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À PROPOS DE NOUS

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ABOUT US

The **International Journal of Open Governments / Revue Internationale des Gouvernements ouverts (RIGO)** is an academic journal created and edited by Irène Bouhadana and William Gilles at IMODEV, the Institut du monde et du développement pour la bonne gouvernance publique.

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ENTITLEMENT TO PUBLIC RECORDS: BEYOND CITIZENSHIP

by **Bernard W. BELL**, Professor at the Rutgers Law School-Newark.

Nations across the globe have enacted government transparency laws,¹ potentially enabling people to learn what those governments are “up to.”² Such laws require governments to provide official documents upon request, albeit often with major exceptions allowing the government to withhold or redact many documents. Scholars have devoted much attention to analysis and assessment of these exceptions and the enforcement mechanisms for holding a government to its transparency obligations. But one conceptually significant question has received scant attention – who should be entitled to demand records under such transparency laws? The statutory answer to this question is far from uniform; indeed, on this issue transparency statutes can differ quite dramatically. Within the United States, some state governments reserve the right to request records to their own citizens.³ A few even bar segments of their citizenry, such as incarcerated felons, from invoking their freedom of information laws.⁴ Internationally, India limits access to its own citizens.⁵ By contrast, the Freedom of Information Act governing access to United States Government records, allows any non-foreign-state requester to obtain records.⁶ The European Union (“EU”) and Canada appear to adopt a middle ground that focuses on “physical presence” so that not only citizens, but permanent residents, can access government records.⁷

¹ See, Roger Vleugels, *Overview of All FOI Laws*, Fringe Special (Sept 30, 2012), accessible at: <http://freedominfo.org/documents/Fringe%20Special%20-%20Vleugels2012oct.pdf> (last accessed Jan 28, 2015). Eighty-six on the ninety-three national FOIA laws have been adopted since 1980.

² EPA v. Mink, 410 U.S. 73, 105 (1973)(Douglas, J., dissenting)(quoting Henry Steele Commager, *The Defeat of America*, THE NEW YORK REVIEW OF BOOKS, Oct. 5, 1972, at 7).

³ ALA. CODE §36-12-40 (Alabama); ARK. CODE ANN. §25-19-105 (Arkansas); MONT. CODE ANN. §2-6-102 (Montana); N.H. REV. STAT. ANN. § 91-A:4(I) (New Hampshire); TENN. CODE ANN. §10-7-503(2)(a) (Tennessee); VA CODE ANN. § 2.2-3704(A) (Virginia).

⁴ Five states, Louisiana, Michigan, Texas, Virginia, and Wisconsin, bar felons from seeking records. Louisiana precludes minors from making such requests. LA. REV. STAT. ANN. §44:31(B)(1). Wisconsin excludes persons involuntarily committed to mental facilities from invoking the state’s public records law. WIS. STAT. ANN. § 19.32(3).

⁵ The Right of Information Act of 2005, § 3 (“[s]ubject to the provisions of this act, all citizens shall have the right to information”).

⁶ 5 U.S.C. § 552(A)(3)(a); see, e.g., *Stone v. Export-Import Bank*, 552 F.2d 132 (5th Cir. 1977), cert. denied, 434 U.S. 1012 (1978). In 2002, Congress amended FOIA to preclude foreign governments or their representatives from seeking records from intelligence agencies. 5 U.S.C. § 552(a)(3)(E); see, *All Party Parliamentary Group on Extraordinary Rendition v. U.S. Department of Defense*, 754 F.3d 1047 (D.C. Cir. 2014). So even foreign-state requesters can seek records other than intelligence records.

⁷ Regulation (EC) No.1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, 2001 O.J. (L 1049) 145, 43 – 48; Access to Information Act, R.S.C. 1985, c. A-1 § 4(1). However, one set of authors has reported that the EU’s Commission and the Council, in their implementing rules, extend the right to all natural and legal persons. CYNTHIA R.

A recent United States Supreme Court decision provides an occasion to reconsider this aspect of FOI law.⁸ In *McBurney v. Young*, two U.S.-citizen non-residents of Virginia challenged Virginia's limitation of the right to obtain state documents to its citizens as a violation of their federal constitutional rights.⁹ The case drew considerable attention from a broad range of *amici curiae*. Yet the Court found the case quite easy, unanimously ruling that state governments could constitutionally limit access to their records, precluding even U.S. citizens domiciled in sister states from obtaining state records. In effect, a state can consider the right to request state records, like the right to vote, a defining attribute of state citizenship that makes membership in the polity unique. The Court relied heavily on the conventional foundation for FOI laws, namely that such statutes enable the citizenry, the ultimate sovereign, to control their government. Only members of the sovereign are entitled to call their government to account.¹⁰ The conception of FOI laws the Court thus embraced is not the only plausible one. Several premises might underlie FOI laws; they can be identified as the *popular sovereignty*, *federal structural*, *individual entitlement*, *instrumental*, and *economic* premises. Each of the last four conceptions would expand the right of access to documents beyond the citizenry. This paper explores each of the five conceptions of FOI laws and their implications for non-citizen and non-resident access to public information.¹¹

§ 1 – MCBURNEY V. YOUNG AND POPULAR SOVEREIGNTY PREMISE

Virginia's Freedom of Information Act ("VFOIA") allows only Virginia citizens to access government documents. Rhode Islander Marc J. McBurney attempted to obtain documents from the

FARINA, SIDNEY A. SHAPIRO, & THOMAS M. SUSMAN, ADMINISTRATIVE LAW OF THE EUROPEAN UNION: TRANSPARENCY AND DATA PROTECTION 87 (2008).

