ARTICLE

A CONSTITUTIONAL RIGHT TO PUBLIC INFORMATION

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INTRODUCTION

In recent years, advocates of increased governmental transparency and access to public records have garnered legislative successes at the state level. For instance, in 2017 Oregon implemented a statutory timeframe requiring public

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entities to acknowledge receipt of public records requests within five business days[1] and to respond to such requests within ten business days.[2] In 2017, South Carolina enacted reform of the South Carolina Freedom of Information Act[3] and implemented legislation providing for a ten business day deadline for public entities to respond to requests for records less than two years old.[4] In Wyoming, legislation to establish a thirty calendar day deadline[5] for governmental entities to furnish records responsive to a public records request passed through the Wyoming Legislature and was signed into law in 2019.[6] With these developments in recent years, those advocating for more open, transparent government seemingly have momentum.

Despite these successes at the state level, the United States Supreme Court's decision in *McBurney v. Young* created a serious setback for open government advocates.[7] In *McBurney*, the court reaffirmed there is no constitutional right to public records.[8] The court also ruled that a state has the discretion to limit access to public records to its own citizens as this policy violates neither the Privileges and Immunities Clause nor the dormant Commerce Clause.[9] The *McBurney* decision makes it permissible for states to amend their public records laws to prohibit non-state-citizen access to the records, even in the event that a noncitizen may have a compelling interest in the public records requested.[10]

In the wake of *McBurney*, this Article calls for policymakers at both the federal and state level to ensure government records remain open and accessible to the public.[11] I urge policy makers to fight not only to strengthen the Freedom

[1] *See* OR. REV. STAT. § 192.324(2) (2019).

[2] *See* OR. REV. STAT. § 192.329(5) (2019).

[3] *See* H.R. 3352, 122nd Gen. Assemb., Reg. Sess. (S.C. 2017).

[4] *See* S.C. CODE ANN. § 30-4-30(C) (2019).

[5] *See* S File No. 57, 65th Leg., 2019 Gen. Sess. (Wyo. 2019).

[6] *See* Ramsey Scott, *Legislators contemplate changes to new open records law*, GILLETTE NEWS RECORD (June 5, 2019), https://www.gillettenewsrecord.com/news/wyoming/article_39902b53-72f7-51c1-ba2b-eef0d45276e7.html.

[7] *See* McBurney v. Young, 569 U.S. 221 (2013).

[8] *Id.* at 232 ("This Court has repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws.").

[9] *Id.* at 237 ("Because Virginia's citizens-only FOIA provision neither abridges any of the petitioners' fundamental privileges and immunities nor impermissibly regulates commerce, petitioners' constitutional claims fail.").

[10] *See* James Bosher, *Questions linger over impact of McBurney v. Young decision* (2020), REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, https://www.rcfp.org/journals/questions-linger-over-impac/ (last visited Mar. 18, 2020).

[11] *See* discussion *infra.* Part III.

of Information Act[12] and the various state public records laws,[13] but also to pursue an amendment to the United States Constitution providing a right to public information.[14] In addition, in states where a constitutional right to public information does not exist, amendments that ensure such a right specifically exists should be enacted.[15] A constitutional right to public records currently is in place in at least seven state constitutions.[16] These state constitutions can guide legislators on how to draft a model federal or state constitutional amendment. This Article contributes a draft of such an amendment to start this conversation.[17]

Part I of this Article explains the *McBurney* decision and the ramifications of the absence of a federal constitutional right to public information.[18] Part II discusses the state constitutional right to public records provisions of the state constitutions of California, Florida, Illinois, Louisiana, Montana, New Hampshire, and North Dakota.[19] Part III of this Article examines how access to public records and documents will be improved by the implementation of a federal constitutional amendment and state constitutional amendments(s) solidifying a constitutional right to public information.[20] Part IV then briefly offers a proposed draft of a federal and/or state constitutional amendment providing for a constitutional right to public information.[21] In concluding, this Article contends the enshrining of a right to public information in both the United States Constitution as well as various state constitutions will ensure

[12] *See e.g.*, Aram A. Gavoor & Daniel Miktus, *Oversight of Oversight: A Proposal for More Effective FOIA Reform*, 66 CATH. U. L. REV. 525, 534 (2017) ("Though agencies and presidential administrations praise FOIA and open government principles, they also quietly endeavor to undermine FOIA's purposes. Rather than permit agencies and presidential administrations that will naturally oppose meaningful FOIA modification to derail such reform efforts, Congress should enact precise FOIA reform measures to ensure that FOIA's main goals and purposes are fully realized.").

