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## ELECTION AS APPOINTMENT: THE TENNESSEE PLAN RECONSIDERED

BRIAN T. FITZPATRICK\*

In 1971, the Tennessee legislature followed the lead of a number of other states and replaced the direct election of appellate judges with a selection method called “merit selection.”<sup>1</sup> Tennessee’s merit selection system—fittingly referred to as the “Tennessee Plan”—calls for the governor to appoint all appellate judges in Tennessee, including state supreme court justices, from a list of three nominees submitted by a commission predominately comprised of lawyers.<sup>2</sup> After a period of time on the bench, the judges appointed by the governor have their names put on the ballot in uncontested retention referenda in which voters are asked whether they wish the judges to remain in office.<sup>3</sup> In light of activity in the most recent legislative session, the Tennessee Plan is now scheduled to expire on June 30, 2009.<sup>4</sup> This is, therefore, an opportune time to consider whether Tennessee should continue to use the Plan to select appellate judges.

The Tennessee Plan has been controversial ever since it was enacted in 1971 to replace contested elections. Many people doubt, for example, whether the Plan has actually accomplished any of its intended purposes. The Plan’s principal purposes are to select better qualified judges, to take the politics out of judicial selection, and to bring more racial and gender diversity to the bench.<sup>5</sup> Scholars, however, have found little evidence that any of these purposes are furthered by merit selection plans in general or the Tennessee Plan in particular.<sup>6</sup>

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1. See 1971 Tenn. Pub. Acts, ch. 198.

2. See TENN. CODE ANN. §§ 14-4-101, -102 (1994 & Supp. 2007).

3. See *id.* §§ 17-4-114 to -116.

4. See *infra* notes 109–11 and accompanying text.

5. See TENN. CODE ANN. § 17-4-101(a) (“It is the declared purpose and intent of the general assembly by the passage of this chapter to assist the governor in finding and appointing the best qualified persons available for service on the appellate courts of Tennessee . . . and . . . to insulate the judges of the courts from political influence and pressure . . . and . . . to make the courts ‘nonpolitical.’”); *id.* § 17-4-102(b)(3) (requiring the speakers of the legislature to appoint to the judicial nominating commission “persons who approximate the population of the state with respect to race . . . and gender”); *id.* § 17-4-102(d) (requiring lawyers’ organizations to submit nominees for the judicial nominating commission “with a conscious intention of selecting a body which reflects a diverse mixture with respect to race . . . and gender”).

6. With respect to the claim that merit selection leads to better qualified judges, scholars

Nonetheless, perhaps the greatest controversy surrounding the Tennessee Plan is whether it is even constitutional. The Tennessee constitution states, as it has since 1853, that all judges “shall be elected by the qualified voters” of

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have found that “the credentials of merit selection judges are not superior to nor substantially different from those of other judges.” Henry R. Glick & Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, 70 JUDICATURE 228, 235 (1987). Moreover, scholars have found that “[j]udges in *more* partisan systems are more productive than judges in less partisan systems [such as merit selection].” Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary* 16 (Univ. of Chi. Sch. of Law, John M. Olin Law & Econ. Working Paper No. 357, 2007), available at <http://ssrn.com/abstract=1008989>.

With respect to the claim that merit selection takes the politics out of judicial selection, scholars have concluded that “[o]f course [it does] not.” Herbert M. Kritzer, *Law is the Mere Continuation of Politics by Different Means: American Judicial Selection in the Twenty-First Century*, 56 DEPAUL L. REV. 423, 466 (2007). “The politics come into play in determining who actually gets appointed to the commission . . . and in how the commission chooses to weigh various criteria in making both initial nominations and in doing the periodic evaluations.” *Id.* In other words, “[t]he system is not nonpolitical; it is simply differently political.” *Id.*; see also HARRY P. STUMPF, AMERICAN JUDICIAL POLITICS 167 (1988) (noting that “far from taking judicial selection out of politics, [merit selection] actually tend[s] to replace [electoral] [p]olitics, wherein the judge faces popular election . . . , with a somewhat subterranean process of bar and bench politics, in which there is little popular control” and “raw political considerations masquerade[] as professionalism via attorney representation of the socioeconomic interests of their clients”); Harry O. Lawson, *Methods of Judicial Selection*, 75 MICH. BUS. L.J. 20, 24 (1996) (“Merit selection does not take politics out of the judicial selection process. It merely changes the nature of the political process involved. It substitutes bar and elitist politics for those of the electorate as a whole.”).

Finally, with respect to the claim that merit selection leads to a more diverse bench, nationwide studies have proved inconclusive. See Sherrilyn A. Ifill, *Through the Lens of Diversity: The Fight for Judicial Elections After Republican Party of Minnesota v. White*, 10 MICH. J. RACE & L. 55, 85 (2004) (“Studies that have examined the effect of appointment versus election of judges on diversity have produced conflicting results.”). In Tennessee, the evidence likewise is conflicting. In 2007, appellate judges in Tennessee—those selected by the Tennessee Plan—were more diverse in both race and gender than were trial judges. See Diversity of the Bench, American Judicature Society, [http://www.judicialselection.us/judicial\\_selection/bench\\_diversity/index.cfm?state=](http://www.judicialselection.us/judicial_selection/bench_diversity/index.cfm?state=) (providing data on race and gender of judges for each state). The opposite was true in both 2004 and 2001. See American Bar Association, National Database on Judicial Diversity in State Courts, <http://www.abanet.org/judind/diversity/tennessee.html> (reporting data for 2004 on racial diversity only); American Judicature Society, Judicial Selection in the States, [http://www.ajs.org/JSremoved3.3.08/js/TN\\_diversity.htm](http://www.ajs.org/JSremoved3.3.08/js/TN_diversity.htm) (citing AMERICAN BAR ASSOCIATION, THE DIRECTORY OF MINORITY JUDGES OF THE UNITED STATES (3d ed. 2001) (reporting data for race and gender in 2001)). Moreover, complaints by the governor that the Tennessee Plan was not producing sufficient racial diversity led him to sue the judicial nominating commission in a case that eventually reached the Tennessee Supreme Court. See *Bredesen v. Tenn. Judicial Selection Comm’n*, 214 S.W.3d 419 (Tenn. 2007).

the state.<sup>7</sup> The Tennessee Plan, relying as it does on initial appointment by the governor and retention in an uncontested referendum, would seem to be in some tension with that language. Given this tension, it is not surprising that the Tennessee Plan has been mired in litigation ever since its inception, with several cases challenging the constitutionality of the Plan heard by the Tennessee Supreme Court.<sup>8</sup>

In this Essay, I examine the constitutional questions surrounding the Tennessee Plan. Although the Tennessee Supreme Court has upheld the constitutionality of the Tennessee Plan on two occasions—once in 1973<sup>9</sup> and again in 1996<sup>10</sup>—in neither case did the court’s decision command a majority of regular supreme court justices,<sup>11</sup> and, in the 1996 case, the opinion was not published and does not constitute binding precedent.<sup>12</sup> Moreover, and more importantly, neither of these decisions even attempted to address three of the most serious constitutional questions raised by the Plan. As I explain, these questions are not easily answered, and, in my view, suggest that the Tennessee Plan is unconstitutional in many of its applications.

The first question that the Tennessee Supreme Court has never addressed is how the constitution permits the governor to appoint all appellate judges in the first place. Although a provision of the constitution permits the governor to appoint judges to fill “vacancies,” it appears that the constitution uses the word “vacancies” to refer only to interim vacancies—i.e., where judges leave in the middle of their terms—rather than to positions that are vacant simply because judges choose not to run for reelection.<sup>13</sup> It would seem, then, that, to the extent the Tennessee Plan permits the governor to make appointments to fill vacancies created by judges who leave office at the end of their terms, the Plan is unconstitutional.<sup>14</sup> This issue has never come before the Tennessee Supreme Court because both the 1973 and 1996 cases involved judges appointed to fill interim vacancies.<sup>15</sup>

The second question that the Tennessee Supreme Court has never addressed is how retention referenda can be squared with the original understanding and purposes of the constitutional requirement of an “election.”

In 1870, when the current constitutional provision was enacted, the idea of retention referenda for public officials was unknown in the United States.<sup>16</sup>

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7. TENN. CONST. art. VI, §§ 3, 4.

8. *See, e.g., State ex rel. Hooker v. Thompson*, No. 01S01-9605-CH-00106, 1996 WL 570090 (Tenn. Oct. 2, 1996); *State ex rel. Higgins v. Dunn*, 496 S.W.2d 480 (Tenn. 1973).

9. *See Dunn*, 496 S.W.2d 480.

10. *See Thompson*, 1996 WL 570090.

11. *See infra* notes 150–53 and accompanying text.

12. *See infra* note 143 and accompanying text.

13. *See infra* text accompanying notes 162–68.

14. *See infra* text accompanying notes 161–67.

15. *See infra* text accompanying note 167.

16. *See infra* text accompanying notes 182–183. The idea was first conceived in 1914. *See id.*

As such, it would have been impossible for the authors of this provision to have intended such a device when they used the word “election.” Although many scholars believe it should not be necessary to amend the constitution to permit the legislature to take advantage of every new way of doing things, it is doubtful whether retention referenda even serve the democratic purposes of the 1870 constitution.<sup>17</sup> As an historical matter, retention referenda were originally designed not to facilitate democratic accountability, but, rather, to insulate judges from such accountability.<sup>18</sup> It is therefore not surprising that, in Tennessee and elsewhere, judges who run in retention referenda are virtually never defeated.<sup>19</sup>

Finally, the Tennessee Supreme Court has never explained how the Tennessee Plan can be constitutional in light of the fact that, in 1977, the voters in Tennessee *rejected* a constitutional amendment that would have repealed the constitutional provision requiring elected judges in favor of provisions permitting the Tennessee Plan.<sup>20</sup> This is in stark contrast to each of the sixteen other states that select judges through a method of initial appointment by the governor followed by a retention referendum; each of these states has amended its constitution to change provisions requiring elected judges in favor of provisions permitting the appointment-retention method of selection.<sup>21</sup>

None of these questions is easily answered, and, together, they comprise a compelling case for the view that many appellate judges in Tennessee have been selected in an unconstitutional manner for the better part of four decades.

