Williams-Yulee v. The Florida Bar, the First Amendment, and the Continuing Campaign to Delegitimize Judicial Elections

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I. INTRODUCTION

Lanell Williams-Yulee, who in 2009 was a candidate for a Florida county court judicial position, was reprimanded by the state supreme court for sending a letter over her signature soliciting campaign contributions, in violation of ethics rules.[1] In a per curiam decision, the Florida Supreme Court rejected Williams-Yulee's argument that the ban on personal solicitations by judges or candidates for judicial office violated her First Amendment rights.[2] In

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1. Williams-Yulee v. The Florida Bar, 138 So. 3d 379, 382, 389 (Fla.) (per curiam), *cert. granted,* 135 S. Ct. 144 (2014).

2. *Id.* at 384–87.

part, no doubt, to resolve a split among the circuits,[3] the Supreme Court granted certiorari and will decide the case this Term. We will make two points in this Essay. First, the arguments put forth by Florida (and other states) in support of broad restrictions on a judicial candidate's ability to personally solicit campaign donations are insufficient to overcome the candidate's free speech rights. Second, we observe that Florida's defense of its restrictions represents yet another battle in the ongoing campaign to stigmatize and delegitimize the popular election of judges.

II. *WILLIAMS-YULEE* AND THE FIRST AMENDMENT

A. An Overview of the Florida Court's First Amendment Analysis

While recognizing that the content-based restriction on speech must satisfy strict scrutiny,[4] the Florida high court's application of that test was rather desultory. Citing itself and several like-minded state supreme courts that had ruled on the constitutionality of similar solicitation prohibitions, it concluded that the state undoubtedly had a compelling interest "in preserving the integrity of [its] judiciary and maintaining the public's confidence in an impartial judiciary."[5]

The court likewise concluded that the personal solicitation ban was narrowly tailored to a compelling interest, a requirement it interpreted to mean that the regulation "targets and eliminates no more than the exact source of the 'evil' it seeks to remedy."[6] The Florida court concluded that the regulation *was* narrowly tailored because even personal solicitation by a mass mailing "raises an appearance of impropriety and calls into question, in the public's

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3. Several federal courts of appeals have held, similarly to the Florida Supreme Court, that such solicitation bans are constitutional. *See, e.g.*, Wersal v. Sexton, 674 F.3d 1010 (8th Cir. 2012); Bauer v. Shepard, 620 F.3d 704 (7th Cir. 2010); Siefert v. Alexander, 608 F.3d 974 (7th Cir. 2010); Stretton v. Disciplinary Bd., 944 F.2d 137 (3d Cir. 1991). Other Circuits have come to the opposite conclusion and held that laws similar to Florida's ban are unconstitutional. *See, e.g.*, Carey v. Wolnitzek, 614 F.3d 189 (6th Cir. 2010); Weaver v. Bonner, 309 F.3d 1312 (11th Cir. 2002).

4. *See, e.g.,* DANIEL A. FARBER, THE FIRST AMENDMENT 23 (4th ed. 2014) ("Government regulations linked to the content of speech receive severe judicial scrutiny.")

5. *Williams-Yulee*, 138 So. 3d at 384 (alteration in original) (internal quotation marks omitted) (quoting *In re* Kinsey, 842 So. 2d 77, 87 (Fla. 2003)); *see also id.* at 384–85 (discussing similar cases from Oregon and Arkansas); *see also id.* at 385:

> These decisions illustrate that other state supreme courts that have addressed the constitutionality of judicial ethics canons similar to Florida's . . . have reached the same conclusion that . . . protecting the integrity of the judiciary, as well as maintaining the public's confidence in an impartial judiciary, represent compelling State interests capable of withstanding constitutional scrutiny.

6. *Id.* (internal quotation marks omitted).

mind, the judge's impartiality."[7] The court bolstered its analysis with observations that the Florida regulations track similar provisions in the Model Code of Judicial Conduct, and that the state (similar to the Model Code) permits candidates to "establish[ ] campaign committees, through which judges can raise campaign funds without direct participation."[8] It concluded with an appeal to consensus, claiming that

> every state supreme court that has examined the constitutionality of comparable state judicial ethics canons has concluded that these types of provisions are constitutional, as one of a constellation of provisions designed to ensure that judges engaged in campaign activities are able to maintain their status as fair and impartial arbiters of the law.[9]

It grudgingly acknowledged that federal courts were split on the constitutionality of personal solicitation bans,[10] but merely cited those opinions (as opposed to examining them in any depth) and sniffed that federal "judges have lifetime appointments and thus do not have to engage in fundraising . . . ."[11]

The Florida high court's application of strict scrutiny in *Williams-Yulee* is, at best, superficial. Not only did it simply assume that personal solicitation posed a serious threat to perceptions of judicial integrity or impartiality, but its characterization of what qualifies as a narrowly tailored speech restriction is inconsistent with the Supreme Court's recent case law.[12] The Florida court presented no evidence that the ban is actually necessary to achieve its claimed interests. Moreover, allowing committee fundraising calls into question the compelling nature of those interests.

