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*1483 NEW YORK'S OPEN MEETINGS LAW: REVISION OF THE POLITICAL CAUCUS EXEMPTION AND ITS IMPLICATIONS FOR LOCAL GOVERNMENT [d]

INTRODUCTION

The New York State Open Meetings Law [1] ("OML") is an attempt to "shed a little sunshine" on the activities of state and local governmental bodies. It implements the oft-cited and well-accepted principle that the public business of public bodies normally should be conducted at public meetings. The OML's Declaration of Legislative Policy emphasizes that in order to maintain democracy citizens must be "fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy." [2]

Since its adoption in 1976, courts have given the OML a "broad and liberal construction so as to achieve the purposes for which it was enacted." [3] Two recent New York State court decisions, however, raise serious questions about the proper ***1484** scope of the judiciary's exercise of statutory interpretation and its fidelity to the express legislative intent underlying the OML. These decisions manifest a frustration with the unequivocal expansiveness of the OML's political caucus exemption and its application to local governments, by carving out exceptions to the OML that lack any statutory basis. Further, the motivation for and substance of recent proposed statutory amendments that focus exclusively on local governments must be seriously questioned for their disregard of the principle and tradition of municipal home rule in New York.

This Article considers the historical purpose, application and treatment of the political caucus exemption to New York's OML. Part I examines the legislative history and judicial treatment of the exemption to the OML, as well as its use by the State Legislature. Part II considers the recent New York decisions that have restricted the scope of the exemption as it applies to local government bodies. Part III analyzes the decisions' implications for local government and criticizes the imposition of restrictive conditions on the statutory exemption's broad applicability. Part IV reviews recent statutory proposals that would limit the political caucus exemption and Part V critiques the proposed amendments that would target local governments exclusively within the context of municipal home rule. The Article concludes by suggesting a redirection of effort by advocates of reform, while noting that legitimate public policy reasons exist that should give pause to such efforts.

I. THE POLITICAL CAUCUS EXEMPTION

While the OML presumes that "(e)very meeting of a public body shall be open to the general public," [4] it contains exceptions recognizing that a public body should be permitted to address certain topics in private, to allow for unfettered discussion outside the glare of public scrutiny. Section 105 delineates the limited reasons for which a public body can hold a closed executive session. These include protecting public safety, criminal investigations, legislative or collective bargaining negotiations, personnel matters and property transactions. [5] Courts ***1485** have construed this provision strictly to prevent "the Article's

clear mandate (from) be(ing) thwarted." [6] Section 108, in turn, carves out three exemptions to the "open meeting" presumption. This section renders the law inapplicable to judicial or quasi-judicial proceedings, except proceedings of the public service commission and zoning boards of appeals; deliberations of political committees, conferences and caucuses; and any matter made confidential by federal or state law. [7]

Although both sections 105 and 108 permit closed meetings, they apply to different types of meetings. An executive session may be convened only upon a motion made in an open meeting, identifying with particularity the subject matter to be discussed in executive session. [8] Upon the termination of such discussion, if other matters are addressed, the public body is obliged to reconvene in open session. Section 106(2) requires that minutes be kept at executive sessions of any action that is taken by a formal vote. [9] In contrast, the meetings covered by section 108 are not "meetings" at all under the OML and are not limited to particular subjects. [10] Public notice provisions do ***1486** not apply, records or minutes need not be kept and formal procedures are not required to convene such an assemblage. If a meeting by definition falls into one of the three prescribed categories, it is outside the OML's scope. [11]

The second class of meetings identified in section 108, collectively known as "the political caucus exemption," [12] has had a provocative statutory and judicial history: the manner in which it has been employed by state and local governmental bodies has been the subject of much contention. As originally enacted in 1976, section 108 simply provided that the OML would not apply to "deliberations of political committees, conferences and caucuses." [13] The failure to define these terms was criticized immediately. A 1977 law review article noted that these were "general categories . . . susceptible to an overbroad construction" [14] and proposed that the exemption be "judicially narrowed to apply only to the internal affairs of political parties . . . (t)o further the legislative purpose behind the open meetings law," and close a "sizable" and "wholly unwarranted" "loophole." [15] The courts followed this thinking and ***1487** consistently interpreted the exemption to encompass only those closed meetings convened to discuss "the private matters of a political party, as opposed to matters which are public business yet discussed by political party members." [16] The political caucus exemption was deemed "inapplicable to closed session meetings of the majority political party to discuss matters of public business." [17]

In an important 1981 decision, Sciolino v. Ryan, [18] the Appellate Division, Fourth Department, held that the closed meetings of the eight Democratic Party members of the nine- member Rochester City Council violated the OML. The Democratic members had met regularly in private with the mayor of Rochester to discuss governmental matters likely to come before the Council. In affirming the lower court decision, the Fourth Department cautioned that "(a)n expansive definition of a political caucus . . . would defeat the purpose of the Open Meetings Law that public business be performed in an open and public manner . . . (because) such a definition could apply to exempt regular meetings of the Council." [19] The court opined that in order "(t)o assure that the purpose of the statute is realized, the exemption for political caucuses should be narrowly, ***1488** not expansively, construed." [20]

The Sciolino court focused on two elements. First, a quorum of the Council had been present at the meeting. Second, the subject matter addressed at the meeting concerned items before the Council that affected the public and "directly relate(d) to the possibility of a municipal matter becoming an official enactment." [21] The court warned that to characterize a meeting containing these two elements as a meeting of a "majority" of a political party rather than a "quorum" of a public body would "allow( ) the public to be aware of only legislative results, not deliberations, violating the spirit of the (OML) and exalting form over substance." [22]

Sciolino played a critical role in the evolution of the political caucus exemption by applying a narrow judicial interpretation to the exemption's scope. The court juxtaposed the statutory exemption with the overriding intent of the OML: to promote "the performance of public business in an open and public manner, with the public able to attend and listen to the deliberations and

decisions that go into the making of public policy." [23] In the absence of a statutory definition of "political caucus," the court inferred from the brevity of the exemption that the legislature had intended "to prevent the statute from extending to the private matters of a political party, as opposed to matters which are public business yet discussed by political party members." [24]

Sciolino was cited with approval in a 1985 opinion of the Committee on Open Government. [25] The Committee's opinion, though advisory, was significant because, unlike previous opinions that had addressed political caucuses in the context of local public bodies, this opinion applied to caucus meetings of ***1489** the New York State Assembly and Senate. Consistent with Sciolino, the Committee on Open Government concluded that when a caucus attended by a quorum of either house was held to discuss public business, as opposed to political party affairs, the OML would apply. [26]

According to one commentator, the advisory opinion served as the catalyst for the 1985 statutory revision of section 108. [27] Given the extent to which the respective majority parties in the Senate (Republican) and Assembly (Democrat) have convened caucus meetings (known in Albany as "conferences") to discuss the substantive and political merits of pending legislation it seems likely that the reforms were a reaction to the Committee's opinion.

The practice of conferences continues and, indeed, they occur almost daily during the legislative session. Closed meetings of a voting majority in each house have become an integral part of the state legislative process. Bills approved by the majority party in conference invariably are approved by that particular house without the need for any public debate since the conference's block of legislators can guarantee its passage. Conversely, those legislative items that fail to win approval in the caucus have virtually no chance of being placed on the legislative agenda for a vote by the full legislative body. Only rarely are bills released by the caucus for a discussion and vote on the floor without predetermining its fate. One political observer in Albany described the process in both houses as follows:

> When the conference, always meeting in secret, makes a decision ***1490** about policy it is the usual rule that everyone "goes along" unless allowed to deviate for some very good reason, and that has been cleared in advance with the leader. If allowed to deviate they are "off the hook." If they are required to take the pain and do what they are told, they are "in the tank." [28]

Because caucuses are not deemed "meetings of a public body" under the OML, no notice of their scheduling, no list of agenda items and no record of final decisions are required to be provided to the public.

Although they are closed meetings, conferences in Albany are hardly clandestine. Party leaders in the State Legislature regularly announce their conference meetings and the fate of bills that have been considered in these closed sessions. In the 1994 legislative session, for example, legislators acknowledged that several noteworthy bills failed to be reported out of party conference and, therefore, would not be considered for a vote. Included among these proposals were bills banning assault weapons and imposing increased penalties for bias-related crimes--both rejected in the Senate Republican conference--and a bill that failed to win approval in the Assembly Democratic conference that would have required doctors to notify parents of the results of HIV tests on newborns. [29]

The reliance of the majority parties in both houses on caucus meetings to determine their legislative agendas is plain. Not surprisingly, when the combination of the Sciolino decision and the Committee on Open Government's 1985 advisory committee opinion threatened the continued availability of ***1491** caucus meetings for such purposes, the State Legislature reacted by protecting its institutional and political interests.

