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À PROPOS DE NOUS

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ABOUT US

The **International Journal of Open Governments / Revue Internationale des Gouvernements ouverts (RIGO)** is an academic journal created and edited by Irène Bouhadana and William Gilles at IMODEV, the Institut du monde et du développement pour la bonne gouvernance publique.

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SUNSHINE'S CHILL: OVERBROAD AMERICAN OPEN MEETINGS LAWS AND THE LIMITS OF DISCLOSURE.

by **Steven J. MULROY**, Prof. of Law, University of Memphis,
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Appropriately enough, symposia on “government transparency” often focus on access to government records, and at the national level. But access to meetings and communications among legislative members, especially local government legislators, has received less attention than it merits. In the United States, all substantive communications (formal or informal) concerning public business among a quorum of any local legislative body must be made in public during a publicly noticed meeting.¹ Unlike other countries (e.g., New Zealand),² this “sunshine” requirement applies even if no actual decisions are made.³ Curiously, while most U.S. states (A) apply this requirement only to meetings or communications among a quorum of a body⁴ (as in Canada),⁵ and/or (B) give the legislative body discretion to decide to meet in secret to discuss certain sensitive matters⁶ (as in Scandinavian and Eastern European countries),⁷ a sizable minority of U.S. states (A) apply this requirement to any substantive communication among 2 or 3 members, far short of a quorum,⁸ and (B) have few to no exemptions for discussions of sensitive topics.⁹

While “government in the sunshine” is a laudable goal, this is one area where open government has been taken too far. Just as with the American “executive privilege” doctrine afforded the executive branch,¹⁰ the need for candid discussion requires that legislative bodies have the option of occasionally deliberating in private. Further, barring private discussion among any 2 or 3 legislators hampers compromise, reduces efficiency, and transfers power from elected officials to unelected staff, lobbyists, and executive officials, who are not covered by such laws.¹¹ Recognizing the

¹ See *infra* Part I.A.

² See (New Zealand) Local Government Official Information and Meetings Act of 1987.

³ Steven J. Mulroy, *Sunlight's Glare: How Overbroad Open Government Laws Chill Free Speech And Hamper Effective Democracy*, 78 TENN. L. REV. 309, 318 (2011) (collecting state statutes and cases). Such open meetings laws are often called “sunshine laws,” because they purport to ensure that government takes place “in the sunshine.” *Id.* at 310.

⁴ *Id.* at 319-20.

⁵ See (Nova Scotia) Municipal Government Act, S.N.S. 1998, c. 18, s. 19.

⁶ Mulroy, *supra* note 4, at 322-23.

⁷ See, e.g., (Norway) Municipalities Act of September 25, 1992; (Hungary) Constitution Article 23.

⁸ Mulroy, *supra* note 4, at 319-20.

⁹ *Id.* at 322-23.

¹⁰ See *U.S. v. Nixon*, 418 U.S. 683, 708 (1974) (recognizing a President's executive privilege).

¹¹ See Mulroy, *supra* note 4, at 355-360 (making these arguments).

impracticability of such restrictions, local legislators routinely disregard them, breeding contempt for the law and converting lawmakers into casual lawbreakers.¹² In their strictest form, they may very well violate the Free Speech rights of local legislators.¹³ At the other extreme are Western countries which have little to no regulation of secret communications among provincial and municipal legislators. These laws generally apply just to formal meetings of the body, and do not reach beyond to informal communications among individual members. Even where a country's laws purport to guarantee public access to meetings, Western laws often give the legislative body the freedom to close a formal meeting for any reason it sees fit.¹⁴

I published a 2011 law review article criticizing overbroad U.S. state sunshine laws (ones which apply to less than a quorum of the body, or which admit of few to no exempt topics) both as bad policy and as a violation of the Free Speech rights of local legislators.¹⁵ A followup 2014 article discussed in detail several developing U.S. constitutional issues concerning these laws.¹⁶ That article discussed the significant threshold constitutional law question of whether such laws are "content based" restrictions on speech, which are presumptively unconstitutional and trigger the most exacting level of judicial scrutiny, or "content neutral" laws which receive a more lenient standard of constitutional review.¹⁷ This discussion revealed the surprising fact that both that specific question of which category "sunshine" laws fell into, and the more general question of how one makes this determination for *any* speech restriction, are unclear in current U.S. constitutional law.¹⁸ Indeed, the U.S. Supreme Court is set to hear a case later this term which may finally decide this issue.¹⁹

Setting the state for this upcoming Supreme Court case, this Article develops the analysis further by synthesizing the most recent Supreme Court case law and proposing a new template for how to classify speech restrictions as content neutral or content based. It applies that template to open meetings laws, concludes they are content based restrictions subject to "strict scrutiny,"²⁰ and argues that the strictest sunshine laws fail this constitutional test. Finding a need for some "breathing room" for private deliberations among legislators, the Article also argues generally for narrowing the

¹² *Id.* at 360-64.

¹³ *Id.* at 326-47; Steven Mulroy, *Sunshine's Chill: Overbroad Open Meetings Laws As Content-Based Speech Restrictions Distinct From Disclosure Requirements*, 51 WILLAMETTE L. REV. 135, __ (2014).

¹⁴ *See, e.g.*, Local Government Act, 1972, c. 70, §100A (Eng. and Wales) (stating that a local government body may exclude the public from viewing and reporting business that contains exempt information).

¹⁵ Mulroy, *supra* note 4, at 326-43, 355-66.

¹⁶ Mulroy, *supra* note 14, at ____.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *See* Brief For Petitioners, *Reed v. Town of Gilbert*, No. 13-502, 2014 WL 4631957 (Sept. 15, 2014), at 22-25.

²⁰ *See infra* Part III.

broader sunshine laws to apply only to communications among a quorum, and to grant a generous set of exemptions for discussion of sensitive topics. It uses Canadian law as a good example.

Across the ocean, it is a different picture. While laws vary widely, many Western democracies could use tougher open meetings laws. They should not apply just to formal public meetings but should also reach informal private communications among a quorum which have the purpose or effect of allowing decisions to effectively be made without the opportunity for public input. There should be flexibility to allow the legislative body to vote to close individual meetings, but that flexibility should be limited to defined topics with a demonstrated higher need for privacy.

§ 1 – BACKGROUND

A) UNITED STATES

All 50 U.S. states have “open meetings laws,” which require, at a minimum, that any physical meeting or communication among a quorum of a local legislative body must be done in public at a publicly noticed meeting.²¹ These laws apply even to informal communications, outside of regular session, even where no formal action is taken.²² A little more than half of those states apply that requirement to the state legislature, but the rest do not,²³ and no such right of public access exists with respect to the U.S. Congress.²⁴

B) Abroad

Most industrialized democracies have some form of open meetings laws.²⁵ Though there are exceptions, the majority of these laws specifically apply to local governments.²⁶ For the most part, these

²¹ Mulroy, *supra* note 4, at 315-320 (collecting sources).

