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SELF-GOVERNMENT BEFORE THE JUDICIARY AND A FIRST AMENDMENT STANDARD THAT PROTECTS THE CONTENT OF COURTROOM ARGUMENT

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I. INTRODUCTION

Unknown to them and abhorrent to their reputations for rousing courtroom argument, Aaron Burr, John Quincy Adams, Thurgood Marshall and Clarence Darrow did not have the freedom in the courtroom (trial or appellate) to offer their client's best, most influential, argument.¹ Lawyers and the public share the

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1. These men crafted some of the most society-changing arguments at the trial, appellate, and Supreme Court levels. Burr was legendary in the courtroom. See GORE VIDAL, *BURR* 357-64, 370-76 (1973) (recounting the primacy of Aaron Burr's legal practice at the beginning of the nation). Adams, along with co-counsel Roger Baldwin, formed the first argument against slavery heard by the Supreme Court. See also *United States v. Libellants & Claimants of the Schooner Amistad*, 40 U.S. 518, 593-94, 596-97 (1841) (wherein former president John Quincy Adams passionately and successfully argued that a group of mutineer Spanish slaves were not the property of Spanish slave traders). Marshall, along with several others, propounded the argument that successfully overthrew the establishment of Jim-Crow and *Plessy v. Ferguson*, 163 U.S. 537 (1896). See Jeff Blumenthal, *When Separate Became Unequal*, LEGAL INTELLIGENCER, May 17, 2004, at 1 (summarizing the thought process that went into Thurgood Marshall's groundbreaking argument strategy in *Brown v. Board of Education*, 347 U.S. 483 (1954), including collaboration with civil rights advocates William Coleman, Jr. and Louis Pollack). Darrow roused the religious passions of the nation with his arguments in defense of a Tennessee school teacher convicted of teaching the banned theory of evolution – arguments that culminated before the Tennessee Supreme Court. See *Scopes v. State*, 289 S.W. 363, 364-

misconception that the litigant may press her most fair and most just argument to obtain the Court's full consideration.² Indeed, the practice of law presupposes that a litigant may craft any relevant, timely, and justiciable argument, the merits of which the Court is duty bound to adjudicate within the inherent limitations of law, policy, and equity.³ Fortunately, these conditions prevailed when the *Brown v. Board of Education*⁴ plaintiffs presented an argument based on sweeping societal impact that the judiciary had no choice but to confront, despite any personal discomfort.⁵ Unfortunately, to the dismay of would-be Marshalls and Matlocks alike, no speech interest in courtroom argument has been recognized as protected by the U.S. Constitution, and the judiciary generally may stifle courtroom speech arbitrarily and without constitutional scrutiny.⁶ This halting of litigant presentation can be direct, through outright bans of words, or through administrative rules and procedures that undermine (or even prohibit) argument. Currently, this trend leaps forward without subtlety, as the Federal District of New Jersey

66, 367 (Tn. 1927) (reviewing the constitutional arguments and dismissing the conviction on a technicality). See also Douglas Linder, *Clarence Darrow, Famous Trials in American History*, Univ. of Mo. Kansas City L. Sch. Project, at <http://www.law.umkc.edu/faculty/projects/ftrials/scopes/darrowcl.htm> (2004) (recounting the public fervor generated by Darrow's argument that pitted religious fundamentalism against science).

2. For all practical purposes, and the purposes of this Article, the attorney and client are subsumed into the idea of a "litigant." As discussed in Section IV, the doctrinal difficulty of separating the attorney and client is unnecessary when discussing an expression interest in the content of relevant argument. See *infra* notes 178-86 and accompanying text.

3. See, e.g., NANCY L. SCHULTZ & LOUIS SIRICO, JR., *LEGAL WRITING AND OTHER LAWYERING SKILLS* 245, 252-53 (3d ed. 1998) (outlining strategies for preparing legal briefs and arguments based on effective use of precedent and inherently assuming that the litigant controls the argument's content).

4. 347 U.S. 483 (1954).

5. See PETER IRONS, *A PEOPLE'S HISTORY OF THE SUPREME COURT* 386-94 (1999) (describing the details surrounding the *Brown* arguments before various courts and finally the Supreme Court); see also Blumenthal, *supra* note 1; *infra* note 149 and accompanying text (for further discussion on the judiciary's own bias and difficulty with race).

6. For a discussion of the judiciary's refusal to recognize courtroom argument as political speech, see *infra* Section III.

prepares to *eliminate* oral argument altogether.⁷ Although oral argument is certainly not the only type of argument a litigant offers, dispensing with all oral presentation indicates a level of judicial disregard for the value of courtroom argument.

The absence of a First Amendment standard that protects the content of courtroom speech is a constitutional anomaly, because such speech is laced with vital political importance. The First Amendment grants political speech its most core protection.⁸ Preserving self-government through discourse about and toward the government is an undisputed and primary goal of the First Amendment.⁹ As such, the First Amendment traditionally handcuffs government when it seeks to limit political speech.¹⁰

This Article, in Part II, outlines the background and

7. See Henry Gottlieb, *Federal District Moves to Limit Oral Arguments*, 178 N.J. L.J. 845 (Nov. 29, 2004) (summarizing the debate). Many courts do not require oral argument for all motions and even in the District of New Jersey it is standard practice not to grant oral argument for every single motion, but formalizing an elimination of all argument because it is considered a “waste of time” indicates a certain lack of respect by the judiciary for the presentations made in the courtroom. *Id.*

8. See *Butterworth v. Smith*, 494 U.S. 624, 632 (1990) (reiterating the long-standing protection of political speech); *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) (referring to political speech as “the essence of self government”).

9. See *First Amendment and Restrictions on Political Speech, Hearing Before the Subcomm. on the Const. of the House Comm. on the Judiciary*, 106th Cong. 8-10 (1999) (Opening Statement of Chairman Charles Canady [hereinafter *Political Speech Hearing*]). Protecting speech that influences politics is a First Amendment value that nearly every constitutional scholar has agreed upon. See ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM – THE CONSTITUTIONAL POWERS OF THE PEOPLE* 20-28, 78-120 (1960) (exalting the virtue of unabridged political speech and separating popular or private speech as less important to self government).

10. See *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 692 (1990) (Scalia, J., dissenting) (reminding the Court that “the premise of our bill of rights, however, is that there are some things – even some seemingly desirable things – that government cannot be trusted to do. The very first of these is establishing restrictions on speech that will assure ‘fair’ political debate”). See also David R. Cooper, *Speaking Out: Lawyers and Their Right to Free Speech*, 18 REV. LITIG. 671, 681-82 (1999) (summarizing the levels of scrutiny given to various types of speech, with political speech receiving the most demanding level).

tradition of courtroom argument, both written and oral, and exposes its naturally political nature.¹¹ Courtroom speech invokes the First Amendment's core protection of political speech in two fundamental ways. First, in a common-law system, courtroom speech carries unequalled political concern because it is a direct appeal to a branch of government with the power to apply, alter, or even create laws and policies that govern society.¹² Second, courtroom argument flows outside the courtroom to influence public debate of legal and social issues, especially given the Internet and the news-media's increasing ability to bring courtroom speech to the forefront of the public marketplace of ideas.¹³

Such dire contribution to our body politic dictates that no government branch should have absolute authority to halt this important speech without recourse, yet the judiciary does just that. Part III argues that legal standards adopted thus far to deal with litigant speech fail to protect the political value of courtroom argument.¹⁴ Part III first outlines the incoherence of current forum analysis of the courtroom. Part III then describes how this incoherence leads to nearly unquestioned power to regulate the forum of the courtroom and allows the judicial branch of government to escape *any* scrutiny for even the most arbitrary limitations of courtroom argument.¹⁵ Using the specific examples of *In Limine* word-bans and "no-citation" rules, Part III illustrates how carte blanche judicial authority to stifle relevant argument results in surprisingly arbitrary restrictions that evoke the significant policy concerns associated with all limitations of political speech.¹⁶ Especially given the political concerns of speech in court,

11. For a discussion of courtroom argument as political speech, see *infra* Part II.

12. For a discussion of the people's power in petitioning the judiciary, see *infra* notes 23-54 and accompanying text.

13. For a discussion of the judiciary's refusal to recognize courtroom argument as political speech, see *infra* notes 55-81 and accompanying text.

14. For a discussion of the judiciary's inconsistency on First Amendment analysis and ominous rulings against the First Amendment in the courtroom, see *infra* notes 82-127 and accompanying text.

15. For a discussion of the dangers of carte blanche judicial authority to curb courtroom speech, see *infra* notes 128-76 and accompanying text.

16. For a discussion of *In Limine* word bans and "no-citation" rule, see

these examples indicate that some substantive First Amendment interest in the content of courtroom argument must be recognized in order to reign in the judicial branch to the control of the people.

Finally, the inherently circumscribed forum of the courtroom need not be inconsistent with a First Amendment standard to protect the content of courtroom argument. Part IV explores the courtroom as a forum for expression and formulates a standard that will protect both the political vitality of courtroom speech and the functional administration of justice.¹⁷ It is clear that, by nature, the judiciary must halt argument through important limitations such as jurisdiction, justiciability, or evidentiary constraints. Arguably, these limitations are so important that they meet the Supreme Court's strictest standard for restrictions on even political speech.¹⁸ The notion of a fair and impartial judiciary, however, implies a guarantee that litigants be free to present the law and the equities.¹⁹ Within the practical limitations, a workable free speech doctrine emerges through a modified limited purpose forum analysis: That all litigants hold a right to freely control the content of their presentation to a court, adhering to justifiable constraints of court function, to obtain the court's considered ruling.²⁰ The political importance of courtroom argument demands, as Justice Scalia warned in *Austin v. Michigan Chamber of Commerce*,²¹ that we not trust the judiciary – which is after all an equal branch of government – with imposing restrictions upon it without scrutiny.²²

infra notes 131-75 and accompanying text.

17. For a discussion of the courtroom as a forum for speech, see *infra* notes 177-211 and accompanying text.

18. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (per curiam) (applying a standard of “strict scrutiny” to restrictions of political speech, which requires the state to show that the law or restriction is narrowly tailored to advance a compelling state interest).

19. See *Sacher v. United States*, 343 U.S. 1, 8-9 (1952) (stating that both the practice and appearance of justice in the courtroom depend in part on “the right of counsel for every litigant to press his claim, even if it appears farfetched and untenable, to obtain the court's considered ruling”).

20. For a discussion of the forum analysis that allows this doctrine to be protected, see *infra* Section IV.

21. 494 U.S. 652 (1990).

22. See *id.* at 692 (Scalia, J., dissenting) (arguing that government simply

II. FOUNDATION: LEGAL ARGUMENT AS POLITICAL SPEECH

On the surface, arguments in the courtroom, oral or written, do not take on the typical town-meeting characteristics that traditionally adorn political speech.²³ Notably, however, descriptions of the town-meeting compare closely with the ideal judicial proceeding: both are assembly “to discuss and act upon matters of public interest”; both allow that “every man is free to come” and “meet as political equals”; both require each side “to think his own thoughts” and “listen to the arguments of others.”²⁴ Through both direct political influence on a governmental branch and more indirect influence on the debate of the body politic itself, court argument shares enough significant traits with traditional political debate to raise similar policy concerns when subjected to arbitrary or discriminatory regulation.²⁵ This political influence compels at least some First Amendment interest in a litigant’s courtroom argument.

A. Unequalled Political Power: Directly Petitioning a Branch of Government to Change or Determine the Law.

In perhaps no other venue does speech exert more direct influence on the fluid laws and policies of our land than in the

“cannot be trusted” to impose restrictions on political speech).

23. See, e.g., MEIKLEJOHN, *supra* note 9, at 24-28 (describing “the procedure of the traditional town meeting”). Meiklejohn outlines the typical model of political debate and argues that it must be relied on to measure validity of restraint on speech. See *id.* He writes:

In the town meeting the people of a community assemble to discuss and to act upon matters of public interest . . . Every man is free to come. They meet as political equals. Each has a right and a duty to think his own thoughts, to express them, and to listen to the arguments of others.

Id. at 24.

24. *Id.* Meiklejohn does not tackle courtroom speech protection but, conceivably, would recognize the similarity with town-meeting political speech.

25. For a discussion of the political vitality of courtroom argument, see *infra* notes 23-81 and accompanying text.

courtroom. The value of political speech is that, in an autonomous society, the people are free to discuss and argue for change in the law or even in the governing structure itself.²⁶ Thus, the First Amendment holds the legislative and executive branches to the most rigid standards when limiting this core expression.²⁷ Because those branches answer to the people, the peoples' political argument is perceived to have both direct and indirect impact on law-making government.²⁸ In a common law system, however, the judiciary also inherently governs by establishing law.²⁹ Because of

26. See Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 883-86 (1963) (discussing the value of political expression in allowing change in naturally rigid institutions). As Emerson theorizes, free political speech operates "as a catharsis for the body politic" which facilitates political change, "keeping a society from stultification and decay." *Id.* at 885.

