

# Errors, Omissions, and the Tennessee Plan

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In the Spring 2008 issue of the Tennessee Law Review, I wrote an essay questioning whether Tennessee’s method for selecting appellate judges, the “Tennessee Plan,” satisfies the requirements of the Tennessee Constitution.<sup>1</sup> The Tennessee Constitution requires all judges to be “elected by the qualified voters” of the state,<sup>2</sup> yet, under the Plan, all appellate judges are initially selected by gubernatorial appointment and then retained in uncontested ref-

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1. See Brian T. Fitzpatrick, *Election as Appointment: The Tennessee Plan Reconsidered*, 75 TENN. L. REV. 473 (2008).

2. TENN. CONST. art. VI, §§ 3, 4.

erenda.<sup>3</sup> Although the Tennessee Supreme Court has twice rejected challenges to the Plan, I argued that the court has not yet considered three very serious questions about the Plan's constitutionality.<sup>4</sup> In my view, these questions are not easily answered, and they suggest that the Tennessee Plan is unconstitutional. For this reason, I recommended that the legislature refuse to reauthorize the Plan when it expires in June of 2009.<sup>5</sup>

Two very distinguished authors, Penny White, a former Tennessee Supreme Court Justice, and Malia Reddick, a researcher at the American Judicature Society,<sup>6</sup> have published a colorful response to my essay.<sup>7</sup> I have the greatest respect for both Justice White and Ms. Reddick, and I very much appreciate the time they took to read my essay and to comment on it. Unfortunately, however, I found much of their response more colorful than careful. Justice White's portion of the response, which argued that the Tennessee Plan is constitutional, in particular suffered from factual errors, misunderstandings of my essay, and methodological uncertainty.<sup>8</sup> Although Ms. Reddick's portion of the response did not suffer from the same flaws, her arguments in favor of the Tennessee Plan did not purport to relate to the constitutional questions I raised in my essay but, rather, to points of public policy.<sup>9</sup> Nonetheless, as the legislature will no doubt consider points of public policy as well as constitutional law when it decides whether to reauthorize the Plan in 2009, I think it is important to note that Ms. Reddick's analysis may have overstated the case for so-called "merit selection" systems, of which the Tennessee Plan is one. Most particularly, very few of the studies on which Ms. Reddick based her analysis attempted to assess whether the differences they observed between elected and merit-selected judges were statisti-

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3. See TENN. CODE ANN. §§ 17-4-101, -102, -114 to -116 (1994 & Supp. 2007).

4. See Fitzpatrick, *supra* note 1, at 490-99.

5. See *id.* at 500.

6. "[T]he American Judicature Society ha[s] run national campaigns to promote the merit [selection] plan." F. Andrew Hanssen, *On the Politics of Judicial Selection: Lawyers and State Campaigns for the Merit Plan*, 110 PUBLIC CHOICE 79 (2002).

7. See Penny J. White & Malia Reddick, *A Response to Professor Fitzpatrick: The Rest of the Story*, 75 TENN. L. REV. 501 (2008).

8. See *infra* Parts I and II.

9. See *infra* Part III.

cally significant (let alone attempted to control for all of the other relevant variables that may have caused those differences).

In Part I of this reply, I show that much of Justice White's response was based on factual assertions that are false. In Part II, I show that Justice White's constitutional arguments suffer from both misunderstandings of my essay and methodological uncertainty. In Part III, I respond to the policy points raised by Ms. Reddick and argue that she overstates the evidence in favor of so-called "merit selection" systems like the Tennessee Plan. Finally, in Part IV, I offer a few conclusions about the future of judicial selection in Tennessee.

### I. SOME FACTS ABOUT THE TENNESSEE PLAN

Justice White began her response by stating that my essay "misinform[ed]" and "misle[d]" readers on "the mechanics" of the Tennessee Plan. Justice White said my essay did this because it described the Plan as "controvers[ial]" and asserted (she said "without attribution") that "'many people doubt' whether it has accomplished its [intended] purposes."<sup>10</sup> I do not believe my characterizations of the Tennessee Plan are misinformed or misleading. Rather, as I explain below, I believe that Justice White's assertions otherwise are based on factual claims that are untrue.<sup>11</sup>

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10. White & Reddick, *supra* note 7, at 501 n.2.

11. Justice White also claimed that I "misle[d]" readers by "suggesting that the Tennessee General Assembly's decision to move to a merit selection system for appellate judges was a response to changes in other states." White & Reddick, *supra* note 7, at 501 n.2. In doing so, she said I "ignore[d] the myriad of circumstances that led to the 1971 legislation." *Id.* It is difficult to know what to make of these colorful claims. All I said was that "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.'" Fitzpatrick, *supra* note 1, at 473. As Ms. Reddick herself pointed out later in the response, it is a fact that Tennessee was not the first state to adopt merit selection but did so only after a number of other states. *See* White & Reddick, *supra* note 7, at 536 (noting that "Missouri . . . first established what it termed the 'Nonpartisan Court Plan' in 1940" and "[d]uring the 1960s and 1970s, twenty-three jurisdictions [including Tennessee] adopted what had become known as the 'Missouri Plan' or 'merit selection'"). Indeed, Justice White herself acknowledged as much when she noted that the Governor who signed the Tennessee Plan into law called it the "modified Missouri Plan." *Id.* at 512. I have no idea why Justice White thinks I have "misle[d]" anyone or "cherry pick[ed]"

To begin with, I did, in fact, make an attribution for my assertion that many people question the effectiveness of the Tennessee Plan. In footnote six of my original essay, I noted that the governor of Tennessee recently sued the commission of lawyers that nominates judges under the Plan because the commission was not furthering one of the intended purposes of the Plan: to bring more racial diversity to the bench.<sup>12</sup> In addition, in the same footnote, I cited *nine* different scholars who have questioned whether merit selection plans like Tennessee's have served their other intended purposes.<sup>13</sup> (These are the scholars that Justice White's co-author, Ms. Reddick, spent eight pages rebutting in her portion of the response.) Although these scholars wrote about merit selection plans in general, and not Tennessee's in particular, I would have thought it *impossible* to have lived in Tennessee in recent years and *not* be aware that the Tennessee Plan is controversial and that many people doubt it is serving its purposes. Perhaps most obviously, the legislature decided in May of 2008, after a high-profile debate, *not to reauthorize the Tennessee Plan*.<sup>14</sup> Instead, the legislature sent the Plan into a one-year wind down period, at the end of which the Plan will terminate unless the legislature acts to save it.<sup>15</sup> And this is just the tip of the iceberg. There have been dozens upon dozens of newspaper articles, radio shows, and public debates regarding the various merits and demerits of the Tennessee Plan in recent years. Many of these articles and other materials have been collected on a website, <http://www.tennplandebate.com>. Readers who go to this website will find a number of commentators who believe the Tennessee Plan is not working;<sup>16</sup> they will learn that newspa-

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anything, *id.* at 501 & n.2, by stating the uncontested fact that a number of states switched from election to merit selection before Tennessee did.

12. See Fitzpatrick, *supra* note 1, at 473–74 n.6.

13. See *id.*

14. See, e.g., John Rodgers, *Wilder's Last Gasp on State Judges Falls Short*, THE NASHVILLE CITY PAPER, May 21, 2008, <http://www.nashvillecitypaper.com/news.php?viewStory=60360>.

15. See *id.*

16. See, e.g., Ron Ramsey, *Judicial Selection Reform Long Overdue*, TriCities.com, June 1, 2008, [http://www.tricity.com/tri/news/opinion/columnists/article/judicial\\_selection\\_reform\\_long\\_overdue/10205/](http://www.tricity.com/tri/news/opinion/columnists/article/judicial_selection_reform_long_overdue/10205/) (asserting that the Plan “obviously does not work”); Joseph Woodruff, *There is a Better Way to Pick Top Judges for Tennessee Bench*, TENNESSEAN.com, June 24, 2007, available at <http://www.tennplandebate.com/archive.aspx?cat=5> (follow “PDF”

pers in the state came out against reauthorizing the Plan in 2008 by a margin of 3-1;<sup>17</sup> and they will even find two editorials written by the second most-widely-circulated newspaper in America, the *Wall Street Journal*, urging the Tennessee legislature not to reauthorize the Plan.<sup>18</sup> Readers can decide for themselves whether any of this makes the Plan controversial.

I should add that the controversy over the Tennessee Plan has not been restricted to the recent past; the controversy dates to the Plan's earliest history. Although Justice White asserted otherwise in her response, her claims are false. For example, she claimed that none of the Tennessee Plan's "statutory prescriptions alarmed scholars of Tennessee constitutional history,"<sup>19</sup> but one of the scholars she cited for her claim is Professor Lewis Laska.<sup>20</sup> Not only has Professor Laska never said that the Tennessee Plan has not alarmed scholars,<sup>21</sup> but he personally has been *quite* alarmed by

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hyperlink under "There is a Better Way to Pick Top Judges for Tennessee Bench") ("Tennessee's process for filing judicial vacancies needs a serious overhaul.").

17. Compare Editorial, *Best Way to Pick State Judges*, CHATTANOOGA TIMES FREE PRESS, Feb. 29, 2008, available at <http://www.tennplandebate.com/archive.aspx?cat=5> (follow "PDF" hyperlink under "Best Way to Pick State Judges") ("We suggest it would be a good idea to let the current system expire . . ."), and Editorial, *Ramsey Idea May be what We Need*, CITY PAPER, April 11, 2008, <http://www.nashvillecitypaper.com/news.php?viewStory=59524> (opining that it would be "doing the people of Tennessee a favor to allow this commission to sunset"), and Editorial, *Reform Tennessee's System for Judicial Picks*, COMMERCIAL APPEAL, May 5, 2008, <http://www.commercialappeal.com/news/2008/may/05/editorials-reform-system-for-judicial-picks/> (opining that "the commission currently wields influence . . . out of proportion to its accountability to citizens" and "[t]hat needs to change"), with Editorial, *Renew Judicial Selection Panel but Open the Process*, KNOX NEWS, May 9, 2008, <http://www.knoxnews.com/news/2008/May/09/renew-judicial-selection-panel-but-open-the/>.

18. See Editorial, *Tennessee's Trial Run*, WALL ST. J., May 10, 2008, at A10; Editorial, *Three Gavels for Tennessee*, WALL ST. J., May 27, 2008, available at [http://online.wsj.com/public/article\\_print/SB121184515872021259.html](http://online.wsj.com/public/article_print/SB121184515872021259.html).

