MANAGING CIVILITY IN PUBLIC COMMENT SESSIONS AT TOWN COUNCIL MEETINGS

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ABSTRACT

Many (if not most) town councils in the United States grant members of the public the opportunity to speak before their elected representatives. Most of these councils have rules regulating these 'public comment' sessions. This Article first discusses the constitutionality of such 'civility codes.' Then, it analyzes these rules across 83 municipalities in six New England states, identifying several common trends among these codes that have significant implications for restrictions on the public's First Amendment right to freedom of speech. Namely, this analysis finds problems with vague standards for 'civility' or 'decorum' that, when commingled with otherwise content-neutral restrictions on speech during public comment sessions, creates an environment where abuses of power by local officials all too keen to censor can grow unchecked. This Article provides solutions for how cities and towns can address this issue.

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INTRODUCTION

Town councils[1] across the United States have seen impassioned participation by members of the public over the last three years, thanks to highly charged debates over municipal COVID-19 policies, police brutality, and school curricula.[2] More routine issues involving taxing and spending can also trigger big reactions from vocal members of the community, who can become 'nasty' or 'uncivil' through their 'vulgar' or 'offensive' remarks.[3]

Such participation takes place during public comment sessions that most town councils make available to residents. Only a handful of states require town councils to allow public comments. Usually, state open meetings laws merely require the potential for public *attendance* at these council meetings and let each council decide whether to allow public comment—though three states (Montana, North Carolina, and Texas) grant their citizens the right to make such public comments through their open meetings laws.[4] Many city ordinances give councils the authority to set rules

1. The terms 'town council' and 'city council' are used interchangeably, regardless of the size of the municipality in question. These terms also connote regionally specific terms for such bodies, such as 'boards of aldermen' or 'selectboards,' etc. However, the term is meant to be distinct from 'town meeting,' which is a form of direct popular governance found mostly in New England states and is distinguished from town/city *council* meetings due to the absence of elected representatives. Also, although the focus of this paper is on civility codes at town/city council meetings, which deal with matters of local governance at a broad level, civility codes are also used during public comment sessions at local school board meetings (i.e., local governing bodies with a narrower legislative purview). Case law regarding civility codes wielded by these governing bodies will be helpful to the analysis of the constitutionality of civility codes in general. *See generally infra*, notes 55–121.

2. *See, e.g.*, Vicky Camarillo, *Corpus Christi Residents Dispute COVID-19 Vaccines, Promote Controversial Drugs at Council Meeting*, CORPUS CHRISTI CALLER TIMES (Sep. 9, 2021), https://tinyurl.com/bduwphz2 [perma.cc/3FV7-RFK6]; Christopher Braunschweig, *Newton Man Critical Of City And Police Arrested At Council Meeting*, NEWTON DAILY NEWS (Oct. 5, 2022), https://www.newtondailynews.com/news/local/2022/10/05/newton-man-critical-of-city-and-police-arrested-at-council-meeting/ [perma.cc/CA2Y-4GNC]; Samira Kassem, *Tensions Run High During Public Comments At District 87 Board Meeting*, WGLT (June 9, 2021), https://www.wglt.org/local-news/2021-06-09/tensions-run-high-during-public-comments-at-district-87-board-meeting [perma.cc/TKP2-RC4Y].

3. In December 2024, a Google News search for "public comments in city council meetings" revealed dozens of recent stories from across the country of citizens making headlines for their inflammatory comments at council meetings. GOOGLE, "public comments in city council meetings" (Dec. 15, 2024) (on file with the Washington University Journal of Law and Policy).

4. *See, e.g.*, N.C. GEN. STAT. §113A-110(e) (2023).

> Prior to adoption or subsequent amendment of any land-use plan, the body charged with its preparation and adoption (whether the county or the Commission

of conduct for council meetings. And, many councils have used this power to restrict the public's ability to speak during public comment sessions in ways that councilmembers deem disagreeable, uncivil, uncouth, vulgar; or any other adjective that the councilmembers themselves get to subjectively define and enforce.

Such civility rules are likely unconstitutional restrictions on the public's First Amendment right to freedom of speech. Case law on this issue has become robust within the last several years.[5] Although results are mixed, at least parts of these civility codes are indeed unconstitutional content-based restrictions on speech, either on their face or as applied. Many prominent communications law scholars agree that these civility codes are often unconstitutional.[6] Yet, civility codes persist, and local officials continue to enforce them. Even several courts' decisions to strike down civility codes in small hamlets have no impact on similar codes throughout the entire country. Cities and towns do not appear to be abandoning them with any deliberate speed or excitement.

In refusing to turn a blind eye to the glaring issues with civility codes, municipalities must abandon these provisions. Public comment sessions are one of the few opportunities that individuals have to interact with elected officials who have power over matters of great and tangible significance to

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> or a unit delegated such responsibility) shall hold a public hearing at which public and private parties shall have the opportunity to present comments and recommendations.

Id.; MONT. CONST. art. II, § 8 ("The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law."); TEX. GOV'T CODE ANN. § 551.007(b) (West 2024) ("A governmental body shall allow each member of the public who desires to address the body regarding an item on an agenda for an open meeting of the body to address the body regarding the item at the meeting before or during the body's consideration of the item."); § 551.007(c) ("A governmental body may adopt reasonable rules regarding the public's right to address the body under this section, including rules that limit the total amount of time that a member of the public may address the body on a given item."); § 551.007(e) ("A governmental body may not prohibit public criticism of the governmental body, including criticism of any act, omission, policy, procedure, program, or service. This subsection does not apply to public criticism that is otherwise prohibited by law.").

5. *See generally infra* notes 54–135.

6. *See, e.g.*, Terri Day & Erin Bradford, *Civility in Government Meetings: Balancing First Amendment, Reputational Interests, and Efficiency,* 10 FIRST AMEND. L. REV. 57 (2011); Frank D. LoMonte & Clay Calvert, *The Open Mic, Unplugged: Challenges to Viewpoint-Based Constraints on Public-Comment Periods*, 69 CASE W. RES. L. REV. 19 (2018); Paul D. Wilson & Jennifer K. Alcarez, *But It's My Turn to Speak! When Can Unruly Speakers at Public Hearings Be Forced to Leave or Be Quiet?* 41 URB. LAW. 579 (2009); Barak Y. Orbach & Frances R. Sjoberg, *Excessive Speech, Civility Norms, and the Clucking Theorem*, 44 CONN. L. REV. 1 (2011).

the public. Giving local officials the power to regulate the 'civility' of speech threatens to chill the dissent of concerned individuals, especially those who may want to address their officials through impassioned rhetoric that matches their level of concern over local policies. Such a restriction is an untenable upturning of the (admittedly altered) maxim from Justice Black that "[t]he Government's power to censor the [people] was abolished so that the [people] would remain forever free to censure the Government."[7] If left unchallenged, such disregard for the First Amendment—paradoxically justified as in the interest of good governance[8]—will continue to choke off the 'breathing space' needed for civilian speakers to redress grievances against their elected representatives.

Further, advocates must not ignore the risk of overlooking these provisions given that their penalties tend to be relatively light compared to adjacent criminal statutes targeting disorderly conduct; which may lead to fines, jail time, probation, or a stain on a criminal record. Case law analyzed herein suggests that city councilmembers enforce civility codes by turning off speaker microphones during public comment sessions, forcible removal with continued resistance, and—in rare instances—arrest and accompanying trespass charges.[9] Additional penalties include bans from future public comment sessions, or even bans from attending public meetings, provided that councils respect due process in levying punishments.

Local officials often see these penalties as minor, and thus any harm done to the First Amendment is a mere peccadillo whose small cost is necessary to bear out good local governing. However, this logic cannot justify silencing vociferous and often uncivil speech by members of the public appearing before a city council. These mere peccadillos add up to death by a thousand paper cuts for the First Amendment and protections for dissenters. Understanding the codes that undergird these penalties is of vital importance in assessing the overall health and resiliency of our democracy.

This Article analyzes regulations on public comment sessions from 83 cities and towns across six New England states (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont). Its

7. N.Y. Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring) (substituting the word "press" for "people" in both instances).

8. *See generally infra* notes 12–23.

9. *See generally infra* notes 54–135.

assessment deemphasizes legal analysis and litigation of specific (and often unique) disputes, emphasizing the more practical realm of codes and statutes that the public must follow with the threat of punishment looming. This Article supplements jurisprudence by shining a light on problems that persist despite litigation. Its analysis reveals that cities and towns continue to employ unconstitutional civility codes of varying types and degrees of flagrancy. However, the rules of one New England city (Lewiston, Maine) offers a beacon of hope, modeling the promotion of civility during public comment sessions without flouting the First Amendment.

To set up this analysis, the Article begins by revealing the subtext surrounding the problem. Attention here will focus on the history and role of these meetings in American democracy, as well as common issues involved with public comment sessions. The following section will first focus on fundamental First Amendment principles related to the opposing side of civility: offensiveness. The section will then turn to case law directly addressing challenges to rules for public comments at town council meetings. This section seeks to establish a First Amendment rubric to objectively compare 83 New England public comment rules before discussing methodology and key trends using the rubric. The Article concludes with guidelines for best practices that town councils can readily employ, outlining limitations and suggestions for further research.

