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Articles

***309** SUNLIGHT'S GLARE: HOW OVERBROAD OPEN GOVERNMENT LAWS CHILL FREE SPEECH
AND HAMPER EFFECTIVE DEMOCRACY

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***310** I. Introduction

Item: A County Commissioner forced to miss an upcoming vote emails colleagues his suggestions on how to proceed. The email is later read aloud at a publicly noticed open meeting.

Item: State legislators working on a lengthy, complex, and controversial law agree publicly while in session to a tentative compromise designed to resolve a bitter partisan dispute. Because there is no time to draft language there in the chamber, the leading members of the Democratic and Republican factions meet later to draft compromise language that will be presented at the next regular public legislative session.

Item: An alderperson attends a Sierra Club meeting where members are discussing a controversial local environmental issue, only to find a fellow alderperson making a presentation. During the question-and-answer period, both field questions from the audience about the best way to resolve the issue.

Responsible lawmaker action or subversions of the democratic process? Under some versions of state "open meetings" laws, there is a good chance that each of these scenarios is illegal. These "sunshine laws" forbid elected officials from conferring with each other about matters coming before them outside of a properly noticed public meeting. While the laws are designed to prevent back-room deals in smoke-filled rooms, their broad definitions of "meeting" and "deliberation" can potentially cause more severe problems.

Although the contours of the state laws vary widely, most apply to informal conversations, phone calls, or emails that contain any substantive discussion of government policy issues; some apply even if there are only two participants. [FN1] Many make no exceptions for personnel matters, [FN2] items *311 threatening individual privacy, [FN3] financial negotiations, or other topics traditionally considered appropriate for private discussion. [FN4] Most of these laws punish violations with criminal or civil penalties. [FN5] For these reasons, these laws raise significant issues regarding the overbreadth and chilling effect on discussion of "core value" speech involving political matters.

Additionally, in over fifteen states, the open meetings provisions apply to local government bodies but not the state legislature, or the provisions are substantially more lenient as applied to the state legislature. [FN6] There is an obvious appeal for state legislators drafting these laws to exempt *312 themselves. But the disconnect between the freedom of speech afforded state legislators and the severe restrictions on local legislators raises a legitimate question of equal protection.

To date, these issues have received surprisingly little attention. A handful of state court cases have dismissed free speech challenges to open meetings laws without giving the issue much significant analysis. [FN7] Cases discussing equal protection challenges are hard to find. [FN8]

Scholarship on this issue has been light. It has focused mostly on the policy disadvantages of sunshine laws, [FN9] in some cases just at the federal *313 administrative level. [FN10] Discussion of possible constitutional challenges to such laws has not been extensive. [FN11]

A recent case has changed this. In *Rangra v. Brown*, [FN12] the Fifth Circuit held that Texas' open meetings law was a content-based restriction on speech subject to "strict scrutiny" constitutional review. [FN13] The court reversed a district court decision dismissing a free speech challenge and remanded to the district court for reconsideration under the exacting "strict scrutiny" standard. [FN14] The case has raised the potential invalidity of open meetings laws as a national issue. [FN15] The Fifth Circuit decided to re-hear the case en banc. [FN16] It ultimately dismissed the case as moot after the plaintiff elected official had left office. [FN17] The dismissal based on mootness came over a vigorous dissent from Judge Dennis, who noted that Rangra still faced a potential renewed prosecution under the open meetings law. [FN18] The case has also inspired some scholarly commentary. [FN19]

The controversy over the Texas Open Meetings Act is ongoing. Represented by the same lawyer in Rangra, a group of local elected officials from several localities have filed suit challenging the law on free speech grounds. [FN20] The case went to a bench trial at the end of 2010, and the *314 district court rendered a decision late March 2011. [FN21] The district court rejected the free speech challenge, [FN22] in part for reasons distinguishing the Texas open meetings law from the statutes that are the focus of this article. [FN23] Another appeal to the Fifth Circuit is expected. [FN24]

The Rangra decision and its sequel raise a legitimate question about the significant free speech issues raised by at least the broadest of the open meetings laws. Particularly where the law (unlike the law at issue in Rangra) applies to substantive conversations between only two or three legislators, or where it allows no exceptions for private discussions of truly sensitive

matters, a broad open meetings law can cause greater damage to democracy than the harm it is designed to prevent.

While legislators, courts, and commentators unqualifiedly laud “government in the sunshine,” [\[FN25\]](#) too much of anything, even sunshine, is not necessarily a good thing. The broadest of open meetings laws chill needed deliberation and collegiality, prevent compromise, and make unrealistic demands on busy part-time local legislators. They transfer power to unelected staff and lobbyists, encourage the violation of individual privacy, and force conscientious local legislators to become casual lawbreakers. While we have enjoyed five decades of increasing sunshine, it might be time for some shade.

This Article examines the constitutionality of open meetings laws. It draws on case law, objective public commentary, and the author's own experience as a local legislator dealing with one of the strictest open meetings regimes in the nation. Part II provides background on these “sunshine laws” nationally, their typical provisions, and their policy rationales. Part III discusses the potential success of a free speech challenge to such laws. It examines the possible standards of review and argues that under any of them, the most broad-reaching of sunshine law provisions likely fail to pass muster. Part IV assesses an equal protection challenge to laws that exempt the state legislature. It concludes that such a challenge's success may turn on whether rational basis or heightened review applies and examines arguments for the use of each standard. Part V discusses [*315](#) policy criticisms of open meetings laws, argues for a “scaling back” of their scope, and proposes a model open meetings law which balances the need for public access with the need for officials to be able to confer with one another to engage in responsible decision making.

II. Background

A. State Open Meetings Laws

All fifty states have some form of open meetings laws. [\[FN26\]](#) Almost all of these open meeting laws require public notice and public access when deliberations are held or when public business is discussed by a governmental body. [\[FN27\]](#) The majority of these statutes apply to local [*316](#) government bodies [\[FN28\]](#) and usually apply to any associated boards, commissions, and related bodies appointed by local government bodies to transact government business. [\[FN29\]](#) In at least twenty-eight states, the “sunshine law” also covers the state legislature. [\[FN30\]](#)

[*317](#) States began to pass comprehensive open meetings laws in the 1950s. [\[FN31\]](#) By 1959, twenty states had such laws, and by the mid-1970s, every state had a statute that imposed open meeting requirements on a wide variety of government bodies. [\[FN32\]](#) Many of these laws were significantly strengthened after the Watergate scandal, which was viewed by many as proof of the need for more “sunshine” in government. [\[FN33\]](#)

The animating policy behind these laws is that government business should be conducted in public with adequate notice so that citizens can attend. [\[FN34\]](#) This openness is necessary in a democracy so that the electorate can be adequately informed of how decisions are made and have an opportunity to offer meaningful input. [\[FN35\]](#) To this end, open meeting laws [*318](#) provide that deliberations concerning public business shall not occur in private conversations between members of a governing body. [\[FN36\]](#)

1. Scope

As a general matter, these laws are intended to be, and are, construed very broadly. Often, the statutes include provisions stating that they are to be interpreted broadly to effectuate the policy goals of openness and accountability. [\[FN37\]](#) Courts also regularly state that these acts are to be given a broad construction. [\[FN38\]](#) This liberal construction generally persists even where the statutes contain penal provisions, [\[FN39\]](#) although some states strictly construe the penal provision while broadly construing the rest of the statute. [\[FN40\]](#)

The broad scope of the acts is evident from the expansive definitions of “governing body” or a similar phrase. Even in states that itemize some entities for inclusion, the general definition is typically given a broad interpretation. [\[FN41\]](#) Most states employ a number of criteria, such as manner of creation or receipt of public funds, any or all of which may place a given entity under the open meetings restrictions. [\[FN42\]](#)

Generally, there is no requirement that official action be taken or that official communications be made for a gathering or communication among officials to be covered by the open meetings law and thus be forbidden unless part of a properly noticed public meeting. While some states have exceptions for meetings held merely for ministerial purposes such as fact-gathering, [\[FN43\]](#) or to clarify a previous decision, [\[FN44\]](#) the statutes, as a rule, reach ***319** broadly to cover any substantive discussion of relevant government action. For example, Colorado requires all “meetings” to be open and noticed, and defines “meeting” as any gathering “convened to discuss public business.” [\[FN45\]](#) State courts have also taken a broad view of legislative intent in this area; for example, the Alaska Supreme Court has construed the open meetings law to reach “every step of the deliberative and decision-making process when a governmental unit meets to transact public business.” [\[FN46\]](#)

One key element of any open meetings law is its definition of “meeting.” Some states define it as an official gathering convened for the purpose of considering matters of public significance. [\[FN47\]](#) However, most states apply restrictions to any meeting, planned or unplanned, at which a group’s members discuss its business. [\[FN48\]](#)

At least twenty-eight states qualify this by requiring that a quorum or majority of the public body be present at the meeting before placing the discussion under the statute. [\[FN49\]](#) Two states say that the law applies whenever a majority of a quorum is involved in the meeting or discussion. [\[FN50\]](#) Even where a quorum or “majority of a quorum” is the rule, officials may not ***320** circumvent the law’s strictures by having a series of smaller meetings that cumulate to a quorum or majority of a quorum. [\[FN51\]](#)

At least one state statute expressly applies the notice requirement whenever two or more members discuss public business. [\[FN52\]](#) Several more states reach this result through interpretation of the statute. [\[FN53\]](#) Virginia’s statute requires a minimum of three legislators for the law’s requirement to be triggered. [\[FN54\]](#) In a few other instances, the statute does not reach communications among only two members, but such a communication has been interpreted as illegal when it was done with intent to violate the statute’s provisions. [\[FN55\]](#)

Tennessee’s open meetings law is an unusual case: it has been interpreted to be among the strictest in the nation, but that interpretation is very much subject to question. Its statute defines “meeting” as “the convening of a . . . body for which a quorum is required,” and it explicitly excludes from this definition “a chance meeting of two or more members.” [\[FN56\]](#) This would suggest that Tennessee adopts the quorum rule. However, the statute also states that “such chance meetings” shall not “be used to decide or deliberate public business in circumvention of the spirit” of the Open Meetings Act. [\[FN57\]](#) Seizing on this last bit of “loophole closer” language, an unpublished county court decision held that the Act applied to any substantive conversation between two or more members. [\[FN58\]](#)

But that is by no means clear from the statute. The “loophole closer” language could just as easily have been written to apply to situations where two or three members constituted a quorum, where serial meetings of two or three members were held by design to cumulate a quorum—a so-called “walking quorum”—or both. Prior Tennessee cases did not raise this question, either because they involved communications among a quorum [\[FN59\]](#) ***321** or found communications among less than a quorum not to violate the Act for independent reasons. [\[FN60\]](#) Some appellate court cases have suggested without deciding that violations would involve a quorum. [\[FN61\]](#) An Attorney General opinion noted that whether a quorum was required presented a “difficult question,” lacking “any definitive answer;” it concluded by issuing, as “cautious advice,” the suggestion that local legislators err on the side of caution by avoiding substantive discussion among two or more members. [\[FN62\]](#) Local legislators and their in-house counsel have proceeded accordingly ever since, with the prevailing view that communications among any two members can violate the Act. [\[FN63\]](#) Given the constitutional ***322** issues raised in this Article, and the rule that statutes be construed to avoid constitutional issues, [\[FN64\]](#) this prevailing view is open to serious question.

At any rate, it is this latter category of state open meeting laws-ones affecting communications between only two or three members-that is most troubling from a First Amendment perspective.

2. Exceptions

The open meetings laws typically extend to indirect communications: a written, telephonic, or electronic communication will not escape the restrictions on that basis alone. [\[FN65\]](#) Most states treat mail correspondence as posing no less risk of abuse than a clandestine meeting. [\[FN66\]](#) This same reasoning applies to electronic letters in the form of email or similar technologies. [\[FN67\]](#) Telephone conversations have also been an issue and have been the subject of similar rulings in many states. [\[FN68\]](#)

There are some exceptions to the laws allowing for "executive sessions" concerning matters best discussed in private. [\[FN69\]](#) An executive session is typically defined as "a session closed to the public." [\[FN70\]](#) Courts have recognized that legislators sometimes need to debate an issue free from the pressures of partisans or interest groups. [\[FN71\]](#) The executive session exception does not allow legislators to simply hold secret meetings and then retroactively justify them according to the criteria for executive sessions. [\[FN72\]](#) Each statute has a protocol for a motion to hold an executive session, and the body must pass such a motion before holding the closed meeting. [\[FN73\]](#) Discussion within the executive session must then be limited to the subject ***323** matter contemplated in the motion, even if further issues arise in the meeting that would also meet the criteria for an executive session. [\[FN74\]](#)

Legislative bodies may not close a session for just any reason. Closure must fit a prescribed subject matter exception. Some states allow closed discussion for pending or anticipated litigation with counsel, [\[FN75\]](#) personnel matters, [\[FN76\]](#) matters affecting an individual citizen's privacy, [\[FN77\]](#) discussion of trade secrets, [\[FN78\]](#) or other topics. [\[FN79\]](#) Similarly, some states define "meeting" so as not to include one or more of these designated sensitive topics, or otherwise permit the requisite number of legislators to discuss such a topic without triggering the open meetings law. [\[FN80\]](#) A full list of topical exceptions, by state, is set out in the Appendix. [\[FN81\]](#)

However, almost no state has accepted all these topics, and many states have few or none. [\[FN82\]](#) Many states admit no exception for personnel matters, for example. [\[FN83\]](#) Some would even require that ongoing financial negotiations between the local government and an outside entity be carried out in public. [\[FN84\]](#)

Tennessee is a good example. By its terms, the Tennessee Open Meetings Act exempts, from public notice requirements, only discussions of trade secrets or consultation with counsel regarding pending litigation. [\[FN85\]](#) The statute itself does not even provide the allowance for private consultation with counsel: [\[FN86\]](#) such an exception was mandated by Tennessee ***324** courts. [\[FN87\]](#) In Tennessee, the open meetings law requirements are triggered whenever two or more members of the government body have a substantive discussion of any matter which is currently or about to be before them; even a meeting with an attorney must be open if the body engages in any decision making or deliberation. [\[FN88\]](#) Tennessee's law is one of the strictest in the nation.

3. Remedies

The remedies available under open meetings laws vary from state to state, but they generally involve suing for enforcement. [\[FN89\]](#) Standing for such lawsuits tends to be as broad as possible, with many statutes granting expanded standing for parties such as the news media. [\[FN90\]](#)

The statutes typically allow parties to obtain an injunction by showing a violation of the open meetings law. [\[FN91\]](#) Most states also provide for civil penalties, [\[FN92\]](#) many of which increase with multiple violations. [\[FN93\]](#) Although criminal penalties may be less attractive due to their higher standard of proof, [\[FN94\]](#) many statutes provide for criminal fines or even imprisonment. [\[FN95\]](#) Most importantly, many states have a mechanism for retroactively invalidating actions taken through an illegal deliberation. [\[FN96\]](#) A few states even provide a mechanism for

removing violators from office. [\[FN97\]](#) Even where the statute explicitly provides for only injunctive relief, courts may ***325** retain equitable discretion to fashion additional relief, such as money damages. [\[FN98\]](#)

B. Federal Open Meetings Law

The federal analogue to the open meetings laws is the Sunshine Act, passed in 1976. [\[FN99\]](#) The Sunshine Act applies to federal agencies and requires that every “meeting” be held in a public forum pursuant to notice. [\[FN100\]](#)

However, the Sunshine Act is much narrower than its typical state counterpart. First, it applies only to federal agencies and not to the legislature. [\[FN101\]](#) As with many state legislatures, there is a natural temptation for those enacting a “sunshine” law to exempt themselves from its provisions. Second, a “meeting” is defined as an assembly of a quorum of the body. [\[FN102\]](#)

Further, there are no less than ten permissible exemptions allowed for a closed meeting. They involve discussions of (1) national defense; (2) personnel issues; (3) statutorily-protected information; (4) trade secrets; (5) accusations of criminal conduct or formal censure; (6) matters of personal privacy; (7) investigatory records; (8) information generated in the regulation of financial institutions; (9) information likely to produce financial speculation or threaten an institution’s financial stability; and (10) information related to various legal proceedings. [\[FN103\]](#) The federal Freedom of Information Act has an almost identical list of exemptions applicable to requests for government records. [\[FN104\]](#)

Finally, the remedies provided under the federal version are weaker than state versions. There are no criminal or civil penalties. The court may not nullify a decision if it finds a violation. Aside from enjoining further violations and assessing court fees, the court may only order that the contents of the meeting be disclosed to the public. [\[FN105\]](#)

***326** III. First Amendment Discussion

A. Generally

The open meetings statutes are relatively new in United States history and generally do not have common law antecedents. [\[FN106\]](#) States typically do not recognize a common law right to attend meetings of governmental bodies. [\[FN107\]](#) Further, courts do not recognize a constitutional right to have all meetings of public bodies be open to the public. [\[FN108\]](#)

Nor has the rule of open meetings long been part of our historical practice. The delegates at the Constitutional Convention in 1787 deliberated in secret, [\[FN109\]](#) as did the members of the first Congress who debated the Bill of Rights. [\[FN110\]](#) Congress began to open at least some of its meetings to the public early on, but congressional committee meetings have only been routinely opened to the public since 1970. [\[FN111\]](#) Even today, while congressional debates and committee meetings are open to the public, there is no legal restriction on members of Congress conferring in private to hold substantive discussions on public business. Indeed, the practice is quite frequent.

At first glance, it may seem that First Amendment concerns would weigh toward strict enforcement of open meetings laws. The United States Supreme Court has ruled that the freedom to speak includes the freedom to receive information. [\[FN112\]](#) Courts have indicated that the First Amendment grants the public some sort of right of access to certain government proceedings. For the most part, the cases have involved access to criminal proceedings and have provided a qualified right of access subject to limitations set by the trial judge. [\[FN113\]](#) Some lower courts have extended this ***327** First Amendment analysis to civil court proceedings as well. [\[FN114\]](#) However, courts have not found a constitutional right of public access to legislative proceedings. [\[FN115\]](#) Indeed, in broad language regarding other types of nonjudicial government bodies, the Supreme Court has suggested the opposite. [\[FN116\]](#) At any rate, the question of public access to legislative meetings has been settled by the adoption of open meetings laws in all states. [\[FN117\]](#)

Even if the federal Constitution does not require the kind of right of public access guaranteed by these statutes, it is arguable that some of the protections afforded by these statutes may be required by particular state constitutions, which are free to provide greater individual liberty protection than the federal Constitution. [\[FN118\]](#) A few states have interpreted their state constitutions explicitly to guarantee public access to, or public notice of, the deliberations of public bodies, [\[FN119\]](#) but even they are subject to some limits. [\[FN120\]](#) *328 Indirect support for such access might also be found from state constitutional provisions on free speech, free press, the right of assembly, the right to petition for redress of grievances, and so forth. [\[FN121\]](#) However, there is little case law supporting such a reading of these state constitutional provisions. [\[FN122\]](#) Further, any such requirements would be trumped if found to be inconsistent with the federal Constitution. [\[FN123\]](#)

Insufficient attention has been given to the negative free speech implications of these laws. Clearly, they cause a substantial restriction on political speech.

No state court adjudicating a free speech challenge to its state's open meetings law has overturned the law on free speech grounds. Some state courts have stated in dicta that such laws in general raise significant free speech issues, though none have referenced the specific statute before them. [\[FN124\]](#) For example, the Florida Supreme Court has stated that the statute would violate the First Amendment if its law were construed "to prohibit any discussion whatever by public officials between meetings." [\[FN125\]](#) However, that court also suggested that a conventional interpretation barring substantive discussion of matters before the government body would likely pass muster. [\[FN126\]](#) Similarly, in *Dorrier v. Dark*, the Tennessee Supreme Court rejected such a free speech challenge on grounds peculiar to the Tennessee open meetings law: because there was no penalty other than invalidating the decision taken by the public body, the court reasoned, there was no significant "chilling effect" on free speech. [\[FN127\]](#) The court also noted that a free speech violation would likely lie if the law had criminal penalties, as many state open meetings laws do. [\[FN128\]](#)

*329 More significant is the free speech discussion by the West Virginia Supreme Court of Appeals in *McComas v. Board of Education of Fayette County*. [\[FN129\]](#) In that case, the court upheld an application of the state's open meetings law where all but one of a board of education's members physically met in secret with the school superintendent to discuss business coming before it publicly the next day. [\[FN130\]](#) In that instance, of course, a quorum of the membership had met. [\[FN131\]](#)

The court instructively considered the kinds of meetings, gatherings, and informal conversations that might be covered under its sunshine law. [\[FN132\]](#) It stated that an interpretation that "precludes any off-the-record discussion between board members about board business would be both undesirable and unworkable-and possibly unconstitutional." [\[FN133\]](#) Such a "sweeping restriction" on public officials' ability to discuss "public issues in a private manner" would raise "serious questions" under the First Amendment. [\[FN134\]](#)

To avoid this constitutional issue, the Court adopted a more flexible, "common sense approach" which focused on the question of whether allowing a private conversation among officials under particular circumstances would "undermine the [sunshine law's] fundamental purposes." [\[FN135\]](#) Making this determination in turn requires consideration of many factors, none exhaustive or controlling: the content of the discussion; the number of members of the public body participating; the percentage of the public body this number represents; the identity of the absent members; the intentions of the members; the amount of planning involved; the duration of the conversation; the setting; and the possible effect on decision making. [\[FN136\]](#) As in this Article, the *McComas* court drew a distinction between conversations between two members of a body and conversations among a quorum of a body. [\[FN137\]](#) Explaining that "[n]umbers are relevant," the court emphasized the "difference between two members of a twenty-member public body having a conversation and fifteen of them having a cabal." [\[FN138\]](#)

McComas is unique among state court decisions in its detailed, nuanced approach to the free speech issues. [\[FN139\]](#) The *McComas* court recognized the *330 legitimate state interest in ensuring that the public have a "meaningful opportunity to respond to, or hold officials accountable for, their private deliberations." [\[FN140\]](#) However, the court also rejected as overbroad any restrictions on private conversations among elected officials where such restrictions are not actually required to further those governmental interests. [\[FN141\]](#) Although

the court did not say so explicitly, its approach was not unlike one requiring that the open meetings law be “narrowly tailored” to further the state's compelling governmental interests.

Five other state court cases have upheld open meetings laws against free speech challenges. [\[FN142\]](#) Crucially, each of those cases involved physical meetings among a quorum or more of the members. [\[FN143\]](#) As explained below, since a quorum is sufficient to conclusively decide a matter, rendering any subsequent public meeting merely pro forma, a restriction on meetings of a quorum of a body is narrowly tailored in a way that a restriction on private chance conversations between any two members is not. [\[FN144\]](#)

In upholding open meetings laws, state courts often simply conclude, without significant discussion, that open meetings laws do not violate free speech rights. [\[FN145\]](#) One response they give is that, quite the contrary, open meetings laws promote free speech, by giving the public an adequate opportunity to participate in public debate. [\[FN146\]](#) Another approach is to reason that by requiring public notice for discussion of public issues, such laws do not restrict the content of an official's speech, but merely its “location and ***331** timing.” [\[FN147\]](#) Still another defense is that such laws do not restrict an individual's right to speak as a citizen but merely speech in one's capacity as a public official. [\[FN148\]](#) Or, on a related note, that when one becomes a public official, one forfeits one's right to speak about government affairs in private. [\[FN149\]](#)

This analysis is incomplete. First, it is not enough to say that because the policy goal of a speech restriction is to foster debate, it survives a free speech challenge. [\[FN150\]](#) The Supreme Court has stated, “As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it.” [\[FN151\]](#) For example, campaign finance laws are often defended on the ground that they are designed to level the playing field among donors of varying means, thereby promoting a fair and open debate in elections. [\[FN152\]](#) Nonetheless, the Supreme Court has subjected laws of this type to exacting scrutiny. Sometimes these laws survive such scrutiny, [\[FN153\]](#) and sometimes they do not, [\[FN154\]](#) but courts treat the free speech issues as serious.

Second, open meetings laws do more than merely regulate the “location and timing” of speech. [\[FN155\]](#) They are not pure “time, place, and manner” regulations but rather laws which impose restrictions based on the content of what is said. [\[FN156\]](#) This is of course a crucial distinction, inasmuch as “content-neutral” regulations enjoy friendlier treatment by courts. [\[FN157\]](#) “Content-based” regulations receive “the most exacting scrutiny,” known as strict scrutiny, whereas content-neutral regulations receive intermediate scrutiny. [\[FN158\]](#) Moreover, even if they are properly analyzed as content-neutral restrictions, they are still subject to more than cursory judicial examination.

