
*Article IV Privileges and Immunities Clause — State Freedom
of Information Laws — McBurney v. Young*

The Article IV Privileges and Immunities Clause¹ provides individuals with a guarantee of comity across state lines for rights that are “fundamental” to citizenship.² The Supreme Court generally applies a two-step test to determine whether a state citizenship classification violates the Privileges and Immunities Clause: First, the Court determines whether the activity on which the classification infringes is “sufficiently basic to the livelihood of the Nation.”³ Second, “if the challenged restriction deprives nonresidents of a protected privilege, [the Court] will invalidate it only if [the Court] conclude[s] that the restriction is not closely related to the advancement of a substantial state interest.”⁴ Courts have recognized a “sovereign identity exception” to the Privileges and Immunities Clause,⁵ whereby states may distinguish between citizens and noncitizens at least with respect to voting and holding public office because states have a substantial interest in defining their political communities.⁶ But determining whether the sovereign identity exception extends to other political rights has largely been an academic exercise.⁷

Last Term, in *McBurney v. Young*,⁸ the Supreme Court rejected a challenge to Virginia’s citizens-only Freedom of Information Act (FOIA) and held that there was no fundamental right to access public records under the Privileges and Immunities Clause.⁹ The Court

¹ U.S. CONST. art. IV, § 2, cl. 2 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”).

² *E.g.*, *Baldwin v. Fish & Game Comm’n*, 436 U.S. 371, 387 (1978) (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1825)) (internal quotation marks omitted).

³ *Supreme Court v. Friedman*, 487 U.S. 59, 64 (1988) (quoting *Baldwin*, 436 U.S. at 388) (internal quotation marks omitted).

⁴ *Id.* at 65.

⁵ *Piper v. Supreme Court*, 723 F.2d 110, 114 (1st Cir. 1983), *aff’d* 470 U.S. 274 (1985).

⁶ *See* *Supreme Court v. Piper*, 470 U.S. 274, 282 n.13 (1985) (“A state may restrict to its residents, for example, both the right to vote and the right to hold state elective office.” (citation omitted)); *Baldwin*, 436 U.S. at 383 (“Suffrage . . . always has been understood to be tied to an individual’s identification with a particular State. No one would suggest that the Privileges and Immunities Clause requires a State to open its polls to a person who declines to assert that the State is the only one where he claims a right to vote. The same is true as to qualification for an elective office of the State.” (citations omitted)).

⁷ *See Piper*, 723 F.2d at 114 (“The Court did not go on to define the extent of the sovereign identity exception to the privileges and immunities clause . . .”). For an example of this debate in academia, see Lea Brilmayer, *Shaping and Sharing in Democratic Theory: Towards a Political Philosophy of Interstate Equality*, 15 FLA. ST. U. L. REV. 389 (1987); and Douglas Laycock, *Equality and the Citizens of Sister States*, 15 FLA. ST. U. L. REV. 431 (1987).

⁸ 133 S. Ct. 1709 (2013).

⁹ *See id.* at 1718. The Court also held that the citizens-only provision in Virginia’s FOIA did not violate a tax-record collector’s rights under the dormant commerce clause. *Id.* at 1719–20.

granted certiorari in *McBurney* to resolve an apparent split between the Third Circuit, which had struck down Delaware's citizens-only FOIA restriction,¹⁰ and the Fourth Circuit, which had upheld Virginia's parallel statute.¹¹ However, the Court passed on its opportunity to explicitly address the theory advanced both by Delaware in the Third Circuit and by Virginia before the Court: that public-records access fits within the sovereign identity exception to the Privileges and Immunities Clause. The resulting doctrinal confusion threatens to leave states and lower courts with a lack of clarity over the extent of a state's authority to reserve political rights to its citizens alone.

