

## 2. MANDATED OPENNESS AND HIGHER-EDUCATION GOVERNANCE: POLICY, THEORETICAL, AND ANALYTIC PERSPECTIVES

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Openness is a cherished value, if problematical practice, in the governance of public-sector institutions in the United States. Although the nation enjoys a long tradition of espoused commitment to the principle of “open government,” legal guarantees of citizens’ *right* to information about their government are a relatively modern creation. In the American states, these guarantees prominently take the form of open-meeting and records laws.<sup>1</sup> Often known as *sunshine laws*, these provisions became widely institutionalized in state statute during the 1960s–70s, when, amidst the Vietnam War, the Watergate scandal, and other widely publicized episodes of corruption at the state level, public confidence in governmental institutions and leaders plummeted. Although these laws vary in form from one state to the next, they share a similar purpose—to make public bodies more transparent and accountable by providing citizens with reliable access to and knowledge about the conditions and deliberations of those bodies.

Every state in the nation today mandates governmental openness through the device of sunshine laws. These laws exert substantial influence on the nature of decision making within the public sector. In the context of *higher education*, sunshine laws help serve the ends of public accountability, academic honesty, fiscal soundness, institutional effectiveness and efficiency, and procedural and outcome equity in decision making. Because of these diverse goals, sunshine laws affect virtually every area of campus functioning: board deliberation, presidential search and selection, research and intellectual property issues, budget decisions,

<sup>1</sup> Congress, in 1965, passed the Freedom of Information Act, the nation’s first *federal* open-meeting statute. While the Act represents a landmark development in the evolution of the public’s-right-to-know, we restrict our focus in this chapter to mandated openness in the states.

resource allocation, business transactions, investments and financial holdings, university foundations, and athletics.

Yet mandated openness in public higher education also produces sharp tensions around a set of competing societal values and goals. In the last national study of legally compelled openness in higher education, published 20 years ago, Cleveland (1985) memorably characterized the tensions as posing for society a *trilemma*. Cleveland meant that sunshine laws, when applied to higher education, create conflict among three desirable societal objectives: ensuring the accountability of publicly owned, governed, and financed institutions; protecting individual privacy rights; and providing institutions the autonomy they need to achieve their public purposes. Cleveland argued that ensuring accountability—the chief rationale asserted in support of sunshine laws during their rapid expansion in the states—acknowledges but one of these obligations. The protection of individual privacy rights is a second important consideration. A third, and perhaps the most vexing of the three societal aims, however, involves the special mandate of higher-education institutions to effectively, efficiently, and equitably achieve their manifold public purposes. As distinctive organizations<sup>2</sup> possessing formally delegated authority from legislatures (Yudof, 1983), public colleges and universities bear certain responsibilities that are different from and more varied than those of most other state agencies. Sunshine laws, while clearly serving other laudable societal ends, sometimes can interfere with the ability of higher-education institutions to fulfill their mandate. It is the need for balance among these competing tensions—accountability, privacy, and autonomy—that makes mandated openness in public higher education especially complex and contentious.<sup>3</sup>

Policymakers today are paying increasing attention to openness issues in public higher education. This increased awareness springs from

<sup>2</sup> The features that distinguish higher-education institutions from most other state agencies are professional bureaucracy, academic freedom, tenure, shared governance, loose coupling, and appointed, multimember governing boards (Goodsell, 1981; Mintzberg, 1991). See Sherman's (2000, pp. 678–679) discussion of court decisions upholding the principle that state universities are not like any other state agency and should not be treated as such.

<sup>3</sup> Although this tension may be especially acute in higher education, analysts have noted its presence in virtually all public settings. One recent analysis framed the problem as follows: "There is an inherent tension between open government on one hand, and government efficiency on the other. Government can become exceedingly efficient when not burdened by the requirements of state sunshine laws, but such efficiency can be both undemocratic and contrary to the public's interest. At the other extreme, notions of open government for the sake of open government, while sounding nice in the abstract, can easily create paralysis in local government, with public officials unable to coordinate with each other in a way that promotes, not retards, the public's interest in good government" (O'Connor and Baratz, 2004, p. 721).

a variety of conditions: intensified critiques of institutional governance; changing fiscal conditions in the states; increasing attention to accountability for public spending; new electronic technologies; emerging threats to campus and public security; and evolving institutional arrangements for funded research, technology transfer, and corporate support. Consequently, many states in recent years have altered their legal requirements mandating openness in public colleges and universities. Although some of these changes have enhanced the climate for openness, and others have detracted from it, keen observers on all sides have noted the potentially profound implications of the changes for both public higher education and American society.

In this general climate of reform, it seems important to explore the laws at the heart of the public compact with higher education, those that promise transparency in the workings of public colleges and universities, and to examine some of the implications of mandated openness for institutional governance. The remainder of the chapter provides such an examination. First, we examine the evolution of mandated openness in public-sector organizations, chart differences among the states in their legal climates for openness, and describe various contemporary conflicts that surround the application of the laws to public higher education. We then discuss select major findings from our own recent study of sunshine laws and public higher-education governance. Turning next to various avenues of theory and research in the policy and organization literatures, we identify a series of orienting questions and conceptual approaches with which to frame future study on mandated openness in higher education. Finally, building on the distinct advantages that American federalism affords, we propose several analytical alternatives for conducting future research on this topic.

#### MANDATED OPENNESS: ORIGINS, EVOLUTION, AND DEMOCRATIC UNDERPINNINGS

Although the concept of *open government* dates to this nation's founding, its practice is largely a 20th-century phenomenon whose origin lie in the American states. Over two centuries ago, prominent framers of the U.S. Constitution argued eloquently for public access to meetings and information held by governmental bodies, perhaps the most famous such being James Madison's pronouncement that, "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" (Madison, cited in Hunt, 1910). Thomas Jefferson also advocated public admission to

meetings as a check on government's power and as a means for ensuring the propriety of government action (Pupillo, 1993; Sunstein, 1986). Yet delegates to the Constitutional Convention in 1787 chose to conduct their deliberations in secret, believing that "so great were the difficulties encountered from the divergent sentiments and interests of different parts of the country" that public knowledge of the ongoing debates would imperil their work (Bryce, 1891).<sup>4</sup> With the precedent set, committees of the U.S. Congress and of the several state legislatures subsequently conducted much of their business in closed session, as did most public agencies. Some advocates of the public's "right to know" over time have pointed to first amendment guarantees of free speech and a free press as the basis for a constitutional claim to open government, but generally courts have rejected these arguments (Bensabat, 1982; Sunstein, 1986).<sup>5</sup> Thus, while the United States has a long history of public distrust of government that operates behind closed doors, throughout much of the nation's history government nonetheless was permitted to do so. This pattern of generally *closed government* endured well into the late 19th century, when Utah pioneered legislation requiring public access to some public bodies.

Utah's 1898 statute required that city councils "sit with doors open." In a 1908 case interpreting that statute, the Utah Supreme Court discussed the importance the law placed on ensuring that the entire decision-making process be open to the public:

The purpose was not that the public might know how the vote stood, but the purpose evidently was that the public might know what the councilmen thought about the matters in case they expressed an opinion upon them. Moreover, the public have the right to know just what public business is being considered, and by whom, and to what extent it is discussed.

(O'Connell, 1980, p. 835)

Over time, however, subsequent court interpretation limited the scope of Utah's statute (O'Connell, 1980). In 1905, Florida enacted the nation's

<sup>4</sup> Jefferson regretted the closing of the Convention. He wrote, "Nothing can justify this example but the innocence of their intentions, and ignorance of the value of public discussions" (Sunstein, 1986, p. 896, quoting a letter from Jefferson to John Adams, August 30, 1787). See Sunstein's (1986) analysis of the implications of Jefferson's and James Madison's conceptions of the function of the first amendment for public access to government information.

<sup>5</sup> Nevertheless, press freedom was a matter of intense concern to the framers of the First Amendment, who conceived of the press as a structural bulwark against government tyranny (Dyk, 1992). Indeed, Anderson (1983) contends that protection of the institutional press was far more important to the framers than protection of speech.

second such openness legislation, requiring all city and town meetings in the state be open to the public. This law, too, was deemed largely ineffective because the statute's narrow literal scope and subsequent limitation by courts left most governmental activity immune from public inspection (Barnes, 1971). Thus, by the early 1900s, only two states legally mandated openness of meetings or information held by governments, and in both cases the laws provided the public with only modest access.

This condition changed rapidly beginning in the middle of the 20th century. In 1950, the American Society of Newspaper Editors undertook a national campaign aimed at remedying "domestic news suppression" (Cross, 1953). Among the objectives of the campaign was a vigorous initiative to make the meetings and records of state governments more open to the press and general public.<sup>6</sup> The close cooperation of various civic groups and media organizations in lobbying state officials for legally mandated openness of public bodies paid dividends: in 1953, New Mexico and California became the first states to adopt comprehensive open-meetings laws. New Mexico's statutes required that all final decisions of all governing boards of state or local subdivisions supported by public funds be made at public meetings. California's Brown Act, which initially was limited only to local governments in that state, contained similar provisions (Barnes, 1971). Within the span of a decade, by 1962, 26 states had enacted open-meeting and records legislation (Open Meetings Statutes, 1962).

Yet, many of these early legislative successes were neither immediate nor uniform. Between 1957 and 1962, bills mandating openness in public-agency deliberations failed to achieve final passage in 16 states (Open Meetings Statutes, 1962). In states where legislation occurred, passage usually resulted only after successive legislative defeats. In Massachusetts, for instance, the legislative impetus for open government began in 1955 when bills providing for an open-meeting law were filed in both the House and the Senate. After three years of hard-fought incremental gains, proponents produced the state's first open-meeting act in 1958 (LaBelle, 1990). The Florida Legislature debated sunshine bills in every one of its sessions from 1957 until 1967, when the state's landmark "Government in the Sunshine Law" was enacted (Barnes, 1971). Incredibly, the Tennessee General Assembly first began the debate on openness legislation in 1957, but another 17 years passed before it adopted the state's Open-Meeting Act, which, when finally enacted in 1974, became recognized by several

<sup>6</sup> Other goals included the admission of photographers to courtrooms, television and radio coverage of the U.S. Congress, and fewer closed Congressional committees (Cross, 1953).

Author: 'Open meeting' has been changed to 'open-meeting' in a few occurrences. Please check whether it is OK; also check the usage 'open-meeting,' 'Open-Meetings,' 'Open Meetings'.

national organizations as the nation's best such law (Adams, 1974; Hollow and Ennis, 1975; Wickham, 1975).<sup>7</sup>

The Watergate scandal and similar, widely publicized episodes of malversation and outright illegality at the state level propelled a new wave of sunshine legislation in the early 1970s.<sup>8</sup> During this period, professional journalism organizations, citizen advocacy groups, and politicians campaigning on good-government platforms often championed open-meeting and records laws as a remedy to government corruption. Texas, for instance, passed its Open Records Act in 1973 as a response to the "Sharpstown" scandal, which had resulted in the indictments of two-dozen high-ranking state officials for bribery and fraud and ultimately brought down the state's governor, attorney general, and top legislative leaders (Kinch, 2005).<sup>9</sup> By 1976, when New York adopted its Open-Meetings Law, all 50 states had enacted comprehensive openness legislation.

As this history suggests, state sunshine laws are in the broadest sense products of public concern over the ways public officials make decisions. Throughout the 20th century, proponents of mandated openness advocated the laws as a mechanism for rendering state governments more accountable to citizens.<sup>10</sup> Advocates rationalized these accountability linkages in several different ways. For example, some proponents extolled sunshine laws as a logical manifestation of America's pluralist democratic tradition: the laws would serve as a check on governmental power by

<sup>7</sup> The laws often ran into difficulty over the question of whether legislatures should be exempt from openness requirements. In some states, legislative reforms eased passage of languishing sunshine bills. For example, by the early 1970s, the Tennessee legislature had amended its own rules providing that all committees be open to the public. Thus, the legislature's objections of 1957, concerning whether its committees should be required to meet publicly, were no longer an impediment to broader sunshine legislation, which passed in 1973 (Hollow and Ennis, 1975).

<sup>8</sup> Analysts have also documented how a complex interplay of social and political forces in some states led to the laws' adoption (Barnes, 1971; Open Meetings Statutes, 1962; Pupillo, 1993). Barnes (1971, p. 361), for example, notes that in the years preceding the enactment of Florida's sunshine laws, reapportionment of the legislature had increased the representation of the urban centers in central and south Florida. "These representatives," Barnes writes, "were more sensitive to the influence of the media than the rural legislators who dominated the legislature before reapportionment. The media's active endorsement of the measure helped convince the legislators of the popularity of an open meeting law," providing impetus for its passage.

<sup>9</sup> In some states, deliberations on sunshine bills uncovered questionable practices that boosted support for legislation. In recounting the history of Florida's laws, Barnes (1971) notes that officials of one state agency testified against the laws' enactment because the agency sometimes employed "convicted felons, known drug addicts, or [those] otherwise unqualified for state employment," and wished that these practices not be exposed (pp. 361–362). Appalled at the revelations, the bill's proponents then pointed to the testimony of the agency officials as evidence of the need for comprehensive openness legislation and demanded that agency personnel matters also be covered under any such legislation.