B. Does the Personal Solicitation Ban Serve a Compelling Governmental Interest?

It is tempting to dismiss the threat personal solicitation poses to actual or perceived judicial integrity as overblown. As courts have observed, elected judges are often forced to raise money from attorneys who will appear before them because the general public pays little heed to judicial elections.[13] Given those elections' low salience among

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7. *Id.*
8. *Id.* at 386.
9. *Id.*
10. *See id.* at n.3.
11. *Id.*
12. *See infra* notes 24–29 and accompanying text.
13. *See, e.g.*, Carey v. Wolnitzek, 614 F.3d 189, 204 (6th Cir. 2010) ("[T]he general public often, though not invariably, pays less attention to judicial elections than other elections, forcing judicial candidates to focus their fundraising efforts on the segment of the population most likely to have an interest in judicial races: the bar."); Stretton v. Disciplinary Bd., 944 F.2d 137, 145 (3d

voters, one wonders when their potential perceptions of quid pro quo corruption between donor and judge would be formed. The Florida Supreme Court—along with most other courts addressing this issue[14]—simply assumed that the public would form the opinion that judges implicitly promise to favor contributors in cases before the judge.[15] Yet in none of the reported cases has the State put forth—nor have courts required—evidence that, in jurisdictions where judges *are* allowed personally to solicit donations, public confidence in the integrity of the judiciary is diminished compared with those jurisdictions where the practice is banned. Scholars have pointed out that there are several forms of "strict scrutiny."[16] However, giving governments a pass on proving the compelling nature of its interest when prohibiting a candidate for office from asking for donations necessary to mount a credible campaign (perhaps against a well-funded incumbent) seems an especially flaccid version of what is supposed to be the most exacting, least deferential standard of review.

Cir. 1991) ("It is no secret that aside from family and close personal friends of the candidate (rarely affluent, or necessarily enthusiastic sources) judicial campaigns must focus their solicitations for funds on members of the bar.").

14. *See, e.g.*, Wersal v. Sexton, 674 F.3d 1010, 1020, 1030 (8th Cir. 2012) ("[W]e have little difficulty concluding Minnesota's interest in preserving impartiality, as defined by the lack of bias for or against a party to a proceeding, is compelling. . . . We must emphasize once more Minnesota's separate interest in avoiding the appearance of impropriety."); Bauer v. Shepard, 620 F.3d 704, 710 (7th Cir. 2010) (citing "[t]he potential for actual or perceived mutual back scratching, or for retaliation against attorneys who decline to donate" as the interests served by the ban); *Carey*, 614 F.3d at 204 (assuming that the solicitation ban "serves Kentucky's compelling interest in an impartial judiciary" and "its interest in preserving the appearance and reality of a non-corrupt judiciary, an objective often served by fundraising limitations"); Siefert v. Alexander, 608 F.3d 974, 989, 990 (7th Cir. 2010) (explaining that "Wisconsin's personal solicitation ban serves [an] anticorruption rationale . . . and acts to preserve judicial impartiality"; also observing that "the personal solicitation itself presents the greatest danger to impartiality and its appearance" (footnote omitted)); Weaver v. Bonner, 309 F.3d 1312, 1322 (11th Cir. 2002) (assuming that assuring "judicial impartiality" was a compelling interest); *Stretton*, 944 F.2d at 142 ("There can be no question . . . that a state has a compelling interest in the integrity of its judiciary."); Simes v. Ark. Judicial Discipline & Disability Comm'n, 247 S.W.3d 876, 882 (Ark. 2007) ("The state certainly has a compelling interest in the public's trust and confidence in the integrity of our judicial system. . . . [In addition,] we take this opportunity to acknowledge that . . . avoiding the appearance of impropriety is also a compelling state interest."). Despite the certitude of these courts, none offers much in the way of evidence that there is a problem with either impartiality or its appearance as a result of solicitation of campaign contributions.

15. *See, e.g.*, *In re* Fadeley, 802 P.2d 31, 41 (Or. 1991) ("The impression created when a lawyer or potential litigant, who may from time to time come before a particular judge, contributes to the campaign of that judge is always unfortunate. . . . [T]he outside observer cannot but think that the lawyer or potential litigant either expects to get special treatment from the judge, or at the least, hopes to get such treatment.").

16. *See, e.g.*, Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 U.C.L.A. L. REV. 1267 (2007) (identifying three distinct versions of strict scrutiny applied by the Supreme Court).

