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## The Supreme Court, Judicial Elections, and Dark Money

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# The Supreme Court, Judicial Elections, and Dark Money

Richard Briffault<sup>1</sup>

## I. INTRODUCTION

Judges, even when popularly elected, are not representatives; they are not agents for their voters, nor should they take voter preferences into account in adjudicating cases. However, popularly elected judges are representatives for some election law purposes. Unlike other elected officials, judges are not politicians. But judges are policy-makers. Judicial elections are subject to the same constitutional doctrines that govern voting on legislators, executives, and ballot propositions. Except when they are not. The same First Amendment doctrine that protects campaign speech in legislative, executive, and ballot proposition elections applies to campaign speech in judicial elections—but not in quite the same way. Independent committees have the same right to spend in judicial elections as they do in other elections. But significant independent spending can result in the imposition of a constitutional restriction on the behavior of an elected judge who benefited from that spending. This restriction is without parallel for elected legislators or executives who benefit from similar independent spending.

Every statement in the preceding paragraph reflects a decision of the Supreme Court concerning judicial elections. As the point-counterpoint indicates, the Court's jurisprudence of judicial elections is a bit of a mess. Technically, all the decisions can be made to hang together, but their emphases, implications, and rhetoric often differ substantially. They can be summed up in the statement: Judicial elections are very similar to, but not quite the same as, other elections. Unfortunately, many significant issues fall into the "not quite the same" space. For now, at least, judicial campaign behavior and judicial campaign finance practices are for the most part

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governed by the same First Amendment doctrine that applies to campaign speech and campaign money generally, but that doctrine may not be applied to judicial elections in precisely the same way and some—s restrictions that would be unconstitutional in most elections may be constitutional in judicial elections. Given the series of close divides that have marked the Supreme Court’s judicial election jurisprudence to date, predicting the future is uncertain.

This has implications for any effort to address the problem of “dark money” in judicial elections. The term “[d]ark money is a short-hand reference to spending by independent groups that is funded by undisclosed sources. Most likely, dark money in judicial elections can be regulated to the extent, but only to the extent that it can be regulated in other elections. That is, it almost surely can be subject to more extensive disclosure requirements, but it also almost surely cannot be limited. The one area in which the judicial election context of dark money may matter is the possibility that a judge who benefited from dark money spending mat be required to recuse under certain circumstances. But recusal is unlikely to be an effective response to the concerns raised by dark money.

This Article reviews the Supreme Court’s evolving treatment of judicial elections and the resulting implications for the regulation of dark money in judicial races. Part II provides a brief summary of the Court’s cases addressing state laws dealing with judicial elections. This sets up the underlying tension within the Court over whether elected judges are policymakers or “representatives” of the voters, like other elected officials. Part III undertakes a more extended treatment of the three cases decided between 2002 and 2015 that directly address judicial election campaigning and its consequences—*Republican Party of Minnesota v. White*,<sup>2</sup> *Caperton*

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2 536 U.S. 765 (2002).

*v. A.T. Massey Coal Co.*,<sup>3</sup> and *Williams-Yulee v. Florida Bar*.<sup>4</sup> This judicial campaign trilogy seeks to hold together the First Amendment’s commitment to robust and unrestricted campaign speech with a growing concern for the implications of judicial campaign spending for the due process value of impartial judicial decision-making and for the public’s confidence in the integrity of the judiciary. Part IV examines the meaning of dark money, how it may be regulated in non-judicial elections, and whether and to what extent it can be more, or differently, regulated in judicial elections. Part V. concludes.

## II. THE JUDICIAL ELECTION PROCESS AND THE “REPRESENTATIVE” QUESTION

The Supreme Court’s treatment of judicial elections began with the assumption that judicial elections are different from other elections because the role of the judge, and the relationship of the judge to the electorate, differs from that of other elected officials. In 1972 in *Wells v. Edwards*<sup>5</sup> the Court summarily affirmed the decision of a three-judge panel holding that judicial elections are not subject to the one person, one vote requirement that governs elections to executive and legislative offices. In the words of the lower court, “manifestly, judges . . . are not representatives in the same sense as are legislators or the executive. Their function is to administer the law, not to spouse [*sic*] the cause of a particular constituency.”<sup>6</sup> Thus, the “rationale” for the equal population principle “which evolved out of efforts to preserve a truly representative form of government, is simply not relevant to the makeup of the judiciary.”<sup>7</sup>

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3 556 U.S. 868 (2009).

4 135 S. Ct. 1656 (2015).

5 409 U.S. 1095 (1973), *aff’g*, 347 F. Supp. 453 (M.D. La. 1972).

6 *Wells*, 347 F. Supp. at 455, quoting and citing *Stokes v. Fortsen* 234 F.Supp. 575, 577 (N.D. Ga. 1964).

7 *Id.* at 455.

Two decades later, however, the Court shifted course and determined that elected judges are “representatives” for purposes of voting rights, albeit in a case of statutory interpretation, not constitutional doctrine. *Chisom v. Roemer*<sup>8</sup> addressed whether the anti-vote dilution provision of the Voting Rights Act, which proscribes voting standards, practices, or procedures that make it more difficult for protected racial and language minority groups “to elect representatives of their choice,” applies to judicial elections. The defendants argued, relying in part on *Wells*, that since judges are not “representatives” the provision of the Voting Rights Act did not apply to judicial elections. The majority disagreed. Although the Court’s analysis turned primarily on Congressional intent, the majority, in an opinion written by Justice Stevens, determined that when judges are chosen by popular election they are, indeed, to some extent “representatives” of the voting public. Justice Stevens acknowledged that “ideally public opinion should be irrelevant to the judge’s role.”<sup>9</sup> But he concluded:

The fundamental tension between the ideal character of the judicial office and the real world of electoral politics cannot be resolved by crediting judges with total indifference to the popular will while simultaneously requiring them to run for elected office. When each of several members of a court must be a resident of a separate district and must be elected by voters of that district, it seems both reasonable and realistic to characterize the winners as representatives of that district.”<sup>10</sup>

Justice Scalia, joined by Chief Justice Rehnquist and Justice Kennedy sharply dissented. Judges may be elected by the people, Justice Scalia wrote, but they do not represent the people “in the

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8 501 U.S. 380 (1991).

9 *Id.* at 400.

10 *Id.* at 400–01.

ordinary sense. . . . [T]he judge represents the Law – which often requires him to rule against the People.”<sup>11</sup>

The back-and-forth between *Wells* and *Chisom* nicely illustrates the tension in the Court over whether elected judges are representatives in terms of their relationship to the electorate in the way that other elected officials are.<sup>12</sup> Two other cases that may provide additional insight on the issue are *Gregory v. Ashcroft*<sup>13</sup> and *New York State Board of Elections v. Lopez Torres*.<sup>14</sup> *Gregory* was not an elections case; rather, it addressed whether the Missouri Constitution’s requirement that judges retire at the age of seventy violates the federal Age Discrimination in Employment Act’s ban on mandatory retirement. The Act exempted from the ban, *inter alia*, state appointees “on the policymaking level.” Noting that judges “exercise . . . discretion concerning issues of public importance,” the Court concluded that Missouri’s appointed judges

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11 *Id.* at 410–11.

12 See also *Clark v. Roemer*, 500 U.S. 646 (1991) (reviewing application of section 5 of the Voting Rights Act to judicial elections); *Houston Lawyers’ Ass’n v. Attorney General*, 501 U.S. 419 (1991) (upholding application of section 2 of the Voting Rights Act to the election of trial judges). For a recent assessment of the law governing judicial election districting in the aftermath of *Williams-Yulee*, see Alec Webley, *Judges Are (Not?) Politicians: Williams-Yulee v. The Florida Bar and the Constitutional Law of Redistricting of Judicial Election Districts*, 19 N.Y.U. J. LEGIS. & PUB. POL’Y 851 (2016).

13 501 U.S. 452 (1991).

14 552 U.S. 196 (2008).

“fall presumptively under the policymaking-level exemption.”<sup>15</sup> To be sure, the Court’s federalism concern placed a thumb on the scale by presuming that a state constitution should set the rules for state judicial selection unless clearly displaced by federal law, so that any ambiguity in the federal law was construed in favor of the state. But the decision still required some recognition of the policymaking role of judges. Indeed, *Chisom*, decided the same day as *Gregory*, drew on *Gregory*’s “recogni[tion] that judges do engage in policymaking at some level” in finding judges to be representatives.<sup>16</sup>

*Lopez Torres* involved a First Amendment challenge to New York’s complex system of political party selection of judicial nominees through a party convention that the plaintiffs contended favored party bosses and burdened insurgents. The case focused on the associational rights of political parties and the conflicting First Amendment rights of parties and their members, relying entirely on precedents concerning the party role in elections for executive or legislative office. That the dispute involved a *judicial* election seemed to be of almost no moment to the Court, except for a passing observation that the state legislature, which enacted the judicial convention system, might prefer conventions to primaries for the nomination of judicial candidates because a primary “leaves judicial selection to voters uninformed about

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<sup>15</sup> *Gregory*, 501 U.S. at 466–67. The Act also exempted elected officials from the ban.

Missouri judges are initially appointed to office and then subject to retention election. In defending the state constitutionality of its mandatory retirement requirement, Missouri also contended that these judges fell within the elected official exemption. Because it found that they fell within the “appointee on the policymaking level” exemption, the Court did not have to address whether they were elected within the meaning of the Act. *Id.* at 467.

<sup>16</sup> 501 U.S. at 399 n.27.

judicial qualifications, and places a high premium upon the ability to raise money.”<sup>17</sup> *Lopez Torres* did not directly address the “representative” question, but it does have implications for whether judicial elections can be treated as different from other elections. The overall thrust of the opinion was that the judicial nature of the election was irrelevant, but, as the quoted language suggests, there was a slight hint of support for a more restrictive electoral process when the election of judges is at stake.

### III. THE JUDICIAL CAMPAIGN TRILOGY

#### A. Republican Party of Minnesota v. White

The Supreme Court launched its examination of the state regulation of judicial election campaigns in 2002 in *Republican Party of Minnesota v. White*, which considered and invalidated the Minnesota Code of Judicial Conduct’s announce clause.<sup>18</sup> The clause provided that a judicial candidate should not “announce his or her views on disputed legal or political issues.”<sup>19</sup> Promulgated by the Minnesota Supreme Court in 1974, the announce clause was based on a canon of the Model Code of Judicial Conduct adopted by the American Bar Association in 1972.<sup>20</sup>

The announce clause can be seen as aimed at preventing circumvention of another restriction on judicial campaign statements—the directive that judicial candidates not make “pledges or promises of conduct in office other than the faithful and impartial performance of the

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<sup>17</sup> 552 U.S. at 206.

<sup>18</sup> 536 U.S. 765.