19. White & Reddick, *supra* note 7, at 510.

20. See *id.* at 510 nn.75-76.

21. Professor Laska's piece simply stated in treatise-like fashion that the Tennessee Plan was the current method of selecting judges; it did not give his opinion of the constitutionality of the Plan, let alone suggest that no scholar has ever been alarmed by the constitutionality of the Plan. See Lewis L. Laska, *The Tennessee Constitution*, in TENNESSEE GOVERNMENT AND POLITICS:

the Plan. He personally filed one of the suits challenging the Plan that was ultimately resolved by the Tennessee Supreme Court,<sup>22</sup> and he attempted to intervene personally in another such suit.<sup>23</sup> In these cases, Professor Laska made quite clear that he thought the Tennessee Plan was unconstitutional. For example, he said that the first Tennessee Supreme Court decision upholding the Plan, *State ex rel. Higgins v. Dunn*,<sup>24</sup> was “flatly wrong” because the notion that “a retention election is a true ‘election’ ignored the Tennessee Constitution’s strong preference for popular election of the judiciary by majority vote.”<sup>25</sup> Thus, it is simply not true that Professor Laska thinks, as Justice White said he does, that “the details of judicial selection in Tennessee were left to the legislature’s prerogative.”<sup>26</sup> Rather, he believes that “[r]etention election of judges

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DEMOCRACY IN THE VOLUNTEER STATE 7, 20–21 (John R. Vile & Mark Byrnes eds., 1998) (“Supreme Court judges serve an eight-year term. The method of electing the judges is left to the General Assembly. Currently, an appellate court nominating commission presents the governor with the names of three qualified persons. After appointment, judges must stand for election during which the voters vote yes or no on retaining the judge, a method called the Missouri Plan (now the Tennessee Plan).”). The same is true of the other scholar cited by Justice White, Professor Thomas Van Dervort. White & Reddick, *supra* note 7, at 510 n.77; see Thomas R. Van Dervort, *The Changing Court System, in TENNESSEE GOVERNMENT AND POLITICS: DEMOCRACY IN THE VOLUNTEER STATE, supra*, at 55, 57 (“The Constitution provides for the election of judges for eight-year terms. However, candidates screened for qualifications and endorsed by the governor may be placed on the ballot for voter approval or rejection, and this method (the Missouri Plan) may be developed by the legislature in such a manner as to constitute election within the meaning of the Constitution. The Constitution also specifies certain minimal age and residency requirements.”).

22. See *State ex rel. Hooker v. Thompson*, 249 S.W.3d 331 (Tenn. 1996). This case was a consolidation of two lawsuits against the Tennessee Plan, one of which was filed by Professor Laska. See *id.*

23. See Brief of Lewis L. Laska in Support of Motion to Intervene, *DeLaney v. Thompson*, 982 S.W.2d 857 (Tenn. 1998) (No. 01S01-9806-CH-00116).

24. 496 S.W.2d 480 (Tenn. 1973).

25. Brief of Lewis L. Laska, *supra* note 23, at 18, 20.

26. White & Reddick, *supra* note 7, at 510 (citing Laska, *supra* note 21, at 20).

. . . is not valid under the Tennessee Constitution, and therefore cannot be instituted by mere legislative act.”<sup>27</sup>

It is not only constitutional scholars who have been alarmed by the Tennessee Plan over the course of its history. Justice White said that the Tennessee Plan was enacted “with little or no opposition,”<sup>28</sup> but the vote in the Senate to enact the Plan in 1971 was 21-10,<sup>29</sup> meaning nearly one-third of the members there opposed it.<sup>30</sup> Justice White also said that, when the Plan was partially repealed in 1974, “no member of the legislature ever suggested that the Tennessee Plan was unconstitutional,”<sup>31</sup> but this, too, is false. Members of the legislature expressed concerns about the constitutionality of the Plan both when it was first enacted in 1971 and when it was partially repealed in 1974. For example, when the Plan was debated on the floor of the Tennessee Senate in 1971, one senator had this to say:

Do you consider this to be an election of judges as set out in Article VI, §§ 3 and 4 of the Constitution? In my opinion this is not an election. An election entails two people running against one another for a position that will be elected. I feel that the constitutional question is serious with a one-man bid on the ballot, and you don't know whether he should stay, and no one is running against him.<sup>32</sup>

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27. Supplemental Brief of Lewis L. Laska in Reply to Defendant's Opposition to Intervention and in Reply to Amicus Curiae Brief of American Judicature Society at 12, *DeLaney v. Thompson*, 982 S.W.2d 857 (Tenn. 1998) (No. 01S01-9806-CH-00116).

28. White & Reddick, *supra* note 7, at 510.

29. See 1971 Tenn. S. J. 739.

30. The vote in the House was more comfortable, 67-13. See 1971 Tenn. H. J. 1047.

31. White & Reddick, *supra* note 7, at 512.

32. Audio tape: S. Deb., S. 55, 87th Gen. Assem., Reg. Sess. (Tenn. Apr. 29, 1971) (tape S-104 on file with Tennessee State Library and Archives) (remarks of Sen. Oehmig).

This senator was not alone in expressing these concerns,<sup>33</sup> and the very same concerns were expressed during the debate over the partial repeal. The sponsor of the partial repeal effort said that the amendment was needed, among other reasons, because “the Constitution does specifically state . . . that justices of the supreme court will be elected by the people.”<sup>34</sup> Other senators noted that “[i]t has been alluded to here that, if we don’t repeal the modified Missouri Plan, the Constitution is being violated because the people are not electing.”<sup>35</sup> Indeed, some members of the senate noted that the repeal plan was inspired by Justice Humphreys’s dissent in *Dunn*, in which he opined that the retention feature of the Plan was “obvious[ly]” unconstitutional.<sup>36</sup> The governor during this time, Winfield Dunn, also remembers constitutional controversy. As he notes in his recent memoir, “[T]here were some who, with justification, questioned the constitutionality of the [Tennessee Plan].”<sup>37</sup> Not much has changed since then: almost forty years later, members of the legislature still think the Plan is unconstitutional.<sup>38</sup>

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33. See, e.g., *id.* (remarks of Sen. Roberson) (noting that the Tennessee Plan “may conflict with the Tennessee Constitution”); *id.* (remarks of Sen. Albright) (warning that the Tennessee Plan was “on very dangerous ground” because it “could be at conflict” with the Constitution and because elections are “the very basics of what we believe in this country”).

34. See, e.g., Audio tape: S. Deb., S. 339, 88th Gen. Assem., Reg. Sess. (Tenn. Apr. 17, 1973) (tape S-101 on file with Tenn. State Library and Archives) (remarks of Sen. Blank) (making this argument despite noting that “the recent opinion in the [*Dunn*] case [said] that it was constitutional”).

35. See *id.* (remarks of Sen. Ayres) (disagreeing with that view).

36. State *ex rel* *Dunn v. Higgins*, 496 S.W.2d 480, 493 (Tenn. 1973) (Humphreys, J., dissenting); see, e.g., S. Deb., *supra* note 34 (remarks of Sen. Ayres) (“One Justice dissented in that opinion and this is the reason for this whole plan today.”); *id.* (remarks of Sen. Porter) (noting that “[t]he gentleman that wrote the dissenting opinion for the Supreme Court had a very persuasive opinion, it appealed to me, it appealed to many,” but acknowledging that “he was one against four”).

37. WINFIELD DUNN, FROM A STANDING START 420 (2007).

38. See, e.g., Ryan Harris, *Judicial Selection Process Under Fire*, CHATTANOOGA TIMES FREE PRESS, Jan. 8, 2008, available at <http://www.timesfreepress.com/news/2008/jan/08/Judicial-selection-process-under-fire/?politicsregional> (reporting that “local lawmakers [have] sa[id] the process is unconstitutional”).

As I noted in my essay, all of this controversy has mired the Tennessee Plan in litigation for much of the last forty years. One might have thought that this alone would be sufficient to show that the Plan has been “controversial,” but, here again, Justice White suggested that I mischaracterized things. In a footnote, she implied that the Plan has not been “mired in litigation” because she said it has been the subject of only four lawsuits.<sup>39</sup> One might have thought that four lawsuits, three of which went all the way to the Tennessee Supreme Court,<sup>40</sup> would be sufficient to constitute a mire of litigation, but, in fact, there have been many more lawsuits involving the Plan. For example, as I noted above, just last year, the governor sued the commission of lawyers that nominates judges under the Plan,<sup>41</sup> noting that they were “playing politics”<sup>42</sup> and “trying to force people down [his] throat.”<sup>43</sup> Although this lawsuit, too, was ultimately decided by the Tennessee Supreme Court, Justice White failed to mention it in her response. Nor did Justice White mention any of the other lawsuits involving the Plan, including one that she filed herself.<sup>44</sup>

Finally, even where Justice White acknowledged the lawsuits that have been filed against the Plan, she left what I think is an erroneous impression that no one has ever taken these lawsuits seriously. She said, for example, that in the first case that went to

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39. White & Reddick, *supra* note 7, at 521 n.143 (“These two constitutional challenges and two others . . . constitute the ‘several cases’ that have caused the Tennessee Plan to be ‘mired in litigation.’”).

40. See DeLaney v. Thompson, 982 S.W.2d 857 (Tenn. 1998); State *ex rel.* Hooker v. Thompson, 249 S.W.3d 331 (Tenn. 1996); State *ex rel.* Higgins v. Dunn, 496 S.W.2d 480 (Tenn. 1973).

41. See Bredesen v. Tenn. Judicial Selection Comm’n, 214 S.W.3d 419 (Tenn. 2007).

42. Erik Schelzig, *Bredesen Hopes for Smoother Judicial Selection Process*, ASSOCIATED PRESS, Sept. 29, 2007.

43. Ken Whitehouse, *Bredesen Lashes Out at Supreme Court Selectors*, NASHVILLE POST, Sept. 6, 2006, available at [http://www.nashvillepost.com/news/2006/9/6/bredesen\\_accuses\\_supreme\\_court\\_selectors\\_of\\_game\\_playing](http://www.nashvillepost.com/news/2006/9/6/bredesen_accuses_supreme_court_selectors_of_game_playing).

44. See, e.g., Lillard v. Burson, 933 F.Supp. 698, 700, 702–03 (W.D. Tenn. 1996) (noting that “Penny J. White” intervened in the suit to enjoin the State of Tennessee from placing her name on the ballot in a contested election because it would violate the Due Process Clause to take away her “property right” under the Tennessee Plan to “run unopposed on a ‘yes or no’ retention ballot”); Holder v. Tenn. Judicial Selection Comm’n, 937 S.W.2d 877 (Tenn. 1996).

the Tennessee Supreme Court, *Dunn*, the court “upheld the constitutionality of the Tennessee Plan without a struggle . . . .”<sup>45</sup> Readers, of course, can review *Dunn* for themselves and decide whether this characterization is a fair one, but to my mind it is not. The court was not even unanimous on the question most relevant to our exchange: whether retention referenda constitute constitutional “elections”; one of the five members of the court, Justice Humphreys, dissented and argued that the retention feature of the Plan was “obvious[ly]” unconstitutional.<sup>46</sup> Nowhere in her response did Justice White ever mention the fact that there was a dissent in *Dunn*. Moreover, it is not quite true, as Justice White asserted, that “no challenge to the constitutionality of the Tennessee Plan has ever been successful.”<sup>47</sup> The court in *Dunn* unanimously struck down as unconstitutional one portion of the Plan—the nominating commission—because it violated a separation of powers provision in the Tennessee Constitution.<sup>48</sup> In addition, as I noted in my original essay, a trial judge struck down the entirety of the Plan in 1998.<sup>49</sup> Although this decision was reversed by the Tennessee Court of Appeals<sup>50</sup> (which was reversed, on other grounds, by the Tennessee Supreme Court<sup>51</sup>), my point here is that there are plenty of people out there—whether constitutional scholars, legislators, or even judges—who have doubts that the Tennessee Plan is constitutional.

