

# Are Judges Politicians?: An Analysis of *Williams-Yulee v. The Florida Bar* and Its Constitutional Impact on Judicial Independence and Judicial Ethics Codes Across the U.S.

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## I. INTRODUCTION

In *Williams-Yulee v. Florida Bar*, the U.S. Supreme Court held by a vote of 5-4 that a ban on judicial candidates directly soliciting campaign funds did not violate the First Amendment.<sup>1</sup> Chief Justice John Roberts, writing the opinion of the Court, found that the proper test to judge the case was strict scrutiny and that the law in question

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1. 135 S. Ct. 1656, 1659 (2015).

had both a compelling interest and was narrowly tailored.<sup>2</sup> Justice Ruth Bader Ginsburg concurred, arguing that, although she agreed with the majority's determination that the Florida law was constitutional, "closely drawn" scrutiny was the appropriate standard of review.<sup>3</sup> Three of the four dissenters penned opinions contending that the Florida ethics rule violated the First Amendment because it failed strict scrutiny.<sup>4</sup>

Recently, the Roberts Court has struck down state regulations that limit speech related to campaigns for political office<sup>5</sup> and content-based speech bans.<sup>6</sup> In *Williams-Yulee*, however, the Roberts Court broke new ground and upheld a state's content-based restriction on campaign speech, something it has not previously done. The case was also unique in that it was an unusual instance of the Court upholding a law when applying the strict scrutiny test in a free speech case:<sup>7</sup> the Court found that the law furthered the compelling interest of maintaining the public's confidence in an impartial judiciary and was narrowly tailored to allow judicial candidates to continue engaging in a great deal of campaign-related speech.<sup>8</sup> In the words of the Chief Justice, "judges are not politicians";<sup>9</sup> thus, the rule restricting judicial candidates' speech was constitutional because judges are subject to more restrictions on their expressions than candidates for legislative or executive offices.<sup>10</sup> It remains to be seen if these features of *Williams-*

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2. See *id.* at 1664–73.

3. See *id.* at 1673–75 (Ginsburg, J., concurring).

4. See *id.* at 1675–82 (Scalia, J., dissenting); *id.* at 1682–85 (Kennedy, J., dissenting); *id.* at 1685–86 (Alito, J., dissenting).

5. See, e.g., *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014); *Citizens United v. FEC*, 558 U.S. 310 (2010).

6. See, e.g., *United States v. Alvarez*, 132 S. Ct. 2537 (2012); *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786 (2011); *United States v. Stevens*, 559 U.S. 460 (2010).

7. See, e.g., Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006) (noting that, while the courts have upheld challenged laws when applying strict scrutiny, such a result is uncommon).

8. *Williams-Yulee*, 135 S. Ct. at 1673.

9. *Id.* at 1672.

10. See *id.*

*Yulee* are anomalies specific to campaign speech for judicial candidates or the beginning of new trends on the Court that have broader First Amendment implications.

This article critically analyzes the Court opinions in *Williams-Yulee*, ultimately concluding that the majority not only identified the correct constitutional test but also applied the test properly to the facts before it. Notably, the majority's opinion emphasized the need to regulate campaign speech in judicial elections differently from other elections because judges have an institutional role that is dissimilar from other public office candidates.<sup>11</sup> This analysis was largely missing from the majority's reasoning in *Republican Party of Minnesota v. White*, thereby completing the circle left open by that case.<sup>12</sup> The majority's analysis and approach differed in various ways from Justice Ginsburg's concurrence and the dissents of Justices Antonin Scalia, Anthony Kennedy, and Samuel Alito, which will be explored below. This article concludes by applying the majority's standard to other American Bar Association ("ABA") judicial ethics canons and explores the constitutionality of those canons in the context of state judicial elections, where campaigning can pose a threat to judicial independence. In this sense, *Williams-Yulee* seeks a balance between defending the free speech rights of judicial candidates and ensuring that judicial integrity and decisional independence continue to protect the due process rights of parties appearing before judges.

## II. BACKGROUND ON *WILLIAMS-YULEE*

The *Williams-Yulee* case began when Lanell Williams-Yulee ("Yulee"), a Florida attorney, ran for a county court judgeship in 2009.<sup>13</sup> After entering the race, Yulee sent a letter to area voters that described her experience and ideas.<sup>14</sup> The letter, which Yulee also posted on her campaign website, additionally stated:

An early contribution of \$25, \$50, \$100, \$250, or \$500,  
made payable to "Lanell Williams-Yulee Campaign for

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11. *Id.* at 1667 (citing *Republican Party of Minn. v. White*, 536 U.S. 765, 783 (2002); *White*, 536 U.S. at 805 (Ginsburg, J., dissenting)).

12. 536 U.S. 765 (2002).

13. *Williams-Yulee*, 135 S. Ct. at 1663.

14. *Id.*

County Judge,” will help raise the initial funds needed to launch the campaign and get our message out to the public. I ask for your support [i]n meeting the primary election fund raiser goals. Thank you in advance for your support.<sup>15</sup>

Yulee lost her bid for the judgeship.<sup>16</sup> That loss, however, soon became the least of Yulee’s troubles. The Florida Bar subsequently filed a complaint against her for allegedly violating a bar association rule that requires judicial candidates to comply with applicable provisions of the Florida Code of Judicial Conduct.<sup>17</sup> One of those provisions, Canon 7C(1), prohibits judicial candidates from making personal solicitations for campaign funds.<sup>18</sup> Specifically, Canon 7C(1) states that:

A candidate, including an incumbent judge, 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.<sup>19</sup>

In other words, like most states with an elected judiciary,<sup>20</sup> Florida prohibits judicial candidates from personally asking for campaign

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15. *Id.*

16. *Id.*

17. *Id.* at 1663–64.

18. FLA. CODE OF JUDICIAL CONDUCT Canon 7C(1) (FLA. SUPREME COURT 2015).

19. *Williams-Yulee*, 135 S. Ct. at 1663.

20. *See, e.g.*, MODEL CODE OF JUDICIAL CONDUCT Canon 4 (AM. BAR ASS’N 2010).

funds from potential contributors but allows candidates to establish committees that can solicit donations on their behalf.<sup>21</sup>

Yulee did not deny that she personally solicited funds in her letter.<sup>22</sup> Instead, she responded that she should not be disciplined because the rule violated her free speech rights under the First Amendment; specifically, she challenged that the Florida canon was an unconstitutional content restriction on expression.<sup>23</sup> Upon recommendations from an appointed referee, the Florida Supreme Court declared that Canon 7C(1) was constitutional because the law regarded a compelling interest, that of protecting “the integrity of the judiciary and maintaining the public’s confidence in an impartial judiciary,” and was narrowly tailored.<sup>24</sup> Accordingly, the Florida Supreme Court found that Yulee violated the rule, publicly reprimanded Yulee, and fined her for the cost of the proceeding, which totaled \$1,860.<sup>25</sup> Yulee then appealed the decision to the Supreme Court of the United States.<sup>26</sup>

### III. THE SUPREME COURT’S DECISION IN *WILLIAMS-YULEE*

#### *A. Constitutional Test to Be Applied*

The U.S. Supreme Court upheld the Florida Supreme Court’s decision by a 5-4 vote. Writing for the majority, Chief Justice Roberts first declared that the appropriate level of scrutiny to apply in the case was strict scrutiny. According to the Chief Justice, “As [the Court has] long recognized, speech about public issues and the qualifications of candidates for elected office commands the highest level of First Amendment protection.”<sup>27</sup> Chief Justice Roberts found this appropriate because Yulee’s fundraising activities took the form of a campaign

21. FLA. CODE OF JUDICIAL CONDUCT Canon 7C(1) (FLA. SUPREME COURT 2015).

22. *Williams-Yulee*, 135 S. Ct. at 1664.

23. *Id.*

24. Fla. Bar v. Williams-Yulee, 138 So. 3d 379, 387 (Fla. 2014), *aff’d*, 135 S. Ct. 1656 (2015).

25. *Williams-Yulee*, 135 S. Ct. at 1664.

26. *See id.*

27. *Id.* at 1665 (citing *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989)).

letter in which she expressed her fitness for the bench and her vision for the judiciary.<sup>28</sup> This form of political speech deserves the highest level of constitutional protection.<sup>29</sup> Chief Justice Roberts then explained why Florida's review under the less demanding "closely drawn" scrutiny was inappropriate. According to Chief Justice Roberts, even though closely drawn scrutiny has been used in some past campaign finance cases, such as *Buckley v. Valeo*<sup>30</sup> and *McConnell v. Federal Election Commission*,<sup>31</sup> that standard was improper here because the Court's prior use of the "closely drawn" standard was used to address claims of freedom of association and laws aimed at preventing circumvention of campaign contribution limits, which were not issues presented in *Williams v. Yulee*.<sup>32</sup> Thus, Chief Justice Roberts could not identify a reason to apply any standard other than strict scrutiny to the speech at issue in the case. In this portion of the opinion, Chief Justice Roberts was joined only by Justices Breyer, Sonia Sotomayor, and Elena Kagan.<sup>33</sup> But since the four dissenters also thought strict scrutiny was the appropriate standard of review,<sup>34</sup> eight members of the Court opined that strict scrutiny should apply. Only Justice Ginsburg advocated applying a lower level of scrutiny.<sup>35</sup>

Chief Justice Roberts's explanation regarding why strict scrutiny is the proper standard of review is an important and useful analysis that was missing from the Court's opinion in *Republican Party of Minnesota v. White*. In *White*, Justice Scalia, writing for a 5-4 majority, struck down a state judicial ethics rule that prohibited judicial candidates from announcing their views on disputed legal and political issues.<sup>36</sup> Without explaining his reasoning, Justice Scalia announced that strict scrutiny was the proper analysis to use in cases regarding judicial candidates' free-speech rights.<sup>37</sup> Indeed, in *White*, Justice

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28. *Id.*

29. *Id.* (citing *Eu*, 489 U.S. at 223).

