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Public Interest Lawyering & Judicial Politics: Four Cases Worth a Second Look in Williams-Yulee v. The Florida Bar

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Public Interest Lawyering & Judicial Politics: Four Cases Worth a Second Look in *Williams-Yulee v. The Florida Bar*

Ruthann Robson*

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I. INTRODUCTION

Let me begin with an experience.¹

It was not the judge himself who asked me for a campaign contribution to support his reelection. Instead, a prominent attorney made the request, although we were clearly in the sight of the judge himself. I remember thinking that the judge might not recognize me: not only was I a relatively new lawyer in this community but we were at the annual Halloween party hosted by this prominent attorney. I regretted that my costume did not include a mask or a beard.

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1. While I am well aware there are problems with experience in legal scholarship, Ruthann Robson, *Beginning from (My) Experience: The Paradoxes of Lesbian/Queer Narrativities*, 48 HASTINGS L.J. 1387, 1391–1394 (1997), and also want to make clear that my use of dialogue is a narrative device rather than accurate recollection, I do think it is noteworthy that I recall this event decades later.

“Is that legal?” I asked the attorney.

“Perfectly.”

“I mean, I have some cases in front of him.”

“All the more reason to contribute.”

“Let me think about it,” I stalled.

I do not recall whether or not I ultimately contributed. But I do recall that every time I appeared before this judge in my role as an attorney with Florida Rural Legal Services, I thought about the Halloween party. I thought about it every time I lost and every time I won, even when the issue was small. I thought about my clients, by definition living below the poverty line, and wondered if I should use some of my salary on their behalf. I wondered whether my opposing counsel had contributed to the judge’s campaign. And how much.

In speaking with fellow members of The Florida Bar about this when it occurred, in 1982 or so, they suggested I was squeamish. One of my former classmates who was now in private practice informed me that this was the way the game was “played.” He contended that this judge was known as “liberal” and that would be good for my clients. He also told me to “get real,” insinuating that I was naïve because of my post-graduate clerkships with federal judges. “State judges are elected,” he reminded me. When I asked about his law firm’s contributions, he boasted that the firm always contributed in every election, and to every candidate. And he mentioned what seemed to me to be a staggering sum.

The ethical rule that governed a judicial candidate’s solicitation of funds from attorneys or others in 1982² is substantially similar to the present rule, Canon 7C(1),³ the provision at issue in *Williams-*

2. Canon 7B(2), adopted in 1973 (and effective until 1995), provided:

A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates should not himself solicit campaign funds, or solicit attorneys for publicly stated support, but he may establish committees of responsible persons to secure and manage the expenditure of funds for his campaign and to obtain public statements of support for his candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from any person or corporation authorized by law. A candidate's committees may solicit funds for his campaign only within the time limitation provided by law. A candidate should not use or permit the use of campaign contributions for the private benefit of himself or members of his family.

In re The Fla. Bar—Code of Judicial Conduct, 281 So. 2d 21, 32 (Fla. 1973) (mem.) (per curiam).

3. Canon 7C(1), effective January 1, 1995, and not altered since then, provides:

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

Yulee v. The Florida Bar.⁴ Lanell Williams-Yulee admittedly wrote and signed a letter directly soliciting funds to support her quest to become a county court judge.⁵ In the state proceedings, before the referee, and before the Supreme Court of Florida, she argued that she did not—or did not intend to—violate Canon 7C(1) because there was no “competing candidate” as required by the Canon. She also argued that Canon 7C(1) violated the First Amendment. The referee and Supreme Court of Florida rejected both these arguments and found her guilty of professional misconduct, although the punishment was the relatively modest one of “public reprimand.”⁶

In this Essay, I do not abandon my decades-old “squeamishness.” Instead, I argue the Court should recognize the interests of practicing lawyers—with special attention to public

expend funds in furtherance of his or her judicial campaign or establish a committee to solicit contributions or public support earlier than one year before the general election. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or members of the candidate's family.

In re Code of Judicial Conduct, 643 So.2d 1037, 1059–60 (Fla. 1994) (mem.).

