

Judicial Elections, Judicial Impartiality and Legitimate Judicial Lawmaking: *Williams-Yulee v. The Florida Bar*

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I. INTRODUCTION

In early 2015, the United States Supreme Court will hear oral argument in *Williams-Yulee v. The Florida Bar*,¹ a case arising out of a judicial election in Florida. Williams-Yulee, a judicial candidate, personally solicited campaign contributions in violation of a Florida law prohibiting judicial candidates from making such solicitations

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

personally, as opposed to doing so through the candidate's campaign committee.² Williams-Yulee contends that this Florida law violates her First Amendment right to freedom of speech. However, the Florida Supreme Court rejected that argument and held that prohibiting judicial candidates from personally soliciting campaign funds is a constitutionally permissible restriction on speech because it is narrowly tailored to promote "the State's compelling interests in preserving the integrity of the judiciary and maintaining the public's confidence in an impartial judiciary."³

At the level of constitutional law then, *Williams-Yulee* is a First Amendment case about judicial campaign fundraising.⁴ The First Amendment issues raised by judicial campaigns⁵ and money in politics⁶ are vital, and they are not the only issues implicated by *Williams-Yulee*. *Williams-Yulee* also implicates broader questions about how judicial election campaigns should be funded and ultimately whether to have judicial elections at all. I bring to *Williams-Yulee* a longstanding interest in a wide range of legal and policy issues surrounding judicial selection,⁷ including issues

2. *Id.* at 381, 383–84.

3. *Id.* at 381.

4. The question presented in the Petition for Certiorari in *Williams-Yulee v. The Florida Bar* is "[w]hether a rule of judicial conduct that prohibits candidates for judicial office from personally soliciting campaign funds violates the First Amendment." Petition for Writ of Certiorari at 3, *Williams-Yulee v. The Florida Bar*, 138 So.3d 379 (No. 13-1499) (June 17, 2014), 2014 WL 2769040 at *1.

5. *See, e.g.*, *Republican Party of Minn. v. White*, 536 U.S. 765 (2002) (holding that Minnesota Supreme Court's canon of judicial conduct, which prohibited candidates for judicial election from announcing their views on disputed legal or political issues, violated the First Amendment).

6. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310 (2010) (upholding disclosure requirements for political advertising sponsors and ban on direct contributions to candidates from corporations and unions, but invalidating limits on independent expenditures by corporations and labor unions); *McConnell v. FEC*, 540 U.S. 93 (2003) (upholding limits on "soft-money" contributions and political advertisements because of the government's interest in preventing corruption or the appearance of corruption in elections); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) (upholding limitations on coordinated spending by political parties); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996) (deciding that campaign spending by political parties on behalf of congressional candidates could not be limited as long as the parties work independently of the candidates); *Buckley v. Valeo*, 424 U.S. 1 (1976) (holding that limits on campaign expenditures unconstitutionally restricted protected political expression, but allowing reasonable restrictions on contributions to candidates).

7. *See* Stephen J. Ware, *The Bar's Extraordinarily Powerful Role in Selecting the Kansas Supreme Court*, 18 KAN. J.L. & PUB. POL'Y 392 (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1478660, archived at <http://perma.cc/3HLW-E4WN>; Stephen J. Ware, *The Missouri Plan in National Perspective*, 74 MO. L. REV. 751 (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1518029, archived at <http://perma.cc/H4Z9-GPXS>; Stephen J. Ware, *Originalism, Balanced Legal Realism and Judicial Selection: A Case Study*, 22 KAN. J.L. & PUB. POL'Y 165 (2013), available at

surrounding the extent and implications of correlations between judicial campaign contributions and judges' rulings.⁸ *Williams-Yulee* seems an opportune time to reconsider my and others' longstanding concerns about judicial elections.

II. PROHIBITING JUDICIAL CANDIDATES FROM PERSONALLY SOLICITING CAMPAIGN CONTRIBUTIONS

A. *Williams-Yulee v. The Florida Bar*

According to her Florida Supreme Court brief, Lanell Williams-Yulee decided in September 2009 to run for Group 10 County Court Judge in Hillsborough County, Florida,⁹ a seat then occupied by Judge Dick Greco, Jr., who had not yet announced whether he would seek reelection.¹⁰ Williams-Yulee had never been a judicial candidate before, nor had she ever run for a publicly elected office. After she registered as a judicial candidate and formed a campaign committee, Williams-Yulee and her committee drafted a letter announcing her candidacy and seeking campaign contributions. Before signing the letter, Williams-Yulee reviewed it in light of the Florida Code of Judicial Conduct Canon 7(C)1 which provides:

A candidate . . . for a judicial office that is filled by public election between competing candidates shall not personally solicit campaign funds, or solicit attorneys for publicly stated support, but may establish committees of responsible persons to secure and manage the expenditure of funds for the candidate's campaign and to obtain public statements of support for his or her candidacy. Such committees are not prohibited from

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2129265, archived at <http://perma.cc/UDE5-7FD3> [hereinafter *Originalism*]; Stephen J. Ware, *Selection to the Kansas Supreme Court*, 17 KAN. J.L. & PUB. POL'Y 386 (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1315493, archived at <http://perma.cc/GWK6-EY3Y>.

8. Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645 (1999), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=262579, archived at <http://perma.cc/2GX9-AFBL>; see also Joanna Shepherd & Michael S. Kang, SKEWED JUSTICE: CITIZENS UNITED, TELEVISION ADVERTISING, AND STATE SUPREME COURT JUSTICES' DECISIONS IN CRIMINAL CASES, www.skewedjustice.org (last visited Dec. 25, 2014), archived at <http://perma.cc/N52M-3DTC>:

The more TV ads aired during state supreme court judicial elections in a state, the less likely justices are on average to vote in favor of criminal defendants. Justices in states whose bans on corporate and union spending on elections [were struck down by the Supreme Court] were less likely on average to vote in favor of criminal defendants than they were before that decision.

9. Initial Brief of Respondent Lanell Williams-Yulee at 3, *The Florida Bar v. Williams-Yulee*, 138 So.3d 379 (No. SC11-265) (Sept. 2012), 2012 WL 5275028 at *3; Amended Answer Brief at 1, *The Florida Bar v. Williams-Yulee*, 138 So.3d 379 (No. SC11-265) (Oct. 2012), 2012 WL 10067893 at *1.

10. Initial Brief of Respondent Lanell Williams-Yulee, *supra* note 9, at 4-6; Amended Answer Brief, *supra* note 9, at 2.

soliciting campaign contributions and public support from any person or corporation authorized by law.¹¹

Williams-Yulee's Florida Supreme Court brief says Williams-Yulee was aware that Canon 7(C)1 prohibited personal solicitation of campaign funds but mistakenly believed that prohibition only applied to an election in which there were competing candidates.¹² As noted above, when Williams-Yulee signed the fundraising letter, there were no competing candidates. Only later did Judge Greco declare his candidacy for reelection and defeat Williams-Yulee in the 2010 primary election.¹³

The Florida Bar filed a complaint with the Florida Supreme Court alleging that Williams-Yulee's letter personally soliciting campaign contributions violated Canon 7C(1).¹⁴ A referee, appointed by the chief justice,¹⁵ rejected Williams-Yulee's argument that Canon 7C(1) "would apply only if there were another candidate in the judicial race,"¹⁶ and stated that "[i]t is clear that the use of 'election between competing candidates' [in Canon 7C(1)] is used to describe the type of judicial office where the prohibition would apply."¹⁷ Accordingly, the referee recommended to the Florida Supreme Court that Williams-Yulee be found guilty and receive a public reprimand.¹⁸

Williams-Yulee requested review by the Florida Supreme Court¹⁹ and argued "Canon 7C(1) is unconstitutional in that it limits a

11. CODE OF JUD. CONDUCT FOR THE STATE OF FLA., Canon 7C(1) (2014). As a lawyer, Williams-Yulee was bound to comply with the Code of Judicial Conduct under the Rules Regulating the Florida Bar, in particular Rule 4-8.2(b) which provides: "A lawyer who is a candidate for judicial office shall comply with the applicable provisions of Florida's Code of Judicial Conduct." R. REGULATING THE FLA. BAR 4-8.2(b) (1992).

