

The Jekyll and Hyde of First Amendment Limits on the Regulation of Judicial Campaign Speech

*Charles Gardner Geyh**

I.	INTRODUCTION	83
II.	THE DR. JEKYLL SCENARIO.....	84
III.	THE MR. HYDE SCENARIO.....	87
IV.	TOWARD AN ANTIDOTE	91

I. INTRODUCTION

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 from personally soliciting campaign funds violates the First Amendment.”¹ At one level, this is a tidy, discrete, and inconsequential case. Whether a mass mailing that solicits contributions to a judicial campaign must go out under the signature of the candidate’s campaign committee chair, rather than the candidate herself, is a narrow, sterile-seeming inquiry that calls for a narrow, sterile-seeming answer of interest to few who are not directly affected by its holding. Given this setting, and with apologies to Robert Louis Stevenson,² it is entirely possible that the Court will offer up a prim, Dr. Jekyll-like decision—narrowly framed and respectful of the precarious situation in which state supreme courts find themselves when regulating judicial campaign conduct. In the first part of this Essay, I will discuss this possibility and offer up

* John F. Kimberling Professor of Law, Indiana University Maurer School of Law. I’d like to thank Jim Alfini, Dan Conkle, James Sample, and Margaret Tarkington for their thoughts and comments.

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

2. See ROBERT LOUIS STEVENSON, *THE STRANGE CASE OF DOCTOR JEKYLL AND MR. HYDE* (1886).

suitably Jekyll-ish insights into how the Court might address the issues at stake from such a perspective.

On another level, however, the impact of the Court's decision in *Williams-Yulee* has the potential to be much farther reaching. This will be the Supreme Court's second foray into the First Amendment limits on the authority of state supreme courts to regulate judicial elections. In the first, announced in *Republican Party of Minnesota v. White*,³ the Court struck a strident tone, invalidating an ethics rule promulgated by the Minnesota Supreme Court in terms that impugned the Minnesota Court's motives, dismissed its purported concern for preserving judicial impartiality, and implicitly questioned the justification for other rules not before the Court.⁴

State and federal courts have disagreed as to the scope of *White* and whether it invalidates other rules of judicial conduct that regulate judicial speech. If *Williams-Yulee* follows the lead of *White* in ways that can be broadly read to threaten ethics rules that impose content-based restrictions on judicial speech within and without judicial races, the implications for the future of judicial elections, judicial ethics, and the very character of state judiciaries are more profound. In the second part of this Essay, I explore these Mr. Hyde-like implications that may emerge if the *Williams-Yulee* Court gets in the grill of the state supreme courts and threatens to foil their efforts to oversee judicial conduct generally and campaign conduct in particular.

Ultimately, neither the Dr. Jekyll nor Mr. Hyde scenarios are satisfactory. The Jekyll scenario is timid and tentative, and perpetuates uncertainty that does little to assuage fears that Hyde will reemerge another day. The Hyde scenario exhibits little appreciation of or respect for the core values that state supreme courts are struggling to preserve and applies First Amendment principles with all the sensitivity of a bull in a china shop. In the third part of this Essay, I discuss a possible antidote that seeks to anesthetize Hyde, enlighten Jekyll, and add a measure of stability to this volatile issue.

II. THE DR. JEKYLL SCENARIO

The issue at stake in *Williams-Yulee* is clear and concise: whether a rule that prohibits a judicial candidate from personally soliciting contributions from prospective contributors abridges the candidate's freedom of speech. The contested piece of this issue is

3. 536 U.S. 765 (2002).

4. See *infra* notes 16–23 and accompanying text.

clean and discrete. Cases that have reached opposite conclusions on the constitutional question are nonetheless generally in accord that the rule imposes a content-based restriction on speech.⁵ Those cases likewise agree that the rule will pass muster only if it is narrowly tailored to serve a compelling state interest⁶ (a consensus that I challenge in the “antidote” section of this paper).⁷ And there seems to be no disagreement that the states profess a compelling interest in preserving the ‘three I’s’ of the judicial role—independence, impartiality, and integrity—as well public confidence in the courts. Hence, the only dispute encircles whether the rule furthers those interests in a way that is tailored with sufficient precision.