I. PUBLIC MEETINGS, PUBLIC COMMENTS, AND PUBLIC ORDER

At a minimum, state open meetings laws require that municipalities protect the right of the public to attend and witness lawmaking. As mentioned above,[10] only three states (Montana, North Carolina, and Texas) protect a more active right of publicness by guaranteeing the public a right to offer comments at lawmaking meetings. For other states, public comment is allowed at the discretion of each local government body. The goal of such 'direct public engagement' is to "establish a process that involves individuals in commenting on, communicating about, and building consensus for important decisions at the local level."[11] Whether such

10. *See, e.g.*, N.C. GEN. STAT. §113A-110(e) (2023); MONT. CONST. art. II, § 8; TEX. GOV'T CODE ANN. § 551.007(b) (West 2024).

11. Daniel J. Greensweig et al., *Increasing Productive Communication in Local Government and Decreasing Barriers to Community Interactions*, 42 MITCHELL HAMLINE L. REV. 1600, 1615 (2016).

comments lead to better governance is an unanswered question that this Article leaves open.[12]

If city councils do choose to allow public comments at public meetings, they must not regulate them according to vague standards of civility.[13] For those governments that do allow public comments, comment sessions cannot be a free-for-all—no governing of any kind would be practical. The rationale behind a regulated system of expression is found in the seminal work of First Amendment theorist Alexander Meiklejohn, beginning with the idea that the central focus of the First Amendment is not "the words of the speakers, but the minds of the hearers."[14] Because the information offered by speakers can enable a listener to be best prepared for rational deliberation and democratic self-governance, the government should have the ability—indeed, the duty—to ensure that "everything worth saying shall be said."[15] This duty is to maximize public participation in discussion about a narrow set of issues within a limited time and space (e.g., at a public meeting hall from 7:00PM–9:00PM on a Wednesday) with the hope of achieving as complete a debate over these issues as possible. Moreover, this duty is most important in the context Alexander Meiklejohn used as a metaphor for his theory: a town meeting (or, in this case, a town *council* meeting).[16]

There is no one set of rules on how to realize this duty, but some common principles jump out: limiting the amount of time any one person can use for public comment, often as a quotient of total time allotted and the number of people wanting to speak; limiting who can speak, often either to residents of the community or on a first-come-first-served basis to those who sign up in advance; and limiting the topics for discussion to those published on the council's agenda.[17] Of course, some of these rules may run

12. *See id.* at 1618–19. The authors found that allowing public comments at a public meeting, while creating a space for direct public engagement, tends to create reduced senses of efficacy in and attachment to community governance when compared to more engagement through smaller and more informal meetings. *See id.*

13. *See* Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).

14. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 25 (1st ed., Harper & Brothers 1948).

15. *Id.*

16. *Id.* at 22–23. This observation is made with the caveat, noted *supra* note 1, that a 'town meeting' and 'town *council* meeting' are not the same thing. However, because they serve similar functions and require ordered public debate to achieve those functions, the metaphor is applicable to the present analysis.

17. Such agendas are often legally required by state open meetings laws to give the public due

counter to the goal of increasing the sheer number of participants in public comment (a limited time allotment, for example). Instead, a combination of any or all of these rules should be seen as balancing the goals of robust public participation and need for political action.

However, most town councils do not stop there. Rather, in the name of realizing the duty outlined above, they require members of the public to speak in a way that preserves 'order' and 'decorum' befitting the venue. In other words, they require 'civility.' According to Oxford's English Dictionary, 'civility' refers to "behaviour or speech appropriate to civil interactions; politeness, courtesy, consideration."[18] It is "the minimum degree of courtesy required in a social situation," and it involves the "absence of rudeness."[19] The word's alternate meanings encapsulate the notions of ordered governance that outline the context of civility codes: "Observance of the principles of civil order; orderly behaviour; good citizenship"[20] or "Civil order; orderliness in a state or region; absence of anarchy and disorder."[21] In the context of city council meetings, civility codes seek to balance the competing interests of allowing citizens' voices to be heard in a public forum and minimizing disruption through the antitheses of civility: rudeness, lack of politeness, or offensiveness.[22] Exactly what constitutes disruption (and, by extension, what types of speech sow disruption) is a key question. To some, disruption could mean an excess of citizen input that makes a legislative body unable to govern efficiently, such as speaking for long periods of time, speaking loudly, holding signs or other visual means of communication, shouting or chanting while others are trying to speak or conduct legislative business, etc. Disruption could also refer to engaging in personal or *ad hominem* attacks against specific members of the local legislative body, to the point that the members are deterred from serving. It could mean disincentivizing some (more moderate)

notice of upcoming hearings. *See, e.g.*, IOWA CODE § 21.4(1)(a) (2016) ("[A] governmental body shall give notice of the time, date, and place of each meeting including a reconvened meeting of the governmental body, and the tentative agenda of the meeting, in a manner reasonably calculated to apprise the public of that information").

18. *Civility*, OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/civility_n?tab=meaning_and_use#9265489 [https://perma.cc/JW83-G3HH] (last visited Dec. 6, 2024) (definition III.12.a).

19. *Id.*

20. *Id.* (definition I.4).

21. *Id.* (definition I.2).

22. *See* Day & Bradford, *supra* note 6, at 63.

members of the community to participate in local government because they are turned off by (and may fear being lumped in with) the disrupting extremists. At its worst, disruption can come in the form of deadly violence.[23]

The existence of these forms of disruption might create state interests that justify regulation grounded in fostering civility. City councils must be able to run at the end of the day. The question thus becomes whether such interests can help civility regulations withstand (at the very least) intermediate scrutiny and (more practically, given the content-based nature of the regulations) strict scrutiny.

II. LEGAL ANALYSIS

A. First Amendment First Principles

First Amendment case law has many examples of failed attempts by public officials to regulate the civility of public discourse. Many of these cases comprise the 'greatest hits' of First Amendment jurisprudence. The starting point for the legal analysis here involves the regulation of 'offensive' speech, given that offensiveness tends to work against the state's interest in civility. In *Texas v. Johnson*, a divided Supreme Court struck down a Texas criminal flag desecration statute as unconstitutional on the grounds of viewpoint discrimination.[24] Applying strict scrutiny, the Court held that Texas could not show a compelling interest to justify the criminal punishment of flag-burning. Namely, it rejected the arguments that (1) flag-burning caused enough offense to others that it tended to provoke a breach of peace, and (2) flag-burning risked destroying a feeling of national unity.[25] Writing for the Court, Justice Brennan said, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[26] In other words, 'offensiveness' is not a constitutionally recognized category of speech that government can regulate, meaning an *explicit* restriction on offensive speech or any equally

23. *See id.* at 62 (discussing fatal shootings at city council meetings in Missouri and Florida, allegedly spurred by extreme rhetoric present at these meetings during public comment sessions).

24. *See generally* Texas v. Johnson, 491 U.S. 397 (1989).

25. *Id*. at 401.

26. *Id*. at 414.

vague synonym of offensive (vulgar, rude, uncivil, etc.—language that tends to appear in civility codes) could hardly pass constitutional muster after *Johnson*. Moreover, courts should deem such codes void for vagueness—a more deeply rooted principle of constitutional law than modern First Amendment doctrines—if they force persons "of common intelligence [to] necessarily guess at [their] meaning and differ as to [their] application."[27]

Some civility codes forbid speakers from engaging in 'personal attacks' directed at specific council members. However, when public figures and public officials are the subject of offensive speech, the First Amendment takes on heightened importance to shield the speaker from being cowed into silence. In the bedrock freedom of press case *Near v. Minnesota*, the Supreme Court held that the First Amendment forbade the use of a state public nuisance law to enjoin the publication of allegedly false allegations of corruption by public officials.[28] Chief Justice Hughes wrote:

> There is nothing new in the fact that charges of reprehensible conduct may create resentment and the disposition to resort to violent means of redress, but this well-understood tendency did not alter the determination to protect the press against censorship and restraint upon publication. . . . The fact that the public officers named in this case . . . may be deemed to be impeccable, cannot affect the conclusion that the statute imposes an unconstitutional restraint upon publication.[29]

The Court continued to protect expression against public figures in *Hustler Magazine v. Falwell*. In *Hustler*, a unanimous Court held that without a showing of actual malice, the First Amendment barred a public figure from recovering for intentional infliction of emotional distress (IIED) stemming from a pornographic parody ad.[30] The Court held that a key

27. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).
28. *See generally* Near v. Minnesota, 283 U.S. 697 (1931).
29. *Id.* at 723.
30. *See generally* Hustler Mag. v. Falwell, 485 U.S. 46 (1988). Here, the case centered on the claim of a public figure (the Reverend Jerry Falwell), though its standard likely also extends to public officials given that the Court chose to borrow the actual malice standard from defamation law, which it held extends to public officials and public figures alike). The Court wrote:

> The sort of robust political debate encouraged by the First Amendment is bound

element of the IIED tort—'outrageousness,' defined by the Restatement (Second) of Torts as conduct "beyond all bounds of decency" and "utterly intolerable in a civilized society"[31]—could not be squared with the First Amendment's prohibition against viewpoint discrimination.[32] There, it was noteworthy that the Court chose to apply the actual malice standard. *Hustler* did not involve defamation because the magazine refrained from making a false statement of *fact* about the plaintiff; rather, *Hustler* sought to lampoon the plaintiff by conjuring a cartoonish image of him engaged in drunken incest. However, in requiring actual malice, the Court framed the dispute in *Sullivan*'s affirmation: "debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[33]

Some civility codes restrict 'profane' speech during public comment sessions. However, prohibiting profanity cannot serve as a content-neutral restriction on speech to thwart content-based (unconstitutional) restrictions on offensive speech. In *Cohen v. California*, the Supreme Court overturned the conviction of a man charged with "willfully disturbing the peace . . . by offensive conduct" for wearing a jacket reading "Fuck the Draft" inside of a Los Angeles County courthouse.[34] The Court held that a state could not apply a content-neutral ban on offensive *conduct* to *speech* because the

> to produce speech that is critical of those who hold public office or those public figures who are intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large . . . .Such criticism, inevitably, will not always be reasoned or moderate; *public figures as well as public officials* will be subject to vehement, caustic, and sometimes unpleasantly sharp attacks.

