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Adjudicative Speech and the First Amendment

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While political speech—speech intended to influence political decisions—is afforded the highest protection under the First Amendment, adjudicative *speech—speech intended to influence* court *decisions—is regularly and systematically constrained by rules of evidence, canons of professional ethics, judicial gag orders, and similar devices. Yet court decisions can be as important, both to the litigants and to society at large, as political decisions. How then can our practice of severely constraining adjudicative speech be justified as consistent with First Amendment principles?*

This Article attempts to answer that question in a way that is informative about both the adjudicative process and the nature of free speech under the First Amendment. The author first explores, and rejects, a number of possible theoretical justifications for the relative lack of protection afforded adjudicative speech. He then offers a more satisfactory explanation that relies in part on the connection between participation and political legitimacy. Restrictions on adjudicative speech, he argues, are necessary to preserve the opportunity for all litigants to fully and fairly participate in the decisionmaking process, and to maintain judicial subservience to general policies generated by processes (legislation, constitutional lawmaking, the common law) that are more politically legitimate than ad hoc judicial policymaking.

The author then applies this justification of adjudicative speech restrictions to several recent controversies involving adjudicative speech. He contends that Legal Services Corp. v. Velazquez, *in which the Supreme Court invalidated a congressional ban on the use of Legal Services Corporation funds to challenge state welfare laws, was correctly decided; that court rules prohibiting the citation of unpublished opinions are unconstitutional; and that the Court was wrong to strike down Minnesota's regulation of judicial campaign speech in* Republican Party v. White.

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Finally, the Article concludes by suggesting that the constraints regularly imposed on adjudicative speech, designed to preserve the political legitimacy of adjudication, imply the propriety of similar constraints on political speech where necessary to preserve the legitimacy of democratic politics. Thus the author suggests that the regulation of campaign funding, mass media, and hate speech might be justifiable as means of promoting full and fair participation in political life.

> *[F]ree speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them.*
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> —Justice Hugo Black, *Bridges v. California*[1]

INTRODUCTION: FOUR CASES

At its core, the Free Speech Clause of the First Amendment[2] connects freedom of speech with legitimate government decisionmaking. The clause, according to the U.S. Supreme Court, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people,"[3] and so the Court protects "political" speech by applying "strict scrutiny" to measures infringing it.[4] It probably is no exaggeration to say that speech directed to processes of government decisionmaking is the most highly protected category of speech in the Court's First Amendment jurisprudence.

Consider, then, the following four cases, asking yourself which of them involves the kind of "political" speech that should be protected by strict scrutiny:

> *Case 1.* An editorial writer accuses the President of the United States of attempting to assume "dictatorial powers." The writer is prosecuted and convicted under a federal statute that prohibits the publication of "false, scandalous and malicious . . . writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame . . . or to bring them . . . into contempt or disrepute."[5]
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> *Case 2.* A candidate for election to a state's supreme court distributes campaign literature critical of some of the court's prior decisions. The candidate is brought before the state's attorney disciplinary board and charged with violating provisions of the state's codes of judicial and attorney conduct that forbid a "candidate for a judicial office" to "announce his or her views on disputed legal or political issues."[6]
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> *Case 3.* Members of the press seek to report details of a grisly multiple murder, including an alleged confession and other evidence that implicates the defendant in custody. The judge presiding over the pending murder trial enters a "restrictive order" that prohibits the press, under

1. 314 U.S. 252, 260 (1941).
2. "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I.
3. Roth v. United States, 354 U.S. 476, 484 (1957).
4. *See, e.g.*, Republican Party v. White, 536 U.S. 765, 774 (2002).
5. Alien and Sedition Act of 1798, 1 Stat. 596 (expired 1801).
6. *White*, 536 U.S. at 768; *see* MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (1993); MINN. RULES OF PROF'L CONDUCT R. 8.2(b) (1993).

> penalty of contempt, from publicly disclosing those facts before or during the trial.[7]
>
> *Case 4*. An attorney believes certain evidence may convince a federal jury to rule in her client's favor and attempts to present that evidence during trial. The judge, after ruling that the evidence is not "relevant" pursuant to Federal Rule of Evidence (FRE) 401,[8] prohibits the attorney from presenting the evidence or referring to it in her arguments on the strength of FRE 402, which provides that "[e]vidence which is not relevant is not admissible."[9]

In all four cases, someone is being prohibited from or punished for engaging in speech; and in all four cases, the basis for the prohibition or punishment is that the attempted speech may have an undesirable influence upon a government decisionmaking procedure. The editorial writer in *Case 1* is being punished because his speech might "bring [the President] . . . into contempt or disrepute," thus impairing the President's chances for reelection or the effectiveness of his administration. The judicial candidate in *Case 2* is being punished because his campaign speech threatens "the impartiality of the state judiciary"[10] by potentially "precommitting" him to particular decisions in cases he will hear if elected. The members of the press in *Case 3* are being prohibited from speaking, under threat of contempt, because their speech might engender predisposition or bias among jurors or prospective jurors in a pending criminal case. The attorney in *Case 4* is being prohibited from speaking, also under threat of contempt, because her speech might mislead the jury into deciding her client's case based on "irrelevant" facts.

Given the similarities in structure of each of the four cases, the proverbial visitor from Mars, assuming he or she (or it?) is generally familiar with the importance of political speech in our First Amendment jurisprudence, probably would assume that all four cases involve specially protected "political" speech—that is, speech that has the potential to influence a government decisionmaking process.

But the visitor from Mars would be wrong. While the Supreme Court has indicated that *Cases 1*, *2*, and *3* involve protected political speech, it has never even suggested that *Case 4* might do so (and has often assumed, mostly implicitly, that it does not).

Case 1 presents such an obvious infringement of political speech that one must go back to 1798 to find it, in the form of the notorious Alien and Sedition

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7. Neb. Press Ass'n v. Stuart, 427 U.S. 539, 542 (1976).

8. FED. R. EVID. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

9. FED. R. EVID. 402.

10. *White*, 536 U.S. at 775.

Acts. While the Supreme Court never ruled on the constitutionality of those Acts before they were repealed, it has since rather resoundingly condemned them.[11] Much more recently, the Court has invalidated an "announce clause" provision like the one at issue in *Case 2* on the ground that it did not survive the strict scrutiny applicable to content-based restrictions on political speech.[12] And the Court has unanimously overturned a "gag order" like the one at issue in *Case 3* as an unconstitutional prior restraint on speech.[13]

But the Court has never even entertained, much less upheld, a challenge to FRE 401 or 402, or indeed to any evidentiary rule, on the ground that such rules impermissibly restrict speech in violation of the First Amendment.[14]

This First Amendment blind spot regarding evidentiary rules is, on reflection, quite baffling. Evidentiary rules seem to fit the classic paradigm of restrictions—indeed, prior restraints—on political speech. A litigant arguing before a court is, in so doing, seeking to influence the decision of a branch of government that will directly affect him or her, no less than classic beneficiaries of political speech protections—the street corner pamphleteer,[15] the editorial writer,[16] the stumping political candidate[17]—are seeking by their speech to influence government decisions that will affect them.[18] Indeed, the

11. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 276 (1964) ("Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history." (footnote omitted)).

12. *See White*, 536 U.S. at 774–88; *see also infra* Part IV.B.

13. *See Stuart*, 427 U.S. at 570.

14. Nor have commentators paid much heed to the issue. A notable exception is Frederick Schauer, *The Speech of Law and the Law of Speech*, 49 ARK. L. REV. 687 (1997). Schauer takes restrictions on speech in adjudication as a First Amendment given (although he briefly mentions some reasons why those restrictions make sense, *see id.* at 695) and proceeds from that premise to some more general points, including: (a) that out-of-court speech by trial participants might present the same dangers as in-court speech, *see id.* at 692–94; and (b) that free speech is in fact restricted in many contexts in our society without our thinking that it presents a major First Amendment problem, *see id.* at 696–97. My approach here will be a bit different: I will try to explain in some theoretical detail *why* we can take restrictions on adjudicative speech as a First Amendment given. In doing so, I will focus, as Schauer does not, on the fact that adjudication—unlike many other contexts in which speech is heavily restricted—is a government decisionmaking process, like legislation or administration. Having done that, I will, among other things, expand a bit on Schauer's observation that in-court and out-of-court speech often present similar dangers, *see infra* Part IV.B.1., and on his suggestion that restrictions on speech in adjudication imply the legitimacy of restrictions on speech in other contexts as well, *see infra* Part IV, and the Conclusion.

15. *See, e.g.*, Schneider v. New Jersey, 308 U.S. 147 (1939) (invalidating the convictions of protest organizers under an ordinance prohibiting distribution of leaflets on the street).

16. *See, e.g.*, Bridges v. California, 314 U.S. 252 (1941) (invalidating the contempt conviction of a newspaper for publication of editorials commenting on a pending criminal case).

17. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976) (invalidating federal statutory limitations on campaign expenditures by political candidates); *White*, 536 U.S. 765 (invalidating state restrictions on the content of candidates' speech during judicial campaigns).

18. Of course, unless the litigant is appearing pro se, he or she "speaks" in court mostly through his or her attorney. This fact is related, I think, to the most convincing justification for restricting adjudicative speech, as I explain *infra* Part III.D.

litigants in a court case, criminal or civil, are quite likely to be affected by the resulting decision more profoundly than most citizens ever will be affected by an act of one of the political branches of government. The losing litigant may be sent to jail, or forced to pay a large amount of damages, or denied custody of a child, or compelled to grant a right-of-way on her property, or made to swallow some other rather nasty medicine.

Of course, each litigant has a chance to directly influence the court's decision—through the presentation of "proofs and reasoned arguments"[19]—that is, correspondingly, considerably greater than a typical citizen's opportunity to directly influence the policies of government. And that is what makes the existence of evidentiary rules especially mysterious from a First Amendment perspective. To censor the content of the litigants' proofs and arguments—and *censorship* is precisely what evidentiary rules accomplish—is to dictate the terms on which litigants (through their lawyers) can participate in adjudicative decisionmaking that will bind them. Government attempts to dictate the terms of participation in other government decisionmaking contexts are uniformly subjected to strict First Amendment scrutiny and almost as uniformly stricken down.[20] Why should rules of evidence in adjudication be any different? Why doesn't the First Amendment dog bark in the courtroom?[21]

This Article attempts, from the point of view of political theory, to answer that question in a way that is informative about both the value of political speech and the nature of the adjudicative process. More precisely, it attempts to answer the normative question of why adjudicative and political speech are treated so differently from each other, not the corresponding question of positive First Amendment law.[22] The outcome of an actual First Amendment challenge to evidentiary rules seems a foregone conclusion: Such rules would be summarily upheld, probably on the ground that a long tradition of restrictions on courtroom speech, together with the incompatibility between unrestricted speech and a

19. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 369 (1978).

20. *See, e.g.*, Turner Broad. Sys. v. FCC, 512 U.S. 622, 641 (1994) ("Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential [First Amendment] right."); Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content."); *see generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 11.2.1, at 902–03 (2d ed. 2002).

21. *Cf.* Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 SUP. CT. REV. 1, 2 (citing Arthur Conan Doyle, *The Adventure of Silver Blaze*, STRAND MAG. (Dec. 1892)) (discussing the absence of First Amendment analysis in hostile work environment claims).

22. In this respect my small project proceeds in the same spirit as the much more comprehensive one undertaken by Frederick Schauer in his book *Free Speech: A Philosophical Enquiry*: It "adopts a philosophical rather than a legal approach." FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY ix–x (1982).

courtroom's function, makes a courtroom a "nonpublic forum" in which government may impose reasonable, viewpoint-neutral constraints on speech.[23]

But my query here is theoretical, not doctrinal: I want to know whether there is any convincing normative justification for the seemingly obvious outcome of a hypothetical First Amendment challenge to evidentiary rules. That is, I want to interrogate our legal assumptions about speech to courts—which I will refer to generally as *adjudicative speech*—and justify those assumptions normatively, if I can. *Why* is the imposition of severe restrictions on adjudicative speech a matter of long-standing tradition? *How* is unfettered speech by litigants incompatible with the function of a court? My hope is that asking and attempting to answer these questions in a systematic way will help us to understand both freedom of speech and adjudication a bit better.

I begin in Part I by suggesting that Anglo-American adjudication is more like Anglo-American politics than is often acknowledged: Each requires for its legitimacy the meaningful participation of the affected parties. And, as I explain, freedom of speech is a necessary condition of meaningful political participation. Given the centrality of participation to both political and adjudicative legitimacy, and the centrality of free speech to meaningful participation, it seems especially anomalous that the First Amendment applies vigorously in politics but hardly at all in adjudication.[24] And despite our reflexive familiarity with this incongruity, it cannot easily be explained away, as I demonstrate in Part II by assessing (and rejecting) five ways of attempting to do precisely that.

In Part III, I offer a more satisfactory explanation for the otherwise curious distinction between (mostly unfettered) political speech and (tightly constrained) adjudicative speech. The very need to preserve the meaningfulness

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23. *Cf.* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 680 (1992) (holding that public airports are nonpublic fora); United States v. Kokinda, 497 U.S. 720, 730 (1990) (holding that post office property is a nonpublic forum); Greer v. Spock, 424 U.S. 828, 838 (1976) (holding that military bases are nonpublic fora); Adderley v. Florida, 385 U.S. 39, 41 (1966) (holding that the areas outside prisons and jails are nonpublic fora).

24. Much of the argument in Part I derives from several prior articles. I first compared adjudication and democratic politics, from the perspective of political legitimacy, in *Adjudication as Representation*, 97 COLUM. L. REV. 312 (1997) [hereinafter Peters, *Adjudication*], in which I argued that Anglo-American adjudication contains the democratic elements of participation and representation. In *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454 (2000) [hereinafter Peters, *Minimalism*], I contended that the desirability of preserving the representative legitimacy of adjudication provides a reason in favor of narrow, "minimalist" court decisions. In *Persuasion: A Model of Majoritarianism as Adjudication*, 96 NW. U. L. REV. 1 (2001) [hereinafter Peters, *Persuasion*], I argued that majoritarian politics can be understood as a type of adjudication the legitimacy of which depends, like actual adjudication, on the degree to which decisionmakers are responsive to the arguments of those affected by decisions. And in *Participation, Representation, and Principled Adjudication*, 8 LEGAL THEORY 185 (2002) [hereinafter Peters, *Participation*], I contended that a judge's responsibility to the litigants generally precludes her from deciding cases based upon prospective policy rather than retrospective principle.

of participation in adjudication, I contend, partly explains the existence of evidentiary rules and other restrictions on adjudicative speech. The rest of the explanation derives from the limits of the legitimacy that participation lends to adjudication, and from the need to maintain judicial subservience to more legitimate modes of policymaking.

In Part IV, I turn to some contemporary issues involving the interaction between free speech norms and adjudication, asking whether those issues might be illuminated by the explanation of adjudicative speech restrictions that I offer. Specifically, I assess the validity of recent congressional attempts to prevent federally funded attorneys from challenging state welfare systems; of court rules prohibiting the citation of unpublished judicial opinions; and of attempts to regulate the speech of candidates in state judicial campaigns.

Finally, I conclude by suggesting that the justification for evidentiary rules and other restrictions on adjudicative speech tells us something valuable not only about speech in adjudication, but also about speech in politics: It tells us that political speech itself, the paradigm of specially protected speech, might permissibly be restricted when necessary to preserve the participatory legitimacy of democratic politics.

I. PARTICIPATION AND SPEECH, POLITICS AND ADJUDICATION

Adjudication and politics are alike in at least two obvious ways: Both produce decisions that bind people, and both, at least paradigmatically, are processes of government.[25] Courts are institutions of government no less than legislatures and administrations; judges, like legislators and chief executives, are government actors.[26] So court judgments,[27] court procedures,[28] and judicial

25. This is not to say that all adjudication is run by government, or that everything that might be called "politics" is aimed at producing government decisions. Types of alternative dispute resolution, such as arbitration and mediation, often proceed without government intervention. And interactions in nongovernmental contexts—families, workplaces, law faculties—frequently are considered "political."

26. This obvious premise underlies Supreme Court decisions that have held a court's enforcement of common law principles to be state action in the constitutionally relevant sense. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) (holding that judicial enforcement of common law libel was state action); Shelley v. Kraemer, 334 U.S. 1, 19 (1948) (holding that judicial enforcement of a racially restrictive covenant in private contracts was state action).

27. *See, e.g.*, *Sullivan*, 376 U.S. at 254; *Shelley*, 334 U.S. at 1.

28. *See, e.g.*, J.E.B. v. Alabama, 511 U.S. 127 (1994) (invalidating a civil litigant's use of peremptory challenges to strike jurors based on gender as a violation of equal protection); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 628 (1991) (invalidating a civil litigant's use of peremptory challenges to strike jurors based on race as a violation of equal protection); Batson v. Kentucky, 476 U.S. 79, 89 (1986) (invalidating the prosecution's use of peremptory challenges in a criminal trial to strike jurors based on race as a violation of equal protection). Of course court procedures are subject to constitutional norms that are directed specifically to courts, such as most provisions of the Fifth Amendment, the Due

orders[29] are subject to constitutional limitations just as the actions of the political branches are.

Because adjudication is a process of coercive government decisionmaking, it is subject not only to the limitations of positive constitutional law, but also to even more fundamental standards of political legitimacy. We may ask not only the familiar question of whether, and under what conditions, *politics* is politically legitimate, but also the question, perhaps somewhat less familiar, of whether and under what conditions *adjudication* is politically legitimate.

When directed to adjudication, this question in practice tends to be asked primarily in the particular public-law contexts of judicial review and statutory interpretation—contexts in which courts interpret and evaluate the work of the political branches and thus provoke worries about comparative legitimacy. So commentators fret about the "countermajoritarian difficulty" of judicial review[30] and about the degree of deference courts owe to legislatures in constitutional and statutory interpretation.[31] But the question of the political legitimacy of adjudication as a general matter is rarely put.

A careful consideration of that question reveals a deeper similarity between adjudication and political decisionmaking. This fact shouldn't be surprising; both adjudication and political decisionmaking in our democracy rely on the same democratic value—participation—to provide legitimacy. It would in fact be a bit surprising if this were not the case; if participation is central to

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Process Clause of the Fourteenth Amendment, and the provisions of the Sixth and Seventh Amendments and Article III.

29. *See, e.g.*, Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) (upholding the First Amendment validity of protective orders limiting public access to information produced during discovery); Neb. Press Ass'n v. Stuart, 427 U.S. 539 (1976) (invalidating a judicial restrictive order against press coverage of a criminal trial as violative of the First Amendment); Bridges v. California, 314 U.S. 252 (1941) (invalidating a contempt citation for a newspaper editorial referring to a pending court case as violative of the First Amendment).

30. Examples here are too numerous to cite without being arbitrary; nonetheless, see, for example, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16 (2d ed. 1986) (1962) (coining the phrase "counter-majoritarian difficulty"); Symposium, *The Counter-Majoritarian Difficulty*, 95 NW. U. L. REV. 843 (2001) (discussing the difficulty). For an historical account of the development of the countermajoritarian difficulty in constitutional theory, see Barry Friedman's ambitious and informative series of articles: Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 N.Y.U. L. REV. 1383 (2001); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971 (2000); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002) [hereinafter Friedman, *Part Five*]. Part Two of Friedman's series is, apparently, as yet unpublished. *See* Friedman, *Part Five*, *supra*, at 157 n.12.

31. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990) (defending an "originalist" approach to statutory and constitutional interpretation); WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994) (defending a "dynamic," nonoriginalist approach to statutory interpretation); ANTONIN SCALIA, A MATTER OF INTERPRETATION (1994) (defending a "textualist" approach to statutory and constitutional interpretation).

democratic legitimacy (as I will argue in a moment), why shouldn't all significant government institutions, the courts included, meaningfully incorporate that value?

A. Participation and Democratic Legitimacy

"Democracy" is, of course, a term of contested meaning.[32] One can't get very far in an argument about "democratic" legitimacy without at least describing, and preferably defending, the particular conception of democracy that forms the basis for one's argument. In my view, the most attractive understanding of democratic legitimacy, from both a descriptive and a normative perspective, has participation as its central value. By participation I mean the participation in government of those bound by government decisions.

Consider participation's main competitor as a foundational democratic value: *consent*.[33] As a bedrock principle of democracy, consent is both descriptively and normatively problematic. As a descriptive matter, it is difficult to assert honestly that most of us have meaningfully "consented" either to our general system of government—what reasonable choices do we have?—or, perhaps more to the point, to those specific actions of that government with which we disagree.[34] As a normative matter, consent is rather severely underde-

32. This point has recently been made quite effectively by several commentators. *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 15–35 (1996); CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 18–20, 46–108 (2001); LOUIS MICHAEL SEIDMAN, OUR UNSETTLED CONSTITUTION 69 (2001).

33. Some commentators treat government by "consent" and government by "participation" as functionally the same thing, without making any conceptual distinction between them. *See, e.g.*, ALEXANDER MEIKLEJOHN, *Free Speech and Its Relation to Self-Government*, *in* POLITICAL FREEDOM 1, 9–16 (1960). If one's definition of political consent in fact turns on the value of political *participation*, as I believe Meiklejohn's does, then any competition between consent and participation for the status of core democratic value is merely a matter of semantics: By consent one really means participation.

34. Locke and Rousseau both attempted to justify majority rule as the product of an original act of consent, a unanimous "compact" or agreement by which all members of society agreed to be ruled thereafter by a majority. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 348–58 (Peter Laslett ed., Cambridge Univ. Press 1963) (1690); JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 116–21 (Wilmoore Kendall trans., Henry Regnery Co. 1954) (1762). But of course such an original social contract would, and could, bind only those who actually agreed to it, not their descendants. Locke tried to solve this problem with a rather tenuous argument that subsequent members of society "tacitly" consent to the compact through "Possession, or Enjoyment, of any part of the Dominions of . . . Government." LOCKE, *supra*, at 366. Rousseau's attempted solution at first seems even more tenuous, but in fact amounts to the same thing: He held that "[t]o reside within the state after its actual establishment . . . is to consent to it," including to the principle of majority rule on matters of ordinary legislation. ROUSSEAU, *supra*, at 168. Of course it is difficult to "reside within" a state without also "possessing or enjoying any part of the dominions of government" of that state.

The vulnerability of both Locke's and Rousseau's solutions is suggested by Rousseau's qualification that consent by residence applies only "to a state that is free. Where this condition is not fulfilled, a resident may be prevented from leaving, despite a wish to do so, by family ties, property, lack of a place of refuge,

terminative as a justification of democratic government, for a society might consent to rule by oligarchy or by dictatorship.[35]

The value of participation, on the other hand, fares reasonably well both descriptively and normatively as a justification of American democracy. Descriptively, government-by-participation is a roughly accurate characterization of our system, at least if participation is understood to include not only actual participation but also the opportunity to participate.[36] Every adult citizen in the United States has the opportunity to influence policy by participating in the election of those who directly make it (or who appoint and supervise those who directly make it). In many states, citizens also have the occasional chance—steadily becoming less occasional—to make policy directly by voting on ballot referenda or initiatives.[37] In some places citizens directly make local policy by participating in town meetings. The notice-and-comment process allows for direct participation in administrative rulemaking.[38] Then, of course, there is the ubiquitous power of political speech in its many forms—not least by way of public opinion polls—which constitutes a sort of direct citizen participation in government between elections.

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poverty, or coercion." *Id.* (emphasis altered). In the real world, of course, such deterrents to exit are nearly ubiquitous. And Rousseau neglects to mention that, even if exit is possible and relatively cost-free, there may not be a suitable alternative state to exit *to*.

35. Indeed, Thomas Hobbes grounded his case for absolute monarchy in consent theory. *See* THOMAS HOBBES, LEVIATHAN 262–88 (Herbert W. Schneider ed., 1958) (1651).

36. Many or most of us do not regularly actually participate in politics, even in the form of voting. For example:

> In the midterm congressional elections of 1998, only 41.9% of the [voting age population, or VAP] bothered to vote, giving the country its worst turnout in modern history. The 1998 elections, however, were only the culmination of a trend forty years in the making. In the congressional elections held throughout the 1960s, the average turnout was 54.6%; by the 1990s, it had dropped nine points to 45.7%.
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> . . . Throughout the 1990s, on average, Congress has been elected by less than a majority of the VAP. . . . [N]ot since 1970 has the turnout been over fifty percent in a midterm election. Even in presidential election years, fifty percent of the VAP has not voted regularly for Congress. In fact, 1992 was the first and last time in twenty years that the congressional vote in a presidential election year did surmount the fifty-percent mark.

Daniel J. Schwartz, Note, *The Potential Effects of Nondeferential Review on Interest Group Incentives and Voter Turnout*, 77 N.Y.U. L. REV. 1845, 1852–53 (2002) (citations omitted).

37. "Over the last few decades, there has been a sea change in the lawmaking process in this country. By initiative and by referendum, American voters in a significant number of states are participating directly in state and local governments." Mildred Wigfall Robinson, *Difficulties in Achieving Coherent State and Local Fiscal Policy at the Intersection of Direct Democracy and Republicanism: The Property Tax as a Case in Point*, 35 U. MICH. J.L. REFORM 511, 512 (2002) (citations omitted).

38. *See, e.g.*, Administrative Procedure Act, 5 U.S.C. § 553 (2000) (requiring federal agencies to provide "[g]eneral notice of proposed rule making" and to allow "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments").

"Of course," Learned Hand remarked, "I know how illusory would be the belief that my vote determined anything."[39] ("Hardly altogether," Alexander Bickel replied.[40]) But if Hand's problem *is* a problem, it is a problem of large-scale democracy, not of democracy itself.[41] Even on a massive scale, democracy is more participatory than dictatorship or oligarchy on any scale.

Normatively, the value of participation unites a broad spectrum of theoretical justifications of democracy. In thinking about normative arguments for democracy, we might divide the universe between *proceduralist* and *functionalist* justifications. Proceduralist justifications value the procedures of democracy themselves, while functionalist justifications value the outcomes of those procedures. Proceduralist justifications might be further divided into *deontological* and *consequentialist* forms, with deontological arguments locating inherent value in democratic procedures and consequentialist arguments placing value in certain ancillary effects of democratic procedures.

The value of participation is central to all of these ways of justifying democracy. One who justifies democracy on deontological proceduralist grounds—who believes that democratic procedures are valuable for their own sake—is likely to focus, like Immanuel Kant, on the ideals of individual autonomy and antipaternalism,[42] each of which is given substance when citizens participate in the government that binds them. Participation in government decisionmaking, the theory goes, transforms government decisions from instances of coercion to expressions of *self*-government.[43] Likewise, one who justifies democracy on consequentialist proceduralist grounds—believing that democratic procedures produce valuable ancillary benefits, good decisions aside—is likely to value participation in government as a means of individual character development,

39. LEARNED HAND, THE BILL OF RIGHTS 73–74 (1958).

40. BICKEL, *supra* note 30, at 20.

41. *See* ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 225–31 (1989) (discussing problems of participation in large-scale democracy); EISGRUBER, *supra* note 32, at 80–82 (same). And it has not been considered a problem by every democratic theorist. James Madison, for example, saw the attenuation of individual influence in a large-scale democracy as a good thing because it impeded the formation of majority factions. *See* THE FEDERALIST NO. 10 (James Madison).

42. *See, e.g.*, IMMANUEL KANT, *On the Common Saying: "This May Be True in Theory, but It Does Not Apply in Practice," reprinted in* KANT: POLITICAL WRITINGS 61, 74–87 (Hans Reiss ed., H.B. Nisbet trans., 2d ed. Cambridge Univ. Press 1991) (1793). For Kant, it was an "*a priori* principle" that "[n]o-one can compel me to be happy in accordance with his conception of the welfare of others, for each may seek his happiness in whatever way he sees fit, so long as he does not infringe upon the freedom of others to pursue a similar end." *Id.* at 74.

43. This idea also animates Locke's justification of civil society and Rousseau's concept of the general will. *See, e.g.*, LOCKE, *supra* note 34; ROUSSEAU, *supra* note 34.

like John Start Mill (following Aristotle),[44] or, like Alexis de Tocqueville, as an impetus to general social dynamism.[45]

And one who justifies democracy on functionalist grounds—believing that it tends to produce better decisions than other forms of government—almost inevitably relies on the value of participation. The functionalist, for example, may believe that broad participation, by bringing those directly affected by decisions into the process of governance, increases the likelihood that the resulting decisions will serve the interests of a majority of society.[46] Or the functionalist might focus on the diversity of experiences and opinions that broad participation injects into government decisionmaking,[47] or on the related idea that broad participation triggers the need for reasoned deliberation in politics.[48] The value of participation, unlike the value of consent, is capable of

44. *See, e.g.*, JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT (Currin V. Shields ed., Library Arts Press 1958) (1861) [hereinafter MILL, REPRESENTATIVE GOVERNMENT]; JOHN STUART MILL, ON LIBERTY (1859), *reprinted in* JOHN STUART MILL, UTILITARIANISM, ON LIBERTY, AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 69 (Geraint Williams ed., J.M. Dent 1993); *see also* ARISTOTLE, NICOMACHEAN ETHICS 3–80 (Roger Crisp trans., Cambridge Univ. Press 2000) (describing a theory of moral virtue).

45. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 231–45 (George Lawrence trans., J.P. Mayer & Max Lerner eds., Harper & Row 1966) (1835); *see also* Stephen Holmes, *Tocqueville and Democracy*, *in* THE IDEA OF DEMOCRACY 23 (David Copp et al. eds., Cambridge Univ. Press 1993) (discussing Tocqueville's theory of democracy).

46. J.S. Mill's utilitarian philosophy, not surprisingly, produced such a view, *see, e.g.*, MILL, REPRESENTATIVE GOVERNMENT, *supra* note 44, at 17–23, 43–46, as did Herbert Spencer's market-based social Darwinism, *see* HERBERT SPENCER, *Representative Government—What Is It Good For?* (1857), *reprinted in* THE MAN VERSUS THE STATE WITH SIX ESSAYS ON GOVERNMENT, SOCIETY, AND FREEDOM 331, 375 (Liberty Classics 1981), and John Dewey's pragmatism, *see, e.g.*, JOHN DEWEY, INTELLIGENCE AND MORALS (1910), *reprinted in* JOHN DEWEY, THE POLITICAL WRITINGS 66, 69 (Debra Morris & Ian Shapiro eds., Hackett Publ'g Co. 1993) [hereinafter DEWEY, POLITICAL WRITINGS]; JOHN DEWEY, THE ETHICS OF DEMOCRACY (1888), *reprinted in* DEWEY, POLITICAL WRITINGS, *supra*, at 59–61; JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS 206–07 (Swallow Press 1991) (1927). *Cf.* ARISTOTLE, *supra* note 44, at 5 ("Each person judges well what he knows, and is a good judge.").

47. This was part of Madison's point in *Federalist No. 10*. *See* THE FEDERALIST NO. 10 (James Madison) (contending that "a greater variety of parties and interests" makes the formation of a majority faction less likely). J.S. Mill made the point somewhat more affirmatively. *See* MILL, REPRESENTATIVE GOVERNMENT, *supra* note 44, at 82–83 (defending representative assemblies as "place[s] where every interest and shade of opinion in the country can have its cause even passionately pleaded").

48. Contemporary work in "deliberative democracy" exemplifies this view. Cass Sunstein, for example, contends that "a large point of the system [of representative democracy] is to ensure discussion and debate among people who are genuinely different in their perspectives and position, in the interest of creating a process through which reflection will encourage the emergence of general truths." CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 241 (1993) [hereinafter SUNSTEIN, FREE SPEECH]; *see also* CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 8–9 (2001) (arguing that a diversity of perspectives and interests is vital to effective deliberation and that democratic constitutions are centrally concerned with preserving and promoting such diversity). Sunstein invokes similar views held by the American Framers and John Dewey. *See* SUNSTEIN, FREE SPEECH, *supra*, at 242 (discussing the Framers' views); *id.* at 248 & n.17 (citing Dewey); CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 20–24 (1993) [hereinafter SUNSTEIN, PARTIAL CONSTITUTION] (discussing the Framers' views); *see also* THE FEDERALIST NO. 81 (Alexander Hamilton); THE FEDERALIST NO. 10

grounding functionalist arguments for democracy because it has an obvious relationship to the quality of political outcomes.

If we are looking for Lincoln's "sheet anchor of American republicanism,"[49] therefore, we need to move beyond mere consent and focus on the value of participation. The essence of our democracy is best understood as government by the meaningful participation of the governed.

B. Democratic Participation and Political Speech

On an understanding of democracy to which participation is essential, the importance of political speech is rather obvious. Political speech by citizens is both a form of participation in government and a facilitator of other forms of participation.

As a working conception of *political speech*, we can adopt Cass Sunstein's definition: Speech is political "when it is both intended and received as a contribution to public deliberation about some issue."[50] The act of contributing to public deliberation is a direct form of political participation because, in an ideally functioning democracy, the outcome of deliberation—a political decision, such as the election of a candidate or the enactment of a statute—will reflect the reasonable arguments made by all the participants in the discussion.[51] When those who make political decisions (voters, legislators, etc.) take into account not only the arguments of those who favor that particular decision, but also the arguments of those who oppose it, then the decision has a claim to legitimacy as a truly *collective* decision; members of the losing minority have participated in the decisionmaking process just as members of the winning majority have.[52] Political speech in fact constitutes political decisions to the extent those

(James Madison); JOHN DEWEY, *Creative Democracy—The Task Before Us* (1939), *reprinted in* DEWEY, POLITICAL WRITINGS, *supra* note 46, at 240, 243; JOHN DEWEY, *Democracy and Human Nature* (1939), *reprinted in* DEWEY, POLITICAL WRITINGS, *supra* note 46, at 219, 228; JOHN DEWEY, *John Dewey Responds* (1950), *reprinted in* DEWEY, POLITICAL WRITINGS, *supra* note 46, at 246, 248; JOHN DEWEY, *Liberalism and Social Action* (1939), *reprinted in* 11 JOHN DEWEY: THE LATER WORKS 1925–1953, at 1, 50–51 (Jo Ann Boydston ed., S. Ill. Univ. Press 1987) (1935).

49. ABRAHAM LINCOLN, *The Repeal of the Missouri Compromise and the Propriety of Its Restoration: Speech at Peoria, Illinois, in Reply to Senator Douglas October 16, 1854, in* ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 283, 304 (Roy P. Basler ed., 1946). Lincoln's "sheet anchor" was the principle "that no man is good enough to govern another man, *without that other's consent*." *Id.* But Lincoln had a participatory notion of "consent," as he demonstrated a few lines later: "Allow ALL the governed an equal voice in the government, and that, and that only, is self-government." *Id.* Lincoln's target, of course, was slavery, and more specifically the argument that prohibiting the spread of slavery into the territories denied the (white) people of those territories the power of self-government.

50. SUNSTEIN, FREE SPEECH, *supra* note 48, at 130 (emphasis omitted).

51. Here I follow the considerably more extensive argument in Peters, *Persuasion*, *supra* note 24, which is itself inspired by the arguments of John Rawls. *See* JOHN RAWLS, POLITICAL LIBERALISM (1993).

52. *See* Peters, *Persuasion*, *supra* note 24, at 3–6, 22–31, and sources cited therein.

decisions are responsive to the content of the speech.[53] Of course, democracy in the real world seldom works quite this way; almost invariably some political speech is unheard or ignored by other participants in the debate. But political speech at least affords the potential to influence political decisions.

Political speech also facilitates other forms of participation, most saliently the act of voting. Mere voting without the benefit of deliberation is likely to be ill-informed and therefore to produce poor decisions, offending functionalist justifications of democracy. Perhaps worse, nondeliberative voting is likely to produce decisions that simply aggregate the individual voters' self-interests,[54] and that result should offend those proceduralist justifications that are concerned with promoting individual autonomy and resisting paternalism. Purely aggregative democracy allows no role in decisionmaking for the opinions and interests of the members of the losing minority, who thus cannot be said to have truly participated in the decisionmaking process at all.[55] But freedom of political speech allows for the participation in political deliberation of all the affected parties, which in turn produces political decisions that are—or at least are likely to be—both better-informed and more legitimate than decisions produced on a purely aggregative model.

It shouldn't be controversial, then, to say that political speech is central to democratic participation. The Supreme Court has recognized as much by generally affording political speech the highest level of protection under the First Amendment.[56] And some of the most influential scholarly commentaries on free speech have justified it in whole or in part by virtue of its connection to political participation.[57]

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53. "[V]oting is merely the external expression of a wide and diverse number of activities by means of which citizens attempt to meet the responsibilities of making judgments, which . . . freedom to govern lays upon them." Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255.

54. For critiques of the idea that aggregation of the preferences, or self-interest, of individual voters is sufficient for democratic legitimacy, *see* DWORKIN, *supra* note 32, at 15–19; Joshua Cohen, *Procedure and Substance in Deliberative Democracy*, *in* DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS 407 (James Bohman & William Rehg eds., 1997); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985) [hereinafter Sunstein, *Interest Groups*]; Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984) [hereinafter Sunstein, *Naked Preferences*].

55. *See* Peters, *Persuasion*, *supra* note 24, at 22–31.

56. *See, e.g.*, Republican Party v. White, 536 U.S. 765 (2002) (invalidating restrictions on speech in judicial campaigns pursuant to strict scrutiny); Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969) (invalidating restrictions on subversive speech where speech is not both directed to inciting imminent lawlessness and likely to do so); Buckley v. Valeo, 424 U.S. 1 (1976) (invalidating restrictions on campaign spending pursuant to strict scrutiny under the First Amendment); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (imposing an "actual malice" requirement for defamation actions brought by public officials).

57. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST 105–16 (1980); MEIKLEJOHN, *supra* note 33, at 9–16; SUNSTEIN, FREE SPEECH, *supra* note 48; Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 23 (1971).

C. Participation and Adjudicative Legitimacy

Political speech is central to citizen participation in government, and citizen participation is, on most views, central to democratic legitimacy; these propositions are relatively familiar, if not entirely undisputed. What is perhaps less familiar is the centrality of participation to the legitimacy of adjudication. American adjudication is, paradigmatically, a participatory process, but that fairly obvious fact tends to be taken for granted, even by lawyers. Instead it should be celebrated, for participatory adjudication is, in its own way, a type of democratic governance.

Lon Fuller described adjudication as "a form of decision that defines the affected party's participation as that of offering proofs and reasoned arguments."[58] Fuller's characterization was descriptive, not interpretive; he meant to define the effective boundaries of adjudication, not to explore its normative foundations. But his positive account of adjudication hints at a more normative understanding, one that connects litigant participation to political legitimacy. Earlier, Edward Levi articulated the same hint when he noted that litigants who are subjected to "new" common law rules "have participated in the law making. They are bound by something they helped to make."[59] But Levi, like Fuller, let the suggestion drop there.

These hints provide a glimpse of a larger truth: American adjudication is structured as a participatory enterprise, perhaps to an even greater extent than American politics. A litigant's capacity to influence the outcome of a case to which she is a party is likely to be much more extensive and direct than an ordinary citizen's capacity—as a voter or a political speaker—to influence the outcome of legislative or administrative policymaking. A litigant's influence on a court decision, in fact, is likely to be greater even than the influence of an individual legislator.[60] This is mostly a matter of simple numbers: A typical court decision reflects the contributions of two or, at most, a small handful of actual participants, while most legislative decisions reflect the input of dozens or hundreds of legislators, each of whom represents thousands or millions of con-

58. Fuller, *supra* note 19, at 369.

59. EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 4 (1949).

60. Of course, in adjudication as in politics, a participant's ability to influence the outcome of the process is likely to depend in part upon that participant's economic resources. *See* Peters, *Minimalism*, *supra* note 24, at 1489–90 n.171. Restrictions on adjudicative speech sometimes can be understood in part as mechanisms for mitigating the effects of economic inequality in adjudication, *see infra* note 222, and I suggest below that restrictions on speech outside adjudication, such as campaign financing and spending limits and "fairness" requirements for mass media, might be justifiable as mechanisms for mitigating the effects of economic inequality on political debate, *see infra* notes 330–338 and accompanying text.

stituents. Adjudicative participation is therefore less attenuated than (most instances of) political participation.

Of course it is true that the effectiveness of adjudicative participation—the participation, by proofs and reasoned arguments, of the litigants (usually through their attorneys)[61] in the decisionmaking process—depends to a large extent on the good faith of the judge and, sometimes, the jury. In making legal rulings, the judge must actually respond to the litigants' participation sincerely—must actually rest her decision on the arguments offered by the parties, without precommitment for or against one of those parties or one of those parties' arguments[62]—in order for that participation to have complete legitimating force. The jury, likewise, must actually rest its decision on the proofs offered by the litigants. To the extent that judges and jurors in the real world do not (indeed cannot) live up to this ideal, the participatory element of adjudication may seem like a sham, too much so to allow the process to be fairly characterized as "democratic." Thus Martin Kotler objects:

> Even if all the recognized trappings of the American judicial system existed—even if the parties initiated the action, framed the legal and factual issues, and participated in the resolution of the dispute by submitting proposed findings of fact and conclusions of law—this would not alter the fact that a fully participating litigant's essential position is still that of supplicant. While such a form of decision making might be legitimate in a society committed to a monarchy, it is not in a democracy.[63]

The suppliant nature of adjudication, for Kotler, "compels the conclusion of illegitimacy" in adjudicative decisionmaking.[64]

But this surely is an overstatement, and not just because it is hard to swallow such a casual condemnation of a centuries-old, constitutionally enshrined[65] decisionmaking procedure. The question is not so much how adjudication works, or doesn't work, in practice, but how adjudication is *structured* to work in practice. And the structure of American adjudication, however much it may be honored in the breach, clearly is designed to promote meaningful (indeed,

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61. In Part III.D., *infra*, I discuss the fact that litigants typically participate in adjudication through the agency of lawyers and the connection between that fact and my underlying themes in this Article.

62. On the impermissibility of judicial precommitment, see the discussion *infra* Part IV.B.

63. Martin A. Kotler, *Social Norms and Judicial Rulemaking: Commitment to Political Process and the Basis of Tort Law*, 49 U. KAN. L. REV. 65, 82 (2000).

64. *Id.*

65. Article III, after all, creates "the judicial power." U.S. CONST. art. III, § 1.

decisive) litigant participation. Consider the following facts about our judicial system:[66]

- A court case in the United States is not supposed to come into existence at all unless and until one of the litigants brings it into existence by means of a complaint.[67]
- Except in cases involving absent parties who will be directly bound by the result, such as class actions, the judge typically must defer to a decision by the litigants to end a case prior to a final judgment on the merits.[68] (Many contemporary procedural statutes and court rules in fact encourage litigants to resolve disputes without any substantive intervention by the court at all.[69])
- The litigants, not the judge or jury, locate relevant facts,[70] identify relevant legal authorities,[71] and determine how to combine them into coherent legal arguments. Judges, for their part, are expressly limited in their ability to rely on facts not proven by the litigants,[72] are tradition-

66. I focus here on procedures in civil cases. Criminal prosecutions differ because they determine whether the government may use its coercive power to punish someone. So, many procedures in criminal cases are skewed in the direction of protecting the defendant from abuse of the government's power (such as the requirement of a grand jury indictment for most federal prosecutions, *see* U.S. CONST. amend. V; FED. R. CRIM. P. 7). Procedures like the grand jury requirement seem to depart from the litigant-driven model of American civil adjudication, but in fact they only depart from that model with respect to one of the litigants—the government—and they do so for the purpose of protecting the other litigant (the defendant) under the specially freighted circumstances of a criminal case. That said, I think my point here about the participatory quality of American adjudication applies with as much force to criminal as to civil cases, and I can't think of any reason why this Article's ultimate conclusions about the function and justification of evidentiary rules would differ according to the nature of particular cases.

67. *See* FED. R. CIV. P. 3 ("A civil action is commenced by filing a complaint with the court.").

68. *See, e.g.*, *id.* 41(a)(1) (allowing dismissal of an action without leave of the court by "stipulation of dismissal signed by all parties who have appeared in the action"); *cf. id.* 23(e) (requiring court approval for dismissal of a class action).

69. *See, e.g.*, 28 U.S.C. § 651(b) ("Each United States district court shall authorize, by local rule . . . , the use of alternative dispute resolution processes in all civil actions . . . ."); *id.* § 654(a) (With certain exceptions, "a district court may allow the referral to arbitration of any civil action . . . pending before it when the parties consent.").

70. *See, e.g.*, FED. R. CIV. P. 11(b)(3) (requiring that papers presented to the court be based upon factual contentions that "have evidentiary support or . . . are likely to have evidentiary support"); *id.* 26–37 (providing for litigant-driven discovery).

71. *See, e.g.*, *id.* 8(a) (requiring pleadings that set forth claims to state the grounds of the claim and of the court's jurisdiction); *id.* 11(b)(2) (requiring that litigants certify to the court that their "claims, defenses, and other legal contentions" be "warranted by existing law or by a nonfrivolous argument for" a change in the law); *id.* 56(c) (requiring that a party seeking summary judgment demonstrate an "entitle[ment] to a judgment as a matter of law").

72. Federal judges may take "judicial notice" of certain facts not in the record, *see, e.g.*, FED. R. EVID. 201, but only of facts "not subject to reasonable dispute," *id.* 201(b). However, even the process of taking judicial notice is largely litigant-driven. Under FRE 201, while a court "may take judicial notice, whether requested or not," *id.* 201(c), the court "*shall* take judicial notice if requested by a party and supplied with the necessary information," *id.* 201(d) (emphasis added), and "[a] party is entitled upon

> ally discouraged from relying on legal arguments not made by the parties,[73] and often are required to write opinions in which they demonstrate their responsiveness to the litigants' proofs and arguments.[74]

If judges or jurors in practice sometimes deviate from these structural norms, the result is not to render adjudication illegitimate on a wholesale basis, but simply to demonstrate that adjudication done in bad faith can be corrupted into illegitimacy.[75]

Which brings us to a second response to the cynicism expressed by Kotler, which is that it is at least as applicable to democratic politics as to adjudication. Participants in democratic politics, too, are supplicants to the whims of a "judge and jury" in the form of the political majority.[76] Those seeking political change in a democracy must convince a majority of their fellow citizens (in an election or referendum) or fellow legislators (in a legislative assembly) to vote in favor of that change. Interestingly—and here is a point seemingly missed by Fuller—that process of persuasion, like adjudication, also typically proceeds by means of proofs

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timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed," *id.* 201(e).

73. Such discouragement tends to be implicit, as in a recent Supreme Court decision in which the Court reversed a court of appeals decision after noting—somewhat snidely, one might think—that "the Court of Appeals based its decision entirely on a ground that was not relied upon below and that was 'virtually ignored by the parties and the amicus in their respective briefs.'" Ashcroft v. ACLU, 535 U.S. 564, 572 (2002) (citation omitted).

74. The Federal Rules of Civil Procedure (FRCP), for instance, require the court to "find the facts specially and state separately its conclusions of law thereon" after a bench trial, a requirement typically fulfilled by a written opinion. FED. R. CIV. P. 52(a). Most state systems have similar requirements. *See* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 12.2, at 539–43 (2d ed. 1993); FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE § 7.6, at 399 (5th ed. 2001). Trial judges often invite counsel for the litigants to submit proposed findings of fact and conclusions of law. *See* FRIEDENTHAL, *supra*, § 12.2, at 541–42; JAMES ET AL., *supra*, § 7.6, at 399.

75. Admittedly I am glossing over some important complexities here. What if the litigants (or one of them) or their attorneys are incompetent in presenting proofs and reasoned arguments? May the judge then depart from the proofs and arguments, or at least the arguments, actually presented and supplement them with the judge's own ideas about how the case should be argued? (Fuller asked this question and gave a rather ambivalent answer. *See* Fuller, *supra* note 19, at 388–91.) May the judge, for example, base her decision on a controlling case that the parties failed to argue? Surely that happens often, explicitly or otherwise. And it seems right and fair that it should, despite the apparent cost to the value of participation. We might draw an analogy here to John Hart Ely's "representation reinforcement" theory of constitutional judicial review. In that context, the "nondemocratic" intervention of judicial review might be thought necessary to promote the proper "democratic" functioning of the political system. *See* ELY, *supra* note 57, at 73–104. In the incompetent counsel context, too, the nondemocratic intervention of the court might be thought necessary to promote the proper democratic functioning of the adjudicative process, especially where the skill or resources of one participant in that process are being greatly outmatched by those of the other. Of course it sometimes will be difficult for a judge to know where to draw the line on these matters.

76. Here I follow my more extensive arguments in Peters, *Persuasion*, *supra* note 24.

and reasoned arguments.[77] Reliance on "naked preferences"[78] is not usually enough to win the day in American political debate.

Of course there is nothing to stop citizens or legislators from relying on naked preferences when they actually *vote*; indeed there is less institutional protection, and perhaps less ethical stigma, against voters or legislators doing so than against judges and juries doing so when they make their decisions. (Judges must write opinions explaining their decisions in non-self-interested terms; voters and legislators need not. And jury verdicts that a judge determines to be against the manifest weight of the evidence can be overturned in favor of a new trial.[79]) Yet somehow the suppliant position in which we as citizens find ourselves with respect to a majority of our fellow citizens does not generally trigger charges that our supposedly democratic political system is in fact democratically illegitimate. The fact that the same dynamic of supplication exists in adjudication shouldn't prompt such charges there, either.

D. Democratic Participation and Adjudicative Speech

All of this simply underscores the strangeness of a regime in which restrictions on the speech necessary for meaningful participation in politics are presumptively unconstitutional, while restrictions on the speech necessary for meaningful participation in adjudication don't draw a constitutional second glance. Both politics and adjudication in America are structured to be participatory in a democratic sense; neither of them is perfectly so in practice, for essentially the same reasons. The potential whims of the majority don't convince us that generally unfettered speech in the political realm is a useless exercise, so why should the potential whims of the judge or jury convince us of this in the adjudicative context?

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77. Fuller contrasted adjudication with two other "forms of social ordering": contract and elections. *See* Fuller, *supra* note 19, at 363–64. Interestingly, in describing the "modes of participation" in each form, Fuller focused rather holistically on adjudication and contract but quite narrowly on elections; he described the "mode of participation" in contract as "negotiation," in adjudication as "presentation of proofs and reasoned arguments," but in elections simply as "voting." *Id.* at 363. Surely there is much more to elections than the final act of voting, just as there is much more to contracts than the final act of executing them and much more to adjudication than the judge's ultimate decision. But aside from a passing reference to the "optimum conditions" of elections—including "an intelligent and fully informed electorate, an active interest by the electorate in the issues, [and] candor in discussing those issues by those participating in public debate," *id.* at 364—Fuller ignored the complex set of participatory dynamics that contributes to political decisions. Indeed it is somewhat strange that he fixated only on "elections" rather than on the entire political process of which elections are only a part. Had Fuller paid more attention to those dynamics, he might not have drawn such a sharp contrast between adjudicative participation on the one hand and "electoral" participation on the other.

78. Cass Sunstein's perfectly evocative term. *See* Sunstein, *Naked Preferences*, *supra* note 54.

79. *See* FED. R. CIV. P. 59; JAMES ET AL., *supra* note 74, § 7.24, at 462–63.

Yet adjudicative speech in our system is routinely and severely limited by rules of evidence and procedure, by judicial rulings pursuant to those rules, and by canons of professional ethics and judicial "gag orders" that stifle the speech of litigants and attorneys outside the courtroom. In the Introduction, I rather casually described adjudicative speech as "speech to courts";[80] let me now be a bit more precise and define it, adapting Cass Sunstein's definition of political speech, as speech that "is both intended and received as a contribution to [a court's] deliberation about some issue."[81] So defined, adjudicative speech is regularly, indeed almost casually, restricted inside and outside American courts of law. Frederick Schauer describes our prevailing treatment of adjudicative speech this way:

> Trials, of course, are highly structured affairs, in which there appears to be quite little free speech. There are elaborate rules about who goes when, about who speaks, and about who does not speak. There are rules about how to speak, and there are rules about what not to say. All of that part of the law of evidence that deals with relevance and materiality can be thought of as a prohibition on speech, a prohibition on saying what (a judge believes) is irrelevant to the particular matter at hand. Those who persist in saying irrelevant things after a ruling by the judge risk punishment for contempt, and thus it is no exaggeration to describe a trial as a place in which people run the risk of imprisonment for saying things that a government official, a judge, believes to be unrelated to the matter at hand.
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> . . . If we were to move our thinking about what happens at a trial away from the category "trials" and into the category "free speech," it would appear that the very institution we call a trial exists by virtue of an elaborate system of restrictions on the freedom of speech, restrictions whose willful violation carry the ultimate threat of imprisonment for contempt of court. The rules that constitute the trial process thus tell people what to say and tell them when to say it, and the trial that is both created and regulated by prohibitions on speech is thereby among the most constrained of all communicative environments.[82]

But courts have never found restrictions on adjudicative speech to be constitutionally controversial except when judges reach outside their courtrooms to stifle litigant or attorney speech. And even in those cases the courts have allowed much more constraint on speech than would be tolerated in the

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80. *See supra* text accompanying note 21.

81. SUNSTEIN, FREE SPEECH, *supra* note 48, at 130 (emphasis omitted). "A court's deliberation" might include the deliberations of both jury and judge, or of either of them. I will bend the edges of this definition a bit in the discussion that follows, especially in Part IV.B., when I discuss in more detail the distinction between political and adjudicative speech; but this description should suffice as I lay out the basic arguments of this Article.

82. Schauer, *supra* note 14, at 689–90.

seemingly analogous political context. Put simply, adjudicative speech in our system is substantially less *free* than "pure" political speech. A quick look at evidentiary rules, and at a few of the rare judicial decisions that have applied the First Amendment to adjudicative speech, will illustrate the point.

1. Rules

In illustrating the ubiquity and severity of formal restrictions on adjudicative speech in our courts, I will focus on rules of evidence as opposed to rules of procedure.[83] By rules of evidence, I mean rules like the FRE that govern the content and form of proofs and arguments presented to the trier of fact and the manner of presenting them. I focus here on rules of evidence rather than rules of procedure because, while most procedural rules impose only content-neutral restrictions on speech,[84] most rules of evidence are classic examples of content-based speech restrictions.

Consider some illustrations from the FRE:

> *Relevancy*. Under FRE 402, "[e]vidence which is not relevant is not admissible." Evidence is "relevant" under FRE 401 if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FRE 403, moreover, allows the exclusion even of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." When combined with FRE 104, which requires the court to determine whether evidence is admissible pursuant to the Rules, the relevancy provisions of the FRE allow a judge to prohibit adjudicative speech that she concludes is not relevant to the action or, even if relevant, is simply not worth the cost of allowing it to be heard.

83. For examples of restrictions on adjudicative speech that apply outside the courtroom, *see infra* Part I.D.2.

84. Many, perhaps most, rules of procedure do not really regulate speech at all, at least not in a way that limits it. The discovery provisions of the FRCP, for instance, do not limit speech so much as they compel it. *See* FED. R. CIV. P. 26–37. The rules regarding service of process do not regulate speech at all in any meaningful sense, *see id.* 4, 4.1; the rules governing joinder of parties and claims regulate speech only incidentally to what are probably better understood as regulations of conduct, *see id.* 17–25. And most of those procedural rules that do regulate speech in a meaningful sense do so in a content-neutral, not a content-based, way, serving simply as "time, place, and manner" restrictions. For example, FRCP 7 specifies the form in which claims and defenses may be presented to the court, but not the content of those claims or defenses. *See id.* 7. Not all rules of procedure are content-neutral, however. Pleading rules often require a particular type (or at least a particular quality) of speech, *see, e.g.*, *id.* 8, 9, and "ethical" rules like FRCP Rule 11 require litigants and attorneys to certify that their speech meets certain content requirements, *see id.* 11.

Character evidence, other crimes, and past sexual behavior. The FRE presumptively prohibit the use of character evidence, evidence of other crimes, or evidence of the past sexual behavior of alleged victims in order to prove the likelihood of conforming or similar conduct.[85] This prohibition applies regardless of the possibility that such evidence will in fact be relevant to an issue in the case.

Witness competency and hearsay. FRE 602 prohibits a witness from testifying "unless . . . the witness has personal knowledge of the matter." FRE 701 limits the ability of lay witnesses to give opinion or inferential testimony; FRE 702 imposes conditions that must be met in order for expert witnesses to testify; and FRE 704 prohibits experts from testifying "as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto." FRE 802 prohibits the use of hearsay evidence, which is defined in FRE 801, subject to exceptions catalogued in FRE 803 through 807. The upshot of these rules is that some would-be witnesses cannot speak at all during trial, while those who can testify may speak only on certain subjects.

Authenticity of evidence. The FRE prohibit the use of evidence that does not pass certain tests of authenticity. FRE 901 generally requires that evidence be supported by proof "that the matter in question is what its proponent claims"—for example, testimony as to the genuineness of a person's alleged handwriting by someone familiar with it. FRE 1002 requires the use of originals to prove the content of writings, recordings, and photographs.[86]

Miscellaneous categories of inadmissible evidence. In the service of policy goals ancillary to the main issues in a lawsuit, the FRE exclude certain types of potentially relevant evidence, including evidence of subsequent remedial measures in a tort or product defect case (FRE 407), evidence of settlement offers in civil cases (FRE 408), evidence that a defendant has paid medical expenses of a plaintiff (FRE 409), evidence of plea negotiations in criminal cases (FRE 410), and evidence of a defendant's liability insurance (FRE 411). FRE 501 incorporates evidentiary privileges recognized either by principles of federal common law (with respect to substantive federal questions) or by state law (with respect to substantive state law questions). Many evidentiary privileges, such as the attorney-client privilege, the physician-patient privilege, and the spousal privilege, prohibit the

85. *See* FED. R. EVID. 404 (evidence of character and other crimes); *id.* 412 (evidence of a victim's past sexual behavior). There are exceptions laid out in these and other rules. *See, e.g., id.* 413, 414, 415 (providing exceptions to prohibitions on evidence of other crimes); *id.* 609 (allowing evidence of certain other crimes to impeach a witness).

