Wilson's Foreboding Forecast for Sunshine Laws:
Partly Cloudy, With a Chance of Unconstitutionality

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I. Introduction

Popular culture's fascination with zombies has given us star-packed dark comedy films ("Shaun of the Dead," "The Dead Don't Die")[1] and even a zombie update to a Jane Austen classic.[2] Now, the Supreme Court is getting into the act. A case slated for argument this fall threatens to disentomb a previously dead-and-buried constitutional issue about whether state statutes requiring government bodies to hold their deliberations in public infringes the First Amendment rights of the participants.

The case, styled below as *Wilson v. Houston Community College System*,[3] raises the question of whether members of a government body have First Amendment rights enforceable against the body itself. How the Court decides the case could breathe new life into an old controversy over the enforceability of state open-meeting statutes[4] – or heave the final shovelful of dirt that buries the issue, seemingly, for good.

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[1] THE DEAD DON'T DIE (Jim Jarmusch, dir. 2019); SHAUN OF THE DEAD (Edgar Wright, dir. 2004).
[2] SETH GRAHAME-SMITH, PRIDE AND PREJUDICE AND ZOMBIES (2009).
[3] 955 F. 3d 490 (5th Cir. 2020), cert granted by ___ S.Ct. ___, 2021 WL 1602636 (Apr. 26, 2021).
[4] *See infra* Sec. IV.

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On April 26, 2021, the Court granted certiorari to review a Fifth Circuit U.S. Court of Appeals decision finding that an elected member of a state community college governing board had an actionable First Amendment challenge to the board's decision to censure him.[5] Although the issue in the *Wilson* case is seemingly a narrow and low-stakes one, the larger principle – whether elected officials have First Amendment protection when speaking in connection with their governmental duties – may end up having spillover impact on the enforceability of state open meeting laws.

The *Wilson* scenario – an elected member of a governmental body, punished for engaging in expression regarded as disloyal to the agency – raises intriguing line-drawing questions. Ordinarily, a government agency has wide latitude to punish an employee for speech disruptive to the effective functioning of the workplace.[6] But when the speaker is part of the ultimate policymaking body for the workplace – and particularly when the speaker must periodically face the electorate, which *requires* speaking about governmental issues – different standards may apply.

This article examines the *Wilson* case in the context of decades' worth of legal challenges involving the free-speech rights of government officials, including a line of cases in Wilson's home state of Texas challenging whether the First Amendment assures elected officials the right to speak privately about government business without being subject to prosecution under state open meeting laws. The article concludes that, if the Supreme Court decides that strict First

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[5] Houston Comm. Coll. Sys. v. Wilson, No. 20-804, ___ S.Ct. ___, 2021 WL 1602636 (Apr. 26, 2021).

[6] *See* J. Michael McGuinness, *Whistleblowing and Free Speech: Garcetti's Early Progeny and Shrinking Rights of Public Employees*, 24 TOURO L. REV. 529, 568 (2008) (decrying erosion of First Amendment protection for government workers and concluding: "More than 18 million American public employees are now at greater risk of retaliation and are left without First Amendment protection for whistleblowing about a vast range of corruption and malfeasance in America").

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Amendment scrutiny should apply to an elected body's decision to sanction one of its members for speech, that rigorous constitutional scrutiny could imperil the enforceability of open meeting statutes in Texas and across the country. The authors encourage the Court to carefully consider the potential unintended consequences of deciding, without qualification, that elected officials have free expression rights on par with those of all other speakers.

II. The *Wilson* Case

The plaintiff in the case, David B. Wilson, is a conservative political activist who served a turbulent tenure as an elected trustee of the Houston Community College District.[7] Wilson, a failed Houston mayoral candidate, got elected to the higher-ed board despite being mostly known as an opponent of the college.[8] While serving on the board between 2014 and 2019, Wilson continued his assertively contrarian ways, to the point that the board's chair called his behavior "reprehensible."[9]

The tension came to a head in 2017, when the board voted to fund an overseas HCC campus in Qatar over Wilson's opposition.[10] In response, Wilson criticized his fellow trustees through a wave of negative robocalls accusing them of failing to represent their constituencies.[11]

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[7] In its petition for Supreme Court review, the college board characterizes Wilson's term as a trustee as "an increasingly chaotic series of events," and explains: "In a span of three years, he filed multiple lawsuits against HCC, helped others to file additional lawsuits, was accused of leaking confidential information, publicly denigrated HCC's anti-discrimination policy, and sparked media attention for a laundry list of other controversies." Houston Comm. College Sys. v. Wilson, No. 20-804, Pet. for Writ of Cert. (Dec. 11, 2020) at 2, 4.

[8] *See* Jo DePrang, *After Shady Campaign, Houston Community College Foe Becomes Trustee*, TEXAS OBSERVER (Nov. 12, 2013), https://www.texasobserver.org/shady-campaign-houston-community-college-foe-becomes-trustee/ (describing Wilson's fractious history with the college, which included campaigning against bond funding for the college and suing the college to block its purchase of real estate).

[9] Lindsay Ellis, *This Trustee Was Censured by His Board. Now the Supreme Court Will Weigh In*, CHRON. OF HIGHER EDUC. (Apr. 26, 2021), https://www.chronicle.com/article/this-trustee-was-censured-by-his-board-now-the-supreme-court-will-weigh-in.

[10] *Id.*

[11] *Id.*

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He also maintained a website to air complaints about the board.[12] Wilson also hired a private detective to investigate the college, and to look into whether a fellow trustee lived in the district she was elected to represent.[13] Adding to the tension, Wilson filed a lawsuit against HCC – his fourth in as many years – seeking a declaratory judgment that allowing a trustee to vote via videoconference violated the board's bylaws.[14]

In January 2018, the board voted to censure Wilson, denouncing him for acting in a manner "not consistent with the best interests of the College or the Board, and in violation of the Board Bylaws Code of Conduct."[15] The board directed Wilson to cease all inappropriate conduct and warned that any repeat of improper behavior would constitute grounds for unspecified further disciplinary action.[16] As part of the censure's sanctions, Wilson was deemed ineligible to hold board leadership positions or get reimbursed for board travel. He also would need additional approval for community-affairs spending beyond what other board members would require.[17]

Not surprisingly, Wilson sued HCC – again. He alleged that the censure violated his right to free speech and that HCC had retaliated against him for exercising his First Amendment rights.[18] The Southern District of Texas granted HCC's motion to dismiss.[19] The court largely followed the reasoning of a factually analogous Tenth Circuit case, *Phelan v. Laramie County Community College Board of Trustees*, in which that court held that an elected community college board did not violate the First Amendment by censuring of one its members, because the

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[12] Wilson v. Houston Cmty. Coll. Sys., 955 F. 3d 490, 493 (5th Cir. 2020).
[13] *Id.*
[14] *Id.*
[15] Wilson v. Houston Cmty. Coll. Sys., No. 4:18-CV-00744, 2019 WL 1317797 at *1 (S.D. Tex. Mar. 22, 2019).
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.* at *3-4.

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censure was merely a statement of opinion that did not interfere with the member's opportunity to speak.[20] Likewise, the *Wilson* court held that HCC's censure did not infringe on Wilson's First Amendment rights, since he remained free to perform his duties, including voicing his concerns regarding decisions made by the Board.[21]

But in an April 2020 ruling, the Fifth Circuit reversed and remanded.[22] Writing for a unanimous three-judge panel, Judge W. Eugene Davis wrote that the district court "improperly endorsed" the Tenth Circuit's decision in *Phelan* and ignored cases in which reprimands of elected officials' speech did raise First Amendment issues.[23] Instead, the panel relied on two Fifth Circuit cases holding that the judges whose protected speech triggered censure by the Texas Commission on Judicial Conduct could raise First Amendment retaliation claims.[24] Importantly, in a 1999 judicial reprimand case, the Fifth Circuit refused to apply the diminished level of First Amendment protection that would apply in an employee/employer workplace dispute, and instead applied the "strict scrutiny" that would govern a claim brought by a non-employee whose speech was censored.[25] The panel reasoned that even though the past Fifth Circuit cases involved judges rather than legislators, their reasoning still applies because judges are still considered "political actors," and a reprimand against any elected official for speech addressing a matter of public concern should be actionable.[26]

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[20] *See id.* at *3, citing *Phelan*, 235 F. 3d 1243 (10th Cir. 2000).
[21] *Id.*
[22] Wilson v. Houston Cmty. Coll. Sys., 955 F. 3d 490 (5th Cir. 2020).
[23] *Id.* at 497.
[24] *Id.* at 497-98, citing Scott v. Flowers, 910 F.2d 201 (5th Cir. 1990); Colson v. Graham, 174 F.3d 498 (5th Cir. 1999).
[25] *See id.* at 498, citing *Colson*, 174 F.3d at 557-58.
[26] *Id.* at 499.

