Nebraska Unicameral Rule 3, Section 15: To Whom Must the Door Be Open?

Kim M. Robak
University of Nebraska College of Law, robak@muellerrobak.com

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Comment

Nebraska Unicameral Rule 3, Section 15: To Whom Must The Door Be Open?

Equality Before the Law—Nebraska State Motto

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I. INTRODUCTION

Every state has some type of legislation that opens “meetings” of “public bodies” to public scrutiny. However, the full scope of these statutes has not yet been determined. Although the public has a right to witness the operations of its government, these statutes have not yet been tested to determine whether this right of access can be satisfied by allowing the media to represent the public’s interest. This Article will address public access and press representation relative to a Nebraska Unicameral rule that provides that executive sessions of legislative committees may be closed to the general public but open to members of the news media.

Each year the Nebraska Legislature enacts rules by which its sessions are governed. The Rules of the Nebraska Unicameral provide for the appointment of committees that have the power “to hold such


2. See infra note 4 and accompanying text.
hearings, to sit and act at such times and places during the sessions . . . as it deems advisable."4 Bills introduced during a legislative session are referred to the appropriate committee for public hearing and consideration.5 Each standing committee must hold a public hearing before taking final action on a bill.6 After the public hearing, the committee may call an executive session pursuant to Nebraska Unicameral Rule 3, section 15, in order to review the proposed legislation.7 Executive sessions "are not electronically recorded and transcribed, unless the committee so provides . . . . Executive sessions shall be open to members of the news media who may report on action taken and on all discussions in executive sessions."8

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5. R. Miewald, Nebraska Government and Politics 65 (1984). Note that certain technical revisor's bills may be placed on general file immediately. Id. See also RNU, supra note 4, Rule 3, §§ 12, 16 at 18-19 (1985).
6. RNU, supra note 4, Rule 3, § 13 at 19: "Before taking final action on a bill or resolution, a committee shall hold a public hearing thereon and shall give at least seven calendar days' notice, after the bill shall have been printed, by publication in the Legislative Journal." See also R. Miewald, supra note 5, at 66.
7. RNU, supra note 4; R. Miewald, supra note 5, at 66.
8. RNU, supra note 4, Rule 3, § 15 at 19 (1985). The rule was first adopted in this form in 1981. Executive sessions were initially opened by rule to members of the news media in 1953: "Reporters of regularly accredited newspapers, press associations, and radio and television stations shall be admitted to executive sessions of the standing committees but shall respect as confidential discussions by members of the committee." Rules of the Neb. Unicameral, 65th Leg., Rule 6, § 11 at 12 (1953). An attempt was made that year to allow representatives of the media to report on the vote taken by committee members on pending legislation. The motion failed on the floor by 19 votes. The Rule was next changed in 1960 to read: "Members and reporters of regularly accredited newspapers, press associations, and radio and television stations shall be admitted to executive sessions of the standing committees, and such reporters and the members of such committees shall respect as confidential the discussions and voting of the other members of any standing committee." This change was presumably made to prevent committee members from disclosing secret discussions and voting that took place in executive sessions. The rule was changed to its present form in 1973, the Legislature voted to change the rule to allow the media to report on any vote taken in an executive session. Rules of the Neb. Unicameral, 83d Leg., 1st Sess., Rule 3, § 7 at 12 (1973). Finally, the rule was changed to its present form in 1981. Telephone interview with Chris Peterson, Researcher for Neb. Leg. Research Office (Apr. 5, 1984).

There is no reason given for dropping the words "regularly accredited" from the description of news media. The conclusion may be drawn, however, that such a description was arbitrary in that it excluded individuals beyond so-called "legitimate" news gatherers. It is unclear who qualifies as "members of the news media" today. However, a booklet compiled by the Clerk of the Legislature lists specific members of the news press, radio, and television media, and their employers. Included in the list is the Daily Nebraskan. The Neb. Unicameral, 88th
It is currently the practice of the Nebraska Legislature to hold executive sessions frequently during the initial stages of a legislative session and after public hearings on legislation in order to discuss the merits of a particular bill and to vote on whether it should be advanced to general file. The importance of closing a meeting at this time is obvious. The committee can refuse to advance a particular bill, or the bill can be extensively changed in executive session. Thus, the public is refused access to the part of the legislative process that can make or break a bill.

Because the public is excluded from these legislative meetings, in which matters of public interest are discussed and acted upon, Rule 3, section 15 violates the Nebraska Public Meetings Law. The public's right to attend meetings of public bodies was codified by the Legislature, and the Legislature must abide by its own mandate. Press representation of the public interest is insufficient, under the statute, to meet the test of an open meeting.

Beyond violating state statute, closing legislative executive sessions to the general public violates the first and fourteenth amendments to the United States Constitution. The first amendment provides for the right of public access to important government functions. This right of access promotes the stability of the government through continued support and loyalty to the system—achieved only if the government operates in an open forum. When the public is barred from legislative executive sessions, this constitutional right of access is violated.

Furthermore, freedom of speech is a fundamental right that cannot...
be abridged except by compelling governmental interests.\textsuperscript{14} By extending the opportunity to view executive sessions to members of the news media only, the Nebraska Legislature has violated the first amendment right to receive information\textsuperscript{15} and the fourteenth amendment right of equal protection.\textsuperscript{16} There is no compelling government reason to exclude the public from, yet grant the news media access to, executive sessions.\textsuperscript{17} When the issue is whether the public may listen to debate on matters encompassing pending legislation, the public's need for information outweighs any inconvenience suffered by legislative committees.

Finally, the Constitution does not provide greater rights under the first amendment for members of the news media than for members of the general public.\textsuperscript{18} Freedom of the press guarantees that all individuals may disseminate information freely and without government interference. The news media is not a special category designated to receive special treatment.\textsuperscript{19} There is no constitutional right enabling the news media to act as representatives of the public and to filter important information before it reaches the public. Access cannot be restricted to only those who have qualified for the label "news media."\textsuperscript{20} If the door is opened at all, it must be opened completely.

II. RULE 3, SECTION 15 OF THE RULES OF THE NEBRASKA UNICAMERAL VIOLATES THE STATE'S OPEN MEETINGS LAW

In 1975, Nebraska strengthened its Public Meetings Law,\textsuperscript{21} through

\begin{itemize}
\item \textsuperscript{14} See, e.g., Stanley v. Georgia, 394 U.S. 557, 567 (1969) (although public distribution of obscene materials disallowed, mere possession doesn't rise to level of compelling interest); Mills v. Alabama, 384 U.S. 214, 218 (1966) (state power to regulate conduct in and around polling places supported as compelling interest); Lovell v. Griffen, 303 U.S. 444, 451 (1938) (licensing and censorship of the press are not compelling state interests); Gitlow v. New York, 268 U.S. 652, 667 (1925) (disturbances of the peace; subversion of government as compelling interests).
\item \textsuperscript{16} See, e.g., Shapiro v. Thompson, 394 U.S. 618, 627 (1969) (right to interstate travel a fundamental right); Griswold v. Connecticut, 381 U.S. 479 (1964) (right of privacy is a fundamental right); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (the right of procreation "fundamental" and entitled to equal protection). See generally L. Tribe, AMERICAN CONSTITUTIONAL LAW §§ 16-6 to -12 (1978).
\item \textsuperscript{17} See infra text accompanying notes 133-38.
\item \textsuperscript{18} See infra text accompanying notes 165-91.
\item \textsuperscript{19} See infra text accompanying notes 185-91. See also Miami Herald Publishing Co. v. McIntosh, 340 So. 2d 904 (Fla. 1977); First Am. Dev. Corp. v. Daytona Beach News-Journal Corp., 196 So. 2d 97 (Fla. 1966).
\item \textsuperscript{20} See supra note 8.
\item \textsuperscript{21} "LB 325 in its amended form insures that all meeting [sic] of public bodies be
the adoption of LB 325, which was designed to yield greater public access to the meetings of public bodies in Nebraska. The statute provides that a meeting of a public body may not be closed unless it "is clearly necessary for the protection of the public interest or for the prevention of needless injury to the reputation of an individual and that individual has not requested a public meeting."26

Legislative Rule 3, section 15, governing the current practice of the Nebraska Legislature, appears to violate the clear language of the
Open Meetings Law. The Legislature is allowed to call an executive session to exclude the public at any time for any purpose.\textsuperscript{27} There are no guidelines provided in the rule for calling an executive session. The doors of an executive session are automatically closed to the public and the meeting need not be reconvened in public before formal action is taken.\textsuperscript{28} Thus, the public cannot see the workings of their elected officials, and generally has only limited access to information from the executive session.