86. Exceptions appear in FRE 1003 and 1004.

> introduction of evidence in order to encourage, or not to discourage, certain types of out-of-court communications deemed important.[87]

These evidentiary rules impose content-based restrictions on adjudicative speech; they limit the substance of what litigants and their lawyers may say in court in an attempt to persuade the judge or jury to make a particular decision. And the theory behind these limitations is that the prohibited evidence may influence that decision (which is, after all, a government decision) in a way that society deems undesirable. The rules therefore seem precisely analogous to content-based restrictions on political speech. If restrictions like these were in fact imposed on participants in politics proper—on street-corner pamphleteers, op-ed writers, political candidates, or politicians—they would, with scarcely a moment's thought, be stricken down under strict scrutiny. "Content-based regulations are presumptively invalid";[88] "[t]o allow a government the choice of permissible subjects for public debate would be to allow the government control over the search for political truth."[89] *Political* truth, apparently, but not *adjudicative* truth.

Moreover, evidentiary rulings are prior restraints—supposedly "the most serious and the least tolerable infringement on First Amendment rights."[90] Judicial rulings enforcing evidentiary rules are essentially "judicial orders *forbidding* certain communications [that are] issued in advance of the time that such communications are to occur," which is the classic example of a prior restraint.[91] Violations of evidentiary rulings—that is, attempts to introduce evidence that a court has prohibited—can result in contempt citations,[92] and convictions for contempt are constitutional even if the conduct triggering the contempt citation was constitutionally protected.[93]

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87. *See generally* EDWARD J. IMWINKELRIED, THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES § 6.2.1, at 447–53 (Richard D. Friedman gen. ed., 2002) (assessing "instrumental" and "humanistic" rationales for the spousal privilege); *id.* § 6.2.4, at 471–77 (same regarding the attorney-client privilege); § 6.2.6, at 490–502 (same regarding the physician-patient privilege).

88. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992); *see also* Republican Party v. White, 536 U.S. 765, 774 (2002) (content-based restrictions are subject to strict scrutiny); Turner Broad. Sys. v. FCC, 512 U.S. 622, 636 (1994) (same).

89. Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 538 (1980).

90. Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

91. Alexander v. United States, 509 U.S. 544, 550 (1993) (quoting MELVILLE NIMMER, NIMMER ON FREEDOM OF SPEECH § 4.03 (1984)).

92. *See, e.g.*, Zal v. Steppe, 968 F.2d 924, 927–29 (9th Cir. 1992) (upholding a contempt citation for violation of evidentiary rulings as consistent with the First Amendment).

93. *See* Walker v. City of Birmingham, 388 U.S. 307 (1967). This principle is known as the "collateral bar rule." *See* CHEMERINSKY, *supra* note 20, § 11.2.3.2, at 922–23.

2. Decisions

Given that evidentiary rules are content-based prior restraints on what looks a lot like political speech, one would expect many of them not to exist—to have been invalidated by a court pursuant to strict scrutiny, or at least to have been challenged in a court under the First Amendment. But, so far as my research reveals, none of these things have occurred with respect to any provision of the FRE or of state rules of evidence. In the cases that have come closest to such a challenge, courts invariably, and usually summarily, have declared that adjudicative speech simply is not entitled to the same quantum of First Amendment protection as political speech.

For example, the Ninth Circuit in *Zal v. Steppe*[94] denied the habeas petition of Zal, an attorney who had been cited for contempt for violating a state trial court's orders not to present certain defenses or use certain inflammatory words during trial. Zal had represented abortion protestors charged with criminal trespass. He was ordered not to use words like "baby killers," "holocaust," and "Hitler" before the jury. Asserting an obligation to obey only "higher law," Zal apparently used many of the words on the court's off-limits list. "In sum, Zal was held in contempt twenty times."[95] Zal contended that the trial judge's orders in limine were prior restraints that violated his First Amendment rights.[96]

Over the partial dissent of one judge, the Ninth Circuit panel rejected Zal's free speech claim on the ground that "the trial judge is charged with preserving the decorum that permits a reasoned resolution of issues. Zealous counsel cannot flout that authority behind the shield of the First Amendment."[97] The court addressed only the issue of whether Zal could be held in contempt for violating the trial court's evidentiary orders—not the underlying question of whether the orders themselves contravened the First Amendment.[98] In a separate concurrence, however, Judge Trott did address that question:

> I believe neither a defendant nor his attorney has a right to present to a jury evidence that is *irrelevant* to a *legal* defense to, or an element of, the crime charged. . . . If society deems important certain "explanations," those explanations explicitly can become part of the law. . . .
>
> . . . .

94. 968 F.2d at 924.
95. *Id.* at 926.
96. *Id.* at 927.
97. *Id.* at 929.
98. The court should have addressed this question. As the court acknowledged, California, the state of Zal's conviction, does not have a collateral bar rule. *See id.* at 927 (citing *In re* Berry, 436 P.2d 273, 281 (Cal. 1968) (en banc)). Thus the question of whether Zal had a constitutional right to present the excluded evidence was relevant to the question of whether his contempt citation was constitutionally permissible.

> Traditional First Amendment analysis also supports the idea that lawyers (and others) have no First Amendment right to speak freely in a courtroom: a courtroom is not a public forum in the technical sense that this terminology is used in free-speech analysis. . . . Although courtrooms have always been devoted to debate, they have never been devoted to free debate, but only to debate within the confines set by the trial judge and the rule of law. The First Amendment does not allow an attorney to speak beyond those confines.
>
> . . . .
>
> Nor am I convinced by [the] argument that the trial court's order violated Zal's *clients*' First Amendment rights. . . . If a plaintiff or defendant has no trial right to present evidence or testimony, then the evidence or testimony may not be presented. In a courtroom, during a judicial proceeding, the First Amendment simply does not protect speech which exceeds the speaker's trial rights. Until today, I would have thought this proposition too obvious for comment.[99]

What is striking about these excerpts from Judge Trott's opinion is how much they take for granted. Zal's (and his clients') freedom of adjudicative speech extends only as far as their "trial rights"—that is, their right to present evidence that "society deems important." Courtrooms simply are *not* public forums. But why not? What are the grounds of distinction between the tightly constrained "debate" that "traditionally" takes place in a courtroom and the largely unconstrained—indeed, constitutionally protected—debate that takes place in other government decisionmaking contexts? Why should a judge be able to prohibit Zal from saying to a jury what he has a clear First Amendment right to say to those same twelve people, in their capacity as voting citizens, from a soapbox on a street corner?

Similar question begging can be found in several Supreme Court opinions dealing with the contempt power and attorney disciplinary proceedings. The Court has held that a lawyer may be cited for contempt if, following an adverse ruling, he "resist[s] it or . . . insult[s] the judge" rather than merely "respectfully . . . preserve[s] his point for appeal."[100] At the same time, the Court has held that vehement language alone is not enough to justify a contempt citation; the language "must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil."[101] The former holding suggests a broad judicial license to censor adjudicative speech; the latter suggests something akin to the

99. 968 F.2d at 930–32 (Trott, J., concurring).

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

101. *In re* Little, 404 U.S. 553, 555 (1972) (per curiam) (quoting Craig v. Harney, 331 U.S. 367, 376 (1947)).

"clear and present danger" test formerly applied to subversive political speech.[102] But none of these contempt cases was a First Amendment case, at least not expressly so; the cases involved either the interpretation of the federal criminal rule providing for criminal contempt citations[103] or some rather vague notions of due process.[104] Nor did any of these decisions actually assess the validity of the underlying evidentiary rules or rulings whose violation produced the contempt citation.

The Supreme Court, however, has used the First Amendment to overturn the punishment of an attorney for *out*-of-court speech about a pending case that violated a state's rules of professional conduct. *Gentile v. State Bar*[105] involved restrictions on speech that were somewhat analogous to evidentiary rules or rulings but that—rather crucially, in light of the Court's contempt precedent—applied to speech that took place outside the courtroom. Gentile, an attorney, held a press conference following the indictment of his client at which he proclaimed his client an innocent "scapegoat" and blamed the crime on "crooked cops."[106] The State Bar of Nevada later reprimanded Gentile for violating a state supreme court rule prohibiting an attorney from making "an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding."[107] Five Justices on a fractured Court held the state rule void for vagueness;[108] but a different alignment of five Justices held that the rule survived what appeared to be strict (or at least heightened) scrutiny, although the Court never expressly labeled it as such.[109]

Despite applying heightened scrutiny, the *Gentile* Court drew an expansive general distinction between (less-protected) adjudicative speech and (more protected) political speech. Gentile argued that his speech was shielded by the "clear and present danger" standard applied by the Court in cases involving judicial attempts to prohibit or punish newspapers and others for reporting or

102. *See, e.g.*, Dennis v. United States, 341 U.S. 494 (1951). The "clear and present danger" formulation has been supplanted by the test laid out in *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969).

103. *See Sacher*, 343 U.S. at 6–14.

104. The per curiam opinion in *In re Little*, which reversed a conviction in a state court, is astoundingly unclear about its supposed basis in federal law. But the First Amendment is never mentioned, and the general tenor of the brief opinion suggests a grounding in due process. *See In re Little*, 404 U.S. at 553–56.

105. 501 U.S. 1030 (1991).

106. *Id.* at 1034.

107. *Id.* at 1033; *see* NEVADA S. CT. R. 177.

108. *Gentile*, 501 U.S. at 1048–50 (Kennedy, J., for the Court).

109. *Id.* at 1065–76 (Rehnquist, C.J., for the Court). The Court held that the rule served Nevada's "legitimate interest" in "protect[ing] the integrity and fairness of [its] judicial system," *id.* at 1075, and that it was "narrowly tailored" to serve that interest, *id.* at 1076.

commenting on pending court cases.[110] In rejecting that argument, the Court began with the "unquestionable" premise that "in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed."[111] After all, "'[t]he very word 'trial' connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper.'"[112] The very "theory upon which our criminal justice system is founded" holds that "[t]he outcome of a criminal trial is to be decided by impartial jurors, who know as little as possible of the case, based on material admitted into evidence before them in a court proceeding."[113]

From these premises the Court reasoned that, in the interest of protecting "the integrity and fairness of a State's judicial system," attorney speech outside the courtroom may be circumscribed as well.[114] The Nevada rule in question was "narrowly tailored to achieve those objectives" because it "applie[d] only to speech that is substantially likely to have a materially prejudicial effect; it [was] neutral as to points of view, applying equally to all attorneys participating in a pending case; and it merely postpone[d] the attorneys' comments until after the trial."[115]

Gentile involved rules of professional conduct aimed at extrajudicial attorney speech, not rules of evidence applied in the courtroom. But it is not difficult to extrapolate from the *Gentile* Court's reasoning to a result in a hypothetical First Amendment challenge to evidentiary rules. The rule at issue in *Gentile* was in fact a sort of evidentiary rule: It prohibited attorneys from making statements likely to "prejudice" the jury in a pending case, much as rules against, say, the admission of irrelevant evidence are designed to do. If the state's interest in protecting the "integrity and fairness" of its judicial system is adequate to sustain the rule challenged in *Gentile* (or at least a sufficiently clear version of that rule), it must be adequate to sustain evidentiary rules that apply to attorney (or litigant) speech *within* the courtroom. Like the "gag rule" upheld in *Gentile*, evidentiary rules are intended to preserve the "integrity and fairness" of adjudication by confining the jury's decision to grounds that, in the words of Judge Trott in *Zal v. Steppe*, "society deems important."[116] Evidentiary rules too are "neutral as to points of view, applying equally to all attorneys [and litigants] participating in a

110. *See id.* at 1069 (citing Neb. Press Ass'n v. Stuart, 427 U.S. 539 (1976)); Bridges v. California, 314 U.S. 252 (1941)). I discuss the *Stuart* and *Bridges* cases *infra* notes 309–324 and accompanying text.

111. *Id.* at 1071.

112. *Id.* at 1070 (quoting *Bridges*, 314 U.S. at 271).

113. *Id.*

114. *Id.* at 1075.

115. *Id.* at 1076.

116. 968 F.2d 924, 930 (9th Cir. 1992) (Trott, J., concurring).

pending case," and they too "merely postpone[] the attorneys' [or litigants'] comments until after the trial."[117]

But this analysis simply begs the important questions. Why is the preservation of the "integrity and fairness" of the process a sufficiently strong state interest in the context of adjudication but not in the broader context of politics?[118] (What, in fact, does "the integrity and fairness of [the] judicial system" really mean?) Why does society have the authority to decide—indeed, to overrule the participants' decisions about—which facts and arguments are "important" enough to influence ("prejudice"?) decisions of courts but not of legislatures or of voters? Why can attorneys' and litigants' adjudicative speech legitimately be "postpone[d] . . . until after the trial"—at which point, of course, it has become irrelevant to its purpose of influencing the court's decision—while citizens' and legislators' political speech cannot be "merely postponed" until after the election is held or the statute is enacted?

Why, in short, is adjudication so different from politics that stringent restrictions on participants' speech are justified, even required, in the former but not in the latter?

3. *Velazquez*

Comparing *Gentile* and *Zal* to the Supreme Court's recent decision in *Legal Services Corp. v. Velazquez*[119] complicates things even further. In *Velazquez*, the Court (in a 5-4 decision) struck down, as violative of the First Amendment, a federal statutory provision "prohibit[ing] legal representation funded by recipients of [Legal Services Corporation] moneys if the representation involves an effort to amend or otherwise challenge existing welfare law."[120] The Legal Services Corporation (LSC) is a federal agency created by Congress "for the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance."[121] The restriction at issue was among the many conditions imposed by Congress over the years on the use of LSC funds;[122] none of the others was at issue in the case, and arguably

117. *Gentile*, 501 U.S. at 1076.

118. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 48 (1976) (rejecting the argument that the "governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify" limits on campaign expenditures).

119. 531 U.S. 533 (2001).

120. *Id.* at 536–37.

121. *Id.* at 536 (quoting 42 U.S.C. § 2996b(a) (2000)).

122. *See id.* at 537–38. The Court described the situation as follows:

> From the inception of the LSC, Congress has placed restrictions on its use of funds. For instance, the LSC Act prohibits recipients from making available LSC funds, program personnel, or equipment to any political party, to any political campaign, or for use in "advocating or opposing any ballot measures." 42 U.S.C. § 2996e(d)(4). See § 2996e(d)(3). The Act further

none of them applied as broadly as the challenged restriction, which had been interpreted by the LSC to require its funded attorneys to withdraw "[e]ven in cases where constitutional or statutory challenges [to existing welfare laws] became apparent after representation was well under way."[123] Thus the challenged restriction acted as a sort of evidentiary rule, prohibiting LSC-supported attorneys from making certain arguments on behalf of their clients in court cases.

In contrast to *Gentile*, in which the Court approved of restrictions on attorney speech as necessary to preserve the judicial function, the *Velazquez* Court invalidated these speech restrictions on the ground that they actually impaired the judicial function:

> Interpretation of the law and the Constitution is the primary mission of the judiciary when it acts within the sphere of its authority to resolve a case or controversy. *Marbury v. Madison* ("It is emphatically the province and the duty of the judicial department to say what the law is"). An informed, independent judiciary presumes an informed, independent bar. Under [the challenged statutory provision], however, cases would be presented by LSC attorneys who could not advise the courts of serious questions of statutory validity. The disability is inconsistent with the proposition that attorneys should present all the reasonable and well-grounded arguments necessary for proper resolution of the case. By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power.[124]

The *Velazquez* Court thus expressly recognized the connection between attorney (and, implicitly, litigant) speech and the legitimacy of adjudication: The "analysis of certain legal issues" and their "presentation to the courts" is "speech and expression upon which courts must depend for the proper exercise of the judicial power."[125] By seeking to "prohibit" that analysis and to "truncate" that presentation in cases litigated by LSC-funded attorneys, Congress had violated

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proscribes use of funds in most criminal proceedings and in litigation involving nontherapeutic abortions, secondary school desegregation, military desertion, or violations of the Selective Service statute. §§ 2996f(b)(8)–(10) (1994 ed. and Supp. IV). Fund recipients are barred from bringing class-action suits unless express approval is obtained from LSC. § 2996e(d)(5).

Id.

123. *Velazquez*, 531 U.S. at 539.

124. *Id.* at 545 (citations omitted).

125. *See* Laura K. Abel & David S. Udell, *If You Gag the Lawyers, Do You Choke the Courts? Some Implications for Judges When Funding Restrictions Curb Advocacy by Lawyers on Behalf of the Poor*, 29 FORDHAM URB. L.J. 873, 899 (2002) ("In *Velazquez*, the Court's holding ultimately rested on a recognition that the opportunity to advance all relevant legal arguments is essential to the proper functioning of the judiciary.").

"the proposition that attorneys should present *all* the reasonable and well-grounded arguments necessary for proper resolution of the case."

But why is it that Congress may not, consistent with the First Amendment, "prohibit" or "truncate" attorneys' ability to present proofs and arguments to the court in *Velazquez*, while the Nevada Supreme Court may do so in *Gentile* (and while Congress, through delegation to the U.S. Supreme Court,[126] apparently may do so by means of the FRE)? The key distinction must lurk behind the *Velazquez* Court's understated qualification that arguments must be "reasonable," "well-grounded," and "necessary for proper resolution of the case" in order to be the type of "speech . . . upon which courts . . . depend for the proper exercise of the judicial power." Perhaps arguments about the constitutionality of welfare laws are "reasonable," "well-grounded," and "necessary for proper resolution of the case" in litigation involving welfare benefits, while arguments about the morality of abortion in a prosecution of trespassing pro-lifers, or extrajudicial speech about police and prosecutorial misconduct in a criminal case, simply are not "reasonable," "well-grounded," or "necessary for proper resolution" of those cases.

Such assumptions are necessary to reconcile *Velazquez* with *Gentile*, with *Zal*, and with the complete absence of any First Amendment challenges to evidentiary rules. But they are assumptions, not justifications. The Court has not explained why certain legal arguments are "reasonable" and others are not; more to the point, it has not explained why the government may, consistent with the First Amendment, determine which legal arguments are reasonable and which are not,[127] given the near-truism that the government may not make such determinations in the political context.[128]

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126. *See infra* note 201 (outlining the procedure for adoption of the Federal Rules).

127. *Cf.* Larry Alexander, *Banning Hate Speech and the Sticks and Stones Defense*, 13 CONST. COMMENT. 71, 73 (1996). Alexander writes:

> The general view reflected in both the theories of freedom of speech and the Supreme Court's first amendment jurisprudence is that it is better to let false or pernicious ideas compete in the marketplace of ideas, where they are unlikely to prevail in the long run, than to trust government to distinguish the false from the true and the pernicious from the beneficial.

Id.

128. This justification gap is made all the more salient by the *Velazquez* Court's conceptualization of constitutional litigation as a type of political speech. 531 U.S. at 548 ("It is fundamental that the First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' There can be little doubt that the LSC Act funds constitutionally protected expression . . . .") (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964); Roth v. United States, 354 U.S. 476, 484 (1957)). *See also* Robert L. Tsai, *Conceptualizing Constitutional Litigation as Anti-Government Expression: A Speech-Centered Theory of Court Access*, 51 AM. U. L. REV. 835 (2002) (arguing that constitutional litigation is a type of dissident or antigovernment speech).

II. SOME UNSATISFACTORY JUSTIFICATIONS

The unanswered theoretical question, then, is why extensive content-based restriction of adjudicative speech is permissible, even desirable, while extensive content-based restriction of political speech is not. I have been able to think of six reasonable-sounding answers to this question. Five of them—the five discussed in this part—do not end up working very well, although some of them provide hints of a more satisfactory sixth answer, which I offer in Part III.

A. The Argument From Relative Importance

Perhaps the most obvious justification of the differential First Amendment treatment of adjudicative and political speech is simply that adjudication is less important than politics. If adjudication is less important than politics, then adjudicative speech might be less important than political speech; this fact in turn might justify restricting adjudicative speech to a greater degree than political speech, on roughly the same theory that other kinds of relatively "low-value" speech—fighting words,[129] obscenity,[130] defamation,[131] commercial speech[132]—can be restricted.

The trouble is that adjudication is not obviously less important than politics in any way that seems to matter; or if it is, it is not less important *enough* to justify the vastly discrepant treatment of speech in the two contexts. This is true on two levels.

First, to the parties most immediately affected—the litigants themselves—adjudication is likely to be tremendously important, perhaps more important than politics ever will be. Courts can order people to jail, to pay large amounts of damages, to perform onerous injunctions—things that will affect their lives more acutely and directly than most political decisions can. Equally to the point, adjudicative *speech* is likely to be proportionally more effective than political speech, for the reason I suggested earlier: The ability of a single litigant to influence a court's decision that will bind her is likely to be much greater than the ability of a single citizen, acting as a voter or a political speaker, to influence executive or legislative decisions that bind her.

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129. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

130. *See, e.g.*, Miller v. California, 413 U.S. 15 (1973); *Roth*, 354 U.S. at 476.

131. *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749 (1985); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

132. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976).

Tocqueville's famous dictum—almost a truism, really—is apropos here: "There is hardly a political question in the United States which does not sooner or later turn into a judicial one."[133] Political issues often *become* judicial issues; political decisions frequently rely for their ultimate content and validity on judicial decisions. The effect of my vote for a ballot initiative may ultimately be determined by a court decision interpreting that initiative or assessing it for constitutionality.[134] The same goes, of course, for the effect of my representative's vote for a statute or my state governor's endorsement, or enforcement, of a statute. It may even be true of my vote for President.[135] So political participation, including political speech, often ends up depending upon adjudicative participation and adjudicative speech for its efficacy.

This leads to the second level at which the attempt to prioritize politics over adjudication falters: the level of impact on society generally. Much public policy is in effect determined by adjudication, which can implement, supplement, and even overrule the results of politics. Courts can overrule political decisions by declaring them unconstitutional. They can implement political decisions—constitutional provisions, statutes, administrative rules—by interpreting them in particular ways, thus requiring their enforcement in a manner consistent with those interpretations. They can supplement political decisions by developing common law doctrines that profoundly affect private behavior.[136] And, mostly in the former two

133. TOCQUEVILLE, *supra* note 45, at 248.

134. *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996) (holding invalid, under the Equal Protection Clause, a state ballot referendum prohibiting the state or its subdivisions from extending "protected status" based on homosexual, lesbian, or bisexual orientation); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982) (holding invalid, under the Equal Protection Clause, a state ballot initiative prohibiting mandatory busing for the purpose of racial integration).

135. *See* Bush v. Gore, 531 U.S. 98 (2000) (holding invalid, under the Equal Protection Clause, the Florida Supreme Court's order of a partial recount of Floridians' votes for President during the 2000 election, with the result that George W. Bush carried Florida and won enough electoral votes to defeat Al Gore).

136. Consider the impact of damages awards in mass tort contexts like asbestos litigation:

> At least fifty-six [asbestos-related] companies have filed for bankruptcy. There are currently hundreds of thousands of claims pending against thousands of solvent defendants. Eventually, between one and three million claims will be filed in total, according to historically low projections. An estimated $54 billion in asbestos-related liabilities have been incurred to date, and an additional $200 to $265 billion are likely to be incurred in the future.

Francis E. McGovern, *The Tragedy of the Asbestos Commons*, 88 VA. L. REV. 1721, 1725 (2002) (citations omitted).

contexts, courts can order sweeping injunctive relief (school desegregation,[137] prison reform,[138] education reform,[139] etc.) that directly dictates public policy.

On both the microcosmic and the macrocosmic levels, then, it simply is not accurate to say that adjudication is generally less important than politics. Which means that the argument from relative importance cannot provide a satisfying justification for our comparative lack of concern for adjudicative speech, at least not by itself.

As I explain in Part III, there is a meaningful sense in which adjudication can in fact be considered "less important" than politics, a sense that ties in with a more satisfactory explanation of our treatment of adjudicative speech. The point here is simply that adjudication is not generally any less important than politics with respect to its actual effects on those who are bound by it.

B. The Argument From the "Search for Truth"

Perhaps adjudicative speech can be restricted to a greater extent than political speech because adjudication involves a "search for truth," or for "right answers," in a sense (or to a degree) that politics does not. If, for example, a principal goal of a judicial trial is to find the "truth" about what happened—about the facts underlying the dispute at hand—then evidentiary rules designed to elicit that truth and to weed out erroneous information would seem justifiable.[140] And if Ronald Dworkin is correct that every court case has a "right answer,"[141] then restrictions not only on proofs but on the content of legal

137. *See, e.g.*, Keyes v. Sch. Dist. No. 1, 413 U.S. 189 (1973) (reversing a district court's refusal to order system-wide relief for de facto school segregation); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (affirming a district court order requiring the gerrymandering of school districts and the busing of students).

138. *See The Prison Litigation Reform Act and the Antiterrorism and Effective Death Penalty Act: Implications for Federal District Judges*, 115 HARV. L. REV. 1846, 1847–52 (2002) (briefly surveying the history of prison reform litigation in the United States).

139. *See, e.g.*, Milliken v. Bradley, 433 U.S. 267 (1977) (affirming a district court order requiring expenditure of state funds for remedial education, counseling, and career guidance in order to remedy segregation); Abbott by Abbott v. Burke, 710 A.2d 450 (N.J. 1998) (ordering a comprehensive state school reform plan to redress funding inequities).

140. The FRE purport to be based on the premise that truth seeking is a primary function of adjudication. FRE 102 reads: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence *to the end that the truth may be ascertained* and proceedings justly determined." FED. R. EVID. 102 (emphasis added). But note that "just determination" of the proceedings is enumerated alongside truth seeking as a principal goal of the Rules, and that "fairness in administration" and the "elimination of unjustifiable expense and delay" are listed as subservient goals.

141. *See, e.g.*, RONALD DWORKIN, *Hard Cases*, *in* TAKING RIGHTS SERIOUSLY 81, 82–90 (1978) (explaining his "rights thesis").

arguments, like those contained in Rule 11 of the Federal Rules of Civil Procedure (FRCP),[142] can be explained as tools for discovering that answer.

The "search for truth" possibility also founders, however, because neither side of the comparison it supposes matches our actual practice. It is pretty clear that American adjudication involves much more than the search for truth or for right answers, and indeed it is clear that truth often plays a subordinate role in adjudication. It also is clear that the pursuit of truth or right answers—or at least *better* as opposed to worse answers—plays a significant and often motivating role in American politics.

On the adjudication side, even a cursory survey of procedural and evidentiary rules, and structural features of adjudication more generally, reveals many that are designed to promote goals other than, and often at the expense of, the search for truth. Some rules of evidence, for example, can only be explained as mechanisms for promoting independent social policies that have nothing to do with truth seeking at trial.[143] FRE 407's prohibition on admitting evidence of subsequent remedial measures, for example, actually impedes the search for truth; fixing a dangerous condition or a product defect implies both the existence of that condition or defect and the defendant's knowledge of it, both facts that seem relevant in a tort lawsuit. In fact the rule promotes the entirely distinct goal of encouraging the remediation of dangerous conditions and products.[144] FRE 408 (excluding evidence of civil settlement offers), 409 (excluding evidence that a defendant has paid a plaintiff's medical expenses), 410 (excluding evidence of criminal plea bargaining), and arguably 411 (excluding evidence of a defendant's liability insurance) all serve similarly independent policies that have nothing to do with, and indeed often stand opposed to, the pursuit of truth in a particular dispute.[145] And most of the law of evidentiary privilege excludes potentially truth-promoting evidence in the service of the extrinsic goals of encouraging or discouraging certain kinds of out-of-court behavior.[146]

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142. *See* FED. R. CIV. P. 11(b)(2) (requiring attorneys and unrepresented parties to certify to the court that "the claims, defenses, and other legal contentions" in papers presented "are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law").

143. I discuss this phenomenon in more detail *infra* Part III.C.2.c.

144. "The exclusionary principle [of FRE 407] rests in large part upon an extrinsic policy—one of encouraging persons to take subsequent precautionary measures." CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 2 FEDERAL EVIDENCE § 127, at 26 (2d ed. 1994).

145. *See id.* § 134, at 79–86 (regarding FRE 408); *id.* § 129, at 113–14 (regarding FRE 409); *id.* § 142, at 120–31 (regarding FRE 410); *id.* § 152, at 175–76 (regarding FRE 411).