<sup>19</sup> *Id.* at 770.

<sup>20</sup> *Id.* at 768.

duties of the office.”<sup>21</sup> As Justice Ginsburg contended in her *White* dissent, “the ban on pledges or promises is easily circumvented” by “statements that do not technically constitute pledges or promises but nevertheless ‘publicly mak[e] known how [the candidate] would decide’ legal issues.”<sup>22</sup> Nonetheless, the breadth of the announce clause opened it up to First Amendment attack. When the ABA revised its Model Code in 1990, it dropped the announce clause. The ABA’s Committee on Ethics and Professional Responsibility stated its belief that the clause was “an overly broad restriction on speech,”<sup>23</sup> and a series of state and lower federal court decisions in the 1990s narrowed or invalidated similar clauses. By the time of the *White* decision, as a result of litigation and canon revisions only nine states continued to impose a version of the announce clause and several of these were narrower than the Minnesota version challenged in *White*.<sup>24</sup>

As a result, the Court’s invalidation of the announce clause was not in itself that significant.<sup>25</sup> But the way the Court did so, in an opinion for the five-justice majority written by

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21 *Id.* at 770.

22 *Id.* at 819–20 (citations omitted).

23 American Bar Ass’n Standing Comm. on Ethics and Professional Responsibility and Judicial Code Subcomm., Draft Revisions to the ABA Code of Judicial Conduct 56 (1989).

24 See Richard Briffault, *Judicial Campaign Codes After Republican Party of Minnesota v. White*, 153 U. PENN. L. REV. 181, 203 (2004).

25 Although in the intermediate aftermath of the decision, other states with announce clauses eliminated them. *See id.* at 208–09.

Justice Scalia, was quite striking.<sup>26</sup> Most importantly, the Court framed the case as a classic First Amendment problem. Treating the announce clause as a content-based restriction that burdened speech “‘at the core of our First Amendment freedoms’—speech about the qualifications of candidates for public office,” the Court subjected the clause to the most stringent standard of First Amendment review, strict scrutiny.<sup>27</sup> Under strict scrutiny the defenders of the clause had to prove that it was narrowly tailored to serve a compelling state interest.<sup>28</sup>

The Court then closely parsed the two interests presented by the state to justify the Clause—preserving the impartiality of the state judiciary and preserving the appearance of the impartiality of the state judiciary. Noting that the state was “rather vague” about what it meant by impartiality, Justice Scalia found that “impartiality” could be used in any of three possible senses: (i) the avoidance of bias with respect to a specific party in a judicial proceeding; (ii) “the lack of preconception in favor or against a particular *legal view*,” or (iii) open-mindedness, in the sense of being willing to consider views that oppose the judge’s preconceptions and being open to persuasion.<sup>29</sup> Justice Scalia determined that assuring the first meaning of impartiality is a compelling state interest and serves the interest in affording litigants due process, but that the announce clause was not narrowly tailored—or tailored at all—to achieve that interest as it did not restrict speech concerning parties, but only speech concerning issues.

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26 Justice Scalia’s opinion was joined by Chief Justice Rehnquist and Justices O’Connor, Kennedy and Thomas. Justice O’Connor and Justice Kennedy also wrote separate concurring opinions.

27 *White*, 536 U.S. at 774.

28 *Id.* at 774–75 (citing election law cases involving executive or legislative candidates).

29 *Id.* at 775–81.

Justice Scalia summarily rejected the second definition of impartiality as a compelling state interest or as barely a state interest at all. In his view, virtually all judges come to the bench after legal careers in which they must have developed some preconceptions about legal issues. Accordingly, preventing this kind of partiality would be impossible; indeed, it would be undesirable as it would produce judicial candidates who had never thought deeply about the legal issues they would have to deal with on the bench.<sup>30</sup>

The Court then turned to the third definition of impartiality—open-mindedness. Justice Scalia acknowledged that “[i]t may well be that impartiality in this sense, and the appearance of it, are desirable in the judiciary.”<sup>31</sup> But he concluded that the announce clause flunked the underinclusiveness component of strict scrutiny’s narrow tailoring prong. In classic First Amendment analysis, a statute or regulation may fail narrow tailoring because it is either overly broad or underinclusive.<sup>32</sup> Overbreadth is fatal because it burdens far more speech than necessary to achieve the compelling interest. The flaw with underinclusiveness is more subtle. An underinclusive law may be struck down because it is so incapable of achieving its stated goal that there is no point in sustaining the burden it does impose.<sup>33</sup> The limited ability of an underinclusive measure to achieve the asserted interest may suggest that the stated purpose was not that interest at all, but something else less compelling.<sup>34</sup> Limitations placed on the announce clause by the Minnesota Supreme Court blunted plaintiffs’ overbreadth challenge but may have rendered it more vulnerable to an underinclusiveness attack.

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<sup>30</sup> *Id.* at 777–78.

<sup>31</sup> *Id.* at 778.

<sup>32</sup> See, e.g., *Burson v. Freeman*, 504 U.S. 191, 207 (1992).

<sup>33</sup> See, e.g., *Holt v. Hobbs*, 135 S.Ct. 853, 865-66 (2015).

<sup>34</sup> See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534-40 (1993); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395-396 (1992).

The announce clause restricted only statements made by judicial candidates while campaigning. However, according to Justice Scalia, “statements in election campaigns are such an infinitesimal portion of the public commitments to legal positions that judges (or judges-to-be) undertake . . . .”<sup>35</sup> As he noted, judges and judicial candidates often express their views on disputed legal questions “outside the context of adjudication” and, for sitting judges, in opinions written while on the bench. If the announcement of views undermines the fact or appearance of impartiality as open-mindedness, limiting only campaign statements “is so woefully underinclusive as to render belief in that purpose a challenge to the credulous.”<sup>36</sup>

In dissent, Justice Stevens<sup>37</sup> contended that campaign statements are indeed different, justifying special restriction. He explained that unlike other assertions of views, campaign statements are intended to convey to the voters a commitment to acting consistently with those views, and are likely to be so taken by the voters.<sup>38</sup> Justice Scalia responded simply that it “is not self-evidently true” that judges will feel “significantly greater compulsion, or appear to feel significantly greater compulsion, to maintain consistency” with campaign statements than other statements.<sup>39</sup> Justice Stevens may have had the better of the argument as declarations of views made publicly on the campaign trail for the purpose of persuading voters may well be seen and treated as more binding than assertions in a law review article or even in a judicial opinion, but

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35 *Id.* at 779.

36 *Id.* at 780.

37 Justice Stevens’ dissent was joined by Justices Souter, Ginsburg and Breyer. Justice Ginsburg authored her own dissent, which was joined by Justices Stevens, Souter, and Breyer.

38 *Id.* at 801–02.

39 *Id.* at 780–81.

that only underscores the majority's stringent application of the underinclusiveness component of the narrow tailoring prong of the strict scrutiny test.

Three other points about the *White* majority opinion are worth noting. First, the Court emphasized the significance of the announce clause's burden on electoral speech and, in so doing, assimilated judicial election campaigns to other election campaigns for First Amendment purposes. Quoting earlier First Amendment elections cases, the Court stressed that “[D]ebate on the qualifications of candidates’ is ‘at the core of our electoral process and of the First Amendment freedoms.’”<sup>40</sup> The fact that only judicial elections were affected by the announce clause was of no moment.

Second, the flipside to the Court's commitment to treating judicial elections as akin to other elections was its dismissal of the argument that the due process interest of litigants requires different rules for judicial elections. Due process, and the judicial impartiality it requires, was the animating concern of Justice Ginsburg's dissent.<sup>41</sup> As she explained, as a matter of due process, judges owe the litigants before them a duty of impartiality and owe the public an appearance of impartiality. Justice Ginsburg asserted this would be compromised by campaign statements that commit judges to positions on issues likely to come before them, with the danger of electoral retaliation if they do not abide by those commitments. Justice Scalia, however, pooh-poohed the likelihood that campaign statements would constrain judicial decision-making. In his view, if the possibility that an elected judge's attention to the impact of a decision on his or her prospects for reelection violates due process, then “the practice of electing judges is itself a

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40 *Id.* at 781 (citations omitted).

41 *Id.* at 813–21.

violation of due process”—a conclusion which Justice Scalia rejected out of hand.<sup>42</sup> More strikingly, Justice Scalia challenged the very idea articulated by Justice Ginsburg in the opening words of her dissent that “judges perform a function fundamentally different from that of the people’s elected representatives. Legislative and executive officials act on behalf of the voters who placed them in office.”<sup>43</sup> Justice Ginsburg then quoted Justice Scalia’s dissent in *Chisom* that stated “judge[s] represen[t] the Law.”<sup>44</sup> Despite what he said in *Chisom*, Justice Scalia in *White* responded that “Justice Ginsburg greatly exaggerates the difference between judicial and legislative elections. . . . This complete separation of the judiciary from the enterprise of ‘representative government’ might have some truth in those countries where judges neither make law themselves nor set aside the laws enacted by the legislature. It is not a true picture of the American system.”<sup>45</sup>

Third, although the overall thrust of the majority’s opinion was to treat judicial elections just like other elections for First Amendment purposes—drawing Justice Ginsburg’s condemnation of “this unilocular, ‘an election is an election’ approach,”<sup>46</sup>—in fact, *White* did not go quite that far. Justice Scalia was careful to state “we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office.”<sup>47</sup> In rejecting Justice Stevens’ position that statements made in an election campaign

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42 *Id.* at 783.

43 *Id.* at 803.

44 *Id.*

45 *Id.* at 784.

46 *Id.* at 805.

47 *Id.* at 783.

pose a special threat to the fact or appearance of a candidate’s open-mindedness, Justice Scalia was careful to distinguish the announce clause formulated from Minnesota’s separate canon that merely barred judicial candidates from making campaign “pledges or promises” with respect to their conduct in office. Justice Scalia noted that Stevens’ argument “might be plausible, perhaps, with regard to campaign *promises*.”<sup>48</sup>

The Court was also careful to avoid expressing a view on the “pledges or promises” clause, even though such a clause would surely be unconstitutional if enforced against candidates for legislative or executive office.<sup>49</sup> To be sure, the pledges or promises clause was not at issue in *White* so there was no need for the Court to address it. But the Court’s opinion and its careful sidestepping of that clause at least left open the possibility that some restrictions on judicial campaign conduct might pass constitutional muster. This is true even if the overall tenor of the opinion—and especially the concurring opinion of Justice Kennedy<sup>50</sup>—treated the First Amendment problem posed by the regulation of judicial elections as essentially the same as in campaign regulation more generally.

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48 *Id.* at 780 (emphasis in original).