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

5. The letter, as reproduced in the petition for certiorari, is worth a read:
LANELL WILLIAMS-YULEE

Dear Friend:

I have served as a public servant for this community as Public Defender as well as a Prosecutor for the past 18 years. Having been involved in various civic activities such as “The Great American Teach In,” Inns Of Court, Pro Bono Attorney, Metropolitan Ministries outreach program, as well as a mentor for various young men and women residing within Hillsborough County, I have long worked for positive change in Tampa. With the support of my family, I now feel that the time has come for me to seek elected office. I want to bring fresh ideas and positive solutions to the Judicial bench. I am certain that I can uphold the Laws, Statutes, Ordinances as prescribed by the Constitution Of the State Of Florida as well as the Constitution of the United States Of America.

I am confident that I can serve as a positive attribute to the Thirteenth Judicial Circuit by running for County Court Judge, Group 10. To succeed in this effort, I need to mount an aggressive campaign. I'm inviting the people that know me best to join my campaign and help make a real difference. An early contribution of \$25, \$50, \$100, \$250, or \$500, made payable to “Lanell Williams-Yulee Campaign for County Judge”, will help raise the initial funds needed to launch the campaign and get our message out to the public. I ask for your support In meeting the primary election fund raiser goals. Thank you in advance for your support.

Sincerely,

/s/

Lanell Williams-Yulee, Esq.

Political Advertisement paid for and approved by Lanell Williams-Yulee, Nonpartisan, for County Judge, Group 10

Petition for a Writ of Certiorari at 31a–32a, *Williams-Yulee v. The Florida Bar*, 138 So.3d 379 (No. 13-1499) (June 17, 2014), 2014 WL 2769040.

6. *Williams-Yulee*, 138 So. 3d at 381.

interest and social justice attorneys—in *Williams-Yulee v. The Florida Bar*. The recognition of such interests are especially important in this case because Ms. Williams-Yulee’s status as a public defender and thus member of the public interest bar has the potential to obscure the negative effects that a ruling in her favor will have on the larger social justice bar. Moreover, while the Supreme Court of Florida did conclude there were “compelling interests in preserving the integrity of the judiciary and maintaining the public’s confidence in an impartial judiciary,”⁷ the interests of the public and the practicing bar in judicial integrity are distinct, if related. Most often, the “public” interacts with the courts through attorneys. As attorneys, our professional and personal lives can be intertwined with judges’ lives, and we may have been judges or aspire to be judges ourselves. More importantly, the actions of the judiciary implicate our own professionalism, ethics, and careers.

From the perspective of public interest lawyering, this “first look” Essay argues that four decisions are worth a “second look” when the Court considers *Williams-Yulee*. The next Parts of this Essay discuss these four opinions in turn, in order from the most obvious to least obvious.⁸

II. *REPUBLICAN PARTY OF MINNESOTA V. WHITE*⁹

If the applicable precedent in *Williams-Yulee v. The Florida Bar* could be reduced to a single case, it would be the United States Supreme Court’s closely divided 2002 decision in *Republican Party of Minnesota v. White*. In *White*, the Court held that the Minnesota Supreme Court’s “canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment.”¹⁰ Justice Scalia’s opinion for the Court holding the so-called “announce clause” unconstitutional was augmented by Justice O’Connor’s concurring opinion, which essentially argued that Minnesota, like other states that selected judges through election, had only itself to blame.¹¹ As the

7. *Id.* at 381.

8. *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *In re Hawkins*, No. SC12–2495, 2014 WL 5470745 (Fla. Oct. 30, 2014), *reh’g denied* (Nov. 26, 2014).

9. 536 U.S. 765 (2002).

10. *Id.* at 788.

11. *Id.* (O’Connor, J. concurring). Since her retirement from the Court, Justice O’Connor has been promoting state court merit selection rather than elections. *See, e.g.*, Sandra Day O’Connor, *Take Justice Off the Ballot*, N.Y. TIMES, May 22, 2010, <http://www.nytimes.com/2010/05/23/opinion/23oconnor.html>. In *White*, Justice Kennedy also

final sentence of O'Connor's concurrence phrases it, "If 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."¹² This notion—that once the state allows judicial elections it cannot constitutionally regulate them any differently than it regulates other elections—is at the heart of *Williams-Yulee*. As the petition for certiorari for *Williams-Yulee* argued, the state "cannot have it both ways."¹³

Yet this dichotomy is a false one, for it rests upon the indistinguishability of judicial and political elections, as well as on the equivalency of judicial and political roles to be assumed after a successful election. Justice Ginsburg, dissenting in *White* and joined by three other Justices,¹⁴ observed that while Justice O'Connor may be correct that there is a "fundamental tension" between "the ideal character of the judicial office and the real world of electoral politics,"¹⁵ it is not the Court's role to resolve that tension

by forcing States to choose one pole or the other. Judges are not politicians, and the First Amendment does not require that they be treated as politicians simply because they are chosen by popular vote. Nor does the First Amendment command States that wish to promote the integrity of their judges in fact and appearance to abandon systems of judicial selection that the people, in the exercise of their sovereign prerogatives, have devised.¹⁶

Republican Party v. White deserves a second look by the Court, because it is a closely divided opinion and Justice Ginsburg's dissent remains cogent.

