation that the amendment did not allow
issue directly by specifically reserving initiative and referendum powers to
the people of each municipality and county "as to all local, special and
municipal legislation of every character in and for their respective
municipalities and counties." 76

The 1920 Initiative and Referendum Amendment also revised and
significantly expanded on the power of the people to initiate constitutional
amendments to make it a broader power of amendment than the power
allowed to the legislature. 77 First, the revised initiative power allows an
unlimited number of amendments to be proposed in each qualifying
election. 78

Second, the framers of the 1920 Initiative and Referendum Amendment
protected the amendments passed by the people from reversal by the
executive or the legislature by prohibiting the Governor from using the veto
power against "measures initiated by or referred to the people" 79 and
requiring a two-thirds supermajority vote in the General Assembly to repeal
or amend initiative-based amendments. 80

Third, the people need only approve a constitutional amendment by a
majority of votes cast on the measure. 81 This corrected a deficiency in the
1910 Initiative and Referendum Amendment's method of amending the
constitution under which it was uncertain what type of majority was
required to pass a constitutional amendment. 82 The 1920 Initiative and

local populations to initiate and enact local legislation).

76. Ark. Const. art. V, § 1, cl. 6, amended by Ark. Const. amend. VII; see also Cobb,
213 Ark. at 185, 209 S.W.2d at 698–99.

77. See Ark. Const. art. V, § 1, cl. 6, amended by Ark. Const. amend.VII; see also
Brickhouse, 167 Ark. at 529–30, 268 S.W. at 870 (Arnold, J., concurring) (finding that the
amendment's "comprehensive and enlarged provisions[] so regulated the initiative and
referendum principle as to remove the doubts which had arisen in judicial construction [of the
1910 Initiative and Referendum Amendment]").

78. Ark. Const. art. V, § 1, amended by Ark. Const. amend.VII. By contrast, the
General Assembly can only propose three amendments for each qualifying election. Ark.
Const. art. XIX, § 22.

79. Id. ("The veto power of the Governor ... shall not extend to measures initiated by or
referred to the people."). Thus, as the term "measures" is defined by the amendment to
include "any bill, law, resolution, ordinance, charter, constitutional amendment or legislative
proposal or enactment of any character," this prohibition protects any and all measures
approved by the people from being subject to the veto power that the Governor would hold
over similar measures originating from the General Assembly. Id. (emphasis added); id. art.
VI, § 15.

80. See id. Moreover, as a constitutional amendment, once an initiated amendment is
adopted by the people, it can only be modified or repealed by future constitutional
amendments. Id.

81. Id.

82. See Goss, supra note 15, at 15–16. This confusion contributed to the invalidation of
a number of constitutional amendments passed prior to the 1920 Initiative and Referendum
Amendment and the renumbering of the recognized amendments to the 1874 Constitution.
See id.
Referendum Amendment therefore specifically disclaimed any requirement that initiative amendments receive a majority of the electors voting in the election in which the constitutional amendment is offered.\textsuperscript{83}

In addition, the 1920 Initiative and Referendum Amendment can itself be seen as an example of popular constitutional activism at work: a popular reaction against a constitutional interpretation by the Arkansas Supreme Court. This is because the 1920 Initiative and Referendum Amendment came about as a popular reaction against the ruling of the Arkansas Supreme Court in \textit{Hodges v. Dawdy}\textsuperscript{84} that disallowed local populations from initiating local legislation. As the court in \textit{Dozier v. Ragsdale}\textsuperscript{85} noted, the court in \textit{Hodges} held the initiation of local legislation provision provided in the 1910 Initiative and Referendum Amendment was “meaningless” despite what appeared to be clear language to the contrary in the amendment itself.\textsuperscript{86} “No one doubted at the time, and no one doubts now, that the people, in adopting this amendment, thought they were providing for local legislation in counties by initiating acts.”\textsuperscript{87} Yet the court in \textit{Hodges} still found that such initiation of local legislation was not guaranteed by the 1910 Amendment.\textsuperscript{88}

In response to this decision, the people adopted the 1920 Initiative and Referendum Amendment to revise and make explicit the power local populations have to enact local legislation.\textsuperscript{89} As the court in \textit{Tindall v. Searan} subsequently observed, “[t]he fact that the people adopted this provision a second time, and having written it in such plain language that it cannot be misunderstood by anyone, shows clearly that the people intended to reserve to themselves the right to pass all local laws affecting the counties.”\textsuperscript{90}

The Arkansas Supreme Court has also recognized that the broad power inherent in the people’s reservation of the legislative power does not permit technical flaws or defects to thwart the intended meaning of constitutional amendments initiated and passed by the people.\textsuperscript{91} The court in \textit{Reeves v. Smith} stated the principle in this way:

\begin{itemize}
  \item \textsuperscript{83} ARK. CONST. art. V, § 1, \textit{amended by ARK. CONST. amend. VII.}
  \item \textsuperscript{84} 104 Ark. 583, 598, 149 S.W. 656, 662 (1912).
  \item \textsuperscript{85} 186 Ark. 654, 656, 55 S.W.2d 779, 780 (1932).
  \item \textsuperscript{86} \textit{Id.}
  \item \textsuperscript{87} \textit{Id.}
  \item \textsuperscript{88} \textit{Hodges}, 104 Ark. at 598, 149 S.W. at 662.
  \item \textsuperscript{89} \textit{Goss, supra} note 15, at 15.
  \item \textsuperscript{90} 192 Ark. 173, 177, 90 S.W.2d 476, 478 (1936).
  \item \textsuperscript{91} \textit{See Reeves v. Smith, 190 Ark. 213, 216, 78 S.W.2d 72, 73 (1935); Tindall, 192 Ark. at 179, 90 S.W.2d at 479. But see infra Part IV.C (noting the court’s increasing involvement in evaluating the ballot sufficiency of initiative-based amendment proposals).}
\end{itemize}
[The 1920 Initiative and Referendum Amendment] permits the exercise of the power reserved to the people to control, to some extent at least, the policies of the [S]tate, but more particularly of counties and municipalities, as distinguished from the exercise of similar power by the Legislature, and since that residuum of power remains in the electors, their acts should not be thwarted by strict or technical construction.92

Moreover, the framers appear to have specifically envisioned the gradual amendment process to be the manner in which the core document was to change after 1874. This is because neither the 1874 Constitution nor any subsequent amendment, however, provided a method for wholesale constitutional change through convention or any other process; in other words, there is no expressly permitted method for obtaining an entirely new or drastically revised constitution.93 The court in Harvey v. Ridgeway observed that this absence was intentional.94 After experiencing five constitutional conventions in the forty years leading up to the 1874 document, the framers were certainly familiar with the convention process and could have built such a process explicitly into their constitutional framework.95 It is clear that the framers elected not to do so.

Importantly, however, the power to adopt a completely new constitution through a constitutional convention has been found to belong to the people regardless of the power's absence from the 1874 Constitution.96 This power has been held to flow from the people's article II, section 1 power to "alter, reform or abolish the [government] in such manner as they may think proper."97

92. Reeves, 190 Ark. at 215–216, 78 S.W.2d at 73.
94. See id. at 46, 450 S.W.2d at 287 (finding that the court "may reasonably assume that the people intended it that way").
95. It is also possible that the framers simply did not feel the need to build a framework for constitutional conventions into the 1874 Constitution because they knew that power already existed inherently in the people and therefore did not need to be explicitly reserved in the text of the constitution. On the other hand, the level of detail and explicit protections and reservations of power that were included in the 1874 Constitution seem to suggest that this is not the case, or at least that the primary method of constitutional change should be by the gradual amendment process.
96. This is because constitutional conventions derive their power from the people and the people have the power to adopt a new constitution by whatever means they see fit. Supra note 57 and accompanying text; see Harvey, 248 Ark. at 45–48, 450 S.W.2d at 287–88. Thus by extension, the General Assembly has the power to ask the people to authorize a convention to adopt a new constitution. Cf., e.g., id.; Id. at 49, 450 S.W.2d at 289 (Wootton, J., dissenting) (citing Webb v. State, 176 Ark. 722, 3 S.W.2d 1000 (1928) and 16 AM. JUR. 2D Constitutional Law § 30 for the proposition that the General Assembly could call a convention because it was not denied the power).
97. Harvey, 248 Ark. at 46–47, 450 S.W.2d at 287 (quoting ARK. CONST. art. II, § 1)
That said, the people have not approved of any such wholesale changes to the Constitution since 1874 despite numerous attempts by the Governor and General Assembly over the years to do so. Interestingly, many of the changes proposed by these sweeping reform efforts have been adopted by way of individual amendments, legislative action, and administrative action, as well as a host of additional reform amendments. As a result of the people's unwillingness to approve the changes offered by the conventions that have been called over the years, and despite the tremendous potential for popular constitutional activism through wholesale constitutional change, constitutional conventions have not played a direct role in the development of constitutional law in Arkansas. Instead, constitutional amendments have been used extensively since 1874 to develop constitutional law. This suggests that the framers' preferred method of piecemeal change by amendment announced in the 1874 Constitution and in the Initiative and Referendum Amendments continues to be dominant today. Indeed, it has

(emphasis added); see also Pryor v. Lowe, 258 Ark. 188, 192, 523 S.W.2d 199, 202 (1975).

98. See infra Part II.B (listing attempts to change the 1874 Constitution by convention).

99. See, e.g., BLAIR & BARTH, supra note 8, at 152 (noting that in the period between 1974 and 2000, of the twenty-seven major changes proposed by the 1968 Constitutional Revision Study Commission, fourteen have been adopted by individual amendment or legislative or administrative action); see also infra Part II.B (noting the absence of any successful attempts at wholesale constitution revision through constitutional conventions since 1874).

100. I do not mean to suggest that the constitutional conventions that have been called since 1874 have not played an important role in the politics of constitutional law. Indeed, these conventions demonstrate convincingly that there is widespread dissatisfaction with the 1874 Constitution. As yet, however, a single magical bullet has not been found to marry this dissatisfaction with actual wholesale change. My point here is only that because these constitutional conventions have not successfully replaced the 1874 Constitution, they have not been the effective instruments of popular constitutional activism that constitutional amendments have been.

101. Certainly other possible explanations exist for the dearth of successful wholesale revisions to the 1874 Constitution. For example, to the extent that amendments proposed by both initiative and legislative groups are driven by political forces, a failure of those forces, however strong, to create or capitalize on a positive political environment would in turn create a failure in any wholesale revision attempt. This is because voter turnout, positive media exposure (particularly in the era of widespread television, radio, and Internet coverage), and a host of other factors impact whether a proposed wholesale revision would achieve enough popular support at the polls to succeed, regardless of whether a majority of people in the state as a whole wanted wholesale constitutional change. Moreover, as Professors Blair and Barth have pointed out, citizen indifference to such attempts has always been a problem to constitutional revision efforts. BLAIR & BARTH, supra note 8, at 145. All of these issues must be overcome to achieve successful broad constitutional reform. That said, the end result continues to be constitutional revision through the only method explicitly provided for in the Arkansas Constitution: piecemeal constitutional amendment, a process
been exclusively amendment-based forces that have expanded the limits imposed by the 1874 Constitution. Consequently, I focus the remainder of this article on the important role that constitutional amendments, particularly initiative-based constitutional amendments, have played and how they represent the best measure of popular constitutional activism in Arkansas today.

B. The Primacy of Initiative-Based Constitutional Amendments as Instruments of Popular Constitutional Activism

The fourth key characteristic of Arkansas’s constitutional tradition is the frequent use of initiative-based constitutional amendments by the citizens of Arkansas to control their constitution. Indeed, Arkansas’s long history of frequently amending the 1874 Constitution102 is evidence that constitutional amendments have been a powerful force in Arkansas’s constitutional law. This use is significant when compared to the other methods of constitutional change because it shows that, instead of relying on the legislature103 or broad constitutional reforms104 to keep the constitution in line with the people's changing social and administrative needs, the people have instead used initiative-based amendments.105 As will be

over which the people have the final say.

102. See, e.g., Goss, supra note 15, at 9, 15–22 (detailing all 169 amendments submitted to the people from 1874 to 1992); infra Parts II.B.1–4; infra app.1. Indeed, the people’s wheels of revision began to change within a decade of the passage of the 1874 Constitution. Since that time, more than 190 amendments have been proposed and submitted to the people for consideration, resulting in the adoption of eighty-three amendments through 2006. Goss, supra note 15, at 9, 15–22; see also Arkansas Secretary of State, Election Results, http://www.arelections.org/index.php?l=1 html (last visited June 27, 2009); Arkansas Secretary of State, Initiatives and Amendments from 1938-2006, http://www.sosweb.state.ar.us/elections/elections_pdf/initiatives_amendments_1938-2006.pdf; infra fig.1.

103. See infra Part II.B.1–4. Moreover, the people have used initiative-based amendments nearly as frequently as the legislature has used their power to propose amendments. See infra Part II.B.1–4.

104. See Goss, supra note 15, at 9; infra Part II.B.1–4. Since 1874, three additional constitutional conventions have been held to reform the state constitution. Goss, supra note 15, at 10–14. Each of the proposed constitutions resulting from these conventions, however, was soundly defeated when presented to the voters. Id.

105. See infra Part II.B.1–4. It is clear, however, that the people as a body are not solely responsible for the creation of initiative-based amendments. It is perhaps more correct to view the people themselves as instruments of constitutional change that are manipulated by powerful political interests precisely because the people are the source of all political power and the only body ultimately empowered to change the constitution. Yet the fickle will of the people in approving or rejecting constitutional changes proposed by these other interests suggests that the people are not completely under the control of political entities. See BLAIR & BARTH, supra note 8, at 141–42 (noting the lack of any persistent pattern in the people's voting habits on constitutional changes). One study of “public opinion” on constitutional
discussed in Part III below, the people have also been seemingly unwilling, until possibly very recently, to rely on the courts to control the direction of constitutional law. Consequently, initiative-based constitutional amendments have historically represented essential instruments of constitutional change in Arkansas. The incidence with which these amendments reach the people for a vote in a given year, therefore, represents the best measure of the level of popular constitutional activism.

change summarized by Professors Blair and Barth suggested that "voters do seem to pick and choose quite deliberately among ballot issues but that 'voting patterns provide only hazy evidence of their choices.'" Id. at 141 (quoting WALTER NUNN, VOTING BEHAVIOR ON STATEWIDE BALLOT ISSUES: 1964–1976, at 36–37 (1976)). Thus, even if the people are influenced by political interests, the people have themselves remained powerful forces of constitutional change, with initiative-based constitutional amendments as their most potent instrument.

