

FROM THE RIGHT TO ASSEMBLE TO THE RIGHT TO BE RUDE

Abstract: Since its ratification in 1780, Article XIX of the Massachusetts Declaration of Rights has provided a robust and independent protection for the right of the people to peaceably assemble and redress their grievances before their legislature. In 2023, in *Barron v. Kolenda*, the Supreme Judicial Court of Massachusetts interpreted the history and purpose of Article XIX to hold that the Town of Southborough’s civility policy for public comment periods at its governmental meetings was unconstitutional. This Note connects the history of Article XIX and its traditional interpretation with its application in *Barron* and describes the case’s effects on local government. This Note also argues that, although the Supreme Judicial Court reached the correct conclusion in *Barron* on other grounds, it misinterpreted the original intent and original public meaning of Article XIX. Finally, this Note concludes that the Supreme Judicial Court could have reached its decision in *Barron* solely under Article XVI, which provides the right to free speech. Instead, the court blurred the jurisprudential line between that right and the right to assemble by improperly and unnecessarily relying on Article XIX.

The native of New England is attached to his township because it is independent and free He takes a part in every occurrence in the place; he practices the art of government in the small sphere within his reach; he accustoms himself to those forms without which liberty can only advance by revolutions

—Alexis de Tocqueville¹

¹ ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 68 (Philip Bradley ed., Vintage 1990) (1835). During his travels through the United States, de Tocqueville noted that the principle of popular sovereignty resulted in municipal independence with vigorous participation in municipal governments by townspeople via the “Town Meeting.” *Id.* at 65. Contemporary scholars have traced the history of the institution of Town Meeting as far back as 1,500 years ago in the politics of the northern Germanic tribes during Rome’s dominance over southern Europe. *See* RICHARD B. JOHNSON, BENJAMIN A. TRUSTMAN & CHARLES Y. WADSWORTH, TOWN MEETING TIME: A HANDBOOK OF PARLIAMENTARY LAW 161–69 (3d ed. 2001) (arguing that the Saxons carried their political traditions with them during their conquest of Britain, that those traditions survived the Norman conquest, and that the first English settlers of America continued those same traditions through the establishment of Town Meetings). Johnson described the ancient Germanic tribesman as following three basic rules of law: each man shall have the right to be heard at council; votes will be taken after each hearing process concludes; and the majority’s vote will be the rule to bind all tribesmen. *Id.* at 162. The first of those ancient rights—the right to be heard by a decision-making body—can be seen as a parallel to Article XIX of the Massachusetts Declaration of Rights, as ratified in 1780. *See* MASS. CONST. art. XIX (providing that “[t]he people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give their instructions to their representatives, and to request of the legisla-

INTRODUCTION

Anyone who has spent enough time working or volunteering in local government can attest to the fact that conducting municipal affairs in the United States can be a rowdy business.² From colonial times to the present day, local government in the Commonwealth of Massachusetts has been no exception.³ Yet, in an era of increasing political polarization, incivility is a growing problem that threatens the orderly operation of municipal government.⁴ Public comment periods are one aspect of local government meetings that can grow particularly inflamed because they provide an opportunity for members of the public to air their grievances.⁵ One conceivable solution for local government

tive body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer"). This similarity is likely not a coincidence, considering the historical connection between Germanic tribes and Town Meetings, and the political and philosophical connections between Town Meetings and Article XIX. *See* Letter from John Adams to the Abbé de Mably (1782), in 5 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 494–95 (Charles C. Little & James Brown eds., Cambridge, Bolles & Houghton 1851) (stating that the inhabitants of towns in New England had the right to assemble in town halls to deliberate on public affairs and that this form of government influenced the political development of other colonies).

² *See, e.g.*, Janet Rogers, *Newton Falls Council Meeting Devolves into Shouting Match, Ends Early with Deputies Called*, WFMJ, <https://www.wfmj.com/story/49159290/newton-falls-council-meeting-devolves-into-shouting-match-ends-early-with-deputies-called> [https://perma.cc/X4VL-6H9F] (July 5, 2023) (recounting a yelling match between local elected officials in Newton Falls, Ohio, that ended in police intervention); Tony Moschetto, *It WAS a Hot Time in the Old Arlington Town Hall, Albeit Briefly, Late Sept. 11*, YOURARLINGTON (Sept. 11, 2023), <https://www.yourarlington.com/arlington-archives/town-school/planning/21641-mbta-091123.html> [https://perma.cc/9VAR-48A5] (reporting on the "ballistic" vocal demands of town residents of Arlington, Massachusetts, after the conclusion of a public comment period on a proposed zoning change, which led to police intervention); Will Sheeline, *Tuesday's Town Board Meeting Devolves into Shouting Match*, LI HERALD (Apr. 23, 2023), <https://www.liherald.com/oysterbay/stories/tuesdays-town-board-meeting-devolves-into-shouting-match,174599> [https://perma.cc/YWQ5-53U7] (describing a town board meeting in Oyster Bay, New York, where an aggrieved citizen insulted board members and was told to stop talking and sit down—which he did only after police intervention).

³ *See* Daniel Farbman, "An Outrage Upon Our Feelings": *The Role of Local Governments in Resistance Movements*, 42 CARDOZO L. REV. 2097, 2110 (2021) (illustrating how Boston's Town Meetings in the 1760s passed resolutions to boycott British goods, and how these Town Meetings were seen by the British as "forces of disorder and revolution" that could only be stopped by military intervention); Adrian Chastain Weimer, *The Resistance Petitions of 1664–1665: Confronting the Restoration in Massachusetts Bay*, 92 NEW ENG. Q. 221, 227 (2019) (describing seventeenth century Town Meetings in Massachusetts as "sometimes rowdy").

⁴ *See* Michael Williams, *Keeping Political Partisanship Out of Local Government*, ICMA (Aug. 1, 2021), <https://icma.org/articles/pm-magazine/keeping-political-partisanship-out-local-government> [https://perma.cc/M5Z6-U9FX] (advocating for local governments to remain nonpartisan on federal issues as a way to mitigate increased incivility in political discourse).

⁵ *See* Ann G. Macfarlane, *Don't Get into Back-and-Forth Exchanges During Public Comment*, MUN. RSCH. & SERVS. CTR. (Nov. 27, 2023), <https://mrsc.org/stay-informed/mrsc-insight/november-2023/don-t-get-into-back-and-forth-exchanges> [https://perma.cc/S924-PN27] (advising local government officials not to engage in dialogue with members of the public during public comment periods because doing so could lead to a "fraught atmosphere," "public outrage," and a "loss of confidence" in local government).

officials who seek to keep their meetings productive and courteous is to institute civility policies that set standards for the remarks that can be made by the public.⁶ In fact, many Massachusetts communities have already instituted such policies in order to maintain a sense of control over municipal meetings.⁷

Nevertheless, in 2023, in *Barron v. Kolenda*, the Supreme Judicial Court of Massachusetts (SJC) struck down a civility policy that was enacted in the Town of Southborough, Massachusetts, finding that it violated the Massachusetts Constitution.⁸ The SJC held that the civility policy was unconstitutional under Article XVI of the Massachusetts Declaration of Rights, which provides a free speech provision analogous to the free speech provision in the U.S. Constitution.⁹ But perhaps more surprisingly, the SJC found that the civility policy was also unconstitutional under Article XIX of the Massachusetts Declaration of Rights, which provides the right of the people to assemble and seek redress from their legislative body.¹⁰ The SJC reached its conclusion by looking at the

⁶ See Melissa Kuehne, *Breaking the Cycle: Steps for Reducing Negative Discourse and Incivility in Public Meetings*, W. CITY (Jan. 1, 2022), <https://www.westerncity.com/article/breaking-cycle-steps-reducing-negative-discourse-and-incivility-public-meetings> [<https://perma.cc/X988-Z43U>] (advocating for city council members to enforce codes of conduct and civility policies to improve civil discourse at city council meetings).

⁷ See, e.g., CAMBRIDGE, MASS., RULES OF THE CITY COUNCIL r. 38 (prohibiting certain speech at city council meetings in Cambridge, Massachusetts, including “fighting words, slander, unreasonably loud or repetitive speech, and/or speech so disruptive of City Council proceedings that the legislative process is substantially interrupted”); Heather McCarron, *No Place for Hate. Franklin Council Adopts Guidelines to Promote Civility, Respect*, WICKED LOC. (Feb. 10, 2022), <https://www.wickedlocal.com/story/country-gazette/2022/02/10/newly-added-franklin-council-guidelines-promote-civility-respect/6670569001/> [<https://perma.cc/5W3G-5Q3P>] (describing a new policy for the town council of Franklin, Massachusetts, that instructs town councilors to encourage civility and respect among residents and local businesses). This policy was instituted in response to a confrontation between residents and an LGBTQ+ student at a school committee meeting. *Id.*; Marty Benson, *Public Comments at School Committee Meeting Challenge Ongoing Behavior: 1. Civility Rules in Public Meetings Are Illegal 2. Textin’ Tessa Deletes the Evidence*, ACTON F. (May 16, 2023), <https://www.actonforum.com/?p=1278> [<https://perma.cc/5S3A-2ZA2>] (explaining how the former chair of the school committee in Acton, Massachusetts, created a rule requiring civility from members of the public in all public comment sessions).

⁸ *Barron v. Kolenda*, 203 N.E.3d 1125, 1139 (Mass. 2023). The Town of Southborough is an affluent suburb located west of the City of Boston. See *QuickFacts: Southborough Town, Worcester County, Massachusetts*, U.S. CENSUS BUREAU (July 1, 2024), <https://www.census.gov/quickfacts/southboroughtownworcestercountymassachusetts> [<https://perma.cc/W9HX-YBT4>] (listing the median household income for the Town of Southborough as \$192,006 from 2019 to 2023).

⁹ *Barron*, 203 N.E.3d at 1137; see U.S. CONST. amend. I (stating that “Congress shall make no law . . . abridging the freedom of speech”); MASS. CONST. art. XVI (declaring, as amended in 1948 by Article of Amendment 77, that freedom of speech will not be abridged). The plaintiffs in *Barron* withdrew their federal First Amendment claims when requesting review by the SJC, perhaps to prevent the case from being removed to federal court. See *Barron*, 203 N.E.3d at 1130 (presenting the state constitutional challenges brought by the plaintiffs and noting that the plaintiffs dropped their federal constitutional challenges which would have allowed for the case to be removed to federal court).

¹⁰ *Barron*, 203 N.E.3d at 1137; see MASS. CONST. art. XIX (granting the people of the Commonwealth of Massachusetts the right to assemble “in an orderly and peaceable manner”). This right has a

connection between the history, purpose, and text of Article XIX in an originalist analysis.¹¹ Due to this interpretation of Article XIX, the SJC's decision in *Barron* requires cities and towns in Massachusetts with civility policies for their public comment periods to revise or revoke such policies in order to avoid violating the Massachusetts Constitution.¹²

Although recent scholarship has illuminated the history of Article XIX, this Note applies that history to *Barron* to assess the SJC's originalist analysis in that case.¹³ Part I of this Note traces the history of the development and drafting of Article XIX and reviews how the SJC has interpreted and applied this constitutional provision prior to *Barron*.¹⁴ Part II describes how *Barron* has affected local government in Massachusetts and seeks to illuminate the original public meaning of Article XIX.¹⁵ Part III argues that the SJC's originalist interpretation of Article XIX was flawed and that, as a result, the SJC has improperly blurred the line between Articles XVI and XIX.¹⁶ Part III also argues that the SJC could have reached the same outcome in *Barron* independently under Article XVI, and that doing so would have prevented jurisprudential confusion.¹⁷

close analogue in the United States Constitution. See U.S. CONST. amend. I (providing "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances").

¹¹ See *Barron*, 203 N.E.3d at 1134–36 (analyzing the historical context of Article XIX's adoption and the philosophical underpinnings of the right to assemble as articulated by the drafters of the provision, John and Samuel Adams). Originalism is a jurisprudential approach which posits that the interpretation of constitutional text should accord to the meaning of that text at the time that the constitution was written or ratified. William Blanchette, Note, *Sufficiently Fundamental: Searching for a Constitutional Right to Literacy Education*, 64 B.C. L. REV. 377, 402 n.164 (2023). There are two recognized originalist interpretive methods: "original-intent originalism," which looks to the original intentions of the framers of constitutions to determine the proper interpretations of such text, and "original-meaning originalism," which looks instead to the public meaning of the text at the time that the constitution was adopted. See Jamal Greene, *The Case for Original Intent*, 80 GEO. WASH. L. REV. 1683, 1683–84 (2012) (finding original-intent originalism to be the original form of originalism despite the growing popularity of original-meaning originalism). In *Barron*, Justice Scott L. Kafker's majority opinion illustrates original-intent originalism by reaching its holding through references to the intent of Article XIX's authors. *Barron*, 203 N.E.3d at 1134–36; Greene, *supra*, at 1683–84.