27. See, e.g., *Comm'n for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 445 (Tex. 1998) (Gonzalez, J., dissenting) (reminding the court that "[t]he strong protections provided for political speech activities are robust").

28. See MEIKLEJOHN, *supra* note 9, at 26 (observing that because political questions will be decided by a vote of the citizens, the importance of influence in political debate is the primary concern, stating that "in that [voting] method of political self-government, the point of ultimate interest is not the words of the speakers, but the minds of the hearers"). In no area of legislative debate are the concerns about the myriad influences of political speech more zealously championed than in the area of campaign finance reform. See *Political Speech Hearings*, *supra* note 8. Importantly, the seminal Supreme Court case on the subject, *Buckley v. Valeo*, 424 U.S. 1 (1976), points to the Supreme Court's willingness to apply First Amendment concerns of "political expression" to actions and areas that are not obviously similar to traditional town-hall speech. *Id.* at 23 (determining that campaign contributions and expenditures are political speech). In so holding, the *Buckley* Court could not discount the political influence of campaign contributions and expenditures on the "quantity and range of debate on public issues." See *id.* Courtroom argument has similar influence on public debate. See *infra* Section II.B. When such political influence is at stake, the first principals cited by the Court in *Buckley* are invoked.

29. See 3 WILLIAM BLACKSTONE, COMMENTARIES *25 (reasoning that judicial power requires judges "to determine the law" from the facts). Differing from "Civil Law" legal systems that place less emphasis on precedent and court-made legal doctrine, in the American system, perverted very little from its roots in England, Common Law courts find "what was before uncertain, and perhaps indifferent, is now become a permanent rule[.]" 1 WILLIAM BLACKSTONE, COMMENTARIES *69. The permanence of these

its law-determining capacity and incomparable power, it is a point of great discomfort that the judiciary does not directly answer to the people as do the other branches of the government (in perception at least).³⁰ Out of this discomfort comes the usual argument for limitation on court “activism” and restraint on court law making.³¹ This argument ignores the necessity of court made

“rules” dictated by judges is established by adherence to precedent through stare decisis. *See id.*

30. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *258-60 (warning that if judges had the legislative power, the people would be “in the hands of arbitrary judges” who were “regulated only by their own opinions”).

31. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (arguing for judicial restraint so that the judiciary doesn’t usurp the authority of the social government). The legitimate concern of keeping the branches of government separate, however, is often hard to parse out of the usual conservative railing against “activist judges” who are often simply exercising judicial review. *See Court Rejects Bid to Halt Gay Marriage*, BOSTON GLOBE, June 30, 2004, at B2 (reporting upon the dismissal of a court action that argued that the Massachusetts Supreme Court improperly usurped the power of the legislative branch); *see also* Susan Milligan, *House Votes to Prevent Court Review of Pledge*, BOSTON GLOBE, Sep. 24, 2004, at A3 (reporting the comments of United States Representative Todd Akin, who authored legislation that would prohibit federal courts from ruling on the constitutionality of including the words “under God” in the Pledge of Allegiance). According to Akin, “activist judges” would interfere with schoolchildren saying “under God.” *See id.* While the Massachusetts Supreme Court’s ruling on gay marriage increased claims of judicial activism, the national debate and litigation over the removal of life support from brain-damaged patient Terri Schiavo raised the criticism of judicial decisions to a full political battle over separation of powers. *See, e.g., Hardball with Chris Matthews* (MSNBC television broadcast, Feb. 10, 2005) (offering commentary from various legislative officials accusing the Massachusetts Supreme Court of “activism” when it held that the Massachusetts Constitution prohibited banning gay marriage); *Meet the Press with Tim Russert* (NBC television broadcast, Mar. 27, 2005) (discussing, at length, the role of courts and judges in the hotly debated and highly politicized case of Florida patient Terri Schiavo).

Fueling the outcry of judicial activism, at least one United States Supreme Court Justice personally subscribes to the view that all so-called “value-laden” decisions should be left to a democratic majority. *See* Douglas Belkin, *Scalia Decries Judicial Activism in Harvard Talk*, BOSTON GLOBE, Sep. 29, 2004, at A2 (In his speech at Harvard University, Justice Scalia remarked, “What I am questioning is the propriety, indeed the sanity, of having value-laden decisions such as [abortion and assisted suicide] made for

law (and judicial review of legislation) in the American common law system and thus propounds a flawed limitation on court power.³²

The more effective limitation lies in recognizing the power of the litigants themselves and ensuring their ability to freely invoke the duties of statute, precedent, policy and equity imposed upon the judiciary by the American common law system.³³ Because the people, as litigants, so directly influence the laws and policies of our land, the political significance of court argument cannot be denied. As the Supreme Court has noted, “The judicial system, and in particular our criminal justice courts, play a vital part in a democratic state, and the public has a legitimate interest in their operations.”³⁴

Further, the judiciary’s acknowledgement of the First Amendment’s right “to petition the Government”³⁵ compels recognition of the political nature of speech that seeks redress of grievances in law, policy or equity. Beginning with the Magna Carta, the now forgotten “right to petition” is the origin of the peoples’ power to limit government authority by requesting a change in policy or a review of law, an inherently political device.³⁶

the entire society . . . by judges . . .”).

32. See Belkin, *supra* note 31; see also Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 585 (2001) (arguing that “entrenched precedent acquires a force or weight as a matter of constitutional law” (emphasis in original)). According to Professor Fallon, the Constitution implicitly validates the entrenched practice of stare decisis, which in turn legitimizes judicial decisions. See *id.* at 582. Indeed, as long as America retains a common law system, the judiciary will continue to define the law, alter the law, and set rules of law. See BLACKSTONE, *supra* note 29, at *69. Further, the idea of judicial review of legislative action, especially for constitutionality, is an established role of the judiciary and has evolved into an essential check and balance of the Legislative power. See *Marbury v. Madison*, 5 U.S. 137 (1803).

33. See BLACKSTONE, *supra* note 29, at *25; Fallon, *supra* note 32, at 585 (arguing that the judicial reliance on precedent promotes continuity and discourages the courts from rethinking every constitutional question).

34. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1035 (1991).

35. U.S. CONST. amend I.

36. See Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2161-70 (1998) (expounding on the early history of the right to petition and its nature as

The people now exercise this right primarily through petitioning the courts.³⁷ Recognizing this reality, the Supreme Court regularly assures the people that the right to petition guarantees “access” to the court system.³⁸ By thus conceding that litigants are exercising their right to petition, the judiciary impliedly recognizes the historic political nature of speech that adorns the exercise of that right.³⁹

The court system provides the fundamental forum by which the populace may influence, through expression aimed at principles of law, equity, fairness, social policy and *stare decisis*, the application and change of the law.⁴⁰ This includes both arguing for

“political speech”). The history of the right to petition indeed proves its political nature. *See id.* The Magna Carta is recognized as beginning the practice by which English society could limit royal authority through pleas of equitable treatment, complaints against officials, and requests for change in policy. *See id.* at 2163-65. In 1669, England’s House of Commons solidified the right “to prepare and present petitions” and it was included in the first “Bill of Rights” in 1689, which declared the right of all subjects to petition the King. *See* John E. Wolfgram, *How the Judiciary Stole the Right to Petition*, 31 UWLA L. REV. 257, 279 (2000). As the right grew, it became the primary political device by which people challenged their authorities, their regulation, and societal norms, including slavery, taxes, and colonies. *See* Mark, *supra* at 2174-95. The political significance culminated in The Declaration of Independence, itself a list of injuries and grievances, including the failure of the Crown to address prior petitions. *See id.* at 2191-95.

37. *See* Wolfgram, *supra* note 36, at 281-83 (arguing passionately, in a somewhat ranting manner, that the Judiciary must recognize that its power is limited by the right to petition).

38. *See* Calif. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) (holding that “[t]he right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition”).

39. *See* Mark, *supra* note 36. After evolving into a practice of actually delivering written grievances to an early and quite overloaded Congress, the “petition” soon became synonymous with general “political speech.” *See id.* at 2223-28. Indeed, as Professor Mark eloquently argues, the right to petition embodied core political speech that should be reflected today in an expansive interpretation of freedom of expression that does not “stifle the very expression that the right to petition was meant to protect.” *See id.* at 2155. Because the right to petition has been adopted as guaranteeing “access” to the courts, the judiciary must recognize the inherent political speech interest that attaches to such access. *See also* Calif. Motor Transp. Co., 404 U.S. at 510.

40. *See In re Sawyer*, 360 U.S. 622, 668 (1959) (plurality opinion) (Frankfurter, J., dissenting) (extolling the virtue of a forum in which to freely

change in the common law and arguing for change in the law promulgated by other branches of the government, which the court is empowered to review.⁴¹ Because the court both identifies new law and strikes down existing law, the argument of litigants before it becomes increasingly politically important. For example, the *Brown v. Board of Education*⁴² plaintiffs, who spearheaded a political venture as any election campaign or soap-box speech, directly requested a change in the entire legal and social structure.⁴³ That it was litigation in court does not make it less so. In fact, the anti-segregation litigants in *Brown* specifically chose the courtroom as the most effective forum for political expression aimed at redress.⁴⁴ In a less successful example, defense attorneys for the famous “Chicago Seven” war protesters strategized to expose abuse of governmental authority, both in policing the streets and prosecuting the Vietnam War.⁴⁵ In its capacity to hear and rule on such arguments, the courtroom stands as the place where the people appeal to the social foundations that underscore legal norms.⁴⁶ Such appeal is unquestionably political and serious

argue a case). Interestingly, Justice Frankfurter supported a freer hand in restricting out-of-court speech because the litigant “does not lack for a forum in which to make his charges of unfairness or failure to adhere to principles of law; he has ample chance to make such claims to the courts in which he litigates.” *Id.* To preserve this “ample chance” the litigant must therefore have some expressive interest in his words before the court.

41. See *Marbury v. Madison*, 5 U.S. 137 (1803) (declaring the judiciary’s power to apply and interpret the law and ensure its consistency with the Constitution).

42. 347 U.S. 483 (1954).

43. See IRONS, *supra* note 5, at 381-94 (detailing “the long road to the Supreme Court for black children” and the entrenched social norms of Jim Crow).

44. See *id.* at 383-94 (describing the political strategy of NAACP attorney Thurgood Marshall in not only picking forums, but litigants themselves, in order to best champion de-segregation).

45. See *id.* (noting the political controversy in the Chicago Seven trial and its contribution to the political movement of the day); see also Carmen Bell, *The Great Experiment: Can Political Speech Survive American Patriotism* (2002) (unpublished manuscript, on file with the author) (discussing the Chicago Seven, Abbie Hoffman and limitations on political speech during the Vietnam War).

46. See W. Bradley Wendel, *Free Speech for Lawyers*, 28 HASTINGS

concerns about the power of the people over their government arise if the court may silence such speech without limit or scrutiny.

This political impact has not gone totally unnoticed. The Second Circuit, in recognition of the political importance of courtroom argument, held that Congress could not legislatively forbid government-funded lawyers from arguing that certain laws were unconstitutional.⁴⁷ Constitutional argument, the court found, was worthy of core First Amendment political speech concerns:

[A] lawyer's argument to a court that a statute, rule, or government practice . . . is unconstitutional or otherwise illegal falls far closer to the First Amendment's most protected categories of speech. . . . If the idea in question is the unconstitutionality or illegality of a governmental rule, the courtroom is the prime marketplace for the exposure of that idea.⁴⁸

This radical brush with populist First Amendment theory is not broadly accepted.

Expression in court can also influence government in an opposite manner, urging the court to apply the law instead of changing or overturning it. *Stare decisis* and reliance on precedent as a method of fairness and uniformity provides a mechanism by which litigants can hold the court to its prior decisions to assure equal treatment.⁴⁹ While the court is often duty bound to follow prior and higher rulings, it is the speech of the litigants that connect the facts and policies of precedent to the case at hand.⁵⁰ Indeed, the

CONST. L. Q. 305, 354 (discussing the "tradition in our legal culture" of appealing to societal values behind just legal norms).

47. See *Valazquez v. Legal Services Corp.*, 164 F.3d 757, 771-72 (2d Cir. 1999), *aff'd*, 531 U.S. 533 (2001).

48. *Id.* The court also noted, "The strongest protection of the First Amendment's free speech guarantee goes to the right to criticism government or advocate change in governmental policy." *Id.* at 771.

