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COMMENT

Williams-Yulee and the Anomaly of Campaign Finance Law

In 2015, the U.S. Supreme Court held in *Williams-Yulee v. Florida Bar* that states may prohibit candidates for judicial office from personally soliciting campaign donations in order to protect the appearance of judicial integrity.[1] For only the third time in its history, the Court upheld a law subjected to strict scrutiny under the First Amendment's Free Speech Clause.[2] Many commentators noted that the opinion employed a heavily watered-down version of strict scrutiny analysis to reach this result.[3] Indeed, as Justice Alito's dissent stated, the judicial ethics canon at issue was "about as narrowly tailored as a burlap bag."[4] As the decision filters down into the lower courts and into other areas of law, *Williams-Yulee*'s forgiving form of tailoring analysis could unduly dilute what should be the most protective level of judicial scrutiny. There is already

1. 135 S. Ct. 1656, 1657 (2015).

2. The Court achieved a similar result in both *Holder v. Humanitarian Law Project*, 561 U.S. 1, 39 (2010), and *Burson v. Freeman*, 504 U.S. 191, 211 (1992).

3. *See, e.g.*, Floyd Abrams, *When Strict Scrutiny Ceased To Be Strict*, SCOTUSBLOG (Apr. 30, 2015, 9:47 AM), http://www.scotusblog.com/2015/04/symposium-when-strict-scrutiny-ceased-to-be-strict [http://perma.cc/9QTJ-8MEM]; Bob Corn-Revere, *For Judges Only*, SCOTUSBLOG (May 4, 2015, 4:36 PM), http://www.scotusblog.com/2015/05/symposium-for-judges-only [http://perma.cc/V93M-APGZ]; Robert D. Durham, *Yes, It Can Hurt Just To Ask*, SCOTUSBLOG (May 4, 2015, 1:18 PM), http://www.scotusblog.com/2015/05/symposium-yes-it-can-hurt-just-to-ask [http://perma.cc/EH4U-ZVU4]; Noah Feldman, *Roberts Plays Politics by Denying Judges Are Political*, BLOOMBERGVIEW (Apr. 29, 2015, 3:07 PM), http://www.bloombergview.com/articles/2015-04-29/roberts-plays-politics-by-denying-judges-are-political [http://perma.cc/M9SS-FN66]; Ilya Shapiro, *The Judicial-Elections Exception to the First Amendment*, SCOTUSBLOG (May 4, 2015, 10:09 AM), http://www.scotusblog.com/2015/05/symposium-the-judicial-elections-exception-to-the-first-amendment [http://perma.cc/BYD9-W43F].

4. *Williams-Yulee*, 135 S. Ct. at 1685 (Alito, J., dissenting).

some evidence, albeit limited, of such dilution.[5] Taken at face value, then, *Williams-Yulee*'s tailoring analysis could fundamentally alter First and Fourteenth Amendment doctrine.[6]

Williams-Yulee was not a fluke. Rather, it was the result of the Court's treatment of many campaign finance regulations as core speech restrictions subject to strict scrutiny. When the overwhelming force of strict scrutiny analysis meets an equally powerful interest, such as judicial integrity, one or the other must fall. The Court ultimately chose to abandon the former. Yet there is a legally sound alternative that the Court did not consider. Instead of struggling within the confines of their strict scrutiny framework, thereby damaging its structure, the Justices should simply have applied a different framework. This Comment argues that the Court could have avoided the First Amendment dilemma in *Williams-Yulee*—and could prevent similar dilemmas in the future—by deciding campaign finance cases under its broader election law doctrine, rather than its pure First Amendment doctrine.[7]

The Court's analysis of other aspects of the election process—such as ballot access, political party activities, and voting rights—has evolved along a different track from that of campaign finance. In a series of cases, most notably *An-*

5. *See, e.g.*, Free Speech Coal., Inc. v. Att'y Gen., 825 F.3d 149, 164 (3d Cir. 2016) ("By remanding for an application of strict scrutiny we are not 'dooming' the Statutes as the dissent suggests . . . . Recently, the Supreme Court, in a First Amendment challenge to Florida's judicial conduct rules regarding campaign solicitations, held that the regulation at issue was 'one of the rare cases in which a speech restriction withstands strict scrutiny.'"); Hodge v. Talkin, 799 F.3d 1145, 1150 (D.C. Cir. 2015) ("The Supreme Court recently, in its just-completed Term, strongly reinforced the [judicial integrity] interest's vitality, along with the government's considerable latitude to secure its realization even through speech-restrictive measures.").

6. As applied to the federal government, the tailoring analysis could also alter jurisprudence under the Fifth Amendment's Due Process Clause.

7. By "pure" or "traditional" First Amendment doctrine, I mean the analysis that courts apply to garden-variety free speech or free association cases. Generally speaking, "[l]aws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" Citizens United v. FEC, 558 U.S. 310, 340 (2010) (quoting FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 464 (2007)). The Court applies a similar analysis to burdens on free association. *See* Eu v. S.F. Cty. Democratic Cent. Comm., 489 U.S. 214, 225 (1989). The idea of a "traditional" analysis is, by necessity, "an egregious oversimplification"; regulations "are measured by . . . context-specific First Amendment principles—rather than some undifferentiated, 'general' First Amendment rule." Richard H. Pildes, *Elections as a Distinct Sphere Under the First Amendment*, *in* MONEY, POLITICS, AND THE CONSTITUTION: BEYOND *CITIZENS UNITED* 19, 28 (Monica Youn ed., 2011). Similarly, the phrase "election law doctrine" is a simplifying shorthand, as discussed *infra*.

derson v. Celebrezze[8] and *Burdick v. Takushi*,[9] the Supreme Court developed a flexible balancing test to determine the constitutionality of most election regulations.[10] The *Burdick* test, as this balancing act is sometimes called, is the closest standard the Court has to a Grand Unified Theory of Election Law.[11] By folding campaign finance into the *Burdick* framework, the Court could decide cases like *Williams-Yulee* without invoking strict scrutiny, and without creating negative repercussions throughout First and Fourteenth Amendment law.

This Comment enters an existing debate over how courts should analyze campaign finance laws and other election regulations. Judges and authors have noted that the Court has left campaign finance out of the jurisprudential framework for election law cases.[12] Scholars have sparred over whether this sit-

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8. 460 U.S. 780, 789 (1983) (stating that "[c]onstitutional challenges to specific provisions of a State's election laws . . . cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions," and setting out for the first time the balancing test now used to evaluate many election regulations (quoting Storer v. Brown, 415 U.S. 724, 730 (1974))).

9. 504 U.S. 428, 434 (1992) (elaborating on the standard from *Anderson*, and stating that "when [First and Fourteenth Amendment] rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance,'" but "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions" (quoting Norman v. Reed, 502 U.S. 279, 289 (1992); *Anderson* 460 U.S. at 788)).

10. The test developed to its current formulation in *Crawford v. Marion County Election Board*, 553 U.S. 181, 189-91 (2008) (plurality opinion).