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The full Fifth Circuit then denied a petition to rehear the case *en banc* with a divided 8-8 vote.[27] Judge Edith H. Jones, joined by four other dissenters, wrote to insist that the panel erred in relying on precedent involving judges, since judges and legislators have fundamentally different public roles.[28] "The First Amendment was never intended to curtail speech and debate within legislative bodies," Jones wrote, asserting that the decision would leave trial courts stuck refereeing political disputes for which constitutional law provides no "manageable legal standards."[29]

The Supreme Court accepted the case in April 2021 for the term beginning October 2021.[30] The college framed the question in terms of the authority of the body, not the rights of the individual member: "Does the First Amendment restrict the authority of an elected body to issue a censure resolution in response to a member's speech?"[31]

III. The Rights of Elected Officials

A. The Majority View: Censures Are Non-Actionable

The Fifth Circuit's *Wilson* result is an outlier among the handful of known appellate rulings to confront the scenario of an elected official challenging a censure resolution from fellow members of the same governing body. Appellate courts have generally taken the position that condemnation is itself an act of constitutionally protected speech, part of the give-and-take that politicians sign up for when they seek elected office.

In the case that the trial court relied on in *Wilson*, *Phelan v. Laramie County Community College Board of Trustees*, the Tenth Circuit held that an elected body's censure of one of its

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[27] Wilson v. Houston Cmty. Coll. Sys., 966 F.3d 341 (5th Cir. 2020) (denying rehearing en banc)
[28] *Id.* at 343-44 (Jones, J., dissenting from denial of rehearing).
[29] *Id.* at 342 (Jones, J., dissenting from denial of rehearing).
[30] Houston Cmty. Coll. Sys. v. Wilson, ___ S.Ct. ___, 2021 WL 1602636 (Apr. 26, 2021).
[31] Houston Cmty. Coll. Sys. v. Wilson, Docket No. 20-804, Pet. for Writ of Certiorari (Dec. 11, 2020) at i.

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members does not give rise to an actionable First Amendment claim.[32] In *Phelan*, a community college board censured a trustee who ran a newspaper advertisement opposing a proposed tax measure supporting the college. The court relied on the well-established proposition that the government may interject its own voice as a speaker, so long as its speech does not "punish or threaten to punish" private speech.[33] Therefore, the censure imposed on Phelan was the board's statement expressing disapproval of her speech rather than a penalty, since the censure in no way restricted her opportunity to speak.

The Fifth Circuit panel in *Wilson* explicitly refused to follow the reasoning of *Phelan*, finding that the Tenth Circuit undervalued the First Amendment interests of elected officials.[34] But *Phelan* is no outlier; it represents the majority view of the appellate courts that have spoken to the issue.

In *Zilich v. Longo*, the Sixth Circuit rejected a former city council member's First Amendment challenge to a council resolution of condemnation.[35] The former councilman alleged that he was censured for constitutionally protected speech critical of the city's mayor and law department.[36] The appeals court, however, found no triable free-speech claim, because a government body's resolution is "simply the expression of political opinion."[37] The court reasoned that the First Amendment protects both "Zilich's right to oppose the mayor" and the council's "right to oppose Zilich."[38] The court did, however, allow the former councilman to go to trial on a First Amendment claim of retaliatory harassment, based on testimony that the mayor

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[32] 235 F.3d 1243 (10th Cir. 2000).
[33] *Id.* at 1247.
[34] *Wilson*, 955 F.3d at 497.
[35] 34 F.3d 359 (6th Cir. 1994).
[36] *Id.* at 363.
[37] *Id.* at 364.
[38] *Id.* at 363.

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and fellow council members openly talked during public council meetings about physically harming the councilman and his wife.[39]

In *Whitener v. McWatters*, the Fourth Circuit cited *Zilich* in finding no First Amendment violation when an elected county board of supervisors censured a member for using "abusive language" toward other board members in private conversations.[40] The court held that the board's censure did not violate the First Amendment.[41] The court grounded its decision in deference to elected bodies to preserve their own institutional integrity: "[B]ecause citizens may not sue legislators for their legislative acts, legislative bodies are left to police their own members. Absent truly exceptional circumstances, it would be strange to hold that such self-policing is itself actionable in a court."[42] Noting that speech in the course of legislative deliberations generally is immune from civil action, the Fourth Circuit extended the logic of that immunity to a resolution that is, effectively, an act embodying the body's speech: "As legislative speech and voting is protected by absolute immunity, the exercise of self-disciplinary power is likewise protected."[43]

In a case not directly involving speech in the course of performing board duties, the Second Circuit found no basis for a First Amendment claim when a school board member was censured for misconduct during a guest lecture at a high school (specifically, showing a film clip containing nudity as part of a lecture about filmmaking).[44] Because the plaintiff was performing the duties of a classroom teacher, the court did not have occasion to consider the applicable level of First Amendment protection for an elected board member, but rather, applied the minimal

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[39] *Id.* at 365.
[40] 112 F. 3d 740, 745 (4th Cir. 1997).
[41] *Id.* at 745.
[42] *Id.* at 744.
[43] *Id.*
[44] Silano v. Sag Harbor Union Free School Dist. Bd., 42 F. 3d 719 (2d Cir. 1994).

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level of First Amendment scrutiny that applies when a classroom teacher is punished for on-the-job speech.[45]

The Vermont Supreme Court has also held that an elected official cannot bring a Section 1983 suit in response to being censured.[46] A school board member sued after his fellow members – who considered him "difficult to work with and disruptive" and accused him of making public statements undermining the board's positions – adopted a resolution reprimanding him for behaving unethically.[47] The court concluded that censure alone did not interfere with the plaintiff's ability to speak or with his right to freedom of association, so there was no basis for a constitutional claim.[48]

The Fifth Circuit's decision in *Wilson* thus represents a break from the general consensus deferring to the authority of elected bodies to police the conduct of their own members. However, the consensus perhaps looks somewhat less overwhelming in view of the fragmented reasoning followed by pre-*Wilson* courts, with some emphasizing deference to legislative bodies to regulate their own internal affairs, and others emphasizing the relative immateriality of a censure as mere counter-speech rather than a restraint on speech.

B. Check Your First Amendment Rights at the Voting Booth?

That courts have largely rejected constitutional challenges to censure resolutions represents a departure from the judiciary's normal solicitude for the free speech rights of elected officials. In general, elected officials have fared well in other types of First Amendment challenges – far better than ordinary public employees, whose rights have been narrowed by adverse Supreme Court precedent.

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[45] *Id.* at 723-24.
[46] LaFlamme v. Essex Junction Sch. Dist., 750 A. 2d 993 (Vt. 2000).
[47] *Id.* at 994-95.
[48] *Id.* at 998-99.

