

RESEARCH ARTICLE

An Enduring System of Local Deliberative Democracy: The 21st Century Legal and Normative Structure of Massachusetts Town Meeting

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This essay examines the legal framework for local deliberative democracy in Massachusetts, within the legislature known as “town meeting.” We review the trajectory of this system of local government allowing direct exercise of citizen power via deliberative governance. We focus on the current framework of state and local laws that were created to support and direct local deliberative systems in Massachusetts with greater attention to functional elements of the system in this legal rhetorical history. We explore the powers of town meeting, including its role within state and federal government, the laws and norms enabling and limiting deliberation, and how and why the legal framework for town meeting has allowed it to endure. Throughout our analysis, we include examples, detailing how philosophical principles of inclusion, self-determination, fairness, and fidelity to the common good underpin town meeting. We note the system’s evolution and close with considerations about directions for further changes. The legal framework for town meeting, largely unchanged for close to three centuries, successfully integrates a local community voice into a broader system of deliberative democracy.

Keywords: town meeting; deliberation; legal framework; deliberative system; direct deliberative democracy; deliberative governance

1. Introduction

Early American critics of direct, deliberative democracy admonished against the idea of an open assembly of purported equals. They argued that in these assemblies, emotion will rule reason, the forceful will rule the reticent, and ‘spectacles of turbulence and contention’¹ will result. As part of debate on the extent and nature of the federal government, ‘Federalists insisted that “the people” meant “we, the people of the United States” rather than the citizens of towns, counties, and states’ and ‘sought to replace those democratic cultures with a powerful national government’ (Miller 1988: 100). The New England town meeting was among those local cultures. And yet today, town meeting has endured as an effective form of local legislature. This article will examine the role of the legal framework adopted for town meetings in Massachusetts in enabling communities to continue to govern themselves through the deliberative democratic body known as ‘open town meeting,’ adapting to shifts in demographics, economic and environmental realities, and technology.

In reviewing the trajectory of this system of local government allowing direct exercise of citizen power via deliberative governance, we explore: 1) the powers of town meeting, including its role within state and federal government; 2) the laws and norms enabling and limiting deliberation; and 3) how and why the legal framework for town meeting has allowed it to evolve and to remain relevant and viable. Throughout our analysis, we include examples detailing how the philosophical principles of inclusion, self-determination, fairness, and fidelity to the common good underpin town meeting. Our aim is neither case study nor a comprehensive historical analysis. This essay offers a rhetorical history of town meeting within the legal framework that created it. We argue that the legal framework for town meeting, largely unchanged for close to three centuries, successfully integrates a local community voice into a broader system of deliberative democracy.

Town meeting is a ‘deliberative system’ that ‘encompasses a talk-based approach to political conflict and problem solving—through arguing...expressing, and persuading’ (Mansbridge et al. 2012: 5–6).² We will explain the town meeting system’s ‘less is more’ legal framework, showing how it allows varied implementation and adaptation in individual communities and empowers and trusts citizens, thereby enabling this form of deliberative democracy to endure. We find that Massachusetts law codified basic

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elements which empirically had worked in the self-regulation of communities through town meetings, leaving broad latitude for implementation of the basic elements in individual towns, but also creating guardrails to prevent communities from making local governance decisions inimical to their roles as functional units within the larger state and national governments. We measure success by the observed functionality of communities employing open town meeting as their legislature and the volume of communities (259 towns plus two fire districts) retaining this form of legislature rather than opting for an elected representative town meeting (33 towns) or city council (59 cities). We are interested in how the open town meeting legislature functions. We make no claims about the qualities of deliberations enabled by this framework, as that would require empirical analysis of the deliberations and their local contexts beyond the scope of this essay.³

2. Present Context and Prior Literature

We begin with developments occurring since the late 18th century, when the Commonwealth of Massachusetts adopted its Constitution. In the 19th century, visitors to the United States observed and wrote about its local governance, focusing on town meeting as a unique feature of the New England states (Bryce 1888; Tocqueville 1835). Tocqueville observed that '[t]he New England town brings together two advantages that, wherever they are found, strongly excite the interest of men [sic]—namely, independence and authority. Its sphere is limited, indeed; but within that sphere its action is unrestrained' (Tocqueville 1835). Resident scholars also have examined the norms, meanings, powers, and limits of local town governance (e.g., Bryan (2004), in Vermont; Handlin & Flug Handlin (1947/1969), in Massachusetts). However, few scholars of deliberative theory and practice have engaged the subject of contemporary town meeting comprehensively and analytically. Historical portraits of Massachusetts town governance (Abbott 1935; Adams 1892; Brown 1955; Bryce 1888; Handlin & Flug Handlin 1947/1969; Harrington 1984; Gustafson 2019; Kerr 1964; Lockridge & Kreider 1966; Lombardo 1997; Mandell 2019; Potter 1957; Round 1999; Tilden 1958; Tocqueville 1835; Zuckerman 1968, 1978, 2019, Zimmerman 1967) are more numerous than contemporary studies (Bresler 1996; Bryan 2004; DeSantis & Hill 2004; Leslie 2013, 2018; Mansbridge 1980; Salvino, Tasto, & Turnbull 2012; Townsend 2004, 2006, 2009, 2019; Townsend & Milburn 2022; Zimmerman 1999). The area thus remains ripe for study.