106. See infra Part IV (describing the reemergence of constitutional law phenomenon in Arkansas and the Arkansas Supreme Court's increasing use of the Arkansas Constitution).

107. Much of what has been discussed in this article, including the initiative power of the people to advance constitutional amendments and the power of the people alone to approve all amendments, can be said of numerous other states. For example, states including Arizona, Missouri, North Dakota, Oklahoma, and Oregon employ similarly "easy-access" constitutional amendment processes. BLAIR & BARTH, supra note 8, at 418 n.6. What makes Arkansas unique is the frequency and manner in which the people have used these tools to control and develop constitutional law in their state.
A simple analysis of the entire period (1912 to 2006) during which initiative-based amendments have been available to the people, however, would not be an appropriate measure of popular constitutional activism because social, political, and legal changes within that period create countervailing forces that likely obfuscate meaningful interpretations of the amendment activity occurring amidst those forces. Consequently, care must be taken to account for these forces analytically and statistically.

I have, therefore, opted to use the following methodology to quantify the impact of initiative-based amendments in Arkansas: (1) distinguish between legislatively-proposed amendments and initiative-based amendments, and (2) break up the 1912 to 2006 period into smaller periods that correspond with major social, political, and legal changes occurring in the state and across the country. Figure 2 reflects the first distinction:

108. Although an amendment-by-amendment breakdown of each constitutional amendment proposed since 1874 would certainly be fascinating, such a review is not appropriate here. First, evaluating each amendment would be beyond the scope of this article because the focus of this article is on describing objectively the process of popular constitutional activism, not necessarily its content. Where content would be informative of the process, however, I will attempt to explain how the content of activism relates the will of the people to the constitutional process. Second, evaluating each amendment would present several analytical flaws. Perhaps foremost among these would be that such an analysis would suggest that I am arguing that every constitutional amendment adopted or proposed since 1874 fits the paradigm of popular constitutional activism that I offer in this article. Although

Figure 1: Constitutional Amendments Proposed from 1874 to 2006
A macroscopic review of this chart and Figure 1 reveals four apparently distinct periods of initiative-based amendment activity: 1874–1908, 1910–1928, 1930–1966, and 1968–2006. The first period describes a period where amendments were submitted to the people only by the legislature. The next two periods correspond to peaks in amendment activity, with the last period witnessing a significant increase in the number of amendments proposed by initiative.

I do believe that the trend of amendments and the amendment process itself constitute powerful instruments for popular constitutional activism, to suggest that they are all exemplars of such a model would ignore a variety of other factors that drive constitutional reform; consequently, I do not make such a claim here. For example, as other scholars have observed, constitutional amendments by initiative have been instigated by political forces and many of the initiatives adopted received plenary gubernatorial support. E.g., BLAIR & BARTH, supra note 8, at 141, 153. Although such forces are certainly at work, this article focuses on the power entrusted solely to the people to approve or reject all amendments, even politically-driven amendments supported by the Governor or the legislature, and the people’s authority to initiate amendments on their own.

In addition, a number of attempts have already been made to find patterns in the amendment process or of underlying meanings in its results. See, e.g., id. at 141–42. As yet, such analyses have been unable to discern a pattern in the amendments approved over the amendments rejected. Id. Here, I suggest only one broad truth: amendments indicate a willingness of the people to directly, and frequently, change the constitutional landscape of Arkansas to suit their collective will.
activity during the period from 1874 to 1966 after the initiative power was introduced in 1910 (and then again in 1920). The last period, and the period focused on in this article, is the period corresponding to the ascendancy of the Arkansas Supreme Court and the reemergence of state constitutional law on a national level, a number of movements towards wholesale constitutional reform, and a marked shift in the number of popular initiatives proposed.

These distinct periods serve as the framework from which I will examine the social, political, and legal movements that have occurred since 1912 and compare the impact of those movements to the incidence of initiative-based amendments proposed in each election year. As I will explain in the following four subsections, these distinct periods also confirm that a statistical analysis of the 1912 to 2006 period as a whole would not likely produce meaningful conclusions given the radical social and political changes that developed in the state contemporaneously with the shifts. I will also take steps both to isolate the impact of these changes for later statistical analysis and to evaluate the state of constitutional change in each period, with an eye toward coming to a conclusion about the future of constitutional revisionism under the initiative power.

As a preliminary matter, it is important to recognize that although there are substantial peaks and valleys in the numbers of amendments proposed and approved, the first significant characteristic of the distinction between initiative-based and legislature-based amendments is the level of participation in the amendment process that the people have maintained over the years. Whether offering one amendment or as many as seven, the people have offered amendments in more than 72% of elections from 1912 to 2006.109

1. 1874–1908: Amendments Submitted to the People

It did not take long for the first signs of Arkansas’s tradition of constitutional revision to develop after the formal ratification of the 1874 Constitution, with the first proposed constitutional amendment offered to the people by the Legislature in 1880.110 During this period, the people were called upon to approve or reject constitutional amendments offered by the General Assembly in 55% of qualifying elections. As indicated by the linear trend line in Figure 3, the legislature’s amendment proposals were used with increasing frequency leading up to the 1910 election.

109. The year 1912 was the first year in which the people could initiate constitutional amendments directly because amendments may only be offered in the state’s biennial general elections and the first initiative and referendum amendment was passed in 1910. Goss, supra note 15, at 15.
110. Id.
2. 1910–1928: A People Empowered

The first major amendment with respect to popular constitutional activism came relatively soon after the initial passage of the 1874 Constitution—the 1910 Initiative and Referendum Amendment. In introducing the initiative power, this amendment ushered in a new era of direct participation by the people in the constitutional process whereby the people could place constitutional amendments directly on the ballot without prior approval of the legislature. With this newfound power, the people initiated proposed amendments to the constitution in nearly 89% of possible elections from 1910 to 1928, averaging nearly 1.5 proposed amendments at each biennial election opportunity. This represents close to a 24% increase in proposed constitutional amendments from the previous period, 1874 to

111. See supra Part II.A.2.b.
112. See supra Part II.A.2.b.
1908, when the legislature alone submitted proposed amendments to the people.

![Figure 4: Amendments Proposed: 1910 to 1928](chart)

Also occurring during this period of relative initiative inactivity was an ultimately unsuccessful movement to effect wholesale constitutional change. In 1918, Governor Charles Brough sponsored a new constitution that included twenty-four significant differences from the 1874 Constitution. Despite the support of the Governor, the proposed constitution was "resoundingly defeated by Arkansas voters." Professors Barth and Blair, however, have noted that such broad movements seem to prompt periods of constitutional updates to implement the very changes that the defeated constitution sought to accomplish in the first place—an effect seen in the next period.

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113. BLAIR & BARTH, supra note 8, at 152.
114. Id.
115. Id. at 152–54. The statistical effect that constitutional conventions have on the level of popular constitutional activism through initiated amendments is explored more fully below in Part IV.A’s analysis of the wholesale constitutional revision movements of the late twentieth century.

The period from 1930 to 1964 represents the busiest period in Arkansas’s constitutional history, with eighty-five amendments proposed over the course of thirty-six years, and more than 2.5 amendments proposed on average per year. In each of the available years, voters considered at least two constitutional amendments, either proposed by the legislature or by the people through the initiative power. This represents an 11% increase in year-by-year constitutional activity from the prior period (1910–1928), and a 45% increase in year-by-year constitutional activity from the period immediately after the ratification of the 1874 Constitution (1874–1908).

Figure 5: Amendments Proposed: 1930 to 1964

Amendments Proposed: 1930 to 1964

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Figure 5: Amendments Proposed: 1930 to 1964
For example, in 1930 the people proposed seven amendments to the constitution on a wide range of issues including elective highway commissions, taxes, challenges to laws by citizens, elections for referenda and vacancies, and judicial compensation. This flurry proposed more amendments in one election than in all of the prior twelve years combined. Although all of these proposals failed, this level of activity turned out to be a harbinger of the level of participation exercised by the people over the next three decades.

Figure 6: Amendments Proposed by Initiative: 1930 to 1964

The next surge in amendments by initiative came in 1938, when six amendments were proposed by initiative (and three proposed by the legislature). These initiatives included proposals for workers compensation, education, highway bond refunding, tax exemptions for new industries, as well as regulations for the practice of law and the method by which vacancies in statewide offices were to be filled. Not surprisingly, the

116. Goss, supra note 15, at 17. The legislature also introduced a proposed amendment that established state schools. Id.

117. Id. at 17–18. Interestingly, the legislature was also active during this period,
character of popular initiative proposals during this period tracked with the broader national themes of social welfare and government reform that swept the nation in the New Deal era of the 1930s.

The last major surge of proposed amendments during this period occurred in 1956. In total, nine constitutional amendments were proposed, seven through the initiative process and two by the legislature.\(^{118}\) Perhaps most notable among the amendments initiated through the people, and certainly the most pertinent insight into the feelings of the people on the constitutional process at the time, was amendment 44.\(^{119}\) This amendment challenged the supremacy of the federal judiciary as the ultimate arbiter of the Federal Constitution by specifically rejecting the United States Supreme Court's decision in *Brown v. Board of Education*.\(^{120}\)

This amendment also reflects Arkansas's tradition of popular constitutional activism perhaps more clearly than any other amendment. First, it indicates a willingness on the part of the people to see their own constitutional traditions as distinctly separate from that of the larger, national constitutional framework. Second, it shows the willingness of the people to use their state's own constitution to provide the level of protection desired by the majority of the voting population.

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\(^{118}\) Goss, *supra* note 15, at 19.

\(^{119}\) Id.

\(^{120}\) Id. at 169; see Ark. Const. amend. XLIV, § 1. Section 1 of the amendment read: "The General Assembly of the State of Arkansas shall take appropriate action and pass laws opposing in every Constitutional manner the Un-Constitutional desegregation decisions of May 17, 1954 and May 31, 1955 of the United States Supreme Court, including interposing the sovereignty of the State of Arkansas to the end of nullification of these and all deliberate, palpable and dangerous invasions of or encroachments upon rights and powers not delegated to the United States nor prohibited to the States by the Constitution of the United States and Amendments thereto, and those rights and powers reserved to the States and to the People thereof by any department of [the Federal Government]. Said opposition shall continue steadfast until such time as such Un-Constitutional invasions or encroachments shall have abated or shall have been rectified, or the same shall be transformed into an Amendment to the Constitution ...."

Ark. Const. amend. XLIV, repealed by Ark. Const. amend. LXIX (referencing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)). Sections 2 through 4 of the amendment empowered the state to enforce the amendment. Id. § 2-4. The amendment was devised by members of the Arkansas legislature in response to the Little Rock High School crisis in 1957 that resulted in the desegregation of Little Rock High School by federal forces. Goss, *supra* note 15, at 170.
Moreover, this amendment did more than regulate the salary of state officials or create allowances for the government to tax or incur debt as many other amendments have. Instead, it articulated a vision that the people were willing to establish by popular vote the place of Arkansas in the federalism of the day and reaffirm the centrality of their constitution in their lives. While amendment 44 is certainly unconstitutional under the Federal Constitution in many respects, and in fact has been repealed by subsequent amendment, it provides an important lens with which to view the state of popular constitutional activism in the 1950s and the people's perspective on the constitutional process. This perspective arguably continues to this day in the form of amendment initiatives that seek to provide or secure rights that are likely unavailable through the existing state constitution or under the Federal Constitution, as well as amendment initiatives that circumscribe rights that are within the province of state control—such as marriage.

The extremely high number of initiated amendments proposed during this period, however, was not uniform across the entire period. First, initiatives appeared in only approximately 78% percent of possible elections. Although this percentage is certainly not low, and is in fact slightly higher than the percentage offered since the initiative power was introduced in 1910, the underlying data indicate a subtle shift in the quantity and quality of constitutional activism in the state. Second, this shift seems centered around the 1956 surge of amendments, and is isolated by a period of four years of initiative inactivity before and after the surge.


After more than three decades of unprecedented popular involvement in the constitutional process, both in adjusting the Arkansas Constitution to reflect the values of the people and in slowly fixing systemic problems inhering from the restrictions imposed by the original 1874 Constitution and its subsequent amendments, another distinct shift occurred in the total number of amendments proposed. As Figure 7 illustrates, beginning in 1966, no amendments were offered in 1966, 1970, or 1972, either by initiative or proposal of the legislature.

122. Ark. Const. amend. LXIX.
123. For example, with the adoption of amendment 83 to the Arkansas Constitution, voters established by popular initiative that marriage consisted only of unions between "one man and one woman." Id. amend. LXXXIII, § 1.
Although such an absence is not unprecedented, this shift occurred contemporaneously with an even more pronounced change in amendments proposed by popular initiative. Figure 8 shows that between 1966 and 1982, only two amendments were proposed by initiative. During this sixteen-year period, initiated amendments were offered during only 22% percent of possible elections, one of the lowest levels of popular involvement through initiated amendments over a sixteen or more year period since 1912 when the initiative power was first used. Moreover, the average number of amendments proposed by initiative during the 1966 to 1982 period plummeted to 0.22, the lowest average number of amendments proposed during any sixteen-year period in Arkansas’s history.

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124. A similar absence occurred around the time of the 1956 surge of proposed amendments. See supra fig. 6.
This statistical shift, however, did not occur within a vacuum; rather, it coincided with a transformation in traditional Arkansas politics. As Professors Blair and Barth have observed, from the 1960s forward Arkansas has experienced a broad “popularization of politics.” “Arkansas voters,” they observe, “have become much more participatory, now generally matching national levels of voter turnout” and occasionally exceeding national turnout. Yet despite this increase in voter turnout, Figure 8 shows that the level of popular constitutional activism by initiative amendment has changed, disappearing from 1966 to 1982 and then briefly

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125. See generally BLAIR & BARTH, supra note 8, at 45–57.
126. Id. at 51 (internal quotation marks omitted).
127. Id. at 50. Professors Blair and Barth cite a number of complex and interrelated reasons for this increase in popular participation at the polls:

[T]he elimination of the poll tax and the white primary; the occasional vigorous voter registration efforts by candidates, parties, and interested organizations; a secretary of state’s office that, by the 1990s, was enthusiastically encouraging voter registration with a host of educational outreach activities; the stimulation provided by spirited close contests replacing predictable outcomes; and, of course, the enfranchisement of the African American citizenry.