¹² See *Supreme Judicial Court Declares Public Comment Policy Unconstitutional*, KPLAW (Mar. 8, 2023), https://k-plaw.com/wp-content/uploads/2023/03/eUpdate_re_Southborough_public_comment_case-2.pdf [<https://perma.cc/Y2JB-AU3X>] (encouraging municipalities to review their public comment regulations to ensure continued compliance with the law following the SJC's decision in *Barron*).

¹³ See Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 YALE L.J. 1652, 1703–08 (2021) (explaining the historical context of the ratification of the Massachusetts Constitution of 1780 and the legislative history behind Article XIX, which has not been amended since its ratification).

¹⁴ See *infra* notes 18–103 and accompanying text.

¹⁵ See *infra* notes 104–146 and accompanying text.

¹⁶ See *infra* notes 148–169 and accompanying text.

¹⁷ See *infra* notes 170–182 and accompanying text.

I. HISTORICAL BACKGROUND AND INTERPRETATION OF ARTICLE XIX

In order to understand Article XIX as the SJC applied it in *Barron*, it is helpful to examine the history of Article XIX and its traditional interpretation.¹⁸ To that end, Section A of this Part provides an overview of the historical context and legislative history of Article XIX.¹⁹ Section B describes the development of the SJC's interpretation of Article XIX through case law over time.²⁰ Lastly, Section C explains how the SJC applied Article XIX in *Barron* to strike down the Town of Southborough's civility policy.²¹

A. The History of Article XIX

The right to assemble in colonial America may have emerged as a practical necessity before it became a codified ideal.²² Early colonial assemblies were attentive and responsive to the grievances of their inhabitants in order to assert domestic authority, and inhabitants' petitions often initiated the lawmaking process.²³ The right to assemble was so important in the eyes of the colony's legislative body, the General Court of Massachusetts, that the General Court included it in the Body of Liberties of 1641, the first legal code established in New England.²⁴ The 1641 version of the right to assemble was as protective or perhaps even more protective of the individual right to petition one's

¹⁸ See *Barron v. Kolenda*, 203 N.E.3d 1125, 1134–36 (Mass. 2023) (discussing the importance of Article XIX's history to its proper modern interpretation).

¹⁹ See *infra* notes 22–50 and accompanying text.

²⁰ See *infra* notes 51–75 and accompanying text.

²¹ See *infra* notes 76–103 and accompanying text.

²² See Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 145 (1986) (describing how early colonial assemblies had trouble establishing domestic authority and, in an effort to do so, made sure to respond to citizens' grievances as a way to extend their jurisdiction). Higginson suggests that the conditions of colonial politics allowed inhabitants to find recourse by petitioning assemblies. *Id.* However, it is unclear whether the practical reasons for such petitioning were the cause or effect of the right to assemble as codified in the Body of Liberties of 1641. See *id.* (determining that the conditions of colonial politics led colonial assemblies to rely on inhabitants' petitions).

²³ See *id.* at 144–45 (finding that the process of petitioning colonial assemblies initiated more bills in colonial America than any other legislative process).

²⁴ See WILLIAM H. WHITMORE, A BIBLIOGRAPHICAL SKETCH OF THE LAWS OF MASSACHUSETTS COLONY FROM 1630 TO 1686, at 35 (Bos., Rockwell, & Churchill 1890) (codifying the right to assemble for the people of Massachusetts in an early stage of the Commonwealth's history). This ancient precursor to Article XIX reads: "Every man whether Inhabitant or fforreiner, free or not free shall have libertie to come to any publique Court, Councel, or Towne meeting, and . . . move any . . . question, or . . . present any necessary motion, complaint, petition, Bill or information . . . so it be done in convenient time, due order, and respective manner." *Id.* The Body of Liberties was drafted by Nathaniel Ward and John Cotton, who collected proposals for fundamental rights from assemblies in every town in Massachusetts and edited down from the collected list. See *Massachusetts Body of Liberties*, MASS.GOV, <https://www.mass.gov/info-details/massachusetts-body-of-liberties> [<https://perma.cc/W57R-7JJ4>] (explaining the procedure that the General Court of Massachusetts ordered drafters to follow to determine which rights to include in its Body of Liberties).

government than the version that would take shape later in Massachusetts' history.²⁵ Yet, even in 1641, the requirement that any speech or writing at a public meeting must "be done in convenient time, due order, and respective manner" notably tempered this early expression of the right to assemble.²⁶ For comparison, in England, William Blackstone identified a similar right held by all English subjects by the time of his writings in the 1760s, although the right he identified was limited to petitioning judicial courts (rather than legislative bodies) to obtain remedies for legal woes.²⁷ One possible explanation for this divergence is that the American right to petition the legislature emerged as an augmentation of the English right to petition the judiciary.²⁸ This shift may make sense, given that colonial assemblies served as the forum for both legislative and judicial petitions.²⁹

A historical analysis of the institution of the Town Meeting is important to understanding the intimate relationship between the historical right to assemble and the eventual drafting of Article XIX.³⁰ In the institution's original iteration, each locality in New England could convene as a Town Meeting, where every inhabitant had the ability to make motions and vote on the town's legislative, judicial, and administrative matters.³¹ Without the ability to assemble as a Town Meeting, the political power of town inhabitants was drastically re-

²⁵ Compare WHITMORE, *supra* note 24, at 35 (providing every man, including non-inhabitants and foreigners, with the right to petition any court, council, or Town Meeting through a written or spoken motion), with MASS. CONST. art. XIX (giving only the people of Massachusetts the aforementioned right, and not specifying that petitions could be made in the form of motions at meetings). To be fair, it is possible that extending the earlier right to petition to foreigners was a practical reflection of the fact that Massachusetts naturally had a high proportion of foreign-born residents and visitors so early in its development as a colony. See *Historical Sketch of Massachusetts*, SEC'Y OF THE COMMONWEALTH OF MASS., <https://www.sec.state.ma.us/divisions/cis/historical/historical-sketch.htm> [<https://perma.cc/9ZMS-V97A>] (estimating that Massachusetts had an immigrant population of approximately 16,000 people by 1640); BUREAU OF THE CENSUS, A CENTURY OF POPULATION GROWTH FROM THE FIRST TO THE TWELFTH CENSUS OF THE UNITED STATES: 1790–1900, at 5 (1909) (estimating that the total population of Massachusetts was between 16,000 and 17,000 people by 1643).

²⁶ See WHITMORE, *supra* note 24, at 35 (providing the requirements for the applicability of the early right to assemble).

²⁷ See 1 WILLIAM BLACKSTONE, COMMENTARIES *136–37 (identifying the right to petition the courts for redress of an individual's injuries as one held by all Englishmen, though also clarifying that it was a subordinate right to the rights of "personal security, personal liberty, and private property").

²⁸ See *id.* (protecting the right of Englishmen to petition the judicial decision-making forum).

²⁹ See WHITMORE, *supra* note 24, at 35 (protecting the right of Massachusetts inhabitants to petition both legislative and judicial decision-making forums); Higginson, *supra* note 22, at 145 (explaining that colonial assemblies acted as both legislatures and judiciaries, and that the line was blurred between petitions to these assemblies for public legislation versus petitions appealing courts' decisions).

³⁰ See Bowie, *supra* note 13, at 1663–64 (identifying Town Meeting as the forum in which residents exercised their right to assemble and formulated the resolutions that would eventually lead to the Revolutionary War).

³¹ See JOHNSON ET AL., *supra* note 1, at 4 (stating that Town Meetings served judicial, administrative, and legislative functions and that these meetings eventually resolved to convene the convention which drafted the first constitution for the Commonwealth of Massachusetts).

duced.³² In the 1680s, such a prospect threatened colonial Massachusetts when then-Governor Edmund Andros declared it unlawful for inhabitants to assemble and convene at Town Meetings.³³ This ban and the lack of a representative colonial government under Andros eventually led, in part, to a colony-wide revolt against Andros, after which the British government replaced him with a representative General Assembly.³⁴

Nonetheless, the British government apparently did not learn its lesson, or at least neglected to consider those earlier events, when it passed the Massachusetts Government Act in 1774, which prohibited the act of convening a Town Meeting without Crown approval.³⁵ The Massachusetts Government Act also restricted what could be discussed at Town Meetings to strictly local matters.³⁶ The British government took this measure in response to the growing revolutionary spirit and rebellious resolutions brewing in local governments at the time—such as the Town Meeting of Boston—that manifested in events

³² See *id.* (identifying the powers held by Town Meetings, and thus by town inhabitants who participated in Town Meetings); PROSPECT FOR AMERICA: THE ROCKEFELLER PANEL REPORTS 432–33 (1961) (stating, in a discussion of the ideal of Town Meeting, that “[t]he ordinary man may or may not be the best judge of his own interests, but if he does not exercise effective authority over matters that are in his immediate range of interest and competence, he may be a well-tended animal, but he will not be a free man”).

³³ See Bowie, *supra* note 13, at 1666 (explaining how the British government replaced the representative government of the General Assembly with Edmund Andros as a single governor, who also banned representative government in the form of Town Meetings).

³⁴ See *id.* at 1667 (describing the reinstitution of representative government in Massachusetts following the 1689 coup against Andros). Andros also had to contend with unruly Massachusettsans in a separate event involving his failed attempt to restore peace with the Wabanaki tribe in the District of Maine during a period of racial tension between Native Americans and settlers. See MAINE: THE PINE TREE STATE FROM PREHISTORY TO THE PRESENT 124 (Richard W. Judd, Edwin A. Churchill & Joel W. Eastman, eds., 2011) (detailing a high point in racial tensions following King Philip’s War in which members of the Wabanaki tribe, who were not being paid rent for their land by settlers, killed four settlers’ cows, prompting the settlers to capture twenty Wabanaki tribe members and imprison them in Boston). Massachusetts inhabitants suspected that Andros was involved in a conspiracy with the Wabanaki and the French to harm the settlers of the District of Maine, and in 1689, they even had him arrested and deported to England in bondage. *Id.*

³⁵ See Farbman, *supra* note 3, at 2111 (explaining how the Massachusetts Government Act was a linchpin of the broader set of enactments dubbed the “Intolerable Acts” by Massachusettsans). The Massachusetts Government Act gave the governor the ability to remove civil officials at will and shifted the ability to choose juries from freeholders to the sheriff. See ROBERT MIDDLEKAUF, THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763–1789, at 236 (rev. ed. 2005) (demonstrating that Parliament vigorously debated the Massachusetts Government Act, which increased the powers given to the Crown-appointed governor, but ultimately passed it with a strong majority). The Intolerable Acts were the Parliamentary responses to the Boston Tea Party, which also included the Boston Port Act, the Impartial Administration of Justice Act, the Declaratory Act, the Quartering Act, and the Quebec Act. See *id.* at 236–37 (listing and describing the other Acts commonly grouped together as the “Intolerable Acts,” despite noting that the Quebec Act was likely unrelated to Parliamentary efforts to penalize the colonists).

³⁶ Farbman, *supra* note 3, at 2111.

such as the Boston Tea Party.³⁷ Massachusetts towns responded by resolving that they had the right to assemble, and that a ban on that right was unlawful.³⁸

Thus, Article XIX of the Massachusetts Constitution may be interpreted as a reaction to the British government's suppression of the ability to assemble at Town Meetings during the events that led to the Revolutionary War.³⁹ The writings of two of Article XIX's three drafters—cousins Samuel and John Adams—support such a conclusion.⁴⁰ For example, Samuel Adams invoked the right to assemble in 1773 when responding to the royal Governor's declaration that the convention of a prior Boston Town Meeting was illegal.⁴¹ In his response, Samuel Adams explained that this right came both from legislative acts and, more importantly, from natural law.⁴² John Adams would also come to identify the right to assemble as a critical wellspring of American democratic ideals, arguing that it gave citizens the opportunity to discuss, deliberate, and decide on public affairs.⁴³

³⁷ See Bowie, *supra* note 13, at 1668–69, 1685–87 (providing an example from the 1760s of the Boston Town Meeting passing radical resolutions that instructed Boston's representatives at the General Assembly to protest taxation by Parliament without colonial representation); MIDDLEKAUF, *supra* note 35, at 228, 230 (explaining how, in the days leading up to the Boston Tea Party, the Boston Town Meeting adopted resolutions mirroring those passed in Philadelphia, which castigated importers of tea from the East India Company as traitors).

³⁸ Farberman, *supra* note 3, at 2111.

³⁹ See Bowie, *supra* note 13, at 1708 (explaining that John Adams, a drafter of Article XIX, felt that the right to assemble was a precipitating cause for the Revolutionary War).

⁴⁰ See *id.* at 1693–94 (identifying the political writings of Samuel Adams in protest of measures by the British government against the assembly of Town Meetings or the Massachusetts General Assembly as influential to the Massachusetts constitutional provision articulating the right to assemble and noting that John Adams produced an original draft of the Declaration of Rights).