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45. White & Reddick, *supra* note 7, at 514.

46. *State ex. rel. Higgins v. Dunn*, 496 S.W.2d 480, 493 (Tenn. 1973) (Humphreys, J., dissenting).

47. White & Reddick, *supra* note 7, at 524.

48. *Dunn*, 496 S.W.2d at 490.

49. 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”).

50. See *id.* at \*5–8.

51. See *DeLaney v. Thompson*, 982 S.W.2d 857, 861 (Tenn. 1998) (“[T]he Tennessee Plan was inapplicable to the election to fill [the appellate judge’s] seat . . .”).

## II. IS THE TENNESSEE PLAN CONSTITUTIONAL?

The Tennessee Constitution requires all judges to be “elected by the qualified voters”<sup>52</sup> of the state. Yet, under the Tennessee Plan, all judges are initially appointed by the governor and then retained in uncontested retention referenda.<sup>53</sup> In my essay, I argued that both the appointment and retention features of the Tennessee Plan are unconstitutional. First, I argued that, as a matter of simple textualism, the appointment feature of the Plan is unconstitutional because, although the constitution sometimes permits judges to come to the bench by appointment rather than “election,”<sup>54</sup> it does so only to fill “unexpired terms,”<sup>55</sup> not, as the Tennessee Plan requires, to fill all terms, whether unexpired or expired.<sup>56</sup> Second, I argued that, as a matter of the original understanding of the constitution—a methodology often referred to as “originalism”<sup>57</sup>—uncontested retention referenda are unconstitutional because, when the constitutional provision requiring “elections” was written in 1870, uncontested retention referenda were an unknown method of selecting public officials in the United States.<sup>58</sup> Third, I argued that, even if the original understanding is put to one side, as a matter of vindicating the original purpose of the 1870 Constitution—a methodology often referred to as “purposivism”<sup>59</sup>—the constitutionality of retention referenda is still dubious. This is the case because the purpose behind the constitu-

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52. TENN. CONST. art. VI, §§ 3, 4.

53. See TENN. CODE ANN. §§ 17-4-101, -102, -114 to -116 (1994 & Supp. 2007).

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

55. *Id.* § 5 (“No appointment . . . to fill a vacancy shall be made for a period extending beyond the unexpired term.”).

56. See Fitzpatrick, *supra* note 1, at 492.

57. See ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38–39 (Amy Gutmann ed., 1997).

58. See Fitzpatrick, *supra* note 1, at 494.

59. Michael C. Dorf, *Foreward: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 4 (1998). This method of interpretation goes by many other names, including “translation,” Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 395 (1997); Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1371 (1997), and “conceptualism,” ERWIN CHERMERINSKY, INTERPRETING THE CONSTITUTION 108 (1987).

tional provision requiring judicial elections was to foster greater democratic accountability in the judiciary, and retention referenda are arguably a poor substitute for contested elections in this regard because incumbents virtually never lose referenda. That is, referenda nearly approximate life tenure, which is the very antithesis of democratic accountability.<sup>60</sup> At the same time, I noted that there were some counterarguments on this point: contested elections in Tennessee were not very competitive before the Tennessee Plan, and there is some evidence that the prospect of losing in retention referenda, even though remote, influences how judges behave on the bench.<sup>61</sup> Nonetheless, I noted that another method of constitutional interpretation, what some call “popular constitutionalism,”<sup>62</sup> might resolve any lingering ambiguity. In 1977, the citizens of Tennessee were given a chance to resolve the constitutional debate over the Tennessee Plan in the form of an amendment to the constitution that would have, among other things, replaced the constitutional language requiring elections with language providing for the Tennessee Plan; voters *rejected* that amendment.<sup>63</sup>

Justice White appeared to suggest that there was something idiosyncratic about my constitutional analysis; she asserted at one point that I had “construct[ed] [my] own test” to assess the constitutionality of the Tennessee Plan.<sup>64</sup> This was most certainly not the case. None of the methodologies I used in my essay—textualism, originalism, purposivism, and popular constitutionalism—were my own creation. Rather, they are some of the most common interpretative methodologies used by courts and commentators today.<sup>65</sup>

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60. See Fitzpatrick, *supra* note 1, at 495.

61. See *id.* at 497.

62. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); Saul Cornell, *Mobs, Militias, and Magistrates: Popular Constitutionalism and the Whiskey Rebellion*, 81 CHI.-KENT L. REV. 883 (2006).

63. See Fitzpatrick, *supra* note 1, at 498.

64. White & Reddick, *supra* note 7, at 530.

65. For example, at least two of the nine Justices of the United States Supreme Court, Justices Scalia and Thomas, are originalists, not to mention countless commentators. See generally Keith Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004) (citing a number of originalists). Purposivism has even more adherents among courts and commentators. See Klarman, *supra* note 59, at 395 (noting that many scholars and judges believe that constitutions should be interpreted “by ‘translating’ the Framers’ concepts

Moreover, I employed multiple methodologies for good reasons: a single methodology is often indeterminate, and not everyone agrees which methodologies are the best ones.<sup>66</sup> My goal was to show that the Tennessee Plan has constitutional infirmities from many different perspectives.

The broader theme of Justice White's response to my constitutional analysis was, again, that my essay was misleading.<sup>67</sup> Her argument this time was that I omitted "essential cornerstones" of constitutional and statutory interpretation from my analysis.<sup>68</sup> As I explain below, none of these so-called "cornerstones" are pertinent to the points I made in my essay, and some of them are not pertinent to any sort of constitutional analysis of the Tennessee Plan. I also explain why Justice White's more specific responses to the constitutional arguments I made in my essay do not cast doubt on those arguments.

#### A. *Stare Decisis?*

As I noted in my original essay, there are two decisions by the Tennessee Supreme Court, *State ex rel. Higgins v. Dunn*<sup>69</sup> and *State ex rel. Hooker v. Thompson*,<sup>70</sup> that have addressed some of the constitutional questions surrounding the Plan.<sup>71</sup> As I also noted, in both cases, the court upheld the Tennessee Plan against the constitutional challenges raised therein.<sup>72</sup> Justice White began

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into modern circumstances"). Although popular constitutionalism is less well subscribed, it, too, has many adherents. *See supra* note 62.

66. *See* RICHARD FALLON, IMPLEMENTING THE CONSTITUTION 45 (2001) ("The implicit norms of our constitutional practice acknowledge the relevance of at least five distinct forms of constitutional arguments . . .").

67. *See* White & Reddick, *supra* note 7, at 501 ("It is impossible . . . to respond to Professor Fitzpatrick's essay without highlighting a multitude of significant omissions that must be considered to fairly evaluate . . . the constitutionality . . . of the Tennessee Plan.").

68. White & Reddick, *supra* note 7, at 522.

69. 496 S.W.2d 480 (Tenn. 1973).

70. 249 S.W.3d 331 (Tenn. 1996).

71. *See* Fitzpatrick, *supra* note 1, at 486–89.

72. *See id.* At one point, Justice White accused me of "ignor[ing] the fact that *Thompson* relied on the precedent established twenty-five years earlier in *Dunn*." White & Reddick, *supra* note 7, at 525. I will simply quote from my original essay and let readers decide for themselves whether I "ignored" this fact:

her constitutional analysis by criticizing me for “disregard[ing]” the doctrine of *stare decisis* with respect to these two decisions.<sup>73</sup> At the same time, however, she also criticized me for making two “specious,”<sup>74</sup> “illogical,”<sup>75</sup> “disturbing,”<sup>76</sup> and “wholly uninformed”<sup>77</sup> arguments in derogation of *stare decisis*. I am not sure how I could have both disregarded *stare decisis* and made arguments in derogation of it, but Justice White was correct the first time: I did not discuss the doctrine of *stare decisis* in my essay. In my view, I had some very good reasons for not doing so. Before I turn to these reasons, however, I wish to address the two arguments she said I made in derogation of the doctrine. One of these arguments I never made, and the other one, which related to the publication rules of the Tennessee Supreme Court and not the prudential doctrine of *stare decisis*, I stand by in full.

As I observed in my original essay, in neither of the Tennessee Supreme Court opinions upholding the Tennessee Plan did a majority of the *regularly constituted* Tennessee Supreme Court decide the cases.<sup>78</sup> In both instances, some (in *Dunn*) or all (in *Thompson*) of the regular justices recused themselves and were replaced by “special justices” appointed by the Chief Justice (in the case of *Dunn*) and the governor (in the case of *Thompson*).<sup>79</sup> From this simple observation, Justice White asserted that I made the “specious,” “illogical,” “disturbing,” and “wholly uninformed”<sup>80</sup>

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In 1996, the suits in *State ex rel. Hooker v. Thompson* were filed . . . . The litigation went up to the Tennessee Supreme Court and was heard by a special panel of judges appointed by the governor because all of the regular justices recused themselves. *The special court held the Tennessee Plan constitutional on the authority of Dunn.*

Fitzpatrick, *supra* note 1, at 488 (emphasis added).

73. White & Reddick, *supra* note 7, at 523–24.

74. *Id.* at 524 (“[T]he essay floats specious arguments against the principle’s application . . .”).

75. *Id.* (“[T]he essay erects illogical arguments to challenge the principle’s application . . .”).

76. *Id.* at 513 (referring to “one of the more disturbing arguments in Professor Fitzpatrick’s essay”).

77. *Id.* at 514 n.99 (criticizing an “assertion” she attributed to me as “wholly uninformed”).

78. See Fitzpatrick, *supra* note 1, at 489–90.

79. See *id.*

80. White & Reddick, *supra* note 7, at 513, 514 n.99, 524.

argument that “both *Dunn* and *Thompson* . . . have diminished precedential value because they were authored by ‘special’ and not ‘regular’ justices of the Tennessee Supreme Court.”<sup>81</sup> Not only did I never make this argument, but *I explicitly stated precisely the opposite*. I said very clearly that “as a formal legal matter, decisions by special justices are just as binding as those rendered by regular justices.”<sup>82</sup> My only point in making the observation that a regular court has never upheld the Plan was to suggest that this is one reason why the controversy over the Plan may not have subsided.<sup>83</sup> Justice White appears to have completely misunderstood this. Unfortunately, this misunderstanding has rendered several pages of her response irrelevant.<sup>84</sup>

The second argument that Justice White criticized as “specious”<sup>85</sup> is at least an argument that I did make. I argued that one of the two Tennessee Supreme Court decisions addressing the constitutionality of the Tennessee Plan, *Thompson*, had never been published, and therefore, under the rules of the Tennessee Supreme Court, it constituted only persuasive and not binding authority.<sup>86</sup> Justice White said I was wrong about this, that even unpublished Supreme Court opinions are binding in future cases.<sup>87</sup> As there is no delicate way to disagree with a former Supreme Court Justice about the rules of her own court, I will simply quote what her court has said on this matter: “*While not controlling authority*, unpublished decisions of this Court are entitled to at least the same re-

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81. *Id.* at 513.