For this reason, I argue that the Tennessee legislature should allow the Tennessee Plan to expire next year and, in doing so, return the selection of appellate judges to contested elections.<sup>22</sup> In my view, the legislature should employ contested elections to select all judges in the state at least until the voters of Tennessee have been given another opportunity to amend the Tennessee constitution—and perhaps beyond that point if the voters again reject the amendment.

In Part I of this Essay, I briefly recount the history of judicial selection in Tennessee. Like most states that entered the Union in the founding era, Tennessee originally appointed all of its judges, but then switched to elections as the populism of home-grown “Jacksonian Democracy” spread across America.<sup>23</sup> Tennessee only turned to merit selection—a Progressive Era reform seeking to place greater control over government in the hands of “experts”—late in the twentieth century.<sup>24</sup> In Part II, I describe the provisions

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17. *See infra* text accompanying notes 184–202.

18. *See id.*

19. *See id.*

20. *See infra* text accompanying notes 204–11.

21. *See infra* notes 212–13 and accompanying text.

22. *See infra* notes 109–11 and accompanying text.

23. *See infra* text accompanying notes 27–39.

24. *See infra* text accompanying notes 52–70.

of the Tennessee Plan. Although many of the provisions have been revised over the years, the core of the Tennessee Plan—appointment by the governor from a list of names supplied by a lawyer-dominated commission followed by a retention referendum—remains the same.<sup>25</sup> In Part III, I recount the litigation over the constitutionality of the Tennessee Plan, including the two Tennessee Supreme Court decisions upholding it.<sup>26</sup> In Part IV, I explain why these two decisions have left a series of important constitutional questions unanswered. In Part V, I conclude that the constitutional case against the Tennessee Plan is strong, and I argue that the legislature should allow it to expire and return the state to contested elections until Tennessee voters decide to amend the state constitution.

### I. THE HISTORY OF JUDICIAL SELECTION IN TENNESSEE

At the time of the founding, judges throughout the new United States came to the bench either by executive or legislative appointment, and they often held their positions for life.<sup>27</sup> The first Tennessee constitution, ratified in 1796 when Tennessee became the nation's sixteenth state, granted judges life tenure (so long as they exhibited "good behavior") and placed the power to select those judges exclusively in the hands of the state legislature.<sup>28</sup>

While the federal judicial system has stayed the same over the ensuing two hundred years, the state judicial systems changed radically in the first half of the nineteenth century.<sup>29</sup> By the time of the Civil War, the vast majority of states had changed their method of judicial selection from executive or legislative appointment to direct election by the people.<sup>30</sup>

In some ways, this dramatic shift in the states was a phenomenon with its roots in Tennessee: Most historians attribute the change in judicial selection to a shift in this country's attitude about democracy that was inspired by Tennessean Andrew Jackson. At the time of the founding, democracy was an ideal embraced only tentatively by the political elite.<sup>31</sup> It was not until the nineteenth century, during the populist movement led by Andrew Jackson, that

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25. See *infra* text accompanying notes 76–104.

26. See *infra* text accompanying notes 115–53.

27. See EVAN HAYNES, *THE SELECTION AND TENURE OF JUDGES* 98 (1944); Larry C. Berkson, *Judicial Selection in the United States: A Special Report*, 64 *JUDICATURE* 176, 176 (1980). Before it became a state, Vermont briefly selected judges by election. See HAYNES, *supra*, at 99.

28. See TENN. CONST. art. V, § 2 (1976) ("The general assembly shall by joint ballot of both houses appoint judges of the several courts of law and equity . . . who shall hold their respective offices during their good behavior.").

29. See Berkson, *supra* note 27, at 176.

30. See *id.* ("By the time of the Civil War, 24 of 34 states had established an elected judiciary with seven states adopting the system in 1850 alone.").

31. See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 21–25 (2000) (explaining that the American Revolution "produced modest, but only modest, gains in the formal democratization of politics").

the country began to emphatically embrace the notion that ordinary citizens were fully capable of making decisions about their government.<sup>32</sup> According to historians, this populist movement (dubbed “Jacksonian Democracy”) that restructured so many American institutions was also responsible for the tide of elected judiciaries that washed across America in the middle of the nineteenth century.<sup>33</sup>

The tide did not begin in Tennessee, however. The first state to select any of its judges by election was Georgia in 1812,<sup>34</sup> and the first state to select all of them in that manner was Mississippi in 1832.<sup>35</sup> Tennessee first considered proposals to select its judges by election at its second Constitutional Convention in 1834.<sup>36</sup> The proposals failed to pass, and the Convention ultimately voted to continue selecting judges by legislative appointment.<sup>37</sup> Tennessee did not make the change to an elected judiciary until 1853.<sup>38</sup> In that year, the people of Tennessee approved a constitutional amendment providing that all judges in the state “shall be elected by the qualified voters” to terms of eight years.<sup>39</sup>

After the Civil War, Tennessee held another Constitutional Convention to bring its constitution into compliance with the requirements demanded by the federal Reconstruction Congress.<sup>40</sup> The Convention of 1870 maintained the provision requiring the election of all judges,<sup>41</sup> and the 1870 language has not

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32. *See id.* at 33–42, 74 (outlining the expansion of suffrage).

33. *See* Republican Party of Minn. v. White, 536 U.S. 765, 785 (2002) (“Starting with Georgia in 1812, States began to provide for judicial election, a development rapidly accelerated by Jacksonian democracy.”); CHARLES H. SHELDON & LINDA S. MAULE, CHOOSING JUSTICE: THE RECRUITMENT OF STATE AND FEDERAL JUDGES 4 (1997) (noting that “the Jacksonian movement . . . encouraged more popular control of judges”); Berkson, *supra* note 27, at 176 (noting that people “were determined to end [the] privilege of the upper class and to ensure the popular sovereignty we describe as Jacksonian Democracy”); Rachel Paine Caufield, *How the Pickers Pick: Finding A Set of Best Practices for Judicial Nominating Commissions*, 34 FORDHAM URB. L.J. 163, 167 (2007) (“States began to move away from appointive selection methods in the mid-1800s with the rise of Jacksonian democracy and its emphasis on democratic accountability, individual equality, and direct voter participation in governmental decision-making.”).

34. *See* HAYNES, *supra* note 27, at 99–100.

35. *See id.*

36. *See* Timothy S. Huebner, *Judicial Independence in an Age of Democracy, Sectionalism, and War*, in A HISTORY OF THE TENNESSEE SUPREME COURT 66 (James W. Ely Jr. ed., 2002); N. Houston Parks, *Judicial Selection—The Tennessee Experience*, 7 MEM. ST. U. L. REV. 615, 624 (1977).

37. *See id.* The 1834 Convention did, however, eliminate life tenure for judges in favor of twelve- and eight-year terms. *See id.*

38. *See* Huebner, *supra* note 36, at 87; Parks, *supra* note 36, at 626–28.

39. *Id.*

40. *See* Parks, *supra* note 36, at 630–31.

41. *See id.*

been changed since then.<sup>42</sup> Thus, the Tennessee constitution still declares that all judges—whether on the “supreme court” or “inferior courts”—“shall be elected by the qualified voters” of the state to a term of eight years.<sup>43</sup>

Throughout the next one hundred years, judges in Tennessee were selected, at least in theory, by voters in contested elections similar to those held for other public offices.<sup>44</sup> But the actual practice of judicial elections did not necessarily comport with the theory. As one commentator has noted, “[e]lection campaigns generally were not very partisan. In fact, incumbent judges usually ran with no, or only nominal opposition.”<sup>45</sup> (After all, for much of the post-Civil War era, Tennessee was a one-party state; thus, whichever candidate was nominated by the Democratic Party was all but certain to win a judgeship.<sup>46</sup>) Moreover, most judges in Tennessee were elevated to the bench after 1853 not by election, but by gubernatorial appointment to fill interim vacancies.<sup>47</sup> Since 1834, the Tennessee constitution has permitted the legislature to direct how such interim vacancies should be filled,<sup>48</sup> and, from the very beginning, the legislature vested that power with the governor.<sup>49</sup> Consequently, one commentator has reported that, in the first one hundred years of judicial elections in Tennessee, “nearly 60 percent of the regular judges who . . . served on [the] Supreme Court [were] appointed by the Governor in the first instance.”<sup>50</sup> This conflict between the theory and reality of judicial elections was not a phenomenon unique to Tennessee; many judges

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42. *See id.*

43. TENN. CONST. art. VI, §§ 3, 4.

44. *See Parks, supra* note 36, at 628–29.

45. *Id.* at 629.

46. *See id.* at 630 (“Since after the Civil War [Tennessee] was generally controlled by the Democratic Party, nomination by the Democrats to a seat on the bench was tantamount to election.”).

47. *See id.* at 629 (“[T]hose elected most often had reached the bench initially though gubernatorial appointment.”).

48. The 1796 constitution made no provision for the filling of vacancies. Thus, all vacancies had to be filled by the manner set forth for initial appointment, i.e., by appointment of both houses of the legislature. *See Smith v. Normant*, 13 Tenn. 271, 272–73 (Tenn. 1833) (holding that, in the case of vacancies, the “constitution has made no exception in favor of the legislature giving authority by law to an agent to appoint judges” and “[t]he two houses acting jointly, and voting by ballot, is the only appointing power under the constitution”). By 1834, the constitution permitted the legislature to prescribe the manner of filling vacancies that arose by reason of “death, resignation, or removal.” TENN. CONST. art. VII, § 4 (1834). The current (1870) constitution likewise permits the legislature to prescribe the manner of filling all vacancies. *See id.* (“[The] filling of all vacancies not otherwise directed or provided by this Constitution, shall be made in such manner as the Legislature shall direct.”).

49. *See Parks, supra* note 36, at 629.

