THE LOGIC OF EXPERIENCE: A HISTORICAL STUDY OF THE IOWA OPEN MEETINGS LAW

*Steve Stepanek**

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I. INTRODUCTION

An editorial in the April 22, 2011 issue of the *Cedar Rapids Gazette* lambasted the Iowa house for stonewalling a senate bill designed to facilitate enforcement of the state's open meetings and open records laws.[1] Specifically, the editorialist took exception to the representatives who were balking at passing the senate's version of legislation, which would have empanelled an "Iowa Public Information Board"—comprised of members from such diverse interests as those represented by broadcasting and newspaper associations, the Iowa Freedom of Information Council, the State Citizen's Ombudsman Office, the Iowa League of Cities, and

* Assistant Professor of Journalism, Georgia Southern University; B.S., Economics, Iowa State University, 1978; J.D., University of Iowa College of Law, 1989; M.A., Journalism, University of Iowa, 1990; Ph.D., Mass Communications, University of Iowa, 2004. The Author's specialty over a twelve-year teaching career, which includes appointments at Truman State University in Kirksville, Missouri, and Southern Arkansas University in Magnolia, Arkansas, centers on communication law and journalistic practice.

1. Op-Ed., *Not Again*, THE CEDAR RAPIDS GAZETTE, Apr. 22, 2011, *available at* http://thegazette.com/2011/04/22/not-again.

representatives from other government groups—to investigate and expedite citizens' claims that officials were violating sunshine statutes.[2] The paper's indignation was not misdirected, as the senate's overture, Senate File 430, was ultimately rebuffed by the House Appropriations Committee when it failed to move on the bill prior to adjournment, nor was the editorial stance without merit, as the bill's impending fate duplicated the disposition of comparable legislation introduced in previous sessions.[3]

This recent spate of activity regarding Iowa's "sunshine laws" may bespeak the eve of a period in which these statutes came under increased public scrutiny or expanded civil litigation. In light of these prospects, those who are likely to become actively engaged in any future controversies in this regard—including attorneys, journalists, officials, and citizen advocates—could likely benefit from a systematic review of the history and philosophy of the open government movement in general and how the movement was translated to the legal landscape of Iowa in particular.[4] Thus, an opportunity to become (re)acquainted with the forces and personalities that initially converged to craft Iowa's first legislative venture in statutory open governance seems recommended, and this Article attempts to give an overview of relevant events and actors.[5]

Further, beyond the context afforded by a straight historical and philosophical examination of open government laws, tracing the specific trajectory of their development in Iowa reflects the undiluted wisdom of Oliver Wendell Holmes's famous assertion that "[t]he life of the law has not been logic: it has been experience."[6] Arguably this country's finest

2. *Id.*

3. *Id.* ("Similar concepts the previous two years drew much bipartisan support, even as local government lobbyists threw a fit. Both were abandoned late in the session. Don't let that happen again, legislators. Do what's right for Iowans.").

4. It is at this point one cannot help but be mindful of philosopher George Santayana's oft-repeated bromide, which might be slightly modified here to hold that those who *know* their history are better positioned to *profit* thereby. *See* GEORGE SANTAYANA, THE LIFE OF REASON 82 (1998).

5. To keep the length of this Article to a manageable portion, the bulk of the discussion will center on the open meetings law, although an equivalent treatment could be developed for the open records law as well. The first segment of this Article, which deals with the historical and philosophical elements of open government is, of course, equally applicable to either or both of these noble laws.

6. OLIVER WENDELL HOLMES, THE COMMON LAW 1 (A.B.A. 2009) (1881). This famous line is first uttered in "Early Forms of Liability," the first of a series of lectures Holmes delivered in Boston. THE MIND AND FAITH OF JUSTICE HOLMES 51

jurist,[7] Holmes's cryptic remark can be construed to mean that the law is not an interred artifact subject to discovery by the diligent, objective seeker; rather, the law is an infinitely complicated confluence of factors that need sorting out through rational evaluation.

> The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. *We must alternately consult history and existing theories of legislation*. But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.[8]

(Max Lerner ed., 1989). The totality of these lectures would comprise his first book, *The Common Law*, published in 1881. *Id.*; Stephen L. Carter, *Foreword* to HOLMES, *supra*, at iii.

7. An acquaintance of Holmes, writing eleven years after his friend's death, stated, "I am not certain whether great judges are inevitably great men. But I have no doubt that Holmes's pre-eminence in the law—Lord [Richard] Haldane[, an eminent British legal scholar, philosopher, and Chancellor of Great Britain in the years leading up to and then following World War I,] thought that he was second not even to Marshall . . . ." FRANCIS BIDDLE, MR. JUSTICE HOLMES 3 (Greenwood Press, Publishers 1986) (1942).

8. HOLMES, *supra* note 6 (emphasis added). Steven Alan Childress, writing in *The* Annotated *Common Law*, correctly points out that

> what [Justice] Holmes means by "theories of legislation" here is not the specific acts and statutes of the legislative branch, especially at a time when most of the common law was made by judicial decision, not by Congress or state [legislatures]. Rather, he means the use of policy to choose among possible rules, but *by judges* in their common law function of creating precedent and law to control that human behavior for the common good.

Steven Alan Childress, *Foreword* to THE *ANNOTATED* COMMON LAW, at vii (2010) (1881). The steady trend from judge-made law to blackletter law in the United States over the century-plus since the *Common Law* was first published may tend to render Holmes's original meaning somewhat anachronistic, but its sense is still very much pertinent to the discussion that follows.

In light of Holmes's learned observations, legal scholars, political operatives, and sincere citizens of ensuing generations profited much from periodically validating their existing laws to ensure the laws remained viable and valid. In examining Iowa's sunshine laws, the discussion that follows will begin by offering a detailed insight into the "necessities of the time[s],"[9] which spurred "the prevalent moral and political theories, [and] intuitions of public policy"[10] to the point where they gave rise to the development of open government laws in Iowa.[11] By examining the then-current social imperatives that critically molded the state's governmental openness initiatives in the late 1960s and juxtaposing some of the more salient legal norms of that period, a picture emerges of how, with respect to this particular aspect of human activity, "[Iowans] should be governed."[12]

In its essence, the Iowa Open Meetings Law was constructed in much the same way similar legislation was crafted elsewhere in America during the twentieth century and came to legal life as the result of a tortuous process played out in the respective halls of a state legislature[13]—or, as another Holmes scholar musing on *The Common Law* put it, as the result of "the force of collective instinct, of the common passions and prejudices of those who ruled."[14] As such, any serious examination of the law must consider the actual historic chain of events and cast of characters that molded the Iowa Open Meetings Law as it moved through the corridors of decision making to ultimate enactment. The concerns, conflicts, concessions, and contestants that marked its odyssey will provide, as Holmes would hopefully approve, a present understanding of the history undergirding this particular law, with one prospective benefit being to serve any who might wish to readdress the ability "to work out desired results" while "depend[ing] very much upon [the] past."[15]

9. HOLMES, *supra* note 6.

10. *Id.*

11. There is nothing talismanic about either the general legal realm of sunshine laws or the specific realm of the Hawkeye State. On the contrary, it could be readily argued that the very randomness of these selection parameters further underscores the transcendent value of Holmes's ideas. *See generally id.* ("The life of the law has not been logic: it has been experience.").

12. *See id.*

13. *See Legislative Blow to Secrecy*, DES MOINES REG., June 16, 1967, at 16 (noting open meetings law passed unanimously in Iowa Legislature).

14. SHELDON M. NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES 159 (1989).

15. HOLMES, *supra* note 6.

II. OPEN MEETINGS LAWS GENERALLY

In the mid- to late-1960s, the Hawkeye State was but one of many states struggling with growing social unease—grounded squarely in political estrangement over the Vietnam conflict and Lyndon B. Johnson's attendant "credibility gap"—that fueled an escalating mistrust of government.[16] So, in deciding to statutorily impose a measure of transparency and accountability upon its loci of governmental authority, Iowa's experiences are representative of similar efforts transpiring elsewhere in the country.[17]

To be sure, proactive legislation of this nature was most likely long overdue because the malaise of the era was but an inevitable reflex to an intractable and long-lived truth: governments will always have secrets.

One need not have Thomas Hobbes's view of the world[18] but only a reasonably good grasp on history and current events to recognize that countries are constantly in competition, if not open conflict, with one another, and there is an abiding need to protect certain types of information from falling into the hands of one's foes. Indeed, even the late Daniel Patrick Moynihan, an archenemy of most governmental secrecy, conceded a realm where a government operating in the shadows is both "legitimate and necessary" and in whose precincts it is permissible to erect walls.[19]

16. *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (discussing the suspension of three Iowa children for wearing black armbands to school to protest the Vietnam War); Smith v. United States, 368 F.2d 529 (8th Cir. 1966) (convicting a University of Iowa student after he burned his draft card in protest of the Vietnam War).

17. It can be a bit dicey trying to specify the origin of such a movement with any degree of precision, yet there seems to be a consensus that the flower of open government bloomed by the mid-1970s. Attention is invited to an assessment by the First Amendment Center: "Although a few states began enacting open meetings laws as early as 1898, most states did not guarantee access to public meetings until the mid-20th century. The federal government waited even longer, as meetings of congressional committees and executive agencies were not routinely open until the mid-1970s." Douglas E. Lee, *Open Meetings*, FIRST AMENDMENT CENTER (Sept. 16, 2002), http://www.firstamendmentcenter.org/open-meetings.

18. In *Leviathan*, Hobbes posited that without governments, men exist in a state of nature. Accordingly, "it is manifest, that during the time men live without a common Power to keep them all in awe, they are in that condition which is called Warre; and such a warre, as is of every man, against every man." THOMAS HOBBES, LEVIATHAN 88 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651).

19. DANIEL PATRICK MOYNIHAN, SECRECY: THE AMERICAN EXPERIENCE

However, it is generally argued that secrecy is inimical to the effective and proper operation of a representative government.[20] While this proposition is generally taken on faith, the following brief examination of the theoretical foundations of this assertion is nevertheless in order. Having thus established that there is a strong argument to be made for open government, examination will then turn to constitutional law scholarship to see if there is an affirmative requirement for the government to make all, or even some, of its operations open to inspection by the public in general or the press—acting as the public's "watchdog"—in particular. Against this background, a generalized review of state open meetings or open records laws will illustrate how these add to the matrix of protections that are seemingly lacking in a constitution-based analysis. This, in turn, will set the predicate for a historical review dealing with the sequence of "collective instinct[,] . . . common passions[,] and prejudices" that transpired to bring open meetings legislation to the citizens of Iowa.[21]

A. *The Need for Open Government*

Proponents of open government expound various theories and arguments in favor of full, or at least nearly full, disclosure of official activities and materials. By way of brevity, the whole of these positions may be distilled to two main propositions: (1) the prerogatives of popular sovereignty and (2) the need for public accountability.

The first camp includes commentators such as Alexander Meiklejohn who assert that under the United States' political regime it is the people who are the masters of a government over which they retain and dutifully must exercise control.[22] To Meiklejohn, it is thus philosophically and institutionally repugnant that the government should then deign to keep information from its sovereign citizenry, as that would undercut the primary ambition of the Constitution: "that the people of the United States shall be self-governed."[23] In essence, this is a strong appeal for the notion that each citizen in a representative democracy requires full

221 (1998).

20. *See, e.g.*, 2 JEREMY BENTHAM, *An Essay on Political Tactics*, *in* THE WORKS OF JEREMY BENTHAM 301, 315 (John Bowring ed., Russell & Russell, Inc. 1962) (1843) ("Secresy [sic] is an instrument of conspiracy; it ought not, therefore, to be the system of a regular government.").

21. NOVICK, *supra* note 14.

22. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 12 (photo. reprint 1989) (1948).

23. *Id.* at 15.

disclosure from his or her elected and appointed officials in order to go about the fundamentally important task of political self-determination.

Beyond the mere impropriety of keeping secrets from the citizenry, the second theory—the need for public accountability—focuses on procedures and policies that close government to the view of the electorate, which poses potentially severe peril for those citizens. This position is aptly proffered by Vincent Blasi who, in advancing his theory on the "checking value" of the First Amendment right of free speech, detailed a disturbing picture of what government can do if left unbridled due to inadequate oversight.[24]

According to Blasi, governments are dangerous entities because they possess the power of "legitimized violence" that can be expressed domestically in the adoption and execution of such things as criminal laws and abroad through the perpetration of war.[25] Against this leviathan there exists no comparable countervailing force in society, save the power of public opinion.[26] It is through public opinion—which, to be effective and legitimate, must rest on solid information—that the natural tendency of governments to predations can be curbed.[27] Only by having timely access to government agents, documents, and facilities can the people discern and rebuke excesses.[28]

Of course, there is not always a smooth transmission vehicle between access to relevant official information and the formation of preemptive public opinion.[29] Jürgen Habermas's "public sphere" construct might be injected into this breach, as it posits that in any enlightened society there will develop some forum in which rational, cognitive actors—representing most, if not all, segments of the social order—will communicate and illuminate matters of compelling concern to the group as a whole.[30] While

24. *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. B. FOUND. RES. J. 521, 538–44 (1977).

25. *Id.* at 538.

26. *Id.* at 539.

27. *Id.* at 538, 543.

28. *See id.* at 623–26.

29. *See, e.g.*, Craig Calhoun, *Introduction: Habermas and the Public Sphere*, *in* HABERMAS AND THE PUBLIC SPHERE 1, 14–15 (Craig Calhoun ed., 1992) (discussing historical examples of the lag between access to information and formation of public opinion in England, France, and Germany).

30. *See generally* JÜRGEN HABERMAS, THE STRUCTURED TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY 57, 62–63 (Thomas Burger & Frederick Lawrence trans., MIT Press 1989) (1962).

other academics, such as Michael Schudson, cast doubt as to whether such a public sphere ever in fact existed in the United States,[31] it still serves as a powerful intellectual construct in support of formulations such as Blasi's.

Taking a step back from the level of grand theory briefly discussed above, one finds other, more functional arguments dealing with official accountability that work in favor of open government.

First, the work of Max Weber, who, among others, prophesied the bureaucratic revolution in modern societies,[32] is instructive. Noting how the world was becoming increasingly complex, he asserted that governments and businesses would come to rely less on pure leadership acumen and instead place a premium on managerial skill, technical expertise, and clerical precision.[33] The upshot for today's observers is that most official business is transacted by a class of anonymous, largely unelected individuals. Since these people are not accountable at the polls, it follows that they need to make their dealings transparent to the public so effective oversight of decisions and policies might be effected.

Of course, none of these arguments are necessarily dispositive in the case of bona fide national secrets held by officials, but this ushers in the next point—the quest for open government is not directed at these types of sensitive matters but, as Richard Gid Powers describes it, at the "symbolic secrecy" of government.[34] As related by Powers, Moynihan drew upon the thoughts of Emile Durkheim to postulate that there is a ritual dimension to what now constitutes the system by which material in control of government is classified.[35] Moynihan said the identifying and keeping of secrets is a way by which officials designate who is "in" and who is "out," who can be trusted, and who must be denied.[36] As a corollary, Moynihan noted how secrets then become the "coin of the realm" of the bureaucracy—being traded for other secrets or favors as the holders of classified material see fit.[37]

31. *See* MICHAEL SCHUDSON, THE SOCIOLOGY OF NEWS 67 (Jeffrey C. Alexander ed., 2003).

32. *See* ILSE DRONBERGER, THE POLITICAL THOUGHT OF MAX WEBER: IN QUEST OF STATESMANSHIP 296–97 (1971).

33. *Id.* at 299 (footnote omitted).

34. Richard Gid Powers, *Introduction* to MOYNIHAN, *supra* note 19, at 18–19.

35. *Id.* at 12.