Two possible explanations for the scant contemporary scholarly interest in town meeting are that the institution is presumed passé, or too rare. The first presumption is reflected in the group interview included in the *Journal of Public Deliberation's* reprint of *Participation's* special issue focused on town meetings (Bryan et al. 2019). Bryan faults the *Journal's* animating question itself: 'Even the question posed by *Participations* exhibits this historical bias: "Is it still beneficial today to refer to these *old* (my italics) models of participation?" Why not employ the verb "use"? And what's with the word "old"?'

The second presumption is reflected as Bryan continues: 'Hundreds of town meetings are still held every year in New England' (2019: 1–2). Despite being rare in the US, town meeting is the majority form of local legislature in Massachusetts; study of these contemporary legislatures is useful for seeing what 'ordinary' citizens do when their governments entrust them with authority to govern. Bryan (2019) reminds us that town meeting 'was not created to "enhance citizen participation and deliberation." It was created to govern' (2019: 13). It is this function of deliberation that is lost in narrower descriptions or critiques that do not attend to the role of the town meeting in the context of a broader governmental system; deliberation at town meeting is not meant to mediate conflict (cf. Gustafson 2019: 5), but to govern. Deliberation is not an end but a means to an end. Studying the legal framework of town meeting allows us to understand why it has continued to operate.

Mansbridge et al. observed that much research on deliberation in democracy has not attended to 'the interdependence of sites within a larger system' (2012: 1). That is, most research is focused on a particular event, or a single unit in isolation. They add that 'no single forum, however ideally constituted, could possess deliberative capacity sufficient to legitimate most of the decisions and policies that democracies adopt' (2012: 1). When scholars frame the analysis in this way, they obscure and deflect the myriad other ways in which a deliberative legislative body reaches decisions, accrued from peripheral deliberations over time, in some cases decades' worth. Mansbridge et al. (2012) urge setting aside this mode of analysis in favor of a systems approach (see also Parkinson & Mansbridge 2012). Zgiep (2019) further develops the concept by focusing on the relational and interactional connections across parts of the system, arguing the importance of understanding 'micro-deliberation which is the fundamental building-block of deliberative democracy' (2019: 8). Consistent with the observations of Mansbridge et al (2012), we find that systemic studies of town meeting are scarce. Bryan's (2004) work comes closest to a systems approach as applied to the state of Vermont, given that it considers the whole context of relations and nodes. An ethnographic approach is another way to consider town meeting in context (e.g., Townsend 2006, 2009, 2019).

We examine town meeting not as a discrete, self-contained institution but as a unit of a larger governmental system by reviewing laws, court decisions, and other sources related to Massachusetts town meeting. Town meeting occurs not in isolation, but within a community system of networked residents' needs, values, history, and laws, neighboring other community systems which are both similar and different, all within a larger legal framework (system) developed over hundreds of years. Its functions are better understood in the context of the systems in which it operates and the structures that both enable and constrain and enable it. A constellation of networks guides town meeting deliberations in the 259 Massachusetts towns that rely upon this form of legislature. Thus, we turn first to the larger context of which town meeting is part.

3. Town Meeting Power within State and National Government

3.1 Federal power as a limitation on town meeting

Town meeting today, which traces its beginnings to the 17th century American colonial period (Zimmerman 1999; Adams 1892; Hall 2019), has a defined role within a federal system. At the Constitutional Convention in 1787, the people of the United States agreed to vest certain powers of the states in the new federal government and to make those powers supreme. State constitutions and laws vested certain state powers in local governments. Although there was some debate historically whether municipalities have an 'inherent right to self-governance,' this view was never broadly accepted.⁴

3.2 State power as both limiting and empowering town meeting

The Massachusetts Constitution, adopted in 1780 (the impetus for which originated in town meeting votes), provides that municipalities may exercise only those powers specifically granted to them by the state legislature, known as the General Court.⁵ In other words, to enact a local law governing a particular topic, a city or town had to find an express authorization of local power to do so somewhere in a state statute. Pressure from local governments for greater control over local matters, originating largely in town meeting votes, led to a patchwork of special state legislative acts to enable individual communities to adopt local regulations, such as creating a historic preservation district, regulating location of signs, or providing for the Town Clerk to be appointed rather than elected at the polls. In the 20th century, growing frustrated with the volume of special municipal acts being requested by towns, the state Legislature concluded that a change to the system of state and local government was in order.