Furthermore, protecting the integrity of the judiciary from an unproven public perception of an equally ill-defined "appearance of impropriety" by a blanket ban on personal solicitations (including signed mass mailings and speeches at large gatherings) seems much less compelling after *Caperton v. A. T. Massey Coal Co.*[17] The *Caperton* Court recognized a due process right to recusal of a judge when

> there is a serious risk of actual bias—based on objective and reasonable perceptions—[that] a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.[18]

Though we have doubts about whether the Court's prior cases compelled (or even justified) the result in *Caperton*, as well as questions about its scope,[19] it offers the remedy of recusal when a plaintiff can show that a *particular* judge's relationship with a *particular* donor in a *particular* case raises questions of fairness and due process. This right to recusal renders (to us) the amorphous concerns cited to justify solicitation bans, particularly those as broad as Florida's, as less than the compelling interest the First Amendment requires to justify infringement on individuals' rights to engage in political speech.

Moreover, as we discuss below,[20] there is empirical evidence that while voters regard campaign finance with disdain, they do not regard *judicial* campaign finance with any more disdain than fundraising in connection with legislative or executive branch races. And, contrary to suggestions of judges, judicial elections seem to enhance, not diminish, the perceived legitimacy of courts. It is possible, then, that the Supreme Court will treat the vague invocation of "preservation of legitimacy" and protection against the "appearance of impropriety" with the same skepticism it did of the stated need to preserve judicial "impartiality" in *Republican Party of Minnesota v. White*.[21] At the very least, the Court should demand some proof from Florida that its sweeping ban addresses a real problem, as opposed to simply being a solution in search of one.

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17. 556 U.S. 868 (2009).

18. *Id.* at 884.

19. *Cf. id.* at 893–98 (Roberts, C.J., dissenting) (posing forty questions about the scope of the majority's decision).

20. *See infra* text accompanying notes 55–67.

21. 536 U.S. 765, 777 (2002) (invalidating a ban on judges announcing electoral positions; discussing the many meanings of "impartiality" and why some were not compelling governmental interests).

C. Is the Personal Solicitation Ban Narrowly Tailored?

Despite our doubts, the Court could simply concede that some compelling governmental interest is present: either the interest in preserving actual or perceived impartiality between parties[22] or the related interest in preventing actual or apparent quid pro quo corruption between donors and candidates.[23] The question then becomes whether Florida's ban on all personal solicitations of contributions by judicial candidates is narrowly tailored to those interest(s). In our view, this is where Florida will likely run into trouble with the Court.

First, it is not clear that the Florida Supreme Court's definition of narrow tailoring is synonymous with the demanding standard the U.S. Supreme Court has applied of late. In its opinion, the state court defined narrowly tailored to mean that the law targeted "no more than the exact source of the 'evil' [the law] seeks to remedy."[24] In recent cases, however, the Supreme Court has required the government to prove that its regulation of speech "be 'actually necessary' to achieve its interest . . . . There must be a direct causal link between the restriction imposed and the injury to be prevented."[25]

A plurality of the Court, for example, refused to uphold the Stolen Valor Act, not only because "[t]he link between the Government's interest in protecting the integrity of the military honors system and the Act's restriction on the false claims of liars like [the] respondent has not been shown,"[26] but also because "[t]he Government has not shown, and cannot show, why counterspeech would not suffice to achieve its interest."[27] In another case,

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22. *See id.* at 775–77 (2002) (implicitly recognizing impartiality, defined as "the lack of bias for or against either *party* to the proceeding," as a compelling governmental interest).

23. *See* McCutcheon v. FEC, 134 S. Ct. 1434, 1450 (2014):

> While preventing corruption or its appearance is a legitimate objective, Congress may target only a specific type of corruption—"quid pro quo" corruption. . . . In addition to "actual quid pro quo arrangements," Congress may permissibly limit "the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions" to particular candidates.

24. Williams-Yulee v. The Florida Bar, 138 So. 3d 379, 385 (Fla.) (per curiam), *cert. granted,* 135 S. Ct. 144 (2014).

25. United States v. Alvarez, 132 S. Ct. 2537, 2549 (2012); *see also* Brown v. Entm't Merchants Ass'n, 131 S. Ct. 2729, 2738 (2011) ("The State must specifically identify an 'actual problem' in need of solving . . . and the curtailment of free speech must be actually necessary to the solution . . . ." (internal citations omitted)).

26. *Alvarez*, 132 S. Ct. at 2549. *See also id.* ("The Government points to no evidence to support its claim that the public's general perception of military awards is diluted by false claims such as those made by Alvarez.").