Id. at 50–51.
reemerging in 1984 before beginning a steady, measured decline leading to 2006 when no amendments were offered. As in the prior period, a review of the social, political, and legal movements occurring during this period provides some insight into the changing use of initiative-based amendments.

Importantly, this increase in overall voter participation coincided with increasing political interest in comprehensive constitutional reform. In 1961, 1963, and 1965, attempts were made to pass legislation that would have called for a general convention to reconstitute the aging 1874 Constitution. These attempts, however, were opposed and defeated by the Governor of Arkansas, Orval E. Faubus, "who was at the peak of his considerable power of his twelve-year tenure (1955–1967)."

In 1967, however, Governor Faubus was succeeded by Winthrop Rockefeller, "a strong advocate of constitutional revision." As one of his first acts, Governor Rockefeller, along with representatives from the legislature, judiciary, and the Arkansas Bar Association, appointed the Arkansas Constitutional Revision Study Commission. The Commission concluded that "a general revision of the 1874 Constitution was needed and that a constitutional convention was the best way to achieve it."

In 1968, Arkansas voters authorized a constitutional convention and strongly supported candidates who supported states' rights and reform of the state constitution. The delegates to Arkansas's seventh constitutional convention worked from 1969 to 1970 to develop a complete revision to the 1874 Constitution. The final product of the Convention was a streamlined and modernized constitution about a fourth the size of the 1874 Constitution. Surprisingly, despite the previously strong support for

129. Goss, supra note 15, at 10–11. This interest was developed under the leadership of several powerful politicians, including future United States Senator David Pryor (then State Representative), State Representative Virgil Butler, United States Representative Wilbur D. Mills, and Ted Boswell. Id.
130. Id. at 10.
131. Id.
132. Id.
133. Id.
134. Id.
135. Goss, supra note 15, at 11. The push for the protection of states' rights in Arkansas was not a new development. It can be expressly seen in amendments as early as Amendment 44 in 1956. See supra notes 119–23 and accompanying text.
137. Id. Not all of the language removed by the proposed constitution's drastic reduction
constitutional revision, the voters soundly defeated the proposed constitution in the general election of 1970. But not surprisingly, however, was the relative absence of amendment proposals during this period. From 1966 to 1970, no amendments were proposed by initiative, and only three were proposed by the legislature.

In 1975, David Pryor, a longtime advocate of constitutional revision and then-Governor Pryor, led a revitalized effort to call another constitutional convention. Limitations imposed on this convention, however, would have prohibited the convention from altering certain constitutional provisions, such as the Declaration of Rights and provisions related to the judiciary, education, workmen's compensation, and the right to work. The Arkansas Supreme Court invalidated the convention before any work could be done on the grounds that the subject-matter limitation placed on the scope of the Convention's authority was an unconstitutional restriction on the right of the people to "alter, reform or abolish [their government] as they may think proper."

In 1977, still another constitutional convention was authorized by the people, again by a relatively wide margin (56% in favor), and again with broad political support including that of Governor Pryor and the General Assembly. The convention was held from 1979 to 1980, and ultimately presented a single document that revised the 1874 Constitution in a similar fashion to that set out by the 1970 Proposed Constitution. Again, however, the people overwhelming rejected the proposed constitutional convention, this time by a margin of 62.7% to 37.3%.

The absence of amendments proposed during this period of intense efforts of wholesale constitutional revision is not surprising. Anecdotally, it was to be lost. The delegates proposed that many of the provisions could simply be reenacted as regular statutes because they simply were not appropriate constitutional provisions. Id. at 11–12. The 1970 Constitution was defeated by a margin of 57.5% to 42.5%, a remarkable defeat considering the wide political and public support that the proposal had once enjoyed. Blair & Barth, supra note 8, at 143.

138. Id. at 11–12. Blair & Barth, supra note 8, at 143.
139. Goss, supra note 15, at 20; supra fig. 8.
140. Goss, supra note 15, at 12.
141. Pryor v. Lowe, 258 Ark. 188, 190, 523 S.W.2d 199, 201 (1975); Blair & Barth, supra note 8, at 143.
142. Lowe, 258 Ark. at 190, 523 S.W.2d at 201 (citing Ark. Const. art. II, § 1 (“All political power is inherent in the people, and government is instituted for their protection, security and benefit; and they have the right to alter, reform or abolish the same in such manner as they may think proper.”)).
143. Blair & Barth, supra note 8, at 143–44; Goss, supra note 15, at 13.
144. Blair & Barth, supra note 8, at 144; Goss, supra note 15, at 13. The Convention did separate out the issue of choosing appellate court judges from the central document, requiring that piece to be approved independently from the main thrust of the proposed constitution. Blair & Barth, supra note 8, at 144; Goss, supra note 15, at 13.
145. Blair & Barth, supra note 8, at 144.
is likely that while these conventions were underway, many, if not all, of the supporters of constitutional revisions became deeply involved in the larger goal of completely revising the existing 1874 Constitution. This focus away from individual amendments—by the very forces who ordinarily presented initiative proposals on behalf the people—would have naturally left fewer resources to develop additional “one-off” amendment proposals.

Under this hypothesis then, once these limited resources were released and became available to promote individual amendments again, the level of amendments proposed by initiative would increase. And beginning in 1984, it appears as though a measure of resurgence happened. The level of initiated amendments since 1984, however, has never approached the levels seen during the “golden age” of popular constitutional activism between 1912 and the authorization of the first modern constitutional conventions in 1968. Moreover, across the twenty-six-year cycle from 1980 to 2006, the use of initiative-based amendments has steadily declined to the point where only one or two initiative-based amendments are offered in any given biennial general election during the past decade, if any are offered at all. Importantly, during this period there were no successfully-convened constitutional conventions.

Interestingly, the use of initiative-based amendments that has occurred from 1984 to 2006 seems to partly track the elections of Governors. Figure 8 illustrates a remarkably distinct, apparently cyclical pattern of initiative-based activity with peaks occurring only in the first biennial general election after the installation of a new Governor in office, and followed by successive years of decreasing use of initiative-based ...

146. In a related analysis, Professors Blair and Barth have suggested that this period of amendment activity is in part a result of the wholesale revision activities of the past four decades. Id. at 152 (“Another period of constitutional updates, prompted in part by wholesale revisions efforts, seems to be in progress.”).


148. During this period, there was some support for another constitutional convention. Blair & Barth, supra note 8, at 146-47. In 1995, Governor Tucker and a specially-appointed commission worked with the legislature to draft a core document that would be sent to a constitutional convention as a starting point for the convention’s work on wholesale revision. Id. at 147. The document proposed would have removed “archaic, obsolete and gender- or race specific’ language,” made sweeping structural changes to government, and included “updates in synch with public consensus.” Id. at 147-48. The scope of this initial document was restricted from making any changes to “abortion, interest rates, or other hot-button issues.” Id. at 147. The question of whether to call a constitutional convention was put to the voters in 1995. Id. at 149. With nearly universal opposition, the convention was rejected by 80% of the votes cast. Id. at 149-50. Amidst a series of complications, legal challenges, and confusion, voter turnout for this election was incredibly low, with only 13% of registered voters coming to the polls. Id.
Whether there is something behind the connection suggested by this cycle is difficult to say with any certainty. Nevertheless, it is without doubt that governors have long played a part in the political machinations that almost certainly have impacted the use of initiative-based amendments in the three previous periods discussed in this section. From this, it is reasonable to conclude that the political capital that governors often have in the years immediately following his or her election would impact the number of initiative-based amendments in those years, and that the number of such amendments would decline as a governor's political capital erodes over the years.

So what can be said of the state of popular constitutional activism in Arkansas? The State's constitutional history suggests a turbulent and unpredictable tradition of constitutional activism shared by the people and the legislature; but as I demonstrated above, there are patterns. Indeed, the same history indicates the development of a trend towards constitutional disengagement by the people and away from the "golden age" of popular activism that abruptly ended with the attempts at wholesale constitutional revision in the 1960s. Yet in order to bring meaning to this apparent trend beyond the mere incidence of initiative-based amendments, it is necessary to

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149. For example, beginning in 1984, the first biennial general election following Bill Clinton's return as Governor, popular constitutional activism experienced something of a reemergence with four initiative-based amendments proposed for consideration by the voters. Yet this reemergence was short-lived: in each successive biennial election, the number of initiative-based amendments dropped from three, to two, and then to one in both 1990 and 1992. Then, in 1994, the first biennial general election following the election of Jim Guy Tucker as Governor, initiative-based amendment use jumped up again to three proposed amendments. Then again in 1996, the first biennial election to occur after Jim Guy Tucker's resignation and the installation of Mike Huckabee as Governor in July 1995, two initiative-based amendments were proposed. Since then, only one initiative-based amendment has been offered in any given election except for 2002, in which two such amendments were offered.

150. In addition, there is also likely some connection between the use of initiative-based amendments and the content of the amendments, particularly in light of the hot-button social and moral issues that have often taken the center stage nationally during the same period—and with respect to which, politicians, including governors, often align themselves.

151. This apparent trend is also counter to the trends in other states across the nation. As Professor G. Alan Tarr observed, "[i]f anything, the pace of amendment appears to have quickened in recent years," noting that "from 1994 to 2001 the states adopted 689 constitutional amendments." STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE POLITICS OF STATE CONSTITUTIONAL REFORM 2 (G. Alan Tarr & Robert F. Williams eds., 2006) [hereinafter POLITICS OF STATE CONSTITUTIONAL REFORM]. As discussed below, Arkansas has seen just the opposite during the period from 1984 and 2006: a marked decline in the number of constitutional amendments proposed by initiative. Infra Part III. Interestingly, Arkansas in fact tracks with the national absence of wholesale constitutional reform. POLITICS OF STATE CONSTITUTIONAL REFORM, supra, at 2 (noting a decrease in the number of constitutional conventions during the late twentieth- and early twenty-first centuries).
attempt to quantify and then qualify the state of popular constitutional activism in some meaningful way.

III. QUANTIFYING THE DECLINE OF POPULAR CONSTITUTIONAL ACTIVISM

As described above, I have measured popular constitutional activism in this article by the number of constitutional amendments proposed by initiative in a given year. Thus, an increase or decrease in the number of amendments proposed by initiative reflects a corresponding increase or decrease in the level of popular constitutional activism. The rub in this seemingly simple syllogism, however, lies in the difficulty in meaningfully explaining changes in popular constitutional activism over time by isolating potentially countervailing factors that may be obfuscating the true nature of the state of popular constitutional activism. The first step in addressing this difficulty is to quantify the magnitude of change in popular constitutional activism in a useful way.

I will begin by reviewing the period of popular constitutional activism from 1912 to 2006. During this period, eighty-two amendments were proposed by initiative. The linear regression line in Figure 9 below suggests that, overall, the number of amendments per year proposed by initiative seems to be gradually decreasing.

Yet, the data in Figure 9 also clearly

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152. The data used in the statistical analysis in this section can be found in Appendix 1: Data infra. As a matter of style, I will not cite to Appendix 1 data specifically as it is being discussed in the analysis. Statistical computations pursuant to this analysis will usually be located in footnotes unless particularly salient to the discussion.

153. The regression line here, like all regression lines in this article, was calculated using the "least squares" method to calculate a straight line that best fits the data. See DAVID S. MOORE & GEORGE P. MCCABE, INTRODUCTION TO THE PRACTICE OF STATISTICS 136–38 (2006). The least-squares regression line here is the line that makes the sum of the squares of the differences in values for the number of amendments proposed by initiative from the predicted value on the line as small as possible, and is described by the following equation:

\[ y_{\text{of amendments}} = -0.0257x_{\text{year}} + 2.3387 \]

See id. Thus, the degree of variance of actual data from the linear line of predictions described by this regression illustrates the strength of the regression in predicting the number of amendments proposed by initiative based on the year. See id. As described below, this strength is in turn reflected in the degree of correlation of the data to the regression line. See infra note 155.

A brief note on the statistical methodology that I employ in this article is also in order. As Professor Walker observed, uncertainty derived from the mathematical modeling of a given set of data using particular linear regressions, such as the simple regression used here to analyze the period from 1912 to 2006, is only one sort of uncertainty encountered when attempting to describe a sample of a population. Vern R. Walker, *Restoring the Individual Plaintiff to Tort Law by Rejecting “Junk Logic” About Specific Causation*, 56
demonstrates that Arkansas has had a turbulent history in the relative levels of initiative activity spanning three relatively distinct periods of initiative activity and featuring wild fluctuations in the number of amendments proposed by initiative occurring alongside long periods of initiative inactivity. These instabilities likely distort and obfuscate any trends that may underlie this period of initiative activity, and do not comport with a conclusion that the number of amendments proposed per year is necessarily decreasing on its own.

ALA. L. REV. 381, 417–20 (2004); see infra notes 155–161 and accompanying text (describing the statistical uncertainties in the regression model used in this article to partially describe the state of popular constitutional activism). Another type of uncertainty rests with the choice of the mathematical model used. Walker, supra, at 419. Here, I have opted to use a regression-based analysis instead of a population-based analysis, even though I appear to have data on the entire population I am interested in during the entire relevant period. Regression-based analyses are used to make statistical inferences about a larger population based on information derived from a sample of that population. Id. at 420. Population-based analyses, on the other hand, describe the population based on information known about the entire population. I have opted to use a regression analysis here because I in fact do not have information on the entire population that I am interested in, namely, the entire population of Arkansas, much less a direct measure of the population’s involvement in constitutional activism. Only with such information on this complete population could I know with a high degree of certainty what the level of popular constitutional activism is in Arkansas using a population-based analysis. Moreover, I am using the number of amendments proposed by initiative as a proxy measure for this characteristic, a measure that is admittedly incomplete. Thus, I use a regression analysis in this article to infer something from my data about the overall level of popular constitutional activism and, as I will discuss in Part IV, its relationship to the changing role of the Arkansas Supreme Court.
The next step to meaningfully explaining changes in popular constitutional activism is to relate the magnitude of change to some causal variable. I have chosen to use the time variable to do this because it acts as a surrogate for the sociopolitical and legal developments that I identified in Part II.\textsuperscript{154} As illustrated in Figure 9, each development is by definition tied to specific years: when the year changes, so do the developments and factors in that year. This interrelates the year variable with each of these developments and allows the year variable to stand in to some extent as a measure for each.

