

**SUNSHINE’S SHADOW: OVERBROAD OPEN MEETINGS  
LAWS AS CONTENT-BASED SPEECH RESTRICTIONS  
DISTINCT FROM DISCLOSURE REQUIREMENTS**

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## I. INTRODUCTION

In February of 2014, U.S. House Republicans held a closed-door session at their annual retreat to discuss the possibility of a bipartisan compromise on the issue of immigration reform.<sup>2</sup> The closed-door nature of the session, open to all House Republicans (and thus to a majority of the U.S. House of Representatives), was not remarked upon, with the focus on the prospects for a compromise on the long-simmering issue.<sup>3</sup> The effort did not, ultimately, result in a bipartisan deal on comprehensive immigration reform, but had it done so, the reaction of the press would no doubt have been laudatory, with no complaints about its genesis in a closed-door session.

Such large, informal, secret gatherings among legislators do occur from time to time at the federal and state levels.<sup>4</sup> But had a similar meeting occurred among legislators at the local government

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2. *Path Emerges Toward Compromise on Immigration, But Major Obstacles Remain*, FOXNEWS.COM (Feb. 1, 2014), <http://www.foxnews.com/politics/2014/02/01/path-emerges-toward-compromise-on-immigration-but-major-obstacles-remain/>.

3. *Id.*

4. The Supreme Court has upheld such meetings on several occasions. *See, e.g.*, *Minn. State Bd. v. Knight*, 465 U.S. 271, 284 (1984); *Madison Joint Sch. Dist. v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 175 n.8 (1976). The U.S. Senate held secret deliberations on appointments and treaties until 1929, and met in secret to deliberate during President Clinton's impeachment trial; the U.S. House met secretly as recently as 2008. *See infra*, nn.184–87 and accompanying text. Within the last two years, both the Kansas and Tennessee state legislatures met in secret. *See infra*, nn.184–87.

level, it would have been illegal. All fifty states have “open meetings acts” which bar communications among a quorum of a local legislative body outside of a formal, noticed, public meeting.<sup>5</sup> Many such state legislatures have exempted themselves from the strictures of these “sunshine” laws.<sup>6</sup> In some states, the ban on substantive communication about legislative issues applies even when it is just two legislators, far short of a quorum, involved.<sup>7</sup> These latter, broader open meetings laws constitute an extensive restriction on the speech of local government legislators.

Surprisingly little attention has been given to just how extensive these restrictions are in many states, and what a contrast exists with many state legislators, and all federal legislators, who have no open meetings law obligations at all.<sup>8</sup> Commentators have also been relatively quiet on this constitutional question. Scholarship has focused mostly on the policy disadvantages of so-called “sunshine laws,” especially at the federal administrative level.<sup>9</sup> Discussion of constitutional challenges to such laws has been light at best.<sup>10</sup>

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5. See Steven J. Mulroy, *Sunlight's Glare: How Overbroad Open Government Laws Chill Free Speech and Hamper Effective Democracy*, 78 TENN. L. REV. 309, 315, 319–20 (2011) (listing state law authorities); see also ANN TAYLOR SCHWING, *OPEN MEETING LAWS* 453–70 (3d ed. 2011) (discussing the various laws used by the states that require a quorum and a minority of states that do not require a quorum).

6. See Mulroy, *supra* note 5, at 316. See SCHWING, *supra* note 5, at 203–09.

7. See Mulroy, *supra* note 5, at 319–20. The states in question are: Arkansas (Mayor & City Council v. El Dorado Broad Co., 544 S.W.2d 206, 208 (Ark. 1976) (statute applies to meetings of two or more, if meeting called for purpose of discussing government business)); Colorado (COLO. REV. STAT. § 24-6-402 (2014) (specifying application to two or more)); Florida (Bigelow v. Howze, 291 So.2d 645, 647 (Fla. Dist. Ct. App. 1974) (applying statute to conversation among two of five County Commissioners)); Hawaii (Haw. Op. Att’y Gen. 85-27 (Nov. 27, 1985) (stating that the law possibly applies to two members, if the meeting is deliberate)); New York (Sciolino v. Ryan, 81 N.Y.S.2d 795 (1981) (applying the statute to just two, as long as they are deliberately evading the open meetings law)); Tennessee (McElroy v. Strickland, Knox Cnty. Ch., No. 168933-2, at \*10 (Tenn. Ct. App. Oct. 5, 2007)); and Rhode Island (R.I. Op. Att’y Gen. 92-06-09 (June 5, 1992) (stating “that the [open meeting] Act is applicable to any gathering whether formal or casual, of two or more members of the same Board to discuss any matter in which action will be taken by the Board.”)). See also VA. CODE ANN. § 2-2-3701 (2010) (statute applies to three or more members).

8. See Mulroy, *supra* note 5, at 316 (citing sources showing that open meetings acts apply to state legislators in 28 states); see also 5 U.S.C. § 552b (2006) (federal open meetings act applies to federal administrative agencies but not Congress itself).

9. See Mulroy, *supra* note 5, at 312–13 (citing sources).

10. 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*

I have previously criticized such strict open meetings laws which ban speech among only two or three local legislators, or which allow for almost no exceptions for sensitive topics requiring some private discussion.<sup>11</sup> Following the reasoning of a Fifth Circuit panel decision which was then the only federal court discussion of the issue,<sup>12</sup> I argued that they are content-based restrictions on speech, which fail the “strict scrutiny” constitutional standard of review.<sup>13</sup> They also are problematic as policy, given their tendency to chill discussion, reduce efficiency, force inappropriate disclosure of sensitive information, and transfer power from legislators to unelected staff and lobbyists.<sup>14</sup>

Since that time, a second federal court opinion has emerged on this novel issue, also from the Fifth Circuit, upholding Texas’ sunshine law against a free speech challenge. Departing from the reasoning of the earlier decision, the opinion in *Asgeirsson v. Abbott* classified the law as a content-neutral speech regulation triggering only “intermediate” review.<sup>15</sup> That decision also relied heavily on an argument for constitutionality not previously discussed in my prior article or any prior decision: analogizing open meetings laws to the campaign finance disclosure requirements upheld by the Supreme Court in the recent post-*Rangra* decision *Citizens United v. Federal Election Commission*.<sup>16</sup>

The result and holding of this new Fifth Circuit case does not directly conflict with the thesis set out in the prior article. The case upholds a law applying only to a quorum of a legislative body,<sup>17</sup> while the prior article criticized only those sunshine laws restricting

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*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); cf. 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) (discussing the tendency of strict open meetings laws to infringe on a legislative body’s ability to confer with counsel).

11. See Mulroy, *supra* note 5.

12. *Rangra v. Brown*, 566 F.3d 515 (5th Cir. 2009), *vacated as moot*, 584 F.3d 206, 207 (5th Cir. 2009) (en banc).

13. Mulroy, *supra* note 5, at 340–43.

14. *Id.* at 360–66.

15. 696 F.3d 454, 459–61 (5th Cir. 2012).

16. *Id.* at 462–65 (citing *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010)).

17. *Id.* (citing Texas Open Meetings Act, TEX. GOV’T. CODE ANN. § 551.001–551.146 (2013)).

speech among two or three members when far short of a quorum.<sup>18</sup> But the case's reasoning does raise new, related arguments about the constitutionality of open meetings laws that potentially apply across the board to defend all forms of such laws, including those applying only to two or three members.<sup>19</sup> These arguments merit attention.

Initially, both *Asgeirsson* and recent Supreme Court opinions warrant a renewed focus on the surprisingly complicated threshold question of whether sunshine laws are properly characterized as “content-based” or “content-neutral” for purposes of First Amendment analysis. This threshold classification is important, for the former classification triggers “strict scrutiny,” the strictest constitutional standard of review.<sup>20</sup> *Asgeirsson* raises an interesting doctrinal question by positing that, in making this classification, courts look past the plain language of the statute to the underlying governmental purposes of the statute.<sup>21</sup> Such an approach could have far-reaching implications in all free speech cases, not limited to open meetings act challenges.

As it happens, the general test to be used in free speech cases to make this classification is surprisingly unclear under current Supreme Court case law,<sup>22</sup> but the Supreme Court has just recently weighed in on the question in a potentially dispositive way. The 2014 decision in *McCullen v. Coakley*, in which the majority and a concurrence debate at length whether an abortion clinic “buffer zone” law is properly characterized as content-neutral or content-based, strongly suggests the *Asgeirsson* approach is in error, and sunshine laws are content-based.<sup>23</sup> Going even further, this Article argues for a definitive resolution of the general free speech doctrinal question in favor of a “purely facial” approach using only the plain language of the statute.

If such an approach is used, suggesting the possible use of “strict

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18. Mulroy, *supra* note 5, at 314, 339–43, 370. The distinction is material. Since a quorum is a number sufficient to make a final decision, allowing private decision-making among a quorum could render a later public meeting a sham formality. See Section III.C.2, *infra*.

19. Problems exist also with those sunshine laws which afford little to no exceptions for discussion of sensitive topics which might legitimately require private deliberation at an initial level. See *infra* Part III.C.1.

20. See *infra* Part III.A.

21. *Asgeirsson*, 696 F.3d at 459–60.

22. See *infra* Part III.B.

23. See *infra* Part III.B.4.

scrutiny,” a related question emerges: could open meetings laws nonetheless get the protection of a more lenient standard of review because they are analogous to campaign finance disclosure laws? Since the Supreme Court’s decision in *Citizens United*, there has been much focus on disclosure laws.<sup>24</sup> That focus has continued with the more recent Supreme Court campaign finance decision of *McCutcheon v. Federal Election Commission*.<sup>25</sup> Understanding the relationship between this growing body of law and “sunshine acts” could inform both the development of the former and the constitutionality and policy wisdom of the latter.

As to these two interrelated topics, I make several assertions. First, while reasonable arguments exist in both directions, open meetings laws are best characterized as content-based laws triggering strict scrutiny. As a descriptive matter of case law on the general method for making this classification, the best synthesis is a presumption of “content-based” where the plain language of the statute makes its application turn on the content of the speech involved. This presumption can be rebutted if the law is motivated solely by a desire to combat “secondary effects” unrelated to the speech’s content—but only if the speech covered by the law truly does trigger secondary effects to a substantially greater degree than speech not covered. As a normative matter, the clearest and most sensible approach is simply to abandon any consideration of “secondary effects” and to say that whenever one looks to the content of the speech in question to decide whether the law applies, that law will always be considered content-based.<sup>26</sup>

Second, while the analogy to disclosure requirements is superficially apt, examination of the government interests recognized by the Court in *Citizens United* and progeny to uphold disclosure requirements reveals some key distinctions. Open meetings laws do not further these government interests as much as campaign finance disclosure requirements, suggesting that the disclosure rationale may not justify the strictest, most speech-suppressive of the open meetings

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24. See, e.g., Michael D. Gilbert, *Campaign Finance Disclosure and the Information Tradeoff*, 98 IOWA L. REV. 1847 (2013); see also Jocelyn Benson, *Saving Democracy: A Blueprint for Reform in the Post-Citizens United Era*, 40 FORDHAM URB. L.J. 723 (2012); Sean McMahon, Note, *Deregulate But Still Disclose?: Disclosure Requirements for Ballot Question Advocacy After Citizens United v. FEC and Doe v. Reed*, 113 COLUM. L. REV. 733 (2013).

25. 134 S. Ct. 1434, 1459–60 (2014).

26. See *infra* Part III.B.

laws.<sup>27</sup>

Ultimately, then, the strictest open meetings laws—those that ban communication among only two or three legislators, or that contain no privacy-based exceptions—may very well violate the Constitution. If they are content-based regulations, they likely fail strict scrutiny by not being narrowly tailored—i.e., by not being the least speech-restrictive means to achieve the purported governmental interests furthered by the laws. If they are content-neutral regulations warranting only intermediate scrutiny, they likely are insufficiently “substantially related” to the relevant governmental interests, and likely fail to provide “ample alternative channels” of communication.<sup>28</sup> Even if such laws pass constitutional muster, they are profoundly misguided as a policy matter.<sup>29</sup>

This Article develops the above assertions about free speech doctrine in general and open meetings laws in particular. Part Two reviews the basic issues regarding strict open meetings laws, and the more recent developments in the *Asgeirsson* litigation. It also addresses an initial issue about the extent to which legislators may be said to possess free speech rights on par with ordinary citizens. Part Three synthesizes case law on how courts classify speech regulations as content-based or content-neutral, argues for a “purely facial” approach to this general question, and concludes that the recent Supreme Court opinion in *McCullen* supports classifying open meetings laws as content-based. It further argues that open meetings laws fail constitutional scrutiny under either classification. Part Four draws on recent Supreme Court pronouncements on campaign finance disclosure requirements to distinguish sunshine laws from such requirements. In doing so, it examines empirical evidence from social science studies to conclude that there is insufficient evidence strict sunshine laws further the good government interests supporting disclosure requirements. Part Five offers concluding thoughts.

## II. BACKGROUND

### A. *Open Meetings Laws*

All states have some form of open meetings laws governing

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27. See *infra* Part IV.B & IV.D.

28. See *infra* Part III.D.

29. See *infra* Part III.C.

deliberations among local legislators.<sup>30</sup> These laws require that any substantive communication among a relevant number of local legislators which constitutes deliberation toward a decision be held at a publicly noticed meeting.<sup>31</sup> Normally, that rule would include oral

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30. See ALA. CODE § 36-25A-2(6) (2010); ARIZ. REV. STAT. ANN. § 38-431(4) (2007); COLO. REV. STAT. ANN. § 24-6-402(1)(b) (2007); CONN. GEN. STAT. ANN. § 1-200(2) (2008); DEL. CODE ANN. TIT. 29, § 10002(b) (2010); GA. CODE ANN. § 50-14-1(a)(2) (2010); HAW. REV. STAT. § 92-2(3) (2010); IDAHO CODE ANN. § 67-2341(6) (2007); 5 ILL. COMP. STAT. § 120/1.02 (2010); IND. CODE § 5-14-1.5-2(a)(1) (2007); KAN. STAT. ANN. § 75-4317a(a) (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 § 15.262(b) (2009); MISS. CODE ANN. § 25-41-1 (2010); MO. REV. STAT. § 610.010(5) (2007); MONT. CODE ANN. § 2-3-202 (2009); NEB. REV. STAT. § 84-1409(2) (2008); NEV. REV. STAT. § 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) (2007); N.C. GEN. STAT. § 143-318.10(d) (2008); N.D. CENT. CODE § 44-04-17.1(8) (2007); OR. REV. STAT. § 192.610(5) (2010); 65 PA. CONS. STAT. § 703 (2007); R.I. GEN. LAWS § 42-46-2(1) (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) (2010); VA. CODE ANN. § 2.2-3701 (2009); WASH. REV. CODE § 42.30.02(3) (2010); WYO. STAT. ANN. § 16-4-402(a)(iii) (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's open meetings law: ALASKA STAT. § 44.62.310 (2009)); *Ark. Gazette Co. v. Pickens*, 522 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. § 12-2801-07 (1967)); *Frazer v. Dixon Unified Sch. Dist.*, 22 Cal. Rptr. 2d 641, 651 (Cal. Ct. App. 1993) (stating that deliberative meetings fall under the California open meetings law: CAL. GOV'T CODE § 54950 (West 2009)); *Wolfson v. State*, 344 So.2d 611, 614 (Fla. Dist. Ct. App. 1977) (declaring that it was the intent of the government to subject all steps of the decision-making process to Florida's Sunshine Law: FLA. STAT. § 286.011 (2009)); *St. Cloud Newspapers, Inc. v. Dist. 742 Cmty. Sch.*, 332 N.W.2d 1, 6 (Minn. 1983) (defining "meetings" to include all discussions regarding matters which foreseeably would be subject to the board's final action and therefore subject to the then in-force open meetings law: MINN. STAT. § 471.705 (2009)); *Goodson Todman Enter. v. City of Kingston Common Council*, 550 N.Y.S.2d 157, 158-59 (N.Y. App. Div. 1990) (declaring that not just voting sessions, but the entire decision-making process, is subject to N.Y. Pub. Off. Law § 7 (McKinney 2009)); *In re Appeal of the Order Declaring Annexation Dated June 28, 1978*, 637 P.2d 1270, 1272 (Okla. Civ. App. 1981) (stating that all of the decision-making process is subject to the Oklahoma open meetings law: Okla. Stat. tit. 25, § 304 (1977)); *Appalachian Power Co. v. Pub. Serv. Comm'n*, 253 S.E.2d 377, 381 (W. Va. 1979) (clarifying meetings subject to the West Virginia open meetings law: W. VA. CODE § 6-9A-1 (2009)); *State ex rel. Newspapers, Inc. v. Showers*, 398 N.W.2d 154, 156 (Wis. 1987) (clarifying which meetings fall under the open meetings law of Wisconsin: WIS. STAT. § 19.81 (2007)); *S.D. Op. Att'y Gen. 89-08, \*1-2* (1989) (stating that "meetings" includes when a majority of the body meets and discusses official business, thereby triggering the South Dakota open meetings law: S.D. CODIFIED LAWS § 1-25-1 (2009)).