146. The classic statement of the "instrumental" rationale for evidentiary privileges is Wigmore's. *See* 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285 (John T. McNaughton ed., 1961); *see also* IMWINKELRIED, *supra* note 87, § 5.11, at 257–59 (describing Wigmore's view). Professor Imwinkelried offers a "humanistic" rationale that he believes better explains many rules of privilege. *See* IMWINKELRIED, *supra* note 87, §§ 5.1–.5, at 256–438 (distinguishing between instrumental and humanistic rationales, critiquing the former, and defending the latter). For my purposes, however, Imwinkelried's

Procedural rules, too, often—perhaps most often—promote values other than truth seeking. The stated purposes of the FRCP are not only "the *just*... determination of every action"[147] (which might incorporate the pursuit of truth), but also the "*speedy*" and "*inexpensive* determination of every action"[148] (which might, and surely often does, stand against the pursuit of truth). The concerns for speed and avoiding expense flow prominently through almost all of the FRCP. Rule 8 requires "short and plain" statements of claims and defenses, not exhaustive and comprehensive ones.[149] Rule 9(b) imposes special pleading requirements for allegations of fraud or mistake,[150] with the result that many truthful claims will be dismissed or not brought at all, thus promoting speed and reducing expense.[151] Rule 11 forbids even truthful papers from being presented to the court "for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."[152] Rule 12 mandates the waiver of potentially truthful defenses of certain types when not made at an early stage in a lawsuit.[153] The discovery rules limit discovery of even relevant material that "is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive," or when "the burden or expense of the proposed discovery outweighs its likely benefit";[154] they allow for protective orders "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense";[155] and they restrict the discoverability of attorney work product[156] and of facts and opinions held by retained experts.[157] One could go on and on.

"humanistic" rationale—"that it is desirable to create certain privileges out of respect for personal rights such as autonomy or privacy," IMWINKELRIED, *supra* note 87, § 5.1.2, at 259—serves just as well, for it too demonstrates that values extrinsic to truth seeking play a large role in evidentiary privileges.

147. FED. R. CIV. P. 1 (emphasis added).

148. *Id.* (emphasis added).

149. *Id.* 8(a), (b).

150. *Id.* 9(b).

151. *See, e.g.*, Olsen v. Pratt & Whitney Aircraft, 136 F.3d 273 (2d Cir. 1998) (dismissing fraud claims for failure to meet Rule 9(b)'s "particularity" requirement). The special pleading requirement for garden-variety fraud may be simply a remnant of the fact that "[f]raud was a so-called 'disfavored action' at common law because it raised questions of defendant's morality." JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 5.9, at 257 (2d ed. 1993). Courts, however, have given it teeth in securities fraud class actions, and Congress recently bolstered special pleading requirements for such cases. *See* Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737; JAMES ET AL., *supra* note 74, § 3.19, at 223–24.

152. FED. R. CIV. P. 11(b)(1).

153. *See id.* 12(h)(1) (mandating waiver of defenses based upon lack of jurisdiction or insufficient service when omitted from a pre-answer motion or responsive pleading).

154. *Id.* 26(b)(2).

155. *Id.* 26(c).

156. *See id.* 26(b)(3).

157. *See id.* 26(b)(4).

Consider also some of the general structural features of American adjudication. Court cases are initiated by disputing parties, not by the court itself, and usually can be terminated by the parties without the court's permission.[158] While a case is going on, the court relies on the litigants' truth-seeking efforts—however self-interested or even incompetent they may be—rather than conducting its own investigation into the facts.[159] A system devoted primarily to the function of truth seeking might be structured to, well, *seek the truth*, regardless of whether the directly affected parties care (or are able) to do so; it might allow for the initiation and investigation of cases by the court itself and for their continuation at the court's, not the litigants', discretion.

And consider the fact that standards of proof shift depending upon the nature of the case: "beyond a reasonable doubt" in criminal cases,[160] "preponderance of the evidence" or, sometimes, "clear and convincing evidence" in civil cases.[161] Surely it is not the nature of truth itself, or even the difficulty in discovering it, that differs so comprehensively and dramatically across different types of cases; it is rather the strength of society's interest in discovering the truth that differs when balanced against competing values in different kinds of cases. Society wants courts to get it right in the vast majority of cases in which someone is sent to jail or worse; but in resolving private disputes, society is content if courts get it right somewhat more often than not.

If one were to encapsulate the idea that other values besides truth seeking play a prominent, sometimes even a dominant, role in adjudication, one might use the phrase "dispute resolution." American adjudication, and particularly civil adjudication, is concerned at least as much with resolving disputes peacefully, reasonably, speedily, and inexpensively as with finding the truth. Obviously there is a relationship between the two categories of values: Litigants, and thus society as a whole, are not likely to be satisfied if they perceive that court judgments typically have little or no relationship to something that looks like the "truth." Flipping a coin is not enough; dispute resolution must be *reasonable*. But as long as truth seeking plays some role in the mix—even if that role is primarily a hortatory one—the speedy and inexpensive judicial resolution of disputes is likely to satisfy the litigants and society.

From the perspective of the "search for truth," then, adjudication actually looks a lot like politics. Politics is often conceptualized as a form of dispute

158. *See supra* notes 67–69 and accompanying text.

159. *See supra* note 70 and accompanying text.

160. *See In re* Winship, 397 U.S. 358 (1970) (holding that proof of guilt beyond a reasonable doubt in a criminal trial is a requirement of due process).

161. "[T]he normal burden of proof in a civil case is measured by a 'preponderance of the evidence.'" 21 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE 557–58, § 5122 (1977) (citations omitted). "Some civil cases also involve heavier burdens; for example, in most states fraud must be proved by 'clear and convincing evidence.'" *Id.* at 557 (citations omitted).

resolution—a method of allocating resources among competing groups in society.[162] But while there is certainly much of value in this "pluralist"[163] story, it is nonetheless fairly obvious that it does not accurately describe all there is to American politics.

As Cass Sunstein has persuasively shown, the American constitutional system is designed in large measure to be "deliberative" rather than pluralist: A central point of the system is to promote reasoned deliberation about "the public good" or "public values" rather than simply to divvy up resources among competing groups.[164] Many of the Constitution's most important provisions—the Equal Protection Clause, the "dormant" Commerce Clause, the Due Process Clauses, and of course the Free Speech Clause—have been interpreted by the courts (albeit not entirely consistently) to serve this function.[165] As a matter of constitutional design, American politics is about the pursuit of (political) "truth"—the common good, or at least the "best" policy according to some standard—and not simply, or even primarily, the "resolution of disputes" among competing interest groups.

This is true at ground level as well. Political science research suggests that legislators often act according to their notions of good policy, despite being influenced by special interests, constituent pressures, and other factors.[166] That is, legislators often pursue political "truth" rather than simply acting on behalf of competing groups or mediating disputes among them. And certainly legislators often *declare*, at least, that they are pursuing political truth. I trust I don't need to provide citable examples of this phenomenon; one can open any issue of the *New York Times* and find instances of legislators or other public officials advocating or opposing some measure because it either is or isn't "in the public interest" and the

162. *See generally, e.g.*, THE FEDERALIST NO. 10 (James Madison); ARTHUR F. BENTLEY, THE PROCESS OF GOVERNMENT (Peter H. Odegard ed., John Harvard Library 1967) (1908); ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956); DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION (1951).

163. I use the term "pluralism" in the same sense as Cass Sunstein does. *See* CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION; RECONCEIVING THE REGULATORY STATE 137 (1990); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1542–43 (1988) [hereinafter Sunstein, *Republican Revival*]; Sunstein, *Interest Groups*, *supra* note 54, at 32–33.

164. *See* SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 48, at 17–39; *see also* SUNSTEIN, FREE SPEECH, *supra* note 48, at 241–50; Sunstein, *Republican Revival*, *supra* note 163, at 1558–64; Sunstein, *Interest Groups*, *supra* note 54; Sunstein, *Naked Preferences*, *supra* note 54.

165. *See* SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 48, at 32–37; SUNSTEIN, FREE SPEECH, *supra* note 48, at 249; Sunstein, *Naked Preferences*, *supra* note 54.

166. *See* Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 883–901 (1987) (summarizing such research and concluding: "Our best picture of the political process . . . is a mixed model in which constituent interest, special interest groups, and ideology all influence legislative conduct").

like.[167] (One would be hard pressed to open the same newspaper and find examples of public officials explaining their actions on the grounds that "a special interest group made me to do it" or "I did it because I want to get re-elected.") And of course even "special interest legislation is . . . often drafted with a public-regarding gloss."[168] The public-regarding rhetoric of American politics suggests that, whatever its failings may be in practice, everyone understands that its purpose, or at least a large part of its purpose, is to pursue good policy—political "truth."

I should address here a potential confusion between two different connotations of the word "truth." Arguably, when a politician speaks in terms of "the public interest" and so on, she is referring to what we might think of as *normative* truth: the correct, or at least the best, policy choice from among a number of alternatives. In contrast, evidentiary rules in adjudication seem mostly to be about *empirical* truth: the factually correct version of "what happened."[169] Thus politics and adjudication might seem to be about different *kinds* of "truth," one normative and one empirical; perhaps this justifies the differential treatment of speech in the two contexts.

But of course both kinds of "truth" play important roles in both contexts. In adjudication, getting the facts right is important so that the judge or jury can make the best normative decision about the legal consequences of those facts—Dworkin's "right answer."[170] (And indeed it is not just speech about facts that is restricted in adjudication, but also speech about norms: Litigants are prohibited from bringing "unwarranted" or "frivolous" claims,[171] from making certain arguments to the jury,[172] and so on.) Likewise, in politics, choosing the normatively best policy obviously depends on getting the facts right, as the

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167. All right, here are two pretty good examples from a single story on a recent *New York Times* front page, which happened to be the first article I looked at in search of evidence:

"'Our approach is to maximize the quality of life for America,' said James L. Connaughton, chairman of [President] Bush's Council on Environmental Quality . . . ." Douglas Jehl, *On Environmental Rules, Bush Sees a Balance, Critics a Threat*, N.Y. TIMES, Feb. 23, 2003, § 1, at 1.

"'We are managing our lands for the needs of the American public . . . ,' Gale A. Norton, the interior secretary, said in a recent interview. . . . 'We . . . need to look for those things that serve the American public.'" *Id.*

168. Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 251 (1986).

169. *Cf.* SCHAUER, *supra* note 22, at 18–19 (distinguishing between the truth of "factual" and of "normative statements").

170. *See, e.g.*, DWORKIN, *supra* note 141. Dworkin's theory holds not that there is always a single "best" or "right" answer to the empirical questions presented in a case, but rather that, *assuming* a given set of facts, there will be a single best answer to the normative question of what legal consequences should obtain. *See id.*

171. *See, e.g.*, FED. R. CIV. P. 11(b)(2) (requiring "claims, defenses, and other legal contentions" to be "warranted by existing law or by a nonfrivolous argument" for a change in the law).

172. *See, e.g.*, Zal v. Steppe, 968 F.2d 924 (9th Cir. 1992) (upholding a contempt citation for, inter alia, making impermissible arguments to the jury).

Supreme Court repeatedly has recognized in protecting not just the communication of opinions but also the communication of facts under the First Amendment.[173]

So the idea that adjudication involves the "search for truth" in a way that politics does not fails to convincingly justify our comparative disregard for adjudicative speech. As it turns out, I think there is a germ of promise in the "truth-seeking" argument, and particularly in the distinction between normative and empirical truth that I discuss above, but only when those points are considered in the context of a more satisfying differentiation between adjudication and politics. I explain that differentiation in Part III.

C. The Argument From Subservience

Maybe our comparative disregard for adjudicative speech can be justified by understanding adjudication as subservient to politics, in the sense that the procedural conditions of adjudication can be determined and altered by the political

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173. *See, e.g.*, Bartnicki v. Vopper, 532 U.S. 514 (2001) (protecting a person from civil liability for disclosure of the contents of illegally intercepted cellular phone conversations); Butterworth v. Smith, 494 U.S. 624 (1990) (protecting a grand jury witness from punishment for the disclosure of testimony); Fla. Star v. B.J.F., 491 U.S. 524 (1989) (protecting a reporter from a damages action based upon publication of a rape victim's name); Smith v. Daily Mail Publ'g Co., 443 U.S. 97 (1979) (invalidating the punishment of a newspaper based upon the publication of the name and photograph of a juvenile offender); Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) (invalidating a state statute prohibiting any person from divulging information regarding confidential matters pending before the state's judicial review commission); Okla. Publ'g Co. v. Dist. Court, 430 U.S. 308 (1977) (invalidating a court order restraining a reporter from disclosing the name of a juvenile offender); Neb. Press Ass'n v. Stuart, 427 U.S. 539 (1976) (invalidating a state trial court order restraining the press from publishing accounts of supposed confessions made by a criminal defendant); Cox Broad. Corp. v. Cohn, 420 U.S. 524 (1975) (protecting a broadcaster from a damages action based upon the publication of a rape victim's name).

Of course, the communication of *incorrect* facts is not subject to full First Amendment protection in the political or social contexts. Such communication may incur damages for defamation, *see, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (upholding a damages award for defamation by a nonmedia defendant against a nonpublic figure in the absence of a public issue); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (upholding a damages award for defamation by a media defendant against a nonpublic figure despite the existence of a public issue), and it may be regulated if it constitutes "commercial speech," *see, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 771–72 (1976) (invalidating a state law prohibiting the advertisement of drug prices but noting in dictum that "false or misleading" commercial speech may be forbidden). As the Court has said, "[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake." *Va. State Board of Pharmacy*, 425 U.S. at 771. But untruthful political speech *has* been protected for the sake of preserving "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964), on the theory "[t]hat erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive,'" *id.* at 271–72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)). In contrast, false adjudicative speech is virtually unprotected—it may be punished, for example, via FRCP 11 (or a state-court analogue) and, if it is sworn testimony, via perjury laws—and even true adjudicative speech is restricted by means of evidentiary rules.

process. On this view, so long as we allow unfettered participation in the political arena, we can justifiably restrict it in subservient contexts like adjudication, or the legislative chamber (which has its own procedural rules), or the workplace, etc. *Everything* (including adjudication) is subject to politics; and if we end up thinking that restrictions on speech in these subservient contexts are unjust, or unfair, or ineffective, or bad in some other way, we can simply use the political process—with its unrestricted speech—to change them. Adjudicative speech really is "free," in the sense that we are free to relax or eliminate restrictions on it through politics.

One problem with this argument is that its premise of judicial subservience is potentially vulnerable. Article III or the Due Process Clauses might limit the ability of the political process to modify traditional court procedures[174] (and of course courts ultimately would decide what such limits are).[175] If, say, admission only of relevant evidence is deemed a due process requirement, then the same Constitution that restricts speech in the adjudicative context also (through the First Amendment) generally prohibits restrictions on speech in the political context. We are left with the normative question of why our Constitution should make this distinction—and not only make it, but insulate both sides of it from political alteration.

A more serious problem is that the argument might prove too much. If an activity's subservience to politics means that speech within it can be restricted by politics, then politics can restrict a whole lot of speech—not just in

174. The Court has stated that, in criminal cases, "[d]ue process requires that the accused receive a trial by an impartial jury free from outside influences." Sheppard v. Maxwell, 384 U.S. 333, 362 (1966). Read broadly, this dictum suggests that at least some evidentiary rules are required by the Due Process Clause in criminal prosecutions (although that was not the holding of *Sheppard*, which involved out-of-court publicity). Of course, the Constitution prescribes certain specific procedural protections in criminal cases. *See* U.S. CONST. art. III, § 2, cl. 3 (requiring that federal crimes be tried by jury in the state of commission); *id.* art. III, § 3 cl. 1 (prohibiting convictions for treason without the testimony of two witnesses or a confession in open court); *id.* amend. V (requiring a grand jury indictment for "capital" or "infamous" crimes and prohibiting compelled self-incrimination); *id.* amend. VI (conferring rights to a "speedy and public trial" by an impartial jury in the state and district of the crime, to information of the "nature and cause of the accusation," to confrontation of witnesses, to compulsory process for obtaining witnesses, and to the assistance of counsel). The Seventh Amendment also preserves the right to a jury trial in many civil cases in federal court, *see* U.S. CONST. amend. VII; Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry, 494 U.S. 558 (1990), "and nearly every state constitution contains a similar guaranty," JAMES ET AL., *supra* note 74, § 8.1, at 491.

More generally, the Court has assessed claimed deprivations of "procedural" due process according to the three-part balancing test set out in *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976), which weighs the private interest affected, the risk of error combined with the probable benefits of additional procedural protections, and the governmental interest. *See generally* CHEMERINSKY, *supra* note 20, §§ 7.4.1–7.4.3, at 556–79.

175. *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) (holding that procedural requirements of the Due Process Clause must be determined by the judiciary rather than the political branches); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (holding that the federal courts must decide whether the jurisdiction given them by Congress exceeds the bounds of Article III).

adjudication, but in commerce, employment, art and literature, private relationships, and on and on. All of these areas of activity are subservient to politics in some sense; as with adjudication, the political process is capable of regulating what happens in them.

Of course it is true that the courts have allowed restrictions on speech in some of these contexts that would not be allowed in politics: with respect to commercial speech,[176] for example, and in the employment context.[177] But the restrictions that have been allowed are different both in degree and in kind from the restrictions imposed by evidentiary rules.

They are different in degree because they tend not to be as severe as restrictions on adjudicative speech; regulations of commercial speech, for instance, cannot be "more extensive than is necessary" to serve a "substantial" government interest,[178] in contrast to evidentiary rules, which completely exclude certain categories of speech from the courtroom.

And they are different in kind because they do not restrict speech *to the government*. Unlike other activities that are subservient to politics, adjudication is, again, a form of participatory government decisionmaking with the authority to legally coerce people. Comparison to political restrictions on, say, commercial speech thus seems somewhat beside the point; while both commerce and adjudication are subservient to politics in some way, adjudication is much more *like* politics than is commerce. Restricting speech in the latter does not justify restricting speech in the former.

All of which is to say that using the idea of subservience to politics, by itself, as an explanation of restrictions on adjudicative speech seems insufficient.

And then there is the *Velazquez* problem. The *Velazquez* decision[179] illustrates an important sense in which adjudication is *not* subservient to politics: Adjudication can determine, or change, the results of politics. Courts can interpret statutes and other political decisions and can even declare them unconstitutional. Political control of adjudicative speech, then, has the sinister potential to insulate politics from assessment according to legal standards. (This potential was an important factor behind the Court's invalidation of the

176. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 562–63 (1980) (holding that "[t]he Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression" and articulating a four-part test for assessing regulations of commercial speech).

177. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 389 (1992) (distinguishing Title VII's prohibition on workplace sexual harassment from a law prohibiting racially motivated cross burning on the ground that the former is "directed not against speech but against conduct"); *see also* Fallon, *supra* note 21; Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687 (1997); Kingsley R. Browne, *Title VII as Censorship: Hostile Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991).

178. *See Central Hudson*, 447 U.S. at 566.

179. Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001); *see supra* Part I.D.3.

speech restriction in *Velazquez*.[180]) It is hard to justify politically imposed restrictions on speech that are designed to prevent political change; "clearing the channels of political change," in John Hart Ely's phrase, is precisely the function of unrestricted political speech.[181] Indeed, viewed this way, adjudicative speech *is a form of* "pure" political speech—making its casual treatment, through evidentiary rules and the like, all that much harder to justify.

Adjudication, then, is not entirely subservient to politics; and the sense in which it is subservient is not enough to justify the differential treatment of adjudicative and "pure" political speech. That said, the relationship of subservience, if we can call it that, that does exist between adjudication and politics will play an important role in the justification I offer in Part III.

D. The Argument From the Need for Closure

We might attempt to justify restrictions on adjudicative speech by reference to the fact that adjudication is a decisionmaking procedure, not just an opportunity for discussion. Courts must render decisions, and perhaps restrictions on adjudicative speech are justifiable as mechanisms for bringing debate to a close and allowing those decisions to be made. Evidentiary and procedural rules are, on this view, akin to the rules (and related precedents and informal traditions) that govern procedure in legislatures: Both are legitimate means of bringing closure to the decisionmaking process and producing an actual decision.

One difficulty with this view is that, as a general matter, evidentiary rules in a courtroom look quite different from procedural rules in a legislature. As we have seen, evidentiary rules are mostly content based; but rules of legislative procedure are mostly content-neutral time, place, and manner restrictions. The rules[182] of the two houses of the U.S. Congress, for example, primarily dictate who

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180. *See Velazquez*, at 545 (quoting *Marbury*, 5 U.S. (1 Cranch) at 178). The Court stated:

> Congress cannot wrest the law from the Constitution which is its source. "Those, then, who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law."

Id.

181. ELY, *supra* note 57, at 105–34. Ely explains the connection between unfettered political speech and political change. *Id.* at 105–16. The Supreme Court has often justified protection of political speech in these terms. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (quoting Roth v. United States, 354 U.S. 476, 484 (1957)) ("The constitutional safeguard [of freedom of speech] . . . 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"); Stromberg v. California, 283 U.S. 359, 369 (1931) (Freedom of speech serves "the end that government may be responsive to the will of the people and that changes may be obtained by lawful means.").

182. The conglomeration of formal rules, precedents, and informal traditions and practices that governs procedure in each house of Congress is extremely complicated and bewildering to the non-expert. Most of what I know about the subject I have learned from two informative and well-written overviews published by the Congressional Research Service (CRS): CRS Report No. 95-563, *The Legislative Process on*

may speak, when, and for how long; only occasionally do they dictate what may be said.[183] The mostly content-neutral rules of legislative procedure really are designed primarily to facilitate closure[184] (or, by their absence, to facilitate deliberation, as in the Senate[185]). But the mostly content-based evidentiary rules of adjudication are designed to influence the substance of the resulting decision, not simply to facilitate a decision being made.

A related difficulty is that rules of legislative procedure, quite unlike rules of evidence, typically can be altered or suspended on an ad hoc basis by the participants in the process themselves. The House of Representatives, for instance, may "suspend the rules" by a two-thirds vote.[186] The Senate may "agree by unanimous consent to operate outside of its standing rules" and frequently does so;[187] "[g]enerally also, Senators insist that the rules be enforced strictly only when the questions before [the body] are divisive and controversial."[188] And of course each legislative body is free to amend or replace its standing rules by resolution, although in actual practice amendments to the rules typically are

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the House Floor: An Introduction, by Elizabeth Rybicki & Stanley Bach, updated on November 8, 2002, *available at* http://www.senate.gov/reference/resources/pdf/95-563.pdf [hereinafter Rybicki & Bach, *The House Legislative Process*], and CRS Report No. 96-548, *The Legislative Process on the Senate Floor: An Introduction*, by Thomas P. Carr and Stanley Bach, updated on November 8, 2002, *available at* http://www.senate.gov/reference/resources/pdf/96-548.pdf [hereinafter Carr & Bach, *The Senate Legislative Process*]. I will cite to these reports here rather than to particular rules or precedents.

183. Perhaps the most important exceptions are the germaneness requirements in the House, which generally mandate that both debate and offered amendments be germane to the bill or resolution being debated. *See* Rybicki & Bach, *The House Legislative Process*, *supra* note 182, at 3, 6. More quaintly (and less functionally), "all debate on the [House] floor must be consistent with certain rules of courtesy and decorum. For example, a Member should not question or criticize the motives of a colleague." *Id.* at 3.

184. Rybicki and Bach note:

> [U]nderlying most of the rules that Representatives may invoke and the procedures the House may follow is a fundamentally important premise—that a majority of Members ultimately should be able to work their will on the floor. While House rules generally do recognize the importance of permitting any minority, partisan or bipartisan, to present its views and sometimes to propose its alternatives, the rules do not enable that minority to filibuster or use other devices to prevent the majority from prevailing without undue delay.

Id. at 1 (citation omitted).

185. According to Carr and Bach:

> The essential characteristic of the Senate's rules, and the characteristic that most clearly distinguishes its procedures from those of the House of Representatives, is their emphasis on the rights and prerogatives of individual Senators. Like any legislative institution, the Senate is both a deliberative and a decision-making body; its procedures must embody some balance between the opportunity to deliberate or debate and the need to decide. Characteristically, the Senate's rules give greater weight to the value of full and free deliberation than they give to the value of expeditious decisions.

Carr & Bach, *The Senate Legislative Process*, *supra* note 182, at 1.

186. *See* Rybicki & Bach, *The House Legislative Process*, *supra* note 182, at 3–4.

187. Carr & Bach, *The Senate Legislative Process*, *supra* note 182, at 2.

188. *Id.*

minor.[189] Rules of legislative procedure, then, really are voluntary—created, maintained, altered, and enforced by the consent of those who are bound by them—in a way that rules of evidence clearly are not.[190]

And there is a third, even more salient distinction between evidentiary rules and rules of legislative procedure that undermines the comparison altogether. Rules of legislative procedure apply only inside the legislative chamber; they do not, and are not designed to, restrict legislators' extralegislative public speech on issues the legislature will consider, even when that extralegislative speech clearly is intended, or likely, to influence the outcome of the legislative process. Representative Smith may be constrained in the subject matter of his speech on the House floor, but no one would suggest that the same Representative Smith cannot appear on the Sunday morning news-talk shows and say whatever he likes about whatever he pleases, even (especially!) if his efforts are intended to influence his fellow representatives to vote a certain way, or his fellow citizens to pressure their representatives to vote a certain way. As we've seen, though, the same is not necessarily true for Litigant Jones or Attorney Gentile. The rules of evidence themselves don't apply outside the courtroom, but the power of the court, or of the bar as defender of "the integrity and fairness of the judicial system," do so apply. Litigant Jones or Attorney Gentile might be punished (held in contempt or disbarred, for example) for speaking publicly about their pending cases outside the courtroom, even (especially!) if their efforts are intended to influence the jury or the judge to decide a certain way.

What this means is that, while rules of legislative procedure really do look simply like mechanisms for facilitating the legislature's function as a decision-making body, evidentiary rules—and the larger web of potential restrictions on

189. The Constitution provides that "[e]ach House may determine the Rules of its Proceedings." U.S. CONST. art. I, § 5, cl. 2. Each house adopts its standing rules by resolution at the beginning of the legislative session. Changes from previous versions of the rules typically are minor. *See, e.g.*, CONSTITUTION, JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES ONE HUNDRED EIGHTH CONGRESS, H.R. DOC. NO. 107-284, at v (2003) (referencing the adoption by resolution of the House Rules and describing the changes from the Rules of the previous session), *available at* http://www.gpoaccess.gov/hrm/browse_108.html.

190. There are some complexities here. Litigants have, in a sense, a role in creating and changing rules of evidence, in that they can make legal and factual arguments about how those rules should be applied in the circumstances of a particular case; a judge's rulings on such issues then may serve as precedents influencing the application of the rules in future similar cases. A litigant also might consent, in a way, to a change in an evidentiary rule by simply failing to object to her opponent's violation of that rule, or by behaving in some other way that is deemed a waiver of the rule (as when a criminal defendant offers character evidence in her defense, thus opening the door for the prosecution to offer rebuttal character evidence under FRE 404(a)(1)). Both of these phenomena also exist, of course, with respect to rules of legislative procedure. But particular litigants cannot enact wholesale repeals or amendments of evidentiary rules in the way that particular legislatures can with respect to legislative rules.

adjudicative speech of which they are a part—look like something quite different. Evidentiary rules look like mechanisms for promoting court decisions that have a certain *content*, or perhaps a certain *type* of content: content, if you will, that has "integrity" and is "fair." They are much more than, and on the whole very different from, mere means of bringing closure to a decisionmaking process.[191] So if they (and the general speech-restrictive *ethos* in adjudication) are to be justified, it is not by understanding them in those terms.

E. The Argument From Illusoriness

But it might turn out that the comparatively hostile treatment of adjudicative speech need not be justified at all, because that hostility is illusory or mostly so. In fact adjudicative speech might be protected as much as, if not more than, political speech. It is true that evidentiary rules and other restrictions on adjudicative speech are mostly content based and often rather draconian in form; but in practice they might not be so bad, for two reasons.

First, the typical consequences of restrictions on adjudicative speech might not be so severe compared to the consequences of restrictions on political speech. If you are prohibited from presenting certain evidence, testimony, or argument in the courtroom, you can always step outside the courtroom and engage in the same speech in another forum.[192] (Perhaps your spouse or coworkers will be interested in hearing about the excluded evidence.) But if you are prohibited from engaging in certain political speech because of its content, no alternative forum exists; if you are barred from advocating, say, the violent overthrow of the government, you cannot step "outside" of politics to do it, because there *is* no "outside" of politics. And, as if the lack of any alternative forum for political speech weren't enough, engaging in unlawful political speech is likely

191. On the other hand, *procedural* rules in adjudication can in fact be understood largely (if not entirely) as content-neutral means of making the decisionmaking process more efficient. *See, e.g.*, *supra* notes 147–157 and accompanying text.