To reach the conclusion that Rule 3, section 15 violates the state’s Open Meetings Law, two questions must be answered. First, it must be determined whether the law applies to meetings of Legislative committees. Second, it must be determined whether any justification for closing executive sessions satisfies the requirements to close a meeting of a public body as set forth in section 84-1410.

\textbf{A. Section 84-1408 of the Nebraska Public Meetings Law Applies to the Legislature}

Section 84-1408 of the Nebraska Public Meetings Law expressly provides that “\textit{[e]very} meeting of a public body shall be open to the public . . . .”\textsuperscript{29} Public bodies are “committees . . . or any other bodies, now or hereafter created by Constitution, statute, or otherwise pursuant to law.”\textsuperscript{30} A meeting of a public body takes place when that body convenes to “discuss public business . . . or [take] any action of the public body.”\textsuperscript{31} From the express statutory language, the Legislature and its committees are public bodies for purposes of the Open Meetings Law.

Legislative committees are constitutionally created.\textsuperscript{32} The purpose of legislative committees is to investigate and to “present to the Legislature for its consideration any final reports and recommendations for action . . . .”\textsuperscript{33} If a committee decides to indefinitely postpone a bill, the legislation will remain in committee and not be considered on the floor.\textsuperscript{34} A decision to report a bill unfavorably to the full Legislature,
which occurs nearly 40 percent of the time, must be reversed by thirty votes. This gives the committee considerable power. Much of the important discussion that determines whether a bill will be advanced or revised, under Rule 3, section 15, is kept from the public. The general public undoubtedly has an interest in these proceedings and, therefore, pursuant to section 84-1408, executive sessions “may not be conducted in secret.”

The Open Meetings Statute provides for only three exceptions to the open public meetings rule: when otherwise provided for (1) in the Nebraska Constitution, (2) by federal statutes, or (3) by other Nebraska law. None of these exceptions expressly exempt the Legislature or its Standing Committees from the force of the Open Meetings Law. The Nebraska Constitution expressly provides that “[t]he doors of the Legislature and of the Committees of the Whole, shall be open, unless when the business shall be such as ought to be kept secret.”

In addition, “the Legislature shall determine the rules of its proceedings . . . .” Although this section permits the Legislature to establish boundaries for conduct and order at its meetings, the section operates in conjunction with Article III, section 11, which requires open meetings. These instructions do not conflict with the Open Meetings Statute. Section 84-1410 allows any public body to close a session “by the affirmative vote of a majority . . . if a closed session is clearly necessary for the protection of the public interest or for the prevention of needless injury to the reputation of an individual . . . .” A legislative committee may govern its proceedings under the rules adopted by the Legislature, pursuant to the Open Meetings Law and the Nebraska Constitution, but cannot close a meeting to the public unless “necessary” or unless it “ought to be kept secret.” Thus, a mandatory closure rule is overbroad and violative of the Open Meetings Law.

Since there are no federal laws governing the conduct of state legislatures, the second exemption under section 84-1408 does not apply. The third exception, any exclusion expressly provided in the Public

35. Id.
36. Id. Because committees are fairly small in size and because of the power a committee recommendation has on the floor, senators may concentrate more time and energy on their committee assignments than on general legislative activity.
37. See supra notes 9-10 and accompanying text.
40. NEB. CONST. art. III, § 11.
41. NEB. CONST. art. III, § 10.
42. NEB. CONST. art. III, § 11.
Meetings Law,\textsuperscript{44} is also inapplicable. The statute specifically exempts from its definition of any "public body" judicial proceedings, and the meetings of those subcommittees that have no authority to act, make policy, or hold hearings.\textsuperscript{45} The statute does not exclude legislative committee proceedings. Thus, the Legislature is not exempt from the statutory mandate— that meetings of public bodies must be open to the public.

1. Meetings of the Legislature Are Covered by the Clear Language of the Statute and by the Legislative History

Elementary rules of statutory construction provide that unless the language of a statute is ambiguous, no recourse to interpretation from legislative history is necessary.\textsuperscript{46} The plain words of the statute, together with its underlying purpose, are the sources from which a statute should be construed.\textsuperscript{47} Whether the Legislature, in passing either the Open Meetings Law or its amendments, intended to exclude itself from the scope of the statute is irrelevant. The language of the statute is unambiguous.\textsuperscript{48} Moreover, the Legislature forthrightly announced its purpose: the formation of public policy is the business of the public and may not be conducted in secret.\textsuperscript{49} The statutory language can clearly be read to include meetings of the Legislature.\textsuperscript{50}

However, even if the language of the Open Meetings Law were deemed to be ambiguous, the legislative history of the statute does not justify the conclusion that the Legislature is exempt from the statute's application.\textsuperscript{51} The expressed purpose of the statute remained unchanged from that declared during the 1975 debate. Senator Hoagland, who sponsored LB 43 (enacted to strengthen the 1975 Open

\textsuperscript{44} Id. § 84-1408 (1981).
\textsuperscript{45} Id. § 84-1409(1)(e) (Cum. Supp. 1984).
\textsuperscript{46} Hill v. City of Lincoln, 213 Neb. 517, 521, 330 N.W.2d 471, 474 (1983) (no interpretation needed when words of statute are plain and unambiguous); Freese v. Douglas County, 210 Neb. 521, 526, 315 N.W.2d 638, 641 (1982) (primary rule of construction is that intention of legislature is to be found in ordinary meaning of words of a statute).
\textsuperscript{48} See Grien v. Board of Educ., 216 Neb. 158, 164-65, 343 N.W.2d 718, 723 (1984) (public meetings laws are to be broadly interpreted and liberally construed in favor of openness to the public; provisions and exemptions permitting closed meeting sessions must be narrowly and strictly construed). See also infra text accompanying note 59.
\textsuperscript{49} Neb. Rev. Stat. § 84-1408 (1981). See also Hearings on LB 325, supra note 21, at 2 (purpose is to give "the public access to the affairs of government") (statement of Sen. Anderson, sponsor).
\textsuperscript{50} See supra notes 30-45 and accompanying text.
\textsuperscript{51} See infra notes 53-59 and accompanying text.
Meetings Law), expressed the philosophy behind the law in a public committee hearing on the bill:

LB 325 was a major step forward in opening up meetings of the Legislature and political subdivisions around this State to attendance by members of the public. . . . LB 325 was a major philosophical step forward because this stands for the proposition that public bodies that conduct the public business in the State of Nebraska and that spend public funds, tax funds, ought to be open to the public except under very limited circumstances. The open meetings law stands for the basic philosophy that when public bodies conduct their business, they ought to conduct their business openly unless there is a compelling need, unless it's clearly necessary for the protection of the public interest that those meetings be closed.52

It is clear from debate on the bill that the purpose of the statute was to protect the public interest. This purpose must apply to meetings of the Legislature. If it does not, we are forced to the absurd conclusion that the Legislature either does not serve the public interest, or is not part of the government.