Moreover, the Court should be wary of simply equating the position statements at issue in *White* with the solicitation for funds before the Court in *Williams-Yulee*. Despite the Court's closely divided but robust recognition of money as highly protected political speech in

issued a separate concurring opinion. See *White*, 536 U.S. at 792–796. Kennedy's opinion argued for a categorical approach, stating that "content-based speech restrictions that do not fall within any traditional exception should be invalidated without inquiry into narrow tailoring or compelling government interests." *Id.* at 793 (Kennedy, J., concurring).

12. *White*, 536 U.S. at 792.

13. Petition for a Writ of Certiorari at 31a–32a, *Williams-Yulee v. The Florida Bar*, 138 So.3d 379 (No. 13-1499) (June 17, 2014), 2014 WL 2769040 (citing and quoting *Geary v. Renne*, 911 F.2d 280, 294 (9th Cir. 1990) (en banc) (Reinhardt, J., concurring)).

14. *White*, 536 U.S. at 803 (Ginsburg, J. dissenting). Ginsburg's dissent was joined by Justices Stevens, Souter, and Breyer. Justice Stevens also issued a dissenting opinion, also joined by the three other dissenters.

15. *Id.* at 821. As Justice Ginsburg stated, the "Court has recognized in the past, as Justice O'Connor does today," a "fundamental tension between the ideal character of the judicial office and the real world of electoral politics." *Id.* (citing *Chisom v. Roemer*, 501 U.S. 380, 400 (1991)).

16. *Id.*

the campaign finance cases,¹⁷ an extension of *White*—and it would be an extension—to the solicitations for campaign contributions involved in *Williams-Yulee* would have a disproportionately negative impact on the public interest bar. Simply put: lawyers practicing public interest and lawyers practicing more lucrative types of law are simply not similarly situated in the area of campaign contributions as distinct from assessing a judicial candidate’s statements and reputation. While Canon 7C(1) does not prohibit campaign contributions, it does govern a judicial candidate’s solicitation of these funds, including direct communication with an attorney. It also implicates judicial integrity as related to financial interests in a way that has previously troubled the Court.

III. *CAPERTON V. A.T. MASSEY COAL CO.*¹⁸

Applying the Due Process Clause of the Fourteenth Amendment rather than the First Amendment at issue in *Williams-Yulee* and *White*, a closely-divided Court in *Caperton v. A.T. Massey Coal Co.* found that the failure of Brent Benjamin, a recently-elected justice on West Virginia’s highest court, to recuse himself in a matter involving his major campaign donor¹⁹ was unconstitutional. The contributor, Don Blankenship, was Massey Coal Company’s chairman, executive officer, and president, and a prominent figure in West Virginia, who has since been indicted for his business practices.²⁰

In finding the due process violation, the Court’s opinion, authored by Justice Kennedy, stressed that not every “campaign contribution by a litigant or attorney creates a probability of bias that requires a judge’s recusal.”²¹ The Court described the facts in *Caperton* as “extreme by any measure,”²² and the case as “exceptional,”²³ although perhaps the situation is not as unique as that language implies.²⁴ The Court concluded that “there is a serious risk of actual

17. See, e.g., *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014); *Ariz. Free Enterprise Club’s Freedom Club PAC v. Bennett*, 131 S.Ct. 2806 (2011); *Citizens United v. FEC*, 558 U.S. 310 (2010); *Davis v. FEC*, 554 U.S. 724 (2008).

18. 556 U.S. 868 (2009).

19. “Blankenship’s \$3 million in contributions were more than the total amount spent by all other Benjamin supporters and three times the amount spent by Benjamin’s own committee.” *Id.* at 873.