49 *See* *Brown v. Hartlage*, 456 U.S. 45, 55–58 (1982) (some candidate promises “are universally acknowledged as legitimate”; “Candidate commitments enhance the accountability of government officials to the people whom they represent, and assist the voters in predicting the effect of their vote”; candidate for county commissioner has a constitutional right to make promises that “express[] . . . his intention to exercise public power in a manner that he believed might be acceptable to some class of citizens”).

50 536 U.S. at 795 (“the State cannot opt for an elected judiciary and then assert that its democracy, in order to work as desired, compels the abridgment of speech”).

*White* was followed by a wave of constitutional attacks on many provisions of the state canons regulating judicial campaign conduct, as well as by revisions to those canons by the state judicial bodies that imposed them. One set of challenges and revisions focused on canons prohibiting judicial candidates from “committing” or “appearing to commit” themselves “with respect to cases, controversies, or issues that are likely to come before the court.” -- arguably a narrower version of the announce clause. Other canons subjected to review in the aftermath of *White* included the pledges or promises clause; various measures restricting the partisan activities of judicial candidates; bans on the personal solicitation of campaign funds by judicial candidates; and prohibitions on statements by a candidate that knowingly “misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent.” As a result, many restrictions on judicial campaigning were narrowed or eliminated. However, the Court’s 2009 decision in *Caperton v. A.T. Massey Coal Co.* became something of a speed bump on the road to the complete assimilation of judicial campaign conduct to the campaigns for executive and legislative offices and ballot propositions. Although *Caperton* did not address or sustain a constraint on judicial campaign activity, its focus on the implications of judicial campaigns for the behavior of judges in office after the election gave new impetus to the due process implications of judicial elections which had been emphasized by Justice Ginsburg’s *White* dissent but downplayed by the *White* majority.

#### *B. Caperton v. A.T. Massey Coal Co.*

*Caperton* grew out of the hotly contested 2004 election for a seat on the West Virginia Supreme Court of Appeals in which incumbent Justice Warren McGraw was challenged by attorney Brent Benjamin. Don Blankenship, chairman, chief executive officer, and president of A.T. Massey Co., contributed \$1,000—the statutory maximum—to Benjamin’s campaign

committee.<sup>51</sup> Blankenship also gave another \$2.5 million to “And for the Sake of the Kids,” a political committee organized under section 527 of the Internal Revenue Code that made independent expenditures in support of Benjamin and in opposition to McGraw.<sup>52</sup> Blankenship spent yet another \$500,000 on his own independent expenditures—direct mail, television and newspaper advertising—promoting Benjamin’s candidacy.<sup>53</sup> Blankenship’s donations and spending in support of Benjamin amounted to more than the total spent by all other Benjamin supporters and three times the amount spent by Benjamin’s own campaign committee.<sup>54</sup>

The 2004 election, which Benjamin won with fifty-three percent of the vote,<sup>55</sup> occurred as a lawsuit against Massey Coal was making its way through the West Virginia courts. In 2002, a West Virginia jury returned a verdict against Massey and awarded the Caperton plaintiffs \$50 million in compensatory and punitive damages.<sup>56</sup> The plaintiffs prevailed in 2004 and 2005 against post-trial motions brought by Massey, which ultimately filed an appeal with the West Virginia Supreme Court of Appeals. The *Caperton* plaintiffs moved to disqualify now-Justice Benjamin under the Due Process Clause and the West Virginia Code of Judicial Conduct from participating in the case, claiming that Blankenship’s campaign support for Benjamin created a conflict of interest.<sup>57</sup> Justice Benjamin denied the motion, declaring that no evidence had been

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51 556 U.S. at 873.

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.* at 873–74.

presented that he could be anything but fair and impartial.<sup>58</sup> Thereafter, the West Virginia Supreme Court, by a 3-2 vote with Justice Benjamin in the majority, reversed the \$50 million verdict against Massey.<sup>59</sup> The plaintiffs sought a rehearing, and moved to have Justice Benjamin recuse himself from participating in the decision to rehear. Justice Benjamin again declined to recuse.<sup>60</sup> The court granted the rehearing request, and the Caperton plaintiffs again moved to have Benjamin recuse himself from participating in the rehearing. For the third time, Justice Benjamin declined to recuse and the court again voted 3-2, with Justice Benjamin in the majority, to reverse the jury verdict. The plaintiffs then sought review by the United States Supreme Court, contending that given the “extraordinary amount” of campaign finance support he had received from Massey’s board chairman and principal officer,<sup>61</sup> Justice Benjamin’s repeated participation in the Massey case denied them an impartial decision-maker in violation of the Due Process Clause of the Fourteenth Amendment.

The Supreme Court, by a 5-4 vote with Justice Kennedy writing for the majority, agreed with the plaintiffs. According to Justice Kennedy, the combination of several factors gave rise to a “probability of actual bias” such that Benjamin violated Caperton’s due process rights by

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58 *Id.* at 874.

59 *Id.* at 875.

60 *Id.* Both sides filed disqualification motions aimed at three of the five justices who had participated in deciding the appeal. Two justices – one who had voted for Caperton’s position and one who had voted for Massey’s position – recused themselves from the rehearing, but Justice Benjamin did not. He selected the replacements for the recused justices. *Id.* at 874–75.

61 *Id.* at 872.

refusing to recuse himself from the case.<sup>62</sup> Justice Kennedy noted the “extraordinary” financial support in absolute dollars, as a share of the spending in support of Benjamin, and as a fraction of the total spending in the election. He determined that Blankenship’s spending had a “significant and disproportionate influence on the electoral outcome,” and he pointed to the “the temporal relationship between the election and the pending case.”<sup>63</sup> Like the circumstances of the case itself, the decision was “extraordinary” in several respects.

First, the Court had never before determined that campaign support for a judicial candidate could trigger a finding that an elected judge was unconstitutionally biased in favor of the supporter. As the Court acknowledged, the Due Process Clause had previously been held to require judicial recusal only in cases where the judge had a financial interest in the outcome of the case or, more rarely, the judge had a conflict arising from her participation in an earlier phase of the case.<sup>64</sup> Indeed, the Court had previously determined that claims of improper partiality requiring recusal resulting from “matters of kinship, personal bias, state policy, [and] remoteness of interest, would seem generally to be matters merely of legislative discretion”<sup>65</sup> and not of constitutional moment. Unconstitutional bias in favor of a financial campaign supporter was something new.

Second, the Court emphasized “[t]his problem arises in the context of judicial elections, a framework not presented in the precedents we have reviewed and discussed.”<sup>66</sup> Whereas *White*

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<sup>62</sup> *Id.* at 885–87.

<sup>63</sup> *Id.* at 885–87.

<sup>64</sup> *Id.* at 876–81.

<sup>65</sup> *Id.* at 876 (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)).

<sup>66</sup> *Id.* at 881–82.

minimized the fact that the election affected by the announce clause was judicial, *Caperton* made that fact central. In elections for other offices, the Court has dismissed the idea that independent spending could give the spender some kind of corrupting or otherwise undue influence over the officeholder benefited by the spending. Dissenting in *McConnell v. FEC*,<sup>67</sup> Justice Kennedy declared that the possibility of officeholder “favoritism” to financial backers was not corruption, would not give rise to the appearance of corruption, and so was not a constitutional basis for limiting campaign money.<sup>68</sup> He reiterated this point in his majority opinion for the Court in *Citizens United v. FEC*,<sup>69</sup> which was decided the year after *Caperton*. Current Supreme Court campaign finance doctrine rejects the idea that there is anything improper about an elected official favoring the interests of her campaign’s financial supporters unless there is an outright quid pro quo between the financial supporter and the official.<sup>70</sup> But central to Justice Kennedy’s analysis in *Caperton* was his certainty that “Justice Benjamin would . . . feel a debt of gratitude to Blankenship for his extraordinary efforts to get him elected.”<sup>71</sup> The Court held this “debt” created “a serious risk of actual bias—based on objective and reasonable perceptions”<sup>72</sup> that

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67 540 U.S. 98 (2003).

68 *Id.* at 297 (Kennedy, J., dissenting).

69 *Citizens United v. FEC*, 558 U.S. 310, 359 (2010).

70 *See, e.g.,* *McCutcheon v. FEC*, 134 S.Ct. 1434, 1462 (2014) (“Constituents have the right to support candidates who share their views and concerns. Representatives are not to follow constituent orders, but can be expected to be cognizant of and responsive to those concerns. Such responsiveness is key to the very concept of self-governance through elected officials.”)

71 558 U.S. at 882.

72 *Id.* at 884.

Justice Benjamin would be favorably disposed to Blankenship's interest in the case. The "serious risk of actual bias" meant that it was unconstitutional for Justice Benjamin to participate in the Massey Coal case.<sup>73</sup>

Justice Kennedy reiterated the crucial significance that *Caperton* involved a *judicial* election the following year in his opinion for the Court in *Citizens United*, asserting that *Caperton* was no precedent for limiting corporate independent spending concerning a presidential candidate because *Caperton* involved a judge and not another category of elected official.<sup>74</sup> As he stressed in *Citizens United*, *Caperton* "was based on a litigant's due process right to a fair trial before an unbiased judge"<sup>75</sup> and so did not provide any support for restricting a litigant's campaign speech.<sup>76</sup> In *Citizens United*, Justice Kennedy repeated his view that "[f]avoritism and influence are . . . [un]avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. . . . Democracy is premised on responsiveness."<sup>77</sup>

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73 Emphasizing just how novel the finding of an unconstitutional conflict of interest was, Blankenship himself was not a party to the case, and Massey Coal – the actual party – had not itself given or spent any funds to aid Benjamin. The majority treated Blankenship's and Massey's interests as equivalent. As Blankenship was Massey's board chairman and principal officer, *id.* at 873, that makes some sense, but legally they were distinct.

74 558 U.S. at 360.

75 *Id.*

76 *Id.*

77 *Id.* at 358 (quoting *McConnell v. FEC*, 540 U.S. at 297 (Kennedy, J., dissenting)).

Judges may be elected, but that does not make them “representatives,” at least not to the extent of allowing them to favor litigants who had been major campaign finance supporters.

Third, *Caperton* is not a First Amendment case. The opinion for the Court never mentions the First Amendment. Nor was *Caperton* technically a campaign finance case, that is, a case dealing with restrictions or requirements with respect to the use of campaign money. The issue of whether Blankenship’s spending should have been or could be restricted never arose. Indeed, the Court ignored a foundational feature of campaign finance law. Ordinarily, in campaign finance parlance the term “contribution” refers to money given to a candidate or to an intermediary—such as a political party or political action committee—to be given to a candidate.<sup>78</sup> Money spent by a candidate, party, or independent group on direct efforts to communicate with, persuade, or mobilize voters is called an “expenditure.”<sup>79</sup> Contributions can be limited because they raise the possibility of corruption or the appearance of corruption.<sup>80</sup> Expenditures may not be limited because, the Court has long contended, they pose no danger of corruption or its appearance.<sup>81</sup> But in *Caperton* Justice Kennedy blurred this crucial campaign finance law distinction. He repeatedly referred to all of Blankenship’s campaign spending as “contributions,”<sup>82</sup> although only the \$1,000 Blankenship gave to the Benjamin campaign committee was a “contribution within the meaning of campaign finance doctrine.” Virtually all of the \$3 million Blankenship spent to promote Benjamin or attack McGraw consisted of independent expenditures, which are constitutionally immune from limitation because the Court

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<sup>78</sup> *Buckley v. Valeo*, 424 U.S. 1, 20-21 (1976).

