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PENNY J. WHITE* & MALIA REDDICK+

In his essay *Election as Appointment: The Tennessee Plan Reconsidered*, Professor Brian T. Fitzpatrick contends that Tennessee's selection and retention method for appellate court judges is both unconstitutional and unmeritorious.[1] This Essay responds to those claims. Part I will respond to Professor Fitzpatrick's claim that the Tennessee Plan is unconstitutional; Part II will respond to his claim that the Plan is not fulfilling the purposes which led the Tennessee legislature, in its wisdom, to adopt it.

It is impossible, or at least disingenuous, to respond to Professor Fitzpatrick's essay without highlighting a multitude of significant omissions that must be considered to fairly evaluate either the constitutionality or the merit of the Tennessee Plan. The essay exhibits a cherry-picking tendency[2] throughout that prompts memories of Paul Harvey's favorite line: "And now you know the rest of the story." This response will complete the story, mindful that "history is the witness that testifies to the passing of time; it illumines reality, vitalizes memory, provides guidance in daily life, and brings us tidings of antiquity."[3]

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1. The Tennessee General Assembly failed to pass the legislation necessary to continue the Tennessee Plan before it adjourned in May 2008.

2. For example, Professor Fitzpatrick begins his essay 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. Brian T. Fitzpatrick, *Election as Appointment: The Tennessee Plan Reconsidered*, 75 TENN. L. REV. 473, 473 (2008). This suggestion ignores the myriad of circumstances that led to the 1971 legislation. *See infra* text accompanying notes 66–77. Before the close of the second paragraph, the essay misinforms the reader on the mechanics of the Tennessee Plan, describing it as marred in controversy, and stating, without attribution, that "many people doubt" whether it has accomplished its purposes. Fitzpatrick, *supra*, at 473. These propositions, even when addressed in more detail in the body of the essay, create an incomplete and, unfortunately, misleading description of the issues that the Professor undertakes to address.

3. CICERO, PRO PUBLIO SESTIO.

I. AN ANALYSIS OF TENNESSEE HISTORY, FUNDAMENTAL PRINCIPLES, AND THE CONSTITUTIONALITY OF THE TENNESSEE PLAN

Before responding to the essay's three specific challenges to the constitutionality of the Tennessee Plan, we will address two essential cornerstones absent from its analysis. The first is the historic role of the Tennessee legislature in judicial selection; the second are the fundamental principles of statutory construction and constitutional interpretation.

A. The Tennessee Legislature's Historic Role in Judicial Selection

Professor Fitzpatrick's essay begins by suggesting that Tennessee simply fell in line with other states in the 1970s to move from an elective to an appointive system of judicial selection for appellate court judges.[4] While the article does briefly acknowledge that the legislature elected judges for the first half of Tennessee's history,[5] it does not recognize the continued integral role that the Tennessee legislature would play in judicial matters. Described as "preeminent," the first Tennessee legislature was granted the power to elect most state officers.[6] That the legislature would also control the creation of the courts and the selection of judges was never doubted.

1. The Constitution of 1796

As historians have noted, any discussion of Tennessee's constitutional history must begin with a discussion of North Carolina's constitutional history.[7] This is because Tennessee "as the daughter of North Carolina, quite naturally adopted the judicial system of the Mother State."[8] Similar to most of the original states, the North Carolina legislature controlled the state, choosing both the governor (described as "little more than a dependency of the legislature")[9] and the judges.[10] The early constitutions of North Carolina and Tennessee therefore

4. Fitzpatrick, *supra* note 2, at 473.

5. *Id*. at 478–79.

6. N. Houston Parks, *Judicial Selection—The Tennessee Experience*, 7 MEM. ST. U. L. REV. 615, 619 (1977).

7. LEWIS L. LASKA, THE TENNESSEE STATE CONSTITUTION: A REFERENCE GUIDE 2 (1990).

8. SAMUEL C. WILLIAMS, PHASES OF THE HISTORY OF THE SUPREME COURT OF TENNESSEE 5 (1944). It is surmised that Tennessee's frontier leaders chose to follow the North Carolina model in order to add "respectability" to their separatist movement. Parks, *supra* note 6, at 619.

9. WALLACE MCCLURE, STATE CONSTITUTION-MAKING WITH ESPECIAL REFERENCE TO TENNESSEE 33–35 (1916); *see* TENN. CONST. art. II, § 2 (1796) ("The governor shall be chosen by the electors of the members of the general assembly . . . .").

10. MCCLURE, *supra* note 9, at 35.

provided for the legislative election of judges,[11] and left "the establishment of courts entirely to the legislature."[12] Both constitutions contained sections which were entitled "Election of Judges," and both provided for these judicial "elections" by joint ballot of the two houses of the General Assembly.[13] From its initial use in Tennessee's first constitution, the word "elect" has maintained a broad and generic meaning.[14]

Tennessee's first constitution, adopted in 1796, granted judicial power to the courts, but retained for the legislature all power to establish courts, set their jurisdiction, and determine the methods for the selection of judges.[15] This legislative preeminence was consistent with the model of the times in which most governmental power was entrusted to a legislative body.[16] It follows that the legislature would be entrusted to elect the judiciary.[17]

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11. The original draft of the 1796 constitution included the creation of a constitutional superior court comprised of three judges. This significant departure from the North Carolina model was not adopted. JOSHUA W. CALDWELL, STUDIES IN THE CONSTITUTIONAL HISTORY OF TENNESSEE 149 (2d ed. 1907). Rather, the 1796 Tennessee Constitution provided that "[t]he judicial power of the state shall be vested in such superior and inferior courts of law and equity, as the legislature shall, from time to time, direct and establish." TENN. CONST. art. V, § 1 (1796).

12. CALDWELL, *supra* note 11, at 149.

13. TENN. CONST. art. V, § 2 (1796); N.C. CONST. art. XIII (1776); *see* MCCLURE, *supra* note 9, at 424–25.

14. *See infra* text accompanying notes 26–50.

15. *See* TENN. CONST. art. V, §§ 1–12 (1796); Lewis L. Laska, *The Tennessee Constitution*, *in* TENNESSEE GOVERNMENT AND POLITICS: DEMOCRACY IN THE VOLUNTEER STATE 7, 8 (John R. Vile & Mark Byrnes eds., 1998); MCCLURE, *supra* note 9, at 48 ("An article of twelve sections defines in considerable detail the judicial system of the state, but leaves the establishment of the courts and the appointment of the judges entirely to the legislature . . . ."). In his book, Joshua Caldwell suggests that the detail contained in the several sections was more a result of oversight than intention. When the initial proposal for the creation of a superior court set forth in article V, section 1 was defeated, Caldwell asserts that the remaining portions were "not carefully recast." CALDWELL, *supra* note 11, at 150.

16. MCCLURE, *supra* note 9, at 138.

17. The state's early history is replete with colorful descriptions of judges elected by the legislature. Because the constitution provided for election by both houses of the legislature, the chore often involved multiple ballots and numerous candidates. One such election, described as one of the "hottest races in judicial annals" was that of Justice Robert J. McKinney, an Irishman. McKinney was elected on the seventh ballot in the legislature despite his having written a letter of recommendation for the other candidate. WILLIAMS, *supra* note 8, at 55 n.18. Justice McKinney was later praised as the supreme court's best opinion writer, noted for his "incisive . . . and logical [opinions] marked by [their] brevity and unusual clarity and exactness." *Id*. at 56. But he was deemed "unelectable" by the people because "he had not the parts or arts of the politician." *Id*.; *see also* Timothy S. Huebner, *Judicial Independence in an Age of Democracy, Sectionalism, and War, 1835–1865*, *in* A HISTORY OF THE TENNESSEE SUPREME COURT 61, 84–85 (James W. Ely ed., 2002).

2. The Creation of the Tennessee Supreme Court

The 1796 Tennessee Constitution referred to superior and inferior courts but neither provided for a court of last resort, nor mandated the existence of any court.[18] In fact, courts only existed *if*, and *when*, and *as long* as the legislature desired.[19] The Tennessee Supreme Court was not created until 1809,[20] was not given appellate jurisdiction until 1819,[21] and did not become exclusively an appellate court until 1834.[22] Even then, the legislature maintained the power to abolish the supreme court since it was not created by the constitution.[23] It was not until 1835, when the constitution of 1834 was adopted, that the supreme court was given constitutional stature sufficient to save it from the control of or abolition by the legislative branch.[24]

3. The Constitution of 1834

Although the constitution of 1834 insured the existence of a state supreme court, by vesting the judicial power of the state in "one Supreme Court [and] in such Inferior Courts as the Legislature shall from time to time ordain and establish,"[25] the legislature retained its power to elect the judges.[26] Using virtually identical language to that used in the constitution of 1796, and under the same heading "Election of Judges," the 1834 constitution provided for judicial election by "joint vote of both Houses."[27] Immediately following that provision, the 1834 constitution provided that "Judges of the Supreme Court shall be *elected* for the term of twelve years."[28] Thus, the State persisted in its generic and broad use of the term "elect." The legislative election of judges to twelve-year terms was viewed as preferable because the judges "did not have to fear insecurity for a reasonably long period,"[29] nor did they have to "engage in a

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18. TENN. CONST. art. V, § 1 (1796) ("The judicial power of the state shall be vested in such superior and inferior courts . . . as the legislature shall, from time to time, direct and establish."); *see* WILLIAMS, *supra* note 8, at 75.

19. TENN. CONST. art. V, § 1 (1796) ("The judicial power shall be vested in such superior and inferior courts . . . as the legislature shall, from time to time, direct and establish.").

20. Initially the Tennessee Supreme Court included two members who were joined for decision with a circuit judge who had heard the case below. WILLIAMS, *supra* note 8, at 75.

21. *Id*. Originally, the supreme court heard some appeals from circuit court but also maintained original jurisdiction in other cases. *Id*.

22. *Id*. at 75–76.

23. *Id*. at 76.

24. *Id*. at 76–77.

25. TENN. CONST. art. VI, § 1 (1834).

26. *Id*. art. VI, § 3.

27. *Id*. The only difference in the 1796 and 1834 provisions is that the 1796 provision used the phrase "joint ballot of both houses" while the 1834 provision used the phrase "joint vote of both Houses." *See* MCCLURE, *supra* note 9, at 424–25.

28. TENN. CONST. art. VI, § 3 (1834) (emphasis added); *see* MCCLURE, *supra* note 9, at 424.

29. WILLIAMS, *supra* note 8, at 46. Judges were originally elected to "hold their respective

struggle for official survival [which was described as] always a bitter experience for a judge-like judge."[30]

Although the 1834 constitution corrected what was regarded as the "most conspicuous deficit of the old Constitution"[31] by completing the proper distribution of governmental power into three separate and independent branches, it continued to assert legislative authority over the manner and details of judicial selection. Although five resolutions were offered at the 1834 Constitutional Convention to provide for the popular election of judges, each failed in turn.[32]

The newly created supreme court acknowledged the legislature's control, but exercised independence when cases required it. In 1836, for example, the court avowed that even though the legislature elected the judges, it was not the sovereign of the judiciary: "The fact that the constitution may prescribe that the mode of appointing the judges shall be by the legislature does not constitute the legislature the [courts'] constituent. . . .[T]he legislature is not sovereign; . . . it is not the constituent of the courts, nor are they its agents . . . ."[33]

4. The Constitutional Amendment of 1853

In the late 1840s the issue of judicial selection divided the two prevailing parties, the Democrats and the Whigs. In 1849, Tennessee elected Democratic governor William Trousdale. Trousdale advocated for a popularly elected judiciary based on the encouragement of Andrew Johnson, then a United States Congressman.[34] Johnson's support for a popularly elected judiciary was not principled. Rather, it was purely political, based on his belief that since the Whigs were in control, they would oppose any change that might reduce their power.[35]

When Johnson co-opted the media into the debate, they reframed the issue as one involving the public's competency to select their own judges.[36] With the

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offices during their good behavior." TENN. CONST. art. V, § 2 (1796).

30. WILLIAMS, *supra* note 8, at 46. *But see* CALDWELL, *supra* note 11, at 149–50 (suggesting that the legislative control was because most of those in attendance at the 1796 Constitutional Convention were not lawyers and were not aware of the importance of an independent judiciary); Morton J. Horwitz, *The Emergence of an Instrumental Conception of American Law, 1780–1820*, *in* PERSPECTIVES IN AMERICAN HISTORY 287, 297–98 (Donald Fleming & Bernard Bailyn eds., 1971) (expressing yet another viewpoint, that because of the view that common law was static, little attention was paid to concerns regarding judicial independence).

31. JOSHUA W. CALDWELL, STUDIES IN THE CONSTITUTIONAL HISTORY OF TENNESSEE 109 (1st ed. 1895).

32. STATE OF TENNESSEE, JOURNAL OF THE 1834 CONSTITUTIONAL CONVENTION OF THE STATE OF TENNESSEE 27, 34, 39, 53–54, 96–97 (1834).

33. Jones' Heirs v. Perry, 18 Tenn. (10 Yer.) 44, 55 (1836).

34. Parks, *supra* note 6, at 626–28.

35. *Id*. (citing 1 THE PAPERS OF ANDREW JOHNSON 509 (L. Graf & R. Haskins, eds. 1970)); *id*. at 628 ("As an initial promoter of a popularly elected judiciary, Johnson probably recognized the change as a potential way to root more Whigs out of public office.").

36. Parks, *supra* note 6, at 627; *see also* Huebner, *supra* note 17, 86–88.

issue framed as one of public trust, the Whigs became leery of opposing proposed judicial reforms. The cross-party support and media attention led to the 1851 legislative resolution to amend the constitution.[37] That year, both gubernatorial candidates campaigned in favor of the amendment.[38] In the summer of 1853,[39] the voters approved the amendment which provided that the "[j]udges of the Supreme Court shall be elected by the qualified voters of the State."[40]

5. The Constitution of 1870

Less than two decades later, Tennessee would undertake a complete revision of its constitution occasioned by the aftermath of the Civil War, the election of President Lincoln, and Reconstruction. The leaders at the 1870 Constitutional Convention believed that the changes they made to the existing constitution would be short-lived. The "nestor" of the Convention, Judge A. O. P. Nicholson, cautioned the delegates to only do what was absolutely necessary because "ten years from now all this must be done again."[41]

Paying heed to Judge Nicholson's warnings, it appears that the delegates did very little of consequence to the judicial article in 1870.[42] Proposals made to revise judicial selection, terms of office, and impeachment provisions were all rejected.[43] But inserted between the two sentences of article VI, section 3 (the 1853 amendment that provided for the election of judges by the qualified voters) was this provision: "The Legislature shall have the power to prescribe such rules

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37. For a record of the story of events leading to the amendment, see Huebner, *supra* note 17, at 85–89. The *Nashville Union* railed against legislative appointment of judges, likening the process to "species of log-rolling and bargaining," and argued that an independent judiciary was "necessary only in a monarchy . . . ." *Id*. at 86.

