First Amendment — Freedom of Speech — Judicial Campaign Speech — Williams-Yulee v. Florida Bar

States have selected judges by popular election since the early nineteenth century, often as a way of increasing judicial accountability to the public.[1] As campaign finance jurisprudence has developed over the past forty years,[2] the Supreme Court has weighed in on the question of what it means to be an elected official,[3] and on how that meaning is different when an elected official is a judge.[4] Last Term, in *Williams-Yulee v. Florida Bar*,[5] the Supreme Court held that a state prohibition on the personal solicitation of campaign funds by judicial candidates did not violate the First Amendment.[6] However, by not engaging in an analysis under the Due Process Clause, the Court provided an incomplete account of the constitutional interests at stake in cases regarding speech by judicial candidates. Instead, *Williams-Yulee* heightened a tension between cases governing the regulation of speech by judicial candidates and cases like *Citizens United v. FEC*[7] that have deregulated campaign finance by vigorously protecting political expenditures under the First Amendment.

In 2009, Lanell Williams-Yulee (Yulee), a candidate in a Florida judicial election, sent a fundraising letter to potential supporters and posted it on her campaign website.[8] After Yulee lost the election, the Florida Bar took steps to discipline her for violating its rules, which require that judicial candidates comply with Florida's Code of Judicial Conduct.[9] At issue was the Code's Canon 7C(1), which prohibits judicial candidates from personally soliciting campaign funds.[10] The Florida Supreme Court appointed a referee, who recommended that Yulee pay the Bar $1860.30 in costs and be publicly reprimanded.[11]

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[1] *See generally* JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS (2012). Today, voters elect judges (trial, appellate, or both) in thirty-nine states. Adam Liptak, *Supreme Court Upholds Limit on Judicial Fund-Raising*, N.Y. TIMES (Apr. 29, 2015), http://www.nytimes.com/2015/04/30/us/supreme-court-rules-in-williams-yulee-florida-judicial-fund-raising-case.html.

[2] Modern campaign finance law arguably began with *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). *See, e.g.*, Victoria S. Shabo, *"Money, Like Water . . .": Revisiting Equality in Campaign Finance Regulation After the 2004 "Summer of 527s,"* 84 N.C. L. REV. 221, 229–30 (2005).

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

[4] *See, e.g.*, Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009); Republican Party of Minn. v. White, 536 U.S. 765 (2002).

[5] 135 S. Ct. 1656 (2015).

[6] *Id.* at 1662.

[7] 558 U.S. 310.

[8] *Williams-Yulee*, 135 S. Ct. at 1663.

[9] *Id.*

[10] Fla. Bar v. Williams-Yulee, 138 So. 3d 379, 384–85 (Fla. 2014) (per curiam). The canon is similar to part of the ABA's Model Code of Judicial Conduct. *Id.* at 385.

[11] *Id.* at 381, 383.

On appeal to the court, Yulee argued that Canon 7C(1) was an unconstitutional infringement of her right to free speech.[12] Acknowledging that the canon restricted speech, the court analyzed it under the First Amendment using strict scrutiny, which requires speech restrictions to be narrowly tailored to serve a compelling government interest.[13] Drawing upon judgments in states with similar rules, the court found a compelling interest in the goal of "protecting the integrity of the judiciary and maintaining the public's confidence in an impartial judiciary."[14] The court then found the prohibition narrowly tailored because it targeted only the personal solicitation and receipt of funds, which the court characterized as activities that unavoidably create the "appearance of impropriety."[15] The ban thus provided candidates with "ample alternative means" for fundraising through the use of campaign committees.[16]

The Supreme Court affirmed.[17] Writing for the Court, Chief Justice Roberts[18] held that Canon 7C(1) survived First Amendment scrutiny.[19] However, the majority split as to the applicable level of scrutiny. Chief Justice Roberts found that the appropriate test was strict scrutiny,[20] citing a history of using strict scrutiny to review the regulation of fundraising activities benefiting charitable causes and reasoning that political fundraising merits at least as much scrutiny.[21] Yulee conceded the existence of a compelling interest,[22] which the majority characterized as an interest "in safeguarding 'public confidence in the fairness and integrity of the nation's elected judges'"[23] and an interest in preventing campaign contributions or lack thereof from *actually* influencing judges.[24] Distinguishing the assertion of a plurality in *McCutcheon v. FEC*[25] that elected officials affirmatively *should* be "responsive" to their financial supporters,[26] the Chief Justice noted that

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12 *Id.* at 383.