⁴¹ See Report to the Town of Boston, March 23, 1773 (arguing that the inhabitants of Boston had the right to convene their Town Meeting, regardless of royal decree, and that this right was derived from both the Acts and Resolves of the Province of Massachusetts Bay and the natural God-given right to convene in an orderly manner to discuss matters of safety and preservation), in 3 THE WRITINGS OF SAMUEL ADAMS 3–6 (Harry Alonzo Cushing ed. 1907); JAMES K. HOSMER, AMERICAN STATESMAN: SAMUEL ADAMS 195 (Bos. & N.Y.C., Houghton, Mifflin & Co. 1899) (calling the American people to action in the wake of controversial decisions by the British government, particularly asking to “[l]et every Town assemble. Let Associations and Combinations be everywhere set up to consult our just rights”).

⁴² Report to the Town of Boston, *supra* note 41, at 3–6.

⁴³ See Letter from John Adams to the Abbé de Mably, *supra* note 1 (identifying Town Meeting, and its provisional right to assemble, as one of the most important aspects of government in the pre-Revolutionary War era). In a separate writing, John Adams argued that, following the American victory in the Revolutionary War, Town Meetings (which were recently banned from assembling by the British government) would never support such a reversion to British rule. See Letter to T. Digges (May 13, 1780) (explaining that Town Meetings “dared, readily enough, to think as they pleased, and say what they would, dared attack the king, lords, commons, governors, councils . . . under the old government, and which attack everybody and every thing that displeases them at this day!”), in 7 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 168 (Bos., Little, Brown & Co. 1851). John Adams' fervent support for the right to assemble does not necessarily mean he was also a supporter of free speech: once he was elected President, Adams signed the Alien and Sedition Acts into law in 1798, which banned any criticism of the government. See *Alien and Sedition Acts* (1798),

The origins of the Massachusetts assembly clause may also be found in the Declaration of Rights of the Continental Congress of 1774, which was influenced by the Adams cousins.⁴⁴ This Declaration listed the forced dissolution of local assemblies among its grievances, and the right of the people to assemble peaceably among its resolutions.⁴⁵ Subsequently, the right to assemble found its way into early state constitutions, starting with the Pennsylvania state constitution, which predated the Massachusetts Constitution.⁴⁶ Although the Pennsylvania constitution was the first to provide a right to assemble, it was very likely influenced by the writings of the Adams cousins, and was perhaps even drafted by them.⁴⁷ The Massachusetts Constitution, which was certainly drafted by the Adams cousins, provided a very textually similar right, but expressly added the requirement that protected meetings must be orderly and peaceable.⁴⁸

Article XIX's influence, or at least the influence of the Adams cousins, ultimately extended far beyond Massachusetts, as can be seen in how the First Amendment to the United States Constitution protects an analogous right to assemble.⁴⁹ Additionally, many later state constitutions adopted assembly clauses similar to the one found in the Massachusetts Constitution, and courts continue to use the legislative history of Article XIX to interpret different state constitutional assembly clauses well into the twenty-first century.⁵⁰

NAT'L ARCHIVES (July 27, 2023), <https://www.archives.gov/milestone-documents/alien-and-sedition-acts#> [https://perma.cc/RV46-W8UK] (providing commentary on the legislative history of the Alien and Sedition Acts, as well as a reproduction of their text); Letter from John Adams to the Abbé de Mably, *supra* note 1 (reproducing Adams' opinion about the importance of the right to assemble).

⁴⁴ Bowie, *supra* note 13, at 1693–94. The assembly clause in the Declaration of Rights of the Continental Congress of 1774 took inspiration from the Middlesex Resolves, which were the product of an earlier county convention in Middlesex County, Massachusetts. *Id.* at 1692–93. These Resolves practically quoted Samuel Adams' 1773 textual formulation of the right to assemble. *Id.*

⁴⁵ *Id.* at 1693.

⁴⁶ See *id.* at 1701 (explaining that the Pennsylvania state constitution was the first state constitution to include an assembly clause).

⁴⁷ See *id.* at 1699–1700 (accounting for the fact that the Adams cousins were not only involved in the drafting of early state constitutions, like that of Pennsylvania, but that they also sought to influence Pennsylvania politics by promoting delegates to the Pennsylvania assembly).

⁴⁸ *Id.* at 1707; see PA CONST. art. I § 20 (providing the people of the Commonwealth of Pennsylvania with the right to assemble “in a peaceable manner”); MASS. CONST. art. XIX (providing the people of the Commonwealth of Massachusetts with the right to assemble “in an orderly and peaceable manner”).

⁴⁹ See Bowie, *supra* note 13, at 1717 (describing the legislative history of the First Amendment, and specifically how James Madison's drafted assembly clause was similar to the Massachusetts assembly clause); *Lahmann v. Grand Aerie of Fraternal Ord. of Eagles*, 121 P.3d 671, 681–82 (Or. Ct. App. 2005) (explaining how the First Amendment was drafted with an assembly provision that mirrored the assembly provisions of early state constitutions such as Massachusetts, North Carolina, New Hampshire, and Pennsylvania).

⁵⁰ See *Lahmann*, 121 P.3d at 679–80 (interpreting the Oregon constitutional assembly provision by tracing its language to its model, the Indiana constitutional assembly provision, and then to the Massachusetts constitutional assembly provision as its original predecessor). In *Lahmann*, the Oregon Court of Appeals held Article XIX to be a bulwark of the tradition of Town Meeting and a reaction to

B. The Traditional Interpretation of Article XIX

Article XIX's roots thus extend back to the revolutionary spirit of Massachusetts Town Meetings, where town inhabitants convened and aired their grievances no matter how disruptive their discussions were to the status quo.⁵¹ Given this history, it is perhaps ironic that when first given the opportunity to interpret Article XIX, the SJC did so to uphold a Massachusetts statute that provided criminal penalties for disrupting a lawfully assembled public meeting.⁵²

In 1854, in *Commonwealth v. Porter*, the SJC was confronted with a motley crew of defendants who had been whistling, coughing, laughing, and talking loudly at a public meeting in the Town of Orange, Massachusetts, that convened to discuss the temperance movement.⁵³ The defendants faced charges pursuant to an 1849 statute, which made it a crime to intentionally interrupt or disturb a lawful assembly of people.⁵⁴ In an opinion drafted by Chief Justice Lemuel Shaw, the SJC held that this statute supported (rather than contradicted) the right provided in Article XIX because preventing interruptions to public meetings provides order to such meetings.⁵⁵ Justice Shaw further deter-

the British ban on the convention of Town Meetings during the pre-Revolutionary War era. *See id.* at 680–82 (tracing the origins of Article XIX, and eventually concluding that various assembly clauses were drafted in reaction to British limitations on the colonists' ability to assert their political interests).

⁵¹ *See supra* notes 22–50 and accompanying text.

⁵² *See Commonwealth v. Porter*, 67 Mass. (1 Gray) 476, 477–78 (1854) (determining that the statute in question, which made interrupting or disturbing an assembly of people illegal, furthered the right to assemble provided in Article XIX).

⁵³ *Id.* at 476. The temperance movement in the United States gained significant traction by the time of *Porter*, as indicated by the expansion of the American Christian Temperance Union. *See Temperance Movement*, OHIO HIST. CENT., https://ohiohistorycentral.org/w/Temperance_Movement [<https://perma.cc/P964-Z4YH>] (indicating that the American Temperance Union increased from 222 local chapters to 8,000 local chapters between 1826 and 1835). The 1850s, in particular, saw the rise of women's groups organizing to support the temperance movement. *See id.* (explaining how Susan B. Anthony led the Woman's Temperance Convention for its first meeting on January 13, 1853). The local temperance movement in the Town of Orange apparently outlasted the disruption of the whistling defendants in *Porter*, as indicated by the Town's 1904 dedication of a granite "temperance" drinking water fountain, which was engraved with the name of the Woman's Christian Temperance Union and intended to provide clean water as an alternate beverage to alcohol. *See Woman's Christian Temperance Union Fountain*, ATLAS OBSCURA (Aug. 9, 2017), <https://www.atlasobscura.com/places/womens-christian-temperance-union-fountain> [<https://perma.cc/8263-LNER>] (describing the temperance drinking water fountain and providing that, although many temperance fountains in the United States were ruined by vandals who disagreed with their purpose, the fountain in the Town of Orange avoided such a fate).

⁵⁴ *See* 1849 Mass. Acts 36 (placing the maximum penalty for such disruptive behavior at imprisonment for up to thirty days or a fine of up to fifty dollars). In *Porter*, Chief Justice Shaw of the SJC grappled with the question of whether the law should apply "to all the noisy political gatherings of the times." *Porter*, 67 Mass. at 478.

⁵⁵ *See Porter*, 67 Mass. at 477–78 (reasoning that the legislature has the authority and duty to make laws that protect the rights provided by the state constitution, and that 1849 Mass. Acts 36 was such a law because it protected the Article XIX right of assembly). Justice Shaw served as a prolific justice in antebellum Massachusetts, writing nearly 2,200 opinions between 1830 and 1860. Kenneth S. Lynn, *Lemuel Shaw and Herman Melville*, 5 CONST. COMMENT. 411, 411 (1988). He was also

mined that the question of what constitutes an “interruption” is a question of fact to be decided on a case by case basis.⁵⁶ The statute used to convict the defendants in *Porter* is still valid today, albeit with a specific exception for schoolchildren.⁵⁷ *Porter* thus emphasized that the right to assemble provided by Article XIX must be exercised “in an orderly and peaceable manner,” but did not expressly define what should be considered orderly and peaceable.⁵⁸

Subsequent SJC decisions after *Porter* also fail to define the specific contours of orderly and peaceable conduct, but do provide insight into the importance of Article XIX and when it may apply.⁵⁹ For example, in 1907, in *Wheelock v. Lowell*, Justice Arthur Rugg invoked the right to assemble in a budgetary dispute in the City of Lowell, Massachusetts, to decide that the City had the authority to expend money in order to construct a new city hall.⁶⁰ Justice Rugg recognized that, despite the transition from town to city government that had occurred in Lowell and many other municipalities by this time, the right of the people to assemble and discuss (if not vote) at public meetings remained vitally important.⁶¹ Thus, constructing a city hall could be seen as fulfilling a public purpose: providing a forum for such meetings.⁶²

father-in-law to famed author Herman Melville, who published his magnum opus *Moby-Dick* three years before Justice Shaw published his decision in *Porter*. See *id.* at 416 (explaining how, long before Melville married Justice Shaw’s daughter Elizabeth, he had looked up to Justice Shaw as a father figure).

⁵⁶ *Porter*, 67 Mass. at 480.

⁵⁷ See MASS. GEN. LAWS ch. 272, § 40 (2025) (codifying the crime provided in 1849 Mass. Acts 36 under the chapter titled “Crimes Against Chastity, Morality, Decency and Good Order”). Chapter 272, true to its title, contains a number of obscure provisions of the Commonwealth’s current moral code. See, e.g., *id.* § 36 (making blasphemy, which is defined as “denying, cursing or contumeliously reproaching God . . . Jesus Christ or the Holy Ghost” or “exposing to contempt and ridicule, the holy word of God contained in the holy scriptures,” a crime punishable by imprisonment for up to one year or a fine of up to three hundred dollars); *id.* § 80F (prohibiting the gifting of live animals as prizes in games, contests, or tournaments); *id.* § 33 (criminalizing the exhibition of people with albinism).

⁵⁸ See *Porter*, 67 Mass. at 480 (opining that answering the question of what constitutes an illegal disturbance under 1849 Mass. Acts 36 would not be difficult in a future case).

⁵⁹ See *infra* notes 60–73 and accompanying text (reviewing relevant case law after *Porter* where the SJC interpreted Article XIX).

⁶⁰ See 81 N.E. 977, 977–79 (Mass. 1907) (applying Article XIX to the facts at issue to determine that the City of Lowell could fund the construction of a new city hall). Justice Rugg penned a number of important cases related to the advent of the modern industrial era and the societal changes that it brought. See Arthur Prentice Rugg: Chief Justice Memorial, MASS.GOV, <https://www.mass.gov/person/arthur-prentice-rugg> [<https://perma.cc/7638-8YDU>] (memorializing the career of Rugg, a sixth-generation Massachusettsan, which shaped the state’s industrial movement in the early twentieth century). For example, Justice Rugg interpreted the then-novel workers’ compensation statute, upheld the validity of zoning bylaws and ordinances, and extended nuisance law to noises that disrupted the quiet at a summer resort. *Id.*

⁶¹ See *Wheelock*, 81 N.E. at 979 (determining that “[t]he jealous care to preserve the means for exercising the right of assembling for discussion of public topics manifested in city charters” demonstrated the continuing force of the right to assemble). In Massachusetts, the city form of government is usually comprised of a mayor who serves as the executive and a city council that serves as the legislature. See *Cities and Towns*, LEAGUE OF WOMEN VOTERS OF MASS.,

Similarly, in 1916, in *Fuller v. Haines*, Justice Rugg interpreted the charter of the City of Medford, Massachusetts, as being consistent with Article XIX, but held that Article XIX did not allow lawfully assembled inhabitants to pass binding votes as they might have done under a town charter.⁶³ Justice Rugg recognized that, although a referendum vote of inhabitants could serve as persuasive authority to city officials and thus must be allowed under Article XIX, it would not have binding authority over municipal affairs.⁶⁴ The following decade, in 1929, in *Commonwealth v. Surridge*, the SJC clarified that the right to assemble cannot be exercised when doing so deprives other individuals of their rights.⁶⁵ For example, slander at a public meeting is not protected by Article XIX because slander is unlawful.⁶⁶

Later SJC cases continued to limit the reach of Article XIX, despite emphasizing its importance.⁶⁷ For example, in 1980, in *MacKeen v. Canton*, the SJC took another opportunity to clarify what Article XIX does not say.⁶⁸ The plaintiffs in *MacKeen* were residents of the Town of Canton, Massachusetts,

and-towns/ [https://perma.cc/XR3W-R4YA] (explaining the differences between the governmental structures of cities and towns in Massachusetts). In contrast, the town form of government is usually comprised of a select board that serves as the executive and a Town Meeting that serves as the local legislature. *Id.*

⁶² See *Wheelock*, 81 N.E. at 979 (holding that city halls serve the public purpose of providing the people with a space to assemble in).

