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## **Underinclusivity and the First Amendment: The Legislative Right to Nibble at Problems After *Williams-Yulee***

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# UNDERINCLUSIVITY AND THE FIRST AMENDMENT: The Legislative Right to Nibble at Problems After *Williams-Yulee*

Clay Calvert\*

## ABSTRACT

*Using the U.S. Supreme Court’s 2015 opinion in Williams-Yulee v. Florida Bar as an analytical springboard, this Article examines the slipperiness—and sometimes fatalness—of the underinclusiveness doctrine in First Amendment free-speech jurisprudence. The doctrine allows lawmakers, at least in some instances, to take incremental, step-by-step measures to address harms caused by speech, rather than requiring an all-out, blanket-coverage approach. Yet, if the legislative tack taken is too small to ameliorate the harm that animates a state’s alleged regulatory interest, it could doom the statute for failing to directly advance it. In brief, the doctrine of underinclusivity requires lawmakers to thread a very fine needle’s eye between too little and too much regulation when drafting statutes. This Article argues that while Williams-Yulee attempts to better define underinclusivity, its subjectivity remains problematic.*

## I. INTRODUCTION

In April 2015, a divided U.S. Supreme Court in *Williams-Yulee v. Florida Bar*<sup>1</sup> upheld, in the face of a First Amendment<sup>2</sup> free-speech challenge, a

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

2. The First Amendment to the U.S. Constitution provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .” U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated ninety-one years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties to apply to state and local government entities and officials. *See* *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

Florida Judicial Canon<sup>3</sup> prohibiting judges and judicial candidates in the Sunshine State from personally soliciting election campaign funds.<sup>4</sup> In delivering the opinion of the Court, Chief Justice John Roberts found the canon passed muster under the typically rigorous strict scrutiny<sup>5</sup> standard of judicial review.<sup>6</sup>

The decision rightfully garners attention for at least three reasons. First, as the Chief Justice wrote, it is “one of the rare cases in which a speech restriction withstands strict scrutiny.”<sup>7</sup> It thus may signal, as some scholars argue, that strict scrutiny is not necessarily as fatal to laws as it seems.<sup>8</sup>

Second, with the lone exception of Roberts, the justices split cleanly along partisan political lines.<sup>9</sup> Specifically, Roberts was joined in upholding the Florida Canon by all four liberal-leaning, Democrat-nominated justices—

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3. See CODE OF JUDICIAL CONDUCT Canon 7(C)(1) (FLA. SUP. CT. 2015), <http://www.floridasupremecourt.org/decisions/ethics/canon7.shtml> (“A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates shall not personally solicit campaign funds . . .”).

4. The effect of the ruling stretches far beyond Florida, as thirty states have rules “that bar judicial candidates from directly soliciting donations.” Richard Wolf, *From Chief Justice Roberts, a Liberal Dose of Autonomy*, USA TODAY (May 6, 2015), <http://www.usatoday.com/story/news/politics/2015/05/06/supreme-court-john-roberts/26935809/>.

5. The strict scrutiny standard of judicial review “applies either when a law is content based on its face or when the purpose and justification for the law are content based . . .” *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015). Under this test, laws are “justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Id.* at 2226.

Ostensibly, strict scrutiny is a demanding standard. As one scholar writes, “modern free-speech law is based on the foundational premise that content-based restrictions on speech are subject to strict scrutiny, and will almost always be invalidated.” Ashutosh Bhagwat, *Reed v. Town of Gilbert: Signs of (Dis)Content?*, 9 N.Y.U. J.L. & LIBERTY 137, 144 (2015); see Toni M. Massaro, *Tread on Me!*, 17 U. PA. J. CONST. L. 365, 397 (2014) (“In the free speech context, true strict scrutiny has been construed to set an extremely high bar for the government.”).

6. *Williams-Yulee*, 135 S. Ct. at 1666 (concluding that the judicial canon at issue “advances the State’s compelling interest in preserving public confidence in the integrity of the judiciary, and it does so through means narrowly tailored to avoid unnecessarily abridging speech. This is therefore one of the rare cases in which a speech restriction withstands strict scrutiny.”).

7. *Id.*

8. See Adam Winkler, *Free Speech Federalism*, 108 MICH. L. REV. 153, 165 (2009) (asserting, based upon an extensive analysis of cases, that “not only do many speech laws survive strict scrutiny, but well over half of the federal laws do. Clearly, strict scrutiny is not really fatal in fact. This finding corresponds to other recent empirical work I have done on the strict scrutiny standard.”).

9. See Erwin Chemerinsky, *Are Judges Politicians? SCOTUS Renews the Question*, A.B.A. J. (Jun. 4, 2015), [http://www.abajournal.com/news/article/chemerinsky\\_scotus\\_renews\\_question\\_of\\_whether\\_judges\\_are\\_politicians](http://www.abajournal.com/news/article/chemerinsky_scotus_renews_question_of_whether_judges_are_politicians) (“In *Williams-Yulee*, Chief Justice Roberts joins the four most liberal justices to create the majority.”).

Stephen Breyer, Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan.<sup>10</sup> Four Republican-nominated justices—the late Antonin Scalia, along with current Court members Anthony Kennedy, Clarence Thomas and Samuel Alito<sup>11</sup>—dissented and would have struck down the canon under the same strict scrutiny test Roberts deployed. Kennedy contended in dissent that a “flaw in the Court’s analysis . . . is its error in the application of strict scrutiny. The Court’s evisceration of that judicial standard now risks long-term harm to what was once the Court’s own preferred First Amendment test.”<sup>12</sup>

This, of course, triggered speculation regarding why Roberts broke from his conservative peers. Brianne Gorod, an attorney for the Constitutional Accountability Center, asserts the Chief Justice has “often said that he wants the justices to be seen as different than politicians, and whether all of his votes are consistent with that goal, this one clearly was. As he explained, ‘Judges are not politicians, even when they come to the bench by way of the ballot.’”<sup>13</sup> Roberts, in other words, strove in *Williams-Yulee* “to make a larger point about the role of the judiciary.”<sup>14</sup>

A third reason *Williams-Yulee* attracts attention is that the majority drew a marked distinction between judges and politicians, with the former subject to greater restrictions when raising money for elections and, quite possibly, when engaging in other forms of expression.<sup>15</sup> As Dean Erwin Chemerinsky of the University of California, Irvine School of Law asserts, the decision “create[s] great uncertainty as to the constitutionality of other restrictions of speech by candidates for elected judicial offices.”<sup>16</sup> He adds that *Williams-*

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10. See *Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE U.S., <http://www.supremecourt.gov/about/biographies.aspx> (last visited Oct. 29, 2016) [hereinafter *Biographies*] (setting forth the official biographies for the justices, including the names of the presidents who nominated each); see also *Biographies of the Justices*, SCOTUS BLOG, <http://www.scotusblog.com/reference/educational-resources/biographies-of-the-justices/> (last visited Oct. 29, 2016).

11. *Biographies*, *supra* note 10. Justice Scalia died February 12, 2016. Adam Liptak, *Justice Scalia, Who Led Court’s Conservative Renaissance, Dies at 79*, N.Y. TIMES, (Feb. 13, 2016), [http://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html?\\_r=0](http://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html?_r=0).

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

13. Brianne J. Gorod, *A Big Year at the Supreme Court*, 18 GREEN BAG 391, 403 (2015) (citations omitted).

14. *Id.*

15. See *Williams-Yulee*, 135 S. Ct. at 1662 (“Judges are not politicians, even when they come to the bench by way of the ballot. And a State’s decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office.”).

16. Chemerinsky, *supra* note 9.

*Yulee* “leaves open the question of what else states may do in regulating speech in judicial election campaigns.”<sup>17</sup>

All of these aspects of *Williams-Yulee* warrant scholarly consideration. This Article, however, analyzes another facet of the Court’s opinion—namely, its articulation and application of the underinclusiveness doctrine as it affects the legislative tailoring of laws. As defined by Roberts in *Williams-Yulee*, “[u]nderinclusivity creates a First Amendment concern when the State regulates one aspect of a problem while declining to regulate a different aspect of the problem that affects its stated interest in a comparable way.”<sup>18</sup> In other words, if the government regulates too little speech to prevent or mitigate a particular type of harm—the harm constituting “the problem,”<sup>19</sup> as Roberts put it—that “vast swaths”<sup>20</sup> of unregulated speech continue to produce, then a law may be fatally underinclusive. As attorney James Ianelli observes, a law is underinclusive if it “fails to reach much of the speech that implicates the government’s interest . . . .”<sup>21</sup>

In *Williams-Yulee*, Roberts suggests a statute’s underinclusiveness may signal one of two problems: (1) that lawmakers are actually and covertly targeting (and thereby discriminating against) a specific class of speakers or viewpoints, rather than serving the allegedly broader interest they purport to address;<sup>22</sup> or (2) the statute fails to “actually advance a compelling interest,”<sup>23</sup> likely because it is too “riddled with exceptions,”<sup>24</sup> exemptions and loopholes.

Regarding the significance of underinclusivity in telegraphing the first problem identified above by Roberts, “[t]here is a great deal of agreement that viewpoint discrimination is at the core of what the First Amendment forbids.”<sup>25</sup> Additionally, in *Citizens United v. Federal Election*

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17. *Id.*

18. 135 S. Ct. at 1670 (emphasis omitted).

19. *Id.*

20. *Id.* at 1668.

21. James Ianelli, *Noncitizens and Citizens United*, 56 LOY. L. REV. 869, 901 (2010).

22. See 135 S. Ct. at 1668 (“[U]nderinclusiveness can raise ‘doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.’”) (quoting *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 802 (2011)).

23. *Id.*

24. *Id.* at 1669.

25. Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 242 (2012). Viewpoint-based speech regulations are a subset of content-based regulations. See McCullen v. Coakley, 134 S. Ct. 2518, 2533 (2014) (labeling viewpoint discrimination “an ‘egregious form of content discrimination’”) (quoting *Rosenberger v. Rector and Visitors of Univ. Va.*, 515 U.S. 819, 829 (1995)); *Rosenberger*, 515 U.S. at 829 (“When the government targets not subject matter, but

*Commission*,<sup>26</sup> the Court “gave full-throated articulation to the principle that discrimination on the basis of the identity of the speaker is offensive to the First Amendment . . . .”<sup>27</sup> As former Stanford Law School Dean Kathleen Sullivan argues in synthesizing these twin concerns, after *Citizens United* “[g]overnment regulation is suspect not only when it discriminates among viewpoints . . . but also when it discriminates among speakers.”<sup>28</sup> Underinclusivity thus is a judicial tool for ferreting out unconstitutional discrimination against both speech and speaker.

As to the second problem—lack of efficacy of the statutory means in serving a compelling interest—that underinclusiveness may signal, this is important because the Supreme Court holds that even when intermediate scrutiny applies, the government still must prove that the means “will in fact alleviate [the harms] to a material degree.”<sup>29</sup> Similarly, it is one thing to assert a compelling interest under strict scrutiny, but quite another matter to demonstrate that the means actually “promote”<sup>30</sup> and “further[.]”<sup>31</sup> that interest. As Justice Antonin Scalia, who died in February 2016, wrote in dissent in *Williams-Yulee*, under strict scrutiny the government must demonstrate that “the speech restriction *substantially advances* the claimed objective.”<sup>32</sup> Underinclusive laws, in contrast, less effectively promote and further compelling interests by allowing some varieties of harm-causing speech to flow freely and unencumbered.

Thus, a substantially underinclusive law—one that fails to serve or advance its alleged interest(s)—squarely comports with what Professor Eric Easton cleverly calls “the futility principle”<sup>33</sup> in First Amendment jurisprudence. This principle holds “that government action to suppress

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particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.”)

26. 558 U.S. 310 (2010).

27. Michael Kagan, *Speaker Discrimination: The Next Frontier of Free Speech*, 42 FLA. ST. U. L. REV. 765, 766 (2015).

28. Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 155 (2010).

29. *Edenfield v. Fane*, 507 U.S. 761, 771 (1993).

30. *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 813 (2000).

31. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015) (noting that the government bears the burden of showing a restriction “*further*s a compelling [governmental] interest”).

32. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1678 (2015) (Scalia, J., dissenting) (emphasis added); *see also* Liptak, *supra* note 11 (reporting on Scalia’s death at age 79 at a resort in West Texas).

33. Eric B. Easton, *Closing the Barn Door After the Genie is Out of the Bag: Recognizing a “Futility Principle” in First Amendment Jurisprudence*, 45 DEPAUL L. REV. 1, 35 (1995).

speech must be effective to be valid.”<sup>34</sup> Indeed, Easton observes that underinclusiveness “implicate[s] the futility principle.”<sup>35</sup>

Roberts was clear in *Williams-Yulee*, however, that while “a law’s underinclusivity raises a red flag”<sup>36</sup> regarding its constitutionality, lawmakers “need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns. We have accordingly upheld laws—even under strict scrutiny—that conceivably could have restricted even greater amounts of speech in service of their stated interests.”<sup>37</sup> Indeed, more than forty years ago, in *Erznoznik v. City of Jacksonville*,<sup>38</sup> the Court remarked that underinclusive regulations are permissible “on the sound theory that a legislature may deal with one part of a problem without addressing all of it.”<sup>39</sup> Colloquially put, a little bit of legislative nibbling at a speech-related problem is okay, so long as the bite taken is not too small. In the case of *Williams-Yulee*—and as explained in detail later<sup>40</sup>—the majority held that Florida’s nibble to protect judicial integrity “raise[d] no fatal underinclusivity concerns.”<sup>41</sup>

Ultimately, as Erwin Chemerinsky writes, underinclusiveness is “used by courts in evaluating the fit between a government’s means and its ends.”<sup>42</sup> In other words, it relates directly to the narrow tailoring process of lawmaking<sup>43</sup>

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34. *Id.*

35. *Id.* at 24.

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

37. *Id.* (citation omitted).

38. 422 U.S. 205 (1975).

39. *Id.* at 215.

40. *See infra* Section II.A.

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

42. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 702 (5th ed. 2015).

43. *See* Jessica Fisher, *Brown v. Entertainment Merchants Association: “Modern Warfare” on First Amendment Protection of Violent Video Games*, 8 J. BUS. & TECH. L. 525, 532 (2013) (“An act is not narrowly tailored if it is underinclusive or overinclusive.”).

and thus is not a “freestanding”<sup>44</sup> doctrine, such as a facial challenge<sup>45</sup> like vagueness<sup>46</sup> or overbreadth.<sup>47</sup>

For legislators, then, the drafting dilemma is this: how little regulation is too little regulation such that a law is declared fatally underinclusive<sup>48</sup> and, conversely, how much regulation is too much regulation such that, under strict scrutiny,<sup>49</sup> a law is not “narrowly tailored”<sup>50</sup> and thus is rendered unconstitutional?<sup>51</sup> The challenge is especially difficult when strict scrutiny is defined, as it was in 2014 by the majority in *McCullen v. Coakley*,<sup>52</sup> as requiring lawmakers to use “the least restrictive means”<sup>53</sup> of serving the interest in question.