13 *Id.* at 384.

14 *Id.* at 385.

15 *Id.*

16 *Id.* at 387 (quoting Simes v. Ark. Judicial Discipline & Disability Comm'n, 247 S.W.3d 876, 883 (Ark. 2007)).

17 *Williams-Yulee*, 135 S. Ct. at 1662.

18 The Chief Justice was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan.

19 *See Williams-Yulee*, 135 S. Ct. at 1673.

20 Chief Justice Roberts was joined by Justices Breyer, Sotomayor, and Kagan in finding that strict scrutiny applied.

21 *See Williams-Yulee*, 135 S. Ct. at 1664–65. In a short concurrence, Justice Breyer reiterated his longstanding view that the free speech tiers of scrutiny are "guidelines informing our approach to the case at hand, not tests to be mechanically applied." *Id.* at 1673 (Breyer, J., concurring).

22 *Id.* at 1668 (majority opinion).

23 *Id.* at 1666 (quoting Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 889 (2009)).

24 *Id.* at 1667–68 (citing ALICIA BANNON ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2011–12, at 15 (Laurie Kinney & Peter Hardin eds., 2013)).

25 134 S. Ct. 1434 (2014).

26 *Williams-Yulee*, 135 S. Ct. at 1667 (citing *McCutcheon*, 134 S. Ct. at 1462 (plurality opinion)).

"the role of judges differs from the role of politicians" and that, unlike other elected officials, judges should not grant "special consideration" to their campaign donors.[27] He concluded that the line of Supreme Court cases addressing campaign finance should have "little bearing"[28] on Yulee's case and asserted that "[a] State's decision to elect judges does not compel it to compromise public confidence in their integrity."[29]

The majority rejected Yulee's argument that Canon 7C(1), because it allowed fundraising through campaign committees and the writing of thank you notes by candidates, was impermissibly underinclusive and therefore insufficiently tailored.[30] Yulee argued that both exceptions reduced public confidence as much as personal solicitation — the latter exception by highlighting to the public that candidates can keep track of who has contributed and who has not.[31] Chief Justice Roberts asserted that Canon 7C(1) was not "riddled with exceptions"[32] and that personal solicitation places a unique "pressure" on potential donors and decreases public confidence in judicial integrity because it suggests that candidates will "remember who says yes, and who says no," once they are elected.[33] As to the thank you notes, the Chief Justice argued that personal solicitation is more strongly related to the state's interests and characterized banning such notes as being too idealistic for "the real world of electoral politics."[34]

The Court also rejected Yulee's arguments that Canon 7C(1) was impermissibly overinclusive as applied to her letter, which she[35] sent

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[27] *Id.*

[28] *Id.*

[29] *Id.* at 1673.

[30] *Id.* at 1668–69. The Court noted the "counterintuitive" nature of invalidating a law for failing to restrict even more speech but acknowledged that underinclusiveness can demonstrate that a government is engaged in unconstitutional viewpoint discrimination or that a law fails to "actually advance" a state interest. *Id.* at 1668.

[31] *Id.* at 1668.

[32] *Id.* at 1669. The Court accomplished this point by defining the ban narrowly as a "ban *on personal solicitation*." *Id.* (emphasis added). This legal move contrasts with the approach in the classic underinclusiveness case *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), in which the Court construed the relevant ordinances not just as bans on ritual animal sacrifice but also as underinclusive bans on animal cruelty, *see id.* at 543.

[33] *Williams-Yulee*, 135 S. Ct. at 1669.

[34] *Id.* (quoting Chisom v. Roemer, 501 U.S. 380, 400 (1991)). Similarly, the majority rejected the principal dissent's point that Canon 7C(1) failed to ban candidates from soliciting gifts and loans, characterizing such a ban as headed toward an idealistic "comprehensive code to leading an ethical life." *Id.* at 1670. Furthermore, the majority acknowledged the discrepancy in characterizing personal solicitations as implying candidates will remember who contributes, but not suggesting that allowing thank you notes would raise the same appearance — but justified the discrepancy by asserting without further explanation that the state interest was "implicated most directly" by personal solicitation. *Id.* at 1669.

