The Governor's Commission for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

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INTRODUCTION

The State of Tennessee Executive Order No. 34 hereby charges the Governor's Commission for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Commission's responsibility in answering the questions in this application questionnaire. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Commission needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website http://www.tncourts.gov). The Commission requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the word processing document.) Please read the separate instruction sheet prior to completing this document. Please submit original (unbound) completed application (*with ink signature*) and eight (8) copies of the form and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with electronic or scanned signature via email to debra.hayes@tncourts.gov, or via another digital storage device such as flash drive or CD.

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Professor of Law, Humphreys School of Law, University of Memphis

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

2010 BPR # 028831 (Note: As a law professor in Tennessee, it was unnecessary for me to be licensed in Tennessee. I used my Virginia license to practice *pro hac vice* until I obtained Tennessee bar membership.)

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

Virginia: 1989--2011 (Active); 2011-Present (Inactive) Bar No. 30774 **District of Columbia: 1991--2000. (Resigned in 2000 when I left the area.) Bar No. 433717**

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any state? If so, explain. (This applies even if the denial was temporary).

No.

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

1989-1991 Law clerk to Hon. Roger Vinson, U.S. Dist. Court, N.D.Fla., Pensacola, FL

1991-1999 Trial Attorney, U.S. Dept. of Justice, Civil Rights Division, Washington, DC
1999-2000 Special Assistant U.S. Attorney, Eastern District of Virginia, Alexandria, VA
2000-Present Law professor, University of Memphis, Memphis, TN
2006-Present County Commissioner, Shelby County, TN

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

N/A

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

I am a full-time professor of law teaching in the areas of criminal law, criminal procedure, constitutional law, and civil rights. I have also taught employment law and a First Amendment course. I publish in the above areas, as well as in election law and voting rights law. Although I do not practice full-time, while a professor I have litigated cases and represented clients in both criminal and civil matters, mostly *pro bono* but in a few instances for compensation. These include matters in federal district courts, the Sixth Circuit, Chancery Court, the Tennessee Court of Appeals, the Tennessee Court of Criminal Appeals, and administrative matters before a local Election Commission and Ethics Commission.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Commission needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Commission. Please provide detailed information that will allow the Commission to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

1989-1991. As an "elbow clerk" for a U.S. district court judge, I played a substantial role in drafting orders and opinions and otherwise assisting the judge at trials, pretrial hearings, sentencings, and the like. The cases that went to trial included multi-defendant white-collar and drug conspiracy criminal cases as well as civil claims arising from contract, antitrust, employment discrimination, and securities law, among other things.

<u>1991-1995</u>. As an attorney in the Voting Section of the U.S. Department of Justice (Civil Rights Division), I tried cases in federal court under the Voting Rights Act and the Equal Protection Clause. I did the full range of motion practice, depositions, oral arguments at hearings, and the like. In additions to handling matters before a single judge, I also tried complex, multiparty cases before three-judge district courts against state governments over redistricting matters, four of which cases went to the U.S. Supreme Court. In two of these four cases (<u>DeGrandy v. Johnson</u> and <u>U.S. v. Bossier Parish, Louisiana</u>) I went to trial as plaintiffs' counsel. In the other two (<u>Hays v. Louisiana</u> and <u>Lawyer v. Department of Justice</u>), I went to trial as defendants' counsel. In all cases I assisted the U.S. Solicitor General's Office in preparing for briefing and oral argument before the U.S. Supreme Court. I also litigated "smaller" cases and participated in administrative review of proposed voting changes by scores of different jurisdictions under the "preclearance" provisions of Section 5 of the Voting Rights Act. During this period, I also briefed and argued a case before the Fifth Circuit Court of Appeals, <u>United States v. Attala County, Mississippi</u>.

<u>1995-1999</u>. As an attorney in the Housing and Civil Enforcement Section of the Civil Rights Division, I represented the United States in fair housing, fair lending, and public accommodations cases. I litigated several smaller, single-client cases referred by HUD. I also litigated complex "pattern and practice" cases involving fair lending and "redlining" cases, involving multimillion dollar settlements with Nationwide Insurance Company and New York-based Albank.

<u>1999-2000</u>. As a Special Assistant Attorney for the Eastern District of Virginia, I prosecuted misdemeanor and felony cases. This involved grand jury work, pretrial hearings, sentencings, plea bargaining, and trials before magistrates, judges, and juries. The federal jury trials involved drug and fraud conspiracies. I also argued two appeals before the Fourth Circuit Court involving bank robbery and felony murder charges.

<u>2000-2013</u>. I have taught full-time as a Univ. of Memphis law professor, teaching in the areas of Constitutional Law, Criminal Law, Criminal Procedure, Civil Rights, and the First Amendment. I taught Employment Law and Civil Rights as a Visiting Professor at William & Mary Law School in 2003. While I have not been engaged full-time in the practice of law during this period, I have been involved in extensive litigation, mostly *pro bono*, but some consulting work. This work has involved written and oral trial work, appellate advocacy, and advocacy before administrative boards, as set out below:

***+2000 Pro bono* counsel in <u>Fladell v. Palm Beach County Canvassing Board</u>, trial, appellate, and state Supreme Court litigation in Florida involving the "butterfly ballot" controversy in Florida. On brief. I published two law review articles (GEORGE MASON LAW REVIEW, STANFORD JOURNAL OF LAW AND PUBLIC POLICY) based on my work in the case.**

***+2001-2002 Pro bono* counsel for *amicus* Tennessee Association of Criminal Defense Lawyers (TACDL) in Death Row case <u>State v. Workman</u>. I briefed and argued before the Court of Criminal Appeals a question of first impression. This also resulted in a law review article (VIRGINIA JOURNAL OF SOCIAL POLICY & THE LAW).**

***+2002-2003 Pro bono* counsel for *amicus* National Association of Criminal Defense Lawyers (NACDL) in Death Row case <u>State v. Austin</u>. I prepared and filed a *cert.* petition before the U.S. Supreme Court. Another law review publication resulted (TULANE LAW**

REVIEW).

***+2004-2005* Pro *bono* counsel for *amicus* TACDL in U.S. v. Terrance Johnson, a case involving felony murder, a life-without-parole sentence, and questions of first impression regarding the Duress defense and mental retardation. Briefed and argued before the Sixth Circuit. Published article (UNIVERSITY OF SAN DIEGO LAW REVIEW).**

***+2006-2007* Pro *bono* counsel for disenfranchised voters in Ford et al v. Tennessee Senate et al. Briefed and argued at trial, briefed before Sixth Circuit. Case resulted in first time a federal court intervened in a state senate election challenge.**

***+2007* Paid counsel on brief in U.S. v. Logan Young (W.D. Tenn.), a high-profile federal bribery case involving University of Alabama "booster" Logan Young. Led to publication in UNIVERSITY OF MEMPHIS LAW REVIEW.**

***+2007-2008* Assisted principal counsel *pro bono* in advocating to District Attorney and Governor for clemency for Death Row inmate Michael Boyd, resulting in first Death Row clemency in Tennessee in 40 years.**

***+2008* *Pro bono* counsel assisting state senate candidate in constitutional and Tennessee election code ballot access issues**

***+2008-2010* Paid counsel on brief in U.S. v. Port Chester (S.D. N.Y.), a Voting Rights Act case presenting a question of first impression. Led to publication of book chapter in AMERICA VOTES (2d ed. 2011).**

***+2012* Assisted in research and writing in case involving Tennessee's "concurrent majority" requirement for consolidation referenda (still pending).**

***+2012* *Pro bono* counsel representing NACDL and a collection of state mental health organizations in State v. Van Tran, another Death Row case presenting a question of first impression. On brief before Sixth Circuit in *habeas* appeal (still pending). Resulted in publication in VERMONT LAW REVIEW.**

***+2013* *Pro bono* plaintiffs' counsel in Hurst et al v. Nineteenth Century Club, Inc. et al (Chancery Court, Shelby County), a high-profile effort to preserve a National Historic Register property. Tried case in Chancery Court; currently preparing appeal.**

2006-2013. Legislative service on the Shelby County Commission as elected local legislator. This service often involved the intersection of law and politics. For example, I drew on my County Commission and legal experience to examine issues concerning the police practice of "48-hour-holds" in Shelby County, and published an article on the legal questions involved in the CASE WESTERN RESERVE LAW REVIEW. I also drew on my political and legal experience to author a TENNESSEE LAW REVIEW article on the constitutional questions concerning Tennessee's Open Meetings Act. I led the successful effort before the Memphis Charter Commission to adopt a ballot proposal to switch to "Instant Runoff Voting" in municipal elections, and led the successful effort to have it adopted via referendum.

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

Of the cases referenced above in Question 8, several involved "firsts" resulting from my legal advocacy:

Lawyer v. United States was the first time the U.S. Supreme Court upheld a redistricting plan over an Equal Protection challenge brought under the then-new theory of "reverse racial gerrymandering" established in Shaw v. Reno and Miller v. Johnson, and the first to hold that a "minority district" could withstand such constitutional scrutiny if it was no more oddly shaped than non-minority districts drawn by the same jurisdiction.

The DOJ fair lending settlement in U.S. v. Nationwide Insurance Company was the largest of its kind at the time.

In State v. Workman, the Tennessee Court of Appeals adopted my proposed "reasonable probability" standard for *coram nobis* cases, a standard still used in Tennessee to this day.

Ford v. Tennessee State Senate was the first time a federal court intervened in an ongoing election dispute being heard by a state legislature.

The clemency in State v. Michael Boyd was the first granting of Death Row clemency in Tennessee in 40 years.

U.S. v. Port Chester resulted in the first extant decision imposing a non-district remedy (specifically, cumulative voting) in a "minority vote dilution" case.

As noted above in Question 8, Workman and Port Chester led to published law review articles.

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

I have not served as a judicial officer. While a University of Memphis law professor, I have served in several cases as an administrative hearing officer acting under the Tennessee University Administrative Procedures Act (TUAPA). While a County Commissioner, I have served in a quasi-judicial capacity, adjudicating land use cases on the Land Use Committee, and as a member of the Equal Opportunity Commission Appeals Board. And, of course, as a law professor, I have served as a trial and appellate judge in numerous Moot Court and Mock Trial competitions.

11. Describe generally any experience you have of serving in a fiduciary capacity such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

N/A

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Commission.

I have been asked to speak on cutting-edge legal topics at conferences all over Tennessee and the U.S. A partial list of such speaking events would include:
+Western U.S. Voting Rights Conference, Denver, Colorado (2001)
+Southeast Association of Law Schools (SEALS) Conference presentations in Hilton Head, SC (2001); Amelia Island, FL (2003); Hilton Head, SC (2005)
+ William & Mary Law School Institute For Bill Of Rights Law, Williamsburg, VA (September, October, and November 2003)
+National Bar Association Conference, Charlotte, NC (2004)
+Memphis Bar Association Bench-Bar Conference, Destin, FL (2007)
+Federal Bankruptcy Court Judges Conference, Chicago, IL (2009)
+FairVote Election Reform Conference, Washington, DC (2009)
+University of Mississippi Law School, Oxford, MS (2010)
+Univ. of Memphis Papasan Public Policy Institute, Nashville, TN (2010)
+American Bar Association Conference, Memphis, TN (2010)
+Texas Tech School of Law, Lubbock, TX (2013)

13. List all prior occasions on which you have submitted an application for judgeship to the Governor's Commission for Judicial Appointments or any predecessor commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

N/A

EDUCATION

14. List each college, law school, and other graduate school that you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

Cornell University, Ithaca, NY. 1982-1986
***B.A. in Linguistics with Distinction In All Subjects, May 1986**
***Full tuition University merit scholarship**
***Arts & Sciences College cash award for achievement**
***Dean of Students' cash award for Public Service**

College Of William & Mary, Marshall-Wythe School of Law Williamsburg, VA 1986-1989
***J.D. with Order of the Coif, May 1989**
***Annual merit scholarship (in-state tuition waiver plus stipend)**
******William & Mary Law Review***

***Third out of 150 in intra-school Moot Court tournament**
***Qualifier, National Moot Court team; Member, Benton Moot Court team**
*** Four Book Awards (aka "CALI awards"): Civil Procedure, Evidence, Contracts I &II**

PERSONAL INFORMATION

15. State your age and date of birth.

49 years old; Born April 9, 1964

16. How long have you lived continuously in the State of Tennessee?

13 years

17. How long have you lived continuously in the county where you are now living?

13 years

18. State the county in which you are registered to vote.

Shelby County, TN

19. Describe your military service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

N/A

20. Have you ever pled guilty or been convicted or are you now on diversion for violation of any law, regulation or ordinance? Give date, court, charge and disposition.

No

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No

22. If you have been disciplined or cited for breach of ethics or unprofessional conduct by any court, administrative agency, bar association, disciplinary committee, or other professional group, give details.

N/A

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

N/A

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

N/A

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

Along with members of the local Election Commission, I was a defendant in *Joe Cooper v. Gregory Duckett et al*, No. CH-06-0367, Part 2 (Chancery Court, Shelby County, TN). A rival County Commission candidate attempted to have my name removed from the ballot on residency grounds, asserting (incorrectly) that I resided outside the relevant County Commission district at the time I qualified as a candidate. The court dismissed the case in an order dated May 25, 2006.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices that you have held in such organizations.

Community Legal Center. Board member, 2005-Present.

Shelby Farms Conservancy. Board member (County Commission representative), 2009-2010, 2012-Present
Faculty sponsor, Univ. Memphis law school Federalist Society; Public Action Law Society
Parent Member (and volunteer), Campus Student Parent Network; Partners In Education (PIE), White Station Middle School; PIE, White Station High School
Holy Rosary Catholic Church. Lector, 2004-Present; Children's Liturgy teacher, 2004-Present; Parish Religious Education Instructor, 2005-2006.
Membership in Memphis Zoo; Pink Palace Museum; Brooks Museum of Art; Dixon Gallery & Gardens; Memphis Botanic Garden; Children's Museum of Memphis.

27. Have you ever belonged to any organization, association, club or society that limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

    a. If so, list such organizations and describe the basis of the membership limitation.

    b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

NO

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices that you have held in such groups. List memberships and responsibilities on any committee of professional associations that you consider significant.

American Bar Association, 2000-Present
Tennessee Bar Association, 2011-Present
Memphis Bar Association, 2008-Present. Board Member (Law School Representative), 2009, 2010; elected as Fellow, 2010

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school that are directly related to professional accomplishments.

At the Department of Justice, I received several awards for distinguished service, presented at annual ceremonies with the Attorney General.
At the University of Memphis, I have received merit pay awards every time they have been available, and have been promoted to the rank of Full Professor, the highest academic

rank available.

In 2008, the national election reform organization, FairVote awarded me its annual "Democracy Innovator Award" for 2008. The award recognized me for my "ground-breaking law review articles about proportional voting systems and the Voting Rights Act," as well as for my advocacy for "Instant Runoff Voting" in the 2008 Memphis referendum on the subject.

In addition to formal awards, I have received national recognition for my scholarship.

***In 2008, based on my voting rights scholarship, litigators in New York who had cited and attached my articles in a federal voting rights case asked me to serve as a consulting expert.**

***In 2011, based on my scholarship on Open Meetings Act reform, I was asked to participate as an expert witness in litigation in Texas on Texas' open meetings law, and my scholarship was cited and quoted in the litigation.**

***In 2012, the dean of the law school, a member of the prestigious American Law Institute (drafters of the Model Penal Code and Restatements of Torts and Contracts), invited me to apply for ALI membership and offered to sponsor my membership. I am currently in the process of applying for ALI membership.**

30. List the citations of any legal articles or books you have published.

Neal Devins and Steven Mulroy, *Judicial Vigilantism: Inherent Judicial Authority to Appoint Contempt Prosecutors in* Young v. United States Ex Rel Vuitton Et Fils S.A., 76 KENTUCKY LAW JOURNAL 861 (1988).