12. Initial Brief of Respondent Lanell Williams-Yulee, *supra* note 9, at 4.

13. See 2010 PRIMARY ELECTION, HILLSBOROUGH COUNTY ELECTIONS, <http://results.enr.clarityelections.com/FL/Hillsborough/20674/32245/en/summary.html#> (last updated Aug. 27, 2010, 1:12:31 PM), *archived at* <http://perma.cc/2DGM-5VTY>.

14. See *Williams-Yulee v. The Florida Bar*, 138 So.3d 379, 381–82 (Fla.), *cert. granted*, 135 S. Ct. 44 (2014).

15. See R. REGULATING THE FLA. BAR 3-7.6(a)(1) (1992) ("The chief justice shall have the power to appoint referees to try disciplinary cases . . .").

16. *Williams-Yulee*, 138 So.3d at 382.

17. *Id.*

18. *Id.* at 381; *see also* R. REGULATING THE FLA. BAR 3-7.6(m) (1992):

[T]he referee shall make a report and enter it as part of the record The referee's report shall include[, *inter alia*, findings of fact, recommendations of guilt, and recommendations of disciplinary measures] The referee's report and record of proceedings shall in all cases be transmitted together to the Supreme Court of Florida.

19. *Williams-Yulee*, 138 So.3d at 383; *see* R. REGULATING THE FLA. BAR 3-7.7(a) (1992) ("(1) Any party to a proceeding may procure review of a report of a referee . . . entered under these rules. (2) The Supreme Court of Florida shall review all reports and judgments of referees recommending . . . public reprimand . . .").

judicial candidate's right to engage in free speech by prohibiting a judicial candidate from directly soliciting campaign contributions."²⁰ Although the Florida Supreme Court recognized that restrictions on speech "must be supported by a compelling, governmental interest and must be narrowly drawn to insure that there is no more infringement than is necessary,"²¹ it held that Canon 7C(1) "is constitutional because it promotes the State's compelling interests in preserving the integrity of the judiciary and maintaining the public's confidence in an impartial judiciary, and . . . is narrowly tailored to effectuate those interests."²² Williams-Yulee petitioned the United States Supreme Court for a writ of certiorari to review the constitutionality of Canon 7C(1).²³ The petition was granted on October 2, 2014.²⁴

B. Beyond Florida

Florida's prohibition on judicial candidates personally soliciting campaign funds is not unusual. Most, but not all,²⁵ states require that such solicitation be conducted through a campaign committee,²⁶ and

20. *Williams-Yulee*, 138 So.3d at 383.

21. *Id.* at 384 (quoting *Firestone v. News-Press Publ'g Co.*, 538 So.2d 457, 459 (Fla. 1989)).

22. *Williams-Yulee*, 138 So.3d at 381. Accordingly, the court approved the referee's recommendation that Williams-Yulee be found guilty of violating Rule 4-8.2(b) and concluded that the referee's recommended sanction of public reprimand was appropriate. *Id.* at 381, 389.

23. Petition for a Writ of Certiorari, *supra* note 4.

24. *Williams-Yulee v. The Florida Bar*, 135 S. Ct. 44 (No. 13-1499) (Oct. 2, 2014), 2014 WL 2763710 at *1.

25. *See, e.g.*, KAN. SUP. CT. R. 601B, CODE OF JUD. CONDUCT, Canon 4, Rule 4.4:

A judicial candidate for retention, nonpartisan, or partisan election may establish a campaign committee to manage and conduct a campaign for the candidate, subject to the provisions of this Code. The candidate is responsible for ensuring that his or her campaign committee complies with applicable provisions of this Code and other applicable law. *A judicial candidate may also personally solicit or accept campaign contributions.*

(emphasis added).

26. *Williams-Yulee*, 138 So.3d at 386 n.2:

With respect to judicial races involving either an opposed election or retention with active opposition, the majority of states require that the solicitation for judicial campaign funds be conducted through a campaign committee. *See, e.g.*, ALASKA CODE OF JUD. CONDUCT, CANON 5C(3); ARIZ. CODE OF JUD. CONDUCT, CANON 4, R. 4.1(A)(6); ARK. CODE OF JUD. CONDUCT, CANON 4, R. 4.2(B)(1); COLO. CODE OF JUD. CONDUCT, CANON 4, R. 4.3(A); CONN. CODE OF JUD. CONDUCT, CANON 5A(4); IDAHO CODE OF JUD. CONDUCT, CANON 5C(2); ILL. CODE OF JUD. CONDUCT, CANON 7B(2); IND. CODE OF JUD. CONDUCT, CANON 4, R. 4.4(A); IOWA CODE OF JUD. CONDUCT, CANON 4, R. 51:4.4(A); KY. CODE OF JUD. CONDUCT, CANON 5B(2); LA. CODE OF JUD. CONDUCT, CANON 7C(2)(B); ME. CODE OF JUD. CONDUCT, CANON 5C(3); MICH. CODE OF JUD. CONDUCT, CANON 7B(2)(B); MINN. CODE OF JUD. CONDUCT, CANON 4, R. 4.4(A); MISS. CODE OF JUD. CONDUCT, CANON 5C(2); MO. CODE OF JUD. CONDUCT, CANON 4, R. 2-4.2(B); MONT. CODE OF JUD. CONDUCT, CANON 4, R. 4.4(A); NEB. CODE OF JUD. CONDUCT,

the American Bar Association Model Code of Judicial Conduct says “a judge or a judicial candidate shall not . . . personally solicit or accept campaign contributions other than through a campaign committee.”²⁷ In short, prohibitions on judicial candidates personally soliciting campaign contributions are the norm around the country and are widely supported by the bar, including the state supreme court justices around the country who (rather than legislators) typically enact them.

Because prohibitions on judicial candidates personally soliciting campaign contributions are so widespread and so well-established, it is no surprise that they were considered by courts before *Williams-Yulee*. In fact, both the Oregon and Arkansas Supreme Courts had, before *Williams-Yulee*, considered First Amendment challenges to their states’ prohibitions on judicial candidates personally soliciting campaign contributions.²⁸ Both courts rejected those challenges on similar reasoning and *Williams-Yulee* cited them both.²⁹ Thus, three states’ highest courts have held that prohibiting judicial candidates’ personal solicitation of campaign contributions serves a compelling state interest and that the prohibition is narrow enough to ensure that there is no more restriction on speech than needed to protect that interest.