This requirement—that the means restrict “no more speech than necessary”<sup>54</sup>—essentially reduces the size of the metaphorical needle’s eye to the point where no slack or elasticity is permitted in the direction of overinclusion. The underinclusion side, in turn, is more problematic because

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

45. See CHEMERINSKY, *supra* note 42, at 994 (“[V]agueness and overbreadth involve facial challenges to laws.”).

46. As the U.S. Supreme Court explained in 2008:

Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment. A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.

*United States v. Williams*, 553 U.S. 285, 304 (2008); see also *Johnson v. United States*, 135 S. Ct. 2551, 2556–61 (2015) (addressing when a law is unconstitutionally vague).

47. The U.S. Supreme Court explained in 2010 that “[i]n the First Amendment context . . . this Court recognizes ‘a second type of facial challenge,’ whereby a law may be invalidated as overbroad if ‘a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.’” *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)).

48. See Mark Cordes, *Sign Regulation After Ladue: Examining the Evolving Limits of First Amendment Protection*, 74 NEB. L. REV. 36, 89 (1995) (noting that underinclusiveness can reflect “[p]roblems of regulating ‘too little’ speech”).

49. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1274 (2007) (“[S]trict scrutiny . . . [is] defined by its insistence on compelling interests and narrow tailoring.”).

50. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1665–66 (2015).

51. See Kathryn A. Kelly, *Moral Rights and the First Amendment: Putting Honor Before Free Speech?*, 11 U. MIAMI ENT. & SPORTS L. REV. 211, 245 (1994) (“To satisfy strict scrutiny, [a] statute must not be over- or underinclusive.”).

52. 134 S. Ct. 2518 (2014).

53. *Id.* at 2530.

54. *Williams-Yulee*, 135 S. Ct. at 1679 (Scalia, J., dissenting).



some slack in the direction of not serving a statutory interest may be okay (as it was in *Williams-Yulee*). The hitch is that there is no hard-and-fast, pre-defined boundary or benchmark that demarcates permissible slack versus impermissible slack.

It's a magical puzzle, then, of finding the legislative sweet spot between underinclusiveness and overinclusiveness, somewhat akin to the line in the theme song for Sid and Marty Krofft's 1969 children's television show, H.R. Pufnstuf: "Can't do a little, 'cause you can't do enough."<sup>55</sup> Pop-culture references aside, the questions raised by the underinclusivity doctrine in *Williams-Yulee* are far from mere grist for the academic mill.

Specifically and most notably, underinclusiveness played a determinative role—just two months after *Williams-Yulee*—when the Court struck down a sign ordinance in *Reed v. Town of Gilbert*.<sup>56</sup> Writing for the *Reed* majority, Justice Clarence Thomas declared that Gilbert's ordinance, which exempted a whopping twenty-three categories of signs from a general ban on the display of unpermitted outdoor signs,<sup>57</sup> was "hopelessly underinclusive"<sup>58</sup> in serving Gilbert's ostensible dual interests of "preserving the Town's aesthetic appeal and traffic safety."<sup>59</sup> Thus, although underinclusiveness was present but not fatal in *Williams-Yulee*, it soon thereafter sunk the ordinance at issue in *Reed*.

Part I of this Article in Section A traces the U.S. Supreme Court's evolving articulation and deployment of the underinclusiveness doctrine in free-speech cases during the past twenty-five years.<sup>60</sup> Additionally, Section B of Part I examines scholarly literature regarding underinclusiveness in the First Amendment free-speech context. It must be recognized that underinclusiveness analysis also applies in First Amendment religious freedom cases,<sup>61</sup> as well as in Fourteenth Amendment equal protection

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55. Les Svaras & Paul Simon, *H.R. Pufnstuf*, on TV'S GREATEST HITS VOLUME 5 (TVT Records 1996).

56. 135 S. Ct. 2218 (2015).

57. See *id.* at 2224 ("The Sign Code prohibits the display of outdoor signs anywhere within the Town without a permit, but it then exempts 23 categories of signs from that requirement. These exemptions include everything from bazaar signs to flying banners.").

58. *Id.* at 2231.

59. *Id.*

60. See *infra* text accompanying notes 65–223.

61. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543–45 (1993) (identifying problems caused by the underinclusiveness of the ordinances at issue in the case).

disputes.<sup>62</sup> Those areas of law, however, are beyond the scope of this Article, which focuses on free-speech underinclusivity.

Next, Part II turns to the heart of the Article, analyzing in greater depth and detail the underinclusivity doctrine's impact in the Court's 2015 opinions in both *Williams-Yulee* and *Reed*.<sup>63</sup> This critique is vital not only for understanding why underinclusiveness proved fatal in one case (*Reed*) but permissible in the other (*Williams-Yulee*), but because it reveals rifts and schisms in the justices' understanding of underinclusivity, particularly in *Williams-Yulee*. Finally, Part III concludes by identifying some lessons from *Williams-Yulee* and *Reed* about underinclusivity and problems that may plague it in the future.<sup>64</sup>

## II. TRACING THE UNDERINCLUSIVENESS DOCTRINE FOR A QUARTER-CENTURY: FROM THE SUPREME COURT TO FIRST AMENDMENT SCHOLARS

This part has two sections. First, Section A provides a primer on nine U.S. Supreme Court rulings over the past quarter-century that directly address underinclusiveness in First Amendment free-speech contexts.<sup>65</sup> Second, Section B reviews and examines academic literature on underinclusiveness.

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62. See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448, 485 (1980) (considering an underinclusiveness challenge to a federal minority business enterprise statute).

63. See *infra* text accompanying notes 224–345.

64. See *infra* text accompanying notes 346–72.

65. For readers seeking examples of the Court's consideration of underinclusiveness issues in free-speech cases *prior* to 1990, see *Fla. Star v. B.J.F.*, 491 U.S. 524, 540 (1989) (examining a Florida statute that prohibited the disclosure of rape victims' names in "an instrument of mass communication," but not prohibiting the spread of that same information by other means of communication, and finding the statute's underinclusiveness "raises serious doubts about whether Florida is, in fact, serving, with this statute, the significant interests which appellee invokes in support of affirmance"); *Posadas De P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 342–43 (1986) (rejecting an underinclusiveness challenge in the context of a commercial speech case involving a law that restricted advertisements for casino gambling, but allowed ads for "other kinds of gambling such as horse racing, cockfighting, and the lottery"); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52–53 (1986) (rejecting the argument that a local zoning ordinance singling out adult motion picture theaters was underinclusive because it did not "regulate other kinds of adult businesses that are likely to produce secondary effects similar to those produced by adult theaters"); *New York v. Ferber*, 458 U.S. 747, 752–65 (1982) (upholding a state child pornography statute, and rejecting the New York Court of Appeals' finding that the statute "was underinclusive because it discriminated against visual portrayals of children engaged in sexual activity by not also prohibiting the distribution of films of other dangerous activity," and concluding that the statute "describes a category of material the production and distribution of which is not entitled to First Amendment protection. It is therefore clear that there is nothing

A. *U.S. Supreme Court Consideration of Underinclusiveness: A Primer on Cases that Paved the Path Toward Williams-Yulee*

This section proceeds chronologically and in case-by-case fashion. It starts with the earliest decision rendered by the Court since January 1, 1990, in which underinclusiveness played a critical role<sup>66</sup> in the Court's First Amendment analysis.<sup>67</sup> It then continues through its 2011 ruling in the violent

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unconstitutionally 'underinclusive' about a statute that singles out this category of material for proscription."); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 511 (1981) (examining the constitutionality of a local offsite (but not onsite) outdoor advertising ordinance, and finding that "whether onsite advertising is permitted or not, the prohibition of offsite advertising is directly related to the stated objectives of traffic safety and esthetics. This is not altered by the fact that the ordinance is underinclusive because it permits onsite advertising."); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 767-93 (1978) (examining the constitutionality of a state statute forbidding "certain expenditures by banks and business corporations for the purpose of influencing the vote on referendum proposals," using the underinclusiveness doctrine to attack the state's asserted interest in protecting corporate shareholders, and finding that the "underinclusiveness of the statute is self-evident," in part, because "[c]orporate expenditures with respect to a referendum are prohibited, while corporate activity with respect to the passage or defeat of legislation is permitted."); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214-15 (1975) (using the underinclusiveness doctrine to undermine Jacksonville's alleged interests in traffic safety and driver-nondistracted for regulating images of nudity at drive-in movie theatres, and reasoning that "[b]y singling out movies containing even the most fleeting and innocent glimpses of nudity the legislative classification is strikingly underinclusive. There is no reason to think that a wide variety of other scenes in the customary screen diet . . . would be any less distracting to the passing motorist.").

66. A "critical role" is used here to mean more than just a mere mention of or a brief reference to underinclusiveness in a First Amendment analysis. For example, in *Simon & Schuster, Inc. v. New York State Crime Victims Board*, Justice Harry Blackmun wrote a three-sentence concurrence in which he asserted that "the New York statute is underinclusive as well as overinclusive and . . . we should say so." *Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd.*, 502 U.S. 105, 123-24 (1991) (Blackmun, J., concurring). In delivering the opinion of the Court, however, Justice Sandra Day O'Connor reasoned that "in light of our conclusion in this case, we need not decide whether, as Justice Blackmun suggests, the Son of Sam law is underinclusive as well as overinclusive." *Id.* at 122 n.2. *Simon & Schuster* thus is not addressed here as a critical case, even though the case mentions and briefly references underinclusiveness.

Similarly, the word "underinclusive" appears just once—in a footnote in a dissent, no less—in the child pornography possession case of *Osborne v. Ohio*. *Osborne v. Ohio*, 495 U.S. 103, 143-44 n.18 (1990) (Brennan, J., dissenting). *Osborne* thus is not addressed in this article. Likewise, "underinclusiveness" appears only once—in a dissent and in the context of an Equal Protection Clause question, rather than in the First Amendment issue that was also involved—in *Metro Broadcasting v. Federal Communications Commission*. *Metro Broad. v. FCC*, 497 U.S. 547, 621 (1990), *overruled in part*, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (O'Connor, J., dissenting).

67. This twenty-five-year period was chosen because it provides an ample number of cases that provide direct insight to the Court's *current* views regarding underinclusiveness. It is beyond the scope of this article, which pivots on the *Williams-Yulee* decision, to provide a historical examination of underinclusiveness. Readers seeking older cases addressing underinclusiveness

video game case of *Brown v. Entertainment Merchants Association*,<sup>68</sup> in which a California statute was declared fatally underinclusive.<sup>69</sup> Finally, Section A closes with a summary of key principles derived from these cases.

Significantly, analysis of these cases concentrates on their examination of underinclusiveness, not on other questions or problems. Additionally, this review provides a synopsis, rather than an in-depth, comprehensive dissection, of the underinclusiveness issues. That is purposeful because these cases are not the centerpiece of this Article; rather, they provide background for better understanding the tortuous road of underinclusiveness that led to 2015 and the key cases of *Williams-Yulee* and *Reed*.

### 1. *Austin v. Michigan State Chamber of Commerce*<sup>70</sup>

In its 1990 decision in *Austin*, which was overruled twenty years later by *Citizens United v. Federal Election Commission*,<sup>71</sup> a six-justice majority rejected an underinclusiveness challenge to a Michigan law that prohibited corporations—but not unincorporated labor unions—from using “treasury funds for independent expenditures in support of, or in opposition to, any candidate in elections for state office.”<sup>72</sup> Applying strict scrutiny,<sup>73</sup> the majority initially found that Michigan had a compelling interest in avoiding both political corruption and its appearance because “[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures.”<sup>74</sup>

In considering whether the law’s exemption for unincorporated labor unions made it fatally underinclusive, the majority rejected this notion, reasoning that there are “crucial differences between unions and corporations.”<sup>75</sup> Specifically, Justice Thurgood Marshall wrote that: (1) unincorporated labor unions lack “the significant state-conferred advantages

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are strongly encouraged to see *supra* note 65, which identifies and briefly describes more than a half-dozen pre-1990 Supreme Court decisions.

68. 131 S. Ct. 2729 (2011).

69. See *infra* Section I.A.9 (addressing *Brown*).

70. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990), *overruled by* *Citizens United v. FEC*, 558 U.S. 310 (2010).

71. *Citizens United*, 558 U.S. 310.

72. *Austin*, 494 U.S. at 654.

73. The majority wrote that it had to determine if the law at issue was “narrowly tailored to serve a compelling state interest.” *Id.* at 657.

74. *Id.* at 660.

75. *Id.* at 666.

of the corporate structure;<sup>76</sup> and (2) “labor unions differ from corporations in that union members who disagree with a union’s political activities need not give up full membership in the organization to avoid supporting its political activities.”<sup>77</sup>

Colloquially put, then, the gist of the underinclusiveness argument made by the Chamber of Commerce against the statute boiled down to this: “If you are really so concerned about avoiding corruption and its appearance in the political process, then why are you only regulating expenditures by corporations and not by unincorporated trade unions?” The Court’s response: “Because those two entities are very different, and the regulated one is much more troublesome than the unregulated one.”

The takeaway from *Austin*, thus, is that drawing decisive differences between regulated and unregulated speakers illustrates one way a state can rebuff an underinclusiveness challenge. *Citizens United*, which overruled *Austin*, casts serious doubts today on this speaker-differentiation tactic when it comes to turning back an underinclusiveness attack. Specifically, Justice Anthony Kennedy wrote for the *Citizens United* majority that “the Government may commit a constitutional wrong when by law it identifies certain preferred speakers.”<sup>78</sup> He added that the government may not “deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.”<sup>79</sup> In brief, the Court’s focus today on speaker-based discrimination as a harbinger of unconstitutionality may well jettison *Austin*’s underinclusiveness analysis to the ashcan of discarded doctrinal thinking.

Finally, Justice William Brennan wrote a concurring opinion in *Austin* in which he explained that “[o]ne purpose of the underinclusiveness inquiry is to ensure that the proffered state interest actually underlies the law.”<sup>80</sup> This comports with Chief Justice Roberts’ observation twenty-five years later in *Williams-Yulee* “that underinclusiveness can raise ‘doubts about whether the government is in fact pursuing the interest it invokes.’”<sup>81</sup> Thus, even if *Austin*’s underinclusiveness analysis is no longer valid after *Citizens United*, the policy behind underinclusiveness challenges still holds true today.

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76. *Id.* at 665.

77. *Id.*

78. *Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

79. *Id.* at 341.

80. *Austin*, 494 U.S. at 677 (Brennan, J., concurring).

81. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1668 (2015) (quoting *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 802 (2011)).

## 2. *Burson v. Freeman*<sup>82</sup>

In *Burson*, the Court considered a Tennessee statute that prohibited “solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place.”<sup>83</sup> Applying strict scrutiny,<sup>84</sup> a divided Court upheld the law. In delivering the Court’s judgment in a plurality opinion joined by three other justices,<sup>85</sup> Harry Blackmun found that Tennessee had “compelling interests in preventing voter intimidation and election fraud.”<sup>86</sup>

Blackmun rejected the argument of Mary Rebecca Freeman, a candidate for office who challenged the law, as well as three dissenting justices,<sup>87</sup> that the statute was fatally underinclusive because it did “not restrict other types of speech, such as charitable and commercial solicitation or exit polling, within the 100-foot zone.”<sup>88</sup> In other words, the *Burson* underinclusiveness argument distills to this: Why is some speech allowed within the zone, but not other speech?