Both parties have cases from which to crib crisp, tightly framed arguments in support of opposite conclusions. The Bar, of course, consistent with the ruling of the Florida Supreme Court,⁸ will argue that the rule is narrowly tailored: of those who receive solicitations in person or by letter, lawyers and prospective parties have the greatest interest in judicial races. Judges may feel (or be perceived to feel) a debt of gratitude to their supporters. Lawyers are acculturated to oblige the requests of judges before whom they appear, and prospective parties will want to avoid giving offense. Hence, direct solicitation puts reciprocal pressure on judges to accommodate their contributors and on lawyers and prospective parties to keep in judges’ good graces, to the detriment of public confidence in the integrity and impartiality of the judiciary. The rule is narrowly tailored to alleviate that pressure by creating a buffer between judge and contributor, while still enabling judicial candidates to solicit contributions through campaign committees.

Williams-Yulee makes a comparably focused argument that Florida’s rule is not tailored with sufficient precision.⁹ Her petition for

5. Compare *Bauer v. Shepard*, 620 F.3d 704, 710 (7th Cir. 2010) (upholding the no-solicitation rule), and *Siefert v. Alexander*, 608 F.3d 974, 981 (7th Cir. 2010) (upholding the no-solicitation rule), and *Stretton v. Disciplinary Board*, 944 F.2d 137, 144–46 (3d Cir. 1991) (upholding the no-solicitation rule), and *In re Fadeley*, 802 P.2d 31, 37–38 (Or. 1990) (upholding the no-solicitation rule), with *Wolfson v. Concannon*, 750 F.3d 1145, 1157 (9th Cir. 2014) (invalidating the no-solicitation rule as applied to non-judge candidates), and *Carey v. Wolnitzek*, 614 F.3d 189, 204–11 (6th Cir. 2010) (invalidating the no-solicitation rule), and *Republican Party of Minn. v. White*, 416 F.3d 738, 764–66 (8th Cir. 2005) (en banc) (invalidating the no-solicitation rule), and *Weaver v. Bonner*, 309 F.3d 1312, 1322–23 (11th Cir. 2002) (invalidating the no-solicitation rule).

6. See *Wolfson*, 750 F.3d at 1157; *Bauer*, 620 F.3d at 710; *Carey*, 614 F.3d at 201–11; *Siefert*, 608 F.3d at 981; *White*, 416 F.3d at 764–66; *Weaver*, 309 F.3d at 1322–23; *Stretton*, 944 F.2d at 144–46; *In re Fadeley*, 802 P.2d at 37–38.

7. See *infra* Part IV.

8. See *Williams-Yulee v. The Florida Bar*, 138 So. 3d 379, 385–88 (Fla. 2014).

9. See *Petition for a Writ of Certiorari*, *supra* note 1, at 17–23.

certiorari mimics the Supreme Court's analysis in *White* by characterizing the rule as both overinclusive (regulating "too much") and underinclusive (regulating "too little").¹⁰ It is overinclusive, she argues, because it prohibits forms of solicitation, like the mass-mailings at issue here, that are too impersonal and remote to impair real or perceived impartiality or integrity and that "present little or no risk of undue pressure or the appearance of a quid pro quo."¹¹ At the same time, it is underinclusive, she contends, because under the rule, the judge remains free to learn who contributes to her campaign and who balks, effectively foiling the buffer that the rule is supposed to create. These arguments, in turn, leads to two conclusions: First, by being overinclusive, the rule is not narrowly tailored, because it restricts more speech than necessary to further its compelling interests; and second, by being underinclusive (and hence ineffective as a means to thwart real or perceived pressure), the rule does not support the claim that its real purpose is to promote integrity and impartiality in the first place.

In the Jekyll world, the Court will take one of these two narrow, well-paved paths. If it sides with the Florida Bar, it will be because the rule, while perhaps not tailored with perfect precision to further the State's interest, is close enough for government work: it creates a meaningful buffer between the judge and contributor that eases the primary pressure points of concern to the State, while still enabling candidates to solicit support for their campaigns through their committees. As the Seventh Circuit explained when forgiving a nearly identical rule that it upheld, "[i]t is the nature of rules to be broader than necessary in some respects."¹²

More likely, I suspect (given that the only justices in the *White* majority to retire in the years since have been replaced by like-minded jurists), the Court will side with Williams-Yulee, on the grounds that the rule does not survive the exacting test that few state laws pass. A Jekyll-like opinion, however, would be tightly drawn to minimize disruption. It would take pains to invalidate the rule only insofar as it applies to mass mailings and would leave other forms of solicitation to another day. Impugning the State's motives would be unnecessary: it is enough to conclude that, however well-intentioned the State may be, the rule is overly broad insofar as it bans solicitation via mass

10. *See id.* at 19–20.

