McBurney v. Young: 19th Century Precedents Used to Downplay 21st Century FOIA Statutes

Michael T. Martínez, Assistant Professor and Dwight L. Teeter, Jr., Professor
University of Tennessee, Knoxville

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ABSTRACT

In 19th Century America, access to public records was problematic, often tied to a citizen having a justifiable and provable personal or financial interest in viewing a specific record. And even if citizens could see a record, there was no guarantee they could copy it. Such a crabbed, dangerous approach to access law supposedly expired with the passage of state and federal Freedom of Information Acts (FOIAs) after World War II.

This research analyzes a spring 2013 decision by a unanimous Supreme Court of the United States in *McBurney v. Young*. Language in that decision written by Justice Samuel A. Alito, Jr. showed his disdain for the concept of the people's right to know through a discursive opinion relying on 19th Century horse-and-buggy era decisions. Justice Alito's opinion may be taken as a poster-child for purposeful and slanted use of history and obsolete legal precedents.

VIRGINIA LIMITS FOIA TO RESIDENTS

Limitation of access to government information in the 19th Century United States was the general rule. In 19th Century America, access to public records was problematic, and frequently was legally tied to a citizen having a justifiable and provable personal or financial interest to viewing a specific record. And even if citizens could prove such an interest, there was no guarantee that they could copy the record. Such requirements, of course, put most records beyond the reach of citizens who wished to seek out who owned what property or look for conflicts of interest in the conduct of public officials in acquiring property. Such a crabbed, dangerous view of access to records supposedly disappeared after World War II with the passage of federal and state Freedom of Information Acts (FOIAs). The modern pattern is that FOIAs generally do not permit questioning a citizen about why he or she wants to see a public record. Such access restrictions are dead and buried, right?

Evidently not, if one reads a spring 2013 decision of the Supreme Court of the United States, *McBurney v. Young.* The Court's use of antiquated rulings as precedent in that decision suggests a lack of respect for access rights and raises questions about courts' use of historically based analogies as evidence.

The Supreme Court agreed to hear *McBurney* to resolve the conflict between *Lee v. Minner*, 458 F. 3d 194 (2006) and *McBurney v. Young*, 667 F.3d 454 (2012).[1] In *Lee v. Minner*, (2006) the United States Court of Appeals for the Third Circuit, found that Delaware's Freedom of Information Act restricting noncitizens' right to access violates the privileges and Immunities Clause of the Constitution. The Third Circuit court stated:

[1] Lee v. Minner, 458 F.3d 194 (2006), McBurney v. Young, 667 F.3d 454 (2012)

> We agree with the District Court that the citizens-only provision of Delaware's Freedom of Information Act burdens noncitizens' right to "engage in the political process with regard to matters of national political and economic importance." Although in some cases the State's asserted objective of "defining its political community" might justify a discriminatory practice, in this case, there is an insufficient nexus between the State's policy of excluding noncitizens from receiving FOIA benefits and that objective. For that reason, we will affirm the judgment of the District Court.

In his opinion, Justice Samuel A. Alito, Jr.'s only mention of *Lee v. Minner* was to acknowledge that the Court granted certiorari to resolve the conflict and did not consider any of the case's arguments.[2]

The purpose of this paper is to examine 19th Century court decisions cited as precedents through the lens of the U.S. Supreme Court's unanimous decision in *McBurney v. Young*. Although this decision dealt primarily with the U.S. Constitution's Privileges and Immunities clause, the opinion by Justice Samuel A. Alito, Jr., for a unanimous Court, downplayed the importance of both state and federal Freedom of Information Acts (FOIAs). Ironically, the gist of the plaintiffs' cases in *McBurney* did not deal with the worthiness of FOI Acts. The language of the Court, however, approvingly citing and quoting from anti-access 19th Century court decisions, raised warning flags for access litigation in years to come. Although the narrow issue decided in McBurney was relevant to only seven states,[3] Justice Alito went out of his way to express evident hostility to the broader concept of open access to government information.

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[2] McBurney et al. v. Young, *Deputy Commissioner and Director, Virginia Division of Child Support Enforcement*, et al., 133 S.Ct. 1709, 1714 (2013).

