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Mr. Smith Comes Home: The Constitutional Presumption of Openness in Local Legislative Meetings

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NOTES

MR. SMITH COMES HOME: THE CONSTITUTIONAL PRESUMPTION OF OPENNESS IN LOCAL LEGISLATIVE MEETINGS*

Every state requires by statute that local legislative meetings be open to the public. This requirement allows citizens to receive information that will enable informed decisionmaking. It provides a forum conducive to the resolution of issues of public concern and affecting municipal life. Finally, it creates a tangible link between city government and the citizenry, ensuring political accountability. In some cases, however, these open-meeting requirements, often riddled with exceptions, have been circumvented. The Author proposes that the courts recognize a constitutional presumption of openness in local legislative meetings, grounded in the first amendment.

FOR A DEMOCRATIC society to succeed, its citizens must have the requisite knowledge for responsible self-government. Depending on the type of democracy, this knowledge can be converted into action in a variety of ways. In a "pure" democracy[1], knowledge is converted directly into legislation as each citizen actively participates in the debate and voting of the "town meeting". In a republican democracy, knowledge is converted into votes for the representative who will best act as the citizen's proxy in governmental decisions.[2] However, the republican citizen is not merely limited to periodically voting for his representative; the citizen can also petition the government directly; write to newspapers and journals; contribute to funds and committees; campaign for a

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1. "[A] pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person . . . ." THE FEDERALIST No. 10, at 67 (J. Madison) (R. Dunne ed. 1901).

2. "A republic by which I mean a government in which the scheme of representation takes place. . . ." *Id.*

referendum, ballot issue, or candidate; advertise political preferences in the media; participate in demonstrations, protests and boycotts; or, of course, run for office himself. American republicanism offers opportunities for citizen participation in public issues which are different from, though not necessarily inferior to, the role of the citizen in a "pure" democracy.

Yet a citizen cannot effectively travel any of these avenues of participatory self-government without access to governmental deliberation. The right to vote is a hollow right if one is barred from learning about the records of the candidates. One cannot support or object to who is representing him, if he does not know *how* he is being represented. Likewise, public advocacy through petition, editorial, or advertisement fails if the public official who opposes such advocacy has access to superior knowledge based on information at least temporarily barred from the common citizen. But in a government, "of the people, for the people, and by the people,"[3] the citizen has not relinquished all power to the representatives. By definition, democratic power remains in the citizens,[4] and to exercise that power responsibly, the citizen needs knowledge. Otherwise, either the government will stagnate into a self-perpetuating class of political aristocrats who control the legislative agenda, or citizens will respond blindly through ballot retribution against all incumbents, a method of franchise finesse akin to shooting fish in a barrel. Such a response may instigate change, but not necessarily assure that the best qualified proxies are maintained in office.

To govern effectively, citizens must be guaranteed access to the deliberations of legislative bodies. Although the courts have yet to address the issue of constitutional protection to the public's right to attend city council meetings, judicial inroads have been made. In a line of cases beginning in 1943 with *Martin v. Struthers*,[5] the Supreme Court recognized that the freedom to discuss novel and unconventional ideas necessarily protects the right of the public to receive those ideas.[6] In determining what speech is protected for the listener, subsequent cases have focused on the quality of speech and its impact on the public's ability to self-

3. A. Lincoln, Gettysburg Address, (November 19, 1863).

4. OXFORD AMERICAN DICTIONARY 169 (1980) (Democracy - "Government by the whole people of the country, especially through representatives whom they elect.").

5. 319 U.S. 141 (1943).

6. *Id.* at 143.

govern.[7] Yet nothing affects the public's ability to govern its own affairs more significantly than the legislative process, and the role of its representatives in the formulation of law and allocation of the public money. If the right to receive doctrine protects political speech[8] so that it can reach the citizens who will evaluate the merits of the speech in their role and duty as self-governors, then the public must surely have a right to receive the information most central to the democratic process, government deliberations.

A right to public knowledge of government deliberations is therefore necessary for effective government. The right, however, is a qualified one: certain matters are too sensitive to be debated openly before the public for fear of ruining personal reputations, creating economic damage, even endangering lives. Yet the quality and quantity of these exceptions diminish as one moves from federal to state to local government. Questions of national security, foreign relations, and troop movements, for instance, give way to exceptions based on local issues such as real estate transactions and personnel matters. Conversely, the citizen's need for government information may well be strongest at the local level, since it is there that legislation most immediately and directly affects him. Moreover, the checks on secrecy that exist at the federal level (national media, interest groups, party machinery) are often unavailable to the citizen trying to divine the content of local deliberations.

The need for a public right of access to government deliberations has been recognized by the Founding Fathers, commentators, and the states themselves. Beginning in 1898, the states began passing open meetings laws known as sunshine laws, designed to prevent municipalities from closing their meetings to the public.[9] In 1976, New York joined the other forty-nine states and the District of Columbia and codified its commitment to open government.[10]

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7. These cases deal with the right to receive information, which ultimately results in the ability to self-govern, despite the fact that such speech may be considered libelous or dangerous. *See infra* notes 109-153 and accompanying text.

8. *See infra* notes 136-140 and accompanying text.

9. Note, Common Cause v. Utah Public Service Commission - *The Applicability of Open-Meeting Legislation to Quasi-Judicial Bodies*, 1980 UTAH L. REV. 829, 835 (citing 1898 Utah Laws § 202).

Most state open-meeting statutes create enumerated exceptions for closed executive sessions. *See infra* notes 182-90 and accompanying text.

10. Sluzar, *New York Abandons a Commitment to Open Meetings*, 50 ALB. L. REV. 613, 613 (1986) (citing Open Meetings Law, ch. 511, 1976 N.Y. Laws (codified as

Though the state sunshine laws have proven that there is a national consensus on the need for public access to local government,[11] many states have not enforced their own sunshine laws. The local citizen may find that if access to local government is cut off through closed city meetings, recourse to the state is no longer sufficient. State courts are reading broader exceptions into their open meeting statutes, and state legislatures are amending those statutes to shield their own deliberations.[12]

Despite the existence of these state laws, the federal government must not shirk its responsibility as the primary guarantor of American citizens' civil rights.[13] Because the state political machinery may prove deficient, the federal Constitution must provide a safeguard for open government based on substantive and structural support.

In a line of cases[14] beginning in 1980 with *Richmond Newspapers, Inc. v. Virginia*,[15] the Supreme Court recognized that the first amendment provides a substantive right of public access to criminal trials.[16] The Court emphasized the public's need to be informed of the functioning of its government.[17] This reasoning can be applied even more persuasively to access to local government meetings. Moreover, there is a structural argument that inherent in the Constitution's republican form of government, and necessary for its survival, is the right of the citizen to be informed of government deliberations. This right is only effective through direct access to those deliberations.

Where there is a federal right, there must be a federal remedy, otherwise the right is meaningless. Such a remedy is necessary to provide the local citizen with an incentive and an opportu-

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amended at N.Y. PUB. OFF. LAW §§ 100-11 (McKinney 1988)) [hereinafter Sluzar].

11. Note, *The Personnel Matters Exception to the Mississippi Open Meetings Act - A Cloud Over the Sunshine Law*, 7 MISS. C. L. REV. 181, 185 (1987) (Open meetings laws now exist in all fifty states and the District of Columbia.).

12. *See infra* notes 182-90 and accompanying text.

13. *See* Monroe v. Pape, 365 U.S. 167 (1961). *Monroe* upheld the enforcement of 42 U.S.C. § 1983 (1982) (a civil action for the deprivation of rights) against policemen for an illegal search and seizure, despite the availability of state criminal and tort remedies. "The third aim [of the statute] was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice." *Id.* at 174.

14. *See infra* notes 38-85 and accompanying text.

15. 448 U.S. 555 (1980).

16. *Id.* at 580.

17. "These expressly guaranteed [first amendment] freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government." *Id.* at 575.

nity, not always available via the state laws, to challenge a city that closes its doors to its own citizens. Only recognition of a constitutional presumption of openness in local meetings " 'assures the maintenance of our political system and open society,' and secures 'the paramount public interest in a free flow of information to the people concerning the public officials.' "[18]

This Note argues that the time is ripe for the judiciary to articulate the principle that there is a constitutional presumption that local legislative meetings should be open to the public. Part I examines Supreme Court prison and criminal trial access cases which have established that the press has no greater right of access to governmental organs than does the public, but that the public does have a guaranteed right of access to certain government deliberations. Part II focuses on the local legislative process, and argues that municipal council meetings fit into the category of government deliberations for which the public must be guaranteed access. Part III analyzes the advantages of a right of access founded in constitutional principles instead of a right of access granted by state sunshine laws.

I. The Right of Access Cases

Major Supreme Court decisions regarding the public's right of access to government institutions fall into two distinct groups. The first series of cases dealt with access to prisons; the second set of cases analyzed access to criminal trials.

A. Access to Prisons

In the mid-1970's, members of the press initiated a number of suits which challenged certain restrictions on media access to jails, penitentiaries, and incarcerated criminals. The central issue was whether freedom of the press guaranteed the media greater access to areas under governmental authority than the access permitted to the normal citizen.

In the 1974 companion cases of *Saxbe v. Washington Post Co.*[19] and *Pell v. Procunier*,[20] both decided on the same day, the Supreme Court rejected first amendment challenges to federal and

18. Pell v. Procunier, 417 U.S. 817, 832 (1974) (quoting Time, Inc. v. Hill, 385 U.S. 374, 389 (1967) and Garrison v. Louisiana, 379 U.S. 64, 77 (1964)).

19. 417 U.S. 843 (1974).

20. 417 U.S. 817 (1974).

state policies prohibiting personal interviews by the press with designated inmates. In opinions by Justice Stewart, the Court emphasized that effective alternative means of acquiring information about the conditions of the prisons were available to the press.[21] Because information was not completely inaccessible, interviews with designated inmates could be prohibited due to the government's overriding interest in maintaining security and peace within the facilities.[22]

Four years later, the Court rejected a similar claim in *Houchins v. KQED, Inc.*[23] In *KQED*, a broadcaster claimed that he had a constitutional right of access to all parts of a county jail, including those areas where access was denied to the general public. As in *Washington Post Co.* and *Procunier*, the Court denied the claim, basing its decision on the availability of alternative avenues for learning about conditions in the jail.[24]

Attempts have been made to interpret these cases as a denial of any first amendment right of access to government information.[25] However, the prison access cases state the more limited proposition that the first amendment does not provide the press with a greater right of access to government information than that provided to the general public.[26] Even in their broadest terms, these cases merely report that the "Court has never intimated a First Amendment guarantee of a right of access to *all* sources of information within government control."[27] Even the most aggressive libertarian acknowledges that some types of government information must be withheld from the public - thus the use of the term "a *presumption* of openness."[28] Moreover, any possible broader interpretations of Court language in these cases could only be considered dicta, since the plaintiffs were news media rep-

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21. *Washington Post Co.*, 417 U.S. at 847-48; *Procunier*, 417 U.S. at 830.