⁸ Perhaps many have considered this question unimportant, assuming it is easy to find a citizen surrogate willing to request the desired records. However, the FOI process often requires some collaboration between the requester and the agency. A requester may need to decide whether to agree to the narrowing of the search parameters. The requester can also seek the requested records in a particular format, 5 U.S.C. § 552(a)(3)(B), sometimes requiring some collaboration with agency officials, see *Public.Resource. Org v. U.S. Internal Revenue Service*, – F. Supp. 2d –, 2014 WL 2810499 (N.D. Cal. 2014). Finally, the surrogate may have to be willing to sue in order to contest government decisions withholding the documents. All this complicates using a surrogate to seek records.

⁹ *McBurney v. Young*, – U.S. –, 133 S. Ct. 1709 (2013).

¹⁰ The concept of citizenship itself has become a topic of active scholarly discourse, see Dominique Leydet, *Citizenship*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed. Spring 2014 Edition), accessible at:

<http://plato.stanford.edu/archives/spr2014/entries/citizenship/>;

Linda Bosniak, *The Citizenship of Aliens*, 56 SOCIAL TEXT 29 (Autumn 1998).

However, the question of who is entitled to citizenship, the usefulness of the concept in light of globalization, and the general meaning of citizenship are beyond the scope of this paper. Defining citizenship more expansively will not resolve the issues regarding access to documents raised in this paper.

¹¹ I will not discuss first-party access provisions, which allow people to access their own files; non-citizens' access to such records stands on much firmer ground. Even in *McBurney v. Young*, the Court acknowledged that state governments have to make a record available to the subject of the record. 133 S. Ct. at 1717-18.

Virginia Division of Child Support Enforcement regarding its nine-month delay in collecting child support from his ex-wife, a Virginia resident. Californian Robert Hulbert sought real estate tax assessment records from a county assessor's office.¹² Hulbert, doing business as Sage Information Services, has obtained state and local real estate tax records across the United States. McBurney's and Hulbert's requests were denied due to their nonresident status. Hulbert appears never to have resided in Virginia. McBurney may not have either; at the time of the records request his only connection to Virginia appears to have been his need for a state agency to secure his wife's compliance with a child support order.

Plaintiffs alleged that Virginia's citizens-only provision violated the Privileges and Immunities Clause in Article IV of the U.S. Constitution, which provides that "the Citizens of each State shall be entitled to all Privileges and Immunities of citizens in the several States."¹³ The federal trial court rejected the claim; the appellate court affirmed. Another influential federal appellate court had previously held just the opposite, in *Lee v. Minner*, invalidating Delaware's citizen-only provision.¹⁴

The U.S. Supreme Court, in an opinion by Justice Samuel A. Alito, held that a non-resident's access to government information was not protected by the Privileges and Immunities Clause. He explained that the Clause "protects only those privileges and immunities that are either 'fundamental,' or 'basic to the maintenance or well-being of the Union.'" He noted that VFOIA had been enacted to "ensur[e] the people of the Commonwealth ready access to public records,"¹⁵ and thus functioned as a means by which those who ultimately hold sovereign power (namely the citizens of the Commonwealth) could demand an accounting from the public officials to whom they have delegated its exercise.¹⁶ Distinguishing citizens from non-citizens served that purpose. For good measure, Justice Alito added that the citizens-only provision recognizes that Virginia taxpayers bear the fixed costs related to government recordkeeping (and, presumably, of responding to FOI requests).¹⁷

The principle that the legitimacy of government rests on the sovereignty of its citizens is well established.¹⁸ And the public's ability to access governmental information is closely related to the citizenry's ability to exercise its ultimate power as sovereign. As

¹² Generally state FOI laws govern access not only records held by state government agencies, but also records held by subdivisions of the state, such as municipality or county governments.

¹³ U.S. CONST., art. IV, § 2, cl. 1.

¹⁴ *Lee v. Minner*, 458 F.3d 194 (2006). Indeed, after *Lee v. Minner*, the small number of states with citizen-only provisions dwindled even further, see, e.g., 2012 GA. LAWS 218, § 2, amending Ga. Code Ann. §50-18-70 (2012).

¹⁵ *McBurney v. Young*, 133 S. Ct. 1715 (quoting Va. Code Ann. § 2.2-3700(B)).

¹⁶ *Id.* at 1716 (quoting *See* VA. CONST., Art. I, § 2; Va. Code Ann. § 2.2-3700(B)).

¹⁷ *Id.* at 1716. Of course Virginia *taxpayers* and Virginia *citizens* are not co-extensive groups.

¹⁸ See Bernard W. Bell, *Legislative History Without Legislative Intent*, 60 OHIO ST. L.J. 1, 10 (1999). I have based a legislative duty to explain statutes at least partially upon this citizen sovereignty conception. *Id.* at 11-18.

James Madison, a principal framer of both the U.S. Constitution and the Bill of Rights, observed: “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.”¹⁹ State FOI laws frequently include statements of purpose asserting that they embody the right of the citizenry to demand information from those to whom they have delegated the power to govern. They reflect the judgment that access to government records enables the citizenry to monitor and control the government officials who wield power in their name.²⁰ For example, the preamble to Oklahoma’s FOI declares:

As the Oklahoma Constitution recognizes and guarantees, all political power is inherent in the people. Thus, it is the public policy of the State of Oklahoma that the people are vested with the inherent right to know and be fully informed about their government... The purpose of this act is to ensure and facilitate the public’s right of access to and review of government records so they may efficiently and intelligently exercise their inherent political power.²¹

Though the Oklahoma statute rests exclusively on the concept of popular sovereignty, the statute does not limit FOI rights to the state’s citizenry or its electorate. Indeed, many states that allow out-of-staters to use their FOI statutes explicitly ground their statutes in citizen sovereignty.²²

At least some FOIA laws outside the United States appear to set forth a citizen sovereignty premise as well. However, their provisions for who can demand government documents do not embody exclusive reliance on that premise; the range of individuals entitled to request records under such laws is broader.²³ Many national FOIA laws do specify that records shall be available to all citizens, implicitly recognizing the popular sovereignty conception. However, in separate, but associated, provisions that right is extended to at least some categories of non-citizens, transcending the popular sovereignty conception.²⁴

¹⁹ Letter from James Madison to W.T. Barry, Aug. 4, 1822, 9 THE WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed., 1910).

