Fair Courts in the Cross-Fire

Holding elections to fill important state judgeships is one of those ideas that may sound good in theory but works terribly in practice. As spending in state judicial races by special interests has vastly escalated in recent years, so has the threat to public confidence in judicial neutrality that is fundamental to the justice system.

Now the lavish spending by interest groups and the politicization of state court judgeships is spreading from races between two or more judicial candidates to the “retention” ballots that were supposed to shield judges from the rough-and-tumble of the election cycle.

More than two dozen states are having active judicial elections this fall. A total of 18 seats are being contested in multicandidate races in 11 states, while 37 sitting state justices are seeking voter approval in up-or-down “retention” elections in 15 states.

Between 2000 and 2009, state supreme court candidates collected more than $206 million in donations, more than doubling the record of the previous decade. States that previously have been home to some of the most expensive and raucous judicial races — Michigan, Alabama, Ohio and Texas — will again have competitive contests this fall.

The stage seems set for record-shattering spending wars, dominated by interest groups bent on influencing judicial decisions and by mud-slinging attack ads that were once limited to contested campaigns for executive or legislative offices. In Michigan, where two seats on the closely divided court are being contested, spending could top $10 million, according to some reform groups.

The exact impact of January’s ruling by the United States Supreme Court allowing free corporate and union spending in political campaigns, including judicial races, will not be known for some time. But the notorious ruling seems destined to further drive up independent expenditures on behalf of judicial candidates and exacerbate conflicts of interest on the bench.

Perhaps the most troubling new development concerns the so-called retention elections. To try to insulate judges from electoral pressures, some states ask voters to cast yes-or-no
ballots on whether to grant them another term, in lieu of having judges face opposing candidates in regular multicandidate contests.

The idea is to give voters a say in choosing judges while making the election as apolitical as possible. To date, with a few noteworthy exceptions, retention elections have tended to be less bitter and partisan than contests where two candidates compete. That is changing.

In Iowa, three Supreme Court justices on the November ballot are the targets of a well-financed campaign by right-wing interests for voting in a case to allow same-sex marriage. The aim is to send a chilling message to judges beyond Iowa’s borders to beware of rendering opinions that some voter blocs might dislike.

In Kansas, anti-abortion activists are trying to defeat a sitting justice. In Illinois, business interests are campaigning to defeat the chief justice following a case that removed a cap on malpractice liability. And in Colorado, a conservative outfit called Clear the Bench Colorado is citing several decisions to try to rile up voters to oust the full slate of justices up for retention there. The group’s efforts may be impeded by a new court ruling that requires the group to register as a campaign committee and abide by certain limits on spending.

In all, the money spent on retention elections this year could surpass the total for the entire previous decade, said Adam Skaggs, a lawyer with the Brennan Center for Justice at the New York University Law School.

The nation’s system of justice depends on having judges who are fair-minded, independent and unafraid to make unpopular decisions. The onslaught coming this fall will not help.