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In its 1983 *Connick* ruling, the Court stripped government employees of First Amendment protection if they are punished for speech that represents a purely personal grievance as opposed to addressing a matter of broader public concern.[49] Then in the 2006 *Garcetti* case, the Court went even further, holding that speech ceases to be the employee's speech at all when it is made as part of an official work assignment, and thus cannot be grounds for a First Amendment claim.[50] These rulings profoundly tilted the balance of power in favor of government employers, so that employees are vulnerable to retaliation even for speech of undeniable public importance if it was uttered in the course of duty.[51]

Notwithstanding this adverse precedent, most courts confronting free-speech cases brought by elected officials have declined to apply the *Connick*/*Garcetti* doctrine with the same rigor that would apply to other public employees. In an illustrative case, a federal district court in Illinois decided that an elected member of a county governing board could proceed with a First Amendment retaliation claim against the board, after he alleged that he was groundlessly arrested on trumped-up battery charges at the board's instigation and then excluded from speaking to county employees or otherwise participating in county business.[52] The board argued for dismissal on the grounds that, under *Garcetti*, the board member lacked any protectable First Amendment interest in speech made as part of official duties.[53] But the court disagreed, and instead of following *Garcetti*, applied the Supreme Court's more speech-protective precedent in

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[49] Connick v. Myers, 461 U.S. 138, 147 (1983).
[50] Garcetti v. Ceballos, 547 U.S. 410, 424 (2006)
[51] *See* David L. Hudson Jr., *The Supreme Court's Worst Decision in Recent Years - Garcetti v. Ceballos, the Dred Scott Decision for Public Employees*, 47 MITCHELL HAMLINE L. REV. 375, 390 (2020) (bemoaning lower courts' application of the *Garcetti* principle to dismiss First Amendment claims by whistleblowing teachers and police officers attempting to call public attention to safety hazards: "It makes little sense to deprive the public of its best sources of information – that is, the employees who actually witness problems firsthand").
[52] Hoffman v. DeWitt Cnty., 176 F.Supp.3d 795 (C.D. Ill. 2016).
[53] *Id.* at 811.

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Bond v. Floyd, which involved retaliation against an elected official.[54] In *Bond*, the Supreme Court found that the First Amendment prohibited the Georgia legislature from refusing to seat a duly elected representative, civil-rights activist Julian Bond, on the grounds of his outspoken anti-war advocacy.[55] Chief Justice Earl Warren wrote for a unanimous Court: "The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy."[56] Relying on *Bond*, the Illinois court in *Hoffman* found a decisive difference between a subordinate employee overruled by a supervisor (as in the *Garcetti* case) versus a member of the agency's governing body "who is being prevented from representing his constituents" by infirmities his co-equal board members impose.[57] Court after court has likewise applied *Bond*, not *Garcetti*, when the speaker is an elected official alleging retaliation for speech arising out of official duties.[58]

In light of this body of precedent, it is perhaps not surprising that Houston Community College chose to litigate its case based on judicial deference to the internal housekeeping discretion of a co-equal branch of government, rather than by arguing that board members lack First Amendment protection for what they do and say.

C. *Carrigan*: Ethics Laws v. The First Amendment

[54] *See id.*, citing *Bond*, 385 U.S. 116 (1966).
[55] *Bond*, 385 U.S. at 137.
[56] *Id.* at 135-36.
[57] *Hoffman*, 176 F.Supp.3d at 812.
[58] *See* Greenman v. City of Hackensack, 486 F.Supp.3d 811 (D.N.J. 2020) at *824-25 (following *Bond* and not *Garcetti* and allowing city council member whose health insurance was canceled after speech critical of the council's majority could proceed with a First Amendment claim); Zerla v. Stary Cty., No. 1:19-cv-01140, 2019 WL 3400622 (Jul. 25, 2019) at *6-*7 (noting "tension" between public employee speech cases and the more protective *Bond* standard, and choosing to follow *Bond* in retaliation claim by county board member).

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The Supreme Court once before dealt with the free-speech rights of elected officials, in a constitutional challenge to state conflict-of-interest laws, though the decision did not broadly address the force with which First Amendment rights protect public officeholders.

Nevada's Ethics in Government Law contains a provision that requires public officials to recuse themselves from voting on or advocating for the passage of legislation if the public official's judgment would be materially affected by a commitment to the interests of others.[59] Michael Carrigan, an elected city council member in Nevada, voted to approve a hotel/casino project proposed by a company that paid Carrigan's longtime friend and campaign manager as a consultant – a relationship Carrigan disclosed when he voted.[60] The Nevada Commission on Ethics censured Carrigan after concluding that he had a disqualifying conflict of interest, under a "catch-all" provision of the ethics code that applied to relationships "substantially similar" to the relationships explicitly spelled in the code as grounds for recusal.[61]

Carrigan argued that the ethics code unconstitutionally infringed his ability to express himself by way of casting his vote. A state trial court rejected the argument, but a divided Nevada Supreme Court reversed, holding that an elected official's act of voting was expressive and thus protected by the First Amendment.[62] The appellate court employed the strict scrutiny that applies to a content-based restraint on speech, and found that the "catch-all" ethics provision was unconstitutionally overbroad.[63]

The Supreme Court accepted the ethics commission's appeal and reversed. In a unanimous opinion written by Justice Antonin Scalia, the Court held that restrictions on

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[59] Nev. Rev. Stat. § 281A.420(2) (2007).
[60] Nevada Comm'n. on Ethics v. Carrigan, 564 U.S. 117, 120 (2011).
[61] *Id.*
[62] Carrigan v. Commission on Ethics, 236 P. 3d 616, 621 (Nev. 2010).
[63] *Id.* at 622-23.

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legislators' voting are not restrictions on speech.[64] Scalia emphasized the long-established tradition of legislative recusal rules, which creates a strong presumption that the prohibition is constitutional.[65] A legislator's act of voting, the Court reasoned, is the commitment of his apportioned share of the legislature's power to the passage or defeat of a particular proposal – a power that is not personal to the legislator, but which belongs to the people.[66] Because the legislator has no personal ownership of voting power, an infringement on exercising the vote does not injure the legislator's constitutionally protected rights.[67] The Court distinguished its holding in *Doe v. Reed*, which found that a voter's act of signing a petition was constitutionally protected speech, because a petition signature exists to express the signer's support or opposition for a cause, even if the signature also serves as a "vote" to put a proposition on a referendum ballot.[68] "It is one thing to say that an inherently expressive act remains so despite its having governmental effect, but it is altogether another thing to say that a governmental act becomes expressive simply because the governmental actor wishes it to be so," Scalia wrote.[69]

Carrigan in no way settles the issue presented by *Wilson* as to whether a government body has a free hand to adopt a censure resolution without implicating the First Amendment rights of the censured member. But, intriguingly, the *Wilson* case somewhat inverts the interests that were at play in *Carrigan*: It is the government body arguing that *its* vote is speech. Justice Scalia pulled that door snug – though not, perhaps, tightly shut – when he wrote in *Carrigan*:

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[64] *Carrigan*, 564 U.S. at 127.
[65] *Id.* at 122-23.
[66] *Id.* at 125.
[67] *Id.* at 126.
[68] *Id.* at 128.
[69] *Id.*

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"This Court has rejected the notion that the First Amendment confers a right to use governmental mechanics to convey a message."[70]

IV. Open Meeting Laws and the First Amendment

When *Carrigan* came before the Supreme Court, open government organizations supported the Nevada Commission's position, out of concern that a broad ruling in favor of elected officials' constitutional rights could cast doubt on the enforceability of open-meeting laws:

> Finding the strict scrutiny standard applicable to restrictions on government officials' "speech" could have fatal implications for state and federal open meetings laws that require government officials forbear from deliberating in private to discuss matters before their respective bodies. As such laws are worded, government officials could argue that such restrictions are not narrowly tailored in that they often ban a wide swath of communications between officials that relate to or could affect their public voting decisions.[71]

To understand why these statutes are important, and why the *Wilson* case could cloud their enforceability, requires stepping back and looking at the origin of open meeting laws and how they operate as a check on government overreach.

A. Open Meeting Fundamentals

The First Amendment forcefully protects the right to speak about matters of public concern, including the affairs of state and local government.[72] Every state and the federal government[73] have laws affording the public some degree of access to meetings of decision-

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[70] *Id.*
[71] At *6-7.
[72] *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978) (observing that commentary addressing a state income tax referendum "is at the heart of the First Amendment's protection").
[73] The federal open meetings statute, 5 U.S.C § 552b(a)(1), applies only to meetings of boards or commissions within the executive branch of government. Because the *Wilson* case is about the rights of elected officials, and the federal statute applies only to appointed officials, the federal law is not implicated directly in the case. Accordingly, further references to open meeting laws will refer to state laws only.