***332** B. Content-Based or Content-Neutral?

At this point in the analysis, we should consider whether open meetings laws can truly be considered “content neutral” under applicable Supreme Court First Amendment precedent. The answer is surprisingly unclear.

The “sunshine” laws are not like an ordinance forbidding loud public displays in residential areas after 11 p.m. on weekdays, or a “Post No Bills” sign on the walls of public buildings. [\[FN159\]](#) Such rules are truly “content-neutral” because the restrictions are the same despite the subject matter of the oral speech or written material involved. [\[FN160\]](#) The open meetings laws ban only discussion of official business outside “sunshined” public meetings. [\[FN161\]](#)

Further, it is no defense to say that the government is not discriminating in favor of speech on one side of an issue, but rather only forbidding a certain general topic of speech in the proscribed context. [\[FN162\]](#) A content-based law regulating a certain subject matter is still subject to strict scrutiny even if it is “viewpoint-neutral.” [\[FN163\]](#)

City of Cincinnati v. Discovery Network, Inc. is a good example. [\[FN164\]](#) Cincinnati banned from city property newsracks containing “commercial handbills” but permitted newsracks containing “newspapers.” [\[FN165\]](#) The law did not discriminate on the basis of the viewpoint expressed by either newspapers or commercial bills. [\[FN166\]](#) The Supreme Court analyzed the ordinance as content-based, stating that “whether any particular newsrack falls within the ban is

determined by the content of the publication resting inside that newsrack. Thus, by any commonsense understanding of the term, the ban is 'content-based.'" [\[FN167\]](#) This analysis is representative of the Court's approach in these cases. [\[FN168\]](#) If liability under the law depends on the *333 content of the speech in question, it will very likely be treated as a "content-based" restriction. [\[FN169\]](#) By this logic, open meetings laws ought to be considered content-based regulations and subjected to "strict scrutiny" analysis.

However, there are reasons for doubting this conclusion. The Supreme Court often states that an important factor in classifying a speech restriction as content-based is whether the government imposes the restriction "because of disapproval of the ideas expressed." [\[FN170\]](#) Preventing this type of censorship is the core value underlying the Court's special hostility toward content-based regulations. [\[FN171\]](#) An alternative formulation is that content-neutral regulations are "justified without reference to the content of the speech," [\[FN172\]](#) or that with such regulations, there is "no realistic possibility that official suppression of ideas is afoot." [\[FN173\]](#) A court evaluating a free speech challenge to an open meetings law could very easily conclude that its goal is not "official suppression of ideas," nor is it motivated because of disapproval of the ideas expressed in the covered speech. [\[FN174\]](#) These conclusions would argue for treating the law as content-neutral. [\[FN175\]](#) Indeed, the district court in the recent *Asgeirsson* case so found. [\[FN176\]](#)

A closer question is whether open meetings laws impose a restriction "because of disapproval of the ideas expressed." [\[FN177\]](#) While the governing body passing an open meetings law may not disapprove of the specific content of any particular statement made among public officials outside of a "sunshined" meeting, it undoubtedly "disapproves" of the expression of those ideas (and only those ideas) in such a context in the first place.

A leading case on this point is *Renton v. Playtime Theatres, Inc.* [\[FN178\]](#) In *Renton*, the Supreme Court upheld a local zoning ordinance, which prevented an adult movie theatre (i.e., one showing sexually explicit content) from locating within 1,000 feet of schools, churches, and certain residential areas. [\[FN179\]](#) Because the ordinance plainly affected only sexually explicit movies, it was undoubtedly "content-based" in a literal sense. [\[FN180\]](#) But the Court held that it did "not fit neatly into either the 'content-based' *334 or 'content-neutral' category" [\[FN181\]](#) because the law was "aimed not at the content of the films . . . but rather the secondary effects of such theaters on the surrounding community." [\[FN182\]](#) The Court relied on a district court finding that the "predominant motive" of the local body passing the law was to prevent the negative effects these theaters had on the surrounding neighborhoods with respect to crime, property values, and the retail trade. [\[FN183\]](#) Thus, the law should be treated as content-neutral. [\[FN184\]](#) Citing *Renton*, the Supreme Court has used this "secondary effects" analysis to treat as content-neutral other laws that would be considered content-based under a more literal approach. [\[FN185\]](#) By analogy, then, open meetings laws may be analyzed as "content-neutral" in this sense. Again, the district court in *Asgeirsson* so held. [\[FN186\]](#)

The mere articulation of "secondary effects" by a defendant government entity, however, is not enough to switch all literally content-based laws to the more lenient content-neutral treatment. In *City of Cincinnati*, for example, the city tried to rely on *Renton* by arguing that its newsrack ordinance was motivated by the content-neutral concerns of safety and aesthetics related to overcrowding of public spaces. [\[FN187\]](#) The Court rejected this argument, noting that these supposed "secondary effects" were not more related to "commercial handbills" than newspapers, and thus did not justify an ordinance banning all commercial handbills but allowing newspapers. [\[FN188\]](#)

Similarly, in *Boos v. Barry*, [\[FN189\]](#) the Supreme Court struck down a law banning protests critical of a foreign government within 500 feet of the government's embassy. [\[FN190\]](#) The Court rejected a *Renton* analogy for a somewhat different reason, emphasizing that the "secondary effects" cited by the government-shielding foreign diplomats from speech offending their dignity was related to the content of the speech. [\[FN191\]](#) This is in accord with Supreme Court precedent generally, which requires that the *335 governmental interests articulated to justify an assertedly content-neutral speech restriction be "unrelated to the suppression of free expression." [\[FN192\]](#)

The Supreme Court cases in this area are not entirely clear on how to tell the difference between a content-based and content-neutral standard. [\[FN193\]](#) One useful way to synthesize

the different cases in this area is to say there is a presumption that laws explicitly referencing a particular subject matter or content of speech will be treated as content-based. This presumption may be overcome if the defendant can show that the law is aimed at a "secondary effect" unrelated to the content of the speech. [FN194] However, the presumption may only be rebutted if the court is convinced that the secondary effects are related to the banned category of speech and not equally related to the permitted category of speech. [FN195]

Under this analysis, open meetings laws are presumptively content-based and thus presumptively subject to strict scrutiny. A government defending such a law against a free speech challenge would have a reasonable argument in rebuttal that the law is aimed not at the content of the speech but at the "secondary effect" of excluding the public from debate leading to decisions by their government representatives. This secondary effect is clearly present with the banned category of speech-discussion of action to be taken by the government body-and not present with the unbanned categories of speech: all other speech.

The closer question is whether this secondary effect is truly unrelated to the content of the speech. One can characterize the government's purpose here as keeping the public involved in the debate (content-neutral) but doing so by stifling any discussion by covered officials of relevant public policy issues (content-based). [FN196] Are open meetings laws more like the content-neutral zoning restriction on adult theaters in Renton, and thus, to be treated as effectively content-neutral? Or are they more like the content-based restriction on opposition protests near foreign embassies in Boos?

Two useful analogous Supreme Court cases point in opposite directions on this question. [FN197] In *Colorado v. Hill*, [FN198] a state law barred anyone from approaching within eight feet of a person who was within 100 feet of a health care facility. The law specifically barred such approaches only when done with the purposes of "oral protest, education, or counseling," which arguably suggests a content-based law. [FN199] Nonetheless, the Court analyzed *336 the law as content-neutral. [FN200] The Court took pains to distinguish its decision in *Carey v. Brown*, [FN201] where it struck down as content-based an Illinois law banning picketing that contained an exemption for picketing a place of employment involved in a labor dispute. In contrast, the Court in *Hill* reasoned that the Colorado law "simply establishes a minor place restriction on an extremely broad category of communications with unwilling listeners." [FN202] Although perhaps inspired by abortion protests, the Colorado law applied equally to protests or other communications regarding animal rights, the environment, or any other subject. [FN203]

Further, the Colorado law was not objectionably under-inclusive in terms of the types of speech it covered. As the Court explained, a speech restriction only "lends itself to invidious use if there is a significant number of communications, raising the same problem that the statute was enacted to solve, that fall outside the statute's scope, while others fall inside." [FN204] The even-handedness of the constitutionally valid Colorado law stands in contrast with the fatal under-inclusiveness of the Illinois picketing ban's exemption for labor disputes.

Applied to open meetings laws, the analysis in *Hill* argues for a content-neutral label. Although such laws do explicitly restrict a particular topic of speech, they arguably involve "a minor place restriction on an extremely broad category of communication," designed in this case not to protect "unwilling listeners" but to prevent exclusion of willing listeners. It is arguably either a "minor place restriction" or "minor time restriction," depending on how one views the notion of "outside of a properly noticed public meeting."

Further, the open meeting restriction is arguably not under-inclusive. The category of speech covered-substantive discussion of action by a governmental body by members of that body-leaves out no speech that implicates the asserted governmental interest of including the public in governmental decisions. [FN205]

A counterargument is that open meetings laws generally are under-inclusive in that they do not cover deliberations by local mayors, elected sheriffs, elected trustees, and other local elected officials, whose decisions often matter far more to average citizens. [FN206] If the legitimate state interest justifying open meetings laws is to ensure that the public has meaningful access to and input in decisions made by local elected officials, then such laws really are under-inclusive.

*337 Of course, these situations involve single-office elected officials conferring with each other, as opposed to fellow elected members of a joint, collegial elected body deliberating in private. But how persuasive is this distinction? In states where judges are elected, multi-judge

judicial panels may have elected judges deliberating in private as they decide cases, yet they are expected to deliberate in private. Indeed, if a legislature were to attempt to require multi-judge panels to deliberate publicly, it would be unsurprising to see fellow judges quickly striking down such a law. [\[FN207\]](#) Defenders of judicial prerogatives would say that such private deliberation is essential for candid discussion, proper outcomes, and the integrity of the decision-making process.

Why is the same not true for legislators? The answer cannot be that judges decide individual cases affecting the legal interests of individual citizens, some of whom may have privacy interests, because many state open meeting laws require legislators to deliberate publicly when they adjudicate personnel grievances, student appeals, and the like. More convincing is the response that judges, unlike legislators, must decide cases based on the law rather than public opinion. But even this is not a complete answer, for where judges are elected, they are elected, at least in part, based on an expectation that their decision making will in some sense reflect public values.

Further, many state legislatures exempted themselves in passing open meetings laws. Given that the "public access and input" rationale applies equally to state legislators as local legislators, [\[FN208\]](#) all such laws are substantially under-inclusive.

However, all these types of under-inclusion are arguably unrelated to the content of the speech involved and perhaps are distinct from the labor dispute exemption relied upon by the Supreme Court in *Carey v. Brown*. Unless open meetings laws' failure to include deliberations by state legislators were not covered or deliberations by non-legislative elected officials renders them "under-inclusive" in the *Carey* sense, *Colorado v. Hill* suggests that "sunshine" laws should be analyzed as content-neutral regulations.

However, *Burson v. Freeman* [\[FN209\]](#) seems to counter this suggestion. It is similar to *Hill* but has one key difference—a difference present with open meetings laws—which renders it content-based in the eyes of the Court. *Burson* involved a free speech challenge to Tennessee's law banning *338 solicitation of votes and display of campaign materials within one hundred feet of a polling place. It was similar to the ordinance at issue in *Colorado v. Hill*, except that it did not ban any approach of a person within one hundred feet of a polling place, but only those involving solicitation of votes.

Because the applicability of the statute depended on the subject matter of what was to be discussed, as well as the physical location, the Supreme Court flatly rejected the State's argument that it was a content-neutral "time, place, or manner" restriction. [\[FN210\]](#) The Court explained that this must be so because "[w]hether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to a political campaign." [\[FN211\]](#) The Court then held that it must apply strict scrutiny because it was a content-based speech restriction. [\[FN212\]](#) The Court eventually upheld the restriction as narrowly tailored to further the compelling governmental interests of protecting against voter intimidation and election fraud. [\[FN213\]](#)

Burson is strikingly similar to the case of open meetings laws. In both cases, to protect the interests of voters, the state imposed a restriction on speech that depended both on the time and place of the speech: within one hundred feet of a polling place or outside of a publicly noticed public meeting. The application of the speech restriction depended additionally on the topic of the speech itself: political campaign speech or substantive discussion of local government business. As the Court explained in *Burson*, the statute "implicates three central concerns in our First Amendment jurisprudence: regulation of political speech, regulation of speech in a public forum, and regulation based on the content of the speech." [\[FN214\]](#)

Another analogous situation is *Republican Party of Minnesota v. White*, [\[FN215\]](#) where the Court struck down a state supreme court's judicial canon preventing judicial election candidates from announcing their views on disputed legal or political issues. The Court concluded that the rule was indeed a content-based restriction subject to strict scrutiny. [\[FN216\]](#) The content-based nature of the rule was apparently not disputed, and the Court seemed to think it obvious that the rule should be so characterized. It did note that the rule was under-inclusive because it was limited to the time period of a judicial election campaign but not to the periods before or after, unless a specific case regarding the legal or political issue in question was pending. [\[FN217\]](#)

***339** Like the restriction in *White*, the open meetings law was a restriction placed on a public official which prevented the official from discussing a large category of public issues related to his office during a specified time period. In the case of sunshine laws, the time period is “any time other than at a properly noticed public meeting;” in the *White* case, it was “during a judicial election campaign.” Unlike the restriction in *White*, the open meetings law was not under-inclusive. Nevertheless, there are sufficient similarities with *White* to suggest that an open meetings law might be properly analyzed as content-based and thus subject to strict scrutiny.

The only federal appellate court to have considered whether open meetings laws are content-neutral characterized them unqualifiedly as content-based regulations subject to strict scrutiny. In *Rangra v. Brown*, [\[FN218\]](#) the Fifth Circuit considered an appeal from an elected official bringing a free speech challenge to Texas' open meetings law. Relying on *White* and *Burson*, the court concluded that the law was indeed a content-based speech restriction subject to strict scrutiny. [\[FN219\]](#)

Indeed, the Fifth Circuit cited language in Supreme Court cases establishing that regulation of political speech would normally trigger strict scrutiny. [\[FN220\]](#) This notion is in accord with First Amendment doctrine, which states generally that protection of political speech and discussion of public issues is a central value of the First Amendment, one affording such speech heightened protection. [\[FN221\]](#) Thus, the only Circuit-level case to have explicitly discussed the proper standard of review for a free speech challenge to an open meetings law has held that the strict scrutiny standard of content-based regulations applies.

1. Applying Strict Scrutiny

If open meetings laws are indeed content-based, there is a very good chance that some of the more broad-reaching provisions of such laws may be successfully challenged. Content-based speech restrictions will fail the ***340** “strict scrutiny” test unless the government can show that they are “narrowly tailored” to serve “a compelling [g]overnment interest.” [\[FN222\]](#) To be narrowly tailored, the law must be the least restrictive means available to serve the compelling governmental interest. [\[FN223\]](#) If another, less restrictive provision would serve the governmental interest equally, the legislature must use such a provision. [\[FN224\]](#) Indeed, if a plaintiff proffers any alternative provision, then the burden is on the government to prove that the proposed alternatives will not be as effective as the challenged statute. [\[FN225\]](#)

For example, it seems a stretch to say that broad laws reaching any substantive conversation between any two legislators are narrowly tailored. Indeed, most open meetings laws do not reach this broadly. Instead, they bar a quorum of a legislative body from secretly discussing a pending matter. [\[FN226\]](#) In such cases, there is a danger that the public will be shut out of meaningful participation in the decision-making process. A quorum could decide on a course of action in advance, then meet in a pro forma public meeting where the preordained conclusion is “rubber-stamped.” In any typical-sized legislative body, a conversation between two, or even three, legislators poses no such realistic danger. [\[FN227\]](#) Other states strike a middle ground of barring a majority of a quorum from discussing matters privately. [\[FN228\]](#)

There is no evidence to suggest that democracy is significantly impaired in these more permissive states, which constitute the overwhelming majority. Thus, while a “quorum rule” seems constitutionally defensible, and a “half a quorum rule” provides a closer case, it is much harder to characterize as “narrowly tailored” a broad, Tennessee-style rule preventing any two legislators from ever having a substantive discussion about government decisions outside a properly noticed public meeting.

Similarly, one could plausibly argue that narrow tailoring would require exceptions for discussion of sensitive matters for which legislators would ***341** have a legitimate desire to discuss in private. Examples might include personnel matters, matters that involve individual citizens' privacy, or consultations with government counsel over pending legal matters. They might also include competitive financial negotiations between the government entity and an outside party, whether it be collective bargaining with a local union, negotiations with a potential vendor, or discussions of the proper price for which a local government might sell government-owned land or acquire new land from private owners. Various states have exemptions to their

open meetings laws covering precisely such areas, but there are many states which recognize only a few or none of these exceptions. [\[FN229\]](#)

Aside from requiring the least restrictive burden on speech, the narrow tailoring requirement also guards against “under-inclusive” speech restrictions. In *R.A.V. v. City of St. Paul*, [\[FN230\]](#) the Supreme Court explained that even where the State regulates a category of speech previously ruled to be unprotected by the First Amendment, such as obscenity, that regulation may run afoul of the First Amendment if it is “under-inclusive”—that is, it regulates only some of the unprotected speech but not all of it. [\[FN231\]](#) In *R.A.V.*, the Court struck down a “hate crimes” ordinance that made it an offense to display any symbol while knowing or having reason to know that it “arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.” [\[FN232\]](#) The ordinance was unconstitutional on the grounds that its protection from fear or alarm was limited to narrow classes of speech. [\[FN233\]](#) Significantly, while the Court discussed the ordinance’s potential viewpoint discrimination by noting that “[o]ne could hold up a sign saying, for example, that all ‘anti-Catholic bigots’ are misbegotten; but not that all ‘papists’ are, for that would insult and provoke violence ‘on the basis of religion,’” [\[FN234\]](#) it went further, suggesting that even non-viewpoint-discriminatory under-inclusiveness might also invalidate such a law. [\[FN235\]](#) Thus, while a State could ban all obscenity, it could not ban just obscenity offensive to African-Americans.

This notion of fatal under-inclusiveness is not limited to the regulation of unprotected speech. For example, in *Carey v. Brown*, the Court cited the under-inclusiveness of a law which barred picketing but exempted labor **342* disputes, characterizing the law as content-based and thus subject to the most exacting scrutiny. [\[FN236\]](#)

This is another significant constitutional vulnerability of the broadest of the open meetings laws. Those that exempt state legislatures are exceedingly under-inclusive. Additionally, open meetings laws do not reach consultations involving single-office elected officials, such as mayors, sheriffs, and trustees, or between one or more of them and a local legislator. Such under-inclusivity is substantial.

2. Applying Intermediate Scrutiny

Even if open meetings laws are properly characterized as content-neutral, a significant amount of judicial examination is still required. A court would still apply “intermediate scrutiny.” Under this standard, the government would be required to show (1) that the law “furthers an important or substantial governmental interest;” (2) that the interest is “unrelated to the suppression of free expression;” (3) that “ample alternative channels” for communication of the information exist; and (4) that the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” [\[FN237\]](#) To satisfy this last criterion, the regulation need not be the least speech-restrictive means of advancing the government’s interests. Here, “narrow tailoring” is satisfied if the means chosen do not “burden substantially more speech than is necessary to further the government’s legitimate interests.” [\[FN238\]](#)

Regardless of whether the state interest of preserving public access to the decision-making process is “compelling,” it is at least “substantial,” and, as noted above, it is unrelated to suppression of free expression. This standard’s effect on open meetings laws thus turns on the application of prongs (3) and (4).

For a covered government official who wishes to consult with colleagues on a governmental matter, there are very few “alternative channels” available. The government official can either consult with those colleagues in a properly noticed public meeting, or, in most states, make a public statement to the media. In some states, the government official could not even circulate a “Dear Colleague” letter outlining the official’s position outside a publicly noticed meeting even if the official were to copy the local media on it. A serious question arises as to whether this limited menu of alternative channels is “ample.”

The hypotheticals that began this Article illustrate the point. Consider the County Commissioner who wishes to email colleagues a detailed memo **343* analyzing a draft ordinance suggesting draft amendatory language for consideration prior to the next County Commission meeting. Local media will not generally oblige the Commissioner by printing such

memos for all the world to see, and scheduling a publicly noticed “pre-meeting meeting” will in most cases be impractical for reasons of time and colleagues’ availability. Ditto for the Democratic and Republican legislators who seek to meet out of committee to craft compromise language to settle a sizzling partisan dispute.

Or consider the alderperson who attends a public forum on an urgent local issue and who wishes to engage in the debate on that issue. If the meeting is at an organization not open to the whole public-e.g., a local party caucus, or a dues-based membership organization like the Jaycees-or even if the meeting is open to all but was simply not properly “sunshined” in accordance with the local open meetings law, the alderperson should hope that no colleague from the aldermanic council is present in the audience. If a colleague is present, then both are under an effective gag order. In these situations, the “alternative channels” available under most open meetings laws simply do not afford the officials a practical manner to convey their views or seek the views of colleagues. These channels hardly sound “ample.”

Regarding the fourth prong, there is likewise a significant issue as to whether the typical open meetings law “burdens substantially more speech than is necessary” to further the government’s legitimate interest. While the government has a legitimate interest in assuring public access to legislative decision making as a general matter, it is by no means clear that that interest extends to ensuring that legislators do not have the ability to confer collectively with counsel in private regarding pending legal matters, or to discuss in private sensitive personnel matters or threats to individual privacy. Nor is it clear that this interest extends to preventing legislators from conferring with each other about what negotiating position they should take with (1) an outside vendor seeking a government contract; (2) a union conducting collective bargaining; (3) a landowner hoping to sell land to the government; or (4) a potential purchaser negotiating the purchase of government-owned land. Finally, it is questionable how significant a public interest there is in barring legislative leaders from either party from ever meeting privately to broker a compromise on a difficult public policy question. If anything, the government interest seems to point in the opposite direction for each of these examples. If even some of these cases are examples of speech banned by open meetings laws without a legitimate government interest, these bans would limit “substantially” more speech than necessary.

C. Legislators as Public Employees

State courts have also dismissed free speech challenges to open meetings laws because such laws do not regulate individuals’ speech as **344* private citizens: instead, the laws cover their speech as officials. [\[FN239\]](#) For example, in *Hays County Water Planning Partnership v. Hays County*, for example, the Texas Court of Appeals noted that the types of statements covered by the open meetings law would be made by plaintiff Commissioner as a Commissioner and not during the “public comment” portion of the meeting, when each citizen is given three minutes to speak. [\[FN240\]](#) Support for this approach arguably can be derived from a series of Supreme Court cases establishing lower free speech protections for government employees. [\[FN241\]](#) However, as the Fifth Circuit has recognized, these cases are inapposite, and government officials’ free speech rights are not subordinate to those of others in the open meetings law context.

The most recent public employee case is *Garcetti v. Ceballos*. [\[FN242\]](#) In *Garcetti*, the Supreme Court held that the First Amendment does not protect a government employee from discipline based on speech made pursuant to the employee’s official duties. The case involved a deputy district attorney who wrote an internal office memorandum criticizing law enforcement’s handling of a case and recommending dismissal. [\[FN243\]](#) The deputy district attorney was later subject to adverse employment actions, claimed retaliation, and brought a First Amendment claim. [\[FN244\]](#) The Court dismissed the claim, holding that the speech involved was not subject to First Amendment protection. [\[FN245\]](#) The Court explained that when public employees speak as part of their official duties, they “are not speaking as citizens for First Amendment purposes” [\[FN246\]](#)

The Court cited its earlier decision in *Connick v. Myers*, [\[FN247\]](#) upholding a decision to discipline a public employee for writing and distributing an internal office questionnaire devoted mostly to internal issues of office morale and reassignment policies. [\[FN248\]](#) In *Connick*, the

Court held that public employees were entitled to protection for speech “made as a citizen on matters of public concern” but not for speech made “as an employee on matters only of personal interest.” [\[FN249\]](#) In *Garcetti*, the Court clarified that even if the public employee's speech concerned a “matter of public concern,” it would not qualify as being made “as a citizen” if the speech *345 were made as part of the discharge of the employee's official duties. [\[FN250\]](#) In sum, the “government employee” cases hold that a public employee's speech is protected under the First Amendment only when it (1) involves a matter of public concern, and (2) was made in the individual's capacity as a citizen, not as part of the employee's duties.