Mark McBurney is a citizen of Rhode Island, and his ex-wife is a citizen of Virginia.¹² After the Virginia Division of Child Support Enforcement delayed nine months before satisfying his request to file a petition for child support on his behalf, McBurney submitted a Virginia Freedom of Information Act¹³ (VFOIA) request seeking documents pertaining to his family, his application for child support, and the agency's handling of similar claims.¹⁴ Roger Hurlbert is a citizen of California and the sole proprietor of a business that requests real estate tax records for its clients.¹⁵ Pursuant to a request from a land/title company, Hurlbert filed a VFOIA request with the Henrico County Real Estate Assessor's Office.¹⁶ VFOIA provides access to Virginia's public records to "citizens of the Commonwealth,"¹⁷ but does not grant similar access rights to noncitizens.¹⁸ Therefore, the requests by both McBurney and Hurlbert were denied because neither man was a Virginia citizen.¹⁹

McBurney and Hurlbert filed a complaint in the Eastern District of Virginia seeking declaratory and injunctive relief under 42 U.S.C. § 1983 from enforcement of VFOIA's citizens-only provision.²⁰ Both plaintiffs alleged violations of their rights under the Privileges and Immunities Clause, and Hurlbert filed a separate claim challenging the

¹⁰ See *Lee v. Minner*, 458 F.3d 194, 195 (3d Cir. 2006).

¹¹ See *McBurney v. Young*, 667 F.3d 454, 458 (4th Cir. 2012); *McBurney*, 133 S. Ct. at 1714.

¹² *McBurney*, 133 S. Ct. at 1713.

¹³ VA. CODE ANN. §§ 2.2-3700 to -3714 (2011 & Supp. 2013).

¹⁴ *McBurney*, 133 S. Ct. at 1713-14.

¹⁵ *Id.*

¹⁶ *Id.* at 1714.

¹⁷ VA. CODE ANN. § 2.2-3704(A) (2011). Virginia also grants access rights to "representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth." *Id.*

¹⁸ *McBurney*, 133 S. Ct. at 1713. Arkansas and Tennessee maintain similar distinctions. See Brief for Petitioners at 10-11, *McBurney*, 133 S. Ct. 1709 (No. 12-17).

¹⁹ *McBurney*, 133 S. Ct. at 1714. Although McBurney received "most of the information he had sought" from a separate document request, he did not receive the information he requested regarding how the agency handled child support claims similar to his. *Id.*

²⁰ *McBurney v. Cuccinelli*, 780 F. Supp. 2d 439, 444 (E.D. Va. 2011).

application of VFOIA as a violation of the dormant commerce clause.²¹ After the Court of Appeals for the Fourth Circuit reversed the district court by holding that McBurney and Hurlbert had standing,²² the district court heard the case on remand and the parties cross-moved for summary judgment.²³ The district court concluded that VFOIA neither abridges any of the plaintiffs' rights under the Privileges and Immunities Clause²⁴ nor violates the dormant commerce clause, and accordingly granted the defendants' motions for summary judgment.²⁵

The Fourth Circuit affirmed.²⁶ Judge Agee, writing for a unanimous panel,²⁷ concluded that the ability to obtain public information is not protected by the Privileges and Immunities Clause.²⁸ The court also determined that VFOIA neither deprived Hurlbert of his ability to pursue his record-collection business²⁹ nor burdened the ability of noncitizens to access Virginia courts on equal terms with Virginians.³⁰ In his analysis, Judge Agee distinguished the Third Circuit's decision in *Lee v. Minner*³¹ striking down the citizens-only provision in the Delaware Freedom of Information Act³² (DFOIA).³³ In *Lee*, the Third Circuit had determined that DFOIA interfered with a noncitizen's

²¹ *McBurney v. Young*, 667 F.3d 454, 460 (4th Cir. 2012). The Commerce Clause grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. "Although the Clause . . . speaks in terms of powers bestowed upon Congress, the Court long has recognized that it also limits the power of the States to erect barriers against interstate trade." *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 35 (1980).

²² See *McBurney v. Cuccinelli*, 616 F.3d 393, 402–04 (4th Cir. 2010).

²³ *McBurney*, 780 F. Supp. 2d at 443.

²⁴ *Id.* at 451. As part of its analysis, the court determined that the right to access information, as well as the rights to advocate for one's own interest and pursue economic interests, is not fundamental within the meaning of the Privileges and Immunities Clause. *Id.* at 448, 450.

²⁵ *Id.* at 453.

²⁶ *McBurney*, 667 F.3d at 458.

²⁷ Judges Niemeyer and Gregory joined the opinion by Judge Agee.

²⁸ *McBurney*, 667 F.3d at 466. *McBurney* also alleged that VFOIA's citizens-only provision violated his right to advocate for his interests, but to the extent that his claim was separate from the argument that the right to access information is fundamental, the court concluded that VFOIA does not prevent *McBurney* from engaging in the political process or advocating for his own interests. *Id.* at 467.