38. Parks, *supra* note 6, at 627. Under the 1834 Tennessee Constitution, governors were elected for two year terms. TENN. CONST. art. III, § 4 (1834).

39. The amendment was not submitted to the voters until 1853 because the constitution required that amendments be passed by two-thirds of the votes of two subsequent legislative sessions before being submitted to the voters. TENN. CONST. art. XI, § 3 (1834).

40. TENN. CONST. art. VI, § 3 (as amended in 1853); Laska, *supra* note 15, at 9.

41. CALDWELL, *supra* note 11, at 300. Some commentators suggest that "many of the [changes] deal with matters which are proper subjects of legislation, and not of constitutional regulation. . . . [T]hey are provisions which are too much dignified by places in the organic law and should be relegated to their proper rank, as stautes." CALDWELL, *supra* note 31, at 152–55 (listing article VI's changes as to the election and ages of judges as among the "unimportant" amendments better left to legislative acts).

42. The 1870 Constitutional Convention has been described as a "political expedient, designed to restore to citizenship and to the mastery of affairs, the majority of the white voters of the State, who had been disenfranchised by a minority party which the war had placed in power." CALDWELL, *supra* note 31, at 147.

43. During the debates, some members suggested that differences between the function and locations of trial and appellate court judges might be a legitimate basis for differentiation in selection methods. *See* STATE OF TENNESSEE, JOURNAL OF THE 1870 CONSTITUTIONAL CONVENTION OF THE STATE OF TENNESSEE 124 (1870); *see also* CALDWELL, *supra* note 11, at 318–21.

as may be necessary to carry out the provisions of section two of this article."[44] The referenced "section two" is the constitutional provision creating the supreme court.[45] Most importantly, the legislature was not given the power to prescribe rules relative to the election of circuit, chancery, or inferior court judges.[46] Apparently the legislature was not prepared to relinquish complete authority over the appellate judiciary.

6. The Legislature and the Courts Today

a. Constitutional and Statutory Provisions

This legislative entanglement with the judiciary, which began in the initial days of statehood, permeates Tennessee's constitutional history.[47] Moreover, the intertwinement remains vibrant today in the applicable constitutional provisions. Three separate constitutional articles contain provisions that relate to the Tennessee court system. Each in turn is linked with the legislature. The first and most basic provision, found in the Declaration of Rights, provides that the legislature may direct the manner and the courts in which suits may be brought.[48] The second set of provisions, set out in article VII, relates to state and county officers.[49] Section 4 of article VII grants the legislature the power to make provisions for "the election of all officers, and the filling of all vacancies not otherwise directed or provided by th[e] Constitution . . . ."[50]

The third and most significant collection of provisions are those set out in article VI, entitled the "Judicial Department."[51] The fifteen sections of the judicial article consign much to the legislature, including the power to create and abolish courts, to alter jurisdiction, and to set salaries and recusal standards.[52] By statute, the legislature has filled much of the void left by the constitution. It has

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44. TENN. CONST. art. VI, § 3 (1870).

45. *Id*. § 2.

46. *Id*. § 4.

47. As one commentator has noted, "the Tennessee practice of frequent legislative tinkering with the judiciary was begun early in the state's political life." LEWIS L. LASKA, TENNESSEE LEGAL RESEARCH HANDBOOK (1977).

48. TENN. CONST. art. I, § 17 (1870).

49. *Id*. art. VII, §§ 1–4.

50. *Id*. § 4.

51. *Id*. art. VI, §§ 1–15.

52. *See, e.g*., *id*. at § 1 (legislature may "ordain and establish" inferior courts and may "vest" jurisdiction in Corporation Courts as necessary); *id*. § 2 (legislature may restrict and regulate the supreme court's appellate jurisdiction); *id*. § 3 (legislature may prescribe rules for the selection of supreme court judges); *id*. § 6 (legislature may remove judges from office); *id*. § 7 (legislature set judges' salaries); *id*. § 8 (legislature may change the jurisdiction of the circuit, chancery, and other inferior courts); *id*. § 11 (legislature shall set standards for relationship recusal and may provide for the appointment of special judges); *id*. § 15 (legislature shall divide the state into judicial districts and may provide for the appointment of justices of the peace).

enacted legislation that establishes the terms of court,[53] the location of court houses,[54] and the site for appellate judges' chambers;[55] it has set the judges' salaries;[56] it has devised methods for replacing judges upon death, illness, or retirement;[57] and it has even mandated an annual training conference.[58]

Among the most significant of the legislature's enactments pertaining to the judiciary is the legislation creating the intermediate courts of appeal. Prior to their permanent creation, the legislature occasionally created temporary appellate panels to help reduce the supreme court's growing case load.[59] The legislature created the first lasting appellate court, and the predecessor to Tennessee's current Court of Appeals, by statute in 1895.[60] This court, the Court of Chancery Appeals, had purely appellate jurisdiction and its decisions were reviewed only for legal error.[61] In 1907, the number of judges on the intermediate appellate court was increased, its jurisdiction was enlarged, and its name was changed to the Court of Civil Appeals.[62] A subsequent name change and increase in membership in 1925 would create the Court of Appeals, today's intermediate court for appeals for civil cases.[63] More than forty years later, the legislature would follow the same procedure in creating the intermediate appellate court for criminal cases, the Court of Criminal Appeals.[64]

By the time the Tennessee Court of Criminal Appeals was created, the Tennessee Law Revision Commission, in conjunction with the Tennessee Bar Association and a lay citizen's organization, was advocating an overhaul of the state's judicial system.[65] Their efforts to call a constitutional convention to institute reform were unsuccessful, but their voices were heard.

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53. TENN. CODE ANN. § 16-2-103 (1994 & Supp. 2007). For more than fifty years, the legislature also dictated the dates of court in each judicial circuit. *See* TENN. CODE ANN. §§ 16-207 to -255 (Supp. 1979).

54. TENN. CODE ANN. § 16-2-102 (1994 & Supp. 2007).

55. *Id*. § 16-5-113.

56. *Id*. § 8-23-103.

57. *Id*. §§ 17-2-116, 17-3-101.

58. *Id*. §§ 16-3-802, 17-3-105.

59. LASKA, *supra* note 47, at 71. The first such panel was known as the Arbitration Commission. Between 1873 and 1883, this body heard cases at the request of the parties and reported its findings to the supreme court. *Id*. In 1883, the Arbitration Commission was replaced with the Referees Commission which heard cases referred to it by the supreme court and then reported its findings back to that court. *Id*. By legislative dictate, neither Commission was permitted to publish its findings and its holdings were "without precedential value." *Id*.

60. 1895 Tenn. Pub. Acts 113; LASKA, *supra* note 47, at 71–72.

61. LASKA, *supra* note 47, at 72.

62. 1907 Tenn. Pub. Acts 232; LASKA, *supra* note 47, at 72 .

63. 1925 Tenn. Pub. Acts 690; LASKA, *supra* note 47, at 72–73.

64. 1967 Tenn. Pub. Acts 587; LASKA, *supra* note 47, at 73–74.

65. Frank N. Bratton, *Report on Tennessee Citizens' Conference to Improve the Administration of Justice*, TENN. BAR J., May 1966, at 13, 13–16.

b. The 1971 Tennessee Plan

In 1971, a bipartisan Tennessee legislature provided for the merit selection of appellate judges. The legislative intent behind merit selection could not have been clearer. In passionate floor debates and an expressive preamble, the Tennessee legislature articulated the unambiguous purpose of merit selection: to secure a highly qualified, apolitical appellate bench.[66] The introductory section of the new legislation provided:

> It is the declared purpose and intent of the general assembly of Tennessee 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 . . . and to assist the electorate of Tennessee to elect the best qualified persons to said courts; to insulate the judges of said courts from political influence and pressure; to improve the administration of justice; to enhance the prestige of and respect for the said courts by eliminating the necessity of political activities by appellate justices and judges; and to make the said courts "nonpolitical."[67]

In the remaining provisions of the chapter, the legislature dictates the application process,[68] the nomination process,[69] the appointment process,[70] and the subsequent election process.[71] Consistent with the terminology used throughout Tennessee's history, the statute provides that every eight years, and in other years in the case of interim appointments, appellate judges who "seek *election*" must declare their "candidacy for *reelection*" by filing a written declaration of candidacy.[72] When declarations are timely filed, election officials are required to place, on the ballot, the question: "Shall (Name of Candidate) be *elected* and retained in office as (Judge) of the (Name of Court)?"[73] If a majority of the voters of Tennessee "vote in favor of *reelecting*" the candidate, the candidate "is duly *elected* to office . . . and given a certificate of *election*."[74]

Nothing about these statutory prescriptions alarmed scholars of Tennessee constitutional history. They had always recognized that the details of judicial

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66. Parks, *supra* note 6, at 633–34 (citing Senator Edward C. Blank, II, Senate Debate of April 29, 1971, on tape at the Tennessee State Archives).

67. TENN. CODE ANN. § 17-4-102 (1994 & Supp. 2007) (originally enacted on May 12, 1971 at 1971 Tenn. Pub. Acts 510 and later codified as TENN. CODE ANN. § 17-701 (Supp. 1976)) (emphasis added).

68. *Id*. § 17-4-110 (previously codified as TENN. CODE ANN. § 17-710 (Supp. 1976)).

69. *Id*. § 17-4-102 (previously codified as TENN. CODE ANN. § 17-702 (Supp. 1976)).

70. *Id*. § 17-4-112 (previously codified as TENN. CODE ANN. § 17-712 (Supp. 1976)).

71. *Id*. § 17-4-114 (previously codified as TENN. CODE ANN. § 17-714 (Supp. 1976)) (for unexpired term) (emphasis added); *id*. § 17-4-115 (previously codified as TENN. CODE ANN. § 17-715 (Supp. 1976)) (for full term) (emphasis added).

72. *See* sources cited *supra* note 71.

73. TENN. CODE ANN. § 17-4-115(b)(1) (1994 & Supp. 2007) (emphasis added).

74. *Id*. at (d)(1) (emphasis added).

selection in Tennessee were left to the legislature's prerogative.[75] While the constitution gives the voters a say, "[t]he method of electing the judges is left to the General Assembly."[76]

> Article VI of the Tennessee Constitution remains as it was drafted in 1870. It provides few limitations on the legislative authority to create and alter the judicial system. . . .
>
> 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.[77]

c. The 1974 Partial Repeal

In 1971 the legislature's desire to secure a highly qualified, apolitical appellate bench led to the passage of the Tennessee Plan under which intermediate appellate and supreme court judges stood for retention elections. If the impetus behind the 1971 passage of the Tennessee Plan was government at its best, the 1974 repeal of the Plan for supreme court justices was politics at its worst. The circumstances which led to the repeal, omitted from Professor Fitzpatrick's essay, are a significant aspect of the legislature's historic control over the judiciary.

After the passage of the Tennessee Plan by the bipartisan Tennessee legislature with little or no opposition, the Plan became the spoils of a highly partisan battle between the Republican governor and the Democratic legislature.[78] Just as the 1853 amendment was not the result of a principled choice between judicial selection methods, neither did the 1974 repeal reflect a rejection of merit selection. In the end, the repeal of the Plan for supreme court justices had little to do with the judiciary; rather, the Plan was a pawn to be given away in exchange for other political favors.[79]

When a justice on the Tennessee Supreme Court died in 1972, the Appellate Court Nominating Commission interviewed applicants and submitted three

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75. *See* Laska, *supra* note 15, at 20.

76. *Id*.

77. Thomas R. Van Dervort, *The Changing Court System*, in TENNESSEE GOVERNMENT AND POLITICS: DEMOCRACY IN THE VOLUNTEER STATE 55, 57 (John R. Vile & Mark Byrnes eds., 1998).

78. *See* Parks, *supra* note 6, at 634; Carl A. Pierce, *The Tennessee Supreme Court and the Struggle for Independence, Accountability, and Modernization, 1974–1998*, *in* A HISTORY OF THE TENNESSEE SUPREME COURT 270, 271–73 (James W. Ely ed., 2002).

79. *See* Parks, *supra* note 6, at 634 (the repeal came "amid charges of vote-swapping on other key legislative issues"); *id*. at 615 ("The partisan manner in which the . . . issue was resolved and the superficiality of the debate on the part of both sides have, however, tended to obfuscate rather than illuminate the significant and difficult questions posed by various methods of selecting judges.").

names to Governor Winfield Dunn.[80] Although the governor appointed his choice in July, he made the appointment effective September 1.[81] A lawsuit was filed by a supreme court aspirant challenging the governor's appointment and the constitutionality of the Tennessee Plan.[82] Ultimately, the court invalidated the appointment, but upheld, without equivocation, the constitutionality of the Tennessee Plan.[83] The process began anew, but the governor's first choice withdrew from consideration.[84]

Following a second appointment process, some Democrats became concerned about the likely replacements for other justices who might retire,[85] and the effect that new justices might have on the court's appointment of the state Attorney General,[86] the composition of the State Building Commission,[87] and the construction of a medical college in East Tennessee.[88] Two days after the supreme court had upheld the constitutionality of the Tennessee Plan, the

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80. Robert Keele, *The Politics of Appellate Court Selection in Tennessee: 1961–1981*, *in* THE VOLUNTEER STATE: READINGS IN TENNESSEE POLITICS 231, 234–39 (Olshfski & Simpson eds., 1985).

81. The death of the justice created a vacancy which was to be filled by the governor in accordance with the merit selection appointment process. The governor was authorized to appoint his nominee to fill out the deceased justice's unexpired term. Rather than effectuate the appointment immediately, the governor appointed his nominee effective September 1, 1972, the beginning of the next term of office. Because the governor's authority to appoint extended only to the period of the unexpired term, his appointment for the subsequent term was invalid. State *ex rel.* Higgins v. Dunn, 496 S.W.2d 480, 491 (Tenn. 1973).

82. *Id*. Despite the appointment by Governor Dunn of Thomas F. Turley, Jr., one of the three nominees from the Appellate Court Nominating Commission, Robert L. Taylor, announced that he was running for the position, campaigned, and received write-in votes in forty-six counties. He declared himself elected and was issued a certificate of election by the Secretary of State. He then took the oath of office before a Chancellor. *Id*. at 482. Meanwhile, the governor issued a commission of appointment to Turley. *Id*. at 482–83.

