

THE BENCH IS NOT A CONSTITUENCY: IN SUPPORT OF
BROADLY UPHOLDING JUDICIAL CAMPAIGN RESTRICTIONS
AFTER *WILLIAMS-YULEE V. FLORIDA BAR*

*Eden Thompson**

I. INTRODUCTION

The judicial branch retains higher public trust than the other two branches of government.¹ This is likely attributable to the fact the judiciary functions separately from politics and aims to provide a fair, impartial, and just application of the law and Constitution.² Or, at least, that is *supposed* to be the judiciary's function.³ Judicial elections, however, have the potential to threaten this function and the corresponding public trust. The vast majority of judges in the United States are subject to election, with 87% of state and local judges in the United States having to face voters.⁴ Skeptics suggest that judicial elections undermine the fundamental role of the judiciary and impede a judge's ability to act impartial, follow the law as applied to individual cases, and put aside any preconceived notions, political agendas, social commitments, and personal biases.⁵

This skepticism is especially apparent today. Today, judicial elections are hotly contested and campaigns cannot be competitive without raising large amounts of money through campaign contributions and independent expenditures by special interest groups, and buying

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1. Jeffrey M. Jones, *Trust in U.S. Judicial Branch Sinks to New Low of 53%*, GALLUP, <http://www.gallup.com/poll/185528/trust-judicial-branch-sinks-new-low.aspx> (last visited Apr. 26, 2016).

2. See generally Anthony Delligatti, Note, *A Horse of a Different Color: Distinguishing the Judiciary from the Political Branches in Campaign Financing*, 115 W. VA. L. REV. 401 (2012).

3. *Id.*

4. Richard Briffault, *Judicial Campaign Codes After Republican Party of Minnesota v. White*, 153 U. PA. L. REV. 181 (2004).

5. Tobin A. Sparling, *Keeping Up Appearances: The Constitutionality of the Model Code of Judicial Conduct's Prohibition of Extrajudicial Speech Creating the Appearance of Bias*, 19 GEO. J. LEGAL ETHICS 441, 447 (2006) ("Judges are like umpires in baseball or referees in football or basketball. Their role is to see that the rules of court procedures are followed by both sides. Like the ump, they call 'em as they see 'em, according to the facts and the law—without regard to which side is popular (no home field advantage) without regard to who is 'favored,' without regard for what spectators want, and without regard to whether the judge agrees with the law.").

massive television and print advertising.⁶ Judicial campaigns have become “nastier, noisier, and costlier” and on par with the conduct of political campaigns.⁷ One Supreme Court of Ohio Justice subject to elections explained to the New York Times: “I never felt so much like a hooker down by the bus station in any race I’ve ever been in as I did in a judicial race.”⁸ This is because contributors think that they can buy a judge’s influence or support.⁹ One study even shows that judges are more likely to rule against criminal defendants and impose tougher sentences in an election year.¹⁰ The public is not blind to these situations. In fact, nine out of ten Americans believe that campaign cash and other special interests associated with campaigns affect courtroom decisions.¹¹

This Casenote is not a forum of discussion about whether judicial elections are a good or bad custom. Rather, using recent Supreme Court of the United States and lower federal court jurisprudence, this Casenote evaluates to what extent states are now able to eliminate risks to judicial integrity. In order to safeguard the important values of the judiciary and depoliticize the judiciary, states have implemented a variety of ethical rules that judges and judicial candidates must abide by during the course of their campaigns.¹² These ethical rules are usually called “canons” or “codes of conduct” and are usually challenged by political parties, candidates, or candidate committees on First Amendment grounds.¹³

Most recently, in *Williams-Yulee v. Florida Bar*, the Supreme Court of the United States addressed a judicial candidate’s First Amendment challenge to a judicial canon that prohibited candidates from personally

6. Paul J. De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 WILLAMETTE L. REV. 367, 368 (2002); see also David Schultz, *Minnesota Republican Party v. White and the Future of State Judicial Selection*, 69 ALB. L. REV. 985, 990–91 (2006); Peter D. Webster, *Selection and Retention of Judges: Is There One “Best” Method?*, 23 FLA. ST. U. L. REV. 1, 19 (1995) (“In the past, judicial elections were low-key affairs, conducted with civility and dignity. As a result, they were relatively inexpensive. However, that is no longer the case. Today, in many jurisdictions, judicial elections have taken on all of the trappings of partisan politics, significantly increasing the resulting cost.”).

7. Robert M. O’Neil, *The Canons in the Courts: Recent First Amendment Rulings*, 35 IND. L. REV. 701 (2002).

8. Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court’s Rulings*, N.Y. TIMES (Oct. 1, 2006), http://www.nytimes.com/2006/10/01/us/01judges.html?pagewanted=all&_r=0.

9. *Id.* (“‘They mean to be buying a vote,’ Justice [Paul] Pfeifer added.”).

10. KATE BERRY, BRENNAN CENTER FOR JUSTICE, *HOW JUDICIAL ELECTIONS IMPACT CRIMINAL CASES* (Dec. 2, 2015), <https://www.brennancenter.org/publication/how-judicial-elections-impact-criminal-cases>.

11. *New Poll: Vast Majority of Voters Fear Campaign Cash Skews Judges’ Decisions*, BRENNAN CENTER FOR JUSTICE (Oct. 29, 2013), <https://www.brennancenter.org/press-release/new-poll-vast-majority-voters-fear-campaign-cash-skews-judges-decisions>.

12. Briffault, *supra* note 4, at 182.

13. *Id.*

soliciting campaign contributions.¹⁴ By plurality decision, the Supreme Court upheld the canon under strict scrutiny and reasoned that the canon was narrowly tailored to achieve Florida's compelling interest in preserving public confidence in its judiciary.¹⁵ Chief Justice Roberts explained that given this interest, this is one of the rare instances in which a speech restriction withstands strict scrutiny.¹⁶ Yet, Justice Scalia and the dissenters lamented that the plurality virtually abandoned strict scrutiny and applied a less taxing standard of review for judicial campaigns.¹⁷

Recently, the federal circuit courts have taken a broad approach to judicial campaign restrictions in light of *Williams-Yulee* and its purportedly loose approach to strict scrutiny. Both the Sixth and Ninth Circuits have used the broad holding of *Williams-Yulee* to uphold other types of judicial campaign restrictions. In *Wolfson v. Concannon*, the Ninth Circuit used *Williams-Yulee* to uphold a restriction prohibiting judicial candidates from endorsing other candidates and participating in political campaigns.¹⁸ In *O'Toole v. O'Connor*, the Sixth Circuit extended *Williams-Yulee* to uphold a restriction on the time in which a judicial candidate's campaign committee can raise funds.¹⁹

This Casenote evaluates the positions that the Sixth and Ninth Circuits have taken after *Williams-Yulee*. Part II provides necessary background information on judicial campaign restrictions and the Supreme Court's jurisprudence on the issue, including the *Republican Party of Minnesota v. White* decision, which came before *Williams-Yulee*. Part III provides an overview of *Wolfson* and *O'Toole* and the respective rationales behind extending *Williams-Yulee* beyond canons prohibiting personal solicitations. Part IV evaluates the appropriateness of how the circuit courts have reconciled with *Williams-Yulee*. First, the Sixth and Ninth Circuits appropriately upheld the respective judicial campaign restrictions in light of *Williams-Yulee*. Second, the Sixth and Ninth Circuits correctly extended the rationale of *Williams-Yulee* broadly—to extend to restrictions other than personal solicitations of campaign contributions. Finally, Part V concludes by maintaining that courts should follow the approach taken by the Sixth and Ninth Circuits in upholding other restrictions on judicial campaigns in an effort to carry out the principled holding of *Williams-Yulee*.

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

15. *Id.*

16. *Id.* at 1666.

17. *Id.* at 1676.

18. See generally *Wolfson v. Concannon*, 811 F.3d 1176 (9th Cir. 2016).

19. See generally *O'Toole v. O'Connor*, 802 F.3d 783 (6th Cir. 2015).

II. BACKGROUND

A. Restrictions on Judicial Candidates and First Amendment Implications

Judicial elections have a distinctive and often controversial place in our system of government that is not present in elections for public office generally.²⁰ While the American legal system remains a model institution worldwide in most respects, judicial elections are an unusual concept in other countries and are unique to the United States.²¹ Judicial elections were created to allow the people to decide for themselves which judges are best qualified and which are most likely to “stand by the constitution of the State against the encroachment of power.”²² Those in favor of judicial elections seek to provide a democratic check on the judiciary and a measure of popular accountability for its decisions.²³ With all elections, however, politics is inevitable. With politics comes a fear that “the pestilential breath of faction may poison the fountains of justice.”²⁴ This section addresses the historical development of judicial elections and judicial campaign restrictions, and how the Supreme Court’s jurisprudence has reconciled the competing interests of free speech and preserving confidence in the judiciary.

