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Colorado's Method Shines as U.S. Supreme Court Grapples With Florida's Judicial Elections

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About the Author

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Colorado's system of judicial selection is one of the nation's best. Coloradans enjoy a balanced system that largely removes politics from the bench but also listens to the citizens' voice in the form of retention elections. Colorado's judicial selection system mirrors the model plan promoted by former U.S. Supreme Court Justice Sandra Day O'Connor since her retirement. When a judicial vacancy occurs in Colorado, a merit selection committee accepts applications from candidates. The committee selects up to three candidates for the governor's consideration. The governor then interviews the finalists and appoints a judge from among the three. Once appointed, the judge periodically faces retention elections where he or she must receive a majority of votes to remain on the bench.[1]

Colorado's system has been touted as one of the best in the country at balancing the competing interests of removing politics from the judicial selection and giving the voters a voice.[2] However, not all states are fortunate enough to share Colorado's balanced process.

The *Williams-Yulee* Case

Recently, Florida's system of judicial selection came under scrutiny when the U.S. Supreme Court analyzed the balancing of a judicial candidate's First Amendment free-speech rights against Florida's interest in regulating judicial elections and judicial ethics.[3] The result left some experts scratching their heads about the Court's implicit notion that judicial elections are different from legislative ones, and therefore may be subject to stricter rules without offending free speech.

Like thirty-eight other states, Florida elects at least some of its judges. In 2009, Lanell Williams-Yulee, a Tampa-area public defender, began her campaign for Hillsborough County Circuit Court Judge.[4] During that campaign, she sent out a fundraising letter personally soliciting campaign contributions.[5] The Florida Bar took disciplinary action and, after a hearing, recommended a public reprimand.[6] The basis for the misconduct was authorized by Florida's Code of Judicial Conduct, Canon 7(C)(1), which provides, in pertinent part:

> A candidate . . . for a judicial office that is filled by public election between competing candidates shall not personally solicit campaign funds, or solicit attorneys for publicly stated support, but may establish committees of responsible persons to secure and manage the

> expenditure of funds for the candidate's campaign and to obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from any person or corporation authorized by law.

Canon 7(C)(1) prohibits the personal solicitation of campaign funds by a judge running for election. Williams-Yulee's fundraising letter did just that, but she argued that this restriction impermissibly curtailed her right to political speech under the First Amendment.[7] The Florida Supreme Court agreed that Canon 7(C)(1) implicates a judicial candidate's free speech rights, but held that the regulation satisfies strict scrutiny in that it is "narrowly tailored to serve a compelling state interest."[8] The Court noted that "Florida has a compelling state interest in preserving the integrity of [its] judiciary and maintaining the public's confidence in an impartial judiciary."[9]

The U.S. Supreme Court affirmed, 5–4, also applying strict scrutiny. To free speech scholars, *Williams-Yulee* seems to be a puzzling departure from the Roberts Court's previous quashing of campaign finance restrictions on free speech grounds in *Citizens United v. FEC*.[10] The Roberts Court also recently championed free speech above sympathetic restrictions on expression in *United States v. Alvarez*[11] (government cannot criminalize lying about military honors) and *United States v. Stevens*,[12] (government cannot criminalize video depictions of animal cruelty). The departure from precedent aside, *Williams-Yulee* illustrates the sharp disagreements, even among legal scholars, about how to regulate judicial elections. Chief Justice Roberts described the problem this way:

> [T]he lines Yulee asks us to draw are unworkable. Even under her theory of the case, a mass mailing would create an appearance of impropriety if addressed to a list of all lawyers and litigants with pending cases. So would a speech soliciting contributions from the 100 most frequently appearing attorneys in the jurisdiction. Yulee says she might accept a ban on one-to-one solicitation, but is the public impression really any different if a judicial candidate tries to buttonhole not one prospective donor but two at a time? Ten? Yulee also agrees that in person solicitation creates a problem. But would the public's concern recede if the request for money came in a phone call or a text message?

We decline to wade into this swamp. . . .[13]

Justice Scalia retorted:

> The Court's accusation of unworkability also suffers from a bit of a pot-kettle problem. Consider the many real-world questions left open by today's decision. Does the First Amendment permit restricting a candidate's appearing at an event where somebody else asks for campaign funds on his behalf? Does it permit prohibiting the candidate's *family* from making personal solicitations? Does it allow prohibiting the candidate from participating in the creation of a Web site that solicits funds, even if the candidate's name does not appear next to the request? More broadly, could Florida ban thank-you notes to donors? Cap a candidate's campaign spending? Restrict independent spending by people other than the candidate? Ban independent spending by corporations? And how, by the way, are judges supposed to decide whether these measures promote public confidence in judicial integrity, when the Court does not even have a consistent theory about what it means by "judicial integrity"? For the Court to wring its hands about workability under these circumstances is more than one should have to bear.[14]

The System of Merit Selection

Unworkability is indeed a concern, as shown by all of the U.S. Supreme Court's opinions in the case. Instead of balancing our court system on a razor's edge between the candidate's First Amendment rights and the state's interest in judicial impartiality, Colorado has wisely sidestepped the problem by selecting judges using a more balanced approach.

Merit selection of judicial candidates can be a difficult concept to sell. It can be hard to persuade someone that his or her vote should be balanced against competing interests. However, to some, the reasons are comparable to why we should not allow the public to vote on matters contrary to the guarantee of equal protection under the law.[15] To others, the reasons are the same as why we should not allow the voters to ban firearms.[16] Some things are so important that they should not be subject to pure majority rule.

A balanced judicial selection model that includes a voice from three government branches and the voters best manages these competing interests. Although no system is perfect, Colorado's model balances all competing interests, avoids the thorny constitutional problems presented in *Williams-Yulee*, and relieves our judges of the impropriety of having to directly solicit campaign fundraising from the lawyers and litigants who appear before them.

Notes

1. After serving a provisional term of at least two years, every Colorado judge must face a retention election, and if retained by a majority of voters, he or she will serve a longer term. The term of office after the retention election is ten years for the Colorado Supreme Court, eight years for the Court of Appeals, and six years for District Court. *See* Colo. Const. art. VI.

2. *See, e.g.*, Institute for Advancement of the American Legal System's Quality Judge's Initiative, iaals.du.edu/initiatives/quality-judges-initiative. *See also* Hersh, "Selection of Independent Colorado Judges," 37 *The Docket* 26 (Feb. 2015), www.dbadocket.org/ethics/selection-of-independent-colorado-judges/#more-1918.

3. *See Williams-Yulee v. Florida Bar*, 135 S.Ct. 1656 (2015) (affirming *Florida Bar v. Williams-Yulee*, 138 So.3d 379 (Fla. 2014)).

4. *Id.*

5. *Id.* at 1671.

6. *Id.*

7. *Id.*

8. *Williams-Yulee*, 138 So.3d at 387.

9. *Id.*

10. *Citizens United v. FEC*, 130 S.Ct. 876 (2010).

11. *United States v. Alvarez*, 132 S.Ct. 2537 (2012).

12. *United States v. Stevens*, 130 S.Ct. 1577 (2010).

13. *Williams-Yulee*, 135 S.Ct. 1656.

14. *Id.* at 1696 (Scalia, J. dissenting) (internal citations omitted) (emphasis in original).

15. *See Obergefell v. Hodges*, Docket No. 14-556, 576 U.S. ___ (2015).

16. *See District of Columbia v. Heller*, 128 S.Ct. 2783 (2008). *See also McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010).