Drawing upon *Garcetti*, one could argue that those subject to open meetings laws cannot raise a free speech challenge because when covered by the laws, they are not speaking as a “citizen” but as an official as part of their official duties. This was indeed the track taken by the district court in *Rangra*. The trial court had rejected the free speech challenge, holding that after *Garcetti*, the First Amendment affords no protection to speech by elected officials made pursuant to their official duties. [\[FN251\]](#)

However, this analysis is also suspect, as the Fifth Circuit made clear in its overruling of the *Rangra* trial court. [\[FN252\]](#) The key lies in the reason behind the lesser protections afforded public employees in the first place. As the Fifth Circuit explained, job-related speech by public employees is less protected [\[FN253\]](#) than other speech because employee speech rights must be balanced with “the government's need to supervise and discipline subordinates for efficient operations.” [\[FN254\]](#)

In these public employee cases, the Supreme Court has repeatedly made clear that government has more power to restrict speech when it acts as an employer supervising an employee as opposed to a sovereign writing rules for persons generally. In *Pickering v. Board of Education*, [\[FN255\]](#) the Court stated that “[t]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.” [\[FN256\]](#) In *Garcetti* itself, the Court stated, “The government as employer indeed has far broader powers than does government as sovereign.” [\[FN257\]](#)

This is the case because, in order to function effectively, government officials must be able to supervise and discipline their employees and make judgments about their work performance based on, among other things, statements they make at work. As the majority in *Garcetti* put it, “Supervisors must ensure that their employees' official communications are *346 accurate, demonstrate sound judgment, and promote the employer's mission.” [\[FN258\]](#) The Court was concerned that if the rule were otherwise, every employer-employee dispute could potentially wind up in federal court, and it did not want to “constitutionalize the employee grievance.” [\[FN259\]](#)

Once we consider the underlying reasons for the *Garcetti/Connick* rule limiting government employees to First Amendment protection only for speech made as a citizen, the analogy to sunshine laws weakens substantially. After all, elected officials are not subject to the type of employer discipline relevant to *Garcetti* and its predecessors. In *Rangra*, the Fifth Circuit held:

While *Garcetti* added a new qualification of public employees' freedom of expression recognized by the Court's long line of cases concerning public employee speech rights, it did nothing to diminish the First Amendment protection of speech restricted by the government acting as a sovereign rather than as an employer and did nothing to impact the speech rights of elected officials whose speech rights are not subject to employer supervision or discipline.

[\[FN260\]](#)

A district court applying *Garcetti* has made a similar distinction between government officials and government employees, noting that the “bureaucratic concerns” regarding employee discipline and supervision simply did not apply to local elected or appointed officials. [\[FN261\]](#)

Indeed, as the Fifth Circuit noted in *Rangra*, case law is clear that First Amendment protection of elected officials' speech is “robust and no less strenuous than that afforded to the speech of citizens in general.” [\[FN262\]](#) *White*, the Supreme Court case discussed above, is a recent example. [\[FN263\]](#) Invalidating the restrictions on judicial candidates' comments, the *White* Court reaffirmed that “[t]he role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public

importance." [\[FN264\]](#) As the Rangra ***347** court noted, there is no shortage of cases upholding the free speech rights of elected officials and candidates. [\[FN265\]](#)

For example, in *Eu v. San Francisco County Democratic Central Committee*, [\[FN266\]](#) a state law purported to prevent local political party officials from endorsing candidates in primary elections. [\[FN267\]](#) The law also barred such candidates from claiming their party's endorsement in a primary election. [\[FN268\]](#) Certainly, there was a "good government" state interest there: it should be up to the primary voters to decide which candidate deserves the party's nomination, and the party endorsement may be seen as an unfair advantage for party "insiders" in such a contest. Nonetheless, the Supreme Court invalidated the law, holding both that party officials have a First Amendment right to endorse candidates in primary elections and that such candidates have a First Amendment right to claim party endorsement. [\[FN269\]](#) Also, in *Brown v. Hartlage*, [\[FN270\]](#) the Supreme Court held that a candidate has a right to promise to reduce his salary, despite laws banning promises of "any thing of value" in consideration of votes. [\[FN271\]](#)

Thus, in the Rangra case, the Fifth Circuit emphasized that the open meetings law at issue was a content-based restriction on political speech and invalid unless it met strict scrutiny. [\[FN272\]](#) Reversing the district court decision ruling that the speech in question was outside First Amendment protection, the court remanded the case for application of the strict scrutiny standard. [\[FN273\]](#) Application of that standard to open meetings laws generally raises serious constitutional doubts about such laws, at least in their most broad form. Even under the more lenient intermediate standard for content-neutral speech restrictions, the broadest of these laws raise significant constitutional issues.

***348** IV. Equal Protection Issues

A. Generally

Another potential ground for challenging open meeting laws is equal protection. The Equal Protection Clause of the Fourteenth Amendment provides that "no State shall deny to any person within its jurisdiction the equal protection of the laws." [\[FN274\]](#) This is "essentially a direction that all persons similarly situated should be treated alike." [\[FN275\]](#)

The Supreme Court has developed a multi-tiered approach to Equal Protection doctrine. The general rule is that laws creating classifications-i.e., differences in treatment-among different categories of persons will be upheld against an Equal Protection challenge as long as they are "rationally related to a legitimate state interest." [\[FN276\]](#) This "rational basis" standard of review is a lenient one, requiring validation of challenged laws unless the relationship of the classification to the asserted state interest "is so attenuated as to render the distinction arbitrary or irrational." [\[FN277\]](#) Generally, social and economic regulation is subject to mere rational basis review, [\[FN278\]](#) as are classifications based on such categories as class, [\[FN279\]](#) age, [\[FN280\]](#) and disability. [\[FN281\]](#)

In contrast, classifications that burden suspect classes are subject to a heightened form of review. [\[FN282\]](#) Classifications based on race, alienage, and nationality are subject to "strict scrutiny"-the most exacting form of constitutional review. [\[FN283\]](#) Such laws will be upheld only if they are "narrowly tailored" to further a "compelling state interest." [\[FN284\]](#) The governmental interest served must be one of the most fundamental interests served by government, and the means used to serve that end must discriminate against the affected group no more than necessary to achieve the end. [\[FN285\]](#)

***349** Meanwhile, classifications based on gender [\[FN286\]](#) and illegitimacy [\[FN287\]](#) are subject to "intermediate scrutiny," and will be upheld as long as the differences in treatment involved are "substantially related to an important governmental objective." [\[FN288\]](#) This standard requires more than some non-arbitrary, reasonable relationship between the asserted legitimate government interest and the difference in treatment between groups. The involved government interest needs to be more than merely legitimate: it must be "important." Further, the classification involved, while not necessarily the most narrow possible to achieve the important end, must not involve significant under-inclusion or over-inclusion. [\[FN289\]](#)

Open meetings laws discriminate among different groups of public officials. These laws regulate legislators but not executive or judicial officials. They regulate only communications among legislators of the same body, not communications between a legislator and an executive branch official of the same government entity. Perhaps most disturbingly, in many states the laws impose burdens on local legislators but exempt state legislators. [\[FN290\]](#)

It is this latter classification-dividing all legislators into local legislators governed by “sunshine” laws and state legislators who are not—that is most constitutionally problematic and will be discussed here. What basis is there for requiring any two local legislators to have substantive communications about pending matters only via a properly “sunshined” public meeting but exempting two state legislators from any corresponding requirement?

B. Strict Scrutiny

The category of “local legislator” is not one which has previously been recognized as a “suspect class” by the Supreme Court. Such recognized suspect classes normally share such characteristics as a history of discrimination, [\[FN291\]](#) immutability, [\[FN292\]](#) and a diminished ability to protect themselves from discrimination through the political process. [\[FN293\]](#) As a group, “local legislators” cannot plausibly claim a history of official discrimination against them sufficient to trigger heightened review. [\[FN294\]](#) Membership in this ***350** class is manifestly mutable: we see its mutability after each election cycle. Compared to an average citizen, local legislators have an influence on the political process that is enhanced, not diminished. From this standpoint, an Equal Protection challenge to open meetings laws which exempt state legislators might be subject merely to rational basis review.

However, there is one argument for heightened review here. Heightened scrutiny is also appropriate under the Equal Protection Clause when the state's classification burdens a fundamental right. The Supreme Court has long held that unequal treatment affecting the right to vote must be evaluated under strict scrutiny. For example, in *Dunn v. Blumstein*, the Supreme Court invalidated Tennessee's durational residency requirement, which required persons to reside in Tennessee for one year, and in the relevant county for three months, in order to vote in a Tennessee county. [\[FN295\]](#) The Court noted that under Equal Protection, such differing treatment regarding the right to vote required strict scrutiny. [\[FN296\]](#) The heightened review came not because the affected category of “new residents” was a suspect class, but because Equal Protection demanded strict scrutiny of any differing treatment regarding the fundamental right to vote. Similarly, in *Reynolds v. Sims*, the Court struck down Tennessee's state legislative districting scheme as a violation of the Equal Protection Clause's “one person, one vote” principle. [\[FN297\]](#) Again, strict scrutiny applied because the districts were classifications of voters which affected voting rights. [\[FN298\]](#) And in *Kramer v. Union Free School District*, the Court applied strict scrutiny to invalidate under Equal Protection a New York law that limited voting in school board elections to persons who owned land in the district or who had children attending school there. [\[FN299\]](#)

The same heightened equal protection analysis applies for laws treating categories of persons differently regarding First Amendment rights. In *Williams v. Rhodes*, the Court overturned ballot access restrictions for third parties, explaining that classifications burdening First Amendment ***351** freedoms were subject to strict scrutiny. [\[FN300\]](#) However, the Court has not been completely consistent on the standard of review in ballot access cases. For example, a plurality of the Court once rejected strict scrutiny in a case involving restrictions on the running for other offices by elected officials, such as a ban on judges and other officials running for the legislature while in office, and a “resign to run” provision triggering automatic resignation if an elected official filed for a different office with more than a year left on his term. [\[FN301\]](#) That plurality distinguished the right of a voter or party to have a candidate of choice on the ballot, which would require strict scrutiny, with the right of a candidate to place his name on the ballot, which would not. [\[FN302\]](#)

Most relevant for open meetings law purposes, the Court has been more consistent in applying strict scrutiny in equal protection challenges to laws burdening the First Amendment right of free speech. In *Police Department of Chicago v. Mosley*, the Court struck down a city ordinance prohibiting picketing near schools because it discriminated between permissible near-

school picketing related to labor disputes and forbade the same picketing not related to labor disputes. [\[FN303\]](#) The Court explained that under Equal Protection analysis, “statutes affecting First Amendment interests [must] be narrowly tailored to their legitimate objectives.” [\[FN304\]](#) Similarly, in *Austin v. Michigan State Chamber of Commerce*, the Supreme Court considered a Massachusetts law which forbade business corporations from making expenditures related to certain referenda, even though such expenditures were allowed for (a) non-corporate organizations with significant treasuries; (b) labor unions; and (c) media corporations. [\[FN305\]](#) Citing *Mosley*, the Court reiterated that statutory classifications burdening First Amendment rights triggered strict scrutiny. [\[FN306\]](#)

Based on these precedents, there is a strong argument for applying strict scrutiny in an equal protection challenge to those open meetings laws which burden local legislators but not state legislators. There is definitely a classification between local and state legislators, and that classification burdens the freedom of speech: the right to speak with a colleague about ***352** matters of public concern outside of an advance-noticed public meeting. Assuming strict scrutiny is applied, the distinction between local and state legislators must be narrowly tailored to further a compelling government interest.

There is indeed a compelling governmental interest in ensuring that government business is conducted “in the sunshine,” and that the public have access to, and meaningful input toward, the decision-making process of elected legislators. However, it seems a stretch to say that this governmental interest applies to local legislators but not state legislators, or even that the interest is greater with respect to local legislators than state legislators. Presumably, one could argue that because the decisions of local legislators affect citizens’ day-to-day lives more, the need for complete citizen access is greater. But this seems a make-weight argument. One could just as easily say that, because state legislators’ decisions are more far-reaching, and because state legislators have powers that local legislators do not, [\[FN307\]](#) it is more imperative to ensure maximum public access to state legislative decision making.

One could not truthfully assert that there are greater opportunities for public access at the state level such that there is a greater need at the local level for open meeting laws. Local media tend to cover local legislative action at least as much, if not more, than state legislative action. [\[FN308\]](#) Further, all things being equal, it is easier for the lay citizen to contact a local legislator than one who is across the state. Again, this analysis, if anything, suggests a greater need for open meeting laws to apply to state legislators. Overall, treating local legislators more strictly than state legislators seems arbitrary and thus unconstitutional, especially inasmuch as the arbitrary discrimination burdens their fundamental right to speak out on matters of public concern.

This conclusion is bolstered by the Supreme Court’s recent decision in *Citizens United v. Federal Elections Commission*. [\[FN309\]](#) In that case, the Supreme Court held that when regulating political speech, the government ***353** could not treat corporations differently from non-corporate entities or individuals. [\[FN310\]](#) Analyzing the issue at great length, the Court emphasized the need to treat entities and individuals consistently with respect to restrictions on political speech, and it treated arguments for such differing treatment with great skepticism. [\[FN311\]](#) Although the Court analyzed the case strictly as a First Amendment issue and focused specifically on discrimination between corporate and non-corporate participants in the political process, the case does signal the Court’s willingness to intervene to prevent what it sees as arbitrary and disparate treatment burdening the right of individuals to participate in political discussion. [\[FN312\]](#)

Thus, under strict scrutiny, the discrimination between state and local legislators by some open meetings laws fails for one of two possible reasons. First, it is unlikely that a compelling governmental interest exists for maximizing public access to the deliberations of local legislators which does not equally apply to state legislators. Alternatively, if one characterizes the governmental interest as a more general one in securing public access to legislative deliberations, such open meetings laws are not narrowly tailored to further this interest given that they are substantially under-inclusive.

C. Rational Basis

Even if the above analysis is incorrect, and the standard of review here is rational basis, there is still cause for concern about the constitutionality of sunshine laws which exempt state legislators. A fair-minded observer may *354 be hard-pressed to advance any rational basis for treating local legislators more strictly than state legislators regarding the exercise of their free speech rights.

However, such an equal protection challenge might collapse on certain state law considerations, depending on the particular state's basis for the state-local distinction. In most states where the distinction exists, the state legislature made the distinction in the open meetings law. [FN313] In a few states, however, the distinction was judicially created based on the dictates of the state constitution. [FN314] Courts have either decided that the state constitution grants state legislators the authority to meet in secret [FN315] or that the state constitution deprives the legislature of the power to bind future legislatures in such matters. [FN316] While a state constitutional requirement does not exempt *355 a state from the requirements of the federal Equal Protection Clause, such legal considerations might provide a rational basis for the distinction between state and local legislators. Indeed, such rationales might apply more broadly to a number of other states.

Thus, although the different treatment between state and local legislators raises serious equal protection issues, it is difficult to say whether a court would sustain an equal protection challenge. The outcome may depend on whether a reviewing court decides that strict scrutiny was appropriate.

Note that this equal protection analysis is independent of the free speech analysis. Even if the most strict open meetings laws pass First Amendment muster on their own, the laws' inexplicable differentiation between the two sets of legislators may violate the Constitution.

Further, this discussion of under-inclusivity is itself under-inclusive. The above analysis addresses only the most egregious form of under-inclusiveness: the hypocritical decision by some state legislators to exempt themselves from the rigorous requirements imposed upon local legislators. There is no rational basis for applying such requirements to local legislators without also applying them to predecisional consultations by multimember courts, single-headed agencies, or executive officials. [FN317]

V. Policy Discussion

A. Policy Problems with the Broader Open Meetings Laws

Because resolution of any constitutional issues turns on the strength of the government interest in broad, strict open meeting laws, consideration of the policies underlying these laws is relevant. And even if the broadest open meetings laws are constitutional, an examination of the policy issues surrounding them is still worthwhile because such laws create serious public policy problems.

1. General: Applying "Transparency" Consistently

The Kansas Supreme Court made a particularly robust First Amendment defense of Kansas's open meetings law in *State ex rel Murray v. Palmgren*. [FN318] In *Palmgren*, litigants asserted an overbreadth challenge to the Kansas statute which barred "a majority of a quorum" of a local legislative body from discussing public business outside of a properly *356 noticed public meeting. [FN319] The case dealt primarily with private meetings held by several county commissioners with a representative of a hospital management firm. [FN320] After confirming that the firm was available to take over management of a public hospital, the commissioners met in a properly noticed public meeting and voted to terminate the existing hospital management firm. [FN321] Notably, there was no discussion on this matter prior to the vote. [FN322]

The court rejected the overbreadth challenge in one paragraph which eloquently states the basic policy rationale behind open meetings laws:

The First Amendment does indeed protect private discussions of governmental affairs among citizens. Everything changes, however, when a person is elected to public office. Elected officials

are supposed to represent their constituents. In order for those constituents to determine whether this is in fact the case they need to know how their representative has acted on matters of public concern. Democracy is threatened when public decisions are made in private. Elected officials have no constitutional right to conduct governmental affairs behind closed doors. Their duty is to inform the electorate, not hide from it. [\[FN323\]](#)

The court's discussion is a forceful policy argument for having a basic right of public access to government deliberative proceedings. Applied to claims of overbreadth by specific statutes, however, it is arguably superficial both as a policy argument and a legal analysis.

As a policy argument, it may prove too much. If "democracy is threatened when public decisions are made in private," then we should prevent presidents, governors, and mayors from privately conferring with advisors or legislators as part of their decision-making process. After all, in many cases, their deliberations have much more profound impacts on policy than conversations between two legislators. But courts have long acknowledged that executive branch officials have a right to engage in confidential discussions based on the recognition that without a guarantee of confidentiality, they will not receive the same level of candor. [\[FN324\]](#)

***357** Similarly, some states elect attorneys general or treasurers. [\[FN325\]](#) Should they be forbidden from making decisions about whom to prosecute or about which investments to make in private? Courts have also recognized the need for prosecutors to keep their internal deliberations secret to protect the privacy of witnesses and the reputations of targets of investigations. [\[FN326\]](#) It seems obvious that an elected treasurer might legitimately wish to control the timing of public announcements of investment decisions. Indeed, by allowing elected sheriffs, trustees, and mayors to confer with each other in private, and to confer with selected legislators in private, open meetings laws give a competitive advantage to these officials that is not shared by local legislators. Such officials can assess the legislative body as a whole by having a series of individual conversations with many members, while each legislator must abstain from learning the feelings of, or lobbying, fellow legislators. This under-inclusiveness should make open meetings laws constitutionally suspect. [\[FN327\]](#) Similarly, an absolute bar on conducting governmental affairs behind closed doors would not protect individuals' privacy when discussing sensitive matters involving personnel disputes, would cause a distinct negotiating disadvantage by mandating public contract negotiations, and would raise any number of legitimate public concerns about confidentiality.

To be sure, open meetings laws do not apply to executive branch officials and many contain exceptions for personnel matters, individual privacy, or contract negotiations. One cannot adequately consider an overbreadth challenge to an open meetings law by reference to over general paeans to government in the sunshine.

As legal analysis, the Palmgren opinion may also go too far when it says that "everything changes" when a person is elected to public office, and that elected officials "have no constitutional right to conduct government affairs behind closed doors." The Kansas Supreme Court did not support this statement with actual authority. Indeed, courts have not held that there is an unqualified right of public access to governmental deliberations, and they have explicitly acknowledged the authority of governmental actions to deliberate in secret. [\[FN328\]](#) As explained above, [\[FN329\]](#) it is by no means clear that elected officials are completely stripped of their First Amendment rights to speak, to whomever they like and whenever they like, about matters of public concern.

***358** 2. Whether the Broader Version is Truly Necessary to Fulfill Open Meetings Law Goals

The Kansas Supreme Court's articulation of policy rationales for open meetings laws is typical. One commentator wrote that such laws are designed to (1) prevent the self-dealing and corruption of "backroom deals;" (2) allow the public to serve as a check on potential governmental abuse; (3) provide for a more thorough examination of the issues and articulation of policies and rationales; and (4) promote confidence in government. [\[FN330\]](#) As discussed below, the strictest form of open meetings laws are not necessary to achieve these goals, and in some cases may be counterproductive.

There is no reason to think that the frequency of corrupt backroom deals would flourish were open meetings laws to require half a quorum, or even a full quorum, before triggering the

“sunshine” requirement. This is indeed the law in the vast majority of states, and there is no empirical evidence to suggest that such states suffer significantly more corruption than the minority of states which define a “meeting” more broadly. [\[FN331\]](#) Narrowing the definition of “meeting” in this way need not create a truck-sized loophole. Statutory language could be crafted to forbid legislators from getting around this requirement through a series of small private gatherings among legislators accumulating to a total over a quorum (or half-quorum). [\[FN332\]](#) This is in line with the general practice of statutes to forbid persons from intentionally or knowingly doing indirectly what cannot be done directly.

Similarly, a narrowing of that sort would still allow the public to serve as a check on government abuse. Recall that after any small gathering of ***359** legislators in which they discuss an issue, there will still be a mandatory publicly noticed official meeting. As long as a quorum has not privately met (at once or in seriatim), that formal meeting will not simply serve to “rubber-stamp” the predetermined outcome. Publicly open debate and discussion among the remaining members will still be necessary to attain a consensus sufficient for official action, and if the issue is at all controversial, it will still be necessary for legislators to explain the basis for their votes in full view of the public prior to the final vote.

Even in the worst-case scenario, where a series of small gatherings has resulted in a de facto quorum pre-meeting, political reality will require that legislators nonetheless explain their votes on any issue of heightened public interest or wherever there is controversy. If a recalcitrant legislator were to refuse to do so, the actual vote of that legislator will always be made in public. [\[FN333\]](#) Given all of this, there remain ample avenues for accountability to the public even in a regime that would allow two or three legislators to talk “offline.” Indeed, it is precisely upon this set of informal political checks on illicit backroom deals that we have relied regarding the United States Congress for the entire history of our republic. [\[FN334\]](#)

The above conclusions hold similarly for the addition of exemptions to open meetings laws for topics which merit private discussion. The federal Sunshine Act has a lengthy list of statutory exemptions for personnel matters, trade secrets, information affecting the privacy of individual citizens, law enforcement records, and certain regulatory financial information. [\[FN335\]](#) Some state laws have similar exemptions. [\[FN336\]](#) In these jurisdictions, neither public corruption, government abuse, nor public confidence in government is notably worse than in the minority of states with little to no categorical statutory exemptions. Unless the exceptions are worded, applied, or interpreted so broadly as to swallow the rule, effective public access to meetings will be the norm. The public will thus be able to check government abuse and assure itself of the legitimacy of the process.

Assuming that the above analysis is correct, adequate mechanisms exist to prevent corruption and ensure public accountability even in states using the quorum rule or half-quorum rule. The same is true of states with a robust list of exceptions for discussion of sensitive topics. If all that is so, then public confidence in the legislative process is not fatally eroded in such states.

For all the above reasons, it also seems unlikely that legislative discussion, debate, and articulation of policy rationales would become significantly less thorough as a result of narrowing the “meeting” definition. Indeed, there is reason to think the opposite. As noted below, a ***360** number of commentators, some citing empirical data, [\[FN337\]](#) have argued that strict open meetings requirements tend to stifle debate and reduce the quality and detail of collaborative decision making.

3. The Costs of Overly Broad Open Meetings Laws

a. The Main Costs Raised by Commentators

So far, I have focused on whether the benefits of open meetings laws can be achieved with less restrictive rules. This point leads directly to consideration of the significant costs of strict sunshine laws, costs not normally addressed by courts and legislators. A number of commentators have noted that such acts have tended to (1) chill discussion [\[FN338\]](#) and thus decrease collegial decision making; [\[FN339\]](#) (2) reduce the actual number of public meetings

held; [\[FN340\]](#) and thus (3) shift authority to staff, [\[FN341\]](#) or to lobbyists. [\[FN342\]](#) Similar findings resulted from a comprehensive implementation study [\[FN343\]](#) commissioned by Congress to assess the effectiveness of the federal Government in the Sunshine Act seven years after its adoption.