20. Indictment, *U.S. v. Blankenship*, No. 514-CC-00244 (S.D. W. Va. Nov. 13, 2014), available at <https://s3.amazonaws.com/s3.documentcloud.org/documents/1373174/donald-blankenship-indictment.pdf>, archived at <https://perma.cc/S5KB-6H8Q>.

21. *Caperton*, 556 U.S. at 884.

22. *Id.* at 887.

23. *Id.* at 884.

24. See, e.g., JOHN GRISHAM, *THE APPEAL* (2008) (based on a Mississippi judicial election).

bias—based on objective and reasonable perceptions—when 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.”²⁵

The dissenting opinion by Chief Justice Roberts critiques this rule as “opening the door” to due process claims with an “amorphous ‘probability of bias’ ” that will themselves essentially undermine judicial impartiality.²⁶ Chief Justice Roberts’s opinion contains a list of forty questions that the Court leaves unanswered, including some that focus on lawyers: Does it matter whether the campaign contributions are from a party or a party’s attorney, and if “from a lawyer, must the judge recuse in every case involving that attorney?” And in the Court’s “objective” test for bias, is the relevant lens that of “a reasonable person, a reasonable lawyer, or a reasonable judge?”²⁷

These are genuine concerns, but they also reinforce the Court’s reminder that due process constrains only the “outer boundaries” of judicial conduct. Instead, states “remain free to impose more rigorous standards.”²⁸ This aspect of *Caperton* demands that the Court give the due process concerns regarding recusal because of the lack of impartiality a second look in *Williams-Yulee*. The Court should be careful not to use the First Amendment to limit these “more rigorous standards” that a state enacts in its judicial ethics codes. To be sure, Canon 7C(1) would not have prevented the *Caperton* situation; there is seemingly no accusation that Brent Benjamin personally solicited the \$3 million that Don Blankenship contributed to Benjamin’s campaign to be a justice on the state’s highest court. But Canon 7C(1) could act as a prophylactic to some of the forty open questions that Justice Roberts raised in his dissent. And to the extent that a decision in *Williams-Yulee* could provoke other First Amendment challenges to other judicial canons, the Court should be mindful of *Caperton*’s excess.²⁹

25. 556 U.S. at 884. The Court continued, “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.” *Id.*

26. *Id.* at 902 (Roberts, C.J. dissenting) (stating that opening the door for such claims would “bring our judicial system into undeserved disrepute, and diminish the confidence of the American people in the fairness and integrity of their courts”).

27. *Id.* at 896 (questions twenty-two and twenty-four).

28. *Id.* at 889 (majority opinion).

29. This is true notwithstanding the argument that the very excesses in *Caperton*, including Blankenship’s donation of almost \$2.5 million to “And For The Sake Of The Kids,” a political organization formed under 26 U.S.C. § 527 to support Benjamin’s judicial candidacy, are

Additionally, *Caperton* is a reminder that pronounced inequality is at odds with judicial impartiality. The concern here is not only the *appearance* of judicial impartiality but the reality of implicit judicial bias.³⁰ As Michele Benedetto Neitz has argued, because judges are members of an elite class who are more economically privileged than the “average individual litigant” appearing before them, “they may be unaware of the gaps between their own experiences and realities and those of poor people.”³¹ Indeed, our nation’s highest Court and the Court’s Bar have been increasingly criticized as elitist.³² But even in the so-called lowest courts, it is this implicit bias that puts public interest attorneys at a special risk for implicit bias. Our clients are usually already those who are very unlikely to share similar economic circumstances with our judges; and again, as public interest attorneys, we are less likely to be able to contribute to judicial campaigns, but may feel more likely to comply with a solicitation because we know our clients are already at a disadvantage. Additionally, our opposing clients and counsel are often those who are precisely in the position of being solicited and of answering those solicitations with substantial contributions. Courts may simply be institutions that can be expected to do no more than maintain the status quo. But the United States Supreme Court has, on occasion, intimated otherwise.

attributable to United States Supreme Court decisions. *See, e.g.*, *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc) (stating that the Supreme Court’s decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), “resolves this appeal” and, in “accordance with that decision,” holding that the “contribution limits of 2 U.S.C. § 441a(a)(1)(C) and 441a(a)(3) are unconstitutional as applied to individuals’ contributions” to *SpeechNow.org*).