[13] *See generally* Chad G. Marzen, *Public Records Denials*, 11 N.Y.U. J. L. & LIBERTY 966 (2018) (discussing various provisions of state public records laws).

[14] *See* discussion *infra.* Part III.

[15] *See* discussion *infra.* Part III.

[16] The author reviewed each of the fifty state constitutions using the following keywords: "public records," "public documents," "documents of public" and "records of public." At least seven state constitutions were identified which include a specific right to public records. These states include: California (*see* CAL. CONST. art. I, § 3(b)(1)); Florida (*see* FLA. CONST. art. I, § 24); Illinois (*see* ILL. CONST. art. VIII, § 1(c)); Louisiana (*see* LA. CONST. art. XII, § 3); Montana (*see* MONT.. CONST. art. II, § 9); New Hampshire (*see* N.H. CONST. art. 8) & North Dakota (*see* N.D. CONST. art. XI, § 6).

[17] *See* discussion *infra.* Part III.

[18] *See* discussion *infra* Part I.

[19] *See* discussion *infra* Part II.

[20] *See* discussion *infra* Part III.

[21] *See* discussion *infra* Part IV.

greater access of public records and documents to the general public, consistent with the democratic value of open, transparent government.[22]

I. THE *MCBURNEY* DECISION AND FEDERAL CONSTITUTIONAL LAW

Several states, including Alabama,[23] Arkansas,[24] Delaware,[25] Missouri,[26] New Hampshire,[27] New Jersey,[28] Tennessee[29] and Virginia,[30] limit access to public records by only allowing citizens of the state to request public records. Plaintiffs in the *McBurney v. Young* case challenged the Virginia statute limiting

[22] *See* discussion *infra* Conclusion.

[23] *See* ALA. CODE § 36-12-40 (2019) (""Every citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute…"); State ex. rel. Kernells v. Ezell, 282 So.2d 266, 268 (Ala. 1973).

[24] *See* ARK. CODE ANN. § 25-19-105(a)(1)(A) (2019) ("Except as otherwise specifically provided by this section or by laws specifically enacted to provide otherwise, all public records shall be open to inspection and copying by any citizen of the State of Arkansas during the regular business hours of the custodian of the records").

[25] *See* DEL. CODE ANN. tit. 29, § 10003(a) (2019) ("All public records shall be open to inspection and copying during regular business hours by the custodian of the records for the appropriate public body. Reasonable access to and reasonable facilities for copying of these records shall not be denied to any citizen").

[26] *See* MO. REV. STAT. § 109.180 (2019) ("Except as otherwise provided by law, all state, county and municipal records kept pursuant to statute or ordinance shall at all reasonable times be open for a personal inspection by any citizen of Missouri, and those in charge of the records shall not refuse the privilege to any citizen").

[27] *See* N.H. REV. STAT. § 91-A:4 (2019) ("Every citizen during the regular or business hours of all public bodies or agencies, and on the regular business premises of such public bodies or agencies, has the right to inspect all governmental records in the possession, custody, or control of such public bodies or agencies, including minutes of meetings of the public bodies, and to copy and make memoranda or abstracts of the records or minutes so inspected, except as otherwise prohibited by statute or RSA 91-A:5").

[28] *See* N.J. STAT. ANN. § 47:1A-1 (2019) ("The Legislature finds and declares it to be the public policy of this State that: government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded by P.L. 1963, c. 73 (C:47:1A-1 et. seq.) as amended and supplemented, shall be construed in favor of the public's right of access").

[29] *See* TENN. CODE ANN. § 10-7-503(a)(2)(A) ("All state, county and municipal records shall, at all times during business hours, which for public hospitals shall be during the business hours of their administrative offices, be open for personal inspection by any citizen of this state, and those in charge of the records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law").

[30] *See* VA. CODE ANN. § 2.2-3704 (2019) ("Except as otherwise specifically provided by law, all public records shall be open 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 during the regular office hours of the custodian of such records").

the applicability of the benefits of public records laws.[31] In *McBurney*, two people, one from Rhode Island and the other from California, filed requests for public records in Virginia under the Virginia Freedom of Information Act ("FOIA").[32] One of the plaintiffs was a citizen of Rhode Island whose ex-spouse lived in Virginia.[33] After his spouse defaulted on a child support obligation, the citizen of Rhode Island sought public records from an agency in Virginia relating to his application for child support.[34] The request was denied on the basis that he was not a Virginia citizen.[35]