<sup>79</sup> *Id.* at 19-20.

<sup>80</sup> *Id.* at 26–29 (1976).

<sup>81</sup> *Id.* at 45–48, 53, 55–56; *Citizens United*, 558 U.S. at 357–60.

<sup>82</sup> *Caperton*, 558 U.S. at 872–73, 884–86.

has determined that they cannot be a cause of corruption, or the appearance of corruption.<sup>83</sup> Justice Kennedy, who has authored multiple opinions in campaign finance cases,<sup>84</sup> surely knew the difference between contributions and expenditures. Perhaps because *Caperton* did not implicate limitations on campaign money but only the consequences for a judge who benefited from so much of it, the First Amendment did not come into play and so the distinction did not matter. The association of “contributions” with “corruption” in campaign finance doctrine, however, may have given the majority opinion some additional rhetorical heft, even if, from a campaign finance law perspective, the use of the term “contribution” was misleading.

*Caperton* is a due process case. Its focus is on the post-election behavior of judges, not on anything a judicial candidate may say or spend – or may not say or spend --in her election campaign, or on anything the candidate’s supporters could say or spend. As Justice Kennedy stressed in *Citizens United*, “*Caperton*’s holding was limited to the rule that the judge must be recused, not that the litigant’s political speech could be banned.”<sup>85</sup> To be sure, the “rule” that emerges from *Caperton* is quite uncertain. The Court repeatedly emphasizes the “extreme” facts and “extraordinary” circumstances driving its holding. By my count Justice Kennedy uses “extraordinary” four times<sup>86</sup> and “extreme” eight times<sup>87</sup> to describe Blankenship’s spending and

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83 See *Buckley*, 424 U.S. at 45–48.

84 See, e.g., *Citizens United*, supra (opinion for the Court); *McConnell*, 540 U.S. at 286–350 (concurring in the judgment in part and dissenting in part); *Nixon v. Shrink Missouri Gov’t PAC*, 500 U.S. 377, 405–10 (2000) (dissenting); *Colorado Rep. Fed. Elec. Camp. Comm. v. FEC*, 518 U.S. 604, 626–31 (1996) (concurring in the judgment and dissenting in part).

85 558 U.S. at 360.

86 See 558 U.S. at 872, 882, 886, 887.

its asserted impact on the election, on tandem with the pendency of the Massey case before Benjamin's court. Justice Kennedy's premise that Blankenship's spending "had a significant and disproportionate influence on the electoral outcome"<sup>88</sup> is debatable. Benjamin won by more than six percent of the vote;<sup>89</sup> he was endorsed by nearly every major newspaper in the state;<sup>90</sup> and McGraw injured his chances by a highly intemperate Labor Day speech in Racine, West Virginia, that became known as the "Scream from Racine" and was prominently featured in campaign ads against him.<sup>91</sup> Moreover, as Chief Justice Roberts demonstrated by the forty questions he asked in his dissent,<sup>92</sup> it is not at all clear from *Caperton* how much spending or from what sources would trigger due process concern, or whether recusal would also be required if the litigant who spent heavily in an election had a case before the benefited judge that implicated a broad social, ideological or policy issue, rather than the narrow economic interest of a specific firm like that at issue in *Caperton*.<sup>93</sup> Nor is it clear whether, if he had been reelected,

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87 *Id.* at 886, 887 (five times), 888 (twice).

88 *Id.* at 885. Justice Kennedy's opinion uses the phrase "significant and disproportionate" to characterize Blankenship's impact on the election four times. See *id.* at 884-86.

89 *Id.* at 901 (dissenting opinion of Chief Justice Roberts).

90 *Id.* at 902.

91 Dickerson, Chris, "McGraw suit 'must be' referring to Racine speech". West Virginia Record, (May 12, 2006), <http://wvrecord.com/stories/510590311-mcgraw-suit-must-be-referring-to-racine-speech>. Chief Justice Roberts referred obliquely to this speech in his dissent. 558 U.S. at 902.

92 558 U.S. at 893-98.

93 *Id.* at 894-95.

Justice McGraw would have had to recuse because of a presumptive campaign-spending-based bias against Massey.<sup>94</sup> It is also uncertain whether the due process concern is limited to campaign spending or could also reach “a debt of gratitude for endorsements by newspapers, interest groups, politicians, or celebrities.”<sup>95</sup>

Although Chief Justice Roberts viewed with alarm “the inherently boundless nature” of *Caperton*’s “rule”<sup>96</sup> and predicted that the courts would soon be “forced to deal with a wide variety of *Caperton* motions,”<sup>97</sup> it appears that the few such motions have followed<sup>98</sup> and the case has had little direct impact on the recusal of elected judges.<sup>99</sup> More surprisingly, perhaps, although the *Caperton* majority avoided any mention of the First Amendment, the case has had an impact on First Amendment challenges to the canons governing judicial campaign behavior. In cases in which state judges or judicial candidates claimed that state canons restricting their partisan political activities (such as endorsing a candidate for non-judicial office or holding a

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94 *Id.* at 895 (question 18).

95 *Id.* (question 20). For another very critical assessment of *Caperton*, see Ronald D. Rotunda, Constitutionalizing Judicial Ethics: Judicial Elections After Republican Party of Minnesota v. White, *Caperton*, and *Citizens United*, 64 *Ark. L. Rev.* 1, 41-57 (2011).

96 558 U.S. at 899.

97 *Id.* at 900.

98 See, e.g., Adam Liptak, et al, *Caperton* and the Courts: Did the Floodgates Open? 18 *N.Y.U. J. LEGIS. & PUB. POL.* 481, 494 (Professor Bradley Smith finds “it has indeed been rare to have *Caperton* motions.”)

99 *Caperton* may have served as the impetus for some states to revise their recusal rules. See *id.* at 486–87 (comments of Professor Keith Swisher).

leadership position in a partisan political organization) are unconstitutional, federal courts of appeals have invoked *Caperton* for the proposition that states “have a compelling interest in developing, and indeed are required by the Fourteenth Amendment to develop” an independent and fair judiciary.<sup>100</sup> Their decisions have also noted that public confidence in the judiciary—which “depends on its reputation for impartiality”—is promoted by “rules that keep judges out of active politics.”<sup>101</sup> Indeed, in the hands of some courts, *Caperton* has taken on new life by providing authority for the determination that the “appearance of impartiality” is a compelling justification for restrictions on the political activities of judges,<sup>102</sup> even though that concern had gotten short shrift in *White*. The Eighth Circuit decision in *Wersal v. Sexton*,<sup>103</sup> citing *Caperton* as establishing that the appearance of judicial impartiality is a compelling state interest, is particularly striking as that court also invoked *Caperton* to reject the idea that recusal would be a less restrictive, and, thus, constitutionally required, alternative to a speech limitation.<sup>104</sup> The court found “*Caperton* illustrative of the unworkability of recusal” in certain circumstances.<sup>105</sup> “[R]ecusal serves as an after-the-fact remedy that is insufficient to cure the damage to the appearance of impartiality.”<sup>106</sup>

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100 *Siefert v. Alexander*, 608 F.3d 974, 980 (7th Cir. 2010).

101 *Bauer v. Shepard*, 620 F.3d 704, 712 (7th Cir. 2010).

102 *Wersal v. Sexton*, 674 F.3d 1010, 1022 (8th Cir. 2012).

103 674 F.3d 1010 (8th Cir. 2012).

104 *Id.* at 1027–31.

105 *Id.* at 1031.

106 *Id.*

*Caperton* has, thus, become a medium for smuggling Justice Ginsburg’s focus on due process concerns into the First Amendment analysis of restrictions on judicial campaign conduct. To be sure, the impartiality threatened in *Caperton* was precisely the one kind of impartiality Justice Scalia in *White* had been willing to accept as a compelling state interest—impartiality with respect to the specific parties in a specific case. *Caperton* did not implicate the other arguable impartiality concerns of preconceptions with respect to legal issues or lack of open-mindedness. But the lower courts citing *Caperton* opened up its potential significance by framing the issue as not about the bias *vel non* of the judge with respect to the parties to a case, but rather about the crucial importance of the *appearance* of judicial impartiality, that is, the public’s belief that its judiciary is impartial.

The post-*Caperton* appeals court cases that factored *Caperton*’s due process focus into a compelling interest in the appearance of judicial impartiality tended to involve restrictions on political activity in support of political parties or other candidates and not the judicial candidate’s own campaign. But in *Williams-Yulee v. Florida Bar*, the Supreme Court extended the due process concern into a First Amendment analysis of a restriction of a judicial candidate’s own campaign behavior.

### C. *Williams-Yulee v. Florida Bar*

In *Williams-Yulee*, the Supreme Court, in yet another 5-4 split, rejected a First Amendment challenge to the canon in the Code of Judicial Conduct adopted by the Florida Supreme Court that prohibits judges and judicial candidates from personally soliciting campaign funds. The Court held, as *White* had assumed,<sup>107</sup> that restrictions on judicial campaign speech

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<sup>107</sup> *White*, 536 U.S. at 774.

are subject to strict judicial scrutiny,<sup>108</sup> thereby requiring that a restriction on the solicitation of campaign contributions be narrowly tailored to serve a compelling interest in order to survive a constitutional challenge.<sup>109</sup> Then the Court, in an opinion by Chief Justice Roberts, did a “rare”<sup>110</sup> thing and held that Florida had demonstrated that its speech restriction was narrowly tailored to serve a compelling state interest.<sup>111</sup> In so doing, the Court’s application of strict scrutiny was considerably less strict than the analysis undertaken in *White* thirteen years earlier.

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

109 *Id.* Chief Justice Roberts’s opinion for the Court commanded only four votes for these points. *See id.* at 1662, 1664–65. Justices Ginsburg and Breyer, who joined in the judgment sustaining the personal solicitation ban and in the rest of the Court’s analysis, would not have applied strict scrutiny. *See id.* at 1673–75. However, the four justices who dissented from the Court’s holding – Justices Scalia, Kennedy, Thomas, and Alito – agreed with the plurality that strict scrutiny applied. *Id.* at 1676 (Dissenting opinion of Justice Scalia, joined by Justice Thomas); *id.* at 1685 (dissenting opinion of Justice Kennedy); *id.* at 1685–86 (dissenting opinion of Justice Alito).