1. A Historic Overview

The appropriateness of electing judges sparked a hallmark debate at the time of our country’s founding, and this debate still remains today. On one hand, due to their impartial function in the legal system, elections must not undermine a judge’s independent role or influence a judge to become indebted to any political parties, special interests, or

20. O’Neil, *supra* note 7, at 720 (“[T]he very nature of a judge’s or judicial candidate’s relationship to the electorate is profoundly different from that of any other public official. The process of communication with a judge is utterly unlike dealing with a legislator or executive office; anyone who seeks or holds office in the latter two branches is fair game for entreaties of all sorts, as much during election campaigns as at any other time.”).

21. Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1064 (2010).

22. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1684 (2015) (Kennedy, J., dissenting) (quoting REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF NEW YORK 672 (Albany, Evening Atlas 1846)).

23. Brief of Amici Curiae American Civil Liberties Union and American Civil Liberties Union of Florida in Support of Petitioner at 7, *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656 (2015) (No. 13-1499).

24. *Wolfson v. Concannon*, 811 F.3d 1176, 1188 (9th Cir. 2016) (Berzon, J., concurring) (citing THE FEDERALIST NO. 81, at 452 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

other forms of bias.²⁵ On the other hand, elections can be a mechanism to hold judges accountable, just like other elected officials.²⁶ Alexander Hamilton held the view that appointing judges to positions with life tenure constituted “the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws.”²⁷ Arguing in the alternative, Thomas Jefferson believed that making judges “dependent on none but themselves” was in conflict with “a government founded on the public will.”²⁸ These competing views among the Founders laid the foundation for our modern system of selecting judges: federal courts through appointment; and in most states, but not all, by way of popular election.

The federal Constitution mandates that federal judges be appointed by the President, with the advice and consent of the Senate;²⁹ however, increasingly throughout history, states started to follow the Jeffersonian view of electing state judges to the bench. As a part of a movement toward greater popular control of public office during Andrew Jackson’s presidency and then continuing throughout the Civil War, states increasingly selected judges through popular election.³⁰ At this time, elections were generally conducted on a partisan basis with no restrictions imposed on judicial campaigns or candidates.³¹

Partisan judicial elections lacking regulation met sharp criticism in the early twentieth century. In 1906, Roscoe Pound, former Harvard Law School Dean, lamented that “compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the bench.”³² Starting in 1924, the American Bar Association (ABA) adopted the first model rules for judges, the Canons of Judicial Ethics, which effectively served the ABA’s goal of “preserving the independence of the legal profession and the judiciary.”³³ Eventually the Model Code of Judicial Conduct replaced the former codes of conduct in 1990, which has subsequently been updated, and contains four canons.³⁴

25. Schultz, *supra* note 6, at 987.

26. *Id.*

27. *Williams-Yulee*, 135 S. Ct. at 1672–73 (2015) (citing THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

28. *Id.* at 1673 (citing 5 THE WORKS OF THOMAS JEFFERSON (P. Ford ed. 1905)).

29. U.S. CONST. art. II, § 2, cl. 2.

30. *Republican Party of Minn. v. White*, 536 U.S. 765, 791 (2002) (O’Connor, J., concurring).

31. *Id.* at 785.

32. *Id.* at 791 (O’Connor, J., concurring) (citing *The Causes of Popular Dissatisfaction with the Administration of Justice*, 8 BAYLOR L. REV. 1, 23 (1956) (reprinting Pound’s speech)).

33. Brief of Amicus Curiae The American Bar Association in Support of Respondent at 2, *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656 (2015) (No. 13-1499).

34. *Id.* at 3.

Most relevant to this Casenote is Canon Four, which provides: “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.”³⁵ The rules within Canon Four place various limitations precluding judges and judicial candidates from engaging in conduct such as: personally soliciting or accepting campaign contributions, publicly endorsing or opposing candidates for public office, making speeches on behalf of a political organization, and seeking and accepting endorsements from a political organization.³⁶ Judges and attorneys who violate these canons are usually subject to certain sanctions and reprimand.³⁷ Currently, voters in thirty-nine states elect judges to the bench at the trial and appellate levels. The majority of these states follow a mirror image of the ABA’s Model Code of Judicial Conduct to impose restrictions on the conduct of judicial candidates.³⁸

2. First Amendment Implications

Throughout its jurisprudence, the Supreme Court of the United States has defended the First Amendment right to free speech in general; however, it has taken an exceptionally protective role against attacks on political speech.³⁹ The Court has noted that the First Amendment “‘has its fullest and most urgent application’ to speech uttered during a campaign for political office.”⁴⁰ Thus, the discussion of public issues and the ability to debate the qualifications of candidates are a fundamental part of our system of government.⁴¹ Given this importance, laws that burden political speech must meet strict scrutiny in order to survive.⁴² To pass constitutional muster under strict scrutiny, a law must be narrowly tailored to achieve a compelling state interest.⁴³ Given that the judicial canons examined throughout the Supreme Court’s jurisprudence have the effect of burdening political speech and

35. MODEL CODE OF JUDICIAL CONDUCT Canon 4 (AM. BAR ASS’N 2011).

36. *Id.*

37. *See Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1663–64 (2015).

38. *Id.* at 1662; *see also* Ashna Zaheer, *Judging Judges: Why Strict Scrutiny Resolves the Circuit Split over Judicial Speech Restrictions*, 87 NOTRE DAME L. REV. 879, 880 (2011).

39. *See generally* Buckley v. Valeo, 424 U.S. 1 (1976); Republican Party of Minn. v. White, 536 U.S. 765 (2002); Citizens United v. Fed. Election Comm’n, 558 U.S. 310 (2010).

40. *Citizens United*, 558 U.S. at 339–40 (citing *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989)).

41. *Id.*

42. *Williams-Yulee*, 135 S. Ct. at 1665 (“Applying a lesser standard of scrutiny to such speech would threaten ‘the exercise of rights so vital to the maintenance of democratic institutions.’”) (quoting *Schneider v. Town of Irvington*), 308 U.S. 147, 161 (1939)).

43. *Id.*

are generally content based, the Court resorts to applying strict scrutiny in the context of judicial canons.⁴⁴ Considering the uniqueness of judicial elections as described above, states generally assert a compelling interest in judicial impartiality and independence as well as an interest in preserving the public's perception of this impartiality and independence.⁴⁵

B. Pre-Williams-Yulee and Prior Supreme Court of the United States Refusal to Restrict the Conduct of Judicial Candidates: Republican Party of Minnesota v. White

For the first time in its jurisprudence, in 2002, a divided Supreme Court of the United States addressed the constitutionality of state restrictions on the speech of judicial candidates and their respective campaigns. At issue in *White* was the “announce clause” in the Minnesota Code of Judicial Conduct, which provided that a “candidate for judicial office, including an incumbent judge,” shall not “announce his or her views on disputed legal or political issues.”⁴⁶ In 1996, after a complaint was filed against him for distributing literature that criticized several Minnesota Supreme Court decisions involving issues related to crime, welfare, and abortion, Gregory Wertz, a candidate for associate justice of the Minnesota Supreme Court, challenged the announce clause on First Amendment grounds.⁴⁷

The *White* majority, written by Justice Scalia concluded that the announce clause failed under strict scrutiny⁴⁸ and therefore violated the First Amendment.⁴⁹ Minnesota asserted two compelling interests. First, preserving the impartiality of the state judiciary, which was compelling in order to protect the due process rights of litigants; second, preserving the appearance of impartiality of the state judiciary, which was compelling to preserve the public confidence in the judiciary.⁵⁰

With these asserted interests in mind, the Court evaluated the meaning of “impartiality” in several ways, first being “the lack of bias for or against either party to the proceeding.”⁵¹ In this sense, the Court

44. *Id.*

45. *Id.* at 1664; O’Neil, *supra* note 7, at 715.

46. Republican Party of Minn. v. White, 536 U.S. 765, 768 (2002) (quoting MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2000)).

47. *Id.* at 768–70.

48. *Id.* at 773 (“Under the strict-scrutiny test, respondents have the burden to prove that the announce clause is (1) narrowly tailored, to serve (2) a compelling state interest.”) (citing *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989)).

49. *Id.* at 788.

50. *Id.* at 775.

51. *Id.* at 775–76. (“That is, it guarantees a party that the judge who hears his case will apply the

concluded that the announce clause was not narrowly tailored to serve this meaning of impartiality because it did not restrict speech for or against particular parties, but rather speech for or against particular issues.⁵² Second, the Court evaluated the interest of impartiality as meaning “a lack of preconception in favor of or against a particular legal view.”⁵³ Within this meaning, however, the Court emphasized that this is not a *compelling* state interest because judges inevitably have preconceptions about the law.⁵⁴

The Court then looked at a third possible meaning of impartiality: open-mindedness, requiring that a judge remain open to persuasion with regard to opposing views.⁵⁵ The compelling interest of open-mindedness proved to be underinclusive because until judges declare themselves candidates for office, they may voice their views on issues and may do so repeatedly after they are elected.⁵⁶

The majority rejected the idea that the special context of electioneering in judicial campaigns justifies an abridgement of the right to speak on disputed issues, calling out such a notion as “set[ting] our First Amendment jurisprudence on its head.”⁵⁷ The Court, however, noted that the First Amendment does not require campaigns for judicial office to “sound the same as those for legislative office” in other respects.⁵⁸ The majority also emphasized that the state’s decision to elect state judges rather than select them through appointment did not justify any degree of First Amendment circumvention.⁵⁹

Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer,

law to him in the same way he applies it to any other party.”).