49. See, e.g., *Anastasoff v. United States*, 223 F.3d 898, 900-04 (8th Cir. 2000) (providing a brilliant overview of the history and value of adherence to precedent), *vacated on rehearing en banc*, 235 F.3d 1054 (8th Cir. 2000).

50. See SCHULTZ & SIRICO, *supra* note 3, at 2 (outlining the style of argument that highlights precedent and connects facts of the instant litigants'

duty of *stare decisis* lends important political influence to all litigants, because “obedience to precedent is the only brake on arbitrary judicial decision-making.”⁵¹

Finally, the self-interested nature of a private court action does not deprive courtroom speech of its direct political impact. Admittedly, courtroom expression does not overtly smack of politics because it is individual in nature and litigants cannot be free to use the court as a pulpit for traditional political discussion.⁵² Limits such as relevance and justiciability, however, exist to ensure that issues and parties are properly before the court.⁵³ Within those practical confines, a court is often urged to consider societal impact and treatment of future litigants to ensure equitable policy. For instance, if a litigant were to urge that stem cell research litigation be adjudicated under the same standard as abortion, the court will review the public policy implications of adopting such a standard and the practical effect on society. The judiciary also welcomes argument on the broader social and political impact of its decision through *amicus curiae* briefs, which turn the court into an arbiter of the broad social impact of its own power.⁵⁴ In this vein, even the litigant interested in only individual vindication brings with her a

case).

51. *Griffy’s Landscape Maint. LLC v. United States*, 51 Fed. Cl. 667, 673 (Fed. Cl. 2001) (citing *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000)); see generally Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570 (2001) (explaining *stare decisis* as a constitutional requirement).

52. See, e.g., MEIKLEJOHN, *supra* note 9, at 22-27.

53. This article uses the term “justiciability” to refer generally to the tenets of ripeness, mootness, standing, and other prudential limits on adjudicatory authority. See GERALD GUNTHER & KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW*, 28-84 (13th ed. 1991) (outlining the basics of constitutional authority for federal courts to adjudicate cases).

54. See WRIGHT, MILLER & COOPER, *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 3D*, § 3975 (1969) (summarizing *amicus* practice in Federal Appellate Court). Generally, most *amicus* argument will be entertained by the courts as long as they do not repeat the arguments of the litigants. See *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (stating that *amicus* briefs “should normally be allowed” when the *amicus* party has a unique perspective beyond the immediate parties).

panoply of social and political implications.

B. First Socrates, then Cable News: The Influence of Courtroom Argument on Political Debate.

Courtroom argument also contributes unmistakable value to the political marketplace of ideas.⁵⁵ Speech in court often channels directly into public debate, where it profoundly impacts upon popular policy decisions.⁵⁶ Especially with the advent of C-SPAN, Court TV, CNN, MSNBC and the twenty-four hour news cycle, argument before the judiciary, including the Supreme Court level, contributes instantly to the widespread mulling of social policy.⁵⁷ Argument on rules of law, constitutional issues, defense

55. See *Abrams v. United States*, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting) (eloquently coining the now famous value of free speech). Justice Holmes, disagreeing with the criminal convictions of publishers of anti-American pamphlets, stated:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best truth is the power of the thought to get itself accepted in the competition of the market . . .

Id. at 630.

56. See EDWARD J. LARSON, *SUMMER FOR THE GODS: THE SCOPES TRIAL AND AMERICA'S CONTINUING DEBATE OVER SCIENCE AND RELIGION* 170-93 (1997) (analyzing, in depth, the arguments made by William Jennings Bryan and Clarence Darrow); see also Edward J. Larson, *The Scopes Trial and the Evolving Concept of Freedom*, 85 VA. L. REV. 503, 519 (1999) (furthering the case for the link between the Scopes trial and public debate over religion because of the "intense public attention" focused on the trial and its arguments). Darrow's argument—that new scientific theory can freely challenge religious fundamentalism—could hardly be kept out of the public debate. See *id.* at 519-20. A new idea of freedom of belief emerged and gained sympathy. See *id.*

57. See, e.g., *The Abrams Report*, (MSNBC television broadcast, Sept. 10, 2004) [hereinafter *The Abrams Report*] (discussing daily arguments put forth in current court cases, including intense discussion on issues of legislation and the legal system raised by such arguments). Broadcasts such as *The Abrams Report* instantly and undeniably affect popular debate, which is evidenced immediately on such programs by the thousands of emails from viewers that

theories and litigant's rights are served up for public consumption, often with contemporaneous commentaries by lawyers, scholars and policy-makers that augment the political significance of such argument.⁵⁸ The Internet, as it has with all information, also offers unprecedented availability to courtroom speech, broadcasting argument, making briefs widely available, and opening yet another all-access door to public consumption of courtroom argument.⁵⁹

form positions on legal, social and political issues based on what they see and hear. *See id.* (broadcasting and critiquing some of these viewer comments). Generally, the political influence of media broadcasts has not gone unnoticed, leading to the assessment that the airwaves have supplanted the traditional forums of public parks and streets for delivery of political speech. *See also* David Cardone, *The 'Dread of Tyrants': Defending the Free-Speech Rights of Independent Political Candidates*, PA. LAW., May/June 2004, at 14, 20 (arguing that current First Amendment standards applied to televised campaign debates are outdated because the airwaves are "today's traditional public forum").

58. *See The Abrams Report*, *supra* note 57 (exporting legal debate for public consumption); *see also Supreme Court Hears Affirmative Action Arguments*, CNN, at <http://www.cnn.com/2003/LAW/04/01/scotus.affirmative.action/> (Apr. 2, 2003) (reporting and analyzing oral argument on the landmark affirmative action cases challenging the Michigan Law School and the University of Michigan undergraduate racial preference programs). A critical political component of such oral argument digestion is the side taken by the government on controversial issues. *See id.* For instance, President George W. Bush's administration weighed in against the Michigan affirmative action programs. *See id.* This side-taking then became part of the debate over the policies of the Bush administration during the ensuing 2004 presidential election. *See The McLaughlin Group* (PBS television broadcast, July 24, 2004), transcript available at <http://www.mclaughlin.com/library/transcript.asp?id=424> (broadcasting a roundtable discussion over whether the President's policies and positions in the affirmative action cases would factor in the pending election).

59. *See, e.g.,* Wisconsin Court System, *Supreme Court Oral Arguments, Listen to an Oral Argument Online*, at <http://www.wicourts.gov/opinions/soralarguments.htm> (last modified Sept. 29, 2004) (offering live and recorded Wisconsin Supreme Court arguments to the public for free from 1997 to present); Oyez, *U.S. Supreme Court Multimedia*, at <http://www.oyez.org> (last visited Feb. 8, 2005) (offering various U.S. Supreme Court oral arguments to the public for downloading). A testament to the eagerness of the public to digest these arguments, the OYEZ website offers a "most popular audiofile" list that indicates that several hundred thousand visitors have downloaded various Supreme Court oral arguments.

Cable news and technology, however, cannot take all the credit for the political significance of courtroom argument.⁶⁰ Indeed, the contribution of courtroom argument to public political debate ages with Western Civilization itself. In Athens, around 800 B.C., prosecutors gave Greek philosopher and rabble-rouser Socrates the right to defend himself at a public trial.⁶¹ “Public” trials in Athens were quite literally that – Socrates had over 500 jurors – and the nuances of trial arguments spread instantly.⁶² Socrates took advantage, and his defense oratory railed against the Athenian state and its refusal to recognize the peoples’ right to question their governance, their gods, and just about everything else.⁶³ Although his executioners were probably unimpressed, Socrates’ courtroom speech sounded in the political psyche of the Athenian masses, which began to stir with questions, and the speech went on to influence political thought for nearly three millennia.⁶⁴

Current western-style judicial proceedings, without as much hemlock, share such public influence, with arguments laid bare for

See id.

60. *See The Abrams Report, supra* note 57 (marketing itself as “The Program About Justice,” with certain implication that it is the lone source for courtroom analysis).

61. *See* THOMAS R. MARTIN, *ANCIENT GREECE: FROM PREHISTORIC TO HELLENISTIC TIMES* 170-73 (1996) (recounting the details of the prosecution of Socrates and his speech in his own defense).

62. *See id.*; *see also* PLATO, *THE LAST DAYS OF SOCRATES* 16 (Hugh Tredennick, trans., Penguin Books 1993) (1954) (describing the Athenian public’s zest for debate and critique of court argument).

63. *See id.* at 37-67 (section titled *The Apology*, reporting Socrates’ last public speech that summarized his own existence as a “gadfly” to the state and the preconceptions of its people, especially its rulers, and rejecting traditional notions of government and religion).

64. *See* MARTIN, *supra* note 61, at 170-73. Indeed, Socrates’ “apology” (as written by Plato) is generally an early jumping off point for the student of modern political philosophy, followed by its progeny, Plato’s *The Republic* and Aristotle’s *Politics*. *See Introduction to Plato Selections, in* PRINCETON READINGS IN POLITICAL THOUGHT 19 (Mitchell Cohen & Nicole Fermon eds., 1996) (summarizing the influence of Socrates on Plato and modern western political philosophy, and introducing *The Apology*). It is not a stretch to say this courtroom speech is one of the earliest influences on the whole of western political philosophy.

consumption by the body politic as a component in its determination of political direction.⁶⁵ Courtroom expression is intentionally public in nature, with all court documents available to the public and often brought forth by the news-media.⁶⁶ In fact, the media championed the idea of a public trial into a heavily protected constitutional right.⁶⁷ The right allows the people to maintain vigilance over the judiciary.⁶⁸ Thus, the media ensures that the channel through which the public digests courtroom speech remains open. Through this increasingly more effective channel, arguments in court flow outside the courthouse walls to compete in the traditional political marketplace of ideas.⁶⁹

The political importance of such competition is undeniable. No example of such political impact is more stark than the effect of courtroom arguments arising from the 2000 Presidential Election, arguments that brought the Constitution and the electoral process into the forefront of national debate.⁷⁰ Not unlike the trial of Socrates, the American people hung on the litigants' every word and every brief.⁷¹ Nearly every major radio and television station

65. Put simpler, the people, upon whom the state relies for government, scrutinize and debate court proceedings as a component in determining the direction of government.

66. See *In re Oliver*, 333 U.S. 257 (1948).

67. See, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

68. See *id.*

69. See *Abrams v. United States*, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting) (citing the value of competition of ideas through free trade in expression).

70. See *Bush, Gore Briefs Preview Oral Arguments at U.S. Supreme Court*, CNN, at <http://www.cnn.com/2000/ALLPOLITICS/stories/12/10/president.election/> (Dec. 11, 2000) (summarizing the arguments offered by the litigants). That day, the public debated no less than the foundations of democracy, as laid out by the arguments of the litigants, Bush and Gore:

In briefs filed Sunday afternoon with the U.S. Supreme Court, attorneys for Republican George W. Bush argue the latest ballot recount in Florida is unconstitutional and will undermine confidence in the election process, while attorneys for Democrat Al Gore say the counting of all legal ballots is "essential to our democracy."

Id.

71. See *U.S. Supreme Court Cases: Election 2000*, C-SPAN, at

broadcast the *Bush v. Gore*⁷² oral arguments before the Florida and U.S. Supreme Courts.⁷³ Analysts and political pundits then used those arguments in both contemporaneous and post-mortem analysis about the election of the United States President.⁷⁴ Indeed, in 2004, the *Bush v. Gore* arguments still rippled in political debate, as the American people grappled with another closely matched presidential election and unprecedented efforts to monitor the polls were set in place.⁷⁵ Such direct contributions to the most important political discourse—the presidential election—solidify the serious political significance of courtroom speech.⁷⁶

Further, the Supreme Court itself thrust courtroom proceedings into the public debate. The Court repeatedly asserts that trials, especially criminal, must be “subject to contemporaneous review in the forum of public opinion.”⁷⁷ The political issues and arguments in pending court cases have been

<http://www.c-span.org/campaign2000/Florida/ussupcourt.asp> (last visited Feb. 9, 2005) (on file with the First Amendment Law Review) (providing the public with a contemporaneous and exhaustive database of arguments related to all stages of the court battles following the 2000 Election, including briefs, reply briefs, court opinions, and oral arguments).

72. 531 U.S. 98 (2000).

73. See Press Release, Senator Charles E. Schumer, Grassley, Schumer: Televised Federal Trials, (June 5, 2001), available at http://schumer.senate.gov/SchumerWebsite/pressroom/press_releases/PR00594.html (recounting the impact of the Florida Supreme Court and U.S. Supreme Court audio broadcasts of the *Bush v. Gore* arguments in order to garner support for a bill that would guarantee televised federal trials).