110 *Id.* at 1665–66.

111 *Williams-Yulee* is only the third time that the Court has found that a measure challenged as a violation of the First Amendment’s protection of speech survived strict scrutiny and only the second election regulation to so survive. *See, e.g.*, Noah B. Lindell, *Williams-Yulee and the Anomaly of Campaign Finance Law*, 126 *YALE L.J.* 1577, 1577 (2017). The other election law case was *Burson v. Freeman*, which upheld a ban on electioneering at polling places. 504 U.S. 191 (1992). The non-election case was *Holder v. Humanitarian Law Project*. 561 U.S. 1, 25–39 (2010).

First, Chief Justice Roberts quickly found “preserving public confidence in the integrity of the judiciary” to be a compelling state interest.<sup>112</sup> Indeed, he twice cited *Caperton*—for which he had written the lead dissent—to make that point.<sup>113</sup> Unlike Justice Scalia in *White*, Chief Justice Roberts made little effort to define “integrity” or its relationship to the other judicial virtues the Chief Justice deemed essential --“impartiality” or “independence”<sup>114</sup> Nor did he make much of an effort to assess what makes for *public confidence* in the judiciary—the actual compelling interest—which he acknowledged is “intangible.”<sup>115</sup> Rather, he seemed comfortable with the fact 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.”<sup>116</sup>

Second, he immediately determined that the ban on personal solicitation served the interests in judicial integrity and the appearance thereof, again without the kind of evidence Justice Scalia had demanded in *White*. Instead the link between the restriction and the interests served was “intuitive,”<sup>117</sup> and like the judicial integrity interest itself needed no empirical proof.

Third, the Court rejected claims that the canon failed strict scrutiny’s narrow tailoring requirement. Indeed, the personal solicitation ban was arguably both overbroad and underinclusive. From the overbreadth perspective, the restriction was not limited to the solicitation of lawyers or litigants, but proscribed the solicitation of anyone. A judicial candidate

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112 135 S.Ct. at 1666.

113 *Id.*

114 *Id.*

115 *Id.* at 1671.

116 *Id.* at 1667.

117 *Id.* at 1666.

could not solicit even her own mother for funds. Nor was the ban limited to in-person solicitations, which could be seen as coercive or leading directly to favoritism to donors, but also applied to internet postings and mass mailings, where there was no personal contact between candidate and donor. Moreover, there was an arguably less restrictive way of dealing with possible favoritism to a donor in a case in which the donor has an interest -- recusal.

The underinclusiveness argument was also strong. The rule provided that the solicitation of campaign funds for a judicial candidate could be undertaken by a committee established by the candidate.<sup>118</sup> But nothing prevented the candidate from learning which potential donors were solicited or which ones made donations. Indeed, Florida specifically permits judicial candidates to write thank you notes to campaign donors.<sup>119</sup>

However, Chief Justice Roberts waved away both sets of objections. The restriction was not overly broad. Florida could conclude that there was something especially problematic about all personal appeals by judges and judicial candidates for campaign money: “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.”<sup>120</sup> Nor was recusal a less restrictive alternative. A recusal requirement “would disable many jurisdictions”—presumably smaller jurisdictions with one or only a small number of judges<sup>121</sup>—and, quoting his *Caperton* dissent, Chief Justice Roberts expressed the concern that “a flood of postelection recusal motions” could itself erode public confidence in the

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<sup>118</sup> *Id.* at 1663.

<sup>119</sup> *Id.* at 1668.

<sup>120</sup> *Id.* at 1671.

<sup>121</sup> See, e.g., Fiut, *Recusal and Recompense: Amending New York Recusal Law in Light of the Judicial Pay Raise Controversy*, 57 *Buff. L. Rev.* 1597, 1601 (2009).

judiciary.<sup>122</sup> The canon was also determined to be not underinclusive. The Court emphasized that Florida could treat personal solicitation as “the conduct most likely to undermine public confidence in the integrity of the judiciary”<sup>123</sup> and as “categorically different and [a] more severe risk of undermining public confidence”<sup>124</sup> than solicitation by a committee even though the candidate is aware of the committee’s work and potential donors know of the candidate’s awareness. Personal solicitation “creates pressure for the recipient to comply, and it does so in a way that solicitation by a third party does not.”<sup>125</sup>

Justice Alito’s sarcastic dissent snarled that the Florida rule “is about as narrowly tailored as a burlap bag. . . . If this rule can be characterized as narrowly tailored, then narrow tailoring has no meaning . . . .”<sup>126</sup> Without getting into the merits of Justice Alito’s critique<sup>127</sup> it is clear

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122 *Id.* at 1671–72.

123 *Id.* at 1668

124 *Id.* at 1669.

125 *Id.*

126 *Id.* at 1685.

127 For more critical appraisals of the Court’s application of strict scrutiny to the Florida personal solicitation ban, *see, e.g.*, Clay Hansen, J. Joshua Wheeler, *Free Speech, Elections, and Judicial Integrity in an Age of Exceptionalism*, 31 J. L. & POL. 457 (2016), Michael Linton Wright, Comment, *Williams-Yulee v. Florida Bar: Judicial Elections, Impartiality and the Threat to Free Speech*, 93 DENV. L. REV. 551, 569–72 (2016); Lijun Zhang, *Paved with Good Intentions: The U.S. Supreme Court’s Decision in Williams-Yulee v. Florida Bar*, 29 GEO. J. LEGAL ETHICS 1483 (2016). Also noteworthy is leading First Amendment advocate Floyd Abrams’s comment that the Court’s strict scrutiny analysis “is enough to make First Amendment

that Chief Justice Roberts adopted a much looser approach to narrow tailoring than Justice Scalia had in *White*. Indeed, the Chief Justice was relatively candid about that. In rebutting the underinclusiveness claim, he asserted a “State need not address all aspects of a problem in one fell swoop.”<sup>128</sup> In defending against the overbreadth argument he explained that narrow tailoring does not mean “perfect tailoring.”<sup>129</sup>

Running through the Court’s opinion and undergirding its deferential approach to the Florida canon was Chief Justice Roberts’ insistence that judicial elections are different from what he called “political elections.” Justice Roberts urged that “[j]udges 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.”<sup>130</sup> As Justice Kennedy had done in distinguishing *Citizens United* in *Caperton*, Chief Justice Roberts emphasized that unlike other elected officials, an elected judge “is not to follow the preferences of his supporters, or provide any special consideration to his campaign donors.”<sup>131</sup> As a result, state regulation of judicial elections can go beyond the prevention of corruption and the appearance of corruption, which are the sole bases for campaign finance restrictions in “political

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aficionados wish that the Court had never decided that strict scrutiny applied at all.” Floyd

Abrams, Symposium: When strict scrutiny ceased to be strict,

<http://www.scotusblog.com/2015/04/symposium-when-strict-scrutiny-ceased-to-be-strict/>, April 30,

2015.

128 *Id.* at 1669.

129 *Id.* at 1671 (quoting *Burson v. Freeman*, 504 U.S. 191, 209 (1992)).

130 *Id.* at 1662.

131 *Id.* at 1667.

elections,” and may aim more broadly to protect public confidence in judicial integrity. The Chief Justice went so far as to claim that *White* provided support for the position that “our precedents applying the First Amendment to political elections have little bearing on the issues here,” although his main citation for that was Justice Ginsburg’s *White* dissent.<sup>132</sup> But whether or not the Court properly read *White*—which seemed far more intent on requiring that the constitutional doctrines applicable to elections generally and election speech in particular presumptively apply to judicial elections—*Williams-Yulee* clearly sets a tone of openness to treating judicial elections differently.

As with *White*, the main significance of *Williams-Yulee* may be its analytical stance rather than its holding. To be sure, unlike the announce clause invalidated in *White*, bans on personal solicitation of campaign funds are widespread, with similar restrictions in place in thirty of the thirty-nine states that elect judges.<sup>133</sup> Moreover, before the Court’s decision the constitutional status of those bans was quite uncertain. One article published after oral argument but before the Court’s decision found that two federal courts of appeals and three state supreme courts (including Florida’s) had rejected constitutional challenges to the bans, while four other federal courts of appeals had held the bans were unconstitutional.<sup>134</sup> If the decision had gone the

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132 *Id.* (citing *White*, 536 U.S. at 783, 805). The second citation is to Justice Ginsburg’s dissent.

The first is to the language in the majority opinion stating “we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office” – not exactly a ringing declaration that judicial elections may be regulated differently.

133 135 S.Ct. at 1663.

134 *See* Steele Trotter, *Williams-Yulee and the Changing Landscape of Judicial Campaigns*, 28 *Geo. J. Legal Ethics* 947, 948 & n.9 (2015) (citing cases).

other way it would have affected the law governing judicial campaigns in many states. On the other hand, given the universal availability of the campaign committee option and the lack of limits on what a judicial candidate can know about the donors to her committee, it is doubtful whether the case will have much practical impact on judicial campaign fundraising. However, the case does appear to invite more deferential judicial review of state restrictions on judicial campaign activities and has been used by lower courts to sustain various restrictions on judicial candidates.

Relying on *Williams-Yulee*'s compelling interest and narrow tailoring analyses, the Ninth Circuit in *Wolfson v. Concannon*<sup>135</sup> rejected a constitutional challenge to the provisions of the Arizona Code of Judicial Conduct barring judges and judicial candidates from soliciting funds for other candidates or political organizations, from publicly endorsing candidates for other public offices, from making speeches on behalf of other candidates or political organizations, or from taking an active part in any political campaign. The state's interest in public confidence in the judiciary was found sufficient to support all the restrictions and, within the spirit of *Williams-Yulee*, they were all held to be narrowly tailored and the least restrictive means of attaining the state's goals.<sup>136</sup>

The Sixth Circuit has also repeatedly drawn on *Williams-Yulee* to sustain restrictions on judicial political activity against First Amendment attack. In *Winter v. Wolnitzek*,<sup>137</sup> the court upheld the Kentucky Code of Judicial Conduct's bans on a judicial candidate making a

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

136 *Id.* at 1181–86.

137 *Winter v. Wolnitzek*, 834 F.3d 681 (6th Cir. 2016).

contribution to a political organization or candidate;<sup>138</sup> endorsing or opposing a candidate for public office;<sup>139</sup> acting as a leader or holding any office in a political organization;<sup>140</sup> and knowingly or with reckless disregard for the truth making false statements on matters material to a campaign during a campaign.<sup>141</sup> With respect to the last provision, the court acknowledged that a different Sixth Circuit panel had just invalidated an Ohio law banning false statements that applied to non-judicial candidates. Citing *Williams-Yulee*, the *Winter* panel reasoned that the different treatment of the judicial candidate false statement ban was justified because Kentucky’s interest “in preserving public confidence in the honesty and integrity of its judiciary is . . . more compelling than Ohio’s purported interest in protecting voters in other elected races from misinformation.”<sup>142</sup>

A Montana federal district court similarly invoked *Williams-Yulee* to rebuff a judicial candidate’s challenge to a Montana canon prohibiting false statements by or about judicial candidates.<sup>143</sup> The court found that the state’s compelling interest in preserving and promoting

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138 *Id.* 690–91 (6th Cir. 2016).

