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# The Evolution of Judicial Selection in Arkansas: External and Internal Explanations of Change and Potential Future Directions<sup>1</sup>

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*Much scholarly debate has swirled around the question of judicial selection methods and their consequences, often pitting political science scholars against legal scholars. Considerably less attention has been given to the causes of these constitutional changes. Since statehood, Arkansas has experimented with nearly every major judicial selection method. While the state has yet to adopt a merit-based system, language in Amendment 80 of the Arkansas Constitution, incentivizes the switch for the state's appellate courts. This paper investigates the causes of these changes. Does the variance throughout Arkansas's history simply point to external explanations, like policy diffusion and constitution sharing between peer states? Or might it be influenced by internal explanations, like retaliation against the judicial branch or a change of party control? Consistent with extant scholarship (i.e. Mintrom & Vergari 1998), this article argues that the influence of internal forces is limited by external forces; that is, external forces limit the number of viable selection options while internal determinants have more control over the ultimate policy outcome. Thus, both external and internal explanations play a role and should be considered in examining how judicial selection may evolve in the future.*

## Introduction

Judicial selection methods and their potential consequences in the states have been subject to considerable scholarly debate. Political science scholars have often been pitted against legal scholars in this foray. Political scientists generally point to the need for accountability, and argue that judges are political actors in a political system. On the whole, then, these scholars advocate for electoral methods of selection or argue that selection methods have little consequence (e.g. Hall & Bonneau 2008; but see Benesh 2006). By contrast, legal scholars tend to prefer non-electoral methods of selection, like gubernatorial appointment or merit selection and retention. These scholars stress judicial independence, and are concerned with the effect of electing

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judges on the public's confidence in the legal system as a neutral and fair arbiter (e.g., Jackson 2007; Phillips 2009; but see Debow 2009; Volcansek 2009).

While much scholarly attention has focused on the potential consequences of judicial selection methods, scant attention has been paid as to why states change their selection methods in the first place (but see Epstein, Knight, & Shvetsova 2002; Hanssen 2004). Are these changes primarily caused by external explanations like constitution sharing among peer states or policy diffusion? Or rather, are these changes primarily driven by internal explanations, like judicial scandals, policy retaliation against the judiciary, or a change in party control? This paper seeks to answer these questions by investigating the causes of judicial selection changes in Arkansas from statehood to the present. As we will see, Arkansas has experimented quite extensively with selection mechanisms, and there is reason to believe that the state will continue this trend into the future.

The focus of this article is limited to Arkansas for a variety of reasons. First, causes of judicial selection in Arkansas have been neglected by scholarly study (Goss 1993). Thus, this article fills a critical gap in the Arkansas politics literature. Second, Arkansas is rich for a study of causes in judicial elections because it has experimented with every type of judicial selection method, with the exception of merit-based selection. Even so, Arkansas' constitution expressly authorizes the possibility of merit-based selection by the legislature referring the issue to a vote of the people. Moreover, Arkansas is in the midst of a movement to change judicial selection from nonpartisan election to merit-based selection with the governor and numerous members of the state legislature calling for this change (Moritz 2016).

We will argue that both external and internal explanations for change are valid—that is, both have contributed to selection changes in the past. Thus, going forward, both explanations should be considered when assessing how judicial selection may evolve in the future. This article proceeds with a review of relevant literature, focusing on both external and internal explanations of policy change, and from this review, several propositions are drawn. We will then show how judicial selection has changed since statehood, focusing on selection methods in the 19th and 20th centuries. Subsequent discussion will review the influences of these changes (and attempted reforms) over time. Finally, in conclusion, this article will

consider how the future of judicial selection in Arkansas may take shape based on changes in the past.

### Literature Review

While there is a paucity of scholarship on the causes of judicial selection changes, other research offers insight into explanations for change. Indeed, one of the richest sub-literatures in the subfield of state politics deals with explanations for policy variance between states (see Berry 1994; Berry & Berry 2014). Of course, judicial selection is just one example of vast differences in policy that can exist between states (see Puro, Bergerson, &

**Table 1: Current Judicial Selection Methods in the United States, 2015**

Court Level	Partisan Election	Nonpartisan Election	Gubernatorial Appointment with Confirmation*	Legislative Election	Merit Selection**
Supreme Courts	<b>AL, IL, LA, NM, PA, TX, WV</b>	<b>AR, GA, ID, KY, MI, MN, MS, MT, NV, NC, ND, OH, OR, WA, WI</b>	CT, DE, HI, ME, MA, NH, NJ, NY, RI, VT	<b>SC, VA</b>	AK, AZ, CA, CO, <b>FL</b> , IN, IA, <b>KS****</b> , MD, MO, NE, OK, SD, <b>TN</b> , UT, WY
Appellate Courts	<b>AL, IL, LA, NM, PA, TX</b>	<b>AR, GA, ID, KY, MI, MN, MS, NC, OH, OR, WA, WI</b>	CT, DE, D.C., HI, MA, NY, ND, VT	<b>SC, VA</b>	AK, AZ, CA, CO, <b>FL</b> , IN, IA, <b>KS****</b> , MD, MO, NE, OK, <b>TN</b> , UT
Inferior Courts	<b>AL, IL, IN, KS****, LA, MO, NM, NY, PA, TN, TX, WV</b>	<b>AZ**</b> , <b>AR, CA, FL, GA, ID, KY, MD, MI, MN, MS, MT, NV, NC, ND, OH, OK, OR, SD, WA, WI</b>	CT, DE, D.C., HI, ME, MA, NH, NJ, RI, VT	<b>SC, VA</b>	AK, CO, IA, <b>KS****</b> , NE, UT, WY

Source: The American Judicature Society, [http://www.judicialselection.us/judicial\\_selection/methods/selection\\_of\\_judges.cfm?state=](http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=).

States in **bold** type belonged to the Confederate States of America.

\*In many states, the governor may only appoint candidates chosen by a nominating commission.

Confirmation, if necessary, can be through the senate or an executive council.

\*\*Appointment with retention elections.

\*\*\*The general election for inferior court judges in AZ is nonpartisan, but primary elections are partisan.

