IMAGE IS EVERYTHING: POLITICS, UMPIRING, AND THE JUDICIAL MYTH

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INTRODUCTION

A. Appearances and Reality Behind the Bench and Behind Home Plate

In his 2005 confirmation hearings, Chief Justice John Roberts famously compared judging to umpiring baseball: "Judges are like umpires. Umpires don't make the rules; they apply them."[1] Under Roberts's view, both law and the rules of Major League Baseball (MLB) are objective, existing apart from the actions and desires of those who enforce them. Neither judges nor umpires are supposed to "make the rules" under the guise of interpreting them.[2]

Further, under the vision of judging and umpiring invoked by the Chief Justice, the *application* of the rules is objective. In arguing that a judge's "job [is] to call balls and strikes and not to pitch or bat,"[3] Roberts suggested that the decisions made by both umpires and judges could be evaluated as objectively right or wrong. Either the pitch is in the strike zone (which is itself defined by the Rule Book) or it is not.[4] Either the judge correctly

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1. *Roberts: 'My job is to call balls and strikes and not to pitch or bat,'* CNN.COM (Sept. 12, 2005), http://www.cnn.com/2005/POLITICS/09/12/roberts.statement/index.html?_s=PM:POLITICS [http://perma.cc/HD3J-TL7S].

2. *Id*.

3. *Id*.

4. *See* OFFICIAL BASEBALL RULES 149 (2015) [hereinafter OFFICIAL RULES] ("The STRIKE ZONE is that area over home plate the upper limit of which is a horizontal line at the midpoint between the top of the shoulders and the top of the uniform pants, and the lower level is a line at the hollow beneath the kneecap. The Strike Zone shall be determined from the batter's stance as the batter is prepared to swing at a pitched ball."); *see also id*. at 157 (diagram of strike zone).

interprets the statute or he does not. Decisions are not supposed to depend on which team or litigant the umpire or judge wants to prevail. And they are not supposed to depend on whether the umpire or judge agrees with the rule or the law.

Roberts's statement has been criticized for inaccurately (or at least incompletely) describing the jobs of both judges and umpires,[5] but his point was memorable and easy to understand. More important than the accuracy of the analogy, however, was the impression Roberts was trying to create—both about his judicial philosophy and about the judiciary itself. That is, it was less important for Roberts that judges *act* like (idealized) umpires than that judges *be thought to act* like them. Roberts was, after all, trying to secure Senate confirmation of his nomination to the Supreme Court. He wanted to assuage fears that he would manipulate the law to serve his favored policy ends, so he claimed to have "no agenda" and promised only to "call balls and strikes," leaving the pitching and batting to the others—presumably Congress, the President, and the states.[6]

The fact that judges, in reality, "make" the law by construing open-ended provisions of the Constitution and by interpreting statutes was beside the point. Neither, for that matter, was it significant for Roberts that umpires, too, have considerable discretion in calling balls and strikes, to say nothing of rules such as obstruction, interference, balks, and the infield-fly rule that even more obviously ask umpires to use their judgment. The important consideration was that judges (and umpires) who are *believed* to be doing no more than applying the law would escape some of the controversy and criticism that they might receive if the full scope of their discretion were realized.

B. Appearances and Reality in Judicial Campaigning

This division between the reality and the appearance of judging is at the heart of *Williams-Yulee v. Florida Bar*, a 2015 case in which the Court, in an opinion by Chief Justice Roberts, upheld a prohibition on the personal solicitation of funds by judicial

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5. *See, e.g.*, Michael P. Allen, *A Limited Defense of (at Least Some of) the Umpire Analogy*, 32 SEATTLE U. L. REV. 525, 526 n.4 (2009).