[3] McBurney v. Young, 133 S.Ct. 1709, (2013). States excluding non-citizens of that state from use of the their FOI Act, in addition to Virginia, are Alabama, Arkansas, Delaware, Missouri, New Hampshire, and Tennessee. Virginia FOI Act, Virginia Code Ann. § 2.2-3704 (A); Ala. Code § 36-12-40 (2012 Cum.Supp.); Ark. Code Ann. § 25-19-105 (2011 Supp.); Del. Code Ann., Tit. 29, § 10003 (2012 Supp.); Mo. Rev. Stat. § 109.180 (2012); N.H. Rev. Stat. Ann. § 47:1A-1 (West, 2003); Tenn. Code Ann.§ 10-7-503 (2012).

What the Court did not say in *McBurney* is instructive, because it avoided some 19th and 20th Century Supreme Court language suggesting First Amendment support for access to government information.[4] It has been said that courts proceed with adequate precedent if not with adequate grace. "Law office history"—one-sided history for the sake of argument rather than for the sake of trying to discover truth—is part of the problem with *McBurney v. Young.* In historian Alfred H. Kelly's words, law office history refers to "selection of data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data proffered."[5] By convening the Court of History through selective use of 19th Century (and earlier) court decisions, Justice Alito used language that some scholars may dismiss as mere *dicta*, side comments not necessary to deciding the case at hand. But as the famed constitutional historian Stanley I. Kutler once said, "Dicta, schmicta. If the Supreme Court says it, I need to know about it."[6]

BACKGROUND: MCBURNEY V. YOUNG (2013)

Mark J. McBurney of Rhode Island and Roger W. Hurlbert of California each requested documents under Virginia's FOIA, but were refused because they were not citizens of Virginia. Justice Samuel A. Alito's opinion for the Court noted that petitioners McBurney and Hurlbert

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[4] See, e.g., *Branzburg v. Hayes, et al., Judges*, 408 U.S. 665, 681 (1972); *Richmond Newspapers v. Virginia*, 448 U.S. 555, 581 (1980). See also Anthony Lewis, "A Right to Be Informed," The New York Times, July 3, 1980, p. A-19.

[5] Alfred H. Kelly, "Clio and the Court: An Illicit Love Affair," *1965 Supreme Court Review,* p. 122.

[6] Conversation with Dwight Teeter, Professor Kutler's neighbor in Madison, WI, circa 1972. Kutler is the author of *Abuse of Power: The New Nixon* Tapes (Glencoe, IL: Free Press, 1997). That book resulted from Kutler's successful lawsuit against the National Archives and Richard M. Nixon. *Black's Law Dictionary* (9th ed. 2004) defines "obiter dictum . . . [Latin 'something said in passing'] (18th c.) A judicial comment made while delivering a judicial decision, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive.)"

"filed suit under U.S.C. [United States Code] § 1983, seeking declaratory and injunctive relief for violations of the U.S. Constitution's Privileges and Immunities Clause,[7] and, in Hurlbert's case, the dormant Commerce Clause."[8]

In 2011, a U.S. District Court upheld the Virginia FOI Act's exclusion of non-citizens of that state via summary judgment, and the summary judgment was upheld by the Court of Appeals for the Fourth Circuit.[9] The U.S. Supreme Court affirmed that holding in 2013, declaring that a state does not have to ". . . always apply all its laws or all its services equally to anyone, resident or non-resident, who may request it so to do."[10] The Court added, "Rather, we have long held that the Privileges and Immunities Clause protects only those privileges and immunities that are 'fundamental.'"[11] Evidently, access to government information, in the eyes of Justice Alito—and by extension, a unanimous Supreme Court, is not "fundamental."

Besides, there were alternative remedies available to Mark McBurney. When McBurney's FOIA request was denied, he was told to seek the materials he needed, Alito wrote, "under the Government Data Collection and Dissemination Practices Act." He did so, and received much of what he sought.[12] Also in 2013, beyond the scope of Alito's opinion, MuckRock, an electronic records retrieval service, sought access volunteers in the states where

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[7] Constitution of the United States of America, Art. IV, § 2, cl. 1, "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the Several States."