²² *Id.* at 318 (listing state statutes).

²³ *Id.*

²⁴ See 5 U.S.C. §552b(a)–(b) (2012) (U.S. federal open meetings law applies to federal agencies only).

²⁵ See, e.g., (Canada) Ontario Municipal Act, S.M. 1996, c. 58, s. 152; (Finland) Local Government Act § 57; (Sweden) Local Government Act; (Norway) Municipalities Act of September 25, 1992; (United Kingdom) Local Authorities Meetings and Access to Information Act; (Romania) Law no. 52, January 21, 2003; (New Zealand) Official Informational and Meetings Act of 1987; (Denmark) Access to Public Information Act of 1985; (Cyprus) Constitution, Article 78; (Malta) Local Council Act of 1993; (Croatia) Act on the right of Access to Information; (Poland) Constitution Article 18, see also Article 61; (Hungary) Constitution Article 23; (Estonia) Local Government Organization Act; (Luxembourg) Constitution Article 61; (Netherlands) Constitution Article 66, see also Article 125; (Slovakia) Constitution Article 81; (Spain) Constitution Article 79-80.

²⁶ See, e.g., (British Columbia) Community Charter, S.B.C. 2003, c. 26, s. 89; (Alberta) Municipal Government Act, R.S.A. 2000 (Sweden) Local Government Act; (Norway) Municipalities Act of September 25, 1992; (United Kingdom) Local Authorities Meetings and Access to Information Act; (New Zealand) Official Informational and Meetings Act of 1987; (Finland) Local Government Act § 57; (Sweden) Local Government Act; (United Kingdom) Local Authorities Meetings and Access to Information Act; (Denmark) Access to Public Information Act of 1985; (Malta) Local Council Act of 1993; (Netherlands) Constitution Article 125.

laws seem to apply by their terms just to the formal meetings of the legislative body, and not to informal communications among legislators outside the legislative chambers.²⁷ Even where the law requires that meetings of public bodies generally be open, the law usually contains multiple exceptions allowing the body to decide to close the meeting.²⁸ This is often the case if the subject being discussed relates to personnel matters or other matters affecting individual privacy, labor or other negotiations, land acquisitions, litigation, or attorney-client matters.²⁹ The same may be true for matters affecting the security of the governing body or its facilities may also be fair game for a closed meeting.³⁰ However, in many countries, the legislative body may vote to close a meeting for any reason it happens to deem fit at the time.³¹

Canada's open meeting laws are the most analogous to the sunshine laws of the United States. Like the U.S., all of Canada's ten provinces and three territories have enacted their own open meetings legislation that generally requires meetings of local government "to be open to the public."³² Canadian ordinances apply just to formal meetings and do not apply informal gatherings and or communications among members.³³ Some jurisdictions require a quorum of the majority of the members of a body to constitute a meeting sufficient to trigger the open meeting rule.³⁴ Ontario, while statutorily silent on the issue, takes a broader approach, emphasizing the substance of the activity rather than the form it takes.³⁵ The Ombudsman of Ontario, the office charged

²⁷ See, e.g., (Canada) Northwest Territories Cities, Towns and Villages Act, RSNWT 1988; (Finland) Local Government Act § 57; (Sweden) Local Government Act; (Norway) Municipalities Act of September 25, 1992; (Cyprus) Constitution Article 78.

²⁸ See, e.g., (Canada) Ontario Municipal Act, S.M. 1996; (Norway) Municipalities Act of September 25, 1992; (United Kingdom) Local Authorities Meetings and Access to Information Act; (New Zealand) Official Information and Meetings Act of 1987; (Finland) Local Authorities Meetings and Access to Information Act; (Denmark) Access to Public Information Act of 1985; (Sweden) Local Government Act.

²⁹ See, e.g., (Ontario) Municipal Act, 2001, S.O. 2001, c. 25, s. 239; (Romania) Law No. 52, January 21, 2003; (Finland) Local Government Act § 57; (New Zealand) Official Information and Meetings Act of 1987; (Romania) Law no. 52, January 21, 2003.

³⁰ See, e.g., (United Kingdom) Local Authorities Meetings and Access to Information Act
³¹ See, e.g., (Norway) Municipalities Act of September 25, 1992; (Newfoundland & Labrador) Municipalities Act; (Cyprus) Constitution Article 78; (Hungary) Constitution Article 23.

³² See, e.g., (Ontario) Municipal Government Act, S.N.S. 1998, c. 18, s. 20; (Nova Scotia) Municipal Government Act, S.N.S. 1998, c. 18, s. 19; (British Columbia) Community Charter, S.B.C. 2003, c. 26, s. 89; (Alberta) Municipal Government Act, R.S.A. 2000, c. M-26, s. 197; (Saskatchewan) The Municipalities Act, S.S. 2005, c. M-36.1, s. 125; (New Brunswick) Municipalities Act; (Quebec) Charter of the Ville de Montreal and Quebec Cities and Towns Act; (Manitoba) Municipalities Act; (Prince Edward Island) Municipalities Act; (Newfoundland & Labrador) Municipalities Act; Yukon Municipal Act; (Northwest Territories) Cities, Towns and Villages Act.

³³ See, e.g., (Ontario) Municipal Government Act, S.N.S. 1998, c. 18, s. 20; (Nova Scotia) Municipal Government Act, S.N.S. 1998, c. 18, s. 19; (British Columbia) Community Charter, S.B.C. 2003, c. 26, s. 89; (Alberta) Municipal Government Act, R.S.A. 2000, c. M-26, s. 197; (Saskatchewan) The Municipalities Act, S.S. 2005, c. M-36.1, s. 125

³⁴ See, e.g., (Nova Scotia) Municipal Government Act, S.N.S. 1998, c. 18, s. 19

³⁵ (Ontario) Municipal Act, 2001, S.O. 2001, c. 25, s. 239 (Alberta) Municipal Government Act, R.S.A. 2000, c. M-26, s. 167; (Saskatchewan) The Municipalities Act, S.S. 2005, c. M-36.1, s. 125.

with investigating violations of the open meeting laws, considers a meeting members coming together “for the purpose of exercising the power or authority of the Council (or committee), or for the purpose of doing the groundwork necessary to exercise that power or authority.”³⁶ As such, “meetings” via electronic and telephonic communications are covered in most jurisdictions.³⁷ Although action is also generally not required to trigger the open meeting rule, the Ontario Court of Appeals has opined: “The key would appear to be whether the councilors are requested to (or do in fact attend without summons) attend a function at which matters which would ordinarily form the basis of council’s business are dealt with in such a way as to move them materially along the way in the overall spectrum of council decisions.”³⁸