⁶³ See 112 N.E. 873, 873–74 (Mass. 1916) (interpreting Article XIX and the charter of the City of Medford to provide city residents with the right to discuss matters at public meetings but not to vote on them). At the time of *Fuller*, Medford had only been a city for twenty-five years and thus had only recently shifted away from the form of town government. See Carl Seaburg, *The Emerging City: 19th Century Medford*, MEDFORD HIST. SOC'Y & MUSEUM, <https://www.medfordhistorical.org/medford-history/about-medford/the-emerging-city-19th-century-medford/> [https://perma.cc/HPA6-3QAH] (stating that in 1891, Medford voters passed the petition to become a city by a vote of 382 in the affirmative to 342 in the negative). Considering that Medford residents may have had memories of a time when they could still vote on bylaws and budgets, Justice Rugg's decision in *Fuller* was a stark reminder that city and town governance differ—and that Article XIX cannot be used as a method of recourse for these growing pains. See *id.* (recounting how Medford decided to become a city in 1891); *Fuller*, 112 N.E. at 874 (explaining that unlike the vote of a Town Meeting, public opinion shared at meetings or by referendum in city government can be persuasive authority, but cannot be binding).

⁶⁴ See *Fuller*, 112 N.E. at 873–74 (opining that the Article XIX protection of voters' ability to freely discuss public issues is a critical right).

⁶⁵ 164 N.E. 480, 481 (Mass. 1929).

⁶⁶ See *id.* (holding that the right to assemble provided by Article XIX cannot be exercised if it conflicts with the rights of other individuals or the public). In *Surridge*, the defendant placed a box in the middle of a public road, stood atop it, gave a speech, and attracted a crowd. *Id.* The SJC held that by obstructing the road, the defendant deprived the right of the public to drive on it. *Id.* Neither Article XIX nor a permit from the City Council of Lynn, Massachusetts, justified the defendant's speech or excused the deprivation. *Id.* at 481–82.

⁶⁷ See *infra* notes 68–73 and accompanying text.

⁶⁸ See 399 N.E.2d 22, 26–27 (Mass. 1980) (holding that Article XIX does not place a constitutional bar on motions to terminate debates at Town Meetings when such motions are voted for prior to any debates taking place).

who sought to overturn a 1978 zoning bylaw amendment.⁶⁹ They argued that the amendment was not passed properly because there was no debate on the article containing it before its passage.⁷⁰ The SJC clarified that Article XIX does not create a constitutional requirement that Town Meetings debate every issue, and held that each town has discretion to determine its own procedures.⁷¹ Most recently, the SJC determined that the Governor of Massachusetts' emergency orders issued in response to the COVID-19 pandemic, which restricted public gatherings, were valid under Article XIX.⁷² In 2020, in *Desrosiers v. Governor*, the SJC held that the state is allowed to place reasonable restrictions on speech and assembly as long as such restrictions satisfy strict scrutiny.⁷³

These cases demonstrate that the SJC has consistently held that Article XIX provides an important and independent constitutional right closely related to a traditional view of robustly democratic local government, but not without

⁶⁹ *Id.* at 23. The Town of Canton has a traditional Town Meeting form of government that allows all residents to vote on warrant articles, thus operating very similarly to pre-Revolutionary War Town Meetings. *See id.* (illustrating that the Town of Canton operates under the open Town Meeting form of government, and that votes on zoning changes require a supermajority pursuant to MASS. GEN. LAWS ch. 40A, § 5); WILLIAM F. GALVIN, SEC'Y OF THE COMMONWEALTH, CITIZEN'S GUIDE TO TOWN MEETINGS 1 (2024), https://www.sec.state.ma.us/divisions/cis/download/Guide_to_Town_Meetings.pdf [<https://perma.cc/3ZFH-YSM8>] (explaining that open Town Meetings, such as the Town Meeting in Canton, consists of all eligible voters in the town); *see also* JOHNSON ET AL., *supra* note 1, at 5 (highlighting that the only other type of Town Meeting, the "representative Town Meeting," did not appear in the United States until the twentieth century as an alternative for growing towns that could not fit inside their town halls but did not want to adopt city charters). In *MacKeen*, the plaintiffs' Article XIX argument was part of a broader lawsuit that sought to invalidate a change in the Town of Canton's zoning bylaw, which allowed a limited industrial use of one land parcel owned by Codex Corporation in a residential zone. 399 N.E.2d at 23. Codex Corporation was a leading company in data communication around the time it sought the zoning change, and it would later be acquired by the Motorola Corporation. *Appendix C: Selected Company Overviews*, THE HIST. OF COMPUT. COMMUNIC'NS, <https://historyofcomputercommunications.info/section/c.1/Codex/> [<https://perma.cc/L874-U2A9>].

⁷⁰ *See MacKeen*, 399 N.E.2d at 26–27 (addressing the plaintiffs' argument under Article XIX that debate on each warrant article is a procedural guarantee and that, without it, an article thus passed would be invalid).

⁷¹ *See id.* (justifying this decision by stating that forcing Town Meetings to continue discussing a matter which two-thirds of Town Meeting members voted to stop debating would do a disservice to Town Meetings as an institution). Votes to terminate debate at Town Meetings typically require a two-thirds majority to pass. JOHNSON ET AL., *supra* note 1, at 102.

⁷² *See Desrosiers v. Governor*, 158 N.E.3d 827, 845–47 (Mass. 2020) (determining that these emergency orders did not violate Article XIX because they were narrowly tailored to an important government interest, they were content-neutral, and they left open alternate forms of communication).

⁷³ *See id.* at 846 (applying the same degree of scrutiny for a restriction on the right to assemble as is applied for a restriction on the right to free speech). The SJC found that limiting the risks of COVID-19 was "a significant government interest" and that the restrictions were narrowly tailored, and thus that they satisfied strict scrutiny. *Id.*

limitation.⁷⁴ Conspicuously missing from the pre-*Barron* case law, however, is an answer to the question implied in the dicta of *Porter*: when is speech at a public meeting an unprotected and potentially illegal disturbance or interruption, and, conversely, when is speech protected under Article XIX's right to assembly?⁷⁵

C. *Barron v. Kolenda*: A Showdown in Southborough

In 2023, in *Barron v. Kolenda*, the SJC finally shed some light on the unknown boundaries of Article XIX's reach in the context of a dispute arising out of the Town of Southborough, Massachusetts.⁷⁶ Plaintiff Louise Barron, a longtime resident of Southborough and experienced local government participant, attended a Southborough Select Board meeting in 2018 that was set to discuss a proposed town budget which would require an increase in real estate taxes.⁷⁷ Defendant Daniel Kolenda, a member of the Southborough Select Board, announced the beginning of the public comment period after the board handled its other business, and read off the town's civility policy for public comments.⁷⁸ This policy required comments to be "respectful and courteous" and "free of rude, personal, or slanderous remarks."⁷⁹

⁷⁴ See *supra* notes 53–73 and accompanying text (identifying several instances where the SJC celebrated the importance of Article XIX while being careful not to apply it too broadly).

⁷⁵ See *Commonwealth v. Porter*, 67 Mass. (1 Gray) 476, 480 (1854) (holding that a law against disruption of public meetings is valid under Article XIX, but leaving open the question of what constitutes a disruption rather than regular speech protected by the Article XIX right to assemble); *supra* notes 60–73 and accompanying text (providing several examples of significant Article XIX cases over the last century and a half, which have failed to address the open question from *Porter*).

⁷⁶ See 203 N.E.3d 1125, 1136 (Mass. 2023) (holding that Article XIX protects disrespectful and discourteous speech, so long as it is orderly and peaceable, and thus implying that such speech is not disruptive).

⁷⁷ *Id.* at 1131–32. Southborough has a tax rate of \$14.76 per \$1,000 of home value, which, for a single-family home priced at the median price of all single-family homes in Massachusetts in 2023, would result in an \$8,413 annual tax bill. See *FAQs: What Is the Current Tax Rate?*, TOWN OF SOUTHBOROUGH, MASS., <https://www.southboroughma.gov/FAQ.aspx?QID=98> [<https://perma.cc/HZU3-J9GM>] (explaining, on Southborough's official website, what the effective property tax rate is); Neal Riley, *Massachusetts Sees "Staggering" Drop in House Sales*, CBS NEWS (Jan. 17, 2024), <https://www.cbsnews.com/boston/news/massachusetts-home-sales-prices-2023/> [<https://perma.cc/S2CK-D4HM>] (revealing current trends in Massachusetts home prices, which continue to rise year after year).

⁷⁸ *Barron*, 203 N.E.3d at 1132. Daniel Kolenda, a veteran originally raised in the state of Nebraska and a resident of Southborough since 1994, made various campaign promises when running for his second term on the Select Board in 2014, such as promises to bring greater transparency to town government and bridge the divide in the political spectrum. See Brad Petrishen, *Southborough Selectman Candidate Profile: Dan Kolenda*, WICKED LOC. (May 9, 2014), <https://www.wickedlocal.com/story/village-news/2014/05/10/southborough-selectman-candidate-profile-dan/37382070007/> [<https://perma.cc/PZ4T-TB33>] (describing the Selectman's second-term campaign platform).

⁷⁹ *Barron*, 203 N.E.3d at 1132.

Barron, armed with a sign reading “Stop Spending” and “Stop Breaking Open Meeting Law,” used the public comment period to criticize the Select Board for its allegedly profligate spending and recent violations of the open meeting law.⁸⁰ Kolenda then accused Barron of slander and attempted to end the public comment session, which triggered Barron to compare Kolenda to Adolf Hitler.⁸¹ Finally, Kolenda yelled at Barron and threatened to have her forcibly removed from the meeting, prompting Barron to leave the meeting of her own volition.⁸²

Barron, her husband Jack, and another Southborough resident sued Kolenda and the Select Board of Southborough, alleging that Kolenda violated Barron’s rights under Article XIX pursuant to the Massachusetts Civil Rights Act (MCRA) when he threatened to remove her from the meeting.⁸³ Additionally, the plaintiffs sought a declaration that Southborough’s civility policy was unconstitutional.⁸⁴ The language used in their request for relief was similar to language often associated with Article XVI free speech claims, which prompted the SJC to address possible Article XVI issues with the civility policy; the plaintiffs, however, withdrew their First Amendment claims voluntarily.⁸⁵

⁸⁰ *Id.* In 2019, the Massachusetts Attorney General’s Office determined that the Southborough Select Board failed to approve meeting minutes dozens of times over five years, violating the Open Meeting Law of Massachusetts. See Susan Spencer, *Southboro Selectmen Found in Violation of Open Meeting Law*, TELEGRAM & GAZETTE (Nov. 12, 2019), <https://www.telegram.com/story/news/local/south-west/2019/11/13/southboro-selectmen-found-in-violation-of-open-meeting-law/2306930007/> [<https://perma.cc/W6MM-CCMX>] (explaining how the members of the Select Board in Southborough violated the Open Meeting Law and thus were ordered to attend an Open Meeting Law training held by the Attorney General). The Board was disciplined after Ginny Kremer, an Acton lawyer who served as Town Counsel for the Town of Grafton, Massachusetts, filed four complaints alleging Open Meeting Law violations by the Select Board on behalf of concerned Southborough residents. *Id.* Kremer, coincidentally or not, was also the lawyer for the Plaintiffs in *Barron*. 203 N.E.3d at 1129.

⁸¹ *Barron*, 203 N.E.3d at 1132–33. The heated exchange in Southborough followed the principle of “Godwin’s law,” developed in 1990 by attorney Mike Godwin, who postulated that the longer an online argument continues, the higher the probability that one party will compare the other party to Hitler. See Ivy Wigmore, *Godwin’s Law*, TECHTARGET (Sept. 2017), <https://www.techtargget.com/whatis/definition/Godwins-law> [<https://perma.cc/L3RX-TLKE>] (defining Godwin’s law, providing its origins, and explaining that “Godwin’s purpose in creating the law was to make people more thoughtful in online communications”).

⁸² *Barron*, 203 N.E.3d at 1133.