31. See cases and statutes cited *supra* note 30.



or written communications.<sup>32</sup> Most states specify that only communication among a quorum of the body triggers the requirement of a publicly noticed open meeting.<sup>33</sup> In such states, the public meeting requirement applies to a so-called “walking quorum,” where groups of legislators smaller than a quorum have a series of conversations among themselves and with others until the grand total amount of individuals involved exceeds that of a quorum.<sup>34</sup>

But five states say that substantive communications among any two or more legislators is forbidden outside the context of a publicly noticed meeting.<sup>35</sup> In two more states, courts have stated that the meeting requirement may be triggered by communications among two or more if there is intent to circumscribe the open meetings act.<sup>36</sup> In

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32. See cases and statutes cited *supra* note 30. These open meetings acts usually also apply beyond local legislative bodies like City Councils and County Commissions to various multi-member non-legislative advisory boards and commissions. See Mulroy, *supra* note 5, at 315, 319–20. In this Article, I refer for simplicity’s sake to local legislative bodies as being affected, but the constitutional and policy analysis applies equally to other bodies covered by such laws. For an updated, state-by-state, ease-of-reference guide to such laws, see *Open Government Guide*, REP. COMMITTEE FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/ogg/index.php> (last visited July 1, 2014).

33. See ALASKA STAT. § 44.62.310(h)(2) (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) (2009); GA. CODE ANN. § 50-14-1(a)(2) (1999); HAW. REV. STAT. § 92-2.5(a), (f) (1998); IND. CODE § 5-14-1.5-2(c) (2007); IOWA CODE § 21.2(2) (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 § 15.262(b) (2010); MONT. CODE ANN. § 2-3-202 (2007); NEV. REV. STAT. § 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) (2010); N.C. GEN. STAT. § 143-318.10(d) (2010); N.D. CENT. CODE § 44-04-17.1(8)(a) (2007); OHIO REV. CODE ANN. § 121.22(B)(2) (West 2010); OKLA. STAT. tit. 25, § 304(2) (2010); OR. REV. STAT. § 192.610(5) (2009); 65 PA. CONS. STAT. § 274 (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) (West 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) (2010); WYO. STAT. ANN. § 16-4-402(a)(i), (iii) (2005).

34. See statutes cited *supra* note 33. For most public bodies, a majority of the members constitutes a quorum. That is the default rule under Robert’s Rules of Order, which is used by many local legislative bodies. See HENRY MARTYN ROBERT, ROBERT’S RULES OF ORDER 20 (10th ed. 2000).

35. See *Mayor & City Council v. El Dorado Broad. Co.*, 544 S.W.2d 206, 208 (Ark. 1976) (statute applies to meetings of two or more, if meeting called for purpose of discussing government business); see also COLO. REV. STAT. § 24-6-402 (2014) (specifying application to two or more); FLA. REV. STAT. § 286.011(1) (2012)) (same); *McElroy v. Knox Cnty.*, No. 168933-2, at \*10 (Tenn. Ct. App. Oct. 5, 2007); R.I. Op. Att’y Gen. 92-06-09 (1992) (stating “that the [open meeting] Act is applicable to any gathering whether formal or casual, of two or more members of the same Board to discuss any matter in which action will be taken by the Board.”).

36. See Haw. Op. Att’y Gen. 85-27 (1985) (stating that the law possibly applies to two

one other state, communication among three or more members suffices to trigger coverage.<sup>37</sup>

States vary widely regarding whether there are any topics that may be discussed in private. Some exempt personnel or disciplinary matters<sup>38</sup> or matters involving ongoing investigative proceedings.<sup>39</sup> However, some states have few or no exceptions.<sup>40</sup> For example, Tennessee, one of the strictest states in the nation, statutorily exempts discussions of trade secrets or other proprietary information,<sup>41</sup> and courts have carved out an exception for consultations between the local legislative body and counsel regarding existing or anticipated litigation,<sup>42</sup> but otherwise, there are no exceptions to the open meeting requirement, which applies to any substantive conversation among two or more legislators.<sup>43</sup>

### *B. Fifth Circuit Litigation*

In *Rangra v. Brown*, the Fifth Circuit reversed a district court order dismissing a First Amendment challenge to the Texas Open Meetings Act.<sup>44</sup> The Fifth Circuit panel ruled that the act was a content-based regulation of speech triggering “strict scrutiny,” the most demanding form of constitutional review.<sup>45</sup> It reversed and remanded for analysis of the law under strict scrutiny.<sup>46</sup> Upon rehearing *en banc*, the full Fifth Circuit vacated the panel decision as moot, in light of the fact that the local elected official who had

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members, if the meeting is deliberate)); *see also* Sciolino v. Ryan, 81 A.D.2d 475 (N.Y. 1981) (applying the statute to just two, as long as they are deliberately evading the open meetings law).

37. VA. CODE ANN. § 2.2-3701 (2010).

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

39. *See, e.g.*, Robinson v. Attorney Gen. of United States, 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).

40. For a table listing exempted categories by state, *see* Mulroy, *supra* note 5, at 371–74 & App.

41. TENN. CODE ANN. § 8-44-102 (2010).

42. *See* Mulroy, *supra* note 5 at 322–24.

43. *Id.*

44. 566 F.3d 515, 526 (5th Cir. 2009).

45. *Id.* at 522.

46. *Id.* at 526.

brought the challenge had retired.<sup>47</sup>

Two years later, another challenge emerged, which was also dismissed at the district court level.<sup>48</sup> In *Asgeirsson v. Abbott*, a Fifth Circuit panel affirmed the dismissal. This time, the court ruled that the Texas Open Meetings Act was a *content-neutral* speech regulation triggering only intermediate scrutiny.<sup>49</sup> Analogizing the Act to the campaign finance disclosure laws upheld by the Supreme Court in *Citizens United*, the panel found the law constitutional.<sup>50</sup>

### C. Free Speech Rights of Legislators

Additionally, the speaker's status as an elected official does not change this analysis. Elected officials do not lose their right to political expression once they take office. The Supreme Court has acknowledged that the government has "no interest in limiting its legislators' capacity to discuss their views of local or national policy."<sup>51</sup>

In *Bond v. Floyd*, the Supreme Court flatly rejected an argument that a state could apply a different free speech standard against an elected legislator, as compared to private citizens.<sup>52</sup> The State had defended the decision of a state legislature to expel a member for publicly expressing anti-war and anti-draft views which they considered to be tantamount to counseling resistance to a lawful draft.<sup>53</sup> The State had argued that although such statements might lawfully be made by a private citizen, the State could "apply a stricter standard to its legislators."<sup>54</sup> Contradicting this assertion, the Court noted that legislators must be given "the widest latitude to express their views on issues of policy."<sup>55</sup>

Other decisions have followed *Bond* in affirming that local legislators' free speech rights are no less robust than those of ordinary citizens. Indeed, the Supreme Court has vigorously protected the Free

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47. *Rangra v. Brown*, 584 F.3d 206 (5th Cir. 2009).

48. *Asgeirsson v. Abbott*, 773 F. Supp. 2d 684 (W.D. Tex. 2011).

49. *Asgeirsson v. Abbott*, 696 F.3d 454, 459–61 (5th Cir. 2012).

50. *Id.* at 462–65.

51. *Bond v. Floyd*, 385 U.S. 116, 135 (1966).

52. *Id.* at 132–33, 136.

53. *Id.* at 132.

54. *Id.*

55. *Id.* at 136. ("the interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen-critics than to legislators").

Speech rights of elected officials.<sup>56</sup> And lower courts have repeatedly reaffirmed the proposition that legislators' First Amendment protection is no less than that of a regular citizen's.<sup>57</sup>

More recently, in *Republican Party of Minnesota v. White*, the 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 public importance."<sup>58</sup> In *White*, the Supreme Court struck down a law restricting what judicial candidates could say during judicial election campaigns.<sup>59</sup> The quoted language suggests that, if anything, it is even more important to guard vigorously the free speech rights of legislators.

Similarly, the line of cases allowing government employers latitude to regulate the on-duty speech of government employees is also inapposite here. In *Garcetti v. Ceballos*, the Court did hold that the First Amendment fails to protect a government employee from discipline based on speech made pursuant to the employee's official duties.<sup>60</sup> But, as I have previously argued,<sup>61</sup> the rationale of *Garcetti* and progeny—the need for government as employer to “supervise and discipline subordinates for efficient operations”<sup>62</sup>—does not apply

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56. See, e.g., *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 222–29 (1989) (invalidating law restricting party officials' right to endorse candidates in primary elections); *Brown v. Hartlage*, 456 U.S. 45, 53–54 (1982) (candidate has First Amendment right to promise to reduce own salary, despite law banning promising “anything of value” for vote).

57. See *Colson v. Grohman*, 174 F.3d 498, 506 (5th Cir. 1999) (“there is no question that political expression such as [a city council member's] positions and votes on City matters is protected speech under the First Amendment”); *Yniguez v. Arizonans For Official English*, 42 F.3d 1217, 1230 (9th Cir. 1994) (citing *Bond* and stating that a state may not impose stricter First Amendment standards on legislators); *Miller v. Town of Hull*, 878 F.2d 523, 532–33 (1st Cir. 1989) (voting by member of public agency or board comes within free speech guarantee, “especially” when members are elected officials); *Melville v. Town of Adams*, 9 F.Supp.3d 77, (D. Mass. 2014) (citing *Bond*, rejecting argument for lower free speech standard for elected officials, and holding that local legislator had “high degree of First Amendment protection” to discuss town business with town employees, free of interference by the town); *Gewertz v. Jackman*, 467 F. Supp. 1047, 1059 (D. N.J. 1979) (citing *Bond* in stating that state legislator had First Amendment protections coextensive with that of a citizen); see also *Barley v. Luzerne Cnty. Bd. Of Elections*, 937 F. Supp. 362, 366 (M.D. Pa. 1995) (same).

58. 536 U.S. 765, 781–82 (2002) (quoting *Wood v. Georgia*, 370 U.S. 375, 395 (1962)).

59. *Id.*

60. 547 U.S. 410, 413–17 (2006).

61. See Mulroy, *supra* note 5, at 343–47 (arguing that *Garcetti* line of cases did not apply to open meetings law).

62. *Rangra v. Brown*, 566 F.3d 515, 522 (5th Cir. 2009), *vacated as moot*, 584 F.3d 206, 207 (5th Cir. 2009) (en banc).

regarding elected officials. That is why the Fifth Circuit opinion in *Rangra* distinguished *Garcetti* and related cases,<sup>63</sup> and may very well be why the more recent Fifth Circuit opinion in *Asgeirsson*,<sup>64</sup> while upholding Texas' open meetings act, did not rely on *Garcetti* in doing so. With one exception, other lower court cases involving the free speech rights of elected officials have similarly distinguished this line of cases.<sup>65</sup>

### III. CONTENT-BASED VERSUS CONTENT-NEUTRAL

#### A. General

A threshold question is what constitutional standard of review to use to analyze such laws. Are such laws “content-based” regulations of free speech or “content-neutral” regulations? The answer determines which constitutional standard of review applies.

Content-based laws must meet “strict scrutiny,” the toughest standard of review.<sup>66</sup> Defenders of such statutes must show that the law furthers a “compelling governmental interest,” and that its provisions are “narrowly tailored” to further such interest.<sup>67</sup> The term “narrowly tailored” in this context, normally means that the law does not burden speech any more than minimally necessary to further the compelling government interest.<sup>68</sup> In other words, it is the “least restrictive means” of furthering that interest.<sup>69</sup>

Strict scrutiny would still apply, even if the speech regulation did not favor one side or other of a controversy, but simply banned any discussion of the controversy at all. Such “viewpoint-neutral” laws are still content-based because they ban discussion of a particular

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63. *Id.* at 524–26.

64. *Asgeirsson v. Abbott*, 696 F.3d 454 (5th Cir. 2012).

65. *See Melville v. Town of Adams*, 9 F. Supp. 3d 77, 102 (D. Mass. 2014) (finding that *Garcetti* did not apply to elected officials); *Conservation Comm'n of Westport v. Beaulieu*, No. 07-11087-RGS, 2008 WL 4372761, at \*4 (D. Mass. Sept. 18, 2008) (the “bureaucratic concerns” involved in *Garcetti* are inapplicable to “public officials”); *but see Shields v. Charter Twp. Of Comstock*, 617 F. Supp. 2d 606, 615–16 (D. Mich. 2009) (applying *Garcetti* to elected officials).

66. *Republican Party of Minn. v. White*, 536 U.S. 765, 774–75 (2002); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 640 (1994).

67. *White*, 536 U.S. at 774–75.

68. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2008); *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2738 (2011).

69. *United States v. Alvarez*, 132 S. Ct. 2537, 2551 (2012); *John Doe No. 1 v. Reed*, 561 U.S. 186, 232 (2010).

subject matter.<sup>70</sup>

Content-neutral laws receive a more lenient form of constitutional scrutiny, “intermediate scrutiny.”<sup>71</sup> Under this standard, both the importance of the governmental interest, and the narrowness of the fit between the challenged statutory provisions and the governmental interest they supposedly further, can be somewhat less. Defenders of such laws must show that they further an “important governmental interest,” one “unrelated to the suppression of free speech,” and that the statutory means employed do not “burden substantially more speech than necessary” to further that interest.<sup>72</sup> To be “substantially related” does not require that the law be the least restrictive means of serving the asserted governmental goal.<sup>73</sup> However, it does require (among other things) that the law not “regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.”<sup>74</sup> The Court has further required that “ample alternative channels” for that kind of speech be available to the would-be speaker.<sup>75</sup>

Thus, while intermediate scrutiny is not as stringent a standard as strict scrutiny, it still subjects the challenged law to a fairly rigorous review. The governmental interest must not be merely a constitutionally permissible, “legitimate” one, but rather, one recognized by the court as “important.” More crucially, the fit between means used (the statutory regulations of speech) and the ultimate ends (the asserted governmental interest) must be fairly tight, without a lot of “over-inclusion” of unnecessarily covered speech. This is a more rigorous standard than the default standard used by courts in most constitutional challenges, that of “rational basis.”<sup>76</sup> That standard requires merely that (1) the governmental interest

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70. *Boos v. Barry*, 485 U.S. 312, 319 (1988) (“the First Amendment’s hostility to content-based regulation extends . . . to a prohibition on discussion of an entire topic”) (quoting *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 537 (1980) (invalidating regulatory order forbidding public utility companies from placing in monthly bills inserts discussing controversial public policy issues)).

71. *United States v. O’Brien*, 391 U.S. 367, 376–77 (1968).

72. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 26–27 (2010) (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997)).

73. *McCullen v. Coakley*, 134 S. Ct. 2518, 2528 (2014) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989)).

74. *Id.*

75. *Burson v. Freeman* 504 U.S. 191, 197 (1992); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

76. *Ysursa v. Pocatello Educ. Ass’n*, 555 U.S. 353, 359–64 (2009).

served be a constitutionally permissible, “legitimate” one; and that (2) the statutory means employed to serve that interest be somehow reasonably related to the objective.<sup>77</sup>

Usually, when courts strike down a law under the First Amendment, it is not because the court refuses to acknowledge that the asserted governmental interest is insufficiently “important” or “compelling.” Instead, it is because the court acknowledges the governmental interest to be of sufficient weight, but finds that the speech restrictions involved are not sufficiently “narrowly tailored” to further them.<sup>78</sup>

In this instance, as is often the case, the constitutional validity of strict sunshine laws will in large part turn on the standard of review. Such laws seem unlikely to pass strict scrutiny. They have a better chance of meeting intermediate scrutiny, although an argument still exists that, even under that standard, such laws are not sufficiently “substantially related” to the relevant governmental interest, and that “ample alternative channels” are not available.

### *B. Can Open Meetings Laws Be Considered Content-Neutral?*

#### 1. Classification by *Asgeirsson*

While the district court in *Asgeirsson* had found that the Texas

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77. See, e.g., *Beard v. Banks*, 548 U.S. 521 (2006); *Heller v. Doe*, 509 U.S. 312 (1993); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Allied Stores v. Bowers*, 358 U.S. 522 (1959).

78. See, e.g., *McCullen v. Coakley*, 134 S. Ct. 2518, 2539 (2014) (holding that a thirty-five foot buffer zone outside abortion clinics was not narrowly tailored to the governmental interests of “ensuring public safety outside abortion clinics, preventing harassment and intimidation of patients and clinic staff and combating deliberate obstruction of clinic entrances.”); *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2741 (2011) (holding that the state’s regulation “imposing restrictions and labeling requirements on the sale or rental of ‘violent video games’” to minors was not “the narrow tailoring to ‘assisting parents’ that restriction of First Amendment rights requires.”); *Sorrell v. IMS Health, Inc.* 131 S. Ct. 2653, 2672 (2011) (holding that the state’s statute which restricted the sale, disclosure and use of pharmacy records that reveal the prescribing practices of individual doctors was invalid because it was not narrowly tailored to specific circumstances).

