What Do Judges Do All Day?*

In Defense of Florida's Flat Ban on the Personal Solicitation of Campaign Contributions From Attorneys by Candidates for Judicial Office

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I. INTRODUCTION

Thirty of the thirty-nine states that elect some or all of their judges ban candidates for elected judicial office from personally soliciting campaign funds from attorneys, even through mass mailings directed to the general public.[1] Whether the rationale underlying the

* With apologies to RICHARD SCARRY, WHAT DO PEOPLE DO ALL DAY? (Random House 1968).

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1. For a useful summary of state statutory provisions regulating the personal solicitation of campaign contributions by candidates for judicial office, see Brief of Amicus Curiae The American Bar Association in Support of Respondent, Williams-Yulee v. The Florida Bar, 138 So.3d 379 (No. 13-1499) (Dec. 24, 2014), 2014 WL 7405735.

personal solicitation ban is: (1) a desire to protect attorneys against undue pressure to contribute; (2) an effort to prevent judges from even being tempted to link their treatment of attorneys to an attorney's response (or lack of response) to the judge's personal fundraising appeal; or (3) an attempt to foster a public image of strict judicial impartiality by avoiding even the appearance of judicial favoritism keyed to an attorney's response to a judge's personal fundraising appeals, a regulatory consensus exists imposing a flat ban on the personal solicitation of campaign contributions from lawyers by candidates for judicial office, no matter what the context.

According to the petitioner in *Williams-Yulee v. The Florida Bar*,[2] at least four states tweak the regulatory consensus by exempting mass mailings to the general public from the personal attorney solicitation ban,[3] apparently reasoning that attorneys randomly included in a mass mailing may be treated as members of the general public. Finally, a handful of states led by Texas impose no regulation on judicial solicitation of campaign funds from attorneys.[4]

Florida has opted for risk-averse prophylaxis, flatly banning the personal solicitation of campaign funds from lawyers by candidates for judicial office, including fundraising appeals directed to the general public.[5] The net effect (whether or not intended) of the Florida ban is to prevent candidates for judicial office from personally soliciting campaign funds from the general public because attorneys will inevitably be in the audience. Instead, Florida invites judicial candidates to authorize third persons to form campaign committees to solicit campaign funds from the general public, including attorneys, on the candidate's behalf. Since Florida's campaign disclosure laws assure that a judicial candidate may learn the identities of those attorneys (or litigants) who respond favorably to solicitations by the judicial candidates' proxies, the narrow First Amendment issue before the Supreme Court in *Williams-Yulee* is whether, from the standpoint

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2. 138 So.3d 379 (Fla.) (per curiam), *cert. granted*, 135 S. Ct. 44 (2014).

3. Brief for Petitioner at 27, Williams-Yulee v. The Florida Bar, 138 So.3d 379 (No. 13-1499) (Nov. 12, 2014), 2014 WL 6465548 at *27.

4. Former Chief Justices of Texas and Alabama, two unregulated states, have filed an *amici curiae* brief in *Williams-Yulee* in support of Respondent describing the harmful effects of a failure to regulate direct, personal judicial solicitations from lawyers. *See* Brief of Amici Curiae Thomas R. Phillips, Wallace B. Jefferson, Perry O. Hooper, Sr. and Sue Bell Cobb in Support of Respondent, Williams-Yulee v. The Florida Bar, 138 So.3d 379 (No. 13-1499) (Dec. 24, 2014), 2014 WL 7405738.

5. Florida's Canon 7(C)(1) 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 . . . ." CODE OF JUD. CONDUCT FOR THE STATE OF FLORIDA Canon 7C(1) (2014).

of: (1) the solicited attorney; (2) the prospective judge; or (3) the general public's faith in the judicial system, there is anything special about a judicial candidate's *personal* solicitation of campaign funds from attorneys that might shield Florida's ban from the Supreme Court's relentless First Amendment march to the sea that began almost 40 years ago in *Buckley v. Valeo*.[6]

