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A JUDICIAL RETROSPECTIVE: SIGNIFICANT DECISIONS BY THE ARKANSAS SUPREME COURT FROM 1991 THROUGH 2011

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I. INTRODUCTION

The Arkansas Supreme Court has blazed new trails in Arkansas jurisprudence in the last two decades with a bevy of significant opinions. The impact of these opinions has been felt not only in Arkansas but across the nation, particularly in the areas of individual privacy rights and term limits for United States representatives and senators. There have also been opinions dealing with separation of powers, the inadequacy and inequality of public education, prior restraint of the press, expanded rights under the Arkansas Constitution, class actions, and tort reform. The purpose of this article is to highlight many of those opinions, while commenting on their impact in Arkansas and beyond.

Of note is the fact that in 2008, the Arkansas Supreme Court was ranked second best in the nation for state supreme courts by a study entitled "Which States Have the Best (and Worst) High Courts?"[1] The report was issued by the University of Chicago and was based on state supreme courts as they were composed between 1998 and 2000.[2] Three law professors prepared the report: Eric D. Posner of the University of Chicago Law School, Stephen J. Choi of the New York University Law School, and Mitu Gulati of the Duke University Law School.[3] The final score was a composite based on productivity of the justices in issuing opinions, independence from partisan pressures,[4] and quality of opinions, including citation by other courts.[5]

II. THE CASES

A. Privacy Rights

Privacy rights of Arkansas citizens have been expanded over the past decades in various contexts, but especially as applied to consensual sex involving unmarried people in the privacy of their bedroom. Two cases particularly illustrate this point. In *Jegley v. Picado*,[6] the issue presented to the supreme court was the constitutionality of Arkansas's sodomy statute under the Arkansas Constitution.[7] The second case, *Arkansas Department of Hu-*

man Services v. Cole,[8] addressed a recent initiated act by the people (Act 1) that prohibited cohabitating, unmarried adults from adopting or fostering children.[9]

The *Jegley* case is significant, because it dealt with (1) whether gay and lesbian citizens had standing to challenge Arkansas's sodomy statute, though they had not been charged with a precise violation; and (2) whether enforcement of that statute violated those citizens' right to private sexual intimacy under the Arkansas Constitution.[10] On point one, the supreme court held that the challenging citizens did have some reason to fear prosecution for violation of the sodomy statute, because they admitted to engaging in the prohibited sexual acts, though charges had not yet been formally brought against them.[11] Thus, though uncharged, the court concluded that they were branded as criminals and had standing to challenge the statute.[12]

At the time *Jegley* was decided, the Supreme Court of the United States had not recognized a fundamental right to engage privately in sodomy under the United States Constitution.[13] Despite this, the Arkansas Supreme Court noted that in the past, it had recognized protection of individual rights "greater than the federal floor" established for certain rights.[14] For example, the Arkansas Constitution does not specifically enumerate a right to privacy, but article 2, section 2 guarantees citizens certain inherent and inalienable rights, like the rights "of enjoying and defending life and liberty; of acquiring, possessing and protecting property, and reputation; and of pursuing their own happiness."[15]

The Arkansas Constitution also recognizes the right of persons to be secure in the privacy of their own homes.[16] In *Jegley*, the court recognized these constitutional protections and further observed that privacy is mentioned in more than eighty statutes enacted by the Arkansas General Assembly and in the Arkansas Rules of Criminal Procedure adopted by the Arkansas Supreme Court.[17] After examining the Arkansas Constitution and Arkansas statutes, rules, and case law, the court determined that the State had a "rich and compelling tradition of protecting individual privacy and that a fundamental right to privacy is implicit in the Arkansas Constitution."[18] The court held, as a result, that this fundamental right to privacy protects all private, consensual, and noncommercial acts of sexual intimacy between adults.[19] Because the sodomy statute impinged on this fundamental right, the statute could not survive unless the State could advance a compelling state interest for doing so.[20] The State conceded that there was no compelling state interest sufficient to justify the statute, and the court, accordingly,

struck down the sodomy statute as an unconstitutional violation of the right to privacy.[21]

The court also held that the sodomy statute was unconstitutional because it violated the Arkansas Equal Rights Amendment by treating same-sex actors differently from opposite-sex actors.[22] The State argued that the sodomy statute did not violate the Equal Rights Amendment, because the statute did not "make an impermissible gender classification or require unequal treatment between genders."[23] The court, though, recognized that "there is no prohibition against members of opposite sexes engaging in the same conduct" under the statute.[24] The State offered no reason why the "conduct is injurious to the public welfare when engaged in by members of the same sex but completely protected when engaged in by members of opposite sexes."[25] Nor did the State offer sufficient reasoning to show that principles of public morality and public interest "justify the prohibition of consensual, intimate behavior between persons of the same sex."[26]

The *Jegley* decision ultimately cobbled together a privacy right from various elements of Arkansas law, similar to the "penumbra" used by the Supreme Court of the United States in *Griswold v. Connecticut*.[27] Yet what is of note is that the Arkansas Supreme Court's decision in *Jegley* preceded the Supreme Court of the United State's action in striking down a Texas statute criminalizing the act of sodomy.[28] The Court's decision under the United States Constitution would be a year later and would cite *Jegley* as a decision supporting the Court's new position.[29]

In 2011, the case of *Arkansas Department of Human Services v. Cole*[30] followed in the wake of *Jegley*. "On November 4, 2008, a ballot initiative entitled 'An Act Providing That an Individual Who is Cohabiting Outside a Valid Marriage May Not Adopt or Be a Foster Parent of a Child Less Than Eighteen Years Old' [("Act 1")] was approved by fifty-seven percent of Arkansas voters."[31] Under Act 1, a person was "prohibited from adopting or serving as a foster parent if that person was 'cohabiting with a sexual partner outside of a marriage that is valid under the Arkansas Constitution and the laws of this state.'"[32] It applied equally to opposite-sex and same-sex individuals cohabiting in a same-sex or opposite-sex relationship.[33]

A group of persons, including "unmarried adults who wish[ed] to foster or adopt children in Arkansas, adult parents who wish[ed] to direct the adoption of their biological children in the event of their incapacitation or death, and the biological children of those parents (collectively 'Cole') filed a complaint against the State of Arkansas, the Arkansas Attorney General, the

Arkansas Department of Human Services (DHS) and its Director, and the Arkansas Child Welfare Agency Review Board (CWARB) and its Chairman (collectively 'the State')."[34] The Family Action Committee moved to intervene as an additional party in support of Act 1, and the motion was granted.[35]

In the complaint, Cole asserted claims under the United States Constitution and the Arkansas Constitution.[36] The circuit court granted Cole's motion for summary judgment and, citing *Jegley*, declared Act 1 unconstitutional under the Arkansas Constitution.[37]

The State and the Family Action Committee argued on appeal that adoption and fostering are not fundamental rights, as the circuit court had found them to be under the Arkansas Constitution.[38] Cole countered that because Act 1 prohibited cohabiting sexual partners from adopting and fostering, her right to engage in private acts of sexual intimacy with her same-sex partner or opposite-sex partner at home was substantially burdened.[39]

The supreme court agreed.[40] It further found that there was no meaningful distinction between the facts of this case and the facts of *Jegley* with regard to the burden placed on the fundamental right to sexual privacy in the home.[41] The supreme court said: "In both situations, the penalty imposed is a considerable burden on the right to intimacy in the home free from invasive government scrutiny."[42] The court concluded that "under the Arkansas Constitution, sexual cohabitors have the right to engage in private, consensual, noncommercial intimacy in the privacy of their homes."[43]

The supreme court also concluded that "unsuitable and undesirable adoptive and foster parents" can be "weeded out" by DHS in the screening process.[44] But the choice inflicted on Cole by the State, according to the court, was a direct and substantial burden.[45] This is because Act 1 presented Cole with the choice of either forgoing the ability to foster or adopt children, should she live with a sexual partner, or risking intrusion into the bedroom by the State to assure that cohabitors who adopt or foster were celibate.[46]

Because a fundamental right to privacy was involved, the supreme court announced that the standard to be applied by the courts was heightened scrutiny.[47] Using this standard, the court concluded that "because Act 1 exact[ed] a categorical ban against all cohabiting couples engaged in sexual conduct, . . . [Act 1 was] not narrowly tailored or the least restrictive means available to serve the State's compelling interest of protecting the best interest of the child."[48] The court ultimately affirmed the circuit court's ruling that Act 1 violated privacy rights under the Arkansas Constitution.[49]

In holding as it did, the supreme court emphatically endorsed privacy rights for a second time under the Arkansas Constitution. It did so regardless of a prior expression of the popular will under Act 1 against the rights of unmarried, cohabiting adults to adopt or foster.