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making bodies.[74] These statutes go by different names, but often are referred to as "sunshine" laws, because they require public officials to conduct official business in the light of day. State open meeting laws all guarantee, at a minimum, three things: That public bodies must give advance notice of their meetings, must admit the public to watch the proceedings, and must publish minutes summarizing the deliberations and decisions made.[75] These laws enable the public to keep watch over school boards, city councils and other policymaking entities, both elected and appointed. While states commonly enable public bodies to close their meetings to discuss topics of special sensitivity or strategic importance, the default assumption is that meetings should be open for public observation, and that closure requires particularized justification.[76] One commentator has called the enforcement of sunshine laws "one of the most essential building blocks of a democratic society – that public business be performed in an open and public manner."[77]

Conducting meetings in public has well-recognized civic benefits: Openness can deter corruption, build a sense of trust that decisions are being made legitimately, and equip citizens with information to enable them to have effective input into government decisions affecting their

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[74] Patience A. Crowder, *"Ain't No Sunshine": Examining Informality and State Open Meetings Acts as the Anti-Public Norm in Inner-City Redevelopment Deal Making*, 74 TENN. L. REV. 623, 641 (2007).
[75] *See id.* at 642-43 (describing common features of state sunshine laws).
[76] *See* Teresa Dale Pupillo, *The Changing Weather Forecast: Government in the Sunshine in the 1990's–An Analysis of State Sunshine Laws*, 71 WASH. U. L. Q. 1165, 1172-73 (1993) (explaining that states commonly provide for closed "executive sessions" for such topics as negotiating real estate transactions, obtaining legal advice about ongoing or impending litigation, or other such matters where disclosure might put the government body at a strategic disadvantage, but that government bodies must observe procedural safeguards before going into closed session).
[77] Robert H. Drummer, *May I Watch? Complying With the Open Meetings Act*, 39 MD. BAR J. 27, 31 (2006).

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lives.[78] But critics suggest that forced openness also exacts civic costs: Governance may be less efficient, public disclosure of information may put the government at a strategic disadvantage or compromise individual privacy, and candid discussion may be inhibited by fear of adverse public reaction.[79] Much of the pushback against openness "stems from a belief in the need for a 'zone of privacy' to allow government officials to deliberate amongst themselves in private without fear of appearing ignorant to the masses."[80]

State statutes provide varying enforcement mechanisms if a meeting is conducted unlawfully. Compliance with open meeting laws is enforced primarily by way of civil penalties, including the possibility of a judicially ordered "do-over" of any decisions made outside public view.[81] But 19 state statutes incorporate criminal penalties for government officials who participate in unlawfully closed meetings. Of those 19, seven provide only a fine or (in one

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[78] 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, 759-60 (2004).
[79] Charles N. Davis, Milagros Rivera-Sanchez & Bill F. Chamberlin, *Sunshine Laws and Judicial Discretion: A Proposal for Reform of State Sunshine Law Enforcement Provisions*, 28 URB. LAW. 41, 44 (1996).
[80] Crowder, *supra* n. 74, at 644 n.126.
[81] *See* Davis *et al.*, *supra* n. 79, at 44-45 (enumerating range of statutory civil remedies).

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instance) removal from office as the maximum penalty.[82] However, 12 states – including Texas – contemplate the possibility of jail for especially flagrant violators,[83] though prosecution is rare.[84]

B. The Texas Three-Step: TOMA Is / Isn't / Is Constitutionally Infirm

Because people who are subject to open meeting requirements must refrain from certain types of speech (*i.e.*, discussing official business with their colleagues outside of duly noticed meetings), questions understandably have arisen about whether these laws impermissibly chill speech in contravention of the First Amendment. In particular, critics have challenged the constitutionality of exposing board members to criminal prosecution for what might be nothing

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[82] *See* Ga. Code Ann. § 50-14-6 (providing maximum fine of $1,000); Haw. Rev. Stat. § 92-13 (penalizing criminal violation of open meetings law with removal from office); N.M. Stat. § 10-15-4 (providing $500 fine for violation); 65 Pa.C.S. § 714 (providing fines of up to $2,000 plus costs for repeat intentional violations); 1 V.S.A. § 314 (specifying fine of no more than $500 as penalty for intentional violation); W. Va. Code § 6-9A-7 (providing for $500 fine for a first offense and up to $1,000 for subsequent offenses); Wyo. Stat. Ann. § 16-4-408 (authorizing fine of not more than $750 for intentional violation).
[83] *See* Ark. Code § 25-19-104 (making violation a misdemeanor punishable by up to 30 days in jail plus a fine); Calif. Govt. Code § 54950.5 (specifying that violation is a criminal misdemeanor, which can carry jail time and fines); Fla. Stat. § 286.011 (identifying knowing violation as a second-degree misdemeanor, which carries up to 60 days in jail); Ill. Comp. Stat. § 120/4 (categorizing violation as Class C misdemeanor, which is punishable by up to 30 days in jail); Mich. Comp. Laws § 15.272 (allowing for criminal penalties of up to a year in jail for a repeat violation); Neb. Rev. Stat. § 84-1414(4) (providing that repeat violation is a Class III misdemeanor, which is punishable by up to three months in jail); N.D. Rev. Stat. § 84-1414(4) (identifying repeat offense as a Class III misdemeanor, which can result in a jail sentence of up to three months); Nev. Rev. Stat. § 241.040 (stating that every participant in an unlawfully closed meeting is guilty of a misdemeanor, which in Nevada can be punished by up to six months in jail and/or fines); N.D. Cent. Code § 44-04- 21.3 (empowering attorney general to seek misdemeanor penalties of up to 360 days in jail for a repeat open meetings violator); Okla. Stat. tit. 25, § 314 (providing that willful violation is punishable by up to a year in jail plus fines); S.D. Codified Laws § 1-25-1 (identifying violation of open meetings law as Class 2 misdemeanor, which carries a jail sentence of up to 30 days or fines); Utah Code § 52-4-305 (stating that knowing or intentional violation is a class B misdemeanor, which under Utah law carries a possible sentence of up to a year in jail plus fines).
[84] *See* Susannah Nesmith, *When public officials skirt open meetings laws, what can we do?*, COLUMBIA JOUR. REV. (Mar. 14, 2014), https://archives.cjr.org/united_states_project/atlanta_journal_constitution_open_meetings_braves_stadium_paulding_airport.php ("[T]he truth is, open meetings violations are almost never punished, even in states with strong laws.").

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more sinister than an exchange of information.[85] The debate has been especially pitched in Texas, which has seen a series of legal challenges over the past two decades by elected officials chafing against the strictures of the Texas Open Meetings Act ("TOMA").[86]

In 1999, a citizen activist group, Hays County Water Planning Partnership, sued the Hays County government, alleging that the public notice provided for an October 1999 meeting was legally deficient.[87] Specifically, the Partnership alleged that the mention on the agenda of a "presentation" by one of the county commissioners was inadequate to enable the public to prepare for what turned out to be a detailed presentation during which the commissioner, Russ Molenaar, launched an attack on the Partnership.[88] The court agreed that the notice was insufficient to satisfy TOMA, because it failed to identify the topics that Molenaar would address.[89] The county argued that TOMA could not be interpreted to restrict Molenaar's speech, because his remarks were protected by the First Amendment, and the trial court agreed.[90] But the Fifth Circuit reversed, finding no First Amendment injury because the commissioner "suffered

[85] *See* Steven J. Mulroy, *Sunshine's Shadow: Overbroad Open Meetings Laws as Content-Based Restrictions Distinct From Disclosure Requirements*, 51 WILLAMETTE L. REV. 135, 193 (2015) ("[O]pen meetings laws are content-based speech regulations triggering strict scrutiny. The strictest of these sunshine laws would fail strict scrutiny."); Devon Helfmeyer, *Do Public Officials Leave Their Constitutional Rights at the Ballot Box? A Commentary on the Texas Open Meetings Act*, 15 TEX. J. ON C.L. & C.R. 205, 231 (2010) (suggesting that TOMA lacks the requisite tailoring to survive strict scrutiny because only a minority of states penalize noncompliance criminally, suggesting that TOMA's criminal penalties cannot be justified as necessary to further the objective of transparency). *See also* Luke J. Cole, *Let's Meet in the Middle: Constitutional Challenges and Policy Problems With Iowa's Open Meetings Law, With Suggestions for Improvement*, 104 IOWA L. REV. 2055, 2079 (2019) (arguing that the requirement to give notice of even incidental lunchtime meetings where business is discussed is "burdensome and impractical, almost comically so" and arguing that open meeting laws should be narrowed).
[86] Tex. Gov't Code § 551.144.
[87] Hays Cty. Water Planning P'nshp v. Hays County, 41 S.W.3d 174, 176 (Tex. App. 2001).
[88] *Id.*
[89] *Id.* at 181.
[90] *Id.*