Steven J. Mulroy, *Limited, Cumulative Evidence*: Divining Justice Department Positions on Alternative Electoral Schemes, 84 NATIONAL CIVIC REVIEW 66 (1995)

Steven Mulroy, *The Way Out: Toward A Legal Standard For Imposing Alternative Electoral Systems As Voting Rights Remedies*, 33 HARVARD CIVIL RIGHTS-CIVIL LIBERTIES LAW REVIEW 333 (Summer 1998).

Steven Mulroy, *Alternative Ways Out: A Remedial Road Map For Using Alternative Electoral Systems As Voting Rights Act Remedies*, 77 NORTH CAROLINA LAW REVIEW 1867 (June 1999)

Steven Mulroy, Book Review of Samuel Issacaroff, Pamela S. Karlan, & Richard H. Pildes, *When Elections Go Bad*, in AMERICAN REVIEW OF POLITICS (Summer 2001)

Steven Mulroy, *Right Without a Remedy? The "Butterfly Ballot" Case and Court-Ordered Federal Election Revotes*, 10 GEORGE MASON LAW REVIEW 215 (Winter 2001)

Steven Mulroy, *Lemonade From Lemons: Can Advocates Convert* Bush v. Gore *Into A Vehicle For Reform?*, 9 GEORGETOWN JOURNAL OF POVERTY LAW & POLICY 357 (Summer 2002)

Steven Mulroy, *Substantial Noncompliance And Reasonable Doubt: How The Florida Courts Got It Wrong In The "Butterfly Ballot" Case*, 14.1 STANFORD J. LAW & POLICY REV. 203 (Spring 2003)

Steven Mulroy, *The Safety Net: Applying Coram Nobis Law To Prevent The Execution Of The Innocent*, 11 VIRGINIA JOURNAL OF SOCIAL POLICY & THE LAW NO. 1 (2003)

Steven Mulroy, *Avoiding "Death By Default": Does The Constitution Require A Life Without Parole Alternative?* 79 TULANE LAW REVIEW 2 (2004)

Steven Mulroy, *The Duress Defense's Uncharted Terrain: Applying It To Murder, Felony Murder, And The Mentally Retarded Defendant*, 43 UNIVERSITY OF SAN DIEGO LAW REVIEW 159 (2006)

Steven Mulroy, *"Official" Explanation: Defining "Official Capacity" And Related "Color Of Office" Phrases In Bribery And Extortion Law*, 38 UNIV. MEMPHIS LAW REVIEW 587 (2008)

Steven Mulroy, *Sunlight's Glare: How Overbroad Open Government Laws Chill Free Speech And Hamper Effective Democracy*, 78 TENNESSEE LAW REVIEW 309 (2011)

Steven Mulroy, *Non-District Remedies*, book chapter in AMERICA VOTES (Ben Griffith, editor, 2nd ed. 2011)

Steven Mulroy, *"Hold" On: The Remarkably Resilient, Constitutionally Dubious "48-Hour Hold"*, *63* CASE WESTERN RESERVE LAW REVIEW *815 (2013)*

Steven Mulroy, *Execution By Accident: Evidentiary And Constitutional Problems With The "Childhood Onset" Requirement In* Atkins *Claims*, 37 VERMONT LAW REVIEW 591 (2013)

Steven Mulroy, *Law School Lifelines: A Game Show-Themed Review Exercise As Alternative Teaching Method,* JOURNAL OF LEGAL EDUCATION (Winter 2013) (forthcoming)

Steven J. Mulroy & Amy H. Moorman, *Raising The Floor Of Company Conduct: Deriving Public Policy From The Constitution In An Employment-At-Will Arena,* __ *FLORIDA STATE UNIVERSITY LAW REVIEW (forthcoming 2014)*

****Pro bono* work on brief in "butterfly ballot" case in Palm Beach Florida, 2000 Presidential election**

****Pro bono amicus* brief before Tennessee Court of Criminal Appeals, on behalf of Tennessee Association of Criminal Defense Lawyers, in Workman v. Tennessee (death penalty case) (2002)**

****Pro bono amicus cert.* petition brief before U.S. Supreme Court on behalf of the National Association of Criminal Defense Lawyers in Austin v. Tennessee (death penalty case) (2003)**

****Pro bono amicus* appellate brief before the Sixth Circuit U.S. Court of Appeals, on behalf of Tennessee Association of Criminal Defense Lawyers, in U.S. v. Terance Johnson (felony murder case) (2004-2005)**

***Pleadings and briefs in pro bono representation of Tennessee Senator Ophelia Ford and various voter plaintiffs before U.S. District Court (W.D. Tenn.) in Ford et al. v. Tennessee Senate et al. (2006) (voting rights case)**

***Pleadings and briefs in pro bono representation before the Sixth Circuit Court of Appeals in Ford et al. v. Tennessee Senate et al. (2007) (voting rights case)**

******Pro bono*** **brief before Shelby County Election Commission in Joe Towns v. Shelby County Election Commission (2008) (election law case)**

******Pro bono*** **brief before Tennessee Democratic Party Primary Board in Barnes v. Kurita (2008) (election law and First Amendment case)**

******Amicus*** **brief before U.S. Court of Appeals for the Sixth Circuit on behalf of various mental health/disability organizations in Heck Van Tran v. Colson (death penalty case) (2012)**

***Two letters to the Editor in THE NEW REPUBLIC magazine, one in the WASHINGTON POST**
***Numerous guest editorial/op-ed placements in the MEMPHIS COMMERCIAL-APPEAL newspaper and other local newspapers**

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

Law school courses: Criminal Law; Constitutional Law; Criminal Procedure; Federal Discrimination Law Seminar. All at the University of Memphis, Cecil C. Humphreys School of Law.

CLEs: As a law professor, I have taught many CLEs. Below is a non-exhaustive list from recent years:
***Nov. 2009*—"Recent U.S. Supreme Court Developments In Criminal Procedure," Tennessee Public Defenders Conference**
***July 2010*---"Criminal Law: Current Cases And Issues," sponsored by University of Memphis Law Alumni Association**
***July 2010*—"*Citizens United* And Free Speech," sponsored by Univ. Memphis Law Alumni Association**
***June 2012*—"Recent Supreme Court Developments In Criminal Law and Procedure," sponsored by Univ. of Memphis Law Alumni Association**

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

County Commissioner, District 5, Shelby County, Tennessee, 2006-Present. Elected in 2006; Reelected 2010. Term-limited; term expires August 2013.

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No.

34. Attach to this questionnaire at least two examples of legal articles, books, briefs, or other legal writings that reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

Attached are (1) an *amicus* brief in a case before the Court of Criminal Appeals; and (2) a TENNESSEE LAW REVIEW article. I wrote both items myself, although the former lists co-counsel, who provided comments to my draft. The brief resulted in the court adopting our proposed legal standard in *coram nobis* cases, a standard which remains to this day.

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? ***(150 words or less)***

I went to law school to do public service, and have continued in public service positions throughout my career. This position is a culmination, the ultimate chance to work for substantive justice. It's also the perfect match for my own skills and interests. It draws upon my passion for legal research and writing and my interest in the techniques of oral advocacy. It's also a good fit for my own personal temperament, which I consider to be measured and balanced, with a real ability to attain objectivity and a personal commitment to intellectual honesty.

I began my legal career working for a judge. I've practiced in federal and state court, criminal and civil, for plaintiff, prosecution, and defense. As a law professor, I moved beyond advocacy to a dispassionate, neutral analysis of the law. I cannot imagine a more fulfilling final step to my legal career, or a greater honor.

36. State any achievements or activities in which you have been involved that demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. ***(150 words or less)***

I chose the Civil Rights Division over higher-paying private sector jobs because of my commitment to equal justice under the law. For 8 years I've been an active board member of the Community Legal Center, which provides free legal services to the working poor. For the past 13 years as a law professor, I have taken on an average of one major, labor-intensive *pro bono* case a year. These ranged from voting rights cases to Death Row appeals to litigation over historic preservation efforts. There has been virtually no time during the last 13 years in which I have not been deeply involved in one long-term pro *bono* effort or another. As a law professor, I led the successful effort to require *pro bono* service among law students, and I lead my students by example.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. ***(150 words or less)***

I seek appointment to the Supreme Court of Tennessee for the vacancy created by the retirement of Justice Janice Holder, who resides in the Western Division. I reside in the Western Division. My selection would add the uniquely objective, scholarly perspective of a legal academician, which is particularly appropriate for a court of last resort. This more philosophical, academic perspective would still be grounded in years of practical experience—experience of unusual variety. Specifically, this would include practical experience with criminal prosecution and defense; civil plaintiff work and defense; trial and appellate work; and litigation in federal and state court. This unique combination of practice and scholarship would bring a different perspective to the Court.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? ***(250 words or less)***

As described above, I have been very involved in community and religious organizations (see Question 26), the bar (Question 28), and *pro bono* representation (Questions 8 and 36). Before getting elected to the County Commission, I led the grass-roots fight to save a historic amusement park in Memphis, and successfully saved and relocated the famed "Zippin Pippin" rollercoaster (which I got onto the National Historic Register). I continued the preservation efforts with my involvement in the recent high-profile fight to save the historic 19th Century Club Building (also on the Historic Register).

I am also dedicated to youth mentoring. I mentored a boy in Washington, DC during my time as a DOJ attorney. For the last 10 years in Memphis, I have been a Big Brother in the Big Brother/Big Sister program. In 2009, I won Big Brother Of The Year for Tennessee.

If I am appointed judge, I would continue as a Big Brother, and switch from direct *pro bono* advocacy to efforts to encourage attorneys to do more *pro bono* work. I would also redirect some of my political and legal reform advocacy efforts to the general support of charitable, educational, and cultural causes, especially that encouraging organ donation (see below).

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Commission in evaluating and understanding your candidacy for this judicial position. ***(250 words or less)***

Earlier this year, I made the decision to do an "altruistic" kidney donation, donating one of my kidneys to a stranger. Such a "non-directed" donation allows a "donor chain" to be formed. That is, recipients have loved ones willing to donate a kidney who aren't a match; the chain allows a multi-party, interstate "swap" to form with the aid of the National Kidney Registry, so that recipients all across the country can receive life-sustaining transplants. My particular donor chain ended up helping 28 recipients in 6

weeks, the second-longest (and quickest) chain in history, and the one with the highest number of desperate, critical-list recipients. At the request of Methodist Hospital, I have been spreading the word about the advantages of living organ donation. I was contacted by recipients along my chain, and was touched by their personal stories of how the chain transformed their lives. This moving experience reinforced my conviction that individuals can make a difference, and help people on a massive scale, if they only remove their blinders and open themselves up to possibility. It is in this spirit that I apply for a position on the Tennessee Supreme Court.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. ***(250 words or less)***

The fundamental obligation of every judge is to follow the law without fear or favor, to be free not only of corruption but of bias as well. Engraved in the Department of Justice building in DC is the motto "Let justice be done though the heavens may fall," an adage I've always taken to heart. In my Constitutional Law class, I teach my students how to detect judicial activism, intellectual inconsistency, and resulted-oriented reasoning, and how to call it out when they see it. I know I have the intellectual honesty, political courage, and objectivity needed to uphold the law even when I disagree with it.

As a law professor, I have to grade papers knowing the students' personalities, politics, and attitudes toward law school, and me. As a County Commissioner chairing hearings, I have to make procedural rulings which follow the rules, even if they disserve my cause. Ask my students and faculty colleagues, and ask my County Commission colleagues of all parties, races, and ideological stripes, and they will tell you (correctly!) I do so without bias.

Also, as an elected official, I have to make decisions based on what I believe, even if they are politically unpopular. For example, in 2012 I had to vote on a controversial contract for reproductive health services. Although these services were not abortion-related, the politics of the issue ended up pitting ardent pro-life supporters of a religious-based health service provider against just as ardent pro-choice supporters of Planned Parenthood. Putting aside the "culture war" politics as irrelevant, I made my decision based on the facts before me, angering pro-choice supporters and ending many close friendships in the process.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Commission or someone on its behalf may contact these persons regarding your application.

A. **Brian Stephens, Esq. Caissa Public Strategies**
B. **W. Neal McBrayer, Esq. Butler, Snow, O'Mara, Stevens & Canada, PLLC,**
C. **Henry Turley, Henry Turley Company,**
D. **Gary Shorb President & CEO, Methodist Le Bonheur Healthcare**
E. **John Bobango, Esq. Farris, Bobango, PLC**

AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the [Court] Supreme Court of Tennessee, and if appointed by the Governor, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Commission members.

I understand that the information provided in this questionnaire shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Commission may publicize the names of persons who apply for nomination and the names of those persons the Commission nominates to the Governor for the judicial vacancy in question.

Dated: 10/30/13, 20____.

Signature

When completed, return this questionnaire to Debbie Hayes, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

STATE OF TENNESSEE,	)	
	)	
	)	**No. W2002-00300-CCA-R3-PD**
v.	)	**(Trial Ct. # B-81209)**
	)	
PHILIP WORKMAN,	)	
	)	
Defendant -Appellant	)	

BRIEF OF AMICUS CURIAE
TENNESSEE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

ON APPEAL AS OF RIGHT FROM THE JUDGMENT OF THE CRIMINAL COURT OF SHELBY COUNTY, THE HONORABLE JOHN COLTON PRESIDING

W. Mark Ward, Esq.
Public Defender's Office
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Counsel for Amicus Curiae TACDL

ORAL ARGUMENT REQUESTED

[Note: Table of Contents and Table of Authorities omitted.]

STATEMENT OF THE CASE

The procedural history of this case is adequately set out in the Brief of Appellant's Statement of the Case, which Amicus adopts. Amicus supplements that statement with a brief discussion of the opinion below.

On January 7, 2002, the trial court entered an order denying defendant's petition for coram nobis (II, 213).[1] While conceding that witness Harold Davis' testimony at the original trial was material, and that defendant exercised reasonable diligence in procuring the new recantation testimony from Davis, the trial court found Davis' coram nobis testimony to be insufficiently clear and persuasive. (II, 223-224). Specifically, the trial court stated that defendant failed to show that Davis' new testimony was "so strong and convincing that a different result would necessarily follow." (II, 225, quoting State v. Rogers, 703 S.W.2d 166 (Tenn. Crim. App. 1985)). Regarding the testimony of Vivian Porter, the trial court found that it "merely serves to contradict Davis' trial testimony, and thus should be given little weight by this court." (II, 225). Significantly, the trial court did not consider the other two items corroborating Davis' recantation, the photographs of the crime scene and the failure of law enforcement to notice Davis' alleged presence at the Wendy's on the night of the shooting.

The trial court then considered the effect of the newly discovered x-ray evidence. After initially acknowledging that the Tennessee Supreme Court has held that defendant cannot be

[1] For consistency, Amicus adopts the record citation convention used by appellant. Volume and page number citations will refer to the coram nobis proceeding unless proceeded by "TR" to indicate the original trial transcript or "CL" to denote the clemency proceedings.

convicted of capital murder if the fatal shot did not come from his weapon, the trial court expressed its disagreement that there was any relevance to the question of whose gun killed the victim. (II, 226-227). The lower court nonetheless held that it "need not address this issue." (II, 227). After acknowledging that the Tennessee Supreme Court ruled that the new x-ray evidence warranted a coram nobis hearing to determine the need for a new trial, the trial court next expressed its doubt that the x-ray evidence truly constituted "newly discovered evidence" necessitating a hearing in the first place. (II, 227).[2]

Considering the merits of the new evidence anyway, the trial court reviewed the testimony at trial, and the testimony of defendant's forensic expert at the coram nobis hearing. The court acknowledged in passing that the defense expert had concluded that, based on the forensics associated with the victim's body, the fatal bullet could not have come from defendant's gun. Rather than addressing this central conclusion in any detail, however, the trial court focused on the defense expert's subsidiary opinion that, to a reasonable degree of certainty, the particular bullet recovered from the crime scene was not fired from defendant's gun. The trial court discounted that opinion because the expert admitted it was "possible" that the recovered bullet came from defendant's gun, and thus the expert "could not conclusively exclude" that possibility. (II, 233-234). The court also relied on its finding that defendant offered no testimony "which affirmatively rules out the possibility" that another bullet fired by defendant killed the victim. (II, 234).