[35] Despite Yulee's gender, the Court's opinions almost exclusively employed male pronouns when discussing abstract figures, consistent with past practice. *See, e.g.*, Judith D. Fischer, *The Supreme Court and Gender-Neutral Language: Splitting* La Difference, 33 WOMEN'S RTS. L.

as a mass mailing and posted publicly online,[36] and that the government could have accomplished its goals with narrower policies, such as updated recusal requirements.[37] Noting that the "intangible" nature of the state interest required the Court to avoid mistakenly demanding "perfect" tailoring rather than narrow tailoring,[38] the majority emphasized the alternative ways judicial candidates could speak about their campaigns and found it reasonable for Florida to determine that personal solicitation invariably threatens public confidence in judicial integrity.[39] The Chief Justice rejected the idea that the First Amendment required narrower tailoring in the form of banning only one-on-one or in-person solicitation.[40] He also rejected the idea that states must require judges to recuse themselves in cases involving their donors, asserting that campaign contributions are too pervasive for such a requirement to be workable, that litigants would choose to insulate themselves from judges by donating to their campaigns, and that the resulting "flood of postelection recusal motions" would only heighten the appearance of impropriety.[41]

Justice Ginsburg concurred in part and in the judgment,[42] agreeing that judges should not be understood as "politicians" and that their elections should be regulated differently.[43] Justice Ginsburg argued that *Citizens United*'s acceptance of the dynamic of persons buying "[f]avoritism and influence" with contributions[44] and *McCutcheon*'s statement that elected officials should be "responsive" to their financial supporters are both inapplicable to judicial elections.[45] Indeed, she asserted that the Due Process Clause's guarantee of a fair trial shows

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REP. 218, 234 ("The opinions of Justice Elena Kagan . . . were among the least gender inclusive . . . . Justice Kagan used masculine pronouns for general statements about both plaintiffs and defendants."); *see also* Katy Steinmetz, *Down the Manhole: State Officials Grapple with Gender-Neutral Language*, TIME (Feb. 5, 2013), http://swampland.time.com/2013/02/05/down-the-manhole-state-officials-grapple-with-gender-neutral-language [http://perma.cc/KH3D-ES6Z] (quoting Justice Scalia saying that "*he* is the traditional, generic, unisex reference to a human being"); Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 135 S. Ct. 1318, 1335 (2015) (Scalia, J., concurring in part and concurring in the judgment) (responding to the abstract "she" by writing "*he* (or she or it)").

36 *Williams-Yulee*, 135 S. Ct. at 1670–71.

37 *See id.* at 1671. Yulee also suggested the State could accomplish its goals through reformed campaign contribution limits, but the Court found it reasonable for a State to conclude that personal solicitation raises a distinct concern. *Id.* at 1671–72.

38 *Id.* at 1671 (citing Burson v. Freeman, 504 U.S. 191, 209 (1992) (plurality opinion)).

39 *Id.* at 1670–71. The Court also found it persuasive that most other states had drawn a similar line for similar reasons. *Id.* at 1671.

40 *Id.* at 1670–71.

41 *Id.* at 1671.

42 Justice Ginsburg was joined in part by Justice Breyer.

43 *Id.* at 1673 (Ginsburg, J., concurring in part and concurring in the judgment) (quoting *id.* at 1662 (majority opinion)).

44 *Id.* at 1674 (alteration in original) (quoting Citizens United v. FEC, 558 U.S. 310, 359 (2010)).