\*\*\*\*Kansas presents an unusual case. Appellate court judges are appointed by the governor from a nominating commission, confirmed by the senate, and retained by the people. 17 inferior court districts are selected via merit selection, while 14 are selected via partisan election.

Puro 1985 for a discussion of the Missouri Plan and policy diffusion). Table 1 shows the variety that exists today, and Table 2 shows the variety that has existed in Arkansas since statehood.

**Table 2: Judicial Selection Methods in Arkansas, 1836-Present**

<i>Year</i>	<i>Selection Method</i>
1836	Election of all judges by the legislature.
1848	Supreme court justices elected by legislature; lower court judges elected by the people.
1861	Supreme court justices appointed by the governor and confirmed by the senate; lower court judges elected by the people.
1864	All judges elected by the people.
1868	Chief justice and lower court judges appointed by the governor and confirmed by senate; four associate justices elected by the people.
1874	All judges elected by the people.
1970*	Merit selection for appellate judges proposed in first draft; nonpartisan election of judges proposed in final draft.
1980*	Ballot question proposed to the people: nonpartisan election or merit selection?
2000	Judges elected in nonpartisan elections, per Amendment 80; the legislature can refer an amendment to switch to merit selection.

\*Proposed constitutions failed to be ratified by the people.

The first set of explanations for this variance focuses on external forces, or influences on policy from outside the state, as the main cause of policy variance. This review will look primarily at constitution sharing and policy diffusion between peer states. On the other hand, scholars have pointed to internal explanations, or influences on policy from within the state, in order to explain policy variance (for a thorough discussion on external factors versus internal determinants, see Berry & Berry 2014). Here, this article will focus on some aspects of political culture, policy retaliation from the legislature and governor, party power, and lobbying efforts from organizations within the state – particularly, in this context, the Bar Association. Before moving on to these explanations, though, the only scholarship that reviews this question will be addressed.

### **Judicial Selection, Historical Theory, and Opportunity Costs**

While scholars have given significant attention to the effects of one selection system over another, few have focused on why such changes occur in the first place. Indeed, many scholars point to the traditional narrative within the scholarship that retention methods are simply a function of time and historical preferences (see, e.g., Donovan et al. 2015, 327-332; Epstein, Knight, Shvetsova 2002, 4-8; Pierson 2004). In this view, states simply respond to contemporary trends in judicial selection that are thought to produce a “better” judiciary. For example, states in the early Republic

tended to choose legislative election because of the prevailing wisdom of the era that neither the governor nor the people should be given too much power. Later, as Jacksonian Democracy swept the nation, states opted for the more democratic approach of partisan election. And in the 20<sup>th</sup> century, states responded to the Progressive movement and activists who sought to insulate the judiciary from popular opinion by bringing nonpartisan elections and merit selection

This historical theory has become the standard, textbook explanation for why states choose particular retention mechanisms over others – so much so that it is rarely questioned by scholars. However, research by Epstein, Knight, and Shvetsova (2002) critiques this conventional wisdom, and attempts to empirically assess the reasons for changing judicial selection systems. Indeed, to date, this study represents the only significant attempt at answering the research question posed in this article. Specifically, they argue that the conventional wisdom fails to account for politics, a more accurate understanding of political motives, and lacks empirical support.

The major thrust of Epstein, Knight, and Shvetsova (2002) is the idea that the uncertainty of the political climate will affect judicial selection mechanisms. To test this, the authors plot retention mechanisms on a scale of low opportunity cost to high opportunity cost. By opportunity cost, the authors mean “the political and other costs justices may incur when they act sincerely” (Epstein, Knight, & Shvetsova 2002, 191). As we will see below, this theory reinforces others’ insights in many ways. This is particularly true of Langer’s (2002) work, which posits that justices are careful about venturing into the particularly salient areas of policy due to the risk of retaliation from elected officials (see also Brace, Hall, & Langer 2001). It also reinforces the idea that a change in dominant party control might precipitate change; specifically, the newly seated party in power may want to increase the opportunity costs for judges by making them more accountable to elected officials and/or to the people.

However, this theory warrants a couple of major cautions. First, while it does seem reasonable to suggest that the uncertainty of the political climate would influence selection choice, this theoretical framework necessarily presumes the presence of all selection options as viable alternatives at any point in time. But if one looks at Arkansas’ 1836 statehood constitution, only two viable selection options existed – namely, legislative election and gubernatorial appointment (Ledbetter 1982). Similarly, Arkansas’ judicial reforms in 2000 did not consider the outdated legislative election method, or

even gubernatorial appointment. Indeed, we know that a state in the late-20th century is more likely to choose merit selection or nonpartisan elections, regardless of the uncertainty of the political climate. Thus, this theory downplays significantly policy diffusion trends and the limits they impose on choice in order to effectively counter the historical theory of judicial selection. Furthermore, the authors' proposed mapping of opportunity costs seems rather subjective. Indeed, one could imagine that reappointment by government officials might be more costly in particular circumstances than nonpartisan reelection by the relatively uninformed electorate (see, e.g., Langer 2002). Given these significant cautions, then, we will look to other scholarship to formulate our hypotheses.

### **Policy Diffusion among the States: External Explanations**

First, many scholars argue that external factors best explain policy variance among the states (see, e.g., Berry & Berry 2014). While these scholars do not totally discount intrastate explanations, they believe national and/or regional interactions are the primary drivers of policy change. These scholars have identified networks of policy diffusion among states, and have empirically shown that states are influenced by the national government and their fellow states.

Perhaps at the most fundamental level, Tarr (1998) shows that similarities between state constitutions are often the result of constitution sharing among peer states. In particular, Tarr notes that borrowing from other states is common because states have similar problems and like to borrow solutions from one another (Tarr 1998, 51). Additionally, borrowing from other states can decrease the time and effort needed to draft a new governing document. States in the 18th and 19th centuries looked to other state constitutions when drafting their first constitutions or rewriting old ones. Likewise, after the Civil War, many southern states borrowed heavily from the constitutions of states in the Union. In fact, the bulk of constitutional revisions happened between 1861-1880 (Tarr 1998, 95). And of course, as people migrated west, they took their constitutional frameworks and ideas about government along for the ride. Tarr (1998) sums this up nicely when he writes "[w]hether in new states or old, convention delegates during the nineteenth century relied heavily on compilations of existing state constitutions, which clarified the progress of constitutional thinking and provided models for emulation" (52).