192. On occasion judges, even highly regarded ones, have actually made this or similar arguments. *See, e.g.*, Gentile v. State Bar, 501 U.S. 1030, 1076 (1991) (Rehnquist, C.J.) ("The regulation of attorneys' speech [in question] is limited . . . it merely postpones the attorneys' comments until after the trial."); Patterson v. Colorado *ex rel.* Attorney Gen., 205 U.S. 454, 463 (1907) (Holmes, J.) ("*When a case is finished*, courts are subject to the same criticism as other people, but the propriety and necessity of preventing interference with the course of justice by premature statement, argument or intimidation hardly can be denied.") (emphasis added); *In re* Sawyer, 360 U.S. 622, 666–68 (1959) (Frankfurter, J., dissenting). Justice Frankfurter implicitly adopted this position:

> Of course, a lawyer is a person and he too has a constitutional freedom of utterance and may exercise it to castigate courts and their administration of justice. But a lawyer actively participating in a trial . . . is not merely a person and not even merely a lawyer. . . . He is an intimate and trusted and essential part of the machinery of justice, an "officer of the court" in the most compelling sense.

Id.

to land you in jail.[193] So (the argument might go), while content-based restrictions on political speech might be relatively few and far between these days, their consequences are considerably more severe than those of content-based restrictions on adjudicative speech.

Second, in adjudication, the question of what speech is permissible is typically decided by the participation of the affected parties. The litigants (usually through their lawyers) can argue to the judge about whether, for example, a particular item of evidence is relevant or is more prejudicial than probative.[194] In this sense restrictions on adjudicative speech are quasi-voluntary in nature; they prohibit speech, yes, but they do so only after the affected party has had the opportunity to demonstrate (without being subject to the rules of evidence in doing so[195]) that his or her speech should not be prohibited.[196] Thus restrictions on adjudicative speech, on this argument, are not as severe as they may at first appear.

These points seem so weak to me that I hesitate even to raise them.[197] For one thing, the consequences of restrictions on adjudicative speech really are every bit as bad as the consequences of restrictions on political speech, for reasons that should be apparent by now. There is no alternative forum for adjudicative speech any more than there is for political speech: Once speech is confined to a time and place where it cannot influence the judge's or the jury's decision, the entire purpose of that speech is defeated. Revealing excluded evidence or presenting barred arguments to one's spouse or coworkers—or even on national television, once the trial and the appeal are over—is not adjudicative speech at all, because it cannot affect the government decisionmaking process to which

193. For example, the first three defendants whose convictions under the Espionage Act of 1917 were upheld by the Supreme Court pursuant to the nascent "clear and present danger" standard "all ended up going to prison for quite tame and ineffectual expression. In fact they went to prison *for ten years*." ELY, *supra* note 57, at 107 (footnote omitted). *See* Schenck v. United States, 249 U.S. 47 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919); *see also* Abrams v. United States, 250 U.S. 616 (1919).

194. The FRE require that evidentiary questions "be determined by the court." FED. R. EVID. 104(a). A court's general obligation to consider the arguments of the litigants on such questions is implied rather than stated expressly by the rules. *See, e.g.*, *id.* 103(a) (requiring parties who wish to appeal evidentiary rulings either to object to the admission of evidence or to make an offer of proof that the evidence should be admitted); *id.* 104(a) (providing that a court "is not bound by the rules of evidence" in making evidentiary rulings); *id.* 104(c) (requiring that "[h]earings on preliminary matters [be] conducted" outside the hearing of the jury "when the interests of justice require").

195. *See id.* 104(a) (a court is not bound by rules of evidence in making evidentiary rulings); *id.* 1101(d) (rules of evidence are not applicable to a court's determination of questions of fact necessary for evidentiary rulings).

196. *But see supra* note 190.

197. But, again, reputedly smart judges occasionally have done so. *See supra* note 192. To be fair, the judges in two of the instances I cited were opining in the context of attorneys' in-court criticism of judges or the judicial process; such criticism *might* in fact be effective even outside the courtroom (that is, it might have a true alternative forum), as I explain *infra* notes 309–324 and accompanying text.

the speech is ostensibly relevant. Barring adjudicative speech from the hearing of judge or jury, then, is the functional equivalent of barring political speech altogether: It eliminates the content of that speech as a potential factor in the process of decisionmaking. (And if that isn't enough, violating restrictions on adjudicative speech can land you in jail,[198] or afflict you with other nasty consequences,[199] just as violating restrictions on political speech can.)

Nor can adjudicative speech be distinguished from political speech by the fact that litigants and their attorneys typically can participate in deciding exactly which of their intended speech will be restricted. The same is true, in essentially the same ways, of restrictions on political speech. Prior restraints against political speech, the Supreme Court has held, cannot be imposed without the opportunity for prompt judicial review by means of a full and fair adversary hearing.[200] Ex post criminal punishments for violations of political speech restrictions must, of course, follow only from the fully safeguarded process of a criminal prosecution. And the rules themselves pursuant to which political speech might be restrained and punished come from a *political* process that is at least as participatory as the one that produces evidentiary rules.[201]

In other words, the comparatively harsh treatment afforded adjudicative speech in our system is far from illusory. Restrictions on adjudicative speech can impact the affected parties' ability to influence government decisionmaking as profoundly as restrictions on political speech can, and violation of those restrictions can result in punishments or disabilities no less severe. Nor is the process

198. *See, e.g.*, Sacher v. United States, 343 U.S. 1, 9 (1952) (upholding contempt citations and jail terms for attorneys who disobeyed trial judges' speech restrictions); Zal v. Steppe, 968 F.2d 924 (9th Cir. 1992) (upholding a contempt citation and a jail term for an attorney's violation of evidentiary rulings); *see also* Schauer, *supra* note 14, at 689. As Frederick Schauer notes:

> Those who persist in saying irrelevant things after a ruling by the judge risk punishment for contempt, and thus it is no exaggeration to describe a trial as a place in which people run the risk of imprisonment for saying things that a government official, a judge, believes to be unrelated to the matter at hand.

Id.

199. *See, e.g.*, Gentile v. State Bar, 501 U.S. 1030 (1991) (upholding a reprimand by the state bar of an attorney who violated the rule against extrajudicial statements that might influence court proceedings).

200. *See* Freedman v. Maryland, 380 U.S. 51 (1965) (requiring the opportunity for prompt judicial review of an adverse licensing decision); Carroll v. President and Comm'rs of Princess Anne County, 393 U.S. 175 (1968) (holding an ex parte court order insufficient for a prior restraint).

201. Pursuant to the Rules Enabling Act, recommendations for changes to the evidentiary and procedural rules for the federal courts are made by a standing committee of the Judicial Conference (typically following the recommendation of an ad hoc committee) to the Judicial Conference itself. *See* 28 U.S.C. § 2073 (2000). The Judicial Conference then makes recommendations to the Supreme Court, *see id.* § 331, which has the authority to implement changes to the rules, *see id.* § 1072 (2000), subject to intervention by Congress, *see id.* § 2074(a) (2000). Rules affecting an evidentiary privilege must be enacted into law by Congress itself. *See id.* § 2074(b).

Of course, "[t]he rules of evidence have evolved over centuries through the familiar common-law processes," LARRY L. TEPLY & RALPH U. WHITTEN, CIVIL PROCEDURE 858 (2d ed. 2000); the FRE largely constitute a codification of this body of evolved principles.

of implementing speech restrictions any more participatory in the adjudicative than in the political context. And yet the quality and quantity of speech restrictions permitted in adjudication are, as we've seen, orders of magnitude greater than the quality and quantity of speech restrictions permitted in politics. The question remains: why?

III. A MORE SATISFACTORY JUSTIFICATION

As I've attempted to demonstrate, it turns out to be harder than one might think to justify the apparent lack of First Amendment attention paid to evidentiary rules and other content-based restrictions on adjudicative speech. Hard as it is to justify, though, it is even harder to believe that it can't be justified. Restrictions on the freedom of adjudicative speech are long-standing and generally accepted features of our judicial system. The question is not so much whether they can be justified as how; and answering that question requires more than the question-begging mantras about "protect[ing] the integrity and fairness of [the] judicial system" and the like that courts tend to intone.[202] What is needed is an understanding of what "the integrity and fairness of the judicial system" might mean and of how those qualities might rationalize imposing rather severe restrictions on the speech of participants in that system. I outline such an understanding in this part.

A. Two Kinds of Adjudicative Legitimacy

We can begin by distinguishing between two complementary ways in which a court decision might be assessed for political legitimacy.

1. Direct Legitimacy

The first way is to ask whether the decision is legitimate with respect to those who will be bound by it[203]—primarily the litigants themselves, but also similarly situated subsequent litigants and potential litigants who will be bound through stare decisis. We might call this the question of *direct* legitimacy.

I explained above how this question of direct legitimacy might be partially answered by focusing on the participatory nature of Anglo-American

202. *See, e.g.*, *Gentile*, 501 U.S. at 1076.

203. I leave open here the question of exactly what it might mean to be bound by a court decision. For a bit more on that issue, see Peters, *Adjudication*, *supra* note 24, at 360–74, 401–30; Peters, *Participation*, *supra* note 24, at 204–11. The most extensive discussion of this question of which I am aware appears in Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 265–69 (1992).

adjudication.[204] Because the litigants can shape the decision that will bind them by participating in the process of making it, that decision has significant democratic legitimacy with respect to those litigants.

Understanding the participatory nature of adjudication only provides a partial answer to the question of direct legitimacy, however, because it alone cannot explain the legitimacy of binding *subsequent* litigants to a court decision through stare decisis. Subsequent litigants—as well as conforming nonlitigants who alter their behavior to avoid becoming litigants—are in a meaningful sense coerced by earlier court decisions that will serve as precedents in their cases, constraining their ability to argue for certain results. Precedents thus are sources of prospectively binding norms, in many respects like statutes.[205] But subsequent litigants and conforming nonlitigants, unlike the litigants in the precedent-setting cases by which they now are bound, have not had the opportunity to participate directly in creating those norms. Participation theory alone, then, cannot justify binding these subsequent parties to decisions reached through the efforts of previous litigants in previous court cases. It cannot alone answer the question of the direct legitimacy of adjudication.

As I have argued at length elsewhere, that question can be answered by understanding judicial precedent as essentially a form of representative government.[206] The interests of subsequently bound litigants and conforming nonlitigants are represented by the litigants who directly participate in deciding a precedential case; the common law method generally ensures that the interests of the precedent-setting and subsequently bound litigants will be materially similar because the facts of the respective cases must be materially similar in order for stare decisis to operate. The more binding a precedential decision, the more closely the facts of that case resemble the facts of the subsequent case in which the precedent will apply; and the more closely the facts of the precedential case resemble those of the subsequent case, the more closely aligned the interests of the litigants in the precedential case are likely to be to those of the corresponding litigants in the subsequent case. The common law method thus creates a relationship of *interest representation* between precedent-setting and subsequently bound litigants. In so doing, it promotes adequate

204. *See supra* Part I.C.

205. But in many respects different from statutes. Statutes typically embody "if and only if" rules: They command that result R should obtain if and only if facts F_1 through F_N are present. Common law "rules," on the other hand, typically allow for the possibility that result R might obtain even if not all of facts F_1 through F_N are present. Statutory rules also typically close the universe of relevant facts, commanding that no facts other than F_1 through F_N may be considered in determining whether result R should obtain; in contrast, common law "rules" typically allow for the possibility that other facts (for example, fact F_{N+1}) may be considered in determining whether result R should obtain. For a more complete discussion of these distinctions, *see* Peters, *Adjudication*, *supra* note 24, at 361–66.

206. The foundation of this approach is set out in Peters, *Adjudication*, *supra* note 24.

representation in court decisionmaking, much as the device of frequent elections promotes adequate representation in political decisionmaking. Understood this way, court decisions can possess direct political legitimacy not only with respect to the litigants immediately bound by those decisions, but also with respect to litigants and conforming nonlitigants who are subsequently bound by stare decisis.

We might interpret the "fairness" component of the Supreme Court's concern, expressed in *Gentile*, for "the integrity and fairness of a . . . judicial system"[207] as a concern for the direct legitimacy of court decisions. A court decision is "fair" to the litigants if it is meaningfully the product of their participatory efforts; it is "fair" to subsequently bound litigants if it binds them only to the extent that their interests were meaningfully represented by the participation of the litigants in the precedential case.

2. Derivative Legitimacy

But the question of direct legitimacy, or fairness, is not the only question we can ask about the legitimacy of court decisions. Suppose a court must interpret and apply some provision of a statute to decide a case. Suppose further that the process of interpreting the statutory provision is entirely participatory, resulting in a judicial decision that meaningfully responds to the arguments made by all the litigants. That decision then would possess considerable direct legitimacy with respect to the litigants bound by it. Finally, suppose that subsequent courts apply this decision as precedent only in cases involving facts (and thus litigants) that are materially similar to the facts and litigants of the precedential case. These subsequent decisions, too, would possess a good deal of direct legitimacy with respect to the litigants bound by them.[208]

But the precedential decision, and therefore the subsequent decisions, still might be illegitimate in another sense. Suppose that the precedential decision, despite being the product of meaningful litigant participation, was bad as a piece of statutory interpretation—it did not accurately implement the purposes of the statutory provision that it was attempting to interpret.[209] We might then think that the decision is illegitimate, not from the perspective of the particular

207. *Gentile*, 501 U.S. at 1075; *see supra* text accompanying note 114.

208. This conclusion might be strengthened if we make the fairly safe assumption that, consistent with the participatory nature of American adjudication, the subsequent litigants themselves have meaningfully participated in the process of deciding their case—including the process of deciding whether and to what extent the prior decision is precedentially binding.

209. I don't mean to make a "purposivist" approach to statutory interpretation crucial to my analysis here. The same point can be made if we substitute the words "text" or "original intent" for the word "purposes" in the above sentence. The idea is simply to imagine a court decision that is, by whatever methodology, an erroneous interpretation of a statute.

litigants and others who will be directly bound by it, but from the perspective of legislative supremacy or the separation of powers. That is, we might think the decision is illegitimate because it frustrates the ability of the political branches—the legislature that voted for the statute and the chief executive who signed it—to make effective policy.

Why might we think this? Well, suppose we have a conception of the separation of powers by which, broadly speaking, the political branches are charged with making general policy and the courts are charged with applying that general policy in particular cases.[210] On such a conception, it would be problematic for the political branches, by enacting a statute, to make policy X, only to have a court, in deciding a particular case, interpret the statute in a way that frustrates policy X.[211] If we believe in a concept of "legislative supremacy," by which legislative (or, more generally, political-branch) policymaking is superior in authority to judicial policymaking, then we are likely to think that there is some political illegitimacy in allowing courts to frustrate legislative policy when they decide cases.

We might call this the question of the *derivative* political legitimacy of court decisions. If we assume a conception of the separation of powers by which the political branches legitimately make general policy, and the courts must attempt to faithfully apply that general policy in particular cases, then a judicial decision is politically legitimate only if it correctly applies the policy made by the political branches. In this sense its legitimacy is derivative of the legitimacy of the general policy it is correctly applying.[212]

We might interpret the "integrity" component of the *Gentile* Court's concern for "the integrity and fairness of a . . . judicial system" as a concern about the derivative legitimacy of court decisions. Court decisions have "integrity," with respect to the proper democratic hierarchy of legitimate policymaking, if they are consistent with the general policies, paradigmatically those created by the political branches, that they are supposed to interpret and apply.[213]

My thesis here is that evidentiary rules, and other restrictions on adjudicative speech, can be understood and justified as means of promoting both the

210. I will defend such a conception in Part III.C., *infra*.

211. I put aside here, for the sake of argument, exactly what it means for the political branches to "make" policy X and to embody it in a statute. Here again, debates will center on the importance of original intent, of statutory text, and so on.

212. As I will contend in Part III.C.3. *infra*, the concern for derivative legitimacy is not limited to cases involving the interpretation of statutes.

213. This understanding of "integrity" echoes Ronald Dworkin's use of the term "political integrity" to describe a moral norm "requir[ing] government to speak with one voice, to act in a principled and coherent manner toward all its citizens." RONALD DWORKIN, LAW'S EMPIRE 165 (1986). But my use of it here, or rather my reading of the *Gentile* Court's use of it, relates specifically to a requirement of judicial allegiance to norms created by politically legitimate processes, not to the more general requirement of holistic decisionmaking consistency that Dworkin means to invoke.

direct legitimacy (the "fairness") and the derivative legitimacy (the "integrity") of court decisions. Sometimes such restrictions promote direct legitimacy by preventing one litigant from skewing a court's decisionmaking process in her favor, without a meaningful opportunity for participation by the opposing litigant. I explain this function in Part III.B. More often the restrictions promote derivative legitimacy by limiting the capacity of a judge or a jury to misapply or ignore the general policies they are supposed to be implementing. I explain this function in Part III.C.

B. Adjudicative Speech Restrictions and Direct Legitimacy

Some common types of restriction on adjudicative speech can be justified as means of preserving the direct legitimacy of court decisions—their "fairness," in the terminology of the *Gentile* Court. *Gentile* itself involved one such restriction. Recall that in that case, Nevada attempted to prohibit attorneys from making extrajudicial statements having "a substantial likelihood of materially prejudicing an adjudicative proceeding";[214] while invalidating Nevada's rule for vagueness, the Court upheld the "material prejudice" standard for restrictions on extrajudicial attorney speech.[215]

The Nevada rule can be understood in part as an attempt to preserve the direct legitimacy of court decisions by preventing one litigant, through its attorney, from influencing an adjudicative decisionmaker—the eventual jury—without giving the other party an opportunity to fully and fairly respond. A verdict reached after the jury has been preconditioned to accept one party's version of events lacks the kind of fairness that we would expect from a legitimate government decision, because one of the parties bound by the decision has not had a fully meaningful opportunity to participate in that decision. As in the case of a preexisting judicial bias against one of the litigants,[216] the decision therefore is tainted from a democratic perspective.

In this sense, we can understand the Nevada rule in *Gentile* to serve a sort of "representation-reinforcing" function analogous to that assigned by John Hart Ely to constitutional rights.[217] The rule attempts to ensure that one party to a government decisionmaking procedure (here, adjudication) does not obtain an unfair advantage over other parties, thus risking a skewed outcome. The Nevada rule also evokes the related notion, recently articulated most vigorously by Cass

214. *Gentile*, 501 U.S. at 1033.
215. *See supra* notes 105–115 and accompanying text.
216. This will be discussed *infra* Part IV.B.
217. *See* ELY, *supra* note 57.

Sunstein, that institutional rules should promote government decisionmaking that is deliberative rather than biased or irrational.[218]

Other common restrictions on adjudicative speech serve similar participation-reinforcing functions. Consider rules limiting the admissibility of hearsay evidence,[219] which can be understood as preventing a litigant from presenting evidence to which its opponent has no full and fair opportunity to respond.[220] Consider also rules against the admission of character evidence and evidence of other crimes;[221] such rules serve to prevent the jury from developing and acting upon an irrational bias against a litigant, much as the Equal Protection Clause serves, in Ely's view, to mitigate irrational bias in the political process against "discrete and insular" minorities.[222]

Indeed many, perhaps most, rules of evidence carry a tinge of this concern for direct legitimacy through procedural fairness, in the following sense. As I argue in the next subpart, rules of evidence and other restrictions on adjudicative speech often can be understood primarily as means of promoting derivative legitimacy—that is, as means of ensuring the accurate judicial implementation of general legislative policies. But there is a close connection between the goals of derivative and direct legitimacy. Considerations of fair notice make it problematic to decide cases according to norms that one or more of the litigants could not have expected might be applied. This is less a problem with outcomes—the actual decisions resulting from adjudication—than with inputs. As long as the litigants have had a full and fair opportunity to participate in the adjudicative process, the outcome (like those of democratic politics) can be seen as legitimate, even if it could not have been predicted at the start of the process.

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218. *See, e.g.*, CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 24–45 (1999).

219. *See, e.g.*, FED. R. EVID. 801–07.

220. In criminal cases, the prohibition of hearsay has a constitutional basis: the defendant's right "to be confronted with the witnesses against him" conferred by the Sixth Amendment. U.S. CONST. amend. VI; *see* Lilly v. Virginia, 527 U.S. 116 (1999); White v. Illinois, 502 U.S. 346 (1992); Ohio v. Roberts, 448 U.S. 56 (1980). But that fact doesn't eliminate the need to justify hearsay rules under the First Amendment. For one thing, the Confrontation Clause applies against the government in criminal cases, and the government itself has no free speech rights. Nor does the Confrontation Clause explain the applicability of hearsay rules in the context of civil cases.

221. *See, e.g.*, FED. R. EVID. 404, 405.

222. *See* ELY, *supra* note 57, chs. 4, 6. Some restrictions on adjudicative speech also mitigate the effects of economic inequality among litigants, thereby increasing the direct legitimacy of court decisions. "Gag rules" like the one upheld in *Gentile* can prevent wealthier litigants from using the media to influence a jury's or judge's deliberations. More generally, the relatively level playing field imposed within a courtroom by evidentiary rules, and by a judge's traditional authority to limit the number of witnesses presented, the amount of time for examination and cross-examination, the length of oral arguments, and the like, *see, e.g.*, FED. R. CIV. P. 16(c)(15) (allowing judges to enter orders, inter alia, "establishing a reasonable limit on the time allowed for presenting evidence"), diminishes some of the advantage that a wealthier litigant might otherwise possess. But of course much potential for economic inequality, and thus for crises of direct legitimacy, remains in American litigation.

But this reasoning supposes the opportunity for full and fair participation; and that in turn relies to some extent upon advance notice regarding what the *grounds* of participation will be.

Imagine, for example, an adjudicative system that has no requirement of relevance—that is, a system that lacks a rule that evidence must meet some standard of relevance in order to be admissible. In such a system, each litigant would have little basis for predicting what kind of evidence and arguments her opponent will present in court. In a personal injury lawsuit, for example, the plaintiff, free of relevancy requirements, could present evidence regarding the defendant's insurance policy, its pattern of political contributions, its propensity for polluting the environment, its political affiliations—anything that might influence the jury to decide in the plaintiff's favor. (The defendant, of course, could reciprocate in kind). But there would be no good way of knowing ahead of time exactly (or even roughly) what types of evidence and arguments the other side is likely to present. The result would be akin to a game played by no fixed rules; outcomes would be arbitrary, less the product of proofs and reasoned arguments than of hit-and-run guerilla tactics.

Of course, an arbitrary, no-holds-barred game might be fine if that's what the players have signed up to play. (Some might describe democratic politics as such a "game.") But *because* of the need for derivative legitimacy—because adjudication, in our tradition, is a process of giving concrete meaning in specific cases to general legislative norms, as I explain in the next section—American litigants reasonably expect that the game of adjudication will be played by certain rules. They expect that adjudication will in fact be a process of attempting to give contextual meaning to general norms, rather than an anything-goes contest of name calling and mudslinging. A litigant who shows up expecting to play one game and finds herself forced to play another has, in some sense, been deprived of the full and fair opportunity to participate, because the terms on which she justifiably expects to participate have suddenly been changed.

So the connection between the goals of derivative and direct legitimacy in adjudication stems from the fact that litigants generally expect adjudication to aspire toward the former goal. If that aspiration proves illusory, the resulting frustration of the litigants' expectations also threatens the latter goal. As such, restrictions that promote derivative legitimacy by constraining the court to the accurate implementation of general policies also promote direct legitimacy by fulfilling the litigants' expectations of such constraint.

Which means that the First Amendment legitimacy of evidentiary rules and other restrictions on adjudicative speech relies significantly on the extent to which they promote derivative legitimacy—"integrity," in the words of the *Gentile* Court. I now turn to that question.

C. Adjudicative Speech Restrictions and Derivative Legitimacy

While preserving direct legitimacy is the primary function of some restrictions on adjudicative speech, most such restrictions can be understood as concerned chiefly with the preservation of derivative legitimacy. Derivative legitimacy, again, is the political legitimacy that adjudicative decisions derive from consistency with the general policies they are supposed to implement. In this subpart, I first explain in more detail what I mean by derivative legitimacy and defend the premise that derivative legitimacy does in fact matter in American adjudication. Then I contend that many common restrictions on adjudicative speech serve the purpose of promoting derivative legitimacy.

1. The Concern With Derivative Legitimacy

Government, of course, usually has the power, and almost always claims the authority, to act coercively. Perhaps the central question of political theory is the question of the conditions under which government may legitimately exercise that power and claim that authority. As I've argued, the "democratic" answer to that question, in its best interpretation, holds that government generally may coerce to the extent that those being coerced have the opportunity to participate meaningfully in the process of deciding how the power to coerce will be used.[223] In a democratic system, those coerced can participate directly, by means of political speech and voting,[224] and indirectly, through the representatives and officials who presumably are influenced by their political speech and voting.

A democratic government, then, may legitimately make *policy*—in Ronald Dworkin's terms, a decision or set of decisions designed to "advance[ ] or protect[ ] some collective goal of the community as a whole"[225]—that is binding on (coercive of) the "community as a whole," because the members of the community as a whole have had the opportunity meaningfully to participate in the making of that policy. So, for example, the U.S. Congress can legitimately pass statutes binding on all U.S. citizens, because those citizens have had the opportunity to participate in the making of the statute through their political speech and their voting (and the incentive for legislators created by their ability to vote in the future).[226] For the same reason, the President and others in

223. *See supra* Part I.A.

224. *See generally* ELY, *supra* note 57, at 105–25.

225. DWORKIN, *supra* note 141, at 82.

226. What about noncitizens who are nonetheless bound by laws passed by Congress? The legitimacy of binding them is a potentially perplexing issue, *see, e.g.*, ELY, *supra* note 57, at 148–50, 161–62; ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 119–31 (1989), that is beyond my scope here. We might get a start at it by asking whether the fact that most aliens are voluntary residents of the United

the executive branch can legitimately make decisions that bind all of us. Officials in our state governments can legitimately coerce citizens of their respective states, and so on. In short, the making of binding general policy by the political branches is politically legitimate because those bound have (or could have) participated (if only by proxy) in the policymaking.

Adjudication, as I have argued, is a participatory process too.[227] Litigants can legitimately (democratically) be bound by judicial decisions because those decisions, at least ideally, are products of their meaningful participatory efforts. And future litigants, along with those who alter their behavior to avoid becoming future litigants, are legitimately (democratically) bound by judicial decisions through stare decisis; their interests and those of the precedent-setting litigants must be materially similar in order for stare decisis to operate, and thus the precedent-setting litigants have a strong incentive to represent those interests.

But note who cannot, on a participation-based theory, be bound legitimately by most judicial decisions: members of "the community as a whole." Members of the community as a whole (future litigants and conforming nonlitigants aside) typically do not have the ability to participate meaningfully in the making of court decisions, either directly or through interest representation. To the extent a court decision is binding on the community as a whole, then, it is democratically illegitimate, or at least less democratically legitimate than policy made by the politically accountable branches of government.[228]

Participation theory, therefore, is one way to explain the traditional understanding of the policymaking hierarchy within our constitutional system of separation of powers. Policymaking by the politically accountable branches is superior in authority to policymaking by relatively unaccountable courts because the former follows from the broad participation of the entire community, while the latter follows only from the relatively narrow participation of the litigants to a particular court case. This hierarchy of legitimacy is preserved

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States allows us to get around restrictions on their political participation by means of some sort of consent theory, and by noting that many constitutional protections, particularly those of equal protection and freedom of speech, apply to aliens. *See* ELY, *supra* note 57, at 161–62.

227. *See supra* Part I.C.

228. Here again we are dealing in ideals. Obviously court decisions often are binding on the community as a whole in various ways. *See, e.g.*, Peters, *Adjudication*, *supra* note 24, at 412–14; Peters, *Participation*, *supra* note 24, at 209–11; Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1487–90 (2000) [hereinafter Peters, *Minimalism*]. One point of evidentiary rules and similar restrictions, I will argue, is to limit the occasions on which, and the extent to which, this is true.

As I have written elsewhere, there are other means besides restrictions on adjudicative speech of imposing such limits, including narrowing the scope of judicial decisions, *see* Peters, *Adjudication*, *supra* note 24, at 401–11; Peters, *Minimalism*, *supra*, at 1513–21, and of making such limits less necessary, including broadening participation in important public law cases, *see* Peters, *Adjudication*, *supra* note 24, at 417–19; Peters, *Participation*, *supra* note 24, at 210; Peters, *Minimalism*, *supra*, at 1488–90.

when a court accurately interprets and applies general policy made by the politically accountable branches. It is frustrated, however, when a court interprets and applies that general policy inaccurately, or when a court rejects that general policy in favor of policy created by the (less accountable) court itself.