B. Expanded Rights Involving Pretextual Arrests and Search and Seizure

In *State v. Sullivan*,[50] the defendant was arrested for speeding, lack of vehicle registration, no proof of insurance, and carrying a weapon, although the actual motive for the arrest by law enforcement was to search for illegal drugs.[51] The search of Sullivan's vehicle incident to the arrest produced methamphetamine, distribution supplies, and drug paraphernalia. Sullivan was charged with the drug-and-weapons offenses as well as speeding.[52]

At issue in the *Sullivan* case was the reasonableness of the pretextual arrest in light of article 2, section 15, of the Arkansas Constitution, which protects against unreasonable searches and seizures and which is similar to the Fourth Amendment of the United States Constitution.[53] The Arkansas Supreme Court held that pretextual arrests represent unreasonable police conduct under the Arkansas Constitution and, therefore, warranted application of the exclusionary rule.[54] To explain its choice not to follow the precedent set by the Supreme Court of the United States, the Arkansas Supreme Court wrote that, "unlike the United States Supreme Court, this court has considered pretextual arrests to be unreasonable for over twenty years."[55] The court then made it clear that it was breaking with federal jurisprudence:

> Today, we solidify our position, based on the adequate and independent state grounds of Article 2, section 15, of the Arkansas Constitution, as well as our own pretext decisions. Under these authorities, pretextual arrests—arrests that would not have occurred *but for* an ulterior investigative motive—are unreasonable police conduct warranting application of the exclusionary rule.[56]

Two years later, the Arkansas Supreme Court again broke with federal precedent and expanded the rights of home dwellers confronted with a proposed consent-to-search form by law enforcement officers.[57] Agents of a drug task force had received anonymous tips that a small child inside the trailer home of the defendants had become sick due to drug manufacturing.[58] When approaching the home, the agents smelled a chemical odor.[59] They knocked on the door and a woman answered.[60] The officers advised her that they had information that marijuana was being grown on the premises and

other drug offenses were occurring on the premises.[61] The officers presented the woman with a consent-to-search form, which she signed.[62] The form did not include a statement that she could refuse the search; nor did the officers advise her of this.[63] Once inside the home, officers saw evidence of drug offenses.[64] Based on this evidence, they obtained a search warrant, arrested the defendants, and seized the evidence supporting involvement with illegal drugs.[65] At the ensuing suppression hearing, the circuit court suppressed the seized evidence as an unreasonable search and seizure because of the failure by law enforcement officers to tell the home dweller that she could refuse to consent to a search.[66]

The State argued on appeal that the Arkansas Constitution does not require police officers to advise home dwellers that they have the right to refuse consent to a search.[67] The supreme court disagreed and held that the circuit judge correctly construed the Arkansas Constitution.[68] The supreme court went further and discussed the "knock and talk" procedure employed by law enforcement: "It is the intimidation effect of multiple police officers appearing on a home dweller's doorstep, sometimes in uniform and armed, and requesting consent to search without advising the home dweller of his or her right to refuse consent that presents the constitutional problem."[69]

The supreme court also emphasized in *Brown* that it was not bound by the federal interpretation of the Fourth Amendment when interpreting the Arkansas Constitution.[70] The court added that it would "break with precedent when the result is patently wrong and so manifestly unjust that a break becomes unavoidable."[71] In holding as it did, the court underscored Arkansas's longstanding and steadfast adherence to the sanctity of the home and protection against unreasonable government intrusions. The *Brown* decision placed Arkansas within a distinct minority of jurisdictions that afforded the same protection.

C. Term Limits for Members of Congress

The issue confronting the Arkansas Supreme Court in 1994 was whether term limits should be imposed on members of the United States Congress and the Arkansas General Assembly as well as other state officials.[72] The court struck down term limits for members of Congress,[73] and the Supreme Court of the United States affirmed that decision by a vote of five to four.[74] In that same opinion, the Arkansas Supreme Court upheld term limits for state constitutional officers and legislators.[75]

Amendment 73 was the amendment to the Arkansas Constitution under review.[76] Proposed as an initiated Act and approved overwhelmingly by the people of this state at the General Election on November 3, 1992, it provided a limit of two terms for state constitutional officers, including the Governor; three terms for state representatives; and two terms for state senators.[77] Beyond that, amendment 73 provided that representatives in Congress who had been elected to three or more terms as a member of the U.S. House of Representatives were not eligible to appear on the ballot for another election to that position.[78] Likewise, any person who had been elected to two or more terms as a U.S. Senator was not eligible to appear on the ballot for election to the U.S. Senate.[79]

A complaint was filed in circuit court to invalidate amendment 73 on several grounds, one of which was that it violated both the Arkansas Constitution and the United States Constitution by adding an additional qualification for state officers and legislators and for congressional candidates as well.[80] That qualification, of course, was the number of terms already served.

The new qualification set out in amendment 73 was upheld by the Arkansas Supreme Court for state officials but invalidated for federal legislators.[81] In striking down any limit on terms to be served by federal legislators, the court observed that these representatives and senators speak to national issues and that any additional restrictions to federal candidacy imposed by the states could create variances in uniformity and lead to differences among the states with respect to who can sit in Congress.[82] By holding as it did, the Arkansas Supreme Court set the stage for an affirmance by the Supreme Court of the United States, which used the same rationale.[83] One can only speculate on how different our Congress would be with a mandatory limit for terms of service and a revolving membership.

D. Public Education

In 2001, Pulaski County Circuit Judge Collins Kilgore found, among other woefully bad education statistics, that almost fifty-eight percent of Arkansas's high school graduates required remediation courses in English or math once they got to college. Based on this finding and others manifesting clear educational deficiencies, it was obvious that public education in Arkansas was grossly defective, inadequate, and not functioning suitably, as the Arkansas Constitution required. This led to the *Lake View* saga, which

consumed more than a decade in Arkansas courts and resulted in multiple major opinions from the Arkansas Supreme Court.[84] The issue throughout the litigation was whether the General Assembly had enacted school-funding legislation for Arkansas's public schools that complied with the Education Amendment of the Arkansas Constitution, which requires an equal and adequate education for students across the state.[85]

The saga actually began in 1994 when Pulaski County Chancery Judge Annabelle Clinton[86] ruled that Arkansas's public-funding system was unconstitutional under the Arkansas Constitution and that the General Assembly had two years to correct it.[87] New funding statutes were enacted in 1995, and in November 1996, amendment 74 to the Arkansas Constitution was adopted by a vote of the people.[88] That amendment provided that a uniform property tax of twenty-five mills would be assessed for the maintenance and operation of the public schools in all school districts.[89] In 1997, the General Assembly enacted additional legislation in an attempt to comply with Judge Clinton's ruling and the requirements of the Arkansas Constitution.[90] That legislation and amendment 74 were again challenged in state court in 1997, and Judge Kilgore found that the challenges to Arkansas's public-education formula were moot due to the adoption of amendment 74 and the legislation.[91]

On appeal, the supreme court reversed and directed in *Lake View II* that a "compliance trial" be held on whether there had been compliance with Judge Clinton's 1994 order.[92] On remand, a compliance trial was conducted, and Judge Kilgore ruled that despite amendment 74, the public-school funding system still was inadequate and unequal under the Arkansas Constitution. [93] Following an appeal, the supreme court affirmed Judge Kilgore's ruling in a forty-page opinion in *Lake View III*.[94] The court held that the State of Arkansas had an "absolute duty" under amendment 14 of its constitution to educate its children and that the State had failed to do so.[95] Further, the court held that funding available for public education varied from school district to school district and, thus, the ultimate education made available to students across the state was disparate and unequal.[96]

The court also looked to the actual money spent in the various school districts on education per student to determine equality. Seeing the disparity in the actual money spent, the court found a corresponding inequity in educational opportunity. In *Lake View III*, the court concluded that it was the State's responsibility—not the local school districts'—to provide an equal education to all students and one that was adequate as well.[97]

The mandate issued following the *Lake View III* decision, after which significant legislation to rectify the Arkansas education system was passed by the General Assembly. The question still remained as to whether public education passed constitutional muster. On January 22, 2004, the supreme court recalled its mandate due to allegations that there was a lack of compliance with *Lake View III*.[98] The court also appointed two Masters to evaluate the State's compliance with the court's decision.[99] In the interim, the governor called a special session of the General Assembly to address educational deficiencies further. The Masters reported to the court, and the court held in *Lake View IV*, that the General Assembly had now taken "laudable" steps to comply with *Lake View III* and that legislative acts, including a $2.1 billion appropriation, evidenced the legislature's intent to make education a priority.[100] The court held that the State was now in compliance with amendment 74. The court added, however, that although consolidation of school districts was not mandated, if adequacy was not attained by the acts passed, "more efficient measures to afford that adequacy will be inevitable."[101] The mandate issued.

On June 9, 2005, the supreme court recalled its mandate a second time, after a petition was filed, and reappointed the same two Masters to evaluate once more legislation enacted by the General Assembly to bring the State into compliance.[102] In a subsequent opinion, *Lake View V*, the supreme court held that the General Assembly had failed to comply with some of its own legislation passed in the Second Extraordinary Session of 2004, which required adequacy hearings before each legislative session.[103] Issuance of the mandate was stayed until December 1, 2006.[104]

On November 30, 2006, the issuance of the mandate was stayed for an additional 180 days so that the Masters could file a supplemental report on any constitutional deficiencies, including a report on facilities, equipment, and teacher pay.[105] The subsequent Masters report confirmed that the General Assembly had enacted the necessary legislation to achieve adequacy and equality, as the constitution required, and that a framework for our improved public-education system was in place.[106] The court adopted the Masters report and ruled the Arkansas education system constitutional.[107]

The end result of the multiple *Lake View* decisions was that the State of Arkansas by dint of its supreme court decisions and the ultimate work of the legislative and executive branches of government made epic leaps forward toward enhancing educational opportunities for all of the children of this state. Now, Arkansas is an acknowledged leader among the fifty states for

its commitment to education and the progress made in providing comprehensive education to all of its students.[108]

E. Special and Local Legislation

When can the General Assembly enact legislation that arbitrarily benefits one person, place, or thing or legislation that applies to only one geographic area of the State? The short answer is never according to amendment 14 of the Arkansas Constitution because that amendment expressly precludes such special or local legislation.[109] The clear catalyst for the amendment was to prevent pork-barrel projects benefitting only one group of people or one locality. The key to a violation is whether the legislative action is arbitrary.[110]

Two cases in the last twenty years dramatically illustrate the parameters of the special-and-local legislation proscription. The earlier of the two, *McCutchen v. Huckabee*, dealt with the Alltel (now Verizon) Arena in North Little Rock.[111]

McCutchen challenged the constitutionality of Act 739 of 1995, wherein the General Assembly appropriated $20 million for the construction of a multipurpose civic center in North Little Rock, Pulaski County.[112] He alleged that Act 739 constituted special and local legislation in violation of amendment 14.[113] The trial court disagreed and concluded that the General Assembly *rationally* decided that a civic center located in Pulaski County would enhance tourism, recreation, and economic development for the entire state, and therefore the legislation withstood constitutional scrutiny.[114] The supreme court agreed.[115]

The court recognized in *McCutchen* that it had repeatedly held that merely because "a statute ultimately affects less than all of the state's territory[, this alone] does not necessarily render it local or special legislation."[116] Instead, the court pointed out that it had "consistently held that an act of the General Assembly that applies only to a portion of this state is constitutional if the reason for limiting the act to one area is rationally related to the purpose of that act."[117] Hence, in *McCutchen*, the issue was whether there was a rational basis for Act 739, which provided for construction in only one county in the state.[118]