III. JUDICIAL IMPARTIALITY

A. Judicial Impartiality Can Coexist with Legitimate Judicial Lawmaking

All three state supreme courts upholding prohibitions on judicial candidates’ personally soliciting campaign funds did so because they believed these prohibitions advanced the states’ interest

CANON 4, R. 5–304.1(A)(8); N.M. CODE OF JUD. CONDUCT, CANON 4, R. 21–404A; N.Y. CODE OF JUD. CONDUCT, CANON 5(A)(5); N.D. CODE OF JUD. CONDUCT, CANON 4, R. 4.6; OHIO CODE OF JUD. CONDUCT, CANON 4, R. 4.4(A); OKLA. CODE OF JUD. CONDUCT, CANON 4, R. 4.4(A); OR. CODE OF JUD. CONDUCT, R. 4–102(D); PA. CODE OF JUD. CONDUCT, CANON 7B(2); S.C. CODE OF JUD. CONDUCT, CANON 5C(2); TENN. CODE OF JUD. CONDUCT, CANON 4, R. 4.4; UTAH CODE OF JUD. CONDUCT, CANON 4, R. 4.2(B)(2); VT. CODE OF JUD. CONDUCT, CANON 5C(3); WASH. CODE OF JUD. CONDUCT, CANON 4, R. 4.4; W. VA. CODE OF JUD. CONDUCT, CANON 5C(2); WIS. CODE OF JUD. CONDUCT, R. 60.06(4); WYO. CODE OF JUD. CONDUCT, CANON 4, R. 4.2(B)(4).

27. A.B.A. MODEL CODE OF JUD. CONDUCT, Canon 4.1(A)(8) (2011).

28. *Simes v. Ark. Judicial Discipline & Disability Comm’n*, 247 S.W.3d 876, 881–82 (Ark. 2007); *In re Fadeley*, 802 P.2d 31, 41 (Or. 1990).

29. *Williams-Yulee*, 138 So.3d at 386 (“[T]hese types of provisions are constitutional, as one of a constellation of provisions designed to ensure that judges engaged in campaign activities are able to maintain their status as fair and impartial arbiters of the law.” (citing *Simes*, 247 S.W.3d at 884; *In re Fadeley*, 802 P.2d at 44)).

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in judicial impartiality. In *Williams-Yulee*, the Florida Supreme Court held that Canon 7C(1), prohibiting Williams-Yulee's personal solicitation of campaign funds, "promotes the State's compelling interests in preserving the integrity of the judiciary and maintaining the public's confidence in an *impartial judiciary*."³⁰ Similarly, the Oregon Supreme Court upheld its similar prohibition after finding the state had a compelling interest in maintaining the public's "faith in the *impartiality of its judiciary*,"³¹ and the Arkansas Supreme Court upheld its similar prohibition as advancing compelling state interests in (1) ensuring "*judicial impartiality*" and (2) ensuring "the public's trust and confidence in the integrity of [the] judicial system" by "avoiding the appearance of impropriety."³²

With judicial impartiality central to all three decisions upholding prohibitions on judicial candidates' personally soliciting campaign funds, assessing these decisions requires unpacking the meaning of judicial "impartiality." The "root meaning" of judicial impartiality, according to the United States Supreme Court, is "lack of bias for or against either party to the proceeding. Impartiality in this sense assures equal application of the law. That is, it guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party."³³ The Court adopted this definition of impartiality in the 2002 case of *Republican Party of*

30. *Williams-Yulee*, 138 So.3d at 381, 385 (emphasis added).

31. *In re Fadeley*, 802 P.2d at 41 (emphasis added); *see id.* at 32 ("A judge may not . . . personally solicit campaign contributions; but a judge may establish committees to secure and manage financing and expenses to promote the judge's election and to obtain public statements of support for the judge's candidacy . . .") (quoting OR. CODE OF JUD. CONDUCT, Canon 7B(7)) (internal quotation marks omitted). Today, the rule reads:

[A] judge or judicial candidate shall not . . . personally solicit or accept campaign contributions other than through a lawfully established campaign committee except, so long as the procedures employed are not coercive, a judge or judicial candidate may solicit or accept campaign contributions from members of the judge's family and judges over whom the judge does not exercise supervisory or appellate authority[.]

OR. CODE OF JUD. CONDUCT, R. 5.1(E) (West 2013). Rule 5.1(E) is adapted from Rule 4.1(A)(8) of the current ABA Model Code of Judicial Conduct. MODEL CODE OF JUD. CONDUCT (2007), available at http://www.americanbar.org/content/dam/aba/migrated/judiciaethics/ABA_MCJC_approved.authcheckdam.pdf, archived at <http://perma.cc/7AA2-KJQQ>.

32. *Simes*, 247 S.W.3d at 882–83 (emphasis added); *see id.* at 879 (quoting ARK. CODE OF JUD. CONDUCT, Canon 5C(2)) ("A candidate shall not personally solicit or accept campaign contributions. A candidate may, however, establish committees of responsible persons to conduct campaigns for the candidate . . ."). Today, the Canon reads: "A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary." ARK. CODE OF JUD. CONDUCT, CANON 4 (West 2009). Rule 4.1(A)(8) of the Canon states: "[A] judge or a judicial candidate shall not . . . personally solicit or accept campaign contributions other than through a campaign committee . . ." ARK. CODE OF JUD. CONDUCT, R. 4.1(A)(8) (West 2009).

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

Minnesota v. White,³⁴ which held that prohibiting judicial candidates from announcing their views on disputed legal and political issues violates the First Amendment. While *White* endorses this “equal application of the law” meaning of impartiality as a compelling state interest,³⁵ *White* rejected—as not a compelling interest—impartiality “to mean lack of preconception in favor of or against a particular legal view.”³⁶ As *White* rightly said:

This sort of impartiality would be concerned, not with guaranteeing litigants equal application of the law, but rather with guaranteeing them an equal chance to persuade the court on the legal points in their case. Impartiality in this sense . . . is not a compelling state interest A judge’s lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law. As then-Justice REHNQUIST observed of our own Court: “Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another.”³⁷

White also questioned whether impartiality of this sort would even be desirable in the judiciary:

Indeed, even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so. “Proof that a Justice’s mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.” . . . And since avoiding judicial preconceptions on legal issues is neither possible nor desirable, pretending otherwise by attempting to preserve the “appearance” of that type of impartiality can hardly be a compelling state interest either.³⁸

34. 536 U.S. 765.

35. It is the meaning:

“[U]sed in the cases cited by respondents and amici for the proposition that an impartial judge is essential to due process.” *Tumey v. Ohio*, 273 U.S. 510, 523, 531–534, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (judge violated due process by sitting in a case in which it would be in his financial interest to find against one of the parties); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822–825, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986) (same); *Ward v. Monroeville*, 409 U.S. 57, 58–62, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972) (same); *Johnson v. Mississippi*, 403 U.S. 212, 215–216, 91 S.Ct. 1778, 29 L.Ed.2d 423 (1971) (per curiam) (judge violated due process by sitting in a case in which one of the parties was a previously successful litigant against him); *Bracy v. Gramley*, 520 U.S. 899, 905, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997) (would violate due process if a judge was disposed to rule against defendants who did not bribe him in order to cover up the fact that he regularly ruled in favor of defendants who did bribe him); *In re Murchison*, 349 U.S. 133, 137–139, 75 S.Ct. 623, 99 L.Ed. 942 (1955) (judge violated due process by sitting in the criminal trial of defendant whom he had indicted).

White, 536 U.S. at 776.

36. *Id.* at 777 (emphasis omitted).

