Civility in Government Meetings: Balancing First Amendment, Reputational Interests, and Efficiency

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CIVILITY IN GOVERNMENT MEETINGS:
BALANCING FIRST AMENDMENT, REPUTATIONAL INTERESTS, AND EFFICIENCY

BY TERRI DAY* & ERIN BRADFORD**

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I. INTRODUCTION

Nowhere is the American ideal of “We the People” democracy more realized than at the level of local government. Government in the
sunshine and open access laws mandate that local school boards, city councils, and county commissions hold public meetings, often requiring a public comment session. Operating government business in the public eye, with the opportunity for citizen input, provides direct access to government decision-makers. Public access allows all citizens, regardless of their political clout, to have the ear of those decision-makers who often have the most direct impact on citizens' everyday lives. Whether the controversy involves employment of a high school coach, a zoning variance or the closing of a community center, those most affected can directly express to local officials their support of, or opposition to, the cause at issue.

There are two aspects of open government; one is transparency, the other is citizen input. This paper focuses on the latter, and specifically on the rules of decorum that apply to public comment sessions at public meetings. Fortunately, violence at government meetings, like the recent shooting at a school board meeting, is rare. However, when angry citizens or disgruntled employees vent their

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1. U.S. CONST. pmbl.
2. See, e.g., FLA. STAT. § 286.001 (2009); MO. REV. STAT. § 610.010 (2006); S.D. CODIFIED LAWS § 1-27-1 (2004); WYO. STAT. ANN. § 16-4-201 (2011).
3. See, e.g., ARIZ. REV. STAT. ANN. § 38-431.01(G) (2011); CAL. GOV'T CODE §§ 11125.7(a), 54954.3(a) (2011); FLA. STAT. § 286.0115(2)(b) (2009); HAW. REV. STAT. § 92-3 (1985); LA. REV. STAT. ANN. § 42:14 (2010); NEB. REV. STAT. § 84-1412(2) (2008); 65 PA. CONS. STAT. § 710.1(a) (2010); VT. STAT. ANN. tit. 1, § 1-312(h) (2010); WIS. STAT. § 19.84 (2011).
frustrations in public meetings, government business can be impeded and reputational harm can result. Some recent examples of public comments that resulted in the ejection or arrest of citizens illustrate the intricate balance between an individual’s right to speak at a public meeting, and the right of public bodies to hold their meetings without undue disruption. In Ohio, after years of listening to the shouts of Norman Edwards, the Cleveland-Cuyahoga County Port Authority told Edwards that he is no longer allowed to comment at public meetings. Edwards is known for accusing public bodies and union officials of “keeping black people from working on publicly funded projects[,]” once calling a board member a racist.

In Louisiana, the Orleans Parish School Board meetings have become what some call a mockery. When board President Gail Glapion told a resident to “[b]e brief” the resident responded, “OK. The end. Period,” prompting hoots from the audience. Another example is when Lloyd Lazard criticized a trip to Washington that Glapion would be taking to attend the Schools’ Spring Legislative Policy Conference, saying that the “trip [was] a waste of money” and the only purpose was for Glapion to continue her “social climbing and elbow rubbing” with local politicians “who all have an office on Magazine Street.” When Glapion responded to Lazard’s comments with a “Thank you, Mr. Lazard, for your opinion,” he retorted, “You’re not welcome, Mizz

6. See White v. City of Norwalk, 900 F.2d 1421 (9th Cir. 1990) (holding that speakers at public meetings can be silenced if they are “disruptive”). “A speaker may disrupt a Council meeting by speaking too long, by being unduly repetitious, or by extending discussion of irrelevancies.” Id. at 1426. “The meeting is disrupted because the Council is prevented from accomplishing its business in a reasonably efficient manner.” Id.


8. See White, 900 F.2d 1421.


10. Id.

11. Lynne Jensen, School Board Meetings Draw the Civic and the Silly, NEW ORLEANS TIMES PICAYUNE, April 1, 1999 at A1.

12. Id.

13. Id.
Such exchanges not only frustrate the Board, but also annoy other citizens, like one elderly woman at the meeting who said, "This is why I didn't want to come to no meeting."

In an attempt to maintain civility and the ability to conduct business, government entities often limit the tenor and subject matter of public comment. However, how, what, and who can comment at public meetings is not clear from the existing case law. The Supreme Court has repeatedly held that discussions on public officials and government business should be open and robust, and are fully protected by the First Amendment, even if not always in perfect taste. In creating parameters that govern public comment, local governing boards must be cautious not to trample on the First Amendment rights of those wishing to speak. This paper will discuss the factors that government entities should consider in fashioning rules of decorum for public comment that comply with First Amendment dictates and protect the operation of government business and the reputational interests of government employees.

Americans have always been imbued with the local "spirit of liberty" and have been powerful participants in local government. A discussion of rules applicable to public comment sessions begins and ends with the First Amendment. However, this paper will discuss the key constitutional principles after reviewing some of the cases involving citizens' claims that their voices were silenced at public meetings and

14. Id.
15. Id.
16. See IND. CODE § 5-14-1.5-3(a) (2007) (maintaining that the public is only allowed to "observe and record" public meetings); see also ARIZ. REV. STAT. ANN. § 38-431.01(H) (2011); CAL. GOV'T CODE §§ 11125.7(b), 54954.3(b) (2010); FLA. STAT. § 286.0115(3) (2009); HAW. REV. STAT. § 92-3 (2007); MD. CODE ANN., STATE GOV'T. § 10-507(b) (2009); NEB. REV. STAT. § 84-1412(2) (2008); VT. STAT. ANN. tit. 1 § 312(h) (2010); W. VA. CODE § 6-9A-3 (2010); WIS. STAT. § 227-18(3)(c) (2009).
18. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 55–56 (J.P. Mayer & Max Lerner, eds., Harper & Row Publishers, Inc. 1966) (1835) (describing America, de Tocqueville wrote, "the strength of free peoples resides in the local community . . . [w]ithout local institutions, a nation may give itself a free government, but it has not got the spirit of liberty").
surveying some of the rules of decorum that states and local governments have adopted. Much of the confusion in finding the appropriate balance between "maximiz[ing] citizen participation" and "ensur[ing] the efficient conduct of the people's business"\textsuperscript{20} lies in a misapplication of forum analysis and the lack of training on the part of officials who have the responsibility of maintaining order at public meetings.

Therefore, before discussing the First Amendment, Part II of this paper will review some of the situations in which citizens' input at public meetings impedes government business or offends the sensibilities of others attending the meetings.\textsuperscript{21} Part III will survey the many different types of state and local laws that govern public session comments.\textsuperscript{22} While legislators and courts are not always in agreement on the scope and latitude of freedom afforded citizen speech,\textsuperscript{23} it is well recognized that citizens have a First Amendment right in speaking on public issues to those who govern, particularly at the local level.\textsuperscript{24} Courts have inconsistently viewed public comment sessions through the lens of a public forum analysis. Furthermore, public employees, speaking in their official capacity, do not receive the same First Amendment protection as private citizens.\textsuperscript{25} With an eye toward unraveling the confusion in the existing case law, Part IV will discuss the First Amendment principles which local government entities must consider when fashioning rules applicable to public comment sessions.\textsuperscript{26} Part V will suggest guidelines

\begin{enumerate}
\item Steinburg v. Chesterfield Cnty. Planning Comm'n, 527 F.3d 377, 387 (4th Cir. 2008).
\item See infra Part II.
\item See infra Part III.
\item See infra Parts II and III.
\item See Mills v. Alabama, 384 U.S. 214, 218–19 (1966) (stating, "[A] major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes."); Piscottano v. Town of Somers, 396 F. Supp. 2d 187, 200 (D. Conn., 2005) (citation omitted) ("The First Amendment's protection of free speech... extends to a broad range of speech and expressive conduct. Speech on public issues and political matters lies at the heart of protected speech.") (internal citations omitted).
\item See Garcetti v. Ceballos, 547 U.S. 410, 418 (2006) (stating "[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom.").
\item See infra Part IV.
\end{enumerate}
for local governments to follow when adopting and implementing rules of decorum for public comment sessions at local government meetings. In conclusion, Part VI will suggest that incivility is inevitable in public discourse and rules of decorum are, at best, aspirational.

II. CITIZENS’ SPEECH CLASHES WITH GOVERNMENT BUSINESS AND SENSIBILITIES

Hundreds of thousands of viewers witnessing a man pulling a gun at a Florida school board meeting as the incident, captured on video, appeared on major news networks and went viral on YouTube. Angry at association rules mandating the use of a contracted landscaper, a member of a gated community took a gun to a county meeting and killed two commissioners. In Missouri, another disgruntled citizen, yelling “[s]hoot the Mayor,” burst into a city council meeting and shot two police officers and three city officials before being fatally wounded. These and other headline-grabbing news stories are fortunately isolated incidents of citizens-gone-mad. No amount of rules adopted to govern citizen participation in government meetings will deter those individuals, who for reasons of illness or other infirmities, are committed to such acts of violence. In fact, the only antidote for such individuals is strong security measures.

However, it is the fear of disruption and the risk of violence that often fuel the promulgation of rules and government actions that limit or preclude citizen participation in public meetings. Where government meetings do include public comment sessions, rules of decorum are

27. See infra Part V.
28. See infra Part VI.
32. See supra Part I.
aimed at minimizing disruption so that government business can be accomplished and citizens' voices can be heard.\(^3^3\)

The foundation of all rules of decorum is that government may not silence viewpoints it disfavors.\(^3^4\) Beyond this basic requirement, local entities can adopt rules that require speakers to maintain relevancy and civility when commenting.\(^3^5\) Rules prohibiting personal attacks have received mixed validation from the courts.\(^3^6\) The "policy against 'personal attacks' focuses on two evils that could erode the beneficence of orderly public discussion."\(^3^7\) These policies further the dual interests of keeping public discussion on topic and reducing defensiveness and

\(^3^3\) See infra Part III for discussion of state laws concerning open meetings and public comment sessions and the limitations placed on such sessions.

