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State judges should be elected by people

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When the General Assembly convenes Tuesday, the first order of business will be the oath of office. Each member will swear to "not propose or assent to any bill ... which shall ... have a tendency to lessen or abridge (the people's) rights and privileges, as declared by the Constitution." Many issues will be voted on this year. None may require greater contemplation of this oath than whether to extend the Tennessee Plan.

The Tennessee Constitution provides that all judges "shall be elected" by the voters. Trial court judges are elected. However, under the Tennessee Plan, a commission composed mainly of lawyers from special interest organizations controls the selection of appeals judges. In fact, judges selected under the Tennessee Plan are never subject to real elections. They run in uncontested retention referendums.

Under the Tennessee Plan, the Tennessee Supreme Court has rendered some troubling decisions. In 2000, for example, the court struck down the state's informed consent requirement and two-day abortion waiting period in *Sundquist v. Planned Parenthood*. The court held that the Tennessee Constitution provides even greater protection for abortion rights than the U.S. Supreme Court recognized in *Roe v. Wade*.

Last year, in *Hannan v. Alltel Publishing Company*, the court held that defendants seeking to dismiss meritless lawsuits without the expense of trial must prove a negative: that the plaintiff cannot prove his case.

As one trial lawyer blog explained, this decision means that it is now "harder to get summary judgment in Tennessee state courts than ... in federal courts." Or, in the words of a justice on the court, Hannan will "undermine" the ability of lower courts to "weed out frivolous lawsuits."

This month, in *Tennessee v. Dailey*, the court used a technicality to free a defendant who had confessed to killing a Nashville woman.

The court tossed out the conviction because, when confessing, the defendant was technically "under arrest" and had not yet been read his Miranda rights, even though the defendant voluntarily agreed to talk to the police and drove himself to the police station for fingerprinting.

Voters regularly hold elected representatives responsible for bad governance.

However, uncontested retention referendums do not provide much of an opportunity to hold judges accountable for bad decisions. With no opponents, over 99 percent of judges have been retained under the Tennessee Plan.

This year the Tennessee Plan is finally set to expire. Various concerns with the plan, judicial elections and other judicial selection methods have been chronicled elsewhere. Yet the most important question may be whether members of the General Assembly feel compelled by their oath of office to

return to contested judicial elections until the Constitution is amended to allow for a different method. A vote in favor of extending the Tennessee Plan may be viewed as a vote to abridge the right of all Tennesseans to an elected judiciary.