Of course, courts do sometimes invalidate speech restrictions for not meeting the first, “governmental interest” prong of heightened scrutiny, rather than the “narrow tailoring” prong. See, e.g., *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 789 (1978) (holding a Massachusetts criminal statute that prohibited business corporations from making contributions to influence the outcome of a referendum was invalid because there was no evidence to justify the government’s interest of preventing corporations from “drown[ing] out other points of view.”).

Open Meeting Act “does not disfavor certain topics of discussion,”<sup>79</sup> open meetings laws clearly ban speech on an entire topic—substantive discussion of matters that might come before the local government body. This conclusion would argue for finding the law content-based and applying strict scrutiny.

On appeal, the Fifth Circuit ruled that the Texas Open Meeting Act was subject to intermediate scrutiny. The court held that a regulation “is not content-based . . . merely because the applicability . . . depends on the content of the speech.”<sup>80</sup> It cited *Renton v. Playtime Theatres, Inc.*<sup>81</sup> where the Supreme Court stated that a statute which “appears content-based on its face may still be deemed content-neutral if it is “justified without regard to the content of the speech.”<sup>82</sup>

As the Fifth Circuit panel saw it, the test for content-neutrality is not whether the law’s application depends on the content of the speech, but whether the government’s *justification* for the regulation refers to the content of the speech.<sup>83</sup> It rejected the plaintiffs’ proposed test, which simply provided that a speech restriction is content-based if the government, in order to decide whether the law applies, must “examine the content of the message that is conveyed.”<sup>84</sup> This alternative test was derived from *Service Employees Int’l Union, Local 5 v. City of Houston*, where, using this test, the Fifth Circuit had ruled that a sales tax on general magazines which exempted religious, professional, trade, and sports journals was content-based and invalid.<sup>85</sup> The Fifth Circuit panel said that the alternate test “does not accurately state the law.”<sup>86</sup>

The *Asgeirsson* panel’s discussion of this issue treats the issue as settled. But as commentators have noted, the law on when to classify

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79. *Asgeirsson v. Abbott*, 773 F. Supp. 2d 684, 696 (W.D. Tex. 2011).

80. *Asgeirsson v. Abbott*, 696 F.3d 454, 459–60 (5th Cir. 2012).

81. 475 U.S. 41 (1986).

82. *Id.* at 46 (citing *Renton*, 475 U.S. at 46–49). In *Renton*, the Court held that even though a zoning ordinance regulated only sexually oriented businesses, it was still content-neutral because the legislature was concerned with the “secondary effects” of crime and lowered property values associated with adult businesses. 475 U.S. at 47–48.

83. *Asgeirsson*, 696 F.3d at 460 (quoting *Renton*, 475 U.S. at 47–48) (referring to a definition of “content-neutral”).

84. *Id.*

85. *Serv. Emp. Int’l Union, Local 5 v. City of Houston*, 595 F.3d 588, 596 (5th Cir. 2010) (quoting *Reno v. ACLU*, 521 U.S. 844, 874 (1997)).

86. *Asgeirsson*, 696 F.3d at 460.



a speech regulation as content-based or content-neutral is actually not that clear.<sup>87</sup> And the *Asgeirsson* panel's own use of the case law is somewhat questionable as well. In sum, there is just as much reason and likely more reason to think of open meetings laws as content-based regulations as content-neutral.

## 2. A Facial Test versus An "Underlying Justification" Test

*Asgeirsson* holds that the only thing a court looks to in deciding this question is the underlying motive of the legislature, as opposed to the facial text of the statute. There is some authority for this assertion. In at least two cases, the Supreme Court has said that the "principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys . . . The government's purpose is the controlling consideration."<sup>88</sup> But in another decision in between those two cases, the Court stated "Nor are we persuaded that . . . the test for whether a regulation is content based turns on the 'justification' for the regulation."<sup>89</sup> And cases abound where the Court immediately classifies a law as content-based (and proceeds to strict scrutiny) solely because it finds the statute facially differentiates between forbidden and permitted speech content, reinforcing the idea that facial discrimination by itself is enough to find it content-based.<sup>90</sup> To further the muddle, almost all these cases recite that a law is

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87. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 968 (4th ed. 2011) (discussing content-based versus content-neutral regulation); EUGENE VOLOKH, THE FIRST AMENDMENT AND RELATED STATUTES 337 (4th ed. 2011) (same); see also Mulroy, *supra* note 5, at 332 (stating that the classification of sunshine laws as either content-based or content-neutral "is surprisingly unclear").

88. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); see also *Colorado v. Hill*, 530 U.S. 703, 719 (2000) (same, quoting *Ward*); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (referring in passing to content-based laws as ones proscribing speech "because of disapproval of the ideas expressed"); *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 536 (1980) ("When regulation is based on the content of the speech, government action must be scrutinized more accurately to ensure that communication has not been prohibited 'merely because public officials disapprove the speaker's views.'" (quoting *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951))).

89. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993).

90. See, e.g., *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27–28 (2010) (statute which banned speech providing "material support" to terrorists was content-based); *Boos v. Barry*, 485 U.S. 312, 318–319 (1988) (ordinance barring protests critical of foreign governments outside their embassies was content-based); *Consol. Edison Co.*, 447 U.S. at 536 (1980) (government agency order forbidding utility companies from including in their monthly bills any inserts discussing controversial public policy issues was content-based).

content-neutral if “it is justified without reference to the content of the regulated speech.”<sup>91</sup>

The Supreme Court will get a chance this Term to resolve this muddle. In *Reed v. Town of Gilbert*, the plaintiffs challenged a local sign ordinance which imposed more lenient requirements on electioneering signs and “ideological” signs than for signs which simply directed readers to a nearby event.<sup>92</sup> The Ninth Circuit Court of Appeals upheld the ordinance, analyzing it as content-neutral.<sup>93</sup> The Supreme Court has granted *certiorari*,<sup>94</sup> and the petitioners have expressly argued that determining whether a speech regulation is content-based involves a purely facial examination of the statutory language.<sup>95</sup>

Some have criticized looking to the government justification for a law as the only or primary test because it allows the government to contrive *post hoc* rationalizations for speech restrictions.<sup>96</sup> For example, *Renton* itself has been widely criticized by scholars.<sup>97</sup>

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91. See *Hill*, 530 U.S. at 720; *Ward*, 491 U.S. at 791; see also *Discovery Network, Inc.*, 507 U.S. at 426; *Clark v. Cnty. For Creative Non-Violence*, 469 U.S. 288, 293 (1984).

92. 707 F.3d 1057 (9th Cir. 2013).

93. *Id.* at 1071–72.

94. 134 S. Ct. 2900 (July 1, 2014).

95. See Brief For Petitioners at 22–25, *Reed v. Town of Gilbert*, No. 13-502 (U.S. Sept. 15, 2014), 2014 WL 4631957.

96. See, e.g., *Hill*, 530 U.S. at 745–46 (Scalia, J., dissenting) (accusing the legislature of providing false content-neutral rationalizations for an underlying anti-abortion purpose, and stating that even if a law is “justified” without reference to speech content, it is still content-based if it in fact discriminates among permitted and impermissible speech); see also *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 60 (1986) (Brennan, J., dissenting) (“The court cannot . . . merely accept these post hoc statements at face value”); *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 536 (1980) (“When a regulation is based on the content of the speech, government action must be scrutinized more accurately to ensure that communication has not been prohibited ‘merely because public officials disapprove the speaker’s views.’” (quoting *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951))).

97. See, e.g., Charles H. Clarke, *Freedom of Speech and the Problem of the Lawful Harmful Public Reaction: Adult Use Cases of Renton and Mini Theatres*, 20 AKRON L. REV. 187, 195 (1986) (criticizing how the Court in *Renton* “thought that a regulation of speech to address its secondary effects can make the regulation content neutral or disqualify the regulation as a content regulation.”); Lisa Yoshida, Note, *The Role of ‘Secondary Effects’ in First Amendment analysis: Renton v. Playtime Theatre, Inc.*, 22 U.S.F. L. REV. 161, 178–87 (1987) (“Analyzing the [Renton] Court’s holding and conclud[ing] that the Supreme Court has undermined the protections afforded expression by applying a minimal standard of review based upon secondary effects.”); cf. William M. Sunkel, Note, *City of Renton v. Playtime Theatres, Inc.: Court-Approved Censorship Through Zoning*, 7 PACE L. REV. 251, 289 (1986) (agreeing with the Court’s use of intermediate scrutiny, but stating that “Renton demonstrates the danger of allowing any judicial or legislative body to develop a ‘hierarchy’ of speech

These criticisms are sound. The threshold issue of whether a statute is content-based should be determined solely by the plain language of the statute. Secondary considerations like the government interests served should be considered only in the second prong of the analysis when the court considers narrow tailoring. This bright-line rule would add certainty and predictability to the law and has a common-sense appeal.

Nor would such an approach require courts to unduly strike laws. In *Renton*, for example, the Court could have applied strict scrutiny and then held that the adult theater zoning restriction at issue was narrowly tailored to further the compelling government-interests served thereby (namely, crime and property values). Conversely, nor would such a “purely facial” approach require courts to unduly uphold laws. For example, a facially content-neutral ban on solicitation during certain periods of time could still be invalidated if it failed to afford “ample alternative means” of communication.<sup>98</sup>

The recent Supreme Court opinion *McCullen v. Coakley* represents an interesting and rare, middle-ground case where the plain language of the statute lends support for an argument in both directions. In *McCullen*, the Court found that a Massachusetts law creating a protester-proof “buffer zone” around abortion clinic entrances was content-neutral, but still invalidated it for restricting more speech than was necessary to further the goals of protecting clinic patients from harassment, intimidation, and physical denial of access.<sup>99</sup> Strictly speaking, the plain text does not discriminate based on speech content. But a three-Justice concurrence argued that the fact that the statute protected abortion clinics only rendered it content-based.<sup>100</sup> This is an example where the plain text of a statute, while not explicitly focusing on one type of speech, nonetheless signals a speech-centric selectivity in underlying goals which could argue for treatment as “content-based.” It is consistent with an approach that content distinctions from the plain text of the statute, while *sufficient* for classifying it as content-based, are not *necessary*.

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values and to ‘assign’ appropriate degrees of first amendment protection to different kinds of speech.”).

98. See *N.J. Citizen Action v. Edison Twp.*, 797 F.2d 1250, 1255–60 (3d Cir. 1986) (invalidating an ordinance banning evening hours door-to-door solicitation on this ground), *cert. denied sub nom. Twp. of Piscataway v. N.J. Citizen Action*, 479 U.S. 1103 (1987).

99. *McCullen v. Coakley*, 134 S. Ct. 2518, 2526–29 (2014).

100. *Id.* at 2543–48.

What is clear from all this is that the matter is unclear. Indeed, there are more than two alternative tests that the Court has used in making this threshold determination.<sup>101</sup> Between the two extremes of (i) a straightforward facial analysis,<sup>102</sup> and (ii) a more involved inquiry into whether the government was motivated by disagreement with the message conveyed by the covered speech,<sup>103</sup> there is (iii) the middle ground approach which allows a facially speech-discriminatory statute to be treated as content-neutral, if the government's primary concern was with certain content-neutral "secondary effects" associated with the type of speech involved. The chief example of (iii) is *Renton*, where the ordinance facially distinguished between "adult" establishments, which had zoning restrictions, and other establishments, which did not. Because the city was concerned with the content-neutral "secondary effects" of crime and lowered property values associated with adult theaters, the Court analyzed an otherwise facially content-based piece of legislation as content-neutral.<sup>104</sup> Finally, in the special case of restrictions on *expressive conduct*, the Court has looked (iv) to whether the law's application depends "on the likely communicative impact."<sup>105</sup>

Although the law in this area is somewhat complex and unclear, it might be usefully summarized with three main rules. First, laws that facially regulate speech based on its content are presumptively content-based.<sup>106</sup> Second, the government can rebut this presumption by showing that the regulation is needed to avoid content-neutral "secondary effects" unrelated to the content of the speech.<sup>107</sup> Third,

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101. See VOLOKH, *supra* note 87, at 337 (2011) (discussing the various tests).

102. See, e.g., *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 536 (1980).

103. See, e.g., *Hill v. Colorado*, 530 U.S. 703, 719 (2000).

104. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986).

105. See *Texas v. Johnson*, 491 U.S. 397, 411–12 (1989) (prosecution for burning an American flag under statute barring "desecration of a sacred object" was content-based triggering strict scrutiny because, in part, the illegality of the act depended on its likely communicative impact). Because the kind of communication covered by open meetings laws is pure speech and not expressive conduct, this test has no application to the situations contemplated in this Article.

106. CHEMERINSKY, *supra* note 87, at 961 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (holding that St. Paul's statute that prohibited "the display of a symbol which one knows or has reason to know 'arouses anger, alarm or resentment to others'" was content-based and therefore invalid)).

107. See *id.* at 965–68 (citing *Renton*, 475 U.S. at 47–48 (1986) (rejecting a First Amendment challenge to a zoning ordinance that regulated the location of adult movie theaters even though the ordinance was clearly content-based because it the law was enacted to control

such a content-neutral “secondary effects” justification must not be motivated by a desire to suppress speech, and it must apply only to the regulated speech and not also to the speech allowed by the statute.<sup>108</sup>

*City of Cincinnati v. Discovery Network*<sup>109</sup> is a good example. In *Discovery Network*, the Court considered an ordinance banning “commercial handbills” from city-owned news racks but permitting “newspapers.”<sup>110</sup> The Court analyzed it as content-based, noting that the facial text of the ordinance made clear that the application of the ban “depended on the content of the publication resting inside that news rack.” Thus, the Court ruled, “by any commonsense understanding of the term, the ban is ‘content-based.’”<sup>111</sup> The City of Cincinnati had argued that the news rack ordinance was content-neutral, because it was justified by the content-neutral concern of controlling the “secondary effect” of overcrowding on city news racks.<sup>112</sup> But the Court rejected this “secondary effects” argument,

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the secondary effects of the theaters and not restrict the speech); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429–30 (1993) (holding that a prohibition on the use of news racks on public property for the distribution of commercial handbills was unconstitutional because “there [were] no secondary effects attributable . . . to news racks [containing commercial handbills] that distinguish them from the news racks [the city] permits to remain on its sidewalks.”); *Boos v. Berry*, 485 U.S. 312 (1988) (distinguishing *Renton* and holding that an ordinance prohibiting speech critical of foreign governments near their embassies was unconstitutional because the government did not justify the ordinance as it related to “secondary effect”, but rather only by reference to the content of the speech); *City of Erie v. PAP’s A.M.*, 529 U.S. 277, 294 (2000) (plurality opinion) (holding a city ordinance prohibiting public nudity that was motivated in an effort to close down a nude dancing club was not unconstitutional and content-neutral because “the interest in combating the secondary effects associated with those clubs is unrelated to the suppression of the erotic message conveyed by nude dancing.”); *Hill v. Colorado*, 530 U.S. 703 (2000) (holding a Colorado law that prohibited individuals from approaching within eight feet of other individuals near a health care facility without consent was not unconstitutional even though it stopped banned speech that was for “protest, education, or counseling” because it was motivated by a desire to prevent the adverse effects of that speech.”))

108. *Id.* There is a potential tension between this third rule and the second rule’s requirement that the “secondary effects” used to justify the regulation be unrelated to the content of the speech. It would seem that in many instances, the more it is the case that the secondary effects relied on to justify the statute are unrelated to the underlying topic of speech being targeted, the less it is the case that such harmful effects are uniquely associated with that topic of speech. Such potential confusion could be avoided if courts departed from the “secondary effects” doctrine altogether and classified as content-based all laws which on their face regulate speech based on its content.

109. 507 U.S. 410 (1993).

110. *Id.* at 414–15.

111. *Id.*

112. 507 U.S. at 430.

noting that these asserted effects were no more associated with commercial handbills than they were with newspapers; therefore, they could not justify a law distinguishing between the two.<sup>113</sup>

Applied to the sunshine law situation, this reasoning would suggest (at least at first glance) that open meetings laws are content-based, because by their plain terms they apply only to speech concerning local government affairs.<sup>114</sup> Indeed, the fact that the subject matter singled out for restriction in sunshine laws is *political speech*—i.e., discussion of public affairs involving local government—enhances the argument for using strict scrutiny. First Amendment doctrine has long held that protection of political speech is a core value of the First Amendment, affording such speech the highest protection.<sup>115</sup>

### 3. “Secondary Effects”

But the court in *Asgeirsson* ruled that, although the law facially regulates based on speech content, it is actually content-neutral, because it is aimed merely at the “secondary effects” of: (1) lack of transparency; (2) fraud and corruption; and (3) fostering mistrust in government.<sup>116</sup> These are, in fact, content-neutral secondary effects. Further, it may very well be the case that they are related to legislators’ secret deliberations on government affairs more than they are to other types of discussions among local legislators, thus avoiding the problem of Cincinnati’s ban on commercial handbills in news racks from *Discovery Network*. So, strict sunshine laws may very well qualify for “content-neutral” treatment.