\(^3^4\) See infra Part III for discussion of constitutional underpinnings of rules governing public comment sessions.

\(^3^5\) While it is undeniable that the First Amendment envisions the "'uninhibited, robust, and wide-open debate' on public issues," it is also beyond doubt that the freedom of speech, is not absolute. Frisby v. Schultz, 487 U.S. 474, 479 (1988) (quoting N.Y. Times v. Sullivan, 376 U.S. 254, 270 (1964)). The Supreme Court has established "that the First Amendment does not guarantee [persons] the right to communicate [their] views at all times and places or in any manner that may be desired." Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 647 (1981).

\(^3^6\) See Bach v. School Bd. of Va. Beach, 139 F. Supp. 2d 738, 741 (E.D. Va. 2001) (striking school board bylaw which prohibits speakers from making "attacks or accusations regarding the honesty, character, integrity or other like personal attributes of any identified individual"). The school board tried to distinguish between "comments about public officials' qualifications and conduct in administering their duties" and "attacks that are targeted at school officials in their personal capacity." Id. at 742. In giving an example of this distinction, the school board contended that calling someone a liar would violate the bylaw provision against personal attacks, but saying someone lied about spending public funds for personal use would not. Id. at 743. The court concluded that the school board was making a distinction without a difference, and such hair-splitting would chill "robust public debate." Id. But see Steinburg v. Chesterfield Cnty. Planning Comm'n, 527 F.3d 377, 387 (4th Cir. 2008) (concluding that "a content-neutral policy against personal attacks is not facially unconstitutional" so long as it serves "the legitimate public interest . . . of decorum and order"). Perhaps the distinction between \textit{Bach} and \textit{Steinburg} can be explained by the specificity of the provision in the bylaw found facially unconstitutional in \textit{Bach}.

\(^3^7\) \textit{Steinburg}, 527 F.3d at 386 (asserting that it was violative of the "no personal attacks" policy to fail to speak on topic and to refuse to relinquish podium after several warnings that comments were impermissible).
counter-argumentation. Both of these interests serve to maintain the orderly conduct of the meeting.

However, determining where to draw the line between disruptive and non-disruptive conduct often causes problems of constitutional significance. For example, a Nazi gesture, lasting one or two seconds, made by a citizen after the close of the public comment session resulted in a long court battle. The incident began in 2002, at a city council meeting. After the Mayor admonished a citizen speaker whose time had expired to relinquish the podium and sit down, Mr. Norse gave a Nazi salute directed at the Mayor. Having resumed the meeting, the Mayor was unaware of Mr. Norse’s gesture until another council member brought it to his attention. At the direction of the Mayor, Mr. Norse was ejected from the meeting. Mr. Norse was also ejected from a second meeting in which he “engaged in a parade about Counsel chambers.”

Eight years later, the Ninth Circuit Court of Appeals, sitting en banc, reversed a previous decision that had affirmed the dismissal of Mr. Norse’s 42 U.S.C. § 1983 claim alleging a First Amendment violation, and remanded the case for trial. At the time of the incident, the city’s rules of procedure for maintaining decorum in council meetings provided:

While the Council is in session, all persons shall preserve order and decorum. Any person making

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38. Id. at 387.
39. Id. (stating that “a personal attack leads almost inevitably to a responsive defense or counter-attack and thus to argumentation that has the real potential to disrupt the orderly conduct of the meeting”).
40. Norse v. City of Santa Cruz, 586 F.3d 697, 698 (9th Cir. 2009) (describing procedural history of the case); reh’g granted en banc, 598 F.3d 1061 (9th Cir. 2010), rev’d in part en banc, 629 F.3d 966 (9th Cir. 2010).
41. Norse, 586 F.3d at 698.
43. Norse, 586 F.3d at 698.
44. Laidman, supra note 42, at 55.
45. Id. at 55–56.
46. Norse v. City of Santa Cruz, 629 F.3d 966, 978 (9th Cir. 2010).
personal, impertinent, or slanderous remarks, or becoming boisterous shall be barred by the presiding officer from further attendance at said meeting unless permission for continued attendance is granted by a majority vote of the Council. The rules also require all speakers to “avoid all indecorous language and references to personalities and abide by the following rules of civil debate.

1. We may disagree, but we will be respectful of one another
2. All comments will be directed to the issue at hand
3. Personal attacks should be avoided.

The city argued that any violation of its decorum rules constituted a “disturbance” which could result in ejection from a public meeting. The court disagreed, concluding that “actual disruption means actual disruption” not “constructive disruption, technical disruption, virtual disruption, *nunc pro tunc* disruption, or imaginary disruption.”

47. Norse v. City of Santa Cruz, No. 02-01479 (RMW), 2007 WL 951854, at *2 (N.D. Cal. Mar. 28, 2007) *rev'd* Norse v. City of Santa Cruz, 629 F.3d 966 (2010). The rules further provided:

Finally, the rules provide that the chief of police, or representative, shall act as ex-officio sergeant-at-arms of the Council and “shall carry out all orders and instructions of the presiding officer for the purpose of maintaining order and decorum in the Council Chambers.”

Upon instructions of the presiding officer it shall be the duty of the sergeant-at-arms or any police officer present to eject from the Council Chambers any person in the audience who uses boisterous or profane language, or language tending to bring the Council or any Councilmember into contempt, or any person who interrupts and refuses to keep quiet or take a seat when ordered to do so by the presiding officer or otherwise disrupts the proceedings of the Council.

*Id.*

48. Norse, 629 F.3d at 976.

49. *Id.*
Like the city in the Norse case, in City of Dayton v. Esrati, the city argued that its mayor had the authority to define what constituted a disturbance and to eject a citizen from a commission meeting for causing one. In a city commission meeting, Mr. David Esrati sat quietly donning a ninja mask. After Mr. Esrati ignored several warnings to remove the mask, he was arrested and charged with criminal trespass, disturbing a lawful meeting, and unlawful conduct at a commission meeting. The City of Dayton put forth several reasons for prohibiting Mr. Esrati from wearing a mask in the commission meeting. According to the city, maintaining decorum, order and control, as well as assuaging fear for physical safety of other citizens justified the action against Mr. Esrati. However, as in the Norse case, the court required the City of Dayton to show an actual disturbance to sustain the charges against Mr. Esrati.

Symbolic speech, such as a Nazi gesture or donning a ninja mask, is not the only type of alleged disturbance for which citizens have been removed from public meetings and subject to arrest. In Leonard v. Robinson, Mr. Leonard used the term “god damn” when addressing the Township Council during the citizen comment portion of the public meeting. After a reprimand from a council member for “us[ing] the Lord’s name in vain,” Mr. Leonard yelled, “I’ll do whatever I want,” at which point a police officer entered the conversation. Mr. Leonard and

51. Id. at 1145 (highlighting the city’s contention that the trial court erred in failing to recognize that the mayor had authority to “regulate the conduct of those attending the Commission meeting”).
52. Id. at 1143.
53. Id. at 1142.
54. Id. at 1145.
55. Id. The city also articulated a fourth rationale of “affording those scheduled to make presentations the opportunity to exercise their First Amendment rights without distraction or hindrance . . . .” Id.
56. See id. at 1146–49 (affirming the trial court judgment dismissing the charges against Mr. Esrati). The court analyzed Mr. Esrati’s First Amendment right under the symbolic speech doctrine and disagreed with the City’s contention that after the public comment session is over, a commission meeting is a nonpublic forum. Id.
57. 477 F.3d 347 (6th Cir. 2007).
58. Id. at 352.
59. Id.
the police officer exchanged unpleasantries, leading to Mr. Leonard's arrest for disturbance of lawful meetings. Mr. Leonard claimed that his arrest was without probable cause and in retaliation for his comments at the council meeting. Although the legal issues concerned the actions of the police officer rather than a council member, the alleged disturbance at the public meeting subjected the speaker to criminal charges. Ultimately, the appellate court reversed the order of summary judgment and remanded Mr. Leonard's claim of retaliation for exercising his First Amendment rights.

Preventing disturbances at public meetings is essential to achieving the dual goals of fostering citizen participation and ensuring the efficient accomplishment of public business. To achieve these goals, it is necessary for local entities to adopt and implement rules of procedure for maintaining decorum in public meetings. Common among the rules of decorum adopted by government entities for public comment sessions are prohibitions against speech that is "repetitive," "harassing" or "frivolous." Citizens have been denied the opportunity to speak or ejected from public meetings for ignoring "legitimate" requests from the presiding official to cease their comments and sit down. Courts have

60. Id. A video of the incident showed that "[w]hat start[ed] as a pointed, but seemingly controlled, exchange between Leonard and a board member turn[ed] into Leonard speaking over the board member and degenerat[ed] into Leonard losing control and simply yelling at the board member." Id. at 364.

61. Id. at 363 (reversing the district court's order granting summary judgment in favor of the defendants).

62. Cf. Norse v. City of Santa Cruz, 586 F.3d 697 (9th Cir. 2009), reh'g granted en banc, 598 F.3d 1061 (9th Cir. 2010), rev'd in part en banc, 629 F.3d 966 (9th Cir. 2010); Dayton v. Esrati, 707 N.E.2d 1140 (Ohio Ct. App. 1997).

63. Leonard, 477 F.3d. at 352.

64. Id. at 351.

65. See Lowery v. Jefferson Cnty. Bd. of Educ., 586 F.3d 427, 430 (6th Cir. 2009) (upholding school board policy prohibiting speech when it is "repetitive," "harassing" or "frivolous"); White v. City of Norwalk, 900 F.2d 1421, 1425 (9th Cir. 1990) (agreeing that it is permissible to prohibit citizen speech that is irrelevant or repetitious); Jones v. Heyman, 888 F.2d 1328, 1333 (11th Cir. 1989) (finding a valid ejection of speaker from city commission meeting based on "irrelevant" and "disruptive" speech); Wright v. Anthony, 733 F.2d 575, 576 (8th Cir. 1984) (upholding five-minute limit for speech at public hearing).

