SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 61 | Issue 2

2010

Open Meetings and Closed Mouths: Elected Officials' Free Speech Rights after *Garcetti v. Ceballos*

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NOTES

OPEN MEETINGS AND CLOSED MOUTHS: ELECTED OFFICIALS' FREE SPEECH RIGHTS AFTER *GARCETTI V. CEBALLOS*[*]

"Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion."[1]

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[*] This is a play off of the Article entitled *Open Meetings and Closed Minds: Another Road to the Mountaintop*, 53 DRAKE L. REV. 11 (2004) by Nicholas Johnson.

[1] EDMUND BURKE, *Speech to the Electors of Bristol*, *in* THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 2, 10 (1826).

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INTRODUCTION

On October 21, 2004, Katie Elms-Lawrence e-mailed three of her fellow Alpine City Councilpersons to arrange a special meeting. Her email spoke of the City's ongoing search for an engineering firm and the fact that she had just discussed one of the candidates they had recently interviewed with Councilwoman Monclova. "[W]e both feel Mr. Tom Brown was the most impressive . . . no need for interviewing another engineer at this time,"[2] her email read. Three days later, Councilman Rangra responded to the e-mail and copied two other councilpersons, saying that he would arrange the meeting. Little did they know that this seemingly innocent exchange of emails would lead District Attorney Frank Brown to indict Rangra, Elms-Lawrence, Monclova, and another council member on criminal charges of violating the Texas Open Meetings Act (TOMA) several months later.[3]

The District Attorney ultimately dropped the criminal charges, but Rangra and Monclova filed a declaratory action under 42 U.S.C. § 1983, seeking a judgment that the criminal provisions of TOMA violated their First Amendment rights under the Free Speech Clause and were unconstitutional both on their face and as applied to their particular situation.[4] The United States District Court for the Western

[2] Rangra v. Brown, No. P-05-CV-075, 2006 WL 3327634, at *2 (W.D. Tex. Nov. 7, 2006), *rev'd*, 566 F.3d 515 (5th Cir. 2009), *dismissed as moot en banc by* 584 F.3d 206 (5th Cir. 2009).

[3] *Id.* at *3 ("The prosecution was based solely on the exchange of the e-mails.").

[4] *Id.* at *1–2.

District of Texas dismissed the suit,[5] reasoning that, because the council members spoke in their official capacity, the First Amendment had no application.[6] A panel of the United States Court of Appeals for the Fifth Circuit reversed, holding that TOMA acted as a content-based restriction on the councilmember's speech (a designation that makes the Act inherently suspect) and remanded the case with instructions for the district court to apply strict scrutiny.[7] The Fifth Circuit voted to rehear the matter en banc;[8] however, before the court heard arguments, it issued a one-line order dismissing the case for mootness.[9]

Although the entire Fifth Circuit declined to reach the merits of the appeal, the panel's decision raises some interesting—and, indeed, far-reaching—questions regarding the free speech rights of elected officials and how open meeting laws may impinge upon these freedoms. Part I of this Note provides some background on the development of open meeting laws, including their pervasiveness and commonly perceived benefits and drawbacks. Part II then discusses the extent to which the Free Speech Clause of the Federal Constitution should apply to elected officials acting in their official capacity. While some courts have held that the recent Supreme Court decision in *Garcetti v. Ceballos*[10] limits the free speech rights of all government employees acting in their official capacity, this Note argues that courts should treat elected officials differently. Rather than having their rights hamstrung, elected officials should receive the full protection of the First Amendment, even when acting in their official capacities, because the nature of their relationship with their "employer" is different from that of other government employees. This Note argues that there are sufficient common-law justifications for extending elected officials the full protections of the First Amendment, and that *Garcetti* does nothing to alter this doctrine. Part

[5] *Id.* at *8.

[6] *Id.* at *6.

[7] Rangra v. Brown, 566 F.3d 515, 526–27 (5th Cir. 2009), *dismissed as moot en banc by* 584 F.3d 206 (5th Cir. 2009) (noting that there was a fundamental difference between an elected official's role as a "state employee" and the role of ordinary state employees).

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

[9] Rangra v. Brown, 584 F.3d 206 (5th Cir. 2009). The vote was 16-1. *Id* at 207. Judge Dennis (the author of the original panel opinion) issued a scathing dissent in which he intimated that the "mootness" the court perceived stemmed from the fact that, during the four years of litigation, all of the plaintiffs had either been defeated in their bids for re-election, or had been prevented from running because of term-limits. *Id.* at 207–08 (Dennis, J., dissenting). He also noted: "The only reason that has been advanced for dismissing this case prior to the date upon which it had been set for en banc rehearing and oral argument, is that it would overtax the judges of this court to prepare for oral argument on both the mootness question and the merits of the appeal." *Id.* at 209.

[10] 547 U.S. 410 (2006).

III then looks at the various levels of First Amendment scrutiny employed by the courts. After giving a brief overview of the two most common forms of speech restriction (content-neutral and content-based burdens), this Note argues that open meeting laws actually regulate speech based upon subject matter. Subject-matter restrictions pose a particular conundrum for courts as they can perpetuate the same evils as either content-neutral or content-based burdens, depending upon the circumstances. As such, courts should adjust the level of scrutiny brought to bear on subject-matter restrictions in accordance with the underlying First Amendment dangers that the particular restriction poses. This requires a more nuanced analysis, rather than a mechanical application of strict scrutiny.

Part IV then uses this framework to analyze both TOMA and the Ohio open meeting law. It concludes that open meeting laws, which choke off all means of communication on the subject of political issues, pose a threat to free discussion and are contrary to basic First Amendment principles. Furthermore, open meeting laws that impose criminal penalties on individual violators are particularly insidious because of the significant chilling effect they create. Finally, Part V proposes several steps that states can take to reduce the burdens on their elected officials' First Amendment rights, including dispensing with criminal penalties and clearly defining "meeting" in their statutes. And, contrary to some critics' contentions, these remedies will enhance, rather than dilute, the level and quality of debate in public bodies.

I. OPEN MEETING LAWS

Though many assume there is a constitutional "right" to attend meetings of the government, this assumption is incorrect; there is, in fact, no generally recognized common law or constitutional right for the public to attend governmental meetings.[11] However, every state

[11] ANN TAYLOR SCHWING, OPEN MEETING LAWS § 1.1 (2d ed. 2000). *See also* Sandra F. Chance & Christina Locke, *The Government-in-the-Sunshine Law Then and Now: A Model for Implementing New Technologies Consistent with Florida's Position as a Leader in Open Government*, 35 FLA. ST. U. L. REV. 245, 246 (2008) ("[T]he right of the public to attend government meetings is granted by government officials, not the common law. . . . [T]here is no First Amendment right of access to government meetings." (footnote omitted)). Although some might analogize the right of access to government meetings with the right of access to criminal trials, this analogy is inapposite. The public does, of course, have a presumptive constitutional right to attend criminal trials. *See generally* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) ("We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and 'of the press could be eviscerated.'" (footnote omitted) (quoting Branzburg v. Hayes, 408 U.S. 665, 681 (1972))).

currently has some form of open meeting law.[12] Though laws requiring open government are actually a relatively new creation,[13] the U.S. House of Representatives and the U.S. Senate have met in public for the vast majority of their existence.[14] Despite these early inklings of openness, had open meeting laws been around in the Eighteenth Century, the United States as we know it today may never have come about—the Founders conducted the Constitutional Convention of 1787 in total secrecy.[15]

Open meeting laws did not begin to crop up in a significant fashion until the middle of the Twentieth Century. Alabama is thought to have enacted the first "open meeting" law in 1915. And, as late as 1950, it remained the lone state with a "comprehensive" open meetings statute.[16] In the years immediately following Watergate, however, the states with open meeting laws rushed to expand them and those without hastily enacted their own.[17] Today, open meeting laws have become so important to the appearance of open government that over half the states make some mention of open government in their constitutions.[18]

A. Why Sunshine Is the Best Disinfectant

The need for open meeting laws grew out of the impression that a great deal of state and local decision making took place "behind closed doors."[19] Perhaps this perception is what led Justice Brandeis to remark: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants;

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[12] SCHWING, *supra* note 11, § 1.1, at 3 (noting that these laws go by several names, including "'sunshine' laws, open door laws, freedom of access acts, right to know laws, or public meeting laws" (footnotes omitted)).

[13] *Id.*

[14] *See* Teresa Dale Pupillo, Note, *The Changing Weather Forecast: Government in the Sunshine in the 1990's—An Analysis of State Sunshine Laws*, 71 WASH. U. L.Q. 1165, 1167 (1993) ("Deliberations of the House of Representatives and the Senate were not opened to reporters until 1790 and 1792 respectively."). However, most congressional committees continued to meet in private until the 1970s. SCHWING, *supra* note 11, § 1.1, at 2.

[15] *See* United States v. Nixon, 418 U.S. 683, 705 n.15 (1974) ("[A]ll records of those meetings were sealed for more than 30 years after the Convention. Most of the Framers acknowledged that without secrecy no constitution of the kind that was developed could have been written." (internal citations omitted)).

[16] SCHWING, *supra* note 11, § 1.1, at 3.

[17] *Id.* § 1.1, at 3–4. Chief Justice Warren famously remarked: "If anything is to be learned from our present difficulties, compendiously known as Watergate, it is that we must open our public affairs to public scrutiny on every level of government." Earl Warren, *Governmental Secrecy: Corruption's Ally*, 60 A.B.A. J. 550, 550 (1974).

[18] SCHWING, *supra* note 11, § 1.1, at 2.

[19] Note, *Open Meeting Statutes: The Press Fights for the "Right to Know,"* 75 HARV. L. REV. 1199, 1199 (1962) [hereinafter *The Right to Know*].

electric light the most efficient policeman."[20] But even this idea needed decades to find traction. It wasn't until the early 1960's that the public (or, more specifically, the media) sent the drive for open meeting laws into high gear by sounding the now familiar rallying cry of "[t]he people have a right to know!"[21]

This sentiment—the "right" to know—was one of the main ideas driving the enactment of open meeting laws. In short, the principle is that government officials should conduct the public's business in public.[22] This principle is rooted in the idea that "government is and should be the servant of the people."[23] Open meeting laws facilitate that service by "promot[ing] the free flow of information so that news media may report events accurately rather than relying on potentially biased or inaccurate leaks."[24] Thus, open meetings encourage confidence in elected officials and reduce corruption.[25] According to some scholars, this openness allows the public to become more involved in the decision-making process and affords them a better understanding of the nuances of modern government.[26]

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[20] LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914).

[21] *The Right to Know*, *supra* note 19, at 1199.

[22] *See* SCHWING, *supra* note 11, § 3.2, at 22–23 ("The overriding public policy is that government is the public's business and should be conducted in public so that the basis and rationale for governmental decisions as well as the decisions themselves are easily accessible to the people." (footnote omitted)).

[23] Lisa A. Reilly, *The Government in the Sunshine Act and the Privacy Act*, 55 GEO. WASH. L. REV. 955, 956 (1986) (quoting H.R. REP. NO. 94-880, at 2 (1976)).

[24] SCHWING, *supra* note 11, § 3.6, at 33. Schwing goes on to note that other common justifications include:

- promotion of stability and public confidence in government;
- improved ability of the people to evaluate public officials and their activities by being privy to the decision-making process so that the public can vote intelligently in elections;
- improved understanding of the decision-making process that enables people to consider future government developments and the consequences of those developments;
- enhancement of the fact-finding process, because discrepancies and omissions can be discovered and revealed, persons giving evidence are less able to conceal falsehood, and perjury can be more easily discovered;
- greater control of governmental abuses;
- increased citizen participation in government; and
- better government responsiveness to the needs of the governed.

Id. § 3.6, at 34.

[25] *See* Pupillo, *supra* note 14, at 1166 ("Open meetings allow the public to observe how their elected officials vote on issues. This information allows members of the public to determine if public officials are truly acting in a representative capacity.").

[26] *See, e.g.*, Michael A. Lawrence, *Finding Shade from the "Government in the Sunshine Act": A Proposal to Permit Private Informal Background Discussions at the United States International Trade Commission*, 45 CATH. U. L. REV. 1, 9–10 (1995) ("Some proponents argue that the openness of agency meetings allows the public to more clearly understand how the government decisionmaking process operates, thereby leading to a greater opportunity for public involvement in the process through enlightened voting and lobbying.").

While several states go so far as to explicitly outline the rationale for open meetings in their constitutions,[27] others simply include these public policy justifications in their statutory schemes.[28] Whatever the form and wherever the locale, the underlying rationale is essentially the same: open access to governmental decisions and deliberations is an overriding public policy goal.[29]

B. But Too Much Disinfectant Can Be Toxic

Though originally touted[30]—and still heralded—by the media as the best tonic for flushing out corrupt practices in government, open meeting laws are not without their detractors.[31] Though most commentators generally agree that the ideals of open government and accountability are laudable, some take issue with the mechanism for attaining those goals.

The most consistent criticism of open meeting laws is that they limit free debate and discussion among elected officials (and members of other agency bodies subject to the laws) and drive the substantive exchange of ideas further into the shadows.[32] The resulting loss of collegiality among the voting members of a public body forces members to lean more heavily on their unelected staffs.

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[27] *See, e.g.*, N.H. CONST. pt. I, art. VIII ("All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted.").

[28] SCHWING, *supra* note 11, § 3.2, at 22–23.

[29] *See, e.g.*, IOWA CODE ANN. § 21.1 (West 2010) ("This chapter seeks to assure, through a requirement of open meetings of governmental bodies, that the basis and rationale of governmental decisions, as well as those decisions themselves, are easily accessible to the people. Ambiguity in the construction or application of this chapter should be resolved in favor of openness.").

[30] *See The Right to Know*, *supra* note 19, at 1199 ("Organized activities to this end [the enactment of open meeting laws] began in 1950 when the Freedom of Information Committee of the American Society of Newspaper Editors directed its attention to the problems of domestic news suppression. . . . [T]he press . . . has remained the principal moving force behind the campaign." (footnote omitted)).

[31] *See, e.g.*, Nicholas Johnson, *Open Meetings and Closed Minds: Another Road to the Mountaintop*, 53 DRAKE L. REV. 11, 13 (2004) ("[Open meeting laws] often create more barriers to the attainment of [their] objectives than if the laws did not exist."); Lawrence, *supra* note 26, at 11 (noting that officials of major regulatory agencies "believed that the presence of the press and public under open meeting statutes subtly inhibit[s] the free exchange of ideas and opinions.").

[32] *E.g.*, Johnson, *supra* note 31, at 25–29; *see also* David M. Welborn et al., *The Federal Government in the Sunshine Act and Agency Decision Making*, 20 ADMIN. & SOC'Y 465, 473 (1989) ("Among the more important [inhibitions] reported by agency participants are . . . [that the laws] 'take the sting out of debate,' as one member put it; . . . impede development of an informed consensus among members after a thorough exchange of views; and . . . generally limit the flow of information, the depth of critical collective scrutiny given to matters before the agency, and strategic speculation and planning.").