But one problem remains. The secondary effect rationale must not be related to the content of the speech. For example, in *Boos v. Barry*, the Court considered a law barring protests critical of a foreign government within 500 feet of that government’s embassy.<sup>117</sup> The “secondary” effects-related purpose relied upon by the government

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113. *Id.*

114. *See* Mulroy, *supra* note 5, at 332–33 (making this observation).

115. *See, e.g.*, *Burson v. Freeman*, 504 U.S. 191, 196 (1992) (“regulation of political speech” was a “central concern” in “our First Amendment jurisprudence”); *Mills v. Ala.*, 384 U.S. 214, 218 (1966) (“a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs”); *Boos v. Barry*, 485 U.S. 312, 318 (1988) (referring to “political speech” as the “core of the First Amendment”).

116. *Asgeirsson v. Abbott*, 696 F.3d 454, 461 (5th Cir. 2012).

117. 485 U.S. 312, 312 (1987).

was to protect foreign diplomats from affronts to their dignity.<sup>118</sup> A three-Justice plurality rejected this government argument because that rationale justified the ordinance in a manner which focused “on the direct impact of speech on its audience”<sup>119</sup> The plurality distinguished *Renton* because the rationales in *Renton*—preventing crime increases and property value declines associated with adult theater neighborhoods—did not, themselves, have anything to do with the content of the speech.<sup>120</sup> In contrast, the Court held the “dignity of diplomats” rationale was “justified *only* by reference to the content of [the] speech.”<sup>121</sup> This reasoning commanded five votes, since two Justices concurred with this analysis, but insisted that the *Renton* analysis should in any event be limited to the narrow context of land use regulation of adult businesses.<sup>122</sup>

In a related vein, the Court has said that the “secondary effects” must not arise from “the direct impact of [the] speech on its audience.”<sup>123</sup> For example, in *Reno v. ACLU*, the government analogized to *Renton* to support a regulation of Internet pornography, characterizing the regulation as “cyberzoning” of the Internet, protecting children from “indecent” cyberspeech.<sup>124</sup> The Court distinguished *Renton* on the ground that the cyber-decency law was attempting to protect children from the “primary effects” of such speech, not “secondary effects” like the crime and property value concerns motivating the zoning regulation in *Renton*.<sup>125</sup> Much more recently, the Court in *McCullen v. Coakley* explained that a law could not be considered content-neutral “if it w[as] concerned with undesirable effects that raise from the ‘the direct impact of speech on

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118. *Id.*

119. *Id.* at 320–21.

120. *Id.* at 321.

121. *Boos*, 485 U.S. at 321 (emphasis in original).

122. *Id.* at 337–38 (Brennan, J., concurring). This decision tracks similar statements proposing to limit the doctrine made by several Supreme Court Justices. See *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 445, 448 (2002) (Kennedy, J., concurring); *Boos v. Barry*, 485 U.S. 312, 334–35 (1988) (Brennan, J., concurring in part); see also *Ward v. Rock Against Racism*, 491 U.S. 781, 804 n.1 (1989) (Blackmun, J., dissenting).

123. See, e.g., *McCullen v. Coakley*, 134 S. Ct. 2518, 2531–32 (2014); *Boos*, 485 U.S. at 321.

124. *Reno v. ACLU*, 521 U.S. 844, 867–68 (1997).

125. *Id.* The Court in that case happened to have struck down the law as overbroad. *Id.* But the more important point is that, regardless of whether the court in such a case decides that the law is valid because narrowly tailored to further a compelling governmental interest, or invalid because it fails strict scrutiny, the proper mode of analysis is in fact strict scrutiny.

its audience’ or ‘[l]isteners’ reactions to speech.’”<sup>126</sup> In the context of a law creating a speech-free “buffer zone” around abortion clinic entrances, the Court noted that rationales of traffic control and safety were content-neutral, but justifications based on fears that abortion clinic entrance encounters would make give listeners offense or make them uncomfortable would not be.<sup>127</sup>

A significant question exists as to whether the Fifth Circuit’s policy rationales for open meetings laws make the case closer to *Boos* (content-based despite an asserted “secondary effects” rationale) or to *Renton* (content-neutral because of such a rationale). The rationales provided by the Fifth Circuit in *Asgeirsson*—transparency, preventing fraud and corruption—are themselves content-neutral, but are implicated only by reference to the content of the speech involved (discussion of local affairs by local legislators). By the same token, a question may exist as to whether these rationales are properly considered “secondary” effects, or whether they are considered “primary” or “direct” effects of the speech. The inquiry is made more difficult by the fact that post-*Renton*, the “secondary effects” rationale has not been successfully advanced outside the context of restrictions on sexually oriented businesses justified by crime and property value concerns,<sup>128</sup> so we have no guidance as to how (if at all) to apply the “secondary effects” analysis outside its genesis context. Indeed, at least one Circuit court has suggested that the “secondary effects” doctrine does not apply to restrictions on political speech.<sup>129</sup>

#### 4. Analogous Cases: *Burson v. Freeman* and *White v. Alabama*

*Burson v. Freeman*,<sup>130</sup> an analogous case cited by plaintiffs in *Asgeirsson*, could very well resolve this uncertainty in favor of

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126. *McCullen*, 134 S.Ct. at 2531–32 (quoting *Boos*, 485 U.S. at 321).

127. *Id.*

128. See, e.g., *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002); *City of Erie v. Pap’s A.M.*, 539 U.S. 277 (2000); *Independence News, Inc., v. City of Charlotte*, 568 F.3d 148 (4th Cir. 2009); *Ctr. For Fair Pub. Policy v. Maricopa Cnty.*, 336 F.3d 1153 (9th Cir. 2003); *SOB, Inc., v. Cnty. of Benton*, 317 F.3d 856 (8th Cir. 2003); *G.M. Enterprises, Inc. v. Town of St. Joseph*, 350 F.3d 631 (7th Cir. 2003); *Int’l Eateries of Am., Inc. v. Broward Cnty.*, 941 F.2d 1157 (11th Cir. 1991);

129. *Rappa v. New Castle Cnty.*, 18 F.3d 1043, 1070 (3rd Cir. 1994) (“We have some doubts, however, that political speech is subject to secondary effects analysis. . . [but] we need not decide this difficult question because, even assuming, *arguendo* [that it is]. . . the statute at issue here [a restrictive outdoor sign ordinance] clearly fails that analysis.”)

130. 504 U.S. 191 (1992).



classifying open meetings laws as content-based. In *Burson*, the Court addressed a law barring electioneering within 100 feet of a polling place.<sup>131</sup> Despite the fact that the law only applied in a specific physical location, a plurality of the Court, nonetheless, analyzed it as a content-based law because, on its face, it only regulated discussions at that location which involved political campaigning.<sup>132</sup> Notably, the fact that the law was justified by the good government concern of protecting voters from election fraud, intimidation, or undue pressure as they went to the polls, did not save the law from being scrutinized as content-based.<sup>133</sup>

*Burson* seems very analogous indeed to the open meetings law situation. Both speech regulations apply to core political speech. They have both content-based elements (it applies only to electioneering, or only to discussion of local government affairs), as well as content-neutral elements (it applies only near a polling place, or only outside the context of a noticed meeting). By analogy, *Burson* would seem to lead toward a conclusion that sunshine laws are content-based regulations triggering strict scrutiny, just as the original Fifth Circuit panel decision in *Rangra* had ruled.<sup>134</sup>

But the Fifth Circuit panel in *Asgeirsson* distinguished *Burson* on several grounds. First, it maintained that the *Burson* plurality had merely stated that the law was “*facially* content-based” and did not discuss the underlying purpose of the law.<sup>135</sup> The *Asgeirsson* opinion seems to suggest that because the *Burson* plurality did not discuss the underlying purpose in detail, it did not, in fact, classify the law as content-based. “Because the plurality ultimately found that the statute satisfied strict scrutiny,” the panel speculated “it may have considered an in-depth purpose analysis to be unnecessary.”<sup>136</sup>

This analysis misreads *Burson*. The plurality opinion clearly states that the law under review “is not a facially content-neutral time, place, or manner restriction” because “[w]hether individuals may exercise their free speech rights near polling places depends entirely

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131. *Id.* at 191.

132. *Id.* at 197–98. Justice Scalia, concurring, concluded that the area near a polling place was not a public forum, so that a mere “reasonableness” standard of review applied, and was met. *Id.* at 214–16 (Scalia, J., concurring).

133. *See id.* at 198–99.

134. *See Rangra v. Brown*, 566 F.3d 515, 521–22 (5th Cir. 2009).

135. *Asgeirsson v. Abbott*, 696 F.3d 454, 461 (5th Cir. 2012) (italics in original).

136. *Id.*

on whether their speech is related to a political campaign.”<sup>137</sup> The opinion goes on to refer to the law as “content-based regulation” and cites cases classifying laws as content-based.<sup>138</sup> More broadly, the *Asgeirsson* panel opinion assumes that extensive analysis of the underlying purpose of the statute is always required and is the only relevant consideration in classifying a speech regulation as content-based or content-neutral. In fact, as discussed above,<sup>139</sup> that is not the case.

The *Asgeirsson* panel also distinguished *Burson* on the ground that the polling place restriction in *Burson* applied to speech in a public forum, whereas the Texas Open Meetings Act prohibition “is applicable only to private forums.”<sup>140</sup> Further, the sunshine law was “designed to *encourage* public discussion, whereas the prohibition in . . . [*Burson*] operated to *discourage* public discussion.”<sup>141</sup> Problems exist with both these distinctions.

First, both the Texas Open Meetings Act, and sunshine acts generally, can apply in a public forum. If the requisite number of legislators convene in a park, street, or sidewalk, or even on the floor of their legislative chamber itself, and proceed to discuss among themselves the substance of pending matters without a proper “sunshine” notice and without allowing all members of the public to listen in, they have violated the statute.<sup>142</sup> More fundamentally, application to a public forum may be a *sufficient* condition for giving the law heightened constitutional scrutiny, but it is not a *necessary* one. A content-based law applying to core speech like the discussion of governmental affairs, but which applies only in private locations, can receive the same heightened scrutiny (and perhaps greater

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137. *Burson*, 504 U.S. at 197.

138. *Id.* (citing *Consol. Edison Co. of N.Y. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 530, 537 (1980)); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)).

139. *See supra*, Section III.B.2.

140. *Asgeirsson*, 696 F.3d at 461.

141. *Id.* (italics in original).

142. TEX. GOV’T CODE ANN. § 551.001–146 (West 2013). The Act defines a meeting as “a deliberation between a quorum of a governmental body, or between a quorum of a governmental body and another person, during which public business or public policy over which the governmental body has supervision or control is discussed or considered or during which the governmental body takes formal action.” *Id.* § 551.001(4)(A). By its terms, the statute does not limit its application to communications outside public fora.

The Texas statute is by no means unique in this respect. *See, e.g.*, TENN. CODE ANN. § 8-44-101, 102(b)(2) (defining “meeting” in similar manner).

scrutiny) as a law applying in a public forum.<sup>143</sup> And the fact that a law burdening speech in a content-discriminatory way is designed to “encourage” public discussion does not save it from searching First Amendment evaluation by courts. For example, a campaign finance “matching fund” provision designed to *increase* campaign discussion can still run afoul of the First Amendment.<sup>144</sup>

Another case analogous to the open meetings act scenario is *Minnesota v. White*, where the Court struck down a rule barring judicial candidates (some of whom are already judges) from discussing legal controversies during their election campaigns.<sup>145</sup> Both laws prevent elected officials from discussing public affairs during certain time periods—outside of a noticed meeting, in the case of sunshine laws, or during the campaign, in the case of *White*.<sup>146</sup> The Court in *White* analyzed the law as content-based, applied strict scrutiny, and ruled the law invalid.<sup>147</sup> Although not discussed by the Fifth Circuit in *Asgeirsson*, *White* lends significant support to the argument that open meetings laws are properly characterized as content-based.

#### 5. The Latest Guidance: *McCullen v. Coakley*

The Supreme Court recently revisited this clouded area in *McCullen v. Coakley*,<sup>148</sup> in a manner seemingly in tension with the *Asgeirsson* approach. In *McCullen*, the Court invalidated a Massachusetts law establishing “buffer zones” of 35 feet around abortion clinic entrances.<sup>149</sup> Persons could not stand within the buffer zones unless they had reason to go in or out of the building.<sup>150</sup>

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143. As an example, consider a content-neutral law applicable to a public forum, like a noise ordinance in public parks. It would receive intermediate scrutiny. Contrast a public university regulation barring professors from uttering views critical of the President in their campus offices. It affects only speech in a non-public forum, yet triggers strict scrutiny because of its plainly content-based (indeed, even viewpoint-based) scope.

144. *Ariz. Free Enter. Club's Freedom PAC v. Bennett*, 131 S. Ct. 2806, 2822 (2011) (striking down law which provided extra public matching funds to a candidate if her opponent and aligned third parties spent over a designated amount, on the grounds that such a competitor subsidy punished the opponent for exercising his right to spend on campaign messaging).

145. 536 U.S. 765, 765 (2002).

146. *See* Mulroy, *supra* note 5, 339.

147. *White*, 536 U.S. at 774–75, 787–88.

148. 134 S. Ct. 2518 (2014).

149. *Id.* at 2518, 2550.

150. *Id.* at 2522. Exempted were persons entering or leaving the clinic; employees of the clinic; municipal agents who had business at the clinic; or persons passing by on their way

Discussing the content-based versus content-neutral classification, the Court stated that “The Act would be content based *if it required ‘enforcement authorities’ to ‘examine the content of the message that is conveyed to determine whether’ a violation has occurred.*”<sup>151</sup> In finding the Massachusetts law content-neutral, the majority noted simply that whether individuals violate the act “depends . . . not on what they say . . . but simply on where they say it.”<sup>152</sup> Indeed, the majority reasoned, one could violate the act merely by standing in the buffer zone, “without displaying a sign or uttering a word.”<sup>153</sup>

That language clearly reaffirms a facial approach and would render open meetings laws content-based. To determine if an open meetings law has been violated, enforcement officials must examine the content of a local legislator’s communication. It very much “depends on what they say,” and one *cannot* violate a sunshine law without “uttering a word” (or at least writing a word).

Quoting *Renton*, the *McCullen* majority did go on to discuss the question of whether a law is “justified without reference to the content of the regulated speech,” but only after finding that the Massachusetts law was facially neutral.<sup>154</sup> Once it so determined, the majority, responding to Justice Scalia’s concurrence, then considered whether the facially neutral statute would nonetheless be characterized as content-based regardless because it disproportionately affected speech relating to abortion.<sup>155</sup> It was in this next part of the analysis, applicable only to *facially speech-neutral laws that had non-neutral effects*, that the Court considered the underlying justification for the law.<sup>156</sup> (Finding a speech-neutral justification, the majority rejected the view that the law’s disproportionately abortion-oriented effect rendered it content-based.)<sup>157</sup> Because open meetings laws are facially speech-discriminatory, that second layer of analysis discussed in *McCullen* does not apply.

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to another location. *Id.* at 2522–23.

151. *Id.* at 2531 (quoting *FCC v. League of Women Voters of Calif.*, 468 U.S. 364, 377 (1984)) (emphasis added).

152. *Id.* at 2523 (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010)) (internal quotations omitted).

153. *Id.* at 2523.

154. *Id.* at 2531 (quoting *Renton*, 475 U.S. at 48) (internal quotations omitted).

155. *Id.* (citing *Renton*, 475 U.S. at 48).

156. *Id.*

157. *Id.* at 2530–32.

As noted above,<sup>158</sup> Justice Scalia's concurrence did argue for a more nuanced view of the statute, arguing that the law was content-based because it only protected buffer-zone speech near abortion clinics.<sup>159</sup> Arguably, such a more context-sensitive approach might nonetheless still be considered "purely facial," because the allegedly invalid "speech favoritism" involved could be discerned from the plain text of the act itself which referred expressly to abortion clinics. But the majority rejected even this approach in favor of a less context-sensitive, more straightforward inquiry into whether the plain text of the statute made its application turn on speech content.<sup>160</sup> At least where the plain text did so, it seems, the *McCullen* majority's approach would classify the statute as content-neutral. Sunshine acts would seem to fall into this category.

### *C. Applying the (Intermediate) Constitutional Standard*

Assuming for the moment that open meetings laws are content-neutral and thus held to the intermediate level of scrutiny, how would the kind of strict open meetings law discussed in this Article fare? This Section applies the intermediate standard as the more generous of the two. Obviously, if such laws fail intermediate scrutiny, they would fail strict scrutiny as well. And any argument suggesting that such laws are imperiled under intermediate scrutiny would have even more force under strict scrutiny.