66. See I.A. Rana Enters., Inc. v. City of Aurora, 630 F. Supp. 2d 912, 923 (N.D. Ill. 2009) (upholding a three-minute time limit); Shero v. City of Grove, 510
deemed the following “legitimate” reasons to silence a speaker: when the speaker has exceeded his allotted time limit;67 debated irrelevancies;68 pursued repetitive debate;69 discussed matters of private concern;70 or delivered comments in a harassing, insulting manner.71

A presiding official must be tasked with the responsibility of cutting off irrelevant, repetitive and caustic debates to avoid free-for-alls.

F.3d 1196, 1203 (10th Cir. 2007) (asserting that three-minute time limit to speak at public comment portion of city council meeting did not constitute a prior restraint in violation of the First Amendment); Wright, 733 F.2d at 577 (upholding five-minute time limit for public comments in public hearing on Social Security reforms). Cf. Rowe v. City of Cocoa, 358 F.3d 800, 803 (2004) (expressing concern over the need to avoid “interminable” meetings) (citing Heyman, 888 F.2d at 1333).

67. See I.A. Rana Enters., 630 F. Supp. at 923; Shero, 410 F.3d at 1203; Wright, 733 F.2d at 577.

68. See Steinburg v. Chesterfield Cnty. Planning Comm’n, 527 F.3d 377 (2008) (agreeing that removal from public meeting for failure to restrict comments to the only topic for consideration at the commission’s meeting did not violate the First Amendment rights of the speaker); White, 900 F.2d at 1425 (finding it permissible to limit public comments to only those topics on the agenda).

69. See Lowery, 586 F.3d 427 (rejecting parents’ request to speak at a school board meeting because the proposed topic was repetitive of the parents’ comments at the previous board meeting did not constitute a prior restraint in violation of the First Amendment); Eichenlaub v. Twp. of Indiana, 385 F.3d 274, 281 (3d Cir. 2004) (holding that removing of speaker from Township Board of Supervisors meeting during public comment session because he was “repetitive and truculent” and “repeatedly interrupted the chairman of the meeting” did not violate the First Amendment).

70. See Mitchell v. Hillsborough Cnty., 468 F.3d 1276, 1284 (11th Cir. 2006) (determining whether government employee speech is a matter of public concern or private speech for purposes of First Amendment protection, and finding that although speech was a private matter there was no retaliatory claim when employee was terminated for vulgar comments during public comment portion of county commission meeting); Eichenlaub, 385 F.3d at 281 (stating that “[o]ne would certainly not expect the forum of a Township meeting to include . . . arguments about private disputes involving town citizens”). However, the court in Eichenlaub went on to note that the distinction between public concern and private matters is not relevant outside of the government employment context, and Plaintiff’s private land use grievance with the Township is protected by the First Amendment. Id. at 285.

71. Mitchell, 468 F.3d at 1288 (maintaining that “vulgar, vituperative, ad hominem attack” against a county commissioner during the public comment session is not entitled to First Amendment protection); Lowery, 586 F.3d at 435 (stating that “harassing” speech threatening legal action can be excluded from public comment session of school board meeting without violating the First Amendment).
and interminably long meetings. Neutral rules provide guidance to officials conducting public meetings who must decide what constitutes a disruption and at what point the speaker should be silenced so that government business can proceed and other citizens can be heard. However, neutral rules of general applicability become vehicles of government censorship when government entities and officials enforce rules of decorum in a selective and arbitrary manner.

Members of the public do not have a constitutionally guaranteed right “to be heard by public bodies making decisions of policy.” However, when state and local laws create a forum for citizen input at public meetings, constitutional guarantees apply. What level of constitutional protection is afforded citizen speech in public comment sessions will be discussed after surveying various states’ open meeting laws and the rules of decorum that govern them.

III. A SURVEY OF OPEN MEETING LAWS AND RULES OF DECORUM

While every state has Open Meetings Laws, not every state’s Open Meetings Laws address whether there is a right to participate in public meetings. Where the Open Meetings Law does not specifically provide for the right of public participation, other statutes or judicial fiat may create this right. Some state statutes limit the right for public

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72. Cf. Lowery, 586 F.3d at 431.
73. Minnesota State Bd. for Cmty. Coll. v. Knight, 465 U.S. 271, 284 (1984) (quoting Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915) (“Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption.”)).
74. See infra Part III.
75. The states that do not specifically address the right to participate in public meetings are: Alabama, Alaska, Colorado, Georgia, Idaho, Illinois, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming.
76. In Texas and Minnesota, the courts have created the right to speak at public meetings. See Eudaly v. City of Colleyville, 642 S.W.2d 75, 77 (Tex. Ct. App. 1982); Claude v. Collins, 518 N.W.2d 836, 841 (Minn. 1994).
comment to specific organizations. For example, in both Alabama and North Carolina, specific statutes require an opportunity for public comment at the Board of Commissioners and Board of Education meetings.

In Texas and Minnesota, where the Open Meetings Laws are silent as to public participation, the courts have weighed in on the issue. The Minnesota Supreme Court has held that one of the purposes of the statute is to “afford the public an opportunity to present its views.” In Texas, a court distinguished between “public meetings,” where the public is not entitled to comment, and “public hearings,” where the public is entitled to comment.

In Florida, both the legislature and the courts have provided for and supported the right to public participation in public meetings. The Florida Supreme Court has emphasized the importance of public participation in open meetings, stating that “specified boards and commissions . . . should not be allowed to deprive the public of this inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made.”


78. ALA. CODE § 11-44-127 (stating that all meetings of city board of commissioners are open to the public “and every citizen of the municipality shall have a right to be heard on any subject relating to the business or conduct of the municipality”); ALA. CODE § 16-8-3 (asserting that county boards of education must hold an annual meeting to give the public an opportunity to present “to the board matters relating to the allotment of public school funds or any other matter relating to the administration of the public schools of the county”); N.C. GEN. STAT. §113A-110(e) (“Prior to adoption or subsequent amendment of any land-use plan, the body charged with its preparation and adoption . . . shall hold a public hearing at which public and private parties shall have the opportunity to present comments and recommendations.”).

79. See Eudaly, 642 S.W.2d at 77; Claude, 518 N.W.2d at 841.

80. Claude, 518 N.W.2d at 841 (quoting St. Cloud Newspapers, Inc. v. Dist. 742 Cnty. Sch., 332 N.W.2d 1, 4 (Minn. 1983)).

81. Eudaly, 642 S.W.2d at 77.

82. See FLA. STAT. § 286.0115(2)(b) (2009) (stating that members of the public have the right to participate in “quasi-judicial proceedings on local government land-use matters”).

The Open Meetings Laws of other states specifically provide for the right to participate in public meetings. Arizona allows members of the public to address the public body on any issue within that body’s jurisdiction, but only if an open call to the public has been made during the public meeting. In Nebraska, while citizens have the right to speak at public meetings, the public body may choose to prevent citizen comments at public meetings as long as the public body does not forbid public participation at all meetings.

California requires that members of the public have an opportunity to speak at public meetings on agenda items at the time the governing body considers the specific agenda item. The California statutes also protect public criticism of the policies, procedures, programs or services of the body, or the acts or omissions of the body.

84. See Haw. Rev. Stat. § 92-3 (2007) (providing that citizens must be permitted to submit data, views, or arguments, in writing as well as through comments at meetings); La. Rev. Stat. Ann. § 42:5(D) (2006) (requiring each public body to provide an opportunity for public comment at meetings); Mont. Code Ann. § 7-1-4142 (2009), § 2-3-111 (2009) (stating that local governments are required to allow for “reasonable opportunity to submit data, views, or arguments” regarding decisions that are of significant interest to the public); N.J. Stat. Ann. § 10:4-12(a) (2010) (requiring a public body to set aside a portion of time in every meeting for public comment on any governmental issue that a citizen feels may be of concern); 65 Pa. Cons. Stat. § 710.1(a) (2010) (requiring that there be a “reasonable opportunity” for all those who have standing to “comment on matters of concern, official action or deliberation which are or may be before the board or council prior to taking official action”); Vt. Stat. Ann. Tit. 1, § 1-312(h) (2010) (maintaining that the public has the right to “express its opinion” on any matter under consideration at the public meeting, however, this right does not apply to quasi-judicial proceedings); Wis. Stat. § 227.18(1)(c) (2009) (contending that public bodies are required to “afford each interested person or representative the opportunity to present facts, opinions or arguments in writing, whether or not there is an opportunity to present them orally”); see also Ariz. Rev. Stat. Ann. § 38-431.01(G) (2011); Neb. Rev. Stat. § 84-1412(2) (2008).

85. Id. at § 11125.7(c), 54954.3(c).

86. Id. at §§ 11125.7(a), 54954.3(a) (2010) (indicating that the public body does not have to listen to comments on items that are not on the agenda or comments that were previously considered in a prior meeting where there was an opportunity to comment).

87. Id. at §§ 11125.7(c), 54954.3(c).
In other states, the Open Meetings Laws expressly limit or narrowly define public participation. In Maryland, New York, and Washington, there is no statutory right to participation, only the right to watch and listen at public meetings. In Oklahoma, the Attorney General has stated that neither the Open Meetings Laws nor "the First Amendment to the United States Constitution [provides] an opportunity for citizens to express their view on issues being considered by a public body, but a public body may voluntarily choose to allow for such comments." Further, case law in Mississippi states that citizens are not participants and are not permitted to interfere with "discussion, deliberation or decision-making" at public meetings.

Almost all states that allow some form of public participation allow the public body to impose reasonable regulations on the public’s participation. In Florida, one court has held that "to deny the presiding officer the authority to regulate irrelevant debate and disruptive behavior at a public meeting . . . would cause such meetings to drag on interminably, and deny others the opportunity to voice their opinions.” In Louisiana, the public body may limit public comment only as specified by reasonable rules and regulations and to prevent “willful[] disrupt[ion]” that would “seriously compromise[]” the “orderly conduct of [a] meeting.” Arizona, Oklahoma and California have expressly

89. See Ind. Code § 5-14-1.5-3(a) (maintaining that the public is only allowed to “observe and record” public meetings).
stated that public bodies can limit public participation by imposing reasonable “time, place and manner restrictions.”