²⁰ This reflects the classical role of the citizen in republican theory. See Leydet, *supra* note 10, at § 2.1.

²¹ Okla. Stat. Ann. tit. 51, § 24A.2. *Accord* Tex. Gov’t Code Ann. § 552.001; Haw. Rev. Stat. § 92F-2; 5 Ill. Comp. Stat. Ann. 140/1; N.Y. Pub. Off. Law § 84; S.C. Code Ann. § 30-4-15; Vt. Stat. Ann. tit. 1, § 311.

²² For example, neither Hawaii, Illinois, New York, South Carolina, Texas, nor Vermont, the states whose FOI statute’s preambles are cited above, have citizens-only provisions.

²³ See Official Information Act of 1982, Pub. Act 1982 § 156 (17 Dec 1982) (“The purposes of this Act are ... (a) to increase progressively the availability of official information to the people of New Zealand in order – (i) to enable their more effective participation in the making and administration of laws and policies; and (ii) to promote the accountability of Ministers ... and officials”); Regulation (EC) No.1049/2001, *supra* note 7, 2 (“Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system.”).

²⁴ For example, the FOI laws of New Zealand, the European Union, Yemen, Thailand, and Bulgaria follow such a structure.

Ironically, even the Commonwealth of Virginia fails to consistently follow the implications of the popular sovereignty premise. VFOIA not only covers requests to state agencies, but also requests to subdivisions of the state (such as municipalities), each with its own distinct citizenry entitled to exercise popular sovereignty within that jurisdiction. Yet VFOIA contains no provision precluding Virginia citizens who have no connection to a particular Virginia municipality from invoking VFOIA to obtain documents from the municipality.

If the right to demand information embodies the right of the ultimate sovereign, “the people,” to call their government to account, as the citizen sovereignty premise suggests, demanding information is an exercise of sovereign power. The power to make such a demand is, in effect, a constitutive right, one that defines the *demos* by defining its membership.²⁵ Some “political rights” may need to be held exclusively by the citizenry so that the people can engage in self-determination. Voting is one such right,²⁶ as perhaps are holding political office and poll watching.²⁷ But should obtaining government information be one of these constitutive rights deemed necessary for self-determination? It is not at all clear that it must be. As the Court explained in *Lee v. Minner*, “because information is not a diminishing resource, there is no risk that permitting noncitizens to access public information will impair a citizen’s ability to do so as well.”²⁸

Indeed, the U.S. Supreme Court would likely view out-of-staters’ right to make financial contributions to political campaigns as warranting greater constitutional protection than their right to obtain public information.²⁹ This seems odd from the perspective of protecting the *demos*’ interest in self-determination. True, such contributions might well enable candidates to engage in more electoral speech that arguably

²⁵ *Lee v. Minner*, 458 F.3d at 201, n.5 (“the only justification we can see for imposing an absolute bar to noncitizens’ access to information is that the very act of exclusion creates a sense of identity among Delaware citizens”); *id.* at 200 (“Delaware’s purported reason for restricting access to information under its FOIA is to ‘define the political community and strengthen the bond between citizens and their government.’ ... The public record law, the State contends, is an ‘extension of the right to vote.’”)

²⁶ *Lee v. Minner*, 369 F. Supp. 2d at 535 (“it is generally accepted that a State has an interest in limiting voting rights to its residents and to define its political community”). Ironically, aliens were permitted in many states during the early Republic. Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1397, 1399-1406 (1993); the move to systematically bar aliens from voting began only in the early 1900’s, *id.* at 1415-17.

²⁷ See *Bernal v. Fainter*, 467 U.S. 216, 221 (1984) (states can limit certain high political offices to citizens); Allison R. Hayward, *Election Day at the Bar*, 58 CASE W. RES. L. REV. 59, 67 (2007) (noting various states’ requirements that poll watchers be electors from the relevant political subdivision or precinct). In New Zealand, the right to contest election results is limited to citizens qualified to vote and candidates. Electoral Act of 1993, § 230(1) (N.Z.).

²⁸ 458 F.3d at 201 n.5.

²⁹ Of the three state bans or limits on out-of-state campaign contributions that have been reviewed by the federal courts, two have been invalidated. See *VanNatta v. Keisling*, 151 F.3d 1215 (9th Cir. 1998) (overturning Oregon provision); *State v. Alaska Civil Liberties Union*, 978 P.2d 597 (Alaska 1999) (upholding Alaska provision); *Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2002), *rev’d on other grounds*, *Randall v. Sorrell*, 548 U.S. 230 (2006) (invalidating Vermont’s provision).

benefits voters, while not diluting citizens' voting power.³⁰ However, there are real reasons, in terms of perception and reality, that the citizenry may find it rights to self-determination undermined by such contributions. Such contributions might well allow incumbents to amass huge "war chests" funded primarily by non-constituents that discourage, indeed virtually preclude, any serious potential challenger from running against the incumbent, thereby limiting the electorate's choice of candidates.³¹ Such a result certainly undermines the citizenry's right of self-determination. Moreover, citizens' perceptions that their representatives may be financially-beholden to non-citizens for their election are quite reasonable.³² Such financially-beholden representatives have incentives to support the policies preferred by their funders over those preferred by their constituents.

