Let's Meet in the Middle: Constitutional Challenges and Policy Problems with Iowa's Open Meetings Law, with Suggestions for Improvement

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ABSTRACT: The right to free expression is not diminished after a person takes the oath of office and becomes an elected official. Yet a close examination of Iowa's open meetings law (Chapter 21 of the Iowa Code) reveals that the law suffers serious First Amendment deficiencies. Because the law limits the manner in which various officials may communicate with their colleagues, it likely constitutes a content-based restriction on speech. Even under a more lenient content-neutral analysis, the open meetings law fails to provide ample alternative channels of communication for officials to carry on general discussions of policy with their colleagues. Policy problems compound the law's constitutional flaws, including its potential to prevent agencies from working effectively, its tendency to discourage, rather than encourage, participation in local government, and its uneven application across agencies within state government. Proposed legislative improvements include defining "deliberation" in the law, opening more channels of communication between elected officials, and eliminating fines for unintentional violations of the law. Judicial improvements include adopting a more flexible approach for assessing violations of the law.

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I. INTRODUCTION

The news magazine *The Week* has a feature called "Boring but Important," which covers issues the average news consumer likely finds dull but whose impact on the wider world merits public attention.[1] One might also appropriately apply the "Boring but Important" label to local government meetings in Iowa. A city council, school board, or drain commission meeting is unlikely to excite anyone. But these local governments serve essential

1. *See, e.g.*, The Week Staff, *Boring but Important*, WEEK (Nov. 21, 2007), https://theweek.com/articles/518938/boring-but-important (covering the resignation of a White House terrorism advisor and a downward revision of estimates of global AIDS cases).

functions, not least of which is administering budgets that can reach into the hundreds of millions of dollars.[2]

Given the importance of the mundane exercise of local government, it is not surprising that these entities are subject to all manner of regulation. These regulations include a requirement that meetings of governmental bodies be open to the media and the general public.[3] But what is the basis of this openness requirement, and how can it operate optimally to best serve the people it is designed to benefit?

The Framers of the Constitution contemplated the importance of open government, at least by implication, by enumerating freedom of the press in the First Amendment.[4] A free press can operate only to the extent it has knowledge, or access to knowledge, of the government's secrets.[5] Nearly 200 years after independence, a sweeping, nationwide effort to enact "Sunshine Laws" began in response to a public desire for greater access to government secrets.[6] Sunshine Laws mandate that most government meetings and records be open to the public, thereby allowing citizens to access and scrutinize the actions of elected officials and public servants.[7] This push arrived in Iowa in 1967.[8]

As with any novel exercise in lawmaking, Iowa's open meetings statute did not satisfy all parties.[9] Despite its worthwhile goals, the law continues to operate in some flawed ways that demand legislative and judicial attention. This Note discusses some of these flaws, both legal and political, and offers possible solutions for improving the law in a more fair and legal manner.

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2. *See, e.g.*, CITY OF DAVENPORT, IOWA, FY 2018: OPERATING & CAPITAL IMPROVEMENT BUDGET 3 (2018), http://cityofdavenportiowa.hosted.civiclive.com/UserFiles/Servers/Server_6481372/File/Departments/Finance/Budget/FY%202018%20Operating%20&%20Capital%20Budget.pdf (showing the city of Davenport has a total budget for fiscal year 2018 of more than $208 million).

3. *See* IOWA CODE § 21.3 (2018).

4. *See* Note, *Open Meeting Statutes: The Press Fights for the "Right to Know,"* 75 HARV. L. REV. 1199, 1204 (1962) [hereinafter *Open Meeting Statutes*]; *see also* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom . . . of the press . . . .").

5. Steve Stepanek, *The Logic of Experience: A Historical Study of the Iowa Open Meetings Law*, 60 DRAKE L. REV. 497, 507 (2012) (noting that, while the right to freedom of the press logically implies a consequent right of access, few courts have seriously accepted this reasoning).

6. *See* JASON ROSS ARNOLD, SECRECY IN THE SUNSHINE ERA: THE PROMISE AND FAILURES OF U.S. OPEN GOVERNMENT LAWS 2–4 (2014) (detailing in brief the history of open government laws at the federal level, including the Freedom of Information Act and the Government in the Sunshine Act).

7. John F. O'Connor & Michael J. Baratz, *Some Assembly Required: The Application of State Open Meeting Laws to Email Correspondence*, 12 GEO. MASON L. REV. 719, 719–20 (2004).

8. Stepanek, *supra* note 5, at 518; *see infra* Section II.A.

9. *See* Note, *The Iowa Open Meetings Act: A Lesson in Legislative Ineffectiveness*, 62 IOWA L. REV. 1108, 1109–10 (1977) (lamenting, *inter alia*, that the Iowa open meetings law as it was then formulated did not encourage the public to enforce their right to attend governemntal meetings).

Part II of this Note provides an overview of the history of Iowa's open meetings law,[10] its most important provisions, and its enforcement.[11] It also gives a brief overview of Free Speech doctrines courts use when assessing restraints on speech.[12] Part III analyzes how the open meetings law operates as a possibly unconstitutional restraint on elected officials' speech.[13] It also assesses the policy downsides the open meetings law causes, including its tendency to frustrate agencies from achieving their purpose, its effect on elected officials, and its uneven application across different organizations within state government.[14] Finally, in Part IV, this Note concludes with suggestions for legislative[15] and judicial improvement.[16]

II. THE HISTORY OF CHAPTER 21, AN OVERVIEW OF ITS PROVISIONS, AND A BRIEF REVIEW OF FREE SPEECH LAW

The desire for open government is obvious and intuitive. Significant historical events of the 20th century, from the Kennedy assassination to the Watergate scandal, were marred by actual or perceived secrecy, which undercut Americans' faith in democracy.[17] More recently, the 2016 Presidential Election arguably turned on Secretary Hillary Clinton's sidestepping of public record laws.[18] Nonetheless, legislation mandating open government, and specifically outlining acceptable conduct by elected officials, must be squared with state constitutions, the federal constitution, and the legal protections to which elected officials are no less entitled.[19] With this in mind, this Part explains the origin of Iowa's open meetings law, outlines its various provisions and mechanisms of enforcement, assesses freedom of speech as it applies to elected officials, and analyzes the basic doctrines of free speech law that might apply when a court reviews open meetings laws for compliance with the First Amendment.

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10. *See infra* Section II.A.

11. *See infra* Section II.B.

12. *See infra* Section II.C.

13. *See infra* Sections III.A–.C.

14. *See infra* Section III.D.

15. *See infra* Section IV.A.

16. *See infra* Section IV.B.

17. *See* Stepanek, *supra* note 5, at 504–05 (summarizing the scholarly justification for open-government laws, and noting that government secrecy leads not only to an inefficient and unresponsive bureaucracy, but also fosters an environment in which secrecy is often interpreted as evidence of a conspiracy, which "inevitably" leads to "sensationalized hypotheses that tend to make the government out as a devious villain and which, in turn, can erode confidence in the institutional order of things").

18. Nate Silver, *The Comey Letter Probably Cost Clinton the Election*, FIVETHIRTYEIGHT (May 3, 2017), https://fivethirtyeight.com/features/the-comey-letter-probably-cost-clinton-the-election (arguing that Secretary Clinton's use of a private email server during her time at the State Department, and the resulting FBI investigation, ultimately caused her electoral college defeat).

19. *See infra* Section II.C.1.

A. OPEN MEETINGS LAWS COME TO IOWA

Long before Wikileaks, Whitewater, and Watergate became synonymous with government secrecy and corruption, Americans were pushing for improved access to government meetings and records at the federal and state levels. In fact, the foundation for modern open meetings laws was laid shortly after World War II, a time when Cold War secrecy and mistrust of the press caused governments large and small to increasingly keep information away from the public.[20] Following a nationwide push for open government laws, led largely by journalists during the 1950s and '60s,[21] Congress passed and President Lyndon Johnson signed the Federal Public Records Act, popularly known as the Freedom of Information Act or "FOIA," in 1966.[22]

Paired with this push for open government at the federal level was a daunting[23] nationwide effort to enact state-level open meetings laws; this effort arrived in Iowa in 1967 with the passage of Senate File 536, the open meetings bill.[24] Twenty-nine of the 61 senators who then sat in the upper chamber sponsored Senate File 536.[25] Following near-unanimous legislative support,[26] Governor Harold Hughes signed the bill into law in June 1967.[27] Although scholarly analysis has noted circumstantial evidence of the law's popularity at the time of its enactment, the legislative record reveals no relevant legislative history that might give insight into the minds of the drafters.[28] The legislature revised the law in 1978, clarifying some ambiguities

20. Imogene E. Atkins, Development and Interpretation of Open Meetings Laws 32–33 (May 1989) (published Ph.D. dissertation, University of Missouri-Columbia) (published by UMI Dissertation Information Service) ("Influenced by wartime censorship practices . . . public officials had laid brick-by-brick a wall of secrecy growing higher each year.").

21. *See Open Meeting Statutes*, *supra* note 4, at 1199–200.

22. Atkins, *supra* note 20, at 37. The Freedom of Information Act (5 U.S.C. § 552) was an addendum to the Administrative Procedures Act of 1946. *Id.*

23. *See Open Meeting Statutes*, *supra* note 4, at 1200 (describing the slow process of state adoption of open meetings laws, including 16 legislative defeats nationwide in the five years preceding 1962); *see also* Atkins, *supra* note 20, at 38 (describing the push for open government laws in all 50 states as "grandiose," couched in warfare terms like "battle" and "fight").

24. Stepanek, *supra* note 5, at 518.

25. *Id.* (citing S. JOURNAL, 62d Gen. Assemb., at 654 (Iowa 1967)).

26. S. JOURNAL, 62d Gen. Assemb., at 1539 (showing 40 votes in favor of Senate File 536 on its third reading, to three votes against and 18 absences or abstentions); Stepanek, *supra* note 5, at 518.

27. S. JOURNAL, 62d Gen. Assemb., at 1539; Stepanek, *supra* note 5, at 518–19.

28. *See* S. JOURNAL, 62d Gen. Assemb., at 1538–39 (showing Senate File 536 had two proposed amendments, each of which failed, but no other record of debate prior to its passage); Stepanek, *supra* note 5, at 518–19 (noting the bill's long list of sponsors drawn from across Iowa's political and geographic spectrum, its swift turnaround from introduction to enactment, and its being paired with Senate File 537, the state open records law, as evidence that the legislation "was a popular response to a perceived need on the part of the body politic").

and adding an explicit presumption in favor of openness.[29] The law is now codified in Chapter 21 of the Iowa Code.[30]

B. THE STRUCTURE AND SCOPE OF IOWA CODE CHAPTER 21

Briefly stated, Iowa's open meetings law prohibits governmental bodies from meeting in private, unless the meeting fits one of the law's specific exceptions. What follows in this Section is an explanation of the law's structure and the ways that Iowa courts have interpreted its most important terms.

The law begins with a general statement of intent that has served as a guideline in subsequent judicial and administrative interpretations.[31] The purpose of the openness requirement is to assure the public "that the basis and rationale of governmental decisions, as well as those decisions themselves, are easily accessible."[32] The statement of intent also gives a rule for judicial construction of the open meetings statute, stating that, "[a]mbiguity in the construction or application of [the open meetings law] should be resolved in favor of openness."[33] The Iowa Supreme Court has stated that the purpose of Chapter 21 is to prohibit secrecy and to allow the general public to access a meeting unless another statutory exception allows the meeting to be closed.[34] The Iowa Supreme Court further clarified that any interpretation of the open meetings law must "be construed most favorably to the public."[35]

There is virtually no elected unit of government in Iowa that falls outside of the open meetings statute.[36] A "[g]overnmental body," for purposes of the statute, is any "board, council, commission, or other [government entity]

29. Stepanek, *supra* note 5, at 529–30, 532; *see* IOWA CODE § 21.1 (2018) (codifying a presumption in favor of openness). The late Professor Stepanek conducted a thorough study of the history of the open meetings law, including the 1978 amendments which, in addition to codifying the presumption in favor of openness, also amended the definition of "meeting" and altered some of the law's exemptions. Stepanek, *supra* note 5, at 531–54.

30. IOWA CODE Ch. 21. At the time of its original codification, the law was located at Chapter 28A. IOWA LEGISLATIVE SERVS. AGENCY, LEGISLATIVE GUIDE: OPEN MEETINGS AND PUBLIC RECORDS 1 (2016), https://www.legis.iowa.gov/docs/publications/LG/801534.pdf.