22. *Washington Post Co.*, 417 U.S. at 848-49; *Procunier*, 417 U.S. at 831-32.

23. 438 U.S. 1 (1978).

24. *Id.* at 15.

25. *See id.* at 16 (Stewart, J., concurring) ("The First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government . . . ."); Gannett Co. v. DePasquale, 443 U.S. 368, 404 (1979) (Rehnquist, J., concurring) ("[I]t is clear that this Court repeatedly has held that there is no First Amendment right of access in the public or the press to judicial or other governmental proceedings.").

26. *KQED, Inc.*, 438 U.S. at 16; *Washington Post Co.*, 417 U.S. at 850; *Procunier*, 417 U.S. at 834-35.

27. *KQED, Inc.*, 438 U.S. at 9 (emphasis added).

28. *See* Note, *Open Meeting Statutes: The Press Fights for the "Right to Know"*, 75 HARV. L. REV. 1199, 1204 & n.36 (1962) [hereinafter *Open Meetings*].

resentatives,[29] and the holdings were explicitly narrow.[30] As stated in *KQED*, "[t]he question presented is whether the news media have a constitutional right of access to a county jail, *over and above that of other persons* . . . ."[31]

Despite the plaintiffs lack of success in the prison access cases, the majority opinions nonetheless emphasized the importance of a citizenry informed of governmental affairs.[32] In the case of prisons, "[i]t is . . . true that with greater information, the public can more intelligently form opinions about prison conditions."[33] Therefore, in order to justify denial of public access, in all three cases the Court had to find effective alternative methods which enabled the public to learn about prison conditions.[34]

In his *Washington Post* dissent, Justice Powell, joined by Justices Brennan and Marshall, felt that the alternative methods of information gathering relied on by the majority, such as written correspondence with prisoners and random interviews during supervised tours, were insufficient:[35]

> What is at stake here is the societal function of the First Amendment in preserving free public discussion of governmental affairs. No aspect of that constitutional guarantee is more rightly treasured than its protection of the ability of our people through free and open debate to consider and resolve their own destiny. As the Solicitor General made the point, "[t]he First Amendment is one of the vital bulwarks of our national commitment to intelligent self-government." It embodies our Nation's commitment to popular self-determination and our abiding faith that the surest course for developing sound national policy lies in a free exchange of views on public issues. And public debate must not only be unfettered; it must also be informed. For that reason this Court has repeatedly stated that First Amendment

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29. *KQED, Inc.*, 438 U.S. at 3; *Washington Post Co.*, 417 U.S. at 844; *Procunier*, 417 U.S. at 819 (a claim by four prison inmates was disposed of separately.

30. *KQED, Inc.*, 438 U.S. at 15-16 ("[T]he media have no special right of access to . . . [a jail] different from or greater than that accorded the public generally."); *Washington Post Co.*, 417 U.S. at 850 ("[N]ewsmen have no constitutional rights of access to prisons or their inmates beyond that offered the general public." (quoting *Procunier*, 417 U.S. at 834)); *Procunier*, 417 U.S. at 834 ("The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally." (footnote omitted)).

31. *KQED, Inc.*, 438 U.S. at 3.

32. *KQED, Inc.*, 438 U.S. at 8; *Procunier*, 417 U.S. at 832.

33. *KQED, Inc.*, 438 U.S. at 8.

34. *See id.* at 34 (Stevens, J., dissenting).

35. *Washington Post Co.*, at 853-56 (Powell, J., dissenting).

> concerns encompass the receipt of information and ideas as well as the right of free expression.[36]

Powell emphasized that, because of the importance of the constitutional issues at stake, the state had a heavier burden to justify the various prohibitions than mere "discretionary authority and administrative convenience."[37] In the area of access to criminal trials, Powell's logic would eventually persuade a majority of the Court.

B. Access to Judicial Proceedings

The cases which dealt with closed criminal trials and hearings eventually led to the Court's recognition of a first amendment right of public access to government deliberations. Ironically, the initial case focused primarily on the sixth amendment guarantee of a fair and public trial. In *Gannett Co. v. DePasquale*,[38] the Court held that the sixth amendment affords only the defendant, and not the public in general, a right to a public trial.[39] If the defendant wants to waive his right to a public trial in the interest of a fair trial, he may do so, though he cannot arbitrarily demand a private trial.[40] The failure of the Blackmun dissenters to prevail on their argument that the sixth amendment guarantees the public a right to attend open trials would lead them to embrace the first amendment argument in *Richmond Newspapers, Inc. v.*

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36. *Id.* at 862-63 (Powell, J., dissenting) (citations omitted).

37. *Id.* at 860 (Powell, J., dissenting).

38. 443 U.S. 368 (1979). In *Gannett*, a newspaper brought suit under the first, sixth, and fourteenth amendments to enjoin the closure of a pretrial suppression hearing. The closure motion was supported by the defendants and the prosecution, and at the time the motion was made, the newspaper reporter made no objection. *Id.* at 375.

39. *Id.* at 381.

40. *Id.* at 382.

Though Justice Stewart's majority opinion would not commit to recognizing a first amendment public right of access to pretrial hearings, Justice Stewart declared, *arguendo*, that if such a right did exist, it was outweighed in the instant case by the interests of a fair and impartial trial under the sixth amendment. *Id.* at 392-93. Since most of the other Justices, both concurring and dissenting, felt that this was primarily a sixth amendment case, they felt no need to reach the first amendment issues. *E.g.*, *id.* at 447 (Blackmun, J., concurring in part and dissenting in part). Predictably, only Justices Powell and Rehnquist, in concurring opinions, tackled the first amendment argument directly. Justice Powell asserted that a public right of access was implicated, but agreed with the Stewart majority that it was outweighed by sixth amendment concerns. *Id.* at 397, 402-03 (Powell, J., concurring). Justice Rehnquist maintained that there was no such right of access under either amendment. *Id.* at 404 (Rehnquist, J., concurring)).

Virginia.[41]

In *Richmond Newspapers*, a plurality held that the public did have a right to attend criminal trials, but that the right was guaranteed by the first and fourteenth amendments. The facts of *Richmond Newspapers* are similar to *Gannett*: the defendant moved for closure of the trial, which was supported by the prosecution and the judge, and the press made no objection at the time of the motion.[42]

Despite the similarities, the two cases can be distinguished. In contrast to *Gannett*, later that same day the *Richmond Newspapers* plaintiff sought and received a hearing on a motion to vacate the closure order; the motion to vacate was denied.[43] Moreover, while *Gannett* involved closure of a pretrial suppression hearing, *Richmond Newspapers* involved closure of the trial itself.[44] Lastly, although no alternative methods to closure were available in *Gannett*, the trial judge in *Richmond Newspapers* did not even inquire into possible alternatives to assure a fair trial.[45]

In recognizing a public right of access, the Court emphasized the self-government objective underlying the first amendment. "These expressly guaranteed . . . [freedoms of the first amendment] share a common core purpose of assuring freedom of communication on matters relating to the functioning of government."[46] Chief Justice Burger's plurality opinion did recognize the possibility of an overriding state interest in closure, but mandated that such an interest would have to be articulated in findings, with

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41. 448 U.S. 555 (1980). In *Richmond Newspapers*, both Justice White and Justice Blackmun repeated their beliefs that the sixth amendment guarantees open trials. This position was rejected by a majority of the Court. Therefore, Justices White and Blackmun were forced to embrace as a "secondary protection" the first amendment arguments in *Richmond*. Richmond Newspapers Inc., v. Virginia, 448 U.S. at 603-04 (Blackmun, J., concurring); *Id.* at 581-82 (White, J., concurring).

42. *Id.* at 560.

43. *Richmond Newspapers, Inc.*, 448 U.S. 561.

44. In addition, the closure order in *Richmond Newspapers* did not articulate reasons for the closure. *Id* at 584 n.2 (Brennan, J., concurring).

45. *Id.* at 564. Since the *Gannett* judge inquired into less restrictive alternatives to closure in order to protect the defendant's rights, but found none available, *id.* at 580, it is possible that closure there would have survived the strict scrutiny test employed by the Court after *Richmond Newspapers* and its progeny. *See infra* notes 66-85 and accompanying text. However, the *Richmond Newspapers* trial judge failed to inquire into less restrictive alternatives and therefore failed to prove a compelling state interest in closure. *Id.* at 580-81.

46. *Id.* at 575.

no less-restrictive alternatives available.[47] In a sense, then, state closure orders had to survive a case-by-case strict-scrutiny test. In the instant case, the plurality held that both findings and a search for less-restrictive means were lacking.[48]

Justice Brennan's concurrence has become the most cited opinion from *Richmond Newspapers*. In it, Brennan developed a two-pronged test which has since been applied by the Court in criminal access cases. For Brennan, there are "two helpful principles" in determining a presumption of openness.[49] First, special weight is given when an argument for access is drawn from an "enduring and vital tradition," and second, public access to a particular process must be important to the functioning of that process.[50]

Perhaps the main reason that Brennan's concurrence is so frequently cited is due to the detail with which he explains the

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47. *Id.* at 580-81.

48. *Id.* at 581. Chief Justice Burger detailed various policy reasons for allowing public access to criminal trials: it promotes public confidence in the fairness of government, *id.* at 570-71; assures that procedures are followed and deviations are discovered, *id.* at 569; and provides a safety valve to allay the frustrations of those who feel that the government is not doing its job, *id.* at 571-72.

Chief Justice Burger also emphasized the historical aspect of openness in criminal trials, and concluded that the first amendment guarantees a public right of access to government institutions traditionally open to the public. *Id.* at 580.

49. *Id.* at 589 (Brennan, J., concurring).

50. *Id.* (Brennan, J., concurring). Despite subsequent application of the two-prong test in later cases, *see infra* notes 66-85 and accompanying text, a close reading of the Brennan concurrence shows that a tradition of openness is not *required* in order to find a presumption of openness. Brennan's test merely states that an historical tradition, as well as public value, must be *considered* in determining whether the public's interest outweighs the state's interest in limiting access. *Id.* Thus, Brennan's use of a tradition of openness is to provide extra support for the second, more important prong of his test, the value of access. (*See* Justice Stevens' dissent in *Press-Enterprise Co. v. Superior Court of Cal. for the County of Riverside*, 478 U.S. 1 (1986) [hereinafter Press-Enterprise II]. Justice Stevens, after asserting that the Court majority had failed to find sufficient evidence of a tradition of open preliminary hearings in criminal trials, declared, "[t]he Court's historical crutch cannot carry the weight of opening a preliminary proceeding that the State has ordered closed; that determination must stand or fall on whether it satisfies the second component of the Court's test." *Id.* at 25 (Stevens, J., dissenting).