Chilling Discussion/Collegial Decision Making. The Supreme Court has recognized that the candor and quality of deliberations can suffer when they are forced to become public. In recognizing a Constitution-based “executive privilege” in *United States v. Nixon*, the Court recognized that “[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process.” [\[FN344\]](#)

The Supreme Court has separately recognized a non-constitutional executive privilege protecting federal government entities from disclosing documents reflecting internal deliberative processes. [\[FN345\]](#) The Court acknowledged the existence of this privilege in civil discovery in litigation against the federal government as embedded in a statutory exemption for inter-agency or intra-agency memoranda under the federal Freedom of **361* Information Act. [\[FN346\]](#) Indeed, the Court noted legislative history from that Act which explicitly feared that intra-agency “frank discussion . . . might be inhibited if the discussion were made public,” and that the decisions thus made “would be poorer as a result.” [\[FN347\]](#) Therefore, the Court reaffirmed the existence of a non-disclosure privilege available to documents revealing predecisional discussion of a policy issue. [\[FN348\]](#)

Applied to the related context of open meetings laws, such an approach argues for the ability of legislators to confer in private while deliberating (precisely that which is not allowed by open meetings laws), relying on the public disclosure of the actual decision itself made at a public meeting to ensure adequate public oversight. In effect, the statutory requirement that properly noticed public meetings precede actual action ensures the disclosure of post-decisional discussion. The public is informed of which elected official decided what and why. Sufficiently great public outcry can then force reconsideration of the decision, or future decisions of that kind can be prevented by voting the officials out of office. Such an approach can also be reconciled with open meetings laws that adopt a “quorum rule.” Once a quorum has met to decide something, the decision is effectively made, and all further discussions are de facto post decisional.

Commentators agree with the Supreme Court that private consultation can enhance the decision-making process:

Closed deliberations enable policymakers to make more thoughtful consideration of the available information and the relative advantages of alternatives, to engage in more fulsome and substantive debate over the most popular and unpopular alternatives regarding even the most passionate public issues, and to bargain openly in order to reach a widely acceptable and optimal result, without the inevitable pressure that accompanies public scrutiny. [\[FN349\]](#)

Many of these same advantages support our universal practice of having multi-judge panels and juries deliberate in private. One cannot imagine a state appellate or supreme court, let alone the United States Supreme Court, being required to deliberate controversial decisions in public. Yet many of these decisions have a much more wide-ranging and profound impact on the lives of the citizenry than the type of local ordinance covered by open meetings laws. Similarly, juries make important decisions, even life-or-death decisions, yet the privacy of juror deliberations is considered so sacrosanct that attempts to pierce the veil of secrecy in the most trivial of jury cases can lead to criminal punishment. While not completely analogous to legislative deliberation, these examples do **362* illustrate society’s recognition that as a practical matter, private deliberation is appropriate and necessary for proper decision making. So too with legislators: private deliberation can lead to greater candor and more nuanced outcomes.

The cramped restrictions of modern open meetings laws thus have a predictable effect:

Anecdotal complaints about open meeting laws suggest that agencies subject to these laws hold fewer meetings; engage in a constrained, less-informed dialogue when they meet; are vulnerable to greater domination by those who possess greater communications skills and self-confidence, no matter the quality of their ideas; and lose the potential for informal, creative debate that chance or planned meetings outside of the public eye enable. [\[FN350\]](#)

This stifling of debate is aggravated where the subject matter is sensitive and the relevant open meetings law admits of few or no subject matter exceptions. For example, suppose a legislative body needs to make an appointment to some government position to fill a vacancy. Members may wish to candidly discuss the pros and cons of various candidates for the vacancy, including reviewing negative information on a candidate's background that may potentially embarrass the candidate. Without an appropriate exception for personnel matters, matters that may infringe on a citizen's privacy, or the like, many legislators might simply decline to raise the issue, thus depriving the body of relevant information and weakening the decision-making process. [\[FN351\]](#)

Moreover, even so simple a thing as co-sponsorship becomes problematic when such laws prevent any two legislators from conferring privately. A legislator drafting a bill may not ask colleagues to co-sponsor the bill prior to its public release. Once it is formally introduced, of course, a legislator may publicly ask for co-sponsors. But some legislators may be reluctant to introduce a controversial bill in the first place unless they know that key colleagues—either those of the same party, or perhaps of the opposite party—will co-sponsor with them. Democracy is furthered, not subverted, by allowing a sponsor to seek such early support in an off-the-record discussion prior to the formal introduction of the bill.

Fewer Meetings. A 1989 Senate Report studying the Sunshine Act's effects on the federal government showed a 31% decline in all federal agency meetings held between 1980 and 1984, based on a survey of fifty-^{*363} nine federal agencies. [\[FN352\]](#) A few years earlier, the Welborn Study found that, after the Sunshine Act's passage, federal agencies engaged in greater use of "notation voting," decision making "on the papers" without actual meetings. [\[FN353\]](#) One commentator has suggested that open meetings laws encourage greater use of the related device of the "consent agenda," where unanimously supported items are bunched together and resolved without discussion through a single vote. [\[FN354\]](#)

Reliance on Staff. The Welborn Study found that the number of staff meetings increased after adoption of the Federal Sunshine Act. [\[FN355\]](#) Such meetings were more common particularly right before scheduled open meetings. [\[FN356\]](#)

Hardly surprising, such a result suggests that agency members asked staff to meet to hash out issues prior to formal meetings. While an understandable instinct, it naturally tends to place more discretion in the hands of staff and less in the hands of the agency members or legislators accountable to the public.

The shift of power to staff is an intuitive result, one entirely in accord with the author's own experience as a local legislator. The more complex or controversial an issue, the greater the impulse of a legislator to confer with colleagues about it in private. Since a legislator cannot confer privately with a fellow decision maker, the legislator naturally turns to staff for guidance, even more than the legislator otherwise might. Further, unlike the legislator, staff members are allowed to consult with multiple legislators and get an overall view of where the legislative body is on a given issue. This information advantage enhances staff members' ability to frame the debate and guide the outcome, and places them in a heightened role as mediator between competing positions of individual legislators. The result is a transfer of power from those elected by the people to unelected bureaucrats.

A similar dynamic is at work with respect to lobbyists and executive branch officials. When complicated or controversial issues are taken up by a legislative body, discussion often continues over a series of formal public meetings. In resolving any policy impasse, it is crucial to know where each legislator stands on the issue and what compromises each is prepared to accept. A lobbyist or executive branch official is free to contact each ^{*364} legislator and discover exactly what that legislator's position is at any given phase of the process. A lobbyist thereby learns which compromises are feasible and which are unrealistic. This gives the lobbyist an enormous tactical advantage over an individual legislator, who is barred by law from finding out where any colleague stands. In this way, broad sunshine laws transfer power from the legislature to the executive and from elected legislators to unelected lobbyists.

Such a transfer exacerbates the disadvantage faced by local legislators, almost all of whom are part-time officials. Most such legislators have full-time "day jobs" they use to support themselves and are thus limited in the amount of time and study they can devote to complex policy issues. [\[FN357\]](#) Therefore, they are often forced to rely on the greater expertise of full-

time staff, executive branch officials, and lobbyists when making up their minds. By isolating each legislator from fellow legislators outside the limited venue of formal public meetings, open meetings laws make this power dynamic even more lopsided. Quere whether this truly enhances the democratic process.

b. Other Costs

In their broadest form, open meetings laws create still more problems. These problems have not been discussed in detail by commentators.

Reduces Efficiency. Obviously, the requirement of a publicly noticed meeting for any discussion between any two legislators slows the resolution of legislative issues. While it is generally understood that democracy is necessarily an inefficient process, [\[FN358\]](#) taken to this extreme, sunshine laws can cause significant problems for the part-time local legislator. If the legislative body is taking up a complicated issue requiring lengthy legislation, there may simply not be enough time to work out all the details during formal meetings, which often involve lengthy agendas and members of the public and staff waiting for particular items to be heard so they can leave.

An obvious time-saving solution would be for key members of the legislature to meet informally to hash out a tentative proposal which would then be discussed openly at the next regularly scheduled meeting. Deprived of this sensible solution by the strictest of the open meetings laws, legislators are faced with three bad choices: (1) repeatedly postponing decisions while the details get worked out through a series of successive regularly scheduled meetings, usually at two-week intervals; (2) scheduling a special meeting to work on the issue, despite the crowded and conflicting ***365** schedules of part-time legislators with "day jobs;" or (3) taking action based on incomplete debate and discussion.

Prevents Compromise. Another problem with broad open meetings laws is that they make legislative compromises on divisive issues more difficult. When parties are locked in a bitter impasse, it is often useful for one member to privately reach across the aisle and float a potential compromise.

Doing so in public entails great risk. The other side may decide to yield political gain by publicly rebuffing the suggestion, playing to its base by loudly decrying any "sell-out" and embarrassing the member who made the suggestion. Or the other side may wish to negotiate but feel constrained from doing so publicly by pressure from interest groups or hard-liners on its own side.

The risk is even greater when, as is often the case, the compromise is multilateral. A promoter of a compromise must often speak in hypotheticals, asking A if A would yield on Issue 1 if the promoter could get B to yield to A on Issue 2; the promoter might continue that if, and only if, that were to take place, the promoter personally would be willing to yield on Issue 3. Such multi-party negotiations are inherently delicate and must often be carried out in stages. In Stage One, it might be politically risky, and fatally so, for A to publicly give conditional, hypothetical assent without yet knowing whether the other parties will be willing to go along. This chilling effect can abort the incipient compromise.

Tacitly acknowledging this reality, media members often praise members of Congress for privately "working across the aisle" to broker compromise and break gridlock. [\[FN359\]](#) It is not reading too much into such praise to see a realization that such delicate negotiations might break down if the participants were forced to negotiate in public. Yet many of these same media commentators would vehemently condemn any attempt to narrow open meetings laws applicable to local legislators, calling such efforts an attempt to return to the smoke-filled room. [\[FN360\]](#)

Forces Inappropriate Disclosure of Sensitive Information. As noted above, absent an appropriate sunshine law exception, a legislator may decide not to raise a sensitive matter for fear of embarrassing an individual or harming that individual's reputation. Alternatively, the legislator may feel obligated to raise the matter in public, doing otherwise unnecessary damage to the individual. Indeed, the prospect of raking over a job candidate's record in public may dissuade some qualified candidates from applying for such positions, lest they endure the harsh glare of public ***366** scrutiny. [\[FN361\]](#) Such a result naturally harms both the candidates and the public institution searching for them.

Similarly, a legislator may feel politically obligated to discuss the city or county's potential "bottom line" in ongoing labor talks, or in a negotiation for the sale of land to, or purchase of goods or services from, a private entity. Doing so may substantially weaken the city or county's bargaining position. Such dilemmas pit the legislator's obligation to protect the government's financial interest against the legislator's obligation to engage in full consideration and discussion in accordance with applicable law.

Rewards the Scofflaw and Punishes the Scrupulous. Given the many disadvantages to the legislator entailed in strict adherence to broad open meetings laws, it should come as no surprise to learn that such laws are often honored in the breach. Reported instances of substantial violations are not uncommon. [\[FN362\]](#)

Yet another pressure to violate strict sunshine laws comes from the competitive nature of legislative politics. Legislators often compete with one another, not only over competing policy visions, but over issues such as budgetary resources, credit for policy initiatives, and bragging rights over legislative victories. The legislators who know what their colleagues are thinking at all times—including, and especially, prior to regularly scheduled public meetings—have a distinct comparative advantage. These are the legislators who end up advancing their legislative agendas, brokering deals, and earning reputations for "getting things done" and being "the guy to see" on Issue X. This, in turn, leads to prestige and influence. The legislators who most scrupulously honor the sunshine law, and are thus the most in the dark about colleagues' positions until the formal debate, are less likely to achieve their policy goals, less likely to broker deals, and generally will have a lower profile.

While it may always be the case that "cheaters" have an unfair advantage over those who play fair, at least until the cheaters are caught, the problem is exacerbated where a rule widely seen as an unrealistic technicality is routinely broken by a wide variety of actors. This, sadly, is almost certainly the case regarding the broadest open meetings laws.

Breeds Contempt for the Law. This last observation illustrates a related but distinct, pernicious byproduct of overbroad sunshine laws. By **367* creating a regime in which violation of the rules is commonplace, such laws breed contempt for the law. Political actors in such regimes routinely joke about the open meetings law. Each actor feels free to craft his or her own "exceptions:" situations where the actor unilaterally decides that a certain violation of the open meetings law is merely technical in nature and not worth worrying about. The practices vary from person to person, creating confusion among legislators regarding both what the law is as a nominal matter and the actual state of compliance as a realistic matter.

The situation is not different from any unrealistic "zero tolerance" law. If a high school student knows that the punishment for being caught with a pseudophedrine tablet is essentially the same as for being caught with a marijuana joint, that student tends to take less seriously both the dangers of marijuana and the authority of the school. This insouciance transfers over to other rules, leading to an epidemic of scofflaw behavior. [\[FN363\]](#)

B. Model Open Meetings Law

A proposed Model Open Meetings Law is set out below. It covers legislative bodies and their subsidiary agencies but not those agencies with merely advisory or ceremonial duties. It explicitly requires that state and local bodies be treated alike. Regarding the crucial definition of "meeting," the Model Law adopts the "quorum rule" used by a majority of states and compiles certain typical categorical exceptions for topics that may appropriately be treated as confidential. In addition to personnel matters, matters affecting individual privacy, and ongoing financial negotiations, these exceptions also explicitly allow a bill sponsor to seek co-sponsors. Since discussions of such topics are not "meetings," they are not covered by the Model Law, and individual members amounting to less than a quorum can have informal discussions about these topics. [\[FN364\]](#) The Model Law allows for retreats by the covered government entity and echoes the exception for fact-finding meetings present in a number of states' open meetings laws. Additionally, the Model Law provides a defined procedure for closing a formal meeting. The Model Law is, by design, simple and short.

As is typical, the enforcement mechanism is a private lawsuit by an interested party. Because criminal liability entails a substantial likelihood of **368* chilling free speech, the remedies do not

include criminal sanctions. However, the remedies do include civil penalties for individual legislators and members of boards and commissions, but only after a showing of willful misconduct: where one member conspired with others to violate the Model Law, such as where two members of a government body agree to hold a series of in seriatim meetings or telephone calls to achieve a quorum cumulatively. Because this is a civil penalty imposed on an individual, the heightened proof standard of clear and convincing evidence is used. By providing for the shifting of costs and attorney fees, the Model Law also seeks to encourage vindication of the rights provided by "private attorneys general." On the other hand, to discourage frivolous and politically motivated lawsuits, the law allows for costs and attorney fees to be assessed against the plaintiff based on a finding of a frivolous claim.

Model Open Meetings Law

1. General. This Act applies to all legislative bodies within this State and all multimember boards, commissions, and agencies appointed by such a legislative body that have the ability to issue rules or decisions which, if left undisturbed, are legally binding. It applies equally in all respects to state and local bodies.

2. Requirement of Open Meetings. All meetings of covered government entities must be open to the public and properly noticed to the public at least 48 hours in advance. Notice shall include the name of the covered body, the time and place of the meeting, a copy of the agenda, and a statement of whether minutes, a transcript, or a recording of the meeting will be made available. Notice shall be accomplished through, at a minimum, placement of a written notice on a designated public bulletin board and on the applicable state, county or city website, if any. The covered government entity may devise additional methods of notice.

3. "Meeting" Defined.

(a) General Definition. For purposes of this Act, a "meeting" is any communication, whether in person, in writing, or through some form of electronic communication, among a quorum of the relevant government entity to the extent such communication involves deliberation toward an official decision by that government entity. A member of a covered government entity may not intentionally circumvent this provision by participating, directly or indirectly, in a series of communications among other members less than a quorum which, taken together, involve a number of such members equal to or greater than a quorum.

(b) Exceptions. The term "meeting" shall not include:

(1) Fact-finding trips, site inspections, or the like;

*369 (2) Retreats sponsored by the government entity, provided that such retreats occur no more frequently than quarterly; or

(3) Discussions of:

(i) personnel decisions, including appointments to fill vacancies in elected or appointed governmental positions;

(ii) trade secrets, confidential intellectual property, or other commercial proprietary information, including, but not limited to, information which, if disclosed by an employee or competitor, would normally give rise to civil liability;

(iii) financial, medical, or other sensitive information concerning a private business or individual that would disturb personal privacy, including, but not limited to, information which, if disclosed by a private party, would normally give rise to tort liability for invasion of privacy;

(iv) then-pending litigation, administrative adjudicatory proceedings, or official investigations into violations of law, ordinance, or regulation;

(v) any information which an applicable statute requires or permits to be held confidential;

(vi) then-pending commercial negotiations between the government entity and another individual or entity, public or private; or

(vii) a potential sponsor's request that a colleague co-sponsor draft legislation.

4. Closed Meetings. A formal meeting of a covered government entity may be ordered closed to the public by a majority vote of the government entity, provided that the general counsel of the entity, or of the legislative body appointing it, or some other qualified consulting attorney, advises that one of the exceptions of Section 3(b) applies. In making this determination, a presumption in favor of open meetings shall apply. Discussion at the closed meeting must be kept pertinent to the matters triggering such exception. No final action can be taken in a closed meeting.

5. Remedies. Any resident of the political jurisdiction in or for which the covered government entity acts may file an action in a court of competent jurisdiction to enforce this law. The court may order, as appropriate:

- (a) an injunction ordering an upcoming meeting open to the public;
- (b) an injunction nullifying an action taken in violation of this Act, which action may be reinstated by a subsequent vote of the covered government entity done in compliance with this Act;
- (c) an injunction against future violations of the Act;
- (d) costs and attorney fees against the covered jurisdiction after a finding of a violation of the Act, or against the plaintiff after a finding that his or her claim was frivolous;
- *370** (e) civil penalties against the covered government entity after a finding that it took a frivolous position in the litigation;
- (f) civil penalties against an individual member of the government entity, after a finding by clear and convincing evidence that such member willfully conspired with others to violate the act;
- (g) such other relief as the court in the exercise of reasonable discretion deems appropriate and consistent with the provisions of this law.

VI. Conclusion

Open meetings laws are content-based restrictions on political speech that deserve strict scrutiny. Where they reach down to regulate individual conversations between two legislators who may wish to confer in private, there is a serious doubt as to whether they are narrowly tailored. Similar doubt exists where such laws contain no exceptions to protect individual privacy, to allow legislative clients to confer confidentially with counsel, or to permit local government agencies to negotiate with outside vendors in private. Even under the more forgiving constitutional standard used for content-neutral regulations of speech, these stricter laws may be fatally under-inclusive or over-inclusive or fail to provide ample alternative channels for deliberation.

It is telling indeed that many state legislatures exempt themselves from the strictest of the open meeting requirements they impose on local government entities. Their tacit acknowledgment of the difficulties involved in banning all private deliberation is understandable, but it is also in tension with equal protection principles.

Discussions of open meetings policies inevitably turn to Justice Brandeis' famous maxim that "[sunlight] is said to be the best disinfectant." [\[FN365\]](#) Comparing a right of public access to sunshine is a powerful metaphor, but, like most metaphors, it can work in multiple directions. Sunlight cannot really disinfect, but overexposure can cause sunburn, skin cancer, and heat exhaustion. In a similar manner, champions of good government certainly should insist that the public be informed of all important government decisions while they are made and that formal public meetings not be sham affairs in which backroom deals are rubber-stamped. But that does not mean that legal sanctions are appropriate every time a Republican legislator takes a Democratic counterpart by the elbow and says, "Let's go get some coffee and see if we can work out a compromise." Nor does it mean that a school board must do live web ***371** streaming when it considers a grievance from a principal accused of sexually harassing a minor.

Open government reform is thus, itself, in need of some reform. The most appropriate vehicle for such reform would be state legislation in line with the Model Open Meetings Law set out above. However, self-interested opposition from media makes such legislative reform difficult to achieve. Arguing for more secrecy in government is a tough sell to a distracted public under the best of circumstances; add inflammatory editorials about "smoke-filled rooms," and such reform may be impossible. Absent such reform, courts may see more challenges like Rangra. One way or another, hopefully local legislators may eventually find some relief from the sunlight's glare.

VII. Appendix

Subject-Matter Exceptions to Open Meetings Law Requirements by State

This table reflects the topics which are not covered by state open meetings laws. An "X" indicates that the relevant state's open meetings law does not apply to discussions of the topic described in the column.

***375** The exceptions listed above are derived from the following statutory provisions:

Alabama: [Ala. Code § 36-25A-2](#)(4) (2010); [Ala. Code § 36-25A-7](#)(a) (2010).

Alaska: [Alaska Stat. § 44.62.310](#)(c)-(d) (2009).

Arizona: [Ariz. Rev. Stat. Ann. § 38-431.03](#)(A) (2010); [Ariz. Rev. Stat. Ann. § 38-431.08](#)(A) (2010).

Arkansas: [Ark. Code Ann. § 25-19-103](#)(4) (West 2010); [Ark. Code Ann. § 25-19-106](#)(c) (West 2010).

California: [Cal. Gov't Code § 11126](#)(c), (e)(1) (West 2009); [Cal. Gov't Code § 54956.7-54957.10](#) (West 2009).

Colorado: [Colo. Rev. Stat. Ann. § 24-6-402](#)(3)(a) (West 2010); [Colo. Rev. Stat. Ann. § 24-6-402](#)(4)(a) (West 2010).

Connecticut: [Conn. Gen. Stat. Ann. §1-200](#)(2), (6) (West 2010).

Delaware: [Del. Code Ann. tit. 29, § 10004](#)(b), (h) (West 2010).

Florida: [Fla. Stat. Ann. § 286.011](#)(3), (8) (West 2010).

Georgia: [Ga. Code Ann. § 50-14-3](#) (West 2010).

Hawaii: [Haw. Rev. Stat. § 92-5](#)(a) (West 2010).

Idaho: [Idaho Code Ann. § 67-2345](#) (1) (West 2010).

Illinois: [5 Ill. Comp. Stat. 120/1-02](#) (2008); [5 Ill. Comp. Stat. 120/2](#)(c) (2008).

Indiana: [Ind. Code § 5-14-1.5-2](#)(c) (2007); [Ind. Code § 5-14-1.5-6.1](#)(b) (2007).

Iowa: [Iowa Code Ann. § 21.5](#) (West 2010).

Kansas: [Kan. Stat. Ann. § 75-4318](#)(f) (2010); [Kan. Stat. Ann. § 75-4319](#)(b) (2010).

Kentucky: [Ky. Rev. Stat. Ann. § 61.810](#)(1) (West 2010).

Louisiana: [La. Rev. Stat. Ann. § 42:6.1](#)(A)-(B) (2010).

Maine: [Me. Rev. Stat. Ann. tit. 1, § 405](#)(6) (2010).

Maryland: [Md. Code Ann., State Gov't § 10-502](#)(h)(3) (West 2010); [Md. Code Ann., State Gov't § 10-508](#)(a) (West 2010).

Massachusetts: [Mass. Gen. Laws Ann. ch. 30A, § 11A 1/2](#) (West 2010); [Mass. Gen. Laws Ann. ch. 39, § 23B](#) (West 2010).

Michigan: [Mich. Comp. Laws Ann. § 15.263](#)(7) (West 2010); [Mich. Comp. Laws Ann. § 15.268](#) (West 2010).

Minnesota: [Minn. Stat. § 13D.01](#)(2) (2009); [Minn. Stat. § 13D.03](#) (2009); [Minn. Stat. § 13D.05](#) (2009).

Mississippi: [Miss. Code Ann. § 25-41-3](#)(a) (West 2010); [Miss. Code Ann. § 25-41-7](#)(4) (West 2010).

Missouri: [Mo. Ann. Stat. § 610.021](#) (West 2010).

Montana: [Mont. Code Ann. § 2-3-203](#)(3)-(5) (2010).

Nebraska: [Neb. Rev. Stat. § 82-1409](#)(1)(b) (2006); [Neb. Rev. Stat. § 82-1410](#)(1) (2006).

Nevada: [Nev. Rev. Stat. Ann. § 241.030](#)(1) (West 2010).

New Hampshire: [N.H. Rev. Stat. Ann. § 91-A:2](#)(I) (2010); [N.H. Rev. Stat. Ann. § 91-A:3](#)(II) (2010).

***376** New Jersey: [N.J. Stat. Ann. § 10:4-8](#)(a) (West 2010).

New Mexico: [N.M. Stat. Ann. § 10-15-1](#)(A), (H) (West 2010).

New York: [N.Y. Pub. Off. Law § 105](#)(1) (Consol. 2009); [N.Y. Pub. Off. Law § 108](#) (Consol. 2009).

North Carolina: [N.C. Gen. Stat. Ann. § 143-318.10](#)(c) (West 2010); [N.C. Gen. Stat. Ann. § 143-318.11](#)(a) (West 2010).

North Dakota: [N.D. Cent. Code § 44-04-19.2](#)(1)-(2) (2007); [N.D. Cent. Code § 44-04-19.3](#) (2007).

Ohio: [Ohio Rev. Code Ann. §121.22](#)(D)-(G) (West 2010).