#### 1. The Burden on Speech

The Supreme Court has cautioned that, in evaluating the validity of a speech regulation, the Court must "look to the extent of the burden which the requirements place on individual rights."<sup>161</sup> In *McCullen*, the Court took a very considered approach to this question, one which was very solicitous of the practical concerns of the individual speakers covered by the law. The Court looked at the effect of the abortion clinic buffer zone law at issue in that case on "abortion counselors," abortion opponents seeking non-

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158. See *N.J. Citizen Action v. Edison Twp.*, 797 F.2d 1250, 1255–60 (3d Cir. 1986) (invalidating an ordinance banning evening hours door-to-door solicitation on the ground that it failed to afford "ample alternative means" of communication), *cert. denied sub nom.* *Twp. of Piscataway v. N.J. Citizen Action*, 479 U.S. 1103 (1987).

159. *McCullen*, 134 S. Ct. at 2541.

160. *Id.* at 2530–32.

161. *Buckley v. Valeo*, 424 U.S. 1, 68 (1976).

confrontational one-on-one, face-to-face conversations with patients entering abortion clinics to inform them of abortion alternatives and dissuade them from going through with the abortion.<sup>162</sup> Under the Massachusetts law, such counselors could still hold signs outside the buffer zone, approach patients outside the buffer zone, and walk along with them until the buffer zone was reached, and thereafter, call out to patients continuing on their way to the clinic entrance.<sup>163</sup> However, such counselors would often not have time to distinguish patients from passersby in the limited time the former would cross from the beginning of the sidewalk to the buffer zone line, or to reach them to hand them literature, before they reached that line; even if they could reach them, they would, soon thereafter, have to “stop abruptly” at the buffer zone line, which the plaintiff abortion counselor alleged caused her to “appear untrustworthy or suspicious.”<sup>164</sup> Reviewing this dynamic, and citing record evidence that the number of patients persuaded to abandon their plans for abortion had dropped since the law’s passage, the majority found that such practical difficulties “have clearly taken their toll,” causing a “substantial” burden on speech.<sup>165</sup>

Thus, the Court goes beyond a superficial estimate of the amount of speech burdened to take a more functional analysis. It asks, “As a practical matter, just how does the law interfere with the effectiveness of communication which covered individuals can legitimately wish to engage in?” Applied to the instance of open meetings laws, this question is revealing. Where the “disclosure” requirement of open meetings laws applies to any substantive discussion of government matters between only two legislators, the burden on speech is great indeed.

Initially, there simply are certain topics which are best discussed in private. Personnel decisions are one example, as are quasi-judicial deliberations of boards or commissions such as local ethics commissions, or a school board consideration of a student’s appeal of an expulsion. Ongoing negotiations with employee unions or outside contractors are another example. Discussions involving trade secrets are yet another example, let alone any matter involving an individual citizen or employee’s medical or psychological condition or matters involving juveniles. True, many open meetings laws have statutory

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162. *McCullen*, 134 S. Ct. at 2535, 2545–47.

163. *Id.* at 2545.

164. *Id.* at 2535 (internal quotations omitted).

165. *Id.*

exemptions for the discussion of some of these topics. But many do not, and none have exemptions for all these topics.<sup>166</sup> And several states have almost no exemptions at all.<sup>167</sup> Strict sunshine laws force local legislators to either violate the legitimate privacy concerns of third parties,<sup>168</sup> or else chill their free and candid discussion of these matters.<sup>169</sup>

More fundamentally, such strict sunshine laws burden local legislators by inhibiting compromise. When warring factions of a legislative body are embroiled in a sensitive public dispute, proposing a compromise entails great risk for a politician: she risks alienating her base, or her colleagues on the same side of an issue. She also risks embarrassment from having offered a compromise and having it rebuffed.<sup>170</sup> It is often not worth taking that risk unless she knows in advance there is a reasonable probability that the offer will be accepted—or at least that it won't be publicly denounced by the other side in an attempt to score cheap political points. Private overtures can thus be essential.<sup>171</sup>

This risk multiplies when the compromise has to be a multilateral one. Often, a lawmaker may be willing to compromise on one issue if, and only if, a second party is willing to compromise on a different issue, which could, in turn, incentivize a third lawmaker to compromise on the original issue. Such negotiations must often occur in phases. If each distinct phase must occur in public, with an attendant possibility of a publicly embarrassing breakdown of the compromise at any phase, it is difficult to even begin the process.<sup>172</sup>

The sensitive nature of negotiating dynamics is by no means a novel concept. Entire books and manuals have been written on the topic, including self-help books for professionals in business,

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166. See Mulroy, *supra* note 5, at 371–76 & App. (table describing the topical exemptions from coverage under sunshine laws for each of the states).

167. See *id.* For example, Tennessee exempts only attorney-client deliberations and discussions involving trade secrets. *Id.* at 323–24 (citing TENN. CODE ANN. § 8-44-102 (2010) for trade secrets exemption and *Van Hooser v. Warren Cnty. Bd. of Educ.*, 807 S.W.2d 230, 237 (Tenn. 1991) for attorney-client discussions exemption).

168. See *id.* at 365–66.

169. See KENNETH C. DAVIS & RICHARD PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 5.18 (3d ed. 1994); Mark Fenster, *The Opacity Of Transparency*, 91 IOWA L. REV. 885, 908–09 (2006).

170. See Mulroy, *supra* note 5, at 365.

171. See *id.*

172. See *id.*

especially sales.<sup>173</sup> No sane businessman or lawyer would prefer to conduct sensitive negotiations in public.

And this burden applies also to situations in which the legislative body might wish to negotiate with an outside entity, such as a government employee union, a company contracting with the local government body, or a private business entity wishing to sell real property to (or buy real property from) that government. The legislative body may wish to have more than one member attending such negotiations—perhaps one Democrat and one Republican. But strict open meetings laws prevent any private negotiation if two or more legislators are present.

Perhaps even more pernicious is the transfer of power away from elected legislators to unelected lobbyists and staff. This occurs because crucial decisions are inevitably made in the run-up to the formal public meeting on an issue. Because open meetings laws do not cover administration officials and lobbyists, they can confer with each legislator and know where each stands, thus gaining advance knowledge of which amendments and compromises can gain majority support. The legislators, barred by law from discussing substance with one another, are siloed, each ignorant of the legislature's general mood.<sup>174</sup>

In addition to these serious degradations of political discussion, overly broad sunshine laws handicap affected legislators in a number of other significant ways. They chill collegial decision-making and, in the words of one commentator, cause covered governmental bodies to:

... 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-

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173. Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1, 109 (2000) (discussing different weaknesses of negotiation and how publicity could prevent parties from fully supporting their point if it is unpopular); Rob Walker, *Take It or Leave It: The Only Guide to Negotiating You Will Ever Need*, INC.COM (Aug. 1, 2003), <http://www.inc.com/magazine/20030801/negotiation.html> (discussing the fears of being embarrassed in negotiations and that one must change his or her mindset and behavior in order to become a better negotiator); see also ANTONIA ENGEL & BENEDIKT KORF, NEGOTIATION AND MEDIATION TECHNIQUES FOR NATURAL RESOURCE MANAGEMENT (Food & Agric. Org. of the U.N. 2005), <ftp://ftp.fao.org/docrep/fao/008/a0032e/a0032e00.pdf> (explaining the importance of choosing the right time and place for negotiations to make parties comfortable with the setting).

174. See Mulroy, *supra* note 5, at 363–64.



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.<sup>175</sup>

Finally, as a practical matter, allowing matters to be settled, and details to be worked out, only during publicly noticed formal meetings, inevitably reduces efficiency and prolongs decision-making. It provides an enormous tactical advantage to the person who breaks the rules, and disadvantages those who follow them. The legislator who confers with colleagues privately knows where everyone stands and has a better sense of which amendments and compromises to pursue, when to press the advantage, and when to tactically retreat. The legislator who scrupulously honors the law is isolated, ignorant of the dynamics around him, and ultimately less effective. This dynamic leads to rampant violations and a wink-wink culture of honoring the strict rules in the breach. This, in turn, breeds contempt for the law among the very people charged with writing the law.<sup>176</sup>

## 2. Burden on “Substantially More Speech than Necessary”?

*McCullen* also provides useful insight into how to apply the constitutional standard once a standard is chosen. Applying intermediate scrutiny, the Court considered whether the abortion access “buffer zone” statute burdened “substantially more speech than . . . necessary” to further the government interests.<sup>177</sup> The state advanced such interests as public safety, safeguarding patient access to healthcare, and the unobstructed use of sidewalks and roadways, as well as, an interest in protecting patients from intimidation by abortion protesters.<sup>178</sup> With each such interest, time and again, the Court emphasized how there were less speech-burdensome measures that could advance the governmental interest just as well.<sup>179</sup>

Specifically, it was the government’s burden to “demonstrate

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175. Fenster, *supra* note 169, 908–09. See also Mulroy, *supra* note 5, at 362–63.

176. For a discussion of these criticisms, see Mulroy, *supra* note 5, at 365–67, and sources cited therein. For further discussion of the burden on legislators’ speech, see Part IV. B, *infra* (distinguishing campaign finance disclosure requirements because sunshine laws actually prevent speech within the open meetings act notice period).

177. *McCullen v. Coakley*, 134 S.Ct. 2518, 2535 (2014).

178. *Id.* at 2531.

179. *Id.* at 2525–35.

that alternative measures that burden substantially less speech would fail to achieve the government's interests."<sup>180</sup> It would not be sufficient to demonstrate merely that the means chosen by that state was "easier."<sup>181</sup> Moreover, the Court faulted the state for failing to provide actual evidence that the obstruction of access to clinics was, in fact, as great a problem as asserted, warranting a measure as broad as a "buffer zone" approach over narrower approaches specifically targeting intimidation, harassment, and blocking of pathways.<sup>182</sup>

Of special interest is the majority's emphasis on legislative approaches taken by other states. It noted that no other State created fixed buffer zones around abortion clinics.<sup>183</sup> More significantly, it pointed to such alternative approaches as laws providing criminal and civil penalties specifically for intimidation of abortion patients, which had been adopted by a dozen other states; a similar law focusing on harassment of such patients, which had been adopted by New York City; and ordinances from other localities requiring that crowds blocking abortion clinic entrances disperse when ordered to do so.<sup>184</sup> Although the Court declined to give "approval" to such alternatives,<sup>185</sup> it relied on their existence to form the conclusion that the particular approach taken by Massachusetts did not need to be as broad as it was.<sup>186</sup>

This very practical and comparative approach lends support to an argument for invalidating the strictest of the open meetings laws. Fewer than 10 States have open meetings acts which apply to as few as two or more legislators communicating,<sup>187</sup> and only five have three

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180. *Id.* at 2540 (emphasis added).

181. *Id.*

182. *Id.*

183. *Id.* at 2537. Five local governments around the nation did have such buffer zones, however. *Id.* at n.6.

184. *Id.* at 2524, 2538 (citing 18 U.S.C. § 248; N.Y.C. ADMIN. CODE § 8-803(a)(3)(2014)). See CAL. PENAL CODE § 423 (2014); D.C. CODE § 22-1314.02 (2014); KAN. STAT. ANN. § 21-5808 (2014); N.C. GEN. STAT. § 14-277.4 (2014); MD. CODE ANN. CRIM. LAW § 10-204(c) (2014); MICH. COMP. LAWS ANN. § 333.20198 (2014); MINN. STAT. § 609.7495 (2014); NEV. REV. STAT. § 449.760 (2013); N.Y. PENAL LAW §§ 240.70–71 (2014); N.Y. CIVIL RIGHTS LAW § 79-m (2014); OR. REV. STAT. § 164.365(1)(E) (2014); WASH. REV. CODE § 9A.50.020 (2014).

185. *Id.* at 2538 n.8.

186. *Id.* at 2537–39.

187. See Mulroy, *supra* note 5, at 319–20 and sources cited therein (regarding minimum number of legislators communicating to constitute a "meeting"). See also *id.* at 323, 371–76 & App. (regarding topics excepted from the statute's reach).

or fewer categories of speech exempted.<sup>188</sup> In these states, it may be difficult for a state to provide concrete factual evidence that laws that strict are required to address adequately the good government concerns over transparency, public knowledge, avoidance of corruption, and accountability which are commonly invoked to justify such laws.<sup>189</sup> The normal approach of restricting speech only when a quorum of a body is involved in the communication<sup>190</sup> (or at least a majority of a quorum) would restrict “substantially less” speech. It would be the government’s burden to show that such less-restrictive approaches were inadequate to the task of serving these good government goals. If they could not do so—and there is much reason to doubt they could—then the open meetings act would fail constitutional muster.

The “quorum rule” seems an adequate response to the desire for transparency, accountability, and related goals. Ordinarily, any private communication among legislators would not be the last word on the debate and decision on an item. It still would be necessary for public deliberations and debate to take place, which would illuminate for the public the issues, the background facts, the competing arguments, and how each member voted. Such deliberation and debate would take place before a final decision was reached (formally or informally). Typically, this would take place on more than one occasion: once in committee, for example, plus once for final adoption. If the item were an ordinance, it might take multiple readings, each one of which would be at a publicly noticed meeting, with debate, discussion, and opportunity for citizen questions and input. Ordinarily, this would keep the public adequately informed, allow voters to hold legislators accountable, and allow monitoring by the public or self-appointed watchdogs in the media, the blogosphere, or among local activists, to guard against corruption. It would also

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188. See Mulroy, *supra* note 5, at 323, 371–76 & App. (regarding topics excepted from the statute’s reach). The 5 states with 3 or fewer categories of speech are Arkansas (3), Montana (3), Nevada (2), North Dakota (3) and Tennessee (1). *Id.*

189. See, e.g., *Asgeirsson v. Abbott*, 696 F.3d 454, 461 (5th Cir. 2012) (listing public transparency, avoiding corruption, and public confidence as government interests supporting the Texas Open Meetings Act). For a fuller discussion of sunshine laws’ furtherance of similar governmental interests advanced to support campaign finance disclosure requirements, see *infra* Part IV.C.

190. For purposes of this analysis, one would also include communications involving a so-called “walking quorum,” where smaller groups of legislators confer with each other *in seriatim*, passing information along, until the total number of legislators involved in the communication equals a quorum of the body. See Mulroy, *supra* note 5, at 320–21.

allow the public ample opportunity to provide input, including public input, prior to the final decision.

However, if a quorum met in secret, decided everything, and then rubber-stamped the prior decision in a choreographed sham public meeting, those public checks and balances would be sidetracked. Since a quorum is sufficient to take final action, if a quorum meets privately and comes to a consensus, the decision is effectively made. All else that happens afterward is post-decision ritual. Thus, the public loses opportunity for meaningful pre-decisional input.

For this reason, open meetings laws which apply only to communications among a quorum of the body seem justifiable.<sup>191</sup> By the same token, it also seems justified to have laws which forbid relayed, indirect communications among a so-called “walking quorum,” where several smaller groups confer among themselves, then have members of each group compare notes, effectively spreading communication among a total number of legislators which exceeds the minimum for a quorum.<sup>192</sup> Laws that require a majority of a quorum seem a closer case.

It is harder to demonstrate that similar public knowledge or accountability rationales require that the public have access to every substantive conversation between any two legislators at any stage of the legislative process, no matter how preliminary. Similarly, it is harder to demonstrate that such good government interests require that every sensitive personnel matter, negotiation, disciplinary proceeding, consultation with counsel, and discussion of trade secret must be held in public, with no exceptions for subject matters for

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191. See Mulroy, *supra* note 5, at 339–44 (making this point). But in March 2013, the State Senate President of Kansas defended a closed-door meeting among the Republican Caucus, which made up a majority of the body and thus a quorum. Tim Carpenter, *Senate GOP Leadership Defends Closed-Door Meeting*, TOPEKA CAP. J. (Mar. 13, 2013, 3:13PM), <http://cjonline.com/news/state/2013-03-13/senate-gop-leadership-defends-closed-door-meeting>. The Senate President said such an off-site, private deliberation was useful to “vent,” “argue,” and “solve differences” of opinion on tax issues, which she called “a healthy process.” *Id.*

192. Consider a county commission for which seven members constitutes a quorum. Two different groups of three commissioners each meet to confer. A seventh commissioner calls up one participant of each subgroup of three to compare notes, and to request that his position be relayed back to each of the two different trios. At this point, communication has been relayed indirectly among a quorum of the body. Provisions barring such indirect communications among a quorum are common in state open meetings acts. See, e.g., KAN. STAT. ANN. § 75-4318(f) (West 2009).

which discretion may serve the public interest.

Of course, required disclosure of communications, even among only two legislators, might be justified if we recognize a significant interest on the part of the public in knowing communications involved in every step of the legislative process, and thus, every conversation among any two legislators that could lead to final action by the legislative body as a whole. If this really is an important governmental interest, then the only way to satisfy it is by having the strictest of open meetings laws.