The court agreed with the trial court that the purpose of Act 739 was to make funds available for the construction of a multipurpose civic center that would "increase tourism, recreation, and economic development for all of

the state."[119] The court then cited the reasons for selecting Pulaski County as the regional location: (1) Pulaski County is the most populous county in the state; (2) it is centrally located; and (3) it is the seat of the government.[120] These reasons, the court held, were not arbitrary and capricious.[121] The court, in sum, found that the decision to construct the civic center in Pulaski County was "rationally related to the intended purposes of Act 739" and, thus, was not local legislation.[122]

To the opposite effect was *Wilson v. Weiss*.[123] This case involved an appeal from multiple orders entered by the Pulaski County Circuit Court regarding multiple acts passed by the General Assembly in the 2005 legislative session to benefit specific legislative districts throughout the state.[124] The plaintiff claimed, in effect, that all of these acts in the 2005 session were pork-barrel projects and constituted special and local legislation in violation of amendment 14.[125]

The supreme court considered only one act, Act 1898 of 2005, relating to a $400,000 appropriation for infrastructure, sewer, and streets in the City of Bigelow.[126] The circuit court had declined to rule that this act was special legislation.[127] The plaintiff, however, urged on appeal that there was no legitimate reason for selecting the City of Bigelow for special treatment in receiving taxpayer funds for these listed purposes and that the legislation violated amendment 14.[128]

The supreme court initially noted that because Act 1898 clearly applied only to the City of Bigelow, the question was whether a rational and legitimate reason supported the application of this appropriation to benefit one community in the state.[129] The City of Bigelow argued that the use of a tiered funding system, whereby an individual member of the General Assembly could justify an appropriation through the General Improvement Fund in order to fill certain funding gaps left in his or her respective jurisdiction, was a completely reasonable method by which legislators might meet their legitimate public duty of "constructing, maintaining, and operating a transportation network" in the state.[130]

The supreme court disagreed and wrote in *Wilson* that the reasons set out to justify the $400,000 appropriation to the City of Bigelow for "infrastructure, sewer, and streets" could be advanced by numerous towns, cities, and communities throughout the state and that there was no rational basis related to a legitimate *state* purpose presented to the court to justify singling Bigelow out for special treatment.[131] In countering the circuit court's reasoning that the appropriation would advance tourism for the state, the su-

preme court said that "[a]ny community located in some proximity to a park or tourist attraction could claim comparable needs. If Act 1898 is allowed to stand, the result would be that amendment 14's prohibition against special and local legislation would be swallowed by exceptions premised on 'safety and tourism.'"[132] The court concluded that Act 1898 ran afoul of amendment 14 and, in doing so, enforced a time-honored principle in the Arkansas Constitution.[133]

F. Amendment 80

1. *Superintending Control*

With amendment 80 to the Arkansas Constitution, which became effective January 2, 2001, came the express declaration that the Arkansas Supreme Court had superintending control over all of the courts of the state.[134] The supreme court invoked this express authority in the case of *Foster v. Hill*, handed down in 2008.[135]

In *Foster*, a young man was shot and killed by a West Memphis Police officer.[136] The sitting prosecutor asked for the appointment of a special prosecutor, which was done by the circuit judge in Division 3 of the Second Judicial Circuit.[137] The special prosecutor submitted a report to the Division 3 judge, finding insufficient evidence to charge the police officer.[138]

Six days later, the judge in Division 6 of the same judicial circuit called a special grand jury to investigate the killing.[139] The previously appointed special prosecutor petitioned the supreme court for a writ of certiorari holding that Division 6 had no authority to call the grand jury, because Division 3 had already exercised jurisdiction over the matter.[140]

The supreme court issued the writ and observed in its opinion that under the common law rule of concurrent jurisdiction, Division 6 had no authority to act after the Division 3 judge had taken action in the case. Division 6, in addition, was not assigned criminal cases under that judicial circuit's administrative plan. As a final point, under the supreme court's authority to provide superintending control under amendment 80, the court deemed issuance of the writ to be appropriate to promote jurisdictional certainty in the judiciary.

The *Foster* case and its progeny have been essential to assuring order within the court system. The decision presents a graphic example of what

was intended by vesting superintending authority in the supreme court under amendment 80.

2. *Separation of Powers*

Amendment 80 also set down markers on rule-making authority vested in the supreme court and, specifically, whether the supreme court or the legislature had the authority to prescribe rules of procedure for the courts.[141] The amendment reads that the supreme court prescribes these procedural rules, provided that they do not "abridge, enlarge or modify any substantive right."[142] What must be read in conjunction with amendment 80 are the provisions in the Arkansas Constitution establishing three separate and distinct departments of government and limiting the exercise of power to each department.[143]

Defining which legislative matters are procedural and which are substantive has been an ongoing mission for the supreme court, both prior to amendment 80 and thereafter. For example, in *Weidrick v. Arnold*, which was pre-amendment 80, the supreme court held that the rule of civil procedure governing commencement of litigation superseded a sixty-day statutory notice requirement mandated by the General Assembly in medical malpractice cases.[144] In *Summerville v. Thrower*, which was post-amendment 80, the court, in the same vein, struck down a statutory requirement that a plaintiff file a reasonable-cause affidavit within thirty days of filing a medical malpractice complaint.[145]

Illustrative of the difficulty in delineating procedural versus substantive matters post-amendment 80 is *Johnson v. Rockwell Automation, Inc.*, where the judicial and legislative branches clashed over whether the liability and resulting damages of nonparties could be determined by juries and deducted from the judgments awarded to plaintiffs.[146] At issue was a provision of the Civil Justice Reform Act, which authorized such nonparty determinations and deductions and which opponents contended invaded the province of the supreme court regarding its power to adopt rules of civil procedure.[147] The federal district court certified the question of separation of powers to the supreme court for resolution.[148]

The supreme court answered the certified question by holding that the legislature had impermissibly established its own procedure to establish the fault of a nonparty, which is a matter that falls within the procedural bailiwick of the supreme court.[149] The court concluded:

> Because the nonparty provision is procedural, it offends the principle of separation of powers and the powers specifically prescribed to this court by amendment 80. Accordingly, we hold that Ark. Code Ann. § 16-55-202 violates separation of powers under article 4, § 2, as well as amendment 80, section 3 of the Arkansas Constitution.[150]

On a second question related to proof of damages under a provision of the same Civil Justice Reform Act, the court ruled that this too violated the separation of powers and amendment 80 because the admissibility of evidence regarding medical costs falls squarely within the procedural domain of the supreme court.[151]

A second separation-of-powers case is *Department of Human Services and Child Welfare Agency Review Board v. Howard*.[152] In *Howard*, the alleged infringement occurred by Regulation 200.3.2 adopted by the Child Agency Review Board, which is part of the executive branch. The regulation provided that "no person may serve as a foster parent if any adult member of that person's household is a homosexual."[153]

The supreme court held that Regulation 200.3.2 violated the separation-of-powers doctrine in that it encroached on the powers of the General Assembly.[154] The court concluded that the General Assembly had provided the Review Board only with authority to enact rules and regulations that promoted the health, safety, and welfare of children, and that there was no correlation between the blanket exclusion of homosexuals from fostering and the health, safety, and welfare of foster children.[155] The underlying purpose of the regulation, the court stated, was morality, based upon the Board's own standard of morality and biases.[156] The court ultimately found that the Board's enactment of Regulation 200.3.2 was an attempt to legislate morality, which was outside the scope of its authority.[157] Because of this, the court held that Regulation 200.3.2 was a violation of the separation-of-powers doctrine.[158]

In a 2011 case, *State v. A.G.*, the supreme court held that Rule 3(a) of the Supreme Court Rules of Appellate Procedure–Criminal, which limited interlocutory criminal appeals by the State of Arkansas to three categories, superseded a legislative act that allowed State appeals in juvenile-transfer matters.[159] Again, the reasoning of the supreme court was that Rule 3(a) was procedural and, thus, the last word on interlocutory appeals.[160] As such, Rule 3(a) excluded any additional right of the State to appeal proclaimed by

the General Assembly.[161] The legislative act, according to the court, invaded the province of the supreme court.[162]

What is patently clear from these decisions is that the supreme court has always jealously guarded its authority to establish procedural rules for our courts. Such authority was memorialized in amendment 80 and will continue to be a battleground issue.

The same is true of the court's authority to rule legislative acts unconstitutional under the Arkansas Constitution. Recently, in *Bayer Cropscience LP v. Shafer*, the court held that the legislative act to cap punitive-damage awards contravened the Arkansas Constitution's protection against limiting the amount to be recovered for injuries to persons or property.[163]

G. Freedom of Speech and the Press

Three cases stand out as examples of the length the supreme court will go to safeguard freedom of the press against prior restraints and to protect against impingement of free speech under the First Amendment to the United States Constitution and article 2, section 6 of the Arkansas Constitution.