[2] The trial court raised this doubt because the defendant's forensic expert admitted that he did not "need" the x-ray to conclude that the defendant's gun did not kill the victim. (II, 228). In so doing, the court acknowledged, but did not consider significant, that the newly discovered x-ray provided corroboration of the expert's findings. See id.

INTEREST OF AMICUS

TACDL is a non-profit corporation chartered in Tennessee in 1973. It has 775 members statewide, mostly lawyers actively representing criminal defendants. Its mission includes education, training, and support to such lawyers, as well as advocacy before courts and the legislature of reforms calculated to improve the administration of criminal justice in Tennessee.

Since it raises novel and important questions of Tennessee criminal law with potentially far-reaching implications for post-conviction relief in this State, the instant case directly implicates TACDL's interests. The importance of the issues in this case are explained in more detail below.

A. The Crisis In Capital Sentencing

It has become increasingly apparent in recent years that many innocent people in this country have been convicted of serious crimes. In the last ten years, for example, the Cardozo Law School's Innocence Project clinic has gotten over 110 convictions overturned based on DNA evidence of innocence. Cardozo Law Innocence Project Website, available at http://www.cardozo.yu.edu/innocence_project) (visited September 13, 2002). Even more troubling, a large number of these wrongly convicted persons have been sentenced to death. Since 1973,[3] 102 persons sentenced to death have been released because of factual innocence. James S. Leibman, *The New Death Penalty Debate*: *What's DNA Got To Do With It?*, 33

[3] The year 1973 is a useful starting point for analysis in light of the United States Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), invalidating death penalty statutes across the country. This led to an effective moratorium on executions which lasted several years. *See State v. Bland*, 958 S.W.2d 651, 662 (1997), *citing*, *inter alia*, *Gregg v. Georgia*, 428 U.S. 153 (1976).

COLUM. HUM. RTS. L. REV. 527, 537-538 (2002);[4] *see also* Death Penalty Info. Ctr., Innocence and the Death Penalty, available at http://www.deathpenaltyinfo.org/innoc.html (visited Sept. 13, 2001). Nationally, the ratio of death row exonerations to executions since 1973 is about 1 to 7. Id.; see also 146 Cong. Rec. S198 (daily ed. Feb. 1, 2000) (statement of Sen. Leahy).

In some states, the ratio is much worse. In Illinois, for example, the ratio has been roughly 1 exoneration to 1 execution for many years. Leibman, *supra*, 33 Colum. HUM. RTS. L. REV. at 538. In response, the Republican Governor declared a moratorium on executions in his state. Dirk Johnson, *Illinois, Citing Faulty Verdicts*, *Bars Executions*, N.Y. TIMES, Feb. 1, 2000, at A1. More recently, Governor Ryan has considered a blanket amnesty for all prisoners on Illinois' death row. Associated Press, *Ill. Death Row Inmates May Get Life If Governor Has Way*, Sept. 6, 2002.[5] Maryland has also imposed a moratorium on executions through judicial decision. Leibman, *supra*, at 527. The growing doubts about the ability of our system to prevent the execution of innocent persons has led such traditionally pro-capital punishment commentators as Pat Robertson, Oliver North, George F. Will, *Washington Times* columnist Bruce Fein, and former Bush Administration faith-based czar John DiIulio, among many others, to criticize capital punishment. Id. Even Justice Sandra Day O'Connor has recently expressed concern that "the system is allowing some innocent defendants to be executed." Ken Armstrong & Steve Mills, *O'Connor Questions Fairness of Death Penalty*, CHI. TRIB., July 4, 2001, at 1.

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[4] Professor Leibman led a mammoth, definitive study of errors detected in the post-conviction process in U.S. capital cases. *See* note 5.

[5] The evidence suggests that Illinois' death penalty adjudication process is not significantly more flawed than the average State's. An exhaustive study of the disposition of death penalty appeals nationwide showed that Illinois' "error rate" was actually slightly lower than the overall national error rate. *See* James S. Leibman et al., *Capital Attrition Error Rates in*

The fact that the innocent persons released were not actually executed (although in many cases, they came close) should not reassure us that "the system (eventually) works." In many of these cases, the exonerations come as the result of the "sheer accident" that a biological DNA sample happened to be available, Leibman, *supra*, at 546, or as the result of tireless work by persons outside the criminal justice system, Innocence Project, available at http://www.innocenceproject.org/causes/index.php (visited Sept. 13, 2002) (calling it "unacceptable" that justice is being "dispensed by law students, journalism students, and a few concerned lawyers, organizations, and citizens"). Every wrongly convicted person released has an unknown number of overlooked counterparts, alive or dead. Indeed, a landmark 1987 study of 20th-century post-conviction exonerations showed 23 cases where the innocent person was actually executed. Margery Koosed, *The Proposed Innocence Protection Act Won't,* 63 OHIO STATE L. J. 263, 275 (2002), *citing* Hugo Bedau & Michael Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987).[6] Since very little effort is expended to prove the innocence of persons already executed, the actual number of wrongly executed persons is probably much higher.

Tennessee has not been immune to this problem. Earlier this year, on the basis of DNA evidence, Memphis resident Clark McMillan was released from prison after serving over 22 years of a life sentence for a rape and robbery he did not commit. *See* Barry Kolar, *Truth From Testing*, TENNESSEE BAR JOURNAL, Vol. 38, No. 8, at 12-17 (August 2002); Tom Bailey Jr., *After*

Capital Cases, 1973-1995, 78 TEX. L. REV. 1839, 1854 (2000)("Leibman et. al.").

[6] A former Florida Supreme Court Justice, who previously had been both a prosecutor and homicide detective, was quoted as saying there was "no question" that Florida had executed persons who were not guilty of the crime for which they were condemned. 146 Cong. Rec. S198 (daily ed. Feb. 1, 2000) (statement of Sen. Leahy).

Tribulation, Freed Man Still May Face A Trial, MEMPHIS COMMERCIAL-APPEAL, July 28, 2002, at A1. In the post- *Furman* era, Tennessee has experienced the highest "error rate" of any state – that is, the highest percentage of death penalty sentences later reversed due to serious error. James S. Leibman et al., *Capital Attrition Error Rates in Capital Cases, 1973-1995,* 78 TEX. L. REV. 1839, 1857, Fig. 2 (2000) (results of exhaustive, comprehensive, five-year study of all death sentences imposed and reviewed over 23-year period). Between 1978, when the first post-*Furman* death sentence was imposed, and 2001, Tennessee sentenced 97 people to death without executing a single one, due to the near-100% rate of error. *See id*. at 1857 Fig. 2, and 1853 n.43, *citing* Duncan Mansfield, *The Price of Death Penalty? Maybe Millions,* A.P. NEWSWIRES, Mar. 26, 2000, *available in* Westlaw, News Library, APWIRES file. Although the actual number of innocent persons wrongly sentenced to death in Tennessee cannot be known with certainty, there is little reason to think that Tennessee's death penalty adjudication process is somehow more perfect than the nation's as a whole. Indeed, a former Tennessee Attorney General and U.S. Attorney for the Western District of Tennessee has written eloquently, based on his own experience, about the crisis in the capital criminal system, criticizing it as fundamentally flawed and advocating the abolition of the death penalty. *See* W.J. Michael Cody, *The Death Penalty In America: Its Fairness And Morality*, 31 Univ. Memphis L. Rev. 919, 920, 929-935 (2001).

B. The Uniquely Crucial Nature Of Coram Nobis Relief

In light of this serious problem, it is essential that adequate procedures exist to provide relief in those situations where, post-conviction, evidence comes to light suggesting that either the conviction or the sentence was erroneous. The writ of coram nobis plays a crucial role in this context, because other procedural avenues are insufficient.

An ordinary motion for new trial based on newly discovered evidence is subject to a mandatory, jurisdictional, 30-day time limit. Tenn. R. Crim. P. 33(b); State v. Williams, 645 S.W.2d 258, 259 (Tenn. Crim. App. 1982) (trial judge has no jurisdiction to consider merits of untimely filed motion for new trial); *see also* W. Mark Ward and Paula R. Voss, TENNESSEE CRIMINAL TRIAL PRACTICE §30-3, at 693 (2000) ("Tenn. Crim. Trial Practice"). Failure to meet this deadline with a specifically stated Rule 33 claim also waives any right to raise the matter on direct appeal. Tenn. Crim. Trial Practice, § 30-3, at 693, *citing* T.R.A.P. 3(e), State v. Boyd, 867 S.W.2d 330, 333 (Tenn. Crim. App. 1992); *see also* State v. Johnson, 980 S.W.2d 414 (Tenn. Crim. App. 1998).7 State post-conviction relief is available only for the violation of a federal or state constitutional right. TCA § 40-30-203. Where the late discovery of the new evidence is not attributable to the incompetence of counsel or to prosecutorial misconduct, neither an ineffective assistance of counsel claim nor a Brady or Giglio-type claim is available, and state post-conviction proceedings can afford no relief. For similar reasons, a federal habeas corpus claim would be unavailable, because the defendant could point to no violation of the U.S. Constitution or federal law. *See* 28 U.S.C. §§ 2241-2244; *see also* Herrera v. Collins, 506 U.S. 3990 (1993) (with the possible exception of truly compelling facts, a claim of actual innocence based on newly discovered evidence is not a ground for federal habeas corpus relief). Finally, to the extent that federal law recognizes a coram nobis claim, it is "well-settled" that a federal coram nobis claim cannot be used to challenge a state court conviction. Sinclair v. Louisiana, 679 F.2d 513, 514-515 (5th Cir. 1982); *see also* U.S. v. Stoneman, 870 F.2d 102, 106 (3d Cir.

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[7] Although appellate courts inclined to consider issues not raised below have some room for laxity in capital cases regarding "significant errors," *see, e.g.*, State v. Martin, 702 S.W.2d 560, 564 (Tenn. 1985), newly discovered evidence in capital cases is often discovered well after

1989); Brooker v. Arkansas, 380 F.2d 240, 244 (8th Cir. 1967); Rivenburgh v. Utah, 299 F.2d 842, 843 (10th Cir. 1962).

Thus, in the all-too-common case where evidence raising a significant factual issue is discovered after the direct appeal has expired, Tennessee's coram nobis statute affords the only chance to correct a potentially serious injustice.

Nor does the ability to reopen the case based on "scientific evidence," as provided by Tennessee Code Section 40-30-202(b)(2), adequately address the problem. High-profile cases of DNA-based exonerations carry the potential for creating a false sense of security. *See* James S. Leibman, *What's DNA Got To Do With It*?, 33 COLUM. HUM. RTS. L.REV.527, 543-549 (2002). Scientific evidence such as DNA evidence is rarely available to remedy erroneous capital convictions or sentences. Of the 102 cases since 1973 where persons were freed from death row based on evidence of innocence, in only 12 of those cases did DNA play a substantial role. *See* Death Penalty Info. Ctr., Innocence: Freed From Death Row, available at http://www.deathpenaltyinfo.org/Innocentlist.html#breakdown (visited Sept. 13, 2002). In the vast majority of capital cases, DNA evidence is simply not physically available to either confirm or dispel suspicion. Leibman, *supra*, 33 COLUM. HUM. RTS. L.REV at 541-542. Each month brings another example of an exoneration occurring without involvement of DNA evidence. *See, e.g.*, Associated Press, *Man Freed After Brother's Confession*, MEMPHIS COMMERCIAL-APPEAL, Sept. 11, 2002, at A15.

For the garden-variety case of witness error or witness perjury, the only realistic alternative is the writ of coram nobis. Indeed, the Tennessee Legislature amended the coram

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the direct appeal process has run its course, as was the case here.

nobis statute in 1978 to clarify that it specifically contemplates reliance on witness recantation evidence—as is present in the instant case–to justify the issuance of the writ. State v. Mixon, 983 S.W.2d 661, 673 (Tenn. 1999). This case affords the novel issue of what the "may have changed the result" language in that statute means. Because coram nobis is such a crucial "safety valve" in the death penalty adjudication process, this Court should use this case to carefully consider this issue and provide guidance to lower courts.

C. The Need For Reopened Proportionality Review

In some cases, a reopened evidentiary record after a coram nobis hearing may not establish sufficient doubt about the defendant's factual innocence to require a new trial or an overturned conviction, but it may raise significant new mitigation evidence. In such a case, the balance of aggravation and mitigation may be sufficiently upset so as to make the sentence of death unjust. Alternatively, the new evidence may raise sufficient residual doubt to compel a similar conclusion regarding the inappropriateness of a death sentence. In such cases, there must be a procedural vehicle for revisiting the proportionality review mandated by Section 39-13-206(c)(1) of the Tennessee Code. Such a review would play a crucial role in the Tennessee courts' continuing duty to ensure that the death penalty was imposed in a fair, just, non-arbitrary manner.

This case thus raises an important and novel question of law: when the original trial record has been reopened through a coram nobis hearing, can—or must---a reviewing court conduct a new proportionality analysis? TACDL has a significant institutional interest in making sure this issue is adequately addressed in this case.

SUMMARY OF ARGUMENT

The governing coram nobis statute and the instructions of the Tennessee Supreme Court in the instant case require that the defendant prevail if he can show merely that the evidence presented at the coram nobis proceeding "may have resulted in a different judgment" at the original trial. Little direct authority exists explaining what sort of evidentiary burden this "may have resulted" language imposes.

The heaviest burden it could plausibly impose would be to show that the new evidence "likely" would change the result, analogizing to the standard for ordinary motions for new trial based on newly discovered evidence. Some Tennessee authority exists for treating coram nobis motions like such "Rule 33" motions. However, the greater weight of authority suggests a lower standard. The plain language of the statute itself supports such a result, as does Tennessee case law under Rule 33 which makes clear that the Rule 33 standard is different from whether the jury "might have" voted differently.

Coram nobis case law from neighboring jurisdictions employs a standard lower than the probability standard of Rule 33. Federal authority in analogous situations, where the issue is whether correcting an error below "might have" led to acquittal, uses the same standard: defendant must show only a "reasonable probability" that the new information would have changed the outcome.

Indeed, both Tennessee case law and analogous federal case law indicate that a "reasonable probability" standard is especially appropriate where, as in the instant case, the newly discovered material evidence includes information which the prosecution failed to disclose. Case law from other jurisdictions also indicates that such an evidentiary burden is particularly called for when there is perjured testimony.

Strong policy reasons exist for this approach. Where material evidence was unavailable at trial through no fault of the defendant, the defendant should be placed in approximately the same position as had the error not occurred. The standard employed by the trial court places the defendant in a substantially worse position by shifting to defendant a burden which should have originally rested with the prosecution. The unfairness of this result is especially obvious where, as here, the newly discovered material evidence includes evidence withheld by the State. More fundamentally, given the significant problem of factually innocent people being sentenced to death, it is unconscionable to allow executions where new evidence raises a "reasonable probability" of a non-capital verdict.

Whether the correct legal standard is one of "reasonable probability" or a Rule 33 showing of a "likely" change in result, the trial court applied an improperly demanding standard in its opinion below. The court below required defendant to show "conclusively" that the evidence would have changed the judgment, that the evidence must be of a "conclusive character," and that denying the petition would create "a strong probability of a miscarriage of justice." With respect specifically to the recanted witness testimony, the trial court required defendant to provide evidence "so strong and convincing that a different result would necessarily follow." These characterizations of the burden are clearly inconsistent with the plain language of the statute. With respect specifically to the x-ray evidence, the court below ruled that the petition should be denied wherever "the jury could have reasonably concluded" in the same manner as it did originally. This approach improperly denies relief in those cases, such as the instant case, in which a reasonable jury could decide either way based on the newly discovered evidence–in other words, cases where the new evidence "may have" changed the result.