45 *Id.* (quoting McCutcheon v. FEC, 134 S. Ct. 1422, 1441 (2014) (plurality opinion)).

that elected judges are different from other politicians and thus merit a different First Amendment framework for regulating their campaigns.[46] Agreeing with the majority that the *Citizens United* line of cases has "little bearing" on judicial elections,[47] Justice Ginsburg then reached a conclusion different from her colleagues' — that strict scrutiny should not apply when the government regulates judicial elections.[48]

Justice Scalia dissented.[49] Noting that a candidate's right to discuss her candidacy and beliefs "lies at the heart" of the First Amendment, he agreed with the plurality that strict scrutiny applied to Florida's rule.[50] However, he charged the majority with relying upon "an ill-defined interest" involving conflicting descriptions of the targeted social ill: by turns a hypothetical and attenuated possibility of actual improper influence, the pressure placed on solicited persons, and an appearance that judges would track who donates and who does not.[51] Further, he noted that the supposed interest was undermined by the exception for thank you notes — which insured that judges would indeed know who donated and who did not — and the prohibition on mass mailings — which raised weaker pressure and appearance concerns.[52] Justice Scalia also noted that designating a new category of speech as unprotected by the First Amendment requires evidence of a strong historical tradition of regulation, which Canon 7C(1) lacked.[53]

Justice Scalia then found Canon 7C(1) overinclusive for banning a judicial candidate from soliciting even persons prohibited by recusal rules from appearing before her if elected, such as her parents, and for even banning impersonal communications like mass-mailed letters and website posts.[54] Justice Scalia rejected the majority's contention that such tailoring would be "unworkable," noting that Florida itself already had ethics rules that employed similarly close tailoring.[55] Justice Scalia also found Canon 7C(1) impermissibly underinclusive because it

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[46] *Id.*

[47] *Id.* (quoting *id.* at 1667 (majority opinion)).

[48] *Id.* at 1673. Justice Breyer declined to join Justice Ginsburg on this conclusion.

[49] Justice Scalia was joined by Justice Thomas.

[50] *Williams-Yulee*, 135 S. Ct. at 1676 (Scalia, J., dissenting).

[51] *Id.* at 1677. Justice Scalia stated that strict scrutiny does not allow concerns like these to be analyzed as different facets of the same compelling interest and that each concern must be analyzed on its own to see whether it presents a compelling state interest. *Id.*

[52] *Id.* at 1677–78.

[53] *Id.* at 1676. The majority countered that it was not creating a new category of unprotected speech but was instead "fully" applying the First Amendment to determine whether Canon 7C(1) could survive First Amendment scrutiny. *Id.* at 1667 (majority opinion).

[54] *See id.* at 1679 (Scalia, J., dissenting).

[55] *Id.* (quoting *id.* at 1671 (majority opinion)) (pointing to Florida rules permitting exceptions to rules against membership in groups or accepting gifts if the group or donor is not likely to appear before the judge's court). Indeed, he charged the majority with raising more workability questions than striking down the canon would have raised. *Id.* at 1680.

still allowed nonincumbent judicial candidates to solicit personal gifts — even cash — and contributions to third-party causes.[56]

Justice Kennedy also dissented, agreeing with Justice Scalia's analysis that Canon 7C(1) failed strict scrutiny.[57] Justice Kennedy added that fundraising speech generates money that enables even more campaign speech, multiplying the canon's speech-restricting effect.[58] He argued that disclosure requirements, information dissemination technologies such as the Internet, and watchdog groups are sufficient to inform voters of a candidate's integrity and fundraising sources.[59]

In *Williams-Yulee*, the majority and the primary dissent presented the differences between the regulation of judicial campaigns and of political campaigns as being accounted for by different state interests within First Amendment analysis. However, the Court has previously considered the Due Process Clause alongside the First Amendment in evaluating judicial speech restrictions. The disagreement in *Williams-Yulee* was certainly about the proper application of the First Amendment to fundraising speech by judicial candidates, but it also indicated the presence of a fundamental disagreement on the Court about how to reconcile the need for impartial, disinterested judges with the widespread practice of choosing judges by ballot. This debate is one that the First Amendment cannot resolve on its own. Confined to the First Amendment, the majority and the primary dissent expressed disagreement in *Williams-Yulee* through differing views on the amorphous and subjective question of what preserves "public confidence in the integrity of the judiciary."[60] Instead, the Court should have more concretely weighed the right to free speech against the due process risk created by the personal solicitation of campaign contributions.