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no sanction or penalty by virtue of his speech and would have suffered none had the agenda fully disclosed the topics on which he would speak."[91] Accordingly, the court found that the public notice requirement of TOMA can require detailed disclosure of the topics to be addressed without running afoul of the First Amendment.[92]

Texas courts next entertained a series of challenges to the constitutionality of criminal penalties for open meeting violations, all arising out of the same email exchange by council members of a small southwest Texas town. In February 2005, three members of the Alpine City Council were indicted in state court for violating TOMA because they engaged in an email discussion about a pending decision to hire an engineering firm.[93] Prosecutors argued that the discussion constituted a "meeting" because a decision-making quorum of the body was deliberating in private about a matter imminently coming before the council.

Although the indictments were later dismissed without prejudice, the two council members sued in federal court, alleging that fear of future prosecutions was chilling their ability to engage in constitutionally protected political speech.[94] The U.S. district court dismissed the plaintiffs' claims, citing the Supreme Court's *Garcetti* standard governing public employee

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[91] *Id.* at 182.
[92] *Hays County* was the rare case in which the proponent of free-speech rights – in this case, the commissioner and the county – actually relied on the Supreme Court's employee speech jurisprudence offensively instead of defensively. They argued that, because Molenaar was addressing a matter of public concern, his speech fell outside the constraints of *Connick* and thus was entitled to robust constitutional protection. *See id.* at 181. The circuit court found the argument unpersuasive, because the commissioner plainly was speaking in his official role and not his "citizen" role. *See id.* at 182. One might wonder whether, had the county argued for protection *greater* than the *Connick* level, on the grounds that an elected official ought not be limited by the same constraints that apply to rank-and-file county employees, the analysis might have changed. But because *Connick* was being relied upon as an affirmative source of the commissioner's rights – and *Connick* protects speech as a citizen addressing a matter of public concern – the analysis became simpler.
[93] Rangra v. Brown, 566 F.3d 515, 518 (5th Cir. 2009).
[94] Rangra v. Brown, No. P-05-CV-075, 2006 WL 3327634 (W.D. Tex. Nov. 7, 2006).

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speech: "For purposes of determining what constitutes protected speech under the First Amendment, there is no meaningful distinction among public employees, appointed public officials, and elected public officials."[95] Because *Garcetti* provides that official-duty speech is unprotected by the First Amendment, the court held, discussions about agency business among elected board members enjoys no constitutional protection, so legislators are free to regulate it.[96] The plaintiffs appealed.

A three-judge panel of the Fifth Circuit held that the district court erred in its premise that elected officials have no more First Amendment protection than ordinary government employees.[97] Instead, the panel agreed with the plaintiffs that the criminal provisions of TOMA are content-based regulations of speech that are subject to strict scrutiny.[98] Furthermore, the panel noted that the penalty provision of TOMA is "content-based" because whether public officials may communicate with each other outside of an open meeting depends on whether their speech refers to "public business or public policy over which the governmental body has supervision or control."[99] The Fifth Circuit reversed and remanded the case for the application of strict scrutiny review.

Both sides filed for rehearing *en banc*. However, the *en banc* court summarily vacated the panel opinion and dismissed the case for lack of standing without hearing oral argument.[100] The full Fifth Circuit deemed the case moot since the plaintiff was no longer serving as a city official due to being term-limited as a council member. But that was just the end of Round One.

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[95] *Id.* at *5.
[96] *Id.* at *6-7.
[97] *Rangra,* 566 F.3d at 522.
[98] *Id.* at 521.
[99] *Id.* at 522.
[100] Rangra v. Brown, 584 F. 3d 206 (5th Cir. 2009) (en banc).

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In *Asgeirsson v. Abbott*, four members of the same city council – joined by other elected council members from across the state – sued the Texas Attorney General, seeking a declaratory judgment that the criminal penalty provision of TOMA violates the First Amendment.[101] Specifically, they contended that TOMA is a content-based restriction on political speech, and is unconstitutionally vague and is overbroad.[102] The district judge found that the statute was a content-neutral statute minimally affecting speech rights, which called for intermediate rather than strict judicial scrutiny.[103] To support its finding of content-neutrality, the court explained that TOMA is not intended to restrict speech for its own sake, but rather to target the "secondary effects" of closed-door meetings, which produce distrust and undermine transparency regardless of what is said in the meetings.[104] The statute survived review under intermediate scrutiny, because transparency is a compelling interest, and TOMA is narrowly tailored to achieve that interest, allowing for ample exceptions, such as confidential meetings with counsel to obtain legal advice.[105] Even if the statute were reviewed under the more demanding standard that applies to content-based restrictions, the court held, the result would be the same: The statute survives even strict scrutiny, because "TOMA requires disclosure; TOMA does not circumscribe speech."[106]

Once more, the plaintiffs appealed to the Fifth Circuit. But this time, a different lineup of judges reached a different conclusion: They upheld the trial court's ruling that TOMA does not

[101] Asgeirsson v. Abbott, 773 F.Supp.2d 682, 690 (W.D. Tex. 2011).
[102] *Id.* at 694.
[103] *Id.* at 701.
[104] *Id.* at 697-98.
[105] *Id.* at 702-03.
[106] *Id.* at 703-04.

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restrict speech based on its content, thus obviating the need for the strict scrutiny that a prior panel had called for in *Rangra*.[107]

The appeals court accepted the trial court's reliance on the "secondary effects" doctrine, under which regulators have latitude to enact regulations incidentally restricting speech if the primary target of the regulation is non-expressive byproducts of the speech.[108] The Supreme Court spelled out the secondary effects principle in *Renton v. Playtime Theatres*, a First Amendment challenge to zoning ordinances targeting sexually oriented businesses.[109] The *Renton* Court upheld the ordinance, even though it targeted a subset of businesses offering expressive materials, because (in the justices' view) the ordinance was not aimed at suppressing the erotic message of the speech. Rather, the target was the "secondary effects" of the expression, such as crime and lowered property values, that tended to accompany such theaters.[110] The Court took a rather narrow view of what it means for a regulation to be impermissibly content-based, explaining that even a statute that appears content-based on its face may still be deemed content-neutral if it is justified without regard to the content of the speech.[111] The *Asgeirsson* court adopted that same formulation.[112]

In applying the same logic to TOMA, the Fifth Circuit held that although TOMA is facially content-based, it is aimed at prohibiting the secondary effects of closed meetings.[113] The court agreed with the trial court that closed meetings (1) prevent transparency, (2) encourage

[107] Asgeirsson v. Abbott, 696 F.3d 454 (5th Cir. 2012).
[108] *Id.* at 460.
[109] 475 U.S. 41 (1986).
[110] *Id.* at 47.
[111] *Id.* at 48.
[112] *Asgeirsson*, 696 F.3d at 459-60 ("A statute that appears content-based on its face may still be deemed content-neutral if it is justified without regard to the content of the speech.).
[113] *Id.* at 460-61.

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fraud and corruption, and (3) foster mistrust in government.[114] Those concerns apply regardless of the messages or ideas expressed in the meetings.[115] The court noted that if a quorum of a governing body were to meet privately to discuss non-governmental topics, "no harm would occur."[116] The court found the situation analogous to *Renton*; just as closed business meetings among elected officials are the only types of meetings that foster corruption and distrust, theaters showing adult films were the only theaters that attracted crime and lowered property values – but not because the ideas or messages expressed in the movies themselves caused crime.[117]

The *Asgeirsson* plaintiffs appealed to the Supreme Court, but the Court denied review, leaving – for the moment – the criminal enforcement provisions of TOMA intact.