When Nebraska senators discussed whether they fell within the scope of the open meetings statute, it was suggested that the state constitution exempted the Legislature. This philosophy was explained at the floor debate:

I know this question has come up and there is a specific recognition of the Legislature's right to open or close its meeting in the Constitution. I think the Constitution says something to the effect that the meetings in the Legislature shall be open except such meetings shall be secret, or something like that. Anyway, in the opening section 1 of the act, it recognizes the Constitution and the Constitution prevails in this case. This particular act does not apply to the Legislature because the Constitution overrides . . . .53

With this explanation, the bill was adopted: thirty-one senators voted in favor, one against, and seventeen did not vote.54

As previously discussed, the Nebraska Constitution does not expressly override the Open Meetings Law.55 Moreover, the 1975 discussion generated no justification as to why executive sessions of legislative committees “ought to be kept secret.” During the 1983 hearings, Senator Nichol did argue public exclusion for convenience sake: “I would suggest that we continue to do it the way it is, allowing the news media in but not the public inasmuch as the news media translates that to the public anyway, would just provide a little less interruption, perhaps, from the public.”56 Senator Hoagland added

54. Id. at 4621.
55. See supra text accompanying notes 40-43.
56. *Hearings on LB 43*, supra note 22, at 4 (statement of Sen. Nichol). Sen. Nichol was responding to Sen. Higgins' question of whether there was any reason not to allow the public access, since media were already allowed in executive sessions. Sen. Hoagland also replied that such an expansion would be something to be con-
that “the open meetings law has been interpreted by the Attorney General as not applying to the Legislature.” There was no discussion of whether the rule should include the Legislature, only the assumption that it did not.

Shortly after the original Open Meetings Law was passed, Senator Warner requested an Attorney General’s opinion on whether the statute applied to the Legislature. The opinion concluded not only that the Legislature is a public body that holds statutorily-defined “meetings,” but that the Constitution does not prohibit application of the statute to the Legislature:

[The Constitution of the State of Nebraska does not make any provisions that are contrary to or in conflict with the Open Meetings Law and, in fact, the Constitution and this act appear to complement one another . . . . Therefore, the clear and unambiguous language of the act . . . must be said to apply to the Legislature and its various committees.

 Obviously, Senator Hoagland’s later assertion—that the Attorney General concluded the Constitution exempted the Legislature from the Open Meetings Law—was mistaken. If senators believed, when they enacted the law, that the Legislature need not be expressly excluded, such reliance was misplaced. There is insufficient evidence that the Legislature intended to exclude its meetings from the law; rather, the issue was never before the Legislature.

It should also be noted that there was concern in the committee hearings that the Open Meetings Law should apply equally to the public and the news media. The hearings conclude unequivocally that the statute was drafted for the benefit of both the public and the news media. In fact, testimony on behalf of the news media stated that press members “do not wish to be separated in the degree of [their] rights to attend any public meeting because [they] carry a press card of some kind . . . . [The statute applies] to all of the public.”

57. Id. at 3. With these explanations given to the Committee, the issue of the statute’s application to the Legislature was dropped.
58. The statute was advanced to general file during executive session. The issue was not discussed during floor debate, and the bill was adopted on Apr. 8, 1983, 34 to 10, with 5 senators not voting. Floor debate on LB 43, 88th Leg., 1st Sess. 2291 (1983).
60. See supra note 57 and accompanying text.
61. See supra text accompanying notes 56-58. See also infra note 77.
62. See Hearings on LB 43, supra note 22, at 15-17, 21-23.
63. Id. at 16 (emphasis added). Sen. Chambers expressed concern that LB 43 was really a bill for the news media and not a bill for open meetings:

Sen. Chambers: Now if we’re talking about an open meetings law, we can be talking about the media, the public body, or the evil. Now to which one of those groups, the right of which one of those groups would this law run?
In summary, the express and unambiguous language of the Open Meetings Law includes the Legislature. Even though the statute was enacted under the mistaken assumption that the Legislature was exempt because of Constitutional prohibitions, the Legislature cannot be immune from the scope of the law simply because of a misplaced belief in an incorrect constitutional argument. The statutory language clearly covers legislative activity. Therefore, the Legislature must either amend the statute in order to expressly exclude executive sessions from the scope of the law, or it must abide by the statute's mandate.

B. Closing Executive Sessions to the Public Does Not Satisfy the Statutory Requirements to Close a Meeting

Pursuant to section 84-1410, a public body may hold a closed meeting when necessary to protect the public interest or to protect an individual's reputation. If the business of a legislative executive session falls under either category, the committee may close the session by a majority vote. An executive session is generally called to discuss the

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Alan Peterson: This law runs to the rights of every citizen, good, bad, malicious, evil, vindictive, whether he works for a newspaper or a TV station or a radio station or not. It goes to all of the public. It's for both public and news media. [A]s you know, the theory is that the news media will help inform the rest of the public if they do their job well.

Sen. Chambers: You and I are more sophisticated. We know that the media often don't inform the public at all. So we won't even talk about that. What I'm trying to get to is (inaudible). Let's take it a step back. Let's go even back, let's go for freedom of the press. Does that right exist and is it constitutionally guaranteed to protect the media or to benefit the public?

Alan Peterson: The cases seem to say and we don't disagree with it, that the presses' and news media's rights go no further than the rest of the public.

Id. (emphasis added).

Senator Higgins expressed her concern for this problem:

Last week, the Nebraska Broadcasters Association magazine reported an executive meeting of the Committee on Committees and in it they quoted me extensively. . . . But the other Senator and what he said was never quoted, what he said to me or about me. Now this is what I'm making a point, the executive session the news media is allowed to report to the public exactly what goes on. But in this instance, the only thing they really reported was what Senator Higgins said. Do you think that the public was really well informed about that executive session.

. . .

You should see the clandestine things we do there.

Id. at 21-22. See also infra note 77.

64. Neb. Rev. Stat. § 84-1410 (1). The section provides that:

Closed sessions may be held for, but shall not be limited to, such reasons as: (a) Strategy sessions with respect to collective bargaining, real estate purchases, or litigation; (b) Discussion regarding deployment of security
merits of proposed legislation and to vote on advancement of a bill. It is difficult to imagine how conducting such discussions behind closed doors, so that members of the public cannot hear debate on the issue, can protect the public interest.

Several reasons are advanced for this policy, none of which justify public exclusion. For example, poor public attendance at executive sessions is one reason for closing executive sessions to the public. Such sessions are held during the daytime, and unless an issue is controversial, attendance at public hearings is low. Besides, the media may attend and report on committee activity, and this should be sufficient to safeguard the public interest. However, this proposition begs the question. The purpose of the Open Meetings Law is to provide access to information regarding public matters. Citizens have a right to hold elected servants accountable for their actions and to observe the workings of a system that, in essence, they have set up to control their lives. To suggest that public meetings should be open for the benefit of public scrutiny, but closed because the public will not attend is absurd.

Furthermore, it is indefensible under present statutory language to allow the news media attendance at executive sessions on the theory that they sufficiently represent the public. There is no provision in the statute providing that meetings are open except when the public body decides that members of the news media are better suited to act as public representatives than are members of the public at large. Although the statute does not define "public," it is understood that the term encompasses both the general public and the media. Thus, if a meeting is closed, it must be closed completely, or it must be open to the entire public.