System change came in the form of the Home Rule Amendment to the state constitution adopted in 1965. The American Municipal Association (predecessor of today's National League of Cities)⁶ promoted this amendment which reversed the approach to local authority for self-governance. Now, a city or town would have the power to enact local legislation on any matter unless specifically preempted by state or federal law, or otherwise inconsistent with state or federal legislation governing the same topic.⁷ Today, in practice, *somewhat* greater power for self-rule belongs to Massachusetts town meetings. However, local legislatures still must be cognizant of their place within the state and federal system and may not regulate in areas which the state or federal government has chosen to regulate, such as water resource management, interstate commerce and transportation. Special state acts remain necessary to empower town meeting to adopt certain types of measures, such as a property tax exemption for senior citizens of limited means, or a bylaw permitting the recall of elected officials.

3.3 Separation of powers limiting local power

The 'separation of powers' principle also limits town meeting authority. This familiar concept provides that

each branch of government has its own function, acts as a check and balance on the others, and none may invade the province of the others.⁸ In local government, town meeting serves the legislative function, the Select Board serves the executive function, and various boards and committees serve the judicial function. As the legislative branch, town meeting may not invade the province of the Select Board in carrying out its executive function, or that of other committees serving either an executive or judicial function. For example, town meeting may not vote to fire the town manager or the police chief, because the hiring and firing of such town employees is the province of the executive power.

3.4 Town meeting's local duties and authority

Within its defined sphere, town meeting has substantial governance duties and authority. Massachusetts municipal governments are responsible for local roads, parks, water, sewers, and other utilities that in other places are managed by county governments. Town meeting must authorize annual appropriations for operation of municipal government and public education,⁹ as well as any borrowing necessary for these purposes, and salary scales for town employees. Local property tax rates are based upon town meeting appropriations. Some towns provide municipal services, such as electricity, water, and sewer, through entities operated as self-supporting independent businesses, with policies and rates determined by an appointed board of citizens. These entities, known as 'enterprise funds,' must seek authorization from town meeting for the expenditure of collected fees on operations, as well as approval for capital project borrowings.

Town meeting is empowered to enact bylaws ('ordinances' in cities) relating to a wide variety of matters, such as land use, hunting and fishing, smoking, refuse disposal, signs, disorderly conduct, historic preservation, domestic animals, and sale of goods in plastic bags and bottles.¹⁰ It may acquire property for public purposes by purchase or eminent domain taking,¹¹ and dispose of town property through sale¹² or long-term lease.¹³ Town meeting may amend the organizational charter of the town, within certain state-defined parameters.¹⁴ It may create and charge a committee to study an issue and report back to a future town meeting.

Adoption of optional legislative provisions and programs created for towns by the state, such as local hotel or meals tax, participation in a state-matched community preservation fund, or reduced local road speed limits, require town meeting authorization. Typically, a town's elected officials bring the option to adopt a state program before town meeting. Town meeting holds the sole authority to direct the Select Board to petition the state legislature for special legislation to give the town additional authority for local regulation. Either regular voters or local elected officials may bring forward such proposals.

3.5 State review of local bylaw decisions

Guardrails to ensure that town meeting action stays within its sphere of power are found in the state statutory

requirement that the Attorney General (AG) review general or zoning bylaws, not budget decisions, passed by town meetings prior to their becoming effective and in the reviewability of town meeting actions by the courts. So long as a community decision formed through deliberation at town meeting does not invade the province of another branch of government or run afoul of state or federal law, it may be enacted as local law. The AG will invalidate a bylaw adopted by a town meeting exceeding its legal authority. For example, Southampton Town Meeting voted to amend their bylaws to restrict town meeting speakers' right to offer amendments to monetary articles, limiting the amounts they may offer; the AG disapproved of this due to it being inconsistent with state law.¹⁵ Other unauthorized actions are subject to challenge in the courts by an aggrieved party. These measures to ensure that town meeting operates as intended with the larger governmental system have proved effective over time.