83. *Id*. at 490–91.

84. Keele, *supra* note 80, at 236.

85. *Id*. at 236–37. Before the death of Justice Larry Creson, all members of the court were Democrats. *See id*. at 232–33. Justice Creson's ultimate replacement was Justice Fones who categorized himself as an Independent. *Id*. at 236.

86. *Id*. at 237. Tennessee is unique in its provision that the state Attorney General is appointed by the supreme court. TENN. CONST. art. VI, § 5 ("An Attorney General and Reporter for the State, shall be appointed by the Judges of the Supreme Court and shall hold his office for a term of eight years.").

87. Keele, *supra* note 80, at 237. The Attorney General served on the State Building Commission, "described at the time as 'one of the last sources of patronage for the state's weakened Democrats.'" *Id*. Hence, the position (and the politics) of the State Attorney General had dual importance to the legislature. *Id*. ("'A switch from a Democrat to a Republican Attorney General would shift the partisan balance on that Commission and give the Republicans control of that body.'").

88. *Id*. at 239.

legislature began the process of repealing it as it applied to supreme court justices.[89]

Governor Dunn vetoed the repealing legislation. His public statement was unadulterated logic:

> I am aware of no reasons for repealing the provisions of the 1971 [A]ct as it relates to members of the Supreme Court and allowing the [A]ct to remain in effect for other appellate judges. There is no basis for the establishment of a dual system to fill appellate court vacancies. If the modified Missouri Plan embodied in the 1971 [A]ct is desirable as the method for filling appellate court vacancies, then it should be retained. If it is not, then it should be repealed in its entirety. I cannot, however, sanction the establishment of a dual system.[90]

In seeking to repeal the Tennessee Plan's application to supreme court justices and to override the governor's veto, no member of the legislature ever suggested that the Tennessee Plan was unconstitutional. Even though the constitutional challenge was fresh, no one asserted a legal basis for repealing the Plan. Rather, they claimed that because justices were more "visible" than their "regional" appellate counterparts, the "electorate could be trusted to make an informed choice between competing candidates."[91] The governor's veto of the repealing statute demonstrated that the executive branch viewed the Plan as constitutional. All of these circumstances indicate that the legislative and executive branch concurred with the supreme court's decision upholding the Plan.

d. The First Constitutional Challenge

Their concurrence was well founded. The supreme court's decision in *State ex rel. Higgins v. Dunn*[92] was based on venerable principles of law and the undisputed historical facts. Perhaps it is the irrefutable logic of the *Dunn* decision that leads to one of the more disturbing arguments in Professor Fitzpatrick's essay, an argument that must be refuted before turning to the merits of the opinion. Professor Fitzpatrick argues with regard to both *Dunn* and *State ex rel. Hooker v. Thompson*[93] that the decisions have diminished precedential value because they were authored by "special" and not "regular" justices of the

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89. 1974 Tenn. Pub. Acts, ch. 433, at 4; *see* Keele, *supra* note 80, at 236–37.

90. S. 88, 1st Sess., at 1523 (Tenn. 1973) (Message from Governor Dunn to the Secretary of State on May 4, 1973). Governor Dunn's concern over the dual system was shared by others:

> The state's present dual system, whereby trial judges and judges of the highest court are elected, while intermediate appellate judges are appointed, is a historical anomaly which should be corrected to reflect public interest as it is presently perceived.
>
> . . . For the sake of consistency, one system, preferably the merit plan, should be used in selecting all judges.

Parks, *supra* note 6, at 635.

91. Keele, *supra* note 80, at 238.

92. 496 S.W.2d 480 (Tenn. 1973).

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

Tennessee Supreme Court.[94] This argument is particularly troublesome in light of Professor Fitzpatrick's assumed fortification of the constitution.

In both *Dunn* and *Thompson*, the Tennessee constitution disqualified the "regular" justices from hearing the cases. In another constitutional provision that proscribes institutional interference with the judiciary, the Tennessee constitution provides that

> [n]o Judge of the Supreme or Inferior Courts shall preside on the trial of any cause in any event of which he may be interested . . . . In case all or any of the Judges of the Supreme Court shall thus be disqualified, . . . the Court, or the Judges thereof, shall certify the same to the Governor of the State, and he shall forthwith commission the requisite number of men, of law knowledge, for the trial and determination thereof.[95]

Since both cases related to the method by which supreme court justices would retain their offices, all of the "regular" justices were "interested" in the cases and were therefore disqualified from hearing them.[96]

Once appointed by the governor, it logically follows that "a special judge has all the power and authority of the regular judge."[97] Otherwise the appointment process would be in vain. Since 1835 the Tennessee law has provided that "[t]he special judges so commissioned shall . . . have the same power and authority in those causes as the regular judges of the court."[98] The *Dunn* and *Thompson* opinions—and any opinions rendered by a special supreme court—are entitled to the same weight as an opinion by the "regular" justices.[99]

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94. Fitzpatrick, *supra* note 2, at 489–90.

95. TENN. CONST. art. VI, § 11.

96. Harrison v. Wisdom, 54 Tenn. 99, 111 (1872) ("It is of the last importance that the maxim that no man is to be a judge in own case, shall be held sacred, and it is not to be confined to a cause in which he is a party, but applies to one in which he has an interest. This will be a lesson to all inferior tribunals to take care, not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of laboring under such an influence." (quoting Dimes v. Proprietors Grand Junction Canal, 3 House of Lords Cases, 759)).

97. *See, e.g.*, Harris v. State, 100 Tenn. 287 (1898); Brewer v. State, 74 Tenn. 198 (1880); Henslie v. State, 50 Tenn. 202 (1871).

98. TENN. CODE ANN. § 17-2-103 (1994 & Supp. 2007).

99. Not only does the assertion that the "special" judges were not qualified to render a decision on a matter of constitutional importance ignore the law, it is also wholly uninformed. Among those who sat as members of the special appellate courts in these cases were Tennessee legal giants. *See, e.g.*, DeLaney v. Thompson, No. 01A01-9806-CH-00304, 1998 Tenn. App. LEXIS 486, at *23 (Tenn. Ct. App. July 16, 1998) ("The veteran judges making up this special court have served as judges at various times and places by every procedure known to the law: appointment, election, interchange, retention, litigant selection, bar election and special designation."). The special judges who sat on the *DeLaney* appellate panel—Judge William S. Russell, Judge Joe D. Duncan, and Judge Samuel L. Lewis—had more than seventy years of combined legal experience. The special justices who sat on the *DeLaney* supreme court included lawyers from all practice areas with nearly a century of combined legal experience. The special justices in *Thompson* included a former chief justice of the Tennessee Supreme Court. State *ex rel.*

The court in *Dunn* upheld the constitutionality of the Tennessee Plan without a struggle based on established principles of constitutional law. The court first recognized the inherent limited purpose of a constitution: to provide a broad outline of the organization and function of government.[100] Constitutions do not "provide the details for exercising governmental power . . . . [T]hey are not intended to establish all the law which, from time to time, may be necessary to meet changing conditions."[101] Article VI, section 3 is not self-executing. The executory details, which are not provided in the constitution, are left to the legislature. This legislative deferral is not only consistent with Tennessee tradition, it is also specifically addressed in the constitution.[102] The legislature assumed the duty and set forth the election details in the statutes.[103]

The *Dunn* court also applied traditional rules of construction to the terms used in the constitution, stating that

> [t]he 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. . . . [Since the Constitution in at least three instances refers to referenda and other methods of ratification as election], it cannot be said that [the 1971 statute] is unconstitutional because the elections therein provided for are limited to approval or disapproval.[104]

A few months after the supreme court upheld the constitutionality of the Tennessee Plan, the legislature, pursuant to its constitutional authority, overrode the governor's veto leaving Tennessee with a dual system for selecting appellate court judges. This incongruity would remain until 1994 when the legislature would enact a modified, incomparable plan for electing and evaluating all of Tennessee's appellate court judges.[105]

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

100. State *ex rel.* Higgins v. Dunn, 496 S.W.2d 480, 487 (Tenn. 1973). *See generally* MCCLURE, *supra* note 9, at 25 ("The people, the fountain of all power, have delegated their sovereignty to their state governing agencies, the nature and organization of which are set forth in the constitutions . . . .").

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

102. Article VII, section 4 provides that "[t]he election of all officers, and the filling of all vacancies not otherwise directed or provided by this Constitution, shall be made in such manner as the Legislature shall direct." TENN. CONST. art. VII, § 4. Article VI, section 3 provides that "[t]he Legislature shall have power to prescribe such rules as may be necessary to carry out the provisions of section two of this article." TENN. CONST. art. VI, § 3.

103. *Dunn*, 497 S.W.2d at 487–88.

104. *Id*. at 489. The court listed dozens of statutory provisions that used the word "elect" to describe various selection methods. *Id*. at 489 n.1.

105. *See infra* text accompanying notes 134–44.

e. The 1977 Limited Constitutional Convention

While it is true that the citizens of Tennessee rejected a constitutional amendment that would have specified the details for electing appellate judges, it is disingenuous to suggest, as Professor Fitzpatrick does, that the 1977 vote somehow affects the constitutionality of the 1994 legislation. The essay's incomplete discussion of Tennessee's 1977 Limited Constitutional Convention creates a misimpression that the professor uses to buttress many of his arguments. The omitted details are discussed below.

The 1977 Limited Constitutional Convention was convened[106] to deal with a multitude of state problems, more than ever before undertaken in a meeting of its kind. While the issues were many, and varied, the primary impetus for the Convention was the state's dire fiscal situation compounded by a constitutional ceiling on interest rates.[107] "Although other groups had been seeking to change the constitution, lobbying by the financial industry (which included mortgage lenders and allies in the real estate industry) was the prime cause of the 1977 Limited Constitutional Convention."[108]

Although judicial reform was not a catalyst for the Convention, those who favored court reform supported the call.[109] The court reformers were not concerned about judicial selection methods. Rather, they were concerned about the overall inefficiency and dysfunction of the Tennessee court system. These concerns, documented in 1971 by the Institute of Judicial Administration,[110] grew

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106. After adjournment, it was determined that the entire 1977 Constitutional Convention was actually invalid because the governor had not signed the act calling for the convention. Crenshaw v. Blanton, 606 S.W.2d 285, 289 (Tenn. Ct. App. 1980) (holding that the constitution "does require the signature of the Governor on a measure submitting to the voters the question of calling a constitutional convention"). Crenshaw had filed a chancery action challenging the validity of the act providing for the convention. On appeal, the court of appeals found a constitutional deficiency, but was

> unwilling at this late date to invalidate the amendments to the Constitution which have been proposed by a convention called upon approval of the voters of the State who also have given final approval to the amendments. Judicial interference with the orderly framework of government as approved by the voters of the State is simply not justified by an omission which cannot be said to have interfered with the free exercise of the rights of the people of the State to change the form of their government.

Id. at 290.

107. Lewis L. Laska, *The 1977 Limited Constitutional Convention*, 61 TENN. L. REV. 485, 486–88 (1994). The primary promoters of the 1977 Constitutional Convention were the State Labor Council, the Tennessee Education Association, the Tennessee County Services Association (a lobbying group for county officials), the Tennessee Municipal League, and the Tennessee Congress of Parents and Teachers. *Id*. at 488 n.12. While none of the promoting groups or lobbyists promoted change in the state judiciary, state Supreme Court Justice Joe Henry is reported to have desired an opportunity to modernize the Tennessee court system. *Id*. at 494–95.

108. *Id*. at 488–89 (footnote omitted).

109. Pierce, *supra* note 78, at 297.

110. *See* JOHN M. SCHEB, II & STEPHEN J. RECHICHAR, THE POLITICS OF JUDICIAL

out of Tennessee's antiquated and jumbled court system.[111] The Tennessee Bar Association and the Tennessee Law Revision Commission had sought a convention to deal with judiciary reform in the mid-1960s. In 1968, the legislature agreed,[112] but the people defeated the call for the convention.[113] When, in 1977, it became likely that a constitutional convention would be held, efforts to modernize the Tennessee court system began anew.

The 1977 call for convention included revisions to six of the eleven articles of the Tennessee constitution[114] For all of the articles, except one, the particular section sought to be revised was specified.[115] But the call relative to the judicial article did not designate any particular section, but provided for consideration of the entire article.[116]

When the delegates had concluded the longest and most expensive convention in Tennessee's history, thirteen proposed amendments were submitted to the voters for approval. Most of the proposed amendments offered a single proposal to the voters.[117] But the amendment concerning the judicial department

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MODERNIZATION: THE CASE OF THE TENNESSEE COURT SYSTEM 43–46 (The Univ. of Tenn., Bureau of Public Administration 1986). In 1971 the Tennessee Judicial Council created the Institute of Judicial Administration to study and recommend court reform measures in Tennessee. *Id*. at 46. The Institute documented "five serious shortcomings" of the Tennessee court system: "(1) Problems of multi-county districting associated with the dual law/equity system . . . ; (2) 'a lack of functional mobility among the judges' . . . and resulting case load inequities . . . ; (3) Judge shopping tendencies arising from 'an overdose of concurrent jurisdiction' . . . ;" (4) Problems of lack of uniformity in procedure; and "(5) An excess of judges at every level except the Supreme Court." *Id*. at 45–46. The study's only other reflection on the appellate courts was that the specialization in the appellate courts had produced a "high quality output with the benefits especially pronounced at the intermediate appellate level." *Id*. at 45.

111. *See* Frederic S. Le Clercq, *The Tennessee Court System*, 8 MEM. ST. U. L. REV. 185, 425 (1978); Van Dervort, *supra* note 77, at 56 (citing the hodgepodge court system and "judge shopping" which created caseload inequities as the "major problem" facing the Tennessee courts).

112. *See* 1968 Tenn. Pub. Acts 37.

113. *See* JOE C. CARR, TENN. SEC'Y OF STATE, TENNESSEE BLUE BOOK 1969–1970, at 254–58 (1969).

114. 1976 Tenn. Pub. Acts ch. 848, § 1; *see* Governor Ray Blanton, *Proclamation by the Governor*, *in* THE LIMITED CONSTITUTIONAL CONVENTION OF 1977, STATE OF TENNESSEE, THE JOURNAL OF THE DEBATES OF THE LIMITED CONSTITUTIONAL CONVENTION OF 1977 (hereinafter *Proclamation by the Governor*).