Even if we should reject the popular sovereignty premise as a basis for refusing non-citizens' document requests, perhaps it justifies a fee differential for citizen and non-citizen requesters. Though government agencies charge fees for the production of documents, the fees are generally insufficient to cover all the associated costs; therefore, governments are subsidizing such requests for such information.³³ Perhaps, given their role as members of the *demos*, citizens should be subsidized whereas others should not. The tuition structure of public colleges and universities may offer an analogy. Many states have established different in-state and out-of-state tuition rates at state colleges and universities to subsidize their citizens' cost of obtaining a higher education.

That said, citizen requests may not be the most useful in terms of informing the public about government activities, as we shall see below. In addition, of course, many non-citizens support the government through their payment of income taxes, property taxes, sales taxes, or other types of levies. In short, it is not clear

³⁰ While greater contributions may mean more candidate speech directed at constituents through mass communications, it may mean much less personal give-and-take interactions with voters, as candidates are occupied with meeting with donors to raise funds for media buys. See, Mark C. Alexander, *Let Them Do Their Jobs: The Compelling Government Interest in Protecting the Time of Candidates and Elected Officials*, 37 LOY. U. CHI. L.J. 669, 678–79 (2006).

³¹ See Jamin B. Raskin & John Bonifaz, *Equal Protection And The Wealth Primary*, 11 YALE L. & POL'Y REV. 273, 279–80, 287–98 (1993) (arguing that a "wealth primary," which precedes any voting prevents candidates lacking personal wealth and affluent backers from competing for office," thus "sharply reduc[ing] voter choice").

³² Since 1974, Congress has generally precluded foreign contributions from both federal and state elections, though it has allowed long-term residents to make such contributions. Pub. L. No. 94-283, tit. I, § 112(2), 90 Stat. 475 (1976). (codified at 2 U.S.C. § 441e). Indeed, this prohibition became the center of a contretemps over the Court's decision in *Citizen's United v. FEC*, 558 U.S. 310 (2010), when President Obama, in his State of the Union Address, accused the Court of permitting foreign participation in U.S. elections, and Justice Alito, in response, visibly shook his head and mouthed "not true."

³³ 2 Harry Hammitt, *Privatization: Its Impact on Public Records Access* 8 available at: http://www.nfoic.org/sites/default/files/hammitt_privatization.pdf ("the cost recovery for furnishing government information is limited to the actual cost of furnishing the information – the cost of copying and a pro-rated hourly fee for staff time to search and copy records – and is not intended to recapture costs such as overhead or employee benefits"); N.C. GEN. STAT. ANN. § 132-1(b) ("it is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost").

that requests for public documents should be considered a political act akin to voting, and arguably the citizen sovereignty conception should not be embraced as the exclusive basis for FOI laws.

§ 2 – THE FEDERAL STRUCTURAL PREMISE

The U.S. Constitution’s framers conceived of a federal system in which two distinct sovereigns exercised authority over the same territory. The success of their vision has led to the creation of federal structures in many nations, as well as the creation of a similar structure in the EU.³⁴ Under some federal systems a person harmed by one level of government can appeal to a higher level of government for protection.³⁵ Such an appeal is possible only if the individual can obtain information regarding what the lower level of government “is up to.”

In the United States, state governments exercise plenary powers and the national government, though paramount, exercises only limited, enumerated powers. One of the powers, indeed perhaps even an obligation, of the national government is to ensure that state governments do not deprive state citizens or others interacting with state governments of “life, liberty or property without due process of law” or “the equal protection of the laws.”³⁶ Similarly, in the EU national governments maintain sovereignty within their borders, but submit themselves to control by the EU in certain respects.³⁷ For example, Article VII of the Treaty on European Union empowers the EU to address a member nation’s breaches of human dignity, freedom and equality.³⁸

The *McBurney* Court failed to acknowledge the dual sovereignty implications of FOI laws, leading it to ignore the critical role that state FOI laws play in out-of-staters’ appeals to the national government to intervene to protect them from states. States may impact U.S. citizens or long-term permanent residents who are not citizens of the state. Some out-of-staters may act in ways that subject themselves to the jurisdiction of the state, especially if they reside in the state temporarily (without desiring to abandon citizenship in their “home” state).³⁹ They may own property in the state, subjecting themselves to state and local laws regulating the use of such property and an obligation to pay taxes to state and

³⁴ See Ronald L. Watts, *Comparing Federal Systems* (3rd ed. 2008).

³⁵ See *id.* at 165-66 (discussing role of national governments in protecting regional minorities from regional majorities).

³⁶ U.S. CONST., amend XIV, §§ 1, 5.

³⁷ I acknowledge the great variety of federal systems, but will focus on federalism in the United States. The analysis, however, should be relevant to other federal systems.

³⁸ Consolidated Version of the Treaty on European Union, art VII, 2-3, 2008 O.J. C 115/13. (permitting the EU Council after obtaining consent of the EU Parliament to declare that a nation is in “serious and persistent” breach of the values of Article II, namely “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights,” and thereupon suspend certain rights the member state enjoys under the EU Treaty).

³⁹ Because “domicile” determines state citizenship, long-term sojourners who are U.S. citizens might be considered residents of the state in which they have taken up long-term residence. U.S. CONST., amend XIV, § 1.

local authorities.⁴⁰ They may hold a professional license in the state which may subject them to the jurisdiction of state licensing authorities, perhaps not solely while engaging in their profession within state bounds.