However, there is no recognized federal constitutional right of access to legislative proceedings,<sup>193</sup> nor do many state constitutions provide for such a right.<sup>194</sup> This is not surprising, since both Congress and most state legislators occasionally have closed-door sessions of certain caucuses.<sup>195</sup> For example, the U.S. Senate's sessions to consider nominations and treaties were closed to the public until 1929.<sup>196</sup> More recently, on March 13, 2008, the United States House of Representatives met in secret to discuss the Foreign Intelligence Surveillance Act and electronic surveillance.<sup>197</sup> The

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193. 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); see also U.S. CONST. art. I § 5 (explicitly authorizing Congress to keep part of its journals secret); STANDING S. RULES XXI, XXIX, & XVII, available at <http://www.rules.senate.gov/public/index.cfm?p=RulesOfSenateHome> (providing for secret Senate sessions for nominations and treaties); H.R. RULES, XVII, available at <http://clerk.house.gov/legislative/house-rules.pdf> (governing secret sessions).

194. SCHWING, *supra* note 5, at 22–23.

195. Richie Davis, *Legislators Raise Questions about State Officials Participating in Closed-Door Meetings on Natural Gas Pipeline Development*, DAILY HAMPSHIRE GAZETTE (June 28, 2014), <http://www.gazettenet.com/home/12560180-95/legislators-raise-questions-about-state-officials-participating-in-closed-door-meetings-on-natural-g> (reporting that New England state administrators met in private sessions with energy business leaders to discuss natural gas pipeline development); Kent Flanagan, *Budgeting Behind Closed-Doors: Secrecy in the Tennessee Legislature*, ST. INTEGRITY INVESTIGATION, (last updated May 3, 2012) [http://www.stateintegrity.org/tennessee\\_legislature\\_budget\\_secrecy\\_coalition\\_open\\_government](http://www.stateintegrity.org/tennessee_legislature_budget_secrecy_coalition_open_government) (discussing the Tennessee's state legislature meeting in private to discuss amendments to the governor's state budget proposal).

196. MILDRED AMER, CONGRESSIONAL RESEARCH SERV. REP. NO. 20145, SECRET SESSIONS OF CONGRESS: A BRIEF HISTORICAL OVERVIEW 4–5 (Mar. 27, 2008), <http://fas.org/sfp/crs/secrecy/RS20145.pdf>.

197. Eric Lichtblau, *House Rejects Eavesdropping Immunity*, N.Y. TIMES (Mar. 14, 2008), <http://www.nytimes.com/2008/03/14/washington/14cnd-fisa.html?hp&module=Sea>

secret nature of the meeting was not much remarked at the time, with the focus turning on the substance of the then-brewing policy debate.<sup>198</sup> Moreover, throughout the spring of 1999, the United States Senate met in secret on a number of occasions to discuss the impeachment trial of President Clinton.<sup>199</sup> Again, there was little controversy regarding the secret nature of the proceedings.

If anything, the Court has recognized the opposite right of government decision-makers to deliberate in private. It has acknowledged the commonsense reality 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*,<sup>200</sup> the Court recognized that “Human 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.”<sup>201</sup>

The Supreme Court has separately recognized a non-constitutional executive privilege protecting federal government entities from disclosing documents reflecting internal deliberative processes.<sup>202</sup> The Court acknowledged the existence of such a privilege in the context of civil discovery in litigation against the federal government and also embedded in a statutory exemption for “inter-agency or intra-agency memoranda” under the federal Freedom of Information Act.<sup>203</sup> Indeed, the Court noted legislative history from that Act which explicitly feared that intra-agency “frank discussion . . . might be inhibited if the discussions were made public,” and that the decisions thus made “would be poorer as a result.”<sup>204</sup>

The dynamic is no different for local legislators. Realism requires that we recognize that to make their deliberations candid and effective, they must have some breathing room, a minimal ability to confer with each other one-on-one and in private. By denying this

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198. *Id.*

199. AMER, *supra* note 196, at 2–3.

200. 418 U.S. 683 (1974).

201. *Id.* at 705.

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

203. *Id.*

204. *Id.*

breathing space, strict open meetings laws impose more speech burden than warranted.

### 3. Ample Alternatives for Speech?

The Court in *McCullen* specifically reserved the question of another prong in the intermediate scrutiny test for content-neutral speech regulations—namely, whether the law allows “ample alternatives” for speech.<sup>205</sup> Serious concerns arise as to whether the “alternative channels” in state’s open meetings laws are actually “ample.”

For a covered government official who wishes to consult with certain colleagues on a government matter prior to the formal meeting at which the final vote will be taken, there are limited “alternative channels” available that would not violate that state’s open meetings law. In many states, the legislator cannot call, email or visit her colleagues, singly or collectively, outside of a publicly noticed meeting. She could not circulate a “Dear Colleague” letter outside of a publicly noticed meeting, even if she circulated such a letter to the media.<sup>206</sup> In such states, the official’s only option may be to consult in a publicly noticed “pre-meeting meeting,” which seems impractical due to time constraints and colleagues’ availability.<sup>207</sup>

And if the matter to be discussed arises only a few days before the relevant meeting, there will be no time to provide the required notice, leaving no alternative channel whatsoever.<sup>208</sup> As discussed above,<sup>209</sup> a legislator who decides she needs to consult with a colleague within the last 48 hours before the relevant formal meeting has no legal means whatsoever to do so. In such a case, there is no alternative at all, let alone an “ample” one.

At any rate, even where there is time to hold a publicly noticed “pre-meeting meeting,” that will not afford the local legislator any opportunity to consult with a colleague in private, even if it is a

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205. *McCullen v. Coakely*, 134 S. Ct. 2518, 2528 (2014).

206. Of course, the local legislator would still be free to communicate to the public generally through the media, in the hopes that other legislators would see or hear the media report. There are no cases finding a violation of the sunshine law in such circumstances. But there is no guarantee that the other legislators will see or hear the media report in question. At any rate, such indirect communication through the media is hardly conducive to a constructive dialogue.

207. *See* Mulroy, *supra* note 5, at 342–43.

208. *Id.*

209. *See infra* Part IV.B.

sensitive matter involving the privacy of a citizen or a sensitive financial negotiation, or if the legislator wishes to privately explore a potential compromise on a volatile issue. Again, such a conscientious legislator is left with no alternative whatsoever.<sup>210</sup>

For these reasons, the “alternative channels” available under most open meeting laws do not provide public officials a practical manner to convey their views or seek the views of their colleagues.

#### IV. THE ANALOGY TO CAMPAIGN FINANCE DISCLOSURE LAWS

In *Asgeirsson*, the Fifth Circuit panel reasoned that open meetings laws were simply another species of disclosure laws.<sup>211</sup> Such laws did not actually prevent a local legislator from speaking her mind, but simply required that she provide adequate notice to the public beforehand, so that the public might attend.<sup>212</sup> The Fifth Circuit cited *Citizens United* and related cases upholding campaign finance disclosure requirements against First Amendment challenge and ruled similarly with respect to the Texas Open Meetings Act.<sup>213</sup>

This is the most persuasive argument yet raised by defenders of strict open meetings laws. If the analogy to campaign finance disclosure requirements is apt, it might mean that even the strictest of sunshine acts are constitutional. However, there is some reason to question the fit of this analogy.

##### A. *Disclosure Requirements: Background*

In the realm of campaign finance regulation, disclosure is treated differently from an actual prohibition on speech. Laws that “burden political speech” are subject to strict scrutiny, while disclosure requirements yield only intermediate scrutiny.<sup>214</sup> Disclosure requirements receive lesser scrutiny because, unlike campaign finance restrictions on campaign contributions and spending, they “impose no

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210. Further insight into the lack of ample alternative channels can be obtained from Part III.C.1, *supra* (discussing the burden on speech generally) and Part IV.B, *infra* (distinguishing campaign finance disclosure laws on the grounds that sunshine laws actually *prevent* some speech from taking place during the notice period).

211. *Asgeirsson v. Abbot*, 696 F.3d 454, 463 (5th Cir. 2012).

212. *Id.*

213. *Id.*

214. *Citizens United v. FEC*, 558 U.S. 310, 340 (2010); *John Doe No. 1 v. Reed*, 561 U.S. 186, 188 (2010); *see also* *Iowa Right To Life Comm., Inc. v. Tooker*, 717 F.3d 576, 589–90 (8th Cir. 2013) (relying on *Citizens United* for such separate standards).



ceiling on campaign-related activities” and “do not prevent anyone from speaking.”<sup>215</sup>

Nonetheless, compelled disclosure requirements still impose “significant encroachments on First Amendment rights.”<sup>216</sup> Citizens may have any number of legitimate reasons for speaking anonymously, from fear of retaliation,<sup>217</sup> or from concern that the identity of the speaker may overshadow the message,<sup>218</sup> or for other reasons. So, while governments are given more latitude to require disclosure than to ban speech outright, the Court has also recognized a constitutional right to speak anonymously.<sup>219</sup> Even disclosure requirements must be held to a heightened form of scrutiny similar to intermediate scrutiny: the government must prove that they have a “substantial relation” to a “sufficiently important” governmental interest.<sup>220</sup>

Recognizing these limitations, the Court has invalidated some disclosure requirements in the non-campaign finance context. In *McIntyre v. Ohio Elections Commission*, for example, the Court struck down a statute banning the distribution of anonymous campaign literature.<sup>221</sup> The statute in that case banned distribution of anonymous literature only when it contained speech designed to influence the voters in an election.<sup>222</sup> Since the application of the law depended on the substantive content of the speech, the Court considered the statute content-based and applied strict scrutiny.<sup>223</sup> Despite the fact that the provision did not directly ban speech *per se*, but merely required disclosure of certain information related to a

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215. *Citizens United*, 558 U.S. at 366–67 (quoting *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) and *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 201 (2003)) (internal quotation marks and brackets omitted).

216. *Buckley*, 424 U.S. at 64.

217. See *Citizens United*, 558 U.S. at 369–70.

218. See Benjamin Barr & Stephen R. Klein, *Publius was not a PAC: Reconciling Anonymous Political Speech, the First Amendment, and Campaign Finance Reform*, 14 WYO. L. REV. 253, 256–58 (2014) (discussing similar concerns by the anonymous authors of the Federalist Papers).

219. *Watchtower Bible and Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 166–70 (2002) (holding the Village’s ordinance which required that individuals wishing to engage in door-to-door advocacy must first register with the mayor and receive a permit, violated the First Amendment as it applies to anonymous political speech).

220. *Citizens United*, 558 U.S. at 366–67.

221. 514 U.S. 334, 357 (1995).

222. *Id.*

223. *Id.*

particular kind of speech, the Court nonetheless invalidated the provision.

Indeed, some have criticized even campaign finance disclosure requirements as being violative of this right to anonymous speech.<sup>224</sup> And the Supreme Court has acknowledged an exception to the general rule allowing campaign finance disclosure requirements where the challenger can show that compelled disclosure would subject them to threats, harassment, or reprisals from either state or private actors.<sup>225</sup>

### *B. Distinguishing Open Meetings Laws and Disclosure Requirements*

Initially, open meetings act requirements differ from campaign finance disclosure requirements in one fundamental way. As noted above,<sup>226</sup> the Supreme Court emphasized that campaign finance disclosure requirements are less constitutionally vulnerable because they do not directly burden speech. But by requiring that public meetings be held with advance notice, open meetings act requirements do burden speech, at least when the speakers wish to confer within the notice period.

The campaign finance disclosure requirements involve disclosure of expenditures and contributions either after-the-fact, or in the case of the closely related case of disclaimers required on political advertisements, contemporaneous with the communication. Open meetings laws require the disclosure to take place at a set time ahead of the communication. This is a significant difference because, in many instances, it means the sunshine act actually *prevents* speech entirely and does not just require disclosure of the speech.<sup>227</sup>

Typically, at least 48 hours' notice is required.<sup>228</sup> Thus, if a city council member decides on Monday that she'd like to consult with a colleague about a potential compromise in preparation for a

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224. See, e.g., *Citizens United*, 558 U.S. at 480 (Thomas, J., dissenting); Barr & Klein, *supra* note 218.

225. *Citizens United*, 558 U.S. at 370; *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 198 (2003); *Buckley v. Valeo*, 424 U.S. 1, 74 (1976).

226. See *supra* Part IV.A.

227. Indeed, it is a basic principle of First Amendment jurisprudence that *prior restraints* of speech are particularly constitutionally suspect. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 558–59 (1978). Thus, the distinction between requiring disclosure in advance, versus requiring disclosure contemporaneously or after-the-fact, is not a trivial one.

228. See, e.g., 5 ILL. COMP. STAT. 120/2.02 (2013); IND. CODE § 5-14-1.5-5 (2012); N.J. STAT. ANN. § 10:4–8 (West 2013); N.C. GEN. STAT. § 143-318.12 (2013); R.I. GEN. LAWS § 42-46-6 (2013); TEX. GOV'T CODE ANN. § 551.043 (West 2013) (requires 72 hours' notice).

Wednesday City Council meeting, she would be unable to do so, even if she invited media representatives, because such a communication would not have been properly “sunshined.” In such an instance, speech really is *prevented*.

And this scenario is not farfetched. Just as cases often settle on the courthouse steps the morning of the trial, plans to avert legislative deadlock via compromise often coalesce at the eleventh hour. It is not at all unusual for state and federal legislators not covered by sunshine laws to huddle in the back room just before the legislative session begins, hastily hammering out a resolution in time for that morning’s vote. Local legislators are no less prone to this last-minute dynamic, but cannot take full advantage of it because of the hamstringing of open meetings laws. Or more accurately, they take full advantage of it, forced into being scofflaws by the obvious impracticality of sunshine laws.

Even apart from situations where the notice requirement interferes with speech, open meetings requirements may differ from campaign finance disclosure rules in salient ways. In fact, the Court in *McIntyre* directly distinguished campaign finance regulation cases which were the predecessors to *Citizens United*. The majority acknowledged that campaign contribution disclosure requirements had been upheld in *First National Bank of Bellotti*<sup>229</sup> and *Buckley v. Valeo*,<sup>230</sup> but distinguished those results on the ground that “[r]equired disclosures about the level of financial support a candidate has received . . . are supported by an interest in avoiding the appearance of corruption that has no application to this case.”<sup>231</sup>

Going further, the *McIntyre* majority acknowledged that the Court also had upheld “independent expenditure” disclosure requirements by non-candidates. Here, it made a more basic distinction between disclosure of the contents of what an identified individual communicates, which is too intrusive, and disclosure of monetary expenditures, which is not. Disclosure of the identity of a speaker reveals “the content of her thoughts on a controversial issue”; disclosure of an expenditure reveals far less information. Such disclosure is “less specific, less personal, and less provocative.”<sup>232</sup>

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229. 435 U.S. 765 (1978).

230. 424 U.S. 1 (1976) (per curiam).

231. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 354 (1995).

232. *Id.* The *McIntyre* Court also went on to say that campaign expenditure disclosures were also less likely to provoke retaliation than the distribution of anonymous literature

The *McIntyre* Court also went on to say that campaign expenditure disclosures also were less likely to provoke retaliation than the distribution of anonymous literature improperly banned in that case.<sup>233</sup>

The same is true of open meetings laws, which also go beyond the forced disclosure of mere monetary expenditures to the actual content of a covered legislator's speech. The disclosures involved are certainly more "specific," "personal," and "provocative" than those involved in campaign finance regulations.<sup>234</sup> And while a local legislator may have less to fear regarding retaliation than a private citizen, the potential for improper retaliation is certainly greater than with regard to campaign finance disclosures.<sup>235</sup>

Lower federal courts have made similar distinctions. Upholding a campaign finance disclosure requirement applied to a nonprofit advocacy group that produced political advertising in a congressional campaign, the Eleventh Circuit distinguished *McIntyre* based on the

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improperly banned in that case.

233. *Id.*

234. Of course, we have less concern for the privacy of a legislator's thoughts; the legislator has thrust herself into public life and must represent the public. But an individual citizen distributing anonymous political literature has also thrust himself into public discussion. And the legislator will eventually be found to reveal her thoughts on the issue, in committee and at the time of the final vote. There is at least some value in giving that legislator some breathing room at an initial stage. At any rate, this analysis shows at a minimum that open meetings laws are more like the law in *McIntyre* than the disclosure law in, say, *Citizens United*.