31. IOWA CODE § 21.1.

32. *Id.*

33. *Id.*

34. Stepanek, *supra* note 5, at 521; *see also* Dobrovolny v. Reinhardt, 173 N.W.2d 837, 840–41 (Iowa 1970) ("It is clear the purpose of chapter [21] is to prohibit secret or 'star chamber' sessions of public bodies, to require such meeting[s] be open and to permit the public to be present unless within the exceptions stated therein.").

35. Stepanek, *supra* note 5, at 521–22 (quoting Greene v. Athletic Council of Iowa State Univ., 251 N.W.2d 559, 560 (Iowa 1977)).

36. Curiously, however, Chapter 21 does not include the Legislature itself. This means, as a result, that Legislators enjoy significantly broader latitude to discuss public policy with their colleagues outside of open sessions of the Legislature than do elected members of other bodies in Iowa. *See infra* Section III.D.3.

expressly created by . . . statute[] . . . or by executive order";[37] any "board, council, commission, or other governing body of a political subdivision or tax-supported district in [the] state";[38] and any "multimembered body formally and directly created by one [of those] boards, councils, commissions, or other [governments]."[39] Committees or subcommittees composed of members of the whole governing body are therefore subject to the open meetings law under Iowa Code Section 21.2(1)(c), including, *inter alia*, a finance committee of a city council or a school board's facilities committee.[40] The test for whether a particular body is a "governing body" for the purposes of Section 21.2(1)(a)–(c) is whether the body may exercise decision-making or policy-making power and is not acting in a purely advisory manner.[41] Boards, committees, or task forces that develop and recommend public policy and are created by the governor or the Legislature,[42] or by executive orders of the state or local government,[43] all fall within the bounds of the open meetings law.

Another statutory term of obvious significance is the word "meeting." A "meeting," for purposes of Chapter 21, is any "gathering . . . of a majority of the members of a governmental body," where those members deliberate or act on any matter or issue that is within the scope of their governing duties.[44] A meeting can be "in person or by electronic means" and can be either "formal or informal."[45] Any meeting of a covered governmental body must

37. IOWA CODE § 21.2(1)(a).

38. *Id.* § 21.2(1)(b). These entities would encompass most local governments in the state, including school districts, conservation districts, library districts, and the like.

39. *Id.* § 21.2(1)(c).

40. *See id.*

41. Donahue v. State, 474 N.W.2d 537, 537, 539 (Iowa 1991) (holding that the University of Iowa promotions committee was not a governmental body subject to Chapter 21 because it made advisory recommendations about faculty promotions but had no decision-making authority); Counties; Open Meetings; Schools; Supervisors; Board of, 1993 Iowa Op. Att'y Gen. 59 No. 93-11-5 (Iowa A.G. Nov. 18), 1993 WL 546195, at *2.

42. IOWA CODE § 21.2(1)(e).

43. *Id.* § 21.2(1)(h). Local governments in Iowa are able to take executive action akin to executive orders; they are empowered by statutory language similar to the "take care" clauses in the U.S. and Iowa constitutions that give the chief executive the authority to issue executive orders. *See, e.g.*, U.S. CONST. art. II, § 3 ("[The president] shall take [c]are that the [l]aws be faithfully executed . . . ."); IOWA CONST. art. IV, § 9 ("[The governor] shall take care that the laws are faithfully executed."); IOWA CODE § 274.1 ("Each school district shall continue a body politic as a school corporation, unless changed as provided by law, and as such may . . . exercise all the powers granted by law . . . ."); *id.* § 331.301(1) ("A county may, except as expressly limited by the [state constitution and acts of the legislature], exercise any power and perform any function it deems appropriate to protect and preserve the rights, privileges, and property of the county or of its residents . . . ."); Iowa Op. Att'y Gen., 1993 WL 546195, at *4 ("[A]s executive authorities of political subdivisions, school boards and boards of supervisors may take administrative action analogous to the governor's executive orders.").

44. IOWA CODE § 21.2(2).

45. *Id.*

follow the strictures of Chapter 21. Thus, it must be preceded by appropriate public notice and "held in open session" unless it fits into one of the enumerated exceptions.[46] Governmental bodies must also keep minutes of their meetings showing the members of the body who are present, actions taken by the body, and how members of the body voted on each action.[47] Meetings are also subject to the public notice mandates of Section 21.4, which require that each governmental body "give notice of the time, date, and place of each meeting" and post a tentative agenda such that the public will be "reasonably . . . apprise[d]" of that information.[48] Other considerations must be met for a governmental body to meet and deliberate or act within the scope of their duties: local news media must be notified of the meeting; notice must be posted on an "easily accessible" bulletin board at the governmental body's office; the meeting must be scheduled "at a time reasonably convenient to the public"; and the meeting must be accessible for people with disabilities.[49] The validity of any meeting of a covered governmental entity depends on its compliance with these requirements.

Gatherings by members of governmental bodies can occur legally without following the open meeting rules of Chapter 21 if the gathering is "for purely ministerial or social purposes."[50] Ministerial or social gatherings must not involve "discussion[s] of policy" and cannot be held with intent to evade the open meetings law.[51] Obvious instances of purely social gatherings include outings by a majority of members to drink coffee or attend a basketball game, assuming no discussion of policy occurs.[52] "Ministerial" has a more nebulous meaning as applied by Iowa's courts. A "ministerial act," as distinct from a discretionary act, is an act in which a governing body performs within its legal authority "in a prescribed manner" without exercising its own judgment or deliberation.[53] Governmental bodies may assemble to hear information that

46. *Id.* § 21.3. Closed sessions of meetings are allowed only if they fit one of the 12 exceptions allowed by Section 21.5 and are authorized by an "affirmative public vote of either two-thirds of the members of the body or all of the members present at the meeting." *Id.* § 21.5(1). Permitted exceptions include, *inter alia*, discussions of legally-confidential records; discussions with counsel about present or future litigation; discussions about or hearings concerning student expulsion; avoiding disclosure of specific law enforcement techniques; discussions of personnel issues; and discussions of real estate purchases. *See id.*

47. *Id.* § 21.3.

48. *Id.* § 21.4(1)(a).

49. *Id.* § 21.4(1).

50. *Id.* § 21.2(2).

51. *Id.*

52. Open Meetings—'Meeting,' 1979 Iowa Op. Att'y Gen. 164 No. 79-5-14 (Iowa A.G. May 16), 1979 WL 21166, at *2; Counties; Open Meetings; Schools; Supervisors, Board of, 1990 Op. Att'y Gen. 65 No. 90-2-6(L) (Iowa A.G. Feb. 8), 1990 WL 484872, at *2.

53. Arrow Express Forwarding Co. v. Iowa State Commerce Comm'n, 130 N.W.2d 451, 452–53 (Iowa 1964) (citations omitted). For decisions distinguishing ministerial from deliberative acts in the context of Chapter 21, see Hettinga v. Dall. Cty. Bd. of Adjustment, 375 N.W.2d 293, 294 (Iowa Ct. App. 1985) (speaking with a county attorney to clarify a point of law

is within the scope of their policy-making duties, and even ask questions in clarification, without running afoul of the ministerial gatherings exception.[54] However, any ministerial gathering can evolve into a deliberative gathering if members take up "any discussion that focuses at all . . . on matters over which they exercise judgment or [policymaking] discretion."[55]

Enforcement of the open meetings law is shared between the Iowa Public Information Board ("IPIB"), which is a state administrative agency, and the courts. The Iowa Legislature created the IPIB, which first met in 2012, "to review and resolve citizen complaints regarding open [meetings]."[56] The legislature empowered the IPIB to receive complaints and allegations of wrongdoing by governmental bodies under Chapter 21; it may offer both informal advice and conduct formal investigations into the alleged violations.[57] The IPIB may also examine and subpoena records of governmental bodies to investigate alleged wrongdoing.[58] Most revolutionarily, the IPIB is able to conduct administrative proceedings and issue legal orders and remedies for violations of Chapter 21.[59] Prior to the creation of the IPIB, aggrieved parties were entitled to seek enforcement of Chapter 21 "in the district court for the county in which the governmental body has its principal place of business."[60] With the creation of the IPIB, complainants now have a choice of where to seek and how to pursue a remedy—complaints may be filed either with the IPIB or in district court under Chapter 21.[61]

Violations of the open meetings law, whether adjudicated by IPIB or the courts, can include civil penalties against members of the body who committed the violation, as well as attorneys' fees and court costs.[62] Complainants must demonstrate, by a preponderance of the evidence, that the governmental body was subject to the open meetings law and held an illegal closed session.[63] Any member of a body who participated in the illegal

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was ministerial and not deliberative); Elections: Open Meetings, 1990 Iowa Op. Att'y Gen. 65 No. 90-2-6(L) (Iowa A.G. Feb. 8), 1990 WL 484872, at *1 (canvassing of election results was ministerial because it did not involve an exercise of discretion).

54. *Hettinga*, 375 N.W.2d at 295.

55. Hutchison v. Shull, 878 N.W.2d 221, 232 n.1 (Iowa 2016) (quoting Open Meetings Act, 1981 Iowa Op. Att'y Gen. 162 No. 81-7-4(L) (Iowa A.G. July 6), 1981 WL 178383, at *6) (citing *Hettinga*, 375 N.W.2d at 295).

56. Susan P. Elgin, Note, *What Happens in Iowa Stays in Iowa: A Framework for Implementing Changes to State Open Records Laws*, 98 IOWA L. REV. 1677, 1681 (2013).

57. *See* IOWA CODE § 23.6(3)–(4) (2018).

58. *See id.* § 23.6(6)–(7).

59. *See id.* § 23.6(8).

60. *Id.* § 21.6(1). Parties entitled to sue under Chapter 21 are "[a]ny aggrieved person, taxpayer to, or citizen of, the state of Iowa, or the attorney general or county attorney." *Id.*

61. *See id.* § 23.5(1).

62. *Id.* § 21.6(3)(a)–(b).

63. *Id.* § 21.6(2)–(3).

meeting is subject to civil fines of between $100 and $500; those fines increase to between $1000 and $2500 for knowing violations of the law.[64] Actions taken in the illegally closed session can also be voided by the court, and a member can be removed from the governmental body if that member was previously assessed damages for violating the act.[65]

In sum, Chapter 21 imposes many restrictions on meetings of governmental bodies in Iowa. These restrictions were enacted in the name of open government, and a presumption in favor of openness permeates the law. "Meeting" is broadly defined to include any gathering of a majority of a body's members to discuss policy or take official action. The law can be enforced both administratively and judicially, and elected officials face consequences for even unintentional violations of the law.

C. ELECTED OFFICIALS AND FREEDOM OF SPEECH

This Section assesses freedom of speech as it applies to members of governmental bodies. First, it analyzes how the First Amendment applies to elected officials and determines that those officials enjoy the right to freedom of speech as they carry out their official duties. Second, this Section provides a brief review of content-based and content-neutral restrictions on speech. This review will be used in Part III to analyze Iowa's open meetings law as a restriction on elected officials' freedom of speech.[66]

1. How Does Freedom of Speech Apply to Elected Officials?

A person's right to freedom of speech is not, as a threshold matter, diminished simply because he or she is elected to office. Parliamentary privilege[67] has a long history pre-dating the founding of the United States,[68] and the U.S. Constitution's Speech or Debate Clause protects members of Congress from being prosecuted for things said on the floor of the House or Senate.[69] For instance, members of the Iowa legislature are not liable for slander or libel for words used during debates or in committee.[70]

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64. *Id.* § 21.6(3)(a).

65. *Id.* § 21.6(3)(c)–(d). Members of some governmental bodies, such as volunteer members of Regional Councils of Government and planning commissions, are not personally liable for violations of the open meetings law unless they knowingly or intentionally violated the law or did so for "improper personal benefit." *Id.* § 28H.4; City of Postville v. Upper Explorerland Reg'l Planning Comm'n, 834 N.W.2d 1, 8 (Iowa 2013), *as amended on denial of reh'g* (July 15, 2013), *as corrected* (July 31, 2013).

66. *See infra* Sections III.A–.C.

67. Also termed "legislative privilege," parliamentary privilege is "[t]he privilege protecting (1) any statement made in a legislature by one of its members, and (2) any paper published as part of legislative business." *Privilege*, BLACK'S LAW DICTIONARY (10th ed. 2014).