11. *Id.* at 19 (quoting *Carey v. Wolnitzek*, 619 F.3d 189, 205 (6th Cir. 2010)) (internal quotation marks omitted).

12. *See Bauer v. Shepard*, 620 F.3d 704, 710 (7th Cir. 2010).

mailings where the risks to impartiality and integrity are too remote to warrant the imposition on candidate speech.

The ripple effects of such a decision would be modest. First, it would confirm the continuing viability of *White*. Second, it would send the American Bar Association's Ethics Committee back to the drawing board, where it would carve out an exception from the no-solicitation rule for mass mailings.¹³ Third, it would perpetuate uncertainty as to *White's* reach. Such a result is entirely possible and entirely tedious. If this scenario comes to pass, *Williams-Yulee* will go down as a lesser, interim case that inches the Court toward wherever it ultimately goes. There is, however, another possibility to which I now turn, wherein the Court bushies up its eyebrows and becomes ornery.

III. THE MR. HYDE SCENARIO

For those (myself included) who think that there is a pressing need for ethics rules to protect judicial systems from the deleterious effects of judicial campaigns on judicial independence, impartiality, and integrity and that such a need can be sufficient to withstand First Amendment challenge, *Williams-Yulee* is a dreadful case. Lanell Williams-Yulee was a sympathetic, seemingly well-intentioned challenger, who solicited contributions by means innocuous in form and vanilla in content.¹⁴ She wanted to become a judge, and so she distributed a mass mailing that summarized her qualifications and asked recipients for their financial support, which contravened an ethics rule that forbade her from soliciting contributions directly. The rule in question seeks to exorcise the deeply unsettling specter of judges rattling coffee cans as lawyers and litigants approach the bench, but *Williams-Yulee's* case conjures that specter in its weakest form.

Given the less than compelling facts of this case, one can be forgiven for asking, with a touch of incredulity, what the Florida Bar was thinking when it decided to pursue this particular case so aggressively in the first place, or when, after prevailing before the Florida Supreme Court, it supported *Williams-Yulee's* petition for certiorari. On the latter question, though, the answer is clear enough: the Florida Bar had won the battle, but because the United States Court of Appeals for the Eleventh Circuit had previously invalidated a similar rule in the Georgia Code of Judicial Conduct, the Bar stood to

13. See, e.g., 52 MINN. STAT. ANN. CODE OF JUD. CONDUCT R. 4.2(B)(3) (West 2014).

14. For a recitation of the facts summarized here, see Petition for a Writ of Certiorari, *supra* note 1, at 2–6.

lose the war in a federal court challenge, unless the Supreme Court intervened.¹⁵ As a consequence, it was ultimately backed into arguing the case before the United States Supreme Court with the functional equivalent of a sign reading “kick me” taped to its rump.

Defending its rule against direct solicitation in a disciplinary action to punish what was at most an isolated, venial sin of a sympathetic judicial candidate will not only increase the likelihood that the Bar will lose—it gives rise to the possibility that it could lose big. If the Court regards the facts as weak enough to engender suspicion that the State’s *real* reason for enforcing the rule against judicial candidates like Williams-Yulee is not to protect judicial integrity and impartiality, but, say, to undermine competitive elections by thwarting challenges to incumbent judges, the Court could decide *Williams-Yulee* in more strident, condescending, and sweeping terms, picking up where *White* left off. Enter Mr. Hyde.

In *Republican Party of Minnesota v. White*, the Supreme Court invalidated an ethics rule that prohibited judicial candidates from announcing their views on legal issues they could be called upon to decide as judges.¹⁶ In concluding that the rule abridged a judicial candidate’s freedom of speech, the Court never reached the question of whether the rule was “narrowly tailored” to serve a compelling state interest in preserving judicial impartiality, because in its view, the rule was not intended to promote impartiality at all. As the Court put it, “the purpose behind the announce clause is not openmindedness in the judiciary, but the undermining of judicial elections.”¹⁷ In other words, the Supreme Court of the United States effectively concluded that the Minnesota Supreme Court was dissembling when it explained that its rule, which barred judicial candidates from announcing their views on issues at stake in future cases before those cases were heard, was intended to preserve judicial impartiality. “[H]orror of horrors!”¹⁸ the Court mockingly exclaimed, as it derided what it regarded as the Minnesota Supreme Court’s faux concern that a judicial candidate who says one thing to voters and then does something else when elected judge, could face impartiality-threatening electoral

15. See The Florida Bar’s Response to Petition for Writ of Certiorari at 2–3, *Williams-Yulee v. The Florida Bar*, 138 So. 3d 379 (No. 13-1499) (August 22, 2014), 2014 WL 4201687 at *2–3 (citing the direct conflict between the Florida Supreme Court’s decision in *Williams-Yulee*, 138 So. 3d at 385–86 & n.3 and the Eleventh Circuit’s decision in *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002)).