ARGUMENT

I. IN DECIDING WHETHER NEW EVIDENCE "MAY HAVE RESULTED IN A DIFFERENT JUDGMENT" UNDER TCA § 40-26-105, COURTS SHOULD DECIDE WHETHER DEFENDANT SHOWED A "REASONABLE PROBABILITY" OF A DIFFERENT RESULT

A. Governing Legal Standards

In an earlier opinion in the instant case, the Supreme Court of Tennessee explicitly set out what defendant needs to show to prevail on his coram nobis petition. He must show that:

> [1] newly discovered evidence may have resulted in a different judgment if the evidence had been admitted at the previous trial . . . and [2] he was 'without fault' in failing to present the newly discovered evidence at the appropriate time.

Workman v. State, 41 S.W.3d 100, 104 (Tenn. 2001) (emphasis added).

In the instant case, the Supreme Court also found that defendant met the second, "without fault" prong of this test. Id. at 103. Thus, the only issue for this court to decide is whether the trial court correctly analyzed the first prong. While the decision to grant or deny the writ of coram nobis is ordinarily reviewed for an abuse of discretion, State v. Hart, 911 S.W.2d 371, 375 (Tenn.1995), the granting of a new trial is a matter of right once these two prongs are met. Taylor v. State, 171 S.W.2d 403, 405 (Tenn. 1943).

The issue here is governed by Section 40-26-105 of the Tennessee Code, which provides in pertinent part that defendant is entitled to a new trial based on

> subsequently or newly discovered evidence relating to matters which were litigated at the trial if the judge determines that such evidence may have resulted in a different judgment, had it been presented at the trial.

Tenn. Code § 40-26-105 (1997) (emphasis added).

Ordinarily this rule presupposes that the newly offered evidence (a) would be admissible

pursuant to the applicable rules of evidence, and (b) is material to the issues or grounds raised in the petition. Hart, 911 S.W.2d at 375.

With the exception of the proffered testimony of original trial juror Wardie Parks (see II, 216 n.1), the newly discovered evidence in this case was ruled admissible at the coram nobis hearing, and those evidentiary determinations are not on appeal. In any event, the two new items, the recantation of a witness (Harold Davis) who testified at the original trial, and victim autopsy X-rays produced by the State itself, are clearly admissible.

The trial court has also acknowledged the materiality of Harold Davis' original trial testimony (II, 232). Thus, his recantation would certainly be material. In the instant case, the Supreme Court has acknowledged that the X-ray evidence "raised serious questions" regarding whether Workman fired the shot which killed the victim, and thus "whether he is guilty of the crime for which he is scheduled to be put to death." State v. Workman, 41 S.W.3d at 103. Similarly, the Sixth Circuit Court of Appeals considered highly material the question of whether the fatal bullet fragmented inside the victim's body, to which the x-ray evidence speaks directly. See Workman v. Bell, 178 F.3d 759, 767 (6th Cir. 1998). Thus, the X-ray evidence is clearly material, and the two preliminary requirements of admissibility and materiality are met. Interestingly, at least one Tennessee Supreme Court opinion suggests that where materiality is shown, a court can presume that newly discovered evidence will "likely . . . change the result, if produced and accepted by the jury." See Taylor v. State, 171 S.W.2d 403, 405 (1943); see also State v. Spurlock, 874 S.W.2d 602 (Tenn. Crim. App. 1993) (when false testimony at original trial is material, defendant is entitled to new trial even if it relates only to impeachment of prosecution witness).

Thus, this case turns on the application of the "may have resulted" prong. The Supreme Court's use of the phrase "may have resulted" in Workman and "might have resulted" in Mixon was not happenstance; it is key language mandated by the governing statute. Because this language is crucial, it is imperative, for this case and for future cases, that its meaning be carefully considered.

B. Statutory Language And Purpose

Initially, consideration of the statute's language and purpose can help to eliminate two extremes.[8] The statute clearly cannot require defendant to show with certainty that a different result would definitely obtain had the newly discovered evidence been considered. That would place too heavy a burden on defendants, be flatly inconsistent with the Legislature's selection of the phrase "may have," and run contrary to the coram nobis writ's overall purpose of correcting injustices (see 18 Am.Jur.2d Coram Nobis § 1 (1985)). At the same time, the statute clearly cannot permit a defendant to get a new trial every time he is able to raise any scenario, however remote or implausible, in which a different outcome at trial is theoretically possible. This would frustrate the recognized need for finality in judicial proceedings. Id. at § 13.

After delineating the primary "permissive" or "discretionary" sense of the word "may" which is plainly inapplicable here, Black's Law Dictionary defines "may" to mean "has a possibility to; might." Black's Law Dictionary (7th ed. 1999). Significantly, the term

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[8] The legislative history of the statute, as reflected in the Tennessee House and Senate Journals, sheds little light on this question. Tapes of all relevant legislative committee hearings of the bills leading to the statutory language in question reveal that the sponsors clearly intended for the "may have resulted" language to be added to the coram nobis statute. Tapes House H-92 3/2/78 & Senate S-124 3/22/78, available from Tennessee Dept. of State, Tennessee State Library & Archives. However, there is no discussion of the reason that particular phrase was chosen. See Id.

"possibility" would imply something less than "probability"–i.e., something less than a preponderance, "more likely than not" standard.

C. Tennessee Case Law

1. Difference From Rule 33 Standard. Amicus is not aware of Tennessee cases explicitly analyzing this statutory question--although examination of the specific facts involved in several analogous cases sheds some light (see Appellant's Brief, at 22-24, citing State v. Goswick, 656 S.W.2d 355 (Tenn. 1983) and State v. Singleton, 853 S.W.2d 490 (Tenn. 1993)). There is some Tennessee authority suggesting that coram nobis cases should be treated like regular motions for a new trial based on newly discovered evidence, see Hart, 911 S.W.2d at 374 (Tenn. 1995), the kind of motion currently made pursuant to Rule 33 of the Tennessee Rules of Criminal Procedure. The standard for such motions is, in addition to a showing of "reasonable diligence" and "materiality," a showing "that the evidence will likely change the result of the trial." State v. Nichols, 877 S.W.2d 722, 737 (Tenn. 1994) (emphasis added), citing State v. Goswick, 656 S.W.2d 355, 360 (Tenn. 1983). This equates to a "probability" or "preponderance" standard, which has been used in other states for both coram nobis and motions for a new trial. See, e.g., Lewis v. State, 367 So.2d 542, 545 (Ala. Cr. App. 1978) (using such a standard for both coram nobis motions and motions for new trial); State v. Lindsey, 106 N.E.2d 230 (Ind. 1952) (using preponderance standard for coram nobis) and Swain v. State, 18 NE2d 921 (Ind. 1939) (coram nobis standard same as that for standard motion for new trial), cert. denied, 306 U.S. 660 (1939); see also United States v. Keogh, 391 F.2d 138, 148 (2d Cir. 1968) (requiring coram nobis petitioner to show that evidence "would have permitted defendant to probably raise a reasonable doubt")(emphasis added).

While this standard would certainly achieve harmony with the case law on ordinary Rule 33 motions, there is strong reason to believe that the coram nobis standard is lower in Tennessee. First, Section 40-26-105 does explicitly require defendant to show merely that the new evidence "may have" changed the result, which is distinct from "likely would have," "probably would have," etc. Rule 33 does not contain any such "may have" language. Second, Tennessee case law concerning Rule 33 motions explicitly rejects the very "might have" standard employed in the coram nobis statute, making clear that the two motions trigger distinct burdens. In the 1983 case State v. Goswick, supra, the Tennessee Supreme Court explained that for ordinary motions for new trial based on newly discovered evidence:

> The question is not what the jury might do, but ... whether they ought to return a verdict more favorable to the defendant than the one returned on the original trial.

Goswick, 656 S.W.2d at 359 (emphasis added), quoting Evans v. State, 557 S.W.2d 927, 938 (Tenn. Crim. App. 1977). By contrast, under Section 40-26-105, the question is indeed what the jury "might" do, thus suggesting that a somewhat lower standard than "more likely than not" would apply.

2. Prosecution Nondisclosure. A lower standard is even more appropriate in cases like the instant case in which the state has withheld from the defendant (inadvertently or otherwise) material information-particularly where, as here, the defendant specifically asked for such information. Tennessee cases have long held that coram nobis relief is particularly appropriate where a defendant was prevented from making a good defense argument by the misconduct of the opposing party. See, e.g., Moore v. Moore, 460 S.W.2d 844 (Tenn. 1970) (divorce case).

In the criminal context, State v. Spurlock, 874 S.W.2d 602 (Tenn. Crim. App. 1993) is useful analogy. In Spurlock, the defendant raised on appeal the fact that the prosecution had

failed to disclose material exculpatory evidence. At issue was whether defendant was entitled to a new trial. The Tennessee Court of Criminal Appeals quoted the United States Supreme Court opinions in United States v. Agurs, 427 U.S. 97 (1976) and United States v. Bagley, 473 U.S. 667 (1985) (discussed infra at Section I.D.1.) holding that a defendant in this situation need only show a "reasonable probability" that the new evidence would have changed the outcome of the trial. Spurlock, 874 S.W.2d at 619. It also cited a string of cases from other jurisdictions using this same "reasonable probability" standard and describing the governing inquiry as whether the new evidence "might have" led to a different result.[9] As discussed below (Section I.D.1.), this "reasonable probability" standard is a lower burden than the "will likely change the result" Rule 33 standard applicable to ordinary new trial motions based on newly discovered evidence.

D. Case Law From Other Jurisdictions

Indeed, neighboring states specify a burden lighter than a preponderance standard for their coram nobis writ. In Arkansas, a defendant seeking coram nobis relief need merely show a "reasonable probability" that the judgment would not have been rendered. Dansby v. State, 37 S.W.3d 599 (Ark. 2001). And in Mississippi, the State Supreme Court ruled that the coram nobis standard should be lowered specially for capital cases, from a probability standard to a "reasonable probability" standard. Smith v. State, 492 So.2d 260, 264-265; see also Williams v. State, 722 So.2d 447, 450 (Miss. 1998) (reiterating this "reasonable probability standard). In Smith, which involved the newly discovered evidence of witness recantation, the Court explained the need for a lower standard in death cases:

[9] Id. at 620, citing McDowell v. Dixon, 858 F.2d 945, 949 (4th Cir. 1988), cert. denied, 489 U.S. 1033 (1989); Campbell v. Reed, 594 F.2d 4, 8 (4th Cir. 1979); State v. Hall, 329 S.E.2d 860, 863 (W.Va. 1985); Dozier v. Commonwealth, 253 S.E.2d 655, 658 (Va.1979).

> [H]ere we are dealing with the ultimate final judgment—death. There is no margin for error. Similar to our holdings that normally harmless error becomes reversible error when the penalty is death, we hold that in death penalty cases there must only be a reasonable probability that a different result will be reached . . .

492 So.2d at 264-265 (emphasis added).

North Carolina also employs this "reasonable probability" standard in the analogous contexts of assessing motions for new trial based on evidence that trial testimony had been perjured, see State v. Britt, 360 S.E.2d 660, 715 (N.C. 1987), and of a late-discovered flaw in the jury instructions, see State v. Rose, 373 S.E.2d 426, 428 (N.C. 1998).

The "reasonable probability" standard is a familiar one from federal criminal procedure. It is used in several analogous "but-for" contexts, where a court must judge what effect a deficiency in the original trial had on the trial's outcome. This is the standard used for judging the prejudicial effect of the ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 694 (1984), citing United States v. Agurs, 427 U.S. 97, 104 (1976) and United States v. Valenzuela-Bernal, 458 U.S. 858, 872-874 (1982). A "reasonable probability" is a "probability sufficient to undermine confidence in the outcome," id., but it is *not* as high as a preponderance standard, see United States v. Bagley, 473 U.S. 667, 680 (1985). The same "prejudice" standard is used in habeas cases involving "procedural default" issues under Wainwright v. Sykes, 433 U.S. 72, 87 (1977).[10]

1. Prosecution Nondisclosure. As it happens, this "reasonable probability" standard

[10] See United States v. Frady, 456 U.S. 152 (1982) (describing the Wainwright procedural default standard as a "substantial likelihood"); John Jeffries & William Stuntz, Ineffective Assistance And Procedural Default, 57 U. Chi. L. Rev. 679 (1990) (explaining how the legal standards are linked for the Strickland ineffective assistance and Wainwright procedural default claims).

has been applied specially to cases like the instant case involving information which the prosecution failed to disclose. These are cases where the underlying concern is, as the United States Supreme Court put it, "that the suppressed evidence might have affected the outcome of the trial." See, e.g., United States v. Bagley, 473 U.S. 667, 674, 681 n.12 (emphasis added); United States v. Agurs, 427 U.S. 97, 104 (1976) ("A fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial") (emphasis added).

Where the prosecution fails to disclose information to the defense---regardless of whether that nondisclosure was knowing and regardless of whether the defense specifically requested the information---federal courts consider that information "material," such that a new trial is in order, wherever "there is a reasonable probability that ... the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 680 (1985) (emphasis added). The Court in Bagley specifically emphasized that this was less than the preponderance standard of the federal Rule 33 (motion for new trial), which required that the defendant show there would "probably" be a different outcome. Id. at 680-681. That same "reasonable probability" standard applies where the prosecution has made a witness unavailable, United States v. Valenzuela-Bernal, 458 U.S. 858, 872-874 (1982), has failed to disclose the identity of a confidential informant, Roviaro v. United States, 353 U.S. 53 (1957), has failed to disclose information regarding the victim's criminal record, United States v. Agurs, 427 U.S. 97, 104 (1976), or where the prosecutor commits any other type of Brady violation.

All these doctrines involve the counterfactual analysis required by the coram nobis statute: had the defect or omission been corrected, would the trial have reached a different

outcome? All these doctrines require a showing of a "significant likelihood," Bagley, 473 U.S. at 683, something more than a mere speculative possibility but less than a preponderance. Id. This is precisely the level of proof suggested by the "might have" language in Section 40-26-105.

Indeed, there is some authority for the proposition that the "might have" language suggests a standard even lower than the federal "reasonable probability" standard. In People v. Vivaldi, 556 N.Y.S.2d 518 (N.Y. 1990), New York's highest court, interpreting its state constitution, declined to follow Bagley with respect to prosecution nondisclosure, at least where the defendant has requested the item in question. Reciting its standard that the defendant must show the missing information "might have resulted" in a different outcome to obtain a new trial, the court held that in this context, the defendant need show only a "reasonable possibility" of but-for causation. Id. at 522-523 (emphasis added). The court explicitly stated that this was a more defendant-friendly standard than the federal "reasonable probability" standard in Bagley, similar to the "seldom if ever excusable" standard applicable to instances of prosecutors knowingly using perjurious testimony. Id. Cf. State v. Rose, 373 S.E.2d 426 (N.C. 1988) (using "reasonable possibility" standard regarding problem with jury instructions at original trial).

2. Perjured Testimony. The "might have" phraseology is used in other jurisdictions where, as here, the new evidence relates to perjury committed at the first trial. In New York, the State Supreme Court has stated that criminal coram nobis relief is available where the use of perjured testimony "might have resulted in a different verdict." People v. Brandau, 189 N.Y.S.2d 818, 824 (1959). The same "might have" standard is used for motions for new trial there, and appears to be a relatively light burden. See, e.g., People v. Seldner, 71 N.Y.S. 35 (App. Div.