6. *Roberts: 'My job is to call balls and strikes and not to pitch or bat,' supra* note 1.

candidates.[7] In reaching that decision, the Court limited a prior case, *Republican Party of Minnesota v. White*, which, in an opinion by Justice Scalia, struck down a prohibition on judicial candidates' announcement of their views on disputed legal or political issues.[8] A comparison of the two opinions shows two radically different approaches to the nature of judging and judicial politics. *White* adopts a realistic conception of judging, viewing judges as human beings who make policy. Its central assumption is that the voters in judicial elections should be able to base their votes on differences between judicial candidates that affect the way those candidates are likely to decide cases. *Williams-Yulee* operates from a different premise. In *Williams-Yulee*, it is not reality but appearance that is paramount. The Court downplays the policy-making role of judges and accepts that states have a compelling interest in encouraging the public to believe in an idealized image of the judiciary because that is the image most likely to preserve "public confidence" in—and thus public willingness to follow—the courts.

In this Article, I examine the different approaches that the Court took in *White* and *Williams-Yulee*, contrasting *White*'s focus on reality with *Williams-Yulee*'s focus on appearances. That difference manifests itself in a variety of ways in the opinions, from the political judgment about the value of public involvement in judicial selection to the doctrinal judgment about the application of strict scrutiny and the permissibility of government regulation of campaign speech. The cases diverge as well on the importance of promoting an image of neutral judging, the importance of public participation in judicial selection, and the importance of ensuring that speech limitations are no broader than necessary. In the pages that follow, I address each of these differences.

I. BACKGROUND AND CONTEXT

In 2009, Lanell Williams-Yulee ran for county judge in Florida. She wrote and signed a letter announcing her candidacy and requesting campaign contributions. She then mailed the

7. 135 S. Ct. 1656 (2015).
8. 536 U.S. 765 (2002).

letter to supporters and posted it on her campaign's website.[9] The Florida Bar then disciplined her for violating Florida's Code of Judicial Conduct,[10] which prohibited candidates from "personally solicit[ing] campaign funds."[11]

The Code of Judicial Conduct allowed for an alternative method of fund-raising, however. Although Canon 7(C)(1) of the Code prohibited the *personal* solicitation of contributions by candidates, it permitted the solicitations to be carried out by committees acting on the candidates' behalf:

> A candidate . . . 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.[12]

Under Florida law, these committees were anything but independent of the candidate. As the Supreme Court acknowledged, the state "allow[ed] a judicial candidate to serve as the treasurer of his own campaign committee, learn the identity of campaign contributors, and send thank you notes to donors."[13] Thus, the ban on personal solicitation did very little or nothing to prevent favoritism. Candidates knew who was giving money to their campaigns, and contributors could respond to committees' solicitations knowing that the candidates would be thankful for their support. Potential contributors could also fear that their failure to offer support could lead to retaliation.

Why, then, did Florida bother to prohibit the personal solicitation of campaign funds by candidates? In a word: image. Florida simply thought that it looked bad for judges to be asking for money. The campaign committees were able to do the necessary fundraising, but because of their lower profile and because few people understood the extent of involvement by the candidates themselves, the committees' fund-raising was believed to do less to tarnish the above-the-fray image of the judiciary.

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9. *Williams-Yulee*, 135 S. Ct. at 1663.

10. *Id.*

11. FLA. CODE OF JUDICIAL CONDUCT Canon 7(C)(1) (2015).

12. *Id*.

13. *Williams-Yulee*, 135 S. Ct. at 1663 (citing FLORIDA JUDICIAL ETHICS ADVISORY COMMITTEE, AN AID TO UNDERSTANDING CANON 7, at 51–58 (2014)).

The question before the Supreme Court, then, was whether Williams-Yulee's personal involvement in her campaign solicitation—undoubtedly activity protected by the First Amendment—could be limited because Florida thought that it undermined the State's preferred image of the judiciary. The Supreme Court held that it could. The decision is disappointing, as it allows the government to limit the electoral speech of candidates seeking support from constituents in order to influence the public to have a more positive—and unrealistic—image of part of the government.