50. *Id.* at 629 (quoting William H. Wicker, *Constitutional Revision and the Courts*, in PROCEEDINGS OF THE SIXTH ANNUAL SOUTHERN INSTITUTE OF LOCAL GOVERNMENT 12, 14 (Bureau of Public Administration, University of Tennessee - Knoxville, 1947)).

in states with elected judiciaries also were elevated by appointment to unexpired terms.<sup>51</sup>

Despite the states' limited experience with contested judicial elections—or perhaps because of it—the trend in favor of elected judiciaries began to wane in America in the early twentieth century. During the Progressive Era, professional lawyers' organizations across the country began to advocate for a new method of judicial selection.<sup>52</sup> The new method was intended to take selection out of the political process, whether that process was political appointment or popular election.<sup>53</sup> The proponents of this new method believed that judges should be selected by “experts”;<sup>54</sup> in particular, they thought that the lawyers' organizations themselves should make the selections. These organizations called the method whereby they would select judges “merit selection.” In 1937, the nation's largest organization of lawyers, the American Bar Association, formally endorsed merit selection plans,<sup>55</sup> and in 1940, the state of Missouri became the first of many states to change its method of judicial selection from popular election to merit selection.<sup>56</sup> With the heavy support of lawyers' organizations in the state,<sup>57</sup> Tennessee first adopted a merit selection plan in 1971.<sup>58</sup>

The merit selection plans adopted by these states did not turn judicial selection entirely over to local lawyers' organizations. Rather, the plans typically charged the state's governor with appointing judges from a list of names submitted by a nominating commission comprised largely of members of local lawyers' organizations.<sup>59</sup> Moreover, although many of the architects of merit selection favored life tenure for judges appointed in this manner, they suspected the public would balk at being entirely excluded from a role in choosing such important public officials.<sup>60</sup> Thus, the architects of merit selection designed a mechanism that they thought would result in life tenure

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51. See SUSAN B. CARBON & LARRY C. BERKSON, *JUDICIAL RETENTION ELECTIONS IN THE UNITED STATES* 14 (1980) (noting that, “in the 30 states which employ partisan and nonpartisan elections to fill most of their judiciaries, a substantial number of judges actually reach the bench by appointment”).

52. See *id.* at 3–6.

53. See *id.*

54. See, e.g., Luke Bierman, *Judicial Independence: Beyond Merit Selection*, 29 *FORDHAM URB. L.J.* 851, 854 (2002) (noting that the reform movement in the Progressive Era was based on the hope that “experts, rather than voters, would be responsible for selecting judges”).

55. See CARBON & BERKSON, *supra* note 51, at 4.

56. See *id.* at 11.

57. See John R. Vile, *The Tennessee Supreme Court, 1946–1974: Tranquility Amid a National Judicial Revolution*, in *A HISTORY OF THE TENNESSEE SUPREME COURT* 268 (James W. Ely Jr. ed., 2002).

58. See Parks, *supra* note 36, at 615 & n.1.

59. See STUMPF, *supra* note 6, at 163 (describing the chief features of merit-selection plans).

60. See CARBON & BERKSON, *supra* note 51, at 6–8.

but without the appearance of life tenure: the retention referendum. In a retention referendum, a judge runs unopposed and the electorate is simply asked whether the judge should remain on the bench.<sup>61</sup> That is, the public votes on retention without any knowledge of who might replace the judge if he or she is voted out of office.<sup>62</sup> Under these circumstances, the public nearly always votes in favor of retention.<sup>63</sup> Again, this was not a surprise to the architects of merit selection. As historians have explained, “many proponents of the commission plan would have preferred good behavior tenure in lieu of retention elections”; “[t]hey perceived retention as a ‘sop’ to those committed to electoral control over the judiciary.”<sup>64</sup>

As explained in more detail in Part II of this Essay, the merit selection plan adopted by Tennessee in 1971—fittingly referred to as the “Tennessee Plan”—is much like the plans in other states. Similar to other plans, judges are initially appointed by the governor from a list of names submitted by a judicial nominating commission.<sup>65</sup> These judges must then run in retention referenda some period of time thereafter.<sup>66</sup> The 1971 Tennessee Plan applied to judges on both the intermediate appellate courts and the state supreme court.<sup>67</sup> In 1974, the Plan for the supreme court was repealed,<sup>68</sup> but it was reenacted in 1994.<sup>69</sup> The Plan has never been adopted for the selection of trial judges.<sup>70</sup>

Unlike every other state that has adopted a method of judicial selection that relies on initial appointment followed by a retention referendum,<sup>71</sup> Tennessee has never amended its constitution to replace the provision requiring that all state judges shall be elected.<sup>72</sup> Indeed, not only has the

61. *See id.*

62. *See id.*

63. *See* Larry Aspin, *Trends in Judicial Retention Elections, 1964–1998*, 83 JUDICATURE 79, 79 & n.1 (1999) (finding that in 4,588 retention referenda in a sample of ten states over thirty-four years, only fifty-two judges were not retained).

64. CARBON & BERKSON, *supra* note 51, at 6–8. Although Missouri was the first state to adopt a merit selection plan, California was the first state to use retention referenda. *See id.* at 11. California began using the referenda in 1934 when they were proposed by a group of citizens that included Earl Warren, who would eventually become Chief Justice of the United States. *See* Gerald F. Uelman, *Supreme Court Retention Elections in California*, 28 SANTA CLARA L. REV. 333, 339 (1988).

65. *See* TENN. CODE ANN. § 17-4-112(a) (1994 & Supp. 2007).

66. *See id.* §§17-4-114 to -116.

67. *See* 1971 Tenn. Pub. Acts, ch. 198.

68. *See* 1974 Tenn. Pub. Acts, ch. 433, § 1.

69. *See generally* 1994 Tenn. Pub. Acts, ch. 942.

70. The one exception is when the governor fills interim vacancies in the trial courts. Since 1994, the governor has been required to fill interim vacancies using the judicial nominating commission. Even so, all trial judges must still run for reelection in contested elections. *See infra* note 85.

71. *See infra* note 213.

72. *See* TENN. CONST. art. VI, §§ 3, 4.

constitution never been amended, but the voters of Tennessee rejected such an amendment in 1977. In that year, a limited Constitutional Convention was called to make several changes to the 1870 constitution.<sup>73</sup> The Convention proposed thirteen different amendments to the people of Tennessee on a variety of topics, including one that would have, among other things, replaced the language guaranteeing an elected judiciary with language providing for the Tennessee Plan.<sup>74</sup> The voters approved every one of the thirteen amendments *except* the one that would have replaced the language on elected judges with the provisions of the Tennessee Plan; this amendment failed by a margin of 55% to 45%.<sup>75</sup>

## II. THE TENNESSEE PLAN

As originally enacted by the legislature in 1971, the Tennessee Plan called for all “vacancies” on the intermediate appellate courts and supreme court to be filled by the governor.<sup>76</sup> The Plan described “vacancies” not only as interim vacancies—i.e., instances where a judge left in the middle of an eight-year term—but also as instances where the judge *completed* an eight-year term and did not run for reelection.<sup>77</sup> That is, the Tennessee Plan required the governor to initially appoint *all* judges on the intermediate appellate courts and the supreme court.

In making the appointments, the governor was required to select one of three persons submitted by a judicial nominating commission.<sup>78</sup> Under the

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73. See LEWIS L. LASKA, *THE TENNESSEE STATE CONSTITUTION 23–27* (1990) (outlining the history and proceedings of Tennessee’s 1977 limited Constitutional Convention).

74. The proposal would have amended Article VI of the Tennessee constitution by deleting Sections 1–15 and substituting language stating, among other things, that “Justices of the Supreme Court and judges of the Court of Appeals shall be appointed by the Governor from three nominees recommended . . . by the Appellate Court Nominating Commission,” and that “[t]he name of each justice and judge seeking retention shall be submitted to the qualified voters for retention or rejection . . . .” Governor Ray Blanton, *Proclamation by the Governor, in THE LIMITED CONSTITUTIONAL CONVENTION OF 1977, STATE OF TENNESSEE, THE JOURNAL OF THE DEBATES OF THE LIMITED CONSTITUTIONAL CONVENTION OF 1977* (see Proposal 13, § 4).

75. See *id.* (noting that the amendment received 157,581 votes in favor and 190,421 votes against).

76. See TENN. CODE ANN. § 17-712 (1972).

77. See *id.* §§ 17-712, -716.

78. See *id.* § 17-712. As originally enacted, the statute permitted the governor to reject names from the commission indefinitely. See *id.* The statute now permits the governor to reject only one list of three names; the governor is required to select someone from the second list submitted by the commission. See TENN. CODE ANN. § 17-4-112 (1994). This requirement was the subject of recent litigation between the governor and the judicial nominating commission that ultimately reached the Tennessee Supreme Court. See *Bredesen v. Tenn. Judicial Selection Comm’n*, 214 S.W.3d 419 (Tenn. 2007) (holding, *inter alia*, that the commission could not include a person on the second list of names sent to the governor if that person had been on the first list as well).

1971 legislation, the nominating commission was comprised of nine members: three members of the legislature, three attorneys elected by their peers, and three others appointed by the governor, only one of whom could be a lawyer.<sup>79</sup>

The judges appointed by the governor were permitted to serve until the next biennial general election, at which time they would face referenda where voters would be asked only: “Shall (Name of Candidate) be elected and retained in office as (name of Office)? Vote Yes or No.”<sup>80</sup> If a majority of voters voted to retain the judge, the judge would serve for the remainder of an eight-year term, at which time the judge would face another retention referendum.<sup>81</sup> If the judge was not retained, then the governor would appoint a new judge from a list of three names submitted by the nominating commission.<sup>82</sup>

Much of the 1971 legislation remains intact today, but there have been several important changes to the Tennessee Plan since then. First, in 1974, the legislature amended the Plan to revoke its applicability to vacancies on the supreme court.<sup>83</sup> The legislature would not add the supreme court back until 1994.<sup>84</sup> Thus, for twenty years, the Plan applied only to the intermediate appellate courts. Today, the Tennessee Plan applies to both the intermediate appellate courts and the supreme court. It has never been extended to trial courts.<sup>85</sup>

Second, the legislature has significantly reworked the nominating commission that supplies the list of names from which the governor must appoint judges. In 2001, the nominating commission was expanded to its present size of seventeen members.<sup>86</sup> Although legislators no longer serve on the commission, the two speakers of the legislature select all seventeen members.<sup>87</sup> Fourteen members must be lawyers, leaving only three non-lawyers.<sup>88</sup> Twelve of the fourteen lawyer members must come from names supplied by five special lawyers’ organizations.<sup>89</sup> Two members must be taken from names submitted by the Tennessee Bar Association, one from the Tennessee Defense Lawyers Association, three from the Tennessee Trial Lawyers Association, three from the Tennessee District Attorneys General

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79. See TENN. CODE ANN. § 17-702 (1972).