[8] The "Dormant" or "Negative" Commerce Clause is derived by courts from Article I, Section 8 of the United States Constitution. It holds that state regulations that improperly burden interstate commerce are unconstitutional.

[9] *McBurney v. Cuccinelli*, 780 F.Supp.2d 439 (E.D.Va. 2011), affirmed, 687 F.3d 454 (C.A.4, 2012).

[10] *McBurney v. Young*, 133 S.Ct. 1709, 1714-1715 (2013), citing *Baldwin v. Fish and Game Comm'n of Mont*., 436 U.S. 371, 383, 98 S.Ct. 1852 (1978).

[11] *Ibid*.

[12] *Ibid.,* p. 1718.

there is a citizens-only FOIA statute. This could take the sting out of the U.S. Supreme Court's *McBurney* decision in those record-access-only-for-citizens states.[13]

FOIA Concerns of Plaintiffs

Plaintiffs McBurney and Hurlbert also argued that the exclusion of non-citizens of Virginia from use of the state's FOI Act violated the Privileges and Immunities Clause because "it denies them the right to access to public information on equal terms with citizens of the Commonwealth." The Court held that such a broad right was not covered by the Constitution, citing Justice Bushrod Washington's famed Circuit Court ruling on the Privileges and Immunities Clause, *Corfield v. Coryell* (1823). Riding circuit, Justice Washington instructed a jury that New Jersey's law allowing seizure and sale of a boat found dredging oysters in the Maurice River cove was repugnant to the "Privileges and Immunities of Citizens in the Several States" as provided in Article IV of the U.S. Constitution.[14]

Denying Access to Records: Voices of Antique Precedents

Then, shifting the argument, Justice Alito cited a 1789 English case, from a time when the United States government was just beginning under the Constitution of 1787 and from a time before the United States' adoption of the First Amendment and the Bill of Rights on December 15, 1791. Alito wrote:

> Most founding-era English cases provided that only those persons who had a personal interest in non-judicial records were permitted to access them. (See, e.g., King v. Shelley, 3 T.R. 141, 142, 100 Eng.Rep. 498, 499 (K.B.1789) (Buller, J.) ("[O]ne man has no right to look into another's title deeds and records, when he . . . has no interest in the deeds or rolls himself.)[15]

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[13] See https://www.muckrock.com/about/, accessed Aug. 20, 2013.

[14] *Corfield v. Coryell*, 6 Fed Cas 546, 551, no 3,230 C.C.E.D.Pa. (1823).

[15] *McBurney v. Young*, at 1718.

Justice Alito also drew on an 1837 English case, *King v. Justices of Staffordshire,*[16] which declared, "'The utmost that can be said on the ground of interest, is that the applicants have a rational curiosity to gratify by this inspection, or that they may thereby ascertain facts useful to them in advancing some ulterior measures in contemplation as to regulating county expenditure…'" That 1837 English decision does not square with American notions of responsive and responsible government. Nor does it jibe with federal and state access legislation enacted in the last half of the 20th Century. Further, England has never had a written constitution, and history lessons from a monarchy's days of yore are quaint yet irrelevant to the American republic in the 21st Century.

Justice Alito's ahistorical history lesson continued, moving to 19th Century America. "'Nineteenth-century American cases,' he wrote, 'while less uniform, certainly do not support the proposition that a broad-based right to access public information was widely recognized in the early Republic.'" Alito provided two examples of 19th Century cases he found instructive.

First, he quoted briefly from *Cormack v. Wolcott, Register, etc*. (Kan., 1887): "'At common law, parties had no vested rights in the examination of a record of title, or other public records, save by some interest in the land or subject of record.'"[17] Alito, although he already had cited a 1988 Virginia Supreme Court decision dealing with that point, *Associated Tax Service, Inc. v. Fitzpatrick,* quoted it primarily on the point that the Virginia FOIA excluded non-citizens of the state from access to public records. Alito then added some verbiage about "less essential" records sought by plaintiff Mark Hurlbert being "generally available" to all online, "in lieu of a

[16] *Ibid.,* at p.1718.