Id. (emphasis added) (internal quotes omitted).

31. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d. (AM. L. INST. 1965).

32. *See Hustler*, 485 U.S. at 55. The Court wrote:

> 'Outrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An 'outrageousness' standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.

Id.

33. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

34. Cohen v. California, 403 U.S. 15, 16 (1971).

speech was profane.[35] Of Cohen's message, Justice Harlan wrote:

> [O]ne man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual. Additionally, . . . much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for the emotive as their cognitive force.[36]

Distilled to its core meaning, Cohen's message was simply, "I am against the draft" or "The draft is bad." That message does not have quite the same volume as "Fuck the draft." But offensiveness to some is the necessary cost for the full emotive force of Cohen's profane message to have been heard by all. Moreover, profanity is seen in First Amendment terms as the *content* of Cohen's speech (i.e., its propensity to cause offense) rather than the *manner* of his speech (i.e., the vehicle of the speech). This distinction is critical because content-based restrictions on speech require a strict-scrutiny analysis, whereas restrictions on the manner of speech require the government to meet the weaker intermediate scrutiny standard.[37] The only area where the government has an ostensibly valid interest in punishing the use of profane language is when such language meets the FCC's standards for indecency as used on broadcast TV or radio at times when children could hear it.[38]

In 2019, the Supreme Court reaffirmed the core of *Cohen* in holding that the federal Lanham Act's ban on registering 'immoral' or 'scandalous' trademarks violated the First Amendment.[39] The case involved the United

35. *Id.* at 26.

36. *Id.* at 25–26.

37. *See generally* Reed v. Town of Gilbert, 576 U.S. 155 (2015) (distinguishing when courts should apply strict scrutiny versus intermediate scrutiny).

38. FED. COMMC'NS COMM'N, CONSUMER GUIDE: OBSCENE, INDECENT AND PROFANE BROADCASTS (2019), https://www.fcc.gov/sites/default/files/obscene_indecent_and_profane_broadcasts.pdf [https://perma.cc/JEJ2-6UQK] (defining indecency as "portray[ing] sexual or excretory organs or activities in a way that is patently offensive but does not meet the three-prong test for obscenity" which also appears in Miller v. California, 413 U.S. 15 (1973)). *See generally* FCC v. Pacifica Found., 438 U.S. 726 (1978).

39. *See generally* Iancu v. Brunetti, 588 U.S. 388 (2019).

States Patent and Trademark Office's (PTO's) denial of Erik Brunetti's trademark "FUCT" under § 1052(a) of the Lanham Act, which allowed the PTO to deny marks that "a substantial composite of the general public would find . . . shocking to the sense of truth, decency, or propriety[and] giv[e] offense to the conscience or moral feelings."[40] The Court rejected the PTO's argument that the Lanham Act gave it authority to deny registration for "marks that are offensive [or] shocking to a substantial segment of the public because of their *mode* of expression, independent of any views that they may express."[41] Although the basis for the Court's holding was one of statutory interpretation—the text of the Lanham Act did not clearly distinguish between immoral 'mode' and immoral 'viewpoint'—the same constitutional principle underlying *Cohen* undergirds its decision here: use of 'immoral' or 'scandalous' language to turn up the volume on one's message (i.e., the emotional mode of the speech) cannot easily disentangle (if it can at all) from the substance of the message. In a concurring opinion, Justice Alito appeared to endorse this principle when he warned that "a law banning speech deemed by government officials to be 'immoral' or 'scandalous' can easily be exploited for illegitimate ends."[42]

Restrictions on profane speech are not any more constitutional when public officials are the targets of said speech. In *City of Houston v. Hill*, the Court held that a Houston ordinance forbidding bystanders from using offensive language toward police officers making an arrest was unconstitutionally vague and overbroad.[43] The Court asserted that individuals have a First Amendment right to verbally challenge and criticize police, and that "in the face of verbal challenges to police action, officers and municipalities must respond with restraint."[44] However, the United States District Court for the District of Kansas held in *McCormick v. City of Lawrence* that the protections of *City of Houston* end with 'fighting words.'[45] The Court held that McCormick's repeated use of expletives and personal affronts uttered to officers, with the intent to provoke an immediate physical and violent response, amounted to unprotected fighting words.[46]

40. *Id.* at 391 (internal quotes omitted).
41. *Id.* at 397 (emphasis added by Kagan, J.).
42. *Id.* at 400 (Alito, J., concurring).
43. *See generally* City of Houston v. Hill, 482 U.S. 451 (1987).
44. *Id.* at 461, 471.
45. McCormick v. City of Lawrence, 325 F. Supp. 2d 1191, 1200 (D. Kan. 2004).
46. *Id.* at 1201. The officers alleged McCormick shouted things like "Motherfuckers,"

The Supreme Court likely sought the 'fighting words' First Amendment exception from the 1942 case *Chaplinsky v. New Hampshire*, holding that speakers could be punished for their "face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitutes a breach of the peace by the speaker."[47] *McCormick* is thus distinct from the IIED claim in *Hustler* because of the heightened risk that *McCormick*-styled speech leads to physical (as opposed to mere emotional) harm.

However, the Supreme Court has not meaningfully revisited the 'fighting words' doctrine since *Chaplinsky* in 1942, leaving lower courts to toil with defining the doctrine's contours. However, the 'fighting words' doctrine as applied in *McCormick* is helpful in understanding civility codes for two reasons. First, it reminds us that this category of unprotected speech still exists and may serve as the basis for valid regulation of public comments. Indeed, other such categories could be used as valid touchstones for regulations: think true threats,[48] incitement,[49] obscenity,[50] and defamation.[51] Second, the 'fighting words' doctrine helps draw a line between speech critical of the government entity (i.e., the town council) and speech directed towards one member of the council as a 'personal attack.' The key for understanding the constitutionality of 'personal attacks'

"Fuckheads," "Fucking pigs," "Why don't you run around the track, chubby?," and "Hey fat ass." *Id.* at 1197.

47. Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942).

48. Counterman v. Colorado, 600 U.S. 66, 69 (2023) (holding that states in criminal true threats cases must prove that defendant had some subjective understanding of the threatening nature of their statements and communicated the threat with the mental state of recklessness).

49. Brandenburg v. Ohio, 395 U.S. 444, 447.

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Id.

50. *Miller*, 413 U.S. 15, 24 (1973) (defining obscenity as "works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.").

51. *N.Y. Times Co*., 376 U.S. 254, 279–80 (1964) (holding that the First Amendment "require[s], we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.").

regulations lies in the term's definition, hewing closer to 'abuse,' 'harassment,' or 'fighting words' versus a vague prohibition that could swallow up any criticism (civil or otherwise) levied against a specific member of the local legislative body. To better understand how well-defined this category is, we turn to an analysis of case law challenging the constitutionality of regulations regarding public comment periods at town council meetings.

B. Free Speech Claims Involving Public Comment Periods at Town Council Meetings

As noted in the Article's introduction, First Amendment issues found in cases involving public comment periods at town council meetings lack the gravamen of the cases discussed in the previous section: million-dollar lawsuits. However, a fundamental premise of this Article follows: constitutional principles should not lose their power when speech moves into an arena where the potential penalties are relatively minor. The First Amendment shields against any penalty, no matter how big or small. Thus, courts should judge threats by the same *Counterman* standard of recklessness when a councilmember seeks to have someone removed from a public comment session for allegedly communicating a threat, perhaps under the pretext of a 'personal attack.' Similarly, courts should only apply the fighting words doctrine to assess an unruly speaker's intent to cause an immediate physical confrontation with another person. Likewise, courts should evaluate Claims of incitement by the *Brandenburg* standard, intent to cause imminent lawless action. Obscenity should stay cabined to its realm of constitutionally out-of-bounds pornography under *Miller*. And profanity, by itself, should not be enough to silence a speaker, unless the speaker uses it within the context of any of the unprotected speech categories listed above. Again, the following analysis of relevant case law does not treat the First Amendment concerns of this area as unique or deserving of a lower standard of scrutiny.

Reviewing this First Amendment case law closely reveals that restrictions on the civility of town council meetings speech are unconstitutional. Courts are unanimous in holding that public comment sessions amount to at least a limited public forum.[52] In such forums, the

52. *See, e.g.*, Moms for Liberty v. Wilson Cnty. Bd. of Educ., 155 F.4th 499, 502 (6th Cir. 2025)

government can impose a limited set of content-based restrictions (e.g., limiting use of the forum to certain speakers with a relationship to that forum, such as citizens of a town), but beyond that, it can only employ content-neutral regulations on the time, place, and (especially) manner of speech taking place therein.[53] Within the context of forum analysis, areas of particular concern in these cases become whether civility codes (or their various parts) are content-based or content-neutral, and whether the punishments levied against violators of these codes are excessive in light of both First Amendment and due process concerns. Although the empirical analysis of this paper focuses on civility codes pertaining to city and town councils rather than school boards, case law involving the latter is instructive to this study given that both are legislative bodies that hold public comment sessions.

i. The *Mama Bears* Case Provides a Litany of First Amendment Issues

We begin with a school board case, *Mama Bears of Forsyth County v. McCall*, because of its breadth of First Amendment issues addressed. There, the United States District Court for the Northern District of Georgia deconstructed the rules for public comment of a local school board's meetings, assessing the constitutionality of each separate restriction as it evaluated the plaintiff's motion for a preliminary injunction.[54] The court held that a local school board's requirement that comments by members of the public be 'respectful' amounted to unconstitutional viewpoint

(citing to previous cases holding that public comment sessions are limited-purpose public forums).