<sup>10</sup> Not all observers accept the premise that increased openness is an unalloyed public good. See Huefner (2003), Rossi (1997), and Tucker (1980) for critiques of the laws in certain settings.

setting the press and public-information advocates against governments and their agents, thus ensuring that the power that information brings remains broadly accessible by different interests within society (Cross, 1953; Yudof, 1983).

Proponents of openness legislation also claimed that the laws would make public officials more accountable *directly* to citizens. Armed with information about their government, citizens would be able to make informed judgments about their political leaders and institutions. By compelling disclosure, proponents argued, sunshine laws would permit citizens to better gauge whether officials were adequately representing their interests. Having made these determinations, citizens would then be able to weigh whether their representatives should be returned to office, or new ones should take their place. One early analysis of mandated openness characterized the reasoning as follows: “The people must be able to ‘go beyond and behind’ the decisions reached and be apprised of the ‘pros and cons’ involved if they are to make sound judgments on questions of policy and to select their representatives intelligently” (Open Meetings Statutes, 1962, pp. 1200–1201).

Finally, openness advocates argued that the laws would help to promote good public policy. Governments, they asserted, are likely to be more responsive to public preferences when officials are able to ascertain clearly the preferences of citizens. Hence, sunshine laws would serve the ends of good policy by providing officials with information about the “real-world” conditions of concern to citizens, which officials could then utilize in developing solutions to pressing public problems (Cross, 1953; Open Meetings Statutes, 1962; Yudof, 1983).

Most states’ public-information laws contain language, the so-called public policy statements, reflecting the democratic purposes that the authors of the statutes had intended these laws to serve. Although such statutory declarations vary in length, strength, and poetic disposition (Schwing, 2000), the statements are important because they express the intent of the legislature and often specify that the laws should be liberally construed.<sup>11</sup> For example, the preamble to California’s sunshine legislation of 1953, parts of which numerous other states copied verbatim when crafting their own laws, proclaims:

It is the public policy of this state that public agencies exist to aid in the conduct of the people’s business and the proceedings of public agencies be conducted openly so that the public may remain informed.

<sup>11</sup> See Schwing’s (2000) review of the policy statements accompanying open-meeting acts.

In enacting this article the Legislature finds and declares that it is the intent of the law that actions of state agencies be taken openly and that their deliberations be conducted openly.

The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

A somewhat bolder proclamation characterizes the Texas statute, adopted in 1973:

Pursuant to the fundamental philosophy of the American constitutional form of representative government, which holds to the principle that government is the servant of the people, and not the master of them, it is hereby declared to be the public policy of the State of Texas that all persons are, unless otherwise expressly provided by law, at all times entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created. To that end, the provisions of this Act shall be liberally construed with the view of carrying out the above declaration of public policy.

## THE CONTEMPORARY LANDSCAPE OF OPEN GOVERNMENT

Broad national characterizations of the laws' democratic purposes hide much substantive differentiation at the state level. Indeed, there is remarkable state-by-state variation in the contemporary landscape of open government. For example, while open-meeting statutes commonly include a description of the governmental bodies required to hold open meetings, a definition of the term *meeting*, a description of the procedural requirements of the law, and an itemization of specific exemptions and remedies for violations of the law, the specific provisions of the laws vary considerably along each of these various dimensions (Pupillo, 1993; Schwing, 2000).<sup>12</sup> Schwing (2000) in fact, observes that while virtually

<sup>12</sup>Schwing's (2000) analysis identified nine dimensions along which these laws vary: definitions of entities subject to the law; mechanical details; definitions of meetings, quorums, deliberations, and

all open-meeting statutes list some of the governmental bodies covered by the act, the laws utilize different tests to define precisely which bodies may be subject: some states identify bodies subject to the law by the manner of the bodies' creation; other states identify the bodies subject to the law by their receipt or disbursement of public funds; still other states identify bodies subject to the law by the public nature of the power and duties of the body. Thus, the laws vary significantly in terms of their applicable scope. Additionally, while all statutes include a provision requiring governmental bodies to notify the public regarding the date, time, and location of a pending session, such provisions vary with respect to the minimum number of days or hours that notice must be posted, as well as the manner in which posting must occur. Likewise, all open-meeting laws contain exemptions permitting public bodies to conduct closed sessions under certain conditions, e.g., matters related to personnel evaluations, collective bargaining, real-estate transactions, and litigation. Yet the number, nature, and scope of these executive-session privileges vary from one state to the next. Open-meeting statutes also vary in the remedies they provide for violations. Some statutes stipulate only civil penalties with fines ranging from as little as \$10 to \$5,000;<sup>13</sup> other statutes provide both civil and criminal penalties (usually misdemeanor offenses), which may range from a few days to one year in jail. This pattern of complexity and variability also characterizes state open-records laws.

Given these differences in the laws, analysts over time have developed typologies that attempt to portray the relative legal climates for governmental openness across the 50 states (Adams, 1974; Cleveland, 1985; Iorio, 1985).<sup>14</sup> The typologies measure the comprehensiveness of state sunshine laws in each state along various dimensions, and rank the 50 states on the basis of these openness "scores." For example, Adams, in 1974, classified the states using 11 unweighted criteria for openness. A decade later, Iorio (1985) replicated the Adams study, drawing a series of conclusions about trends in the comprehensiveness of the laws over the previous 10-year period. Notably, Iorio found a trend toward open-meeting laws that allowed greater access to government and provided stiffer penalties for noncompliance, but she also documented a decline in the number of states whose laws forbade executive sessions.

voting; executive-session exemptions; remedies; cures; defenses; prescribed processes of litigation; and stipulations for attorneys' fees, defense arrangements, and reimbursement.

<sup>13</sup> Under Wisconsin law, for example, the penalty for violating the open meeting law is a fine of \$25 to \$300 for each official who attended the meeting; the fines must be paid personally.

<sup>14</sup> It is worth noting that these classifications do not capture how open the states are in practice; rather, they measure only the extent of formal legal requirements in a given state.

Also in 1985, Cleveland published his “spectrum of openness” that classified and ranked the states based upon 25 attributes of their sunshine statutes.<sup>15</sup> Although the Cleveland and Iorio studies consistently identified two states—Tennessee and Florida—as exhibiting relatively great openness under the law, they demonstrated little agreement in their ranking of many other states.

Although these typologies and rankings afford useful insights into the status of sunshine laws at particular moments in the laws’ evolution, ultimately their value may be limited because many states have altered substantially their requirements for governmental openness over time.<sup>16</sup> Indeed, one distinguishing feature of the contemporary landscape of state sunshine laws is the frequency with which legislatures in recent years have debated the laws’ amendment. Since the mid 1990s, lawmakers have revised open-meeting and records laws—or seriously debated doing so—in almost every state of the Union. Particularly high-profile episodes have taken place in California, Georgia, Illinois, Kansas, Maine, Mississippi, Missouri, New Jersey, North Carolina, North Dakota, Pennsylvania, South Dakota, Texas, and West Virginia.

Many openness advocates, and some legal analysts, claim that recent statutory revisions have eroded the effectiveness of public-information laws nationally (Davis, 1994; Ismach, 2000; Kallestad, 2003; Kjos, 2002; Pupillo, 1993).<sup>17</sup> They point, for example, to numerous exemptions that have been carved into records statutes as evidence of diminishing governmental openness. The cases of Florida and Tennessee—states whose

<sup>15</sup> Because of the prominence of Cleveland’s work, we believe it is useful to list the criteria Cleveland used in developing his ranking. These criteria were as follows: whether the law contained a policy statement; permitted exemptions for individual bodies; required all final actions be made in open meeting; required discussion be held in open meeting; permitted information gathering in open meeting; required committee meetings be open, advisory boards be open, informal meetings be open, quasi-judicial meetings be open, meetings of local entities be open, and subquorum meetings be open; permitted involved parties to request openness; required minutes of closed meetings be maintained; provided for criminal penalties; excluded all exemptions; excluded exemptions for personnel, employment, property, financial, legal, labor negotiations, and security matters; and provided enforcement provisions.

<sup>16</sup> Recently, researchers with the Citizen Access Project at the University of Florida developed a sevenfold rating system of “weather categories,” ranging from “sunny” to “dark,” with which to classify 30 dimensions of state open-meeting and records laws nationally. These ratings are updated frequently and available via the Internet (<http://www.citizenaccess.org/>), thus overcoming some of the limitations plaguing earlier classification schemes.

<sup>17</sup> The climate for openness in a state may be influenced by resource constraints, in addition to formal changes in the law. For example, Hawaii’s Office of Information Practices, which provides legal advice to public bodies on the applicability of sunshine laws, experienced budget cuts that decreased its size from 15 staff members in 1995 to 8 in 2005. These cuts created backlogs that undermined the office’s capacity to ensure compliance with the law (Lee, 2005).

laws were once lauded as model statutes—are revealing. The Florida legislature passed 15 bills creating new exemptions to public-records laws in 2001 and another 10 bills in 2002; in 2003, Florida legislators considered an additional 35 records exemptions (Kallestad, 2003). In Tennessee, the General Assembly has adopted more than 200 exemptions to the state's open-meeting and records laws since those laws were originally enacted (Alligood, 2004). Executive-session exemptions have proliferated in other states, too, prompting observers to lament that too much of the public's business now is being conducted behind closed doors (Benson, 2003).

Although many of these new exemptions have arisen from reasonable concerns for protecting the privacy interests of citizens (e.g., consumer privacy, crime-victim identity, and student and employee disciplinary records),<sup>18</sup> public-information advocates counter that increasingly parties are using these otherwise legitimate concerns for privacy as “cover” in rolling back openness to suit their own proprietary interests (Ismach, 2000).<sup>19</sup> Openness advocates also point to what they view as reduced access to records relating to matters of alleged public security. In the wake of the “9/11” attacks, many states began restricting access to information deemed to have implications for public safety. In Florida, the legislature in 2001 and 2002 banned public access to information on certain pharmaceuticals stockpiles, security plans for state-owned property, and crop-duster aircraft—for fear the planes might be used in acts of terrorism. Similar bills have been proposed recently in Idaho, Maryland, Michigan, Minnesota, Missouri, Oklahoma, and Washington, prompting concerns that the public's right to know is being substantially dismantled in the name of public security (Kjos, 2002).

Openness advocates point disturbingly also to the results of statewide openness “audits,” which in many states have highlighted pervasive problems of noncompliance with sunshine laws by certain government agencies.<sup>20</sup> For example, campaign organizers in Rhode Island in 2003 sent identical records requests to 137 state agencies, departments, commissions, and school districts seeking a complete listing of employees, their job titles, and salaries as provided under law. The audit documented

<sup>18</sup> Municipal leagues, state school board associations, and state associations of district attorneys have been particularly active proponents of these exemptions.

<sup>19</sup> One senate bill in Florida in 2002 would have closed off public utility records, ostensibly to protect against identity theft. Critics alleged, however, that the real push for this exemption came from public utilities seeking to shield their customer base from competitors (Assaults on Sunshine, 2002). In 2003, the legislature considered bills that would have prevented public access to reports of catastrophic mistakes by doctors or pharmacists (Kallestad, 2003).

<sup>20</sup> These audit campaigns typically are led by coalitions of press associations, nonprofit public watchdog groups (e.g., local affiliates of Common Cause), and university-affiliated researchers.

“widespread noncompliance” with the requests by many of those public agencies (Fitzpatrick, 2003). A similar survey conducted in Alabama in 2003 found “widespread ignorance” of the open-meeting and records laws in that state (Weaver, 2003).<sup>21</sup> An audit of records accessibility in 95 Tennessee counties in 2004 found that government workers “routinely” denied auditors access to records of schools, planning departments, and law enforcement agencies, which should have been available under sunshine law (Alligood, 2004). An Ohio audit conducted in 2004 found that agencies complied with records requests as required by law only about one-half of the time (Reporters Committee, 2004a). Since 1999, similar audits and surveys have been conducted in at least 31 states, including Arizona, California, Connecticut, Colorado, Florida, Illinois, Indiana, Maryland, Minnesota, New Jersey, Texas, Washington, West Virginia, and Wisconsin (Open Records Surveys, 2005).