30. 424 U.S. 1 (1976).

31. 540 U.S. 93 (2003).

32. *Williams-Yulee*, 135 S. Ct. at 1665.

33. *Id.* at 1662-64.

34. *See id.* at 1676 (Scalia, J., dissenting); *id.* at 1685 (Kennedy, J., dissenting); *id.* at 1685 (Alito, J., dissenting).

35. *Id.* at 1673 (Ginsburg, J., concurring).

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

37. *Id.* at 774.

Scalia merely stated that the Court of Appeals concluded strict scrutiny was the appropriate test because the rule at issue was a content-based prohibition of speech concerning a candidate's qualifications for public office.<sup>38</sup> Granted, the parties in *White* did not ask the Court to decide whether strict scrutiny was the appropriate standard of review to apply to restrictions on judicial candidate speech,<sup>39</sup> so the Court could avoid deciding it in 2002. Nevertheless, the Court in *White* did not elaborate on why strict scrutiny was appropriate under the circumstances.

Conversely, the issue of which level of scrutiny should be applied was squarely before the Court in *Williams-Yulee*. Chief Justice Roberts's majority opinion amply described why strict scrutiny is the appropriate standard of review for restrictions on speech in judicial campaigns while remaining consistent with the Court's recent rulings on such speech.<sup>40</sup> *Williams-Yulee* involved a public-office candidate's attempts to announce her campaign messages to the public and to raise money to help spread those messages. Yulee's speech, even though it was in part for the *purpose* of raising money, was not the *contribution* of money for the purpose of speaking about an election.<sup>41</sup> Therefore, the case is sufficiently distinct from the issues presented in *Buckley* and *McCutcheon*, which both used the "closely drawn" scrutiny standard because those cases dealt with challenges to contribution limits.<sup>42</sup> The content restriction on Yulee's speech, coupled with the fact that it was speech involving the democratic process, makes strict scrutiny the proper standard for analysis.<sup>43</sup> Indeed, this follows a longstanding default rule from the Court that content-based restrictions on pure speech are generally analyzed under strict scrutiny.<sup>44</sup>

With little elaboration, Justice Stephen Breyer joined the majority in applying strict scrutiny to the case, but he also noted that the

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38. *Id.*

39. *Id.*

40. *See* Citizens United v. FEC, 558 U.S. 310, 340 (2010).

41. *Williams-Yulee*, 135 S. Ct. at 1665.

42. *See* McCutcheon v. FEC, 134 S. Ct. 1434, 1444 (2014); *Buckley v. Valeo*, 424 U.S. 1 (1976).

43. Steele Trotter, *Williams-Yulee and the Changing Landscape of Judicial Campaigns*, 28 GEO. J. LEGAL ETHICS 947, 967 (2015).

44. *See* David S. Han, *Transparency in First Amendment Doctrine*, 65 EMORY L.J. 359, 395 (2015).

Court should not rigidly apply any tier of scrutiny.<sup>45</sup> In his dissent, Justice Scalia applied strict scrutiny as well because the canon at issue “restricts fully protected speech on the basis of content”; although he came to a different conclusion about the application of the test for reasons discussed below, he used the same standard of review as the majority.<sup>46</sup> With less elaboration than Justice Scalia, both Justices Kennedy and Alito reached the same conclusion that strict scrutiny is the appropriate standard for analyzing a content-based speech restriction, such as the one at issue in *Williams-Yulee*.<sup>47</sup>

The only member of the Court to recommend a different standard of review was Justice Ginsburg. The principle reason for her concurrence was to make clear that she did not believe strict scrutiny was the appropriate test for restricting candidates’ speech in judicial elections. First, she noted that she would have upheld the types of campaign finance regulations the Court struck down in *Citizens United v. Federal Election Commission*<sup>48</sup> and *McCutcheon*<sup>49</sup> that restricted electioneering communications and aggregate campaign contributions.<sup>50</sup> But if the Court would not revisit its use of strict scrutiny in those cases, she thought that such a standard should not be applied in speech involving judicial candidates. Indeed, harkening back to her dissent in *Republican Party of Minnesota v. White*,<sup>51</sup> Justice Ginsburg reiterated her belief in “the substantial latitude . . . [that] States should possess to enact campaign-finance rules geared to judicial elections” because judges should not be responsive to the concerns of constituents.<sup>52</sup>

For Justice Ginsburg, recent history is littered with campaign donors trying to buy access to justice and issue-oriented organizations

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45. *Williams-Yulee*, 135 S. Ct. at 1673 (Breyer, J., concurring).

46. *Id.* at 1676 (Scalia, J., dissenting).

47. *Id.* at 1682–85 (Kennedy, J., dissenting); *id.* at 1685–86 (Alito, J., dissenting).

48. *See* 558 U.S. 310, 320–21 (2010) (describing those regulations under the Bipartisan Campaign Reform Act (“BCRA”).

49. *See* 134 S. Ct. 1434, 1442–43 (2014) (describing those regulations under the BCRA).

50. *Williams-Yulee*, 135 S. Ct. at 1674 (Ginsburg, J., concurring).

51. *See id.* at 1673 (referencing *Republican Party of Minn. v. White*, 536 U.S. 765, 820 (Ginsburg, J., dissenting)).

52. *Id.* at 1673–74 (Ginsburg, J., concurring) (quoting *White*, 536 U.S. at 821 (Ginsburg, J., dissenting)).



spending large amounts of money trying to unseat judges who have delivered decisions with which they disagree.<sup>53</sup> She saw disproportionate spending in judicial elections as a serious threat to judicial independence. In this regard, she cited a 2013 poll showing that “87% of voters stated that advertisements purchased by interest groups during judicial elections can have either ‘some’ or ‘a great deal of influence’ on an elected ‘judge’s later decisions’”<sup>54</sup> to emphasize the potentially corrosive impact of campaign spending on voters’ perceptions of judicial impartiality. Thus, whether applying the Court’s strict scrutiny analysis or a more deferential “closely drawn” scrutiny, Justice Ginsburg stressed that the risks to judicial independence and integrity were great enough to allow states to ban judicial candidates from directly soliciting campaign contributions.<sup>55</sup>

Justice Ginsburg was correct to raise the problems with regard to spending in judicial elections. In particular, her insightful citation to empirical evidence showed that donations to judicial candidates’ campaigns threaten to erode public trust in the judiciary as a fair and impartial institution. Indeed, judicial elections at the state level can threaten the decisional independence of judges, particularly if campaign support from donors buys, or appears to buy, influence.<sup>56</sup> Justice Ginsburg’s notion, however, that states should be given “substantial latitude” to regulate judicial elections is a bit troubling.<sup>57</sup> Her approach has the potential to open a Pandora’s Box, permitting states to silence judicial candidates to the point that they cannot effectively communicate their views to voters and reversing the free speech protections announced by the Court in *White*. In what other context has the Court permitted states “substantial latitude” in regulating actual electoral

53. *Id.* at 1674–75 (Ginsburg, J., concurring).

54. *Id.* at 1675 (Ginsburg, J., concurring) (quoting 20/20 INSIGHT LLC, JUSTICE AT STAKE/BRENNAN CENTER NATIONAL POLL, 10/22–10/24, 2013 Question 9 (2013), <https://www.brennancenter.org/sites/default/files/press-releases/JAS%20Brennan%20NPJE%20Poll%20Topline.pdf>); see also 20/20 INSIGHT LLC, *supra*, at Question 8 (setting forth the information used by Justice Ginsburg even though her opinion cites Question 9).

55. *Williams-Yulee*, 135 S. Ct. at 1674 (Ginsburg, J., concurring).

56. See Charles Gardner Geyh, *Judicial Independence as an Organizing Principle* 18 (Indiana Legal Studies Research Paper No. 280, 2014), <https://ssrn.com/abstract=2387012> (citation omitted).

57. *Williams-Yulee*, 135 S. Ct. at 1673 (Ginsburg, J., concurring).

speech based on content? This approach would ask judicial candidates to check their constitutional right to freedom of speech at the door when they declare their candidacies.<sup>58</sup> Although Justice Ginsburg presents convincing points, these issues are so compelling that they overwhelmingly justify the use of strict scrutiny, making reversion to her more deferential approach unnecessary.

Perhaps this potential danger influenced the other eight Justices' decision to decline to adopt Justice Ginsburg's approach. Even with Justice Scalia's death in early 2016,<sup>59</sup> a 7-1 majority on the Court remained in support of using strict scrutiny to analyze content restrictions on judicial candidates' speech.

### B. Judging Compelling Interests

Upon establishing that strict scrutiny is the appropriate form of analysis, Chief Justice Roberts turned to the first part of the test: determining whether Florida has a compelling interest in restricting judicial candidates' fundraising methods. Here, the Chief Justice explained the reasons why the Florida Supreme Court adopted the rule: to protect the integrity of the judiciary and to maintain public confidence in an impartial judiciary.<sup>60</sup> These interests date back "at least eight centuries to Magna Carta" and have been recognized in multiple Court precedents; thus, Chief Justice Roberts characterized the state interests as being "of the highest order."<sup>61</sup> Before declaring that those interests were compelling, however, the Chief Justice discussed how preserving public confidence in the integrity of its judiciary extends well beyond state interests in preventing the appearance of corruption in legislative and executive elections. Chief Justice Roberts found that, while elected members of the legislative and executive branches "are

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58. Many more restrictions on judicial candidate speech would presumably be permissible. For instance, the prohibition on announcing views on controversial issues that the Court struck down in *White* would likely be upheld. Furthermore, under such a standard the Court would likely uphold all of the ABA Model Rules of Judicial Conduct provisions discussed in Part IV below.

59. Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), [http://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html?\\_r=0](http://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html?_r=0).

60. *Williams-Yulee*, 135 S. Ct. at 1666.

61. *Id.*

expected to be appropriately responsive to the preferences of their supporters,” the same is not true of an elected judge, who “is not to follow the preferences of his supporters, or provide any special consideration to his campaign donors.”<sup>62</sup> In other words, elected judges are to maintain a level of independence in their decisions that is not expected of other elected officials. Judges do not “represent” campaign supporters or voters. The Chief Justice characterized judges who personally ask for campaign contributions as creating an unavoidable threat to judicial integrity and independence, establishing an appearance that justice is for sale, so the Chief Justice found Florida’s interest to be compelling.<sup>63</sup>

Yulee, however, argued that the restriction was underinclusive because it prohibited judicial candidates from directly asking for contributions while also permitting them to form committees to ask for money on their behalf and allowing judicial candidates to write thank you notes directly to donors who contribute via these committees.<sup>64</sup> In other words, if what Yulee did raises risks of corruption or the appearance of corruption, how was the situation improved by permitting a committee to ask for money on the judicial candidate’s behalf, reporting the results to the candidate, and then allowing the candidate to directly thank the contributor? This is an important question Chief Justice Roberts had to address because “[u]nderinclusiveness can . . . reveal that a law does not actually advance a compelling interest.”<sup>65</sup> As the Court stated in *Brown v. Entertainment Merchants Association*, another recent free speech case that struck down less-than-comprehensive restrictions on the sale of violent video games to minors, “[u]nderinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.”<sup>66</sup> For the majority in *Williams-Yulee* to be sufficiently inclusive, however, a law need not address *all* aspects of a

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62. *Id.* at 1667.

63. *Id.* at 1667–68.

64. *Id.* at 1668.

65. *Id.*

66. *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 802 (2011) (citing *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994)); *Fla. Star v. B.J.F.*, 491 U.S. 524, 540 (1989).

problem to ban speech in furtherance of its compelling interest.<sup>67</sup> According to Chief Justice Roberts, Florida could reasonably conclude that a candidate's personal solicitation "creates a categorically different and more severe risk of undermining public confidence" than a campaign committee's solicitation; for the Chief Justice, the former situation puts greater pressure on the person being solicited and also "creates the public appearance that the candidate will remember who says yes, and who says no."<sup>68</sup> Thus, for Chief Justice Roberts, there was ample reasoning for the state to conclude that the two situations are sufficiently different, which permitted Florida to ban one but not the other under the First Amendment. The same is true of the thank you notes when compared to solicitations: thank you notes raise much less of a risk to judicial integrity than campaign solicitations.<sup>69</sup> In short, the Chief Justice wrote that permitting candidates to write thank you notes and having committees make solicitations on their behalf are accommodations that "reflect Florida's effort to respect the First Amendment interests of candidates and their contributors—to resolve the 'fundamental tension between the ideal character of the judicial office and the real world of electoral politics.'"<sup>70</sup> According to Chief Justice Roberts, there was no underinclusivity problem with the rule and the state's claimed compelling interest was legitimate.

Justice Scalia, in his dissent, approached the strict scrutiny analysis from a different position. To set up his much more demanding standard for what constitutes a compelling interest, Justice Scalia emphasized that the judicial ethics rule is a content-based restriction on speech and argued that recent precedents suggest that speech cannot be restricted based on content unless there is a long tradition of regulating that category of expression. Since very few restrictions on judicial candidate speech existed until after World War II and the American Bar Association did not adopt a canon prohibiting direct solicitations of contributions by judicial candidates until 1990, for Justice Scalia, the Court had "no basis for relaxing the rules that normally

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67. *Williams-Yulee*, 135 S. Ct. at 1668 (citing *McConnell v. FEC*, 540 U.S. 93, 207–08 (2003); *Burson v. Freeman*, 504 U.S. 191, 207 (1992); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 511–12 (1981) (plurality opinion); *Buckley v. Valeo*, 424 U.S. 1, 105 (1976)).

68. *Id.* at 1669.

69. *Id.*

70. *Id.* (quoting *Chisholm v. Roemer*, 501 U.S. 380, 400 (1991)).

apply to laws that suppress speech because of content.”<sup>71</sup> Indeed, Justice Scalia cited that in recent years the Court struck down restrictions on expression that did not have long histories of being banned,<sup>72</sup> including speech prohibitions that had the goals of preventing animal torture (*United States v. Stevens*),<sup>73</sup> protecting children from violent video games (*Brown v. Entertainment Merchants Association*),<sup>74</sup> and honoring soldiers (*United States v. Alvarez*).<sup>75</sup> As has been noted elsewhere, these other cases represent a shrinking frontier of unprotected speech.<sup>76</sup> According to Justice Scalia, relatively new types of restriction on speech that have a generalized goal of the “preservation of public respect for the courts,” although an important objective, must undergo similar scrutiny.<sup>77</sup> For these reasons, Justice Scalia agreed with the opinion of the Court that strict scrutiny is the proper form of analysis. The tone of Justice Scalia’s opinion in this regard was rather adversarial, something that was probably not necessary to apply the same test—strict scrutiny—as the majority applied, unless Justice Scalia’s point was to create the impression that the notion of “strict scrutiny” was much more demanding than the majority suggested.

Undeniably, in applying strict scrutiny, Justice Scalia did not believe that Florida’s interest, protecting judicial integrity, was sufficiently specific. Instead, he characterized it as “hazy” and “ill-defined.”<sup>78</sup> Furthermore, he declared that Florida could not demonstrate that banning requests for lawful contributions improved public confidence in judges in any significant way, especially when a judicial candidate can have a proxy ask for contributions on his or her behalf. He concluded in this regard that neither Florida nor the Court’s majority “identifie[d] the slightest evidence that banning requests for contributions will substantially improve public trust in judges. Nor does com-

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71. *Id.* at 1676 (Scalia, J., dissenting).

72. *Id.* at 1682 (Scalia, J., dissenting).

73. *United States v. Stevens*, 559 U.S. 460 (2010).

74. *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 802 (2011).

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

76. John D. Moore, *The Closed and Shrinking Frontier of Unprotected Speech*, 36 WHITTIER L. REV. 1, 6–7 (2014).

77. *Williams-Yulee*, 135 S. Ct. at 1682 (Scalia, J., dissenting).

78. *Id.* at 1677 (Scalia, J., dissenting).

mon sense make this happy forecast obvious,” given that judicial candidates have been allowed to make such personal solicitations for much of U.S. history.<sup>79</sup>

Justice Scalia’s failure to see that the protection of judicial integrity is a compelling interest was a bit shortsighted. Defining “judicial integrity” can be difficult,<sup>80</sup> but it clearly includes ensuring that judges do not decide cases based on who has contributed to their electoral campaigns and ensuring that the public does not perceive this to be the case. As the Court previously acknowledged in *Caperton v. A. T. Massey Coal Co.*, all states have recognized, in some form, the long-standing importance of maintaining judicial integrity.<sup>81</sup> Placing restrictions on judicial candidates’ attempts to raise funds for office is a key component of ensuring that justice is not for sale and that the public does not perceive that it is for sale. Even Justice Scalia, writing for the Court in *White*, implied that judicial impartiality, in the sense of having a “lack of bias for or against either party to the proceeding,” is a compelling interest, even though he found the rule at issue in *White* was not narrowly tailored.<sup>82</sup> In *White*, Justice Scalia also implied the mere *appearance* of impartiality is a compelling interest.<sup>83</sup> Additionally, a majority of Justices in *White*, and perhaps all of the Justices, agreed that judicial impartiality and judicial integrity can be compelling interests.<sup>84</sup> Granted, judicial integrity is a broader concept than judicial impartiality. The notion of judicial impartiality, however, is certainly a part of judicial integrity, and given the rule at issue in *Williams-Yulee*, Florida’s rule aimed to preserve both judicial impartiality and the appearance of judicial impartiality.

The timing element of Justice Scalia’s argument, which at first appears relevant, is aimed at the wrong level of analysis. True, there is not an overly long history of specifically prohibiting judicial candidates from directly soliciting campaign contributions. But, more

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79. *Id.* at 1678 (Scalia, J., dissenting).

80. Bryan S. Gowdy, *Leniency Bribes: Justifying the Federal Practice of Offering Leniency for Testimony*, 60 LA. L. REV. 447, 472–73 (2000).

81. 556 U.S. 868, 888–90 (2009).

82. *Republican Party of Minn. v. White*, 536 U.S. 765, 775–76 (2002).

83. *Id.* at 776.

