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The Absent Amicus: With Friends like These

Robert M. M. O'Neil

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*Robert M. O'Neil**

I. INTRODUCTION: REVISITING CORE JUDICIAL VALUES

The *Williams-Yulee* case presents two singular features worthy of scholarly attention. First, of course, is the striking split among the lower courts on the crucial issue this case presents. As the petition for certiorari amply demonstrates, "the lower courts are deeply and expressly divided over the question whether rules like [the Florida Canons governing judicial conduct] violate the First Amendment."[1] Mercifully, the Justices responded to the mounting conflict by agreeing to grant the petition in early October, though of course even the sharpest split alone would not by itself mandate review. Seldom have the federal circuits been so sharply divided; moreover, an impressive number of state supreme courts are also at odds on the validity of judicial election rules. Curiously, though, the nation's ultimate arbiter has not addressed this issue in a dozen years—during which myriad factors have heightened the urgency of intervention.[2]

The other novel—indeed, seemingly unique—feature of this case is the total absence of any formal argument (in amicus briefs or

* Professor of Law Emeritus and President Emeritus, University of Virginia; Former President and Professor of Law, University of Wisconsin System, Senior Fellow, Association of Governing Boards of Colleges and Universities.

1. Petition for a Writ of Certiorari at 2, Williams-Yulee v. The Florida Bar, 138 So.3d 379 (June 17, 2014) (No. 13-1499), 2014 WL 2769040.

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

elsewhere) presenting the views of state bar organizations and their members. The Florida State Bar, which would normally have advanced the case for the respondent, simply took a pass, apparently sensing the inevitability of the Supreme Court's grant.[3] That left as the only possible source of potential balance the arguments marshaled in the Florida Supreme Court's opinion.[4]

Meanwhile, the case for the Petitioner has been amply and ably presented to the Supreme Court. In addition to a thorough and persuasive brief on the complainant's behalf, three amicus curiae briefs appeared in late November. They conveyed strong support for the petitioner and other judicial candidates who have challenged the Florida Canon's constitutionality. Those briefs advanced the views of three keenly interested organizations—the American Civil Liberties Union (and its Florida Chapter),[5] the James Madison Center for Free Speech in Indiana (joined by six judicial candidates),[6] and the Thomas Jefferson Center for Freedom of Expression in Charlottesville, Virginia.[7]

The ACLU brief stressed traditional free expression precepts, insisting, for example, upon narrow tailoring and strict scrutiny for campaign restrictions, while urging greater reliance on disclosure as a less restrictive alternative.[8] The James Madison Center candidly recognized that "the appearance of bias toward a party can [pose a] compelling interest," while disparaging the case advanced by the Florida court for the particular Canon.[9] The Madison Center brief also noted the potential validity of other bans on personal solicitation by judicial candidates (e.g., courthouse solicitations and soliciting participants in pending litigation) while also urging the preferability

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3. *See* The Florida Bar's Response to Petition for Writ of Certiorari, Williams-Yulee v. The Florida Bar, 138 So.3d 379 (Aug. 22, 2014) (No. 13-1499), 2014 WL 4201687.

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

5. Brief of Amici Curiae American Civil Liberties Union and American Civil Liberties Union of Florida in Support of Petitioner, Williams-Yulee v. Florida Bar, 138 So.3d 379 (Nov. 14, 2014) (No. 13-1499), 2014 WL 6706840.

6. Brief of Amici Randolph Wolfson, Marcus Carey, Gregory Wersal, Judges David Certo, John Siefert, Eric Yost; and the James Madison Center for Free Speech, Supporting Petitioner, in Williams-Yulee v. The Florida Bar, 138 So.3d 379 (Nov. 24, 2014) (No. 13-1499), 2014 WL 6706839 [hereinafter Brief of the James Madison Center].