²⁹ See *id.* at 464–65 (explaining that VFOIA does not regulate a profession or trade in Virginia, its purpose is unrelated to commerce, and any effect on Hurlbert's record-collection business is incidental). Both *McBurney* and Hurlbert further argued that VFOIA impedes their ability to pursue their economic interests, but the court declined to identify such a right under the Privileges and Immunities Clause. *Id.* at 467.

³⁰ *Id.* at 467. While the right to access courts on equal terms is protected by the Privileges and Immunities Clause, Judge Agee explained that the plaintiffs' ability to access public records is distinct from their ability to seek relief in court. See *id.*

³¹ 458 F.3d 194 (3d Cir. 2006).

³² DEL. CODE ANN. tit. 29, §§ 10001–06 (2003 & Supp. 2012).

³³ *McBurney*, 667 F.3d at 465–66.

“right to ‘engage in the political process with regard to matters of national political and economic importance.’”³⁴ After expressing initial skepticism over whether the Privileges and Immunities Clause protects such a right,³⁵ the Fourth Circuit found that *Lee* was different because *McBurney* and Hurlbert wanted “information of *personal* import.”³⁶ Judge Agee concluded by rejecting Hurlbert’s dormant commerce clause claim.³⁷

The Supreme Court affirmed.³⁸ Writing for a unanimous Court, Justice Alito held that the Privileges and Immunities Clause does not protect the right to access public records.³⁹ The Court further concluded that VFOIA’s citizens-only provision does not abridge the other rights cited by the plaintiffs, and the Court rejected Hurlbert’s dormant commerce clause challenge.⁴⁰

Justice Alito began by addressing the plaintiffs’ four arguments under the Privileges and Immunities Clause. First, Hurlbert’s argument that VFOIA inhibits his fundamental right to pursue a common calling failed because the Court concluded that VFOIA’s citizens-only provision is not motivated by protectionist goals.⁴¹ Rather, it “represents a mechanism by which those who ultimately hold sovereign power (*i.e.*, the citizens of the Commonwealth) may obtain an accounting from the public officials to whom they delegate the exercise of that power.”⁴² Second, the Court determined that VFOIA does not hinder

³⁴ *Lee*, 458 F.3d at 198 (quoting *Lee v. Minner*, 369 F. Supp. 2d 527, 534 (D. Del. 2005)); *see also id.* at 199–200 (“No state is an island . . . and some events which take place in an individual state may be relevant to and have an impact upon policies of not only the national government but also of the states.”).

³⁵ *See McBurney*, 667 F.3d at 465 (“[A]s out-of-circuit authority, [*Lee*] is not binding on this Court. Although the Third Circuit traced its analysis to general principles from Privileges and Immunities Clause jurisprudence, the specific right that *Lee* identified is not one previously recognized by the Supreme Court, or any other court, as an activity within the scope of the Privileges and Immunities Clause.”). *But see* *Jones v. City of Memphis*, 852 F. Supp. 2d 1002, 1016 (W.D. Tenn. 2012) (reconciling *Lee* with the Fourth Circuit’s review of *McBurney* by concluding that the Fourth Circuit “accept[ed]” the existence of the right to engage in the political process with regard to matters of national political and economic importance).

³⁶ *McBurney*, 667 F.3d at 465. In comparison, the plaintiff in *Lee* was a noncitizen journalist who was denied access to information relating to Delaware’s settlement of a lawsuit against a mortgage lender. *Lee*, 458 F.3d at 195–96.

³⁷ *McBurney*, 667 F.3d at 469. Judge Agee reasoned that the purpose of VFOIA is to provide a more transparent government and not to burden the economic interests of noncitizens. *Id.* The court also restated its view that any impact from VFOIA on Hurlbert’s business is incidental. *Id.*

³⁸ *McBurney*, 133 S. Ct. at 1720.

³⁹ *Id.* at 1718–19.

⁴⁰ *Id.* at 1715–20.

⁴¹ *Id.* at 1715–16.