In order to preserve their policymaking superiority, then, the political branches must have the legitimate authority not only to make policy, but also to exert some control over how that policy is applied (and to ensure that the policy is *applied* rather than rejected or changed). The authority to make policy is not worth much if the policy one makes is changed by those (the courts) that are supposed to apply it, or is applied in ways that are inconsistent with the policy.

A word of caution here. A classic understanding of the separation of powers holds that policymakers and policy-appliers must be distinct from each other.[229] The idea is that a combined policymaker/policy-applier could make seemingly neutral policies (say, a tax on everyone's income) and then apply those policies in nonneutral ways (say, by exempting the policymakers themselves and their friends, family, and campaign contributors). This would undercut one of the safeguards supposedly applicable to policymaking in a representative democracy: the fact that our representatives "can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of the society."[230]

To say that policymakers should not, for this reason, also be policy-appliers, though, is not to say that policymakers should not be able to ensure that their policies will be applied in ways that are *consistent* with (not contradictory of) the policies themselves. It is not to say, for example, that the legislature that enacts an income tax should not be able to ensure that the courts who interpret it (and, for that matter, the executive who enforces it) cannot exempt their *own* friends, family, and campaign contributors.[231]

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229. *See, e.g.*, THE FEDERALIST NOS. 47, 51 (James Madison); MONTESQUIEU, THE SPIRIT OF THE LAWS 157 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748).

230. THE FEDERALIST NO. 57 (James Madison).

231. True, Montesquieu worries that "[w]hen the legislative power is united with the executive power . . . there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically." MONTESQUIEU, *supra* note 229, at 157; *see also* THE FEDERALIST NO. 47 (James Madison) (quoting Montesquieu to this effect). This suggests a concern not for tyranny through inconsistency between policymaking and policy applying, but rather for tyranny through consistency between those two functions. The idea here seems to be that a separate executive can temper, through moderate enforcement, unduly harsh laws enacted by the legislature; as such, it resonates with the argument made by Madison in *Federalist No. 51* that the separation of powers helps protect individual rights. *See* THE FEDERALIST NO. 51 (James Madison). Montesquieu's argument for separating the *judicial* from the legislative power, however, is different: "If [the judicial power] were joined to the legislative power, the power over the life and liberty of the citizens would be arbitrary, for the judge would be the legislator." MONTESQUIEU, *supra* note 229, at 157. This argument seems to support the notion that courts should not be policymakers—that they should faithfully apply, not independently create, general policy in order to avoid "arbitrariness." Of course, Hamilton complicates matters in *Federalist No. 78* when he suggests

My thesis in this part of the Article, which I defend below, is that many or most content-based restrictions on adjudicative speech can best be understood as means by which the legitimate policymaking branches of government control the case-by-case application of that policy by the courts. To put it a bit differently, restrictions on adjudicative speech are mechanisms for effectuating the policymaking role of the political branches (and, as I will argue, of the common law and the constitutional Framers) and for confining the role of the judicial branch to policy-applying. As such, they legitimately constrain the speech of participants in adjudicative decisionmaking—legitimately because the process is one of *applying* policy made elsewhere, not of creating or changing it.[232]

There are some readily apparent complications of this general idea which flow from the fact that much adjudication does not involve the application of general legislative policy in the form of statutes. Common law cases involve the application of norms derived from prior court decisions; constitutional cases involve the application of norms derived from a source of law that trumps ordinary statutes. I deal with these complications below. First, however, let me explain how restrictions on adjudicative speech serve the function I have described here, that of promoting derivative legitimacy.

2. Adjudicative Speech Restrictions as Means of Preserving Derivative Legitimacy

In order for a court decision to possess derivative legitimacy, it must meet the requirement of *accuracy*, meaning that it must be a reasonably correct implementation of the applicable legislative policy or policies. It must also meet the corollary requirement of *faithfulness*, meaning that it must not involve the rejection of applicable legislative policies in favor of new policies created by the court (including the jury). In this subpart, I explain how evidentiary rules,

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that the judiciary might "operate[] as a check upon the legislative body" by "mitigating the severity and confining the operation of [unjust and partial] laws." THE FEDERALIST NO. 78 (Alexander Hamilton).

232. This sentence is likely to raise a red flag for the reader attuned to jurisprudential debates about whether courts, in deciding cases, "create" new law or merely "discover" or "apply" existing law. I am something of a Dworkinian on this question; I believe that judges exercise a creative function in determining the most justifiable way to apply existing general norms to specific facts. *See generally* DWORKIN, *supra* note 141; DWORKIN, *supra* note 213. That is, judges combine creativity with discovery. But I don't think the particular contours of my jurisprudential understanding matter much to the point I'm trying to make in the text. What is important is the idea that the proper role of judges (or rather *courts*, including not only juries but also litigants and their lawyers) within a constitutional democracy like ours is to implement (or apply, or translate, or whatever particular term one prefers) generally applicable norms ("policies") created by the other branches in specific cases, and to do so in a way that is consistent with the norms being implemented. Clearly this will almost always involve some creativity on the part of the judge and the other participants, because there will almost always be room for debate about exactly which implementation is most consistent with the guiding norms (or about what the guiding norms themselves are).

and other restrictions on adjudicative speech, can be justified as means of preserving these requirements of accuracy and faithfulness.

Restrictions on adjudicative speech can be roughly broken down into three different categories, according to the way in which they constrain courts' application of legislative policy. As we shall see, the categories bleed into one another somewhat. I call the categories, respectively, *fact-constraining* restrictions (which are concerned with preserving the *accurate* application of legislative policy), *norm-constraining* restrictions (which are concerned with preserving the *faithful* application of legislative policy), and *extrinsic* restrictions (which are concerned with the accurate and faithful implementation of legislative policies that cut across different types of claims). I describe each category and explain its legitimating function below.

a. Fact-Constraining Restrictions

Many evidentiary rules, and related restrictions on adjudicative speech, can be understood as safeguards against empirically inaccurate applications of legislative policy. Suppose, for example, that the legislature enacts a statute establishing a policy that people who knowingly make material misrepresentations in securities transactions should pay damages to those who purchased or sold securities in reliance on the misrepresentations. Empirically accurate implementation of that policy requires making sure that, for example, the defendant made false representations and did so knowingly, and that the plaintiff relied on those representations. If a defendant is found liable for securities fraud despite, say, not having actually made the representations alleged, the legislative policy has not been accurately applied.

Evidentiary rules, and other speech restrictions, that serve the function of promoting the empirically accurate application of general legislative policies might be described as fact-constraining restrictions: They limit the universe of facts upon which courts may rely in their decisionmaking to those facts, or types of facts, that the legislature (or other policymaker) considers sufficiently relevant to the application of its general policies in specific cases. So, for instance, courts (including juries) deciding lawsuits for securities fraud might be restricted to relying on those facts that, in the legislative judgment, are likely to be relevant to whether the defendant actually committed the acts for which she is being sued. And if courts may be restricted in the facts upon which they rely in deciding a case, then the litigants (and their attorneys) may be restricted in the facts they present in seeking a court decision. That is where evidentiary rules and the like come in.

Notice that the same justification of speech restrictions doesn't work in the context of democratic politics. The political branches need not be constrained

to accurately applying policy, because they can *make* policy that is legitimately binding on the community as a whole. That is, they can make policy that is legitimately binding so long as the community as a whole—including all its members[233]—has the opportunity to participate in making it. Imposing fact-constraining restrictions, or norm-constraining restrictions like I describe below, on political debate would deprive those members of the community who think certain facts or norms are relevant and important of the opportunity to participate in policymaking. And, unlike in adjudication, in politics there is no limiting principle, based in the legitimate purpose of the enterprise, for imposing such constraints.

In adjudication, many rules of evidence serve an obvious fact-constraining function. Rules restricting admissible evidence to what is "relevant" are salient examples,[234] as are rules governing witness competency,[235] hearsay,[236] and the authenticity of documentary and physical evidence.[237] Some other restrictions on adjudicative speech (besides evidentiary rules proper) also fit into this category. For instance, "gag orders" preventing attorneys or litigants from public discussion of a pending case,[238] and rules of professional conduct to the same effect (as in *Gentile*[239]), serve to prevent juries from being exposed to (and thus potentially basing their decisions upon) "facts" that have not been tested for their relevance to the accurate decision of a pending case, that is, to the accurate judicial application of legislative policy.

Note in this connection that some restrictions on adjudicative speech appear to serve the goals of both derivative and direct legitimacy in fairly salient ways. The conduct rule at issue in *Gentile*, for example, protects against both a jury's departure from applying applicable legislative policies to the facts of a

233. Of course, there will be definitional issues here. *See, e.g.*, DAHL, *supra* note 226, at 119–31.

234. *E.g.*, FED. R. EVID. 401, 402.

235. *E.g.*, *id.* 602, 606, 702, 704.

236. *E.g.*, *id.* 801–07.

237. *E.g.*, *id.* 901, 1002.

238. Such orders "are increasingly common, and there are lower court cases both invalidating and upholding [them]," although "[t]he Supreme Court has never addressed the question of when it is permissible for courts to impose gag orders on attorneys and other trial participants." CHEMERINSKY, *supra* note 20, § 11.2.3.3, at 931. Chemerinsky notes:

> [T]he law in this area is in "significant disarray" and . . . "[a]ppellate courts tend to reverse such gag orders when [the speech they prohibit does] not pose serious and imminent threats to the fairness of the proceedings. When the order is narrowly tailored to eliminate serious and imminent threats, however, appellate courts are inclined to sustain such orders."

Id. (quoting RODNEY SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH 8–67 (1994)). Thus, court-imposed gag orders typically have been subjected to roughly the same test of validity as the "substantial likelihood of material prejudice" standard adopted by the rule of professional conduct upheld by the Supreme Court in the *Gentile* case. *See* Gentile v. State Bar, 501 U.S. 1030, 1065–76 (1991); *see also supra* notes 105–115 and accompanying text.

239. *See Gentile*, 501 U.S. at 1033.

particular case (that is, derivative illegitimacy) and the jury's formation of an anterior bias against one of the parties (that is, direct illegitimacy).[240]

b. Norm-Constraining Restrictions

Fact-constraining restrictions can be distinguished conceptually from norm-constraining restrictions, although the line sometimes will be tricky to draw in practice and although some restrictions might serve both functions. Norm-constraining restrictions are designed to ensure that courts, in "applying" general legislative policies, do so faithfully—that is, do not in fact apply some other policy of the court's (including potentially the jury's) own creation. They are designed, that is, to restrict courts as much as possible to the implementation of legislatively created norms. In slightly different terms, norm-constraining restrictions are designed to ensure that courts get "the law" right.[241]

So, for example, the legislature that provides liability for securities fraud might have the purposes of deterring knowing misrepresentations, punishing them when they occur, and making whole those who are injured by them. It might then want to prohibit a court (including a jury) from deciding to hold liable for securities fraud a defendant who did not actually know her representations were false or misleading, or to award damages to a plaintiff who did not actually rely on the defendant's representations.[242] An obvious way to enforce such a prohibition is to prohibit the litigants from trying to persuade the jury to decide the case on such inappropriate grounds. Fact-constraining restrictions serve to prevent the court from *mistakenly* holding the innocent or harmless defendant liable for securities fraud; norm-constraining restrictions serve to prevent the court (including the jury) from *intentionally* holding the innocent or harmless defendant liable for securities fraud.

Norm-constraining restrictions are nearly as common as fact-constraining restrictions. Rules against the admission of character evidence or evidence of past crimes[243] can be understood as norm-constraining restrictions: They prohibit the litigants from arguing, say, that the accused murderer should (or should not) be punished because she is (or is not) a "good person," or because she did (or did

240. I discuss this latter aspect of the *Gentile* rule *supra* Part III.B.

241. I want to be careful not to give the impression, by the language I use, that all restrictions on adjudicative speech have been intentionally and consciously "designed" to serve these purposes; I argue only that these restrictions can be understood to serve, and can be normatively justified as serving, these functions. I am *not* contending that when courts and legislative bodies promulgate the restrictions, or when courts apply them, they always (or even often, or even ever) are self-consciously attempting to serve these functions. Thus I use the terminology of "design" in the text to indicate function rather than intention.

242. Juries might be tempted to reward particularly sympathetic plaintiffs, regardless of legislative policy, or to punish particularly wealthy or arrogant corporate defendants.

243. *See, e.g.*, FED. R. EVID. 404 (presumption against admission of evidence of character and other crimes).

not do) something bad in the past, rather than because she is (or is not) actually a murderer. Rules against admitting evidence that a tort defendant carries liability insurance[244] or made a settlement offer[245] prevent the plaintiff from arguing that the defendant should be found liable not because he actually committed a tort, but because he can afford to or offered to pay for the plaintiff's injuries. Even the requirement of relevance can be understood to serve norm-constraining purposes as well as fact-constraining ones: It prevents judges and juries from relying on irrelevant facts *intentionally* as well as mistakenly. Rules excluding evidence that is more "prejudicial" than "probative"[246] are perhaps best understood as norm-constraining restrictions. And judicial gag orders, and rules of professional conduct to the same effect, serve the norm-constraining function of preventing not only the confusion of juries but also the temptation of juries to decide cases according to policies of their own, or of the litigants' own, devising.

c. Extrinsic Restrictions

Some restrictions on adjudicative speech, particularly certain evidentiary rules, do not fit comfortably into either the fact-constraining or the norm-constraining category. Consider, for example, FRE 407, which excludes evidence of "subsequent remedial measures" offered for the purpose of proving "negligence, culpable conduct, a defect in a product, . . . or a need for a warning or instruction."[247] Rule 407 does not seem like a fact-constraining rule, because exclusion of evidence of subsequent remedial measures typically will make a court less rather than more likely to accurately apply the legislative policy at issue in a case. (This is another way of saying that the rule excludes obviously relevant evidence.) If the defendant in, say, a premises liability case took steps to fence in the huge pit in his yard the day after the plaintiff fell into it, surely that fact is relevant to whether the pit should have been fenced in the day before—that is, to whether the defendant was negligent pursuant to the general policy of negligence the court is supposed to apply.

But Rule 407 does not seem like a proper norm-constraining rule, either: It does not serve to avoid tempting the jury (or, conceivably, the judge) to change rather than apply the general legislative policy. The general legislative policy, after all, is to hold negligent parties liable for the injuries they cause.[248]

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244. *See, e.g., id.* 411.
245. *See, e.g., id.* 408.
246. *See, e.g., id.* 403.
247. *Id.* 407.
248. Of course, as this example suggests, courts often will be applying common law, rather than legislative, policy. I address below the complications presented by this fact. *See infra* Part III.C.3.a.

Admitting fairly powerful evidence that a party has acted negligently only encourages a judge and jury to *enforce* that policy, not to circumvent or alter it.

I think FRE 407, and similar rules that exclude seemingly probative and nonprejudicial evidence,[249] are examples of a special type of norm-constraining rule: one designed to prohibit courts from frustrating legislative policies that are extrinsic to the primary policy being applied in a case. Thus I call them *extrinsic* restrictions on adjudicative speech (although the term is somewhat misleading, as I explain below). The obvious policy behind FRE 407 is to encourage remediation of unsafe conditions, products, etc., even (or perhaps especially) when those conditions or products already have caused injury. The obvious policy behind the attorney-client privilege is to encourage the uninhibited solicitation and provision of legal advice; and so on. These "extrinsic" policies are so important that the legislature (or the common law) is willing to pursue them even to the detriment of the "primary" policies being applied in a given case—even at the cost of allowing a tortfeasor to avoid liability or a guilty criminal to go free. Restrictions on adjudicative speech like FRE 407 and the attorney-client privilege serve the function of ensuring that courts apply the extrinsic policy rather than the primary policy when the two conflict.

In fact, it is probably better to think of the extrinsic and primary policies as parts of a holistic policy package rather than as separate and potentially conflicting policies. (This is the sense in which it is misleading to speak of "extrinsic" policies.) The legislative policy in tort cases, taken as a whole, is to hold negligent parties liable except when doing so would discourage them from taking reasonable remedial measures; the legislative policy in criminal cases is to punish guilty parties except when doing so would discourage them from seeking legal advice; and so on.[250] Viewed against this understanding, extrinsic restrictions like FRE 407 are in fact norm-constraining rules designed to prevent courts from

249. Many or most evidentiary privileges are examples of such rules. The attorney-client privilege, for instance, excludes obviously probative evidence that is not likely to be "prejudicial" in the sense of creating factual confusion or normative temptation, as does the Fifth Amendment privilege against self-incrimination. Other examples include FRE 412 (which generally excludes evidence of a victim's past sexual behavior) and, arguably, FRE 409 (which excludes evidence that a defendant paid or offered to pay a victim's medical expenses). I say "arguably" with respect to FRE 409 because that rule might also be considered a norm-constraining rule akin to the exclusion of evidence of liability insurance and settlement offers—one designed to prevent the jury from punishing the defendant solely because of his ability to pay.

250. There are likely to be multiple "except" clauses applicable in any given case, because there are likely to be multiple extrinsic restrictions on speech that apply or potentially apply in any case. For instance, the plaintiff in a tort case is prohibited from presenting evidence of the defendant's subsequent remedial measures *and* from presenting evidence of the defendant's privileged communications with her attorney.

applying only *part* of the relevant policy—for example, the (primary) liability-imposing part but not the (extrinsic) remediation-encouraging part.[251]

3. Complications

To this point, my argument connecting adjudicative speech restrictions to derivative legitimacy has focused on the paradigm case in which a court is assigned the task of applying legislatively created—that is, statutory—policy. It is easy to see that the argument applies also to cases involving the application of administrative rules, executive orders, and other nonstatutory products of the political branches. But cases involving statutes, administrative rules, and the like do not make up all of adjudication; in fact, historically they have comprised a minority of court cases. Does my analysis hold also in cases involving common law—that is, court-created—norms? In cases involving norms that derive not from ordinary legislation, but from a constitution? I think it does hold in both types of cases, and I explain why in this subpart.

a. The Common Law

Restrictions on adjudicative speech, including rules of evidence, apply in common law cases as well as in statutory cases. Indeed, despite recent codifications,[252] most evidentiary rules have evolved over time through decisions made by the courts themselves.[253] So if it is true that most evidentiary rules and other adjudicative speech restrictions can be justified as means of preserving derivative legitimacy—the supremacy of policymaking by the political branches—how can the use of such restrictions be justified in common law cases, in which courts apply law that has been made not by the legislature, but by other courts?

We can take a step toward answering that question by appreciating the fairly obvious fact that the common law can be overridden by legislation; it exists at the sufferance of the legislature. Where it continues to exist, the common law reflects a de facto legislative policy to leave certain fields of the law unplowed by legislation.[254] (The policy need not be the product of a considered judgment by

251. Indeed, there often will be a particular danger that courts, especially juries, will shortchange the full legislative policy in this way: Plaintiffs in tort cases are likely to emphasize liability-imposition (which, after all, will get them paid) over remediation-encouragement (which won't), and defendants might prefer to stay away from the subject of "remediation" altogether.

252. The FRE, for instance, were not promulgated until 1975. *See* TEPLY & WHITTEN, *supra* note 201, at 858 n.167.

253. *See id.* at 858.

254. *Cf.* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 164 (William N. Eskridge, Jr. & Philip P. Frickey eds., Found. Press 1994) (1958) ("[I]n relation to the body of general directive arrangements which govern private activity in the society [the legislature's] responsibility is . . . accurately described as secondary in

the legislature that certain areas are best left to the common law; it might simply be an implication of a series of ad hoc legislative judgments that the legislature's limited resources should be devoted to legislating in *other* areas.) In making and developing the common law, then, courts are in a sense applying legislative policy: They are applying the general policy that specific norms in particular areas should be adjudicatively developed.

The idea that the common law is a sort of delegated legislation, however, doesn't provide a completely satisfactory justification for the application of evidentiary rules and other speech restrictions in common law cases. For one thing, as an historical matter, extensive legislation is a relatively recent development in Anglo-American law. The status of legislation as a source of legal norms didn't begin to rival that of the common law until the late nineteenth or early twentieth century,[255] but of course rules of evidence and other speech restrictions had been applied in common law cases from a much earlier date. So, even if such restrictions might now be justified on the theory that courts are doing the legislature's work when they decide common law cases, their historical development can't be explained in that way.

Moreover, even if we can satisfactorily conceptualize common law–making as a type of delegated legislation, participation theory does not necessarily require the presence of adjudicative speech restrictions in common law cases. Even if common law norms exist at the sufferance of the political branches, it wouldn't be accurate to say that their *content* has been determined by means of a broad participatory process. The fact that the legislature has not chosen to replace a common law rule does not mean that the rule itself has the same democratic legitimacy that a statute has. The process of generating a statute is more broadly participatory than the process of creating a common law rule. It would be a bit strange, then, to equate the function of speech restrictions in statutory cases, which is to maintain the court's faithfulness to broadly participatory, politically generated policy, with their function in common law cases, which is to maintain the court's faithfulness to policy generated by other (narrowly participatory) courts.

Of course, while court decisions are more narrowly participatory, as a general matter, than political decisions, they also are more narrowly binding. Most political decisions—statutes serve as the paradigm example here—set out a general rule that applies in a broad range of specific cases. Common law court decisions, however, produce only decisions of specific cases and, through stare decisis, of future materially similar cases; their binding effect, therefore, is not

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the sense of second-line. The legislature characteristically functions in this relation as an intermittently intervening, trouble-shooting, back-stopping agency.").

255. *See generally* WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION 59–63, 88–96 (1999).

usually as broad as a statute's. Thus the participation that is required in order for a typical common law decision to be legitimate is the participation of a relatively narrow segment of the community: the parties to a particular case (who participate directly) and future similar litigants and conforming nonlitigants (who are represented by the parties to the precedential case). In this sense, as I suggested in Parts II.C. and IV.A., it is inaccurate to say that a common law court decision is "less legitimate," from a democratic perspective, than a statute or other political decision. Common law decisionmaking is less broadly participatory than politics, but it also is less broadly binding.

The problem for evidentiary rules and other adjudicative speech restrictions, however, remains. If it is the participation of the litigants we care about in assessing the legitimacy of common law court decisions, why should the terms of that participation be circumscribed by things like evidentiary rules? Here the notion of a policymaking hierarchy doesn't supply the answer: While courts may be bound to faithfully apply politically generated policy, it is hard to see why, from the perspective of participatory legitimacy, a court should be bound to faithfully apply the judicially (or, as I prefer, the *adjudicatively*) generated policy from a previous case. The legislature may have the authority to control how its general policies are applied in specific cases, but what authority does a court have to control how its decisions are applied by subsequent courts? A court decision is intended to bind only the parties before the court, not society at large. (If it is intended to bind society at large, it is illegitimate, because society at large has not had the opportunity to participate in the process of making it.) So subsequent courts should be under no duty to follow the decisions of previous courts; the litigants in subsequent cases should be free to participate in an unfettered process of creating the decision that will bind *them*. And if so, the application of evidentiary rules and other speech restrictions in subsequent cases seems unjustifiable.

This line of reasoning shows, I think, that participation theory alone can't justify speech restrictions in common law cases. What is needed is another reason why courts should be bound, at least to some extent, to faithfully implement norms generated by earlier courts. In other words, what is needed is a justification for the practice of stare decisis.

This is not the forum in which to provide such a justification at any length. Elsewhere I have argued against two popular justifications for stare decisis: the "egalitarian" idea that likes should be treated alike merely because of their likeness,[256] and Ronald Dworkin's theory that a norm of political consistency called "integrity" requires adherence to precedent.[257] By default, the only remaining

256. *See* Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031, 2033–73 (1996) [hereinafter Peters, *Foolish Consistency*]; Christopher J. Peters, *Equality Revisited*, 110 HARV. L. REV. 1210, 1215–56 (1997).

257. *See* Peters, *Foolish Consistency*, *supra* note 256, at 2073–112.

reasonable justifications for stare decisis are consequentialist, or strategic, justifications: the ideas, for example, that stare decisis promotes legal predictability and thus social stability, or that it serves judicial economy, or that it protects justified reliance interests, or that it fulfills a sort of Burkean function of developing rules that can stand the test of time.[258] It isn't necessary here to reject or defend particular explanations for stare decisis, though, because of the salient fact that stare decisis is, for whatever reasons, a central feature of Anglo-American legal practice. Our entrenched practice of respecting precedent serves as a reason to constrain the ability of courts to depart from precedent, just as our practice of assigning democratic legitimacy to processes of participatory decisionmaking provides a reason to constrain the ability of courts to depart from politically generated norms.[259]

Thus evidentiary rules, and other restrictions on adjudicative speech, can be justified in common law cases as means of promoting adjudicative faithfulness to norms generated by earlier courts. As I explained earlier, such restrictions encourage courts to apply common law norms accurately and discourage courts from creating new common law norms *sub silentio*.

Now is perhaps a good time to take overdue notice of the elephant standing in the corner of the room. It is a salient fact that most rules of evidence are targeted at juries rather than judges; they are designed primarily to constrain the facts and arguments that can be made to juries, and thus to limit the grounds upon which a jury can base its verdict.[260] This suggests that the primary threat to the authority of stare decisis—whatever the justifications for that authority—historically has been thought to come from juries. Perhaps juries are less likely than judges to respect the need for consistency and more likely to be moved by the exigencies of particular cases, thus undermining whatever values are served by adherence to a gradual and relatively predictable development of legal norms. There is an active debate about "jury nullification" that is relevant to this question, although that debate focuses primarily on criminal prosecutions (and thus on jury adherence, or lack thereof, to statutory rather

258. On the distinction between such "consequentialist" justifications for stare decisis and "deontological" justifications, the latter of which I reject, see *id.* at 2039–44; for some examples of each, see *id.* at 2044–50.

259. Which is not to say that strategic considerations of efficiency, stability, predictability, and the like don't also play a role in justifying the courts' subservience to the political branches in our system.

260. "It is an oft repeated *bon mot* among lawyers that jurors should be treated like mushrooms—kept in the dark and fed an ample supply of horse manure." Stephan Landsman, *Of Mushrooms and Nullifiers: Rules of Evidence and the American Jury*, 21 ST. LOUIS U. PUB. L. REV. 65, 69 (2002). Landsman adds that "[i]f the state of affairs described in this witticism has any reality, it is in part because, in certain circumstances, American evidence law purposely tries to blindfold jurors with respect to information about the consequences following from certain of the factual decisions they reach." *Id.* Landsman's article, by the way, offers a thought-provoking brief analysis of the relationship between the role of the jury and evidentiary rules.

than common law norms).[261] Generally speaking, rules of evidence and other speech restrictions appear to make it more difficult for juries to engage in nullification, because they limit juries' exposure to information they can use to create their own policy. As such, while it can be argued that juries are sufficiently "democratic" that they should be entitled to reject court-made norms—perhaps even legislatively created norms—in particular cases, the continued existence of evidentiary rules is itself strong evidence that such arguments historically have not been persuasive.

But to return to the primary point here: Evidentiary rules and other adjudicative speech restrictions can be justified in common law cases as means of preserving the faithfulness of courts—especially including juries—to norms developed over time through the common law process. The fact that our tradition accords significant legitimacy to common law–making is consistent with the participation theory I have expounded here, because the creation of the common law is a meaningfully participatory process, but it is not fully explained by that theory. Whatever the reasons for the practice, however—efficiency, predictability, stability, Burkean gradualism—it would be frustrated if any given court, including any given jury, easily could reject or pervert the common law norms it is supposed to be applying. As I have explained, evidentiary rules and other adjudicative speech restrictions serve to reduce the possibility that this will happen.

b. Constitutional Adjudication

Evidentiary rules and other speech restrictions apply in constitutional cases, too; but if it seems difficult to justify them in common law cases as means of controlling the application of policy, it seems even more difficult to justify them that way in constitutional litigation. Courts in constitutional cases do not apply policy, but rather review policy for consistency with the Constitution. How, then, can speech restrictions in constitutional cases be justified as means of preserving accurate and faithful judicial adherence to policy?

This superficial conceptual problem can be solved quite easily by understanding constitutional law as simply another level of policy. While legislation and the common law are levels of government-created policy typically designed to constrain private activity, constitutional law is a level of meta-policy designed to constrain *government* activity. Restrictions on adjudicative speech in constitutional cases are means of promoting the faithful and accurate judicial implementation of constitutional policy.

261. *See, e.g.*, Landsman, *supra* note 260; Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U. CHI. L. REV. 433 (1998). *But see* Lars Noah, *Civil Jury Nullification*, 86 IOWA L. REV. 1601 (2001) (assessing the question of jury nullification in civil cases).