Thus, many public officials now conduct any significant, substantive discussions on complex and controversial policy questions with their staff members, rather than with the other members of the public body.[33]

From 1976–1982, Professor David Welborn surveyed the effects of the newly enacted Government in the Sunshine Act (the federal "open meeting law").[34] His study found that, in the period just prior to the enactment of the Act, 80.1% of agency members responding felt that their agency discussed "important matters" in formal meetings.[35] An overwhelming number of respondents (over 85%) also indicated that they made their decisions on most issues *after* these discussions in formal meetings.[36] Welborn then surveyed members of the affected bodies after the Federal Sunshine Law took effect, and the vast majority of respondents (over 83%) noted that they now came to conclusions about issues *prior* to the formal discussions at these new "open meetings."[37]

This likely explains the sharper criticism leveled against those states with laws barring pre-decisional discussions. These states go so far as to forbid members of a public body to "hear, discuss, [or] deliberate . . . on any item that is within the subject matter jurisdiction of the legislative body," outside of an open meeting.[38] While the likely purpose of these prohibitions is to prevent members of public bodies from meeting in small groups—thereby evading open meeting requirements—these broad prohibitions are cumbersome to enforce and strict adherence is, in most cases, unrealistic.[39]

Viewing open meeting laws in the context of the First Amendment magnifies these concerns, especially when the state imposes criminal penalties on violators. Though some states do provide limited

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[33] *See* Kathy Bradley, Note, *Do You Feel the Sunshine? Government in the Sunshine Act: Its Objectives, Goals, and Effect on the FCC* and You, 49 FED. COMM. L.J. 473, 483 (1997) ("Since a commissioner may not discuss or debate with all of her colleagues, she will often turn to discussions with staff members.").

[34] Welborn, *supra* note 32, at 466.

[35] *Id.* at 471.

[36] *Id.*

[37] *Id.*

[38] CAL. GOV'T CODE § 54952.2(a) (West 2010). *See also* TEX. GOV'T CODE ANN. § 551.001(4)(A) (West 2004 & Supp. 2010) ("'Meeting' means: 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 . . . .").

[39] *See* Johnson, *supra* note 31, at 15 ("To capture *all* discussions merely because they are called deliberations is an impossibility. To try to do so only guarantees that fewer discussions and deliberations will take place, and that fewer wise decisions will be made.").

exceptions for chance encounters or social gatherings,[40] the chilling effect these provisions can have on speech is of paramount concern.

C. And What's Really in this "Best of Disinfectants"?

Although the laws vary from state to state in scope, content, and application, they have a number of similar veins. For instance, the vast majority of states apply their open meeting laws to almost all of their political subdivisions.[41] Additionally, every state requires open meetings of public bodies unless a specific statute or provision authorizes a closed meeting.[42] In order to have an "open meeting," the body must publish (usually several days in advance) notice of the time, place, and (in some states) scope of the meeting.[43] Generally, most states also break meetings down into three categories: regular, special, and emergency, with slightly less burdensome notification requirements for the latter two.[44]

Despite these overarching similarities, the reach and "bite" of open meeting acts still varies widely from state to state.[45] One way to judge the scope and effect of a state's open meeting law is to look at how the statute defines "meeting."[46] Some, like Texas, define the term broadly. Under the Texas Code, a "meeting" is defined 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."[47] Other states, like Ohio,

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[40] *See* SCHWING, *supra* note 11, § 6.52, at 312–14 (noting that some states forbid "informal" meetings of a quorum or more, other states allow these, so long as they comply with the open meeting law, and others merely state that informal meetings or chance encounters may not be used to circumvent the open meeting law).

[41] *Id.* § 4.22, at 72. Curiously, some of these same state legislatures see it fit to exempt themselves from these laws. Nevertheless, their own rules often require them to publish detailed minutes and/or a journal of their proceedings. *See id.* § 4.80, at 130–33.

[42] *Id.* § 6.4, at 258. ("[A]ll states have now elected to require open meetings in the absence of a specific provision requiring or permitting closure.").

[43] *See generally id.* § 5. For example, Ohio requires that: "Every public body, by rule, shall establish a reasonable method whereby any person may determine the time and place of all regularly scheduled meetings and the time, place, and purpose of all special meetings." OHIO REV. CODE ANN. § 121.22(F) (West 1994 & Supp. 2009). Texas's act is similar: "A governmental body shall give written notice of the date, hour, place, and subject of each meeting held by the governmental body." TEX. GOV'T CODE ANN. § 551.041.

[44] SCHWING, *supra* note 11, § 5.10, at 172.

[45] *See id.* §§ VI, VIII (discussing variations in states' open meeting acts).

[46] *Id.* § 6.6, at 258.

[47] TEX. GOV'T CODE ANN. § 551.001(4). The statute also has several specific exceptions for "social functions," even if a quorum is present, so long as either: there is no discussion of public business, or the discussion of public business is "incidental" to the function. *Id.* "Incidental," is, of course, undefined. *See id.*

take a much narrower approach. The Ohio Revised Code simply defines a meeting as "any prearranged discussion of the public business of the public body by a majority of its members."[48] Part IV compares the way these two states define "meeting," and how these varying definitions can have important implications for the constitutionality of the statute.

Additionally, the level of enforcement and the accompanying penalties for violation vary greatly by state. For example, Ohio's statute requires that the court invalidate any formal action that is not adopted in an open meeting.[49] The statute also provides a civil fine of $500, court costs, and reasonable attorney's fees.[50] Provisions like these are common in nearly all states. Some states, however, go further, and impose criminal penalties on violators,[51] often in the form of fines and/or imprisonment for up to six months.[52] While most states require a knowing violation for the criminal penalties to kick in, a few states, such as Arkansas, even impose these criminal sanctions for merely negligent violations of their open meetings act.[53] Statutes like these rest on particularly precarious constitutional footing because of the chilling effect they can have on core political speech.

II. FIRST AMENDMENT IMPLICATIONS

A complete journey through the muddled thicket of First Amendment theories is beyond the scope of this Note. Nonetheless, several guiding principles bear mentioning. Chief among these is the notion that free speech is indispensible to the idea of liberty and freedom of thought.[54] Consequently, "debate on public issues should

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[48] OHIO REV. CODE ANN. § 121.22(B)(2).

[49] *Id.* § 121.22(H). Almost all states provide for this type of remedy. *See* SCHWING, *supra* note 11, § 8.62, at 513 & n.282 (collecting statutes and noting that "[a] number of statutes expressly require or empower the court to void any binding or final action taken at a meeting not in compliance with the open meeting law").

[50] OHIO REV. CODE ANN. § 121.22(I)(1)–(2).

[51] *See* SCHWING, *supra* note 11, § 8.58 at 507–09 (describing various states' civil penalties for violations of open meeting laws);); *see also id.* § 8.62 at 513–26 (describing various state provisions which invalidate actions taken in violation of open meeting laws).

[52] *Compare* 65 PA. CONS. STAT. ANN. § 714 (2010) (imposing fine of up to $100 plus cost of prosecution), *with* TEX. GOV'T CODE ANN. § 551.143(b) (conviction punishable by fine of $100 to $500, or one to six months imprisonment, or both).

[53] *See, e.g.*, ARK. CODE ANN. § 25-19-104 (2004 & Supp. 2010) ("Any person who negligently violates any of the provisions of this chapter shall be guilty of a class C misdemeanor."); *id.* § 5-4-401 (person convicted of a class C misdemeanor may be punished by up to 30 days in jail).

[54] *See* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("[F]reedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that

be uninhibited, robust, and wide-open."[55] This encourages the free flow of thought and best facilitates the marketplace of ideas.[56] While it would seem that this cornerstone of First Amendment law is in perfect harmony with the bedrock principle of open meeting laws (i.e., that meetings should be open in order to facilitate public understanding of the governing process), a brief glance over this rocky ledge belies this illusion and reveals the abyss below.

The First Amendment also stands on the proposition that individuals should be free to decide for themselves, rather than be compelled by the government, what ideas they accept and want to express.[57] The evil inherent in this so-called "compelled speech" is that it distorts the marketplace of ideas. If we allow the government not only to force the electorate to listen to the state's views, but also to compel its citizens to advocate and spread those views, we give the government an extraordinary power to slant the marketplace to suit its whims. Thus, the right to refrain from speaking is just as important as the ability to enter the marketplace of ideas and advocate your own positions.

Finally, the First Amendment is not absolute; its freedom is not unqualified.[58] After all, the text of the First Amendment speaks of

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public discussion is a political duty; and that this should be a fundamental principle of the American government.").

[55] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[56] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.").

[57] *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994) ("At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal."). *See also* Wooley v. Maynard, 430 U.S. 705, 714 (1977) ("We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.").

[58] *See, e.g.*, Cohen v. California, 403 U.S. 15, 19 (1971) ("[T]he First . . . Amendment[] [has] never been thought to give absolute protection to every individual to speak whenever or wherever he pleases, or to use any form of address in any circumstances that he chooses."); Konigsberg v. State Bar of Cal., 366 U.S. 36, 49–51 (1961) ("At the outset we reject the view that freedom of speech and association as protected by the First and Fourteenth Amendments, are 'absolutes' . . . . Throughout its history this Court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk. On the one hand, certain forms of speech, or speech in certain contexts, has been considered outside the scope of constitutional protection. On the other hand, general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved." (footnote and internal citations omitted)).

"abridgment" and not an all-out prohibition of regulation.[59] This inherently implies that the right to speak is limited in some way. Indeed, many of the Supreme Court's decisions are an attempt at defining those limits. For instance, while the government "may not favor one speaker over another,"[60] it may restrict access to its property for speech-related purposes in certain situations.[61] The government may also place reasonable, content-neutral time, place, or manner restrictions on certain forms of expressive conduct, so long as the government leaves open ample alternative means of communication.[62] Additionally, the government may proscribe speech that is likely to incite or induce "imminent lawless action."[63] And, there is that pesky little detail that "speech" must often be defined as such before it receives the requisite protections.[64]

But these regulatory scenarios represent the exception, rather than the rule. Rarely will the government have a free hand to restrict speech as it pleases.[65] In fact, the Supreme Court generally regards any law or regulation based upon the content of the particular

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[59] *See* U.S. CONST. amend. I. ("Congress shall make no law . . . abridging the freedom of speech . . . .").

[60] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828 (1995) ("In the realm of private speech or expression, government regulation may not favor one speaker over another.").

[61] *See* Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 799–800 (1985) ("Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities.").

[62] Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 535–36 (1980) ("This Court has recognized the validity of reasonable time, place, or manner regulations that serve a significant governmental interest and leave ample alternative channels for communication. . . . [T]he essence of time, place, or manner regulation lies in the recognition that various methods of speech, regardless of their content, may frustrate legitimate governmental goals.").

[63] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

[64] In other words, the speech must be considered "speech." *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 383–84 (1992) ("Such statements must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand characterizing obscenity 'as not being speech at all.' What they mean is that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)–not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content.") (internal quotations and citations omitted).

[65] *See* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 812 (2000) ("Laws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles"); Barnes v. Glenn Theatre, Inc., 501 U.S. 560, 576 (1991) (Scalia, J., concurring) ("When any law restricts speech, even for a purpose that has nothing to do with the suppression of communication . . . we insist that it meet the high First-Amendment standard of justification.").

message a speaker conveys as presumptively unconstitutional.[66] And government discrimination based upon the speaker's viewpoint is even more inherently suspect.[67] In these cases of so-called viewpoint discrimination, courts apply strict scrutiny.[68]

With these basic tenets of First Amendment jurisprudence as guideposts, the remainder of this Section analyzes the contours of free speech protection the Constitution affords public employees and elected officials. It argues that there are fundamental differences between elected officials and public employees that warrant higher protection of the former's speech, even when they act within the ambit of their official duties. Furthermore, it argues that analogies to public-employee free speech cases, though providing a useful framework, should not be controlling, especially when the government attaches criminal violations to an elected official's exercise of First Amendment freedoms.

A. Public Employee Free Speech

No Supreme Court case deals directly with the First Amendment rights of elected officials in the context of open meeting laws. Recently, however, elected officials have challenged restrictions of their First Amendment rights in several federal district courts.[69] Judges in these cases have generally looked to the Supreme Court's decision in *Garcetti v. Ceballos*[70] when determining the extent of

[66] *See, e.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828 (1995) ("Discrimination against speech because of its message is presumed to be unconstitutional."); *R.A.V.*, 505 U.S. at 382 ("Content-based regulations are presumptively invalid.").

[67] *See R.A.V.*, 515 U.S. at 829 ("Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.").

[68] Davenport v. Wash. Educ. Ass'n, 127 S. Ct. 2372, 2381 (2007) ("It is true enough that content-based regulations of speech are presumptively invalid. We have recognized . . . that the rationale of the general prohibition . . . is that content discrimination raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.") (internal quotations and citations omitted).

[69] *See, e.g.*, Hartman v. Register, No. 1:06-CV-33, 2007 WL 915193, at *7 (S.D. Ohio Mar. 26, 2007) (applying *Garcetti* to restrict Township Trustee's First Amendment rights when acting pursuant to his official duties in opposing passage of the minutes); Hogan v. Twp. of Haddon, Civil No. 04-2036 (JBS), 2006 WL 3490353, at *7 (D.N.J. Dec. 1, 2006) (applying *Garcetti* to hold that elected Township Commissioner has no First Amendment rights when acting in her official capacity); Rangra v. Brown, No. P-05-CV-075, 2006 WL 3327634, at *5 (W.D. Tex. Nov. 7, 2006), *rev'd,* 566 F.3d 515 (5th Cir. 2009), *dismissed as moot en banc by* 584 F.3d 206 (5th Cir. 2009) ("For purposes of determining what constitutes protected speech under the First Amendment, there is no meaningful distinction among public employees, appointed public officials, and elected public officials.").

[70] 547 U.S. 410 (2006).

First Amendment protection to afford the speech of elected officials acting in their official capacity.[71]

In *Garcetti*, Ceballos (a calendar deputy in the Los Angeles County District Attorney's Office) prepared a disposition memorandum recommending that the District Attorney dismiss a pending case because of a faulty warrant.[72] Ceballos's supervisors decided to go ahead with the prosecution anyway, despite a "heated" discussion with Ceballos.[73] Ceballos alleged that, as a result of his criticism of the office's handling of the case, his supervisors subjected him to a series of retaliatory actions, including transfer to a position of lesser responsibility in a different jurisdiction and denial of a promotion.[74]

The Supreme Court found that the First Amendment did not protect Ceballos' memorandum. The Court held that when public officials speak during the performance of their official duties, their speech receives little—or, in most cases, no—First Amendment protection against employer discipline.[75] Only when an employee speaks as a private citizen on a matter of public concern, does his speech falls under the ambit of the First Amendment.[76] But even then the protection is more limited, and the government may still be able to impose discipline if: 1) "the employee spoke as a citizen on a matter of public concern," and (if this answer is yes), 2) the interests of the government in regulating that employee's speech justify the burdens placed on it.[77]

Originally, the government's ability to regulate an employee's speech more readily than the speech of a private citizen stemmed from Justice Holmes' proposition that "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[78] This proposition—that government employees enjoyed absolutely no right to object when his employer placed

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[71] *See* cases cited *supra* note 69.