52. *White*, 536 U.S. at 776.

53. *Id.* at 777.

54. *Id.* at 777–78 (In the words of then-Justice Rehnquist, “Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of sweeping clauses of the Constitution and their interaction with one another. It would be merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous careers.”) (quoting *Laird v. Tatum*, 409 U.S. 824, 835 (1972)).

55. *Id.* at 778.

56. *Id.* at 779–80 (“underinclusiveness ‘diminish[es] the credibility of the government’s rationale for restricting speech’”(quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 52–53 (1994))).

57. *Id.* at 781 (“[D]ebate on the qualification of candidates” is “at the core of our electoral process and of the First Amendment freedoms”).

58. *White*, 536 U.S. at 783 (“[E]ven if the First Amendment allows greater regulation of judicial election campaigns than legislative election campaigns, the announce clause still fails strict scrutiny because it is woefully underinclusive, prohibiting announcements by judges and would-be judges only at certain times and in certain forms.”).

59. *Id.* at 788. (“[T]he greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance. If the state chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles.”) (citing *Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)).

dissented, and stressed the important differences between judicial elections and political elections that implicate a state's compelling interest in impartiality and therefore, justify stricter regulations.⁶⁰ According to Justice Ginsburg, the majority's "an election is an election" approach is not appropriate.⁶¹ In Justice Ginsburg's view, the strong First Amendment justifications for unrestricted political campaign speech do not carry over to judicial campaigns because candidates for political office must be responsive to the electorate, whereas judges are not political actors and do not sit as representatives of persons, communities, parties, or constituencies.⁶²

After the *White* decision, canons designed to promote the independence and impartiality of judiciaries became vulnerable to attack.⁶³ *White*, however, still left open the avenue whereby states could regulate judicial elections differently, rather than accepting the full constitutional doctrine applicable to political elections, as long as these regulations meet strict scrutiny.⁶⁴

C. A Sweeping Change to the U.S. Supreme Court's Judicial Election Jurisprudence: Williams-Yulee v. Florida Bar (2015)

Thirteen years post-*White*, the Supreme Court of the United States faced another First Amendment challenge to a judicial canon, but, this time, ruled quite differently.⁶⁵ The Court in *Williams-Yulee v. Florida Bar* held that the First Amendment permits states to restrict judicial candidates from personally soliciting campaign contributions from donors.⁶⁶ The challenged canon, Canon 7C(1) in the Florida Supreme Court's Code of Judicial Conduct, provides:

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*

60. *Id.* at 805.

61. *Id.* at 805.

62. *Id.* at 806.

63. Wendy R. Weiser, *Regulating Judges' Political Activity After White*, 68 ALB. L. REV. 651 (2005).

64. *Id.* at 652.

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

66. *Id.* at 1662 ("Judges are not politicians, even when they come to the bench by way of the ballot. And a State's decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office. A state may assure its people that judges will apply the law without fear or favor—and without having personally asked anyone for money.").

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.⁶⁷

Lanell Williams-Yulee challenged Canon 7C(1) on First Amendment free speech grounds after the Florida Bar charged her with failing to comply with Florida's Code of Judicial Conduct.⁶⁸ During the early part of her campaign for a county court seat in September 2009, Williams-Yulee drafted a letter announcing her candidacy and asking supporters to contribute money to her campaign. The letter stated:

An early contribution of \$25, \$50, \$100, \$250, or \$500, made payable to "Lanell Williams-Yulee Campaign for 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.⁶⁹

After sending the letter, a Florida Supreme Court referee sanctioned Williams-Yulee and recommended that she be publicly reprimanded and ordered to pay the costs of the proceeding.⁷⁰ The Supreme Court of Florida adopted the referee's recommendations and rejected Williams-Yulee's First Amendment argument, holding that Canon 7C(1) survived strict scrutiny by furthering Florida's compelling interest in "preserving the integrity of [its] judiciary and maintaining the public's confidence in an impartial judiciary."⁷¹ The Supreme Court of Florida concluded that Canon 7C(1) was narrowly tailored to serve the compelling interest of impartiality because it only insulates a judicial candidate's ability to solicit funds, leaving alternate channels for obtaining funds open.⁷²

67. *Id.* at 1663 (citing MODEL CODE OF JUDICIAL CONDUCT CANON 7C(1) (AM. BAR ASS'N 2011)) (emphasis added).

68. *Id.* at 1663–64.

69. *Id.* at 1663.

70. *Id.* at 1664; Charles Gardner Geyh, *The Jekyll and Hyde of First Amendment Limits on the Regulation of Judicial Campaign Speech*, 68 VAND. L. REV. EN BANC 83, 87 (2015) (Sympathetic to Williams-Yulee herself, Professor Charles Gardner Geyh explains that the rule in question likely seeks to "exorcise the deeply unsettling specter of judges rattling coffee cans as lawyers and litigants approach the bench, but Williams-Yulee's case conjures that specter in its weakest form.").

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

72. *Id.*

1. The Plurality Opinion

Chief Justice Roberts, writing for the plurality, joined by Justices Breyer, Sotomayor, Kagan, and in part by Justice Ginsburg, upheld Canon 7C(1) under strict scrutiny on the grounds that Florida had a compelling interest in preserving public confidence in the integrity of the judiciary, and it achieved this compelling interest through narrowly tailored means that did not unnecessarily abridge speech.⁷³ The Chief Justice explained that judges cannot seek out campaign donors without compromising neutrality, independence, and the public's confidence in judicial integrity—a concept that dates back to Magna Carta.⁷⁴ As recognized in *White*, Chief Justice Roberts agreed that states can regulate judicial elections differently than they regulate political elections, because the role of judges differs from the role of politicians.⁷⁵

Williams-Yulee conceded that a state has a compelling interest in judicial integrity; however, she argued that there is still a risk of compromising judicial integrity because Canon 7C(1) is underinclusive and does not restrict other types of speech, such as the ability of a campaign committee to raise money.⁷⁶ In response, Chief Justice Roberts articulated that policymakers may focus on the most pressing concerns without restricting other forms of speech, and the solicitation ban aimed at the most pressing concern: the notion that public confidence in the integrity of the judiciary will be undermined through personal requests for money by judges and judicial candidates.⁷⁷ In addition, Chief Justice Roberts emphasized that personal solicitation by candidates themselves implicates a different problem than solicitation by committees because a solicited individual knows that a judicial candidate, if elected, will be in a unique position of power over

73. *Id.* at 1666.

74. *Id.* (“To no one will we sell, to no one will we refuse or delay, right or justice.”) (citing WILLIAM S. MCKECHNIE, *MAGNA CARTA, A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* 395 (2d ed. 1914)).

75. *Id.* at 1667 (“Politicians are expected to be appropriately responsive to the preferences of their supporters. Indeed, such ‘responsiveness is key to the very concept of self-governance through elected officials.’ The same is not true of judges. In deciding cases, a judge is not to follow the preferences of his supporters, or provide any special consideration to his campaign donors. A judge instead must ‘observe the utmost fairness,’ striving to be ‘perfectly and completely independent’”) (internal citations omitted).

76. *Id.* at 1668.