3.6 Town meeting's influence on other branches and levels of government

On matters beyond its legal authority, town meeting has the power to *influence* other branches of town government and other levels of the governmental system. When voters have no authority to act directly, but have a point of view, they may use town meeting to communicate their views by adopting a resolution. Typically, a resolution is brought to town meeting by means of a 'citizen petition,' an article offered by ten or more registered voters of the town. For example, although town meeting has neither legal authority to direct a School Committee to construct an athletic field using natural versus artificial turf nor power to veto a school budget item for an artificial turf field, it does have the power to adopt a resolution stating the voters' preference for natural turf and urging the School Committee to choose accordingly. Although such resolutions are not formally binding, elected officials ignore them at their peril in the next election. On issues of state or national importance, such as expanding state law on management of plastic beverage bottle waste or revamping national political campaign contribution laws, communities have been known to organize presentation of the same resolution before town meetings in multiple communities, followed by the transmittal of all resolutions thus adopted to the state or federal legislature. The ability of a community to raise its voice through resolution, serves as a pressure-relief valve for frustration and enables the community to abide the limitations on local authority (DeSantis & Hill 2004; Leslie 2013, 2018; Mansbridge 1980; Townsend 2006, 2009, 2019; Salvino, Tasto, & Turnbull 2012). The continued use of town meeting by local communities to deliberate upon topics of concern, find a common voice, and make that voice heard beyond legally defined borders and spheres of authority strongly suggests that this function is one of the reasons that town meeting endures as a form of local government.

4. Laws and Norms Enabling and Limiting Deliberation

Town meeting offers participants a chance to deliberate on proposals before they vote. In deliberations, participants ask questions, give answers, weigh benefits and costs, make arguments, tell stories, and engage in verbal play (Townsend 2006, 2009, 2019; Townsend & Milburn 2022). They bring their own professional expertise, experiences, and have town staff and consultants. In North Andover, for example, deliberation on a citizen's petition to permit a medical marijuana facility was held. One participant asked for more time to consider the environmental impacts the proposal would have on a local lake; a business owner spoke to the economic benefits it would have; and another made a motion to shorten the time for deliberation, which is denied by the Moderator (NorthAndoverCAM 2017). Amendments can be made—with deliberation on them first, then a vote on whether to amend, before returning to more deliberation on the main motion.

4.1 State law framework for town meeting

The state constitution and general laws create the legal framework for town meeting decision-making, while locally adopted regulations and normative rules and traditions give full and unique shape to the deliberation that takes place at each town meeting. This legal structure left room for the local variations and nuances to develop. During the 17th and 18th centuries, when individual towns were distant from and in limited communication with each other, each adopted their own rules and procedures for town meeting. Every town meeting reflected the character and values of its respective town (Zimmerman 1999). The same is true today.

State law protects the basic rights of voters by requiring that towns permit all registered voters to participate in town meeting¹⁶ and provide a venue (or connected venues) large enough to accommodate them, with provision for all to hear and to address the meeting.¹⁷ If a number of voters greater than the venue is able to support come to the meeting, it must be adjourned and reconvened within a specified time at a venue able to accommodate all voters who wish to participate.¹⁸ To assure advance notice of the matters open for voters to deliberate and decide, the statutory framework imposes upon Select Boards the duty to publish a 'warrant' describing all the matters to be considered at town meeting, as well as the time and place of the meeting.¹⁹

Because town meeting is not a public forum but a *legislature*, participants do not hold all individual rights guaranteed against state interference by the state and federal constitutions. For example, at town meeting there is no First Amendment right to freedom of expression or to petition the government for redress of grievances: a non-voter has no right to speak unless given permission by the Moderator, and "there is no constitutional right to insist that there be debate when, in the proper course of town meeting procedures, the meeting determines to terminate or forgo discussion" (*MacKeen v. Town of Canton*, 379 Mass.

514 (1980)). Outside of the meeting itself, however, voters and non-voters alike remain free to voice their views on town meeting matters, individually or collectively, through print and social media, mailings, phone calls, posters, lawn signs, or public demonstrations—and they do. ‘Demonstration’ may occur as part of the broader deliberative system (Mansbridge et al. 2012: 5).