The first prong is useful in that tradition implies recognition of the values of access by those in control of the institutions in question. Presumably, reasons for openness in a particular government forum might be so valuable to the public interest, that the second prong alone will outweigh the state's interest in closure, and a finding of historical tradition will be unnecessary. Certainly, Justice Brennan would not abide by the idea that if a particular institution either disregarded or undervalued the public's interest in access, its actions alone would permanently bar the public. In practice, then, Brennan's two-pronged test is really a balancing test between a state's interests and the public's interest, with tradition acting merely as an institutional concession of an important public interest in access.

application of his "two helpful principles." For example, Brennan articulates why a tradition of openness is helpful: it implies the "favorable judgment of experience."[51] In determining whether a past practice of openness for a particular process constitutes an American tradition, Brennan looked at its roots in the common law heritage,[52] its colonial usage,[53] contemporaneous state usage (both in state constitutions and statutes),[54] and the Court's own history of protecting the public quality of the particular process.[55] These factors combine to reflect "a profound judgment about the way in which law should be enforced and justice administered."[56]

In determining the importance of openness to the functioning of a particular government organ, Brennan looked at a number of factors: 1) the degree in which openness and publicity acted as a necessary check and balance,[57] 2) the degree to which public scrutiny would help the citizens maintain control over the particular process,[58] 3) the necessity of openness for maintaining public confidence in its government,[59] 4) the fact-finding role of openness in providing more views and information to the particular institution,[60] and 5) the truthfinding role of openness where the threat of publicity discourages falsehood.[61] Also, Brennan looked at the effect of a particular organ's actions upon the public in general. "Under our system, judges are not mere umpires, but, in their own sphere, lawmakers - a coordinate branch of government. While individual cases turn upon the controversies between parties, or involve particular prosecutions, court rulings impose official and practical consequences upon members of society at large."[62]

Like the Chief Justice, Justice Brennan also emphasized the structural role of the first amendment: "Implicit in this structural role is not only 'the principle that debate on public issues should

51. *Richmond Newspapers, Inc.*, 448 U.S. at 589 (Brennan, J., concurring).
52. *Id.* (Brennan, J., concurring).
53. *Id.* at 590 (Brennan, J., concurring).
54. *Id.* at 590-91 (Brennan, J., concurring).
55. *Id.* at 591-92 (Brennan, J., concurring).
56. *Id.* at 593 (Brennan, J., concurring) (quoting Duncan v. Louisiana, 391 U.S. 145, 155 (1968)).
57. *Id.* at 592, 596 (Brennan, J., concurring).
58. *Id.* at 593 (Brennan, J., concurring).
59. *Id.* at 594-95 (Brennan, J., concurring).
60. *Id.* at 596 (Brennan, J., concurring).
61. *Id.* at 597 (Brennan, J., concurring).
62. *Id.* at 595 (Brennan, J., concurring) (footnote omitted).

be uninhibited, robust and wide-open,' but also the antecedent assumption that valuable public debate - as well as other civic behavior - must be informed."[63]

Justice Stevens recognized with approval that such first amendment concerns were not limited to the judiciary. "Today, however, for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedom of speech and of the press protected by the First Amendment."[64] Justice Stevens further commented that the first amendment protects the public's access to information, "about the operation of their government, *including* the Judicial Branch . . . ."[65]

In subsequent cases, the Court has continued to apply the Brennan's *Richmond Newspapers* test to various aspects of criminal trials. One example is *Globe Newspaper Co. v. Superior Court for the County of Norfolk*[66] which involved a state statute mandating the closing of a trial during the testimony of a minor complainant in a sex crime. Justice Brennan, now representing the majority, began his opinion by emphasizing the structural importance of free, informed discussion of government affairs in republican self-government.[67] Since *Globe*, like *Richmond Newspapers*, involved a type of criminal trial, Brennan then repeated the historical and functional analysis for public access with the same result: the tradition and utility of openness for criminal trials creates a constitutional presumption of public access.[68] Such a presumption can only be overcome by an "overriding interest articulated in findings,"[69] or as he now defined it, by a "compelling governmental interest" where closure "is narrowly tailored to serve that in-

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63. *Id.* at 587. (Brennan, J., concurring) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

64. *Id.* at 583 (Stevens, J., concurring).

65. *Id.* at 584 (Stevens, J., concurring) (emphasis added).

66. 457 U.S. 596 (1982).

67. *Id.* at 604-05. Underlying the first amendment right of access to criminal trials is the common understanding that "a major purpose of that Amendment was to protect the free discussion of governmental affairs." Mills v. Alabama, 384 U.S. 214, 218 (1966).

> By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government . . . . Thus to the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that this constitutionally protected "discussion of governmental affairs" is an informed one.

Globe Newspaper Co., 457 U.S. at 605.

68. *Globe Newspaper Co.*, 457 U.S. at 605-06.

69. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 (1980).

terest."[70] However, since *Globe* involved a different kind of criminal trial than *Richmond Newspapers*, the state's interests in closure had to be analyzed anew.[71] Brennan recognized the compelling state interests in protecting minor victims of sex crimes from further trauma and embarrassment, and in encouraging victims to come forward to testify.[72] Nevertheless, the Court found that mandatory denial of public access in every such case was too broad a remedy to be permissible, especially in light of alternative means.[73] The availability of a case by case determination, coupled with the opportunity for *in camera* conferences to screen out potentially embarrassing information, were less restrictive alternatives to mandatory closure.[74] Even in such case-by-case determinations, representatives of the public and press must be allowed to argue for open proceedings.[75]

A public right of access was extended to voir dire examinations of prospective jurors in *Press-Enterprise Co. v. Superior Court of California* (*Press-Enterprise I*).[76] Unlike the *Globe* opinion, which repeated the theory of structural and historical/functional justifications for open trials without applying the test to specific facts, Justice Burger's *Press-Enterprise I* opinion re-applied the *Richmond* test by focusing specifically on the historical and functional aspects of public jury selection.[77] This new application implied that voir dire proceedings are analytically different than criminal trials for first amendment public access purposes, thereby extending the public access doctrine beyond the *Richmond/Globe* trial settings.

The implication of the majority opinion was made explicit by Justice Steven's concurrence, which asserted that a definition of "trial" would be important if this were a sixth amendment case, "[b]ut the distinction between trials and other official proceedings is not necessarily dispositive, or even important, in evaluating the First Amendment issues."[78] *Press Enterprise I* thus left the door open for application of the two-prong test for public access outside

70. *Globe Newspaper Co.*, 457 U.S. at 607.
71. *Id.* at 605 n.13.
72. *Id.* at 607-10.
73. *Id.* at 609 & n.25.
74. *Id.*
75. *Id.*
76. 464 U.S. 501 (1984).
77. *Id.* at 505-10.
78. *Id.* at 516 (Stevens, J., concurring).

of the courtroom setting. The Court found that the important state interests in protecting the privacy of jurors could be protected through means less restrictive than closure, such as *in camera* conferences. If necessary, partial closure could then be ordered for the particular juror's testimony, followed by release of a public transcript, either complete or edited *in camera*.[79] The availability of less restrictive alternatives reduced the state's compelling interest for closure. Consequently, the right of access doctrine was extended to the voir dire process.

The first amendment right of access was extended next to preliminary criminal hearings. Both closed preliminary criminal hearings and sealed transcripts were challenged in *Press-Enterprise Co. v. Superior Court of California (Press-Enterprise II)*.[80] Although the Court often equated preliminary hearings to criminal trials, which had already been established as "open," the Court nonetheless examined the historical usage and functional utility of pretrial hearings, independent of the trial itself.[81] Finding that a public right of access did extend to preliminary criminal hearings,[82] the Court then looked to see if California could justify closure through a compelling state interest. The California Supreme Court had affirmed the Superior Court's finding that the particular criminal defendant (a male nurse charged with twelve murders) would be prejudiced by the release of the pretrial transcript in violation of his sixth amendment right to a fair trial.[83] The Supreme Court of the United States stressed that the test applied by the lower courts did not give adequate weight to first amendment interests. The Supreme Court replaced the "reasonable likelihood of substantial prejudice" test with a stricter test — "substantial probability" that a defendant may be prejudiced. The Court held that the record did not show a "substantial probability" of prejudice that would justify closure.[84] In addition, the Supreme Court noted that the state court failed to consider

79. *Id.* at 512.
80. 478 U.S. 1 (1986).
81. *Id.* at 10-13.
82. *Id.* at 13.
83. *Id.* at 5.
84. *Id.* at 14. At issue was the California courts' refusal to release the transcripts after the preliminary hearing, but before the trial. Ultimately, the defendant waived his right to a jury trial, and the transcript was released. However, the Supreme Court of the United States avoided potential mootness concerns and reviewed the initial refusal to release the transcripts, based on the doctrine that such a practice was "capable of repetition, yet evading review." *Id.* at 6.

alternatives to closure that would protect the defendant's interest in a fair trial.[85] *Press-Enterprise II* thus stands for the proposition that in the face of a presumed public right of access, even a sixth amendment justification for closure will not be considered a compelling state interest unless it is substantiated through articulated findings and an absence of less restrictive means.

II. Access to Legislative Bodies

When the Court's public access rationale is applied to local legislative deliberations, it becomes evident that open meetings are integral both to the success of the municipal legislative process and to the proper functioning of democratic government in general. This section will demonstrate not only how the practice of open city meetings fulfills the historical and functional prongs of the *Richmond/Globe* access test, but also how it helps to maintain the structural integrity of American self-government.

A. The Tradition of Open Meetings

In determining whether a tradition of openness exists for a particular activity, Justice Brennan's *Richmond Newspapers* opinion looked at the common law heritage, colonial usage, contemporaneous state usage, and the Supreme Court's history of protecting the public quality of the activity.[86] The Court has subsequently relaxed the degree of inquiry required to satisfy the historical prong. In *Press-Enterprise II*,[87] the Court traced the tradition of openness for preliminary hearings of criminal trials to the Aaron Burr trial of 1807[88] without relying on the common law heritage and usage at the time of the Constitutional Convention. The Court instead focused on whatever historical evidence would reveal "the favorable judgment of experience."[89] Nonetheless, the practice of opening legislative meetings to the public has been suf-

85. *Id.* at 14-15.

86. *See supra* notes 52-56 and accompanying text.

87. Press-Enterprise II, 478 U.S. 1 (1986).

88. *Id.* at 10.