74. See, e.g., David Von Drehle, *Analysis: Nine Decisive Votes, Deep Political Peril*, WASH. POST, Dec. 12, 2000, at 1A (discussing the details of the oral argument and critiquing Supreme Court positions and the election process); see also Daniel Okrent, “Get me Boies!”, TIME, Dec. 25, 2000, at 104 (outlining the political impact Al Gore’s election attorney David Boies has had with his legal arguments).

75. See Press Release, Lawyers’ Committee for Civil Rights Under Law, Lawyers Prepared to Protect Voters’ Rights During Primary (Aug. 30, 2004), available at <http://www.lawyerscomm.org/publications/press/press083004.html> (detailing efforts by nation wide civil rights organization to monitor the 2004 presidential elections in Florida).

76. See *id.*

77. *In re Oliver*, 333 U.S. 257, 270-71 (1948); see also *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 598 (1980).

called “the most important topics of discussion” in public debate.⁷⁸ Upon this platform, expression in the courtroom proves to be political speech of the most fundamental type, both taking part in and influencing robust political debate.

Lastly, the fact that all courtroom speech is not socially charged or consumed by the public does not lessen its political value. The above contributions warrant recognition of courtroom speech as politically important enough to require concern with its unchecked limitation.⁷⁹ Indeed, many times, court-speech may be fully recognized as political speech of the most critical type.⁸⁰ Of course, for all the *Brown*-like cases that carry dire political implications, the judiciary hears hundreds of “slip-and-fall” cases where arguments do not harbor obvious political importance. It is unnecessary to decide whether every argument before every court is political speech. The traditional town-hall meeting is not less protected because it does not always result in rousing political discourse.⁸¹ For the purposes of this Article, one need only recognize the potential political concerns that speech in court evoke. From those concerns arise the First Amendment interest in the content of courtroom argument.

III. “YOU’RE OUT OF ORDER! THIS WHOLE TRIAL IS OUT OF ORDER!”⁸² – THE JUDICIARY IGNORES THE CORE PROTECTIONS OF POLITICAL SPEECH IN THE COURTROOM

Lawyerly frustrations aside, one cannot seriously argue that melodrama-weary judges must endure screaming courtroom tirades, such as that of Al Pacino’s character in *And Justice for All*,

78. See *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1035 (1991) (quoting *Bridges v. California*, 314 U.S. 252, 268 (1941)).

79. For further discussion of the political implications of courtroom speech, see *supra* notes 23-81 and accompanying text.

80. See MEIKLEJOHN, *supra* note 9, at 20-28, 78-120 (explaining the vital role of political speech).

81. See MEIKLEJOHN, *supra* note 9, at 24-29 (discussing the “town-hall” idea).

82. *AND JUSTICE FOR ALL* (Columbia Pictures 1979) (depicting Al Pacino’s character, Arthur Kirkland, reaching the climax of frustration with court procedure and injustice).

because such tirades might be political.⁸³ The many differences of the court system require that it cannot be answerable to the people as a forum for expression in all similarity to its legislative and executive counterparts.⁸⁴ The court system contains hundreds of rules that limit argument. The rules of evidence, jurisdiction, and standing, for instance, cannot be void merely because they preclude relevant, sometimes political, argument.⁸⁵ As discussed below, however, the incoherent struggle to treat the courtroom as a forum for expression has thus far left litigants exposed to arbitrary limitation without any concern whatsoever for the litigants' right to control their own arguments.⁸⁶ This lack of consistency results in startling restraint of politically important expression that escapes constitutional scrutiny under the guise of administrative necessity.⁸⁷

A. Hodge Podge: The Struggle with the Courtroom as a Forum for Expression

First Amendment rights retained by a litigant participating in the judicial process are inconsistent at best and non-existent at worst.⁸⁸ Often, the potentially vast political implications of courtroom speech remain at risk because the judiciary is uncomfortable applying the First Amendment to itself. Preliminarily, it is generally understood that the court must exercise tight control over speech before it to ensure preservation of the

83. See *id.* (shattering courtroom decorum but pointing out the helplessness of litigants when faced with the arbitrary and sometimes blatantly unjust results of litigation). As many trial lawyers know, melodrama is at once the bane and best-friend of the argument.

84. For a discussion of the attempts to apply the First Amendment to the forum of the courtroom, see *infra* notes 82-127 and accompanying text.

85. For a discussion of the balance between courtroom control and freedom of political expression, see *infra* notes 189-201 and accompanying text.

86. For a discussion of such standards, see *infra* notes 82-127 and accompanying text.

87. For a discussion of examples that indicate the lack of proper constitutional respect for courtroom speech, see *infra* Section III.B.

88. See W. Bradley Wendel, *Free Speech for Lawyers*, 28 HASTINGS CONST. L. Q. 305, 305, 313 (2001) (describing "doctrinal confusion" among courts dealing with lawyer free speech issues).

judicial process.⁸⁹ On the other hand, most courts also recognize that “attorneys . . . do not lose their constitutional rights at the courthouse door.”⁹⁰ Yet primarily because courtroom argument takes place in such an inherently circumscribed forum, courts are uneasy applying traditional “forum” analysis and apply only vague standards based on even more vague ideas.⁹¹ This incoherence opens the door to arbitrary and non-uniform restrictions of courtroom speech.

Most criticism and opinion in the area of court-restricted speech arises in the context of prior restraint of attorney speech *outside* the courtroom and protective orders against the press.⁹² Because any “prior restraint” of speech is the “least tolerable” restriction of speech, the Supreme Court initially required a “clear and present danger” to the judicial process before restricting extra-judicial attorney speech.⁹³ Later, however, the Court reversed itself and the pendulum quickly swung in favor of a much more lenient standard, even for prior restraints, with only a “substantial

89. See *Sacher v. United States*, 343 U.S. 1, 8 (1951). The Court stated: [Zealous advocacy] can pervert as well as aid the judicial process unless it is supervised and controlled by a neutral judge representing the overriding social interest in impartial justice and with power to curb both adversaries [The court must] possess and frequently exert power to curb prejudicial and excessive zeal of prosecutors.

Id.

90. *Levine v. United States Dist. Court for Central Dist. of Cal.*, 764 F.2d 590, 595 (9th Cir. 1985); see also *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32-33 (1984).

91. See *Sacher*, 343 U.S. at 8-9.

92. See *Sheppard v. Maxwell*, 384 U.S. 333, 358-63 (1966) (citing the dangers of immense publicity and the ability of the trial court to protect the judicial process); see also Erwin Chemerinsky, *Silence is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L.J. 859 (1998) (reviewing primarily the attorney’s right to speak about ongoing legal matters and offering protective solutions for the problems of prior restraint).

93. *Neb. Press Assoc. v. Stuart*, 427 U.S. 539 (1976) (finding that a prior restraint of speech outside the courtroom regarding the trial would only be valid if the trial court found a clear and present danger to the defendant’s right to a fair trial). This holding stemmed from almost total distrust of prior restraints in any fashion. See *id.*

likelihood” of prejudice needed.⁹⁴

Speech *inside* the courtroom fares much worse. Even though the accepted first step in reviewing speech made on government property usually requires determining “the nature of the forum,” this step is often skipped.⁹⁵ Most courts theorize that an attorney’s role as an “officer of the court” automatically subjects her to some implied court power to curb speech.⁹⁶ In supporting great latitude of a court to regulate attorney speech, Justice Frankfurter in *In Re Sawyer* wrote:

An attorney actively engaged in the conduct of a trial is not merely another citizen. He is an intimate and trusted and essential part of the machinery of justice, an ‘officer of the court’ in the most compelling sense.⁹⁷

Such a glorified marionette can have no objection to the whims of its venerable master.

The commonly recognized distinction holds that the closer an attorney gets to the courtroom, the more restrictions on speech become permissible.⁹⁸ Accordingly, the fairly strong protections

94. *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991) (setting the current standard). Indicative of the Court’s typical difficulty when it applies the First Amendment to itself, the *Gentile* Court fractured into many differing opinions. *See id.*

95. *See Cornelius v. NAACP*, 473 U.S. 788, 797 (1985) (outlining the process for determining whether speech restrictions on government property are valid); *see also Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 965-66 (9th Cir. 2002) (determining that a courthouse building was a “non-public” forum and therefore restrictions on speech within the building would be upheld if reasonable in light of the forum’s purpose and are viewpoint neutral).

96. *See Kuiper v. Dist. Court*, 632 P.2d 694, 697 (Mont. 1981); *In re Hinds*, 449 A.2d 483, 489 (N.J. 1982); *State ex. rel. Okla. Bar Ass’n v. Porter*, 766 P.2d 958, 968 (Okla. 1988).

97. *See In re Sawyer*, 360 U.S. 622, 668 (1959) (plurality opinion) (Frankfurter, J., dissenting).

98. *See* David R. Cooper, Note, *Speaking Out: Lawyers and Their Right to Free Speech*, 18 REV. LITIG. 671, 683 (1999) (“Clearly, any conception of the lawyer as an officer of the court steadily diminishes the further he moves away from the courtroom . . .”); Kathleen K. McGinn, Note, *Zal v. Steppe: Ninth Circuit Approval of an In Limine Ban of Specific Words*, 23 GOLDEN GATE U. L. REV. 35, 51-52 (1993) (outlining what she calls “A Limited Protection

afforded attorney speech *outside* the courtroom are not extended to speech *inside* the courtroom. For instance, reviewing sanctions against a lawyer for holding a press conference after the indictment of his client, the Supreme Court in *Gentile v. State Bar of Nevada*⁹⁹ held that extra-judicial limits must be “designed to protect the integrity and fairness of a State’s judicial system” and must impose only “narrow and necessary limitations on lawyers’ speech.”¹⁰⁰ Ominously, however, the *Gentile* Court distinguished *in-court* speech as “extremely circumscribed” and stated that no judge’s ruling may be verbally resisted beyond what is necessary to preserve appeal.¹⁰¹ Some courts have used *Gentile* to eliminate virtually all First Amendment protections in favor of absolute judicial power to “circumscribe” courtroom speech.¹⁰²

On the other hand, even this “extreme” circumscription does not necessarily foreclose a First Amendment expression interest in controlling the content of argument. The Court has repeatedly assured litigants that they “do not ‘surrender their First Amendment rights at the courthouse door,’” implying that parties retain some freedom of expression despite the highly controlled atmosphere of a court case.¹⁰³ Also, at least one Supreme Court

View”).

99. 501 U.S. 1030 (1991).

100. *Id.* at 1075 (Rehnquist, C.J., delivering the opinion of the Court with respect to Parts I and II only). *Gentile* established a balancing test to measure a court’s restrictions on litigant speech: First Amendment interests against “the State’s legitimate interest in regulating the activity in question.” *Gentile*, 501 U.S. at 1075. Without specifically defining a level of scrutiny, the *Gentile* Court proceeded with exacting analysis, pointing out the State’s “fundamental interest” in fair trial by “impartial jurors” and a “narrowly tailored” restraint aimed at only speech “likely to have a materially prejudicial effect.” *See id.* at 1075-76 (upholding the constitutionality of the Nevada rule).

101. *Id.* at 1071.

102. *See Zal v. Steppe*, 968 F.2d 924, 927-29 (9th Cir. 1992).

103. *Gentile*, 501 U.S. at 1073 (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32-33 n.18 (1984) (quoting *In re Halkin*, 598 F.2d 176, 186 (D.C. Cir. 1979))). With regard to attorney speech, the Court has often implied that the First Amendment cannot be forgotten. *See Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 634 (1995) (reminding litigants that there are circumstances in which attorney speech requires “the strongest protection our Constitution has to offer”); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32-33 n.18 (1984) (holding that restriction on communications during trial are appropriate

opinion has implied further, combining free speech with the First Amendment's almost dormant right "to petition the Government."¹⁰⁴ In *Sacher v. United States*,¹⁰⁵ the Court held that it was "the right of . . . every litigant to press his claim, even if it appears farfetched and untenable, to obtain the court's considered ruling."¹⁰⁶ Even the speech-limiting *Gentile* pluralities, concurring and dissenting, relied on *Sacher* as valid precedent.¹⁰⁷ The *Sacher* Court found that rowdy conduct and speech by an advocate during trial was only sanctionable to the extent the lawyer's actions "make

"where necessary to ensure a fair trial . . ."); *In re Primus*, 436 U.S. 412, 432 (1978) (stating that punishing a lawyer for political expression requires "exacting scrutiny"). With these rulings, and sometimes dicta, the Court has kept the First Amendment close to the courtroom, but has been reluctant to wholly lower itself to fully recognize the courtroom as a forum for speech.

