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How Do Campus Administrators Go Beyond the First Amendment in Achieving Balance Between Free Speech and Civil Discourse?

Putting the Hammer Down

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In a frequently paraphrased line from *The Psychology of Science*, Abraham Maslow said, “I suppose it is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail.” Indeed, given a single tool to solve all problems, it seems natural to find ways to make that tool apply in every case. Some might view the ability to adapt a single tool to many functions as an exemplar of the ingenuity that is crucial in an ever changing field like student affairs. However, I view Maslow’s point as more of a caution than a suggestion. Everything is not a nail, so how effective is any approach that assumes universal nailiness? Rather than treating everything as a nail, the person with only a hammer would be better served to seek out other tools or perhaps to begin honing the blunt instrument at hand into something more multifaceted.

The First Amendment to the U.S. Constitution serves as the hammer in resolving questions of free speech throughout society, including on college campuses. This first concept in the Bill of Rights is an effective...
blunt instrument; there is nothing inherently complex in its assertion, "Congress shall make no law . . . abridging the freedom of speech, or of the press; or of the people to peaceably assemble." Court decisions over two centuries have created nuances in applying the First Amendment, but even these nuances fail to address every tension that might arise in the course of public discourse. Case law hones the First Amendment hammer a bit but still leaves day-to-day decision makers a relatively blunt instrument to hammer out challenging questions and answers.

Unfortunately, a blunt instrument in the hands of students, faculty, and administrators looking for easy answers and widely applicable truisms becomes a wildly swinging cudgel, as likely to smash the fragile balance of civil discourse as to pound in the nails that strengthen that balance. As we resolve the question of how student affairs educators protect freedom of speech while ensuring civil discourse, we must acknowledge the different contextual hardware we encounter and hone the blunt implements we may find in our problem-solving toolboxes into precision instruments we can draw upon at different times and in different situations to best serve our diverse student populations.

This essay examines two periods of campus controversy in the last half century. Responses to the 1960s' free speech movement and the implementation of speech codes in the late 1980s and early 1990s drive existing case law regarding free speech on campus and illustrate how the blunt application of First Amendment legal precedent inadequately addresses the tension between freedom of expression and civil discourse. I also explore two cases where different restrictive—rather than discursive—approaches to controversy allow opportunities for educational conversation to pass by in favor of blanket definitions of appropriate speech. Finally, I advance a framework that offers campus constituents access to an environment that is simultaneously open to controversial—even offensive—ideas and respectful of the need for civility in creating a welcoming and supportive campus environment.

The Campus Free Speech Movement: Forging First Amendment Protections

Richard C. Ratliff said, "A rash of free speech cases in the federal and state courts in the late 1960's [sic] underscored the fact that the 'speech' provision of the first amendment embraces more forms of expression
than mere oral communication." Thus, free speech protection or regulation on a college campus can apply to things ranging from words written on a residence hall whiteboard to the length of a student’s hair to a symbol on an article of clothing. Because of the breadth of these situations, I choose to use the broader term freedom of expression in discussing the application of the First Amendment on campus.

The cases Ratliff referred to in describing how the concept of freedom of expression developed in a campus setting came largely as the result of what is called the free speech movement of the late 1960s. Students stretched into their newfound freedoms in the wake of the "legal death of the in loco parentis doctrine vis-à-vis college students." Because the Supreme Court no longer legally defined administrators as having a parental authority, students could speak up and act out with less threat of punishment from campus authorities.

Writing a few years after the free speech movement case law came down from the nation’s courts, Ratliff pointed out that the courts of the late 1960s were largely willing to defer to college and university educators. The case law acknowledges that as in the broader society, students on a college campus do not have unfettered free speech rights. However, the balance between free speech and the mission of a college or university mean that decisions about how to limit free speech need the nuanced eye of an administrator with contextual knowledge of each situation. In a sense, the free speech movement case law tells college officials that court rulings alone are too blunt to provide adequate answers in the case of free speech on the college campus.

If the reason we call on speech codes is that conflicting and intensely held opinions make discourse challenging, to expect an entire community to buy in to a single set of proscribed expressions defies logic.

