

## CASE NOTE

### CONSTITUTIONAL LAW—FREE SPEECH—NINTH CIRCUIT UPHOLDS CITY COUNCIL’S EJECTION OF AUDIENCE MEMBER BASED ON NAZI SALUTE

#### *NORSE V. CITY OF SANTA CRUZ*

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An irony of American free speech law is that it provides more protection for ranting on a street corner than speaking out at a public meeting. This is partly a quirk of the United States Supreme Court’s complicated First Amendment jurisprudence and partly a recognition that such meetings are venues for administrative business and not just citizen engagement. And yet all across the country, city councils, school boards, planning commissions, and other public bodies provide time for members of the public to speak at their meetings. Sometimes the comments are relevant and persuasive, sometimes no one from the public shows up, and sometimes officials are besieged by hostile gadflies who seize the platform to create a spectacle. Officials concerned about such abuse are allowed to quiet speakers if their comments would derail a meeting. However, such power is limited to quelling speech that is disruptive, not merely disfavored.

Not surprisingly, judges and local officials have struggled to draw this fine distinction, as exemplified by the recent Ninth Circuit opinion, *Norse v. City of Santa Cruz*.<sup>1</sup> In *Norse*, a divided panel held that city officials did not violate a citizen’s First Amendment rights by ejecting him from two municipal meetings—one in which he paraded around the city council chambers in protest and another in which he silently gave a Nazi-style salute.<sup>2</sup> The majority found both ejections acceptable, although the panel was split on the silent salute. A dissenting judge deemed that ejection to be impermissible viewpoint discrimination.<sup>3</sup> The Ninth Circuit announced on March

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1. 586 F.3d 697 (9th Cir. 2009).

2. *Id.* at 698–99.

3. *Id.* at 700–03 (Tashima, J., concurring in part and dissenting in part).

12 that it would rehear the case en banc, setting the stage for an important reexamination of the law governing citizen speech at public meetings.<sup>4</sup>

The majority opinion in *Norse* turned an exception aimed at containing truly disruptive speech into a broad loophole that could give officials latitude to punish speakers because of their views. By expanding the definition of “disruptive,” the court suggested that avoiding mere affronts to decorum can constitute a compelling state interest that justifies silencing political speech. This logic runs against well-established First Amendment principles. The case also shows how the doctrinal framework for analyzing speech at public proceedings is grounded in antiquated notions about where valued speech takes place, obscuring modern realities about political engagement.

Citizen speech at public meetings is typically analyzed under public forum principles, which apply when officials regulate speech in government-controlled locations. Since the 1980s, the most important question in public forum cases is the nature of the forum.<sup>5</sup> The Supreme Court has created a system of categorical rules in which different levels of constitutional scrutiny are applied depending on how a location is labeled. Speech gets the most protection in a “traditional public forum” like a street corner or a park and the least protection in a “nonpublic forum” like a military base. Somewhere in between is a “limited public forum” like public school facilities. Courts decide which label to use by looking to “society’s time-tested judgment, expressed through acquiescence in a continuing practice.”<sup>6</sup> This categorical approach has led to criticism from commentators who would rather see the courts weigh the particular speech and governmental interests at stake in a given case.<sup>7</sup>

Public forum doctrine relies heavily on history and tradition. A location is deemed a “traditional public forum” or a “general public forum” and given the highest level of First Amendment protection when it has “immemorially been held in trust for the use of the public, and, time out of mind, [has] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”<sup>8</sup> Strict scrutiny applies to any content-based speech

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4. *Norse v. City of Santa Cruz*, No. 07-15814, 2010 WL 963171 (9th Cir. Mar. 12, 2010) (order granting rehearing en banc).

5. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 986–87 (2d ed. 1988).

6. See *Int’l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680–81 (1992).

7. See TRIBE, *supra* note 5, at 987 (contending that this categorical approach has “proven to be quite manipulable and problematic”).

8. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)).

restriction in these locations.<sup>9</sup> At the opposite end of the spectrum is the “nonpublic forum.” There is no tradition of speech in nonpublic forums, and the government has not opened them up to expressive activity.<sup>10</sup> Speech restrictions in such locales are held to the minimum standard of constitutional review: they need only be reasonable and viewpoint neutral.<sup>11</sup>

In the middle of the spectrum are places that the government makes available only to certain speakers. For example, a public university can open its facilities for expressive activity by student groups only, and a city can operate a venue exclusively for theatrical productions.<sup>12</sup> Courts have called such sites “limited public forums” or “designated public forums.” If the government has provided one of these sites for open-ended expressive activity, then content restrictions are analyzed under strict scrutiny.<sup>13</sup> However, if the government has reserved the site for a particular kind of speech, then it can impose reasonable content-based restrictions, as long as these restrictions remain viewpoint neutral.<sup>14</sup> Across all of these categories, the government can impose reasonable “time, place and manner” restrictions on speakers that do not relate to the content or viewpoint of the speech.<sup>15</sup>

Despite these bright line rules based on the type of location, it remains unclear where exactly citizen speech at public meetings fits. The Supreme Court has held that a government body can entirely exclude public speakers from participating in meetings without violating the Constitution.<sup>16</sup> Once officials provide an opportunity for public comment, some First Amendment scrutiny applies to any subsequent limitations, although confusion abounds as to the proper standard. Courts have expressed frustration about this lack of clarity,

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9. *Id.* at 45 (“For the State to enforce a content-based exclusion, it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”).

10. *See, e.g., Lee*, 505 U.S. 672 (airport terminal); *Greer v. Spock*, 424 U.S. 828 (1976) (military base); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (exterior of a city bus).

11. *See Lee*, 505 U.S. at 679.

12. *See Widmar v. Vincent*, 454 U.S. 263, 267 (1981); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555–56 (1975).

13. *See Perry Educ. Ass’n*, 460 U.S. at 45–46 (giving university meeting facilities, school board meetings, and municipal theaters as examples from past cases).

14. *See Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). A content-based restriction bars speech about a certain topic, while a viewpoint-based restriction bars speech that expresses a particular opinion about the topic. *Id.* (“The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”).

15. *Perry Educ. Ass’n*, 460 U.S. at 46.

16. *See Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 283 (1984) (“The Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy.”).

and many have simply declined to pick a category.<sup>17</sup> Nonetheless, the broad principles behind public forum doctrine have almost always guided the resolution of cases dealing with citizen speech at public meetings.

In *City of Madison Joint School District v. Wisconsin Employment Relations Commission*,<sup>18</sup> the Supreme Court struck down a state policy that prohibited teachers who were not official representatives of the teachers' union from speaking at school board meetings.<sup>19</sup> The Court held that when the panel "sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of their employment, or the content of their speech."<sup>20</sup> Even though this decision predated the establishment of the categorical public forum rules and terminology, Justice Brennan suggested in a concurring opinion that public comment at a school board meeting or a comparable proceeding would be analyzed under the category of "designated public forum." He wrote: "[o]nce a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say."<sup>21</sup>

When subsequent courts addressing citizen speech at public meetings have picked a category, however, they have tended to use the "limited public forum" label, which allows for some content-based discrimination.<sup>22</sup> In *White v. City of Norwalk*,<sup>23</sup> the Ninth Circuit considered a challenge by a citizen who was ejected from city council meetings for refusing to stop talking after council members ruled him out of order for being unduly repetitive.<sup>24</sup> The court cited

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17. See *Bowman v. White*, 444 F.3d 967, 975 (8th Cir. 2006) ("Substantial confusion exists regarding what distinction, if any, exists between a 'designated public forum' and a 'limited public forum.'"); *Farnsworth v. City of Mulvane*, No. 08-1150-MLB, 2009 WL 2973128 at \*7 (D. Kan. Sept. 16, 2009) (pointing to "confusion" caused by the Supreme Court's "inconsistent" application of the categorical labels). For examples of courts declining to choose a category, see *Shero v. City of Grove*, 510 F.3d 1196, 1202 (10th Cir. 2007) (finding it unclear if a city council meeting is a limited or designated public forum), and *Eichenlaub v. Township of Indiana*, 385 F.3d 274, 281 (3d Cir. 2004) (calling it a "close question" if the Township Board of Supervisors meeting was a general public forum or limited public forum).