89. *Id.* at 11 (quoting Globe Newspaper Co. v. Superior Court for the County of Norfolk, 457 U.S. 596, 605 (1982)). *See also* Brief for Common Cause/Ohio and the ACLU of Cleveland Found., as *amici curiae* at 8, 9, WJW-TV, Inc. v. City of Cleveland, 878 F.2d 906 (6th Cir. 1989) (No. 88-3341) [hereinafter Brief] (In their brief, *amici* argue that restricting the scope of first amendment guarantees to those that existed at the time of the framing of the Constitution would repudiate "virtually the entire corpus of First Amendment jurisprudence."), *cert. denied*, 110 S. Ct. 74 (1989).

ficiently prevalent in our tradition to pass even the stricter *Richmond Newspapers* test.

1. The Common Law Heritage and the Founding Fathers

A tradition of open legislative meetings can be found prior to the Revolution at both the national and local levels. For example, meetings of Parliament were open to the public.[90] In addition, meetings of local legislative bodies have been open to American and Colonial citizens since the seventeenth century.[91] Indeed, city councils are direct descendants of the colonial town meeting, which in turn descended from the English and colonial folkmoots.[92] The Supreme Court has traced the tradition of open criminal trials to these very same folkmoots.[93] A shared characteristic of folkmoots and town meetings was the emphasis on public attendance and participation; in most council localities, attendance was compulsory.[94]

Despite the fact that the Constitutional Convention was closed to the public,[95] Founding Fathers such as Jefferson and Madison were explicit in their desire that legislative meetings be open to the public.[96] In addition, the public's interest in government information was constitutionalized in the journal of proceedings clause of Article I.[97] In 1790, deliberations of the House of

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90. Brief, *supra* note 89, at 9.

91. *Id.* at 10.

92. *Id.*

93. Press-Enterprise v. Superior Court of Cal. for the County of Riverside, 464 U.S. 501, 505-06 (1984) (Press Enterprise I). *See also* Press-Enterprise II, 478 U.S. 1, 8 (1986) (noting that before the Norman Conquest criminal cases were brought before moots); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 565-66 (1980) (same).

94. Brief, *supra* note 89, at 10.

95. The Constitutional Convention, though closed, did offer procedural safeguards which diminished some of the dangers of closure. Delegates had no authority to do more than propose amendments, which were then submitted to state conventions, where, "tense battles" ensued over ratification. A. COX, THE COURT AND THE CONSTITUTION 35 (1987). It has been argued that because of the secrecy of the convention, the *Federalist Papers* had to be written to help achieve acceptance. *Open Meetings*, *supra* note 28, at 1202 n.18. Despite the safeguards of the ratification procedure, Thomas Jefferson rued the closure: "Nothing can justify this example but the innocence of their intentions, and ignorance of the value of public discussions." Sunstein, *Government Control of Information*, 74 CALIF. L. REV. 889, 896 n.29 (1986) (citing Letter from Thomas Jefferson to John Adams (Aug. 30, 1787), *reprinted in* 1 THE ADAMS-JEFFERSON LETTERS 194, 196 (L. Cappon ed. 1959)).

96. For Jefferson's views, see *infra* notes 155, 172-75 and accompanying text. For Madison's views, see *infra* note 160 and accompanying text. For the views of another founding father, James Wilson, see *infra* note 158 and accompanying text.

97. "Each House shall keep a Journal of its Proceedings, and from time to time

Representatives were opened to reporters; two years later, the Senate followed suit.[98]

The practice of open meetings evolved from English folk-moots and the example of Parliament; it was then embraced in America through the town meeting and a 200 year history of an open Congress. Though the practice has not been adopted in every locality,[99] it nonetheless has been a common thread in our legislative history, coloring the fabric of our democratic process, and passing the "favorable judgment" of time.

2. Contemporaneous State Usage

For further evidence of an historical affirmation of openness, Justice Brennan in *Richmond Newspapers* looked to state usage and state constitutions.[100] As mentioned above, all fifty states have passed open meeting legislation.[101] In addition, thirty-four states have constitutional requirements that their legislatures meet in public.[102]

In addition to state usage, there is a federal policy of openness for rule-making bodies. Not only has that policy been demonstrated by an open Congress, but it has been codified to ensure openness in federal administrative hearings through the Federal Sunshine Act.[103] The Act not only mandates that all agency hearings be open to the public,[104] but also provides for a procedural framework which includes advance notice to the public for all meetings.[105] Like many state sunshine laws,[106] the Federal law re-

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publish the same, excepting such Parts as may in their Judgment require Secrecy . . . ." U.S. CONST. art I, § 5, cl. 3.

98. SEIBERT, THE RIGHTS AND PRIVILEGES OF THE PRESS 58-59 (1970).

99. *See Open Meetings supra* note 28, at 1199.

100. "The earliest charters of colonial government expressly perpetuated the accepted practice of public trials . . . . Subsequently framed state constitutions also prescribed open trial proceedings." Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 590-91 (1980) (Brennan, J., concurring)

101. *See supra* notes 10-11 and accompanying text.

102. *Open Meetings*, *supra* note 28, at 1203.

103. Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified at 5 U.S.C. § 552b (1988)).

104. 5 U.S.C. § 552b(b) (1988).

105. 5 U.S.C. § 552b(e)(1) (1988).

106. For example, the New York statute provides that:

> It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to listen to the deliberation and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate

quires that agency meetings may be closed for certain enumerated exceptions,[107] but such closures must be explained in writing,[108] and transcripts of such meetings must be recorded to ensure that the exceptions are not abused.[109]

While the focus on openness in common law criminal trials was necessarily at the state level only, analysis of openness in legislative-type deliberations must be expanded to include federal as well as state practices. The historical support for openness at both state and federal levels lends even greater weight to the finding of a "favorable judgment" for a public right of access to legislative meetings.

3. Judicial Protection of the Public Character of Government Information

In reviewing Supreme Court protection of the public character of the judicial process, Justice Brennan's *Richmond Newspapers* concurrence cited only one precedent which directly addressed open criminal trials.[110] *In re Oliver*[111] established that the due process clause of the fourteenth amendment forbids closed criminal trials.[112] The Court in *Oliver* focused on many of the same historical and functional reasons for openness which it would later look to in *Richmond Newspapers*[113] and its progeny, such as the historical distrust of secrecy and the public check against possible governmental abuse of power.[114]

Justice Brennan also looked to Supreme Court precedents upholding the right to report about judicial matters as evincing a "special solicitude for the public character of judicial proceedings."[115] In reviewing these cases, Brennan pointed to their em-

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under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it.

N.Y. PUB. OFF. LAW § 100 (McKinney 1988).

107. 5 U.S.C. § 552b(c) (1988).

108. 5 U.S.C. § 552b(d)(3) (1988).

109. 5 U.S.C. § 552b(f) (1988).

110. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 571-92 (1980) (Brennan, J., concurring).

111. 333 U.S. 257 (1948).

112. *Id.* at 266.

113. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 591-92 (1980) (Brennan, J., concurring).

114. In re *Oliver*, 333 U.S. at 266-71.

115. *Id.* at 592 (Brennan, J., concurring).

phasis on the structural role of an open judicial system.[116]

It has been argued that the very purpose of first amendment protection of free expression is to make the citizen more informed and capable of self-government.[117] Indeed, the development of first amendment doctrine has recognized not only the importance in allowing the speaker to impart information or opinions about governmental matters, but the right of the potential audience to receive such information. This development can be traced through the development of four areas of first amendment jurisprudence: prior restraint, libel, political, and commercial/corporate speech.

i. Prior Restraint

Prior restraints are restraints on speech by a government body or agent (such as through preliminary or permanent injunctions) prior to a fair judicial determination of whether the speech is protected expression under the first amendment.[118] Central to the doctrine against prior restraint is the fear that the government in question (particularly the legislature or executive) can insulate itself from criticism or competition through restrictions on critical speech.[119] Thus, in *Near v. Minnesota*,[120] a state statute which enjoined any newspaper from printing truthful matters unless published "with good motives and justifiable ends," was struck down by the Court.[121] The Court reasoned that if the statute was upheld, "the legislature may provide machinery for determining in the complete exercise of its discretion what are justifiable ends and restrain publication accordingly. And it would be but a step to a complete system of censorship."[122]

The prior restraint doctrine culminated in the Court's per

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116. *Id.* (Brennan, J., concurring). Brennan acknowledged that such cases as Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978), Nebraska Press Ass'n. v. Stuart, 427 U.S. 539 (1976), and Cox Broadcasting, Corp. v. Cohn, 420 U.S. 469 (1975), could be analyzed as prior restraint cases; however, "they are also bottomed upon a keen appreciation of the structural interest served in opening the judicial system to public inspection." *Nebraska Press*, 427 U.S. at 559, *cited in Richmond Newspapers*, 448 U.S. at 592 (Brennan, J., concurring).

117. A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 15-16, 24-27, 39 (1948); *see also* discussion of the structural role of open legislative meetings, *infra* notes 172-81 and accompanying text.

118. *See, e.g., Nebraska Press Association*, 427 U.S. 539.

119. Near v. Minnesota, 283 U.S. 697, 714 (1931).

120. 283 U.S. 697 (1931).

121. *Id.* at 702, 722-23.

122. *Id.* at 721.

curiam decision in the *Pentagon Papers* case.[123] There, a confidential Defense Department study of Vietnam War policy, strategy, and status, was leaked to the press; the government filed suit to stop publication. Among the six justices who ruled against the government injunction, three asserted that the government failed to support a contention of inevitable, direct, and immediate harm,[124] and two believed a prior restraint could never issue for matters critical or embarrassing to the government.[125] Perhaps the most interesting facet of the *Pentagon Papers* case is the fact that the Court conceded that the government did have statutory authority to prosecute those who possessed the papers without authorization.[126] Thus the Court's holding acted not so much to protect the speaker from government prosecution, but to insulate the important governmental information from executive censorship, and protect the rights of the citizens in receiving that information.[127]

ii. Libel

In libel cases, the Court has severely limited the states' power to punish the speaker for false or disparaging comments regarding government action. Hence, in *New York Times Co. v. Sullivan*,[128] the Court prohibited Alabama from imposing civil liability for defamatory statements against a public official absent a showing of actual malice (the court defined actual malice as knowledge of falsity or reckless disregard of whether or not the statement is false). Although it was conceded that the Times may have been negligent in running an advertisement without checking its accuracy against stories in its files,[129] the Court found no presence of actual malice.[130] The Court feared that allowing a stricter standard in defense of a libel accusation, such as a defense of truth,

123. New York Times Co. v. United States, 403 U.S. 713 (1971) (per curium).

124. *Id.* at 726-27 (Brennan, J., concurring); *id.* at 730 (Stewart, J., joined by White, J., concurring).