84. *See id.* at 788 (O’Connor, J., concurring); *id.* at 800 (Stevens, J., dissenting); *id.* at 819 (Ginsburg, J., dissenting).

broadly, as the *Williams-Yulee* majority amply demonstrated, the desire to protect judicial integrity dates back several centuries.<sup>85</sup> As early as 1924, the ABA began creating ethics canons to regulate judicial conduct and improve judicial integrity.<sup>86</sup> Just because the *methods* of protecting that interest in *Williams-Yulee* are relatively new does not diminish the fact that the *interest* is an important, longstanding one. Additionally, given recent increases in the amount of money spent by campaigns, including judicial campaigns and particularly since *Citizens United*,<sup>87</sup> it is not surprising that this specific issue is now being addressed in ways it was not addressed in the past. Finally, the *Williams-Yulee* majority utilized strict scrutiny and emphasized the importance of the speech at issue in a way that parallels Justice Scalia's analysis of the same issues in *White*.<sup>88</sup>

Finally, like Chief Justice Roberts, Justice Scalia turned to the potential underinclusiveness of the rule; Justice Scalia, however, found the underinclusive problems to be fatal.<sup>89</sup> The rule prohibits personal pleas for campaign funds but does not prohibit a judicial candidate from asking a lawyer for a personal loan or other personal benefits that are unrelated to elections. As characterized by Justice Scalia, “[c]ould anyone say with a straight face that it looks *worse* for a candidate to say ‘please give my campaign \$25’ than to say ‘please give *me* \$25’?”<sup>90</sup> After citing cases where the Court has recently struck down underinclusive laws that are content-based restrictions,<sup>91</sup> Justice Scalia noted that he could not vote to sustain the current regulation. Justice Scalia characterized the majority's approach as tone deaf and one that

85. *Williams-Yulee*, 135 S. Ct. at 1666.

86. Jessica Conser, Comment, *Achievement of Judicial Effectiveness Through Limits on Judicial Independence: A Comparative Approach*, 31 N.C.J. INT'L L. & COM. REG. 255, 274 (2005).

87. See generally Debra Erenberg & Matt Berg, *The Dark Night Rises: The Growing Role of Independent Expenditures in Judicial Elections after Citizens United*, 49 WILLAMETTE L. REV. 501 (2013) (“explain[ing] how *Citizens United* [has] exacerbated existing trends related to judicial election spending and how it has helped increase the influence of independent groups and dark money on these races”).

88. *Williams-Yulee*, 135 S. Ct. at 1665.

89. *Id.* at 1680–82 (Scalia, J., dissenting).

90. *Id.* at 1680–81 (Scalia, J., dissenting).

91. *Id.* at 1681 (Scalia, J., dissenting) (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387–88 (1992); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215 (1975)).

exemplified the hubris he sometimes saw in unelected federal judges deciding the rules applied to state-level judicial candidates running for elective office:

A Court that sees impropriety in a candidate's request for *any* contributions to his election campaign does not much like judicial selection by the people. One cannot have judicial elections without judicial campaigns, and judicial campaigns without funds for campaigning, and funds for campaigning without asking for them. When a society decides that its judges should be elected, it necessarily decides that selection by the people is more important than the oracular sanctity of judges, their immunity from the (shudder!) indignity of begging for funds, and their exemption from those shadows of impropriety that fall over the proletarian public officials who must run for office. . . . The prescription that judges be elected probably springs from the people's realization that their judges can become their rulers—and (it must be said) from just a deep-down feeling that members of the Third Branch will profit from a hearty helping of humble pie, and from a severe reduction of their great remove from the (ugh!) People.<sup>92</sup>

Thus, Justice Scalia saw judicial elections as carrying with them the reality that judicial candidates must raise funds for office.<sup>93</sup> Just as other elected officials can “profit from a hearty helping of humble pie” by campaigning for office, including asking for funds in the process, as a way to be held accountable, so can judges.<sup>94</sup> And if judges are in this position, the First Amendment protects them too, according to Justice Scalia.

Justice Scalia correctly noted that judicial elections are here to stay for the foreseeable future and that the reality of any major con-

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92. *Id.* at 1681–82 (Scalia, J., dissenting).

93. *Id.* (Scalia, J., dissenting).

94. *Id.* at 1682 (Scalia, J., dissenting).



tested election is that funds must be raised and spent to promote a candidate.<sup>95</sup> But Justice Scalia failed to see sufficiently the dangers that exist and the real tension between judicial elections and judicial integrity and independence. The language he used (e.g., “shudder!” and “ugh!”) suggests that he did not treat the issue with the seriousness it deserves.<sup>96</sup> For the reasons outlined in Justice Ginsburg’s concurrence, allowing too much connection between judicial candidates and donors threatens judicial integrity and at the very least, threatens the appearance of judicial integrity.<sup>97</sup> Finally, although Justice Scalia’s comparison between a candidate asking someone to give \$25 to their campaign and a candidate asking someone to give \$25 to them personally raises an interesting ethics issue, it is not relevant to the facts of the *Williams-Yulee*. If a candidate used the funds in the latter scenario for his or her campaign, the candidate would be violating the law; if the state of Florida wanted to make the latter solicitation illegal when the funds are used personally outside of a campaign, it would (and could) do so under an ethics rule dealing with non-candidate judicial behavior. Either way, Justice Scalia’s point does not make the rule underinclusive.

All told, Chief Justice Roberts took the best approach by maintaining that protecting judicial integrity and the public’s confidence in it is compelling. Indeed, Justice Kennedy said as much in *White*<sup>98</sup> in a concurrence that was later quoted approvingly by the Court majority in *Caperton*; a case in which the Court struck down as unconstitutional a judge sitting on a case after one of the parties to the action spent, directly and indirectly, \$3 million on the judge’s campaign.<sup>99</sup> According to the majority in *Caperton*, “[j]udicial integrity is, in consequence, a state interest of the highest order.”<sup>100</sup> Although the *Williams-Yulee* dissenters, particularly Justice Scalia, would argue that no compelling

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95. See *Outside Spending by Special Interests Floods Judicial Elections at Record Percentage, Report Finds*, BRENNAN CTR. FOR JUST. (Oct. 29, 2015), <https://www.brennancenter.org/press-release/outside-spending-special-interests-floods-judicial-elections-record-percentage-report>.

96. *Williams-Yulee*, 135 S. Ct. at 1681–82 (Scalia, J., dissenting).

97. See *id.* at 1674–75 (Ginsburg, J., concurring).

98. *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring).

99. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009) (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (Kennedy, J., concurring)).

100. *Id.* (quoting *White*, 536 U.S. at 793 (Kennedy, J., concurring)).

interest existed in *Williams-Yulee*, it is clear that there is a compelling interest. Protecting the integrity of elections, particularly the integrity of judicial elections, is a paramount interest. As the Court described in *Caperton*, it “is axiomatic that ‘[a] fair trial in a fair tribunal is a basic requirement of due process.’”<sup>101</sup> One of the threats to the fairness of judicial proceedings and the neutral treatment of parties is an overly close association between judges and the people financing their campaigns, particularly if a party in a case was one of the judge’s campaign financiers. As *Caperton* also pointed out, even the appearance of a judge’s impropriety can cast doubt upon the integrity of the judiciary.<sup>102</sup> Thus, to protect a judiciary’s independence and impartiality from such threats, states certainly have a compelling interest, as implicated in *Williams-Yulee*.<sup>103</sup>

### C. Narrow Tailoring

Having found a compelling interest, Chief Justice Roberts, in *Williams-Yulee*, then turned to the second part of the strict scrutiny analysis: asking whether the rule was narrowly tailored. In this regard, the Chief Justice found that very little speech was restricted because the rule permits judicial candidates to do all of the following:

Canon 7C(1) leaves judicial candidates free to discuss any issue with any person at any time. Candidates can write letters, give speeches, and put up billboards. They can contact potential supporters in person, on the phone, or online. They can promote their campaigns on radio, television, or other media. They cannot say, “Please give me money.” They can, however, direct their campaign committees to do so.<sup>104</sup>

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101. *Id.* at 877 (alteration in original) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

102. *Id.* at 888.

103. Stephen J. Ware, *Judicial Elections, Judicial Impartiality and Legitimate Judicial Lawmaking: Williams-Yulee v. The Florida Bar*, 68 VAND. L. REV. EN BANC 59, 64–66 (2015).

104. *Williams-Yulee*, 135 S. Ct. at 1670.

Thus, a tremendous number of speech outlets remain available to judicial candidates, increasing the probability that the restriction was narrowly tailored.

Still, Yulee argued that the restriction went too far, and instead of restricting all solicitations for campaign funds, the rule could have restricted candidates from specifically asking lawyers or litigants for donations. Alternatively, the rule could have restricted only in-person solicitations; Yulee argued that no one would lose confidence in the integrity of the judiciary based on a letter posted online and in a mass mailing.<sup>105</sup> Even though the rule could be written to restrict less speech, Chief Justice Roberts stated unequivocally that the Justices “decline to wade into this swamp” because “[t]he First Amendment requires that Canon 7C(1) be narrowly tailored, not that it be ‘perfectly tailored.’ The impossibility of perfect tailoring is especially apparent when the State’s compelling interest is as intangible as public confidence in the integrity of the judiciary.”<sup>106</sup> Although some forms of personal solicitation may raise greater risks to judicial integrity than others, the Chief Justice found that all forms of solicitation pose enough risk that banning them all is narrowly tailored enough to satisfy strict scrutiny.<sup>107</sup> Chief Justice Roberts bolstered this argument by citing the fact that most states with elected judges have a similar rule and said that these “considered judgments deserve our respect.”<sup>108</sup>

A portion of the Chief Justice’s argument here is a bit misplaced, although, on the whole, it is reasonable. True, perfect tailoring is not required by strict scrutiny. To borrow a phrase from another area of the Court’s First Amendment jurisprudence, there is some room for “play in the joints.”<sup>109</sup> In other words, a requirement of perfect tailoring without any wiggle room for state bar associations to adopt different rules designed to address specific issues that arise in each state would be unduly burdensome on the states.<sup>110</sup> Where the Chief Justice goes too far, however, is in his description of the Court needing to give

105. *Id.* at 1670–71.