The ban on personal fundraising is likely to be little more than a trivial burden for most judicial candidates. In fact, it might be a relief for some candidates who are happy to leave the personal fundraising appeals to others. And, as noted, there are plenty of alternative fundraising methods available to candidates. Consequently, the immediate impact of *Williams-Yulee* may not be terribly harmful for the candidates, the voters, or the institution of an elected judiciary. But the principle that speech can be limited to prop up an idealistic and unrealistic image of government is a dangerous one. For elections and electoral speech to fulfill their democratic promise and serve as a check on the government, they must be free of control by the government. And while we accept that some limits on electoral speech are necessary to serve compelling ends, such as protecting access to the polls,[14] the government should not be able to limit speech to make sure that the public thinks well of the government.

II. NARROWLY TAILORED TO A COMPELLING INTEREST IN KEEPING UP APPEARANCES

Williams-Yulee's focus on appearances was apparent from the very beginning of the opinion. In its second paragraph, the Court announced its conclusion: "A State may *assure its people* that judges will apply the law without fear or favor—and without having personally asked anyone for money."[15] This concern with appearances remained the focus of the opinion's

14. *See* Burson v. Freeman, 504 U.S. 191, 211 (1992) (upholding campaign-free zones around polling places).

15. *Williams-Yulee*, 135 S. Ct. at 1662 (emphasis added).

analysis of whether Florida's ban on campaign solicitations could survive strict scrutiny.

Strict scrutiny, of course, requires that a law be narrowly tailored to serve a compelling state interest. Accordingly, the initial step for a court is to determine what interests the law serves and to decide whether those interests qualify as compelling. In *Williams-Yulee*, the Court held that there was a compelling interest in establishing and maintaining the proper judicial image. In the Court's words, the government's compelling interest was "in preserving public confidence in the integrity of the judiciary."[16] The concern was not necessarily preserving the *actual* integrity of the judiciary, but, rather, in ensuring that the public *believes in* the integrity of the judiciary. The Court went on to explain how solicitation of campaign funds might be thought to undermine this interest in public appearances: "[T]he public may lack confidence in a judge's ability to administer justice without fear or favor if he comes to office by asking for favors."[17] Again, the Court was not suggesting that personal solicitation of funds *actually* led to judicial favoritism—only that "supplicat[ing] campaign donors" would lead to "diminishing *public confidence* in judicial integrity."[18]

White's approach was completely different. In that case, too, the state claimed that its restriction on political speech was narrowly tailored to protect judicial impartiality and the appearance thereof. However, unlike *Williams-Yulee*, which focused on appearances, *White* focused on whether impartiality would *actually* be threatened by the prohibited speech. The Court first tried to determine which of three possible kinds of "impartiality" the state might have wanted to promote: lack of favoritism between parties, lack of preconceived legal views, and open-mindedness.[19] Ultimately, the Court found each kind of impartiality insufficient to justify the Minnesota's speech restriction. But more importantly for present purposes, as to each kind of impartiality, the Court considered the actuality and appearance of impartiality together.

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16. *Id*. at 1666.
17. *Id*.
18. *Id*. (emphasis added).
19. Republican Party of Minn. v. White, 536 U.S. 765, 775–78 (2002).

The Court in *White* held that the speech restriction was not narrowly tailored to promote either the actuality or appearance of a judiciary that was free from party bias.[20] Because the banned statements related to issues, rather than to parties, the Court held that the ban was "barely tailored to serve that interest *at all*."[21] In other words, the *White* Court took seriously the requirement that states not suppress any more speech than absolutely necessary.[22] Even though it was a compelling interest—indeed, it is part of the constitutional command of due process[23]—to have judges who were not biased for or against a party to a case, banning speech on disputed legal or political issues did little to protect against that kind of bias.

The other potential meanings of "impartiality" fared no better. *White* rejected the notion that states would have a compelling interest in ensuring that judges lack preconceptions on legal issues, based on the Court's realistic evaluation of the judicial decision-making process. The Court forthrightly treated judges as human beings who come to the bench with "at least some tentative notions" of the law.[24] Accordingly, judges are not—and should not be—"impartial" in the sense of lacking all preconceptions on legal issues. Given this conclusion, the interest in promoting an *appearance* of that kind of impartiality fell flat as well: "[S]ince avoiding judicial preconceptions on legal issues is neither possible nor desirable, pretending otherwise by attempting to preserve the 'appearance' of that type of impartiality can hardly be a compelling state interest either."[25] In this way, *White* tied a state's interest in the appearance of impartiality to the state's interest in achieving

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20. *Id.* at 776.