77. *Williams-Yulee*, 135 S. Ct. at 1668–70 (“Taken to its logical conclusion, the position advanced by Yulee and the principal dissent is that Florida may ban the solicitation of funds by judicial candidates only if the State bans *all* solicitation of funds in judicial elections. The First Amendment does not put a State to that all-or-nothing choice. We will not punish Florida for leaving open more, rather than fewer, avenues of expression, especially when there is no indication that the selective restriction of speech reflects a pretextual motive.”).

decisions and outcomes.⁷⁸ Williams-Yulee also argued that the canon was underinclusive because judicial candidates are allowed to write thank you notes to campaign donors. Chief Justice Roberts acknowledged the possibility that permitting thank you notes could heighten the likelihood of bias within the judiciary, but he ultimately concluded that the candidate's personal solicitation itself necessitates the state's compelling interest.⁷⁹

Williams-Yulee then contended that Canon 7C(1) was too broad and not narrowly tailored to advance the state's compelling interest through the least restrictive means. Chief Justice Roberts rejected the overbreadth argument as well, explaining that the canon gives candidates free reign to discuss issues with supporters and potential supporters, except for discussing donations.⁸⁰ Williams-Yulee further contended that the canon constitutionally could not be applied to her chosen form of solicitation: a letter posted online and distributed via mass mailing because the public would not lose confidence in the integrity of the judiciary based on personal solicitation to such a broad audience.⁸¹ In response, Chief Justice Roberts stated that the Court "decline[s] to wade into this swamp" over which forms of personal solicitation may generate a problem of impropriety as opposed to other forms, because the First Amendment only requires narrow tailoring, not perfect tailoring.⁸²

In the last part of her overbreadth argument, Williams-Yulee contended that Florida could accomplish its compelling state interests through recusal rules and campaign contribution limits. Chief Justice Roberts sharply disagreed with both arguments. With regard to recusal, Chief Justice Roberts reasoned that such rules would disable

78. *Id.* at 1669. ("When the judicial candidate himself asks for money, the stakes are higher for all involved. The candidate has personally invested his time and effort in the fundraising appeal; he has placed his name and reputation behind the request. The solicited individual knows that, and also knows that the solicitor might be in a position to singlehandedly make decisions of great weight: The same person who signed the fundraising letter might one day sign the judgment. This dynamic inevitably creates pressure for the recipient to comply, and it does so in a way that solicitation by a third party does not.").

79. *Id.*

80. *Id.* at 1670 ("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.").

81. *Id.* at 1671.

82. *Williams-Yulee*, 135 S. Ct. 1671 ("[Yulee's] argument misperceives the breadth of the compelling interest that underlies Canon 7C(1). Florida has reasonably determined that personal appeals for money by a judicial candidate inherently create an appearance of impropriety that may cause the public to lose confidence in the integrity of the judiciary. That interest may be implicated to varying degrees in particular contexts, but the interest remains whenever the public perceives the judge personally asking for money.").

jurisdictions by limiting the amount of judges and resources and would also create an incentive for litigants to make campaign contributions to judges solely as a means to trigger their later recusal.⁸³ With regard to campaign contribution limits, Chief Justice Roberts explained that these limits already apply to judicial candidates and even if Florida were to reduce the contribution limit, the appearance that judges who personally solicit funds might improperly favor their campaign donors would remain.⁸⁴

2. Justice Ginsburg's Concurrence

Justice Ginsburg joined the plurality opinion, except for Part II, with respect to the plurality's application of strict scrutiny.⁸⁵ Instead, Justice Ginsburg noted her approach in the *White* dissent, which would not apply exacting scrutiny to a state's decision to differentiate judicial elections from political elections.⁸⁶ Much like her dissent in *White*, Justice Ginsburg also emphasized that judges are not politicians and therefore, states should have latitude to enact campaign-finance rules geared towards judicial elections. Justice Ginsburg explained that, "when the political campaign-finance apparatus is applied to judicial elections, the distinction of judges from politicians dims," because donors who seek to influence politicians through campaign contributions will anticipate that "investment in campaigns for judicial office will yield similar returns."⁸⁷

Accordingly, Justice Ginsburg highlighted instances in multiple states where millions of dollars were spent on judicial campaigns, usually in opposition to incumbent judges who do not support a party line, rendered an unfavorable decision, or are allegedly out of step with public opinion.⁸⁸ Justice Ginsburg further explained that instances of disproportionate spending to influence court judgments threaten judicial independence.⁸⁹ In support of this, Justice Ginsburg cited to multiple studies showing that the influence of money in judicial campaigns affects not only judicial decision-making in cases, but also leads voters to believe that campaign contributions have at least "some influence" on judicial decision-making.⁹⁰

83. *Id.* at 1671–72.

84. *Id.* at 1672.

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

86. *Id.* at 1673.

87. *Id.* at 1674.

88. *Williams-Yulee*, 135 S. Ct. at 1674–75 (Ginsburg, J., concurring).

89. *Id.* at 1675.

90. *Id.* ("[I]n response to a recent poll, 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

3. The Dissenting Opinions

Justice Scalia, joined by Justice Thomas in the dissent, criticized the Court for “flatten[ing] one settled First Amendment principle after another.”⁹¹ In mocking the plurality’s standard of review as “the appearance of strict scrutiny,”⁹² Justice Scalia conducted his own analysis under strict scrutiny and concluded that Canon 7C(1) failed. Under strict scrutiny, Justice Scalia first described Florida’s asserted compelling interest as “ill-defined” and went on to criticize the Court for using too much discretion in accepting the asserted interest.⁹³ Next, Justice Scalia concluded that Canon 7C(1) was not narrowly tailored because the canon extended broadly and prohibited solicitations from family members, friends, and persons who have no chance of ever appearing in the candidate’s court.⁹⁴ In addition, Justice Scalia noted that Canon 7C(1) extended too broadly in banning candidates from asking for contributions through all mediums, including mass mailings, flyers, speeches, and websites, such mediums that avoid “the spectacle of lawyers or potential litigants directly handing over money to judicial candidates.”⁹⁵

Justice Scalia also took issue with Canon 7C(1)’s underinclusive nature.⁹⁶ Rather than restricting all personal solicitations, the canon only restricts personal solicitations from campaigns. Therefore, “favors” unrelated to campaigns—for example, personal loans between attorneys or access to a law firm’s luxury suite at a football stadium—would equally erode the public confidence in the integrity of the judiciary as campaign favors.⁹⁷

Justices Kennedy and Alito wrote separate dissents. Kennedy criticized the Court for “undermin[ing] the educational process that free

elected ‘judge’s later decisions.’”) (citing *Justice at Stake/Brennan Center National Poll 10/22-10/24, 2013*, 20/20 INSIGHT LLC Q9 (Oct. 22–24, 2013), http://www.justiceatstake.org/file.cfm/media/news/toplines337_B2D51323DC5D0.pdf).

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

92. *Id.* at 1677.

93. *Id.* (“As its opinion unfolds, however, today’s concept of judicial integrity turns out to be ‘a mere thing of wax in the hands of the judiciary,’ which they may twist, and shape into any form they please”) (citing 12 THE WORKS OF THOMAS JEFFERSON 137 (P. Ford ed. 1905)).

94. *Williams-Yulee*, 135 S. Ct. at 1679 (Scalia, J., dissenting) (“The state has not come up with a plausible explanation of how soliciting someone who has no chance of appearing in the candidate’s court will diminish public confidence in judges.”).

95. *Id.* at 1678. Scalia claimed that Canon 7C(1)’s tailoring is as “narrow as the Court’s scrutiny is strict.” *Id.* at 1679.

96. *Id.* at 1680.

97. *Id.* at 1680. Canon 7C(1) suggests that “it has nothing to do with appearances created by judges’ asking for money, and everything to do with hostility toward judicial campaigning The Court tries to strike a pose of neutrality between appointment and election of judges, but no one should be deceived.” *Id.* at 1681.

speech in elections should facilitate” by eliminating public discourse over ethical standards for the judiciary and instead allowing for state censorship.⁹⁸ Alito characterized Canon 7C(1) as “narrowly tailored as a burlap bag” because the canon applied to all solicitations and all persons solicited, even if that person is not a lawyer or has no stake in litigation.⁹⁹

III. POST-*WILLIAMS-YULEE* RULINGS: THE SIXTH AND NINTH CIRCUITS

A. *Wolfson v. Concannon (2016): The Ninth Circuit Extends Williams-Yulee to Restrict Judicial Candidates from Campaigning for or Endorsing Other Candidates*

The Ninth Circuit has extended the rationale of *Williams-Yulee* to a judicial canon prohibiting judicial candidates from campaigning for or endorsing other candidates for public office. The Arizona Code of Judicial Conduct has several clauses that regulate judicial campaigns.¹⁰⁰ Together, the clauses within the Code forbid judicial candidates from (1) personally soliciting funds for their campaigns (Personal Solicitation Clause); (2) campaigning for another candidate or political organization; (3) publicly endorsing another candidate for public office; (4) making speeches on behalf of another candidate or political organization; and (5) actively taking part in any political campaign (together, Endorsement Clauses and Campaign Prohibition).¹⁰¹

Randolph Wolfson, an Arizona state judicial candidate in 2006 and 2008, filed a lawsuit against the Commissioners of the Arizona Commission on Judicial Conduct in the District Court of Arizona, challenging the regulations on First Amendment freedom of speech and association grounds.¹⁰² The district court disagreed with Wolfson’s contentions and granted summary judgment for the Commission, following the lead of the Seventh Circuit in applying an intermediate

98. *Id.* at 1684 (Kennedy, J., dissenting) (“One advantage of judicial elections is the opportunity offered for the public to become more knowledgeable about their courts and their law. This might stimulate discourse over the requisite and highest ethical standards for the judiciary, including whether the people should elect a judge who personally solicits campaign funds. Yet now that teaching process is hindered by state censorship.”).

99. *Id.* at 1685 (Alito, J., dissenting) (“If this rule can be characterized as narrowly tailored, then narrow tailoring has no meaning, and strict scrutiny, which is essential to the protection of free speech, is seriously impaired.”).