The Legislature made clear in the 1985 Amendment its intent to include within the political caucus exemption discussion of public matters by legislative bodies, including local governments, and caucuses that consist of a quorum of a legislative body.

Its declaration of legislative intent acknowledged that the political caucus exemption supports the political party system in legislative bodies by allowing members to engage in "the private, candid exchange of ideas and points of view . . . concerning the public business" that comes before the body.[30] Meetings were perceived as thereby enhancing the function of parties as "mediating institutions between disparate interest groups and government . . . (which) promote continuity, stability and orderliness in government."[31] The declaration of legislative intent also noted that recent judicial decisions had eroded the exemption by limiting its application to discussions of political business.[32] The declaration of intent then proclaimed the Legislature's "adherence to the original intent"[33] of the political caucus exemption and set forth the substantive changes in the law. The most significant change was the Legislature's assertion that the OML:

> does not apply to the deliberations of political committees, conferences and caucuses of legislative bodies regardless of (i) the subject matter under discussion, including discussions of public business, (ii) the majority or minority status of such political committees, conferences and caucuses.[34]

It is debatable whether the 1985 Amendment clarified the original law's legislative intent or instead created a sweeping restriction of public access to the workings of government. One critic of the amendment asserted that it "presages an end to New York's commitment to open meetings" and "vitiate(s) the public's right to open government."[35] In particular, the critic noted the potential for abuse at local municipal levels, where governments controlled by one party could use the expanded ***1492** coverage of the political caucus as a means for essentially conducting all public business in private, thereby excluding not only any minority party members but also the public "from observing any meaningful discussion of public business."[36] The validity of this criticism, which expresses the same premise as the Sciolino decision, was explicitly denied by the State Legislature.

Shortly after the enactment of the 1985 Amendment, the Third Department, in Oneonta Star v. County of Schoharie, found the amended language dispositive. The case involved a challenge to the closed caucus meetings of the ten-member Republican Party majority on Schoharie County's sixteen-member governing board. During these meetings, party members had discussed matters scheduled for an upcoming vote.[37] The court upheld the meetings by citing to the State Legislature's declaration that "its intent in the enactment of prior legislation was not to prohibit political caucuses from considering public business to come before legislative bodies and exempting such meetings from such law."[38] Since Oneonta Star, few cases have challenged the political caucus exemption to the OML, perhaps because its broad application appeared so explicitly defined. Recently, however, two decisions, Humphrey v. Posluszny[39] and Buffalo News v. City of Buffalo Common Council,[40] came to conclusions at odds with the Third Department's seemingly straightforward interpretation of the 1985 law. Taken together, these decisions evince a judicial attempt to restrict the scope of the political caucus exemption despite the Legislature's explicit determination to the contrary. These cases represent a frustration with the perceived inefficacy of the OML as a mechanism for ensuring adequate public access to the deliberations of local government.

*1493 II. THE JUDICIARY OPENS THE CAUCUSES' DOORS

A. Humphrey v. Posluszny

In the first of these cases, Humphrey v. Posluszny, the Fourth Department reversed a lower court opinion that had found that closed meetings between Independent Party members of the Lancaster Village Board, who constituted a quorum, and members of the Village Police Benevolent Association were protected by the political caucus exemption.[41] In 1990, the Erie County Supreme Court dismissed an Article 78 petition brought by the minority party members of the Board. The lower court relied on pre-1985 cases that had exempted caucuses from the OML only if the agenda was limited to internal political business. According to the court, the 1985 Amendment "represents the Legislature's response to a series of judicial decisions which had, in that body's collective judgment, •eroded' the political caucus exemption."[42] While assuming the facts presented in the light

most favorable to the petitioners, and conceding that public business was, and had continued to be, regularly discussed, the court found that "the meetings of the majority of the Board under the aegis of the Independent Party are clearly the deliberations of a political caucus, and, as such, are exempt from the requirements of the Open Meetings Law. No other conclusion comports with the plain language of . . . Section 108(2)(a), (b), the clear intention of the Legislature . . . and the relevant case law." [43]

On appeal, the Fourth Department reversed in a 3-2 decision. The appellate court referred to the legislative intent of the 1985 law, citing a portion of the Legislature's finding that "the public interest was promoted by a •private, candid exchange of ideas and points of view among members of each political party concerning the public business to come before legislative bodies."' [44] According to the court, "(n)onetheless, what occurred at the meeting at issue went beyond a candid ***1494** discussion, permissible at an exempt caucus, and amounted to the conduct of public business, in violation" of section 103(a) of the OML. [45] The court provided no further explanation for its decision. Nor was the dissent illuminating. It merely stated that the meeting fell within the exemption contained in section 108(2)(b). [46]

The appellate decision is at best puzzling. The Fourth Department's characterization of what transpired in the closed meetings as the "conduct of public business" [47] directly conflicts with the lower court's finding that "public business was, and is regularly, discussed." [48] Unfortunately, neither opinion refers explicitly to the specific subject matter of the meeting. The appellate court's failure to explain its differing interpretation of the meeting's subject matter leaves little room for discussion on the point. All that can be gleaned from this decision is that the appellate court determined that the "conduct" of public business in political caucuses is distinct from the "discussion" of public business and must be prohibited. For the first time, a New York court carved out an exception within the recently amended exemption, and distinguished the prohibited act of conducting public business from permissive discussion of such affairs. The distinction is vague at best and the court failed to specify what prohibited conduct is.

Indeed, the intent of the OML was to open the deliberations of public bodies to public scrutiny in order to reveal more than simply the formal vote-taking or decision-making rite. [49] As the Third Department recently noted, it is "the deliberative process which is at the core of the (OML)." [50] The Fourth Department in Humphrey failed to appreciate that the "deliberations" ***1495** allowable in a political caucus encompass discussions of public business that often culminate in consensus or resolution--for those in attendance, everything but an official vote. Such activity was challenged in Sciolino and the Committee on Open Government's advisory opinion, but was sanctioned explicitly by the 1985 Amendment. Though certainly a valid subject for criticism, the State Legislature's action in 1985 expressly broadened the scope of the political caucus exemption and should have resolved conclusively any previous ambiguities.

B. Buffalo News v. City of Buffalo Common Council

The second judicially created exception to the political caucus exemption was introduced in 1992 by the Supreme Court in Erie County in Buffalo News v. City of Buffalo Common Council. [51] This decision held that although the members were all of the same political party, a closed meeting of a quorum of the Buffalo Common Council violated the OML. The members, who had convened for the purpose of discussing the city's budget crisis, alleged that their meeting fell within the political caucus exemption to the OML. Significantly, the entire membership of the Common Council was comprised of one political party. Once again, the concerns expressed in 1977 and 1986 were realized as a one-party controlled government body abused the political caucus exemption. [52] According to the court, the one-party legislature had convened "to adopt in private a proposed plan to address the deficit before •going public' to debate whether such a plan will be accepted." [53] Petitioner, The Buffalo News, had sought judicial intervention to invalidate the closed meeting as violative of the OML and contrary to the conventional applicability of the political caucus exemption. The Buffalo Common Council argued that the meeting fell squarely within the scope of the exemption as it had been clarified by the State Legislature in 1985.

The court rejected the Common Council's argument, noting the danger that:

> ***1496** A literal reading of Section 108 . . . could effectively preclude the public from any participation whatsoever in a government which is entirely controlled by one political party. Every public meeting dealing with sensitive or controversial issues could be preceded by a "political caucus" which would have no public input, and the public meeting decisions on such issues would be a mere formality. Such interpretation would negate the Legislature's declaration in Section 100. [54]

The court concluded that the legislature's amendment of the political caucus exemption must be viewed within the context of its preservation of the OML's declaration of legislative intent in section 100. Thus, the court deemed it "necessary to determine if section 108 can be reasonably interpreted consistent with the declaration of section 100." [55]

The court distinguished the Third Department's 1985 Oneonta Star decision from its own decision in Humphrey (which was later overturned). The critical distinction, according to the Buffalo News court, was that in both prior decisions, the political caucus exemption was addressed within the context of a two- or multi-party public body on which at least one minority party member had served. The court suggested that "perhaps . . . it would be fair to assume that" a meeting unattended by a single member of an opposing political party may be considered a political caucus only if the legislative body itself is composed of representatives from more than one party. The same could not be true when "the entire legislature is of one party and the stated purpose is to adopt a proposed plan to address the deficit before going public." [56]

The court cited no precedent to support its conclusions nor did it refer to any statements evincing the Legislature's intent to limit the scope of the 1985 Amendment. The court entered the realm of the hypothetical by distinguishing between a public body comprised of members entirely of one political party and a public body with a ratio of perhaps 8:1, 34:1, or 100:1.