Oklahoma: [Okla. Stat. Ann. tit. 25, 304](#)(1) (West 2010); [Okla. Stat. Ann. tit. 25, 307](#)(B) (West 2010).

Oregon: [Or. Rev. Stat. § 192.660](#)(2) (2009); [Or. Rev. Stat. § 192.690](#)(1) (2009).

Pennsylvania: [65 Pa. Cons. Stat. Ann. § 703 \(West 2010\)](#); [65 Pa. Cons. Stat. Ann. § 707\(c\) \(West 2010\)](#).
Rhode Island: [R.I. Gen Laws § 42-46-2\(c\) \(2007\)](#); [R.I. Gen Laws § 42-46-5\(a\) \(2007\)](#).
South Carolina: [S.C. Code Ann. § 30-4-20\(a\) \(2010\)](#); [S.C. Code Ann. § 30-4-70\(a\) \(2010\)](#).
South Dakota: [S.D. Codified Laws § 1-25-2 \(2009\)](#).
Tennessee: [Tenn. Code Ann. § 8-44-102\(b\) \(2010\)](#); [Tenn. Code Ann. § 50-3-2013\(c\)\(1\) \(2010\)](#).
Texas: [Tex. Gov't Code Ann. § 551.071-088 \(West 2007\)](#).
Utah: [Utah Code Ann. § 52-4-205\(1\) \(West 2010\)](#).
Vermont: [Vt. Stat. Ann. tit. 1, § 312\(e\) \(2010\)](#); [Vt. Stat. Ann. tit. 1, § 313\(a\) \(2010\)](#).
Virginia: [Va. Code Ann. § 2.2-3703\(A\) \(West 2010\)](#); [Va. Code Ann. § 2.2-3707.019 \(West 2010\)](#); [Va. Code Ann. § 2.2-3711\(A\) \(West 2010\)](#).
Washington: [Wash. Rev. Code Ann. § 42.30.110\(1\) \(West 2010\)](#).
West Virginia: [W. Va. Code Ann. § 6-9A-2\(4\) \(LexisNexis 2009\)](#); [W. Va. Code Ann. § 6-9A-4\(b\) \(LexisNexis 2009\)](#).
Wisconsin: [Wis. Stat. Ann. § 19.85\(1\) \(West 2010\)](#).
Wyoming: [Wyo. Stat. Ann. § 16-4-405\(a\) \(2010\)](#).

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[FN1]. See, e.g., [Colo. Rev. Stat. Ann. § 24-6-402\(2\)\(a\) \(West 2007\)](#); [Tenn. Code Ann. § 8-44-102\(c\) \(Supp. 1998\)](#). See generally Ann Taylor Schwing, Open Meeting Laws 271-72 (2d ed. 2000) (describing methods employed in various states for determining the number of participants required to place a gathering under open meeting restrictions).

[FN2]. See [Ariz. Rev. Stat. Ann. § 38-431\(4\) \(2007\)](#); [Ark. Code Ann. § 10-3-305\(a\) \(West 2010\)](#); [Colo. Rev. Stat. Ann. § 24-6-402\(1\)\(b\) \(West 2007\)](#); [Conn. Gen. Stat. Ann. §1-200\(2\) \(West 2008\)](#); [Del. Code Ann. tit. 29, § 10002\(b\) \(West 2010\)](#); [Fla. Stat. Ann. § 286.011 \(West 2008\)](#); [Ga. Code Ann. § 50-14-1\(a\)\(2\) \(West 2010\)](#); [Haw. Rev. Stat. § 92-10 \(West 2010\)](#); [Idaho Code Ann. § 67-2341 \(West 2007\)](#); [5 Ill. Comp. Stat. Ann. 120/1.02 \(West 2010\)](#); [Ind. Code Ann. § 5-14-1.5-2\(a\)\(1\) \(West 2007\)](#); [Iowa Code Ann. § 21.2 \(West 2007\)](#); [Kan. Stat. Ann. § 75-4317a \(West 2008\)](#); [Ky. Rev. Stat. Ann. § 61.805\(1\) \(West 2010\)](#); [Me. Rev. Stat. Ann. tit. 1, § 401 \(2007\)](#); [Mich. Comp. Laws Ann. § 15.262\(b\) \(West 2009\)](#); [Miss. Code Ann. § 25-41-1 \(West 2010\)](#); [Neb. Rev. Stat. Ann. § 84-1409\(2\) \(LexisNexis 2008\)](#); [N.C. Gen. Stat. Ann. § 143-318.10\(d\) \(West 2008\)](#); [N.D. Cent. Code § 44-04-17.1\(8\)\(a\),\(b\) \(2007\)](#); [Ohio Rev. Code Ann. § 121.22\(B\)\(2\) \(West 2009\)](#); [Okla. Stat. tit. 25 § 304\(2\) \(2010\)](#); [Or. Rev. Stat. Ann. § 192.630\(5\) \(West 2010\)](#); [65 Pa. Cons. Stat. Ann. § 703 \(West 2007\)](#); [S.C. Code Ann. § 30-4-70\(e\) \(2005\)](#); [S.D. Codified Laws § 1-25-1 \(2010\)](#); [Tenn. Code Ann. § 8-44-102\(b\)\(1\)\(A\) \(Supp. 1998\)](#); [Tex. Gov't Code Ann. § 551.001\(4\)\(A\) \(West 2009\)](#); [Vt. Stat. Ann. tit. 1, § 310\(2\) \(West 2010\)](#); [Wash. Rev. Code Ann. § 42.30.020\(4\) \(West 2010\)](#); [Wis. Stat. Ann. § 19.81\(2\) \(West 2009\)](#); [Wyo. Stat. Ann. § 16-4-402\(a\)\(iii\) \(West 2010\)](#).

[FN3]. See [Alaska Stat. Ann. § 44.62.310\(a\) \(West 2009\)](#); [La. Rev. Stat. Ann. § 42:6.2\(A\)\(2\) \(2009\)](#); [Mont. Code Ann. § 2-3-202 \(2009\)](#); [Nev. Rev. Stat. Ann. § 241.015\(2\)\(a\)\(1\) \(2007\)](#); [N.D. Cent. Code § 44-04-17.1\(8\)\(a\) \(2007\)](#); [R.I. Gen. Laws Ann. § 42-46-2\(1\) \(West 2009\)](#); [Tenn. Code Ann. § 8-44-102\(b\)\(1\)\(A\) \(Supp. 1998\)](#); [Utah Code Ann. § 52-4-103\(4\)\(a\) \(West 2009\)](#).

[FN4]. See [Alaska Stat. Ann. § 44.62.310\(a\) \(West 2009\)](#); [Ark. Code Ann. § 10-3-305\(a\) \(West 2010\)](#); [Cal. Gov't Code § 54950 \(West 2009\)](#); [Colo. Rev. Stat. Ann. § 24-6-402\(1\)\(b\) \(West 2007\)](#); [Conn. Gen. Stat. Ann. §1-200\(2\) \(West 2007\)](#); [Del. Code Ann. tit. 29, § 10002\(b\) \(West 2010\)](#); [Ga. Code Ann. § 50-14-1\(a\)\(2\) \(West 2010\)](#); [Haw. Rev. Stat. § 92-2\(3\) \(West 2010\)](#); [5](#)

[Ill. Comp. Stat. 120/1.02 \(West 2010\)](#); [Iowa Code Ann. § 21.2 \(West 2007\)](#); [Ky. Rev. Stat. Ann. § 61.805\(1\) \(West 2010\)](#); [La. Rev. Stat. Ann. § 42:6.2\(A\)\(2\) \(2009\)](#); [Me. Rev. Stat. Ann. tit. 1, § 401 \(2007\)](#); [Mich. Comp. Laws Ann. § 15.262\(b\) \(West 2009\)](#); [Mont. Code Ann. § 2-3-202 \(2009\)](#); [Neb. Rev. Stat. Ann. § 84-1409\(2\) \(LexisNexis 2008\)](#); [Nev. Rev. Stat. Ann. § 241.015\(2\)\(a\)\(1\) \(2007\)](#); [N.H. Rev. Stat. Ann. § 91-A:2\(I\) \(2009\)](#); [N.J. Stat. Ann. § 10:4-8\(b\) \(West 2009\)](#); [N.D. Cent. Code § 44-04-17.1\(8\) \(2007\)](#); [Ohio Rev. Code Ann. § 121.22\(B\)\(2\) \(West 2009\)](#); [Okla. Stat. tit. 25, §§ 304\(2\) \(2010\)](#); [65 Pa. Cons. Stat. Ann. § 703 \(West 2007\)](#); [Utah Code Ann. § 52-4-103\(4\)\(a\) \(West 2009\)](#); [Vt. Stat. Ann. tit. 1, § 310\(2\) \(West 2007\)](#); [W. Va. Code Ann. § 6-9A-1 \(West 2009\)](#); [Wyo. Stat. Ann. § 16-4-402\(a\)\(iii\) \(West 2010\)](#).

[FN5]. See, e.g., [N.D. Cent. Code § 44-04-21.2\(1\) \(2007\)](#) (allowing a criminal fine of up to \$1,000 in cases of willful violation).

[FN6]. See [Alaska Stat. § 44.62.310 \(2009\)](#); [Ark. Code Ann. § 10-3-305\(a\) \(West 2010\)](#); [Conn. Gen. Stat. Ann. § 1-225\(a\) \(West 2008\)](#); [Ga. Code Ann. § 50-14-1\(a\)\(1\) \(West 2010\)](#); [Haw. Rev. Stat. § 92-10 \(West 2010\)](#); [5 Ill. Comp. Stat. Ann. 120/1.02 \(West 2010\)](#); [Ind. Code Ann. § 5-14-1.5-2\(a\)\(1\) \(2007\)](#); [Ky. Rev. Stat. Ann. § 61.805\(1\) \(West 2010\)](#); [La. Rev. Stat. Ann. § 42:6.2\(A\)\(2\) \(2009\)](#); [Miss. Code Ann. § 25-41-1 \(West 2010\)](#); [N.M. Stat. Ann. § 10-15-2\(A\) \(West 2009\)](#); [Or. Rev. Stat. Ann. § 192.630 \(West 2010\)](#); [S.C. Code Ann. § 30-4-70\(e\) \(2005\)](#); [Tenn. Code Ann. § 8-44-102\(a\) \(Supp. 1998\)](#); [Texas Gov't Code Ann. §§ 551.003, 551.046 \(West 2009\)](#); [Wash. Rev. Code Ann. § 42.30.020\(1\)\(a\) \(West 2010\)](#); [Wyo. Stat. Ann. § 16-4-402\(a\)\(iii\) \(West 2010\)](#); [Abood v. League of Women Voters of Alaska, 743 P.2d 333, 334 \(Alaska 1987\)](#) (holding that the legislature could exempt itself from the open meetings law); [Coggin v. Davey, 211 S.E.2d 708, 710 \(Ga. 1975\)](#); [Sarkes Tarzian, Inc. v. Legislature of the State of Nev., 765 P.2d 1142, 1144 \(Nev. 1988\)](#) (holding that the legislature could make rules exempting it from the open meetings law in some cases); [Mayhew v. Wilder, 46 S.W.3d 760, 769-70 \(Tenn. Ct. App. 2001\)](#) (holding that the General Assembly does not fall within the definition of "governing body" applicable to the open meetings law).

[FN7]. See [Cole v. State, 673 P.2d 345, 350 \(Colo. 1983\)](#) (finding the statute proper in light of the public's right to receive information); [People ex rel. Difanis v. Barr, 397 N.E.2d 895, 899 \(Ill. App. Ct. 1979\)](#) (ruling that the statute does not restrict the content of speech but merely requiring the speech to be public); [St. Cloud Newspapers, Inc. v. Dist. 742 Cmty. Sch., 332 N.W.2d 1, 7 \(Minn. 1983\)](#) (holding that the public's interest in hearing the content of government meetings outweighs government officers' rights to speak in closed sessions); [Sandoval v. Bd. of Regents of Univ., 67 P.3d 902, 907 \(Nev. 2003\)](#) (finding that the statute did not violate the First Amendment because officials' comments were not restricted, as long as they were scheduled); [Smith v. Pa. Emps. Benefit Trust Fund, 894 A.2d 874, 880 n.4 \(Pa. Commw. Ct. 2006\)](#) (dismissing a free speech challenge on the grounds that the statute was intended to promote discussion); [Hays Cnty. Water Planning P'ship v. Hays Cnty., 41 S.W.3d 174, 182 \(Tex. Ct. App. 2001\)](#) (holding that the statute restricted only the place and time of speech). But see [McComas v. Bd. of Educ., 475 S.E.2d 280, 290-91 \(W. Va. 1996\)](#) (examining the free speech issue more closely, upholding the law's application where the entire board physically met in secret, but establishing a multi-factor test to determine when a narrower application might violate free speech).

[FN8]. The relative lack of court challenges might not be so surprising after all. The persons most motivated to bring such challenges are elected officials. They are precisely those most vulnerable to the media criticism sure to follow from a public court challenge seeking the right to secret deliberations.

[FN9]. See Mark Fenster, The [Opacity of Transparency, 91 Iowa L. Rev. 885, 908-09 \(2006\)](#) (reciting criticisms of open meetings laws based on the need for some private deliberations among decision-makers); Nicholas Johnson, [Open Meetings and Closed Minds: Another Road to the Mountaintop, 53 Drake L. Rev. 11, 22-24 \(2004\)](#) (arguing that because not all public officials are experienced public speakers, some time to prepare collectively prior to public discussion

should be allowed); Michael A. Lawrence, [Finding Shade From the "Government in the Sunshine Act": A Proposal to Permit Private Informal Background Discussions at the United States International Trade Commission](#), 45 *Cath. U. L. Rev.* 1, 10-12 (1995) (arguing for allowing private deliberations at the International Trade Commission); Joseph W. Little & Thomas Tompkins, *Open Government Laws: An Insider's View*, 53 *N.C. L. Rev.* 451, 452 (1975); James T. O'Reilly & Gracia M. Berg, [Stealth Caused by Sunshine: How Sunshine Act Interpretation Results in Less Information for the Public About the Decision-Making Process of the International Trade Commission](#), 36 *Harv. Int'l L.J.* 425, 458 (1995); Kathy Bradley, Note, [Do You Feel the Sunshine? Government in the Sunshine Act: Its Objectives, Goals, and Effect on the FCC and You](#), 49 *Fed. Comm. L.J.* 473, 481-85 (1997) (discussing a number of problems with the Sunshine Act, especially the erosion of collegiality between officials); Randolph J. May, *Taming the Sunshine Act; Too Much Exposure Inhibits Collegial Decision Making*, *Legal Times*, Feb. 5, 1996, at 24. But see Devon Helfmeyer, Note, [Do Public Officials Leave Their Constitutional Rights at the Ballot Box? A Commentary on the Texas Open Meetings Act](#), 15 *Tex. J. C.L. & C.R.* 205, 213-20 (2010) (discussing free speech issues involved with the Texas open meetings law raised by the case of [Rangra v. Brown](#), 576 F.3d 531 (5th Cir. 2009)).

[FN10]. See Fenster, *supra* note 9, at 908-09; Lawrence, *supra* note 9, at 10-12; O'Reilly & Berg, *supra* note 9, at 458.

[FN11]. See Mandi Duncan, Comment, [The Texas Open Meetings Act: In Need of Modification or All Systems Go?](#), 9 *Tex. Tech Admin. L.J.* 315, 317-22 (2008) (reviewing the Texas Open Meetings Act and discussing the district court's decision in [Rangra v. Brown](#), 576 F.3d 531 (5th Cir. 2009)); Anthony B. Joyce, Note, [The Massachusetts Approach to the Intersection of Governmental Attorney-Client Privilege and Open Government Laws](#), 42 *Suffolk U. L. Rev.* 957, 968 (2009) (recognizing the existence of some constitutional debate); Kevin C. Riach, [Case Note, Epilogue to a Farce: Reestablishing the Power of Minnesota's Open Meeting Law-Prior Lake American v. Mader](#), 33 *Wm. Mitchell L. Rev.* 681, 682 (2007) ("[It may be] unfair and economically inefficient to resolve [the clash between public information and effective litigation] by construing public officials' use of attorney-client privilege more narrowly than private parties' use.").

[FN12]. [566 F.3d 515 \(5th Cir. 2009\)](#).

[FN13]. [Id.](#) at 521.

[FN14]. [Id.](#) at 522.

[FN15]. See Chuck Lindell, *Advocates Fear Ruling Will Void Open Meetings Laws*, *Austin American-Statesman*, May 17, 2009, <http://www.statesman.com/news/content/news/stories/local/05/17/0517speech.html>.

[FN16]. [Rangra v. Brown](#), 576 F.3d 531, 532 (5th Cir. 2009).

[FN17]. [Rangra v. Brown](#), 584 F.3d 206, 207 (5th Cir. 2009) (en banc).

[FN18]. [Id.](#) at 207-11 (Dennis, J., dissenting).

[FN19]. See Helfmeyer, *supra* note 9, at 213.

[FN20]. See [City of Alpine v. Abbott](#), 730 F. Supp. 2d 630, 631 (W.D. Tex. 2010).

[FN21]. See [Asgeirsson v. Abbott](#), No. P-09-CV-59, 2011 WL 1157624 (W.D. Tex. Mar. 25, 2011).

[FN22]. [Id.](#) at *35-36.

[FN23]. *Id.* at *25-28, *30-31 (holding that the statute passed intermediate and strict scrutiny in part because it allowed private speech among less than a quorum of the public body, and because it provided exemptions for specified categories of speech like personnel matters). See *infra* Sections III.B.1 and III.B.2.

[FN24]. Email from plaintiffs' counsel Rod Ponton to author, April 4, 2011 (on file with author).

[FN25]. See, e.g. 5 U.S.C. § 552b (2006); [Office of the Governor v. Winner, 858 N.Y.S.2d 871, 874 \(N.Y. App. Div. 2008\)](#) ("It is preferable that government operations be conducted in the sunshine of daylight."); Alison K. Hayden, [Two Cheers for the Illinois Freedom of Information Act, 98 Ill. B.J. 82 \(2010\)](#) ("'[S]unshine laws' are important tools for pulling back the curtain that often surrounds those in power.").

[FN26]. See Open Government Guide, <http://www.rcfp.org/ogg/index.php> (last visited Mar. 12, 2011).

[FN27]. See, e.g., [Ala. Code § 36-25A-2\(6\) \(2010\)](#); [Ariz. Rev. Stat. Ann. § 38-431\(4\) \(2007\)](#); [Colo. Rev. Stat. Ann. § 24-6-402\(1\)\(b\) \(West 2007\)](#); [Conn. Gen. Stat. Ann. § 1-200\(2\) \(2008\)](#); [Del. Code Ann. tit. 29, § 10002\(b\) \(West 2010\)](#); [Ga. Code Ann. § 50-14-1\(a\)\(2\) \(West 2010\)](#); [Haw. Rev. Stat. § 92-2\(3\) \(West 2010\)](#); [Idaho Code Ann. § 67-2341\(6\) \(West 2007\)](#); [5 Ill. Comp. Stat. Ann. § 120/1.02 \(West 2010\)](#); [Ind. Code § 5-14-1.5-2\(a\)\(1\) \(West 2007\)](#); [Kan. Stat. Ann. § 75-4317a\(a\) \(West 2008\)](#); [Ky. Rev. Stat. Ann. § 61.805\(1\) \(West 2010\)](#); [La. Rev. Stat. Ann. § 42:4.2\(1\) \(2009\)](#); [Me. Rev. Stat. Ann. tit. 1, § 401 \(2007\)](#); [Md. Code Ann., State Gov't § 10-502\(g\) \(West 2007\)](#); [Mich. Comp. Laws Ann. § 15.262\(b\) \(West 2009\)](#); [Miss. Code Ann. § 25-41-1 \(West 2010\)](#); [Mo. Rev. Stat. § 610.010\(5\) \(West 2007\)](#); [Mont. Code Ann. § 2-3-202 \(2009\)](#); [Neb. Rev. Stat. § 84-1409\(2\) \(LexisNexis 2008\)](#); [Nev. Rev. Stat. Ann. § 241.015\(2\)\(a\)\(1\) \(2007\)](#); [N.H. Rev. Stat. Ann. § 91-A:2\(I\) \(2009\)](#); [N.J. Stat. Ann. § 10:4-8\(b\) \(West 2009\)](#); [N.M. Stat. Ann. § 10-15-1\(B\) \(West 2007\)](#); [N.C. Gen. Stat. Ann. § 143-318.10\(d\) \(West 2008\)](#); [N.D. Cent. Code § 44-04-17.1\(8\) \(2007\)](#); [Or. Rev. Stat. Ann. § 192.610\(5\) \(West 2010\)](#); [65 Pa. Cons. Stat. Ann. § 703 \(West 2007\)](#); [R.I. Gen. Laws Ann. § 42-46-2\(1\) \(West 2009\)](#); [S.C. Code Ann. § 30-4-20\(d\) \(2009\)](#); [Tenn. Code Ann. § 8-44-102\(b\)\(1\)\(A\) \(2010\)](#); [Tex. Gov't Code Ann. § 551.001\(4\)\(A\) \(West 2009\)](#); [Utah Code Ann. § 52-4-103\(4\)\(a\) \(West 2009\)](#); [Vt. Stat. Ann. tit. 1, § 310\(2\) \(West 2010\)](#); [Va. Code Ann. § 2.2-3701 \(West 2009\)](#); [Wash. Rev. Code Ann. § 42.30.02\(3\) \(West 2010\)](#); [Wyo. Stat. Ann. § 16-4-402\(a\)\(iii\) \(West 2010\)](#); [Brookwood Area Homeowners Ass'n. v. Mun. of Anchorage, 702 P.2d 1317, 1323 \(Alaska 1985\)](#) (holding that every step of the decision-making process of a governmental unit transacting public business is subject to [Alaska Stat. § 44.62.310 \(2009\)](#)); [Ark. Gazette Co. v. Pickens, 552 S.W.2d 350, 353 \(Ark. 1975\)](#) (declaring that all deliberations of a governing body must be held in public because the public is entitled to learn of actions taken by the governing body and the reasoning behind such actions under Arkansas's Freedom of Information Act: [Ark. Stat. Ann. § 12-2801-12-2807 \(1967\)](#)); [Frazer v. Dixon Unified Sch. Dist., 22 Cal. Rptr. 2d 641, 651 \(Cal. Ct. App. 1993\)](#) (stating that deliberative meetings fall under the California open meetings law: [Cal. Gov't Code § 54950 \(West 2009\)](#)); [Wolfson v. State, 344 So.2d 611, 614 \(Fla. Dist. Ct. App. 1977\)](#) (declaring that it was the intent of the government to subject all steps of the decision-making process to Florida's Sunshine Law: [Fla. Stat. § 286.011 \(2009\)](#)); [St. Cloud Newspapers, Inc. v. Dist. 742 Cmty. Sch., 332 N.W.2d 1, 6 \(Minn. 1983\)](#) (defining "meetings" to include all discussions regarding matters which foreseeably would be subject to the board's final action and therefore subject to the then in-force open meetings law: [Minn. Stat. § 471.705 \(2009\)](#)); [Goodson Todman Enter. v. City of Kingston Common Council, 550 N.Y.S.2d 157, 158-59 \(N.Y. App. Div. 1990\)](#) (declaring that not just voting sessions, but the entire decision-making process, is subject to [N.Y. Pub. Off. Law § 7 \(McKinney 2009\)](#)); *In re Appeal of the Order Declaring Annexation Dated June 28, 1978, 637 P.2d 1270, 1272 (Okla. Civ. App. 1981)* (stating that all of the decision-making process is subject to the Oklahoma open meetings law: [Okla. Stat. tit. 25, § 304 \(1977\)](#)); [Appalachian Power Co. v. Pub. Serv. Comm'n, 253 S.E.2d 377, 381 \(W. Va. 1979\)](#) (clarifying meetings subject to the West Virginia open meetings law: [W. Va. Code § 6-9A-1](#)

(2009)); [State ex rel. Newspapers, Inc. v. Showers, 398 N.W.2d 154, 156 \(Wis. 1987\)](#) (clarifying which meetings fall under the open meetings law of Wisconsin: [Wis. Stat. § 19.81](#) (2007)); S.D. Op. Att'y Gen. 89-08, *1-2 (1989) (stating that "meetings" includes when a majority of the body meets and discusses official business, thereby triggering the South Dakota open meetings law: [S.D. Codified Laws § 1-25-1](#) (2009)).