100. *Wolfson v. Concannon*, 811 F.3d 1176, 1178 (9th Cir. 2016).

101. *Id.* at 1179.

102. *Id.*

level of scrutiny to judicial campaign regulations.¹⁰³ Wolfson appealed and a Ninth Circuit panel reversed the judgment of the district court.¹⁰⁴ After the Supreme Court decided *Williams-Yulee* in April of 2015, however, an en banc rehearing was ordered, and the Ninth Circuit reversed the decision of the panel, upholding these restrictions under strict scrutiny.¹⁰⁵ As such, the en banc panel held that strict scrutiny was appropriate in light of *Williams-Yulee* and emphasized that strict scrutiny extends to not only the personal solicitation regulation, which was at issue in *Williams-Yulee*, but also to Arizona's regulations that prohibited judicial candidates from endorsing and actively campaigning for candidates for public office.¹⁰⁶

After determining that strict scrutiny applied, the en banc panel turned to Arizona's individual restrictions. First, the court examined the Arizona Code of Judicial Conduct's restriction on personal solicitations. Substantively, the Personal Solicitation Clause was similar to that at issue in *Williams-Yulee*, but the asserted state interests were worded slightly differently. Bound by *Williams-Yulee*, Wolfson's attempt to distinguish Arizona's Personal Solicitation Clause failed.¹⁰⁷

The court then considered Wolfson's First Amendment challenge to Arizona's Endorsement Clauses and Campaign Prohibition. Here, Wolfson argued that the prohibitions were underinclusive, overbroad, and therefore not tailored towards the interest at hand.¹⁰⁸ First, with regard to underinclusivity, Wolfson contended that the prohibitions still allowed judicial candidates to receive endorsements, endorse public officials and noncandidates, and allow other candidates to participate in their judicial campaigns.¹⁰⁹ Citing to *Williams-Yulee*, the court rejected this argument and reasoned that the clauses aimed solely at the conduct most likely to undermine public confidence are applied evenhandedly to all judges and are not riddled with exceptions.¹¹⁰ Thus, the court

103. *Id.* (citing *Siefert v. Alexander*, 608 F.3d 974, 983–88 (7th Cir. 2010); *Bauer v. Shepard*, 620 F.3d 704, 713 (7th Cir. 2010)).

104. *Id.*

105. *Id.* at 1179.

106. *Wolfson*, 811 F.3d at 1181 (“A decision otherwise would be contrary to the Supreme Court’s broad reasoning in *Williams-Yulee*, which addressed not just a prohibition on personal requests for campaign contributions, but state restrictions on judicial candidate speech generally.”).

107. *Id.* at 1182 (“Even if Arizona adopted slightly different language for its articulation of its interest, Arizona is similarly interested in upholding the judiciary’s credibility. There are no magic words required for a state to invoke an interest in preserving public confidence in the integrity of the state’s sitting judges.”).

108. *Id.* at 1183.

109. *Id.*

110. *Id.* at 1183 (“[T]he Supreme Court’s reasoning was broad enough to encompass underinclusivity arguments aimed at other types of judicial candidate speech prohibitions such as Arizona’s Endorsement Clauses and its Campaign Prohibition.”).

concluded that Arizona's Endorsement Clauses and Campaign Prohibition were aimed squarely at preventing conduct that could erode the judiciary's credibility, emphasizing that when judicial candidates actively engage in political campaigns, a judge's impartiality can be questioned.¹¹¹ Further, the court did not want to call into question whether Arizona could have prohibited more types of endorsements or campaign prohibitions.¹¹²

Next, Wolfson argued that the Endorsement Clauses and Campaign Prohibition were unconstitutionally overbroad because the campaign prohibition banned involvement with ballot measures and the endorsement clause forbid judicial candidates from endorsing any candidate, even candidates for President of the United States who are unlikely to appear before the judge.¹¹³ Rejecting these arguments as well, the court again relied on *Williams-Yulee* to reason that speech restrictions need only be narrowly tailored, not "perfectly tailored"; therefore, courts need not draw unworkable lines regarding the maximum amount of speech that can be limited.¹¹⁴

Lastly, Wolfson contended that the Endorsement Clauses and Campaign Prohibition did not offer the least restrictive means to further the state's interest, arguing that the clauses do not prevent judges from favoring certain candidates that may appear in court, and even if they did, recusal could handle impartiality or the appearance of impartiality. The court quickly dismissed this argument, acknowledging that it was flatly dismissed in *Williams-Yulee* due to the fact that recusal rules could "cripple the judiciary" and erode public confidence in the judiciary even more.¹¹⁵

B. O'Toole v. O'Connor (2015): The Sixth Circuit Extends Williams-Yulee to Temporal Restrictions on Campaign Committees

The Sixth Circuit has extended the rationale of *Williams-Yulee* to canons restricting the conduct of campaign *committees* in addition to candidates. At issue in *O'Toole v. O'Connor* was Ohio Code of Judicial Conduct Rule 4.4(E), promulgated by the Supreme Court of Ohio. Like

111. *Id.* at 1183–84 (“When a judicial candidate actively engages in political campaigns, a judge’s impartiality can be put into question, and the public can lose faith in the judiciary’s ability to abide by the law and not make decisions along political lines.”).

112. *Wolfson*, 811 F.3d at 1184 (“[P]olicymakers may focus on their most pressing concerns’ and the fact that the state could [sic] ‘conceivably could have restricted even greater amounts of speech in service of their stated interests’ is not a death blow under strict scrutiny.”) (quoting *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1668 (2015)).

113. *Id.*

114. *Id.* at 1185 (“It is not our proper role to second-guess Arizona’s decisions in this regard.”).

115. *Id.* at 1186.

in *Williams-Yulee*, the Code prohibited personal solicitation of campaign contributions and allowed for the establishment of campaign committees to manage and conduct the campaign for the candidate.¹¹⁶ These committees are subject to Rule 4.4(E), at issue in this case, which provides:

The campaign committee of a judicial candidate may begin soliciting and receiving contributions no earlier than one hundred twenty days before the first Tuesday after the first Monday in May of the year in which the general election is held. If the general election is held in 2012 or any fourth year thereafter, the campaign committee of a judicial candidate may begin soliciting and receiving contributions no earlier than one hundred twenty days before the first Tuesday after the first Monday in March of the year in which the general election is held.¹¹⁷

Despite this restriction, campaign committees may continue to receive contributions until 120 days *after* the earlier of: (1) the general election; (2) defeat; or (3) death or withdrawal of the candidate.¹¹⁸ In addition, candidates can contribute personal money to their own campaigns 210 days before the primary election.¹¹⁹

Colleen O'Toole, Judge on Ohio's Eleventh District Court of Appeals and one of the Republican Party primary candidates for the 2016 Supreme Court of Ohio election, filed a motion for a temporary restraining order and preliminary injunction to enjoin enforcement of Rule 4.4(E).¹²⁰ She alleged that the rule violated her campaign committees' First Amendment right to free speech, and specifically, core political speech.¹²¹ After the district court denied this motion,

116. O'Toole v. O'Connor, 802 F.3d 783, 787 (6th Cir. 2015).

117. *Id.* at 788.

118. *Id.* (citing OHIO CODE JUDICIAL CONDUCT R. 4.4(E)-(G)).

119. *Id.* (citing OHIO CODE JUDICIAL CONDUCT R. 4.4(H)(1)).

120. *Id.* at 787.

121. *Id.* at 788. Plaintiff also alleged a violation of the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection argument is beyond the scope of this Casenote. In contrast to *O'Toole*, a Sixth Circuit panel in the 2016 decision of *Winter v. Wolnitzek* struck down as unconstitutional Kentucky canons of judicial conduct that prohibited judicial candidates from campaigning as members of political organizations and making speeches for or against political organizations. In *Winter*, Judge Sutton explained that the "campaigning clause" was vague and unconstitutionally overbroad because it gave "judicial candidates little confidence about when they exercise their right to affiliate with a party or when they violate the law. . . ." *Winter v. Wolnitzek*, 834 F.3d 681, 689 (6th Cir. 2016). Likewise, the "speeches clause" did "too little to advance the State's interest in impartiality and the avoidance of partisan influence." *Id.* The speeches clause also "suppress[ed] too much speech to advance the government's interest." *Id.* It "impermissibly bar[red] protected speech about the judge's own campaign." *Id.* at 691. However, the court upheld as constitutional a clause that prohibited judicial candidates from endorsing political candidates for public