[72] *Garcetti*, 547 U.S. at 413–14.

[73] *Id.* at 414.

[74] *Id.* at 415.

[75] *See id.* at 421 ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from *employer discipline*.") (emphasis added).

[76] *See id.* at 417 ("[T]he First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern.").

[77] *See id.* at 418 ("[T]wo inquiries to guide interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. [The second,] whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.").

[78] McAuliffe v. City of New Bedford, 29 N.E. 517, 517 (Mass. 1892) (Holmes, J.).

conditions on his employment—was the norm for nearly 100 years.[79] But it has since changed, and the Court now grounds the government's ability to discipline an employee, whether acting within the scope of his employment or as a private citizen, in its interests as an employer.[80] As such, when the government employee takes off his official-duty "hat," and speaks in his capacity as private citizen, his speech is generally protected unless the government can advance a weighty enough interest to justify curtailing it. While his official-duty "hat" is on, however, the employee must abdicate his First Amendment rights in the name of efficiency and effectiveness.

The government's interest in regulating employee speech is rooted in the idea that, as an employer, it should be able to efficiently control the conduct of its employees and send consistent messages. When the right conditions are met, these interests are sometimes weighty enough to justify burdening the employee's First Amendment rights.[81] Thus, so long as the government can show that the employee spoke pursuant to her official duties, the First Amendment affords no protection. And, even if the employee spoke "as a private citizen," the government may still be able to discipline the employee if it advances a weighty enough interest.

It therefore appears settled that the government can justify applying open meeting laws, like the Federal Sunshine Act, to agencies, commissions, universities and other non-elected public bodies under the rationale of *Garcetti*. Most open meeting acts limit the reach of the law to business that is before,[82] or, in some more extreme cases, any business that *may* come before,[83] the body. By

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[79] *See* Connick v. Myers, 461 U.S. 138, 143 (1983) ("For most of this century, the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights.").

[80] *See* Waters v. Churchill, 511 U.S. 661, 671 (1994) (plurality opinion) ("[T]he government as employer indeed has far broader powers than does the government as sovereign.").

[81] *See Garcetti*, 547 U.S. at 418 ("Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services."); *Waters*, 511 U.S. at 675 ("[W]here the government is acting as employer, its efficiency concerns should . . . be assigned a greater value."); *cf.* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995) ("[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.").

[82] *See, e.g.*, OHIO REV. CODE ANN. § 121.22(B)(2) (West 1994 & Supp. 2009) (defining "meeting" as "any prearranged discussion of the public business of the public body by a majority of its members").

[83] *See, e.g.*, TEX. GOV'T CODE ANN. § 551.001(4)(B) (West 2004 & Supp. 2010) (defining a "meeting" as a gathering conducted by a government body with a quorum present "at which the members receive information from, give information to, ask questions of, or receive questions from any third person . . . about the public business or public policy over which the

definition, then, the employee would be acting within the scope of his employment, and thus would fall under the first prong of *Garcetti* (employee speech pursuant to his official duty is not protected),[84] and therefore would be subject to governmental discipline. But this does little to solve the problem of open meeting laws that impose criminal penalties; *Garcetti* says only that the speech is not protected from *employer discipline*.[85]

B. The Test from Garcetti Is Not an Appropriate Tool to Analyze the Speech of Elected Officials

There is a fundamental difference between the mode of regulation in cases like *Garcetti* (namely, employer disciplinary action)[86] and the penalties attached to violations of an open meeting law. The former uses methods such as reprimand, reassignment, and, in extreme cases, termination, while the latter "regulates" through criminal prosecution, imposition of fines, and, in extreme cases, imprisonment.

Another problem arises when courts attempt to apply the rule in *Garcetti* blindly to all public employees, regardless of their rank in the bureaucratic hierarchy and their unique and varied relationships with their employer. The issue lies in defining "public employee" in the context of the *Garcetti* analysis. While in most cases it will undoubtedly be clear, some courts have hesitated to apply *Garcetti* to higher-ranking government officials.[87] And *Garcetti* itself does not draw a clear line. Although Ceballos exercised some supervisory authority, he still had non-elected officials supervising him.[88] This ambiguity requires further parsing of the nebulous term "public employee," especially when that employee is an elected official.

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governmental body has supervision or control").

[84] *Garcetti*, 547 U.S. at 421.

[85] *Id.* See *infra* Part IV for a discussion of how the application of an open meeting law's criminal penalties would change the analysis.

[86] *See also* Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968) (holding that a public school teacher's dismissal for making false statements was not justified without a showing that the statements were made recklessly or knowingly)).

[87] *See* Steven J. Stafstrom, Jr., Note, *Government Employee, Are You a "Citizen"?:* Garcetti v. Ceballos *and the "Citizenship" Prong to the* Pickering/Connick *Protected Speech Test*, 52 ST. LOUIS U. L.J. 589, 620–21 (2008) (discussing courts' struggles to apply the *Garcetti* standard to employees who are neither regular state employees nor state officials).

[88] Ceballos v. Garcetti, 361 F.3d 1168, 1170–71 (9th Cir. 2004). It appears from the factual background that Ceballos had at least two non-elected officials supervising him: "Ceballos discussed the problems arising from this investigation with others in the Office, including his immediate supervisor, Carol Najera and the then-Head Deputy District Attorney, Frank Sundstedt." *Id.* at 1171.

A closer inquiry reveals that elected officials are not covered by the *Garcetti* test because they are not "employees," as the Court uses that term. *Garcetti* distinguishes speech uttered within the scope of employment from that spoken in the employee's individual capacity.[89] Whether an employee acts within the scope of his employment depends in large part upon the control his principal exerts over his actions.[90] This right of control is lacking in the elected official—electorate relationship. While, elected officials serve set terms and are ultimately accountable to the electorate, "the people" have no direct mode of control over their representatives' day-to-day actions. Citizens can, of course, write letters and lobby their city councilperson to vote one way or another on an issue, but there are no immediate repercussions if the councilperson chooses to ignore these overtures. [91] And often there are citizens lobbying him to vote the other way as well, so any sort of penalty for failing to listen to the recommendations of the electorate would put the legislator in an impossible Catch-22.

One might argue that, despite the fact that the electorate cannot directly control their elected representatives, they can certainly influence their decisions through various mechanisms (donations, petitions, letters, rallies, etc.).[92] This ability to influence, however, does not necessarily give rise to the right to control,[93] and the absence of this right significantly alters the "employment" relationship of elected officials. This deviation is sufficient to remove elected officials from the purview of *Garcetti*.

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[89] Garcetti v. Ceballos, 547 U.S. 410, 418 (2006).

[90] *See generally* RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. F (2006) ("An essential element of agency is the principal's right to control the agent's actions. . . . A relationship of agency is not present unless the person on whose behalf action is taken has the right to control the actor."); *id.* § 7.07(3)(a) (2006) ("[A]n employee is an agent whose principal controls or has the right to control the manner and means of the agent's performance of work.").

[91] At least, not the sort of repercussions seen in "public employee" cases like *Garcetti* and *Waters*.

[92] *But see, e.g.*, Michael Kent Curtis, *Critics of "Free Speech" and the Uses of the Past*, 12 CONST. COMMENT. 29, 31 (1995) ("One metaphor embraced by advocates of representative government is that of agency. . . . In the agency metaphor, the people are the principal, elected officials are the agents . . . .").

[93] *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006). As the commentary makes clear:

> The principal's right of control in an agency relationship is a narrower and more sharply defined concept than domination or influence more generally. Many positions and relationships give one person the ability to dominate or influence other persons but not the right to control their actions. . . . A relationship is one of agency only if the person susceptible to dominance or influence has consented to act on behalf of the other and the other has a right of control, not simply an ability to bring influence to bear.

Id. cmt. f(1).

Additionally, limiting the free speech rights of elected officials would not serve the interests that allow the government to regulate employee speech in the first place: efficiently and effectively achieving its mission as an employer. When regulating the speech of public employees like Ceballos, the government has sufficient interests as an employer—promoting a consistent message, maintaining discipline, etc.—to justify the burden it places on the employee's speech. These burdens are necessary to ensure that the agency or governmental entity runs smoothly.[94]

This efficiency rationale simply does not apply in the case of elected officials. Elected officials do not have a direct supervisor, but rather, in many respects, elected officials *are* the individuals responsible for making the policies and shaping the consistent messages that the lower-level public employees must carry out. Our national system of government is predicated upon republican principles: the idea that the people have *delegated* their law-making responsibility to a select few.[95] Treating these select few as if they were identical to all other public employees would severely restrict their ability to govern and, in the process, undermine the conscious choice we, as a people, made to found a republican form of government.

Ideally, our representatives should be able to detach themselves and step away from their private interests—even their self-interest in reelection—when discussing and deliberating the merits of a proposition.[96] While in today's partisan political atmosphere this may seem slightly naïve, the Founders thought that the electorate should only support the wisest and most virtuous candidates; those capable of rising above the pressures of their private lives to determine what

[94] *See* Waters v. Churchill, 511 U.S. 661, 675 (1994) (plurality opinion) ("The key to First Amendment analysis of government employment decisions, then, is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as a sovereign to a significant one when it acts as employer. . . . [W]here the government is acting as employer, its efficiency concerns should . . . be assigned a greater value.").

[95] THE FEDERALIST NO. 10, at 56 (Alexander Hamilton) (George Stade ed., 2006) ("The two great points of difference, between a democracy and a republic, are, first, the delegation of the government, in the latter, to a small number of citizens elected by the rest. . . . The effect of . . . [this] difference is, on the one hand, to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations.").

[96] *See* Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L. J. 1539, 1547–48 (1988) (arguing that, in a republic, "political participants [are] to subordinate their private interests to the public good through political participation in an ongoing process of collective self-determination").

is in the best interest of the common good.[97] They thought that the ability to deliberate freely and without restraint was vital to uncovering the common good, especially in times where popular passions counseled an expedient course of action.[98]

Modern commentators (some part of the "Republican Revival") have indicated that it may not be in the public's best interest for these deliberations in search of the public good to be aired openly.[99] Rather, the deliberative process itself enables elected officials to step back from their personal interests and "achieve a measure of critical distance from prevailing desires and practices," thereby allowing them to subject these desires and practices to an unbiased review and debate.[100] Such a mechanism serves to "insulate political actors from private pressure" and prevent attempts to undermine the deliberative process.[101] While strict record keeping, disclosure requirements, open meetings, and public information statutes might allow for better monitoring of the deliberative process, these measures come with added costs.[102] For instance, some of these requirements may unduly burden deliberative bodies; others are cumbersome to enforce.[103]

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[97] *See* THE FEDERALIST NO. 57, at 316 (James Madison) (George Stade ed., 2006) ("The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous, whilst they continue to hold their public trust.").

[98] *See* THE FEDERALIST NO. 71, at 396 (Alexander Hamilton) (George Stade ed., 2006) ("When occasions present themselves, in which the interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed, to be the guardians of those interests; to withstand the temporary delusion, in order to give them time and opportunity for more cool and sedated reflection."); Sunstein, *supra* note 96, at 1548–49 ("[D]eliberation counsels political actors to achieve a measure of critical distance from prevailing desires and practices, subjecting these desires and practices to scrutiny and review.").

[99] *See generally* Cass R. Sunstein, *Government Control of Information*, 74 CAL. L. REV. 889 (1986). Professor Sunstein argues, "[I]f decisionmaking processes were exposed to public view, disagreements and controversial views might not be aired at all. Similarly, a group is unlikely to develop a coherent position if it is unable to explore, with some tentativeness, the disparate options with which it is confronted. . . . If deliberations are disclosed while they are in progress, organized groups with intense preferences may attempt to influence the outcome." *Id.* at 895–96.

[100] Sunstein, *supra* note 96, at 1548–49.

[101] *Id.* at 1549. Professor Sunstein notes that: "The requirement of deliberation is not purely formal. . . . [D]eliberative processes are often undermined by intimidation, strategic and manipulative behavior, collective action problems, adaptive preferences, or—most generally—disparities in political influence." *Id.* at 1549–50.

[102] Samuel Issacharoff & Daniel R. Ortiz, *Governing Through Intermediaries*, 85 VA. L. REV. 1627, 1664–65 (1999).

[103] *See id.* ("As a general matter, such requirements might unduly burden these entities, and such sunshine requirements would be awkward to enforce . . . ."). Issacharoff and Ortiz continue: "Indeed, a significant branch of First Amendment law was forged in an effort to protect the autonomy and privacy of dissident groups." *Id.* at 1665.

Thus it is clear that our republican form of government requires that we allow the elected officials therein some breathing room.[104] The citizenry cannot afford to constantly hover behind their elected officials, peering eagerly over their shoulders at every turn. If this were truly what our Founders intended, they could have chosen to be governed by a direct democracy. But they did not. And therefore, the people cannot expect to instruct their elected representatives as if they were ordinary "employees," serving at the beck-and-call of their "employer." As such, a degree of separation is not only appropriate, but necessary to the maintenance of our form of republican government.

In fact, the Founders debated whether the citizenry should have this very right: a right to instruct their representatives. But, as the British Statesman Edmund Burke pointed out: "Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion."[105] The First Congress seemed to share Burke's sentiment as it debated this proposed addition to the First Amendment, which would have given citizens the right "to instruct their representatives."[106]

During the spirited debate that ensued, Representative Thomas Hartley argued that "the principle of representation is distinct from an agency," and that "the people ought to have confidence in the honor and integrity of those they send forward to transact their business."[107] He noted specifically that during the times when the People's passions were inflamed and their mood intransigent, binding instructions would be particularly problematic and antithetical to the core purposes of representation. Rather, he felt that insulating representatives from being bound by such reactionary opinions was a virtue, one necessary for the Union's existence.[108]

Representatives George Clymer and Roger Sherman also decried the proposed addition. Rep. Clymer put his opposition in no uncertain terms:

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[104] *Cf.* NAACP v. Button, 371 U.S. 415, 433 (1963) ("First Amendment freedoms need breathing space to survive . . . .").

[105] BURKE, *supra* note 1, at 10.

[106] 1 ABRIDGMENT OF THE DEBATES OF CONGRESS 138 (Thomas Hart Benton ed., 1857).

[107] *Id.*

[108] *Id.* Hartley specifically said:

> When the passions of the people are excited, instructions have been resorted to and obtained, to answer party purposes; and although the public opinion is generally respectable, yet at such moments it has been known to be often wrong; and happy is that Government composed of men of firmness and wisdom to discover, and resist popular error.

Id.