53. *See* Ison v. Madison Loc. Sch. Dist. Bd. of Educ., 3 F.4th 887, 893 (6th Cir. 2021). The Court wrote:

> The government may also impose content-based restrictions, such as those reserving the forum for certain groups or for the discussion of certain topics . . . so long as they are reasonable in light of the purpose served by the forum and are viewpoint neutral. . . . But the government may not engage in a more invidious kind of content discrimination known as viewpoint discrimination.

Id. (internal quotes omitted) (internal citations omitted).

54. *See generally* Mama Bears of Forsyth Cnty. v. McCall, 642 F. Supp. 3d 1338 (N.D. Ga. 2022). The ordinance in question stated, "[m]embers of the public shall conduct themselves in a respectful manner that is not disruptive to the conduct of the Board's business. . . . Speakers are asked to keep their remarks civil. The use of obscene, profane, physically threatening or abusive remarks will not be allowed. Loud and boisterous conduct or comments by speakers or members of the audience are not allowed." *Id.* at 1346.

discrimination.[55] It also held that the board's rule against 'personally directed' attacks against board members during public comments sessions was vague and overbroad,[56] and thus the court sided with the plaintiffs in their facial challenge to the board's policy against 'abusive'[57] and 'profane'[58] speech during these sessions. Interestingly, the court suggested that councils could prohibit abusive speech if it came in the context of 'hateful racial epithets' due to such speech (1) not having political value, and (2) likely causing disruption at council meetings.[59]

Although socially laudable, this exception likely would not withstand a First Amendment challenge. For one, the court cited to one of its previous opinions where it applied the 'substantial disruption' test for situations where a principal at a public high school could constitutionally punish the speech of students to public comment sessions by adults at school board meetings.[60] In all reality, an adult speaking at a school board public comment session should not be subject to the same standard that governs the disruptiveness of high school students.[61] The concept of 'order' in the context of a public school is plainly differs from the concept as applied in a schoolboard meeting. Second, it cited to an opinion from Florida that denied plaintiffs' First Amendment claim because their speech at a public comment session was not relevant to matters on the agenda (i.e., a content-neutral distinction).[62] A person could use a hateful racial epithet in a way that is relevant to matters on a city council's agenda, thereby leading punishments against such speech to fall into the *Cohen* realm of content-based restrictions against speech found to be offensive.[63]

The Court found that it was not substantially likely that the plaintiffs would be successful in their facial challenge against the board's policy requesting that public comments be 'civil' because the policy was a request ('aspirational') and not a requirement. However, since the policy was

55. *Id.* at 1351.
56. *Id.*
57. *Id.* at 1357.
58. *Id.*
59. *Id*.
60. *Id*. (citing Dyer v. Atlanta Indep. Sch. Sys., 426 F. Supp. 3d 1350, 1359 (N.D. Ga. 2019)).
61. *See* Mahanoy Area Sch. Dist. v. B.L., 594 U.S. 180, 191–92 (2021) (evaluating a "[public] school's interest in teaching good manners and consequently in punishing the use of vulgar language aimed at part of the school community" as a factor that a school-defendant cited in favor of censorship).
62. Moms for Liberty v. Brevard Pub. Schs., 582 F. Supp. 3d 1214, 1220 (M.D. Fla. 2022).
63. *See infra*, notes 70–73.

applied as a requirement, the Court found it substantially likely that the plaintiffs would succeed with their as-applied challenge.[64] The Court also sided with the school board and did not enjoin its enforcement of the rules against obscene speech[65] or loud and boisterous conduct or comments.[66]

The *Mama Bears* case is instructive in how it identifies parts of civility codes that are more problematic (content-based prohibitions on profanity and personal attacks) versus less problematic (content-neutral restrictions on volume and prohibitions on obscene speech under the *Miller* test[67]). It also shows how plaintiffs can find success in facial challenges to civility codes that are void for vagueness or overbreadth. *Mama Bears* is also somewhat perplexing in that it finds a constitutionally significant distinction between requirements that speech be 'respectful' and requirements that it be 'civil.'

ii. Strict Scrutiny Applies to Content-Based Civility Codes

In March 2023, the Massachusetts Supreme Judicial Court issued a key decision that is highly instructive for evaluating First Amendment claims against civility codes. The court held that a civility code in Southborough violated Articles 16[68] and 19[69] of the Massachusetts constitution, which protect the freedom of speech and petition, respectively.[70] Although the

64. *See* Mama Bears of Forsyth Cnty. v. McCall, 642 F. Supp. 3d 1338, 1352 (N.D. Ga. 2022).

65. *Id.* at 1354.

66. *Id.* at 1359.

67. Miller v. California, 413 U.S. 15, 24 (1973) outlined the following test for when hardcore pornographic speech becomes criminal obscenity:

> (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest . . .; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. (internal quotes omitted).

68. MASS. CONST. art. XVI, *amended by*, MASS. CONST. amend. LXXVII, https://www.mass.gov/news/massachusetts-declaration-of-rights-article-16 [https://perma.cc/7853-GVVB].

69. MASS. CONST. art. XIX, pt. 1, https://www.mass.gov/news/massachusetts-declaration-of-rights-article-19 [https://perma.cc/2DGN-HUTE].

70. *See generally* Barron v. Kolenda, 203 N.E.3d 1125 (Mass. 2023). The civility code read, "[a]ll remarks and dialogue in public meetings must be respectful and courteous, free of rude, personal, or slanderous remarks. Inappropriate language and/or shouting will not be tolerated." *Id.* at 1136.

plaintiff only invoked state claims, the relevant articles of the Massachusetts Constitution echo the First Amendment of the U.S. Constitution. Article 16 of the Massachusetts Constitution (as amended by Article 77) declares that the "right of free speech shall not be abridged,"[71] while Article 19 protects the right of the people to "give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer."[72] Moreover, the Court applied the same standard of review—strict scrutiny—in this case as a federal court would in a First Amendment claim. The Court held that the civility code was a content-based restriction on speech, which (as is almost always the case with content-based restrictions) failed to survive strict scrutiny. In other words, city officials could not show a compelling state interest necessary to restrict speech. Justice Kafker wrote for the unanimous Court:

> Although civility, of course, is to be encouraged, it cannot be required regarding the content of what may be said in a public comment session of a governmental meeting without violating both provisions of the Massachusetts Declaration of Rights, which provide for a robust protection of public criticism of governmental action and officials.[73]

Thus, like the federal *Mama Bears* court, this state court distinguishes aspirational and forced attempts at civility.

iii. Content-Neutral Restrictions

The constitutionality of civility codes often turns on whether courts consider them content-based or content-neutral. Content-neutral regulations deal with restrictions on the time, place, or manner of the speech in question and are unrelated to the message expressed in the speech.[74] The cases

71. MASS. CONST. art. XVI, *amended by*, MASS. CONST. amend. LXXVII, https://www.mass.gov/news/massachusetts-declaration-of-rights-article-16 [https://perma.cc/7853-GVVB].

72. MASS. CONST. art. XIX, pt. 1, https://www.mass.gov/news/massachusetts-declaration-of-rights-article-19?_gl=1*15pm0nz*_ga*Mzg2OTkwNTYuMTc2NjQzOTIzMw..*_ga_MCLPEGW7WM*czE3Njk4MDQ0ODkkbzEkZzAkdDE3Njk4MDQ0ODkkajYwJGwwJGgw&_ga=2.91118617.283691448.1769804411-38699056.1766439233 [https://perma.cc/2DGN-HUTE].

73. *Barron*, 203 N.E.3d at 1130.

74. *See, e.g.*, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984). The Court

discussed below suggest such restrictions may include: requiring speech to pertain to the meeting agenda; and prohibiting behavior that could cause disruption, so long as the focus is on a speaker's disruptive manner of speaking rather than the disruptive content of their message. However, these cases also highlight how courts struggle in finding the line between content-based versus content-neutral restrictions on disruptiveness.

Restrictions that speech during public comment sessions be limited to items on the official meeting agenda are generally seen as valid content-neutral limitations. In *Spiehs v. Larsen*, the United States District Court for the District of Kansas dismissed the plaintiff's facial and void-for-vagueness claims against requirements that comments before the council of the city of Lawrence, Kansas be 'germane' to council business.[75] The plaintiff had been removed from council meetings due to the lack of germaneness of his comments. His comments included expressions of the following beliefs: Democrats were dumb; the cost of living was better under President Donald Trump; the local school district's mask mandate following the height of the COVID-19 pandemic was improper; a local reporter would likely not report on the fact that the progressive mayor had accidently misgendered someone (but would report about it if he, a conservative, had done it); and the mayor was a Nazi for telling him to stop speaking.[76] The Court also rejected the plaintiff's as-applied challenges that the council enforced the germaneness rule against him "because of the ideas he expressed."[77]

A few courts have upheld restrictions on manner of speech during public comment sessions as content-neutral. Although these restrictions do not pertain to 'civility,' their treatment of 'disruptiveness' is illustrative because of the connection between these two concepts. First, the United States Court of Appeals for the Second Circuit held that a city ordinance

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wrote:

> Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions. We have often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.