According to the court, a lone minority member changes the entire political dynamic, transforming a private meeting of ***1497** an overwhelming veto-proof majority of legislators, into one in which the majority party will discuss "political posturing on public issues." [57] Such a distinction lacks any nexus with reality and elevates technical over substantive fidelity to the law. From a public policy perspective, that lone minority party member can offer no effective resistance to the overwhelming tide of the majority. The impact the solitary opposing legislator might have on law-making depends more on broader media and public support for a particular municipal issue rather than on ideologically grounded, partisan opposition (as would any member of a public body regardless of party affiliation).

An equally improbable yet logical extension of Buffalo News occurs with the election of a single minority party member to a body comprised of a vast majority of opposition-party local legislators. Although prohibited from calling a caucus prior to the election, the majority delegation would now be free to do so and exclude the lone minority party member, as well as the press, advocates and other interested parties, from the entire range of deliberative and decision-making activity. As long as the sole minority party member is in office, the majority party could avail itself of an exclusive caucus. If in the next election, however, the minority party member loses, the exemption ends.

Such discontinuity results in institutional instability in both the internal operations of the legislature and its relations with the executive branch and other levels of government. Furthermore, it raises the possibility that the controlling majority party may decide not to run a candidate in one race, trading token minority party representation for the ability to retain the use of the caucus exemption to prevent public and media scrutiny. (A speculative but not unthinkable scenario in the real world of local party politics).

That the existence of this lone minority party representative carried such weight with the court suggests that the court stretched its logic extremely thin to reach a certain conclusion. The tenuousness of the court's logic is illustrated by its refusal "to declare

open every possible meeting of the Buffalo Common Council where the budget crisis may be discussed," claiming ***1498** that this would be "difficult if not impossible" to order. [58] Instead, the court stated that with respect to single-party legislatures:

> it must be left to the sound discretion of honorable and honest legislators to clearly announce the intent and purpose of future meetings and open the same accordingly consistent with the overall intent of (the OML). [59]

As with the judicially created "one-party legislature exception" to the political caucus exemption, this "one-party legislature honor system" cannot be found in the OML. In fact, assuming that the court's statutory analysis is valid, its finding that the caucus exemption is facially inapplicable to single- party legislatures, combined with the fact that budget discussions are most certainly matters of public business, appears to make an order prospectively opening all such meetings a straightforward application of the law rather than a "difficult" or "impossible" undertaking. [60] Furthermore, if the court was seeking to rewrite the exemption, the existence of a single minority party representative is a weak basis for triggering the caucus exemption. The court could have addressed its public policy concerns better by setting the minority party numerical threshold at a level that could prevent a majority party override of an executive veto. The court's concern that the political caucus in a one-party public body would preclude public participation applies equally to a political caucus convened by a large number of majority-party members. In either situation, the caucus can be used as a pretext for making an irreversible, ***1499** institutional decision on a matter of public policy while in closed session, thereby rendering any ensuing public meeting decision "a mere formality."

III. IMPLICATIONS OF HUMPHREY AND BUFFALO NEWS

While Humphrey and Buffalo News are considered attempts to promote "good government" and address public policy concerns, they fail to consider the realities of local government and institutional party politics. More significantly, the courts' actions represent attempts to legislate, adding caveats and conditions to the OML that the State Legislature both explicitly and implicitly has rejected. When the legislature revisited the political caucus exemption in 1985, it indeed may have, as one commentator stated, "widened the exemptions granted to political caucuses, and as a result, the exception . . . swallow(ed) the rule." [61] Notwithstanding the arguable validity of such criticism, both houses of the State Legislature (and the Governor, who signed the 1985 Amendment into law) presumably were aware that large party majorities (if not monopolies) exist in local legislative bodies. The state, however, did nothing to limit the political caucus exemption to address such local "evils."

The judiciary's proper role in interpreting the OML was articulated by the Court of Appeals several years prior to the 1985 Amendment. In 1978, the state's highest court emphasized the importance of deferring to legislative intent and declared that it "is neither appropriate nor necessary to suggest agreement with the legislative policy or to indorse it, a matter exclusively for the Legislature in applying its views to the legislative and executive branches of government." [62] Nevertheless, the courts in Humphrey and Buffalo News ignored the plain meaning and intent of the 1985 Amendment and effectively inserted their own revisions into the OML. In responding to perceived attempts by local governments to manipulate the law to avoid public scrutiny, the courts clearly overstepped their bounds and inappropriately assumed the role of ***1500** the legislature. These revisions, while arguably beneficial to the cause of greater access to government decision-making, were promulgated by the wrong branch of government in seriously flawed decisions. [63]

The foregoing criticism of these two decisions is not offered in support of the attempted manipulation of the OML's political caucus exemption as a shield against public scrutiny of local legislative bodies. Nor is it meant to justify the regular use of the exemption by the majority parties in the State Senate and Assembly to determine the fate of pending legislative items. The analyses contained in the 1977 and 1986 law review articles detailing the potential, or as one commentator put it, the "invitation," [64] for abuse of the exemption by local legislatures dominated overwhelmingly by one party remain sound. [65] In all likelihood, the public has been and continues to be excluded from some of the discourse and deliberations of its local boards and councils through their use of the political caucus exemption.

Whether this is wholly inappropriate is less than certain. The open meetings requirement can and does hamper a legis- lature's efficacy as a counterweight to the local executive. The requirement limits the legislature's ability to strategize on important and complex matters and to allow its members to speak openly and freely on sensitive institutional issues, such as ongoing budget negotiations. Legislators may show some self-restraint in using such caucuses and, indeed, the Democratic majority leadership of the New York City Council has convened caucuses sparingly during the past several years. In the months of May and June 1994, for example, the few caucuses called during negotiations on the fiscal year 1995 budget were supported by reasons such as the existence of a Republican Mayor, an expanded seven-member Republican minority contingent, the charged tenor of the ongoing negotiations with ***1501** the executive branch, and several complex and controversial issues related to the budget. It is worth noting that the OML does not constrain discussions between the executive and his or her cabinet or commissioners. For better or worse, the law applies, per se, to a local legislature, but not to the local executive. [66]

The OML, with all its flaws and loopholes, dictates the activities of local public bodies. Yet, its application to local governments is not necessarily a neat fit. As evidenced by the State Legislature's swift and decisive action in 1985 ensuring the broad availability of the political caucus exemption, the OML was designed and revised most clearly within a state context. One commentator contends that underlying the caucus exemption is the assumption that an active, significant two- party system exists, in which legislative representatives from both parties are sufficient in relative size and power to compete for political advantage. [67] Such two- (or multi-) party systems typically do not exist at the local municipal level. Lacking such a strong partisan political paradigm, applying the OML's political caucus exemption within a local context is akin to attempting to fit a square peg in a round hole. The frustration with the behavior of some local public bodies, as manifested by the judicial actions taken in Humphrey and Buffalo News, can be attributed, in part, to this gap between the scope of the state law and the nature and practice of local governments.

Of course, many observers of the state legislature's operations ***1502** would contend that the existence of two relatively equal party delegations does not guarantee that a government body's deliberations will occur in open, public forums. The regular use of the political caucus exemption by the majority parties in the State Senate and Assembly to determine the fate of legislative items is an accepted fact of political life in Albany. Despite criticism from the media, good government advocates and some minority party legislators, the majorities in both houses have steadfastly resisted any pressure to limit their use of the exemption.

IV. PROPOSED STATUTORY SOLUTIONS

During every state legislative session since 1983 legislation has been proposed that would amend the caucus provisions of the OML. [68] In 1994, each house introduced a separate bill designed to reform the statutory framework of the exemption, yet neither was adopted. [69]

The proposed Senate bill, sponsored by Democratic Senator Nancy Larraine Hoffman of Syracuse and twelve other Democrats, would have limited political committees, caucuses and conferences to discussions of "partisan political matters" only. [70] Under this bill, party meetings that discuss "public business" would be subject to the provisions of the OML. As the prime sponsor's memorandum in support of the bill explicitly stated, the bill's intent was to "repeal the provision of the 1985 law permitting closed meetings and open the decision- making process up to public scrutiny both at the state and local level." [71] The New York Public Interest Research Group ***1503** ("NYPIRG"), a non-profit government watchdog group, issued a statement in support of an identical bill introduced by Senator Hoffman in the 1992 legislative session. The group observed that caucuses are "where crucial decisions about the future of New York State are often made" and are "commonly used as a method to shut the public out of important, fast-breaking decisions." [72] A 1992 editorial in The Buffalo News endorsed this bill, stating that

> (w)hen lawmakers are discussing the policy their party bloc or their members will take on legislation, they are doing the public's business. Hiding behind the excuse that these are party discussions won't work. . . . No matter how the Albany establishment resists this recommended change, it is scarcely a radical new idea. . . . Senator

> Hoffman's bill, which she would also apply to local government, merely responds to the ideals of a democratic society governed by elected representatives. [73]

Such external support notwithstanding, the proposed legislation would have profoundly restricted the Legislature's activities. It is not surprising therefore that the bill received little institutional backing. The bill was referred to the Senate's Committee on Investigations, Taxation and Government Operations, and became the subject of a "motion to discharge" by its sponsor on March 30, 1994. [74] The motion, if adopted, would have allowed the bill to be discharged from the committee without an affirmative vote and to be placed before the full Senate. The motion was defeated, however, in a strictly partisan vote without any discussion by the Republican majority ***1504** members. It was the third consecutive year that Senator Hoffman's motion to discharge the bill from committee was defeated.