7. Amicus Curiae Brief of the Thomas Jefferson Center for the Protection of Free Expression, in Support of Petitioner, Williams-Yulee v. The Florida Bar, 138 So.3d 379 (2014) (No. 13-1499), *available at* http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-1499_amicus_JeffersonCenter.authcheckdam.pdf.

8. Brief of Amici Curiae American Civil Liberties Union, *supra* note 5, at 4–5.

9. Brief of the James Madison Center, *supra* note 6, at 13.

of recusal.[10] Similarly, the Thomas Jefferson Center recognized the potential of recusal, while disparaging the case for "preventing the mere appearance of potential bias."[11] Such impressive advocacy on the Petitioner's behalf could hardly have been missed, even by a casual observer.

Thus emerged a truly extraordinary situation. It would be difficult to recall a comparable gap or default within recent memory. On a few occasions over the years, usually in order to avoid a clear conflict of interest, special counsel has been invited by the high court to submit an amicus brief in lieu of what would normally have been the filings of the parties.[12] That is not, however, what eventually happened here, and it is far too late to file the now clearly absent amicus brief. Happily, having written on this very subject a dozen or so years ago, I have taken on precisely this task.[13] Moreover, that assignment is a quite congenial one, as a later Part of this article will elaborate. The constitutional challenge to regulations like Florida's Canon 7C(1) may have few champions, but surely offers ample grounds for support, as I shall note later.

Meanwhile, analysis of the *Williams-Yulee* case is clearly a work in progress. For many (indeed most) observers, the crucial questions are to what extent the nearly forty states that elect at least some of their judges may regulate personal solicitation by judicial candidates, and just what specific forms of regulation may incur or survive constitutional challenge. For a minority of critics and scholars, though, the central question is far broader. It hinges upon nothing less basic than the difference between the several branches of government—specifically, the contrast between the judicial branch and the legislative and executive arms of state government. It is that fundamental contrast which this essay addresses as we await the argument and decision.[14]

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10. *Id.* at 24–26.

11. Amicus Curiae Brief of the Thomas Jefferson Center, *supra* note 7, at 2.

12. It would theoretically have been possible for an appellate court to have invited someone other than the parties to submit an amicus brief designed to maintain balance among the contending arguments in such a case.

13. *See generally* Robert M. O'Neil, *The Canons in the Courts: Recent First Amendment Rulings*, 35 IND. L. REV. 701 (2002) (explaining that First Amendment challenges to judicial election rules increased in the 1990s).

14. *See, e.g.*, Adam Liptak, *Judges on the Campaign Trail*, N.Y. TIMES (Sept. 27, 2014), *available at* http://www.nytimes.com/2014/09/28/sunday-review/judges-on-the-campaign-trail.html?_r=0, *archived at* http://perma.cc/W34F-3JM9.

II. FLORIDA'S JUDICIAL CANON AND ITS VALIDATION

The Supreme Court of Florida, after resolving several technical aspects of the pending complaint of a Hillsborough County attorney, ruled broadly in favor of the Florida Bar and the constitutionality of Canon 7C(1)'s ban on a judicial candidate's personal solicitation of campaign contributions.[15] Several premises drove this conclusion. First, the court reaffirmed its conviction, as conveyed in earlier rulings, that Florida "has a compelling state interest in preserving the integrity of [its] judiciary and maintaining the public's confidence in an impartial judiciary."[16] The court cited comparable commitments from other states, notably Oregon and Arkansas.[17] Second, the Florida ruling addressed the question whether the Canon in issue was "narrowly tailored" since "the respondent was not completely barred from soliciting campaign funds, but was simply required to utilize a separate campaign committee to engage in the task of fundraising."[18] The specific regulation thus left open "ample alternative means for candidates to raise the resources necessary to run their campaigns."[19] Finally, Florida's justices vindicated the complainant in regard to the incidental charge of making a false representation to a reporter, which the evidence failed to support.[20]

Given the substantial attention evoked by this and other recent rulings in states as varied as Arizona, Indiana, Illinois, Montana, and Delaware, as well as another pending Florida case, a major challenge seemed inevitable.[21] That challenge emerged in an ably crafted petition for certiorari filed by the Washington, D.C. office of Mayer Brown and the Yale Law School Supreme Court Clinic, guided by Professor Eugene Fidell.[22]

After briefly summarizing the Florida Supreme Court's judgment, the Petition initially addressed the importance of the case

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15. *See* Williams-Yulee v. The Florida Bar, 138 So.3d 379, 387 (Fla.), *cert. granted*, 135 S. Ct. 44 (2014).