[17] *Ibid.,* at p. 1719, citing 37 Kan.391, 394, 15 P.2d 245, 246 (1887).

relatively cumbersome state FOIA process."[18] Alito's statement, however, overlooked the main point in the *Associated Tax Service,* a 1988 Virginia Supreme Court decision. There, the Virginia Supreme Court held that a citizen's purpose or motivation in making a request is not relevant to the citizen's entitlement to requested information under the Virginia FOIA.[19] That ruling is precisely contradictory to the cited 19th Century cases demanding a special interest in a record before it can be viewed by a citizen. For whatever reason, Justice Alito was grasping at anachronistic legal straws.

Selective quotations are a problem. Justice Alito stopped quoting *Cormack v. Wolcott* after the sentence quoted at footnote 15. An ethical scholar's standard, however, assumes that cited decisions should be read as a whole in order to characterize their overall meaning with accuracy. That 1887 Kansas decision moved on beyond the few words quoted by Alito to express wildly elitist and undemocratic fulminations. In *Cormack,* the Kansas Supreme Court denied a writ of mandamus, thus forbidding records inspection to A.W. Cormack. Cormack sought to create a business abstracting titles held by the Russell County Register of Deeds. Register of Deeds Wolcott refused this request, and was upheld by the Kansas Supreme Court decision.

Writing for the 1887 Kansas Supreme Court, Judge J.B. Clogston denounced Cormack's business venture, saying that allowing a private person to run such a business would cause more

[18] Ibid., at p. 1717. The records Hurlbert sought were real estate tax assessment documents. Alito added that "less essential documents sought by plaintiff Mark Hulbert were generally available to all online, in lieu of a relatively cumbersome state FOIA process."

[19] *Associated Tax Service, Inc. v. Fitzpatrick*, 236 Va. 181, 372 S.E.2d 625 (1988), cited in *McBurney v. Young*, at p. 17.

work and require creation of more facilities for the Register of Deeds. Further, "'it would be enabling private individuals to engage in speculation for gain at the public expense.'"[20]

Judge Clogston then gave free rein to his imagination, declaring that allowing abstracting of public records would convert a public office "largely to an office for private individuals, for private and not for public use, and if this right is granted, then could it be denied in any other department of county or state government?" Further, when the right [of record inspection]

> is for private use or inspection, then it is conceded to be equally open for him who examines for idle curiosity or unlawful purposes. If you grant this right to one citizen, you must grant it to another. No distinction can be made between the good citizen and the bad.[21]

Judge Clogston conceded that the register had the duty of granting the right of inspection of records to persons with a proper interest in them, "but it was never intended that the inspection would give the right to make entire copies of the records. The language is 'to make an examination.'"[22]

Brewer v. Watson (Ala. 1882) was the second 19th Century case directly quoted by Justice Alito, who extracted these words:

> The individual demanding access to, and inspection of, public writings must not only have an interest in the matters to which they relate, a direct, tangible interest, but the inspection must be sought for some specific and legitimate purpose. The gratification of mere curiosity, or motives merely speculative will not entitle him to demand examination of such writings.[23]

Justice Alito here was dealing with tautological (if underlying and unexplained) evidence. He quoted Alabama Chief Justice Robert C. Brickell's words, but neglected to repeat the Alabama

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[20] *Ibid.,* pp. 246-247.

[21] *Ibid.,* p. 247.