36. *See* MOYNIHAN, *supra* note 19, at 168 ("It was beyond the range of a commission report to speculate on the allure of secrecy, but this must never be discounted. The official with a secret *feels* powerful. And is.").

37. *Id.* at 169.

The affront to democracy, in Moynihan's eyes, was patent.[38] Public servants are in the employ of the people who entrust them to discharge their duties in an efficient and professional manner. Playing tedious games with (and developing wasteful cliques through) nominally sensitive material is antithetical to their obligations. Making government more accessible to outside oversight would, Moynihan contended, help minimize such shenanigans.[39] In addition, as expounded by Powers, an obsession with symbolic secrecy leads to conspiracy theories.[40] In the wake of government stonewalling over an issue that seemingly poses no threat to national security, people may come to conclude that something bigger is afoot; what inevitably transpires are 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.[41] In this vein, one could consider the fallout from the government's reluctance to reveal some material relating to the JFK assassination or the supposed UFO incident in Roswell, New Mexico.[42] Further, symbolic secrecy exacerbates a syndrome that Sissela Bok referred to as "risky shift"—the tendency of individuals to take more chances when they are members of a group than if they were acting independently.[43] Under the cloak of secrecy, the tendency to go even further out on a limb is enhanced, she pointed out.[44]

On a related note, Moynihan also wrote that symbolic secrecy unnecessarily cuts decision makers off from numerous sources of input, most notably the public, which could serve to flag bad policies or erroneous assumptions.[45] President Kennedy's Bay of Pigs fiasco, when the President later bemoaned his decision to pressure the *New York Times* from publishing the invasion plan after the fact, is a case in point.[46]

Taken together, these arguments make a compelling case for open

38. *See id.* at 218 ("A democracy does not leave its citizens uninformed in these matters.").

39. *See id.* at 221–22, 226–27.

40. See Powers, *Introduction* to MOYNIHAN, *supra* note 19, at 22 ("The hunt for secret conspiracies . . . is an American tradition of long standing.").

41. *See* MOYNIHAN, *supra* note 19, at 219–21.

42. *See id.* at 219–20.

43. *See* SISSELA BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION 109 (1982).

44. *Id.*

45. MOYNIHAN, *supra* note 19, at 221–22.

46. JEFFERY A. SMITH, WAR AND PRESS FREEDOM: THE PROBLEM OF PREROGATIVE POWER 178–79, 212 (1999).

government—one that eschews arbitrary secrecy and provides maximum access. However, to what degree can the government be compelled to act in such a high-minded and responsible manner? The answer to that question, in a fashion, lies buried in the United States Constitution.

B. *Constitutionally Compelled Open Government*

Much as the concept of an open government is de facto simpatico with the overarching design of the United States Constitution and its construction of a representative republican form of government, the ultimate question remains as to whether there is a de jure requirement for this laudable condition.

Blasi certainly thought so. He argued the concept of open government, characterized by him as the affirmative right to know, infuses—no, permeates—the very fabric of the First Amendment.[47] Without recognizing such a right, all the other free speech elements of the First Amendment are just so much blather.[48] In essence, the First Amendment dictates that the government can have no prerogative to deny access to officials, meetings, documentary materials, facilities, and the like simply because allowing such openness is inconvenient or contrary to "the way things are done around here."[49] Rather, when a citizen applies to the government for the opportunity to have access to some official site, activity, or document, the First Amendment puts the burden squarely on officials to show access would seriously compromise a clear and substantial government interest and no other response short of access denial would protect that interest.[50] On its face, this formulation would seemingly fall somewhere between "intermediate" and "strict" scrutiny standards that are generally ascribed to court rulings that deal with equal protection issues and as such, would place a substantial burden on any government effort to withhold information.[51]

47. Blasi, *supra* note 24, at 591.

48. *Id.* at 591–92.

49. *See id.* at 609–10.

50. *See id.* ("[T]he interest of the press . . . in learning certain information relevant to the abuse of official power would sometimes take precedence over perfectly legitimate and substantial government interests . . . .").

51. *See* United States v. Virginia, 518 U.S. 515, 531 (1996) (applying intermediate scrutiny to a gender-based law, which requires "an 'exceedingly persuasive justification' for [an] action" (citations omitted)); Loving v. Virginia, 388 U.S. 1, 9 (1967) (requiring the government to meet a "very heavy burden of justification" to support a race-based classification).

In addition, Blasi stipulated that even if the government could make the case that the interest it was trying to protect was sufficiently grave, such a contention could still be overborne by a plaintiff who made the case that he had reason to believe the information sought related to some instance of official malfeasance or nonfeasance.[52] Beyond this, Blasi argued in favor of recognizing the press as the acceptable and capable surrogate of the people, such that it should be allowed to assert any claims vested in the populace under the undeniable right to know embraced by the First Amendment.[53]

In a similar historical vein, Jeffery Smith argued the principles of the Enlightenment—which served, among other things, to corrode popular faith in the existence of benevolent sovereigns—influenced the deliberations and opinions of some of the Founding Fathers and their peers.[54] He cited the writings of Patrick Henry as an example of the array of early patriots who cherished a broad right to know as the citizens' first line of defense against a predatory government—a sentiment that can be seen as subsumed within the substantive guarantees of the Constitution.[55]

Of course, it is one thing to make a thoughtful and spirited argument that the First Amendment implicitly entails a right-to-know or right-of-access element—and that it bestows a preferred position upon the press—but it is quite another matter to get the courts to buy into it. Thus far, few have to any serious degree. While one could list several authoritative cases—such as one of the prominent "prison cases" of the period[56]—perhaps the starkest and most antagonistic declaration of the Supreme Court that First Amendment protections need to be read narrowly is

52. *See* Blasi, *supra* note 24, at 610.

53. *See id.* at 539.

54. *See* SMITH, *supra* note 46, at 31.

55. *Id.* at 30 (citing 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 315, 449 (Jonathan Elliot, ed., J.B. Lippincott 1881)).

56. *See, e.g.*, Houchins v. KQED, Inc., 438 U.S. 1 (1978) (considering the right to inspect and take both visual and audio recordings of a county prison where an inmate committed suicide); Pell v. Procunier, 417 U.S. 817 (1974) (holding that a California prison regulation prohibiting individual inmate interviews was unconstitutional); Saxbe v. Wash. Post Co., 417 U.S. 843 (1974) (holding that the Federal Bureau of Prisons' policy prohibiting personal interviews of inmates violated the First Amendment). Booking no equivocation, Chief Justice Burger put the matter squarely on the table by proclaiming that "[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control." *Houchins*, 438 U.S. at 15.

Branzburg v. Hayes, in which Justice White unequivocally rebuked any contention that the Constitution confers implicit new rights upon the public in general and the press in particular.[57] In his opinion, Justice White steadfastly resisted all efforts to extend the meaning of the First Amendment to protect reporters from divulging the names of confidential sources in grand jury proceedings.[58] Noting journalists have no more or fewer rights under the First Amendment than any other citizen, Justice White concluded the government interest in the efficient and effective operation of the grand jury system trumped the "consequential, but uncertain, burden [placed] on news gathering."[59]

In one of those sublime instances of irony legal researchers so often encounter in perusing a large body of caselaw, Justice Stewart—who, by the lights of fervent First Amendment proponents, conducts himself extremely well with his ringing dissent in *Branzburg*[60]—actually became one of the most vocal advocates for limiting the First Amendment's scope in regard to affording untrammeled access to matters under the government's aegis:

> The press is free to do battle against secrecy and deception in government. But the press cannot expect from the Constitution any guarantee that it will succeed. There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy. The public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.
>
> The Constitution, in other words, establishes the contest, not its resolution.[61]

In the wake of such decisions and assorted pronouncements from the high bench, other scholars have advanced more general governmental interests, the nature of which would still serve to outweigh efforts to compel openness under a First Amendment theory. According to Bok,

57. *See* Branzburg v. Hayes, 408 U.S. 665, 684–85, 690–91 (1972).

58. *See id.* at 682–91.

59. *See id.* at 690–91.

60. *See, e.g.*, Donna M. Murasky, *The Journalist's Privilege:* Branzburg *and Its Aftermath*, 52 TEX. L. REV. 829, 856 (1974); *see also Branzburg*, 408 U.S. at 725–52 (Stewart, J., dissenting).

61. Potter Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631, 636 (1975) (footnote omitted).

these generalized interests include: (1) the need for open exchange among officials;[62] (2) the legitimate need for surprise;[63] and (3) the need to protect innocent parties.[64]

This argument holds that if every meeting or memo were open for public inspection, government workers would be much more circumspect in their expressed opinions, thus inhibiting creative views and novel approaches that might ultimately, when refined through robust debate, best serve the public.[65]

The decision to launch criminal investigations is a strong example on point, but the need for surprise also extends to taking pains to keep certain private groups from learning information they could use to their personal benefit at the public's expense.[66]

The government compels many groups and individuals to submit personal data in order to get licenses and receive certain benefits, for example. Thus, a duty must exist on the part of the government to protect this involuntarily supplied information from outsiders.[67]

Not surprisingly, *Branzburg* was not a hit among the media.[68] However, *Branzburg*'s basic contention that the First Amendment does not supply an affirmative right of access or a preferred position for the press resonated positively with at least a few scholars, one of whom—O'Brien—argued that for a right to be strongly manifested, it must have a solid grounding in the history of the amendment and in sound policy as well.[69]

62. *See* BOK, *supra* note 43, at 175–76.

63. *See id.* at 176.

64. *See id.*

65. *See id.* at 175–76.

66. *See id.* at 176.

67. *See id.*

68. *See* Austin v. Memphis Publ'g Co., 655 S.W.2d 146, 147 (Tenn. 1983) (quoting the Tennessee Court of Appeals' decision, which noted that the passage of the Tennessee privileges and immunities law for news media was the media's response to the *Branzburg* decision); DAVID M. O'BRIEN, THE PUBLIC'S RIGHT TO KNOW: THE SUPREME COURT AND THE FIRST AMENDMENT 63 (1981) ("The vast majority of news reporters, however, decried the general trend of the Court's rulings, specifically the *Branzburg v. Hayes* decision.").

69. *See* O'BRIEN, *supra* note 68 (discussing the structuralist theory's focus on constitutional history and policy when examining "the public's right to know" and "press privileges").

First, O'Brien contended there was nothing in the documents, discussions, or collateral effects of the Constitutional Convention, or subsequent ratification debates even hinting at the possibility that the right to know and right of access were subsumed within the First Amendment.[70] His historical evaluation is supported by Professor Daniel Hoffman, who explained that while governmental secrecy was a matter that was given some consideration by the founding generation, it was never asserted that the First Amendment would be the vehicle by which such skullduggery was disposed.[71] Rather, it was in the very act of establishing coequal branches of government that unseemly behavior by one actor would be addressed and curbed through authority and action of another.[72]

Hoffman observes that this noble ambition was thwarted by the unforeseen rise of the two-party system in which institutional loyalties came to be locked in combat with partisan affections, but nevertheless it was through the political electoral provisions of Articles I and II—not the dictates found within any of the Bill of Rights—that rogue activity was to be determined, monitored, and sanctioned.[73] But beyond that, O'Brien stated that there are strong policy arguments against extending the reach of the First Amendment.[74]

For one, there is the definitional problem of establishing who and what constitutes "the press."[75] Is government itself to be entrusted with deciding who is recognized as a professional journalist and who is not? If so, is this not a serious roadblock to expressive freedom? In other words, does this not present a fine example of the cure being worse than the disease? Further, to elevate the press to an institutional player within the constitutional scheme would, in O'Brien's opinion, come with the concomitant requirement that some applicable system of checks and balances then be applied to the press in the same manner that such strictures are imposed on jurists, legislators, and executives.[76] Such a development would, of course, fly in the face of journalism's long-held and

70. *See id.* at 53.

71. *See* DANIEL N. HOFFMAN, GOVERNMENTAL SECRECY AND THE FOUNDING FATHERS: A STUDY IN CONSTITUTIONAL CONTROLS 4–5 (Paul L. Murphy ed., 1981).

72. *Id.* at 9–10.

73. *Id.*

74. *See* O'BRIEN, *supra* note 68, at 106–08.

75. *Id.* at 106.

76. *See id.*

zealously guarded freedom and autonomy.[77]

Finally, O'Brien confronted what he saw to be the pernicious propensity for some other commentators to try and do to the First Amendment and the right to know what was done earlier to the Fourth Amendment and the right of privacy.[78] Decrying the doctrine of using "penumbras" to cobble substantive rights from disparate constitutional sources, O'Brien argued that spurring such judicial tinkering is an affront to the Constitution, rendering it less Magna Carta and more carte blanche.[79] He described this process as leading to the development of "constitutional common law" and cited Hugo Black for the proposition that to allow this is to permit the justices to act as "a day-to-day constitutional convention."[80]

C. *The Scholarly Birthright of State Open Government Laws*

Scholarly argument aside, it seems clear that general access to the halls and files of government has been staked out by *Branzburg* and its ilk.[81] This could be the end of a very sad story for open government proponents, except that the dynamics of representative democracy ultimately worked to affect a seemingly propitious end for *Branzburg* and created another legacy apart from the one described above.

Spurred by the majority opinion[82] and Justice Powell's nuanced—and limiting—opinion in concurrence,[83] many states rushed to pass shield laws

77. *See id.* at 103 (describing the press's argument for "special privileges," which are claimed to "'secure to the public the benefits to result from the wide dissemination of intelligence as to current events'" (footnote omitted)).

78. *See id.* at 21.

79. *See id.* (calling the declaration of penumbral rights a "danger[] of infidelity to the parchment guarantees of the Constitution").

80. *See id.*

81. *See, e.g.*, Pell v. Procunier, 417 U.S. 817, 834–35 (1974) (quoting *Branzburg* for the proposition that "'[n]ewsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded'" (quoting Branzburg v. Hayes, 408 U.S. 665, 684–85 (1972))); Saxbe v. Wash. Post. Co., 417 U.S. 843, 849 (1974) (discussing *Pell*'s reliance on *Branzburg* regarding the constitutional rights of the press (citing *Pell*, 417 U.S. at 834–35)); *Branzburg*, 408 U.S. at 684–85 (holding the press is not entitled to broader First Amendment rights than the public).

82. *See Branzburg*, 408 U.S. at 706 (stating there is value in "leaving state legislatures free . . . to fashion their own standards").