68. David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429, 431–32 (1983).

69. U.S. CONST. art. I, § 6.

70. IOWA CODE § 2.17.

The importance of freedom of speech for public officials, as for all Americans, has been recognized by courts across the country—and Iowa is no exception.[71] The United States Supreme Court seems to endorse the view —despite some cases to the contrary at the state level[72]—"that the free speech rights of elected officials are" no less protected than the rights of all Americans.[73] In *Wood v. Georgia*, the Supreme Court rejected arguments by the state of Georgia that a county sheriff's position limited his right to speak out against a redistricting plan.[74] The Supreme Court expanded its position further in *Bond v. Floyd*.[75] In *Bond*, the state of Georgia attempted to justify its expulsion of Representative Julian Bond from the Georgia House of Representatives for expressing anti-draft and anti-war opinions, arguing that higher standards should be imposed on legislators compared to civilians.[76] "[T]he Supreme Court flatly rejected" this view,[77] holding that, for legislators at least, the state must grant "the widest latitude to express their views on issues of policy."[78] *Wood* and *Bond* suggest that elected officials enjoy no less protection of their freedom of speech—and perhaps more—than the public at large.[79] Elected officials are not government employees, but rather serve a role as "stewards or trustees of the public welfare."[80] In this role as both critic and policymaker, their right to freedom of expression enjoys a hefty degree of protection.[81]

71. *See, e.g.*, Bertrand v. Mullin, 846 N.W.2d 884, 902 (Iowa 2014) (denying a defamation claim by a legislative candidate against his opponent, stating, "[w]hile the Constitution has delivered the freedom of speech to all with just a few simple words, the history and purpose of those iconic words are immense and powerful, and have solidified a long-standing right for people in this country, including public officials, to criticize public officials").

72. Christopher J. Diehl, Note, *Open Meetings and Closed Mouths: Elected Officials' Free Speech Rights After* Garcetti v. Ceballos, 61 CASE W. RES. L. REV. 551, 574–75 n.128 (2010) (citing Cole v. State, 673 P.2d 345, 350 (Colo. 1983)); Kansas *ex rel.* Murray v. Palmgren, 646 P.2d 1091, 1099 (Kan. 1982) (upholding state open meeting laws against First Amendment challenges).

73. Diehl, *supra* note 72, at 574–75.

74. *Id.* at 576 (citing Wood v. Georgia, 370 U.S. 375, 394 (1962)). The Supreme Court went on to reason, in *Wood*, that "[t]he role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." *Wood*, 370 U.S. at 395; *see* Diehl, *supra* note 72, at 575–76.

75. Diehl, *supra* note 72, at 575 (citing Bond v. Floyd, 385 U.S. 116 (1966)).

76. *Bond*, 385 U.S. at 123–25, 135–36; Steven J. Mulroy, *Sunshine's Shadow: Overbroad Open Meetings Laws as Content-Based Speech Restrictions Distinct from Disclosure Requirements*, 51 WILLAMETTE L. REV. 135, 145 (2015) [hereinafter Mulroy, *Sunshine's Shadow*]; Diehl, *supra* note 72, at 575–76.

77. Mulroy, *Sunshine's Shadow*, *supra* note 76, at 145.

78. *Bond*, 385 U.S. at 136.

79. *See* Diehl, *supra* note 72, at 577; Mulroy, *Sunshine's Shadow*, *supra* note 76, at 145–46.

80. Diehl, *supra* note 72, at 580.

81. *See id.*

2. Content-Based and Content-Neutral Laws

Laws limiting expression can be broadly categorized as content-based restrictions or content-neutral restrictions. A content-based restriction limits expression "because of the message conveyed" by the content.[82] The Supreme Court evaluates content-based restrictions on expression by first assessing whether the expression occupies "a 'subordinate position in the scale of First Amendment values.'"[83] The government may restrict speech deemed "low value" in certain well-defined circumstances, but otherwise, the Court grants virtually absolute or unlimited protection from content-based restrictions and applies "strict scrutiny" to any attempt to restrict the expression.[84] Strict scrutiny requires that a content-based restriction on speech further "a compelling state interest" in a manner that is "narrowly tailored" to fit that interest.[85] The government can defend content-based restrictions by arguing that the speech in question furthers such a compelling interest, or that the speech presents a "clear-and-present-danger,"[86] but these arguments rarely result in content-based regulations on high-value speech being upheld.[87]

"Content-neutral restrictions limit expression without regard to the content or communicative impact" of the expression itself.[88] For example, laws that restrict creating a ruckus near a hospital or prohibit burning of draft cards are content-neutral—it is the fact of creating a disturbance near a hospital, rather than the nature or content of the disturbance, that is being regulated.[89] The Supreme Court has used multiple standards to evaluate content-neutral restrictions on expression: "Deferential" (the law restricting expression is constitutional if it advances a "legitimate governmental interest")[90]; "Intermediate" (the law restricting expression is assessed for a balance between the governmental interest being advanced and available

82. *Id.* at 583 (quoting Geoffrey R. Stone, *Content Regulation and the First Amendment,* 25 WM. & MARY L. REV. 189, 190 (1983)).

83. Geoffrey R. Stone, *Content-Neutral Restrictions,* 54 U. CHI. L. REV. 46, 47 (1987) (quoting Ohralik v. Ohio State Bar Ass'n, 463 U.S. 447, 456 (1978)).

84. Stone, *supra* note 83, at 47–48. "Low-value" speech includes child pornography and fighting words. Diehl, *supra* note 72, at 583–84.

85. Republican Party of Minn. v. White, 536 U.S. 765, 774–75 (2002); *see also* Mulroy, *Sunshine's Shadow, supra* note 76, at 147 (discussing the strict scrutiny standard of review).

86. Cass R. Sunstein, *Half-Truths of the First Amendment*, 1993 U. CHI. LEGAL F. 25, 31; *see also* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that the government may not restrict speech advocating for lawlessness or use of force, "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

87. Mulroy, *Sunshine's Shadow, supra* note 76, at 148; Stone, *supra* note 83, at 47–48 (noting that, as of the date of the writing in 1987, the Supreme Court had struck down almost all content-based restrictions on speech from the preceding 30 years).

88. Stone, *supra* note 83, at 48.

89. *Id.*

90. *Id.* at 50.

alternatives that are less restrictive on expression)[91]; and "Strict" (requiring that a "compelling[,] rather than substantial governmental interest" be at stake, and "that the challenged restriction is 'necessary' to achieve that interest," in order to uphold a law limiting expression).[92] The main concern for the Supreme Court is the individual's ability to express themselves and their views in the face of content-neutral restrictions.[93] Otherwise, an excess of deference to governmental restrictions would limit the modes of expression available to citizens.[94]

Intermediate scrutiny is the most common test applied to content-neutral laws.[95] Intermediate scrutiny allows laws to stand even if the importance of the governmental interest being advanced—and the degree of fit between the chosen law and the governmental interest—is relatively lower than would be allowed under a strict-scrutiny analysis.[96] A law cannot survive intermediate scrutiny unless it serves "an 'important governmental interest,' one 'unrelated to the suppression of free speech' and [does not restrict] 'substantially more speech than necessary.'"[97] There must also be "ample alternative channels" available for the speaker to advance the speech that is being restricted.[98] A law cannot survive intermediate scrutiny review unless it serves an important—not just legitimate—governmental purpose.[99]

A law restricting more expression than is necessary to meet an important governmental end will fail under intermediate-scrutiny analysis.[100] In the same vein, even if a law does successfully advance an important governmental interest, it will be struck down if it is not "narrowly tailored" or does collateral violence to expression that need not be restricted to advance the government's interests.[101] A statute that is overbroad—or, put another way, not sufficiently narrowly-tailored to an important governmental interest—is one that "reaches a substantial amount of constitutionally protected conduct."[102] The overbreadth of a statute must be substantial when compared

91. *Id.* at 52.

92. *Id.* at 53.

93. Diehl, *supra* note 72, at 583.

94. *Id.*

95. Mulroy, *Sunshine's Shadow*, *supra* note 76, at 148.

96. *Id.*

97. *Id.* (quoting Holder v. Humanitarian Law Project, 561 U.S. 1, 26–27 (2010)).

98. *Id.* (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)) (citing Burson v. Freeman, 504 U.S. 191, 197 (1992)).

99. *Id.*

100. *Id.* at 148–49.

101. *Id.* at 149 (citing McCullen v. Coakley, 573 U.S. 464, 494 (2014)) (finding that a buffer zone for protests outside an abortion clinic was not narrowly tailored to advance the important governmental interest of allowing clinic access and preventing harassment of patients); Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 804–05 (2011); Sorrell v. IMS Health Inc., 564 U.S. 552, 579–80 (2011).

102. Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 (1982).

with the legitimate governmental interest which the statute seeks to advance by restricting expression.[103]

The "ample alternative channels" test is also critical to determining whether a restriction on speech will survive intermediate scrutiny. A law that is narrowly-tailored but does not "leave open ample alternatives for communication" is violative of the First Amendment.[104] Courts determine the adequacy of alternative channels by examining "the relative effectiveness of alternative modes of expression that the speaker did not use."[105] In cases where alternative, effective channels are available to a speaker, a restriction on a "speaker's *chosen* channel of expression will" be upheld, so long as it is content-neutral.[106] A law that leaves a speaker without adequate alternative channels, besides their "chosen channel," will fail an intermediate scrutiny analysis.[107]

3. Some Additional Complications: Speaker-Based Restrictions and the Secondary-Effects Justification for Content-Based Restrictions

These descriptions of content-based and content-neutral restrictions on expression seem simple enough in theory. The actual law on the matter, however, is far fuzzier than these textbook descriptions.[108] An important and distinct category of speech restrictions are those that regulate expression "based on the identity of the speaker."[109] Legislatures may enact laws that appear to be content-neutral because, rather than target a particular viewpoint, they target a particular class of speaker, regardless of the idiosyncratic viewpoints that any one speaker holds.[110] However, even though these laws do not discriminate based on the content of the speech at issue, they are not automatically rendered content-neutral.[111] Speaker-based discrimination raises the same concerns of censorship as viewpoint-based discrimination, and these laws are still subject to strict scrutiny, even though

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103. Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

104. Burson v. Freeman, 504 U.S. 191, 197 (1992) (citing United States v. Grace, 461 U.S. 171, 177 (1983)); Mulroy, *Sunshine's Shadow, supra* note 76, at 148.

105. Enrique Armijo, *The "Ample Alternative Channels" Flaw in First Amendment Doctrine*, 73 WASH. & LEE L. REV. 1657, 1661 (2016).

106. *Id.*

107. *See id.* at 1661, 1702.

108. Diehl, *supra* note 72, at 589; Michael Kagan, *Speaker Discrimination: The Next Frontier of Free Speech*, 42 FLA. ST. U. L. REV. 765, 780–81 (2015).

109. Kagan, *supra* note 108, at 766–67, 777.

110. *See id.* at 781–82; *see also* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 767–68, 777, 795 (1978) (holding unconstitutional a Massachusetts law that prohibited banking associations and corporations from engaging with voters on many political issues).

111. Kagan, *supra* note 108, at 766–67 (citing Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 340 (2010)) (subjecting to strict scrutiny federal campaign finance laws that restricted the political speech of corporations and labor unions (speaker-based restrictions), without regard to the particular viewpoint that the corporation or union espoused); Mulroy, *Sunshine's Shadow, supra* note 76, at 177–78.

they are ostensibly content-neutral.[112] In the same vein, restrictions that target a particular subject matter, rather than targeting specific viewpoints on that subject matter, are also not deemed to be content-neutral.[113] These "viewpoint-neutral" laws raise the same specter of censorship as viewpoint-based laws, and are "still subject to strict scrutiny."[114]

Finally, the government can justify a content-based restriction by showing that the regulation of certain expression is necessary to avoid "secondary effects" that are content-neutral.[115] An example is an ordinance regulating the zoning of adult movie theatres in order to avoid the secondary effects of crime and disorder that these theatres attract.[116] The concern of these statutes is not the content of the expression being regulated, but rather the secondary effects of allowing the expression, which must themselves be important governmental interests under intermediate scrutiny.[117] Further, these restrictions on speech may not be a pretextual attempt by the legislature to suppress speech based on its content.[118]

III. CONSTITUTIONAL AND POLICY ISSUES WITH CHAPTER 21

This Part analyzes the constitutional and policy challenges that entities covered by Iowa Code Chapter 21 face. Section A scrutinizes *Asgeirsson v. Abbott*, the most important case at the federal level to yet confront a state open meetings law. Section A further argues that, contrary to the holding in *Asgeirsson*, open meetings laws in Texas and Iowa are content-based restrictions on officials' speech, which in turn calls the laws' constitutionality into doubt.[119] Section B casts doubt upon the "secondary effects" analysis of *Asgeirsson* because of the way in which open meetings laws cannot be enforced

112. *Citizens United*, 558 U.S. at 340; *see* Kagan, *supra* note 108, at 779.

113. Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 532–33, 537–40, 544 (1980) (striking down regulations imposed by the state of New York that prohibited utility companies from sending billing inserts that discussed political matters to customers). While the regulations prohibited billing inserts dealing with political issues (subject-based restriction), without regard to the particular political views being espoused, the Supreme Court found the restriction to be an impermissible content-based restriction on speech. *See id.* at 544; Diehl, *supra* note 72, at 585; Steven J. Mulroy, *Sunlight's Glare: How Overbroad Open Government Laws Chill Free Speech and Hamper Effective Democracy*, 78 TENN. L. REV. 309, 332–33 (2011) [hereinafter Mulroy, *Sunlight's Glare*] (citing City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993)) (striking down a Cincinnati city ordinance that prohibited racks containing commercial handbills from city property, but allowed racks containing newspapers, reasoning that it was a "content-based" restriction on speech).

114. Mulroy, *Sunlight's Glare*, *supra* note 113, at 332.

115. Mulroy, *Sunshine's Shadow*, *supra* note 76, at 154.

116. *Id.* at 150 (citing City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986)).

117. *Id.* at 154.

118. *Id.* at 155.

119. *See infra* Section III.A.

"without reference to the content of the regulated speech."[120] Section C assesses Chapter 21 under intermediate scrutiny and questions whether the law allows adequate alternative channels for officials covered under the law to communicate amongst themselves.[121] Finally, Section D observes the downsides of Chapter 21 on public policy, from discouraging public service to frustrating agencies' functions.[122]

A. Open Meetings Laws as Content-Based Restrictions on Speech After Asgeirsson v. Abbott *and* Reed v. Town of Gilbert

Although there is no on-point authority from the Eighth Circuit or Iowa courts that distinguishes open meetings laws as content-based or content-neutral, other authority exists on the subject. The most persuasive on-point authority that directly confronts open meetings laws on constitutional grounds is the Fifth Circuit's 2012 decision in *Asgeirsson v. Abbott*, a challenge to the Texas Open Meetings Act ("TOMA").[123] Similar to Iowa Code Chapter 21, TOMA defines a "meeting" as "a deliberation . . . during which public business or public policy over which the governmental body has supervision or control is discussed or considered."[124] A "deliberation" is defined as "a verbal exchange . . . between a quorum of a governmental body . . . concerning an issue within the jurisdiction of the governmental body or any public business."[125] TOMA prohibits unauthorized closed meetings, which are meetings that are inaccessible to the public and not allowed by the statute to be closed.[126] It is a misdemeanor in Texas for a member of a covered governing body to knowingly call or participate in an unauthorized closed meeting, with penalties ranging from $100 fines to six-month jail sentences.[127] Government officials in Texas sought declaratory relief that TOMA was "a

120. *City of Renton*, 475 U.S. at 48 (quoting Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)); *see* Mulroy, *Sunlight's Glare*, *supra* note 113, at 333; *infra* Section III.B.

121. *See infra* Section III.C.

122. *See infra* Section III.D.

123. Mulroy, *Sunshine's Shadow*, *supra* note 76, at 138 (citing Asgeirsson v. Abbott, 696 F.3d 454, 459–61 (5th Cir. 2012), *cert. denied*, 568 U.S. 1249 (2013)).

124. TEX. GOV'T CODE ANN. § 551.001(4) (West 2017); *see* Mulroy, *Sunshine's Shadow*, *supra* note 76, at 160 n.142; *cf.* IOWA CODE § 21.2(2) (2018) ("'Meeting' means a gathering in person or by electronic means, formal or informal, of a majority of the members of a governmental body where there is deliberation or action upon any matter within the scope of the governmental body's policy-making duties." (emphasis omitted)).

125. TEX. GOV'T CODE ANN. § 551.001(2).

126. *See id.* §§ 551.001(1), 551.002.

127. *Id.* § 551.144. Conviction under the TOMA closed meeting statute may result in a maximum fine of $500, a jail sentence between one and six months, or both. *Id.* § 551.144(b). Knowing participation by a government official in a closed meeting that is not being properly recorded is also a Class C misdemeanor in Texas. *Id.* § 551.145(a).

content-based restriction on political speech . . . unconstitutionally vague, and . . . overbroad."[128]

The plaintiffs in *Asgeirsson* argued that TOMA was a content-based restraint on speech because it concerned itself only with speech regarding policy over which the governing body exercised "supervision or control."[129] The plaintiffs proposed a test for the Fifth Circuit to apply to determine whether the law was content-based, positing that any "regulatory scheme that requires the government to 'examine the content of the message that is conveyed' is content-based regardless of its motivating purpose."[130] The Fifth Circuit rejected this test, and ruled that TOMA was content-neutral rather than content-based.[131] Instead of analyzing the text of the statutory restriction on speech, the Fifth Circuit held that the underlying motivation of the legislature in enacting the restriction is what determined whether the statute was content-based.[132] This position was not inconsistent with previous pronouncements by the Supreme Court—whether a restriction is content-neutral has turned, in the past, on the government's purpose in enacting the restriction.[133] In the intervening years since the *Asgeirsson* decision, the Supreme Court may well have vindicated the plaintiffs' position.

The Supreme Court more recently clarified the way strict scrutiny applies in *Reed v. Town of Gilbert*, a 2015 case.[134] At issue was a Gilbert, Arizona, ordinance that restricted the size and manner of display of certain signs, depending on the message those signs conveyed.[135] Enforcement of the ordinance required officials to scrutinize the content of signs to determine whether they were permitted under the law.[136] The Ninth Circuit found that

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128. *Asgeirsson*, 696 F.3d at 458. The lead plaintiffs, who were members of the City Council of Alpine, Texas, were indicted for conducting an illegal closed meeting over email. Asgeirsson v. Abbott, 773 F. Supp. 2d 684, 688 (W.D. Tex. 2011).

129. *Asgeirsson*, 696 F.3d at 459 (quoting TEX. GOV'T CODE § 551.001).

130. *Id.* at 460 (quoting Serv. Emps. Int'l Union, Local 5 v. City of Houston, 595 F.3d 588, 596 (5th Cir. 2010)).

131. *Id.* at 461–62.

132. *See* Mulroy, *Sunshine's Shadow*, *supra* note 76, at 150–52 (citing *Asgeirsson*, 696 F.3d at 459–61).

133. *Id.* at 151 ("[T]he 'principal inquiry in determining content neutrality [in speech cases] . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.'" (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989))).

134. Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015).

135. *See id.* at 2224; *see also* Mulroy, *Sunshine's Shadow*, *supra* note 76, at 152. Although *Reed* had not been decided at the time Professor Mulroy wrote *Sunshine's Shadow*, he anticipated that the Supreme Court might resolve the question by "determining whether a speech regulation is content-based involves a purely facial examination of the statutory language." *Id.* at 152.

136. *See Reed*, 135 S. Ct. at 2226. The Sign Code enacted by Gilbert, Arizona, in 2005 identified categories of signs based on the message they conveyed and regulated each category differently. *See id.* at 2224–25. Many types of signs could be erected without a permit, including "Ideological Sign[s]," "Political Sign[s]," and "Temporary Directional Signs." *Id.* (alterations in original). Ideological signs of up to 20 square feet could be displayed regardless of zoning. *Id.* at 2224. Political signs were more restricted in size and could only be displayed near the time of an

the ordinance was not enacted by the City Council in order to regulate speech with which it disagreed, and therefore held that the Sign Code was content-neutral.[137] The Supreme Court reversed, stating that legislative intent does not control when assessing the content-bias or neutrality of a statute.[138] A regulation on expression that discriminates based on the content of that expression does not become content-neutral simply because it is enacted with innocent or innocuous legislative intent.[139] A law that is facially content-based is not made content-neutral because the legislature enacted it with a "benign motive."[140] Here, the Sign Code's discrimination based on the nature of the sign was, according to the Court, "a paradigmatic example of content-based discrimination."[141] Because the dangers of censorship are ever-present, even if a restriction is passed with innocent intent, any content-based restriction on speech is now subject to strict scrutiny analysis.[142]

The holding in *Reed* appears to contradict, quite aggressively, the ruling in *Asgeirsson*. The Fifth Circuit in *Asgeirsson* explicitly rejected the notion that facially-discriminatory statutes are inherently content-based.[143] Instead, the underlying motive of the legislature in enacting the statute controlled whether the statute was content-based or content-neutral in the eyes of the Fifth Circuit.[144] On this reasoning, the Fifth Circuit held that TOMA was content-neutral because, despite discriminating based on the content of the speech at issue, the legislature's purpose in enacting the statute was to regulate speech "without regard to the content."[145] This cuts precisely against the majority decision in *Reed*, which held that a law imposing content-based restrictions on speech does not become content-neutral because it was enacted by a legislature with "benign motive."[146] The test proposed by the *Asgeirsson* plaintiffs became, in relevant part, the law of the land after the decision in *Reed*.[147]

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election. *Id.* at 2224–25. Finally, Temporary Directional Signs were restricted to six square feet and could be displayed no more than 12 hours before, and one hour after, the event that they advertised. *Id.* at 2225. Plaintiff Clyde Reed was the pastor of an itinerant church and advertised the time and place of his services via "temporary directional signs." *Id.* After his signs were confiscated and citations were issued, he challenged the ordinance. *Id.* at 2225–26.

137. Reed v. Town of Gilbert, 707 F.3d 1057, 1071–72 (9th Cir. 2013), *rev'd and remanded*, 135 S. Ct. 2218 (2015).

138. *Reed*, 135 S. Ct. at 2228–29, 2233.

139. *Id.* at 2229.

140. *Id.* at 2228.

141. *Id.* at 2230.

142. *Id.* at 2228–29.

143. Mulroy, *Sunshine's Shadow*, *supra* note 76, at 150–51 (citing Asgeirsson v. Abbott, 696 F.3d 454, 459–60 (5th Cir. 2012), *cert. denied*, 568 U.S. 1249 (2013)).

144. *Id.* at 151–52 (discussing legal authority that supports and contradicts the *Asgeirsson* Court's decision to solely consider the legislature's motive).

145. *Asgeirsson*, 696 F.3d at 460, 462.

146. *Reed*, 135 S. Ct. at 2228.

147. *See supra* note 130 and accompanying text.

Reed's implications for Iowa Code Chapter 21 are potentially profound. First, no binding authority exists regarding the constitutionality of Chapter 21's restrictions on discussion of policy outside of open meetings by elected officials. Second, *Asgeirsson*, ostensibly the most persuasive authority that has confronted these prohibitions, is now seriously in doubt. Like Texas, Iowa's open meetings law targets a discrete group of people—a quorum of elected officials.[148] And like Texas, Iowa's open meetings law prohibits discussion and deliberation on an entire subject—matters within elected officials' policy-making duties.[149] Any enforcement official's determination that a member of a governmental body participated in a prohibited discussion in contravention of Chapter 21 would necessarily require an examination of the speech's content.[150] On its face, this is a content-based restriction on speech, and thus strict scrutiny should apply.[151] No matter the benign purposes the Iowa Legislature had in enacting the law 50 years ago, the plain text of the statute appears to be a content-based restriction on expression—a situation that calls the law's constitutionality into serious doubt.[152]

B. THE SECONDARY-EFFECTS TEST, ASGEIRSSON, *AND IOWA CHAPTER 21*

The government can justify a restriction on expression that is "facially content-based," and therefore subject to strict scrutiny,[153] as a content-neutral restriction, and therefore subject to intermediate scrutiny, if the government, in enacting the statute, sought to avoid "secondary effects" in a content-neutral manner.[154] The Fifth Circuit in *Asgeirsson* reasoned that TOMA's restrictions on elected officials' expression were aimed at controlling such undesirable "content-neutral secondary effects."[155] Closed meetings, according to the court, have the effect of "(1) prevent[ing] transparency;

148. IOWA CODE § 21.2(2) (2018).

149. *Id.*; *see also* Mulroy, *Sunshine's Shadow*, *supra* note 76, at 160 (citing TEX. GOV'T CODE ANN. § 551.001–.146 (West 2013)) (discussing the Texas Open Meetings Act's notice requirements). In fact, Iowa's restriction is arguably more sweeping than Texas's. No discussion of substantive issues over which a governing body has control may be undertaken by a majority of that governing body except in a properly-conducted open meeting (or a permitted closed session) by elected officials in Iowa. IOWA CODE §§ 21.2(2), 21.3–.5. The "ministerial or social purposes" exception applies only to gatherings where no discussions of policy under a governing body's control take place. *Id.* § 21.2(2). Texas takes a somewhat more relaxed view, allowing "discussion of public business . . . incidental to [a] social function, convention, workshop, ceremonial event, press conference, forum, appearance, or debate," so long as formal action is not also taken. TEX. GOV'T CODE ANN. § 551.001(4) (West 2017). This indicates somewhat more tolerance for incidental discussion of public business by covered officials in Texas compared to Iowa.