125. *Id.* at 723-24 (Douglas, J., joined by Black, J., concurring).

126. *Id.* at 735-40 (White, J., concurring). Congress gave the government authority to protect documents of national security through 18 U.S.C. § 793(e) (1971). *See id.* at 737 n.8 (White, J., concurring).

127. For a subsequent prior restraint case, see Nebraska Press Ass'n. v. Stuart, 427 U.S. 539 (1976) (striking down a Nebraska court order prohibiting the pretrial publication of any information "strongly implicative" of the accused).

128. 376 U.S. 254 (1964).

129. *Id.* at 287-88.

130. *Id.*

would cause a publisher to, " 'steer far wider of the unlawful zone.' [The stricter] rule thus dampens the vigor and limits the variety of public debate."[131]

In *Garrison v. Louisiana*,[132] the Court extended the actual malice rule to strike down a Louisiana statute for criminal defamation, as applied to criticism of public officials. The rule was further extended in *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*[133] to cover criticism or false statements concerning public figures who were not public officials.

Conversely, the Court reached a compromise standard for false statements concerning private officials in public matters. In *Gertz v. Robert Welch, Inc.*,[134] the speaker of such statements could be liable for compensatory damages upon a finding of negligence and knowledge that such a statement could be harmful to its object's reputation. Nevertheless, in the case of a purely private party and a private matter, the common law standard of strict liability for false statements still applies.[135]

The Court's libel doctrine is consistent with the structural purpose of the first amendment: the focus is on the subject matter of the speech, and therefore the value of the speech to the public. Information critical of government conduct receives the highest protection for its speaker, since such information adds to the free and open debate necessary for republican self-government. Though private figures are afforded more protection, even in public matters, this is also consistent with a structural purpose, since falsehoods pertaining to such individuals are less relevant to information regarding government conduct. Thus, first amendment libel jurisprudence focuses not on the speaker's conduct, since speaker liability for falsehood or negligence will vary depending on the type of information, but on the public's right to hear information relevant to its duty as self-governor.

iii. Political Speech

The public interest in receiving political information was also emphasized in cases concerning restrictions and regulations of the political speech of broadcasters and corporations. In *Red Lion*

131. *Id.* at 279 (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).
132. 379 U.S. 64 (1964).
133. 388 U.S. 130 (1967) (consolidated cases).
134. 418 U.S. 323 (1974).
135. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. 472 U.S. 749 (1985).

Broadcasting v. F.C.C.,[136] the Court upheld F.C.C. rules, known collectively as the fairness doctrine, which required broadcasters to supply equal air time to the subjects of personal attacks in controversial public issues, as well as the opponents of candidates endorsed through political editorials. A unanimous Court (Justice Douglas not taking part) asserted that Congress had deemed it in the "public interest" to impose a duty on broadcasters to discuss both sides of controversial public issues.[137] The Court explicitly recognized the first amendment goal of keeping the public informed,[138] and felt this was best promoted through public knowledge of all political viewpoints:

> It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be *by the Government itself* or by a private licensee . . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.[139]

The Court also emphasized the importance of getting that information from the source:

> Nor is it enough that he should hear the arguments of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. That is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest, and to their very utmost for them.[140]

iv. Commercial/Corporate Speech

The right of the public to receive "corporate" information regarding a referendum was at the heart of *First National Bank of Boston v. Bellotti*.[141] In *Bellotti*, the Court struck down a Massachusetts criminal statute which prohibited specified corporations from making contributions or expenditures to influence the vote on any measure before the voters, unless such a measure materially

136. 395 U.S. 367 (1969).
137. *Id.* at 380.
138. *Id.* at 392.
139. *Id.* at 390 (emphasis added).
140. *Id.* at 392 n.18, (quoting J. MILL, ON LIBERTY 32 (R. McCullum ed. 1947)).
141. 435 U.S. 765 (1978).

affected the business interests of the corporation.[142] Justice Powell immediately characterized the proper focus for judicial review of the statute: not the first amendment rights of corporations as speakers, but the importance to society of the expression which is limited by the statute. "The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests."[143] The speech at issue, regarding a public referendum, was characterized as "the type of speech indispensable to decision-making in a democracy."[144] As in *Red Lion*, the Court explicitly recognized the structural purpose of the first amendment,[145] as well as the need to hear debate directly from those who espouse a particular view: "[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate."[146] For those reasons, the Court concluded that the first amendment "prohibit[s] government from limiting the stock of information from which members of the public may draw."[147]

As the above cases indicate, the Court has recognized in the first amendment a right of the audience to receive information on matters of public concern. It is not the job of corporations, the press, the schools,[148] or even the government itself to limit that information. Certain speech must be protected, not merely for the speaker's right of self-expression and self-fulfillment, but more importantly, for the value of the speech to the audience and their ability to govern themselves. And though the Court has recognized that many types of speech facilitate self-government and should be afforded first amendment protection, it is speech specifically relating to the operations of government which is most valuable to the receiving public.[149] The court affords speech the high-

142. *Id.*
143. *Id.* at 776.
144. *Id.* at 777.
145. *Id.* at 776-77.
146. *Id.* at 791-92.
147. *Id.* at 783.
148. See Bd. of Educ. v. Pico, 457 U.S. 853, 872-73 (1982), in which the Court held that a school board could not remove selected books from a school library based on impermissible criteria, such as personal values, morals, tastes, and political philosophies, rather than permissible criteria (in the education context) such as educational suitability, relevance, and appropriateness to age and grade level.
149. *Cf.* Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S.

est protection when the speech most directly affects the ability to self-govern. For example, the prior restraint doctrine faced its greatest challenge in the *Pentagon Papers* case (and emerged in its hardiest form), a case involving embarrassing information of government policy.[150] In *New York Times v. Sullivan*, the actual malice rule replaced less protective state libel laws as a result of an advertisement critical of Southern law enforcement and racial policy;[151] and laws prohibiting certain corporate expenditures for political advocacy were overturned in *Bellotti*, a case involving a referendum, an issue "referred" directly to the populace, perhaps the purest form of legislation available in a republican form of government.[152] Clearly, a "special solicitude" of the public character of government information and, in particular, information relating to the creation of law and policy, is evident from the Supreme Court's analysis of cases establishing a public right to receive information.[153]

B. The Functional Advantages of Openness

In addition to looking at the historical aspects of public access to a particular activity, the Court also looks at how openness can best serve the purposes of that activity. This second, *functional* prong of the *Richmond/Globe* test scrutinizes the degree to which openness acts as a necessary check and balance on government abuse of power, facilitates public scrutiny over the process, encourages public confidence in the process, aids in fact-finding/truth-finding, and informs those actually affected by the process.[154]

1. Openness as a Necessary Check and Balance

Among the founders, Thomas Jefferson most explicitly recognized the need for public access to act as a check on government abuse of power. Two themes underlie the Jeffersonian concept of

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748, 771-72 n.24 (1976). ("In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiated from other forms . . . . [These differences] suggest that a different [lesser] degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired.")

150. New York Times Co. v. United States, 403 U.S. 713 (1971).

151. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

152. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

153. For a list of other cases examining the constitutional right to receive information and ideas, see Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972).

154. *See supra* notes 50, 57-62 and accompanying text.

the use of public discussion and disclosure as a check: to prevent representatives from making self-interested decisions at the expense of the public interest, and to prevent private interest groups from asserting undue influence on the deliberative process.[155]

Commentators through the years have seized on Jefferson's model of free expression in explaining the core values of the first amendment, and applying them to open government. Thomas Cooley explained:

> [The general purpose of the First Amendment was] to guard against the repressive measures by the several departments of the government, by means of which persons in power might secure themselves and their favorites from just scrutiny and condemnation . . . . The evils to be prevented were not the censorship of the press merely, but any action by the government by means of which it might prevent such free and general discussion of public matters.[156]

Indeed, the Court itself has commented on the critical checking power of an informed citizenry. "Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account."[157] In the area of legislation, where representatives can be tempted by the advances of private interest to a much higher degree than the criminal court judge, the checking power of a public right of access takes on added significance.

2. Openness to Facilitate Public Scrutiny (in Maintaining Public Control over the Process)

Though American democracy is most obviously a representative form of government, the ultimate power rests in the people. In order to maintain control over their governmental institutions, the people must be able to scrutinize those institutions. As James Wilson commented at the Constitutional Convention, "[t]he people have a right to know what their Agents are doing or have done, and it should not be in the option of the Legislature to conceal their proceedings."[158]

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155. Sunstein, *supra* note 95, at 892.

156. 2 T. COOLEY, CONSTITUTIONAL LIMITATIONS 885 (8th ed. 1927), *cited in* Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution*, 26 GEO. WASH. L. REV. 1, 11 (1957).

157. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 596 (1980) (Brennan, J., concurring) (quoting *In re* Oliver, 333 U.S. 257, 271 (1948)).

158. 2 THE FOUNDERS' CONSTITUTION 290-91 (Kurland & Lerner eds. 1987).

During the drafting and ratification of the Constitution, many felt that the journal of proceedings clause was not protective enough of the public's interest. During the Virginia ratification debates, for example, George Mason rued the requirement that Congress publish a journal only "from time to time." Mason felt that the public had a right to know about the receipts and expenditures of their money but the journal clause provision "was so loose, it might be concealed forever from them, and might afford opportunities of misapplying the public money, and sheltering those who did it."[159]

Both Thomas Jefferson and James Madison wrote extensively on the need for citizens to acquire information about their government. In fact, practically no commentary on a public right of access has been written without the inclusion of the following quote from Madison: "A popular government, without popular information or the means of acquiring it, is but a Prologue to a Farce or Tragedy; or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[160]

The need for public scrutiny may be greater today than ever before. Retired Chief Justice Earl Warren commented on this fact:

> It would be difficult to name a more efficient ally of corruption than secrecy. Corruption is never flaunted to the world. In government it is invariably practiced through secrecy — secrecy found in every level of government from city halls to the White House and Capitol. If anything is to be learned from our present difficulties, compendiously known as Watergate, it is that we

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159. *Id.* at 292-93.

160. Letter from James Madison to W.T. Barry (Aug. 4, 1822), *reprinted in* 9 WRITINGS OF JAMES MADISON 103 (G. Hunt, ed. 1910), *cited in* Emerson, *Colonial Intentions and the First Amendment*, 125 U. PA. L. REV. 737, 754-55 (1977). Madison also stated that:

> The right of electing members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively.

6 WRITINGS OF JAMES MADISON at 398, *cited in* Note, *Access to Official Information: A Neglected Constitutional Right*, 27 IND. L. J. 209, 217 n.29 (1951) [hereinafter *Access to Official Information*]. Ultimately, according to Madison, "[t]he right of freely examining public characters and measures, and of free communication thereon, is the only effectual guardian of every other right. *Id.* at 398. *cited in Access to Official Information, supra* at 212.