1901) (exclusion of character witness "might have resulted in a different verdict by raising reasonable doubt," even when the prosecution evidence is strong; new trial ordered); see also Maldonado v. Cotter, 685 N.Y.S.2d 339, 341 (App. Div. 1998) (new trial ordered in medical malpractice case where exclusion of one expert, who would have testified certain defendants failed to use proper electronic monitors on patient, "might have changed verdict"). The "might have" standard is also used in some federal courts where perjured testimony is involved. See Larrison v. United States, 24 F.2d 82 (7th Cir. 1928) (question is whether without the perjured testimony "the jury might have reached a different conclusion"); but see United States v. Stofsky, 527 F.2d 237 (2d Cir. 1975) (usual "probably" Rule 33 standard applied). Moreover, our neighbor to the east assigns the lesser "reasonable probability" burden when evaluating the need for a new trial in light of evidence of perjured testimony. State v. Britt, 360 S.E.2d 660, 715 (N.C. 1987).

In sum, both the plain language of the coram nobis statute and relevant case law from Tennessee and other jurisdictions show that something like a "reasonable probability" showing is the best interpretation of the statutory language in question. At most, the coram nobis standard matches the "more likely than not" standard of Rule 33 motions for a new trial based on newly discovered evidence. Either interpretation is significantly lower than the unduly demanding standard actually used by the trial court below. (See Section II, infra).

E. Policy Considerations

Strong policy considerations argue for rejecting the stringent standard used by the trial court. In any criminal case, and especially a capital case, it is essential that no reasonable doubt remain regarding the defendant's guilt, and that the State bear the burden of establishing guilt

beyond all reasonable doubt. Where, through no fault of defendant, material evidence emerges after the time for normal appeals and challenges which raises "serious question" (see State v. Workman, 41 S.W.3d at 103) about whether the State can meet this burden, it is unfair to ask defendant to show (as the court below required it to) that the new evidence compels acquittal as the only reasonable conclusion. This in effect would place a "beyond reasonable doubt" burden on the defendant, shifting the burden to a degree foreign to notions of fair play in our criminal justice system.

At least where the defendant is without fault, justice requires that he be placed in the approximate position he would have been had the original trial been based on all material evidence. The shifted burden used by the trial court would instead make the defendant substantially worse off. If all material information had been available in 1982, the prosecution would have had the burden of dealing with any extra doubts raised by (1) the absence of Davis' eyewitness testimony and (2) the admission of an x-ray showing that the fatal bullet did not fragment inside the victim's body. In 2002, the prosecution is relieved of these burdens, which are transferred to defendant.

This result is even more unjust where, as here, the tardy emergence of the material exculpatory evidence is not only not the fault of the defendant, but in fact is the fault of the State. A coram nobis standard higher than "reasonable probability" would give the prosecution no serious incentive to avoid improper failures to disclose. If anything, it would create the opposite incentive. Where through misconduct or neglect such information is withheld, a prosecutor benefits by being able to more easily meet her "reasonable doubt" burden at trial. Under the trial court's approach, when the evidence is later discovered, the prosecutor need not meet the

reasonable doubt standard using all the material evidence. Instead, she need merely offer any reasonable scenario wherein the newly discovered evidence ends up being non-outcome-determinative. The State receives a windfall in the form of a lowered burden as a reward for its own (intentional or unintentional) misconduct.

Finally, there are even more fundamental policy reasons demanding a more lenient approach. As discussed above (see "Interest Of The Amicus," supra), our criminal justice system has condemned a significant number of factually innocent persons.

Given the very real risk that capital defendants are in fact innocent, courts must be particularly vigilant in protecting their rights when claims of actual innocence arise. In such a climate, it would be unconscionable to hold that a reasonably diligent defendant should be put to death on the basis of incomplete evidence, even though there is a "reasonable probability" that a trial based on all material evidence would have saved his life. It would be even more unthinkable to hold that such executions are permissible where a different result at the original trial is "likely."

No doubt in part because of these and similar concerns, courts in various jurisdictions have held that a standard lower than a preponderance is especially appropriate where certain factors are present: prosecution nondisclosure (see supra Section I.D.1), and perjured testimony (see supra Section I.D.2). For policy reasons, a similar burden is appropriate regarding death sentences. The instant case involves all three factors. Because of the unique facts in the instant case, and because it is the first time a Tennessee court will explicitly address the meaning of the "may have" language in Section 40-26-105, this Court should make clear that the applicable standard is not an unduly demanding one.

II. THE TRIAL COURT USED AN INCORRECT LEGAL STANDARD IN APPLYING TCA 40-26-105.

A review of the opinion below illustrates why it is so important for this Court to clarify the legal standard here. The opinion shows that the trial court placed an inappropriately heavy burden on the defendant regarding the "may have" prong of the coram nobis analysis. The court characterizes the defendant's burden somewhat differently at different points in its opinion,[11] but consistently sets the bar too high.

A. Recanted Witness Testimony

With specific respect to the recantation by witness Howard Davis, the lower court required defendant to provide "evidence so strong and convincing that a different result would necessarily follow." (II, 225) (emphasis added). This too is plainly contradicted by the statutory language. To say something would "necessarily" follow is to say that it would definitely follow, or certainly follow, without doubt. If words have meaning, this statement of the burden requires a higher degree of confidence that the result would be changed than to merely say that the result "may" be different.

For this statement of the burden, the court relies on an appellate case dealing with motions for a new trial pursuant to Rule 33 of the Tennessee Rules of Criminal Procedure. State v. Rogers, 703 S.W.2d 166, 169 (Tenn. Crim. App. CA 1985), citing Rosenthal v. State, 292 S.W.2d 1, 4 (Tenn.1956). Specifically, the language cited comes from the statement of an old rule regarding new evidence which "can have no other effect" than to impeach a prosecution

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[11] See II, 217 (requiring errors to be "of such fundamental character as to render the proceeding itself irregular and invalid … [and] which conclusively would have prevented rendition of the judgment"); II, 219 (again requiring evidence to be of a "conclusive character," and additionally requiring a showing of "a strong probability of a miscarriage of justice").

witness. Id. The trial court held that the only purpose of Harold Davis' testimony is to impeach his trial testimony--that is, to impeach himself--and therefore this rule applies. (II, 225). But if this reasoning were valid, it would hold to a higher evidentiary standard the use of any recanted testimony in coram nobis cases, despite the clear intent of the Legislature in its 1978 amendments to Section 40-26-105 to clarify that recanted testimony was a perfectly legitimate ground for a coram nobis petition. See Mixon, 983 S.W.2d at 673 n.16 (describing this amendment).

And the trial court's jaundiced view of Davis' recantation testimony runs counter to the general rule that motions for new trial should be viewed more favorably when the witness impeached is the only material witness on the element in question. See David Louis Raybin, 11 Tennessee Practice: Criminal Practice And Procedure § 33.75 n.20 at 306 (1985 & 2002 Supp.). Here, Davis is the only witness from the original trial claiming to have seen the defendant shoot toward the victim. See State v. Spurlock, 874 S.W.2d 602, 620 (Tenn. Crim. App. 1993) (when false testimony at original trial is material, defendant is entitled to new trial even if the new evidence serves only to impeach the original testimony); State v. Goswick, 656 S.W.2d 355,359 (Tenn. 1983) (new evidence which served only to cast doubt on complainant's version of events nonetheless sufficient by itself to require new trial).[12]

Harold Davis' testimony at the coram nobis proceeding was no model of consistency. But it was clear on one point: his testimony now is that he did not actually see the defendant shoot the victim, and that his testimony at trial was not truthful. Though his testimony indicates

[12] The trial court mistakenly applies this same rule when it finds that the corroborative testimony of Vivian Porter "should be given little weight" because it "merely serves to contradict

reasons for doubting his reliability, that is all the more reason to err on the side of crediting his recantation, since the jury would have resolved all reasonable doubts in defendant's favor. This is especially true given the corroboration Vivian Porter's testimony provides to the recantation. It is true that Porter's version of events contradicts Davis', in that Davis does not recall being with Porter the night in question.[13] But the record reveals no reason to doubt Porter's memory, mental stability, or objectivity, whereas, according to the trial court, all of those are issues with respect to Davis.

The trial court found that because of Davis' admissions of memory lapses, confusion, and drug use during his coram nobis hearing testimony, the court was "unable to conclude" that Davis' trial testimony was false and his coram nobis hearing testimony was true. (II, 200). But the trial court also noted that Davis' original trial testimony was itself burdened with inconsistencies. On cross-examination during the original trial, Davis admitted that his pretrial statement to the police provided a different version of events than those he testified to on direct. (II, 197, citing T.E. p. 664-666). And while Davis testified at trial that he had previously identified the defendant from a photographic line-up, he was unable during trial to identify defendant in court. Id., citing T.E. p. 658.[14]

Davis' trial testimony." (II, 201).

[13] See note 13, supra.

[14] There were also inconsistencies in the versions of the only other two witnesses present around the time of the crime. Officer Stoddard testified that defendant shot him as they were struggling and physically touching. TR. 635. Officer Parker testified that defendant shot Stoddard from about 15 feet away. TR. 700. Officer Parker's testimony contained several inconsistencies with his police report; he admitted that he changed his testimony from his police report after discussing the incident with Officer Stoddard. Among the points which he changed for his trial testimony were (1) Stoddard's location and position when he was shot, (2) which of Stoddard's arms was shot, and even (3) whether he actually saw defendant shoot Stoddard at all.

The court below reasoned that, because the jury had decided to credit Davis' trial testimony despite these inconsistencies, Davis' current recantation "would have little if any impact" upon the jury's evaluation of Davis' testimony. (II, 201). But this reasoning is suspect. The jury may have decided to overlook Davis' trial testimony inconsistencies and credit Davis when Davis asserted that his story was true in its essentials; but those inconsistencies take on a whole new light given Davis' current testimony that they were the product of intentional fabrication at trial.

That Harold Davis would admit to memory uncertainties and confusion twenty years after the trial is unsurprising. That he would make similar mistakes at the original trial itself is more surprising–unless Davis is telling the truth now that his testimony was fabricated then. By themselves, Davis' inconsistencies at trial might not mean much. But when compared to his own recent admissions that he was perjuring himself, and the independent corroboration of those admissions by (a) the testimony of a disinterested witness (Porter), (b) the photographs of the crime scene, and (c) the failure of law enforcement to note Davis' presence at the time despite his meeting the suspect profile they were looking for, they strongly suggest that Davis' trial testimony was untruthful. Except for the Porter testimony, the trial court never considered the effect of this corroborative evidence. In light of it, it is clearly erroneous for the trial court to dismissively find that "Davis' current contradictory statements would have little if any impact upon the jury's consideration."[15]

TR. 700-705.

[15] Suspect reasoning is also at work regarding the lower court's evaluation of the corroborative testimony of Vivian Porter. After finding that in his coram nobis testimony, Davis was "simply unable...to 'separate fact from fiction'" regarding the "events surrounding Oliver's

C. X-Ray Evidence

The standard employed by the court in its discussion of the X-ray evidence is no better. At trial, defendant argued that there was reasonable doubt regarding whether his gun fired the fatal shot, relying on ballistics evidence and expert testimony thereon to show that his gun could not have done so. This evidence implicitly countered the testimony of the two surviving police officers that they did not discharge their weapons before the victim was shot. The newly discovered X-ray evidence significantly bolsters the ballistics expert testimony on this crucial factual issue by showing the absence of bullet fragmentation inside the victim's body. Significantly, the trial court does not consider this fact when evaluating the effect of the x-ray evidence under TCA 40-26-105. See (II, 205-211).

In evaluating the forensic evidence, the trial court denied the petition because "the jury could have reasonably concluded" that defendant's gun killed the victim, even if the jury accepted the defense expert's conclusion that the particular bullet recovered at the scene did not. (II, 234) (emphasis added).[16] This turns the Section 40-26-105 standard on its head. Under the trial court's analysis, defendant loses as long as the jury still reasonably "could have" reached the same result. Under the statute as written, defendant wins as long as the jury reasonably could have reached a different result. The trial court's analysis fails to leave any room for those

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death," (II, 200), the court then relies on that very same testimony to discredit Porter, noting that Davis' coram nobis testimony contradicts Porter's assertion that she was with Davis on the night in question (II, 201).

[16] Similarly, the court faults the defendant for failing to "affirmatively rule out the possibility" of an alternative prosecution theory linking defendant's gun to the killing. (II, 234). The trial court's use of this language—which, like the "jury could have reasonably concluded" language, is employed without any supporting authority—likewise demonstrates the trial court's disregard for the plain language of Section 40-26-105.

situations, undoubtedly common in criminal law, in which reasonable minds can differ, and a jury "might" reasonably acquit, convict, or return a penalty verdict other than death. When such "it could go either way" situations occur as the result of newly discovered evidence obtained through reasonable diligence and submitted in a timely fashion, Section 40-26-105 compels that the court give the benefit of that reasonable doubt to defendant and order a new trial. That is the only plausible interpretation of the "might have" language used by the Legislature, the Supreme Court in Mixon, and the Supreme Court in the instant case. Cf. State v. Goswick, 656 S.W.2d 355, 358-359 (Tenn. 1983) (court considering new trial motion must decide whether new evidence likely to change result "if produced and accepted by the jury"), quoting Taylor v. State, 171 S.W.2d 403, 405 (Tenn. 1943).[17]

Although the trial court does occasionally recite the "may have" language employed by the Supreme Court in the instant case, see, e.g., II, 220, whenever it describes its governing standard or explains its application of specific facts to the law, it makes clear that the standard it used is alien to the applicable legislative intent.

D. The Cumulative Weight Of The Evidence

A final flaw in the trial court's analysis is its separate analysis of the weight of the Harold

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[17] The trial court further purports to base its ruling regarding the x-ray evidence on the supposed fact that defendant admitted at trial "that he indeed pointed the weapon at the victim." (II, 211). However, the trial court's own opinion makes clear that defendant's testimony was far more equivocal than that. See id. at 207 (quoting defendant as testifying "I had my hand around the gun and I guess it was pointed at the officers") (emphasis added). Indeed, a review of defendant's testimony shows that he was unclear about exactly what he did after exiting the Wendy's, testifying to memory problems. See TR. 998-1003. Moreover, since defendant testified that the shot in question was directed toward an officer that was firing at him, see TR. 1002, and the State's own theory was that the victim did not shoot toward the defendant until the victim had himself already been shot, TR. 1057, the most that can be said is that defendant admitted firing toward *Officer Stoddard*---not toward the victim.

Davis and x-ray testimony. The court separately finds that neither of the two types of new evidence is enough to meet the coram nobis burden. The court never explicitly analyzes whether all of the new evidence taken together creates sufficient doubt about the accuracy of the verdict to warrant a new trial. A proper analysis of this question would lead to a granting of the petition.18

III. THIS COURT SHOULD RULE THAT A DEATH SENTENCE IS DISPROPORTIONATE IN THIS CASE

A. Availability Of Proportionality Review At This Stage Of The Case

The Tennessee General Assembly has directed appellate courts reviewing capital cases to determine whether the death sentence is "excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant." State v. Godsey, 60 S.W.3d 759, 781 (Tenn. 2001), *quoting* TCA § 39-13-206c(1)(D). Reviewing courts thus have an affirmative "duty," which they "do not take lightly," Godsey, 60 S.W.3d at 782, to "assure that no aberrant death sentence is affirmed," *id.* at 784. The resulting "comparative proportionality review" plays an important role in capital cases as "a check against the random or

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18 Alternatively, this Court could grant the writ of coram nobis only as to the sentence imposed, without granting a new trial. Federal and state authority holds that courts entertaining coram nobis petitions have a common law authority to modify the sentence in this manner. See United States v. Morgan, 346 U.S. 502, 513, 74 S.Ct. 247, 98 L.Ed 248 (1954)(in coram nobis proceedings "the power to remedy an invalid sentence exists"); Puente v. United States, 676 F.2d 141 (5th Cir. 1982)(convicted youth offender receives coram nobis relief entitling him to resentencing under a specified statute); Rewark v. United States, 512 F.2d 1184 (9th Cir. 1975)(same); United States v. Hamid, 531 A.2d 628 (D.C. 1987)(mitigating information not provided sentencing court due to duress entitles coram nobis applicant to a reduced sentence); Petition of Broom, 168 So.2d 44, 47 (Miss. 1964)(applicant can seek to have a criminal sentence vacated, set aside, or corrected through an error coram nobis application). Since the newly discovered evidence raises residual doubt regarding defendant's death-eligibility, such an

arbitrary imposition of the death penalty." *Id.* at 781, *quoting* Gregg v. Georgia, 428 U.S. 153, 206 (1976). Under proportionality review, a court must invalidate a death sentence "if the case, taken as a whole, is plainly lacking in circumstances consistent with those in similar cases in which the death penalty has been imposed." State v. Bland, 958 S.W.2d 651, 651 (Tenn. 1997) (emphasis added). If a court fails to consider the "case taken as a whole," it fails to carry out this important duty.