The interrelation in this broad period, however, is not perfect. First, there is only a relatively weak statistical correlation between the number of amendments proposed by initiative and the year over the period from 1912 to 2006.\textsuperscript{155} Thus, the year variable is at best a weak predictor for the number

\begin{figure}
\centering
\includegraphics[width=\textwidth]{Amendments_Proposed_by_Initiative_1912_to_2006.png}
\caption{Amendments Proposed by Initiative: 1912 to 2006}
\end{figure}

\textsuperscript{154} See supra Part II.A.2. As described below, the Arkansas Supreme Court's increasing role in Arkansas's constitutional process is also tied to certain periods, specifically from the 1970s to the present.

\textsuperscript{155} The correlation, $r$, between the number of amendments proposed by initiative and the year calculates to be -0.198.
of amendments proposed by initiative in a given year during this period.\textsuperscript{156} Moreover, the year variable is not a statistically significant predictor of the number of initiatives proposed by initiative in this regression model.\textsuperscript{157} This

\[ r = \frac{1}{n-1} \sum \left( \frac{x_i - \bar{x}}{s_x} \right) \left( \frac{y_i - \bar{y}}{s_y} \right) = -0.198 \]

See Moore & McCabe, supra note 153, at 124–25. The correlation between any two variables is between -1 and 1. \textit{Id.} at 125. A value of 0 indicates a very weak linear relationship. \textit{Id.} A value of -1 or 1 indicates a perfect fit between the data and the linear regression line. \textit{Id.} Therefore, the strength of this relationship increases as the correlation value approaches -1 or 1. \textit{Id.} A negative correlation indicates a negative association between the variables, and a positive correlation indicates a positive association between the variables. \textit{Id.} In the social and behavior sciences, a correlation of 0.1 is considered a low degree of correlation, 0.3 a medium degree of correlation, and 0.5 a large degree of correlation. Walker, supra note 153, at 417–18 (citing Jacob Cohen & Patricia Cohen, Applied Multiple Regression/Correlation Analysis for the Behavioral Sciences 59–61 (2d ed. 1983)). Thus, a correlation of -0.198 indicates a relatively low degree of correlation. As I will demonstrate, although this may evince some sort of relationship between the year and the number of amendments proposed by initiative, the import and clarity of this relationship is muddied by a number of confounding, interrelated, and lurking variables. See infra notes 160–62 and accompanying text. If these variables are removed from the data set, as I have attempted to do below, the strength of the relationship between the year and the number of amendments proposed by initiative becomes evident. See infra notes 164–71 and accompanying text.

\textsuperscript{156} In statistical analyses, the predictive power of a variable (the explanatory variable) to explain the behavior of another variable (the response variable) is often described in terms of the percent variance of the second variable accounted for by the first. See Moore & McCabe, supra note 153, at 141–42; Walker, supra note 153, at 417–18. The percent variance is expressed by what is known as the $R^2$ value, which is derived from the correlation between two variables. See Moore & McCabe, supra note 153, at 141–42. The $R^2$ value therefore is used to describe the success of a regression in explaining the response variable with an explanatory variable. In this case then, the correlation of -0.198 corresponds to an $R^2$ value of 0.039, or 3.9%:

\[ R^2 = r^2 = \frac{\text{variance of predicted values}}{\text{variance of observed values}} \approx -0.198^2 = 3.9\% \]

\textit{Id.} In other words, the $R^2$ value indicates that only 3.9\% of the variance in the number of amendments proposed by initiative is accounted for in a given year by the regression model. The year then is a weak predictor for the number of amendments proposed by initiative in a given year over the 1912–2006 period because the year variable itself explains or accounts for very little of the changes in the number of amendments proposed. See Walker, supra note 153, at 417–18.

\textsuperscript{157} The statistical significance of a variable in a complex system indicates the predictive power of the variable for the behavior of the system. In statistical terms, significance is defined using the variable's coefficient $p$-value. See, e.g., Walker, supra note 153, at 399; Moore & McCabe, supra note 153, at 407. A $p$-value in this context is the probability that the coefficient of the associated variable occurred by chance assuming that the null hypothesis, the test hypothesis that the coefficient of the associated variable is zero (and thus has no effect), is true. See Moore & McCabe, supra note 153, at 405. The hypothesis that the coefficient is zero, and therefore has no impact, is conventionally rejected if the calculated $p$-value is below the threshold of 0.05, or 5\%, in which case the $p$-value is deemed statistically significant. See, e.g., Walker, supra note 153, at 399; Moore & McCabe, supra note 153, at 407. Here, the year variable's coefficient $p$-value in this regression is high,
suggests that, without further information on at least the contributing factors described above, evaluating the entire 1912 to 2006 population of data on the number of amendments proposed by initiative based on year will be statistically ineffective in describing the behavior of the constitutional process in Arkansas.

Second, a given year may contain more than one of these sociopolitical or legal developments. For example, in 1995, the reemergence of state constitutional law and judicial federalism were well on their way around the country and were developing in Arkansas. During this year, however, the question of whether to convene a constitutional convention was also put to the voters. The concurrence of these two distinct factors in 1995 confounds the explanatory efficacy of the year variable on the level of popular constitutional activism at least with respect to the effect of those factors. The same problem occurs more forcefully in the late 1960s and 1970s when the reemergence of state constitutional law and judicial federalism coincided with the zenith of constitutional convention activity in Arkansas, and again in 1918 when a movement for wholesale constitutional revision coincided with the introduction of the initiative power itself. Because the year variable reflects each of these factors temporally, and each factor may have a different and possibly countervailing effect on the incidence of amendments proposed by initiative, the year variable is ineffective across the 1912–2006 period without additional analysis.

The uncertainty inherent in the year variable, however, does not render it completely useless. If some of the sociopolitical and legal developments can be controlled for or removed so as to allow the year to be a more direct and exclusive stand in for a smaller set of complicating factors, the year could become a powerful explanatory tool for the state of popular constitutional activism—particularly where there is a compelling causal

approximately 0.178. Intra app.1, tbl.2. In other words, the probability that the measured coefficient for the year coefficient would be -0.0257 by chance if the value is actually 0.00 is approximately 17.8%. Id. Thus, at the 0.05 standard, it is not possible to statistically eliminate the hypothesis here that the coefficient for the year variable is zero. Id. (showing that the p-value for the year variable is approximately 0.178, well above the 0.05 level of certainty required in similar statistical analyses). It is therefore not possible to reject the view that the impact of the year variable is zero, and it is possible that the impact of the year variable is zero.

158. See infra Part IV.A (describing the changing role of the Arkansas Supreme Court).
159. See supra note 148 and accompanying text.
160. See MOORE & MCCABE, supra note 153, at 176 (“Two variables are confounded when their effects on a response variable cannot be distinguished from each other. The confounded variables may be either explanatory variables or lurking variables.”).
161. Intra notes 180–89 and accompanying text; supra notes 113–15,125–50 and accompanying text; see also infra Part IV.A.
explanation to connect the variable and statistical results to factual circumstances.

Attempting to account for the sociopolitical and legal developments in each of the periods that I have described, however, is difficult at best because these characteristics are difficult to measure meaningfully and account for statistically other than through their associations with the year variable. Moreover, each period is characterized by at least one factor that likely impacted the state of popular constitutional activism as measured by initiative-based amendments. Thus, although there are distinct periods and seemingly apparent patterns in the development of popular constitutional activism over the years, the inability of the year variable to account for the sociopolitical and legal developments that helped shape those periods counsels against attempting to monolithically model the development of popular constitutional activism across all periods.

Therefore, the most appropriate period to evaluate is the period from 1984 to 2006 because it allows me to evaluate the effect that the increasing role of the Arkansas Supreme Court in the constitutional process has had on popular constitutional activism without needing to worry about other potentially confounding developments affecting my analysis.  

As indicated in Figures 9 and 10, the 1984 to 2006 period evidences a pattern of decreasing numbers of initiative-based amendments that is  

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162. Although this period contains no broad efforts at wholesale constitutional revision through constitutional conventions or the kind of the widespread political unrest that disrupted the process in prior years, it does include a call for a constitutional convention in 1995. *Supra* note 148. I have nonetheless defined my sample period to include the entire 1984 to 2006 span. First, the 1995 request for a constitutional convention put to the voters failed. *Supra* note 148. This failure suggests that the impact of activities surrounding the proposed constitutional convention was not significant, or at least not as significant as the impact of activities related to constitutional conventions that were actually called and yielded a proposal for a wholesale revision of the constitution. Moreover, unlike prior attempts at constitutional convention-based revision, the 1995 proposal did not enjoy wide initial popular or political support and in the end it was defeated by eighty percent of the voting electorate. *Supra* note 148. Second, the 1995 call for a constitutional convention is the only instance of such activity in the 1984 to 2006 population sample. This is in contrast to the flurry of constitutional conventions and proposed constitutional revisions that characterized the early years of the 1966 to 2006 period. As such, the impact of such an isolated push, particularly one that failed, is likely not to be as great as the prior more frequent attempts at constitutional revision by convention that enjoyed far wider support. Third, a large sample size is generally more informative of overall patterns and relationships than a small sample size, such as a sample that was limited to, say, 1996 to 2006. The benefits of a sample twice the size of the alternative without the 1995 convention activity are controlling over the low marginal costs to the analysis caused by including the 1995 call for a constitutional convention in the sample. Fourth, there is a distinct and quite remarkable pattern evident from 1984 to 2006 data. Evaluating the nuances of this pattern may in itself be both fascinating and uniquely helpful to the analysis of the impact of the changing role of the Arkansas Supreme Court on popular constitutional activism that is at the heart of this article.
reflected in the downward-sloping linear regression line shown in Figure 10. Unlike the 1912 to 2006 period, however, this pattern is more pronounced and far more statistically significant in describing the behavior of popular constitutional activism during the 1984 to 2006 period. First, there is a quantifiable and statistically significant decrease in the number of amendments proposed by initiative that occurred between the beginning of the sample period in 1984 and the end of the sample period in 2006. In other words, the decline indicated by the trend line in Figure 10 does not appear to be due to simple randomness. Second, the regression reflected by the linear regression line in Figure 10 shows a very high negative correlation between the year variable and the number of amendments proposed by initiative that is much higher than the relatively low correlation between the year and the number of amendments proposed by initiative across the entire 1912 to 2006 period.

163. This regression line can be described with the following predictive equation:

\[ Y_{\# \text{ of Amendments}} = -0.220x_{\text{year}} + 3.181 \]

164. To determine if the apparent drop in the number of amendments proposed by initiative across the 1984 to 2006 time period is statistically significant, it is useful to compare the mean of the first six data points (1984 to 1994) with the mean of the last six data points (1996 to 2006) using a t-test evaluation. Moore & McCabe, supra note 153, at 485–503 (describing two-sample analysis). The hypothesis to be tested here is whether the first group's population mean is greater than the second group's population mean. This would indicate that a statistically significant decrease in the number of amendments proposed by initiative occurred between the beginning of the sample period, 1984, and the end of the sample period, 2006. Conversely, the null hypothesis is that the population means are equal. The latter circumstance would indicate that a statistically significant drop from the mean of the early years of the period, 1984 to 1994, to the mean of the later years, 1996 to 2006, did not occur. This would in turn suggest that there was not a statistically significant effect on the number of amendments proposed by initiative over the sample time period. As described below, the difference in the means of the early years from the later years is statistically significant. The data therefore suggests a statistically significant tendency for a decreasing number of constitutional amendments proposed by initiative in Arkansas over the period from 1984 to 2006.

To reach this conclusion, I used the t-test function in Microsoft Excel to calculate the probability of whether the difference in means between the groups, which corresponds to 2.33 and 1.66 respectively, is statistically significant. I calculated the probability to be approximately 0.05, or right at the 0.05 level of significance. See, e.g., Walker, supra note 153, at 399 (describing 0.05 in this context as the threshold at or below which a statistical change is conventionally deemed statistically significant); Moore & McCabe, supra note 153, at 407 (same). At this level of significance, I can reject the hypothesis that the population means are equal and can conclude that the mean of the first group of years, 1984 to 1994, is statistically greater than the mean of the second group of years, 1996 to 2006.

165. The correlation for the 1912 to 2006 period is -0.198. Supra note 155. In contrast, the correlation between the number of amendments proposed by initiative and the year variable for the 1984–2006 period calculates to be -0.698:
turn demonstrates that when other confounding factors are removed from
the data set, the correlation between the year and the number of amendments
proposed by initiative in a given year becomes clearer. 166 Third and finally,
based on this extremely high correlation, approximately 48.7% of the
variance in the number of amendments proposed by initiative is accounted
for in a given year by the linear regression used to model the data in Figure
10's trend line. 167 This percentage is extraordinarily high and suggests that
the year variable provides a very successful mathematical explanation for
the number of initiative-based amendments proposed in a given year and, by

\[ r = \frac{1}{n-1} \sum \left( \frac{x_i - \bar{x}}{s_x} \right) \left( \frac{y_i - \bar{y}}{s_y} \right) = -0.698 \]

See Moore & McCabe, supra note 153, at 124–25. In a social science such as this one, a
correlation of -0.698 represents an unmistakably strong connection. See generally Walker,
supra note 153, at 417–18.

166. It is, of course, possible that there may be additional variables that are interrelated to
or reflected by the year variable that may be influential in this analysis but are not explicitly
covered here. The focus in this article, however, has been to identify the major statistical
factors in the level of popular participation in the state constitutional process. Any such
hidden "lurking" variables, while important, are likely to be themselves covered under the
ambit of major factors that I have identified here: the presence of constitutional conventions,
the level of civil and political unrest, the increasing role of the Arkansas Supreme Court, and
the reemergence of state constitutional law.