The case of *Arkansas Democrat-Gazette v. Zimmerman* concerned a gag order on the press issued by a juvenile judge.[164] Members of the media petitioned the supreme court for a writ of mandamus directing the judge to revoke her gag order, which prohibited the media from disseminating the names and photographs of the victim and the victim's family as well as the juvenile defendant and the juvenile defendant's family.[165] The judge also prohibited the media from distributing pictures of juveniles who were present in the courthouse or entering or leaving the courthouse.[166] The gag order arose from the publication of the name and yearbook photograph of the juvenile defendant and the publication of the names of his parents and the name and employment of the victim.[167]

After the gag order was orally issued, a reporter for the *Arkansas Democrat-Gazette* newspaper told a photographer from the Democrat-Gazette that the judge had issued the gag order.[168] Later that day, the photographer took pictures of the juvenile's parents outside the courthouse and of the juvenile leaving the courthouse with a coat over his head.[169] The Democrat-Gazette published the pictures the next day.[170] The judge held the Democrat-Gazette in contempt of court and fined the newspaper $100 for violating the gag order.[171] After that, the media petitioned the Arkansas Supreme Court for extraordinary relief.[172]

The supreme court held in *Zimmerman* that a writ of certiorari was the appropriate remedy because the issue before the court was whether the judge's action in gagging the media violated the freedom of press and was on its face a plain, manifest, clear, and gross abuse of discretion in excess of her authority.[173] The supreme court then held that the judge's gag order was too broad and constituted a prior restraint on the media.[174] The court emphasized the importance of a constitutionally protected free press and maintained that any restraint on freedom of the press will be subject to the closest scrutiny.[175]

The court reasoned, in addition, that the judge could have closed the proceedings under her statutory authority but chose not to do so.[176] Furthermore, under Administrative Order Number 6, the judge had the authority to exclude photographs in areas immediately adjacent to her courtroom, but the court recognized that the scope of Administrative Order Number 6 did not include public streets and sidewalks.[177] The supreme court also noted that once the juvenile proceedings had been opened to the public, there was no overriding state interest that would warrant an injunction against photographing the juvenile and the others leaving the courthouse. For all of these reasons, the writ of certiorari issued.[178]

Similarly, the supreme court held in 2006 in *Helena Daily World v. Simes* that a circuit judge could not issue a restraining order to prohibit the publication of testimony given by a witness in open court.[179] The testimony at issue was given by a witness concerning an improper ex parte conversation by the judge and the complaint he filed with the Arkansas Judicial Discipline and Disability Commission because of that conversation.[180] Among those restrained from communicating this testimony was a reporter from the local newspaper, the *Helena Daily World*.[181]

The supreme court found the judge's order to be a prior restraint on freedom of the press.[182] It noted that the conversation sought to be restrained had been relayed in open court and was already in the public domain.[183] The court further emphasized the heavy presumption that prior restraints of the press are invalid despite a statute providing that probable-cause proceedings in Judicial Discipline cases shall be confidential.[184] The court stated that balanced against the heavy presumption against prior restraints, this confidentiality must yield.[185] The supreme court granted the petition for a writ of certiorari.[186]

In a third case not involving prior restraint—albeit one with First Amendment significance—a letter of admonishment was issued by the Ar-

kansas Judicial Discipline and Disability Commission that declared remarks made by then Court of Appeals Judge Wendell L. Griffen to members of the Arkansas General Assembly to be a violation of then Canon 4(C)(1) of the Judicial Code.[187] The case came to the Arkansas Supreme Court by way of a petition for writ of certiorari from Judge Griffen on the grounds that the Commission had exceeded its authority in admonishing the judge.[188]

The speech in question occurred when Judge Griffen appeared before the Arkansas Legislative Black Caucus in a public meeting called to discuss the dismissal of University of Arkansas basketball coach Nolan Richardson.[189] Judge Griffen, as an African American, described his involvement with the University of Arkansas as a college and law school student and his further involvement as president of the university's Black Alumni Society.[190] He traced the history of African American involvement with the university and illuminated his concern about the disparate treatment afforded to black students, faculty, and employees compared to whites, which, he asserted, culminated in the firing of Coach Richardson.[191] Judge Griffen called upon the legislators to engage in economic retaliation against the university during the legislative session.[192]

These and other comments by Judge Griffen relating to Coach Richardson's firing and connecting the firing to racism appeared in several national and statewide newspapers.[193] The issue was brought to the attention of the Judicial Discipline Commission when it received three complaints about Judge Griffen's public comments.[194] The Commission investigated the controversy and eventually voted to issue a letter of admonishment to Judge Griffen on the grounds that Canon 4(C)(1) of the Judicial Code was violated.[195] Canon 4(C)(1), as it then existed, read:

> A judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice or except when acting pro se in a matter involving the judge or the judge's interests.[196]

The supreme court issued the writ of certiorari and quashed the admonishment letter.[197] In doing so, the court ruled that Canon 4(C)(1) had not been "narrowly tailored" or sufficiently drawn to place Judge Griffen on notice as to what was the proscribed conduct concerning "the judge's interests" under the canon.[198] The court also found that the canon implicated the First Amendment and that its vagueness prevented the canon from passing muster under a strict-scrutiny analysis.[199] The court said:

> Without a standard established in the "judge's interest" exception to Canon 4(C)(1) to guide Judge Griffen on what is a proper area of comment to the legislative officials, we are hard-pressed to find a violation of the canon. And without proof of a "narrow tailoring" of the exception by the Judicial Commission when the parameters of speech based on conduct are directly involved, Canon 4(C)(1), as applied to Judge Griffen, violates his First Amendment rights.[200]

H. Usury

For decades, Arkansas toed a strict line regarding its usury laws with the benchmark fixed by the Arkansas Constitution at ten percent per annum.[201] That changed when the people voted to raise the usury limit under the constitution to five percent above the Federal Discount Rate,[202] and the usury limit was changed again just recently by a vote of the people, with a maximum interest rate on loans and contracts not to exceed seventeen percent per annum.[203]

One effort to bypass the prior usury limit took the form of the Check-Cashers Act passed by the General Assembly in 1999.[204] This act provided a "deferred presentment option" under which "customers" would write a personal check to the check-cashers business for the amount of cash to be advanced plus fees.[205] The business would advance the customer the face amount of the check less the fees.[206] The customer could then repurchase the check at a later time, allow it to be cashed, or roll it over by payment of another fee.[207]

In a spate of litigation over the act, the question raised was whether the cash advanced was a loan and whether the fees paid constituted interest. If the answer was yes to both questions, the transactions in many, if not all cases, would be usurious based on the fees paid. The supreme court ultimately held that the transactions were loans and that the fees paid were interest.[208] Because the record reflected interest rates under the sample contracts ranging from 168.20% to 558.71%, the supreme court had no problem ruling that the Check-Cashers Act was unconstitutional, because it conflicted with the usury provision of the Arkansas Constitution.[209]

In holding as it did, the supreme court again sent a strong message that it would look to the substance of a transaction regardless of the terminology used in the law or contract to decide whether the usury law had been violat-

ed. This guiding principle has steered the supreme court for decades and continues to do so.

I. Recalling the Mandate in Death Cases

Two cases in particular illustrate that the Arkansas Supreme Court affords a higher level of scrutiny to defendants on death row to assure that a miscarriage of justice has not been perpetrated before an execution. In the first case, *State v. Robbins*, the defendant, Robert Robbins, pled guilty to murdering a young woman.[210] He then waived his right to counsel and requested the death penalty.[211] He was convicted of capital murder and sentenced to death. The mandate issued.[212]

After a filing by Robbins's mother, as next friend, resulted in a stay of execution, the supreme court declared that the law required an automatic review of the record in all death-penalty cases for prejudicial error regardless of a guilty plea.[213]

Following that review, an affirmance by this court, and the issuance of the mandate, Robbins petitioned to reopen his case based on an alleged error that occurred in the jury's completion of the sentencing forms.[214] Robbins argued that the supreme court's previous decision in *Willett v. State*[215] required a resentencing trial since the sentencing forms in that case were unclear as to whether the jury found any mitigating circumstances before sentencing Willett to death.[216] According to Robbins, this same error occurred in his case and had been overlooked by previous counsel appointed by the court to handle his case.[217]

The supreme court agreed that the federal standard of review of avoiding a miscarriage of justice should be applied in Robbins's case in deciding whether to recall the mandate.[218] The court further determined that recalling a mandate is equal to reopening a case and that should be done in Robbins's case due to the unique circumstances in connection with the mitigation sentencing form.[219] The court also agreed that the *Robbins* case was very similar to the *Willett* case and noted that the federal district court had dismissed Robbins's habeas corpus petition, because this issue surrounding mitigating circumstances had not yet been addressed in state court.[220] The court underscored that this was a death-penalty case, and, as such, demanded a higher level of scrutiny.[221] The court concluded that recalling the mandate was a unique circumstance not to be repeated.[222]

Despite this admonition in *Robbins* about non-repetition, that is precisely what occurred in a later case. In *Lee v. State*, Ledell Lee was convicted of the 1993 capital murder of a female victim and was sentenced to death.[223] His conviction and sentence were affirmed on direct appeal,[224] after which he filed a petition for post-conviction relief on grounds of ineffective assistance of counsel.[225] The circuit court denied his petition, and this court affirmed.[226]

Later, Lee filed a petition for a writ of habeas corpus in federal district court.[227] The district court held the petition in abeyance to allow Lee to seek relief in state court, because Lee had raised sua sponte the issue of the impairment of his defense counsel due to intoxication during the Rule 37 hearing.[228] The State appealed that decision to the Eighth Circuit Court of Appeals, and that court affirmed the district court's decision to hold the case in abeyance pending a state-court determination.[229]

Lee next moved the Arkansas Supreme Court to recall its mandate and reopen his post-conviction hearing.[230] In his motion, he repeated his claim that his Rule 37.5 counsel had been impaired by alcohol during the Rule 37 proceedings, and thus, was ineffective.[231] Rule 37 counsel admitted that he was indeed impaired at that time.[232]

The supreme court agreed.[233] In its analysis, the court looked at three factors in deciding whether to recall the mandate, which were the same factors set forth in the *Robbins* opinion: "1) the presence of a defect in the appellate process; 2) a dismissal of proceedings in federal court because of unexhausted state claims; and 3) . . . a death case that required heightened scrutiny."[234] On the first issue, the court held that the intoxication and impairment of Lee's counsel constituted a defect because of the exacting requirements of Rule 37.5 regarding qualified and competent counsel.[235] The court further held that the federal district court's holding the case in abeyance satisfied the second condition under *Robbins*, and, finally, that the heightened level of scrutiny required for death cases was applicable.[236] The court granted the motion to recall the mandate and ultimately granted Lee a new Rule 37 hearing.[237]

A third case, *Collins v. State*,[238] took a different tack. In *Collins*, the defendant had failed to verify his petition for Rule 37 relief.[239] The supreme court held that the failure to show that qualified counsel for post-conviction relief had been appointed and the failure of the defendant to verify his Rule 37 petition evidenced a breakdown in post-conviction procedures in this death case.[240] The court reversed the denial of the Rule 37 petition seeking a

new trial and remanded the case to the circuit court for the appointment of counsel who qualified under Arkansas Rule of Criminal Procedure 37.5.[241] New counsel was granted leave to file a second petition for postconviction relief.[242]

One further comment needs to be made about *Robbins*. The *Robbins* opinion, though a death case and uncited, was precedent for the Arkansas Supreme Court when it twice recalled its mandate in the *Lake View* cases discussed above.