O'Toole subsequently appealed.¹²²

Using the preliminary injunction framework, the Sixth Circuit affirmed the judgment of the district court in denying plaintiff's motion.¹²³ First, the court held that plaintiff did not establish a likelihood of success on First Amendment grounds.¹²⁴ The court noted that the parties disagreed on the appropriate level of scrutiny to apply to the challenged restriction.¹²⁵ While O'Toole argued that strict scrutiny should apply, the State argued that a lesser scrutiny should apply because Rule 4.4(E) limits the campaign committees' associational freedoms, which are typically subject to a lower level of scrutiny.¹²⁶ Despite these arguments on both sides, the court chose not to decide the issue because O'Toole failed to demonstrate a likelihood of success on the merits, even with strict scrutiny applied to Rule 4.4(E).¹²⁷

In evaluating the likelihood of success on the merits, the court first looked to the state's asserted interests of "judicial impartiality, judicial independence [and] judicial integrity."¹²⁸ Relying on *Williams-Yulee*, the court accepted these interests as "legitimate" because of the longstanding recognition of this interest in history. O'Toole, however, argued that this interest only applied to her, as the candidate, and not to the solicitation or receipt of contributions by her campaign committee.¹²⁹ The court rejected this argument as contrary to the holding of *Williams-Yulee*. The court acknowledged that, while the solicitation by committees is more attenuated than those made directly by a campaign, "the close connection between judicial candidates and

office because under *Williams-Yulee*, the clause "aim[ed] squarely at the conduct must likely to undermine' nonpartisanship in judicial elections" and was thus narrowly tailored to that interest. *Id.* at 692. In addition, the court upheld a clause that prohibited judicial candidates from "act[ing] as a leader or hold[ing] any office in a political organization." *Id.* The court reasoned that the clause "target[ed] an admirable goal"—preserving public confidence in its judges and "use[d] permissible means in doing so." *Id.* The court also upheld a clause that prohibited judicial candidates from "mak[ing] a contribution to a political organization or candidate." *Id.* at 690. In upholding the contributions clause, the court noted that while "[j]udicial candidates have a First Amendment right to speak in support of their campaigns," it does not follow that they have "an unlimited right to contribute money to someone else's campaign." *Id.*

122. *O'Toole*, 802 F.3d at 787.

123. *Id.* at 788–89. A party seeking injunctive relief must prove that "he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* (quoting *Winter v. Nat. Res. Def. Counsel, Inc.*, 555 U.S. 7, 20 (2006)). No one factor is controlling in this analysis.

124. *Id.* at 789 ("To prevail, a plaintiff must show substantial overbreadth: that the statute prohibits a substantial amount of protected speech both in an absolute sense and relative to [the statute's] plainly legitimate sweep[.]") (internal quotation marks omitted).

125. *Id.*

126. *Id.* at 789.

127. *Id.*

128. *O'Toole*, 802 F.3d at 789.

129. *Id.*

their campaign committees under Ohio law implicates many of the same concerns regarding judicial integrity and propriety.”¹³⁰ In support, the Sixth Circuit noted that judicial campaign committees in Ohio derive their authority from the candidate and may include the candidate herself.¹³¹ In addition, candidates are further aligned with their committees in the eyes of the public because Ohio law requires that the name of a campaign committee include at least the last name of the candidate.¹³²

O’Toole also argued that the State failed to present sufficient evidence to establish that the regulation advances its interest.¹³³ Relying on *Williams-Yulee*, the Sixth Circuit rejected this argument as well because of the well-established nature of the judicial impartiality as a compelling state interest. Further, the court quoted *Williams-Yulee* in explaining that “[t]he concept of public confidence in judicial integrity does not easily reduce to precise definition, nor does it lend itself to proof by documentary record.”¹³⁴ Last, O’Toole argued that Rule 4.4(E) was not narrowly tailored to represent the least restrictive means of the state’s interest. Again relying on *Williams-Yulee*, the Sixth Circuit rejected this argument by emphasizing that the First Amendment does not require perfect tailoring, which is “especially apparent when the State’s compelling interest is as intangible as public confidence in the integrity of the judiciary.”¹³⁵

The court went on to explain that Rule 4.4(E) is less restrictive than Canon 7C(1) at issue in *Williams-Yulee*, which banned all personal solicitations by candidates across the board. Rule 4.4(E) allows a committee sixteen months to solicit contributions and allows candidates to spend their own funds and engage in other campaign activities that do not include the soliciting of funds.¹³⁶ Further, Rule 4.4(E) exclusively restricts committees in the context of solicitation and receiving money and only during a period of time that implicates the government’s stated interest, recognizing that “contributions that are not proximate in time to

130. *Id.* at 789–90.

131. *Id.* at 790 (citing to OHIO. REV. CODE ANN. § 3517.01 (C)(1) (West), which defines campaign committee as “a candidate or combination of two or more persons authorized by a candidate . . . to receive contributions and make expenditures.”).

132. *Id.* at 790 (citing to OHIO. REV. CODE ANN. § 3517.10 (D)(1)) (West).

133. *Id.* at 790.

134. *O’Toole*, 802 F.3d at 790. (quoting *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1667 (2015)).

135. *Id.* (quoting *Williams-Yulee*, 135 S. Ct. at 1671).

136. *Id.* (“This regulation also leaves candidates ‘able to contribute and spend their own funds, marshal volunteers and supporters and engage in campaign activities other than soliciting funds, such as attending political functions, marching in parades and making speeches about their candidacy’ Rule 4.4(E) is focused exclusively on the solicitation and receipt of money—the activities most likely to harm public confidence in the judiciary.”).

an election can increase the appearance of impropriety and the risk of actual bias.”¹³⁷ The Sixth Circuit recognized that the time limit—120 days—may seem arbitrary; however, the “First Amendment does not confine a State to addressing evils in their most acute form.”¹³⁸ In addition to failing to show a likelihood of success on the merits with respect to her First Amendment claim, O’Toole failed to prove irreparable harm and that a preliminary injunction would serve the public interest.

IV. THE LOGIC BEHIND EXTENDING *WILLIAMS-YULEE*

Supreme Court of the United States precedent on judicial election restrictions and First Amendment implications fails to provide lower courts with solid guidance. Through striking down Minnesota’s announce clause, *White* led to inconsistent outcomes, uncertainty about which legal standards to apply to individual judicial conduct regulations, uncertainty about the future of canons, and a weakening of state efforts to regulate judicial conduct.¹³⁹ In upholding Florida’s personal solicitation ban, *Williams-Yulee*, by plurality opinion, represented a continued disagreement about how to reconcile the Court’s First Amendment jurisprudence with judicial elections, while allowing states to guarantee an impartial, disinterested judiciary.¹⁴⁰ In addition, the plurality in *Williams-Yulee* reached a majority with respect to upholding Canon 7C(1), but the Court could not agree on the level of scrutiny to apply for this specific canon; thus leading to a plurality opinion.¹⁴¹

The plurality’s holding in *Williams-Yulee* raises many common concerns regarding judicial campaign restrictions moving forward, both of which *Wolfson* and *O’Toole* addressed. Two of these common questions will be addressed in turn. First, how should lower courts apply the standard of review used in *Williams-Yulee*? The plurality applied strict scrutiny without the support of Justices Ginsburg and Breyer, and the standard of review in Justice Scalia’s mind was “the appearance of strict scrutiny.”¹⁴² Second, should the *Williams-Yulee* rationale extend beyond personal solicitations to uphold restrictions on other types of canons that restrict conduct that has the potential to threaten judicial integrity? This Casenote supports the purportedly

137. *Id.* at 790.

138. *Id.* (quoting *Williams-Yulee*, 135 S. Ct. at 1671).

139. Weiser, *supra* note 63, at 654.

140. *Freedom of Speech-Judicial Campaign Speech- Williams-Yulee v. Florida Bar*, 129 HARV. L. REV. 231, 236 (2015).

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

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

loosened approach to strict scrutiny used by the Ninth and Sixth Circuits, which closely mirrors how the Supreme Court in *Williams-Yulee* upheld Canon 7C(1). Given that *Williams-Yulee* clarifies that these canons must be only narrowly tailored and not perfectly tailored, *Wolfson* and *O'Toole* appropriately upheld the canons under strict scrutiny and courts should use this approach moving forward.

This Casenote also advocates that courts extend the *Williams-Yulee* holding to other types of judicial campaign restrictions. Given that the public perception of judicial integrity is a “state interest of the highest order”¹⁴³ and that *Williams-Yulee* signals a certain amount of state deference in enacting restrictions, the Ninth Circuit in *Wolfson* and the Sixth Circuit in *O'Toole* properly used the broad reasoning of *Williams-Yulee* to uphold the respective judicial canons at issue.

A. Evaluating the Standard of Review for Judicial Canons Post-Williams-Yulee

After *Williams-Yulee*, the standard of review for judicial canons appears to be in a perplexed state. In writing the *Williams-Yulee* plurality opinion, Chief Justice Roberts warned that this was one of the rare cases in which a speech restriction withstands strict scrutiny.¹⁴⁴ The compelling interest of preserving public confidence in the judiciary and the fundamental difference between judicial elections and political elections likely makes this case different from other First Amendment cases. Justice Scalia appeared to accept the notion that states have more compelling interests in regulating judicial elections than in regulating political elections.¹⁴⁵ Justice Scalia took issue with the plurality's analysis on how the personal solicitation canon was not narrowly tailored to achieve Florida's interest in preserving public confidence in the judiciary. Regardless of whether the scrutiny was strict enough to satisfy Justice Scalia, both *Wolfson* and *O'Toole* appropriately used strict scrutiny, or the appearance of it, to satisfy the broad command of *Williams-Yulee*.