82. Fitzpatrick, *supra* note 1, at 490.

83. *See id.* at 490.

84. Thus, for example, Justice White’s claim that my “argument” would create “decisional chaos” because “[e]ither ‘regular’ judges would be forced to decide matters in which they had an interest . . . or substitute judges would render a decision that was of no value,” White & Reddick, *supra* note 7, at 524–25, is entirely misplaced because I never made the “argument” that she said I did. It should also be noted that other judicial systems take different approaches to the problem of conflicts by all of the members of their highest courts without any resulting “decisional chaos.” *See, e.g.*, *United States v. Will*, 449 U.S. 200, 213 (1980) (holding that all Supreme Court Justices can hear a case, even though they all have a conflict of interest, because no other Article III judge would be without the same conflict).

85. White & Reddick, *supra* note 7, at 524.

86. *See* Fitzpatrick, *supra* note 1, at 488–89.

87. White & Reddick, *supra* note 7, at 524–25.

spect [as unpublished decisions of intermediate appellate courts].”<sup>88</sup> I am not the only commentator to understand this decision to mean what it says: “a previous unreported Supreme Court decision is not controlling authority, but it is entitled to persuasive force.”<sup>89</sup>

It is important to reiterate, however, that my point about *Thompson* was entirely technical. As I noted in my original essay, *Thompson* was not published due to an oversight, and, when I brought this oversight to the attention of the office of the Attorney General, the office said it might correct the error.<sup>90</sup> Thus, as I predicted in my original essay,<sup>91</sup> the decision has now been published,<sup>92</sup> and under the Supreme Court’s rules, is now binding.

In any event, as I said, Justice White was correct when she first asserted that I “disregard[ed]” the doctrine of *stare decisis* in my essay. I do not believe, however, that this was an “omission.”<sup>93</sup> Rather, there are three rather obvious reasons why *stare decisis* was largely irrelevant to the arguments I made in my original essay.

The first reason is that the three constitutional questions I raised were not considered by the Tennessee Supreme Court in either of its two decisions upholding the Plan.<sup>94</sup> It is a common principle of *stare decisis* that the doctrine does not apply to arguments that were never considered in previous decisions. Indeed, the Tennessee Supreme Court adopted this principle almost one hundred years ago, when it struck down a statute as unconstitutional, even though the same statute had previously been upheld against a similar constitutional challenge, because the new challenge relied on a new argument.<sup>95</sup> As the court said, “it is a famil-

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88. *McConnell v. State*, 12 S.W.3d 795, 799 n.5 (Tenn. 2000) (emphasis added and noting that “[u]npublished intermediate court opinions have persuasive force”).

89. 2 LAWRENCE A. PIVNICK, TENNESSEE CIRCUIT COURT PRACTICE § 30:20 (2008 ed.).

90. See Fitzpatrick, *supra* note 1, at 489 n.143.

91. See *id.*

92. See *State ex rel. Hooker v. Thompson*, 249 S.W.3d 331 (Tenn. 1996).

93. *White & Reddick*, *supra* note 7, at 524.

94. Fitzpatrick, *supra* note 1, at 475 (“[N]either of these decisions even attempted to address three of the most serious constitutional questions raised by the Plan.”).

95. See *State ex rel. Pitts v. Nashville Baseball Club*, 154 S.W. 1151, 1155 (Tenn. 1913). The statute was held unconstitutional because it violated

iar principle that *stare decisis* only applies with reference to decisions directly upon the point in controversy” and only “in respect of decisions directly upon the points in issue.”<sup>96</sup>

Second, even if *Dunn* and *Thompson* would foreclose any consideration by the Tennessee Supreme Court of the arguments I raised in my original essay, I did not think a discussion of *stare decisis* was relevant because I did not direct my arguments to the Tennessee Supreme Court; I directed them to the Tennessee legislature.<sup>97</sup> It is another longstanding principle that, in republican governments, where power is separated into co-equal branches, members of each branch, all of whom usually take their own oaths to uphold the constitution,<sup>98</sup> are entitled to their own independent view of what is and is not constitutional.<sup>99</sup> Although the judiciary may have the last word on the constitution in litigation, the political branches have the last word in legislation. That is, it has long been thought that, even though the judicial branch might think a piece of legislation is constitutional, members of the legislative and

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Article 2, § 18, of the Tennessee Constitution on account of the fact that it had not been read three times in the Senate before it was enacted. *See id.* The previous challenge was based on a different argument using the exact same constitutional provision. *See id.*

96. *Id.* (quoting *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 574 (1895)); *see also* *Denny v. Wilson County*, 281 S.W.2d 671, 674 n.4 (Tenn. 1955) (“Where an applicable rule, statute or common law is overlooked in the decision of a case, such decision is no authority . . . .”); *Burns v. Duncan*, 133 S.W.2d 1000, 1008 (Tenn. 1939) (refusing to follow precedent holding that a sheriff could be sued in a particular venue because “the above cited statute invoked by the defendants in the case now before us was not brought to the attention of the Court, and was not in the mind of the Court when [it] was decided”).

97. *See* Fitzpatrick, *supra* note 1, at 500 (concluding that “the best reading of the Tennessee Constitution is one that holds the Tennessee Plan unconstitutional” and arguing that “the legislature—duty bound as it is to uphold the Tennessee Constitution—should do what it needs to do to return the selection of appellate judges to contested elections”).

98. *See, e.g.*, 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 . . . .”).

99. *See, e.g.*, Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707, 740–41 (1985) (“Acting like a lower federal court is certainly not what Jefferson envisioned for Congress; Congress should be able to make its own decisions rather than having to predict what the Supreme Court would do . . . .”).

executive branches are still free to vote against the legislation on the basis of their independent view of the constitutional merits.<sup>100</sup>

Indeed, one of the most famous examples of this practice has its roots in Tennessee. In 1832, Tennessean Andrew Jackson, while President of the United States, vetoed a bill that would have reauthorized the Second Bank of the United States because he thought the Bank was unconstitutional.<sup>101</sup> He did this even though the Supreme Court had declared that the Bank was indeed constitutional.<sup>102</sup> There is nothing to stop members of the Tennessee legislature from likewise refusing to reauthorize the Tennessee Plan on constitutional grounds even if they believe that the Tennessee Supreme Court would disagree with these grounds. Given Justice White's repeated invocation of the "preemin[ence]"<sup>103</sup> of the legislature, as well as her endorsement of deference to the legislature in constitutional interpretation,<sup>104</sup> one might have thought that she would have been especially attracted to these longstanding norms.

Finally, even if all of this were not reason enough to omit a discussion of *stare decisis*, I also did not address the doctrine because my essay was an academic work, not a piece of litigation. Law professors thoughtfully criticize decisions rendered by courts all the time. That is the very point of the scholarly enterprise. If law professors were forbidden from doing so, they would not have much to do, and the law reviews would have nothing with which to fill their pages. Law professors do not do this in vain; we do it because one never knows when a court will read something in a law review and change its mind. As Justice White well knows, *stare decisis* is not an inexorable command. At least once in her tenure on the Tennessee Supreme Court she voted to overrule a precedent of that court—and she did so on the basis (at least in part) of academic criticism.<sup>105</sup>

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100. See, e.g., *id.* at 744 ("Even after courts hand down a decision, there are opportunities for Congress to test the soundness of the decision by passing new legislation and supporting further litigation.").

101. See Andrew Jackson, Veto Message (July 10, 1832), reprinted in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 576–82 (James Richardson ed., 1907).

102. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

103. White & Reddick, *supra* note 7, at 502–03.

104. See *id.* at 522–23.

105. See *State v. Reeves*, 916 S.W.2d 909, 914 (Tenn. 1996) (joining opinion overturning precedent because of "persuasive criticisms" of previous deci-

B. *The Essential Principles of (Statutory?) Interpretation?*

Justice White also criticized my essay for omitting consideration of three “basic principles of statutory construction and constitutional interpretation.”<sup>106</sup> Readers can decide for themselves whether any of these principles contribute meaningfully to the discussion of whether the Tennessee Plan is constitutional.

To begin with, two of the three “basic principles” are, as she herself noted, principles of *statutory* interpretation. One principle says that, “[i]f a statute lends itself to more than one construction, the construction that upholds constitutionality must be applied.”<sup>107</sup> The other principle is one that says “[i]n construing statutes, [courts] look at the objects aimed at by the Legislature, and not to the particular verbiage, in which a statute, in some of its parts, may be expressed.”<sup>108</sup> I have a hard time understanding how either of these principles of statutory interpretation is relevant to a single thing I said in my essay. I did not argue—and, as far as I am aware, no one has argued—that the statutory provisions comprising the Tennessee Plan are ambiguous. The debate is whether the statutory provisions are constitutional. I am therefore puzzled as to why Justice White decided to focus her response on questions of the proper interpretation of the Tennessee Plan statutes.<sup>109</sup>

Although Justice White also referred to her third “basic principle” as a “principle of statutory construction,”<sup>110</sup> I think she probably meant this last principle is one of *constitutional* interpretation, and therefore, at least potentially relevant to the *constitutional* questions I raised in my original essay. The principle is that courts should “presume” that statutes duly enacted by the legislature are constitutional and “indulge ‘every presumption’ in favor of constitutional validity.”<sup>111</sup> This is a very fine principle of constitu-

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sion) (citing Jerome Hall, *Criminal Attempt- A Study of Foundations of Criminal Liability*, 49 YALE L.J. 789, 821–22 (1940); Barbara Baum Levenbook, *Prohibiting Attempts and Preparations*, 49 UMKC L. REV. 41 (1980); Herbert Wechsler et al., *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 571, 586–611 (1961)).

106. White & Reddick, *supra* note 7, at 522.

107. *Id.* at 523.

108. *Id.* (quoting *Arrington v. Cotton*, 60 Tenn. 316, 319–20 (1872)).

109. *See id.* at 522–23, 526–27.

110. *Id.* at 522.

111. *Id.*

tional interpretation. It is one that I myself subscribe to, although it is not as much in vogue these days as it used to be.<sup>112</sup> I did not invoke the principle that courts should defer to legislatures, however, because the constitutional arguments in my essay were, again, not directed to courts, but to the legislature. That is, a principle that tells one branch of government (the judiciary) what to do vis-à-vis another (the legislature) does not help the other branch (the legislature) decide what to do in the first instance. As I noted above, members of the Tennessee legislature are free to make their own independent determination of whether the Tennessee Plan is constitutional and to vote their consciences accordingly in their 2009 session.