The other plaintiff, a California citizen, operated a business that requested real estate tax records for clients from states throughout the United States.[36] He requested real estate tax records for a particular client from a county in Virginia and his FOIA request was also denied because he was not a citizen of Virginia .[37] The United States District Court for the Eastern District of Virginia upheld the denial of the records[38] and the United States Court of Appeals for the Fourth Circuit affirmed this decision.[39]

Both plaintiffs argued violations of the Privileges and Immunities Clause and the plaintiff from California, who operated the business, contended that the denials of the public records requests also violated the dormant Commerce Clause.[40] The dormant Commerce Clause claim did not persuade the *McBurney* court, which held that the state of "Virginia neither prohibits access to an interstate market nor imposes burdensome regulation on that market. Rather, it merely creates and provides to its own citizens copies – which would not otherwise exist – of state records."[41]

The Privileges and Immunities Clause of the Constitution requires that "the Citizens of each State shall be entitled to all Privileges and Immunities of

[31] *See* McBurney v. Young, 569 U.S. 224, 225 (2013).

[32] *Id.* at 224–225.

[33] *Id.* at 224.

[34] *Id.* at 224–225.

[35] *Id.* at 225.

[36] *Id.*

[37] McBurney v. Young, 569 U.S. 224, 225 (2013).

[38] McBurney v. Cuccinelli, 780 F. Supp. 2d 439 (E.D. Va. 2011).

[39] McBurney v. Young, 667 F.3d 454 (4th Cir. 2012).

[40] *See* Edward A. Zelinsky, *The False Modesty of Department of Revenue v. Davis: Disrupting the Dormant Commerce Clause Through the Traditional Public Function Doctrine*, 29 VA. TAX. REV. 407, 412 (2010) ("The Commerce Clause of the U.S. Constitution affirmatively bestows upon Congress the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." One of the great debates of the American constitutional tradition is whether this explicit grant of legislative power implicitly constrains the authority of the states. From this debate has emerged the notion of the 'dormant' (or 'negative') Commerce Clause, i.e., the proposition that, even in the absence of federal legislation, the Clause on its own displaces the authority of the states relative to interstate commerce"); *see also* Young, 569 U.S. at 225.

[41] *Id.* at 235–236.

Citizens in the several States."[42] The United States Supreme Court in *Paul v. Virginia* noted the purpose of the Privileges and Immunities Clause is "to place the citizens of each State upon the same footing with citizens of other States, as far as the advantages resulting from citizenship in those States are concerned."[43] The plaintiffs contended four specific privileges were violated in the denial of the public records requests: the right to a common calling,[44] right to place all citizens on the "same footing" by infringing access to records which are "indispensable to securing property rights,"[45] the right to access to the courts in Virginia,[46] and the right to public information.[47]

The plaintiffs in *McBurney* first argued the Virginia FOIA statute denied the California plaintiff the ability to engage in his business because it denied him the ability the collect records in Virginia.[48] Thus, the statute infringed upon his right to a "common calling."[49] The Supreme Court specifically remarked that the Court has struck down laws on the "common calling" basis "only when those laws were enacted for the protectionist purpose of burdening out-of-state citizens."[50] As an example of the protectionist purpose the Court cited[51] the case of *Hicklin v. Orbeck*, where the United States Supreme Court struck down an Alaska statute which gave a hiring preference for Alaska residents over nonresidents working in the state's oil and gas industry.[52] The Supreme Court in *McBurney* contrasted the Virginia FOIA statute with the *Hicklin* decision, concluding that "while the Clause forbids a State from intentionally giving its own citizens a competitive advantage in business or employment, the Clause does not require that a State tailor its every action to avoid incidental effect on out-of-state tradesmen."[53]

In addition, the court in *McBurney* found that the Virginia FOIA statute also did not impose a significant burden on noncitizens to own or transfer property in Virginia.[54] While the Supreme Court acknowledged that real estate tax assessment records in Virginia could only be requested through the FOIA law by state citizens, it also noted that almost every county in Virginia placed this information online.[55] The *McBurney* Court concluded that "requiring

[42] U.S. CONST. art. IV, § 2, cl. 1.

[43] Paul v. Virginia, 75 U.S. 168, 180 (1868).

[44] Brief for Petitioner at 17-18, McBurney v. Young, 569 U.S. 221 (2013) (No. 12–17).

[45] *Id.* at 18.

[46] *Id.*

[47] *Id.*

[48] *Id.* at 35.

[49] *Id.*

[50] *See* McBurney v. Young, 569 U.S. 221, 227 (2013).