235. To take just one example, in the spring of 2014, conservative bloggers reported on the action of one gun rights activist who published a list of the home addresses of Connecticut legislators supporting a gun registration law; the conservative bloggers, sympathetic to the activist's point of view, called this act "retaliation." See, e.g., *Retaliation: Home Addresses of CT Legislators Who Voted in Favor of Gun Registration Posted by Patriot Activist*, reprinted in <http://freedomoutpost.com/2014/02/retaliation-home-addresses-ct-legislators-voted-favor-gun-registration-posted-patriot-activist/>; <http://thelastgreatstand.com/lgs/2014/03/11/retaliati-on-home-addresses-of-ct-legislators-who-voted-in-favor-of-gun-registration-posted-by-patriot-activist/>; <http://beforeitsnews.com/alternative/2014/02/retaliation-home-addresses-of-ct-legislators-who-voted-in-favor-of-gun-registration-posted-by-patriot-activist-2908742.html>; <http://forum.opencarry.org/forums/showthread.php?120585-Retaliation-against-CT-Legislators-who-voted-in-favor-of-gun-registration>. One online commenter said "I hope this doesn't result in bloodshed, but I'm afraid it's coming. Somebody will likely take Thomas Jefferson's famous 'Tree of Liberty' quote literally." See *Thread: Retaliation against CT Legislators who voted in favor of gun registration*, OPENCARRY.ORG, <http://forum.opencarry.org/forums/showthread.php?120585-Retaliation-against-CT-Legislators-who-voted-in-favor-of-gun-registration> (last updated Feb. 28, 2014). The statement refers to Jefferson's famous quote that "The tree of liberty must be refreshed from time to time with the blood of tyrants."

governmental interests advanced.<sup>236</sup> In *McIntyre*, the governmental interest in requiring disclosure of the identity of the pamphleteer was “informing the electorate” by providing “additional information that may either buttress or undermine the argument in a document.”<sup>237</sup> This was considered an insufficiently important governmental interest. In contrast, requiring an independent group to disclose in campaign advertising whether its message was authorized by a candidate “protects the integrity of the electoral process by ensuring that the words of the independent group are not mistakenly understood as having come from the mouth of a candidate.”<sup>238</sup> Once again, this interest—this time, in clarifying the identity of the true speaker—is not implicated in open meetings laws.

Finally, the mere fact that an open meetings requirement does not directly burden speech does not make it the equivalent of constitutionally permissible disclosure requirements. The Supreme Court has distinguished campaign finance laws even where the regulation at issue did not directly suppress speech. In *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, the Court struck down a state campaign finance law provision which provided additional public matching funds to candidates receiving public financing, if the spending of their opponent, plus independent expenditures aligned with that opponent, together exceeded a certain threshold amount.<sup>239</sup> Even though the matching funds provision imposed no direct or indirect ban on speech, it was still invalid.

Notably, the Court sharply distinguished the kind of disclosure provisions approved in *Citizens United*. The State had argued that because it did not directly burden speech, the matching funds provision was more analogous to such disclosure requirements. The Court rejected this argument, finding the analogy “not even close.”<sup>240</sup> Thus, even if strict open meetings requirements did not directly burden speech (and they do), that would not necessarily save them from constitutional challenge as analogous to constitutionally acceptable disclosure requirements.

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236. Fed. Elec. Comm'n v. Pub. Citizen, 268 F.3d 1283, 1288 (11th Cir. 2001).

237. *Id.* (citing *McIntyre*, 514 U.S. at 348).

238. *Id.*

239. 131 S. Ct. 2806 (2011).

240. *Id.* at 2822.

*C. Governmental Interests Supporting Disclosure Requirements v. Sunshine Laws*

*Buckley* recognized three governmental interests that were important enough, and closely related enough, to justify compelled disclosure;<sup>241</sup> the Court has since reaffirmed these interests in later cases. First, disclosure provides the electorate with information about the sources of a candidate's campaign funds so as to aid it in evaluating a candidate's probable interests and priorities.<sup>242</sup> As applied to disclosure mandates on non-candidates, such as those who pay for political advertisements expressly supporting or opposing a candidate, they provide voters with information useful in evaluating not only the candidate, but also the message and the messenger.<sup>243</sup> The Court in *Citizens United* and progeny recently reaffirmed the validity of this governmental interest.<sup>244</sup> Second, disclosure requirements deter corruption and avoid the appearance of corruption by exposing large contributors and allowing voters to see if they are afforded any special favors.<sup>245</sup> In the post-*Citizens United* case of *McCutcheon v. Federal Election Commission*,<sup>246</sup> the Court reaffirmed this interest.<sup>247</sup> Third, as the Court had originally made clear in *Buckley*, compelled disclosure assists in detecting violations of contribution limits.<sup>248</sup>

If viewed narrowly as applying to financial transactions and individual electoral candidates, none of these three interests are supported by strict open meetings laws. Barring two or three legislators from conferring with one another in private does nothing to inform the public about campaign financing, or to deter violations of campaign contribution limits, as explained below,<sup>249</sup> nor does it help deter corruption, as corruption is narrowly defined in *Citizens United*.

But the interests could be viewed more generally in a way arguably related to open meetings acts. Thus, where the Court says

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241. *Buckley v. Valeo*, 424 U.S. 1, 66–68 (1996).

242. *Id.*

243. *Citizens United*, 558 U.S. at 368–69; *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1459–1460 (2014).

244. *Citizens United*, 558 U.S. at 366–68.

245. *Buckley*, 424 U.S. at 67.

246. 134 S. Ct. 1434 (2014).

247. *Id.* at 1459–60.

248. *Buckley*, 424 U.S. at 56.

249. *See infra* Part IV.C.2

that disclosure laws help citizens “make informed choices in the political marketplace,”<sup>250</sup> such language could be applied more generically to keeping citizens informed about the deliberations among local legislators. This might very well be a governmental interest deemed “sufficiently important.” Where *Buckley* discusses specifically assisting in discovering violations of contribution limits, such a rationale could apply more broadly to ensuring public confidence in government.

In *Asgeirsson*, the Fifth Circuit identified three governmental interests implicated with open meetings laws that also might support disclosure laws: (1) transparency, which is similar to *Buckley*'s “public information” rationale; (2) preventing corruption, present in both instances; and (3) avoiding mistrust in government, which can also be characterized as public confidence in government.<sup>251</sup> A related government goal which could be asserted to defend strict open meetings laws is that of (4) accountability. Each of these asserted governmental interests will be discussed in turn.

### 1. Transparency

The importance of the interest in transparency is lent support by case law recognizing the public's right to know information about the workings of its government. Many such Supreme Court cases involve the arguably distinct context of public access to criminal proceedings.<sup>252</sup> Lower courts have extended this right of access to the (still-distinct) context of civil court proceedings.<sup>253</sup> However, this

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250. *Citizens United*, 558 U.S. at 367 (quoting *McConnell*, 540 U.S. at 237).

251. *Asgeirsson v. Abbott*, 696 F.3d 454, 461 (2012). See also Nicholas Johnson, *Open Meetings And Closed Minds: Another Road To The Mountaintop*, 53 DRAKE L. REV. 11, 17–20 (2004).

252. See, e.g., *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980) (access to criminal trials); *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596 (1982) (criminal trials); *Press Enter. v. Super. Ct. (Press Enterprise I)*, 464 U.S. 501 (1984) (criminal jury selection); *Press Enter. II*, 478 U.S. 1 (1986) (criminal preliminary hearing); *In re Wash. Post Co.*, 807 F.2d 383 (4th Cir. 1986) (sentencing hearings).

253. See, e.g., *Publicker Indus. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984) (preliminary injunction hearing); *In re Continental 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); *Newman v. Graddick*, 696 F.2d 796 (11th Cir. 1983) (pre- and post-trial hearings); *Brown & Williamson Tobacco Corp. v. FTC*, 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); see also *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (stating that “though its original inception was in the realm of criminal proceedings, the right of access [to judicial proceedings]

right has not been extended to legislative proceedings, and the Court has suggested that such a right does not exist in various contexts involving non-judicial proceedings.<sup>254</sup>

Nonetheless, as a general matter, openness in government can be considered to be a good thing. A court could understandably view public access as a legitimate, perhaps even an important, governmental interest. And open meetings laws certainly further that interest.

## 2. Corruption

While certainly relevant to disclosure laws, the “corruption” interest is particularly compelling regarding open meetings laws. Certainly, a corrupt bargain of some kind could conceivably be made during a private conversation between two legislators, and compelled disclosure might theoretically prevent such corruption. But the only kind of corruption currently recognized by the Supreme Court to justify campaign finance regulation is *quid pro quo* corruption<sup>255</sup>— basically, old-fashioned, unadulterated bribery. Mere “access” or “influence” is not enough.<sup>256</sup>

The anti-corruption rationale was always to be construed parsimoniously. As far back as *Buckley*, the Court suggested that disclosure requirements applied to the expenditures of non-candidates and non-political committees would be overbroad unless narrowed to those political expenditures which paid for communications that expressly advocated the election or defeat of a candidate.<sup>257</sup> In

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has since been extended to civil proceedings because the contribution of publicity is just as important there,” for proposition that “the right of access belonging to the press and the general public also has a First Amendment basis”); *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).

254. See, e.g., *Minn. State Bd. v. Knight*, 465 U.S. 271, 284 (1984) (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) (Constitution does not require all public acts to be done in town meeting or assembly of the whole); see also *Flesh v. Bd. of Trs.*, 786 P.2d 4, 10 (Mont. 1990) (closure of grievance hearing on privacy grounds did not violate First Amendment). The greater allowance for private non-judicial proceedings is particularly interesting when one contrasts the strong tradition of secret deliberations by jurors and panels of judges with the strict legislative bans on private deliberations among local legislators.

255. *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1450–52 (2014); *Citizens United*, 558 U.S. at 345, 357–62.

256. *Citizens United*, 558 U.S. at 361–62.

257. *Buckley*, 424 U.S. at 79–80.



*Citizens United*, the Court reemphasized the limited nature of this governmental interest: preventing *quid pro quo* corruption only.<sup>258</sup>

This kind of corruption almost always involves communication between one legislator and someone from *outside* the legislative body. There is no particular reason to fear *quid pro quo* corruption in a conversation between two members of the same legislative body. To the extent sunshine laws are justified as targeting *quid pro quo* corruption, then they are clearly substantially overbroad.

The only type of arguable *quid pro quo* “corruption” involved here is old-fashioned, back-room deal-making: “I’ll vote for your bill if you vote for mine.” This kind of “logrolling” is common to all legislative action and can often be beneficial. Indeed, precisely these kinds of deals provide a crucial means of compromise to resolve legislative gridlock.<sup>259</sup> There are those who consider them salutary, even essential.<sup>260</sup> But regardless of whether they are salutary or harmful, preventing them is not the kind of “sufficiently important” governmental interest previously recognized by the Court as supporting forced disclosure requirements.

For the above reasons then, preventing corruption is not a governmental interest supporting strict open meetings laws.

### 3. Public Confidence in Government

Public confidence in government would certainly seem to be a governmental interest properly viewed as being important. Political scientists study public confidence and consider it an important attribute of a healthy democratic system.<sup>261</sup> And one can see at least a superficial argument that requiring all legislative deliberations to be public could bolster public confidence in government.

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258. *Citizens United*, 558 U.S. at 357–61.

259. See, e.g., Richard L. Hansen, *Vote Buying*, 88 CAL. L. REV. 1323, 1339–48 (2010) (discussing the pros, cons and legality of legislative logrolling in political deals); cf. F. Andrew Hessick & Jathan P. McLaughlin, *Judicial Logrolling*, 65 FLA. L. REV. 443 (2013).

260. See, e.g., Hansen, *supra* note 259, at 1339–48. That would include the author, who bases his conclusion on eight years of personal experience as a legislator.

261. Peri K. Blind, *Building Trust in Government in the Twenty-First Century: Review of Literature and Emerging Issues*, U.N. PUB. ADMIN. NETWORK 5 (June 26–29, 2007), <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan025062.pdf> (“The legitimacy and durability of democratic systems . . . depend in large part on the extent to which the electorate trusts the government to do what is right.”).

#### 4. Accountability

“Accountability” is an open-ended term that can include many aspects. At a minimum, it includes the extent to which the elected representatives are responsive to constituent concerns, and the extent to which citizens have access to mechanisms to hold elected officials responsible for misconduct, for acting contrary to the popular will, or for incompetence in office.<sup>262</sup>

Accountable government certainly seems like a governmental interest both legitimate and important. In its major federalism decisions, the Court has cited it as a crucial reason for having separate federal and state governmental spheres.<sup>263</sup> Political scientists cite it as a foundational interest in establishing any representative democracy,<sup>264</sup> and ensuring that all substantive deliberations among legislators are known to the public can certainly further this cause.

Thus, at least three distinct (though interrelated) important governmental interests might plausibly support strict open meetings laws under intermediate scrutiny: informing the public/transparency, public confidence, and government accountability. Each of these interests will be discussed in turn as we examine the “narrow tailoring” prong.

#### D. Narrow Tailoring

##### 1. Generally

Even when supporting these important governmental interests, disclosure requirements can run afoul of the requirement of narrow tailoring. Assuming that the intermediate scrutiny standard of *Asgeirsson* applies, disclosure requirements must be “substantially

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262. Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2078–80 (2005).

263. See *NFIB v. Sebelius*, 132 S. Ct. 2566, 2607–09 (2012) (invalidating federal statutory penalties for states which decline to expand Medicaid); *New York v. United States*, 505 U.S. 144, 175–78 (1992) (invalidating federal statutory penalties for states which decline to address problem of nuclear waste); *United States v. Lopez*, 514 U.S. 549, 561–67 (1995) (Kennedy, J., concurring) (invalidating federal statute banning possession of guns near schools).

264. Mala Htun & G. Bingham Powell, Jr., *Political Science, Electoral Rules, and Democratic Governance*, AM. POL. SCI. ASS'N 4 (Sept. 2013), <http://www.publicintegrity.org/2012/03/19/8423/grading-nation-how-accountable-your-state> (stating that the accountability of government and individual politicians are goals and priorities of democracies).

related” to the relevant governmental interests.<sup>265</sup>

The Supreme Court has demonstrated its sensitivity to this requirement in the context of disclosure rules. In *Buckley*, to avoid the disclosure requirement from being too broad, the Court used a narrowing construction of the statute’s disclosure requirement as applied to expenditures by non-candidates and non-political committees. To ensure that the disclosure mandate to such non-political actors was not “impermissibly broad,” the Court limited it to expenditures which “expressly advocate” the election or defeat of a “clearly identified candidate.”<sup>266</sup>

In the context of strict sunshine laws, the applicable inquiry is to compare the relevant governmental interests to the ban on communication among two or three local legislators, as well as to the recognition of almost no categorical exemptions as to subject matter. To keep the public well informed, to maintain public confidence, and to keep local government accountable, just how necessary is it that every substantive communication between two fellow legislators be open to the public with advance notice? How necessary is it to maintain this requirement, even where the matters discussed involve legitimate privacy concerns of third parties, or sensitive financial negotiations?

## 2. Informing the Public

It is hard to believe that the public could not be adequately well informed about its local legislature if an open meetings law covered only communications among a quorum of the body, the approach taken by a majority of the states.<sup>267</sup> Citizens in such states would still have access to public records, the public debates at formal meetings, and the contents of any communications which, separately or cumulatively, involved enough members to make a decision. They would also still be able to communicate with public officials directly and ask them about the officials’ positions on the issues and general activities. The media would still have access to all these sources of information and could relay relevant information to the public.

Empirical evidence on the subject suggests no significant

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265. See *supra* notes 48–50 and accompanying text (discussing *Asgeirsson*’s use of the intermediate scrutiny standard).

266. *Buckley*, 424 U.S. at 79–80.

267. See Mulroy, *supra* note 5, at 319–20 nn.49–55, and sources cited therein.

correlation between public knowledge of local government affairs in states that eschew the quorum requirement.

A study by the nonprofit Center for Public Integrity examined, among other things, the “transparency” of state governments based on both laws on the books and administrative practice affecting the ease of access of government information to the public.<sup>268</sup> It looked at such things as financial disclosure requirements, what information is made available online and in how digestible a format, etc.<sup>269</sup> This study also examined other factors related to distinct interests like government accountability and public corruption,<sup>270</sup> but the overall state rankings, nonetheless, shed at least some light on how states fare in the area of transparency. Viewed as a barometer of correlation between “transparency” and strict definitions of “meeting,” the results are mixed at best. Four of the eight “strict” sunshine states are ranked in the top half of states, and four of the eight are ranked in the bottom half.<sup>271</sup>

Such results are hardly surprising, given that even in quorum rule states, all local legislative decisions must occur after a public debate at a publicly noticed meeting. Decision-makers may be technically freer to discuss matters in private among a very few of their number in advance of such a meeting, but they are still expected to explain their vote at the public meeting, and the public gets to watch or listen to all of the debate at such a meeting. And the pre-meeting discussion, by law, cannot involve enough members to control the outcome at the public meeting. As long as the private communications have not violated the quorum rule by using a “walking quorum,” a real, valid, deliberative debate will be necessary on controversial topics to reach a majority consensus before the final vote. The public will see this vote and thus get accurate and adequate information about the decision-making process.<sup>272</sup>

Viewed with a pragmatic eye toward how local government

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268. See Caitlin Ginley, *Grading The Nation: How Accountable Is Your State?*, CTR. FOR PUB. INTEGRITY, <http://www.publicintegrity.org/2012/03/19/8423/grading-nation-how-accountable-your-state> (last updated May 19, 2014).