Pursuant to state law, Select Boards typically call the annual and special town meetings, but voters may direct the calling of a special town meeting by petition. Voters may bring issues of importance to the annual town meeting is a right secured in the statutory obligation of the Select Board to place on the warrant any item that ten voters petition to include. The Select Board is required to call a special town meeting sought by 200 voters, or 20% of all voters, whichever number is lower.²⁰ Should they ‘unreasonably’ refuse to call a meeting, a justice of the peace may do so.²¹ Town meetings, no matter the time of year, call people together to deliberate and vote, face-to-face, typically in the evening on weeknights. In general, a town must hold its town meeting within its own borders, but a community may hold its town meeting in the regional school building in a district of which they are part, despite the building being in another town.²²

Conduct of town meeting requires a Moderator (who must be an elected town resident) to regulate the meeting and a Clerk (who may be an elected town resident or an appointed resident or non-resident) to record results (Johnson et al. 2001: 26). The statutory requirement for a Moderator at town meeting codified a practice well established in colonial times. As early as 1645, it was determined in the Massachusetts town of Dorchester ‘that [so] Confusion may be avoided and business more orderly dispatched, for the ends before mentioned, we the seven men have appointed one of us to be our moderator to propound and also to order our meetings: And that all the assembly shall address and direct their speech unto him and shall be attentive unto the business of the assembly’ (Adams 1892: 16). The ‘seven men,’ antecedent to today’s Select Board, instituted the office of Moderator in reaction to a particularly raucous town meeting.

Largely unchanged since the 1700s, state law provides only general parameters for the exercise of the Moderator’s powers and responsibilities. As observed by the state’s highest court, ‘the office of Moderator is an ancient one. Its powers are extensive. It is provided, in [Massachusetts General Laws] that the Moderator “shall preside and regulate the proceedings, decide all questions of order, and make public declaration of all votes.”’ Unlike the ‘speaker,’ or president of a state or federal legislature or city council, the town meeting Moderator has no authority to decide the legislative agenda. The role is strictly procedural, created for the management of deliberation and votes. The Moderator is specifically empowered to give, and to withhold, permission to speak at the meeting, and to have removed any attendee who refuses the Moderator’s direction or otherwise disrupts the meeting.²³ In case of a public health or safety emergency,

the Moderator is empowered to recess and continue the meeting to another date, time, and place certain. Specific details on the management and conduct of deliberation at town meeting are left to local regulation through custom and practice or local bylaw.

Other provisions in the basic framework for town meeting endeavor to make certain that the results of its deliberative process accurately reflect the decisions of the voters. For example, if seven or more voters question the Moderator’s declaration of a vote taken by voice or a show of hands or raised paper slips, the Moderator must recount the vote by ‘polling the voters or dividing the meeting unless the town has by a previous order or bylaw provided another method.’²⁴ ‘Dividing the meeting’ involves a physical count of the votes, usually by having tellers walk through the hall to tally the votes row by row (Johnson et al. 2001: 24–25). Statutory supermajority provisions, requiring clear and convincing support within the deliberative body, apply to actions that would have a significant impact on a town. Examples include the two-thirds quantum of vote requirements for passage of land-use bylaws, purchase of real property by the town, approval of town debt obligation, or exclusion of specific debt from counting toward the maximum allowed property tax increase (2.5%, pursuant to state law).²⁵

To aid citizen legislators in making educated decisions on consequential financial matters, Massachusetts law also requires that any town with a tax apportionment valuation over \$1 million appoint or elect a finance or advisory committee, which ‘shall consider any or all municipal questions for the purpose of making reports or recommendations to the town.’²⁶ This broad charge has taken different shape in different towns, in accordance with individual town charters, bylaws, and traditions. In many towns, the finance committee is a powerful force both in shaping financial proposals, and in the meeting’s deliberations. In public meetings during the time preceding town meeting, the finance committee may drive changes in budgets proposed by a town manager or school superintendent, or it may even be itself responsible for developing and presenting the town’s budget to town meeting. These state-level framework provisions, together with the requirements that a Moderator elected by the voters must preside over the meeting and declare votes²⁷ and a town Clerk must be present to keep a publicly available record of the meeting’s votes,²⁸ have served for centuries to safeguard the effectiveness and legitimacy of decisions made through the deliberative process.

4.2 Local law, custom, and practice

The procedural basics for town meeting, requiring that action by the meeting take the form of motions on articles in the warrant followed by debate, opportunity to amend, closing of debate, and vote, are established by local rule and are relatively consistent across towns. As one parliamentary handbook author observed, ‘[e] very deliberative assembly, by the mere fact of its being assembled and constituted, does thereby necessarily

adopt and become subject to those rules and forms of proceeding, without which it would be impossible for it to accomplish the purposes of its creation' (Cushing 1928: 6). This fundamental need for general parliamentary rules led towns historically to adopt guides such as Robert's *Rules of Order* and *Cushing's Manual*. These guides, written with other types of deliberative bodies in mind, were not wholly apposite to town meeting.²⁹ In the 1960s, the Massachusetts Moderators Association, a statewide organization dedicated to the support and education of Moderators, wrote a procedural guide specifically tailored for town meeting, called *Town Meeting Time*, which has been widely adopted (Johnson et al. 2001).