A similar bill was introduced in the Assembly late in the 1994 legislative session that would have limited state and local legislative caucuses to discussions of "matters of political party business, including the development of political party policy on issues of public business." [75] In an attempt to strike a more accommodating position, the Democratic sponsors' memorandum in support noted that "(w)hile it is important to the legislative process for members of a political conference to conduct party business and develop party policy in private, it is essential when they cross the line to conduct public business that the public be involved and aware of their deliberations." [76] The practical distinction between developing party policy on issues of public business and actually making a partisan decision on those issues is so unclear that it likely would have been construed broadly by governmental bodies and consequently challenged in the courts. Nevertheless, the bill died without consideration in the Assembly's Democrat-controlled Governmental Operations Committee. [77]

The fate of these legislative proposals is hardly surprising. Hopes for the direct repeal or restriction of the 1985 Amendment, insofar as it applies to the State Legislature, appear marginal. Considering the expansive amendatory language added in 1985, any encroachment on legislative operations in Albany is likely to receive the same negative treatment as the two bills introduced in 1994. The intransigence of both parties in the State Legislature on this issue, may result in legislative action that shifts the focus of statutory reform to the local context. While legislative proposals restricting the use of caucuses by local governmental bodies and exempting the State Legislature may face enhanced prospects of passage in Albany, they do so only at the expense of the local autonomy underlying municipal home rule. This increasingly likely scenario, raises significant questions regarding the institutional relationship ***1505** between state and local government in New York.

V. POSSIBLE STATE REFORM OF LOCAL GOVERNMENT CAUCUSES

Opponents of the caucus exemption's current scope now must wrestle with finding feasible statutory solutions to perceived abuses while conceding that the State Legislature is not going to adversely affect its own operations by reversing the 1985 law. One alternative is to seek legislative reform of the manner in which the exemption applies to local government. [78] In fact, Governor Cuomo proffered such a proposal in a bill he submitted for consideration in 1993. [79] The bill, proposed as the Governor's "Program Bill Number 117" of 1993, was never actually introduced by either house and, therefore, was not considered seriously. Nevertheless, this proposal presents a possible compromise that could be struck among the Governor and the majority leaders in the Senate and Assembly, albeit to the exclusion of municipal input or agreement.

The former Governor's proposed legislation would have added a new section 105-a to the OML. This clause would regulate the conduct of caucuses of party members of a "unicameral legislative body," thus explicitly excluding the bicameral State Legislature. Essentially, the bill would have limited the availability of closed caucuses to any political party delegation that constituted less than fifty-one percent of the legislative ***1506** body's total membership. [80] The legislation also provided that this composition threshold could be increased by a local legislative body acting by local law to allow closed caucuses for

political party delegations that constituted no more than two-thirds of the body's total membership. [81] The proposed legislation further provided that closed caucuses would only be allowed "for the purpose of discussing political party strategy or political party position with respect to the responsibility, authority, powers or duty of the legislature." [82] Finally, the legislation would have required the party to announce publicly meeting times pursuant to section 104 of the OML. [83]

According to the former Governor's memorandum in support, this bill attempted to address the fact that

> (i)n the case of unicameral legislative bodies dominated by a single political party, a political majority potentially has the ability to engage in the entire deliberative process in private. The only action required to be public in that circumstance is a public vote affirming a decision essentially made in private. [84]

By allowing local legislative bodies to increase the maximum party composition from one-half to two-thirds, the memorandum asserted that the bill "gives effect to principles of home rule." [85] The requirement that such increase in the party composition threshold be effected by local law "would allow for public debate as to whether a majority party could validly ***1507** conduct closed caucuses when discussing public business." [86]

The legislative proposal is seriously flawed in several respects. First, the bill's focus on local legislative bodies begs the retort, "State government, heal thyself." The bill hypocritically excludes the State Legislature from the open meeting provisions it advocates for local governments. There are two possible explanations for the bill's exemption for the State Legislature. Either the caucus exemption is used appropriately by the State Legislature consistent with the original intent and the Governor's interpretation of the OML, or, despite the Senate's and Assembly's apparent circumvention of the OML through the use of party conferences, the only reform that would have any possibility of passage is one that deflects the focus from state government to local government. Given the widespread opinion of observers within and without government circles that the caucus exemption is used improperly, the latter rationale is most likely.

If the intent of the OML is to ensure that "the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy," [87] then an analysis of the effect of the caucus exemption must be based upon whether state conferences prevent the public from observing, attending or listening to the legislature's deliberations and decisions on public policy. If this threshold question is answered in the affirmative, the next consideration must be whether the purposes and practical applications of those caucuses satisfy other governmental concerns and merit the continued exemption from the OML's provisions. The primary arguments offered to justify differential treatment of State Legislature caucuses as compared with local legislative bodies inappropriately deviate from this straightforward analysis.

The contention that more equal party representation in the State Legislature serves as a check on closed caucuses and therefore provides a reason to exempt the State from reform, fails. Deliberations and decisions are being made in private by ***1508** voting majorities in each house. The reality is that whatever decisions are reached in the Republican party conference in the Senate or in the Democratic party conference in the Assembly become the final decisions of their respective bodies. Minority party protestations have slight, if any, effect. A recent analysis of the declining condition of New York State challenged this reality and issued the following appraisal of government in Albany:

> New York politics is a duopoly, a bipartisan condominium in restraint of competition and accountability. . . . Democrats have controlled the Assembly for 20 years and, with the exception of one session, Republicans have controlled the Senate since the 1920s. There is little or no debate in Albany, where the governor and the majority leaders make policy for everyone else. A few mavericks such as Sen. Nancy Larraine Hoffman from Syracuse--

> part of the chamber's permanent Democratic minority--have bucked the tide, but at a high price. She has been shunned by her own party and targeted by the Republicans. [88]

Thus, upon closer examination, the assertion that Albany's two-party system mitigates against what proponents of reform assert would otherwise be abuses of the caucus exemption is not convincing.

Similarly, the notion that the State Legislature's size, party representation or media exposure make it more likely that discussions held in party conferences in Albany will be conveyed to the public through the media simply lacks merit. [89] The intent of the OML is not satisfied simply because some second-hand or paraphrased excerpts of those discussions are publicly available. As the legislative declaration in section 100 makes clear, it is not access to adulterated information that the OML guarantees, but rather actual, physical, contemporaneous proximity to the deliberations and discussions of public business. If the Senate and Assembly are denying such ***1509** actual access through the use of closed party conferences, then proponents of reform must include the State Legislature in any reform measures.

Conferences in the State Legislature clearly serve as forums in which a political majority can engage in the entire deliberative process in private. The bicameral structure of the State Legislature does not effectively distinguish it from local unicameral bodies, except insofar as a decision made by the Senate Republican majority conference to support an item may be countered by the opposing position taken by the Assembly Democratic majority conference, or vice versa, thus precluding the possibility of enactment into law. The fact remains that both types of decisions are made by a voting majority in each house during a private session away from public scrutiny. This is the exact evil that the former Governor's proposed bill would have addressed, except that it would have distinguished state and local evils, or more precisely, bicameral and unicameral legislative bodies. [90] The bill fails because such a distinction is unwarranted.