104. U.S. CONST. amend. I. The First Amendment right to petition the government for redress of grievances is generally limited to the right to demand exercise of the Government's powers, including the judicial branch. See *Calif. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (holding that "the right to petition extends to all departments of the Government"). Although interpretation of the modern clause has not been extended to protect the *content* of such petitions, the clause's progenitors, England's House of Commons in 1669, did recognize a certain inherent right to control the content of a petition, declaring that all the King's subjects had "the inherent right to *prepare* and present petitions." See Findlaw, *Rights of Assembly and Petition*, at <http://caselaw.lp.findlaw.com/data/constitution/amendment01/21.html> (last visited Apr. 10, 2005) (on file with the First Amendment Law Review).

The right to petition is indeed a well-spring of support for the argument that the people must be in control of their arguments before the Court. In arguing for its adoption into the Constitution, the Anti-federalist supporters of the right saw the petition not as a plea for redress to a higher power, but the demands of "a free people [to] their servants." PHILADELPHIENSIS, NO. 5, reprinted in 3 THE COMPLETE ANTI-FEDERALIST 117 (Herbert J. Storing ed., 1981) (expounding the anonymous writings of Anti-federalism at the creation of the Constitution). The Court, in deeming itself to be an outlet for the right to petition, has thus recognized its role as a "servant" to the free people, and thus should not have monarch-like control over the content of the petitions before it. See *Calif. Motor Transp. Co.*, 404 U.S. at 510 (holding that the right to petition extends to all branches of government, including the judiciary).

105. 343 U.S. 1 (1952).

106. *Id.* at 9.

107. See *Gentile*, 501 U.S. at 1071.

impossible an orderly and speedy dispatch of the case.”¹⁰⁸ Similar later cases also reversed contempt convictions for a pro se litigant hurling accusations of bias at the court¹⁰⁹ and for a witness’ vulgar name-calling during cross-examination, primarily because the insults were not an “imminent . . . threat to the administration of justice.”¹¹⁰ At least one Circuit Court judge considers these holdings in the posture of First Amendment expression in the courtroom:

[Supreme Court] holdings provide broad latitude for the use of language during a trial. They protect abusive and even obscene language in no way connected to the substance of a litigant’s case. *A fortiori*, they indicate that the First Amendment protects vigorous speech closely connected with the case being litigated.¹¹¹

While it is unclear and not yet adopted, there seems at least some room in Supreme Court jurisprudence for a First Amendment interest in the substance of courtroom argument.¹¹² Conversely,

108. *Sacher*, 343 U.S. at 3-4 (quoting *United States v. Dennis*, 183 F.2d 201, 225 (2d Cir. 1950)).

109. *See In re Little*, 404 U.S. 553, 554-55 (1972).

110. *Eaton v. City of Tulsa*, 415 U.S. 697, 698 (1974) (quoting *Craig v. Harney*, 331 U.S. 367, 376 (1947)).

111. *Zal v. Steppe*, 968 F.2d 924, 935 (9th Cir. 1992) (Noonan, J., concurring in part, dissenting in part). Judge Noonan disagreed with the majority’s assumption of total power over courtroom language. He agreed with the majority that the defendant violated the trial court’s word-ban, but found that the defendant did not act unprofessionally in resisting the order because he had legitimate reasons for challenging the word-ban as overbroad. In Judge Noonan’s view, the court’s holding of the defendant in contempt went beyond its order regarding the use of non-banned words.

112. Doctrinally, however, reconciling such cases with *Sacher* and *Gentile*’s “no resistance beyond preserving appeal” has led to the confusing separation of review of rulings for First Amendment violations from review of contempt orders. *See Gentile*, 501 U.S. at 1071 (holding, “An attorney may not, by speech or other conduct, resist a ruling of the trial court beyond the point necessary to preserve a claim for appeal”); *Sacher*, 343 U.S. at 8. The theory is that once a ruling is issued, review for constitutionality may be preserved by appeal, and if an attorney resists the ruling, improper or not, he is in contempt. Therefore, the “obstruct the administration of justice”

though, courts are tempted to distinguish the *Sacher* and similar rulings as dealing with specific forms of contempt convictions, and ignore the First Amendment implications.¹¹³

The few rare cases that have applied forum analysis to the courtroom are entirely inconsistent. Holding that a bailiff does not have a right to preach in the courtroom, the United States District Court for the Southern District of Indiana declared sweepingly and without nuance that “a courtroom is not a public forum or a designated public forum” because it “is not a debate hall or a gathering place for the public to exchange ideas.”¹¹⁴ On the other hand, courts regularly refer to the courtroom as a “traditional public forum” when ruling on issues involving the press.¹¹⁵ Some have also used forum analysis to protect litigants’ speech during proceedings. Even within this “full protection” view, however, courts are unclear on how the interest applies to the litigation itself apart from actual speech in court.¹¹⁶

standard of *Sacher* and the vulgarity cases may be distinguished because a contempt order was issued summarily (without a violation of a prior ruling). See *id.* at 928 (holding that summary criminal contempt orders can only limit speech when the speech is an immediate threat to the judicial process, but when a litigant is subject to a court order that limits speech, his only remedy is appeal); see also McGinn, *supra* note 98, at 49-50 (describing the contempt order issue).

113. See, e.g., *Zal*, 968 F.2d at 928 (distinguishing *Sacher* and *In re Little* as dealing only with summary contempt orders and upholding the idea that if a ruling is adverse, any resistance beyond preserving appeal is contempt).

114. *Kelly v. Mun. Ct. of Marion County*, 852 F. Supp. 724, 734-35 (S.D. Ind. 1994) (failing to recognize the traditional expression that goes on in a courtroom by the litigants at least, if not by the bailiffs).

115. See *O’Leary v. Vill. of Elmhurst*, No. 86 C 997, 1989 WL 18333, at *2, *6 (N.D. Ill. 1989) (referring to the courtroom as a “traditional” public forum and a public source of information that may be obtainable by the press); *Okla. Publ’g Co. v. United States*, 515 F. Supp. 1255, 1258 (W.D. Okla. 1981) (referring to the right of the press to “report events that take place in the public forum of the courtroom”).

116. See, e.g., *In re Halkin*, 598 F.2d 176, 187 (D.C. Cir. 1979) (generally discussing participants in the judicial process while holding that a court could not arbitrarily prohibit disclosure of discovery materials). In *Halkin*, reviewing a gag on discovery disclosure to third parties, the District of Columbia Circuit stated: “Litigation itself is a form of expression protected by the First Amendment. It is indisputable that attorneys and parties retain their First Amendment rights even as participants in the judicial process.” *Id.* In

Two illustrative decisions applied differing forum analysis to the courtroom but recognized the traditionally expressive nature of the courtroom. In *Velazquez v. Legal Serv. Corp.*¹¹⁷ a divided Second Circuit panel, without specifically identifying a public forum, held that Congress impermissibly employed viewpoint discrimination when Congress prohibited legal services attorneys from making constitutional arguments.¹¹⁸ Importantly, the *Velazquez* majority stated that the courtroom is the “prime marketplace” for making constitutional argument and recognized the litigants’ speech interest in being able to freely make such argument.¹¹⁹ Daring more specific analysis, the New York Supreme Court in *Frankel v. Roberts*¹²⁰ held that defense counsel had a First Amendment right during trial to wear a button bearing the political slogan, “Ready To Strike.”¹²¹ Uniquely, the court successfully applied early forum-style reasoning outlined by the U.S. Supreme Court in *Grayned v. City of Rockford*,¹²² which upheld a public school anti-noise regulation by asking “whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.”¹²³ Accordingly, the political button did not interfere with “the normal activity and operation” of

1984, the Second Circuit held that CNN, which sought to place cameras in the courtroom, could not assert a “public forum” First Amendment claim, stating, “Whatever public forum interest may exist in litigation, that interest is clearly a speaker’s interest, not an interest in access to the courtroom.” *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 21 (2d Cir. 1984) (holding that “it has never been suggested that there is a link between the First Amendment interest that a litigant has in his trial as a ‘form of expression’ and the right that the public may have to view that expression on television”). Nevertheless, the Second Circuit seemed to agree that the courtroom was a public forum for the litigants themselves. *See id.*

117. 164 F.3d 757 (2d Cir. 1999).

118. *Id.* at 771-72 (ruling that constitutional argument has close ties to traditional political speech and noting that “the suit-for-benefits exception is viewpoint discrimination subject to strict First Amendment scrutiny”).

119. *Id.*

120. 165 A.D.2d 382 (N.Y. App. Div. 1991).

121. *Id.* at 384-86.

122. 408 U.S. 104 (1972).

123. *Id.* at 116.

a bench trial.¹²⁴ Furthering the forum analysis, the Court also reasoned that the trial judge employed an improper “content-based” restriction, because the judge later admitted that a “Save the Whales” button would have been fine.¹²⁵ While not needing to equate the courtroom to a public park, these two decisions are significant because they indicate that a First Amendment forum analysis can work in the courtroom without sacrificing vital practical limitations.¹²⁶ No other court, however, has been willing to make this leap.

No court, state or federal, has come close to any uniform First Amendment standard to protect the political importance of courtroom argument. Possibilities remain for some protection, but have not yet been exploited because the forum is so absolutely regulated by the judiciary. As the next Section will illustrate, trusting the judiciary to assume such total control of this politically charged speech ignores the ideal of a free people in control of their own government and the petitions before it.¹²⁷

B. Trusting Too Much In the Judiciary? Arbitrary Speech Prohibitions in the Courtroom that Raise Political Speech Concerns

Without the bother of a First Amendment interest in the content of courtroom argument, courts freely limit argument without even thinking about traditional speech implications.¹²⁸ This freedom has spawned judicial limitations of courtroom speech that run afoul of traditional First Amendment principles and ignore the warning that government cannot simply “be trusted” when it comes to politically important speech.¹²⁹ The following two examples indicate that the judicial branch fails to respect the political value of courtroom speech and its role as a government branch subject to

124. *Frankel*, 165 A.D.2d at 384-85.

125. *See id.* at 385-86 (the objectionable words were “Ready to Strike,” but the trial judge admitted that he would have no problem with a “Save the Whales” button worn in court).

126. *See id.*

127. For a discussion of examples, see *infra* Section III.B.

128. *See id.*

129. *See id.*

the self-governing people.¹³⁰ While there are literally hundreds of procedural and substantive rules that limit argument, these examples illustrate that a speech interest would protect against arbitrary abuses that ignore the courtroom as a forum for traditional political expression.

1. In Limine Word-Bans

The most creative, and therefore most disturbing, use of judicial power to curb courtroom speech has come in the form of banning the utterance of specific, generic words.¹³¹ In *Zal v. Steppe*,¹³² the Ninth Circuit upheld a District Court ruling that banned, prior to trial, a defense attorney from using 50 specific words in defending abortion protesters.¹³³ The words forbidden by the “in limine word-ban” included:

kill	abortion	rescuer
Hitler	manslaughter	sacrifice
destroy	homicide	butcher

130. For further discussion of examples, *see infra* notes 131-176 and accompanying text. These examples merely provide a clear indication of the lack of respect paid by the judiciary to the traditional political interests of litigants in freely arguing before the court, but they are not the only such possibilities. For example, in *Velazquez v. Legal Serv. Corp.*, 164 F.3d 757, 771 (2d Cir. 1999), the court addressed a legislatively mandated rule that legal services lawyers were precluded from making constitutional challenges to certain laws. The judiciary could easily adopt such a rule or apply such limitation to its court appointed or pro bono counsel.

131. *See generally* McGinn, *supra* note 98 (discussing word bans and contempt orders for violating them). Motions In Limine for word-bans are not rare before the judiciary. *See, e.g.*, *Cook v. Phila. Transp. Co.*, 199 A.2d 446, 447 (Pa. 1964) (holding that forbidding attorneys from using the name “Crazy Bar,” a store name relevant to the case, was appropriate because the court believed the name carried unnecessarily prejudicial connotation). Most attorneys are familiar with motions precluding reference to certain facts or certain legal theories based on evidentiary grounds. These motions, though, usually do not seek preclusion of entire sections of the English language, as in *Zal*.

132. 968 F.2d 924 (9th Cir. 1992).