Both Texas and Maryland, while allowing public bodies to limit public participation by adopting reasonable rules and regulations, require training for public officials aimed at informing them about Open Meetings Laws. Texas requires each elected or appointed public official to complete a training course, overseen by the Attorney General, regarding the responsibilities of the governmental body and its members under the Open Meetings Laws. Maryland has created an “Open Meeting Law Compliance Board” to review open meeting complaints and violations. It reviews current Open Meetings Laws, makes recommendations to the legislature regarding Open Meetings Laws, and develops educational programs aimed at informing the public bodies about Open Meetings Laws.

The Open Meetings Laws of some states account for the possibility of disruptive citizens at public meetings. Delaware allows for those who are “willfully and seriously disruptive” to be escorted out of the meeting. In Louisiana, if someone, acting willfully, “seriously compromise[s]” the orderly conduct of the meeting, the public body may remove that person. Similarly in Washington and California, if a

100. Id. §10-502.4.
101. See NEV. REV. STAT. § 241.030(4)(b) (2010) (allowing for the removal of a “person who willfully disrupts a meeting to the extent that . . . orderly conduct is made impractical”); W. VA. CODE § 6-9A-3 (2010) (stating that a member of the public may be removed if they “disrupt[] the meeting to the extent that orderly conduct of the meeting is compromised”); WYO. STAT. ANN. § 16-4-406 (1990) (allowing the public body to prevent willful disruption that inhibits the orderly conduct of the meeting by either removal of the offending party or ending the meeting); see also, CAL. GOV’T. CODE § 54957.9 (2010); DEL. CODE ANN. tit. 29 § 10004(d) (2003); LA. REV. STAT. ANN. § 42:17(c) (2006 & Supp. 2011); WASH. REV. CODE § 42.30.050 (2006).
102. DEL. CODE ANN. tit. 29 § 10004(d).
103. LA. REV. STAT. ANN. §42:17(c).
meeting is interrupted "so as to render the orderly conduct of the meeting unfeasible, and order cannot be restored by the removal of" those causing the disruption, the members of the governing body "may order the meeting room cleared" of all citizens and may continue the meeting in private.\footnote{104}

IV. CONSTITUTIONAL PRINCIPLES APPLICABLE TO PUBLIC COMMENT SESSIONS

The right to participate in public meetings is not a constitutional right, but one created by statute or judicial fiat. Once created, however, constitutional protections from government interference apply to citizens who comment at public meetings.

It has long been recognized that discussion of public issues lies "at the heart of the First Amendment[]."\footnote{105} Free and uninhibited political discussion is so essential to our constitutional system that it is considered vital to "[the security of . . . [our] Republic."ootnote{106} "[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions[."ootnote{107} However, despite the

\begin{footnotesize}
\item[104] Cal. Gov't. Code § 54957.9 (2010) (stating that if a meeting is "willfully interrupted," the public body may order the room cleared if removal of the disruptive person does not restore order; the body may only consider items on the agenda; and the body must allow members of the press not involved in the disturbance to stay); Wash. Rev. Code § 42 30-050 (stating that if there is an interruption, only matters listed on the agenda may be considered and that members of the press not involved in the disruption must be allowed to attend the private session).
\item[106] N.Y. Times v. Sullivan, 376 U.S. 254, 269 (1964) (quoting Stromberg v. California, 283 U.S. 359, 369 (1931)) (recognizing that common law defamation, applied to claims of public officials, has a chilling effect on political speech and creating a constitutional rule for public official defamation to ensure wide-open and robust public debate).
\item[107] Id. (quoting Bridges v. California, 314 U.S. 252, 270 (1941)).
\end{footnotesize}
unequivocal language of the First Amendment,\textsuperscript{108} it has never been
interpreted literally nor considered an absolute freedom.\textsuperscript{109}

The First Amendment affects government restrictions on private
speech and the constitutional validity of government speech restrictions
depends on the "what and where" of those restrictions.\textsuperscript{110} Although First
Amendment protection is at its zenith when public debate is involved,\textsuperscript{111}
that maxim does not hold true when the discourse occurs in public
meetings because "the government's ability to limit private expression in
a public context"\textsuperscript{112} depends upon the forum in which it occurs.\textsuperscript{113}

\textit{A. Forum Analysis}

The public forum doctrine is judicially created and relates to the
use of government property for expressive activity.\textsuperscript{114} Over one hundred
years ago, the Court viewed public property like private property, with
the government as owner having power to forbid its use to members of

\begin{itemize}
\item \textsuperscript{108} "Congress shall make no law ... abridging the freedom of speech ... ." U.S. CONST. amend. I.
\item \textsuperscript{109} See Schenck v. United States, 249 U.S. 47, 52 (1919) ("The most
stringent protection of free speech would not protect a man in falsely shouting fire in
a theatre and causing panic.").
\item \textsuperscript{110} See generally Snyder v. Phelps, ___ U.S. ___, 131 S. Ct. 1207 (2011). In
general, speech restrictions that target the message, its impact, or the speaker receive
the highest scrutiny. See id. Content-based restrictions are presumptively invalid and
the government bears the burden to show that the restriction is necessary to serve a
compelling government interest. See id. When the speech restriction targets the time,
place, or manner of speech and is unrelated to the content of the speech, intermediate
scrutiny applies. See id. The government also bears the burden to satisfy the
intermediate scrutiny test. See id. The government must show that the restriction is
narrowly tailored to serve a significant government interest and leaves open ample
alternative channels of communication. See id.
\item \textsuperscript{111} Buckley v. Valeo, 424 U.S. 1, 14 (1976) ("The First Amendment affords
the broadest protection . . . to . . . political expression . . . .").
\item \textsuperscript{112} Leventhall v. Vista Unified Sch. Dist., 973 F. Supp. 951, 956 (S.D. Cal.
1997).
\item \textsuperscript{113} See Pleasant Grove City v. Summum, 555 U.S. 460, ___, 129 S. Ct. 1125,
\item \textsuperscript{114} Christian Legal Soc'y v. Martinez, ___ U.S. ___, ___, 130 S. Ct. 2971,
2984 (2010) ("[I]n a progression of cases, [the Supreme] Court has employed forum
analysis to determine when a governmental entity, in regulating property in its
charge, may place limitations on speech.").
\end{itemize}
the public. Eventually, the Supreme Court modified its restrictive view of public property, understanding that streets and parks, as traditional public forums, belonged to the people for public use.

Over time, the public forum analysis has developed into a three-tiered doctrine. Government property is sorted into three categories: (1) traditional public forums; (2) designated public forums; and (3) limited public forums. Speech restrictions “in traditional public forums, such as public streets and parks,” receive the highest scrutiny. A designated public forum is “government property that has not traditionally been regarded as a public forum, [but is] intentionally opened up for that purpose.” Speech restrictions in designated public forums are scrutinized under the same standard as restrictions in traditional public forums. Lastly, limited public forums are created when government property, traditionally not dedicated to public use, is opened, but “limited to use by certain groups or dedicated solely to the

115. Davis v. Massachusetts, 167 U.S. 43, 47 (1897) (“For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.”).

116. Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939) (finding an ordinance prohibiting distribution of leaflets and pamphlets on city streets facially unconstitutional and that the use of streets and parks for the public to assemble, to communicate, and to discuss public questions, “has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens”).

117. Christian Legal Soc’y, ___ U.S. at ___, 130 S. Ct. at 2984 n.11 (citing Pleasant Grove City, 555 U.S. at ___, 129 S. Ct. at 1132); but see William W. Van Alstyne, The American First Amendment in the Twenty-First Century: Cases and Materials, 496 n.86 (4th ed. 2011) (“Or is it . . . a four-forum approach: (a) traditional public forum, (b) dedicated public forum, (c) ‘limited’ public forum, (d) ‘nonpublic’ forum?”).

118. Christian Legal Soc’y, ___ U.S. at ___, 130 S. Ct. at 2984 n.11 (citing Pleasant Grove City, 555 U.S. at ___, 129 S. Ct. at 1132).

119. Id. (stating that a content-based restriction, aimed at silencing the message, its effect or the speaker, in a traditional public forum “must be narrowly tailored to serve a compelling government interest”).

120. Id. But see Van Alstyne, supra note 117.

121. Christian Legal Soc’y, ___ U.S. at ___, 130 S. Ct. at 2984 n.11 (citing Pleasant Grove City, 555 U.S. at ___, 129 S. Ct. at 1132).
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discussion of certain subjects.”122 Unlike traditional and designated public forums, speech restrictions in limited public forums can be content-based, so long as they are “reasonable and viewpoint neutral.”123

While the Supreme Court’s recently articulated rules of the public forum doctrine can be clearly and simply stated, their application is anything but straightforward. There is no Supreme Court decision stating in what type of forum public comment sessions fall.124 Without Supreme Court precedent, the circuit courts have developed their own rules in applying the public forum doctrine to public comment sessions.125 It is fair to say that the circuit courts’ jurisprudence in this area is a morass of confusion.126 The First,127 Second,128 Third,129 Fifth,130

122. Id. at __, 130 S. Ct. at 2984. (stating that government may impose speech restrictions in limited public forums, so long as the restrictions are “reasonable and viewpoint neutral”).

123. Id.

124. See Fairchild v. Liberty Indep. Sch. Dist., 597 F.3d 747, 759 n.42 (5th Cir. 2010) (citing City of Madison Joint Sch. Dist. No. 8 v. Wis. Emp’t Relations Comm’n, 429 U.S. 167 (1976)) (discussing that the Supreme Court’s holding that non-union teachers could not be prohibited from speaking at a school board meeting was based on the conclusion that the applicable state statute was not viewpoint neutral, not on a determination that a school board meeting is designated as a public forum).

125. See infra notes 127–38.

126. See Bowman v. White, 444 F.3d 967, 975 (8th Cir. 2006) (discussing the confusion among the circuit courts on what constitutes a designated public forum).