Beyond the norms of parliamentary practice, significant local differences due to local histories and conflicts in the conduct of town meeting result in a distinct feel and functionality to every town meeting (Johnson et al. 2001). Some towns have adopted extensive bylaws governing specific town meeting procedures (limiting the Moderator's discretion), while others operate primarily by normative rules existing by tradition and custom with little proscribed by bylaw (reserving broad Moderator discretion). Some require a quorum of voters to allow town meeting to commence and act; others require no quorum. Means for taking a vote vary considerably, with some town meetings voting by electronic tabulation devices, some by raised paper voting slips, some by counted ballot, and some by voice vote. Numerous other practices vary by local custom, from the pre-meeting availability of information on the articles, to what materials may be distributed inside the meeting venue, to how motions are presented and who presents them, to whether non-voters may speak at the meeting and with whose permission, to whether and to what extent speakers are time-limited, to whether and how technology is used at the meeting, to the character and quality of deliberation, to whether demonstrations of voter sentiment (clapping, booing) are common, and even to whether a community supper precedes the meeting. In Bedford Town Meeting, for example, voters may speak, but nonvoters may speak only without objection from the participants, as happened in the deliberation on an amendment to provide additional appropriations for the Housing Authority's Life Management program (Bedford TV 2019). These differences, representing each town's choices on how to structure its local deliberative democracy to best meet its goals, form the 'character lines' that make the face of every town meeting unique.

The town meeting deliberative process serves to generate understanding of complex or technical recommendations. Voters who cannot reasonably be expected to have full command of the regulatory, technical, and financial aspects of, for example, a town wastewater treatment facility project, nonetheless are charged at town meeting with approving the borrowing of large sums of money for the recommended facility. On some decisions, the deliberative opportunity at town meeting may be adequate to secure the understanding and acceptance (or rejection) of the community. For particularly complex or controversial decisions, local officials may host additional deliberative sessions. No decisions are made at hearings

of this sort, but the deliberation that takes place often shapes the proposal and may provide the basis for town officials' recommendations.³⁰

Volunteer-led committees play a central role in local government and town meeting. These committees develop citizen competence and expertise in municipal affairs and contribute local knowledge to town meeting deliberations. Community members often raise issues (e.g., expressing desire for a senior center or recreation area) which elected officials have not identified as priorities; boards may then take up these citizen-identified priorities as their own. Committees study and hold public discussion on proposals offered for town meeting consideration, form recommendations for appropriate action, and often develop their own proposals. The ancillary deliberative processes of these committees add breadth and depth to town meeting deliberations, effectively enabling the legislature to delve deeply into complex issues to make informed decisions.

5. Adaptations within the Legal Framework

Adaptations in town meeting over time have allowed this form of direct deliberative democracy to remain a relevant and viable means of local government. Massachusetts state law allowed individual towns to determine how to implement powers and guardrails to accord with local needs and desires, and to adjust their chosen means over time. The framework was based upon historical experience of the town meeting form of legislature, with its local variations and idiosyncrasies. Contemporary towns, with complex infrastructure, public safety departments, public education systems, and myriad citizen services and regulatory obligations, are vastly different from the towns of the 17th century, whose concerns were primarily land and livestock management and local trade. The world of technology, communications, demographics, and economics in which the 21st-century town meeting operates could scarcely have been imagined in 17th-century America. Yet the town meeting abides. As communities have evolved, voters have been empowered to study and recommend modifications to their town meeting, within the limits of state and federal authority, to allow it to function as they need and wish through bylaws, charter changes, and Home Rule petitions. The simplicity and flexibility of the legal framework for town meeting have permitted it to adapt to the changes in the world around it.

For example, one important way in which the legal framework for town meeting systems has proven itself is in its ability to welcome new participants as expansion of the right to vote has expanded. Prior to 1920, voters were men, with women participating in minor roles, and prior to 1700, landowning men only.³¹ Mandell's (2019) study shares an exception, of Mahicans' participation in town meeting, in both Mahican and English, and serving in elected office. Women's suffrage in 1920 doubled the range of participation possible at town meeting.³² Current state law opens participation in town meeting to any town voter. Town meeting participants today may include both voting and non-voting residents, elected

and appointed government officials, employees, non-voting non-residents, and media. Changing community views continue to be a force for evolution in the rules on participation in town meeting; for example, several towns recently have sought authority from the state legislature to allow 17-year-olds to vote in municipal elections and participate in town meeting.