133. *Id.* at 925.

decimation thug eradication¹³⁴

The trial court reasoned that these words could be used to refer to precluded defenses, which attorney Zal had a reputation for arguing in attempts to emotionally sway the jury.¹³⁵ Using *Gentile*, the Ninth Circuit found Zal's courtroom speech could be "extremely circumscribed" because "the trial judge is charged with preserving the decorum that permits a reasoned resolution of issues."¹³⁶ In an assertion of power, the court thumbed its nose at its own duty to heed the First Amendment, adding that, "Zealous counsel cannot flout that authority behind the shield of the First Amendment."¹³⁷

Given the political implications of courtroom speech, prescribing use of general words gives rise to several First Amendment concerns. First, words are the tools that attorneys use to obtain the court's considered ruling.¹³⁸ With the power to forbid utterance of words themselves, a court can stifle courtroom speech to the extent it precludes zealous advocacy.¹³⁹ With such a limitation, the political influence on the court itself and on the public debate is at risk.¹⁴⁰ If the court can limit words without any scrutiny at all, it can effectively shield itself from unpopular, yet relevant, ideas. In *Cohen v. California*¹⁴¹ the Supreme Court spoke sweepingly against banning words themselves because the practice inherently bans ideas:

[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might

134. *Id.*

135. *Id.* at 925-26.

136. *Id.* at 928-29.

137. *Id.* at 929.

138. See McGinn, *supra* note 98, at 64-65 (offering some basic concerns about word-bans).

139. See *In re Sawyer*, 360 U.S. 622, 665-69 (1959) (plurality opinion) (Frankfurter, J., dissenting) (finding that lawyers need an "ample chance" to make claims).

140. For further discussion of the political impact of courtroom speech, see *supra* notes 23-81 and accompanying text.

141. 403 U.S. 15 (1971).

soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.¹⁴²

Trusting the judicial branch of government with free reign over ideas, even in the circumscribed forum of the courtroom, is dangerous to a free society as it undermines political impact and the semblance of self-government.¹⁴³ Indeed, it is these ideas that are the focus of First Amendment first principles.¹⁴⁴ In the *Brown* litigation or the Chicago Seven trials, the inadequacies of the government itself were part of the arguments.¹⁴⁵ Following the *Zal* principal, a court uneasy about such socio-structural arguments could limit the scope of relevant argument by simply banning certain words that might refer to something irrelevant or emotionally swaying. The *Brown* arguments exposed the inherently detrimental effect of segregation, a controversial and emotional argument.¹⁴⁶ If the *Brown* court had banned the words

142. *Id.* at 26.

143. See MEIKLEJOHN, *supra* note 9, at 28 (“To be afraid of ideas, any idea, is to be unfit for self-government. Any such suppression of ideas about the common good, the First Amendment condemns with its absolute disapproval.”). The political importance of language is not lost upon political philosophers, who have thoroughly examined how specific words can be used to achieve impact. See George Orwell, *Politics and the English Language*, in PRINCETON READINGS IN POLITICAL THOUGHT: ESSENTIAL TEXTS SINCE PLATO 591 (Mitchell Cohen & Nicole Fermon, eds., 1996) (analyzing—with some sarcasm—words and phrases that are used to generate political influence, often without saying much at all). Orwell, who was concerned with government power to distract and disinform, argued that eliminating bad habits in the English language could help us think more clearly, “and to think more clearly is a necessary first step towards political regeneration.” *Id.*

144. See *Velazquez v. Legal Serv. Corp.*, 164 F.3d 757, 771-72 (2d Cir. 1999) (holding that the courtroom is the best “marketplace” for argument that the rules or laws of the government are unconstitutional or illegal).

145. See IRONS, *supra* note 5, at 388-94 (recounting the civil rights challenge to the wide-spread law of Jim Crow segregation). As an indication of the breadth of the change that the *Brown* litigants sought, by Kansas law the plaintiff’s attorneys, one black and one white, could not eat, sleep or bathe in the same facilities before the trial. See *id.* at 389.

146. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (“To separate [African Americans] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the

“race,” “white,” and “black” from use by Thurgood Marshall, the *Brown* litigation would have been difficult, perhaps impossible.¹⁴⁷ Although the same arguments may have been formed by referring only to “segregation,” a powerful argument would have been eviscerated by a court with racist, or even simply overly cautious, motives.¹⁴⁸ While such prohibition seems now unreasonable, in 1954 it was not uncommon to encounter entire government structures that were bent on making racial integration impossible.¹⁴⁹ It would be naïve to assume that some judges did not sympathize.¹⁵⁰ This healthy democratic mistrust, combined with the vital political role of courtroom argument, demands First Amendment scrutiny.

community that may affect their hearts and minds in a way unlikely ever to be undone.”).

147. See, e.g., Alan L. Yatvin, *Facts to Know, Tell On Landmark Case*, LEGAL INTELLIGENCER, May 17, 2004, at 5, 7 (enumerating and analyzing the details and evidence used for the *Brown* arguments). Among the evidence was a powerful and controversial study done by Dr. Kenneth Clark that offered “white dolls” and “black dolls” to African-American children to see which they had been taught to prefer. *Id.* at 7.

148. See *id.*

149. See IRONS, *supra* note 5, at 400-10 (discussing the entrenched resistance to *Brown* and the extremist positions taken by many members from Southern governments).

150. See, e.g., IRONS, *supra* note 5, at 387 (noting some judges that were defenders of white supremacy and explaining the judicial prejudices a case like *Brown* could encounter). It is almost certain that Marshall and his fellow NAACP civil rights advocates did face racial bias in the judiciary as they argued their way from the trial courts through the appellate courts. In fact, in all the segregation cases that were joined together by the Supreme Court under the *Brown* caption, only one lower court judge had ruled against segregation, Delaware Court of Chancery Judge Collins J. Seitz. See Jennifer Batchelor, *Collins J. Seitz Sr. Defied Convention and Ruled for the Underdog*, LEGAL INTELLIGENCER, May 17, 2004, at 3 (commemorating the bravery and egalitarianism of Judge Seitz, who wrote the only decision affirmed by the Supreme Court in *Brown*). Many feared prejudice even on the Supreme Court Bench, especially from Chief Justice Fred Vinson, known for his support of segregation. See Tony Mauro, *On the Right Side of History: A Look at Philip Elman*, LEGAL INTELLIGENCER, May 17, 2004, at 4 (recounting the prospective Court vote with Vinson included). When Justice Vinson suddenly died in late 1953, civil rights supporter Justice Felix Frankfurter is reported to have enthusiastically announced, “[T]his is the first solid piece of evidence I’ve ever had that there really is a God.” *Id.*

If applied, First Amendment scrutiny would likely invalidate word-bans as unnecessary by even the most lenient First Amendment forum scrutiny, and such bans are much too broad to withstand a requirement that restraint of argument content be “no more restrictive than necessary” to meet a “substantial governmental interest.”¹⁵¹ Traditional power of the courts to exclude arguments on evidentiary foundations gives a court full ability to meet any efficacy concerns *without* banning generic words. In preserving relevant and probative courtroom speech, the court may halt questioning or argument mid-sentence, if need be, to steer it toward admissible issues. The words “abortion” or “sacrifice” alone provide insufficient basis to judge relevance and could just as conceivably be used in relevant, non-prejudicial argument (such as “Your honor, the free speech rights of these *abortion* protesters should not be *sacrificed*”). Thus, if the First Amendment applies, the word-ban is clumsily overbroad because it treads on protected speech.

Finally, the word-ban creeps dangerously close to viewpoint discrimination, which is impermissible in even the “nonpublic” forum.¹⁵² Certainly each side in the courtroom offers competing viewpoints, yet the *Zal* word-ban is used to limit the argument content of only one party.¹⁵³ *Zal*’s word-ban was not an edict for the entire court or against all parties, but only against *Zal* himself.¹⁵⁴ Presumably, the prosecution was free to say “abortion” or “sacrifice.” Power to limit the language (and thus the ideas) of one-party could easily be used to make it difficult for the unpopular side and favor the other. Even without yet deciding what type of forum a courtroom is, such view-point based discrimination is almost *per*

151. See *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (setting the standard for content-neutral time, place, and manner regulation at promoting a substantial government interest that would be achieved less effectively absent the regulation); *Clark v. Cmty. for Creative Non-violence*, 468 U.S. 288 (1984) (applying the standard); *Cooper*, *supra* note 98, at 698-99 (explaining the time place and manner standard).

152. See *Cooper*, *supra* note 98, at 698-99.

153. See *Zal v. Steppe*, 968 F.2d 924 (9th Cir. 1992) (applying an in limine word ban against only attorney *Zal*).

154. See *id.*

se invalid, even in the most limited governmental forums.¹⁵⁵ The reason is simple: healthy and robust political debate dictates that the government must not be able to protect positions it prefers and trample the positions it dislikes.¹⁵⁶ The courtroom should not be an exception.

2. No-Citation Rules: Gags Without Cause

Every brief-writing lawyer and law student knows the teeth-gnashing frustration of finding an on-point court opinion that would add significant support to her argument if it were not labeled “unpublished” or “not precedential.”¹⁵⁷ Many circuit courts and state appellate courts adopt a “no-citation rule” that strips such prior opinions of precedential value and forbids argument upon such opinions.¹⁵⁸ This practice chronically limits courtroom speech

155. See *Cornelius v. NAACP*, 473 U.S. 788 (1985) (discussing types of forums and the standards applied); *Perry Ed. Ass'n. v. Perry Local Educ. Ass'n.*, 460 U.S. 37 (1983) (holding that although the state could reserve public property for an intended use, it could not viewpoint discriminate within that use).

156. See generally *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (holding a city ordinance that prohibited cross-burning and other speech that arouses anger “on the basis of race, color, creed, religion, or gender” unconstitutional).

157. See INTERNAL OPERATING PROCEDURE OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, CHAPTER 5.3 (setting wide latitude for an appellate opinion to be labeled “not precedential”).

158. See, e.g., 2D CIR. R. 0.23; 5TH CIR. R. 47.5; 7TH CIR. R. 53(B)(2); 8TH CIR. R. 28(A)(1); 9TH CIR. R. 36-3; FED. CIR. R. 47.6(B); 10TH CIR. R. 36.3; 11TH CIR. R. 36-2; 11TH CIR. R. 36-3, I.O.P. 5; ALA. R. APP. P. 53(D); ARIZ. SUP. CT. R. 111(C); ARIZ. R. CIV. APP. P. 28(C); ARK. SUP. CT. 5-2(D); CAL. R. CT. 977; COLO. CT. APP., *Policy of the Court Concerning Citation of Unpublished Opinions* (Apr. 2, 1994); D.C. CT. APP. R. 28(H); TN. SUP. CT. R. 4. The foregoing list is not by any means exhaustive. For a complete assessment of all state and federal rules forbidding and allowing citation to unpublished opinions, see generally Stephen R. Barnett, *No Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J. APP. PRAC. & PROCESS 473 (2003) (definitively outlining current no-citation rules and judicial rule-making trends). Many other court rules, including state trial courts, allow citation to such opinions only under restricted circumstances. See, e.g., N.J. CT. R. 1:36-3 (allowing citation to unpublished opinions only if the citing attorney serves a copy of the opinion and “all other relevant unpublished opinions” on opposing

– nearly eighty percent of Court of Appeals opinions in a given year are labeled not precedential.¹⁵⁹ Such prohibition ignores the politically vital function, especially in a common law system, of bringing prior rulings to the court's attention in order to reign in equality and predictability of court rulings.¹⁶⁰

First, *stare decisis* is a politically charged doctrine that is only viable through courtroom speech. As it operates in our system, the people, as litigants, function to brake judicial law-making by holding the court to the reasoning of precedent.¹⁶¹ Precedent serves as an essential political device in a common law system by ensuring that courts uniformly apply the law and consider all prior reasoning relevant to the petition at hand, not because it was prior but because it is a vital starting point for equal treatment and diligent consideration.¹⁶² Of course, a court may part from

parties).

159. See Salem M. Katsh & Alex V. Chachkes, *Constitutionality of "No-Citation" Rules*, 3 J. APP. PRAC. & PROCESS 287, 287-88 (2001) (reporting that nearly eighty percent of all circuit opinions were placed into the "phantom zone" of non-citability); JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 1999 ANNUAL REPORT OF THE DIRECTOR 49, available at <http://www.uscourts.gov/judbus1999/supps.html> (last visited Feb. 4, 2005) (on file with the First Amendment Law Review) (reporting the percentages from the Administrative Office of the United States).

160. See, e.g., *Encore Video, Inc. v. City of San Antonio*, No. CIV.A.SA-97-CA1139FB, 2000 WL 33348240, at *9-10, (W.D. Tx. Oct. 2, 2000) (emphatically illustrating that non-precedential appellate rulings hinder uniformity and consistency because the Texas District Court, faced with contrary earlier precedent on a difficult constitutional issue, could not rely on a singularly relevant Fifth Circuit opinion, *NATCO v. City of San Antonio*, because that opinion was "non-precedential"). Ironically, the *Encore Video* case involved a ruling on the First Amendment. *Id.* For further discussion of the role of precedent in a common law system, see *supra* notes 29-31 and accompanying text (reviewing the vital importance of precedent in a common law system).