⁴² *Id.* at 1716. Although VFOIA may have an “incidental effect” on noncitizen record collectors, the Court maintained that the Privileges and Immunities Clause “does not require that a State tailor its every action to avoid any incidental effect on out-of-state tradesmen.” *Id.* Justice

Hurlbert's fundamental right to own and transfer property in Virginia because current practices in the state provide ample property records to noncitizens.⁴³ Third, the Court denied that VFOIA abridged McBurney's fundamental right to access Virginia's courts on equal terms with Virginians. Justice Alito reasoned that Virginia's procedural rules provide noncitizens with adequate methods for accessing documents needed in litigation, and that Virginia ensures that noncitizens have equal access to both judicial records and personal information that the state possesses.⁴⁴ Fourth, the Court held that the Privileges and Immunities Clause does not protect a right to access public information.⁴⁵ Justice Alito explained that a right to access public records does not exist in the Constitution and was not widely recognized at common law, in founding-era English cases, or in nineteenth-century American cases.⁴⁶ And he reasoned that while FOIA laws are relatively new, "[t]here 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."⁴⁷

Justice Alito concluded by explaining that the dormant commerce clause does not apply to this case because VFOIA "neither prohibits access to an interstate market nor imposes burdensome regulation on that market."⁴⁸ Instead, the purpose of VFOIA is related to government transparency.⁴⁹ Justice Alito also clarified that even if the dormant commerce clause applied, the market participant exception⁵⁰

Alito also justified the citizenship distinction by noting that Virginia taxpayers pay the costs for maintaining their record system. *Id.*

⁴³ *Id.* at 1716–17. Justice Alito explained that Virginia allows citizens and noncitizens alike to obtain title documents, notices of tax liens, and notices of mortgages. *See id.* And although VFOIA does not require that Virginia's agencies and municipalities provide real estate tax assessment records to noncitizens, the Court did not view this distinction as a significant burden on noncitizens because Virginia and its constituent entities typically make these records available to the public by posting them online. *Id.* at 1717.

⁴⁴ *See id.* at 1717–18.

⁴⁵ *Id.* at 1718–19.

⁴⁶ *See id.* Although nineteenth-century American cases were "less uniform," the Court did not find that a right to access public information was "widely recognized in the early Republic." *Id.* at 1718.

⁴⁷ *Id.* at 1719.

⁴⁸ *Id.* at 1720.

⁴⁹ *See id.* ("[T]he express purpose of Virginia's FOIA law is to 'ensur[e] the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees, and free entry to meetings of public bodies wherein the business of the people is being conducted.'" (alteration in original) (quoting VA. CODE ANN. § 2.2-3700(B) (2011))).

⁵⁰ According to the Court, "a State does not violate the dormant Commerce Clause when, having created a market through a state program, it 'limits benefits generated by [that] state program to those who fund the state treasury and whom the State was created to serve.'" *Id.* (quoting *Reeves, Inc. v. Stake*, 447 U.S. 429, 442 (1980)).

would permit VFOIA's citizens-only provision because the state created the "market" for public records in Virginia.⁵¹

Justice Thomas filed a brief concurrence. While he agreed with Justice Alito's application of the Court's precedent, he wrote to record his continued objection to using the Commerce Clause as an independent restraint on the states.⁵²

In *McBurney v. Young*, the Supreme Court passed on an opportunity to address an important issue raised both by Delaware before the Third Circuit and by Virginia before the Court: whether public-records access falls within the sovereign identity exception to the Privileges and Immunities Clause. The Third Circuit answered in the negative, holding that citizens-only FOIA provisions, unlike citizenship restrictions on voting and holding public office, are not closely related to a state's substantial interest in preserving its sovereign identity. The Supreme Court, however, opted to resolve *McBurney* at the first step of its Privileges and Immunities Clause analysis without reaching the issue of whether allowing only citizens to access public records implicates a state's substantial interests. As a result, the Court has contributed to the lack of clarity over a state's ability to exclude noncitizens from certain aspects of political participation.

The Supreme Court has explained that a state has a substantial interest in preserving its sovereign identity. For example, the Court struck down a one-year voter residency requirement under the Equal Protection Clause in *Dunn v. Blumstein*,⁵³ but acknowledged that "[a]n appropriately defined and uniformly applied requirement of bona fide residence may be necessary to preserve the basic conception of a political community, and therefore could withstand close constitutional scrutiny."⁵⁴ One year later, the Court in *Sugarman v. Dougall*⁵⁵ considered New York's exclusion of non-U.S. citizens from certain civil service positions.⁵⁶ As in *Dunn*, the Court "recogniz[ed] a State's interest in . . . limiting participation in [its] government to those who are within 'the basic conception of a political community,'"⁵⁷ as well as a "State's broad power to define its political community,"⁵⁸ but ultimately determined that the exclusion was not narrowly tailored to New

⁵¹ See *id.*

⁵² See *id.* at 1720–21 (Thomas, J., concurring).