But *Asgiersson*'s vitality has been questioned, because the Supreme Court refined (and arguably, broadened) its view of what constitutes a content-based restraint on speech in a 2015 opinion, *Reed v. Town of Gilbert*.[118] In *Reed*, the justices found that an Arizona sign ordinance was a content-based restriction, and thus unconstitutional under an application of strict scrutiny.[119] In reversing the circuit court's ruling that the ordinance was content-neutral, the Supreme Court explained that, while proof of legislative antipathy for the speaker or the speaker's message is one way of demonstrating that an enactment is content-based, it is not the only way; a statute that is facially content-discriminatory is presumed to be unconstitutional regardless of whether it was intended to silence a disfavored message.[120] Because the court in *Asgeirsson* applied a motive-centric test – "whether the government has adopted a regulation of

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[114] *Id.* at 461.
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] 576 U.S. 155 (2015).
[119] *Id.* at 171-72.
[120] *Id.* at 168-69.

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speech because of disagreement with the message it conveys"[121] – rather than simply looking to the face of the statute, a post-*Reed* Fifth Circuit decision suggests *Asgeirsson* may no longer carry much force, leaving the constitutionality of the open meetings act still unsettled.[122]

But, as with all good zombie movies, there was yet another sequel. In 2019, the Texas Court of Criminal Appeals struck down a different TOMA provision – making it a crime to conspire to violate the act – as unconstitutionally vague.

In August 2015, Craig Doyal, a county judge and member of the county commission, met with two other commissioners – shy of a quorum of the body – to discuss a potential structure for a county road bond issue.[123] At the time, the Texas Open Meetings Act made it a crime if a member or group of members of a governmental body "knowingly conspires to circumvent this chapter by meeting in numbers less than a quorum for the purpose of secret deliberations in violation of this chapter."[124] Doyal was indicted for violating TOMA, but moved to dismiss on the grounds that the conspiracy provision was unconstitutionally vague and overbroad.[125] The trial court granted the motion and dismissed the indictment.[126]

An intermediate appellate court agreed with the state that the statute was neither unconstitutionally overbroad nor vague.[127] The court held that the statute was content-neutral because it was "directed at conduct, *i.e.*, the act of conspiring to circumvent TOMA by meeting in less than a quorum for the purpose of secret deliberations in violation of TOMA."[128] The court

[121] *Asgeirsson*, 696 F. 3d at 460 n. 6 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).
[122] *See* Reagan Nat'l Advertising of Austin, Inc. v. City of Austin, 972 F.3d 696, 703 (5th Cir. 2020) ("In the wake of *Reed*, our *Asgeirsson* precedent must be revisited").
[123] State v. Doyal, 541 S.W. 3d 395 (Tex. App. 2018).
[124] Tex. Gov't Code § 551.143(a).
[125] *Doyal*, 541 S.W.3d at 397.
[126] *Id*. at 398.
[127] *Id.* at 402.
[128] *Id.* at 401.

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further concluded that strict scrutiny was inapplicable because TOMA does not restrict speech, but rather, encourages public discussion.[129] The court found no disqualifying level of vagueness, concluding that "ordinary people can understand what conduct is prohibited."[130] Consequently, the court reinstated the indictment.[131]

The Court of Criminal Appeals granted Doyal's petition for discretionary review and ultimately held that Section 551.143 was unconstitutionally vague on its face.[132] In evaluating the challenged prohibition against conspiracy, the Court noted that the statute defines a "meeting" by reference to a quorum of the body, yet makes conspiracy punishable even if it involves gatherings of less than a quorum – creating, in the court's view, an internal inconsistency.[133] The Court further noted that it is unclear what it means to "circumvent" a law, so that a person of ordinary intelligence would not know when he is committing a punishable conspiracy.[134] The court concluded that the language in Section 551.143 is so lacking in specificity that it could not be salvaged with a narrowing interpretation.[135]

The Texas legislature reacted to *Doyal* by enacting a narrower conspiracy provision in 2019.[136] The fix restores the "walking quorum" provision in TOMA with a more specific provision, which states that for a conversation to rise to the level of a crime, the defendant must

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[129] *Id.*
[130] *Id.* at 402.
[131] *Id.*
[132] State v. Doyal, 589 S.W.3d 136 (Tex. Crim. App. 2019).
[133] *Id.* at 147-48.
[134] *Id.*
[135] *Id.* at 152.
[136] Catherine Marfin, *How Texas lawmakers patched open government laws this session*, TEX. TRIB. (Jun. 5, 2019), https://www.texastribune.org/2019/06/05/texas-lawmakers-open-records-laws-fixes/.

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know that the conversation would qualify as a "deliberation" covered by TOMA and that the conversation is part of a series of deliberations that will constitute a quorum.[137]

C. Undefeated (So Far): Sunshine Statutes Survive Scrutiny

The *Asgeirsson* decision, rebuffing a First Amendment challenge to the criminal penalties of the Texas Open Meetings Act, aligns with how courts elsewhere have, so far, resolved constitutional challenges to open meeting laws. While the cases are infrequent, no court has yet seriously indulged the possibility that elected officials have a constitutional right to deliberate privately about public business, perhaps because sunshine laws are so deeply entrenched in political culture that an adverse ruling would unsettle long-held expectations.

In 1979, an Illinois appellate court rebuffed the first documented constitutional challenge to the enforceability of open meeting laws.[138] A state prosecutor sought a declaratory judgment that the Democratic majority on the Urbana city council, which constituted a quorum of the council, could not continue holding closed-door caucuses to discuss official business in derogation of the Illinois Open Meetings Act.[139] The council questioned the constitutionality of the Open Meetings Act in its defense, but the appeals court was unpersuaded: "The Open Meetings Act neither prohibits the expression of any idea, nor makes assembly illegal; the Act requires merely that public bodies meet and deliberate public business openly rather than behind closed doors."[140] The court did not assign any meaningful First Amendment value to the private exchange of information among council members, stating that the purpose of the First Amendment is to protect "the right to express ideas publicly(.)"[141]

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137 Tex. Gov't Code § 551.143(2).
138 People *ex rel.* Difanis v. Barr, 397 N.E.2d 895 (Ill. App. 1979).
139 *Id.* at 896.
140 *Id.* at 899.
141 *Id.*

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A series of challenges in the 1980s likewise went nowhere, as courts in Kansas, Colorado and Minnesota all upheld the legality of their states' open meeting statutes.

In Kansas, trustees of a state hospital, who met privately with a hospital management contractor, challenged the Kansas Open Meetings Act as unconstitutionally vague and overbroad.[142] But the state Supreme Court found no constitutional infirmity. The justices distinguished the rights of private citizens, who have a constitutionally protected right to conduct private conversations about government affairs, from those of elected officials who voluntarily submit to scrutiny when they assume public office: "Elected officials have no constitutional right to conduct governmental affairs behind closed doors. Their duty is to inform the electorate, not hide from it."[143] In effect, the Kansas court anticipated the reasoning of the Supreme Court's *Carrigan* in treating the discussion of a forthcoming vote by government board members as an *act* of official consequence as opposed to pure speech, making it easier to regulate.[144]

In Minnesota, the state Supreme Court rebuffed a vagueness and overbreadth challenge to the state Open Meeting Law brought by a county school superintendent and members of the elected school board.[145] Citing Illinois' *Defanis* decision, the justices found no First Amendment concern because the statute does not prohibit any speech, but "merely requires that... meetings be open to the public."[146] The court did not clearly settle on what level of review applied, at one point using phraseology associated with strict or intermediate scrutiny ("compelling state interest") but ultimately appearing to apply a mere reasonableness test.[147]

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[142] State ex rel. Murray v. Palmgren, 646 P.2d 1091 (Kan. 1982).
[143] *Id.* at 1099.
[144] *See id.* (stating that the Kansas Open Meetings Act "regulates only the *conduct* of public business") (emphasis added).
[145] St. Cloud Newspapers, Inc. v. District 742 Cmty. Sch., 332 N.W.2d 1 (Minn. 1983) (*en banc*)
[146] *Id.* at 7.
[147] *See id.* ("The Minnesota Open Meeting Law is … a reasonable regulation of public officials' rights of free speech and association.").