21. *Id.*

22. For cases applying the First Amendment's least-restrictive-means test, see, e.g., Ashcroft v. ACLU, 542 U.S. 656, 666 (2004); Sable Commc'ns of Cal. v. FCC, 492 U.S. 115, 126 (1989); Ward v. Rock Against Racism, 491 U.S. 781, 798–800 (1989).

23. *See* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 876 (2009); Tumey v. Ohio, 273 U.S. 510, 523 (1927).

24. *White*, 536 U.S. at 777 (quoting Laird v. Tatum, 409 U.S. 824, 835 (1972) (memorandum opinion of Rehnquist, J.)). *White*'s own language uses Justice Scalia's characteristically more direct style: "[I]t is virtually impossible to find a judge who does not have preconceptions about the law." *Id*.

25. *Id*. at 778.

actual impartiality, with a realistic analysis about who judges are and how they decide cases.

The kind of impartiality at issue in *Williams-Yulee*—favoritism for donors—is unquestionably more significant than the imaginary no-preconceptions kind of impartiality discussed in *White*. Nevertheless, *White*'s more general point seems to be that the government does not have a compelling interest in creating an appearance that differs from reality. Particularly when those appearances relate to candidates for elective office, that point would seem to be a fundamental precept of democratic government.[26]

The third potential meaning of "impartiality"—openmindedness—also failed. The Court did not decide whether openmindedness could ever be a compelling state interest, but it rejected the interest as presented in *White*, finding the state regulation to be "woefully underinclusive."[27] The state law banned campaign statements ostensibly as a way of promoting openmindedness, but "statements in election campaigns are such an infinitesimal portion of the public commitments to legal positions that judges (or judges-to-be) undertake, that this object of the prohibition is implausible."[28]

White did not decide whether promoting an appearance of impartiality could ever justify a suppression of political speech, but it implied that such an interest would not be sufficient to justify a restriction on speech unless, at a minimum, the state had a compelling interest in actually achieving impartiality. And if the state regulations were "woefully underinclusive" ways of actually achieving impartiality, then the state could not be seen as having a compelling interest; after all, if the interest were truly compelling, then the state would not have regulated in an underinclusive manner.[29]

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26. For an extended argument about the impropriety of restricting judicial campaign speech to prop up an unrealistic vision of the judiciary, see Michael R. Dimino, *Pay No Attention to That Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians*, 21 YALE L. & POL'Y REV. 301 (2003).

27. *White*, 536 U.S. at 783.

28. *Id*. at 779.

29. *Cf*. Carey v. Brown, 447 U.S. 455, 465 (1980) (suggesting that residential privacy was not a "transcendent objective" of a law banning residential picketing but exempting some labor picketing).

Williams-Yulee showed none of this concern with narrow tailoring. The Court in that case allowed the state to presume that its speech restriction served the interest in protecting public confidence in the judiciary. The Court did not require the state to show that the restriction was necessary to achieve that interest, nor did the Court require the state to show that a narrower restriction would have been less effective. On the contrary, *Williams-Yulee* permitted the state to restrict political speech in order to promote its preferred image of the judiciary even while acknowledging that the law did nothing to improve the judiciary's actual impartiality: "In short, personal solicitation by judicial candidates implicates a different problem than solicitation by campaign committees. *However similar the two solicitations may be in substance*, a State may conclude that they present markedly different *appearances* to the public."[30]

Williams-Yulee's abandonment of narrow tailoring was most apparent in its disregard of the underinclusivity of Canon 7(C)(1). The law, recall, forbade candidates from personally soliciting contributions, but it permitted the candidates to be aware of the contributors and even to write thank-you notes in appreciation of donations. It was thus clear that there was a risk of favoritism despite the ban on personal solicitations. The Court brushed this problem aside:

> These accommodations [(i.e., allowing candidates to write thank-you notes and raise money through committees)] reflect Florida's effort to respect the First Amendment interests of candidates and their contributors—to resolve the "fundamental tension between the ideal character of the judicial office and the real world of electoral politics." . . . We will not punish Florida for leaving open more, rather than fewer, avenues of expression, especially when there is no indication that the selective restriction of speech reflects a pretextual motive.[31]

But the very point of requiring that speech restrictions not be too underinclusive is to guard against pretextual reasons for limiting speech that might be hard to uncover otherwise.[32] By an-

30. *Williams-Yulee*, 135 S. Ct. at 1669 (emphases added).

31. *Id*. at 1669–70 (quoting Chisholm v. Roemer, 501 U.S. 380, 400 (1991)).

32. I have previously written of my suspicion that the move to rein in or eliminate judicial elections has an ulterior motive, namely, protecting judicial power and the public policies supported by the judiciary but not by the general public.

nouncing that it was not going to "punish" the state for enacting a narrow restriction on political speech, the Court declined to exercise one of the most important functions of the First Amendment: ensuring that limits on speech do not privilege one set of speakers or one set of viewpoints—such as the viewpoint that judges should enjoy public confidence in their integrity.

Perhaps even more troubling than the Court's disregard of the Florida law's underinclusivity is its disregard of the law's *over*inclusivity. Again, the Court appeared to acknowledge that the law regulated more speech than necessary. For example, Williams-Yulee's "personal" solicitation of funds took the form of a letter mailed to potential supporters and posted online.[33] It is difficult to see how such a solicitation would undermine the judicial image any more than would a solicitation by a campaign committee, and the Court admitted that the state's interest "may be implicated to varying degrees in particular contexts."[34] Nevertheless, the Court held that the law was not too overinclusive, deferring to the state's judgment "that personal appeals for money by a judicial candidate inherently create an appearance of impropriety that may cause the public to lose confidence in the integrity of the judiciary."[35] Such an argument appears to lack a limiting principle; while purporting to apply strict scrutiny, the opinion defers to the judgment of the state and permits it to suppress speech without demonstrating that the prohibited speech actually threatens the interest the state is claiming to protect.

Perhaps most worrisome of all, the Court explained its unwillingness to require "perfect tailoring" by saying that it was "impossibl[e]" to expect the state to meet such a standard "when the State's compelling interest is as intangible as public confidence in the integrity of the judiciary."[36] It seems that the harder it is for the state to prove that it needs to suppress speech, the easier it will be for the state to enact a speech restriction.

See Michael R. Dimino, Sr., *Counter-Majoritarian Power and Judges' Political Speech*, 58 FLA. L. REV. 53 (2006).

33. Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1663 (2015).

34. *Id.* at 1661.

35. *Id*.

36. *Id*. at 1671.

Allowing states to interfere with constitutional rights because of a vague concern about "appearances" and "public confidence" can lead to dangerous consequences decried alike by the right and the left. Two examples: In the field of campaign finance, supporters of restrictions on contributions and expenditures cite an "appearance of corruption" as a justification for restricting that form of campaign speech, while opponents have scoffed at such an argument and have demanded more direct evidence of corruption.[37] In cases challenging the constitutionality of voter-identification requirements, on the other hand, it was supporters of the laws (mostly conservatives) who said that such regulations promote public confidence in the integrity of elections. It was liberals who were left arguing that states should not be able to restrict access to the ballot without evidence of actual voter fraud.[38] If appearances suffice to limit constitutional rights, courts may even be creating a perverse incentive for pro-regulatory forces to create a false buzz about a problem (for example, political corruption or voter fraud) to justify the regulatory solution (for example, campaign-finance restrictions or voter-identification requirements). Whichever side of the political spectrum is helped or hurt, the "intangible" goal of keeping up appearances is a flimsy justification for restricting constitutional rights.