27. *Id.*

California's attempt to regulate sales of violent video games to minors likewise foundered on the State's admitted inability to "show a direct causal link between violent video games and harm to minors."[28] Rejecting the State's "claim[ ] that it need not produce such proof because the legislature can make a predictive judgment that such a link exists, based on competing psychological studies," the Court noted that the case on which California relied had been applying intermediate scrutiny to a content-neutral law.[29] Under strict scrutiny, the Court pointed out, "California's burden is much higher, and because it bears the risk of uncertainty . . . ambiguous proof will not suffice."[30]

In previous cases involving limits on professionals' solicitations of clients—cases in which the Court applied only intermediate scrutiny—the outcomes turned on the presence or absence of information supporting the government's claim that restrictions were aimed at protecting the integrity of the profession in the eyes of the public. In *Edenfield v. Fane*, for example, the Court invalidated a rule banning accountants from in-person solicitation of clients.[31] The Court conceded that fraud prevention and the protection of client privacy were "substantial" goals.[32] As the Court pointed out, though, the requirement that the restrictions "directly advance" the substantial ends "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[33] According to the Court, however,

> The Board has not demonstrated that, as applied in the business context, the ban on CPA solicitation advances its asserted interests in any direct and material way. It presents no studies that suggest personal solicitation of prospective business clients by CPA's creates the dangers of fraud, overreaching, or compromised independence that the Board claims to fear. The record does not disclose any anecdotal evidence, either from Florida or another State, that validates the Board's suppositions.[34]

By contrast, in sustaining a thirty-day ban on the direct mail solicitation by attorneys of mass accident victims and their families, the Court distinguished *Edenfield* by pointing to an impressive

28. *Entm't Merchants Ass'n*, 131 S. Ct. at 2738.

29. *Id.* at 2738–39 (discounting the analytical force of *Turner Broad. Sys. v. FEC*, 512 U.S. 622 (1994)).

30. *Id.* at 2739.

31. 507 U.S. 761, 763 (1993).

32. *Id.*

33. *Id.* at 770–71.

34. *Id.* at 771.

statistical and anecdotal record compiled by the state bar that it described as "noteworthy for its breadth and detail"[35]:

> The Bar submitted a 106-page summary of its 2-year study of lawyer advertising and solicitation to the District Court. That summary contains data—both statistical and anecdotal—supporting the Bar's contentions that the Florida public views direct-mail solicitations in the immediate wake of accidents as an intrusion on privacy that reflects poorly upon the profession. As of June 1989, lawyers mailed 700,000 direct solicitations in Florida annually, 40% of which were aimed at accident victims or their survivors. . . . A survey of Florida adults commissioned by the Bar indicated that Floridians "have negative feelings about those attorneys who use direct mail advertising." . . . Fifty-four percent of the general population surveyed said that contacting persons concerning accidents or similar events is a violation of privacy. . . . A random sampling of persons who received direct-mail advertising from lawyers in 1987 revealed that 45% believed that direct-mail solicitation is "designed to take advantage of gullible or unstable people"; 34% found such tactics "annoying or irritating"; 26% found it "an invasion of your privacy"; and 24% reported that it "made you angry." . . . Significantly, 27% of direct-mail recipients reported that their regard for the legal profession and for the judicial process as a whole was "lower" as a result of receiving the direct mail.[36]

Recall that these are commercial speech cases in which the standard of review was intermediate, not strict, scrutiny. Contrast the Florida Bar's record in *Went for It* with the complete absence of evidence, anecdotal or otherwise, linking personal solicitation of campaign funds with quid pro quo corruption or the preservation of impartiality.[37]

The notion that there is a direct causal link between the ban on personal solicitations and a particular compelling interest is further undermined by the fact that Florida's rules specifically allow for the candidate to employ a fundraising committee to raise money by proxy. Unlike in other states, there is nothing in Florida's rules prohibiting the judicial candidate from (1) seeing donor lists; (2) writing personal thank you notes to donors; or even (3) appearing at fundraisers where the solicitation is made by someone other than the candidate herself.

While courts have tended to treat solicitation-by-proxy as a suitable workaround to enable the candidate to raise necessary funds, we think that the existence of that workaround calls into question the supposed compelling interest necessitating the ban. If—as Florida posits—members of the public assume that the act of personally soliciting a campaign contribution will compromise judicial impartiality (in the sense of treating parties fairly) or creates the appearance of impropriety in the form of quid pro quo corruption, then the simple expedient of a committee of bagmen is unlikely to assuage those suspicions. Insofar as the candidate could keep tabs on who donates and how much, as well as who declined, the same concerns

35. The Florida Bar v. Went For It, Inc., 515 U.S. 618, 626–27 (1995).

36. *Id.* (internal citations omitted).

37. *See supra* notes 13–16 and accompanying text.

about impartiality and quid pro quo corruption remain. If the use of a proxy fundraising committee *does* allay those concerns—and remember that we have no evidence one way or the other—then that, to us, suggests that voters' fears are, like the threats to judicial integrity allegedly posed by personal fundraising appeals themselves, not all that serious.