Moreover, states laws, regulations, and other actions can have extraterritorial effects. Just three years ago, Massachusetts' lax regulation of compounding pharmacies resulted in the shipment of tainted medications to retail pharmacies in 20 states, thereby leading to the infection of 751 people, 64 of whom died.⁴¹ Ironically, none of those infected lived in Massachusetts. Similarly, some state policies regarding firearm purchases have significant impacts in other states, because purchasers can transport those guns to other states.⁴² Indeed, even if a state wished to limit the extraterritorial effects of its regulation, by prohibiting interstate transportation of such products, the U.S. Constitution would bar it from doing so. In *Lee v. Minner*, the court noted that Delaware's preeminence as a place of incorporation for companies located across the nation meant that its law governed the relationships between the various stakeholders in corporations across the country.⁴³

Thus, the Supreme Court's unanimous opinion seems wrong even in terms of the Privileges and Immunities Clause standard it sought to apply. Information about what states are "up to," regardless of the requester's state citizenship, is critical to the maintenance and well-being of the Union – most particularly the federal government's role as a counterbalance to the states.⁴⁴ It is also, surely, a corollary of the right to petition the federal government.⁴⁵

Moreover, many important U.S. policy issues are decided by the states, which often function as "laboratories for experimentation."⁴⁶ Thus, information regarding state policies is important for the nation as a whole, and is a critical component of an ongoing national dialogue regarding important public issues.⁴⁷

⁴⁰ In many state a significant portion of local government revenues come from property taxes. See Tax Policy Center, Local Property Taxes as a Percentage of Local Revenue (Jan. 12, 2015), accessible at: <http://www.taxpolicycenter.org/taxfacts/displayafact.cfm?Docid=518> (last accessed Feb. 7, 2015).

⁴¹ Centers for Disease Control and Prevention, "Multistate Outbreak of Fungal Meningitis and Other Infections – Case Count," accessible at: <http://www.cdc.gov/hai/outbreaks/meningitis-map-large.html> (last accessed Feb. 5, 2015).

⁴² See, e.g., D.W. Webster et al., *Relationship Between Licensing, Registration, and Other Guns Sales Laws and the Source State of Crime Guns*, 7 INJURY PREVENTION 187 (Sept. 2001) (in a sample of cities with the strictest gun laws, only 33.7 guns used in crimes came from in-state sources).

⁴³ *Lee v. Minner*, 369 F. Supp. 2d at 534 ("As the 'corporate home' for thousands of corporations in the United States, Delaware's regulations have nation-wide political and economic impact."); *Lee v. Minner*, 458 F.3d at 199.

⁴⁴ THE FEDERALIST No. 51 (James Madison) (Clinton Rossiter ed., 1961) ("a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.")

⁴⁵ U.S. CONST., amend I.

⁴⁶ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

⁴⁷ Brief for Judicial Watch, Inc. and Allied Educational Foundation as Amici Curiae Supporting Petitioners at 12-14, *McBurney v. Young*, 133 S. Ct. 1709 (2013) (No. 12-17), 2013 WL 75283 ("Public records ... also provide valuable information for researchers,

At the very least this federal structural premise expands the relevant citizenship, from state citizenship to national citizenship. Indeed, perhaps access to each states' public records is a privilege and immunity of *national* citizenship protected under section 1 of the Fourteenth Amendment to the U.S. Constitution, and is therefore enforceable by Congress.⁴⁸ After all, one privilege of national citizenship is the right to petition the councils of the federal government for assistance, without interference from the states.⁴⁹ The existence of this privilege suggests that the Supreme Court should set minimum standards for access to state information, rather than merely enforcing a principle that out-of-staters have the same access as in-staters – the argument made by petitioners in *McBurney*. Ultimately, given that all people, not just U.S. citizens or aliens, are entitled to federal protection from state tyranny, this premise expands the right to demand information beyond the citizenry, state or national, and encompasses anyone entitled to federal protection.

§ 3 – THE INDIVIDUAL ENTITLEMENT PREMISE

The individual entitlement premise is grounded in respect for individuals affected by government actions. Many non-resident non-citizens may feel the sting of a government's actions. Among them, as noted above, are non-residents who own real property, hold a professional license, or pay taxes in the jurisdiction. Even those maintaining a lesser connection with the state may be affected by its policies, given the interrelationships between political jurisdictions (nationally and internationally) and increasing economic integration.

The right to self-determination suggests that certain acts, like the right to vote and the right to hold high public office, may be limited to citizens. However, even those who have no right to vote or become public officials should be entitled to (1) know why they have been treated as they have, (2) assure themselves that they have been treated equally, and (3) appeal to the citizenry for assistance in changing applicable laws or government policies. Access to government information may well be essential for accomplishing each of these goals.⁵⁰

As human beings entitled to basic respect, people affected by government action are entitled to understand the reason for their treatment.⁵¹ As theorists Mortimer and Sanford Kadish explain:

social scientists, policy advocates, and think tanks wishing to analyze state and local government in comparative perspective”).

⁴⁸ U.S. Const., amend XIV, §§ 1, 5.

⁴⁹ *Slaughter-House Cases*, 83 U.S. 36, 79 (1872). While the Court ruled that the privileges and immunities of national citizenship protected by the Fourteenth Amendment were quite limited, one such right was the right “to come to the seat of government ... to seek its protection.” *Id.*

⁵⁰ Some theorists argue that impact alone should be sufficient to give one a right to *participate* in a decision. Arash Abizadeh, *Democratic Theory and Border Coercion. No Right to Unilaterally Control Your Own Borders*, 36(1) *POLITICAL THEORY* 37–65 (2008).