In addition, the linear regression model based on the year variable as applied to the
1984 to 2006 period and reflected in Figure 10's trend line yields a year coefficient that is
non-zero and statistically significant. In other words, the calculated coefficient for the year
variable did not occur by chance and it is statistically significant in the prediction of the
number of amendments proposed by initiative during the 1984 to 2006 period. See supra
fig.10; infra app.1, tbl.3. This observation is based on the year variable’s coefficient p-value
for the 1984 to 2006 period. See, e.g., Walker, supra note 153, at 399; Moore & McCabe,
supra note 153, at 407; infra app.1, tbl.3. Calculated to be 0.011, the year variable’s
coefficient p-value for the 1984 to 2006 period is much lower than the year variable’s
coefficient p-value for the 1912 to 2006 period. See infra app.1, tbl.2 infra app.1, tbl.2–3
(noting that the year variable’s coefficient p-value for the 1912 to 2006 period is 0.178). At
0.011, this value is also lower than the standard 0.05 threshold used in statistical analysis to
reject the hypothesis that the coefficient is zero. See, e.g., Walker, supra note 153, at 399;
Moore & McCabe, supra note 153, at 407. As a result, we can reject the hypothesis that the
year variable’s calculated coefficient is zero, that is, we can reject the hypothesis that the
calculated coefficient occurred by chance. We can therefore further say that the year
coefficient is non-zero and its predictive power to describe the number of initiative-based
amendments proposed across the 1984 to 2006 period is statistically significant.

167. As described above, the percent variance in the number of amendments proposed by
initiative in a given year accounted for by the regression model employed in this article is
described using the \( R^2 \) value, which is in turn based on the correlation between two variables,
the response variable and the explanatory variable. In this case, these variables correspond to
the number of amendments proposed by initiative in a given year and the year variable
respectively. With respect to the period from 1984 to 2006, the \( R^2 \) value calculates to be
0.487, or 48.7%:

\[ R^2 = r^2 = \frac{\text{variance of predicted values}}{\text{variance of observed values}} = -0.698^2 = 48.7\% \]

See Moore & McCabe, supra note 153, at 141–42.
extension, the statistically significant decline in the number of amendments proposed by initiative that has occurred since 1984.  

The statistical significance of using the year variable to describe the behavior of popular constitutional activism from 1984 to 2006, however, does not sufficiently explain this behavior because numbers alone cannot tell the whole story, particularly where the numbers attempt to describe circumstances that are difficult to measure statistically—which is exactly the case here. Therefore, in order to adequately explain the state of popular constitutional activism during this period, it is necessary to find a compelling causal explanation that connects the statistical significance of the year variable to the decline in popular constitutional activism over time as objectively reflected by the incidence of initiative-based amendments reaching the people in a given year. In other words, it is necessary to explain why popular constitutional activism has declined over time in order to validate and give meaning to the statistical observations outlined above.

In Part IV below, I argue that the increasing role of the Arkansas Supreme Court in the use and development of state constitutional law can provide just such an explanation.

IV. THE INCREASING CONSTITUTIONAL ROLE OF THE ARKANSAS SUPREME COURT

At the beginning of this article, I asked: to what extent has Arkansas's tradition of popular constitutional activism been affected by the ascendance of the Arkansas Supreme Court? The answer to this question began with the indications above that Arkansas's tradition of popular constitutional activism appears to be changing. Indeed, from 1984 to 2006, the level of the people's participation in the constitutional process has declined to its lowest levels in history.\(^{169}\) Absent from this period, however, are the kinds of events that have likely impacted popular constitutional activism in the past. There was no widespread political or civil unrest, nor were there widely-supported attempts at wholesale constitutional revision by constitutional conventions.\(^{170}\) In the absence of such potentially confounding and countervailing developments, the strong negative correlation between the year variable and the number of initiative-based amendments proposed in a given year suggests that another development occurring during this period may be causally related to the decline in popular constitutional activism and may also explain why the incidence of popular constitutional activism has declined in the way it has over the past four decades.

I argue that the only other major development that occurred during this same period has been the changing constitutional role of the Arkansas Supreme Court. Based on this coincidence and the quality of the court's expansion of its substantive role in the constitutional process described below, I conclude that the increasing role of the Arkansas Supreme Court has negatively affected Arkansas's tradition of popular involvement in the constitutional process, and it has done so by providing a ready means to control state action and depressing the use of the people's primary instrument for effecting constitutional change: the popular initiative.

As described below, the court has demonstrably expanded its role in the constitutional process in at least three key areas: (1) the protection of individual rights based on the Arkansas Constitution; (2) the court's ability and willingness to decide important cases and involve itself in public policy; and (3) the evaluation of the sufficiency of constitutional-initiative proposals.

\(^{169}\) See supra notes 164–68 and accompanying text.

\(^{170}\) E.g., supra note 162.
A. The Protection of Individual Rights Based on the Arkansas Constitution

Perhaps the most significant area in which the Arkansas Supreme Court has expanded its role in the Arkansas state constitutional process is in the court's use of the Arkansas Constitution as a font for protecting individual rights. Although the court has always been the ultimate authority on the Arkansas Constitution, it has only relatively recently begun to take an active role in the protection of individual rights using Arkansas's own constitutional system. Indeed, as at least one commentator has observed, the Arkansas Supreme Court was arguably not a meaningful source of state constitutional law, much less a significant source of constitutional protections, before the year 2000. That apparent paradigm, however, clearly began to change in 2000, when the court decided the first in a series of important cases that identified significant new individual rights based on Arkansas's state constitution and the Arkansas Supreme Court's precedents. In doing so, the court began to set the bar for Arkansas's state constitutional protections higher than those afforded by the Federal Constitution or interpretations of the Arkansas Constitution that tracked with federal protections, and definitively announced the (re)emergence of state constitutional law and judicial federalism in Arkansas as key dimensions of Arkansas's constitutional framework.

In order to highlight the significance of this development, it is first necessary to briefly review the national development of such judicial federalism and the attendant reemergence of state constitutional law in the protection of individual rights. Judicial federalism is the "phenomenon where state courts interpret their state constitutions to provide more rights than recognized by the [Federal Constitution]." The emergence of judicial federalism and the increasing utilization of state constitutional law in the modern era, often referred to by many commentators as new judicial federalism, is often traced back to the 1970s. Before the 1970s, and

171. ARK. CONST. art. VII; id. amend. LXXX.
172. Williams, supra note 1. See generally BLAIR & BARTH, supra note 8, at 225 (describing the role that the Arkansas Supreme Court has played in the state).
173. Williams, supra note 1, at 883–86.
174. See infra notes 195–207 and accompanying text.
175. Williams, supra note 1, at 883.
extending back to the early twentieth century, state constitutional law was relatively silent in American jurisprudence.\(^\text{177}\) Prior to the 1930s, however, much of the law was primarily governed by state constitutions, particularly with respect to the criminal law.\(^\text{178}\) But following the Supreme Court’s 1932 decision in *Powell v. Alabama* and continuing through the Warren and Burger courts, the utilization of state constitutional law began to wane in favor of both the federal and state courts’ increasing reliance on interpreting and applying new requirements found under the Federal Constitution.\(^\text{179}\)

Yet state constitutional traditions had not disappeared, and by the 1970s, state courts had once again begun to use state constitutions in the first instance and construe state constitutional protections as exceeding those provided by similar measures in the Federal Constitution.\(^\text{180}\) The increasing importance of state constitutions was brought into specific relief by the United States Supreme Court’s 1975 decision in *Oregon v. Hass*.\(^\text{181}\) In that case, the United States Supreme Court expressly rejected the ability of state courts to interpret the United States Constitution to provide greater protection than the Supreme Court’s own federal constitutional precedents provide.\(^\text{182}\) As the Court would note in *Arkansas v. Sullivan* nearly twenty-five years later, while a state is free “as a matter of its own law” to provide greater protections for individual rights than those the United States Supreme Court “holds to be necessary upon federal constitutional standards,” a state court “may not impose such greater restrictions as a matter of federal constitutional law when [the United States Supreme Court] specifically refrains from imposing them.”\(^\text{183}\)

In light of the Supreme Court’s decision in *Hass* and the trends in the nation’s federal and state courts to rely principally on the Federal Constitution in addressing individual rights, Justice William Brennan, 

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178. *Id.*

179. *Id.* at 1147.

180. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 495 (1977). Justice Brennan describes in some detail the historical steps that brought American jurisprudence back to the state courthouse; among those was the increasing incorporation of federal constitutional protections against state actions through the Fourteenth Amendment. *Id.* at 490–95. These steps, although fascinating, are beyond the scope of this article.


182. *Id.*

183. 532 U.S. 769, 772 (2001) (quoting *Hass*, 420 U.S. at 719) (internal quotation marks omitted). The Court in *Hass* similarly observed that although “a State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards,” it “may not impose such greater restrictions as a matter of federal constitutional law when this Court specifically refrains from imposing them.” 420 U.S. at 719.
among others, began to champion the importance of state constitutional law and encourage the use of state constitutional law to protect individual rights. By the end of the 1970s, this vision of judicial federalism was off to the races across the country. Indeed, many state high courts, as the ultimate arbiters of what their own constitutions mean, enthusiastically embraced this resurgence and have been at the forefront ever since. These courts have acted in the years following the so-called reemergence of state constitutional law to construct a complex landscape of constitutionally-based protections specific to the constitutions of the individual states.

Similarly, Arkansas’s case law during this period also reflects a long judicial history of “protect[ing] individual rights greater than the federal floor.” As early as 1978, the Arkansas Supreme Court had recognized the role of state constitutions in securing “basic and fundamental rights which our state and federal constitutions secure to every arrestee” from invasions

184. See, e.g., Brennan, supra note 180, at 502–03 (calling on the state courts to provide the level of protection needed to protect important individual rights as a result of the federal courts’ abdication of their federalism role, and entrusting to the state courts the role of adequately “safeguard[ing] individual rights”).

185. For example, early decisions from California, Hawaii, and Pennsylvania during this period were very supportive of the independence of state constitutions from the mandates of the Federal Constitution. See, e.g., People v. Disbrow, 545 P.2d 272, 280 (Cal. 1976) (“We... reaffirm the independent nature of the California Constitution and our responsibility to separately define and protect the rights of California citizens despite conflicting decisions of the United States Supreme Court interpreting the federal Constitution.”); Accord Commonwealth v. Triplett, 341 A.2d 62 (Pa. 1975); State v. Santiago, 492 P.2d 657 (Haw. 1971).


by the government. Other cases show that the Arkansas Supreme Court has been willing to rule on state constitutional questions, at least in cases where there were no direct federal constitutional provisions on point. Yet, these cases do not specifically articulate the independent reliance on the state constitution in the identification and protection of individual rights above the level that may be protected by the Federal Constitution.

The Arkansas Supreme Court’s stated approach to individual rights, however, began to change in 2000 when the court decided State v. Sullivan. In Sullivan, the Arkansas Supreme Court announced for the first time that pretextual police arrests were “unconstitutional”—notably without defining its specific constitutional analysis. Instead, the court articulated its decision based on its interpretation of a 1932 United States Supreme Court decision using Arkansas precedents that purported to establish that “an arrest may not be used as a pretext to search for evidence.”

The Arkansas Supreme Court subsequently denied the State’s petition for rehearing, but in doing so, it addressed for the first time the State’s new argument that the court’s use of pretext in the context of police searches was contrary to the United States Supreme Court’s decision in Whren v. United States. The court held that Whren did not prevent a court from invalidating a search based on pretext, reasoning that although Whren was
broadly written, it did not provide "blanket authority for pretextual arrests for purposes of a search in all cases." Interestingly, the court also noted that several other state jurisdictions had similarly refused to give such authority based either on state constitutional principles or unreasonableness. This suggests that the court may have intended to announce a state constitutional rule, not a rule arising from the Federal Constitution per se.

The court, however, went on to support its interpretation of federal constitutional precedent by opining that "nothing ... prevent[ed] [it] from interpreting the Constitution more broadly than the United States Supreme Court, which has the effect of providing more rights." On appeal, however, the United States Supreme Court reversed largely based on that reasoning. The Court held that its precedents precluded state high courts from interpreting the Federal Constitution to provide more rights than the United States Supreme Court's own federal constitutional precedents recognized. The Court then remanded the case back to the Arkansas Supreme Court for further proceedings in light of its decision.

On remand, the Arkansas Supreme Court again addressed the issue of pretextual arrests. This time, however, the court found the very same rights identified in its original decisions as protected under the Arkansas Constitution, thereby completing the Arkansas Supreme Court's adoption of the Arkansas Constitution as a powerful source of individual rights.

In the years since Sullivan, the Arkansas Supreme Court has continued this approach and has decided several important cases involving individual rights based solely on the Arkansas Constitution. For example, in the court's 2002 Jegley v. Picado decision, the court struck down a statute that criminalized same-sex sodomy, but not opposite-sex sodomy, under the Arkansas Constitution. After observing that the federal right to privacy

196. Id. at 318, 16 S.W.3d at 552.
197. Id. at 318, 16 S.W.3d at 552 (citing to courts in Washington, Minnesota, New York, and Arizona).
198. Id. at 318, 16 S.W.3d at 552.
200. Id.
201. Id. at 772.
203. Id. at 657–58, 74 S.W.3d at 222.
did not encompass a right to engage in same-sex conduct, the court held that the Arkansas Constitution did protect an individual’s right to engage in same-sex conduct under the Arkansas Constitution’s fundamental right to privacy and Arkansas’s Equal Rights Amendment. Similarly, the court struck down a state regulation in 2006 that banned homosexual individuals from serving as foster parents, or even living in the same home as foster children. Interestingly, the court invalidated the regulation based on a violation of the Arkansas Constitution’s separation of powers doctrine, but did not reach the arguments that the regulation violated the equal protection and privacy protections of the Arkansas Constitution. Rather, the court

205. Id. at 624, 80 S.W.3d at 344–45. At the time Jegley was decided in 2002, the controlling United States Supreme Court precedent, Bowers v. Hardwick, provided that the Federal Constitution conferred no fundamental right to engage in same-sex sexual conduct. Bowers v. Hardwick, 478 U.S. 186 (1986) (holding that there was no federal right to engage in same-sex sodomy). The Arkansas Supreme Court relied on the holding in Bowers in finding that the federal right to privacy did not protect a right to engage in same-sex sexual conduct. Jegley, 349 Ark. at 623–24, 80 S.W.3d at 344–45. Bowers, however, was expressly overruled in 2003, a year after Jegley was decided. Lawrence v. Texas, 539 U.S. 558 (2003) (invalidating the criminalization of same-sex sexual conduct based (somewhat unclearly) on the Federal Constitution). For more information on the Lawrence decision, see Jerald A. Sharum, Comment, Controlling Conduct: The Emerging Protection of Sodomy in the Military, 69 ALB. L. REV. 1195 (2006).