16. *Id.* at 384 (internal citations and quotation marks omitted) (alterations in original).

17. *See id.* at 384–87.

18. *Id.* at 387.

19. *Id.*

20. *See id.* at 387–88.

21. *See, e.g.*, Delaware Coalition for Open Gov't, Inc. v. Strine, 733 F.3d 510 (3d Cir. 2013); Sanders County Republican Central Comm. V. Bullock, 698 F.3d 741 (9th Cir. 2012); Dobson v. Arizona, 309 P.3d 1289 (Ariz. 2013); *see generally* FAIR COURTS LITIGATION TASK FORCE, CURRENT AND RECENT CASES OF INTEREST, http://www.faircourtslitigation.org/ (last visited January 4, 2015).

22. *See* Petition for a Writ of Certiorari, *supra* note 1. The petition was also joined by a smaller Orlando law firm, which had earlier championed the cause. *Id.*

and the need for intervention, though its primary attention already served to marshal the claimant's case on the merits.[23] The burgeoning conflict among federal circuits and state tribunals received immediate attention. Notable within the petition's suggested rationale for granting a writ of certiorari was the observation that "although the question presented arises often, suitable vehicles with which to address it are rare," adding that "this case offers such a vehicle" and noting that the constitutionality of Canon 7C(1) remained the "sole remaining issue" likely to engage the Justices' attention.[24] Unlike the welter of prospective suits seeking declaratory relief, the "constitutionality of the personal solicitation ban is presented independently" in this proceeding.[25]

The Petitioner's brief on the merits—also crafted by the Yale Law School Supreme Court Clinic—essentially restated arguments already advanced in the Petition.[26] This brief reaffirmed the central premise that the challenged Canon "is a content-based regulation, applicable only to speech soliciting campaign contributions," which "prohibits speech at the core of the First Amendment—the speech of candidates for elective office."[27] Such a restriction, the petitioner urged, cannot be "justified based on a state interest in preventing quid pro quo corruption."[28] Conceding that "the state has a compelling interest in preventing judicial bias," the brief insisted that the challenged Canon's "underinclusiveness substantially 'diminish[es] the credibility of the government's rationale for restricting speech.' "[29]

Moreover, the Petitioner's advocates insisted that the Florida Canon "fails strict scrutiny for the additional reason that it is overinclusive, prohibiting speech that carries no risk of bias."[30] Finally, the brief cited less restrictive alternatives (such as recusal and contribution limits) that were readily available, and should be preferred because of the Canon's abridgement of protected expression.[31] The concluding section reminded readers that "at a minimum, Canon 7C(1) is unconstitutional as applied to petitioner."[32]

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23. *See id.*
24. *Id.* at 16.
25. *Id.*
26. *See* Petition for a Writ of Certiorari, *supra* note 1.
27. *Id.* at 8.
28. *Id.*
29. *Id.* at 9 (internal citations omitted) (alterations in original).
30. *Id.*
31. *Id.* at 2, 9–10, 23–25.
32. *Id.* at 28.