Free speech movement case law also upheld long-standing legal precedents that placed public and private institutions in different constitutional contexts. William Kaplan cited an 1819 Supreme Court case overruling an intended state takeover of Dartmouth College that
declared, “Private schools have been spared any governmental encroachment that impairs their charters of incorporation.” Still, many private institutions take pride in protecting free speech at the same level as their public counterparts. Thus, Robert M. O’Neil said, “The guiding principle for virtually all institutions of higher learning is that free speech must be protected, even when the speech for which the freedom is sought may be offensive or disruptive or at variance with the campus mission.”

**Campus Speech Codes: Working Around the First Amendment**

When free speech conflicts with creating a welcoming campus environment—particularly for underrepresented populations—student affairs professionals face some of their toughest work in finding the appropriate educational tool. Ronald J. Rychlak estimated as many as 200 schools adopted speech codes in the 1980s and 1990s to directly address the tension between free speech and the sort of insensitive expression that harms equality, diversity, and civility. Donald Alexander Downs argued that such codes minimized free speech values, saying, “Free speech has lost status to the university’s drive for diversity: when certain forms of discourse are deemed harmful for equality and diversity, the institutional commitment to free speech falters.”

Speech codes explicitly state what forms of expression are and are not tolerable in the pursuit of civil discourse and holistic learning. Speech code advocates often justify their position by saying that the prohibited forms of speech are fighting words, which add nothing to the public discourse and are so threatening to public morality and social order that they warrant exclusion from conversation. Many speech codes failed to pass constitutional muster in the 1990s, but those that managed to stay within constitutional limits on speech regulation represented what campus officials felt were reasonable restrictions aimed at balancing free speech and civil discourse.

The limited success of some speech codes was insufficient to convince Evan G. S. Siegel of the codes’ propriety:

Enacting policies that punish the perpetrators of ugly verbal abuse may help improve matters if such codes meet constitutional scrutiny. A wholesale, content-based prohibition of entire categories of speech and ideas,
however, will only gloss over existing problems and undoubtedly will create new ones.¹¹

Siegel’s assessment paints speech codes as another example of using too blunt a tool to address an issue of context and details.

With its effort to apply a single interpretation of what constitutes acceptable speech on campus, the speech code movement suffers from the same sweeping bluntness as a First Amendment–exclusive approach to upholding free speech with reasonable limitations. Both seek to address a big issue, but they do so in a way that can function too readily as a formula for addressing the distinctly nonformulaic nuances of human communication and its contexts. Robert C. Post warns us, “These formulas cast an illusion of stability and order over First Amendment jurisprudence, an illusion that can turn dangerous when it substitutes for serious engagement with the question of why we really care about protecting freedom of expression.”¹²

Placing too much attention on formulas is especially frustrating because it is not in the finite variables of the specific words themselves that the chief challenge to civil discourse on campus exists. Rather, it is in the nuances of understanding and interaction that the offense and the damage occur. José Ortega y Gasset offers this artful explanation:

The real meaning of a word appears when the word is uttered and functions in the human activity called speech. Hence we must know who says it to whom, when and where . . . what we call language forms only one, if a relatively stable, constituent which must be supplemented by the vital setting.¹³

Because this vital setting changes in infinite and unpredictable ways, no codified list of permissible and forbidden forms of speech can fully address the harmful effects of insensitive or hurtful campus expression. In addition to the illusion of order, the presence of a speech code sends a message of finality in the debate between free speech and civil discourse. Administrators can opt to hide behind a code and its process to escape harder conversations about why students choose to use certain words or why specific expressions cause such grief to members of the campus community.

E. David Hyland highlights the worthy goal at the heart of the speech code movement. He said, “What many speech code advocates are seeking
is simple: a way of enlisting a whole community in creating an environment where people are not attacked and injured on the basis of their

*Without addressing the complexity of those things we find most offensive on campus, we risk ending up as cudgel-wielding thought police rather than as skilled educational architects, able to call upon multiple tools in the process of interacting with students with challenging ideas and opinions.*

However, this goal seems troubled from the start. If the reason we call on speech codes is that conflicting and intensely held opinions make discourse challenging, to expect an entire community to buy into a single set of proscribed expressions defies logic. A student’s commentary from 1971 reminds us that “the era of consensus politics on campus is over. The university must determine how to handle adversary relationships without promoting violence or destroying itself.” This assessment may be a disappointment for those who prefer a more idealist view of our campus communities; unfortunately, it seems as accurate today as it was decades ago. Rather than seeking or creating false consensus about what is and is not permissible to say or do, we must satisfy ourselves with finding meaningful ways to bring disparate ideas into engagement with one another.