[22] *Ibid.*

[23] *McBurney v. Young*, at 1719, quoting *Brewer v. Watson,* 71 Ala 299, 305 (1882).

judge's citations. Brickell cited, among other things, that 1832 King's Bench decision in *King v. Justices of Staffordshire*, 6 Ad. & Ell (1832) used earlier in his opinion by Justice Alito.[24] Then Alito quoted from Andrea G. Nadel's Annotation in a 1984 edition of American Law Reports (ALR) to reiterate that at common law, "'person requesting inspection of a public record was required to show an interest therein which would enable him to maintain or defend an action for which the document or record sought could provide evidence or necessary information.' "[25] Since *McBurney v. Young* was a Virginia case being decided in the 21st Century, why did Justice Alito focus on the now-defunct requirement that demanded a "direct, tangible interest" on the part of the record-seeker? Because the Supreme Court of the United States comes to its decisions in secrecy, that question is unanswerable. It is evident, however that the 19th Century requirements of a special interest to see a record generally do not exist in the United States in the 21st Century**.**

Alito quoted selectively from Harold L. Cross's 1953 classic *The People's Right to Know*, concentrating on Cross's generalization that common law [court-made] rules from courts of 18th Century England and of 19th Century United States generally denied that there was a public right to inspect records. There were, however, some 19th Century American decisions which supported access, and they were described in attorney Cross's book and not mentioned by Alito. As Cross wrote, a New Jersey decision, *State ex rel. Ferry v. Williams* (1879) granted mandamus [ordering that records be made available] "in favor of one 'who asserts no interest to be subserved by an inspection of these letters except that common interest which every citizen

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[24] See Note 13, above.

[25] *McBurney v. Young* at 1719, quoting Nadel, "What are 'Records' of Agency Which Must be Made Available Under State Freedom of Information Act[s]," 27 A.L.R.4th 680, 687, § 2[b] (1984).

has in enforcement of the laws and ordinances of which he dwells' to compel access to letters of recommendation for applicants for licenses to sell ale . . ."[26] And in 1889, the Michigan Supreme Court held that a title abstracter could not be refused access to files in the State Auditor's office to get information on suspected irregularities. The Michigan Court declared that it did not know of "'any common law ever obtained in this free government that would deny to the people thereof the right of free access to and public inspection of public records.'"[27]

Alito then referred to a 1978 decision, *Baldwin v. Fish and Game Commission of Montana*,[28] a Privileges and Immunities Clause ruling upholding Montana's charging 7 ½ times more to out-of-staters than to Montana residents for the privilege of elk hunting. Conflating elk hunting with records searches, Alito declared:

> Nor is such a sweeping right [of access to government records] "basic to the maintenance or well being of the Union." Baldwin, 436 U.S., at 388, 98 S.Ct. 1852 [1978]. FOIA laws are of relatively recent vintage. The federal FOIA was enacted in 1966, § 1, 80 Stat.383, and Virginia's counterpart was adopted two years later, 1968 Va. Acts ch. 479, p. 690. There is no contention that the Nation's unity foundered in their absence, or that it is suffering now because of the citizens-only FOIA provisions that several states have enacted.

By concentrating on old common law citations, Justice Alito ignored or minimized 20th Century statutory developments in Freedom of Information legislation. Alito conveniently overlooked passages in FOI Attorney Harold L. Cross's 1953 book—published 13 years before passage of the 1966 federal FOI Act—covering 20th Century trends in access to information. Cross depicted the right of access to public records as moving away from demanding a personal or financial interest in matters covered in public records, with the most common requirement

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[26] Harold L. Cross, *The People's Right to Know* (Morningside Heights, Columbia University Press, 1953), pp. 27-28, quoting State ex rel. Ferry v. Williams, 41 N.J.L. 382 (1879).

[27] Cross, p. 27, quoting Burton v. Tuite, City Treasurer, 78 Mich. 353, 44 N.W. 282 (1889).

[28] *Baldwin v. Fish and Game Commission of Montana*, 478 U.S. at 388, 98 S.Ct. 1852 (1978).

being that the inspection must be for a lawful purpose. In Pennsylvania a court held in 1948 that mere "idle curiosity" was a sufficient reason for inspecting public records.[29] On the other hand, Cross wrote that in Massachusetts and West Virginia as of 1953, and probably in other states too, "idle curiosity" was not a sufficient reason to inspect records.[30] Cross reported, however, that the Montana Supreme Court was not swayed by an argument that records inspection was sought to attack a public official, declaring, "'We are not interested in the motives . . .'" of the person seeking to inspect records.[31] If Harold Cross's research did not suit Justice Alito, he ignored it.