37. *Id.*

38. *Id.* *White* also considered a third meaning of impartiality—as open-mindedness that “seeks to guarantee each litigant, not an equal chance to win the legal points in the case, but at least some chance of doing so”—but did not determine whether this was a compelling interest. *Id.* at 778.

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In short, *White* distinguishes between judges failing to apply legal rules equally to all parties (bad) and judges having views about what those legal rules should be (good).

Not only is it good for judges to have views about what the legal rules should be (which can be called the judge's "normative views about the law" or the judge's "policy preferences"), judges' normative views about the law may be especially detailed and nuanced because judges' jobs immerse them in the law at a granular level. For instance, the average citizen might have broad normative views about the law like "consumer protection needs to be strengthened" or "consumer regulations on business have gone too far." In contrast, a judge's normative views might be as detailed as wanting a particular section of the federal Magnuson-Moss Warranty Act or state Consumer Sales Practices Act amended with specific language the judge thinks would best resolve a question that has divided courts interpreting the current statutory language.

An even more important distinction between a judge's normative views about the law and the average citizen's is that judges sometimes have the power to conform the law to their normative views. That judges make law is a truism.³⁹ As the Supreme Court said in *White*:

39. "Post-realist jurisprudence must depart from the truism that judges make law and begin instead with the question of how they make law." Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 *CARDOZO L. REV.* 601, 636 (1993). That "we are all realists now" is so thoroughly accepted as to be a cliché. Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 *TEX. L. REV.* 267, 267 (1997); see also MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, 169-212 (1992) (arguing that legal realism's most important legacy was its challenge to the notion that law has an autonomous role separate from politics); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 *COLUM. L. REV.* 267, 274 (1998) ("[T]he program of unmasking law as politics [was] central to American Legal Realism"); Jerry Elmer, *Legal Realism, Legal Formalism and the D'Oench Duhme Doctrine: A Perspective on R.I. Depositors Econ. Prot. Corp. v. NFD*, 53 *R.I. B.J.* 9, 11 (2004) ("Today, we are all Legal Realists. Being Realists, we understand two things: that judges do make law, not just *find* it, and that public policy considerations may properly enter into a judge's deliberations."); Charles Gardner Geyh, *Straddling the Fence Between Truth and Pretense: The Role of Law and Preference in Judicial Decision Making and the Future of Judicial Independence*, 22 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 435, 438, 444 (2008) ("In an age when '[w]e are all legal realists now,' it is too late in the day to pretend that when judges adjudicate disputes between adversaries, both of whom support their positions with credible-seeming legal arguments, the value preferences of the judges never factor into the choices they make."); Thomas W. Merrill, *High-Level, "Tenured" Lawyers*, 61 *LAW & CONTEMP. PROBS.* 83, 88 (1998) ("We live in a post-Legal Realist Age, when most legal commentators take it for granted that law cannot be disentangled from politics and that legal judgment is driven by the political beliefs of the decisionmaker."); Gary Peller, *The Metaphysics of American Law*, 73 *CALIF. L. REV.* 1151, 1152 (1985) ("It is a commonplace that law is 'political.'").

[The] 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. Not only do state-court judges possess the power to “make” common law, but they have the immense power to shape the States’ constitutions as well. Which is precisely why the election of state judges became popular.⁴⁰

Our “American system” involves frequent and sometimes far-reaching judicial lawmaking. Judges “inevitably make the common law”⁴¹ and inevitably make law when interpreting vague or ambiguous statutory and constitutional provisions.⁴² The scope and impact of judicial lawmaking grows the higher a judge is in the court system. “All appellate judges are, as one of them puts it, ‘occasional legislators’ and justices on our federal and state supreme courts are tremendously important and powerful lawmakers.”⁴³

Given that our “American system” gives judges, particularly high-court judges, significant discretion to make law, is it sometimes legitimate for judges to use that discretion to conform the law to their policy preferences? I believe so. For example, when a state’s highest court confronts an issue of first impression entirely within the common law—clearly untouched by statute, regulation, or constitutional provision—I believe the judges on that high court properly give significant weight to their own views about what the law on that issue should be. That is an example of legitimate judicial lawmaking. In contrast, a trial judge who is so eager to conform the law to his policy preferences that he knowingly rules contrary to clear, recent appellate court precedent is engaged in illegitimate lawmaking.⁴⁴ In between these two polar cases are undoubtedly many intermediate cases in which reasonable people can disagree about whether a judge’s lawmaking was or was not legitimate, but when we agree that a particular example of judicial lawmaking was legitimate, then our sense of judicial impartiality should not be troubled by it. As *White* says, judicial impartiality “assures equal application of the law. That is, it guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other

40. *White*, 536 U.S. at 784 (citation omitted).

41. *Ware*, *Originalism*, *supra* note 7, at 172.

42. *Id.* at 173–76; *see also* *In re Fadeley*, 802 P.2d 31, 40 (Or. 1990) (referring to a “democratic society that, like ours, leaves many of its final decisions, both constitutional and otherwise, to its judiciary”).

43. *Ware*, *Originalism*, *supra* note 7, at 182.

44. A judge who acts on the principle that he “would rather be right than affirmed,” *see*, for example, Julie A. Brenizer Klosterman, *Tribute to Judge Don J. Young*, 28 U. TOL. L. REV. 355, 356 (1997) (“Judge Young said he would rather be right than affirmed”), likely deserves the epithet “judicial activist.”

party.”⁴⁵ In contrast, judicial impartiality does not preclude judges from using their legitimate lawmaking discretion to change the law for everyone, even if the judges make the change to conform the law to the judges’ policy preferences.

B. Judicial Impartiality and Judicial Campaign Contributions

Following *White*, the previous Part of this Article concluded that the judicial impartiality we should seek is judges’ equal application of the law to all parties. In contrast, the judicial impartiality we should not seek is judges’ refraining from using their legitimate lawmaking discretion to try to conform the law to their policy preferences.

We can apply this distinction in the context of judicial campaign contributions. If a contribution causes a judge to apply a legal rule differently to the contributor than the judge would to another otherwise similarly situated party, then the contribution caused the judge to violate judicial impartiality. Thinking systemically, if judicial campaign contributions cause a significant number of judges to apply legal rules differently to their contributors than to otherwise similarly situated parties, then that judicial election system violates judicial impartiality. In contrast, if judicial campaign contributions cause a significant number of judges to share the contributors’ views about the content of the law—e.g., “tort liability is too burdensome on business” or “possession of marijuana should not be punished harshly”—that is consistent with judicial impartiality. More broadly, if, for example, southern states’ judicial campaign contributions cause the election of more conservative judges while northern states’ judicial campaign contributions cause the election of more progressive judges, this scenario is also consistent with judicial impartiality.

Of course, in all these scenarios what is “caused” by judicial campaign contributions, as opposed to by other causes, may be very difficult to determine.⁴⁶ The point is that with respect to advancing judicial impartiality—properly and narrowly understood as “equal application of the law”⁴⁷—we need not determine whether campaign

45. *White*, 536 U.S. at 775–76.

46. CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS 133 (2009) (“Overall, we find exactly what studies of elections to nonjudicial offices have determined: that big spending is important in reelection campaigns but is only one of the many important factors that affect how well incumbents who are seeking reelection do with voters on election day.”).