**Shouting Down Discourse: The Irvine 11 Controversy**

The difference between the sort of engagement at the heart of civil discourse and the sort of engagement that entrenches disparate viewpoints is evident in cases involving controversial campus lecturers. At the University of California, Irvine (UCI), students who disapproved of Israeli Ambassador Michael Oren’s university-sponsored speech on campus disrupted the event by shouting their views during his presentation. Eventually, officials arrested the 11 students who stood up to shout Oren down. Further controversy followed, as supporters of the Muslim Student Union protesters argued that administrators had violated the students’ free
speech rights, while the students’ detractors called on UCI to expel the students for their disrespectful actions.¹⁶

Erwin Chemerinsky, dean of the UCI School of Law, noted shortly after the incident that a blunt application of the First Amendment offers clear support for disciplinary action against the student protesters.¹⁷ Their speech would have restricted the ambassador’s own right to free speech if the students had been allowed to proceed: “The government, including public universities, always can impose time, place and manner restrictions on speech. . . . Freedom of speech, on campuses and elsewhere, is rendered meaningless if speakers can be shouted down by those who disagree.”¹⁸

The week after the controversial speech at Irvine, students at Kenyon College sent dozens of outraged comments to an all-campus e-mail distribution list criticizing the planned appearance of British National Party Chair Nick Griffin, whose connection to White supremacist groups, dismissal of the Holocaust, and condemnation of Islam, students argued, were incompatible with the school’s espoused values.¹⁹ These critics prompted the members of the Robert A. Taft Society who had invited Griffin to campus to cancel the speech, citing safety concerns. While Kenyon president S. Georgia Nugent told the Kenyon Collegian, “In general, I do not believe that heckling and shouting down is a good use of free speech,” the student uproar in some ways shouted Griffin down without his even setting foot on campus.²⁰ In the days following the cancellation, Taft Society president Taylor Somers captured the challenge many administrators face in dealing with issues of free speech and civility, saying, “It’s hard to draw a line arbitrarily of what is an acceptable level of controversy.”²¹

Conversation: The Multifaceted Tool for Student Affairs Educators

The acceptable level of controversy on any campus depends in large part on how well educators have prepared campus community members for conversing with each other. Administrators of colleges and universities must recognize that acting as free speech regulators or civil discourse referees relinquishes the educating power of conversation. While lessons exist in barring a certain word or shutting down a student protest, it is
our shared responsibility to foster learning experiences rather than considering our duty done once we have made a specific decision or taken a specific action. Robert M. O’Neil put it this way: “Above all, universities should approach racism, homophobia, sexism, and anti-Semitism [ideologies that form the basis for many free speech controversies] through what they do best—education. Special programs and even courses may be developed with an eye to increasing intergroup understanding across campuses.” An emphasis on civil discourse should be at the heart of that educational mission and those special programs.

Jonathan Zimmerman conceptualized civil discourse as a set of shared ground rules for interaction, “and when we forsake these ground rules, we lose our ability to communicate—literally, to ‘make common’—with each other.” Additionally, Zizi Papacharissi described civil discourse as imperfect. Exploring civility in online communications, Papacharissi said, “Sanitized and controlled conversation does not fully capture the conditioned illogic of human thought. Civility standards should promote respect for the other, enhance democracy, but also allow human uniqueness and unpredictability.”

A framework that meets Zimmerman’s and Papacharissi’s standards for civil discourse is the concept of moral conversation that Robert J. Nash, DeMethra LaSha Bradley, and Arthur W. Chickering used in How to Talk About Hot Topics on Campus. Moral conversation moves participants away from the sort of formulaic approaches that ask students to assess words and consequences rather than meanings and intentions.

Moral conversation is about students sharing the stories that inform who they are and how they make meaning of the world around them. Nash, Bradley, and Chickering describe moral conversation this way:

A moral conversation is literally a manner of living whereby people keep company with each other and talk together in good faith, in order to exchange sometimes agreeable, sometimes opposing, ideas. Above all, however, moral conversation is a mutual sharing of all those wonderful stories that give meaning to people’s lives.