One might analogize bans on personal solicitations from judicial candidates to bans on in-person solicitations of potential clients by lawyers that the U.S. Supreme Court upheld in *Ohralik v. Ohio State Bar Association*.[38] Accepting that the State's interest in consumer protection was furthered by a blanket ban on in-person solicitation, the Court specifically noted that

> the potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person. Such an individual may place his trust in a lawyer, regardless of the latter's qualifications or the individual's actual need for legal representation, simply in response to persuasion under circumstances conducive to uninformed acquiescence.[39]

In addition to the fact that the Court applied intermediate, not strict, scrutiny in the solicitation cases, there are two problems with analogizing campaign solicitations to a lawyer's in-person solicitation of potential clients. First, because the solicitations will often be made lawyer-to-lawyer, no basis exists for adopting the *Ohralik* Court's concern that in-person interactions between professional persuaders and untrained (possibly vulnerable) laypersons were inherently one-sided. Second, whatever may be said for the need to protect individual lawyers from real or apparent coercion said to accompany a face-to-face contribution request from, say, a sitting judge in whose court a lawyer regularly appears, it seems a stretch to say that the same pressures accompany a letter like the one Williams-Yulee sent or an appeal made to an audience at a campaign event. The Court itself recognized the distinction when it invalidated Kentucky's attempt to bar lawyers from soliciting clients through the mail.[40] Distinguishing *Orahlik*, the Court observed that

> [l]ike print advertising, petitioner's letter—and targeted, direct-mail solicitation generally—"poses much less risk of overreaching or undue influence" than does in-person solicitation . . . . Neither mode of written communication involves "the coercive force of the personal presence of a trained advocate" or the "pressure on the potential client for an immediate yes-or-no answer to the offer of representation." Unlike the potential client with a badgering advocate breathing down his neck, the recipient of a letter and the "reader of an advertisement . . . can 'effectively avoid further bombardment of [his] sensibilities simply by averting [his] eyes,' " . . . A letter, like a

38. 439 U.S. 883 (1978).

39. *Id*. at 465.

40. *See* Schapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988).

> printed advertisement (but unlike a lawyer), can readily be put in a drawer to be considered later, ignored, or discarded.[41]

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As it did in *White*, the Supreme Court is likely to invalidate Florida's sweeping ban on personal solicitations by judicial candidates. Given the low salience of judicial elections among voters and lack of evidence that actual quid pro quo corruption occurs between donors and candidates, the Court might be skeptical that a compelling interest is even being pursued here. Assuming Florida's purposes to be compelling, its ban will likely founder on the lack of evidence demonstrating that the ban is actually necessary to further those interests. A public suspicious of donations by lawyers to judicial campaigns is unlikely to have those suspicions allayed by the employment of a committee of cutouts—especially when the candidate can see who did or did not donate when approached. Perhaps a case could be made that in-person solicitations by judicial candidates carry with them the danger of coercion, but Florida has failed to make such a case, and that case would not support the breadth of Florida's ban. To us, the anxieties expressed about judicial campaign finance are a function of elite antipathy towards judicial elections generally. In the next Part, we recount the history and evolution of this antipathy, as well as discuss new evidence suggesting that the broader electorate does not share elite fears about judicial elections.

III. *WILLIAMS-YULEE* AND THE LEGITIMACY OF JUDICIAL ELECTIONS

State regulation of judicial elections that is more restrictive than regulations applied to legislative and executive branch races must be based on the assumption that judicial electioneering poses more serious risks to the public weal than legislative or executive electioneering. This is the precise idea forcefully communicated, for more than a century, by crusaders opposed to the institution of judicial elections—particularly partisan judicial elections. A brief review of the history of this criticism may be helpful.

The most important institutional platform for the crusade against judicial elections has been the American Judicature Society (AJS), founded in 1913 by Roscoe Pound and other legal luminaries.[42] From its inception, the goal of the AJS was to promote alternatives to partisan judicial elections. The reform AJS offered as a substitute for

41. *Id.* at 475–76 (internal citations omitted).

42. *About AJS*, AM. JUDICATURE SOC'Y, https://www.ajs.org/about/, *archived at* https://perma.cc/2SKD-233L (last visited Jan. 1, 2015).

partisan judicial elections is known by the terms "merit selection" and the "Missouri Plan." To avoid begging the question, we will adopt the term Missouri Plan. In 2014 the AJS listed "the development of the 'Missouri Plan' for judicial selection, [and] the creation of state judicial . . . nominating committees" as two of the four "notable accomplishments" in its history.[43]

The classic Missouri Plan constrains gubernatorial discretion by limiting possible judicial appointees to those persons recommended by the state's judicial nominating committee to the governor. It further eliminates campaigning between two (or more) candidates for judicial office (either partisan or nonpartisan) in favor of so-called retention elections, where voters are asked only whether an incumbent judge should be retained in office or not. In the highly unlikely event that the voters remove an incumbent judge from office, the governor chooses his or her successor via the nominating committee procedure. In practice, the nominating committee structure amounts to a significant transfer of power to the bar, with lawyers taking a majority or near-majority of seats on the committees of all but five Missouri Plan states (as of 2009).[44]

The AJS's efforts yielded substantial results in the mid-twentieth century, with fourteen states adopting the Missouri Plan between 1940 and 1980. A hybrid plan including some Missouri Plan features was adopted in New Mexico in 1988.[45] At that time, some twenty-five states had either Missouri Plan systems or systems that included at least some of its features.[46] This would prove to be its high-water mark, however. As one researcher put it in 2004, "[p]opular support for constitutional change . . . to merit selection . . . has declined significantly over the past three decades."[47] Since then, the Missouri Plan has proved a tough sell to voters and its advance has suffered several setbacks, including Nevada voters' rejection of the Plan by referendum in 2010.[48] More recently, two states have dismantled all or a portion of their Missouri Plan systems. In 2013 the Kansas legislature scrapped that state's version (including the

43. *American Judicature Society Dissolving*, AM. JUDICATURE SOC'Y, https://www.ajs.org/, *archived at* http://perma.cc/NQ7N-MPF5 (last visited Jan. 1, 2015).