This borrowing was not unique to the 18th and 19th centuries. Indeed, the trend of interstate borrowing continued into the twentieth century. Many states, for instance, created constitution revision commissions that were charged with regularly looking at the state's constitution and recommending changes. As part of their work, these commissions would monitor constitutional changes in other states. Additionally, interest and citizen groups have been active in ensuring certain provisions are inserted into the drafts of new constitutions. The Model State Constitution, created by the National Municipal League in 1921, promotes what it considers to be the ideal state government. These observations give us our first proposition:

*P1: Judicial selection changes are caused by constitution sharing among peer states.*

Similarly, Gray (1973) and Walker (1969) find a national system of emulation and competition across several policy domains. Walker (1969) further identifies regional clusters of policy diffusion. He develops a tree system of pioneer states and laggard states, and argues that newer networks have sped up diffusion within regional clusters. Similarly and more contemporarily, Mintrom and Vergari (1998) look at policy networks and the influence of policy entrepreneurs. They find that external networks increase the likelihood that a state will consider a policy from another state, but have no effect on adoption. Instead, the presence of a policy entrepreneur and internal networks are significant for policy adoption.

Finally, scholars have pointed to public opinion forces across states as influences on policy change and diffusion. Erikson, Wright, and McIver (1993, 2007) and other scholars (e.g., Brace et al. 2007) argue that while party identification trends in states may change, citizen preferences in states remain stable over time. Thus, any change, they argue, is best explained by national trends, and not intrastate trends. Much change surrounding judicial selection seems consistent with this theory. This leads us to our second proposition:

*P2: Judicial selection changes are caused by national and/or regional public opinion trends.*

And while reliable polling data from the 19th century is not available, we will look to larger trends in democratic thinking among the American people, e.g., Jacksonian Democracy.

## Of the State Itself: Internal Explanations

Other scholars have focused more on internal explanations, arguing that the primary drivers of policy variance are characteristics within the state (see Berry & Berry 2014). There is, in fact, a long history of state politics scholars taking this approach. For instance, Daniel Elazar's political cultures can account for policy variance – and indeed, many scholars still use political culture as an independent variable when empirically investigating variance. Similarly, Lieske used U.S. Census data to uncover differences in political cultures that could account for policy variance. While their approaches are more narrowly tailored, methodologically sophisticated, and issue-specific, contemporary scholars have also investigated policy variance using this concept (see, e.g. Frenreis & Tatalovich 2010; Hero & Tolbert 1996; Hill & Leighley 1992; Rigby & Wright 2013).

We expect that judicial selection mechanisms will reflect the state's political culture. This, of course, assumes that constitutional mechanisms reflect the people's desires. Furthermore, this assumes that the people – outside of the legal elite – care about how judges are selected. Finally, it seems that if this hypothesis were to be valid, selection mechanisms would be more static than volatile. Change to these mechanisms would be difficult, then, particularly if the changes ran counter to the dominant trends of the political culture of the state. But political culture can be an elusive and unwieldy concept, and therefore difficult to operationalize. Indeed, one could look to several factors when evaluating Arkansas' traditionalistic culture. In this paper, we are primarily interested in citizens' distrust of political elites. We posit that this populist outlook will constrain elite efforts to reform the judiciary:

*P3: Judicial selection changes are constrained by a populist distrust of political and legal elites.*

Additionally, scholars have looked at the impact of public opinion – an attitudinal explanation – on policy variance. Unfortunately, there is a severe lack of comparable survey data for all 50 states (see Parry, Kisida, & Langley 2008).<sup>2</sup> For that reason, state politics scholars have been forced to take

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<sup>2</sup> Of course, even if there were comparable polling data, it seems rather unlikely that judicial selection mechanisms would be a concern of pollsters or citizens. Surprisingly, though, the American Judicature Society does track polling efforts on this question in individual states. Polling on this question, however, is uneven, and the methodology of the polls is not provided.

innovative approaches to measuring public opinion, which has resulted in the formation of two camps. In contrast to Erikson, Wright, and McIver (1993, 2007) and other scholars, who were discussed in the previous section, Berry et al. (1998) argue that public opinion in the states changes over time. Using their Citizen Ideology Index as an indirect measure of public opinion, they argue that citizen preferences fluctuate between conservative and liberal, e.g., in reaction to public policy or a particular event. They hold, then, that policy changes within states more often reflect changing opinions of the state's citizenry. Critics argue, however, that this index is not a measure of citizen preferences, but of elite opinion (see Brace et al. 2004, 2007; Carsey & Harden 2010; Erikson, Wright, & McIver 2007). Even if this is the case, we still hold that Berry et al.'s index has value; given low participation rates in the states, an understanding of elite opinions is crucial. This seems to be especially true for judicial politics, which generally have even lower political participation (see Bonneau 2005; Hall 2007; Klein & Baum 2001). Moreover, as our research will show, judicial politics seem to be a particularly salient concern for legal elites in Arkansas. More broadly speaking, while constitutional change has been fueled by public passions in the past (e.g., the Populist movement), it is unclear how much influence the mass public has (Tarr 1998, 32-33). Indeed, the latter half of the 20th century shows that constitutional changes are most often guided by professional or political elites. The fluctuation of elite opinion, then, may help explain the tremendous variance in judicial selection mechanisms since 1836.