> This is a most dangerous principle, utterly destructive of all sides of an independent and deliberative body, which are essential requisites in the Legislatures of free Governments; they prevent men of abilities and experience from rendering those services to the community that are in their power, destroying the object contemplated by establishing an efficient General Government and rendering Congress a mere passive machine.[109]

Rep. Sherman thought that such an addition would defeat the purpose of having a deliberative body in the first place.

> I think, when the people have chosen a representative, it is his duty to meet others from the different parts of the Union, and consult, and agree with them to such acts as are for the general benefit of the whole community. If they were to be guided by instructions, there would be no use in deliberation . . . .[110]

Sherman also thought such a right unnecessary because a representative had a duty to discover and act in the best interests of the general welfare. If his instructions were on point, they would be redundant. If they were to the contrary, he must, by virtue of his position, "be bound by every principle of justice to disregard them."[111]

James Madison (at the time, a Representative from Virginia) also participated in the debate. Madison felt that, because the First Amendment already included the freedoms of speech and petition, a "right to instruct," if it was not binding, would simply be superfluous.[112] If, however, the People could issue binding instructions to their legislators, then Madison felt this was a "dangerous" proposition; and one to be avoided.[113] In the end, the

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[109] *Id.* at 139.

[110] *Id.*

[111] *Id.* Sherman said:

> It is the duty of a good representative to inquire what measures are most likely to promote the general welfare, and, after he has discovered them, to give them his support. Should his instructions, therefore, coincide with his ideas on any measure, they would be unnecessary ; if they were contrary to the conviction of his own mind, he must be bound by every principle of justice to disregard them.

Id.

[112] *Id.* at 141 ("The right of freedom of speech is secured ; the liberty of the press is expressly declared to be beyond the reach of this Government ; the people may therefore publicly address their representatives, may privately advise them, or declare their sentiments by petition to the whole body ; in all these ways they may communicate their will.").

[113] *Id.* Madison said:

proposed "right to instruct" failed, with ten votes in favor and forty-one against.[114]

Thus, it appears that elected officials have an inherently different relationship with their "employer" than other public employees. As such, the test from *Garcetti* is not an appropriate mechanism to analyze their free speech rights. Subjecting our elected representatives, who act in essence as trustees for the general good, to an analysis more aptly suited for determining the rights of agents, severely undercuts their legislative autonomy and the republican principles upon which our government was founded. It is therefore inappropriate for courts to wield *Garcetti* like a hatchet to cut off the hand when only the pinky need be amputated.

C. Elected Official's Free Speech Rights

The Supreme Court has yet to address the free speech rights of elected officials in the wake of *Garcetti*—and it has never squarely addressed the extent of their free speech protection when they are performing their official duties. The intent of the Framers, however, in specifically including the Speech or Debate Clause in the Constitution (before they adopted the First Amendment, mind you) may shed some light on how they viewed the free speech rights of elected officials. Additionally, the jurisprudential landscape is not completely barren regarding the free speech rights of politicians, and there are several decisions that help guide our way.

1. Interpreting the Speech or Debate Clause

The Speech or Debate Clause provides: "[F]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place."[115] James Wilson (a drafter of the clause and one of George Washington's six original appointments to the Supreme Court)[116] felt that the Speech or Debate Clause was an indispensible component of the Constitution because it "enable[d] and

> My idea of the sovereignty of the people is, that the people can change the constitution if they please; but while the constitution exists, they must conform themselves to its dictates. But I do not believe that the inhabitants of any district can speak the voice of the people; so far from it, their ideas may contradict the sense of the whole people; hence the consequence that instructions are binding on the representative is of a doubtful, if not of a dangerous nature.

Id.

[114] *See id.* at 144.

[115] U.S. CONST. art. I, § 6.

[116] COMM'N ON THE BICENTENNIAL OF THE U.S. CONSTITUTION, THE SUPREME COURT OF THE UNITED STATES: ITS BEGINNINGS AND ITS JUSTICES 1790–1991 60 (1992).

encourage[d] a representative of the publick [sic] to discharge his publick [sic] trust."[117] Wilson felt that representatives should "enjoy the fullest liberty of speech, and that [they] should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence [sic]."[118]

The Supreme Court, however, did not construe the Clause until 1880 in *Kilbourn v. Thompson.*[119] There, the Court noted that the speech or debate privilege derived from the English Parliament and that soon after its adoption in that body, it had become "indispensible and universally acknowledged."[120] The *Kilbourn* Court then quoted favorably from Chief Justice Parsons' opinion in *Coffin v. Coffin*,[121] which gave the Clause a liberal interpretation.[122] The Court even went so far as to extend the privilege beyond mere words spoken in the House or Senate to written reports, resolutions, votes, and other things "generally done in a session of the House by one of its members in relation to the business before it."[123]

In more recent times, the Supreme Court has upheld this broad reading because the privilege ensures legislative independence.[124] The legislative history shows that the Framers intended the Clause to act

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[117] JAMES WILSON, *Of the Constitution of the United States and of Pennsylvania—of the Legislative Department*, *in* 1 THE WORKS OF JAMES WILSON 421 (Robert G. McCloskey ed., 1967), *quoted in* Tenney v. Brandhove, 341 U.S. 367, 373 (1951).

[118] *Id.*

[119] 103 U.S. 168 (1880).

[120] *Id.* at 202 (quoting Stockdale v. Hansard, (1839) 112 Eng. Rep. 1112 (Q.B.) 1156). Lord Denman elaborated in *Stockdale*:

> The privilege of having their debates unquestioned, though denied when the members began to speak their minds freely . . . was soon clearly perceived to be indispensable and universally acknowledged. By consequence, whatever is done within the walls of either assembly must pass without question in any other place. For speeches made in Parliament by a member to the prejudice of any other person, or hazardous to the public peace, that member enjoys complete impunity.

Stockdale, 112 Eng. Rep. at 1156, *quoted in Kilbourn*, 103 U.S. at 202.

[121] 4 Mass. 1 (1808).

[122] *Kilbourn*, 103 U.S. at 203 ("These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office. . . . I, therefore, think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered." (quoting Coffin v. Coffin, 4 Mass. 1 (1808))).

[123] *Id.* at 204. The Court went on:

> It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers.

Id.

[124] *See* United States v. Johnson, 383 U.S. 169, 179 (1966) ("The legislative privilege, protecting against possible prosecution by an unfriendly executive and conviction by a hostile judiciary, is one manifestation of the 'practical security' for ensuring the independence of the legislature.").

as a shield for legislators against abusive encroachments by the other branches.[125] Additionally, in *United States v. Brewster*,[126] the Supreme Court said: "[T]he purpose of the Speech or Debate Clause is to protect the individual legislator, not *simply* for his own sake, but to preserve the independence and thereby the integrity of the legislative process."[127]

Thus, there appear to be two overriding motivations for the Speech or Debate Clause. First, the Framers placed a high value on legislators' ability to debate freely. This includes, presumably, freedom not only from prosecution, but also from other extraneous influences that would have a similar chilling effect on their ability to openly debate the merits of a proposition without fear of retaliation or suppression. Second, the drafters intended that the Clause serve as an additional buffer protecting the legislative branch in the event of an overreaching executive or a hostile judiciary.

Though only tangentially related to the broader notion of free speech, these considerations help to focus our analysis of elected officials' free speech rights. In choosing to exempt congressional speech or debate from question "in any other place," the Framers recognized not only the right of legislators to speak, but also the right of the legislative branch, as a whole, to be free of encroachment from the other branches.

2. The Extent of Elected Officials' First Amendment Rights

The proposition that the free speech rights of elected officials are more limited than those of ordinary citizens seems (at first blush, at least) rather counterintuitive. Nonetheless, this is what several courts have held.[128] *Garcetti* has invited an increase in these rulings, with several federal district courts applying that rationale and finding that elected politicians acting in their official capacity receive no First

[125] *Id.* at 180–81 ("[I]t is apparent from the history of the clause that the privilege was not born primarily of a desire to avoid private suits such as those in *Kilbourn* and *Tenney*, but rather to prevent intimidation by the executive and accountability before a possibly hostile judiciary.").

[126] 408 U.S. 501 (1972).

[127] *Id.* at 524 (emphasis added).

[128] *See, e.g.*, Cole v. State, 673 P.2d 345, 350 (Colo. 1984) ("We conclude that the Open Meetings Law strikes the proper balance between the public's right of access to information and a legislator's right to freedom of speech. The people have determined that they are willing to assume the detriment of a potential stifling of discussion among legislators to secure the advantages of open government."); Kansas *ex rel.* Murray v. Palmgren, 646 P.2d 1091, 1099 (Kan. 1982) ("The First Amendment does indeed protect private discussions of governmental affairs among citizens. Everything changes, however, when a person is elected to public office. . . . Elected officials have no constitutional right to conduct governmental affairs behind closed doors.").

Amendment protections.[129] But the Supreme Court of the United States has not endorsed this application.[130] In fact, such an application appears to go against a seemingly clear line of precedent that emanates from the Supreme Court's decisions in *Wood v. Georgia*[131] and *Bond v. Floyd*,[132] both of which intimate that elected officials receive full First Amendment protections even when they act in their official capacities.[133]

In *Wood*, a county sheriff was indicted for contempt of court because he made public statements criticizing local court proceedings related to redistricting. The indictment specified that the sheriff made the statement in his capacity as a citizen and not in his official capacity as sheriff.[134] Nevertheless, Georgia argued that because Wood was a sheriff, "his right to freedom of expression must be more severely curtailed than that of an average citizen."[135] The Court explicitly rejected this argument,[136] stating that even if Wood spoke in

[129] *See, e.g.*, Hartman v. Register, No. 1:06-CV-33, 2007 WL 915193, at *6 (S.D. Ohio Mar. 26, 2007) ("*Garcetti* . . . makes clear that speech made pursuant to an individual's official duties is not protected by the First Amendment. The distinction between the public employee in *Garcetti* and an elected official, in this case, Plaintiff, is inconsequential."); Hogan v. Twp. of Haddon, No. 04-2036 (JBS), 2006 WL 3490353, at *6 (D.N.J. Dec. 1, 2006) (elected township commissioner protested the withholding of an article she authored and submitted for publication to the town newspaper, but "because her submissions were made in her capacity as a Township commissioner (and not a private citizen), [she] has no First Amendment rights . . . ."); Rangra v. Brown, No. P-05-CV-075, 2006 WL 3327634, at *5 (W.D. Tex. Nov. 7, 2006), *rev'd,* 566 F.3d 515 (5th Cir. 2009), *dismissed as moot en banc by* 584 F.3d 206 (5th Cir. 2009) ("Because the speech at issue is uttered entirely in the speaker's capacity as [an elected] member of a collective decision-making body, and thus is the kind of communication in which he or she is required to engage as part of his or her official duties, it is not protected by the First Amendment . . . .").

[130] Siefert v. Alexander, 608 F.3d 974, 991 (7th Cir. 2010) (Rovner, J., dissenting) (noting that, with reference to the *Pickering–Garcetti* line of cases, "[n]either this court nor the Supreme Court . . . has ever held that these decisions limiting the speech of public employees can be applied to elected officials' speech").

[131] 370 U.S. 375 (1962).

[132] 385 U.S. 116 (1966).

[133] *See also* Republican Party of Minn. v. White, 536 U.S. 765, 781–82 (2002) ("The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." (quoting *Wood*, 370 U.S. at 395)); X-Men Sec., Inc. v. Pataki, 196 F.3d 56, 69 (2d Cir. 1999) ("One does not lose one's right to speak upon becoming a legislator."); Miller v. Town of Hull, 878 F.2d 523, 532 (1st Cir. 1989) ("[W]e have no difficulty finding that the act of voting on public issues by a member of a public agency or board comes within the freedom of speech guarantee of the first amendment. This is especially true when the agency members are elected officials."); Wrzeski v. City of Madison, 558 F. Supp. 664, 667 (W.D. Wis. 1983) ("Plaintiff's status as a legislator does not strip her of any rights she would otherwise enjoy under the First Amendment to speak freely or not to speak at all. . . . Courts have repeatedly analyzed freedom of speech cases in the legislative context without the use of any special First Amendment standard.").

[134] *Wood*, 370 U.S. at 380–81.

[135] *Id.* at 393.

[136] *Id.* ("Under the circumstances of this case, this argument must be rejected.").

his capacity as sheriff, that fact provided no basis for curtailing his right to free speech.[137]

> The petitioner was an elected official and had the right to enter the field of political controversy, particularly where his political life was at stake. The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance.[138]

The Court elaborated on the extent of elected officials' First Amendment protection in *Bond v. Floyd*.[139] In that case, Bond, a newly elected member of the Georgia House of Representatives, filed suit after the Clerk of the House refused to administer his oath of office. The Clerk demanded that Bond retract certain statements—made after he was elected, but before he took office—opposing the Vietnam War. He reasoned that Bond could not, in good faith, take the oath of office because his statements opposing the war gave aid and comfort to the enemy, and were thus in conflict with the Georgia Constitution.[140] Georgia specifically argued that the court must hold an elected legislator to a higher standard than a private citizen for the purpose of analyzing his First Amendment rights. The Supreme Court disagreed.[141] The Court again reasoned that elected representatives should have wide latitude to express their views so that their constituents can properly judge their actions.[142]

Georgia then attempted to argue that the Court should not extend the principle that "debate on public issues should be uninhibited, robust, and wide-open,"[143] to cases involving legislators because the policy of free debate on public issues applies only to the citizen-critic.[144] The Court also dismissed this argument: "The interest of the public in hearing all sides of a public issue is hardly advanced by

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[137] *Id.* at 394 ("However, assuming that the Court of Appeals did consider to be significant the fact that petitioner was a sheriff, we do not believe this fact provides any basis for curtailing his right of free speech.").

[138] *Id*. at 394–95 (footnote and citation omitted).

[139] 385 U.S. 116 (1966).

[140] *Id.* at 123–27.

[141] *Id.* at 132–33 ("The State declines to argue that Bond's statements would violate any law if made by a private citizen, but it does argue that even though such a citizen might be protected by his First Amendment rights, the State may nonetheless apply a stricter standard to its legislators. We do not agree.").

[142] *Id.* at 135–36 ("The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy.").

[143] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[144] *Bond*, 385 U.S. at 136.

extending more protection to citizen-critics than to legislators."[145] The Court reasoned that not only do legislators have a responsibility to their constituents to take a position on controversial matters, but also the electorate is also entitled to "be represented in governmental debates by the person they have elected to represent them."[146]

Taken together, *Bond* and *Wood* strongly support the idea that elected officials enjoy the same protection under the Free Speech Clause as private citizens—and they perhaps enjoy even greater latitude.[147] But, though the decision in *Wood* seems explicit, the Court did not have a clear enough factual record to determine whether Wood issued his statements in his capacity as sheriff or as a private citizen.[148] Nonetheless, lower courts have interpreted these decisions as holding that elected officials have very few restraints on their First Amendment freedoms.[149]

For example, in *Wrzeski v. City of Madison*,[150] a city councilwoman challenged an ordinance requiring council members to vote either "aye" or "nay" on every question put before the council (in other words, no council member could abstain from voting). The ordinance authorized the council president to censure any member who refused to vote and, if that same member refused to vote on a

[145] *Id.*

[146] *Id.* at 136–37.