Canadian jurisdictions differ significantly in regard to the exceptions permitted to the open meeting rule. The majority of jurisdictions, including Ontario, permit meetings to be held behind closed doors when the topics concern: security; personnel; privacy; labor negotiations; land negotiations; litigation/administrative proceedings; or fall under the attorney-client privilege.³⁹ However, some jurisdictions allow local governments more discretion than others. For example, Newfoundland allows council members to circumvent the open meeting rule completely by simply passing a motion.⁴⁰ In the Northwest Territories, meetings can only be held outside of the public purview after an analysis in the “consideration of the public interest.”⁴¹ Conversely, jurisdictions such as British Columbia [comma removed] explicitly define every permissible exception allowing governments no discretion when deciding to meeting behind closed doors.⁴² Finally, jurisdictions such as Alberta and Manitoba allow closed meetings to take place under certain exceptions, but no resolution or bylaw may be passed at the meeting, except a resolution to revert to a meeting held in public.⁴³ The United Kingdom has also passed laws that create more transparency in government. The U.K. passed these laws in order to increase the public and press’ access to governmental meetings and to allow the public and press to openly report on such meetings.⁴⁴ In general, all meetings by local governments and

³⁶ Ombudsman of Ontario, *Open Conflict: Investigation into whether the Town of South Bruce Peninsula Council improperly held closed meetings*, by André Marin at para 86 (July 7, 2010).

³⁷ See, e.g., (Saskatchewan) *The Municipalities Act*, S.S. 2005, c. M-36.1, s. 125; (Alberta) *Municipal Government Act*, R.S.A. 2000, c. M-26, s. 199

³⁸ *Southam Inc v Ottawa (City)* (1991), 5 OR (3d) 726, 1991 CarswellOnt 482 (Div Ct).

³⁹ See, e.g., (Nova Scotia) *Municipal Government Act*, S.N.S. 1998, c. 18, s. 19;

⁴⁰ (Newfoundland & Labrador) *Municipalities Act*, 1999, SNL 1999, c M-24, s 213(1).

⁴¹ (Northwest Territories) *Cities, Towns and Villages Act*, RSNWT 1988, c C-8, s 22(2)(a).

⁴² (British Columbia) *Community Charter*, SBC 2003, C 26, ss 90(1)-(2). These exceptions include security, employee relations, litigation, and legal privilege.

⁴³ *The Municipal Act*, S.M. 1996, c. 58, s. 152. ; *Municipal Government Act*, R.S.A. 2000, c. M-26, s. 197; See also (British Columbia) *Community Charter*, S.B.C. 2003, c. 26, s. 89.

⁴⁴ See *Open and accountable local government*, DEPARTMENT FOR COMMUNITIES AND LOCAL GOVERNMENT, <https://www.london.gov.uk/sites/default/files/Openness-in-Meetings.pdf> (last visited Feb. 13, 2015).

councils designated by statute⁴⁵ are open to the public.⁴⁶ This rule applies to all statutorily granted annual meetings,⁴⁷ other meetings in addition to the annual meeting,⁴⁸ and when an extraordinary meeting is called.⁴⁹ The local government bodies must also publish notice that a meeting is taking place and the proposed business to be transacted during the meeting.⁵⁰ No meeting may take place unless a quorum is present.⁵¹ Unlike in the U.S., there is no statutory provision expansively defining "meeting" to reach any communication or informal gathering among individual members of the legislative body.⁵²

Despite the general rule that meetings must be held open for the public, the U.K. laws do make some local government meetings private.⁵³ The public and press is excluded from all meetings of a principal council if the nature of the proceedings would disclose confidential information in breach of a confidential obligation.⁵⁴ A local government body may also exclude the public and press from a meeting if the body passes a resolution to exclude the public from a meeting because the nature of the proceedings would disclose exempt information to the public.⁵⁵ "Exempt information"

⁴⁵ The following is a list of local governments and councils required to hold public meetings: (1) district councils; (2) county council in England; (c) London borough councils; (4) the London Assembly; (5) a parish council; and (6) a parish meeting. *See* Local Audit and Accountability Act, 2014, c. 2, § 40 (Eng.).

⁴⁶ *See* Local Government Act, 1972, c. 70, § 100A (Eng. And Wales) ("A meeting of a principal council shall be open to the public except to the extent that they are excluded [by other sections].").

⁴⁷ *See, e.g., id.* at § 1, sch. 12 (principal councils); *id.* at § 7 (parish councils); *id.* at § 23 (community councils).

⁴⁸ *See id.* at § 2 (principal councils); *id.* at § 8 (parish councils); *id.* at § 24 (community councils).

⁴⁹ *See id.* at § 3 (principal councils); *id.* at § 9 (parish councils). An extraordinary meeting may be called at any time by the chairman of the council, or, if the chairman refuses to call the extraordinary meeting, then five members of the council may call such a meeting. *Id.* at § 3 (principal councils). For parish and community councils, only two counselors are required to call an extraordinary meeting if the chairman refuses to call one. *Id.* at §§ 9, 25.

⁵⁰ A principal council, parish council, and community council must give the public notice of a meeting three days before the meeting commences. *Id.* at § 4 (public council); *id.* at § 10 (parish councils); *id.* at § 26 (community councils).

⁵¹ Principal councils are required to have one-quarter of its whole members present in order to conduct a meeting. *See id.* at § 6. Parish councils and community councils are required to have at least one-third of the whole number of members present in order to hold the meeting. *See id.* at §§ 12, 28.

⁵² *See Your council's cabinet - going to its meetings, seeing how it works*, DEPARTMENT FOR COMMUNITIES AND LOCAL GOVERNMENT, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/207528/Your_councils_cabinet_-_going_to_its_meetings_seeing_how_it_works.pdf (last visited Feb. 18, 2015) (stating that the public meetings rule only applied to "when councillors meet as a decision making body to exercise their statutory . . . responsibilities").

⁵³ While the statute refers only to "principal councils" as being able to exclude the public from meetings, the Department for Communities and Local Government also states that parish and community councils may also hold private meetings. *See* DEPARTMENT FOR COMMUNITIES AND LOCAL GOVERNMENT, *supra* note 45.

⁵⁴ *See* Local Government Act, 1972, c. 70, at § 100A. "Confidential information" is defined as "(a) information furnished to the council by a Government department upon terms (however expressed) which forbid the disclosure of the information to the public; and (b) information the disclosure of which to the public is prohibited by or under any enactment or by the order of a court." *Id.*

⁵⁵ *See id.*

includes information relating to an individual, information which is likely to reveal the identity of an individual, information relating the financial or business affairs of any particular person, or information in respect of which a claim to a legal professional privilege could be maintained in legal proceedings.⁵⁶ If the meeting consists of both public and private matters, the public and press are still allowed to attend and report on those public business items.⁵⁷

C) The Quorum Rule

The state laws in the U.S. which apply to communications among only 2 or 3 legislators are overly strict. The proper trigger for coverage under a sunshine law is a communication among a quorum of the body.