In Arkansas, as in other states, the elite organization that would be particularly concerned with judicial selection mechanisms is the Bar Association. Indeed, this seems to be the sort of internal network that is crucial for the successful adoption of policy change (Mintrom & Vergari 1998). The professionals that belong to the Bar have a considerable stake in selection, both because they regularly interact and work with judges, and because they may have professional ambitions of becoming judges. Moreover, the degree of control sometimes given to the Bar in the Missouri Plan—like appointment power, for instance—could be another reason these professionals and legal professional organizations (e.g., the Institute for the Advancement of the Legal Profession) tend to support merit selection. This leads us to our fourth proposition:

*P4: Judicial selection changes are driven by the opinions of the legal community in the state.*

In addition to the Bar Association, research from Langer (2002) shows that elites in government, i.e., elected state officials, can and do exert influence on the judiciary, often in response to decisions that adversely affect their policies. In other words, the judicial branch is sometimes subjected to policy retaliation. While Langer does not discuss judicial selection mechanisms, changes in selection methods could be an example of this retaliation. A change to a gubernatorial appointment system, for example, gives both the governor and senate considerable power and influence over judges. The recent debate over judicial selection in Kansas illustrates this point well (see Stinson 2014).

*P5: Judicial selection changes are caused by policy retaliation from the legislative and/or executive branches of government.*

Similarly, a change in the dominant party of a state could precipitate policy change. For one, policy change could be the result of policy retaliation. In other words, the party may be punishing judges for ruling a particular way, as Langer (2002) suggests. It could also be that parties have different beliefs about appropriate selection mechanisms. As we will see below, a change in the dominant party in Arkansas has contributed to judicial selection changes for both of these reasons.

*P6: Judicial selection changes are due to a change with party power shifts.*

We expect that both external and internal forces influence judicial selection changes in the state. Furthermore, the dominant influences of change may vary with time. In other words, the forces that were important in 1874 may not be as dominant in the 21st century. Our analysis of the foregoing propositions will be descriptive in nature. While an empirical analysis might lead to more definitive and generalizable conclusions, we are employing a descriptive analysis for a couple of obvious reasons. First, given that all of Arkansas' constitutions were written and ratified in the mid- to late-19th century, a descriptive approach is more appropriate. The data needed in an empirical design are largely unavailable. Secondly, these available data lend themselves to a descriptive approach. Most of our information will come from a review of historical events surrounding these changes, as well as any information that may be garnered from journals, convention records, and, in the case of 20th century changes, personal

accounts. Finally, while Epstein, Knight, and Shvetsova (2002) do provide an empirical framework, the data needed to run the model are elusive. While we can point to a general account of uncertainty in the state, we cannot point to the uncertainty felt by individual legal elites and lawmakers in many (if not most) cases. Indeed, the subjective nature of uncertainty makes a descriptive approach more acceptable in the absence of personal accounts.

## **The 19<sup>th</sup> Century: From Statehood to Redemption**

The 19th century was one of great flux in constitutional governance for Arkansas. As Tarr (1998) notes, states experimented greatly with their constitutional designs in the 19th century, and Arkansas was not unusual in this regard. Many states, like Arkansas, were admitted to the Union during the century; and southern states, like Arkansas, went through an extensive revision process before and after the Civil War. In total, the citizens of Arkansas wrote and ratified five different constitutions during this century. This section will outline the judicial selection mechanisms prescribed in each of the constitutions of the 19th century, beginning with the statehood Constitution of 1836. As we will see, mechanisms for selecting judges varied extensively, both in response to external trends and in response to internal state politics.

### **The Constitution of 1836**

The general assembly shall, by joint vote of both houses, elect the judges of the supreme and circuit courts, a majority of the whole number in joint vote being necessary to a choice. The judges of the Supreme Court [...] shall hold their offices during the term of eight years from the date of their commissions. [...] The judges of the circuit court [...] shall be elected for the term of four years from the date of their commission...Art. 6, Sec. 7<sup>3</sup>

The first judicial selection mechanism the state employed was legislative election for all judges. For Supreme Court justices, legislative election would remain the selection method until the Civil War. The question raised here is why the state of Arkansas may have chosen legislative election over gubernatorial appointment, the only other method at the time.

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<sup>3</sup> Quotes from Arkansas' constitutions are taken from Rose (1891).

The primary, if not only, answer for this method is *constitution sharing*. As noted above, Tarr (1998) notes that constitution sharing was very common in the 19th century, particularly for statehood constitutions. Indeed, Ledbetter (1982) shows that the Constitution of 1836 was hastily written and speedily adopted, and that it borrowed heavily from other states. In fact, he notes that one could switch Arkansas' constitution with those of Mississippi, Tennessee, or Missouri, and would not find any significant differences (244). This is not to say, however, that Arkansas did not make an informed decision, but it should be taken as strong evidence that the state leadership simply borrowed other states' judicial selection mechanisms without much deliberation. This idea is even more compelling when one takes the strong desire for statehood into account; Arkansans' desire to join the Union was strong enough to buffet the objections of policymakers at the national level (Ledbetter 1982). Thus, the Arkansan elites writing the constitution would have turned to other states for a model in order to avoid complications with congressional approval of the state constitution.

### 1848 Amendment

That the qualified electors of each judicial circuit in the state of Arkansas shall elect their circuit judge. 1848 Amendment

In 1848, the people ratified the above referred amendment from the General Assembly. This amendment made circuit court judges – or all inferior court judges at the time – elected by the people, but still retained legislative election for Supreme Court justices. It seems peculiar that the legislature would voluntarily forfeit its power to appoint circuit judges. However, when this amendment is examined in context of broader trends, it is logical.

First, this amendment falls squarely within the era of Jacksonian Democracy, pointing to the influence of *national or regional public opinion trends*. The election of circuit judges, then, represents a return of power to the people from the state (Williams 2010, 290). Given the widespread popularity of this line of thought among the American people and some elites, the diffusion of elected judges is understandable. And yet, in Arkansas this power sharing is moderated by the legislature retaining the power to appoint justices on the state's Supreme Court.

In addition to these national and regional public opinion trends, this change was spurred on by *constitution sharing*. Ledbetter (1982) notes that

Mississippi was the first to elect its judges about a decade before in 1832. The diffusion of elected judges across states can be attributed to states adopting the new constitutional provisions of its peer states: “Between 1846 and 1912 every new state entering the Union embraced this scheme of selection [i.e., partisan election], as did most of the previously settled states” (Hall 1984, 346-347).