A coram nobis hearing is a continuation of the original trial. The writ of coram nobis is designed to allow a trial court "to reopen and correct its judgment" based on the discovery of new information--information without which the original trial record would be incomplete. State v. Mixon, 983 S.W.2d 661, 667 (Tenn. 1999) (emphasis added). As detailed below, the new evidence is highly material to the proportionality analysis. The Tennessee Supreme Court has already noted that the new evidence raises a "serious question," 41 S.W.3d at 103, on an essential part of the State's case (the death-eligibility of the defendant). Thus, it is beyond serious dispute that the new evidence developed at the coram nobis hearing below is part of the "case taken as a whole." As such, it should be considered for purposes of comparative proportionality review.

The "serious question" raised by this new evidence---whether the defendant fired the shot which killed the victim---bears directly on the proportionality analysis. It relates to the "means of death" and the "manner of death," two of the factors this State's Supreme Court has listed for proportionality review purposes. *See* Bland, 958 S.W.2d at 667. It also speaks to "residual doubt" regarding defendant's guilt and death-eligibility; such "residual doubt" has been

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approach might be appropriate in this case. See Section III, infra.

recognized as a non-statutory mitigating factor in capital sentencing. *See* State v. Hartman, 42 S.W.3d 44, 55-56 (Tenn. 2001).

Consideration of post-trial evidence for proportionality purposes is not without precedent. When conducting proportionality review on direct appeal, this Court has considered evidence (or lack therof) previously developed at a hearing on a motion for a new trial. *See*, *e.g.*, State v. Harris, 1994 WL 123647, *20 (Tenn. Crim. App. April 13, 1994) (court rejected defendant's claim that the trial court improperly failed to include his comments to the Rule 12 certificate, because defendant failed to offer any proof of such comments at his hearing on new trial motion).

Had the original trial been conducted with knowledge of all relevant facts, this new coram nobis evidence would have been introduced. On direct appeal, it would then have been considered for proportionality review purposes. The Supreme Court granted defendant a coram nobis hearing to correct the first problem. This Court must reopen proportionality review to correct the second.19

B. Merits Of Proportionality Review

While the existence of cases where similar circumstances yielded a lesser penalty than death does not necessarily require a finding of disproportionality, it could so require if the court cannot "discern some basis for the lesser sentence." Godsey, 60 S.W.3d at 784, *citing* Bland, 958 S.W.2d at 665. Similarly, while an "isolated decision" by a particular jury to impose a lesser

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19 There can be no doubt that this Court has the authority to reopen proportionality review. It is "well-settled" that Tennessee courts at all levels have "inherent power to adopt appropriate rules of criminal procedure when an issue arises for which no procedure is otherwise specifically prescribed." State v. Reid, 918 S.W.2d 166, 170 (Tenn. 1998). The governing statute is silent on what should be done regarding proportionality review when the original trial record has been reopened and supplemented through the writ of coram nobis, and Amicus is aware of no Tennessee cases directly addressing this issue. Thus, this Court has the authority and the duty to rule that

penalty under comparable circumstances would not invalidate a death sentence,[20] a number of such decisions could show a lack of proportionality. *See* Godsey, 60 S.W.3d at 786-793 (finding disproportionality after reviewing 10 roughly comparable cases, 7 of which yielded a non-death penalty).

In an earlier stage of this case, the Chief Justice of this State's Supreme Court noted:

> In almost twenty years of service as a justice on the Tennessee Supreme Court, I have participated in reviewing the sentences in 117 death penalty cases and have been the author of the majority opinion of this Court in thirty-one of those cases and the author of the minority opinion in five of those cases. In addition, I have reviewed innumerable reports of trial judges in first degree murder cases in which a sentence of life imprisonment …. was imposed. I have no hesitation in observing that the circumstances of this case are by no means as egregious as most of the death penalty cases I have reviewed.

Workman, 22 S.W.3d 807, 813 (Tenn. 2000). [21]

Even more compellingly, Chief Justice Drowota noted, the facts in the instant case are significantly less egregious than many cases in which the prosecution sought the death penalty and obtained only life imprisonment instead. *See id.* Despite prosecutors' attempts to obtain death penalty sentences, first-degree murder defendants received only life imprisonment in many cases, even where the murder was premeditated.[22] A thorough review of relevant cases would show that Chief Justice Drowota's concerns are well-founded, and that the death penalty would be disproportionate in this case.[23]

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reconsideration of proportionality is warranted in this procedural posture.

20 *See* Godsey, 60 S.W.3d at 784-785; Keen, 31 S.W.3d at 222; State v. Smith, 993 S.W.2d 6, 21 (Tenn. 1999).

21 In making this assertion, Chief Justice Drowota cites as examples 10 capital cases reviewed by the Supreme Court, 9 of which took place after the statutory comparative proportionality review in this case, and all of which have egregious fact patterns which make the instant case pale in comparison. *See id.*

22 *See, e.g.*, State v. Harris, 989 S.W.2d 307 (Tenn. 1999); State v. North, No. 02C01-9512-CC-00369, 1996 WL 711473 (Tenn. Crim. App., Dec. 12, 1996), *appeal denied* (Tenn. 1997); State v. Kelley, 683 S.W.2d 1 (Tenn. Crim. App. 1984), *appeal denied* (Tenn. 1984); State v. Turnbill, 640 S.W.2d 40 (Tenn. Crim. App. 1982), *appeal denied* (Tenn. 1982); State v. Wright, 618 S.W.2d 310 (Tenn. Crim. App. 1981), *appeal denied* (Tenn. 1981).

23 Actually, the proportionality analysis required by Section 39-12-206(c)(1)(D) is only one of three separate legal

IV. CONCLUSION

For the reasons stated above, the judgment of the trial court should be reversed, and defendant should be granted a new trial. In the alternative, this Court should change defendant's sentence to something less than death.

Respectfully submitted,

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bases for this Court to rule that the death penalty is improper here. The Court also has the statutory authority and responsibility to do so as it independently weighs the aggravating and mitigating circumstances pursuant to Section 39-13-206(c)(1)(C). Finally, as indicated earlier (see Section II.D., supra), the common law of coram nobis grants courts this authority.

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

STEVEN J. MULROY*

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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.[1] Many make no exceptions for personnel matters,[2] items

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1. *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).

2. *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

threatening individual privacy,[3] financial negotiations, or other topics traditionally considered appropriate for private discussion.[4] Most of these laws punish violations with criminal or civil penalties.[5] 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.[6] There is an obvious appeal for state legislators drafting these laws to exempt

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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).

3. *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).

4. *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).

5. *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).

6. *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).

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.[7] Cases discussing equal protection challenges are hard to find.[8]

Scholarship on this issue has been light. It has focused mostly on the policy disadvantages of sunshine laws,[9] in some cases just at the federal

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7. *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).

8. 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.

9. *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*

administrative level.[10] Discussion of possible constitutional challenges to such laws has not been extensive.[11]

A recent case has changed this. In *Rangra v. Brown*,[12] the Fifth Circuit held that Texas' open meetings law was a content-based restriction on speech subject to "strict scrutiny" constitutional review.[13] 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.[14] The case has raised the potential invalidity of open meetings laws as a national issue.[15] The Fifth Circuit decided to re-hear the case en banc.[16] It ultimately dismissed the case as moot after the plaintiff elected official had left office.[17] 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.[18] The case has also inspired some scholarly commentary.[19]

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.[20] The case went to a bench trial at the end of 2010, and the

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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)).

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

11. *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.").

12. 566 F.3d 515 (5th Cir. 2009).

13. *Id.* at 521.

14. *Id.* at 522.

15. *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.

16. Rangra v. Brown, 576 F.3d 531, 532 (5th Cir. 2009).

17. Rangra v. Brown, 584 F.3d 206, 207 (5th Cir. 2009) (en banc).

18. *Id.* at 207–11 (Dennis, J., dissenting).

19. *See* Helfmeyer, *supra* note 9, at 213.

20. *See* City of Alpine v. Abbott, 730 F. Supp. 2d 630, 631 (W.D. Tex. 2010).

district court rendered a decision late March 2011.[21] The district court rejected the free speech challenge,[22] in part for reasons distinguishing the Texas open meetings law from the statutes that are the focus of this article.[23] Another appeal to the Fifth Circuit is expected.[24]

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,"[25] 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 policy criticisms of open meetings laws, argues for a "scaling back" of their

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21. *See* Asgeirsson v. Abbott, No. P-09-CV-59, 2011 WL 1157624 (W.D. Tex. Mar. 25, 2011).

22. *Id*. at *35-36.

23. *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.

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

25. *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.").

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.[26] 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.[27] The majority of these statutes apply to local

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26. *See* OPEN GOVERNMENT GUIDE, http://www.rcfp.org/ogg/index.php (last visited Mar. 12, 2011).

27. *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.

government bodies[28] and usually apply to any associated boards, commissions, and related bodies appointed by local government bodies to transact government business.[29] In at least twenty-eight states, the "sunshine law" also covers the state legislature.[30]

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)).

28. *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.

29. *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, §

States began to pass comprehensive open meetings laws in the 1950s.[31] 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.[32] 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.[33]

The animating policy behind these laws is that government business should be conducted in public with adequate notice so that citizens can attend.[34] 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.[35] To this end, open meeting laws provide that deliberations concerning public business shall not occur in private conversations between members of a governing body.[36]

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).

30. *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).

31. SCHWING, *supra* note 1, at 3.

32. *Id.*

33. *Id.*

34. *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).

35. *See, e.g.*, ARK. CODE ANN. §25-19-102 (1996); CAL. GOV'T CODE § 54950 (West 1997); MISS. CODE ANN. § 25-41 (1991).

36. *See, e.g.*, ME. REV. STAT. tit. 1, § 401 (1989) ("It is further the intent of the

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.[37] Courts also regularly state that these acts are to be given a broad construction.[38] This liberal construction generally persists even where the statutes contain penal provisions,[39] although some states strictly construe the penal provision while broadly construing the rest of the statute.[40]

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.[41] 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.[42]

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,[43] or to clarify a previous decision,[44] the statutes, as a rule, reach

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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.").

37. *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).

38. *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).

39. *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).

40. *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).

41. SCHWING, *supra* note 1, at 51.

42. *Id.*

43. *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).

44. *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).

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."[45] 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."[46]

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.[47] However, most states apply restrictions to any meeting, planned or unplanned, at which a group's members discuss its business.[48]

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.[49] Two states say that the law applies whenever a majority of a quorum is involved in the meeting or discussion.[50] Even where a quorum or "majority of a quorum" is the rule, officials may not circumvent the law's strictures by having a series of smaller meetings that cumulate to a quorum or majority of a quorum.[51]

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45. COLO. REV. STAT. ANN. § 24-6-402(1)(b) (West 2007).

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

47. *E.g.*, N.Y. PUB. OFF. LAW § 102(1) (McKinney 2010).

48. *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).

49. 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).

50. 5 ILL. COMP. STAT. ANN. 120/1.02 (West 2010); KAN. STAT. ANN. § 75-4317a (West 2010).

51. *See, e.g.*, KAN. STAT. ANN. § 75-4318(f) (West 2009)

At least one state statute expressly applies the notice requirement whenever two or more members discuss public business.[52] Several more states reach this result through interpretation of the statute.[53] Virginia's statute requires a minimum of three legislators for the law's requirement to be triggered.[54] 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.[55]

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."[56] 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.[57] 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.[58]

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[59]

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52. COLO. REV. STAT. ANN. § 24-6-402(2)(a) (West 2010).

53. *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).

54. VA. CODE ANN. § 2.2-3701 (West 2010).

55. *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).

56. TENN. CODE ANN. § 8-44-102(b)(2), (c) (2010).

57. *Id.* § 8-44-102(c).

58. *McElroy*, No. 168933-2, at *10.

59. *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));

or found communications among less than a quorum not to violate the Act for independent reasons.[60] Some appellate court cases have suggested without deciding that violations would involve a quorum.[61] 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.[62] 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.[63] Given the constitutional issues raised in this Article, and the rule that statutes be construed to avoid constitutional issues,[64] this prevailing view is open to serious question.

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).

60. *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).

61. *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).

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

63. Craig E. Willis, *Sunshine Law Update*, 45 TENN. BAR J. No. 6, at 6–7 (2009).

64. *See, e.g.*, Jerman v. Carlisle, McNellie, Rini, Kramer, & Ulrich, LPA, 130 S. Ct. 1605, 1635 (2010); State v. Burkhart, 58 S.W.3d 694, 697–98 (Tenn. 2001).

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.[65] Most states treat mail correspondence as posing no less risk of abuse than a clandestine meeting.[66] This same reasoning applies to electronic letters in the form of email or similar technologies.[67] Telephone conversations have also been an issue and have been the subject of similar rulings in many states.[68]

There are some exceptions to the laws allowing for "executive sessions" concerning matters best discussed in private.[69] An executive session is typically defined as "a session closed to the public."[70] Courts have recognized that legislators sometimes need to debate an issue free from the pressures of partisans or interest groups.[71] 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.[72] 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.[73] Discussion within the executive session must then be limited to the subject matter contemplated in the motion, even if further issues arise in the meeting that would also meet the criteria for an executive session.[74]

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65. SCHWING, *supra* note 1, at 291.

66. *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].").

67. SCHWING, *supra* note 1, at 293.

68. *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).

69. SCHWING, *supra* note 1, at 358.

70. Sanders v. City of Fort Smith, 473 S.W.2d 182, 183 (Ark. 1971). *See generally* SCHWING, *supra* note 1, at 360.

71. *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).

72. SCHWING, *supra* note 1, at 361.

73. *See, e.g.*, Caldwell v. Lambrou, 391 A.2d 590, 593 (N.J. Super. Ct. Law Div. 1978).

74. *See, e.g.*, NEB. REV. STAT. § 84-1410(3) (2009).

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,[75] personnel matters,[76] matters affecting an individual citizen's privacy,[77] discussion of trade secrets,[78] or other topics.[79] 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.[80] A full list of topical exceptions, by state, is set out in the Appendix.[81]

However, almost no state has accepted all these topics, and many states have few or none.[82] Many states admit no exception for personnel matters, for example.[83] Some would even require that ongoing financial negotiations between the local government and an outside entity be carried out in public.[84]

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.[85] The statute itself does not even provide the allowance for private consultation with counsel:[86] such an exception was mandated by Tennessee courts.[87] In Tennessee, the open meetings law requirements are triggered whenever two or more members of the government body have a substantive

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75. *E.g.*, CAL. CONST. art. IV, § 7(c)(1)(C); N.Y. PUB. OFF. LAW § 105(1)(d) (McKinney 1988).

76. *See, e.g.*, CAL. CONST. art. IV, § 7(c)(1); MICH. COMP. LAWS ANN. § 15.268(a), (f) (West 2010).

77. *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).

78. *See, e.g.*, S.C. CODE ANN. § 30-4-40(a)(1) (2010).

79. *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).

80. *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.

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

82. *E.g.*, N.D. CENT. CODE § 44-04-19 (2009); TENN. CODE ANN. § 8-44-102 (2010).

83. *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).

84. *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).