150. *See Reed*, 135 S. Ct. at 2228; Mulroy, *Sunshine's Shadow*, *supra* note 76, at 140, 158.

151. *See* Mulroy, *Sunshine's Shadow*, *supra* note 76, at 154–56, 176–79.

152. *See* IOWA CODE §§ 21.2(2), 21.3–.5.

153. Mulroy, *Sunshine's Shadow*, *supra* note 76, at 159 (emphasis omitted).

154. *Id.* at 156–58; *see* Asgeirsson v. Abbott, 696 F.3d 454, 460 (5th Cir. 2012), *cert. denied*, 568 U.S. 1249 (2013); *supra* notes 115–18 and accompanying text.

155. Mulroy, *Sunshine's Shadow*, *supra* note 76, at 156 (citing *Asgeirsson*, 696 F.3d at 461).

(2) encourag[ing] fraud and corruption; and (3) foster[ing] mistrust in government."[156] Only by restricting speech based on its content—topics over which the governing body could exercise control—could the state prevent these insidious secondary effects.[157] These justifications were sufficient for the Fifth Circuit to find that TOMA was properly aimed at secondary effects, and, therefore, was to be treated as a content-neutral statute, subject to intermediate scrutiny.[158]

The Fifth Circuit's secondary-effects analysis is important and appealing to backers of open meetings statutes, as well as open government advocates who seek to avoid the possible vices of closed meetings and secret deliberation. It is, however, flawed in important ways. Most seriously, any secondary-effects analysis must be made without regard to the content of the speech at issue—that is, the effects must be measured "without reference to the content of the regulated speech."[159] The canonical example of a permitted secondary-effects analysis is *Renton v. Playtime Theatres*, in which the city of Renton, Washington, prohibited adult movie theaters from being located "within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school."[160] The Supreme Court found that the ordinance was justified as a content-neutral restriction on speech because it sought to regulate theaters not because of the content of their expression (showing pornography), but rather to avoid or control legitimate secondary effects that happened to be associated with adult theaters (higher crime and lower property values).[161] These rationales were completely independent of the expression emanating from the theater, and therefore could be justified in a content-neutral manner.[162] Such would not be the treatment of a law that sought to ameliorate secondary effects of expression by making "reference to the content of speech" itself.[163]

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

157. *Id.* ("The allegedly content-based requirement—that the speech concern public policy—is relevant, because only that speech would have the effects listed above. If a quorum of a governing body were to meet in secret and discuss knitting or other topics unrelated to their powers as a governing body, no harm would occur.").

158. *Id.* at 461–62; Mulroy, *Sunshine's Shadow*, *supra* note 76, at 156. The plaintiffs did not challenge the finding of the District Court that the law met intermediate scrutiny, so while the Fifth Circuit decided that TOMA was to be properly analyzed under intermediate scrutiny, it did not conduct such an analysis to determine conclusively whether TOMA met the standard. *Asgeirsson*, 696 F.3d at 462.

159. Mulroy, *Sunshine's Shadow*, *supra* note 76, at 151–52 (quoting Hill v. Colorado, 530 U.S. 703, 720 (2000)).

160. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 43 (1986); Mulroy, *Sunshine's Shadow*, *supra* note 76, at 157.

161. Mulroy, *Sunshine's Shadow*, *supra* note 76, at 154–55; *see Renton*, 475 U.S. at 47.

162. Mulroy, *Sunshine's Shadow*, *supra* note 76, at 157.

163. *Id.* at 156–57 (quoting Boos v. Barry, 485 U.S. 312, 321 (1988)). In *Boos*, a challenge was brought against a District of Columbia law that banned displays of signs within 500 feet of embassies if those signs "[brought] into public odium any foreign government." *Boos*, 485 U.S. at

The Fifth Circuit's *Asgeirsson* ruling relied in part on the secondary effects of TOMA to uphold the constitutionality of the law. The court affirmed that the primary purpose of the restrictions on private deliberation by elected officials was to control for the secondary effects of transparency, good government, and public trust.[164] It reasoned that "[the good government] justifications [were] unrelated to the messages or ideas that are likely to be expressed in closed meetings."[165] TOMA, the court added, regulates only speech about policy because only that kind of speech would have the deleterious secondary effect that the statute sought to control.[166]

The Fifth Circuit's conclusion is a contradiction that mistakes secondary effects for primary effects. By the Fifth Circuit's own terms, the secondary effects of meetings behind closed doors can be measured only with reference to the content of elected officials' expression—the law only restricts discussions of policy over which elected officials have control or oversight.[167] If only discussions about a specific topic (i.e., public policy) are causing deleterious secondary effects (as the Fifth Circuit reasons they are), then measurement of the effects can necessarily only occur after an inquiry into the content of elected officials' expression, to determine whether those officials were discussing policy over which they hold control.[168] The effects the court calls "secondary effects" are actually primary effects—determining whether the ill effects of closed-door meetings have materialized will require an inquiry into the expression at issue.[169] This necessarily brings TOMA outside of the realm of the secondary effects and reverts it to what it would be without such an inquiry: a content-based regulation on expression subject to strict scrutiny.[170]

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316 (quoting D.C. CODE § 22-115 (1988)). The District sought to justify the law based on its secondary effects, which was "to shield diplomats from speech that offend[ed] their dignity." *Id.* at 320. Justice O'Connor criticized this argument, finding that the embassy protest law directly targeted a particular kind of speech and only justified its supposed secondary effects "*only* by reference to the content of [the] speech" being regulated. *Id.* at 321. This would be analogous, Justice O'Connor wrote, to the ordinance in *Renton* being justified because it sought to prevent the secondary effect of psychological harm caused by viewing pornography; such a justification would necessarily require referring to the content of the expression being regulated, which is not permitted under the secondary-effects test. *Id.*

164. *See* Asgeirsson v. Abbott, 696 F.3d 454, 461 (5th Cir. 2012), *cert. denied*, 568 U.S. 1249 (2013); Mulroy, *Sunshine's Shadow*, *supra* note 76, at 156.

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

166. *Id.* The court analogized closed meetings to adult theaters, and closed-door deliberations to pornography shown by the theater—only closed-door deliberations are liable to sew public mistrust, encourage fraud, and prevent transparency, and closed-door deliberation can only occur during a closed meeting. *Id.*

167. *See* TEX. GOV'T CODE ANN. § 551.001(2) (West 2017); *Asgeirsson*, 696 F.3d at 461; Mulroy, *Sunshine's Shadow*, *supra* note 76, at 158.

168. *See* Mulroy, *Sunshine's Shadow*, *supra* note 76, at 158.

169. *Id.* (internal quotation marks omitted).

170. *See supra* notes 82–87, 115–18, 159–63 and accompanying text.

Once again, the results of *Asgeirsson* and the analogy to TOMA have serious implications for Iowa Code Chapter 21. The Iowa open meetings law restricts speech by elected officials based on the content of that speech—discussion by a quorum of elected officials of policy over which those officials exercise control is prohibited outside of public meetings.[171] The secondary effects that Chapter 21 ostensibly seeks to correct—mistrust of government, inducement to fraud, and the like[172]—can only be remedied by making reference to the content of elected officials' speech. Only by analyzing the content of officials' expression can the effects be measured.[173] This inquiry necessarily brings Chapter 21 outside the boundaries of the secondary-effects test and leaves it as a content-based restriction on speech.

That Chapter 21 would fail the secondary-effects test is even less surprising when considering the history of the test in the federal courts. Following *Renton* in 1986, the secondary-effects test has only been successfully used in cases concerning adult businesses, where the secondary effects at issue were increased crime and decreased property values.[174] It is therefore difficult to reason that the test would be successfully used to uphold a restriction on political speech, especially one like Iowa's open meetings law, where violators are subject to fines, removal from their elected posts, and public ridicule. It is also worth noting that the Third Circuit has rejected the secondary-effects analysis for laws that restrict political speech.[175] On balance, given the flaws with the *Asgeirsson* reasoning and the possible inapplicability of the secondary-effects doctrine on political speech, it is reasonable to believe that the test would likely not render Chapter 21 a content-neutral law if its restrictions on speech were ever to be challenged.

C. APPLYING INTERMEDIATE SCRUTINY TO CHAPTER 21

As has already been demonstrated, there is reason to believe that Iowa's open meetings law is a content-based restriction on elected officials'

171. IOWA CODE §§ 21.2(2), 21.3–.5 (2018).

172. As noted previously, the legislative history regarding Chapter 21 is relatively thin, but it is reasonable to believe that the ills that TOMA sought to correct mirror those in Iowa. For a discussion of the legislative history of Chapter 21, see *supra* Section II.A. *See also* Nicholas Johnson, *Open Meetings and Closed Minds: Another Road to the Mountaintop*, 53 DRAKE L. REV. 11, 16–18 (2004) (noting that open meetings are justified as helping prevent "[s]elf-dealing, [c]onflicts of [i]nterest, and the 'Smoke-filled, Backroom Deals' of an [e]arlier [e]ra," and promote "cooperation and confidence" with and among government officials).

173. *See supra* notes 167–70 and accompanying text.

174. Mulroy, *Sunshine's Shadow*, *supra* note 76, at 158. Professor Mulroy lays out a thorough list of the cases in which the secondary-effects test has been applied. *Id.* at 158 n.128.

175. *Id.* at 158 & n.129 (citing Rappa v. New Castle Cty., 18 F.3d 1043, 1070 (3d Cir. 1994)). The plaintiff in *Rappa* challenged a Delaware law that resulted in his campaign signs being removed from the side of roads, while signs advertising businesses and historical attractions were allowed to remain. *Rappa*, 18 F.3d at 1047. The Third Circuit wondered, in dicta, whether the secondary-effects test could be applied to political speech, but ultimately held that the law in question would fail the analysis even if it were applied. *Id.* at 1069.

expression, bringing the law's constitutionality into doubt. There is also reason to believe that, contrary to the holding in *Asgeirsson v. Abbott*, the open meetings law's content-based restrictions on expression will not be saved by the "secondary-effects" doctrine. As it stands, however, *Asgeirsson* is still good law in the Fifth Circuit, and its holding that intermediate scrutiny applies to open meetings laws is therefore worth assessing.

The District Court in *Asgeirsson v. Abbott* found that TOMA was a content-neutral restriction on speech and, after applying intermediate scrutiny, found the law constitutional.[176] On appeal, the plaintiffs did not challenge the District Court's intermediate scrutiny conclusion.[177] As a result, the Fifth Circuit found that TOMA was content-neutral and met intermediate scrutiny, without analyzing the substance of the District Court's intermediate scrutiny analysis.[178] Nonetheless, the District Court's intermediate scrutiny analysis is instructive and warrants examination for its implications for Iowa Chapter 21.

The Western District of Texas found that TOMA's restriction on speech "[left] open ample alternative channels of communication" and that it was "narrowly tailored to serve a significant government interest."[179] The governmental interests at stake were "not merely 'significant,' but compelling," according to the court.[180] Those interests included maintaining transparency, preventing fraud, and "foster[ing] trust in government."[181] Under the alternative channels analysis, the District Court found that TOMA "[left] open all channels of communication for council members to be heard."[182] First, the court reasoned, TOMA allowed for violations of the open meetings law to be cured if the illegal closed meeting is followed by a subsequent, legally-compliant open meeting.[183] Further, elected officials in Texas were not prohibited from discussing public business with friends, family, the media, or their colleagues, so long as the communication was not an attempt to circumvent the requirements of TOMA.[184]

176. Asgeirsson v. Abbott, 773 F. Supp. 2d 684, 701–03 (W.D. Tex. 2011), *aff'd*, 696 F.3d 454 (5th Cir. 2012), *cert. denied*, 568 U.S. 1249 (2013); Mulroy, *Sunshine's Shadow*, *supra* note 76, at 150. The Western District of Texas also found that, even if strict scrutiny was applied, the law would survive. *Asgeirsson*, 773 F. Supp. 2d at 703–04.

177. *Asgeirsson*, 696 F.3d at 462. The Western District of Texas concluded that TOMA was not a content-based restriction on speech; that even if it was, it met strict scrutiny; and that it met intermediate scrutiny. *Id.* at 458. The appellants argued that strict scrutiny should apply to the law but did not appeal the trial court's intermediate scrutiny analysis. *Id.*

178. *Id.* at 462.

179. *Asgeirsson*, 773 F. Supp. 2d at 701 (quoting Serv. Emps. Int'l Union, Local 5 v. City of Houston, 595 F.3d 588, 596 (5th Cir. 2010)).

180. *Id.* at 702 (quoting *Serv. Emps. Int'l Union*, 595 F.3d at 596).

181. *Id.* at 701–02.