129. Eichenlaub v. Twp. of Indiana, 385 F.3d 274, 281 (3d Cir. 2004) (discussing a sliding-scale standard for a designated public forum, which “allows for content-related regulation so long as the content is tied to the limitations that frame the scope of the designation, and so long as the regulation is neutral as to viewpoint within the subject matter of that content”). However, the Third Circuit’s sliding-scale standard is contrary to the Supreme Court’s recently articulated standard for a designated public forum. Christian Legal Soc’y v. Martinez, __ U.S. __, __, n.11, 130 S. Ct. 2971, 2984 n.11 (2010) (citing Pleasant Grove City v. Summum, 555 U.S. 460, __, 129 S. Ct. 1125, 1132 (2009)) (“Government restrictions on speech in a designated public forum are subject to the same strict scrutiny as restrictions in a traditional public forum.”).
Sixth, Eighth, and Tenth Circuit Courts of Appeals have struggled with the distinction between a “designated public forum” and a “limited public forum,” and consequently, remain unclear how to categorize public comment sessions. The Eleventh Circuit Court of Appeals seemingly categorized citizen comment sessions as “limited public forums,” but applied the standard of scrutiny for a “designated public forum.” In contrast, the Fourth and Ninth Circuit Courts of

130. Fairchild v. Liberty Indep. Sch. Dist., 597 F.3d 747, 758 n.38 (5th Cir. 2010) (citing Chiu v. Plano Indep. Sch. Dist., 260 F.3d 330, 346 (5th Cir. 2001)) (discussing that the line separating designated and limited public forums “remains undefined”). However, the court was inconsistent in describing the type of forum and applicable standard it ascribed to the public comment session. In one portion of its opinion, the court concluded that the rules adopted for the Liberty Independent School District’s public comment sessions created a limited public forum, applying a reasonable, viewpoint-neutral standard. Id. at 760. A page later in its opinion, the court applied an intermediate scrutiny standard to the challenged rules, stating “[t]hese rules were designed to serve a substantial government interest and allow for reasonable alternative [channels of] communication.” Id. at 761.

131. Lowery v. Jefferson Cnty. Bd. of Educ., 586 F.3d 427, 432 (6th Cir. 2009) (categorizing the public comment session at a school board meeting as both a “designated” and “limited” public forum).

132. Bowman v. White, 444 F.3d 967, 975 (10th Cir. 2007) (“Substantial confusion exists regarding what distinction, if any, exists between a ‘designated public forum’ and a ‘limited public forum.’”).

133. Shero v. City of Grove, 510 F.3d 1196, 1202 (“Under our precedent, it is not entirely clear whether a city council meeting should be treated as a ‘designated public forum’ or a ‘limited public forum.’”).

134. See supra notes 127–33.

135. Rowe v. City of Cocoa, 358 F.3d 800, 802–03 (11th Cir. 2004) (stating that in a limited public forum, government speech restrictions that are content neutral and regulate the time, place, and manner of speech must be narrowly tailored to serve a significant government interest). However, later in its opinion, the court seemed to contradict itself. The court upheld the residency requirement for citizens to speak in the open session of the city council meeting because the limitation was considered reasonable and viewpoint neutral. Id. at 804; see Christian Legal Soc’y v. Martinez, ___ U.S. ___, ___, n.11, 130 S. Ct. 2971, 2984 n.11 (2010) (citing Pleasant Grove City v. Summum, 555 U.S. ___, ___, 129 S. Ct. 1125 1132 (2009)) (stating that in a limited public forum, government speech restrictions must be reasonable and viewpoint neutral).

136. Steinburg v. Chesterfield Cnty. Planning Comm’n, 527 F.3d 377, 385 (4th Cir. 2008) (finding that a public meeting is a limited public forum, which permits reasonable restrictions “to preserve the civility and decorum necessary to
Appeals have applied, without equivocation, the current standard articulated by the Supreme Court for limited public forums, thereby, permitting speech restrictions on citizen comments in public meetings which are reasonable and viewpoint neutral.138

Much of the confusion in the circuit courts’ public forum jurisprudence can be traced to earlier Supreme Court cases which used different terminology for the categories of public property currently termed “designated public forum” and “limited public forum.” For example, in United States v. Kokinda,139 the Court used the term “nonpublic forum” to categorize a sidewalk near the entrance of a post office, located entirely on postal service property.140 When members of an advocacy group placed a table on the post office sidewalk for the purpose of soliciting contributions and distributing literature, they were arrested for violating a federal statute prohibiting the solicitation of contributions on postal premises.141 The Court upheld the no solicitation regulation as applied, stating that “the regulation... must be analyzed under the standards set forth for nonpublic fora: It must be reasonable and ‘not an effort to suppress expression merely because public officials oppose the speaker’s view.’”142 In a case challenging a prohibition on solicitation in a public airport terminal, the Court again used the term

137. Norse v. City of Santa Cruz, 629 F.3d 966, 975 (9th Cir. 2010) (defining city council meetings open to the public as limited public forums, requiring speech restrictions to be reasonable and viewpoint neutral).

138. Christian Legal Soc’y, ___ U.S. at __ n.11, 130 S. Ct. at 2984 n.11 (citing Pleasant Grove City, 555 U.S. at __, 129 S. Ct. at 1132) (holding that in a limited public forum, government speech restrictions must be reasonable and viewpoint neutral).

139. 497 U.S. 720 (1990). Specifically, in Kokinda, the Court upheld a conviction of advocacy group members for violating a federal regulation prohibiting any person from soliciting contributions on postal premises because the Court decided that the sidewalk in front of the post office, located entirely on postal service property, was a nonpublic forum. Id. at 731.

140. Id. at 730.

141. Id. at 723–24.

142. Id. at 730 (quoting Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 46 (1983)).
“nonpublic forum.”143 Holding that terminals are nonpublic forums,144 the Court applied a reasonable, viewpoint neutral standard to the airport terminal’s no solicitation regulation.145 In these earlier cases, the Court used the terminology “nonpublic forum” for government property now categorized as “limited public forum.”

To further confuse the public forum analysis, the Supreme Court defined a designated public forum, as having either a limited or unlimited character.146 The difference between the “limited” designated public forum and the “unlimited” designated public forum is whether the government has opened up the property for expressive activity “by part or all of the public.”147 Whatever the character of the designated property, “[r]egulation of such property is subject to the same limitations as that governing a traditional public forum.”148

Given the Court’s various mutations of terminology applied to the second and third categories of public property—designated public forum, whether limited or unlimited, and nonpublic forum—it is completely understandable why the circuit courts’ “analysis of what constitutes a ‘designated public forum’ . . . is far from lucid.”149 One might question the importance of unraveling the confusion in terminology and the futility in placing a label on public comment sessions. However, the characterization of the forum dictates which party has the burden to justify a challenged speech restriction and the level of

143. Int’l Soc’y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 679 (1992) (determining that terminals are nonpublic forums, and regulations on expressive activity in nonpublic forums “need only be reasonable, as long as the regulation is not an effort to suppress the speaker’s activity due to disagreement with the speaker’s view”).

144. Id.

145. Id. at 683; see also Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788 (1985) (determining that a fundraising drive for charitable purposes in the federal workplace was a nonpublic forum); Greer v. Spock, 424 U.S. 828 (1976) (determining that a military base is a nonpublic forum); Lehman v. Shaker Heights, 418 U.S. 298 (1974) (determining that the car card space for advertising on a public bus is a nonpublic forum).

146. Int’l Society for Krishna Consciousness, 505 U.S. at 672 (defining the second category of public property as a designated public forum and as having a limited or unlimited character).

147. Id. at 678.

148. Id.

149. Bowman v. White, 444 F.3d 967, 975 (8th Cir. 2006).
scrutiny or deference a court should give to the legislative explanation for the restriction.

Some of the cases upon which the circuit courts have relied address the public forum doctrine in the context of a school mail system;\textsuperscript{150} university meeting facilities;\textsuperscript{151} an annual charitable fundraising drive;\textsuperscript{152} and a student activities fund.\textsuperscript{153} In each of these cases, groups sought use of government facilities or funds to hold meetings or to disseminate their message.\textsuperscript{154} Unlike the unilateral use of government property at issue in the above-mentioned cases, participation in a public meeting consists of a dialectic discourse, involving multiple voices.\textsuperscript{155} Public comment sessions have more of the characteristics of the quintessential public forum political debate, involving face-to-face, real-time discourse between citizens and their elected officials on matters of public concern.\textsuperscript{156} Nevertheless, a public comment session is neither a public forum nor an “unlimited” designated public forum.

As the modern public forum doctrine evolved, an elements-based approach was used to determine whether government opened a non-traditional forum for public discourse, focusing on “the policy and

\textsuperscript{150} See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37 (1983) (holding that a school mail facility is not a public forum and a reasonableness standard applied to the state’s distinction between the exclusive bargaining representative and its rival in using the system for communication).

\textsuperscript{151} See Widmar v. Vincent, 454 U.S. 263 (1982) (finding a state university’s policy created a public forum for use of its meeting facilities by student groups).

\textsuperscript{152} See Cornelius v. NAACP Legal Def. and Educ. Fund. Inc., 473 U.S. 788 (1985) (holding that an annual charitable fundraising drive in the federal workplace is a nonpublic forum and excluding some advocacy organizations satisfied the reasonableness standard).

\textsuperscript{153} See Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819 (1995) (characterizing the student activities fund as a limited public forum, prohibiting the state from discriminating based on viewpoint).

\textsuperscript{154} See supra notes 150–53.

\textsuperscript{155} See supra notes 150–53.