In refuting this underinclusiveness attack, Justice Blackmun made an important general observation—that “[t]he First Amendment does not require States to regulate for problems that do not exist.”<sup>89</sup> This, in turn, suggests a general underinclusiveness principle—that it is permissible to exempt from regulation categories of speech for which there is no evidence and no proof that they cause harm. As applied to *Burson*’s facts, Blackmun found “ample evidence that political candidates have used campaign workers to commit voter intimidation or electoral fraud. In contrast, there is simply no evidence that political candidates have used other forms of solicitation or exit polling to commit such electoral abuses.”<sup>90</sup>

Dissenting, Justice John Paul Stevens disagreed with this conclusion. In his view, it improperly shifts the burden to the party challenging the law to

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82. *Burson v. Freeman*, 504 U.S. 191 (1992).

83. *Id.* at 193.

84. *See id.* at 198 (“[The Tennessee statute] must be subjected to exacting scrutiny: The State must show that the ‘regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.’”) (quoting *Perry Ed. Assn. v. Perry Local Educators’ Assn.*, 460 U.S. 37, 45 (1983)).

85. The opinion was joined by Chief Justice William Rehnquist and Justices Byron White and Anthony Kennedy. *Id.* at 193.

86. *Id.* at 206.

87. Justice John Paul Stevens authored a dissent that was joined by Justices Sandra Day O’Connor and David Souter. *Id.* at 217 (Stevens, J., dissenting).

88. *Id.* at 207.

89. *Id.*

90. *Id.*

prove that an unregulated niche of speech causes harm. As Stevens wrote, Blackmun’s “analysis contradicts a core premise of strict scrutiny—namely, that the heavy burden of justification is on the State. The plurality has effectively shifted the burden of proving the necessity of content discrimination from the State to the plaintiff.”<sup>91</sup> Stevens’ view in *Burson* thus amounts to this: if the government faces an underinclusiveness challenge, then it carries the burden of proving that the unregulated varieties of speech do not, in fact, cause the same type of harm that the regulated variety causes.

Ultimately, the outcome in *Burson*—a law surviving strict scrutiny—foreshadows, by more than twenty years, an observation of Chief Justice Roberts in *Williams-Yulee*. There, the Court also rejected an underclusiveness challenge in the process of upholding a statute in the face of strict scrutiny, and Roberts dubbed it “one of the rare cases in which a speech restriction withstands strict scrutiny.”<sup>92</sup> Back in 1992, Justice Blackmun similarly characterized *Burson* as “a rare case”<sup>93</sup> that survives strict scrutiny.

### 3. *R.A.V. v. City of St. Paul*<sup>94</sup>

In *R.A.V.*, the Court held that a St. Paul, Minnesota hate crimes statute was facially unconstitutional because “it prohibit[ed] otherwise permitted speech solely on the basis of the subjects the speech addresses.”<sup>95</sup> In delivering the opinion of the Court, Justice Antonin Scalia initially accepted the Minnesota Supreme Court’s narrowing construction of the statute—namely, that it reached only fighting words,<sup>96</sup> one of the few categories of speech not protected by the First Amendment.<sup>97</sup>

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91. *Id.* at 226 (Stevens, J., dissenting) (emphasis omitted).

92. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1666 (2015).

93. *Burson*, 504 U.S. at 211.

94. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

95. *Id.* at 381.

96. *Id.* at 391.

97. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (identifying fighting words as one of the “well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem,” and defining fighting words as “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace”); *see also United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (identifying nine categories of unprotected speech, including fighting words); *Cohen v. California*, 403 U.S. 15, 20 (1971) (describing fighting words as “those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction,” and adding that fighting words encompass only speech amounting to “a direct personal insult”).

Nonetheless, Justice Scalia found the statute facially unconstitutional because it applied “only to ‘fighting words’ that insult, or provoke violence, ‘on the basis of race, color, creed, religion or gender.’”<sup>98</sup> For Justice Scalia and the four justices who joined him,<sup>99</sup> this amounted to impermissible content-based discrimination. Why? Because fighting words used in connection with other topics and other ideas were left unregulated.<sup>100</sup> “The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects,” Justice Scalia concluded.<sup>101</sup> In summary, by going inside the general category of fighting words and carving out for regulation only those fighting words dealing with particular topics, lawmakers in St. Paul engaged in unconstitutional “selective limitations upon speech.”<sup>102</sup>

The concept of underinclusiveness—particularly as a criticism of Justice Scalia’s reasoning that St. Paul could not single out some types of fighting words for regulation based on their content—was raised by Justices Byron White and John Paul Stevens in separate concurrences. Justice White accused the Scalia majority of “inventing its brand of First Amendment underinclusiveness.”<sup>103</sup> He asserted that:

the Court’s new “underbreadth” creation serves no desirable function. Instead, it permits, indeed invites, the continuation of expressive conduct that in this case is evil and worthless in First Amendment terms, until the city of St. Paul cures the underbreadth by adding to its ordinance a catchall phrase such as “and all other fighting words that may constitutionally be subject to this ordinance.”<sup>104</sup>

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98. *R.A.V.*, 505 U.S. at 391.

99. Justice Scalia was joined by Chief Justice William Rehnquist and Justices Anthony Kennedy, David Souter and Clarence Thomas. *Id.* at 378.

100. *Id.* at 391.

101. *Id.*

102. *Id.* at 392; Justice Scalia emphasized the problem with selectively regulating fighting words based on the ideas they convey. *id.* at 393–94 (“[St. Paul] has proscribed fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance. Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas. That possibility would alone be enough to render the ordinance presumptively invalid, but St. Paul’s comments and concessions in this case elevate the possibility to a certainty.”).

103. *Id.* at 402 (White, J., concurring).

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



Similarly, Justice Stevens criticized what he dubbed “the novel ‘underbreadth’ analysis”<sup>105</sup> of Justice Scalia’s opinion, with its all-or-nothing reasoning. Justice Stevens asserted that Justice Scalia’s opinion:

embraces an absolutism of its own: Within a particular “proscribable” category of expression, the Court holds, a government must either proscribe all speech or no speech at all. This aspect of the Court’s ruling fundamentally misunderstands the role and constitutional status of content-based regulations on speech, conflicts with the very nature of First Amendment jurisprudence, and disrupts well-settled principles of First Amendment law.<sup>106</sup>

Responding to Justices White and Stevens, Justice Scalia called their underinclusiveness critique “the concurrences’ own invention.”<sup>107</sup> Justice Scalia contended that lawmakers are perfectly free to target unprotected categories of expression “only in certain media or markets, for although that prohibition would be ‘underinclusive,’ it would not discriminate on the basis of content.”<sup>108</sup>

Professor Michael Herz asserts that “[t]he dispute between White and Scalia in *R.A.V.* concerns when, if ever, content-based underinclusion is of constitutional concern.”<sup>109</sup> Herz contends that for Justice White, underinclusivity of the kind found in St. Paul’s statute is not a fatal problem because the greater power of government to regulate an entire category of speech, such as fighting words, includes the lesser power to regulate subsets or facets of it.<sup>110</sup> Herz writes that “[u]nder the greater-includes-the-lesser approach, underinclusion objections automatically fail.”<sup>111</sup> In contrast, for Justice Scalia content-based discrimination represented “an independent constitutional prohibition on the exercise of the lesser power”<sup>112</sup> in *R.A.V.* Thus, Justice Scalia’s position was that “if the state is going to proscribe fighting words, it must proscribe all of them; it cannot pick and choose.”<sup>113</sup>

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105. *Id.* at 428 (Stevens, J., concurring).

106. *Id.* at 419.

107. *Id.* at 387.

108. *Id.*

109. Michael Herz, *Justice Byron White and the Argument that the Greater Includes the Lesser*, 1994 BYU L. REV. 227, 256 (1994).

110. *Id.* at 255.

111. *Id.* at 257.

112. *Id.*

113. *Id.* at 258.

Writing in 1992—long before she took her seat on the U.S. Supreme Court—then-Professor Elena Kagan critiqued the Court’s opinion in *R.A.V.*<sup>114</sup> Specifically, she focused on what she called the issue of “content-based underinclusion,”<sup>115</sup> which involves the “partial limitation”<sup>116</sup> of speech as the government “picks and chooses among expression on the basis of what is said.”<sup>117</sup>

Justice Kagan remarked on Justice Scalia’s “attempts in *R.A.V.* to avoid the term ‘underinclusiveness’ in favor of the broader term ‘content discrimination,’ apparently because he thinks the former term more liable to the concurring opinions’ charges of First Amendment absolutism.”<sup>118</sup> Justice Kagan seemingly considers this distinction little more than judicial sleight of hand, writing that “content-based underinclusion is no more than a distinctive kind of content-based distinction, and analysis explicitly focusing on underinclusion (when it exists) does no more than respond to the peculiar nature of the governmental action and the peculiar concerns it raises.”<sup>119</sup>

Ultimately, *R.A.V.* is an outlier from the other cases examined here for two reasons. First, the other cases involve as-applied challenges under either strict or intermediate scrutiny. In contrast, the majority in *R.A.V.* struck down the statute for being facially unconstitutional; it thus did not apply either strict or intermediate scrutiny.

Second and more importantly, *R.A.V.* is an outlier because its discussion of underinclusiveness occurs within the context of a category of speech—fighting words—that receives no First Amendment protection. Thus, the underinclusiveness issue in *R.A.V.* pivots only on the ability to regulate some aspects, but not others, of a category of speech that already is not protected by the U.S. Constitution. In contrast, the other cases addressed in this part deal with speech that is presumptively protected by the First Amendment.

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114. Elena Kagan, *The Changing Faces of First Amendment Neutrality: R.A.V. v St. Paul, Rust v. Sullivan, and the Problem of Content-Based Underinclusion*, 1992 SUP. CT. REV. 29, 31 (1992).

115. *Id.* at 38.

116. *Id.*

117. *Id.* at 39.

118. *Id.* at 39, n.39.

119. *Id.*

4. *City of Cincinnati v. Discovery Network, Inc.*<sup>120</sup>

In *Discovery Network*, the Court struck down a Cincinnati ordinance that targeted newsracks for commercial handbills, but not newsracks for traditional newspapers. The twin interests underlying the newsrack ordinance were safety and aesthetics.<sup>121</sup>

Although the Court did not use the term underinclusiveness in its analysis, its reasoning reflects underinclusivity principles. To wit, the Court noted that the effect of the ordinance was the removal of only sixty-two newsracks, “while about 1,500-2,000” remained in place.<sup>122</sup> This veritable drop-in-the-bucket of banned newsracks detrimentally affected “the ‘fit’ between the city’s goal and its method of achieving it,”<sup>123</sup> despite Cincinnati’s argument that “every decrease in the number of such dispensing devices necessarily effects an increase in safety and an improvement in the attractiveness of the cityscape.”<sup>124</sup>

The Court wrote that Cincinnati’s distinction between commercial and non-commercial newsracks “bears no relationship whatsoever to the particular interests that the city has asserted. It is therefore an impermissible means of responding to the city’s admittedly legitimate interests.”<sup>125</sup> Specifically, the Court noted that all newsracks—for commercial handbills or otherwise—are “equally unattractive.”<sup>126</sup> It thus concluded that “[b]ecause the distinction Cincinnati has drawn has absolutely no bearing on the interests it has asserted, we have no difficulty concluding, as did the two courts below, that the city has not established the ‘fit’ between its goals and its chosen means that is required.”<sup>127</sup>

In a nutshell, the vast underinclusiveness of the Cincinnati ordinance revealed that it did not serve the interests of either aesthetics or traffic safety and, in turn, that the distinction between types of regulated and unregulated speech—commercial versus non-commercial—made no sense. This foreshadows the Court’s 2015 decision in *Reed v. Town of Gilbert*, in which underinclusivity similarly proved fatal to a municipality’s alleged interests in

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120. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993).

121. *See id.* at 412 (noting that Cincinnati was “[m]otivated by its interest in the safety and attractive appearance of its streets and sidewalks”).

122. *Id.* at 418.

123. *Id.*

124. *Id.*

125. *Id.* at 424.

126. *Id.* at 425.

127. *Id.* at 428.

aesthetics and traffic safety.<sup>128</sup> Ultimately, as Professor Emily Erickson observes, the ordinance in *Discovery Network* was “struck down as unconstitutionally underinclusive because the law failed to advance the government interest by targeting only commercial newsracks, whose commercial identity had nothing to do with mitigating visual blight.”<sup>129</sup>

##### 5. *City of Ladue v. Gilleo*<sup>130</sup>

In *Ladue*, the Court struck down a Ladue, Missouri ordinance that banned “homeowners from displaying any signs on their property except ‘residence identification’ signs, ‘for sale’ signs, and signs warning of safety hazards.”<sup>131</sup> The ordinance had ten exemptions,<sup>132</sup> including those permitting signage on non-residential properties such as businesses and churches.<sup>133</sup> Ladue identified several goals justifying the ordinance, including preserving both aesthetic beauty and homeowners’ property values, as well as preventing “safety and traffic hazards to motorists, pedestrians, and children.”<sup>134</sup> The law was challenged by a homeowner who was denied a variance to place a 24- by 36-inch sign criticizing the Persian Gulf War in her yard.<sup>135</sup>

In delivering the opinion for a unanimous Court, Justice John Paul Stevens remarked that “the notion that a regulation of speech may be impermissibly underinclusive is firmly grounded in basic First Amendment principles.”<sup>136</sup> He identified two key dangers posed by laws that are underinclusive due to exemptions or loopholes carved out from a general ban.

First, such exemption-based underinclusiveness can signal an effort by the government to favor and promote one viewpoint in a public debate.<sup>137</sup> Second, “through the combined operation of a general speech restriction and its exemptions, the government might seek to select the ‘permissible subjects for public debate’ and thereby to ‘control . . . the search for political truth.’”<sup>138</sup> In

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128. See *infra* Section III.B (addressing the Court’s analysis in *Reed*).

129. Emily Erickson, *Disfavored Advertising: Telemarketing, Junk Faxes and the Commercial Speech Doctrine*, 11 COMM. L. & POL’Y 589, 621 (2006).

130. *City of Ladue v. Gilleo*, 512 U.S. 43 (1994).

131. *Id.* at 45.

132. *Id.* at 46.

133. See *id.* at 45 (“The ordinance permits commercial establishments, churches, and nonprofit organizations to erect certain signs that are not allowed at residences.”).

134. *Id.* at 47.

135. *Id.* at 45.

136. *Id.* at 51.

137. *Id.*

138. *Id.*

brief, the first danger relates to viewpoint-based discrimination,<sup>139</sup> while the second involves subject-matter or content discrimination.<sup>140</sup>

Furthermore, exemptions carved out from a general ban “may diminish the credibility of the government’s rationale for restricting speech in the first place.”<sup>141</sup> Indeed, as applied in *Ladue*, “the exemptions from Ladue’s ordinance demonstrate that Ladue has concluded that the interest in allowing certain messages to be conveyed by means of residential signs outweighs the City’s esthetic interest in eliminating outdoor signs.”<sup>142</sup> Put colloquially, if Ladue was really concerned about its natural beauty (aesthetics) being harmed by signs, then it should not have exempted signs from many non-residential locations.