The Court has previously held that the Due Process Clause requires judges to recuse themselves from cases in which they have an interest,[61] and in *Caperton v. A.T. Massey Coal Co.*[62] the Court found that, in extreme circumstances, campaign contributions can provide

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[56] *Id.* at 1680–81 ("Could 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'?").

[57] *Id.* at 1685 (Kennedy, J., dissenting).

[58] *Id.* at 1683.

[59] *Id.* at 1684. In a short dissent, Justice Alito endorsed "the essential elements" of the dissents by Justices Scalia and Kennedy. *Id.* at 1685 (Alito, J., dissenting). Justice Alito agreed with both the application of strict scrutiny and the finding of a compelling interest and characterized Canon 7C(1) as "about as narrowly tailored as a burlap bag." *Id.*

[60] *Id.* at 1666 (majority opinion).

[61] In *Tumey v. Ohio*, 273 U.S. 510 (1927), the Court found that due process requires recusal when a judge has "a direct, personal, substantial, pecuniary interest" in a case, *id.* at 523, and in *Withrow v. Larkin*, 421 U.S. 35 (1975), the Court found that "a realistic appraisal of psychological tendencies and human weakness" shows that in certain extreme cases due process can require recusal even for the *risk* of bias, when that risk is high enough, *id.* at 47.

[62] 556 U.S. 868 (2009).

such an interest and can require recusal even when there is merely the appearance or chance of an improper interest.[63] In *Caperton*, a coal company and its affiliates planned to appeal a $50 million verdict against them when Don Blankenship, the company's chairman, CEO, and president, contributed $3 million in support of a candidate to the court with jurisdiction.[64] The candidate won, and the coal company's opponents moved for his recusal.[65] Noting that Blankenship's contributions exceeded the spending of all of the new justice's other supporters combined,[66] the Court held that "in all the circumstances of this case," the Due Process Clause required the new justice to recuse himself.[67] Although the facts of *Williams-Yulee* did not approach the extreme case presented in *Caperton*, the latter demonstrates that judicial campaign contributions can implicate due process concerns.

Furthermore, in *Republican Party of Minnesota v. White*,[68] the Court considered whether speech by judicial candidates could pose due process concerns. Writing for the Court, Justice Scalia applied strict scrutiny under the First Amendment to strike down a state canon prohibiting judicial candidates from announcing their "views on disputed legal or political issues."[69] In doing so, however, he also had to contend with Justice Ginsburg's dissenting argument that allowing an elected judge to decide an issue on which he had previously taken a public position could violate the Due Process Clause.[70] She described the Court's task as finding a balance between a candidate's First Amendment right to free speech and a litigant's due process guarantee of a fair trial, free of "prejudgment."[71] Justice Ginsburg explained that this guarantee prohibits judges from deciding cases in which they have too great an interest, even without evidence of *actual* bias.[72] Asserting that a judge's continued employment is such an interest, Justice Ginsburg reasoned that judges therefore have impermissible interests in cases where the outcomes would affect their electoral chances because of previous campaign statements.[73] Justice Scalia countered that this argument implied a conclusion inconsistent with the Fourteenth Amendment's history: that the very enterprise of electing judges is incompati-

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[63] *Id.* at 872.
[64] *Id.* at 873.
[65] *Id.* at 873–74.
[66] *Id.* at 873.
[67] *Id.* at 872.
[68] 536 U.S. 765 (2002).
[69] *Id.* at 768; *see also id.* at 781, 788.
[70] *Id.* at 813–17 (Ginsburg, J., dissenting).
[71] *Id.* at 813.
[72] *See id.* at 814–15 (citing Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986)).
[73] *See id.* at 816–17.

ble with the Due Process Clause.[74] By contrast, the disagreement between the *White* majority and Justice Ginsburg that was confined to the First Amendment alone was a comparatively amorphous back-and-forth over whether judges are "different" enough from other elected officials to be the source of a compelling government interest.[75]