30. For further discussions, see Raymond J. McKoski, *Judicial Discipline and the Appearance of Impropriety: What the Public Sees Is What the Judge Gets*, 94 MINN. L. REV. 1914, 1973–1984 (2010) (providing an overview and criticism of the “appearance standard” for judicial impartiality); Jeffrey W. Stempel, *In Praise of Procedurally Centered Judicial Disqualification--And a Stronger Conception of the Appearance Standard: Better Acknowledging and Adjusting to Cognitive Bias, Spoliation, and Perceptual Realities*, 30 REV. LITIG. 733, 774–78 (2011) (discussing the current standards of recusal for economic interest and suggesting areas for improvement).

31. Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137, 141 (2013).

32. *See, e.g.*, Joan Biskupic, Janet Roberts, & John Shiffman, *The Echo Chamber: A Small Group of Lawyers and Its Outsized Influence at the U.S. Supreme Court*, REUTERS INVESTIGATES (Dec. 8, 2014), <http://www.reuters.com/investigates/special-report/scotus/>; Dahlia Lithwick, *The 2014 Supreme Court: An Ivy League Clan*, NEW REPUBLIC (Nov. 13, 2014), <http://www.newrepublic.com/article/120173/2014-supreme-court-ivy-league-clan-disconnected-reality>, archived at <http://perma.cc/GEF5-B8LL>.

IV. *SHELLEY V. KRAEMER*³³

The 1948 landmark case of *Shelley v. Kraemer* established that judicial actions are subject to the same Fourteenth Amendment strictures as legislative and executive actions. While *Williams-Yulee* does involve the Supreme Court of Florida imposing a judicial reprimand, it is not the state action doctrine that merits the Court's consideration of *Shelley v. Kraemer*. Instead, *Shelley v. Kraemer* deserves a second look for its message about the responsibility of all courts—and all judges—to achieve equality.

The Court in *Shelley v. Kraemer* held that the state court's enforcement of a racially restrictive covenant regarding the sale and ownership of private property constituted state action necessary to assert the constitutional claim. The Court rejected the view that the state judiciary was outside the Fourteenth Amendment because it was abstaining from action, merely applying settled common law, or merely enforcing a private agreement. The Court also rejected an insidious formal equality argument.³⁴

The power of *Shelley v. Kraemer* is highlighted in Justice Kennedy's opinion for the Court in *Edmonson v. Leesville Concrete Co.*, which synthesized the standard for state action and applied it to a preemptory challenge during voir dire in a civil case.³⁵ In articulating the test to determine whether a particular actor could be considered a state actor, the Court cited *Shelley*—and *Shelley* alone—for its factor “whether the injury caused is aggravated in a unique way by the incidents of governmental authority.”³⁶ In applying this factor, the Court stated that “the injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself.” It continued:

Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds. Within the courtroom, the government invokes its laws to determine the rights of those who stand before it. In full view of the public, litigants press their cases, witnesses give testimony, juries render verdicts, and judges act with the utmost care to ensure that justice is done.³⁷

This attention to the role of judges and courts in the actual work of doing justice is worth replicating in *Williams-Yulee*. It is

33. 334 U.S. 1 (1948).

34. The Court did not accept the argument that the state courts were not violating the Equal Protection Clause because the “state courts stand ready to enforce restrictive covenants excluding white persons.” *Id.* at 21–22.

35. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 614–15 (1991).

36. *Id.* at 622.

37. *Id.* at 628.

related to the noteworthy recusal of three Justices in *Shelley v. Kraemer*. As the opinion recites, “Mr. Justice Reed, Mr. Justice Jackson, and Mr. Justice Rutledge took no part in the consideration or decision of these cases.”³⁸ The common understanding is that these Justices owned property with racially restrictive covenants, although not the property at issue in the case.³⁹ It is difficult to imagine such recusals happening today given current practices.⁴⁰ Yet such recusals deserve a second look in light of the standard set in *Caperton* and the vision of justice articulated in *Shelley*.

For contemporary public interest attorneys, the option of judges recusing themselves because property they own might be less valuable if we prevail—as might be the case in a tenant strike in a small community—is relatively remote. Yet what is real is that, as litigators, we must believe in the ability of judges to be impartial and not to be biased against our clients or against us. And we want not to be placed in a position in which we feel we cannot “offend” a judge who will be making rulings.