### The Constitution of 1861

The judges of the supreme court shall be appointed by the governor, by and with the advice and consent of the senate. The judges of the supreme court [...] shall hold their offices during the term of eight years from the date of their commissions, and until their successors are appointed and qualified. Art. 6, Sec. 7

The qualified voters of each judicial circuit in the state of Arkansas, shall elect their circuit judges. The judges of the circuit courts [...] shall be elected for the term of four years, from and after the dates of their commissions, and until their successors are elected and qualified—and all elections of circuit judges shall be held as is, or may be provided by law. Art. 6, Sec. 8

One of the primary characteristics of the Constitution of 1836 is its longevity vis-à-vis the other constitutions of the 19<sup>th</sup> century (Ledbetter 1982). By that measure, regardless of whether the constitution should be considered exceptional or ordinary (see Ledbetter 1982), the Constitution of 1836 can be hailed as a success. For that reason, the Constitution of 1861 does not meddle too much with the previous constitution, but by and large just rewrites it to join the Confederate States of America (Ledbetter 1982).

One exception to that rule is judicial selection. In 1861, circuit judges continue to be elected by the people; however, the selection for Supreme Court justices is changed from legislative election to gubernatorial appointment with senate confirmation. Two explanations for this change are *constitution sharing* and *national or regional public opinion trends*. While New York had been the first to adopt gubernatorial appointment to select Supreme Court justices in the 18<sup>th</sup> century (Tarr 1998), southern states were hesitant to join the movement. A century later, however, Arkansas and much of the South—including the Confederate States’ government—decided to

adopt the change as legislative elections became an increasingly outdated mode to choose judges.

### **The Constitution of 1864**

The qualified voters of this state shall elect the judges of the supreme court. The judges of the supreme court [...] shall hold their offices during the term of eight years from the date of their commissions, and until their successors are elected and qualified...Art. 7, Sec. 7

The qualified voters of each judicial district shall elect a circuit judge. The judges of the circuit court [...] shall be elected for the term of four years from the date of their commissions, and shall serve until their successors are elected and qualified. Art. 7, Sec. 8

With the end of the Civil War, states were required to rewrite their constitutions in order to be readmitted to the Union. Of course, a new constitution would be required in just four more years after the assassination of President Lincoln and the heightened demands from the Radical Republican Congress. Much has been written about this elsewhere, thus there is not a need to delve too deeply into it here (see, e.g., Ledbetter 1985). However, we see distinct differences in judicial selection between 1864 and 1868.

An obvious influence on change is *constitution sharing*. Ledbetter (1985) notes that at this time, southern states were adopting much from the constitutions of their northern neighbors in order to decrease any complications in the re-admittance process. We might also expect to see that a change in dominant party control would influence selection mechanisms; however, that does not seem to be the case here. Republicans would have preferred selection by appointment — as we will see in 1868. Instead, the more moderate voices in 1864 opted for partisan election for all judges. Interestingly, then, this may point to the influence of *populist distrust of elites*, particularly outside or Republican elites, and the people's preference for selecting their judicial actors. In fact, this explanation fits well here because most of the drafters of this constitution were Arkansans; only four delegates had been in the state fewer than five years (Ledbetter 1985, 20).



### The Constitution of 1868

...The supreme court shall consist of one (1) chief justice, who shall be appointed by the governor, by and with the advice and consent of the senate, for the term of eight (8) years, and four associate justices, who shall be chosen by the qualified electors of the state at large for the term of eight (8) years...Art. 7, Sec. 3

...The judges of the inferior courts [...] shall be appointed by the governor, by and with the advice and consent of the senate, for the term of six (6) years, and until such time as the general assembly may otherwise direct...Art. 7, Sec. 5

In contrast to the Constitution of 1864, we see a different approach to judicial selection that gives considerably more power to elected officials instead of the people of the state. This change is due to a change in decision-makers; Radical Republicans in Arkansas and Washington expected constitutional mechanisms that would protect recently emancipated citizens. In other words, the judiciary was insulated from the people and their opinions.

We can say, then, that that primary reason for the rather bizarre selection arrangement is a change in *party power*. Unlike in 1864 when a more moderate coalition drafted the state constitution, the constitution of 1868 was drafted and ratified by more radical Republicans within the state. These decision-makers wanted to ensure that black citizens would be protected under the state and federal constitutions, and that those protections would be duly enforced by the judiciary. This change, then, not only reflects the change in the party power structure in Arkansas, but also the *national trends* pushed by the Radical Republicans in Congress.

In addition to ensuring that newly emancipated citizens would be given justice, there was concern about judges discriminating against Republicans and those who had sympathized with the North. The convention record from 1868 confirms this.<sup>4</sup> The journal records that a letter by L. Lamborn was sent to the convention on the subject of the judiciary. Lamborn writes,

[...] there has been no *loyal* judiciary tribunal since the war, and no Union man could obtain impartial justice; and I

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<sup>4</sup> The 1868 Constitutional Convention kept meticulous records. Other conventions, by contrast, did not.

hope you will pardon my boldness in making one suggestion to your honorable body; that is, that the new constitution shall provide that judges shall be appointed by the Executive of the State. (Arkansas Constitutional Convention, 1868, 204)

The delegates went on to debate the merits of the letter. The convention record reflects that several denounced the letter, including a Mr. Duvall who had originally come from Virginia, and Mr. Cypert and Mr. McCown who had originally come from Tennessee. By contrast, Mr. Dale, who had been born in Indiana, lent his support to the merits of the letter.

This change also represents *retaliation by the legislative and executive branches* against the judiciary. As Stafford (2001) notes, between 1864 and 1868, there were rival governments in Arkansas, including two rival supreme courts. The government in 1868, then, was concentrating power in a single court, and by appointing most judges—including all inferior court judges—the state was ensuring maximum control over the judicial branch during Reconstruction.