206. Jegley, 349 Ark. at 636–37, 80 S.W.3d at 350, 353–54. The precision with which the Arkansas Supreme Court identified the constitutional analysis and standard of review that it used to invalidate the offending statute stands in stark contrast to the confusing argumentation the United States Supreme Court used in Lawrence. See Lawrence, 539 U.S. 558; Sharum, supra note 205.

207. Dep’t of Human Servs. v. Howard, 367 Ark. 55, 66, 238 S.W.3d 1, 8 (2006). The offending regulation read: “No person may serve as a foster parent if any adult member of that person’s household is a homosexual.” Id. at 58, 238 S.W.3d at 3 (citing section 200.3.2 of the Minimum Licensing Standards for Child Welfare Agencies). The regulation defined “homosexual” as any person who voluntarily and knowingly engages in or submits to any sexual contact involving the genitals of one person and the mouth or anus of another person of the same gender, and who has engaged in such activity after the foster home is approved or at a point in time that is reasonably close in time to the filing of the application to be a foster parent.

208. Id. at 57–58, 66, 238 S.W.3d at 3, 8–9. In 2008, the people of Arkansas approved a statutory (but not constitutional) measure by initiative that prohibits unmarried, cohabiting individuals from serving as foster parents: “A minor may not be adopted or placed in a foster home if the individual seeking to adopt or to serve as a foster parent is cohabitating with a sexual partner outside of a marriage which is valid under the constitution and laws of this state.” Arkansas Elections, Proposed Initiative Act No. 1, Statewide Results by Contest, http://www.arelections.org/index.php?ac:show:contest_statewide=1&elecid=181&contestid=5 (last visited Sept. 8, 2009); Proposed Initiative Act No. 1 (2008), available at http://www.votenaturally.org/2008_elections/Proposed_Initiative_Act_No1.pdf (codified at ARK. CODE ANN. § 9-8-304 (West Supp. 2009)) [hereinafter “2008 Adoption Statute”]. It is unclear whether this development will precipitate further involvement by the court on the
agreed with the trial court that the state agency that promulgated the regulation acted outside its authority by attempting to legislate morality, and invalidated the regulation on the narrow separation of powers issue.\textsuperscript{209}

As described above, the Arkansas Supreme Court’s decisions over the past four decades highlight the court’s evolving approach to individual rights. In a subtle but enduring jurisprudential shift that appears to have begun in the 1970s, the Arkansas Supreme Court’s role in protecting individual rights has expanded to one characterized by the court’s increasingly active involvement in the protection of individual rights and its increasing willingness to use the Arkansas Constitution as a ready source for individual rights. Instead of exclusively relying on the Federal Constitution to protect individual rights, or on both the Federal and Arkansas Constitutions, the court now appears to be comfortable using the Arkansas Constitution as an independent and sufficient basis to protect individual rights.\textsuperscript{210}

issue of adoption by same-sex couples or homosexual individuals because the act specifically applies to both same-sex and opposite-sex individuals. 2008 Adoption Statute, supra. I would, however, expect the Arkansas Supreme Court or a federal court to review the act because it creates a classification based only on the marital status of the person or persons seeking to adopt or serve as a foster parent. \textsuperscript{209} See Howard, 367 Ark. at 66, 238 S.W.3d at 8–9.

\textsuperscript{210} See, e.g., State v. Brown, 356 Ark. 460, 465–66, 156 S.W.3d 722, 727 (2004) (citing Arkansas v. Sullivan, 532 U.S. 769 (2001); Jegley, 349 Ark. 600, 80 S.W.3d 332; State v. Sullivan, 348 Ark. 647, 74 S.W.3d 215 (2002); and Griffin v. State, 347 Ark. 788, 67 S.W.3d 582, (2002)). The court, however, may have recently signaled a change in at least its method of interpreting the requirements of the Arkansas Constitution if not a renewed unwillingness to interpret the Arkansas Constitution differently than the United States Supreme Court has interpreted similar provisions in the Federal Constitution. See State v. Stites, 2009 Ark. 154, 9–10, __ S.W.3d __; Jerald Sharum, Court Signals Departure from “New” Judicial Federalism, \textsc{HogLAW.ORG}, Mar. 25, 2009, available at http://www.hoglaw.org/home/2009/3/25/court-signals-departure-from-new-judicial-federalism.html [hereinafter Court Signals Departure]. In Stites, the court stated, notably without supporting authority, that it will only depart from the federal precedent in interpreting the Arkansas Constitution when “justified.” Stites, 2009 Ark. 154, at 9–10, __ S.W.3d at __. Moreover, the court went on to say that it would make such a determination using a balancing analysis. \textsl{Id}. at 9–10, __ S.W.3d at __. Under this analysis, the court balanced its “duty to interpret [Arkansas’s] state constitution and follow [Arkansas’s] state law” with the effects of “deviating too much from federal precedent base[d] solely on [Arkansas’s] state constitution.” \textsl{Id}. at 10, __ S.W.3d at ___ (emphasis added) (quoting dicta in \textsc{Brown}, 356 Ark. at 470, 156 S.W.3d at 729). Between these two “interests,” the court argued, a “proper balance must be struck.” \textsl{Id}. at 10, __ S.W.3d at ___ (quoting dicta in \textsc{Brown}, 356 Ark. at 470, 156 S.W.3d at 729). This analysis, however, appears to effectively create a presumption that the Arkansas Constitution merely restates the applicable federal standard and that the United States Supreme Court’s interpretation of that standard is the starting point of Arkansas’s state constitutional law tradition. Sharum, Court Signals
This evolution has also been visible to the public. Aside from direct news coverage of its decisions, the court's involvement in hot-button issues such as gay rights and adoption in a largely socially conservative state certainly roused the "interests and passions" of many Arkansans more so than it has likely ever done in the past.211

Such an assumption of the court's province over individual rights into the public psyche may therefore explain the statistically significant decline in the number of initiative-based amendments that occurred during the same period. In such a situation, the people of Arkansas may have become accustomed to the Arkansas Supreme Court's involvement in the resolution of individual rights, and simply began to increasingly defer to the court's new role in the area instead of using its own powers to resolve controversial issues of individual rights. Perhaps more likely, the people are simply becoming more comfortable using the courts to resolve issues instead of using constitutional initiatives.

B. Ability and Willingness of the Arkansas Supreme Court to Review Important Cases and Involve Itself in Public Policy

The second area in which the Arkansas Supreme Court's authority has expanded is the scope of cases that the court can review and the court's willingness to involve itself in political and public policy issues. As explained below, these expansions are based on the Arkansas Supreme Court (1) becoming a certiorari court and (2) sanctioning so-called compliance trials of state policies.

1. The Arkansas Supreme Court as a True Certiorari Court

Perhaps the most important development in this aspect of the court's increasing role in the constitutional process is procedural and came in 1997 when the court became a true certiorari court by its own per curiam order.212

Departure, supra. Such a presumption would represent a remarkable departure from the court's recent jurisprudence, which expressly used the state's constitutional traditions and state law as the starting point for interpreting Arkansas's state constitutional requirements. See id. (citing Brown, 356 Ark. at 467, 156 S.W.3d at 727); see also Hannah, supra note 176, at 829-33.


As a certiorari court, like the United States Supreme Court, the Arkansas Supreme Court became empowered to "take appeals in all cases of public significance and cases of first impression where development of the law is necessary."\footnote{213}

By comparison, before 1997 the court only heard appeals in certain kinds of cases, particularly those involving life and death sentences, wills, torts, and statutory interpretation.\footnote{214} A 1961 study of the Arkansas Supreme Court characterized the court as merely a "private law court" that did not consider "many of the great political issues of the day" and whose decisions did not "arouse the interest and passions of the citizenry."\footnote{215} Under this tradition, the court did not take "direct appeals for several categories of cases, like property and contract cases, and even espoused a policy that the court of appeals might be wrong in a case but that, by itself, was not grounds for review."\footnote{216}

It is not surprising that such an expansion in the court's jurisdiction and purpose coincided with an increase in the court's constitutional and political power. Indeed, the ability of a state high court to engage in the appellate development of state constitutional law is at the very essence of any involvement in that state's constitutional process by that court.

\footnote{213} Brown, supra note 212; see ARK. SUP. CT. R. 1-2(a), (b). As the court now provides in its Rules, the court may transfer to itself any case involving:

\begin{itemize}
  \item[(1)] issues of first impression,
  \item[(2)] issues upon which there is a perceived inconsistency in the decisions of the Court of Appeals or Supreme Court,
  \item[(3)] issues involving federal constitutional interpretation,
  \item[(4)] issues of substantial public interest,
  \item[(5)] significant issues needing clarification or development of the law, or overruling of precedent, and
  \item[(6)] appeals involving substantial questions of law concerning the validity, construction, or interpretation of an act of the General Assembly, ordinance of a municipality or county, or a rule or regulation of any court, administrative agency, or regulatory body.
\end{itemize}

\footnote{214} Brown, supra note 212.

\footnote{215} BLAIR \& BARTH, supra note 8, at 223 (citing Ledbetter, supra note 211, at 142).

\footnote{216} Brown, supra note 212 (citing Moose v. Gregory, 267 Ark. 86, 590 S.W.2d 662 (1979)).
2. DuPree, Lake View, and the Development of Compliance Trials to Actively Evaluate State Policies

In addition to the Arkansas Supreme Court's increasing willingness to use its constitutional authority to protect individual rights and its expansion of its appellate authority, the court has also been willing to become actively involved in the political and public policy processes using so-called "compliance trials." Perhaps the best example of this comes from the court's involvement in public school funding.

Beginning in 1983, the court decided a series of cases that found Arkansas's system of public school funding to be unconstitutional under the Arkansas Constitution. First among these decisions was DuPree v. Alma School District No. 30, the 1983 decision in which the court found that the state's school-funding formula was unconstitutional because it violated the Arkansas Constitution's equal protection guarantee by denying "educational opportunity to children in poor school districts." In reaching this conclusion, the court went beyond the express educational requirements in the Arkansas Constitution that public education be a "general, suitable and efficient system [of free public schools]." Instead, the court also relied on the state constitution's equal protection clause to invalidate the state's school-funding formula:

For some districts to supply the barest necessities and others to have programs generously endowed does not meet the requirements of the constitution. Bare and minimal sufficiency does not translate into equal educational opportunity. Equal protection is not addressed to minimal sufficiency but rather to the unjustifiable inequalities of state action.

Importantly, the court also announced its "narrow" role in the review of the state's educational system:

Our task is... to determine whether the trial court committed prejudicial legal error in determining whether the state school financing system at issue before it was violative of our state constitutional provisions guaranteeing equal protection of the laws insofar as it denies equal educational opportunity to the public.

217. See generally Blair & Barth, supra note 8, at 223, 315–23.
218. 279 Ark. 340, 350, 651 S.W.2d 90, 95 (1983).
219. Id. at 342, 651 S.W.2d at 91 (citing Ark. Const. art. XIV, § 1).
220. Id. at 347, 651 S.W.2d at 93 (citations omitted) (internal quotation marks omitted). Interestingly, the court articulated the application of Arkansas's equal protection guarantee by referencing language from San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 89 (1973) (Marshall, J., dissenting). Dupree, 279 Ark. at 346, 651 S.W.2d at 93.
school students of this state. If we determine that no such error occurred, we must affirm the trial court’s judgment, leaving the matter of achieving a constitutional system to the body equipped and designed to perform that function.\textsuperscript{221}

The court also noted the primary role of the state government’s political branches in evaluating education and the court’s constitutional subordination to the state in this area:

We have discussed the two major problems faced in financing our state’s educational system. The first is the obvious disparity in property wealth among districts. That wealth is what primarily dictates the amount of revenue each district receives and the quality of education in that district. The second problem is the manner in which the state determines how the state funds are distributed, and as we have said, the current system is not a rational one. The end result is a violation of the mandates of our constitution. Ultimately, the responsibility for maintaining a general, suitable and efficient school system falls upon the state. “Whether the state acts directly or imposes the role upon the local government, the end product must be what the constitution commands. [When a district falls short of the constitutional requirements], whatever the reasons for the violation, the obligation is the state’s to rectify it. If local government fails, the state government must compel it to act, and if the local government cannot carry the burden, the state must itself meet its continuing obligation.” \textit{Serrano} in addressing the same problem notes also the limits of judicial interpretation on this issue. The comments are worth repeating:

The dispositive answer to the above arguments is simply that this court is not now engaged in—nor is it about to undertake—the “search for tax equity” which defendants prefigure. As defendants themselves recognize, it is the Legislature which by

\textsuperscript{221} \textit{Dupree}, 279 Ark. at 349–50, 651 S.W.2d at 95 (citing \textit{Serrano v. Priest}, 557 P.2d 929, 946 (1976)). Under this approach, the court is also willing to defer to the trial court’s determination of constitutionality, and review it only for “prejudicial legal error.” \textit{Id.} at 349–50, 651 S.W.2d at 95. This deference to the trial court is perhaps not surprising insofar as it preceded the court’s transition to a true certiorari court that could fully review such issues. \textit{See supra} Part IV.B.1.
virtue of institutional competency as well as constitutional function is assigned that difficult and perilous quest.222

This language is striking when compared to the court’s later detailed involvement in evaluating the actions of the state to create constitutionally “adequate” public education and ensuring that the state follows the court’s constitutional instructions. Not surprisingly, the decision prompted the state’s political branches to address school funding.223

Yet, despite the changes made between 1983 and 1994 in response to the court’s decision, a chancery court224 held in 1994 that the state distribution formula established in response to DuPree was still unconstitutional because of funding disparities under the Arkansas Constitution’s equal protection and education provisions.225 The court ordered the state to “enact and implement appropriate legislation” within two years to correct the constitutional violations.226

This decision prompted the state to repeatedly revisit education funding in the political and public policy contexts for the next decade.227 This resulted in the enactment of several laws in 1995 that repealed the old funding system, required school districts to levy a base millage rate, and provided for state funding, as well as the adoption of Amendment 74 to the Arkansas Constitution in 1996, which definitively allowed for these