Williams-Yulee further illustrates how an exclusively First Amendment analysis of the regulation of judicial elections is incomplete. Although *White* focused on free speech, it discussed the possibility of due process being a countervailing force; the opinions in *Williams-Yulee*, on the other hand, occurred entirely within a First Amendment framework of balancing free speech against government interests. Justice Ginsburg made the case's only mention of the Due Process Clause,[76] yet she employed it in an attenuated way that retained the case's focus on the First Amendment, arguing that the due process right to an impartial trial justified the idea that judges are "different," a premise that in turn supported the finding of a compelling government interest for First Amendment balancing purposes.[77] However, after characterizing the Due Process Clause as the justification behind a compelling First Amendment interest, Justice Ginsburg refrained from unambiguously articulating that the clause provides an entirely separate right that is in tension not within a First Amendment balancing analysis but rather with the First Amendment itself.[78] Instead, *Williams-Yulee* offered a range of speech-focused viewpoints, from Justice Scalia's approach, which the majority characterized as even more exacting than strict scrutiny (because of its "perfect" tailoring), to Justice Ginsburg's argument that strict scrutiny should not even apply. As in the parts of *White* confined to the First Amendment alone, the Justices engaged in an indeterminate debate over how "dif-

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[74] *Id.* at 782–83 (majority opinion).

[75] Justice Ginsburg argued that judges, unlike legislators, must avoid "catering to particular constituencies," *id.* at 804 (Ginsburg, J., dissenting), and Justice Scalia countered that enabling judges to engage in democratic lawmaking is exactly why states choose to have judicial elections, *see id.* at 784 (majority opinion). Justice Ginsburg asserted that judges must refrain from prejudging controversial issues before trials, *see id.* at 803–04 (Ginsburg, J., dissenting), and Justice Scalia responded that such a requirement is impossible because all judges have preconceptions, *see id.* at 777 (majority opinion); *cf. id.* at 792 (O'Connor, J., concurring) ("If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.").

[76] Indeed, the Due Process Clause was not mentioned by anyone at oral argument, *see* Transcript of Oral Argument, *Williams-Yulee*, 135 S. Ct. 1656 (No. 13-1499), although one coalition did submit an amicus brief that engaged with the clause at length, *see* Brief for Amici Curiae Brennan Center for Justice at NYU School of Law et al. in Support of Respondent, *Williams-Yulee*, 135 S. Ct. 1656 (No. 13-1499).

[77] *See Williams-Yulee*, 135 S. Ct. at 1674 (Ginsburg, J., concurring in part and concurring in the judgment).

[78] However, when rejecting the application of strict scrutiny at the start of her concurrence, Justice Ginsburg incorporated her *White* dissent by reference. *Id.* at 1673.

ferent," for First Amendment purposes, judicial elections are from the elections of other public officials.[79] Although the result in *White* and the extreme facts in *Caperton* suggest the Court would not have found that the Due Process Clause *requires* Canon 7C(1), consideration of the clause would have resulted in a fuller, more concrete analysis.

Williams-Yulee and cases like *Citizens United* and *McCutcheon* arguably suggest different understandings of free speech rights, and the First Amendment alone cannot relieve this tension. Scholars have attempted at length to reconcile *Caperton* and *White* with *Citizens United* and its progeny.[80] Some commentators have taken the position that Justice Ginsburg ultimately adopts in *Williams-Yulee*: that judicial elections are so different that an altogether different tier of First Amendment scrutiny applies.[81] Many scholars, however, have persuasively argued that the two conceptions of the First Amendment presented by the cases are not reconcilable.[82] Professor Richard Hasen has noted that "Justice Kennedy's statements in *Caperton* about the importance of the impartiality of the judiciary . . . are in tension with the view . . . of money and politics that he expressed in his *Citizens United* majority opinion, . . . [where he noted] that '[f]avoritism and influence are not . . . avoidable in representative politics.'"[83]

The use of due process analysis in judicial election cases would enrich the Court's amorphous First Amendment approach. For example, weighing due process concerns against the First Amendment can shed light on Justice Scalia's protestation in *White* that to argue that it violates due process for a judge to sit in a case in which ruling a certain way increases her prospects for reelection is also to imply, contrary to established understanding, that judicial elections themselves are incon-

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[79] *Compare id.* at 1662 (majority opinion) ("Judges are not politicians . . . . [A] State's decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office."), *and id.* at 1673 (Ginsburg, J., concurring in part and concurring in the judgment), *with id.* at 1682 (Scalia, J., dissenting) ("The Court . . . should not relax the guarantee [of free speech] when the Supreme Court of Florida pursues [its goals]. The First Amendment is not abridged for the benefit of the Brotherhood of the Robe.").