A second reason proffered for excluding the public from executive sessions may be to effectively exclude lobbyists. Lobbyists have become very influential in controlling legislators' votes. Removing lobbyists from meetings in which bills are being discussed may relieve pressure from senators who wish to express an opinion on a bill, but who do not want to do so in front of lobbyists. Angering a particular lobby may mean fewer campaign dollars for the legislator's next election. Closed executive sessions allow senators to speak free from this personnel or devices; or (c) Investigative proceedings regarding allegations of criminal misconduct. Nothing in this section shall permit a closed meeting for discussion of the appointment or election of a new member to the public body.

Note that closing to protect public interest and opening only enough to safeguard public interest are not the same issue.

65. See supra note 25.
concern. The argument is weak, however, because it is overbroad, and because it does not accomplish its purpose.

If legislators are uncomfortable with lobby pressures, only lobbyists should be excluded from executive sessions, and members of the general public allowed to attend. Closing an executive session to the entire public “throws the baby out with the bathwater.” Furthermore, lobbyists have access to exactly the information that legislators are trying to withhold. Lobbyists, because they must be familiar with all phases of the legislative process, generally know who will vote in favor of or in opposition to any bill before a vote is taken in executive session. The final vote of the committee is also published for the public—and for the lobbyists—to review. Thus, closing a session does not prevent lobby pressures. The rule merely makes it more convenient for members of the Legislature to conduct their business.

A third reason advanced for closing executive sessions is that votes at open meetings may be different than those made at closed sessions. Public accountability may inhibit a legislator from speaking publicly in opposition to, or in favor of, a measure. Because the public may not understand sufficiently all the workings of the Legislature, or may take a statement out of context or misconstrue the gist of an argument, the legislator may be held strictly accountable for every remark. Debate will thus become stifled and discussions will be inhibited.

For several reasons, this argument, too, is unconvincing. The proceedings of the Legislature, as one body, are open for public viewing. There is no fear expressed at these general sessions that public eyes preempt meaningful discussion of issues. On the contrary, these meetings are open to the public because the consequences of legislative action so affect the public that they have a right to hold their elected officials accountable. The same reasons for opening sessions of the entire Legislature should equally apply to legislative committees. It seems clearly in the public interest to know a senator’s view on the issues in order for the public to respond to that representative.

68. RNU, supra note 4, Rule 3, § 18, at 20.
69. The argument that the news media are representatives of the public can also be applied to lobbyists. They are paid to advance the interests of certain segments of the population. If the media attends executive sessions as public representatives, lobbyists should also attend as representatives. Note, however, that if both media and lobbyists are included, there is no logical reason to exclude the general public.
70. One example of this phenomenon was displayed during the 1984 session of the Legislature. The general consensus of the Legislature, prior to the impeachment vote against Attorney General Paul Douglas, was that the vote would fail. Several attempts to get the vote to the floor failed in closed committee sessions. When in full view of the Commonwealth depositors, however, the Legislature impeached Mr. Douglas. In fact, few senators spoke in his favor.
71. NEB. CONST. art. III, § 11.
democratic system of government enables the electorate to make their collective voices heard through the election process. Closing an executive session because of what the public might hear or think is clearly contrary to that goal.72

Finally, it may be argued that time, space, and convenience suggest prohibiting public access to executive sessions.73 If members of the public were allowed to attend, rooms large enough to accommodate them would be required. Meetings would last longer because of public input and disruption, and thus would have to be transcribed and put on public file. However, none of these reasons are sufficiently compelling to close discussions made in executive session to public scrutiny.

Under the Open Meetings Law, the public body can “make and enforce reasonable rules and regulations regarding the conduct of persons attending . . . its meetings,”74 and “is not required to allow citizens to speak at each meeting . . . .”75 Therefore, under the statute members of the public may be lawfully excluded if they unreasonably interfere with committee business. Reasonable restrictions may be established to enable legislators to conduct their business efficiently. Regarding room size, for example, the statute provides that although a meeting cannot be held in a place “known by the body to be too small to accommodate the anticipated audience, [n]o public body shall be deemed in violation of this section if it holds its meeting in its traditional meeting place.”76 Thus, the statute resolves problems of time, place, and convenience. Also, the expense in transcribing the proceedings cannot justify excluding the public when the cost is borne by the public. Finally, even though the committee deliberating on the 1983 amendments was mistakenly told that no other states had open meetings laws applied to their legislatures, Nebraska is the only state to mandatorily exclude the public yet include the press in discussions of pending legislation.77 Any argument based on the logistics or oper-

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73. See supra text accompanying notes 56-57.
75. Id.
76. Id. at § 84-1412 (4).
77. Floor debates are open in every state by statute, by practice, or by the state constitution. Thirty-two states open legislative committee meetings to the public pursuant to the state open meetings laws. Each of these states has certain exceptions for which committee meetings can be closed. See, e.g., N.C. Gen. Rev. Stat. § 143.318.1 (1983) (sessions may be closed to prevent personal embarrassment or when in best interest of the state). Alaska, Georgia, Hawaii, Idaho, Iowa, Massachusetts, Minnesota, Nevada, Ohio, and Washington open legislative meetings by rule. Alabama, Utah, Wisconsin, and Wyoming open legislative committee meetings by practice. Two states, Illinois and Montana, open all legislative meetings by constitution. In Oklahoma, any committee meeting may be closed by majority
ation of opening executive sessions to the public must be dispelled. If such procedure works elsewhere, it can also work in Nebraska.

The Nebraska Supreme Court recently ruled on the scope of the section 84-1410 closed meeting provisions in *Grein v. Board of Education.*\(^{78}\) In *Grein,* the Fremont Board of Education closed a meeting to the public in order to discuss whether to accept the low bid made on a school boiler project. The contractor who submitted the bid had made a $3,000 error in computation, and it was asserted that public disclosure of the error “would needlessly injure the reputation of the contractor.”\(^{79}\) When the meeting was reconvened in public, the board accepted the second lowest bid, without any discussion or explanation. The court affirmed that the closed meeting violated the Open Meeting Law, and declared the acceptance of the second lowest bid void.\(^{80}\)

The court justified its decision on the ground that the Open Meetings Law is a “statutory commitment to openness in government.”\(^{81}\) Because public meetings laws should be broadly interpreted in favor of public access and narrowly construed when granting closed sessions,\(^{82}\) closing a meeting under section 84-1410 requires strong justification. The “slight discomfort, if any, experienced by a low bidder in the area of public lettings is far outweighed by the public policy favoring openness in the meetings of the public body.”\(^{83}\) The court concluded that a public body’s good intentions are not sufficient to close a public meeting, and that issues impacting on the “pocketbooks and wallets” of the public must be deliberated in public.\(^{84}\)

Issues discussed in executive sessions of legislative committees im-

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\(^{78}\) 216 Neb. 158, 343 N.W.2d 718 (1984).

\(^{79}\) Id. at 160, 343 N.W.2d at 721.

\(^{80}\) Id. at 166, 343 N.W.2d at 725.

\(^{81}\) Id. at 163, 343 N.W.2d at 722 (emphasis added).

\(^{82}\) Id. at 164, 343 N.W.2d at 723. See also *Rice v. Union City Bd. of Educ.,* 155 N.J. Super. 64, 70, 382 A.2d 386, 388 (1977) (follow strict adherence to the letter of the law); Daily Gazette Co. v. Town Bd., 111 Misc. 2d 303, 304, 444 N.Y.S.2d 44, 45-46 (1981) (exceptions to open meetings law are few and narrowly construed).