80. *Id.* §§ 17-714 to -716.

81. *See id.*

82. *See id.* §§ 17-714 to -715 (stating that such a situation would create a “vacancy,” and that, per § 17-712, the governor would fill that vacancy).

83. *See* 1974 Tenn. Pub. Acts, ch. 433, § 1.

84. *See generally* 1994 Tenn. Pub. Acts, ch. 942.

85. The one exception is interim appointments to fill unexpired terms, which, since 1994, the legislature has required the governor to fill through the judicial nominating commission. *See* TENN. CODE ANN. § 17-4-118(a) (1994). Unlike interim appellate appointments, however, all trial judges must run for reelection in contested elections. *See id.* § 17-4-118(e).

86. *See id.* § 17-4-102(a) (Supp. 2007).

87. *See id.* § 17-4-102(b).

88. *See id.* § 17-4-102(a)(5) (noting that “[t]hree (3) members . . . shall not be lawyers”).

89. *See id.* § 17-4-102(a)(1)–(4).

Conference, and three from the Tennessee Association of Criminal Defense Lawyers.<sup>90</sup> The two remaining lawyer members need not be taken from one of these groups.<sup>91</sup> Each lawyers' organization is required to compose these lists "with a conscious intention of selecting a body which reflects a diverse mixture with respect to race . . . and gender";<sup>92</sup> the speakers are likewise required to appoint from these lists "persons who approximate the population of the state with respect to race . . . and gender."<sup>93</sup> Each commission member serves a term of six years.<sup>94</sup>

Third, in 1994, the legislature created a new "judicial evaluation commission" to publish an evaluation of all judges before they run in their required retention referenda.<sup>95</sup> If the evaluation commission recommends that the public retain a judge, then the judge runs in a retention referendum.<sup>96</sup> If the commission does not recommend that the public retain a judge, however, then the general election laws apply and the judge runs in a contested, partisan election.<sup>97</sup> Given that judges who run in retention referenda virtually never lose,<sup>98</sup> the evaluation commission can make a big difference as to whether a judge stays on the bench. The evaluation commission is comprised of twelve members, only four of whom are non-lawyers.<sup>99</sup> The members are selected by the speakers and the Tennessee Judicial Council,<sup>100</sup> an advisory body created to advise the legislature on judicial administration.<sup>101</sup> Four of the members must be selected from lists proposed by many of the same special lawyers' organizations that propose names for the judicial nominating commission.<sup>102</sup> As with the nominating commission, those selecting the evaluation commission "shall endeavor to make appointments and submit nominees . . . that approximate the population of the state with respect to race and gender."<sup>103</sup> Evaluation commission members serve six-year terms.<sup>104</sup>

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90. *See id.*

91. *See id.* § 17-4-102(a)(6).

92. *Id.* § 17-4-102(d).

93. *Id.* § 17-4-102(b)(3). These statutory provisions, which appear to set forth racial and gender quotas for service on the judicial nominating commission, themselves raise constitutional questions. *See, e.g.,* *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 486 (1989) (striking down racial set aside in government contracting); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978) (opinion of Powell, J.) (striking down racial quota in medical school admissions).

94. *See* TENN. CODE ANN. § 17-4-106(a) (Supp. 2007).

95. *Id.* § 17-4-201.

96. *See id.* §§ 17-4-114(c), -115(c).

97. *See id.*

98. *See infra* text accompanying notes 107–08, 189–93.

99. *See* TENN. CODE ANN. § 17-4-201(b)(1)–(4) (Supp. 2007).

100. *See id.* § 17-4-201(b)(2)–(4).

101. *See id.* § 16-21-101.

102. *See id.* §§ 17-4-102(a)–(b), -201(b)(3)–(4).

103. *Id.* § 17-4-201(b)(7). These apparent racial and gender quotas may themselves be unconstitutional. *See supra* note 93.

Since the judicial evaluation commission was created in 1994, the commission has evaluated sixty-six judges. In every single one of these sixty-six evaluations, the commission recommended that the judge be retained.<sup>105</sup>

Since the Tennessee Plan was created in 1971, there have been 146 retention referenda.<sup>106</sup> In 145 of the 146 referenda, the public voted in favor of retention, a retention rate of 99.3%.<sup>107</sup> The only exception was in 1996, when 55% of the public voted against retaining a supreme court justice, Penny White.<sup>108</sup>

The Tennessee legislature permitted the statutes creating the judicial nominating and judicial evaluation commissions to expire on June 30, 2008.<sup>109</sup> Nonetheless, the commissions continue to operate until June 2009 under a provision of the law that allows them to wind down their activities for one year.<sup>110</sup> Unless the legislature acts to save the commissions next year, it

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104. See TENN. CODE ANN. § 17-4-201(b)(8) (Supp. 2007).

105. See TENN. JUDICIAL EVALUATION COMM'N, TENNESSEE APPELLATE JUDGES EVALUATION REPORT (1998) (on file with Tennessee Law Review) (recommending the retention of four supreme court justices, ten court of appeals judges, and twelve court of criminal appeals judges); TENN. JUDICIAL EVALUATION COMM'N, TENNESSEE APPELLATE JUDGES EVALUATION REPORT (2000), available at <http://www.tsc.state.tn.us/geninfo/JudEval/judeval2000.pdf> (last visited May 13, 2008) (recommending the retention of two court of appeals judges and four court of criminal appeals judges); TENN. JUDICIAL EVALUATION COMM'N, TENNESSEE APPELLATE JUDGES EVALUATION REPORT (2004) (on file with Tennessee Law Review) (recommending the retention of two court of appeals judges); TENN. JUDICIAL EVALUATION COMM'N, TENNESSEE APPELLATE JUDGES EVALUATION REPORT (2006), available at <http://www.tncourts.gov/geninfo/Publications/judeval/judEval2006b.pdf> (last visited May 13, 2008) (recommending the retention of three supreme court justices, twelve court of appeals judges, and twelve court of criminal appeals judges); TENN. JUDICIAL EVALUATION COMM'N, TENNESSEE APPELLATE JUDGES EVALUATION REPORT (2008), available at <http://www.tncourts.gov/geninfo/Publications/JudicialEvaluation/2008%20Final%20Report.pdf> (last visited May 13, 2008) (recommending the retention of two supreme court justices, two court of appeals judges, and one court of criminal appeals judge).

106. Telephone interview with Tim Gregory, Tennessee Division of Elections (Dec. 11, 2007) (transcript on file with Tennessee Law Review).

107. *Id.*

108. See SECRETARY OF STATE, TENNESSEE BLUE BOOK 1996–1997, at 543 (listing results for the August 1, 1996, general election). For an account of the controversial ruling that led to Justice White's defeat, see Carl A. Pierce, *The Tennessee Supreme Court and the Struggle for Independence, Accountability, and Modernization, 1974–1998*, in A HISTORY OF THE TENNESSEE SUPREME COURT 308–11 (James W. Ely Jr. ed., 2002).

109. The commissions were scheduled to expire on June 30, 2008, see TENN. CODE ANN. § 4-29-229(a)(46)–(47) (Supp. 2007), and after much hand wringing, the legislature refused to extend them. See, e.g., John Rodgers, *Wilder's Last Gasp on State Judges Falls Short*, NASHVILLE CITY PAPER, May 21, 2008, available at <http://www.nashvillecitypaper.com/news.php?viewStory=60360>; John Rodgers, *Wilder's Judicial Plan on Rocks as Senate Tempers Ignite*, NASHVILLE CITY PAPER, May 14, 2008, available at <http://www.nashvillecitypaper.com/news.php?viewStory=60187>.

110. See TENN. CODE ANN. § 4-29-112 (2005) (“Upon the termination of any governmental

appears that the Tennessee Plan will terminate at that time. If the legislature does not enact a new system in the meantime, the selection of appellate judges will most likely return by default to the prior system of contested elections.<sup>111</sup>

### III. LITIGATION AGAINST THE TENNESSEE PLAN

Although the Tennessee Plan has been in operation since 1971, the language from the 1870 Tennessee constitution that requires all judges in the state to be “elected by the qualified voters” has never been changed.<sup>112</sup> (Indeed, a proposed amendment that would have changed this language in favor of language providing for the Tennessee Plan was rejected by voters in 1977.<sup>113</sup>) For this reason, the Tennessee Plan has always operated under a cloud of legal uncertainty. Indeed, on three occasions since 1971, the Tennessee Plan’s constitutionality has been tested in litigation.<sup>114</sup>

The earliest and most important litigation was *State ex rel. Higgins v. Dunn*.<sup>115</sup> In *Dunn*, a supreme court justice, Larry Creson, passed away in June 1972, some two years before his term was set to expire on August 31, 1974.<sup>116</sup>

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entity under the provisions of this chapter, it shall continue in existence until June 30 of the next succeeding calendar year for the purpose of winding up its affairs. During that period, termination shall not diminish, reduce, or limit the powers or authorities of each respective governmental entity.”).