There are, of course, many disputed questions about what exactly constitutes constitutional policy, but we need not engage those questions here. Disputes about the legitimate sources of constitutional law—original intent, text, precedent, morality, tradition, consensus, and the like[262]—have little if any relevance to the kinds of restrictions on adjudicative speech that might be imposed in constitutional cases. Such disputes are almost always played out in the litigants' legal arguments, not in their proofs. For example, in the recent case *Lawrence v. Texas*,[263] in which the Supreme Court ultimately invalidated Texas's criminal prohibition of homosexual sodomy, an amicus brief argued that the Court should consider rulings of courts in other countries, including a decision of the European Court of Human Rights, in determining whether the Texas law was consistent with the Due Process and Equal Protection Clauses.[264] Whether such sources were relevant to the Court's decision became a point of contention among the Justices, with Justice Kennedy's majority opinion partly relying on them over Justice Scalia's strong objection.[265] But even if a majority of the Court had found decisions of foreign courts to be constitutionally irrelevant, there was no possibility that future litigants would somehow be prohibited from basing their arguments upon such decisions, or from attempting to convince the Court to change its mind about their value. Precisely because the proper sources of constitutional law are contested, litigants are never constrained in their ability to argue about them.

In other words, disputes about the legitimate sources of constitutional law are disputes about what constitutional law *is*; in the parlance of this Article, they are disputes about the content of policy. There is no legitimate reason to prevent litigants from engaging in such disputes; indeed, the question of what constitutional law *is* is logically prior to the question of how it should be applied, which is the central question for courts in constitutional cases. And so litigants in constitutional cases remain free to argue about such questions, unfettered by restrictions on their adjudicative speech.

As in other kinds of cases, actual restrictions on adjudicative speech in constitutional cases almost always go to questions about the facts to which the law—whatever it may be—must be applied. For example, in another recent Supreme Court case, *Grutter v. Bollinger*,[266] involving the University of Michigan Law School's policy of affirmative action in admissions, the FRE applied to the

262. A helpful survey of the popular alternatives can be found in ELY, *supra* note 57, at 1–72. Ely's own preferred alternative, "representation-reinforcement," is defended in *id.* at 73–183.

263. 123 S. Ct. 2472, 2484 (2003).

264. *See* Brief of Amici Curiae Mary Robinson et al. at 10–13, Lawrence v. Texas, 123 S. Ct. 2472 (U.S. 2003) (No. 02-102).

265. *See Lawrence*, 123 S. Ct. at 2474, 2483, 2494–95; *id.* at 2494–95 (Scalia, J., dissenting).

266. 123 S. Ct. 2325 (2003).

trial court's process of factfinding about the nature and effects of the Law School's policy. The restrictions imposed by the FRE were important in promoting the accuracy of the Court's ultimate constitutional ruling. But those restrictions constrained the litigants' arguments about facts—not their arguments about the meaning of the Equal Protection Clause or its proper application to those facts.

This observation about speech restrictions in constitutional adjudication can be generalized as a deeper and more important point about adjudicative speech restrictions. Regardless of the type of case, such restrictions as a rule apply only to arguments about the *application* of the law, not about the *content* of the law. Litigants almost always are permitted to argue about what the law is; indeed, the infrequent exceptions to this rule are, in my view, illegitimate restrictions on free speech.[267] Actual restrictions on adjudicative speech—rules of evidence are the paradigmatic example here—almost universally apply only to arguments about the facts to which the law, whatever it is, will apply, or to arguments that, like those of the abortion protestors in *Zal v. Steppe*,[268] essentially amount to appeals for jury nullification of the law. They apply to ensure accurate and faithful application of the law by courts and juries—not to impose some uniform dogma about what the "law" that must be applied really is.

D. A Word About Lawyers

Thus far I have elided a fact about adjudication that might be seen as significant, especially on a participation-based theory. That fact is simply that litigants typically participate in adjudication indirectly, through the agency of lawyers. What implications, if any, does this apparent attenuation of a litigant's participation have for the connection between participation and adjudicative legitimacy?

The short and probably obvious answer to this question is that law, like many other disciplines, is a specialized field that usually cannot be navigated successfully without the help of an expert. So long as the clients themselves call the important shots, lawyers make their clients' participation more effective than it otherwise would be. The presence of lawyers thus enhances, not undermines, the legitimacy of adjudication.

There is a somewhat more nuanced way of understanding the lawyer-client relationship, however, that relates closely to my themes in this Article, and it seems worth articulating that understanding briefly here. As I've argued,

267. In Part IV.A. *infra*, I make this argument with respect to two extant examples of such restrictions—those invalidated in the *Velazquez* case and those embodied in court rules prohibiting citation of unpublished opinions.

268. *See supra* notes 94–99 and accompanying text.

adjudication has direct legitimacy to the extent that it incorporates the full and meaningful participation of the litigants. That participation, however, takes a particular form, as my description of derivative legitimacy shows. The grounds of the litigants' participation are defined and cabined by the courts' role as appliers of general policies created elsewhere. Derivative legitimacy demands that the litigants participate in a process, not of creating general norms, but of applying general norms to specific facts.

And that is where lawyers come in. The process of applying general norms, or policies, to specific factual circumstances is a highly specialized task that entails distinctive types of reasoning and of argument; as such, it is a job that requires special expertise. To put the point as an overused law school cliché, the process of adjudication demands that its participants be able to "think like lawyers." It is legal reasoning and argument, not just any type of reasoning or argument, that are required in order for the derivative legitimacy of adjudication to be preserved. And of course it is lawyers who are experts in legal reasoning and argument.

As such, for a litigant's participation in the adjudicative process to be fully effective, the litigant usually must have the help of an expert at applying general norms to specific facts: that is, a lawyer. Generally speaking, then, the presence of lawyers actually increases the legitimacy of adjudication: It increases derivative legitimacy by improving the accuracy of a court's application of general policies to specific facts, and it increases direct legitimacy by giving litigants access to the special kinds of reasoning and argument that derivative legitimacy requires.

Understood on these terms, the mediating presence of lawyers shares a justification with the existence of evidentiary rules: Both are necessary to effectuate and preserve the courts' limited and specialized role as appliers of general policy.

IV. SOME TOPICAL IMPLICATIONS

My analysis so far suggests that evidentiary rules and other content-based restrictions on adjudicative speech can be justified on one or both of two grounds: as means of preserving the direct legitimacy of adjudication by ensuring that the litigants can participate fully and fairly, and as techniques of preserving the derivative legitimacy of adjudication by constraining courts to the accurate and faithful application of general policy. In this part, I discuss a few implications of this analysis for some current issues in adjudication and free-speech law.

First, the justification of adjudicative speech restrictions offered here has a negative corollary: Such restrictions are unjustified if they fail to serve either

of the legitimacy-promoting purposes described in the previous part. In Part IV.A., below, I offer some topical illustrations.

Second, some types of speech that have been treated by the courts as "political" are in fact better understood as examples of adjudicative speech, which can be subjected to reasonable restrictions in order to promote direct or derivative legitimacy. An important recent example is the canon of professional ethics struck down—erroneously, I will argue—by the Supreme Court in *Republican Party v. White*,[269] the case that served as the template for my *Case 2* in the Introduction. I examine that case in subpart B, along with some contrasting examples of speech that, while it is about adjudication, is in fact true political speech and thus cannot justifiably be restricted in order to preserve the legitimacy of court decisions.

A. Constitutional Limits on Evidentiary Rules

Some recent attempts to restrict adjudicative speech are not, in my view, justified as protective of either direct or derivative legitimacy. I discuss two timely examples here: the speech-restrictive conditions imposed by Congress on attorneys who receive Legal Services Corporation funds, and the flurry of court rules prohibiting the citation of unpublished opinions.

1. *Velazquez* Redux

Recall that in *Velazquez*,[270] the Supreme Court invalidated certain congressionally imposed funding restrictions and the rules implementing them, which effectively prohibited attorneys who received LSC funds from challenging existing welfare laws on statutory or constitutional grounds. This prohibition was a sort of content-based evidentiary rule—a restriction on the kinds of proofs and arguments that could be offered in certain cases. But the understanding of the adjudicative role I've outlined here actually undermines, not justifies, the prohibition at issue in *Velazquez*.

Rather than facilitating the application of policy by the courts, the prohibition in *Velazquez* frustrated the application of policy by excluding proofs and arguments that were clearly relevant to that task. A court cannot accurately determine whether welfare laws are being administered consistently with legislative policy if the litigants (or at least the only litigant inclined to do so) cannot offer proofs and arguments relevant to that question. Nor can a court accurately determine whether welfare laws or their administration are consistent with constitutional policy if the litigants can't make arguments on that issue. The

269. 536 U.S. 765, 788 (2002).
270. Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001); *see supra* Part I.D.3.

LSC funding restriction prevented the litigants not from making unfaithful or erroneous arguments about how to apply the law, but from arguing about what the law *is* in the first place; as such, it actually impeded the derivative legitimacy of the cases it affected.

The restriction also impeded direct legitimacy in a fairly obvious way: It tipped the balance of welfare litigation rather severely in favor of the government. The government's lawyers were free to argue, without penalty, that the government's conduct was consistent with applicable statutory and constitutional law; but lawyers challenging the government's conduct were not free to argue that it was inconsistent with the law. In this way the restrictions were not only content based, but viewpoint based; they handicapped the participation of one class of litigants, namely those who sought to challenge the legality of government policy.

Thus the Court in *Velazquez* got it precisely right when it struck down the restrictions as inconsistent with the judicial role. "Interpretation of the law and the Constitution"—that is, in the idiom I've been using, application of general legislative or constitutional policy to specific facts—"is the primary mission of the judiciary when it acts within the sphere of its authority to resolve a case or controversy."[271] And, "[b]y seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review [in *Velazquez*] prohibit[ed] speech and expression upon which courts must depend for the proper exercise of the judicial power."[272] The speech restrictions in *Velazquez* worked to obstruct "the judicial power," not to preserve it.

Perhaps, though, we can justify the restrictions at issue in *Velazquez* by understanding them as examples of what I call extrinsic restrictions—restrictions designed to enforce policies independent from the policies that give rise to particular court cases. It may be that Congress's policy of providing welfare benefits to those who deserve them—the policy LSC-funded attorneys are seeking to vindicate when they bring benefits cases—is qualified by Congress's extrinsic policy of preserving the structure of the existing welfare system. The speech restrictions in *Velazquez* could then be justified as Congress's mechanism for ensuring that courts apply the extrinsic rather than the primary policy when the two conflict (or, if we prefer, for ensuring that courts apply the *entire* policy, including the caveat about preserving the existing welfare system).

There are two reasons why we can't excuse the restrictions in *Velazquez* this way. First, "[a]s interpreted by the LSC and by the Government, the restriction[s] prevent[ed] an attorney from arguing to a court that a *state* [welfare] statute

271. *Velazquez*, 531 U.S. at 545.
272. *Id.*

conflicts with a *federal* [welfare] statute."[273] Even if it is *Congress*'s policy that its welfare statutes should not be enforced against conflicting state statutes, it may not be any particular *state*'s policy that its welfare statutes be enforced against conflicting federal statutes. By preventing LSC attorneys from arguing that state statutes conflict with federal ones, Congress was attempting to dictate state policy—something Congress does not have authority to do[274]—rather than simply to enforce its own policy.

Second, and more saliently, "the restriction[s] prevent[ed] an attorney from arguing to a court . . . that either a state or federal statute by its terms or in its application is violative of the United States Constitution."[275] Obviously Congress cannot simply dictate constitutional policy; it cannot prevent a court from applying constitutional policy to override inconsistent legislative policy. So the speech restrictions in *Velazquez* cannot really be understood as extrinsic restrictions along the lines of, say, the attorney-client privilege.

The Court in *Velazquez* was right, therefore, to strike down the restrictions as attempts to obstruct, rather than preserve, the proper policy-applying function of the judiciary. The interesting thing is the particular basis on which the Court struck the restrictions down. The Court's own language suggests that the case could have been decided pursuant to the Article III grant of "the judicial power,"[276] which the Court in *Velazquez* essentially interpreted, following *Marbury v. Madison*,[277] to be the power of policy application ("interpretation of the law") and to imply unfettered access to the information necessary to fully exercise that power. (Understood this way, the Article III "judicial power" includes a guarantee of derivative legitimacy—the "integrity" component of the judicial process, by the *Gentile* formulation.) We might think the case also could have been decided pursuant to the Due Process Clause of the Fifth Amendment,[278] on the theory that the opportunity to fully present proofs and arguments that are relevant to the application of policy is part of the "process" that traditionally is "due" in a court of law. (The Due Process Clause thus protects direct legitimacy—the "fairness" component of *Gentile*.) But the case was

273. *Id.* at 537 (emphasis added).

274. *See, e.g.*, Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992).

275. *Velazquez*, 531 U.S. at 537.

276. U.S. CONST. art. III, §§ 1, 2.

277. *See Velazquez*, 531 U.S. at 545 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

278. *See* U.S. CONST. amend. V. Presumably the Due Process Clause of the Fifth Amendment, not its Fourteenth Amendment counterpart, would apply in *Velazquez*, despite the fact that the restrictions at issue there apparently applied in both federal and state courts, because their source was Congress rather than the states.

brought, litigated, and decided as a *free speech* case—a fact that seems fairly significant.

Conceptualizing *Velazquez* as a free speech case rather than an Article III or due process case emphasizes—and bespeaks an implicit recognition by the Court of—the importance of participation to judicial legitimacy and the parallels between adjudicative and political participation. Deciding the case on Article III grounds would have implied a focus on the injury done by Congress to the judicial branch as an institution—on the attempt to undermine "the judicial power," which sounds like a garden-variety separation-of-powers problem. (As it was, much of the Court's language adopted this tone.) Deciding the case on due process grounds would have shifted the focus somewhat to the participation of the litigants themselves, but the due process concern with tradition[279] still would have anchored the result in ideas about the judiciary's institutional role. Deciding the case on free speech grounds, however, swung the spotlight squarely around to focus on the litigants themselves and the importance of their participation in the decisionmaking process. As a result, it is possible to understand the decision as being grounded not simply in the Court's self-protective vision of the judicial role, but also, maybe even primarily, in an acknowledgement that participation is as important to legitimacy in the adjudicative as in the political context. It is possible, that is, to read the decision as being primarily about direct rather than derivative legitimacy, and as endorsing the notion that direct legitimacy is intimately connected to meaningful litigant participation.

The *Velazquez* decision thus contributes to a fuller understanding of adjudicative legitimacy and, ultimately, to a fuller understanding of the Free Speech Clause. It suggests that, while restrictions on adjudicative speech are justifiable so long as they contain courts within their legitimate policy-applying role, they are unjustifiable when they frustrate the ability of the litigants to meaningfully participate in deciding what it means to properly apply policy. I expand on this embryonic idea in Part IV.B. below.

2. No-Citation Rules

Another example of what I believe are unjustifiable content-based restrictions on adjudicative speech is the recent phenomenon—now, hopefully, in decline—of court rules that prohibit citation of unpublished opinions.[280]

279. *See, e.g.*, Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945) (relying in part on "traditional notions of fair play and substantial justice" to uphold the state court's assertion of personal jurisdiction over an out-of-state corporation).

280. Recent developments suggest that the tide has turned against no-citation rules. *See* Stephen R. Barnett, *From* Anastasoff *to* Hart *to* West's Federal Appendix: *The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1, 1–6 (2002) (surveying judicial opinions, bar association positions, rule changes, and other developments to this effect). "Of the thirteen [federal] circuits, there remain only

"Approximately 80% of the caseload of the federal appellate courts is resolved by means of 'unpublished' opinions,"[281] meaning that "the court has designated the opinion for exclusion from the bound volumes of the Federal Reporter, the official reporter for the federal courts of appeals."[282] Typically "no-citation rules take the form of an outright prohibition on reference to unpublished opinions in briefs and arguments,"[283] although sometimes they assume the more hortatory form of "disfavoring" or otherwise discouraging citation.[284]

No-citation rules, at least in their mandatory form, pretty clearly are content-based restrictions on adjudicative speech:[285] They prohibit lawyers and litigants from making certain kinds of arguments, namely those based upon unpublished opinions.[286] But no-citation rules probably cannot be justified as attempts to preserve either derivative or direct legitimacy.

With respect to derivative legitimacy, no-citation rules seem to be neither fact-constraining, norm-constraining, nor extrinsic restrictions on speech in the senses in which I have defined those concepts. Judicial opinions, published or not, are neither facts to which existing policy must be (or must not be) applied nor norms that might be used, illegitimately, to change existing policy; they are rather *evidence* of existing policy, means of determining what existing policy is.

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five—the First, Second, Seventh, Ninth, and Federal—that ban citation of unpublished opinions . . . ." *Id.* at 45 (citations omitted). The ABA House of Delegates has come out against no-citation rules, and one federal judge has held them unconstitutional in the federal courts as exceeding the Article III "judicial power." *See id.* at 1–2; Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc). Still, the use of no-citation rules remains prevalent in both federal and state courts. *See* David Greenwald & Frederick A.O. Schwarz, Jr., *The Censorial Judiciary*, 35 U.C. DAVIS L. REV. 1133, 1135 (2002) (surveying the use of no-citation rules in the federal circuits); Melissa M. Serfass & Jessie L. Cranford, Note, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J. APP. PRAC. & PROCESS 251 (2001) (surveying rules on the publication and citation of opinions in all federal circuits and state appellate courts).

281. Greenwald & Schwarz, *supra* note 280, at 1137.

282. *Id.* But legal publishers, like nature, abhor a vacuum: "[T]he West Group in September 2001 launched its *Federal Appendix*[,] . . . a new case-reporter series in West's National Reporter System that consists entirely of 'unpublished' opinions from the federal circuit courts of appeals (except, currently, the Fifth and Eleventh Circuits)." Barnett, *supra* note 280, at 2 (citation omitted).

283. Greenwald & Schwarz, *supra* note 280, at 1139.

284. *See id.* at 1140.

285. Greenwald and Schwarz suggest that they can be analyzed either as content-neutral or as content-based restrictions, but they don't explain the former possibility—indeed, they "think the better view is" that no-citation rules are content-based—and frankly I can't think of a reasonable argument that they are content-neutral. *See id.* at 1162–64.

286. And the dodge that those arguments can be made (or those opinions cited) outside the courtroom will not do, for reasons we've rehearsed already. The whole point of citing unpublished cases is to affect the resulting judicial decision; citing them outside the courtroom obviously defeats this purpose. The obviousness of this conclusion did not stop one reputable federal judge from making the "alternative forum" argument, however. *See id.* at 1165 n.127 (citing remarks by Judge Alex Kozinski of the Ninth Circuit: "You can publish an unpublished decision in the San Francisco Examiner. You can put it online on a web page. You can tattoo it to your chest. You can write articles about it. You can't do it in a brief . . . . But that is not a First Amendment issue.").

An on-point judicial opinion applying a principle of the common law to a particular set of facts is evidence, in a later case, of how that common law principle should be applied to a similar set of facts; it is evidence of what that principle *means* when applied to those facts.[287] The same is true of an on-point opinion applying a constitutional or statutory policy. To deny litigants the ability to build their arguments upon this evidence is to deny them the ability to fully participate in deciding what the applicable principle is and how it should be applied in their case. It has nothing to do with preventing courts from erroneously misapplying policy or from intentionally changing policy.

No-citation rules, then, seem to present the same free speech problems that the restrictions struck down in the *Velazquez* decision presented: The rules deny litigants the ability to participate fully in the process of making a decision that will bind them, and they do so without finding justification in the limits of the judicial role.[288]

Admittedly there is an argument—somewhat tenuous, in my view—that such rules serve direct legitimacy by denying an advantage to litigants with significantly greater resources than their opponents. The idea would be that litigants who can afford to hire expensive lawyers, use electronic databases, send messengers to courthouses, and the like would have better access to unpublished opinions than their poorer counterparts, justifying a ban on citing those opinions as a field-leveling mechanism.[289] There is something to this point,

287. I use the word "principle" here with caution, not wanting to beg questions about the difference, asserted by Dworkin, between "principles" and "policies." *See* DWORKIN, *supra* note 141, at 82–84.

288. What is apparently the only court decision to have invalidated no-citation rules on constitutional grounds was based on Article III, not the First Amendment. *See* Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc). (Of course, Article III is the other side of the First Amendment coin where adjudicative speech is concerned; the two provisions protect judicial legitimacy from different angles. *See supra* notes 276–279 and accompanying text.) In 1976, the Supreme Court rejected, without comment, a petition brought by a litigant seeking a writ of mandamus against the Seventh Circuit's striking a reference to an unpublished opinion in the litigant's brief. *See* Do-Right Auto Sales v. United States Court of Appeals for the Seventh Circuit, 429 U.S. 917 (1976). More recently the Ninth Circuit affirmed the dismissal of a challenge to its no-citation rule on standing grounds. *See* Schmier v. United States Court of Appeals for the Ninth Circuit, 136 F. Supp. 2d 1048 (N.D. Cal. 2001), *aff'd*, 279 F.3d 817 (9th Cir. 2002). A number of commentators, though, have argued that no-citation rules are invalid under the First Amendment. *See* Greenwald & Schwarz, *supra* note 280, at 1161–66; Mark D. Hinderks & Steve A. Leben, *Restoring the Common in the Law: A Proposal for the Elimination of Rules Prohibiting the Citation of Unpublished Decisions in Kansas and the Tenth Circuit*, 31 WASHBURN L.J. 155, 215–17 (1992); Salem M. Katsh & Alex V. Chachkes, *Constitutionality of "No-Citation" Rules*, 3 J. APP. PRAC. & PROCESS 287, 297–300 (2001).

289. Lauren Robel has argued that unpublished opinions disproportionately advantage frequent litigants, such as government entities. *See* Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940, 959–62 (1989). She concludes not that no-citation rules are appropriate, however, but that the practice of issuing unpublished opinions itself is suspect. *See id.*; Lauren Robel, *The Practice of Precedent: Anastasoff, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 IND. L. REV. 399, 404–09, 414–17 (2002).

but not enough, I think, to outweigh the harm that no-citation rules do to derivative legitimacy. The potential disadvantage to less-wealthy litigants posed by unpublished opinions seems quite marginal—a drop in the bucket—in the context of the much larger structural handicaps that such litigants face. Poorer litigants often cannot afford to hire skilled attorneys (or, sometimes, any attorneys) in the first place; they may not be able to conduct extensive discovery, hire jury consultants, commission visually compelling trial exhibits, pay reputable expert witnesses, or afford other valuable litigation tools. Prohibiting citation of unpublished opinions seems unlikely to equalize the balance in any appreciable way—especially now that most "unpublished" opinions have become widely available, and easily accessible, in electronic and print form.[290] And of course no-citation rules apply to both wealthy and poor litigants, regardless of which litigant's case would be helped by the unpublished opinion she cannot cite. There is no reason I can think of to suppose that this disadvantage will not harm poor litigants as often as wealthy ones.

No-citation rules, then, clearly undermine the derivative legitimacy of court decisions, and on balance there seems no reason to believe that they improve their direct legitimacy. At the very least, such rules should be viewed with considerable suspicion as restrictions on litigants' free speech rights.

B. *White* and Political Versus Adjudicative Speech

In its 2002 decision in *Republican Party v. White*, the Supreme Court invalidated a canon of Minnesota's Code of Judicial Conduct that forbade a "candidate for a judicial office" to "announce his or her views on disputed legal or political issues."[291] The Court treated the Minnesota canon as a paradigm example of a restriction on political speech,[292] subjecting it to strict scrutiny on the ground that it "both prohibit[ed] speech on the basis of its content and burden[ed] a category of speech that is 'at the core of our First Amendment freedoms'—speech about the qualifications of candidates for public office."[293] Not surprisingly, the Court held that the canon did not survive strict scrutiny.[294]

Minnesota attempted to justify the canon at issue in *White* as a means of "preserving the impartiality of the state judiciary and preserving the appearance

290. *See* Barnett, *supra* note 280, at 1–7.

291. 536 U.S. at 765, 770 (2002) (quoting MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2002)). The operative provision of the Code of Judicial Conduct was made applicable to nonincumbent lawyers running for judicial office by Minnesota Rule of Professional Conduct 8.2(b) (2002).

292. *See also White*, 536 U.S. at 793 (Kennedy, J., concurring) ("The political speech of candidates is at the heart of the First Amendment . . . .").

293. *Id.* at 774 (quoting Republican Party v. Kelly, 247 F.3d 854, 861 (8th Cir. 2001)).

294. *Id.* at 774–88.

of the impartiality of the state judiciary."[295] The various opinions in the case thus sparred about the meaning of judicial "impartiality" and whether preserving it, whatever it might mean, qualified as a compelling state interest that the canon was narrowly tailored to serve.

Writing for the majority, Justice Scalia distinguished three different senses of judicial "impartiality" that the canon might be intended to promote. First, Justice Scalia noted, "impartiality" might mean "the lack of bias for or against either *party* to the proceeding."[296] But Justice Scalia rejected the notion that the Minnesota canon was narrowly tailored to preserve this sense of impartiality because it was directed not at "speech for or against particular *parties*, but rather speech for or against particular *issues*."[297]

Justice Scalia also noted a second possible meaning of "impartiality" in judging: "lack of preconception in favor of or against a particular *legal view*."[298] "Impartiality" in this sense, Justice Scalia wrote, "would be concerned, not with guaranteeing litigants equal application of the law, but rather with guaranteeing them an equal chance to persuade the court on the legal points in their case."[299] But Minnesota could not have a compelling interest in preserving this kind of impartiality, Justice Scalia concluded, because

> [a] judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law.... Indeed, even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so. "Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of

295. *Id.* at 775.

296. *Id.* at 775. The idea of a "party to the proceeding" here is a bit slippery: A judge might be biased with respect to particular litigants in particular cases (for example, she might favor Smith in *Smith v. Jones* because she is Smith's business partner), or she might be biased with respect to certain categories of litigants across multiple cases (for example, she might tend to favor employers over employees in workplace disputes). Justice Scalia didn't distinguish between the two types of bias.

297. *Id.* at 776. The problem with Justice Scalia's distinction is that speech about issues can have implications for decisions about parties. A judicial candidate who complains during her campaign about the shoddy way in which Minnesota's courts have treated employers is likely, if she remains true to her campaign rhetoric, to hold something like a bias in favor of particular *parties* who happen to be employers when they appear before her as a judge. Justice Stevens made this point in his *White* dissent:

> Even when "impartiality" is defined in its narrowest sense to embrace only "the lack of bias for or against either *party* to the proceeding"... the announce clause serves that interest. Expressions that stress a candidate's unbroken record of affirming convictions for rape, for example, imply a bias in favor of a particular litigant (the prosecutor) and against a class of litigants (defendants in rape cases).

Id. at 800–01 (Stevens, J., dissenting) (citation and footnote omitted).

298. *Id.* at 777.

299. *Id.*

> constitutional adjudication would be evidence of lack of qualification, not lack of bias."[300]

Finally, Justice Scalia described a third, even broader potential meaning of judicial "impartiality"—"open-mindedness":

> This quality in a judge demands, not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case. This sort of impartiality seeks to guarantee each litigant, not an *equal* chance to win the legal points in the case, but at least *some* chance of doing so.[301]

Justice Scalia and the majority rejected this premise for the Minnesota canon, not because it was insufficiently compelling, but because they did "not believe the Minnesota Supreme Court adopted the announce clause for that purpose."[302]

> The short of the matter is this: In Minnesota, a candidate for judicial office may not say "I think it is constitutional for the legislature to prohibit same-sex marriages." He may say the very same thing, however, up until the very day before he declares himself a candidate, and may say it repeatedly (until litigation is pending) after he is elected. As a means of pursuing the objective of open-mindedness that respondents now articulate, the announce clause is so woefully underinclusive as to render belief in that purpose a challenge to the credulous.[303]

As I suggest in some of the foregoing footnotes, and as the dissents in *White* do a pretty good job of showing, the details of Justice Scalia's application of strict scrutiny to the Minnesota canon are vulnerable, to say the least. But my criticism of *White* goes deeper than that: I think the Court in *White* was mistaken to treat the Minnesota canon as a restriction on *political* speech (and

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300. *Id.* at 777–78 (quoting Laird v. Tatum, 409 U.S. 824, 835 (1972) (mem.)). Putting aside the fact that Justice Scalia's conception of what is "desirable" in the selection of judges, and thus what can serve as a "compelling" state interest, seems little more than a product of his personal views, Justice Scalia simply identified the wrong interest here. The interest served by the Minnesota canon was not the selection of judges who have no "preconceptions about the law," but rather the selection of judges who do not make *precommitments* about the law—who do not effectively announce ahead of time how they will decide cases. Justice Scalia did address something like this interest in describing a third possible conception of "impartiality." *See infra* notes 301–303 and accompanying text.

301. *White*, 536 U.S. at 778.