83. *See id.* at 709–10 (emphasizing the Court's limited holding and that "courts will be available to newsmen under circumstances where legitimate First Amendment interest requires protection").

to statutorily protect that which the Constitution would not.[84] Similarly, in the period from the mid-1960s to the late 1970s—when the Court was deciding *Zemel*,[85] *Pell*,[86] *Branzburg*,[87] and a wealth of other access cases[88] and was no doubt abetted by the revelations spawned by the Vietnam War and Watergate—the federal government, as well as the state legislatures, passed laws granting protections and privileges not grounded in the Constitution.[89] Prominent among these were laws that better assured unprecedented access to official meetings and records.[90]

84. At the time of the decision, seventeen states had some type of statutory protection. *Id.* at 689 n.27 (listing states with shield laws). Another twenty-one have since passed shield laws. *See* COLO. REV. STAT. § 13-90-119 (2011); CONN. GEN. STAT. ANN. § 52-146t (West 2005 & Supp. 2011); DEL. CODE ANN. tit. 10, § 4321 (1999); FLA. STAT. ANN. § 90.5015 (West 2011 & Supp. 2012); GA. CODE ANN. § 24-9-30 (West 2003 & Supp. 2011); 735 ILL. COMP. STAT. ANN. 5/8-901 (West 2003 & Supp. 2011); KAN. STAT. ANN § 60-481 (2005 & Supp. 2010); ME. REV. STAT. tit. 16, § 61 (2006 & Supp. 2011); MINN. STAT. ANN. § 595.023 (West 2010 & Supp. 2012); NEB. REV. STAT. ANN. § 20-146 (LexisNexis 2008); N.C. GEN. STAT. ANN. § 8-53.11 (West 2011); N.D. CENT. CODE ANN. § 31-01-06.2 (West 2010); OKLA. STAT. ANN. tit. 12, § 2506 (West 2009 & Supp. 2012); OR. REV. STAT. ANN. § 44.520 (West 2003 & Supp. 2011); R.I. GEN. LAWS § 9-19.1-2 (1997); S.C. CODE ANN. § 19-11-100 (1985 & Supp. 2011); TENN. CODE ANN. § 24-1-208 (2000 & Supp. 2011); TEX. CIV. PRAC. & REM. CODE ANN. § 22.023 (West 2008 & Supp. 2011); WASH. REV. CODE ANN. § 5.69.010 (West 2009 & Supp. 2012); W. VA. CODE ANN. § 57-3-10 (LexisNexis 2005 & Supp. 2011); UTAH R. EVID. 509(b). Additionally, Virginia courts have acknowledged the existence of shield laws in public figure defamation cases. *See, e.g.*, Hatfill v. N.Y. Times Co., 459 F. Supp. 2d 462, 466 (E.D. Va. 2006) (recognizing a "qualified privilege against disclosure of confidential sources in public figure defamation cases").

85. Zemel v. Rusk, 381 U.S. 1 (1965) (discussing the lack of a constitutional right of access to government officials).

86. *Pell*, 417 U.S. 817 (discussing the lack of a constitutional right of journalist access to prisoners).

87. *Branzburg*, 408 U.S. 665 (discussing the lack of a constitutional testimonial privilege for journalists and possible limited effects on flow of information).

88. *See, e.g.*, Houchins v. KQED, Inc., 438 U.S. 1, 15 (1978) ("Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control."); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 495 (1975) ("[T]he First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection."); Saxbe v. Wash. Post Co., 417 U.S. 843, 849 (1974) (finding journalists were not allowed greater access to prisons under the First Amendment than the general public).

89. *See* H.R. REP. NO. 94-880(I), at 4–5 (1976) (discussing history of open information legislation in the 1960s and 1970s).

90. *See, e.g.*, COLO. REV. STAT. §§ 24-6-101–402 (2011) (providing access to

Supporting this populist push for greater governmental openness and accountability, scholars also began to weigh in on the merits and desirability of more transparent official dealings from the mid-1960s to the mid-1970s.[91] One of the most influential pieces of this genre is a seminal Harvard Law Review Note that preceded *Branzburg* by a decade and has been cited in many subsequent writings.[92] The note begins by offering high praise of the open meetings principle.[93] In part, the author offered an opinion that open meetings are essential to effective government because

> [t]he presence of outside observers is an invaluable aid in making . . . information available, for official reports, even if issued, will seldom furnish a complete summary of the discussion leading to a particular course of action. Even though only newspaper reporters and a few interested citizens are actually present, the benefit of granting access to governmental meetings will inure to a far larger segment of the population, because those who attend will pass on the information obtained.[94]

Interestingly, the author augmented the substantive argument with a psychological one as well, asserting that the public's expectations for open government, as manifested through legislation, will thus be communicated to public officials.[95]

> [O]pen meeting legislation is considered desirable for "its educational effect, rather than its effect as a legal weapon" [and] [t]he statutes are viewed . . . as serving "to exemplify a public attitude," to tell "the politicians that the moral sentiments of the people [favor] open meetings. . . . [They are] a tool for the public—and the press on behalf of the public—to use in prying open doors, not to use in punishing . . . officials."[96]

meetings of the general assembly and state agencies); MO. ANN. STAT. §§ 610.010–.035 (West 2006 & Supp. 2011) (granting access to government meetings, records, and votes); OR. REV. STAT. ANN. §§ 192.610–.710 (West 2007 & Supp. 2011) (granting access to public meetings).

91. *See generally*, Note, *Open Meeting Statutes: The Press Fights for the "Right to Know,"* 75 HARV. L. REV. 1199 (1962) [hereinafter *Open Meeting Statutes*] (discussing the development of open meetings laws).

92. *See id.*

93. *Id.* at 1199–1200.

94. *Id.* at 1201.

95. *See id.* at 1216.

96. *Id.* (sixth and seventh alterations in original) (footnotes omitted).

Seemingly, the potential consequences of open meetings legislation on the functioning of government officials were of some moment.[97] However, as the author noted, plumbing the depths of governmental concern was problematic because "an open meeting law 'is a little like motherhood; no one wants to express himself against it publicly.'"[98] Still, the conclusion was reached that "[o]pen meeting legislation has neither revolutionized the conduct of state and local government nor brought it grinding to a halt."[99]

Related scholarship on this issue has considered buttressing existing open meetings law by "constitutionalizing" a right of access[100] despite the fact it has long been circumscribed by judicial edict.[101] This task begins by recounting yet again all of the perceived benefits that flow from ensuring better public access to government proceedings, such as improving official accountability, enhancing public confidence in the system, and improving the flow of information to those affected by government decisions.[102] In addition to the benefits, commentators argue the history surrounding the framing of the Constitution mandates that such a right be read into the nation's founding charter:

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

97. *See id.* at 1218 (noting editors disagreed on the effect of open meeting legislation).

98. *Id.* (quoting Letter from Managing Editor, to Harvard Law Review (Nov. 30, 1961) (quoting Letter from Chairman, Me. Comm'n on Freedom of Info., to Managing Editor, Portland Press Herald)).

99. *Id.* at 1219.

100. *See, e.g.*, R. James Assaf, Note, *Mr. Smith Comes Home: The Constitutional Presumption of Openness in Local Legislative Meetings*, 40 CASE W. RES. L. REV. 227, 230 (1989) ("Because the state political machinery may prove deficient, the federal Constitution must provide a safeguard for open government based on substantive and structural support.").

101. *See, e.g.*, Zemel v. Rusk, 381 U.S. 1, 17 (1965) ("The right to speak and publish does not carry with it the unrestrained right to gather information.").

102. *See* Assaf, *supra* note 100, at 237 (citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 592–97 (1980) (Brennan, J., concurring)).

democracy together turns to grease.[103]

On the other hand, some commentators were decidedly more circumspect in asserting such a fundamental basis for access; in fact, a few even questioned the validity and viability of open government law in general. For example, Professor Douglas Wickham conceded the value of then-current open meetings laws on the books around the country but critiqued what he felt were some of their faults, citing what he believed to be the essential elements of an ideal open meetings law.[104] Among these was the need to have a definite statement of the law's intent included in the legislation itself.[105] In addition, he discussed the need for a well-established enforcement mechanism with specific sanctions, which should not include a criminal penalty but could encompass removal from public office.[106] These are telling points, as the current Iowa Open Meetings Law contains such provisions.[107]

Other scholars, such as Thomas H. Tucker, have proven much more strident than Wickham and offer a scathing evaluation of open meetings laws as being ill-considered and misdirected. Reviewing the aftermath of the 1976 federal open meetings law, Tucker pointed out that although

> the most emotionally persuasive argument for open meetings on the federal level was the need to restore the people's faith in the government and its leaders[,] . . . the Government in the Sunshine Act would not have affected nor even pertained to those problems which largely caused the public's malaise in the Vietnam-Watergate era.[108]

Tucker further excoriated the notion that open meetings laws will do anything even minimally effective in "cleaning up" government, noting, "[t]o the extent that there are shady dealings, open meetings will at most cause a change of venue. . . . [S]uch a problem is one of human nature rather than procedure, ..."[109] He made a further stab at an empirical understanding of the effects the federal sunshine law had on government

103. *Id.* at 268.

104. *See* Douglas Q. Wickham, *LET THE SUN SHINE IN! Open-Meeting Legislation Can Be Our Key to Closed Doors in State and Local Government*, 68 NW. U. L. REV. 480, 488–93 (1973).

105. *Id.* at 488.

106. *See id.* at 495–99.

107. IOWA CODE §§ 21.1, .6 (2011).

108. Thomas H. Tucker, *"Sunshine"—The Dubious New God*, 32 ADMIN. L. REV. 537, 543 (1980).

109. *Id.* at 544.

agencies by sending out questionnaires to twenty-eight members of fourteen federal agencies, such as the Federal Reserve Board, Nuclear Regulatory Commission, and the Federal Communications Commission.[110] While most of the responses to his questions were couched in self-serving or circumspect language, one general verity was revealed: the belief by most respondents that the open meetings act affected their ability to informally discuss their agencies' business, with many noting that the pall cast on their deliberative processes was "significant."[111]

As Tucker noted, such a possible adverse consequence was seemingly heeded by the Supreme Court in *NLRB v. Sears, Roebuck & Co.*, in which Justice White opined that "'[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . *to the detriment of the decision-making process*.'"[112]

As history well documents, despite the stark ambivalence within the scholarly community regarding the source and sanity of open meeting laws, the mid-1960s through the mid-1970s was an active time for states to institute, review, and, in many instances, reform laws on this subject.[113] While this Article does not require an exhaustive recitation of each state's experience in this regard, it was truly remarkable how, in the aggregate, many of these laws effectively reconciled the aims, desires, and concerns of all parties, including many of the academics, regarding whether—and to what extent—the government should be open to the governed. For example, state open meetings and open records laws often begin with a strongly-worded purpose statement indicating the government is a creature of the people and as such, the statute confers a "presumption of openness" on all government activity.[114] This coincides nicely with Blasi's formulation

110. *Id.* at 538–39, 551.

111. *Id.* at 547.

112. *Id.* at 545–46 (alterations in original); *see also* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150–51 (1975) (quoting United States v. Nixon, 418 U.S. 683, 705 (1974)).

113. *See supra* note 17 and accompanying text.

114. *See, e.g.*, ARK. CODE ANN. § 25-19-102 (2002 & Supp. 2011) ("It is vital in a democratic society that public business be performed in an open and public manner so that the electors shall be advised of the performance of public officials and of the decisions that are reached in public activity and in making public policy."); CAL. GOV'T CODE § 54950 (West 2010 & Supp. 2012) ("The people of this state do not yield their sovereignty to the agencies which serve them."); HAW. REV. STAT. § 92F-2 (1993) (stating that "[i]n a democracy, the people are vested with the ultimate decision making power[,] [g]overnment agencies exist to aid the people in the formation and conduct of

that the burden must be on the government to keep matters out of the public eye.[115]

On the other hand, open government statutes typically include a roster of situations in which records can be sealed or meetings closed.[116] Generally, these exceptions relate to meetings where a quorum of decision makers are not present, thus allowing for one-on-one exchanges and brainstorming; where litigation strategy or a major public purchase—such as real estate—is to be discussed, thus preventing a private interest to gain an advantage in the subsequent dealing with the government body regarding that matter; and where personnel or other privacy-related matters are to be considered.[117]

What can be seen during this period is an emerging, nationwide movement to make governmental units at all levels more open and

public policy" and the underlying purpose is to "[b]alance the individual privacy interest and the public access interest, allowing access unless it would constitute a clearly unwarranted invasion of personal privacy"); N.Y. PUB. OFF. LAW § 100 (McKinney 2008 & Supp. 2011) ("The people must be able to remain informed if they are to retain control over those who are their public servants."); OKLA. STAT. ANN. tit. 51, § 24A.2 (West 2008 & Supp. 2012) ("[A]ll political power is inherent in the people. . . . [The] agency or political subdivision shall at all times bear the burden of establishing such records are protected by such a confidential privilege.").

115. *See* Blasi, *supra* note 24, at 609 (arguing the government should only be able to place restrictions on press coverage of its activities when it can prove the restrictions "substantially promote an important governmental objective that cannot be promoted sufficiently by alternative policies having less restrictive impact").

116. *See, e.g.*, ARK. CODE ANN. § 25-19-106 (carving out an exception to the open meeting law for "executive sessions" held for the following purposes: "considering employment, appointment, promotion, demotion, disciplining, or resignation of any public officer or employee"); CAL. GOV'T CODE § 54950.5 (West 2010) (allowing "closed session" for meetings regarding the following matters: license and permit determinations, conferences with real property negotiators, conferences with legal counsel regarding existing or anticipated litigation, and more); DEL. CODE ANN. tit. 29, § 10004 (2003 & Supp. 2010) (allowing closed "executive sessions" for the following purposes: job placement discussion, strategy sessions, personnel matters, and preliminary discussions regarding site acquisitions for publicly funded capital improvements); KY. REV. STAT. ANN. § 61.810 (LexisNexis 2004 & Supp. 2011) (stating generally that when a quorum of members of the agency are present the open meeting law applies but listing several exceptions, including discussions regarding the acquisition or sale of real estate, litigation, parole, and personnel matters); N.Y. PUB. OFF. LAW § 105 (allowing closed "executive sessions" after a majority vote when discussing the following: acquisition, sale or lease of real property, litigation, any matter that would imperil public safety if disclosed, and more).

117. *See* 5 U.S.C. § 552b(c) (2006) (providing these exceptions in the federal Open Meetings Act); *supra* note 116.

responsive to the constituents they serve.[118] As will be detailed next, it was within this stew of activism that the state of Iowa instituted, and later modified, its statutory obeisance to open government.

III. OPEN MEETINGS LAW IN IOWA

A. *The First Step*

The dawn of openness in Iowa, at least with respect to enhancing citizens' rights of access to governmental meetings, can generally be traced to 1967 and the work of the sixty-second general assembly of the Iowa Legislature.[119] Unfortunately, there is little in the public record that speaks to the specific promptings of the legislators who enacted the state's first access laws, and it may be that they were responding to the general tenor of public antipathy toward governmental secrecy infusing this time period. Even so, there are some objective artifacts that may give an insight into the motivation and degree of resolve these solons brought to the task of enacting Iowa's first statutory foray into official openness.

First, the open meetings bill, when introduced as Senate File 536 on March 15, 1967, was sponsored by almost half, twenty-nine of sixty-one, of the sitting members of the Iowa Senate, who as a group represented the full political, geographic, and socioeconomic gamut of the state.[120] From this it might be concluded that the corpus of the legislation profited from wide, nonpartisan support not only within the senate chamber but throughout the state as well.

Second, on the very same date and under the designation of Senate File 537, twenty-eight senators also sponsored a bill protecting citizens' rights in pursuing information from public records.[121] Such "piggybacking" possibly serves to even more fully evidence the legislators' full-fledged commitment to attaining comprehensive openness in Iowa state government.

Finally, the open meetings legislation—first introduced in mid-March[122]—was subsequently passed by both houses of the legislature and

118. *See Open Meeting Statutes*, *supra* note 91, at 1199–1201 (discussing the growth in number of open meeting statutes and their purposes).

119. *See Legislative Blow to Secrecy*, *supra* note 13.

120. *See* S. JOURNAL, 62d Gen. Assemb., at iv–v, 654 (Iowa 1967).

121. *Id.* at 654.