Meanwhile, the Florida Bar failed even to punt, despite ample opportunity to do so—apparently so confident of the Supreme Court's imminent intervention that no elaboration was in order.[33] Indeed, the state Bar's passive response actually enhanced the case for judicial resolution, while anticipating the prospect of mounting intercircuit tensions in the absence of an early grant. Moreover, the Florida Bar noted the "particularly troublesome position in which" the case places its own governance structure.[34] Specifically, an unresolved conflict might leave the state high court ruling intact, but "would provide The Florida Bar with little comfort"[35] because of the decade-old conflict between the state high court's ruling and the Eleventh Circuit's directly contrasting judgment over a 2002 challenge to a comparable Georgia ruling.[36] Anticipating the outcome, the state Bar promised eventually to reaffirm its position consistent with the Florida court's judgment. In short, this succinct submission from Tallahassee offered a welcome and timely plea for mercy.

The Justices did indeed heed that plea, and granted review on October 2, 2014.[37] Action so early in the new Term ensured that oral argument and eventual decision (barring a major diversion) would occur well within that Term. Given the abundance of media, scholarly, and judicial interest, observers should be well prepared for further developments in the case.

III. THE ELEPHANT IN THE ROOM: *REPUBLICAN PARTY OF MINNESOTA V. WHITE*

Every commentator has begun his or her analysis of the anomalous status of judicial campaigning by noting that the Supreme Court has not ruled on that matter since its murky 2002 judgment in *Republican Party of Minnesota v. White*.[38] Clearly that decision will dominate the forthcoming oral argument, much as it has pervaded scholarly and judicial analysis in recent weeks. The focus there was on Minnesota's "announce" clause[39] in contrast to the currently pending challenge to Florida's "personal solicitation" regulation.[40]

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33. *See* The Florida Bar's Response to Petition for Writ of Certiorari, *supra* note 3.
34. *Id.* at 2.
35. *Id.*
36. *Id.* at 2–3 (citing Weaver v. Bonner, 309 F.3d 1312 (11th Cir. 2002)).
37. Williams-Yulee v. The Florida Bar, 138 So.3d 379 (Fla.), *cert. granted*, 135 S. Ct. 44 (2014).
38. 536 U.S. 765 (2002).
39. *See id.* at 744.
40. *See Williams-Yulee*, 138 So.3d at 382.

Surprisingly few observers have, however, paused to probe the anomalous division within the Court in *White*. Two features of this division invite special attention. For one, the usual ideological split among the Justices was uncharacteristically reversed; it was the four "liberal" Justices (Stevens, Breyer, Ginsburg and Souter) who would have invalidated the Minnesota Canon on First Amendment grounds,[41] while the usually "conservative" wing of the Court would have reached the opposite result and sustained the challenged regulation.[42] Equally perplexing, meanwhile, was the actual division within the majority. Justice Scalia wrote the prevailing opinion, joined only by Justices Thomas and Chief Justice Rehnquist[43] while Justices O'Connor and Kennedy concurred separately.[44]

The focus of that case was clearly on the "announce" clause in Minnesota's Canons, rather than on the now pending challenge to Florida's "personal solicitation" regulation. Justice Scalia's prevailing opinion invalidated the Minnesota Canon, which barred candidates for judicial office from announcing their views on legal and political issues, ruling that the restrictive language failed to meet First Amendment standards.[45] Despite several limitations lurking in the specific language of Minnesota's "announce" clause, the majority stated that the "announce" clause unambiguously prevents a "judicial candidate from stating his views on any specific nonfanciful legal question within the province of the court . . . except in the context of discussing past decisions—and in the latter context as well, if he expresses the view that he is not bound by stare decisis."[46]

Moreover, the prevailing opinion faulted the "announce" clause for failing to have been "narrowly tailored to serve impartiality (or the appearance of impartiality) . . . . Indeed, the clause is barely tailored to serve that interest at all, inasmuch as it does not restrict speech for or against particular parties, but rather speech for or against particular issues."[47] Further, Justice Scalia disparaged the claimed interest in impartiality as one that failed to meet the First Amendment standard of strict scrutiny. And as a means of "pursuing the objective of open-mindedness that respondents now articulate, the

41. *See White*, 536 U.S. at 805–09 (Ginsburg, J., dissenting).
42. *See id.* at 768.
43. *See id.*
44. *See id.* at 788 (O'Connor, J. concurring); *id.* at 792 (Kennedy, J., concurring).
45. *See id.* at 788.
46. *Id.* at 773.
47. *Id.* at 776.