222. DuPree, 279 Ark. at 349, 651 S.W.2d at 95 (alteration in original) (citing Serrano, 557 P.2d at 946).
223. BLAIR & BARTH, supra note 8, at 315–19.
224. The chancery court judge in this case was Annabelle Clinton Imber, a future justice of the Arkansas Supreme Court. Lake View Sch. Dist. No. 25 v. Huckabee (Lake View III), 340 Ark. 481, 487, 10 S.W.3d 892, 895 n.3 (2000).
225. Lake View Sch. Dist. No. 25 v. Tucker (Lake View I), No. 92-5318 (Chancery Ct. Nov. 9, 1994) (Imber, J.); see Lake View III, 340 Ark. at 484–89, 310 S.W.3d at 893–99 (recounting the procedural history of the Lake View cases); BLAIR & BARTH, supra note 8, at 319–20; Cynthia Howell, Judge Gives State 2 Years to Make School Funding Constitutional, ARK. DEMOCRAT-GAZETTE, Nov. 10, 1994, at 1A. Specifically, the court found that Arkansas’s school funding violated sections 2, 3, and 18 of article II (equal protection provisions) and section 1 of article XIV. Lake View I, No. 92-5318; see also Lake View III, 340 Ark. at 484–93, 10 S.W.3d at 893–99. Interestingly, the trial court found that Arkansas’s school funding did not run afoul of the Federal Constitution. Lake View I, No. 92-5318; see also Tucker v. Lake View Sch. Dist. No. 25 (Lake View II), 323 Ark. 693, 917 S.W.2d 530 (1996).
226. Lake View I, No. 92-5318; see also Lake View III, 340 Ark. at 484, 10 S.W.3d at 895 (noting that the court in Lake View I stayed its order for the state to “implement a constitutional system ‘in conformity with [its] opinion’” for two years (citing Lake View I)); BLAIR & BARTH, supra note 8, at 319–20.
provisions and purportedly changed the constitutional standard for public school funding.²²⁸

In 1996, the Arkansas Supreme Court denied the state’s appeal of the chancery court’s constitutional and equitable findings, holding that there was not a final order for it to review due to the two-year stay allowed by Chancellor Imber.²²⁹ Also in 1996, the plaintiffs in Lake View I filed amended complaints alleging that the legislature’s 1995 attempts to comply with the Lake View I court order were themselves unconstitutional and did not remedy the unconstitutionality of the school funding system.²³⁰ Before the trial court held a full trial on the State’s compliance with the trial court’s 1994 order, however, the legislature enacted a new system of funding and set out what a “general, suitable, and efficient system of education should include.”²³¹ The plaintiffs filed another series of amended complaints alleging that the new 1997 legislation was also violative of the Arkansas Constitution’s equal protection and education provisions.²³² In 1998, the trial court entered its final order, finding the plaintiff’s amended complaint moot and effectively dismissing the suit.²³³

On appeal to the Arkansas Supreme Court in 2000, the court remanded the case back to the trial court for a factual hearing to determine whether the state’s 1995 and 1997 changes and the 1997 constitutional amendment were sufficient to correct the constitutional violations.²³⁴ The court did not conduct its own constitutional analysis de novo in part because there were no factual findings on the 1995 and 1997 legislation with which it could compare against the state constitutional standard.²³⁵ Thus, the court found that a compliance trial on these factual issues was necessary for sufficient judicial review of the state policies.

In sanctioning the continuing jurisdiction asserted by the trial court over the constitutionality of a state policy rather than on a specific challenge

²²⁹ Lake View II, 323 Ark. at 697, 917 S.W.2d at 533.
²³⁰ Lake View III, 340 Ark. at 485, 10 S.W.3d at 895 (discussing Lake View II).
²³¹ Id. at 488, 10 S.W.3d at 896 (describing Act 1307 of 1997 and Act 1361 of 1997).
²³² Id. at 488, 10 S.W.3d at 896 (discussing Lake View II).
²³³ Id. at 491–92, 10 S.W.3d at 898–99 (discussing Lake View II).
²³⁴ Id. at 495, 10 S.W.3d at 900; see also BLAIR & BARTH, supra note 8, at 322.
²³⁵ See Lake View III, 340 Ark. at 492–94, 10 S.W.3d at 899–900. The court also expressed its unwillingness to affirm a lower court’s decision on the grounds of mootness because the decision could be “viewed as binding precedent on the issue of whether the 1995 and 1997 legislative acts and Amendment 74 corrected the disparities in pupil expenditures and pupil opportunities.” Id. at 494, 10 S.W.3d at 900. Such a precedent could then bar future challenges to “the constitutionality of the funding system based on [those] changes” and defeat the effectiveness of an ongoing compliance review. Id. at 494, 10 S.W.3d at 900.
to a state law, the court expressly authorized a new mechanism of active constitutional review on the actions of the legislative and executive branches: the compliance trial. As articulated by the Lake View line of cases, a compliance trial allows the courts to retain jurisdiction over a state policy challenge in order to continue evaluating the constitutionality of the laws enacted since the court's determination that the policy was invalid, and determine whether those laws have cured the unconstitutional infirmities that the trial court initially found.

As shown by its subsequent decisions, the Arkansas Supreme Court is willing to become involved in the political process through a de novo constitutional and policy review once sufficient factual findings have been made regarding the compliance of the state's policies and laws with constitutional requirements. Thus, compliance trials involve a comprehensive judicial review of state policies from the trial court all the way to the Arkansas Supreme Court in an active and ongoing review of the policies enacted by the legislative and executive branches.

As Justice Tom Glaze observed in his dissenting opinion in Lake View III, however, the compliance trial model represents a departure from the limited role that the Arkansas Supreme Court had previously used in such circumstances. Citing the court's decision in DuPree, which involved a nearly identical case reviewing the constitutionality of the state's funding system for public schools, Justice Glaze noted that the court's precedent specifically set a limit on the ability of the court to address such constitutional issues, namely, to merely determine whether the trial court committed "prejudicial legal error" in its constitutional analysis, and leave to the legislature the "difficult and perilous quest" of searching for "tax equity." Thus, under this limitation, where "no such error occurred, [the court] must affirm the trial court's judgment, leaving the matter of achieving a constitutional system to the body equipped and designed to perform that function."

236. The trial court did more than merely assert jurisdiction over a future judicial proceeding. Rather, Chancellor Imber introduced the compliance trial model itself by staying her decision for two years in order to allow the state an opportunity to correct the unconstitutionality of the funding system and "implement a funding system in conformity with [her] opinion." See id. at 502, 10 S.W.3d at 905 (Glaze, J., dissenting).
237. See id. at 501, 10 S.W.3d at 904.
238. Id. at 501, 10 S.W.3d at 904.
239. See, e.g., Lake View V, 351 Ark. 31, 91 S.W.3d 472 (2002); infra notes 245–46 and accompanying text.
240. Lake View III, 340 Ark. at 501, 10 S.W.3d at 904 (Glaze, J., dissenting). Justice Lavenski Smith also wrote a separate opinion on the issue of mootness because he found "no authority in Arkansas law for a compliance trial." Id. at 500, 10 S.W.3d at 904 (Smith, J., dissenting in part and concurring in part).
241. Id. at 501–02, 10 S.W.3d at 904–05 (Glaze, J., dissenting).
242. Id. at 502, 10 S.W.3d at 905 (emphasis omitted).
More pointedly, Justice Glaze observed that the Arkansas Supreme Court's cases have "never sanctioned a procedure whereby a trial court, after ruling a statute unconstitutional, could retain jurisdiction of the case until the General Assembly enacts a new measure the trial court believes meets constitutional muster," and the majority opinion cites to no such case to support such a proposition. Instead, the majority asserted that the "best way" to determine "whether the disparities in treatment noted in the 1994 order have been corrected so as to pass constitutional muster" was to use a compliance trial model. In sanctioning such so-called compliance trials, however, it seems that the court involved itself in the policy-making process in a way that the court had never before done.

On remand back to the trial court to conduct the compliance trial, the chancery court (now presided over by Judge Collins Kilgore) again found the public school funding system unconstitutional, this time as a violation of both the education article and the due process protections of the Arkansas Constitution. In the years following this 2001 decision, the Arkansas Supreme Court conducted at least twenty-one further reviews and proceedings as part of the compliance trial process.

243. Id. at 502, 10 S.W.3d at 905. For its part, the trial court did cite to a Montana case for the authority to issue a stay and retain jurisdiction over the implementation of a funding system in conformity with the trial court's opinion. Id. at 503 n.7, 10 S.W.3d at 905 n.7. Yet, as Justice Glaze argues, the trial court appears to have had no authority to order such a stay under Arkansas law. Id. at 502-03, 10 S.W.3d at 905 (citing to contrary authority under Ark. R. Civ. P. 62(a); Ark. R. App. P.-Civ. 8; Ryder Truck Rental, Inc. v. Sutton, 305 Ark. 374, 807 S.W.2d 909 (1991)).

244. Lake View III, 340 Ark. at 494, 10 S.W.3d at 900 (majority opinion). Without such a compliance trial in this case, the court argued, "we are loathe to conclude that mere changes in the school funding system warrant a dismissal." Id. at 494, 10 S.W.3d at 900.

245. Lake View School Dist. No. 25 v. Huckabee, No. 1992-5318, at *1 (Ark. May 25, 2001) (finding that that the new system was inequitable and inadequate under article II, sections 2, 3, and 18, and article XIV, section 1).

Perhaps the most important of these subsequent decisions came on appeal from the 2001 decision of Judge Kilgore. In this appeal, the Arkansas Supreme Court expressly articulated for the first time the constitutional authority for its involvement in the state’s education policy. Rejecting the state’s argument that the school-funding system was a nonjusticiable issue, the court held that the judiciary had an affirmative constitutional duty to ensure that public education was adequately provided pursuant to the state constitution’s requirements and that duty required the Arkansas Supreme Court to review school funding, including revenues and expenditures per pupil.

The court based this finding on the Arkansas Constitution’s current language: “the State shall ever maintain a general, suitable and efficient system of free public schools and shall adopt all suitable means to secure to the people the advantages and opportunities of education.” After comparing this language to previous versions of the education article that provided that only the General Assembly was responsible for public education, the court concluded that the current language was significant and expanded responsibility for ensuring the adequacy of public education to include all “departments of state government”—including the judiciary. Pursuant to this authority, the court affirmed Judge Kilgore’s finding that Amendment 74 and the state’s post-1994 legislation were insufficient to address the constitutional deficiencies in the state’s school funding system under both the Arkansas Constitution’s education—“adequacy” requirements and equal protection provisions.

The court also reconciled its previous school-funding decision in DuPree with this authority by finding that DuPree stood for the proposition that the legislature and the judiciary have complementary roles relative to school funding. Implicit to this finding was the understanding that

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247. Both the prevailing party (Lake View) and the State filed appeals. Lake View V, 351 Ark. at 45–46, 91 S.W.3d at 479. Among the issues raised by Lake View was the “failure of the trial court to order specific remedies” to correct the unconstitutional school system. Id. at 46, 91 S.W.3d at 479. This decision represented the first, full appellate decision reviewing the 2001 Kilgore decision. The Arkansas Supreme Court’s prior orders and rulings leading up to this review are set out in Lake View, 349 Ark. 116, 76 S.W.3d 250.

249. Id. at 53, 91 S.W.3d at 484 (citing ARK. CONST. art. XIV, § 1).
250. Id. at 52–53, 91 S.W.3d at 484.
251. Id. at 53, 91 S.W.3d at 484.
252. Id. at 79, 91 S.W.3d at 501.
253. Id. at 52, 91 S.W.3d at 483.
DuPree did not necessarily limit the court's involvement in public education policy, but rather established its specific role in public education policy. Although this interpretation of the court's role is not expressly at odds with the DuPree decision, there is a palpable tension between the holding in DuPree that underscored the Arkansas Supreme Court's limited role in education policy and the holding in the Lake View cases that authorized the court's active involvement in evaluating the sufficiency of education funding and expenditures on students, as well as the sufficiency of the education provided by individual school districts and the State's education policies.

This tension arises from the court's statement in DuPree that it "[was] not now engaged in—nor...about to undertake—the 'search for tax equity.'" Rather, the court held that it had a limited role in "maintaining a general, suitable and efficient school system" because the ultimate responsibility for meeting this standard fell upon the "State." Although the court had not yet announced its role in determining "State" responsibilities for public education that are described above, the court appeared to separate itself from the part of the "State" that had ultimate responsibility for public education and limited itself to reviewing the equal protection findings of the trial court for "prejudicial legal error." Yet a few years later in Lake View V, the court enthusiastically embraced its "State" role in this area and actively engaged in precisely the review of tax equity and student education details that the court in DuPree disclaimed.257

255. Id. at 349, 651 S.W.2d at 95.
256. Id. at 345–50, 651 S.W.2d at 93–95.
257. See Lake View V, 351 Ark. at 70–78, 91 S.W.3d at 495–500. This apparently new level of judicial review is perhaps most clearly illustrated by the court's detailed review of the state revenues paid to local school districts, the actual expenditures spent on the students, and the quality of education provided by Arkansas's public schools. For example, the court effectively announced that tax equity was subordinate to the Arkansas Constitution's mandate for adequate public education in its equal protection analysis. See id. at 79, 91 S.W.3d at 500 (discussion of equality under equal protection). The court explained this subordination in part by observing that the touchstone of education is reflected by the actual expenditures spent on students. See id. at 73, 91 S.W.3d at 496. Expenditures in turn necessarily implicate the taxation equities among and between school districts because expenditures under the then-current system were based on the locality's tax base. See id. at 73, 91 S.W.3d at 496. In addition, the court evaluated the quality of education provided by Arkansas's public schools and found that the "State" did not fulfill its absolute constitutional duty to provide an adequate school-funding system because of the remaining deficiencies in Arkansas's public education system. Id. at 54–70, 91 S.W.3d at 485–95. Even without an official evaluation by one of the political branches, the court went on to describe a litany of educational deficiencies in Arkansas's public schools. Id. at 56–63, 91 S.W.3d at 486–90. In these ways, the court
As described above, the court has also become involved in a number of other important social issues including adoption policies, criminal law, and gay rights. It must be noted, of course, that the court’s particular brand of involvement in education funding policy is likely a special case because of the Arkansas Constitution’s detailed emphasis on education and the constitutional duty that the court identified for the judiciary in providing public education. As the court observed in its 2002 Lake View opinion, “education has been a constitutional focus and mandate since the founding of our state.” In contrast, it is not clear whether other subjects, such as budget challenges, would achieve a similar level of involvement or interest by the court. Yet, the court’s willingness to become involved in public policy, at least to the extent of education policy and the other important social issues described above, evidences a widespread involvement at the intersection of constitutional law and public policy that I argue help explain the declining levels of popular interest in constitutional development to the extent that the Arkansas Supreme Court’s role in the constitutional process has been adopted into the State’s political culture.

