A Report on Reauthorization of the Tennessee Plan

By

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A Report on Reauthorization of the Tennessee Plan

By Brian T. Fitzpatrick[*]

In June of 2008, some of the operative provisions of Tennessee's method of selecting appellate judges—called the "Tennessee Plan"—will expire unless they are reauthorized by the Tennessee Legislature. Under the Tennessee Plan, judges are initially appointed by the Governor from a list of three names selected by a nominating commission made up primarily of lawyers who belong to special lawyer's organizations. After a period of time, these judges then have their names put on the ballot in uncontested retention referenda where voters are asked whether to keep the judges appointed by the Governor. Ever since the Tennessee Plan was enacted to replace contested elections in 1971, it has been controversial, and, for much of its history, it has been mired in litigation. Indeed, just last year, the Governor was so unhappy with the work of the nominating commission that he brought a lawsuit against it that went all the way to the Tennessee Supreme Court.

This report is an effort to further the debate over whether the Tennessee Plan should continue by examining some of the controversies surrounding the Plan. In particular, this report examines the following questions: First, is the Tennessee Plan constitutional? Second, is the Tennessee Plan serving its own professed purposes? And, third, what will happen if the Legislature chooses not to reauthorize the expiring provisions in June? This report finds as follows:

First, serious questions remain whether the Tennessee Plan is consistent with the Tennessee Constitution. Since 1853, the Tennessee Constitution has required that all judges be elected by the qualified voters of the state. Under the Tennessee Plan, however, appellate judges are neither selected nor retained in contested elections; they are selected by the Governor and a nominating commission, and retained in retention referenda. Although the constitutionality of the Tennessee Plan has been addressed more than once by the Tennessee Supreme Court, these decisions have left many unanswered questions:

- It is unclear whether the Tennessee Constitution permits the Governor to appoint a new judge to the bench when the previous judge completed his or her entire term; the Constitution appears to permit new judges to come to the bench by appointment rather than by election only when the previous judge

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left in the middle of his or her term. No court in Tennessee has considered this question.

- It is unclear whether the Tennessee Constitution permits judges to remain on the bench through an uncontested retention referendum. At the time the current constitutional provision was written in 1870, the idea of a retention referendum for public officials was unknown in the United States. Thus, it was impossible for the authors of the Constitution to have intended such a device when they required all judges to be "elected by the qualified voters" of the state. Although it may not be necessary to amend the Constitution in order to permit the Legislature to take advantage of every new way of doing things, there are serious doubts that retention referenda serve the 1870 Constitution's democratic purposes as well as contested elections do. As a historical matter, retention referenda were originally designed not to facilitate democratic accountability, but, rather, to insulate judges from such accountability. It is therefore unsurprising that, in Tennessee and elsewhere, judges who run in a retention referendum are virtually never defeated. No court in Tennessee has considered these points.

- Any ambiguity in the Tennessee Constitution on these questions arguably was resolved by the voters in 1977. In that year, a limited Constitutional Convention proposed to the people of Tennessee that they repeal the constitutional provision requiring elected judges in favor of provisions permitting the Tennessee Plan, but the voters rejected this constitutional amendment. This is in stark contrast to the 16 other states in the United States that select judges through a method of initial appointment by the Governor followed by a retention referendum. Unlike Tennessee, every single one of these states has amended its constitution to change provisions requiring elected judges in favor of provisions permitting the appointment-retention method of selection. No court in Tennessee has considered this matter.

Second, there are serious questions whether the Tennessee Plan serves any of the purposes it was designed to achieve. The principal purposes of the Tennessee Plan are to select judges on the basis of "merit," to foster judicial independence by removing politics from the selection process, and to foster racial and gender diversity on the bench. It is unclear if the Plan is serving any of these purposes:

- Scholars have been unable to find any evidence that judges selected by gubernatorial appointment from a nominating commission are better qualified or more productive on the bench than elected judges.

- Although the Tennessee Plan might produce judges who are more independent from the public, it may do so only by producing judges who are more dependent on the special lawyer's organizations that control the list of nominations from which the Governor must appoint the judges. The members of these special lawyer's organizations have political views just as do other

members of the public. For these reasons, many scholars have found that methods of judicial selection like the Tennessee Plan do not take the politics out of the selection process so much as substitute one group's politics (the public at large) with another's (the special lawyer's organizations).

- It is unclear whether judges selected by the Tennessee Plan are more diverse than judges selected by contested elections. Nationwide studies on this question have produced mixed results. The data in Tennessee is also inconclusive. In 2007, appellate judges in Tennessee (*i.e.*, those selected by the Tennessee Plan) were slightly more female and African American than were trial judges (*i.e.*, those primarily selected in contested elections). In 2004 and 2001, however, the reverse was true.

Third, the provisions of the Tennessee Plan that are expiring in June of 2008 are the statutes authorizing the commissions that nominate appellate judges to the Governor and that evaluate those judges when they seek retention. If the Legislature does not reauthorize these commissions, the Tennessee Plan will nonetheless remain in operation until June 2009 because there is a provision in the law permitting the commissions to wind down their activities for one year. Thus, the Legislature will have one full year to decide what method of judicial selection should replace the Tennessee Plan. If the Legislature does not act within that year, it is not entirely clear how appellate judges in Tennessee will be selected going forward, but, for several reasons, it is likely that the judges would revert to initial selection and retention under the old system of contested elections (which is the system still in place for trial judges).

I. A Brief History Of Judicial Selection In Tennessee

How Americans select their judges has undergone a great deal of change over the course of this country's history. Interestingly, perhaps no state has been more responsible for this change than the state of Tennessee.

At the time of the founding, judges everywhere in America came to the bench by appointment and they often stayed on the bench for life.[1] In the federal system, judges were selected by the President with confirmation by the Senate, and, in the states, judges were appointed either by the Legislature or the Governor.[2] Thus, the first Tennessee Constitution, ratified in 1796 when Tennessee became the sixteenth state, granted judges life tenure (so long as they exhibited "good behavior") and

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

[2] *See* HAYNES, *supra* note 1, at 98; Berkson, *supra* note 1, at 176 & n.1.

placed the power to select those judges exclusively in the hands of the state legislature.[3]

While the federal system has stayed the same over the ensuing two hundred years, things radically changed in the states, and they changed early on. By the time of the Civil War, the vast majority of states had changed their method of selecting judges from appointment to direct election by the people.[4]

In some ways, the dramatic shift in the states had its epicenter in Tennessee. Most historians attribute the shift in judicial selection to a shift in this country's attitude about democracy that was inspired by one of Tennessee's favorite sons, Andrew Jackson. At the time of the founding, democracy was an ideal embraced only tentatively.[5] It would not be until the populist movement led by Andrew Jackson in the Nineteenth Century that the country would emphatically embrace the notion that ordinary citizens were fully capable of making decisions about their government.[6] According to historians, this same populist movement—dubbed "Jacksonian Democracy"—that restructured so many American institutions was also responsible for the tide of elected judiciaries that washed across America in the middle of the Nineteenth Century.[7]

The tide began with Mississippi, which, in 1832, became the first state to select all of its judges by election.[8] Tennessee first considered proposals to do so at its second Constitutional Convention in 1834, but the Convention ultimately voted to continue selecting judges by legislative appointment.[9] Tennessee would not make the change

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[3] *See* TENN. CONST. of 1796, art. V, § 2 ("The general assembly shall by joint ballot of both houses appoint judges of the several courts of law & equity . . . who shall hold their respective offices during good behavior.").

[4] *See* Berkson, *supra* note 1, at 176 ("By the time of the Civil War, 24 of 34 states had established an elected judiciary with seven states adopting the system in 1850 alone.").

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

[6] *See id.* at 33-42, 74 (outlining the expansion of suffrage).

[7] *See* Republican Party of Minn. v. White, 536 U.S. 765, 785 (2002) ("Starting with Georgia in 1812, States began to provide for judicial election, a development rapidly accelerated by Jacksonian democracy."); CHARLES H. SHELDON & LINDA S. MAULE, CHOOSING JUSTICE: THE RECRUITMENT OF STATE AND FEDERAL JUDGES 4 (1997) (noting that "the Jacksonian movement . . . encouraged more popular control of judges"); Rachel Paine Caufield, *How the Pickers Pick: Finding A Set of Best Practices for Judicial Nominating Commissions*, 34 FORDHAM URB. L.J. 163, 167 (2007) ("States began to move away from appointive selection methods in the mid-1800s with the rise of Jacksonian democracy and its emphasis on democratic accountability, individual equality, and direct voter participation in governmental decision-making."); Berkson, *supra* note 1, at 176 (noting that people "were determined to end [the] privilege of the upper class and to ensure the popular sovereignty we describe as Jacksonian Democracy").