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

I argued in my essay that the feature of the Tennessee Plan that calls on the governor to appoint all appellate judges in the first instance was unconstitutional insofar as it permitted the governor to appoint new judges to the bench when their predecessors served their entire terms.<sup>113</sup> I argued that this was unconstitutional because, although the Tennessee Constitution allows “vacancies”<sup>114</sup> on the courts to be filled by gubernatorial appointment rather than election, it also says that “[n]o appointment . . . to fill a vacancy shall be made for a period extending beyond *the unexpired term.*”<sup>115</sup> Thus, I argued, to the extent that there is no unexpired term to fill—e.g., because a judge has served his or her entire term and decides not to run for reelection—the judge’s successor must be elected rather than appointed.<sup>116</sup>

Justice White’s response to this argument was to note that judges appointed under the Tennessee Plan must run in retention referenda within two years of their appointment. That is, she noted that, even if an appointed judge’s predecessor served his or her

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112. See KRAMER, *supra* note 62, at 65, 228 (noting that, at the founding, judicial review was premised on the notion that “laws should be declared void only if ‘unconstitutional beyond dispute’” and that modern judicial review “represents a profound change from what we have seen was historically the case”).

113. See Fitzpatrick, *supra* note 1, at 491–92.

114. TENN. CONST. art. VII, § 4.

115. *Id.* § 5 (emphasis added).

116. See Fitzpatrick, *supra* note 1, at 491–92.

entire term (and there was, therefore, no unexpired term to fill), the newly appointed judge will not forever be able “to avoid an election.”<sup>117</sup> The trouble with this response, however, is that I did not contend that judges appointed under the Tennessee Plan would forever be able to avoid an election. I contended that they would be able to do so for as long as two years.<sup>118</sup> That is permitted by the constitution when the judge was appointed to fill an “unexpired term.”<sup>119</sup> There is nothing in the constitution, however, that permits the governor to appoint a judge to fill an “expired term.” Justice White’s only response to this point was to embark on a lengthy discourse on the meaning of the word “vacancy” in the constitution and in the Tennessee Plan’s statutory provisions.<sup>120</sup> As I have noted above, none of her discourse on the meaning of the statute is relevant because, as I made clear in my original essay, I do not dispute—and I know of no one who does dispute—that the Tennessee Plan permits the governor to appoint judges to expired terms.<sup>121</sup> The relevant question is *whether this is constitutional*. On this question, Justice White’s focus on the meaning of the word “vacancy” was incomplete. In order to appoint rather than elect judges, the constitution requires not only a “vacancy,” but also that the “vacancy” arise during an “unexpired term.”<sup>122</sup> Justice White had nothing to say about the meaning of the phrase “unexpired term,” and, indeed, it is difficult to see how those words could be twisted to permit the governor to appoint judges to “expired terms.”

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

I also argued in my original essay that the retention feature of the Tennessee Plan is unconstitutional. Although Article VI of the Tennessee Constitution requires all judges to be “elected by the

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117. White & Reddick, *supra* note 7, at 525–26.

118. See Fitzpatrick, *supra* note 1, at 491 (“[T]hey can serve for as long as two years before they are put before the people in retention referenda.”).

119. TENN. CONST. art. VII, § 5.

120. See White & Reddick, *supra* note 7, at 526–27.

121. See Fitzpatrick, *supra* note 1, at 482 (noting that the Tennessee Plan permits gubernatorial appointment “not only [to] interim vacancies” but also where “the [previous] judge *completed* an eight-year term and did not run for reelection”) (emphasis added).

122. TENN. CONST. art. VII, §§ 4, 5.

qualified voters of the state,”<sup>123</sup> the Tennessee Plan does not call for judges to be retained in traditional, contested elections but rather in yes-or-no referenda where judges face no opponents.<sup>124</sup> I argued that retention referenda are inconsistent with the 1870 Constitution’s requirement of “election by the qualified voters” because the authors of the 1870 Constitution would not have understood these words to include retention referenda; retention referenda were unknown in the United States at that time (they did not become known until 1914).<sup>125</sup> Indeed, for 100 years after the 1870 Constitution was ratified, judges ran in contested elections just like other public officials.<sup>126</sup> Although I noted that, in Article II of the 1870 Constitution, the word “election” is used to refer to a yes-or-no vote by citizens to approve loans issued by municipalities,<sup>127</sup> I argued that ballot propositions of that sort had always taken place in yes-or-no form, and in light of the fact that the election of public officials had never taken place in yes-or-no form, the framers of the 1870 Constitution might have understood the word “election” in Article VI to mean something different.<sup>128</sup> Although we often assume the same word means the same thing in every usage throughout a document, sometimes we do not.<sup>129</sup> The same words in the United States Constitution, for example, sometimes mean one thing in one provision and something else in a different provision.<sup>130</sup> Context, of course, matters.<sup>131</sup>

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123. *Id.* art. VI, §§ 3, 4.

124. *See* TENN. CODE ANN. §§ 17-4-114 to -116 (1994 & Supp. 2007).

125. *See* Fitzpatrick, *supra* note 1, at 493–94.

126. *See* N. Houston Parks, *Judicial Selection—The Tennessee Experience*, 7 MEM. ST. U. L. REV. 615, 628–34 (1977).

127. *See* TENN. CONST. art. II, § 29.

128. *See* Fitzpatrick, *supra* note 1, at 493–94.

129. *Cf., e.g.,* Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 595 (2004) (noting that the “presumption that identical words used in different parts of the same act are intended to have the same meaning” is “not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent” (internal quotation marks omitted)).

130. For example, although some provisions in the U.S. Constitution invoking the word “state” have been interpreted to include the District of Columbia, see *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 617–26 (1949) (Rutledge, J., concurring in the result), others have not, see U.S. CONST. art. I, § 2 (“The House of Representatives shall be composed of Members cho-

Justice White did not deny that retention referenda were unknown in 1870, nor did she respond to the argument that the word “election” might have been understood differently in the context of public officials than it was in the context of ballot propositions. Rather, she appeared to disavow the originalist methodology altogether.<sup>132</sup> This is fair enough because, as I noted above, not everyone agrees on the best interpretative methodology. That is precisely why I analyzed this question using other methodologies. For example, I argued that, even if we interpret constitutional provisions to take on new meanings, we often do so only when the new meanings serve the original purposes of the provisions.<sup>133</sup> But under the purposivist methodology, too, the constitutionality of retention referenda is in doubt.<sup>134</sup> The animating purpose behind the movement toward the election of judges in Tennessee and elsewhere was to inject more democratic accountability into the policy decisions rendered by judges,<sup>135</sup> yet incumbent judges who run in retention referenda are virtually never defeated (the retention rate in Tennessee is 99.3%).<sup>136</sup> That is, retention referenda are arguably little more than life tenure, which, of course, is the very antithesis of democratic accountability. On the other hand, I noted that judges who run in retention referenda nevertheless report that their decisions are influenced by public opinion,<sup>137</sup> and, before the

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sen . . . by the People of the several States . . . .”); *id.* § 3 (“The Senate . . . shall be composed of two Senators from each State . . . .”).

131. Given that I explicitly based my argument on the 1870 understanding of the word “election” in the context of public officials, it is difficult to know what to make of Justice White’s claim that my argument was based on nothing other than “[my] own definition of ‘election.’” White & Reddick, *supra* note 7, at 527.

132. See *id.* at 529 (“[C]onstitutions are intended to provide a general outline conducive to flexible interpretation . . . .”).

133. See Fitzpatrick, *supra* note 1, at 494–97.

134. See *id.*

135. See *id.* at 477–78 (“Most historians attribute the change in judicial selection to a shift in this country’s attitude about democracy . . . .”).

136. See *id.* at 485.

137. See *id.* at 497. (“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. 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.”). Thus, although Justice White attributed to me the statement that “democracy fails unless judges are

Tennessee Plan, elections in Tennessee were not very spirited because Tennessee was a one-party state.<sup>138</sup> Thus, I argued that it is not entirely clear that retention referenda are a poor substitute for contested elections even from the perspective of democratic accountability.

In her response, Justice White seemed to suggest that “democratic accountability” could not have been the original purpose of the constitutional provision requiring an elected judiciary because “accountability to majority rule . . . has never been the model for the American justice system.”<sup>139</sup> There is not, however, only one “model for the American Justice system.”<sup>140</sup> There are many models, and Justice White appeared to choose the wrong one by which to measure the constitutionality of the Tennessee Plan. Justice White’s “model for the American Justice system” is the *federal* judicial system.<sup>141</sup> The Tennessee Plan, however, does not select federal judges; it selects state judges, and Tennessee’s judiciary has been designed much differently than has the federal judiciary. As I noted in my original essay, although at the time of the founding of the United States, states followed the federal government in designing unelected judiciaries where judges held their seats for life, that changed in the wake of Andrew Jackson’s presidency.<sup>142</sup> The vast majority of states, including Tennessee, changed their judiciaries in the nineteenth century away from the federal model and toward popular election without life tenure.<sup>143</sup>

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defeated,” White & Reddick, *supra* note 7, at 533, I, yet again, explicitly said precisely the opposite in my original essay.

138. See Fitzpatrick, *supra* note 1, at 497.

139. White & Reddick, *supra* note 7, at 530–32. She also appeared to argue that, if considerations of democratic accountability influence the interpretation of the words “elected by the qualified voters of the state,” then these considerations must influence the interpretation of every other phrase of the Tennessee Constitution. *Id.* at 530 (“If the provisions of the 1870 constitution must accomplish ‘democratic accountability,’ . . . then dozens of provisions of the Tennessee constitution and hundreds of Tennessee statutes are invalid.”). It is difficult to know what to make of this argument. Obviously, different provisions of the constitution have different purposes and each provision should be interpreted in light of its own purposes.

140. See *id.* at 532.

141. See *id.* (citing *Dennis v. United States*, 341 U.S. 494 (1951) (Frankfurter, J., concurring)).

142. See Fitzpatrick, *supra* note 1, at 477.

143. See *id.*

The reason for these changes, at least according to countless historians, was to give the public more control over the decision making of the courts.<sup>144</sup> Thus, for better or for worse, the Tennessee Constitution strikes a different balance between judicial independence and democratic accountability than does the federal constitution. These differences obviously need to be respected when interpreting the Tennessee Constitution.

Rather than grapple with these differences, however, Justice White appeared to rest her constitutional analysis on something of a formalism. She argued that retention referenda must qualify as “elections” under the 1870 Constitution because all that is required for something to be an “election” is for voters to have some ability to “choose.”<sup>145</sup> Her definition of “election” came from a 1989 dictionary and other contemporary documents,<sup>146</sup> but even by contemporary standards, it is not entirely clear that every time citizens are presented with a “choice” at the ballot box we are willing to call it an “election.” Many communist nations, for example, purport to hold “elections” by permitting voters to go to the polls and “choose” between hand-picked candidates and no one else,<sup>147</sup> yet most of us do not think that these events are “elections” because they are “elections” only in form, not in substance. Under the retention referenda of the Tennessee Plan, voters have only ever had the “choice” between an incumbent and “none of the

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144. See *id.* at 477–78 & n.33.

145. White & Reddick, *supra* note 7, at 528 (defining “‘elect’ to mean ‘to choose’”).

146. See *id.* at 528 & nn.180–81 (citing OXFORD ENGLISH DICTIONARY 115 (2d ed. 1989); Erica Klarreich, *Election Selection*, 162 SCI. NEWS 280 (2002); Pippa Norris, *Choosing Electoral Systems: Proportionate, Majoritarian, and Mixed*, 18 INT’L POL. SCI. REV. 297 (1997)).