More significantly, the former Governor's bill represented an assault on the integrity and autonomy of local governments, despite its assertions to the contrary in the accompanying memorandum. The doctrine of municipal home rule has had a long, albeit rocky, history in New York State. [91] Its latest incarnation, ***1510** is comprised of three tiers of constitutional and statutory assertions of and restrictions on the governmental autonomy of municipalities. [92] Article IX of the State Constitution sets forth the basic "bill of rights" for local governments. It limits the State Legislature's power to act in relation to the "property, affairs or government" of any local government except ***1511** by general law, or by special law upon the request of the local legislative body (known as a "home rule message"). [93] Article IX also prescribes the parameters of local legislative authority. It authorizes local governments to adopt and amend local laws so long as they are consistent with the provisions of the State Constitution, or relate to municipal property, affairs or government, and other general laws regarding specifically enumerated subjects, including "the transaction of its business." [94] These same powers are reiterated and specifically applied to all counties, cities, towns and villages in section 10 of the Municipal Home Rule Law, the statutory enactment that followed the approval of the new constitutional provisions in 1963. [95]

In summary, home rule encompasses a complex interplay of state and local governmental authority. It is an affirmative grant of power to local governments to manage their own affairs and a restriction on the state from intruding upon matters of local, rather than state, concern. Home rule also limits the autonomy of local governments through the doctrines of legislative inconsistency and preemption, and establishes the specific parameters of local legislative authority. [96]

***1512** In 1976, when the OML was enacted, little consideration was given to the effect its provisions would have on local governments. [97] Although the conduct of meetings of a local body certainly seem to fit within the scope of the phrase "property, affairs or government," the State Legislature declared it a matter of state concern that the public exposure to governmental processes guaranteed in the OML be applied uniformly throughout the state. [98] Deliberations on the 1985 Amendment

prompted by the Sciolino decision and the subsequent advisory opinion suggest an inattentiveness to application of the OML to local governments. Instead the State Legislature appeared preoccupied with staving off any further challenges to the State Legislature's use of party conferences. [99] Nevertheless, ***1513** the amendment clearly evinced the Legislature's intent that it should apply to "legislative bodies," not simply to the State Legislature and should serve to reverse the "ero(sion)" of the exemption by "recent judicial decisions," not simply the restrictive interpretation advocated by the advisory opinion. [100]

The 1985 Amendment deliberations made no attempt to distinguish the State Legislature from local legislatures. Furthermore, the only substantive difference in a similar joint Senate-Assembly bill introduced two days prior to the subsequently enacted bill was that the earlier bill explicitly defined caucuses to mean only "a private meeting of members of the senate or assembly of the state of New York." [101] All references in the enacted bill to local legislative bodies were specifically omitted. The earlier version of the legislation, which presumably would have more accurately reflected the State Legislature's desire to protect its own party conferences, was never acted upon.

Moreover, the State Legislature's intent to establish a statewide framework for ensuring that "public business be performed in an open and public manner" is evidenced by its explicit declaration, in section 110, that the OML supersedes any local law, ordinance or regulation that is more restrictive of public access. [102] In other words, the state, by statute, expressly ***1514** deemed inconsistent any local enactment that did not at a minimum provide the degree of openness prescribed in the OML. Pursuant to this provision, any such local regulation would be deemed void to the extent that it was more restrictive.

Conversely, and of critical importance, section 110 also accords local governments a certain measure of autonomy in providing for greater public exposure to the political process. Section 110, subdivision 2, explicitly permits local governments to maintain pre-existing laws or regulations and adopt new such provisions so long as they facilitate greater public access than the OML provides. In other words, local governments are expressly delegated the authority to spread more "sunshine" on their political processes. [103] This local authority can be exercised without limitation even to specifically limit the political caucus exemption as determined by the local governmental body.

Though virtually ignored by some commentators on the OML, this provision should serve to shift the reformers' focus from judicial attempts to re-write the OML--such as Humphrey and Buffalo News--and from amendatory state legislation that exempts the State Legislature. The advocates' appropriate alternative, contemplated under the existing statute and properly respectful of the home rule authority of municipalities, is to engage in efforts to convince local governments to adopt ordinances or regulations that increase public access by restricting their use of the political caucus exemption. This exact scenario occurred in the City of Ithaca in 1985. The Ithaca city council enacted an ordinance adopting the OML while amending the local provision regarding the caucus exemption to read as follows: "notwithstanding any state law to the contrary this exemption is to be narrowly, not expansively construed; it shall apply solely to those meetings at which only political and not public business is discussed." [104] ***1515** This example illustrates how section 110 of the OML can and should be utilized as it was intended to prohibit municipalities from restricting open government while allowing them to respond to local needs and interests by expanding public exposure to local government.

Section 110 indicates that although the State Legislature has established a statutory framework of statewide application, it intended to defer to each local government the decision whether to expand upon the statewide minimum in order to accommodate the specific nature and context of local government processes. The State Legislature could have sought to preempt all local regulation on the subject of open meetings either by expressly declaring so or by implication through enacting a comprehensive, detailed legislative scheme. It did not do so, presumably because of its desire to allow municipalities to go beyond the state scheme and opt for greater public access to the political process.

CONCLUSION

The OML's inherent flexibility in its application on the local level should serve to redirect judicial efforts to legislate and legislators' futile attempts to seek amendments to state legislation toward public campaigns to convince local governments to increase public access to their activities by restricting the political caucus exemption. At the very least, the potential for negative exposure on a local level from concerted efforts by the media and advocacy groups may serve to constrain local legislatures from regularly or cavalierly convening political caucuses to transact public business. Indeed, by including section 110 in its statutory scheme, the State Legislature facilitated the exercise of the democratic process on the municipal level. As with any public issue, advocates of local reform may change the way their municipal legislatures conduct their business by clearly articulating their concerns, gaining active media support and employing aggressive, sustained lobbying ***1516** efforts.

Of course, a strong argument can be made that unlimited or expansive openness is not necessarily good for the institutional political process. It can hinder the institutional checks between legislative and executive branches and hamper frank discussions of sensitive or complex matters that would be counterproductive if engaged in publicly. Yet such a conclusion, or its converse, must be reached or rejected based upon the deliberations of the local body politic, and should not be imposed by other institutions of government. The judicial attempts in Humphrey and Buffalo News to re-write the OML ultimately trespassed upon the territory of the State Legislature, as well as local legislative bodies, and improperly articulated non-existent amendments to the OML. Similarly, state legislative efforts that would restrict the exemption only for local legislative bodies at best represent an incomplete and flawed legislative exercise and at worst are a utilitarian calculation that sacrifices an intellectually consistent reform movement for political expediency. Regardless of motivation, such an amendment would inappropriately impinge upon the municipal autonomy, however tenuous in practice, that has been constitutionally ingrained in state-local governmental relations in New York State and evidenced by the explicit seventeen-year statutory grant of local authority in the OML.

Footnotes

d Portions of this Article originally appeared in the New York Law Journal on August 31, 1994.

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1 N.Y. Pub. Off. Law SS 100-111 (McKinney 1988).

2 N.Y. Pub. Off. Law S 100. When New York enacted the OML in 1976, it became the last state to codify this commitment to open government. Ch. 511, S 90 (1976) N.Y. Laws 1. Since Alabama first adopted its “sunshine” law in 1915, similar laws “have been enacted to expose and lay bare the decision-making process of governmental bodies” to address the “(p)ervasive tendency for our public officials to attempt to function in secrecy.” Orange County Publications v. Council of Newburgh, 60 A.D.2d 409, 418, 401 N.Y.S.2d 84, 91 (2d Dep't), aff'd, 45 N.Y.2d 947, 383 N.E.2d 1157, 411 N.Y.S.2d 564 (1978).

3 Holden v. Board of Trustees, 80 A.D.2d 378, 381, 440 N.Y.S.2d 58, 60 (3d Dep't 1981).

4 N.Y. Pub. Off. Law S 103(a).

5 N.Y. Pub. Off. Law S 105. Section 105 authorizes executive sessions for discussions of the following subjects:
(a) matters which will imperil the public safety if disclosed;
(b) any matter which may disclose the identity of a law enforcement agent or informer;
(c) information regarding any current or future investigation or prosecution of a criminal offense which would imperil public safety if disclosed;
(d) discussions regarding proposed, pending or current litigation;
(e) collective bargaining negotiations pursuant to article 14 of the civil service law;
(f) the medical, financial, credit or employment history of an individual or entity, as well as various personnel matters;
(g) the preparation, grading or administration of exams; and
(h) proposed real property or securities transactions.

Id.

6 Daily Gazette Co. v. Town Bd., 111 Misc. 2d 303, 304, 444 N.Y.S.2d 44, 46 (Sup. Ct. Schoharie County 1981) (declaring invalid a town board executive session over enforcement of zoning ordinances for failure to identify specifically the proposed litigation to be discussed). "In order to be validly convened there must be strict adherence to the procedure (of S 105). . . . (The) boilerplate recitation (of a statutorily prescribed purpose for an executive session) does not comply with the intent of the statute." Id.

7 N.Y. Pub. Off. Law S 108.

8 Daily Gazette, 111 Misc. 2d at 304, 444 N.Y.S.2d at 46.

9 N.Y. Pub. Off. Law S 106(2).

10 Orange County Publications v. Council of Newburgh, 45 N.Y.2d 947, 949, 383 N.E.2d 1157, 1157, 411 N.Y.S.2d 564, 564 (1978). The Court of Appeals addressed the Open Meetings Law ("OML") for the first time and held, in part, that the determination of whether a meeting of a public body was subject to the OML did not turn upon whether a formal vote was taken. In response, the State Legislature changed the statutory definition of "meeting" from "the formal convening of a public body for the purpose of officially transacting public business" to "the official convening of a public body for the purpose of conducting public business," ch. 704, S 1 (1979) N.Y. Laws 1361 (emphasis added), in order to encompass the broader definition of activities that would bring a meeting within the scope of the OML.