139 *Id.* at 691–92.

140 *Id.* at 692–93

141 *Id.* at 693.

142 *Id.* The Ohio law also swept more broadly than the Kentucky measure, applying to all false statements, whereas the Kentucky law applied only to false statements of material facts, and the Ohio law imposed liability on publishers, not just speakers. *Id.*

143 *Myers v. Thompson*, 192 F.Supp.3d 1129 (D. Mont. 2016).

public confidence in the integrity of the judiciary supported a ban on candidate false statements and that the restriction was neither overbroad nor underinclusive.<sup>144</sup>

A second Sixth Circuit panel relied on *Williams-Yulee*'s compelling interest in “maintaining public perception of judicial integrity and impartiality” in sustaining Ohio’s prohibition on listing judicial candidate party affiliations on the general election ballot.<sup>145</sup> The court also invoked *Williams-Yulee*'s rather loose approach to narrow tailoring in finding that this limited minimization of partisanship in judicial elections<sup>146</sup> was not fatally underinclusive.<sup>147</sup> A third Sixth Circuit decision, *O’Toole v. O’Connor*,<sup>148</sup> relied on *Williams-Yulee*'s compelling interest and narrow tailoring analyses to sustain against First Amendment attack a provision of the Ohio Code of Judicial Conduct limiting the time period in which a judicial candidate’s campaign committee may solicit and receive campaign contributions.<sup>149</sup> That panel also rejected an argument that the application of a fundraising time limit only to judicial campaigns and not to other political organizations violated the Equal Protection Clause, citing *Williams-Yulee*'s

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144 *Id.* at 1139–41.

145 *Ohio Council 8 AFSCME v. Husted*, 814 F.3d 329, 338 (6th Cir. 2016).

146 Judicial candidates must first compete in partisan primaries; the candidates may identify with their political parties during their campaigns; and the parties may campaign for and advertise on behalf of their candidates. *Id.* at 332-33.

147 *Id.* at 340.

148 *O’Toole v. O’Connor*, 802 F.3d 783 (6th Cir. 2015).

149 *Id.* at 789–91.

“enunciation of the distinction between judicial campaigns and non-judicial political campaigns.”<sup>150</sup>

To be sure, none of these decisions call into question *White*’s determination that judicial candidates are free to announce their views on disputed legal questions. The Ninth Circuit in *Wolfson* made that point in confirming that a judicial candidate has the right to speak concerning her own campaign. The Arizona canons at issue limited only the candidate’s freedom to participate in other candidates’ campaigns.<sup>151</sup> The Sixth Circuit in *Winter* made the point even more strongly in invalidating Kentucky’s ban on a judicial candidate “campaigning as a member of a political organization,” such as a political party, and on making speeches for a political organization, which the court read as barring the candidate from declaring that he or she is “for the Republican Party.”<sup>152</sup> Both provisions were seen as unconstitutionally interfering with the candidate’s *White*-protected ability to “tak[e] a stance on ‘matters of current public importance.’”<sup>153</sup> As Judge Sutton put it at the conclusion of his *Winter* opinion , although “treating elections for the courts just like elections for the political branches does not make sense,” a state that elects its judges also “has no right to suspend the First Amendment in the process.”<sup>154</sup>

#### *D. A Court Divided*

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150 *Id.* at 792.

151 811 F.3d at 1185.

152 834 F.3d at 689.

153 *Id.* at 688.

154 *Id.* at 695.

Over the last two decades the Supreme Court has heard three cases dealing with speech and campaign finance in judicial elections, and each time the Court divided 5-4. The Court’s “conservatives” have generally opposed restrictions on judicial candidates. Justices Scalia and Thomas voted against the restrictions in all three cases. Chief Justice Rehnquist did so in the one case he heard (*White*) and Justice Alito did so in the two cases he heard (*Caperton* and *Williams-Yulee*). The Court’s “liberals” have generally supported regulation of judicial campaigns. Justices Ginsburg and Breyer voted for regulation in all three cases. Justices Stevens and Souter did so in the two cases they heard (*White* and *Caperton*), and Justices Sotomayor and Kagan did so in the one case they heard (*Williams-Yulee*). This divide tends to map the Court’s 5-4 division in campaign finance cases generally—with two anomalies.<sup>155</sup> Justice Kennedy and Chief Justice Roberts have both been vigorous critics of campaign finance regulation and both have

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155 Another arguable anomaly is Justice O’Connor, who frequently voted to reject challenges to campaign finance laws but voted with the anti-regulatory majority in *White*. Justice O’Connor was deeply troubled by judicial elections generally, expressing her concern that “the very practice of electing judges” undermines the compelling interest in an impartial judiciary. 536 U.S. at 788. However, she appeared to conclude that having “chosen to select its judges through contested popular elections,” *id.* at 792, the First Amendment rules ordinarily applicable to contested elections would apply. According to Professor Geyh, after she retired, Justice O’Connor “second-guessed her own conclusions and embarked on a campaign to ameliorate what she regarded as the deleterious effects of judicial elections.” 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, 92 (2015). In any event, *White* was not a campaign finance case so it is not clear that her *White* vote is in tension with her other votes concerning election regulation.

consistently been part of the Court's 5-4 majority that has repeatedly cut back on or invalidated campaign finance laws since the mid-2000's. Yet in the judicial campaign setting each cast the dispositive vote once, and wrote the majority opinion for, the regulatory side. However, each also sharply disagreed with the other in the two cases on which they both sat (*Caperton*, *Williams-Yulee*).<sup>156</sup>

Of the two, the bigger anomaly is surely Chief Justice Roberts and his vote in *Williams-Yulee*. As previously noted, Justice Kennedy's *Caperton* opinion avoided any mention of the First Amendment and, as he subsequently stressed in *Citizens United*, his *Caperton* opinion provided no basis for limiting judicial campaign speech or spending. In his view, judges may have a higher duty to avoid the appearance of partiality than do other elected officials, but judicial elections are to be run by the same rules as other elections. This theme is also central to his separate opinions in both *White* and *Williams-Yulee*.

By contrast, Chief Justice Roberts grounded his *Williams-Yulee* analysis in the First Amendment and confirmed that strict scrutiny applies to restrictions on judicial candidate speech. Yet he strongly asserted that not only are judges different from other elected officials, but the special status of judges allows states to treat judicial elections to differently and to subject them to more speech-restrictive rules.<sup>157</sup> Given *Williams-Yulee*, it is a little hard to understand the vehemence of his *Caperton* dissent. Perhaps it was the lack of a clear-cut "rule" in the Court's "totality of the circumstances" opinion. Perhaps it was the concern that by inviting constitutionally-grounded recusal motions *Caperton* would ultimately undermine public

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156 Justice Kennedy also sat on *White* case and voted with the anti-regulatory majority in that case.

157 135 S.Ct. at 1667, 1672.

confidence in the integrity of the judiciary, which, as his *Williams-Yulee* opinion indicates, is for him a consideration of the highest order. Yet, his *Caperton* dissent notwithstanding, his *Williams-Yulee* opinion clearly reflects the integration of *Caperton*'s due process concern into the First Amendment analysis.

Moreover, although the issue in *Williams-Yulee* was a narrow one, the Chief Justice's opinion is potentially quite open-ended, arguably more so than Justice Kennedy's opinion in *Caperton*. In *Caperton*, the Court tracked *White* in focusing on the compelling interest in avoiding judicial bias for or against a party in a specific case. *Caperton* extended the grounds of what could constitute bias, but its sole focus was on party-specific bias. *Williams-Yulee*, instead, focused on the broader and more intangible concepts of judicial integrity and the public perception of it. It sustained a restriction not tied to preventing bias for or against a specific litigant but aimed instead at promoting the legitimacy of the judiciary generally. Coupled with its loosened approach to the narrow tailoring requirement, *Williams-Yulee*'s more capacious definition of compelling interest may enable many more restrictions to pass constitutional muster than would have been the case if *White* were still the lead First Amendment precedent. That is certainly how it has been used in the handful of federal court decisions that have applied the case over the past two years.<sup>158</sup>

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158 See, e.g., *Winter v. Wolnitzek*, 834 F.3d at 692–93 (relying on *Williams-Yulee* in sustaining provisions banning judicial candidate endorsements and acting as the leader of a political organization, and penalizing false statements by judicial candidates); *O'Toole v. O'Connor*, 802 F.3d at 78992 (relying on *Williams-Yulee* in sustaining provision limiting time period for solicitation and receipt of campaign contributions); *Wolfson v. Concannon*, 811 F.3d at 1181–86 (relying on *Williams-Yulee* in sustaining provisions concerning personal solicitation,

Of course, none of these cases support any limits on judicial campaign speech, other than the very specific speech of a candidate expressly asking for a contribution, or any limits on spending by either the candidate or independent groups.

#### IV. REGULATING DARK MONEY IN JUDICIAL ELECTIONS

##### *A. What is Dark Money, and What Makes It Dark?*

The term “dark money” refers to election campaign expenditures by independent groups that do not disclose the sources of the funds used to pay for those expenditures.<sup>159</sup> Some of the expenditures, particularly broadcast advertising that focuses on a candidate, are commonly subject to reporting requirements, and the name and address of the entity that formally pays for the expenditure is typically subject to disclosure. But the identities of the donors, and the amounts given by individual donors, are not disclosed.

How can this occur even when the jurisdiction has laws requiring the disclosure of the identities of, and sums given by, campaign donors? There are two reasons. First, most donor disclosure laws focus on “political committees,” which consist of candidate campaign committees, political party committees, and other committees that cross some threshold of

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endorsements, and campaigning for other candidates); *Myers v. Thompson*, 192 F.Supp.3d at 1138–42 (relying on *Williams-Yulee* in sustaining provision barring false statements about judicial candidates); *Ohio Council 8 AFSCME v. Husted*, 814 F.3d 329, 340 (6th Cir. 2016) (relying on *Williams-Yulee* in sustaining Ohio law barring indication of a judicial candidate’s party affiliation on the general election ballot).