⁸³ *Id.*; *id.* at 1130. It is unclear whether the Jack Barron in this case is the same Jack Barron who served as the chairman for the Republican Committee of Southborough in 2020, and whose car was vandalized for having a Republican bumper sticker attached to it. See Carrie Saldo, *A Trend in Worcester County: Increasing Support for Republican Presidents*, WGBH (Oct. 28, 2020), <https://www.wgbh.org/news/local/2020-10-28/a-trend-in-worcester-county-increasing-support-for-republican-presidents> [<https://perma.cc/P82Y-QEVZ>] (using Jack Barron as an example of a Worcester County Republican and describing how Republican voters have become more commonplace in Worcester County).

⁸⁴ *Barron*, 203 N.E.3d at 1130.

⁸⁵ See *id.* (detailing the procedural history of *Barron*). The plaintiffs did include federal claims in their original complaint. *Id.* When the defendants successfully removed the case to federal court, however, the plaintiffs withdrew these claims, and the case was remanded to a Massachusetts trial court. *Id.* at 1133. This was likely a strategic decision on the plaintiffs’ part because the removal required the

The Massachusetts Superior Court, which served as the trial court for this case, granted the defendants' motion for judgment in their favor.⁸⁶ The plaintiffs appealed, and the SJC transferred the case into its jurisdiction *sua sponte*.⁸⁷

The SJC ultimately held that Southborough's civility policy was unconstitutional under both Articles XVI and XIX.⁸⁸ In so doing, the SJC also determined that Kolenda's threat to remove Barron from the meeting was a violation of her constitutional rights under those Articles, and that this violation was sufficient to establish a claim under the MCRA.⁸⁹ The court also held that Kolenda was not protected in his individual capacity by qualified immunity.⁹⁰

plaintiffs to withdraw these claims, although it is unclear what the perceived strategic advantages of state over federal court were in this specific case. See Gary Deel, *Demystifying the Law: State Versus Federal Courts*, AM. PUB. UNIV. EDGE (Sept. 20, 2022), <https://apuedge.com/demystifying-the-law-state-versus-federal-courts/> [<https://perma.cc/AV9N-M8GU>] (explaining how the tactic of "forum shopping," or selecting whether to try a case in state or federal court, can be used to a plaintiff's advantage).

⁸⁶ *Barron*, 203 N.E.3d at 1133. Specifically, the Superior Court held that the plaintiffs' Massachusetts Civil Rights Act (MCRA) claims failed because Kolenda's conduct could not rise to the level of "threats, intimidation, or coercion" and thus the amended complaint failed to state a claim for which relief could be granted. See *Barron v. Kolenda*, No. 2085CV00382, 2021 WL 6880843 at *3, *9 (Mass. Super. Mar. 08, 2021) (holding that Barron's MCRA claims lacked merit). The Superior Court also held that the Southborough civility policy was nearly, but not actually, an unconstitutional restraint on free speech, because it was a "reasonable, viewpoint-and-content neutral, restriction that serve[d] the legitimate government interest of preventing disruptions of the Board's meetings." See *id.* at *8 (analyzing the constitutional validity of the Southborough civility policy). Lastly, the Superior Court found that Barron's tort claims, which Barron did not raise on appeal, also lacked merit. *Id.* at *4-5; see *Barron*, 203 N.E.3d at 1130 (listing the plaintiffs' claims on appeal, which did not include a tort claim).

⁸⁷ *Barron*, 203 N.E.3d at 1133. Normally, appeals from trial court decisions in Massachusetts are heard by the Massachusetts Appeals Court, which serves as the first level of appellate decision-making in the Commonwealth. See *Learn About the Court Appellate Process*, MASS.GOV, <https://www.mass.gov/info-details/learn-about-the-court-appellate-process> [<https://perma.cc/8GFK-F8EA>] (July 9, 2019) (explaining that the only exception to this rule exists for first-degree murder cases, which are automatically appealed to the SJC). A party unhappy with a decision of the Appeals Court must request review from the SJC. *Id.* It is unclear from the language of *Barron* why the SJC moved to take the case rather than let it go through the Appeals Court first, but perhaps it did so because the suit implicated state constitutional issues. See 203 N.E.3d at 1133-34 (discussing how deciding *Barron* required an interpretation of Articles XVI and XIX of the Massachusetts Declaration of Rights).

⁸⁸ *Barron*, 203 N.E.3d at 1133.

⁸⁹ *Id.* The MCRA allows a private party whose rights have been restricted under the laws and constitutions of either the United States or Massachusetts to file a lawsuit for injunctive or other equitable relief. MASS. GEN. LAWS ch. 12, § 11I(2025). The MCRA also allows the Attorney General of Massachusetts to sue on behalf of the aggrieved party. *Id.* § 11H. This Act was enacted in 1979 to respond to a growing problem of racial violence; however, it provides remedies for both race-related and non-race-related civil rights infringements. See David A. Hoffman, *The Massachusetts Civil Rights Act: Recent Developments*, MASS. GOV. LIAB. REP., Dec. 1989, at 78 & n.3 (outlining the legislative history of the MCRA and explaining that it was passed after the assassination of a Black football player, Darrell Williams, who was killed by a sniper during a football game at Charlestown High School).

⁹⁰ *Barron*, 203 N.E.3d at 1141. Qualified immunity is the doctrine that protects public officials from liability in civil suits based on decisions they make in their official capacities, granted that such

As for Article XIX, the SJC turned to the history of the provision to interpret its meaning, emphasizing the writings of Samuel and John Adams.⁹¹ The SJC noted that Samuel Adams asserted a right to assemble in reaction to British suppression of town assemblies, and that John Adams emphasized the importance of Town Meeting, and the right to assemble that made its performance possible.⁹² Overall, the SJC held that the Article XIX right to assemble was born from a spirit of rowdy opposition to British colonial government, and that it should thus continue to be a source of protection for “rude, personal, and disrespectful” language at public meetings.⁹³ At the same time, the SJC acknowledged that the text of Article XIX protects the right to assemble only “in an orderly and peaceable manner.”⁹⁴

Applying this analysis to the facts before it, the SJC determined that the Southborough civility requirement of respect and courtesy was not an equivalent to peace and order, and it justified this distinction based on the fact that revolutionary-era public assemblies were not particularly respectful or courteous.⁹⁵ The SJC also conceded that content-neutral “time, place, and manner restrictions” on public meetings would be acceptable after its holding in *Desrosiers*, but that the Southborough civility policy did not satisfy such requirements.⁹⁶ Ultimately, the SJC held that the Southborough civility policy was unconstitutional under Article XIX because it contradicted Article XIX’s text and original purpose.⁹⁷

decisions do not violate well-established rights that a reasonable person should have been aware of. See *LaChance v. Comm’r of Corr.*, 978 N.E.2d 1199, 1207 (Mass. 2012) (quoting *Rodrigues v. Furtaido*, 575 N.E.2d 1124, 1127 (Mass. 1991)) (providing the well-established standard for determining whether an individual is protected by qualified immunity). In *Barron*, the SJC found that Kolenda was not entitled to qualified immunity because “the contours of the rights [were] sufficiently clear, and a reasonable public official would understand that his response to the exercise of those rights was unlawful.” 203 N.E.3d at 1141.

⁹¹ *Barron*, 203 N.E.3d at 1134–36.

⁹² See *id.* at 1135 (referencing the importance of the right to assembly in Samuel Adams’ appeal to the British government following the Boston Massacre and John Adams’ philosophical writings on the importance of the assembly of Town Meeting to the concept of self-governance).

⁹³ *Id.* at 1134–35.

⁹⁴ *Id.* at 1135–36.

⁹⁵ See *id.* (reasoning that “‘peaceful and orderly’ is not the same as ‘respectful and courteous’” in order to determine that the Southborough civility policy was facially unconstitutional). The original public meaning of the phrase “in an orderly and peaceable manner” is analyzed later in this Note in order to evaluate whether the framers of the Massachusetts Constitution of 1780 would agree with the SJC’s 2023 decision that orderly and peaceable does not mean respectful and courteous. See *infra* notes 135–146 (defining the text of Article XIX using contemporaneous dictionaries).

⁹⁶ See *Barron*, 203 N.E.3d at 1135–36 (holding that criticism of government officials is protected under Article XIX’s right to assemble); *Desrosiers v. Governor*, 158 N.E.3d 827, 846 (Mass. 2020) (holding that the same analysis used when examining the constitutionality of free speech restrictions—namely, that they regulate only the time, place, and manner of speech—should be applied when examining the constitutionality of assembly restrictions under Article XIX).

⁹⁷ *Barron*, 203 N.E.3d at 1137.

The SJC also held that Article XVI's right to free speech—which the plaintiffs did not explicitly refer to in their complaint, but which the SJC assumed was implicitly included in their allegations—provided an independent basis for its decision.⁹⁸ The SJC determined that Article XVI case law (independent of federal case law concerning the First Amendment right to free speech) required any regulation on political speech to be narrowly drawn and to serve a compelling governmental interest.⁹⁹ The SJC held that the Southborough civility policy did not satisfy this degree of scrutiny because it was overbroad and because civility cannot be required in political discourse, even if it is preferable.¹⁰⁰ Additionally, the SJC determined that Article XVI disallows viewpoint discrimination, and held that the Southborough civility policy was discriminatory because it allowed for polite praise of public officials but prohibited rude criticism of them.¹⁰¹

Finally, the SJC reversed the Superior Court's decision in favor of the defendants' motion for judgment on the pleadings and remanded the case, requiring a declaration that the civility policy of Southborough was unconstitutional.¹⁰² As of the time of this Note's publication, the case is still on remand.¹⁰³

⁹⁸ *Id.* Curiously, the Massachusetts Constitution as ratified in 1780 provided only “the liberty of the press” in Article XVI and failed to include protections for free speech anywhere in its text. *Id.* Article XVI, however, was amended in 1948 to protect free speech as well. *Massachusetts Declaration of Rights—Article 16*, MASS.GOV (Jan. 16, 2019), <https://www.mass.gov/news/massachusetts-declaration-of-rights-article-16> [<https://perma.cc/5TBL-YVQK>] (showing the differences between the original and amended Article XVI). Yet, this does not mean that Massachusettsans' freedom of speech could have been curtailed at the whim of government officials until 1948, because the First Amendment to the United States Constitution, as incorporated by the Fourteenth Amendment, provided protection against such an infringement of liberty as early as 1925. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925) (holding that the freedom of speech was among the fundamental rights included in the Due Process Clause of the Fourteenth Amendment).

⁹⁹ *Barron*, 203 N.E.3d at 1138. Courts in Massachusetts consider Article XVI to be a separate and independent constitutional provision from the First Amendment to the United States Constitution. *Id.* For example, the SJC has held that Article XVI allows only content-based restrictions against political speech that satisfy the standard of strict scrutiny. *See Commonwealth v. Lucas*, 34 N.E.3d 1242, 1251–52 (Mass. 2015) (holding that an analysis of First Amendment case law was relevant but not dispositive when determining what level of scrutiny to apply under Article XVI). To satisfy strict scrutiny under Massachusetts law, a regulation must serve a compelling state interest and be narrowly tailored to achieve that goal. *Id.* at 1252 (quoting Opinion of the Justices to the Senate, 764 N.E.2d 343, 348 (Mass. 2002)).

¹⁰⁰ *Barron*, 203 N.E.3d at 1138.

¹⁰¹ *Id.* at 1139. Both Article XVI and the First Amendment to the United States Constitution disallow viewpoint discrimination, and the SJC finds the Supreme Court's First Amendment jurisprudence instructive when interpreting Article XVI. *See id.* (citing *Shurtleff v. Boston*, 142 S. Ct. 1583, 1587 (2022) (drawing on federal case law to interpret the restrictions Article XVI places on viewpoint discrimination)).

¹⁰² *Barron*, 203 N.E.3d at 1141.

¹⁰³ *See id.* (remanding the case to Superior Court, which has not, by the time of the writing of this Note, issued a new decision on the case); Notice of Withdrawal, *Barron v. Kolenda*, No. 2085-CV-00382 (Sup. Ct. Jan. 3, 2024) (providing the most recent motion filed in the case's docket as of April 2024).

II. INTERPRETING *BARRON V. KOLENDA*

The decision in *Barron* not only opened a new chapter in the development of Article XIX jurisprudence; it also had practical ramifications across the Commonwealth for municipalities that had civility policies in place.¹⁰⁴ Whether those ramifications were a necessary result of the original intent of Article XIX has not yet been discussed in scholarship.¹⁰⁵ In an attempt to answer this question, Part A of this Section describes the history and status of civility policies in Massachusetts municipalities up until *Barron*.¹⁰⁶ Part B then explains the effect of *Barron* on these municipalities, and the reactions of practitioners and scholars to the decision.¹⁰⁷ Finally, Part C supplements the SJC's interpretation of Article XIX in *Barron* with further originalist analysis.¹⁰⁸

A. Civility Policies Across the Country

Civility is both an important democratic ideal and a practical necessity to ensure that public meetings run smoothly.¹⁰⁹ Unfortunately, incivility has become a growing concern for local governments across the country.¹¹⁰ In 2022, in response to rising incidents of incivility, the Institute for Local Government even published instructions for city governing boards to help manage disruptive and angry participants.¹¹¹ Accordingly, municipalities across the nation

¹⁰⁴ See *infra* notes 123–134 and accompanying text (detailing the impact of *Barron* on communities that were forced to change their civility policies, and the reactions of practitioners who were affected by the case).