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

contributions cause the election of more conservative judges in one state or more progressive judges in another state, and we need not determine whether campaign contributions tend to cause the election of more judges whose views on businesses' tort liability more closely resemble those of the Chamber of Commerce or the plaintiffs' bar. In contrast, with respect to advancing judicial impartiality, we do need to determine whether campaign contributions cause a significant number of judges to apply legal rules differently to their contributors than to otherwise similarly-situated parties. That is, we need to determine whether campaign contributions cause a significant number of judges to depart from equal application of the law.⁴⁸

To put it another way, judicial impartiality requires a system that largely prevents campaign contributors from buying favorable outcomes in their cases but does not require a system that largely (or even slightly) prevents campaign contributors from buying changes in the content of legal rules that will apply to a range of cases.⁴⁹ I made this distinction a few years before *White* in an article entitled *Money, Politics and Judicial Decisions*, in which I distinguished between judicial campaign contributors "buying justice [outcomes] in individual cases involving the contributor,"⁵⁰ and "buying legal policy [the content of a legal rule] that affects a range of cases not involving the contributor."⁵¹ As to buying outcomes in individual cases, I quoted Paul Carrington describing "celebrated occasions . . . when very large [judicial campaign] contributions were made by lawyers or parties who thereafter secured large favorable judgments,"⁵² and I flatly condemned such "excessive accountability to campaign contributors."⁵³ When a judge rules in favor of a contributor, I wrote, "some will suspect that 'justice is for sale,' i.e., the judge is 'owned' by the contributor."⁵⁴ In other words, some will suspect the judge has failed to apply legal rules to the contributor in the same manner as the judge would apply those rules to an identical case involving only noncontributors.

48. If we cannot determine this with empirical data, then I suppose we are left with our instincts about human nature. See *infra* Part III.B, notes 73–82 and accompanying text (disclosing mine).

49. Admittedly, if we define the relevant "policy" narrowly enough, then it is likely to apply only to one case, so there could be close cases not easily resolved by the distinction I draw.

50. Ware, *supra* note 8, at 652.

51. *Id.*

52. *Id.* at 653 (quoting Paul Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 92 (1998)).

53. Ware, *supra* note 8, at 653.

54. *Id.* at 652–53.

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In contrast, I distinguished situations “[w]hen the campaign contributor is not a single lawyer or litigant, but rather a large group of people who band together to advance their political philosophy.”⁵⁵ Whereas “a single contributor may seek only victories in cases in which the contributor appears as a party or lawyer[,] . . . an interest group may have a broad policy agenda, such as protecting the environment or deregulating the economy.”⁵⁶

Such an interest group may contribute to the campaigns of judges who share its political philosophy, just as it may contribute to the campaigns of like-minded candidates for other public offices[,] . . . [affecting] the results in many cases in which the winning parties and lawyers are not members of the interest group. In short, the interest group succeeds, not by buying justice [outcomes] in individual cases, but by buying policy [the content of a legal rule] that influences a range of cases.⁵⁷

Although buying the outcome of a particular case involving the contributor violates judicial impartiality (“equal application of the law,”) buying policy that treats all cases alike does not:

Buying justice in individual cases violates the principle that courts should apply legal rules without regard to the identities of the parties and lawyers who happen to be involved in a particular case. This principle of treating like cases alike is crucial to many widely-shared conceptions of justice. While buying justice violates the principle of treating like cases alike, buying policy does not. Buying policy changes legal rules, but changes them for everybody. Contributors who buy policy must still live under the same rules as everybody else. For this reason, buying judge-made policy through judicial campaign contributions is not as bad as buying justice in particular cases through judicial campaign contributions. In fact, buying policy through judicial campaign contributions may not be bad at all. *It is not easy to condemn contributors who buy policy through judicial campaign contributions without endorsing the myth that courts are apolitical and do not make policy. The Legal Realists exploded that myth and showed that judges do make policy. This is especially true of judges on states' highest courts.* Should not interest groups be as free to buy judge-made policy through campaign contributions as they are to buy governor-made and legislator-made policy through campaign contributions?⁵⁸

To the extent we support “representative democracy,”⁵⁹ if we have judicial elections (and I do not think we should⁶⁰), then we should hope

55. *Id.* at 654.

56. *Id.*

57. *Id.*

58. *Id.* 654–55 (emphasis added) (footnotes omitted).

59. *Nev. Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2353 (2011) (stating that citizens helping candidates whose positions correspond with their own is one of the “mechanisms that sustain representative democracy”).

60. I prefer the indirect democracy of a senate confirmation appointment process to the direct democracy of contestable elections. Stephen J. Ware, *The Missouri Plan in National Perspective*, 74 MO. L. REV. 751, 772–74 (2009); see also Richard A. Posner, *Judicial Autonomy in a Political Environment*, 38 ARIZ. ST. L.J. 1, 3–5 (2006) (endorsing Joseph Schumpeter as “[t]he best theorist of our actual existing democratic system”).

The election of judges violates Schumpeter's conception of democratic rule. In that conception, the people vote only on the top officials, the ones who make the really

for correlations between the judge's legitimate lawmaking and the policy preferences of her supporters, including her campaign contributors, which "might occur because judicial candidates have firmly established views and interest groups know each candidate's views well enough to predict with great accuracy how that candidate will vote in various cases."⁶¹

It should not trouble our sense of judicial impartiality if a judge who receives her campaign contributions from conservatives exercises her legitimate lawmaking discretion to make the law more conservative, or if a judge who receives his campaign contributions from progressives exercises his legitimate lawmaking discretion to make the law more progressive. Nor should it trouble our sense of judicial impartiality if a judge who receives her campaign contributions from the Chamber of Commerce exercises her legitimate lawmaking discretion to try to lower businesses' tort liability, or if a judge who receives his campaign contributions from the plaintiffs' bar exercises his legitimate lawmaking discretion to try to raise businesses' tort liability.

As the Supreme Court said in the 2011 case of *Nevada Comm'n on Ethics v. Carrigan*:

As a general matter, citizens voice their support and lend their aid [to a candidate] because they wish to confer the powers of public office on those whose positions correspond with their own. That dynamic, moreover, links the principles of participation and representation at the heart of our democratic government. Just as candidates announce positions in exchange for citizens' votes, so too citizens offer endorsements, advertise their views, and assist political campaigns based upon bonds of common purpose. These are the mechanisms that sustain representative democracy.⁶²

consequential decisions, so that the people have some sense of whether those are the officials they want ruling them. The people are not busy monitoring the activities of the civil servants. That is not their function. They are not to waste their time trying to master issues and to figure out whether the dog catcher is catching enough dogs.

...

[T]he election of judges even at the state or local level is contrary to the core of Schumpeter's insight, which is that we do not want our citizens to spend their time trying to master technical issues of governance. That is not an efficient division of labor. Most of what courts do is opaque to people who are not lawyers. It is completely unrealistic to think that the average voter will ever know enough about judicial performance to be able to evaluate judicial candidates intelligently.

Id. at 5. For a contrary view, see BONNEAU & HALL, *supra* note 46, at 138:

In sum, appointment systems merely relocate politics from the electorate to political elites, allow judges to decide cases based on personal preferences (whether consistent with the rule of law or not, whether unbiased or not), and create serious issues of legitimacy at the state level when sitting justices engage in improper conduct or consistently make decisions not supported in law.

61. Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 661 (1999)

62. *Carrigan*, 131 S. Ct. at 2353 (citations omitted).

To accept this common-sense observation with respect to the selection of legislators and governors but not judges is to fight for the myth that judges do not make law and therefore should be apolitical.