Id.

75. Spiehs v. Larsen, 728 F. Supp. 3d 1190, 1215 (D. Kan. 2024).
76. *Id.* at 1199–1200.
77. *Id.* at 1210–11.

forbidding members of the public from bringing signs and posters into city council meetings was a constitutional content-neutral restriction on speech.[78] In the similar vein of a restriction on visual messaging, the United States Court of Appeals for the Eleventh Circuit held (albeit in an unpublished opinion) that a rule prohibiting members of the public from wearing clothing with messages related to the campaigns of local officials was a content-neutral restriction on speech, justifiable as a desire to limit political influence on city employees.[79] These cases suggest that the Court construes the state's interest in preventing 'disruptiveness' broadly, leading content-neutral restrictions to survive intermediate scrutiny so long as the codes are not used as a pretext to silence unpopular speech.

Several courts that have upheld the constitutionality of civility codes (or at least parts of them) have done so by mischaracterizing restrictions that are very likely content-based as content-neutral. For example, in *Scroggins v. City of Topeka*, the United States District Court for the District of Kansas held that the Topeka city council's rule prohibiting "personal, rude, or slanderous remarks" during public comment sessions was a content-neutral regulation.[80] The Court found the rule to be content-neutral because it applied to *any person* discussed during public comments, not just council members (i.e., including other attendees), irrespective of a person's message. The Court emphasized how the law targeted abusive comments' inherently disruptive nature rather than their expressive content.[81] It held that the rule furthered an important government interest by keeping meetings orderly, citing that the city had already afforded ample alternative channels for the plaintiffs to speak about their grievances outside of the council meeting.[82]

It is important to highlight the unique facts of *Scroggins* that make its decision a narrow one, distinguishable from *Barron* where a court struck down a similar civility code, treating its restriction as content-based.[83] First, the court interpreted the personal attack rule to apply to anyone, even though the rule did not expressly suggest such an interpretation.[84] Moreover, it is

78. Tyler v. City of Kingston, 74 F.4th 57, 63 (2d Cir. 2023).
79. Cleveland v. City of Cocoa Beach, 221 F. App'x 875, 879 (11th Cir. 2007).
80. Scroggins v. City of Topeka, 2 F. Supp. 2d 1362, 1372 (D. Kans. 1998).
81. *Id*. at 1371.
82. *Id.* at 1373.
83. *See generally* Barron v. Kolenda, 203 N.E.3d 1125 (Mass. 2023).
84. *Scroggins*, 2 F. Supp. 2d at 1369.

unclear how applying the personal attack rule to speech directed at audience members (as well as councilmembers) makes it *per se* content-neutral. Second, the Court saw the plaintiffs' other attempts to petition the council outside of public comment as sufficient alternative channels, even though these channels did not allow the plaintiffs to have their grievances put in the record of an official proceeding, like a public meeting.[85]

Scroggins is not the only example of a court misdiagnosing a civility code as content-neutral and erroneously applying the intermediate scrutiny standard instead of strict scrutiny. In *Murray v. City of New Buffalo*, the United States District Court for the Western District of Michigan rejected a facial First Amendment challenge to the city's prohibition against "derogatory, disparaging, and disrespectful language," holding that such a prohibition is "not based on the speech's content, but rather on a reasonable need for decorum in a meeting," which it saw as a legitimate government interest.[86]

However, some courts have rebuffed attempts by city councils to label civility policies as content-neutral when they are not. In *Farnsworth v. City of Mulvane*, the United States District Court for the District of Kansas held that a town's rules prohibiting public comments focusing on the 'social ills' of certain policies amounted to unconstitutional viewpoint discrimination (an especially disfavored subset of content-based regulations in the law) and not, as the council tried to argue, a content-neutral restriction on *any* speech.[87] Similarly, the United States Court of Appeals for the Ninth Circuit held that discriminatory application of otherwise content-neutral rules against 'disruption' is just as unconstitutional when applied to speech during a public comment session versus when applied to speech made outside of such a session.[88] In *Norse*, the Santa Cruz City Council expelled a man from a public meeting because he made a Nazi salute after his time for making public comments had ended, arguing that such speech was likely to cause a disruption to the meeting. The Court admonished the council for defining disruption so loosely: "Actual disruption means actual disruption. It does not mean constructive disruption, technical disruption, virtual disruption,

85. *Id.* at 1372.
86. Murray v. City of New Buffalo, 708 F. Supp. 3d 1313, 1331 (W.D. Mich. 2023).
87. Farnsworth v. City of Mulvane, 660 F. Supp. 2d 1217, 1226 (D. Kans. 2009).
88. Norse v. City of Santa Cruz, 629 F.3d 966, 976 (9th Cir. 2010).

nunc pro tunc disruption, or imaginary disruption."[89] In a concurring opinion, Judge Kozinski and Judge Reinhardt went further, writing that the council "clearly want[ed] Norse expelled because the 'Nazi salute' is 'against the dignity of this body and the decorum of this body' and not because of any disruption. But, unlike der Führer, government officials in America occasionally must tolerate offensive or irritating speech."[90]

Town councils can also get into trouble if they cite individuals' violations of content-neutral regulations to justify draconian punishments (such as lengthy or indefinite bans from public meetings) that violate the individuals' First Amendment rights, due process rights, or both. One court has held that once a member of the public has violated otherwise content-neutral regulations prohibiting disruptive *conduct* at meetings, even if he or she has done so multiple times, the city council may not ban that person from public meetings indefinitely.[91] However, another court has held the opposite, determining that a school board's 14-month ban of a speaker who engaged in disruptive behavior (including repeated use of racial slurs) during public comments, coupled with the threat of a permanent ban if the disruption continued, did not violate the speaker's First Amendment rights.[92] A third court held that a school board violated a speaker's due process rights when they issued trespass notices to the speaker without a basis in official policies, and without offering him a meaningful opportunity to contest the notices, even though the man had threatened school officials.[93]

When it comes to assessing whether speech will cause a disruption, local governments almost certainly have grounds to punish speech made during public comments that meet the standard for incitement of imminent lawless action.[94] In *Brandenburg*, the Court wrote: "the constitutional

89. *Id.*

90. *Id.* at 979 (Kozinski, J., concurring).

91. Walsh v. Enge, 154 F. Supp. 3d 1113, 1132 (D. Or. 2015) ("[M]ere speculation that some persons may make others feel unsafe or engage in additional disruptions is an insufficient basis upon which to erect a governmental power to bar those who wish to express their views from participating in public debate.").

92. Dyer v. Atlanta Indep. Sch. Sys., 426 F. Supp. 3d 1350, 1362 (N.D. Ga. 2019).

93. Cyr v. Addison Rutland Supervisory Union, 60 F. Supp. 3d 536, 552–53 (D. Vt. 2014). *See also* Besler v. Bd. of Educ. of W. Windsor-Plainsboro Reg'l Sch. Dist., 201 N.J. 544, 571 (2010). Although this case involved a challenge to a punishment (the speaker being banned for critical comments) rather than a facial or as-applied challenge to a civility code, it is instructive to assessing the constitutionality of civility codes because the ban (like civility codes) was a content-based restriction on speech.

94. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[95] However, at least one court has questionably applied the Supreme Court's incitement standard in assessing whether an official was justified in banning speech on incitement grounds.[96] During a tense meeting on the anniversary of the death of a Black man killed by a police officer, the Cincinnati City Council asked another Black man (Kirkland) to stop speaking during public comment after he said he represented the "nigganati," referring to other Black residents in the room.[97] The council's civility code provided simply, the "Council is [] entitled to expect those coming before its meetings and committees to be respectful of other citizens, staff and members of council."[98] Reading an anti-incitement provision into the code, the Court held that the mayor rightly viewed the word "nigganati . . . to be a highly offensive and degrading racial slur when used by any member of the public at a government meeting" that "was likely to incite the members of the audience during the meeting, cause disorder, and disrupt the meeting."[99] Even if the court was correct in assessing the likelihood that uttering this word would have led to imminent lawless action as defined by disrupting a public meeting, the Court failed to account for Kirkland's intent for his speech to cause such an outcome, as mandated by *Brandenburg*.

iv. Prohibitions on Personal Attacks

It can often be difficult to disentangle critique of city councilmembers as the people's representatives in local government from the policies they enact and put on meeting agendas for discussion. Thus, courts have had to

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Id.

95. *Id*. at 446.
96. *See generally* Kirkland v. Luken, 536 F. Supp. 2d 857 (S.D. Ohio 2008).
97. *Id.* at 862, 866.
98. *Id.* at 875.
99. *Id.* at 876.

assess the constitutionality of prohibitions against 'personal attacks' directed toward members of a local legislative body (rather than their policies) during public comment sessions.[100] For example, the United States Court of Appeals for the Sixth Circuit has held that such prohibitions against personal attacks are likely unconstitutional. In *Ison v. Madison Local School District Board of Education*, the Court sided with parents who had been kicked out of a public comment session at a school board meeting for criticizing the board's lack of a policy on gun control, on both their facial and as-applied challenge to a policy restricting "abusive, personally directed, and antagonistic speech."[101] However, the Court upheld a summary judgment ruling in the board's favor regarding the plaintiffs' challenge to the board's general 'decorum' policy. The Court held that although "the exact contours of 'reasonable decorum' lack precision, 'perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.'"[102] The court noted that "a rule against 'attacks on people or institutions' during the public comment portion of a city council meeting 'could be construed as viewpoint discrimination.'"[103] Such analysis makes sense in light of cases like *Near*, *Sullivan*, and *Hustler*, which identify the ability of citizens to sharply criticize their elected officials as one of the core freedoms the First Amendment is designed to protect.