J. Class Actions

Two cases were handed down by the supreme court in 1997 that emphasized the criteria for certifying a class action under Arkansas Rule of Civil Procedure 23. The first was *Mega Life & Health Ins. Co. v. Jacola*,[243] which involved 400 insureds under Mega Life's health insurance coverage and which raised the question of whether the policies issued were group or individual policies.[244] The second case was *Seeco, Inc. v. Hales*,[245] which concerned 3000 gas-royalty owners who sought a class certification based on allegations that the gas producers fraudulently withheld gas-royalty payments.[246]

In *Mega Life*, the trial court certified a class using the criteria under Rule 23 and found that the alleged class was sufficiently numerous, that a common injury of paying void coverage was involved, that the common issue predominated over individual issues, and that a bifurcated process could be employed first for a finding of a common wrong and second to decide individual damages.[247] In its holding, the supreme court declined to use the federal standard of a rigorous analysis to decide whether common issues predominated, as the dissent advocated, and instead held that allegations of wrongdoing asserted in the complaint sufficed.[248]

In *Seeco*, a common scheme to defraud 3000 royalty owners was alleged.[249] The circuit court certified the class, and the supreme court affirmed on the basis that an overarching fraudulent scheme had been alleged, which predominated over individual defenses raised by Seeco.[250] After the decision was made on the central claim, the court stated that individual defenses against individual class members such as lack of reliance or diligence could be brought in a separate proceeding, if necessary.[251] Again, the fact that a common wrong was alleged was decisive as opposed to whether that

allegation could survive a rigorous analysis by the court at the certification stage, as the dissent claimed.[252]

In *Fraley v. Williams Ford Tractor & Equipment Company*,[253] a class-action case decided two years later, the supreme court emphasized that a circuit court should not delve into the merits of affirmative defenses raised by the defendant financing company against the alleged class of debtors at the class-certification stage to determine the number of class members.[254] That the merits of the alleged common wrong alleged by class members and the defenses raised by the defendant cannot be examined as part of the Rule 23 analysis has now become an article of faith in Arkansas's class-certification jurisprudence.

Arkansas has, thus, rejected the federal standard of rigorously analyzing claims and defenses at the class-certification stage.[255] The supreme court, instead, looks to the allegations of wrongdoing.[256] Any defenses against individual class members can be resolved in a bifurcated proceeding.[257] If the class action proves unmanageable, the circuit court can always decertify the class.[258]

K. Dramshop Laws

Prior to 1997, Arkansas had long adhered to the principle that selling alcoholic beverages to consumers was not the proximate cause of a resulting accident.[259] In 1997 and 1999, that changed when the supreme court handed down two cases that looked to the public policy of the state, as established by the General Assembly, in connection with the sale of alcoholic beverages to minors and to extremely intoxicated people.[260]

In *Shannon v. Wilson*, the court examined the criminal statutes that prohibited the sale of alcohol to minors and concluded that they created a legal duty and imposed a high standard of care on alcohol licensees to protect minors.[261] A breach of that duty, the court held, could lead to vendor liability, because the sale of alcohol to minors as well as the resulting consumption qualified as joint proximate causes.[262] In light of this, violation of the criminal statutes could be presented to the jury as evidence of negligence on the part of the vendors in selling the alcoholic beverages.[263]

In *Jackson v. Cadillac Cowboy*, an alcohol vendor was sued after alcohol was sold to a man who was extremely intoxicated and who evidenced an intention to drive his vehicle.[264] The Arkansas Supreme Court extended its ruling in *Shannon* and held that evidence of alcohol sales by a licensed ven-

dor to a visibly intoxicated person, in violation of a misdemeanor statute, was some evidence of negligence.[265] The court's reasoning, again, was based on its finding that the statute established a duty of care against sales by licensed vendors to intoxicated persons.[266] The court said:

> Among the prohibited practices in the Arkansas Alcoholic Beverage Control Act is the sale of alcohol "to a habitual drunkard or an intoxicated person," which is a misdemeanor. *See* Ark. Code Ann. § 3-3-209 (Repl. 1996). When we read this statute in conjunction with Act 695, it is clear to us, as it was in *Shannon v. Wilson*, . . . that the General Assembly has spoken on this point and has established a high duty of care on the part of holders of alcohol licenses, which includes the duty not to sell alcohol to high-risk groups, including intoxicated persons. Stated in a different way, a duty of care exists on the part of licensed alcohol vendors not to endanger the public health, welfare, or safety, and that duty is breached when vendors sell alcohol to intoxicated persons in violation of § 3-3-209.[267]

The General Assembly subsequently used the *Shannon* and *Jackson* decisions as the basis for legislation—Act 1596 of 1999—that encompassed these holdings and established a duty of care and liability against alcohol vendors.[268] The decisions present an important scenario where

the court evaluated its common law in light of legislative changes, which established a duty of care in alcohol vendors, and opted to overrule its prior authority.

L. Workers' Compensation Jurisdiction

In *VanWagoner v. Beverly Enterprises*,[269] the issue was which forum—the circuit court or the Workers Compensation Commission—had jurisdiction to decide a work-related injury.[270] An employee alleged that she had suffered injuries resulting from a slip-and-fall at work.[271] She originally filed a claim for benefits with the Workers' Compensation Commission, but this claim was controverted by her employer, and a claim representative ruled that her claim was not compensable.[272] A hearing before the commission on the issue of compensability was scheduled, but the employee instead requested that the hearing be cancelled, and she filed suit in circuit court against her employer.[273] The circuit court dismissed the action under the exclusive-remedy provision of the Workers' Compensation Act.[274] The

question before the Arkansas Supreme Court then became whether the circuit court or the commission had jurisdiction to determine the jurisdictional question of whether an employee's injuries were covered by the Workers' Compensation Act or could be litigated in circuit court.[275]

In previous holdings, the court had consistently followed the rule that the circuit courts and the commission had concurrent jurisdiction to determine the applicability of workers' compensation laws in a given case; however, this had resulted in problems.[276] The court explained:

> One practical result of this rule is that the party that acts first inevitably decides which tribunal will resolve the jurisdictional question.
>
> . . . .
>
> In addition to creating a race to file, the concurrent-jurisdiction approach can lead to duplicative litigation, that is, the simultaneous pursuit of claims in both the commission and in circuit court.[277]

Accordingly, the court in 1998 decided to change the rule. The court said: "We believe that the better rule is to recognize the administrative law rule of primary jurisdiction and to allow the Workers' Compensation Commission to decide whether an employee's injuries are covered by the Workers' Compensation Act. This rule is consistent with the purpose of the Act . . . ."[278]

Following *VanWagoner*, it has been the commission that has had sole jurisdiction to decide whether it had exclusive jurisdiction over such claims, and the race to circuit court has been eliminated. The procedure has now been streamlined and potentially cumbersome jurisdictional problems avoided in a multitude of workers' compensation cases.

M. Residency Requirement for Constitutional Officers

In 2006, an Arkansas voter challenged the eligibility of Bill Halter, a candidate for Lieutenant Governor, to run for that office on the basis that he failed to meet the seven-year residency requirement under article 6, section 5 of the Arkansas Constitution.[279] The voter sought a declaratory judgment of ineligibility in circuit court and a writ of mandamus removing Halter from the ballot.[280] The circuit court denied that relief.[281]

In affirming the denial of the voter's petition, the supreme court first observed that the voter had appropriately raised a pre-election attack on eligibility.[282] The next issue was the meaning of the phrase, "resident of this state," in article 6, section 5.[283] The court concluded that this was really a matter of the intention of the person involved.[284] Focusing on the findings of the circuit court, the supreme court emphasized in particular Halter's voting in Arkansas, his Arkansas driver's license, and his filing Arkansas income tax returns.[285] Though he was physically out of state at various times, the proof did not show an intent to leave the state permanently.[286] In addition, the court found that Halter never abandoned Arkansas as his residence for a new domicile.[287] Because of this lack of abandonment, Halter satisfied the seven-year residency requirement.[288]

N. Illegal Exactions

Article 16, section 13 of the Arkansas Constitution reads: "Any citizen of any county, city or town may institute suit, in behalf of himself and all others interested, to protect the inhabitants thereof against the enforcement of any illegal exactions whatever."

Article 16, section 9 of the Arkansas Constitution further provides that "no county shall levy a tax to exceed one-half of one percent for all purposes." In 1993, the voters of Jefferson County approved a one-cent sales tax.[289] In *Foster v. Jefferson County Quorum Court*, a Jefferson County taxpayer filed suit, contending that the one-cent sales tax was an illegal tax, or illegal exaction, as prohibited by article 16, section 13.[290] The circuit court rejected that claim, and the taxpayers appealed to the Arkansas Supreme Court.[291]

The Arkansas Supreme Court first reversed the circuit court and held that the one-cent sales tax was an illegal exaction that violated article 16, section 9.[292] On rehearing, however, the court shifted its vote and affirmed the circuit court.[293] In doing so, the court looked to the history of article 16, section 9 and concluded that the tax restriction only related to ad valorem property taxes and not to the sales tax.[294] The sales tax was not enacted until 1935, the court pointed out, which was sixty-one years after the 1874 Arkansas Constitution was adopted.[295] The mischief to be remedied in 1874 was high property taxes—not the sales tax, which had not yet come into existence.[296] Moreover, the court asserted, other sections of article 16 all

related to property taxes.[297] Accordingly, the court held that article 16, section 9 did not fix a limit on the county's ability to levy a sales tax.[298]

The significance of the *Foster* opinion on rehearing is that the court looked not only to the plain language of article 16, section 9, but also to the historical context of that constitutional provision. It also examined other tax sections within article 16, as part of its analysis. The far reaching consequences of this sales tax authority in the counties cannot be overstated.