44. Brian T. Fitzpatrick, *The Politics of Merit Selection*, 74 MO. L. REV. 675, 679–84 (2009).

45. Seth Andersen, *Examining the Decline in Support for Merit Selection in the States*, 67 ALB. L. REV. 793, 793 (2004).

46. *Id*. at 794.

47. *Id*. at 793.

48. The vote was 57.74% against, 42.26% in favor. *See Official Results as Canvassed by the Nevada Supreme Court on November 23, 2010*, NEV. SEC'Y OF STATE, http://www.nvsos.gov/SilverState2010Gen/Ballots.aspx, *archived at* http://perma.cc/9SWY-VWHX (last visited Jan. 1, 2015).

nominating committee) and provided for unconstrained gubernatorial appointment of judges to the intermediate appellate court, subject to confirmation by the state senate.[49] In November 2014 Tennessee voters overwhelmingly adopted a constitutional amendment outlining a process very similar to Kansas', but covering all appellate judgeships.[50]

Having suffered these setbacks, the crusade against judicial elections took yet another blow in September 2014, when the AJS Board of Directors announced its decision to dissolve the organization.[51] This does not mean that the campaign against partisan judicial elections will lack an institutional foundation, thanks to the generosity of billionaire George Soros. In 2002 Soros, acting through his Open Society Institute ("OSI"), founded Justice at Stake ("JAS") to take a very active role in the opposition to state judicial elections. One study estimates that OSI contributed $5.5 million to JAS from 2001 to 2008, and contributed around $40 million more between 2000 and 2009 to a wide range of recipients for "projects related to the judiciary."[52] While the exit of the AJS may reduce the volume of criticism of judicial elections somewhat, barring a change in Mr. Soros's view of the matter, one may safely expect JAS and related organizations to continue to campaign against judicial elections.

In addition to the AJS and JAS, the campaign against judicial elections has benefitted from the contributions of numerous judges, both state and federal. Most prominently, Justice Sandra Day O'Connor has devoted much of her time in retirement to her critique of state judiciaries and the advocacy of reform. In June 2014 she unveiled "The O'Connor Judicial Selection Plan," which proposes some

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49. *Nominating Commissions*, KAN. JUDICIAL BRANCH, http://www.kscourts.org/ Appellate-Clerk/nominating-commission/default.asp, *archived at* http://perma.cc/F8NQ-8PJH (last visited Jan. 1, 2015).

50. *Tennessee Judicial Selection, Amendment 2 (2014*), BALLOTPEDIA, *available at* http://ballotpedia.org/Tennessee_Judicial_Selection,_Amendment_2_(2014), *archived at* http://perma.cc/6GY3-29B4 (reporting that the vote was 60.92% in favor and 39.08% opposed). Good sources for information on state judicial selection include the Federalist Society's State Courts Guide website, *State Courts Guide*, FEDERALIST SOC'Y, http://www.statecourtsguide.com/, *archived at* http://perma.cc/LY3L-3LMD (last visited Jan. 1, 2015), and (for now) on the AJS's Judicial Selection in the States website, *Judicial Selection in the States*, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/, *archived at* http://perma.cc/LFZ4-CP89 (last visited Jan. 1, 2015).

51. Debra Cassens Weiss, *American Judicature Society is Dissolving; Problems with "Membership Model" Cited*, A.B.A. J. (Oct. 1, 2014 8:53 AM), http://www.abajournal.com/news/article/american_judicature_society_is_dissolving_amid_declining_membership, *archived at* http://perma.cc/3YNR-NKW4.