[FN28]. See [Ala. Code § 36-25A-2\(4\)](#) (2010); [Alaska Stat. Ann. § 44.62.310\(h\)](#) (West 2009); [Ariz. Rev. Stat. Ann. § 38-431\(6\)](#) (2007); [Ark. Code Ann. § 12-280](#) (1967); [Cal. Gov't Code § 54950](#) (West 2009); [Colo. Rev. Stat. Ann. § 24-6-402\(1\)\(d\)](#) (West 2007); [Conn. Gen. Stat. Ann. § 1-200\(2\)](#) (West 2008); [Del. Code Ann. tit. 29, § 10002\(c\)](#) (West 2008); [Fla. Stat. Ann. § 286.011\(1\)](#) (West 2008); [Ga. Code Ann. § 50-14-1\(a\)\(2\)](#) (West 2010); [Haw. Rev. Stat. § 92-2\(1\)](#) (West 2010); [Idaho Code Ann. § 67-2341\(5\)](#) (West 2007); [5 Ill. Comp. Stat. Ann. § 120/1.02](#) (West 2010); [Ind. Code Ann. § 5-14-1.5-2\(a\), \(b\)](#) (West 2007); [Iowa Code Ann. § 21.2](#) (West 2007); [Kan. Stat. Ann. § 75-4317](#) (a) (West 2008); [Ky. Rev. Stat. Ann. § 61.805\(2\)](#) (West 2010); [La. Rev. Stat. Ann. § 42:4.2\(2\)](#) (2009); [Me. Rev. Stat. Ann. tit. 1, § 401](#) (2007); [Md. Code Ann., State Gov't § 10-502\(h\)](#) (West 2007); [Mich. Comp. Laws Ann. § 15.262\(a\)](#) (West 2009); [Miss. Code Ann. § 25-41-1](#) (West 2010); [Mo. Rev. Stat. § 610.010\(4\)](#) (2007); [Mont. Code Ann. § 2-3-202](#) (2009); [Neb. Rev. Stat. Ann. § 82-1409\(1\)](#) (LexisNexis 2008); [Nev. Rev. Stat. Ann. § 241.015\(3\)](#) (2007); [N.H. Rev. Stat. Ann. § 91-A:1-a](#) (2009); [N.J. Stat. Ann. § 10:4-8\(b\)](#) (West 2009); [N.M. Stat. Ann. § 10-15-1\(B\)](#) (West 2009); [N.C. Gen. Stat. Ann. § 143-318.10\(b\)](#) (West 2008); [N.D. Cent. Code § 44-04-17.1\(12\)](#) (2007); [N.Y. Pub. Off. Law § 102\(2\)](#) (McKinney 2010); [Ohio Rev. Code Ann. § 121.22\(1\)](#) (West 2009); [Okla. Stat. tit. 25, § 304\(1\)](#) (2010); [Or. Rev. Stat. Ann. § 192.610\(3\),\(4\)](#) (West 2010); [65 Pa. Cons. Stat. Ann. § 703](#) (West 2007); [R.I. Gen. Laws Ann. § 42-46-2\(3\)](#) (West 2009); [S.C. Code Ann. § 30-4-20\(a\)](#) (2009); [S.D. Codified Laws § 1-25-1](#) (2009); [Tenn. Code Ann. § 8-44-102\(b\)\(1\)](#) (2007); [Tex. Gov't Code Ann. § 551.001\(3\)](#) (West 2007); [Utah Code Ann. § 52-4-103\(7\)](#) (West 2007); [Vt. Stat. Ann. tit. 1, § 310\(3\)](#) (West 2007); [Va. Code Ann. § 2.2-3701](#) (2007); [Wash. Rev. Code Ann. § 42.30.02\(1\)](#) (West 2007); [W. Va. Code Ann. § 6-9A-1](#) (West 2009); [Wis. Stat. Ann. § 19.81\(2\)](#) (West 2009); [Wyo. Stat. Ann. § 16-4-402\(a\)\(ii\)](#) (West 2010). For a useful and comprehensive compilation of various state approaches by topic, see the "Open Government Guide" at <http://www.rcfp.org/ogg/index.php>.

[FN29]. See [Ala. Code § 36-25A-2\(4\)](#) (2007); [Ariz. Rev. Stat. Ann. § 38-431\(6\)](#) (2007); [Ark. Code Ann. § 12-280](#) (1967); [Cal. Gov't Code § 54950](#) (West 2009); [Del. Code Ann. tit. 29, § 10002\(c\)](#) (West 2010); [Fla. Stat. Ann. § 286.011\(1\)](#) (West 2008); [Haw. Rev. Stat. § 92-2\(1\)](#) (West 2010); [Ind. Code Ann. § 5-15-1.5-2\(a\),\(b\)](#) (West 2007); [Iowa Code Ann. § 21.2](#) (West 2007); [Kan. Stat. Ann. § 75-4317\(a\)](#) (West 2008); [Ky. Rev. Stat. Ann. § 61.805\(2\)](#) (West 2010); [La. Rev. Stat. Ann. § 42:4.2\(2\)\(h\)](#); [Me. Rev. Stat. Ann. tit. 1, § 402\(2\)](#) (2007); [Md. Code Ann., State Gov't § 10-502\(g\)](#) (West 2007); [Mich. Comp. Laws Ann. § 15.262\(a\)](#) (West 2009); [Mo. Rev. Stat. § 610.010\(4\)](#) (2007); [Mont. Code Ann. § 2-3-202](#) (2009); [Neb. Rev. Stat. § 82-1409\(1\)](#) (2006); [Nev. Rev. Stat. Ann. § 241.015\(3\)](#) (2007); [N.H. Rev. Stat. Ann. § 91-A:1-a](#) (2009); [N.J. Stat. Ann. § 10:4-8\(a\)](#) (West 2009); [N.M. Stat. Ann. § 10-15-1\(B\)](#) (West 2009); [N.C. Gen. Stat. Ann. § 143-318.10\(b\)](#) (West 2008); [N.D. Cent. Code § 44-04-17.1\(12\)](#) (2007); [Okla. Stat. tit. 25, § 304\(1\)](#) (2010); [Or. Rev. Stat. Ann. § 192.610\(3\), \(4\)](#) (West 2010); [65 Pa. Cons. Stat. Ann. § 703](#) (West 2007); [R.I. Gen. Laws Ann. § 42-46-2\(3\)](#) (West 2009); [S.C. Code Ann. § 30-4-20\(a\)](#) (2006); [S.D. Codified Laws § 1-25-1](#) (2010); [Tenn. Code Ann. § 8-44-102\(b\)\(1\)](#) (2007); [Tex. Gov't Code Ann. § 551.001\(3\)](#) (West 2009); [Utah Code Ann. § 52-4-103\(7\)](#) (West 2007); [Vt. Stat. Ann. tit. 1, § 310\(3\)](#) (West 2010); [Va. Code Ann. § 2.2-3701](#) (2007); [Wash. Rev. Code Ann. § 42.30.02\(1\)](#) (West 2010); [W. Va. Code Ann. § 6-9A-1](#) (West 2009); [Wis. Stat. Ann. § 19.81\(2\)](#) (West 2009); [Wyo. Stat. Ann. § 16-4-402\(a\)\(ii\)](#) (West 2010).

[FN30]. See [Ariz. Rev. Stat. Ann. § 38-431\(6\)](#) (2009); [Ark. Code Ann. § 10-3-305\(a\)](#) (West 1987); [Colo. Rev. Stat. Ann. § 24-6-402\(1\)\(d\)](#) (West 2008); [Del. Code Ann. tit. 29, § 10002\(c\)](#) (West 2009); [Kan. Stat. Ann. § 75-4318](#) (West 2008); [Ky. Rev. Stat. Ann. § 61.805\(2\)](#) (West 2010); [Me. Rev. Stat. Ann. tit. 1, § 402\(a\)](#) (2007); [Md. Code Ann., State Gov't § 10-502\(h\)](#) (West 2009); [Mich. Comp. Laws Ann. § 15.262\(a\)](#) (West 2009); [Mo. Rev. Stat. § 610.010\(4\)](#)

(2009); [Neb. Rev. Stat. § 84-1409\(1\)](#) (2009); [N.J. Stat. Ann. § 10:4-8\(a\)](#) (West 2009); [N.M. Stat. Ann. § 10-5-2\(A\)](#) (West 2008); [N.C. Gen. Stat. Ann. § 143-318.10\(b\)](#) (West 2009); [N.D. Cent. Code § 44-04-17.1\(6\)](#) (2009); [Ohio Rev. Code Ann. § 121.22\(B\)\(1\)](#) (West 2009); Okla. Stat. tit. 25, § 304.1 (2009); [65 Pa. Cons. Stat. Ann. § 712](#) (West 2009); [R.I. Gen. Laws Ann. § 42-46-2\(3\)](#) (West 2008); [S.C. Code Ann. § 30-4-20\(a\)](#) (2008); [Tex. Gov't Code Ann. § 551.001\(3\)](#) (West 2009); [Utah Code Ann. § 52-4-102\(7\)](#) (West 2009); [Va. Code Ann. § 2.2-3701](#) (2009).

[FN31]. Schwing, supra note 1, at 3.

[FN32]. Id.

[FN33]. Id.

[FN34]. See, e.g., [Ark. Code Ann. § 25-19-102](#) (1996); Me. Rev. Stat. tit. 1, § 4012 (1989); [Md. Code Ann. State Gov't § 10-501\(a\)](#) (LexisNexis 1995); [Neb. Rev. Stat. § 84-1408](#) (Supp. 1998); [N.C. Gen. Stat. § 143-318.9](#) (1996); [Tenn. Code Ann. § 8-440101\(a\)](#) (1993).

[FN35]. See, e.g., [Ark. Code Ann. § 25-19-102](#) (1996); [Cal. Gov't Code § 54950](#) (West 1997); Miss. Code Ann. § 25-41 (1991).

[FN36]. See, e.g., [Me. Rev. Stat. tit. 1, § 401](#) (1989) (“It is further the intent of the Legislature that clandestine meetings, conferences or meetings held on private property without proper notice and ample opportunity for attendance by the public not be used to defeat the purposes of this subchapter.”).

[FN37]. See, e.g., [Del. Code Ann. tit. 29, § 10001](#) (West 2010); [Ind. Code Ann. § 5-14-1.5-1](#) (West 2007); [Iowa Code Ann. § 21.1](#) (West 2007).

[FN38]. See, e.g., [Parole & Prob. Comm'n v. Thomas](#), 364 So.2d 480, 481 (Fla. Dist. Ct. App. 1978); [Wexford Cnty. Prosecuting Attorney v. Pranger](#), 268 N.W.2d 344, 348 (Mich. Ct. App. 1978); [Grein v. Bd. of Educ.](#), 343 N.W.2d 718, 723 (Neb. 1984).

[FN39]. See, e.g., [City of Fayetteville v. Edmark](#), 801 S.W.2d 275, 278 (Ark. 1990); [State ex rel Murray v. Palmgren](#), 646 P.2d 1091, 1096-97 (Kan. 1982), appeal dismissed, 459 U.S. 1081 (1982).

[FN40]. See, e.g., [Wis. Stat. Ann. § 19.81](#) (West 2009); [Kansas City Star Co. v. Shields](#), 771 S.W.2d 101, 104 (Mo. Ct. App. 1989). But cf. [State v. Patton](#), 837 P.2d 483, 484 (Okla. Crim. App. 1992) (recognizing that the open meeting law is a penal statute and must be strictly construed).

[FN41]. Schwing, supra note 1, at 51.

[FN42]. Id.

[FN43]. See, e.g., [Iowa Code Ann. § 21.2\(2\)](#) (West 2007) (defining “meeting” so as not to include ministerial or social gatherings wherein no policy is discussed); [Holeski v. Lawrence](#), 621 N.E.2d 802, 805-06 (Ohio Ct. App. 1993) (holding that the Ohio open meetings law does not apply to fact-finding sessions).

[FN44]. See, e.g., [Hillsboro-West End Neighborhood Ass'n v. Metro Bd. of Zoning Appeals](#), No. 01A01-9406-CH-00282, 1995 Tenn. App. LEXIS 120, at *11 (Tenn. Ct. App. Feb. 24, 1995) (holding no open meetings law violation where defendants met privately to clarify a prior zoning board ruling).

[FN45]. [Colo. Rev. Stat. Ann. § 24-6-402\(1\)\(b\)](#) (West 2007).

[FN46]. [Brookwood Area Homeowners Ass'n v. Anchorage](#), 702 P.2d 1317, 1323 (Alaska 1985).

[FN47]. E.g., [N.Y. Pub. Off. Law § 102\(1\)](#) (McKinney 2010).

[FN48]. See [Hinds Cnty. Bd. of Supervisors v. Common Cause of Miss.](#), 551 So.2d 107, 122-23 (Miss. 1989) (allowing public officials to meet as long as no public business is discussed).

[FN49]. [Alaska Stat. Ann. § 44.62.310\(h\)\(2\)](#) (West 2009); [Ariz. Rev. Stat. Ann. § 38-431\(4\)](#) (2007); [Cal. Gov't Code § 54952.2\(a\), \(b\)](#) (West 2010); [Del. Code Ann. tit. 29, § 10002\(b\)](#) (West 2009); [Ga. Code Ann. § 50-14-1\(a\)\(2\)](#) (West 1999); [Haw. Rev. Stat. § 92-2.5\(a\), \(f\)](#) (West 1998); [Ind. Code Ann. § 5-14-1.5-2\(c\)](#) (West 2007); [Iowa Code Ann. § 21.2\(2\)](#) (West 2010); [Ky. Rev. Stat. Ann. § 61.810\(1\)](#) (West 2005); [La. Rev. Stat. Ann. § 42:4.2\(A\)\(1\)](#) (2009); [Md. Code Ann., State Gov't § 10-502\(g\)](#) (West 2010); [Mich. Comp. Laws Ann. § 15.262\(b\)](#) (West 2010); [Mont. Code Ann. § 2-3-202](#) (2007); [Nev. Rev. Stat. Ann. § 241.015\(2\)](#) (2010); [N.H. Rev. Stat. Ann. § 91-A:2\(I\)](#) (2009); [N.J. Stat. Ann. § 10:4-8\(b\)](#) (West 2009); [N.M. Stat. Ann. § 10-15-2\(B\)](#) (West 2010); [N.C. Gen. Stat. Ann. § 143-318.10\(d\)](#) (West 2010); [N.D. Cent. Code § 44-04-17.1\(8\)\(a\)](#) (2007); [Ohio Rev. Code Ann. § 121.22\(B\)\(2\)](#) (West 2010); [Okla. Stat. Ann. tit. 25, § 304\(2\)](#) (West 2010); [Or. Rev. Stat. § 192.610\(5\)](#) (2009); 65 Pa. Cons. Stat. Ann. § 274 (West 2010); [S.C. Code Ann. § 30-4-20\(d\)](#) (2005); [S.D. Codified Laws § 1-25-1 \(2009\)](#); [Tex. Gov't Code Ann. § 551.001\(4\)](#) (Vernon 2007); [Utah Code Ann. § 52-4-103\(4\)](#) (West 2010); [Vt. Stat. Ann. Tit. 1, § 310\(2\)](#) (2007); [W. Va. Code Ann. § 6-9A-2\(4\)](#) (West 2010); [Wyo. Stat. Ann. § 16-4-402\(a\)\(i\), \(iii\)](#) (2005).

[FN50]. [5 Ill. Comp. Stat. Ann. 120/1.02](#) (West 2010); [Kan. Stat. Ann. § 75-4317a](#) (West 2010).

[FN51]. See, e.g., [Kan. Stat. Ann. § 75-4318\(f\)](#) (West 2009)

[FN52]. [Colo. Rev. Stat. Ann. § 24-6-402\(2\)\(a\)](#) (West 2010).

[FN53]. See [Bigelow v. Howze](#), 291 So.2d 645, 647 (Fla. Dist. Ct. App. 1974) (applying the statute to a conversation between two of five County Commissioners); [McElroy v. Strickland](#), Knox Cnty. Ch., No. 168933-2, at *10 (Oct. 5, 2007); Ala. Op. Att'y Gen 232-39 (construing statute to reach communication between two legislators); R.I. Opp. Att'y Gen. 92-06-09 (same).

[FN54]. [Va. Code Ann. § 2.2-3701](#) (West 2010).

[FN55]. See [Sciolino v. Ryan](#), 440 N.Y.S.2d 795 (1981) (applying statute to just two, as long as they are deliberately evading the open meetings law); [Mayor & City Council v. El Dorado Broad Co.](#), 544 S.W.2d 206, 208 (Ark. 1976) (requiring two or more, but only when the mayor or a council member calls the meeting for the purpose of discussing public business); Haw. Op. Att'y Gen. 85-27 (stating that law possibly applies to two members, if the meeting is deliberate).

[FN56]. [Tenn. Code Ann. § 8-44-102\(b\)\(2\), \(c\)](#) (2010).

[FN57]. [Id. § 8-44-102\(c\)](#).

[FN58]. [McElroy](#), No. 168933-2, at *10.

[FN59]. See [Johnston v. Metro. Gov't of Nashville and Davidson Cnty.](#), 320 S.W.3d 299, 310-12 (2009) (finding a violation for a series of emails between the whole metropolitan council); [Waste Mgmt., Inc. of Tenn. v. Solid Waste Region Bd. of Metro. Gov't](#), No. M2005-01197-COA-R3-CV, 2007 WL 1094131, at *2 n.9 (Tenn. Ct. App. April 11, 2007) (citing [Bordeaux Beautiful, Inc. v. Metro. Gov't](#), Davidson Cnty. Ch., No. 04-1513-III (June 4, 2004) (failing to overturn a lower court decision regarding a meeting among a quorum)); [Grace Fellowship Church of Loudon](#)

[Cnty., Inc. v. Lenoir City Beer Bd., No. E2000-02777-COA-R3-CV, 2002 WL 88874 \(Tenn. Ct. App. Jan. 23, 2002\)](#) (vacating the Beer Board's decision to grant a permit where a quorum was present at the meeting in question); [Englewood Citizens for Alternate B v. Town of Englewood, No. 03A01-9803-CH-00098, 1999 WL 419710, at *6 \(Tenn. Ct. App. June 24, 1999\)](#) (finding that an improperly-noticed meeting among more than a quorum of the town Board of Commissioners was a violation of the OMA); [Abou-Sakher v. Humphreys Cnty., 955 S.W.2d 65, 69-70 \(Tenn. Ct. App. 1997\)](#) (finding that a meeting among a quorum of the airport authority violated the OMA); [State ex rel. Akin v. Town of Kingston Springs, No. 01-A-01-9209-CH00360, 1993 WL 339305, at *2 \(Tenn. Ct. App. Sept. 8, 1993\)](#) (finding an OMA violation, later cured by public meetings; though the court did not specify the number present at the disputed "work sessions," it implied that all members attended); [State ex rel. Matthews v. Shelby Cnty. Bd. of Comm'rs, 1990 WL 29276, at *8 \(Tenn. Ct. App. March 21, 1990\)](#) (reversing a dismissal of an OMA complaint when a "walking quorum" decided the issue amongst themselves through serial, individual discussions); [Sharondale Constr. Co. v. Metro. Knoxville Airport Auth., 1989 WL 109470, at *3 \(Tenn. Ct. App. Sept. 22, 1989\)](#) (affirming a dismissal for failure to allege particularized facts leading to the conclusion that an observed conversation was a "meeting;" the appellate court mentioned that the number of attendees, specifically relative to a quorum, would be relevant to the issue).

[FN60]. See [Metro. Air Research Testing Auth., Inc. v. Metro. Gov't of Nashville, 842 S.W.2d 611, 618-19 \(Tenn. Ct. App. 1992\)](#) (finding no violation where a number of city officials less than a quorum met without notice with a purchasing agent who was not bound by their recommendations); [Univ. of Tenn. Arboretum Soc., Inc. v. City of Oak Ridge, 1983 WL 825161 \(Tenn. Ct. App. May 4, 1983\)](#) (finding that a meeting of less than a quorum did not violate the OMA where no official business was discussed).

[FN61]. See [Roberson v. Copeland, No. 85-199-II, 1985 WL 3524, at *5 \(Tenn. Ct. App. Nov. 5, 1985\)](#) (making special note of the presence of a quorum); [Dorrier v. Dark, 537 S.W.2d 888, 893 \(Tenn. 1976\)](#) (rejecting a vagueness challenge in part because "the existence or non-existence of a quorum and whether or not they are in the course of deliberation" would almost always be clear to members of public bodies).

[FN62]. Tenn. Op. Att'y Gen. No. 88-169 (Sept. 19, 1988).

[FN63]. Craig E. Willis, Sunshine Law Update, 45 Tenn. Bar J. No. 6, at 6-7 (2009).

[FN64]. See, e.g., [Jerman v. Carlisle, McNellie, Rini, Kramer, & Ulrich, LPA, 130 S. Ct. 1605, 1635 \(2010\)](#); [State v. Burkhardt, 58 S.W.3d 694, 697-98 \(Tenn. 2001\)](#).

[FN65]. Schwing, *supra* note 1, at 291.

[FN66]. See, e.g., [City Council v. Cooper, 358 So.2d 440, 441 \(Ala. 1978\)](#) (finding that continued operation of city government by mailed ballots would irreparably harm citizens in light of the open meetings law); [Common Cause v. Sterling, 147 Cal. App. 3d Supp. 518, 524 \(Cal. Ct. App. 1983\)](#) ("[A]greeing to advise the city council members not to take future action by means of circulated letter . . . did violate the [act].").

[FN67]. Schwing, *supra* note 1, at 293.

[FN68]. See, e.g., [Bd. of Trustees v. Bd. of County Comm'rs, 606 P.2d 1069, 1073 \(Mont. 1980\)](#) (holding that a telephone conversation counted as a "meeting" requiring conformity with the open meetings statute); [Hitt v. Mabry, 687 S.W.2d 791, 795 \(Tex. Ct. App. 1985\)](#) (applying the law to telephone conversations).

[FN69]. Schwing, *supra* note 1, at 358.

[FN70]. [Sanders v. City of Fort Smith, 473 S.W.2d 182, 183 \(Ark. 1971\)](#). See generally Schwing, supra note 1, at 360.

[FN71]. See [Pulitzer Publ'g Co. v. McNeal, 575 S.W.2d 802, 805 \(Mo. Ct. App. 1978\)](#); [Common Cause of Utah v. Utah Pub. Serv. Comm'n, 598 P.2d 1312, 1313-14 \(Utah 1979\)](#).

[FN72]. Schwing, supra note 1, at 361.

[FN73]. See, e.g., [Caldwell v. Lambrou, 391 A.2d 590, 593 \(N.J. Super. Ct. Law Div. 1978\)](#).

[FN74]. See, e.g., [Neb. Rev. Stat. § 84-1410\(3\) \(2009\)](#).

[FN75]. E.g., [Cal. Const. art. IV, § 7\(c\)\(1\)\(C\)](#); [N.Y. Pub. Off. Law § 105\(1\)\(d\) \(McKinney 1988\)](#).

[FN76]. See, e.g., [Cal. Const. art. IV, § 7\(c\)\(1\)](#); [Mich. Comp. Laws Ann. § 15.268\(a\), \(f\) \(West 2010\)](#).

[FN77]. E.g., [Mont. Code Ann. § 2-3-203\(3\) \(2009\)](#) (“[I]f and only if . . . the demands of individual privacy clearly exceed the merits of public disclosure.”); [Va. Code Ann. § 2.2-3711\(A\)\(4\) \(West 2010\)](#).

[FN78]. See, e.g., [S.C. Code Ann. § 30-4-40\(a\)\(1\) \(2010\)](#).

[FN79]. See, e.g., [Md. Code Ann., State Gov't § 10-508\(a\)\(10\) \(West 2010\)](#); [Miss. Code Ann. § 25-41-3\(a\) \(West 2010\)](#); [Wash. Rev. Code Ann. § 42.30.110\(1\)\(a\) \(West 2010\)](#).

[FN80]. E.g., [Haw. Rev. Stat. § 92-2.5\(c\) \(West 2009\)](#) (allowing any group of less than a quorum to discuss selection of board officers without limitation). Contra [Caldwell v. Lambrou, 391 A.2d 590, 593 \(N.J. Super. Ct. Law Div. 1978\)](#) (requiring passage of a formal resolution, in a public meeting, indicating that an exception applies before any private meeting can occur). Many states require a formal motion to hold an executive session in order for a body to invoke an exception to the open meetings law, but these states may allow a few exceptions to this rule.

[FN81]. I am grateful for Nathaniel Terrell's assistance in the preparation of this Appendix.