18. 429 U.S. 167 (1976).

19. *Id.* at 175-76.

20. *Id.* at 176.

21. *Id.* at 179 (Brennan, J., concurring) (quoting *Police Dep't v. Mosley*, 408 U.S. 92, 96 (1972)).

22. See, e.g., *Rowe v. City of Cocoa*, 358 F.3d 800, 803 (11th Cir. 2004) (holding that a City Council meeting was a limited public forum); *Curley v. Philo*, No. 07-cv-370 (GLS-DHR), 2009 WL 2152323, at \*3 (N.D.N.Y. July 14, 2009) (deeming a school board meeting to be a limited public forum); *Jocham v. Tuscola County*, 239 F. Supp. 2d 714, 728 (E.D. Mich. 2003) ("A city council meeting is the quintessential limited public forum, especially when citizen comments are restricted to a particular part of the meeting."); see also *Piscottano v. Town of Somers*, 396 F. Supp. 2d 187, 201-02 & n.19 (D. Conn. 2005) (applying a "designated public forum label" to the case at hand, but reserving the question of whether the limited public forum category would be more appropriate given more facts).

23. 900 F.2d 1421 (9th Cir. 1990).

24. *Id.* at 1423.

the Supreme Court's language in *Wisconsin Public Employment Relations Commission* in suggesting that speech in public meetings must be given strong protection, but then it noted countervailing concerns about the efficient administration of municipal business: "[A] City Council meeting is still . . . a governmental process with a governmental purpose. The Council has an agenda to be addressed and dealt with."<sup>25</sup> Therefore, the court held that certain content-based restrictions, such as those limiting public comment to the agenda item at hand, do not violate the First Amendment and that speakers can be cut off for being repetitious or irrelevant as long as they are not targeted because officials disagree with their views.<sup>26</sup>

A subsequent Ninth Circuit case, *Kindt v. Santa Monica Rent Control Board*,<sup>27</sup> concerned a citizen's challenge to an elected municipal rent control board ejecting him from several public meetings. The court suggested in dicta that due to their "highly structured nature," public meetings of city councils and other such municipal boards "fit more neatly into the nonpublic forum niche."<sup>28</sup> However, the court declined to precisely label the forum and merely held that "limitations on speech at those meetings must be reasonable and viewpoint neutral, but that is all they need to be."<sup>29</sup>

The Ninth Circuit's decisions in *White* and *Kindt* provided the precedential and analytical foundation for the opinion in *Norse v. City of Santa Cruz*. The petitioner, Robert Norse, is an activist with a long history of clashing with city officials.<sup>30</sup> The litigation involved two incidents in which he was ejected from city council meetings. The first occurred at a contentious proceeding in 2002, in which two other audience members had already created a disruption in the back of the chambers.<sup>31</sup> As presiding officer at the meeting, the mayor then told a member of the public who was speaking during an open comment period that her time had elapsed. As a result, the speaker was "visibly unhappy," and Norse "directed a Nazi salute in the presiding officer's direction."<sup>32</sup> Though the mayor did not notice the gesture, Norse was ejected after another council member pointed it out.<sup>33</sup> A second incident came in 2004 when

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25. *Id.* at 1425.

26. *Id.*

27. 67 F.3d 266 (9th Cir. 1995).

28. *Id.* at 270.

29. *Id.* at 271.

30. See, e.g., Ken McLaughlin, *Santa Cruz Disbands Police Review Board—Activists Denounce Drastic Move; Council Says City Can't Afford to Keep It Running*, SAN JOSE MERCURY NEWS, Jan. 30, 2003, at B6.