[147] *See* William V. Luneburg, *Civic Republicanism, the First Amendment, and Executive Branch Policymaking*, 43 ADMIN. L. REV. 367, 378 (1991) ("[A]pplication of the First Amendment to representatives acting in their official capacities as in *Bond* is entirely consistent with Professor Sunstein's view of that provision as a structural guarantee whose purpose extends beyond private autonomy to the protection of the republican-envisioned deliberative process . . . .").

[148] Wood v. Georgia, 370 U.S. 375, 393 (1962) ("[T]here was no finding by the trial court that the petitioner issued the statements in his capacity as sheriff . . . .").

[149] *See, e.g.*, Velez v. Levy, 401 F.3d 75, 101 (2d Cir. 2005) ("*Bond* . . . established nearly forty years ago that the exclusion of an officeholder from her office in retaliation for her political views is a violation of the First Amendment."); Camacho v. Brandon, 317 F.3d 153, 166 (2d Cir. 2003) (Walker, C.J., concurring) ("[T]he Court recognized in *Bond v. Floyd* that representative democracy requires that we provide legislators broad freedom of speech."); DeGrassi v. City of Glendora, 207 F.3d 636, 647 (9th Cir. 2000) ("While the free speech rights of elected officials may well be entitled to broader protection than those of public employees generally, the underlying rationale remains the same. Legislators are given the widest latitude to express their views on issues of policy.") (internal quotations omitted); Gewertz v. Jackman, 467 F. Supp. 1047, 1058 (D.N.J. 1979) ("*Bond* squarely holds that legislators enjoy the same degree of first amendment protection as private citizens."). The Fifth and Eighth Circuits have also determined that legislators enjoy First Amendment rights, but neither relied explicitly on *Bond* or *Wood*. *See* Colson v. Grohman, 174 F.3d 498, 506 (5th Cir. 1999) ("There is no question that political expression such as [Councilwoman] Colson's positions and votes on City matters is protected speech under the First Amendment."); O'Brien v. City of Greers Ferry, 873 F.2d 1115, 1118 (8th Cir. 1989) ("A city council is not free to retaliate against a member of the council because of such member's exercise of first amendment rights.").

[150] 558 F. Supp. 664 (W.D. Wis. 1983).

subsequent issue, to order a civil forfeiture of $100.[151] The court, citing *Police Department v. Mosley*,[152] analyzed the ordinance as a content-based restriction because "[l]egislators enjoy the same First Amendment protections as any other members of our society."[153] Before enjoining enforcement of the ordinance, the court noted, "a representative who consistently dodges difficult or controversial issues by not voting on them does a disservice to his or her constituency. However, in our government system, the proper remedy for such behavior lies with the electorate."[154]

The district court in *Wrzeski* also stated that it might, at first blush, seem "incongruous" to analyze a legislator's speech under the First Amendment.[155] But the fact that the speech emanated from an elected member of the legislative branch is of no moment in terms of the First Amendment standard applied. According to the court, the difference lies not in the standard of First Amendment review, but rather the weight accorded to the government's interest.[156] Therefore, the court undertook to weigh the interest advanced by the council against the content-based regulation of the ordinance. In applying this "compelling government interest test," the district court found that requiring councilpersons to vote on every matter did not "tend[] to further the effective operation of the . . . Council."[157] Thus, according to the district court in *Wrzeski*, the proper place to account for the legislator's status is in the evaluation of the government's advanced interest, rather than a blanket, categorical denial of First Amendment rights.

Similarly, in *Miller v. Town of Hull*,[158] the First Circuit held that the Town Selectmen could not suspend the elected commissioners of the Housing Redevelopment Authority for refusing to vote in accordance with the Selectmen's wishes. The court noted: "Although we have found no cases directly on point, *probably because it is considered unassailable*, we have no difficulty finding that the act of voting on public issues . . . comes within the freedom of speech guarantee of the first amendment."[159] After citing to *Bond*, the court

[151] *Id.* at 665–66.

[152] 408 U.S. 92 (1972).

[153] *Wrzeski*, 558 F. Supp. at 667 (citing Bond v. Floyd, 385 U.S. 116, 132–33 (1966)).

[154] *Id.* at 668.

[155] *Id.* at 666.

[156] *See id.* at 667–68 ("[T]he council's need to structure its proceedings in an orderly fashion is an appropriate consideration in applying the 'compelling government interest' test to the facts of this case.").

[157] *Id.* at 668.

[158] 878 F.2d 523 (1st Cir. 1989).

[159] *Id.* at 532 (emphasis added).

continued: "The right to vote freely . . . derives from the first amendment, which protects the official statements of legislators."[160]

The Town attempted to argue that the suspensions were legitimate disciplinary actions under one of two theories: political patronage[161] and regulation of government employee speech.[162] The First Circuit conceded that "public officials in politically relevant positions may sometimes be properly removed from office because of their political affiliation, and because of the political views they express, without running afoul of the First Amendment," and that "discharging a *government employee*" could be appropriate if his speech hampered the effective operation of the governmental body.[163] But the court quickly dismissed each of these scenarios as "remote from the one presented in this case."[164] The court refused to treat the elected commissioners as "government employees," presumably because they were not. Instead, the court reasoned that, as elected officials, they had "an obligation to take positions on controversial political questions so that their constituents [could] be fully informed by them, and be better able to assess their qualifications."[165]

Finally, the Supreme Court has recently intimated that candidates for office enjoy the full and robust protections of the First Amendment. In *Republican Party of Minnesota v. White*,[166] the Court evaluated the "announce clause" of the Minnesota Rules of Professional Conduct. The clause said, "a candidate for judicial office shall not announce his or her views on disputed legal or political issues."[167] This prohibition extended to even "a mere statement of [a candidate's] current position, even if he [did] not bind himself to maintain that position after election."[168] While the announce clause purports to prohibit candidates for judicial office from discussing the *subject* of politics, the Court held that it was an impermissible content-based ban that "burden[ed] a category of speech . . . at the core of our First Amendment freedoms—speech about the

[160] *Id.* at 533 (citing Bond v. Floyd, 385 U.S. 116 (1966) and Clarke v. United States, 705 F. Supp 605 (D.D.C. 1988)).

[161] *Cf.* Elrod v. Burns, 427 U.S. 347, 367 (1976) (plurality opinion) (patronage dismissals may be appropriate to ensure political loyalty among policy-making officials).

[162] *Cf.* Connick v. Myers, 461 U.S. 138, 146–47 (1983) (disciplining a public employee for speech on matters of purely personal concern or for speech disrupting the orderly functioning of the governmental entity does not necessarily violate the First Amendment).

[163] *Miller*, 878 F.2d at 532 n.13 (emphasis added).

[164] *Id.*

[165] *Id.* at 532 (quoting Bond v. Floyd, 385 U.S. 116, 136–37 (1966)).

[166] 536 U.S. 765 (2002).

[167] *Id.* at 770 (internal quotation omitted).

[168] *Id.*

qualifications of candidates for public office."[169] *White* therefore supports the proposition that elected officials receive the same First Amendment protections as private citizens.

These federal precedents, along with the Speech and Debate Clause, demonstrate that elected officials are inherently different from government "employees." Classifying them as mere agents grossly undervalues the role they play in our society. In actuality, they are more akin to stewards or trustees of the public welfare, rather than blind executors of the electorate's whims. The Speech or Debate Clause suggests that legislators may be worthy of greater free speech protections than private citizens, especially when they are carrying out their legislative duties. This serves not only to protect the individual legislators right to free expression, but the legislative branch, as a whole, from encroachment by the other branches.

The Supreme Court of Nevada recently recognized this distinction in *Carrigan v. Commission on Ethics*.[170] In that case, a city council member challenged a written censure he received from the Nevada Ethics Commission for failing to abstain from voting on a measure in which he had a potential conflict of interest. The district court concluded that, because voting on a matter before the council was an official act, the *Pickering–Garcetti* line of cases applied.[171] The Supreme Court of Nevada disagreed, noting: "[w]hile Carrigan is employed by the government, he is an elected public officer, and his relationship with his 'employer,' the people, differs from that of other state employees. Therefore, the district court erred in applying the *Pickering* balancing test."[172] The court then proceeded to apply strict scrutiny.[173]

In *Carrigan*, Justice Pickering (ironically enough) issued a lone dissent. He argued that the majority's distinguishment of Carrigan's employment relationship was "overly simplistic," because it "does not take into account the Legislature's control over local governments . . . and the constitutional and policy-based imperative of non-self-interested governmental decisionmakers."[174] Thus, he

[169] *Id.* at 774 (internal quotation omitted). While the Court did not explicitly acknowledge the subject-matter-based nature of the ban, it did note the following: "There is an obvious tension between the article of Minnesota's popularly approved Constitution which provides that judges shall be elected, and the Minnesota Supreme Court's announce clause which places most *subjects* of interest to the voters off limits." *Id.* at 787 (emphasis added).

[170] 236 P.3d 616 (Nev. 2010).

[171] *Id.* at 619 ("The Commission and the Legislature (as amicus) assert that the district court properly concluded that the statute should be reviewed under a less strict standard as outlined by the United States Supreme Court in *Pickering*.").

[172] *Id.* at 622.

[173] *Id.*

[174] *Id.* at 626 (Pickering, J., dissenting).

would have, like the district court, applied the *Pickering* balancing test.

But arguments of this type represent a misunderstanding of strict scrutiny. This higher level of inquiry does not ignore interests (which are often weighty) in maintaining impartiality and preventing corruption and impropriety. Rather, strict scrutiny simply strips away the presumption of validity that normally attaches to a legislative enactment and shifts the burden of proof to the government.[175] The solution is not to apply *Pickering/Garcetti's* lower level of review, but rather to accord the government's stated interests the proper weight.[176]

This is what the Supreme Court of the United States did in *White*. There, the Court did not distinguish between the First Amendment rights of elected judges and the First Amendment freedoms of private citizens.[177] Rather, it adhered to the principle expressed in *Wood*: "[t]he role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance."[178] This realization becomes even more powerful when put into the context of the time: *Wood* and *Bond*, which noted the unqualified First Amendment freedoms of legislators, were decided several years *before* cases like *Pickering v. Board of Education*[179] and *Keyishian v. Board of Regents*,[180] which

[175] Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 359–60 (2006) ("Strict scrutiny varies from ordinary scrutiny by imposing three hurdles on the government. It shifts the burden of proof to the government; requires the government to pursue a 'compelling state interest;' and demands that the regulation promoting the compelling interest be 'narrowly tailored.'") (internal quotations and footnotes omitted).

[176] *Cf.* Siefert v. Alexander, 608 F.3d 974, 993 (7th Cir. 2010) (Rovner, J., dissenting) ("[T]he solution is to apply strict scrutiny but give proper weight to the exceedingly compelling interest the state has in ensuring an impartial and fair judiciary.").

[177] Even the dissenting Justices in *White* each defended the cannon under the assumption that strict scrutiny was the proper standard of review. *See* Republican Party of Minn. v. White, 536 U.S. 765, 800 (2002) (Stevens, J., dissenting) ("Minnesota has a compelling interest in sanctioning such statements."); *id.* at 817 (Ginsburg, J., dissenting) ("In addition to protecting litigants' due process rights, the parties in this case further agree, the pledges or promises clause advances another compelling state interest: preserving the public's confidence in the integrity and impartiality of its judiciary."). *See also Siefert*, 608 F.3d at 992 (Rovner, J., dissenting) ("In *White*, it was undisputed and uncontroversial that the court should apply strict scrutiny in evaluating the content-based restrictions on the canons of judicial conduct.").

[178] Wood v. Georgia, 370 U.S. 375, 395 (1962).

[179] 391 U.S. 563 (1968) (holding that a school board could not fire a teacher for writing a newspaper editorial critical of a recent board decision). The Court went on to explain that:

> To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court.

soundly rejected the notion that one must give up his constitutional freedoms upon taking public employment. Thus, it seems legislators and elected officials had greater liberty to express themselves than other public "employees" well before cases like *Garcetti* and there appears to be little reason to doubt that their expressive freedoms should be, in any way, limited by it. This further compels the conclusion that elected representatives, even when acting in their official capacity, should enjoy First Amendment protections equal to private citizens.

III. OPEN MEETING LAWS AND THE FIRST AMENDMENT

The First Amendment protects elected officials' expression to the same extent that it protects a private citizen's expression. "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[181] Efficient and effective function of government may logically enable limiting the free-speech rights of public employees while they are acting within the scope of their employment. They are, after all, *implementing* the already expressed "will of the people." But it makes little sense to similarly limit elected representatives' speech; for they are charged with gauging, devising, and enacting those political and social changes. As such, our elected representatives should be given the broadest latitude in the exercise of their First Amendment rights.[182]

But discerning that elected officials have free speech protection akin to private citizens hardly disposes of the matter. Rather, it confirms that we must delve deeper into the murky bog of First Amendment jurisprudence in search of answers to our open meeting law problems.

Id. at 568.

[180] 385 U.S. 589, 605–06 (1967) ("[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." (quoting Keyishian v. Bd. of Regents, 345 F.2d 236, 239 (2d Cir. 1965).

[181] Roth v. United States, 354 U.S. 476, 484 (1957).

[182] *See supra* notes 137, 141 and accompanying text. *Cf. supra* note 122 and accompanying text.

A. Determining the Burden on Elected Officials' Speech

1. Content-Neutral and Content-Based Restrictions

Most governmental burdens on speech are either content-neutral or content-based restrictions.[183] Content-neutral restrictions "limit expression without regard to the content or communicative impact of the message conveyed."[184] Content-based restrictions, on the other hand, "limit the communication because of the message conveyed."[185] Since content-neutral regulations generally receive much more deference than content-based ones,[186] this question of content has become central to modern First Amendment jurisprudence.[187]

When evaluating content-neutral restrictions, for instance, the Supreme Court is generally concerned that the restrictions undercut individuals' ability to communicate their views to others.[188] By reducing the avenues available to communicate, the government essentially reduces the total amount of discussion. This, in turn, impedes other core First Amendment values, such as the search for truth.[189] Since laws differ in the number of avenues they restrict, the Supreme Court tests most content-neutral restrictions by balancing the government's interest with the intrusiveness of the restriction, and, in doing so, the Court attempts to ensure that no less-intrusive means could achieve the government's objective.[190]

On the other hand, the Supreme Court treats content-based restrictions quite differently. First, the Court generally determines

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[183] *See generally* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987) [hereinafter Stone, *Content-Neutral Restrictions*]; Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978) [hereinafter Stone, *Subject-Matter Restrictions*].