⁵³ 405 U.S. 330 (1972).

⁵⁴ *Id.* at 343–44. The Court found an appropriate requirement one year later. See *Marston v. Lewis*, 410 U.S. 679, 680 (1973) (per curiam) (upholding Arizona's fifty-day residency requirement for voting).

⁵⁵ 413 U.S. 634 (1973).

⁵⁶ See *id.* at 635.

⁵⁷ *Id.* at 642 (quoting *Dunn*, 405 U.S. at 344).

⁵⁸ *Id.* at 643.

York's interest in achieving these purposes.⁵⁹ The Court has also cited *Dunn* in the Privileges and Immunities Clause context while confirming that states have no obligation to grant the right to vote or the right to hold public office to noncitizens.⁶⁰ From these decisions among others, at least one lower court⁶¹ and several scholars⁶² have extrapolated the sovereign identity exception (also known as the political rights exception) to the Privileges and Immunities Clause, whereby states may exclude noncitizens from certain aspects of political participation without violating the constitutional rights of noncitizens. However, the Supreme Court has not defined the scope of the exception.⁶³

On one view, the sovereign identity exception should stretch no further than the right to vote and the right to hold public office. This view guarantees that noncitizens "have all the rights of political participation except for voting and holding office"⁶⁴ because "[t]he restriction of voting and office holding to the residents of each state is essential to the states' existence as separate polities."⁶⁵ The proponents of this view distinguish voting from political speech by reasoning that citizens are free to resist the persuasive speech of noncitizens, "[b]ut if the deciding votes are cast by visiting outsiders, the choice of local voters is overridden, and the resulting decision is not that of the polity."⁶⁶ Under this view, voting and holding public office are "extreme" cases that

⁵⁹ *Id.*

⁶⁰ See, e.g., *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 383 (1978).

⁶¹ See *Piper v. Supreme Court*, 723 F.2d 110, 114–15 (1st Cir. 1983), *aff'd* 470 U.S. 274 (1985).

⁶² See, e.g., Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 270–71 (1992); Gary J. Simson, *Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV*, 128 U. PA. L. REV. 379, 387, 392 & n.63 (1979); Note, *A Constitutional Analysis of State Bar Residency Requirements Under the Interstate Privileges and Immunities Clause of Article IV*, 92 HARV. L. REV. 1461, 1476–79 (1979).

⁶³ See *Piper*, 723 F.2d at 114 (seeking guidance regarding the scope of the sovereign identity exception from the Supreme Court's Equal Protection Clause cases because the Court had not yet "define[d] the extent of the sovereign identity exception" in its Privileges and Immunities Clause cases). However, the Court has signaled at least one relevant line of inquiry when determining whether a state's interest in excluding noncitizens from public office extends to other areas of employment; while denying that a state has a sufficient interest in excluding noncitizens from its bar, the Court has explained that lawyers do not *formulate government policy* or *exercise government power*. See *Supreme Court v. Piper*, 470 U.S. 274, 282 (1975) ("We do not believe . . . that the practice of law involves an 'exercise of state power' justifying New Hampshire's residency requirement."); *In re Griffiths*, 413 U.S. 717, 729 (1973) ("Nor does the status of holding a license to practice law place one so close to the core of the political process as to make him a formulator of government policy.").

⁶⁴ Laycock, *supra* note 7, at 433. Laycock pays particular attention to the rights of noncitizens to speak on equal terms with citizens: "They may march in the streets, lobby the legislature, or buy political advertising on local television. They may contribute to campaign funds for candidates or referendum issues." *Id.* at 433–34.

⁶⁵ *Id.* at 434.

⁶⁶ *Id.* at 436. Laycock reached this conclusion after surveying historical allegations that wealthy individuals influenced state elections by recruiting out-of-state voters. See *id.* at 435.

justify overriding the “presumption of unconstitutionality” attached to citizenship classifications.⁶⁷ In essence, this view starts from the assumption that states must include noncitizens in all aspects of political participation unless there is a substantial justification for exclusion, and the proponents of this view find such a justification for excluding noncitizens from voting and holding public office.