85. TENN. CODE ANN. § 8-44-102.

86. *Id.*

87. Van Hooser v. Warren Cnty. Bd. of Educ., 807 S.W.2d 230, 237 (Tenn. 1991).

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.[88] 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.[89] Standing for such lawsuits tends to be as broad as possible, with many statutes granting expanded standing for parties such as the news media.[90]

The statutes typically allow parties to obtain an injunction by showing a violation of the open meetings law.[91] Most states also provide for civil penalties,[92] many of which increase with multiple violations.[93] Although criminal penalties may be less attractive due to their higher standard of proof,[94] many statutes provide for criminal fines or even imprisonment.[95] Most importantly, many states have a mechanism for retroactively invalidating actions taken through an illegal deliberation.[96] A few states even provide a mechanism for removing violators from office.[97] Even where the statute explicitly provides for only injunctive relief, courts may retain equitable discretion to fashion additional relief, such as money damages.[98]

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88. TENN. CODE ANN. § 88-44-102.

89. SCHWING, *supra* note 1, at 471–72.

90. *E.g.*, Ark. Gazette Co. v. Pickens, 522 S.W.2d 350, 355 (Ark. 1975).

91. *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).

92. *E.g.*, LA. REV. STAT. ANN. § 42:13 (2010), WIS. STAT. ANN. § 19.96 (West 2010).

93. *E.g.*, IDAHO CODE ANN. § 67-2347(4) (West 2010) (adding a $500 recidivism penalty for multiple violations within a twelve-month period).

94. SCHWING, *supra* note 1, at 509.

95. *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).

96. *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).

97. *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).

98. *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,

B. Federal Open Meetings Law

The federal analogue to the open meetings laws is the Sunshine Act, passed in 1976.[99] The Sunshine Act applies to federal agencies and requires that every "meeting" be held in a public forum pursuant to notice.[100]

However, the Sunshine Act is much narrower than its typical state counterpart. First, it applies only to federal agencies and not to the legislature.[101] 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.[102]

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.[103] The federal Freedom of Information Act has an almost identical list of exemptions applicable to requests for government records.[104]

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.[105]

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421 (Tenn. 1998) (trial courts have equitable discretion to award monetary damages).

99. 5 U.S.C. § 552b (2006).

100. *Id*. § 552b(b).

101. *Id*. § 552b(a)(1).

102. *Id*. § 552b(a)(2).

103. *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).

104. *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).

105. *Id.* § 552b(i).

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.[106] States typically do not recognize a common law right to attend meetings of governmental bodies.[107] Further, courts do not recognize a constitutional right to have all meetings of public bodies be open to the public.[108]

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,[109] as did the members of the first Congress who debated the Bill of Rights.[110] 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.[111] 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.[112] 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.[113] Some lower courts have extended this

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106. *See* SCHWING, *supra* note 1, at 1.

107. *See id.* (citing various state court cases).

108. *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.").

109. *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)).

110. *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).

111. 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.*

112. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 757 (1976).

113. *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

First Amendment analysis to civil court proceedings as well.[114] However, courts have not found a constitutional right of public access to legislative proceedings.[115] Indeed, in broad language regarding other types of nonjudicial government bodies, the Supreme Court has suggested the opposite.[116] At any rate, the question of public access to legislative meetings has been settled by the adoption of open meetings laws in all states.[117]

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.[118] A few states have interpreted their state constitutions explicitly to guarantee public access to, or public notice of, the deliberations of public bodies,[119] but even they are subject to some limits.[120]

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).

114. *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).

115. *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).

116. *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.

117. SCHWING, *supra* note 1, at 2.

118. *Id.*

119. *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).

120. *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

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.[121] However, there is little case law supporting such a reading of these state constitutional provisions.[122] Further, any such requirements would be trumped if found to be inconsistent with the federal Constitution.[123]

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.[124] 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."[125] However, that court also suggested that a conventional interpretation barring substantive discussion of matters before the government body would likely pass muster.[126] 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.[127] 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.[128]

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ability of some individuals to attend).

121. *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).

122. SCHWING, *supra* note 1, at 16.

123. *See* Contemporary Indus. Corp. v. Frost, 564 F.3d 981, 988 (8th Cir. 2009) (discussing the Supremacy Clause).

124. 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).

125. *Berms*, 245 So.2d at 41.

126. *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).

127. *Dorrier*, 537 S.W.2d at 892.

128. *Id*.

More significant is the free speech discussion by the West Virginia Supreme Court of Appeals in *McComas v. Board of Education of Fayette County*.[129] 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.[130] In that instance, of course, a quorum of the membership had met.[131]

The court instructively considered the kinds of meetings, gatherings, and informal conversations that might be covered under its sunshine law.[132] 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."[133] Such a "sweeping restriction" on public officials' ability to discuss "public issues in a private manner" would raise "serious questions" under the First Amendment.[134]

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."[135] 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.[136] 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.[137] 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."[138]

McComas is unique among state court decisions in its detailed, nuanced approach to the free speech issues.[139] The *McComas* court recognized the

129. 475 S.E.2d 280 (W. Va. 1996).
130. *Id*. at 293.
131. *Id.* at 298–99.
132. *Id.* at 290.
133. *Id*.
134. *Id*. at 290 n.18.
135. *Id*. at 290.
136. *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.
137. *Id.* at 291.
138. *Id*.
139. *See id.* at 280.

legitimate state interest in ensuring that the public have a "meaningful opportunity to respond to, or hold officials accountable for, their private deliberations."[140] 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.[141] 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.[142] Crucially, each of those cases involved physical meetings among a quorum or more of the members.[143] 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.[144]

In upholding open meetings laws, state courts often simply conclude, without significant discussion, that open meetings laws do not violate free speech rights.[145] 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.[146] 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

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140. *Id.*

141. *Id.* at 289.

142. *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).

143. *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.

144. *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.

145. *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.

146. *See, e.g.*, *Smith*, 894 A.2d at 880–81 n.4.

timing."[147] 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.[148] Or, on a related note, that when one becomes a public official, one forfeits one's right to speak about government affairs in private.[149]

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.[150] 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."[151] 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.[152] Nonetheless, the Supreme Court has subjected laws of this type to exacting scrutiny. Sometimes these laws survive such scrutiny,[153] and sometimes they do not,[154] but courts treat the free speech issues as serious.

Second, open meetings laws do more than merely regulate the "location and timing" of speech.[155] They are not pure "time, place, and manner" regulations but rather laws which impose restrictions based on the content of what is said.[156] This is of course a crucial distinction, inasmuch as "content-neutral" regulations enjoy friendlier treatment by courts.[157] "Content-based" regulations receive "the most exacting scrutiny," known as strict scrutiny, whereas content-neutral regulations receive intermediate scrutiny.[158] Moreover, even if they are properly analyzed as content-neutral restrictions, they are still subject to more than cursory judicial examination.

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147. *Sandoval*, 67 P.3d at 907; *Hays*, 41 S.W.3d at 182.

148. *See Hays*, 41 S.W.3d at 181–82.

149. State *ex rel.* Murray v. Palmgren, 646 P.2d 1091, 1099 (1982), *appeal dismissed*, 459 U.S. 1081 (1982).

150. Reno v. ACLU, 521 U.S. 844, 885 (1997).

151. *Id.*

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

153. *See, e.g.*, FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 437 (2001).

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

155. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 904–08 (2d ed. 2002) (discussing content-based regulation).

156. *Id.*

157. United States v. O'Brien, 391 U.S. 367, 377 (1968).

158. 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

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.[159] Such rules are truly "content-neutral" because the restrictions are the same despite the subject matter of the oral speech or written material involved.[160] The open meetings laws ban only *discussion of official business* outside "sunshined" public meetings.[161]

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.[162] A content-based law regulating a certain subject matter is still subject to strict scrutiny even if it is "viewpoint-neutral." [163]

City of Cincinnati v. Discovery Network, Inc. is a good example.[164] Cincinnati banned from city property newsracks containing "commercial handbills" but permitted newsracks containing "newspapers."[165] The law did not discriminate on the basis of the viewpoint expressed by either newspapers or commercial bills.[166] 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.'"[167] This analysis is representative of the Court's approach in these cases.[168] If liability under the law depends on the

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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.

159. CHEMERINSKY, *supra* note 152, 904–09.

160. *Id.*

161. SCHWING, *supra* note 1, at 23–24.

162. *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).

163. *Hill*, 530 U.S. at 723; *Carey*, 447 U.S. at 462; *Consol. Edison Co.*, 447 U.S. at 538.

164. 507 U.S. 410 (1993).

165. *Id.* at 414–15.

166. *Id.* at 431.

167. *Id*. at 429.

168. *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).

content of the speech in question, it will very likely be treated as a "content-based" restriction.[169] 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."[170] Preventing this type of censorship is the core value underlying the Court's special hostility toward content-based regulations.[171] An alternative formulation is that content-neutral regulations are "justified without reference to the content of the speech,"[172] or that with such regulations, there is "no realistic possibility that official suppression of ideas is afoot."[173] 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.[174] These conclusions would argue for treating the law as content-neutral.[175] Indeed, the district court in the recent *Asgeirsson* case so found.[176]

A closer question is whether open meetings laws impose a restriction "because of disapproval of the ideas expressed."[177] 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*.[178] 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.[179] Because the ordinance plainly affected only sexually explicit movies, it was undoubtedly "content-based" in a literal sense.[180]

169. *Turner Broad.*, 512 U.S. at 642.

170. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

171. *Id*.

172. *Id.* at 389 (citing Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986)).

173. *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.

174. *R.A.V.*, 505 U.S. at 389–90.

175. *Id.*

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

177. *Id.* at 382.

178. 475 U.S. 41 (1986).

179. *Id.* at 54–55.

180. *Id.* at 57–58.

But the Court held that it did "not fit neatly into either the 'content-based' or 'content-neutral' category"[181] because the law was "aimed not at the *content* of the films . . . but rather the secondary effects of such theaters on the surrounding community."[182] 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.[183] Thus, the law should be treated as content-neutral.[184] 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.[185] By analogy, then, open meetings laws may be analyzed as "content-neutral" in this sense. Again, the district court in *Asgeirsson* so held.[186]

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.[187] 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.[188]

Similarly, in *Boos v. Barry*,[189] the Supreme Court struck down a law banning protests critical of a foreign government within 500 feet of the government's embassy.[190] 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.*[191] This is in accord with Supreme Court precedent generally, which requires that the

181. *Id.* at 47 (emphasis added).

182. *Id*. (emphasis in original).

183. *Id*. at 48.

184. *Id.*

185. *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).

186. *Asgeirsson*, *supra* note 176, at *14-15.

187. 507 U.S. at 430.

188. *Id*.

189. 485 U.S. 312 (1987).

190. *Id.* at 337–38.

191. *Id*. at 320–21.

governmental interests articulated to justify an assertedly content-neutral speech restriction be "unrelated to the suppression of free expression."[192]

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.[193] 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.[194] 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.[195]

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).[196] 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.[197] In *Colorado v. Hill*,[198] 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.[199] Nonetheless, the Court analyzed

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192. Texas v. Johnson, 491 U.S. 397, 410–13 (1989) (citing United States v. O'Brien, 391 U.S. 367, 377 (1968)).

193. *See* CHEMERINSKY, *supra* note 15552, at 908–09 (citing United States Supreme Court cases on the issue).

194. *See id*.

195. *Id.*

196. *See id.* at 904–09 (discussing content-based and content-neutral regulations).

197. Hill v. Colorado, 530 U.S. 703, 703 (2000); Carey v. Brown, 447 U.S. 455, 455 (1980).

198. 530 U.S. 703 (2000).

199. *Id*. at 720.

the law as content-neutral.[200] The Court took pains to distinguish its decision in *Carey v. Brown*,[201] 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."[202] 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.[203]

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 statue's scope, while others fall inside."[204] 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.[205]

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.[206] 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.

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200. *Id*. at 721.
201. 447 U.S. 455 (1980).
202. *Hill*, 530 U.S. at 723.
203. *Id*. at 723–24.
204. *Id*. This latter point sounds much like narrow tailoring, the second prong of strict scrutiny analysis.
205. SCHWING, *supra* note 1, at 23–24.
206. *See infra* Section V.

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.[207] 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,[208] 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 where 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*[209] 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

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207. 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.

208. *See infra* Section IV.

209. 504 U.S. 191 (1992).

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.[210] 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."[211] The Court then held that it must apply strict scrutiny because it was a content-based speech restriction.[212] The Court eventually upheld the restriction as narrowly tailored to further the compelling governmental interests of protecting against voter intimidation and election fraud.[213]

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."[214]

Another analogous situation is *Republican Party of Minnesota v. White*,[215] 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.[216] 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.[217]

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210. *Id.* at 197–98.
211. *Id*. at 197.
212. *Id.*
213. *Id*. at 207–10.
214. *Id*. at 196.
215. 536 U.S. 765 (2002).
216. *Id*. at 774–75.
217. *Id*. at 787–88.

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*,[218] 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.[219]

Indeed, the Fifth Circuit cited language in Supreme Court cases establishing that regulation of *political* speech would normally trigger strict scrutiny.[220] 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.[221] 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

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218. 566 F.3d 515 (5th Cir. 2009).

219. *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.

220. *See id*.

221. *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).

"strict scrutiny" test unless the government can show that they are "narrowly tailored" to serve "a compelling [g]overnment interest."[222] To be narrowly tailored, the law must be the least restrictive means available to serve the compelling governmental interest.[223] If another, less restrictive provision would serve the governmental interest equally, the legislature must use such a provision.[224] 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.[225]

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.[226] 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.[227] Other states strike a middle ground of barring a majority of a quorum from discussing matters privately.[228]

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

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222. United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000).

223. *Id.*

224. *Id*.

225. Ashcroft v. ACLU, 542 U.S. 656, 665 (2004).

226. SCHWING, *supra* note 1, at 265.

227. 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).

228. *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).

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.[229]

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*,[230] 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.[231] 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."[232] The ordinance was unconstitutional on the grounds that its protection from fear or alarm was limited to narrow classes of speech.[233] 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,'"[234] it went further, suggesting that even non-viewpoint-discriminatory under-inclusiveness might also invalidate such a law.[235] 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

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229. *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).

230. 505 U.S. 377 (1992).

231. *See id.* at 377.

232. *Id.* at 380, 391.

233. *Id.* at 391.

234. *Id.* at 391–92.

235. *Id.* at 387.

disputes, characterizing the law as content-based and thus subject to the most exacting scrutiny.[236]

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."[237] 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."[238]

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

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236. 447 U.S. 455 (1980).

237. *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).

238. Turner Broad. Sys. v. FCC, 512 U.S. 622, 642 (1994) (citing *Ward*, 491 U.S. at 799).

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

private citizens: instead, the laws cover their speech as officials.[239] 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.[240] Support for this approach arguably can be derived from a series of Supreme Court cases establishing lower free speech protections for government employees.[241] 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*.[242] 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.[243] The deputy district attorney was later subject to adverse employment actions, claimed retaliation, and brought a First Amendment claim.[244] The Court dismissed the claim, holding that the speech involved was not subject to First Amendment protection.[245] The Court explained that when public employees speak as part of their official duties, they "are not speaking as citizens for First Amendment purposes . . . ."[246]

The Court cited its earlier decision in *Connick v. Myers*,[247] 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.[248] 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."[249] 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

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239. *See* Hays Cnty. Water Planning P'ship v. Hays Cnty., 41 S.W.3d 174, 182 (Tex. Ct. App. 2001).

240. *Id*.

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

242. 547 U.S. 410 (2006).

243. *Id.* at 413–17.

244. *Id*. at 415.

245. *Id*. at 417.

246. *Id*. at 421.

247. 461 U.S. 138 (1983).

248. *See id.*

249. *Id*. at 147.

were made as part of the discharge of the employee's official duties.[250] 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.[251]

However, this analysis is also suspect, as the Fifth Circuit made clear in its overruling of the *Rangra* trial court.[252] 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[253] than other speech because employee speech rights must be balanced with "the government's need to supervise and discipline subordinates for efficient operations."[254]

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*,[255] 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."[256] In *Garcetti* itself, the Court stated, "The government as employer indeed has far broader powers than does government as sovereign."[257]

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

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250. *Garcetti*, 547 U.S. at 421–23.