11. Physicists use the phrase "grand unified theory" to describe theories that attempt to unite the four fundamental forces of nature: the strong and weak nuclear forces, electromagnetism, and gravity. *See* NEIL DEGRASSE TYSON ET AL., WELCOME TO THE UNIVERSE: AN ASTROPHYSICAL TOUR 351 (2016). While no other scholar appears to have used this phrase to describe the Court's balancing test in *Burdick*, some have noted that this test is a unified form of analysis employed across many areas of election law. *E.g.*, Christopher S. Elmendorf & Edward B. Foley, *Gatekeeping vs. Balancing in the Constitutional Law of Elections: Methodological Uncertainty on the High Court*, 17 WM. & MARY BILL RTS. J. 507, 510-11 (2008); Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283, 292 (2014). The Court also does not currently analyze gerrymandering or "one person, one vote" claims under the *Burdick* test. *See* Harris v. Ariz. Indep. Redistricting Comm'n, 136 S. Ct. 1301, 1306 (2016) ("[T]he Constitution permits deviation [from one person, one vote] when it is justified by 'legitimate considerations incident to the effectuation of a rational state policy.'" (citation omitted)); Shaw v. Reno, 509 U.S. 630, 643 (1993) (subjecting racial gerrymanders to strict scrutiny).

12. VanNatta v. Keisling, 151 F.3d 1215, 1221 (9th Cir. 1998) (Brunetti, J., concurring in part and dissenting in part); Green Party of Conn. v. Garfield, 648 F. Supp. 2d 298, 350 (D. Conn. 2009), *aff'd in part, rev'd in part*, 616 F.3d 213 (2d Cir. 2010); James Bopp, Jr., *Constitutional Limits on Campaign Contribution Limits*, 11 REGENT U. L. REV. 235, 243 n.50 (1999); *see also* R. Randall Kelso, *The Structure of Modern Free Speech Doctrine: Strict Scrutiny, Intermediate Review, and "Reasonableness" Balancing*, 8 ELON L. REV. 291, 307-09, 377-87 (2016) (compar-

uation should be changed and, if so, what campaign finance doctrine should look like.[13] At least two authors have directly advocated for using some form of balancing analysis in campaign finance challenges, though neither proposes using the *Burdick* test.[14] By explicitly arguing that the Court should fold campaign finance law into the *Burdick* test, this Comment adds a different perspective to a growing literature debating whether and how to unify the domains of election law. It also provides a new way to examine *Williams-Yulee* itself. As *Williams-Yulee* is a relatively new decision, it has not yet generated substantial academic scholarship. Several early commentators lamented the Court's approach to strict scrutiny analysis, but many of them simply argued that the Court should have decided the case the other way.[15] This Comment, by contrast, situates *Williams-Yulee* in a broader framework, reexamining the divide between the campaign finance and election law doctrines.

This Comment proceeds in two Parts. Part I discusses the Court's ruling in *Williams-Yulee* and explores how the analysis developed to this point. It then discusses *Williams-Yulee*'s potential to affect First and Fourteenth Amendment cases. Part II lays out an alternative jurisprudential path. It describes how campaign finance law diverged from the rest of election law, explains the modern *Burdick* test, and shows how the test's application would affect the analysis in

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ing the "exacting scrutiny" used in campaign finance cases with the "reasonableness balancing" test used in voting rights cases).

13. For pieces arguing that campaign finance does not involve the same need to regulate electoral structure that underlies the *Burdick* test, see, for example, John O. McGinnis, *Neutral Principles and Some Campaign Finance Problems*, 57 WM. & MARY L. REV. 841, 907-11 (2016); and Geoffrey R. Stone, *"Electoral Exceptionalism" and the First Amendment*, *in* MONEY, POLITICS, AND THE CONSTITUTION: BEYOND *CITIZENS UNITED*, *supra* note 7, at 37, 51-52. For authors who dispute this premise, see, for example, ROBERT C. POST, CITIZENS DIVIDED 64-65 (2014); and Pildes, *supra* note 7, at 26.

14. Jessica Medina calls for courts to strike "a balance between the various potential governmental interests and the definition of corruption attributable to the speaker." Jessica Medina, *When Rhetoric Obscures Reality: The Definition of Corruption and Its Shortcomings*, 48 LOY. L.A. L. REV. 597, 645 (2015) (footnote omitted). Meanwhile, Kenneth Potter suggests using an undue burden standard similar to that used in abortion jurisprudence. Kenneth G. Potter, Note, Nixon v. Shrink Missouri Government PAC*: Political Speech of the Common Voter Is Promoted Through Campaign Finance Reform*, 11 WIDENER J. PUB. L. 151, 171 (2002). Other authors believe that courts should import aspects of campaign finance doctrine into voting rights cases, rather than the other way around. *See* Armand Derfner & J. Gerald Hebert, *Voting Is Speech*, 34 YALE L. & POL'Y REV. 471, 471-72 (2016); Recent Case, Crawford v. Marion County Election Board*, 472 F.3d 949 (7th Cir. 2007)*, 120 HARV. L. REV. 1980, 1982-85 (2007).

15. *See* sources cited *supra* note 3. One case comment suggests that the Court should have decided *Williams-Yulee* on due process grounds. *See* Leading Case, Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015)*, 129 HARV. L. REV. 231, 239-40 (2015).

Williams-Yulee and other campaign finance cases. Part II also addresses the most common theoretical arguments against using the *Burdick* test in this area.

I. CAMPAIGN FINANCE AND STRICT SCRUTINY, BEFORE AND AFTER *WILLIAMS-YULEE*

The Court's opinion in *Williams-Yulee* is, in some sense, the culmination of a longtime trend. For decades, the Court has treated campaign finance as a pure speech and association issue, rather than as a question of election regulation.[16] During the Roberts Court years, the conservative majority has steadily ratcheted up its scrutiny of campaign finance laws.[17] The regulation at issue in *Williams-Yulee* posed a problem for the Court's campaign finance doctrine: it served a particularly compelling interest but was not narrowly tailored in the way traditionally required to sustain speech restrictions. To save Florida's solicitation ban, the Court chose to relax its rigid tailoring analysis, a move that will have significant ripple effects throughout First and Fourteenth Amendment law.

A. The Williams-Yulee *Decision*

In 2009, Lanell Williams-Yulee ("Yulee"), a candidate for county court judge in Hillsborough County, sent out a mass mailing.[18] The mailing introduced her to voters, described her qualifications, and asked for "[a]n early contribution of $25, $50, $100, $250, or $500."[19] Yulee also posted the letter on her campaign's website.[20] The Florida Bar filed suit against Yulee, claiming that she violated Florida Canon of Judicial Ethics 7C(1), which prohibits any candidate "for a judicial office that is filled by public election between competing candidates" from "personally solicit[ing] campaign funds."[21]

Yulee, however, claimed that Canon 7C(1) was a content-based restriction on her speech, and that preventing her from personally soliciting donations

16. *See, e.g.*, McCutcheon v. FEC, 134 S. Ct. 1434, 1444 (2014) (plurality opinion); Buckley v. Valeo, 424 U.S. 1, 14-15, 25, 44-45 (1976) (per curiam).

17. *See* Richard L. Hasen, *Election Law's Path in the Roberts Court's First Decade: A Sharp Right Turn but with Speed Bumps and Surprising Twists*, 68 STAN. L. REV. 1597, 1603-04 (2016).