¹⁰⁵ See *infra* notes 130–133 and accompanying text (describing the two scholarly reactions to the holding of *Barron* as of the time of the writing of this Note).

¹⁰⁶ See *infra* notes 109–122 and accompanying text.

¹⁰⁷ See *infra* notes 123–134 and accompanying text.

¹⁰⁸ See *infra* notes 135–146 and accompanying text.

¹⁰⁹ See Larry Schaefer, *History and Civility*, 40 NAMTA J. 103, 110 (concluding, after a survey of the linguistic and ideological development of the concept of civility in Western civilization, that “[c]ivility is the force that made civilizations civilized”); Kuehne, *supra* note 6 (quoting the former mayor of Rolling Hills Estates, California, who asserted that the important work of city council meetings is impeded by a lack of civility).

¹¹⁰ See, e.g., *A Call for Civility a Matter of Common Sense*, ANDOVER TOWNSMAN (June 16, 2014), https://www.andovertownsmen.com/opinion/a-call-for-civility-a-matter-of-common-sense/article_bf5eb9e8-2658-50e3-b6fd-9dbb7514011c.html [<https://perma.cc/N58M-ULFD>] (restating the opinion of a longtime public servant that by the mid-2010s, civic dialogue had grown unbearably contentious); Deborah Brennan, *County Supervisors Vote for Rules to Curb Disruptive Comments in Board Meetings*, SAN DIEGO UNION-TRIB. (Nov. 10, 2021), <https://www.sandiegouniontribune.com/news/politics/story/2021-11-10/public-comment-rules-get-update-for-san-diego-county-board-of-supervisors-meetings> [<https://perma.cc/6TUP-44E9>] (explaining how a particular incident of extreme incivility at a county board meeting in San Diego County, California, persuaded the county board to adopt a civility policy).

¹¹¹ See FRANK BENEST, RUSTY KENNEDY & ERICA L. MANUEL, INST. FOR LOC. GOV'T, MANAGING ANGRY MOBS DISRUPTING GOVERNING BOARD MEETINGS 1–6 (2022), https://www.ca-ilg.org/sites/main/files/ilg_managing_angry_mobs_ver4.pdf [<https://perma.cc/H4BZ-QWVY>] (giving practical advice to local government officials who are faced with mobs of “QAnon” followers, anti-vaxxers,

have begun to adopt or revise their rules of decorum for public meetings to try to ensure orderly proceedings.¹¹²

Many such municipalities that have adopted civility policies are in Massachusetts, including, but not limited to, Acton, Andover, Cambridge, Franklin, Lexington, Salem, Shrewsbury, and, of course, Southborough.¹¹³ Such policies are not unique to the Commonwealth, as they can be found across the United States.¹¹⁴ For example, on the West Coast, the City of San Carlos, California, prohibits disruptive behavior during public meetings and obligates participants to treat others courteously and to listen to them respectfully.¹¹⁵ The City of San Diego, California, instituted a similar policy in 2021 after a speaker used racial slurs at a County Board of Supervisors meeting.¹¹⁶ Likewise, in the Rockies, the Town of Fraser, Colorado, prohibits insulting, loud, or demeaning communication at public meetings, and asserts in its recitations that its policy was enacted in response to the popular belief that American society is becoming less

and anti-police advocates). The Institute for Local Government is a California-based organization that provides local government officials with necessary information to serve their communities and promotes regional cooperation among local governments. *Serving California's Local Agencies for More Than 60 Years*, INST. FOR LOC. GOV'T, <https://www.ca-ilg.org/history> [<https://perma.cc/BSJ4-AFCU>].

¹¹² See *infra* notes 113–120 (providing a geographically diverse sample of municipalities that have instituted civility policies).

¹¹³ See Benson, *supra* note 7 (describing the Acton civility policy); *A Call for Civility a Matter of Common Sense*, *supra* note 110 (outlining the backdrop and content of the Andover civility policy); CAMBRIDGE, MASS., RULES OF THE CITY COUNCIL r. 38 (enacting the Cambridge civility policy); McCarron, *supra* note 7 (reporting on the enactment of the Franklin civility policy); Susanne Beck, *State Supreme Court Redefines Civility at Public Meetings*, LEXINGTON OBSERVER (Mar. 17, 2023), <https://lexobserver.org/2023/03/17/state-supreme-court-redefines-civility-at-public-meetings/> [<https://perma.cc/985T-QGFQ>] (attempting to justify the civility policy in the Town of Lexington, Massachusetts, in the wake of *Barron*); SALEM, MASS., CODE OF ORDINANCES, app. A, § 26C (enacting the Salem civility policy); Bill Gilman, *In Wake of Ruling, Shrewsbury Select Board Adopts Changes to Public Comment Policy*, CMTY. ADVOC. (Apr. 12, 2023), <https://www.communityadvocate.com/2023/04/12/in-wake-of-ruling-shrewsbury-select-board-adopts-changes-to-public-comment-policy/> [<https://perma.cc/X8MD-446N>] (describing the civility policy of the Town of Shrewsbury, both before and after *Barron*); *Barron v. Kolenda*, 203 N.E.3d 1125, 1136 (Mass. 2023) (stating the Southborough civility policy).

¹¹⁴ See *infra* notes 115–120 (providing examples of civility policies across the various regions of the United States).

¹¹⁵ See SAN CARLOS, CAL., RULES OF DECORUM AND CIVILITY AT PUBLIC MEETINGS (enacting the San Carlos civility policy for public meetings).

¹¹⁶ See Brennan, *supra* note 110 (explaining the background to the change in San Diego's civility policy, which involved an incident where a member of the public used racial slurs against the region's health official during a COVID-19-related announcement). This rule change led one law professor to opine that the new civility policy was unconstitutional under the First Amendment. See Miranda McGowan, Opinion, *San Diego Board of Supervisors' New Rules of Decorum Pose a Free Speech Problem*, SAN DIEGO UNION-TRIB. (Nov. 16, 2021), <https://www.sandiegouniontribune.com/opinion/commentary/story/2021-11-16/opinion-miranda-mcgowan-free-speech-public-meetings-supervisors> [<https://perma.cc/X3DB-VUHL>] (suggesting that San Diego's new civility policy goes too far in its aim of preventing incivility at board meetings, and that no constitutional issue would be raised if the new rules were merely procedural).

civil.¹¹⁷ Moreover, in the Midwest, the City of Bowling Green, Ohio, prohibits disruptive behavior at public meetings, and specifically includes insulting communications as an example of such disruptive behavior.¹¹⁸ In the Northeast, the City of Saratoga Springs, New York, amended its rules for public conduct in January 2024 to prohibit discourteous expressions of opinions, which includes intimidation of members of the city council.¹¹⁹ And in the Southeast, the City Council of Raleigh, North Carolina, went as far as prohibiting residents from addressing council members by name during the council's public comment periods.¹²⁰

This list is not comprehensive, but it demonstrates the geographic diversity of communities that have sought to address incivility at public meetings through codes of conduct.¹²¹ *Barron* disrupted and prevented Massachusetts municipalities' continued reliance on civility codes, however, and thus put Massachusetts municipalities in a novel and unique position compared to their out-of-state counterparts.¹²²

¹¹⁷ See FRASER, COLO., FRASER CIVILITY POLICY AND RULES OF DECORUM (enacting the City of Fraser's civility policy).

¹¹⁸ See BOWLING GREEN, OHIO, CODE OF ORDINANCES, tit. III § 31.38 (enacting the City of Bowling Green's civility policy).

¹¹⁹ See Thomas Dimopoulos, *Saratoga Springs Adopts Amended Rules for Public Conduct*, SARATOGA TODAY (Jan. 18, 2024), <https://www.saratogatodaynewspaper.com/home/item/21041-saratoga-springs-adopts-amended-rules-for-public-conduct> [<https://perma.cc/GEW3-HJK8>] (describing how the City Council of Saratoga Springs adopted new civility rules for public comment periods that prohibit profanity, shouting, and threats). Mayor John Safford emphasized that issues with public comment periods were an important part of the city's last election. *Id.*

¹²⁰ See Leigh Trauss, *Raleigh Bans Residents from Addressing Individual Council Members During Meeting*, INDYWEEK (June 18, 2019), <https://indyweek.com/news/wake/why-is-david-cox-reporting-tweets-to-the-city-attorney/> [<https://perma.cc/P8S5-PDF2>] (explaining the rule change, and providing the opinion of a local attorney that the rule change was unconstitutional). Only about six months later, the Raleigh City Council proposed to abolish this restriction on public comments in order to reduce barriers between citizens and the council at meetings. See Leigh Trauss, *Raleigh City Council's Revised Decorum Rules Would Let You Name Council Members*, INDYWEEK (Jan. 03, 2020), <https://indyweek.com/news/wake/raleigh-council-revised-decorum-rules/> [<https://perma.cc/D73F-YY8J>] (explaining the impetus behind the Raleigh City Council's course correction on its civility policy).

¹²¹ See *supra* notes 115–120 (providing a geographically and politically diverse set of municipalities that have sought to address incivility at public meetings by enacting or enforcing civility policies, with some producing mixed reactions from public officials and concerned citizens).

¹²² See 203 N.E.3d 1125, 1130 (Mass. 2023) (holding restraints on the content of speech during public comment periods in the name of civility to be unconstitutional under the Massachusetts Constitution of 1780); *supra* notes 115–120 (demonstrating how many parts of the country allow civility policies as a legitimate solution to the issue of incivility in local government meetings). Perhaps Massachusetts' position is not entirely novel. See *Marshall v. Amuso*, 571 F. Supp. 3d 412, 417–18, 425 (E.D. Penn. 2021) (determining, on the plaintiffs' motion for a preliminary injunction against the Pennsbury School Board's civility policy, that the policy infringed on the free speech protections granted by the First Amendment). In 2021, in *Marshall v. Amuso*, the United States District Court for the Eastern District of Pennsylvania held that the policy for the public comment periods at the Pennsbury School Board's meetings, which prohibited “lengthy, personally directed, abusive, obscene, or irrelevant” language, was likely unconstitutional under the First Amendment of the United States

B. Panic in Massachusetts Municipal Law Departments

After *Barron*, local newspapers were abuzz with reports on the case and how it would affect their cities and towns.¹²³ Yet, as much excitement as there was in the media, there was an equal amount of confusion in municipal law departments.¹²⁴ Some municipalities with civility policies that went further than regulating the time, place, and manner of public comments revised those policies to comply with *Barron*.¹²⁵ However, not all municipalities have taken heed of *Barron* as of the time of the writing of this Note.¹²⁶ For example, the City of Salem stripped down its regulations from disallowing vulgar, disrespectful, and profane language, to only requiring that public comments remain orderly and peaceable (in an apparent appeal to the language of Article XIX).¹²⁷ Conversely, the City of Cambridge did not update its civility policy in the wake of *Barron*.¹²⁸ It is debatable whether the City's restriction against fighting words and repetitive speech is still constitutional under the case's holding.¹²⁹

Constitution. *Id.* This still leaves Massachusetts, however, as the only jurisdiction where civility policies have been restricted on state constitutional grounds, and where such restrictions come from the right to assemble as well as the right to free speech. *See id.* at 417 (holding that the Pennsbury public comment policy violated only the federal constitutional right to free speech); *Barron*, 203 N.E.3d at 1130 (concluding that the Southborough civility policy violated both the state constitutional right to free speech and the state constitutional right to assemble).

¹²³ *See* Beck, *supra* note 113 (reflecting on the relationship between the holding of *Barron* and the Town of Lexington's civility policy); Gilman, *supra* note 113 (describing the impact of *Barron* on the Town of Shrewsbury—namely, that the Select Board changed its civility policy in an attempt to ensure its constitutionality following the SJC's decision); Marty Benson, *Supreme Judicial Court Decision Exposes Acton's Repeated Violations of the Constitution of Massachusetts*, ACTON F. (Mar. 27, 2023), <https://www.actonforum.com/?p=1240> [<https://perma.cc/5HMP-9X3U>] (arguing that the Acton Select Board should adjust its behavior in accordance with the SJC's holding in *Barron*).

¹²⁴ *See Supreme Judicial Court Declares Public Comment Policy Unconstitutional*, *supra* note 12 (providing guidance to Massachusetts municipalities seeking to comply with *Barron* only one day after the case was decided, while noting that the extent of the case's impact is not yet known and will likely evolve over time as novel situations arise).

¹²⁵ *See infra* notes 127–129 and accompanying text (comparing the reactions to *Barron* in the City of Salem and the City of Cambridge).

¹²⁶ *See infra* notes 127–129 and accompanying text.