While it's a close case on the facts, given the importance of maintaining public trust in the impartiality of the judicial process and the ready availability of alternative methods of raising campaign funds from the general public, I believe that a viewpoint-neutral state regulator should be allowed to say "yes" as a matter of risk-averse prophylaxis. But I fear that the Supreme Court will almost certainly say "no" unless the *Buckley* paradigm governing the funding of legislative and executive electoral campaigns is altered in the context of judicial elections. In my opinion, the First Amendment paradigm that has emerged from *Buckley* should be altered significantly before applying it to the financing of judicial elections. The vision of a rough-and-tumble partisan political process that undergirds the *Buckley* paradigm—where electoral resource imbalance is routine, campaign promises are the coin of the realm, and winners are expected to treat their supporters, including their financial supporters, more favorably than their opponents—cannot be applied to judicial elections without risking the integrity of, and public confidence in, the judicial process. Thus, the crucial First Amendment issue posed by *Williams-Yulee* is not the relatively narrow question of whether the *personal* solicitation of campaign funds from attorneys by judicial candidates in the context of a mass mailing directed to the general public is uniquely regulable, but whether a majority of the Court will use the *Buckley* paradigm in answering the question.

II. THE *BUCKLEY* COURT'S AIRLESS ROOM

Efforts to regulate the financing of legislative or executive elections take place in an airless First Amendment room built by the *Buckley* Court. One wall of the airless room is formed by the Justices' insistence that the communicative acts of contributing and spending campaign money must be deemed the legal equivalent of "pure speech" (rather than "communicative conduct"),[7] forcing almost all efforts to

6. 424 U.S 1 (1976) (per curiam).

7. The principle that raising and spending campaign money equals "pure" campaign speech, as opposed to "communicative conduct," was first enunciated by the Court in *Buckley*. *Id.* at 19. The Court reasoned that since raising and spending campaign money was a necessary precondition for campaign speech, the acts of raising and spending campaign money must be

regulate campaign spending to run the gauntlet of First Amendment strict scrutiny.[8]

The room's second wall rests on the *Buckley* Court's refusal to acknowledge the preservation of political equality as a "compelling governmental interest" that would justify placing limits on massive campaign spending by the extremely rich, including corporations.[9] Somewhere along the way, the egalitarian ideal of "one person, one vote" codified in *Reynolds v. Sims*[10] morphed into a system of merely formal voting equality that glorifies "one dollar, one vote."[11]

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treated as constitutionally interchangeable with the speech it funds. The Court analogized the relationship between money and speech to the relationship between gasoline and driving a car. *Id* at 19 & n.18. In each setting, argued the Court, the amount of fuel determines how much speaking or driving can take place. *Id.* It is a deeply flawed analogy. A political campaign is not a unilateral drive in the country. It is a race. And a "race" that depends on which driver (or candidate) has the most fuel (or money) isn't really worth watching. Justice Stevens, who did not participate in *Buckley*, never accepted the constitutional equation of money and speech. *See* Nixon v. Shrink Mo. Gov't PAC, 528 US. 377, 398 (2000) (Stevens, J. concurring). The linkage has, nevertheless, become the cornerstone of the Court's campaign finance jurisprudence. I agree with Justice Stevens that it is a cornerstone resting on intellectual sand.

8. In its classic form, First Amendment strict scrutiny requires the government to demonstrate a "compelling" governmental interest in regulating "pure" speech that cannot be advanced by any "less drastic means." In effect, it bans risk-averse regulatory prophylaxis where speech is at stake. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam). Government efforts to regulate "communicative conduct" like burning a draft card or engaging in a protest march, are, on the other hand, governed by an intermediate scrutiny formula that asks whether the regulation is a "narrowly tailored" effort to deal with an "important" governmental interest that is unconnected to the substantive content of the message. *See* United States v. O'Brien, 391 U.S. 367 (1968) (upholding conviction for burning draft card to express opposition to Vietnam War). First Amendment strict scrutiny is usually lethal. For a rare—perhaps unique—example of a government regulation of speech that survived classic strict scrutiny, see *Burson v. Freeman*, 504 U.S. 191 (1992) (upholding ban on electioneering within 100 feet of the polls). As *O'Brien* demonstrates, however, the government often wins under intermediate First Amendment scrutiny, precisely because the less stringent standard of review is designed to allow the government more leeway in managing risk. *See O'Brien*, 391 U.S. at 376–80.

9. Corporations were welcomed into the airless room in *Citizens United v. FEC*, 558 U.S. 310 (2010).

10. 377 U.S. 533, 565–70 (1964).

