

Much Ado About Nothing: The Irrelevance of *Williams-Yulee v. The Florida Bar* on the Conduct of Judicial Elections

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I. INTRODUCTION

The facts of *Williams-Yulee v. The Florida Bar*¹ are clear and undisputed. Florida, like many states, prohibits the direct solicitation of campaign funds by judicial candidates. Specifically, Canon 7C(1)² states, “A candidate . . . for a judicial office that is filled by public election between competing candidates shall not personally solicit campaign funds”³ The Florida Supreme Court upheld that statute,

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1. 138 So.3d 379 (Fla.), *cert. granted*, 135 S. Ct. 44 (2014).

2. FLA. CODE JUD. CONDUCT, Canon 7C(1).

3. *Id.* Initially, Williams-Yulee also contended that, because she was the only candidate in the race at the time she solicited funds, hers was not an election “between competing

holding that the restriction serves a compelling state interest (preventing corruption or the appearance of corruption) and is narrowly tailored to serve that interest (by allowing candidates to raise campaign funds through campaign committees). Lanell Williams-Yulee petitioned the Supreme Court for certiorari, claiming the Florida canon violates the First Amendment. In an unusual move, the Florida Bar joined Williams-Yulee in urging the Court to decide the case given the contradictory rulings made by lower state and federal courts: some courts have upheld statutes like Canon 7C(1), while others have struck it down. Specifically, “three state high courts and two federal circuit courts have held Florida’s rule and materially equivalent rules . . . to be constitutional and four federal circuits have held equivalent rules to be unconstitutional.”⁴ The specific question presented to the Court is: “Whether a rule of judicial conduct that prohibits candidates for judicial office from personally soliciting campaign funds violates the First Amendment.”⁵

II. OTHER CASES DEALING WITH JUDICIAL ELECTIONS

This is not the Court’s first foray into judicial elections in recent years. As it relates to this case, the two most relevant cases are *Republican Party of Minnesota v. White*⁶ and *Caperton v. A.T. Massey Coal Company*.⁷ In the *White* case, the Court struck down a Minnesota provision that prohibited judicial candidates “from announcing their views on disputed legal and political issues.”⁸ Prior to this decision, several states forbade candidates for the bench from informing the electorate of their views on issues such as the death penalty, abortion, and tort reform. *White* struck down these bans; as Justice Scalia wrote in his opinion, states cannot “leav[e] the principle of elections in place while preventing candidates from discussing what the elections are about.”⁹ Judicial elections may be a bad idea, and states certainly can

candidates.” *Williams-Yulee*, 138 So.3d at 382–83. The Florida Supreme Court held that this phrase refers to the *type* of election (contestable versus noncontestable), and not to whether the race was actually contested. *Id.* at 387. This issue is not before the Supreme Court.

4. See Florida Bar’s Response to Petition for Writ of Certiorari at 1, *Williams-Yulee v. The Florida Bar*, 138 So.3d 379 (No. 13-1499) (Aug. 22, 2014), 2014 WL 4201687 at *1.

5. See Petition for a Writ of Certiorari at i, *Williams-Yulee v. The Florida Bar*, 138 So.3d 379 (No. 13-1499) (July 17, 2014) 2014 WL 2769040 at *i.

6. 536 U.S. 765 (2002).

7. 556 U.S. 868 (2009).

8. *White*, 536 U.S. at 768.

9. *Id.* at 788.

opt not to have them. But they cannot have elections and then prohibit the candidates from discussing relevant issues in the race.¹⁰

Despite fears that this would fundamentally change the nature of judicial elections, there is no evidence that this would be the case. Bonneau, Hall, and Streb¹¹ empirically examined the conduct of state supreme court and intermediate court elections both before and after *White*. The conclusion reached by these scholars is clear: “in both state supreme courts and intermediate appellate courts, we failed to find any statistically significant differences in the fundamental characteristics of these elections after the *White* decision.”¹² Despite the Court changing the rules of how judicial elections are conducted, *White* had no impact on the conduct in these races.

The second recent case involving judicial elections is *Caperton*. In this case, the Court held that a judge must recuse himself or herself in cases where “there is a serious risk of actual bias—based on objective and reasonable perceptions— . . . when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.”¹³ In *Caperton*, a litigant with a case pending before the state supreme court donated \$3 million to a political action committee supporting then-candidate Brent Benjamin, who went on to win the election. Interestingly, as this relates to the *Williams-Yulee* case, these funds were not directly solicited by Benjamin (or by anyone in his campaign). The amount of money spent led the Court to conclude that, while there was no evidence that Benjamin was biased,¹⁴ there was a “serious risk” of bias that mandated recusal.¹⁵

10. Many states also prohibit judges from pledging or promising to decide a certain case a particular way. The Court did not strike down those bans, and it seems unlikely they would do so. There is a big difference between saying you are in favor of tort reform and saying that you would vote to uphold a particular law passed by the legislature.