The Court, however, was clearly cognizant of the difficulty municipalities face in threading the needle’s eye between too many exemptions (leading to potentially fatal underinclusiveness problems) and too few exemptions (leading to a statute not being narrowly tailored and, in turn, failing strict scrutiny). As the Court noted, Ladue “might theoretically remove the defects in its ordinance by simply repealing all of the exemptions. If, however, the ordinance is also vulnerable because it prohibits too much speech, that solution would not save it.”<sup>143</sup>

Ultimately, however, the Court did not base its decision to strike down Ladue’s ordinance on the underinclusiveness problem. Rather, it did so because “Ladue’s ban on almost all residential signs,”<sup>144</sup> virtually foreclosed “an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute.”<sup>145</sup> In other words, Ladue erred by foreclosing “a venerable means of communication that is both unique and important. It has totally foreclosed that medium to political, religious, or personal messages.”<sup>146</sup> When Ladue wiped out “an important and distinct medium of expression,”<sup>147</sup> it went too far in squelching speech. One commentator therefore concludes that *Ladue* holds that “a wholesale ban on political signs

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139. *See supra* note 25 and accompanying text (addressing viewpoint-based discrimination).

140. *Ladue*, 512 U.S. at 52 (noting “the risks of viewpoint and content discrimination” fostered by underinclusive laws).

141. *Id.*

142. *Id.* at 53.

143. *Id.*

144. *Id.* at 58.

145. *Id.* at 57.

146. *Id.* at 54.

147. *Id.* at 55.

on residential property placed by a person residing at that location is absolutely at odds with the First Amendment.”<sup>148</sup>

It is important to understand that the Court in *Ladue* dodged the question of whether the ordinance was content based or content neutral. As Stevens wrote, “we set to one side the content discrimination question.”<sup>149</sup> Instead, the Court assumed, for the sake of argument, that the ordinance was content neutral.<sup>150</sup> Nonetheless, by foreclosing an entire and important medium of expression—namely, residential yard signs—*Ladue* failed to leave open adequate alternative avenues of communication to its residents under the intermediate scrutiny test<sup>151</sup> that typically applies to content-neutral laws.<sup>152</sup>

Concurring in the judgment, Justice Sandra Day O’Connor objected to this methodology. She “would have preferred to apply our normal analytical structure in this case, which may well have required us to examine this law with the scrutiny appropriate to content-based regulations.”<sup>153</sup> O’Connor added that “[t]he normal inquiry that our doctrine dictates is, first, to determine whether a regulation is content based or content neutral, and then, based on the answer to that question, to apply the proper level of scrutiny.”<sup>154</sup>

Regardless of the Court’s departure from its standard protocol on the content-based versus content-neutral question, *Ladue* sheds important light on the underinclusiveness doctrine, in terms of both the policy concerns that animate it and the Court’s recognition that curing underinclusiveness by eliminating all exemptions from a general ban may render a law overly inclusive and thus not narrowly tailored.

Critically, the underinclusivity that plagued *Ladue*’s sign ordinance surfaced again—and fatally so—in 2015 in another sign ordinance case, namely *Reed v. Town of Gilbert*.<sup>155</sup> In fact, as described later, Justice Elena Kagan suggested in her *Reed* concurrence that *Ladue* should have controlled

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148. Marc Rohr, *De Minimis Content Discrimination: The Vexing Matter of Sign-Ordinance Exemptions*, 7 ELON L. REV. 327, 337 (2015).

149. *Ladue*, 512 U.S. at 53 n.11.

150. *See id.* at 54 (“[W]e will assume, *arguendo*, the validity of the City’s submission that the various exemptions are free of impermissible content or viewpoint discrimination.”).

151. *See* Leslie Kendrick, *Nonsense on Sidewalks: Content Discrimination in McCullen v. Coakley*, 2014 SUP. CT. REV. 215, 238 (2014) (observing that the intermediate scrutiny standard “has historically required that the law be ‘narrowly tailored to serve a significant governmental interest’ and that it leave open ‘ample alternative channels of communication’”).

152. *Ladue*, 512 U.S. at 53 n.11. As Justice Stevens wrote, the Court examined “the adequacy of alternative channels of communication.” *Id.*

153. *Id.* at 60 (O’Connor, J., concurring).

154. *Id.* at 59.

155. 135 S. Ct. 2218 (2015).

the Court's analysis in *Reed* and that, per *Ladue*, there was no need to apply strict scrutiny to measure the validity of Gilbert's sign code.<sup>156</sup> As this Article's Conclusion suggests, the importance of *Ladue* may be resuscitated after *Reed* if the justices search for an end-run around having to apply strict scrutiny to all sign ordinances that make, no matter how seemingly insignificant, content-based distinctions.<sup>157</sup>

6. *Republican Party of Minnesota v. White*<sup>158</sup>

In *White*, the Court considered the constitutionality of a Minnesota Judicial Canon, known as the "announce clause,"<sup>159</sup> that prohibited candidates for judicial election "from announcing their views on disputed legal and political issues."<sup>160</sup> Applying strict scrutiny, the Court examined whether Minnesota had compelling interests in "preserving the impartiality of the state judiciary and preserving the appearance of the impartiality of the state judiciary."<sup>161</sup> Additionally, Minnesota alleged a compelling "interest in *openmindedness*, or at least in the appearance of *openmindedness*."<sup>162</sup> The announce clause supposedly served this interest by relieving "a judge from pressure to rule a certain way in order to maintain consistency with statements the judge has previously made."<sup>163</sup>

It was on this *openmindedness* interest where Justice Antonin Scalia, in writing the majority opinion, used the underinclusiveness doctrine to attack its validity. Specifically, Justice Scalia focused on the fact that the canon only applied to speech after a person had formally declared candidacy for a judgeship.<sup>164</sup> Using an example to illustrate the way in which unregulated, pre-candidacy speech undermined the validity of the Minnesota's asserted interest in *openmindedness*, Scalia wrote:

a candidate for judicial office may not say "I think it is constitutional for the legislature to prohibit same-sex marriages."  
He may say the very same thing, however, up until the very day before he declares himself a candidate, and may say it repeatedly

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156. See *infra* notes 333–39 and accompanying text.

157. See *infra* note 371 and accompanying text.

158. *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).

159. *Id.* at 768.

160. *Id.*

161. *Id.* at 775.

162. *Id.* at 778 (emphasis added).

163. *Id.* at 778–79.

164. *Id.* at 778–81.

(until litigation is pending) after he is elected. As a means of pursuing the objective of open-mindedness that respondents now articulate, the announce clause is so woefully underinclusive as to render belief in that purpose a challenge to the credulous.<sup>165</sup>

The key here is that a statute's underinclusiveness can be fatal in undermining the legitimacy of a supposedly compelling government interest. As Scalia concluded, "the announce clause still fails strict scrutiny because it is woefully underinclusive, prohibiting announcements by judges (and would-be judges) only at certain times and in certain forms."<sup>166</sup> In other words, the canon failed to regulate enough speech to serve the goal of openmindedness.

It is interesting to note Scalia's clear articulation of the relationship between strict scrutiny and underinclusiveness. In particular, deployment of the underinclusiveness doctrine falls within the scope of the strict scrutiny doctrine, rather than underinclusiveness constituting a stand-alone or independent doctrine.

#### 7. *McConnell v. Federal Election Commission*<sup>167</sup>

In *McConnell*, a fractured Court considered provisions of the Bipartisan Campaign Reform Act of 2002. In doing so, it rejected an underinclusiveness challenge to a segregated-funds provision which provided that "corporations and unions may not use their general treasury funds to finance electioneering communications, but they remain free to organize and administer segregated funds, or PACs, for that purpose."<sup>168</sup>

Specifically, the plaintiffs argued that the "segregated-fund requirement for electioneering communications is underinclusive because it does not apply to advertising in the print media or on the Internet."<sup>169</sup> The provision, instead, only applied to television ads.<sup>170</sup> The Court turned away this challenge, finding that "[t]he records developed in this litigation and by the Senate Committee adequately explain the reasons for this legislative choice."<sup>171</sup>

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165. *Id.* at 779–80.

166. *Id.* at 73.

167. *McConnell v. FEC*, 540 U.S. 93 (2003).

168. *Id.* at 204.

169. *Id.* at 207.

170. *Id.*

171. *Id.*



This is a significant point because it suggests that when drafting statutes that leave unregulated speech on some types of media but not others, lawmakers should anticipate possible underinclusiveness challenges and, in turn, make it clear in the legislative history or in the statute itself the specific reasons for distinguishing between types of media. In *McConnell*, the Court found that the “record amply justifies Congress’ line drawing.”<sup>172</sup>

8. *Citizens United v. Federal Election Commission*<sup>173</sup>

In *Citizens United*, underinclusiveness played a pivotal role for the majority in refuting the government’s assertion that it had a compelling interest in limiting corporate political expenditures in order to protect “dissenting shareholders from being compelled to fund corporate political speech.”<sup>174</sup> In other words, the government contended that its “shareholder-protection interest”<sup>175</sup> was sufficient to ban corporations from using general treasury funds to make independent expenditures on electioneering communications.<sup>176</sup>

Writing for the majority, Justice Anthony Kennedy reasoned that “if Congress had been seeking to protect dissenting shareholders, it would not have banned corporate speech in *only certain media* within 30 or 60 days before an election. A dissenting shareholder’s interests would be implicated by speech in any media at any time.”<sup>177</sup> In other words, the law did too little—it should have regulated more speech and, specifically, more forms of media at more times—to help protect dissenting shareholders, thus gutting this rationale as a compelling interest.

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172. *Id.* at 208.

173. *Citizens United v. FEC*, 558 U.S. 310 (2010).

174. *Id.* at 361.

175. *Id.* at 362.

176. *See id.* at 318–19 (“[The law] prohibits corporations and unions from using their general treasury funds to make independent expenditures for speech that is an ‘electioneering communication’ or for speech that expressly advocates the election or defeat of a candidate.”).

177. *Id.* at 362 (emphasis added).

9. *Brown v. Entertainment Merchants Association*<sup>178</sup>

In *Brown*, the Court applied strict scrutiny<sup>179</sup> to declare unconstitutional a California statute that restricted minors' ability to purchase and rent violent video games.<sup>180</sup> Underinclusiveness played a critical role in the statute's demise, as articulated in the majority opinion by Justice Scalia.

Specifically, California argued that the compelling interest justifying the law was harm to minors caused by violent media content.<sup>181</sup> But given the wide and vast variety of other forms of violent media content left unregulated by the statute, such as violent movies and cartoons, Justice Scalia called the law "wildly underinclusive when judged against its asserted justification, which in our view is alone enough to defeat it."<sup>182</sup> Justice Scalia suggested such underinclusivity signaled that California was improperly targeting or picking on one class of speakers—video game producers—over others.<sup>183</sup> "Here, California has singled out the purveyors of video games for disfavored treatment—at least when compared to booksellers, cartoonists, and movie producers—and has given no persuasive reason why," Scalia reasoned.<sup>184</sup> Put differently, this brand of underinclusiveness alerted the Court to the possibility that California lawmakers might not have been truly concerned with protecting minors, as much as they were with "disfavoring a particular speaker or viewpoint."<sup>185</sup>

Furthermore, underinclusiveness crushed California's claim that, as Justice Scalia put it, its law addressed "a serious social problem."<sup>186</sup> Specifically, while minors could not directly purchase or rent violent video games under the terms of the statute, their parents and guardians remained free to purchase or rent them on their behalf.<sup>187</sup> "The California Legislature is perfectly willing to leave this dangerous, mind-altering material in the hands of children so long as one parent (or even an aunt or uncle) says it's

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178. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786 (2011).

179. *See id.* at 2738 (opining that because the California statute "imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest").

180. *See id.* at 2732–33 (setting forth the terms of the California statute).

181. *Id.* at 2739.

182. *Id.* at 2740.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

OK,” Scalia observed.<sup>188</sup> Put bluntly, if California really thought violent video games were so dangerous for minors, then why would it still allow parents to purchase them for their children?

Scalia concluded that “[a]s a means of protecting children from portrayals of violence, the legislation is seriously underinclusive, not only because it excludes portrayals other than video games, but also because it permits a parental or avuncular veto.”<sup>189</sup> Professor William Lee thus accurately sums up *Brown* by observing that the underinclusiveness of California’s statute “would have been determinative and fatal on its own.”<sup>190</sup>

### B. Summary

The nine cases described above reveal at least five important points and lessons regarding underinclusiveness. They are summarized below.

First and foremost, underinclusiveness is sometimes—but not always—fatal. Furthermore, sometimes its presence is acknowledged by the Court, yet another doctrine or rationale is chosen to strike down an otherwise underinclusive statute. Specifically, the Court found that underinclusiveness was not fatal in *Austin*,<sup>191</sup> *Burson*,<sup>192</sup> and *McConnell*.<sup>193</sup> On the other hand, underinclusiveness proved deadly in *Discovery Network*,<sup>194</sup> *White*,<sup>195</sup> *Citizens United*,<sup>196</sup> and *Brown*.<sup>197</sup> In *Ladue*, the Court clearly recognized underinclusiveness problems with Ladue’s sign ordinance, but ultimately based its decision to strike down the ordinance on other grounds.<sup>198</sup> Finally, in *R.A.V.* the majority’s approach was criticized in two concurrences for supposedly creating a new rule against underinclusiveness when the category of regulated speech falls within a larger category that is not protected by the First Amendment.<sup>199</sup>

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188. *Id.*

189. *Id.* at 2742.

190. William E. Lee, *Books, Video Games, and Foul-Mouthed Hollywood Glitteratae: The Supreme Court and the Technology-Neutral Interpretation of the First Amendment*, 14 COLUM. SCI. & TECH. L. REV. 295, 381 (2013).

191. *See supra* Section I.A.1.

192. *See supra* Section I.A.2.

193. *See supra* Section I.A.7.

194. *See supra* Section I.A.4.

195. *See supra* Section I.A.6.

196. *See supra* Section I.A.8.

197. *See supra* Section I.A.9.

198. *See supra* Section I.A.5.

199. *See supra* Section I.A.3.

Second, the three cases in which underinclusiveness proved non-fatal reveal possible ways that lawmakers can, during the drafting process and legislative history phase, take steps to ward off underinclusiveness challenges. Specifically, and considered in reverse chronological order:

- *Austin* suggests that if lawmakers make distinctions between the type of speakers that are regulated (corporations versus unincorporated trade unions, in *Austin*), then the legislative record should clearly explain why one class of speaker is supposedly more harmful in its speech activities (and therefore deserving of heightened regulation) than the other or others.<sup>200</sup> The Supreme Court’s rejection in *Citizens United* of speaker-based distinctions,<sup>201</sup> as well as its overruling of *Austin*, cast serious doubt on the validity of *Austin*’s underinclusiveness analysis.
- *Burson* indicates that lawmakers should make clear when drafting a statute why a category or type of speech that is left unregulated does not cause the same types of harm attributable to the regulated variety.<sup>202</sup> In brief, lawmakers need to anticipate potential underinclusiveness challenges when they use unregulated categories of speech that might appear to cause the same problems that the regulated category cause. In turn, they also need to put on the record factual reasons why the unregulated category is not statutorily addressed and explain how it is different from the regulated variety.
- *McConnell*, as with *Austin* and *Burson*, illustrates the importance of creating a factual record when lawmakers distinguish between the types of media on which speech is conveyed.<sup>203</sup> In rejecting the argument that the regulation in question was underinclusive because it only applied to ads on television—not to ads in print or on the Internet—the Court found that “[t]he records developed in this litigation and by the Senate

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200. See *supra* Section I.A.1.