16. 536 U.S. 765 (2002).

17. *Id.* at 782.

18. *Id.*

retaliation.¹⁹ Announcing one's views beforehand did not impair a judge's subsequent impartiality, the Court opined, because such announcements were not pledges or promises (which codes of conduct regulate separately), which might be viewed as binding.²⁰ Even as to pledges, however, the Court offered the gratuitous aside that "campaign promises are—by long democratic tradition—the least binding form of human commitment,"²¹ implying that judicial candidates lack the integrity to take their promises seriously, and hence, subsequently breaking such promises would not compromise their impartiality qua openmindedness either.

Ultimately, the *White* majority's view was animated by disdain for the premise that judicial campaigns are different enough from other races for elective office to be regulated differently. In response to Justice Ginsburg's argument 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[.]"²² Justice Scalia, writing for the majority, disagreed, concluding that "Justice Ginsburg greatly exaggerates the difference between judicial and legislative elections."²³ For her part, Justice O'Connor, concurring in the majority opinion, took a "you have made your bed, now lie in it" approach, concluding that "[i]f the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges."²⁴

The Court's opinion in *White* challenges the State's motives at every turn. In defense of the Court, such skepticism is the norm when the Court is evaluating the validity of content-based restrictions on speech imposed by state actors. But the net effect of that approach in *White*, and *Williams-Yulee* if the Court goes there again, is twofold. First, it invites a state of extreme uncertainty. State codes of conduct impose numerous content-based restrictions on the speech of judges, including but not limited to the context of judicial campaigns. How vulnerable are those rules to invalidation by an openly skeptical, if not hostile Court?

To date, courts in one or more jurisdictions have interpreted *White* to invalidate rules that: forbid judges and judicial candidates

19. *See id.*

20. *See id.* at 780.

21. *Id.*

22. *Id.* at 806 (Ginsburg, J., dissenting).

23. *Id.* at 784.

24. *Id.* at 792 (O'Connor, J., concurring).

from soliciting campaign contributions directly (the issue at stake in *Williams-Yulee*);²⁵ prohibit judges and judicial candidates from making pledges, promises, or commitments;²⁶ require judges to disqualify themselves from cases in which the positions they previously announced call their impartiality into question;²⁷ prohibit judges and judicial candidates from engaging in partisan activities of various kinds;²⁸ subject judges to discipline for making public statements that undermine their perceived impartiality;²⁹ and bar judges and judicial candidates from making false or misleading statements in judicial campaigns.³⁰ Because *White* has been applied to judges and judicial candidates within and without judicial campaigns, uncertainty reigns. The fate of many rules—from those forbidding judges from commenting on pending and impending cases, commending or criticizing jurors, or joining discriminatory clubs, to those requiring judges to be patient and courteous to lawyers, litigants, and witnesses³¹—becomes uncertain.

Second, this aggressive approach, in which federal judges accuse their state counterparts of craven and self-serving conduct, drives a wedge between federal and state judicial systems. The war between the systems that such an approach invites was not lost on the Florida Supreme Court in *Williams-Yulee*. There, the court called attention to the fact that every state supreme court to address the constitutional validity of no-solicitation clauses in state codes of judicial conduct had upheld them and that the only courts to invalidate such clauses were in the federal system, “whose judges,” the court pointedly added, “have lifetime appointments and thus do not have to engage in fundraising.”³² An irretrievably cynical, Hyde-like rejoinder to the Florida Supreme Court would be to say that because

25. See, e.g., *supra* notes 5–6.

26. See, e.g., *Duwe v. Alexander*, 490 F. Supp. 2d 968, 976–77 (W.D. Wis. 2007); *N.D. Family Alliance, Inc. v. Bader*, 361 F. Supp. 2d 1021, 1038 (D. N.D. 2005); *Family Trust Found., Inc. v. Wolnitzek*, 345 F. Supp. 2d 672, 694–702 (E.D. Ky. 2004).