NO CONSTITUTIONAL RIGHT TO ACCESS TO PUBLIC RECORDS

Changing directions, Justice Alito moved from old Privileges and Immunities cases to reinforce the Court's refusal to support access to public records under the aegis of the First Amendment.

> This Court has repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws. See Houchins v. KQED, Inc., 438 U.S. 1, 14, 98 S.Ct. 2558 (1978) (plurality opinion) ("The Constitution itself is not a "Freedom of Information Act") * * * It certainly cannot be said that such a broad right has 'at all times been enjoyed by the citizens of the several states which comprise this union, from the time of their becoming free, independent, and sovereign. Corfield, 6 F.Cas., at 551. No such right was recognized at common law. See H. Cross, The People's Right to Know 25 (1953) ("[T]he courts declared the primary rule that there was no general common law right in all persons (as citizens, taxpayers, electors, or merely as persons) to inspect public records.

[29] Harold L. Cross, *The People's Right to Know* (Morningside Heights: Columbia University Press, 1953), p.36, citing *Butcher v. Civil Service Commission, etc.,* 163 Pa. Super. Ct. 343, 61 A.2d 367 (1948).

[30] Ibid., citing *Hardman v. Collector of Taxes in North Adams*,. 317 Mass. 349, 58 N.E.2d 845 91945), and *State v. Harrison,* 130 W.Va. 236, 43 S.E.2d 214 (1947).

[31] *Ibid*., citing *State ex rel. Halloran v. McGrath*, 104 Mon. 490, 67 P2d 838 (1967).

The quotation from "H. [Harold L.] Cross" referred to English court decisions: A fuller quote should have been provided for accurate context. The original quote said, before truncation by Justice Alito:

> RIGHT OF INSPECTION
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> Accordingly, the [English] courts declared the primary rule that there was no general common law right in all persons (as citizens, taxpayers, electors or merely as persons) to inspect public records or documents.[32]

The H. Cross reference in support of limiting inspection of public documents was, at best, ironic. Harold L. Cross was the legendary lawyer and teacher at the Columbia University School of Journalism who wrote the iconic 1953 book, *The People's Right to Know,* when he was legal counsel for the American Society of Newspaper Editors. Cross worked closely with Rep. John E. Moss's House Subcommittee on Government Information as it drafted the federal Freedom of Information Act, and is credited with being the author of much of the language of the FOIA.[33]

What Alito also failed to acknowledge is that Virginia recognizes the First Amendment value in FOIA law because included language are media exemptions. It states:

> Access to such records shall not be denied to citizens of the Commonwealth, representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth.[34]

HAROLD CROSS AND FIRST AMENDMENT LEGAL THEORY

When Cross wrote *The People's Right to Know*, he did his path-breaking research during the Korean war in an era of Cold War secrecy. He studied British and American common law

[32] Harold L. Cross, *The People's Right to Know: Legal Access to Public Records and Proceedings* (Morningside Heights, NY, Columbia University Press, 1953), p. 25.

[33] First Amendment Center at Vanderbilt University, www.firstamendmentcenter.org/halloffame/Harold-L-Cross

[34] Va. Code Ann. § 2.2-3704(A)

decisions on access not in praise of their narrowness but to demonstrate that the American republic needed more access to records to be and to remain a free people. Cross's book was a key part of the right to know movement that led Congress to enact the Freedom of Information Act, signed into law on July 4, 1966 by President Lyndon B. Johnson. Cross wrote, in words not quoted by Justice Alito, "Public business is the public's business. The people have the right to know. Freedom of information is their just heritage. Without that citizens of a democracy have but changed their kings."[35]

Those words by Harold L. Cross presaged arguments by two leading First Amendment theorists, Thomas I. Emerson of the Yale Law School, and Vincent Blasi, a chaired professor at Columbia Law School in 2013. Emerson, who died in 1991, outlined four values "sought by society in First Amendment theory. Values outlined by Emerson included free communication to aid in individual self-fulfillment; communication as a means of attaining truth; communication as a means of securing participation in society, including political decision-making, and communication to maintain a balance between stability and change in a society.[36]

The third value remains of particular importance to his argument, because securing participation by the members of society in social, including political, involvement is absolutely crucial to a free society. Emerson pointed out that the "right to know" depends on access to information, and for reasons of "military secrecy, foreign policy, or simple face-saving" the government often is reluctant to be forthcoming with the very information needed for citizens to make intelligent judgments.[37] Emerson stated that access to government information is an area

[35] Harold L. Cross, *The People's Right to Know*, p. xiii.