122. *Id.*

signed into law by the governor in mid-June of 1967.[123] It was effective on July 1, 1967.[124] Such a "fast track" to enactment may again evidence how the law was a popular response to a perceived need on the part of the body politic. Indeed, the *Des Moines Register* editorial board may have aptly captured the sense of legislator and citizen alike when it hailed the final house passage of the bill by opining that "[t]he dangers of secrecy are so great, so undermining to our form of government, that they outweigh problems which may arise from a requirement that both formal and informal meetings be open to the public."[125]

As to the specifics of the new law, it was comparatively brief in nature, as its substantive element took up only about two-thirds of one page in the Iowa Code.[126] The logic of the statute was, therefore, exceptionally straightforward, as it began by proscribing—unless otherwise explicitly permitted by law—the use of closed meetings by agencies that the law itself went on to define.[127] The law also clearly underscored the interest of any citizen to attend any official forum that chapter 28A designated as a meeting.[128] In addition, the law provided the mechanism and acceptable rationale under which public officials might legitimately close a meeting that was otherwise covered by the statute.[129] The statute also obliged officials to provide advance notice of their meetings and to keep minutes of their proceedings, which were then treated as open records.[130] The law further covered the types of meetings excepted from coverage—those relating to the deliberations of a "court, jury, or military organization."[131] Finally, sections 28A.7 and 28A.8 covered, respectively, the availability of equitable relief for parties aggrieved under the law and the possible imposition of criminal sanction on officials guilty of willful breach of its

123. 1967 Iowa Acts 152–53.

124. Dobrovolny v. Reinhardt, 173 N.W.2d 837, 839 (Iowa 1970) (noting the statute became effective July 1, 1967).

125. *Legislative Blow to Secrecy*, *supra* note 13.

126. *See* IOWA CODE ch. 28A (1971).

127. *See id.* § 28A.1.

128. *See id.* § 28A.2.

129. *Id.* § 28A.3. In pertinent part, the statute allowed a closed session "when necessary to prevent irreparable and needless injury to the reputation of an individual whose employment or discharge [was] under consideration, or to prevent premature disclosure of information on real estate proposed to be purchased, or for some other exceptional reason so compelling as to override the general public policy in favor of public meetings." *Id.*

130. *See id.* §§ 28A.4–.5.

131. *See id.* § 28A.6.

edicts.[132]

It is often said that the devil is in the details, and when this maxim is extended to the realm of statutory law, most attorneys will readily concede that the preponderance of the demons repose in and among the definitions. So, within a couple years of enactment, several cases percolated up to the Iowa Supreme Court that required these jurists to conduct some statutory interpretation.

In *Dobrovolny v. Reinhardt*,[133] the court—in what appears to be the case of first impression dealing with any aspect of the state open meetings law—affirmed a trial court's refusal to invalidate the action of a local school board that voted to consolidate its system with a neighboring school district pursuant to an illegally closed meeting.[134] The basis of the Iowa Supreme Court's affirmation was that no interpretation of the statute's provisions—especially that of section 28A.7, which dealt with the specified forms of equitable relief, as read in conjunction with the then-existing Iowa Rules of Civil Procedure 320 to 330—allowed for after-the-fact invalidation of an official action that was otherwise within the authority of the governmental body in question.[135]

It might be noted at this point that this particular decision did not sit well with everyone, as evidenced by one law review author who took the Iowa Supreme Court to task for its opinion in *Dobrovolny*.[136] Specifically, the commentator disapproved of the court's failure to recognize the rights of citizens to retroactive equitable relief in order to force public bodies to comply with the open meetings law.[137] While members of the Iowa Supreme Court may have read this comment at some point, it had no effect on the court. Soon thereafter, the court affirmed and expanded its ruling in *Dobrovolny* with its decision in *Anti-Administration Ass'n v. North Fayette County Community School District*.[138]

132. *See id.* §§ 28A.7–.8.

133. Dobrovolny v. Reinhardt, 173 N.W.2d 837 (Iowa 1970).

134. *Id.* at 839, 841.

135. *Id.* at 841.

136. *See generally* Comment, *The Iowa Open Meetings Act: A Right Without a Remedy?*, 58 IOWA L. REV. 210 (1972) [hereinafter *Right Without a Remedy*] (confronting the Iowa Supreme Court's holding that denied equitable relief in *Dobrovolny*).

137. *Id.* at 220; *see also Dobrovolny*, 173 N.W.2d at 841 ("Rights already lost and wrongs already committed are not subject to injunctive relief . . . .").

138. Anti-Admin. Ass'n v. N. Fayette Cnty. Cmty. Sch. Dist., 206 N.W.2d 723, 725–26 (Iowa 1973).

While the influence of the critique was questionable, it nevertheless provided evidence that the open meetings law was still in the crosshairs of at least a few observers and that this scrutiny might lie at the base of a future revisiting of the law.[139] Specifically, within four years of *Anti-Administration Ass'n*, another law review author emerged citing what were construed to be several additional problems with the law as it existed in the mid-1970s.[140]

In *The Iowa Open Meetings Act: A Lesson in Legislative Ineffectiveness*, the statute was criticized for not providing a clear policy statement to serve as an interpretive guide to the law.[141] In addition, the "exceptional reason" provision contained in section 28A.3 of the then-current law was described as placing too much unbridled discretion within the ambit of public officials.[142] The author also asserted that the notice requirement was woefully inadequate[143] while also echoing the enforcement concerns cited earlier in *The Iowa Open Meetings Act: A Right Without a Remedy?*.[144]

The law was once again subjected to the Iowa Supreme Court's scrutiny in 1977 in *Greene v. Athletic Council of Iowa State University*.[145] In this decision, the court reversed a lower court ruling that the Athletic Council at Iowa State University was not subject to the state statute on open meetings.[146] In ruling the council was indeed subject to Iowa Code chapter 28A,[147] the Iowa Supreme Court noted the purpose of the Iowa Open Meetings Law was "'to prohibit secret or "star chamber" sessions of public bodies, to require such meetings be open and to permit the public to be present unless within the exceptions stated therein.'"[148] In other words, the statute was "enacted for the public benefit and [was] to be construed

139. *See generally Right Without a Remedy*, *supra* note 136.

140. Note, *The Iowa Open Meetings Act: A Lesson in Legislative Ineffectiveness*, 62 IOWA L. REV. 1108 (1977) [hereinafter *Legislative Ineffectiveness*].

141. *See id.* at 1116–39.

142. *See id.* at 1124.

143. *See id.* at 1131.

144. *See id.* at 1132 (citing *Right Without a Remedy*, *supra* note 136, at 215).

145. Greene v. Athletic Council of Iowa State Univ., 251 N.W.2d 559 (Iowa 1977).

146. *Id.* at 559.

147. *Id.* at 562.

148. *Id.* at 559–60 (quoting Dobrovolny v. Reinhardt, 173 N.W.2d 837, 840–41 (Iowa 1970)).

most favorably to the public."[149]

The *Greene* case was one of those rare birds that, once hatched, had a propensity to take flight in directions fully unexpected, for it served not to cow the members of the defendant athletic council, but rather emboldened them to umdertake a titanic struggle with the open meetings law.

In *Knight v. Iowa District Court of Story County*,[150] the Iowa Supreme Court reviewed the law again and concluded that chapter 28A did not reference individual conduct and "it [did] not 'sufficiently specify what those within its reach must do in order to comply.'"[151] In reaching this conclusion, the court pointed out the following:

> In the criminal cases below these plaintiffs were charged with "participating" in a closed meeting of the council. But "participation" is neither mentioned nor defined in chapter 28A. Obviously, participatory conduct could run the gamut from an active instigation of a closed meeting to reluctant presence after objecting to or voting against a secret session. By reading chapter 28A no individual would know when, if ever, his or her involvement with a prohibited meeting becomes a criminal act.[152]

As such, the law "violate[d] the vagueness standards . . . and resultantly deprive[d] plaintiffs of due process."[153]

The plaintiffs' prospects were not diminished by the fact that by the time the Iowa Supreme Court decided their case in mid-1978, a proposed massive change in the Iowa Open Meetings Law was already set to take effect on January 1, 1979, and the new statute positively addressed, and corrected, the very issue before the bar in *Knight*—although the court took pains that its decision to find in favor of the plaintiffs was strictly based on

149. *Id.* at 560 (citing Laman v. McCord, 432 S.W.2d 753 (Ark. 1968)). As further evidence that *Greene* was a catalyst for change in the law, the Iowa General Assembly responded in the 1978 legislative session by rewriting the entire Iowa open meetings statute. *See* 1978 Iowa Acts 183–90. One specific change was that "governmental body" was redefined to "be expressly created by statute, or be formally and directly created by another governmental body which itself is subject to the open meetings law." *See* Donahue v. State Bd. of Regents, 474 N.W.2d 537, 539 (Iowa 1991) (citing 1978 Iowa Acts ch. 1037, § 3); *see also* 1978 Iowa Acts 183–84.

150. Knight v. Iowa Dist. Court of Story Cnty., 269 N.W.2d 430 (Iowa 1978).

151. *Id.* at 434 (quoting Hynes v. Mayor of Oradell, 425 U.S. 610, 621 (1976)).

152. *Id.* at 433.

153. *Id.* at 434.

a reading of the then-current version of chapter 28A.[154] The court stated, "We need not treat here plaintiffs' contention the new act provides evidence the legislature recognized the constitutional infirmities in the penal sanctions of chapter 28A. Nor do we pass on the constitutionality of the new enactment, a question not now before us."[155]

Knight clearly signaled the last hurrah of the original chapter 28A and served to anticipate a new open meetings regime. It also culminated a time in which citizens, public officials, and academics who involved themselves with the prevailing law began to seemingly grow restive with its vagaries and restrictions and pressed the legislature for improvements.

B. *The Longer Stride*

That a move to modify the Iowa Open Meetings Law was afoot even before the Supreme Court's decision in *Knight* is attested to by the fact that on October 12, 1977, the legislature empanelled the Joint State Government Subcommittee on the Open Meetings Law "to study the present practice under chapter 28A of the Code."[156] The membership of the subcommittee comprised co-chairs Senator E. Kevin Kelly and Representative Don Avenson, Senators Minnette Doderer and Lowell Junkins, and Representatives Norman Jesse and Nancy Shimanek.[157]

According to the subcommittee's final report, delivered to the second session of the sixty-seventh general assembly of the Iowa Legislature, these legislators had two meetings calculated to see the need for and to define the substantive elements of changes in chapter 28A.[158] The first, held on November 14, 1977, was "a public hearing and testimony was given by journalists, citizens groups, and government agencies. These parties spoke to the problems they encounter[ed] with the present language of the open meetings law and discussed suggested revisions."[159] It has proven difficult to retrieve many original documents or statements relating to this particular hearing, but one such artifact—the text of a speech delivered by

154. *See id.* at 433–34.

155. *Id.* at 434.

156. OPEN MEETINGS LAW SUBCOMMITTEE OF THE STANDING COMMITTEES ON STATE GOVERNMENT, REPORT TO MEMBERS OF SECOND SESSION OF THE SIXTY-SEVENTH GENERAL ASSEMBLY, STATE OF IOWA, 1978, at 1 (1978) [hereinafter OPEN MEETINGS LAW REPORT], *available at* http://contentdm.legis.state.ia.us/cdm4/document.php?CISOROOT=/78ic&CISOPTR=293.

157. *Id.*

158. *Id.*

159. *Id.*

the Dean of Drake University's School of Journalism and Mass Communication and executive secretary of the then-newly formed Iowa Freedom of Information (FOI) Council, Herbert Strentz—still exists to underscore at least some of the priorities and concerns of those associated with media operations in the state.[160]

In addressing the members of the subcommittee, Strentz stated that as of that date, the FOI Council had "no formal stand in calling for specific revisions of Chapter 28A,"[161] but it was his personal belief that any revisions should, at the very least, include "a preamble stating [the law's] purposes and intent" because "[s]uch a preamble would be a guide in judicial interpretation of the law, and such preambles are found in the statutes of many states."[162] Beyond this, Strentz stressed that "[m]ore than a glowing preamble [was] needed."[163]

Dean Strentz explained this stance by noting, "I make this statement particularly with regard to that part of Chapter 28A (28A.3) which notes that a public meeting can be closed for 'some other exceptional reason so compelling as to override the general public policy in favor of public meetings.'"[164] Noting that this particular statutory proviso had come to be dubbed the "'catch-all' phrase," he concluded that with such a vague provision, "the Iowa Open Meetings Law [could] become a Closed Meetings Law," and he advocated its removal.[165]

Dean Strentz also commented that the notice for the subcommittee meeting asked participants to submit comments as to "what should constitute a 'meeting.'"[166] He stated the then-current law failed to provide a workable definition, and in response, he offered his own definition to be taken under consideration by the Open Meetings Committee of the FOI Council:

> "Meeting means the convening whether in person of a ~~public~~

160. *See* Herbert Strentz, Exec. Sec'y, Iowa Freedom of Info. Council & Dean, Sch. of Journalism and Mass Commc'n, Drake Univ., Speech to Hearing of the Joint Interim Subcommittee to Study the Iowa Open Meetings Law (Nov. 14, 1977) [hereinafter Strentz Speech] (on file with author).

161. *Id.*

162. *Id.* Dean Strentz discussed Hawaii's statute as a particularly good example. *See id.*

163. *Id.*

164. *Id.* (quoting IOWA CODE § 28A.3).

165. *See id.*

166. *Id.*

> ~~agency~~ governmental body in order to make a decision or deliberate toward a decision ~~on any~~ upon a matter, regardless of where the meeting is held and whether formal or informal."
>
> "Nothing in this section shall be construed to require a chance or social meeting of two or more members of a public body to be considered a public meeting, but no such chance meetings, informal assemblages or electronic communications shall be used to decide or deliberate public business in circumvention of the spirit or requirements of this act."[167]

In closing his remarks at the hearing, Dean Strentz admitted there was ambivalence within the FOI Council with regard to the nature and extent of the law and the restrictions it was to place on public officials.[168] Specifically, he stipulated the following: "Within the FOI Council there is support for a blanket open meetings law to require that all meetings be open to the public, as is the case in Tennessee, and there also is support for some specific exemptions similar to those in the current Iowa law."[169] There is indirect evidence from later in the hearing that indicates several of the legislators on the subcommittee balked at such a blanket approach, finding that such a formulation would "hamper efficiency in government."[170]

In conjunction with the November 14 hearing during which Dean Strentz and others presented their ideas and proposals, the subcommittee also reported that "[a] survey was conducted of several state boards and commissions to obtain an indication of the frequency of use of the exceptions to the open meetings law."[171] In addition, less than a month later on December 6, the FOI Council organized a workshop to address concerns about the law—a meeting that the governor of Iowa was scheduled to attend, along with members of the subcommittee.[172] Several telling commentaries emerged from this convocation.

For example, it appears that the FOI Council was now unified in its support of an "unqualified ban on closed meetings by public agencies."[173]

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167. *Id.* (alterations in original).
168. *Id.*
169. *Id.*
170. *Meetings*, FORT DODGE MESSENGER, Dec. 2, 1977, at 3A.
171. OPEN MEETINGS LAW REPORT, *supra* note 156.
172. Charles Harpster, *Information Panel Endorses Open Meetings Law Change*, DES MOINES REG., Dec. 2, 1977, at 12B.
173. *Meetings*, *supra* note 170.

Evidence that the council likely expected this to be an extremely tough sell, however, is indicated by the admission of Steve Weinberg, a reporter with the *Des Moines Register* and the *Des Moines Tribune* and head of the FOI committee that drafted the proposal, that the proposal "'was not drafted with political practicality in mind.'"[174] He said that the proposal was written with full knowledge that "'legislators would dilute it if necessary.'"[175] In addition to eliminating exceptions under which a closed meeting could be held, the council advocated other changes, including voiding "any action by a public body in an illegal closed session" and the imposition of criminal penalties."[176]

Professor Arthur Bonfield of the University of Iowa College of Law assailed the FOI Council's position as being an undesirable "unidirectional value choice [which presupposes] that openness is so much more important than any other value, that openness should always prevail over [an] opposing public interest."[177]

Professor Bonfield emphasized that he was, philosophically, "biased in favor of openness," but as a scholar of the law he was opposed to such a "unidirectional value choice" for the following reasons:

> Openness and the important values it represents are not the only important values in society. On occasion other values are more important in specified situations. As noted those other values include efficiency and effectiveness as well as avoidance of undue invasions of personal privacy. Mere inconvenience to public officials, or some increase in cost, are never, in my view, enough to outweigh the public interest in openness.
>
> The interests of the press are not always the same as the public. The interest of the press in open government usually is congruent with the public's interest in open government because the press helps inform the people. But sometimes the press seems unwilling to balance the competing instances in which the public interest, as distinguished from the interest of the press, may require a closed meeting.
>
> In my view, therefore, what we need to do is start with a presumption that insofar as possible public business should be conducted in public.