11. The Court's rejection of an egalitarian justification for limiting the campaign spending of the ultra-rich also flows from *Buckley*. 424 U.S. at 48–49 & n.55, 54, 56–57. While the *Buckley* Court did not question the importance of electoral equality, it rejected the idea that equality could be attained by silencing the strong rather than strengthening the weak. *Id.* That is why the *Buckley* Court upheld voluntary public financing of elections. *Id.* at 91–96. Although the analytic linkage is less than explicit, the option of voluntary public financing operates in the airless room as a less drastic means of advancing political equality than imposing spending limits. Unfortunately, the Court has imposed onerous restrictions on public funding programs that hamper their ability to succeed. *See* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011) (invalidating public funding program based on matching the spending of privately-funded candidates); Davis v. FEC, 554 U.S. 724 (2008) (invalidating waiver of contribution limits triggered by substantial personal spending by opponent).

The third wall of the airless room is formed by the Court's holding in *Buckley* and later cases like *Citizens United v. FEC*[12] and *McCutcheon v. FEC*,[13] that while the prevention of "corruption" of the democratic process (real or apparent) is a compelling governmental interest that justifies imposing limits on the size of campaign contributions to a given candidate,[14] the "corruption" to be avoided is limited to extortion by the candidate, or the quid pro quo trading of votes for money.[15]

The fourth wall is formed by the *Buckley* Court's refusal to acknowledge that massive independent expenditures in support of a given candidate pose a risk of corruption similar to the risk posed by a direct contribution.[16]

Florida's risk-averse exercise in prophylaxis wouldn't survive for five minutes in the Supreme Court's airless room. The Court would first label the personal solicitation of judicial campaign funds from the general public, including attorneys, as an exercise in "pure speech," triggering strict scrutiny. It would note in passing that any equality concerns, while important, could be dealt with by the less drastic means of public financing. The Court would then observe that while guarding against the reality and/or appearance of judicial corruption

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12. 558 U.S. 310 (2010).

13. 134 S. Ct. 1434 (2014).

14. *Buckley*, 424 U.S. at 27. The *Buckley* Court reasoned that campaign contributions (as opposed to campaign expenditures) are a form of "indirect" speech because the contributor does not control the speech funded by the contribution. Accordingly, reasoned the Court, it is entitled to diminished First Amendment protection. *Id.* at 20–22. Moreover, reasoned the Court, the process of transferring cash from contributor to candidate, often in response to a candidate's personal solicitation, provides a fertile opportunity to extort support, or to trade political influence for cash. *Id* at 26–27. In the years since *Buckley*, the Court has upheld state contribution limits of $1,075, Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000), but invalidated Vermont's $100 cap on contributions because, inter alia, the Court found it implausible to believe that a $101 contribution could corrupt anyone. *See* Randall v. Sorrell, 548 U.S. 230, 249–53, 261 (2006). In *McCutcheon v. FEC*, 134 S. Ct. 1434, 1442, 1452 (2014), the Court reaffirmed the validity of the $5,200 cap on individual contributions to a federal candidate, but invalidated a $123,500 cap on total contributions to all federal candidates in a single election cycle as inadequately linked to the corruption of a particular candidate, as long as the individual per candidate cap is respected.

15. *McCutcheon* made clear that the sole form of corruption of concern to the Court's majority in the context of a political election is extortion or vote buying. 134 S. Ct. at 1450–51.

16. The *Buckley* Court reasoned that since independent expenditures do not involve a personal interaction between the candidate and the financial supporter, the opportunity for extortion and bribery present in the contribution process is absent from the world of independent expenditures. 424 U.S. at 45–47. The Court ignored, however, the fact that independent expenditures are not necessarily one-shot events, leaving ample opportunity for ongoing improper influence keyed to gratitude for past support, and/or the hope of future largesse. *See* Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009) (requiring recusal under the Due Process Clause in a case where an elected judge presiding over an appeal had benefitted from $3 million in independent expenditures by one of the parties to the appeal).

is a compelling governmental interest, contribution limits provide a less drastic means of protecting against quid pro quo corruption.[17] The Court would also note that a ban on personal solicitation does nothing to prevent a judge from learning which attorneys have been naughty or nice to her campaign proxies. Finally, the Court would observe that it would be highly unlikely for a member of the general public to believe that an attorney's response (or refusal to respond) to a personally signed mass mailing seeking modest campaign contributions from the general public would lead a judge to violate her oath to provide equal justice to all. The Court would close by assuring us that in extreme cases, a judge may be forced to recuse herself under *Caperton*.[18]

If I were a betting man, I would put money on that result in *Williams-Yulee*. But, for the sake of continued public trust in the impartiality of elected state judges, I hope that I am wrong.