\(^{84}\) Id. at 165, 167, 343 N.W.2d at 723.
pact on the people of Nebraska, not only in the wallet or pocketbook, but in everyday life as well. Decisions made by the Legislature govern nearly every facet of life in some form or another. To suggest that legislative committee decisions are not in the public interest is ludicrous. The scale weighs heavily in favor of open executive sessions because of the public's need to be aware of the deliberations and decisions that go into the making of public policy. Granted, there are arguments against public access to executive sessions, but when in doubt, "bear in mind the policy of openness promoted by the Public Meetings Laws and opt for a meeting in the presence of the public."

III. RULE 3, SECTION 15 VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The guarantees of the first amendment are applicable to the states through the fourteenth amendment. The first amendment is to be given a broad interpretation to insure that the public has access to a marketplace of ideas. Because first amendment principles must be applied "in light of the characteristics of the . . . environment," its freedoms are not absolute. However, "[t]he principle of the freedom of speech springs from the necessities of the program of self government." Only through the free exchange and debate of ideas will the government remain responsive to the desire of its people.

85. Id. at 168, 343 N.W.2d at 724.
A. The First Amendment Secures a Right of Access to Important Government Business

Since Richmond Newspapers, Inc. v. Virginia, the United States Supreme Court has consistently held that the first amendment guarantees a right of access to "matters relating to the functioning of government." In Richmond Newspapers, the Court held that criminal trials must be open to the public, absent overriding articulated interests. This right of access is not stated explicitly in the Constitution. However, because criminal trials have been historically open to the press and the public, that "tradition of accessibility implies the favorable judgment of experience." Two years after Richmond Newspapers, the Court again addressed the right-to-access issue. In Globe Newspaper Co. v Superior Court, a Massachusetts statute providing for exclusion of the general public from trials involving minor sex victims was held unconstitutional. Justice Brennan's majority opinion reasoned that the first amendment serves to ensure the continuation of the republican system of government through individual participation and contribution. The Court declared: "Thus to the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that this constitutionally protected 'discussion of governmental affairs' is an informed one." In a footnote, the majority negated the need to identify a historical precedent for a particular rule, stating that the right to access depends not on history "but rather on the state interests assertedly supporting the restriction." Because this right of access is not absolute, the Court announced a two-part test to determine when access to criminal trials can be denied: first, denial must be predicated on a

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91. 448 U.S. 555 (1980).
94. Id. at 589 (Brennan, J., concurring).
96. Id. at 605. See also Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980) ("[T]he first amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees [of freedom of speech and freedom of the press].") See also text accompanying note 91.
98. Id. at 605 n.13.
compelling governmental interest; and second, it must be narrowly
tailored to serve that interest.99

Finally, in Press-Enterprise Co. v. Superior Court,100 the Court
held that voir dire proceedings in a rape and murder trial could not be
constitutionally closed to the public when no alternatives to closure
were considered and no explanation was given.101 The Court reiter-
ated the Globe Newspaper test and concluded that the practices of the
Superior Court of California failed to pass the test.102 However, reli-
ance was once again placed on historical precedent.103

Justice Stevens concurred to state specifically that the right to ac-
cess is found in the first amendment.104 Quoting Richmond Newspa-
ers, Globe Newspaper, and Saxbe v. Washington Post Co.,105 he
concluded: "It follows that a claim to access cannot succeed unless
access makes a positive contribution to this process of self-govern-
ance. . . . Surely such proceedings should not be hidden from public
view."106

The caselaw unmistakeably holds that the first amendment guar-
antees a right of access to matters relating to the process or function-
ing of government. It is unclear, however, whether historical
precedent must be shown to establish a right of access.107 Therefore,
to determine whether this right of access applies to Nebraska legisla-
tive proceedings, certain questions are raised: (1) has historical prece-
dent been established allowing governmental bodies to be open to the
public?; (2) does the policy espoused by the Supreme Court apply to

99. Id. at 606-07. It should be noted that this test was applied in the context of a
criminal trial, and was applied because the “State attempt[ed] to deny the right of
access in order to inhibit the disclosure of sensitive information.” Id. at 606. The
trial court in Globe Newspaper had a good reason for closing the trial: to protect
the minor sex victim from trauma and embarrassment. The Court held that this
alone was not sufficient to mandate exclusion of the public even though it was a
“compelling” reason. Id. at 607.
101. Id. at 824. The trial court did not reveal why the voir dire was not closed only for
solicitation of sensitive information. Id. at 824-25.
102. Chief Justice Burger spoke for the majority in Press-Enterprise. He articulated
the test of Globe Newspaper as the standard for closure. However, in his previous
dissenting opinion in Globe Newspaper, the Chief Justice stated that he felt the
two-part test was too rigid. Instead, he advocated that the restrictions need only
be reasonable and override the limited and incidental effects on first amendment
C.J., dissenting). The Chief Justice based this position on the fact that there was
no historical precedent for opening trials involving the minor victims of sexual
assaults and because of the compelling interests involved in the case. Id. at 614-
16.
104. Id. at 827.
107. See supra text accompanying notes 95-104.
all governmental proceedings?; and (3) does Rule 3, section 15 meet the *Globe Newspaper* test?

1. **Historical Precedent Establishes a General Right of the Public to Attend Meetings of Governmental Bodies**

Although it is true that under English common law there was no public right to attend meetings of governmental bodies, in the United States such a public right of access has historically been maintained.\(^{108}\) English Parliament was closed because "[t]o print or publish the speeches of gentlemen in this House looks very like making them accountable without doors for what they say within."\(^{109}\) However, American democracy is premised upon a system of government by the people, with checks and balances. The ideal cannot succeed without public access to, and scrutiny of, government meetings and government records. As James Madison noted, "[a] popular government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy, or perhaps both."\(^{110}\) Thus, gatherings of legislative bodies, for the most part, have been open in the United States.\(^{111}\) The Nebraska Constitution also reinforces this observation by requiring that meetings of the Legislature be open.\(^{112}\)

2. **The Need for Open Government Mandates that the Public Should have Access to Legislative Committee Meetings**

While the proceedings of a legislature as one body have generally been open, the same has not always been true for legislative committees.\(^{113}\) Because of conflicting language in *Globe Newspaper* and

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111. *Id.* The fact that not all of the proceedings of Congress have been public can be analogized to the fact that not all of the proceedings of the judiciary have been historically public. Bench conferences have not been open to the public, nor have jury deliberations. Congress has closed its proceedings when they related to sensitive or security information.

It should be noted that there is an argument that closing legislative committee meetings is violative of the Nebraska Constitution, which requires that all meetings of the Legislature shall be open. A discussion of that argument is beyond the scope of this Article.

113. See H. LINDE & G. BUNN, *supra* note 109, at 393. \*See also* Note, *supra* note 109, at 1139 (open meetings laws mandating open government developed rapidly during the 1950's and early 1960's).
Press-Enterprise, it is unclear whether historical precedent is a requirement for open proceedings. However, the Court has consistently justified the first amendment right of access on the "common core purpose of assuring freedom of communication on matters relating to the functioning of government." As the Court concluded in Globe Newspaper, openness of criminal trials encourages an appearance of fairness and allows the populace to participate in, and act as a check on, the system, "an essential component in our structure of self-government."

Although a majority of the Court has never expressly limited this right of access to criminal trials, in earlier cases it held that there is no constitutional right of access to prisons and jails. Quoting Justice Stewart, the Court in Houchins v. KQED, Inc., stated that the constitution "is neither a Freedom of Information Act nor an Official Secrets Act." These earlier "prison access" cases can be distinguished on several bases.