⁵¹ Legislative History Without Legislative Intent, *supra* note 18, at 18-19.

“[T]he principle that people must justify undertaking an action when others are affected is based on a system of values and not on logical necessity [;] [i]t flows from an underlying commitment that other people are entitled to be treated as autonomous and free beings rather than as manipulable things – a commitment that has informed ... the entire Western liberal tradition.”⁵²

Granted, even a duty to explain may not imply a duty to allow the affected person to question the decision and obtain documents relevant to the decision. But it is hardly a great extension of the argument to conclude that individuals should have a right to obtain the documents needed to understand how they have been treated, and that they need not simply accept unquestioningly the government’s explanation of its action.

Any entitlement to understanding the government’s action would necessarily consist of two components. First, one must understand the reasons and justifications for the government’s actions – what are the rules governing the government decision, what conclusions did the government reach, and what were the basis for those conclusions? Second, fairness can fully be assessed only in relative terms, thus one must understand how others similarly situated are treated – have they been treated differently and if so what justifies the difference?⁵³ Thus, for McBurney to understand the apparently lax enforcement of his wife’s child support obligations, he needed information about the agency’s handling of his own child support order as well as its handling of those pertaining to others. Most jurisdictions recognize a right to obtain documents regarding oneself. But such first-party access is insufficient for the subject to fully assess the relative fairness of his treatment.

In addition, all individuals should have an opportunity to persuade the *demos* to change the applicable policies. The values of freedom of speech and the right to petition government are enshrined in the U.S. Constitution,⁵⁴ as well as in the constitutions of many other nations.⁵⁵ A necessary byproduct of allowing government to exert power over individuals surely is a willingness to allow those individuals to seek redress against the use of that power. Information not only about oneself, but about the manner in which

⁵² Mortimer R. Kadish & Sanford H. Kadish, *Discretion to Disobey* 12-13 (1973).

⁵³ Consistency is a cardinal principle of administrative law. ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW*, n. 12, at 307 (1993); L. Harold Levinson, *The Legitimate Expectation That Public Officials Will Act Consistently*, 46 AM. J. COMP. L. 549, 551 (1998).

⁵⁴ U.S. CONST., amend I.

⁵⁵ Many national constitutions include a right to petition the government for redress. While some constitutions restrict the right to citizens of the country, like those of Mexico, Spain, and Zimbabwe, many others extend the right to non-citizens as well, such as those of Brazil, the Czech Republic, Germany, Greece, Japan, New Zealand, Portugal, South Africa, Switzerland, and Turkey. Some of these constitutions include a right to receive a response (Greece, Mexico, Portugal, and Turkey). Indeed, the Greek Constitution requires public authorities “to take prompt action in accordance with provisions in force, and to give a written and reasoned reply to the petitioner as provided by law.” GREECE CONST., Part 2, art. 10, cl. 1 (emphasis added).

the government wields its power, may well be critical to making such claims.

This argument is even more compelling when a government affirmatively takes steps that it knows will have extraterritorial consequences. For instance, Delaware has made its laws particularly hospitable to corporations in order to encourage businesses to select that state as their place of incorporation.⁵⁶ Delaware officials undoubtedly understand that the state's law of corporations will have impact the relations of stakeholders in corporations headquartered in other states.

In *McBurney* the U.S. Supreme Court recognized that federal constitutional doctrine requires out-of-staters to have access to the documents needed to vindicate their rights and interests through litigation. The Court took pains to note that the Privileges and Immunities Clause protects non-residents' rights to obtain government documents needed to pursue state court lawsuits.⁵⁷ Almost thirty years earlier, the Supreme Court had held that the Clause requires states to treat out-of-state and in-state applicants for admission to the bar equally, reasoning in part that "out-of-state lawyers often represent those who raise unpopular federal claims, and that in some instances 'representation by non-resident counsel may be the only means available for the vindication of federal rights.'"⁵⁸

But at times non-residents cannot fully press their grievances, including those of constitutional dimension, through litigation. *Federal* courts "under-enforce" constitutional values to avoid intruding excessively upon federal and state governments' capacities to give substance to constitutional rights and balance them against other imperatives.⁵⁹ *State* supreme courts often follow a similar approach with regard to state constitutional norms.⁶⁰ Thus, obtaining government information may be necessary to those who hope to pursue quasi-constitutional interests in the only fora that will entertain them – the state or federal political processes.

The individual entitlement premise suggests that any person affected by government action be entitled to demand information relevant to that particular government action. This might suggest a type of "standing" rule with regard to making FOI requests. Of course, the "standing" doctrine in the U.S. is beset with difficulties which do not auger well for application of any "standing" concept in this context. The individual entitlement premise could more easily be satisfied by an admittedly over-inclusive rule that allows all individuals to make FOI requests.

⁵⁶ Lewis S. Black, Jr., *Why Corporations Choose Delaware* (Delaware Dept. of State 2007).

⁵⁷ *McBurney v. Young*, 133 S. Ct. at 1717-18.

⁵⁸ Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 281-82 (1985).

⁵⁹ See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978); Bernard W. Bell, *Marbury v. Madison and the Madisonian Vision*, 72 Geo. Wash. L. Rev. 197, 202-04 (2003).

⁶⁰ See, e.g., Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy In State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 690-95 (2000).