52. Colleen Pero, *Justice Hijacked: Your Right to Vote Is At Stake,* AM. JUSTICE P'SHIP (Sept. 2010), *available at* http://americanjusticepartnership.com/hijacked.php, *archived at* http://perma.cc/56YV-GMEH.

adjustments to the classic Missouri Plan, including nonlawyer majorities on judicial nominating committees and more extensive judicial performance evaluations.[53] Other custodians of elite opinion, including many legal academics and journalists, also tend to disapprove of judicial elections.[54]

The polite phrasing of the core of the opposition to judicial elections is that they compromise judicial integrity and/or the public's perception of the judiciary by harming (the appearance of) the judiciary's "independence"; the bumper-sticker version is that judicial elections mean that judicial office is "for sale." JAS doubles down on alarmist rhetoric. Its very name proclaims that justice itself is "at stake." Rhetoric of this sort amounts to an attack on the legitimacy of elected state judges, as political scientist James Gibson recently defined that term:

> [C]ourts in reality have only a single form of political capital: legitimacy. Compliance with court decisions is contingent upon judicial institutions being considered legitimate. Legitimacy is a normative concept, basically meaning that an institution is acting appropriately and correctly, within its mandate. Generally speaking, a great deal of social science research has shown that people obey law more out of a felt normative compunction deriving from legitimacy than from instrumental calculations of the costs and benefits of compliance.[55]

Gibson also speaks of judicial legitimacy in terms of the institution's "reservoir of goodwill" among "ordinary people."[56] Ironically, to the extent that ordinary people listen to overwrought critiques of state judicial elections, they may be more likely to doubt the integrity of the judicial branch. Whether this is an intended or an unintended consequence of the campaign against judicial elections, we cannot say. It does seem to be a potentially significant negative externality of JAS's heated rhetoric warning of the loss of judicial independence.

To date, the JAS style does not seem to be winning many voters to its side. There are several reasons why this might be the case. First, and perhaps most importantly, Americans put a high value on

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53. Sandra Day O'Connor, *The O'Connor Judicial Selection Plan*, INST. OF THE ADVANCEMENT OF THE AM. LEGAL SYS. (June 2014), *available at* http://iaals.du.edu/images/wygwam/documents/ publications/OConnor_Plan.pdf, *archived at* http://perma.cc/BEH3-7W88.

54. For a categorical rejection of all types of judicial elections, including retention elections, see Martin H. Redish & Jennifer Aronoff, *The Real Constitutional Problem with State Judicial Selection: Due Process Judicial Retention and the Dangers of Popular Constitutionalism*, 56 WM. & MARY L. REV. 1, 2 (2014) (arguing that "life tenure, or, at the very least, some form of formal term limit [for state judges] is required by the Due Process Clause to assure constitutionally required judicial independence").

55. JAMES L. GIBSON, ELECTING JUDGES: THE SURPRISING EFFECTS OF CAMPAIGNING ON JUDICIAL LEGITIMACY 4–5 (2012) (citations omitted).

56. *Id.* at 5–8.

democratic processes, and thus tend to disfavor proposals that would take their vote away from them, in whole or in part.[57] When this preference for electoral accountability is added to the public's low opinion of lawyers in general,[58] the weakness of the Missouri Plan as a political matter is manifest: the Plan depends on nominating commissions that seem likely to be dominated by lawyers. Much of the public apparently does not see this as a positive development. Various public opinion polls bear this out. For example, a 2010 poll of Pennsylvanians found that seventy-five percent rejected the idea that adopting the Missouri Plan would "remove politics from judicial selection" and seventy percent agreed that it would "give 'politicians and trial lawyers' the power to pick judges."[59]

In short, while judicial elections, including partisan elections, are not without flaws, neither are the alternatives to election perfect. Voters seem to appreciate this, perhaps more so than do the opponents of elections. In the matter of judicial selection, the "ordinary people" seem less prone to commit the Nirvana fallacy[60]—the comparison of an actual, flawed reality with an imagined, perfect alternative—than do the great and the good. While judicial elections may lessen (the perception of) judicial independence, the alternatives to election may be seen as lessening judicial accountability to the public. Reasonable people surely may disagree as to how to strike a balance between independence and accountability.

Yet something stronger may be said in favor of judicial elections as institutions, thanks to the recent work of James Gibson. His research looked primarily at Kentucky voters' reactions to the nonpartisan judicial races conducted during 2006.[61] Gibson explains that "[t]he essential question" he sought to answer was "the effects of campaign activity on public perceptions of judicial institutions."[62] He summarizes his "surprising" results as follows:

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57. Andersen notes that the opposition to Missouri Plan proposals has emphasized this point. Andersen, *supra* note 45, at 796–97.

58. *Public Esteem for Military Still High*, http://www.pewforum.org/2013/07/11/public-esteem-for-military-still-high/ (lawyers ranked last among ten occupations for contributing to "society's well-being") (July 11, 2013) (last visited Jan. 6, 2015); Debra Cassens Weiss, *Only 25% of Americans Have a Positive Image of Lawyers*, A.B.A. J. (Aug. 21, 2009 1:44 PM), http://www.abajournal.com/news/article/only_25_of_americans_have_a_positive_image_of_lawyers (last visited Jan. 6, 2015).

59. Pero, *supra* note 52, at 9.

60. This phrase originated in Harold Demstez, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1 (1969).

61. GIBSON, *supra* note 55. Gibson's research was funded by a grant from the National Science Foundation. *Id.*

62. *Id.* at 22.