Certainly, moral conversation will not be effective if applied solely in the face of existing controversy. To come into a simmering debate about offensive language and ask everyone involved to “[begin] with an assumption that there is nothing inherently erroneous or immoral about any initial presumption of a particular truth,” would do little to resolve
the situation. However, a campus that foundationally emphasizes moral conversation prepares its students to engage in controversial issues with a level of civility that can feel more like the norm than like a special approach to crisis. For this approach to be effective at keeping student affairs educators from living the reactionary life of First Amendment interpreters, moral conversation must be a part of everyday civil discourse. As Susan Herbst stated,

the fundamental problem of incivility is not about one-time behaviors and events, but about norms and culture. . . . Teaching civility, so that you don’t have to worry so hard onangent campus events, will minimize the trauma that comes with mean speech. And in doing so, all this will help to produce the citizens we say we make at a university.²⁹

Moral conversation’s chief virtue is the way it digs beneath the surface level of words—where speech codes and First Amendment case law would have us operate—and grapples with the deeper meanings and contexts Ortega y Gasset describes.³⁰ First Amendment advocate Nat Hentoff said, “An essential part of . . . education is to learn to demystify language, to strip it of its ability to demonize and stigmatize. . . . The way to deal with bigoted language is to answer it with more and better language of your own.”³¹ Enlisting moral conversations in place of simple speech codes or court rulings enables us to rise to Hentoff’s educational expectations.

Conclusion

Carolyn J. Palmer, Sophie W. Penney, Donald D. Gehring, and Jan A. Neiger stated that we as student affairs educators must look beyond the legal lens as we address free speech questions on campus.³² Though they apply their concluding analysis to upper-level colleagues, their words apply to all who engage with college students around controversial issues:

[Senior student affairs officers] would be wise to approach the issues of hate speech and hate crimes by using a balanced approach that takes into account all legal requirements and carefully considers the ethical, moral, and educational implications of all programs, policies, and procedures designed to address these important issues.³³

The important realization for campus partners involved in creating a balance between free speech and civil discourse is that looking purely
to constitutional protections is insufficient. Certain words or forms of expression may fall under the protection of the First Amendment, but that does not mean all protected forms of speech and expression inherently contribute to the meaningful exchange of ideas. Alternatively, administrators might reasonably limit some words or forms of expression, based on sound constitutional interpretations. However, simply limiting forms of expression fails to address the ideas and meanings that lie beneath controversy. Without addressing the complexity of those things we find most offensive on campus, we risk ending up as cudgel-wielding thought police rather than as skilled educational architects, able to call upon multiple tools in the process of interacting with challenging ideas and opinions.

Notes

2. U.S. Const. amend. I.
4. Ibid., p. 162.
7. Ibid., p. 15.
10. O'Neil, Free speech in the college community.


21. Ibid.


25. Ibid., p. 265.


27. Ibid., p. 8.

28. Ibid.


30. Ortega y Gasset, Concord and liberty.


33. Ibid., p. 121.
Drafting a Community-Wide Blueprint for Civil Discourse

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In today’s society of lawsuits and controversy, many believe that ensuring First Amendment freedom of speech while also ensuring constructive conversations on a college campus are incompatible. University administrators often fall into the trap of guaranteeing the rights provided by the First Amendment at the cost of facilitating conversations where productive dialogue seldom occurs, or restricting free speech and creating a sanitized, limiting, and less than constructive conversation involving collegiate communities. However, if one purpose of a liberal education is to encourage students to explore ideas from multiple perspectives, we must model such behavior in the way we initiate and guide civil discourse.

Approaching campus conversations in terms of absolutes limits speech or allows for it to proceed unchecked—two approaches that seldom result in constructive conversation. While Tobias Uecker suggests administrators need to find tools beyond the hammer, we must first decide why and for what we are using our tools and draft a blueprint for productive conversation on campus. Many administrators possess or can access the precision instruments Uecker suggests we hone, yet run into roadblocks by not considering what we are building and the potential complications of using these tools.