In a second illegal-exaction case of significance, *McGhee v. Arkansas State Board of Collection Agencies*,[299] the issue was whether an illegal-exaction suit filed on behalf of check cashers against a publicly funded state board could survive.[300] The supreme court looked to the Sovereign Immunity Clause of the Arkansas Constitution, article 5, section 20, which reads: "The State of Arkansas shall never be made a Defendant in any of her Courts."[301] While acknowledging that the immunity provision usually protects state boards and agencies like the Board of Collection Agencies against suit, the court held that the illegal-exaction section of the Arkansas Constitution, as the more specific section, controlled over the immunity section.[302] Because an illegal exaction had been pled, sovereign immunity did not pertain.[303]

O. In Loco Parentis

The doctrine of in loco parentis has been recognized in Arkansas for grandparents, and even stepparents, who occupied the role of parents, but the supreme court had never extended the doctrine to same-sex partners who were parenting a child. This changed with the case of *Bethany v. Jones*.[304]

In *Bethany*, one partner had conceived the child by artificial insemination, and then, while that partner returned to work, the other partner stayed at home as the primary caregiver.[305] The two partners separated, and the former stay-at-home partner sought visitation, which was denied by the custodial partner.[306] The former stay-at-home partner sued for visitation. The circuit court granted visitation, reasoning that the doctrine of in loco parentis applied.[307]

On appeal, the supreme court focused on the relationship between the child and the person asserting an in loco parentis status and agreed that the doctrine applied.[308] The question next to be resolved was a factual one relating to the relationship between the child and the person who invoked the doctrine and sought visitation.[309]

Using the facts found by the circuit court, the supreme court concluded that the partner seeking visitation was a parent figure and did, in fact, stand in loco parentis.[310] As a final point, the court addressed whether her visitation was in the best interest of the child. This question too was resolved in favor of the noncustodial parent who had initially been the primary caregiver for the child.[311] For the first time in Arkansas, the supreme court recognized the right of a same sex domestic partner to stand in the place of a natural parent and be afforded visitation privileges.

P. Freedom of Information

Two decisions in the same case were handed down in 2007 that concerned the Arkansas Freedom of Information Act (FOIA) and whether in camera review by a circuit judge was required before e-mails involving a Pulaski County employee could be disclosed as public records.[312] The precise issue was whether all e-mails between a Pulaski County comptroller and a contractor with whom he was having an alleged sexual relationship were subject to disclosure upon demand by a newspaper before a judicial determination of whether they were public records was made.[313]

In the first case, Pulaski County had released some but not all of the e-mails on the basis that the undisclosed e-mails were private.[314] The circuit judge, without reviewing the undisclosed e-mails, concluded that they were public records under the FOIA and ordered their release.[315] The newspaper, on appeal, argued this ruling was correct because there is a statutory presumption found in the FOIA that the records are public.[316]

Following an appeal by Pulaski County, the supreme court remanded the matter to the circuit judge for an in camera review of the content of the e-mails to discern whether the alleged sexual relationship was intertwined with the business relationship or purely personal.[317] The review was a required first step, the court stated, before a public-records determination could be made.[318]

After performing that in camera review, the circuit judge again ordered the release of the e-mails as public records, save for six photographs, which the court determined were sexually explicit.[319] A second appeal came to the supreme court, raising the question of whether the circuit judge had followed this court's mandate to review all e-mails in question.[320] The supreme court held that the circuit judge had reviewed the e-mails for content and had followed the court's mandate; thus, the circuit judge's order was

affirmed.[321] The import of these two FOIA cases is that under the facts of this case, an in camera review by the circuit judge was required to determine the character of the disputed e-mails—whether personal or business related—prior to their release to the press. A simple demand by the press for the information is not determinative under Arkansas's FOIA.

III. CONCLUSION

The decisions discussed in this article are but a sampling of significant, and in some cases landmark, decisions handed down by the Arkansas Supreme Court. The cases discussed, however, are not exhaustive, and other articles, no doubt, will be written about other cases of equivalent significance. These decisions, nevertheless, underscore the quality of the supreme court's work and evidence the impact our court has had over the past two decades on both the state's jurisprudence and the nation's as well.

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1. Stephen J. Choi, G. Mitu Gualti, and Eric A. Posner, *Which States have the Best (and Worst) High Courts?* 22 (Univ. of Chi. Law of Econ., Olin Working Paper No. 405; Univ. of Chi., Pub. Law Working Paper No. 217; Duke Law Sch. Pub. Law & Legal Theory Paper No. 236, 2008), *available at* http://ssrn.com/abstract=1130358.
2. *Id.* at 9.
3. *Id.* at 1.
4. Arkansas, as of January 1, 2001, elects its judges on a non-partisan basis, which should improve its composite score even more.
5. Choi, et al., *supra* note 1 at 9.
6. 349 Ark. 600, 80 S.W.3d 332 (2002).
7. *Id.* at 608–10, 80 S.W.3d at 334–35.
8. 2011 Ark. 145, ___ S.W.3d ___.
9. *Id.* at 1, ___S.W.3d at ___.
10. *Jegley*, 349 Ark. at 608, 80 S.W.3d at 334.
11. *Id.* at 622, 80 S.W.3d at 343.
12. *Id.*, 80 S.W.3d at 343.
13. *See* Bowers v. Hardwick, 478 U.S. 186, 195–96 (1986) *overruled by* Lawrence v. Texas, 539 U.S. 558, 578 (2003).
14. *Jegley*, 349 Ark. at 631, 80 S.W.3d at 349.
15. ARK. CONST. art. II, § 2 (1874); *Jegley*, 349 Ark. at 347, 80 S.W.3d at 627.

16. ARK. CONST. art. II, § 15.
17. *Jegley*, 349 Ark. at 628–31, 80 S.W.3d at 347–49.
18. *Id.* at 632, 80 S.W.3d at 350–351.
19. *Id.* at 632, 80 S.W.3d at 350.
20. *Id.*, 80 S.W.3d at 350.
21. *Id.* at 638, 80 S.W.3d at 353–54.
22. *Id.*, 80 S.W.3d at 353–54. See ARK. CONST. art. II, § 3 for the Arkansas Equal Rights Amendment.
23. *Jegley*, 349 Ark. 632–33, 80 S.W.3d at 350.
24. *Id.* at 635, 80 S.W.3d at 352.
25. *Id.* at 636, 80 S.W.3d at 352.
26. *Id.* at 637, 80 S.W.3d at 353.
27. 381 U.S. 479, 487 (1965).
28. Lawrence v. Texas, 539 U.S. 558 (2003).
29. *Id.* at 576.
30. Ark. Dept. of Human Services v. Cole, 2011 Ark. 145, ___S.W.3d___.
31. *Id.* at 1, ___S.W.3d at ___.
32. *Id.* at 2, ___S.W.3d at ___ (quoting Arkansas Adoption and Foster Care Act of 2008, codified at ARK. CODE ANN. § 9-8-304(a) (Repl. 2009).
33. *Id.*, ___S.W.3d at ___.
34. *Id.*, ___S.W.3d at ___.
35. *Id.* at 4, ___S.W.3d at ___.
36. *Cole*, 2011 Ark. at 3–4, ___S.W.3d at ___.
37. *Id.* at 4, ___S.W.3d at ___.
38. *Id.* at 7, ___S.W.3d at ___.
39. *Id.* at 7–8, ___S.W.3d at ___.
40. *Id.* at 13–14, ___S.W.3d at ___.
41. *Id.* at 7, ___S.W.3d at ___.
42. *Cole*, 2011 at 13, ___ S.W.3d at ___.
43. *Id.* at 13–14, ___S.W.3d at ___.
44. *Id.* at 17, ___S.W.3d at ___.
45. *Id.*, ___S.W.3d at ___.
46. *Id.*, ___S.W.3d at ___.
47. *Id.* at 19, ___S.W.3d at ___.
48. *Cole*, 2011 at 20, ___S.W.3d at ___.
49. *Id.* at 26, ___S.W.3d at ___.
50. 348 Ark. 647, 74 S.W.3d 215 (2002).
51. *Id.* at 649, 74 S.W.3d at 216.
52. *Id.* at 656, 74 S.W.3d at 221.
53. *Id.* at 656–57, 74 S.W.3d at 221. The Arkansas Supreme Court had initially held that it was granting Sullivan more protection under the United States Constitution than the federal courts had done. Sullivan v. State, 340 Ark. 315, 11 S.W.3d 526 (2000). But this decision was reversed and remanded by the Supreme Court of the United States for the reason that state courts cannot expand federal constitutional rights beyond what the Supreme Court of the United States has afforded. Arkansas v. Sullivan, 532 U.S. 769, 777 (2001).
54. State v. Sullivan, 348 Ark. at 655–56, 74 S.W.3d at 221 (2002).

55. *Id*. at 652, 74 S.W.3d at 218.
56. *Id*, at 655–56, 74 S.W.3d at 221.
57. *See* State v. Brown, 356 Ark. 460, 156 S.W.3d 722 (2004).
58. *Id*. at 463, 156 S.W.3d at 724.
59. *Id*., 156 S.W.3d at 724.
60. *Id*., 156 S.W.3d at 724.
61. *Id*., 156 S.W.3d at 724.
62. *Id*., 156 S.W.3d at 724.
63. *Brown*, 356 Ark. at 463, 156 S.W.3d at 724.
64. *Id*. at 464, 156 S.W.3d at 725.
65. *Id*., 156 S.W.3d at 725.
66. *Id*. at 465, 156 S.W.3d at 725.
67. *Id*., 156 S.W.3d at 725.
68. *Id*. at 474, 156 S.W.3d at 732.
69. *Brown*, 356 Ark. at 466, 156 S.W.3d at 726.
70. *Id*. at 467, 156 S.W.3d at 727.
71. *Id*. at 473, 156 S.W.3d at 731.
72. *See* U.S. Term Limits, Inc. v. Hill, 316 Ark. 251, 872 S.W.2d 349 (1994).
73. *Id*. at 266, 872 S.W.2d at 357.
74. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).
75. *Hill*, 316 Ark. at 270, 872 S.W.2d at 359.
76. *Id*. at 255, 872 S.W.2d at 357.
77. *Id*. at 255–56, 872 S.W.2d at 351–52.
78. *Id*., 872 S.W.2d at 351–52.
79. *Id*., 872 S.W.2d at 351–52.
80. *Id*. at 258, 872 S.W.2d at 352–53.
81. *Hill*, 316 Ark. at 270, 872 S.W.2d at 357.
82. *Id*. at 265, 872 S.W.2d at 356.
83. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 779-80 (1995)..
84. The following are the "Lake View" cases: Tucker v. Lake View Sch. Dist. No. 25 of Phillips Cnty. (*Lake View I*), 323 Ark. 693, 917 S.W.2d 530 (1996); Lake View Sch. Dist. No. 25 of Phillips Cnty. v. Huckabee (*Lake View II*), 340 Ark. 481, 10 S.W.3d 892 (2000); Lake View Sch. Dist. No. 25 of Phillips Cnty. v. Huckabee (*Lake View III*), 351 Ark. 31, 91 S.W.3d 472 (2002); Lake View Sch. Dist. No. 25 of Phillips Cnty. v. Huckabee (*Lake View IV*), 358 Ark. 137, 189 S.W.3d 1 (2004); Lake View Sch. Dist. No. 25 of Phillips Cnty. v. Huckabee (*Lake View V*), 364 Ark. 398, 220 S.W.3d 645 (2005); Lake View Sch. Dist. No. 25 of Phillips Cnty. v. Huckabee (*Lake View VI*), 370 Ark. 139, 257 S.W.3d 879 (2007).
85. ARK. CONST. art. XIV, § 1 provides as follows: "Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, 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."
86. Judge Annabelle Clinton later became Justice Annabelle Clinton Imber and is now Annabelle Imber Tuck.
87. *Lake View I*, 323 Ark. at 694–95, 917 S.W.2d at 531–32.
88. *Lake View II*, 340 Ark. 481, 485–86, 10 S.W.3d 892, 894–95.
89. *Id*. at 486–87, 10 S.W.3d at 895.