[FN82]. E.g., [N.D. Cent. Code § 44-04-19 \(2009\)](#); [Tenn. Code Ann. § 8-44-102 \(2010\)](#).

[FN83]. E.g., [Nev. Rev. Stat. Ann. § 241.020 \(2010\)](#); [N.D. Cent. Code § 44-04-19 \(2009\)](#); [Tenn. Code Ann. § 8-44-102 \(2010\)](#); [Utah Code Ann. § 52-4-201 \(West 2010\)](#).

[FN84]. E.g., [Mont. Code Ann. § 2-3-203\(3\) \(2009\)](#); [Nev. Rev. Stat. Ann. § 241.020 \(2010\)](#); [N.D. Cent. Code § 44-04-19 \(2009\)](#).

[FN85]. [Tenn. Code Ann. § 8-44-102](#).

[FN86]. Id.

[FN87]. [Van Hooser v. Warren Cnty. Bd. of Educ., 807 S.W.2d 230, 237 \(Tenn. 1991\)](#).

[FN88]. [Tenn. Code Ann. § 88-44-102](#).

[FN89]. Schwing, supra note 1, at 471-72.

[FN90]. E.g., [Ark. Gazette Co. v. Pickens, 522 S.W.2d 350, 355 \(Ark. 1975\)](#).

[FN91]. E.g., [Ga. Code Ann. § 50-14-5\(a\) \(West 2009\)](#); [Tex. Gov't Code Ann. § 551.142 \(West](#)

[1994](#); [Wash. Rev. Code Ann. § 42.30.130 \(West 2009\)](#).

[FN92]. E.g., [La. Rev. Stat. Ann. § 42:13 \(2010\)](#), [Wis. Stat. Ann. § 19.96 \(West 2010\)](#).

[FN93]. E.g., [Idaho Code Ann. § 67-2347\(4\) \(West 2010\)](#) (adding a \$500 recidivism penalty for multiple violations within a twelve-month period).

[FN94]. Schwing, *supra* note 1, at 509.

[FN95]. E.g., [Ark. Code Ann. § 25-19-104 \(West 2010\)](#) (making a violation a Class C misdemeanor, carrying the possibility of both fines and jail time); see Helfmeyer, *supra* note 9, at 227-30 (finding that at least nineteen state open meetings laws impose criminal penalties, with twelve of those including imprisonment as an option and the remaining seven providing for fines or removal from office only).

[FN96]. E.g., [Ariz. Rev. Stat. Ann. § 38-431.05\(A\) \(2010\)](#) (requiring mandatory vacation of all decisions reached in illegal meetings); [Iowa Code Ann. § 21.6\(3\)\(c\) \(West 2010\)](#) (allowing vacation of illegally-reached decisions at the court's discretion); [Carter v. City of Nashua, 308 A.2d 847, 856 \(N.H. 1973\)](#) (holding that the judiciary has discretion to vacate illegally-reached decisions absent an explicit statutory rule).

[FN97]. E.g., [Ariz. Rev. Stat. Ann. § 38-431.07\(A\) \(2010\)](#) (granting courts discretion to remove officials who violate the open meetings law with intent to disenfranchise the public); [Haw. Rev. Stat. § 92-13 \(West 2010\)](#) (granting courts discretion to summarily remove from office any individuals convicted of willful violations of the open meetings law).

[FN98]. See, e.g., [Tenn. Code Ann. § 8-44-106\(a\) \(2010\)](#) (empowering courts to impose penalties for violations); [Forbes v. Wilson Cnty. Emergency Dist. 911 Bd., 966 S.W.2d 417, 421 \(Tenn. 1998\)](#) (trial courts have equitable discretion to award monetary damages).

[FN99]. [5 U.S.C. § 552b \(2006\)](#).

[FN100]. *Id.* [§ 552b\(b\)](#).

[FN101]. *Id.* [§ 552b\(a\)\(1\)](#).

[FN102]. *Id.* [§ 552b\(a\)\(2\)](#).

[FN103]. *Id.* [§ 552b\(c\)](#). To counterbalance this extensive list of exemptions, the Act provides for a presumption in favor of openness, allows a citizen to challenge a decision to close a meeting, and places the burden of proof in such a challenge on the agency. *Id.* [§ 552b\(h\)\(1\)](#).

[FN104]. See *id.* [§ 552b\(b\)](#) (listing exemptions analogous to all but items (5), (9) and (10), and adding exemptions for (i) geological information concerning wells and (ii) inter-agency or intra-agency memoranda); see also *id.* [§ 552b\(c\)](#) (adding separate exemption, similar to (10) above, concerning certain information relevant to pending criminal investigations).

[FN105]. *Id.* [§ 552b\(i\)](#).

[FN106]. See Schwing, *supra* note 1, at 1.

[FN107]. See *id.* (citing various state court cases).

[FN108]. See, e.g., [Minn. State Bd. v. Knight, 465 U.S. 271, 284 \(1984\)](#) (recognizing that public bodies may constitutionally hold non-public sessions to transact business); [Madison Joint Sch. Dist. v. Wis. Emp't Relations Comm'n, 429 U.S. 167, 175 n.8 \(1976\)](#); [Bi-Metallic Inv. Co. v.](#)

[State Bd. of Equalization, 239 U.S. 441, 445 \(1915\)](#) (“The Constitution does not require all public acts to be done in town meeting or an assembly of the whole.”).

[FN109]. See [United States v. Nixon, 418 U.S. 683, 705 n.15 \(1974\)](#) (citing 1 M. Farrand, *The Records of the Federal Convention of 1787* xi-xxv (1911)).

[FN110]. See George Lankevich, *Roots of the Republic: The First House of Representatives and the Bill of Rights* 13, 22-23 (Gary D. Hermalyn, C. Edward Quinn & Lloyd Ultan eds., Grolier Educational 1996).

[FN111]. Schwing, *supra* note 1, at 2. Though a few states had laws opening up isolated government bodies in the 1800s, the first comprehensive open meetings law did not pass until 1915. *Id.*

[FN112]. [Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 757 \(1976\)](#).

[FN113]. See generally [Press Enter. Co. v. Super. Ct. of Cal. \(Press Enterprise II\), 478 U.S. 1 \(1986\)](#) (criminal preliminary hearing); [Press Enter. Co. v. Superior Court of Cal. \(Press Enterprise I\), 464 U.S. 501 \(1984\)](#) (criminal jury selection); [Globe Newspaper Co. v. Superior Court, 457 U.S. 596 \(1982\)](#) (criminal trials); [Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 \(1980\)](#) (criminal trials); [In re Washington Post Co., 807 F.2d 383 \(4th Cir. 1986\)](#) (sentencing hearings).

[FN114]. See, e.g., [Grove Fresh Distribs., Inc. v. Everfresh Juice Co., 24 F.3d 893, 897 \(7th Cir. 1994\)](#) (“Though its original inception was in the realm of criminal proceedings, the right of access [to judicial proceedings] has since been extended to civil proceedings because the contribution of publicity is just as important there. . . . [T]he right of access belonging to the press and the general public also has a First Amendment basis.”); [Publicker Indus. v. Cohen, 733 F.2d 1059 \(3d Cir. 1984\)](#) (preliminary injunction hearing); *In re Cont’l Ill. Sec. Litig.*, [732 F.2d 1302 \(7th Cir. 1984\)](#) (hearing on motion to dismiss); [In re Iowa Freedom of Info. Council, 724 F.2d 658 \(8th Cir. 1984\)](#) (contempt hearing); [Brown & Williamson Tobacco Corp. v. Fed. Trade Comm’r, 710 F.2d 1165 \(6th Cir. 1983\)](#) (vacating the district court’s sealing of documents filed in a civil action based on common law and First Amendment right of access to judicial proceedings); [Newman v. Graddick, 696 F.2d 796 \(11th Cir. 1983\)](#) (pre- and post-trial hearings); [Doe v. Santa Fe Indep. Sch. Dist., 933 F. Supp. 647, 648-50 \(S.D. Tex. 1996\)](#) (concluding that the right of the public to attend civil trials is grounded in the First Amendment as well as the common law).

[FN115]. See, e.g., [Minn. State Bd. v. Knight, 465 U.S. 271, 284 \(1984\)](#) (stating that public bodies may constitutionally hold non-public sessions to transact business); [Madison Joint Sch. Dist. v. Wis. Emp’t Relations Comm’n, 429 U.S. 167, 175 n.8 \(1976\)](#) (same); [Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 \(1915\)](#) (“The Constitution does not require all public acts to be done in town meeting or an assembly of the whole.”); [Flesh v. Bd. of Trs., 786 P.2d 4, 10 \(Mont. 1990\)](#) (concluding that the closure of grievance hearing on privacy grounds did not violate the First Amendment).

[FN116]. See, e.g., [Knight, 465 U.S. at 284](#); [Wis. Emp’t Relations Comm’n, 429 U.S. at 175 n.8](#); [Bi-Metallic Inv. Co., 239 U.S. at 445](#); [Flesh, 786 P.2d at 10](#).

[FN117]. Schwing, *supra* note 1, at 2.

[FN118]. *Id.*

[FN119]. See, e.g., [Law & Info. Servs., Inc. v. Riviera Beach, 670 So.2d 1014 \(Fla. Dist. Ct. App. 1996\)](#); [Hayes v. Jackson Parish Sch. Bd., 603 So.2d 274 \(La. Ct. App. 1992\)](#); [Associated Press v.](#)

[Bd. of Pub. Educ., 804 P.2d 376 \(Mont. 1991\).](#)

[FN120]. E.g., [Eastwold v. New Orleans, 374 So.2d 172, 173 \(La. Ct. App. 1979\)](#) (holding that meetings can be scheduled during normal business hours, even if this interferes with the ability of some individuals to attend).

[FN121]. E.g., [Maurice River Twp. Bd. of Educ. v. Maurice River Twp. Teachers' Ass'n, 475 A.2d 59 \(N.J. Super Ct. App. Div. 1984\)](#) (holding that the constitutional rights of freedom of assembly and petition for redress of grievances create a right to access public meetings).

[FN122]. Schwing, *supra* note 1, at 16.

[FN123]. See [Contemporary Indus. Corp. v. Frost, 564 F.3d 981, 988 \(8th Cir. 2009\)](#) (discussing the Supremacy Clause).

[FN124]. [City of Miami Beach v. Berms, 245 So.2d 38, 41 \(Fla. 1971\)](#); see also [Dorrier v. Dark, 537 S.W.2d 888, 892 \(Tenn. 1976\)](#) (explaining that a chilling effect on free speech would arise if the Tennessee statute, like most other open meeting statutes, punished violations with fines, criminal punishments, or removal from office).

[FN125]. Berms, 245 So.2d at 41.

[FN126]. *Id.* In addition, one state supreme court decision struck down the criminal provision of an open meetings law on vagueness grounds but did not reach the free speech issue. See [Knight v. Iowa Dist. Ct. of Story Cnty., 269 N.W.2d 430, 432-34 \(Iowa 1978\)](#) (finding the criminal provision vague because it did not specify what level of participation in an illegal meeting constituted illegal conduct).

[FN127]. [Dorrier, 537 S.W.2d at 892.](#)

[FN128]. *Id.*

[FN129]. [475 S.E.2d 280 \(W. Va. 1996\).](#)

[FN130]. *Id.* at 293.

[FN131]. *Id.* at 298-99.

[FN132]. *Id.* at 290.

[FN133]. *Id.*

[FN134]. *Id.* at 290 n.18.

[FN135]. *Id.* at 290.

[FN136]. *Id.* Under the facts in *McComas*, the Court held that the sunshine law was appropriately applied where an actual physical meeting was planned and attended by four-fifths of a school board's members with the intent to discuss information relevant to an issue coming before the board. *Id.* at 293.

[FN137]. *Id.* at 291.

[FN138]. *Id.*

[FN139]. See *id.* at 280.

[FN140]. *Id.*

[FN141]. *Id.* at 289.

[FN142]. See [Cole v. State](#), 673 P.2d 345, 350 (Colo. 1983) (applying open meetings law to a meeting of a full legislative caucus); [St. Cloud Newspapers, Inc. v. Dist. 742 Cmty. Schs.](#), 332 N.W.2d 1, 7 (Minn. 1983) (series of secret meetings of full membership of the government board)); [Sandoval v. Bd. of Regents Univ.](#), 67 P.3d 902 (Nev. 2003) (meeting before a quorum of government body); [Smith v. Pa. Employees Benefit Trust Fund](#), 894 A.2d 874 (Pa. 2006) (meeting before a quorum of government body); [Hays Cnty. Water Planning P'ship v. Hays Cnty.](#), 41 S.W.3d 174 (Tex. Ct. App. 2001) (meeting before a quorum of government body).

[FN143]. See [Cole](#), 673 P.2d at 350; [St. Cloud Newspapers, Inc.](#), 332 N.W.2d at 7; [Sandoval](#), 67 P.3d at 902; [Smith](#), 894 A.2d at 880; [Hays Cnty.](#), 41 S.W.3d at 182.

[FN144]. See [Cole](#), 673 P.2d at 350; [St. Cloud Newspapers, Inc.](#), 332 N.W.2d at 7; [Sandoval](#), 67 P.3d at 902; [Smith](#), 894 A.2d at 880; [Hays Cnty.](#), 41 S.W.3d at 182.

[FN145]. See, e.g., [Cole](#), 673 P.2d at 350 (stating that the statute properly balanced free speech concerns against the public's right of access); [St. Cloud Newspapers, Inc.](#), 332 N.W.2d at 7; [Sandoval](#), 67 P.3d 902 (dismissing free speech issue in just one sentence); [Smith](#), 894 A.2d at 880-81 n.4; [Hays Cnty.](#), 41 S.W.3d at 182 (mentioning briefly that the law restricted only the time and place of the speech, and that the officer involved spoke in his official capacity and not as a member of the public). Typical is *St. Cloud Newspapers*, where the state supreme court stated conclusorily that "the legislature is justified in prescribing such openness in order to protect the compelling state interest of prohibiting the taking of actions at secret meetings where the public cannot be fully informed about a decision or . . . detect improper influences." [St. Cloud Newspapers, Inc.](#), 332 N.W.2d at 7.

[FN146]. See, e.g., [Smith](#), 894 A.2d at 880-81 n.4.

[FN147]. [Sandoval](#), 67 P.3d at 907; [Hays](#), 41 S.W.3d at 182.

[FN148]. See [Hays](#), 41 S.W.3d at 181-82.

[FN149]. [State ex rel. Murray v. Palmgren](#), 646 P.2d 1091, 1099 (1982), appeal dismissed, 459 U.S. 1081 (1982).

[FN150]. [Reno v. ACLU](#), 521 U.S. 844, 885 (1997).

[FN151]. *Id.*

[FN152]. [McConnell v. FEC](#), 540 U.S. 93, 267 (2003) (citing [Buckley v. Valeo](#), 424 U.S. 1, 38 (1976)).

[FN153]. See, e.g., [FEC v. Colo. Republican Fed. Campaign Comm.](#), 533 U.S. 431, 437 (2001).

[FN154]. E.g., [Randall v. Sorrell](#), 548 U.S. 230, 236 (2006) (holding that low, specific ceilings on expenditures violate the First Amendment).

[FN155]. See Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 904-08 (2d ed. 2002) (discussing content-based regulation).

[FN156]. *Id.*

[FN157]. [United States v. O'Brien, 391 U.S. 367, 377 \(1968\)](#).

[FN158]. [Republican Party of Minn. v. White, 536 U.S. 765, 774-75 \(2002\)](#); [Turner Broad. Sys. v. FCC, 512 U.S. 622, 640 \(1994\)](#). Under "strict scrutiny," content-based laws are unconstitutional unless the government can show that the law furthers a "compelling governmental interest" and is "narrowly tailored" to further that interest. [White, 536 U.S. at 774-75](#). By contrast, the "intermediate scrutiny" applied to content-neutral laws requires only an "important governmental interest" to justify the law; the law must only be "substantially related" to furthering that interest. [O'Brien, 391 U.S. at 377](#).

[FN159]. Chemerinsky, *supra* note 155, 904-09.

[FN160]. *Id.*

[FN161]. Schwing, *supra* note 1, at 23-24.

[FN162]. See [Hill v. Colorado, 530 U.S. 703, 723-24 \(2000\)](#); [Carey v. Brown, 447 U.S. 455, 462 n.6 \(1980\)](#); [Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 538 \(1980\)](#).

[FN163]. [Hill, 530 U.S. at 723](#); [Carey, 447 U.S. at 462](#); [Consol. Edison Co., 447 U.S. at 538](#).

[FN164]. [507 U.S. 410 \(1993\)](#).

[FN165]. [Id. at 414-15](#).

[FN166]. [Id. at 431](#).

[FN167]. [Id. at 429](#).

[FN168]. See, e.g., [Turner Broad. Sys. v. FCC, 512 U.S. 622, 648 \(1994\)](#) (treating as content-neutral a federal law requiring cable TV channels to carry local broadcast stations because it included all broadcast stations regardless of the content of the stations' programs); [Ward v. Rock Against Racism, 491 U.S. 781, 792 \(1989\)](#) (treating as content-neutral an ordinance regulating sound levels at public concerts because it applied equally to all types of speech and music).

[FN169]. [Turner Broad., 512 U.S. at 642](#).

[FN170]. [R.A.V. v. City of St. Paul, 505 U.S. 377, 382 \(1992\)](#).

[FN171]. *Id.*

[FN172]. *Id.* at 389 (citing [Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 \(1986\)](#)).

[FN173]. *Id.* at 390. On the other hand, the Court has also cautioned that a content-discriminatory purpose is sufficient, but not necessary, to show that a law is content-based. [Turner Broad., 512 U.S. at 642](#).

[FN174]. [R.A.V., 505 U.S. at 389-90](#).

[FN175]. *Id.*

[FN176]. [Asgeirsson v. Abbott, No. P-09-CV-59, 2011 WL 1157624, at 14-15 \(W.D. Tex. Mar. 25, 2011\)](#).

[FN177]. *Id.* at 382.

[FN178]. [475 U.S. 41 \(1986\)](#).

[FN179]. [Id. at 54-55](#).

[FN180]. [Id. at 57-58](#).

[FN181]. [Id. at 47](#) (emphasis added).

[FN182]. [Id.](#) (emphasis in original).

[FN183]. [Id. at 48](#).

[FN184]. [Id.](#)

[FN185]. See, e.g., [Hill v. Colorado, 530 U.S. 703, 720 \(2000\)](#) (concerning a state law banning approaching within eight feet of a person who is within 100 feet of a health facility for purposes of “protest, education, or counseling”); [City of Erie v. PAP’s AM, 529 U.S. 277, 294-95 \(2000\)](#) (involving a city ordinance barring public nudity).

[FN186]. [Asgeirsson v. Abbott, No. P-09-CV-59, 2011 WL 1157624, at 14-15 \(W.D. Tex. Mar. 25, 2011\)](#).

[FN187]. [507 U.S. at 430](#).

[FN188]. [Id.](#)

[FN189]. [485 U.S. 312 \(1987\)](#).

[FN190]. [Id. at 337-38](#).

[FN191]. [Id. at 320-21](#).

[FN192]. [Texas v. Johnson, 491 U.S. 397, 410-13 \(1989\)](#) (citing [United States v. O’Brien, 391 U.S. 367, 377 \(1968\)](#)).

[FN193]. See Chemerinsky, *supra* note 15555, at 908-09 (citing United States Supreme Court cases on the issue).

[FN194]. See *id.*

[FN195]. [Id.](#)

[FN196]. See *id.* at 904-09 (discussing content-based and content-neutral regulations).

[FN197]. [Hill v. Colorado, 530 U.S. 703, 703 \(2000\)](#); [Carey v. Brown, 447 U.S. 455, 455 \(1980\)](#).

[FN198]. [530 U.S. 703 \(2000\)](#).

[FN199]. [Id. at 720](#).

[FN200]. [Id. at 721](#).

[FN201]. [447 U.S. 455 \(1980\)](#).

[FN202]. [Hill, 530 U.S. at 723](#).

[\[FN203\]](#). [Id. at 723-24.](#)

[\[FN204\]](#). Id. This latter point sounds much like narrow tailoring, the second prong of strict scrutiny analysis.

[\[FN205\]](#). Schwing, *supra* note 1, at 23-24.

[\[FN206\]](#). See *infra* Section V.

[\[FN207\]](#). In some cases, a court might strike down such a law on separation of powers grounds, ruling that the legislature was inappropriately intruding on the independence of the judicial branch. However, not all states' separation of powers doctrines are identical to the federal government's or to each other. If it were somehow necessary or desirable to resolve such a case by resorting to First Amendment principles, it is not hard to imagine fellow judges doing so to protect judicial prerogatives.

[\[FN208\]](#). See *infra* Section IV.

[\[FN209\]](#). [504 U.S. 191 \(1992\).](#)

[\[FN210\]](#). [Id. at 197-98.](#)

[\[FN211\]](#). [Id. at 197.](#)

[\[FN212\]](#). Id.

[\[FN213\]](#). Id. at 207-10.

[\[FN214\]](#). Id. at 196.

[\[FN215\]](#). [536 U.S. 765 \(2002\).](#)

[\[FN216\]](#). [Id. at 774-75.](#)

[\[FN217\]](#). [Id. at 787-88.](#)

[\[FN218\]](#). [566 F.3d 515 \(5th Cir. 2009\).](#)

[\[FN219\]](#). [Id. at 518, 520-25.](#) Because this case was later dismissed as moot, the Rangra decision lacks formal precedential value. Nonetheless, it provides significant guidance as the only federal circuit court case to have considered the question.

As this article goes to press, plaintiffs are appealing (see note 24) the recent district court decision which acknowledged this Fifth Circuit holding, noted that the Fifth Circuit hold no longer has precedential value, and held that the Texas open meetings law was content-neutral. See [Argeirsson v. Abbott, No. P-09-CV-59, 2011 WL 1157624 \(W.D. Tex. Mar. 25, 2011\)](#). The court reasoned that, *inter alia*, the law was unrelated to the suppression of speech and targeted "secondary effects." Id. at 14-15.

[\[FN220\]](#). See *id.*

[\[FN221\]](#). See [Connick v. Myers, 461 U.S. 138, 145 \(1983\)](#) ("The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'") (quoting [Roth v. United States, 354 U.S. 476, 484 \(1957\)](#)); [N.Y. Times v. Sullivan, 376 U.S. 254, 269 \(1964\)](#).

[\[FN222\]](#). [United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 \(2000\).](#)

[\[FN223\]](#). *Id.*

[\[FN224\]](#). *Id.*

[\[FN225\]](#). [Ashcroft v. ACLU, 542 U.S. 656, 665 \(2004\)](#).

[\[FN226\]](#). Schwing, *supra* note 1, at 265.

[\[FN227\]](#). One objection to this argument is that allowing two legislators to confer outside a publicly noticed meeting can “open the floodgates.” Legislator A could confer separately with Legislator B and C, while Legislator D confers separately with Legislator E and F, thus allowing a final conference between Legislators A and D to accomplish the equivalent of a quorum meeting. However, most states that use a “quorum rule” or “half a quorum rule” expressly ban the use of such serial communications to accomplish indirectly what cannot be accomplished directly. See, e.g., [Sutter Bay Assocs. v. Cnty. of Sutter, 68 Cal. Rptr. 2d 492 \(Cal. Ct. App. 1997\)](#); [Moberg v. Indep. Sch. Dist., 336 N.W.2d 510 \(Minn. 1983\)](#).

[\[FN228\]](#). E.g., [5 Ill. Comp. Stat. 120/1.02 \(West 2010\)](#); [Kan. Stat. Ann. § 75-4317\(a\) \(West 2008\)](#); see Schwing, *supra* note 1, at 271 (showing a further examination of compromises defining meetings through partial quorum counts).

[\[FN229\]](#). Compare [Ala. Code § 36-25A-7 \(2010\)](#) (providing numerous enumerated exceptions), and [Miss. Code Ann. § 25-41-1 \(West 2010\)](#), with [Alaska Stat. Ann. § 44.62.310 \(West 2009\)](#) (providing exceptions only in cases pertaining to personal character or information made secret by statute), and [Ark. Code Ann. § 10-3-305 \(West 2010\)](#).

[\[FN230\]](#). [505 U.S. 377 \(1992\)](#).

[\[FN231\]](#). See [id.](#) at 377.

[\[FN232\]](#). [Id.](#) at 380, 391.

[\[FN233\]](#). [Id.](#) at 391.

[\[FN234\]](#). [Id.](#) at 391-92.