302. *Id.*

303. *Id.* at 779–80. Of course, as Justice Stevens pointed out in dissent, a judge's statement of a particular legal or political belief takes on a special character when made in the context of a judicial election: It becomes "a reason to vote for" the candidate and is offered precisely as such a reason. *Id.* at 800 (Stevens, J., dissenting). A judicial candidate who advertises her views about law or policy is making a campaign promise, not a contribution to academic debate. She is saying, in effect, "Vote for me because I believe X, and I will judge cases accordingly." *Id.*

thus, arguably, to subject it to strict scrutiny[304]) in the first place. The canon, I believe, is better understood as a restriction on *adjudicative* speech, and is justifiable as such on one or both of two complementary arguments.

1. The Canon as a Safeguard of Derivative Legitimacy

First, the Minnesota canon might be justified as a sort of norm-constraining restriction designed to promote faithful application of policy by judges. In Part III, I defined norm-constraining restrictions on adjudicative speech as restrictions designed to limit courts to applying general policy made by the legislature (or the Constitution, the common law, or an administrative agency) rather than policy of the courts' own creation.[305] Minnesota's goal of preserving judicial "impartiality" can be understood in this sense: as a goal of preventing a judge's own "preconceptions on legal [or political] issues"—her own ideas of good policy—from tainting her decisionmaking process. In other words, it can be understood as a means of promoting derivative legitimacy in adjudication.

Suppose, for instance, that a judge is faced with a case affecting the interests of employers in the state. The Minnesota canon might prevent the judge from deciding the case not in accordance with legislative policy ("the law"), but with the pro-employer statements she made during her last campaign. By preventing the judge from making those pro-employer statements in the first place, Minnesota is removing a temptation for the judge to act according to her own (announced) conceptions of good policy rather than those of the legislature. Thus the Minnesota canon operates analogously to judicial gag orders and rules of professional conduct prohibiting litigants or attorneys from speaking publicly about a pending case: The point is to avoid tempting the decisionmaker (here the judge, elsewhere the jury) to rely on policy norms that have not been sanctioned by the appropriate political process.

If this way of understanding the Minnesota canon is correct, then the Court was wrong to treat that canon as a restriction on political speech merely because it regulated speech in something that looks like "politics."[306] Threats, "fighting words," or obscenity would not deserve protection as political speech merely by

304. I don't want to take the position that restrictions on adjudicative speech (for example, evidentiary rules) should not be subjected to strict scrutiny as a doctrinal matter; I'm not sure how I would come out on that question. My position is simply that restrictions on adjudicative speech, properly understood, are generally justifiable as a theoretical matter. Doctrinally, that conclusion might result from application of a lower standard than strict scrutiny; or it might result because appropriate restrictions on adjudicative speech will survive strict scrutiny.

305. *See supra* Part III.C.2.b.

306. Justices Stevens and Ginsburg, in their respective dissents in *White*, would have distinguished between judicial elections and other kinds of elections for free speech purposes—in effect recognizing that the Minnesota canon did not regulate true political speech. *See* 536 U.S. at 802 (Stevens, J., dissenting); *id.* at 805–07 (Ginsburg, J., dissenting).

virtue of having occurred during a political campaign—or even by virtue of having been intended to influence people's votes. (My threat to break both your legs if you don't vote for me is not political speech.) Those kinds of speech can legitimately be regulated, even in a political context, to avoid the (nonpolitical) harms they might cause. And the same should go for adjudicative speech that happens to occur in the political arena.[307] If the speech poses a real threat to the impartiality—that is, the policy-applying function—of the judiciary, then the state ought to be able to regulate it in the interest of avoiding that threat.

We need to be careful here to distinguish adjudicative speech that has no real political function from "adjudicative" speech that has. A judicial candidate's statements of policy on the campaign trail do have a *sort* of "political" function, in that they are designed to cause, and might succeed in causing, people to vote for the candidate. But this is not the kind of political function I mean. Politics ultimately is about the making of policy, and a judicial candidate's speech about "disputed legal or political issues" is not intended to influence the making of policy. It is intended to influence the applying of policy—the deciding, by the judicial candidate if she is elected, of particular court cases. The judicial candidate who criticizes anti-employer court decisions is not calling for the legislature to enact pro-employer legislation; she is hinting that, if she is elected judge, she will decide cases in a pro-employer way. This is the sense in which her speech is adjudicative speech and, I believe, may be regulated as such. It is not really political speech (although the exact same speech would be political if the candidate were running for the state legislature).[308]

By the same token, there is some speech that looks "adjudicative" at first blush but in fact turns out to be political—to be about (or at least partly about) the making, not the applying, of policy. Consider the speech involved in *Nebraska Press Association v. Stuart*[309] (which I used as the template for *Case 3* in the Introduction). The defendant in *Stuart* was on trial for a grisly multiple murder; the Nebraska trial judge entered a "restrictive order" forbidding the press

307. *Cf.* Schauer, *supra* note 14, at 693–94. Schauer asserts:

> [T]here is . . . a serious question about . . . why an argument that would be thought frivolous quickly becomes a serious First Amendment claim just because the physical locus of the speech is outside of the courthouse walls, given that the substance of the restriction and the motivations behind it are virtually identical.

Id.

308. And speech by a judicial candidate that *is* intended to influence legislative policymaking—a candidate's call for the legislature to enact more employer-friendly statutes, for instance—would be political speech and probably should be protected as such. But arguably the state should be able to proscribe even that kind of speech in the context of judicial campaigns, on the theory that it might serve as a veiled promise to decide cases in a certain (for example, pro-employer) way.

309. 427 U.S. 539 (1976).

from reporting certain facts about the case.[310] On certiorari, the Supreme Court acknowledged that failing to restrain the press might threaten the fairness of the trial.[311] But still the Court unanimously overturned the restrictive order, reasoning that the cost of restraining speech about the judicial process outweighed, at least in that case, the danger that the speech would taint that process:

> The damage [caused by restraining speech] can be particularly great when the prior restraint falls upon the communication of news and commentary on current events. Truthful reports of public judicial proceedings have been afforded special protection against subsequent punishment. For the same reasons the protection against prior restraint should have particular force as applied to reporting of criminal proceedings, whether the crime in question is a single isolated act or a pattern of criminal conduct.
>
> "A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."[312]

What the Court is saying here is, in essence, that the speech in *Stuart* must be protected as political speech. It is true that media reporting of facts about a high-profile court case has the potential to influence the case's outcome; and it may even be true that media reporting (and other speech) about pending cases sometimes is intended to influence the outcome.[313] But speech like that in *Stuart* also has the arguable intent, and the potential effect, of influencing public policy, and it is on that basis that it is entitled to protection. The Court in *Stuart* recognized this when it characterized the press "as the handmaiden of effective judicial administration, . . . guard[ing] against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."[314] The speech in *Stuart* was protected, *despite* its potential to influence the decision of a particular court case, *because of* its potential to influence the administration of justice more generally. How justice should be administered generally is, ultimately, a question of policy for the political branches; speech about that question, then, is protected political speech.

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310. *See id.* at 543–44. The Nebraska Supreme Court subsequently narrowed the order somewhat. *See id.* at 545.

311. *See id.* at 562–63.

312. *Id.* at 559–60 (citations omitted) (quoting Sheppard v. Maxwell, 384 U.S. 333, 350 (1966)).

313. See, for example, the speech in *Bridges v. California*, discussed *infra* notes 315–321.

314. *Stuart*, 427 U.S. at 559–60 (quoting Sheppard v. Maxwell, 384 U.S. 333, 350 (1966)).

The speech protected by the Court's decision in another case, *Bridges v. California*,[315] also should be understood as political speech, despite the adjudicative context in which it occurred. In *Bridges*, two separate California state trial judges issued contempt citations against nonlitigants for extrajudicial speech about pending cases. In one instance the *Los Angeles Times* published editorials proclaiming, among other things, that a trial judge would "make a serious mistake" if he granted probation to two convicted criminal defendants;[316] in the other instance a union official sent a telegram to the U.S. Secretary of Labor stating that enforcement of a judge's ruling against the union "would tie up the port of Los Angeles and . . . involve the entire Pacific Coast."[317]

In an opinion by Justice Black, the Supreme Court overturned both contempt convictions as violative of the First Amendment. Although California had an interest in avoiding the "disorderly and unfair administration of justice,"[318] that interest was outweighed by "how much, as a practical matter, [the contempt convictions] would affect liberty of expression":[319]

> It must be recognized that public interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist. Since they punish utterances made during the pendency of a case, the judgments below therefore produce their restrictive results at the precise time when public interest in the matters discussed would naturally be at its height. Moreover, the ban is likely to fall not only at a crucial time but upon the most important topics of discussion. Here, for example, labor controversies were the topics of some of the publications. Experience shows that the more acute labor controversies are, the more likely it is that in some aspect they will get into court. It is therefore the controversies that command most interest that the decisions below would remove from the arena of public discussion.[320]

The speech in question was protected because of its capacity to generate "public interest" in the "important topic[]" of "labor controversies." It was protected, that is, because of its capacity to influence public policy with respect to labor disputes, despite its concurrent potential (which the Court discounted in any event)[321] to affect the results of pending court cases.

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315. 314 U.S. 252 (1941).
316. *Id.* at 271–72 (quoting *Probation for Gorillas?*, L.A. TIMES, May 5, 1938, at II4).
317. *Id.* at 275–76.
318. *Id.* at 271.
319. *Id.* at 268.
320. *Id.* at 268–69.
321. *See id.* at 271–78 (concluding that the speech was not sufficiently likely to affect the fairness of the pending court proceedings to justify punishment).

Stuart and *Bridges* on one side, and *Gentile* on the other,[322] can be seen as recognizing a line, albeit a fuzzy one, between speech that is predominantly political, with the intent and likely effect of influencing public policy, and speech that is predominantly adjudicative, with the intent and likely effect of influencing a court decision. The former kind of speech is subject to special protection; the latter is not. And the decisions show that the nature of the speech, adjudicative or political, does not depend entirely or even primarily on where or when the speech occurs: Speech may be political even though it refers to a pending court case (*Stuart* and *Bridges*)[323]—indeed, even if it takes place in a courtroom[324]—and speech may be adjudicative even though it occurs outside the courthouse (*Gentile*). I would add that speech may be adjudicative even though it occurs during an election campaign, and that *White* was wrongly decided because the Court failed to recognize that fact.

2. The Canon as a Safeguard of Direct Legitimacy

The second way to justify the Minnesota canon at issue in *White*, which goes hand-in-hand with the first way, is to understand the canon as protective rather than restrictive of speech—at least of the kind of speech that matters. The canon, to be specific, can be justified as necessary to protect the adjudicative speech of litigants in court cases, and thus to promote the direct legitimacy of court decisions.

Court decisions, I have argued, are legitimately binding on litigants because, and to the extent that, the litigants have the opportunity to participate meaningfully in making them. If a judge has pre-judged a case, however, the litigants are denied this opportunity; they cannot contribute to a decision that has already been made.[325] Put another way, the litigants' presentation of

322. *See* Gentile v. State Bar, 501 U.S. 1030 (1991); *supra* notes 105–115 and accompanying text.

323. *See* Schauer, *supra* note 14, at 697–98 (citation omitted). Schauer writes:

> [I]f one of the important purposes of the First Amendment is to ensure that government, its officials, and its processes are subject to public criticism, then it would be wrong to give those governmental officials who happen to wear black robes an immunity from this otherwise prevalent and vitally important principle.

Id.

324. One of the Court's most famous speech-protective decisions involved political speech that occurred in a courthouse. *See* Cohen v. California, 403 U.S. 15 (1971) (overturning the conviction, for disturbing the peace, of a Vietnam war protestor who wore a jacket bearing the words "Fuck the Draft" in the Los Angeles County Courthouse).

325. I discuss this particular point at greater length in Peters, *Persuasion*, *supra* note 24, at 25–26, and in Peters, *Participation*, *supra* note 24, at 192–93.

proofs and reasoned arguments—their adjudicative speech—is made worthless by a judge's precommitment, or "partiality," with respect to a case.[326]

The Minnesota canon can be seen, then, as a means to protect the efficacy of litigants' speech, to safeguard litigants' right of participation in making decisions that will bind them. It is a mechanism for ensuring that every Minnesota judge will be "willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case."[327] By limiting the adjudicative speech of *judges*, the canon effectuates, makes meaningful, the adjudicative speech of *litigants*.

This is in fact precisely the argument at the center of Justice Ginsburg's dissent in *White*—except that Justice Ginsburg characterized it as an argument about the litigants' rights of due process, not their rights of free speech.[328] As we saw in analyzing the *Velazquez* decision, however, due process and free speech—and indeed the Article III grant of "the judicial power"—effectively merge in the context of adjudicative participation.[329] Litigants have the free speech right to participate in creating the court decisions that will bind them. But the scope of that speech may be limited by the boundaries of the judicial power, which extend only to the application, and not to the creation, of policy, and by the requirements of due process, which prohibit giving one litigant an unfair participatory advantage over another. Each of these concepts—free speech, due process of law, and the judicial power—emphasizes a different aspect of the nature of participation in adjudication. And the value of participation necessitates both freedom of speech and constraints on that freedom.

CONCLUSION: FREE SPEECH AT BOTH ENDS

Adjudication is one of those contexts, not tremendously uncommon, in which the Free Speech Clause seems not to operate, or to operate with much less than full force. Commercial advertising, employment, and labor relations are a few other environments in which the First Amendment dog rarely barks or, when it does, barks much more loudly than it bites. Adjudication, though, is qualitatively different from these examples: It is a government decisionmaking process with the capacity legally to coerce people, backed by

326. In this sense, a judge's ideological precommitment to a particular result is akin to her acceptance of a bribe to reach a particular result: Both render meaningless the litigants' efforts to influence the result. *See* Peters, *Persuasion*, *supra* note 24, at 25; Peters, *Participation*, *supra* note 24, at 192.

327. Republican Party v. White, 536 U.S. 765, 778 (2002).

328. *See id.* at 803, 813 (Ginsburg, J., dissenting) (quoting Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980)) ("This judicial obligation to avoid prejudgment corresponds to the litigant's right, protected by the Due Process Clause of the Fourteenth Amendment, to 'an impartial and disinterested tribunal in both civil and criminal cases . . . .'").

329. *See supra* Part IV.A.1.

the force of the state. We thus need some special justification for our willingness to squelch the free speech of participants in adjudication.

The justification I've offered here turns on the need to preserve the political legitimacy of the adjudicative process. Freedom of speech is a component of political legitimacy; it is a necessary means of self-governance, of citizen participation in government decisions. In adjudication, though, strong freedom of speech would threaten legitimacy, in two senses. First, it would threaten the direct legitimacy of the process, which relies on the opportunity for full and fair participation, by opening the door to prejudgment of a case or to bias in favor of one of the litigants. And second, it would threaten the derivative legitimacy of the process, which relies on the accurate and faithful judicial application of general policy, by inviting judges and, particularly, juries to incorrectly apply policy or to reject applicable policy altogether.

Using adjudication as a laboratory, we thus can see that concerns for political legitimacy operate at both ends, so to speak, of free speech theory. Such concerns animate freedom of speech in the first place, mandating it as a vital element of citizen (or litigant) participation in government. But legitimacy concerns also justify limitations on freedom of speech where unfettered speech would serve to undermine participation or to invert the legitimate policymaking hierarchy.

Let me conclude by suggesting, rather tentatively, a further implication that flows from this understanding. I believe that the Janus-faced nature of free speech, revealed in the adjudicative context, obtains in the pure political context as well. Our willingness to restrict the freedom of adjudicative speech in the name of legitimacy implies that even political speech may be restricted where necessary to preserve the very legitimacy that free political speech is designed to promote.

The justification for free political speech that I described in Part I holds that free speech generally is necessary to allow for meaningful citizen participation in policymaking. But we've seen, in the context of adjudication, how complete freedom of speech sometimes can frustrate participatory legitimacy. Without fact-constraining speech restrictions, courts might inaccurately apply policy, frustrating the participatory efforts of the community as a whole. Without norm-constraining restrictions, courts might make up policy themselves—illegitimately, because court decisionmaking lacks full community participation. And without restrictions on judicial speech like that invalidated in *White*, the participation of the litigants in the process of applying general policy to their specific circumstances might be rendered meaningless.

Democratic politics does not need, and therefore cannot legitimately impose, the kinds of fact-constraining and norm-constraining speech restrictions that are acceptable in adjudication. This is because the process of democratic

politics, unlike that of adjudication, can legitimately create generally binding policy. There is no concern for derivative legitimacy, then, that can justify limiting the empirical or normative inputs into democratic politics, and indeed doing so would undermine direct legitimacy by frustrating the participatory efforts of those who think that the prohibited facts or norms actually are relevant to public policy.

But there is the persistent danger that the speech of some participants in the political process, like the speech of judicial candidates in *White*, will effectively render the speech of other participants meaningless, or at least less meaningful. That is, there is the danger that unfettered political speech might itself, in certain circumstances, undermine the direct legitimacy of democratic politics.

Consider, for instance, the fact that some in our society disproportionately control, through money or political power, access to the mass media that are the most effective platforms for political speech.[330] Large corporations, for example, powerfully influence the content of everyday television programming, including news programming, through the use of their advertising dollars or through their ownership of the media outlets themselves.[331] Even more troublingly, well-financed candidates, political action committees, and interest groups can dominate debate about candidates and issues during political campaigns by purchasing large amounts of advertising.[332] Because the opportunity for speech through the mass media is a marketable commodity, those with more money can afford to purchase more of it—to engage in more, and more effective, speech—than those with less money. The result, both in potential and in actual practice, is that the contributions of some (richer and more powerful) members of society to political debate effectively drown out the contributions of others.[333]

Many have argued that government has the power, under the First Amendment, to regulate the "marketplace" of speech in order to mitigate or prevent these kinds of free speech inequities.[334] Arguably the Supreme Court has not been consistent in deciding whether, when, and to what extent

330. Here I derive examples from, and reach conclusions generally consistent with, those offered in SUNSTEIN, FREE SPEECH, *supra* note 48, particularly in Chapters 2, 3, 4, and 6. Sunstein's excellent analysis is much more in-depth and much less tentative than the suggestions I make here.

331. *See id.* at 62–66.

332. This was the rationale behind the Michigan restriction on corporate political expenditures challenged in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and behind the Court's decision upholding that restriction: "Corporate wealth can unfairly influence elections," *id.* at 660 (citations omitted). *See also* Fallon, *supra* note 21, at 37 (explaining the result in *Austin* as "reflect[ing] the worry that political advertising achieves causal dominance, not rational persuasion"); CHEMERINSKY, *supra* note 20, at 1043–44 (explaining the rationale behind *Austin*).

333. *See generally* SUNSTEIN, FREE SPEECH, *supra* note 48; John Rawls, *Basic Liberties and Their Priority*, *in* THE TANNER LECTURES ON HUMAN VALUES III 76 (Sterling M. McMurrin ed., 1982); RAWLS, *supra* note 51, at 362–63.

334. *See, e.g.*, sources cited *supra* note 333.

government may do so.[335] My analysis in this Article suggests, quite generally, that government *may* reasonably regulate speech in order to prevent the speech of some from being rendered comparatively less meaningful. Doing so would be analogous to preventing judicial precommitment—in the form of de facto campaign "promises," as in *White*, or in the starker form of, say, a bribe—to a particular result in a particular court case; it would restrict the speech of some participants in government decisionmaking (the judge in adjudication, the rich and powerful in politics) in order to preserve the speech of others.[336] Such restrictions, if reasonable, might actually *enhance* the overall freedom of speech, and political participation more generally, rather than impair them.[337] They might, in other words, increase the direct participatory legitimacy of the political process, which is after all what justifies freedom of political speech in the first place.[338]

Consider also examples of "hate speech," such as the racially motivated cross burning held protected by the Court in *R.A.V. v. City of St. Paul*.[339] It is debatable, first of all, whether hate speech directed at women or at racial, ethnic, religious, or other minorities, at least in its most egregious forms, constitutes political participation at all; does hate speech really contribute, or even attempt

335. For example, the Court has upheld the FCC's so-called "fairness doctrine" requiring broadcast television stations to offer balanced discussions of public issues. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 369–71, 400–01 (1969). But the Court also has invalidated a state law requiring newspapers to accept and print letters by political candidates replying to criticism in the paper, *see* Miami Herald Publ'g v. Tornillo, 418 U.S. 241, 243, 258 (1974), and has held that intermediate scrutiny must be applied to a federal statute requiring cable TV companies to carry local broadcast channels, *see* Turner Broad. Sys. Inc. v. FCC, 512 U.S. 622, 661–62 (1994). In the area of campaign finance regulation, the Court has invalidated federal restrictions on campaign expenditures by candidates and noncandidates alike but has upheld restrictions on campaign contributions, *see* Buckley v. Valeo, 424 U.S. 1 (1975), and has invalidated some restrictions on corporate campaign expenditures but upheld others. *Compare* First Nat'l Bank v. Bellotti, 435 U.S. 765, 767 (1978) (invalidating a Massachusetts law prohibiting banks or businesses from making contributions or expenditures in connection with ballot initiatives or referenda), *with* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 655, 669 (1990) (upholding a Michigan law prohibiting corporations from making contributions or expenditures in connection with political campaigns). Shortly before this Article went to press, the Court issued a lengthy and fractured decision upholding provisions of the federal Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002), that regulate the use of "soft money" (campaign related funds previously unregulated by federal law) and of "issue ads" (advertisements intended to affect federal election results without overtly advocating a particular candidate's election or defeat). *See, e.g.*, McConnell v. Fed. Election Comm'n, 124 S. Ct. 619 (2003).

336. It would, on the other hand, be foolish for government to attempt to make everyone's speech, in adjudication or in politics, *equally* effective. Even if every participant who wants to speak, in either context, is given an equal opportunity to do so, some people's arguments will simply be more persuasive than others. The idea is to equalize—or at least to remove the most egregious forms of inequality in—opportunity to meaningfully participate, not the results of participation.

337. The Supreme Court suggested as much in *Red Lion*. *See Red Lion*, 395 U.S. at 375 (FCC's fairness doctrine would "enhance rather than abridge the freedoms of speech and press.").

338. I am offering only a very general suggestion here and leaving many problems and details unconsidered. For careful analysis of many of those problems and details, see SUNSTEIN, FREE SPEECH, *supra* note 48.

339. 505 U.S. 377 (1992).

to contribute, to anyone's understanding about good public policy?[340] But this may be too narrow a conception of valuable political participation, and so let's suppose that cross burning and other egregious forms of hate speech do amount to true political speech. The possibility remains that protecting hate speech actually impairs freedom of speech more than it enhances freedom of speech, because hate speech might result in "silencing" the speech of its targets.[341]

We might compare hate speech in this regard to a judge's campaign promise to decide certain cases in certain ways.[342] A judge's precommitment to a certain decision renders the litigants' participation ineffective; what is more, a litigant's *knowledge* of a judge's precommitment may deter the litigant from attempting to meaningfully participate at all. The litigant is essentially silenced by her knowledge that the judge will not take her arguments seriously.

Hate speech may have a similar silencing effect: It tells its targets not only that the speaker thinks poorly of them, but also that the speaker simply will not take their arguments seriously. The hate speaker is telling his targets that, because they are his "moral subordinates,"[343] he need not listen or respond to their moral (including their political) arguments—not even to their arguments that they are not in fact his moral subordinates. This message matters to the targets because the speaker, like the precommitting judge, is a government decisionmaker: He can influence government decisions with his speech and, assuming he is a citizen, with his vote. Like a judge's announcement of how he will decide certain cases, then, hate speech might be understood as an attempt by a government decisionmaker to preempt the meaningful participation of those who will be bound by his decisions.

Understanding hate speech in this way allows us to distinguish (albeit only roughly) between, on the one hand, garden-variety statements of opinion about the abilities or worth (or lack thereof) of women, racial minorities, and the like—which seems fully deserving of First Amendment protection as political speech, however disagreeable most of us might find it to be—and, on the other

340. Perhaps only in that its existence suggests that good public policy would be to restrict it.

341. For descriptions of how racist hate speech can "silence" its victims, see Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2335–41 (1989); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 136–49 (1982).

342. The majority in *White* did not decide that this overt sort of promise is protected by the First Amendment; its decision applied only to judicial candidates' statements about "disputed legal or political issues" that fell short of precommitments to particular decisions. Republican Party v. White, 536 U.S. 765, 770 (2002).

343. I take this phrasing from Larry Alexander, who takes it in turn from Andrew Altman. *See* Alexander, *supra* note 127, at 87–89 (citing Andrew Altman, *Liberalism and Campus Hate Speech: A Philosophical Examination*, 103 ETHICS 302, 310 (1993)).

hand, true hate speech, which might not be so deserving. Consider an example offered by Henry Louis Gates, Jr.:

> Contrast the following two statements addressed to a black freshman at Stanford: (A) LeVon, if you find yourself struggling in your classes here, you should realize it isn't your fault. It's simply that you're the beneficiary of a disruptive policy of affirmative action that places underqualified, underprepared and often undertalented black students in demanding educational environments like this one. The policy's egalitarian aims may be well-intentioned, but given the fact that aptitude tests place African Americans almost a full standard deviation below the mean, even controlling for socioeconomic disparities, they are also profoundly misguided. The truth is, you probably don't belong here, and your college experience will be a long downhill slide. (B) Out of my face, jungle bunny.[344]

Statement A is within the realm of moral or political argument; it is a statement of opinion that allows for the possibility of disagreement, even of persuasion in the other direction. If it is not exactly an invitation to reasoned debate, at least it isn't an advertisement that the speaker has precommitted to a particular moral or political judgment, debate be damned. But Statement B is precisely such an advertisement: It tells the listener that none of his moral arguments, including the argument that he is *capable* of moral argument, can possibly be effective with respect to the speaker. It is one citizen telling another that he has, in effect, prejudged the other's case. As such, it seems to me analogous to the judge's precommitment to particular decisions of cases; it is speech that might be justifiably restricted in the name of greater freedom of political expression.[345]

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344. *Id.* at 72 (quoting Henry Louis Gates, Jr., *Let Them Talk: Why Civil Liberties Pose No Threat to Civil Rights*, NEW REPUBLIC, Sept. 20 & 27, 1993, at 37, 45).

345. Thus I lean towards disagreement with Larry Alexander's conclusion that bans on hate speech, at least outside the context of public universities, cannot be justified under the First Amendment as protections against subordination. *See id.* at 87–89. Alexander argues that hate speech cannot in fact subordinate its targets because,

> [f]or one to be legally subordinated, he must have his legal rights and duties altered in a way that brings about a subordinate legal status. Hate speech does not effect such an alteration. Nor does it alter moral rights and duties. It leaves the target's moral status as it was. Of course, those who engage in hate speech may often believe that the targets are moral subordinates. However, they do not believe that uttering epithets is what makes them moral subordinates.

Id. at 88. I think that hate speakers *do* in fact believe that uttering epithets makes their targets into legal (or perhaps political) subordinates by deterring the targets from offering reasoned moral and political arguments (including arguments about the targets' moral and political status). The desire to subordinate in this way is, at least in part, what motivates people to engage in hate speech rather than in reasoned argument about the supposed inferiority of women, blacks, or whomever. Reasoned argument, after all, invites a reasoned response; hate speech seeks to cut off a reasoned response before it can be offered.

It seems to me, then, that the only "value" hate speech adds to moral and political discussion is the questionable one of silencing its targets; any moral or political ideas lurking beneath hate speech could be expressed in the form of reasoned arguments rather than epithets. Thus the harm of silencing hate speech

Of course there will be very difficult lines to draw in these and other kinds of cases. My point here is only that, despite the Supreme Court's occasional pronouncements to the contrary,[346] the project of line drawing itself should not be taboo in the context of political speech any more than in the context of adjudicative speech. Sometimes we must restrict speech in the name of democratic legitimacy, which after all animates the freedom of speech in the first place. We have been doing it in adjudication for centuries.

is not really a harm at all—the ideas it expresses can be conveyed effectively in other forms—while the "silencing" harm of hate speech seems to me quite real.

Of course, this leaves many line-drawing or "slippery slope" problems, *see id.* at 88–89, 91–96 (discussing the slippery slope problem with regulating hate speech), including the problem of distinguishing hate speech from reasoned arguments. Perhaps those problems, and the risk of erroneous political or judicial resolutions of them, outweigh the gains to true freedom of speech that could be obtained by a perfectly drawn and perfectly administered ban on hate speech. I take no position here on that extremely difficult and probably ultimately decisive question.

346. *See, e.g.*, Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 538 (1980) ("To allow a government the choice of permissible subjects for public debate would be to allow the government control over the search for political truth."); Buckley v. Valeo, 424 U.S. 1, 48–49 (1976) (per curiam) ("[T]he concept that government may restrict the speech of some elements in our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ."); *see also* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 680 (1990) (Scalia, J., dissenting) ("[T]he absolutely central truth of the First Amendment [is] that government cannot be trusted to assure, through censorship, the 'fairness' of political debate.").

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