V. *IN RE HAWKINS*⁴¹

About six months after the Supreme Court of Florida decided *Williams-Yulee*, it decided *In re: Judith W. Hawkins* and imposed the ultimate sanction in a judicial disciplinary proceeding: removal from the bench.⁴² A look—and then a second look—at *In re Hawkins* elucidates some of the concerns inherent in *Williams-Yulee*.

The charges against Judge Hawkins, a county court judge, revolved around her role as the proprietor of Gaza Road Ministries, featuring her work as an inspirational speaker and author of the book

38. *Shelley v. Kraemer*, 334 U.S. at 23.

39. *See, e.g.*, RICHARD KULGER, *SIMPLE JUSTICE* 254 (1975) (stating that the most widely drawn inference from the recusal of Justices Jackson, Reed, and Rutledge was that they owned or occupied land subject to restrictive covenants); Leland B. Ware, *Invisible Walls: An Examination of the Legal Strategy of the Restrictive Covenant Cases*, 67 WASH. U. L.Q. 737, 761 (1989) (“Three of the nine Supreme Court Justices did not participate in the covenant cases decision. Justices Jackson, Reed and Rutledge recused themselves. No official reason was given but it was widely assumed that they lived in homes that were subject to restrictive covenants.”).

40. *See, e.g.*, James Sample, *Supreme Court Recusal from Marbury to the Modern Day*, 26 GEO. J. LEGAL ETHICS 95, 96–97 (2013) (arguing that while Chief Justice Roberts’s “relatively bare assertion that when it comes to disqualification, the Supreme Court is simply constitutionally and pragmatically different . . . is neither emotionally nor intellectually satisfying, in an imperfect world, his argument is also entirely correct”).

41. No. SC12–2495, 2014 WL 5470745 (Fla. Oct. 30, 2014), *reh’g denied* (Nov. 26, 2014).

42. *Id.* at *14.

Old Stories, New Insights, which is based on biblical stories.⁴³ Some of these charges, found to be true by the Hearing Panel and affirmed by the Supreme Court of Florida, involved Judge Hawkins's selling of her book. She "sold a book to an attorney appearing before her in open court who had asked her about the book and requested a copy"; she "accepted \$15 for a copy of the book at that time."⁴⁴ The Hearing Panel also found:

Another attorney testified that he had a conversation with Judge Hawkins in the courthouse hallway in which she mentioned that she had a book for sale, which the attorney purchased although he was not really interested in the subject. He testified he did not want to offend the judge.⁴⁵

Additionally, the court stated that "Hawkins testified at the hearing that three or four attorneys bought her book, as well as some judicial assistants, some court administration personnel, a judge, two bailiffs, an employee in the probation department, and some court clerks."⁴⁶ There was little certainty about the number of books Judge Hawkins sold and the court found she was not forthcoming with this information.⁴⁷

Judge Hawkins's infractions were not limited to the actual sales of her books: she may have been actively dishonest as well as not forthcoming; she did not pay taxes on the books; and she may have been using state property and personnel to promote her business/ministry.⁴⁸ But Judge Hawkins's book sales were a keystone of the charges against her for judicial misconduct. The book-selling

43. *Id.* at *2. For the Gaza Road Ministries website, see GAZA ROAD MINISTRIES, <http://www.gazaroadministries.com/> (last visited Dec. 23, 2014), *archived at* <http://perma.cc/SD2H-ZSW2>.

44. *Hawkins*, 2014 WL 5470745, at *7.

45. *Id.*

46. *Id.* at *11.

47. As the court stated:

She did not know all the names of those to whom she sold the book, and defended her noncompliance with the order to compel a complete list of purchasers by saying she was under no obligation to create anything, but just to provide what information she had. This conflicted with her earlier statements to the Investigative Panel that she kept a "fairly meticulous list" of those persons to whom she sold the book.

Id.

48. *Id.* at *5, *7–8. The Florida Supreme Court's specific discussion of the work Judge Hawkins's judicial assistant may have done on Gaza Road Ministries raises the specter of the assistant's ability to complain about this work and remain protected from negative employment consequences. *Id.* at *7. In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Court held that a prosecutor did not have First Amendment protection when he disagreed with his supervisors about possible police misconduct because such statements were "pursuant to his official duties." *Id.* at 411. Importantly, while the Court may have expanded First Amendment protections for those seeking elected office, in the same time period it can be seen to have constricted First Amendment rights for public employees. *See, e.g.*, Mark Strasser, *Whistleblowing, Public Employees, and the First Amendment*, 60 CLEV. ST. L. REV. 975, 997 (2013).

charges, as well as the charge that she posted an image of herself wearing her robe on the Gaza Road Ministries website,⁴⁹ are amenable to First Amendment defenses, although Judge Hawkins seemingly failed to raise constitutional issues.