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

19. *Id.* (citation omitted).

20. *Id.* For a copy of the email, see Petition for Writ of Certiorari at 31a-32a, *Williams-Yulee*, 135 S. Ct. 1656 (No. 13-1499).

21. FLA. CODE JUD. CONDUCT, Canon 7C(1) (2016).

through a mass mailing violated the First Amendment.[22] The Florida Supreme Court,[23] and then the U.S. Supreme Court,[24] agreed with Yulee's characterization of the restriction, but disagreed with her conclusion. Both courts applied strict scrutiny but upheld Canon 7C(1) as a narrowly tailored means of protecting the integrity—and the appearance of integrity—of the judiciary.[25] For the justice system to work, the U.S. Supreme Court reasoned, the public must believe that justice will be dispensed fairly by neutral magistrates.[26] States may foster such public confidence by prohibiting judicial candidates from soliciting campaign donations without violating the First Amendment.[27]

For a campaign finance case, the Court's reasoning was as unusual as the outcome. The majority cared so deeply about Florida's interest—preserving judicial integrity—that it simply could not conduct the truly "strict" strict scrutiny analysis that the Court typically applies.[28] To reconcile its view of the state interest with the level of scrutiny required by its precedents, the Court emphasized how little Canon 7C(1) burdens judicial candidates' speech. It asserted that the canon "aims squarely at the conduct most likely to undermine public confidence in the integrity of the judiciary"—solicitation of contributions by judicial candidates themselves.[29] It also noted that the canon applied evenly to all judicial candidates.[30] In the end, the Court insisted that "Canon 7C(1) restricts a narrow slice of speech,"[31] giving candidates near-total freedom to receive money through their campaign committees and to speak about political issues.[32] To the majority, it seems, the solicitation ban was simply not a great burden.

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22. Initial Brief of Respondent at 12-21, Fla. Bar v. Williams-Yulee, 138 So. 3d 379 (Fla. 2014) (No. SC11-265).

23. *Fla. Bar*, 138 So. 3d at 387.

24. *Williams-Yulee*, 135 S. Ct. at 1673.

25. *Id.*; *Fla. Bar*, 138 So. 3d at 387.

26. *Williams-Yulee*, 135 S. Ct. at 1667-68.

27. *Id.* at 1672.

28. *See, e.g.*, Corn-Revere, *supra* note 3. As Corn-Revere notes, strict scrutiny "has been described as 'strict in theory, but fatal in fact,'" because the government must "prove that the measure is necessary to serve a compelling interest and that it employs the least restrictive means of doing so." *Id.*

29. *Williams-Yulee*, 135 S. Ct. at 1668.

30. *Id.*

31. *Id.* at 1670.

32. *Id.* at 1672.

B. Williams-Yulee *in Doctrinal Context*

The Court's analysis in *Williams-Yulee* was so unusual because, under its established First Amendment doctrine, the Court should have struck down Canon 7C(1). For decades, some Justices have advocated for subjecting all campaign finance regulations to strict scrutiny.[33] The Court has refused to go this far,[34] instead enforcing a fundamental divide. Campaign finance laws that directly restrict speech, such as expenditure limits and regulations on candidate communication, receive strict scrutiny and are almost uniformly struck down.[35] Laws that do not impose such "onerous" constraints on speech, such as campaign contribution limits, public financing schemes, and disclosure requirements, are subject to slightly lesser burdens.[36] Contribution limits, for instance, need only be "closely drawn" to serve a "sufficiently important interest."[37]

While formally maintaining this divide, the Roberts Court has become more willing to impose strict scrutiny, asserting that challenged laws create content- or speaker-based restrictions on speech. For example, in *Davis v. FEC*, the Court struck down a provision that raised campaign contribution caps for candidates with self-funded opponents;[38] then, in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, it invalidated a law that increased public financing grants in response to privately funded opponents' spending.[39] The Court treated both of these provisions as speaker-based restrictions on the self- or privately financed candidates' speech.[40] And the Court struck down a ban on corporate independent expenditures in *Citizens United v. FEC* because it "impose[d] re-

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33. *See* Randall v. Sorrell, 548 U.S. 230, 267 (2006) (Thomas, J., joined by Scalia, J., concurring in the judgment) ("I would overrule *Buckley* and subject both the contribution and expenditure restrictions of Act 64 to strict scrutiny, which they would fail."); Colo. Republican Fed. Campaign Comm'n v. FEC, 518 U.S. 604, 640 (1996) (Thomas, J., dissenting) ("I begin with the premise that there is no constitutionally significant difference between campaign contributions and expenditures: Both forms of speech are central to the First Amendment. Curbs on protected speech, we have repeatedly said, must be strictly scrutinized.").

34. McCutcheon v. FEC, 134 S. Ct. 1434, 1446 (2014) ("We therefore need not parse the differences between the two standards [of review] in this case.").

35. *See* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 734-35 (2011).

36. *Id.* at 735.

37. *Id.*

38. Davis v. FEC, 554 U.S. 724, 738 (2008).

39. *Bennett*, 564 U.S. at 755.

40. *Id.* at 737; *Davis*, 554 U.S. at 738.

strictions on certain disfavored speakers."[41] Even when it has not applied strict scrutiny, the Court has become increasingly hostile toward campaign finance laws, invalidating the very sorts of regulations that it had previously upheld.[42]

In *Williams-Yulee*, the parties agreed that Canon 7C(1) was a content-based restriction on judicial candidates' speech.[43] Because solicitations are "intertwined with informative and perhaps persuasive speech," the canon "infringe[d] Yulee's freedom to discuss candidates and public issues—namely, herself and her qualifications to be a judge."[44] The Court had already assumed that speech restrictions on judicial candidates are subject to strict scrutiny.[45] Given all this, and given that laws rarely survive strict scrutiny, the solicitation ban would normally have been struck down.

But the Court did not follow its usual path, dismissing what are normally statute-killing objections. The dissenting Justices rightly pointed out that Canon 7C(1) bans solicitations in *any* form and of *any* person—without heed to whether the solicitations threaten judicial integrity.[46] In other words, the ban is *over-inclusive*. The Court swept away this concern, stating that, "most problems arise in greater and lesser gradations, and the First Amendment does not confine a State to addressing evils in their most acute form."[47] Canon 7C(1) also contains numerous loopholes: close friends may solicit on a candidate's behalf, and candidates can learn who donated and write them thank-you notes.[48] The Court likewise rejected this argument, saying that "the First Amendment imposes no freestanding '*underinclusiveness* limitation,'" and that states "need not address all aspects of a problem in one fell swoop."[49] This is far from narrow tailoring, at least as the Court has normally defined the term.

In order to maintain public confidence in judicial integrity, the Court had to minimize the burden that Canon 7C(1) places on judicial candidates' speech.

41. 558 U.S. 310, 341 (2010).

42. *See* McCutcheon v. FEC, 134 S. Ct. 1434, 1442 (2014) (striking down aggregate federal campaign contribution limits); Randall v. Sorrell, 548 U.S. 230, 236-37 (2006) (striking down state contribution limits).

43. Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1664 (2015).