106. *Id.* at 1671.

107. *Id.*

108. *Id.* (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)).

109. *Locke v. Davey*, 540 U.S. 712, 718 (2004) (quoting *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 669 (1970)).

110. *Cf.* Vicki C. Jackson, Essay, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 *DUKE L.J.* 223, 265 (2001).

respect to the “considered judgments” of state bar associations’ rules.<sup>111</sup> It is difficult to think of other contexts where the Court has given respect to “considered judgments” of state officials making rules that impose a content-based restriction on speech, especially speech that relates directly to the democratic process and politics. For instance, in *Texas v. Johnson*, the Court did not give such deference to the considered judgments of a state legislature wanting to protect the flag as a symbol of national unity.<sup>112</sup> More pertinently, the Court did not give such deference to Congress in either *Citizens United* or *McCutcheon*, even though, in both of those cases, the law in question also dealt with the corrupting influence of much more money or indirect campaign assistance than was likely to have been raised by Yulee by her solicitations.<sup>113</sup> Chief Justice Roberts went too far in this portion of his analysis, but he reached the correct result in holding that the rule was narrowly tailored. It restricts no more speech than necessary to accomplish its goal of preserving the integrity of elections. Even if there might be other means used to accomplish this goal, such as only barring candidates from asking for donations from lawyers or litigants or restricting only in-person solicitations, the fact is that the rule, as written, permits a great deal of speech and allows candidates to effectively campaign and express their messages, especially considering that a campaign committee can be created to act on the candidate’s behalf.

Granted, allowing candidates to ask for contributions by proxy still raises some difficult issues. If contributions made online can be banned because of the appearance of corruption, and judges can track just as easily who gives money to their campaign committee, then the Florida rule appears facially inconsistent. Additionally, similar issues are raised and not fully addressed by allowing judicial candidates to send thank you notes to donors. But it is a reflection of the difficult conflicts posed by judicial elections.<sup>114</sup> At a certain point judicial elections require states to delicately balance two different rights against

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111. *Williams-Yulee*, 135 S. Ct. at 1671 (quoting *Gregory*, 501 U.S. at 460).

112. 491 U.S. 397 (1989).

113. See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1443 (2014); *Citizens United v. FEC*, 558 U.S. 310, 319–20 (2010).

114. See Rachel Paine Caufield, *In the Wake of White: How States are Responding to Republican Party of Minnesota v. White and How Judicial Elections are Changing*, 38 AKRON L. REV. 625, 644 (2005).

each other: the free speech rights of judicial candidates and the due process rights of parties that appear in front of a judge after his or her election.<sup>115</sup> In this regard, Florida could have narrowly tailored its rules by also barring other, similar forms of campaign activities that potentially call into question judicial integrity. But states also need to permit some method for judicial candidates to raise money as campaign spending is an inescapable reality for most candidates running for office today, including many judicial candidates.<sup>116</sup> Furthermore, the state could have put in place a rule that requires campaign committees, rather than candidates themselves, to write thank you notes. But, as Chief Justice Roberts explained, narrowly tailored does not mean perfectly tailored. States retain some policy choices within the confines of the First Amendment.

Justice Scalia did not see eye-to-eye with the Chief Justice on the issue of narrow tailoring, beginning this portion of his analysis by stating that even if “we play along with the premise that prohibiting solicitations will significantly improve the public reputation of judges,” Canon 7C(1) falls far short.<sup>117</sup> For Justice Scalia, the prohibition is far too sweeping in that it is not restricted to lawyers or litigants who will appear before a judicial candidate should he or she be elected.<sup>118</sup> Instead, for Justice Scalia the canon’s fatal flaw is that it prohibits a candidate from asking *anyone* for money, including long-time friends and family members, who, if they appeared in the judge’s court would trigger the judge’s recusal anyway.<sup>119</sup> He continued on and found fault in imposing the rule against Yulee for posting her request online, where no one would feel personal pressure to make a donation and no one would fear retribution from the judge after the election for not making a donation.<sup>120</sup> Justice Scalia sarcastically characterized the situation as follows: “This tailoring is as narrow as

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115. Jacintha M. Webster, Note, *An Impossible Balance: Judicial Elections and the Constitution*, 9 ALB. GOV'T L. REV. 384, 399 (2016).

116. Anthony Champagne & Kyle Cheek, *The Cycle of Judicial Elections: Texas as a Case Study*, 29 FORDHAM URB. L.J. 907, 924 (2002).

117. *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1679 (2015) (Scalia, J., dissenting).

118. *Id.* (Scalia, J., dissenting).

119. *Id.* (Scalia, J., dissenting).

120. *Id.* (Scalia, J., dissenting).

the Court's scrutiny is strict."<sup>121</sup> Instead, Justice Scalia found that a multitude of other rules would have been properly tailored under strict scrutiny, including bans on soliciting participants in pending cases, bans on soliciting people who are likely to appear in the candidate's court, bans on soliciting any lawyer or litigant, regulations permitting candidates to make fundraising appeals that are not directed to any particular listener (like requests in mass-mailed letters), or fundraising appeals plainly directed to the general public (like requests placed online).<sup>122</sup> Finally, for Justice Scalia, the lack of narrowed tailoring raises other issues that were not addressed by the Court's majority opinion, such as a candidate appearing at an event where someone asks for funds on his or her behalf, a candidate's family member making personal solicitations on the candidate's behalf, a state ban on thank you notes by a judicial candidate, and a host of other unresolved issues.<sup>123</sup>

Justice Scalia again raised some good points, particularly that judicial candidates can track who gives them money and who does not under the methods that Florida still permits. Nevertheless, Justice Scalia asked for too much parsing in demanding that Florida provide for every single contingency. His opinion in this regard is precisely what Chief Justice Roberts called *perfect* tailoring as opposed to *narrow* tailoring. Indeed, there is quite a bit of speech in which the candidate can engage. Almost every topic of speech is still something that can be commented on by the candidate (thanks to the *White* case) and solicitations can still be made by the candidate's committee. Furthermore, solicitations of family and friends still threaten the appearance of impropriety because there may potentially be an unfair advantage garnered by a candidate with a larger, wealthier family. Similarly, solicitations online can create the appearance of impropriety by permitting judicial candidates to openly and personally beg for money, thus questioning the integrity of the judicial office by giving the appearance that a judicial candidate is for sale. Further, with regard to a mass-mailing solicitation for campaign funds, it is not necessarily clear to the recipient whether the letter is part of a mass mailing or a specialized request to that recipient. In other words, Justice Scalia's examples here

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121. *Id.* (Scalia, J., dissenting).

122. *Id.* (Scalia, J., dissenting).

123. *Id.* at 1680 (Scalia, J., dissenting).

do not raise doubt about the narrow tailoring of Canon 7C(1). By directing Florida how to rewrite their judicial ethics rule with such specificity, Justice Scalia appeared to be engaging in an analysis of the construction of the ethics code itself rather than determining the rule's constitutionality. This is not, however, to belie the fact that Justice Scalia raises some difficult questions; he certainly does. But those difficult questions will remain with us as long as judicial elections are used to select judges. For instance, when Justice Scalia suggests that the rule is improper because it bans campaign contributions by a candidate's "friends," how would he define the word "friend"? And what is to say that a trial judge, especially in a less populated jurisdiction, will not see a case involving such a person? Thus, Justice Scalia's parsing of the rule leads to its own set of potential problems that require even more parsing, which would tend toward a never-ending process of trying to achieve perfect tailoring.

Also applying strict scrutiny, Justice Kennedy, like Chief Justice Roberts, found that Florida had a compelling interest in "seeking to ensure the appearance and the reality of an impartial judiciary"; for Kennedy, however, it did not logically follow that the State may "alter basic First Amendment principles" in pursuing that goal.<sup>124</sup> In this regard, it appears that Justice Kennedy was concerned with a judicial candidate who is not able to staff a campaign committee, putting that judicial candidate at a disadvantage compared to an opponent who does have access to a campaign committee that can solicit funds on her or his behalf.<sup>125</sup> Furthermore, if the candidate's speech is silenced during an election, it deprives everyone from hearing it, raising significant First Amendment concerns: "By cutting off one candidate's personal freedom to speak, the broader campaign debate that might have followed—a debate that might have been informed by new ideas and insights from both candidates—now is silenced."<sup>126</sup> Instead, Justice Kennedy's answer to the problem is to allow more candidates more speech, not less, because any potential corruption could be exposed via the Internet.<sup>127</sup>

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124. *Id.* at 1683 (Kennedy, J., dissenting) (citing *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002)).

125. *Id.* (Kennedy, J., dissenting).

126. *Id.* (Kennedy, J., dissenting).

127. *Id.* at 1684–85 (Kennedy, J., dissenting).