115. 1976 Tenn. Pub. Acts ch. 848, § 1. The call listed article II, sections 8, 15, 18, and 24; article III, sections 4 and 18; article IV, section 1; article VII, section 1 and 2; article XI, section 7, 11, 12, and 14. For article VI, the judiciary article, the call specified the entire article: "Article VI, consisting of Sections 1 through 15." *Id*.

116. *Id*.

117. *See Proclamation by the Governor*, *supra* note 114. For example, Proposal 1 required the voters to vote on whether the constitutional prohibition on interracial marriage should be repealed. *Id*. Proposal 3 called for the repeal of the constitutional homestead exemption. *Id*. Proposal 4 allowed a governor to serve two consecutive terms. *Id*. Proposition 7 allowed voters age eighteen and over to vote. *Id*. Proposal 10 deleted the constitutional maximum interest rate and allowed the legislature to set the maximum rate. *Id*.

contained sixteen separate proposals,[118] consisting of more than 1,500 words. The amendments affected virtually every person serving in the justice system—judges, clerks, district attorneys, the state Attorney General, constables, and jurors.[119] Yet despite the number of separate proposals and the various constituencies affected, the voters were not allowed to vote separately on the provisions but were required to either accept or reject the amendment as a whole.

So complex were the changes to the judicial article that many of the delegates professed confusion over what was included in the final proposal.[120] In addition, the proposal omitted, perhaps by political design,[121] a constitutional provision that had protected judicial salaries from legislative tinkering during a judge's term of office.[122] This omission, coupled with the requirement of a unitary vote, assured that the proposed amendments to the judicial article would fail.

Those who had initially supported the inclusion of the article in the call for convention, including Chief Justice Joe Henry and the Tennessee Bar Association, vehemently opposed its passage.[123] Chief Justice Henry decried the interference with the independence of the judiciary: "It is incredible that in the last three quarters of the twentieth century a constitutional convention would make judges dependent upon the good will of the legislature for their compensation."[124] In the words of the chief justice, the amendment would assure

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118. Among the proposed changes to the judicial article were a complete restructuring and renaming of the court system; a combination of intermediate appellate courts; a reduction in the judicial term of office; the creation of a new "Superior Court"; the abolition of the Chancery Court; the creation of a state-wide General Sessions Court with "uniform" jurisdiction; the creation of a Court of Discipline and Removal; a change in the method of selection and the term of office of the State Attorney General; a reduction in the term of office of District Attorney Generals; the creation of a state-wide indigent defense system; and the elimination of clerks and masters. *See id*.

119. *See id*.

120. *See* Laska, *supra* note 107, at 549; Van Dervort, *supra* note 77, at 56.

121. The proposed constitutional prohibition on altering a judge's salary during the term of office was ultimately tied to a similar provision protecting the salaries of district attorneys and public defenders. This created concern and controversy, resulting in its deletion and ultimate omission from the proposal. Laska, *supra* note 107, at 550.

122. Van Dervort, *supra* note 77, at 56. Since the founding of the Republic the issue of removing the control of judges via reduction in salaries during terms of office had been prominent. DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776) ("[The King] has made Judges dependent on his Will alone for the Tenure of their Offices, and the Amount and Payment of their Salaries."); *see* SUSAN B. CARBON & LARRY C. BERKSON, JUDICIAL RETENTION ELECTIONS IN THE UNITED STATES 1 (1980).

123. Laska, *supra* note 107, at 570–71.

124. *Id*. at 551. Justice Henry was always a master of language, but his remarks to the Tennessee Municipal League in opposition to the amendment may be among his finest. In remembering a phrase used by Governor Gordon Browning, "Stand still, little pig, while I gut you," Justice Henry pronounced, "I won't be gutted!" SCHEB & RECHICHAR, *supra* note 110, at 58 (quoting Kirk Loggins, *Henry Launches Effort to Kill Judicial Article*, NASHVILLE TENNESSEEAN, Jan. 7, 1978, at 1).

a "devitalized, disorganized, demoralized, and subservient judiciary"[125] and should be rejected.

It was not only the vocal opposition to the amendment that led to its failure, but also its lack of support.

> The judicial article failed because there was no strong ally in support of it, and many discordant voices against it. The loudest was Chief Justice Joe Henry. . . . [H]is conclusion was pure Justice Henry: "I hope the people of Tennessee will consign the proposed judicial article to the oblivion it so richly deserves."

Despite their overwhelming support of judicial reform, the Tennessee Bar Association ultimately opposed the new judicial article. The Bar Association believed that the article adversely affected the traditional notions of checks and balances and separation of power of separate and equal branches of government. "In the end, the judicial article was abandoned by those whom it would have influenced the most: the supreme court (at least Justice Henry), the trial court judges, the court clerks, and even the nonlawyer general sessions judges."[126]

The legislature ultimately used its plenary powers to adopt many of the progressive court revisions contained in the rejected amendment to the judicial article.[127] The legislature reorganized the trial court system,[128] created a state-wide public defender system,[129] gave the supreme court extensive rulemaking powers,[130] and increased uniformity in the General Sessions Court.[131] And in 1994, the legislature revised the Tennessee Plan to assure the quality of the Tennessee appellate bench.

f. The 1994 Tennessee Plan

When the legislature revised the Tennessee Plan, it not only reinstated retention elections for supreme court justices, it also fashioned a merit election system that was unique to Tennessee. The legislature restated its clear and unambiguous purpose, first outlined in 1971: to secure a highly qualified apolitical appellate bench.[132] The Tennessee Plan was designed to assist the governor in the initial appointment and the citizens in the subsequent elections.[133]

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125. SCHEB & RECHICHAR, *supra* note 110, at 60 (quoting Kirk Loggins, *Henry Launches Effort to Kill Judicial Article*, NASHVILLE TENNESSEEAN, Jan. 7, 1978, at n.45).

126. *Id*. at 570; *see* Van Dervort, *supra* note 77, at 55–57. According to Van Dervort, "[i]n the end the judicial article proposal failed because there was no strong lobby in support of it and many discordant voices, primarily those of the Chief Justice and the Tennessee Bar Association, against it." Van Dervort, *supra* note 77, at 57.

127. Van Dervort, *supra* note 77, at 58.

128. TENN. CODE ANN. §§ 16-2-101 to -520 (1994 & Supp. 2007).

129. *Id*. §§ 8-14-201 to -212.

130. *Id*. § 16-3-401.

131. *Id*. §§ 16-3-501 to -504.

132. *Id*. §17-4-101.

133. *Id*. ("It is the declared purpose and intent of the general assembly . . . to assist the

This time, the legislature added a feature to the Tennessee Plan that made the Plan uniquely able to "assist the electorate" in "elect[ing] the best qualified persons to the court."

The added dimension of the 1994 Tennessee Plan is a judicial performance evaluation program[134] by which court personnel, lawyers, and other judges evaluate the performance of Tennessee's judges.[135] In addition, the program includes self-evaluation and the opportunity for judges to discuss and reflect on their own strengths and weaknesses.[136]

The overriding purpose of the evaluation program is to "improve[e] the administration of justice in Tennessee . . . by instituting a program of continuous self-improvement . . . that empowers the judges, with the assistance of their peers, to enhance and to broaden their own judicial skills."[137] By assisting judges in identifying areas in which they need to boost their judicial skills, the program improves the overall quality of the Tennessee bench.[138]

But for appellate judges, the purpose of evaluation is deeper than the mere desire for individual self-improvement. The program achieves the legislative purpose of "assist[ing] the electorate"[139] by providing information that "promote[s] informed retention decisions."[140] Each appellate judge standing for retention election is evaluated in order to inform the electorate about the judge's performance on the bench. This enables the voters to cast a more knowledgeable vote.[141]

By adopting the judicial evaluation program as part of the Tennessee Plan, the Tennessee legislature demonstrated a true commitment to assuring a quality

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governor in finding and appointing the best qualified persons available for service on the appellate courts of Tennessee, and to assist the electorate of Tennessee to *elect* the best qualified persons to the courts . . . ." (emphasis added)).

134. At the time that Tennessee adopted its judicial evaluation program only nine other states in the country had similar programs providing for the evaluation of their judges. *See* Marla N. Greenstein, Dan Hall, and Jane Howell, *Improving the Judiciary through Performance Evaluations*, *in* THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE (American Bar Association 7th ed. 2002); JUDICIAL PERFORMANCE EVALUATION HANDBOOK 3 (American Bar Association, 1996).

135. TENN. SUP. CT. R. 27, § 1.

136. *Id*. at § 1.04

137. *Id*. at § 1.03

138. *Id*. at § 1.02.

139. *See supra* note 133.

140. TENN. SUP. CT. R. 27, § 1.05 ("In addition to its primary purpose of self-improvement, the Judicial Performance and Evaluation Program must provide information that will enable the Judicial Evaluation Commission to perform objective evaluations and to issue fair and accurate reports concerning the appellate judges' performances.").

141. TENN. CODE ANN. § 17-4-201(a)(1) (1994 & Supp. 2007) provides that "[t]he purpose of the [judicial evaluation] program shall be to assist the public in evaluating the performance of incumbent appellate court judges." To this end, " [t]he judicial evaluation program shall require publication and disclosure of a final report." *Id*. § -201(c)(1). The report is publicly available and is published in six daily newspapers preceding the election. *Id*.

appellate bench. For the last fourteen years, appellate judges in Tennessee have been appointed by the governor, evaluated by the Judicial Evaluation Commission, and elected by the voters.[142] The system has not only provided a unique model for other states; it has also produced a diverse and qualified appellate bench removed from partisan politics.

g. The Second[143] Constitutional Challenge[144]

In 1996, a perennial litigant in Tennessee state and federal courts[145] filed suit to enable himself to run for a seat on the supreme court.[146] His attack on the

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142. Professor Fitzpatrick complains that the Commission has recommended retention for "every single one" of the sixty-six judges that have been evaluated since 1994. Fitzpatrick, *supra* note 2, at 484. His critique implies that some of Tennessee's judges did not deserve either a positive evaluation or retention. An equally plausible explanation is that Tennessee's merit selection and evaluation system has produced good judges who do their jobs well and deserve to continue to do so. His criticism is also irrelevant—even before Tennessee moved to a merit selection system for its appellate judges, few appellate judicial races were contested and even fewer incumbents lost their seats. *See* Harry Phillips, *Our Supreme Court Justices*, 17 TENN. L. REV. 466, 468 (1942) ("Indeed, the caliber of Tennessee's appellate judges has been such that the State has seen few contests for the highest bench.").

143. These two constitutional challenges and two others, one challenging the application of the system when a judge was not evaluated, *see infra* note 147, and the other dismissed by the federal court in March of this year, Johnson v. Bredesen, No. 3:07-0372, 2008 U.S. Dist. LEXIS 19738 (M.D. Tenn. Mar. 13, 2008), constitute the "several cases" that have caused the Tennessee Plan to be "mired in litigation." *See* Fitzpatrick, *supra* note 2, at 475.

144. I was a named defendant in the second suit challenging the constitutionality of the Tennessee Plan brought by Mr. John Jay Hooker. I am not unique; Mr. Hooker has sued every sitting Tennessee Supreme Court justice, the members of the Tennessee Judicial Selection Commission, at least three governors, and several State Attorney Generals, as well as at least two United States Senators, the mayor of Nashville, and the Federal Election Commission. *See* sources cited *infra* note 145.

145. With two exceptions, all of the litigation concerning the administration of the Tennessee Plan has been filed either by or on behalf of Mr. John Jay Hooker. In addition to these suits over the state judicial selection system, Mr. Hooker often challenges campaign finance systems in federal elections. *See, e.g.*, Hooker v. Fed. Election Comm'n, 21 F. App'x 402 (6th Cir. 2001); Hooker v. Thompson, 21 F. App'x 342 (6th Cir. 2001); Hooker v. Sasser, 893 F. Supp. 764 (M.D. Tenn. 1995); Hooker v. Alexander, No. M2003-01141-COA-R3-CV, 2005 Tenn. App. LEXIS 304 (Tenn. Ct. App. May 20, 2005).

146. At the time of this lawsuit, Mr. Hooker was not qualified to serve as a justice because "he failed to meet the requirement that a candidate for Supreme Court Justice must be an attorney licensed to practice law in Tennessee . . . ." State *ex rel*. Hooker v. Thompson, No. 01S01-9605-CH-00106, 1996 WL 570090, at *2 (Tenn. Oct. 2, 1996). Mr. Hooker's law license had been suspended for his failure to comply with continuing legal education requirements. *Id*. at *1 n.4. In addition, Mr. Hooker resided in the Middle Grand Division of the State and could not qualify for the seat because two sitting justices, Justice Drowota and Justice Birch, also resided in that Division. *Id*.; *see* TENN. CONST. art. VI, § 2 ("The Supreme Court shall consist of five Judges, of whom not more than two shall reside in any one of the grand divisions of the State.").

Tennessee Plan in *State ex rel. Hooker v. Thompson* was based initially on the fact that the sitting justice[147] who was on the ballot for retention had not been evaluated by the Judicial Evaluation Commission.[148] Ultimately, a special supreme court[149] assessed and upheld the constitutionality of the Tennessee Plan.[150]

The decision was not unexpected. Although the legislature had added an evaluation program to the Tennessee Plan, the remaining provisions were identical to those upheld by the court in 1973. While the 1973 precedent was a basis for the court's analysis,[151] it was not the sole foundation. The court also relied upon fundamental principles of statutory construction and constitutional interpretation essential to analyzing any constitutional challenge.

B. Fundamental Principles of Statutory Construction and Constitutional Law

The second cornerstone omitted from Professor Fitzpatrick's discussion is consideration of basic principles of statutory construction and constitutional interpretation. These principles, discussed below, are essential to evaluating the constitutionality of any legislative act. When properly utilized to analyze the Tennessee Plan, the principles lend further support to the conclusion that the Tennessee Plan is constitutional.

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147. To state the obvious, that sitting justice was me.

148. A similar unsuccessful attack on the Plan was mounted by at attorney seeking to run for the Tennessee Court of Appeals, Middle Division, in 1998. Judge Henry Todd advised the Judicial Evaluation Commission that he did not intend to seek election at the end of his term. As a result the Commission did not perform an evaluation of Judge Todd. An aspirant for Judge Todd's seat sought and received injunctive relief against the application of the Tennessee Plan, claiming the Plan inapplicable since Judge Todd was not evaluated. The Davidson County Chancery Court decision granting relief was reversed by a special panel of the Tennessee Court of Appeals, which held the Tennessee Plan constitutional based upon rules of statutory and constitutional construction and the *Dunn* precedent. DeLaney v. Thompson, No. 01A01-9806-CH-00304, 1998 Tenn. App. LEXIS 486 (Tenn. Ct. App. July 16, 1998). The special court of appeals's decision was in turn reversed by a special supreme court which, based on equally long-standing principles, found it unnecessary to address the issue of the constitutionality of the Tennessee Plan. DeLaney v. Thompson, 982 S.W.2d 857, 858 (Tenn. 1998) ("It is the duty of all courts, including the Supreme Court, to pass on a constitutional question only when it is absolutely necessary for the determination of the case and of the rights of parties to the litigation.").