159 See, e.g., Center for Responsive Politics, *Dark Money Basics*,

<http://www.opensecrets.org/dark-money/basics>.

engagement in electioneering.<sup>160</sup> Some committees engage in both electioneering concerning candidates and political activity that addresses issues more broadly. Committees that engage in independent spending (i.e. spending that is not coordinated with a candidate) will be subject to donor disclosure requirements only if their electioneering spending concerning candidates crosses a certain dollar threshold or a certain fraction of their overall spending.<sup>161</sup> Second, some laws require the disclosure of the donors financing electioneering expenditures above a certain threshold amount even if the organization paying for the expenditure is not a political committee.<sup>162</sup> The Supreme Court, however, has narrowed the definition of electioneering for

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160 *See, e.g.*, 52 U.S.C. § 30101(4) (defining “political committee” for purposes of federal campaign finance law), §§ 30102, 30103, 30104 (tying organizational, registration, and reporting requirements to political committee status).

161 *See, e.g.*, *Buckley v. Valeo*, 424 U.S. at 79 (committee, other than a candidate’s committee or political party committee, will be subject to federal campaign finance reporting requirements if its “major purpose” is the nomination or election of a candidate); *Yamada v. Snipes*, 786 F.3d 1182 (9th Cir. 2015) (sustaining Hawaii law applying reporting and disclosure requirements to committees that raise or spend more than \$1,000 for electoral purposes in an election cycle); *Nat’l Org. for Marriage v. McKee*, 649 F.3d 34 (1st Cir. 2011) (sustaining Maine law applying political committee status and reporting requirements to committees that raise or spend more than \$5000 for election purposes in an election cycle);

162 *See, e.g.*, *Delaware Strong Families v. Attorney General*, 793 F.3d 304 (3d. Cir. 2015) (sustaining application of Delaware law requiring disclosures by organization that spend over a threshold amount on electioneering communications), cert. den. sub nom. *Delaware Strong Families v. Dent*, 579 U.S. \_\_\_\_ (2016).

the purposes of campaign finance regulation. The Court’s definition includes only communications that expressly advocate for or against the election of a clearly identified candidate, and broadcast communications in the immediate pre-election period that clearly name a candidate even if they do not engage in express advocacy.<sup>163</sup> Communications that sharply criticize a candidate, but avoid the “magic words” of express advocacy outside the immediate pre-election period, are not considered to be electioneering.<sup>164</sup> Thus, any donations specifically funding such communications do not have to be disclosed. Moreover, such expenditures are not counted in determining whether the organization’s expenditures cross the threshold that triggers treating the organization as a political committee.

*B. How May Dark Money Be Regulated in Non-Judicial Elections?*

Starting with *Buckley v. Valeo*, the Supreme Court has consistently emphasized the informational benefits of donor disclosure in enabling voters to evaluate candidates. By informing voters about the sources of a candidate’s funds, disclosure “alert[s] the voter to the interests to which a candidate is most likely to be responsive and thus facilitate[s] predictions of future performance in office.”<sup>165</sup> The voter information value of donor disclosure is even more important for independent committees that typically operate under meaningless names like

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163 *Buckley v. Valeo*, 424 U.S. at 43-44 & n. 52. See generally Richard Briffault, Issue Advocacy” Redrawing the Elections/Politics Divide, 77 Tex. L. Rev. 1751 (1999).

164 *Id.* In *McConnell v. FEC*, 540 U.S. 93 (2003), the Supreme Court sustained Congress’s determination in the Bipartisan Campaign Reform Act of 2002 that for purposes of the definition of “electioneering communications” broader than express advocacy the immediate pre-election period is thirty days before a primary and sixty days before a general election.

165 424 U.S. at 67.

“Americans for Prosperity” or “American Action Network,” which tell the voters nothing about what the committee stands for or may be downright misleading.<sup>166</sup>

The Court reiterated its commitment to donor disclosure by independent committees in *Citizens United*. Although *Citizens United*’s spending could not be limited, it could be required to disclose the identities of the donors who paid for its television broadcasts that mentioned candidate Hillary Clinton in the pre-election period even though its ads did not include express advocacy. The Court declared that “the public has an interest in knowing who is speaking about a candidate shortly before an election.”<sup>167</sup> Moreover, although the Court in *Buckley* construed the Federal Election Campaign Act’s (“FECA”) definition of “political committee” to apply only to organizations with the “major purpose”<sup>168</sup> of supporting or opposing candidates in federal elections,<sup>169</sup> it is not clear whether the “major purpose” standard is constitutionally required for state disclosure laws. In *McConnell v. FEC*, the Court held that *Buckley*’s definition of election-related spending for purposes of FECA’s disclosure requirement as “express advocacy” was a matter of “statutory interpretation, not a first principle of constitutional law,<sup>170</sup> so that Congress could go further and subject “electioneering communications”—defined as broadcast ads that

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166 See, e.g., Richard Briffault, Updating Disclosure for the New Era of Independent Spending, 27 J. L. & POL. 683, 691–92 (2012).

167 558 U.S. at 369.

168 The Supreme Court has never defined “major purpose,” but in federal cases it has been treated as requiring that a majority of an organization’s fundraising or spending be for federal election purposes. See, e.g. *Citizens for Responsibility & Ethics in Washington v. FEC*, 209 F.Supp.3d 77 (D.D.C. 2016) (considering the question of the applicable time frame for determining an organization’s major purpose).

169 424 U.S. at 79.

170 540 U.S. 93, 190 (2003).

refer to a candidate in a defined pre-election period—to disclosure. Several federal appeals courts have upheld state laws setting a much lower threshold than “major purpose” for imposing disclosure requirements on independent spenders.<sup>171</sup> There is also a good argument that for disclosure purposes the broader definition of “electioneering communication” endorsed by the Court in *McConnell* could be extended beyond the broadcast media covered by the federal statute before the Court in *McConnell* to include other media, such as print, direct mail, and telephone banks.<sup>172</sup> Although few jurisdictions have adopted them, *Citizens United* signals that relatively broad campaign finance disclosure laws are likely to pass constitutional muster.<sup>173</sup>

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171 *See, e.g., Yamada v. Snipes, supra; Center for Individual Freedom v. Madigan, 697 F.3d 464 (7th Cir. 2012); Nat’l Org. for Marriage v. McKee, supra; Human Life of Washington, Inc. v. Brumsickle, 624 F.3d 990 (9th Cir. 2010). But see N.C. Right to Life, Inc. v. Leake, 525 F.3d 247 (4th Cir. 2008). See generally Briffault, *Updating Disclosure*, *supra*, 27 J. L. & Pol. at 692-95.*

172 *See id.* at 699–707.

173 *See also John Doe No. 1 v. Reed, 561 U.S. 186 (2010).* Disclosure is one area where the death of Justice Scalia and his replacement by Justice Gorsuch could affect the Supreme Court’s jurisprudence. Although strongly hostile to most campaign finance regulation, Justice Scalia was a strong proponent of disclosure, famously remarking that disclosure “is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.” *See id.* at 228 (concurring in the judgment). It is unclear where Justice Gorsuch stands on disclosure.

However, Justice Kennedy and Chief Justice Roberts have also supported disclosure laws, so, joined by the Court’s “liberals” there is probably still a majority for disclosure. *Cf.*

On the other hand, there is at present zero prospect of limiting “dark money” or any other independent spending in executive or legislative elections. With the sole exception of one decision sustaining limits on corporate and union independent spending<sup>174</sup>—which was overturned in *Citizens United*<sup>175</sup>—the Court has consistently invalidated limits on independent spending. Thus, *Citizens United* firmly establishes the unconstitutionality of limits on independent spending for the foreseeable future. Dark money can be made less dark, but it cannot be limited.

### *C. Can Dark Money Be More Regulated in Judicial Elections?*

There are three possible types of regulation of dark money in judicial elections: disclosure, limits, and recusal.

#### (1) Disclosure

As I just suggested, there is a strong doctrinal basis for requiring significant donor disclosure by dark money groups in all elections. Lower courts have indicated that electioneering need not be the dominant purpose of a group in order to trigger a disclosure requirement. The Supreme Court has made clear that disclosure need not be limited to donors to ads engaged in express advocacy. To be sure, not many jurisdictions have gone to the constitutional limit for disclosure in elections generally. Arguments about the special nature of judicial elections would

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Independence Inst. v. FEC, 137 S.Ct. 1204 (Feb. 27, 2017), *aff’g mem.* Independence Inst. v. FEC, 216 F.Supp.3d 176 (D.D.C. 2016) (three-judge court rejects claim by non-profit organization that its advertising constituted issue advocacy exempt from disclosure though it referred to specific candidates).

174 *Austin v. Michigan Chamber of Commerce*, 494 U.S. 662 (1990).

175 558 U.S. at 365.

not be needed to support effective disclosure of dark money donors in judicial contests, although they might be politically helpful.

A related question is whether it would be constitutionally permissible to have enhanced disclosure for independent committees that spend only on judicial elections, and not for independent committees participating in other elections. The Sixth Circuit's rejection in *O'Toole v. O'Connor* of an Equal Protection argument challenging more restrictive regulation of judicial elections suggests that such a targeted disclosure requirement could be constitutionally viable. This is significant given the generally lower availability of voter information concerning candidates in judicial elections compared to other races. On the other hand, such an enhanced disclosure requirement would have to be implemented by statute. Most of the special restrictions on judicial campaign conduct are found in the canons of judicial conduct that are adopted by state supreme courts, but the courts can regulate only by court rule and only with respect to judges, judicial candidates, and possibly lawyers. They cannot regulate other campaign actors, such as political parties and independent committees.

## (2) Limits

Limits on spending in elections generally are flatly unconstitutional. Can judicial elections be a special case? Can the compelling interest in judicial integrity and the appearance of judicial integrity support such limits? Probably not.<sup>176</sup> In the Supreme Court's vision, campaign expenditures benefit from strong First Amendment protection because they communicate arguments, ideas, and information to the voters. According to the Court,

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<sup>176</sup> See, e.g., *Suster v. Marshall*, 149 F.3d 523 (6th Cir. 1998) (invalidating judicial candidate spending limit adopted by Ohio Supreme Court as amendment to the Ohio Code of Judicial Conduct).

independent spending that is, spending undertaken by organizations without prearrangement or coordination with a candidate, poses no danger of corruption or the appearance of corruption, which the Court has said is the only justification for limiting campaign money.<sup>177</sup> Is the spending on campaign communications by independent groups in judicial races less constitutionally protected than in other elections? Surely not.

Independent spending in judicial elections is as much about the communication of views on matters of public importance as is independent spending in all other elections. *White* confirms this, and even *Williams-Yulee* emphasized that the canon it upheld restricted only “a narrow slice of speech”<sup>178</sup> and asserted that “[j]udicial candidates have a First Amendment right to speak in support of their campaigns.”<sup>179</sup> The post-*Williams-Yulee* lower court cases that sustained restrictions on judicial political activities consistently confirmed the broad First Amendment protections that judicial candidates enjoy when campaigning for themselves.<sup>180</sup> It seems highly unlikely that the compelling interest in judicial integrity would support limits on spending by judicial candidates. After all, a candidate’s own campaigning does not undermine his or her impartiality—assuming as *White* does that the articulation of legal or political views is not inconsistent with judicial impartiality—or independence.