Houchins, a plurality opinion, held that members of the news media have no constitutional right of access to county jails beyond that of the general public. Justice Stewart, concurring in the judgment, specifically held open the issue of whether denying access to the public violated the first amendment. Furthermore, a prison or jail is not a constitutionally established system of elected officials. The prison system does not make laws and is generally not accountable directly to the electorate through the voting process. Thus, closing prisons to the public is not nearly the infringement on the public's need to know as is closing the legislative process.

The legislative closed meetings issue is more closely analogous to the "open court" cases. Criminal trials must be public in order to hold the system accountable. The public's need for government information is likewise essential to its ability to hold government officials accountable, and to intelligently select representatives. People

114. See supra text accompanying notes 99-104.
117. But see id. at 611 (O'Connor, J., concurring) ("I interpret neither Richmond Newspapers nor the Court's decision today to carry any implications outside the context of criminal trials.").
118. See supra note 93 and accompanying text.
119. 438 U.S. 1 (1978) (plurality opinion).
120. Id. at 14-15 (quoting Stewart, "Or of the Press," 26 HASTINGS L.J. 631, 636 (1975)).
122. Id. 18-19. See supra note 93.
124. See supra text accompanying notes 95-106.
125. See supra text accompanying note 94.
have a right to know how and why their money is being spent, and how their country is being run.26 Open legislative committee meetings provide a "positive contribution to this process of self governance."27 Conversely, "[S]ecrecy is the most convenient means of keeping power out of the hands of the people. Public bodies that make decisions behind closed doors breed suspicion that private interests are being served."28

Finally, although there is an inherent conflict in opening criminal trials to the public because such access could jeopardize the defendant's sixth amendment right to a fair trial,29 criminal trials must nevertheless be open to the public even when the defendant's request for closure is unopposed.30 A legislative committee meeting, on the other hand, can be open and accessible to the public without fear of violating other constitutionally protected rights.31 If trials must be open, even when the constitutional guarantee of a fair trial is at stake, it surely follows that a legislative committee meeting must also be open.

3. Rule 3, Section 15 Does Not Meet the Globe Newspaper Test

Even if the historical precedent of open legislatures in general does not apply to committee meetings, these meetings must nevertheless be open because of the general policy favoring a right of access to government proceedings. Nebraska Unicameral Rule 3, section 15 must therefore pass the two-prong Globe Newspaper test in order to constitutionally deny public access. That is, it must involve a compelling governmental interest that is narrowly tailored.32

First, of the reasons that might justify public exclusion from legislative committee meetings—public apathy, lobby pressure, convenience, lack of public pressure, and press representation33—none are

126. See supra note 63.
129. See Garnett v. DePasquale, 443 U.S. 368, 391-94 (1979) (no right of access to pre-trial proceedings when parties to litigation have agreed to closure to protect defendant's fair trial rights); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 551 (1976) ("tensions develop between the right of the accused to trial by an impartial jury and the rights guaranteed others by the First amendment").
131. An argument that privacy rights are violated might be made. See, e.g., Griswold v. Connecticut, 381 U.S. 479, 483 (1965) (citing NAACP v. Alabama, 357 U.S. 449, 462 (1958) (invalid disclosure of membership lists)). However, it is doubtful that such an argument would succeed. Public officials choose, when they run for elected office, to relinquish some privacy.
132. See supra text accompanying notes 95-99.
133. See supra text accompanying notes 64-73.
sufficiently compelling to justify closing meetings from public scrutiny. This is especially clear when compared to the fact that a criminal trial cannot be closed even for the “compelling” reason of protecting a minor.\footnote{134} The Legislature’s desire to conduct secret meetings is surely not a sufficient and compelling reason to mandate public exclusion. Furthermore, press access, based on a theory of press representation, is not the functional constitutional equivalent of public access. It is firmly established that the press’s right of access is no greater than the public’s.\footnote{135} Thus, Rule 3, section 15 fails the “compelling interest” prong of the \textit{Globe Newspaper} test.

Second, the rule is overbroad. Concededly, the right to access is not absolute,\footnote{136} and reasonable time, place, and manner restrictions may be imposed.\footnote{137} However, even if some compelling governmental need for closure exists, the committee cannot exclude the public from every session without determining the necessity of such action. Before closure will be allowed, alternatives must be tried to satisfy first amendment demands.\footnote{138} As the Court noted in \textit{Globe Newspaper}, closure must be determined on a case-by-case basis,\footnote{139} because a “presumption of openness inheres in . . . our system of justice.”\footnote{140} So, too, must a presumption of openness exist in our system of democratic government. If the Legislature is truly concerned about interruptions and efficient meetings, alternative and less drastic means can be estab-


\footnote{138} A mandatory closure of access to information is suspect. See \textit{Globe Newspaper Co. v. Superior Ct.}, 457 U.S. 596, 608 (1982) (“[I]t is clear that the circumstances of the particular case may affect the significance of the interest.”).\footnote{139} \textit{Id.} The Court noted that: “Indeed, the plurality opinion in \textit{Richmond Newspapers} suggested that individualized determinations are \textit{always} required before the right of access may be denied . . . .” \textit{Id.} at n.20 (emphasis in original).\footnote{140} \textit{Id.} at 610 (quoting \textit{Richmond Newspapers, Inc. v. Virginia}, 448 U.S. 555 at 573 (1980) (plurality opinion).
lished. For example, the public might observe executive sessions from a separate room via video camera.\textsuperscript{141} Those persons disrupting the session could be excluded or the press could be guaranteed priority seating.\textsuperscript{142} If unreasonable interference becomes a problem, the solution should be "not to restrict the openness of the [meeting] to the public, but instead to prescribe rules for the conduct of those attending."\textsuperscript{143} Rule 3, section 15 fails to satisfy the second prong of the \textit{Globe Newspaper} test because it is not narrowly tailored to a government interest.

B. The Equal Protection Clause of the Fourteenth Amendment Guarantees First Amendment Freedoms for all Citizens

The fourteenth amendment provides that no state shall "deny to any person in its jurisdiction the equal protection of the laws..."\textsuperscript{144} Generally, classifications created by the government must have some rational basis.\textsuperscript{145} However, when a classification burdens a fundamental right, that classification is subject to strict analysis in order to preserve the value of equal treatment.\textsuperscript{146} First amendment guarantees have long been established as fundamental rights.\textsuperscript{147} The state may abridge these rights (1) by the direct suppression of ideas or information; or (2) by incidental or indirect restriction on the flow of information.\textsuperscript{148}

1. \textit{Denial of Public Access to Legislative Committee Meetings Expressly Restricts the Public's Right of Access}

If a government classification \textit{expressly} suppresses first amendment freedoms, the classification is constitutional only if it can withstand strict scrutiny: the burden must further a compelling state interest, and must be narrowly tailored to that goal.\textsuperscript{149} On its face, Rule 3, section 15 classifies the press as a special group with greater

\textsuperscript{141} This method of access was successfully utilized during the recent removal proceedings against Attorney General Paul Douglas before the Nebraska Supreme Court. However, even this method may pose constitutional problems if the press is allowed direct access, but the public is only given video-camera access.

\textsuperscript{142} See, e.g., Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980) ("While media representatives enjoy the same right of access as the public, they often are provided special seating and priority of entry so that they may report...".")

\textsuperscript{143} Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 567 (1980).

\textsuperscript{144} U.S. CONST. amend. XIV.