161. See *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000); see also *Griffy's Landscape Maint. LLC v. United States*, 51 Fed. Cl. 667, 673 (Fed. Cl. 2001) (stating that precedent provides a "brake" on court power).

162. See Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. REV. 81, 81-83, 94-98 (2000) (departing from the Article III reasoning of *Anastasoff* and finding that precedent and *stare decisis* were even more "core ideas" to ensure equal justice and protection of property). Price argued that, essentially, "a long-standing tradition has viewed precedent as a

precedent in proper circumstances, but if the people cannot confront the court with its own prior reasoning, a swell of secret law may swallow the perception of equal treatment under the law and with it judicial legitimacy.¹⁶³ Therefore, speech that ensures equality of legal treatment (or, indeed, even its perception) through freely confronting a court with its own decisions carries enough political significance to be recognized by the First Amendment.¹⁶⁴ At the very least, such speech should be protected from arbitrary interference from the very government institution it is aimed to control.

Second, given the ingrained status of the doctrine of *stare decisis* and the weight given to higher court precedent in a common law system, no-citation rules gag every litigant from structuring an argument as persuasively as possible.¹⁶⁵ The Supreme Court has

necessary starting point for judicial decision. When a court departs from this idea, it violates the essential function of the judiciary to treat like cases alike or explain the difference.” *Id.* at 81.

163. See Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 85-121 (2001) (measuring the “secret law” of unpublished opinions and warning of the inconsistency of factors determining publication and the disagreement within unpublished opinions).

164. For further discussion, see *supra* Section II.A.

165. See Honorable Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219 (1999) (essay of 8th Circuit judge who authored *Anastasoff*). According to Judge Arnold, unpublished opinions impermissibly “gag” the bar:

The most important provision of the [8th Cir. No-citation Rule] occurs in the first sentence, which I repeat for emphasis: ‘Unpublished opinions are not precedent and parties generally should not cite them.’ As one who came to the bar almost forty years ago, I find this a startling statement. . . . The court is saying that it is not bound by its unpublished opinions. In general, of course the court on which I sit, like all courts in common-law countries, recognizes the doctrine of precedent. A court should not, without very good reasons publicly acknowledged, depart from past holdings. Our Rule 28 A(i) says, quite plainly, that this principle applies only when the court wants it to apply. . . . *Even more striking, if we decided a case*

implied this very right in its praise of zealous argument but not yet connected it to an expression interest:

[I]t is the right of counsel for every litigant to press his claim, even if it appears farfetched and untenable, to obtain the court's considered ruling. Full enjoyment of that right, with due allowance for the heat of controversy, will be protected¹⁶⁶

Ironically, the idea of an unrestricted enjoyment of the "right" to fully argue one's side has been used to support stricter limitations on attorney out-of-court speech. In *In Re Sawyer*,¹⁶⁷ Justice Frankfurter warned that issues must not be tried in the media or in the frenzy of public opinion.¹⁶⁸ To ensure that this does not occur, the attorney must have "a forum to make his charges of unfairness or failure to adhere to principals of law."¹⁶⁹ The attorney will not seek public nullification because:

[H]e has ample chance to make such claims to the courts in which he litigates. As long as any tribunal bred in the fundamentals of our legal tradition . . . still exercises judicial power those claims will be heard and heeded.¹⁷⁰

When a litigant is prevented from bringing prior judicial reasoning to a court's attention, he is prevented from arguing

directly on point yesterday, lawyers may not even remind us of this fact. The bar is gagged.

Id. at 221 (emphasis added). Seemingly, Judge Arnold recognizes that the litigant has an inherent expression interest in bringing prior opinions to the court's attention, whether he terms it that or not. *Id.*

For further discussion on the role of precedent, stare decisis, and historical common law procedures, see Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & The Nature of Precedent*, 4 GREEN BAG 2d 17 (2000); Fallon, *supra* note 32; Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199 (2001); Price, *supra* note 162, at 94.

166. *Sacher v. United States*, 343 U.S. 1, 9 (1952).

167. 360 U.S. 622 (1959).

168. *See id.* at 665-69 (Frankfurter, J., dissenting).

169. *See id.* at 668.

170. *Id.*

adherence to core principals of common law, an expression interest that every litigant must freely enjoy when petitioning the court.¹⁷¹

Perhaps this is why so many lawyers recoil so violently from the “no-citation” rules – they are an inherent limitation on offering the best argument and a bane on the argumentative instinct. It also explains why Article III and Due Process challenges have found no purchase to invalidate such rules; the limitations are expressive in nature.

Like word-bans, if a First Amendment interest attaches to the content of courtroom argument, it will protect against judicial abuse by simply requiring a justification that all judges must keep in mind.¹⁷² The proffered reasons for no-citation rules, for example, are primarily administrative and do not indicate the type of government interest that can outweigh vital political expression interests.¹⁷³ For justification of no-citation rules, the judicial branch cites primarily costs, volume and general overload, and secondarily unavailability of unpublished opinions.¹⁷⁴ While costs and overload are important, the advent of electronic databases has eliminated the spacing and cost problems with which earlier paper-publishing courts were concerned.¹⁷⁵ Unavailability is also much less of a

171. See Arnold, *supra* note 165, at 221-23 (arguing that *all* judicial decisions have precedential value in application of the law).

172. See *Cornelius v. NAACP*, 473 U.S. 788, 797 (1985) (stating that the extent to which a government may regulate speech depends on the type of forum).

173. See Arnold, *supra* note 165, at 221 (summarizing the defense of no-citation rules in one word: “volume”).

174. See *id.*; Charles E. Carpenter, Jr., *The No-Citation Rule For Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy?*, 50 S.C. L. REV. 235, 241-44 (1998) (discussing reasons given for no-citation rules); Honorable Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 181-83 (1999) (summarizing the case for unpublished opinions as one of keeping administration of justice practicable by recognizing that there are “too many cases, too little merit”). According to Judge Martin, the concerns of a base of “secret law” are overstated and if every opinion had precedential value, circuit court caselaw would become a confusing “Tower of Babel.” Martin, *supra*, at 178.

175. See Hannon, *supra* note 165, at 206-40 (extensively detailing the effect of electronic databases on the need for unpublished opinions).

concern.¹⁷⁶ Formidable First Amendment interests, as discussed above, should not be automatically subordinate to such concerns without scrutiny. The “no-citation” rules must be tested.

IV. A WORKABLE FIRST AMENDMENT STANDARD FOR COURTROOM ARGUMENT WITHOUT SACRIFICING PRACTICAL RESTRAINTS

While this Article has gone to great lengths to show the existence of a substantial First Amendment interest in courtroom argument and serious concern with its unchecked obstruction, it would be altogether remiss not to offer a solution. Because the people must be free to petition the court with their best, most influential ideas, the solution lies in accepting the courtroom as a forum dedicated to a certain type of speech.¹⁷⁷ The solution must be flexible enough to compensate the two competing interests, protection of speech aimed to influence, change or mold the government and court functional limits vital to the very existence of a court system.¹⁷⁸

At the outset, an initial practical confusion must be solved – mostly by seeing the forest, not the talking trees. To best protect the political speech concerns of courtroom argument, the First Amendment standard applied must not separate the attorney from the client. Too many courts and commentators get tied in logical knots and fail to find solid First Amendment footing for in-court

176. Both Westlaw and LexisNexis carry nearly all court opinions, published and unpublished, precedential and non-precedential. Legal periodicals also publish synopses and make available unpublished opinions. *See, e.g.*, Case Digests, 173 N.J. L.J. 525, 545 (2003) (publishing certain federal and state cases in full); Unpublished Opinions, 173 N.J. L.J. 525, 558 (2003) (making full text of unpublished opinions available). Incidentally, the fact that Law Journals actually publish synopses of unpublished opinions goes far to illustrate that such opinions still have impact on the rule of law.

177. *See Velazquez v. Legal Serv. Corp.*, 164 F.3d 757, 771-72 (2d Cir. 1999) (stating that the courtroom is the best “marketplace” for argument that the rules or laws of the government are unconstitutional or illegal).

178. For a discussion of the vital political nature of courtroom argument and its contribution to self-government, *see supra* notes 23-81 and accompanying text.

argument by considering the attorney alone.¹⁷⁹ This method focuses unnecessarily on the attorney's right to speak as an individual (such as wearing a button or giving a speech) but forgets the client's need to argue freely, or have someone argue freely, on his behalf.¹⁸⁰ Because the attorney is in the courtroom to speak for his client, examining the rights of the attorney alone leads inevitably to the extreme view that the attorney has no, or very little, right of expression inside the courtroom and therefore the First Amendment does not exist at all in court.¹⁸¹ This view is difficult to argue with when one imagines a clientless attorney attempting to argue a nonexistent case.¹⁸²

But the view that an attorney may only speak "to the extent that his client's rights allow him to speak"¹⁸³ should not remove the First Amendment from the courtroom so handily.¹⁸⁴ The separation of the attorney need only stand for the revelation that an attorney cannot seek a court ruling on his own issues or rant Pacino-like at

179. See, e.g., *Zal v. Steppe*, 968 F.2d 924, 931-32 (9th Cir. 1992) (Trott, J., concurring) (arguing that an attorney retains no independent First Amendment rights inside a courtroom); *Wendel*, *supra* note 46, at 379-81 (arguing for the limited rights approach).

180. See *Wendel*, *supra* note 46, at 379-81; see also *Cooper*, *supra* note 98 (analogizing courtroom speech to government funded speech). This is the flawed analysis that the *Zal* majority applied, worried about the political statements that the attorney himself might make without seeing the interest the attorney's client had in freely preparing an uninhibited argument. See *Zal*, 968 F.2d at 927-28.

181. See *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1071 (1991) (distinguishing in-court speech as "extremely circumscribed"); *Zal*, 968 F.2d at 931-32 (Trott, J., concurring) ("In a courtroom, a lawyer without a client is like an actor without a part: he has no role to play, and no lines to deliver."). For a further discussion of this view, see *supra* Section III A.

182. For example, one scholar has disregarded the client's speech interest to such an extent as to propose that by licensing an attorney, the state grants entitlement to courtroom speech and therefore may attach restrictions because the lawyer herself is not giving up constitutional rights she otherwise had. See *Wendel*, *supra* note 46, at 379-81 (analogizing courtroom speech to government funded speech). This is a stretch that the judiciary has yet to address, but is another lurking limitation to courtroom free speech interests if only the attorney's interest is considered. See *id.*

183. *Zal*, 968 F.2d at 931 (Trott, J., concurring).

184. See *id.* at 931-32.

the court on his own topics – merely a reiteration of evidentiary and standing limitations. While separating the attorney and client is most appropriate strategy for analysis of speech *outside* the courtroom, it is unnecessary for speech inside the courtroom.¹⁸⁵ The attorney/client relationship, both contractually and practically, inside the courtroom is so close that the same standard may be applied to both, jointly. A client rarely speaks in court, and the attorney has almost total control over the content of briefs and arguments.¹⁸⁶ The attorney is duty bound to speak on behalf of the client and represent the client's rights.¹⁸⁷ Therefore, in controlling the content of speech before the court, the attorney should take on the speech interest that the client has, as if they were jointly "litigants" with the same issues before the court. The parallel is exact – where the client might wear a "Save the Whales" button, so could the attorney, and where the client might make an argument to the court, so could the attorney.¹⁸⁸ The attorney, then, does not have "extremely circumscribed" First Amendment rights inside the courtroom, as many have suggested, but rather that he possesses exactly the same First Amendment rights as his client, and is limited by the same court rules.

Next, proper First Amendment forum analysis will move away from the *Gentile* "extremely circumscribed" dicta to ensure that courtroom speech is given its due consideration as politically charged expression in a forum provided specifically for that expression.¹⁸⁹ Courtroom speech is, after all, speech upon

185. See Chemerinsky, *supra* note 92, at 859 (outlining lawyer's free speech rights outside the courthouse); Cooper, *supra* note 98, at 677 (reviewing disciplinary action against lawyer speech outside the courtroom).

186. See SCHULTZ & SIRICO, *supra* note 3, at 301-343 (describing tactics and strategies for brief preparations, oral argument, and oral communication on behalf of the client).

187. See, e.g., PA. R.P.C. 1.1-1.16 (outlining the typical ethical duties of the attorney/client relationship in order to protect the client's rights).

188. See *In re Frankel*, 165 A.D.2d 382, 386-87 (N.Y. App. Div. 1991) (holding that an attorney may wear a political slogan on his or her person during a trial).