Unfortunately, many lawyers (including judges) who surely know that judges have legitimate discretion to make law nevertheless seek to perpetuate the myth that judges are not lawmakers when the public's belief in this myth will serve the self-interests of lawyers.

[M]any judges and lawyers are still reluctant to acknowledge publicly the inevitability of judicial lawmaking. In fact, judges and lawyers sometimes publish statements that tend to conceal from the public the fact that judges make law—for example, statements describing the judicial role in a way that omits the lawmaking part of this role. These omissions are especially common in debates over the Missouri Plan, a method of judicial selection that divides the power to appoint judges between the governor and the bar.⁶³

In short, judicial selection is an important topic on which we should be alert to counter lawyers who perpetuate the myth that judges do not make law and therefore should be apolitical. And within the topic of judicial selection, we should be especially alert to lawyers perpetuating this myth when they are advancing a selection system that favors them or when they are expressing concerns about a selection system that treats a lawyer like any other citizen. Of the three common judicial selection systems in the United States, the only one that favors lawyers is the Missouri Plan (sometimes propagandistically touted as “merit selection”⁶⁴) which allows only lawyers to pick some members of the nominating commission that restricts the governor's choice of judicial candidates.⁶⁵ The bar tends to support this lawyer-favoring system.⁶⁶ In contrast, the other two common methods of judicial selection around the fifty states—election of judges and appointment of judges by democratically elected officials—make the vote of a lawyer worth no more than the vote of nonlawyer.⁶⁷

63. *Originalism*, *supra* note 7, at 166.

64. See Michael R. Dimino, *The Futile Quest for a System of Judicial “Merit” Selection*, 67 ALB. L. REV. 803 (2004) (“Merit selection—purely, so far as I can tell, [is] a propagandistic misnomer . . .”).

65. Ware, *supra* note 60, at 758–64.

66. See ABA MODEL CODE OF JUD. CONDUCT, Canon 5(C)(2), cmt (2007) (“[M]erit selection of judges is a preferable manner in which to select the judiciary”); ABA COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE, AN INDEPENDENT JUDICIARY 96 (1997):

The American Bar Association strongly endorses the merit selection of judges, as opposed to their election Five times between August 1972 and August 1984 the House of Delegates has approved recommendations stating the preference for merit selection and encouraging bar associations in jurisdictions where judges are elected . . . to work for the adoption of merit selection and retention.

67. See Stephen J. Ware, *The Missouri Plan in National Perspective*, 74 MO. L. REV. 751, 754–55 (2009):

Thus, when lawyers express concern about judicial elections, we should be alert to the possibility that such lawyers are trying to empower themselves by replacing judicial elections with a version of the Missouri Plan, and are doing so by perpetuating the myth that judges do not make law and therefore should be apolitical. In other words, when lawyers express concern about judicial elections they should be met with skepticism about lawyer self-interest masquerading as public-regarding concern for judicial impartiality and the integrity of the judicial system. And this skepticism should heighten when lawyers complain that judicial elections tend to politicize the judiciary because that complaint tends to imply that “judge” is not the sort of office—a lawmaker’s office—ordinarily filled by a political process.⁶⁸

The bar’s efforts to replace judicial elections with the Missouri Plan have not fared well over the last several decades,⁶⁹ so the bar’s attention has often turned to Plan B—taming judicial elections through codes of judicial conduct and other laws.⁷⁰ Just as bar efforts

Although not as populist as the direct democracy of contestable judicial elections, senate confirmation does make judicial selection indirectly accountable to the people because, at the federal level, the people elect their senators and, through the Electoral College, the President. Similarly, in states that use this method of judicial selection, the people elect their governors and state senators.

In other words, senate confirmation is—like contestable elections—fundamentally democratic Senate confirmation is democratic because it facilitates the “rule of the majority” by adhering to the principle of one-person-one-vote. At the federal level, one-person-one-vote is tempered by federalism, . . . [b]ut at the state level nothing similarly tempers the democratic nature of senate confirmation. In those states in which the governor may appoint to the court whomever he or she wants, subject only to confirmation by a popularly elected body, judicial selection is laudably democratic because governors and state senators are elected under the principle of one-person-one-vote [M]embers of the bar get no special powers. Again, a lawyer’s vote is worth no more than any other citizen’s vote.

68. As noted above, I believe this office should be filled through the indirect democracy of senate confirmation rather than through direct election by the citizenry. *See supra* note 60.

69. *See* Seth Andersen, *Examining the Decline in Support for Merit Selection in the States*, 67 ALB. L. REV. 793 (2004) (stating that the support for “merit selection” has been declining over the past decades, and also that the last time a state adopted some form of “merit selection” was New Mexico in 1988).

70. *See id.* at 800–01. The American Bar Association (ABA) and other organizations “support appointive systems as the ultimate goal.” *Id.* However, the ABA, recognizing “the immediate need to reform judicial elections,” advocates changes, such as “use of elections only at the point of initial selection,” “use of retention elections,” “use of nonpartisan elections,” longer office terms, “expansion of voter guides on judicial candidates, and use of voluntary guidelines on judicial campaign conduct.” *Id.* Furthermore, “[t]he [ABA] has also introduced the concept of employing a ‘Judicial Eligibility Commission’ in elective systems to place more emphasis on professional qualifications and to ensure that voters have the benefit of candidate screening performed by a neutral, non-partisan, and diverse commission.” *Id.* For example, the Minnesota Supreme Court canon of judicial conduct invalidated in *White* prohibited candidates for judicial election from announcing their views on disputed legal or political issues. *See* *Republican Party of Minn. v. White*, 536 U.S. 765 (2002):

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to end judicial elections should be met with skepticism about lawyer self-interest, so should bar efforts to tame judicial elections, especially if they tend to perpetuate the myth that judges, even state supreme court justices, do not make law and therefore should be apolitical. Particularly suspect are bar efforts to make judicial elections exclusively about candidates' qualifications, experience, and professional abilities rather than at all about their policy preferences.⁷¹ A *Williams-Yulee*-like requirement that judicial campaign contributions be solicited by the candidate's campaign committee, rather than by the candidate herself, may fit this "distract the public from the importance of the judicial candidates' policy preferences" narrative. This is because such requirements can plausibly be seen as attempts by the bar to create the impression that the office of judge is less political—less lawmaking—than it is by separating the judicial candidate from the "political" task of soliciting campaign contributions.

As to the practicalities of *Williams-Yulee*, I wonder if the distinction between campaign contributions solicited by campaign committees and by the judicial candidates themselves is more cosmetic than real because judges can usually easily learn who contributed to their campaign committees, and lawyers and litigants know that judges can easily learn who contributed to their campaign committees. For example, Judge Martha Daughtrey recalling her campaign for the Tennessee Supreme Court said:

The thing that worried us was who was really interested in our election or any judicial election, and the answer is the lawyers. You end up trying to get money from the lawyers that are going to be actually appearing before you, which is a very uncomfortable position to be in. So we had a committee that was doing the money raising, and we took the position that we didn't want to know who gave what. The problem was there was a financial contribution disclosure law in Tennessee that said that everybody who raised money running for political office had to sign a statement where the contributors were listed. How much they gave was on there, and we were supposed to sign it as being correct. We were kind of hoist on our petard at that point.

...