Despite ongoing concerns in some states concerning noncompliance with routine records requests and a pattern of proliferating exemptions to open-meeting and records laws in other states, evidence is inconclusive of a trend toward a general weakening of openness nationally. Indeed, many states have strengthened, rather than weakened, their legal requirements for openness. Writing more than a decade ago, Pupillo (1993, pp. 1177–1184) concluded that legislatures recently had strengthened open-meeting statutes by (1) broadening the applicability of the laws to encompass more public bodies, (2) narrowing statutory exceptions to the laws, and (3) adding stiffer penalties for violations. More recent legislation provides additional evidence along these lines. In 2003, for example, Illinois became the first state to enact a “verbatim record” bill, requiring public bodies to keep a precise record of executive-session proceedings that a court might review privately when ruling on a potential violation (Reporters Committee, 2003). In 2004, Kansas, Maine, Missouri, and South Dakota also enacted changes to their laws that enhanced the climate for openness in those states. Kansas’ new law requires the release of documents relating to the “character and qualifications” of any person appointed to fill a vacancy in an elected position and permits those who successfully sue against the wrongful denial of public records to recover attorney’s fees (Reporters Committee, 2004b). The Maine legislation, which

<sup>21</sup> Ignorance of the laws is not limited to state officials. A 2002 poll conducted by University of Florida researchers to gauge public knowledge of the laws in the state found that more than 81% of respondents did not know the requests do not have to be made in writing, 58% did not know that citizens are not required to explain why they want the information requested, and 70% did not know that citizens do not have to present identification to obtain the requested information (Gailey, 2002). Similar surveys have been conducted in Washington (<http://www.washingtoncog.org/news/nr221.html>), and elsewhere.

the state press association characterized as “the broadest package of public access reforms in the 45-year history of Maine’s Freedom of Access Act,” established a criteria and an annual review process by which to evaluate the appropriateness of existing records exemptions, reduced the time-frame within which agencies must respond to records requests and the costs they may charge requestors, and commissioned a body to examine how well state agencies are enforcing disclosure laws (Reporters Committee, 2004c). Missouri’s law also reduced the copying fees that agencies are permitted to charge those who make records requests, increased the maximum fine for sunshine-law violations to \$5,000 (a fivefold increase), specified requirements for the posting of notice for meetings conducted electronically, and lowered the standard of proof required to demonstrate whether a party has broken the law (The Missouri Bar, 2004). Finally, the South Dakota law created a special state commission to review openness complaints and to publicly scold officeholders who are found to violate the law (Brokaw, 2004).

In summary, the contemporary landscape of sunshine laws is one marked by much variability in the nature and scope of the laws across the states, volatility of the laws over time, and ambiguity concerning the existence of trends toward a general weakening or strengthening of the laws nationally.<sup>22</sup> This general climate of variability, volatility, and ambiguity holds important implications for the manner in which openness in public higher education is mandated throughout the nation.

#### MANDATED OPENNESS AND HIGHER EDUCATION: LEGAL PATTERNS AND CONTEMPORARY FLASHPOINTS

Because sunshine laws differ from one state to the next, the specific applications of the laws to higher-education institutions also vary across the states, as they have varied over time (Cleveland, 1985; Schwing, 2000; Sherman, 2000). Each state has its own version of the laws affecting educational institutions, and often, application of the laws to colleges and universities varies within states by system or by sector. In a few states, sunshine laws are partly or wholly specific to the system at hand. For example, the flagship universities of California, Michigan, and Minnesota

<sup>22</sup>Even indicators such as change in the number of open-meeting and records complaints filed annually can be open to interpretation. For example, the Texas attorney general’s office issued 10,747 rulings on open-government issues in 2003, a 25% increase from 2002 (Abbott Fighting Ignorance, 2004). Whether the increase can be attributed to a growing propensity for misbehavior by public officials, to increased awareness by citizens of legal recourse, to more vigorous enforcement by attorney general, or to a combination of the factors is unclear.

have a form of constitutional autonomy not provided to other universities in the same state and are therefore exempted from certain openness obligations that are incumbent upon the other institutions.<sup>23</sup> In some states, private universities that receive public funds, such as Cornell University and Syracuse University, at times have been deemed to be covered by sunshine laws (Cleveland, 1985). Another form of differentiation may be found in the application of sunshine laws to vocational postsecondary institutions, which sometimes are covered under the laws for K-12 education. Additionally important are variations in the “depth of coverage” of the laws—that is, how deeply within the university organization openness laws may apply.<sup>24</sup> At one extreme lies Florida, where committees, subcommittees, and even advisory boards must be open to the public. At the other extreme, according to Cleveland (1985, p. 133), is the “closed state of Pennsylvania, [where] only meetings of the Board of Regents must be open.” Of course, the actual climate of openness depends not only on the letter of the law but also on the context of compliance within a given state. Thus, the distinctive historical, cultural, and political contexts in which sunshine laws are fashioned and enforced serve as another source of differentiation in the concept and practice of mandated openness in higher education.

One commonality among the states, however, is the frequency with which disputes involving higher-education institutions have catalyzed efforts to amend state sunshine laws. For example, a running controversy between the University of North Carolina (UNC) and the North Carolina Press Association in the late 1990s centered on whether the state’s sunshine laws should be changed to make confidential the proceedings of faculty and student committees that advised the UNC chancellor, to seal alumni and donor records, and to restrict access to the chancellor’s office mail (Kirkpatrick, 1997a). This dispute inspired a series of legislative proposals that could have reshaped the nature of public access to meetings and information held by all public agencies in North Carolina—not merely those of public colleges and universities. One news account characterized the conflict as having had potential to “unravel 20 years of gains and balance in the laws that govern open meetings and public records” in that state (Kirkpatrick, 1997b). Controversies involving higher education have stirred disputes of comparable scope and magnitude in many other states.

<sup>23</sup> Cleveland also cites Massachusetts, Virginia, and Wisconsin as states where the laws once had been applied less rigorously to public universities than they had to other agencies.

<sup>24</sup> The question of depth of coverage of the law tends to be determined by courts on a case-by-case basis, rather than under statute proper (Cleveland, 1985, pp. 133–134).

Clearly, the one openness issue in higher education that has generated more conflict, litigation, and editorialization than any other is the presidential search and selection (Estes, 2000; McLaughlin and Riesman, 1985, 1986; Sherman, 2000).<sup>25</sup> Although a variety of complex issues are at stake in the application of sunshine laws to presidential search processes, the major dilemma for policymakers is how best to balance the demand for accountability with the need of institutions to be able to recruit highly capable leaders. Thus, states must weigh the following questions: When, in the search for and selection of a new college or university president, should citizens gain access to search proceedings? Is the public interest well served when search committees are compelled to reveal the names of all applicants and nominees for a presidency, or should only the names of finalists be disclosed? When should those names be disclosed? To what extent do the benefits of attracting experienced candidates—benefits alleged to result when candidate confidentiality is protected—warrant restrictions on the public's right-to-know? Does the use of executive-search firms to assist institutions in their search for new presidents enhance the effectiveness and efficiency of searches, or shirk accountability by permitting outside parties to evade openness requirements, or both? Under what conditions do the availability of more information impede rather than advance the public interest?

High-profile litigation over presidential searches in public higher education are good indicators of this arena's complex, contentious nature. In recent years, public-information disputes over the selection of new presidents have resulted in legal suits involving a number of institutions, including Michigan State University, Georgia State University, and the Universities of Kentucky, Michigan, Minnesota, New Mexico, and Washington. Table 2.1 provides a synopsis of 18 lawsuits reviewed by legal authorities since the mid 1980s. This listing reports final rulings in cases in which either legal action before a court or formal petition with a state attorney general's office was filed; neither lower court decisions that subsequently were reviewed by higher courts nor numerous other clashes in which parties threatened legal action, but failed to pursue it, are reported. In all but one of the cases described in the table (the exception being *Arizona Bd. v. Phoenix Newspapers*), news organizations brought suit or petition alleging a presidential search committee either had met illegally (i.e., in private or without proper notice) to interview or discuss candidates or had illegally withheld public records (e.g., names of candidates

<sup>25</sup> Important early studies were those by McLaughlin and Riesman (1985, 1986), who used surveys and case studies to examine presidential searches conducted in the sunshine.

Table 2.1: Litigation Over Openness in College and University Presidential Searches, 1986–2004 (Cases Arranged Alphabetically by State and Year)

| Plaintiff(s)  | Defendant  | Year Suit or Petition Filed | Year Judgment Rendered | Ruling  |
|---|--|-----------------------------|------------------------|---|
| Arizona Board of Regents                            | <i>The Arizona Republic and Mesa Tribune</i>         | 1989                        | 1991                   | The Board sought declaratory judgment that it was justified in withholding from the media names and resumes of nominees and applicants for appointment to the presidency of Arizona State University, as well as of same information concerning persons who were final candidates for position. Newspapers counterclaimed for relief under public-records law and sought the production of resumes of all 256 persons in pool. The Arizona Supreme Court held that that the Board was not required to disclose information on prospects, only the names and resumes of the 17 persons who were in the smaller pool of “finalists” whom the Board had interviewed confidentially out-of-state ( <i>Arizona Bd. of Regents v. Phoenix Newspapers</i> , 1991). |
| <i>Atlanta Journal and the Atlanta Constitution</i> | Board of Regents of the University System of Georgia | 1986                        | 1989                   | The Supreme Court of Georgia held that a statutory exemption to open-records law for “confidential evaluations” in connection with hiring decisions of government agencies was not applicable to the University System’s search for a new president of Georgia State University because the newspapers requested only the names and resumes (not evaluations) of candidates for the position ( <i>Board of Regents v. The Atlanta Journal</i> , 1989).  |

|  |  |      |      |  |
|--|--|------|------|--|
| <i>Lexington Herald-Leader Company</i>       | University of Kentucky Presidential Search Committee | 1986 | 1987 | In reversing a circuit-court decision, the Supreme Court of Kentucky held that the University of Kentucky Presidential Search Committee, which was created by formal action of the Board of Trustees of the University of Kentucky, is a public agency and therefore subject to the provisions of the Open-Meetings Act. The Court held, "... exceptions to open meeting requirements... was not [designed] to permit discussion of general personnel matters in secret, so that presidential search committee was not excepted from requirements of Open Meetings Act in screening candidates and selecting successor president" (p. 884). ( <i>Lexington Herald-Leader Co. v University of Kentucky</i> , 1987). |
| <i>Boston Globe</i>                          | The University of Massachusetts                      | 1991 | 1991 | The attorney general ruled that the University of Massachusetts Board violated state open-meetings law when members met behind closed door to select an interim president; the attorney general ordered the board to rescind its appointment and hold another session to fill the position (Phillips, 1991).   |
| <i>Worcester Telegram and Gazette</i>        | Worcester State College                              | 2002 | 2002 | The attorney general ruled that Worcester's board violated state open-meetings law by allowing private interviews of semifinalists vying for the presidency. The attorney general also concluded, however, that the process was not so tarnished as to require a new search be conducted (Astell, 2002).   |
| <i>Ann Arbor News and Detroit Free Press</i> | Board of Regents of The University of Michigan       | 1988 | 1993 | The Michigan Supreme Court rejected the Board's assertion that application of the Open-Meetings Act (OMA) to presidential search processes of the University violated the autonomy vested in the body by the state Constitution. The Court held that the Board violated the OMA by interviewing and deliberating on candidates in secret ( <i>Booth Newspapers v. University of Michigan Board of Regents</i> , 1993).<br>( <i>cont.</i> )   |

Table 2.1: (Continued)

| Plaintiff(s)                                      | Defendant  | Year Suit or Petition Filed | Year Judgment Rendered | Ruling   |
|---|--|-----------------------------|------------------------|--|
| <i>Lansing State Journal and The Detroit News</i> | Board of Trustees of Michigan State University                               | 1993                        | 1999                   | In reversing the Court of Appeals decision, the Michigan Supreme Court held that the application of the state's Open-Meetings Act to presidential searches processes by the Board of Michigan State University was an unconstitutional infringement on the Board's power of institutional supervision. The opinion read: "The Michigan Constitution confers a unique constitutional status on our public universities and their governing boards, which grants defendant broad authority over Michigan State University, including the power to elect the president of the university. . . . The Legislature is institutionally unable to craft an open-meetings act that would not, in the context of a presidential selection committee, unconstitutionally infringe the governing board's power to supervise the institution" (p. 493) ( <i>Federated Publications v. Michigan State Board of Trustees</i> , 1999). |
| <i>Oakland Press</i>                              | Oakland University Board of Trustees, Presidential Search Advisory Committee | 1996                        | 1997                   | A Circuit Court had declared that the Oakland University Board of Trustees improperly delegated its authority to select the president of Oakland University to defendant Presidential Search Advisory Committee and enjoined the Committee from holding any further meetings relating to the search except in compliance with the Open-Meetings Act. The Michigan Court of Appeals vacated the injunction and dismissed the appeal as moot because, while the appeal was pending, (1) a new president was hired in conformity with the terms of the injunction and (2) an amendment to the state's Open-Meetings Act exempting universities from the Open-Meetings Act became enacted ( <i>Great Lakes v. Oakland Board</i> , 1997).   |

|   |                             |      |      |   |
|---|-----------------------------|------|------|---|
| The Minnesota Daily   | The University of Minnesota | 1988 | 1988 | Court of Appeals denied the university newspaper's appeal for injunctive relief to compel the University of Minnesota Presidential Search Advisory Committee to hold open meetings. The court found that the committee's role was to provide only advice and consultation to the regents on the selection of the president. Because the committee would play an active role in screening applicants and narrowing the field to a short list of finalists, but its decisions would be subject to review by the regents, the committee was held not to be within the purview of the state's Open-Meeting Law ( <i>Minnesota Daily v. University of Minnesota</i> , 1988). |
| Star Tribune; St. Paul Pioneer Press; Minnesota Daily; Rochester Post-Bulletin; and Minnesota Joint Media Committee | University of Minnesota     | 2002 | 2004 | The Minnesota Supreme Court ruled that release of information on finalists for the presidency of the University of Minnesota did not violate the underlying constitutional protections insulating the Board of Regents from legislative control, nor did it impede the Regents' ability to "manage" the University. Because the Minnesota Constitution does not exempt the Board of Regents from the state's Open-Meeting Law and Data Practices Act, the Board therefore was compelled to release its list of finalists for the position of president ( <i>Star Tribune v. University of Minnesota Board of Regents</i> , 2004).                                       |
| The Associated Press; the Lincoln Journal Star; Omaha World-Herald; and Omaha television station, WOWT              | University of Nebraska      | 2004 | 2004 | The state Attorney General ruled that meetings conducted out-of-state with candidates for the presidency of the University of Nebraska constituted "interviews" and, as such, the names of those finalists must be made public under state open-records law (Bauer, 2004; Hord, 2004a,b).   |

(cont.)