90. *Id.* at 487–88, 10 S.W.3d at 896.
91. *Id.* at 492, 10 S.W.3d at 899.
92. *Id.* at 494–95, 10 S.W.3d at 900.
93. Lake View Sch. Dist. No. 25 of Phillips Cnty. v. Huckabee (*Lake View III*), 351 Ark. 31, 45, 91 S.W.3d 472, 479 (2002).
94. *Id.* at 42, 91 S.W.3d at 477.
95. *Id.* at 71–72, 91 S.W.3d at 495.
96. *Id.* at 79, 91 S.W.3d at 500.
97. *Id.* at 72–79, 91 S.W.3d at 495–00.
98. Lake View Sch. Dist. No. 25 of Phillips Cnty. v. Huckabee, 355 Ark. 617, 142 S.W.3d 643 (2004).
99. The two masters appointed were former Arkansas Supreme Court Chief Justice Bradley Jesson and former Arkansas Supreme Court Justice David Newbern. Lake View Sch. Dist. No. 25 of Phillips Cnty. v. Huckabee (*Lake View IV*), 358 Ark. 137, 140, 189 S.W.3d 1, 3 (2004).
100. *Lake View IV*, 358 Ark. at 158–60, 189 S.W.3d 15–16.
101. *Id.* at 157, 189 S.W.3d at 14.
102. Lake View Sch. Dist. No. 25 of Phillips Cnty. v. Huckabee, 362 Ark. 521–23, 210 S.W.3d 28–30 (2005).
103. Lake View Sch. Dist. No. 25 of Phillips Cnty. v. Huckabee (*Lake View V*), 364 Ark. 398, 415, 220 S.W.3d 645, 657 (2005).
104. *Id.* at 415–16, 220 S.W.3d at 657.
105. *Lake View VI*, 370 Ark. at 139–40, 257 S.W.3d at 879.
106. *Id.* at 145, 257 S.W.3d at 883.
107. *Id.* at 145–46, 257 S.W.3d at 883.
108. *See, e.g.*, Amy M. Hightower, *Weighing States' School Performance, Policymaking*, EDUCATION WEEK, Jan. 13, 2011, *available at* http://www.edweek.org/ew/articles/2011/01/13/16stateofthestates.h30.html?tkn=QMBFexNkgmIADQ8yy46X0FWBPjrxaISWYHzJ&cmp=clp-ecseclips.
109. ARK. CONST. amend. XIV.
110. McCutchen v. Huckabee, 328 Ark. 202, 208, 943 S.W.2d 225, 227 (1997).
111. *Id.* at 205, 943 S.W.2d at 226.
112. *Id.*, 943 S.W.2d at 226.
113. *Id.* at 208, 943 S.W.2d at 227.
114. *Id.* at 206–07, 943 S.W.2d at 226–28.
115. *Id.* at 213, 943 S.W.2d at 230.
116. *McCutchen*, 328 Ark. at 208, 943 S.W.2d at 227.
117. *Id.* at 208, 943 S.W.3d at 227.
118. *Id.* at 209, 943 S.W.2d at 228.
119. *Id.*, 943 S.W.2d at 228.
120. *Id.*, 943 S.W.2d at 228.
121. *Id.*, 943 S.W.2d at 228.
122. *McCutchen*, 328 Ark. at 209, 943 S.W.2d at 228.
123. 368 Ark. 300, 245 S.W.3d 144 (2006).
124. *Id.* at 301, 245 S.W.3d at 146.
125. *Id.*, 245 S.W.3d at 146.

126. *Id.* at 306–07, 245 S.W.3d at 148–49.
127. *Id.* at 306, 245 S.W.3d at 148–49.
128. *Id.* at 306–07, 245 S.W.3d at 149.
129. *Wilson*, 368 Ark. at 308, 245 S.W.3d at 151.
130. *Id.* at 309, 245 S.W.3d at 151.
131. *Id.*, 245 S.W.3d at 151.
132. *Id.*, 245 S.W.3d at 151.
133. *Id.* at 310, 245 S.W.3d at 152.
134. ARK. CONST. amend. LXXX, § 4.
135. 372 Ark. 263, 275 S.W.3d 151 (2008).
136. *Id.* at 264 n.1, 275 S.W.3d at 152 n.1.
137. *Id.* at 265, 275 S.W.3d at 153.
138. *Id.*, 275 S.W.3d at 153.
139. *Id.*, 275 S.W.3d at 153.
140. *Id.* at 265–66, 275 S.W.3d 153.
141. *See* ARK. CONST. amend. LXXX, § 3.
142. ARK. CONST. amend. LXXX, § 3.
143. ARK. CONST. art. IV, § 1.
144. 310 Ark. 138, 146, 835 S.W.2d 843, 848 (1992).
145. 369 Ark. 231, 239, 253 S.W.3d 415, 421 (2007).
146. 2009 Ark. 241, 1–2, 308 S.W.3d 135, 138 (2009).
147. ARK. CODE ANN. §§ 16-55-201 to 16-55-220 (Supp. 2003).
148. ARK. CODE ANN. §§ 16-55-201 to 16-55-220 (Supp. 2003).
149. *Johnson*, 2009 Ark. at 8–9, 308 S.W.3d at 141–42.
150. *Id.* at 9, 308 S.W.3d at 142.
151. *Id.* at 10–11, 308 S.W.3d at 142.
152. 367 Ark. 55, 238 S.W.3d 1 (2006).
153. Regulation 200.3.2 of the Minimum Licensing Standards for Child Welfare Agencies as cited in *Howard*, 367 Ark. at 58, 238 S.W.3d at 3.
154. *Howard*, 367 Ark. at 66, 238 S.W.3d at 8–9.
155. *Id.* at 65, 238 S.W.3d at 7.
156. *Id.*, 238 S.W.3d at 7.
157. *Id.* at 66, 238 S.W.3d at 8.
158. *Id.*, 238 S.W.3d at 8.
159. 2011 Ark. 244, ___ S.W.3d ___.
160. *Id.* at 5–6, ___S.W.3d at ___.
161. *Id.*, ___S.W.3d at ___.
162. *Id.*, ___S.W.3d at ___.
163. 2011 Ark. 518, ___S.W.3d at ___.
164. 341 Ark. 771, 20 S.W.3d 301 (2000).
165. *Id.* at 774, 20 S.W.3d at 302–03.
166. *Id.* at 774–75, 20 S.W.3d at 302–03.
167. *Id.*, 20 S.W.3d at 302–03.
168. *Id.* at 775, 20 S.W.3d at 303.
169. *Id.*, 20 S.W.3d at 303.
170. *Zimmerman*, 341 Ark. at 775, 20 S.W.3d at 303.

171. *Id.* at 776, 20 S.W.3d at 304.
172. *Id.* at 777, 20 S.W.3d at 304.
173. *Id.* at 779, 20 S.W.3d at 305.
174. *Id.* at 786, 20 S.W.3d at 310.
175. *Id.* at 780, 20 S.W.3d at 306.
176. *Zimmerman*, 341 Ark. at 784–85, 20 S.W.3d at 309.
177. *Id.* at 785–86, 20 S.W.3d at 309–10.
178. *Id.* at 786, 20 S.W.3d at 310.
179. 365 Ark. 305, 229 S.W.3d 1 (2006).
180. *Id.* at 306–07, 229 S.W.3d at 2.
181. *Id.*, 229 S.W.3d at 2.
182. *Id.* at 311–12, 229 S.W.3d at 5–6.
183. *Id.* at 309, 229 S.W.3d at 3–4.
184. *Id.* 311–12, 229 S.W.3d at 5–6.
185. *Simes*, 365 Ark. at 312, 229 S.W.3d at 5–6.
186. *Id.* at 312, 229 S.W.3d at 6.
187. Griffen v. Ark. Judicial Discipline and Disability Comm'n, 355 Ark. 38, 44, 130 S.W.3d 524, 527 (2003). Canon 4(C)(1) has since been amended. *See* Ark. Code Judicial Conduct R. 3.2(c) (2011).
188. *Griffen*, 355 Ark. at 48, 130 S.W.3d at 530.
189. *Id.* at 41, 130 S.W.3d at 525–26.
190. *Id.* at 41–42, 130 S.W.3d at 525–26.
191. *Id.*, 130 S.W.3d at 525–26.
192. *Id.* at 42–43, 130 S.W.3d at 526–27.
193. *Id.* at 45, 130 S.W.3d at 528.
194. *Griffen*, 355 Ark. at 43, 130 S.W.3d at 527.
195. *Id.* at 45–46, 130 S.W.3d at 528–29.
196. *Id.* at 44–45, 130 S.W.3d at 528 (citing Ark. Code Judicial Conduct Canon 4(c)(1)).
197. *Id.* at 61, 130 S.W.3d at 538.
198. *Id.* at 60, 130 S.W.3d at 538.
199. *Id.* at 60–61, 130 S.W.3d at 538.
200. *Griffen*, 355 Ark. at 60, 130 S.W.3d at 538.
201. ARK. CONST. art. XIX, § 13, *repealed by* ARK. CONST. amend. LXXXIX.
202. ARK. CONST. amend. LX.
203. ARK. CONST. amend. LXXXIX.
204. ARK. CODE ANN. §§ 23-52-101 to 23-52-117 (Repl. 2011).
205. ARK. CODE ANN. § 23-52-102(5) (Supp. 2007).
206. *See, e.g.*, McGhee v. Arkansas State Bd. Of Collection Agencies, 375 Ark. 52, 59–60, 289 S.W.3d 18, 24 (2008).
207. *Id.* at 60, 289 S.W.3d at 24–25.
208. *Id.* at 61–62, 289 S.W.3d at 25–26.
209. *Id.* at 63, 289 S.W.3d at 27.
210. 342 Ark. 262, 264, 27 S.W.3d 419, 419 (2000).
211. *Id.* at 267, 270, 275 S.W.3d 422–23.
212. *Id.* at 267, 275 S.W.3d at 422.