> Relying upon measures of attitude changes (made possible through the use of a panel survey in which the same individuals were interviewed at three points in time), the hypothesis [I] tested . . . all relate perceptions of campaign activity to changes in institutional loyalty. My findings are nuanced, but the most significant conclusion is that, while some campaign activities do indeed harm judicial legitimacy, *the overall effect of judicial elections is beneficial to legitimacy*. This is a very important finding, one that should fundamentally reframe how we understand the benefits and costs of electing judges.[63]

Gibson describes this as "an unexpected finding and a bold conclusion,"[64] and indeed it is. His work greatly undermines the foundation of the case against judicial elections. What AJS, JAS, and other would-be reformers have long taken for granted has now been brought into very serious question.

Praised as a landmark study, even by reviewers who disagree or question aspects of it, Gibson's book seems destined to have a substantial impact on the debates surrounding state judicial selection.[65] After the book was published, Gibson concluded that "the tide has turned in how we understand the state judiciaries—and how we understand what we do not understand about them as well."[66] He notes, not surprisingly, that unanswered questions remain and further research is needed.[67]

Applying Gibson's key insight to the *Williams-Yulee* case is straightforward in one sense. Gibson studied nonpartisan judicial races, and the race for County Court of Hillsborough County was a nonpartisan race. While it might be wrong to assume that Florida voters would react in roughly the same fashion as Kentucky voters to judicial electioneering,[68] it does not seem too much to ask that a student of the *Williams-Yulee* case not simply assume that judicial elections harm the legitimacy of a state's judiciary.

One final point about Gibson's conclusion deserves mention. Campaign fundraising is one of the activities that Gibson considers harmful to judicial legitimacy. However, he does not emphasize this

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63. *Id.* (emphasis added).

64. *Id.* at 130.

65. *See* Lee Epstein, *Electoral Benefits: The Assault on the Assaulters of Judicial Elections*, 96 JUDICATURE 218, 219 (2013) (the book is "timely, creative, clever, and quite accessible, despite its methodological rigor and sophistication"); Sara C. Benesh, *Judicial Elections: Directions in the Study of Institutional Legitimacy*, 96 JUDICATURE 204, 204 (2013) (Gibson "has once again set the standard for inquiry into the legitimacy of courts and the forces that coalesce to influence that legitimacy").

66. James L. Gibson, *Electing Judges: Future Research and the Normative Debate about Judicial Elections*, 96 JUDICATURE 223, 231 (2013).

67. *See id.*

68. For Gibson's discussion of the temporal, spatial, and institutional generalizability of a study based upon a single election, see GIBSON, *supra* note 55, at 136–38.

point nor does he propose any new legal treatment of it. Instead, he views this drawback in a larger context:

> The problem for courts is campaign contributions, although it is no more of a problem in the judicial case than in the legislative or gubernatorial cases. Unfortunately, the American people do not seem to distinguish between contributions from those with direct, self-interested business before an institution and groups seeking to select like-minded representatives on either the courts or the legislature. A strong, consensual, and nearly indiscriminate revulsion to all forms of campaign contributions characterizes the American people . . . .[69]

This observation is consistent with Gibson's bottom line recommendation, based on his reading of the majority decision in *Republican Party of Minnesota v. White*:[70] "[I]f elections are employed as a means of selecting judges, then the elections must be legitimate, and all campaign activity that is allowed in elections for other offices must be tolerated in elections for judges."[71] It would follow that a state cannot require judicial candidates to solicit campaign contributions only through fundraising committees, if the same restriction is not placed on candidates for legislative or executive offices.

IV. CONCLUSION

Florida's ban on the solicitation of campaign funds by judicial candidates sweeps far too broadly to address any valid concerns the state may have about preventing corruption. The lack of proof that in-person solicitation (as opposed to solicitation by proxy committees) poses a particular threat to judicial integrity or impartiality, as well as the availability of recusal in particular cases, should be sufficient to conclude the regulation is not narrowly tailored. Further, we suspect that the bar's problem with donations is less about the possibility for partiality or corruption and more about its dislike of judicial elections in general. Reasonable people can differ about the propriety of judicial elections (though voters generally seem to favor them), but that debate should be joined directly. Regulations like Florida's suggest that there is something unsavory about electioneering generally and raising money to engage in electioneering in particular. To insinuate that either is especially sleazy when done by judges both demeans democratic politics in general, as well as promotes a version of the Nirvana fallacy wherein disinterested, public-regarding legal experts (selected by other, equally disinterested and public-regarding legal experts) are favorably contrasted with the squalid, rent-seeking

69. *Id.* at 140.

70. 536 U.S. 765 (2002).

71. GIBSON, *supra* note 55, at 132.

habitués of the executive and legislative branches and the problems they create. Better that we have a candid debate about judicial selection with all the tradeoffs in view. Our suspicion, however, is that many do not want to have such a debate, because voters tend to favor accountability, even for judges, hence the need to portray judicial elections and all that go with them as positively deviant.