¹²⁷ *See* Scott Souza, *Speak Your Mind: Salem City Council Loosens Rules on Public Comment*, PATCH, <https://patch.com/massachusetts/salem/speak-your-minds-salem-city-council-loosens-rules-public-comment> [<https://perma.cc/7THY-A5NR>] (Mar. 28, 2023) (reporting on the Salem City Council's rule change in the wake of *Barron*, and providing the opinion of City Councilor Ty Hapworth that being rude to elected officials is an American tradition).

¹²⁸ *See* CAMBRIDGE, MASS., RULES OF THE CITY COUNCIL r. 38 (enacting the current civility policy for the City of Cambridge, which disallows the use of fighting words and repetitive speech during the public comment periods of City Council meetings). These restrictions appear to regulate the content of speech (which the SJC held was unconstitutional) rather than the “time, place, and manner” of speech (which the SJC stated would be constitutional), though one could conceivably argue that they are actually regulations of the manner of speech rather than its content. *See Barron*, 203 N.E.3d at 1130 (holding that content regulations of speech at public comment periods are unconstitutional, while “time, place, and manner” regulations of speech at the same are constitutional).

¹²⁹ CAMBRIDGE, MASS., RULES OF THE CITY COUNCIL r. 38.

A select few practitioners have reacted to *Barron* with ambivalence, noting that although there were some clear takeaways for public officials, several questions remain unanswered.¹³⁰ For example, these practitioners noted that the SJC failed to explain the degree of opportunities that municipalities must provide for public comments to comply with Article XIX, and thus failed to explain whether or not the abolition of public comment periods at public meetings would be a constitutional solution to incivility.¹³¹ Another practitioner argued that the SJC reached the correct result under both the right to assemble and the right to free speech, but raised concerns that the case could stifle residents' willingness to serve on public boards.¹³² Ultimately, that practitioner resolved that the holding in *Barron* is a constitutional necessity, and that any chilling effect is simply a price that local governments must pay.¹³³ Beyond these two opinions, there is limited legal scholarship on the reasoning or impact of *Barron*, despite its implications for the daily operation of local governments in Massachusetts.¹³⁴

C. Seeking the Original Public Meaning of Article XIX

Because the decision in *Barron* relied in part on an originalist analysis of Article XIX, it is worth gleaning additional insight into the original public meaning and original intent of Article XIX.¹³⁵ Given that Part I of this Note

¹³⁰ See Mina Makarious & Paul Combiners, *Case Focus: Democracy, Some Assembly Required: Barron v. Kolenda*, BOS. BAR J. (July 27, 2023), <https://bostonbar.org/journal/democracy-some-assembly-required-barron-v-kolenda/> [<https://perma.cc/5VA8-W4YD>] (explaining the clear implications of *Barron*, while identifying several unresolved issues).

¹³¹ See *id.* (highlighting how the SJC in *Barron* did not overturn its earlier decision in *MacKeen*, which held that Article XIX does not provide a constitutional guarantee to debate or discussion over every article on a warrant at Town Meeting). The “warrant” is a document published prior to any Town Meeting which lists the subject matters to be acted upon at Town Meeting. See GALVIN, *supra* note 69, at 5 (defining “warrant” in the context of Town Meeting and explaining that “[a] Town Meeting’s action is not valid unless the subject was listed on the warrant”).

¹³² See Marc C. Laredo, *The Rights to Assembly and Free Speech Prevail Over Civility in Public Forums*, 104 MASS. L. REV. 79, 81–82 (2023) (opining that the SJC reached the proper legal outcome in *Barron*, but identifying that the holding will likely pose challenges to public officials in local government). Laredo is not only a practicing attorney, but also a City Councilor in the City of Newton, Massachusetts, and he thus will need to grapple with the holding of *Barron* directly in his elected capacity. See Marc. C. Laredo, LAREDO & SMITH, LLP, <https://laredosmith.com/attorneys/marc-laredo/> [<https://perma.cc/AQB9-QMPQ>] (enumerating Laredo’s accomplishments in scholarship and public service).

¹³³ See Laredo, *supra* note 132 (concluding that local government officials must allow members of the public to make impolite and unpleasant comments at public meetings because, for better or for worse, “that is how our democracy works”).

¹³⁴ See *supra* notes 130–133 (providing the opinions of the only two legal scholars to write about *Barron* that the author of this Note was able to locate as of the time of this writing).

¹³⁵ See 203 N.E.3d 1125, 1134–37 (Mass. 2023) (analyzing the history and purpose of Article XIX to determine its meaning and to hold that Southborough’s civility policy unconstitutionally contradicts it).

analyzed the original intent of Article XIX, this Section supplements that understanding with insight into the Article's original public meaning.¹³⁶ When seeking the original public meaning of a constitutional provision, the Supreme Court often looks to English language dictionaries in publication around the time of such provision's ratification, and this Note adopts the same approach to interpret the text of Article XIX.¹³⁷

Article XIX's text provides that "[t]he people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions . . . and to request of the legislative body . . . redress of the wrongs done them, and the grievances they suffer."¹³⁸ The operative word of the first clause of Article XIX is "assemble," which the 1773 edition of Samuel Johnson's English language dictionary defined as "[t]o bring [persons and things] together into one place."¹³⁹ A few decades later, Noah Webster's 1828 English language dictionary provided a somewhat broader definition: "[t]o collect a number of individuals or particulars into one place, or body," or "to bring or call together."¹⁴⁰

Yet, the right to assemble granted in Article XIX is notably tempered by the requirement that the right be exercised "in an orderly and peaceable manner."¹⁴¹ Johnson's 1773 dictionary defined "orderly" as either "[n]ot tumultu-

¹³⁶ See *supra* notes 22–50 and accompanying text (seeking the original intent of Article XIX by tracing its origins, legislative history, and drafters' philosophies); *supra* notes 91–97 and accompanying text (reviewing the SJC's application of Article XIX in *Barron*, including the invocation of the Article's history and purpose, in order to determine its proper interpretation); *infra* notes 139–146 (detailing the original public meaning of Article XIX).

¹³⁷ See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008) (interpreting the text of the Second Amendment of the United States Constitution by using the eighteenth century and early nineteenth century definitions of the Amendment's operative words); *Chifalo v. Washington*, 591 U.S. 578, 599 (2020) (Thomas, J., concurring) (interpreting Article II, Section 1 of the Constitution by using contemporary definitions of the provision's operative words). The Court in *Heller* specifically referenced Noah Webster's *American Dictionary of the English Language* from 1828 and Samuel Johnson's *Dictionary of the English Language* from 1773, among others. 554 U.S. at 581. These sources will be used where applicable in this Note to find the original public meaning of Article XIX. See *infra* notes 139–146 and accompanying text.

¹³⁸ MASS. CONST. art. XIX. The following analysis will focus on the meaning of "assemble" rather than the other verbs following it, assuming that "consult[ing] upon the common good," "giv[ing] instructions to their representatives," and "request[ing] the legislative body" are merely stated purposes for assemblies protected by the provision. See *infra* notes 139–146 (analyzing the original public meaning of the pertinent terms of Article XIX without analyzing the original public meaning of "give," "consult," or "request").

¹³⁹ SAMUEL JOHNSON, *DICTIONARY OF THE ENGLISH LANGUAGE* (4th ed. 1773).

¹⁴⁰ See NOAH WEBSTER, *AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE* (1st ed. 1828) (defining "assemble" more broadly than Samuel Johnson did, while still maintaining the word's connection to gatherings of people).

¹⁴¹ See *Barron v. Kolenda*, 203 N.E.3d 1125, 1136 (Mass. 2023) (explaining that Article XIX only provides protection of speech to government officials when such speech is conducted "in a peaceable and orderly manner"); *Commonwealth v. Porter*, 67 Mass. (1 Gray) 476, 478 (1854) (hold-

ous; well regulated,” or as “[o]bservant of method.”¹⁴² Webster apparently took instruction from Johnson’s earlier dictionary, as he provided the same two definitions, along with additional alternative definitions: “[n]ot unruly” or “peaceable.”¹⁴³ As for “peaceable,” Johnson provided various definitions, including “[n]ot quarrelsome; not turbulent,” and “[q]uiet; undisturbed.”¹⁴⁴ Webster again defined the term similarly.¹⁴⁵

Taken together, Article XIX likely had an original public meaning that was something akin to the following: the people have a right to bring themselves together in a public body to instruct their representatives and request redress of their grievances in a manner that is not tumultuous, quarrelsome, unruly, or turbulent.¹⁴⁶

III. THE RIGHT TO ASSEMBLE IS NOT THE RIGHT TO BE RUDE

In *Barron*, the SJC could have reached the same decision by finding the Southborough civility policy unconstitutional under either Article XVI or Article XIX.¹⁴⁷ But instead, it chose to find the policy unconstitutional under both provisions.¹⁴⁸ This was both unnecessary because the SJC could have reached a holding that struck down the civility policy under Article XVI alone, and improper because the SJC incorrectly interpreted the original public meaning and intent of Article XIX.¹⁴⁹ Part A of this Section critiques the SJC’s originalist interpretation of Article XIX.¹⁵⁰ Part B argues that this incorrect originalist interpretation will lead to jurisprudential confusion between the right to assemble and

ing that Article XIX’s principal protection is the protection of peaceable assemblies, and that laws which promote the peaceable nature of assemblies further this constitutional mandate).

¹⁴² JOHNSON, *supra* note 139.

¹⁴³ WEBSTER, *supra* note 140. Webster clarifies his “unruly” definition of the term further by saying “not inclined to break from inclosures; peaceable. We say, cattle are *orderly*.” *Id.*

¹⁴⁴ JOHNSON, *supra* note 139.

¹⁴⁵ See WEBSTER, *supra* note 140 (providing four different definitions of “peaceable,” including “[f]ree from private feuds or quarrels,” and “[q]uiet; undisturbed; not agitated with passion”).

¹⁴⁶ See *supra* notes 139–146 (providing definitions of the terms used in Article XIX from dictionaries that were contemporary to the drafting of the Massachusetts Constitution of 1780).

¹⁴⁷ See *infra* notes 170–179 (explaining how Article XVI provided independent grounds to reach the same result that the SJC reached in *Barron* using Article XIX).

¹⁴⁸ See *Barron v. Kolenda*, 203 N.E.3d 1125, 1137 (Mass. 2023) (concluding that Southborough’s civility policy was unconstitutional under both Article XVI and Article XIX).

¹⁴⁹ See *id.* at 1136 (holding that the history and intent of Article XIX indicates that it protects the content of speech, much like Article XVI does); *supra* notes 22–50 (tracing the history of Article XIX to find that it was intended to prevent the suppression of Town Meeting, and to protect local government from intrusion by higher forms of government); *supra* notes 139–146 (concluding that the original public meaning of Article XIX’s “peaceable and orderly” phrase likely meant that assembly was only protected if it was not tumultuous, quarrelsome, unruly, or turbulent); *infra* notes 152–182 and accompanying text (arguing that the SJC in *Barron* misinterpreted Article XIX but correctly interpreted Article XVI).

¹⁵⁰ See *infra* notes 152–169 and accompanying text.

the right to free speech, and explains how the SJC could have used Article XVI to strike down Southborough's civility policy without misinterpreting Article XIX.¹⁵¹

A. The Misguided Originalist Analysis in Barron

In *Barron*, the SJC concluded that Article XIX's history and intent demonstrated that its drafters envisioned an aggrieved, angry populace, and that the right to assemble thus protected personal, rude, and disrespectful opposition to government.¹⁵² Although Article XIX was drafted in an era of acute animosity between the people of Massachusetts and the British government, the SJC misinterprets the animus behind the adoption of the provision.¹⁵³

Since colonial times, Massachusetts has had a long history of strong local government, which the British government sought to stifle by passing legislation to make Town Meetings unlawful.¹⁵⁴ The British government attempted to outlaw Town Meetings at least twice.¹⁵⁵ First, in the 1680s, the Crown-appointed Governor Andros tried to ban the assembly of Town Meetings, and the people of Massachusetts revolted until the British government removed Governor Andros and repealed the ban.¹⁵⁶ Then, in the 1770s, Parliament tried to ban Town Meetings again, only that time the revolt was nationwide and ended with Massachusetts' independence from the British government.¹⁵⁷

The Adamses, who drafted Article XIX, sought to prevent a repetition of this oppressive history by providing a constitutional right to assemble in Massachusetts, thereby protecting traditional local government in the Common-

¹⁵¹ See *infra* notes 170–182 and accompanying text.

¹⁵² See *Barron*, 203 N.E.3d at 1134–35 (reaching conclusions about the original intent of Article XIX based on its historical context).

¹⁵³ See MIDDLEKAUF, *supra* note 35, at 248 (explaining how the first Continental Congress discussed possible responses to the Intolerable Acts, including the Massachusetts Government Act that banned Town Meetings, such as a total boycott of trade with England or an outright declaration of war); *supra* note 39 and accompanying text (concluding, based on historical accounts and the writings of Samuel and John Adams, that Article XIX was a reaction against the suppression of town governments' ability to assemble on their own accord, rather than a reaction against content-based regulations of speech at Town Meetings).