Table 2.3. (Continued)

| Plaintiff(s)   | Defendant   | Year Suit or Petition Filed | Year Judgment Rendered | Ruling  |
|--|---|-----------------------------|------------------------|---|
| The New Mexico Foundation for Open Government and the <i>Albuquerque Tribune</i> | Board of Regents of the University of New Mexico  | 1989                        | 1991                   | In this consent decree, the plaintiffs and the Regents settled on a policy under which a candidate's application for the university presidency is publicly disclosed when the candidate interviews for the job, permitting applicants an opportunity to withdraw from the running before the interview to prevent their applications from being disclosed (Estes, 2000).  |
| The New Mexico Foundation for Open Government and the <i>Albuquerque Journal</i> | Board of Regents of the University of New Mexico  | 1998                        | 1998                   | A district court judge held that the Board likely violated the terms of the 1991 consent decree concerning when the names of candidates for the position of president must be made public. The court enjoined the Board from completing its search unless it disclosed the names of 14 candidates whom the search committee had interviewed; the Board terminated its search ( <i>Gallagher v. Board of Regents</i> , 1998).  |
| <i>Las Vegas Review-Journal</i>  | University and Community College System of Nevada | 2000                        | 2001                   | In a suit involving a search at the Community College of Southern Nevada, the Nevada Supreme Court ruled that the position of president of taxpayer-funded colleges is not a "public officer" under state law, thus candidates for the job are not subject to the Open-Meeting Law and can be interviewed behind closed doors ( <i>University and Community College System of Nevada v. Las Vegas Review-Journal</i> , 2001). |

|  |  |      |      |  |
|--|--|------|------|--|
| <i>The Daily News Journal</i>            | The Tennessee State University and Community College System Board of Regents | 1989 | 1990 | An Appeals Court held that the meetings between a chancellor and the advisory committee that was assisting him screen applicants for the presidency of Tennessee State University was not required to be public because the committee was not a governing body and because it did not make a decision or deliberate toward a decision ( <i>Mid-South Publishing v. Tennessee State University</i> , 1990).   |
| Utah Society of Professional Journalists | Utah Board of Regents (University of Utah)                                   | 1997 | 1997 | The attorney general ruled that the Utah Board of Regents did not fully comply with the Open and Public Meetings requirements regarding notice and conduct of a meeting it held behind closed doors to select the new president of the University of Utah, but that any violations were cured by a subsequent meeting held in the open (Cortez, 1997).   |
| <i>The Seattle Times</i>                 | University of Washington Board of Regents                                    | 1995 | 1995 | A superior court denied newspaper's request to force regents to interview candidates for the presidency of the University of Washington in open session. The court also allowed regents to rank their candidate preferences and discuss potential salary levels for presidential candidates in closed session. The court, however, said meetings should be open when discussing timetables and the scheduling of finalist interviews, campus visits by candidates, and the role of a search consultant or methods for notifying candidates of their selection or rejection (Broom, 1995a). |
| <i>The Seattle Times</i>                 | University of Washington Board of Regents                                    | 1995 | 1995 | A superior court held that the University of Washington Board of Regents knowingly violated the state's Open-Meetings Act by holding two secret meetings without required public notice. The court ordered the regents to identify those who attended the meetings and to describe what matters were discussed (Broom, 1995b).   |

Sources: In addition to the individual sources cited, information on select litigation came from Estes (2000) and Sherman (2000).

for the position or scoring sheets used to evaluate candidates) pertinent to a search. Collectively, these cases convey the richness of the issues that often are at dispute in the application of openness laws to presidential searches in higher education.

Although revealing of the complex legal questions that attend presidential search disputes, the table does not convey the long-term repercussions—legal, policy, and political—that can follow in the wake of litigation. The case of Michigan, therefore, is instructive. In 1988, the *Ann Arbor News* and the *Detroit Free Press* sued the University of Michigan Board of Regents, alleging it had violated the state's Open-Meetings Act during its recent search for a new president. The Board responded that the Michigan Constitution's autonomy provision for public universities, which dated to 1850 and had been broadly upheld since in a series of court rulings, superseded the open-meetings statute, thus permitting the Board to conduct its search in the manner in which it had. The Michigan Supreme Court in 1993, however, sided with the newspapers, ruling that the University of Michigan had indeed violated state law (*Booth Newspapers*, 1993). Several months later, in a case involving a disputed search at Michigan State University (MSU), an appellate court similarly ruled in favor of the *Detroit News* and the *Lansing State Journal*, holding that MSU also had broken the law during its 1993 search for a new president. The university appealed the decision.

In response to these significant legal setbacks, the universities began to aggressively lobby lawmakers to exempt presidential searches from coverage under the Open Meetings Act (Leatherman, 1993). In 1996, the University of Michigan again began screening candidates to replace an outgoing president, using a complex process of consultants and an advisory committee to privately vet candidates. Although this search was more open than previous ones (Sherman, 2000), newspapers sued the university claiming that all aspects of its search must be open under the sunshine law. A circuit judge sided with the papers. Over time, however, the lobbying efforts of the universities, highlighted by growing public concern over the costs of conducting searches in the sunshine and defending them in court,<sup>26</sup> led Michigan's legislature to take action of its own: in December 1996 the legislature amended the law so as to permit university search committees to withhold the names of all but five finalists for the position of president (Healy, 1996). Meanwhile, the appeal filed by MSU involving its 1993 search reached the Michigan Supreme Court,

<sup>26</sup>In its 1996 search, the University of Michigan paid \$225,000 to outside attorneys to help the school defend the university against newspapers' suits (Peterson and McLendon, 1998).

which, in 1999, issued a landmark ruling that the application of the Open-Meetings Act to university presidential searches was an unconstitutional infringement upon university governing boards' power of institutional supervision (*Federated Publications*, 1999).

The Michigan experience is not unique. Estes (2000) notes that controversy over presidential search and selection in higher education has inspired change in sunshine statutes in a number of other states. In an analysis of those changes, Estes notes what he characterizes as a trend toward an increasing number of state legislatures that have added exceptions to their public-records laws expressly exempting from disclosure the names of applicants for public employment. Of the 22 states that Estes identified as now having such exemptions, at least three—Michigan, New Mexico, and Texas—have applied the exemption exclusively to public-university presidential searches. As in Michigan, the New Mexico and Texas legislatures revised their statutes after courts compelled universities to reveal the names of candidates. Estes notes a distinctive pattern in these cases: a presidential search attracted litigation from the media in pursuit of disclosure of candidate identities, the media initially won its suit, the university appealed to the legislature arguing it could not attract presidential candidates of sufficient quality under existing law, and the legislature then provided exemptions allowing for greater confidentiality in searches in an effort to address the concerns of higher-education officials. Estes (2000, p. 509) concludes that this adversarial process, culminating in legislative intervention, may be appropriate in a representative democracy. He writes, "Perhaps state legislatures are in the best position to judge the value of attracting top leadership to their higher-educational systems, and can balance the desire for total openness with the practical reality that such openness will diminish their state's chances of attracting top candidates . . ."

Beyond presidential search and selection, other issues raise questions about the appropriate boundaries of state openness laws. For example, the deliberations and decision-making processes of institutional and system governing boards often serve as flashpoints for debate over mandated openness. In some instances, these conflicts have garnered national press attention, as in the case of Auburn University, which a circuit-court judge ruled in 2001 had violated Alabama's open-meetings act at least 39 times during the previous three-year period (Schmidt, 2001). Issues commonly at dispute center on the applicability of sunshine laws to the use of electronic communications in board deliberation (Jayson, 2002; Nathans, 2004; Wetzell, 1998); board retreats, workshops, and social outings (HCCS, 2001; Hord, 2004a,b); issue-briefing sessions held for

trustees prior to formal votes (Bush, 2004); advisory bodies and *ad hoc* groups of decision makers at subboard levels (Arnone, 2004; Kirkpatrick, 1997a); and the meetings of informal groups of campus or system leaders (Anez, 2003; Klein, 2001; Quinn, 2003).<sup>27</sup> In at least one recent case, recurring litigation over openness complaints brought against a system board led to the reorganization of its legal-affairs office (Chancellor, 2004).

University-affiliated foundations are another source of steady controversy. These foundations—-independent 501(c)(3) organizations established for the purpose of raising, managing, and dispersing private funds on behalf of host institutions—now number in excess of 1,500 nationally (Roha, 2000). Many universities have become increasingly dependent on their foundations for private financial support, as state appropriations have declined. As the importance of foundations to public universities has grown, so too have disputes over the extent to which foundations' activities should be open to public inspection.<sup>28</sup> Since 1980, courts have ruled on the applicability of state open-meeting and records laws to foundations affiliated with the University of Louisville (1980, 2003, 2004), West Virginia University (1989), University of South Carolina (1991), University of Toledo (1992), Kentucky State University (1992), Indiana University (1995), and Iowa State University (2003) (Bass, 2004; Gevarghese, 1996). Often at the center of such disputes is the question of how states should balance (1) the need for accountability in the use of funds by tax-supported institutions, (2) donors' privacy concerns, and (3) the need of institutions to be able to respond to external financial conditions.<sup>29</sup> In the past few years, governors and legislatures in several states (e.g., Colorado and Tennessee) waded into foundation-related controversies when foundations affiliated with flagship universities became embroiled in allegations of financial impropriety (Bartels, 2004; Stambaugh, 2003).<sup>30</sup>

<sup>27</sup> In both Illinois and Florida, faculty and media organizations sued state college president associations for holding meetings privately.

<sup>28</sup> Not all university-foundation relations proceed amicably. In May 2004, the Board of Regents of the University of Georgia voted to terminate its relationship with the University of Georgia Foundation, which controls the university's \$400 million endowment, amid criticisms by the university that the foundation was micromanaging its affairs and complaints by the foundation about the leadership and spending practices of the university's president (Basinger, 2004).

<sup>29</sup> In response to these openness controversies, the Association of Governing Boards of Universities and Colleges and the Council for Advancement and Support of Education in 2005 jointly created guidelines for defining the degree of independence between universities and their affiliated foundations. See <http://www.case.org/files/AboutCASE/PDF/CASEAGB.pdf>.

<sup>30</sup> One example of the issues that can arise involves the case of the University of Louisville Foundation's McConnell Center for Political Leadership, named for U.S. Senator Mitch McConnell (R-KY). A

New conflicts over mandated openness in higher education continue to arise. Very recently, for example, organizations opposed to affirmative-action practices in college and university admissions announced a nationwide campaign in which open-records laws would be used to force institutions to divulge information about their policies. Organizers planned to use records laws to determine the weight campuses are giving to the race and ethnicity of applicants when making admission decisions. The leader of one of the organizations, the National Association of Scholars, described sunshine laws as an effective “weapon” for promoting transparency by universities that, in his view, had sought to “hide” the data (Schmidt, 2004).

Thus, in summary, the contemporary landscape is one marked by the existence of diverse climates for openness in public higher education, of fluid state legal and policy settings, and of continuing controversies over the ways in which laws compelling openness may best be applied to higher-education institutions. Yet, with the exception of several thoughtful legal analyses (Davis, 1994; Estes, 2000; Geevarghese, 1996; Sherman, 2000), little effort has been made in recent years to systematically explore this landscape or its implications for higher-education governance. Although much has been written about select issues, notably presidential search and selection, the literature overall is prescriptive, anecdotal, or hortatory. Indeed, the laws, and especially their governance implications, have not been examined systematically and comprehensively since Cleveland’s undertaking, 20 years ago.