147. See *Cubans Ratify Castro, New Slate of Candidates*, ASSOCIATED PRESS, Jan. 21, 2008, available at <http://www.msnbc.msn.com/id/22761365/>.

Cubans ratified a slate of parliamentary candidates on Sunday including Fidel Castro . . . . Only one choice appeared for each post in districts across the country and there was no campaigning. The Communist Party is the only party allowed . . . . Candidates lose if they do not get more than 50 percent of the vote, although National Assembly officials don’t remember that happening since Cubans began voting for parliament in 1993.

*Id.*

above.” Is that enough of a “choice” to constitute an “election?” Formalism cannot answer this question.

Finally, it must be noted that Justice White’s formalism leads to some very strange results. Justice White was forced to concede that, if her interpretation of the Tennessee Constitution is accepted, then the legislature could abolish contested elections for other public officials, including the governor.<sup>148</sup> That is, in Justice White’s view, even though the Tennessee Constitution requires governors to be selected by “election,”<sup>149</sup> they need never run against an opponent again. Needless to say, this is not how executives are usually selected in democratic governments; it is, again, the manner of selection in communist and other totalitarian governments—governments that, as I noted above, like to put on only the guise of elections. Readers can decide for themselves whether they wish to follow Justice White down this road.

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

In my original essay, I suggested that, to the extent there was any ambiguity over whether the Tennessee Plan was constitutional using the methodologies I outlined above, that ambiguity might be resolved by using a final methodology, one called “popular constitutionalism.” The theory behind this methodology is that we should not see constitutional interpretation as the exclusive domain of political elites, but rather, as a dialogue with the public.<sup>150</sup> In this vein, I asked whether the Tennessee Constitution should be interpreted in light of a salient moment of public expression about the constitutionality of the Tennessee Plan: in 1977, voters *rejected* an amendment to the Tennessee Constitution that would have, among other things, replaced the constitutional provision requiring all judges to be “elected” with a provision that set forth the provisions of the Tennessee Plan.<sup>151</sup> It was the first con-

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148. See White & Reddick, *supra* note 7, at 529 (“The simple truth is that the legislature could do so. It would not be unconstitutional . . . to have a retention election for governor or for any elected office.”).

149. TENN. CONST. art. III, § 4.

150. See, e.g., KRAMER, *supra* note 62, at 7 (“[I]t was the people themselves—working through and responding to their agents in government—who were responsible for seeing that [the Constitution] was properly interpreted and implemented.”).

151. See Fitzpatrick, *supra* note 1, at 497–99.

stitutional amendment proposed by a limited constitutional convention ever to fail in Tennessee.<sup>152</sup>

I noted in my essay that it is always difficult to interpret the significance of a rejected constitutional amendment because amendments can be rejected for any number of reasons.<sup>153</sup> Accordingly, I noted that the defeated amendment was “not conclusive” in my mind.<sup>154</sup> Nonetheless, I argued that the defeated amendment, when combined with the other doubts about the constitutionality of the Tennessee Plan, might create a sufficient basis, at least for those inclined to think that the legislature should be solicitous of the constitutional views of the public, to jettison the Tennessee Plan until the public is given another opportunity to amend the constitution.<sup>155</sup> Indeed, I noted that Tennessee is the *only* state in the United States with a system of judicial selection relying upon gubernatorial appointment and retention referenda that has *not* amended its constitutional provision requiring an elected judiciary.<sup>156</sup>

Justice White called this analysis “indefensible,” but again, her colorful commentary appears to be based on a misunderstanding of my essay.<sup>157</sup> She asserted that, from the “complex and intricate history” of the 1977 vote, I “urge[d] one conclusion: [t]he people rejected the judiciary amendment because they wanted an elected judiciary.”<sup>158</sup> As I just noted, however, I said nothing of the sort. I explicitly said that “[t]he amendment containing the Tennessee Plan would have made many other significant changes to the judicial branch” and that “[i]t is possible that the voters favored the Tennessee Plan but rejected the amendment for the other

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152. See LEWIS L. LASKA, *THE TENNESSEE STATE CONSTITUTION* 26 (1990).

153. See Fitzpatrick, *supra* note 1, at 498 (stating, for example, that “[t]he amendment containing the Tennessee Plan would have made many other significant changes to the judicial branch” and that “[i]t is possible that the voters . . . rejected the amendment for the other changes it would have made”).

154. *Id.*

155. See *id.* at 498–99.

156. See *id.*

157. White & Reddick, *supra* note 7, at 534.

158. *Id.*

changes it would have made . . . .”<sup>159</sup> This is one reason why I said the failure of the 1977 amendment was “not conclusive.”<sup>160</sup>

In any event, although it is certainly true that we cannot be sure why the voters rejected the Tennessee Plan in 1977, this is the case every time amendments fail,<sup>161</sup> yet we nonetheless use failed amendments to interpret constitutional provisions all the time.<sup>162</sup> I noted one example of this in my original essay: an opinion joined by several U.S. Supreme Court Justices interpreting the Eleventh Amendment to the U.S. Constitution in light of an amendment that failed in Congress.<sup>163</sup> Justice White asserted that the relevance of this case is “totally illusory” because the question in the case was whether “suits by Indian tribes against states had been authorized by Congress consistent with the Eleventh Amendment.”<sup>164</sup> It is not clear from Justice White’s description of this case, however, why

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159. Fitzpatrick, *supra* note 1, at 498.

160. *Id.*

161. See, e.g., Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1209–10 (2003) (noting that “[i]t is not always clear . . . that the rejection of proposed language . . . is direct evidence that Congress decided not to adopt the specific policy in question” because “[s]ometimes the rejection of an amendment or proposal reflects a belief that the amendment or proposal was unnecessary,” and that “negative inferences are considerably more slippery in constitutional interpretation”).

162. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 398 & n.21 (1989) (“No comparable restriction [in the Constitution] applies to judges, and we find it at least inferentially meaningful that . . . two prohibitions against plural office-holding . . . were proposed, but did not reach the floor . . . for a vote.”); *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting) (“Proposals to have [in the Constitution] multiple executives, or a council of advisers with separate authority were rejected.”). We do the same for statutory provisions. See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442–43 (1987) (“Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.” (internal quotation marks omitted)).

163. See, e.g., *Seminole Tribe of Fla. 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 . . .”).

164. White & Reddick, *supra* note 7, at 534 n.217.

she thought its relevance was “totally illusory.”<sup>165</sup> It is true that the case involved Indian tribes,<sup>166</sup> but I do not know why that means it should be disregarded. The question in the case, as Justice White herself noted, involved how to interpret the Eleventh Amendment of the U.S. Constitution.<sup>167</sup> I invoked the case because several Supreme Court Justices argued that the Eleventh Amendment should be interpreted in light of a constitutional amendment that had failed (even though it may not have been possible to know for sure why the amendment failed).<sup>168</sup> There are many other judicial decisions interpreting constitutional provisions in light of failed amendments,<sup>169</sup> not to mention countless articles by scholars endorsing the approach.<sup>170</sup> Moreover, the approach has been used not only for amendments rejected contemporaneously with the enactment of the relevant constitutional provision, but also for amendments rejected long after the relevant provisions were enacted.<sup>171</sup>

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165. *Id.*

166. *See Seminole Tribe*, 517 U.S. at 44.

167. White & Reddick, *supra* note 7, at 534 n.217.

168. *See Seminole Tribe*, 517 U.S. at 111.

169. *See supra* note 162.

170. *See, e.g.*, Kesavan & Paulsen, *supra* note 161, at 1209–12 (endorsing the approach “with extra caution”); 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”); Glen V. Salyer, *Free Exercise in Illinois: Does the State Constitution Envision Constitutionally Compelled Religious Exemptions?*, 19 N. ILL. U. L. REV. 197, 205–06 (1998) (arguing that the Free Exercise Clause in the Illinois Constitution should not be interpreted like the Free Exercise Clause in the U.S. Constitution because the language used in the U.S. Constitution was proposed for the Illinois Constitution and rejected); Bernard Schwartz, “*Shooting the Piano Player?*” *Justice Scalia and Administrative Law*, 47 ADMIN. L. REV. 1, 11 (1995) (arguing that the U.S. Constitution should not be interpreted to embody a strict separation of powers because an amendment embodying such a separation was proposed and rejected).

171. *See, e.g.*, David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1275–77 (2000) (arguing that the rejection of the Bricker Amendment “enhanced” the constitutional case for the view of the treaty power in *Missouri v. Holland* because “[h]aving been decisively defeated in the realm

It is possible that Justice White's point was that it is more difficult to know what to make of amendments rejected by the public than amendments rejected by Congress.<sup>172</sup> If that was her point, then I am skeptical of it. In many states, citizens are permitted to enact constitutional provisions by popular vote, and accordingly, courts are often called upon to interpret the meaning of this activity.<sup>173</sup> As far as I can tell, courts interpret constitutional provisions in light of amendments rejected by voters in much the same way they do amendments rejected by the legislature.<sup>174</sup>

The short of the matter is this: every other state that adopted a selection method like Tennessee's amended its constitution in order to do so (a point Justice White nowhere disputed), and when Tennessee voters had the chance to do the same, they did not take it. For those who think popular expressions of constitutional meaning are relevant to constitutional analysis, the public's rejection of the Tennessee Plan suggests caution before concluding that the Plan is constitutional. This is the case even though it cannot be known whether the public rejected the amendment because it included the Tennessee Plan or for other reasons. Where there is uncertainty in the public's view, the response from popular constitutionalism should be to clarify the uncertainty, not to ignore it. It was for this reason that I argued the legislature should give the public another chance to express themselves more clearly on this point before reauthorizing the Plan. If Justice White truly believes that the people of Tennessee want the Tennessee Plan, then she should have no problem putting it to another vote.

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of constitutional politics, there would seem to be little basis for revisiting the question today through judicial construction").

172. See White & Reddick, *supra* note 7, at 534 ("There is no legal basis for using the public's vote to evaluate the constitutionality of a legislative enactment.").

173. See, e.g., *In re Proposal C*, 185 N.W.2d 9, 14 (Mich. 1971).

174. See, e.g., Justin Levitt & Michael P. McDonald, *Taking the "Re" out of Redistricting: State Constitutional Provisions on Redistricting Timing*, 95 GEO. L.J. 1247, 1258 n.49 (2007) (noting that, when interpreting constitutional provisions, "states have in the past compared current text with prior provisions or failed amendments"); Richard Shattuck, *A Cry for Reform in Construing Washington Municipal Corporation Statutes*, 59 WASH. L. REV. 653, 671 (1984) ("[I]f a proposed constitutional amendment failed to receive voter approval, the supreme court could interpret the failure as the will of the people that the powers of municipal corporations be interpreted very narrowly.").