27. See, e.g., *Duwe*, 490 F. Supp. 2d at 977.

28. See, e.g., *Republican Party of Minn. v. White*, 361 F.3d 1035 (8th Cir. 2004), *vacated* 416 F.3d 738, 754 (8th Cir. 2005); *In re William A. Vincent, Jr.*, 172 P.3d 605, 606 (N.M. 2007); *Carey v. Wolnitzek*, No. 3:06-cv-00036, 2006 WL 2916814 at *19–22 (E.D. Ky. Oct. 10, 2006).

29. See, e.g., *Miss. Comm’n on Judicial Performance v. Wilkerson*, 876 So. 2d 1006, 1014–15 (Miss. 2004).

30. See, e.g., *Weaver v. Bonner*, 309 F.3d 1312, 1319–21 (11th Cir. 2002).

31. See MODEL CODE OF JUD. CONDUCT R. 2.10 (restricting comments on pending cases), 2.8(C) (prohibiting judges from commending or criticizing jurors), 3.6 (barring affiliation with discriminatory organizations), 2.8(D) (requiring judges to be patient and dignified) (2007), available at http://www.americanbar.org/content/dam/aba/migrated/judicialethics/ABA_MCJC_approved.authcheckdam.pdf.

32. *Williams-Yulee v. The Florida Bar*, 138 So. 3d 379, 386 n.3 (Fla. 2014).

federal judges “have lifetime appointments and thus do not have to engage in fundraising,”³³ they lack the motivation of their state counterparts to stifle the speech of challengers who threaten their incumbency with fundraising campaigns made more effective by direct solicitation. But so antagonistic a spin misses the Florida Supreme Court’s point, which is a warranted, if backhanded, call for a little empathy.

If *White* is any indication, the likelihood that the Court will heed such calls for empathy is low. Every justice in the *White* majority, who shared the conclusion that barring judicial candidates from announcing their views on future cases did not further judicial impartiality at all, were once judicial candidates themselves, who declined Senate Judiciary Committee overtures to announce their views on future cases on the grounds that it would undermine their impartiality.³⁴ Then Judge Scalia’s confirmation testimony is illustrative:

I think it is quite a thing to be arguing to somebody who you know has made a representation in the course of confirmation hearings, and that is, by way of condition to his being confirmed, that he will do this or do that. I think I would be in a very bad position to adjudicate the case without being accused of having a less than impartial view of the matter.³⁵

This testimony may not resolve whether a state-imposed announce clause should survive strict scrutiny, but it certainly renders puzzling the strident conclusion that barring judicial candidates from announcing their views on issues they will later decide as judges has nothing to do with preserving their future impartiality.

IV. TOWARD AN ANTIDOTE

The federal and state courts have all adopted codes of judicial conduct based on a common, American Bar Association-promulgated model.³⁶ Those codes impose a welter of restrictions on the speech and

33. *Id.*

34. In recent years, Supreme Court nominees have categorically declined Senate Judiciary Committee requests to announce their views on issues that may come before the Court, citing impartiality-related concerns. See generally DENIS STEVEN RUTKUS, CONG. RESEARCH SERV., QUESTIONING SUPREME COURT NOMINEES ABOUT THEIR VIEWS ON LEGAL OR CONSTITUTIONAL ISSUES: A RECURRING ISSUE, No. 7-5700 R41300 (2010), available at <http://fpc.state.gov/documents/organization/145137.pdf> (describing the practice of Supreme Court nominees declining to answer Senate inquiries about nominee views on legal issues).

35. *Hearing on the Nomination of Judge Antonin Scalia to be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 99th Cong., 2d Sess. 38 (1986).