[8] *See* HAYNES, *supra* note 1, at 99-100.

[9] *See* N. Houston Parks, *Judicial Selection—The Tennessee Experience*, 7 MEM. ST. U. L. REV. 615, 624 (1977); Timothy S. Huebner, *Judicial Independence in an Age of Democracy, Sectionalism, and*

to an elected judiciary until 1853. In that year, the people of Tennessee approved an amendment to the Constitution providing that all judges in the state "shall be elected by the qualified voters" to terms of 8 years.[10]

After the Civil War, Tennessee held another Constitutional Convention to bring its Constitution into compliance with the requirements set forth by the Reconstruction Congress. The Convention of 1870 maintained the provision requiring the election of all judges, and the 1870 language has not been changed since then. Thus, the Tennessee Constitution still declares that all judges—whether on the "Supreme Court" or "inferior courts"—"shall be elected by the qualified voters" to a term of 8 years.[11]

For the next 100 years, judges in Tennessee were selected, at least in theory, by voters in contested elections like the candidates for other public offices. But the practice of judicial elections did not necessarily live up to the theory. As one commentator has noted, "[e]lection campaigns generally were not very partisan. In fact, incumbent judges usually ran with no, or only nominal opposition."[12] (After all, for much of the post-Civil War era, Tennessee was a one-party state; thus, whichever candidate was nominated by the Democratic Party was all but certain to win a judgeship.[13]) Moreover, many—if not most—judges in Tennessee were initially elevated to the bench after 1853 not by election, but by gubernatorial appointment.[14] This is the case because many judges retired or died in the middle of their terms. Ever since 1834, the Tennessee Constitution has permitted the Legislature to direct how such vacancies should be filled until the next scheduled election,[15] and, from the very beginning, the Legislature vested the Governor with the power to appoint judges to fill unexpired

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War, in A HISTORY OF THE TENNESSEE SUPREME COURT 66 (James Ely ed., 2002). The 1834 Convention did, however, eliminate life tenure for judges in favor of 12- and eight-year terms. *See id.*

[10] *See* Huebner, *supra* note 9, at 87; Parks, *supra* note 9, at 626-28.

[11] TENN. CONST. art. VI, §§ 3, 4.

[12] Parks, *supra* note 9, at 629.

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

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

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

terms.[16] Consequently, one commentator reported that, in the first 100 years of judicial elections in Tennessee, "nearly 60 percent of the regular judges who . . . served on [the] Supreme Court [were] appointed by the Governor in the first instance."[17]

This reality of judicial elections was not a phenomenon unique to Tennessee; many states with elected judiciaries saw large numbers of their judges elevated by appointment to unexpired terms.[18] Despite the limited experience with contested judicial elections—or perhaps because of it—the trend in favor of elected judiciaries began to wane in America in the early 1900s. During the Progressive Era, professional lawyer's organizations across the country began to advocate a new method of judicial selection, one that they thought would take selection out of the political process (whether that process was political appointment or popular election).[19] They believed that judges should be selected by "experts"[20]—in particular, they thought the lawyer's organizations themselves should do the selecting. These organizations called the method whereby they would select judges "merit selection." In 1937, the nation's largest organization of lawyers, the American Bar Association, formally endorsed "merit selection" plans, and, in 1940, the state of Missouri became the first of many states to change its method of judicial selection from election to "merit selection."[21] With the heavy support of lawyer's organizations in the state,[22] Tennessee first adopted a "merit selection" plan in 1971.[23]

The "merit selection" plans adopted by these states did not turn judicial selection entirely over to local lawyer's organizations. Rather, the plans typically charged the state's governor with appointing judges from a list of names submitted by a nominating commission made up largely of members of local lawyer's organizations.[24] Moreover, although many of the architects of "merit selection" favored life tenure for the judges appointed in this manner, they suspected the public

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[16] *See* Huebner, *supra* note 9, at 87; Parks, *supra* note 9, at 629.

[17] *Id.* at 629 (quoting W. WICKER, PROCEEDINGS OF THE SIXTH ANNUAL SOUTHERN INSTITUTE OF LOCAL GOVERNMENT 14 (1947)).

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

[19] *See id.* at 3-6.

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

[21] *See* CARBON & BERKSON, *supra* note 18, at 11.

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

[23] *See* Parks, *supra* note 9, at 615 & n.1.

[24] *See infra* note 148.

would balk at being cut out entirely from a role in choosing important public officials like judges.[25] Thus, the architects of "merit selection" designed a mechanism that they thought would result in life tenure but without the appearance of life tenure: the retention referendum. In a retention referendum, a judge runs unopposed and the electorate is simply asked whether this judge should be retained on the bench or not; that is, the public votes on retention without any knowledge of who might replace the judge if he or she is voted out of office. Under these circumstances, the public nearly always votes to retain a judge.[26] Again, this was not a surprise to the architects of "merit selection." As historians have explained, "many proponents of the commission plan would have preferred good behavior tenure in lieu of retention elections"; "[t]hey perceived retention as a 'sop' to those committed to electoral control over the judiciary."[27]

As explained in more detail in the next section, the "merit selection" plan adopted by Tennessee in 1971—fittingly referred to as the "Tennessee Plan"—is much like the plans in other states. Like other plans, judges are initially appointed by the Governor from a list of names submitted by a judicial nominating commission,[28] and the judges must then run in a retention referendum some period of time thereafter.[29] The 1971 Tennessee Plan applied to judges on both the intermediate appellate courts and the Supreme Court.[30] In 1974, the Plan for the Supreme Court was repealed,[31] but it was reenacted in 1994.[32] The Plan has never been adopted for the selection of trial judges.[33]

Unlike every other state that has adopted a method of judicial selection that relies on initial appointment followed by a retention referendum,[34] however, Tennessee never amended its Constitution to replace the provision stating that all state judges shall be

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[25] *See* CARBON & BERKSON, *supra* note 18, at 8.

[26] *See* Larry Aspin, *Trends in Judicial Retention Elections, 1964-1998*, 83 JUDICATURE 79, 79 (1999) (finding that, in 4,588 retention referenda in a sample of 10 states over 34 years, only 52 judges were not retained).

[27] CARBON & BERKSON, *supra* note 18, at 6-8. Although Missouri was the first state to adopt a "merit selection" plan, California was the first state to use retention referenda. *Id.* at 11. California began using them in 1934 when they were proposed by a group of citizens that included a man who would eventually become Chief Justice of the United States: Earl Warren. *See* Gerald F. Uelmen, *Supreme Court Retention Elections in California*, 28 SANTA CLARA L. REV. 333, 339 (1988).

[28] *See* TENN. CODE ANN. § 17-4-112(a) (2007).

[29] *See id.* §§17-4-114 to 116.

[30] *See* TENN. CODE ANN. § 17-712 (1972).

[31] *See* 1974 Tenn. Pub. Acts, ch. 433, § 1.

[32] *See generally* 1994 Tenn. Pub. Acts, ch. 942.

[33] The one exception is when the Governor fills mid-term vacancies to the trial courts; since 1994, he has been required to use the judicial nominating commission to do so. Nonetheless, all trial judges run for reelection in contested elections. *See infra* note 47.

[34] *See infra* note 148.

elected. Indeed, not only has the Constitution never been amended, but the voters of Tennessee voted down such an amendment in 1977. In that year, a limited Constitutional Convention was called to make several changes to the 1870 Constitution.[35] The Convention proposed 13 different amendments to the people of Tennessee on a variety of topics, including one on the judiciary that would have, among other things, replaced the language guaranteeing an elected judiciary with language providing for the Tennessee Plan.[36] The voters approved every one of the 13 amendments *except* the one that would have replaced the language on elected judges with the Tennessee Plan; this amendment failed by a margin of 55% to 45%.[37]

II. The Tennessee Plan

As originally enacted by the Legislature in 1971, the Tennessee Plan called for all "vacancies" on the intermediate appellate courts and Supreme Court to be filled by the Governor.[38] The Plan described a "vacancy" not only as an instance where a judge left in the middle of an 8-year term, but also where the judge *completed* an 8-year term and did not run for reelection.[39] That is, the Plan required the Governor to initially appoint all new judges on the intermediate appellate courts and the Supreme Court.