Before we can design a blueprint for our campuses, we must recognize our goals. Many envision liberal education as a marketplace of ideas where individuals can evaluate multiple perspectives to develop their own stance. However, we must consider Barbara Applebaum’s argument that “the liberal belief in freedom of expression and a market-place of ideas is compelling only if all viewpoints have an equal opportunity to have their voices matter.” Thus, if a university is this marketplace, its officials must find a way to ensure equal opportunity for as many perspectives as possible to be heard and evaluated.

The First Amendment outlines the rights of the individual regarding expression—individuals have the opportunity to speak their mind, as long as the speech does not include fighting or hate words. Yet if we were to simply allow our community to speak with minimal parameters,
conversation would stall as the individual with the biggest hammer dominates discussion, and attempts to facilitate dialogue disintegrate into power plays aimed at advancing one’s own agenda. If the purpose of a student’s education is to engage in the marketplace of ideas, we must assist our students in understanding that blindly following this freedom does not necessarily further their agenda. Students and administrators must learn that, although they can, it is rarely beneficial to cling to the protection provided by the First Amendment if they truly wish to engage in meaningful dialogue.

Henry Louis Gates Jr. suggested that the “First Amendment absolutism has never entailed absolute devotion to free expression; the question has always been where to draw the line.” Administrators have sought to draw this line distinctly to counteract the breakdown of conversation that can occur when dialogue is left with minimal guidelines. Administrators picked up the hammer and brought down the speech codes of the 1980s and 1990s or chose to restrict speakers or art exhibitions from campus to lessen controversy. Such tactics prove to be counterintuitive and counterproductive to the free exchange of ideas.

Many administrators have encountered situations where students challenge administration-imposed expectations. In residence halls, it typically proves more challenging to enforce a departmentally imposed quiet-hour policy than one self-determined by residents. During student organization meetings, many advisers encounter resistance from students when trying to impose regulations set by the administration because the students do not understand the purpose of the restrictions. Similarly, students will view any attempt to draw a line for acceptable speech as an administratively enforced rule, thus reducing the likelihood for students’ buying in to any regulations. In many cases, students will challenge any attempts by administrators to define acceptable speech and will act out in manners that will be more detrimental to the community.

By restricting speech, we negate any opportunities for students to learn how to engage in dialogue by simply addressing the specific words used rather than tone and implication. For example, if an administrator approached a student about using an offensive phrase without clarifying why that phrase is destructive, the student only learns not to say the phrase around that administrator. By restricting certain words or imposing a set of parameters for expression on campus (without a clearly stated rationale), we eliminate any teachable moments.
Attempts to define acceptable expression, even though established with an overarching goal to allow all voices to be heard, will in fact sometimes silence some. While such parameters aim to guide those outspoken students toward productive dialogue, they also restrain more hesitant students. Limiting expression on campus in absolute terms sends a clear message that there are certain topics, issues, or words that are off limits. Those students who are already hesitant to engage in difficult dialogue out of fear of using inappropriate terminology or becoming involved in potential conflict will only have those feelings reinforced by the message that there are wrong words or topics too provocative to discuss.

Administrators’ addressing student speech in absolute terms accounts only for student interaction at a macro level. Student conversations are not limited to classrooms or official university events that administrators can supervise to ensure all their expectations are met. Rather, they occur at all hours of the day—at lunch in the cafeteria or 2:00 a.m. in a residence hall room.

The desire for administrators to have a clearly defined approach to expression on campus is appealing at face value. However, allowing unchecked free speech or restricting speech are methods riddled with potential missteps that can create unintended consequences. We must set aside taking a restrictive or reactionary approach to speech and expression on campus in favor of a proactive community-based approach to an educational exchange of ideas. In a similar vein, Uecker argues for the educating power of conversation and fostering learning experiences rather than simply enforcing a set of standards.

Robert Corrigan argued, “Free expression is a matter of balancing rights with responsibilities.” Achieving this balance of rights and responsibilities begins by creating a campuswide understanding of what civil discourse truly means. Civil discourse must be understood as a respectful
exchange of views, with active listening, no interruptions, no inflammatory language, and no ad hominem attacks. Civil discourse is not a sanitized, noncontroversial interaction. In fact, Manuel N. Gomez suggested we do not want our campus to shy away from controversy, as tension instructively highlights the personal investment students have in their beliefs and ideas. Universities must educate faculty, staff, and students on the true nature of civil discourse.