"announce" clause is so woefully underinclusive as to render belief in that purpose a challenge to the credulous."[48]

Meanwhile, Justice Kennedy concurred on related grounds, invoking more traditional free speech grounds for striking down the Minnesota rules but conveying slight misgivings in doing so.[49] Justice O'Connor, however, filed what might be termed a partial dissent (though formally listed as a concurrence).[50] Indeed, she began by noting that she "[wrote] separately to express [her] concerns about judicial elections generally" and specifically conveyed her concern that "even aside from what judicial candidates may say while campaigning, the very practice of electing judges undermines this interest."[51]

That left the four *White* dissenters in the anomalous role of deferring to state regulation of judicial campaign speech despite cogent First Amendment concerns. Justice Stevens, the first to speak in dissent, lost no time in creating distance between his views and those of the majority.[52] He declared:

> The Court's reasoning will unfortunately endure . . . . By obscuring the fundamental distinction between campaigns for the judiciary and the political branches, and by failing to recognize the difference between statements made in articles or opinions and those made on the campaign trail, the Court defies any sensible notion of the judicial office and the importance of impartiality in that context.[53]

Justice Stevens continued: "Even when 'impartiality' is defined in its narrowest sense to embrace only 'the lack of bias for or against either party to the proceeding,' the announce clause serves that interest."[54] And, lest his central point be lost, the senior Justice reaffirmed his unequivocal view that the "flawed premise that the criteria for the election to judicial office should mirror the rules applicable to political elections is profoundly misguided."[55]

Justice Ginsburg now had much to add in her concluding dissent, reflecting also the unstated views of Justices Breyer and Souter.[56] Like Justice Stevens, she insisted that "judges are not politicians" and that campaigning should not and cannot be logically

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48. *Id.* at 780.

49. *See id.* at 793 (Kennedy, J., concurring).

50. *See id.* at 788 (O'Connor, J., concurring).

51. *Id.* at 788 (O'Connor, J., concurring). Notably, Justice O'Connor happened to be the Court's only former state high court judge.

52. *Id.* at 797 (Stevens, J.. dissenting).

53. *Id.*

54. *Id.* at 801 (internal citations omitted).

55. *Id.* at 803.

56. *See id.* at 804, 819 (Ginsburg, J., dissenting).

analogized to legislators and administrators.[57] Moreover, she reaffirmed her conviction that "the rationale underlying unconstrained speech in elections for political office—that representative government depends on the public's ability to choose agents who will act at its behest—does not carry over to campaigns for the bench."[58] In the process of appraising the case for the Minnesota Canon, she elevated an easily overlooked but vital element in the equation—that "a litigant is deprived of due process where the judge who hears his case has a 'direct, personal, substantial, and pecuniary interest in ruling against him.' "[59] She later added her conviction that "due process does not require a showing that the judge is actually biased as a result of his self-interest."[60]

Finally, Justice Ginsburg declared with confidence that "the justification for the pledges or promises prohibition follows from these principles."[61] And, as a coda for her dissent, she offered a vital observation:

> The constitutionality of the pledges or promises clause is amply supported; the provision . . . advances due process for litigants in Minnesota courts, . . . [and it] is equally vital to achieving these compelling ends, for without it, the . . . provision would be feeble, an arid form, a matter of no real importance.[62]

IV. WHAT'S NEXT: THE SUPREME COURT'S OPTIONS

With the *Williams-Yulee* case ready for argument and decision, it may be worth noting a substantial change in the Court's composition since *White*. Let us first assume that the retirement of Justice O'Connor and the passing of Chief Justice Rehnquist, as well as the arrival of Chief Justice Roberts and Justice Alito would not necessarily have realigned the *White* majority—unless, of course, one or more members of that contingent wished to reassess the post-*Citizens United* explosion of campaign support for future judicial elections.[63] Guessing the views of the erstwhile dissenters, however, seems more problematic; only Justices Breyer and Ginsburg can safely be counted upon to validate language comparable to what they

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57. *Id.* at 821.