In making his appointments, the Governor was required to select one of three persons sent to him by a judicial nominating commission.[40] Under the 1971 legislation, the nominating commission was comprised of nine members: three members of the legislature, three attorneys elected by their peers, and three others appointed by the

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[35] *See* LEWIS L. LASKA, THE TENNESSEE STATE CONSTITUTION 23-27 (1990) (outlining the history and proceedings of Tennessee's 1977 Limited Constitutional Convention).

[36] The proposal would have amended Article VI of the Constitution "by deleting therefrom in their entirety Sections 1-15" and by substituting language stating, among other things, that "Justices of the Supreme Court and judges of the Court of Appeals shall be appointed by the Governor from three nominees recommended . . . by the Appellate Court Nominating Commission," and that "[t]he name of each justice and judge seeking retention shall by submitted to the qualified voters for retention or rejection . . . ." Governor Ray Blanton, Proclamation Subsequent to the 1977 Tennessee Constitutional Convention (Mar. 31, 1978) (transcript available in THE JOURNAL OF THE DEBATES OF THE CONSTITUTIONAL CONVENTION (1977)).

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

[38] *See* TENN. CODE ANN. § 17-712 (1972).

[39] *See id.* §§ 17-712, 17-716.

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

Governor, only one of whom could be a lawyer.[41] The judges appointed by the Governor were permitted to serve until the next biennial general election, at which time they would face a retention referendum where voters would be asked only: "Shall (Name of Candidate) be elected and retained in office as (Name of Office)? Vote Yes or No."[42] If a majority of voters voted to retain the judge, the judge would serve for the remainder of an 8-year term, at which time the judge would face another retention referendum.[43] If the judge was not retained, then the Governor would appoint a new judge from a list of three names submitted by the nominating commission.[44]

Much of the 1971 legislation remains intact today, but there have been several important changes to the Tennessee Plan since then. First, in 1974, the Legislature amended the Plan to revoke its applicability to vacancies on the Supreme Court.[45] The Legislature would not add the Supreme Court back until 1994.[46] Thus, for 20 years, the Plan applied only to the intermediate appellate courts. Today, the Plan applies to both the intermediate appellate courts and Supreme Court. It has never been extended to trial courts.[47]

Second, the Legislature has significantly reworked the nominating commission that supplies the list of names from which the Governor must appoint judges. In 2001, the nominating commission was expanded to its present size of 17 members.[48] Although legislators no longer serve on the Commission, the Speakers of the Legislature do select all 17 members. Fourteen members must be lawyers, leaving only three nonlawyers.[49] Twelve of the 14 lawyer members must come from names supplied by five special lawyer's organizations.[50] Two members must be taken from names submitted by the Tennessee Bar Association, one from the Tennessee Defense Lawyers Association, three from the Tennessee Trial Lawyers Association, three from the Tennessee District Attorneys General Conference, and three from the Tennessee Association of Criminal Defense Lawyers.[51] The two remaining lawyer

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[41] *See* TENN. CODE ANN. § 17-702 (1972).

[42] *Id.* §§ 17-714 to 17-716.

[43] *See id*.

[44] *See id.* §§ 17-714, 17-715 (stating that such a situation would create a "vacancy," and, per § 17-712, the governor would fill that vacancy).

[45] *See* 1974 Tenn. Pub. Acts, ch. 433, § 1.

[46] *See generally* 1994 Tenn. Pub. Acts, ch. 942.

[47] The one exception is interim appointments to fill unexpired terms, which, since 1994, the Legislature has required the Governor to fill through the Judicial Nominating Commission. *See* TENN. CODE ANN. § 17-4-118(a) (2007). Unlike interim appellate appointments, however, all trial judges must run for reelection in contested elections. *See id*. § 17-4-118(d).

[48] TENN. CODE ANN. § 17-4-102 (2007).

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

[50] *See id.* § 17-4-102(a)(1)-(4).

[51] *See id.*

members need not be taken from one of these groups.[52] Each lawyer's organization is required to compose these lists "with a conscious intention of selecting a body which reflects a diverse mixture with respect to race . . . and gender";[53] the speakers of the Legislature are likewise required to appoint from these lists "persons who approximate the population of the state with respect to race . . . and gender."[54] Each commission member serves a term of 6 years.[55]

Third, in 1994, the Legislature created a new "judicial evaluation commission" to publish an evaluation of all judges before they run in their required retention referenda.[56] If the evaluation commission recommends that the public retain a judge, then the judge runs in a retention referendum; if the commission does not recommend that the public retain a judge, however, then the general election laws apply and the judge runs in a contested, partisan election.[57] Given that judges who run in retention referenda virtually never lose,[58] the evaluation commission can make a big difference to whether a judge stays on the bench. The evaluation commission is comprised of 12 members, only 4 of whom are non-lawyers.[59] The members are selected by the Tennessee Judicial Council, an advisory body created to advise the Legislature on judicial administration,[60] and the speakers of the Legislature.[61] Four of the members must be selected from lists proposed by many of the same special lawyer's organizations that propose names for the judicial nominating commission.[62] As with the nominating commission, those selecting the evaluation commission "shall endeavor to make appointments and submit nominees . . . that approximate the population of the state with respect to race and gender."[63] Evaluation commission members serve 6-year terms.[64]

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[52] *See id.* § 17-4-102(a)(6).

[53] *Id.* § 17-4-102(d).

[54] *Id.* § 17-4-102(b)(3). These statutory provisions appear to set forth racial and gender quotas for service on the Judicial Nominating Commission. It is beyond the scope of this report to address whether these quotas violate the Equal Protection Clause of the United State Constitution. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (striking down racial set aside in government contracting); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 318 (1978) (striking down racial quota in medical school admissions).

[55] *See id.* § 17-4-106(a).

[56] *Id.* § 17-4-201.

[57] *See id.* §§ 17-4-114(c), 17-4-115(c).

[58] *See infra* text accompanying notes 66-67 & 127-130.

[59] *See id.* § 17-4-201(b)(1)-(4).

[60] *See id.* § 16-21-101.

[61] *See id.* § 17-4-201(b)(2)-(4).

[62] *See id.*

[63] *Id.* § 17-4-201(b)(7). It is beyond the scope of this report to address whether these apparent racial and gender quotas are unconstitutional. *See supra* note 54.

[64] *See id.* § 17-4-201(b)(8).

Since the Judicial Evaluation Commission was created in 1994, the Commission has evaluated 60 judges. In every single one of these 60 evaluations, the Commission recommended that the judge be retained.[65]

Since the Tennessee Plan was created in 1971, there have been 146 retention referenda. In 145 of the 146 referenda, the public voted in favor of retention, a retention rate of 99.3%.[66] The only exception was in 1996, when 55% of the public voted against retaining a Supreme Court justice, Penny White.[67]

The statutes creating the Judicial Nominating and Judicial Evaluation Commissions expired on June 30, 2007, but the Legislature reauthorized them for one year.[68] These statutes are now scheduled to expire on June 30, 2008.[69] If the statutes are permitted to expire in June 2008, the Commissions will nonetheless continue to operate until June 2009 under a provision of the law that allows them to wind down their activities for one year.[70]

III. Litigation Against The Tennessee Plan

Although the Tennessee Plan has been in operation since 1971, the language from the 1870 Tennessee Constitution that requires all judges in the state to be "elected by the qualified voters" has never been changed. (Indeed, a proposed amendment that would have changed this language in favor of language providing for the Tennessee Plan was rejected by voters in 1977.) For this reason, the Tennessee Plan has always operated under a cloud of legal uncertainty. Indeed, on three occasions since 1971, the Tennessee Plan's constitutionality has been tested in litigation and one additional lawsuit is pending today.

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[65] *See* 1998 TENN. APPELLATE JUDGES EVALUATION REP. (recommending the retention of four supreme court justices, 10 court of appeals judges, and 12 court of criminal appeals judges); 2000 TENN. APPELLATE JUDGES EVALUATION REP. (recommending the retention of two court of appeals judges and three court of criminal appeals judges); 2004 TENN. APPELLATE JUDGES EVALUATION REP. (recommending the retention of two court of appeals judges); 2006 TENN. APPELLATE JUDGES EVALUATION REP. (recommending the retention of three supreme court justices, 12 court of appeals judges, and 12 court of criminal appeals judges).