However, the above explanations can hardly explain why the drafters chose to allow the associate justices to be elected while appointing the chief justice and all inferior court judges. Indeed, electing associate justices runs counter to the above explanations. We propose that there are two possible explanations. The first, and more cynical, is political corruption. One notable chief justice under the Constitution of 1868 was McClure, who was a key member of the 1868 convention and a close ally and friend to future governors Clayton and Brooks. It could be argued that McClure pushed for the chief justice to be appointed in order to secure his own political future. However, this explanation falls short because McClure was democratically elected to the post of associate justice before being appointed by Clayton to the position of chief justice. Perhaps the best explanation is this structure *de facto* gave the chief justice expansive powers and control over the Supreme Court. For example, in exploring his impeachment, Ewing (1954) shows that Chief Justice McClure possessed broad administrative powers in fact, whether or not those powers were justified by law.

### **The Constitution of 1874**

...The judges of the supreme court shall be elected by the qualified electors of the state, and shall hold their offices

during the term of eight years from the date of their commission...Art. 7, Sec. 6

The judges of the circuit courts shall be elected by the qualified electors of the several circuits, and shall hold their offices for the term of four years. Art. 7, Sec. 17

After Reconstruction, Arkansas quickly initiated efforts to “redeem” its constitution and government. In most ways, therefore, the Constitution of 1874 is drastically different from previous constitutions. Other scholars have dealt extensively with these southern constitutions (see, e.g., Atkinson 1946; Blair & Barth 2005; Tarr 1998). With respect to judicial selection in Arkansas, we see a change back to the popular election of all judges. With popularly elected judges, judicial enforcement of certain civil rights provisions would be more unlikely, which only serves to reinforce the policy reasons for which the Constitution of 1874 was drafted.

With these so-called redeemer constitutions, we see several external forces at play. For one, *constitution sharing* was common. This is not only true of peer states, but states were also adopting provisions from constitutions in the past. Thus, we see a return to partisan elections for judges and justices across the South. Additionally, we see *regional public opinion trends* influencing developments. Many southerners were anxious to return to an antebellum state of existence, and while that may not have been possible in fact, it could be simulated constitutionally. With popularly elected judges, a return to the antebellum South and its hierarchal structure would be possible.

Many internal forces influenced the constitutional changes, as well, including the change of judicial selection mechanism. Indeed, in 1874, many of these internal forces exerted strong influence on changes. The most obvious is a change in the *party power* structure. Democrats once again had control of the General Assembly and dominated the constitutional convention. With this dominance, they had the ability to return to the popular election of judges. In addition, this return to popular election is a form of *retaliation against the judiciary*, particularly against those judges who had been appointed by Republican governors. The drafters knew that Republicans could not be elected in much of post-Reconstruction Arkansas. Indeed, after the so-called return to home rule, the chief justice and two associate justices of the Supreme Court were impeached and removed from office (Russell 1985, 16). Finally, *distrust of political elites* exerted a strong

influence. The right to select its judges was again being returned to the people, who on the whole distrusted the government.

Overall, then, we see that the above changes were influenced by both internal and external forces. As the state moved into the twentieth century, Arkansas would see a halt to the frequent constitutional rewrites. Instead, the 1874 constitution and its method for judicial selection would remain until Amendment 80 in 2000, despite numerous attempts by elites to reform the judiciary.

### **The 20<sup>th</sup> Century: A Century of (Attempted) Reforms**

While constitution adoption would drop off after the 19th century, reformers continued to work to change public policy in the states through state constitutional amendments and/or constitutional conventions. Consistent with the general preferences of the legal field today, many reforms over the 20th century attempted to limit ballot-box influence on judicial behavior. For example, the 6th edition of the Model Constitution, published in 1968, pushes for appointment of judges by the governor or nomination commission. Progressive reformers also pushed with considerable success for nonpartisan elections of judges during the first part of the 20th century. Similarly, the change to merit selection, or the Missouri Plan, has been promoted by a host of legal interest groups to insulate judicial actors from the influence of popular elections. This promotion has continued into the 21st century by groups like the Institute for the Advancement of the Legal Profession and the O'Connor Judicial Selection Initiative. This section will map changes and attempted reforms to judicial selection in Arkansas during this century. As we will see, reformers consistently failed to change selection mechanisms until Amendment 80 in 2000.

### **1970 and 1980 Constitutional Conventions**

The Governor shall fill vacancies on the Supreme Court and Circuit Courts by selecting one of three persons nominated by the appropriate Nominating Commission. If the Governor fails to make the appointment within sixty days after the three names are submitted to him, the Chief Justice of the Supreme Court shall make the appointment from among the three nominees. Recommended change by the Arkansas Constitutional Revision Study Commission, 1968

The Supreme Court shall consist of a Chief Justice and six Associate Justices, each of whom shall be elected by a majority vote on a nonpartisan basis at a statewide general election for a term of eight years Art. 5, Sec. 2, Proposed Constitution of 1970

FOR Merit Selection by Appointment of Supreme Court Justices and Court of Appeals Judges

OR

FOR Non-partisan Election of Supreme Court Justices and Court of Appeals Judges

Ballot Form for Selection of Supreme Court Justices and Court of Appeals Judges, Proposed Constitution of 1980

Consistent with broader national trends toward rewriting and/or revising constitutions, constitutional conventions were held in Arkansas in 1970 and 1980. While the people approved these two conventions, they failed to ratify the resulting documents. It should also be noted that there were two other conventions during the century. However, we have not chosen to include them here for a couple of reasons. First, an earlier convention was ruled unconstitutional by the state Supreme Court because the people were not asked if there should be a convention. And in the 1990s, Governor Tucker's proposed changes failed to gain any popular support.

The first significant convention, then, was held in 1970. As mentioned in the literature review, the mid-20th century was a time of extensive constitutional revision and review (see Tarr 1998). *Political and legal elites* in Arkansas were similarly pushing for reforms, particularly reforms that dealt with the judicial article and included a switch in selection methods. In fact, in 1968, the Arkansas Constitutional Revision Study Commission issued a report that urged for, among other things, the adoption of merit selection for judges. The writers of the report go on to note that “[t]he popular election of judges is a highly controversial method for selection of the judiciary which has recently been abandoned in a number of other states. It should be restudied (9).” The study ultimately recommended a merit system for two reasons: first, they argued that voters without legal experience could not make informed decisions, and secondly, that running for election can create conflicts of interest (72). The commission they proposed would have been made up of lawyers and non-lawyers. The commission would send three

nominees to the governor, and the selected judge would be retained in periodic elections.