#### A NATIONAL STUDY OF MANDATED OPENNESS AND HIGHER-EDUCATION GOVERNANCE

Given the sparse research base, we initiated a national study of mandated openness in public higher education in the fall of 2002 to better understand the laws and their impact on institutional governance.<sup>31</sup> Because in the context of higher education, mandated openness represents a

ircuit-court judge ruled in favor of the *Louisville Courier-Journal*, which had filed an open-records suit against the Foundation seeking disclosure of the names of contributors. Foundation officials argued that proceeds to the center, which totaled in excess of \$6 million, had provided scholarships to more than 150 Kentuckians, and cautioned that revealing donors’ identities would hamper fund raising. However, the Center for Responsive Politics, a campaign-finance watchdog, claimed that some of the donors were political-action committees that had been among the senator’s biggest campaign contributors, insinuating that the university had become entangled in the groups’ influence-peddling (Pitsch, 2004).

<sup>31</sup> Our study was funded by the University of Southern California’s Center for Higher Education Policy Analysis and the Association of Governing Boards of Universities and Colleges.

complex legal, organizational, and policy phenomenon for which few systematic insights exist, our study took the form of a rigorous exploratory analysis. We sought to learn about the laws and their governance impacts by interviewing individuals who were most familiar with the laws' operation, enriching those insights with multiple archival sources. Thus, we relied heavily on field research methods to help us accumulate and compare insights drawn from a variety of settings. Overall our aim was to identify the boundaries of the phenomenon and the robustness of relationships we documented (King, Keohane, and Verba, 1994; Yin, 2002).

This interest of ours drove our sample-selection strategy. Although we did not pursue a formal *most different systems design* (King, Keohane, and Verba, 1994), we did seek to select states with notable differences so that our conclusions would be sensitive to contextual distinctions among the states and their higher-education systems. We followed a two-stage sample-selection process. First, we chose as sites for intensive study six states whose diversity along certain dimensions, we believed, would afford insights into the operation and impact of mandated openness in distinctive settings. Using seven criteria to ensure diversity,<sup>32</sup> we selected California, Florida, Iowa, Massachusetts, Texas, and Washington as our samples. We next identified informants within each state who were likely to be well informed about the application of sunshine laws to colleges and universities. We identified members of governing boards, senior campus officials (e.g., presidents and general counsels), faculty senate leaders, members of the press, attorneys general, state agency officials, and legislators. We also identified national observers with first-hand perspective on sunshine laws, including leaders of national higher-education associations, executive-search firm consultants, and public-information advocates.

Throughout 2003, we conducted site visits to the six states in our sample. In each state, we collected documents (e.g., newspaper articles, legislation, and reports) and interviewed key informants. We used protocols tailored to the different categories of respondents to guide our interviews. Including both the national and the state-specific respondents, we interviewed a total of 92 officials, many of whose experiences cut across our informant categories, thus enabling them to reflect on openness from multiple professional and organizational perspectives.

<sup>32</sup>The seven criteria included geography, population, higher-education enrollment, organizational diversity of higher education, state governance, state rank on Cleveland's (1985) "openness index," and state classification on a national survey conducted by the American Association of State Colleges and Universities, which asked state officials the extent to which they believed sunshine laws had been applied "appropriately" to higher education in their states.

We developed an elaborate set of procedures for coding and analyzing our data (Huberman and Miles, 1998; Miles and Huberman, 1994). We created an electronic file of the transcribed interview data, which consisted of nearly 900 pages of single-spaced text. We then developed an extensive coding scheme and assigned a series of codes to each portion of text in the electronic files.<sup>33</sup> These procedures permitted us to electronically sort and cross-sort codes and the themes to which the codes were assigned. The patterns that emerged from this systematic sorting and comparing of data served as the basis of our study findings.

We present below 14 findings of our study. Because we have elaborated on these and other findings elsewhere (Hearn, McLendon, and Gilchrist, 2004; McLendon and Hearn, in press), we provide here only brief summaries of select findings, rather than detailed discussions of all of them. From the findings emerge a general picture of stakeholder views that in some ways defies conventional wisdom: we found no evidence of outright revolt against sunshine laws and more cooperation and respect among the various parties to openness than stereotypes often suggest. At the same time, clearly there are very significant challenges and tensions over the implementation of mandated openness in public higher education.

First, we found that states and systems within them vary remarkably in their ongoing levels and nature of attention to openness issues in higher education. In some states, higher-education officials attend very closely to openness issues and assign substantial human resources to help manage those issues; in other states, leaders characterize these issues as being far less significant in their work. Differing media climates, critical judicial holdings, past controversies, and other factors help to shape the extent to which the laws are deemed salient. On a related question, our study found no evidence of a trend away from openness. Many states have refined their sunshine laws in recent years, but these go both toward and away from reduced openness. Absent any clear patterns in our data, we cannot conclude that there are now discernible tendencies toward a weakening of sunshine laws nationally.

Sunshine laws have become increasingly institutionalized in public higher-education governance. Openness is a widely shared value, and respondents repeatedly told us that maintaining open meetings and records is essential for ensuring public trust in public colleges and

<sup>33</sup> Our codebook included 97 codes, including 66 thematic codes. For each portion of text, we assigned a series of demographic and content codes. We also assigned codes indicating positive and negative valence so that we could assess the tone an interviewee used in discussing a given topic.

universities—despite the fact that openness often is uncomfortable for campus leaders. As might be expected, media officials held the most uniformly positive views of mandated openness in higher education. Institutional leaders, however, also voiced strong support, often espousing their commitment in broad philosophical terms, e.g., the importance of transparency in promoting democratic values within the academy and in the broader society.

At the same time, however, the various parties hold distinct notions of the “public good” as it relates to openness in higher education. Almost all of our media respondents presented the view that openness is an absolute value and more information about higher-education institutions is an unalloyed public good. As a result, the media officials we interviewed equated the *public good* with complete public disclosure about virtually all aspects of campus governance, regardless of the implications for campuses. Campus leaders, by contrast, tended to view the public good in terms of a multifaceted balancing of institutional needs for discretion in disclosure that sometimes outweigh blanket accession to media demands for openness.

A fourth finding involves a shared concern by all parties that the specific applications of sunshine laws often are not well understood. Even at the highest levels of governance, officials in every state told us, the precise application of the laws to a given situation is often ambiguous. In fact, we found a notable zone of confusion or inattention surrounding the details of openness requirements for public higher education. Dynamic legal and policy climates contribute to this misunderstanding: legislatures frequently amend their laws, courts reinterpret the laws, and a transition from one attorney general to the next may change the state’s enforcement of its laws. These changes breed uncertainty among officials about their precise obligations under the law.

Officials in every state also expressed concern for the arguably excessive use of the laws—a condition we refer to as the “weaponization” of openness. Weaponizing sometimes involves use of the laws by commercial interests to gain an edge over competitors, by parties involved in collective bargaining to gain an upper hand in negotiations, and by parties involved in litigation as a way to circumvent “discovery” rules. Weaponizers sometimes have employed the laws to bog down institutions in myriad records requests, forcing campuses to expend resources at especially inopportune times (e.g., at the end of a budget cycle). Similarly, at pivotal times in a negotiating process, unions have sued institutions to tie the hands of officials, consume institutional resources, and create a public impression of institutional impropriety.

Closely related to the weaponizing issue is the broader question of costs: especially in states with large, highly visible institutions, setting up legal and organizational systems for handling openness queries can be expensive. Appealing to judicial authorities for clarification of an institution's legal obligation presents additional financial burdens. What is more, a single records request can consume vast amounts of time and resources; in the case, for instance, of an institution being asked for a record of every meeting its president had held over the previous three-year period. Redacting the calendars of campus administrators to protect the privacy of students or faculty can be time-consuming and can open them to liability. Some institutions also have been subjected to "fishing expeditions," in which huge swathes of information are requested in the hopes that a suspicious shred may be found. Institutions also sometimes bear heavy political costs when allegations of wrongdoing are raised. Numerous leaders said that the mere appearance of impropriety likely would invite external inspection and scrutiny, and that this alone justified their spending substantial resources in maintaining systems for compliance.

Seventh, in contrast to the popular view, media representatives generally tend not to be especially negative toward higher education, although they do express concerns over the attitudes of campus leaders and the nature of their organizations. They tend to see campuses as naturally prone to secretiveness and cumbersome procedures. Yet, the mistrust that exists is not as pronounced as many might believe. A familiar stereotype is that of institutions reluctant to engage the media and of media eager to sue institutions, but both parties reported that they expend much effort developing productive working relationships. Of course, there is appreciable variation in the nature of these relationships. In some systems, mutual accommodations have fostered productive relationships; in other settings, ongoing distrust prevails.

As the previous finding implies, individuals can play major roles in the specifics of implementation, application, and reform of openness laws. Media and academic institutions figure prominently in the openness storyline in public higher education, but the laws often take shape and are applied in particular ways because of certain critical individuals. Fondly remembered champions, committed state officials, public demagogues, powerful critics, attorneys general and courts expressing different attitudes toward the laws, beloved presidents, and scheming college officials were all mentioned to us as important figures in the states.<sup>34</sup>

<sup>34</sup> For example, one of Georgia Governor Roy Barnes' first act as chief executive was to strengthen his state's sunshine act, which he helped draft as a member of the legislature in the 1970s. Close observers

Although faculty tend not to see sunshine laws as significantly affecting their own activities, significant connections are emerging. Several respondents related emerging concerns about researchers' freedom to conduct research privately, without public notice and media attention. Several institutions' general counsels voiced concern that, under existing laws, citizens or proprietary interests could force the disclosure of information about a research program—against researchers' wishes and before a patent application could be filed.<sup>35</sup>

Our study also led us to a number of conclusions regarding the impact of mandated openness on institutional governing boards. Most stakeholders told us that the laws have helped sustain the generally high levels of public support their institutions now enjoy. Yet openness also can impair board performance, effectiveness, and development. Openness can create awkward climates for board discussion to the extent that board members often are reluctant to discuss controversial issues in public. This reluctance of trustees to speak freely in public settings can result in boards skimming the surface of or bypassing controversial issues. Respondents also expressed concerns about the impact of sunshine laws on board learning and communication. For example, board members, especially new ones, need to be able to learn outside of the public eye, where they may feel free to ask "dumb questions" without risking public embarrassment; sunshine laws often preclude such opportunities.<sup>36</sup>

Although there appears to be broad consensus that presidents should be selected with substantial input from the public, respondents also expressed deep concern about the drawbacks associated with conducting presidential searches in the public eye. The foremost criticism is that complete openness tends to have a "chilling effect" upon searches, diluting both the quality and the quantity of applicants for the position of president. Sitting presidents are unwilling generally to become candidates at peer institutions because public exposure of their candidacy could compromise the backing of the board and other constituencies at their present institutions, thus opening the field to provosts and other administrators

attribute the governor's commitment to openness to his work for the *Marietta Daily Journal*, for which he served as counsel for many years (Patel, 1999).

<sup>35</sup> A recent analysis identifies several ways in which records laws may adversely affect research on university campuses (Reed, 2004). This analyst also classifies the states into four categories on the basis of the protections their statutes accord academic research: 18 states have "research-encouraging" exemptions designed to protect academic research; 17 states have "research-friendly" exemptions; 9 states have "research-supporting" exemptions; and 6 states have "research-unfriendly" statutes, or ones containing no language that protects academic research.

<sup>36</sup> In 2003, a trustee of the University of Florida resigned her seat saying sunshine laws had so impeded her interactions with fellow board members as to have undermined her effectiveness.

at comparable institutions or to presidents of less prestigious ones. In recognition of the need for balancing between absolute secrecy and unmitigated exposure, most respondents favored confidentiality in the early stages of a search, but broad public participation in the later stages, when the names of finalists are announced.

Respondents in each of the states we studied reported both lingering and new controversy over the openness of university foundations. Indeed, many of our respondents characterized these issues as among the most contentious openness questions their institutions face. Campus officials we interviewed were most concerned about potential threats to donor anonymity, worrying that forced disclosure of donors' identities could hurt fund-raising efforts, and cited specific instances in which this was said to have occurred.

Another area of concern involves communications technologies that have created new tensions in the debate over access to information in higher education. The spread of e-mail, cell phones, and videoconferencing poses legal and policy dilemmas for institutions and their leaders by blurring the meaning of what constitutes a "meeting," a "record," or a "deliberation" for purposes of determining the extent to which openness laws apply. For example, some officials acknowledged they were unsure whether their institution's practice of purging e-mail messages was a violation of state law—this at a time when some media organizations have sought access, under records laws, to the entire e-mail databases of campuses. Officials also expressed concern about the growing tendency of administrators not to electronically record or exchange novel or controversial ideas for fear such records could be obtained through public-disclosure laws. Respondents viewed this trend as inhibiting creative problem solving by administrators.

Finally, heightened anxieties in the post-"9/11" era about the preparedness of public agencies for acts of terrorism have made campus security issues a significant concern in the context of mandated openness. Campus officials in each of the states we studied expressed concern that their institutions could be compelled under sunshine laws to publish the blueprints of research facilities, the emergency evacuation procedures, the campus security plans, the placement of security cameras, the routines of police patrols, the location of hazardous chemicals, or other documents that might endanger campuses or communities. Some states have enacted statutory exemptions to address these concerns, thereby raising the larger question of how exceptions to openness can be crafted so that states do not restrict public access to legitimate information.