¹⁵⁴ See *supra* notes 22–38 and accompanying text (tracing the origins and importance of local governments' ability to assemble in colonial New England, and describing the vehemently negative reactions of Massachusettsans on two documented occasions when the British government deprived them of this right).

¹⁵⁵ See *infra* notes 156–157 (listing the two times that the British government outlawed Town Meetings).

¹⁵⁶ See *supra* notes 33–34 (explaining how Andros attempted to strip Massachusettsans of their right to assemble and how this led to his political downfall).

¹⁵⁷ See MIDDLEKAUF, *supra* note 35, at 594–95 (recounting how the Revolutionary War ended with American independence through the signing of a treaty between the United States and Great Britain); *supra* notes 35–38 (identifying the Massachusetts Government Act of 1774 as one of the precipitating causes of revolt in Massachusetts).

wealth.¹⁵⁸ In this way, laws against the assembly of any Town Meeting in the young State would have to be ruled unconstitutional by the judiciary in its exercise of judicial review; a better solution, perhaps, than the people revolting in response to such a ban every century.¹⁵⁹ It is conceded that the Massachusetts Government Act of 1774 did include a content-based regulation on assemblies, in that it required Town Meetings convened by the Governor to only discuss topics of his own prescription.¹⁶⁰ But the principal concern leading to the adoption of Article XIX was not that the meetings were restricted in content, but rather that they were restricted to the governor's will to convene them, thereby effectively abolishing them.¹⁶¹ The drafters likely would have included a provision protecting against regulation of the content of public meetings in Article XIX if they sought to prevent repetition of that particular aspect of the Massachusetts Government Act.¹⁶²

The original public meaning of Article XIX, too, seems to undermine rather than support the SJC's interpretation of it.¹⁶³ The dictionary definitions of "peaceable" and "orderly" from the time of Article XIX's drafting suggest that the drafters believed that the content, or at least the procedure, of protected

¹⁵⁸ See *supra* notes 39–48 (connecting the writings and thoughts of Samuel and John Adams to Article XIX). The concept of a right to assemble was not a novel invention of the Adams cousins, but rather had been immortalized as a principle of Massachusetts government almost a century and a half prior in the Body of Liberties of 1641. See WHITMORE, *supra* note 24, at 35 (codifying the right to assemble for residents of colonial Massachusetts in the mid-seventeenth century).

¹⁵⁹ See MASS. CONST. art. XIX (providing the right to assemble as a constitutional guarantee). John Adams seemed to believe that the form of government adopted in Massachusetts should not be one that required the people to resort to violence to secure their natural rights. See JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 71 (Phila., Hall & Sellers 1787) (opining that the people's right to legally and peaceably select new governing officials is both wise and necessary to prevent recurring political violence).

¹⁶⁰ See HOSMER, *supra* note 41, at 266 (explaining that the Massachusetts Government Act, as passed by Parliament, attempted to stop Town Meetings from assembling unless the governor convened them and to limit the content of their discussions to topics that the governor prescribed).

¹⁶¹ See, e.g., 3 THE WRITINGS OF SAMUEL ADAMS, *supra* note 41, at 3–6 (arguing that Massachusetts residents have a natural right to assemble, rather than a right to free speech at such assemblies).

¹⁶² See Bowie, *supra* note 13, at 1707 (illuminating how a free speech provision was not actually added to the list of the Commonwealth's constitutional rights until 1948). One legal historian has suggested that free speech protections were implied in the Article XIX right to assemble based on one writing by John Adams, which stated that in Town Meeting, every "Man, high and low . . . has a right to vo[te] and [to speak his senti]ments of public Affairs." *Id.* at 1708. John Adams was speaking specifically about Town Meetings, however, and not about public comment periods at select board or city council meetings; thus it requires a significant logical leap to conclude that Adams, who would later sign legislation that criminalized criticism of the government into law as President of the United States, interpreted Article XIX to allow for free speech outside of Town Meeting. See *id.* (quoting John Adams on the subject of Town Meeting); *Alien and Sedition Acts (1798)*, *supra* note 43 (describing how, in 1798, then-President John Adams signed the Alien and Sedition Acts into federal law).

¹⁶³ See *supra* notes 135–146 and accompanying text (seeking the original public meaning of Article XIX using contemporary dictionaries).

assemblies should be regulated to prevent disorder, tumult, or unruliness.¹⁶⁴ The potential counterargument that the addition of these terms to the text was accidental, and thus that orderliness is not an operative term in the provision, is untenable.¹⁶⁵ The term “orderly” was explicitly added to Article XIX while the earlier Pennsylvania Constitution only contained the term “peaceable,” thereby indicating the particular importance of orderliness in the Massachusetts right to assemble.¹⁶⁶

The SJC believed that its exercise of judicial review against the Southborough civility policy was consistent with the text and intent of Article XIX, but there is a stark difference between a policy regulating the content of speech at a public meeting and a law banning public meetings altogether.¹⁶⁷ Taken together, the text, history, and purpose of Article XIX suggest that its intent was not to prevent content-based regulations of speech at public assemblies, but rather to defend the natural right to hold them at all.¹⁶⁸ Ironically, *Barron* may have the unintended effect of inspiring local governments to completely remove public comment periods from their meetings if they seek to curb incivility.¹⁶⁹

B. Blurring the Line Between the Right to Free Speech and the Right to Assemble

Putting Article XIX aside, the SJC reached the correct result in *Barron* under Article XVI—the right to free speech—and thus reached the correct outcome on the facts of the case by declaring the Southborough civility policy unconstitutional.¹⁷⁰ The SJC properly interpreted established case law by holding that speech at a public comment period is political speech, and thus regulating its content must satisfy strict scrutiny, meaning that it must be narrowly

¹⁶⁴ See *supra* notes 142–145 and accompanying text (providing contemporary definitions of the terms “peaceable” and “orderly”).

¹⁶⁵ See *infra* note 166 and accompanying text (arguing why such an assertion is untenable).

¹⁶⁶ See Bowie, *supra* note 13, at 1707 (highlighting how the inclusion of the “orderly and peaceable” phrase in Article XIX was the only meaningful difference between its text and the text of Pennsylvania’s assembly clause).

¹⁶⁷ See *Barron v. Kolenda*, 203 N.E.3d 1125, 1137 (Mass. 2023) (holding that the Southborough civility policy was “contradicted by the letter and purpose of [Article XIX]”).

¹⁶⁸ See *supra* notes 152–167 (assessing the original intent and original public meaning of Article XIX to conclude that the SJC reached an improper holding on the Article XIX issue in *Barron*).

¹⁶⁹ See *Supreme Judicial Court Declares Public Comment Policy Unconstitutional*, *supra* note 12 (advising municipalities seeking to conform with *Barron* that public comment periods are not a statutory requirement for municipalities’ meeting, but that some specific municipal charters or special acts may place such a requirement on individual municipalities).

¹⁷⁰ See *Barron*, 203 N.E.3d at 1137–39 (holding the Southborough civility policy to be unconstitutional under Article XVI because it regulated the content of political speech rather than its time, place, and manner, and because the regulation was not narrowly tailored to serve a compelling governmental interest).

tailored to serve a compelling governmental interest.¹⁷¹ The Southborough civility policy was not narrowly drawn, because the policy's text was so vague and standardless that conceivably any speech could be prohibited if it does not suit the Select Board's subjective opinion of what might be "respectful."¹⁷² Moreover, the SJC was within its discretion to determine that the need for civility is less compelling than the need for uninhibited political discourse.¹⁷³

By using both Article XVI and Article XIX to reach its holding, the SJC has blurred the jurisprudence between the two rights.¹⁷⁴ This blurring began as early as in *Desrosiers*, when the SJC held that Articles XVI and XIX require identical analyses to determine the constitutionality of restrictions on protected speech and assembly.¹⁷⁵ Yet, the result of *Barron* goes even further by holding that content-based regulations of political speech violate Article XIX, despite the fact that such regulations must also be analyzed under Article XVI at the same exact level of scrutiny.¹⁷⁶ Thus, *Barron* has the effect of diluting Article XIX as merely a concomitant rule that an individual would violate whenever violating Article XVI (although, perhaps, only at governmental meetings).¹⁷⁷ In effect, this dilution distorts and obfuscates the important and independent purpose of Article XIX, which is to prevent higher governmental authority from forbidding the assembly of the people in local government.¹⁷⁸ The degree

¹⁷¹ See *id.* at 1138 (finding that the Southborough civility policy regulated political speech because it involved speech at a governmental meeting, and that it was content-based because it regulated what was said at such a meeting); *Commonwealth v. Lucas*, 34 N.E.3d 1242, 1251–52 (Mass. 2012) (clarifying the requirements for a constitutional content-based regulation of political speech).

¹⁷² See *Barron*, 203 N.E.3d at 1138 (stating that the civility code was "drafted with an extraordinarily broad brush," and thus was not narrowly tailored). As a reminder, the civility code stated that "[a]ll remarks and dialogue in public meetings must be respectful and courteous, free of rude, personal, or slanderous remarks." *Id.* at 1136.

¹⁷³ See *id.* at 1138 (holding that the Southborough civility code did not serve a compelling governmental interest, and rather inhibited a different compelling interest: the preservation of open political discourse); see also *Van Liew v. Stansfield*, 47 N.E.3d 411, 418 (Mass. 2016) (concluding that under the First Amendment of the United States Constitution, political speech, and particularly political accusations, must remain uninhibited).

¹⁷⁴ See *infra* notes 175–179 and accompanying text (analyzing how the SJC's application of similar tests for similar legal issues has led to confusion between the applicability of Articles XVI and XIX).

¹⁷⁵ See *Desrosiers v. Governor*, 158 N.E.3d 827, 846 (Mass. 2020) (holding that strict scrutiny is the applicable standard for determining whether such restrictions are constitutional).

¹⁷⁶ See *Barron*, 203 N.E.3d at 1137–39 (analyzing whether Southborough's civility policy violated both Articles XVI and XIX by determining whether the policy's content-based regulation of political speech was narrowly tailored to serve a compelling governmental interest and reaching the same conclusion under both Articles).

¹⁷⁷ See *id.* at 1130–31 (holding that the Southborough civility policy violated both Articles XVI and XIX, without drawing a proper distinction between the applicability of these rights).

¹⁷⁸ See *supra* notes 39–43 (interpreting the history of Article XIX to determine that its purpose was to protect the right of Town Meetings to assemble and conduct the business of local government—a right that is independent from the right to free speech).

to which this result will be felt in future Article XIX cases will become clearer as litigators and courts begin to draw on *Barron* as authority.¹⁷⁹

In a novel approach, the SJC extracted Barron's right to be rude to Kolen-da from the Article XIX right to assemble.¹⁸⁰ But, as has been shown, a right to be rude already exists under Article XVI.¹⁸¹ The SJC's distortion of the right to assemble into a second and superfluous right to be rude was a misappropriation of Article XIX's text, history, and purpose that will undoubtedly result in jurisprudential blurring between the two provisions.¹⁸²

CONCLUSION

In 2023, in *Barron*, the SJC held that the Massachusetts constitutional provisions for the right to assemble and the right to free speech preempted the Town of Southborough's civility policy for the public comment periods of its Select Board meetings. Article XIX, which provides the right to assemble, was originally intended to prevent the dissolution of Town Meetings, and its original public meaning does not lend itself to the protection of discourteous speech. The SJC incorrectly determined that Article XIX, as understood by its drafters, should disallow civility policies like that of Southborough. Article XVI, however, was properly applied by the SJC to strike down the civility policy, and could have been applied independently in order to do so. *Barron* has already had and will continue to have a significant impact on public meetings in local government by strictly curtailing regulations on public comments to only permit those that regulate the time, place, and manner of speech. The SJC could have reached the same result in the case without blurring the line between the right to assemble and the right to free speech, and thus could have avoided these unnecessary consequences.

ALEXANDER FRANZOSA

¹⁷⁹ See *Supreme Judicial Court Declares Public Comment Policy Unconstitutional*, *supra* note 12 (suggesting that the full extent of *Barron*'s impact is difficult to predict). The Appeals Court of Massachusetts has already cited *Barron* in a non-precedential decision, interpreting it to hold that civility can be encouraged, but cannot be required. See *M.B. v. T.E.*, No. 22-P-906, 2023 WL 5163290 at *4 (Mass. App. Ct., Aug. 11, 2023) (holding, in a case about a harassment prevention order, that civility could not be required in emails from an alleged harasser to an alleged harassee).

¹⁸⁰ See *Barron*, 203 N.E.3d at 1130–31 (holding that the Southborough civility policy was unconstitutional under both Articles XVI and XIX, and that Barron was entitled to relief under the MCRA).

¹⁸¹ See *supra* notes 170–173 (explaining how the SJC reached the correct conclusion that the Southborough civility policy violated Article XVI).

¹⁸² See *supra* notes 152–168 (arguing that the SJC misinterpreted Article XIX's text, history, and purpose).