> must open our public affairs to public scrutiny on every level of government.[161]

Openness not only inures to the public's benefit in retaining popular control over government, but it can actually be in a councilman's interest, as well. For example, by knowing only the voting records of a representative, without the debate and rationale behind each vote, a citizen has a very incomplete and unfair picture of a representative. This is comparable to evaluating the record of a judge solely on his holdings, without any review of the opinions and legal reasoning behind the holdings.

Moreover, the mere publication of the transcript of a meeting will not suffice. Such a transcript is after-the-fact and can be biased or incomplete.[162] To analogize again to the judiciary, such a transcript cannot convey the nuances and inflections, the attitudes and the passions, that can be felt through actual presence. That is why, for example, an appellate court accords great deference to the findings of fact of the trial court. Although actual open meetings are often attended only by the press, its presence can serve to convey a more accurate description of the proceedings than a transcript: a good reporter will be able to convey to his readers perceptions of a meeting which are not included in the edited or even verbatim transcripts. Thus, public meetings, despite the absence of the "laymen public," will facilitate public scrutiny of the process.

3. Openness Enhances Public Confidence and Encourages Fact-Finding/Truth-Finding

In an incisive Harvard Law Review note,[163] many of the important reasons already given here for public access are summarized, such as the insufficiency of official reports of closed meetings, the right of the people to see how their own money is being spent, and the checking power of the public on government conflicts of interest and misbehavior. However, the author also offers several other considerations:

> Government will be more responsive to the governed if officials are able to ascertain public reaction to proposed measures. Public meetings also may operate to provide officials with more ac-

161. Warren, *Government Secrecy: Corruption's Ally*, 60 A.B.A. J. 550, 550 (1974).
162. *Open Meetings*, *supra* note 28, at 1201.
163. *Id.*

> curate information; individual citizens will be able to correct factual misconceptions, particularly in local government where the public is apt to have greater knowledge of the issues involved. Then, too, as people better understand the demands of government and the significance of particular issues, they will be better prepared "to accept necessary, and perhaps difficult and unpalatable measures essential to the public good."[164]

The Supreme Court has surmised that openness can improve the quality of testimony, since the speaker may realize that any inaccuracies stand a better chance of being discovered through public attendance and publicity.[165] In addition, attendance causes all participants to perform their duties more conscientiously.[166]

Perhaps more importantly, the Court has realized that secrecy breeds distrust, whereas openness breeds confidence. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."[167] Openness both implies that the government is working in the public's best interest, and rejects the paternalistic notion that there are some matters about which the public is better off not knowing.

4. Openness Helps to Inform Those Affected by the Governmental Process

As argued by George Mason during the ratification debates, legislative meetings should be open to the public due to the direct impact that such meetings have on citizens as taxpayers.[168] It is interesting that, the Supreme Court has limited a first amendment right of access to proceedings in criminal trials, when the core values of the first amendment - to facilitate and inform public debate on important issues while checking governmental abuses - seem most relevant to legislative functions. The right of access to courtrooms and prisons inure primarily to the rights of citizens to receive information,[169] and only indirectly affects their abilities as citizens to govern their own affairs through their representatives.

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164. *Id.*, (quoting J. WIGGINS, FREEDOM OR SECRECY 20 (1956)).

165. *See* Globe Newspaper Co. v. Superior Court for the County of Norfolk, 457 U.S. 596, 609 n.26 (1982); Gannett Co. v. DePasquale, 443 U.S. 368, 383 (1979).

166. *Gannett Co.*, 443 U.S. at 383.

167. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572 (1980).

168. *See supra* note 159 and accompanying text.

169. For a discussion of the Court's protection of the public character of government information, see *supra* notes 39-56 and accompanying text.

The requirement of open city meetings, however, is based directly on the right of the public to know the actions of their elected officials, who govern only by the consent of their constituents. It is the right of a citizen to know how his tax dollars are being allocated, and how his land is being assessed and zoned. Without such a right, a public official has no true accountability to his constituents.

Moreover, the impact of legislative closure upon the citizen is greater in his relationship with local government than with federal government. Historically, disclosure of government information has been opposed for various reasons, perhaps the most compelling being the need for secrecy in the interest of national military defense and effective foreign relations.[170] However, at the local level of government, many of the compelling reasons for closure disappear. Whatever reasons remain, such as discussion of personnel matters and real estate transactions, lead to far less dangerous results in the event the information becomes public. Yet the consequences of closure at the local level are more dangerous. The citizen must rely on his own ability to gather information with regards to local matters, since he does not have the national media and public advocate groups to acquire information for him. Without a government enforced right to guarantee him access to the political process, he could be rendered ignorant of the deliberations that most directly affect him.

While judicial access can be distinguished from legislative access, arguments favoring a right of access to judicial proceedings, yet denying access to legislative meetings, are flawed. The notion that the citizen, barred from a local town meeting, has a political remedy on election day misses the point. Such a citizen cannot make an intelligent decision on whom to re-elect when he has no idea how and why his representatives voted on specific issues.[171] The other alternative, a blanket decision to vote out all incumbents in closed governments, is hardly a good solution. Not only is it unfair to those representatives who were against closure, it is hardly supportive of assuring a competent local government, staffed with at least some experienced councilmen.

In applying the *Richmond/Globe* test to local legislative

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170. Parks, *supra* note 156, at 5; Sunstein, *supra* note 95, at 895-96.

Despite such compelling federal interests in closure, both houses of Congress have been open to reporters since 1792. Seibert, *supra* note 98, at 58-59.

171. *Access to Official Information*, *supra* note 146, at 216-17.

meetings, it is clear that openness promotes the purposes of honest and informed municipal legislation, and therefore fulfills the functional prong for public access. Although that in itself should be reason to articulate a constitutional presumption of openness, openness also serves a structural purpose not merely in the functioning of local meetings, but in the democratic process of government as a whole.

C. The Structural Role of Open Legislative Meetings in the Democratic Process

The structural argument for public access recognizes that in order for citizens to be able to govern themselves competently in their political affairs, they need to be knowledgeable about how their government operates; the more information they have, the better equipped they are to govern. Conversely, the more ignorant a populace, the greater the risk that the wrong choices will be made concerning representation and referendum, and that governmental abuse (be it legislative, judicial, or executive) will go unrecognized, be tolerated, or even encouraged.

Like his Secretary of State, James Madison, Thomas Jefferson emphasized the central importance of information to democracy. Though he advocated a more direct role for the citizen in the decision-making process than Madison or, ultimately, the Constitutional Convention,[172] Jefferson's views on the importance of an informed public have helped define the popular understanding of the function of the first amendment.[173] Under his approach, democratic government functions through widespread public deliberations on important issues; for intelligent decision making, the public must be informed:[174]

> The basis of our governments being the opinion of the people, the very first object should be to keep that right. The way to prevent [errors of] the people, is to go give them full information of their affairs through the channel of the public papers, and to contrive that these papers should penetrate the whole mass of the people.[175]

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172. Sunstein, *supra* note 95, at 890, n.7.

173. *Id.* at 890.

174. *Id.* at 891.

175. H. LASSWELL, NATIONAL SECURITY AND INDIVIDUAL FREEDOM 62 (1950) (quoting Thomas Jefferson *cited in Access to Official Information, supra* note 160, at 212, n.11.

These sentiments have been developed further by such commentators as Professor Alexander Meiklejohn:

> Just so far as . . . the citizens who are to decide an issue are denied acquaintance with information or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning, for the general good. It is that mutilation of the thinking process of community against which the First Amendment to the Constitution is directed.[176]

Some commentators seeking to limit first amendment protection in other areas have nonetheless emphasized the self-government role of certain speech. Meiklejohn himself stated, "[t]he First Amendment does not protect a 'freedom to speak.' It protects the freedom of those activities of thought and communication by which we 'govern'. It is concerned, not with a private right, but with a public power, a governmental responsibility."[177] Even Judge Robert Bork, not known for liberal constitutional interpretations, emphasized the necessity of first amendment protection of political debate, since, "a representative democracy [is] a form of government that would be meaningless without freedom to discuss government and its policies. Freedom for political speech could and should be inferred even if there were no First Amendment."[178]

Congress has acknowledged the imperative value of public governmental information in justifying passage of the Federal Sunshine Act,[179] as well as the Freedom of Information Act.[180]

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176. A. MEIKLEJOHN, *supra* note 118, at 26 (1948), *cited in* Houchins v. KQED, Inc., 438 U.S. 1, 31 n.21 (1978) (Stevens, J., dissenting).

177. Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255, *cited in* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26 (1971).

178. Bork, *supra* note 177, at 23.

179. *See* S. REP. NO. 354, 94th Cong., 1st Sess. 5 (1975), in explaining passage of 5 U.S.C. § 552b:

> [T]his bill should enhance greatly the public's understanding of the decisions reached by the government . . . . [U]p to now the public has not had a full opportunity to learn how or why government official [sic] make the important policy decisions which they do. All too often the meetings at which such decisions are made are closed to the public. Interested persons must content themselves with elementary minutes, or background papers tangentially related to the official agenda. Formal statements in support of agency actions are frequently too brief, or too general, to fully explain the Commission's reasoning, or the compromises that were made. As a result, the public may not understand the reasons an agency has acted in a certain way, or even what exactly it has de-

Yet some kinds of information may be more critical to democratic citizens than other kinds. We are indeed a nation of laws, and it is the role of government to promulgate, interpret and enforce those laws. If knowledge and open debate of government matters is critical to democracy, then surely the most essential knowledge and debate is that which pertains to the origin and rationale behind the law itself. In short, the knowledge most fundamental to democracy is legislative knowledge.

There has been a dearth of commentary regarding a constitutional right of access to government meetings. The reason is plainly the proliferation of state open meetings, or sunshine laws that originally seemed to negate the necessity of arguing about a constitutional right of access. In reality, the state remedies have proven to be inadequate.[181] Yet, in order to defend a right completely central to democratic self-government, federal and constitutional law must be expressly available to *guarantee* the exercise of this constitutional right.

III. ADVANTAGES OF ENFORCING A CONSTITUTIONAL RIGHT OF ACCESS

There are certainly some well-written state open-meeting statutes that are effectively enforced in the state courts. But other statues often lack clarity, vision, or a real commitment to the public's right of access.

One common problem is a lack of precision in the language of the state laws. A recurrent example is the definition of "meeting" itself. Absent precise language as to the legislature's intent, state courts are often left to come up with their own definition of the word. Frequently, these definitions restrict the public's interest more than the plain language of the statute.[182]

Another problem related to the lack of clarity is the use of enumerated exceptions to the state laws which allow deliberative bodies to go into closed, or executive, sessions. Common exceptions include discussions of personnel matters, conduct of official investigations or preparation for pending litigation, and discus-

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cided to do . . . .