[66] Telephone interview with Tim Gregory, Tennessee Division of Elections (Dec. 2007).

[67] *See* TENNESSEE BLUE BOOK 1995-1996, at 543 (listing results for the August 1, 1996, general election). For an account of the controversial ruling that led to Justice White's defeat, see Carl A. Pierce, *The Tennessee Supreme Court and the Struggle for Independence, Accountability, and Modernization, in* A HISTORY OF THE TENNESSEE SUPREME COURT 308-11 (James Ely ed., 2002).

[68] *See* 2007 Tenn. Pub. Acts, ch. 285, 445.

[69] *See* TENN. CODE ANN. § 4-29-229(46), (47) (2007).

[70] *See id.* § 4-29-112 ("Upon the termination of any governmental entity under the provisions of this chapter, it shall continue in existence until June 30 of the next succeeding calendar year for the purpose of winding up its affairs. During that period, termination shall not diminish, reduce, or limit the powers or authorities of each respective governmental entity.").

The earliest and most important litigation was *State ex rel. Higgins v. Dunn*.[71] In *Higgins*, a Supreme Court justice, Larry Creson, passed away in June 1972, some two years before his term was set to expire on August 31, 1974.[72] Governor Winfield Dunn appointed Thomas Turley, Jr., to fill the position from a list of names submitted by the judicial nominating commission, but the Governor did not make the appointment effective until September.[73] In the meantime, there was an August general election, and, despite the fact that there was no ballot question for the vacant Supreme Court position, Robert Taylor ran a write-in campaign for the seat.[74] The Secretary of State certified Taylor to the position, the Governor certified Turley, and the entire matter went to the Tennessee Supreme Court for resolution.[75] The Court held both that the Governor's appointment was invalid (because the Governor could not appoint someone to a vacancy beyond the time for the next general election) and that the write-in election was invalid (because the Supreme Court position had not been put on the ballot).[76]

Although it did not appear necessary to its decision, the *Higgins* court also went on to consider the constitutionality of the Tennessee Plan.[77] The Court found the Plan constitutional for two reasons. First, the Court found that it was constitutional for the Governor to initially appoint judges—despite the language of the Constitution requiring their election—because the Constitution elsewhere gives the Legislature the power to prescribe how "all vacancies not otherwise directed or provided by this Constitution" shall be filled.[78] In the Court's view, when Justice Creson passed away, a vacancy was created, and the broad powers of this provision kicked in.[79] The Court noted that Governors had been filling mid-term vacancies for over one hundred years.[80]

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[71] 496 S.W.2d 480 (Tenn. 1973).

[72] *See id.* at 482, 491.

[73] *See id.* at 482.

[74] *See id.*

[75] *See id.* at 482-83.

[76] *See id.* at 487, 491. Two of the four justices in the *Higgins* majority were special justices appointed by the Governor to fill vacancies created by a temporary absence on the Court. *See id.* at 491 (noting that Justices McAmis and Wilson joined the majority as special justices). Under Tennessee law, decisions by special justices are just as binding as decisions by regular Supreme Court justices. *See* Ridout v. State, 30 S.W.2d 255, 257 (1930). It is beyond the scope of this report to examine whether this practice—permitting the Governor to appoint judges for a single case after the issues in the case are already known—comports with the Due Process Clause of the U.S. Constitution.

[77] *See Higgins*, 496 S.W.2d at 487.

[78] *See id.* at 487-88 (quoting TENN. CONST. art. VII, § 4).

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

[80] *See id.* at 487-88.

Second, the Court found that the "yes or no" retention referendum that takes place under the Tennessee Plan at the next scheduled election qualifies as an "election" under the constitutional provision requiring all judges to be "elected by the qualified voters."[81] Although contested elections had always been used under the 1870 Constitution until 1971, the Court noted that that the word "elected" in the Constitution was not specifically defined, and, therefore, was ambiguous.[82] The Court further noted that three other provisions of the Constitution use the word "election" to refer to other ballot matters where voters are asked only a "yes or no" question;[83] in these provisions, voters are asked ballot questions such as whether to approve amendments to the Constitution[84] or to authorize municipalities to lend credit.[85] In light of these other provisions, the Court thought that the word "election" could encompass a "yes or no" vote for a public official as well.[86] This was especially the case in light of another provision of the Constitution giving the Legislature the power to direct the "manner" of "election of all officers . . . not otherwise directed or provided by this Constitution."[87] The Court concluded that, to the extent the Legislature was given discretion in the Constitution over prescribing the format of elections, the Legislature was within its rights to choose retention referenda.[88]

One justice dissented in *Higgins*. Justice Humphreys argued that "the part of the Plan that does away with the popular election of judges, and substitutes a recall election, is so obviously contrary to the arrangement in our Constitution . . . for the people to have the right to both Nominate and Elect their constitutional officers" that the unconstitutionality of the Tennessee Plan was "obvious."[89] Justice Humphreys came to this view because the Constitution requires the election not only of judges, but of other civil officers, including members of the Legislature.[90] He argued that, if members of the Legislature can abolish contested elections for judicial positions, then

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[81] *See id*. (quoting TENN. CONST. art. VI, § 3).

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

[83] *See id.*

[84] *See* TENN. CONST. art. XI, § 3.

[85] *See id.* art. II, § 29.

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

[87] *See id.* at 489 (quoting TENN. CONST. art. VII, § 4).

[88] *See id.* at 487-89.

[89] *Id.* at 493 (Humphreys, J., dissenting).

[90] *See id.*

presumably they could do so for other positions, including their own, a result that he thought was clearly inconsistent with the Constitution.[91]

After *Higgins*, the Tennessee Legislature repealed the Tennessee Plan insofar as it applied to "vacancies" on the Supreme Court.[92] The legislature would not reauthorize the Plan for Supreme Court vacancies until 1994,[93] and, when it did, it inspired a new round of litigation over the Plan's constitutionality. In 1996, a suit was filed, *State ex rel. Hooker v. Thompson*,[94] by Lewis Laska and John Jay Hooker, two lawyers who wished to run for a seat then occupied by Justice Penny White, who, under the Tennessee Plan, would run only in a retention referendum.[95] 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.[96] The special court held the Tennessee Plan constitutional on the authority of *Higgins*.[97]

The final piece of significant litigation challenging the constitutionality of the Tennessee Plan came in 1998, in *DeLaney v. Thompson*.[98] In this case, a court of appeals judge was planning to retire at the end of his term, and the plaintiff, Robert DeLaney, sought to run for his seat.[99] The state coordinator of elections denied his application for the seat, and DeLaney sued.[100] The trial court held the Tennessee Plan unconstitutional, not so much because it denied the voters an election, but because it restricted the candidates who could seek a position on an appellate court to those selected by the judicial nominating commission.[101] The court of appeals, sitting as a special court in light of the recusals of the regular members, reversed and upheld

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[91] *See id.*

[92] *See* 1974 Acts, ch. 433, § 1.

[93] *See generally* 1994 Acts, ch. 942.

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

[95] *See id.* at *1.

[96] *See id.* at *1 n.6. Under Tennessee law, decisions by special justices are just as binding as decisions by regular Supreme Court justices. It is beyond the scope of this report to examine whether this practice comports with the Due Process Clause of the U.S. Constitution. *See supra* note 76.

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

[98] 982 S.W.2d 857 (Tenn. 1998).

[99] *See id.* at 858.

[100] *See id.* at 859.

[101] *See* DeLaney v. Thompson, No. 01A01-9806-CH-00304, 1998 WL 397363, at *1 (Tenn. App. 1998) (noting that the Chancery Court had "ruled that the comprehensive scheme of the Tennessee Plan is unconstitutional because it drastically limits the group of persons who can become appellate judges").

the Plan, on the authority and arguments of *Higgins* and *Hooker*.[102] But the Tennessee Supreme Court, sitting as a special court as well, reversed the Court of Appeals on other grounds, finding it unnecessary to reach the constitutional question.[103]

There is yet another suit challenging the constitutionality of the Tennessee Plan currently pending, this time in federal court. This suit argues that the Plan violates the U.S. Constitution insofar as it violates the Due Process and Equal Protection Clauses to deny the people of Tennessee their right to an election under the Tennessee Constitution.[104]

IV. Is The Tennessee Plan Constitutional?

As noted above, under the 1870 Tennessee Constitution, all judges in the state must be "elected by the qualified voters," and, for most of Tennessee's history, that meant judges were initially placed into new terms and retained for subsequent terms through contested elections. Under the Tennessee Plan, however, judges are initially placed into new terms by gubernatorial appointment, and judges are retained for subsequent terms by retention referenda. The question is whether these two devices—initial appointment by the Governor and the retention referendum—are consistent with the constitutional requirement that all judges be "elected."