182. *Id.* at 701.

183. *Id.* (citing Burks v. Yarbrough, 157 S.W.3d 876, 883 (Tex. App. 2005)).

184. *Id.* at 701–02.

The Western District of Texas also found that TOMA was "sufficiently narrowly tailored" to comply with intermediate scrutiny.[185] Because the law only prohibits discussions of public policy between a quorum of elected officials, carves out numerous exceptions for permitted closed meetings, and offers immunity from prosecution to elected officials who violated the law based on official advice from counsel, the Western District of Texas held that it was "narrowly tailored to serve . . . significant governmental interest[s]."[186]

While the District Court was not necessarily incorrect in finding that significant governmental interests were served by open meetings statutes, questions remain as to whether "ample alternative channels" of communication actually remain open under open meetings laws—especially in Iowa.[187] The District Court noted that one alternative channel in TOMA is the provision allowing elected officials to "correct" a violation of the open meetings statute by holding an open meeting, where action that had been taken at the illegally closed meeting can be cured and enacted legally.[188] No such provision exists in Iowa Chapter 21; there is no opportunity to "cure" a violation of the open meetings law at a subsequent, valid meeting.[189] Furthermore, such a "cure" provision, even if it existed under Iowa law, would hardly grant an "unlimited" number of ways for elected officials to communicate, as the Western District of Texas asserts.[190] True, if the "action" taken at an unauthorized closed meeting is a routine legislative matter, such as the issuance of a contract, it can adequately be corrected at a subsequent, legally compliant open meeting. The same cannot be said of a conversation about policy that takes place between a quorum of elected officials, especially if that quorum consists of only a small number of individuals.[191] Consider, for instance, a situation in which two of the three members of the Education Committee of the Iowa City Community School District attend a conference, where they discuss presentations and how they relate to issues facing Iowa City

185. *Id.* at 701 (quoting *Serv. Emps. Int'l Union,* 595 F.3d at 596).

186. *Id.* at 701, 702–03 (quoting *Serv. Emps. Int'l Union,* 595 F.3d at 596).

187. *See* Mulroy, *Sunlight's Glare*, *supra* note 113, at 342.

188. *Asgeirsson*, 773 F. Supp. 2d at 701 (citing *Burks*, 157 S.W.3d at 883).

189. IOWA CODE § 21.6(3)(c) (2018) (allowing a court to "void any action taken in violation of [Chapter 21]," provided that "under the facts of the particular case that the public interest in the enforcement of the policy of [Chapter 21] outweighs the public interest in sustaining the validity of the action taken in the [unauthorized] closed session").

190. *Contra Asgeirsson*, 773 F. Supp. 2d at 701 ("[M]embers of a governmental body[] that hold a closed meeting in violation of TOMA can correct their violation with a subsequent open meeting. Thus, a public official who wishes to communicate his or her ideas is unlimited in the ways he or she can do so." (citation omitted)).

191. The smallest possible quorum on a governing board in Iowa is two individuals, a situation that is quite common, especially among committees or sub-committees of small governmental bodies like school boards. For instance, the Iowa City Community School District Board has seven members, divided into two committees, each of which has three voting members and two alternate members. IOWA CITY CMTY. SCH. DIST., 2018–2019 BOARD COMMITTEE ASSIGNMENTS (2018), https://www.iowacityschools.org/Domain/78.

schools.[192] Because this is a governmental body engaging in "deliberation . . . upon any matter within the scope of the [school board's] policy-making duties," a meeting has occurred, about which the public was not properly notified or accommodated.[193] "Curing" this closed meeting would require preparing an agenda and notifying the public in order to recreate what would be, in any other context, an unexceptional conversation between colleagues.[194] The alternative to requiring that this lunchtime conversation be docketed and re-created is a rule requiring that the public be notified and allowed to attend any time a quorum of elected officials expect, or have reason to believe, that policy-related discussions might occur.[195] Either scenario is burdensome and impractical, almost comically so. A cure provision, if it even existed in Iowa law, would not offer an adequate alternative under the intermediate scrutiny analysis, let alone an "unlimited" array of communicative choices, as the Western District of Texas purports.

Other doubts remain about the extent to which Chapter 21 allows for ample alternate means of communication by elected officials. Under the law, a member of a board or commission who solicits a fellow committee member to co-sponsor a resolution or ordinance, or even discusses draft legislation with his colleague, has conducted a closed meeting.[196] The only permitted alternative form of communication in this instance is to call a meeting compliant with Chapter 21, a burdensome, costly, and impractical endeavor,

192. Johnson, *supra* note 172, at 37. This example is drawn directly from Professor Johnson's article, where he argues that exactly this situation—a conversation over lunch by a quorum of members of a school board—would constitute "deliberation" under Chapter 21, leading to an absurd result where an unplanned discussion of general policy matters that happen to be within the scope of elected officials' responsibilities cannot legally occur unless the public is properly notified and invited to witness the discussion. *Id.* Professor Johnson draws this example from his first-hand experience as a longtime member of the Iowa City Community School District Board. *Id.* at 11 n.*.

193. IOWA CODE § 21.2(1)–(2) (2018); Johnson, *supra* note 172, at 37.

194. *See* Johnson, *supra* note 172, at 37.

195. Professor Johnson elaborates on the potential absurdity of this situation:

> How could they possibly have constructed an agenda for their luncheon meeting and made it public in advance, since they did not know (a) the subject of the workshop or speech, (b) that a quorum of members would be having lunch together, or (c) what they would be discussing? If this is really thought to be a serious open meetings problem, is it not a little silly to say the solution is for them to split into three luncheon groups so that none will constitute a quorum?

Id.

196. *See* Mulroy, *Sunlight's Glare*, *supra* note 113, at 342–43, 362. Of course, if the governmental body in question has more than three members, and if the colleague being solicited is a member of the committee of the whole, but not the same subcommittee as his solicitous colleague, no meeting would be held because no quorum would be deliberating, thus limiting in strange and seemingly artificial ways what does and does not constitute a meeting.

considering the issue at stake.[197] This cannot reasonably be viewed as an ample alternative.[198]

D. THE POLICY DOWNSIDES OF CHAPTER 21, WITH ILLUSTRATIVE EXAMPLES

So far, this examination of Iowa Code Chapter 21 has focused on its deficiencies under the First Amendment. These flaws are, in a sense, an adequate policy justification on their own for reforming the law. But there are many non-constitutional flaws with the law that are equally likely to impact governmental bodies and the citizens of Iowa in undesirable ways. These flaws stem from the law's frustration of the functions of governmental bodies, its impact on citizens' willingness to seek elected office, and its uneven application across government. While the constitutional issues with Chapter 21 are, as yet, largely theoretical, the policy issues have already played out in several instances.

1. Frustration of Agency Functions

First, the Iowa open meetings law tends to frustrate the functioning of governmental bodies whose actions are subject to the law's provisions. As noted previously, communications as simple as a discussion between two school board members at a conference are, for purposes of Chapter 21, a meeting.[199] From one flippant discussion about public policy over lunch, a volunteer member of an elected body potentially faces fines, attorneys' fees and court costs, and even expulsion from the body.[200] This surely serves to frustrate the ability of elected officials to communicate effectively amongst themselves.

Another impediment caused by Chapter 21 is the fact that it does not allow members of governmental bodies to attend retreats outside the strictures of the law.[201] Retreats are often used by governmental bodies to accomplish goals that are difficult to do during a regular meeting, including strategic planning, free-form discussion of organizational issues, team building exercises, and orientation of new members.[202] While recognizing the

197. *See id.* at 343.

198. *See id.*

199. IOWA CODE § 21.2(2) (2018); *supra* notes 192–93 and accompanying text.

200. IOWA CODE § 21.6; Johnson, *supra* note 172, at 37. It is worth noting further that, in certain circumstances, the governmental body itself (and therefore the taxpayers that support it) can be held liable for the damages and attorneys' fees resulting from a successful suit against a governmental body. IOWA CODE § 21.6(3)(b).

201. *See* Open Meetings Law, 1993 Iowa Op. Att'y Gen. 26 No. 93-7-5(L) (Iowa A.G. July 28), 1993 WL 375335, at *2; David Vestal, Iowa State Ass'n of Ctys., A Baker's Dozen: 13 Issues Regarding the Open Meetings Law, at slide 5 (May 14, 2004), *available at* https://www.iowacounties.org/wp-content/uploads/2013/06/2004-IARC-Staff-Retreat.ppt.

202. Edwin C. Thomas, *A Guide to Planning and Conducting Successful Retreats*, INST. FOR PUB. SERV. & POL'Y RESEARCH, U. S.C., http://www.ipspr.sc.edu/grs/A%20Guide%20to%20Planning%20and%20Conducting%20Successful%20Retreats.htm (last visited Feb. 27, 2019).

usefulness of retreats, the Iowa Attorney General's Office issued an opinion saying that retreats must be open to the public and preceded by adequate notice.[203] As a practical matter, this means that retreats must be held near the seat of the governmental body, so that it remains "reasonably accessible to [members of] the public."[204] While including the public and press in a gathering where substantive policy is likely to be discussed appears to be a rational goal, it can also serve to frustrate the very purpose of holding the retreat—to orient new members; build a cohesive team; and conduct frank, lengthy discussions about goals and policies that cannot practically be held in a typical meeting.[205] Without the ability to truly "retreat" from the everyday demands of one's office, the usefulness of these gatherings cannot be fully realized.

In the most extreme cases, Chapter 21 completely prevents governmental bodies from performing their duties. One example involving the Iowa Civil Rights Commission starkly illustrates this oversight. "The Iowa Civil Rights Commission is a neutral, fact-finding law enforcement agency" whose "mission . . . is to end discrimination within the state of Iowa."[206] In 1981, it made "plans to meet with . . . inmates at the Iowa State Penitentiary" in Fort Madison and field their concerns about civil rights.[207] The Attorney General's office issued an opinion finding that, because "deliberation" and action" in Chapter 21[208] were intended to be read broadly, they "include[d] general discussion and/or consideration of matters preliminary to final decision-making."[209] Because the Civil Rights Commission conducts investigations, and because "meet[ing] to obtain information from individuals participating in [an] investigation" involves deliberation, the Office of the Attorney General opined that any such investigation must comply with the open meetings law if a majority of Commission members were present.[210]

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203. Iowa Op. Att'y Gen., 1993 WL 375335, at *4.

204. IOWA CODE § 21.4(1)(b).

205. *See* Thomas, *supra* note 202 (noting that retreats held away from home are possibly more conducive to productive discussion because participants are less likely to be distracted by travel between the retreat and other obligations at home, and are more likely to engage in "teamwork, creative thinking, [sic] and consensus building").

206. *General Information About the Commission and Civil Rights*, IOWA C.R. COMMISSION, https://icrc.iowa.gov/about-us/general-information-about-commission-and-civil-rights (last visited Feb. 27, 2019).

207. Open Meetings, Iowa Op. Att'y Gen. No. 81-2-13(L) (Iowa A.G. Feb., 16), 1981 WL 671610, at *1.

208. At the time the opinion was issued, Iowa's open meetings law was codified in Chapter 28A. *See id.*

209. *Id.* at *2.

210. *Id.* Because the open meetings law sought to make "the basis and rationale of governmental decisions, as well as those decisions themselves" open to the public, the Attorney General's office concluded that the public should have access to the investigations themselves,

The implications of this opinion are serious. The Civil Rights Commission was established to investigate precisely this type of issue—the civil rights of marginalized and vulnerable citizens, which likely includes many inmates. It cannot effectively conduct these investigations without meeting directly with the affected people and fielding their concerns. And yet, according to this interpretation of Iowa's open meetings law, any such investigation must be conducted in a publicly accessible manner, open to all interested persons.[211] In this case, that would require bringing the public into a prison, which is practically impossible.[212] Here, there are easy alternatives that would allow the public to have access, such as publishing a report of the Commission's findings and releasing recordings of the investigation. But Chapter 21 means these alternatives are legally inadequate and, by extension, impose serious restraints on the ability of the Civil Rights Commission to do its job.[213]

2. Impact on Citizens' Willingness to Serve in Elected Office

Another important consideration is Iowa's open meetings law's impact on citizens' willingness to serve in elected office, especially at the local level where those officials are often volunteers.[214] For many elected officials, the tasks are intimidating, the stakes are high, and the nature of the position is

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e.g., the public should have access to the rationale for decisions rendered by the Commission. *Id.* (emphasis omitted) (quoting IOWA CODE § 28A.1 (1981)).