[36] Thomas I. Emerson, *Toward A General Theory of the First Amendment*, (New York: Random House, 1963).

[37] *Ibid.,* p. 112.

where the courts are often reluctant to expand First Amendment doctrine. Emerson declared that if courts failed to expand freedom, that process must be the domain of the legislative and executive branches.[38]

Vincent Blasi argued for a slightly different value: the Checking Value of the First Amendment.[39] Blasi, then a young law professor at the University of Michigan, argued in 1977 that "[t]his is the value that free speech, a free press and free assembly can serve in checking the abuse of power by public officials."[40] Blasi differentiated the checking value from the self-governance value, pointing out that "one must keep in mind that the checking value is to be viewed as a possible supplement to, not a substitute for, the values that were at the center of 20th Century thinking about the First Amendment."[41]

Integral to both Emerson's and Blasi's theories is the need for the public to have access to information. Blasi, however, pointed out that "the Court has failed to accord the newsgathering interest the full measure of favorable procedures, presumptions and substantive doctrines that normally follow from the determination that a particular interest is truly a First Amendment pedigree."[42] To some extent, Congress has filled that gap with the federal Freedom of Information Act of 1966 (FOIA), which is perforated by many loopholes denying access, as in the areas of Exemption 1 ("Those documents properly classified as secret in the interest of national defense or foreign policy") and Exemption 6 ("A personnel, medical or similar file the

[38] *Ibid*.

[39] See, generally, Vincent Blasi, "The Checking Value in First Amendment Theory," 2 *American Bar Foundation Research Journal,* 1977.

[40] *Ibid*., p. 527.

[41] *Ibid*., p. 528.

[42] *Ibid.,* p. 601.

release of which would constitute a clearly unwarranted invasion of personal privacy.").[43] In addition, since Harold L. Cross spearheaded the freedom of information movement in the 1950s, all 50 states have enacted freedom of information statutes.[44]

It will take a 21st Century sea change in First Amendment interpretation to overcome the U.S. Supreme Court's long-held conclusion that the First Amendment is not a freedom of information act. There have been tantalizing suggestions by the Court that gathering records has First Amendment protection. In the 1972 reporters privilege case, *Branzburg v. Hayes,* the Court found that reporters, when subpoenaed, must testify before a state or federal grand jury. Reporters Privilege was not accorded First Amendment protection. But throwing a sop to the press as he wrote for the Court in *Branzburg*, Justice Byron White declared:[45]

> We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could eviscerated.

The Supreme Court's strongest move toward First Amendment protection for newsgathering came in 1980, in a decision involving the right for the public (and thus the news media) to attend criminal trials. Chief Justice Warren Burger wrote that the First Amendment guarantees a public right to attend criminal trials. He declared that the Court has recognized that "certain unarticulated rights" are implicit in the Bill of Rights, including the rights or association, privacy, and the right to attend criminal trials.[46] In a concurring opinion, Justice John Paul Stevens termed Richmond Newspapers "a watershed case." Stevens wrote:

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[43] See generally 5 United States Code (U.S.C.) §552; http://www.sec.gov/nfoia.htm

[44] http://www.nfoic.org/state-freedom-of-information -laws. Accessed August 26, 2013.

[45] *Branzburg v. Hayes, et al., Judges*, 408 U.S. 665, 681 (1972).

[46] *Richmond Newspapers v. Virginia*, 448 U.S. 555, 581 (1980).