§ 4 – THE INSTRUMENTAL PREMISE

The instrumental premise, like the popular sovereignty and federal structural premises, rests on the concept that FOI laws exist primarily to facilitate the citizenry's exercise of sovereignty. However, it recognizes that non-citizens and non-residents may contribute to the citizenry's knowledge of government policies – the “inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source.”⁶¹ Or, to quote Free Speech theorist Alexander Meiklejohn, “what is essential is not that everyone shall speak, but that everything worth saying be said.”⁶² Under this view, FOI laws do not make demanding information a sovereign prerogative, rather they maximize the available information about the government. Restricting the ability to obtain information to citizens can inhibit the overall availability of information about the government's policies and actions. For example, traditionally the institutional press has assumed an “informing” function.⁶³ Generally individuals, including citizens, have limited time to obtain, aggregate, and analyze information about public affairs. Traditionally, the news media has been viewed as playing the role of obtaining, aggregating, and analyzing information.⁶⁴ Indeed, unlike many citizens-only provisions, such as the Delaware provision struck down in *Lee v. Minner*, VFOI allows representatives of news organizations that broadcast or maintain circulation in Virginia to access state records without regard to citizenship.⁶⁵ VFOI thus seems to recognize the role of the press, at least, as a surrogate for the public. But the distinction between “the press” and other “speakers” has never been entirely clear, and given the dramatic transformation of our means of communication it has become even less so.⁶⁶

⁶¹ See, *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) (discussing the value of corporate speech).

⁶² Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* 26 (1979).

⁶³ Many national constitutions recognize this role in protecting freedom of the press, at least to some extent. For example, the Constitutions of Brazil, Canada, Germany, Italy, Mexico, the Czech Republic, Denmark, France, Greece and Japan contain such provisions. National constitutions do seem to vary with respect to whether or not the press has separate more robust protection than any other speakers. Compare F.R.D. CONST., art. 51 with FR. DECLARATION OF HUMAN AND CIVIC RIGHTS, art. XI.

⁶⁴ Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. B. FOUND. RES. J. 521, 527 (1977); Potter Stewart, *Of the Press*, 26 HASTINGS L.J. 631, 634 (1975).

⁶⁵ VA. CODE ANN. § 2.2–3704(A). In *Lee v. Minner*, the District Court considered Lee a journalist, even though he was not affiliated with a traditional media outlet. *Lee v. Minner*, 369 F.Supp.2d at 530, 533.

⁶⁶ For the difficulty of determining which individuals or institutions are member of the “press.” *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 801 (1978) (Burger, J., concurring); David Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77, 101-107 (1975). Just recently Lyle Dennison of Scotusblog was denied press credentials because he was not considered a journalist. Lydia Wheeler, “Access Denied: The Fight for Scotusblog,” THE HILL (Jan. 20, 2015), accessible at: <http://thehill.com/business-a-lobbying/lobbyist-profiles/229986-access-denied-the-fight-to-blog-scotus>.

With regard to the revolution of communication breaking down the boundaries separating “the press” from other speakers, see David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 435-41, 443-45, 507 (2002); Yochai Benkler, *A Free Irresponsible Press: Wikileaks and the Battle Over The Soul Of The Networked Fourth Estate*, 46 HARV. C.R.-C.L. L. REV. 311, 359-61, 362 (2011).

In any event, many individuals and organizations can play a role in informing the public, even those that do not strive for the “objectivity” that journalists seek to maintain.⁶⁷ National advocacy organizations for a variety of causes may have little connection with a particular state but, given their resources and expertise, can be instrumental in informing the citizenry about issues facing the state. *Amici curiae* in *McBurney* noted a number of prominent national advocacy organizations whose efforts to inform the public would be hampered by upholding citizens-only access provisions, including Judicial Watch, Citizens for Responsibility and Ethics in Washington, the Electronic Frontier Foundation, the Electronic Privacy Information Center, and the Institute for Justice. Precluding such organizations from making effective contributions to the public debate by limiting their access to official information would seem to retard, rather than enhance, the electorate’s knowledge of what their government is “up to.”

Indeed, the trial and appellate court opinions in *Lee v. Minner* seemed to focus on exactly this issue, challenging the government to show the harm that allowing out-of-staters access to information would have on the information available to the citizens of Delaware.⁶⁸ Delaware’s lawyers never explained how accommodating out-of-stater requests would diminish the information available to a state’s citizens. Justice Alito, for the Supreme Court, elided that challenge in *McBurney v. Young*.

Indeed, this premise for FOI laws suggests that any subsidies should go to those whose requests are most likely to yield valuable information or to inform the public. Indeed, this is what the U.S. Government FOIA does.⁶⁹ Privileging such requests, rather than merely those originating from citizens, expands the universe of information available to the public.

In short, the instrumentalist premise suggests that citizenship, or even the degree of an individual’s relationship to a jurisdiction, should be considered largely irrelevant in determining whether they should be allowed access to public information. The focus should be on what citizens are likely to learn as a result of a FOI request rather than on who is demanding the information. Indeed, many non-citizen requests will further government transparency much more than citizen requests.

⁶⁷ Regarding the press’ role of objectivity and independence from advocacy groups, see *Nelson v. McClatchy Newspapers*, 131 Wash.2d 523, 540-41, 936 P.2d 1123, 1131-32 (Wash. 1997), cert. denied, 522 U.S. 866 (1997); Jon Paul Dils, *The First Amendment And Credibility: Revisiting Nelson v. McClatchy Newspapers*, 10 COMM. L. & POL’Y 1, 12-13, 21-23, 25-26, 27 (2005).

⁶⁸ *Lee v. Minner*, 369 F. Supp. 2d at 535-36; *Lee v. Minner*, 458 F.3d at 201 n.5.