149. *See supra* text accompanying notes 93–98.

150. State *ex rel.* Hooker v. Thompson, No. 01S01-9605-CH-00106, 1996 WL 570090 (Tenn. Oct. 2, 1996).

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

1. Presumption of Constitutionality

The most basic principle of statutory construction requires that courts indulge "every presumption" in favor of constitutional validity.[152] Statutes are presumed to be constitutional because it is within the province of the legislature to prescribe law by which society is governed.

The principle of presumed constitutionality requires that courts indulge every presumption in favor of upholding a legislative enactment. Every doubt as to the viability of a statute must be resolved in favor of constitutionality. So strong is the presumption that when two possible interpretations exist, the one that sustains constitutionality is imposed over the other.[153] Unless a plain and unambiguous interpretation compels the conclusion that a statute violates the constitution, the statute must be upheld.[154]

2. Construction to Uphold Constitutionality

In addition to the presumption of constitutionality that adheres to all statutes, a court must construe a statute so as to preserve constitutionality.[155] If a statute lends itself to more than one construction, the construction that upholds constitutionality must be applied. A statute must not be declared unconstitutional if "it is possible to avoid doing so."[156] If doubt arises as to the meaning of the provision, a court must "harmonize [the conflicting] portions and favor the construction which will render every work operative rather than one which would make some words idle and meaningless."[157]

3. Legislative Objectives

When a statute's constitutionality is challenged, the court must look at the goals intended by the legislature and not the particular language used.

> In construing statutes, we 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. If the real object aimed at is within legislative competency, and can be clearly seen from the whole statute taken together, the history of the prior legislation upon the same subject, the Court will not be turned aside by particular expressions, which, taken by themselves, might seem to indicate that

152. *See, e.g.*, Bank of State v. Cooper, 10 Tenn. (2 Yer.) 599, 608 (1831).

153. *See, e.g.*, Kirk v. State, 150 S.W. 83, 85 (Tenn. 1911); Cole Mfg. Co. v. Falls, 16 S.W. 1045, 1046 (Tenn. 1891).

154. *See, e.g.*, Arrington v. Cotton, 60 Tenn. 316 (1872); Smith v. Normant, 13 Tenn. (5 Yer.) 271 (1833).

155. *See, e.g.*, Consolidated Enters., Inc. v. State, 263 S.W. 74, 75 (Tenn. 1924) (describing it as the "primary" rule); Turner v. Eslick, 240 S.W. 786, 789 (Tenn. 1921) (same).

156. Knoxville Power & Light Co. v. Thompson, 276 S.W. 1050, 1051 (Tenn. 1925).

157. Shelby County v. Hale, 292 S.W.2d 745, 748–49 (Tenn. 1956).

> the Legislature was assuming to transcend its constitutional power, but will give effect to the will of the Legislature thus discovered.[158]

C. The Constitutionality of the Tennessee Plan

1. The Principle of *Stare Decisis* in General

These fundamental rules of constitutional law and statutory construction viewed in light of Tennessee's constitutional history lead to the inescapable conclusion reached by the *Dunn* and *Thompson* courts that the Tennessee Plan does not violate the Tennessee constitution. These decisions are dismissed too summarily by Professor Fitzpatrick. His essay discounts the importance of judicial precedent in two ways. In general, the essay disregards the principle of *stare decisis*. In particular, the essay erects illogical arguments to challenge the principle's application to the *Dunn* and *Thompson* decisions.

> The rule of stare decisis is peculiarly applicable in the construction of written constitutions. . . . "A cardinal rule in dealing with written instruments is that they are to receive an unvarying interpretation, and that their practical construction is to be uniform. A constitution is not to be made to mean one thing at one time, and another at some subsequent time, when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. A principal share of the benefit expected from written constitutions would be lost, if the rules they established were so flexible as to bend to circumstances or be modified by public opinion."[159]

The final arbiter of the Tennessee constitution has twice upheld the Tennessee Plan against constitutional challenges. Several United States District Courts and the Sixth Circuit Court of Appeals have relied on the supreme court's holdings in dismissing countless actions challenging the Plan.[160] The decisions upholding the Tennessee Plan have uniformly held that a retention election satisfies the constitutional requirement that the justices of the supreme court "be

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158. *Arrington*, 60 Tenn. at 319–320.

159. McCulley v. State (The Judges' Cases), 53 S.W. 134, 139–40 (Tenn. 1899); *see also* State *ex rel.* Pitts v. Nashville Baseball Club, 154 S.W. 1151, 1154–55 (Tenn. 1913).

160. Judges Higgins, Donald, and Campbell have all dismissed cases in which Mr. Hooker has claimed a property interest either in the right to run for justice or in the right to vote in a popular election of appellate judges. A threshold question in each case has been whether the Tennessee Plan violates state constitutional law. *See* Hooker v. Anderson, 12 F. App'x 323 (6th Cir. 2001); Hooker v. Thompson, 21 F. App'x 342 (6th Cir. 2001); Hooker v. Burson, No. 96-6030, 1997 U.S. App. LEXIS 2682 (6th Cir. Feb. 12, 1997); Johnson v. Bredesen, No. 3:07-0372, 2008 U.S. Dist. LEXIS 19738 (M.D. Tenn. Mar. 13, 2008).

elected by the qualified voters of the State."[161] Thus, no challenge to the constitutionality of the Tennessee Plan has ever been successful.

2. The Principle of *Stare Decisis* applied to *Dunn* and *Thompson*

In addition to its general disregard for the importance of *stare decisis*, the essay floats specious arguments against the principle's application to the *Dunn* and *Thompson* decisions. The first taunt, addressed previously in this article, is that the decisions are not entitled to the effect of *stare decisis* because a "majority of regular justices" did not render the decisions. In addition to ignoring the constitutional provision requiring judicial disqualification,[162] the claim defies common sense. Advanced to its logical conclusion, Professor Fitzpatrick's point would create decisional chaos. Either "regular" judges would be forced to decide matters in which they had an interest, thereby creating "good" precedent, or substitute judges would render a decision that was of no value.

The second jab is aimed only at the *Thompson* decision and claims that the decision has no precedential value because it was not published.[163] This argument relies upon a supreme court rule that specifies that certain intermediate appellate decisions will have "no precedential value."[164] But the unpublished *Thompson* decision does not fall in that category. Moreover, consistent with the essay's general disregard for *stare decisis*, the argument ignores the fact that *Thompson* relied on the precedent established twenty-five years earlier in *Dunn*.

3. The Essay's Four Remaining Arguments

This paper's earlier discussions of the legislature's historic involvement with the judiciary, Tennessee's constitutional history, and fundamental principles of constitutional law and statutory construction have exposed the fallacy of most of the arguments against the constitutionality of the Tennessee Plan. This section makes additional observations relative to Professor Fitzpatrick's four remaining arguments: that the legislature cannot give the governor the authority to appoint judges except when a midterm vacancy occurs; that retention elections are not "elections"; that retention races cannot be reconciled with democracy; and that

161. TENN. CONST. art VI, § 3.

162. *Id*. § 11.

163. *See* Fitzpatrick, *supra* note 2, at 488–89, 489 n.143.

164. TENN. SUP. CT. R. 4(E)(1) ("If an application for permission to appeal is hereafter denied by this Court with a "Not for Citation" designation, the opinion of the intermediate appellate court has no precedential value."); *cf.* TENN. SUP. CT. R. 4(G)(1) ("An unpublished opinion shall be considered controlling authority between the parties to the case when relevant under the doctrines of the law of the case, res judicata, collateral estoppel, or in a criminal, post-conviction, or habeas corpus action involving the same defendant. Unless designated "Not For Citation," "DCRO" or "DNP" pursuant to subsection (F) of this Rule, unpublished opinions for all other purposes shall be considered persuasive authority.").

the electorate's rejection of the 1977 constitutional amendment is evidence that the Tennessee Plan in unconstitutional.

a. The Legislature May Authorize the Governor to Fill all Appellate Court Vacancies

Professor Fitzpatrick claims that the Tennessee Plan is unconstitutional "to the extent [it] permits the governor to appoint a new judge to a position created when the previous judge served [a] full term . . . ."[165] If the legislature may empower the governor to fill end-of-term vacancies, Professor Fitzpatrick contends that the vacancy provision would nullify the election provision.[166] This argument fails for two reasons. First, it is contradicted by the plain language of the constitution. Second, its legitimacy depends upon a forced, incorrect construction of the word "vacancy."

The constitution requires the legislature to determine the manner for filling all vacancies not otherwise provided for in the constitution.[167] This includes vacancies in the appellate courts. In circumscribing the legislature's power, the constitution has placed a limitation on the period of the appointment, providing that "[n]o appointment or election to fill a vacancy shall be made for a period extending beyond the unexpired term."[168] The legislature has abided by this constitutional mandate by providing that the term of an appointed judge expires on August 31 following the next biennial election.[169] The appointed judge either must be "elected by the qualified voters of the State," at that election or cease to serve;[170] otherwise the appointment would be in violation of the constitutional limitation imposed on the period of appointment. By virtue of these provisions, no appointed judge is able to avoid an election.

In fulfilling its constitutional mandate to determine the manner for filling vacancies, the legislature, by statute, has authorized the governor to fill all appellate court vacancies.[171] The statute plainly provides that "[w]hen a vacancy occurs in the office of an appellate court . . . by death, resignation, *or otherwise*, the governor shall fill the vacancy by [appointment.]"[172] The language makes it

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165. Fitzpatrick, *supra* note 2, at 492.

166. *Id*. at 491–92.

167. TENN. CONST. art. VII, § 4.

168. *Id*. § 5.

169. TENN. CODE ANN. § 17-4-112(b) (1994 & Supp. 2007).

170. *Id*.

171. TENN. CODE ANN. § 17-4-112 provides that

> (a) When a vacancy occurs in the office of an appellate court after September 1, 1994, by death, resignation or otherwise, the governor shall fill the vacancy by appointing one (1) of the three (3) persons nominated by the judicial selection commission, or the governor may require the commission to submit one (1) other panel of three (3) nominees. . . .
>
> (b) 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.

172. *Id*. § 17-4-112(a) (emphasis added).

clear that all vacancies are to be filled by gubernatorial appointment. To circumvent this plain language used in the constitution and statute, Professor Fitzpatrick relies upon a forced and incorrect definition of the term "vacancy," surmising that the "constitution uses the word 'vacancies' to refer only to interim vacancies."[173] This strained construction is directly contradicted by more than a century of Tennessee law.

While neither the constitution nor the statute defines "vacancy," the courts have applied a consistent and unambiguous definition. The term is used in its ordinary sense, not in a limited or special one: "There is no technical or peculiar meaning to the word 'vacant' when applied to office. It means unoccupied, without an incumbent, *regardless of whether it was ever filled, or when or how it subsequently became without an incumbent.*"[174]

Professor Fitzpatrick suggests that the issue of the constitutionality of gubernatorial appointments for end-of-term vacancies remains viable because "[n]one of the courts that have considered the constitutionality of the Tennessee Plan have addressed this point."[175] This argument disregards the plain unequivocal language of the appointment statute and recent precedent. The statute requires the governor to fill all vacancies created by "death, resignation or otherwise."[176] "Otherwise" means "in another way, or in other ways."[177] Thus, the governor must fill vacancies created by death, resignation, or created in any other way.

The only legitimate judicial interpretation of the statute is that the governor fills *all* appellate court vacancies, not just vacancies occurring midterm. This was the interpretation applied to the statute by the United States District Court for the Middle District of Tennessee in *Johnson v. Bredesen*. The District Court held that the statute "makes it abundantly clear" that it applies to vacancies created by appellate judges deciding not to pursue a new eight-year term. That vacancy "is to be filled by gubernatorial appointment followed by a retention election held at the next biennial August election . . . ."[178]

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173. Fitzpatrick, *supra* note 2, at 475 ("[I]t appears that the constitution uses the word 'vacancies' to refer only to interim vacancies—i.e., where the judges leave in the middle of their terms—rather than to positions that are vacant simply because judges choose not to run for reelection.").

174. Richardson v. Young, 125 S.W. 664, 683 (Tenn. 1910); *accord* Conger v. Roy, 267 S.W. 122, 125 (Tenn. 1924); Ashcroft v. Goodman, 202 S.W. 939, 940 (Tenn. 1918); State *ex rel.* Gann v. Malone, 174 S.W. 257, 259 (Tenn. 1915); State *ex rel*. Witcher v. Bilbrey, 878 S.W.2d 567, 573–74 (Tenn. Ct. App. 1994).

175. Fitzpatrick, *supra* note 2, at 492.

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

177. 10 OXFORD ENGLISH DICTIONARY 984 (2d ed. 1989).

178. Johnson v. Bredesen, No. 3:07-0372, 2007 U.S. Dist. LEXIS 33897, at *16 n.5 (M.D. Tenn. May 8, 2007). In this case, plaintiffs, which included the Tennessee Center for Policy Research, challenged the constitutionality of the Tennessee Plan in United States District Court on the basis that it denied voters their Fourteenth Amendment property right to vote for a judge in a contested judicial election. *Id*. at *3. Mr. Johnson's suit was consolidated with Mr. Hooker's. Among the challenges was an attack on the authority of the governor to appoint a judge for an end-

b. Retention Elections are Elections

Professor Fitzpatrick next argues that a retention election is unconstitutional because it cannot be reconciled with either traditional notions of democracy nor traditional definitions of election. In reality, his argument is that retention elections fail to satisfy his own definition of "election" and his concept of democracy.

The first argument—that a retention election does not fit the definition of election—fails because it turns on the assumption that the word "elect" means a popular election between candidates. The argument runs counter to the most basic tenets of construction. Words must be given their natural and ordinary meaning. They must be construed in a common-sense fashion so as to not create inconsistencies within a document. To construe the word "elect" to refer specifically to popular elections would lead to internal conflict within the constitution. Rather than creating conflict by construction, courts are required to "'harmonize such portions and favor the construction which will render every word operative . . . .'"[179] By construing the word "elect" broadly to mean any kind of a selection process, the Tennessee courts have honored their obligation as interpreters of the law.