The expanded role of committees and boards is a significant adaptation underlying the ability of town meeting to remain an effective deliberative body for local governance as management of municipalities has become more complex physically, technologically, and legally. Today's towns have numerous citizen committees, focused on discrete areas such as capital planning, public works, cemeteries, historic preservation, and natural resources, which engage the community in advance of town meeting in deliberation on matters that will be brought to the meeting for a vote. Certain committees, for example, the finance committee, are created by state law, but the bulk are formed and charged locally. Without these advance deliberative sessions held by committees, and the publicly available summaries and recommendations which emerge from them, it would be challenging for town meeting to address the dozens of (frequently complex) items which appear on a typical warrant.

The ability of town meeting to allocate its deliberative time has been another component of its continued viability. State law *allows* for town meeting deliberation but does not *require* it. With local variation, it has been procedurally appropriate for a voter at town meeting to move to curtail deliberation and proceed directly to a vote, and for the meeting to vote accordingly. An average town meeting warrant in the 18th century might have included a dozen items and several meetings likely would have been called per year, whereas a 21st-century warrant may include upwards of sixty items with only one or two meetings called in a year. Towns' political calendars have become more regular. The budget calendar works backward from the spring annual town meeting. Committees' work centers on what they plan to bring before town meeting. The practical challenges of accomplishing a modern town's legislative business in a town meeting format are obvious. To address the increased complexity and volume of the business that comes before town meeting, towns have adopted 'consent agendas' identifying a slate of non-controversial items to be taken up together for a vote without any deliberation. Often the matters included have been addressed in other public deliberative sessions before town committees. Typically, the Moderator reads the consent agenda and pauses to allow any citizen who wishes to have the article held for separate full deliberation to do so with a simple call of 'hold.' The meeting then votes the slate of items remaining on the consent agenda, without further discussion. This efficiency measure allows the meeting to allocate its deliberation time to the matters on which it places the greatest weight.

The legal framework limits towns on the kinds of adaptations to town meeting they may make. For example, a town may not hold its town meeting 'virtually,' with voters watching, listening, and voting from various

and remote locations. Although voters and officials in some towns have urged the state legislature to permit remote participation in open town meeting, it has been reluctant to do so, in the current absence of cost-effective and reliable technology for secure large-scale remote voting.³³ Future advances in technology are likely to bring changes in this area, for better or worse. The challenge of maintaining meaningful deliberation among hundreds of voters on a virtual platform will be a truly new frontier.

6. Conclusion

In examining the system of laws and norms for deliberation in Massachusetts' local direct democracies, the legislative body and event known as 'town meeting,' we focused on the history and trajectory of this system, and expectations for its continued adaptation. Town meeting is a functioning legislature in an evolving system allowing exercise of direct citizen power. We examined the role of town meeting within the state and federal government, noting that the town meeting's contemporary power has been enhanced by the Home Rule Act. We focused on how town meeting's context helps in understanding its authority, and on the laws and norms enabling and limiting deliberation. This local legislature is a small unit operating within a larger system. Similarly, every deliberation at every town's town meeting has micro-moments that are influenced by the larger system and help that larger system develop and evolve. Most notably, as of our writing, a pandemic has demanded quick adaptation. The state legislature and individual towns met the challenge by enabling meetings to continue with precautions in place, such as mask-wearing, physical distancing, and meetings outdoors³⁴ or 'drive-in' style with cars in parking lots (Farragher 2020; Hohenberger 2020; Massachusetts Association of Health Boards 2020). Adaptation observed in this historical moment informs our expectation that town meeting will continue to adapt and evolve. No form of government is perfect, and while we avoid assessing in favor of explaining, we do note that this form has limitations. Competing demands on citizens' time is but one. As Salvino, Tasto, and Turnbull (2012) find, there is 'strong evidence that, while differences between the town and city forms of government may matter, differences between direct and representative democracy do not. Direct and representative democracy yield sufficiently similar outcomes' (p. 2401). Direct democracy can be capable of meeting 'the deliberative demands of contemporary lawmaking' (Levy 2013: 355).

In each Massachusetts town where town meeting remains the form of local legislature, self-government through a deliberative, democratic process continues to be possible because the community respects the rule of law, holds an abiding acceptance of community norms, has fair opportunity to participate in the process, trusts the process and results, and has a pressure-relief valve for frustration with the limitations on local authority. The town meeting, as deliberative system of government, trusts the people. The legal and normative rules governing town meeting have permitted adaptation and created a hospitable climate for these enduring community attitudes, serving

to confound the admonitions offered by critics of direct democracy over the years that, in an open and numerous assembly of purported equals, emotion will rule reason, the forceful will rule the reticent, and “spectacles of turbulence and contention” will result.³⁵

The contemporary town meeting, relatively unstudied compared with historical town meetings, remains the accepted, well-functioning form of local government in most Massachusetts municipalities. Continued communication scholarship on the rhetoric and social interactions that form part of the deliberative system (those “before the meeting starts” conversations in hallways and parking lot de-briefings) may offer deeper insights into the rhythm of deliberation in town life.