Rounding out the dissenters, Justice Alito filed a short three-paragraph opinion. He too thought it proper to apply strict scrutiny because the law in question is a content-based regulation of electoral speech.<sup>128</sup> Like Justice Kennedy, Justice Alito found a compelling interest for Florida because Florida's law was "making sure that its courts decide cases impartially and in accordance with the law and that its citizens have no good reason to lack confidence that its courts are performing their proper role."<sup>129</sup> Like Justice Scalia, however, Justice Alito preferred to use more colorful language to get his point across about the means portion of the strict scrutiny test, stating that the "rule is about as narrowly tailored as a burlap bag" because it applies to all direct solicitations by a candidate in any format to any person.<sup>130</sup>

Regarding points about narrow tailoring raised by Justices Kennedy and Alito in dissent, one can first turn to the issue of a judicial candidate who cannot field a campaign committee. Justice Kennedy's hypothetical raises a seemingly valid concern, but the candidate that he describes is not a realistic judicial candidate. The First Amendment does not guarantee listeners for a speaker, nor does it guarantee that like-minded persons will join a campaign committee formed to support a candidate. If a candidate has any realistic chance of winning a major contested election, he or she will have at least some supporters who would be willing to serve on a campaign committee to help raise funds for that candidate. If one has no supporters who would serve on a campaign committee, it would be difficult to believe that such a candidate would be able to secure a majority of voters in a contested election.

Further, Justice Kennedy's concern about cutting off speech, although sound in theory, is almost non-existent in practice: how many ideas will never see the light of day because a surrogate acting for a candidate has to ask for money instead of the candidate asking for money himself or herself? Certainly, there may be some. But it will be exceptionally rare. The speech the candidate would have given in the absence of such a rule would likely be very similar to what is spo-

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128. *Id.* at 1685 (Alito, J., dissenting).

129. *Id.* (Alito, J., dissenting).

130. *Id.* (Alito, J., dissenting).



ken by the campaign's surrogate in this context. Since judicial candidates may still speak to the voters about any legal and political issue,<sup>131</sup> there is quite a bit of speech that is protected, even with Canon 7C(1)'s limitations. Additionally, just like putting certain reasonable limits on campaign contributions is not seen as a sufficient threat to the freedom of speech,<sup>132</sup> even though it means some candidate ideas might not be broadcast in television commercials, so too is it the case that the Florida Bar rule negates few, if any, ideas from the public discourse. Justice Kennedy's response to the issue that more speech, not less, is the answer because the Internet can expose corruption, is generally true and makes sense in theory.<sup>133</sup> When dealing with speech about public issues, "more speech" is often a better solution than the restriction of expression. But asking for money changes the equation because it tempts both the candidate and the donor to enter into a financial relationship in which the donor and observers may believe that the judge could be expected to "repay" a contribution in future cases; this threat is especially acute as the amounts donated grow larger.<sup>134</sup> When money requests can potentially affect how judges will decide cases or even the public's perception of judges' decisions, real risks to judicial independence and integrity are created that Justice Kennedy ignores, making Chief Justice Roberts's approach much more sound.

Even though he had already found the means narrowly tailored, Chief Justice Roberts addressed an additional contention from Yulee: that the same means could be achieved instead by recusal rules (something also noted by Justice Scalia) and campaign contribution limits.<sup>135</sup> The Chief Justice dismissed these arguments in short order, claiming that this could lead to a "flood of postelection recusal motions" that would erode public confidence in the judiciary and that could even create "a perverse incentive for litigants to make campaign contributions to judges solely as a means to trigger their later recusal—a form of preemptory strike against a judge that would enable transparent forum

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131. See *Republican Party of Minn. v. White*, 536 U.S. 765, 781–82 (2002).

132. See *Buckley v. Valeo*, 424 U.S. 1, 21 (1976).

133. See Richard Briffault, *Two Challenges for Campaign Finance Disclosure After Citizens United and Doe v. Reed*, 19 WM. & MARY BILL OF RTS. J. 983, 1014 (2011).

134. Cf. Jennifer Mueller, *The Unwilling Donor*, 90 WASH. L. REV. 1783, 1818–19 (2015).

135. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1671 (2015).

shopping.”<sup>136</sup> Additionally, he noted that Florida already has contribution limits, and, furthermore, that a state may “decide that the threat to public confidence created by personal solicitation exists apart from the amount of money that a judge or judicial candidate seeks.”<sup>137</sup> He went on to note that even for “political elections,” by which it appears he means legislative and executive office elections, states may pursue measures beyond contribution limits to prevent quid pro quo corruption and the appearance of such corruption.<sup>138</sup> It was then that Chief Justice Roberts uttered what was perhaps the most memorable line from the opinion of the Court: “a State has compelling interests in regulating judicial elections that extend beyond its interests in regulating political elections, because judges are not politicians.”<sup>139</sup> Thus, even though a similar provision restricting the expression of legislative candidates or gubernatorial candidates would be harder to sustain constitutionally, judges are categorized differently from other elected officials, and the considerations states must take into account for judicial elections provide greater leeway to regulate judicial candidates’ speech.

Again, on the whole, the Chief Justice had useful reasoning that was on point and consistent with previous relevant rulings by the Court. Potential recusal rules and contribution limits create their own set of problems. But states could adopt them if they found these approaches necessary, as part of the notion of narrow tailoring not being perfect tailoring, a concept that is not new to free speech analysis.<sup>140</sup> What the Chief Justice described as “peremptory strike” recusals pose a direct threat to judicial independence and integrity by permitting litigants to strategically choose their own judges; although this could potentially be nullified by the judge refusing or returning the contribution, thus alleviating any impropriety or the appearance of impropriety of the judge directly accepting contributions. Nevertheless, Chief Justice Roberts correctly asserted that this is a policy choice for each state to make and not a policy that the First Amendment commands.

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136. *Id.* at 1671–72.

137. *Id.* at 1672.

138. *Id.*

139. *Id.*

140. See Fred C. Zacharias, *Flowcharting the First Amendment*, 72 CORNELL L. REV. 936 (1987) (referring throughout to “nearly perfect” tailoring as opposed to perfect tailoring).

Finally, there is the Chief Justice's statement that "judges are not politicians." On the one hand, he correctly implied (as it appears his statement intends to say) that judges are in a different class than candidates for elective legislative and executive offices, as these types of candidates are expected to serve as representatives and carry out the will of their constituents upon taking office.<sup>141</sup> Judges, on the other hand, are expected to adhere to the rule of law, even in the face of popular pressures to the contrary.<sup>142</sup> It is rules such as the one at issue in *Williams-Yulee* that permit states to hold judicial elections while also preserving judicial independence, so that judges can be faithful to the rule of law. Maintaining that distinction is important. Chief Justice Roberts's word choice, however, could be improved. Under just about any political science definition, judges—especially elected judges—could also be classified as "politicians." For example, a well-accepted definition of "politics" is Harold Lasswell's notion that it is the determination of who gets what, when, and how.<sup>143</sup> Put another way, "politics" includes the study of power and its exercise in various dimensions.<sup>144</sup> In this sense, judges *are* politicians, in that they determine who wins a case; how the law is interpreted and applied; and how resources are allocated after a case is concluded, such as the awarding of civil damages and meting out of punishments in criminal cases. The difference between judges and other politicians, however, is that judges have a distinct institutional role to fulfill and work under different constraints than legislative and executive officials,<sup>145</sup> something that most Americans still think is important for courts to be considered

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141. Vicki C. Jackson, *Pro-Constitutional Representation: Comparing the Role Obligations of Judges and Elected Representatives in Constitutional Democracy*, 57 WM. & MARY L. REV. 1717, 1745 (2016).

142. *Id.* at 1738.

143. HAROLD D. LASSWELL, *POLITICS: WHO GETS WHAT, WHEN, HOW* (Peter Smith ed., 1936).

144. See Winston P. Nagan & Craig Hammer, *The Changing Character of Sovereignty in International Law and International Relations*, 43 COLUM. J. TRANSNAT'L L. 141, 146 (2004).

145. See HOWARD GILLMAN, *THE CONSTITUTION BESIEGED* (1993); Neil K. Komesar, *A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society*, 86 MICH. L. REV. 657, 661–64 (1988).

legitimate.<sup>146</sup> Thus, Chief Justice Roberts was correct in characterizing what judges do as fundamentally different from what legislators, governors, and presidents do, even if his terminology to describe the distinction is a bit misleading.

#### IV. APPLYING *WILLIAMS-YULEE*'S REASONING TO SIMILAR JUDICIAL ETHICS RULES

The issues raised by *Williams-Yulee* and the effects of the ruling extend well beyond the boundaries of Florida. Thirty-eight states conduct elections for their courts of last resort, and when including retention elections, nearly ninety percent of state appellate judges must regularly be reelected.<sup>147</sup> State judges presiding over trial courts of general jurisdiction, when including judges in merit systems with retention elections, are subject to election, reelection, or both in thirty-nine states.<sup>148</sup> When considering the forty-five states with trial courts of limited jurisdiction, e.g. municipal courts, city courts, justice of the peace courts, and others, in 35 of those states at least some of these judges are subject to elections, including retention elections.<sup>149</sup> Assuming that many judges around the country will continue to be subjected to elections and reelections, what does *Williams-Yulee* tell us about the balance of those judges' First Amendment rights and the need to ensure judicial integrity and decisional independence?<sup>150</sup>

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146. James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 LAW & SOC'Y REV. 195 (2011).

147. SCOTT GREYTAK ET AL., BRENNAN CTR. FOR JUSTICE, BANKROLLING THE BENCH 1 (Laurie Kinney ed., 2015), <http://newpoliticsreport.org/app/uploads/JAS-NPJE-2013-14.pdf>.

148. AM. JUDICATURE SOC'Y, JUDICIAL SELECTION IN THE STATES (2013), [http://www.judicialselection.us/uploads/documents/Judicial\\_Selection\\_Charts\\_1196376173077.pdf](http://www.judicialselection.us/uploads/documents/Judicial_Selection_Charts_1196376173077.pdf).