C. The Evaluation of the Sufficiency of Constitutional-Initiative Proposals

The third area in which Arkansas Supreme Court has expanded its role in the constitutional process is the court’s increasing involvement in evaluating the ballot sufficiency of initiative-based amendment proposals before they reach voters at the polls. This development can best be seen by examining the number of challenges to constitutional initiatives that have reached the court since the initiative power was first adopted in 1910.

affirmatively involved itself in the “search for tax equity” that its decision in DuPree disavowed but that its decision in Lake View V accepted.

258. See, e.g., Dep’t of Human Servs. v. Howard, 367 Ark. 55, 238 S.W.3d 1 (2006); Jegley v. Picado, 349 Ark. 600, 80 S.W.3d 332 (2002); Sullivan III, 348 Ark. 647, 74 S.W.3d 215 (2002); see also supra Part IV.A.

259. See Lake View V, 351 Ark. at 51–55, 91 S.W.3d at 482–85 (regarding justiciability); id. at 64–72, 91 S.W.3d at 490–95 (regarding the court’s constitutional duty).

260. Id. at 64, 91 S.W.3d at 491 (tracking the constitutional history of education in Arkansas through its previous and current constitutions). While the court also discussed in dicta whether education as a fundamental right of citizens could be a basis for its opinion, the court ultimately found it unnecessary to resolve the issue because of the State’s “absolute duty to educate our children.” Id. at 67–71, 91 S.W.3d at 492–95. The court also noted that where the State fails in that duty, “judicial scrutiny in subsequent litigation will, no doubt, be as exact as it has been in the case before us.” Id. at 67–71, 91 S.W.3d at 492–95.

261. I explore this development in greater detail in Jerald A. Sharum, Constitutional Implementation and the Effectiveness of the Initiative Power in Arkansas (manuscript on file with author).

262. The Arkansas Supreme Court holds original and exclusive jurisdiction to review the ballot sufficiency of such proposals upon a challenge to the petition. Ark. Const. amend. VII, para. 21; see Thomas B. Cotton, Comment, The Arkansas Ballot Initiative: An Overview
As Figure 11 shows, the court evaluated the sufficiency of at least thirty-eight proposed constitutional amendments from 1912 to 2008.263 From these challenges, the court rejected at least twenty-four, that is, the court rejected more than 63% of the initiative petitions that it considered during this period.


As there is not a consolidated list of Arkansas Supreme Court challenges to proposed constitutional amendments, however, the challenges identified in this Article were derived from extensive research through LEXIS, Westlaw, and government sources in Arkansas. I am also especially grateful for the help of Chief Justice Jim Hannah of the Arkansas Supreme Court in researching this area.

Nevertheless, as a result of this limitation, my data may not include all such challenges that were made.

In addition, as a matter of methodology, individual challenges that were bifurcated to examine multiple issues, however, were not treated as separate challenges for the purposes of this Article. See, e.g., Porter, 310 Ark. 674, 839 S.W.2d 521 (signature sufficiency); Porter, 310 Ark. 562, 839 S.W.2d 512 (ballot title sufficiency). I did, however, include as unique challenges each case that reached the Arkansas Supreme Court, even if more than one case challenged the same proposed initiative.
But as Figure 11 shows, the court also appears to have become increasingly willing to invalidate proposed constitutional amendments. Indeed, of the twenty-four proposed constitutional initiatives that the court rejected, nearly 71% of them (seventeen) occurred in the last forty years, and 82% of those (fourteen) occurred in the last fifteen years. Moreover, from 1990 to 2000, the court rejected an astounding 83% (fifteen) of the constitutional initiative petitions that it reviewed.264

At least one commentator has found that such removals by the Arkansas Supreme Court, however appropriate to address ballot defects, may infringe upon the means of the people “to ratify or reject important and comprehensible questions of public government and morality” through the amendment process.265 Moreover, this level of involvement in such a critical element of Arkansas’s constitutional process appears to be a departure from

264. Kurrus, 342 Ark. 434, 29 S.W.3d 669; Roberts, 341 Ark. 813, 20 S.W.3d 376; League of Women Voters of Ark., 334 Ark. 558, 975 S.W.2d 828; Roberts, 334 Ark. 503, 975 S.W.2d 850; Parker, 326 Ark. 386, 931 S.W.2d 108; Donovan, 326 Ark. 353, 931 S.W.2d 119; Crochet, 326 Ark. 338, 931 S.W.2d 128; Scott, 326 Ark. 328, 932 S.W.2d 746; Holt, 326 Ark. 277, 930 S.W.2d 359; Burge, 326 Ark. 67, 928 S.W.2d 338; Southland Racing Corp., 326 Ark. 1, 927 S.W.2d 338; Page, 318 Ark. 342, 884 S.W.2d 951; Bailey, 318 Ark. 277, 884 S.W.2d 938; Christian Civic Action Comm., 318 Ark. 241, 884 S.W.2d 605; Finn, 303 Ark. 418, 798 S.W.2d 34.

265. See Cotton, supra note 262, at 802–04.
the court’s tradition of liberally construing the sufficiency of initiative-based amendments in order to further the purpose of the Initiative and Referendum Amendment to “reserve to the people the right to adopt, reject, approve, or disapprove legislation.”

In any event, it is clear that the court’s recent activity in acting as gatekeeper to the exercise of popular constitutional activism has negatively impacted the exercise of that right by reducing the number of potential initiatives considered by the people. It is not hard to imagine how such a gatekeeper might also effectively suppress popular constitutional activism in other ways, such as by disincentivizing groups from developing initiatives for fear of them being removed from the ballot by the court right before the election.

V. CONCLUSION

Since its adoption in 1874, Arkansas’s current constitution has been under pressure to adjust to modern needs. Throughout Arkansas’s history, the people have exerted this pressure through an active role in the constitutional process that has allowed them to use their constitutional powers to effect social and governmental change. In the first twenty years of the twentieth century, the people began to aggressively chart a new course in constitutional governance with the passage of the initiative amendments. These amendments greatly expanded upon the people’s powers of constitutional revision and ushered in dramatic increases in active popular participation in the constitutional process by proposing constitutional amendments that restrained their government (or freed their government from prior constitutional restraints) and advanced constitutional reform.

Indeed, the power of the people to propose constitutional amendments by initiative has been a powerful force in Arkansas’s constitutional law. Since 1912, the people have proposed by initiative an astounding eighty-two constitutional amendments over the course of 72% of possible elections. This amounts to over 45% of the 180 amendments that have been submitted

266. Id. at 762 (citing the court’s recent rulings as inconsistent with the long-standing doctrine of liberal construction that the Court has used in evaluating the sufficiency of initiative petitions). Under this tradition, substantial compliance with the Initiative and Referendum Amendment was all that was required of ballot sufficiency in order to ensure that proposed amendments are not “thwarted by strict or technical construction” of initiative requirements. Fletcher v. Bryant, 243 Ark. 864, 867, 422 S.W.2d 698, 700 (1968) (citing Reeves v. Smith, 190 Ark. 213, 78 S.W.2d 72 (1935); Cochran v. Black, 240 Ark. 393, 400 S.W.2d 280 (1966); and Blocker v. Sewell, 189 Ark. 924, 75 S.W.2d 658 (1987)).

267. Infra app.1, tbl.1.
to the people overall (including amendments proposed by the legislature)—a level of direct popular involvement well above the national average of 10%. Although political forces in Arkansas have likely manipulated the people’s involvement, the initiative power and the people’s frequent utilization of it remain a testament to the people’s dominant role in Arkansas’s constitutional process.

It is difficult to conceive of what Arkansas would be like today without the people’s consummate involvement because of the pervasive restrictions on the powers and operations of the state government that the original 1874 Constitution imposed. Without constitutional amendment, these restrictions would likely have remained in place today. Yet the people have chosen to make the numerous and far-reaching changes and expansions of powers in order to enable the state government to meet the changing needs of the people and the modern administrative state. Thus, popular involvement in the constitutional process has been essential in the development of both constitutional law and the ability of the state to meet modern challenges, all while maintaining the people’s active hand in restraining government and meeting the majority of the voting population’s evolving social, moral, and political needs.

I have defined this type of participation as popular constitutional activism. I have measured it by the number of constitutional amendments that are proposed by initiative in a given year because these initiatives are the very instruments that the people have used to directly participate in the constitutional process. A simple accounting of these amendments, however, indicates that the level of popular constitutional activism has not been constant throughout Arkansas’s history. More importantly, this tradition of activism appears to have undergone a rapid decline over the last four decades. As this is the period of time that generally corresponds to the Arkansas Supreme Court’s increasing participation in the constitutional (and political) process, the focus of this article has been to evaluate the extent to which this tradition may have been affected by the increasing role of the Arkansas Supreme Court in the constitutional process.

I have therefore attempted to statistically quantify this decline in order to provide a means to measure the decline of popular constitutional activism during the Arkansas Supreme Court’s ascendency. Based on this analysis, I can make several statistical observations. First, there has been a statistically significant decline in the level of popular constitutional activism from 1984 to 2006. Second, during this period, there is a high negative correlation between the year and the number of amendments proposed by initiative that

268. Id.; Gerald Benjamin, Constitutional Amendment and Revision, in AGENDA OF STATE CONSTITUTIONAL REFORM, supra note 186, at 181. (“Over the course of American history about 90 percent of state constitutional amendments have been proposed through state legislatures.”).
allows the year variable to account for more than 48.7% of the variance in the number of amendments proposed in a given year. The year variable therefore appears to be an effective stand-in for the court's increasing role because (1) a strong correlation between the year variable and the number of initiative-based amendments proposed in a given year developed during the same period in which the court's expansions occurred, and (2) that period lacked other factors that previously distorted patterns of popular constitutional activism.

By comparing these illuminating statistical observations with the increasing role of the Arkansas Supreme Court in the constitutional process, the ascendance of the Arkansas Supreme Court provides a compelling causal explanation for this decline. First, the coincident ascendance of the court with the decline of initiated amendments suggests that the court's increasing role is an important and strongly influential factor in the level of participation by the people in the constitutional process, and therefore, an important factor in the level of popular constitutional activism. Second, the court has expanded its constitutional role in three key areas visible to the people: (1) the protection of individual rights based on the Arkansas Constitution; (2) the court's ability and willingness to review important cases and involve itself in public policy; and (3) the evaluation of the sufficiency of constitutional initiative proposals. As described above, although these changes provide a ready means to control state action to protect individuals and become involved in important issues of the day, they also allow the court to alter Arkansas's long-standing tradition of popular constitutional activism and depress, both directly and indirectly, the people's use of their primary instrument for effecting constitutional change: the popular initiative.

Perhaps most tellingly, the decline in popular constitutional activism and the increasing role of the Arkansas Supreme Court have occurred during a period of relatively constant involvement by the people in elections overall. Thus, the decline in popular constitutional activism does not appear to be the result of popular disengagement of the electorate in so far as voter turnout has remained relatively constant over the same period. In


270. Measuring voter turnout reliably is problematic. United States Election Project, Voter Turnout Frequently Asked Questions, http://elections.gmu.edu/FAQ.html. This is because, beyond defining the population to be measured, a number of factors affect voter turnout rates. For example, the content and context of a given election impact the rate at which the voting population gets to the polls. This effect can be seen in presidential election
addition, Arkansas’s decline in initiative-based amendment proposals coincides with an increase in such activism nationwide.271

My analysis therefore suggests that the level of popular constitutional activism has declined in the face of the rising constitutional influence of the Arkansas Supreme Court and that the people are at least becoming more content to allow the judiciary to take a more active role in the constitutional process, effectively allowing the government of Arkansas to provide all of the protections and government limitations that “the people” require. As Professors Blair and Barth observed, “Arkansas voters have shown an increased willingness in recent years to remove the shackles from their governing institutions,” but at the same time appear to increasingly see litigation and the courts “as a means of changing public policy when majoritarian institutions are nonresponsive to them.”272 With the people’s at least partial abdication of their traditional role as masters of Arkansas’s constitutional law and the Arkansas Supreme Court’s increasing acceptance of a more active role in developing state constitutional law and supervising the constitutional process, perhaps the legislature should consider changing the motto of the state from regnat populus, the people rule, to minus regnat populus, the people rule less.

years where voter turnout is often higher than in non-presidential election years. Arkansas Election, Data, supra note 269. Similarly, the presence of hot button social issues on ballot measures in a given election year also influence voter turnout for that year one way or the other. Yet when these factors are accounted for, the level of voter turnout is remarkably constant.

There are, however, issues related to defining what part of the population is included in the voter turnout calculation that often escape consideration. Voter Turnout FAQ, supra. Because of these issues, I have used data corresponding to voting rate measurements for persons eligible to vote in a given election in order to provide the most meaningful rate measurements. Id.

271. See INITIATIVE & REFERENDUM INST., INITIATIVE USE (2009), http://www.iandinstitute.org/IIR%20Initiative%20Use%20%281904-2008%29.pdf (indicating that the number of initiatives, both constitutional and statutory, have generally increased from approximately 1966 to 2008).

272. BLAIR & BARTH, supra note 8, at 154, 223.
Appendix 1: Data

Table 1: History of Constitutional Amendments in Arkansas

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273. There is currently no single, comprehensive source that provides accurate data on amendments proposed by initiative or legislative referendum. As a result, the data relied on in this article represents a compilation of data from several sources. The primary source was Kay Collett Goss's reference guide on the Arkansas Constitution. Goss, supra note 15. Where that source lacked coverage, additional sources were used to fill in the missing data, including Arkansas Secretary of State, Election Results, http://www.arelections.org/index.php?l=1 (last visited Aug. 4, 2009); Arkansas Secretary of State, Initiatives and Amendments from 1938-2006, http://www.sosweb.state.ar.us/elections/electionspdfs/initiatives_amendments_1938-2006.pdf (last visited Aug. 4, 2009); INITIATIVE & REFERENDUM INST., ARKANSAS, STATEWIDE INITIATIVE USAGE: 1912 TO 2000, http://www.ianandinstitute.org/New%20IR%20Website%20Info/I&R%20Research%20and%20History/I&R%20at%20the%20Statewide%20Level/Usage%20History/Arkansas.pdf.
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Table 2: Summary Output (1912–2006). Year, # of Amendments

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Table 3: Summary Output (1984–2006). Year, # of Amendments

Proposed by Initiative

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