201. *Supra* notes 78–79 and accompanying text.

202. See *supra* Section I.A.2.

203. See *supra* Section I.A.7.

Committee adequately explain the reasons for this legislative choice.”<sup>204</sup>

A third lesson is that the cases of *Austin*, *Burson*, and *McConnell* reveal three different types of legislative line-drawing and distinctions that can lead to underbreadth challenges. These include distinctions based upon types of 1) speakers (*Austin*); 2) speech (*Burson*); and 3) media (*McConnell*).

These three areas may be thought of as underinclusiveness danger-zone distinctions and, as described above, lawmakers should lay in-depth factual foundations in the legislative history why the distinctions were made. The records in *Austin*, *Burson*, and *McConnell* were sufficient to help the statutes involved pass constitutional muster.

A fourth lesson regarding underinclusiveness is derived from *Brown*.<sup>205</sup> Specifically, when drafting bills ostensibly designed to protect minors from harmful forms of expression (in *Brown*, violent video games), lawmakers should be aware that codifying what might be called parental-bypass mechanisms (in *Brown*, specifically allowing parents and guardians to purchase games for their children) can lead to fatal underinclusiveness. Thus, if a type of speech really is harmful to minors, then lawmakers must not include statutory terms that allow parents to obtain it for them.

Fifth and finally, *R.A.V.* addresses a very different brand of underinclusiveness than the other seven cases described above—one that occurs within the context of regulating subsets or parts of an already unprotected category of expression (in *R.A.V.*, fighting words).<sup>206</sup> As Justice Elena Kagan wrote in her 1992 journal article, cases like *R.A.V.* involved “selective bans on speech within a wholly proscribable speech category.”<sup>207</sup> Scalia’s analysis for the majority forecloses regulations that carve out facets of a category of unprotected speech if done so by topic or subject matter.<sup>208</sup>

With these nine cases from the past quarter-century in mind, this part now examines scholarly literature regarding underinclusivity, particularly as it applies to non-*R.A.V.* scenarios, such as those in *Williams-Yulee* and *Reed*, which are at the core of this Article.

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204. *McConnell v. FEC*, 540 U.S. 93, 207 (2003) *overruled by* *Citizens United v. FEC*, 558 U.S. 310, 365 (2010).

205. *See supra* Section I.A.9.

206. *See supra* Section I.A.3.

207. Kagan, *supra* note 114, at 77.

208. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992).

C. *Literature Review on Underinclusiveness & the First Amendment*

A paucity of scholarly literature is devoted exclusively to underinclusiveness in contexts other than those at issue in *R.A.V.*, which involved a category of wholly unprotected speech, namely fighting words.<sup>209</sup> That scenario differs from the settings in both *Williams-Yulee* and *Reed*, where the regulated speech was presumptively protected and strict scrutiny was applied to measure the constitutionality of the regulations. Nonetheless, underinclusivity in non-*R.A.V.* situations have been addressed from time to time, although generally in passing fashion.

What is underinclusivity? Professor Matthew Bunker writes that it may simply be a shorthand phrase for “not broad enough,”<sup>210</sup> particularly as it affects “the narrow tailoring inquiry”<sup>211</sup> of judicial analysis. Unfortunately, Bunker’s article openly “avoids”<sup>212</sup> further discussion of underinclusiveness cases and, instead, concentrates on other issues.

Writing more than twenty years ago, however, Professor William Lee provided an in-depth examination of what he called the underbreadth doctrine.<sup>213</sup> He dubbed it “a highly controversial methodology.”<sup>214</sup> Lee’s article, admittedly focused “on differential treatment of *communicators*”<sup>215</sup> and, within that context, whether the “press” should be treated differently from other communicators.<sup>216</sup> He also examined the links in underinclusivity analyses between First Amendment free speech<sup>217</sup> and Fourteenth

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209. Kagan, *supra* note 114, at 33. As noted earlier, Justice Elena Kagan addressed the *R.A.V.* underbreadth scenario in an article published while she was working as a law professor.

210. Matthew D. Bunker & Emily Erickson, *The Jurisprudence of Precision: Contrast Space and Narrow Tailoring in First Amendment Doctrine*, 6 COMM. L. & POL’Y 259, 264 n.16 (2001).

211. *Id.*

212. *Id.*

213. William E. Lee, *The First Amendment Doctrine of Underbreadth*, 71 WASH. U. L.Q. 637, 637 (1993).

214. *Id.* at 638.

215. *Id.* at 640 (emphasis added).

216. *See id.* (“[B]ecause the press is frequently singled out for special treatment, the author discusses the question whether the press should be regarded as special. This Article argues that there are powerful reasons for preventing the government from discriminating among members of the press.”).

217. The First Amendment to the U.S. Constitution provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech.” U.S. CONST. amend. I.

Amendment<sup>218</sup> equal protection concerns when it comes to treating communicators in different manners.<sup>219</sup>

Despite his different emphasis compared to this Article, Lee made several cogent points that proved prescient since publication of his 1993 article. For instance, he noted that “[i]t is possible to infer from underinclusive laws that the legislature selected the burdened class in order to harm that class.”<sup>220</sup> Eighteen years later, Justice Scalia inferred precisely that about California lawmakers in *Brown* when it came to singling out video game makers from other purveyors of violent media content.<sup>221</sup>

Writing much more recently, Harvard Law School Professor Richard Fallon explains that the heart of underinclusivity is the principle that “[a] statute will not survive strict scrutiny if it fails to regulate activities that pose substantially the same threats to the government’s purportedly compelling interest as the conduct that the government prohibits.”<sup>222</sup> Underinclusiveness both weakens the credibility of the government’s stated reasons for regulating the speech in question and, as Fallon writes, “generate[s] suspicion that the selective targeting betrays an impermissible motive.”<sup>223</sup> Furthermore, he notes that “the demand that restrictions on constitutional rights not be underinclusive reflects an insistence that the government not infringe on rights when doing so will predictably fail to achieve purportedly justifying goals.”<sup>224</sup> In brief, underinclusiveness can: (1) undermine the ostensible interest behind lawmakers’ actions; (2) expose a latent, improper interest; and (3) signal a law’s lack of efficacy.

Fallon’s observation that underinclusiveness undermines the government’s asserted interest jibes with UCLA Professor Eugene Volokh’s contention that “[a] law’s underinclusiveness—its failure to reach all speech that implicates the interest—may be evidence that an interest is not

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218. The Fourteenth Amendment to the U.S. Constitution provides in pertinent part that:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

219. See Lee, *supra* note 213, at 688 (“*Austin* creates two separate tiers of First Amendment rights, but does so under the facade of equal protection.”).

220. *Id.* at 644.

221. *Supra* notes 182–83 and accompanying text.

222. Fallon, *supra* note 49, at 1327.

223. *Id.*

224. *Id.*

compelling, because it suggests that the government itself doesn't see the interest as compelling enough to justify a broader statute."<sup>225</sup>

Writing shortly after the *Ladue* decision, Professor Mark Cordes asserted that the Supreme Court generally focused on the "underinclusive nature of First amendment restrictions in two contexts."<sup>226</sup> The first involves content-based regulations where underinclusivity in "permitting some speech based on content denigrates the asserted state interests in restricting other speech."<sup>227</sup> The second arises with content-neutral regulations, where "non-expressive activities" pose problems similar to the speech-based ones.<sup>228</sup>

With these scholarly observations, as well as the review and analysis of nine different cases involving underinclusivity challenges from the past quarter-century in mind, the Article now turns to its centerpiece—the Court's 2015 decisions in both *Williams-Yulee* and *Reed*, where underinclusiveness played key roles.

### III. EXPLORING THE COURT'S EMPHASIS ON UNDERINCLUSIVITY IN 2015: FROM NON-FATAL (*WILLIAMS-YULEE*) TO FATAL (*REED*)

This part has two sections. The first addresses underinclusiveness within the context of the Court's decision in *Williams-Yulee*, while the second analyzes its deployment in *Reed*.

#### A. *Williams-Yulee v. Florida Bar*<sup>229</sup>

The American Bar Association's Model Code of Judicial Conduct includes a canon banning judges and judicial candidates from personally soliciting campaign contributions.<sup>230</sup> Today, "[a] majority of states have enacted similar provisions."<sup>231</sup> One of those states is Florida, with its Code of Judicial Conduct Canon 7(C)(1) providing, in relevant part, that:

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225. Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2420 (1996).

226. Mark Cordes, *Sign Regulation After Ladue: Examining the Evolving Limits of First Amendment Protection*, 74 NEB. L. REV. 36, 69 (1995).

227. *Id.*

228. *Id.*

229. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656 (2015).

230. MODEL CODE OF JUDICIAL CONDUCT Canon 4 r. 4.1(8) (AM. BAR ASS'N 2016), [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_code\\_of\\_judicial\\_conduct/model\\_code\\_of\\_judicial\\_conduct\\_canon\\_4/rule4\\_1politicalandcampaignactivitiesofjudgesandjudicial.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_4/rule4_1politicalandcampaignactivitiesofjudgesandjudicial.html).

231. *Fla. Bar v. Williams-Yulee*, 138 So. 3d 379, 386 (Fla. 2014).



A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates shall not personally solicit campaign funds, or solicit attorneys for publicly stated support, but may establish committees of responsible persons to secure and manage the expenditure of funds for the candidate's campaign and to obtain public statements of support for his or her candidacy.<sup>232</sup>

In 2009, attorney Lanell Williams-Yulee personally signed a mass-mailed, fundraising letter when she unsuccessfully ran for judgeship in Hillsborough County, Florida.<sup>233</sup> Not only did she lose the election to a long-time incumbent in a landslide, but Williams-Yulee was publicly reprimanded and fined about \$1,800 for violating Canon 7(C)(1)<sup>234</sup>—a finding the Supreme Court of Florida affirmed in May 2014.<sup>235</sup> In the process, Florida's highest court found that Canon 7(C)(1) was “constitutional because it promotes the State's compelling interests in preserving the integrity of the judiciary and maintaining the public's confidence in an impartial judiciary, and that it is narrowly tailored to effectuate those interests.”<sup>236</sup> In October 2014, the U.S. Supreme Court granted Williams-Yulee's petition for a writ of certiorari<sup>237</sup> to consider the following question: “Whether a rule of judicial conduct that prohibits candidates for judicial office from personally soliciting campaign funds violates the First Amendment.”<sup>238</sup>

In April 2015, by a five-to-four vote that—but for Chief Justice John Roberts<sup>239</sup>—split along partisan lines<sup>240</sup> and surprised many,<sup>241</sup> the U.S. Supreme Court affirmed the Florida Supreme Court and upheld Canon

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232. CODE OF JUDICIAL CONDUCT Canon 7(C)(1) (FLA. SUP. CT. 2015), <http://www.floridasupremecourt.org/decisions/ethics/canon7.shtml>.

233. Elaine Silvestrini, *Justices to Review Tampa Case; Supreme Court Decision Could Alter Judicial Campaigns*, TAMPA TRIBUNE (Oct. 19, 2014), <http://www.tbo.com/news/crime/supremecourt-decision-in-tampa-case-could-alter-judicial-campaigns-20141019/>.

234. Roberts Barnes, *Justices to Take up Financing of Judicial Elections*, WASH. POST, Jan. 5, 2015, at A11.

235. Fla. Bar v. Williams-Yulee, 138 So. 3d 379, 381 (Fla. 2014).

236. *Id.*

237. Williams-Yulee v. Fla. Bar, 135 S. Ct. 44 (2014).

238. Question Presented, Williams-Yulee v. Fla. Bar, 135 S. Ct. 44 (2014) (No. 13-1499), <http://www.supremecourt.gov/qp/13-01499qp.pdf>.

239. See *supra* note 9 and accompanying text.

240. See *supra* notes 9–11 and accompanying text.

241. See Cliff Collins, *Judges as Candidates: The Debate Over Free Speech Versus Protecting Courts' Neutrality*, OR. ST. B. BULL., Nov. 2015, at 22, 23 (“What astounded many observers was that Chief Justice John Roberts joined the Court's liberal justices in a 5-4 decision, whereas in previous cases about similar issues, he had voted in favor of free speech. But in *Williams-Yulee*, he stated that judicial elections are different.”).

7C(1).<sup>242</sup> While both the Roberts-authored majority opinion and the three separate dissenting opinions purported to apply strict scrutiny,<sup>243</sup> they differed dramatically on the question of fit—the narrow tailoring prong, as it were—and the underinclusivity doctrine, in turn, played a pivotal role in the justices’ analyses.

Before analyzing the fit and concomitant underinclusiveness issues, however, it first is important to briefly address the other half of the strict scrutiny equation—namely, the goal or interest underlying the Florida Canon. Chief Justice Roberts found for the majority that Florida had a compelling interest in “preserving public confidence in the integrity of the judiciary.”<sup>244</sup> Justice Alito agreed in his dissent with this assessment, finding that “Florida has a compelling interest in making sure that its courts decide cases impartially and in accordance with the law and that its citizens have no good reason to lack confidence that its courts are performing their proper role.”<sup>245</sup> Justice Kennedy, who issued a separate dissent, also concurred that “States

242. *Williams-Yulee*, 135 S. Ct. at 1662.

243. *See id.* at 1666 (concluding, for the majority, that Florida’s canon “advances the State’s compelling interest in preserving public confidence in the integrity of the judiciary, and it does so through means narrowly tailored to avoid unnecessarily abridging speech. This is therefore one of the rare cases in which a speech restriction withstands *strict scrutiny*”) (emphasis added); *id.* at 1676 (Scalia, J., dissenting) (reasoning that Florida Canon 7(C)(1) can be upheld “only if the State meets its burden of showing that the canon survives *strict scrutiny*—that is to say, only if it shows that the canon is narrowly tailored to serve a compelling interest”) (emphasis added); *id.* at 1685 (Kennedy, J., dissenting) (agreeing with Justice Scalia’s dissent that “the state law at issue fails *strict scrutiny* for any number of reasons”) (emphasis added); *id.* at 1685 (Alito, J., dissenting) (“The Florida rule regulates that speech based on content and must therefore satisfy *strict scrutiny*. This means that it must be narrowly tailored to further a compelling state interest.”) (emphasis added).