174. Harpster, *supra* note 172.

175. *Id.*

176. *Id.*

177. Arthur Earl Bonfield, Outline: Speech on Iowa Open Meetings Law 1 (Dec. 6, 1977) (unpublished outline) (on file with author).

> Then we need to evaluate with a skeptical eye the specific claims for exceptions to that principle in light of the equally important competing claims for efficient, effective, government and the protection of individual privacy.[178]

Representatives of other governmental groups weighed in as well, generally staking out positions somewhere in the middle of the ideological spectrum.[179] One example is offered in the statement made by T.E. Davidson, Executive Director of the Iowa Association of School Boards (IASB).[180] Davidson's address at the December 6 forum reflected the "position taken by IASB Delegate Assembly Oct. 27, 1977."[181] Davidson commenced by stating his organization's support for an open meetings statute:

- The Iowa Association of School Boards believes that, as a general policy, school board meetings should be conducted as open sessions. School board meetings are public meetings, open to the public, and should be closed only for reasons expressly permitted by law. School boards should make every effort to minimize the number of closed meetings.

- We support revising the present law and limiting the option of closing school board meetings to those few reasons which we view as essential to proper handling of school board responsibilities. If those essential reasons are listed in the law, we are willing to see the broad "other exceptional reason" clause abolished.[182]

Davidson then proceeded to enumerate what he and the IASB thought would be situations in which a closed school board meeting might be warranted:

> 1. Consideration of the employment, evaluation, appointment or discharge of an individual whose reputation might suffer needless or irreparable injury.
>
> These personnel matters, as they pertain to an individual employee or prospective employee, should be conducted

178. *Id.*

179. *See generally* T.E. Davidson, Exec. Dir., Iowa Ass'n of Sch. Bds., Statement on Open Meetings (Dec. 6, 1977) (on file with Freedom of Info. Council, Drake Univ.).

180. *Id.*

181. *Id.*

182. *Id.*

> privately. Public employers should have the opportunity to discuss the relative qualifications of job applicants, an employee's performance and the possibility of discharge in closed session, provided that other laws are followed.
>
> 2. Discussion of the proposed purchase or rental of real estate.
>
> It is our opinion that the premature disclosure of potential real estate transactions could cause price speculations which would increase the cost to a district's taxpayers.
>
> 3. Hearings to determine possible disciplinary action against students where an executive session is requested (by the student and/or parents).
>
> If requested by the student or the student's parent or guardian, student suspension or expulsion hearings should be conducted in closed session. It appears desirable to have the opportunity to avoid a situation that would embarrass or label a student and thus inhibit the possibility of rehabilitation.
>
> 4. Review of confidential documents as defined in Section 68A.7 of the Code.
>
> Chapter 68A pertains to public documents and the access of citizens to those documents. Section 68A.7 lists certain documents as confidential and not subject to public disclosure. It would be contradictory to have confidential documents specified in the Code and not allow the governing board to review those documents in closed session.
>
> 5. Matters in litigation.
>
> This should pertain to pending and prospective litigation. It seems to us that if there is a threat of a lawsuit and discussions are held with legal counsel about prospects and strategies, these talks should be allowed to be private.
>
> 6. Negotiation strategy sessions.
>
> IASB supports the present law which exempts from Chapter 28A strategy sessions of a public employer, mediation sessions and the deliberative process of arbitrators. Fact-finding and arbitration hearings are, as they should be, open sessions.[183]

183. *Id.* Many of Davidson's exemptions mirror suggestions made by Bonfield. *Compare id.* (listing six exceptions), *with* Bonfield, *supra* note 177, at 3–4

Despite all of their provisos, the IASB also declared that "[t]he law should continue to mandate that any final action be taken in open public session."[184]

The distillation of the IASB's input found form in several proposals for modifying the existing open meetings law.[185] On December 20, 1977, the joint subcommittee held its second meeting "to discuss various drafts which had been submitted to it."[186] At the meeting, the subcommittee approved a draft of an open meetings law that was submitted to the legislature.[187] As detailed by the subcommittee in its report to the general assembly, "some of the principle features of the draft" included the following:

> 1. Those governmental bodies subject to the law [we]re defined and the applicability of the law down the chain of administrative delegation [wa]s limited.
>
> 2. The requirements for notice of meetings [wa]s made more specific.
>
> 3. The justifications for closing a meeting [we]re limited to

(listing twelve exceptions subsuming those offered by Mr. Davidson). Bonfield also provided additional exceptions, such as agency discussions of licensure provisions, the setting of administrative or law enforcement "tolerances," and the elaboration of law enforcement procedures that might allow would-be miscreants to avoid detection. *See* Bonfield, *supra* note 177, at 3–4. Indeed, in substance or essence, almost all of the exceptions Bonfield listed at the December 6 meeting ultimately found their way into subsequent versions of the Iowa Open Meetings Law along with Bonfield's call—and scheme—for a more credible means of enforcement, improved notice provisions, a clearer statement of the governmental bodies covered by the law, and a definitive pronouncement of legislative intent. *Compare id.* (listing twelve exceptions to the general rule requiring open meetings), *with* IOWA CODE § 21.5 (2011) (delineating twelve instances where "[a] governmental body may hold a closed session").

184. Davidson, *supra* note 179.

185. *See* Minutes, Open Meetings Law Subcommittee of the House and Senate Committees on State Government, State of Iowa (Dec. 20, 1977) [hereinafter Minutes, Dec. 20, 1977].

186. OPEN MEETINGS LAW REPORT, *supra* note 156.

187. In a meeting that lasted over seven hours, subcommittee members Avenson, Kelly, Doderer, and Shimanek, along with a dozen advisory attendees, proposed drafts of the new open meetings law prepared by both the House Majority Caucus and Professor Arthur Bonfield, who was among the attending advisors. *See* Minutes, Dec. 20, 1977, *supra* note 185. The final version, which the subcommittee voted to report to the State Government Standing Committee, represented something of a hybrid of the two. *See id.*

> discussion of confidential records, litigation strategy, licensee examinations and disciplinary actions, student disciplinary actions, deliberations of contested cases, and some law enforcement matters.
>
> 4. The voting requirement for closing a meeting [wa]s increased.
>
> 5. Detailed minutes and recordings [we]re required to be kept of closed meetings and procedures [we]re stated for the review and disclosure of the minutes and recordings in a court proceeding.
>
> 6. The action taken at an unlawfully closed meeting [was made] voidable.
>
> 7. Personal civil liability is provided for those who violate the open meetings law.
>
> 8. Attorneys' fees and costs can be recovered by parties bringing an action to enforce the law.
>
> 9. A public official can be removed from office for repeated violations of the law.
>
> 10. The use of conference call meetings [wa]s limited to emergency circumstances and prior notice is required.[188]

Certainly, the recitation above indicates that the proposed overhaul of the state's open meetings law was to be an ambitious one. In fact, in addition to the substantive changes, the first—if not the most defining—element of the proposed new law was contained in section 2:

> INTENT—DECLARATION OF POLICY. This Act seeks to assure, through a requirement of open meetings of governmental bodies, that the basis and rationale of governmental, as well as those decisions themselves, are easily accessible to the people. Ambiguity in the construction or application of this Act should be resolved in favor of openness.[189]

In effect, the drafters of the proposed legislation heeded what Dean Strentz said on November 14[190] and explicitly included a directive to officials, administrators, and in fact, jurists that the legislature wanted the presumption of openness to inform every instance when the new law was to

188. *Id.* at 1–2.
189. *Id.* at 4.
190. *See* Strentz Speech, *supra* note 160.

be used, reviewed, and construed.[191] Given this, it may not be a surprise that the road to ultimate passage of the revised Iowa Open Meetings Law was marked by a series of fits and starts, as outlined below.

C. *The Choppy Gait*

Despite what was an arguably extensive process of fact finding, opinion seeking, and law writing, the subcommittee's submission did not enjoy immediate approval within the legislature.[192] In fact, it failed to even make it out of the Iowa House State Government Committee on its first go-round.[193] Failing to garner the ten affirmative votes required to send the bill to the full house, State Representative Donald Avenson, a Democrat from Oelwein and co-author and committee manager of the bill, vowed the legislation was "not dead"[194] and "predicted a new law would be approved during the 1978 legislative session."[195]

The major point of contention was that many of the committee members saw the expanded roster of exceptions to the open meetings requirement as providing a harbor that allowed "public bodies more ways to close meetings."[196] Avenson argued, on the contrary, that the reformulation of the law eliminated the amorphous wording of the existing statute, which allowed "governmental bodies to close meetings for a reason 'so compelling as to override the general public policy in favor of open meetings'"[197]—a provision he termed as being "'misused and overused.'"[198]

Avenson further pointed out that the proposed new law "eliminated . . . provisions permitting public bodies to close meetings to discuss the purchase of real estate, or to discuss hiring and firing of public employees."[199] In sum, Avenson tried to deny that the expanded list of exemptions undercut the drive for openness by making the argument that "the proposed bill 'would tighten up the (reasons for closing a meeting) by adding more [exemptions] and by making more specific penalties' for

191. *See* OPEN MEETINGS LAW REPORT, *supra* note 156, at 4.

192. *See* David Yepsen, *Vote on Open Meetings Bill Falls Short*, DES MOINES REG., Dec. 22, 1977, at 2B (tallying the votes in favor and against the proposed amendments).

193. *Id.*

194. *Id.*

195. *Id.*

196. *See id.*

197. *Id.*

198. *Id.*

199. *Id.*

violating the law."[200]

The proposed new open meetings law also hit a glitch in committee when one of its members, State Representative Reid Crawford, a Republican from Ames, introduced an amendment to "open collective bargaining with government bodies"—a move that gained the approval of five other members but fell short of becoming incorporated into the law.[201] Another move, this time by State Representative John Patchett, a Democrat from West Liberty, to modify the law to "require open meetings of the athletic councils at the three state universities failed on a 6 to 4 vote."[202]

The bill stayed in legislative limbo for nearly a month until it was finally passed by the Iowa House State Government Committee on January 18, 1978.[203] On a fourteen to three vote, members passed a revised version of the bill that was similar to legislation approved by the Iowa Senate State Government Committee.[204] However, the house version did include several provisions not found in its senatorial counterpart. First, the "House committee voted to allow governing bodies to go behind closed doors to discuss the hiring and firing of employees, an exemption that [was not] present in the Senate version."[205] Second, the "House committee also voted to make the athletic councils at Iowa State University and the University of Iowa subject to the new law."[206] Third, the house committee's version differed from the senate's with regard to enforcement; the latter "provide[d] a penalty of $200 for each member of a governing body who violate[d] the law," whereas the former "assesse[d] a $200 penalty if the board member earn[ed] more than $500 a year from his public post and a $25 penalty if the board member earn[ed] less than $500," and "in addition to the $200 or $25 fines, the House committee version

200. *Id.*

201. *See id.*

202. *Id.* This was an issue of some moment, as the Iowa Supreme Court earlier that year held that these councils were—under the existing open meetings law—subject to the statutory requirements. *See* Greene v. Athletic Council of Iowa State Univ., 251 N.W.2d 559, 562 (Iowa 1977). Perhaps the proposed new open meetings law was one legislator's attempt to see that the new law reflected the Iowa Supreme Court's interpretation.

203. *See* Charles Bullard, *House Panel OKs Revision of Meetings Law*, DES MOINES REG., Jan. 19, 1978, at 6A.

204. *Id.*

205. *Id.*

206. *Id.*

[said] legal fees and costs also must be paid by board members found guilty of violating the law."[207] Fourth, under the house prescription, a "board member who violate[d] the law three times" had to be removed from office, an injunction "[could] be granted to require the law to be obeyed," and the courts of the state were given the authority to "void any action taken during an illegal closed session if it is challenged within 90 days."[208] Finally, the house bill required "detailed minutes and a tape recording of all closed meetings [to] be kept for a year for possible use in court proceedings."[209]

As the two versions of the proposed new open meetings law began to wend through their respective chambers, the journey did not escape the notice of outside commentators. Specifically, the state's most prominent newspaper shortly weighed in with a timely and reasoned critique of the prospective statute. In its lead editorial on January 24, 1978, the date on which the full Iowa house was to begin debate on its version of the bill, the *Des Moines Register* weighed in with what it saw as the bill's major virtues and flaws.[210]

At the outset, the paper lauded how the new law proposed to expand its coverage to include "any committee created by one of the covered state and local governing bodies"—thus sidestepping court rulings that "the [then-]present law [did] not apply to such committees that include[d] no members of the creating body in its membership."[211]

In addition, the paper opined that the "proposal would improve enforcement by providing for civil penalties rather than the criminal penalty which prosecutors and courts [had] been reluctant to seek or impose, and by providing for the removal from office of any official found guilty of three violations."[212] The paper also looked favorably on the specific clauses of the law that would have permitted "electronic meetings"—e.g., telephone conferences—only if public access was provided as well; given license to private citizens to record any public meeting; required "secret"—as the paper characterized them—meetings to be "recorded so the courts could use the recording for evidence if legality

207. *Id.*
208. *Id.*
209. *Id.*
210. *See* Editorial, *Open Government*, DES MOINES REG., Jan. 24, 1978, at 14A.
211. *Id.*
212. *Id.*

should be challenged"; and authorized the courts to "void action taken at a meeting which violated the law."[213]

Paramount, though, the paper lauded the positive development of the legislature, which was looking to eliminate "the catchall provision which permit[ted] public bodies to meet in secret 'for some other exceptional reason so compelling as to override the general public policy in favor of public meetings.' This would be replaced with a list of eight specifically defined topics which may be discussed in secret."[214]

It is at this point that the *Des Moines Register* changed its tone to issue its opinion on how the bill—in its then-current manifestation—could be improved and to then admonish the legislators on how the final bill should thus look.[215] In particular, the paper exhorted the legislators to carefully scrutinize the definitions they had wrought and the exceptions they had thus far proposed.[216] For example, the editorialist took the legislators to task for the definition of what constituted a "meeting," averring that it "[was] inadequate and could lead to excessive numbers of sessions being closed to the public."[217] Next, the paper—while conceding the wisdom of exempting meetings where matters under litigation are to be discussed—feared that "the provision for secret discussion of 'imminent litigation' could open the door to unjustified secrecy."[218] Similarly, the paper seemingly had no problem with licensing boards "discussing tests and investigations" but asserted that "disciplinary steps must not be secret."[219] So, too, did the commentator here take issue with yet one other "major weakness of the bill"—specifically, "its failure to open up collective bargaining sessions with public employees," noting that these proceedings "now may be kept secret under the Public Employee Collective Bargaining Act."[220]

However, notwithstanding all these other concerns, the writer of this particular editorial saved most of his space for an assault on what would

213. *Id.* ("Each of these provisions would be an improvement over the present law.").
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.* This presages an issue which occasionally gets presented in open meetings contests: conflicts with other statutory provisions guaranteeing privacy or secrecy.

prove to be a lingering vestige of the previous law:

> The bill would continue one of the two specific grounds for secret meetings in the present law by permitting secrecy to discuss hiring or firing of an individual if secrecy is necessary to prevent "irreparable and unnecessary injury to that person's reputation."
>
> Public bodies often have distorted the exemption to cover any "personnel" matter. Drafters of the House bill sought to limit the possibility for abuse by stipulating that the employee under discussion must request a closed session.
>
> But how can a board keep secret its concern about an employee if it must first publicly seek the employee's approval for secrecy? There should be a better way to prevent abuse.[221]

In the view of the *Des Moines Register*, the bills working their way through both houses of the Iowa Legislature had shortcomings,[222] but nevertheless the paper was, on balance, buoyed by the fact that each measure seemed to offer a "framework for writing a strong open meetings statute . . . that best serve[d] the public interest [by holding] secret sessions to the absolute minimum required for government to function."[223]

In its reporting the next day of the house's January 24 open meetings law debate, the *Des Moines Register* made immediate note of the fact that this was the chamber's "first evening session of the year,"[224] a rare event designed to "allow members of the public who work during the day to watch the legislative process."[225] Indeed, according to the report, approximately eighty people jammed into the house gallery to watch the proceedings, including Governor Robert Ray who, one of his spokesmen later admitted, had never seen the legislature in action during his nine previous years as governor.[226]

On a substantive note, the most prominent resolution was the house's decision "that collective bargaining sessions should not be open to the public. Negotiations between public employees and public agencies [could]

221. *See id.*
222. *Id.*
223. *Id.*
224. Charles Bullard, *House Begins Open Meetings Law Debate*, DES MOINES REG., Jan. 25, 1978, at 6A.
225. *Id.*
226. *See id.*

be closed under the [then-]present law."[227] This was one of about forty amendments to the bill that representatives had to "plod" through, including one new proposal that "governing bodies representing fewer than 350 persons" could be spared the requirement of having "to notify the public of upcoming meetings";[228] this amendment was ultimately scrapped, but not until after fifty-five minutes of oratorical wrangling.[229] Another amendment would have allowed officials to close sessions involving discussions with legal counsel about "possible"—in addition to "imminent," as was already specified in the proposed new statute—litigation.[230] This proposal was shot down at the behest of Representative Donald Avenson, who argued that this could turn into another "catchall" provision that might allow governmental bodies far more leeway in closing meetings than the legislature intended.[231] Finally, "[a]ttempts to include legislative committees, subcommittees and party caucuses in the bill also were ruled out of order."[232]

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *See id.* (arguing the loophole might be used excessively).

232. *Id.* The legislative branch is still not subject to the requirements of Iowa Code chapter 21, but there still exists certain prescriptions for openness at the state house. For example, the Iowa constitution dictates that "[t]he doors of each house shall be open, except on such occasions, as, in the opinion of the house, may require secrecy." IOWA CONST. art. III, § 13. This provision grants so much discretion that *Des Moines Register* attorney and open government specialist Michael Giudicessi said, "'It's kind of like you will stop at red lights unless you don't feel like it.'" Jonathan Roos, *'65 Changes Reduced Legislative Secrecy*, DES MOINES REG., Jan. 11, 2004, at 18A. This same article also described how Lyndon B. Johnson's landslide presidential victory in 1964 swept the democratic party in Iowa to control of the statehouse for the first time since 1934, and in its wake the new legislature immediately approved a change to the rules that sought to open all committee meetings to the public. *See id.* However, in the four decades that have followed, legislators have since taken to using "working groups that meet in secret to fashion bills before they are considered in public by committees." *Id.* The upshot is that the Iowa constitution, the Iowa Open Meetings Law, and any specific legislative rules were insufficient to deter "Iowa lawmakers [from] secretly consider[ing] eliminating the state's income tax, raising the state sales tax as high as 8 percent and doubling the state's cigarette tax to 72 cents a pack." Lynn Okamoto & Jonathan Roos, *Behind Closed Doors*, DES MOINES REG., Jan. 11, 2004, at 1A. This may prove to be an issue that will not go away for Iowa lawmakers, as the *Des Moines Register*'s drumbeat is being picked up by other editorialists around the state who are opining that "there is no place in government at any level for public officials who say it's too difficult to conduct the public's business in the public." *Let the Sun Shine In*, THE CEDAR RAPIDS GAZETTE, Jan. 10, 2004, at 4A.

However, two additional exceptions to the proposed new open meetings law were approved that evening: "On a voice vote, the House decided that governing bodies may go behind closed doors to discuss applications for patents. And the House said meetings may be closed to 'discuss the purchase, sale, leasing or renting of real estate.'"[233] And here the matter rested for about two days.

On Thursday, January 26, 1978, the house met again to pick up where it left off at its night session two days prior. What may have seemed settled at that time quickly evolved to a state of flux.[234] For one, Representative Tom Tauke, a Republican from Dubuque, tried to get the chamber to reconsider its approval of the amendment that would have allowed public bodies to go behind closed doors to discuss the acquisition or disposition of real estate, stating, "'[It] provides a loophole we did not want to create.'"[235] "Under the amendment's broad wording, he said, the Department of Transportation Commission and the Conservation Commission would be able to go behind closed doors at virtually all of their meetings because they discuss real estate so frequently."[236] Tauke's motion to reconsider the amendment was defeated forty to fifty-two, but after impassioned appeals by Representatives Jesse and Avenson, the house voted sixty-nine to twenty-four to defer motion on the amendment, "which indicate[d] a compromise position [could have been] hammered out before the bill [was] debated again."[237]

Even more contentious, though, was the house's sixty-two to twenty-seven vote to approve an amendment "authorizing public boards to bar the public when . . . considering appointments and employee evaluations."[238] It was assailed by several members of the chamber, including Nancy Shimanek, a Republican from Monticello, Donald Avenson, a Democrat from Oelwein, and Norman Jesse, a Democrat from Des Moines, as providing "'a wide, wide loophole'" that "would [have] allow[ed] public bodies to close proceedings 'for almost any personnel matter'";[239] proponents countered that the amendment was the least intrusive method

233. Bullard, *supra* note 224.

234. Charles Bullard, *Open Meetings Law Revisions Are Weakened*, DES MOINES REG., Jan. 27, 1978, at 4A.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

of addressing the privacy interests of workers in government employ.[240]

Representative William Griffee, a Democrat from Nashua who sponsored the amendment, "argued that the amendment [was] necessary to protect the reputations of public employees."[241]

> The amendment says a meeting may be closed "to consider the employment, evaluation, appointment or discharge of a person whose reputation might suffer needless or irreparable injury."
>
> Under the amendment, the affected person may request an open session and the board must grant that request.
>
> Before the amendment, the bill would have allowed a closed session only if the affected person were being hired or fired and only if the affected person requested a closed session.
>
> The amendment will allow more closed meetings than the current law, which has been criticized for being too lax.[242]

After that legislative bloodletting, the Solons still had the wherewithal to defeat an attempt to eliminate the provision of the bill requiring all closed meetings to be tape recorded should they sometime be challenged in court.[243]

Interestingly, perhaps, the *Des Moines Register* wasted little time in taking the legislature to task for its dealings of January 26, as the lead editorial on Saturday, January 28 was very blunt in attacking the legislature's present disposition of the open meetings bill; however, the paper vented its institutional spleen not on the expanded personnel exemption but instead on the notion that real estate considerations and transactions should take place beyond the public's view.[244] To the editorialist's view, such an exemption was seen as shortsighted and counterproductive:

> The present[—1967-era—]law permits secrecy "to prevent premature disclosure of information on real estate proposed to be purchased." The House State Government Committee wisely omitted

240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.*
244. Editorial, *Secret Property Deals*, DES MOINES REG., Jan. 28, 1978, at 14A.

> this exception from the new open meetings bill . . . .
>
> Unfortunately, House members do not appear to be inclined to go along with this decision. . . .
>
> While the owner of property desired by some private business might be in a position to jack up the price unreasonably, public bodies face no such threat. The power of eminent domain enables them to compel the owner to sell at a value established by independent appraisal.
>
> . . . What is the point of secret discussion?
>
> Public discussion is more likely to benefit the taxpayer than to cost him. If a board discusses the possibility of renting an office suite for $15,000 a year, the news might prompt an offer of equal space for $12,000 from a different landlord.
>
> While a city council might be besieged with complaints if it publicizes the three locations it is considering for a new fire station, those complaints could point the way to a more informed decision than the council could have made through secret discussion.
>
> The potential for private shenanigans in property transactions is great. The House amendment would keep the public in the dark, but insiders could tip off speculators. Publicity and openness are the best disinfectants.[245]

From the *Des Moines Register*'s mouth to the representatives' ears. The following Monday, January 30, 1978, the house finally approved—on a seventy to fifteen vote—its "complete revision of the Iowa Open Meetings Law."[246] One of the major last-minute changes involved the exemption dealing with real estate transactions:

> In Monday's action, the House tightened up one of the exceptions that was added to the measure last Tuesday night. That exception, before rewording, would have allowed closed meetings "to discuss the purchase, sale, leasing or renting of real estate."
>
> Representative Carroll Perkins (Dem., Jefferson) said that

245. *Id.*

246. Charles Bullard, *Iowa House Revises Law on Meetings*, DES MOINES REG., Jan. 31, 1978, at 1A.

> language was too broad. "We feel we may have gone too far," said Perkins.
>
> The House agreed to narrow the exemption so it allows closed meetings "to discuss the purchase of particular real estate only where premature disclosure could be reasonably expected to increase the price the governmental body would have to pay for that property."
>
> Representative Norman Jesse (Dem., Des Moines), who had opposed the exception, said the new language "is probably an improvement over present law and certainly is an improvement over the amendment we adopted Tuesday night."
>
> However, the House left unchanged an amendment adopted Thursday that weakens the bill. That amendment allows more closed meetings by authorizing public bodies to bar the public when they are considering "the employment, evaluation, appointment or discharge of a person whose reputation might suffer needless or irreparable injury."[247]

With the house's cards all on the table, the *Des Moines Register* editorial page weighed in once again with what it perceived to be the apparent strengths and persistent weaknesses of that chamber's version.[248] The editorial conceded the following: "Iowa House has sent to the Senate a bill that would improve the open meetings law in several respects. The measure clears up ambiguities, provides better machinery for enforcement and closes a major loophole."[249] Still, the editorial lamented that some of the new bill's nine specific exemptions "[were] still too broad."[250]

The *Des Moines Register* continued to carry the torch for jettisoning the real estate transaction exemption, noting that while the house did qualify its earlier language so as to tighten up the exception, nevertheless "the power of eminent domain assures governments of the opportunity to purchase land at a fair market price. No exemption for real estate discussions is warranted."[251] The paper was equally put off by the expansion of the "hiring and firing" exemption contained in the then-existing law to prospectively cover "employment, evaluation, appointment

247. *Id.* at 1A, 4A.

248. *See* Editorial, *Mixed Bag on Secrecy*, DES MOINES REG., Feb. 4, 1978, at 12A.

249. *Id.*

250. *Id.*

251. *Id.*

or discharge of a person whose reputation might suffer needless or irreparable injury."[252]

> The addition of "appointment" would permit boards to discuss in secret the appointment of persons to board vacancies—denying the public a substitute for the give and take of an election campaign and enhancing opportunities for "deals."
>
> The addition of "evaluation" creates the opportunity for a wide range of secret discussions since "evaluation" of performance comes into almost any discussion of an operation.[253]

Nor were these the only faults the paper found with the house's final version:

> The bill's value is lessened by its failure to deal with some exemptions from the open meeting requirement granted in other sections of the Code. Collective bargaining is one of these exemptions.
>
> Another is the exemption granted licensing board disciplinary hearings by a 1977 law. Whether a hearing under that law is public is "at the discretion of the licensee." The hearing as well as the decision should be public.[254]

The editorial concluded, "The House-passed bill has several good features, but the House has left the Senate with plenty of room to improve the bill."[255]

It took the Iowa Senate State Government Committee nearly two weeks to rise to the challenge, but when it next deliberated the bill it did, in fact, make some effort to "stiffen" the proposed law accepted earlier by the house.[256] For one, the senate committee scaled back the house's more-sweeping grant of authority to close meetings when a public body is called upon to decide the "employment, evaluation, appointment or discharge of a person whose reputation might suffer needless or irreparable injury," preferring instead to limit the exemption to only those instances "when a

252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.*
256. Bonnie Wittenburg, *Senate Panel Tightens Law on Meetings*, DES MOINES REG., Feb. 17, 1978, at 4A.

person's firing is under consideration."[257] Other comparatively minor changes to the house version included an amendment to the enforcement provisions of the law that would have subjected "a board member voting to hold an illegal closed meeting (to a fine of) a minimum of $100 and a maximum of $500."[258] The committee also decided to remove the stipulation specifically requiring the athletic councils at the state's three public universities to hold open meetings.[259] Finally, the committee beat back an attempt from Senator Bob Rush, a Democrat from Cedar Rapids, to "require the accuser to prove the governing board held an illegal closed meeting," preferring to stay with the then-present version "that the members of the governing board should have to prove that they did not hold an illegal closed meeting."[260] These qualifications noted, the committee "voted to recommend that the Senate pass the bill."[261]

What soon followed was a "thanks, but no thanks" response to the committee by the Iowa Senate as a whole.[262] For one, the senate voted thirty-one to fourteen to stick with the house formulation of the law that would allow governmental bodies to close meetings when "the 'evaluation' of an employee is being considered," rather than opting for the Iowa Senate State Government Committee's approach of limiting the exemption to cases where only "the discharge of an employee is under consideration."[263] The senate also rebuffed the Iowa Senate State Government Committee by "vot[ing] to stick with the House definition of 'meeting.'"[264]

> And, the committee wanted to drop certain language from the definition of meetings the House had approved.
>
> The House definition reads: "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 discussion,

257. *Id.*
258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.*
262. Bonnie Wittenburg, *Senate Following House to Tighter Open Meeting Law*, DES MOINES REG., Mar. 7, 1978, at 4A.
263. *Id.*
264. *Id.* The committee's exception to this particular provision of the house bill must be presumed, as it was not specifically reported earlier in the *Des Moines Register*.

> deliberation or action upon any matter within the scope of the governmental body's policy making duties.
>
> "Meetings shall not include a gathering of members of a governmental body for purely ministerial, social or informational purposes when there is no intent to formulate policy or to avoid the purposes of this act."
>
> [Senator Kevin Kelly, a Republican from Sioux City and floor manager of the senate bill,] said the suggestion to go back to the House definition "guts" the bill, saying citizens have a right to know how and when a decision was reached.
>
> What does ministerial, social and informational mean, he asked senators. The committee had suggested that that wording be left out.
>
> The author of the proposal to use the House definition—C.W. Hutchins (Dem., Guthrie Center)—responded: "I'm fully and totally committed to passing a reasonable open meetings law. To suggest that this guts the bill is ridiculous."
>
> Hutchins argued that, otherwise, members of the same governmental body would be in violation of the law if a business topic came up while they were at a social event or were traveling together.[265]

Adding insult to insult, the senate also voted, in contravention of the committee's recommendation, to reinstate the athletic councils of Iowa's three state universities as subject to the new open meetings requirements.[266] In addition, the senators agreed to "exempt township trustees from a requirement that the public be told of proposed meetings, but their meetings would [still] have to be open."[267] The senators also decided not to "drop a section requiring board members to demonstrate compliance with the law when a closed meeting is held."[268]

The Iowa Senate State Government Committee did receive one bone, as the full chamber voted to approve the committee's recommendation to change the part of the bill's penalty section to provide "that a board member voting to hold an illegal closed meeting shall be fined a minimum

265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.*

of $100 and a maximum of $500."[269] Even so, in the aftermath of the bill's debate and resolution to that point, Senator Kelly "said he was disappointed. 'Piece by piece we've been tearing this law down,' he said."[270]

This squabble was just a prelude, however, for greater conflict was ahead as the senate took not even one day off from discussing the bill before returning to roil the waters by passing a substantive—and controversial—amendment to the pending house version of the open meetings law.[271] In hindsight, it is somewhat difficult to decide if *what* passed was as controversial as *how* it was passed.