149. *Methods of Judicial Selection: Limited Jurisdiction Courts*, NAT'L CTR. FOR ST. CTS., [http://www.judicialselection.us/judicial\\_selection/methods/limited\\_jurisdiction\\_courts.cfm?state](http://www.judicialselection.us/judicial_selection/methods/limited_jurisdiction_courts.cfm?state) (last visited June 13, 2017).

150. Without delving into the merits or demerits of election and reelection as methods of judicial selection and retention, the discussion below assumes that electoral systems for judges do, and will continue to, exist in many states. See CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS (2009) (defending judicial elections); Martin H. Redish & Jennifer Aronoff, *The Real Problem with State Judicial Selection: Due Process, Judicial Retention, and the Dangers of*

Applying the *Williams-Yulee* standard to ethics rules regulating judicial campaigning serves to safeguard both the freedom of speech and the rights of parties in states with elected judiciaries. Every state has its own set of judicial ethics requirements, but many mirror the ABA Model Rules of Judicial Conduct.<sup>151</sup> Particularly relevant for present purposes is the Model Code's Canon 4, which states that "a judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary."<sup>152</sup> This explains a goal that was at stake in the *Williams-Yulee* case. Canon 4 then has five rules, with various sections, that specify how a judge or candidate for judicial office is to comply with this general principle. In the discussion that follows, the Model ABA Rules will serve as illustrative examples of similar ethics rules nationwide.

One relevant ABA provision is Rule 4.5(A), which requires that, "[u]pon becoming a candidate for a nonjudicial elective office, a judge shall resign from judicial office."<sup>153</sup> Because the rule affects how a candidate can conduct one's campaign for office and what the candidate can say, it has First Amendment implications for the rights of candidates.<sup>154</sup> The rule is aimed at protecting the judiciary's independence, integrity, and impartiality. If a judge is campaigning for a legislative or executive office, that judge may be tempted to issue rulings that make the candidate more appealing to the voters in ways that are very different when running for judicial office. For instance, a judge may hand down decisions he or she believes to be publicly perceived as "fiscally responsible" or "anti-establishment" if those are the salient issues raised by an opponent in a legislative or executive race. Indeed, the nature of legislative and executive elections have traditionally tended to be much more competitive, partisan, and salient,<sup>155</sup> meaning they are fundamentally different types of campaigns with different interests at stake when compared to judicial elections. While

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*Popular Constitutionalism*, 56 WM. & MARY L. REV. 1 (2014) (arguing against judicial elections), for discussion of pros and cons related to this issue.

151. See MODEL CODE OF JUDICIAL CONDUCT (AM. BAR ASS'N 2010).

152. *Id.* Canon 4.

153. *Id.* Rule 4.5.

154. *Republican Party of Minn. v. White*, 536 U.S. 765, 787–88 (2002).

155. David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 266 (2008).

this threat of tailoring decisions to voters also exists if a sitting judge is running for reelection or is running for another judicial office, that threat is much less likely to materialize because a sitting judge already has a judicial record on which to run.

There is a significant threat, however, of non-legal considerations affecting a judge's decisions when that judge is campaigning for nonjudicial office. For example, in *Tumey v. Ohio*, the Court held that it is unconstitutional for a judge to also serve as its city's mayor.<sup>156</sup> In a majority opinion penned by Chief Justice William Howard Taft, the only U.S. Supreme Court justice with past experience as President of the United States, the Court proclaimed that a "situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him."<sup>157</sup> In *Tumey*, the Court was concerned with, among other things, a mayor-judge potentially finding someone guilty because the fine would help the city's budget.<sup>158</sup> The rights of parties are similarly threatened even if the judge does not yet occupy a nonjudicial office but is campaigning for one. For example, as noted above, it may be advantageous for the judge to be perceived as "fiscally sound," which could result in the judge increasing fines against defendants; if a judge running for another office instead thought that being known as "anti-establishment" could help her or him get elected to a non-judicial office, that judge might begin dismissing cases of disorderly conduct. Thus, there is clearly a compelling interest for such an ethics rule under *Williams-Yulee*. There is no other way of limiting the First Amendment expression of judges than by barring them from campaigning for a nonjudicial office until after they have resigned their judicial office, making the model ABA rule, if a state adopts it, constitutional under the standard announced in *Williams-Yulee*.

Another relevant ABA restriction is Rule 4.1(A)(3), which states that judges and judicial candidates shall not "publicly endorse or oppose a candidate for any public office."<sup>159</sup> According to the standards the Court set in *Williams-Yulee*, the ABA rule (if a state adopts it)

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156. 273 U.S. 510, 532–34 (1927).

157. *Id.* at 534 (citing *State ex rel. Colcord v. Young*, 12 So. 673 (1893)).

158. *Id.* at 532–34.

159. MODEL CODE OF JUDICIAL CONDUCT r. 4.1(A)(3) (AM. BAR ASS'N 2010).

would fail strict scrutiny. The compelling interest is keeping judges and judicial candidates out of legislative and executive politics generally to ensure that the judiciary is truly independent and not the lackey of the other branches. On tailoring, however, the ABA rule is not narrow enough. By prohibiting *all* endorsements by judges and judicial candidates, the rule goes a step too far. For instance, the rule would prohibit an appellate judge from endorsing a trial judge for office. Such a rule curtails the expression of the appellate judge, who cannot be swayed by the virtue of the trial judge's office;<sup>160</sup> is not under the authority of the trial judge in any way; and, as a member of the judiciary, may need to make important, substantive comments to the public that demonstrate the trial judge's worthiness. An appellate judge's speech in such an instance may be speech that cannot realistically be offered by anyone else and deserves protection if it regards a matter of public concern, such as a judicial election.<sup>161</sup> Thus, the model ABA rule is unconstitutionally overbroad and would need to be more narrowly tailored before being adopted.

Another model rule promoted by the ABA relates directly to the issue of partisanship. ABA Rule 4.1(A) states that, unless permitted by law, a judge or judicial candidate shall not "act as a leader in, or hold an office in, a political organization," "make speeches on behalf of a political organization," "solicit funds for, pay an assessment to, or make a contribution to a political organization," "attend or purchase tickets for dinners or other events sponsored by a political organiza-

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160. There is a scenario where an appellate judge could, after a trial judge's election, appear as a party before that trial judge in a criminal or civil case. This presents the potential to place the appellate judge under the trial judge's authority. However, such a scenario will be exceedingly rare, given that there are typically a relatively small number of appellate judges in a state. An endorsement, as a form of pure speech, has more First Amendment protection than a financial contribution, see, e.g., *Buckley v. Valeo*, 424 U.S. 1, 18–19 (1976), and the speech at issue would outweigh any countervailing interests. Finally, recusal remains an option if an appellate judge made such an endorsement and later found herself or himself before the trial judge; since there are many more potential donors than there are appellate judges, this does not raise the potential "flood of postelection recusal motions" that Chief Justice Roberts feared regarding donations. See *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1671 (2015).

161. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (finding a teacher's right to comment on matters of public concern).

tion,” or “publicly identify himself or herself as a candidate of a political organization.”<sup>162</sup> According to the ABA’s “Terminology” section of the Model Rules of Judicial Conduct, a “political organization” includes “a political party or other group sponsored by or affiliated with a political party or candidate, the principal purpose of which is to further the election or appointment of candidates for political office.”<sup>163</sup> The caveat about “unless permitted by law” is meant to signal that this rule would not need to be adopted by a state that permits a partisan judiciary.<sup>164</sup> The ABA model rules on this matter are very inclusive, prohibiting judges from participating a great deal in political parties. This set of rules implicates, in various parts, either freedom of speech or freedom of association rights, or both, which requires the government to establish a compelling interest to sustain the law.<sup>165</sup> Can this set of rules claim a compelling interest? If a jurisdiction has determined that it will make use of a nonpartisan judiciary to achieve the goals of judicial integrity and independence, then banning judges’ and judicial candidates’ involvement in partisan affairs is a compelling interest, following the reasoning of *Williams-Yulee*. Obviously, this would only apply to a state that establishes a nonpartisan judiciary and adopts this ABA rule. If a state permitted candidates to run as members of a political party, however, there would be no compelling reason to establish any of the ABA’s rules announced concerning partisanship. Thus, with only one possible exception explored below, all of the rules specified above have a compelling interest.

When determining whether the respective rules are narrowly tailored, though, the devil is in the details. Most, but not all, of the ABA model rules are narrowly tailored if one follows the majority’s approach in *Williams-Yulee*. The key is to recall Chief Justice Roberts’s admonition that rules like this need to be *narrowly* tailored, not *perfectly* tailored. A judge’s extensive public involvement in partisan activities and overt support for a political party could result in future litigants questioning whether the judge is making a decision on the law

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162. MODEL CODE OF JUDICIAL CONDUCT r. 4.1(A)(1)–(2), (4)–(6).

163. MODEL CODE OF JUDICIAL CONDUCT Terminology.

164. Plymouth Nelson, Comment, *Don’t Rock the Boat: Minnesota’s Canon 5 Keeps Incumbents High and Dry While Voters Flounder in a Sea of Ignorance*, 28 WM. MITCHELL L. REV. 1607, 1618–25 (2002).

165. See *Cal. Democratic Party v. Jones*, 530 U.S. 567, 586 (2000) (finding the state’s asserted interests incompatible with the petitioner’s first amendment rights).



or under partisan political considerations. This threat could be particularly acute if a judge is hearing a case involving a witness, plaintiff, or defendant who is a known member of a political party different from the judge's political party. Given this potential threat to due process, the ABA model rules prohibiting judges from being party leaders, publicly speaking on behalf of a party, publicly endorsing party platforms, openly participating in party functions and events, and making or soliciting financial contributions to or for a party are all narrowly tailored.