\textsuperscript{146} L. TRIBE, \textit{supra} note 16, at § 16-6. See, e.g., Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976) ("[E]qual protection analysis requires strict scrutiny of a legislation classification... when the classification impermissibly interferes with the exercise of a fundamental right... ").


\textsuperscript{149} This is the same test enunciated in Globe Newspaper Co. v. Superior Ct., 457 U.S.
access to information. The Rule thereby restricts the first amendment freedoms of persons not members of that special group. The Nebraska Legislature must, therefore, demonstrate that there is a compelling reason for this classification, and also show that the classification is tailored to avoid any unnecessary infringement on first amendment freedoms. As discussed above, neither of these burdens can be met.

If the Legislature excludes the public from committee meetings because it wishes to keep the content of those meetings secret, the classification does not serve that purpose. Classifying members of the public into press and non-press categories, in essence, circumvents the closed meeting objective. Although committee members are at liberty to discuss issues without fear of immediate constituent or lobby reaction, press persons may attend committee meetings and report what they saw and heard to non-press persons. Thus, the content of the meetings is not kept confidential, rendering the rule impotent.

If the Legislature is not concerned with secrecy, it may hope that through partial public access committee meeting information will eventually reach the rest of the public. However, the classification remains impermissible because press access takes away public access and does not ensure any public dissemination. Executive sessions are not transcribed for public record and the press has no duty to report on the proceedings. Thus, non-press persons have no consistent or complete access to discussions in executive session.

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596, 607 (1982) (indicating that the right of access is a fundamental right). See also L. Tribe, supra note 16, at § 12-8.


151. See supra text accompanying notes 133-44.

152. The press does not have a duty to report and, as such, the public may not receive any information on a topic discussed in executive session. Although it is true that the public would still not have that information if it chose not to attend, the right to the information and the potential to receive it would still exist. See infra text accompanying notes 165-91.

153. See supra note 8 and accompanying text.

154. See L. Tribe, supra note 16, at § 12-19. In essence, without information about the legislative process, citizens cannot effectively bring about the political and social changes they desire. Such restrictions tend to close the spectrum of information from which individuals may draw. See generally Stanley v. Georgia, 394 U.S. 557 (1969) (established right to possess pornographic material in one’s home); Meyer v. Nebraska, 262 U.S. 390 (1923) (cannot prohibit teaching of German).

Sen. Chambers stated in the committee hearing for LB 43: [T]he news media which is often dishonest, distorting, picks and chooses what it’s going to report, will often send an unlettered reporter to cover a story and as a result through ignorance, inattentiveness, totally misrepresents to the public what has happened and that is the public’s only information. Certain public officials receive favored treatment by the
Furthermore, media-only access is bound to result in censorship of ideas and information.\textsuperscript{155} Only that information the news media considers newsworthy will be communicated to the general public. Because not all executive session business is of interest to enough of a news medium’s audience, only “popular” issues will be broadcast or published.\textsuperscript{156} Even assuming that the public will eventually receive some information, there is still no logical reason to exclude the public from committee meetings—unless the Legislature knows that the press will not report or only selectively report.\textsuperscript{157} If the public will learn what happens in executive session, why bother to exclude them? In any case, the classification must fail because information to which the non-press public has a right is being selectively filtered by the media.

2. Denial of Public Access Also Places an Incidental Burden on First Amendment Liberties

If the government’s classification system only incidentally restricts free speech and expression while pursuing other legitimate goals, the government must show that the regulatory interests outweigh the values of freedom of expression.\textsuperscript{158} This test was articulated in Procunier v. Martinez,\textsuperscript{159} in which the Court held that censorship of inmate correspondence was unconstitutional under the first amendment. Regulatory restrictions must “further an important or substantial interest unrelated to the suppression of expression . . . . [and] the

\textsuperscript{155} See supra note 155 and accompanying text.
\textsuperscript{156} See L. Tribe, supra note 16, at \textsection 12-2.
\textsuperscript{157} 416 U.S. 396, 413 (1974).
limitation must be no greater than is necessary or essential to the pro-
tection of the particular governmental interest involved."\textsuperscript{160}

The classification of news personnel may further a governmental
interest unrelated to the suppression of first amendment freedoms,
since closed committee meetings may be convenient, yet still allow
some public dissemination. However, it is far from clear that this in-
terest is substantial. Even if closed executive sessions do not prevent
lobbyists or the general public from receiving information or exerting
pressure, administrative ease alone is an insubstantial excuse to keep
the public from the information that it elected the legislators to dis-
cuss.\textsuperscript{161} Weighing the convenience of uninterrupted meetings against
the public's need to know and right to view the workings of its Legisla-
ture, the balance tips in favor of the public. Continued loyalty and
trust in the legislative process is imperative, and granting the press a
right to access over the general public promotes distrust of the govern-
ment. Clearly, inconvenience, when compared to the value of public
access, cannot be considered a substantial reason for closure.

Even assuming that committee convenience is a substantial inter-
est, the classification is again more restrictive than necessary to pro-
tect that interest. To keep meetings orderly, the Legislature may
impose reasonable time, place, and manner requirements on the pub-
lic, without eliminating access altogether.\textsuperscript{162} Unless these measures
are impossible, the classification system imposed by Rule 3, section 15
is broader than necessary.\textsuperscript{163}

3. The "Press" Has No Constitutional Right to Act as a Public
Representative so as to Exclude the Public from
Governmental Proceedings

Although the right to gather news "is not without its first amend-
ment protections,"\textsuperscript{164} the institutionalized press has no greater right of
access under the first amendment than the general public. The
Supreme Court has never directly addressed the corollary issues of
whether the public and the news media must be provided the same

\textsuperscript{160}. \textit{Id.} at 413. This test is comparable to the test espoused by Chief Justice Burger's
dissenting opinion in \textit{Globe Newspaper}. \textit{See supra} note 103 and accompanying
text.

\textsuperscript{161}. \textit{Cf.} \textit{Reed v. Reed}, 404 U.S. 71 (1971) (administrative ease not enough to discrimi-
nate on basis of gender under a "middle-tier" analysis).

\textsuperscript{162}. \textit{See supra} notes 73-77 & 140-44 and accompanying text.

\textsuperscript{163}. \textit{See supra} text accompanying note 161.

\textsuperscript{164}. Branzburg v. Hayes, 408 U.S. 665, 707 (1972). This statement does not imply that
the first amendment provides the institutionalized media with any rights greater
than the general public. In \textit{Branzburg} the court held that the first amendment
does not grant newpersons the right to withhold information from federal grand
juries. In that context, the court announced simply that the right to gather infor-
mation was important.
rights of access, or whether the press clause of the first amendment provides the news media with a power to act as agent of the public.\textsuperscript{165} Yet, dicta in several cases lead to the conclusion that press and public must receive equal treatment.\textsuperscript{166}

In his concurring opinion in \textit{First National Bank v. Bellotti},\textsuperscript{167} Chief Justice Burger provided an extensive and thoughtful critique of the press clause. In \textit{Bellotti}, the majority held that the first amendment protects corporate discussions and dissemination of ideas or information.\textsuperscript{168} Chief Justice Burger stated that this protection extended to all corporations, not simply media corporations, for two reasons.\textsuperscript{169} First, the press clause does not create a special constitutional privilege for the institutionalized press.\textsuperscript{170} In fact, the freedom of speech and freedom of press were historically interchangeable terms.\textsuperscript{171} This does not suggest that the press clause is redundant: "The speech clause standing alone may be viewed as a protection of the liberty to express ideas and beliefs, while the press clause focuses specifically on the liberty to disseminate expression broadly and 'comprehends every sort of publication which affords a vehicle of information and opinion."\textsuperscript{172}

Chief Justice Burger also found an inherent difficulty in defining

\textsuperscript{165.} See \textit{First Nat'l Bank v. Bellotti}, 435 U.S. 765, 785 (1977) (Burger, C.J., concurring) (the rights inherent under the press clause "[have] not yet been squarely resolved"). See also id. at 798 n.3.