The constitutionality of a personal-attack rule could turn on whether speech is critical of a city official in a way that is connected to their policies. In *Murray*, the court granted summary judgment on the plaintiffs' claims that the mayor used a 'personal attack' prohibition to unconstitutionally stop them from speaking during public comments merely because they challenged *his* policy positions, rather than the positions of the entire council.[104] On the other hand, the Court sided with the city for stopping one of the plaintiffs from speaking after citing the 'personal attack' rule because the plaintiff insinuated that one of the councilmembers was intoxicated at the meeting.[105] Thus, the Court appeared to create a distinction between

100. *See, e.g.*, Scroggins v. City of Topeka, 2 F. Supp. 2d 1362 (D. Kans. 1998).
101. Ison v. Madison Loc. Sch. Dist. Bd. of Educ., 3 F.4th 887, 895 (6th Cir. 2021).
102. *Id.* at 897 (citing Ward v. Rock Against Racism, 491 U.S. 781, 794 (1989)).
103. *Id.* at 894 (citing Youkhanna v. City of Sterling Heights, 934 F.3d 508, 518–20 (6th Cir. 2019)).
104. Murray v. City of New Buffalo, 708 F. Supp. 3d 1313, 1334 (W.D. Mich. 2023).
105. *Id.*

personal attacks based on criticism of policy and personal attacks that were either potentially false or not germane to the meeting agenda.

v. Synthesis

From the discussion of the foregoing public comment cases, one can distill the following trends regarding the constitutionality of civility codes in public comment sessions.

First, this body of First Amendment law is relatively new, and no one case commands a controlling, gravitational force. Numerous variations exist across the facts of these cases that muddle any clear constitutional rule.

Second, contradictions exist across these cases. Significant confusion arises regarding whether certain parts of these codes are content-based or content-neutral. There is also confusion as to whether the maintenance of 'decorum' (as a synonym for 'order') during a public meeting is a legitimate government interest that can justify some content-based restrictions on speech.

Third, and the arguably most troubling trend: not all courts have applied tried-and-true First Amendment principles when dealing with issues of categorical restrictions on public comment-speech. The *Kirkland* decision stands out as especially problematic here. The court in *Kirkland* did not even consider the *Brandenburg* test despite justifying a speaker's removal from public comment on the grounds that his speech could reasonably have incited disorder during the meeting.[106] Without its other required element, inciting 'disorder' arises as far too lenient of a standard; bordering on a revival of the squishy 'bad tendency' test from the early 20th century.[107] Indeed, such a standard becomes an insidious tool for suppressing speech on contentious topics (i.e., relations between police and communities of

106. *See generally* Kirkland v. Luken, 536 F. Supp. 2d 857 (S.D. Ohio 2008). The words '*Brandenburg*,' 'imminent,' and 'lawless' do not appear anywhere in the text of the decision.

107. Whitney v. California, 274 U.S. 357, 371 (1927). The Court wrote:

> [T]hat a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, *tending to incite to* crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question.

Id. (emphasis added). The bad tendency test is criticized (especially when compared to the *Brandenburg* standard currently in place) due to its vagueness, both in terms of defining the harms of speech and assessing the propensity of the speech to cause those harms. *See generally* Kent Greenawalt, *Speech and Crime*, 1980 AM. BAR FOUND. RSCH. J. 645 (1980).

color) that should be the highest priority of the First Amendment to protect.

Having looked to First Amendment jurisprudence, this Article now turns to an empirical analysis of current civility codes in seeking to identify what codes still exist, and what best practices spotlight in promoting free speech while maintaining order.

III. METHODOLOGY

In June and July of 2023, the researcher requested copies of rules regulating civility during public comment sessions from the clerk's offices of the largest 20 municipalities in each of the six New England states.[108] The researcher then coded each rule based on the foundational principles of First Amendment law discussed above, analyzing whether it was: vague, content-based, content-neutral, included prohibitions on already unprotected categories of speech (e.g., threats, incitement, obscenity), or some mix of these qualities. The researcher then organized each rule according to common themes that emerged. All told, 83 of 120 clerks (69%) responded to emails, including clerks from the largest cities in five of the six New England States.[109]

It is important to note that very few of the civility codes received from clerks are publicly available online. More commonly, the codes appear in the form of a PDF (often scanned from a physical copy) on file with the clerk's office. When a publicly available code is referenced in the findings below, a citation will be provided to that publicly available source. For codes referenced without such a citation, it should be inferred that such

108. Ranking of city/town size came from 2021 data published by the demographic website Cubit for each state. *See generally* Kristen Carney, *Connecticut Cities by Population (2025)*, CONN. DEMOGRAPHICS BY CUBIT (Aug. 7, 2025), https://www.connecticut-demographics.com/cities_by_population [https://perma.cc/3JHK-3VRS]. *See also* Kristen Carney, *Maine Cities by Population (2025)*, ME. DEMOGRAPHICS BY CUBIT (Aug. 7, 2025), https://www.maine-demographics.com/cities_by_population [https://perma.cc/E6QC-TSXE]; Kristen Carney, *Massachusetts Cities by Population (2025)*, MASS. DEMOGRAPHICS BY CUBIT (Aug. 7, 2025), https://www.massachusetts-demographics.com/cities_by_population [https://perma.cc/45G5-8RT5]; Kristen Carney, *New Hampshire Cities by Population (2025)*, N.H. DEMOGRAPHICS BY CUBIT (Aug. 7, 2025), https://www.newhampshire-demographics.com/cities_by_population [https://perma.cc/MYX6-NJL4]; Kristen Carney, *Rhode Island Cities by Population (2025)*, R.I. DEMOGRAPHICS BY CUBIT (Aug. 7, 2025), https://www.rhodeisland-demographics.com/cities_by_population [https://perma.cc/DRV2-TXSR]; Kristen Carney, *Vermont Cities by Population (2025)*, VT. DEMOGRAPHICS BY CUBIT (Aug. 7, 2025), https://www.vermont-demographics.com/cities_by_population [https://perma.cc/6MJZ-EERA].

109. No response was received from the clerk of Portland, Maine.

codes are not publicly available. However, readers may contact the author and request that any such codes be emailed to them.

IV. FINDINGS

The rules coalesced into five distinct categories (*see* Table 1): (1) codes that made no mention of civility; (2) codes that mentioned certain constitutional categories of speech that could be prohibited (such as threats or incitement); (3) codes that were unconstitutional either due to (a) vague or content-based regulation of civility or (b) vague requirements for meeting 'decorum;' (4) code(s) that matched the comprehensive Lewiston, Maine, model, which stands out as an outlier that other cities and towns should emulate; and (5) codes that contained mere aspirational guidelines. Most often, unconstitutional codes contained prohibitions on a combination of categories of speech, some constitutional, like prohibitions on true threats; and some not, like prohibitions on profanity. Similarly, these codes also contained other content-neutral regulations, such as those requiring speakers to keep their comments in line with the meeting agenda or "official city business."[110] The very involved set of civility rules at issue in the *Mama Bears* case is an example of such a "mixed bag" approach.[111]

110. For an example of how such a code was abused in one city (Warwick, RI), *see* NEFAC, *ACLU of Rhode Island Denounce Removal of Speaker at Warwick City Council Meeting*, NEW ENGLAND FIRST AMEND. COAL. (Aug. 2, 2023), https://www.nefac.org/news/nefac-aclu-of-rhode-island-denounce-removal-of-speaker-at-warwick-open-meeting/ [https://perma.cc/9UUJ-GDVK] (involving a speaker at a council meeting who was cut off from speaking and removed from the meeting after discussing a *Providence Journal* article involving a council member, who cited the city's rule about focusing on matters related to city governance to have the speaker removed).

111. *See generally* Mama Bears of Forsyth Cnty. v. McCall, 642 F. Supp. 3d 1338 (N.D. Ga. 2022).