11 N.Y. Pub. Off. Law S 108.

12 Id.

13 N.Y. Pub. Off. Law S 103(2) (amended as Ch. 136, S 2 (1985) N.Y. Laws 462 (McKinney), recodified at N.Y. Pub. Off. Law S 108(2)).

14 William A. Brewer, II & Alex Smith, Comment, New York Open Meetings Law: A Critical Evaluation, 41 Alb. L. Rev. 329, 355 (1977). In 1977, the year in which the OML became effective, a "deluge of complaints" already had been registered regarding the vagueness and ambiguity of the statute. In response, the authors provided a comprehensive critical analysis of its provisions and proposed various legislative amendments "to improve the structure of the law." Id. at 330. The statutory changes enacted during the past 17 years have had mixed results. They have widened certain loopholes and effectively diminishing public access to governmental deliberations while ensuring that a broad definition of a "public meeting" is applied to maximize the number of gatherings within the OML's scope. See supra note 5.

15 Brewer & Smith, supra note 14, at 355. The authors proposed a restrictive judicial interpretation in order to "prevent a quorum of a public body made up of members of the same political party from meeting to discuss public, non-party affairs." Id.

16 Sciolino v. Ryan, 81 A.D.2d 475, 479, 440 N.Y.S.2d 795, 798 (4th Dep't 1981).

17 Britt v. County of Niagara, 82 A.D.2d 65, 68, 440 N.Y.S.2d 790, 793 (4th Dep't 1981). In Britt, the court found that meetings of a county legislature's Democratic majority to discuss a reapportionment plan did not violate the OML because a quorum of the legislature was not present. Although the majority based its decision on the lack of a quorum, which is required for a meeting to fall within the scope of the OML, it cited Sciolino to deny the applicability of the caucus exemption where matters of public business are discussed. Id. at 68, 440 N.Y.S.2d at 793. The concurring opinion, however, de-emphasized the issue of a quorum and found instead that the meetings in question were exempt from the OML as "partisan political caucuses." Id. at 71, 440 N.Y.S.2d at 794 (concurring judgment). The concurrence further found that the legislature's intent to exclude such meetings from the OML was evidenced by: (i) the express exemption in the Public Officers Law; and (ii) the failure of the legislature to amend or modify that exemption after the decision of the Third Department in Daily Gazette Co. v. North Colonie Bd. of Educ., 67 A.D.2d 803, 412 N.Y.S.2d 494 (1979), which held that board's standing committees did not come within the definition of a "public body" subject to the OML. Id. at 71, 440 N.Y.S.2d at 795.

18 81 A.D.2d 475, 440 N.Y.S.2d 795 (4th Dep't 1981).

19 Id. at 479, 440 N.Y.S.2d at 798. The court, noting that "the term • political caucus' is not defined by the statute," formulated its own definition, consistent with the OML's intent. Id.

20 Id.

21 Id. at 478, 440 N.Y.S.2d at 798.

22 Id.

23 Sciolino, 81 A.D.2d at 477, 440 N.Y.S.2d at 797.

24 Id. at 479, 440 N.Y.S.2d at 798.

25 Letter from Robert J. Freeman, Executive Director, New York State Committee on Open Government, to Frederic Dicker, Albany Bureau Chief, New York Post 4 (Apr. 11, 1985) (Informal Advisory Opinion No. 1158) (hereinafter Freeman Letter). Section 109 of the Public Officers Law authorizes the Committee on Open Government to "issue advisory opinions from time to time as, in its discretion, may be required to inform public bodies and persons of the interpretations of the provisions of the open meetings law." N.Y. Pub. Off. Law S 109.

26 Freeman Letter, supra note 25, at 8.

27 Joseph Sluzar, New York Abandons a Commitment To Open Meetings, 50 Alb. L. Rev. 613 (1986). "While the New York State Legislature did not react to Sciolino or to other political caucus litigation, it reacted swiftly to the opinion of the Committee on Open Government." Id. at 623.
An equally significant, if not greater, catalyst for the Legislature's 1985 Amendment was a lawsuit threatened at that time by the New York Post. According to Fred Dicker, the Post's veteran reporter in Albany, in 1985 he sought and was denied access to the majority party conferences in both the Senate and Assembly. Subsequently, the New York Post formally notified the majority parties in both houses that it intended to sue them for violating the OML based upon the Committee on Open Government's advisory opinion. Within a few weeks, the Senate and Assembly summarily passed the amendment to section 108 overriding the advisory opinion and Governor Cuomo signed it into law. Telephone Interview with Fred Dicker, N.Y. Post (Aug. 25, 1994).

28 Alan Chartock, There Are Times To Say Yes, Times To Say No, Legislative Gazette, May 31, 1994, at 15.

29 For example, the New York Times reported on July 1, 1994 that:
For the second year in a row, the Republican majority in the Senate killed a bill that would guarantee civil rights protection to homosexuals. As last year, when the bill was first passed by the Democratic-controlled Assembly, the Senate Republicans decided during a closed-door meeting tonight that the gay rights bill would not be sent to the floor for a vote.
Ian Fischer, Bill Compels Care for Mentally Ill, N.Y. Times, July 1, 1994, at B4.
A few days earlier, the New York Times had reported that "(a)fter a closed door session of Assembly Democrats tonight, where nearly 40 members spoke about the bill," the Assembly Speaker announced the rejection of the bill providing for mandatory parental notification of HIV test results for newborns and endorsed an alternative bill that would have mandated counseling of pregnant women and new mothers about the benefits of the early diagnosis of HIV. Kevin Sack, Compromise is Proposed on H.I.V. Test, N.Y. Times, June 29, 1994, at B1.

30 Ch. 136, S 1 (1985) N.Y. Laws 462 (McKinney).

31 Id.

32 Id.

33 Id.

34 Id. (emphasis added).

35 Sluzar, supra note 27, at 624, 625.

36 Sluzar, supra note 27, at 627.

37 Oneonta Star v. County of Schoharie, 112 A.D.2d 622, 492 N.Y.S.2d 145 (3d Dep't 1985).

38 Id. at 623, 492 N.Y.S.2d at 146. Further, the court denied the newspaper's request for legal fees "(b)ecause the legislative enactment (1985 Amendment) is intended to be a declaration of preexisting law." Id. at 623, 492 N.Y.S.2d at 146.

39 175 A.D.2d 587, 573 N.Y.S.2d 790 (4th Dep't), appeal dismissed, 78 N.Y.2d 1072, 582 N.E.2d 605, 576 N.Y.S.2d 222 (1991).

40 154 Misc. 2d 400, 585 N.Y.S.2d 275 (Sup. Ct. Erie County 1992).

41 Humphrey, 175 A.D.2d at 588, 573 N.Y.S.2d at 791.

42 Humphrey v. Posluszny, 148 Misc. 2d 848, 849, 562 N.Y.S.2d 598, 598 (Sup. Ct. Erie County 1990).

43 Id. at 849, 562 N.Y.S.2d at 599 (emphasis added).

44 175 A.D.2d at 588, 573 N.Y.S.2d at 791 (quoting Ch. 136, S 1 (1985) N.Y. Laws 462 (McKinney)).

45 Id. at 588, 573 N.Y.S.2d at 791.

46 Id. at 589, 573 N.Y.S.2d at 792.

47 Id. at 588, 573 N.Y.S.2d at 791.

48 Humphrey, 148 Misc. 2d at 849, 562 N.Y.S.2d at 599.

49 See Orange County Publications v. Council of Newburgh, 60 A.D.2d 409, 414, 401 N.Y.S.2d 84, 89 (2d Dep't) ("We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. . . . It is the entire decision- making process that the Legislature intended to affect by the enactment of this statute."), aff'd, 45 N.Y.2d 947, 383 N.E.2d 1157, 411 N.Y.S.2d 564 (1978).

50 Goodson Todman Enters. v. City of Kingston, 153 A.D.2d 103, 105, 550 N.Y.S.2d 157, 158 (3d Dep't 1990) (quoting Orange County, 60 A.D.2d at 414, 401 N.Y.S.2d at 88).

51 154 Misc. 2d 400, 585 N.Y.S.2d 275 (Sup. Ct. Erie County 1992).