> A proposal to open collective bargaining negotiating sessions to the public squeaked through the Iowa Senate Tuesday when Lt. Gov. Arthur Neu broke a tie by voting to open such sessions.
>
> The vote on that proposal, which would affect negotiations involving public employees, was 24-23.
>
> Senator Tom Slater, a Council Bluffs Democrat and opponent of open bargaining sessions, was out of the chamber momentarily when the vote was taken.
>
> A move to reconsider the vote was made by Gene Glenn (Dem., Ottumwa), who argued that all senators should be given a chance to vote. The attempt to reconsider was defeated on a 23-23 tie vote, however.
>
> Tie votes fall under Senate rules.
>
> The decision to open negotiating sessions, a long-standing controversy, came as the Senate debated a bill rewriting the state's open meetings law.
>
> The Senate went on to approve the bill, 44-2.[272]

Of course, this promised to set up something of a political donnybrook as the "provision mandating open negotiations [was] expected

269. *Id.*
270. *Id.*
271. *See* Bonnie Wittenburg, *Collective Bargaining Proposal Passes with Open Meetings Bill*, DES MOINES REG., Mar. 8, 1978, at 6A.
272. *Id.*

to meet opposition in the House."[273] As it may be recalled, earlier "[s]ome House members attempted to require open bargaining sessions when the House debated the open meetings law in January, but those proposals were ruled out of order."[274]

Despite the possibility of a coming storm in the statehouse, at least one party found this development to be a delightful turn of events: the *Des Moines Register*, which went on record in its editorial on January 24, 1978 as finding the house's stand on this issue to be a "major weakness" of its proposed bill.[275] A few months later, however, the *Des Moines Register* fairly gushed with praise for the actions of the legislature's other chamber:

> The Iowa Senate took a major step toward opening collective bargaining to public scrutiny when it approved a measure to require bargaining between public employers and employees (not including the strategy sessions of either side) to be open.
>
> . . . The House had repeatedly turned back—on what were close to party-line votes—efforts to bring bargaining under open meeting requirements. Senate insistence on this point could lead to a law which will assure the public a chance to know how the bill they eventually pay is arrived at.
>
> It is as much in the interests of public employees for the public to have this opportunity as it is in the interests of employers.
>
> . . . Many one-time opponents of open bargaining have discovered, in states where the law now requires it, that the process is much more workable than they had imagined.
>
> We favor collective bargaining by public employees. That bargaining must have continued public confidence and acceptance. The best way to assure confidence and acceptance is to let the public know what goes on and why.[276]

Despite the editorialist's hopes to the contrary, it was the house that firmly maintained an insistence on this point, as it summarily spurned the senate's stance on opening up collective bargaining negotiations—plus a

273. *Id.*
274. *Id.*; *see also supra* notes 238–42 and accompanying text.
275. *See Open Government*, *supra* note 210.
276. Editorial, *Vote for Openness*, DES MOINES REG., Mar. 9, 1978, at 14A.

couple of other of its amendments for good measure.[277]

> The House rejected [the senate's] provision and decided that only the initial askings of public employee groups and the initial response of public employers should be made public.
>
> [Representative Don] Avenson said the House wording would force public employees and employers to be more realistic in their initial bargaining proposals.
>
> "I believe it will moderate the positions both sides take initially," he said.[278]

Besides the much anticipated shootout over the open bargaining provision, the house also held firm in insisting upon its formulation of the personnel exemption and its general definition of what constituted a meeting:

> The Senate version would allow a meeting to be closed to consider the evaluation or discharge of a person whose reputation might suffer needless or irreparable injury.
>
> The House insisted on its wording, which would allow a meeting to be closed to consider the employment, evaluation or discharge of a person whose reputation might suffer needless or irreparable injury.
>
> Avenson argued against the House version.
>
> "The term evaluation, I believe, is going to become the new catchall exemption," he said, adding: "I see no good reason not to have an open meeting to discuss the employment or appointment of an individual."
>
> The House also insisted on its definition of what constitutes a meeting.
>
> The Senate said a meeting "shall not include a gathering of members of a governmental body for purely social purposes."
>
> The House version says a meeting "shall not include a gathering of members of a governmental body for purely ministerial, social or

277. Charles Bullard, *House Slams Door on Bid to Tighten Open Meetings*, DES MOINES REG., Apr. 14, 1978, at 4A.

278. *Id.*

> informational purposes."
>
> [Representative Norman] Jesse said the vast majority of governmental meetings are informational.
>
> The House wording, he said, "would create a loophole that would make the loopholes we are trying to close pale in comparison."
>
> [Representative Tom] Tauke said the House language is necessary to prevent boards of supervisors from being charged with violating the open meetings law every time they inspect a bridge and hear a complaint from a farmer about dusty roads and don't inform the public that a meeting is taking place.[279]

It was not with a great deal of prescience, therefore, that Charles Bullard, the *Des Moines Register* staff writer who penned the article, concluded, "Chances appear good that the measure will land in a conference committee to work out differences between the Senate and House."[280] His conjecture would, of course, come to pass, but in the interim there was time for a couple of commentators to weigh in on the state of the bill thus in limbo.

In a *Des Moines Register* Op-Ed piece, Dean Strentz tried to raise the consciousness of readers as to the haplessness of the then-current law in ensuring open governmental functions while pitching for the general desirability of the new open meetings bill now working its tortuous way through the Iowa statehouse.[281] However, he tempered his laud with a measure of censure, the nature of which had been previously expressed by Representative Avenson and friends:

> Perhaps it is my pollyanna nature, but it seems that the proposed law can resolve many questions and concerns. It is a decided improvement upon the current law, seems enforceable and seems to manifest a spirit of openness not found in the current law. However, a major problem with the proposed law is the addition of one troublesome exemption, permitting closed meetings for the evaluation of personnel. That would provide a loophole which would do to openness in government what the chuckholes around Iowa are now doing to the wheel alignment of our automobiles.

279. *Id.*

280. *Id.*

281. *See* Herbert Strentz, Op-Ed., *Obeying Open Meetings Law Optional: True or False?*, DES MOINES REG., Apr. 15, 1978, at 14A.

> Are there problems with snow removal in town? Close the City Council meeting to discuss this because it involves evaluation of personnel. Is the high school football team losing too many games? Close the School Board meeting to discuss this because it involves evaluation of personnel. Far-fetched? I don't think so.
>
> The current law provides for closed meetings for "compelling" and "exceptional" reasons, and these words were meant to be restrictive. But the number of times meetings have been closed for "compelling" and "exceptional" reasons, I think, is only a hint of what will happen if public officials can close meetings for something as amorphous as evaluation of personnel.[282]

Soon thereafter, the editorialists at the *Des Moines Register* weighed in as well.[283] Asserting the main purpose of the new bill was to remove the loophole permitting secrecy for "'some other exceptional reason,'" and that the proposed legislation would also "clear up ambiguities and provide better machinery for enforcement," the paper "applaud[ed] the Senate for standing firm . . . and insisting on its version."[284] Predictably, the editorial decried the house's delimiting definition of "meeting," which did not include "'purely ministerial, social or informational'" get-togethers of public officials.[285] The editorial also took issue with the language in both chambers' versions, which allowed meetings to be closed where a personnel evaluation may take place.[286] Finally, while noting with approval that the house backed off to a degree from its somewhat absolutist position on keeping collective bargaining meetings closed, the editorial still concluded this concession "[did] not go far enough to enlighten the public."[287] In closing, the editorialist intoned that the "Legislature . . . invested a lot of time in the open meetings issue. It should make its investment pay by assuring Iowans of the opportunity to learn what their government is doing."[288]

The degree to which either, both, or other journalistic scourgings prompted the Iowa legislators is not easily known, but it is a matter of

282. *Id.*
283. Editorial, *Closed or Open Meetings?*, DES MOINES REG., Apr. 20, 1978, at 18A.
284. *Id.*
285. *See id.*
286. *See id.*
287. *Id.*
288. *Id.*

record that the two chambers did continue to resist changes to their respective versions of the proposed new open meetings law, so the matter was ultimately turned over to a conference committee.[289] As reported, the bone of contention devolved to disagreements "over [the house and senate] definitions of what constitutes a meeting, over which parts of the collective bargaining process should be opened to the public and when a meeting may be closed to discuss an employee."[290]

It would take a week of negotiations to break the logjam, but at last, on April 27, the first signs of an ultimate agreement began to emerge.[291] On that day, the house approved the compromise conference committee version by a vote of eighty to four.[292] In retrospect, the compromise reflects a Solomonic use of excision and explication.[293]

For example, in dealing with the dispute over what will or will not constitute a meeting, the conference committee judiciously deleted the problematic term "informational."[294] As amended, the full definition of meeting was constructed to mean

> "a gathering in person or by electronic means, formal or informal, of a majority of the members of a governmental body where there is discussion, deliberation or action upon any matter within the scope of the governmental body's policy-making duties."
>
> "Meetings," the committee said, "shall not include a gathering of members of a governmental body for purely ministerial or social purposes when there is no discussion of policy or no intent to avoid the purposes of this act."[295]

According to conference committee member and house floor manager of the bill, Representative Avenson, the term "ministerial" was defined as those "'strictly non-policy-making functions,' such as opening

289. *Open Meetings Issue Goes to Conference Committee*, DES MOINES REG., Apr. 21, 1978, at 13A.

290. *Id.*

291. *See* Charles Bullard, *House Okays Compromise on Open Meetings Law*, DES MOINES REG., Apr. 28, 1978, at 4A.

292. *Id.*

293. *See id.*

294. *See id.* (noting the differences in the house and senate definitions and the conference committee's definition).

295. *Id.*

the mail."[296]

With regard to the nagging question of when a meeting dealing with personnel issues could be closed, the conference committee finally decided, to the eventual approval of the house, that "a meeting may be closed 'to evaluate the professional competency of an individual whose appointment, hiring, performance or discharge is being considered when necessary to prevent needless and irreparable injury to that individual's reputation.' In addition, the employee would have to request a closed session."[297]

Disarming, perhaps, on what may have been the most contentious issue before it, the conference committee decided to adopt *in toto*—and propose—the house's provisions of the law, which kept the majority of collective bargaining sessions closed.[298] To be sure, the fact that this nonchange passed the house is not too surprising. The question then would be its fate, and that of its brethren, in the senate.

Surprisingly, the resistance that met the bill upon its reintroduction in the senate the next day was comparatively tepid, and the amendments to the bill were accepted by a vote of twenty-six to thirteen, with the bill itself

296. *Id.* This admittedly vague terminology has benefited somewhat from subsequent Iowa attorney general's opinions. *See, e.g.*, Open Meetings Act, 1981 Iowa Op. Att'y Gen. 162 (Iowa A.G.) ("[S]uch a meeting occurs whenever a majority of the members of a school board gathers to deliberate or act upon any matter within the scope of the board's policymaking duties."); Open Meetings, 1981 Iowa Op. Att'y Gen. 41 (Iowa A.G.) ("The Iowa Civil Rights Commission conducts a meeting . . . when a majority of its members gathers at the Iowa State Penitentiary to obtain information on the civil rights concerns of inmates."); Open Meetings—"Meeting," 1979 Iowa Op. Att'y Gen. 164 (Iowa A.G.) (further defining and clarifying the definition of "meeting" within Iowa's Open Meetings Law).

297. *See* Bullard, *supra* note 291.

298. *Id.* The specific provision of Iowa law relating to this matter is substantively governed by the provisions of Iowa Code section 20.17(3), which states:

> Negotiating sessions, strategy meetings of public employers, mediation, and the deliberative process of arbitrators shall be exempt from the provisions of chapter 21. However, the employee organization shall present its initial bargaining position to the public employer at the first bargaining session. The public employer shall present its initial bargaining position to the employee organization at the second bargaining session, which shall be held no later than two weeks following the first bargaining session. Both sessions shall be open to the public and subject to the provisions of chapter 21. . . . Hearings conducted by arbitrators shall be open to the public.

IOWA CODE § 20.17(3) (2011).

approved by an even larger margin, thirty to nine.[299] To be sure, Senate Minority Leader Clavin Hultman, a Republican from Red Oak, continued to express dismay at the degree to which the collective bargaining process could continue to be shielded from general public scrutiny.[300] In passing the law, Senator Hultman opined, "'Somehow we're not concerned about the millions and millions of dollars spent at every level of government in Iowa.'"[301] He continued, "[C]ollective bargaining deals with public money to pay public employees, yet 'the only people who can't be there is the public.'"[302] Nevertheless, the seed of merit within his protestations failed to find purchase, and the bill, after four months of bouncing from one chamber to the other and being the subject of much coverage and editorializing, was finally on its way to the governor's desk, where it would ultimately be signed and become law in Iowa, effective January 1, 1979.[303]

Perhaps not surprisingly, the mere act of signing the bill into law did not extinguish all of the controversy that had theretofore surrounded it. In fact, one major conflict seemed to persist between the forces of the "true believers," those who championed unbridled openness, and the "rock-ribbed," those who demanded temperance with respect to the act's coverage. On the one hand, advocates such as Strentz were adamant in insisting that the new law be made to apply to "an advisory committee appointed by a public agency."[304] For Strentz, and others, any other formulation was merely a recipe for mischief.

> For example, if a school board were to appoint a committee to make recommendations to the board on closing schools, that committee might not be covered by the law because it would be an advisory committee. This seems to result from an interpretation of 28A.2(2), in which a meeting is defined in part as "deliberation or

299. *See* S. JOURNAL, 67th Gen. Assemb., 1119–20 (Iowa 1978).

300. *See* Bonnie Wittenburg, *New Open Meetings Law Sent to Ray for Approval*, DES MOINES REG., Apr. 29, 1978, at 7A.

301. *Id.*

302. *Id.*

303. *See* IOWA CODE §§ 21.1–.11 (2011) ("Official Meetings Open to Public (Open Meetings)"); *see also* Wittenburg, *supra* note 300 (discussing the bill's history and stating it had been sent to the governor for approval with an effective date of January 1, 1979, if signed into law).

304. Letter from Herbert Strentz, to E. Kevin Kelly (Dec. 22, 1980) (on file with author). It might be recalled that Kelly was an original member of the subcommittee that composed the initial draft of the new open meetings law, and Strentz was writing him to obtain an interpretation. Kelly, in turn, forwarded a copy of Strentz's letter to Bonfield for his opinion.