36. CHARLES GARDNER GEYH ET AL., JUDICIAL CONDUCT AND ETHICS § 1.03 (5th ed. 2013).

associational freedoms of judges to the end of preserving the “three I’s” of independence, impartiality, and integrity. In other words, all codes of conduct are situated at the fault lines where the tectonic plates of First Amendment rights and the needs of the judicial role collide and grind, and judges are largely at peace with the need for First Amendment freedoms to yield in a range of situations. For example, we do not see a flood of cases raising First Amendment challenges to reprimands of state or federal judges for unfairly berating litigants or lawyers in court proceedings, publicly commenting on the merits of cases pending in their courts, or spewing ethnic or racial slurs. In states that select their judges by popular election, there is a third tectonic plate to negotiate. But the inclusion of that third plate does not obliterate the need to preserve an independent, impartial judiciary, which is also enshrined in state constitutions (embedded in the tripartite structure of state governments and clauses such as those calling for an independent judicial branch and requiring judges to take an oath of impartiality). State supreme courts that struggle to manage the friction between these three plates where they converge may sometimes get it wrong, but to characterize their motives as illegitimate and subterranean betrays the ignorance of their accusers. In short, Mr. Hyde would be well advised to get off his high horse. It is no coincidence that after she retired, Justice O’Connor—the only justice with prior experience as a state judge to participate in *White*—second-guessed her own conclusions and embarked on a campaign to ameliorate what she regarded as the deleterious effects of judicial elections.³⁷

In pursuit of an antidote, I will close with four points. First, by virtue of taking an oath to administer justice impartially, judges *are* different from elected or appointed public officials in the legislative or executive branches, albeit in additional ways than those considered and rejected by the Court in *White*. Lawyers who become judges are neither stupid nor oblivious: they understand that they are human, and hence that they are subject to the same pressures and biases that afflict our species. But they are also acculturated from their first day of law school to take their role in upholding the rule of law seriously—a role that requires them to struggle against those pressures and biases as best they can. Hence, when they ascend the bench, judges

37. See INST. FOR ADVANCEMENT OF THE AM. L. SYS., QUALITY JUDGES INITIATIVE, <http://iaals.du.edu/initiatives/quality-judges-initiative/> (last visited Jan. 4, 2014); see also Bob Egelko, *Former Justice Warns of Threat to Judiciary / O'Connor Tells of Political Assault on Court's Autonomy*, SAN FRANCISCO CHRONICLE (Nov. 4, 2006, 4:00 AM), <http://www.sfgate.com/bayarea/article/SAN-FRANCISCO-Former-justice-warns-of-threat-to-2467339.php>.

willingly relinquish some of the freedoms they would otherwise enjoy to speak and associate in ways that indulge their biases and undermine their independence and integrity. As we explained in our treatise on judicial conduct:

There are many First Amendment protections that are available to ordinary citizens but that judges must forego upon assuming office. For example, judges are prevented from endorsing political candidates, a practice that lies at the very heart of the First Amendment. They also may not solicit charitable contributions, hold office in certain organizations, or discuss certain pending or impending litigation. All of these activities would be protected by the Constitution if undertaken by members of the public, but they are prohibited to judges for the purpose of insuring the dignity, integrity, and impartiality of the judiciary [I]n order to foster the proper functioning of our courts, it is necessary for those who take the bench to covenant to adhere to “standards of conduct more stringent than those acceptable for others.”³⁸

I have to assume that the Supreme Court would agree, given that the Code of Conduct for U.S. Judges, which was approved by the Judicial Conference of the United States that the Chief Justice oversees in his capacity as Chair of Conference, and which (according to the Chief Justice) the other justices use as a guide, is replete with restrictions on judicial speech aimed at preserving the impartiality, independence, and integrity of the judiciary.³⁹

Second, what judges and judicial candidates say to voters can impair their real or perceived independence, impartiality, or integrity. When a future judge asks lawyers and prospective litigants, “will you give me money?”, both sides stand to gain or lose by the answer: the candidate’s professional objective is helped or hindered, and if elected, the future of the lawyers and litigants turns on the rulings of a judge whose professional objective they helped or hindered. The implications of this scenario for judicial independence, impartiality, and integrity are too obvious to belabor.

The rebuttal—that existing rules are simply a subterfuge, because they enable judges to solicit lawyers and litigants indirectly through their campaign committees—misses the point. Codes of conduct struggle to accommodate the need for an electoral system to fund judicial campaigns, while minimizing the deleterious effects of solicitation on the judicial role. Without disputing that the buffer campaign committees create is porous enough to permit the evil judge to circumvent it, the rule is not designed for evil judges. Rather, it is designed for essentially decent judges who take their oaths seriously and seek refuge from the temptations of direct solicitation and the

38. GEYH et al., *supra* note 36, at § 10.06[2].

39. THE SUPREME COURT OF THE UNITED STATES, CHIEF JUSTICE’S 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 4 (December 31, 2011), available at <http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>.

perils it presents. This does not resolve whether the existing no-solicitation rule is tailored narrowly enough to survive First Amendment scrutiny. It does, however, refute strident assertions that the rule is so underinclusive as to belie its stated purpose.