[184] Stone, *Content-Neutral Restrictions*, *supra* note 182, at 48.

[185] Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 190 (1983) [hereinafter Stone, *Content Regulation*].

[186] *See generally id.*

[187] *See, e.g.*, Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in The Supreme Court's Application*, 74 S. CAL. L. REV. 49, 49 (2000) ("[I]ncreasingly in free speech law, the central inquiry is whether government action is content based or content neutral."); Wilson R. Huhn, *Assessing the Constitutionality of Laws that Are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, 79 IND. L.J. 801, 804 (2004) ("The distinction between content-based and content-neutral laws has played a crucial role in determining the standards of review that are used to measure the constitutionality of laws that affect freedom of expression."); Leslie Gielow Jacobs, *Clarifying the Content-Based/Content-Neutral and Content/Viewpoint Determinations*, 34 MCGEORGE L. REV. 595, 596 (2003) ("The distinction between content-based and content neutral government actions is fundamental to free speech doctrine.").

[188] Stone, *Content Regulation*, *supra* note 184, at 192–93.

[189] *Id.* at 193.

[190] *Id.* at 192.

whether the speech is of low or high value. Low-value speech (fighting words, child pornography, express incitement, etc.), generally receives only limited protection. As such, the Court tends to simply balance the contribution of this low-value speech with competing government interests and the risk that the law will inadvertently chill high-value speech.[191] High-value speech, though, tends to receive far greater protection. The Court will often employ some form of a "clear and present danger" or "compelling government interest" test. Consequently, the Supreme Court has invalidated almost every content-based regulation of high-value speech.[192]

The Court's particular hostility to content-based restrictions stems from three factors: distortion of public debate, improper legislative motivation for the ban, and the adverse consequences the restrictions tend to have on the speech's communicative impact.[193] Content-based burdens distort public debate by effectively eliminating competing viewpoints or ideas from the marketplace; essentially entrenching the status quo.[194] Additionally, the Court has consistently held that the government cannot ban a message simply because it disapproves of it,[195] or because it fears the impact the message will have on its audience, or that the public will not be able to act intelligently in response to the message.[196]

2. Subject-Matter Restrictions

At first glance, open meeting laws would seem to fit within this content-based framework. And the panel opinion in *Rangra* thought just that.[197] In that case, TOMA required: "Every regular, special, or

[191] *Id.* at 194–95.

[192] *Id.* at 196–97. *See, e.g.*, Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

[193] Stone, *Content-Neutral Restrictions*, *supra* note 182, at 254–56.

[194] *See* Stone, *Content Regulation*, *supra* note 184, at 199–200. *See also* Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981) (discussing the use of categories in first amendment legal analysis).

[195] *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 392 (1992) ("The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content.").

[196] *See, e.g.*, Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (The Framers "believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.").

[197] Rangra v. Brown, 566 F.3d 515, 521 (5th Cir. 2009), *dismissed as moot en banc by* 584

called meeting of a governmental body shall be open to the public, except as provided by this chapter."[198] Open meetings, under this statute, are those to which the public has access.[199] All other meetings are "closed" meetings.[200] The problem identified by the Fifth Circuit panel concerned the penalty TOMA imposed: any member who participated in a "closed meeting" was subject to a fine of up to $500 and/or imprisonment of up to six months.[201] The court reasoned that this was a content-based regulation on the elected officials' speech and the law, therefore, had to satisfy strict scrutiny.[202]

While, superficially, the distinction between content-neutral and content-based restrictions seems straightforward, there are several subcategories within the content-based realm that the courts afford various levels of protection.[203] Chief among these (for the purpose of evaluating open meeting laws) are subject-matter restrictions. Subject-matter restrictions "are directed, not at particular ideas, viewpoints, or items of information, but at entire subjects of expression."[204]

Open meeting laws appear to fall more in-line with subject-matter restrictions, rather than content-based ones. The laws are directed, not at the particular ideas being expressed, but at entire subjects of expression.[205] The applicability of the law turns not on whether the elected official is Republican, Democrat, Green, or Libertarian, but on whether he discusses the public business before the body *at all* (or whatever else his particular state statute prohibits).

F.3d 206 (5th Cir. 2009) ("We agree with the plaintiffs that the criminal provisions of TOMA are content-based regulations of speech that require the state to satisfy the strict-scrutiny test in order to uphold them.").

[198] TEX. GOV'T CODE ANN. § 551.002 (West 2004 & Supp. 2010). Ohio's provides: "All meetings of any public body are declared to be public meetings open to the public at all times." OHIO REV. CODE ANN. § 121.22(C) (West 1994 & Supp. 2009). In fact, most states use very similar phrasing. SCHWING, *supra* note 11, § 6.4, at 256–57.

[199] TEX. GOV'T CODE ANN. § 551.001(5).

[200] *Id.* § 551.001(1). There are some exceptions for "executive sessions," but these are rather limited. *See id.*

[201] *Id.*§ 551.144; *Rangra*, 566 F.3d at 521–22.

[202] *See Rangra*, 566 F.3d at 521–22.

[203] *See* Stone, *Content Regulation*, *supra* note 184, at 251 ("Careful scrutiny of these ambiguous restrictions [which do not fit within the content-based, content-neutral dichotomy] reveals an almost bewildering array of easily masked analytic refinements and distinctions.").

[204] *Id.* at 239.

[205] In the case of TOMA, the law is directed at "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." TEX. GOV'T CODE ANN. § 551.001(4). Ohio similarly targets the specific business of a public body. *See* OHIO REV. CODE ANN. § 121.22(B)(2) (West 1994 &Supp. 2010) (defining "meeting" as "any prearranged discussion of the public business of the public body by a majority of its members").

This distinction between subject-matter and content-based restrictions is important because the two may entail different levels of scrutiny, depending upon the values the restriction impinges upon.[206] Professor Stone has argued that if the Court wishes to scrutinize subject-matter restrictions in the same manner as content-based restrictions, it should be guarding against the same evils—distortion of debate, improper legislative motivation, and communicative impact.[207]

Following this line of reasoning, the dangers of open meeting laws do not seem to align perfectly with the dangers of content-based restrictions. The laws are not designed to silence a particular side of the debate; they simply prohibit elected officials from having the debate at all unless certain conditions are met. In other words, open meeting laws appear to be viewpoint-neutral. Their enforcement does not act to disadvantage any one "side" of the debate. Similarly, open meeting laws do not appear to stem from an improper legislative motivation (though it is interesting to note that so few legislatures have subjected *themselves* to the constraints of their state's open meeting law). And open meeting laws seem to have little or no relation to the communicative impact of the message; elected officials can still, ultimately, communicate their message, so long as the "meeting" is open to the public. But, at the same time, they are not content-neutral time, place, and manner restrictions because they regulate speech based upon its content. So, it seems that evaluating open meeting laws as subject-matter restrictions is the appropriate course of action.

But, as appealing as this line of reasoning may be, the Supreme Court's jurisprudence on the subject-matter–content-based distinction is rather murky.[208] Perhaps the closest a majority of the Court has come to endorsing the distinction was in *Consolidated Edison Co. v. Public Service Commission.*[209] In *Consolidated Edison*, the Court held unconstitutional the Public Service Commission's order banning electric utilities from including information about controversial

[206] Stone, *Content Regulation*, *supra* note 184, at 241–42; Stone, *Subject-Matter Restrictions*, *supra* note 182, at 108–15.

[207] Stone, *Subject-Matter Restrictions*, *supra* note 182.

[208] *See* John Fee, *Speech Discrimination*, 85 B.U. L. REV. 1103, 1123 (2005) ("[T]he Supreme Court has never overruled the line of authority disfavoring subject-matter classifications, and the Court continues to hold many such laws unconstitutional under the standard of strict scrutiny."). *But see* Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 828 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."); R.A.V. v. City of St. Paul, 505 U.S. 377, 381 (1992) (invalidating a city ordinance because "it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses.").

[209] 447 U.S. 530 (1980).

political topics in their billing statements.[210] The Commission had allowed "inserts that present[ed] certain information to consumers on certain subjects," but it forbade "the use of inserts that discuss[ed] public controversies."[211] The Commission attempted to defend the restriction using several theories, including arguing that the ban was a content-neutral time, place, or manner restriction, or that it was a permissible subject-matter restriction.[212] The Court rejected each of these arguments in turn, noting that "[g]overnmental action that regulates speech on the basis of its subject matter 'slip[s] from the neutrality of time, place, and circumstance into a concern about content.'"[213] Additionally, the Court held that this was not one of the "narrow circumstances" where subject-matter regulation was permissible.[214]

The Supreme Court elaborated on of these "narrow circumstances" in a footnote, explaining: "when courts are asked to determine whether a species of speech is covered by the First Amendment, they must look to the content of expression."[215] Here, though, the Court appears to have only been concerned with discerning classifications of low-value speech, such as commercial speech, libel, obscenity, fighting words, or indecent speech.[216] The Court also distinguished cases such as *Greer v. Spock*[217] and *Lehman v. City of Shaker Heights*[218] as instances of private parties asserting a right of access to public facilities, rather than as cases where the government prohibited a person from using his own resources to disseminate a message on a disfavored subject.[219]

But instead of looking at this problem through the lens of access rights, courts should distinguish between the two flavors of subject-matter restrictions: those that perpetuate the evils of content-based restrictions, and those that operate more like content-neutral bans. This would clarify the problem courts face when evaluating open meeting laws. For example, when the Fifth Circuit in *Rangra*

[210] *Id.*

[211] *Id.* at 537.

[212] *See id.* at 535.

[213] *Id.* at 536 (quoting Police Dep't v. Mosley, 408 U.S. 92, 99 (1972)) (alteration in original).

[214] *Id.* at 538.

[215] *Id.* at 538 n.5.

[216] *Id.*

[217] 424 U.S. 828 (1976) (upholding federal prohibition of partisan political speech on military bases, even though bases could choose to allow civilian speakers on other topics).

[218] 418 U.S. 298 (1974) (plurality opinion) (upholding the City Transit System's ban on political advertising on busses, even though it allowed commercial advertising).

[219] *See Consolidated Edison*, 447 U.S. at 540 ("[T]he Commission's attempt to restrict the free expression of a private party cannot be upheld by reliance upon precedent that rests on the special interests of a government in overseeing the use of its property.").

confronted the issue, it felt compelled to apply strict scrutiny because the law looked like a content-based restriction on speech. Analyzing the law as what it actually is (a subject-matter restriction) however, would allow for a more nuanced—and accurate—analysis of the impact of the law, and would ultimately open up a bevy of options for reviewing courts, rather than forcing them to apply a categorical strict-scrutiny analysis. Indeed, Justice Stevens appears to have recognized this distinction in his concurrence to *R.A.V. v. City of St. Paul*.[220]

B. Determining the Appropriate Level of Scrutiny

By correctly identifying subject-matter restrictions as such, the Court can avail itself of more nuanced standards of review, while at the same time respecting precedent. But adopting Professor Stone's distinction between subject-matter and content-based restrictions will not entirely dispose of the problem, due to the two different flavors of subject-matter restrictions: those that mimic the effects of content-based restrictions and those that have effects similar to content-neutral restrictions. But even if the reviewing court treats those subject-matter restrictions that narrowly restrict speech on specific issues (like the *Mosely* ordinance, which focused only on labor speech) as content-based restrictions, and those which sweep more broadly (which, by implication, remove the possibility of illicit legislative motive) as content-neutral restrictions, this still will not address the harms effected by broad-based open meeting laws.

What is required is an approach that will give courts flexibility in their analysis, and enable them to ferret out those laws truly adverse to the core values of the First Amendment. If the court identifies certain risks at play in a law that track closely with those of traditional content-based restrictions (i.e., distortion of debate, improper legislative motive, and restrictive communicative impact), then it can appropriately apply strict scrutiny. This is especially apposite if the subject-matter restriction appears to be viewpoint-based. If, however, the law operates in a more content-neutral manner (i.e., there is not

[220] 505 U.S. 377, 430 (1992) (Stevens, J., concurring) ("More particularly to the matter of content-based regulations, we have implicitly distinguished between restrictions on expression based on *subject matter* and restrictions based on *viewpoint*, indicating that the latter are particularly pernicious."). Justices Stevens and Kennedy seem to be engaged in an interesting debate over this issue. *See* Republican Party of Minn. v. White, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring) ("I adhere to my view, however, that content-based speech restrictions that do not fall within any traditional exception should be invalidated without inquiry into narrow tailoring or compelling government interests. . . . The political speech of candidates is at the heart of the First Amendment, and direct restrictions on the content of candidate speech are simply beyond the power of government to impose.").

much concern about viewpoint discrimination, the law only burdens one mode of expression, etc.), then the court can apply a less exacting method of scrutiny.[221]

Although the Supreme Court has generally applied this more flexible balancing approach to most content-neutral restrictions, it has employed strict scrutiny when dealing with some particularly offensive ones.[222] Although this type of heightened review is rare, it tends to come into play when a law acts to shut off not just one mode of communication (like most content-neutral restrictions) but several or all means of expressing an idea.[223] Therefore, simply discerning whether the dangers of a particular subject-matter restriction more closely approximate those of a content-based or content-neutral restriction does not end our inquiry.[224] Instead, we must take an approach similar to a continuum, and look to the various levels of analysis the Court has afforded the different forms of restrictions, based upon the dangers each seeks to prevent, and then proceed to align these with the subject-matter restriction at hand.[225]

IV. ANALYZING OPEN MEETING LAWS

Citizens have an interest in knowing the actions of their elected representatives; how else can the public evaluate their performance come election time? But representatives have just as great an interest in informing the electorate of their activities; how else are we to reelect them? The problem lies in the fact that much of the public does not trust (or, at least, has been led to believe that they should not trust) those in office. Many of the open meeting laws were knee-jerk reactions, either to Watergate specifically or some other, more local, scandal.[226] But these attempts at reassuring an apprehensive electorate

[221] For a discussion on the various levels of review the Court has given content-neutral restrictions, see Stone, *Content Regulation*, *supra* note 184.

[222] *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976) (invalidating the expenditure limitations of the Federal Election Campaign Act of 1971 that forbid any person from spending more than $1,000 on the campaign of any political candidate).

[223] *See* Stone, *Content-Neutral Restrictions*, *supra* note 182, at 58–60.

[224] *See* Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347, 1405 (2006) ("[A]s to both of these concerns [(viewpoint and subject-matter restrictions)], it is clear that they cannot be properly assessed in a vacuum looking just at the content-based character of a restriction. As discussed earlier, one must also assess other characteristics of a speech regulation, such as its temporal, spatial, or other breadth of application, and the nature of the burden being placed on engaging in the regulated expression.").

[225] *See* Schauer, *supra* note 193, at 299 ("There is a spectrum rather than a dichotomy. The question is not *whether* we permit judges to balance in the particular case, but rather *how much* authority the governing rule should allocate to the judge to take account of the particular circumstances of the case at hand.").