31. *Norse v. City of Santa Cruz*, 586 F.3d 697, 698 (9th Cir. 2009).

32. *Id.*

33. *Id.*

Norse was kicked out of a meeting after he “engaged in a parade about the Council chambers” in protest.<sup>34</sup> He brought a civil rights lawsuit under 42 U.S.C. § 1983, contending that the city’s actions violated his First and Fourth Amendment rights.

The district court dismissed Norse’s complaint, but in 2004, a Ninth Circuit panel ruled 2–1 that Norse had stated a claim that his First Amendment rights were violated when he was ejected based on the salute.<sup>35</sup> The district court ruled against Norse on remand, and this time, with the benefit of a more complete record including video of the meeting, the same Ninth Circuit panel upheld the decision by ruling 2–1 in favor of the city.<sup>36</sup> The opinion does not attempt to locate the city council meeting on the public forum spectrum, finding only that it does not fall in the most protected category. Writing for the majority, Judge Mary M. Schroeder followed *White* and *Kindt* and noted that “[w]e have long recognized that First Amendment rights of expression are more limited during a meeting than in a public forum, as, for example, a street corner.”<sup>37</sup> The majority found that, based on the record, Norse’s salute was in direct protest of the mayor enforcing reasonable time, place, and manner limitations aimed at preventing the disruption of the meeting’s official business.<sup>38</sup> Therefore, ejecting him for the gesture was not viewpoint discrimination but rather the type of content-based regulation acceptable in such contexts.<sup>39</sup> The majority stressed that the real-time interpretation and enforcement of such rules during meetings are “highly discretionary functions” in which deference to public officials is appropriate.<sup>40</sup>

Judge A. Wallace Tashima concurred in the portion of the opinion relating to the parading incident, finding it to be disruptive as a matter of uncontroverted fact, but he dissented regarding the saluting incident.<sup>41</sup> Judge Tashima found that the facts supported an inference that the officials ejected Norse because they disliked the viewpoint he expressed with his Nazi salute, not because he was disrupting the meeting. He noted that Norse remained totally silent as he saluted for “a second or two” and that no one in the audience reacted; indeed, the mayor himself did not notice the gesture and carried on with the next items on the council agenda.<sup>42</sup>

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34. *Id.*

35. *Norse v. City of Santa Cruz*, 118 Fed. Appx. 177, 178–79 (9th Cir. 2004).

36. *Norse*, 586 F.3d at 698.

37. *Id.* at 699. Judge Diarmuid F. O’Scannlain joined Judge Schroeder in the majority.

38. *Id.* at 700.

39. *Id.* at 699.

40. *Id.*

41. *Id.* at 700 (Tashima, J., concurring in part and dissenting in part).

42. *Id.* at 701.

Under Santa Cruz City Council rules, audience members were allowed to display signs or engage in other silent expression that did not block others' view, which suggested that Norse's conduct fell within city policy.<sup>43</sup> The dissent further noted that there was a history of conflict between Norse and council members over his use of the Nazi salute and that evidence in the record suggested the mayor initiated the ejection at the behest of "an *offended* council member."<sup>44</sup> Judge Tashima also objected to the majority's suggestion that the ejection was appropriate because the salute was intended to object to a reasonable time limitation and not express a political viewpoint. Citing Supreme Court cases that establish that the government cannot limit speech based on hypothetical disruptions caused by listeners, Judge Tashima found Norse's intent to be irrelevant.<sup>45</sup> Given that Norse appeared to comply with city rules and did not cause a disruption, the dissenting opinion concluded that the record suggested "that Norse was removed because of his viewpoint—because Council members detested being characterized as acting Nazi-like."<sup>46</sup>