This limitation on the reach of the “sunshine” requirement is crucial. Where open meetings laws ban discussion of public business among just two, or three, or other small groups of members far short of a quorum, they have a significant tendency to chill needed deliberation among policymakers, and to hamper attempts at compromise.⁵⁸ At the local level especially, many of these legislators are part-time public servants who do not see each other on a daily basis. Requiring substantive discussion to take place only in formal, publicly noticed meetings also reduces efficiency. It transfers power from elected officials to unelected staff and lobbyists. During the crucial lobbying occurring between formal sessions, the latter groups are free to speak to all legislators, assess the position of each, and have superior knowledge about which proposals, amendments, and compromises will yield majority support; meanwhile, the elected representatives are siloed, forced into ignorance about their colleagues’ positions, and at a serious tactical disadvantage. Perhaps even more important, such severe speech restrictions violate the free speech rights of the affected legislators.

The analysis changes when one considers secret communications among a quorum of a legislative body. A quorum of a body is the minimum number required to be able to take action.⁵⁹ For communications among less than a quorum on a business item, such communication cannot be the final word. There will still be further public debate and deliberation, with opportunities for public input, before a final decision is reached and the legislative body acts. But if the private communication takes place among a

⁵⁶ See Department for Communities and Local Government, *supra* note 45, at Annex B.

⁵⁷ See Local Government Act, 1972, c. 70, at § 100A (stating that a local government body may only exclude the public and press from viewing private business items).

⁵⁸ For a more extensive discussion of these public policy concerns about the strictest of American open meetings laws, and the related discussion contained in Section I.C of this article, see Steven J. Mulroy, *Sunlight's Glare: How Overbroad Open Government Laws Chill Free Speech And Hamper Effective Democracy*, 78 TENN. L. REV. 309, 360-366 (2011).

⁵⁹ See Henry Martyn Robert, *Robert's Rules Of Order* 20 (10th ed. 2000).

quorum, it is possible that the decision will be made in private, with any subsequent public meeting being a sham in which the quorum merely rubber-stamps the decision previously made in private. For this reason, at the quorum level, good government considerations of transparency, anti-corruption, and the need for public input take on greater weight, enough to overcome the above concerns about chilling discussion, hampering compromise, reducing efficiency, and transferring power to unelected staff and lobbyists. This is true not only as a public policy matter, but also as constitutional matter: limiting a sunshine law's strictures to communications among at least a quorum of a body does not restrict "substantially more speech" than is necessary.⁶⁰

By the same token, other countries could profit from toughening their open meetings laws. Giving the legislature the authority to vote to close legislative sessions is not inherently problematic, if the authority is cabined by defined topics which are judged appropriate for private deliberations—personnel matters, for example. But carte blanche authority may be taking this too far.

More important, the laws should not be limited just to formal legislative session. If a quorum of a body makes decisions informally outside the legislative chamber prior to the meeting, any subsequent public on-the-record discussion and opportunity for public could be a sham.

§ 2 – FREE SPEECH CONCERNS

A. Content Based v. Content Neutral

A threshold question in evaluating the constitutionality of these strict open meetings laws is whether they are best classified as "content based" or "content neutral" regulations of speech. This distinction is a basic one in U.S. constitutional law.

Content based laws—laws regulating speech based on the content of the speech in question—receive the most exacting standard of constitutional review, "strict scrutiny."⁶¹ Under this standard, the law must be "narrowly tailored" to further "a compelling governmental interest."⁶² To be "narrowly tailored," the speech restriction must ban no more speech than necessary to further the compelling governmental interest posited by the state; that is, it is the "least restrictive means" of furthering the interest.⁶³ A law is still content based even if it does not favor one side or another in a particular controversy, but rather restricted all discussion of a particular subject matter. Such a law would be considered

⁶⁰ See discussion *infra* Parts II.A (discussing the "narrow tailoring" requirement), II.C. (applying the "narrow tailoring" requirement to open meetings laws).

⁶¹ *Republican Party of Minn. v. White*, 536 U.S. 765, 774-775 (2002); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 640 (1994).

⁶² *White*, 536 U.S. at 774-775.

⁶³ *Brown v. Entm't Merch. Ass'n*, 131 S.Ct. 2729, 2738 (2011); *John Doe No. 1 v. Reed*, 561 U.S. 186, 232 (2010); *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2008).

“viewpoint neutral” but still content based.⁶⁴ Deciding that strict scrutiny applies can often (but not always) determine the outcome of a constitutional challenge: as Justice Thurgood Marshall memorably put it, one may wonder whether it is “strict in theory but fatal in fact.”⁶⁵

Content neutral speech laws are those regulating the “time, place, or manner” of speech rather than its content.⁶⁶ They receive a less exacting form of constitutional review, that of “intermediate scrutiny.”⁶⁷ Such laws must only meet an “important” rather than a “compelling” governmental interest; this governmental interest must be “unrelated to the suppression of free speech.”⁶⁸ Rather than being the least speech-restrictive means necessary to meet the stated governmental end, they must only avoid burdening “substantially more speech than necessary” to further that interest.⁶⁹ The Supreme Court has further specified that “ample alternative channels” for speech be open in order for a speech restriction to pass intermediate scrutiny.⁷⁰

Thus, a law banning criticism of the President is a content based, viewpoint-discriminatory restriction. A law barring any discussion of the President’s job performance, either pro or con, would be viewpoint-neutral but still content based. A law stating that public demonstrations in a public park must conclude before midnight, or must not be louder than 100 decibels, is content neutral. The first two would receive strict scrutiny review, while the latter merely intermediate review.

The only federal appellate court to have examined the question has concluded that open meetings laws are content neutral.⁷¹ In *Asgeirsson*, the Fifth Circuit held that a regulation “is not content based ... merely because the applicability...depends on the content of the speech.”⁷² Rather, the test for content neutrality is whether the government’s *rationale* for the regulation refers to the content

⁶⁴ *Boos v. Barry*, 485 U.S. 312, 391 (1988); *Consol. Edison Co. v. Pub. Serv. Comm’n*, 447 U.S. 530, 537 (1980).

⁶⁵ *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1995) (Marshall, J., concurring). The Court has subsequently hastened to caution that strict scrutiny is not always “fatal in fact.” *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 326-27 (2003).

⁶⁶ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

⁶⁷ *U.S. v. O’Brien*, 391 U.S. 367, 376-77 (1968).

⁶⁸ *Id.*

⁶⁹ *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)).

⁷⁰ *Burson v. Freeman*, 504 U.S. 191, 197 (1992); *Ward*, 491 U.S. at 791. This intermediate standard still entails a more searching examination of the law by the courts than the default constitutional standard of “rational basis,” which applies to most non-discriminatory laws which do not burden speech or another fundamental right. *Ursula v. Pocatello Educ. Ass’n*, 555 U.S. 353, 359-64 (2009). That standard merely requires that the governmental interest supposedly served by the law is a constitutionally permissible, “legitimate” interest, and that the provisions of the law are somehow reasonably related to that interest. *Armour v. City of Indianapolis*, 132 S.Ct. 2073, 2080 (2012); *Heller v. Doe*, 509 U.S. 312, 320 (1993).