TABLE 1—TYPES OF CIVILITY CODE BY STATE

Category (and notable subcategories)	**Conn.**	**Me.**	**Mass.**	**NH**	**RI**	**Vt.**	**Total**	**%**
No Mention of Civility								
Roberts Rules Only	1	1	0	3	2	3	10	12%
No specific rule given	4	5	5	6	4	4	28	34%
Vague Reference to Content Neutrality	0	0	1	0	0	1	2	2%
Prohibitions on Unprotected Categories	0	0	1	0	0	0	1	1%
Unconstitutional Codes								
Appeals for decorum	4	0	4	2	7	2	19	23%
Obviously vague or content-based	7	4	1	1	3	3	19	23%
Lewiston Model	0	1	0	0	0	0	1	1%
Aspirational Guidelines	0	1	1	0	0	1	3	4%
Totals	**16**	**12**	**13**	**12**	**16**	**14**	**83**	

A. No Mention of Civility

i. "Robert's Rules only"

Some town clerks responded to emails saying their council meetings simply follow Robert's Rules of Order[112] rather than any formally adopted set of rules (n = 10, 12%). The issue with this approach is that Robert's Rules say nothing about public comment sessions at public meetings. This absence of rules on public comment sessions opens the door for city officials to make their own ad hoc rules in the name of preserving order, a setup ripe for failing First Amendment muster if councilmembers deem speech

112. *See generally* ROBERT'S RULES ONLINE (2013), http://www.rulesonline.com [https://perma.cc/GW5Q-BTHY].

disorderly.

ii. "No specific rule given"

The no specific rule given category was the second most common after unconstitutional codes (n = 29, 34%). These rules said nothing about public comment, except that they exist. The positive side of rules framed like this is that there are no explicit bans on 'uncivil' speech that councilpersons can use against the public. The negative side is that the absence of a clear declaration that such speech is allowed (even if it is not encouraged) breeds ambiguity. This ambiguity could chill the speech of individuals who wish to convey their message more forcefully, and it could empower city officials to enforce civility 'norms' (even if not a formal civility *rule*) subjectively, and without clear notice to the public.

iii. Vague Reference to Content Neutrality

Two towns (Somerville, Massachusetts, and Montpelier, Vermont) had rules mandating that any regulation of speech shall be exclusively content-neutral. However, these rules did not outline what those content-neutral regulations would be, hence why they are coded in the 'No Mention of Civility' category of codes. Such rules regulate public comments without regard for viewpoints expressed. For example, these may be rules that regulate the total time available for public comment, the time per person available for public comment, a requirement that speakers pre-register to speak at a meeting, a requirement that speakers be residents of the city/town, or a requirement that all comments must relate to each meeting's agenda. It is possible that city officials' exclusive use of content-neutral regulations *implies* that they are not regulating speech for civility. However, an explicit message of support for freedom of expression during public comment periods (even at the cost of civility) is preferrable, and it is also possible (see the Lewiston, Maine model discussed below).

B. Prohibitions on Unprotected Categories

Only one city (Cambridge, Massachusetts) had rules that focused exclusively on categories of speech not protected by the First Amendment. However, these rules are discussed in detail here because (1) some of the

categorical restrictions are more problematic than others, and (2) many of these categories also appeared in codes classified as unconstitutional due to their vagueness or content-based preferences, as discussed below.

i. Incitement

As noted above, when a speaker intends to incite imminent lawless action, that speech automatically loses constitutional protection.[113] This standard is a high bar, designed to protect impassioned speakers addressing a restive crowd of supporters from criminal liability for the actions taken by that crowd partly due to the speaker's words. As noted above, the incitement standard can excessively chill speech during public comment sessions if the focus of the incitement is on mere *disorder* rather than tangible, physical harm.[114] Still, due to the significant interest in avoiding actual physical violence sparked by speech at a town council meeting, the prohibition on incitement is a constitutionally sound one, provided the rules stress the physical nature of the harm at issue.

ii. True threats

In June 2023, the United States Supreme Court held that criminal liability for threats requires a finding that the speaker made the statements with reckless disregard for their capacity to communicate a threat of physical harm.[115] Just like in the case of incitement, avoiding physical violence is a valid reason, under constitutional standards, to prohibit true threats made in public comment sessions.[116] And, as with incitement, regulating threats in the context of public comment sessions is distinct from threats in the context of criminal liability. Still, the same recklessness standard should govern regulations on threatening statements when it comes

113. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). The Court wrote:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Id.

114. *See* Kirkland v. Luken, 536 F. Supp. 2d 857, 873–74 (S.D. Ohio 2008).

115. *See* Counterman v. Colorado, 600 U.S. 66, 76 (2023).

116. *Id.*

to silencing a speaker in public comment sessions, lest speech with a high emotive value be chilled.

iii. Slander

False speech that harms a person's reputation does not enjoy First Amendment protection. However, major constitutional safeguards exist to protect speech that borders on slander, especially when the speech targets public officials regarding official acts. A person cannot be civilly liable for defamation unless they spoke a false and defamatory statement with reckless disregard for its falsity (i.e., they knew it was false, but they said it anyway).[117] Although this 'actual malice' standard is a powerful shield for defendants in defamation lawsuits, the shield is of little use in the context of anti-slander rules in public comment sessions. This is because public officials can commonly exact punishment (i.e., silence the speaker) without a finding of fault. Indeed, in the *Kolenda* case, the council stopped the plaintiff from speaking because the chair claimed she slandered the council when she accused the council of flouting the Massachusetts Open Meetings Act.[118]

iv. Obscenity

Obscenity is a legal term of art denoting patently offensive sexual expression that appeals to depraved interests as defined by contemporary community standards and has no scientific, literary, artistic, or political value.[119] Simply put, it tends to involve the hardest of hardcore pornography. Bans on obscenity (i.e., its proper legal definition) in public comment sessions are constitutional under the *Miller* standard.[120] However, it is theoretically possible that a person could engage in hardcore pornographic speech during a public comment session, to the point that they run afoul of the *Miller* test for obscenity. However, the more likely reason that prohibitions of 'obscene' speech exist in civility codes is because officials are not using the term within its proper legal meaning, but rather in its broader colloquial meaning as a synonym for 'offensive' or 'uncivil'

117. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).
118. Barron v. Kolenda, 203 N.E.3d 1125, 1132 (Mass. 2023).
119. Miller v. California, 413 U.S. 15, 24 (1973).
120. *Id.*

speech. Thus, there is potential for councilmembers to wield such a term subjectively against speech that, while uncivil, does not come close to the legal definition of obscene.

v. Unconstitutional Codes

Codes that appear to be unconstitutional on their face made up a plurality of the findings (n = 38, 46%). They came in several varieties, discussed, in turn, below.

a. General 'decorum' rules

These rules tended to be two-pronged. First, they establish rules of decorum and civility for members of the town council when speaking and addressing *each other*. Such rules involve prohibitions on uncivil, offensive, and (especially) personal remarks against a fellow council member. Second, they require all people speaking in public comment sessions to follow these same rules of decorum. Thus, a civility code is grafted onto the public in the name of respecting the solemn institution of the public meeting just as the councilmembers do. These rules tend to predominate in Rhode Island,[121] with a few found in Massachusetts.[122] Two towns in Connecticut—Stratford and Milford—have rules empowering the council chair to enforce decorum, though they do not explicitly indicate whether that rule applies only to other council members or to all people in attendance. As with the 'no specific rule given' category mentioned above, such a rule risks chilling speech if the public cannot be certain of the regulations on their rights to speak at these meetings.

b. Explicitly vague or content-based regulations on civility

These rules explicitly require people speaking in public comment sessions to not use 'uncivil,' 'vulgar,' or 'offensive' language. These rules are the most blatantly unconstitutional of the civility codes discussed in this Article. In investigating these codes, one New England city made local headlines after its state's American Civil Liberties Union chapter notified

121. Codes in Providence, Cranston, Woonsocket, South Kingstown, Newport, and Portsmouth followed this model.

122. Codes in Worcester and Framingham followed this model.

the organization of its code's pending unconstitutionality, especially in light of the *Kolenda* decision. In July 2023, the Board of Aldermen of Nashua, New Hampshire, voted to strike prohibitions on 'crude' or 'vulgar' speech from its code.[123] However, the Board left restrictions in place on 'profane' or 'obscene' speech, which, for the reasons discussed above, raise their own constitutional issues.[124]

c. Personal Attacks

These rules prohibit members of the public from harshly criticizing individual members of a town council. These rules are related to the prohibitions against slander, though (despite all the problems of the slander rule) the rule against personal attacks against council members lacks the same constitutional hook as slander as an unprotected category of speech. As some of the cases discussed above show,[125] 'personal attack' prohibitions are ripe for abuse when local officials view mere critical speech directed at them as *ad hominem* insults.

d. Profanity

Prohibiting 'profanity,' as merely another way of prohibiting 'uncivil' speech, is likely unconstitutional per *Cohen* and *Iancu*.[126] The issue is the subjective nature of profanity. A narrow definition of profanity involves words that demean or offend things considered sacred, namely those that are religious.[127] Thus, the word 'Goddamn' would fit the definition of

123. Christopher Roberson, *Aldermen Approve Changes To Public Comments Ordinance*, NASHUA TELEGRAPH (July 14, 2023), https://www.nashuatelegraph.com/news/2023/07/14/aldermen-approve-changes-to-public-comment-ordinance/ [https://perma.cc/YA3J-X9RW].

124. *See infra* notes 145–46 and accompanying text.

125. *See infra* notes 129–31 and accompanying text.

126. *See generally* Cohen v. California, 403 U.S. 15 (1971); Iancu v. Brunetti, 588 U.S. 388 (2019).

127. *Profane*, OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/profane_adj?tab=meaning_and_use#28080259 [https://perma.cc/85LE-83WA] (last visited Jan. 9, 2026) (Definition III).

> Of persons, behaviour, etc.: characterized by, exhibiting, or expressive of a disregard or contempt for sacred things (esp., in later use, by the taking of God's name in vain); not respectful of religious practice; irreverent, blasphemous, impious; (hence, more generally) ribald, coarse, indecent. Now the most common sense.

profane, where a coarse word that is more secular in nature (e.g., 'shit' or 'fuck') might not be profane if it is not used to demean something sacred. However, the broader definition of profanity (that is, *any* word considered crude or offensive) captures an expansive range of speech.[128] For instance, a general exasperated comment of "what the hell is going on with this policy?" is a politically significant message that has an extra bite to it. Similarly, speakers could use profane metaphors or adjectives to describe disdain with policies with extra force (e.g., "this ordinance is shit" or "this fucking ordinance"). Speakers may also use profane words in personal invectives against council members (e.g., "you are an asshole"), which is a variation on the issue of personal remarks (discussed above) with no constitutionally significant change because of included profanities.[129] As noted above, the only recognized list of profane words prohibited by government lie within indecency regulations on broadcast TV and radio.[130] The Supreme Court's holdings in *Cohen* and *Iancu* further reinforce the principle that restrictions on profanity are unconstitutional content-based restrictions on speech.[131]

vi. The Lewiston Model

The biggest outlier of this Article's findings is Lewiston, Maine. Its rules read:

> As a limited designated public forum, the City Council does not have the right to prohibit disparaging, rude and other remarks of a personal nature. But, because of the potential implications, including personal liability of the speakers, we encourage any speakers to strive to be accurate in their statements and avoid making personal, rude, or provocative remarks.[132]

Id.