Neither the majority nor the dissent defined "disruption" or said precisely where they would set the threshold for determining when cutting off a speaker is constitutionally permissible. Indeed, it is difficult to find a clear statement of how disruptive one needs to be in order to be silenced in previous cases regarding public meeting speech.<sup>47</sup> The Fourth Circuit did note in the recent case *Steinburg v. Chesterfield County Planning Commission*<sup>48</sup> that "disruption . . . is of course not confined to raw, physical violence, but includes any conduct that significantly violates generally or specially established rules of parliamentary order" such that the "orderly conduct of a meeting" is harmed.<sup>49</sup>

*White* and *Kindt* seem to have followed this definition by upholding ejections based on speakers going off topic, being unduly repetitive, yelling, or refusing to stop speaking after their allotted time expired.<sup>50</sup> This type of speech can plausibly be said to cause actual disruption of a meeting by creating delays,

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43. *Id.*

44. *Id.*

45. *Id.* at 702.

46. *Id.* at 701.

47. See Paul D. Wilson & Jennifer K. Alcaez, *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, 594–95 (2009) (trying to find such guidance in the case law and coming up with broad rules that can vary by circuit).

48. 527 F.3d 377 (4th Cir. 2008).

49. *Id.* at 386 n.3.

50. See *Kindt v. Santa Monica Rent Control Bd.*, 67 F.3d 266, 271 (9th Cir. 1995); *White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990).

blocking other speakers from being heard, and preventing the panel from addressing agenda items.

However, the majority in *Norse* went further by upholding a speech restriction without a claim that the meeting was delayed or the council was prevented from conducting business. Rather, the majority suggested that speech that supports or fosters a potential disruption can justify an ejection even if the meeting has yet to be interrupted.<sup>51</sup> In contrast, the dissent apparently would require actual interference with the conducting of the meeting or the audience's ability to follow the proceedings.<sup>52</sup> Under the majority's approach, some precautionary measures are necessary because a strict actual disruption standard waits until the damage has already been done before taking action. Essentially, defining a disruption broadly or narrowly involves making a choice between jumping in too early or too late, and ensuring the smooth flow of government business argues for giving officials the flexibility to cut off speakers before the meeting is disrupted.

A problem with this approach is that it views disruptions as all-or-nothing propositions rather than as matters of degree. If a meeting were ruined the moment disruptive words were uttered, then perhaps preventative silencing would be justified. In practice, however, officials can usually bounce back from disruptive speech and return to the agenda after enforcing the rules. Some time may be lost, but losing a few minutes during a meeting is preferable to a preventative policy that requires officials to speculate about what members of the public are going to say and do, providing too much leeway to silence contrary views.

The public forum doctrine is designed to balance free speech rights with the government's ability to ensure that a site is being used for its proper purpose. At public meetings, officials must exchange information with one another and take votes. For the majority of jurisdictions that have opened their meetings to public comment, however, an additional purpose is interaction with the public. The meetings provide an opportunity for citizens to express themselves about pertinent issues and to help officials make their decisions. Citizens' free speech is not just a factor to be balanced against the governmental interest, but it is itself an integral part of the governmental interest. Officials should be allowed to ensure that speech at public meetings is relevant to the affairs of the jurisdiction and the agenda item at hand. Beyond that, however, governmental restrictions on expression at public meetings should be limited

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51. *Norse*, 586 F.3d at 699–700.

52. *Id.* at 701.

to reasonable time, place, and manner (TPM) rules. And the most important of these TPM limits is the prohibition on speech that disrupts a meeting.

The *Norse* opinion could lead to a very broad interpretation of “disruption.” In arguing that city officials did not engage in viewpoint discrimination, the majority found that Norse’s Nazi salute was protesting only one thing: the mayor’s enforcement of the time limits for public comment. According to the majority, officials can eject someone from a public meeting for showing disagreement with procedural rules even if the demonstration of disagreement does not impede the meeting. As mentioned earlier, Norse’s silent, one-to-two second gesture did not lead to any reaction among the audience, and the mayor himself continued on with the agenda without noticing it. Even accepting that Norse’s Nazi salute was exclusively aimed at the time limit and not indicative of any other political disagreement, the council ejected him because of the idea that the gesture expressed and not any tangible disruptive effect.