11. See Chris W. Bonneau, Melinda Gann Hall & Matthew J. Streb, *White Noise: The Unrealized Effects of Republican Party of Minnesota v. White on Judicial Elections*, 32 JUST. SYS. J. 247 (2011).

12. *Id.* at 264.

13. *Caperton*, 556 U.S. at 870–71.

14. In fact, there is ample evidence that he was not biased in favor of Massey. According to the Public Information Office of the Supreme Court of Appeals in West Virginia, from 2005–2008, Justice Benjamin voted against the interests of Massey Energy 81.6% of the time (15.5 votes against compared to 3.5 votes for). Press Release, Public Information Office of the Supreme Court of Appeals of West Virginia, Summary of Chief Justice Benjamin’s Dispositive Voting Record Regarding Massey Energy Cases from 01/01/2005 to 12/31/2008 (Mar. 2, 2009),

The Court was quick to say that this does not mean that “every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge’s recusal”; rather, the Court emphasized that this was “an exceptional case.”¹⁶ As Chief Justice Roberts points out in his dissent, however, the decision provides no guidance as to when the probability of bias becomes unconstitutionally high.¹⁷ Is there a specific dollar amount? A proportion of the candidate’s funds? A proportion of the amount spent by all candidates in the race? Does the source of the funds matter—for example, an individual, attorney or corporation? All of these are open questions after *Caperton*.

What have the effects of *Caperton* been on the conduct of judicial elections? It is difficult to find any. Campaign spending in these races has continued to increase,¹⁸ and attorneys and litigants who have cases before the particular court remain the largest contributors to these campaigns. If campaign contributors were worried that a judge might have to recuse him or herself from a case involving the contributor, one would expect these contributors to curtail their donations. But there is no evidence that this has occurred.

What can we learn from *White* and *Caperton*? Despite the Supreme Court changing the legal context surrounding judicial elections, there is no evidence that elections have changed in response to these decisions. In the next Part, we discuss the concerns over direct solicitation as it relates to the legitimacy of the courts and what empirical scholars have found on the topic.

III. LEGITIMACY AND DIRECT SOLICITATIONS

The Florida Supreme Court admits that “by prohibiting judicial candidates from personally soliciting campaign contributions, Canon

http://www.courts.wv.gov/public-resources/press/releases/2009-releases/march2_09.htm, archived at <http://perma.cc/ZCG3-65GZ>. In terms of money, the net cost to Massey of Benjamin’s votes was approximately \$263.5 million, and this includes the *Caperton* case. *Id.* Further, on remand, the West Virginia Supreme Court of Appeals, with only one of the original five justices deciding the case, ruled in *favor* of Massey Energy against *Caperton*. *Caperton v. A.T. Massey Coal Co.*, 690 S.E.2d 322 (W. Va. 2009).

15. *Caperton*, 556 U.S. at 884.

16. *Id.*

17. *Id.* at 890–91 (Roberts, C.J., dissenting).

18. See ALICIA BANNON, ERIC VELASCO, LINDA CASEY & LIANNA REAGAN, *THE NEW POLITICS OF JUDICIAL ELECTIONS 2011–12*, at 1–2 (2013).

7C(1) clearly restricts a judicial candidate's speech."¹⁹ However, they argue this restriction is justified because the state has "a compelling state interest in preserving the integrity of [its] judiciary and maintaining the public's confidence in an impartial judiciary."²⁰ Given that this is the reason for the ban, it is instructive to look at judicial legitimacy and what threatens it.

Compared to the other branches of government, the judiciary enjoys unparalleled levels of legitimacy.²¹ Moreover, legitimacy is particularly valuable for the institution of the Supreme Court. Whereas Congress has the power of the purse and the President has the power of the sword, the power of the Court depends almost solely on public approval.²² Consequently, protecting the legitimacy of the judiciary at all levels of government is of utmost importance to those who sit on the bench, as reflected in the Florida Supreme Court's decision.