111. This is the case because the old statutory provisions requiring appellate judges to be selected by election are still on the books. *See, e.g.*, TENN. CODE ANN. § 17-1-103 (1994 & Supp. 2007) (“The judges of the supreme court, court of appeals, and court of criminal appeals are elected by the qualified voters of the state at large . . .”); *see also, e.g., id.* §§ 16-3-101, 16-4-102, 16-5-103. Although these provisions were repealed to the extent they conflict with the Tennessee Plan, *see* 1971 Tenn. Pub. Acts, ch. 198, § 17, the Tennessee Plan instructs the courts to return to contested elections if any provision of the Plan is held “invalid,” *see* 1994 Tenn. Pub. Acts, ch. 942, § 23. It is true that allowing part of the Tennessee Plan to expire is not the same thing as a court holding part of the Plan “invalid,” but it does suggest that the legislative intent behind the Tennessee Plan was to have all of it or none at all. This was also the assumption of one of the special courts that was asked to rule on the constitutionality of the Tennessee Plan; the special supreme court in *DeLaney* noted that, if the Tennessee Plan was by its terms inapplicable to a particular appellate vacancy, then the vacancy would be filled with a contested election. *See DeLaney v. Thompson*, 982 S.W.2d 857, 858 (Tenn. 1998) (“[T]he failure of the Commission to recommend the retention of any judge would render the Tennessee Plan inapplicable to the election to fill that judge’s seat, and the election therefore would be conducted as any other election (rather than as a ‘retention election’).”).

112. *See* TENN. CONST. art. VI, §§3, 4.

113. *See Constitutional Amendments Proposed by the Convention for Submission to the People, in THE LIMITED CONSTITUTIONAL CONVENTION OF 1977, STATE OF TENNESSEE, THE JOURNAL OF THE LIMITED CONSTITUTIONAL CONVENTION OF 1977* (see Article VI, § 4).

114. *See DeLaney v. Thompson*, 982 S.W.2d 857 (Tenn. 1998); *State ex rel. Hooker v. Thompson*, No. 01S01-9605-CH-00106, 1996 WL 570090 (Tenn. Oct. 2, 1996); *State ex rel. Higgins v. Dunn*, 496 S.W.2d 480 (Tenn. 1973).

115. 496 S.W.2d 480 (Tenn. 1973).

116. *See id.* at 482, 491.

Governor Winfield Dunn appointed Thomas Turley, Jr., to fill the position from a list of names submitted by the judicial nominating commission, but the governor did not make the appointment effective until September.<sup>117</sup> In the meantime, there was an August general election, and, despite the fact that there was no ballot question for the vacant supreme court position, Robert Taylor ran a write-in campaign for the seat.<sup>118</sup> The secretary of state certified Taylor to the position, the governor certified Turley, and the entire matter went to the Tennessee Supreme Court for resolution.<sup>119</sup> The court held both that the governor's appointment was invalid (because the governor could not appoint someone to a vacancy beyond the time for the next general election) and that the write-in election was invalid (because the supreme court position had not been put on the ballot).<sup>120</sup>

Although it did not appear necessary to its decision, the *Dunn* court also considered the constitutionality of the Tennessee Plan.<sup>121</sup> The court found the Plan constitutional for two reasons. First, the court found that it was constitutional for the governor to initially appoint judges—despite the language of the constitution requiring their election—because the constitution elsewhere gives the legislature the power to prescribe how “all vacancies not otherwise directed or provided by this Constitution” shall be filled.<sup>122</sup> In the court's view, when Justice Creson passed away, a vacancy was created, and the broad powers of this provision kicked in.<sup>123</sup> The court noted that governors had been filling interim vacancies for over one hundred years.<sup>124</sup>

Second, the court found that the “yes or no” retention referendum that takes place under the Tennessee Plan at the next scheduled election qualifies as an “election” under the constitutional provision requiring all judges to be “elected by the qualified voters.”<sup>125</sup> Although contested judicial elections had always been used under the 1870 constitution before the advent of the Tennessee Plan, the court noted that that the word “elected” in the constitution was not specifically defined, and, therefore, was ambiguous.<sup>126</sup> The court further noted that three other provisions of the constitution use the word “election” to refer to other ballot matters where voters are asked only a “yes or

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117. *See id.* at 482.

118. *See id.*

119. *See id.* at 482–83.

120. *See id.* at 487, 491.

121. *See id.* at 487.

122. *See id.* at 487–88 (quoting TENN. CONST. art. VII, § 4).

123. *See id.* at 488 (“[T]he Legislature as authorized by Article 7, Section 4, exercised the authority vested in it to make provision for ‘the filling of all vacancies not otherwise directed or provided for by this Constitution.’”).

124. *See id.* at 487–88.

125. *See id.* at 488 (quoting TENN. CONST. art. VI, § 3).

126. *See id.* at 489 (“The Constitution of Tennessee does not define the words, ‘elect’, ‘election’, or ‘elected’ and we have not found nor have we been referred to any provision of the Constitution or of a statute or to any decision of one of our appellate courts defining these words.”).

no” question;<sup>127</sup> in these provisions, voters are asked ballot questions such as whether to approve amendments to the constitution<sup>128</sup> or to authorize municipalities to lend credit.<sup>129</sup> In light of these other provisions, the court thought that the word “election” could encompass a “yes or no” vote for a public official as well.<sup>130</sup> This was especially the case in light of another provision of the constitution giving the legislature the power to direct the “manner” of “election of all officers . . . not otherwise directed or provided by this Constitution.”<sup>131</sup> The court concluded that, to the extent the legislature was given discretion in the constitution over prescribing the format of elections, the legislature was within its rights to choose retention referenda.<sup>132</sup>

One justice dissented in *Dunn*. Justice Humphreys argued that “the part of the Plan that does away with the popular election of judges, and substitutes a recall election, is so obviously contrary to the arrangement in our Constitution . . . for the people to have the right both to *nominate* and *elect* their constitutional officers” that the unconstitutionality of the Tennessee Plan was “obvious.”<sup>133</sup> Justice Humphreys came to this view because the constitution requires the election not only of judges, but of other civil officers, including members of the legislature.<sup>134</sup> He argued that, if members of the legislature can abolish contested elections for judicial positions, then presumably they could do so for other positions, including their own, a result that he thought was clearly inconsistent with the constitution.<sup>135</sup>

After *Dunn*, the Tennessee legislature repealed the Tennessee Plan insofar as it applied to “vacancies” on the supreme court.<sup>136</sup> The legislature would not reauthorize the Plan for supreme court vacancies until 1994,<sup>137</sup> and when it did, it inspired a new round of litigation over the Plan’s constitutionality. In 1996, the suits in *State ex rel. Hooker v. Thompson*<sup>138</sup> were filed by Lewis Laska and John Jay Hooker, two lawyers who wished to run for a seat then occupied by Justice Penny White (who, under the Tennessee Plan, would run only in a retention referendum).<sup>139</sup> The litigation went up to the Tennessee Supreme Court and was heard by a special panel of judges appointed by the

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127. *See id.*

128. *See* TENN. CONST. art. XI, § 3.

129. *See id.* art. II, § 29.

130. *See Dunn*, 496 S.W.2d at 489 (“It seems to us that if the Constitution itself denominates these methods of ratification as elections, it cannot be that Chapter 198 is unconstitutional because the elections therein provided for are limited to approval or disapproval.”).

131. TENN. CONST. art. VII, § 4.

132. *See Dunn*, 496 S.W.2d at 489.

133. *Id.* at 493 (Humphreys, J., dissenting).

134. *See id.*

135. *See id.*

136. *See* 1974 Tenn. Pub. Acts, ch. 433, § 1.

137. *See generally* 1994 Tenn. Pub. Acts, ch. 942.

138. No. 01S01-9605-CH-00106, 1996 WL 570090 (Tenn. Oct. 2, 1996).

139. *See id.* at \*1.

governor because all of the regular justices recused themselves.<sup>140</sup> The special court held the Tennessee Plan constitutional on the authority of *Dunn*.<sup>141</sup> The *Thompson* opinion has never, however, been published in the official Tennessee Supreme Court reporter.<sup>142</sup> As a result, it is not considered binding precedent.<sup>143</sup>

The final piece of significant litigation challenging the constitutionality of the Tennessee Plan came in 1998, in *DeLaney v. Thompson*.<sup>144</sup> In this case, a court of appeals judge planned to retire at the end of his term, and the plaintiff, Robert DeLaney, sought to run for his seat.<sup>145</sup> The state coordinator of elections denied his application for the seat, and DeLaney sued.<sup>146</sup> The trial court held the Tennessee Plan unconstitutional, not because it denied the voters an election, but because it restricted the candidates who could seek a position on an appellate court to those selected by the judicial nominating commission.<sup>147</sup> The court of appeals, sitting as a special court in light of the recusals of the regular members, reversed and upheld the Tennessee Plan on the authority and arguments of *Dunn* and *Thompson*.<sup>148</sup> But the Tennessee Supreme Court, sitting as a special court as well, reversed the court of appeals on other grounds, finding it unnecessary to reach the constitutional question.<sup>149</sup>

It is interesting to note that, despite all this litigation, a majority of the regularly constituted Supreme Court has never upheld the constitutionality of the Tennessee Plan. In both *Thompson* and *Dunn*, the justices that upheld the

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140. *See id.* at \*1 n.6.

141. *See Thompson*, 1996 WL 570090, at \*3 (“The issue of whether yes/no retention elections violate the Constitution of Tennessee has previously been decided by the Tennessee Supreme Court in the case of *State ex rel. Higgins v. Dunn*, and no compelling reason has been given to persuade this Court that it should disturb that ruling.” (citation omitted)).

142. *See generally Thompson*, 1996 WL 570090.

143. *See* TENN. SUP. CT. RULE 4(A)(1), (G)(1) (designating opinions not published in the Southwestern Reporter as “persuasive” and not “controlling” authority to all persons other than those who were parties to the case). Interestingly, although the *Thompson* opinion has never been published in the Southwestern Reporter, the special supreme court that decided the case designated it as “for publication.” I brought this discrepancy to the attention of the office of the Tennessee Attorney General (which is responsible for reporting supreme court decisions), and the office suggested that it may have committed an error by not publishing the opinion. The office also indicated that it might seek to correct the error by publishing the opinion now. If the *Thompson* opinion is eventually published in the Southwestern Reporter, it would presumably become binding precedent at that time.

144. 982 S.W.2d 857 (Tenn. 1998).

145. *See id.* at 858.

146. *See id.* at 859.