The decision’s implication that disruption encompasses affronts to decorum as well as tangible hindrances of official business is troubling. The majority quotes the district court, which found that after the mayor was alerted to the gesture he was “suddenly faced with a meeting that had been interrupted by an offended council member.”<sup>53</sup> According to press reports, the councilman interrupted the mayor and demanded action because he said the Nazi salute insulted the “dignity of the body.”<sup>54</sup> The majority’s conception of disruption thus appears to encompass harm to an official’s dignity since any tangible disruption to the city council’s ability to function resulted from officials taking offense rather than from the speech itself.

Under this approach, speech can be curtailed either because it is personally offensive to a government official or because of a prediction that the meeting will be disrupted by the action an official takes after being offended. The latter reason relies on speculation and makes the speaker liable for the behavior of a listener. The former reason runs against a strong tradition in American jurisprudence that assures 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.”<sup>55</sup> This principle that offensiveness is not a sufficient ground for silencing political speech was reinforced in *Cohen v. California*,<sup>56</sup> in which the

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53. *Id.* at 698.

54. Genevieve Bookwalter, *Appeals Court Rules in Favor of City of Santa Cruz in Robert Norse Nazi Salute Case*, SANTA CRUZ SENTINEL, Nov. 7, 2009, available at [http://www.santacruzsentinel.com/ci\\_13736459](http://www.santacruzsentinel.com/ci_13736459).

55. *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964).

56. 403 U.S. 15 (1971).

Court overturned the disturbing the peace conviction of a man who wore a jacket reading “Fuck the Draft” in a corridor outside of a courtroom. The fact that others might have seen the jacket and been offended was not enough to criminalize the speech in the absence of an actual disruption.<sup>57</sup> For the government to “shut off discourse solely to protect others from hearing it” in the absence of “a showing that substantial privacy interests are being invaded in an essentially intolerable manner . . . would effectively empower a majority to silence dissidents simply as a matter of personal predilections.”<sup>58</sup>

The Sixth Circuit recently applied these principles to a public meeting situation in *Leonard v. Robinson*.<sup>59</sup> A panel ruled in favor of a citizen arrested for saying “god damn” while addressing a local township board meeting.<sup>60</sup> Even though a township supervisor apparently took offense at the speaker’s using “the Lord’s name in vain,” the court found that the speech was not sufficiently disruptive to justify curtailment.<sup>61</sup> The *Leonard* court gave the proper weight to the role of the public meeting as a forum for interaction between citizen and government, noting that “[e]ven those who advocate the most narrow interpretation of the freedom of speech agree that in a democratic forum like a township meeting, the state should abstain from regulating speech.”<sup>62</sup>

This line of cases suggests that the Santa Cruz City Council should not have been able to eject Norse because his salute offended a council member. Similarly, the fact that other audience members might have taken offense should not be enough to suppress Norse’s speech. The interests of courthouse decorum were not enough to outweigh the First Amendment concerns in *Cohen* even though judges have traditionally had great leeway to enforce such rules.<sup>63</sup> Like those entering courtrooms, people attending a city council meeting are entering into a public place where some discussion of political issues, perhaps even some heated and offensive discussion, is expected.<sup>64</sup> Jurisdictions have

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57. *Id.* at 21 (“[T]he mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense.”).

58. *Id.*

59. 477 F.3d 347 (6th Cir. 2007).

60. *Id.* at 351.

61. *Id.* at 352, 359–60.

62. *Id.* at 357.

63. See generally Jona Goldschmidt, “Order in the Court!”: *Constitutional Issues in the Law of Courtroom Decorum*, 31 HAMLIN L. REV. 1 (2008) (providing an overview of courtroom decorum rules and related case law and concluding that many of the regulations raise First Amendment and due process concerns).