Justice Breyer, who joined with Chief Justice Roberts’ opinion in full, issued a brief concurrence explaining that he views the “Court’s doctrine referring to tiers of scrutiny as guidelines informing our approach to the case at hand, not tests to be mechanically applied” and joined Roberts’ opinion with this understanding. *Id.* at 1673 (Breyer, J., concurring). This is not surprising, as it comports with what Harvard Professor Mark Tushnet aptly calls “Justice Breyer’s partial de-doctrinalization of the First Amendment.” Mark Tushnet, *Justice Breyer and the Partial De-Doctrinalization of Free Speech Law*, 128 HARV. L. REV. 508, 511 (2014). Indeed, Breyer tends to engage in a “free-form balancing approach.” Vikram David Amar & Alan Brownstein, *The Voracious First Amendment: Alvarez and Knox in the Context of 2012 and Beyond*, 46 LOY. L.A. L. REV. 491, 497 (2013).

Finally, Justice Ruth Bader Ginsburg issued a concurring opinion suggesting that she would apply a standard of scrutiny less than strict scrutiny and that states should have “substantial latitude” when enacting “campaign-finance rules geared to judicial elections.” *Williams-Yulee*, 135 S. Ct. at 1673 (Ginsburg, J., concurring).

244. *Williams-Yulee*, 135 S. Ct. at 1666.

245. *Id.* at 1685 (Alito, J., dissenting).

have a compelling interest in seeking to ensure the appearance and the reality of an impartial judiciary.”<sup>246</sup>

In contrast, Justice Scalia in his dissent mocked the allegedly compelling interest in preserving judicial integrity as “ill-defined,”<sup>247</sup> yet even he grudgingly “accept[ed] for the sake of argument that States have a compelling interest in ensuring that its judges are *seen* to be impartial.”<sup>248</sup> He also was willing to “assume that a judicial candidate’s request to a litigant or attorney presents a danger of coercion that a political candidate’s request to a constituent does not.”<sup>249</sup>

Thus, to one degree or another, all nine justices in *Williams-Yulee* agreed that Florida possessed a compelling interest. It was on the fit side of the strict scrutiny equation, however, where they vehemently disagreed and where, in turn, underinclusiveness proved to be a critical wedge issue. Those disagreements are explained below.

The Introduction already provided an overview of Chief Justice Roberts’ views about underinclusivity in *Williams-Yulee*.<sup>250</sup> Rather than repeat that information here, it is more profitable first to identify a quartet of big-picture principles regarding the majority’s conception of underinclusiveness and then to show how the majority applied these principles to the facts of the case. Four big-picture takeaways about underinclusiveness from the majority opinion are:

1. Underinclusivity Involves the “Selective Restriction” of Speech when Addressing a Single “Problem”

As Roberts wrote, “underinclusivity creates a First Amendment concern when the State regulates one aspect of a problem while declining to regulate a different aspect of the problem that affects its stated interest *in a comparable way*.”<sup>251</sup> What does this mean? Initially, lawmakers determine that a “problem”<sup>252</sup> exists. In turn, they choose to address it through “the selective restriction of speech,”<sup>253</sup> rather comprehensively targeting all forms

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246. *Id.* at 1683 (Kennedy, J., dissenting).

247. *Id.* at 1677 (Scalia, J., dissenting).

248. *Id.*

249. *Id.*

250. *See supra* notes 18–41 and accompanying text (addressing Roberts’ majority opinion in *Williams-Yulee*).

251. *Williams-Yulee*, 135 S. Ct. at 1670.

252. *Id.*

253. *Id.*

or varieties of speech that might cause it. If, however, speech that is not selected for regulation causes “a comparable” amount of the same problem as does the regulated speech, then the legislative action raises “a First Amendment concern.”<sup>254</sup>

This principle thus unpacks into three steps of judicial underinclusivity analysis. First, the court must identify the “problem” (the compelling interest, in strict scrutiny analysis) that lawmakers claim to address. Second, the court must determine if lawmakers are selectively regulating one type of speech that allegedly causes the identified problem, but leaving unregulated and unimpeded another type of speech that also relates to the same problem. Third, the court must determine if the regulated speech and the unregulated speech affect the problem in comparable ways. If the regulated and unregulated varieties of speech comparably affect the same problem, then underinclusiveness may prove fatal.

## 2. Selectivity is Sometimes OK

This principle is revealed by the Chief Justice’s observation that the government “need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns. We have accordingly upheld laws—even under strict scrutiny—that conceivably could have restricted even greater amounts of speech in service of their stated interests.”<sup>255</sup> He later added that “[t]he First Amendment does not put a State to [an] all-or-nothing choice.”<sup>256</sup> Thus, because some selectivity may be permissible, there is necessarily a key difference between permissible underinclusivity and “fatal underinclusivity.”<sup>257</sup> The issue, then, becomes when selectivity is tolerated.

## 3. Selectivity is OK if Noncomparability of Either Affect or Effect is Demonstrated by the Government

Demonstrating differences (or noncomparability) of amount of influence between regulated and unregulated speech, as well as differences between the type of problems caused by regulated and unregulated speech, appears key for the Roberts majority in sparing underinclusive laws from demise.<sup>258</sup> The

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254. *Id.*

255. *Id.* at 1668.

256. *Id.* at 1670.

257. *Id.* at 1668.

258. *See id.* at 1659.

former difference is a question of degree and quantity of impact—one type of speech (the regulated variety) causes significantly more of the same problem than the other. In other words, the regulated variety of speech does more damage. The latter difference is a question of kind; the regulated and unregulated varieties of speech lead to different types of effects and thus, in reality, address different problems.

Put differently, if the regulated variety of speech impacts or affects the identified problem more severely and to a significantly greater degree than does the unregulated variety of speech, underinclusiveness is not a problem. Furthermore, if the regulated variety of speech targets a qualitatively different kind of problem than the unregulated variety, then underinclusiveness also is not a problem.

#### 4. Underinclusiveness Functions as a Warning Sign of Both Ineffective and Discriminatory Statutes

As the Chief Justice wrote, “a law’s underinclusivity raises a red flag.”<sup>259</sup> Possible problems underinclusivity may signal are that “a law does not actually advance a compelling interest”<sup>260</sup> or that the government is discriminating against “a particular speaker or viewpoint.”<sup>261</sup> Underinclusivity thus may doom a statute either for being ineffective because it is “riddled with exceptions”<sup>262</sup> or for being discriminatory because it fails to regulate “vast swaths”<sup>263</sup> of speakers or viewpoints “that similarly diminish[] its asserted interests.”<sup>264</sup>

In summary, and as viewed by the Roberts majority in *Williams-Yulee*, underinclusivity pivots on legislative selectivity in regulating a problem. Selectivity, however, is permissible if lawmakers prove significant differences between the regulated and unregulated varieties of speech. Permissible differences may relate either to the greater size and amount of harm produced by the regulated speech, or to qualitative differences in the kinds of harm produced by the regulated and unregulated varieties.

How, then, did the majority apply these underinclusivity principles to the facts in *Williams-Yulee*? Initially, Lanell Williams-Yulee argued that the Florida Canon failed “to restrict other speech *equally damaging* to judicial

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259. *Id.*

260. *Id.*

261. *Id.* (quoting *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 802 (2011)).

262. *Id.* at 1669.

263. *Id.* at 1668.

264. *Id.*

integrity.”<sup>265</sup> In other words, she asserted that regulated and unregulated speech negatively affected the problem (the compelling interest)—preserving judicial integrity—in comparable ways. Specifically, Williams-Yulee pointed to two varieties of unregulated speech she claimed were equally harmful to judicial integrity.<sup>266</sup> First, the canon permitted a candidate’s campaign committee, but not the candidate herself, to solicit money.<sup>267</sup> Second, candidates were free to write thank-you notes to donors, thus ensuring that they knew who supported them.<sup>268</sup>

The Chief Justice deployed the third principle identified above—that selectivity is permissible if noncomparability of either affect or effect is demonstrated by the government—to reject Williams-Yulee’s underinclusiveness challenge.<sup>269</sup> In terms of Florida failing to regulate solicitations by campaign committees, Roberts reasoned that the Sunshine State:

along with most other States, has reasonably concluded that solicitation by the candidate personally creates a *categorically different* and *more severe risk* of undermining public confidence than does solicitation by a campaign committee. The identity of the solicitor matters, as anyone who has encountered a Girl Scout selling cookies outside a grocery store can attest. When the judicial candidate himself asks for money, the *stakes are higher* for all involved.<sup>270</sup>

The key to this line of logic is the alleged noncomparability between the regulated and unregulated varieties of speech. Specifically, in Roberts’ view, the risk of harm to judicial integrity caused by personal solicitation is significantly greater compared to the risk caused by third-party committee solicitation.

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265. *Id.* at 1668 (emphasis added).

266. *Id.*

267. *See id.*

268. *Id.*

269. *Id.* at 1668–69.

270. *Id.* at 1669 (emphasis added).

Additionally for Roberts, the pressure to give money that is placed on an individual solicited directly by a judicial candidate far exceeds the pressure placed when a committee solicits donations.<sup>271</sup> As noted above, underinclusivity for Roberts only raises a First Amendment concern “when the State regulates one aspect of a problem while declining to regulate a different aspect of the problem that affects its stated interest *in a comparable way*.”<sup>272</sup>

What is somewhat alarming here, however, is that Roberts points to no tangible evidence that the risks and magnitudes of harm really are different. His Girl Scout example<sup>273</sup> suggests it is just a matter of common sense—everyday knowledge—that “[t]he identity of the solicitor matters.”<sup>274</sup> It was almost as if Roberts took judicial notice<sup>275</sup> of this supposed fact, and thus Florida could “reasonably conclude” there is a far more significant risk of harm caused by the regulated variety of speech.<sup>276</sup>

This vast deference to legislative determination regarding harms is reminiscent of Justice Scalia providing a free pass in 2009 to the Federal Communications Commission when it came to proving harm to minors caused by fleeting expletives.<sup>277</sup> Scalia wrote for the majority in *FCC v. Fox*

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271. As Roberts explained:

When the judicial candidate himself asks for money, the stakes are higher for all involved. The candidate has personally invested his time and effort in the fundraising appeal; he has placed his name and reputation behind the request. The solicited individual knows that, and also knows that the solicitor might be in a position to singlehandedly make decisions of great weight: The same person who signed the fundraising letter might one day sign the judgment. This dynamic inevitably creates pressure for the recipient to comply, and it does so in a way that solicitation by a third party does not. Just as inevitably, the personal involvement of the candidate in the solicitation creates the public appearance that the candidate will remember who says yes, and who says no.

*Id.*

272. *Id.* at 1670.

273. *Id.* at 1669.

274. *Id.*

275. See Christopher Onstott, *Judicial Notice and the Law’s “Scientific” Search for Truth*, 40 AKRON L. REV. 465, 465 (2007) (“Through judicial notice, judges bind juries to accept a principle as conclusive without taking evidence concerning that principle. Over time, a repeatedly judicially noticed scientific or technical principle is endowed by the law with a false sense of truth.”); see also FED. R. EVID. 201(b) (providing that a “court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.”).

276. *Williams-Yulee*, 135 S. Ct. at 1669.

277. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 519 (2009).

*Television Stations, Inc.* that “[t]here are some propositions for which scant empirical evidence can be marshaled”<sup>278</sup> and that “it suffices to know that children mimic the behavior they observe—or at least the behavior that is presented to them as normal and appropriate. Programming replete with one-word indecent expletives will tend to produce children who use (at least) one-word indecent expletives.”<sup>279</sup> In brief, Roberts in *Williams-Yulee* took a page out of Scalia’s deference playbook.

Addressing the second category of unregulated speech pointed out by Lanell Williams-Yulee—namely, thank-you notes to donors written personally by judgeship candidates—Roberts reasoned that “the State’s compelling interest is implicated most directly by the candidate’s personal solicitation itself. A failure to ban thank you notes for contributions not solicited by the candidate does not undercut the Bar’s rationale.”<sup>280</sup> In other words, personal solicitation of funds affects judicial integrity in a different manner—“most directly”—compared to thank-you notes and other forms of communication.<sup>281</sup> Again, it is a matter of noncomparability that makes the underinclusiveness problem disappear for the Roberts majority.

Finally, the Roberts majority confronted a third underinclusiveness argument, this one raised by Justice Antonin Scalia in his dissent: that “Canon 7C(1) is underinclusive because Florida does not ban judicial candidates from asking individuals for personal gifts or loans.”<sup>282</sup> Roberts determined that the threat to judicial integrity here was purely speculative and no more than conjecture.<sup>283</sup> That is because the record provided “no basis to conclude that judicial candidates are in the habit of soliciting personal loans, football tickets, or anything of the sort.”<sup>284</sup> In other words, the government is under no obligation to regulate a category of speech when there is no evidence that it actually threatens the compelling interest—in this case, preserving judicial integrity.

Roberts’ logic here comports squarely with Justice Harry Blackmun’s observation, in refuting an underinclusiveness argument raised in *Burson v. Freeman*,<sup>285</sup> that “[t]he First Amendment does not require States to regulate

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278. *Id.*

279. *Id.*

280. *Williams-Yulee*, 135 S. Ct. at 1669.

281. *Id.*

282. *Id.*

283. *Id.* at 1670.

284. *Id.*

285. 504 U.S. 191 (1992).



for problems that do not exist.”<sup>286</sup> Applying this principle to the polling-place, buffer-zone scenario in *Burson*, Blackmun found “ample evidence that political candidates have used campaign workers to commit voter intimidation or electoral fraud. In contrast, there is simply no evidence that political candidates have used other forms of solicitation or exit polling to commit such electoral abuses.”<sup>287</sup>

In summary, the *Williams-Yulee* majority rebuffed all three lines of underinclusivity arguments. On the first two arguments described above, it found greater risks and dangers of harm to judicial integrity caused by the regulated speech when compared to the unregulated varieties. Noncomparability thus proved key in rejecting these challenges. On the third argument in Scalia’s dissent, the majority simply found no evidence of any harm caused by the unregulated variety of speech. It was not, then, a matter of differences of degree of harm here; it was simply an abject lack of proof of any harm at all caused by the unregulated category of speech.

But that was simply how the bare, five-justice majority saw it in *Williams-Yulee*. The other four justices—Scalia, Kennedy, Thomas, and Alito—took a dramatically different view of underinclusivity, issuing three dissenting opinions in the process. For all four dissenting justices, problems of underinclusiveness permeated the Florida Judicial Canon and should have rendered it unconstitutional.

Justice Scalia wrote a dissent joined by Thomas.<sup>288</sup> Although Kennedy did not join Scalia’s dissent, Kennedy nonetheless wrote in his separate dissent that Scalia provided “a full and complete explanation of the reasons why the Court’s opinion contradicts settled First Amendment principles.”<sup>289</sup> Similarly, Justice Alito penned a solo dissent, yet he too noted that he largely agreed “with what I view as the essential elements of the dissents filed by Justices Scalia and Kennedy.”<sup>290</sup> It is thus fair to say that Scalia’s sentiments regarding underinclusivity were shared by each of the dissenters.

Scalia began by calling the Florida Canon a “*wildly disproportionate* restriction upon speech.”<sup>291</sup> This characterization is important because underinclusivity, by definition, is a problem of disproportionality of fit.<sup>292</sup>

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286. *Id.* at 207.