44. *Id.* at 1665.

45. Republican Party of Minn. v. White, 536 U.S. 765, 774-75 (2002).

46. *Williams-Yulee*, 135 S. Ct. at 1679 (Scalia, J., dissenting); *id.* at 1685 (Alito, J., dissenting).

47. *Id.* at 1671 (majority opinion).

48. Brief for Petitioner at 18-20, *Williams-Yulee*, 135 S. Ct. 1656 (No. 13-1499); Judicial Ethics Advisory Comm., *An Aid To Understanding Canon 7*, OFF. ST. CTS. ADMIN. 57-59 (Oct. 1, 2016), http://flcourts.org/core/fileparse.php/304/urlt/canon7update.pdf [http://perma.cc/53PG-7MPQ].

49. *Williams-Yulee*, 135 S. Ct. at 1668 (emphasis added).

This resulted in a form of strict scrutiny analysis alien to modern free speech jurisprudence—one that could seep into other areas of First and Fourteenth Amendment law. As Justice Kennedy's *Williams-Yulee* dissent warned, the Court's tailoring analysis could greatly weaken the bulwark that strict scrutiny erects against government overreach.[50]

C. *The Impact of* Williams-Yulee*: Early Evidence*

At first glance, *Williams-Yulee* might seem like an aberration. After all, one might think that, as judges, the Justices are likely to be more concerned with maintaining the appearance of *judicial* integrity than of legislative or executive integrity.[51] Indeed, the Court has made efforts to distinguish judicial elections from other elections. The *Williams-Yulee* majority opinion rejected comparisons to cases like *Citizens United*, arguing that politicians are expected to respond to their constituents' desires, while judges must remain neutral.[52] Ultimately, the Court said, states have a broader interest in preserving the appearance of judicial integrity than in preventing the appearance of legislative and executive corruption.[53] The decision itself was tightly aligned to the specifics of regulating campaign finance in judicial elections. In this sense, *Williams-Yulee* looks like a mere doctrinal oddity.

But the case is not quite the outlier it appears to be. Justice Thomas, for instance, suggested (disapprovingly) that *Williams-Yulee* is part of a larger "tendency to relax purportedly higher standards of review for less-preferred rights."[54] Moreover, since many other areas of First and Fourteenth Amendment law employ versions of the strict scrutiny test, much of the Court's analysis in *Williams-Yulee* could have ripple effects beyond free speech cases. For instance, the Court held that laws should not fail strict scrutiny simply because they do not restrict all relevant activity.[55] At the same time, the Court held that even strict scrutiny allows states to regulate *more* activity than is necessary to

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50. *Id.* at 1685 (Kennedy, J., dissenting).

51. *See, e.g.*, Abrams, *supra* note 3.

52. *Williams-Yulee*, 135 S. Ct. at 1667 (majority opinion).

53. *Id.*

54. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2328 (2016) (Thomas, J., dissenting).

55. *Williams-Yulee*, 135 S. Ct. at 1668. This means laws can be underinclusive; even under strict scrutiny, they need not target the whole universe of speech that their underlying interests would seem to require.

accomplish their aims.[56] These are general statements about how to conduct strict scrutiny analysis; they are not necessarily limited to a particular context.

It is therefore not surprising that *Williams-Yulee*'s weakening of strict scrutiny has already had an impact. This reasoning was felt most immediately in other judicial campaign finance cases. Several such cases cited *Williams-Yulee* in upholding a range of judicial ethics laws.[57] Outside of this sphere, the D.C. Circuit, sitting en banc, made liberal use of the *Williams-Yulee* opinion to justify upholding the federal ban on political contributions from government contractors.[58]

Beyond campaign finance, the analysis in *Williams-Yulee* has also already begun to spread into other areas of First Amendment law. For instance, courts have utilized its holdings on under- and over-inclusiveness, as well as its reminder that some laws *can* survive strict scrutiny, in a variety of decisions. These decisions involve everything from commercial solicitation,[59] to inspection regimes for child pornography,[60] to noise prohibitions in an abortion buffer zone law,[61] to certain forms of traffic offenses,[62] to restrictions on doctors' ability to ask whether their patients own firearms.[63] This extensive use of *Williams-Yulee* demonstrates the case's impact on the broader world of campaign finance—and general First and Fourteenth Amendment—jurisprudence. With

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56. *Id.* at 1671. Additionally, while the Court made much of the difference between judges and politicians, the reasoning in *Williams-Yulee* could be applied to other campaign finance cases. As the Court put it: "The concept of public confidence in judicial integrity does not easily reduce to precise definition, nor does it lend itself to proof by documentary record. But no one denies that it is genuine and compelling." *Id.* at 1667. This is similar to rhetoric used under the appearance-of-corruption standard in other campaign finance cases prior to the Roberts Court's heyday. *See, e.g.*, Randall v. Sorrell, 548 U.S. 230, 248 (2006); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 390-91 (2000).

57. *See, e.g.*, Ohio Council 8 Am. Fed'n State, Cty., & Mun. Emps. v. Husted, 814 F.3d 329, 340 (6th Cir. 2016) (lack of partisan affiliation on ballot); Wolfson v. Concannon, 811 F.3d 1176, 1182-86 (9th Cir. 2016) (en banc) (prohibitions on solicitation of campaign funds and on endorsing or campaigning for others); O'Toole v. O'Connor, 802 F.3d 783, 789-91 (6th Cir. 2015) (temporal restrictions on solicitation and receipt of contributions); *see also* Hodge v. Talkin, 799 F.3d 1145, 1167, 1169-70 (D.C. Cir. 2015) (analyzing and upholding a prohibition on protests in the U.S. Supreme Court plaza).

58. Wagner v. FEC, 793 F.3d 1, 26-30, 34 (D.C. Cir. 2015) (en banc).

59. Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay, 128 F. Supp. 3d 597, 616-17 (E.D.N.Y. 2015).

60. Free Speech Coal., Inc. v. Att'y Gen., 825 F.3d 149, 164 (3d Cir. 2016).

61. March v. Mills, No. 2:15-CV-515-NT, 2016 U.S. Dist. LEXIS 67087, at *24 (D. Me. May 23, 2016).

62. Raef v. Superior Court, 193 Cal. Rptr. 3d 159, 176 (Cal. Ct. App. 2015).

63. Wollschlaeger v. Governor of Fla., 814 F.3d 1159, 1195 (11th Cir. 2015).

a diluted strict scrutiny standard, states might gain greater leeway to impinge on a range of freedoms under both the First Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. This could weaken protections ranging from the right to marry to the right to vote.

II. REIMAGINING CAMPAIGN FINANCE AS AN ELECTION LAW ISSUE

Williams-Yulee illustrates the need to rethink campaign finance jurisprudence. Since *Buckley*, the Court has subjected campaign finance restrictions to its pure freedom of speech and freedom of association doctrines.[64] Yet the rest of election law doctrine has developed separately. Recognizing the need for government regulation of voting and ballot access systems, the Court adopted the *Burdick* sliding-scale approach to constitutional challenges. Section II.A discusses how campaign finance and election law diverged. Section II.B shows how the *Burdick* test works today. It then applies the *Burdick* test to *Williams-Yulee* to show how the test could change courts' analyses in campaign finance cases. Section II.C then takes on the main theoretical objections to unifying election law doctrine.