## THEORETICAL PERSPECTIVES ON MANDATED OPENNESS AND HIGHER-EDUCATION GOVERNANCE

Although important descriptive and comparative insights on sunshine laws and public higher education have begun accumulating, there remains scant conceptualization about broader questions of openness in higher-education governance. In this section of the chapter, we turn to various avenues of theory and research in the policy and organization literatures that we believe can hold promise as fresh approaches to the study of mandated openness in higher-education settings.

### WHAT FACTORS EXPLAIN PATTERNS IN STATE OPENNESS LEGISLATION AND REFORM, PARTICULARLY REFORMS IN THE HIGHER-EDUCATION ARENA?

Notwithstanding this nation's history of generally widespread support for the *principle* of openness, the actual climates of governmental openness have varied remarkably—both across states and over time. Indices of mandated openness, such as Cleveland's (1985), amply demonstrate the wide variability that exists in the legal and policy postures of the states. The history of mandated openness also demonstrates temporal variability among the states: some states, such as California, New Mexico, and Utah, were early leaders in openness reforms, while other states, such as New York, were relative laggards. At the same time, this history reveals several distinct eras of reform activity—periods when large numbers of states enacted similar kinds of reforms, such as in the 1950s and, again, in the early 1970s, when the laws became widely institutionalized virtually everywhere. In recent years, the pattern appears to have been one of measured policy rethinking, with reforms in some states having enhanced openness and reforms elsewhere having detracted from it.

These patterns raise a number of interesting questions that have eluded systematic scholarly attention, but that could form the basis for important new lines of research. Looking back over the past one-half century of statutory change, what explains variations in the origins, evolution, and proliferation of state openness regimes? Under what conditions are states most likely to reform their openness policies? Why do some states emerge as trend setters in the establishment of new openness regimes? What explains the seeming tendency of many states to adopt similar policies at approximately the same period in time? More specifically, what factors influence the adoption of openness initiatives in higher

education, such as the spate of legislation permitting exemptions in the conduct of university presidential searches, or other exemptions?

Much of the anecdotal writing on compelled openness—and indeed even our own recent research—indicates that a certain degree of idiosyncrasy may be at work. Local disputes and scandals, interpersonal relations, and the values, proclivities, or experiences of individual actors appear to play an important role in shaping state policy and law. Yet the literature also provides limited, tantalizing evidence that a set of more generalized conditions may affect openness policy across states and over time. For example, in state after state whose history of sunshine legislation has been chronicled, the presence of an organized lobby advocating for change (e.g., powerful media organizations) is portrayed as having exerted critical influence on the course of openness legislation (Barnes, 1971; Cross, 1953; Davis, 1994; Estes, 2000; LaBelle, 1990; Pupillo, 1993; Wickham, 1975). Studies also have highlighted the general propensity of a state's citizenry toward openness (i.e., a cultural predisposition toward transparent government) and certain characteristics of legislatures as factors affecting the openness policies of states.<sup>37</sup>

These studies suggest the value of scholarship that examines the antecedents of openness legislation and reform—as well as their effects. Most commentators and analysts of mandated openness have focused primarily on the policy or organizational consequences of the laws. Here, however, we are suggesting the desirability of research into the determinants of openness laws. This new avenue would in effect reconceptualize mandated openness as a *dependent* variable for future study, in contrast with the independent-variable focus that now predominates. Although insufficient scholarship exists currently to address this kind of question head-on, we believe valuable conceptual leverage is to be found in the comparative-state politics and policy literature, particularly research on state policy innovation and diffusion, which has emerged as perhaps the leading conceptual lens for explaining interstate variations in policy adoption and reform.

Policy innovation and diffusion research draws on theories of American federalism in conceptualizing the 50 states as both individual policy actors and agents of potential mutual influence within a larger social system. It suggests that states adopt the policies they do in part because of their internal sociodemographic, economic, and political characteristics and in part because of their ability to influence one another's behavior. In

<sup>37</sup> See footnote 8.

this respect, it melds previously rival models of state policy adoption into a single, unified perspective.

Social scientists have studied comparatively the determinants of state policy for 50 years. Early studies favored socioeconomic or political explanations of state policy activity. Both interpretations, however, identified the important drivers of policy as residing within individual states. Walker's (1969) landmark study of policy diffusion first challenged this assumption. Walker noted that some states (e.g., New York, California, Wisconsin) had long been recognized as policy innovators, or as states to which their neighbors looked for ideas when crafting their own policies. He reasoned that states might emulate the policies of their neighbors, resulting in the spread of policies regionally. In fact, Walker's analysis of some 90 state policies enacted prior to 1965 revealed distinct regional patterns in policy adoption. His work helped broaden the scope of inquiry from the intrastate determinants of policy to the interstate migration of policy.

In the early 1990s, Berry and Berry (1990, 1992) brought further conceptual and analytical sophistication to bear on Walker's ideas through their pioneering use of event history analysis to study state lottery and tax adoptions. Their longitudinal analyses indicated that the best predictors of states adopting new lotteries and taxes were a variety of characteristics internal to the states *and* the prior adoption behavior of neighboring states, i.e., the greater the proportion of a state's neighbors who had already adopted a lottery or a new tax, the more likely that state was to adopt the same policy. Over the past decade, numerous studies have assayed the determinants of policy adoption along the lines developed initially by Walker and refined subsequently by Berry's. Researchers have applied the policy innovation and diffusion perspective to the study of school-choice initiatives in states and cities, consumer-protection policies, health-insurance reforms, abortion and death-penalty statutes, public utilities deregulation, and various state administrative reforms (Glick and Hays, 1991; Hays, 1996; Ka and Teske, 2002; Mintrom, 1997; Mooney and Lee, 1995, 1999; Stream, 1999). Notably, higher-education researchers also have begun incorporating these theoretical and methodological approaches into their own work (Doyle, 2005; Hearn and Griswold, 1994; McLendon, Hearn, and Deaton, 2004; McLendon, Heller, and Young, 2005).

Building on this tradition of research, we propose an initial framework for comparative analysis that conceptualizes mandated openness as a form of policy innovation and seeks to explain patterns in the initial adoption, subsequent reform, or contemporary variation in state openness

policies<sup>38</sup> as a function of the factors previous research has shown to influence policy adoption in other areas. For example, using the enactment dates of sunshine legislation as dependent variables, one could analyze the probability of a state adopting an openness regime initially or a particular kind of reform subsequently—approaches for which event history analysis would be ideal (DesJardins, 2003; McLendon, Hearn, and Deaton, 2004). Alternatively, employing as one's dependent-variable state "scores" on a 50-state index of openness laws [such as Cleveland's (1985)], one could analyze the factors that account for more or less rigorous openness climates—an avenue for which pooled cross-sectional time-series analysis would be especially suitable. One limitation of both of these approaches is that they would require a longitudinal data set containing (semi) annual indicators of the factors presumed to influence policy adoption or change. The advantage of these approaches is that they permit the researcher to examine the impact of influences that may vary substantially across space and over time.

The conceptually relevant independent-variable influences in such a model of state openness policy might include socioeconomic development patterns, political culture and ideology, interest group characteristics, legislative professionalism, divided government, policy entrepreneurship, and interstate influences on policy behavior, as well as a set of higher-education system-specific characteristics.<sup>39</sup> *Socioeconomic development* refers to influences on state policy arising from long-term demographic, educational, and economic conditions within a given state. By the terms, *political culture* and *ideology*, we are referring to the works of Elazar (1972), Erikson, Wright, and McIver (1993), and Berry *et al.* (1998), who, separately, developed various conceptualizations and measures of the impact of elite and mass attitudes on state policy. *Interest-group characteristics* include measures of the lobbying capabilities and internal cohesion of one or more influential parties of relevance advocating for or resisting policy change, such as a coalition of open-government groups (Thomas and Hrebenar, 1999). *Legislative professionalism* refers to particular attributes of state legislatures—particularly session length, member compensation, and number of staff—that may influence the policy postures of state governments (Squire, 2000). *Divided government* refers to the condition that exists when the legislative and executive branches of a state are held by different political parties (Alt and Lowry, 1994). By *policy*

<sup>38</sup> These foci may represent different dependent variables requiring nuanced conceptualization.

<sup>39</sup> For elaboration on the theoretical linkages between these factors and the state policy outcomes, see McLendon, Hearn, and Deaton (2004) and McLendon, Heller, and Young (2005).

*entrepreneurship*, we mean the existence within a state of one or more individuals whose actions promote dynamic policy change (Baumgartner and Jones, 1993; Kingdon, 1984; Mintrom, 1997). *Interstate influence* (i.e., diffusion) refers to the tendencies of states in some domains of policy activity to emulate one another's behavior (Berry and Berry, 1992). Additionally, in order for this general model to be applicable to policies specific to higher education, or to account for higher education's influence on the broader policy landscape, we propose incorporating indicators of conceptually relevant conditions within the sector itself, including the organizational ecology of higher education, the aggregate size and wealth of the sector, the interest-group activity of higher education, the legal bases of public universities, and the recent patterns of conflict over openness in public higher education.

Specifying these relationships directionally, future research might reasonably hypothesize the existence of policies mandating greater governmental openness (or policies mandating greater openness in the higher-education sector) in states where levels of urbanization, education, and income are higher; where the political ideology of a state's citizenry is more liberal; where levels of legislative professionalism are higher; where a well-organized and -resourced coalition of openness advocates exists; where party control of government is divided;<sup>40</sup> where one or more policy insiders (e.g., a governor or key legislator) have emerged as dedicated champions of open government; where a greater proportion of neighboring states have already adopted similar openness reforms; where the organizational ecology of higher education in a given state exhibits greater balance between two- and four-year institutions;<sup>41</sup> where higher education consumes a relatively smaller share of the state budget; where public colleges and universities have a history of relatively ineffectual lobbying of state officials; where flagship universities are statutory creations, rather than constitutional ones; and where there is an absence historically of high-profile conflicts over openness issues involving public higher education.

Admittedly, the directions of some of these relationships are speculative and the overall conceptual framework we have outlined (i.e., one

<sup>40</sup> Often it is theorized that, where different parties control the two branches of government, the incentives for legislatures to control executive agencies (e.g., enacting sunshine laws) are greater.

<sup>41</sup> Our premise is, because public bureaucracies (including public colleges and universities) in general prefer to function under less, rather than more, external oversight (e.g., rigorous sunshine laws), they might actively resist such oversight. Thus, we reason that systems where relatively autonomous, prestigious, well-funded research universities that have become politically engaged over openness issues are dominant are ones more likely to have resisted openness pressures.

grounded in the policy innovation and diffusion literature) is but one of several conceivable possibilities. Our suggestions, however, are aimed toward establishing a conceptually well-grounded starting point from which to address systematically the questions we raised at the beginning of this section, those aimed at enhancing generalized understanding of the sources of variation in openness policy across the 50 states.

#### HOW DO DIFFERENT OPENNESS ARRANGEMENTS INFLUENCE POLICY CHOICE—PARTICULARLY POLICY CHOICE IN HIGHER-EDUCATION AGENCIES AND INSTITUTIONS?

Sunshine laws were designed expressly for the purpose of influencing the behavior of public officials, namely, to reduce official misconduct and to increase the likelihood of decisions made in the public's "best interest." Yet very little is known empirically about how and to what extent openness influences policy choice. Precisely, how do environments characterized by more rather than less openness shape policymakers' incentives for choosing among various policy alternatives? More specifically, how does access by the public to the decision-making processes of public college and university governing boards influence board behavior on specific policies such as tuition and fee setting, access and admissions, or institutional expenditures? Phrased simplistically, how might openness matter in the adoption of specific board policies? For guidance on these questions, we look to several strands of research in public regulatory theory and principal-agent relations.

In his study of state public utility commissions, Berry (1984) sought to develop a *postcapture theory* of regulation to challenge the once-dominant notion that regulated groups over time tend to control the agencies first established to regulate them (see Bernstein, 1955). Berry's model of rate regulation by utility commissions was based on an assessment of the goals of commissioners, the characteristics of a commission, and the access by the public to agency deliberations. He argued that the principal pecuniary goal of regulatory commissioners is to "survive," meaning maintaining sufficient legislative and public support to remain in office for the duration of one's term. The chief nonpecuniary goal of commissioners involves setting rates consistent with the "cost-of-service principle," a policy widely viewed within the domain of utility regulation as constituting good public policy. Berry deduces, however, that these twin goals of commissioners—serving in office and making good public policy—are likely to vary across commissions depending on characteristics of a commission and of its environment.

