

## Town Cannot Demand “Polite” Conduct in Public Meetings. What about Town Meeting?

In a decision that threatens to make local politics more contentious, the SJC unanimously held that municipalities could not require speakers to be civil during public comment sessions.

At issue in *Barron v. Kolenda*, was the Southborough Select Board’s public participation policy that required “that all remarks and dialog in public meetings must be respectful and courteous, free of rude, personal or slanderous remarks.” This policy was challenged by a resident after she was interrupted while speaking in the public comment portion of a Select Board meeting and ultimately was cut-off. At the time she was criticizing the Select Board for alleged legal violations and other name-calling, including that members were “being a Hitler.” The Board pointed to its public participation policy to defend its action. The SJC ruled that these so-called “civility restraints” violated Articles 16 and 19 of the Massachusetts Declaration of Rights.

In reaching this decision, the SJC explored the historical underpinnings of Article 19, which protects the right “to assemble, speak in a peaceable manner, and petition her town leaders for redress.” Protection of these civil rights, the Court wrote, even echoes the values Massachusetts colonists fought for during the American Revolution. The SJC concluded that Barron’s actions were precisely what the writers of Article 19 had in mind, namely to protect opposition “even if it was rude, personal, and disrespectful to public figures.”

### What Can Towns Regulate in Speech by the Public?

The SJC did not remove all of the government’s powers to moderate speech in such settings though. “What can be required is that the public comments session be conducted in an ‘orderly and peaceable’ manner, including designating **when** public comment shall be allowed in the governmental meeting, the **time limits** for each person speaking, and **rules preventing speakers from disrupting others**, and removing those speakers if they do.” (Emphasis added).

But “orderly and peaceable” is not the same as “respectful and courteous.” In short, towns can enact time, place, and manner restrictions on speech, but cannot limit speech based on its content or the viewpoint of the speaker.

To be clear, Towns may also “hold public meetings limited to a particular subject without violating [the freedom of assembly], so long as the town provides other opportunities to exercise this right...” But the SJC did not elaborate on what constitutes adequate “other opportunities.” It stands to reason that Towns can limit the topic of public comment in meetings on a particular topic (*e.g.*, budget-focused meetings, meetings of a Building Committee), provided that it ensures that citizens have the opportunity to openly comment at regular Select Board meetings.

One issue that remains to be determined is whether Massachusetts courts after *Barron* expand the public’s right to criticize government policy and policymakers to also include critical statements of other members of the public, not just public officials.

### Where Does This Leave Towns With Town Meeting Approaching?

As towns prepare for their annual Town Meetings this spring, *Barron* leaves many asking how the decision will affect the rules for that body. *Barron* does not directly address Town Meeting, but we foresee testing of the lines of public decency and civility in this forum too.

However, it is important to bear in mind that Town Meeting is a legislative body distinct from a typical public meeting. “[T]own meetings continue to exist in New England as a town’s legislative arm and are responsible for the traditional legislative functions of making laws and controlling spending.” *Curnin v. Town of Egremont*, 519 F.3d 24, 26 (1st Cir. 2007). Thus, Town Meeting members are legislators, whether they know it or not.

Limits on legislators’ speech have been recognized and upheld by the courts. For instance, rules that may not be applied to the public may be imposed by legislators on themselves for efficiency and expediency. Indeed, “even the humblest assembly in this country historically enjoyed the power to prescribe rules for its own proceedings.” *Houston Cmty. Coll. Sys. v. Wilson*, 142 S. Ct. 1253, 1260 (2022). Such rules could include speaking only on topics in front of the Meeting at any given time, time limits or restrictions on personal attacks.

But legislators do not give up all First Amendment protections simply by joining a legislature or, in this case, Town Meeting. In fact, the US Supreme Court has recognized there may be a special significance to protecting legislators’ speech rights in a representative democracy and that the First Amendment “requires that legislators be given the widest latitude to express their views on issues of policy.” *Bond v. Floyd*, 385 U.S. 116, 136 (1966).

Helping Town Meetings figure out and impose the proper line between robust policy debate and destructive speech will be primarily the job of the Moderator. The responsibility of Town Meeting Moderators is to “facilitat[e] an efficient and orderly town meeting.” Prior to this spring’s Town Meetings, Moderators would be well advised to review any conduct or comment, with Town Counsel if there is any question. The Moderator may also want to consider whether the Meeting itself should adopt rules on process or decorum at the outset to set

expectations for voters and members.

In sum, although questions remain on the extent to which the speech of Town Meeting members can be restricted on “decency” grounds, the SJC in *Barron* has staked its claim that “political speech must remain uninhibited, robust, and wide-open.” Where one could view Town Meeting as more akin to a public meeting than a traditional legislature, it is not a stretch to imagine the SJC extending that credo to the walls of Town Meeting.

Read the decision in *Barron* [here](#).