52 See supra notes 14-18 & 34-36 and accompanying text.

53 Buffalo News, 154 Misc. 2d at 401, 585 N.Y.S.2d at 276.

54 Id. at 402-03, 585 N.Y.S.2d at 277.

55 Id. at 403, 585 N.Y.S.2d at 277.

56 Id. at 403-04, 585 N.Y.S.2d at 278.

57 Buffalo News, 154 Misc. 2d at 403, 585 N.Y.S.2d at 277.

58 Id. at 404, 585 N.Y.S.2d at 278.

59 Id.

60 Section 107 of the OML provides for the enforcement of its provisions by an Article 78 proceeding and/or an action for declaratory judgment and injunctive relief. N.Y. Pub. Off. Law S 107 (McKinney 1988); see also Goodson Todman Enters. v. City of Kingston,

153 A.D.2d 103, 106, 550 N.Y.S.2d 157, 159 (3d Dep't 1990) (after finding several private meetings violative of the OML, the Third Department rejected appellant's request to enjoin the Council from holding such secret meetings in the future, but did so solely upon the basis that the record did not support the "drastic remedy of injunctive relief"); Sanna v. Lindenhurst Bd. of Educ., 85 A.D.2d 157, 160, 447 N.Y.S.2d 733, 735 (2d Dep't 1982) (in rejecting petitioner's claim to annul board's termination of her employment in an unlawful closed session, the Second Department noted that "apart from a demand for an attorney's fee authorized by the (OML), petitioner asks for no other relief that might be more appropriate in view of the public nature of the wrong committed by the board, such as an injunction against future procedural informalities").

61 Sluzar, supra note 27, at 635.

62 Orange County Publications v. Council of Newburgh, 45 N.Y.2d 947, 949, 383 N.E.2d 1157, 411 N.Y.S.2d 564, 564 (1978).

63 In his 1986 article, Sluzar appears to recognize that any alteration of the exemption to limit its applicability must be undertaken by the State Legislature. Sluzar, supra note 27, at 614 ("(Changing the scope of the exemption) will be accomplished only if the legislature is willing to modify its 1985 amendment."); id. at 628 ("Open government will become a relic in New York State unless the legislature retreats from its current position.").

64 Id. at 627.

65 See generally Brewer & Smith, supra note 14; Sluzar, supra note 27.

66 Of course, commissions or task forces established by a municipality's executive, as well as other entities, may fall within the OML's definition of "public body," but the executive's actions and deliberations with his/her executive staff are not subject to the OML. The OML defines "public body" as:
any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body.
N.Y. Pub. Off. Law S 102(2).

67 See, e.g., Sluzar, supra note 27, at 627 ("The structure and size of the state legislature tend to prevent elected officials from excluding the public from all discussions of public business. . . . This stable two-party structure, with a powerful minority party, protects the public's right to information.") To illustrate, as of August 1994, there were 35 Republicans and 26 Democrats in the State Senate. The Assembly was comprised of 100 Democrats and 50 Republicans.

68 The New York Times commented in a recent editorial, "Bills to beef up the meetings law have been kicking around Albany for years. It is time the Legislature made it easier for citizens to make the law work to their advantage." Beef Up the Open Meetings Law, N.Y. Times, June 29, 1994, at 22.

69 N.Y.S. 3509, N.Y.A. 12281, 214th Sess. (1994). Although it did not directly address the political caucus exemption, another piece of legislation was introduced in 1994 that would have subjected members of any state or local public body that intentionally met in violation of the OML to personal liability of fines of up to $100. N.Y.A. 2446, 214th Sess. (1994). According to a memorandum in support of the legislation, it was proposed as "an attempt to discourage any public body from conducting meetings required to be open in a covert fashion." Memorandum in Support of N.Y.A. 2446, *2 (Feb. 1, 1993).

70 N.Y.S. 3509, 214th Sess. (1994).

71 Memorandum in support of N.Y.S. 12281 (July 11, 1994).

72 Memorandum of New York Public Interest Research Group in Support of N.Y.S. 3086 and N.Y.S. 7016.

73 Open Up Albany Back Rooms and Let People See Process, Buffalo News, Apr. 13, 1992, at C2.

74 A motion to discharge is a procedural motion to bring a bill to the floor for debate without the favorable vote of a committee. If the motion is approved by a majority of the members of the body, an affirmative vote of the standing committee is not required on the bill prior to consideration of the item by the full house. See N.Y. Sen. R. XXI, S 1.
According to Senator Hoffman's staff, her motion was defeated without comment after the Senate's Republican acting majority leader called a "party vote in the negative," which was adhered to by the entire Republican delegation. An editorial published by the

Rochester Times Union after the Senate's rejection of the motion to discharge this bill in 1992 criticized the use of "party line" votes because Senators were not required to vote by name. Democracy? No Way, Not in Albany, Rochester Times Union, May 20, 1992 ("Party line votes mean that no one is accountable, and nothing changes.").

75 N.Y.A. 12281, 214th Sess. (1994).

76 Memorandum in Support of N.Y.A. 12281, at *2 (July 11, 1994).

77 As of August 1994, the committee was chaired by a Democrat, and was comprised of seven other Democrats and two Republicans.

78 In his 1986 article, Sluzar proposed an amendment "allowing state legislative caucuses to discuss any matter in private, yet restricting such discussion for local legislative caucuses to political business" because "the structure and composition of the state legislature tend to minimize the adverse effects of the statute." Sluzar, supra note 27, at 629. This proposition, however, ignores the fact that all substantive deliberations and decisions of voting majorities in each house on the state level would remain closed to the public. Further, even if one were to overcome the fundamental issue of whether the State Legislature is acting in a manner consistent with the intent of the OML, reliance upon its composition as a mitigating factor is tenuous given the obvious potential for electoral change in party representation.

79 Governor's Program Bill No. 117 (1993). A substantially identical program bill was introduced in 1988 but failed to make it out of committee. See N.Y.A. 8936, 211th Sess. (1988). Similar legislation also was introduced, both independently and at the request of Governor Cuomo, in 1989, 1990 and 1991. Although the Governor's program bill was not introduced in either 1993 or 1994, in each year the Governor's annual message to the State Legislature included brief references to this proposed reform.

80 Governor's Program Bill No. 117, at 1.

81 Id.

82 Id. The New York Times recently endorsed this proposal, stating that it "would bring party caucuses under the law when those gatherings amount to a dress rehearsal for an open meeting rather than a purely intramural strategy session." Beef Up the Open Meetings Law, supra note 68, at 22. Although this proposed language appears markedly different than the current provision, its actual impact is doubtful. As Sluzar noted with respect to this language when initially proposed in 1986, "(t)his is the equivalent of allowing a political caucus to discuss public business in private." Sluzar, supra note 27, at 633. The broad language proposed likely would serve as a large tent under which much of the closed-door activity that the bill apparently seeks to proscribe would be allowed.

83 Id. Other provisions of the proposed legislation would have authorized courts to impose up to a $500 fine on any individual member of a public body who intentionally violated any provision of the OML and to invalidate any action taken by a public body when that action, or "substantial deliberations" relating to it, was taken in violation of the OML. See id.

84 Governor's Program Bill No. 117, supra note 80, at 1.

85 Governor's Program Bill No. 117, supra note 80, at 1.

86 Governor's Program Bill No. 117, supra note 80, at 1.

87 N.Y. Pub. Off. Law S 100.

88 Fred Siegel & Bruce Bender, The Decline of the Empire State: Rockefeller, Cuomo and the "New York Idea", New Democrat, Nov. 1994, at 13.

89 "A reporter in Albany may get direct quotes from legislators as to what happened in caucus meetings; the reporter on the local beat has a lesser chance of such cooperation." Sluzar, supra note 27, at 628 n.107. But see id. at 633, wherein Sluzar, rather than advocating for some form of public notice or disclosure of caucus deliberations on a local level, insists that "the public needs to be inside those doors. The Open Meetings Law should be amended in a manner that gives the public substantive rights of access." Id. at 633 (emphases added).

90 It only can be assumed that the bill was an attempt to achieve what limited reform its proponents thought possible given the historical reluctance of the State Legislature. Such is not the stuff of sound public policy nor responsible law- making.

As an illustration of the extent to which the State Legislature was insulated from the substantive provisions of this bill, both the limitation on the subject matter that could be discussed in caucuses and the notice provisions, contained in the new section 105-a, would have applied only to unicameral legislative bodies. Therefore, while local legislative caucuses could only be closed upon notice when discussing "political party strategy or (a) political party position with respect to the responsibility, authority, powers or duties of the legislative body," the provisions of section 108 still would apply to the State Legislature, which allows closed caucuses regardless of "the subject matter under discussion, including the discussion of public business," without any requirement of public notice.