⁷¹ *Asgeirsson v. Abbott*, 696 F.3d 454, 459-61 (5th Cir. 2012). Much of the ensuing background discussion of *Asgeirsson* and the content-neutral standard is taken from Mulroy, *supra* note 14, 51 WILLAMETTE L. REV. at ____.

⁷² *Asgeirsson*, 696 F.3d at 459-460.

of the speech.⁷³ The court relied on *Renton v. Playtime Theatres, Inc.*, 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.”⁷⁴ *Renton* concerned a local zoning ordinance which on its face treated “adult” businesses like strip clubs differently than non-“adult” businesses.⁷⁵ Despite the seeming facial distinction based on speech content, the Court classified it as a content neutral law and applied intermediate scrutiny, because, it found, the city’s underlying concerns were the “secondary effects” of crime and lowered property values associated with the placement of adult theaters in a neighborhood.⁷⁶ Such concerns were content neutral.⁷⁷

B. “Secondary Effects”

Asgeirsson represented it as settled law that a court look solely to the motivations behind the legislature’s passage of the law,⁷⁸ and not the plain text of the law itself, to make the initial content based/content neutral determination. But as commentators have noted,⁷⁹ the rule on how to make this distinction is peculiarly muddled. As *Asgeirsson* noted, there are cases like *Renton* with language suggesting that a court would look past the plain text of the statute to the underlying purpose of the legislature in passing it.⁸⁰ But there are also Supreme Court cases (including post-*Renton*

⁷³ *Id.* at 460.

⁷⁴ *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 46-49 (1986).

⁷⁵ *Id.* at 41-43.

⁷⁶ *Id.* at 47.

⁷⁷ *Id.*

⁷⁸ In the cases discussing this issue, no distinction is made between the stated rationale for the law—its ostensible purpose—and the true motivation behind the law. The cases’ discussion includes an implicit assumption that the two are one and the same. Of course, a legislature’s true motivation and its state rationale for a law might differ materially in a given case. One might be “concerned with suppression of speech” and not the other. If a non-facial approach were taken in such a case, additional questions arise: Should courts look to the asserted purpose or the “real” purpose? The former would be easier to administer, and would avoid a messy factual inquiry into the legislature’s “real” motivations. But it would also arguably be too trusting of the government, too amenable to government manipulation by *post hoc* rationalization, and thus insufficiently protective of individual liberty. Alternatively, would *both* have to be truly content-neutral? An additional reason for preferring a facial approach is to avoid such questions, as well as a potential additional factual inquiry into the “true” motivations underlying enactment of a speech law.

⁷⁹ 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); Mulroy, *supra* note 4, at 332 (stating that the classification of sunshine laws as either content based or content-neutral “is surprisingly unclear”).

⁸⁰ See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (stating that the “principal inquiry... is whether the government has adopted a regulation ... because of disagreement with the message it conveys”); see also *Colorado v. Hill*, 530 U.S. 703, 719 (2000) (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 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

cases) rejecting this “underlying motivation” approach explicitly,⁸¹ or adopting a “facial” approach explicitly,⁸² or seemingly doing so implicitly by finding a law content based solely because its plain text differentiates between covered and non-covered speech content.⁸³ Lower federal courts making this determination in contexts other than open meetings laws are roughly equally split, with some circuits using a “plain language” approach⁸⁴ and some an “underlying legislative purpose” approach.⁸⁵ Indeed, in some circuits, different panel opinions within the circuit take opposite

‘merely because public officials disapprove of the speaker’s views.’” (quoting *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951))).

⁸¹ *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993) (“Nor are we persuaded that ...the test for whether a regulation is content based turns on the ‘justification’ for the regulation”).

⁸² *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 643 (1994) (“As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based.”); *see also City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring) (“[W]hether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based.”).

⁸³ *See Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653, 2663 (2011) (analyzing law as content based where “[o]n its face it enacts content- and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information”) (emphasis added); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27-28 (2010) (statute which banned speech providing “material support” to terrorists was content based); *Burson v. Freeman*, 504 U.S. 191, 197-198 (1992) (plurality opinion) (despite the fact that it applied only to one type of location, law barring electioneering within 100 feet of a polling place was content based because on its face it only regulated discussions involving political campaigning); *Boos v. Barry*, 485 U.S. 312, 318-19 (1988) (ordinance barring protests critical of foreign governments outside their embassies was content based); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 514 (1981) (rejecting argument of content-neutrality because city billboard ordinance distinguished between noncommercial content allowed and disallowed); *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 536 (1980) (government agency order forbidding utility companies from including in their monthly bills any inserts discussing controversial public policy issues was content based); *Carey v. Brown*, 447 U.S. 455, 458-59 (1980) (law that “on its face” exempted labor disputes from ban on residential picketing content based).

⁸⁴ *See Matthews v. Town of Needham*, 764 F.2d 58 (1st Cir. 1985) (holding a sign ordinance content based because its plain language differentiated between signs based on the text placed on the sign, and rejecting city’s argument that it was content-neutral because coverage depended on a sign’s “function”); *Nat’l Adver. Co. v. Town of Babylon*, 900 F.2d 551, 557 (2d Cir. 1990) (following *Metromedia* in holding that any billboard ordinance distinguishing between allowed and disallowed types of noncommercial speech was content-neutral); *Neighborhood Enters., Inc. v. City of St. Louis*, 644 F.3d 728 (8th Cir. 2011) (zoning code restriction was content based because “the message conveyed determines whether the speech is subject to the restriction”); *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1259-60 (11th Cir. 2005) (because a city sign code’s exemptions impose differing permitting requirements based on the text portrayed on the sign in question, they “are plainly content based,” despite city’s assertion of a content-neutral motive).