As a general proposition, neither "elect" nor "election" have a unilocular meaning. The word "elect" has many definitions and dozens of applications.[180] The Oxford English Dictionary defines "elect" to mean "[t]o choose (a person) by vote for appointment to an office or position of any kind."[181] Other definitions include "to choose" and "to select." While the word undoubtedly describes a selection process, it does not demarcate, nor mandate, the details of the process. Rather, it provides flexibility and a wide range of options.

None of Tennessee's constitutions have defined the term "elect," but all of them have used the word interchangeably to refer to numerous different selection processes. These include popular elections, legislative appointments, legislative balloting, retention elections, referenda, and ratifications, to name but a few.[182] While Professor Fitzpatrick criticizes the Tennessee Supreme Court for

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of-term vacancy. *Id*. at *14–15. The has been dismissed for failure to state a claim. Johnson v. Bredesen, No. 3:07-0372, 2008 U.S. Dist. LEXIS 19738 (M.D. Tenn. Mar. 13, 2008).

179. State *ex rel*. Hooker v. Thompson, No. 01S01-9605-CH-00106, 1996 WL 570090 (Tenn. Oct. 2, 1996) (quoting Shelby County v. Hale, 292 S.W.2d 745, 749 (Tenn. 1956)).

180. *See generally* Erica Klarreich, *Election Selection*, 162 SCI. NEWS 280 (2002) (comparing plurality voting with other voting procedures used internationally, based upon principles of mathematics); Pippa Norris, *Choosing Electoral Systems: Proportionate, Majoritarian, and Mixed*, 18 INT'L POL. SCI. REV. 297, 299 (1997) (discussing four major categories of election types with at least twelve subcategories).

181. 5 OXFORD ENGLISH DICTIONARY 115 (2d ed. 1989). In the seminal early work on judicial retention elections in the United States, the authors likewise refer to retention elections as elections. CARBON & BERKSON, *supra* note 122, at 3.

182. *See supra* text accompanying notes 30–32, 49–66. Similarly, as the Tennessee Supreme Court has pointed out, the word is used in multiple ways in the Tennessee statutes. State *ex rel*. Higgins v. Dunn, 496 S.W.2d 480, 489 n.1 (Tenn. 1973) (listing thirteen separate statutory uses).

considering these various constitutional provisions[183] this interpretive mechanism used by the court in *Dunn* and *Thompson* is the very core of statutory construction.[184] By reference to other election procedures in the constitution, the court determined that retention elections satisfy the constitutional requirement.

In all of the various election processes provided for in the constitution, the details of the process have been left to legislative design. This is consistent with the recognition that the purpose of a constitution is to provide a general framework for government. It is neither appropriate nor desirable for a constitution to contain exhaustive details; doing so would limit the document's vitality over time.

Consistent with the underlying purpose of a constitution, the Tennessee judicial article provides generally for an electoral process but leaves the details to statute. The constitutional requirement that "the judges of the Supreme Court shall be elected by the qualified voters of the state"[185] is satisfied by any process by which the voters have a right to choose or select. In retention elections, voters choose whether a judge remains in office. By giving voters this choice, the constitutional requirement of an election is fulfilled.

Professor Fitzpatrick expresses concern that if the term "elect" is broadly construed consistent with the *Dunn* decision "then the legislature might permit governors to win second terms in uncontested retention referenda . . . ."[186] The sincere, albeit curt, response is "Yes, and your point is . . . ?" The simple truth is that the legislature could do so. It would not be unconstitutional, as a general proposition, for a state to have a retention election for governor or for any elected office. The fact that such a process might be unwise or unpopular does not mean that it would be unconstitutional. To the extent that the constitution does not mandate a particular electoral process for an office, it allows any process that involves some selection or choice.

c. Retention Elections Satisfy Democracy

Professor Fitzpatrick reasons that because retention elections were not customary when the constitution of 1870 was passed, they could not have been contemplated nor intended under its terms.[187] But he readily concedes that constitutions are intended to provide a general outline conducive to flexible interpretation, not a comprehensive description embracing every potential issue

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183. Fitzpatrick, *supra* note 2, at 492–94.

184. *See supra* text accompanying notes 152–58.

185. TENN. CONST. art. VI, § 3. The very next sentence confirms legislative involvement in the details of the election. It provides that the "[l]egislature shall have power to prescribe such rules as may be necessary to carry out the provisions of section two of this article." The specific reference to section two does not limit the general power of the legislature to provide the details of the election process, but simply reiterates that the power is to be used to assure that no more than two judges reside in any of the state's three divisions. *Id*. § 2–3.

186. Fitzpatrick, *supra* note 2, at 493.

187. *Id*. at 494.

that might arise.[188] Moreover, he admits that the 1870 constitution used the word "elect" to refer to yes/no votes.[189] His criticism of the *Dunn* court for relying on two later amendments also providing for yes/no votes is unwarranted because not only did the 1870 constitution use the word "elect" to include yes/no votes, so did the two previous constitutions.[190] The fact that those who authored the document used the word even a single time to describe yes/no voting is sufficient to establish that it was understood and contemplated at the time.

Professor Fitzpatrick next suggests that retention elections might be valid if they "serve the democratic purposes of the 1870 constitution just as well as contested elections do." In essence, he constructs his own test for determining whether retention elections are constitutional. In order to do so, he continues to presuppose a rigid and forced construction of the word "elect" which cannot be justified.[191] The test that he creates is whether retention elections "facilitat[e] democractic accountability" as well as popular elections. The suggestion is that retention elections survive constitutional scrutiny only if they equal popular elections in facilitating accountability. But both the choice of this standard—"facilitating democratic accountability"—and the definition of accountability that is implicit in the essay's discussion are the author's alone.

Retention elections may be inconsistent with *some* ideas of democracy. But just as there is no one meaning of "elect," there is no one meaning of democracy. Without a doubt, the frontier Tennesseeans believed they were creating a democracy when they adopted the early constitutions. Yet both the 1796 and 1835 constitutions provided for the appointment of judges and the governor by the legislature. And while it is true that the 1870 constitution coincided with the development of Jacksonian democracy, the framers did not provide that judges would be popularly elected. Instead, they used the same word that they used to refer to yes/no votes on referenda, ratifications, and other approval processes.[192]

If the provisions of the 1870 constitution must accomplish "democratic accountability," and if, as Professor Fitzpatrick suggests, democratic accountability may be accomplished only by popular elections or their equivalent, then dozens of provisions of the Tennessee constitution and hundreds of Tennessee statutes are invalid. Surely, for example, the legislative election of the Speakers, Treasurer, and Comptroller[193] does not "serve[] the democratic purpose[] . . . as well as contested elections";[194] neither do the legislative appointments of interim members[195] or the Secretary of State.[196] Yet the

188. *Id*.

189. *Id* at 493–94.

190. *See supra* text accompanying notes 15, 30.

191. *See supra* text accompanying notes 181–86.

192. *See* TENN. CONST. art. II, § 15; *id*. art. III, § 2.

193. *Id*. art. II, § 11; *id*. art. VII, § 3; *see* David Carleton, *The Governorship*, *in* TENNESSEE GOVERNMENT AND POLITICS: DEMOCRACY IN THE VOLUNTEER STATE 41, 47 (John R. Vile & Mark Byrnes eds., 1998).

194. Fitzpatrick, *supra* note 2, at 495.

195. TENN. CONST. art. II, § 15.

constitution specifically provides for these selection methods.[197] Similarly, the constitution provides for the gubernatorial appointment of judges (when regular judges are disqualified)[198] and temporary constitutional officers;[199] and for the appointment of the Attorney General[200] and the Clerks of the Court[201] by the supreme court. None of these appointment processes provides for democratic accountability in the way that a popular election does, but all are nonetheless constitutional.

Similarly, numerous statutes vest the power to appoint judges, sometimes permanently and sometimes temporarily, in either the executive or legislative branch. For example, the governor is empowered to fill judicial positions created by death, resignation, and removal[202] and to appoint special judges to hear cases when sitting judges are disqualified by sickness, incompetency, or disability.[203] The chief justice of the supreme court may appoint special judges;[204] county and municipal bodies appoint county and municipal judges;[205] sitting judges may appoint substitute judges,[206] and until 1997, with consent, the parties to a civil suit could appoint their own judge.[207]

Just as retention elections may be inconsistent with some ideas of democracy, they may also be inconsistent with some ideas of judicial accountability. Without

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196. *Id*. art. III, § 17.

197. The constitution also provides that the legislature has the power to determine the method of selection for all officers not otherwise provided for. *Id*. art. VII, § 4. As one commentator explained, "[n]ow the legislature can call for an election or otherwise specify how an officer is to be selected." LEWIS L. LASKA, THE TENNESSEE STATE CONSTITUTION: A REFERENCE GUIDE 129 (1990).

198. TENN. CONST. art. VI, § 11.

199. *Id*. art. III, § 14.

200. *Id*. art. VI, § 5.

201. *Id*. § 13.

202. TENN. CODE ANN. § 17-1-301(a) (1998). The current version of the statute refers to a vacancy which occurs as a result of "death or other disqualifying event." TENN. CODE ANN. § 17-1-301(a) (1994 & Supp. 2007).

203. TENN. CODE ANN. § 17-2-102 (1994 & Supp. 2007) (incompetency); *id*. § 17-2-104 (illness); *id*. § 17-2-105 (incompetency, sickness, or disability of intermediate appellate judges); *id*. § 17-2-107 (incompetency, sickness, or disability of general sessions judges); *id*. § 17-2-115 (giving governor the power to appoint a judge in the event of incompetency); *id*. § 17-2-116 (giving governor the power of appointment in the event that a judge is certified as ill or disabled; providing that if the judge subsequently dies or retires, the successor shall continue to serve "until such time as the successor . . . is duly elected, qualified and installed in office in the manner provided by law . . . ."). The procedure set forth in section 17-2-116 has been at issue in all cases challenging the constitutionality of the Tennessee Plan.

204. *Id*. § 17-2-109(a)(1).

205. *Id*. § 17-1-303 (county judges); *id*. § 16-18-101 (municipal judges).

206. *Id*. § 17-2-118(a) ("If, for good cause, including, but not limited to, by reason of illness, physical incapacitation, vacation or absence from the city or judicial district on a matter related to the judge's judicial office, the judge of a state or county trial court of record is unable to hold court, such judge shall appoint a substitute judge to hold court, preside and adjudicate.").

207. TENN. CODE ANN. §17-2-108 (1996) (repealed 1997).

expressly saying so, Professor Fitzpatrick implies that by judicial accountability he means the ability to influence judicial decisions. In other words, he links judicial accountability with majority public approval and finds it encouraging that "judges who run in referenda . . . report . . . that the prospect of running in the referenda influences their decisions on the bench."[208]

But accountability to majority rule and thus susceptibility to majority influence has never been the model for the American justice system. As Justice Felix Frankfurter explained, "Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. . . . Their essential quality is detachment, founded on independence."[209] It was as important in 1870 that judges remain independent from undue political influence as it was that the people elect judges. It is disingenuous to assume, as Professor Fitzpatrick does, that the constitution intended one motivation to completely displace the other.

In the Tennessee Plan, the legislature has created a judicial selection method that satisfies the desire for public accountability while shielding judges from undue political influence. It is a unique system that responds to concerns about the absence of accountability by linking retention with satisfactory judicial performance.[210] By its passage, the legislature has evidenced its desire to provide for accountability but not at the expense of excellence. Moreover, accountability under the Tennessee Plan is based on criteria that signifies good judging,[211] rather

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208. Fitzpatrick, *supra* note 2, at 497.

209. Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring).

210. TENN. SUP. CT. R. 27 (providing for the judicial performance and evaluation program).

211. Judicial performance is evaluated based on the following criteria:

(A) Integrity. In addition to other appropriate performance measures, the committee shall consider: (1) avoidance of impropriety and appearance of impropriety; (2) freedom from personal bias; (3) ability to decide issues based on the law and the facts without regard to the identity of the parties or counsel, or the popularity of the decision and without concern for or fear of criticism; (4) impartiality of actions; and (5) compliance with the Code of Judicial Conduct contained in TENN. S. CT. R. 10.

(B) Knowledge and Understanding of the Law. In addition to other appropriate performance measures, the committee shall consider: (1) understanding of substantive, procedural, and evidentiary law; (2) attentiveness to factual and legal issues before the court; and (3) proper application of judicial precedents and other appropriate sources of authority.

(C) Ability to Communicate. In addition to other appropriate performance measures, the committee shall consider: (1) clarity of bench rulings and other oral communications; (2) quality of written opinions with specific focus on clarity and logic, and the ability to explain clearly the facts of the case and the legal precedents at issue; and (3) sensitivity to the impact of demeanor and other nonverbal communications.

(D) Preparation and Attentiveness. In addition to other appropriate performance measures, the committee shall consider: (1) judicial temperament, including courtesy to all parties and participants; and (2) willingness to permit every person legally interested in a proceeding to be heard, unless precluded by law or rules of court.

(E) Service to the Profession and the Public. In addition to other appropriate performance measures, the committee shall consider: (1) efficient administration of caseload; (2) attendance at and participation in judicial and continuing legal education

than being at best a popularity contest and at worst a high dollar partisan political race.[212]

Although Professor Fitzpatrick acknowledges that the judicial performance evaluation system provides a measure of accountability, he argues that it does not fulfill "democratic accountability" because judges receive favorable evaluations and have routinely been retained. In other words, democracy fails unless judges are defeated. This cynical viewpoint ignores the more likely explanation for the positive evaluations and the high rate of retention among Tennessee's appellate judges—perhaps the judges are doing a good job. Those who have experience with the Tennessee judiciary have attributed the high retention rate to the "high caliber" of Tennessee's appellate judges.[213]

If, as Professor Fitzpatrick posits, democracy fails unless judges are defeated, then Tennessee's popular election period was a complete democratic failure. During that time, most Tennessee judges were appointed, not elected, to the bench, and few were ever opposed for their seats.[214] The tradition of appointment and non-opposition was so entrenched, that by 1947, the method of choosing state appellate judges would be described as an "approval" system:

> [N]early 60 percent of the regular judges who have served on our Supreme Court during the last one hundred years have been appointed by the Governor in the first instance. . . . Judges appointed to serve out unexpired terms are generally re-elected. Even when a judge first reaches the bench through the election route, he is not as a rule selected by the electorate. He is selected by the party leaders, and the party leaders are generally lawyers who have considerable information as to their selectee's qualifications for judicial office. The election by the people is only a formal approval of such selection by the

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programs; (3) participation in organizations which are devoted to improving the administration of justice; (4) efforts to ensure that the court is serving the public and the justice system to the best of its ability and in such a manner as to instill confidence in the court system; and (5) service in leadership positions and within the organizations of the judicial branch of government.