Third, when evaluating whether a rule that aims to preserve judicial independence, integrity, and impartiality by restricting judicial speech passes constitutional muster, the Court should acknowledge explicitly that the test for content-based restrictions on the speech of a judge is not the same as for the average citizen. The average citizen neither holds nor aspires to hold a job that requires her to be an impartial, independent, forthright, and competent adjudicator of legal claims. When other government employees are disciplined or fired because of their speech, a well-developed body of law has circumscribed the scope of employees' First Amendment rights. When a government employee speaks in her capacity as such, the Supreme Court has ruled that the employee's First Amendment claim will fail.⁴⁰ Hence, ethics rules regulating a judge's speech on the bench ought to be safe from attack.⁴¹ When they speak in their capacity as citizens on matters of public concern, the Court has balanced the government employee's First Amendment rights against the government employer's operational needs for the restriction.⁴² As a consequence, the Supreme Court has permitted restrictions on government employee speech when necessary for efficient and effective agency operation.⁴³ That body of law should apply with even greater force to judges as a unique subset of government employees, for whom the judiciary, as the government employer, demands that judges "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary."⁴⁴

Fourth, the more relaxed scrutiny employed in the context of restrictions on the speech of judges as government employees should

40. See *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006). Summarizing *Garcetti's* conclusion here does not imply my support for the Court's sweeping conclusion that when it comes to work-related speech, government employees (including judges) should enjoy no First Amendment rights. My limited point is to argue that content-based restrictions on the speech of judges should be subject to a standard of review less exacting than strict scrutiny.

41. Rodney A. Smolla, *Regulating the Speech of Judges and Lawyers: The First Amendment and the Sole of the Profession*, 66 FLA. L. REV. 961, 970–71 (2014).

42. *Id.* at 965–66.

43. See *Connick v. Myers*, 461 U.S. 138, 154 (1983) (holding that statements which the employer "reasonably believed would disrupt the office" were not protected). See generally ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 11.3.8 (1997).

44. MODEL CODE OF JUD. CONDUCT R. 1.2 (2007), available at http://www.americanbar.org/content/dam/aba/migrated/judicialethics/ABA_MCJC_approved.authecheckdam.pdf (footnotes omitted).

extend to aspiring judicial candidates, not because they are “employees,” but because they are similarly situated for reasons unique to judicial races. In his concurrence in *White*, Justice Kennedy alluded to the government employee speech cases, and raised the possibility that this line of cases “could be extended to allow a general speech restriction on sitting judges—regardless of whether they are campaigning—in order to promote the efficient administration of justice.”⁴⁵ Hence, my third point. Justice Kennedy took pains to add, however, that *White* did not present that question because the rule at issue did not “restrict the speech of judges because they are judges,” but rather “regulate[d] the content of candidate speech merely because the speakers are candidates.”⁴⁶ The petitioner was “not a sitting judge but a challenger,” Justice Kennedy concluded, who “had not voluntarily entered into an employment relationship with the State or surrendered any First Amendment rights.”⁴⁷

Justice Kennedy was correct, of course, that aspiring judges are not yet government employees, but I take issue with the suggestion that they have not voluntarily “surrendered any First Amendment rights.” With exceptions for some lower-ranking judicial officers, virtually every state requires that its judges be licensed to practice law within the jurisdiction.⁴⁸ Hence, judicial candidates are limited to licensed practitioners, who have opted into a profession regulated by rules of professional conduct and the restrictions on speech and association that those rules impose. Such restrictions range from duties to keep client communications confidential, to duties of candor toward tribunals, constraints on direct solicitation of prospective clients, and prohibitions on communications with unrepresented parties. Among those rules is American Bar Association Model Rule of Professional Conduct 8.2(b) (adopted in Florida, where Williams-Yulee practices⁴⁹), which bootstraps restrictions on speech and conduct that the Code of Judicial Conduct imposes on judicial candidates to lawyers who seek judicial office: “A lawyer who is a candidate for judicial office shall comply with applicable provisions of the Code of Judicial Conduct.”

To the extent that rules of professional conduct regulate the content of lawyer speech, such restrictions have been subjected to less exacting standards of review than content-based restrictions on the

45. *Republican Party of Minn. v. White*, 536 U.S. 765, 796 (2002) (Kennedy, J. concurring).

46. *Id.*

47. *Id.*

48. Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 59, n.71 (2003).