⁸⁵ *See Brown v. Town of Cary*, 706 F.3d 294, 301 (4th Cir.2013) (holding that the government “may distinguish speech based on its content so long as its reasons for doing so are not based on the message conveyed”); *ACLU v. Alvarez*, 679 F.3d 583, 603 (7th Cir. 2012) (stating generally 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,” and not whether a court “must look at the content ...to determine whether a rule of law applies”); *H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609, 621 (6th Cir. 2009) (sign height restrictions based on content of sign upheld because they were “not adopted because of disagreement with the message the speech conveys”); *see also James Cleith Phillips, Separate Because Unequal: The Ninth Circuit’s Mangling Of The First Amendment In Reed v. Gilbert*, 119 PENN. STATE L. REV. 21, 33-35 (2014) (discussing the Circuit split and citing cases).

views.⁸⁶ This includes the Fifth Circuit itself, where a pre-*Asgeirsson* panel opinion took a “plain language” approach.⁸⁷

Indeed, the Supreme Court this year has accepted a case which involves this very question of whether the classification of a speech law as content based or content neutral turns on the plain text of the law or the legislature’s underlying rationale. The case, *Reed v. Town of Gilbert*, concerns a city outdoor sign ordinance which imposes more stringent requirements on “directional” signs pointing the way towards an event than on election-related signs or “ideological” signs expressing a political viewpoint.⁸⁸ Lower courts accepted the city’s argument that the ordinance was content-neutral, in part because the city’s asserted governmental interests (e.g., traffic) were unrelated to speech content, and because the city “did not adopt its regulation...because it disagreed with the message conveyed.”⁸⁹

Determining the proper approach here is important. For one thing, the constitutionality of strict sunshine laws and similar laws is a much clearer question if we know which standard applies. And deciding the proper way to engage in the threshold content based/content neutral classification will be crucial for all free speech cases to come. The example of sunshine laws is a useful prism through which to view this question.

C. An Overall Template From McCullen

Just last year, the Supreme Court provided useful new guidance on this question, in a case called *McCullen v. Coakley*. In *McCullen* the Court invalidated on free speech grounds a Massachusetts law creating a 35-foot “buffer zone” around abortion clinic entrances, which had the effect of preventing anti-abortion “sidewalk counselors” from approaching patients considering an abortion.⁹⁰ Under the law, persons could not stand within the buffer zone unless they had reason to go in or out of the building.⁹¹ The majority classified the law as content neutral because, on its face, it applied to anyone within the buffer zone, regardless of what they were saying, or even if they stood there “without displaying a sign

⁸⁶ Compare *Berger v. City of Seattle*, 569 F.3d 1029, 1051 (9th Cir. 2009) (explaining that to be content-neutral, a regulation cannot by its very terms single out particular content for differential treatment) with *Reed v. Town of Gilbert* (Reed II), 707 F.3d 1057 (9th Cir. 2013) (finding that a city sign ordinance imposing greater restrictions on “directional” signs directing readers to nearby events was nonetheless content-neutral because, to determine if the provision applied, an official need only look at the “objective” factors of the identity of the speaker and the date of the event), *cert. granted*, 134 S. Ct. 2900 (2014).

⁸⁷ *Serv. Emps. Int’l Union, Local 5 v. City of Houston*, 595 F.3d 588, 596 (5th Cir. 2010) (“A regulatory scheme that requires the government to ‘examine the content of the message that is conveyed’ is content based regardless of its motivating purpose.”).

⁸⁸ See Brief For Petitioners, *Reed v. Town of Gilbert*, No. 13-502, 2014 WL 4631957 (Sept. 15, 2014), at 22-25.

⁸⁹ *Reed v. Town of Gilbert*, 707 F.3d 1057, 1071-72 (9th Cir. 2013).

⁹⁰ 134 S. Ct. 2518, 2250 (2014).

⁹¹ *Id.* at 2522. Exempted from the “buffer zone” were persons entering or leaving the clinic; employees of the clinic; municipal agents who had business in the clinic; or persons passing by on their way to another location. *Id.* at 2522-23.

or uttering a word.”⁹² The Court stated that the law would indeed 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.”⁹³

McCullen’s majority opinion provides a template for how to analyze these cases.

First, a court should ask whether “enforcement authorities” must necessarily examine the content of the relevant speech to determine whether the law applies.⁹⁴ If so, the law is almost certainly content based.

I say “almost certainly” rather than “certainly” only because of the possibility that a *Renton*-style “secondary effects” analysis could cause such a law to be analyzed as content neutral. Interestingly, *McCullen* does not discuss the *Renton* “secondary effects” doctrine. Of course, that might be because, since the Massachusetts law in *McCullen* did not on its face distinguish between different topics of speech as the law in *Renton* itself did,⁹⁵ there was no *need* to consider a fallback “secondary effects” argument from the government. But the language used in the majority opinion strongly suggests that once such facial distinction based on expressive content is found, the inquiry ends, with the final conclusion that the law is content based. Notably, it states flatly that if the law’s enforcers did have to examine speech content to decide if the law applied, “The Act would be content based.”⁹⁶

This unqualified statement is significant for what it does *not* say. Given Massachusetts’ secondary effects-style, content neutral justifications for the abortion clinic buffer zone law (traffic, public safety, patient access to health care),⁹⁷ had a *Renton* analysis been a serious consideration, it would not have been so easy to say that facial speech-topic distinctions in the law would have ended the inquiry. Instead, the Court would have had to say that if the law’s enforcers had to examine speech content, the Court would still then have to consider if a “secondary effects” analysis would dictate a more lenient intermediate level of scrutiny. Therefore, this *McCullen* majority language, though arguably *dicta*, is another reason

⁹² *Id.* at 2523.

⁹³ *Id.* at 2531 (quoting *FCC v. League of Women Voters of Calif.*, 468 U.S. 364, 377 (1984)) (emphasis added) (internal quotes and citations omitted).

⁹⁴ *Id.*

⁹⁵ There actually is a respectable argument that the Massachusetts law was facially content based because by its plain terms it only applied to abortion clinics, as opposed to all health clinics, or all public businesses. The law’s challengers made precisely this point. See *McCullen*, 134 S.Ct. at 2530-32. But since the majority found that there was no facial content based discrimination because the plain text did not draw distinctions on topics of speech conveyed in the buffer zone, *id.*, it is sufficient for present purposes to assume that is correct.

⁹⁶ *Id.* at 2531. The opinion also begins its explanation of its finding of content neutrality by noting simply that “the Act does not draw distinctions on its face.” *Id.* It also emphasizes, and seems to treat as dispositive, the fact that whether someone violated the Act “depends not on what they say...but simply on where they say it.” *Id.* All of this strongly supports a purely “facial” approach by the *McCullen* majority.

⁹⁷ *Id.* at 2535.

to think that the “secondary effects” rationale is indeed limited to, or will soon be limited to, the context of zoning regulations.⁹⁸

Even where a secondary effects argument *is* considered, it will be subject to at least three significant limitations. A “secondary effects” argument by the govern will not serve to lower the standard of review to intermediate scrutiny if the cited secondary effects are related to the content of the speech;⁹⁹ or if they are related to the “direct impact” of the speech on the listener/reader;¹⁰⁰ or if the secondary effects were no more associated with the categories of banned speech than they were with the categories of speech left unregulated.¹⁰¹

Second, if enforcing the law does not necessarily entail examining the content of the speech at issue to see if the law applies, a court should next ask whether the law nonetheless has a disproportionate effect on some topics of speech and not others.¹⁰² If it does not, then the law would be considered content neutral. If it does, then the law will be considered content neutral only if its underlying justification is (i) “unrelated to the content of the expression”¹⁰³ and (ii) is unrelated to the “direct impact” of that speech on its audience.¹⁰⁴

In making these factual inquiries, it will help the government’s case if the statute reaches a broad variety of speech categories, as opposed to having an impact on a narrower category of speech which might plausibly be considered disfavored by the government.¹⁰⁵ In *McCullen*, for example, those challenging the statute complained that the “buffer zone” law focused on abortion clinics while leaving out a wide array of other types of health facilities.¹⁰⁶

This advantage of broad reach may at first seem counterintuitive, given the Court’s general preference in the “narrow tailoring” part of its free speech analysis for laws which do not restrict more

⁹⁸ See *infra* notes 90-96 (discussing Supreme Court opinions along these lines). Admittedly, this may be reading a lot into a single sentence of *dicta*. But if the “secondary effects” doctrine is indeed limited in scope to zoning cases, then in all non-zoning cases, once it is clear that the plain text of the law distinguishes speech based on topic, we would have our answer; there would be no need for any factual inquiry into the legislature’s underlying motivations.