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In Colorado, a state legislator lost his First Amendment challenge to the Open Meetings Law, which he alleged was unconstitutional if interpreted broadly to extend to legislators' party caucus strategy sessions.[148] The court treated the statute as a content-neutral "time, place and manner" restriction, and found that it furthered the important governmental interest of providing the public with information needed to cast well-informed votes and hold elected officials accountable.[149] The court also took note of the countervailing First Amendment interest of the would-be attendees at government meetings to receive information and ideas.[150]

Finally, in a 2003 ruling, the Nevada Supreme Court followed Texas' *Hays County* case and ruled that requiring government officials to place a subject on a publicly disseminated meeting agenda before discussing it does not implicate First Amendment rights.[151] The dispute arose after members of the state's higher education governing board launched into a debate about a police drug raid on a university dormitory, even though the issue was not spelled out on the meeting's published agenda.[152] The board members argued that interpreting the Open Meeting Law's public notice requirement rigidly would infringe members' freedom of speech, but the court – citing *Hays County* – disagreed: "The regents are free to speak on any topic of their choosing provided they place the topic on the agenda(.)"[153]

As these cases demonstrate, open meeting laws have proven durable enough to withstand constitutional attacks on varying grounds. But in none of these cases has the court rigorously analyzed what First Amendment standard should apply, or whether the statute would survive if a strict-scrutiny level of review applied.

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[148] Cole v. State, 673 P.2d 345 (Colo. 1983) (*en banc*).
[149] *Id.* at 350.
[150] *Id.*
[151] Sandoval v. Board of Regents, 67 P.3d 902 (Nev. 2003) (*en banc*).
[152] *Id.* at 904.
[153] *Id.* at 907.

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V. The Shadow of *Wilson*: Will the Sun Set on Open Meetings?

If the Supreme Court rules broadly in Wilson's favor, open meeting laws could be left to navigate a narrow constitutional passageway between the Scylla of *Carrigan* and the Charybdis of *Wilson*. Although the justices could narrowly resolve the case by focusing on facts peculiar to Wilson's situation, a broad decision putting the First Amendment rights of elected officials on par with those of all other speakers would risk reinvigorating the debate over the constitutionality of penalizing government officials for discussing public business privately.

The First Amendment applies most forcefully to discussion about issues of public concern.[154] The right to speak anonymously is well-entrenched in First Amendment jurisprudence.[155] A law that required *non*-government officials to obey the formalities of sunshine laws – giving advance notice before they discuss governmental issues, and inviting the public to listen – would be readily invalidated. For example, in a 1995 ruling, the Supreme Court struck down an Ohio statute that outlawed distributing unsigned political literature, because the statute infringed the right to speak anonymously.[156] So, if the free-speech rights of elected officials are equivalent to those of all other citizens – period – then constraining their ability to speak anonymously would invite constitutional challenge.

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[154] *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758-59 (1985) ("We have long recognized that not all speech is of equal First Amendment importance. It is speech on matters of public concern that is at the heart of the First Amendment's protection.") (internal quotes and citation omitted).

[155] *See* First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978) (applying strict scrutiny and invalidating a statute restricting corporations from spending money to influence the outcome of referendums on constitutional amendments: "[W]here, as here, a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, the State may prevail only upon showing a subordinating interest which is compelling") (internal quotes and citation omitted); *see also* Thornhill v. Alabama, 310 U.S. 88, 101-02 (1940) ("The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.").

[156] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995).

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Even a ruling that open meeting laws must survive strict scrutiny would not necessarily be a constitutional death sentence. Even the appellate court in *Rangra* that found strict scrutiny applicable did not strike down the Texas statute; it simply remanded the case for an application of closer scrutiny[157] (which, because of mootness, never happened). The trial court in the *Asgeirsson* case drew a roadmap for how a sunshine law can be justified even under a strict scrutiny analysis: Honesty and confidence in government is a compelling interest, and open meeting laws are narrowly tailored because they cover only a very small swath of speech (official-business conversations behind closed doors with fellow board members) and even allow for closed meetings when circumstances require confidentiality.[158] Defenders of open meeting laws might persuasively argue that the imposition on speech is quite small in relation to the countervailing public benefits: A person who sits on a nine-member board (the size of the Houston Community College board) is permitted to exercise the full benefit of freedom of speech when speaking to anyone in the world except for eight specific people – and even then, still is free to speak with those eight people about anything other than business that might foreseeably come before the board.[159]

The statutes that would seemingly be most vulnerable to constitutional challenge would be the most aggressive ones: Those carrying criminal penalties, and those penalizing closed meetings of less than a quorum of board members. Florida is among the few states with both

[157] Rangra v. Brown, 566 F.3d 515, 522 (5th Cir. 2009).
[158] Asgeirsson v. Abbott, 773 F.Supp.2d 682, 703-04 (W.D. Tex. 2011).
[159] One might analogize the modest imposition on elected officials' speech to the strictures of sexual harassment laws, which leave regulated individuals free to make sexual overtures to anyone in the entire world except for people within the workplace who find the overtures unwelcome.

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provisions.[160] Predictably, its statute would be in the crosshairs if the Supreme Court were to decide the *Wilson* case broadly in favor of elected officials' First Amendment rights.

VI. Conclusion

Open meeting laws are inherently difficult to enforce.[161] The array of remedies available to policymakers are all, to some extent, unsatisfying.[162] When a person wronged by a government agency files suit, the typical remedy would be money damages and/or injunctive relief, *i.e.*, a directive to cease engaging in unlawful behavior or discontinue an unlawful policy. But suppose the violation is exclusion from a critical meeting where a government decision was formulated. Money damages do not rectify the "civic injury" of a lost opportunity to oversee the operation of a government body – and because the municipality could use taxpayer dollars to satisfy the judgment, there is a perverse boomerang penalty on the citizenry, and not much deterrent effect on individual wrongdoers. Prospective injunctive relief – an order to cease excluding the public from future meetings – does nothing to redress a decision that has been tainted by an unlawfully closed meeting if that decision is complete. Retrospective injunctive relief – a "do-over" order that unwinds a governmental decision reached in an unlawfully closed meeting – comes the closest to putting injured plaintiffs back in the position they would have occupied if not for the illegality.[163] But that remedy is not always practicable. If the city council

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[160] *See* Fla. Stat. § 286.011(3)(b) (providing misdemeanor criminal penalty for any board member who "knowingly" violates Florida's sunshine law).

[161] *See* Pupillo, *supra* n. 76, at 1176 (stating that "courts have been reluctant to give open meeting statutes full effect" and theorizing that reluctance may stem from lack of legislative support for rigorous enforcement or from inartful statutory drafting).

[162] *See id.* at 1182 (stating that "lax enforcement and lenient penalties decreased the effectiveness of open meeting statutes" and that "statutes often do not contain penalty provisions which effectively deter violations").

[163] *See, e.g.*, Town of Palm Beach v. Gradison, 296 So.2d 473, 478 (Fla. 1974) (holding that a zoning ordinance enacted as the product of unlawful secret meetings of a city planning board should be nullified). *See also* Pupillo, *supra* n. 76, at 1183-84 (observing that the remedy of redoing a closed-door decision in an open proceeding does not truly undo the harm of the

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appoints Jones as the new city manager in a closed meeting, and Jones resigns her current job and sells her house in reliance on the appointment, a court may find it unpalatable to order the city to "un-hire" Jones and redo the process in the open. The Florida Supreme Court, for instance, found in a 1981 case that members of a county school board violated the state sunshine law by holding private gatherings to discuss eliminating a key staff position, but found that no remedy was in order, because the board ultimately held the vote to eliminate the position in an open session – leaving the violation effectively unpunished.[164] Because of the shortcomings of other remedies, legislators understandably have turned to criminal penalties as the only tool that might effectively deter – or impose meaningful consequences on – the individual decisionmakers who are in a position to violate the law.

On the handful of occasions that courts have confronted constitutional challenges to open meeting statutes, they have accurately applied then-existing First Amendment precedent to find that the statutes are constitutional.[165] If a statute is understood to be content-based only if it is motivated by disfavor for the speaker or the message,[166] then open meeting laws cannot logically be considered content-based – if for no other reason than that, in many states, the statutes apply to the very legislators who enacted them.[167] It goes without saying that legislators have no self-loathing motivation to inhibit themselves from speaking. But the Supreme Court's *Reed* case is widely understood to have unmoored the "content neutrality" inquiry from legislative purpose,

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unlawful closure, because "the discussions and deliberations that occurred during closed meetings are not erased from the minds of decision makers").