There is considerable agreement among scholars that legitimacy refers to "diffuse support" of a particular institution or "a reservoir of favorable attitudes or good will that helps members to accept or tolerate outputs to which they are opposed or the effect of which they see as damaging to their wants."²³ Caldeira and Gibson find that democratic values are one of the strongest predictors of diffuse support for the Supreme Court. "[T]hose who are more firmly committed to democratic norms . . . show more support for the Court."²⁴ Moreover, an individual's support for the Court is relatively stable over time since people tend to form democratic values early in life.²⁵

How would the decision rendered by the Supreme Court in the *Williams-Yulee* case affect the high level of legitimacy to which the

19. *Williams-Yulee v. The Florida Bar*, 138 So. 3d 379, 384 (Fla. 2014).

20. *Id.*

21. See Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. OF POL. SCI. 635, 635 (1992); Gregory Casey, *The Supreme Court and Myth: An Empirical Investigation*, 8 LAW & SOC'Y. REV. 385, 385 (1974); Jeffery J. Mondak & Shannon Ishiyama Smithey, *The Dynamics of Public Support for the Supreme Court*, 59 J. POL. 1114, 1138–40 (1997).

22. See generally Casey, *supra* note 21 (discussing relationship of the Court and public opinion).

23. See DAVID EASTON, A SYSTEMS ANALYSIS OF POLITICAL LIFE 273 (1965).

24. Caldeira & Gibson, *supra* note 21, at 648.

25. See *id.* at 648–49; James L. Gibson & Michael J. Nelson, *The Legitimacy of the U.S. Supreme Court: Conventional Wisdoms, and Recent Challenges Thereto* 8–9 (Ann. Rev. L. & Soc. Sci. Working Paper, 2014), available at <http://ssrn.com/abstract=2519024>.

courts are accustomed? While the direct relationship between the method by which campaign contributions are solicited and perceptions of judicial impartiality have not, to our knowledge, been empirically tested, the pathway to establishing deleterious effects on confidence in the court resulting from judges personally soliciting contributions (as opposed to having a campaign committee do it) during the campaign seems long, with several hurdles along the way. In order to address this question, let us walk through the assumptions that underlie the Florida Supreme Court's claim that permitting personal solicitation of campaign contributions could damage the public's perception of an impartial judiciary.

First, an individual would have to determine that past contributions have a significant influence on a judge's decisionmaking. In other words, in order for the impartiality of the court to be harmed, an individual would have to believe that a judge's decisions unfairly advantage campaign contributors. A handful of scholars have examined the influence of judicial campaign contributions on the legitimacy of the institution.²⁶ Indeed, Gibson finds that campaign contributions can harm the legitimacy of elected state supreme courts.²⁷ Similarly, Jamieson and Hardy find that the majority of participants in their study believe that a judge raising money during his or her campaign will affect how that judge rules on the bench.²⁸ However, Gibson and Caldeira find that the effect of independent campaign contributions on legitimacy is contingent on other variables, such as the level of preexisting support an individual has for the court and the expected role that an individual believes the court should play in government.²⁹ For example, they find that citizens who are generally supportive of the court "believe that judges will judge fairly, irrespective of any contributions they may have received."³⁰ These

26. As mentioned previously, this is different from examining the impact of *how* contributions were solicited.

27. Though less relevant to the purpose of this paper, Gibson also finds that campaign contributions affect state legislatures in the same way. See James L. Gibson, "New-Style" *Judicial Campaigns and the Legitimacy of State High Courts*, 71 J. POL. 1285, 1285 (2009).

28. See Kathleen Hall Jamieson & Bruce W. Hardy, *Will Ignorance & Partisan Elections of Judges Undermine Public Trust in the Judiciary?*, 137 DAEDALUS 11, 13–14 (2008).

29. See James L. Gibson & Gregory A. Caldeira, *Campaign Support, Conflicts of Interest, and Judicial Impartiality: Can Recusals Rescue the Legitimacy of the Courts?*, 74 J. POL. 18, 28–31 (2012).

30. *Id.* at 30.

citizens conclude that “contributions, *ipso facto*, do not necessarily undermine the integrity of the judiciary.”³¹

Additionally, in order for personal solicitation of contributions to harm the integrity of the court, an individual would have to be aware of the sources of campaign contributions for each judge in any particular case. The individual would also have to distinguish between contributions received from the judge’s personal solicitation efforts and contributions received by a campaign director or special committee. Moreover, the individual would have to conclude that contributions received through personal solicitation are somehow worse than contributions received through other means of solicitation. While all of this might be possible, the vast majority of the public would likely not stray down this line of logic.