> action upon any matter within the scope of the governmental body's policy-making duties."
>
> It was my impression at the time the law was drafted, and it remains my impression today, that the intent of the Legislature and a reading of the entire law would include coverage of all committees and subcommittees conducting public business. To do otherwise might be to allow a public agency to forward any controversial or questionable issue to a committee for a recommendation and to act on that recommendation at a formal open session.[305]

Strentz's contention once again placed him at odds with Bonfield who, at the December 20, 1977 session of the Open Meetings Law Subcommittee, opined that such advisory groups should be excluded from coverage:

> For practicability reasons alone we should exclude from the act any multiheaded body that is only informally created by a subdelegation from a superior administrative official, or that is only temporary or ad hoc, or that has only recommending power. This last distinction between bodies having authority to decide and those only having authority to recommend was suggested in the Greene case as probably operative—though not clearly so—under the current statute.
>
> The decision as to how to define those multimember bodies that are to be covered by the open meetings law, and those that are not is, perhaps, the most difficult of all the issues facing you. That is, how far down in the chain of legislative delegation, followed by administrative subdelegation, which is followed by further administrative subdelegation, etc., should the open meetings law and all its attendant requirements apply. . . . [I]t would be very unfair to leave the definition of covered bodies vague or unclear at the same time you make the enforcement provisions of the act stronger and more effective, since that would facilitate the entrapment of good faith public officials, and make their jobs unnecessarily more difficult and risky.[306]

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305. *Id.*

306. Arthur Earl Bonfield, John Murray Professor, Univ. of Iowa Law Sch., Presentation to the Joint Committee on the Open Meetings Law of the General Assembly 3 (Dec. 20, 1977) (on file with author). Subsequent to the law coming into force in 1979, Bonfield contended that this argument held sway as

> [a]n analysis of the language employed in the new statute as well as its

Consistent with his position, Bonfield was both quick and blunt in replying to not only Kelly, but the other members of the original drafting subcommittee.

> I write you this letter because it appears to me that [Dean Strentz's] letter written you soliciting your opinion on the coverage of 28A was onesided and the questions it asked particularly confusing. This appears to be an effort to create a "post hoc" or subsequent legislative history counter to my understanding of what actually happened three years ago. It is my view that if the legislature wishes to cover purely advisory committees, it should do so expressly by statute; and if it does so, it should impose on such advisory committees appointed by covered bodies duties far less onerous and procedures far more practical in their circumstances than those it imposes on initially covered bodies under 28A.2(a), (b).[307]

Fortified with this formulation—and no doubt informed by the pitched battle that had been waged just a few short years before—House Minority Leader Avenson seemingly (but tactfully) put the matter to rest in his reply to Dean Strentz:

> In reviewing the history of H.F. 2074, I have confirmed my opinion that we did not intend to include purely advisory committees within the scope of chapter 28A. . . .
>
> As I remember, we felt that purely advisory bodies should not be subject to all the requirements of 28A, some of which are rather stringent. Also, it would have been much more difficult politically to sell people on our bill if it placed advisory committees under these restrictions.
>
> When an advisory committee has finalized its recommendations to a governmental body subject to 28A, the report will be made in

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> legislative history indicates that the legislature intended to preserve the Greene case distinction between purely 'advisory' bodies which were not to be covered by the Open Meetings Law and 'policy-making or decision-making' bodies which were to be covered . . . .

Arthur Earl Bonfield, Report to the University Central Administration on the Applicability of the Open Meetings Law to Hearing Panels and Review Panels Appointed Under Authority of University of Iowa Operations Manual 3 (Apr. 18, 1979) (on file with author).

307. Letter from Arthur Bonfield, John Murray Professor, Univ. of Iowa Law Sch., to Donald Avenson, et al. 2 (Jan. 5, 1981) (on file with the author).

> open session, questions asked and answered and pertinent information disseminated. I think this is a reasonable balance between the public's right to know and our interest in not unduly burdening advisory groups.[308]

Without question, Avenson would never have risen through the ranks of the state's Democratic Party to one day be its nominee for governor without the ability to salve wounds; nevertheless, his parting admission to Strentz that "the law as written is confusing"[309] may not have been the balm his correspondent was seeking.

D. *The Final Walk in the Sunshine*

Despite the lingering question of how advisory bodies were to be treated—and the more immediate, but short-lived, objections proffered by the *Des Moines Register*'s final editorial published on the eve of the governor's signature[310]—the benefit of a full generation's worth of retrospection would seem to sustain the assertion that Iowa's legislators did a commendable job in overhauling the state's then-twelve-year-old law to produce a statute that "allows less secrecy and is more enforceable" than its predecessor.[311]

Perhaps one measure of the legislators' handiwork has been the relative stability of the law over the past third of a century.[312] One group that was instrumental in getting the law revised in 1978 and retains a strong interest in scrutinizing it to this day, is the Iowa Freedom of Information Council, which is headquartered in Drake University's School of Journalism and Mass Communication and represents "a consortium of news media associations, radio and television stations, newspapers, publishers, librarians, educators, lawyers and business leaders concerned about openness in government."[313] Obviously neither a sycophant of the

308. Letter from Donald D. Avenson, House Minority Leader, State of Iowa, to Herbert Strentz, Sch. of Journalism, Drake Univ. (Jan. 27, 1981) (on file with author).

309. *Id.*

310. *See* Editorial, *Curbs on Secrecy*, DES MOINES REG., May 16, 1978, at 4A (objecting to what it saw as some loose strings within the exemptions section, "particularly the [unjustified] exception for purchase of real estate").

311. *Id.*

312. *See infra* notes 315–24 and accompanying text.

313. IOWA FREEDOM OF INFO. COUNCIL, IOWA OPEN MEETINGS, OPEN RECORDS HANDBOOK iv (14th ed. 2011); *see generally Council History*, IOWA FREEDOM OF INFO. COUNCIL, http://www.drakejournalism.com/newsite_ifoic

Iowa Legislature nor an apologist for closed governmental proceedings, this organization has some credibility in assessing the merits of the existing open meetings law—especially its viability and durability:

> Chapter 21 has been virtually amendment-free for 20 years. Reasons for that are at least threefold:
>
> 1. The law was well-crafted, with a mandate for openness and 10 relatively narrow exemptions.
>
> 2. The general nature of the law provides public agencies sufficient flexibility to operate and the specific exemptions provide sufficient grounds for holding the agencies accountable.
>
> 3. In indirect, but effective, ways, the law is amended whenever Chapter 22, the open records law, is amended by the legislature or interpreted by the judiciary. Section 21.5(a) provides that a closed meeting can be held "[t]o review or discuss records which are required or authorized by state or federal law to be kept confidential or to be kept confidential as a condition for that government body's possession or continued receipt of federal funds." Consequently, each new exemption and each new interpretation of Chapter 22 may provide additional grounds for holding a closed meeting without amending the open meetings law.[314]

To be certain, the law has been relatively free from tinkering for these many years. Besides the decidedly non-substantive change that moved the law from its original Iowa Code designation as chapter 28A to its present cite as Iowa Code chapter 21 in 1985,[315] only a handful of amendments have been added since the law became operative at the start of 1979. First, in 1981, the legislature amended the open meetings law to accommodate those employee negotiations not covered by a collective bargaining agreement.[316] It was incorporated into the law as a new section, stating:

> A meeting of a governmental body to discuss strategy in matters relating to employment conditions of employees of the governmental

/about/about.htm (last updated Sept. 2009) (detailing the history, purpose, and work of the Iowa Freedom of Information Council).

314. IOWA FREEDOM OF INFO. COUNCIL, KEEPING IOWA OPEN: A GUIDE TO THE STATE'S ACCESS LAWS & THE COURTS 3 (2000).

315. *Compare* IOWA CODE §§ 21.1–.9 (1985), *with* IOWA CODE §§ 28A.1–.9 (1983).

316. 1981 Iowa Acts 135–36.

> body who are not covered by a collective bargaining agreement under chapter 20 is exempt from this chapter. For the purpose of this section, "employment conditions" means areas included in the scope of negotiations listed in section 20.9.[317]

Eight years later, in 1989, the legislature tweaked the code twice. First by adding a new subparagraph to the definition section designated section 21.2(1)(e), which states that the definition of "governmental body" includes "[a]n advisory board, advisory commission, or task force created by the governor or the general assembly to develop and make recommendations on public policy issues."[318] In addition, the law was amended with a new section, section 21.10, which declares, "The authority which appoints members of governmental bodies shall provide the members with information about this chapter and chapter 22. The appropriate commissioner of elections shall provide that information to members of elected governmental bodies."[319]

In a battle that largely pitted the state's established media interests against the developing power of its nascent gambling industry, the legislature passed several new provisions during its 1990 session which, for the first time, explicitly placed certain entities licensed to conduct gaming enterprises under the umbrella of the open meetings law.[320] In an effort to mollify the aggrieved gambling interests, the legislature almost simultaneously limited their exposure under the newly amended statute by requiring only those sessions that relate to the "conduct of pari-mutuel racing and wagering pursuant to chapter 99D"[321] to be open—a concession heralded as a betrayal by media partisans who saw the provision as a loophole "one could easily sail a riverboat through."[322]

Finally, in 1993, the law was substantially amended for the last time to again further expand the scope of what type of group was deemed subject to the law.[323] This time, designated as section 21.2(1)(h), the amendment added a definition for "governmental body," which states: "An advisory board, advisory commission, advisory committee, task force, or other body

317. *Id.*

318. 1989 Iowa Acts 81.

319. *Id.*

320. 1990 Iowa Acts 246; 1990 Iowa Acts 881; *see also* IOWA CODE § 21.2(1)(f)–(g) (1993).

321. *See* IOWA CODE § 21.2(1)(f).

322. IOWA FREEDOM OF INFO. COUNCIL, BAD BILL KILLED; GAMBLING 'OPENNESS' FLAWED 1 (1990).

323. *See* 1993 Iowa Acts 24.

created by statute or executive order of this state or created by an executive order of a political subdivision of this state to develop and make recommendations on public policy issues."[324]

Of course, refining and illuminating the law is not completely the province of the legislature, as both limited Iowa caselaw and a battery of state attorney general opinions have also helped define the contours of the statute over the past few decades. For example, the Office of the Iowa Attorney General has issued over sixty opinions relating to the Iowa Open Meetings Law since its legislative reincarnation in January 1979.[325] Interestingly enough, many of these opinions were prompted by letters not only from private citizens, but also from county attorneys and, in a few instances, even state legislators—all of whom were interested in ironing out statutory language that was either vague or generated collateral questions.[326]

The courts of Iowa, for their part, have also been called on periodically to make material decisions on the Iowa Open Meetings Law since 1979. As an example, consider the twin suits of *City of Dubuque v. Telegraph Herald, Inc.*[327] and *Telegraph Herald, Inc. v. City of Dubuque*.[328] In these cases, the Iowa Supreme Court had to sort through the controversy relating to a newspaper's access to the applications and interviews concerning the replacement of a city manager.[329] The most salient result of these cases was the court's determination that interviews between applicants and only one or two city council members from a five-person council—in the absence of evidence showing a specific intent to avoid the dictates of the statute—did not meet the statutory definition of "meeting."[330] In *KCOB/KLVN v. Jasper County Board of Supervisors*,[331]

324. *Id.*; *see also* IOWA CODE § 21.2(1)(h) (1995).

325. *See, e.g.*, Open Meetings Act, 1981 Iowa Op. Att'y Gen. 162 (Iowa A.G.); Open Meetings, 1981 Iowa Op. Att'y Gen. 41 (Iowa A.G.); Open Meetings—'Meeting', 1979 Iowa Op. Att'y Gen. 164 (Iowa A.G.); Open Meetings—Public Records, 1979 Iowa Op. Att'y Gen. 89 (Iowa A.G.).

326. *See, e.g.*, Open Meetings—Public Records, 1979 Iowa Op. Att'y Gen. 89, 90 (Iowa A.G.) (clarifying that "the governmental body is responsible for the necessary costs involved with providing notification" to those "agencies which have filed a request with a governmental body").

327. City of Dubuque v. Tel. Herald, Inc., 297 N.W.2d 523 (Iowa 1980) [hereinafter *Dubuque*].

328. Tel. Herald, Inc. v. City of Dubuque, 297 N.W.2d 529 (Iowa 1980) [hereinafter *Tel. Herald*].

329. *See Dubuque*, 297 N.W.2d at 525; *Tel. Herald*, 297 N.W.2d at 531.

330. *See Tel. Herald*, 297 N.W.2d at 531, 533–34.

the Iowa Supreme Court held that public agencies should be granted some latitude in complying with notice and agenda provisions of the open meetings law, writing that compliance need only be "substantial rather than absolute."[332] This decision was further refined—at the expense of governmental latitude—in *Barrett v. Lode*,[333] when the court held executive meetings of a governmental body subject to the open meetings law may not include issues not listed on the published agenda.[334] For example, not specifically stating the topic(s) intended to be addressed by a board in closed session is a violation of the law, even if the public might have been able to anticipate that the issue(s) would arise.[335] Further, in *Waterloo/Cedar Falls Courier v. Hawkeye Community College*,[336] the issue was more squarely one of reporter privilege than open meetings law.[337] Here, the media entity was challenging a lower court order for in-camera inspection of interviews of individual attendees of an alleged illegal closed meeting sought by the governmental body in question—the college.[338] This move was shot down by the Iowa Supreme Court on interlocutory appeal.[339]

As judged from the above, the Iowa courts have not been shy to add depth and meaning to the law. Doubtless, additional examples could include *Feller v. Scott County Civil Service Commission*,[340] a case that stands for the proposition that despite the language of Iowa Code section 21.5(5)—"'[n]othing . . . requires a governmental body to hold a closed session'"[341]—it could nevertheless be an actionable breach of discretion for a county civil service commission to deny a request for a closed hearing concerning allegations of improper conduct, such as private sexual

331. KCOB/KLVN v. Jasper Cnty. Bd. of Supervisors, 473 N.W.2d 171 (Iowa 1991).

332. *Id.* at 176 (citing IOWA CODE § 331.301(1), (5) (1989)).

333. Barrett v. Lode, 603 N.W.2d 766 (Iowa 1999).

334. *See id.* at 769–70.

335. *See id.*

336. Waterloo/Cedar Falls Courier v. Hawkeye Cmty. Coll., 646 N.W.2d 97 (Iowa 2002).

337. *See id.* at 101 ("[T]he [trial] court ruled on whether the Courier was eligible for the shield afforded by the reporter's privilege.").

338. *See id.* at 99.

339. *See id.* at 99, 104.

340. Feller v. Scott Cnty. Civil Serv. Comm'n, 435 N.W.2d 387 (Iowa Ct. App. 1988), *aff'd on appeal after remand*, 482 N.W.2d 154 (Iowa 1992).

341. *Id.* at 389 (quoting IOWA CODE § 21.5(5)).

misconduct or association with a known criminal element.[342] Also, in the case of *Schumacher v. Lisbon School Board*,[343] the Iowa Supreme Court decided the school board violated a student's rights under Iowa Code section 21.5(1)(e) when it denied his request for an open hearing because a third-party teacher's aide was concerned her work performance would be contested during the proceeding.[344]

IV. CONCLUSION

In trying to distill the above, it may be fit to conclude by simply appreciating the handiwork that marks the Iowa Open Meetings Law which, in essence, sprang from the scrupulous attention given by all three branches of the state government and the newsroom of the *Des Moines Register*, among others. Within and beyond the precincts of these varied institutions, numerous voices were joined to conjure a dynamic calculus—a dialectic—yet this product was not apt for the types of pure mathematical "axioms and corollaries" that Holmes saw as being antithetical to the nature of law.[345] The product has, thus far, "computed," however, and the law has served the people of Iowa quite credibly for what is now approaching a half-century. Nevertheless, as evidenced by recent legislative events, there is a perceived need for—but inability to enact—provisions to the law that might expand its enforcement.[346] An astute observer could credibly predict that the Iowa Open Meetings Law may be poised for a period of flux. Should this truly prove to be the case, both principles and principals involved in the fray will be well served, if Holmes is to be believed, by a constructive knowledge of the historical and philosophical forces that crafted the law in the first instance.

342. *See id.* at 390.

343. Schumacher v. Lisbon Sch. Bd., 582 N.W.2d 183 (Iowa 1998).

344. *See id.* at 185–86.

345. *See supra* note 8 and accompanying text.

346. *See, e.g.*, S.F. 430, 84th Gen. Assemb. (Iowa 2011) (passing a bill through the Iowa state senate that will amend provisions of chapter 21 "relating to violations of the open records and public meetings laws").