III. SHOULD THE REGULATION OF JUDICIAL CAMPAIGN FINANCING TAKE PLACE IN THE AIRLESS ROOM?

Within the four walls of *Buckley's* airless room, the top one-tenth of one percent of the nation's wealthiest individuals, and a host of its largest corporations,[19] pour massive amounts of cash into influencing the outcome of federal and state elections, ranging from the Presidency to membership on school boards, zoning bodies, and water allocation districts. While much of the spending is disclosed, the favored status of independent expenditures (as opposed to campaign contributions) that emerged from *Buckley* has fostered the explosive growth of pools of undisclosed, independent campaign money that operate to deprive many candidates of the ability to shape their own campaign agendas, and are designed to tilt the outcome in close elections.[20]

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17. *See McCutcheon*, 134 S. Ct. at 1441.

18. *See* 556 U.S. at 886 (holding that presiding over an appeal in which petitioner had contributed significantly to the judge's campaign violated Due Process, but stressing the "extreme" facts of the case).

19. *Citizens United* invalidated bans on independent expenditures by corporations. The ban on corporate campaign contributions remains in effect, at least for now. *See* FEC v. Beaumont, 539 U.S. 146 (2003) (upholding ban on corporate contributions, as opposed to independent expenditures).

20. Although the Court has consistently upheld the constitutionality of disclosure requirements, it has proven impossible to persuade a Congress awash in cash to close disclosure loopholes that permit a vast amount of independent campaign spending to go unreported. Disclosure laws at the state level are also honeycombed with loopholes. For an overview, see Douglass Oosterhause, Note, *Campaign Finance Reform and Disclosure: Stepping-up IRS*

Predictably, the torrent of unregulated campaign spending by the ultra-rich has spawned high levels of cynicism and anomie in the public-at-large about the controlling impact of big money on elections that appear to be eroding faith in American democracy. The anemic national voter turnout in the 2014 elections of just over thirty-six percent of the eligible electorate was the lowest rate of democratic participation in seventy-two years.[21] If the preliminary turnout figures hold, I fear that a sobering aspect of the 2014 elections is a vote of no confidence in democracy by almost two-thirds of the American electorate. I believe this is attributable, in part, to: (1) the *Buckley* Court's cavalier treatment of political equality and the current Court's myopic definition of what counts as "corruption" of the democratic process; (2) the Court's refusal to confront massive partisan gerrymandering;[22] and (3) the failure of the two major parties (both funded by the rich) to speak effectively to the needs of the American electorate.[23]

In contrast to the dramatic erosion of the average American's confidence in the political system, respect for the judicial process remains relatively higher, at least for now.[24] Faith in the integrity of the judicial process is one of nation's most important assets. While it does not appear on formal balance sheets, or generate beans for empiricists to count, the general public's willingness to accept judicial rulings as the product of a fair and completely impartial process[25] is an indispensable prerequisite for a stable political and economic system based on the rule of law. Without faith in the impartiality and

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Enforcement as a Remedial Measure to Partisan Deadlock in Congress and the FEC, 65 RUTGERS L. REV. 261 (2012).

21. *See* Jose A. DelReal, *Voter Turnout in 2014 Was the Lowest Since WWII*, WASH. POST (Nov. 10, 2014), http://www.washingtonpost.com/blogs/post-politics/wp/2014/11/10/voter-turnout-in-2014-was-the-lowest-since-wwii/, *archived at* http://perma.cc/XUP4-U7HY. Turnout was lower in 1942 as a result of dislocation caused by WWII. *Id.*

22. Contrast the Court's hyperactive response to efforts to regulate campaign financing in *Buckley* and its progeny with its utter passivity in the face of massive partisan gerrymandering that has turned competitive elections to the House of Representatives and the state legislatures into endangered species. *See* Vieth v. Jubelirer, 541 U.S. 267 (2004) (holding gerrymandering claims to be nonjusticiable).

23. I fear that, for many, voting has become an existential act in elections where the dominant voices of the rich and powerful of both political parties drown out the ability of ordinary people to make themselves heard, and where the structure of the election (most importantly, rampant partisan gerrymandering of legislative lines) has anointed the winner without the inconvenience of a meaningless election.