269. *Id.*

270. *Id.*

271. *Id.* Of the 8 states with strict definitions of “meeting” for open meeting purposes, see *supra* notes 35–37 and accompanying text, the transparency ranks were Tennessee (8th), Rhode Island (9th), Hawaii (13th), Florida (18th), Arkansas (28th), Colorado (33rd), New York (37th), and Virginia (47th).

272. See Mulroy, *supra* note 5, at 359.

actually works, and how the public actually monitors local government action, it seems that there is, at most, a small marginal benefit in public information from requiring all conversations among two or three legislators to be publicly noticed, as opposed to those directly or indirectly involving a quorum (or even a majority of a quorum). On the other hand, the burden on speech among local legislators and the resulting costs to effective local government are large indeed. There is thus a credible argument that such strict sunshine laws repress substantially more speech than is necessary to further the public knowledge goal and are thus not “substantially related” to that important governmental interest.

The same analysis applies when one considers the absence of any significant exemptions for discussion of sensitive topics found in some of the stricter sunshine laws. The federal Sunshine Act exempts many such categories of discussion, including not only trade secrets, but also personnel matters, law enforcement records, and information affecting the privacy of individual citizens.<sup>273</sup> State laws vary but many feature similar exemptions.<sup>274</sup>

There is no evidence suggesting that the public is materially less well informed about government matters in the federal government.<sup>275</sup> Nor is there evidence showing a public materially less well informed in states with a high number of such exemptions. This can be seen by comparing the six states with the greatest number of categorical exemptions from its sunshine act with the six states with the least number of such exemptions.<sup>276</sup> Using the Center for Public Integrity’s measure of (*inter alia*) transparency, we see 2 of the 6 most

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273. See 5 U.S.C. § 552b(c) (2006).

274. See Mulroy, *supra* note 5, at 322–24 (discussing examples of such exemptions), 367–71 & App. (providing table listing each category of exemption applicable to each state).

275. Indeed, there is arguably substantially more information available to the public about the workings of the federal government, in large part due to the generally greater interest in federal government matters. One exception may involve the lack of information known by the public about national security matters. But this is a special case where the Court has sanctioned secrecy (see *Gen. Dynamics Corp. v. United States*, 131 S. Ct. 1900, 1904 (2011) (“[P]rotecting our national security sometimes requires keeping information about our military, intelligence, and diplomatic efforts secret.”)) and where there is no analogous area covered by state or local governments.

276. The “lenient” states with the greatest number of categorical exemptions were Alabama, Oregon, Illinois, Mississippi, Maryland, and Virginia (in order of increasing number of exemptions). The “strict” states with the smallest number of such exemptions are Tennessee, Nevada, Montana, North Dakota, Arkansas, and Florida (also in order of increasing number of exemptions). See Mulroy, *supra* note 5, at App. (table listing exemptions by state). The number six was chosen simply because there was a tie for fifth place in each group.

lenient states in the top quartile of states, and an additional 2 (for a total of 4) of these 6 in the top half.<sup>277</sup> Examining the 6 strictest states, we see only 1 in the top quartile and only 2 in the top half.<sup>278</sup>

### 3. Public Confidence

The same conclusion holds with respect to the goal of securing public confidence in government. The marginal benefit in public confidence (if any) from denying all topical exemptions and applying sunshine requirements to conversations among two legislators is small and pales in comparison to the substantially greater burden on free speech.

Empirical evidence exists to at least suggest the first part of this latter claim regarding public confidence (no large benefit in public confidence from strict sunshine requirements), although arguable (but weak) evidence exists for the opposite conclusion. Take, for example, the Center for Public Integrity study noted above. In the states with a wide variety of categorical exemptions from sunshine requirements, 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.<sup>279</sup> Unless the exceptions are worded, applied, or interpreted so broadly as to swallow the rule, effective public access to meetings will be the norm in such states. The public will thus be able to check government

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277. See *Investigating Corruption Risk in Your State Government*, ST. INTEGRITY INVESTIGATION, [http://www.stateintegrity.org/your\\_state](http://www.stateintegrity.org/your_state) (last visited June 30, 2014) [hereinafter Center For Public Integrity study]. Of the 6 “lenient” states, Mississippi (6th) and Illinois (11th) were in the top quartile, and Oregon (14th) and Alabama (17th) were in the top half. *Id.* Maryland (40th) and Virginia (47th) trailed toward the bottom.

278. *Id.* Of the 6 strictest states, Tennessee (8th) and Florida (18th) were in the top quartile. Arkansas (28th), Montana (31st), Nevada (42nd), and North Dakota (43rd) trailed toward the bottom. I do not mean to suggest that strict open meetings laws *retard* transparency, but merely that there seems to be no evidence establishing any correlation between strictness and transparency at all.

Similarly, I do not suggest that any one of the studies discussed in this Section can prove the presence or absence of a correlation, or that the studies discussed in this Section are an exhaustive recitation of studies in the area, or even that the studies selected are necessarily the most empirically sound available. I use a sample of reputable studies examining a cross-section of relevant variables and a variety of methodologies in the hopes that, cumulatively, they can suggest the difficulty a state would have in proving the existence of a relationship. Under either strict or intermediate scrutiny, of course, it would be the *state's* burden to show the presence of a relationship, and not a challenger's burden to show its absence.

279. See Center for Public Integrity study, *supra* note 277.

abuse and assure itself of the legitimacy of the process.<sup>280</sup>

Another set of studies shows that public confidence in local government has remained steady between 1997 and 2011, while public confidence in state and federal government has sharply declined.<sup>281</sup> Perhaps this is due to the existence of open meetings laws restricting local government legislators to a greater degree than state and federal legislators. However, the public confidence expressed went beyond legislative to all functions of government.<sup>282</sup> And the study made no distinction between states with strict open meetings laws and those with less strict laws.<sup>283</sup>

A more relevant 2013 Gallup Poll study of public trust in state governments distinguished among these states, thus allowing a comparison of states having strict sunshine laws with more lenient states.<sup>284</sup> That study showed no difference in public confidence in states with strict open meetings laws, defined as states which applied sunshine requirements to communications among just two or three legislators.<sup>285</sup> Of those 8 states, 3 ranked as Average among U.S. states in public confidence, 3 Below Average, and 2 Above Average.<sup>286</sup> And, of the nine states, Rhode Island, ranked in the

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280. See Mulroy, *supra* note 5, at 359.

281. Earl Mathers, *Local Government's Success In Maintaining Public Trust*, INT'L CITY/CNTY. MGMT. PUBL'NS (Mar. 2012), <http://webapps.icma.org/pm/9402/public/pmplus2.cfm?title=Local%20Government%E2%80%99s%20Success%20in%20Maintaining%20Public%20Trust&subtitle=&author=Earl%20Mathers> (last visited June 30, 2014); *Trust in Government Nears Record Low, But Most Federal Agencies Are Viewed Favorably*, PEW RES. CTR. (October 18, 2013), <http://www.people-press.org/2013/10/18/trust-in-government-nears-record-low-but-most-federal-agencies-are-viewed-favorably> (discussing the decline in the public's trust of federal government). *State Governments Viewed Favorably as Federal Ratings Hit New Low*, PEW RES. CTR. (April 15, 2013), <http://www.people-press.org/2013/04/15/state-governments-viewed-favorably-as-federal-rating-hits-new-low/> (stating that the public continues to have a "favorable view" of state and local governments as the public views of the government continue to decline).

282. See Mathers, *supra* note 281.

283. *Id.*

284. Jeffrey Jones, *Illinois Residents Least Trusting Of Their State Government*, GALLUP POLL (Apr. 4, 2014), <http://www.gallup.com/poll/168251/illinois-residents-least-trusting-state-government.aspx#2> (last visited June 30, 2014). The study reported confidence levels by state, allowing the author to compare state-by-state results according to the relative strictness of a state's open meeting requirements.

285. These states are Arkansas, Colorado, Florida, Hawaii, New York, Rhode Island, Tennessee, and Virginia. See *supra* notes 35–37 and accompanying text.

286. Jones, *supra* note 284. The study ranked states according to the percentage of survey respondents who indicated that they had a "Great Deal" or "Fair Amount" of confidence in their state government. Arkansas and Hawaii ranked Above Average; Florida,

bottom 10% among states in this measure.<sup>287</sup> The only correlation with public confidence found by the study was one relating low public confidence with high state population.<sup>288</sup>

Nor does there seem to be more corruption in “sunshine-lenient” states, as opposed to “sunshine-strict” states. For example, a 2010 University of Illinois study of United States Justice Department data on public corruption convictions ranked states according to level of corruption.<sup>289</sup> Of the 8 states with open meetings acts forbidding conversations among two or three legislators, 4 were ranked in the top quartile for federal corruption convictions per capita, and a total of 5 were ranked in the top half for corruption convictions.<sup>290</sup>

Of course, the measure of federal corruption convictions per capita may be misleading. Perhaps states with higher conviction rates simply have better systems for detecting corruption or better cultures of reporting corruption. In other words, higher corruption convictions per capita might simply mean that the system is working. To check for this effect, the nonprofit Center for Public Integrity compiled a “State Integrity Index” using 330 “Integrity Indicators” across 14 categories of state government.<sup>291</sup> Although the study looked at factors directly related to public information as well as accountability, the study authors characterized the overall score as suggesting a “corruption risk” for that state’s government. Using this measure, of the 8 strict states, 1 was in the top quartile for integrity, and a total of 4 were in the top half for integrity.<sup>292</sup> This is a much better score for

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New York, and Rhode Island ranked Below Average; Colorado, Tennessee, and Virginia ranked Average.

287. *Id.*

288. *Id.* The study notes that states with larger populations “have larger economies and more citizens needing services, and often more diverse populations, so they may be more challenging to govern than smaller states.” *Id.*

289. See DICK SIMPSON ET AL., CHICAGO AND ILLINOIS, LEADING THE PACK IN CORRUPTION, ANTI-CORRUPTION REPORT NUMBER 5 (2012), [http://pols.uic.edu/docs/default-source/chicago\\_politics/anti-corruption\\_reports/leadingthepack.pdf?sfvrsn=2](http://pols.uic.edu/docs/default-source/chicago_politics/anti-corruption_reports/leadingthepack.pdf?sfvrsn=2).

290. *Id.* at Table 7. Tennessee (11th), New York (12th), Virginia (17th), and Florida (19th) were ranked in the top quartile. Hawaii (25th) just made it into the top half. Rhode Island (29th), Arkansas (31st) and Colorado (45th) were toward the bottom. *Id.*

291. See Ginley, *supra* note 268. The fourteen categories of state government were: public access to information; political financing; executive accountability; legislative accountability; judicial accountability; state budget processes; civil service management; procurement; internal auditing; lobbying disclosure; pension fund management; ethics enforcement; insurance commissions; and redistricting. *Id.*

292. *Id.* Of the 8 states with strict definitions of “meeting” for open meeting purposes, the ranks of “integrity,” where higher ranks were considered least at risk for corruption, were



the strict states (4 of 9) than the above study using federal conviction rates, but since almost as many of these states were in the bottom half as the top half, this does not seem like strong evidence for a link between strict definitions of “meeting” and lower corruption.

Again, the lack of strong empirical support for correlations here is not surprising. Public confidence in government will correlate largely with the rate of exposed corruption, public perceptions of government performance, the economic situation in the state at the time, and other general-level indicators of well-being.<sup>293</sup> These factors are far more important than whether it takes two members or a quorum of a legislative body to trigger access to pre-public-meeting discussions. As discussed above, there is no evidence to suggest a correlation between exposed corruption and strict sunshine laws. Nor is there any evidence correlating strict sunshine laws with public confidence generally.

#### 4. Accountability

A similarly weak-to-nonexistent correlation between strict sunshine laws and public accountability is suggested by the Center for Public Integrity study discussed above. Attempting to assess this by examining a broad array of factors, the Center for Public Integrity study looked at such things as lobbying disclosure requirements; government audit procedures; the redistricting process; the enforcement aggressiveness and enforcement powers of the state ethics agency; pension fund management; government procurement practices; and other factors.<sup>294</sup> Again, the “accountability” ranking showed no real correlation with broad definitions of “meeting” for

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Tennessee (8th), Rhode Island (9th), Hawaii (13th), Florida (18th), Arkansas (28th), Colorado (33rd), New York (37th), and Virginia (47th). *Id.*

293. See Jones, *supra* note 284 (discussing exposed public corruption, the economy, and other “economic, political, and historical factors all seemingly related” to public confidence). See generally, Tyler Schario & David Konisky, *Public Confidence in Government: Trust and Responsiveness*, UNIV. OF MO. INST. OF PUB. POL’Y (June 2008), <https://mospace.umsystem.edu/xmlui/bitstream/handle/10355/2545/PublicConfidenceGovernment.pdf?sequence=1> (showing that trust and confidence in the government may vary based upon which levels of government are responsible for certain economic, social, and political factors and that public confidence is the lowest for the highest levels of government). *Public Trust in Government: 1958-2013*, PEW RES. CTR. (October 18, 2013), <http://www.people-press.org/2013/10/18/trust-in-government-interactive/> (showing the rise and falls of public confidence after significant governmental events).

294. See Center for Public Integrity Study, *supra* note 277.

sunshine act purposes.<sup>295</sup> Nor did this ranking reflect significantly better on the six states with the fewest number of categorical exemptions from open meetings requirements, or worse on the six states with the greatest number of such exemptions.<sup>296</sup>

In sum, there is little reason to suspect that moving from a typical open meetings law to one that regulates contact among two or three decision-makers, or from a sunshine law with a healthy number of topical exemptions to one that has none or very few, creates any significant marginal increase in government accountability, public confidence in government, or public knowledge about government. If that is the case, *quaere* whether such strict rules can be said to be “substantially related” to these governmental interests. If they are not substantially related, then one cannot draw upon disclosure case law to uphold the real burdens on speech occasioned by the strictest versions of open meetings laws.

#### V. CONCLUSION

Though less attention is focused on it than on state or federal government, local government has the greatest effect on the day-to-day lives of citizens. The free speech rights of local legislators are at least as important as those of ordinary citizens and can reasonably be seen as just as important as the free speech rights of state and federal legislators. In some cases, it is particularly important that the elected representatives of the people, who exercise a watchdog oversight authority over the potential excesses of the rest of local government, are free to speak and consult as they see fit. Hyper-strict open meetings laws create a significant speech burden interfering with this function.

Despite considerable doctrinal uncertainty on the question, the proper test of whether a law affecting speech is content-based is simply whether one needs to examine the content of a regulated

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295. *See id.* Of the 8 states with broad definitions of “meeting,” 4 were ranked in the top half and 4 ranked in the bottom half. *Id.* (Tennessee, Rhode Island, Hawaii, Florida, Arkansas, Colorado, New York, and Virginia). With 2 of the 8 states in the top quartile and 2 in the bottom quartile. *Id.*

296. *See id.* Of the 6 with the greatest number of exemptions, 4 (Alabama, Illinois, Mississippi, and Oregon) were in the top quartile, and 2 (Maryland and Virginia) were in the bottom quartile. *Id.* Of the 6 with the fewest exemptions, 1 (Tennessee) was in the top quartile and 2 (Tennessee and Florida) in the top half; 2 (Nevada and North Dakota) were in the bottom quartile, and 4 (Arkansas, Montana, Nevada, and North Dakota) in the bottom half. *Id.*

person's speech to determine whether the law applies. *McCullen*, the Supreme Court's latest pronouncement on the content-based/content-neutral distinction, reinforces this view.<sup>297</sup> Using this simple test, open meetings laws are content-based speech regulations triggering strict scrutiny. The strictest of these sunshine laws would fail strict scrutiny. Even if such strict open meetings laws were analyzed under intermediate scrutiny as content-neutral laws, they should be found to restrict substantially more speech than is necessary to further the important good governmental interests they serve and to provide insufficiently ample alternatives for speech.

Nor does recent case law regarding disclosure requirements fatally undermine this view. While open meetings laws do serve a disclosure-related function, there are key differences between campaign finance disclosure rules and strict sunshine laws. Governments more justifiably require disclosure of financial payments than the content of one's speech itself. They more justifiably require after-the-fact disclosure than before-the-fact disclosure. And in many cases (particularly those involving communication during the notice period), open meetings laws serve to actually directly burden speech, as opposed to merely requiring disclosure. Perhaps most important, there is little empirical evidence suggesting that the strictest provisions of strict open meetings laws are reasonably necessary to further the governmental interests recognized as supporting campaign finance disclosure laws. For this reason, courts or legislatures should scale back the overbreadth of the strictest of the open meetings laws.<sup>298</sup>

Even the most well-intentioned reform can overshoot. In their effort to bring "sunshine" to the local legislative process, some state legislatures have cast too dark a shadow on the free speech rights of legislators, and thus of the people they represent.

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297. See *supra* notes 140–52 and accompanying text.

298. For a model open meetings law addressing these concerns, see Mulroy, *supra* note 5, at 368–370.