As explained below, the answer to this question is still unclear. Moreover, to the extent there is any uncertainty about the meaning of the Tennessee Constitution, that uncertainty was arguably resolved by the people of Tennessee in 1977 when they rejected an amendment to the Constitution that would have replaced the provision requiring elected judges with one that would have permitted the Tennessee Plan. Indeed, in this regard, it is worth noting that, of the 17 states that select judges by some mechanism of appointment followed by a retention referendum, Tennessee is the only one that has not revised its Constitution to replace a provision requiring elections with a provision setting forth the appointment-retention mechanism.

1. <u>Are Judges "Elected" If They Are Initially Appointed By The Governor?</u>

Under the Tennessee Plan, judges are initially placed on the bench through an appointment by the Governor, and they can serve for as long as two years before they are put before the people in retention referenda.[105] Yet, Article VI of the 1870

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[102] *See id.* at *5-*8.

[103] *See DeLaney*, 982 S.W.2d at 861.

[104] *See* Johnson v. Bredesen, No. 3:07-0372 (M.D. Tenn. May 8, 2007).

[105] *See* TENN. CODE. ANN. § 17-4-112 (2007) ("The term of a judge appointed under this section shall expire on August 31 after the next regular August election occurring more than thirty (30) days after the vacancy occurs.").

Tennessee Constitution requires that all state judges be "elected by the qualified voters."[106] How can the two be reconciled?

The answer given in *Higgins* is another part of the 1870 Tennessee Constitution—Article VII—that says "the filling of all vacancies not otherwise directed or provided by this Constitution . . . shall be made in such manner as the Legislature shall direct."[107] But if the Constitution permits the Legislature to fill judicial "vacancies" however it wishes, then what effect would be left for the provision of the Constitution requiring judicial elections? That is, if any time a judge left office and a position became open the Legislature could empower the Governor to appoint a replacement, then the provision regarding vacancies would nullify the provision requiring an elected judiciary.

The solution to this puzzle is that the authors of the 1870 Constitution probably did not intend the word "vacancies" in Article VII to include a judicial position that becomes available because a judge has served his entire term and chooses not to run for reelection. Rather, the authors of the 1870 Constitution probably intended "vacancies" to mean judicial positions that became available in the middle of a term—such as by the death or resignation of a judge. Appointment is a common mechanism by which to fill vacancies that occur in the middle of a term; it is often thought too expensive and too cumbersome to hold a special election every time a public official leaves office early.[108]

Indeed, that this was probably the intention of the authors of the 1870 Constitution is evident by a neighboring provision in Article VII, one which provides that "No appointment . . . to fill a vacancy shall be made for a period extending beyond *the unexpired term*."[109] By limiting the Legislature's ability to fill vacancies only for the rest of an "unexpired term," the authors of the 1870 Constitution indicated that they intended for the Legislature to fill only those vacancies *with* unexpired terms—*i.e.*, only those that occur in the middle of a term (such as by death or resignation) not those that occur when a judge serves his or her entire term but chooses not to run for reelection (in which case there is no "unexpired term" remaining).

Thus, to the extent the Tennessee Plan permits the Governor to appoint a new judge to a position created when the previous judge served his or her full term, there is a very good argument that the Plan is unconstitutional. None of the courts that have considered the constitutionality of the Tennessee Plan have addressed this point.

Indeed, not only has this point never been addressed, but the two Supreme Court opinions that upheld the Plan are not even necessarily to the contrary. In both

[106] TENN. CONST. art. VI, §§ 3, 4.

[107] *Id.* art. VII, § 4.

[108] *See id.* art. VII, § 5 ("No special election shall be held to fill a vacancy in the office of Judge . . . .").

[109] *Id.* (emphasis added).

Higgins and *Hooker*, the vacancy occurred in the middle of a term.[110] There is no doubt that this kind of vacancy is the kind that the Tennessee Constitution permits the Legislature to fill in whatever manner it chooses. With respect to other vacancies, however—those that occur when a judge completes his or her term and does not run for reelection—there is still serious doubt as to whether the initial appointment device of the Tennessee Plan is constitutional.

2. Do Retention Referenda Count As Elections?

As the Supreme Court in *Higgins* noted, the 1870 Constitution does not explicitly say whether a retention referendum qualifies as an "election." The Court thought, however, that the Constitution answered this question elsewhere. The Court found three provisions in the Constitution where the word "election" is used to describe a vote that, much like a retention referendum, poses only a yes-or-no question to the voters.[111] One of these provisions requires an "election" to authorize a municipal government to loan its credit to others;[112] one requires amendments to the Constitution to be approved "at an election";[113] and one requires a variety of other municipal acts to be ratified "in an election."[114] In each of these instances, the Constitution is referring to a vote that is not contested between two people, but, rather, is a vote asking for an up or down decision by the voters. The Court extrapolated from these three provisions to conclude that the retention referendum mechanism in the Tennessee Plan qualified as an "election" as well.

There are several difficulties with extrapolating from these three examples to a conclusion that the word "election" in Article VI must include uncontested, yes-or-no votes on the tenure of public officials. The first difficulty is the one raised by Justice Humphreys in *Higgins*: if a retention referendum can be an "election" for judges, why not also for other public officials, such as legislators or even the Governor?[115] The majority did not respond to this argument, and there is good reason for that: the argument is hard to answer. Although one might be able to distinguish the constitutional provision requiring the election of legislators from that requiring the election of judges—the former says that the legislature shall be "dependent on the people"[116] whereas the latter says that judges "shall be elected,"[117] and one might argue the former implies a different, more democratic form of election than the

[110] *See Higgins*, 496 S.W.2d at 481, 491; *Hooker*, 1996 WL 570090, at *1 n.1 (noting that Justice White had been initially appointed to fill the unexpired term of Justice O'Brien).

[111] *See Higgins*, 496 S.W.2d. at 489.

[112] TENN. CONST. art. II, § 29.

[113] *Id.* art. XI, § 3.

[114] *Id*. art. XI, § 9.

[115] *See Higgins*, 496 S.W.2d. at 493 (Humphreys, J., dissenting).

[116] TENN. CONST. art. II, § 3.

[117] *Id.* art VI, §§ 3, 4.

latter—it is difficult to distinguish the provision requiring the election of the Governor. Like the provision for judges, the provision for the Governor says simply that the "Governor shall be elected."[118] Thus, if *Higgins* is correct, then it would seem that the Legislature could permit Governors to win second terms in uncontested retention referenda, something that it would be difficult to believe is consistent with the democratic guarantees of the Tennessee Constitution.

There are other difficulties with the *Higgins* analysis. For example, two of the three examples relied upon by the Court were not even part of the 1870 Constitution; they were added many decades later, in 1953.[119] These two examples are, therefore, of little probative value in discerning what the authors of the 1870 Constitution meant when they used the word "elected." In addition, all three examples relied upon in *Higgins* involved votes on ballot propositions as opposed to votes on public officials. Votes on ballot propositions always take place in the form of yes-or-no votes—the proposition is either agreed to or not—whereas a vote for public officials can take place—and, for most of American history, has taken place—in other forms, such as a choice between multiple candidates. The fact that the 1870 Constitution once uses the word "election" to refer a vote that has always taken place in a yes-or-no form does not answer the question whether the word "election" means the same thing in the context of a vote that has *not* taken place in yes-or-no form.

But perhaps the greatest difficulty with the conclusion that the authors of the 1870 Constitution intended the word "election" to include retention referenda is that such referenda appear to have been unknown in the United States at that time. The first retention referendum was adopted in the United States in 1934,[120] and the very idea of a retention referendum for public officials was not even conceived until 1914, when it was first proposed by a law professor at Northwestern University.[121] It is, obviously, impossible for the authors of the 1870 Constitution to have intended that document to encompass something that did not yet exist. No court considering the constitutionality of the Tennessee Plan has addressed this point.

Of course, there are many things that the authors of the 1870 Constitution did not know that we know today. It would be cumbersome and impractical to force an amendment to the Constitution every time the Legislature wanted to take advantage of a new idea or a new technology. Thus, it is often thought in constitutional analysis that the meaning of words can change to encompass new ideas so long as the new

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[118] *Id.* art. III, § 4.