But suppose Judge Hawkins had raised a First Amendment defense grounded in both the Free Speech and Free Exercise Clauses, given the content of both the book and the website. Assuming her litigation were ongoing, one can imagine that she would be eagerly awaiting the Court's decision in *Williams-Yulee*. To the extent that the Court in *Williams-Yulee* acknowledges judicial impartiality as a state interest—even a compelling one—but finds that Canon 7C(1) is not sufficiently narrowly tailored, it would lend credence to Hawkins's First Amendment speech claim. Perhaps there would be an argument that *Williams-Yulee* would be limited to the context of judicial elections, but the Court's decision in *Republican Party v. White* has

49. I have discussed the question of judicial robe-wearing as expression covered by the First Amendment in RUTHANN ROBSON, *DRESSING CONSTITUTIONALLY* 97–100 (2013). While many of the issues involve judges appearing wearing robes in their campaign literature—an issue most similar to that in *Williams-Yulee* and in disarray—the case most relevant to a First Amendment claim by Judge Hawkins is *Jenevein v. Willing*, 493 F.3d 551 (5th Cir. 2007). In *Jenevin*, the Fifth Circuit partially expunged the censure of a Texas judge by the state's commission on judicial ethics “to the extent that it reached beyond” the judge's “use of the courtroom and his robe to send his message.” *Id.* at 562. As part of contentious litigation in 2003 that spawned allegations of bribes, favors, and sexual misconduct, Judge Jenevein held a press conference in the courtroom—and importantly, wore his judicial robe—to announce his withdrawal from the case and his institution of grievance proceedings against the attorney who had made the allegations. *Id.* at 553–54. The attorney, however, filed a grievance against Judge Jenevein for holding the press conference, and the state commission issued a censure against the judge, without addressing the First Amendment defenses the judge had raised. *Id.* at 555–56. Judge Jenevein thereafter brought an action in federal court challenging the constitutionality of the censure. *Id.* at 557. The Fifth Circuit held that while the judge was indeed an employee, the First Amendment doctrine governing government employee speech by emphasizing the divide between matters of public and private concern was inapposite. *Id.* at 557–58. Instead, the court applied strict scrutiny. *Id.* at 558. Considering whether judicial impartiality was a compelling governmental interest, the court held that it could not be gainsaid that the “state's interest in achieving a courtroom that at least on entry of its robed judge becomes a neutral and disinterested temple” was compelling. *Id.* at 559. The state's compelling interest extended to the “judicial use of the robe, which symbolically sets aside the judge's individuality and passions.” *Id.* at 560. On the issue of whether the censure was narrowly tailored, the court had more difficulty separating the content of the judicial statements from their environment. *Id.* at 562. The court found the judge's use of the “trappings of his judicial office to boost his message,” particularly “stepping out from behind the bench, while wearing his judicial robe, to address the cameras,” could constitutionally support a censure. *Id.* at 560. In a limited victory for the state judge, however, the court ruled that the content of the statements could not be constitutionally censured. *Id.* at 562. The Fifth Circuit emphasized that the judge was publicly addressing abuse of process, that the communication was between the judge and “his constituents,” and that it was on a matter of “judicial administration” rather than the merits of a case. *Id.* at 560. See ROBSON, *supra*, at 99.

not been so limited.⁵⁰ Or one might seek to distinguish *In re Hawkins* because Judge Hawkins sold her book in “open court” and in the courthouse hallways, and the Court has certainly recognized severe limitations on the First Amendment in the context of its own Supreme Court building.⁵¹ Nevertheless, the potential of the Court’s decision in *Williams-Yulee* to invalidate a range of judicial canons and their applications needs careful consideration. While “slippery slope,” “parade of horrors,” and “line-drawing” rhetoric can be misused in legal reasoning, the Court in *Williams-Yulee* should take a look—and a second look—at *In re Hawkins*.