[226] *See supra* note 17 and accompanying text.

often required subsequent amendments to account for such things as informal discussions that, upon further reflection by state legislatures, were later deemed more valuable when held in private.[227]

There is no question that public bodies should take any and all official action in public. But laws like TOMA, which require *every* discussion between a quorum of members of an elected body regarding *any* issue that could *conceivably* come before the body be held in an "open" meeting, go too far.[228] The following Section views open meeting laws as subject-matter restrictions, and proceeds to apply the appropriate level of scrutiny to the laws of Texas and Ohio.

A. Analysis of Texas' Open Meeting Law

The most troubling aspect of open meeting laws that reach as broadly as TOMA is that they whittle down an elected official's opportunity to communicate (especially with his elected colleagues) to one defined instance: the open meeting. To compound the problem, the State does not always clearly define when that instance occurs. Normally it depends on interpreting other terms, such as "meeting" or "deliberation" or some other qualifying factor. This interpretation is often not done by the legislature, but rather, when the statute requires the imposition of criminal penalties, the executive (in the form of the prosecutor). Additionally, the imposition of criminal penalties—including imprisonment—creates a substantial chilling effect on the speech of elected officials, the individuals among whom we most want to create the conditions for free debate. But laws like TOMA foster the possibility that an aggressive executive, in conjunction with a potentially hostile judiciary, could encroach upon the legislative branch—not unlike the encroachment the Framers sought to prevent by enacting the Speech or Debate Clause.

1. TOMA Generally

Although the hallmarks of content-based burdens (viewpoint discrimination, distortion of public debate, or illicit legislative motive) are not glaringly present, TOMA does limit *all* means of

[227] For example, Florida's open meetings law currently has around 85 exemptions. Sandra F. Chance & Christina Locke, *The Government-in-the-Sunshine Law Then and Now: A Model for Implementing New Technologies Consistent with Florida's Position as a Leader in Open Government*, 35 FLA. ST. U. L. REV. 245, 260 (2008).

[228] *See* SCHWING, *supra* note 11, § 6.6, at 259 ("Members of local public bodies, however, may be unable to live normal lives if they risk violating the open meeting law every time they attend a PTA meeting, go to worship, shop for groceries, or attend a wedding or party. Strict enforcement of an all encompassing statute would ensure that virtually no one would be willing to serve on local public bodies.").

expression—not just speech by mail, or telephone, but all of it—on political subjects in a large number of instances. Any time a quorum of a public body is together, and the meeting is not "open"[229] (or does not fall within one of the "executive session" exceptions),[230] the members violate the open meeting act if they even *discuss* any "public business or public policy over which the governmental body has supervision or control."[231] In order to "open" the meeting (or even have a legal closed one), the members must give notice to the public, which requires a posting "in a place readily accessible to the general public at all times for at least 72 hours before the scheduled time of the meeting."[232] What is most troubling about this is that the Texas Attorney General's Handbook on Open Meetings warns that the State will apply the open meetings law even to informal gatherings of officials if they discuss public business.[233]

Assume two of a town's three elected city councilpersons (call them A and B) are standing in line at the supermarket on a Saturday morning. The line is long; five or six persons deep, and A and B are standing next to each other at the end. The matters of public policy over which a city council has control are so numerous as to defy any attempt to quantify them. Yet A and B can discuss none of these topics. For instance, assume the town's high school football team won their game the night before and finished the regular season undefeated. Can A turn around and, without violating the open meeting law, say to B: "Hey, did you see the football team won last night? That's our first undefeated season in school history! We should do something to recognize them. Let's write a resolution congratulating them!"? What if, instead of A posing the idea then, the resolution was already on the agenda for a council meeting the following Monday. Could A and B discuss the football team at all, knowing that the resolution is pending?[234]

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[229] TEX. GOV'T CODE ANN. § 551.041 (West 2004 & Supp. 2010) ("A governmental body shall give written notice of the date, hour, place, and subject of each meeting held by the governmental body.").

[230] *See generally id.* §§ 551.071–088 (listing acceptable reasons for entering executive session).

[231] *Id.* § 551.001(4)(A).

[232] *Id.* § 551.043.

[233] ATT'Y GEN. OF TEX., OPEN MEETINGS 2010 HANDBOOK 18 (2010), *available at* http://www.oag.state.tx.us/AG_Publications/pdfs/openmeeting_hb.pdf ("When a quorum of the members of a governmental body assembles in an informal setting, such as a social occasion, it will be subject to the requirements of the Act if the members engage in a verbal exchange about public business or policy.").

[234] *Cf.* Gardner v. Herring, 21 S.W.3d 767 (Tex. App.-Amarillo, 2000) (genuine issue of material fact existed as to whether an open meeting violation occurred where president of a school board informed a "congregation" of the board about a lawsuit that had just been filed against her in her official capacity and some members of the board remarked that this was

Obviously this is an absurd example. But it illustrates the absurdity of the law. A and B could spend six months in jail and pay a fine of $500 for talking about football while standing in line at the grocery store.

2. First Amendment Analysis

Rangra v. Brown serves as a good test case for analyzing TOMA.[235] The Fifth Circuit treated TOMA as a content-based restriction "because whether a quorum of public officials may communicate with each other outside of an open meeting depends on whether the content of their speech refers to 'public business or public policy over which the governmental body has supervision or control.'"[236] While this is by no means an incorrect interpretation (especially in light of the Supreme Court's affinity for the content-based–content-neutral dichotomy), "[n]ot all content-based regulations are alike; [the Supreme Court] clearly recognize[s] that some content-based restrictions raise more constitutional questions than others."[237]

Elected officials should be entitled to greater First Amendment protection than other government employees.[238] Open meeting laws clearly burden a type of core (or "high value") speech: political.[239] They regulate what elected officials can say about politics. But they are not so invidious as to warrant strict scrutiny. Instead, courts should utilize Justice Stevens' formulation in *R.A.V.* That way, in addition to looking at the type of expression burdened, courts evaluating open meeting laws would also examine: 1) the nature of the restriction, 2) the context surrounding the restriction, and 3) the scope of the restriction.[240] This deviation from traditional "strict"

"regrettable"). Even though the resolution is non-binding, it is an official act of the governmental body on a matter of public concern. *See* Tex. Att'y Gen. Op. DM-95 (March 4, 1992), *available at* http://www.oag.state.tx.us/opinions/opinions/48morales/op/1992/pdf/dm0095.pdf (advising that if a quorum of a governmental body issued a signed "joint statement" on a subject falling within TOMA, the deliberations leading to the creation of the joint statement must occur in an open meeting). Thus, it would qualify as official business under Texas law.

[235] *See supra* notes 2–9 and accompanying text for the facts of *Rangra*.

[236] Rangra v. Brown, 566 F.3d 515, 522 (2009) *dismissed as moot en banc by* 584 F.3d 206 (5th Cir. 2009) (quoting TEX. GOV'T CODE ANN. § 551.001 (West 2004 & Supp. 2010)).

[237] R.A.V. v. City of St. Paul, 505 U.S. 377, 429 (1992) (Stevens, J., concurring).

[238] *See supra* Part II.B–C.

[239] *See, e.g.*, Meyer v. Grant, 486 U.S. 414, 425 (1988) (noting that, in the realm of political expression, First Amendment protection is "at its zenith"); Buckley v. Valeo, 424 U.S. 1, 39 (1976) (holding that campaign expenditure restrictions "limit political expression 'at the core of our electoral process and of the First Amendment freedoms.'" (quoting Williams v. Rhodes, 393 U.S. 23, 32 (1968))).

[240] *See R.A.V.*, 505 U.S. at 429–32 (Stevens, J., concurring). *See also* Ysursa v. Pocatello

scrutiny is not due to the fact that elected officials are government employees, but rather to the nature of the restriction at hand. Thus, if an open meeting law were applied to a completely "private" citizen, this is the same level of inquiry that courts should utilize.[241]

a) TOMA as a Subject-Matter Restriction

As discussed above, TOMA is a subject-matter restriction.[242] It constrains elected officials' ability to communicate with their fellow legislators regarding "public business or public policy over which the governmental body has supervision or control" to one defined instance: the open meeting.[243] Any violation results in a fine of up to $500 and imprisonment for up to six months.[244] Whether these meetings are happenstance (in the supermarket, at a coffee shop, at the high school football game, etc.), inadvertent (clicking "reply all" to an email), or completely intentional (the proverbial "smoke-filled backroom") is of no matter. The law focuses on whether elected officials speak on a disfavored subject, at disfavored times, and under disfavored conditions.

TOMA, however, does not appear to rise to the extreme level of the subject-matter restriction in *Mosely*, as the legislature's asserted purpose is to enhance government, not restrict viewpoint. Indeed, the law appears to be applied evenhandedly, not based upon what view the elected official is espousing, merely whether or not he is talking about the disfavored subject at a "closed" meeting. Thus, there does

Educ. Ass'n, 129 S. Ct. 1093, 1103 (2009) (Breyer, J., concurring) (arguing that, when competing constitutional interests are at play, the court should consider "[1] the seriousness of the speech-related harm the provision will likely cause, [2] the importance of the provision's countervailing objectives, [3] the extent to which the statute will tend to achieve those objectives, and [4] whether there are other less restrictive ways of doing so"); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 402 (2000) (Breyer, J., concurring) ("[W]here a law significantly implicates competing constitutionally protected interests in complex ways—the Court has closely scrutinized the statute's impact on those interests, but refrained from employing a simple test that effectively presumes unconstitutionality. Rather, it has balanced interests. And in practice that has meant asking whether the statute burdens any one such interest in a manner out of proportion to the statute's salutary effects upon the others.").

[241] If, however, courts reject the distinction between subject-matter restrictions and full-out content-based restrictions, then they should proceed to evaluate open meeting laws using the traditional method of strict scrutiny. My point is that the seemingly lower level of inquiry I utilize here has nothing to do with the fact that the individuals at issue are elected officials; it is the same level that I would apply to any subject-matter restriction that operates to choke off all forms of communication with regard to a disfavored subject.

[242] *See supra* Part III.A.ii.

[243] TEX. GOV'T CODE ANN. § 551.001(4) (West 2004 & Supp. 2010).

[244] *Id.* § 551.144(b).

not appear to be an invidious governmental motive behind the restriction.

Whether TOMA distorts debate is a more complex question. True, open meetings laws affect only the members of public bodies subject to the act. As such, one could argue that the impact on *public* debate is minimal. But this would be a narrow view indeed. Rather, TOMA distorts *the* debate. It prevents our elected legislators from fleshing out their positions on public issues with each other. Instead, they are often forced to debate issues behind closed doors with their aids and staff. But, why not just have the debate in the open meeting with their elected colleagues? As Professor Welborn's study suggests—and what our infatuation with the 24-hour news media has likely enhanced—the risk of embarrassment a member faces from appearing ill-informed at a public meeting (like, when he's seeing an issue of first impression) or, worse, "flip flopping" on a position after being persuaded by a thoughtful, intellectual discussion with a fellow elected representative at an open meeting, likely dissuades even the most boisterous representative with even an inkling of wanting to be reelected.[245] This results in an "open meeting" that is no more than a perfunctory exercise and devoid of any real discussion.

Finally, as *Rangra* illustrates, TOMA chokes off all forms of communication on its disfavored subject. Whether the chosen method be email, telephone, letter, in person, probably even smoke signal, is of no moment. All communication between a quorum or more of an elected body is forbidden unless the meeting is "open." Such a broad sweep takes TOMA squarely out of the content neutral designation, and elevates it to a more disfavored position.[246]

b) The Context Surrounding TOMA Suggests Invalidation

"If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech."[247] TOMA's criminal penalties and overreaching definition of "meeting," which leads to unnecessary nuance, create a significant chilling effect on elected officials' speech. Against this backdrop, any potentially asserted justifications of efficient or effective functioning of government or of combating the appearance or existence of corruption prove unavailing.

[245] *See supra* notes 32–37 and accompanying text.

[246] *Cf.* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("A regulation that serves purposes unrelated to the content of expression is deemed neutral . . . . Government regulation of expressive activity is content neutral so long as it is *justified* without reference to the content of the regulated speech.") (internal quotations omitted).

[247] Citizens United v. FEC, 130 S. Ct. 876, 904 (2010).

Here, the criminal penalties (particularly imprisonment) are not necessary to the proper functioning of open meeting laws. In actuality, few states allow judges to imprison violators of an open meeting law.[248] At least sixteen states do not authorize criminal penalties for violations of their open meetings law at all.[249] This shows that criminal penalties, particularly imprisonment, are not necessary to the proper and effective functioning of open meeting laws.[250]

Furthermore, the lawsuits themselves (particularly, *Rangra* and, more recently, *City of Alpine v. Abbott*[251]) further evince a finding that TOMA chills elected officials' speech. The councilpersons in *Rangra* sued to prevent the local district attorney from indicting them again over fears that their emails violated TOMA. The suit in *City of Alpine* consists of three Texas cities and at least sixteen elected officials who fear prosecution for a violation of TOMA.[252]

This fear is enhanced by the incredibly broad reach of the law resulting from the definition of "meeting." For instance, one Texas Attorney General's Opinion advises, "agenda preparation procedures may not involve deliberations among a quorum of members of a governmental body except in a public meeting for which notice has been posted in accordance with the act."[253] This is essentially what the councilpersons in *Rangra* were indicted for: using a series of emails to arrange a special meeting and discussing the purpose thereof.

Another advisory opinion argued:

> If a quorum of a governmental body agrees on a joint statement on a matter of such business or policy, the deliberation by which that agreement is reached is subject to the requirements of the act, and those requirements are not

[248] *See* SCHWING, *supra* note 11, § 8.60, at 511 n.266. While not purporting to list every state that imposes criminal punishment, it only lists seven separate states that have imprisonment as an available sanction. *Id.*

[249] *Id.* § 8.58, at 509. These include: Arizona, Idaho, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, New Jersey, Ohio, Oregon, Rhode Island, Virginia, and Washington. *Id.*

[250] *Cf. Citizens United*, 130 S. Ct. at 908–09 ("The anticorruption interest is not sufficient to displace the speech here in question. Indeed, 26 States do not restrict independent expenditures by for-profit corporations. The Government does not claim that these expenditures have corrupted the political process in those States.").

[251] 730 F. Supp. 2d. 630 (W.D. Tex. 2010).

[252] The City of Big Lake withdrew as a plaintiff. Defendant's Motion to Dismiss, *City of Alpine*, 730 F. Supp. 2d 630 (No. P:09-CV-59), 2010 WL 516941.

[253] Tex. Att'y Gen. Op. DM-473, at 3 (Apr. 13, 1998), available at http://www.oag.state.tx.us/opinions/opinions/48morales/op/1998/pdf/dm0473.pdf.