Respondents contend that this still leaves plenty of topics for discussion on the campaign trail . . . [including] a candidate's character, education, work habits, and how [he] would handle administrative duties if elected. Indeed, the Judicial Board has printed a list of preapproved questions which judicial candidates are allowed to answer. These include how the candidate feels about cameras in the courtroom, how he would go about reducing the caseload, how the costs of judicial administration can be reduced, and how he proposed to ensure that minorities and women are treated more fairly by the court system.

Id. at 774 (internal quotation marks and citations omitted).

71. *Id.*

I would have wanted to be able to say I'm not in a position to decide a case based on who your lawyer is and whether that lawyer gave a contribution or not.⁷²

With judges' ability to easily learn who contributed to their campaign committees, I fear the rule enacted by most states' codes of judicial conduct—solicitations by a campaign committee instead of by the candidate—is mere window dressing.⁷³ I doubt if it fools anybody. And if it does, that seems doubly pernicious. Bad enough to risk lawyers and potential litigants buying influence with the judge, but still worse for the bench and bar to try to hide that reality from the general public in an effort to maintain, as the Arkansas Supreme Court put it, “the public's trust and confidence in the integrity of our judicial system.”⁷⁴

In other words, healthy skepticism toward bar self-interest in taming judicial elections should not make us comfortable with untamed judicial elections. Even judicial impartiality, narrowly and properly defined as “equal application of the law,” may well be threatened by judicial campaign contributions whether the contributions are solicited by the candidate personally or by her campaign committee. Frankly, I question whether the public should trust the integrity of a system in which judges' campaign committees accept contributions from lawyers or parties who then appear before the judge.

As the Oregon Supreme Court said, “The persons most actively interested in judicial races, and the persons who are the most consistent contributors to judicial campaigns, are lawyers and potential litigants. The impression created when a lawyer or potential litigant, who may from time to time come before a particular judge,

72. See *The Policy Implications of Campaign Contributions: A Discussion*, 97 JUDICATURE 279, 281–82 (2014) (statement of Senior Judge Martha Daughtrey, U.S. Court of Appeals for the Sixth Circuit).

73. As the Oregon Supreme Court said in upholding a requirement that candidates soliciting campaign funds through a committee, “[T]he candidate is not seriously impaired either in the ability to solicit and receive funds.” *In re Fadeley*, 802 P.2d 31, 40 (Or. 1990).

74. *Simes v. Ark. Judicial Discipline & Disability Comm'n*, 247 S.W.3d 876, 882 (Ark. 2007). In contrast to *White*, see *supra* text at notes 45–48, the Arkansas Supreme Court defined judicial impartiality to mean not only “lack of bias for or against either party” but also “open-mindedness, guaranteeing each litigant at least some chance to win the legal points in the case.” *Simes*, 247 S.W.3d at 881. The Arkansas Supreme Court explained that the solicitation ban would ensure judicial impartiality and “the open-mindedness of judges” by “diminishing the possibility that judges, once in office, will be pressured to decide issues in favor of those who financially supported their campaign.” *Id.* From the other side of the bench, the solicitation ban avoids the appearance of impropriety, so that “solicited individuals” would not be placed “in a position to fear retaliation if they fail[ed] to financially support that candidate.” *Id.* at 882. Thus, attorneys would “not feel pressured to support certain judicial candidates in order to represent their clients,” and the public would not feel forced “to search for an attorney in part based upon the criteria of which attorneys have made the obligatory contributions.” *Id.*

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contributes to the campaign of that judge is always unfortunate.”⁷⁵ Unless there is objective evidence suggesting that the individual lawyer or potential litigant is supporting the judge because of the judge’s policy preferences,⁷⁶ it appears to me “that the lawyer or potential litigant either expects to get special treatment from the judge or, at the least, hopes to get such treatment.”⁷⁷ As Paul Carrington pithily says:

Judicial candidates receive money from lawyers and litigants appearing in their courts; rarely are there contributions from any other source. Even when the amounts are relatively small, the contributions look a little like bribes or shake-downs related to the outcomes of past or future lawsuits. . . . There have been celebrated occasions . . . when very large contributions were made by lawyers or parties who thereafter secured large favorable judgments or remunerative appointments such as receiverships.⁷⁸

I cannot help but conclude with Erwin Chemerinsky that judicial campaign contributions from lawyers and litigants “risk both the reality of undue influence and the appearance of impropriety.”⁷⁹

For these reasons, I fear that judicial campaign contributions pose a serious risk of causing a significant number of judges—perhaps unconsciously—to apply legal rules differently to their contributors than to otherwise similarly situated parties. I cannot point to significant data to warrant this fear. As Ronald Rotunda says, “[o]bviously we do not want judges to treat parties or lawyers differently because of contributions that the judges did or did not receive Yet, while the assertion of linkage is common, it is surprisingly difficult to prove.”⁸⁰ My worry that some judges treat

75. *In re Fadeley*, 802 P.2d at 41.

76. Such evidence might include the judge belonging to the political party that receives the vast majority of the lawyer’s or potential litigant’s contributions to campaigns for nonjudicial office. In contrast, if the lawyer or potential litigant does not contribute to nonjudicial campaigns, then we should be very suspicious of the contributor’s motives behind a judicial campaign contribution.

77. *In re Fadeley*, 802 P.2d at 41.

78. Paul Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 91–92 (1998) (footnotes omitted). “A fundamental difference exists between judicial and legislative offices in this respect because judges decide the rights and duties of individuals even when they are making policy; hence any connection between a judge and a person appearing in his or her court is a potential source of mistrust.” *Id.*

79. Erwin Chemerinsky, *Preserving an Independent Judiciary: The Need for Contribution and Expenditure Limits in Judicial Elections*, 74 CHI.-KENT L. REV. 133, 134 (1998).

80. Ronald D. Rotunda, *Constitutionalizing Judicial Ethics: Judicial Elections After Republican Party of Minnesota v. White, Caperton, and Citizens United*, 64 ARK. L. REV. 1, 17 (2011); see also BONNEAU & HALL, *supra* note 46, at 129:

[G]iven the notable absence of any identifiable crises of legitimacy in the states that have hosted competitive judicial elections for decades, we wonder if the real crisis is not the unrelenting assaults on the democratic process by judicial reform advocates and their never-ending cries that elections are poisoning the well of judicial independence and legitimacy

parties or lawyers differently because of campaign contributions rests not on empirical proof but on intuitions about human nature—what we might call a secular belief in Original Sin. As Kant put it, “Out of the crooked timber of humanity, no straight thing was ever made.”⁸¹

*C. Reducing the Threat Judicial Campaign Contributions Pose to
Judicial Impartiality*

If a *Williams-Yulee*-like rule diverting judicial campaign fundraising from candidates personally to their campaign committees is insufficient to minimize the risk of contributors buying influence over the outcomes of their cases, then are there other ways to accomplish that goal without abolishing judicial elections? Brian Fitzpatrick and I list three possible solutions: “asking judges to recuse themselves from cases involving campaign donors, making campaign donations anonymous, and publicly financing judicial elections.”⁸² These three—recusal, anonymity, and public financing—are discussed in turn.