180. The Freedom of Information Act is now codified at 5 U.S.C. § 552b (1982).

181. *See infra* notes 182-97 and accompanying text.

182. *See e.g.*, Note, *Entering the Door Opened: An Evolution of Rights of Public Access to Governmental Deliberations in Louisiana and a Plea For Realistic Remedies*, 41 LA. L. REV. 192, 198, n.32 (1980) [hereinafter *Public Access*].

sions involving real estate transactions.[183] Though in theory these exceptions are necessary to protect important privacy and economic interests, they can be exploited by local governments as loopholes for avoiding public scrutiny. The following two examples illustrate this point:

1. The Mississippi Open Meetings Law,[184] like most open meetings laws, contains an exception for the discussion of "personnel matters."[185] A Mississippi lower court stated that the exception could apply to discussions of insurance, holidays, parking spaces and architects.[186] However, this broad exception was later narrowed somewhat by the Mississippi Supreme Court even though they held that "personnel matters" still covers a large subject area.[187]

2. The New York Open Meetings Law[188] contains an exception allowing for closed "deliberations of political committees,

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183. Wickham, *Let the Sunshine In! Open Meeting Legislation Can Be Our key to Closed Doors in State and Local Government*, 68 NW. U.L. REV. 480, 485-86 (1973).

184. MISS. CODE ANN. §§ 25-41-1 to 25-41-17 (Supp. 1989).

185. MISS. CODE ANN. § 25-41-7(4)(a) (Supp. 1989).

186. Common Cause v. Minds County Bd. of Supervisors, No. 118, 538 (Minds Co. Ch. Ct. First Dist. August 18, 1986), *rev'd in part*, Minds County Bd. of Supervisors v. Common Cause, No. 58177, 1989 WL 76443 (Ms. June 28, 1989).

187. Minds County Bd. of Supervisors v. Common Cause, No. 58177, 1989 WL 76443 (Miss. June 28, 1989). In dicta, the Mississippi Supreme Court subsequently narrowed the chancellor's broad reading of "personal matters":

> The authorization to go into executive session to discuss "personnel matters," of course embraces a large area of subject matter. Obviously, however, there is any number of matters of discussion involving the employees of an organization which would never require an executive session. Commendations, need to work overtime upon occasion, shift in hours of employment, increase in life insurance, any of these might very well come under the heading of "personnel matters," but they are hardly the stuff for which a board would trouble itself to go into executive session.

Id.

The court did hold that a decision on whether to retain an architect is not a personnel matter:

> We have no difficulty holding that the words "personnel matters" are restricted to matters dealing with employees hired and supervised by the board, not those employees of some other county official, and not other county officials themselves . . . . Moreover, an independent contractor such as an accountant, lawyer, or architect is not an employee of the board, and would not come under "personnel".

Id.

The court found it unnecessary to define exactly what encompasses personnel matters, since the county board in question neglected to even announce the reason for going into executive session, and to take competent minutes to show that discussion remained focused on the appropriate matters. *Id.*

188. N.Y. PUB. OFF. LAW §§ 100-111 (McKinney 1988).

conferences and caucuses."[189] In the statute's original form, the presence of a quorum in a political caucus meeting fell outside the exception, unless the discussion focused on political party matters. The New York state legislators soon realized this meant that their own political caucuses could be opened to the public if they discussed public business, so they amended the statute. Now, any political caucus can meet in closed session, regardless of whether or not it contains a governmental quorum, and regardless of whether it discusses party business or public business. Such a loophole permits local legislative bodies to meet behind closed doors.[190]

Another drawback of open meetings statutes is the lack of effective enforcement procedures. Since the common law did not recognize a public right of access, there are no judicially developed remedies available.[191] Statutory remedies have included criminal sanctions against offending officials, nullification of the legislation passed in secret, civil relief, and removal from office.[192] Yet all of the statutory remedies are found wanting. In practice, criminal sanctions, though the most common statutory remedy, are rarely if ever imposed.[193] Legislatures have failed to include meaningful standards for determining what qualify as criminal violations,[194] and courts are hesitant to provide them. Either the criminal sanction would have to be a strict liability crime, and therefore carry with it a penalty too small to be effective, or it would have to depend on a showing of intent or bad faith, which is always difficult to prove. Also, criminal sanctions are left to the discretion of district attorneys who might be loathe to prosecute fellow local officials.[195] Nullification offers no better solution because it can be negated simply by re-run votes.[196]

Removal from office is the least prevalent of enforcement remedies. To be effective, removal would also have to be a strict liability punishment (for instance, two violations could suffice for removal); the severity of such a sanction may be why it has not

189. N.Y. PUB. OFF. LAW § 108(2)(a) (McKinney 1988).

190. Sluzar, *supra* note 10, at 613, 622-624.

191. Wickham, *supra* note 183, at 495.

192. *Id.* at 496-99.

193. *Id.* at 496.

194. *Id.*

195. *Public Access*, *supra* note 182, at 207 & n.94.

196. *See* Wickham, *supra* note 183, at 496-98; Note, Public Access, *supra* note 182, at 212-14.

garnered more support in the state legislatures.[197]

A constitutional right of public access could overcome many of the drawbacks of the state statutes. For instance, unclear language becomes a problem when state courts interpret the statutory language too narrowly, or the exceptions too broadly, to the detriment of the public interest. This is understandable, since the state courts do not have an articulated valuation of the public's right of access. Thus, in balancing the values between a vague conception of the worth of open meetings against the concrete supplications of governmental bodies in seeking closure, where the statutory language gives any leeway, the courts often decide in favor of the government bodies. Recognition of a constitutional right of access would provide the courts with the bedrock valuation of the public's right to open government.

Moreover, a constitutional right of access would close the loopholes provided by unclear language and overbroad exceptions by mandating the application of the *Richmond/Globe* strict scrutiny test.[198] Using such a test, the state would not only have to show a compelling interest in closure (such as personnel, litigation, or real estate matters), but would have to prove that no means less restrictive than closure were available. This is not to say that every time a city council wants to meet in executive session, it has to go to court to justify the closure. Certainly, the body of constitutional law will develop appropriate standards, so that certain reasons for closure will be known as acceptable, thereby aborting any such suits. Moreover, in a strict scrutiny framework, overbroad exceptions such as general employee policy discussions, absent named individuals, would fall out of the range of permissible exceptions.

Another common loophole for local governments is the executive session which begins by discussing an enumerated exception, but then turns to other public business not covered by the exceptions clause. Currently, to enforce sanctions against this type of behavior after the fact, if it were even attempted by a plaintiff, would require deposing the city officials involved. A much less intrusive method for requiring a city government body to confine themselves to the excepted subject matter, is to require audio or videotaping of all closed sessions.[199] In this age of rampant video

197. *See* Wickham, *supra* note 182, at 499 n.99.

198. *See supra* notes 41-77 and accompanying text.

199. The Federal Sunshine Act allows for closed meeting transcripts or minutes that

consumerism, such a requirement would neither tax a city's treasury nor hinder their deliberative processes. Of course, closed sessions in any event would be the exception to the rule. But in almost all instances, the tape of the closed session would remain securely in the hands of the city, since most closed sessions would occur without a constitutional challenge. However, in the event of litigation over the matter, the city could submit the tape to the judge for *in camera* inspection. If the closed session was confined to the proper subject matter, the city would win the lawsuit and retain possession of the tape. If other public business is discussed, however, the judge would have the discretion to release those portions to the public in an edited version of the tape. *In camera* inspection is one proven method of assuring that first amendment rights are protected while other compelling interests are also served.[200] Such an application would assure that the public's right to access has not been exploited, while also protecting the important privacy and economic interests of the city without noticeable intrusion by the federal or state judiciary.

Despite the advantages of a constitutional presumption of public access, a city council may still not feel compelled to open its doors if it feels that no one will take the expense and trouble of challenging it in court. In fact, perhaps the greatest weakness of most state open- meetings law is their failure to provide for attorney's fees for the private plaintiff, absent a showing of bad faith on the part of the government. The cost of litigation has deterred local newspapers and broadcasting companies, the most likely plaintiffs, from bringing suit in many instances.[201]

Congress, however, has determined that any person who has been deprived of a constitutional right, by a person acting under color of state law, has a private federal cause of action and, among other statutory and common law remedies, can recover attorney's fees. In *Monroe v. Pape*,[202] the Supreme Court held that a section 1983[203] action gave a remedy to any individual deprived

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the public can obtain if the transcripts do not contain exempt information. 5 U.S.C. § 552b(f) (1988).

200. *E.g.*, Marrese v. American Academy of Orthopaedic Surgeons, 726 F.2d 1150 (7th Cir. 1984) (en banc) (court suggests *in camera* viewing of documents to strike a balance between first amendment interest in association and need for discovery).

201. Conversation with Susan Gillis, on October 27, 1988, first amendment lawyer for the law firm of Baker & Hostetler, Cleveland, Ohio.

202. 365 U.S. 167 (1961).

203. 42 U.S.C. § 1983 (1982) states:

of constitutional rights by an official's abuse of his position, regardless of whether that official was abiding by or violating state law. *Monell v. Department of Social Services*[204] broadened the class of permissible section 1983 defendants to include corporate municipalities. Hence, if a constitutional right of public access to local government were recognized, section 1983 would allow a private party, barred from a meeting, to sue the city officials and/or the city itself.

An after-the-fact suit brought under section 1983 would probably seek only declaratory judgment against the city, since money damages, though available in section 1983 action, would be too difficult to calculate in this type of action.[205] However, such a suit could include recovery for attorney's fees for the plaintiffs, since section 1988[206] gives the judge discretion in awarding attorney's fees to the prevailing party in a section 1983 action.[207]

Since section 1983 is not a cause of action exclusive to federal courts, the states can choose to entertain such suits.[208] Hence, the fear that recognition of the constitutional presumption of public access will give the federal courts too much power in the affairs of local government is somewhat mitigated. Also, the federal courts have discretion themselves to send a case to the state courts, utilizing the *Pullman* abstention doctrine to avoid the constitutional issue if the state statute could decide the case.[209] However, the plaintiff in such a case would reserve the right to have

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Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

204. 436 U.S. 658 (1978).

205. *But cf.* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (Harlan, J., concurring) (finding an illegal search and seizure by federal agents, in violation of fourth amendment rights, capable of judicial determination of meaningful compensation).

206. 42 U.S.C. § 1988 (1982) ("In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.")

207. Congress created a public right to sue, and to win attorneys fees, for violations by the Government in the Sunshine Act. 5 U.S.C. §§ 552b(h)(1), (i) (1988).