> necessarily avoided by avoiding the physical gathering of a quorum in one place at one time.[254]

Yet another advisory opinion provides that the members of a commissioner's court cannot sign or approve an invoice, claim, or bill unless such action occurs at an open meeting.[255]

In a word, these restrictions are silly. Elected officeholders should not have to be looking over their shoulders for the district attorney every time they prepare an agenda. Nor should the district attorney have to police such a trivial matter as whether the city council correctly met in an open meeting before issuing a joint statement. All of this comes into greater focus when we remember that these bodies are often small city and town councils that "may not have legal representation at their meetings and may depend on volunteers serving without pay or with minimal compensation, so that criminal penalties may be perceived to be excessive and to deter public service."[256]

c) TOMA's Scope May be Narrow, but It Has a Potent Impact on the Level and Quality of Political Debate

TOMA extends only to those situations where elected members of a governmental body are talking about the public business under their jurisdiction while in the presence of a quorum. But the law's sweep is what is most disconcerting. While Texas may argue that TOMA merely regulates the efficient functioning of the government,[257] or that the appearance and prevention of corruption are sufficiently substantial interests to justify the burdens imposed by the statute,[258] the facts belie this claim.

Statutes as onerous as TOMA, in all likelihood, do more to hinder efficient and effective government than they do to promote it. They drive substantive discussions about policy—which used to and should

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[254] Tex. Att'y Gen. Op. DM-95 at 5-6 (Mar. 4, 1992), *available at* http://www.oag.state.tx.us/opinions/opinions/48morales/op/1992/pdf/dm0095.pdf.

[255] Tex. Att'y Gen. Op. JC-0307, at 1–2 (Nov. 20, 2000), *available at* http://www.oag.state.tx.us/opinions/opinions/49cornyn/op/2000/pdf/JC0307.pdf.

[256] SCHWING, *supra* note 11, § 8.60, at 510.

[257] *Cf.* Parker v. Merlino, 646 F.2d 848, 854 (3rd Cir. 1981) (holding that the New Jersey State Senate's procedural rules governing debate are not unconstitutional because the State has a substantial interest in ensuring the efficient functioning of its legislature); Kucinich v. Forbes, 432 F. Supp. 1101, 1114 n.18 (N.D. Ohio 1977) (noting that the efficient functioning of council is a substantial interest which may allow for regulation of speech).

[258] *Cf.* Buckley v. Valeo, 424 U.S. 1, 58 (1976) ("The contribution ceilings thus serve the basic governmental interest in safeguarding the integrity of the electoral process without directly impinging upon the rights of individual citizens and candidates to engage in political debate and discussion.").

take place among the elected officials—to conference rooms with staffs and aides.[259] Any substantive debate on even the most menial of resolutions, joint statements,[260] or even the meeting's agenda,[261] requires an open meeting. Or, in the event that a governmental body requires, for instance, two of the three elected commissioners to sign an invoice before the treasury will pay it, an open meeting is required.[262] Unless these discussions fall into one of a few exceptions,[263] they must be conducted in accordance with TOMA, which requires them to post notice of the "meeting" at least 72 hours in advance.[264] So our three-member, "effective and efficient" town council can't pay its bills, issue a joint statement, or set its agenda without a 72-hour lag period.

Furthermore, the efficacy of open meeting laws is dubious to begin with.[265] Many were passed in the wake of Watergate to placate an irate press and reassure a petulant electorate.[266] It is with this history in mind that a court must weigh the public's interest in avoiding the appearance of corruption, against the significant burdens to our representatives' free speech rights. What's more, some believe that it is mere folly for a court to attempt to divine what influences a particular legislator in the first place. As one court noted:

> The mental gymnastics of each legislator operates in an unpredictable universe of its own, unfettered by law. Such mental operations are not confined to moments when all are assembled on the public stage. Any attempt to control them has no probability of success, constitutes an interference with the power of a separate branch of government and interferes with personal rights of privacy.[267]

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[259] *See supra* Part I.B.

[260] Tex. Att'y Gen. Op. DM-95 (Mar. 4, 1992), *available at* http://www.oag.state.tx.us/opinions/opinions/48morales/op/1992/pdf/dm0095.pdf.

[261] Tex. Att'y Gen. Op. DM-473 (Apr. 13, 1998), *available at* http://www.oag.state.tx.us/opinions/opinions/48morales/op/1998/pdf/dm0473.pdf.

[262] Tex. Att'y Gen. Op. JC-0307 (Nov. 20, 2000), *available at* http://www.oag.state.tx.us/opinions/opinions/49cornyn/op/2000/pdf/JC0307.pdf.

[263] For example, TOMA permits an exception to the general rule requiring 72 hours notice in "emergency" situations. TEX. GOV'T CODE ANN. § 551.045 (West 2004 & Supp. 2010). "Emergency" is confined to either "an imminent threat to public health or safety" or "a reasonably unforeseeable situation." Even here, the meeting still requires two hours notice. *Id.*

[264] *Id.* § 551.043(a).

[265] *See supra* notes 31–39 and accompanying text.

[266] From 1972 to 1973, 19 states either enacted (for the first time) open meetings laws or strengthened already existing ones. SCHWING, *supra* note 11, at 3–4.

[267] Dayton Newspapers, Inc. v. City of Dayton, 259 N.E.2d 522, 530 (Ohio Ct. Com. Pl. 1970), *aff'd*, 274 N.E.2d 766 (Ohio App. 2d 1971).

Another court notes: "There are, of course, some activities, legal if engaged in by one, yet illegal if performed in concert with others, but political expression is not one of them."[268] The only exception is combating the appearance of (or actual) corruption on the part of public officials.[269] In certain circumstances, fighting the appearance of impropriety is a compelling interest that, if narrowly tailored, will support restrictions on speech.[270] But TOMA fails this narrow tailoring requirement. It is nowhere near narrowly tailored to serve the interest of combating perceived or actual impropriety. Other states achieve the same objective with a much narrower definition of meeting.[271] Furthermore, criminalizing TOMA violations serves to chill an unnecessary amount of speech that is, in all likelihood, unrelated to the statute's goal of preventing the appearance of corruption. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."[272] This is especially true when laws that may be vague[273] impose criminal penalties for a violation. In such cases, "[c]lose examination of the specificity of the statutory limitation is required where . . . the legislation imposes criminal penalties in an area permeated by First Amendment interests."[274] TOMA also empowers the executive to enforce it, a power that the Founders feared when they drafted the Speech or Debate Clause. This risk of encroachment on the legislative branch by an overzealous executive (who has the power to impose criminal sanctions on legislators) is further reason to strike down the criminal provisions of TOMA.

Because TOMA is a subject-matter restriction that chokes off all mediums of communication on political speech, unless certain conditions are met, and imposes criminal sanctions for any violation,

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[268] Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 296 (1981).

[269] *Id.* at 296–97 ("*Buckley* identified a single narrow exception to the rule that limits on political activity were contrary to the First Amendment. The exception relates to the perception of undue influence of large contributors to a *candidate*.").

[270] *See* Republican Party of Minn. v. White, 536 U.S. 765, 775–76, 777 n.7 (2002) (noting that while upholding the appearance of impartiality and actual impartiality are compelling interests, Minnesota's statute was not narrowly tailored to serve those interests); Buckley v. Valeo, 424 U.S. 1, 26 (1976) ("[T]he Act's primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions [. . . is] a constitutionally sufficient justification for the $1,000 contribution limitation.").

[271] *See, e.g.*, *infra* Part IV.B.

[272] NAACP v. Button, 371 U.S. 415, 433 (1963) (citing Cantwell v. Connecticut, 310 U.S. 296, 311 (1940)).

[273] *See, e.g.*, Tex. Att'y Gen. Op. GA-0326 (May 18, 2005), available at http://www.oag.state.tx.us/opinions/opinions/50abbott/op/2005/pdf/ga0326.pdf (responding to an inquiry about whether TEX. GOV'T CODE ANN. § 551.143 is unconstitutionally vague). Although the opinion concluded that the law was not vague, it is curious that it had to be issued at all.

[274] *Buckley*, 424 U.S. at 40–41.

it unconstitutionally impinges upon the free speech rights of elected officials and cannot stand.

B. Analysis of Ohio's Open Meeting Law

Ohio's open meeting law (OML) contrasts starkly with TOMA. Ohio confines a "meeting" to "any prearranged discussion of the public business of the public body by a majority of its members."[275] By limiting "meetings" to "prearranged" discussions, it avoids the chance encounters that could easily occur in Texas and states with similar laws. And, Ohio has no specific method for notice, and no minimum time that notice has to be posted. Rather, each body is responsible for maintaining a rule that provides for "reasonable" methods of providing notice.[276] And no body can call a "special" meeting unless they provide 24-hour notice to any media outlets and interested persons who have requested advance notice of any special meetings.[277] Courts must void any action taken in a meeting that violates the OML and force the offending body to pay a civil forfeiture of $500 to the plaintiff.[278] Furthermore, any official action that derived from deliberations held in violation of the OML is also void.[279] Additionally, the body must pay court costs and the plaintiff's reasonable attorney's fees.[280]

Ohio's open meeting law, while still a subject-matter restriction, should survive a First Amendment challenge because it has a more circumscribed definition of "meeting" and lacks the chilling effect imposed by criminal sanctions.

V. PROPOSED SOLUTIONS

Keep in mind that this Note does not advocate changing the open meeting laws with regard to administrative agencies or other bodies that do not include elected public officials. Under the *Garcetti* rationale, those limitations appear to be permissible.[281] Nor does it

[275] OHIO REV. CODE ANN. § 121.22(B)(2) (West 1994 & Supp. 2010).

[276] *Id.* § 121.22(F).

[277] *Id.*

[278] *Id.* § 121.22(I)

[279] *Id.* § 121.22(H) ("A resolution, rule, or formal action adopted in an open meeting that results from deliberations in a meeting not open to the public is invalid unless the deliberations were for a purpose specifically authorized in division (G) or (J) of this section and conducted at an executive session held in compliance with this section.").

[280] *Id.* § 121.22(I).

[281] They are also, arguably, more soundly grounded in policy. Agencies are, for the most part, "agents" of the legislature, tasked by the legislature with carrying out specific functions in a designated area. The legislative body's interest in observing their operations and ensuring their proper functioning is heightened by the different nature of the relationship.

counsel the skirting of open meetings by elected officials. Our elected representatives should aspire to inform us not only of their decisions and official actions, but also the underlying rationale. Open meeting laws should simply serve to remind them of this duty, not to punish them for inadvertently violating it.

Some may see a decision striking the criminal penalties from open meeting laws as a step back, a blow to open government. Or, perhaps, as encouraging elected officials to meet privately and revert to the days of the "backroom deal." They may also argue that we will be less able to monitor our elected representatives. While these are plausible concerns, in reality they are likely to be overblown posturing.

There is an easy fix to any of the above criticisms: vote for someone else. If you truly do not trust your representative to work in your interest, or if you think that he is going behind your back to strike deals that benefit him (and not you), you should vote for someone else. Those truly bent on conducting business in "smoke-filled rooms" (i.e. the egregious offenders who are the targets of these laws) will do so despite an open meeting law,[282] so the persons generally punished are those who either inadvertently violate the statute or those who are charged as a pretext for some other offense (which, as appears to be the case in *Rangra*, can be a political disagreement with some other member or branch of the government).

The monitoring problem may still exist, but this is more than compensated for by most states' freedom of information acts, and the remaining aspects of the open meeting law. I do not think anyone would question the wisdom of requiring any and all official actions of the government to be recorded and taken in public, which open meeting laws do. Additionally, most states' freedom of information acts make the records of those decisions available for inspection.

Deliberations should be uninhibited. States like Texas, with a broad definition of meeting (which encompass everything from staff briefings, to chance encounters at the supermarket, to actual, convened formal meetings), should narrow their statutes to envelope a more realistic number of discussions, preferably only those that are prearranged and where decisions are generally made. This would still serve the purpose of open meeting laws (by keeping the public informed about the official actions of their governments), while at the same time enabling elected representatives to debate the merits of an

[282] *Cf.* Buckley v. Valeo, 424 U.S. 1, 45 (1976) ("[N]o substantial societal interest would be served by a loophole-closing provision designed to check corruption that permitted unscrupulous persons and organizations to expend unlimited sums of money in order to obtain improper influence over candidates for elective office.").

issue candidly, and without the pressure and fear of having their initial impressions of a proposal posted to the internet and streamed in real-time.

States should similarly strike the criminal penalties that attach to violations. In many instances, the people serving in these elected capacities are our friends and neighbors, who do the job for little or no pay and usually even less appreciation. Having them run around frantic in search of an attorney to tell them whether the conversation they just had at the supermarket might put them in jail for the next six months is a great way to show our gratitude for their service to our community.

CONCLUSION

Elected officials enjoy the same free speech protections as private citizens. The government cannot regulate their speech outright without running afoul of the First Amendment. And, empowering one branch to police the speech of another (especially when the executive patrols the legislature) raises serious separation of powers concerns, and serves to unnecessarily chill the speech of legislators and inhibits robust, wide-open debate on controversial issues. With this in mind, the government cannot simply assert its "interests as an employer" to justify curtailing elected officials' First Amendment rights. Their "employment" relationship is sufficiently different than other government employees, who are not elected or directly accountable to people. Therefore, courts must evaluate the constitutionality of open meeting laws (as applied to the speech of elected officials) as if they were evaluating the speech a private citizen, and not a public "employee" under the *Garcetti* test.

Since elected officials have broad First Amendment rights, a court's initial evaluation of these freedoms must look much the same as if those laws were being applied to a private citizen. Because open meeting laws completely eviscerate all means of communication with regard to political issues (except at certain, favored times), they should be treated as subject-matter restrictions, and not blindly evaluated under the strict-scrutiny analysis reserved for purely content-based regulations. Instead, the reviewing court must look to the underlying harms of the restriction, and inquire whether it was born of an illicit governmental motive, discriminates based upon viewpoint, or completely chokes off all means of communication on a specific subject. It must then look to the context of the regulation and its scope. In the case of TOMA, the broad sweep encompassed by the

definition of "meeting" and the imposition of criminal penalties on violators tend to point towards invalidation of the restrictions.

In light of this analysis, states should take steps to remove the criminal sanctions accompanying their open meeting laws and consider narrowing the definition of "meeting," so as to better facilitate debate amongst their elected representatives. While our First Amendment doctrine is by no means perfect, we should take care not to hamper the free speech of those we entrust to debate the merits of issues affecting the public welfare. Instead, we should foster conditions that allow them to conclude that is in the best interest of the general good. President Adams once wrote: "When people talk of the freedom of writing[,] speaking or thinking, I cannot choose but laugh. No such thing ever existed. No such thing now exists: but I hope it will exist. But it must be hundreds of years after you and I shall write and speak no more."[283] Today, we are closer to the existence of these freedoms than ever before; but they still do not yet exist. And they may never exist. But that does not mean that we should cease to aspire towards a time when those freedoms do exist in the way that our Founders envisioned.

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[283] Letter from John Adams to Thomas Jefferson (July 15, 1817), *in* 2 THE ADAMS-JEFFERSON LETTERS 519 (Lester J. Cappon ed., 1959).

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