But it is far from clear that courts should start from the assumption that states must *include* noncitizens in all aspects of political participation unless there is a substantial justification for *exclusion*. Instead, courts could start from the opposite assumption that states may *exclude* noncitizens from all aspects of political participation unless there is a substantial justification for *inclusion*.⁶⁸ This view relies on the debatable notion that noncitizens inherently have a lesser interest in state governance than citizens have. And because noncitizens do not have the same inherent interest in the governance of a particular state that citizens have, states may be skeptical of the motives of noncitizens who seek to participate in state politics. As a result, states may exclude these potential troublemakers from political participation unless a substantial justification exists for including them.

McBurney presented precisely this issue of whether a state may exclude noncitizens from political participation as a default without any other substantial justification. VFOIA represented an effort by Virginia to allow its people to view the inner workings of their government.⁶⁹ But unlike the right to vote, public-records access presented no obvious justification for excluding noncitizens.⁷⁰ Instead, VFOIA’s citizenship

⁶⁷ Simson, *supra* note 62, at 388.

⁶⁸ This view arguably has the benefit of being more faithful to the history of the Privileges and Immunities Clause because it starts with the premise that the Privileges and Immunities Clause does not protect political rights. See Douglas G. Smith, *The Privileges and Immunities Clause of Article IV, Section 2: Precursor of Section 1 of the Fourteenth Amendment*, 34 SAN DIEGO L. REV. 809, 908 (1997) (“Members of Congress [debating the Privileges or Immunities Clause of the Fourteenth Amendment] noted that it was well established under the case law of the Privileges and Immunities Clause of Article IV, Section 2 that the phrase ‘Privileges and Immunities of Citizens’ did not refer to political rights, but rather merely extended civil rights to foreign citizens.”); David R. Upham, Note, *Corfield v. Coryell and the Privileges and Immunities of American Citizenship*, 83 TEX. L. REV. 1483, 1502 (2005) (“[I]n the first judicial construction of the Privileges and Immunities Clause, it was ruled that while *some* of the privileges of citizenship were protected under the clause, the political rights of citizenship were not.”).

⁶⁹ See VA. CODE ANN. § 2.2-3700(B) (2011) (“The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government.”).

⁷⁰ Justice Alito mentioned that VFOIA’s citizens-only provision “recognizes that Virginia taxpayers foot the bill for the fixed costs underlying recordkeeping in the Commonwealth.” *McBurney*, 133 S. Ct. at 1716 (citing Transcript of Oral Argument at 53–54, *McBurney*, 133 S. Ct. 1709 (No. 12-17)). But administrative burdens are a weak justification for excluding noncitizens. As a practical matter, Virginia is able to recoup its administrative costs from record requesters, and some Virginia agencies “voluntarily honor out-of-state requests because they do not consider them burdensome.” Brief for Petitioners, *supra* note 18, at 50. Noncitizen record collectors can

distinction represented a default belief that only citizens have a need to inquire about their government, and Virginia simply found no justification for including noncitizens in the benefits of public information.

Both the Third Circuit and the Supreme Court considered this issue. In front of the Third Circuit, Delaware cited *Sugarman* to demonstrate its interest in defining its political community.⁷¹ The Third Circuit accepted that states have such an interest, but ultimately held that citizens-only FOIA provisions “bear[] little — if any — relationship to this goal.”⁷² Like Delaware, Virginia argued in its brief before the Supreme Court that it had a substantial interest in reserving public-records access to its citizens because only Virginia citizens are “directly affected by [Virginia’s] political process,” while noncitizens have “no direct stake in Virginia politics and governance.”⁷³ At oral argument, several Justices approvingly cited this theory.⁷⁴ For example, Justice Scalia explained the purpose of VFOIA’s citizenship distinction by remarking, “[Virginians] don’t want outlanders mucking around in . . . Virginia government.”⁷⁵ And Justice Ginsburg questioned why Virginia cannot reserve public-records access to its “political community” in the same way that it reserves the right to vote to its citizens.⁷⁶

However, while Justice Alito’s opinion gestured toward a recognition of Virginia’s argument,⁷⁷ his mentions of Virginia’s interest in ex-

also use citizen intermediaries to access Virginia’s records, thus imposing the same administrative burden on the state as if the noncitizens made the request themselves. *See* Transcript of Oral Argument, *supra*, at 30 (Sotomayor, J.) (“I’m not sure how you save administrative costs under this statute. [Noncitizens] could go to any Virginia resident . . . and get the very same information.”). And as a doctrinal matter, the Court has previously rejected administrative costs as a justification for discriminating against nonresidents when a territory can simply charge fees to those nonresidents to compensate for any increased costs. *See* *Barnard v. Thorstenn*, 489 U.S. 546, 556–57 (1989).