287. *Id.*

288. *Williams-Yulee*, 135 S. Ct. at 1675 (Scalia, J., dissenting).

289. *Id.* at 1682 (Kennedy, J., dissenting).

290. *Id.* at 1685 (Alito, J., dissenting).

291. *Id.* at 1676 (Scalia, J., dissenting) (emphasis added).

292. See *supra* note 42 and accompanying text.

Specifically, underinclusive statutes regulate too little speech—their means are disproportionately too small—to accomplish their asserted goals.

Scalia, just as the majority did, analyzed the statute under strict scrutiny<sup>293</sup> and assumed, *arguendo*, that Florida had “a compelling interest in ensuring that its judges are seen to be impartial.”<sup>294</sup> It was on the first facet of the analysis where Scalia determined the canon could not pass constitutional muster.<sup>295</sup> Although Scalia found the canon was both overinclusive<sup>296</sup> and underinclusive, this Article focuses on his underinclusivity concerns.

Scalia laid the groundwork for a rigorous and demanding underinclusiveness analysis when he wrote that the statutory means chosen to address a compelling interest must, in fact, “substantially advance[.]”<sup>297</sup> Proving substantial advancement, Scalia opined, is “a difficult burden.”<sup>298</sup> Quoting his own majority opinion in the violent video game case of *Brown v. Entertainment Merchants Association*—a decision described above in which underinclusivity proved fatal<sup>299</sup>—Scalia asserted that “ambiguous proof will not suffice.”<sup>300</sup>

Thus, when a statute appears to be underinclusive, the government faces an uphill battle to unambiguously prove that it nonetheless substantially advances a compelling interest. Scalia put metaphorical teeth into underinclusivity analysis by demanding such proof and characterizing it as a difficult burden.<sup>301</sup> As applied to the facts in *Williams-Yulee*, this means that “Florida bears the burden of showing that banning requests for lawful contributions will improve public confidence in judges—not just a little bit,

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293. *Williams-Yulee*, 135 S. Ct. at 1676 (Scalia, J., dissenting).

294. *Id.* at 1677 (emphasis in original).

295. *Id.*

296. In terms of overinclusivity, Scalia observed that the canon “applies even when the person asked for a financial contribution has no chance of ever appearing in the candidate’s court.” *Id.* In other words, if the canon’s true aim was to preserve the appearance of judicial integrity and impartiality, then it should have been more narrowly drafted to apply only to solicitations of funds from individuals who might, in fact, later appear in a court where the soliciting candidate was presiding as a judge. Only in such situations might there be an appearance of favor. As Scalia wrote, Florida “has not come up with a plausible explanation of how soliciting someone who has no chance of appearing in the candidate’s court will diminish public confidence in judges.” *Id.* at 1679.

297. *Id.* at 1678.

298. *Id.*

299. *Supra* Section II.A.9.

300. *Williams-Yulee*, 135 S. Ct. at 1678 (quoting *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 800 (2011)).

301. *Id.*

but significantly.”<sup>302</sup> In contrast to this arduous approach, Scalia ridiculed the majority’s analysis as amounting to “sleight of hand”<sup>303</sup> and merely “applying the appearance of strict scrutiny.”<sup>304</sup>

Turning to the heart of Scalia’s underinclusivity analysis, he explained that the government “ordinarily may not regulate one message because it harms a government interest yet refuse to regulate other messages that impair the interest in a comparable way.”<sup>305</sup> This is strikingly similar—and ironically so, given that they reached different outcomes in the same case—to Chief Justice Roberts’ observation in *Williams-Yulee* addressed above that “[u]nderinclusivity creates a First Amendment concern when the State regulates one aspect of a problem while declining to regulate a different aspect of the problem that affects its stated interest *in a comparable way*.”<sup>306</sup> Scalia asserted that in the context of comparability, “the First Amendment is a kind of Equal Protection Clause for ideas.”<sup>307</sup>

Applying this comparability-of-harms principle to the Florida Canon to demonstrate its underinclusiveness, Scalia spun a veritable parade of horrors that could befall judicial integrity from speech left unregulated.<sup>308</sup> Scalia reasoned that although the Florida Canon:

prevents Yulee from asking a lawyer for a few dollars to help her buy campaign pamphlets, it does not prevent her asking the same lawyer for a personal loan, access to his law firm’s luxury suite at the local football stadium, or even a donation to help her fight the Florida Bar’s charges. What could possibly justify these distinctions? Surely the Court does not believe that requests for campaign favors erode public confidence in a way that requests for favors unrelated to elections do not.<sup>309</sup>

The critical problem here for Justice Scalia harkens directly back to his majority opinion in *R.A.V.*, which he cited as standing for the principles that “lawmakers may not target a problem only in certain messages”<sup>310</sup> and that the First Amendment prohibits “selectivity on the basis of content.”<sup>311</sup>

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302. *Id.*

303. *Id.*

304. *Id.* at 1677.

305. *Id.* at 1680.

306. *Id.* at 1670 (emphasis in original).

307. *Id.* at 1680 (Scalia, J., dissenting).

308. *Id.*

309. *Id.*

310. *Id.* at 1681 (emphasis in original).

311. *Id.*

*Williams-Yulee*, Scalia reasoned, “involves selectivity on the basis of content.”<sup>312</sup>

In contrast, underinclusivity was permissible, in Scalia’s view, when lawmakers engage in selectivity of regulation based not upon content, but when they target “a problem only at certain times or in certain places.”<sup>313</sup> In other words, permissible underinclusivity for Scalia took the form of content-neutral time, place and manner regulations.<sup>314</sup> Content-based underinclusivity, in stark contrast, is simply verboten.<sup>315</sup> Thus, Scalia drew a critical selectivity distinction—one “between selectivity on the basis of content and selectivity on other grounds,” with the former always forbidden.<sup>316</sup>

Therefore, even though *R.A.V.* dealt with a very different fact pattern—the regulation of a subset of speech inside a larger category of completely unprotected expression (namely, fighting words)<sup>317</sup>—than in *Williams-Yulee*, where the regulated speech was presumptively protected, Scalia seemed wedded to stretching his *R.A.V.* logic to other contexts more than two decades later.

This is striking. It is generally understood that *R.A.V.* stands for the principle, as Professor Rebecca Tushnet observes, that “even when an entire class of speech, such as fighting words, may constitutionally be regulated, constitutional infirmity may arise if the regulator chooses a subclass on the wrong basis.”<sup>318</sup> Yet, Scalia still seemed stubbornly intent on applying his *R.A.V.* principles to very different underinclusive scenarios, such as those in *Williams-Yulee*, that do not involve an entire class of unprotected expression.

Scalia did, however, agree with Chief Justice Roberts on one thing—that underinclusivity casts doubt on a government’s professed interest behind a

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312. *Id.*

313. *Id.*

314. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (“[T]he government may impose reasonable restrictions on the time, place or manner of protected speech, provided the restrictions ‘are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.’”) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). See generally Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1260–66 (1995) (providing an excellent overview of time, place and manner regulations).

315. *Williams-Yulee*, 135 S. Ct. at 1681 (Scalia, J., dissenting).

316. *Id.*

317. See *supra* II.A.3 (providing a review of the underinclusiveness issues in *R.A.V.*).

318. Rebecca Tushnet, *Attention Must Be Paid: Commercial Speech, User-Generated Ads, and the Challenge of Regulation*, 58 BUFF. L. REV. 721, 756 (2010).

regulation.<sup>319</sup> In *Williams-Yulee*, Scalia found that the canon’s failure to regulate judicial solicitations for funds other than campaigns revealed that the state’s real interest was “hostility toward judicial campaigning.”<sup>320</sup> He thus used Florida’s selectivity to shoot down its asserted interest guarding against appearances of impartiality “created by judges’ asking for money.”<sup>321</sup> Pounding home his point that underinclusivity allowed him to ferret out Florida’s real motivation, Scalia somewhat snarkily added that “[i]t should come as no surprise that the ABA, whose model rules the Florida Supreme Court followed when framing Canon 7C(1), opposes judicial elections—preferring instead a system in which (surprise!) a committee of lawyers proposes candidates from among whom the Governor must make his selection.”<sup>322</sup>

Justice Kennedy issued a solo dissent that did not specifically reference underinclusivity, but that nonetheless characterized the majority’s opinion as an “evisceration” of strict scrutiny.<sup>323</sup> Scalia’s views on underinclusivity apparently represented those of Kennedy, who wrote that “[a]s Justice Scalia well explains, the state law at issue fails strict scrutiny for any number of reasons.”<sup>324</sup> Underinclusivity analysis, as explained earlier, occurs within the context of examining the fit or narrow tailoring aspect of strict scrutiny.<sup>325</sup> Because Kennedy agreed with Scalia’s analysis and ultimately concluded that the majority wrote “a casebook guide to eviscerating strict scrutiny any time the Court encounters speech it dislikes,”<sup>326</sup> and because underinclusivity analysis is part and parcel of strict scrutiny, it therefore can reasonably be assumed that Kennedy objects to Chief Justice Roberts’ understanding and application of underinclusivity.

Justice Alito authored a dissent that did not address underinclusivity.<sup>327</sup> Instead, it focused on overinclusivity issues.<sup>328</sup> Yet, like Kennedy, Alito

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319. See *Williams-Yulee*, 135 S. Ct. at 1681 (Scalia, J., dissenting) (“The Court concedes that ‘underinclusiveness can raise doubts about whether the government is in fact pursuing the interest it invokes.’”) (quoting *Williams-Yulee*, 135 S. Ct. at 1668).

320. *Id.*

321. *Id.*

322. *Id.*

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

324. *Id.*

325. *Supra* note 42 and accompanying text.

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

327. *Id.* at 1685 (Alito, J., dissenting).

328. Alito illustrated the overbreadth problems by pointing out that that the Florida Canon:

[A]pplies to all solicitations made in the name of a candidate for judicial office—including, as was the case here, a mass mailing. It even applies to an

agreed with “the essential elements”<sup>329</sup> of Scalia’s dissent—one of which, by implication, is Scalia’s underinclusivity analysis.

The bottom line, then, is that the majority opinion of Chief Justice Roberts and the dissent of Justice Scalia in *Williams-Yulee* reveal significant constitutional cleavage on both the meaning and application of underinclusivity in First Amendment free speech jurisprudence. For Scalia, content-based underinclusivity was always fatal; for Roberts, it is not. Just two months later, underinclusivity played a key role in another free expression case, as the next section explains.

### B. *Reed v. Town of Gilbert*<sup>330</sup>

In *Reed*, the Court applied strict scrutiny<sup>331</sup> in striking down an outdoor sign code that imposed more stringent restrictions on temporary signs directing the public to meetings for nonprofit groups than it did on signs displaying other types of content, such as political messages.<sup>332</sup> In delivering the opinion of the Court, joined by five other justices,<sup>333</sup> Clarence Thomas initially determined the law was “content based on its face”<sup>334</sup> because the different levels of regulation it imposed “depend[ed] entirely on the

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ad in a newspaper. It applies to requests for contributions in any amount, and it applies even if the person solicited is not a lawyer, has never had any interest at stake in any case in the court in question, and has no prospect of ever having any interest at stake in any litigation in that court. If this rule can be characterized as narrowly tailored, then narrow tailoring has no meaning, and strict scrutiny, which is essential to the protection of free speech, is seriously impaired.

*Id.*

329. *Id.*

330. *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).

331. Not all of the justices, however, believed strict scrutiny was the appropriate test to apply in *Reed*. In a separate opinion concurring only in judgment, Justice Stephen Breyer wrote that the “regulation at issue does not warrant ‘strict scrutiny.’” *Id.* at 2236 (Breyer, J., concurring). As explained later in this section, Justice Elena Kagan also questioned the application of strict scrutiny.

332. *Id.* at 2224–25.

333. Thomas was joined by Chief Justice Roberts and Justices Scalia, Kennedy, Alito, and Sotomayor. *Id.* at 2223.

334. *Id.* at 2227.

communicative content of the sign.”<sup>335</sup> Thus, strict scrutiny was the appropriate standard by which to measure the code’s validity.<sup>336</sup>

Turning to the goals/interests side of the strict scrutiny equation, Thomas assumed, for the sake of argument, that Gilbert had compelling interests in aesthetics and traffic safety.<sup>337</sup> That, however, was the only judicial bone Thomas tossed Gilbert’s way. The code’s underinclusivity proved fatal on the fit facet of strict scrutiny, with Thomas calling the code “hopelessly underinclusive.”<sup>338</sup> What was the problem?

In terms of the principles articulated by Chief Justice Roberts in *Williams-Yulee*,<sup>339</sup> the trouble in *Reed* was one of comparability.<sup>340</sup> Specifically, the regulated and unregulated varieties of signs were equal eyesores and thus harmed Gilbert’s interest in preserving its aesthetics in comparable ways.<sup>341</sup> Here, Justice Thomas cited<sup>342</sup> the newsrack case of *City of Cincinnati v. Discovery Network, Inc.*,<sup>343</sup> which was described earlier in this Article.<sup>344</sup> Gilbert, Thomas explained, “cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town while at the same time allowing unlimited numbers of other types of signs that create the same problem.”<sup>345</sup>

The comparability-of-harm problem also plagued Gilbert’s other asserted compelling interest, namely traffic safety. Thomas reasoned here that the municipality “has offered no reason to believe that directional signs pose a greater threat to safety than do ideological or political signs.”<sup>346</sup>

Essentially, it was just that simple for underinclusivity to doom Gilbert’s sign code. As Thomas summed it up, “[i]n light of this underinclusiveness, the Town has not met its burden to prove that its Sign Code is narrowly

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335. *Id.*

336. *See id.* at 2231 (“Because the Town’s Sign Code imposes content-based restrictions on speech, those provisions can stand only if they survive strict scrutiny.”).

337. *Id.*

338. *Id.*

339. *See supra* notes 251–64 and accompanying text (identifying four principles of underinclusivity drawn from the majority opinion in *Williams-Yulee*).

340. Roberts explained in *Williams-Yulee* that “[u]nderinclusivity creates a First Amendment concern when the State regulates one aspect of a problem while declining to regulate a different aspect of the problem that affects its stated interest *in a comparable way*.” *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1670 (2015).

341. *Reed*, 135 S. Ct. at 2231.

342. *Id.*

343. 507 U.S. 410, 425 (1993).

344. *See supra* Section II.A.4.

345. *Reed*, 135 S. Ct. at 2231.

346. *Id.* at 2232.

tailored to further a compelling government interest.”<sup>347</sup> Because Gilbert lightly regulated significant amounts of speech that caused the same harms to its alleged interests in aesthetics and traffic safety as heavily regulated speech, the code failed to directly serve and advance its twin interests.