\textsuperscript{156} But see Fairchild v. Liberty Indep. Sch. Dist., 597 F.3d 747, 760 (5th Cir. 2010) (finding the school district’s public comment session lacked the characteristics of a public debate because the rules did not permit the School Board to deliberate or to take action on any subject that is raised and stating, instead, that the purposes of the comment session were learning about topics that the Board may take up at a later time and routing citizen or employee concerns to administrative procedures when appropriate).
practice of the government, the nature of the property and its ‘compatibility’ with expressive activity.’” 157 Circuit courts have mirrored this elements-based approach by focusing on two factors: (1) “the government’s policy and practice with respect to the forum,” and (2) “the nature of the forum and its compatibility with the [speech] at issue.” 158

In determining whether a public comment session should be characterized as a designated public forum, a limited public forum, or a nonpublic forum (depending on the nomenclature being used), the elements-based approach can provide guidance. The government’s intent with respect to the public comment session can be construed from the statute creating the right for public participation in public meetings. Looking to the nature of a public meeting and its compatibility with public participation, the forum designation depends upon the relative value placed on accomplishing government business versus promoting citizen participation. 159

Like so many of the circuit courts that place open comment sessions somewhere between a designated public forum and a limited public forum, this “hybrid” public forum category strikes the proper balance between protecting efficient government business and promoting citizen participation. While the Supreme Court, in its most recent cases, did not include in the list of forum categories a “limited” designated public forum,160 it is not without precedent to recognize a fourth type of


159. See supra notes 114–58 and accompanying text.

160. See Christian Legal Soc’y v. Martinez, ___ U.S. ___, ___ n.11, 130 S. Ct. 2971, 2984 n.11 (2010) (citing Pleasant Grove City v. Summum, 555 U.S. ___, ___, 129 S. Ct. 1125, 1132 (2009)); see Van Alstyne, supra note 117. The legal issues addressed in these cases focused on the government speech doctrine and a university’s antidiscrimination policy, not the public forum doctrine. See supra note 117. Therefore, the Court’s list of three categories of public forums is merely dicta. Further, the Court has never directly addressed the application of the public forum doctrine to open comment sessions in public meetings.
public forum. Some have suggested that the public forum doctrine does include a fourth category, using the terminology: traditional, dedicated or designated, limited, and nonpublic forums.161

If the Court were to address the application of the public forum doctrine to open comment sessions in public meetings, the Court should recognize, as the circuit courts have, the unique aspect of this type of forum.162 Unlike expressive activities in traditional public forums, public meetings have a dual purpose of conducting government business and promoting public discourse. However, citizen participation in public meetings is more than the use of government property to disseminate a unitary message, such as the nonpublic forum of a school mail system.163

Therefore, comment sessions should be categorized as a "limited" designated public forum (or limited forum in a four category scheme). Under this category, speech may be limited to the subject matter of the forum's jurisdiction, but any further restrictions would be subject to the same level of scrutiny applicable to speech restrictions in traditional and designated public forums. Of course, a statute may create a nonpublic forum by further limiting public comments, such as limiting comments to agenda items only or allocating discretion to the government entity to hold public comment sessions. Then, the comment session would be a "true" nonpublic forum, subject to a standard of reasonableness and viewpoint neutrality.

Concluding that a public comment session is a "limited" designated public forum protects the dual goals of conducting government business in an orderly and efficient manner and providing the opportunity for citizens to voice their opinions on matters of public concern. Subjecting government restrictions on citizen participation to a heightened standard of scrutiny upholds the importance placed on public discussion of public matters without sacrificing efficiency in government business. Even in the non-traditional forum of a public meeting, the right

161. See Van Alstyne, supra note 117, at 496 n.86 (suggesting a four-forum approach: "(a) traditional public forum, (b) dedicated or designated public forum, (c) "limited" public forum, (d) 'nonpublic' forum").
162. See supra notes 127–38.
163. See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (holding that a school mail facility is not a public forum and a reasonableness standard applied to the state's distinction between the exclusive bargaining representative and its rival in using the system for communication).
of public participation is consistent with "a fundamental principle of the American form of government."164

B. Government Employees' Speech Rights in Public Comment Sessions

First Amendment rights afforded to citizens who speak in public comment sessions do not apply with equal force to government employees.165 The "recently minted government speech doctrine"166 imposes another layer of confusion to this already complex area of the law. The Supreme Court explained the government speech doctrine in a recent case involving a city's right to accept or deny privately donated monuments to be permanently installed in a public park.167 Beginning with the premise that "[t]he Free Speech Clause . . . does not regulate government speech," the Court concluded that the government is free to pick and choose the content and viewpoint of its own message.168 When the government speaks or when "it enlists private entities to convey its message," it may "regulate the content of what is or is not expressed."169


165. Garcetti v. Ceballos, 547 U.S. 410, 418 (2006) (holding that not all speech by a public employee is protected by the First Amendment and stating that "[w]hen a citizen enters government service, the citizen by necessity much accept certain limitations on his or her freedom").

166. Pleasant Grove City v. Summum, 555 U.S. 460, __, 129 S. Ct. 1125, 1139 (2009) (Stevens, J., concurring) (disagreeing with majority's reliance on "the recently minted government speech doctrine").

167. Id. at 1129–30 (majority opinion); Id. at 1139 (Stevens, J. concurring) (discussing that a religious organization wanted to install a stone monument containing its religious precepts in the city park that was similar to a monument containing the Ten Commandments which was privately donated and permanently installed in the city park).

168. Id. at 1131 (citing Johanns v. Livestock Marketing Ass'n., 544 U.S. 550, 553 (2005)) ("[T]he Government's own speech . . . is exempt from First Amendment scrutiny"); see also id. (citing Nat'l Endowment for Arts v. Finley, 524 U.S. 569, 598 (1998) (Scalia, J., concurring) ("It is the very business of government to favor and disfavor points of view.").

169. Pleasant Grove City, 555 U.S. at __, 129 S. Ct. at 1131 (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (2000)).
This limitation on First Amendment speech rights applies when
government employees speak in their official capacity.170 Articulating its
employee-speech doctrine, the Court has consistently held that "when
public employees are making statements pursuant to their official duties,
the employees are not speaking as citizens for First Amendment
purposes."171 In employee-speech cases, the beginning premise is that the
government cannot condition public employment on the relinquishment
of constitutionally protected rights of freedom of expression.172 However,
in these cases, the Court has made a distinction between situations in
which an employee speaks "as a citizen upon matters of public
concern"173 and when the employee speaks in his or her official
capacity.174 Further, government employees cannot use the First
Amendment to "constitutionalize" an employee grievance.175

There are competing interests involved in treating government
employee "official" speech differently from speech spoken as a citizen
on matters of public concern for First Amendment purposes.176
Government employees' "official" speech implicates the employer-
employee relationship.177 Like private employers, government employers
need to exercise control over their employees to ensure the workplace

171. Id.
172. See id. at 413 (citing Connick v. Myers, 461 U.S. 138, 142 (1983)).
173. Id. at 416 (quoting Connick, 461 U.S. at 146–47). In determining whether
an employee's speech is a matter of public concern, the Court looks to "the content,
form, and context of a given statement, as revealed by the whole record." Connick,
461 U.S. at 147–48.
High Sch. Dist. 205, Will Cty., 391 U.S. 563 (1968)); see also Connick, 461 U.S. at
146–47 (discussing that when government employees claim retaliatory discharge for
exercising their First Amendment right of freedom of expression, the beginning
inquiry is "whether the expressions in question were made by the speaker 'as a
citizen upon matters of public concern'").
175. Garcetti, 547 U.S. at 420 (stating that although the First Amendment
gives public employees certain rights, "it does not empower them to
'constitutionalize' the employee grievance" (quoting Connick, 461 U.S. at 154)).
176. Id. at 430 (Stevens, J., dissenting) (stating that public employees enjoy a
qualified speech protection that balances "the tension between individual and public
interest in the speech . . . and the government's interest in operating efficiently
without distraction or embarrassment by talkative or headline-grabbing employees").
177. Id.
functions efficiently. Additionally, public employees’ speech can be imputed to the government, “contraven[ing] governmental policies or impair[ing] the proper performance of governmental functions.”

In contrast to promoting efficiency and discipline in the workforce and ensuring government policy is expressed as a “single” voice, the public’s right to know about the conduct and misconduct of government entities is affected by government employee speech restrictions. Government employees are often the best source of information about the performance of governmental entities and public officials. Open and robust discussion about public entities and public officials is at the core of First Amendment protected speech. Therefore, any restriction on public employees from speaking on the inefficiency or misconduct of their government employers inhibits the public’s First Amendment right to know information essential to self-governance.

Trying to balance these competing interests in the context of a public comment forum can create a plethora of problems from a First Amendment perspective. While it is constitutionally permissible to exclude a public employee’s employment grievance from public comment sessions, it is not at all clear whether a public employee’s general dissatisfaction with job related matters is off limits. Perhaps, the

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178. Id. at 419 (majority opinion).
179. Id.
180. Id. at 419–20.
181. Id. at 425.
182. See Mills v. Alabama, 384 U.S. 214, 218–19 (1966) (“[A] major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.”); Piscottano v. Town of Somers, 396 F.Supp.2d 187, 200 (D. Conn. 2005) (“The First Amendment’s protection of free speech . . . extends to a broad range of speech and expressive conduct . . . . Speech on public issues and political matters lies at the heart of protected speech.”).
183. See Garcetti, 547 U.S. at 425; Terri Day, Speak No Evil: Legal Ethics v. The First Amendment, 32 J. LEGAL PROF. 161, 187–89 (2008) (discussing the Garcetti opinion and its counterintuitive result from a First Amendment perspective in that it restricts the public’s access to information essential to self-governance from those most knowledgeable about governmental performance).
184. Garcetti, 547 U.S. at 420 (holding that public employees’ employment grievances are not constitutionally protected speech).
deciding factor is whether the public employee is speaking “pursuant to employment responsibilities” specifically or to general matters pertaining to his or her government employer.\textsuperscript{185}

Making such fine distinctions between permissible and impermissible speech for public employees in open comment sessions can be too difficult for public officials not schooled in the nuances of the employee-speech doctrine. A public employer can avoid such difficulties by creating policies and procedures which provide the opportunity for public employees to air both specific and general employment-related grievances.\textsuperscript{186} “Giving employees an internal forum for their speech will discourage them from concluding that the safest avenue of expression is to state their views in public.”\textsuperscript{187}