Judges recusing themselves from cases involving campaign donors seems prudent to minimize the risks of contributors buying influence over the outcomes of their cases. However, if such recusal was required, then a lawyer or potential litigant might contribute to a judge expected to rule against the litigant to disqualify the judge and thus get a different judge assigned to the case. In a two-party case, that problem might be solved by allowing the opposing party to choose whether the judge should recuse, but in multi-party cases the practicalities would get more complex, and opportunities for collusion among parties would abound. And even in two-party cases, if the judge recuses from cases involving campaign contributors, what about cases involving less direct help to the judge’s election? In *Caperton v. A.T.*

Ware, *supra* note 8, at 661 (presenting data showing “a strong correlation” between the votes of Alabama Supreme Court justices on arbitration cases and whether their campaign funds came from business groups or plaintiffs’ lawyers); *id.*:

[E]mphasiz[ing] that correlation does not prove causation. Knowing that there is a strong correlation between a justice’s source of campaign funds and how that justice votes in arbitration cases does nothing to explain why this occurs. It might occur because judicial candidates have firmly established views and interest groups know each candidate’s views well enough to predict with great accuracy how that candidate will vote in various cases.

81. IMMANUEL KANT, *IDEA FOR A UNIVERSAL HISTORY WITH A COSMOPOLITAN PURPOSE*, in H. S. REISS, *KANT, CAMBRIDGE TEXTS IN THE HISTORY OF POLITICAL THOUGHT* (Cambridge 2d ed., 1991)

82. Brian Fitzpatrick & Stephen Ware, *How Does Your State Select Its Judges?*, INSIDE ALEC (American Legislative Exchange Council, D.C.), March 2011, at 9.

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Massey Coal Co., the Supreme Court held that Due Process required recusal in a case involving, not contributions to the judge's campaign, but independent expenditures criticizing the judge's opponent.⁸³ And those expenditures were not by the party (a corporation) but by the President of the party.⁸⁴ *Caperton* helps us imagine difficult line-drawing problems as new cases' facts involve people increasingly remote from the party or lawyer before the judge helping the judge's election in increasingly attenuated ways. In sum, recusal seems capable of contributing to a reduction in the risks of contributors buying influence over the outcomes of their cases but is not a panacea.

Similarly, making judicial campaign contributions anonymous has potential to help, but I am not confident about it. I associate the idea of requiring anonymity in campaign contributions with Ian Ayres and his coauthors. They explain, "[A]nonymous donations through a system of blind trusts would make it harder for candidates to sell access or influence because they would never know which donors had paid the price."⁸⁵

Knowledge about whether the other side actually performs his or her promise is an important prerequisite for trade. People—including political candidates—are less likely to deal if they are uncertain whether the other side performs. By keeping political candidates ignorant of their donors' identities, we can disrupt the 'influence selling' market just as voting booth privacy disrupts the 'vote buying' market.⁸⁶

"So long as a politician cannot identify a given donor's gift on an individual basis, the donor cannot reasonably expect to gain a private quid pro quo. As a consequence, he will continue giving large sums only when motivated by public-regarding considerations."⁸⁷ For these reasons, perhaps requiring anonymity for judicial campaign contributions is worth a try, and then we will have some experience from which to draw conclusions about practical challenges.

The third possible way to minimize the risk of contributors buying influence over the outcomes of their cases is to finance judicial campaigns through tax dollars rather than private contributions.⁸⁸

83. 556 U.S. 868, 888–90 (2009).

84. *Id.* at 873.

85. Ian Ayres & Jeremy Bulow, *The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence*, 50 STAN. L. REV. 837, 838 (1998).

86. *Id.*

87. Bruce Ackerman & Ian Ayres, *The New Paradigm Revisited*, 91 CAL. L. REV. 743, 746 (2003).

88. See Charles Gardner Geyh, *Publicly Financed Judicial Elections: An Overview*, 34 LOY. L.A. L. REV. 1467, 1476 (2001).

Four states have such programs: Wisconsin,⁸⁹ North Carolina,⁹⁰ New Mexico,⁹¹ and West Virginia.⁹² However, opponents of public funding object that it “ ‘forces taxpayers to contribute to candidates who they do not support’ ”⁹³ and “argue that spending limitations on candidates who participate . . . are an unconstitutional restriction on free speech.”⁹⁴ Another danger of public financing is that its “spending limits simply would reinforce the incumbency advantage by not permitting challengers to spend enough money to gain voter familiarity.”⁹⁵ On the other hand, public funding may do little more than make the flow of political money more circuitous because while “public financing may reduce private contributions to candidates,” it does “not eliminate any of the money raised and spent by independent groups,” so “public financing may not reduce the total sums of money spent in campaigns (even with spending limits on candidates) but may simply shift spending from one set of political actors to another.”⁹⁶ Former chair of the Federal Election Commission, Bradley Smith,⁹⁷ concludes that “the United States remains one of the healthiest democracies, despite, or perhaps because of, its reliance on private financing of campaigns.”⁹⁸

89. See Michael W. Bowers, *Public Financing of Judicial Campaigns: Practices and Prospects*, 4 NEV. L.J. 107, 117 (2003).

90. See Brian P. Troutman, *Part Over? The Politics of North Carolina’s “Nonpartisan” Judicial Elections*, 86 N.C. L. REV. 1762, 1763, 1772 (2008); see also Doug Bend, *North Carolina’s Public Financing of Judicial Campaigns: A Preliminary Analysis*, 18 GEO. J. LEGAL ETHICS 597, 599 (2005).

91. Thomas J. Cole, *First Judge Elected with Public Financing*, ALBUQUERQUE J. (NOV. 17, 2014, 12:05 AM), <http://www.abqjournal.com/497234/news/nm-news/first-judge-elected-with-public-financing-in-new-mexico.html>, archived at <http://perma.cc/R27A-V8UY>.

92. John O’Brien, *Legislature Passes Public Financing Bill for SC Elections*, WEST VIRGINIA RECORD (Apr. 15, 2013, 12:03 PM), <http://wvrecord.com/news/259285-legislature-passes-public-financing-bill-for-sc-elections>, archived at <http://perma.cc/WWA3-ZNT8>.

93. Bend, *supra* note 90, at 604 (quoting U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-03-453, EARLY EXPERIENCES OF TWO STATES THAT OFFER FULL PUBLIC FUNDING FOR POLITICAL CANDIDATES 6–7 (2003), available at <http://www.gao.gov/new.items/d03453.pdf>, archived at <http://perma.cc/W689-DKER>).

94. Bend, *supra* note 90, at 604.

95. BONNEAU & HALL, *supra* note 46, at 102.

96. *Id.* at 105.

97. Bradley A. Smith, FEC.GOV, http://www.fec.gov/members/former_members/smith/smith.shtml (last visited Dec. 29, 2014), archived at <http://perma.cc/6MXT-RFBW>.

98. Bradley A. Smith, *Some Problems with Taxpayer-Funded Political Campaigns*, 148 U. PA. L. REV. 591, 628 (1999).

IV. CONCLUSION

In a narrow doctrinal sense, *Williams-Yulee* is about the constitutionality of a requirement that a judicial candidate solicit campaign funds through her campaign committee, rather than personally. At the intermediate level, however, *Williams-Yulee* implicates questions about how judicial election campaigns should be funded. And at the broadest level, *Williams-Yulee* implicates the question whether to have judicial elections at all. My answer to that broadest question is no; we should not have judicial elections, although I disagree with most of my fellow lawyers about whether to replace judicial elections with appointment of judges by democratically elected officials, or by a combination of such officials and the bar. At the intermediate level, I doubt that funding for judicial election campaigns can be accomplished without posing significant risk to judicial impartiality or creating other important problems, which is one of the reasons why I want to eliminate judicial elections. As for the narrow doctrinal issue in *Williams-Yulee*, I leave that to First Amendment experts.