128. *See id.*

129. *See generally* Cohen v. California, 403 U.S. 15 (1971); Iancu v. Brunetti, 588 U.S. 388 (2019)

130. FCC, *supra* note 38.

131. *See generally* Cohen v. California, 403 U.S. 15 (1971); Iancu v. Brunetti, 588 U.S. 388 (2019).

132. LEWISTON, ME., RULES GOVERNING THE CITY COUNCIL § 15(7) (2025), https://www.lewistonmaine.gov/DocumentCenter/View/466/006-CouncilRules?bidId= [https://perma.cc/5EQF-3S7U].

The acknowledgement that it cannot prohibit uncivil speech sets Lewiston apart from all other cities and towns reviewed. Moreover, the Lewiston model avoids conflating the legal and colloquial definitions of 'slander' by fronting 'accuracy' and general concerns about liability rather than slander specifically. The mere encouragement to speak civilly is constitutionally sound as long as such a provision remains only an aspirational commitment to civility.[133] However, it should be noted that Lewiston's rules also stipulate that "[a]ll statements should respect the dignity and seriousness of the proceeding." This rule appears to follow the general 'decorum' approach to civility mentioned above,[134] though it is likely aspirational in nature when considered in context with the acknowledgement on the council's inability to prohibit uncivil speech and encouragement for civility.

vii. Aspirational Guidelines

Three towns: Orono, Maine; Newton, Massachusetts; and Barre City, Vermont, did not have explicit rules regarding civility during public comment sessions, but rather offered non-binding guidelines for how the public can practice 'respectful' democratic engagement during these sessions. Thus, these guidelines would only become subject to an as-applied challenge if councils wielded them with legal force.[135]

V. DISCUSSION: BEST PRACTICES MOVING FORWARD

The desire of city officials to uphold high standards of order and decorum at city council meetings during public comment sessions is understandable, especially in light of recent examples of fiery and uncivil discourse in these forums.[136] However, city officials should not contravene the First Amendment's protections in using the force of law to regulate the civility of public comments, such as by silencing a speaker, having a speaker removed, or prematurely ending a public comment session. Rather, the best

133. *See generally* Mama Bears of Forsyth Cnty. v. McCall, 642 F. Supp. 3d 1338 (N.D. Ga. 2022); Barron v. Kolenda, 203 N.E.3d 1125 (Mass. 2023).

134. *See, e.g.*, Murray v. City of New Buffalo, 708 F. Supp. 3d 1313, 1331 (W.D. Mich. 2023); Ison v. Madison Loc. Sch. Dist. Bd. of Educ., 3 F.4th 887, 893 (6th Cir. 2021).

135. *Mama Bears*, 642 F. Supp. 3d at 1352; Barron, 203 N.E.3d at 1130.

136. *See supra* note 2 and accompanying text (containing links to viral videos from public comment sessions making headlines).

way to achieve civility is to do the following: (1) regulate public comment sessions in ways that do not discriminate against speech on the basis of content; (2) explicitly indicate the intention to not regulate speech through content-based codes and to only regulate speech through content-neutral means; and (3) publish non-legally binding guidelines encouraging citizens to practice civility in public comments, including clear examples of what civility ideally looks like.

Proper regulation of public comment sessions begins and ends with strict and exclusive adherence to content-neutral regulations. City officials can still preserve order through a variety of regulations that do not discriminate on the viewpoint, content or tone (i.e., following *Cohen*[137]) of speakers' messages during public comment sessions. Officials can prohibit recognized, constitutionally unprotected categories of speech (incitement, threats, fighting words, and obscenity), provided they properly inform the public on what these terms of art mean and how they will assess them.[138] Moreover, officials can restrict the amount of time individuals have to speak to ensure meetings adjourn at reasonable times. They can limit speakers to those who live in the affected community and, perhaps, require pre-registration to speak. They can even limit the scope of public comment to issues related to the council's agenda items for each meeting. However, these rules must be both clearly communicated and respected to have their desired effect. Here, the rules from Lewiston, Maine, are instructive. Lastly, city officials can achieve their goal of maintaining both order and civility during public meetings by publishing guidelines, as Orono, Maine; Newton, Massachusetts; and Barre City, Vermont do. Officials should also publish examples of what kind of speech the officials *hope* to see, alongside clear disclaimers that the guidelines are aspirational and that failing to follow them will *not* result in legal sanctions.

If city officials do not amend civility codes voluntarily, advocates of free expression can, and should push for changes to these codes. Addressing these concerns is no small-potatoes issue. The history of First Amendment litigation shows that some of the most significant victories for free speech

137. *See generally* Cohen v. California, 403 U.S. 15 (1971).

138. Although defamatory speech also does not enjoy absolute First Amendment protection, city officials should not prohibit 'slander' during public comment sessions due to the risk of council members silencing speech without first meeting the heightened constitutional standard of showing that the speaker is acting with reckless disregard for the truth of their words.

involve speech that takes place at the edge of civility, decorum, and decency. *Cohen v. California* (profanity used in political speech), *Texas v. Johnson* (flag burning), and *Hustler v. Falwell* (crude and outrageous criticism of a public figure) stand for the principle that protecting the most extreme expression ensures that civil and decent (i.e., more 'mainstream') speech on important public issues will have the 'breathing space' needed to survive, if not thrive.[139] The decades-long battle over where courts should draw the line separating protected pornography from unprotected obscenity reveals that the fight is not merely about the battling the harms associated with extreme sexual speech, but rather about asserting who should have the power to regulate social mores.[140] Moreover, fighting battles in such fringe settings is essential for ensuring the constant exercising of our First Amendment muscles, lest they atrophy. Indeed, at a time when challenges to freedom of expression appear regularly in headlines, such exercise becomes even more important.[141]

How can individuals get involved? They can access the rules of order

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139. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 298 (Goldberg, J., concurring) ("The prized American right to speak one's mind . . . about public officials and affairs needs breathing space to survive.") (internal quotes omitted).

140. *See* ROBERT CORN-REVERE, THE MIND OF THE CENSOR AND THE EYE OF THE BEHOLDER (2021) (focusing on the 19th and 20th century battles of obscenity to highlight the psychology of censorship).

> Ultimately, censorship results from the conviction that some forms of expression are so vile or dangerous that they should be restricted, or so valuable that they should be compelled. Censors claim the moral sanction to speak for the collective, either by enforcing 'community standards' against evil expression or by mandating speech that they believe serves the 'public interest.'

Id. at 5.

141. *See* Li Yuan, *How to Silence Dissent, Bit by Bit Until Fear Takes Over*, N.Y. TIMES (Sep. 22, 2025), https://www.nytimes.com/2025/09/22/business/china-censorship-jimmy-kimmel.html [https://perma.cc/CR8D-SKM8] (comparing the gradual erosion of freedom of expression in China with events in 2025 involving suppression of expression in the United States).

> For those of us who grew up under strict censorship [in China], late-night comedy always felt like an emblem of American freedom. The idea that millions of Americans could go to bed each night having watched their presidents mocked felt almost magical, something unimaginable where we came from. That's why ABC's suspension of the Jimmy Kimmel show after pressure from the Trump administration, amid the president's public threats toward critical journalists, felt so jarring. To many Chinese who have endured the relentless erosion of speech by the country's top leader, Xi Jinping, it felt ominous. Free speech rarely vanishes in a single blow. It erodes until silence feels normal.

Id.

for town council meetings exactly as the researcher did in this study: by emailing their town clerk. Individuals can use this Article as a guide for analyzing and assessing their town's rules to see how or if they regulate civility in public comment sessions. If the rules appear to be unconstitutional, individuals can write a letter to city officials, especially the city attorney, noting concern with the unconstitutionality of the rules and respectfully requesting that they be amended according to the recommendations from this Article. If city officials are unwilling to accede to such a request, individuals can get in touch with local advocacy organizations or attorneys who may be willing to take formal legal action against the city.

CONCLUSION

This study focused on city and town councils in six states within one specific region of the United States. Thus, its findings are limited by its narrow geographical scope. The focus of it emphasizes rules governing public comment sessions of city council meetings rather than other municipal or regional legislative bodies such as school boards or county boards of supervisors. This choice was deliberate to keep the focus of the study narrow and manageable; but of course, this choice also limits our findings. The hope is that this study inspires future research into how school boards or other bodies manage public comments.

All citizens should appreciate that the job of town councilperson is difficult and thankless, and that listening to uncivil or offensive barbs hurled by members of the public during comment sessions can be difficult to endure. However, these officials are reminded that elected members of city councils serve the sovereign public. Such service demands granting an audience to the full range of the public's grievances and concerns, including those that are uncivil. City officials should heed the words of Justice William Brennan and respect our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[142]

142. *N.Y. Times Co.*, 376 U.S. at 270.