64. And in fact, while citizens may likely be attending city council or school board meetings because official business personally affects them, they are not likely to be present under official compulsion like many of the people at a courthouse. And yet the Court in *Cohen* did not find the free speech interest to be outweighed by the courthouse spectators’ interest in not being offended. See *Cohen v. California*, 403 U.S. 15, 21–22 (1971).

other, less-intrusive remedies available to try to shield members of the public from offensive speech, such as posting warnings and disclaimers. They can also place general comment periods at the end of meetings so spectators interested in a particular agenda item could leave before the floor is opened up for more open-ended and potentially offensive speech.<sup>65</sup>

The *Norse* case also suggests that the current iteration of the public forum doctrine may be a poor fit for the regulation of restrictions on citizen speech in public meetings. When the Supreme Court began developing the doctrine in the 1930s and 1940s, it used a historical analysis to make sure that citizens were not prohibited from passing out leaflets, making speeches, or organizing parades on public streets, on sidewalks, or in parks.<sup>66</sup> The language from those early cases about such venues being “immemorially” considered proper places for public debate<sup>67</sup> provides a strong basis for protecting expressive activities but is a flawed rationale for denying First Amendment protection to citizens at public meetings. The *Norse* majority’s statement that courts “have long recognized that First Amendment rights of expression are more limited during a meeting than in a public forum, as, for example, a street corner,” seems counterintuitive.<sup>68</sup>

Streets, sidewalks, and parks have traditionally been venues for speech, but using these venues for expressive activities has always been ancillary to the primary functions of promoting traffic and pedestrian flow and providing recreational space. In contrast, the free speech purpose of public meetings with citizen comment periods is inextricably linked to the government business interest. In *City of Madison Joint School District v. Wisconsin Employment Relations Commission*,<sup>69</sup> the Supreme Court recognized the dual function of such public meetings “to conduct public business and hear the views of citizens.”<sup>70</sup> Moreover, the latter role of public meetings is arguably more important than it has ever been. Government observers widely believe that the growing influx of campaign money and lobbying in municipal government has created alienation and apathy by making it more difficult for ordinary citizens to

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65. If the city tried to enact a blanket ban on Nazi salutes or other such offensive gestures, it would likely run afoul of prohibitions on viewpoint discrimination. See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). However, narrow bans on profanity or speech likely to cause imminent violence might pass constitutional muster. See *Fed. Comm’n Comm’n v. Pacifica Found.*, 438 U.S. 726 (1978); *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

66. See *TRIBE*, *supra* note 5, at 986 & n.1.

67. See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (quoting *Hague v. Comm. for Indus. Org.*, 301 U.S. 496, 515 (1939)).

68. *Norse v. City of Santa Cruz*, 586 F.3d 697, 699 (9th Cir. 2009).

69. 429 U.S. 167 (1976).

70. *Id.* at 176.

participate in local politics.<sup>71</sup> For those who cannot afford campaign contributions or lobbyists, public meetings may be the only opportunity to speak face-to-face to elected officials and to try to influence their votes on matters of pressing importance. This modern reality of political engagement in American cities should take precedence over any sense that public meetings lack the same historical foundation as sidewalks and parks as venues for core political speech.

Finally, the policy rationale at work in decisions such as *Norse* likely goes beyond raw legal doctrine. As courts have moved away from the Supreme Court's *Wisconsin Public Employment Relations Commission* decision and approved widespread content-based restrictions on citizen speech at public meetings, judges surely must be motivated at least in part by concern for the local officials who preside over these affairs. Unlike judges' tight control of courtroom proceedings, it is customary for local government meetings to include a wide range of commentary from members of the public.<sup>72</sup> Those who show up to take advantage of such openness tend not to be ordinary citizens engaged in a particular issue but city hall fixtures enraged about every issue. Their comments can be insightful but are just as often rambling, profane, or cruel. Indeed, the city hall gadfly has become a familiar archetype.<sup>73</sup>