A. The Free Speech/Election Law Divide

The Supreme Court's approach to election law cases has changed significantly over the years. The Warren Court revolutionized many areas of election law, subjecting voting rights,[65] ballot access,[66] and redistricting[67] regulations to First and Fourteenth Amendment analysis. In the process, the Court employed what today we would call strict scrutiny.[68] Then, in the Burger Court years, the

64. *See* Buckley v. Valeo, 424 U.S. 1, 14 (1976) (per curiam).

65. *See, e.g.*, Harper v. Va. Bd. of Elections, 383 U.S. 663, 665, 670 (1966).

66. *See, e.g.*, Williams v. Rhodes, 393 U.S. 23, 32, 34 (1968).

67. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 568 (1964).

68. *See Rhodes*, 393 U.S. at 31 ("In determining whether the State has power to place such unequal burdens on minority groups where rights of this kind are at stake, the decisions of this Court have consistently held that 'only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.'" (quoting NAACP v. Button, 371 U. S. 415, 438 (1963))); *Harper*, 383 U.S. at 670 ("We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined."); *Reynolds*, 377 U.S. at 562 ("Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.").

Justices began to pull back on the rights-protective decisions made in the 1960s. "It is very unlikely," the Court said in *Storer v. Brown*, "that all or even a large portion of the state election laws would fail to pass muster under our cases."[69] It recognized that, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."[70]

In the 1980s and 1990s, the Court followed the logic of *Storer* and once again transformed its election law doctrine. In *Anderson v. Celebrezze*, the Court reaffirmed that states needed leeway to develop election regulations and determined that most "reasonable, nondiscriminatory restrictions" on the electoral process would pass constitutional muster.[71] The Court therefore developed "a lenient balancing test" to analyze election regulations.[72] Upon further refinement, this became today's *Burdick* test.[73]

The Court has not followed this path in campaign finance cases. Instead, it has used the same rigid analysis since its seminal 1976 decision in *Buckley v. Valeo*.[74] In *Buckley*, plaintiffs challenged Congress's new campaign finance law, the Federal Election Campaign Act of 1971 (FECA), which placed limits on political contributions and expenditures.[75] The Court of Appeals for the D.C. Circuit grounded its constitutional evaluation of FECA in the same need (and power) to regulate that the Supreme Court had identified in its other election law cases.[76] However, the Supreme Court did not see it this way, instead conducting a pure First Amendment analysis.[77]

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69. 415 U.S. 724, 730 (1974).

70. *Id.*

71. 460 U.S. 780, 788 (1983).

72. Derfner & Hebert, *supra* note 14, at 481.

73. *Id.* at 482-83; *see* Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 190-91 (2008) (plurality opinion) (laying out the *Burdick* test and clarifying that, "[h]owever slight [a] burden may appear, . . . it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation'" (quoting Norman v. Reed, 502 U.S. 279, 288-89 (1992))).

74. Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* McConnell v. FEC, 540 U.S. 93 (2003), *overruled in part by* Citizens United v. FEC, 558 U.S. 310 (2010).

75. *Id.* at 12-13.

76. *See* Buckley v. Valeo, 519 F.2d 821, 841-42 (D.C. Cir. 1975) (en banc) (per curiam).

77. *See Buckley*, 424 U.S. at 14-15.

The *Buckley* Court saw campaign expenditure limits as direct restrictions on speech and association; it therefore subjected them to strict scrutiny.[78] But because it viewed campaign *contribution* limits as a lesser infringement on these rights, the Court developed a less demanding standard: states must "demonstrate[] a sufficiently important interest and employ[] means closely drawn to avoid unnecessary abridgment of associational freedoms."[79] Using these tests, the Court found that Congress's interest in preventing corruption and its appearance could sustain FECA's contribution restrictions,[80] but not the expenditure limits.[81] The Court continues to employ the strict and closely drawn scrutiny tests in campaign finance cases today.[82]

It is clear that election law doctrine and campaign finance doctrine, both of which began as skeptical of government regulation, have diverged. Why they have diverged is less certain. Perhaps the Court simply never saw campaign finance as related to other electoral regulations.[83] While we may see them all as part of a larger election law sphere today, election law was not a coherent field of study when the Court decided *Buckley* and created the *Burdick* test.[84] Prior to the 1990s, scholars and courts alike treated election issues as straightforward extensions of the many constitutional law doctrines that applied to political regulations.[85] The Court may not have had a theoretical architecture to connect campaign finance with voting rights and ballot access issues.

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78. *See id.* at 44-45 ("[T]he constitutionality of [the expenditure limit] turns on whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression.").

79. *Id.* at 25.

80. *Id.* at 26-27.

81. *Id.* at 45.

82. *See, e.g.*, McCutcheon v. FEC, 134 S. Ct. 1434, 1445-46 (2014) (plurality opinion).

83. Several election law scholars have made a similar point. *See* Edward B. Foley, *Election Law and the Roberts Court: An Introduction*, 68 OHIO ST. L.J. 733, 733-34 (2007) ("[I]t may be unfair for scholars who specialize in election law to expect the Court to have an overarching vision of election law that guides their resolution of disputes in the distinctive areas of campaign finance, legislative redistricting, and voting procedures."); Pildes, *supra* note 7, at 29 ("There had been little academic development or sustained public debate of the First Amendment perspectives surrounding regulation of elections at the moment of the Court's momentous and baptismal engagement with these issues in *Buckley*. Thus, the Court assessed the Federal Election Campaign Act of 1974 by assimilating general principles of First Amendment adjudication . . . .").

84. Election law did not develop into its own area of study until the 1990s. *See* Heather K. Gerken, *Keynote Address: What Election Law Has To Say to Constitutional Law*, 44 IND. L. REV. 7, 7 (2010).

85. *Id.*

But why maintain the split now? It is most likely that the Court believes, as some scholars do, that government does not have the same structural interest in regulating campaign finance that it does for other aspects of the election process.[86] Section II.C will address this assumption. Today, however, the judiciary now uses two forms of analysis: traditional First Amendment analysis in campaign finance cases, and the *Burdick* test in other election cases.

B. Applying the Burdick *Test to Campaign Finance*

To understand how the *Burdick* test would affect campaign finance cases, we must first understand how the *Burdick* test operates. Rather than use a "litmus test" to separate valid from invalid regulations, courts confronting election laws employ a more open-ended analysis.[87] First, a court "must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate.'"[88] The court then balances the burden against the state's interests.[89] As part of this inquiry, the court must examine the fit between those interests and the laws passed to further them.[90] Under this "flexible standard," severe burdens are subject to strict scrutiny, while lesser burdens receive lesser scrutiny.[91] However, the test is essentially a sliding scale; regardless of how slight the burden on constitutional rights, the court must weigh the burden against the state's interests.[92]

For a good example of the *Burdick* test, consider the Court's decision in *Buckley v. American Constitutional Law Foundation, Inc.*[93] In that case, Colorado had passed a number of restrictions regarding who could circulate petitions to put initiatives on the ballot.[94] The Court acknowledged that petition circulation "is 'core political speech,' because it involves 'interactive communication con-

86. *See infra* text accompanying notes 135-139.