147. *See DeLaney v. Thompson*, No. 01A01-9806-CH-00304, 1998 WL 397363, at \*1 (Tenn. Ct. App. July 16, 1998) (noting that the Chancery Court found the Tennessee Plan unconstitutional because “it drastically limits the group of persons who can become appellate judges” and “virtually insures the name of the incumbent on the ballot”).

148. *See id.* at \*5–8.

149. *See DeLaney*, 982 S.W.2d at 861 (holding that “the Tennessee Plan was inapplicable to the election to fill [the appellate judge’s] seat”).

constitutionality of the Plan were comprised largely of special justices appointed to hear only those particular cases.<sup>150</sup> In *Thompson*, as I noted, all five justices recused themselves and the governor named special justices to replace them.<sup>151</sup> In *Dunn*, two of the five justices who heard the case were special justices, including two of the four justices who comprised the majority that upheld the Plan.<sup>152</sup> Although, as a formal legal matter, decisions by special justices are just as binding as those rendered by regular justices,<sup>153</sup> the fact that the Plan has never been upheld by a regular court has only added to its controversy.

#### IV. IS THE TENNESSEE PLAN CONSTITUTIONAL?

As noted above, under the 1870 Tennessee constitution, all judges in the state must be “elected by the qualified voters.”<sup>154</sup> For most of Tennessee’s history, that meant judges were initially placed into new terms and retained for subsequent terms through contested elections.<sup>155</sup> Under the Tennessee Plan, however, judges are initially placed into new terms by gubernatorial appointment, and judges are retained for subsequent terms by retention referenda.<sup>156</sup> The question is whether these two devices—initial appointment by the governor and the retention referendum—are consistent with the constitutional requirement that all judges be “elected.”

As explained below, it is hard to see how these devices are consistent with the constitution. Moreover, to the extent any uncertainty existed over the meaning of the Tennessee constitution, that uncertainty was arguably resolved by the people of Tennessee in 1977 when they rejected an amendment to the constitution that would have replaced the provision requiring elected judges with one that would have permitted the Tennessee Plan.<sup>157</sup> Indeed, of the seventeen states that select judges by some mechanism of appointment followed by a retention referendum, Tennessee is the only one that has not revised its constitution to change a provision requiring elections in favor of a provision setting forth the appointment-retention mechanism.<sup>158</sup>

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150. Although it is beyond the scope of this paper to address this question, it is interesting to ask whether it is comports with the Due Process Clause of the U.S. Constitution to permit the governor, as he did in the *Thompson* case, to appoint an entire supreme court to hear a single case *after* the issue in that case is already known. In these circumstances, the governor has an unusual power to control the outcome of the case by appointing judges sympathetic to his views.

151. See *supra* text accompanying note 140.

152. See *Dunn*, 496 S.W.2d. at 491 (noting that Justices McAmis and Wilson joined the majority as special justices).

153. See *Ridout v. State*, 30 S.W.2d 255, 257 (1930).

154. TENN. CONST. art. IV, §§ 3, 4.

155. See *supra* text accompanying notes 44.

156. See *supra* text accompanying notes 76–104.

157. See *infra* text accompanying notes 204–11.

158. See *infra* notes 212–13 and accompanying text.

A. *Are Judges “Elected” if They are Initially Appointed by the Governor?*

Under the Tennessee Plan, judges are initially placed on the bench through an appointment by the governor,<sup>159</sup> and they can serve for as long as two years before they are put before the people in retention referenda.<sup>160</sup> Yet, Article VI of the 1870 Tennessee constitution requires that all state judges be “elected by the qualified voters.”<sup>161</sup> How can the two be reconciled?

The answer given by the *Dunn* court<sup>162</sup> refers to another part of the 1870 Tennessee constitution, Article VII, which states that “the filling of all vacancies not otherwise directed or provided by this Constitution . . . shall be made in such manner as the legislature shall direct.”<sup>163</sup> But if the constitution permits the legislature to fill judicial “vacancies” however it wishes, then what effect would be left for the provision of the constitution requiring judicial elections? That is, if any time a judge left office and a position became open the legislature could empower the governor to appoint a replacement, then the provision regarding vacancies would nullify the provision requiring an elected judiciary.

The solution to this puzzle is that the authors of the 1870 constitution did not intend the word “vacancies” in Article VII to include a judicial position that becomes available because a judge has served his or her entire term and chooses not to run for reelection. Rather, the authors of the 1870 constitution intended “vacancies” to mean interim judicial positions that became available in the middle of a term, such as by the death or resignation of a judge. Appointment is a common mechanism by which to fill interim vacancies in states that otherwise elect office holders; it is often thought too expensive and too cumbersome to hold a special election every time a someone leaves office early.<sup>164</sup> Indeed, the Tennessee constitution explicitly prohibits special elections for judges.<sup>165</sup>

159. See TENN. CODE ANN. § 17-4-112(a) (2004 & Supp. 2007) (“When a vacancy occurs in the office of an appellate court . . . by death, resignation or otherwise, the governor shall fill the vacancy by appointing one (1) of three (3) persons nominated by the judicial selection committee . . .”).

160. See TENN. CODE ANN. § 17-4-112(b) (2004 & Supp. 2007) (“The term of a judge appointed under this section shall expire on August 31 after the next regular August election occurring more than thirty (30) days after the vacancy occurs.”).

161. TENN. CONST. art. VI, §§ 3, 4.

162. See *Shriver ex rel Higgins v. Dunn*, 496 S.W.2d 480, 487 (Tenn. 1973).

163. TENN. CONST. art. VII, § 4.

164. See Joseph A. Colquitt, *Rethinking Judicial Nominating Commissions*, 34 *FORDHAM URB. L. J.* 73, 77 (2007) (“The death or resignation of a judge from the active bench seriously disrupts the work of the court, and the speedy selection of a replacement is important to the litigants and the public. Most, perhaps virtually all, of these interim vacancies are filled by gubernatorial appointment. In a few states, the legislature makes the appointment. Alternatively, a state could choose a special election, but that method entails uncertainty, delay, and costs. Appointment is the better method of filling vacancies.”); Daniel R. Deja, *How Judges are Selected*, 75 *MICH. B.J.* 904, 906 (1996) (“Judges die or resign from office on

It is apparent from a neighboring provision in Article VII that the authors of the 1870 constitution used the word “vacancies” there to refer only to interim vacancies. The neighboring provision states that “[n]o appointment . . . to fill a vacancy shall be made for a period extending beyond *the unexpired term.*”<sup>166</sup> By limiting the legislature’s ability to fill vacancies only for the rest of an “unexpired term,” the authors of the 1870 constitution indicated that they intended for the legislature to fill only those vacancies *with* unexpired terms—i.e., only those that occur in the middle of a term (such as by death or resignation) and not those that occur when a judge serves his or her entire term but chooses not to run for reelection (in which case there is no “unexpired term” remaining).

Thus, to the extent the Tennessee Plan permits the governor to appoint a new judge to a position created when the previous judge served his or her full term, the Plan would appear unconstitutional.

None of the courts that have considered the constitutionality of the Tennessee Plan have addressed this point. Indeed, not only has this point never been addressed, but the two Tennessee Supreme Court opinions that upheld the Tennessee Plan are not even necessarily to the contrary. In both *Dunn* and *Thompson*, the vacancy occurred in the middle of a term.<sup>167</sup> There is no doubt that this is the kind of vacancy that the Tennessee constitution permits the legislature to fill in whatever manner it chooses.<sup>168</sup> With respect to other vacancies, however—those that occur when a judge completes his or her term and does not run for reelection—it is hard to see how the initial appointment device of the Tennessee Plan is constitutional.

#### B. Are Retention Referenda “Elections”?

As the supreme court in *Dunn* noted, the 1870 constitution does not explicitly say whether a retention referendum qualifies as an “election.”<sup>169</sup> The court thought, however, that the constitution answered this question elsewhere. The court found three provisions in the constitution where the word “election” is used to describe a vote that, much like a retention referendum,

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schedules that are determined by factors other than the dates of general elections. The cost and time needed to schedule special elections is generally prohibitive. The presumption is that gubernatorial appointment is a more expedient and cost-efficient means of filling judicial vacancies.”)

165. See TENN. CONST. art. VII, § 5 (“No special election shall be held to fill a vacancy in the office of Judge . . .”).

166. *Id.* (emphasis added).

167. See *State ex rel Higgins v. Dunn*, 496 S.W.2d 480, 482, 491 (Tenn. 1973); *State ex rel Hooker v. Thompson*, 1996 WL 570090, at \*1 n.1 (Tenn. Oct. 2, 1996) (noting that Justice White had been initially appointed to fill the unexpired term of Justice O’Brien).

168. See TENN. CONST. art. VII, § 4 (“[T]he filling of all vacancies not otherwise directed or provided by the Constitution, shall be made in such manner as the Legislature shall direct.”).

169. *Dunn*, 496 S.W.2d at 487.

poses only a yes-or-no question to the voters.<sup>170</sup> One of these provisions requires an “election” to authorize a municipal government to loan its credit to others;<sup>171</sup> another requires amendments to the constitution to be approved “at an election”;<sup>172</sup> and another requires a variety of other municipal acts to be ratified “in an election.”<sup>173</sup> In each of these instances, the constitution refers not to a vote that is contested between two people, but to one that asks for an up or down decision by the voters. The court extrapolated from these three provisions to conclude that the retention referendum mechanism in the Tennessee Plan qualified as an “election” as well.<sup>174</sup>

There are several difficulties with extrapolating from these three examples to a conclusion that the word “election” in Article VI must include uncontested, yes-or-no votes on the tenure of public officials. The first difficulty is the one raised by Justice Humphreys in *Dunn*: If a retention referendum can be an “election” for judges, why not also for other public officials, such as legislators or even the governor?<sup>175</sup> The majority did not respond to this argument, and there is good reason for that: The argument is hard to answer. One might be able to distinguish the constitutional provision requiring the election of legislators from that requiring the election of judges: The former says that the legislature shall be “dependent on the people,”<sup>176</sup> whereas the latter says that judges “shall be elected,”<sup>177</sup> and one might argue that the former implies a different, more democratic form of election than the latter. It is quite difficult, however, to distinguish the provision requiring the election of the governor. Like the provision for judges, the provision for the governor says simply that the “governor shall be elected.”<sup>178</sup> Thus, if *Dunn* is correct, then the legislature might permit governors to win second terms in uncontested retention referenda—a proposition few would believe is consistent with the democratic guarantees of the Tennessee constitution.