With respect to the environment,<sup>42</sup> Berry hypothesized that two types of potential public intervention may influence regulatory rate setting. First, commissions face potential intercession on consumers' behalf from formal "intervenors"—often representatives of public interest groups. These consumer intervenors, argues Berry, can change the incentive structures within which commissioners operate. Because intervenors can impede the attainment of commissioners' survival goal by obstructing proceedings, it is in the interest of commissioners "to bargain with intervenors trading influence on regulatory policy for cooperation in moving proceedings along at a steady pace (p. 530)." Thus, in settings where intervenors are not present, the regulated firm is in a stronger position to bargain with the commission for higher electricity prices.

A second potential form of public intervention that may influence utility commission rate setting involves the presence of public observers at commission hearings. Building on the work of Wamsley and Zald (1973), Berry contends that public agencies subject to a high degree of scrutiny will be more responsive to their environments. In the case of public utility regulation, Berry notes that some states bar the public from commission proceedings, while other states permit public access. Some of the observers at open meetings are likely to be members of the press, whose coverage of proceedings is likely to create broader public exposure to commission decisions. Berry reasons that, the greater this exposure, the more likely regulatory decisions unfavorable to consumers (i.e., higher electricity rates) will prompt consumer engagement in the future. As a result, the survival goal of commissioners provides an incentive for commissions to make rate decisions more favorable to consumers when regulatory proceedings are open to the public than when they are not.

Berry analyzed the effects of these and other hypothesized relationships on the price of electricity established by state commissions using a cross-sectional data set and a multivariate model of the rate-setting process. His analysis revealed support for both of his openness hypotheses: (1) the presence of a consumer intervenor in regulatory proceedings affects the price of electricity established and (2) the extent to which regulatory commission proceedings are open to the public is inversely related to the price of electricity set by a commission.

Lowry's (2001) application of principal-agent theory (Calvert, McCubbins, and Weingast, 1989; McCubbins, 1985) to explain the tuition

<sup>42</sup>Berry also develops hypotheses about the importance of commission professionalism, which we have excluded from our discussion for the sake of space.

pricing and spending behaviors of public universities provides additional conceptual support for this general line of reasoning. Lowry hypothesized that statewide governance structures for higher education should help explain variation across states and systems because these institutional arrangements “affect the ability of different actors to influence decisions . . .” (p. 846). Lowry reasoned that *regulatory coordinating boards*—present in 21 states at the time of his study—are in effect extensions of elected officials’ capacity to supervise because either the state legislature or the governor appoints all the members of these boards. Because of this direct political control, Lowry hypothesizes that regulatory coordinating boards should behave in a manner more or less consistent with the preferences of elected officials (and of voters), namely, in the form of setting lower tuition levels and spending more on instructional and student services. Lowry suggests that other kinds of higher-education governance structures (ones without such direct political oversight) tend to institutionalize the preferences of faculty and administrators and, thus, lead to policies that are more or less consistent with the preferences of academic stakeholders, that is, higher tuition levels and lower spending on student and instructional services. Lowry estimated a series of models using data on 407 public universities for a single year, 1995. Consistent with his hypotheses, Lowry found that universities located in states with regulatory boards in fact charged significantly lower prices and spent more on student and instructional services. He attributed these differences to the greater political influence exercised over higher-education agency officials in states that practice the regulatory coordinating-board model.

Together, the Berry and Lowry studies—and the larger theoretical streams from which the studies flow—suggest how different openness arrangements may influence the incentives, and ultimately, the policy choices of public higher-education boards. The studies sensitize us to at least three key governance considerations: the trustees’ policy goals, the implications of different principal-agent relationships for trustee survival, and the role of public information and intervention in shaping board behavior. First, not unlike their counterparts in public utility commissions, individual members of public-university governing boards are likely to hold substantive policy goals. For example, board members personally may be more or less inclined toward the goal of maintaining relatively low tuition levels or of enhancing the research prestige of the institutions on whose boards they serve. Second, however, trustees’ adherence to these policy goals will likely vary depending on trustees’ assessment of

the threats to their own individual “survival” and that of their institutions. Members of governing boards, whether at the state level or at the level of the individual institution, are agents of the principals who appoint them. Often, these principals are governors. In a few states—Colorado, Michigan, New Mexico, Nebraska, Nevada—voters determine board membership directly in statewide elections (McGuinness, 1997).<sup>43</sup> Under either scenario, trustee survival depends on sustaining political and/or public support sufficient to permit them to keep their jobs. Thus, a third key consideration involves the impact of openness on trustees’ perceptions of the threats to their survival. One potential threat may be intervention by consumers (i.e., students, families, etc.) when public college and university boards pursue policies that are misaligned with consumers’ preferences. For many of the same reasons Berry outlined, we might expect the level of consumer intervention to vary across board settings depending on the degree of mandated openness that attends those settings. Where there is greater openness under law (i.e., greater access to board proceedings by the media and the general public), there is likely to be greater external scrutiny of board decisions, which may increase the threat of organized consumer reaction, as well as direct or indirect intervention by political elites, in the event of decisions deemed adverse to consumers’ interests. This increased threat of external intervention may drive college and university boards toward policy positions that are broadly popular with the public or with the elected officials; it may also militate, however, against boards taking positions that serve the public interest, yet are politically unpopular.

We might conclude, therefore, that openness “matters” in the governance of public higher-education institutions because varying climates of openness may differentially shape the incentives for decision making by individual trustees and, therefore, the policy choices of public higher-education boards institutions and agencies. Although the literature on regulatory policymaking provides other theoretical rationales for the behavior of public-sector boards (e.g., Gerber and Teske, 2000), we view this particular approach as especially useful because it affords researchers testable hypotheses with which to study openness effects on specific policies across different legal, political, and organizational settings.

<sup>43</sup> Until 1997, voters also elected members of the University of Illinois Board of Trustees. In some of the states we mention, popular elections cover only one (e.g., Colorado) or several universities (e.g., Michigan) within the state; the governor appoints membership of the governing boards of the other colleges and universities.

TO WHAT EXTENT DOES THE PURPORTED RELATIONSHIP BETWEEN  
OPENNESS IN INSTITUTIONAL GOVERNANCE AND PUBLIC CONFIDENCE  
IN HIGHER EDUCATION HOLD UP TO EMPIRICAL SCRUTINY?

Media officials, institutional leaders, board members, and legislators interviewed in the recent Hearn, McLendon, and Gilchrist study (2004) frequently asserted that mandated openness enhances public confidence in state-supported institutions. This claim echoes perceptions reported in earlier work on higher-education sunshine laws (Cleveland, 1985; McLaughlin and Riesman, 1985; Sherman, 2000), and closely parallels assertions made in support of state public-information laws in general during their era of institutionalization several decades ago (Cross, 1953; Open Meetings Statutes, 1962; Pupillo, 1993). The claim, however, lacks empirical evidence. That is, to our knowledge, public perceptions have never been studied in a way sufficiently systematic to support inferences about the effects of openness on public confidence.

Although the claim of a positive relationship may seem obviously true to supporters of sunshine legislation, might the reverse in fact be true? Might expanded openness diminish, rather than enhance, the public's trust in higher education? Organizational life, in any setting, can be unavoidably disorderly, conflicted, inefficient, and at times, dispiriting. In public higher education, faculty, staff, and students can and do fail their institutions and the public trust. Even if such failings are infrequent, their exposure to public view may not always be edifying and productive, especially if public distrust is high, public support is low, and public knowledgeable about the entire enterprise is limited. In such circumstances, direct access by citizens to the decision-making processes of public colleges and universities may inspire less, not more, trust.

Political scientists McCubbins (1985) and Clingermeyer (1991) have hypothesized that policymaker and public tolerance of secrecy (e.g., via laxness in openness legislation) may be greater in settings where uncertainties are low, suggesting that secrecy is efficient and acceptable to the extent a domain is seen as reasonably routinized and predictable, and not expected to produce controversies over decision-maker discretion. Similarly, in their review of the literature on trust in organizations, Mayer, Davis, and Schoorman (1995) suggest that the need for trust among different parties lessens as more information is provided. Absent enough information, trust is more needed.<sup>44</sup> Thus, prior research suggests that

<sup>44</sup>For more on the trust literature, also see Biley and Pearce (1998), Jones and George (1998), and Dirks and Ferrin (2001).

when uncertainties are low and information is high, openness may be viewed as less necessary by stakeholders.

Applying these views to higher education, one might surmise that, to the extent sunshine laws reveal more of the workings of higher education to the general public, making decision processes in that setting better known and understood, trust will be less demanded and more easily accorded institutions. That hypothesis is in keeping with the sunshine literature. It should be noted, however, that for sunshine legislation to be effective, stakeholders should have the “right” amount and kind of information (Rohrbaugh and Wehr, 1978). Perhaps certain amounts and kinds of information can lower rather than raise trust, in the manner that, when gossip columnists print specific facts about celebrities, readers eagerly but perhaps fallaciously generalize to broader attributions regarding the character of the celebrities.

The hypothesis of a positive relationship between openness and confidence should be subjected to empirical examination via a survey of citizens’ attitudes toward public higher education, using a sample of states stratified by their legal provisions for openness in public-institutional settings. With appropriate controls for confounding factors, and perhaps access to comparable surveys of media, legislators, and system officials as well, it would be possible to learn more about the nature of the connection between openness and public confidence.

#### UNDER WHAT CONDITIONS CAN SECRECY AND PRIVACY CONTRIBUTE TO EFFECTIVE DECISION MAKING IN HIGHER EDUCATION?

There is a robust literature in organizational theory (e.g., see Perrow, 1986) on how differing structural arrangements (rules, divisions of labor, reporting requirements, team composition, etc.) affect decision processes. Openness laws alter the dynamics of high-level decisions in organizations by turning what may naturally tend to be competitive, strategic discussions into what are at least in part theatrical performances for external constituencies. The higher-education decision makers and stakeholders interviewed by Hearn, McLendon, and Gilchrist (2004) varied in their views on the conditions under which information and deliberations should be kept in the “shade,” i.e., out of public view. This question has been little considered in higher education from a scholarly perspective, but theories and research on organizational decision making under varying conditions are potentially of use for understanding the implications of secrecy in different situations.

Organizational theorists have considered secrecy, privacy, and other information-flow issues as strategic factors in performance (e.g., see Stinchcombe, 1990). Economists have produced a robust literature on information as a factor in economic markets.<sup>45</sup> Theoretical economists term the problem of secrecy a matter of “asymmetric information,” i.e., a matter of two parties to a negotiation or transaction having different levels of knowledgeability about the issues at hand. For example, private and public colleges and universities compete aggressively for presidents and for funds of various kinds, and the information asymmetries involved in that public/private competition may have implications for effective governance in the public sector. To our knowledge, other scholarly fields’ theoretical and research perspectives on information asymmetries have not been considered in studies of higher-education governance.

Of course, the effectiveness of decision making is not an easy topic for analysis, but researchers could begin by assaying the domains protected under most states’ sunshine applications (e.g., real-estate transactions, business investments, personnel matters, security concerns, early stages of presidential searches) and then contrast the nature and fate of decisions in such domains across more open and more closed settings. For example, given that Florida’s robust laws do not protect discussions of real-estate issues from public scrutiny, analysts might study what price, if any, the state has paid for its openness, relative to other states facing similar matters. Although empirical analysis of such matters is daunting, the question is worthy of attention. The conventional wisdom is that limits on openness (i.e., allowing pockets of asymmetric information) are selectively warranted, but hard data on that assertion are entirely lacking. In keeping information symmetrical around such issues as real-estate transactions, Florida and some other states have selectively chosen to reject the conventional wisdom. The results of such choices merit empirical analysis.

The effectiveness of specific choices for restricted openness especially warrants attention. Eisenberg and Witten (1987) suggest that organization theorists and managers need to adopt a thoroughly contingent perspective on the utility of openness, evaluating its appropriateness neutrally situation by situation. The same point may apply to policy: the value of selective limits on openness to the public should be subjected to critical scrutiny, if only to ensure thorough consideration of what, ultimately, best serves the public good.

In this context, it may be important to think of openness laws as a kind of external control system on managers and leaders in higher

<sup>45</sup> Several recent Nobel Prizes in economics have been awarded in this area (e.g., Stiglitz, 2000).

education. Such a system can be studied as to its efficiency and effectiveness. Although research from this perspective is rare in higher education, it has been a frequent topic in the broader management literature. Walsh and Seward (1990), for example, examined the relative efficiency of internal and external control systems in corporate governance. Although internal controls are delivered by such mechanisms as incentive pay systems for managers, external controls are imposed via the vulnerability of managers to external takeover bids because of poor performance. The authors argue that the contrasting approaches each deliver distinctive benefits and costs, and are each appropriate in varying circumstances, but they generally view internal systems as more efficient. For them, external systems are best considered last resorts.

In universities under legally mandated openness, external as well as internal controls are salient daily. The constraints on strategic planning and management are far greater in public settings than in privately controlled settings, for example, and expectations and controls should be adjusted appropriately (Hearn, 1988; Perry and Rainey, 1988; Ring and Perry, 1987). Hostile takeovers occur more metaphorically than analogously to stockholder revolts. Obviously, the theoretical literature on external controls from a management-studies perspective would require adaptation for higher education—the analogies to corporate governance are strained. Nevertheless, the effort may be worthwhile.