⁷¹ *See* *Lee v. Minner*, 458 F.3d 194, 200–01 (3d Cir. 2006).

⁷² *Id.* at 201; *see also id.* (“There is no evidence that allowing noncitizens to directly obtain information will weaken the bond between the State of Delaware and its citizens. Put simply, there is no nexus between the State’s purported objective and its practice of prohibiting noncitizens from obtaining public records.” (footnote omitted)).

⁷³ Brief of Respondents at 19, *McBurney*, 133 S. Ct. 1709 (No. 12–17); *see also* Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. (forthcoming Feb. 2014) (explaining that Virginia’s defense of VFOIA relied on its political justifications for excluding noncitizens from public-records access rather than economic justifications).

⁷⁴ *See* Bulman-Pozen, *supra* note 73.

⁷⁵ Transcript of Oral Argument, *supra* note 70, at 21.

⁷⁶ *Id.* at 9.

⁷⁷ Some believe that the opinion provided more than a mere gesture toward Virginia’s argument. *See* Lyle Denniston, *Opinion Recap: Only One Argument Needed*, SCOTUSBLOG (Apr. 29, 2013, 12:16 PM), <http://www.scotusblog.com/2013/04/opinion-recap-only-one-argument-needed/> (“The Court . . . upheld the power of a state to limit records access to state residents, on the theory that this gives those individuals some help in monitoring the performance of state government agencies. . . . [T]he Court paid scant attention in its final ruling to the commercial side of records access, opting to keep its focus on a state’s choice to help its citizens keep track of how their public agents are performing.”); Bulman-Pozen, *supra* note 73.

cluding political outsiders from public-records access remained couched within other doctrinal points and are far from precedential. For example, Justice Alito explained that the purpose of VFOIA is to allow the individuals who “ultimately hold sovereign power” — Virginia citizens — to “obtain an accounting from [their] public officials.”⁷⁸ But this statement merely allowed Justice Alito to distinguish *McBurney* from cases in which state action burdened a noncitizen’s right to pursue a common calling because a state burdens such a right only when it acts with a “protectionist purpose.”⁷⁹ Therefore, the fact that VFOIA served the purpose of excluding political outsiders from public-records access was divorced from any notion that Virginia has a sufficiently substantial interest in doing so.

Likewise, while explaining why the right to access public information is not fundamental, Justice Alito presented a distinction between individuals who had a “personal interest” in records and those who did not.⁸⁰ One possible implication of this distinction is that the Court believed that noncitizens lack a sufficient personal interest in state records. But this analysis remained tied to the Court’s dismissal of the plaintiffs’ attempt to allege a new fundamental right — the right to access information. And the fact that the right to access public information is not fundamental does not address whether a state has a substantial interest in burdening that right.

The Court’s merely tacit acceptance of Virginia’s political justification for VFOIA’s citizenship distinction will not provide sufficient clarity for lower courts that seek to determine the scope of the sovereign identity exception. Indeed, it remains unclear after *McBurney* whether the legal rationale that allows states to exclude noncitizens from voting and holding public office may apply to any other political rights. Until the Court defines the full scope of the sovereign identity exception, the connection between political rights and the Privileges and Immunities Clause will remain ambiguous.

⁷⁸ *McBurney*, 133 S. Ct. at 1716.

⁷⁹ *Id.* at 1715 (“[T]he Court has struck laws down as violating the privilege of pursuing a common calling only when those laws were enacted for the protectionist purpose of burdening out-of-state citizens.”).

⁸⁰ *See id.* at 1718 (“Most founding-era English cases provided that only those persons who had a personal interest in non-judicial records were permitted to access them.”). The nineteenth-century American cases that the Court cited contained the same distinction. *See id.* at 1718–19.