211. IOWA CODE § 21.3 (2018); Iowa Op. Att'y Gen., 1981 WL 671610, at *1–2.

212. Certain procedures for conducting public meetings with prisoners have been established by the Iowa Board of Parole, which is also subject to the open meetings law. Attendees must register with the Board of Parole and follow standards of decorum set by the Board. *Attending a Parole Board Hearing*, IOWA BD. PAROLE, https://bop.iowa.gov/constituent-information/attending-parole-board-hearing (last visited Feb. 27, 2019). Media may attend only with adequate advanced notice. *See id.* It seems probable, though not certain, that the Civil Rights Commission would be starting from scratch in 1981 as concerns procedures for accommodating the public at interviews with prisoners. Some procedures could be implemented today to ameliorate this situation, such as creating a live video link between investigators in Fort Madison and a public audience outside the prison, but this would also involve considerable logistical difficulty and expense.

213. While Chapter 21 makes certain allowances for closed meetings conducted by law enforcement agencies, such as the Civil Rights Commission, neither exception would apply to the proposed prison investigation. Section 21.5(g) allows closed sessions to discuss "specific law enforcement matters, such as current or proposed investigations or inspection or auditing techniques or schedules," but only insofar as disclosure of this information "would enable law violators to avoid detection." IOWA CODE § 21.5(g). This exception implicates meetings to plan and prepare investigations, not meetings to conduct the investigations themselves. *See id.* Section 21.5(h) allows governmental bodies to hold closed meetings "[t]o avoid disclosure of specific law enforcement matters, such as allowable tolerances or criteria for the selection, prosecution, or settlement of cases, which if disclosed would facilitate disregard of requirements imposed by law." *Id.* § 21.5(h). Again, this involves meetings of agencies to strategize enforcement techniques and goals, but not to investigate and gather facts that might aid in implementing those goals.

214. Johnson, *supra* note 172, at 22.

unnatural.[215] Local elected officials' missteps can have potentially serious consequences, especially because officials are responsible for even unintentional violations of the law.[216] In addition to fines, violations of Chapter 21 can harm officials' standing in the community.[217] News travels quickly in small towns, and word that a school board member or city councilman held an illegal closed meeting will tend to embarrass and lower the member's esteem in the eyes of others, even if the violation was an innocent discussion with a colleague over lunch about the condition of city sidewalks.[218] In this way, Chapter 21 fails to balance the need for openness with the community's need to have citizens who are willing to volunteer as elected officials. To the extent Chapter 21 discourages service by its restraints on deliberation, it should be reformed.[219]

3. Uneven Application Across State Government

Chapter 21 does not apply to all elected, multimember governing bodies in Iowa, causing the law to fall short of its open government goals.[220] Surely, if the goals of open meetings are to foster accountability and trust in government, [221] broad application should be preferred over narrow application.[222] Despite this, many parts of government are left out of the provisions of Chapter 21. Chief among these exemptions is the Iowa Legislature itself, even though it, standing alone from any other lawmaking body in the state, has unmatched power to spend public money and affect citizens' lives.[223] Also unaffected by the open meetings law are the heads of

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215. *Id.* ("Many agency members have neither the self-confidence born of a lifetime of academic training, public speaking, and debate, nor the heightened level of agency-relevant experience and expertise that might otherwise overcome some of their insecurities.").

216. IOWA CODE § 21.6(3)(a); Johnson, *supra* note 172, at 22; *see supra* notes 62–65 and accompanying text.

217. Johnson, *supra* note 172, at 22 ("Members may have reasonable concerns that what they say could result in a loss of customers for their business, a loss of their job if employed by others, social ostracism at the country club or workplace, or a loss of an election if they want to be reelected.").

218. *See id.*; *supra* notes 192–93 and accompanying text.

219. *See* Johnson, *supra* note 172, at 22. Professor Johnson finds that the benefits of openness are, on balance, offset by the costs, drawing on his experience as a school board member in Iowa. *Id.* at 20; *see supra* note 192. Among the costs of the requirement to conduct all pre-decisional deliberations in public are fewer meetings with less substantive deliberation occurring; deliberation migrating from elected officials to bureaucrats; loss of interest by elected officials; and lack of "[i]nnovation, [c]hange, and [i]nstitutional [s]elf-[r]enewal." Johnson, *supra* note 172, at 20–29.

220. *See* IOWA CODE § 21.2(1); *supra* notes 36–43 and accompanying text (discussing the governmental bodies and entities to which the open meetings law applies).

221. *See supra* note 172 and accompanying text.

222. *See* Johnson, *supra* note 172, at 45.

223. *See* Mulroy, *Sunlight's Glare*, *supra* note 113, at 351–52. The fact that open meetings laws distinguish among lawmaking bodies, subjecting some to controls on expression while leaving others unrestrained, also raises potential equal protection issues. *Id.* at 349–53. These issues, discussed at length in Professor Mulroy's *Sunlight's Glare* article, are beyond the scope of this Note.

executive agencies, inferior civil servants, and other members of the state's bureaucracy, as well as officers of the judicial branch.[224] The result is that while some policymaking bodies—over which voters have political control—must conduct all deliberation in public or be subject to fines and other sanctions,[225] bureaucrats—who also possess weighty powers over public policy—are *not* held directly politically accountable by the public and also are *not* required to deliberate in the open.[226] It is an odd policy indeed to require members of a school board to deliberate on budgetary issues in public, yet at the same time allow the unelected school district superintendent to conduct virtually unlimited discussions about the same topic in private.[227]

Further, Chapter 21's application results in seemingly artificial distinctions—not just between multimember policymaking bodies that are subject to the law, and bureaucrats who are not, but also between *different groups* of multimember policymaking bodies. Members of Regional Councils of Governments, established by the state legislature, are not personally liable for unintentional violations of the open meetings law in the discharge of their duties.[228] Regional Councils are tasked with cooperating across jurisdictions to develop "plans and programs for community development."[229] There is no reason to believe that, in discharging these duties, Regional Councils have less of an impact on public policy than any other multimember policymaking body in Iowa. Yet volunteer members of these Councils are not liable for unintentional violations of Chapter 21, while elected members of other policymaking bodies are subject to fines for engaging in incidental, unintentional private deliberation.[230] Distinguishing among policymakers in this manner serves no obvious purpose and helps to further isolate these

224. *See* Johnson, *supra* note 172, at 32, 45–48. Executive Branch agencies are subject to other open government laws, such as the Iowa Freedom of Information Act. *Id.* at 48. But the essential provisions of Iowa's open meetings law—that any deliberation by policymaking bodies must be conducted in full view of the public—most certainly do not apply to those agencies. *Id.* at 48–49.

225. IOWA CODE § 21.6(3)(a); Johnson, *supra* note 172, at 48–49.

226. Johnson, *supra* note 172, at 47–49.

227. *Id.* at 27 ("When open deliberation requirements result in *less* group process, what usually fills the vacuum is a shift to, in the case of schools, the superintendent.").

228. IOWA CODE § 28H.4(2) ("A[n] . . . officer [or] . . . member . . . [of a council of governments] . . . is not personally liable for a claim based upon an act or omission of the person performed in the discharge of the person's duties, except for acts or omissions which involve intentional misconduct or knowing violation of the law . . . ."); *see supra* note 65 and accompanying text; *see also* City of Postville v. Upper Explorerland Reg'l Planning Comm'n, 834 N.W.2d 1, 7–8 (Iowa 2013), *as amended on denial of reh'g* (July 15, 2013), *as corrected* (July 31, 2013) (finding volunteers on council were immune from personal liability for Iowa Open Meetings Act violations).

229. IOWA CODE § 28H.2(1)(b). Current projects of Regional Councils of Government include work on rental housing inspections, community health initiatives, and an inmate apprenticeship program to create affordable housing in Iowa. *See ICOG Projects*, IOWA ASS'N COUNCILS GOV'TS, https://www.iowacog.com/projects (last visited Feb. 27, 2019).

230. IOWA CODE §§ 21.6(3)(a), 28H.4(2).

elected officials from the rest of government, where openness requirements apply with less stricture.

IV. A MORE RATIONAL WAY FORWARD: LEGISLATIVE AND JUDICIAL REMEDIES FOR CHAPTER 21'S CONSTITUTIONAL AND POLICY PROBLEMS

The preceding Part analyzed both the constitutional issues with Iowa Code Chapter 21, and the policy weaknesses, which render it less-than-effective. There are concrete, workable solutions available to address Chapter 21's most problematic constitutional and policy problems. An important consideration here concerns bodies with a quorum of two—that is, where two individuals serve on the same multimember body and are therefore unable, in any legal manner, to discuss public policy over which they have control.[231] Section A of this Part suggests legislative solutions to the problems posed by Chapter 21, including defining the term "deliberation" in the statute, opening ample alternative channels for elected officials to communicate with one another, and eliminating fines for officials who unknowingly violate the law. Section B suggests judicial solutions. It urges courts in Iowa to follow the lead of West Virginia, whose Supreme Court adopted a "common sense approach" to determining whether a particular private deliberation violated that state's open meetings law.[232] The goal in formulating these solutions is not to allow a return to the past, when unlimited private meetings by elected officials cleared the way for secrecy and corruption.[233] Rather, it is an attempt to create a workable, fair solution that serves the governmental and public interest without unreasonably burdening policymakers' ability to speak with their colleagues about necessary matters.

A. POSSIBLE LEGISLATIVE SOLUTIONS

The Iowa Legislature holds the power to remedy these challenges with a few achievable modifications. First, the legislature ought to amend Iowa's open meetings law to define "deliberation," which it currently does not do.[234]

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231. *See supra* notes 191–92 and accompanying text (detailing Chapter 21's unworkability when two members of a policymaking body serve on the same three-member subcommittee, a situation that is common on school boards and other local commissions).

232. Mulroy, *Sunlight's Glare*, *supra* note 113, at 329–30 (quoting McComas v. Bd. of Educ. of Fayette Cty., 475 S.E.2d 280, 290 (1996)).

233. *See supra* Section II.A; *supra* note 172.

234. IOWA CODE § 21.2(2) defines a "meeting" as "a gathering . . . where there is deliberation or action upon any matter within the scope of the governmental body's policy-making duties," which by implication suggests that "deliberation" is any communication related to the scope of policymakers' duties. *See* IOWA CODE § 21.2(2). This is simply an implication, however, and the term deliberation remains undefined in Chapter 21. See TEX. GOV'T CODE ANN. § 551.001(2) (West 2017) for an example of an open meetings statute that defines "deliberation," albeit one that is so broad that it prohibits private discussion between a quorum of elected officials about

The Iowa Supreme Court has ruled that "[d]eliberation generally involves 'discussion and evaluative processes in arriving at a decision or policy.'"[235] Professor Nicholas Johnson presents an attractive modification, opining that deliberation "should [not] be defined to include members' informal discussions at a time when formal proposals have not been contemplated, formulated, or scheduled for 'deliberation.'"[236] Synthesizing these two ideas, deliberation should be defined in Chapter 21 as

> discussion and evaluation, the aim of which is to evaluate policy or reach a decision, about any matter within the scope of a governmental body's policymaking duties, but not including discussions or evaluations of such policy at a time when formal proposals have not been contemplated, formulated, or scheduled by the governmental body for consideration.[237]

This definition would help to remedy both the constitutional and policy ills of Chapter 21.

Defining "deliberation" this way would help narrowly tailor the law so that, under a strict scrutiny analysis, speech is restricted only insofar as the restriction furthers a compelling governmental interest.[238] The governmental interest in preserving openness and transparency is upheld because discussion about formal proposals or policy ideas is still required to be held in the open. At the same time, general or informal discussions by a two-member quorum about issues within the scope of their policymaking powers would not be restricted under this definition. This is an improvement on the current formulation, where even informal discussions about general policy matters are subject to the open meetings law, a restriction that is not, by any stretch, narrowly tailored.[239] This definition would also remedy some of the policy problems identified with Chapter 21's inflexible construction of "deliberation." No longer would volunteer school board members or city councilors face fines for innocent, general discussions about matters of policy over which they hold decision-making authority—such as the hypothetical

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"any public business." *See also* Johnson, *supra* note 172, at 35–39 (giving a thorough account of the possible meanings of "deliberation").

235. Hutchison v. Shull, 878 N.W.2d 221, 232 n.1 (Iowa 2016) (quoting Hettinga v. Dall. Cty. Bd. of Adjustment, 375 N.W.2d 293, 295 (Iowa Ct. App. 1985)). *Hettinga*, in turn, adopted the definition of "deliberation" announced in an opinion by the Iowa Attorney General. *See* Open Meetings—'Meeting,' 1979 Iowa Op. Att'y Gen. 164 No. 79-5-14 (Iowa A.G. May 16), 1979 WL 21166, at *3.