87. *See* Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 190 (2008) (plurality opinion) (describing the "balancing approach" to review of election laws).

88. Burdick v. Takushi, 504 U.S. 428, 434 (1992) (quoting Anderson v. Celebrezze, 460 U.S. 780, 789 (1983)).

89. *Id.*

90. *Id.*

91. *Crawford*, 553 U.S. at 190-91, 190 n.8.

92. *Id.* at 191.

93. 525 U.S. 182 (1999).

94. *Id.* at 188-89.

cerning political change.'"[95] However, it also recognized the need for election regulation[96] and therefore applied the *Burdick* test.[97] The Court found that the regulations "significantly inhibit[ed] communication with voters about proposed political change."[98] It cited evidence from the district court record to show that the regulations severely limited the number of people able and willing to circulate petitions.[99] The Court did not specify a level of scrutiny, instead asking "whether the State's concerns warrant the reduction."[100] Ultimately, after examining these concerns, the Court determined that the regulations were "not warranted by" Colorado's interests.[101]

The Court has used this same balancing test to examine a wide swath of election laws: voter ID requirements,[102] prohibitions on fusion candidacies,[103] bans on write-in voting,[104] early filing deadlines for independent candidates,[105] and laws that force parties to either open up primaries to non-party members[106] or restrict them to those in the party.[107] The *Burdick* test is thus the closest thing we have to a Grand Unified Theory of election law.

As both courts[108] and scholars[109] have pointed out, however, this unified framework does not encompass campaign finance. The reasoning of the *Wil-*

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95. *Id.* at 186 (quoting Meyer v. Grant, 486 U.S. 414, 422 (1988)).

96. *Id.* at 187.

97. *See id.* at 192 ("We have several times said 'no litmus-paper test' will separate valid ballot-access provisions from invalid interactive speech restrictions; we have come upon 'no substitute for the hard judgments that must be made.'" (quoting Storer v. Brown, 415 U.S. 724, 730 (1974))).

98. *Id.*

99. *Id.* at 193-94, 197-98; *see also id.* at 199-200 (discussing the severity of the identification badge requirement's effect on political speech rights).

100. *Id.* at 193.

101. *Id.* at 192.

102. *See* Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 199-202 (2008) (plurality opinion).

103. Timmons v. Twin Cities Area New Party, 520 U.S. 351, 353-54, 357-59 (1997). Fusion bans "prohibit a candidate from appearing on the ballot as the candidate of more than one party." *Id.* at 354.

104. Burdick v. Takushi, 504 U.S. 428, 430, 433-34 (1992).

105. Anderson v. Celebrezze, 460 U.S. 780, 786-90 (1983).

106. Cal. Democratic Party v. Jones, 530 U.S. 567, 570-73 (2000).

107. Tashjian v. Republican Party of Conn., 479 U.S. 208, 210-11, 213-15 (1986).

108. *See, e.g.*, VanNatta v. Keisling, 151 F.3d 1215, 1221 (9th Cir. 1998) (noting that the Supreme Court "has not applied this [weighing] test to campaign contribution restrictions").

liams-Yulee decision was disappointing not only because it diluted strict scrutiny, but also because it missed a prime opportunity to subsume campaign finance doctrine into the Court's broader election law doctrine. The main benefit of this move is that the *Burdick* test allows a court to consider the burden that a particular regulation places on First or Fourteenth Amendment rights *before* determining the level of scrutiny it will apply. Traditional First Amendment doctrine, on the other hand, tends to sort laws into one broad category or another (for example, content-based restrictions, speaker-based restrictions, or restrictions on speech in public forums[110]), each of which has a predefined level of scrutiny. The real discussion of *how much* a law burdens First Amendment rights—and sometimes even the fine-grained discussion of *how* a law burdens these rights—does not take place until the tailoring analysis, after the level of scrutiny has already been set and the government's interest examined.[111] Indeed, the whole purpose of the least-restrictive-means test in strict scrutiny cases is "to ensure that" protected activity "is restricted no further than necessary to achieve the goal."[112] The *Burdick* test, by contrast, allows courts to consider the law's scope from the outset.

Using the *Burdick* test in *Williams-Yulee* would have freed the majority to invoke something less than strict scrutiny. As discussed in Part I, much of the Court's tailoring analysis was actually an attempt to show how little the solicitation ban burdened judicial candidates' speech.[113] This parallels the *Burdick* test's focus on the "magnitude" of the injury a law imposes.[114] In particular, the Court asserted that what appeared to be major loopholes in Florida's ban were actually attempts to focus as narrowly as possible on what the Florida legislature saw as the threat to public confidence in judicial integrity.[115] Conversely, a complete ban on speaking or spending money—like the provision the Court

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109. Bopp, *supra* note 12, at 243 n.50, 296; Curtis K. Tao, Note, *A Compelling Opportunity To Rethink the Flawed Evolution of Contribution Speech*, 51 RUTGERS L. REV. 1345, 1348 n.15, 1376 (1999).

110. *See, e.g.*, Burson v. Freeman, 504 U.S. 191, 196 (1992) (plurality opinion) (noting that the Tennessee statute at issue implicates "three central concerns in our First Amendment jurisprudence: regulation of political speech, regulation of speech in a public forum, and regulation based on the content of the speech").

111. *See, e.g.*, Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1668-72 (2015); United States v. Alvarez, 132 S. Ct. 2537, 2549-51 (2012) (plurality opinion).

112. Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 666 (2004).

113. *See supra* text accompanying notes 28-32.

114. Burdick v. Takushi, 504 U.S. 428, 434 (1992) (quoting Anderson v. Celebrezze, 460 U.S. 780, 789 (1983)).

115. *Williams-Yulee*, 135 S. Ct. at 1668-70.

confronted in *Citizens United*[116]—would impose a much heavier burden and thus would likely still be subject to strict scrutiny.

In addition to the "magnitude"—or severity—of the burden, the *Burdick* test lets courts consider the "character"—or form—of the harm.[117] The judicial canon at issue in *Williams-Yulee* focused solely on candidates' *solicitation* of contributions, as opposed to supporters' ability to give contributions[118] or judicial candidates' ability to announce their views on political issues.[119] Moreover, the canon only affects candidates themselves, not their campaign committees.[120] The law in *Citizens United*, by contrast, restricted the ability to make independent expenditures and singled out certain speakers (corporations) for unfavorable treatment.[121] These distinctions matter in election law cases. Under *Burdick*, the Court might not have had to apply strict scrutiny in *Williams-Yulee* because of this earlier burden analysis. By contrast, current campaign finance doctrine puts off the consideration of these differences until after choosing a level of scrutiny.[122]

There are some indications that the Court might be open to switching to the *Burdick* test. In *Nixon v. Shrink Missouri Government PAC*, the Court told states that more common and plausible justifications for campaign contribution limits would require less evidentiary support.[123] Then, in *Randall v. Sorrell*, the Court said that the dollar amount of a contribution limit must be examined for its "proportionality" to the state's interests.[124] Additionally, in *Buckley v. Valeo* and more recent cases, the Court has stated that the constitutionality of disclosure requirements depends on "the extent of the burden that they place

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116. Citizens United v. FEC, 558 U.S. 310, 337 (2010) ("The law before us is an outright ban, backed by criminal sanctions.").