> Until today the Court has accorded virtually absolute protection to the dissemination of information or ideas, but never before has it squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever.[47]

In 1980, the brilliant *New York Times* reporter Anthony Lewis also saw better days ahead, thanks to this the "historic" decision in *Richmond Newspapers v Virginia.* Lewis wrote, "[T]he Court today established that the Constitution gives the public a right to learn how public institutions function in a democracy."[48] So far, the open society hopes of Anthony Lewis expressed in 1980 go unrealized. The influence of *Richmond Newspapers v. Virginia* has not spread from open courts to more open government.

Perhaps a judicial advocate for a right to government records might have pursued the logic of a statement in the U.S. Supreme Court's second-most important libel decision under the First Amendment, *Gertz v. Welch* (1974). The Gertz decision, as cited in *Milkovich v. Lorain Journal* Co. (1990). Quoting *Gertz*, Chief Justice William H. Rehnquist wrote for the Court in *Milkovich,*[49]

> Under the First Amendment, there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of ideas. *But there is no constitutional value in false statements of fact.* Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust and wide-open debate on public issues.' *New York Times v. Sullivan*, 356 U.S. at 270.

The highly centrist liberals on the Supreme Court, perhaps waiting for a fight they might win, did not challenge Justice Alito's questionable use of evidence in *McBurney.* The "liberal wing" led by Justice Ruth Bader Ginsburg, simply joined Alito's opinion. Yet Alito's opinion

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[47] Opinion of Mr. Justice Stevens, *Richmond Newspapers v. Virginia,* 448 U.S. 555, 581 (1980).

[48] Anthony Lewis, "A Right to Be Informed," *The New York Times*, July 3, 1980.

[49] *Gertz v. Robert Welch, Inc*. (1974), quoted in Milkovich v. Lorain Journal Co., 497 U.S. 1, 17 (1990). Emphasis added in quote.

had logically vulnerable earmarks of "law office history" as described by Alfred Kelly, "selection of data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the data proffered."[50] For one thing, in writing the Court's opinion in a Virginia case, Alito repeatedly quoted 19th Century common law decisions declaring that records could be opened only to those with a special personal or financial connection to those records, despite a contrary holding in 1988 by the Virginia Supreme Court.[51]

Justice Alito's opinion for the Court in *McBurney v. Young* raises questions about judicial use of history as precedent. This, of course, is nothing new. The elder Justice John Marshall Harlan, for example, dissented from the 1897 decision in *Robertson v. Baldwin*, a 13th Amendment involuntary servitude case involving a merchant seaman. In deciding the case against a seaman who claimed he was justified in jumping ship because he had been snared by a deceptive contract, Justice Henry Billings Brown made extensive use of ancient maritime law as precedent. Justice Brown discussed not only the Imperial English experience but the lore of the ancient Rhodians and the Hanseatic League, which was a trading force in Northern Europe from the 13th to the 15th Centuries. Justice Harlan objected to such ancient precedents, in words from which 21st Century Justices could profit. Justice Harlan wrote:[52]

> In considering the antiquity of regulations that restrain the personal freedom of seamen, the court refers to the laws of the ancient Rhodians, which were supposed to have antedated the Christian era. But the those laws, whatever they may have been, were enacted at a time when no account was taken of a man as man, when human life and

[50] Alfred Kelly, cited at footnote 4.

[51] See *Associated Tax Service, Inc. v. Fitzpatrick*, 236 Va. 181, 372 S.E.2d 625 (1988), cited in *McBur*ney v. *Young,* at 1721.

[52] *Robertson v. Baldwin,* 165 U.S. 275, 293 (1897). This was a 7-1 decision, with Justice Horace Gray taking no part in the case. John Marshall Harlan served on the Court from 1877 to 1911. His grandson, John Marshall Harlan II, served on the Court from 1955 to 1971.

> human liberty were regarded as of little value, and when the powers of government were employed to gratify the ambition and pleasures of despotic rulers rather than promote the welfare of the people.

Justice Harlan asked: "Why the references to the enactments of ancient times. . ."?[53]

Why, indeed. Perhaps a partial answer can be found in a quip attributed to the newspaper editor and cynical sage of Baltimore, H.L. Mencken: A judge, Mencken said, is a law student who marks his own examination papers.

[53] *Ibid*.