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

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

145. *Id.* at 1677 (Scalia, J., dissenting) (“I do not for a moment question the Court's conclusion that States have different compelling interests when regulating judicial elections than when regulating political ones. Unlike a legislator, a judge must be impartial—without bias for or against any party or attorney who comes before him. I accept for the sake of argument that States have a compelling interest in ensuring that its judges are *seen* as impartial. I will likewise assume that a judicial candidate's request to a litigant or attorney presents a danger of coercion that a political candidate's request to a constituent does not.”).

1. Narrowly Tailored

The First Amendment only requires narrow tailoring, not perfect tailoring.¹⁴⁶ States may target the most pressing concerns without abridging other forms of speech.¹⁴⁷ Thus, underinclusive arguments in the context of judicial elections are likely to fail post *Williams-Yulee*. In *Williams-Yulee*, Canon 7C(1) did not prohibit committees from soliciting funds or prohibit candidates from writing thank-you notes to donors after the election.¹⁴⁸ In addition, the canon did not prohibit other types of favors outside the context of campaigns.¹⁴⁹ The canon's failure to cover these types of conduct did not matter. Speech may be more severe in certain contexts; however, states are not required to place an overall blanket ban on conduct that may have only the slightest impact on judicial integrity. The First Amendment does not leave states to this all-or-nothing choice.¹⁵⁰

This indicates that the Court has given a wide amount of latitude to states in deciding what type of conduct adversely affects public confidence in the judiciary.¹⁵¹ Thus, it was proper for the *Wolfson* court to give Arizona substantial latitude in making this determination. Even though the Endorsement Clauses and Campaign Prohibition at issue in *Wolfson* still allowed political involvement to a certain extent—since judicial candidates could still receive endorsements, endorse public officials, and allow politicians to participate in their judicial campaigns—the state made a reasoned judgment that the public confidence is most affected when the public views a judicial candidate as actively involved in political campaigns, not necessarily vice versa.¹⁵² The *O'Toole* court did not address any underinclusive arguments; however, *Wolfson* provides sufficient guidance on how *Williams-Yulee* likely precludes litigants from bringing forward arguments that judicial canons do not restrict enough speech, so long as it appears that a canon is aimed squarely at harmful conduct and is not riddled with unnecessary exceptions.¹⁵³

Likewise, due to Court's rejection of perfect tailoring, overbreadth arguments in the context of judicial campaigns are equally as likely to

146. *Id.* at 1671 (majority opinion).

147. *Id.* at 1668.

148. *Id.*

149. *Id.* at 1680 (Scalia, J., dissenting) (“Surely the Court does not believe that requests for campaign favors erode public confidence in a way that requests for favors unrelated to elections do not.”).

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

151. *Id.* at 1668 (“A State need not address all aspects of a problem in one fell swoop.”).

152. *Wolfson v. Concannon*, 811 F.3d 1176, 1184 (9th Cir. 2016).

153. *Id.* at 1183.

fail as arguments of underinclusivity. So long as a judicial canon does not restrict a wildly disproportionate amount of speech,¹⁵⁴ the First Amendment does not require states to address evils in their most acute form.¹⁵⁵ In addition, the Court refused to wade into the swamp and draw unworkable lines in determining which forms of solicitation through different types of mediums is the most harmful to the public confidence.¹⁵⁶ Much like in *Williams-Yulee*, the *Wolfson* court refused to draw unworkable lines as to whether Arizona should not have banned involvement with ballot measures and endorsements of candidates such as President of the United States.¹⁵⁷ Again, the *Wolfson* court correctly relied on the reluctance of the Court in *Williams-Yulee* to second-guess the judgment of states.

Similarly, O'Toole advanced the argument that Ohio's campaign committee time restrictions were overbroad. The *O'Toole* court, however, properly gave substantial latitude to what Ohio recognized as conduct likely to harm public confidence in the judiciary: solicitations by committees, which are connected to the candidate, that are not proximate to the election create a risk of bias. In addition, much like the personal solicitation clause in *Williams-Yulee*, O'Toole could still engage in other campaign activities such as attending political functions and making speeches about her candidacy.¹⁵⁸ Further, the Court in *Williams-Yulee* blatantly rejected any further arguments made by litigants regarding recusal; thus, *Wolfson* correctly signaled an end to this overbreadth argument as well.¹⁵⁹

2. Compelling State Interest

From the onset of their opinions, both the *Wolfson* court and the *O'Toole* court accepted the asserted state interests as compelling without inquiry. In *Williams-Yulee*, Florida framed its compelling interests as protecting the integrity of the judiciary and maintaining the public's confidence in an impartial judiciary.¹⁶⁰ In *Wolfson*, Arizona framed its compelling interests as serving judicial honesty, impartiality,

154. *Williams-Yulee*, 135 S. Ct. at 1670; see, e.g., *Winter v. Wolnitzek*, 834 F.3d 681, 689 (6th Cir. 2016) (striking down a clause in the Kentucky Commonwealth's Code of Judicial Conduct that prohibited judicial candidates from "mak[ing] speeches for or against a political organization or candidate" because the clause "suppresse[d] too much speech to advance the government's interest").

155. *Williams-Yulee*, 135 S. Ct. at 1671.

156. *Id.*

157. *Wolfson*, 811 F.3d at 1185.

158. *O'Toole v. O'Connor*, 802 F.3d 783, 790 (6th Cir. 2015).

159. *Wolfson*, 811 F.3d at 1186.

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

temperament, or fitness.¹⁶¹ In *O'Toole*, Ohio defined its compelling interest as serving judicial impartiality, judicial independence, and judicial integrity.¹⁶² While all of these interests may be framed slightly differently, *Williams-Yulee* does not require that states have one precise definition of the concept.¹⁶³ In addition, states are not required to document proof of any risks to public confidence in judicial integrity.¹⁶⁴

Given this latitude towards the states, courts should follow the lead of *Wolfson* and *O'Toole* in accepting judicial impartiality (however framed) as a compelling state interest. In fact, even *Williams-Yulee* herself did not contest Florida's compelling state interest. Justice Scalia seemed to concede that argument as well.¹⁶⁵ The plurality, with the support of Justices Ginsburg and Breyer concurring, automatically accepted the fact that personal solicitations of campaign contributions pose a risk to judicial integrity. Thus, courts can assume that other potential risks to judicial integrity are just as much of a problem, giving rise to a state's compelling interest without the need to show substantive evidence. As such, the *O'Toole* court was correct to rely heavily on *Williams-Yulee* in not requiring the state to provide sufficient evidence to establish that restricting the time limit of when campaign committees can solicit contributions advances its compelling interest.¹⁶⁶

In addition, the historical acknowledgement in *Williams-Yulee* of judicial impartiality as a compelling state interest also lends itself to lower courts automatically recognizing this interest as compelling.¹⁶⁷ This is a well-founded interest dating back many centuries. Furthermore, the Court's growing recognition since *White* of the fundamental difference between judicial elections and political elections further lends itself to lower courts automatically recognizing this interest as compelling.¹⁶⁸ Judicial elections are a different animal than political elections, thus heightening the compelling nature of the state's interest. The plurality continually acknowledged this throughout *Williams-Yulee*.

161. *Wolfson*, 811 F.3d at 1181–82.

162. *O'Toole*, 802 F.3d at 789.

163. *Williams-Yulee*, 135 S. Ct. at 1667.

164. *Id.*

165. *Id.* at 1676–77 (Scalia, J., dissenting).

166. *O'Toole*, 802 F.3d at 790 (“The interest at issue in this case is well-established . . . and was recently reiterated by the Supreme Court.”).

167. *Williams-Yulee*, 135 S. Ct. at 1666 (Public confidence in judicial integrity is a principle which “dates back at least eight centuries to Magna Carta, which proclaimed, ‘To no one will we sell, to no one will we refuse or delay, right or justice.’”).

168. *Id.* (“The importance of public confidence in the integrity of the judge stems from the place of the judiciary in the government. Unlike the executive or the legislature, the judiciary ‘has no influence over either the sword or the purse; . . . neither force nor will but merely judgment’”) (internal quotation marks omitted).