236. Johnson, *supra* note 172, at 39. Professor Johnson would "not . . . restrict[] [the definition of deliberation] to discussions in open meetings prior to voting," but would exclude informal discussions between members of bodies when no formal action had been proposed. *Id.*

237. *See* IOWA CODE § 21.2(2); Johnson, *supra* note 172, at 39.

238. *See supra* notes 84–90 and accompanying text for a discussion of the strict scrutiny analysis on content-based restrictions on expression.

239. *See supra* notes 147–52, 200 and accompanying text.

school board members discussing conference presentations over lunch.[240] Members of multimember policymaking bodies subject to Chapter 21 would enjoy the same flexibility as their counterparts in the bureaucracy in their ability to communicate with one another. This would help to remedy Chapter 21's uneven application problem.[241] Other legislative solutions could help ameliorate Chapter 21's constitutional (under the intermediate-scrutiny analysis) and policy problems by providing more alternative channels for communication between members of governmental bodies. One of the gravest faults of Chapter 21 under the intermediate scrutiny analysis was its lack of ample alternative channels for communication between members of covered entities about matters of public policy.[242] The proposed definition of "deliberation" helps to remedy this fault because it allows for increased levels of communication between elected officials about general policy matters, which is not currently permitted under Chapter 21 if a quorum is present.[243] Another avenue for opening alternative channels of communication under Chapter 21 is to allow one member of a policymaking body to privately solicit another member about co-sponsoring a piece of proposed legislation.[244] Currently, Chapter 21 allows no legally-compliant channel for one member of a body to solicit another member about sponsorship of proposed legislation if, in doing so, the two members would constitute a quorum (as would be the case if the two members serve together on a three-member board or subcommittee).[245] Allowing this exception to the open meetings law would open an alternative channel of communication, where one does not currently exist, and allow policymakers to engage in simple yet necessary discussions without calling a special meeting.

The Legislature should also consider amendments to Iowa Code Chapter 21 to allow occasional closed retreats by policymaking bodies, and to remedy the situation that the Iowa Civil Rights Commission faced in 1981 when it sought to interview inmates at Iowa prisons. A law that allows infrequent closed retreats would help policymakers build cohesive teams, set general policy goals, and candidly discuss challenges and opportunities facing their

240. *See supra* notes 199–200 and accompanying text.

241. *See* Johnson, *supra* note 172, at 45–48; *supra* notes 220–27 and accompanying text.

242. *See supra* notes 187–98 and accompanying text.

243. Johnson, *supra* note 172, at 39; *supra* note 236 and accompanying text.

244. Mulroy, *Sunlight's Glare*, *supra* note 113, at 362. Professor Mulroy proposes a Model Open Meetings Law in *Sunlight's Glare*, which would exempt solicitation of a co-sponsor from the openness requirement. *Id.* at 369. Professor Mulroy explains that

> [s]ome legislators may be reluctant to introduce a controversial bill in the first place unless they know that key colleagues—either those of the same party, or perhaps of the opposite party—will co-sponsor with them. Democracy is furthered, not subverted, by allowing a sponsor to seek such early support in an off-the-record discussion prior to the formal introduction of the bill.

Id. at 362.

245. *See id.*; *supra* notes 196–98 and accompanying text.

organization.[246] The legislature should assess current local government practices to determine the appropriate number of closed retreats governmental bodies may hold each year.[247] The open meetings law should also be amended so that it does not prevent entities like the Iowa Civil Rights Commission from carrying out their statutory functions. Because meetings between Civil Rights Commission staff and inmates are subject to the open meetings law, investigations of civil rights complaints at prisons are seriously hampered.[248] Excepting "[f]act-finding trips, site inspections, or the like" from the definition of "meeting" would allow bodies to conduct these trips without being forced to accommodate the public.[249] Another possible solution is to specifically exempt meetings with inmates conducted at prisons from the open meetings requirement, provided that the findings of fact or recordings from those meetings are later released publicly. Parole hearings, which are currently open to the public, should remain so under the law.[250] Yet another solution is to allow closed meetings for all entities in Iowa if (1) the meeting is needed for the entity to carry out its statutory duties, and (2) accommodating the public at the meeting would constitute an unreasonable hardship under the circumstances. This formulation would allow the Civil Rights Commission to investigate the civil rights complaints of prisoners without needing to accommodate the general public inside a prison (and open the door for other unanticipated circumstances where such a meeting needs to be conducted in a manner where public attendance is impractical or impossible).

Finally, the Legislature should reformulate Chapter 21 to move toward parity between entities that are currently subject to the law's requirements and entities that are not. Part of the solution, as has already been proposed, is to allow informal discussions about policy between a quorum of members of a covered entity if formal action has not yet been proposed or contemplated.[251] Additional uniformity would be achieved if the Legislature removed artificial distinctions from the law, such as the fact that members of Regional Councils of Governments are not liable for unintentional violations of Chapter 21, while most other elected officials are liable even for

246. *See* Mulroy, *Sunlight's Glare*, *supra* note 113, at 368–69; *supra* notes 201–05 and accompanying text.

247. *See* Mulroy, *Sunlight's Glare*, *supra* note 113, at 369. Professor Mulroy would allow closed retreats to be held quarterly but does not offer a justification for this tolerated frequency. *Id.* An annual or semiannual allowance might be adequate.

248. *See supra* notes 206–13 and accompanying text.

249. Mulroy, *Sunlight's Glare*, *supra* note 113, at 368. Professor Mulroy notes that Ohio courts have exempted "information-gathering and fact-finding" from its open meetings requirement, finding that they are an "essential function[] of any board," akin to the ministerial function exemption in IOWA CODE § 21.2(2). Holeski v. Lawrence, 621 N.E.2d 802, 805 (Ohio Ct. App. 1993); Mulroy, *Sunlight's Glare*, *supra* note 113, at 318.

250. *See supra* note 212.

251. *See* Johnson, *supra* note 172, at 39; *supra* notes 235–41 and accompanying text.

unintentional violations.[252] This disparity could be fixed by making members of Regional Councils liable for unintentional violations of the open meetings law, but if the goal is more flexibility in the manner in which Chapter 21 applies, a better solution might be to eliminate fines for unintentional violations of the law, at least for a first offense.[253] Civil penalties might be appropriate for willful circumvention of the open meetings requirement, but this is quite apart from an incidental discussions about policy between two board members that violates the law.[254] There are many benefits to this approach: It allows similar civil liability for violations of the law when the identities and actions of the violators are similar, and it eliminates the threat of a penalty for a volunteer board member's unintentional actions, which is one of the factors that might dissuade otherwise-qualified citizens from running for elected office.[255]

B. POSSIBLE JUDICIAL SOLUTIONS

While the vast majority of state-level judicial challenges to the constitutionality of open meetings laws have failed,[256] one case stands out for recognizing that a more forgiving, more flexible standard should be applied to these laws. *McComas v. Board of Education of Fayette County* involved a challenge to a secret meeting between a quorum of school board members and the school superintendent.[257] While holding that an illegal meeting had taken place, the Court went on to find that "an interpretation of the Sunshine Law that precludes any off-the-record discussion between board members about board business would be both undesirable and unworkable —and possibly unconstitutional."[258] To remedy constitutional issues and undesirable results, the Court adopted a "common sense approach" that focused on whether a particular conversation between policymakers "undermine[d] the fundamental purposes" of the open meetings law.[259] In

252. IOWA CODE §§ 21.6, 28H.4 (2018); *see supra* notes 228–30 and accompanying text.

253. Mulroy, *Sunlight's Glare*, *supra* note 113, at 369–70. In his proposal, Professor Mulroy would impose "costs and attorney fees against the covered jurisdiction after a finding of a violation of the [open meetings law]," unless it was found "by clear and convincing evidence that [an individual] member willfully conspired with others to violate the act," in which case the offending member would be subject to civil penalties. *Id.* This would end the imposition of civil fines against individuals for unintentional violations of the act.

254. *Id.*

255. *See* Johnson, *supra* note 172, at 22; *supra* notes 215–19 and accompanying text.

256. Mulroy, *Sunlight's Glare*, *supra* note 113, at 330 n.142 (noting state courts in Colorado, Minnesota, Nevada, Pennsylvania, and Texas have upheld open meetings laws as constitutional).

257. *Id.* at 329; McComas v. Bd. of Educ. of Fayette Cty., 475 S.E.2d 280, 283–84 (W. Va. 1996). West Virginia's open meetings law defines a "meeting" as a "convening of a governing body of a public body for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter." *McComas*, 475 S.E.2d at 286 (quoting W. VA. CODE § 6-9A-2(4) (1996)).

258. *McComas*, 475 S.E.2d at 290; *see* Mulroy, *Sunlight's Glare*, *supra* note 113, at 329.

259. Mulroy, *Sunlight's Glare*, *supra* note 113, at 329 (quoting *McComas*, 475 S.E.2d at 290, 293).

determining whether a particular conversation was violative of the open meetings laws, the Court said that the relevant factors included

> the content of the discussion, the number of members of the public body participating, the percentage of the public body that those in attendance represent, the significance of the identity of the absent members, the intentions of the members, the nature and degree of planning involved, the duration of the meeting and of the substantive discussion, the setting, and the possible effects on decision-making of holding the meeting in private.[260]

Alleged violations of West Virginia's open meetings law are to "be carefully examined in each instance to protect the legislative and constitutional designs."[261] These factors, the court emphasized, were especially relevant in deciding what relief was due for violations of the law.[262]

The *McComas* analysis is an attractive response to a future judicial challenge brought against a policymaking body under Iowa Code Chapter 21. Given the inflexible line Chapter 21 currently draws between allowed and prohibited speech, a "common sense" interpretation would provide the flexibility needed to avoid undesirable constitutional and policy results. Constitutionally, *McComas* tends to "narrowly tailor[] [the open meetings law] to further the state's compelling governmental interests."[263] As a matter of policy, *McComas* allows courts to examine the totality of the circumstances behind an allegedly illegal meeting, which helps to head off absurd interpretations and consequences.[264] This "common sense," totality of the circumstances analysis squares well with Iowa law concerning statutory interpretation, which requires a court to "consider among other matters . . . [t]he consequences of a particular construction."[265] When interpreting statutes, the Iowa Supreme Court favors "reasonable interpretation[s] that achieve[] [a] statute's purposes and avoid[] absurd results."[266] Absurd results—such as prohibiting a general lunchtime discussion of education policy by two members of a school board—could be avoided by adopting the *McComas* framework for interpreting Iowa's open meetings law.[267] A more flexible judicial standard for evaluating Chapter 21 will effectively address many of the flaws that beset the law in its current form.

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260. *McComas*, 475 S.E.2d at 290; Mulroy, *Sunlight's Glare*, *supra* note 113, at 329.

261. *McComas*, 475 S.E.2d at 291.

262. *Id.* at 291 n.22.

263. Mulroy, *Sunlight's Glare*, *supra* note 113, at 330 (internal quotation marks omitted).

264. *See McComas*, 475 S.E.2d at 290–91.

265. IOWA CODE § 4.6 (2018).

266. State v. Paye, 865 N.W.2d 1, 7 (Iowa 2015) (quoting State v. Gonzalez, 718 N.W.2d 304, 308 (Iowa 2006)).

267. *See* Johnson, *supra* note 172, at 37; *supra* note 200 and accompanying text.

V. CONCLUSION

Openness in government has developed significantly since the secretive days of the Cold War. New laws must be constantly reformulated to account for technology's potential impact on government secrecy.[268] But these laws are still subservient to the First Amendment. To the extent that Iowa Code Chapter 21 is a content-based restriction on elected officials' expression, it must be narrowly tailored to further a compelling interest of the state. It is not clear that the law is so tailored,[269] nor is it clear that the law would survive even an intermediate scrutiny analysis.[270] These, and the policy downsides of the law, can be remedied both legislatively and judicially through new and creative amendments and interpretations.[271] Legislative solutions include adding a definition of "deliberation" to Chapter 21, opening up alternative channels of communication between elected officials, and eliminating civil fines for unintentional violations of the law. Judicially, Iowa's courts should follow the lead of West Virginia in the *McComas* case: use flexibility and common sense to assess the relative seriousness of a violation of the law.

When a simple conversation between two school board members from a small town in Iowa is potentially illegal,[272] it should arouse suspicion and demand attention from everyone. Reforms of Iowa's open meetings law will ensure the public interest in good government is properly balanced with the free speech rights of our elected leaders.

268. For instance, the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899 (2002) was an attempt by Congress to harness the internet's potential, and reign in its potential dangers, on government openness. *See* PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 534–36 (11th ed. 2011).

269. *See supra* Section III.A.

270. *See supra* Section III.C.

271. *See supra* Part IV.

272. *See supra* note 191 and accompanying text.