49. FLA. STAT. ANN. RULES OF PROF'L CONDUCT R. 4-8.2(b) (West 2014).

speech of ordinary citizens. As the Court explained in *Gentile v. Nevada State Bar*:

It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to “free speech” an attorney has is extremely circumscribed Even outside the courtroom, a majority of the Court in two separate opinions . . . observed that lawyers in pending cases were subject to ethical restrictions on speech to which an ordinary citizen would not be.⁵⁰

The field is a mess, and the reasons for diminished scrutiny vary.⁵¹ For purposes of this Essay, I am indifferent to whether it is because the speech of lawyers is like the speech of public employees, because lawyers knowingly relinquish some of their rights when they become lawyers, because the state needs greater breathing room to regulate lawyer speech in professional settings, or just because. The point is that lawyers are differently situated in ways that justify more relaxed scrutiny of state-imposed impingements on their speech.

Although the Court’s reflexive impulse in *White* was to say that all bets are off when it comes to elections, the Court never came to terms with the principle underlying Rule 8.2. As lawyers transition to become judges, they shed their regulated roles as zealous advocates and embrace their new regulated roles as impartial adjudicators. The notion, implicit in *White*, that during the transition they enter an unregulated Wild West in which they are welcome to be as bad as they want to be, overlooks the unique relationship between the bench and bar as two halves of a unified legal system, with Rule 8.2 as the bridge. Put another way, codes of judicial conduct do not regulate candidates because they are candidates, but because they are *judicial* candidates.⁵² They are lawyers who, by virtue of being prospective judges, must be mindful of their changing roles, and must surrender their freedom to speak and behave in ways incompatible with the judicial role to which they aspire.

The notion that aspiring judges must sometimes self-censor to preserve their impartiality, independence, and integrity is not news that any member of the United States Supreme Court needs to be

50. *Gentile v. Nev. State Bar*, 501 U.S. 1030, 1071 (1991).

51. Margaret Tarkington, *A First Amendment Theory for Protecting Attorney Speech*, 45 U.C. DAVIS L. REV. 27, 44–57 (2011).

52. In an insightful article, James Sample notes how, in *Caperton v. Massey Coal Company*, 556 U.S. 868 (2009), the majority implicitly defined campaign “contributions” differently (and more expansively) in judicial races than in political branch campaigns, which might allow for heightened regulation of independent expenditures qua “*Caperton* contributions.” James J. Sample, *Democracy at the Corner of First and Fourteenth: Judicial Campaign Spending and Equality*, 66 N.Y.U. ANN. SURVEY OF AM. L. 727, 756 (2010). Just as Sample differentiated between contributions and *Caperton* contributions, I am suggesting a correlative need to differentiate between candidates and judicial candidates.

sitting down to hear. When the Justices were nominees who declined Senate invitations to announce their views on issues they would later decide, they did not do so because they were sitting judges for whom answers to such questions might reflect adversely on themselves in their current roles. Rather, they did so because they were lawyers who, as judicial candidates, understood that their answers to such questions might reflect adversely on themselves as future justices. Again, these restrictions were self-, not government-imposed, but the need for judicial candidates to watch what they say and to whom—a need that underlies the Code’s restrictions on judicial candidates—is widely, if not universally, internalized by the bench and bar.

If, when assessing code-based restrictions on the speech of judicial candidates, the Court were to apply a less exacting standard of review, akin to that applied to restrictions on the speech of lawyers or government employees, it would not resolve the question presented by *Williams-Yulee*. The Court would still need to balance the interests of the speaker against the State’s purported need for the restriction, and the restriction might not survive. I could, for example, see the Court drawing lines between written and in-person solicitation (as it has in lawyer advertising cases), in which it concludes that the risk of reciprocal pressure on candidates and contributors posed by mass mailings is too remote to justify the prohibition.

What the proposed antidote would do is change the dynamic in this line of cases. It would acknowledge that state supreme courts have a difficult but important role to play in regulating the conduct of judicial candidates that is not presumptively illegitimate. State supreme courts must be cognizant of the rights of judicial candidates to speak to prospective voters in states where the people have chosen to select their judges in contested elections, but they are within their authority to sand the edges of those rights when necessary to preserve the independence, integrity, and impartiality of the judiciary. No Mr. Hyde condescension, no Dr. Jekyll death by a thousand genteel cuts. Instead, a fresh start will replace absolutism with a more balanced approach that takes both candidate speech and codes of judicial conduct seriously.