The ABA rules are too broadly tailored, however, when they prohibit attendance at a dinner sponsored by a political party. As the Supreme Court ruled in *De Jonge v. Oregon*, attendance at such an event implicates First Amendment rights,<sup>166</sup> requiring review under strict scrutiny; therefore this rule is too broad to survive this constitutional muster. Unlike making public statements of support or raising funds for a political party, which are activities that would require a judge to take a strong stance regarding his or her beliefs about a political party, a judge may merely attend an event for a variety of reasons. A judge may be present at an event because the judge is being honored for his or her service to the community at an event co-sponsored by a political party and various nonprofit organizations, or perhaps a judge is attending a party-sponsored dinner because the judge's spouse is an active party member. In short, there are a variety of reasons why a judge might attend a political party's sponsored dinner that do not threaten the judge's integrity or the public's perception of the judge. Attendance at an event where one might sit discretely and quietly in the back of the room does not appear to raise any questions about judicial integrity and independence. Thus, this is not a narrowly tailored way to implement these compelling interests, and the rule is unconstitutional as applied to judges' and judicial candidates' mere attendance at party events in states with nonpartisan judiciaries.

As a final example of judicial and judicial-candidate First Amendment speech rights, one can look to ABA Rule 4.1(A)(11), which states that judges and judicial candidates shall not "knowingly, or with reckless disregard for the truth, make any false or misleading statement" while campaigning.<sup>167</sup> This rule can successfully claim a

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166. 299 U.S. 353, 364–65 (1936).

167. MODEL CODE OF JUDICIAL CONDUCT r. 4.1(A)(11) (AM. BAR ASS'N 2010).

compelling interest. Per *Williams-Yulee*, preservation of judicial integrity and the public's perception of the judiciary's integrity are compelling state interests.<sup>168</sup> It is difficult to argue that a judge or judicial candidate misrepresenting the truth would align him or herself with judicial integrity or uphold the public's confidence in them. Looking at the rule's tailoring yields the same constitutional result. The model ABA rule prohibits a judge or judicial candidate from making statements he or she knows are false or making statements with reckless disregard for the truth. This standard was not arrived at arbitrarily: this well-known language is identical to verbiage used in the U.S. Supreme Court's ruling in *New York Times v. Sullivan*, where the Court stated that the First Amendment protects public statements about public officials against libel lawsuits unless the statements were made with actual malice, which the Court defined as "knowledge that it was false or with reckless disregard of whether it was false or not."<sup>169</sup> This language is narrowly tailored because it prohibits judges and judicial candidates from making statements that have no First Amendment protection against libel claims. Thus, that portion of each rule bans no more speech than necessary, as a candidate who used the speech banned by the rule could be successfully sued for libel. In protecting judicial integrity, the rule then goes on to generally prohibit "misleading" statements during the campaign. This is tailored as closely as possible to the notion of promoting and protecting judicial integrity. Certainly, making insinuations about an opposing judicial candidate's identity, qualifications, or positions are specific and can be readily identified. Such speech does not serve any greater purpose than to get a candidate elected to office under false pretenses.

## V. CONCLUSION

Overall, in *Williams-Yulee*, the majority found that restrictions on judicial candidates' speech are to be reviewed under strict scrutiny because judges have different roles than other elected officials, protecting judicial integrity is a compelling interest, and the Florida Bar's rule was tailored narrowly to achieve that end. Justice Ginsburg, under the theory that judicial candidates are in a fundamentally different class

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168. 135 S. Ct. 1656, 1666 (2015).

169. 376 U.S. 254, 280 (1964).

from other elected officials, advocated for the use of a more deferential level of scrutiny and easily found the rule in question to be constitutional.<sup>170</sup> Justice Scalia also believed that judicial candidates' free speech restrictions should be judged under strict scrutiny but instead found that Florida failed to show a specific compelling interest and failed to show that the state's means for achieving its goal were narrowly tailored. Justices Kennedy and Alito agreed that review under strict scrutiny was appropriate for limitations on judicial candidates' speech, but unlike Justice Scalia, their disagreement merely regarded the breadth of the Florida rule. Finally, for the reasons outlined above, strict scrutiny was the appropriate standard of review to use and the majority opinion applied it properly.

*Williams-Yulee* is a tough case that raises difficult issues, which helps to explain why the decision was 5-4. But the majority took the right approach and struck the proper balance between judicial integrity, judicial independence, and free speech rights. Based on personnel changes on the Court since *Williams-Yulee* and potential personnel changes in the near future, the majority's approach to these issues is likely to remain the same for some time. With the death of Justice Scalia in early 2016 and his seat on the Court still vacant in early 2017, there currently exists a 5-3 majority in favor of upholding the Florida ethics rule at issue in *Williams-Yulee*. Now that Justice Gorsuch has been confirmed, and considering the justices likely to retire soon,<sup>171</sup> the Court is likely to remain closely divided on the application of *Williams-Yulee*; although there is little question that the application of strict scrutiny, which had the support of eight of nine justices in the case, will most certainly remain in place for the foreseeable future in these types of cases.

Judges live under many restrictions that curtail their freedom in various ways. Just like members of the active military may have their

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170. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1673 (2015) (Ginsburg, J., concurring).

171. At the time of this article's final submission in April 2017, the eldest three justices on the Supreme Court were Justice Ginsburg (age 84), Justice Kennedy (age 80), and Justice Breyer (age 78). See *Biographies of Current Justices of the Supreme Court*, SUP. CT. OF THE U.S. (last visited June 13, 2017), <https://www.supremecourt.gov/about/biographies.aspx>.

First Amendment rights partially restricted due to institutional concerns,<sup>172</sup> so too may judges and judicial candidates have their rights restrained slightly more than the general population. This is necessary because the needs of the court system—to function properly and impartially and to protect due process—override individual judges’ and judicial candidates’ free speech rights in certain, limited situations. Moreover, there is an integral connection in elective judicial systems between decisional independence and due process,<sup>173</sup> as a judge who is under pressure (or appears under pressure) to decide a case because of prior campaign activities is less than independent (or appears so), threatening the due process rights of at least one of the parties in the case. In this regard, restrictions on free speech, like Florida’s Canon 7C(1), serve to enhance judicial decisional independence by limiting the potentially corrosive intersection of judicial candidates and donors.<sup>174</sup> Similar to how the freedom of the press may be limited to protect the right to a fair trial,<sup>175</sup> so too may a judge’s and a judicial candidate’s freedom of speech be limited to protect the rights of parties in civil and criminal cases.

*Williams-Yulee* is an excellent clarification and continuation of the Court’s rulings in *White*, *Caperton*, *Tumey*, and similar cases regarding judicial candidates’ speech rights. *Williams-Yulee* puts in place strong protections for the First Amendment while looking out for the due process rights of parties to have their cases heard by independent, impartial judges. Although some laws that burden the freedom of speech will pass strict scrutiny, the high bar to do so ensures that government regulations certainly will not always pass this level of review.

When using strict scrutiny, however, courts should be mindful of Justice Breyer’s admonishment that the tiers of scrutiny should be “guidelines informing our approach to the case at hand, not tests to be

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172. *Goldman v. Weinberger*, 475 U.S. 503 (1986).

173. *Redish & Aronoff*, *supra* note 150, at 21.

174. See Geyh, *supra* note 56, at 18–24, for a more thorough discussion of judicial decisional independence and its relationship to campaign finance in judicial elections.

175. *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

mechanically applied.”<sup>176</sup> Constitutional tests like this should not be applied rigidly but rather used as a general framework. When judges’ and judicial candidates’ free speech rights are at stake, that framework needs to consider that it is a fundamentally different situation from an average citizen’s free speech rights. In other words, it is not *always* the case, as Gerard Gunther once famously wrote, that strict scrutiny is “‘strict’ in theory and fatal in fact.”<sup>177</sup> Context matters. Even though judges engage in politics, they are not “politicians” in the same way that legislators or executives are considered politicians. Judges take an oath to fulfill certain functions—including to ensure equal rights to the poor and to the rich, to faithfully and impartially perform their judicial duties, and to adhere to the Constitution<sup>178</sup>—regardless of the judges’ personal beliefs or opinions.

The U.S. Supreme Court has decided several cases in the last decade and a half—including *White*, *Caperton*, and *Williams-Yulee*—that have ruled on constitutional rights implicated by judicial elections. As long as judicial elections occur, there will be a tension between judges’ free speech rights and the need to preserve judicial independence and the due process rights of those who appear before elected judges, particularly as the cost of running in judicial elections continues to climb.<sup>179</sup> States that use judicial elections need to resolve those tensions while remaining mindful of the First Amendment.<sup>180</sup> *Williams-Yulee* strikes the proper balance by helping to promote free speech values, due process values, and judicial independence to a degree that sufficiently protects the rights of everyone involved.

176. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1673 (2015) (Breyer, J., concurring) (citing *United States v. Alvarez*, 132 S. Ct. 2537 (2012) (Breyer, J., concurring); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 400–03 (2000) (Breyer, J., concurring)).

177. Gerald Gunther, *The Supreme Court, 1971 Term: Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

178. *See, e.g.*, 28 U.S.C. § 453 (2012) (setting forth the oath required of U.S. Supreme Court justices and federal judges).

179. *See* Redish & Aronoff, *supra* note 150, at 15.

180. This analysis is not dissimilar from the balancing that sometimes must take place when substantial institutional goals are at stake, including in the military and the judiciary. *See* *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986).; *Sheppard*, 384 U.S. at 363.

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