[\[FN235\]](#). [Id.](#) at 387.

[\[FN236\]](#). [447 U.S. 455 \(1980\)](#).

[\[FN237\]](#). See [Ward v. Rock Against Racism, 491 U.S. 781, 791 \(1989\)](#); [Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 649-55 \(1981\)](#).

[\[FN238\]](#). [Turner Broad. Sys. v. FCC, 512 U.S. 622, 642 \(1994\)](#) (citing [Ward, 491 U.S. at 799](#)).

[\[FN239\]](#). See [Hays Cnty. Water Planning P'ship v. Hays Cnty., 41 S.W.3d 174, 182 \(Tex. Ct. App. 2001\)](#).

[\[FN240\]](#). *Id.*

[\[FN241\]](#). See *id.* (citing [Connick v. Myers, 461 U.S. 138, 147 \(1983\)](#); [Pickering v. Bd. of Educ., 391 U.S. 563 \(1968\)](#)).

[\[FN242\]](#). [547 U.S. 410 \(2006\)](#).

[FN243]. [Id. at 413-17.](#)

[FN244]. [Id. at 415.](#)

[FN245]. [Id. at 417.](#)

[FN246]. [Id. at 421.](#)

[FN247]. [461 U.S. 138 \(1983\).](#)

[FN248]. See [id.](#)

[FN249]. [Id. at 147.](#)

[FN250]. [Garcetti, 547 U.S. at 421-23.](#)

[FN251]. [Rangra v. Brown, 566 F.3d 515, 517-18 \(5th Cir. 2009\).](#)

[FN252]. See [id.](#)

[FN253]. I say “less protected” because the Court has made clear that even where the public employee speech is not made “as a citizen” or on “a matter of public concern,” it is not completely without First Amendment protection. For example, if such an employee were to be sued for defamation, the same First Amendment protections afforded all defamation defendants would still apply. See [Connick v. Myers, 461 U.S. 138, 147 \(1983\).](#)

[FN254]. [Rangra, 566 F.3d at 522.](#)

[FN255]. [391 U.S. 563 \(1968\).](#)

[FN256]. [Id. at 568.](#)

[FN257]. [Garcetti v. Ceballos, 547 U.S. 410, 418 \(2006\)](#) (quoting [Waters v. Churchill, 511 U.S. 661, 671 \(1994\)](#)).

[FN258]. [Id. at 422](#) (“The fact that his duties sometimes required [plaintiff] to speak or write does not mean his supervisors were prohibited from evaluating his performance.”); see also [Waters, 511 U.S. at 675](#) (“When someone who is paid a salary so that she will contribute to an agency’s effective operation begins to do or say things that detract from the agency’s effective operation, the government employer must have some power to restrain her.”).

[FN259]. [Garcetti, 547 U.S. at 420](#) (quoting [Connick v. Meyers, 461 U.S. 138, 154 \(1983\)](#)).

[FN260]. [Rangra v. Brown, 566 F.3d 515, 523-24 n.23 \(5th Cir. 2009\)](#) (emphasis added).

[FN261]. See [Conservation Comm’n of Westport v. Beaulieu, No. 01-11087-RGS, 2008 WL 4372761, at *4 \(D. Mass. Sept. 18, 2008\)](#) (“Although the Selectmen are the appointing body and have the power to remove the Commissioners for cause, they do not have supervisory authority or managerial control over the Commissioners’ day-to-day activities.”).

[FN262]. [Rangra, 566 F.3d at 524.](#)

[FN263]. [Republican Party of Minn. v. White, 536 U.S. 765, 774-75 \(2002\).](#)

[FN264]. [White, 536 U.S. at 781-82](#) (emphasis added) (quoting [Wood v. Georgia, 370 U.S. 375, 395 \(1962\)](#)); see also [Bond v. Floyd, 385 U.S. 116, 133-35 \(1966\)](#) (reinstating a state

representative excluded from the legislature because of his statements criticizing the Vietnam War and the draft) (cited in Rangra, [566 F.3d at 524](#)). Indeed, the importance of the ability of legislators to speak freely is also reflected in the doctrine of legislative immunity. See [U.S. Const., art. I, § 6, cl. 1](#) (Speech and Debate Clause); [Gravel v. United States, 408 U.S. 606, 623-25 \(1972\)](#); [Tenney v. Brandhove, 341 U.S. 367, 379 \(1951\)](#).

[FN265]. [Rangra, 566 F.3d at 524-25 n.24](#) (citing [Eu v. San Francisco Cnty. Democratic Cent. Comm., 489 U.S. 214, 222 \(1989\)](#) (upholding the right of party officials to endorse candidates in primary elections, and candidates to claim party endorsement)); see also [Brown v. Hartlage, 456 U.S. 45, 53-54, 58 \(1982\)](#) (upholding the right of candidates to promise to reduce their salary, despite laws banning promises of any thing of value in consideration of votes).

[FN266]. [489 U.S. 214 \(1989\)](#).

[FN267]. *Id.*

[FN268]. *Id.*

[FN269]. *Id.* at 222-29.

[FN270]. [456 U.S. 45 \(1982\)](#).

[FN271]. *Id.* at 53-54.

[FN272]. [Rangra v. Brown, 566 F.3d 515, 526-27 \(5th Cir. 2009\)](#).

[FN273]. *Id.*

[FN274]. [U.S. Const. amend. XIV, § 1](#).

[FN275]. [City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 \(1985\)](#) (citing [Plyler v. Doe, 457 U.S. 202, 216 \(1982\)](#)); see also [Village of Willowbrook v. Oleck, 528 U.S. 562, 564-65 \(2000\)](#).

[FN276]. [City of Cleburne, 473 U.S. at 440](#).

[FN277]. *Id.* at 446.

[FN278]. *Id.* at 440.

[FN279]. [San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16, 62 \(1973\)](#).

[FN280]. [Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83-84 \(2000\)](#).

[FN281]. [Ala. Bd. of Trs. v. Garrett, 531 U.S. 356, 366-67 \(2001\)](#); [City of Cleburne, 473 U.S. at 445-46](#).

[FN282]. *Id.* at 440.

[FN283]. *Id.*

[FN284]. *Id.*

[FN285]. See, e.g., [Dunn v. Blumstein, 405 U.S. 330, 343 \(1972\)](#).

[FN286]. [United States v. Virginia, 518 U.S. 515, 532-33 \(1996\)](#); [Craig v. Boren, 429 U.S. 190,](#)

[197 \(1976\)](#).

[FN287]. [Clark v. Jeter, 486 U.S. 456, 461 \(1988\)](#).

[FN288]. *Id.*

[FN289]. [Califano v. Boles, 443 U.S. 282, 305 \(1979\)](#).

[FN290]. E.g., [Del. Code Ann. tit. 29, § 10002\(c\)](#) (West 2010); [5 Ill. Comp. Stat. Ann. 120/1.02 \(West 2010\)](#) (carving out an exception for the General Assembly and its subsidiary committees).

[FN291]. [Frontiero v. Richardson, 411 U.S. 677, 684-88 \(1973\)](#).

[FN292]. *Id.*

[FN293]. [Lawrence v. Texas, 539 U.S. 558, 580 \(2003\)](#).

[FN294]. There may be other examples of laws which treat state legislators more favorably than local legislators. However, local legislators have not historically been subject to the systematic discrimination relied upon by the Court in recognizing race, alienage, and gender as suspect classes.

[FN295]. [Dunn v. Blumstein, 405 U.S. 330, 330, 341-44 \(1972\)](#). Such “durational residency” cases merit strict scrutiny because the classifications involved burden the right of interstate travel. See [Dunn, 405 U.S. at 343](#). See generally [Saenz v. Roe, 526 U.S. 489 \(1999\)](#) (invalidating durational residency requirement for receipt of welfare payments); [Shapiro v. Thompson, 394 U.S. 618 \(1969\)](#) (invalidating durational residency requirement for receipt of welfare payments).

[FN296]. [Dunn, 405 U.S. at 330, 341-44](#).

[FN297]. [377 U.S. 533, 561-62 \(1964\)](#).

[FN298]. *Id.*

[FN299]. [Kramer v. Union Free Sch. Dist., 395 U.S. 621, 633 \(1969\)](#). But see [Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 734-35 \(1973\)](#) (upholding a law limiting voting in a special-use irrigation district to landowners by applying the rational basis test).

[FN300]. [Williams v. Rhodes, 393 U.S. 23, 30-32 \(1968\)](#); see also [Texas v. White, 415 U.S. 767, 771-72 \(1974\)](#) (upholding ballot access requirements under the strict scrutiny standard). But see [Jenness v. Fortson, 403 U.S. 431, 442 \(1971\)](#) (upholding less restrictive ballot access rules without expressly applying strict scrutiny).

[FN301]. [Clements v. Fashing, 457 U.S. 957, 963-66 \(1982\)](#).

[FN302]. *Id.* at 966-68.

[FN303]. [Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95-98 \(1972\)](#).

[FN304]. [Id. at 101](#) (citing [Williams, 393 U.S. at 30-32](#) (striking down third party ballot access restrictions under Equal Protection and explaining that such analysis required strict scrutiny where First Amendment freedoms are burdened)).

[FN305]. See generally [Austin, v. Mich. State Chamber of Commerce, 494 U.S. 652 \(1996\)](#).

[FN306]. [Id. at 666](#) (citing [Mosley, 408 U.S. at 101](#)). The Court in Austin upheld the distinctions under strict scrutiny, noting the governmental interest in preventing the large accumulations of wealth, possible because of the special advantages of the corporate structure, from corrupting the political process.

[FN307]. It is a basic principle of state and local law that municipalities and counties are creatures of the state, created by the state, subject to abrogation by the state and possessed of only those powers granted to it by the state. See, e.g., Romualdo P. Eclavea et al., *New York Jurisprudence, Constitutional Law* § 184 (2d ed. 2010); Michael A. Pane, *New Jersey Practice Series, Local Government Law* § 3:1 (2009). Only the state has sovereignty. [Williams v. Eggleston, 170 U.S. 304, 310 \(1898\)](#) (“A municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of the state for conducting the affairs of government, and as such it is subject to the control of the legislature.”). As such, there are innumerable powers which the state has that local governments do not. [Id. at 309-10](#).

[FN308]. Doris Graber, *Mass Media & American Politics* 303-04 (7th ed. 2006) (discussing results of surveys showing that local TV stations spend more than half their time on local stories, as opposed to roughly 10% on state stories and roughly 25% on national stories).

[FN309]. [Citizens United v. FEC, 130 S. Ct. 876, 886 \(2010\)](#).

[FN310]. [Id. at 903-13](#).

[FN311]. See generally *id.*

[FN312]. At the same time, the Citizens United case might provide defenders of strict open meetings laws an additional argument. In the recent federal district court case [Asgeirsson v. Abbott, No. P-09-CV-59, 2011 WL 1157624 \(W.D. Tex. Mar. 25, 2011\)](#), the Texas Attorney General used the Citizens United opinion's validation of campaign disclosure requirements, [130 S.Ct. at 914-916](#), to argue that disclosure requirements are fundamentally different from outright speech restrictions, and that the Texas open meetings act was more akin to a requirement that public officials disclose the contents of their private communications. [Asgeirsson, 2011 WL 1157624 at *201-21](#).

This novel argument may ultimately save strict open meeting acts, but there is significant room for doubt. For one thing, by their plain terms, open meeting acts do more than merely require disclosure of private communications among public officials: they ban the communication in the first place. For another, campaign finance disclosure laws merely require disclosure of the identity of political campaign contributors and the dates and amounts of the contributions, while open meeting acts require the disclosure of the entire content of the communications. By way of example, if public advocacy organizations like the NAACP were required to disclose the content of all communications among their members, they would very likely have viable free speech claims. Cf. [NAACP v. Alabama, 357 U.S. 449, 460-465 \(1958\)](#) (stating that compelled disclosure of membership lists compromised not only privacy rights but First Amendment rights of freedom of association and freedom of speech).

[FN313]. [Alaska Stat. Ann. § 44.62.310\(a\)](#) (West 2009); [Ark. Code Ann. § 10-3-305\(a\)](#) (West 2010); [Conn. Gen. Stat. Ann. § 1-225\(c\)](#) (West 2008) (explicitly exempting the legislature from agenda or notice requirements); [Ga. Code Ann. § 50-14-1\(e\),\(f\)](#) (West 2010) (explicitly exempting legislature from agenda or notice requirements); [Haw. Rev. Stat. § 92-10 \(West 2010\)](#) (expressly granting authority to the state legislature to set requirements); [5 Ill. Comp. Stat. Ann. 120/1 \(West 2010\)](#) (exempting the state legislature because it falls outside the statutory definition of “public body”); [Ind. Code Ann. § 5-14-1.5-2\(a\)\(1\)](#) (West 2007) (not expressly including the General Assembly); [Ky. Rev. Stat. Ann. § 61.810\(1\)\(i\)](#) (West 2010) (exempting committees, other than standing committees, from the open meetings law); [La. Rev. Stat. Ann. § 42:6.2](#) (2009) (granting the state legislature express authority to hold closed meetings in a variety of enumerated situations); [Miss. Code Ann. § 25-41-3\(a\)](#) (West 2010)

(placing legislative committees, but not the state legislature itself, within the scope of the statute); [N.M. Stat. Ann. § 10-15-2 \(West 2009\)](#) (carving out a number of open meetings law exceptions relating to the state legislature); [Or. Rev. Stat. § 192.610\(4\)](#) (West 2010) (failing to include the state legislature in the statute); [S.C. Code Ann. § 30-4-70\(e\)](#) (2005) (allowing closed sessions for the General Assembly in certain constitutionally authorized situations); [Wash. Rev. Code Ann. § 42.30.020\(1\)](#) (West 2010) (expressly excluding the state legislature from the open meetings law); [Wyo. Stat. Ann. § 16-4-402\(a\)\(ii\)](#) (West 2010) (expressly excluding the state legislature from the open meetings law); see [Abood v. League of Women Voters, 743 P.2d 333 \(Alaska 1987\)](#) (holding that the legislature could exempt itself from the open meetings law); [Coggin v. Davey, 211 S.E.2d 708, 710 \(Ga. 1975\)](#); [Sarkes Tarzian, Inc. v. Legislature of State, 104 Nev. 672, 673 \(Nev. 1988\)](#) (holding that the legislature could make rules exempting it from the open meetings law in some cases).

[FN314]. See [Ark. Code Ann. § 10-3-305\(a\)](#) (West 2010); [Tenn. Code Ann. § 8-44-102\(a\)](#) (Supp. 1998); [Mayhew v. Wilder, 46 S.W.3d 760, 770 \(Tenn. Ct. App. 2001\)](#) (holding that the General Assembly does not fall within the definition of “governing body” applicable to the open meetings law due to state constitutional concerns).

[FN315]. See Ark. Const. of 1874, art. V, § 13 (1874) (“The sessions of each house, and of committees of the whole, shall be open, unless when the business is such as ought to be kept secret.”); see also Schwing, *supra* note 1, at 131-34.

[FN316]. See [Mayhew, 46 S.W.3d at 770-71](#). In *Mayhew*, the Tennessee Court of Appeals outlined additional reasons for interpreting the Open Meetings Act as excluding the state legislature. Defining “governing body” as an entity “whose authority may be traced to state, city, or county legislative action,” the court reasoned that this excluded the state legislature, whose authority comes from the state constitution. *Id.* The Court also relied on the statutory maxim that a statute must expressly bind the state in order to be effective in doing so. *Id.* The first of these two additional rationales might provide an additional rational basis justifying the state-local distinction.

[FN317]. See Johnson, *supra* note 9, at 15-16.

[FN318]. See generally [State ex rel. Murray v. Palmgren, 646 P.2d 1091 \(1982\)](#).

[FN319]. [Id. at 1095.](#)

[FN320]. [Id. at 1094-95.](#)

[FN321]. *Id.*

[FN322]. *Id.*

[FN323]. *Id.* at 1099 (emphasis added).

[FN324]. [United States v. Nixon, 418 U.S. 683 \(1974\)](#); see also [Capital Info. Grp. v. State, 923 P.2d 29, 33 \(Alaska 1996\)](#) (applying executive privilege protections because they encourage “open exchange” of ideas and advice among officials); [Wilson v. Brown, 962 A.2d 1122, 1131 \(N.J. Super. Ct. App. Div. 2009\)](#) (finding the need for free, private consultation and deliberation to be the most important reason for gubernatorial executive privilege).

[FN325]. E.g., Ala. Const. art. V, § 114; [Ariz. Const. art. V, § 1.](#)

[FN326]. See, e.g., [Robinson v. Att’y Gen. of U.S., 534 F. Supp. 2d 72, 82-84 \(D.D.C. 2008\)](#); [Blethen Me. Newspapers, Inc. v. State, 871 A.2d 523, 537 \(Me. 2005\)](#) (refusing, on grounds of privacy interests held by witnesses and victims, to release prosecutor’s records absent credible

allegation of governmental misconduct).

[\[FN327\]](#). See *supra* Section III.

[\[FN328\]](#). See *supra* discussion accompanying notes 93-103.

[\[FN329\]](#). See *supra* Section III.C.

[\[FN330\]](#). Johnson, *supra* note 9, at 17-20. There is no shortage of different formulations of these rationales, including additional rationales. See, e.g., Fenster, *supra* note 9, at 896-902. But the four rationales listed here capture the essence of the arguments.

[\[FN331\]](#). A search of social studies journals uncovered no empirical evidence for a claim of greater corruption among states with more lenient open meetings laws. A search of news articles for the period 2004-2010 among five representative states with a broad definition of “meeting” reaching less than a quorum (Colorado, Connecticut, Illinois, Kansas, and Virginia), plus five representative states using a narrower “quorum rule” (Arizona, California, Michigan, Ohio, and Texas) showed no more reported instances of corruption in the “quorum rule” states. While a comprehensive empirical analysis is outside the scope of this Article, there appears to be no significant evidence that the more speech-friendly quorum rule leads to greater government corruption.

[\[FN332\]](#). See, e.g., [Sutter Bay Assocs. v. Cnty. of Sutter, 68 Cal. Rptr. 2d 492, 502-03 \(Cal. Ct. App. 1997\)](#) (concluding that it is possible for serial meetings to constitute a conspiracy to violate the open meetings law); [McComas v. Bd. of Educ. of Fayette Cnty., 475 S.E.2d 280, 289-92 \(W.Va. 1996\)](#) (listing numerous cases from multiple states holding that individuals could not achieve indirectly what they were forbidden to do directly). For an example of such statutory language barring circumvention of the quorum rule via “in seriatim” meetings, see the Model Open Meetings Law at the end of this Article.

[\[FN333\]](#). See [5 U.S.C. § 552b\(b\)](#) (2006).

[\[FN334\]](#). See Fenster, *supra* note 9, at 902.

[\[FN335\]](#). See [5 U.S.C. § 552b\(b\)](#).

[\[FN336\]](#). See *supra* Section II.

[\[FN337\]](#). See *infra* notes 332-348 and accompanying text (especially references to the Welborn Study and the 1989 Senate Report).

[\[FN338\]](#). See Kenneth C. Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 5.18 (3d ed. 1994); Fenster, *supra* note 9, at 908-09; Johnson, *supra* note 9, at 21-22.

[\[FN339\]](#). See, e.g., Davis & Pierce, *supra* note 338, at 220; Fenster, *supra* note 9, at 908-09; Johnson, *supra* note 9, at 17-20.

[\[FN340\]](#). See Johnson, *supra* note 9, at 23-26.

[\[FN341\]](#). See, e.g., *id.* at 26-27.

[\[FN342\]](#). See Charles H. Koch, Jr., [33 Federal Practice and Procedure § 8456 \(2006\)](#).

[\[FN343\]](#). See David M. Welborn et al., *Implementation and Effects of the Federal Government in the Sunshine Act in 1984: Recommendations and Reports* 235-37 (1986) [hereinafter Welborn Study].

[FN344]. [United States v. Nixon, 418 U.S. 683, 705 \(1974\)](#).

[FN345]. See [NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150-51 \(1975\)](#).

[FN346]. [Id. at 149](#) (discussing [5 U.S.C. § 552b\(b\)\(5\)](#) (2006)).

[FN347]. [Id. at 150](#) (internal quotation omitted).

[FN348]. [Id. at 151-52](#). The pre-decision/post-decision distinction has been echoed by commentators.

[FN349]. Fenster, *supra* note 9, 908; see also Johnson, *supra* note 9, at 26-29.

[FN350]. Fenster, *supra* note 9, at 909.

[FN351]. There are still other arguments for the proposition that overly rigid public access rules weaken legislative and other governmental output. See *id.* at 909-10 (“Just as creativity and innovation in the sciences and arts are adversely affected by a legal regime that under-protects intellectual property, so the amount of information produced by government and the quality of its decision making are harmed when disclosure requirements become too rigorous.”).

[FN352]. Rogelia Garcia, Cong. Research Serv. Reports, *Government in the Sunshine: Public Access to Meetings Held Under the Government in the Sunshine Act, 1979-1984*, in *Government in the Sunshine Act: History and Recent Issues*, S. Rep. No. 101-54, at 61, 63 (1989).

[FN353]. Welborn Study, *supra* note 343, at 236-39.

[FN354]. Johnson, *supra* note 9, at 25-26. This assertion may overstate the chilling effect of sunshine laws. Many local legislative bodies routinely use the consent agenda as a time-saving tactic as part of their regular rules of order. See, e.g., Shelby County, Tenn., *Permanent Record of Order of the Board of County Commissioners* (2010). Such routine usage may be unaffected by the strictness or laxity of the applicable open meetings law.

[FN355]. Welborn Study, *supra* note 343, at 223.

[FN356]. *Id.*

[FN357]. See Pam Squyres, *Legislators' Day Jobs*, Mother Jones, May 22, 2000, <http://motherjones.com/politics/2000/05/legislators-day-jobs>.

[FN358]. Adam Przeworski et al., *Democracy and Development: Political Institutions and Well-Being in the World, 1950-1990* 14-15 (2000).

[FN359]. See *Primary Choices: John McCain*, N.Y. Times, Jan. 25, 2008, at A24, available at <http://www.nytimes.com/2008/01/25/opinion/25fri2.html>.

[FN360]. See *Beef Up the Open Meetings Law*, N.Y. Times, June 29, 1994, at A22, available at <http://www.nytimes.com/1994/06/29/opinion/beef-up-the-open-meetings-law.html>. Of course, not every media discussion of sunshine laws opposes such reforms.

[FN361]. Cf. Fenster, *supra* note 9, at 908 n.104 (2006) (noting that the pool of applicants for high level administrator jobs at public universities has been narrowed by the application of open meetings laws to such job searches) (citing Nick Estes, [State University Presidential Searches: Law and Practice](#), 26 J.C. & U.L. 485, 502-08 (2000)).

[FN362]. See, e.g., [State ex rel Murray v. Palmgren, 646 P.2d 1091, 1101 \(1982\)](#); Readers Cheer Tenn. Newspaper's Open-Meetings Lawsuit, First Amendment Center (Mar. 20, 2007) <http://www.firstamendmentcenter.org/news.aspx?id=18307>; see also Michele Bush Kimball, [Law Enforcement Records Custodians' Decision-Making Behaviors in Response to Florida's Public Records Law, 8 Comm. L. & Pol'y 313, 314-15 \(2003\)](#) (discussing pervasive noncompliance by state and local government agencies)

[FN363]. Nekima Levy-Pounds, [Can These Bones Live? A Look at the Impacts of the War on Drugs on Poor African-American Children and Families, 7 Hastings Race & Poverty L.J. 353, 371 \(2010\)](#) (discussing the tendency of zero tolerance policies to lead to juvenile delinquency).

[FN364]. This is consistent with another Model Open Meetings Law drafted by commentators. See Little & Tompkins, *supra* note 9, at 485 (setting out a model law with the proviso that “[n]othing herein shall make illegal informal discussions, either in person or telephonically, between members of public bodies for the purpose of obtaining facts and opinions provided that there is no intention of violating [the law]”), quoted in [St. Cloud Newspapers, Inc. v. District 742 Cmty. Schs., 332 N.W.2d 1, 8-9 \(Minn. 1983\)](#) (Simonett, J., concurring in part and dissenting in part).

[FN365]. Louis Brandeis, *Other People's Money And How The Bankers Use It* 92 (1914). The statement was made not in the context of open meetings laws or public access to government decision making but rather activity by private industry. Specifically, the statement refers to proposed regulations requiring disclosure of financial information to shareholders and the public by banks and institutional investors. *Id.* Nonetheless, it is quoted commonly as a call for open government.

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