[119] *See id.* art. XI, §§ 3, 9.

[120] *See* CARBON & BERKSON, *supra* note 18, at 11.

[121] *See id.* at 2. Of course, other mechanisms of removing public officials from office were well known in 1870, including impeachment and recall. Until the Progressive Era, however, it appears that neither of these mechanisms had ever been placed directly in the hands of the electorate. Thus, even the closest analogue to the retention referendum—the recall election—post-dated the 1870 Convention. *See* Joshua Spivak, *California's Recall*, 81:2 CALIFORNIA HISTORY 20, 22 (2004).

ideas serve the old purposes.[122] This reasoning is especially appropriate in this case because, as the *Higgins* Court noted, the 1870 Constitution explicitly charges the Legislature with deciding the "manner" in which judicial elections take place.[123] Thus, even though the retention referendum was unknown in 1870, the device may be nonetheless constitutional because it serves the democratic purposes of the 1870 Constitution just as well as contested elections do. There are a number of reasons, however, to doubt that retention referenda do a very good job of facilitating democratic accountability.

First among these reasons is the fact that retention referenda were originally designed to *insulate* judges from public accountability. The architects of "merit selection" in the early Nineteenth Century favored life tenure for judges, but feared that the post-Jacksonian public would no longer accept this as they once had.[124] Thus, the architects of "merit selection" came up with what some scholars have concluded was a "sop" to the public: the retention referendum.[125] That is, the retention referendum was designed to make the public feel as though they had a role in selecting their judges but make it unlikely they would exercise that role by voting a judge off the bench.[126]

The experience with retention referenda has vindicated its design. Scholars have found that judges virtually never lose a retention referendum. In the most comprehensive study, which examined over thirty years of data in ten states, judges running in retention referenda were returned to office 98.9% of the time.[127] Even that incredibly high number is misleading, however, because over half of the defeats were from Illinois, a state that requires judges to win 60% of the vote rather than a mere majority (as do Tennessee and most other states) in order to stay on the bench.[128] Removing from the data the Illinois defeats where the judges won more than 50% of the vote but less than 60%, the retention rate becomes 99.5%. By contrast, judges who run for reelection in states that use contested elections are defeated much more often. One comprehensive study of state supreme court races between 1980 and 2000 showed that justices running for reelection in states that use partisan elections were defeated nearly 23% of the time—a full *13 times* as often as justices running in

[122] *See, e.g.*, Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 395 (1997) (noting that many scholars and judges believe that the Constitution should be interpreted "by 'translating' the Framers' concepts into modern circumstances").

[123] TENN. CONST. art. VII, § 4 ("The election of all officers . . . shall be made in such manner as the Legislature shall direct.").

[124] *See* CARBON & BERKSON, *supra* note 18, at 8.

[125] *See, e.g.*, *id.* (noting that the architects "perceived retention as a 'sop' to those committed to electoral control over the judiciary").

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

[127] *See* Aspin, *supra* note 26, at 79 (finding that only 52 out of 4588 judges were not retained).

[128] *See id.*

retention referenda over the same period.[129] As the author of that study has noted, in states that use contested elections, "supreme court justices face competition that is, by two or three measures, equivalent if not higher to that for the U.S. House."[130]

The experience in Tennessee is in line with these studies. As noted above, there have been 146 retention referenda in Tennessee, and, in every single referendum but one (99.3%), the voters retained the incumbent.[131]

It is unclear why the public so infrequently votes against retention. One possible theory is that, without another candidate in the race, there is no one with an interest in providing information to the public about the incumbent.[132] Another possible theory is that, in this atmosphere of inadequate information, the absence of a political trademark—*i.e.*, affiliation with a political party—makes it especially hard for voters to assess whether to retain a public official.[133] Finally, some commentators believe that voters are reluctant to vote against an incumbent if they have no idea who will replace the incumbent—*i.e.*, "the devil you know is preferable to the devil you don't."[134] Nonetheless, regardless of the reason for the high rates of retention, scholars have concluded that, in light of the fact that these judges are a virtual lock to keep their seats, "those who maintain that retention elections serve to insulate judges from popular control seem to be correct."[135]

It should be noted that the Tennessee Plan is a bit different from many of the "merit selection" plans used in other states insofar as judges appointed under the Plan do not automatically run in retention referenda. Rather, they do so only if the Judicial Evaluation Commission recommends that the public retain them; if the Commission votes the other way, they must run in a contested election.[136] Thus, in assessing the accountability offered by the Tennessee Plan, the fact that the Commission might not

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

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

[131] *See supra* text accompanying notes 66-67.

[132] *See, e.g.*, Dimino, *supra* note 126, at 805 ("By removing challengers from the ballot, retention races eliminate the public figures most likely to motivate and organize opposition to the incumbent.").

[133] Political scientists believe "that the most important cue for voters is political party affiliation"; "[p]arty labels are signals . . . and voters rely heavily on them." 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, 433 (2007).

[134] *See* HARRY P. STUMPF, AMERICAN JUDICIAL POLITICS 170 (1988) ("You can't beat somebody with nobody.").

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

[136] *See* TENN. CODE ANN. §§ 17-4-114(c), 17-4-115(c) (2007).

grant some judges the security of retention referenda should be considered. It appears, however, that this feature of the Tennessee Plan has not transformed it into a device of democratic accountability. Since the Commission was created in 1994, it has rendered 60 evaluations. In every single one, the Commission recommended that the judge be retained.[137]

Despite the limitations of retention referenda, it is nonetheless difficult to conclude that they are necessarily less democratic than the contested elections that preceded them. Although judges who run in referenda are virtually guaranteed to win, they nonetheless report on surveys that the prospect of running in the referenda influences their decisions on the bench.[138] Thus, it is possible that retention referenda produce judges that are accountable to the public even though they do not produce judges who get defeated. Moreover, it bears reiterating that, even when contested elections were used to select appellate judges in Tennessee, the races were often not very spirited. As noted above, many, if not most, judges still came to the bench through gubernatorial appointment, and, in a state that was for a long time controlled by one political party, even the reelection campaigns often were not contested.[139] Thus, even if retention referenda are largely coronations, it is not entirely clear that, at least as an historical matter, contested elections were much different.

3. What About The Failed Amendment Of 1977?

Much of the uncertainty over the constitutionality of the Tennessee Plan might have been resolved in 1977. In 1976, the Legislature authorized a limited Constitutional Convention to address several changes to the Tennessee Constitution, and, the following year, the Convention proposed thirteen separate constitutional amendments to the people of Tennessee.[140] The thirteen amendments covered topics as diverse as repealing the 1870 Constitution's ban on interracial marriage to repealing the 1870 Constitution's prohibition on charging interest rates of more than 10%.[141] One of the amendments would have made several changes to the judiciary, including repeal of the 1870 Constitution's requirement that all judges "shall be elected" in favor of a provision stating that "Justices of the Supreme Court and judges of the Court of Appeals shall be appointed by the Governor from three nominees recommended . . . by the Appellate Court Nominating Commission" and that "[t]he name of each justice and judge seeking retention shall be submitted to the qualified voters for retention or rejection . . . at the expiration of each six year term."[142] In other words, the proposed

[137] *See supra* note 65.

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

[139] Parks, *supra* note 9, at 629-30.

[140] *See* LASKA, *supra* note 35, at 23-25.

[141] *See id.* at 24-25.

[142] *See* Governor Ray Blanton, Proclamation Subsequent to the 1977 Tennessee Constitutional Convention (Mar. 31, 1978) (transcript available in THE JOURNAL OF THE DEBATES OF THE CONSTITUTIONAL CONVENTION (1977)).