[80] *See, e.g.*, andré douglas pond cummings, *Procuring "Justice"?:* Citizens United*,* Caperton*, and Partisan Judicial Elections*, 95 IOWA L. REV. BULL. 89 (2010); Norman L. Greene, *How Great Is America's Tolerance for Judicial Bias? An Inquiry into the Supreme Court's Decisions in* Caperton *and* Citizens United*, Their Implications for Judicial Elections, and Their Effect on the Rule of Law in the United States*, 112 W. VA. L. REV. 873 (2010); Ronald D. Rotunda, Hartman Hotz Lecture, *Constitutionalizing Judicial Ethics: Judicial Elections After* Republican Party of Minnesota v. White*,* Caperton*, and* Citizens United, 64 ARK. L. REV. 1 (2011).

[81] *See, e.g.*, Anthony J. Delligatti, Student Work, *A Horse of a Different Color: Distinguishing the Judiciary from the Political Branches in Campaign Financing*, 115 W. VA. L. REV. 401, 426 (2012).

[82] *See, e.g.*, Richard L. Hasen, Citizens United *and the Illusion of Coherence*, 109 MICH. L. REV. 581, 611–15 (2011); Larry Howell, *Once upon a Time in the West:* Citizens United*,* Caperton*, and the War of the Copper Kings*, 73 MONT. L. REV. 25, 41–42 (2012).

[83] Hasen, *supra* note 82, at 614 (second alteration and final omission in original) (quoting Citizens United v. FEC, 558 U.S. 310, 359 (2010)).

sistent with due process. In this context, *Williams-Yulee* serves to remind that the modern deregulation of campaign finance is not clearly grounded in history either. That is, *Williams-Yulee* helps illustrate that the implausible conclusion that Justice Scalia rejected in *White* might instead be an indication that campaign finance jurisprudence, especially when applied to judicial elections, could benefit from more considerations outside the First Amendment — like those raised by the Due Process Clause. Although Justice Scalia suggested in *White* that certain due process arguments imply that judicial elections are unconstitutional, it may well be that it is the current state of campaign finance First Amendment jurisprudence (in the context of judicial elections) that is in tension with due process rights. Indeed, although the Due Process Clause's protections do not extend to campaign finance questions in nonjudicial elections, the clause's presence as a counterbalance in the context of judicial elections raises questions of whether the First Amendment is ever at odds with other constitutional interests in the context of nonjudicial campaign finance as well. *Williams-Yulee* may be only a short-term victory for proponents of greater campaign finance regulation, inasmuch as the case entrenches the First Amendment's dominance over campaign finance jurisprudence.

By cabining its analysis in *Williams-Yulee* to a First Amendment balancing exercise, the Court declined an opportunity to discuss a crucial dynamic and ensure that a constitutional interest besides the First Amendment remains in consideration in cases regarding judicial elections and campaign finance generally. A fuller discussion of the interests at stake would have engaged with the fact that assessing values within the First Amendment — free speech and compelling government interests — is not enough to provide clarity on the rights at stake in judicial campaign fundraising. A clear understanding of the constitutional interests in judicial elections requires that courts recognize that one competing value to a judicial candidate's First Amendment speech right has to be the Due Process Clause right to a fair trial.

The Court has repeatedly found that the practice of holding judicial elections does not mean forfeiting judicial integrity, and the Court was correct to find that the Florida Bar acted to prevent damage to that integrity. But the potential for damaged public confidence that the Court recognized in *Williams-Yulee* is not a reason to create a new pocket of First Amendment campaign finance jurisprudence with different rules and unclear boundaries. Rather, it may be indicative of a background failure to develop campaign finance jurisprudence that, when implemented in judicial elections, also safeguards the due process right to a fair trial. By not engaging directly with personal solicitations' implications for that right, the Court has increased the need for a reckoning between its deregulatory campaign finance jurisprudence and the line of cases governing how states may regulate judicial elections.