24. For example, a recent Gallup Poll rated the judiciary twice as respected as the legislature (sixty-seven percent to thirty-four percent). *See* Frank Newport, *Americans Trust Judicial Branch Most, Legislative Least*, GALLUP (Sept. 26, 2012), www.gallup.com/poll/157685/americans-trust-judicial-branch-legislative-least.aspx, *archived at* http://perma.cc/TUW7-CCAJ.

25. It is no coincidence that the traditional symbol of justice is blindfolded.

integrity of our judges, everything comes apart. Forget about the center. Nothing holds. Thus, the truly important issue raised by *Williams-Yulee* is whether the Court will put our continued faith in our justice system at unnecessary risk by forcing judicial campaign finance regulation into the same First Amendment airless room that has turned legislative and executive elections into playthings for the ultra-rich.

The importance of *Williams-Yulee* transcends the relatively narrow questions of whether a solicitation of campaign funds mailed to the general public that is personally signed by a candidate for judicial office places undue pressure on attorneys to contribute;[26] or whether a reasonable observer could plausibly believe that an elected judge who personally solicits campaign funds from attorneys as part of a mass mailing to the general public might be tempted to treat generous attorney-donors more favorably than non-donors.[27] The answers to both questions turn less on empirical data than on intuitive assumptions about how much backbone personally solicited attorneys have, and how cynical the general public is likely to be about whether a lawyer's response to a personal solicitation of

26. Like Tennessee Williams's Blanche Dubois, much of my career as a civil liberties lawyer has depended on the kindness of the strangers who have funded me. In my never-ending search for funding, I've learned that a great way to raise money is to honor a corporate executive with the power to hire lots of lawyers. You would be amazed how many law firms (and other suppliers) just cannot wait to buy expensive tables at the dinner honoring the corporate executive who wields the power to butter their toast. Case law supports prophylactic bans on the solicitation of campaign funds under hierarchical settings where the prospective donor may feel pressure to contribute. *See* United Pub. Workers of Am. (CIO) v. Mitchell, 330 U.S. 75, 94–104 (1947) (upholding statutory prohibition on campaign activities by federal employees on the basis that it promoted political neutrality); *see also* U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548 (1973) (re-affirming *Mitchell*); Cullen v. Margiotta, 811 F.2d 698 (2d Cir. 1987) (upholding RICO verdict based on inherently coercive solicitation of campaign contributions from public employees). The other side of the coin is the Court's refusal to permit public employers to condition employment on political affiliation or support. *See* Rutan v. Republican Party of Ill., 497 U.S. 62 (1990); Branti v. Finkel, 445 U.S. 507 (1980); Elrod v. Burns, 427 U.S. 347 (1976); *see also Bd. of* Cnty. Comm'rs v. Umbehr, 518 U.S. 668 (1996) (extending the First Amendment protections of public employees established by *Rutan*, *Branti*, and *Elrod* to independent contractors working for the government); O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712 (1996) (same). Similar reasoning underlies both the ban on campaign contributions by public contractors whose future business turns on the discretionary decision of the winner of the election, and the requirement that corporate PACs shield the identities of employee contributors (or noncontributors) from the boss.

27. I pass on whether there is a real danger that many judges would actually be swayed by whether an attorney responded positively or negatively to a personal request for a modest campaign contribution. The more difficult question is whether the appearance of favoritism to contributors (or hostility to noncontributors) is likely to make its way into the public's consciousness. Given how difficult it is to explain the basis for many judicial actions to the lay public, it is, I believe, inevitable that many lay observers will fix on judicially solicited campaign contributions from attorneys as an explanation for a judge's otherwise mysterious behavior.

campaign funds might affect the judge's behavior. In each setting of uncertainty, the regulatory question is how much risk should (or must) be tolerated. The crucial issue in *Williams-Yulee* is whether the Supreme Court will insist on applying the same restrictive campaign financing analysis to the funding of judicial elections that the Court has imposed on the funding of legislative and executive elections—a restrictive "strict scrutiny" model that refuses to allow risk-averse regulation.