B. The Breadth of Williams-Yulee: The Lower Courts Have Correctly Extended the Court's Rationale Beyond Personal Solicitations

Turning first to *Wolfson*, the dangers to judicial integrity are equally apparent when a judge actively participates in political campaigns and endorses political candidates as when a judge personally solicits campaign contributions. Both scenarios raise concerns that a judge or judicial candidate is entrenched in politics, which draws into question their credibility and independence from the political branches.¹⁶⁹ The Ninth Circuit was correct to conclude that *Williams-Yulee* addressed not just a prohibition on personal requests for money, but state restrictions on judicial candidate speech generally.¹⁷⁰ Just as the public may lack confidence in a judge's ability to administer justice without fear or favor as a result of solicitation of campaign contributions,¹⁷¹ the public may lose faith in the judiciary's ability to abide by the law and not make decisions along political lines.¹⁷²

Endorsements are equally problematic, as they have the potential to place judges "at the fulcrum of local party politics, blessing and disposing of candidates' political futures."¹⁷³ When judges actively campaign for political candidates, the public may begin to see them not as neutral arbiters, but as "participants in the larger game of politics."¹⁷⁴ The role of a judge is to make decisions based upon the law and the facts of every case and this role is undermined when a judge is succumbed to monetary and political pressure.¹⁷⁵ Judicial entanglement in party politics may result in party loyalty and favors owed to political actors, which may overshadow impartial application of the law.¹⁷⁶

169. Brief of Amici Curiae the Brennan Center for Justice at NYU School of Law, et al. in Support of Defendants-Appellees at 9, *Wolfson v. Concannon*, 811 F.3d 1176 (9th Cir. 2016) (No. 11-17634); *see also* *Winter v. Wolnitzek*, 834 F.3d 681, 691 (6th Cir. 2016) ("Because endorsements often are 'exchanged between political actors on a quid pro quo basis,' the endorsements clause is narrowly tailored to Kentucky's compelling interest in preventing judges from becoming (or perceived as becoming) part of partisan political machines.").

170. *Wolfson v. Concannon*, 811 F.3d 1181 (9th Cir. 2016).

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

172. *Wolfson*, 811 F.3d. at 1184.

173. Brief of Amici Curiae the Brennan Center for Justice at NYU School of Law, et al., *supra* note 169, at 9.

174. *Wolfson*, 811 F.3d at 1188 (Berzon, J., concurring).

175. *Id.* at 1184 (majority opinion); *see* ARIZ. JUDICIAL CODE CONDUCT R. 4.1 cmt. 1 ("Rather than making decisions based upon the expressed views or preferences of the electorate, a judge makes decisions based upon the law and the facts of every case. Therefore, in furtherance of this interest, judges and judicial candidates must, to the greatest extent possible, be free and appear to be free from political influence and political pressure.").

176. Brief of Amici Curiae the Brennan Center for Justice at NYU School of Law, et al., *supra* note 169, at 9–10 (citing *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 882 (2009) (concerning a judge's "debt of gratitude" to a campaign supporter)).

Neutrality further becomes an issue in cases where a judge must rule on legislation closely associated with a political party or a judge must make a judgment vindicating an individual's civil rights in a case closely associated with a party's position.¹⁷⁷ In *Williams-Yulee*, Chief Justice Roberts recognized that even the mere possibility that a judge's decisions are motivated by a favor, monetary or otherwise, is likely to undermine the public's confidence in the judiciary.¹⁷⁸

The *Williams-Yulee* Court, and even the *White* Court in some respects, recognized the distinct nature of judicial elections that allows for judicial campaign restrictions that would not otherwise be justified in the political sphere, so long as these restrictions survive strict scrutiny.¹⁷⁹ Further, one of the reasons that the *White* Court rejected the announce clause was because it was not narrowly tailored to serve the compelling interest of a lack of bias, given that the canon only targeted issues, and not particular parties.¹⁸⁰ Although the *White* Court did not address a canon restricting the political activity of judicial candidates, in light of *Williams-Yulee* and the Supreme Court's further recognition of the importance of separating the judiciary from politics, the *Wolfson* court properly extended the rationale of *Williams-Yulee* to uphold Arizona's endorsement and campaign prohibition clauses.

Second, turning to *O'Toole*, the Sixth Circuit correctly extended the rationale of *Williams-Yulee* to uphold Ohio Rule 4.4(E), which places time limits on when campaign committees can solicit contributions. *Williams-Yulee* recognized that "judges, charged with exercising strict neutrality and independence, cannot supplicate campaign donors without diminishing public confidence in the judiciary."¹⁸¹ Accordingly, the same dangers inherent in personal solicitations are apparent in personal solicitations by campaign committees because these committees are "alter egos" of the candidates under Ohio law and are often named after

177. *Id.* at 11 ("In these cases, it is critical that judges act, and be seen as acting, as neutral arbiters rather than political actors. Even if a judge faithfully and impartially applies the law in such politically-charged cases, close association with political players will provide ammunition for partisans on the other side to call the judge's motivation into question and may damage public confidence in the legitimacy of the court's determination.").

178. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1667 (2015).

179. *Id.* at 1662 ("Judges are not politicians, even when they come to the bench by way of the ballot."); *id.* at 1667 ("States may regulate judicial elections differently than they regulate political elections, because the role of judges differs from the role of politicians."); *Republican Party of Minnesota v. White*, 536 U.S. 765, 783 (2002) ("[W]e neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office.").

180. *White*, 536 U.S. at 776.

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

the candidate and can include the candidate.¹⁸² Similar to personal solicitations, there is an inherent risk to the public's perception of judicial integrity when donations are further removed from an election.¹⁸³ Contributions made closer to an election are likely more akin to political speech, whereas earlier contributions can create an appearance of quid pro quo corruption.¹⁸⁴

In evaluating which judicial campaign restrictions the *Williams-Yulee* rationale should extend to, it is again important to note that the Supreme Court in *Williams-Yulee* was very deferential to state judgment in upholding judicial impartiality and public confidence in the judiciary. As Chief Justice Roberts emphasized: “these considered judgments deserve our respect” because they reflect choices by the states in an area central to their own governance—how to select those who “sit as their judges.”¹⁸⁵ Given this deference and the variety of campaign risks that have the potential to harm judicial integrity, courts should follow in the footsteps of *Wolfson* and *O’Toole* and apply the broad rationale of *Williams-Yulee* to other judicial canons beyond those banning personal solicitations. If courts come across judicial canons restricting candidates’ speech on issues, such as the announce clause at issue in *White*, however, they should continue to abide by *White* unless the broad reasoning of *Williams-Yulee* provides a distinction.

V. CONCLUSION

Williams-Yulee left its mark in expansively changing the Supreme Court’s First Amendment jurisprudence in the context of electioneering, signaling a lesser burden to impose judicial campaign restrictions and more state deference in this area. The *Williams-Yulee* plurality upheld the Florida canon prohibiting personal solicitation; however, the canon was not upheld on an agreed-upon standard of review. After *Williams-*

182. Brief of Appellees at 16, *O’Toole v. O’Connor*, 802 F.3d 783 (6th Cir. 2015) (No. 15-3614) (“The same interests that support the independence of our judiciary apply with equal force to the committees who act on the candidates’ behalf.”).

183. *O’Toole v. O’Connor*, 803 F.3d 783, 790 (6th Cir. 2015) (“[C]ontributions that are not proximate in time to an election can increase the appearance of impropriety and the risk of actual bias.”).

184. Brief of Appellees, *supra* note 182, at 33 (citing *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1121 (9th Cir. 2011)).

185. *Williams-Yulee*, 135 S. Ct. at 1671 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)); *see also* Brief of Appellees, *supra* note 182, at 21 (“*Williams-Yulee* . . . articulated a new and more deferential analysis for state rules governing judicial election campaigns.”); *Williams-Yulee*, 135 S. Ct. at 1671 (“Florida has reasonably determined that personal appeals for money by a judicial candidate inherently create an appearance of impropriety that may cause the public to lose confidence in the integrity of the judiciary. That interest may be implicated to varying degrees in particular contexts . . .”).

Yulee, courts must decide whether to expand the case's broad rationale to judicial canons other than those that prohibit personal solicitations of campaign funds. In addition, when evaluating other canons, courts must decide whether to follow the purportedly loosened scrutiny approach from *Williams-Yulee*.

Based on the broad reasoning in *Williams-Yulee* and the Court's further acknowledgement that judicial elections are different in light of a compelling state interest of preserving public confidence in the judiciary, the rationale provided by the *Wolfson* court and the *O'Toole* court serve as examples of how other courts should reconcile with this new Supreme Court precedent. After *Williams-Yulee*, states likely will have an easier time reprimanding judicial candidates for violating judicial canons. With the passing of Justice Scalia, a stalwart defender of upholding judicial canons under the strictest scrutiny and nothing looser, a different Court makeup could further give states this latitude, in the event that another First Amendment challenge to a judicial canon comes before the Court. *Williams-Yulee* serves as a further confirmation that the bench is not a constituency. Although Justice Scalia and the more conservative Justices on the Court may not accept such a distinction in First Amendment jurisprudence, the lower courts are accepting this distinction and using it to allow states latitude to regulate judicial elections differently.