However, at the convention itself, the delegates instead chose to adopt nonpartisan elections for the proposed constitution. Granted, the adoption of this selection method is also consistent with *national public opinion trends* and *constitution sharing*, though it is worth noting that most other states using this method had adopted nonpartisan elections several decades earlier. In addition to recommending the use of nonpartisan elections, it is interesting to note that the proposed constitution also established a court of appeals.

Similarly, in 1980 there was much momentum for the adoption of merit selection in Arkansas. However, unlike in 1970, the delegates of the 1980 Constitutional Convention could not come to a clear consensus on retaining judicial elections or adopting merit selection. In fact, the convention ended up sending both proposals to the people for a vote, meaning one would vote for the new constitution and then vote for their judicial selection preference (Ledbetter 2001). After the convention, there was what appeared to be considerable organization campaigning for the adoption of the merit selection process (Abramson 1980). Raymond Abramson, an arch proponent of merit-based selection recorded that numerous delegates to the constitutional convention were in favor of merit based selection as well as Walter Hussman, the owner of the prominent *Arkansas Democrat* newspaper. But Abramson also noted that the campaign effort was a low budget, grassroots affair. However, due to the fact that the proposed constitution itself failed with the voters, merit-based selection was a nullity.

As in 1970, this momentum in 1980 for adoption of merit judicial selection fits squarely in line with the rest of the nation adopting merit-based selection, or *national and regional public opinion trends* and *constitution sharing*. Of the 34 states that adopted merit selection, all did so between 1940 and 1988, predominantly between 1970 and 1980.<sup>5</sup> Thus, Arkansas' effort correlates strongly with the rest of her sister states, suggesting external influences were at play during the 1980 constitutional convention. Furthermore, *the legal community* in the state was pushing for reforms to the judicial article, including to the method of selection. In fact, a ledger kept by Cal Ledbetter shows plainly that the delegates were especially interested in reforming the judicial article (Ledbetter, undated). Indeed, based on

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<sup>5</sup> See [statecourtsguide.com](http://statecourtsguide.com).

Ledbetter's papers, it appears that the legal community was pushing harder for merit selection in 1980 than in 1970.

After 1980, the rest of the nation appears to have veered away from merit selection, which is consistent with Arkansas' trajectory. The last state to adopt a merit selection system by constitutional amendment was New Mexico in 1988, and New Mexico was far from a full-fledged Missouri plan system as it retained contested partisan elections following initial appointment (Anderson 2004). As merit selection fell off nationally, it also fell off in Arkansas until quite recently.

The reasons for which the proposed constitutions were not ratified deserve some attention. The first reason we can point to is *populist distrust of political elites*. Time and again, the people were cautious to adopt these new constitutions with their sweeping reforms, even though they had approved the conventions. Furthermore, Arkansas was endeavoring to rewrite its constitutions at a time when *national public opinion* was manifesting severe distrust of government and public officials in the wake of the Vietnam War, Watergate, and other political scandals.

#### **2000: Amendment 80**

Circuit Judges and District Judges shall be elected on a nonpartisan basis by a majority of qualified electors...Amendment 80, Sec. 17 (A)

Supreme Court Justices and Court of Appeals Judges shall be elected on a nonpartisan basis by a majority of qualified electors voting for such office. Provided, however, the General Assembly may refer the issue of merit selection of members of the Supreme Court and the Court of Appeals to a vote of the people at any general election. If the voters approve a merit selection system, the General Assembly shall enact laws to create a judicial nominating commission for the purpose of nominating candidates for merit selection to the Supreme Court and Court of Appeals. Amendment 80, Sec. 18 (A)

On the one hand, it might appear that the idea behind merit selection in Arkansas is alive and well. Amendment 80 to the Arkansas Constitution, which was adopted in 2000, allows for the legislature to refer the issue of merit selection of appellate judges to the voters at any general election. This

is a significant retreat from offering merit selection on the ballot as was done in 1980. Moreover, the legislature has never referred the idea to the people, possibly due to other states overwhelmingly rejecting merit-based selection around this time.<sup>6</sup>

Amendment 80 abolished partisan judicial elections and switched the state to nonpartisan judicial elections. This was done about 50 years after the idea of switching to nonpartisan judicial elections was in its heyday.<sup>7</sup> When examined nationally, then, Arkansas is clearly a laggard state (see Walker 1969 for a discussion of leaders and laggards). However, when one looks at other states in the region, it is clear that Arkansas' selection method was the norm – or at the very least was not unusual (see Table 1). Even so, we can say that Arkansas was influenced by *constitution sharing* with other states, in regard to both judicial selection and other provisions.

One thing that Amendment 80 does demonstrate about judicial selection in Arkansas is that changes in the *party power* structure again had an influence on judicial selection. In 2000, Arkansas was starting to show signs that pointed to rising Republicanism in the state (see Barth 2003). Consequently, then, the Republican establishment had an opportunity to shape judicial selection methods by exerting influence from its newfound position of power. Moreover, the drafters of the amendment proposed this switch purely to gain the support of their new, Republican negotiating partner (Stroud 2013). This demonstrates that Arkansas' change from partisan to nonpartisan judicial elections was the product of a massive adjustment in party dominance in Arkansas, which resembles selection changes in the late-19th century.

Stroud (2013) also notes that the amendment had the backing of the *legal community*. Certainly many on the Bar would have supported the selection change, either to nonpartisan elections or merit selection. However, many on the Bar supported the amendment primarily because it updated Arkansas' judicial branch. Chiefly, it did away with the antiquated bifurcation between courts of equity and courts of law.

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<sup>6</sup> For example, in 2000 the voters of Florida overwhelmingly voted rejected a proposed a local option constitutional amendment to change to merit-based selections from nonpartisan elections. In 1987, Ohio voters rejected a switch from judicial elections to merit-based selection.