From the perspective of public interest attorneys practicing in Hawkins’s county court, the vulnerability of our clients would make the refusal to buy Judge Hawkins’s book risky. This is true even if—and perhaps especially if—one imagined Judge Hawkins might be otherwise well-disposed towards our clients.⁵² Moreover, the religious nature of Judge Hawkins’s book not only enhances her First Amendment claim, it also makes the possibility of coercion more pronounced. Like the attorney who testified he did not want to “offend” the judge and so bought the book, it would be difficult to decline the \$15 purchase. Certainly the courthouse hallway adds to the problem, but I daresay that if I had been at a social engagement with Judge Hawkins—say, a Halloween party—I would have been squeamish when presented with the book.

VI. CONCLUSION

In addition to the four cases I have suggested deserve a “second look”—*Republican Party of Minnesota v. White*; *Caperton v. A.T. Massey Coal Co.*; *Shelley v. Kraemer*; and *In re Hawkins*—the Court

50. For example, the Fifth Circuit in *Jenevein*, discussed *supra* at note 49, cited and quoted *White*. See, e.g., *Jenevein*, 493 F.3d at 559.

51. See, e.g., *United States v. Grace*, 461 U.S. 171, 183–84 (1983); Ruthann Robson, *Occupy Jacket-Wearer Arrested at Supreme Court Building*, CONST. L. PROF BLOG (Jan. 21, 2012), <http://lawprofessors.typepad.com/conlaw/2012/01/occupy-jacket-wearer-arrested-at-supreme-court-building.html>, archived at <http://perma.cc/H4X8-MDXT>; Ruthann Robson, *The First Amendment and the Supreme Court - - - Building*, CONST. L. PROF BLOG (Oct. 20, 2011), <http://lawprofessors.typepad.com/conlaw/2011/10/the-first-amendment-and-the-supreme-court-building.html>, archived at <http://perma.cc/8Y39-LLWH>.

52. For example, the Supreme Court of Florida’s opinion contains a suggestion that Judge Hawkins might have been sympathetic to criminal defendants who were not represented:

Judge Hawkins was found not guilty of the charge that her actions in advising a defendant, who was about to enter a plea, to contact one of three named lawyers and tell them “Judge Hawkins sent you” failed to promote public confidence in the judiciary.

In re Hawkins, 2014 WL 5470745, at *6.

will undoubtedly take a look at the circuit court cases that have split on the issue of First Amendment protections for candidates seeking election to the judiciary. Yet in considering these cases, the Supreme Court of Florida's not-so-subtle comment that federal judges have unelected positions with lifetime appointments is worth more than passing attention.⁵³ It is especially noteworthy as compared with the Supreme Court of Florida's conclusion 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."⁵⁴ The Court's own status as an elite institution in a federalist system merits a careful self-examination.

Additionally, a hard look at practicing attorneys—and as I have suggested, public interest and social justice attorneys—is warranted, if perhaps unlikely. Yet when one circuit court opines that "[n]o one could reasonably believe that a failure to respond to a signed mass mailing asking for donations would result in unfair treatment in future dealings with the judge,"⁵⁵ I wonder about the concept of a "mass mailing"—especially in a small legal community—just as I wonder about the concepts of reasonable belief and unfair treatment. Perhaps I am overly squeamish.

But perhaps it is practicing lawyers—and most of all social justice lawyers—rather than an undifferentiated public who need to believe that those who judge our cases and clients do so with the most impartiality humanly possible. We should not have to worry whether they think we "support" them, or whether our adversaries "support" them. We should not have to curry favor through financial contributions directly requested by a person who is hearing our

53. Footnote 3 of the Supreme Court of Florida's opinion in *Williams-Yulee* reads:

As to the federal courts that have considered this issue—whose judges have lifetime appointments and thus do not have to engage in fundraising—the federal courts are split. Several federal courts have held that laws similar to Canon 7C(1) are constitutional. See *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. of S.Ct. of Pa.*, 944 F.2d 137 (3d Cir.1991). Conversely, other federal courts have held that laws similar to Canon 7C(1) are unconstitutional. See *Carey v. Wolnitzek*, 614 F.3d 189 (6th Cir.2010); *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir.2002).

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

54. *Williams-Yulee*, 138 So.3d at 386.

55. *Carey v. Wolnitzek*, 614 F.3d 189, 205 (6th Cir. 2010).

clients' causes. To do our work, we must continue to have faith that our judges, whether elected or whether appointed to the United States Supreme Court, are not mere politicians.