Even when they are rational, these speakers can be irritating to public officials, but activists like *Norse* escalate the level of confrontation and offensiveness. In addition, *Norse's* Nazi salute is far from an isolated incident. In Dallas, attendees who comment regularly at council meetings yell about "police brutality, sex, drugs, Satan, the Ku Klux Klan and a host of other disparate topics."<sup>74</sup> In Los Angeles, a group of street vendors and performers disgruntled over a city ordinance began attending council meetings in mid-2006 and seized nearly every public comment opportunity to rant, sing, dance, shout, and use

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71. See, e.g., Matthew J. Parlow, *Civic Republicanism, Public Choice Theory, and Neighborhood Councils: A New Model for Civic Engagement*, 79 U. COLO. L. REV. 137, 138–40 (2008) (discussing different theories of how "an insiders' game controlled by dominant interest groups" has come to define local politics in many areas).

72. Compare Goldschmidt, *supra* note 63, at 54 (identifying a broad range of "decorum" rules in U.S. courtrooms that have free speech implications), with Wilson & Alcaez, *supra* note 47, at 580 (providing an overview of legal controversies surrounding public comment periods at local government meetings).

73. See, e.g., Richard Salit, *Unabashed 'Contrarian' Leaving City*, PROVIDENCE J. (R.I.), Dec. 24, 1998, available at <http://www.projo.com/words/stor0217.htm> (providing an elegiac tribute to one such stalwart public commenter); Scot Key, *Eccentric Gadflies: Without Them America Itself Would Be Impossible*, NEWWEST.NET, Aug. 29, 2006, <http://www.newwest.net/index.php/city/article/11095/C110/L110>.

74. Dave Levinthal, *Dallas City Council Cuts Public Comment Sessions From Meeting Broadcasts*, DALLAS MORNING NEWS, Nov. 20, 2008, available at <http://www.dallasnews.com/sharedcontent/dws/news/localnews/stories/112008dnmetdalcouncil.3c2621b.html>.

ethnic slurs; this behavior prompted the city to adopt a new speech ordinance.<sup>75</sup> Some of those same gadflies still speak at nearly every meeting, and one of them recently showed up to the podium in full Ku Klux Klan regalia, prompting so many council members to walk out of the chambers that a quorum was lost, and the meeting was cancelled.<sup>76</sup> Three years after revising its public comment rules, Los Angeles adopted yet another ordinance.<sup>77</sup>

In light of this pattern of abuse of public comment periods, it is understandable that local officials want to use legal tools to keep their meetings from deteriorating into profane shouting matches. The courts have mostly been accommodating. They have shown deference to local officials by allowing viewpoint-neutral restrictions when speech is actually disruptive and using public forum doctrine to balance citizen expression with governmental efficiency. However, when courts show too much deference to local officials and allow “disruption” to be read too broadly, the balance is upset and core political speech is jeopardized. The Ninth Circuit’s decision to rehear the *Norse* case en banc is an opportunity to restore the balance and bring clarity to this important area of First Amendment law.

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75. See Kerry Cavanaugh, *Free Speech Crackdown: Council Approves Tough Rules for Public; ACLU Warns of Abuse*, L.A. DAILY NEWS, Aug. 2, 2006, at A1.

76. See Maeve Reston, *Man in Klan Robe Prompts L.A. Council to Walk Out, Weigh Limitations on Public Comment*, L.A. NOW, July 15, 2009, <http://latimesblogs.latimes.com/lanow/2009/07/la-council-adjourns-rather-than-hear-from-man-in-klx-robe-may-see-tighter-limits-on-speakers.html>.

77. See Maeve Reston, *L.A. Council Approves Rules That Could Ban Members of the Public Who Violate Decorum*, L.A. NOW, July 29, 2009, <http://latimesblogs.latimes.com/lanow/2009/07/the-los-angeles-city-council-unanimously-approved-a-measure-today-that-will-give-the-council-president-more-discretion-to-eje.html> (quoting a council member who voted for the new ordinance that includes immediate ejection and thirty meeting bans for speakers who disrupt meetings with “disorderly, contemptuous or insolent” behavior, as nonetheless voicing concern that “the rules can be abused by someone who frankly just doesn’t want to face the public”).