There are other difficulties with the *Dunn* analysis. For example, two of the three examples relied upon by the court were not even part of the 1870 constitution; they were added many decades later, in 1953.<sup>179</sup> These two examples are, therefore, of little probative value in discerning what the authors of the 1870 constitution meant when they used the word “elected.” In addition, all three examples relied upon in *Dunn* involved votes on ballot propositions as opposed to votes on public officials. Voting on ballot propositions has almost always taken place in the form of yes-or-no votes—the

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170. *See id.* at 489.

171. TENN. CONST. art. II, § 29.

172. *Id.* art. XI, § 3.

173. *Id.* art. XI, § 9.

174. *See Dunn*, 496 S.W.2d at 489.

175. *See id.* at 493 (Humphreys, J., dissenting).

176. TENN. CONST. art. II, § 3.

177. *Id.* art. VI, §§ 3, 4.

178. *Id.* art. III, § 4.

179. *See id.* art. XI, §§ 3, 9.

proposition is either agreed to or not.<sup>180</sup> By contrast, voting for public officials has rarely taken place—and, for most of American history, had never taken place—in the yes-or-no form.<sup>181</sup> The fact that the 1870 constitution once uses the word “election” to refer to a yes-or-no vote in the ballot proposition context, where such votes have almost always taken place in the yes-or-no form, does not answer the question whether the word “election” means the same thing in the different context of public officials, where such votes have almost never taken place in the yes-or-no form.

But perhaps the greatest difficulty with the conclusion that the authors of the 1870 constitution intended the word “election” to include retention referenda is that such referenda appear to have been unknown in the United States at that time. The first retention referendum was adopted in the United States in 1934,<sup>182</sup> and the very idea of a retention referendum for public officials was not even conceived until 1914, when it was first proposed by a law professor at Northwestern University.<sup>183</sup> It is, obviously, impossible for the authors of the 1870 constitution to have intended that document to encompass something that did not yet exist. No court considering the constitutionality of the Tennessee Plan has addressed this point.

Of course, the authors of the 1870 constitution did not know many of the things that we know today. Many scholars believe it would be cumbersome and impractical to force legislatures to amend their constitutions every time they wanted to take advantage of a new idea or a new technology; these scholars believe that the meanings of constitutional provisions should change over time to encompass new ideas so long as the new ideas serve the old purposes.<sup>184</sup> This reasoning is especially appropriate in this case because, as

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180. The only possible exception of which I am aware is the dilemma that is occasionally created by “conflicting ballot propositions.” See Philip L. Dubois & Floyd Feeney, *LAWMAKING BY INITIATIVE* 158–163 (1998). In a small handful of states, voters can be given a choice between two competing ballot questions. See *id.* at 160–61 (listing the states of Washington, Maine, Mississippi, and Massachusetts). This practice has never been followed in Tennessee, see *id.* at 158–163, and, even in the states in which it is practiced, it arose during the Progressive Era and well after the 1870 constitution was written. See ME. CONST. art. IV, pt. 3, § 18 (approved in 1909); MASS. CONST. amend. Art. XLVIII, Init., pt. 6 (approved in 1918); MISS. CONST. art. 15, § 273 (approved 1912); WASH. CONST. art. II, § 1 (amended in 1911).

181. See *infra* notes 182–83 and accompanying text.

182. See CARBON & BERKSON, *supra* note 51, at 11.

183. See *id.* at 2. Of course, other mechanisms of removing public officials from office were well known in 1870, including impeachment and recall. Until the Progressive Era, however, it appears that neither of these mechanisms had ever been placed directly in the hands of the electorate. Thus, even the closest analogue to the retention referendum—the recall election—post-dated the 1870 Convention. See Rod Farmer, *Power to the People: The Progressive Movement for the Recall 1890s–1920*, 57 NEW ENG. J. HIST. 59, 62, 64 (2001); Joshua Spivak, *California’s Recall: Adoption of the “Grand Bounce” for the Elected Officials*, CAL. HIST., Mar. 22, 2004, at 22.

184. See, e.g., Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 395 (1997) (noting that many scholars and judges believe that the Constitution should be interpreted “by

the *Dunn* court noted, the 1870 constitution explicitly confers flexibility on the legislature in deciding the “manner” in which judicial elections should take place where the constitution does not otherwise provide.<sup>185</sup> Thus, even though the retention referendum was unknown in 1870, the device nonetheless may be constitutional because it serves the democratic purposes of the 1870 constitution just as well as contested elections do. There are a number of reasons, however, to doubt that retention referenda do a very good job of facilitating democratic accountability.

First among these reasons is the fact that retention referenda were originally designed to *insulate* judges from public accountability. The architects of merit selection in the early nineteenth century favored life tenure for judges, but feared that the post-Jacksonian public would no longer accept this as they once had.<sup>186</sup> Thus, the architects of merit selection came up with what some scholars have concluded was a “sop” to the public: the retention referendum.<sup>187</sup> That is, the retention referendum was designed to make the public feel as though they had a role in selecting their judges but make it unlikely they would exercise that role by voting a judge off the bench.<sup>188</sup>

The experience with retention referenda has vindicated its design. Scholars have found that judges virtually never lose retention referenda. In the most comprehensive study, which examined over thirty years of data in ten states, judges running in retention referenda were returned to office 98.9% of the time.<sup>189</sup> Even that incredibly high number is misleading, however, because over half of the defeats were from Illinois, a state that requires judges to win 60% of the vote rather than a mere majority (as do Tennessee and most other states) in order to stay on the bench.<sup>190</sup> Removing the Illinois defeats from the data where the judges won more than 50% but less than 60% of the vote yields a retention rate of 99.5%.<sup>191</sup> By contrast, judges who run for reelection in states that use contested elections are defeated much more often. One comprehensive study of state supreme court races between 1980 and 2000 showed that justices running for reelection in states that use partisan elections were defeated nearly 23% of the time—a full *thirteen times* as often as justices

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‘translating’ the Framers’ concepts into modern circumstances”).

185. TENN. CONST. art. VII, § 4 (“The election of all officers . . . not otherwise directed or provided by this Constitution, shall be made in such manner as the legislature shall direct.”).

186. See CARBON & BERKSON, *supra* note 51, at 6, 8.

187. See, e.g., *id.* at 8, 10 (noting that the architects “perceived retention as a ‘sop’ to those committed to electoral control over the judiciary”).

188. See, e.g., Michael R. Dimino, *The Futile Quest for a System of Judicial “Merit” Selection*, 67 ALB. L. REV. 803, 806 (2004) (“Merit selection uses the public as participants in what is predetermined to be a useless exercise designed to ensure the retention of the incumbent.”).

189. See Aspin, *supra* note 63, at 79 (finding that only fifty two out of 4,588 judges were not retained).

190. See *id.*

191. See *id.*

running in retention referenda over the same period.<sup>192</sup> As the author of that study has noted, in states that use contested elections, “supreme court justices face competition that is, by two or three measures, equivalent if not higher to that for the U.S. House.”<sup>193</sup>

The experience in Tennessee is in line with these studies. As noted above, there have been 146 retention referenda in Tennessee, and in every single referendum but one (99.3%), the voters retained the incumbent.<sup>194</sup>

It is unclear why the public so infrequently votes against retention. One possible theory is that, without another candidate in the race, there is no one with an interest in providing information to the public about the incumbent.<sup>195</sup>

Another possible theory is that, in this atmosphere of inadequate information, the absence of a political trademark—affiliation with a political party—makes it especially hard for voters to assess whether to retain a public official.<sup>196</sup>

Finally, some commentators believe that voters are reluctant to vote against an incumbent if they have no idea who will replace the incumbent—“the devil you know is preferable to the devil you don’t.”<sup>197</sup> Regardless of the reason for the high rates of retention, scholars have concluded that, in light of the fact that these judges are a virtual lock to keep their seats, “those who maintain that retention elections serve to insulate judges from popular control seem to be correct.”<sup>198</sup>

It should be noted that the Tennessee Plan is a bit different from many of the merit selection plans used in other states insofar as judges appointed under the Plan do not automatically run in retention referenda. Rather, they do so only if the judicial evaluation commission recommends that the public retain them; if the commission votes the other way, they must run in a contested election.<sup>199</sup> Thus, in assessing the accountability offered by the Tennessee Plan, the fact that the commission might not grant some judges the security of retention referenda should be considered. It appears, however, that this feature of the Tennessee Plan has not transformed it into a device of democratic

192. See Melinda Gann Hall, *Competition as Accountability in State Supreme Court Elections*, in *RUNNING FOR JUDGE 177* (Matthew Streb ed., 2007) (finding that 22.9% of state supreme court incumbents were defeated in partisan elections while only 1.8% of incumbents were defeated in retention referenda between 1980 and 2000).

193. Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 AM. POL. SCI. REV. 315, 319 (2001).

194. See *supra* text accompanying notes 107–08.

195. See, e.g., Dimino, *supra* note 188, at 805 (“By removing challengers from the ballot, retention races eliminate the public figures most likely to motivate and organize opposition to the incumbent.”).

196. Political scientists believe “that the most important cue for voters is political party affiliation. Party labels are signals . . . and voters rely heavily on them.” Kritzer, *supra* note 6, at 433 (footnote omitted).

197. See STUMPF, *supra* note 6, at 170 (“You can’t beat somebody with nobody.”).

198. William K. Hall & Larry T. Aspin, *What Twenty Years of Judicial Retention Elections Have Told Us*, 70 JUDICATURE 340, 347 (1987).