189. See *Zal*, 968 F.2d at 927-28 (ignoring proper forum analysis); *Velazquez v. Legal Serv. Corp.*, 164 F.3d 757, 771-72 (2d Cir. 1999) (holding that the courtroom is the best marketplace for "ideas" presented by the litigants and extolling the importance of free flowing "ideas" in the

government property established for that purpose, leaving the judiciary's assumption of total mastery over courtroom proceedings out of kilter with its own forum jurisprudence.¹⁹⁰ The appropriate standard need not totally reject the *Gentile* sentiment, but rather recognize that "circumscribed" refers only to the power of the court to halt argument for valid justiciability, standing, jurisdiction, evidentiary, or timing reasons. These functionality concerns can be addressed within a candid analysis of the courtroom as a government forum for expression of the most important type.

First, a modified version of modern "public forum" analysis will provide the appropriate scrutiny because the courtroom shares much in common, in practice and policy, with both the widest public forum and the narrowest limited forum. Generally, in all places that "by long tradition or by government fiat have been devoted to assembly and debate,"¹⁹¹ speech is given the greatest protection, and any restriction on content in these "quintessential public forums" must be narrowly tailored to meet a compelling interest.¹⁹² While not quite a public park, the courtroom swells with a long tradition of "assembly and debate," stems from the historical "right to petition," and encompasses politically important issues.¹⁹³ In fact, courtrooms have since time immemorial been devoted by the government solely to the speech of the petitioning public.¹⁹⁴ As discussed above, this speech resounds in political importance, both as a petition to the government from its supposed masters – the people – and as a direct contribution to the political and social marketplace of ideas.¹⁹⁵ Even the surface distinction that only

courtroom).

190. See *Cornelius v. NAACP*, 473 U.S. 788, 799-800 (1985) (describing the first step in determining whether speech restrictions on government property are valid).

191. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

192. *Id.* at 45-46 (summarizing the public forum analysis and the various types of government expression forums).

193. For further discussion of the historical and traditionally political background of courtroom speech, including its subsuming of the right to petition, see *supra* notes 23-81 and accompanying text.

194. See *supra* notes 23-81 and accompanying text.

195. See *supra* notes 23-81 and accompanying text.

certain parties are allowed to speak in the courtroom is not wholly accurate, for often any person may choose to weigh in on an issue before the court by filing an amicus curiae brief, a procedural nod by the judiciary that the issues before it are open for public debate and that the court is concerned with broader policies and social impact of its decision than may be raised by the instant parties.¹⁹⁶

Conversely, the limited purpose for which the courtroom exists removes it somewhat from the company of venues in which the public can at will debate any issue it likes. It is not likely, for instance, that a court would hear argument on “what a bastard the presidential candidate is” or other quite valid point for the park soap-box. The fact that the judicial branch is set up specifically for hearing and adjudicating grievances, both civil and criminal, public and private, links it closely with “designated public forums,” and “limited public forums.”¹⁹⁷ In *Perry Education Association v. Perry Local Educators’ Association*¹⁹⁸ the Supreme Court first recognized that non-public government property might be opened for a limited expressive purpose.¹⁹⁹ Although the government holds wide latitude in keeping the forum limited to speech related to that purpose, as long as the speaker stays within the designated purpose, the speech is protected from arbitrary limitation and viewpoint discrimination.²⁰⁰ A courtroom shares much in common with this description, as it has many functional rules and is limited to the purpose of hearing parties that have a legal grievance.²⁰¹ If applied,

196. See, e.g., PA. R. APP. P. 531(a) (allowing “[a]nyone interested in the questions involved in any matter” to file a brief amicus curiae addressing those questions without applying for leave of the appellate court).

197. See *Perry*, 460 U.S. at 45-47 (describing designated and limited public forums).

198. 460 U.S. 37 (1983).

199. See *id.* at 47-49 (holding that a public school mailbox system was not enough of a traditional public forum to require access to outside labor unions because the mailbox system was “limited” to student related news and activities – a purpose that the labor unions did not address).

200. See *id.* (describing the limited purpose forum).

201. An interesting parallel might be drawn between the courtroom and the television political debate. In *Arkansas Education Television Commission v. Forbes*, 523 U.S. 666 (1998), the Supreme Court found that the intensely important journalistic control of PBS over its own debate overrode a right of access by third-party candidates. *Id.* at 681. The judiciary has a similar, if

no speech properly before the court could be arbitrarily limited without scrutiny, because it is within the purpose for which the courtroom is provided.

Lenient “limited purpose forum” analysis, however, does not fully protect the fundamental First Amendment political speech concerns raised by limitation of courtroom argument content.²⁰² “Limited purpose” analysis is inappropriate for forums that are in nature, history, and tradition forums for expressive activity, a criteria that practically governs modern forum analysis.²⁰³ The

more limited, discretion as to which parties are before it. That discretion assumed, arguendo, little doubt remains that once the debater is properly participating, or once the litigant is properly before the court, the government’s discretion ends and a free speech interest applies in the content of what is presented. For further discussion on *Forbes* and the control over political debates, see David Cardone, *The ‘Dread of Tyrants’: Defending the Free-Speech Rights of Independent Political Candidates*, PA. LAW., May/June 2004, at 14, 20 (arguing that the current standard prescribes vital political speech and that “the airwaves, not parks and sidewalks, are today’s traditional public forum”).

202. See LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 205-10 (1985) (criticizing *Perry’s* categorical analysis as failing to sufficiently address the fluid interests of the First Amendment); Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1234 (1984) (reasoning that forum categories ignore the real First Amendment values and concerns). Justice Brennan had misgivings about public forum categorization as well. In *United States v. Kokinda*, 497 U.S. 720 (1990), a case where the majority upheld a ban on sidewalk solicitation, Justice Brennan, in dissent, observed that “public forum categories – originally conceived of as a way of preserving First Amendment rights. . . – have been used [to uphold] restrictions on speech.” *Id.* at 741 (Brennan, J., dissenting) (citation omitted). For a discussion of the political concerns raised by arbitrary or discriminating obstruction of courtroom argument, see *supra* notes 128-176 and accompanying text.

203. See, e.g., *Cornelius v. NAACP*, 473 U.S. 788, 804-09 (1985) (basing its decision to uphold a ban on private groups from participating in a federal office fund raising event on the fact that federal offices are not traditionally or by nature set aside for expressive activity). Generally, limited purpose forums apply to non-speech related areas that are opened by the government to the public - an outcropping of the non-public forum, which are those places that are not associated with or established for expression at all, such as office buildings. See *id.* Interestingly, the halls and municipal offices surrounding a courtroom have often been found to be “nonpublic forums” because their

courtroom is innately a government provided place where the people air grievances and argue legal, social and equitable issues.²⁰⁴ Speech, written and oral, flows naturally in such a forum. The subsuming of the “right to petition” into courtroom function only strengthens the notion of the courtroom as the traditional place for speech directed to and about government.²⁰⁵

Therefore, to properly protect the vital political importance of courtroom speech and to account for the historical and traditional purpose of the courtroom as a place of free expression aimed at law and policy, a modified standard combining the “quintessential public forum” with the “limited purpose forum” must be created. As is often the case with new First Amendment principles, a simple balancing test will merely muddy the waters and may rarely work to effectively protect against improper regulation.²⁰⁶ Instead, once the First Amendment interest in the content of argument is recognized, content-based protection fits naturally. Presuming that fair and orderly adjudication is a sufficient compelling interest,²⁰⁷ to meet that interest the judiciary must heed the traditional and political importance of courtroom expression and apply only the most narrow and necessary restrictions upon content of the argument before it. To maintain order in an already clogged system, core court functions that govern how and when argument is presented, such as standing and evidentiary rules, will be presumed to meet this standard. Of course, the internal operating procedures of the courthouse itself,

administrative function has nothing to do with the traditional airing of views and debate. *See, e.g.,* *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 965-66 (9th Cir. 2002). Even in such non-public forums, however, arbitrary speech restrictions are unconstitutional, with the government requiring a “reasonable” purpose that is not an effort to suppress the speaker’s viewpoint. *See id.*

204. For further discussion of the speech interest in courtroom argument, see *supra* notes 23-81 and accompanying text.

205. *See Calif. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (accepting the Court’s role in fulfilling the right to petition); *Wolfgram, supra* note 36, at 292-94 (objecting to the Court’s subsuming of the traditional practice of petitioning the government).

206. *See Wendel, supra* note 46, at 310-11 (sarcastically refraining from adding another pebble to the rock heap of balancing tests).

207. *See Martin, supra* note 174.

such as oral argument timing or the operating hours of the courthouse, can easily be deemed valid time, place, and manner restrictions within the forum.

Such a standard does not unreasonably curtail the power of the court, which must retain substantial grip over courtroom proceedings. If a word or phrase will prejudice a fair trial, the court will be free to preclude its reference.²⁰⁸ The litigant, however, will have a standard of review to rely upon to prevent improper or overly broad restriction. For instance, banning general words such as “sacrifice” or “race” will likely not be narrow enough to protect the litigant’s interest in controlling argument content. The standard isn’t impossible to meet, but rather the proper heightened scrutiny to allow review of such politically charged speech as courtroom argument.

Lastly, although the above solution is described as a modified modern public forum analysis, in practice it operates rather like earlier Supreme Court public forum reasoning outlined in *Grayned*.²⁰⁹ The more flexible *Grayned* standard is specifically designed to keep restrictions from treading unnecessarily upon protected speech by calculating the purpose of the forum and whether the speech that has been limited would have been wholly inconsistent with such purposes.²¹⁰ This standard applies appropriately to the courtroom, which does not neatly fit the categories of modern forum reasoning. Applied to the courtroom, as the New York Supreme Court ventured in *Frankel*, courtroom speech should not be limited unless it is inconsistent with the purposes of conducting a trial or threatens the efficient administration of justice.²¹¹ Conceptually, this standard provides

208. Arguably, in *Cook v. Philadelphia Transportation Company*, 199 A.2d 446 (Pa. 1964), the Pennsylvania Supreme Court was within its discretion when it prohibited mention of a store name, “Crazy Bar,” because it perceived that the name might prejudice a jury against a patron that otherwise had no evidence of drinking against him. *Id.* at 446-49.

209. See *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) (deciding “whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time”).

210. See *id.* (finding that a protest was basically incompatible with school grounds during classes).

211. See *In re Frankel*, 165 A.D.2d 382, 385 (N.Y. App. Div. 1991).

the needed flexibility to account for both the political vitality and traditionally expressive nature of courtroom speech and the inherent control a judge must exercise in her courtroom.

V. CONCLUSION

This Article means only to accomplish the modest goal of returning some control over the judicial process to the litigants themselves. If a First Amendment interest in freely controlling one's presentation to the judiciary is adopted, it will simply give the court system a concrete ideal to consider before it adopts rules and procedures that cut broad swaths out of the litigant's presentation. I, like most attorneys, cringe at the increasing crushing administrative reasons given to overbear full and fair argument. Although attorneys will doubtless for the life of the judicial system be subject to the whims of the courts when submitting briefs or making oral argument, no branch of government should automatically assume unreviewable control over any speech offered by the people, much less political speech.²¹² This Article illustrates the vital and traditional political role that courtroom argument plays in our great experiment, self-government.²¹³ This Article then warns that, by failing to recognize the courtroom as a traditional forum for expression, not only does the judiciary fail to properly acknowledge the political nature of courtroom argument, but it clears itself of any scrutiny for arbitrary or discriminating limitation of such argument.²¹⁴ Some of these limitations thwart the very perception of a judiciary that is bound to the duties of a common law system and is controlled by equal treatment for all litigants.²¹⁵ Finally, very little reason exists to maintain the status quo because the First Amendment is flexible enough to apply within the

212. For a discussion of the political impact of courtroom speech, see *supra* notes 23-81 and accompanying text.

213. For a discussion of the role of courtroom argument, including using courtroom argument as a means to exercise the right to petition, see *supra* notes 26-39 and accompanying text.

214. For a discussion of the judiciary's lack of forum analysis, see *supra* notes 88-127 and accompanying text.

215. See *supra* notes 88-127 and accompanying text.

courtroom without sacrificing the necessary practical controls of the judicial process.²¹⁶

As a whole, however, the First Amendment's first principle of ensuring self-government is no less important within the courtroom than without. After all, the judicial system is nothing if it is not, both in perception and in reality, a fair and equitable place for the people to petition for social redress.²¹⁷ The Judicial Branch, given its generally non-elected position, singular power over the rights of the people, common-law determining role, and checking capacity over the executive and legislature, must recognize that it is not anointed Solomon. Rather, the judiciary serves the people with specific duties that limit its power. The most effective of such limitations, and therefore the most important to the First Amendment's ideal of self-government, is that the people be free to control their appeal to the court and lay before it their most influential position.

216. For an analysis of forum standards and their applicability to the courtroom, see *supra* notes 189-210 and accompanying text.

217. For a discussion of the right to petition, see *supra* note 36 and accompanying text.