208. Martinez v. California, 444 U.S. 277, 283-84 & n.7 (1980).

209. Railroad Commission v. Pullman Co., 312 U.S. 496 (1941) (where a state law is ambiguous but its interpretation could negate the need to proceed to a constitutional issue federal courts should direct the state issue to the state court for adjudication).

the federal claim litigated later in federal court.[210]

Of course, articulating a constitutional right of public access to local legislative meetings requires a definition of what is meant by the word "meeting" in the constitutional context. Choices range from any communication concerning public business between two or more legislators, to a quorum meeting of a city council in which a vote takes place.

The problems in defining the word "meeting" can be seen in articles analyzing state sunshine laws[211] and the federal Sunshine Act.[212] Section 552b(a)(2) of the Sunshine Act defines a "meeting" as "the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business."[213] As it applies to agency committees, the Supreme Court has interpreted the statute to apply only "where a subdivision of the agency deliberates upon matters that are within the subdivision's formally delegated authority to take official action for the agency."[214] Though the Court was engaged in statutory, not constitutional, interpretation, the focus upon the authority to take legal action is appropriate in application to local legislative bodies. Through such a focus, a quorum of a city council would be obligated to open its doors to the public,

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210. England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 417 (1964) (quoting NAACP v. Button, 371 U.S. 415 (1963)) ("[A] party has the right to return to the District Court, after obtaining the authoritative state court construction for which the court abstained, for a final determination of his claim.").

211. *See, e.g.*, McKee, *The Amended Open Meetings Law: New Requirements for Publicly Funded Corporations as Well as Governmental Agencies*, 25 GA. ST. B.J. 78, 79 (Nov. 1988) ("A covered meeting is defined as 'the gathering of a quorum of the members of the governing body' of a covered entity or 'any committee of its members' 'at which official business or policy' is to be discussed or 'at which official action is to be taken,' or, in the case of a committee, 'recommendations on official business or policy' are formulated or discussed'."); McManus, *Meetings and Records in Illinois: How Open Are They*, 77 ILL. B.J. 156, 156 (Nov. 1988) ("Originally, the Act required only that 'official meetings' at which 'legal action' was to be taken must be open. The amendment required that both the 'deliberations' and 'actions' be open and eliminated the references to 'official' meetings and to 'legal' actions."); *Public Access*, *supra* note 182, at 198-202 & n.32 ("While rejecting a broad reading of 'meeting,' the [Louisiana Supreme C]ourt also refused a wooden and formalistic construction, reasoning that administrative 'conference sessions' could not 'be held without compliance with the Public Meetings law.' " (citations omitted)).

212. *See*, Note, *Facilitating Government Decision Making: Distinguishing Meetings and Nonmeetings Under the Federal Sunshine Act*, 66 TEX. L. REV. 1195 (1988) [hereinafter *Decision Making*].

213. 5 U.S.C. § 552b(a)(2) (1988).

214. FCC v. ITT World Communications, Inc., 466 U.S. 463, 472 (1984).

since that body would have authority to take almost any action not limited by the city charter or state constitution. Conversely, meetings of city council subcommittees would not be constitutionally compelled to provide public access. However, such subcommittee hearings, findings, and reports should be provided to the public in the event that it is used as evidence at a vote of the entire city council. Once a matter moves from committee to the entire council, the public must be allowed to attend. At that point, the committee's findings and recommendations will be presented and debated in front of the whole legislative body; the public will have the opportunity to scrutinize the process, provide a check upon the intrusion of private interest in the debates, add comment to the proceedings, and help ensure against inaccuracies in the deliberations. Thus, even though the public will initially miss out on important information in committee, it will learn of the information as it is presented to the entire body, and it will still effectively participate in the legislative process. The functional and structural roles of public access will be fulfilled.

In addition, restricting a constitutional right of access to quorums of the legislative body will be more easily enforceable, and will allow the courts to avoid constant line drawing on a case by case basis of whether a particular subcommittee meeting should be open. It does not mandate that all subcommittee meetings should be closed, however; it leaves that decision to the state legislatures, who are free to expand upon the basic constitutional rights.[215] Admittedly, such a rule could be abused through such techniques as splintering the quorum;[216] however, in that instance, the existence of a pre-determined decision might be evident at the subsequent open meeting, which then could be countered through

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215. Such a constitutional rule of access might help to alleviate the fears of critics such as Archibald Cox:

> Drawing new lines for the Legislative and Executive Branches between what must be open and what may be closed is unsuited to judicial determination . . . . In the end, therefore, the only protection of the people against excessive government secrecy is the people's own active insistence on disclosure, expressed by their votes and the legislative action of their representatives. The Freedom of Information Act, though subject to many exceptions, is an example.

A. Cox, *supra* note 95, at 233-34. The rule mandating openness for bodies authorized to take legal action is not susceptible to constant and intrusive line drawing, but puts the city on notice of when access is required. In addition, Professor Cox's reliance on the vote to protect the public interest loses its force when applied to closed local meetings, since the public cannot know how to use their votes effectively. *See supra* notes 168-71.

216. *See Decision Making, supra* note 212, at 1203 n.51.

adverse publicity and election returns.

Some commentators advocate an even narrower construction of "meeting," so that preliminary "collective inquiry" gatherings can be closed, while later "deliberative" and "decisional" meetings would be open.[217] Theoretically, at the collective inquiry stage, information is gathered, expertise gained, and possible solutions identified but not compared.[218] Openness at this stage, the critics argue, would expose disagreements among subordinates regarding policy determinations; create a public image of ignorance through searching questions, producing demagogic oratory; hamper collegial decision making through the fear of benefiting special interests; invite pressure from special interests; and freeze members into policy opinions that they might prefer to abandon since a change in position could appear as a weak-willed backing down in the face of pressure.[219] In addition, openness could cause the decision makers to simplify and trivialize public discourse, boiling it down to two-sided, rather than multi-sided, issues.[220]

Most of these arguments are more applicable at the federal agency level. Because legislatures generally are not bound by the policy mandates of a superior body, subordinate disagreements are usually irrelevant. The fear of appearing ignorant, or of trivializing matters for public understanding, is also irrelevant. For the most part, local legislators are not "experts", therefore, they are at the same level as the public, and have no need to simplify matters for public consumption.

Openness has been clearly acknowledged as a check against special interests. This was recognized early on by the Founding Fathers.[221] The greater the audience, the more the power of special interest will be diluted in the competition with other factions. Certainly, fears of appearing ignorant or weak through compromise are of little significance when balanced against the public's need for information, and public attendance can provide useful comment and information that could help to alleviate a legislator's real ignorance. The practice of an open Congress has proven that legislators can ask simple questions, and can change positions or remain publicly undecided until just before a vote without com-

217. *Id.* at 1205.
218. *Id.*
219. *Id.* at 1209 n.85 & 1211.
220. *Id.* at 1211.
221. *See supra* notes 155-58 accompanying text.

promising effectiveness.

Moreover, rules that limit public access to the moment when discussion becomes decision-oriented are simply unenforceable. As the commentators admit, collective inquiry, where knowledge of an issue expands, often overlaps with deliberation, where issues are narrowed and alternatives discarded.[222] Such a process will necessarily vary depending on the individual legislator and the issues. In some situations, a majority might have their minds made up immediately upon the introduction of an issue, even before all the relevant facts are gathered. Such hair-splitting is even more problematic when the issues involve the formulation of government policy, rather than the enactment of laws. Since policy is more abstract and may not even be articulated in a published format, or voted upon, a determination of policy could occur at almost any stage of the decision-making process, and could even play a part in the collective inquiry stage of more particularized legislation. Since the formulation of government policy can be as important to the public as actual legislation, the public must be afforded access to all meetings of a legislative quorum.

Enforcing a constitutional right of access to legislative meetings would guarantee that the public play its critical role in the legislative process, and acquire the proper information to be competent self-governors. The right would guarantee public access to all quorums of city council meetings unless the meetings fell within certain enumerated exceptions. Even then, safeguards, such as transcripts, would ensure that discussions remain focused on those exceptions. The constitutional right would not conflict with state sunshine laws, but would complement them: the states would be free to grant their citizens even greater access than that guaranteed by the constitution. Moreover, a constitutional right would give state judges the proper weight to allot to the public interest when balancing it against interests in closure; this would provide for more consistent and understandable interpretations of state statutes. This right would give every citizen in the country the freedom to attend local meetings, the opportunity to influence how his tax dollars are allocated, and the right to ask the courts to enforce that freedom.

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222. *Id.* at 1205-06. The author concedes that if enforcement of a restriction of openness to the deliberate process is to be effective, "[t]he day to day realities of administering the affected agencies require the agency members themselves to be the primary enforcers of the [Sunshine] Act's requirements." *Id.* at 1225.

CONCLUSION

For all practical purposes, a constitutional right of public access to local government meetings has already been recognized. The language of the Founding Fathers, of commentators through the years, both liberal and conservative, and of the Supreme Court declares that an informed populace, free to debate important public issues, is essential to the functioning of our government. Without allowing the public the right to attend local legislative deliberations, the glue which holds our democracy together turns to grease.

The fact that every state has an open meetings law points to the consensus of a need for a public right of access. But the existence of these laws has not guaranteed the exercise of that right. Many of the laws are of recent vintage: thirty of them are less than thirty years old, and of those, many were drafted as a response to Watergate and the growing distrust of government in the early 1970s.[223] The laws were commendable attempts by the states to clean up their own messes, just as Congress passed laws at the federal level, such as the Freedom of Information Act, to put its own house in order. Commentators and the courts restrained themselves from advocating the expansion of the first amendment right of access doctrine, as they turned their attention elsewhere and waited to see how the state sunshine experiments fared.

The state laws have created a climate where the public, and in particular the media, are aware of their rights. Likewise, the local governing bodies are aware of their constraints. Unfortunately, they are also aware of the loopholes to get around those constraints. Despite these loopholes, however, procedures have been put into place, courts have responded, and the nation knows the rules — except in special instances, it is illegal to close local governmental meetings to the public.

It is time to take the next step. At this point, articulation by the judiciary of a *constitutional* right of public access will not come as the shock it would have twenty or thirty years ago. Articulation will allow a constitutional standard to be applied by state courts when balancing the public's interest against the state's. Articulation will protect the public's interest in the face of weak open meetings statutes due to lack of clarity or the self-interest of

223. Wickham, *supra* note 183, at 184-85.

the state legislature. Articulation will allow the normal federal remedies to be applied when a state body acts to deprive a party of its constitutional rights. As was Congress' intent, such remedies will encourage plaintiffs to come forward and press their claims. Such remedies will guarantee that a republican form of open government will flourish in the states.

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