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

Each of the thirteen proposed amendments submitted to the public from the 1977 Convention was approved by the voters *except* for the amendment that would have inserted the Tennessee Plan into the Constitution.[143] As one historian has noted, this amendment "became the first amendment ever offered by a limited convention to face voter rejection."[144]

The fact that voters rejected putting the Tennessee Plan into the Constitution when given the chance is a powerful point in favor of the view that the Tennessee Plan is unconstitutional. On the other hand, this amendment would have made many other significant changes to the judicial branch, including the designation of a uniform jurisdiction for all trial courts and the creation of a statewide public defender program.[145] It is possible, of course, that the voters favored the Tennessee Plan but rejected the amendment for the other changes it would have made to the judicial branch. Indeed, the Tennessee Plan does not appear to have been the most controversial part of the proposed amendment.[146]

Although it is impossible to know exactly why the people of Tennessee rejected the 1977 amendment, it is hard to see how this event is not at least relevant to the question whether the Tennessee Plan is constitutional. This is all the more true because, of the 17 states that use a method of judicial selection that relies upon appointment by the Governor followed by a retention referendum,[147] Tennessee is the *only one* that has not revised its constitution to replace a requirement of an elected judiciary with a provision setting forth the appointment-retention mechanism.[148] Nonetheless, no court addressing the constitutionality of the Tennessee Plan has ever considered the impact of either the failed 1977 amendment or the contrast its failure marks with the path blazed by Tennessee's sister states.

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[143] *See id.*

[144] *See* LASKA, *supra* note 35, at 26.

[145] *See id.* at 26 ("All trial courts were to have uniform jurisdiction, and the legislature was restricted in creating new types of courts; the Missouri Plan was approved for appellate judges. Provision was made for a chief court administrator. The legislature was required to set up a statewide public defender program.").

[146] *See id.* at 24-25.

[147] The 17 states are: Alaska, Arizona, California, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, New Mexico, Oklahoma, South Dakota, Tennessee, Utah, and Wyoming. *See* Methods of Judicial Selection, American Judicature Society's State-by-State Report on Selection of Judges, *available at* http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state= (last visited Nov. 21, 2007).

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

V. Does The Tennessee Plan Serve Its Own Purposes?

In assessing whether the expiring portions of the Tennessee Plan should be reauthorized, it is worth considering not only whether the Plan is constitutional, but also whether it is serving any of its declared purposes. The Tennessee Plan was adopted with many purposes in mind, but perhaps the two most important purposes were (1) to facilitate the selection of judges on the basis of merit and qualifications, and (2) to take the politics out of judicial selection in order to foster a more independent judiciary.[149] As the Plan has been revised over the years, it has acquired an additional purpose: (3) to ensure racial and gender diversity on the bench.[150] As discussed below, it is still unclear whether the Plan is serving any of these purposes.

1. Do Judges Selected By "Merit Selection" Have More Merit?

There has never been agreement on what "merit" means in the context of selecting judges.[151] Nonetheless, scholars have tried to examine the claim that "merit selection" produces "better" judges along several possible dimensions. Thus far, scholars have found little to no evidence that "merit selection" systems produce judges with more "merit."

Although these studies rely on nationwide data rather than data particular to Tennessee, they are nonetheless instructive because the Tennessee Plan shares many characteristics with "merit selection" plans in other states. For example, scholars have examined whether "merit" systems select judges with different educational credentials, lengthier legal experience, or different types of legal experience (such as prior judicial experience). The answer is "no": "the credentials of merit selection judges are not superior to nor substantially different from those of other judges."[152] More recently, scholars have even examined whether "merit selection" yields more productive judges than do elections. Again the answer is "no"; in fact, the opposite is true: "judges in more partisan systems are *more* productive than judges in less partisan systems [such as 'merit selection']."[153]

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[149] *See* TENN. CODE. ANN. § 17-4-101(a) ("It is the declared purpose and intent of the general assembly by the passage of this chapter to assist the governor in finding and appointing the best qualified persons available for service on the appellate courts of Tennessee . . . and . . . to insulate the judges of the courts from political influence and pressure . . . and . . . to make the courts 'nonpolitical.'").

[150] *See supra* text accompanying notes 53-54 & 63.

[151] *See* STUMPF, *supra* note 134, at 168 ("[T]here remains no direct measure of what a 'good' judge is.").

[152] Henry R. Glick & Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, 70 JUDICATURE 228, 235 (1987).

[153] Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary*, 16, August 2007, *available at* SSRN: http://ssrn.com/abstract=1008989. Although these same scholars also found that "merit selection" produces judges who write opinions that are more frequently cited by courts in other jurisdictions—

As one commentator has summarized the scholarship, "the research reported thus far does not lend much support to th[e] claim [that 'merit selection'] produce[s] . . . superior judges."[154]

2. Are Judges Selected Under The Tennessee Plan More Independent?

Proponents of "merit selection" often contend that judges will be more independent if they do not have to curry favor with the public and the political process in order to obtain and keep their jobs.[155] The one weakness with this view is that, although "merit selection" may make judges less dependent upon the *public and political parties* for their jobs, it may make them *more* dependent on the special lawyer's organizations whose members largely control the judicial selection apparatus. As noted above, in Tennessee, judges cannot be appointed to the appellate bench unless their names appear on a list produced by the Judicial Nominating Commission, the members of which are drawn largely from lawyer's organizations who represent clients of a special interest—such as trial lawyers or corporate defense lawyers.[156] Moreover, if the appointed judges wish to run in a retention referendum instead of a contested election—something that greatly improves the chances of keeping the job—then the judge must win the favor of the Judicial Evaluation Commission, the members of which are, again, drawn largely from lawyer's organizations who represent clients of a special interest.[157] As a result, "merit selection" judges may be no more independent than elected judges—they might simply be dependent on a different group of people.

Moreover, as political scientists and legal scholars have long noted, substituting a judge's dependence on the public with dependence on special lawyer's organizations does not take the "politics" out of judicial selection. The lawyers who belong to these organizations have political beliefs just as well formed as anyone else. Thus, merit selection is often thought simply to replace one set of political influences (the public's) with another's (the special lawyer's organizations'). As one scholar has explained:

> Is ['merit selection'] nonpolitical? Of course not . . . . The politics come into play in determining who actually gets appointed to the commission, in what role is played by the staff of the commission, in whom the commission consults in assessing candidates, and in how the

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one possible metric of quality—they concluded that the small benefit in this regard was more than offset by the large deficit in productivity. *See id.* at 31, 39 ("[T]he lack of productivity on the part of appointed judges diminishes the overall influence and quality of their total judicial output of opinions.").

[154] STUMPF, *supra* note 134, at 168.

[155] *See id.* at 166.

[156] *See supra* text accompanying notes 48-55.

[157] *See supra* text accompanying note 62.

> commission chooses to weigh various criteria in making both initial nominations and in doing the periodic evaluations. The system is not nonpolitical; it is simply differently political.[158]

As another scholar has summarized the research into "merit selection," "far from taking judicial selection out of politics, ['merit selection'] actually tended to replace [electoral] [p]olitics, wherein the judge faces popular election . . ., with a somewhat subterranean process of bar and bench politics, in which there is little popular control."[159] That is, in "merit selection" systems, "raw political considerations masquerade[e] as professionalism via attorney representation of the socioeconomic interests of their clients."[160] As one scholar has explained:

> [T]he repetition of unsuccessful efforts to banish politics makes one wonder whether this is ultimately a quixotic quest. So too do studies of selection under current merit systems. 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.[161]

In other words, "merit selection does not take politics out of the judicial selection process. It merely changes the nature of the political process involved. It substitutes bar and elitist politics for those of the electorate as a whole."[162]

Of course, many believe that contested elections are also a far cry from a perfect reflection of the political preferences of the "electorate as a whole." As the proponents of "merit selection" note, contested elections are influenced by special interest groups who contribute money to judicial campaigns.[163] But even if contested elections are not perfect in this regard, it is difficult to see how "merit selection" is not even worse. The same groups who merely influence contested elections through campaign contributions—such as the plaintiff's bar and the corporate defense bar—are the groups handed full control over the selection apparatus under the Tennessee

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[158] Kritzer, *supra* note 133, at 466.

[159] STUMPF, *supra* note 134, at 167

[160] *Id.*

[161] G. Alan Tarr, *Designing an Appointive System: The Key Issues*, 34 FORDHAM URB. L.J. 291, 300 (2007).

[162] Harry O. Lawson, *Methods of Judicial Selection*, 75 MICH. B. J. 20, 24 (1996).

[163] *See* Sandra Day O'Connor, Editorial, *Justice for Sale*, WALL ST. J., Nov. 15, 2007, at A2; Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 91-92 (1998) ("Judicial candidates receive money from lawyers and litigants appearing in their courts; rarely are there contributions from any other source. Even when the amounts are relatively small, the contributions look a little like bribes or shake-downs related to the outcomes of past or future lawsuits.").