It is even harder to see how the judicial integrity interest can support limits on spending by independent organizations that will never decide cases or sit on the bench. The due process

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177 See *Buckley*, 424 U.S. at 45–47; *Citizens United*, 558 U.S. at 359–61.

178 135 S.Ct. at 1670.

179 *Id.* at 1673.

180 See, e.g., *Wolfson v. Concannon*, 811 F.3d at 1185; *Winter v. Wolnitzek*, 834 F.3d at 688–90.

concern for judicial integrity that *Williams-Yulee* relied on is unlikely to provide support for limitations on the core First Amendment-protected speech of non-judges.<sup>181</sup> To be sure, spending by independent organizations can generate a “debt of gratitude” in judicial candidates and result in the danger of bias in favor of the spender in post-election litigation. However, as *Caperton* held, the remedy for this is recusal, not limitations on spending.

(3) Recusal:

*Caperton* clearly mandates recusal due to significant independent spending in some cases and confirms that the states are free to go further “to impose more rigorous standards for judicial disqualification” than the Constitution requires.<sup>182</sup> *Caperton*, of course, was not a dark money case. It was the very fact that it was well-known that Don Blankenship was financing the anti-McGraw spending that led to the requirement that Justice Benjamin recuse. In theory, disclosure actually generates the need for recusal as there can be no danger of bias for a financial supporter if the judge does not know the identity of that supporter. However, even without public disclosure of the identities of the funders of dark money spending, candidates are likely to know who their backers are even if the voting public doesn’t. Thus, there is a case for recusal even without disclosure – although without disclosure it will be difficult for the litigant seeking

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181 And of course there is no way that state codes of judicial conduct could regulate the activities of non-judges, non-judicial-candidates, and non-lawyers.

182 566 U.S. at 889–90 (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986)). *See also White*, 536 U.S. at 794 (a state “may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards”) (Kennedy, J., concurring).

recusal to prove that the asserted financial supporter really was one. So, an effective recusal requirement is contingent on effective dark money disclosure.<sup>183</sup>

Recusal presents many difficulties, not the least of which is that in most states the judge whose recusal is sought decides the recusal motion.<sup>184</sup> There is also the problem alluded to by Chief Justice Roberts in *Williams-Yulee* that in some settings it may be difficult to find a judge to take the recusant's place.<sup>185</sup> The most significant obstacle to recusal as a response to the specific problem of dark money spending is that many independent committees are not de facto surrogates for a specific individual or organization that has a stake in a specific case, as And for the Sake of the Kids appears to have been for Don Blankenship and Massey Coal in *Caperton*. Instead, committees are generally advocates for relatively broad economic, social, ideological, or partisan agendas.<sup>186</sup>

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183 *But cf.*, Stephen J. Ware, Judicial Elections, *Judicial Impartiality and Legitimate Judicial Lawmaking: Williams-Yulee v. The Florida Bar*, 68 Vand. L. Rev. En Banc 59, 79 (2015) (suggesting but not embracing making judicial campaign contributions anonymous to reduce the threat to judicial impartiality).

184 *See, e.g.*, Dmitry Bam, *Recusal Failure*, 18 NYU J. Legis. & Pub. Pol'y 631, 652–56 (2015).

185 135 S.Ct. at 1671.

186 *See, e.g.*, Scott Greytak et al, *Bankrolling the Bench: The New Politics of Judicial Elections*, 2013-14 (Oct. 2015) at 3-4, 9, 13-15, 30-34, 42-47, 59, 76-80 (exploring the large and growing role of national partisan, economic, and ideological interests in state judicial elections),

<http://newpoliticsreport.org/app/uploads/JAS-NPJE-2013-14.pdf>.

To be sure, spending to promote judges who will take a pro-business or anti-environmental regulation approach could financially benefit some of those who have donated to the spending committee, but that connection is far more attenuated than the one in *Caperton*. Would a judge who benefited from spending by a pro-business group have to recuse in a case challenging a government regulation where the litigant had not contributed to the committee that had backed the judge? Would it matter if some of those who had contributed to the committee would benefit from the decision even though they are not parties to the case? And in some instances of independent spending—by civil rights organizations, traditional moral values groups, or criminal defense lawyers—the funders may have no *financial* stake in the litigation challenging or enforcing a state regulation at all.

As Justice Scalia indicated in *White*, there is no constitutional difficulty if a judge holds preexisting views on the legal issues likely to come before her. So, too, voters may choose to take those views into account when voting on judicial candidates just as in appointive systems the appointing executive surely takes the views of prospective nominees into account in determining who to nominate, as do the legislators whose consent may be needed to confirm the nominee. Although judges are not supposed to be representatives in exactly the same way that legislators and executives are, they are as *Chisom* indicated, representatives to some extent, and, as *Gregory* held, also policy-makers. Accordingly, not only do independent groups have a constitutional right to inform the voters and influence them with policy-focused campaigns, but it is hard to see why an elected judge is improperly biased if he or she participates in cases in which the policy issues raised by independent committee campaign advertising and arguably

taken into account by the voters are salient.<sup>187</sup> Certainly, there is no greater bias in that case than if an appointed judge, whose perspective on an issue was likely considered by the appointing officer, participates in a case in which that issue is central.

A robust recusal requirement triggered by significant independent spending would also have to decide what to do when a judge, elected in the face of significant hostile independent spending, is called upon to participate in a case in which those who paid for that spending are parties. It would be ironic if a committee that failed to defeat a judicial candidate could still use its spending to knock the judge out of a case in which it has an interest by claiming bias. Yet due process would be as threatened by the hostile judicial bias of a reelected Justice McGraw as by Justice Benjamin's arguable "debt of gratitude" to Don Blankenship.

There is clearly an argument for clarifying and possibly extending *Caperton's* recusal rule to cases in which a party with a significant financial interest in the outcome was also a significant financial backer of an independent committee that supported the judge hearing the case. Certainly, it would be useful to clarify many issues, such as how much support—whether in absolute amounts or as a percent of total spending—should trigger a concern about a "debt of gratitude"; how long after the election any bias in favor of a financial backer may be presumed to continue; and what counts as a litigant interest that would trigger concern. The Court has

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<sup>187</sup> Professor Ware makes a similar point in arguing that while the interest in judicial impartiality requires that a judge not apply a legal rule specifically to benefit a contributor, as opposed to other similarly situated parties, it is appropriate for a judge who shares the views of contributors to exercise a judge's "legitimate lawmaking discretion" to develop legal rules or apply them broadly in a manner consistent with those views. See Ware, *supra*, 68 Vand. L. Rev. En Banc at 68-78.

indicated that states may go beyond the minimum due process requires in mandating recusal for campaign-finance bias, but any recusal requirement would have to address these knotty issues.

Moreover, much as *Williams-Yulee* indicates that due process can inform the First Amendment, it may also be the case that the First Amendment may constrain the scope of due process. The First Amendment has been construed to bar state regulations that discourage election spending as well as those that prohibit it. In *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*,<sup>188</sup> the Supreme Court struck down the provision of Arizona's public funding law that provided candidates with additional public funds to respond to high levels of spending by opponents or independent committees. Although nothing in the law limited opposition or independent spending, the Court determined that the provision for additional public funds imposed a "substantial burden" on the spending of those opponents and independent groups.<sup>189</sup> A super-sensitive recusal requirement that forces judges to recuse from the cases most important to the independent groups that supported their campaigns could be open to a similar charge that it unconstitutionally burdens campaign speech, which would require a showing that spending by such a group threatens the fact or appearance of judicial integrity. That would seem most challenging with respect to the spending of partisan, ideological, or social interest groups seeking to elect judges who actually share their views rather than groups that hope that judges will simply be inclined to feel grateful to their financial backers.

## V. CONCLUSION

The Supreme Court's judicial campaign jurisprudence reflects the inevitable tug of war between the idealized vision of judges as impartial decision-makers attentive only to the Law

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188 564 U.S. 621 (2011).

189 *Id.* at 748.

with a capital “L,” whose legitimacy as decision-makers requires some public belief in their impartiality, and a pragmatic recognition that judges are also policymakers who come to their cases with predispositions concerning legal issues that will inevitably affect their judgments. This tension concerning the appropriate role and political nature of the judge is compounded when judges are elected. Free elections operate under the assumptions that the voters can make decisions based on their assessment of how the elected official will perform in office concerning issues that matter to the voters, that candidates can make their cases to the voters concerning their performance in office, and that other individuals and groups with an interest in the election can also seek to inform the voters about the candidates and influence their votes. These operating rules for elections surely apply in judicial elections<sup>190</sup> but they are also to at least some extent at odds with the ideals of judicial impartiality and independence. Some attention to the special nature of the judicial function may lead to some modification of the rules for free elections, but too many restrictions on campaign communications will undermine the function of the election itself.

The Supreme Court’s case law demonstrates a point-counterpoint effort to accommodate these competing concerns. Judicial candidates must be free to communicate their views to the voters, but certain campaign practices, such as the personal solicitation of campaign funds, may

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190 As Professor Burt Neuborne as explained, “American judges, especially appellate judges, routinely make new law in order to resolve a case or controversy before them. . . . That is why judicial candidates must be free to express their views on legal issues during the campaign, allowing the electorate to gain a sense of where the potential judge’s view of the common good may lie.” Burt Neuborne, *What Do Judges Do All Day?* 68 Vand. L. Rev. En Banc 99, 110 (2015).

be curtailed if they are seen as posing too great a threat to the appearance of judicial impartiality. But the scope of the Court's sense of "too great a threat" is far from resolved.

Judicial campaign spending, including the spending by independent groups, is as constitutionally protected as spending in other elections; so, too, as in other elections, campaign spending in judicial races may be subject to disclosure requirements. Under some circumstances a judge may be required to recuse from a case in which the financial interest of a major campaign supporter is at stake. But what exactly are the circumstances that trigger a constitutional duty to recuse? Conversely, how far can a state go in requiring recusal in response to independent spending before that is seen as unconstitutionally burdening the rights of independent spending? Both of these questions are far from resolved as well.

The dark money problem is really just an instance of the broader dilemma. On the one hand, the Court's standard campaign finance jurisprudence provides adequate support for bringing dark money to light without regard to the special circumstances of the judiciary. On the other hand, judicial elections are almost certainly not special enough to exempt them from the constitutional ban on independent spending. Recusal requirements may in some circumstances be an appropriate response to dark money spending. But recusal is likely to be least adequate in dealing with the economic, social, ideological, or partisan spending that accounts for much of the growth of dark money spending.