⁶⁹ FOIA provides for a fee waiver “if disclosure of information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(ii)(II). Media entities are entitled to reduced fees, *id.*

§ 5 – THE ECONOMIC PREMISE

Under the economic premise, the weakest premise in terms of the actual impetus for enacting FOI statutes, such statutes provide a foundation for a free market in information that the government collects. Much government information possesses economic value entirely unrelated to the public's efforts to monitor government actions. Companies use information gained through FOI statutes to provide information to entities interested in a variety of commercial transactions, such as landlords screening tenants and lenders considering extensions of credit.⁷⁰ Such information might be used by banks in setting a customer's credit card interest rate,⁷¹ or by credit reporting companies in compiling their credit history and arriving at a credit score.⁷² Commercial data aggregators provide information helpful to consumers as well. For example, Carfax uses information derived from FOI requests to provide information to prospective used car buyers about the accident history of used cars offered for sale.⁷³ Perfect information is a critical assumption underlying classical economics. Thus, in a capitalistic system, low-cost dissemination of information is salutary: "So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed."⁷⁴ Indeed, most FOIA queries to the U.S. government are made for commercial purposes.⁷⁵ Hulbert in particular complained about the lacunae in his dataset due to VFOI. Much of his challenge to VFOI was focused on the citizens-only provision as a form of economic impediment that favored Virginia citizens over others in terms of the data brokerage business.

The economic premise suggests the desirability of free access to government information as a means for lowering barriers to entry and ensuring fair competition and efficient markets. In terms of information services as an economic activity, there seems little reason to allow states to limit records access to in-staters. States have no legitimate reason to give their residents such an advantage in the interstate market for information. Moreover, if a significant number of states impose such barriers, thereby potentially forcing companies to hire in-state surrogates to obtain the information for them, there will be a corresponding increase in the cost of

⁷⁰ Brief of the Coalition for Sensible Public Records Access, et. al. as Amici Curiae in Support of Petitioner at 4, *McBurney v. Young*, 133 S. Ct. 1709 (2013) (No. 12-17).

⁷¹ *Id.* at 31.

⁷² *Id.* at 4.

⁷³ *Id.* at 32.

⁷⁴ *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 765 (1976).

⁷⁵ Frequent Filers: Businesses Make FOIA Their Business: CJOOG Study Finds Commercial Uses of Government Information Outpace Requests by Journalists and Others, available at <http://www.spj.org/rrr.asp?ref=31&t=foia>. (reporting results of 2006 study finding that 60% of FOIA inquiries within the study's parameters were made by commercial requesters).

obtaining information. Such costs involve economic waste and serve no useful purpose.

Nor do such restrictions provide a means for protecting individual privacy, particularly given that most states lack such limitations. It is not clear why providing residents with access to information involves any less of an invasion of privacy than providing such access to non-residents. And surely marginally increasing national data-broker's cost in obtaining the information will do little to protect privacy. In any event, a more sensible and direct protection of privacy is available now under virtually all FOI laws: allowing the government to withhold information as an unwarranted invasion of personal privacy.

Ironically, as a matter of U.S. constitutional law the economic effects of Virginia's citizen-only restriction provided the strongest basis for the challenge in *McBurney*. States have limited powers to discriminate in favor of their own residents in terms of economic "regulation," and the courts seek to ensure that states do not balkanize national markets.⁷⁶ So during oral argument in *McBurney*, the Justices and the lawyers focused almost exclusively on Hulbert's claim of economic discrimination, virtually ignoring *McBurney*'s non-economic claim of discrimination, the claim that better reflects the primary rationales for enacting transparency laws.

Ultimately, this economic premise for FOI laws is not particularly strong. Commercial uses of information are generally viewed as a ancillary "benefit" of FOI laws.⁷⁷ Such law are primarily intended to enable citizens to monitor government activity, by learning what their government is "up to." Moreover, this premise does not justify subsidizing such commercial requests, whether from citizens or non-citizens, as commercial activities should be sustainable without state subsidization.⁷⁸

CONCLUSION

Popular sovereignty is a core principle of government, but need not be the exclusive premise underlying FOI laws. The *McBurney* Court failed to appreciate this point, erring even in terms of constitutional doctrine. Even aside from constitutional doctrine, it is surely questionable whether popular sovereignty should be enshrined as the sole premise underlying FOI laws. If it is not so enshrined, access should be broadened beyond citizenship. Such an expansion is justified in terms of the benefits that accrue to the citizenry from making government records available to surrogates with greater resources and expertise who are better able to assess

⁷⁶ *H.P. Hood & Sons v. Du Mond* 336 U.S. 525, 538-39 (1949); *New Energy Co. v. Limbach*, 486 U.S. 269, 273-74, 278-80 (1988); see Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43 (1988).

⁷⁷ See *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989).

⁷⁸ FOIA was amended in 1986 to allow agencies to charge higher fees when records are requested for commercial uses. 5 U.S.C. § 552(a)(4)(A)(ii)(I); see P. STEPHEN GIDIERE III, *THE FEDERAL INFORMATION MANUAL* 205 (2006).

and analyze the information. It is also justified as a mechanism for allowing national (or supra-national) governmental authorities to intervene on behalf of individuals facing injustice, whether or not those individuals are a citizen of that national (or supra-national) government. And at the most basic level, it is justified by governments' impact on lives of citizens and noncitizens alike; governments should grant anyone affected by their actions access to information that allows them to both fully understand how government affects their lives and remonstrate against their treatment. In short, there is little to recommend allowing governments to impose restrictive limitations on who can seek government information, especially so for restrictions based on membership in the polity.⁷⁹

⁷⁹ The rights of artificial persons, *e.g.*, corporations, are beyond the scope of this paper. That said, the citizen sovereignty premises is clearly the least hospitable to claims that artificial persons possess a right to request records, while the instrumentalist and economic premises seem the most hospitable to such claims.