Even if we assume that an individual is aware of campaign contribution sources and believes that those received from personal solicitations by the candidate are worse than other types, the negative effect of the contribution source would have to be of a greater magnitude than the positive effect associated with judicial elections. Related to the idea that democratic values are one of the strongest sets of predictors of perceived legitimacy,³² scholars have found that judicial elections increase courts’ legitimacy.³³ Not only can voters hold elected judges more accountable than unelected judges, but elections also generally provide voters with more information about the judges and courts than the appointment of judges.

Elections of all types of offices are associated with greater levels of information received by voters, whether through television advertisements, newspaper editorials, or campaign leaflets. Judicial elections are no exception. Moreover, it is a given that campaigns of all types cost money. If we combine this with Gibson and Caldeira’s finding that greater knowledge is positively related to institutional loyalty,³⁴ then it is not surprising that judicial elections increase the legitimacy of the courts. Indeed, Gibson and Caldeira suggest that “paying attention to courts not only provides citizens information, but

31. *Id.* at 32.

32. Caldeira & Gibson, *supra* note 21, at 648.

33. See JAMES L. GIBSON, ELECTING JUDGES: THE SURPRISING EFFECTS OF CAMPAIGNING ON JUDICIAL LEGITIMACY 136 (2012); James L. Gibson, Jeffrey A. Gottfried, Michael X. Delli Carpini & Kathleen Hall Jamieson, *The Effects of Judicial Campaign Activity on the Legitimacy of Courts: A Survey-Based Experiment*, 64 POL. RES. QUART. 545, 553–54 (2011).

34. See James L. Gibson & Gregory A. Caldeira, *Knowing the Supreme Court? A Reconsideration of Public Ignorance of the High Court*, 71 J. POL. 429, 429 (2009).

also exposes them to powerful symbols of judicial legitimacy.”³⁵ Similarly, Gibson et al. find that elections enhance judicial legitimacy.³⁶ They state, “Elections are beneficial to courts because they are one means by which citizens are stimulated to think about the accountability of the judiciary”³⁷

Although the net effect of elections on court legitimacy is positive, Gibson et al. find that not every aspect of judicial elections increases legitimacy.³⁸ Campaign contributions are one of these aspects. But it is important to remember that campaign contributions are not prohibited under the Florida canon, nor are campaign contributions before the Supreme Court in this case; rather, the only issue here is the direct solicitation of campaign contributions by a candidate for judicial office, as opposed to by his or her campaign committee. There is simply no reason to think (or evidence to support the notion) that direct campaign contributions are somehow more deleterious to legitimacy than indirect contributions. Although empirical studies directly testing the effects of various campaign contribution sources on judicial legitimacy have yet to be conducted, existing evidence leads us to conclude that the positive effects on legitimacy associated with judicial elections outweigh any negative effects associated with campaign contributions being solicited personally by the candidate. In fact, voters may not even be aware of the method of solicitation or contribution. As Bonneau and Hall point out, “Elections generally are one of the most powerful legitimacy-conferring institutions in American democracy and should serve to balance if not counteract other negative features associated with campaigns.”³⁹

35. *Id.*

36. *See* Gibson et al., *supra* note 33, at 553–54.

37. *Id.*

38. Gibson et al. focused on various types of campaign advertisements shown to voters. *Id.* at 549. They found that overall support of the Pennsylvania Supreme Court was enhanced even among those individuals who viewed the worst campaign ads. *See id.* at 554; *see also* GIBSON, *supra* note 33, at 131 (noting that study of judicial elections in Kentucky indicated that some forms of campaigning can harm the legitimacy of the judiciary).

39. *See* CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS 2 (2009).

IV. EMPIRICALLY COMPARING STATES WITH DIRECT SOLICITATION
BANS WITH STATES WITHOUT SUCH BANS

Of course, whether the Court's decision in *Williams-Yulee* will affect the conduct of judicial elections is, at its heart, an empirical question. In Table 1, we compare the total amount of money raised in state supreme court elections from 2005–2012 in states with a ban on direct candidate solicitation of contributions with those in states without such a ban.⁴⁰ We obtained the list of states with bans from *Williams-Yulee*'s petition for certiorari⁴¹ and the total amount of money raised by candidates from Justice at Stake's reports on the New Politics of Judicial Elections.⁴² If these bans were effective in reducing the amount of money raised, we would expect to see less money being raised in states with a ban on direct candidate solicitation of funds. A lack of a difference between states with and without a ban would provide strong evidence in support of our hypothesis that the Court's decision in *Williams-Yulee*—regardless of what it is—is unlikely to have an effect on the conduct of these elections.