A community commitment to civil discourse, and an understanding of how it advances liberal arts education, is a necessary yet complicated task. Administrators cannot simply expect students to automatically invest themselves or understand the role civil discourse plays in a campus community when they enter college. Many students, according to Marcia Baxter Magolda, enter college with an absolute view on the world and only over time do they learn to recognize the validity of new perspectives. It is our responsibility as educators to assist our students in opening themselves to new perspectives. However, we must also have a safety net in place, since as Gomez stated, “If students believe they are being harassed or feel unsafe it is an administrative responsibility to ensure that there are mechanisms in place to investigate any claims quickly and carefully. Administrators also must make the campus community aware of these mechanisms.”

J. Herman Blake argued, “One of the best preventative approaches is a sense of community. In a community you don’t wait for the offended person to intervene; the potentially offended person needs to know that many voices will be raised on his or her behalf.” Such a community cannot be formed by administrative edicts for the same reasons that speech codes fail—students are not invested. We must step away from regulation and move toward creating a community norm of free exchange of ideas, constructive dialogue, and as Uecker suggests, interacting civilly over controversial issues.

How do we create such a norm of positive dialogue among our students to assist them in developing their opinions and to engage in civil discourse so all perspectives are heard and respected? One suggestion offered by Lawrence White is, “The university should encourage constant open discussion of its commitment to diversity.” We must find mechanisms to allow students to express their opinions without fear of recourse. Taking it one step further, Gomez said, “Certainly students need a safe place in which to learn. . . . But a community is not safe when speech is
chilled and certain ideas are not free to be heard, examined or evaluated.”

If campus administrators truly value civil discourse, they must extend this commitment to the entire campus community—they must draft the blueprint that encourages students to engage in constructive conversations. Jodi Fisler and John Foubert said, “If a college aims to instill certain values in students, those values should be made clear to prospective students as well as those already on campus.”

Administrators can create a sense of investment in their students by creating universal classroom, residence hall, and organization norms that value constructive dialogue; holding campuswide conversations on hot topics; and addressing violations of campus expectations as a community. They can also adopt a values code, similar to an honor code, advocating commitment to dialogue and constructive expression, which all students must agree to honor upon entering the university.

Students must also ask themselves, according to David M. Estlund, “What kind of restraint ought I to exercise in my political expression, and under what conditions might the appropriate standards be more or less permissive?” Essentially, we must encourage students to consider the following question: When engaging in discussion, what type of expectations must I adopt for myself to be part of this community—not because I am told to, but because I am committed to the values espoused by the institution and I have committed to growing as an educated member of the university?

Until true civil discourse becomes a community-wide priority, tension involving free speech and civil discourse will always exist. Because of their developmental stage, students entering college cannot be left without guidance on how to hold constructive conversations. Conversely, administrators cannot take it upon themselves to prescribe or dictate the interactions that can occur between students. Rather, a community-wide commitment is necessary to create a positive learning environment, in which all parties buy in to the concept that all members are entitled to their opinion, the only way to strengthen one’s own opinion is to interact with those who hold different beliefs, and that everyone values hearing everyone’s voices. We must ask ourselves, what does our blueprint look like, and how do we educate our community members on how we can continually draft it together?
Notes

7. Gomez, Imagining the future, p. 15.
9. Ibid.
10. Ibid. Imagining the future, p. 17.
Further Reading and Related Blog

Craig Berger, Miami University


Downs provides a history of free speech on college campuses and argues that higher education administrators have unfairly prioritized certain groups in the university community by creating speech codes. Downs uses four case studies to frame and illuminate his argument, indicating that speech codes do more harm than good.


Gomez, vice-chancellor of student affairs at the University of California, Irvine, offers a practical exploration of how to balance freedom of speech in the university setting with the need to educate students on engaging in civil discourse. Gomez draws on his experiences working at a campus that has had its share of politically charged incidents; he describes the positive impact of dialogue on a college community.


The editors provide readers—presumably faculty, staff, and students—with a framework for facilitating conversations on controversial issues. This work emphasizes the need for a campuswide culture of conversation that welcomes varying perspectives and values. The editors stress that the moral conversation outlined in their work does not emphasize persuasion but instead encourages participants to listen and engage in open and civil dialogue.

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