III. "JUDGES ARE NOT POLITICIANS"[39]

The public dislikes and distrusts politicians. It is therefore not surprising that the Florida Supreme Court, which adopted the state's Code of Judicial Conduct, wished to create an image of judges as removed from politics and independent from the influences and favoritism that people believe infect the process of electing members of the other branches. But the government

37. To cite only the most prominent recent example, consider *Citizens United v. FEC*, 558 U.S. 310, 360 (2010) ("Ingratiation and access, in any event, are not corruption.").

38. *See* Crawford v. Marion County Election Bd., 553 U.S. 181, 197 (2008) (Stevens, J.) (plurality opinion) ("While that interest is closely related to the State's interest in preventing voter fraud, public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process.").

39. *Williams-Yulee*, 135 S. Ct. at 1662 (typeface altered).

should not be able to take one group of elected government officials, call them "non-politicians," and use that label to justify a restriction of political speech. Doing so might raise the public's esteem for those officials, but the efficacy of elections as a way for the public to influence government depends on voters having a realistic appraisal of the candidates and the offices that are chosen by election. If voters have a misguided impression, they will be unlikely to choose candidates wisely. And when that misimpression is fostered by the government through a ban on political speech, there is a substantial risk that the government is limiting political speech so as to favor the election of the government's favored candidates—even when the public left to its own devices would make other choices.

The Court in *White* was troubled by that possibility. Although it never came out and announced that judges were politicians, it did draw parallels between judges and the politicians in the other branches.[40] Specifically, it treated elected judges, like other politicians, as policy-makers who have considerable discretion in deciding cases and "mak[ing] law,"[41] and so it recognized that the selection of particular judges affects the policies that are made by courts. This policy-making authority and discretion mean that judges in "the American system" are part of the structure of "representative government" and explain the public's desire to make judges accountable to the people.[42] As *White* noted, "Not only do state-court judges possess the power to 'make' common law, but they have the immense power to shape the States' constitutions as well. Which is precisely why the election of state judges became popular."[43]

Whereas *White* relied on political-speech cases involving other kinds of elections and drew parallels between those elections and judicial ones, *Williams-Yulee*'s approach was to announce

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40. Republican Party of Minn. v. White, 536 U.S. 765, 783–84 (2002) ("[W]e neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office. . . . But in any case, [the dissent] greatly exaggerates the difference between judicial and legislative elections.").

41. *Id*. at 784 n.12 ("[Even] the judges of inferior courts *often* 'make law,' since the precedent of the highest court does not cover every situation, and not every case is reviewed.").

42. *Id*. at 784.

43. *Id*. (citation omitted).

that judicial elections are different from other kinds of elections, and "therefore, our precedents applying the First Amendment to political elections have little bearing on the issues here."[44] But *Williams-Yulee* elided the crucial question of whether the government should be able to impose its vision of the proper judicial role. Its implicit answer was that the government could indeed impose an umpireal vision of the judge who simply followed the law, but *White*'s approach was more democratic. *White* insisted that it was not the role of the government to tell the electorate how to vote or to limit the issues that the voters should consider, whether the voters were selecting a governor, mayor, legislator, or judge: "'It is simply not the function of government to select which issues are worth discussing or debating in the course of a political campaign.' We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election."[45] Thus, *White* in effect held that the states could not decree to voters: 'judges are not politicians; therefore, information about the candidates' political opinions is irrelevant and the candidates can be prohibited from disclosing that information.' Rather, *White* interpreted the First Amendment as giving the *voters* the right to decide what information was relevant—even if the voters were acting on the assumption that judges were just as political as legislators.