⁹⁹ *Boos v. Barry*, 485 U.S. 312, 320-21 (1987) (invalidating an ordinance barring protests critical of a foreign government within 100 feet of an embassy, and rejecting a secondary effects rationale of protecting diplomats from affronts to their dignity).

¹⁰⁰ *Id.* (characterizing the distinction in this manner).

¹⁰¹ *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 430 (1993) (finding that a ban on commercial handbills on city newsracks not justified by combating “secondary effect” of overcrowded newsracks, where permitted category of newspapers was just as prone to contribute to overcrowding).

¹⁰² *McCullen*, 134 S.Ct. at 2530-32 (discussing how the Massachusetts law, by creating a buffer zone only around *abortion* clinics, disproportionately burdened discussions on the topic of abortion).

¹⁰³ *Id.* (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

¹⁰⁴ *Id.* (citing *Boos*, 485 U.S. at 321).

¹⁰⁵ *Id.* at 2532 (citing Kagan, *Private Speech, Public Purpose: The Role Of Governmental Motive In First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 451-452 (1996)).

¹⁰⁶ *Id.* at 2530-32.

speech than is necessary.¹⁰⁷ But such a broad reach helps to dispel the suspicion that in crafting the speech law, the government “evinced a purpose to single out for regulation speech about one particular topic.”¹⁰⁸

At the same time, a decision to reach only a smaller category of speech in this context is not necessarily fatal. If the government’s actual experience is that the problems associated with the government’s proffered content neutral justifications are limited to a narrower class of times, places, or manners of speech, the government may narrowly target those times, places, or manners. Thus, the majority opinion explained, since Massachusetts had experience with crowding, obstruction, and violence only at abortion clinics, it was permissible for it to craft its buffer zone law aimed only at such clinics.¹⁰⁹

D. The Best Approach

The above template is a synthesis of existing case law, and a close interpretation of the most recent Supreme Court case, mixed in with some predictions about the direction in which the Court is headed. But as a normative matter, what *should* the analysis be?

Courts should apply a “plain language” approach to this important question, classifying a law burdening speech as content based or content neutral based solely on the text of the statute, without regard to the proffered justification or actual underlying rationale of those enacting it.¹¹⁰ A court would consider the government’s proffered justification, but only in the later stage of *applying* the appropriate standard of review.

As a general matter, a common-sense “facial” approach would add certainty, simplicity, and predictability to the law. It would avoid the messy question of whether to rely on the government’s stated rationale for the Act, or its actual original underlying motivation (where the two differ), along with any factual inquiry necessary to establish the latter. In most cases, it would better protect individual liberty by preventing the government from inventing *post hoc* rationalizations for speech-restrictive rules.¹¹¹ As a related matter, the Supreme Court should overrule *Renton* and the “secondary

¹⁰⁷ See *supra* Part II.A.

¹⁰⁸ *McCullen*, 134 S.Ct. at 2530-32 (internal citations omitted).

¹⁰⁹ *Id.*

¹¹⁰ See Mulroy, *supra* note 14, 51 WILLAMETTE L. REV. at ____; see also Phillips, *supra* note 86 (making a similar argument).

¹¹¹ See, e.g., *Colorado v. Hill*, 530 U.S. 703, 745–46 (2000) (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”); see also *Consol. Edison Co. of New York v. Pub. Serv. Comm’n of New York*, 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))).

effects” doctrine, which has caused unnecessary confusion in this area of the law.

Indeed, Supreme Court Justices have recognized that using the “secondary effects” doctrine to call ordinances content neutral is a legal fiction, a means to give more lenient treatment to certain types of ordinances with content neutral justifications.¹¹² Justice Kennedy, for example, has acknowledged a plain facial approach.¹¹³ He has noted that this legal fiction “is perhaps more confusing than helpful,” a fiction that has not “commanded our consistent adherence.”¹¹⁴

As Justice Kennedy correctly states, *Renton*-style ordinances “are content based, and we should call them so.”¹¹⁵ He has urged that *Renton* be limited to zoning ordinances;¹¹⁶ other Justices urge an even narrower limit to land use restrictions for sexually oriented businesses.¹¹⁷ This reasoning comports with that of scholars who have criticized the “secondary effects” doctrine.¹¹⁸ But even with *Renton* retained, it can and should be viewed narrowly, with a facial approach taken in most cases.

Is this approach too harsh as applied to facially content based laws which may be motivated by content neutral concerns? I do not think so. In those cases where the content neutral rationale is a genuine government motivation and not a *post hoc* rationalization, it will likely be considered a “compelling” government interest, and will be upheld as long as the courts do not restrict any more speech than is necessary. In *Renton*, for example, the City had a sound basis for fearing that adult business sites correlated with higher crime rates and lower property values.¹¹⁹ A narrowly crafted ordinance thus would likely have passed muster even under strict scrutiny. If it did not, that would only be because the ordinance was judged to

¹¹² *Renton*, 475 U.S. at 47 (law at issue in *Renton* “did not fit neatly into” either category); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring) (to call such laws “content neutral” is “something of a fiction, which... is why [the *Renton* Court] kept the phrase in quotes”); see also *id.* at 457 (Souter, J., dissenting) (“the Court has recognized that this kind of ordinance [in *Renton*] occupies a kind of legal limbo between full-blown, content-based restrictions and regulations that apply without any reference to the substances of what is said”).

¹¹³ *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring).

¹¹⁴ *Id.* (citing *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 322 & n.2 (2002) (suggesting that a licensing scheme targeting only those businesses purveying sexually explicit speech is content based).

¹¹⁵ *Id.* Justice Kennedy would still allow a valid “secondary effects” rationale to give an otherwise content based law to receive intermediate scrutiny rather than strict scrutiny, but only in the context of zoning laws. *Id.*

¹¹⁶ See *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring).