Plan; it is members from these groups who make up the nominating and evaluation commissions that decide whether the Governor can appoint a judge and whether that judge can win a new term through a retention referendum rather than a contested election.[164] It is therefore not surprising that many scholars have concluded that the "conventional wisdom" that "merit selection" judges "are more independent than elected judges is a simplification and probably an exaggeration."[165]

In other words, many scholars believe that it is naïve to think that politics can ever be removed from the selection of public officials who have as much power to shape public policy as judges do. Rather, many scholars believe that the better question to ask about judicial selection is *whose* politics should control that selection.[166] Some, such as those inspired by the populism of Andrew Jackson, favor as much control over public policy by the electorate as possible. Others, including many of those in the founding generation of the United States, believe that democracy must be tempered by the wisdom of well-educated elites, and, therefore, that at least one branch of government should be designed to counter majority sentiment. There is no right or wrong answer to this question; the answer is not empirical, but philosophical.

3. Are Judges Selected Under The Tennessee Plan More Diverse?

As noted above, in order to foster racial and gender diversity in judicial selection, the Tennessee Plan was amended in 1994 to require that the members of the Judicial Nominating and Judicial Evaluation Commissions reflect the racial and gender composition of the state.[167] It is therefore worth asking whether the Tennessee Plan has been successful at selecting a diverse group of judges.

The answer to this question is unclear. No study currently exists that compares the gender and race of judges in Tennessee who come to the bench through the Tennessee Plan with those who do so through contested elections. There are, however, studies by the American Judicature Society and the American Bar Association that periodically assess the race and gender diversity of state trial and appellate courts. As all appellate judges in Tennessee are selected by the Tennessee Plan, and, as all trial

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[164] *See, e.g.,* Justice Charles T. Wells, *The Inherent Danger of Judicial Evaluation Commissions*, JACKSONVILLE FINANCIAL NEWS & DAILY RECORD, Jan. 7, 2008 ("[A] judicial evaluation commission is a ready target for special interest groups.").

[165] Choi et al., *supra* note 153, at 38.

[166] *See, e.g.*, Michael R. Dimino, *The Worst Way of Selecting Judges—Except All the Others that Have Been Tried*, 32 N. Ky. L. Rev. 267, 288 (2005) ("Whatever the form of judicial selection, ideology matters. The question is *whose* ideology should matter."); Kritzer, *supra* note 133, at 467 ("Selecting and retaining governmental officials, including judges, is fundamentally a political process. That process can be internally political as is the case in bureaucratically organized judiciaries, it can include public officials who are directly answerable to the electorate, or it can involve the electorate itself. How politics plays out in the selection system depends on the structure of that system . . . . We must make choices. We cannot avoid politics.").

[167] *See* TENN. CODE ANN. § 17-4-102(b)(2), (b)(3), (d) (2007).

judges must run in contested elections, these studies might be used to draw inferences about whether the Tennessee Plan brings about more diversity than contested elections.[168]

To the extent any inference can be drawn from these studies, the inference appears to be that the Tennessee Plan has not brought about more diverse judges than have contested elections. Although the appellate judges serving in 2007 were slightly more diverse than the trial judges (21% female and 7% African American versus 17% female and 5% African American),[169] precisely the opposite was true in 2004[170] and 2001.[171] Moreover, in 1997, appellate judges and trial judges were equally diverse.[172] These results mirror nationwide studies, which have also found that "merit selection" has a mixed record of bringing about diversity.[173]

VI. What Will Happen If The Expiring Provisions Of The Plan Are Not Reauthorized?

In June of 2008, the statutes creating the Judicial Nominating and Evaluation Commissions of the Tennessee Plan will expire unless reauthorized by the Tennessee Legislature.[174] If the Legislature does not reauthorize the Commissions, the Tennessee Plan will nonetheless remain in operation until June 2009 because there is a provision in the law permitting the Commissions to continue their activities for one

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[168] These inferences are limited, however, because many trial judges in Tennessee are initially elevated to the bench as interim appointments by the Governor from a list supplied by the Judicial Nominating Commission. *See id.* § 17-4-118 and *supra* notes 33 & 47.

[169] *See* Diversity of the Bench, The American Judicature Society's Summary of Judicial Diversity, *available at* http://www.judicialselection.us/judicial_selection/bench_diversity/index.cfm?state= (last visited Jan. 21, 2008).

[170] In 2004, appellate judges in Tennessee were 3% African American while trial judges were 7% African American. *See* American Bar Association, National Database on Judicial Diversity in State Courts, *available at* http://www.abanet.org/judind/diversity/tennessee.html (last visited Jan. 21, 2008). No data for female judges is available from this source.

[171] In 2001, appellate judges in Tennessee were 14% female and 3% African American while trial judges were 17% female and 7% African American. *See* American Judicature Society, Judicial Selection in the States, *available at* http://www.ajs.org/js/TN_diversity.htm (last visited Jan. 21, 2008) (citing AMERICAN BAR ASSOCIATION, THE DIRECTORY OF MINORITY JUDGES OF THE UNITED STATES (3d ed. 2001)).

[172] In 1997, African Americans comprised 3% of both appellate judges and trial judges. *See* AMERICAN BAR ASSOCIATION, THE DIRECTORY OF MINORITY JUDGES OF THE UNITED STATES 104-105 (2d ed. 1997). No data for female judges is available from this source.

[173] *See* Sherrilyn A. Ifill, *Through the Lens of Diversity: The Fight for Judicial Elections After* Republican Party of Minnesota v. White, 10 MICH. J. RACE & L. 55, 85 (2004) ("Studies that have examined the effect of appointment versus election of judges on diversity have produced conflicting results.").

[174] *See* TENN. CODE ANN. § 4-29-229(46)-(47) (2007).

year.[175] Thus, the Legislature will have one full year to decide what method of judicial selection should replace the Tennessee Plan.

If the Legislature does not act within that year, it is not entirely clear how appellate judges in Tennessee will be selected going forward, but it is likely that the judges would revert to initial selection and retention under the old system of contested elections. The old statutory provisions requiring appellate judges to be selected by election are still on the books.[176] Although these provisions were repealed to the extent they conflict with the Tennessee Plan,[177] the Tennessee Plan instructs the courts to return to contested elections if any provision of the Plan is held "invalid."[178] It is true that allowing part of the Plan to expire is not the same thing as a court holding part of the Plan "invalid," but it does suggest that the legislative intent of the Plan was to have all of it or none at all. This was also the assumption of one of the special courts that was asked to rule on the constitutionality of the Plan; the special Supreme Court in *DeLaney* noted that, if the Plan was by its terms inapplicable to a particular appellate vacancy, then the vacancy would be filled with a contested election.[179]

VII. Conclusion

For most of American history, judges have been elected to the bench. Perhaps no state is more responsible for this than the state of Tennessee because perhaps no man is more responsible for it than Andrew Jackson. Despite efforts to do away with its provision requiring an elected judiciary, the Tennessee Constitution still reflects the Jacksonian ideal that ordinary citizens should have the power to choose the members of every branch of their government.

Whether the Tennessee Plan lives up to that ideal is an open question. The Plan raises serious constitutional questions that still have not been completely addressed by the Tennessee Supreme Court. Nor is it even clear whether the Plan is serving its own professed purposes.

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[175] *See id.* § 4-29-112 ("Upon the termination of any governmental entity under the provisions of this chapter, it shall continue in existence until June 30 of the next succeeding calendar year for the purpose of winding up its affairs. During that period, termination shall not diminish, reduce, or limit the powers or authorities of each respective governmental entity.").

[176] *See, e.g., id.* §§ 17-1-103 ("The judges of the supreme court, court of appeals, and court of criminal appeals are elected by the qualified voters of the state at large . . . ."), 16-3-101, 16-5-103, 16-4-102.

[177] *See* 1971 Tenn. Pub. Acts, ch. 198, § 17.

[178] *See* 1994 Tenn. Pub. Acts, ch. 942, § 23.

[179] *See* DeLaney v. Thompson, 982 S.W.2d 857, 858 (Tenn. 1998) ("[T]he failure of the Commission to recommend the retention of any judge would render the Tennessee Plan inapplicable to the election to fill that judge's seat, and the election therefore would be conducted as any other election (rather than as a 'retention election').").

Nonetheless, the operative provisions of the Plan are set to expire on June 30, 2008, unless they are reauthorized by the Tennessee Legislature. It will thus be left to the members of the Legislature to resolve these questions for themselves—and to do so in accordance with their own oath of office to uphold the Tennessee Constitution.[180]

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