I hope not. Not one of the Court's four walls should apply to Florida's prophylactic, risk-averse effort to shield attorneys from personal solicitations of future judges, no matter what form the personal solicitation takes. First, the personal solicitation from an attorney by a judge (or a judicial candidate) with the hierarchical potential to affect the attorney's professional life is much closer to a form of "communicative conduct" than it is to "pure speech." To the extent the distinction between pure speech and communicative conduct is anything more than conclusory, it attempts to capture the difference between regulating a communication with no consequence other than the transmission of a message, and regulating a communication that generates by-products in addition to communicating an idea. Burning a privately owned American flag is treated by the Court as "pure" speech because the physical act of burning your own flag generates no regulable byproducts. Burning a draft card, picketing, or holding a demonstration also transmit a message, but each generates regulable byproducts (nonpossession of the draft card and obstruction of the public way) that cause the Court to treat the activity as communicative conduct, justifying narrowly tailored, viewpoint-neutral regulations aimed at effectively regulating the byproduct.[28]

The act of personally soliciting campaign funds from a potential subordinate undoubtedly has a communicative aspect. But it also generates a byproduct—a whiff of coercion and the temptation to curry favor—that are as worthy of prophylactic regulation as was the temporary nonpossession of a draft card in *O'Brien*, or the physical presence of the homeless in Lafayette Park in *Clark v. Community for Creative Non-Violence* ("*CCNV*").[29] Prophylactic regulation of hierarchical solicitation of campaign funds should, therefore, trigger the somewhat relaxed level of First Amendment scrutiny applied in

28. *Compare* Texas v. Johnson, 491 U.S. 397 (1989) (holding that burning an American flag was protected under the First Amendment), *with* United States v. O'Brien, 391 U.S. 367 (1968) (affirming conviction for burning draft card).

29. 468 U.S. 288 (1984) (upholding ban on demonstrative camp for homeless in Lafayette Park).

communicative conduct cases like *O'Brien* and *CCNV*. While it is not a sure thing, Florida's ban has a fighting chance under the *O'Brien* test. Under this framework, Florida's Canon 7(C)(1) may survive because the regulation merely must be "narrowly tailored," as opposed to the least drastic means possible for dealing with a feared serious harm; and because the Court applies a more deferential approach to the regulators' assessment of risk.[30] In short, there is room for a degree of risk-averse regulation under the *O'Brien* test that would be forbidden under strict scrutiny. How else could the government have won (unanimously, no less) in *O'Brien*?

Second, the Court's cavalier rejection of egalitarian justifications for limiting campaign spending by the ultra-rich put forth in *Buckley*, and reaffirmed in *Citizens United* and *McCutcheon*, is a much harder sell in the context of judicial elections. In a judicial system where "equal justice under law" is more than a slogan, regulation of campaign spending designed to preserve the reality (and appearance) of strict judicial equality cannot be shrugged off as easily as in a political context. One of the joys of having practiced law for more than fifty years in American courtrooms has been the system's intense (and still evolving) commitment to treating each litigant equally, no matter how rich or poor they may be. While equality is also an important ideal in the political realm, the spectacle of well-financed candidates and well-heeled independent political actors being able to purchase far more time with the electorate than poorly financed candidates or ordinary citizens, while disturbing to some, is tolerated by the Supreme Court as a fact of life. Imagine the Court's response to a rule providing that the permissible length of Supreme Court briefs, or the amount of argument time before the judge or jury, was to be sold to the highest bidder.[31]

Third, and most importantly, the Court's myopic view of what constitutes "corruption" of the political process cannot be transferred to the judicial process without risking the underpinnings of our judicial system. As applied to the legislative or executive electoral process, the idea of "corruption" is confined by the current Court to undue coercion or quid pro quo trading of money for official action. The Court reasons that we expect elected officials in the two political branches to discriminate on the basis of political views, favoring their large campaign contributors by listening more closely to them, and

30. The precise formulation of the *O'Brien* standard of review is set forth at 391 U.S. at 377.

31. *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001) (invalidating effort by LSC to condition federal funds to lawyers for the poor on an agreement to refrain from raising legal arguments that would be available to a privately represented litigant).

advancing policies endorsed by the slice of the electorate that supported the candidate's election, financially or otherwise.[32] That, a majority of the current Court insists, is the essence of our "winner takes most" brand of representative democracy.