¹¹⁷ *Boos v. Barry*, 485 U.S. 312, 334-35 (1988) (Brennan, J., concurring in part); *Ward v. Rock Against Racism*, 491 U.S. 781, 804 n.1 (1989) (Blackmun, J., dissenting).

¹¹⁸ 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.”).

¹¹⁹ *Renton*, 475 U.S. at 50-52.

over-regulate, and the plain remedy would simply be to narrow its regulatory scope.

A more interesting question arises as to whether a purely approach is too lenient as to laws which are facially content neutral but motivated by speech-suppressive aims. Imagine a wily city which knows a disfavored group tends to communicate by distributing cheap handbills as opposed to more capital-intensive media. It could impose harsh restrictions on handbill distribution in an effort to squelch disfavored speech, all in the guise of, say, combatting a litter problem. Should a court shut its eyes to evidence that a facially neutral law was motivated by such illicit aims?

I think the evils feared in such scenarios will in most cases be caught under existing law. First, to meet intermediate scrutiny, the government will have to prove that its rule does not restrict “substantially more speech than necessary” to meet the asserted content neutral governmental interest, and that there still remain “ample alternative channels” for the affected group to convey its message. Ill-motivated efforts as above would likely involve some amount of overreach and fail one of these criteria. Indeed, that is what happened in one case similar to the hypothetical above.¹²⁰ And if they meet the criteria—if there truly are ample alternative channels for communication—the free speech concern is not a dramatic one, and thus is a concern outweighed by the need for ending the doctrinal confusion occasioned under the current legal regime. Further, true evidence of ill motive in such instances is often redressable through a theory of First Amendment retaliation against protected speech activity,¹²¹ or unconstitutional animus against a group of persons in violation of the Equal Protection clause.¹²²

§ 3 – APPLYING THE TEMPLATE TO OPEN MEETINGS LAWS

Where does this leave open meetings laws? It seems that *McCullen* supports a template pointing toward a classification of all sunshine laws as content-based subject to strict scrutiny. Enforcement officials unquestionably have to inquire about the topic of the

¹²⁰ *Krantz v. City of Fort Smith*, 160 F.3d 1214 (8th Cir. 1998) (striking down an anti-litter ordinance barring placement of handbills on automobiles unless their occupants accepted them, on the ground that the city had the “less restrictive means” of punishing those who actually littered instead of leafletters). *But see Jobe v. City of Catlettsburg*, 409 F.3d 261 (6th Cir. 2003) (upholding a similar ordinance on the ground that the ability to do in-person and door-to-door handbill distribution afforded “ample alternative channels”).

¹²¹ *See, e.g., Perry v. Sinderman*, 408 U.S. 593, 597 (1972) (“the government may not punish a person or deprive him of a benefit on the basis of his constitutionally protected speech”); *Mt. Healthy v. City Bd. Of Ed. v. Doyle*, 429 U.S. 274, 283-84 (1977) (applying this principle to protect government employees); *Crawford-El v. Britton*, 523 U.S. 574, ___ (1998) (applying this principle to protect prisoners); *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (applying this principle to protect victims of retaliatory criminal prosecution).

¹²² *See U.S. v. Windsor*, 133 S.Ct. 2675, 2693 (2013) (neither a “bare ...desire to harm a politically unpopular group” nor “animus” is a legitimate governmental interest); *Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003) (same, regarding moral disapproval of a group); *Romer v. Evans*, 517 U.S. 620, 632 (1996) (same, regarding animus).

speech (i.e., pending business before the local legislative body) in order to determine if the law applies. If the “secondary effects” doctrine were overruled, or limited to land use regulation, that would end the inquiry. Such laws would almost certainly not survive strict scrutiny. Even if courts were to consider a secondary effects analysis, there is a significant argument that it would not apply, because the secondary effects commonly offered as justifications—government transparency, an informed public, etc.—are related to the “direct impact” of the speech upon the listener/reader.¹²³

And even if the good-government rationales normally invoked to justify strict open meetings laws were considered to be truly “secondary” in nature, and intermediate scrutiny were held to apply, there is still a good argument that the strict open meetings laws are unconstitutional.¹²⁴ When private discussion of government matters occurs only among a few legislators, there will still have to be much subsequent public discussions before those communications lead to final legislative action. As long as the private discussions do not occur among a quorum, making the subsequent public discussions shams, those subsequent public discussions will afford a real opportunity for the public to learn about the decisionmaking process, and for the public to provide meaningful input. Thus, sunshine laws which reach much beyond a quorum requirement can be said to restrict “substantially more speech than is necessary.”¹²⁵ The same conclusion can be reached about those sunshine laws which have little to no exemptions for the discussion of sensitive topics.¹²⁶ Finally, legislators wishing to communicate with their colleagues to discuss compromise in private have no other practical way to do so without violating these strict laws; thus, they are vulnerable because they fail to leave “ample alternative channels” for speech.¹²⁷

CONCLUSION

A hallmark of an open government is not just access to records, but access to the meetings and conversations at which our elected officials formulate policy and make decisions. There should be an opportunity for the public to observe the decisionmaking process and also to provide input toward it. Where a legislative body is engaged in collective decisionmaking, it is particularly necessary and appropriate to have public access to at least some of these discussions.

As a practical matter, this means legal access not just to the formal legislative sessions themselves, but also informal behind-the-scenes

¹²³ See, e.g., *Boos v. Barry*, 485 U.S. 312, 321 (1988); Mulroy, *supra* note 14, 51 WILLAMETTE L. REV. at ____ (making this argument).

¹²⁴ See Mulroy, *supra* note 14, at ____ (making this argument).

¹²⁵ See *Holder v. Humanitarian law Project*, 561 U.S. 1, 26-27 (2010) (quoting *Turner Broad. System, Inc. v. FCC*, 520 U.S. 180, 189 (1997)),

¹²⁶ See Mulroy, *supra* note 4, at 342-43; Mulroy, *supra* note 14, at ____ (making this argument).

¹²⁷ See *id.*

communications at which key decisions are made. Such a concern would argue for enhancements to the open meetings laws in those Western democracies whose sunshine laws cover only the formal meetings themselves. It would also argue for placing some sort of principled limit on the ability of a legislative body to vote to close its own sessions.

By the same token, reformers can very easily take the idea of public access too far. All collegiate decisionmaking bodies need at least some opportunities for private consultation. Hyperstrict U.S.-style laws which ban communication among even just 2 members of the legislative body, or which admit only very few or no topics deemed suitable for private consultation, unduly chill discussion and are ultimately counterproductive.

Perhaps more significant, such hyperstrict laws are not only a bad idea, but they are unconstitutional. Properly analyzed, they are content based restrictions on speech subject to strict scrutiny. Although U.S. constitutional law is shockingly muddled on this basic question of categorizing speech restrictions as content based or content neutral, the Supreme Court may resolve this question in the coming year. Both to preserve free speech values, and to remove confusion from the federal courts, the Court should clarify that on this issue, we should all be textualists now.