### III. IS MERIT SELECTION GOOD PUBLIC POLICY?

Ms. Reddick's portion of the response was dedicated to a number of policy arguments in favor of merit-selection systems like the Tennessee Plan.<sup>175</sup> Although Ms. Reddick did not suggest that these points bear on the question of whether the Tennessee Plan is constitutional,<sup>176</sup> the legislature will no doubt consider questions of public policy when it decides whether to reauthorize the Tennessee Plan in 2009. For this reason, I will explain why I believe Ms. Reddick may have overstated the evidence in favor of merit-selection systems.

#### A. *Do Merit Systems Select Judges with More Merit?*

Ms. Reddick acknowledged that the research is mixed on whether merit selection produces better qualified judges than do elections.<sup>177</sup> She conceded that “[t]he most comprehensive analysis of this kind reported that merit-selected and popularly-elected state high court judges did not differ significantly in the extent of their legal or judicial experience . . . .”<sup>178</sup> She also conceded that “elected judges [a]re more productive than merit-selected judges.”<sup>179</sup> Nonetheless, she asserted that judges who come to the bench through merit selection are “more likely than popularly-elected judges to have attended prestigious law schools”<sup>180</sup> and write “higher quality” opinions.<sup>181</sup> She further asserted that elected judges are disciplined more frequently than judges in merit systems, and that surveys of lawyers for corporations rate judges in states with merit selection higher than judges in states with elected judiciaries.<sup>182</sup>

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175. See White & Reddick, *supra* note 7, at 535–43.

176. See *id.*

177. *Id.* at 537.

178. *Id.*

179. *Id.*

180. *Id.* (citing Henry R. Glick & Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, 70 JUDICATURE 228, 231–33 (1987)).

181. *Id.* (citing Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary*, (Univ. of Chi. Sch. of Law, John M. Olin Law & Econ. Working Paper No. 357, 2007), available at SSRN:<http://ssrn.com/abstract=1008989>).

182. *Id.* at 537–38.

Although Ms. Reddick conceded this evidence presents only a mixed case for the Tennessee Plan, I think the evidence is even more uncertain than she acknowledged. For example, although it is true that the Glick-Emmert study found that judges in merit-selection states were more likely than judges in other systems to attend “prestigious law schools,” the study noted that “[t]he total number is small, however.”<sup>183</sup> The study also concluded in rather unequivocal terms that “the evidence is clear that merit selection judges do not possess greater judicial credentials than judges in other states.”<sup>184</sup>

Similarly, although Ms. Reddick was quite right that the Choi-Gulati-Posner study found that judges in merit-selection states tend to write opinions that are cited in other jurisdictions (the study’s proxy for “high quality” opinions) at a higher rate than do elected judges, the study also found that the greater productivity of elected judges *more than outweighed* the greater out-of-state citation rate of merit-selection judges.<sup>185</sup> That is, the study found that judges in elected states received a greater absolute number of out-of-state citations.<sup>186</sup> Thus, if the unit of analysis is the judge rather than the opinion, elected systems are superior to merit-selection systems even on this metric.<sup>187</sup>

Moreover, it is hard to know what, if anything, can be inferred from the surveys of corporate lawyers upon which Ms. Reddick relied. To begin with, the corporate lawyers surveyed obviously make up a very small and unrepresentative slice of the public. In addition, Ms. Reddick’s conclusions from these surveys were based on a comparison of ratings from different states. States, however, are different from each other in many ways other than their methods of judicial selection, and Ms. Reddick nowhere

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183. Glick & Emmert, *supra* note 180, at 231.

184. *Id.* at 233.

185. See Choi et al., *supra* note 181, at 17.

186. *Id.*

187. See RICHARD POSNER, HOW JUDGES THINK 138 & n.18 (2008) (describing the Choi-Gulati-Posner study to find that “state supreme court justices receive *more* citations in judicial opinions from judges in other states the *less* secure their tenure is” because, although “[t]he appointed judges receive more citations per opinion, [t]he elected judges write more opinions, and the relative number of opinions is greater than the relative number of citations per opinion”).

attempted to control for any of these differences. This renders her comparisons suspect from a scientific perspective.<sup>188</sup>

The same can be said for Ms. Reddick's reliance on the different rates at which judges have been disciplined. None of the studies she cited attempted to assess whether the different rates of discipline they observed were statistically significant as opposed to the result of random chance.<sup>189</sup> Moreover, at least one of the studies compared completely different types of courts to one another.<sup>190</sup> A scientific assessment of these comparisons would need to try, again, to control for any other relevant differences between such courts; no such effort was attempted. Finally, even if these scientific obstacles could be overcome, it is worth noting that the total number of judges who were disciplined was extremely small in all of Ms. Reddick's studies. Thus, whatever advantage merit selection might offer on this point could be easily outweighed by the many other considerations that go into selecting a judicial system.

### B. Do Merit Systems Select More Diverse Judges?

Ms. Reddick acknowledged that the studies on whether merit systems select judges with more racial and gender diversity have been "inconsistent."<sup>191</sup> Nonetheless, she went on to suggest

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188. See, e.g., John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. LEGAL STUD. 1, 4 (1997) (noting the empirical difficulties with interstate comparisons); Steven Raphael & Rudolf Winter-Ebmer, *Identifying the Effect of Unemployment on Crime*, 44 J.L. & ECON. 259, 266 (2001) (same).

189. See Steven Zeidman, *To Elect or Not to Elect: A Case Study of Judicial Selection in New York City 1977–2002*, 37 U. MICH. J.L. REFORM 791, 808–10 (2004); CALIFORNIA COMMISSION ON JUDICIAL PERFORMANCE, SUMMARY OF DISCIPLINE STATISTICS 1990–1999 (source on file with author); *Merit Selection and Retention*, "Board Information Paper," <http://www.floridabar.org> (follow "Media Resources" hyperlink; then follow "Issue Papers" hyperlink; then follow "Merit Selection and Retention" hyperlink) (last visited Nov. 8, 2008).

190. See Zeidman, *supra* note 189, at 808–10 (comparing criminal courts and family courts to civil courts). It is not clear from the cursory findings of the two other studies if they compared different courts to one another as well.

191. White & Reddick, *supra* note 7, at 539. In addition to examining studies on merit systems, Ms. Reddick also examined two studies on non-merit "appointive systems." *Id.* at 539–40. It is hard to understand why these studies are more relevant to a study of merit systems than are the studies on merit systems themselves. One of the two studies was limited to interim appointments in states that normally elect their judges. See Lisa M. Holmes & Jolly A. Emrey,

that the Tennessee Plan has brought greater diversity to the bench. She suggested this by favorably comparing the number of women and racial minorities who have been appointed under the Tennessee Plan with “the composition of Tennessee’s benches before merit selection.”<sup>192</sup> However, comparing the race and gender composition of the judiciary in the 1980s to the composition in the twenty-first century is fraught with empirical peril because many things have changed in the meantime besides the method of judicial selection. For a whole host of social and legal reasons, women and racial minorities are much more likely to be *elected* today than they were two or three decades ago.<sup>193</sup> Indeed, the number of black officials elected in Tennessee increased nearly *five times* from 1970 to 2000.<sup>194</sup> Ms. Reddick did not attempt to control for any of these changes. Thus, it may very well be the case that Tennessee would have the same number—or even more—judges who are women and minorities today had it continued with contested elections and never adopted merit selection. On this point, it is worth noting that Tennessee’s trial judges are still subject to contested elections, and over the last ten years, there has been little to no dif-

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*Court Diversification: Staffing the State Courts of Last Resort through Interim Appointments*, 27 JUST. SYS. J. 1, 1 (2006) (“In this study, we examine a governor’s ability to appoint interim replacement judges to courts of last resort in states with elective judiciaries.”). The other combined interim appointments in states that elect their judges with appointments in merit systems. See Kathleen A. Bratton & Rorie L. Spill, *Existing Diversity and Judicial Selection: The Role of the Appointment Method in Establishing Gender Diversity in State Supreme Courts*, 83 SOC. SCI. Q. 504, 509 n.7 (2002) (“We measure appointment as actual appointment by governor and/or judicial nominating commission, rather than as selection in a state with an appointment system. That is, justices who are appointed as replacement justices in election systems are considered appointed justices.”). It is therefore difficult to draw any conclusions about merit systems in particular from these studies. In addition, the first study did not even attempt to assess whether the differences it observed were statistically significant, and although the second study did so, it found a statistically significant association only for gender and only when the court was previously all-male; when the court was not previously all-male, appointments did not improve diversity any more than elections. See *id.* at 514 (“Women have a relatively high probability of being selected to state high courts only when the court is all male.”).

192. White & Reddick, *supra* note 7, at 540.

193. See, e.g., JOINT CENTER FOR POLITICAL AND ECONOMIC STUDIES, BLACK ELECTED OFFICIALS: A STATISTICAL SUMMARY 28 (2000).

194. See *id.*

ference between the diversity of these judges and the diversity of appellate judges who have been subject to the Tennessee Plan.<sup>195</sup> Even this comparison, however, is imperfect because the labor pools for trial and appellate judges might not be the same, and as Ms. Reddick noted,<sup>196</sup> some trial judges in Tennessee initially obtained their positions through interim appointments from nominating commissions rather than by election.<sup>197</sup> Nonetheless, all of this is consistent with the notion that there is no good evidence one way or another on whether merit systems like the Tennessee Plan produce more racial or gender diversity.

*C. Do Merit Systems Minimize Political Considerations in  
Judicial Selection?*

Ms. Reddick acknowledged that “it is impossible to entirely eliminate politics” from judicial selection, but she argued that merit selection is preferable to elections because it “minimize[s] the role of politics in judicial selection.”<sup>198</sup> She said this is the case because judges in merit-selection states “are not required to raise money, seek party support, or campaign for office.”<sup>199</sup> But even if merit selection freed judges from these activities—and how far it does so is not clear<sup>200</sup>—it does not necessarily follow that merit selection reduces the role of politics in judicial selection. Under

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195. In 2007, appellate judges in Tennessee were more diverse in both race and gender than were trial judges. See AMERICAN JUDICATURE SOCIETY, DIVERSITY OF THE BENCH, available at [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, available at <http://www.abanet.org/judind/diversity/tennessee.html> (reporting data for 2004 on racial diversity only); AMERICAN JUDICATURE SOCIETY, JUDICIAL SELECTION IN THE STATES, available at [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)).