58. *Id.* at 806.

59. *Id.* at 815 (internal citations omitted).

60. *Id.*

61. *Id.*

62. *Id.* at 820.

63. *See, e.g.,* Mark Joseph Stern, *Justice for Sale*, SLATE (Oct. 15, 2014, 11:07 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/10/judicial_elections_and_free_speech_the_supreme_court_s_williams_yulee_case.html, *archived at* http://perma.cc/3CGV-XU3C.

embraced in *White*. Justice Kagan, by contrast, apparently had no opportunity to express her views on judicial campaign contributions. Nor, for that matter, is Justice Sotomayor on record since the Second Circuit is one of the few appeals courts that have not ruled on this issue.

Moreover, speculation about possible changes within the Court on either side might be risky for other reasons. Myriad subtle variations in the precise terms of "announce" clauses could attract the interest of one of the four later additions to the high Court. Even more important, the dramatic explosion of judicial campaign contributions in the post-*Citizens United* environment may well have caused at least further reflection, if not an actual modification, of any individual Justice's views. Finally, it seems quite likely that one or more amicus briefs (along the lines of the Mayer Brown and Yale Law School Supreme Court Clinic opus) may attract the interest of one or more of the not yet committed Justices. Obviously as we anticipate the oral argument this is a time at which to stay tuned.

V. JUDGES ARE DIFFERENT—VERY DIFFERENT

We should recall briefly just how sharply and uniquely divided the *White* Court was a dozen years ago.[64] Four Justices unequivocally declared their condemnation of such restrictions on judicial campaigning. Two other Justices (O'Connor and Kennedy) expressed their doubts while eventually concurring. That left only three members of the 2002 Court ready to express their unqualified deference to such regulations. At the heart of this judicial ambivalence was what can only be characterized as persistent confusion about the very nature of the constitutional separation of powers. The villain of the piece was a 1982 Supreme Court ruling—*Brown v. Hartlage*.[65] The Court there almost casually assimilated outright promises made by an aspirant for legislative election with the vastly different issue of promises conveyed by a candidate for judicial election.[66]

Let me offer a few working premises to set the stage as we await the *Williams-Yulee* oral argument. First, let us assume that most state judges will continue to be elected, and that any systemic reforms that may be adopted will not diminish the need for attention to the rhetoric of judicial campaigns. Second, the likeliest near-term reforms of the current judicial campaign system (e.g., public financing)

64. *See supra* Part III.
65. 456 U.S. 45 (1982).
66. *See id.* at 56–60.

will have little impact on the quality of quality of judicial campaign rhetoric or the impetus for its regulation. Third, as the currently pending case admirably illustrates, legal challenges to the constitutionality of regulatory measures such as the Canons are certain to continue, given the pressure from organizations like the three current amici. Fourth, public confidence in the judiciary and its integrity will surely remain a fragile commodity, not likely to be enhanced by public exposure to intemperate exchanges among occasionally contentious candidates for the bench. Finally, the quality of election rhetoric—as well as the steadily mounting level of subvention in the post-*Citizens United* era—will almost certainly get worse before it improves.[67] Given the ominous context within which the current Court will hear argument next month, many options remain.