When, however, a citizen wishes to publicly comment on the public entity’s employees or employment-related decisions, the employee speech doctrine does not apply.\textsuperscript{188} The government-as-employer concerns about discipline in the workforce and controlling the message of government policy are not implicated.\textsuperscript{189} Thus, citizens’ complaints against public employees are usually permissible in open comment sessions, so long as the topic is not inconsistent with other legitimate, content-neutral, time, place, and manner restrictions.\textsuperscript{190}

Speech about the qualifications and performance of public employees and the employment-related decisions of public officials lies

\begin{itemize}
\item 185. \textit{Id.} at 424 (“When a public employee speaks pursuant to employment responsibilities, however, there is no relevant analogue to speech by citizens who are not government employees.”). \textit{But see} Pickering v. Bd. of Educ., 391 U.S. 563 (1968) (holding that a teacher who wrote a letter to a local newspaper criticizing the school board’s handling of particular fiscal matters was speaking as a private citizen on a matter of public concern; a position necessitating that his speech be protected by the First Amendment).
\item 186. \textit{Garcetti}, 547 U.S. at 424 (discussing the different means a government employer can use to avoid a situation in which employees make their grievances known publicly).
\item 187. \textit{Id.} (“A public employer that wishes to encourage its employees to voice concerns privately retains the option of instituting internal policies and procedures that are receptive to employee criticism.”).
\item 188. \textit{See id.} at 417.
\item 189. \textit{Id.} at 419.
\item 190. Leventhal v. Vista United Sch. Dist., 973 F. Supp. 951 (S.D. Cal. 1997) (finding that a citizen’s right to criticize public employees in open comment sessions is protected by the First Amendment).
\end{itemize}
at the heart of the First Amendment.\textsuperscript{191} Such speech would receive the highest level of protection in a public comment session, characterized as a “limited” designated public forum.\textsuperscript{192} However, other concerns surface when employment related matters are raised by citizens in public comment sessions. These types of discussions open the door to defamation and privacy concerns.\textsuperscript{193} Trying to protect reputational and privacy interests of government employees when these matters are raised in open comment sessions are usually insufficient reasons to silence a concerned citizen.\textsuperscript{194}

\textbf{C. Protecting Reputational and Privacy Interests}

In many jurisdictions, rules governing public comment sessions restrict discussion of personnel matters,\textsuperscript{195} including citizens’ complaints against individual employees.\textsuperscript{196} Courts have found that silencing citizens’ criticism of public employees, particularly in the setting of

\begin{itemize}
  \item \textsuperscript{191} \textit{Id.} at 958 (reviewing constitutionality of bylaws provisions relating to a complaint or charge against a public employee in open public meetings).
  \item \textsuperscript{192} \textit{Id.} at 957 (noting that the same standards apply to a limited public forum as applied in a traditional public forum).
  \item \textsuperscript{193} \textit{Id.} at 958 (discussing the potential for privacy invasions that can stem from open public comment sessions).
  \item \textsuperscript{194} See \textit{id.} (noting that First Amendment guarantees trump comment session bylaws).
  \item \textsuperscript{195} See, e.g., Fairchild v. Liberty Indep. Sch. Dist., 597 F.3d 747, 757 (5th Cir. 2010) (addressing rules governing public comment sessions prohibit discussion of personnel matters, such as “the appointment, employment, evaluation, reassignment, duties, discipline or dismissal of a public . . . employee”) (quoting the Record of the case); Leventhal, 973 F.Supp. at 953–54 (discussing rules prohibiting complaints against individual employees of the school district unless employees consented to discussion in public comment session); Moore v. Asbury Park Bd. of Educ., No. 05-2971 (ML), 2005 WL 2033687, at *13 (D. N.J. Aug. 23, 2005) (finding that a prohibition on personally directed comments is an impermissible viewpoint-based restraint and is unconstitutional).
  \item \textsuperscript{196} See, e.g., Baca v. Moreno Valley Unified Sch. Dist., 936 F.Supp. 719, 726 (C.D. Cal. 1996) (involving a parent who was ejected from a school board meeting for criticizing a principal and superintendent, referenced by names and positions, in violation of school board policy).
\end{itemize}
school board meetings, violates the First Amendment. As one court has stated:

[L]imitation on public criticism [of public employees] is of particular concern in this case, arising as it does in the context of public education. The public entrusts school boards with the education of its children, and the schools play a critical role in the social, ethical, and civic development of those students. To relegate discussion on the education of a community’s children to closed, back-room sessions would deprive the public of the most appropriate forum to debate these issues.

Public entities have offered the following justifications for restricting public criticism of their employees: protecting privacy and property interests and avoiding reputational harm. However, these proffered justifications are not sufficient to silence “the expressive rights of the public.” Whether applying strict scrutiny or a lower standard of review, courts have held that the “no public criticism of employees” rules are unconstitutional.

In several open meetings, the board president chastised citizens who raised their concerns about a district superintendent’s qualifications and job performance. In Leventhal, the board president invoked the
proscriptions of a bylaw that prohibited discussion of personnel matters in open meetings unless the affected employee consented. Addressing a challenge to the specific provision, the court recognized that any interest in protecting employees' right to privacy applied to the district only in its role as an employer, not as a government entity. In providing a forum for citizens' concerns about employees, the district was fulfilling its statutory obligations as a government entity, not an employer.

Receiving citizens' critical comments did not require the government entity to "endorse, sanction, or act upon those comments at the open meeting." Any deliberations and actions the board takes in its role as employer affecting individual employment decisions will occur in closed sessions. Therefore, "the public's statements cannot, as a matter of law, give rise to an insulted employees' claim for defamation or deprivation of due process." In its opinion, the court assumed the public comment session was a "limited" public forum, but applied the level of scrutiny applicable to traditional public forums. Characterizing the no criticism rule as

204. Id. at 953–54 (stating that although state law creates an open forum for citizens to address items of interest within the board's subject matter jurisdiction, complaints or charges against employees are prohibited unless the affected employee consents).

205. Id. at 959 (quoting Baca, 936 F. Supp. at 732) ("[The District's] interest in protecting its employees' right to privacy is an interest it holds only as an employer, not as a government entity, e.g., a legislative body charged with permitting public comment at its meeting.").

206. Id.

207. Id.

208. Id.

209. Id. (quoting Baca, 936 F.Supp. at 733) ("[O]ne who is not the employees' employer cannot directly deprive the employee of due process.").

210. Id. at 957. The court relied upon City of Madison Joint School District No. 8 v. Wis. Employment Relations Commission, 429 U.S. 167 (1976), for the proposition that school board meetings are "'a designated public forum unlimited as to speakers but not as to topic.'" Id. (quoting Clark v. Burleigh, 841 P.2d 975, 985 (Cal. 1992)). Thus, this court categorized public comment sessions at open school board meetings as limited public forums, but applied the same standard of review as applicable to traditional public forums. Id. In dicta, the court recognized that Ninth Circuit precedent did not apply the Madison forum analysis to city board meetings. Id. (citing Kindt v. Santa Monica Rent Control Bd., 67 F.3d 266, 270 (9th Cir. 1995)) (stating that the nature of "city council and city board meetings 'fit more
content-based, the court applied strict scrutiny review and held that the school board’s asserted interests to support the rule were not sufficiently compelling to justify the speech restriction.\footnote{Leventhal, 973 F.Supp. at 959–60.}

Alternatively, the court applied the more deferential standard of review applicable to nonpublic forums; and even under the less exacting standard, the no criticism rule violated the First Amendment.\footnote{Id. at 960.} Although content-based speech restrictions are permissible in nonpublic forums, those restrictions must be viewpoint neutral.\footnote{Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 806 (1985).} In any forum, government cannot restrict private speech because it disfavors the speaker’s views.\footnote{The First Amendment stands against attempts to disfavor certain subjects or viewpoints. See, e.g., United States v. Playboy Entm’t Group, Inc., 529 U.S. 803, 813 (2000). Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. See First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765, 784 (1978).} When government silences particular views, government censorship is most egregious and always offends the First Amendment.\footnote{See Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829 (2000) (“When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.”).}

The challenged bylaw in \textit{Leventhal} prohibited critical comments of employees, but permitted praise for and laudatory comments about neatly into the nonpublic forum niche””\footnote{Rosenherger, supra note 15, at 829.} (quoting \textit{Kindt}, 67 F.3d at 270)). The court appeared to find precedent for distinguishing school boards from other public entities for purposes of public forum analysis. \textit{Id.} The court’s reasoning is flawed for two reasons: first, the court’s strong reliance on \textit{Madison} for the proposition that “the Supreme Court has never wavered from its characterization of school boards as limited public fora,” is questionable. \textit{Id.; see Ridley v. Mass. Transp. Auth.}, 390 F.3d 65, 76 n.4 (1st Cir. 2004) (“The phrase ‘limited public forum’ has been used in different ways.”). Second, while there may be specific state statutes treating citizen participation in open meetings of school boards different than for meetings of other governmental entities, case law generally does not make a distinction between school boards and other governmental entities for purposes of forum analysis. \textit{See supra} Part II. However, the unique impact that educators and school board administrators have on a community’s children may demand more community input at open meetings, while the ballot box provides sufficient community input in other government arenas, lessening the need for public discourse in open meetings. \textit{See Baca} 936 F.Supp. 719, 727–28.
employees. In favoring positive comments, the rule constituted classic viewpoint-based discrimination. It silenced one view, but not all views about employees’ performance and fitness. Consequently, the bylaw violated the First Amendment under any standard of review.

In another case involving a similar bylaw, a citizen complained about a principal and superintendent in an open comment session. The speaker in Baca v. Moreno Valley Unified School District ignored warnings to refrain from mentioning either employee by name or by position, resulting in her ejection from the meeting. A lawsuit followed, alleging that the bylaw was unconstitutional. In its ruling, the court held that: (1) the restriction on criticizing district employees violated the First Amendment; (2) the open comment session was “a designated and limited public forum”; (3) the challenged bylaw was subject to the same standard of review as applied to speech restrictions in traditional public forums; and (4) the bylaw was a content-based restriction, not narrowly tailored to serve compelling government interests.