196. See White & Reddick, *supra* note 7, at 537 & n.238.

197. See TENN. CODE ANN. § 17-4-118(a) (1994).

198. White & Reddick, *supra* note 7, at 541.

199. *Id.*

200. Judges in Tennessee, even those selected under the Tennessee Plan, are permitted to “attend” and “speak” to “political gatherings,” as well as to “contribute to a political organization or a political candidate.” See TENN. SUP. CT. R. 10, Canon 5C(1)(a)(i), (iii), 5C(1)(b)(i).

the Tennessee Plan, judges must be nominated by a commission of individuals made up largely of members of special lawyers' organizations.<sup>201</sup> Nothing prevents these lawyers from considering the ideological or jurisprudential leanings of judicial candidates, regardless of whether the candidates raise money, seek party support, or campaign. Indeed, given that the livelihoods of these lawyers will often depend on the jurisprudential inclinations of the judges they nominate, it would be nothing short of superhuman if these considerations did not enter into their deliberations. Scholars who have studied merit-selection systems in other states have found that such lawyers are not, in fact, superhuman.<sup>202</sup>

That is, it may be that the Tennessee Plan does not so much reduce the role of politics in judicial selection as it reduces the *visible manifestation* of politics in judicial selection (i.e., the raising money, seeking party support, and campaigning to which Ms. Reddick pointed). Although the Tennessee Plan's judicial nominating commission meets in public to hear testimony in favor or against applicants for judicial office, the commission retreats behind closed doors to deliberate and make its decision.<sup>203</sup> Simply

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201. Fourteen of the seventeen members of the nominating commission must be lawyers, and twelve of the fourteen must come from names supplied by five special lawyers' organizations: the Tennessee Bar Association, the Tennessee Defense Lawyers Association, the Tennessee Trial Lawyers Association, the Tennessee District Attorneys General Conference, and the Tennessee Association of Criminal Defense Lawyers. See TENN. CODE ANN. § 17-4-102(a)(1)–(6) (Supp. 2007).

202. See, e.g., 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) (concluding that merit selection "is not nonpolitical" but "simply differently political" because "[t]he 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"); G. Alan Tarr, *Designing an Appointive System: The Key Issues*, 34 FORDHAM URB. L.J. 291, 300 (2007) ("The classic study of the first 'merit selection' system in Missouri concluded that appointment transformed the politics of judicial selection but did not eliminate politics. More recent accounts have documented either partisan conflict or competition between elements of the bar (e.g., plaintiffs' attorneys vs. defense attorneys) in several 'merit selection' systems.").

203. See C. Barry Ward, *Judicial Selection Process Serves People Well*, COMMERCIAL APPEAL (Memphis), July 1, 2007, at V3. The non-public nature of the Tennessee Plan has been criticized by the current Governor of Tennessee,

because the politics are not as visible, however, does not mean they are not there. As one of the earliest studies of the Tennessee Plan concluded, although “[i]t is doubtless true that there has been an amelioration of the more visible manifestations of partisanship since the establishment of the [Tennessee Plan],” the “process of appellate court selection, whether before or after 1971, can hardly be characterized as non-political.”<sup>204</sup>

Indeed, I am not even sure it is possible to reduce the role that politics plays in judicial selection. Judges (especially appellate judges) have a great deal of discretion to make public policy when they decide cases.<sup>205</sup> As the U.S. Supreme Court noted a few years ago on this point, “Not only do state-court judges possess the power to ‘make’ common law, but they have the immense power to shape the States’ constitutions as well.”<sup>206</sup> It seems inevitable that those who have a stake in these policy decisions will try to influence how the judges that make them are selected. This, it should be noted, is precisely why lawyers’ organizations favor merit-selection systems. As one scholar has pointed out, “The merit plan gives bar associations a degree of influence in the choice of judicial candidate unmatched under any other selection procedure . . . . Lawyers support it, accordingly.”<sup>207</sup>

In my view, the futile effort to reduce the role that politics plays in judicial selection obfuscates the more relevant question: *whose* politics should drive the selection process and, thereby, the public policy that the selected judges ultimately fashion. This, it should be noted, is not an empirical question but a philosophical one. Those who believe that public policy should be promulgated by well-educated elites, such as the members of lawyers’ organiza-

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Phil Bredesen. See John Rodgers, *Briley: Judicial Meetings Should Remain Secret*, CITY PAPER, Apr. 18, 2008, <http://www.nashvillecitypaper.com/news.php?viewStory=59655>.

204. Robert Keele, *The Politics of Appellate Court Selection in Tennessee: 1961-1981*, in THE VOLUNTEER STATE: READINGS IN TENNESSEE POLITICS 231, 252 (Olshfski & Simson eds., 1985).

205. This has been well understood since the Legal Realist movement almost one hundred years ago. See CHERMERINSKY, *supra* note 59, at ix-x (“[T]he legal realists long ago taught that judges have inherent discretion in deciding cases, especially in interpreting an open-textured document such as the Constitution.”).

206. *Republican Party of Minn. v. White*, 536 U.S. 765, 784 (2002).

207. Hanssen, *supra* note 6, at 87.

tions, should favor selection systems like the Tennessee Plan. Those, by contrast, who believe in a more democratic form of government, where members of the public have the most influence over public policy, might wish to look elsewhere.

It should be noted, again, that the Tennessee Constitution is not silent on this philosophical question. The constitution was amended in 1853 for the very reason of giving the public greater control over the policymaking of the judicial branch.<sup>208</sup> As the U.S. Supreme Court recently put it, “[This] is precisely why the election of state judges became popular.”<sup>209</sup>

*D. Do Merit Systems Enhance Public Confidence in the Courts?*

Ms. Reddick closed her portion of the response by arguing that “substantial majorities of voters nationwide and in individual states support merit selection and retention systems.”<sup>210</sup> However, the survey questions on which Ms. Reddick relied for this point merely asked voters whether they approved or disapproved of merit selection; they did not ask voters whether they preferred merit selection over popular election.<sup>211</sup> When voters are asked the

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208. See Fitzpatrick, *supra* note 1, at 477–78 & n.33.

209. *White*, 536 U.S. at 784.

210. *White & Reddick*, *supra* note 7, at 543.

211. See JUSTICE AT STAKE CAMPAIGN, NATIONAL SURVEY OF AMERICAN VOTERS 12 (2001), available at <http://www.justiceatstake.org/files/JASNationalSurveyResults.pdf> (“Q.80 Now, I’m going to read you a summary of a proposal that deals with the way judges are selected. Under this proposal, a non-partisan panel of citizens, legal professionals, and civic leaders evaluates and recommends potential judges to the governor. The governor then chooses a nominee from the list who must then be confirmed by the state legislature. After each term, the public then votes on whether a judge should keep the seat or be removed from office. If a judge is rejected, the selection process starts again. Based on this statement, would you support or oppose such a proposal?”); Memorandum from Patrick Lanne, Public Opinion Strategies, to Interested Parties 7 (Dec. 11, 2007), available at <http://www.justiceatstake.org/files/MissouriMemoAndOverallResults.pdf> (“Q.16 Now, I have a few questions about how some [of] Missouri’s judges are selected. First, under the current system, a non-partisan panel of citizens and attorneys selected by the Governor, the state bar association, and the Supreme Court evaluate and recommend potential judges to the governor. The governor then chooses a new judge from the recommended list. After a short initial term, the public then votes on whether the judge should keep the seat or be removed from office. If a judge is rejected by the voters, the selection process starts again. Based on this statement, do you support or oppose the existing system?”); JUSTICE AT STAKE CAMPAIGN, 2008 MINNESOTA

latter question, the results are much different. In a recent national poll, voters preferred elections to merit selection for state supreme court judges by a margin of seventy-five percent to twenty-one percent.<sup>212</sup> The same is true in Tennessee, where a recent poll showed voters in favor of elections over merit selection by a margin of over three to one.<sup>213</sup> In any event, if merit selection is as popular with members of the public as Ms. Reddick suggested, then she, too, should have no problem joining with me in a call for another vote on a constitutional amendment that would settle this matter once and for all.

#### IV. CONCLUSION

The Tennessee Plan is currently set to expire on June 30, 2009.<sup>214</sup> As I noted in my original essay, if the legislature does not reauthorize the Plan or enact an alternative system for judicial selection before then, Tennessee will most likely return by default to contested elections to select its judges.<sup>215</sup>

At the close of her response, Justice White predicted that, if the legislature fails to reauthorize the Tennessee Plan next year, it will not be because the legislature gave consideration to arguments or logic but instead because the legislature “gambled away” the Plan as a “bargaining chip.”<sup>216</sup> Justice White said much the same

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PUBLIC OPINION POLL ON JUDICIAL SELECTIONS (Jan. 2008), *available at* <http://www.justiceatstake.org/files/MinnesotaJusticeatStakesurvey.pdf> (“59. Shall the Minnesota Constitution be amended to provide that judges shall be appointed by the Governor from a list of names provided by a Merit Selection Committee, evaluated based on performance, and retained or removed according to the decision of the voters[?]”).

212. See AMERICAN JUSTICE PARTNERSHIP FOUNDATION, VOTER OPINION ON THE ELECTION OR APPOINTMENT OF STATE SUPREME COURT JUSTICES 1 (July 2008), *available at* [http://www.legalreforminthenews.com/2008PDFS/State\\_Supreme\\_Court\\_Elected\\_vs.\\_Appointed\\_7-8-08.pdf](http://www.legalreforminthenews.com/2008PDFS/State_Supreme_Court_Elected_vs._Appointed_7-8-08.pdf).

213. See Letter from Kellyanne Conway, President and CEO, The Polling Company, Inc., to interested Parties (Feb. 27, 2008), *available at* <http://www.pollingcompany.com/cms/files/Tennessee%20Statewide%20Survey%20January%202008.pdf> (noting that 54% of voters favored returning to direct elections and only 16% favored retaining the Tennessee Plan).

214. See TENN. CODE ANN. §§ 4-29-112, -229(a)(46)–(47) (2008).

215. See Fitzpatrick, *supra* note 1, at 485–86.

216. At the close of her response, Justice White stated that:

thing about the decision of the people of Tennessee to adopt judicial elections in 1853 (which she called “not . . . principled”<sup>217</sup>) and the decision of the legislature to partially repeal the Tennessee Plan (which she called “politics at its worst”<sup>218</sup>).

I am more optimistic. I have the greatest regard for all Tennessee’s public servants—whether they are judges, legislators, or others<sup>219</sup>—and I believe that reasonable people of good faith can disagree with one another about almost anything, including questions of constitutional law and judicial selection. I am confident that the next legislature will have no trouble making a thoughtful decision regarding the Tennessee Plan.

My own recommendation to the legislature is to allow the Tennessee Plan to expire and return judicial selection to elections until the people of Tennessee have been given another opportunity to amend the constitution. Although judicial elections are not perfect, there is at least no doubt that they are constitutional.

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If the Tennessee legislature fails to revive the Tennessee Plan during the next calendar year, the Plan’s demise will not be attributable to either author’s rhetoric or logic, nor will it signify a considered rejection of merit selection. Rather, as has been true from the beginning, Tennessee’s merit selection system will be yet another bargaining chip gambled away at the tables of the Tennessee General Assembly.

White & Reddick, *supra* note 7, at 543.

217. *Id.* at 510 (“[T]he 1853 amendment was not the result of a principled choice . . .”).

218. *Id.*

219. I therefore do not accept Justice White’s invitations to join her in casting aspersions on these public servants. At one point she said that I “assert[ed]” in my original essay that Tennessee’s special judges—those temporarily appointed to replace regular judges who recused themselves—are “not qualified to render a decision on a matter of constitutional importance.” *Id.* at 514 n.99. Readers will search my original essay in vain for any such assertion. Likewise I never “imply[d]” that some of Tennessee’s judges “did not deserve either a positive evaluation or retention.” *Id.* at 520 n.142. Even if the Tennessee Plan produces outstanding judges, it does not necessarily follow that it is consistent with the Tennessee Constitution.