213. *Id.* at 264, 275 S.W.3d at 420 (citing State v. Robbins, 339 Ark. 379, 5 S.W.3d 51 (1999)). In 2001, the court adopted an amendment to Ark. R. App. P.—Crim. 10, which establishes automatic appeals and mandatory review in death cases. In re: Amendment to Rule 10 of Arkansas Rules of Appellate Procedure Criminal, 345 Ark. Appx. 671 (2001).
214. Robbins v. State, 353 Ark. 556, 557, 114 S.W.3d 217, 218 (2003).
215. 322 Ark. 613, 911 S.W.2d 937 (1995).
216. *Robbins*, 353 Ark. at 557–58, 114 S.W.3d 218–19.
217. *Id.*, 114 S.W.3d at 218–19.
218. *Id.* at 563, 114 S.W.3d at 222.
219. *Id.* at 563–64, 114 S.W.3d at 222.
220. *Id.* at 564, 114 S.W.3d at 222.
221. *Id.*, 114 S.W.3d 222–23.
222. *Robbins*, 353 Ark. at 564, 114 S.W.3d at 223.
223. 327 Ark. 692, 696, 942 S.W.2d 231, 232–33 (1997).
224. *Id* at 696, 942 S.W.2d at 232–33.
225. Lee v. State, 343 Ark. 702, 709, 38 S.W.3d 334, 339 (2001).
226. *Id.*, 38 S.W.3d 339.
227. Lee v. Norris, 354 F.3d 846, 847 (8th Cir. 2004).
228. *Id.* at 847–48.
229. *Id.* at 850.
230. Lee v. State, 367 Ark. 84, 86, 238 S.W.3d 52, 53 (2006).
231. *Id.*, 238 S.W.3d at 53.
232. *Id.* at 87, 238 S.W.3d at 54.
233. *Id.* at 93, 238 S.W.3d at 57–58.
234. *Id.* at 88, 238 S.W.3d at 54–55.
235. *Id.*, 238 S.W.3d at 55.
236. *Lee*, 367 Ark. at 88–89, 238 S.W.3d at 55.
237. *Id.* at 93, 238 S.W.3d at 57–58.
238. 365 Ark. 411, 231 S.W.3d 717 (2006).
239. *Id.* at 413–15, 231 S.W.3d at 718–19.
240. *Id.*, 231 S.W.3d at 718–19.
241. *Id.* at 413–16, 231 S.W.3d at 718–19.
242. *Id.* at 415–16, 231 S.W.3d at 720.
243. 330 Ark. 261, 954 S.W.2d 898 (1997).
244. *Id.* at 265–67, 954 S.W.2d at 899–00.
245. 330 Ark. 402, 954 S.W.2d 234 (1997).
246. *Id.* at 404, 954 S.W.2d 235.
247. 330 Ark. at 270–73, 954 S.W.2d at 901–903.
248. *Id.* at 276–280, 954 S.W.2d at 905–907 (Thornton, J. dissenting).
249. 330 Ark. at 404, 954 S.W.2d at 235.
250. *Id.* at 412–14, 954 S.W.2d at 240–41.
251. *Id.* at 413–414, 954 S.W.2d at 240–41.
252. *Id.* at 415, 954 S.W.2d at 241 (Thornton, J. dissenting).
253. 339 Ark. 322, 5 S.W.3d 423 (1999).
254. *Id.* at 335–37, 5 S.W.3d at 431–33.
255. *See id.*, 5 S.W.3d at 431–32.

256. *See id*. at 344–46, 5 S.W.3d at 432–38.
257. *See id.*, 5 S.W.3d at 432–38.
258. *See id*. at 347, 5 S.W.3d at 439.
259. *See* Carr v. Turner, 238 Ark. 889, 890, 385 S.W.2d 656, 657 (1965) *overruled by* Jackson v. Cadillac Cowboy 337 Ark. 24, 34, 986 S.W.2d 410, 415 (1999).
260. *See* Jackson, 337 Ark. 24, 986 S.W.2d 410; Shannon v. Wilson, 329 Ark. 143, 947 S.W.2d 349 (1997).
261. *Shannon*, 329 Ark. at 160–61, 947 S.W.2d at 357–58.
262. *Id.*, 947 S.W.2d at 357–58.
263. *Id.*, 947 S.W.2d at 357–58.
264. *Jackson*, 337 Ark. at 26, 986 S.W.2d at 411.
265. *Id.* at 29, 986 S.W.2d at 412–13.
266. *Id.*, 986 S.W.2d at 412–13.
267. *Jackson*, 337 Ark. at 29, 96 S.W.2d at 413.
268. *See* ARK. CODE ANN. § 16-126-101.
269. VanWagoner v. Beverly Enterprises, 334 Ark. 12, 970 S.W.2d 810 (1998).
270. *Id.* at 13, 970 S.W.2d at 811.
271. *Id.*, 970 S.W.2d at 811.
272. *Id.* at 13–14, 970 S.W.2d at 811.
273. *Id.*, 970 S.W.2d at 811.
274. *Id.*, 970 S.W.2d at 811.
275. *VanWagoner*, 334 Ark. at 14, 970 S.W.2d at 811.
276. *Id.*, 970 S.W.2d at 811.
277. *Id.*, 334 Ark. at 14, 970 S.W.2d at 811–12.
278. *Id.* at 15, 970 S.W.2d at 812.
279. Clement v. Daniels, 366 Ark. 352, 353, 235 S.W.3d 521, 522–23 (2006).
280. *Id.*, 235 S.W.3d at 522–23.
281. *Id.* at 354, 235 S.W.3d at 523.
282. *Id.* at 354–55, 235 S.W.3d at 523–24.
283. *Id.* at 335, 235 S.W.3d at 524.
284. *Id.* at 358–59, 235 S.W.3d at 526.
285. *Clement*, 366 Ark. at 358–59, 235 S.W.3d at 526.
286. *Id.*, 235 S.W.3d at 526.
287. *Id.*, 235 S.W.3d at 526.
288. *Id.*, 235 S.W.3d at 526.
289. Foster v. Jefferson County Quorum Court, 321 Ark. 105, 107, 901 S.W.2d 809, 810 (1995).
290. *Id.*, 901 S.W.2d at 810.
291. *Id.*, 901 S.W.2d at 810.
292. *Id.*, 901 S.W.2d at 810.
293. *Id.* at 116H, 901 S.W.2d at 818.
294. *Id.* at 116E, 901 S.W.2d at 818.
295. *Foster*, 321 Ark. at 116E, 901 S.W.2d at 816.
296. *See id.*, 901 S.W.2d at 816–17.
297. *Id.* at 116F–G, 901 S.W.2d at 816–17.
298. *Id.*, 901 S.W.2d at 816–17.

299. 360 Ark. 363, 201 S.W.3d 375 (2005).
300. *Id.* at 367, 201 S.W.3d at 376–77.
301. *Id.* at 372–73, 201 S.W.3d at 380.
302. *Id.*, 201 S.W.3d at 380.
303. *Id.*, 201 S.W.3d at 330.
304. 2011 Ark. 67, ___ S.W.3d ___.
305. *Id.* at 1–2, ___S.W.3d at ___.
306. *Id.* at 2–3, ___S.W.3d at ___.
307. *Id.* at 6–7, ___S.W.3d at ___.
308. The court noted that "[i]t was undisputed that [Jones] was the stay-at-home mom for over three years who took care of [the child]. [The child] called her mommy. She thought of Jones's parents as her grandparents and spent holidays with Jones's family. The parties' intentions were always to co-parent, until Bethany unilaterally determined she no longer wanted to allow Jones to have visitation." *Id.* at 11–12, ___S.W.3d at ___.
309. *Id.*, ___S.W.3d at ___.
310. *Bethany*, 2011 Ark. at 12, ___S.W.3d at ___.
311. *Id.* at 12–13, ___S.W.3d at ___.
312. *See* Pulaski County v. Ark. Democrat-Gazette, Inc. (*Pulaski County I*), 370 Ark. 435, 438, 260 S.W.3d 718, 720 (2007); Pulaski County v. Ark. Democrat-Gazette, Inc. (*Pulaski County II*), 371 Ark. 217, 264 S.W.3d 465 (2007).
313. *Pulaski County II*, 371 Ark. at 220, 264 S.W.3d at 467.
314. *Id.* at 218–19, 264 S.W.3d at 466–67.
315. *Id.*, 264 S.W.3d at 466–67.
316. *Pulaski County I*, 370 Ark. at 437, 260 S.W.3d at 719; *see* ARK. CODE ANN. § 25-19-103(5)(A) (Supp. 2005).
317. *Pulaski County I*, 370 Ark. at 445–46, 260 S.W.3d at 725–26.
318. *Id.* at 446, 260 S.W.3d at 725.
319. *Pulaski County II*, 371 Ark. at 218–19, 264 S.W.3d at 466–67.
320. *Id.* at 221, 264 S.W.3d at 468.
321. *Id.* at 221–22, 264 S.W.3d at 468.