TO THE ENDANGERED SPECIES LIST, ADD: NONPARTISAN JUDICIAL ELECTIONS

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Sam Houston, on the Texas Democratic state chairman who began the practice of having the party endorse judicial candidates: "A drop of his blood would freeze a frog."[1]

I. INTRODUCTION

Today, of the thirty-nine states that have judicial elections for some or all of their judges, twenty have nonpartisan elections—in thirteen states, for all judges.[2] Three forces are converging to jeopardize these states' ability to preserve nonpartisanship in elections—or, increasingly, to jeopardize all thirty-nine states' ability to preserve *any* distinctions between judicial and other elections. The first force is new—three federal court decisions. Two decisions came down in 2002: first, a 5-4 Supreme Court decision invalidating a few states' regulation of speech in judicial campaigns; second, an Eleventh Circuit invalidation of a limit on how funds are raised in judicial campaigns—a limit that has been law in thirty-six states.[3] The third decision came down in February 2003 from a federal district court in Utica, N.Y., invalidating the limits on several types of partisan activities by judicial candidates in New York, where judges run as partisans.[4] Those three decisions, by reducing or eliminating long-standing distinctions between elections for judges and elections for other officials, may leave untouched the twenty states' limits on partisanship in judicial elections—or, obviously, may lead to their end.

The second threatening force is that judicial campaigns are suffering practices that are making these elections more like other elections. The third threat comes from almost two decades of rising political conflict over the nation's judiciary, with well-known impacts on federal judicial selection, as well as changes recently begun in state legislatures.

Nonpartisan elections are not limited, of course, to judicial candidates but are a major segment, perhaps even a majority, of elections for municipal and other local officials. What studies we have on nonpartisan elections have been drawn by those nonjudicial elections.[5] But this article is limited to the judicial domain, and it sounds a note that may well be drowned out in the rising storm. No subject in American law has drawn as much ink, and sweat, as the debate and fight over which method of selecting judges is least unsatisfactory.

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1. A.W. Terrell, *Recollections of General Sam Houston*, 16 S.W. HISTORICAL Q. 113, 119-20 (1912).

2. Those states account for 17% of our appellate judges and 33% of our trial judges (general jurisdiction). While the ballots in Michigan and Ohio carry no party labels for judicial candidates, nominations in those states are made in totally partisan ways (party conventions in Michigan, party primaries in Ohio) and candidates campaign as partisans. Also, in Idaho since 1998, their official and strong tradition of nonpartisan judicial races (going back to 1932) has eroded. For a list of each state's selection system, see Roy Schotland, *2002 Judicial Elections and State Court Reforms*, in THE BOOK OF THE STATES 2003, 232, 235 (Council of State Governments, 2003).

3. Republican Party of Minnesota v. White, 536 U.S. 765 (2002); Weaver v. Bonner, 309 F.3d 1312 (11th Cir. 2002), *rehearing and rehearing en banc denied*, 57 Fed. Appx. 416 (11th Cir. 2003).

4. Spargo v. N.Y. State Comm'n on Judicial Conduct, 244 F. Supp.2d 72 (N.D.N.Y. 2003), *appeal pending.*

5. *E.g.*, EUGENE C. LEE, THE POLITICS OF NONPARTISANSHIP: A STUDY OF CALIFORNIA CITY ELECTIONS (1960); C.R. ADRIAN, NONPARTISAN LEGISLATURE IN MIN-NESOTA (1950).

The fact that twenty states have chosen nonpartisan elections—some only in the past two years, some for about a century—says much. If state sovereignty means anything, if there is any value in having "laboratories" of democracy,[6] those twenty states are entitled not merely to deference but to preserve and protect their choice of how to select their own judges.

First, this article notes the ways in which our state constitutions reflect the fact that the judge's job differs from the jobs of other elected officials, which is why judicial elections are unique. Second is a brief exploration of recent developments in judicial elections. Third is a brief description of the various provisions regulating judicial campaign conduct that have been adopted to make judicial elections nonpartisan, and an analysis of how those provisions may be affected by the three new decisions. Last comes a plea: that in the endlessly debated problem of how to select judges, the states' diversity of choices—which has included a constantly rising preference for nonpartisan elections—is entitled to survive.

6. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).