\textsuperscript{166.} Obviously opinions differ. However, Supreme Court dictum weighs heavily toward press clause rights for all. See, e.g., \textit{Richmond Newspapers, Inc. v. Virginia}, 448 U.S. 555, 577 n.12 (1980) ("That the right to attend may be exercised by people less frequently today when information as to trial generally reaches them by way of print and electronic media in no way alters the basic right."); \textit{Houchins v. KQED, Inc.}, 438 U.S. 1, 13-14 (1978) ("media personnel [may not be] the best qualified persons for the task of discovering malfeasance in public institutions."); \textit{Saxbe v. Washington Post Co.}, 417 U.S. 843, 857 (1974) (Powell, J., dissenting) ("The guarantees of the First Amendment broadly secure the rights of every citizen; they do not create special privileges for particular groups or individuals."). But see, e.g., \textit{Cox Broadcasting v. Cohn}, 420 U.S. 469, 492 (1975) ("the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice"); \textit{Mills v. Alabama}, 384 U.S. 214, 219 (1966) ("the press [is] a constitutionally chosen means for keeping officials elected by the people responsible").


\textsuperscript{168.} \textit{Bellotti} overturned a Massachusetts statute forbidding expenditures by banks and business corporations for the purposes of influencing votes on referendum proposals under the first and fourteenth amendments.


\textsuperscript{170.} Id. at 798.

\textsuperscript{171.} Id. at 799. See also \textit{Scott v. City Clerk}, 8 MEDIA L. REP. (BNA) 1164, 1165 (Fla. Cir. Ct. 1982) (press and public used interchangeably, therefore press cannot be allowed if public excluded); \textit{Pennsylvania v. Contakos}, 499 Pa. 340, 348, 453 A.2d 578, 582 (1982) ("Neither may be excluded because the other is present.").

who comprises the "press" for purposes of the press clause. The Court has plainly stated that freedom of the press embraces all forms of dissemination. Any attempt to limit the right to disseminate to only those powerful or rich enough to reach institutional news media status reduces the press clause to a licensing system—something the first amendment was enacted to prevent. Chief Justice Burger emphasized that the first amendment, including the press clause, belongs to all citizens, not simply to an established class or group.

Chief Justice Burger's analysis is appropriately applied to closed committee meetings. Granting press access to executive sessions as the public representative implies that the press has a duty to provide to the public the content of those sessions. Unless this duty is fulfilled, the representative label is meaningless. Once a duty is imposed, governmental enforcement of that duty follows. The Supreme Court has consistently found that this type of control is an infringement on the media's right to decide what to publish. In Miami Herald Publishing Co. v. Tornillo, the Court held that the public has no right to dictate to the newspaper press: "[N]o 'government agency—local, state, or federal—can tell a newspaper in advance what it can print and what it cannot.' Thus, unless the Legislature requires disclosure of the entire executive session, or at least fair portions on each side, the public is denied access. The people elected their govern-

173. Id. at 801.
175. See, e.g., Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 248-54 (1974), in which the Court noted that monopoly of newspaper groups and chains is a growing concern. See also Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 99 (1973) ("system is heavily weighted in favor of the financially affluent, or those with access to wealth").
177. First Nat'l Bank v. Bellotti, 435 U.S. 765, 802 (1977) (Burger, C.J., concurring), quoting Pennekamp v. Florida, 328 U.S. 331, 364 (1946) ("[T]he purpose of the constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it." (Frankfurter, J., concurring)).
178. See supra text accompanying notes 153-54.
181. Id. at 255-56 (quoting Pittsburg Press Co. v. Human Relations Comm'n, 413 U.S. 376, 400 (1973) (Stewart, J., dissenting)).
182. Of course there is a problem of determining what are fair portions and what are
ment officials to act as public servants. This representative system does not vest those officials with the right to decide what information is good and what is not good for the people to receive. This principle is even stronger when applied to the news media because there is no election process, no method of “voting out” a news source that fails to properly and adequately “represent.” 183

Defining members of the news media for purposes of the rule again resurrects the licensing system spectre. 184 Classifications among the various types of news media may be upheld as rational. 185 However, denying certain members of the public the right to disseminate information, by classifying them as “non-media,” may not be constitutional. The press’ right of dissemination inures “not only [to] newspapers, books, and magazines, but also [to] humble leaflets and circulars.” 186 Thus, each individual has the right to attend executive sessions if for no other reason than to assimilate and disseminate this information through a handwritten leaflet. 187 Any system that eliminates this right “strikes at the very foundation of the freedom of the press by subjecting it to license and censorship . . . .” 188

Finally, press representation imposes a constitutionally impermissible filter on publicly available information by investing in a single group the discretion to open or close important channels of communication. The first amendment prohibits “limiting the stock of information from which members of the public may draw.” 189 A decision by the press alone regarding what information the public should receive unreasonably restricts the public’s right to access. Press reporting, like the transcript of a judicial proceeding, “is no substitute for public presence.” 190 Granting the press rights under the press clause while denying these same rights to others, even to facilitate information dis-

183. There is “consumer pressure” that can be used on news institutions. However, unless the public has some access to information, they will not know what information they are being denied.
184. See supra text accompanying notes 176-77.
185. See supra text accompanying notes 176-77.
187. Of course, the right to disseminate information must be equal to the right to access information. If not, the right of dissemination, which has been zealously protected by the Court, would disappear. There must be sources of information, uncensored and unfiltered, to publish.
190. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 597 n.22 (1980) (Brennan, J., concurring). “Indeed, to the extent that publicity serves as a check upon trial officials, ‘[r]ecordation . . . . would be found to operate rather as cloa[k] than chec[k]: as cloa[k] in reality, as chec[k] only in appearance.’ ” Id. (quoting 1 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1827)).
IV. CONCLUSIONS AND POLICY CONSIDERATIONS

The first amendment is the cornerstone of all constitutional freedoms, without which tyranny and government control prevail. The freedoms enunciated by the Supreme Court as emanating from the first amendment must be ensured complete protection. Thus, the Nebraska Legislature must eliminate the distinction between press and public in its legislative rules. This can be done in two ways: (1) denying access to all; or (2) providing access to all.

First, denying access to all solves some of the problems inherent in Rule 3, section 15. Press representation problems of licensing and control are avoided. In addition, if total access is denied, constituent pressure might evolve to open the process. The democratic system of government provides for this type of check and balance, so that if those elected to do the public's bidding do not so perform, they can be replaced at the next election.

By far, the better approach is to open executive sessions to all the public. It is incongruous to elect individuals to act as public representatives only to have those servants "hide" the process of the government from their constituents. All of the public has the right as well as a need to know, and it would seem to be the Legislature's duty to open its meetings to accomplish this purpose.

Although press representation is no assurance of public access, inclusion of the general public in legislative committee executive sessions does not mean that the public must be allowed to attend every gathering of news personnel. Gathering and dissemination of news has evolved into a business enterprise. As such, the public should not be allowed to interfere with the "business" of gathering news. Members of the media can attend press conferences, take private interviews, or chase stories without fear of public intrusion. However, when the government is acting in its decisionmaking capacity, formulating policy, and taking votes that affect the general public, the press cannot be the sole recipient of that information under the guarantees of the first amendment.

Kim M. Robak, '85