Central to this discussion is the range of potentially implicated interests. While many observers confine their analysis to "judicial integrity" or "public confidence," with an occasional nostalgic wish for "civility in judicial campaigns," the scope of regulatory reach must be seen as far broader. As former Indiana Supreme Court Chief Justice Randall Shepard has demonstrated forcefully on several occasions, the imperative is far broader.[68] He asks rhetorically whether a court that reviews a challenge to the Canons should confine its analysis to a free speech claim, or "should the judge place more on the value of the ability of courts to afford litigants due process of law in individual cases, and affirm the canons designed to prevent political speeches that will diminish the courts' ability to render impartial justice and their ability to be viewed as impartial."[69]

Chief Justice Shepard's focus on the far broader interest in due process for litigants is crucial and is widely shared by others. As Judge Richard Posner observed some years ago, "the principle of impartial justice under law is strong enough to entitle government to restrict the freedom of speech of participants in the judicial process, including candidates for judicial office . . . ."[70] Professor Roy Schotland, a member of the faculty at Georgetown, has noted a striking array of

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67. *See, e.g.,* The Editorial Board, Editorial, *Money and Judges, a Bad Mix*, N.Y. TIMES Nov. 2, 2014, at A30, *available at* http://www.nytimes.com/2014/11/03/opinion/money-and-judges-a-bad-mix, *archived at* http://perma.cc/J74K-SM6T; Seth Hoy & Laurie Kinney, *TV Ad Spending Reaches Nearly $14 Million in 2014 State Supreme Court Races*, BRENNAN CTR. FOR JUSTICE, *available at* www.brennancenter.org/print/12833, *archived at* http://perma.cc/7NCS-RQ8R.

68. *See, e.g.*, Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS, 1059 (1996).

69. *See* O'Neil, *supra* note 13, at 715 (quoting Shepard, *supra* note 68, at 1090–91 (1996)).

70. Buckley v. Illinois Judicial Inquiry Bd., 997 F.2d 224, 231 (7th Cir. 2003) (Posner, J.).

regulatory interests that sharply distinguish candidates for judicial office from their counterparts who seek legislative or executive roles: "[N]onjudicial candidates," he notes, are free to "seek support by making promises about how they will perform."[71] Other elected officials, he observed in contrast, "are free to meet . . . their constituents or anyone who may be affected by their action in pending or future matters."[72] In these and myriad other respects, judicial candidates differ sharply from their nonjudicial counterparts and running mates.[73] Yet the *White* majority's casual acceptance of the *Brown v. Hartlage* analogy between those who seek to become judges and those who seek other forms of elected office remains a source of regrettable confusion likely to persist in *Williams-Yulee* and beyond.

No Supreme Court opinion better illuminated this vital contrast better than Justice Felix Frankfurter's eloquent dissent in *Bridges v. California*:

> [J]udges are restrained in their freedom of expression by historic compulsions resting on no other officials of government. They are so circumscribed precisely because judges have in their keeping the enforcement of rights and the protection of liberties which, according to the wisdom of the ages, can only be enforced and protected by observing such methods and traditions.[74]

In the end, the outcome of this case must reflect nothing less majestic than the constitutional framework within which it emerged. On one hand, it remains beyond doubt that states may (and nearly forty of them do) choose to place the selection of judges in the hands of the political process. That is true even for the two states (Virginia and South Carolina) in which the legislature appoints, reappoints, and removes judges—arguably, in any other setting, clearly defying the separation of powers. Nonetheless, the regulation of judicial election campaigns—and specifically restrictions upon personal solicitation—is a quite different matter, the resolution of which reflects not only First Amendment imperatives, but at least as clearly the unique character of the judicial office.

While we await the imminent oral argument in the *Williams-Yulee* case, we should assume that only the central constitutional validity of Florida's Canon 7C(1) will likely be adjudicated. Beyond doubt, the regulatory structure of those states that elect judges will be potentially affected, including both "announce" and "personal solicitation" clauses. Given the number and variety of currently

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71. Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. REV. MICH. ST. U.-D.C.L. 849, 857.

72. *Id.* at 859.

73. *See* O'Neil, *supra* note 13, at 716 (quoting Shotland, *supra* note 71).

74. Bridges v. California, 314 U.S. 252, 283 (1941) (Frankfurter, J., dissenting).

pending challenges to regulatory provisions parallel or comparable to Florida's Canons, there should be more than enough future litigation to occupy those of us who continue to be fascinated by the special nature of judicial election campaigns.