We expect that town meeting will continue to welcome new participants and that citizen power shall grow stronger for the diversity of perspectives made more equitably heard. While there are myriad studies of people's trust in government, there are few studies of government's trust in people. Towns with town meeting legislatures are robust locations for learning what kinds of decisions emerge when government entrusts its decisions on how it should spend its money, and how it should regulate its citizens, to the people themselves. When the legislature is the voting public itself, people place a great deal of trust in themselves and their fellow citizens.

Notes

- ¹ Zimmerman (1999: 6) quoting Madison, *Federalist* Number 10 (on the inability of direct democracy to cure ‘the mischiefs of faction’).
- ² ‘Demonstrating,’ a fourth activity Mansbridge et al. (2012) mention, may occur outside the physical location of the town meeting *per se*.
- ³ See DeSantis & Hill (2004); Leslie (2013, 2018); Mansbridge (1980); Townsend (2006, 2009); Salvino, Tasto, & Turnbull (2012).
- ⁴ *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907).
- ⁵ *Commonwealth v. Plaisted*, 148 Mass. 375 (1889).
- ⁶ For a discussion of evolving ideas on home rule, see National League of Cities (2020).
- ⁷ *Bloom v. City of Worcester*, 363 Mass. 136 (1973) at footnote 4 (citations omitted).
- ⁸ Tilden (1958: 347, 389), citing Madison (1788).
- ⁹ Massachusetts General Laws (M.G.L.) Ch. 40, § 5 and Ch. 44.
- ¹⁰ See, e.g., M.G.L. Ch. 40, § 21.
- ¹¹ M.G.L. Ch. 40, § 14.
- ¹² M.G.L. Ch. 40, § 14.
- ¹³ M.G.L. Ch. 30B, § 12.
- ¹⁴ M.G.L. Ch. 43B, § 2.
- ¹⁵ AG Municipal Law Unit Decision 26 September 2017–8449 Southampton.
- ¹⁶ M.G.L. Ch. 39, § 18.
- ¹⁷ M.G.L. Ch. 39, § 10.
- ¹⁸ One town, for a 2018 Special Town Meeting to address a single controversial issue, made provisions to accommodate 3000 voters using linked venues, and contracting for audio visual equipment, so that all could see and hear. The matter under consideration

was a proposed 1.5-million square foot cannabis cultivation and research facility.

- ¹⁹ M.G.L., Ch. 39, § 10.
- ²⁰ M.G.L. Ch. 39 §10.
- ²¹ M.G.L. Ch. 39 §12.
- ²² 358 Mass. 838 (1971).
- ²³ M.G.L., Ch. 39, § 17.
- ²⁴ M.G.L., Ch. 39, § 15.
- ²⁵ Debt exclusion votes also must be ratified by a majority vote at the polls.
- ²⁶ M.G.L., Ch. 39, § 16.
- ²⁷ M.G.L., Ch. 39, § 15.
- ²⁸ M.G.L., Ch. 41, § 15.
- ²⁹ In analyzing the application of a provision of Robert's *Rules of Order* in a challenge to the validity of a town meeting action, the Massachusetts Supreme Judicial Court noted that the provision was inapposite to a town meeting, and violative of state law, *Blomquist v. Arlington*, 156 N.E.2d 416 (Mass. 1959).
- ³⁰ Supplemental deliberative sessions address concerns Neblo (2015) discusses regarding the capacity of ordinary citizens to make considered and rational decisions through democratic deliberative processes.
- ³¹ In Stockbridge, Mandell (2019) observes, ‘about three-quarters of all men qualified, and there is evidence that sometimes those below that bar were allowed to participate’ (p. 6).
- ³² Bryan finds no correlation between socioeconomic status and attendance (2004: 122).
- ³³ The Legislature enacted emergency legislation authorizing remote participation in representative town meeting during the COVID-19 pandemic. Technology was available to permit secure participation by 100 to 300 elected town meeting members.
- ³⁴ For an example of one outdoors, see Alford's Annual Town Meeting (Community Television for The Southern Berkshires 2021).
- ³⁵ Zimmerman (1999: 6) quoting Madison, *Federalist* Number 10 (on the inability of direct democracy to cure “the mischiefs of faction.”).

Competing Interests

The authors have no competing interests to declare.

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