Defending its bylaw and its removal of plaintiff from the open meeting, the school district argued that plaintiff’s speech “regarding child abusers and racists” was slander and a “false light utterance” not protected by the First Amendment. The court disagreed. While the government may restrict defamatory content, it may not restrict only defamation critical of the government. The challenged bylaw

216. Leventhal, 973 F.Supp. at 960.
217. Id.
218. Id. at 960–61 (noting that the court does not address whether the district could limit complaints about non-policymaking employees, such as teachers, custodians, cafeteria workers, alleging violations of the law or school policies).
219. Id.
221. Id.
222. Id. at 724–25.
223. Id. at 726–27.
224. Id. at 727.
225. Id.
226. Id. at 728 n.5 (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 384 (1992) (reversing a conviction under a bias-motivated crime ordinance for burning a cross on a black family’s yard and suggesting that, while fighting words are not protected,
"proscribes only speech critical of District employees, not speech critical of anyone else, and does not proscribe only defamatory criticism." 227

Like the district’s concern for reputational harm, the interest in protecting its employees’ privacy was equally unpervailing. 228 Similar to the decision in Leventhal, 229 the Baca court distinguished between the district’s roles as an employer from that as a government entity. 230 In its role as an employer, protecting employee privacy is not a compelling government interest. 231 Further, in discussing the tort of invasion of privacy, the court emphasized that liability cannot be based on disclosing already publicly known private facts. 232 According to the court, the ban on discussing complaints against employees in open comment sessions is over-inclusive because it “forbids public disclosure of any criticism,” even if the criticism would not satisfy the elements of the privacy tort. 233

In addition to defamation and privacy, the district argued that its bylaw served the compelling interest of protecting its employees’ liberty interests. 234 Unsure what the district was arguing, the court recognized that, in this case, the constitutionally protected liberty interest could only be violated if employees suffered adverse government action without due
process. Since any adverse employment action would occur in a closed meeting only after an employee had notice and an opportunity to be heard, the district’s concern about protecting employees’ liberty interests was without merit.

Even more than the “generic” no personal attack prohibitions, the ban on complaints against employees in open meetings is doomed to fail a constitutional challenge. Both are content-based speech restrictions, which are permissible in some forums, but the further content discrimination of proscribing complaints against employees is always constitutionally impermissible. Protecting employees from reputational harm or invasions of privacy are not sufficient interests to justify a speech restriction that discriminates based on both content and viewpoint.

As Part IV of this article illustrates, there are constitutional “landmines” that must be avoided when government entities adopt and implement rules of decorum. Effective and constitutionally valid rules must be neutral and generally applicable to all speakers, clear and concise, yet specific enough to inform public officials and citizens what is and is not permissible expressive conduct in public meetings, and easily enforceable.

V. GUIDELINES FOR ADOPTING AND IMPLEMENTING RULES OF DECORUM

While common sense can help public officials and citizens to maintain civility in open comment sessions, properly implementing rules of decorum cannot rest on common sense alone. What seems

235. Id. ("[O]nly the government . . . can provide the employee with due process [notice and a right to be heard] related to the government’s threatened stigmatizing action.").

236. Id.


238. See infra Part IV.
commonsensical may offend constitutional principles. \(^{239}\) It is costly for government entities to defend lawsuits brought by citizens alleging their First Amendment rights were violated when public officials silenced their voice or ejected them from public meetings. \(^{240}\)

Despite constitutional complexities, a code of conduct should incorporate some basic principles. Foremost, whichever forum rules a jurisdiction has adopted, government entities must adopt civility rules that are viewpoint neutral. Government entities may constitutionally limit discussion topics and groups consistent with their subject matter jurisdiction, but, beyond this, rules should be content neutral. Rules that limit citizen comments should address the time, place, and manner of the comments. For instance, government entities may impose time limits on citizens’ comments. The open comment session of public meetings may be scheduled at the beginning or end of meetings. Placards, signs, and visual aids may be barred from public meetings and comment sessions. Depending on the type of forum created, comments may be limited to agenda items. Citizens may be required to request speaking time prior to the meeting and list the topic of their planned comments, so long as the review process is timely and impartial to subject matter and identity of the speaker.

All codes of conduct should include rules of procedure for cutting off disruptive comments. For example, rules of procedure may require a presiding official to inform a speaker of his non-compliance, to warn a speaker of possible consequences for non-compliance, and to request voluntary compliance before taking more punitive measures, such as ejection from the meeting or arrest for disrupting a public meeting. Rules can restrict comments that are irrelevant, repetitive, and harassing. However, public officials must take care to apply these rules according to the governing procedures and in a consistent, non-arbitrary manner.

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\(^{239}\) While it may seem commonsensical to not make offensive comments to people, the First Amendment protects offensive speech. See, e.g., Snyder v. Phelps, ___ U.S. __, 131 S. Ct. 1207 (2011); Texas v. Johnson, 491 U.S. 397 (1989).

\(^{240}\) MALDEF: Missouri Town Releases Information on Litigation Costs (Nov. 24, 2008), http://www.maldef.org/truthinimmigration/missouri_town_releases_information_on_litigation_costs/index.html (stating that one suit in which the city defended an ordinance cost more than $115,000.00).
Some topics are inappropriate for discussion in comment sessions and may be restricted. Specifically, public employees do not have a constitutional right to air their employment grievances in open meetings. The law is less clear about the right of public employees to raise general complaints about their government employer in open meetings. To avoid the fine line-drawing between employees' "official" speech and employees' speech as a private citizen on matters of public concern, the government employer should provide public employees administrative processes for airing specific and general employment-related grievances. This provides public employees alternative channels of communication, and public entities could require their employees to pursue and to exhaust administrative procedures before airing grievances in open meetings.

As to citizens' employee-related grievances, public officials should respect citizens' rights to publicly question and criticize the fitness and job performance of public employees. However, private complaints, unrelated to job performance, are not appropriate discussion for open comment sessions. Public officials should not respond to citizens' criticisms of employees in open meetings. Furthermore, the rules should require that no deliberations or actions affecting employment conditions of public employees shall occur in open meetings without the consent of the affected employee.

In the heat of public debate, it can be difficult for public officials to apply neutral rules of general applicability in a consistent, non-arbitrary manner. Perfectly drafted rules of decorum can be impermissibly applied if public officials are selective in their enforcement. Training is a key component to ensure that rules of decorum serve their dual purpose of protecting citizens' rights to participate in public meetings and furthering the efficient accomplishment of government business. Training also serves a third purpose, which is to protect public officials and public entities from lawsuits challenging the constitutionality of rules of decorum and their application.

VI. CONCLUSION

Public debate on public issues is a prized American privilege. While the Constitution does not guarantee citizens the right to participate in public meetings, those rights can be created by state statute or judicial fiat. Once citizens are granted expressive rights in public meetings, those rights fall under the protective umbrella of the First Amendment.

Government entities required to open their meetings to public comment are challenged with adopting and implementing rules of decorum. On the surface, such rules would seem fairly basic. At its core, civility is “play nice in the sandbox;” a concept drilled into the psyches of most people from earliest memories. However, one only has to read the headlines, watch TV news, or log on to YouTube to recognize that too many acts of violence are the result of citizens-gone-mad and no amount of civility rules will impact the reality of such tragedies. Without belaboring the obvious, the effectiveness of rules of decorum depends upon “uncontrollable” and “unknowable” factors, such as an individual’s emotional stability and tolerance for conflict. The most well drafted and perfectly implemented set of rules cannot account for the “human” factor.

However, even level-headed, responsible citizens can become disruptive when confronting official policymakers whose decisions affect the most precious aspects of everyday lives: children’s education, jobs, property values, and economic welfare. Officials presiding over public comment sessions must determine when citizens’ participation becomes disruptive and how to contain the disruption. In deciding when and how to cut-off disruptive citizens, public officials must balance the rights of citizens to participate in open meetings with the need to efficiently accomplish government business. Finally, First Amendment principles

243. See Mills v. Alabama, 384 U.S. 214, 218-19 (1966) (“[A] major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.”); Piscottano v. Town of Somers, 396 F.Supp.2d 187, 200 (D.Conn. 2005) (“The First Amendment’s protection of free speech . . . extends to a broad range of speech” and expressive conduct. “Speech on public issues and political matters lies at the heart of protected speech.”).

244. See supra Part III.
dictate what actions taken by presiding officials are constitutionally permissible and impermissible.\footnote{245}

While meeting all of the above considerations, government entities must adopt and implement rules of decorum to guide public officials tasked with the responsibility of presiding over open meetings and public participation sessions. As discussed above, it is a difficult task even for the courts to unravel the constitutional complexities that arise when citizens challenge the application of these rules of decorum. If courts struggle, it is inevitable that public officials, unschooled in the nuances of First Amendment jurisprudence, would have difficulties knowing when and how to apply civility rules in a way that cuts off disruptive citizens and, at the same time, does not trample on their First Amendment rights.

Public officials must respect the First Amendment rights of citizens to participate in public meetings and conduct government business in an orderly and efficient manner. Well-drafted rules of decorum, without proper training, will be ineffective tools to guide public officials. Public officials, like citizens, are not immune from the passions that are stirred in public debate. It is “human” to get defensive when receiving angry citizens’ complaints. Rules of decorum, along with training, can provide public officials an effective shield to perform their public responsibilities within the constitutional parameters of the First Amendment.

Civility in public debate is somewhat of an oxymoron. It is expected that public debate will be uninhibited, robust, wide-open, vehement, caustic, and sharp. Such speech is not only protected, it is encouraged. The First Amendment embodies the right of Americans to express their views in political discourse, even if not always in good taste or according to dictates of civility.

\footnote{245. Whatever actions public officials take to stop disruptive comments in public meetings, those actions must be consistent with the First Amendment. See Norse v. City of Santa Cruz, 586 F.3d 697 (2009) (stating that the public official might not like that a citizen made a Nazi salute, but a Nazi salute is protected by the First Amendment unless it disrupts the public meeting).}