Williams-Yulee exhibits a much greater degree of trust in government to regulate political speech than *White* did—indeed, a greater degree of trust than did perhaps any modern precedent involving political speech outside of the campaign-finance context. *Williams-Yulee*'s description of the "independent" judicial role followed (and cited) both the *dissent* in *White* and Justice O'Connor's concurrence, in which she attacked judicial elections.[46] Those opinions play up judges' obligation to follow the law regardless of public opinion. And while *Williams-Yulee* cited the *White* majority as well, it selectively drew on that opinion to make it appear as if *White* highlighted, rather than downplayed,

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44. *Williams-Yulee*, 135 S. Ct. at 1667 (2015); *see also id*. at 1672 ("[A] State has compelling interests in regulating judicial elections that extend beyond its interests in regulating political elections, because judges are not politicians.").

45. *White*, 536 U.S. at 782 (quoting Brown v. Hartlage, 456 U.S. 45, 60 (1982)).

46. *See Williams-Yulee*, 135 S. Ct. at 1667.

the differences between judges and other government officials. *Williams-Yulee* described *White* this way: "As we explained in *White*, States may regulate judicial elections differently than they regulate political elections, because the role of the judge differs from the role of politicians."[47] But *White* actually only *assumed* that some greater restriction of judicial campaigns was permissible: "*[E]ven if* the First Amendment allows greater regulation of judicial election campaigns than legislative election campaigns, the announce clause still fails strict scrutiny . . . . But in any case, [the dissent] greatly exaggerates the difference between judicial and legislative elections."[48]

Williams-Yulee argued that "[p]oliticians are expected to be appropriately responsive to the preferences of their supporters," but "a judge is not to follow the preferences of his supporters, or provide any special consideration to his campaign donors."[49] Instead, a judge is to strive for "'fairness'" and "'independen[ce], with nothing to influence or controul him but God and his conscience.'"[50] *Williams-Yulee* elevated this vision of the judicial role—which is in some tension with the practice of electing judges—over candidates' right to appeal personally to potential supporters and ask for their assistance. *White*, on the other hand, was less sanguine about the power of independent jurists to make policy while responsible to no one but "'God and [their] conscience[s].'"[51]

To illustrate the immense policy-making capability of state courts, *White* cited a single case, which, at the time, seemed to represent the height of judicial adventurism.[52] The case was *Baker v. State*, which interpreted the Vermont constitution to require the state to provide same-sex couples with the benefits available to married couples.[53] Clearly, the *Baker* decision was an exercise of policy-making authority, as the justices on the Vermont Supreme Court were not bound to issue such a deci-

47. *Id*.

48. *White*, 536 U.S. at 783–84.

49. *Williams-Yulee*, 135 S. Ct. at 1667.

50. *Id*. (quoting Address of John Marshall, *in* PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829–1830, at 616 (1830)).

51. *Id.*

52. *White*, 536 U.S. at 784.

53. 744 A.2d 864 (Vt. 1999) (cited in *White*, 536 U.S. at 784).

sion—at the time, no court had interpreted any American constitution to require states to treat same-sex relationships as equivalent to marriages. Ironically, only two months after Chief Justice Roberts wrote in *Williams-Yulee* about the need to protect the image of the judiciary as non-political, he dissented when the Supreme Court itself held, in *Obergefell v. Hodges*, that the United States Constitution protected the ability of couples to enter same-sex marriages. [54] The Chief Justice criticized the majority for reaching a policy-driven result—one he believed inconsistent with the limited judicial role he had invoked in *Williams-Yulee* as a justification for limiting the political speech of supposedly non-political judicial candidates.[55] One wonders whether he was rethinking his position in *Williams-Yulee* that judges were fundamentally different from politicians when he wrote in *Obergefell*:

> The majority's decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedent. The majority expressly disclaims judicial "caution" and omits even a pretense of humility, openly relying on its desire to remake society according to its own "new insight" into the "nature of injustice." As a result, the Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?[56]

White recognized that where such policy choices are made by the judiciary, a state's electorate quite naturally would want to exert some democratic control over the courts. The judicial image championed by *Williams-Yulee* is hard to square with such an exercise of power, and it is difficult to understand how Florida could have a compelling interest in convincing its citizens to believe in an unrealistic image of the judiciary—an image

54. 135 S. Ct. 2584 (2015).