91 See, e.g., New York ex rel. Metropolitan Street Ry. v. State Bd. of Tax Comm'rs, 174 N.Y. 417, 431-32, 67 N.E. 69, 70-71 (1903) ("The principle of home rule, or the right of self-government as to local affairs, existed before we had a constitution. . . . The liberties and customs of localities reappear on a novel and wider basis in the town meetings of New England and the various colonies, including the colony of New York."), aff'd, 199 U.S. 1 (1905); see also James D. Cole, Constitutional Home Rule in New York: "The Ghost of Home Rule" 59 St. John's L. Rev. 713 (1985).

In New York, home rule was an outgrowth of the nineteenth century political struggle between New York City, dominated by one political party, and the rural areas of the state, dominated by another political party. . . . Despite the efforts of such mid-nineteenth century home rule advocates as Governor Tilden, the state legislators of rural areas in New York were able to prevent a home rule amendment to the constitution until 1894. The 1894 amendment to the state constitution (Article XII, S2) provided the first constitutional basis of home rule in New York. Subsequent legislatures have continued to enact home rule statutes and constitutional amendments. In New York, home rule retains considerable support in the legislature but has consistently been restricted by the judiciary.

Id. at 714 n.4. Addressing the effect of this pattern of judicial decisions, Cole concluded:

The recent trend toward a more precipitous contraction of home rule powers is crumbling the foundation of effective home rule in New York. The balance between state and local powers has tipped away from the preservation of local authority toward the presumption of state concern. The foundation, "property, affairs or government," has come to embody "the ghost of home rule."

Id. at 715. More recently, Judge Hancock of the New York Court of Appeals cited Cole's article in his dissent from the Court's opinion upholding the enactment of a 1990 law without a home-rule message, which prescribed a procedure for determining Staten Islanders' interest in secession from New York City. City of New York v. State, 76 N.Y.2d 479, 491, 562 N.E.2d 118, 124, 561 N.Y.S.2d 154, 160 (1990) (Hancock, J., dissenting). According to Judge Hancock, the majority opinion "gives unwelcome credence to the gloom expressed by one commentator for the future of home rule in New York." Id.

92 See N.Y. Const. art. 9 (establishing the constitutional framework of municipal home rule); N.Y. Mun. Home Rule Law (McKinney 1988) (expands upon the constitutional grant and details specific powers granted to, and limitations on, cities, counties, villages and towns); N.Y. Stat. Local Gov'ts (McKinney 1988) (grants certain home-rule powers and establishes a mechanism whereby such powers cannot be restricted except by an enactment made in two successive legislative sessions). In his 1963 approval message of the Municipal Home Rule Law, Governor Rockefeller stated that "(t)he proposed constitutional amendment and implementing legislation represent another important step in the efforts of my Administration to strengthen the governments closest to the people so that they may help meet the present and emerging needs of our time." Governor's Memorandum on Approval of Ch. 843 N.Y. Laws (1963), reprinted in Ch. 843 (1967) N.Y. Laws xxvi (McKinney).

93 N.Y. Const. art. 9, S 2(b)(2) (the legislature "(s)hall have the power to act in relation to the property, affairs or government of any local government only by general law, or by special law only (a) on request of two-thirds of the total membership of its legislative body or on request of its chief executive officer concurred in by a majority of such membership"); see also N.Y. Mun. Home Rule Law S 40 (allows local government to request enactment of laws relating to their property, affairs or government).

94 N.Y. Const. art. 9, S 2(c)(3); see also N.Y. Mun. Home Rule Law S 10(1)(i) (gives local governments the power to adopt and amend local laws so long as they are not inconsistent with the State Constitution or any general law relating to courts property, affairs or government).

95 1963 N.Y. Laws 843 (codified at N.Y. Mun. Home Rule Law S 10).

96 A local law may be deemed invalid and superseded by state law based upon a finding of either preemption or inconsistency, two related but distinct doctrines. The overriding doctrine of preemption applies when the state has evidenced its intention to occupy the entire field or subject matter to the exclusion of local law. Such intention to preempt may be established by an express declaration by

the state or implied through the enactment of a comprehensive statutory scheme. Incorporated Village of Nyack v. Daytop Village, Inc., 78 N.Y.2d 500, 505, 583 N.E.2d 928, 930, 577 N.Y.S.2d 215, 217 (1991). Where this state intention is found, local regulations are preempted "regardless of whether their terms conflict with provisions of the State statute or only duplicate them." Lansdown Entertainment Corp. v. New York City Dep't of Consumer Aff., 74 N.Y.2d 761, 765, 543 N.E.2d 725, 727, 545 N.Y.S.2d 82, 84 (1989). In those instances where the state has not evinced an intent to preempt all local legislation, inconsistency may be found if state and local laws directly conflict--for example if the state specifically permits conduct prohibited at the local level, or conversely, the local law permits an act which has been prohibited by state law. Lansdown Entertainment Corp., 74 N.Y.2d at 766-67, 543 N.E.2d at 728, 545 N.Y.S.2d at 85; see also Roth v. Cuevas, 158 Misc. 2d 238, 246-47, 603 N.Y.S.2d 962, 968 (Sup. Ct. N.Y. County), aff'd, 82 N.Y.2d 791, 624 N.E.2d 689, 604 N.Y.S.2d 551 (1993). A local law also may be deemed inconsistent if it imposes prerequisite additional restrictions on rights under state law, so as to inhibit the operation of the state's general laws. New York State Club Ass'n v. City of New York, 69 N.Y.2d 211, 217, 505 N.E.2d 915, 917, 513 N.Y.S.2d 349, 351 (1987), aff'd, 487 U.S. 1 (1988).

97 The first comprehensive analysis of the OML, undertaken shortly after its enactment, contained no discussion regarding possible distinct implications of the OML on a local versus state level. See Brewer & Smith, supra note 14.

98 Since Adler v. Deegan, 251 N.Y. 467, 167 N.E. 705 (1929), courts universally have accepted that municipal home rule protection is removed if the subject matter of state legislation concerns a matter of overriding state concern. In his concurring opinion in Adler, Judge Cardozo articulated the standard that has been used ever since: "(I)f the subject be in a substantial degree a matter of State concern, the Legislature may act, though intermingled with it are concerns of the locality." 251 N.Y. at 491, 167 N.E. at 714 (Cardozo, J., concurring); see also Wambat Realty Corp. v. State, 41 N.Y.2d 490, 494, 362 N.E.2d 581, 584, 393 N.Y.S.2d 949, 952 (1977) ("Restated, the phrase •property, affairs or government' of a locality has not served to paralyze the State Legislature where to a substantial degree, in depth or extent, a matter of State concern is involved."). Cole criticized courts' commonplace finding of "substantial state concerns" to encroach upon municipal home rule, commenting that in Adler "the roots of home rule had barely taken hold when the state's highest court established a rubric for the expansion of state powers at the expense of local authority." Cole, supra note 91, at 714-15.

99 See e.g., Sluzar, supra note 27, at 628-29.
Although the 1985 amendment has widespread effects throughout the state, it is obvious that the sponsors of the bill were concerned most with protecting the right to hold closed political caucuses in the New York State Legislature. Prior to the vote on the amendment, two senators, majority leader Warren Anderson and minority leader Manfred Ohrenstein, spoke in favor of the bill. Both senators failed, however, to discuss the impact of this bill on local government. Instead, they focused their comments on the state legislature. Id.

100 Ch. 136, S 1 (1985) N.Y. Laws 1.

101 N.Y.S. 6252, N.Y.A. 7792, 210th Sess. (1985); see also Sluzar, supra note 27, at 629 n.114 (the joint bill did not apply to local political caucuses).

102 Section 110 of the Public Officers Law, entitled "Construction with Other Laws," reads as follows:
1. Any provision of a charter, administrative code, local law, ordinance, or rule or regulation affecting a public body which is more restrictive with respect to public access than this article shall be deemed superseded hereby to the extent that such provision is more restrictive than this article.
2. Any provision of general, special or local law or charter, administrative code, ordinance, or rule or regulation less restrictive with respect to public access than this article shall not be deemed superseded hereby.
3. Notwithstanding any provision of this article to the contrary, a public body may adopt provisions less restrictive with respect to public access than this article.

103 For example, the New York City Charter provides that an executive session may be convened by the City Council, its committees or certain listed commissions and boards by a three-fourths vote of all its members to do so, rather than the majority vote required by S 105 of the OML. See N.Y.C. Charter S 1060(b).

104 This example was cited by Sluzar in a footnote to show that "(a)fter the Open Meetings Law was amended, lobby groups began to pressure lawmakers for repeal" and "(s)ome municipalities responded to the political pressure by enacting their own resolutions pertaining to open meetings." Sluzar, supra, note 27, at 631 n.118. In that same footnote, the author included a one-sentence reference to the local authority granted under N.Y. Pub. Off. Law S 110(3), the only mention of this section in the entire article.

60 BKNLR 1483