Table 1: Comparison of Average Fundraising by State Supreme Court Candidates in States with and Without Direct Contribution Bans (Number of Elections in Parentheses)

Year	Direct Ban	No Direct Ban
2011-2012	\$1,514,636 (14)	\$1,650,546 (5)
2009-2010	\$1,428,129 (14)	\$1,405,695 (5)
2007-2008	\$2,065,351 (15)	\$2,136,763 (6)
2005-2006	\$819,564 (13)	\$3,962,684 (6)*
All years	\$5,666,492 (16)	\$8,646,315 (6)

* = $p < 0.05$

Table 1 shows that, between 2005 and 2013, candidates raised \$5,666,492 in states with a ban on direct contributions and \$8,646,315 in states without such a ban. However, this difference is not

40. Since the vast majority of candidates in retention elections report no campaign fundraising, we omit them from this analysis. However, even when we include them, our empirical conclusions remain unchanged.

41. See Petition for a Writ of Certiorari, *supra* note 5, at 13 n.5.

42. *The New Politics of Judicial Elections*, JUSTICE AT STAKE, <http://www.justiceatstake.org/resources/the-new-politics-of-judicial-elections/>, archived at <http://perma.cc/Q8L8-C3KD> (last visited Dec. 22, 2014).

statistically significant. Moreover, when we look at each election cycle independently, the only election cycle where there is a statistically significant difference is in the 2005–2006 cycle.

This (admittedly simple) empirical analysis suggests, at least from the perspective of the conduct of campaigns, prohibiting candidates for judicial office from directly soliciting contributions is a law that has no practical, real-world consequences. Moreover, there are likely to be no changes in the perceived legitimacy of the judiciary if this ban is struck down (since the public is highly unlikely to have the requisite knowledge to know if such a ban exists in the state).

V. NORMATIVE IMPLICATIONS

It is important to consider the normative implications of the argument and evidence advanced above.⁴³ In many ways, our analysis is good news for those who are concerned about the legitimacy of courts; regardless of the Court’s decision in this case, little (if anything) is likely to change. From a policy perspective, our argument suggests that policymakers and others concerned about the electoral process should focus their attention elsewhere. Banning candidates from directly soliciting funds neither increases the legitimacy of the courts nor leads to lower amounts of campaign funds being raised. There are good reasons to be concerned about the appearance of impropriety that comes from candidates for the bench soliciting campaign funds. Policymakers have a number of options at their disposal to try to ameliorate that concern (e.g., public financing), and they should focus their efforts on things other than forcing candidates to raise money indirectly.

From the perspective of free speech, we should be very wary of government attempts to curtail candidate behavior in campaigns. In the Florida Supreme Court’s opinion holding Canon 7C(1) survives strict scrutiny, the court’s “narrowly tailored” analysis undermines its “compelling interest” analysis. Even if we grant that the state has a compelling interest in promoting (or protecting) the perceived impartiality of the judiciary (something the Supreme Court appears to agree with), indirect contributions undermine this interest. The Florida Supreme Court opines that allowing indirect contributions

43. See generally BRANDON L. BARTELS & CHRIS W. BONNEAU, MAKING LAW AND COURTS RESEARCH RELEVANT: THE NORMATIVE IMPLICATIONS OF EMPIRICAL RESEARCH (2014) (examining importance of normative implications in empirical research in legal and judicial realms).

makes the ban on direct contributions constitutional; however, there is no evidence that allowing indirect contributions does anything to achieve the compelling interest of promoting the impartiality of the judiciary. One cannot justify restricting candidate speech with a reason that is, logically and empirically, unlikely to achieve the goals the state set out to achieve. If legitimacy (or the perception thereof) is not going to be enhanced by banning direct contributions because of the allowance of indirect contributions, then how can there be a compelling reason to ban direct contributions?

VI. CONCLUSION

The *Williams-Yulee* case is one that will be watched closely by many in the legal community, especially those considering running for judicial office. However, it is not clear to us that the decision will matter at all in terms of how judicial elections are conducted. We do not dispute that the current state of the law on the direct solicitation of contributions by candidates for the bench is confusing and contradictory, and the Court needs to step in to issue legal clarity. But regardless of how the Court rules, candidates seeking judicial office will still be able to raise ample amounts of funds, elections will proceed in states in much the same way as they have always proceeded, and the legitimacy of the courts is unlikely to be adversely affected.