The current Supreme Court's vision of tooth-and-claw representative democracy as a political system driven almost exclusively by self-interest, where the electoral spoils belong to the (often wealthy) victors, comes very close to a quiet embrace of "public choice" theory that treats all decisions by government actors as driven by self-interest, with any purported disinterested search for the common good almost always a cover for selfish behavior.[33] If you accept the public choice vision of democracy, it is hard, indeed, to corrupt the operation of such a jaded vision of selfish politics by anything other than bribery and coercion. If, however, you believe that Edmund Burke's vision of representative democracy calls for a modicum of altruism and a willingness to search for the disinterested common good,[34] such a Burkean process is vulnerable to corruption whenever an elected representative's behavior is unduly influenced, not by his independent vision of what is best for all, but rather by his narrow, self-interested vision of what is best for him and his largest campaign contributors.

Whatever the applicability of public choice theory to the processes of representative democracy, judges—even elected judges—are different. Self-interested behavior that would be tolerated, expected, even applauded in legislators or executive officials would almost certainly be viewed as corrupt by the Supreme Court if committed by a judge. The very essence of judicial impartiality is to

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32. *See* McCutcheon v. FEC, 134 S. Ct. 1434, 1461–62 (2014) (citing THE SPEECHES OF THE RIGHT HON. EDMUND BURKE 129–130 (J. Burke ed., 1867)); Citizens United v. FEC, 558 U.S. 310, 356–61 (2010).

33. For a concise summary of the elements of public choice theory, *see* William Shughart II, *Public Choice*, *in* THE CONCISE ENCYCLOPEDIA OF ECONOMICS (David R. Henderson ed., 2d ed. 2007), *available at* www.econlib.org/library/Enc/PublichChoice.html, *archived at* http://perma.cc/SU53-EFA6 (last visited Jan. 7, 2015).

34. Edmund Burke's complex vision of the duty of an elected legislative representative to occasionally seek the common good, not merely the advancement of the narrow self-interest of the slice of the world that elected him, is set forth in his Address to the Electors of Bristol, where Burke explains that he will, as a matter of moral duty, vote against an Irish tariff bill despite the strongly expressed views of his constituents. Edmund Burke, *Address to the Electors of Bristol, 3 Nov. 1774*, *in* 1 THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 2000), *available at* press.pubs.uchicago.edu/foundersdocuments/v1/ch13s7.html, *archived at* http://perma.cc/Q94W-8K6X. The *McCutcheon* Court's citation of the "Address" to support the propriety of a close relationship between a representative and his electoral supporters, while technically accurate, fails to convey Burke's belief in a duty to seek the common good. *See* 134 S. Ct. at 1461–62.

avoid tilting in favor of supporters, especially financial supporters. That is why the Supreme Court has recognized that elected judges are not "representatives" within the meaning of "one-person, one-vote."[35] They do not "represent" a constituency.[36] Rather, they swear to administer justice equally to all: supporters and opponents; voters and nonvoters; campaign contributors and political foes. The American judicial process is, moreover, more complex than a mere mechanical application of preexisting rules. American judges, especially appellate judges, routinely make new law in order to resolve a case or controversy before them. In exercising such creative power, elected judges (as opposed to elected representatives) do not merely carry out political commands from their supporters or advance the interests of their campaign contributors. They are sworn to speak for us all in an effort to generate a legal rule that advances the common good. Indeed, elected judges carrying out the lawmaking function may well be the last true Burkean figures in American democracy. That is why judicial candidates must be free to express their views on legal issues during the campaign, allowing the electorate to gain a sense of where the potential judge's views of the common good may lie.[37] But it is also why we recoil from the idea of an elected judge making campaign promises that would bind the candidate to the wishes of a segment of the electorate.[38]

Given the vast difference between the political and judicial process, it would, I believe, be simplistic for the Supreme Court to apply the narrow idea of "corruption" generated in the context of a public choice vision of the political process as driven by self-interest and a desire to capture the largest slice of any available pie, to the judicial process where elected judges seek to apply preexisting law with strict neutrality, and pledge to make new law only to advance the common good. In short, behavior that would not corrupt a political system of representative democracy premised on favoring an elected

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35. Wells v. Edwards, 347 F. Supp. 453 (M.D. La. 1972), *aff"d mem.* 409 U.S. 1095 (1973).