199. See TENN. CODE ANN. §§ 17-4-114(c), -115(c) (Supp. 2007).

accountability. Since the commission was created in 1994, it has rendered sixty-six evaluations.<sup>200</sup> In every single one, the commission recommended that the judge be retained.<sup>201</sup>

Despite the limitations of retention referenda, there are some reasons to think that they are no less democratic than the contested elections that preceded them. Although judges who run in referenda are virtually guaranteed to win, they nonetheless report on surveys that the prospect of running in the referenda influences their decisions on the bench.<sup>202</sup> Thus, it is possible that retention referenda produce judges that are accountable to the public even though they do not produce judges who get defeated. Moreover, it bears reiterating that, even when contested elections were used to select appellate judges in Tennessee, the races were often not very spirited. As noted above most judges still came to the bench through gubernatorial appointment, and, in a state that was for a long time controlled by one political party, even the reelection campaigns often were not contested.<sup>203</sup> Thus, even if retention referenda are largely coronations, it is not entirely clear that, at least as an historical matter, contested elections were much different. For this reason, the case against the constitutionality of the Tennessee Plan's provision for retention referenda is not as strong as it is against the provision calling for gubernatorial appointment of all appellate judges in the first instance.

### C. *What About the Failed Amendment of 1977?*

Much of the uncertainty over the constitutionality of the Tennessee Plan might have been resolved in 1977. That year, a limited Constitutional Convention proposed to the people of Tennessee thirteen separate amendments to the Tennessee constitution.<sup>204</sup> The thirteen amendments covered topics as diverse as repealing the 1870 constitution's ban on interracial marriage to repealing the 1870 constitution's prohibition on charging interest rates of more than 10%.<sup>205</sup> One of the amendments would have made several changes to the judiciary, including repeal of the 1870 constitution's requirement that all judges "shall be elected" in favor of a provision stating that "Justices of the Supreme Court and judges of the Court of Appeals shall be appointed by the Governor from three nominees recommended . . . by the Appellate Court Nominating Commission" and that "[t]he name of each justice and judge seeking retention shall be submitted to the qualified voters for retention or rejection . . . at the expiration of each six year term."<sup>206</sup> In other words, the

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200. See *supra* note 105 and accompanying text.

201. See *id.*

202. See Larry T. Aspin & William K. Hall, *Retention Elections and Judicial Behavior*, 77 JUDICATURE 306, 312–13 (1994).

203. See Parks, *supra* note 36, at 629–30.

204. See LASKA, *supra* note 73, at 23–25.

205. See *id.* at 24–25.

206. See Governor Ray Blanton, *Proclamation by the Governor*, in THE LIMITED

proposed amendment would have replaced the constitution's requirement of an elected judiciary with the Tennessee Plan.

Voters approved each of the thirteen proposed amendments submitted to the public from the 1977 Convention *except* the amendment that would have inserted the Tennessee Plan into the constitution.<sup>207</sup> As one historian has noted, this amendment "became the first amendment ever offered by a limited convention to face voter rejection."<sup>208</sup>

The fact that voters rejected putting the Tennessee Plan into the constitution when given the chance is a powerful, but not conclusive, point in favor of the view that the Tennessee Plan is unconstitutional. The amendment containing the Tennessee Plan would have made many other significant changes to the judicial branch, including the designation of a uniform jurisdiction for all trial courts and the creation of a statewide public defender program.<sup>209</sup> It is possible that the voters favored the Tennessee Plan but rejected the amendment for the other changes it would have made to the judicial branch. Indeed, the Tennessee Plan does not appear to have been the most controversial part of the proposed amendment.<sup>210</sup> It is also possible that the voters favored the Tennessee Plan but rejected the amendment because they thought the constitution *already* permitted the Plan.

Despite the ambiguous meaning of rejected constitutional amendments, it is certainly not uncommon to use them to interpret the meaning of a constitution.<sup>211</sup> Nonetheless, the Tennessee Supreme Court has never addressed the events of 1977 in any of its opinions regarding the constitutionality of the Tennessee Plan. This is even more surprising in light of the constitutional experience of other states with similar methods of judicial selection. Of the seventeen states that rely upon appointment by the governor followed by a retention referendum,<sup>212</sup> Tennessee is the *only one* that has not

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CONSTITUTIONAL CONVENTION OF 1977, STATE OF TENNESSEE, THE JOURNAL OF THE DEBATES OF THE LIMITED CONSTITUTIONAL CONVENTION OF 1977 (see Proposal 13, § 4).

207. See LASKA, *supra* note 73, at 25–26.

208. *Id.* at 26.

209. See *id.* ("All trial courts were to have uniform jurisdiction, and the legislature was restricted in creating new types of courts; the Missouri Plan was approved for appellate judges. Provision was made for a chief court administrator. The legislature was required to set up a statewide public defender program.").

210. See *id.* at 24–25.

211. See, e.g., *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 111 (1996) (Souter, J., dissenting) ("If the Framers had meant the Amendment to bar federal-question suits as well, they could not only have made their intentions clearer very easily, but could simply have adopted the first post-*Chisholm* proposal, introduced in the House of Representatives by Theodore Sedgwick . . ."); David B. Kopel, *It Isn't About Duck Hunting: The British Origins of the Right to Arms*, 93 MICH. L. REV. 1333, 1357 (1995) (arguing that "the 'National Guard' interpretation of the Second Amendment amounts to an Orwellian reversal [by] treating the enacted Amendment that guarantees the right of the people as having a meaning identical to a proposed but rejected amendment dealing with the rights of states").

212. The seventeen states are: Alaska, Arizona, California, Colorado, Florida, Indiana,

revised its constitution to change a requirement of an elected judiciary in favor of a provision setting forth the appointment-retention mechanism.<sup>213</sup> Courts often interpret constitutions in light of how neighboring jurisdictions have treated similar provisions in their own constitutions.<sup>214</sup> When the voters' decision in 1977 is juxtaposed against the experience in every other state, it becomes even harder to conclude that the Tennessee Plan is consistent with the constitution. Again, although this point might not be dispositive on its own, when combined with the other serious doubts about the Tennessee Plan, the case against its constitutionality becomes close to compelling.

## V. CONCLUSION

Ever since it was enacted in 1971, the Tennessee Plan has been controversial, and its greatest controversy has always been whether it is constitutional. Although the Tennessee Supreme Court has twice said that it is, neither of these decisions was supported by a majority of regular supreme court justices, one decision was unpublished and therefore is not even binding, and, most importantly of all, both of these decisions left serious constitutional questions unanswered. The most serious of these questions is how the constitution's requirement that all judges be "elected" can be squared with the Plan's requirement that all judges be appointed by the governor. Although the constitution permits the governor to appoint judges to "vacancies," it seems rather clear that the constitution means only interim vacancies. Thus, to the extent the Tennessee Plan calls for the governor to appoint judges to positions where their predecessors completed their full terms, it is hard to come to any conclusion other than that the Tennessee Plan is unconstitutional.

There are also serious doubts that the feature of the Tennessee Plan requiring judges to run for reelection in uncontested retention referenda is consistent with the constitution. Although these doubts are not as strong as those surrounding the feature of the Plan requiring gubernatorial appointment, when combined with the fact that the voters of Tennessee rejected a constitutional amendment that would have explicitly adopted the Tennessee

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Iowa, Kansas, Maryland, Missouri, Nebraska, New Mexico, Oklahoma, South Dakota, Tennessee, Utah, and Wyoming. See American Judicature Society, *Methods of Judicial Selection: Selection of Judges State-by-State Report*, available at [http://www.judicialselection.us/judicial\\_selection/methods/selection\\_of\\_judges.cfm?state=](http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=) (last visited Feb. 25, 2008).

213. See ALASKA CONST. art. IV, §§ 5, 6; ARIZ. CONST. art. VI, §§ 37, 38; CAL. CONST. art. VI, § 16(d); COLO. CONST. art. VI, §§ 20, 25; FLA. CONST. art. V, §§ 10, 11; IND. CONST. art. VII, §§ 10, 11; IOWA CONST. art. V, §§ 15, 17; KAN. CONST. art. III, § 5; MD. CONST. art. IV, § 5A; MO. CONST. art. V, § 25; NEB. CONST. art. V, § 21; N.M. CONST. art. VI, §§ 33, 35; OKLA. CONST. art. VII, § 3; S.D. CONST. art. V, § 7; UTAH CONST. art. VIII, §§ 8, 9; WYO. CONST. art. V, § 4.

214. See, e.g., *Richardson v. Tenn. Bd. of Dentistry*, 913 S.W.2d 446, 453 (Tenn. 1995) ("careful[ly] examin[ing] cases . . . in other states" to resolve a question of Tennessee constitutional law).

Plan, these doubts, too, become compelling. It is rare that we have explicit instructions from the body politic as to what a constitutional provision means; the public's rejection of the 1977 amendment is often as close as we ever come.

For these reasons, I am persuaded that the best reading of the Tennessee constitution is one that holds the Tennessee Plan unconstitutional. If we are to have merit selection in Tennessee, then the proponents of merit selection should do what they could not do in 1977: persuade the voters to pass a constitutional amendment. Until then, the legislature—duty bound as it is to uphold the Tennessee constitution<sup>215</sup>—should do what it needs to do to return the selection of appellate judges to contested elections. The easiest way to accomplish this task would be to take no action in June 2009 when the operative pieces of the Tennessee Plan—the judicial nominating and evaluation commissions—are scheduled to terminate.<sup>216</sup> If the legislature allows the commissions to terminate—and does not adopt a new system in the meantime—then appellate judges in Tennessee should revert by default to initial selection and retention in contested elections.<sup>217</sup> In short, as the Wall Street Journal recently put it, “the best thing [the legislature] can do is nothing at all.”<sup>218</sup> +

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215. See TENN. CONST. art. X, § 2 (“Each member of the Senate and House of Representatives, shall before they proceed to business take an oath or affirmation to support the Constitution of this State . . .”).

216. See *supra* notes 109–10 and accompanying text.

217. See *supra* note 111.

218. *Tennessee's Trial Run*, WALL ST. J., May 10, 2008, at A10.

+ [EDITOR'S NOTE: Professor Penny White and Malia Reddick, Ph.D., have written a response to this Essay. It may be found at 75 TENN. L. REV. 501 (2008). In addition, Professor Fitzpatrick has written a reply to their response, which is posted at <http://papers.ssrn.com/abstract=1152413>.]