In an opinion concurring in the judgment that was joined by Justice Ruth Bader Ginsburg and Justice Stephen Breyer, Justice Elena Kagan questioned the Court’s application of strict scrutiny in *Reed*.<sup>348</sup> She suggested that the better way to resolve the case, lest all manners of other content-based sign ordinances be jeopardized, was to apply the precedent from *Ladue v. Gilleo*,<sup>349</sup> described earlier in this Article.<sup>350</sup> “The majority could easily have taken *Ladue*’s tack here,”<sup>351</sup> Kagan wrote, pointing out the similar underinclusivity problems in *Reed* whereby Gilbert “provides no reason at all for prohibiting more than four directional signs on a property while placing no limits on the number of other types of signs.”<sup>352</sup>

In Kagan’s view, the underinclusivity issues plaguing *Reed*’s sign code would have been sufficient to strike it down on the fit facet of even intermediate scrutiny,<sup>353</sup> thereby eliminating the need to apply strict scrutiny. As Kagan wryly wrote, “Gilbert’s defense of its sign ordinance—most notably, the law’s distinctions between directional signs and others—does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test.”<sup>354</sup>

This suggests that the Court’s underinclusiveness analysis in *Ladue* takes on added and renewed importance today—at least among three justices and especially in light of concerns that strict scrutiny need not always apply to content-based sign ordinances. As Justice Breyer, who joined in Kagan’s concurrence, asserted in *Reed*, “the specific regulation at issue does not warrant ‘strict scrutiny.’ Nonetheless, for the reasons that Justice Kagan sets forth, I believe that the Town of Gilbert’s regulatory rules violate the First Amendment.”<sup>355</sup>

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347. *Id.*

348. *Id.* at 2236–39 (Kagan, J., concurring).

349. 512 U.S. 43 (1994).

350. *See supra* Section II.A.5.

351. *Reed*, 135 S. Ct. at 2239 (Kagan, J., concurring).

352. *Id.*

353. *See id.* (“The absence of any sensible basis for these and other distinctions dooms the Town’s ordinance under even the intermediate scrutiny that the Court typically applies to ‘time, place, or manner’ speech regulations. Accordingly, there is no need to decide in this case whether strict scrutiny applies to every sign ordinance in every town across this country containing a subject-matter exemption.”).

354. *Id.*

355. *Id.* at 2236 (Breyer, J., concurring).



The bottom line is that underinclusivity can prove fatal under the fit facets of both strict scrutiny (as it was for Justice Thomas in *Reed*) and intermediate scrutiny (as it was for Justice Kagan in *Reed*). Perhaps more importantly, *Reed* suggests—at least for the liberal concurring block of Kagan, Breyer, and Ginsburg in the case—that underinclusivity principles provide a judicial mechanism for striking down a content-based law while simultaneously avoiding strict scrutiny analysis. Underinclusivity, as addressed two decades ago in *Ladue*, thus today might provide a kind of judicial escape hatch that eliminates the need to apply strict scrutiny in future sign ordinance cases involving subject-matter exemptions that are sure to arise after *Reed*.<sup>356</sup> As Justice Kagan wrote in *Reed*, “[t]he majority could easily have taken *Ladue*’s tack here.”<sup>357</sup>

Writing in *The New York Times*, Adam Liptak asserted that *Reed* “marks an important shift toward treating countless laws that regulate speech with exceptional skepticism.”<sup>358</sup> While *Reed* certainly can “be read to dramatically expand the reach of a previously limited view of what is considered a ‘content-based’ restriction,”<sup>359</sup> the supposed shift toward exceptional skepticism came just two months after the Court in *Williams-Yulee* upheld a content-based law in the face of strict scrutiny. Indeed, rather than treating the statute in *Williams-Yulee* with exceptional skepticism under strict scrutiny, Justice Kennedy wrote that the majority opinion provides “a casebook guide to eviscerating strict scrutiny any time the Court encounters speech it dislikes.”<sup>360</sup>

In summary, this Article illustrates that underinclusiveness played a key role in both *Williams-Yulee* and *Reed*, but with different results. Underinclusivity proved permissible—at least, for five justices—in *Williams-Yulee*, but was fatal for all justices, regardless of whether they all would have applied strict scrutiny or a lower standard, in *Reed*. *Williams-Yulee* reveals fissures among the justices in the application of underinclusivity principles, with Justice Scalia and his three fellow dissenters finding the underinclusivity of Florida’s canon lethal.

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356. Kagan waggishly wrote that after *Reed*, the “Court may soon find itself a veritable Supreme Board of Sign Review.” *Id.* at 2239 (Kagan, J., concurring).

357. *Id.*

358. Adam Liptak, *Sidebar: Court’s Free-Speech Expansion Has Far-Reaching Consequences*, N.Y. TIMES, Aug. 18, 2015, at A15.

359. Dustin Howell, *U.S. Supreme Court*, 79 TEX. B.J. 41, 42 (2016).

360. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1685 (2015) (Kennedy, J., dissenting).

## IV. CONCLUSION

If Justice Felix Frankfurter’s porcine observation nearly sixty years ago in *Butler v. Michigan*<sup>361</sup> is correct—that overbroad statutes “burn the house to roast the pig”<sup>362</sup>—then fatally underinclusive statutes are akin to flicking a disposable cigarette lighter to barbecue the beast. They simply do too little to accomplish their goals or, in the process of feebly attempting to do so, reveal an unconstitutional legislative motive of targeting a particular class of either speech or speaker.

*Williams-Yulee* already is being cited by lower courts as it relates to the “fit” facet of strict scrutiny. In December 2015, the U.S. Court of Appeals for the Eleventh Circuit in *Wollschlaeger v. Governor of Florida*<sup>363</sup> cited it for the proposition that “[a] law is not . . . required to be perfectly tailored.”<sup>364</sup> Indeed, the majority in *Williams-Yulee* upheld a law that was not perfectly tailored due its underinclusiveness, and thus perhaps it is not surprising that the Eleventh Circuit in *Wollschlaeger* found that Florida’s statute restricting physicians’ speech to patients about firearms possession also survived strict scrutiny.<sup>365</sup> Permissive underinclusivity—in measures like those endorsed by the majority in *Williams-Yulee*—could provide a key judicial tool that renders strict scrutiny not as strict as its name suggests.

The importance of this is clear. If strict scrutiny requires that statutes restrict absolutely no more speech than is necessary to serve a compelling interest,<sup>366</sup> then there is no room for overinclusivity and perfection is required. The only wiggle room or latitude for statutory slippage and imperfection lies on the underinclusivity side, with underinclusiveness proving permissible and non-fatal in cases such as *Williams-Yulee*. Lawmakers seeking to thread the needle’s eye between too little speech regulation and too much speech regulation thus only have room to err on the too little side of the equation. Changing metaphors, lawmakers should veer to the underinclusive side of the

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361. *Butler v. Michigan*, 352 U.S. 380 (1957); see Clay Calvert, *Of Burning Houses and Roasting Pigs: Why Butler v. Michigan Remains a Key Free Speech Victory More than a Half-Century Later*, 64 FED. COMM. L.J. 247, 271 (2012) (“*Butler*’s famous analogy of burning the house to roast the pig continues to resonate with courts today to exemplify the principle of overbreadth.”).

362. *Butler*, 352 U.S. at 383.

363. 814 F.3d 1159 (11th Cir. 2015), *vacated and reh’g en banc granted*, 649 F. App’x 647 (11th Cir. 2016).

364. *Id.* at 1195.

365. See *id.* at 1201 (“[W]e hold that the District Court erred by concluding that the Act violates the First Amendment. The Act withstands strict scrutiny as a permissible restriction of speech.”).

366. See *supra* notes 52–54 and accompanying text.

road, with underinclusivity providing a tad of shoulder space not found on the overinclusivity side.

Perhaps Chief Justice Roberts' tolerance for underinclusiveness in *Williams-Yulee* is explained by his belief that it is "important for the constitutional system that people trust judges to be apolitical umpires."<sup>367</sup> If that is correct—that Roberts' articulation of underinclusivity principles is confined to the facts of a case involving judges and their fundraising activities—then *Williams-Yulee* might be a kind of judicial one-off case.

But if that is not the situation, then the five-to-four split in *Williams-Yulee* suggests underinclusivity is an extremely malleable principle. It can be used to kill a statute (as in *Reed*) or, alternatively, it can be worked around, with its red flag of danger being waved off (as in *Williams-Yulee*). This flexibility, in turn, affects the application of strict scrutiny on "the back-half of the strict scrutiny analysis—the means designed to carry out the interest."<sup>368</sup> The only intransigent principle regarding underinclusivity seemed to exist for Justice Scalia, who in both his *Williams-Yulee* dissent and his *R.A.V.* majority opinion made it clear that content-based underinclusivity is always fatal. He limited permissive underinclusivity only to content-neutral regulations.<sup>369</sup> Whether other justices now pick up Scalia's underinclusivity baton since his passing in February 2016 remains to be seen.<sup>370</sup>

One problem, then, pervading underinclusivity relates to judicial deference.<sup>371</sup> Specifically, how much deference should the Court afford lawmakers when it comes to their choice to nibble incrementally at speech-based problems rather than attack them with full regulatory force? When

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367. Laurence H. Tribe, *Dividing Citizens United: The Case v. the Controversy*, 30 CONST. COMMENT. 463, 490 (2015).

368. Matthew D. Bunker et al., *Strict in Theory, but Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16 COMM. L. & POL'Y 349, 381 (2011).

369. *Supra* notes 310–16.

370. *See supra* note 32.

371. As Professor Robert Schapiro defines it:

[j]udicial deference acknowledges that, based on the interpretation of another branch of government, a court might arrive at a conclusion different from one it would otherwise reach. Indeed, deference only has meaning if the court addressing the matter independently would reach a conclusion different from that of the Executive or the Legislature.

Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 665 (2000); *see also* Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 4–5 (1983) (noting that judicial deference "is not a well-defined concept but rather an umbrella that has been used to cover a variety of judicial approaches").

courts defer, they necessarily “suspend their own judgment in favor of the judgment of some other party—another branch of government.”<sup>372</sup> A problem, however, is the Court asserts that “[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.”<sup>373</sup>

As noted above, however, Chief Justice Roberts’ “Girl Scout” hypothetical in *Williams-Yulee* provides substantial deference to Florida, allowing it to escape an underinclusivity challenge.<sup>374</sup> Additionally, the Court engages in deference in other areas of First Amendment jurisprudence—even when applying strict scrutiny—as was evidenced in *Holder v. Humanitarian Law Project*.<sup>375</sup> That case pivoted on speech affecting national security interests.<sup>376</sup> As one commentator observed about *Humanitarian Law Project*, “[t]he majority, though occasionally paying lip service to strict scrutiny, did not hide its deference to the Government.”<sup>377</sup> The squishiness of underinclusivity analysis thus is compounded by deference, which itself “is a malleable concept”<sup>378</sup> that sometimes “constitutes a judicial wildcard that justices can play when dealt a First Amendment hand.”<sup>379</sup>

Strict scrutiny, in terms of tiers of constitutional scrutiny, is supposed to be a very stringent, non-deferential standard, compared to “deference doctrines, such as rational basis.”<sup>380</sup> But permitting underinclusivity within the strict scrutiny standard, as the majority did in *Williams-Yulee*, provides a means of softening up strict scrutiny. Justice Scalia, as described above, rejected this deferential treatment on the means side of the strict scrutiny equation in *Williams-Yulee*.<sup>381</sup>

Another problem affecting underinclusivity analysis relates to measuring or gauging the nature and amount of harm caused by unregulated speech. A fatally underinclusive statute is one in which unregulated speech causes

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372. Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1065 (2008).

373. *Landmark Commc’ns, Inc. v. Virginia*, 435 U.S. 829, 843 (1978).

374. *See supra* notes 270–72 and accompanying text.

375. 561 U.S. 1 (2010).

376. *See id.* at 34 (“[W]hen it comes to collecting evidence and drawing factual inferences in this area . . . respect for the Government’s conclusions is appropriate.”).

377. Andrew V. Moshirnia, *Valuing Speech and Open Source Intelligence in the Face of Judicial Deference*, 4 HARV. NAT’L SEC. J. 385, 418 (2013).

378. Clay Calvert & Justin B. Hayes, *To Defer or Not to Defer? Deference and Its Differential Impact on First Amendment Rights in the Roberts Court*, 63 CASE W. RES. L. REV. 13, 17 (2012).

379. *Id.*

380. Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797, 874 (2011).

381. *See supra* notes 293–96 and accompanying text.

“appreciable damage”<sup>382</sup> and negatively affects the government’s stated interest in a manner “comparable”<sup>383</sup> to the regulated speech. In *Reed*, the appreciable and comparable damage to the town’s aesthetics may have been so obviously evident to all nine justices—perhaps because of two contrasting, color photos depicting lightly and severely regulated signs that Pastor Clyde Reed included in his petition for a writ of certiorari<sup>384</sup>—that no other proof of appreciable harm caused by the lightly regulated speech was needed. But such ocular evidence is not always present in speech-harm cases.

In *Williams-Yulee*, Roberts had to explain that the regulated speech caused “a categorically different and more severe risk”<sup>385</sup> of harm than the unregulated speech. Scalia simply didn’t buy that argument. One takeaway for lawmakers from both *Williams-Yulee* and *Reed* thus is this: when they choose not regulate some varieties of speech that they nonetheless anticipate might be perceived as harming the interest underlying a statute, they should provide a detailed factual record, in either the legislative history or in the statute itself, explaining the noncomparable amount and/or nature of the harm caused by the regulated and unregulated varieties of expression. This comports with the principle identified earlier that selectivity in speech regulation is permissible if noncomparability of either affect or effect is demonstrated by the government.<sup>386</sup>

Another takeaway rests in Justice Kagan’s *Reed* concurrence.<sup>387</sup> It is that the underinclusivity analysis in *Ladue*—a case in which the Court did not apply strict scrutiny to strike down a sign ordinance that included (certainly by Justice Thomas’ definition in *Reed*) content-based distinctions—provides a possible path out of the thicket wrought by Thomas’ opinion, which seemingly mandates that strict scrutiny always applies to content-based sign ordinances. In other words, if a sign ordinance can be struck down via underinclusiveness as deployed within the intermediate scrutiny standard in *Ladue*, then the Court should do so rather than applying strict scrutiny.

Ultimately, four dissenting justices in *Williams-Yulee* believed the majority eviscerated strict scrutiny and rendered it toothless on the fit side of the equation.<sup>388</sup> Will such dire predictions about the weakness of strict

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382. Fla. Star v. B.J.F., 491 U.S. 524, 542 (Scalia, J., concurring).

383. Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1670 (2015).

384. See Petition for Writ of Certiorari at 1–2, Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015) (No. 13-502) 2013 WL 5720386, at \*1–2.

385. 135 S. Ct. at 1669 (emphasis added).

386. See *supra* Section III.A.3.

387. See *supra* notes 348–54 and accompanying text (addressing Justice Kagan’s *Reed* concurrence).

388. For instance, Justice Kennedy pointed out “[t]he Court’s evisceration of that judicial standard.” *Williams-Yulee*, 135 S. Ct. at 1685 (Kennedy, J., dissenting).

scrutiny hold true in future cases? They certainly did not in *Reed*, where underinclusivity was front and center in Justice Thomas' ordinance-killing strict scrutiny analysis just two months later. How loosely and deferentially or, in contrast, how stringently and skeptically the quartet of underinclusivity principles identified by the *Williams-Yulee* majority is applied in the future may prove pivotal in determining the fatalness of strict scrutiny. The importance of underinclusivity simply cannot be underestimated in the future of First Amendment free-speech jurisprudence.