117. *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789).

118. McCutcheon v. FEC, 134 S. Ct. 1434, 1462 (2014) (plurality opinion).

119. Republican Party of Minn. v. White, 536 U.S. 765, 774-75 (2002).

120. *Contra McCutcheon*, 134 S. Ct. at 1442 (striking down a law that imposed aggregate limits on donations both to individual candidates and campaign committees).

121. *Citizens United*, 558 U.S. at 337, 341.

122. *See* FEC v. Beaumont, 539 U.S. 146, 162 (2003) ("It is not that the difference between a ban and a limit is to be ignored; it is just that the time to consider it is when applying scrutiny at the level selected, not in selecting the standard of review itself.").

123. 528 U.S. 377, 391 (2000) ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.").

124. 548 U.S. 230, 249 (2006) (plurality opinion).

on individual rights."[125] And there are more direct signals: Justices Breyer and Ginsburg have explicitly called for the Court to "balance[] interests," rather than presume unconstitutionality, in campaign finance cases.[126]

The *Williams-Yulee* decision itself also showed hints, however faint, of moving in this direction. The majority often deferred to Florida's judgments the same way it would with a typical election regulation. For instance, it accepted Florida's stated interest in maintaining the appearance of judicial impartiality even though this interest "does not easily reduce to precise definition" or "lend itself to proof by documentary record."[127] This looks much like the Court's voter ID cases, in which the Court has accepted states' alleged interests in deterring voter fraud despite the lack of evidence that in-person voter fraud poses a real problem.[128] If the *Williams-Yulee* Court had invoked the *Burdick* test, it likely would have given Florida a lower bar to meet. Instead, it wrote "a casebook guide to eviscerating strict scrutiny any time the Court encounters" activity "it dislikes"—in *any* area of First or Fourteenth Amendment law.[129]

Importing campaign finance into election law doctrine would not require a complete overhaul of the Court's First Amendment precedents. Just as *Anderson* did not overturn the Warren Court's election law cases that applied strict scrutiny, stare decisis could keep most past campaign finance cases intact. But as the analysis of *Williams-Yulee* shows, and as the history of election regulation jurisprudence also illustrates,[130] the gap between *Burdick* and across-the-board strict scrutiny could make a real difference in future cases.

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125. 424 U.S. 1, 68 (1976) (per curiam); *see also* Davis v. FEC, 554 U.S. 724, 744 (2008) ("[T]he strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.").

126. *Shrink Mo.Gov't PAC*, 528 U.S. at 402 (Breyer, J., concurring). Both Justices renewed their calls for less-than-strict scrutiny in *Williams-Yulee*. *See* Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1673 (2015) (Breyer, J., concurring); *id.* at 1675 (Ginsburg, J., concurring in part and concurring in the judgment).

127. *Williams-Yulee*, 135 S. Ct. at 1667 (majority opinion).

128. *See* Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 194-96 (2008) (plurality opinion); Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) (per curiam). The Court also used deferential language normally reserved for rational basis review, saying phrases like "Florida has reasonably determined" and "a State may conclude." *Williams-Yulee*, 135 S. Ct. at 1669, 1671.

129. *Williams-Yulee*, 135 S. Ct. at 1685 (Kennedy, J., dissenting).

130. See cases cited *supra* notes 69, 102-104, in which the Court upheld regulations that likely would not have survived an across-the-board strict scrutiny standard.

C. The Counterargument: Campaign Finance as Individual Right

Despite the Court's occasional moves toward a balancing test, it has resisted explicitly adopting the *Burdick* test. Indeed, the Court has suggested that *Burdick* applies only to laws that "control the mechanics of the electoral process," and not to "regulation[s] of pure speech."[131] Though the Court has never directly addressed the use of the *Burdick* test in campaign finance cases,[132] there are two main counterarguments to the idea of folding campaign finance into the *Burdick* framework. Justice Thomas has articulated the first, more practical objection: using the *Burdick* test would make little difference, according to him, because all "restrictions on core political speech so plainly impose a 'severe burden.'"[133] But the Court's analysis in *Williams-Yulee* shows that burdens on speech are not always severe. Justice Thomas seems to think that political speech rights deserve the utmost constitutional protection, regardless of the magnitude of the intrusion.[134] Though his concern is legitimate, cases like *Williams-Yulee* illustrate the danger of such an absolute rule.

There is also a more theoretical reason why some might wish to separate campaign finance from other election regulations. At its most fundamental level, campaign finance may seem less regulable than voting rights or ballot access. The Court created the *Burdick* test because, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order . . . is to accompany the democratic processes."[135] A balancing test protects constitutional rights while still allowing the government to safeguard the integrity of its elections. One might argue, however, that Congress and the states do not have the same need to regulate campaign finance. After all, campaign contributions and expenditures fund the very discussion of public issues that is central to the First Amendment's purpose.[136] Moreover,

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131. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 345 (1995).

132. The Court has, however, addressed the *Burdick* test as related to a prohibition on distributing anonymous handbills. *See id.* at 345-47. The rationale for rejecting *Burdick* in this circumstance is similar to the one discussed below. *See infra* notes 133-134 and accompanying text.

133. Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 208 (1999) (Thomas, J., concurring in the judgment).

134. *See id.*

135. Anderson v. Celebrezze, 460 U.S. 780, 788 (1983) (quoting Storer v. Brown, 415 U.S. 724, 730 (1974)).

136. *See* Buckley v. Valeo, 424 U.S. 1, 14 (1976) (per curiam) ("The Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities.").

states are perfectly capable of holding elections without campaign finance regulations; twelve states do not limit individual campaign contributions, and thirteen allow unlimited contributions from political action committees.[137] As one scholar put it, "[e]lectoral mechanisms by their nature require government action," while "expressive activity requires no government regulation outside the general rules of property, tort, and contract."[138] If one believes that the government has very little interest in regulating political speech, then the theoretical basis for using a balancing test disappears.[139]

But even this rationale does not hold up. The *Buckley* Court explicitly recognized that Congress has the power to regulate federal elections, including through campaign finance restrictions.[140] More importantly, even the Roberts Court has accepted that the government has a compelling interest in regulating campaign finance.[141] From *Buckley* onward, the Court's decisions reflect the fact that campaign finance law is "an area in which the election domain and the domain of public discourse both have strong claims."[142] The government has a deep interest in regulating campaign finance to ensure the integrity of elec-

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137. Brian Cruikshank, *Contribution Limits Overview*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/research/elections-and-campaigns/campaign-contribution-limits-overview.aspx [http://perma.cc/XAE4-7SQY].