251. Rangra v. Brown, 566 F.3d 515, 517–18 (5th Cir. 2009).

252. *See id.*

253. 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).

254. *Rangra*, 566 F.3d at 522.

255. 391 U.S. 563 (1968).

256. *Id.* at 568.

257. Garcetti v. Ceballos, 547 U.S. 410, 418 (2006) (quoting Waters v. Churchill, 511 U.S. 661, 671 (1994)).

accurate, demonstrate sound judgment, and promote the employer's mission."[258] 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."[259]

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*.[260]

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.[261]

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."[262] *White*, the Supreme Court case discussed above, is a recent example.[263] 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."[264] As the *Rangra*

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258. *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.").

259. *Garcetti*, 547 U.S. at 420 (quoting Connick v. Meyers, 461 U.S. 138, 154 (1983)).

260. Rangra v. Brown, 566 F.3d 515,523–24 n.23 (5th Cir. 2009) (emphasis added).

261. *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.").

262. *Rangra*, 566 F.3d at 524.

263. Republican Party of Minn. v. White, 536 U.S. 765, 774–75 (2002).

264. *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

court noted, there is no shortage of cases upholding the free speech rights of elected officials and candidates.[265]

For example, in *Eu v. San Francisco County Democratic Central Committee*,[266] a state law purported to prevent local political party officials from endorsing candidates in primary elections.[267] The law also barred such candidates from claiming their party's endorsement in a primary election.[268] 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.[269] Also, in *Brown v. Hartlage*,[270] 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.[271]

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.[272] 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.[273] 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.

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).

265. *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).

266. 489 U.S. 214 (1989).

267. *Id.*

268. *Id.*

269. *Id*. at 222–29.

270. 456 U.S. 45 (1982).

271. *Id*. at 53–54.

272. Rangra v. Brown, 566 F.3d 515, 526–27 (5th Cir. 2009).

273. *Id.*

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."[274] This is "essentially a direction that all persons similarly situated should be treated alike."[275]

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."[276] 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."[277] Generally, social and economic regulation is subject to mere rational basis review,[278] as are classifications based on such categories as class,[279] age,[280] and disability.[281]

In contrast, classifications that burden suspect classes are subject to a heightened form of review.[282] Classifications based on race, alienage, and nationality are subject to "strict scrutiny"—the most exacting form of constitutional review.[283] Such laws will be upheld only if they are "narrowly tailored" to further a "compelling state interest."[284] 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.[285]

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274. U.S. CONST. amend. XIV, § 1.

275. 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).

276. *City of Cleburne*, 473 U.S. at 440.

277. *Id*. at 446.

278. *Id.* at 440.

279. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16, 62 (1973).

280. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83–84 (2000).

281. Ala. Bd. of Trs. v. Garrett, 531 U.S. 356, 366–67 (2001); *City of Cleburne*, 473 U.S. at 445–46.

282. *Id.* at 440.

283. *Id*.

284. *Id*.

285. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 343 (1972).

Meanwhile, classifications based on gender[286] and illegitimacy[287] 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."[288] 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.[289]

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.[290]

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,[291] immutability,[292] and a diminished ability to protect themselves from discrimination through the political process.[293] As a group, "local legislators" cannot plausibly claim a history of official discrimination against them sufficient to trigger heightened review.[294] Membership in this

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286. United States v. Virginia, 518 U.S. 515, 532–33 (1996); Craig v. Boren, 429 U.S. 190, 197 (1976).

287. Clark v. Jeter, 486 U.S. 456, 461 (1988).

288. *Id*.

289. Califano v. Boles, 443 U.S. 282, 305 (1979).

290. *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).

291. Frontiero v. Richardson, 411 U.S. 677, 684–88 (1973).

292. *Id*.

293. Lawrence v. Texas, 539 U.S. 558, 580 (2003).

294. There may be other examples of laws which treat state legislators more favorably

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.[295] The Court noted that under Equal Protection, such differing treatment regarding the right to vote required strict scrutiny.[296] 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.[297] Again, strict scrutiny applied because the districts were classifications of voters which affected voting rights.[298] 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.[299]

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

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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.

295. 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).

296. *Dunn*, 405 U.S. at 330, 341–44.

297. 377 U.S. 533, 561–62 (1964).

298. *Id*.

299. 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).

freedoms were subject to strict scrutiny.[300] 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 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.[301] 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.[302]

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.[303] The Court explained that under Equal Protection analysis, "statutes affecting First Amendment interests [must] be narrowly tailored to their legitimate objectives."[304] 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.[305] Citing *Mosley*, the Court reiterated that statutory classifications burdening First Amendment rights triggered strict scrutiny.[306]

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

300. 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).

301. Clements v. Fashing, 457 U.S. 957, 963–66 (1982).

302. *Id*. at 966–68.

303. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95–98 (1972).

304. *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)).

305. *See generally* Austin, v. Mich. State Chamber of Commerce, 494 U.S. 652 (1996).

306. *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.

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,[307] 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.[308] 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*.[309] In that case, the Supreme Court held that when regulating political speech, the government

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307. 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.

308. 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).

309. Citizens United v. FEC, 130 S. Ct. 876, 886 (2010).

could not treat corporations differently from non-corporate entities or individuals.[310] 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.[311] 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.[312]

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

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310. *Id*. at 903–13.

311. *See generally id*.

312. 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*, 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*, *supra* note 176 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 its members, it would very likely have a viable free speech claim. *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).

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.[313] In a few states, however, the distinction was judicially created based on the dictates of the state constitution.[314] Courts have either decided that the state constitution grants state legislators the authority to meet in secret[315] or that the state constitution deprives the legislature of the power to bind future legislatures in such matters.[316] While a state constitutional requirement does not exempt

313. 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 requirementss); 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).

314. *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).

315. *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.

316. *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

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.[317]

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*.[318] 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

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.

317. *See* Johnson, *supra* note 9, at 15–16.

318. *See generally* State *ex rel.* Murray v. Palmgren, 646 P.2d 1091 (1982).

noticed public meeting.[319] The case dealt primarily with private meetings held by several county commissioners with a representative of a hospital management firm.[320] 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.[321] Notably, there was no discussion on this matter prior to the vote.[322]

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.[323]

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.[324]

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319. *Id*. at 1095.

320. *Id*. at 1094–95.

321. *Id*.

322. *Id*.

323. *Id*. at 1099 (emphasis added).

324. 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).

Similarly, some states elect attorneys general or treasurers.[325] 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.[326] 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.[327] 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 conducting contract negotiations in public, or 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.[328] As explained above,[329] 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.

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325. *E.g.,* ALA. CONST. art. V, § 114; ARIZ. CONST. art. V, § 1.

326. *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).

327. *See supra* Section III.

328. *See supra* discussion accompanying notes 93–103.

329. *See supra* Section III.C.

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.[330] 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.[331] 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).[332] 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

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330. 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.

331. 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.

332. *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.

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.[333] 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.[334]

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.[335] Some state laws have similar exemptions.[336] 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

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333. *See* 5 U.S.C. § 552b(b) (2006).
334. *See* Fenster, *supra* note 9, at 902.
335. *See* 5 U.S.C. § 552b(b).
336. *See supra* Section II.

number of commentators, some citing empirical data,[337] 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[338] and thus decrease collegial decision making;[339] (2) reduce the actual number of public meetings held;[340] and thus (3) shift authority to staff,[341] or to lobbyists.[342] Similar findings resulted from a comprehensive implementation study[343] 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."[344]

The Supreme Court has separately recognized a non-constitutional executive privilege protecting federal government entities from disclosing documents reflecting internal deliberative processes.[345] 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

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337. *See infra* notes 33832–35148 and accompanying text (especially references to the Welborn Study and the 1989 Senate Report).

338. *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.

339. *See, e.g.*, DAVIS & PIERCE, *supra* note 33832, at 220; Fenster, *supra* note 9, at 908–09; Johnson, *supra* note 9, at 17–20.

340. *See* Johnson, *supra* note 9, at 23–26.

341. *See, e.g.*, *id.* at 26–27.

342. *See* CHARLES H. KOCH, JR., 33 FEDERAL PRACTICE AND PROCEDURE § 8456 (2006).

343. *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].

344. United States v. Nixon, 418 U.S. 683, 705 (1974).

345. *See* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150–51 (1975).

Information Act.[346] 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."[347] Therefore, the Court reaffirmed the existence of a non-disclosure privilege available to documents revealing *predecisional* discussion of a policy issue.[348]

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.[349]

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

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346. *Id*. at 149 (discussing 5 U.S.C. § 552b(b)(5) (2006)).

347. *Id*. at 150 (internal quotation omitted).

348. *Id*. at 151–52. The pre-decision/post-decision distinction has been echoed by commentators.

349. Fenster, *supra* note 9, 908; *see also* Johnson, *supra* note 9, at 26–29.

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.[350]

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.[351]

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-

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350. Fenster, *supra* note 9, at 909.

351. 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.").

nine federal agencies.[352] 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.[353] 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.[354]

Reliance on Staff. The Welborn Study found that the number of staff meetings increased after adoption of the Federal Sunshine Act.[355] Such meetings were more common particularly right before scheduled open meetings.[356]

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 impasses, 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

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352. 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).

353. Welborn Study, *supra* note 34337, at 236–39.

354. 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.

355. Welborn Study, *supra* note 337, at 223.

356. *Id.*

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.[357] 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. *Quaere* 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,[358] 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

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357. *See* Pam Squyres, *Legislators' Day Jobs*, MOTHER JONES, May 22, 2000, http://motherjones.com/politics/2000/05/legislators-day-jobs.

358. ADAM PRZEWORSKI ET AL., DEMOCRACY AND DEVELOPMENT: POLITICAL INSTITUTIONS AND WELL-BEING IN THE WORLD, 1950-1990 14–15 (2000).

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.[359] 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.[360]

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

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359. *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.

360. *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.

scrutiny.[361] 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.[362]

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

361. *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)).

362. *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)

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.[363]

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.[364] 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

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363. 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).

364. 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).

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;

(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;

(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."[365] 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

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365. 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.

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.

State	Protection of individual privacy	Personnel matters	Student disciplinary hearing	Attorney consultation/ litigation	Public safety	Certain law enforcement matters	Investigative proceedings	Acquisition or sale of real property	Preliminary negotiations involving trade or commerce/ To protect confidential data or trade secrets	Labor negotiations	Certain proceedings of a quasi-judicial body
Alabama	X	X	X	X	X	X	X	X	X	X	X
Alaska	X										X
Arizona		X		X				X		X	
Arkansas		X			X						
California	X	X		X	X			X			
Colorado		X	X	X	X			X		X	
Connecticut		X		X	X			X		X	
Delaware		X	X	X			X	X		X	
Florida				X	X				X		
Georgia		X		X		X	X	X			
Hawaii		X		X	X		X	X		X	
Idaho		X	X	X				X	X	X	
Illinois		X	X	X	X	X	X	X		X	X
Indiana		X	X	X	X			X	X	X	
Iowa		X	X	X		X		X			
Kansas		X	X	X	X			X	X	X	X
Kentucky		X	X	X				X		X	X
Louisiana	X		X	X	X		X			X	
Maine		X	X	X				X		X	
Maryland	X	X		X	X		X	X	X	X	
Massachusetts	X	X		X	X		X	X		X	
Michigan		X	X	X				X		X	
Minnesota				X	X			X		X	X
Mississippi		X	X	X	X	X	X	X	X		
Missouri	X	X	X	X	X			X	X	X	
Montana	X			X							
Nebraska		X		X	X		X	X		X	
Nevada	X										
New Hampshire	X	X	X	X	X			X		X	
New Jersey	X	X		X	X		X	X		X	
New Mexico	X	X		X				X	X	X	
New York		X		X	X	X	X	X		X	X
North Carolina		X		X	X		X	X	X	X	
North Dakota				X							
Ohio		X		X	X		X	X		X	
Oklahoma		X	X	X	X			X		X	
Oregon		X		X	X			X	X	X	
Pennsylvania		X		X				X		X	
Rhode Island	X		X	X	X		X	X	X	X	
South Carolina		X	X	X	X		X	X	X		
South Dakota		X	X	X					X	X	
Tennessee									X		
Texas		X	X	X	X			X	X		
Utah	X			X	X		X	X		X	
Vermont		X	X	X	X			X		X	X
Virginia	X	X	X	X	X	X		X	X		
Washington		X		X	X			X	X		
West Virginia	X	X	X		X		X	X			X
Wisconsin		X		X	X			X	X		X
Wyoming		X	X	X	X			X		X	

State	Caucuses	Courts	Voluntary membership associations with no legislative or executive functions	Matters that would have an adverse effect upon the finances of the public entity	To consider or receive information classified as confidential by law	Juries	Parole boards	Certain meetings of members of public hospitals	Staff meetings or other gatherings of employees of a public entity	Preparation and grading of examination materials/ Application for professional license	Certain administrative proceedings
Alabama	X	X	X								
Alaska		X	X	X	X	X	X	X	X		
Arizona	X	X			X		X				
Arkansas						X				X	
California					X		X			X	X
Colorado					X			X			
Connecticut	X				X				X		
Delaware		X			X	X	X				
Florida											
Georgia					X		X	X			
Hawaii					X					X	
Idaho					X		X				
Illinois			X		X		X	X			
Indiana	X		X		X					X	
Iowa					X					X	X
Kansas							X				
Kentucky					X	X	X				
Louisiana		X								X	
Maine					X					X	
Maryland		X			X	X		X		X	
Massachusetts											
Michigan	X				X						
Minnesota					X						
Mississippi		X			X	X	X	X		X	
Missouri					X					X	
Montana		X									
Nebraska		X									
Nevada										X	
New Hampshire	X						X				
New Jersey		X			X	X	X			X	
New Mexico		X						X		X	X
New York	X	X								X	
North Carolina					X			X	X		
North Dakota	X				X						
Ohio					X	X	X	X		X	
Oklahoma		X			X						X
Oregon		X			X	X	X	X		X	
Pennsylvania	X				X						
Rhode Island	X										
South Carolina								X			
South Dakota											
Tennessee											
Texas					X		X	X		X	
Utah											
Vermont		X			X		X				
Virginia	X				X	X	X			X	
Washington											
West Virginia	X				X					X	
Wisconsin		X					X				
Wyoming					X		X			X	

State	To consider the conferring of honorary degrees or awards	Certain matters related to gifts, donations, and bequests	Investment of public funds	Certain tax matters	Public insurance agencies	Child death review team	Ethics commission	Certain proceedings of municipal utilities	Cabinets or executive councils	Judicial nominating commission	Certain workers' comp proceedings
Alabama											
Alaska											
Arizona										X	
Arkansas											
California	X	X	X								
Colorado	X										
Connecticut											
Delaware		X		X							
Florida				X							
Georgia			X								
Hawaii		X									
Idaho				X	X			X			
Illinois			X		X	X	X	X			
Indiana											
Iowa											
Kansas											X
Kentucky									X	X	
Louisiana											X
Maine											
Maryland			X		X				X	X	
Massachusetts											
Michigan	X				X						X
Minnesota											
Mississippi				X							X
Missouri											
Montana											
Nebraska									X		
Nevada											
New Hampshire											
New Jersey											
New Mexico											
New York	X		X								
North Carolina	X										
North Dakota											
Ohio				X		X					
Oklahoma											
Oregon			X								X
Pennsylvania							X				
Rhode Island		X	X								
South Carolina			X								
South Dakota											
Tennessee											
Texas		X	X		X						
Utah											
Vermont											
Virginia	X	X	X			X					
Washington			X								
West Virginia	X										
Wisconsin			X		X		X				X
Wyoming		X									

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).

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).