(F) Effectiveness in Working With Other Judges and Court Personnel. In addition to other appropriate performance measures, the committee shall consider: (1) exchanging ideas and opinions with other judges during the decision-making process; (2) commenting on the work of colleagues; (3) facilitating the performance of the administrative responsibilities of other judges; and (4) working effectively with court staff.

TENN. SUP. CT. R. 27 § 3.01.

212. The recent campaign for the position of Chief Justice of the Alabama Supreme Court cost $8.2 million. JAMES SAMPLE, LAUREN JONES, & RACHEL WEISS, THE NEW POLITICS OF JUDICIAL ELECTIONS 2006, at 5 (Jesse Rutledge ed.), *available at* http://www.justiceatstake.org/files/NewPoliticsofJudicialElections2006.pdf. The total spending in the race was $13.4 million. *Id*. Alabama is not an aberration; record totals were spent in Georgia, Kentucky, Oregon, and Washington in 2006 as well. *Id*. at 15.

213. *See supra* note 142.

214. *See id*.

> party leaders and that approval is generally obtained in Tennessee in an election in which there is no opposition.[215]

Part II of this Essay responds to the remainder of the claims related more generally to Professor Fitzpatrick's claim that the Tennessee Plan is not fulfilling the legislature's purpose.

d. Rejection of the 1977 Constitutional Amendment Did Not Render the Tennessee Plan Unconstitutional

Professor Fitzpatrick's last point, which he characterizes as "powerful, but not conclusive,"[216] is that the voter's rejection of the 1977 amendment favors the conclusion that the Tennessee Plan is unconstitutional. This is an indefensible and overly simplistic interpretation of the failed 1977 constitutional amendment. There is no legal basis for using the public's vote to evaluate the constitutionality of a legislative enactment;[217] nor is it proper to construe the vote as enjoining future legislative reform for the courts.

Even if the law attached legal significance to a failed public initiative, which it does not, it could not do so under the complex circumstances surrounding the 1977 Limited Tennessee Constitutional Convention. From the complex and intricate history of the Convention, described earlier in this paper,[218] Professor Fitzpatrick urges one conclusion: The people rejected the judiciary amendment because they wanted an elected judiciary. Under that logic, the 1979 statute creating the Court of the Judiciary would be unconstitutional, because the voters rejected the constitutional proposal to create the Court of Discipline and Removal.[219] Similarly, the 1989 statute providing for a state-wide public defender system would be unconstitutional,[220] because the voters rejected the constitutional proposal requiring that the General Assembly provide for the "adequate defense of indigents."[221] In addition, statutes providing for court

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215. Parks, *supra* note 6, at 629 (quoting WILLIAM H. WICKER, *Constitutional Revision and the Courts*, *in* PROCEEDINGS OF THE SIXTH ANNUAL SOUTHERN INSTITUTE OF LOCAL GOVERNMENT 12, 14 (Bureau of Public Administration, University of Tennessee – Knoxville 1947)).

216. Fitzpatrick, *supra* note 2, at 498.

217. Professor Fitzpatrick cites Justice Souter's dissent in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), as authority for the proposition that "it is certainly not uncommon to use [rejected constitutional amendments] to interpret the meaning of a constitution." Fitzpatrick, *supra* note 2, at 498 n.211. The case deals with the whether suits by Indian tribes against states had been authorized by Congress consistent with the Eleventh Amendment. *Seminole Tribe*, 517 U.S. at 47. It's relevance on the point for which it is cited seems totally illusory.

218. *See supra* text accompanying notes 106–26.

219. *See* TENN. CODE ANN. § 17-5-101 to -314 (1994 & Supp. 2007); *see also supra* note 118.

220. TENN. CODE ANN. § 8-14-201 to -212.

221. This was the proposal set forth in section 12 of Proposal 13. *Proclamation by the Governor*, *supra* note 114; *see also supra* note 118.

redistricting[222] and supreme court rulemaking[223] would also violate the constitution. Thus, Professor Fitzpatrick's claim that the public's failure to ratify the judicial article represents a public mandate against merit selection finds no support in the circumstances or in the law.

II. AN ANALYSIS OF THE TENNESSEE PLAN'S FULFILLMENT OF ITS LEGISLATIVE PURPOSE

Just as the more complete story of Tennessee history has refined the discussion of the constitutionality of the Tennessee Plan, a more balanced account of merit selection will inform the discussion of the Tennessee Plan's success in fulfilling its legislative purpose.

Merit selection of judges originated from dissatisfaction with judicial elections, both partisan and nonpartisan. Roscoe Pound summarized this dissatisfaction in a famous 1906 speech to the American Bar Association entitled *The Causes of Popular Dissatisfaction with the Administration of Justice*: "Putting courts into politics, and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the bench."[224]

In 1914, Albert M. Kales of the American Judicature Society proposed an alternative selection process in a series of writings.[225] According to Kales, judges should be selected by the entity that is "most emphatically legal, conspicuous, subject directly to the electorate, and interested in and responsible for the due administration of justice."[226] The Kales Plan called for judges to be appointed by the chief justice, who would be popularly elected. Kales also proposed that a "judicial council" be given the authority to compile an "eligible list" of attorneys from which the chief justice would appoint judges.[227]

Under the Kales Plan, the tenure of judges appointed by the chief justice would be determined by voters in periodic noncompetitive elections.[228] Kales believed that such elections "present[ed] the essential features of a recall and at the same time [were] a fair substitute for the present periodic election" in that they allowed the electorate to "retire unfit men" but relieved voters of the "largely impossible" task of choosing which lawyers should serve as judges.[229]

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222. *See* SCHEB & RECHICHAR, *supra* note 110, at 61–67; *see also supra* note 118.

223. TENN. CODE ANN. §§ 16-3-401 to -408.

224. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 46 J. AM. JUDICATURE SOC'Y 54, 66 (1962).

225. *See* ALBERT M. KALES, UNPOPULAR GOVERNMENT IN THE UNITED STATES (1914); *First Draft of an Act to Establish a Model Court for a Metropolitan District*, 4 AM. JUDICATURE SOC'Y BULL. (1914); *First Draft of a State-Wide Judicature Act*, 7 AM. JUDICATURE SOC'Y BULL. (1914).

226. *See First Draft of an Act to Establish a Model Court for a Metropolitan District*, *supra* note 225, at 36.

227. *See* KALES, *supra* note 225, at 250.

228. *See First Draft of an Act to Establish a Model Court for a Metropolitan District*, *supra* note 225, at 149–53.

229. *See First Draft of a State-Wide Judicature Act*, *supra* note 225, at 164. While Professor

Founder of the American Judicature Society Herbert Harley offered a modified version of the Kales Plan in 1928, in which the governor would appoint judges from a list of names compiled through a bar plebiscite.[230] Participation of laypersons in the judicial nominating process was first suggested in 1931 by the Grand Jury Association in New York.[231]

In 1937, the American Bar Association adopted a resolution that combined the elements proposed by Kales and Harley, recommending the "filling of vacancies by appointment by the executive or other elective official or officials, but from a list named by another agency, composed in part of high judicial officers and in part of other citizens, selected for the purpose, who hold no other public office."[232] The American Bar Association resolution called for reappointment or retention elections after an initial term of office and periodically thereafter.[233]

Versions of this nominative-appointive-elective plan were considered in several states during the 1930s, but it was Missouri that first established what it termed the "Nonpartisan Court Plan" in 1940.[234] During the 1960s and 1970s, twenty-three jurisdictions adopted what had become known as the "Missouri Plan" or "merit selection."[235] Today, thirty-three states and the District of Columbia use merit selection to choose at least some of their judges.[236]

When the Tennessee legislature created the Tennessee Plan in 1971 it announced four goals: selecting the best qualified judges, bringing more racial and gender diversity to the bench, insulating judges from political pressure and

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Fitzpatrick maintains that the "architects of merit selection" proposed retention elections to provide "life tenure but without the appearance of life tenure," historians report that retention elections had two principal purposes: "to ensure that judges would be retained for lengthy terms of tenure once they had been chosen on the basis of professional merit," and "to accommodate the populists who insisted on a mechanism to hold judges publicly accountable." *See* CARBON & BERKSON, *supra* note 122, at 6.

230. Editorial, *The Eligible List of Judicial Candidates*, 11 J. AM. JUDICATURE SOC'Y 131 (1928).

231. *See* Glenn Winters, *The Merit Plan for Judicial Selection and Tenure—Its Historical Development*, *in* SELECTED READINGS: JUDICIAL SELECTION AND TENURE 36 (Glenn Winters ed., 1973).

232. John Perry Wood, *Basic Propositions Relating to Judicial Selection—Failure of Direct Primary—Appointment Through Dual Agency—Judge to "Run on Record"*, 23 A.B.A. J. 104–05 (1937).

233. *See id*.

234. Winters, *supra* note 231, at 36.

235. *See* AMERICAN JUDICATURE SOCIETY, JUDICIAL MERIT SELECTION: CURRENT STATUS (2008), *available at* http://www.judicialselection.us/uploads/documents/Judicial_Merit_Charts_0FC20225EC6C2.pdf (hereinafter CURRENT STATUS).

236. *See id*. Twenty-four states and the District of Columbia use merit selection to make initial appointments to some or all of their courts; nine states use merit selection to fill midterm vacancies only. *Id*. Eight states and the District of Columbia require legislative confirmation of gubernatorial appointments, and five states and the District of Columbia substitute a reappointment process for retention elections. *Id*.

influence, and enhancing the prestige of and public respect for the courts.[237] In the sections that follow, this Essay examines the extent to which merit selection generally, and the Tennessee Plan specifically, accomplishes these objectives.

A. Selecting Highly Qualified Judges

Scholars have used a variety of approaches to address the question of whether merit selection systems produce better judges than do other selection methods, with mixed results.[238] Some studies have compared the educational backgrounds and professional experience of judges selected by appointment and election. The 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, but merit-selected judges were more likely than popularly-elected judges to have attended prestigious law schools.[239]

Other research has compared judges' performance once they attain their seats. A recent study examined the work product of state high court judges and concluded that, while elected judges were more productive than merit-selected judges, appointed judges' opinions were of higher quality.[240] Some analyses have assessed judicial performance through ratings or rankings by attorneys. Results of a survey of corporate attorneys indicated that three of the five states whose courts ranked highest on judges' competence were states in which judges are appointed, while four of the five lowest ranking states on this criterion were elective states.[241] These findings are consistent with an early study of the effects

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237. *See* TENN. CODE ANN. §§ 17-4-101, -102 (1994 & Supp. 2007).

238. Some studies comparing appointed and elected judges utilize inaccurate data for some judges, as they classify judges according to their formal selection method rather than the method through which they actually attained their seats. According to Holmes and Emrey, 52% of judges serving on high courts in elective states from 1964 to 2004 were initially appointed. Lisa M. Holmes and Jolly A. Emrey, *Court Diversification: Staffing the State Courts of Last Resort through Interim Appointments*, 27 JUST. SYS. J. 1, 1 (2006). Data available on the American Judicature Society's Judicial Selection in the States website indicates that 35% of judges currently serving on high courts in states with contestable elections were initially appointed to their seats. American Judicature Society, Methods of Judicial Selection, http://www.judicialselection.us/judicial_selection/methods/justices_of_the_supreme_court.cfm?state (last visited May 28, 2008).

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

240. *See* Stephen J. Choi, G. Mitu Gulati, & Eric A. Posner, *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather Than Appointed Judiciary* 1 (Univ. of Chi. Sch. of Law, John M. Olin Law & Econ. Working Paper No. 357, 2007), *available at* http://ssrn.com/abstract=1008989 (last visited May 20, 2008). Productivity was measured by the number of opinions judges wrote; opinion quality was measured by the number of citations to opinions by judges in other states. *Id*. at 2.

241. *See* U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, LAWSUIT CLIMATE 2008: RANKING

of the Missouri Plan. While substantial proportions of both elected and merit-selected judges ranked in the highest quartile, fewer merit-selected than elected judges were ranked in the lowest quartile, suggesting that a merit plan "tend[ed] to eliminate the selection of very poor judges . . . ."[242]

A third approach to assessing whether appointive systems select "better" judges than elective systems is to compare the number of disciplinary incidents in which appointed and elected judges have been involved. Studies of this kind have uniformly found that elected judges were disciplined and removed from office with greater frequency than were appointed judges.[243]

It is not surprising that studies have found meaningful differences between judges chosen in appointive and elective systems. In a merit selection system, the emphasis is on qualifications and experience at the outset, and only the best qualified applicants are eligible for appointment. The Tennessee Plan is an example of how this process works in practice. Judicial vacancies are publicized when they occur, and applications are solicited from candidates who meet the constitutional and statutory requirements. Applicants are required to provide information about their professional background, judicial and administrative experience, education, and achievements. The judicial selection commission convenes a public meeting to receive comments on potential candidates, investigates and interviews applicants, and forwards the names of the three best qualified individuals to the governor.[244] There is no similar screening process for

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THE STATES 14 (2008), *available at* http://www.instituteforlegalreform.com/states/lawsuitclimate2008/pdf/LawsuitClimateReport.pdf. The top ranking states were Delaware, Minnesota, Virginia, Nebraska, and Indiana; the lowest ranking states were Louisiana, Mississippi, West Virginia, Alabama, and Hawaii. *Id*. A follow-up analysis indicated that the average ranking of states with merit selection of judges (i.e., gubernatorial appointment from a nominating commission) was higher than states with any other selection method, while states with partisan judicial elections had the lowest average ranking. *See* Joshua C. Hall & Russell S. Sobel, *Is the "Missouri Plan" Good for Missouri? The Economics of Judicial Selection*, POLICY STUDY (Show-Me Institute, St. Louis, Mo.), May 21, 2008, *available at* http://showmeinstitute.org/docLib/20080515_smi_study_15.pdf.