138. McGinnis, *supra* note 13, at 908. It should be noted that electoral mechanisms do not necessarily require state action. "For much of the nineteenth century," for instance, "voters had obtained their ballots from political parties." ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 115 (2009). Each party made its ballot a different color and size and included only the names of the candidates of that party; the voter needed only to drop the ballot in the ballot box, while party officials made sure that people voted the right way. *Id.* One of today's most basic state election functions—the printing and provision of ballots—did not become widespread until the late 1800s. *Id.*

139. *See, e.g.*, Dan Tokaji & Allison Hayward, Debate, *The Role of Judges in Election Law*, 159 U. PA. L. REV. 273, 291 (2011). McGinnis also argues that courts should not defer to legislatures on the constitutionality of their campaign finance laws because speech at election time cannot be separated from ongoing political debate. McGinnis, *supra* note 13, at 908. However, the courts have shown themselves capable of drawing lines to prevent the diminution of such speech. *See, e.g.*, FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 469-70 (2007). The *Burdick* test, with its focus on measuring the burden on constitutional rights, allows courts to tailor their scrutiny based on how wide a speech-regulating net laws cast.

140. *Buckley*, 424 U.S. at 13-14.

141. *See* McCutcheon v. FEC, 134 S. Ct. 1434, 1450 (2014) (opinion of Roberts, C.J.) ("[W]e do not doubt the compelling nature of the 'collective' interest in preventing corruption in the electoral process.").

142. James Weinstein, *Participatory Democracy as the Basis of American Free Speech Doctrine: A Reply*, 97 VA. L. REV. 633, 645 n.44 (2011); *see* McConnell v. FEC, 540 U.S. 93, 136-37 (2003), *overruled in part by* Citizens United v. FEC, 558 U.S. 310 (2010).

tions, just as it does with voting rights, political parties, or ballot access. "From a constitutional perspective," then, "decisions about whether to structure the financing of elections are not so obviously different from other decisions that are currently far less controversial about how to structure elections."[143]

Moreover, as mentioned above,[144] there is some evidence from previous cases that the Court may have been willing to move toward a sliding-scale test for campaign finance laws in substance, even if it has refused to do so explicitly.[145] First, the Court has applied the *Burdick* test to the very rights that it says campaign finance laws abridge. For instance, contribution limits primarily burden donors' and candidates' freedom of association,[146] but the *Burdick* test is routinely applied to association claims.[147] And, as *Buckley v. American Constitutional Law Foundation* shows, the Court has even been willing to apply the *Burdick* test to laws that regulate core political speech.[148] Second, the Court has admitted that it has "subjected strictures on campaign-related speech that [it has] found *less onerous* to a lower level of scrutiny."[149] In theory, at least, the two-tiered scrutiny of campaign finance is already somewhat similar to the *Burdick* test, except that the Court determines the burdens imposed by an entire *category* of laws rather than focusing on the severity of the particular statute at issue.[150]

The Court has recently begun to grapple with this theoretical debate, as evidenced by the dueling opinions in *McCutcheon v. FEC*. In the plurality opinion, Chief Justice Roberts suggests that the First Amendment protects individuals against any collective interests that campaign finance laws might further.[151] Ac-

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143. Pildes, *supra* note 7, at 26.

144. *See supra* notes 123-129 and accompanying text.

145. *See* Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 357-61 (2007); Elmendorf & Foley, *supra* note 11, at 510-11; Richard L. Hasen, *The Newer Incoherence: Competition, Social Science, and Balancing in Campaign Finance Law After* Randall v. Sorrell, 68 OHIO ST. L.J. 849, 889-90 (2007); Stephanopoulos, *supra* note 11, at 292.

146. Buckley v. Valeo, 424 U.S. 1, 24-25 (1976) (per curiam).

147. *See, e.g.*, Cal. Democratic Party v. Jones, 530 U.S. 567, 574 (2000); Burdick v. Takushi, 504 U.S. 428, 436 (1992); Anderson v. Celebrezze, 460 U.S. 780, 787 (1983).

148. *See* 525 U.S. 182, 186-87, 191-92 (1999).

149. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 735 (2011) (emphasis added).

150. The standards are not in reality applied this way, since the difference between closely drawn and strict scrutiny has shrunk significantly in the past decade. *See supra* note 42 and accompanying text.

151. McCutcheon v. FEC, 134 S. Ct. 1434, 1449-50 (2014) (plurality opinion).

cording to Chief Justice Roberts, the public interest in regulating campaigns must not "truncate th[e] tailoring test at the outset";[152] he therefore rejects any "ad hoc balancing of relative social costs and benefits."[153] In contrast, Justice Breyer's dissent treats political speech as serving not just individual speakers' rights, but also a broader public purpose: "seek[ing] to form a public opinion that can and will influence elected representatives."[154] Because campaign finance laws are rooted in the First Amendment's core purpose—to "create a democracy responsive to the people"—they should be seen "as seeking in significant part to strengthen, rather than weaken, the First Amendment."[155] According to this vision of the First Amendment, the regulation of campaign finance is as necessary to the integrity of elections as the regulations the *Burdick* test was designed to protect.

CONCLUSION

Williams-Yulee was the result of two conflicting realities. Campaign finance regulations serve a vital purpose: protecting the integrity of our political system.[156] Yet the Court has steadily ratcheted up its scrutiny of those regulations.[157] Up to this point, this has not caused a problem. The Court has been quite willing to employ strict scrutiny because it has been happy to strike down most campaign finance regulations.[158] But in *Williams-Yulee*, the Court finally reaped what it had sown: it confronted a regulation that was too important to strike down, but which existing jurisprudence suggested it had to subject to strict scrutiny.

Using the *Burdick* test, the Court could have avoided this problem. Even now, after *Williams-Yulee*, the Court can and should evaluate campaign finance laws under the *Burdick* framework. By examining the character and magnitude of the harm before applying a level of scrutiny, courts would have greater flexibility to account for the specific characteristics of different campaign finance restrictions. Instead, the Court has undermined its traditional free speech ju-

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152. *Id.* at 1450.

153. *Id.* at 1449 (quoting United States v. Stevens, 559 U.S. 460, 470 (2010)).

154. *Id.* at 1467 (Breyer, J., dissenting).

155. *Id.* at 1468.

156. McConnell v. FEC, 540 U.S. 93, 137 (2003), *overruled in part by* Citizens United v. FEC, 558 U.S. 310 (2010) ("[C]ontribution limits, like other measures aimed at protecting the integrity of the [electoral] process, tangibly benefit public participation in political debate.").

157. *See supra* notes 39-42 and accompanying text.

158. *See supra* notes 39-42 and accompanying text.

risprudence, giving governments a roadmap to defeating strict scrutiny across the board.

Williams-Yulee's evisceration of strict scrutiny illustrates the benefits of switching to the *Burdick* test. It also highlights the potential dangers of letting campaign finance decisions drive the Court's broader First and Fourteenth Amendment jurisprudence. Campaign finance cases involve legal considerations unique to the electoral domain and sometimes do not get the benefit of factual development in the lower courts.[159] This increases the danger that the Court could announce rules in the campaign finance context that have unintended and destabilizing consequences in other First and Fourteenth Amendment areas. The Court should save campaign finance from First Amendment doctrine—and save First Amendment doctrine from campaign finance.

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159. *McCutcheon*, 134 S. Ct. at 1447 n.4 (plurality opinion); *id.* at 1479-81 (Breyer, J., dissenting); Citizens United v. FEC, 558 U.S. 310, 399-400 (2010) (Stevens, J., dissenting).

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