Author: Ring and Perry (1985) has been changed to Ring and Perry (1987) as per the list. Please check.

#### IN WHAT WAYS ARE OPENNESS LAWS EVOLVING, AND WHY?

Analysts of sunshine statutes in settings beyond higher education have noted that the laws may be becoming so difficult to follow that true compliance is impossible. For example, Brehm and Hamilton (1996) reported that most violations of openness provisions in the arena of environmental protections were based on ignorance of the laws, rather than outright evasion of them. Hearn, McLendon, and Gilchrist (2004) reported similar confusion regarding higher-education laws in some settings. What is more, some observers have suggested that openness laws are weakening around the country, as exceptions are granted for increasing numbers of situations (e.g., Davis, 1994; Schmidt, 2001). In this evolving context, with the laws becoming more arcane and thus potentially more difficult to follow, is it possible that policymakers and leaders may begin to de-emphasize openness, or even abandon those statutes altogether? Our own empirical analysis suggests that it is too early to conclude that such a trend is currently underway, but the question remains valid: if the laws are not

being followed “on the street,” can the enduring longevity of the laws still be assumed?

Perhaps openness statutes are destined to become one of higher education’s transient “management fads.” Some similarities between the laws and the features of fads noted by Birnbaum (2001) are notable: most such laws were created in a time of perceived crisis (the Watergate era), and over time the founding narratives of openness against power have been refined, with some accompanying disillusionment. For example, a current counternarrative regarding sunshine laws is that they can ruin presidential searches, impede effective resource diversification, and generally reduce the competitiveness and quality of the public sector as compared with the private sector of higher education.<sup>46</sup> Another counternarrative developing in recent years is that the laws do not always “travel well” from other organizational sectors (e.g., public-works contracting) into higher education, with its loose coupling and its institutionalized professional norms favoring discretion and autonomy.

Of course, an important difference between the sunshine laws and the fads studied by Birnbaum is their origins—most of the fads noted by Birnbaum arose in the business context, while sunshine laws arose in state’s legal and political contexts. Fads arising in public domains may be fundamentally different from fads in management. Matters involving public trust are different from marginal changes in forms of institutional management. Yet, it seems important to examine conceptual linkages and differences between the organizational literature and the political innovation literature discussed at some length earlier in this chapter. Regardless of the extent the analogy to Birnbaum’s management fads holds, the life cycles of innovations in management may inform thinking about the life cycles of governance innovations. No governance feature remains unchanged over time, and the patterns of change in sunshine laws noted earlier are a topic of both theoretical and practical importance.

#### ANALYTICAL ALTERNATIVES IN THE DESIGN OF FUTURE OPENNESS RESEARCH

Because conceptualization and empirical testing go hand in hand, we devote this final section of the chapter to examining several types of designs for conducting future research on legally mandated openness in higher education, and discuss the merits and limitations of each alterna-

<sup>46</sup> See McLaughlin and Riesman and a variety of recent *Chronicle of Higher Education* articles.

tive. From a rigorous analytic perspective, ascertaining the benefits, costs, and ultimate governance effects of various implementations of sunshine laws in public higher education is difficult if not impossible. All 50 states have had sunshine laws of some kind in place for many years, so there is no clear-cut “control group” in the public sector. How, then, might comparisons among the states and the sectors and systems of higher education within them be leveraged in future research to improve our understanding of the effects of mandated openness?

Several analytic alternatives exist, and each should be explored in future work. Here, we briefly examine the potential usefulness of multi-state longitudinal and cross-sectional designs and single-state designs. In considering these alternative approaches, we discuss issues and problems associated with sample selection, data collection, and the generalizability of findings. Across each of the alternatives, we examine the appropriateness of systematic comparative inquiry. Too often, questions of research design devolve into stale recitations of the pros and cons of quantitative and qualitative approaches. Instead, we urge attention to creative use of a variety of methods aimed toward an intelligent comparison of governance under different openness conditions.<sup>47</sup>

Multistate designs have the advantage of greater generalizability across distinct settings. As numerous analysts have observed, the extent of substantive demographic, economic, social, and political differences across states is extraordinary (Gray and Hanson, 2004). For a study of higher-education governance in state postsecondary systems, in particular, we must consider as well the many differences among state postsecondary systems and policies. Potentially relevant elements of variation for such a study include the population size of the state, its total postsecondary enrollment and its breakdown among two and four institutions and the public and private sectors, the state’s total number of postsecondary institutions and its breakdown among two- and four-year institutions and public and private institutions, the nature of the state higher-education governance system, and, of course, the history and nature of the sunshine statutes in place in the state. States may even vary in the social and political “climate” surrounding openness—the Hearn, McLendon, and Gilchrist (2004) analysis found the level of underlying trust among different stakeholders (notably, the media and higher-education leaders) varies from state to state and shapes the nature of

<sup>47</sup> Ragin (1987) provides a useful review of productive approaches to comparative research, while King, Keohane, and Verba (1994) argue persuasively for the complementarity of qualitative and quantitative research designs.

interactions around openness issues. Interestingly, there can be substantial within-state variation around openness: for example, in California, mandated openness is substantially wider in the community-college system than in the University of California system. Obviously, a study of openness in one system in one state may have very little to suggest for openness policies and practices in systems in other states.

Yet interstate differences are not of the magnitude as to overwhelm the search for generalized understanding. Rather, the states share some basic social, economic, and political similarities. Thus, the 50 states represent a system of constrained variation that makes possible meaningful comparisons. Some attention to sampling to reflect the dimensions of variation, however, is essential if generalizability is a goal—multistate studies can address that need.

Two kinds of multistate designs are possible: longitudinal and cross-sectional. Without question, longitudinal designs provide many advantages, such as those we mentioned in our earlier conceptualizing of openness laws as a form of state policy innovation. Openness approaches vary appreciably across states in their stability and in the extent to which they have become institutionalized. A state's level of formalization of its openness statutes may increase in response to past episodes, for example. Only by examining openness issues over time can analysts begin to understand the origins, effects, and costs of particular policy moves and approaches. Additionally, one of the distinct advantages of the longitudinal analytic techniques that policy scientists have incorporated into the field in recent years (e.g., pooled cross-sectional time-series analysis and event history analysis) is that they represent improvements over cross-sectional designs in the inferences that can be drawn from a 50-state sample. As we noted previously, however, use of these techniques can impose heavy data-collection burdens. Collecting comprehensive data on a wide range of theoretically relevant indicators at the campus, system, and state level over time may be impracticable in many instances.

Multistate, cross-sectional designs are usually more feasible, and therefore are prevalent among contemporary quantitative studies of state policy change. In such studies, analysts hope that data from interviews, documents, or databases will provide a usable profile of a state's openness context. Designs of this kind can range from cursory review of public documents in a set of states, without actual contact with state leaders and citizens, to in-depth surveys and interviews, document review, and data analysis. Data collection and analysis for these more ambitious cross-sectional designs can be logistically complex, financially burdensome,

and labor-intensive. To the extent such designs are feasible, however, the benefits can be substantial. In such projects, for example, it is possible to integrate some historical data and information into the work. In particular, while respondents' recollections of past actions and perceptions for an interview or survey are never unassailable as research resources, such recollections can be useful additions to purely contemporary or archival data.

Even at their most ambitious, however, multistate designs can be subject to the criticism of insufficient depth. Attempting to draw conclusions on predetermined conceptual dimensions across states may sacrifice what is most important about the context of a particular state. In contrast, truly in-depth exploration of a single state—either through qualitative or quantitative focused analysis—can provide richer, more grounded, and better-contextualized information (Nicholson-Crotty and Meier, 2002). For example, analysts and policymakers in a state, especially a larger state with substantial “data” around such openness issues as presidential searches, may find important locally useful returns to pursuing analysis in that state alone.

Single-state designs can take several forms. In states with an adequately rich supply of institutions, comparisons of governance-related processes and outcomes between otherwise similar public and private institutions can be fruitful; in such settings, private higher education may serve as an ideal control group for purposes of comparison with public-sector institutions. Such comparisons permit analysis of the impacts of mandated openness among institutions that are roughly similar in mission, size, complexity, and resource base but that differ in their fundamental legal obligations to openness. Perry and Rainey (1988) provide a useful overview of empirical studies comparing public and private organizations within similar functional categories (e.g., schooling, service provision) and suggest directions for future research in this vein. One of the most cited educational studies they include is Chubb and Moe's (1990) article reporting comparatively on the organizational perceptions of administrators and teachers in public and private K-12 schools. In a given state, a survey or interview design might similarly untangle differences across the public and private postsecondary sectors. Of course, the missions of private institutions rarely emphasize the public good and the investment of state resources in that sector is far lower. Caution in inferences is essential. Still, private higher education operates outside of the purview of sunshine laws,<sup>48</sup> and comparing governance activities,

<sup>48</sup> A recent court ruling (Hoover, 2004) may extend openness laws into private higher education.

such as board effectiveness, communication, and development patterns or presidential selection processes, in the two sectors may well be worthwhile.

Comparisons across public systems within individual states can also be fruitful. As noted earlier, systems within states sometimes vary in the openness laws affecting them. For example, in California, Michigan, and Minnesota, states with a constitutionally autonomous flagship institution, the research-university sector is immune from some of the openness requirements in place in the state-university and community-college systems. Different sectors in public higher education tend to have significantly different personnel, students, missions, and funding, and those differences can compromise analysis. Nevertheless, comparisons across systems within given states have the distinctive advantage of “controlling for” differences in state politics, history, and culture. It seems appropriate to examine within-state differences in openness regimes. Like some comparisons across states, analysis of this variation may provide grounds for generating productive directions for analysis and policy consideration.

Another within-state approach to analysis is the examination of governance change over time. Of special interest would be comparing institutional processes and outcomes before and after a reform in openness statutes. Recent changes in the application of state sunshine laws to higher-education institutions may provide researchers opportunities to examine how such reforms as the shielding from public view of donor records or the names of applicants in presidential searches might influence various dimensions of institutional governance. By comparing the experiences of institutions before and after a change in state law, analysts may be able to discern the ground-level implications of state-level policy changes. Obviously, analysts should treat cautiously the findings drawn from pre- and postreform comparisons involving a single institution or state. Regardless, however, such studies might contribute useful insights on the governance influences of various kinds of policy changes.

Analyses such as those outlined above each make sense as feasible avenues to greater understanding of the costs, benefits, and effects of various forms of openness. Unlike many topics in higher-education studies, mandated openness is a significant concern among large numbers of stakeholders, including students, faculty, administrators, boards, the press, elected officials, and the larger public. Given the absence of much systematic empirical and conceptual work on the topic, a variety of research design options merits consideration.

## CONCLUSION

Openness in governance, upon systematic study, is both widely shared as a public value and hotly disputed in its application. Higher-education leaders honor its tenets in the abstract, and debate its proper extensions to their day-to-day work. This duality cannot be condemned, for it is fully in keeping with the ambiguities of our democracy itself, as noted in the opening passages of this chapter. Can leaders both cherish openness and work energetically to limit its scope? Clearly, they can and do. In an essay such as this, we can only attempt to delve deeper into the workings of what seems, to current eyes, an archetypically American problem.

Secrecy often carries negative connotations of deception and misdeed, but such analogies are facile. In business, for example, the skillful feint as well as the artful use of information unavailable to others are more often accepted and admired than condemned and criminalized. The cutting point for the distinction between socially legitimate and illegitimate withholding of information lies in the law, as one would hope and expect. For example, for commodities and securities markets to operate properly, the law requires certain domains of full disclosure and proscribes certain forms of deception. At the same time, patents, licenses, business plans, and marketing information may be withheld from the public. In public affairs, however, the distinctions between legitimate and illegitimate secrecy are murkier. As noted earlier, concealed policy deliberations were the norm throughout much of the U.S. history, and public leaders later deemed “great” by historians (e.g., Thomas Jefferson, Franklin Roosevelt, John Kennedy) maintained governmental and personal secrets of palpable public significance. Would those secrets’ revelation during the leaders’ lives have better served the public good? Likewise, while sunshine laws most assuredly have helped stanch malfeasance in some settings, the laws have had unintended negative consequences for public deliberation and decision making in many other settings. Thus, while there are reasonable objectives at the heart of the laws that promote transparency in government—and in higher education—there are also reasonable boundaries to such transparency. In doing the public’s business, what is best revealed and what is wisely kept confidential? What should be exposed and what should be allowably secret?

Our review of mandated openness in higher education portrays an uncertain and evolving answer to these questions. Variations by domain, timing, and context abound, and only limited generalizations are currently possible. It may be best to think of the notion of allowable secrets

as a social construction subject to ongoing revision. Openness laws are products of an evolving social consensus, reflecting it imperfectly but undeniably. The social construction of allowable secrets, the laws that reflect that construction, and the day-to-day and longer-term effects of the laws on higher education each compose compelling territory for further investigation.

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