55. Chief Justice Roberts himself has been attacked for deciding cases on policy grounds rather than through a neutral application of the law. *See, e.g.*, King v. Burwell, 135 S. Ct. 2480, 2496–2507 (2015) (Scalia, J., dissenting)).

56. *Obergefell*, 135 S. Ct. at 2612 (Roberts, C.J., dissenting) (citation omitted).

that Chief Justice Roberts himself exposed as a sham mere months later.[57]

Williams-Yulee imagines a choice between fair courts and ones beholden to financial supporters—or at least ones that appear to be beholden to financial supporters. It calls to mind a judge deciding a case where the law is relatively clear—where the judge's job is "to hold the balance nice, clear and true."[58] The policy-making role of judges is nowhere discussed, and similarly absent is any acknowledgement that judges who are independent enough to ignore the public are also independent enough to use their discretion to enact their policy preferences through their judicial decisions.

White, on the other hand, imagines a choice between judges who make policy in an accountable fashion, and those who make policy undemocratically, unaccountably, and based on the preferences of the judges themselves. In this way, the conflict between *White* and *Williams-Yulee* can be seen as being based on two complementary fears: *White* feared a judiciary run amok, and *Williams-Yulee* feared a judiciary that was the lackey of its financial supporters—or that would be perceived as such.

CONCLUSION

Ironically, given how much baseball fans love to hate umpires, Chief Justice Roberts's analogy has made umpires our national judicial ideal.[59] The ideal departs from reality, however, in two respects: Umpires are not the passive, detached ad-

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57. Recently, however, Chief Justice Roberts has returned to the judges-are-sports-officials-and-not-politicians theme. *See* Robert Barnes, *The political wars damage public perception of Supreme Court, Chief Justice Roberts says*, WASH. POST (Feb. 4, 2016), https://www.washingtonpost.com/politics/courts_law/the-political-wars-damage-public-perception-of-supreme-court-chief-justice-roberts-says/2016/02/04/80e718b6-cb0c-11e5-a7b2-5a2f824b02c9_story.html [https://perma.cc/WW9M-U3WS] (reporting on a speech in which the Chief Justice said that "partisan extremism is damaging the public's perception of the role of the Supreme Court, recasting the justices as players in the political process rather than its referees.").

58. *Williams-Yulee*, 135 S. Ct. at 1667 (quoting Tumey v. Ohio, 273 U.S. 510, 532 (1927)).

59. The comparison to judges would flatter some umpires, but some already have higher opinions of themselves. *See* DOUG HARVEY & PETER GOLENBOCK, THEY CALLED ME GOD: THE BEST UMPIRE WHO EVER LIVED (2014).

judicators that the analogy calls to mind, and neither are judges. Rule books are full of provisions that recognize the discretion of sports officials, and American statutory law is full of provisions that recognize the discretion of judges (particularly trial judges, who are most analogous to the umpires in Chief Justice Roberts's analogy). In large part, judicial elections exist because states recognize that different judges will exercise their discretion in different ways, and therefore the choice of judges affects the outcomes of cases.

White embraced a realistic conception of judging that recognized the discretion that judges exercise in making policy. *Williams-Yulee* abandoned that realistic conception. *Williams-Yulee* seems to acknowledge that judges do exercise discretion but consciously allows states to create a false image of robotic, dispassionate, "impartial" judges who resemble Chief Justice Roberts's umpireal ideal.

Democratic self-government, however, requires voters to have a realistic assessment of government and its officials. The Court has often recognized that the interest in the free flow of information is at its zenith in the context of elections,[60] and that interest is no less powerful when judges, rather than legislators or executive officials, are on the ballot. By allowing states to limit speech in order to promote an unrealistic image of the judiciary, *Williams-Yulee* elevates public confidence in the judiciary over what is perhaps the most important First Amendment value of all: political truth.

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60. *See, e.g.*, Mills v. Alabama, 384 U.S. 214, 218–19 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.").