242. RICHARD A. WATSON & RONDAL G. DOWNING, THE POLITICS OF THE BENCH AND THE BAR 283 (1969).

243. *See, e.g.*, 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) (from 1977 to 2002, judges of New York City's Civil Court, who are elected, were substantially more likely to be disciplined than judges of the Criminal and Family Courts, who are appointed); CALIFORNIA COMMISSION ON JUDICIAL PERFORMANCE, SUMMARY OF DISCIPLINE STATISTICS 1990–1999, *available at* http://cjp.ca.gov/publicat.htm (disciplinary rates for elected judges from 1990 to 1999 were higher than those for judges who were initially appointed); The Florida Bar, Merit Selection and Retention, http://www.floridabar.org/DIVCOM/PI/BIPS2001. nsf/BIP+List?OpenForm (last visited May 28, 2008) (follow "Merit Selection and Retention" hyperlink) (since 1970, ten of the thirteen judges removed from the bench were elected rather than merit-selected, and 73% of the judges disciplined since 1998 initially reached the bench via election).

244. *See* TENN. CODE ANN. §§ 17-4-109 (1994 & Supp. 2007). When filling appellate vacancies, the governor may request a supplemental list of three names but is required to appoint a

potential candidates in states with contestable elections, and political connections can take precedence over professional credentials.[245]

As has already been discussed, Tennessee has supplemented its selection and retention processes with a performance evaluation program designed both to promote judicial self-improvement and to enable voters to make more informed decisions in retention elections.[246] Under the Tennessee Plan, attorneys, other judges, and court personnel are asked to evaluate judges on several criteria, including integrity, knowledge and understanding of the law, ability to communicate, preparation and attentiveness, service to the profession, and effectiveness in working with other judges and court personnel.[247] The results of the evaluations of appellate judges are made public along with a recommendation for or against retention.[248] No similar, official performance evaluation programs exist in elective states.

The Tennessee Plan, both in theory and in practice, selects and retains highly qualified judges.

B. Bringing More Diversity to the Bench

Numerous studies have addressed whether particular selection methods are more likely to place diverse candidates on the bench, but the findings have been inconsistent.[249] While most of these studies consider only a state's formal selection method rather than how a judge actually reached the bench,[250] a recent analysis of state high courts over a forty-year period took into account the frequency of interim appointments in elective states and reported that gender and racial diversification is more likely to occur through interim appointments than elections.[251] The demographics of state appellate courts in 2008 confirm these

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judge from the second list. *Id*. § 17-4-112(a).

245. In 2007, New York State created Independent Judicial Election Qualification Committees, a statewide network of screening panels to review the qualifications of trial court candidates. *See* New York State Unified Court System, Rules of the Chief Administrative Judge, http://www.nycourts.gov/rules/chiefadmin/150.shtml (last visited May 30, 2008). These committees are not comparable to nominating commissions, however, in that they simply rate candidates as qualified or not qualified, and candidates are not required to submit to screening in order to run for office.

246. *See supra* text accompanying notes 134–42.

247. *See* TENN. CODE ANN. §17-4-201; TENN. SUP. CT. R. 27.

248. *See* TENN. CODE ANN. § 17-4-201(a)(1), (c).

249. *Compare, e.g.*, Mark S. Hurwitz & Drew Noble Lanier, *Women and Minorities on State and Federal Appellate Benches,1985 to 1999*, 85 JUDICATURE 84, 88–91 (2001) (women and minorities were no more likely to become state appellate judges under merit systems than non-merit systems), *with* M.L. HENRY, THE SUCCESS OF WOMEN AND MINORITIES IN ACHIEVING JUDICIAL OFFICE (1985) (women and minorities were more likely to attain judgeships through appointive systems than elective systems).

250. *See supra* note 238.

251. *See* Holmes & Emrey, *supra* note 238, at 7. A similar study found that women are significantly more likely to be selected to state high courts when initially appointed. *See* Kathleen

findings, with 65% of women judges and 76% of minority judges having been appointed rather than elected to their positions.[252]

A chief advantage of a merit selection system is that it is possible to structure the process so that opportunities for selecting a more diverse group of judges are enhanced.[253] The Tennessee Plan calls for consideration of the racial and gender population of the state in the appointment of members of the judicial selection commission,[254] and research has demonstrated that demographically diverse nominating commissions attract more diverse applicants and select more diverse nominees.[255]

According to data provided by the Administrative Office of the Courts, Tennessee's judicial selection commission has screened candidates for eighty-seven vacancies since 1994.[256] The commission has recommended 245 applicants to the governor to fill these vacancies, including sixty-three women and twenty-eight minorities. Of the governor's eighty appointees, twenty-two have been women and seven have been minorities. This contrasts markedly with the composition of Tennessee's benches before merit selection.[257] In the last decade alone, the number of women serving as appellate judges has tripled and the number of minorities serving on appellate benches has doubled.[258]

In Tennessee and nationwide, appointive systems have provided more diversity on appellate courts than have elective systems.

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, 504 (2002).

252. These figures include judges chosen through merit selection, gubernatorial appointment, or judicial appointment. Data on file with authors.

253. For a discussion of measures that may be used to promote diversity among nominating commission members and judicial appointees, see Leo M. Romero, *Enhancing Diversity in an Appointive System of Selecting Judges*, 34 FORDHAM URB. L.J. 485 (2007).

254. *See* TENN. CODE ANN. §17-4-102(b)(3), (d) (1994 & Supp. 2007).

255. *See* Kevin M. Esterling & Seth S. Andersen, *Diversity and the Judicial Merit Selection Process: A Statistical Report*, *in* RESEARCH ON JUDICIAL SELECTION 1999 (American Judicature Society ed., 2000).

256. Data provided by the Administrative Office of the Courts is on file with the authors.

257. *See* GENTRY CROWELL, TENN. SEC'Y OF STATE, TENNESSEE BLUE BOOK 1988–1989, at 222–31 (1989); GENTRY CROWELL, TENN. SEC'Y OF STATE, TENNESSEE BLUE BOOK 1989–1990, at 226–35 (1990); RILEY C. DARNELL, TENN. SEC'Y OF STATE, TENNESSEE BLUE BOOK 1991–1994, at 248–58 (1994); RILEY C. DARNELL, TENN. SEC'Y OF STATE, TENNESSEE BLUE BOOK 1995–1996, at 254–63 (1996); RILEY C. DARNELL, TENN. SEC'Y OF STATE, TENNESSEE BLUE BOOK 1997–1998, at 250–60 (1998); RILEY C. DARNELL, TENN. SEC'Y OF STATE, TENNESSEE BLUE BOOK 1999–2000, at 264–73 (2000); RILEY C. DARNELL, TENN. SEC'Y OF STATE, TENNESSEE BLUE BOOK 2001–2004, at 288–97 (2004).

258. *See* sources cited *supra* note 257.

C. Limiting Politics in Judicial Selection

Regardless of which judicial selection method is used, it is impossible to entirely eliminate politics from the selection process.[259] In fact, in some appointive states, partisan politics is an explicit part of the process, with partisan balance required on judicial nominating commissions[260] or on the courts themselves.[261] But merit selection systems minimize the role of politics in judicial selection. Judicial aspirants in merit plan states are not required to raise money, seek party support, or campaign for office as are judicial candidates in elective states; and judicial campaigns in recent years have come to closely resemble campaigns for legislative and executive positions.

Judicial elections for the past decade have been characterized by unprecedented campaign fundraising and spending, increased special interest group involvement, and relaxed ethical standards for candidate speech. In the last four election cycles, candidates for state high courts have raised more than double the amount raised in the 1990s.[262] In a 2004 Illinois contest, candidates for a single district-based seat on the supreme court raised nearly $10 million, exceeding fundraising in eighteen of the thirty-four U.S. Senate races that year.[263] In 2006, candidates for the Alabama Supreme Court shattered previous records for judicial elections, raising a total of $13.4 million.[264]

At the same time, special interest groups have ramped up their efforts to influence the composition of state courts—making contributions to candidates, funding television advertising through independent expenditures, and pressuring candidates to discuss their political views. In the 2005–2006 election cycle, 44% of the contributions to state high court candidates came from business groups, and 21% came from trial attorneys.[265] These special interest groups also spent a total of more than $5 million on television ads in ten states with high court races in 2005–2006,[266] and in an April 2008 Wisconsin race, special interest groups spent approximately $4 million on a single supreme court race.[267]

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259. *See, e.g.*, Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 AM. POL. SCI. REV. 315 (2001) (voter reactions to controversial policy issues and the extent of partisan composition in the state affected outcomes in all types of judicial elections—partisan, nonpartisan, and retention).

260. These states include Arizona, Connecticut, Delaware, Indiana, Nebraska, New York, South Dakota, Utah, Vermont. *See* CURRENT STATUS, *supra* note 235.

261. These states include Delaware and New Jersey. *See* American Judicature Society, Judicial Selection in the States, http://www.judicialselection.us (last visited May 20, 2008) (click on individual states shown on interactive map).

262. *See* SAMPLE ET AL., *supra* note 212, at 15.

263. *See* Robert Barnes, *Judicial Races Now Rife with Politics*, WASHINGTON POST, Oct. 28, 2007.

264. *See* SAMPLE ET AL., *supra* note 212, at 15.

265. *See id*. at 18.

266. *See id*. at 3.

267. *See* Emma Schwartz, *Elections for Judges are Getting Nastier*, U.S. NEWS & WORLD REPORT, Apr. 4, 2008.

Outside groups have also expanded their efforts to ascertain judicial candidates' views on controversial issues, distributing questionnaires regarding their positions on such subjects as abortion, the death penalty, and same-sex marriage, and publicizing their responses and failures to respond.[268] And in recent elections, candidates have been less constrained than in the past in responding to such questionnaires. According to a 2002 U.S. Supreme Court decision, candidates for state court seats are free to announce their views on legal and political issues—issues that may later come before them as judges.[269]

While no system of selecting judges can be completely insulated from politics, merit selection systems negate the importance of electoral campaigning, interest group activity, and candidate fundraising in the selection process.

D. Enhancing Public Confidence in the Courts

The increased politicization of judicial elections has not gone unnoticed by voters, and it seems to have taken a toll on the public's confidence in its courts. According to recent national surveys, between two-thirds and three-fourths of Americans believe that the need to raise money to conduct their campaigns influences judges' decisions.[270] More than four in five Americans are concerned that the U.S. Supreme Court's decision in *Republican Party of Minnesota v. White* will lead to special interest groups pressuring candidates to take positions on controversial issues,[271] and nine in ten fear that special interests are trying to use the courts to shape economic and social policy.[272] These concerns are reinforced by research that identifies correlations between campaign contributions and judicial decisions.[273]

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268. *See* Marcia Coyle, *Judicial Surveys Vex the Bench*, THE NATIONAL LAW JOURNAL, Sept. 8, 2006.

269. Republican Party of Minn. v. White, 536 U.S. 765 (2002).

270. *See* ANNENBERG PUBLIC POLICY CENTER, PUBLIC UNDERSTANDING OF AND SUPPORT FOR THE COURTS 3 (2007), *available at* http://www.annenbergpublicpolicycenter.org/Downloads/20071017_JudicialSurvey/Judicial_Findings_10-17-2007.pdf (69% of respondents believed that the need to raise money for elections affects judges' rulings to a moderate or great extent); JUSTICE AT STAKE CAMPAIGN, AMERICANS SPEAK OUT ON JUDICIAL ELECTIONS 1 (2004), *available at* http://www.justiceatstake.org/files/ZogbyPollFactSheet.pdf (71% of respondents believed that campaign contributions from interest groups have at least some influence on judges' decisions); JUSTICE AT STAKE CAMPAIGN, NATIONAL SURVEY OF AMERICAN VOTERS 7 (2001), *available at* http://www.justiceatstake.org/files/JASNationalSurvey Results.pdf (67% of respondents believed that individuals or groups who give money to judicial campaigns often receive favorable treatment).

271. *See* AMERICANS SPEAK OUT ON JUDICIAL ELECTIONS, *supra* note 270, at 1.

272. *See* NATIONAL SURVEY OF AMERICAN VOTERS, *supra* note 270, at 9.

273. *See, e.g.*, TEXANS FOR PUBLIC JUSTICE, PAY TO PLAY: HOW BIG MONEY BUYS ACCESS TO THE TEXAS SUPREME COURT (2001), *available at* http://www.tpj.org/docs/2001/04/reports/paytoplay/paytoplay.pdf (the Texas Supreme Court was four times more likely to accept a case for review if the petitioner had contributed to a justice's campaign); Madhavi M. McCall & Michael A. McCall, *Campaign Contributions, Judicial Decisions, and the Texas Supreme Court: Assessing*

On the other hand, substantial majorities of voters nationwide and in individual states support merit selection and retention systems.[274] These systems significantly limit the involvement of parties, special interests, and money in the selection of judges, and in so doing, they preserve the public's confidence in its courts.

CONCLUSION

A few weeks before these Essays, wrestling with the constitutionality of the Tennessee Plan, were published, Tennessee's unique system for electing appellate court judges with its mutual accommodation of judicial independence and public accountability was dealt a likely fatal blow by the Tennessee General Assembly. Set to sunset in 2008, the Plan needed legislation to keep it alive. Because the legislation did not pass, the Plan is set to wind down completely in 2009, unless new legislation is passed. 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.[275]

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the Appearance of Impropriety, 90 JUDICATURE 214 (2007) (the likelihood of a justice voting in a party's favor was significantly higher if the party contributed to the justice's campaign); Vernon Valentine Palmer & John Levendis, *The Louisiana Supreme Court in Question: An Empirical Study of the Effect of Campaign Money on the Judicial Function*, 82 TUL. L. REV. 1291 (2008) (in nearly half of the cases heard by the court over a fourteen-year period, a litigant or attorney had contributed to at least one justice's campaign, and on average, justices voted in favor of contributors 65% of the time); Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, NEW YORK TIMES, Oct. 1, 2006 (over a twelve-year period, justices of the Ohio Supreme Court routinely participated in cases involving campaign contributors and, on average, voted in favor of contributors 70% of the time).

274. *See* NATIONAL SURVEY OF AMERICAN VOTERS, *supra* note 270, at 12 (71% of voters nationwide supported a general merit selection and retention proposal); Memorandum from Patrick Lanne, Public Opinion Strategies, to Interested Parties (Dec. 11, 2007), *available at* http://www.justiceatstake.org/files/MissouriMemoAndOverallResults.pdf (71% of Missourians supported the state's current system of judicial merit selection and retention); Justice at Stake Campaign, Minnesota Statewide Survey January 2008, http://www.justiceatstake.org/files/MinnesotaJusticeatStakesurvey.pdf (last visited May 28, 2008) (74% of Minnesotans supported merit selection of judges with retention elections and performance evaluation).

275. [EDITOR'S NOTE: Professor Fitzpatrick has written a reply to this Essay. It is posted at http://papers.ssrn.com/abstract=1152413.]