<sup>7</sup> See

[http://www.judicialselection.us/judicial\\_selection/reform\\_efforts/formal\\_changes\\_since\\_inception.cfm?state](http://www.judicialselection.us/judicial_selection/reform_efforts/formal_changes_since_inception.cfm?state)



## 2016: The Present

In Arkansas, it seems the past has been predictive of the future as the debate over judicial selection in Arkansas is not over. In recent news, a task force created by the Arkansas Bar Association has submitted a report to the Arkansas Bar's board of delegates backing a switch from Judicial Elections to merit based selection for the Arkansas Supreme Court. The Governor of Arkansas, as well as members of the legislature have likewise endorsed such a proposition (Moritz 2016). Indeed, the debate about spending in judicial campaigns is also heating up nationally as well.<sup>8</sup> While it is impossible to judge the importance of the events without the state adopting a formal change in judicial selection mechanisms, it can be noted that the political structure toward adopting a change seems to be rooted in internal forces, i.e., the Bar and Governor. The fact that Arkansas is pushing toward merit-based selection, something which no state has done since 1994, strongly demonstrates the role external forces are playing in the current political structure. Whether these internal forces will breed success, though, remains to be seen.

## Discussion

As the above has shown, preferences concerning judicial selection have varied over time in Arkansas. And generally, these shifting preferences are consistent with trends in other states. In this way, Arkansas is not unusual or unique in its experience. Indeed, all judges in Arkansas are presently retained at the ballot box, and as Williams (2010) notes, the vast majority of state judges will be on the ballot at some point in their careers (290).

Based on the above, what can we say are the influences on changing judicial selection methods in Arkansas? We have identified six propositions from the literature that may explain judicial selection changes. These influences can be divided between external or internal influences – that is, influences from outside the state and influences from within the state. Table 3 presents these propositions, and plots which forces are in play with each change.

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<sup>8</sup> See, e.g., *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1667 (2015) (holding that Judicial elections can be subjected to greater restrictions, such as campaign finance, than standard political elections cannot due to the fact that a judge is supposed to hold up the highest degree of impartiality, whereas a politician is supposed to respond to the will of the people and their followers).

**Table 3: Influences on Selection Changes, 1836-Present**

Year of Change	Propositions					
	External Influences		Distrust of Elites	Internal Influences		
Constitution Sharing	National/Regional Trends	Legal Community Opinion		Legislative/Executive Retaliation	Party Power Change	
1836	X					
1848	X	X				
1861	X	X				
1864	X		X			
1868	X	X			X	X
1874	X	X	X		X	X
1970*	X	X	X	X		
1980*	X	X	X	X		
2000	X			X		X

\*Failed attempts at reform.

The table shows that changes have been influenced heavily by external forces, particularly constitution sharing between peer states and national or regional trends of public opinion. In fact, in all of the above cases there is evidence to suggest constitution sharing between peer states has always been a force in play. National or regional public opinion trends have influenced selection changes to a slightly lesser degree, but have still been a significant force.

By contrast, several internal forces have influenced changes at different times. These influences by and large appear to have been less consistent than the two external forces identified above. Instead, different forces have risen to a prominent position of influence depending on the year and the political climate within the state. In fact, this makes logical sense in the context of the earlier propositions drawn about internal influences. Changes in the party power structure, for example, are rather infrequent, and retaliation against the judiciary from the other branches of government is dependent on the state of internal politics at a specific time. Furthermore, Table 3 suggests that internal forces have been more important post-Civil War, particularly in the 20th century. During this time, Arkansas has seen the influence of populist distrust on selection changes, and has also seen the increasing influence and professionalization of legal elites.

One may have expected that populist sentiments would have had more consistent influence. Instead, in this analysis we could only identify a few occasions where citizens' distrust of political and legal elites seemed to play a role: 1864, 1874, 1970, and 1980. In each of these cases, this force served as a

conservative force by inhibiting change (as in 1970 and 1980) and by keeping more power in the hands of citizens who, on the whole, tend to distrust the government and prefer the traditional way of doing things.

Based on this analysis, what might we say about the influences on judicial selection changes overall? While we see that both external and internal forces have influenced selection processes, they do not seem to have had equal influence. Indeed, external trends have been more consistent across time. Moreover, it appears that while internal forces did play a role, external forces (namely, policy diffusion trends) narrowed the viable alternatives to a select few. Thus, we can say that the influence of internal forces was limited by external forces. Additionally, internal forces have served as a catalyst or an inhibitor for change. This is particularly true of citizens' populist distrust of political elites.

### **Conclusion: Beyond Amendment 80**

This paper has mapped the changes to Arkansas' methods of judicial selection from 1836 to the present, and has explored several propositions about the potential causes of those changes. We have argued that both external and internal forces have influenced judicial selection mechanisms, though they have done so unequally. Specifically, constitution sharing and national or regional trends in public opinion--or external forces--have limited the viable judicial selection options. Of course, the analysis here is limited in its conclusiveness and generalizability. Hopefully future scholarship on this question will take a more empirical approach that looks at the changes in several states over time.

In Arkansas and across the nation, we know that judicial selection reform is generating great discussion. This article can offer two insights to scholars, lawmakers, and citizens who are interested in judicial selection reform. First, with respect to the diffusion of merit selection across the states, Arkansas is playing the roles of both laggard and leader (see Gray 1973 and Walker 1969 for a larger discussion about laggards and leaders). When considered nationally, Arkansas is without doubt a laggard state, despite efforts by legal elites throughout the 20th century to adopt the Missouri Plan. However, when one looks at Arkansas and a small group of her peer states that once belonged to the Confederacy (Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia), Arkansas could be considered an adoption leader. To date, only Florida and Tennessee have adopted merit selection for their supreme

and appellate courts. Assuming merit selection is adopted in Arkansas and subsequently begins to diffuse to these other peer states, scholars should take a second look at traditional regional networks of diffusion (see Walker 1969). And secondly, both proponents and opponents of selection changes should remain cognizant of the past effects of citizens' populist distrust of political and legal elites on judicial selection changes – or the lack thereof. If reform efforts in the 20th century are any guide, the people may be hesitant to adopt any system that is heavily controlled by legal and political elites.

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