36. Although elected judges do not represent a formal constituency, the electoral process may not be rigged to diminish the ability of minority voters to elect judges of their choice. *See* Chisom v. Roemer, 501 U.S. 380 (1991) (holding that Section 2 of Voting Rights Act applies to judicial elections); Clark v. Roemer, 500 U.S. 646 (1991) (holding that Section 5 of Voting Rights Act applies to judicial elections).

37. Republican Party of Minn. v. White, 536 U.S. 765, 781–84, 788 (2002).

38. While political candidates have a First Amendment right to make campaign promises, Brown v. Hartlage, 456 U.S. 45 (1982), *White* suggests that campaign promises by judges may be inconsistent with the appearance and reality of open-minded willingness to be persuaded that is a hallmark of judicial impartiality. *White*, 536 U.S. at 770, 780, 783 (discussing campaign promises).

representative's political supporters would be utterly destructive of a judicial system pledged to equal justice under law.

Viewed through a broader lens of what counts as "corruption" of the judicial process, the act of a judge in personally soliciting attorneys for campaign funds, even in the context of a mass mailing directed to the general public, might well lead a reasonable regulator to perceive a risk of real or apparent corruption of the judicial process.

Finally, it is worth noting that the Supreme Court has already collapsed the airless room's fourth wall in *Caperton*, when the Court ruled that an elected appellate judge who had enjoyed massive independent campaign support from a litigant before him was obliged to recuse himself to avoid the appearance (and the unconscious reality) that he would favor his campaign benefactor.[39] Florida's personal attorney solicitation ban is a prophylactic effort to make such agonizing ad hoc recusal proceedings unnecessary.

IV. HOW SHOULD *WILLIAMS-YULEE* BE DECIDED?

It is possible that even under an appropriately relaxed analytic paradigm, Florida's ban is not sufficiently narrowly tailored to survive *O'Brien* scrutiny.[40] After all, as petitioner notes, at least four states allow a judicial candidate to mail personally signed campaign solicitations to the general public, including attorneys, without obvious adverse effects on the judicial process.[41] Most of the remaining states, like Florida, have, however, opted not to gamble on whether the four are right or wrong. Given the high stakes, I would defer to Florida's decision to opt for risk-averse prophylaxis, especially since Florida provides a prospective judicial candidate with ample alternative opportunities to engage in fundraising through third-party proxies. In the end, I believe that a reasonable Florida regulator should be able to view the marginal First Amendment value of a personally-signed mass mailing seeking campaign funds (as opposed to one by proxy) as outweighed by the risk that attorneys may view the personal solicitation as a form of pressure, and that litigants and

39. *See* Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009).

40. As far as I am concerned, *O'Brien* should not have survived *O'Brien* scrutiny. I have never been able to understand why the ban on draft card burning in *O'Brien* was sufficiently "narrowly tailored" under intermediate scrutiny when a requirement that a new card be obtained promptly (similar to the requirement for lost or stolen cards) would have adequately protected the government's interest in assuring uniform possession of a draft card in case of military emergency. I guess that is the difference between strict scrutiny's requirement of least drastic means, and intermediate scrutiny's requirement of "narrow tailoring." In any event, if the *O'Brien* ban was "narrowly tailored," so is Florida's.

41. *See* Brief for Petitioner, *supra* note 3, at 27.

the general public may believe that inappropriate judicial consequences might flow from responding (or not responding) to such a personal solicitation.

There is, finally, an argument in favor of reversal that does not appear to have been advanced by the petitioner, nor, I believe, by any of the amici. All agree that the petitioner's violation of Florida's ban was inadvertent, based on a good faith misreading of ambiguous language in Canon 7, leading her to believe that the ban kicked in only when a judge was faced with announced opposition. Since the text is indeed ambiguous, and the petitioner's misreading a good faith, reasonable mistake, I would recognize a First Amendment defense based on an objectively plausible belief that the speech in question was not covered by Florida's ban. If, as the Court has recently held, police are entitled to a good faith mistake-of-law defense in Fourth Amendment contexts,[42] why shouldn't a similar defense be available to a First Amendment speaker as an application of the Court's First Amendment scienter and vagueness doctrines?[43]

The only way that the *Williams-Yulee* case *should not* be decided, though, is as a routine application of the *Buckley* paradigm.

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42. *See* Heien v. North Carolina, 135 S. Ct. 530 (2014).

43. *See* Smith v. Goguen, 415 U.S. 566 (1974) (vagueness); Smith v. California, 361 U.S. 147 (1959) (scienter).