[164] Tolar v. Sch. Bd. of Liberty County, 398 So.2d 427, 429 (Fla. 1981).

[165] *See supra* Sec. IV.

[166] *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.").

[167] *See* Pupillo, *supra* n. 76, at 1179 ("State legislatures increasingly are amending state open meeting laws to require state legislatures to hold open meetings.").

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so that a facially content-based statute is not rescued by a neutral motivation.[168] If *Reed* is read as a game-changer lowering the bar for a statute to qualify as content-discriminatory (as the Fifth Circuit suggested in *Reagan National Advertising*),[169] then pre-*Reed* assumptions about the constitutionality of open meeting laws may be open to revisiting.

Because of the widely accepted consensus that open meeting laws serve a salutary public purpose, it is important for the Supreme Court to decide the *Wilson* case mindful of its potential adverse spillover effects. At the Fifth Circuit, Wilson argued for a broad First Amendment ruling, insisting: "It is well settled law, that political speech by an elected official is the highest form of protected speech … and that any statue, rule, or resolution abridging that right, chills free speech and is unconstitutional."[170] But Wilson's case could be narrowly decided in a way that does no violence to open meeting laws, because there are elements both to Wilson's conduct and to the HCC board's response that are not constitutionally protected speech and that implicate no First Amendment concerns.

It does not seem plausible that the Court could accept the proposition that sanctions imposed on elected officials are categorically unreviewable.[171] If a government body is free to punish its members even for core political speech addressing matters of public concern, dissenting minority voices could be muted. Contrarian voices are those most in need of the

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[168] *See* Minch Minchin, *A Doctrine at Risk: Content Neutrality in a Post-*Reed *Landscape*, 22 COMM. L. & POL'Y 123, 124 (2017) (commenting that *Reed* makes "all regulations that target specific topics presumptively unconstitutional," which casts doubt on "countless legitimate regulations on expression").
[169] *See supra* n. 122 and accompanying text.
[170] Wilson v. Houston Cmty. Coll. Sys., No. 19-20237, 2019 WL 3020846, Appellant's Brf. at *21
[171] *See* Blair v. Bethel Sch. Dist., 608 F. 3d 540, 545 n. 4 (9th Cir. 2010) (stating, in dismissing First Amendment retaliation case brought by elected official whose only injury was largely symbolic removal as vice chair of school board, "we do not suggest that the retaliatory acts of elected officials against their own can never violate the Constitution" if the retaliation is sufficiently material).

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protection of the First Amendment from the tyranny of the majority.[172] It is one thing to say that the elected leaders of an agency can require subordinate employees to do their jobs in accordance with agency policy while they are on-duty (the *Garcetti* principle), but another to say that the majority on a board can compel conformity among co-equal elected officials, even during the officials' off-hours. That is a recipe for ossifying the status quo, the opposite of the competitive "marketplace of ideas" that the First Amendment purports to foster.[173] As the Court observed in *Bond*: "Legislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office(.)"[174]

The Court's narrowest path to resolving the *Wilson* case would be to differentiate Wilson's situation from those of other censured elected officials by putting decisive weight on the non-expressive aspects of the Houston college board's vote. Unlike, for example, the censured Wyoming trustee in the Tenth Circuit's *Phelan* case,[175] Wilson did not merely experience a verbal rebuke, but also experienced tangible losses, including the lost ability to qualify for travel expense reimbursements.[176] While a pure censure resolution might defensibly be rationalized as counterspeech by Wilson's board colleagues, nothing about the revocation of

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[172] *See* Cohen v. California, 403 U.S. 15, 26 (1971) ("[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views."). *See also* Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949) (stating that allowing lawmakers to criminalize speech that arouses anger or invites dispute "would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups").
[173] *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited market-place of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.").
[174] *Bond*, 385 U.S. at 136.
[175] 235 F.3d 1243 (10th Cir. 2000).
[176] Wilson v. Houston Cmty. Coll. Sys., 955 F. 3d 490, 494 n.7 (5th Cir. 2020).

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expense-paid travel is "communicative."[177] A government agency should not be allowed to insulate its decisions from judicial scrutiny by claiming that substantive decisions carry an expressive message, or by appending an expressive message to a substantive vote. Focusing on the nonspeech elements of the board's resolution would dispose of the board's only argument: That a resolution of condemnation is an unreviewable act of government speech. It is thus possible to differentiate *Wilson* on its facts from seemingly contradictory "pure censure" cases in other jurisdictions, so as to avoid recognizing a direct conflict in need of reconciling.[178]

The Court also could dispose of the case by sending it back for fact-finding as to how much, if any, of the motivation for the college board's censure was, in fact, speech. At least some part of the basis for the board's decision was non-expressive conduct – in particular, Wilson's act of hiring a private investigator to investigate the college and a fellow board member.[179] In its 1977 *Mt. Healthy* case,[180] the Supreme Court recognized a burden-shifting framework enabling a government agency to defeat a First Amendment retaliation claim by showing that, even if speech was one motivating factor for an adverse government action, independent nonspeech

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[177] The Supreme Court recognized in the aforementioned *Carrigan* case that votes on substantive issues are not expressive in the sense that the First Amendment protects, because they do not convey any message other than the intention to see a proposition enacted. *See* Nevada Comm'n on Ethics v. Carrigan, 564 U.S. 117, 126-27 (2011) ("[T]he act of voting symbolizes nothing. It discloses, to be sure, that the legislator wishes (for whatever reason) that the proposition on the floor be adopted, just as a physical assault discloses that the attacker dislikes the victim. But neither the one nor the other is an act of communication.") (parentheses in original).

[178] This distinction between a purely symbolic act of denunciation versus a material deprivation accords with the views of several circuits that have considered First Amendment retaliation claims by elected board members. *See* Werkheiser v. Pocono Tp., 780 F. 3d 172, 181 (3d Cir. 2015) ("the First Amendment may well prohibit retaliation against elected officials for speech pursuant to their official duties only when the retaliation interferes with their ability to adequately perform their elected duties"); Blair v. Bethel Sch. Dist., 608 F. 3d 540, 545 n. 4 (9th Cir. 2010) (stating that, while elected official could not challenge purely symbolic deprivation, case would be different if board's vote "deprive[d] him of authority he enjoyed by virtue of his popular election").

[179] Wilson v. Houston Cmty. Coll. Sys., 955 F. 3d 490, 493 (5th Cir. 2020).

[180] Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274 (1977).

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motives would have produced the same result.[181] Although the HCC board did not argue for a *Mt. Healthy* defense, the Supreme Court could send the case back for application of the *Mt. Healthy* framework, to enable the parties to develop evidence as to whether the board would have imposed the same consequences on Wilson for the nonspeech elements of his behavior.

The broadest – and for the future well-being of open meeting laws, most treacherous – way for the Court to decide the case would be to declare that First Amendment rights apply with full force to elected officials, without exception, and that strict scrutiny applies to any content-based regulation of their speech, as it would apply to a content-based regulation targeting any other speaker. A decision inviting strict scrutiny of open meeting laws surely would breathe renewed life into the *Rangra* line of cases and embolden a future First Amendment challenge, unsettling four decades' worth of precedent from courts across the country upholding the constitutionality of sunshine laws. With *Ranga* securely interred, the justices would be well-advised to tiptoe gingerly past its graveside so as not to disturb a well-earned repose.

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[181] *See* Frank D. LoMonte & Clay Calvert, *The Open Mic, Unplugged: Challenges to Viewpoint-Based Constraints on Public-Comment Periods*, 69 CASE W. RSRV. L. REV. 19, 56-57 (2018) (explaining that, under *Mt. Healthy*, plaintiff alleging retaliation first carries burden of establishing a *prima facie* case that constitutionally protected expression caused a state entity to take adverse action, after which the burden shifts to the agency to establish that the same decision would have been made even absent the expressive conduct).

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