[51] *Id.*

[52] Hicklin v. Orbeck, 437 U.S. 518 (1978).

[53] *Young*, 569 U.S. at 229.

[54] *Id.* at 230–31.

[55] *Id.* at 230.

noncitizens to conduct a few minutes of Internet research in lieu of using a relatively cumbersome state FOIA process cannot be said to impose any significant burden on noncitizens' ability to own or transfer property in Virginia."[56]

The *McBurney* Court also rejected the argument that the Virginia FOIA law denied plaintiffs access to the courts.[57] The Court noted that Virginia's laws provide for discovery and the ability to send subpoenas *duces tecum* in litigation and it gives all, both citizens of the state and noncitizens of the state, access to judicial records.[58]

Finally, the *McBurney* Court also found that there is not a constitutional right to public information.[59] The Supreme Court's prior jurisprudence reveals no constitutional right. In *Houchins v. KQED, Inc.*, the Court found that "there is no discernible basis for a constitutional duty to disclose, or for standards governing disclosure of or access to information."[60] The *McBurney* Court reaffirmed that there is no constitutional right [61] and also noted that there is no common law right to public information.[62]

Overall, the *McBurney* decision not only leaves a gap in constitutional rights—in clarifying that there is no constitutional right to public information afforded by the United States Constitution—it also explicitly grants states the ability to restrict the release of public information to citizens of that state only.[63] As will be discussed further, the ramifications of this decision galvanizes a compelling argument to enact a constitutional amendment adding the right to public information to the United States Constitution.

II. STATE CONSTITUTIONS AND THE RIGHT TO PUBLIC INFORMATION

Despite the United States Supreme Court decision in *McBurney*, several states have the right to public records specifically enumerated in their state

[56] McBurney v. Young, 569 U.S. 221, 230–31 (2013).

[57] *Id.* at 231–32.

[58] *Id.*

[59] *Id.* at 232.

[60] Houchins v. KQED, Inc., 438 U.S. 1, 14 (1978).

[61] *Young*, 569 U.S. at 232 ("This Court has repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws").

[62] *Id.* at 233–34. Despite this holding, at least one scholar has noted in a 2015 law review article that there was once a "thriving" doctrine for the common law right to information. *See* Joe Regalia, *The Common Law Right to Information*, 18 RICH. J. L. & PUB. INT. 89, 90 (2015) ("A once-thriving doctrine, today the common law right to information has been largely forgotten by U.S. courts at both the state and federal level"). Although the *McBurney* Court failed to recognize a federal common law right to public information, a number of state cases note there is a state common law right to public information. *See e.g.*, State of Missouri ex. rel. Pulitzer Missouri Newspapers, Inc. v. Seay, 330 S.W.3d 823, 826 (Mo. App. S.D. 2011) ("In Missouri, there is a common law right of public access to court and other public records").

[63] *See Young*, 569 U.S. at 230–232.

constitutions. The length, breadth, and contours of these state constitutional rights vary, from conferring rights to access public information generally, to conferring the limited right to examine public records involving the utilization of public funds, as is the case of Illinois,.[64] Two states, Montana and New Hampshire, refer to the state constitutional right to examine records as a "right-to-know."[65] Each of these state constitutional amendments will be discussed briefly in this section.

A. California

California's state constitution enumerates the right to public records as a general "right to access to information" under Article I's Declaration of Rights.[66] The California Constitution states: "The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny."[67]

B. Florida

Florida's constitutional amendment providing the right to inspect public records and mandate open meetings in cases where "public business" is discussed is the most extensive of any state with a specific constitutional right to public information.[68] The Florida Constitution stipulates that "every person has the right to inspect or copy" the public records made in connection with the "official business" of any "public body, officer, or employee of the state."[69] Only records that are particularly exempted by the Florida Legislature or by the Florida Constitution are exempt from disclosure.[70] The Florida Constitution states:

> Every person has the right to inspect or copy of any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created by law or this Constitution.[71]

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[64] ILL. CONST. art VIII, § 1 (c).

[65] MONT. CONST. art. II, § 9 & N.H. CONST. art. 8.

[66] CAL. CONST. art. I, § 3 (b)(1).

[67] *Id.*

[68] FL. CONST. art. I, § 24.

[69] *See* FL. CONST. art. I, § 24(a).

[70] *Id.*

[71] *Id.*

The Florida Constitution also requires that all meetings of public bodies where public bodies take "official acts" or discuss "public business" be open.[72] The Constitution provides:

> All meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public and meetings of the legislature shall be open and noticed as provided in Article III, Section 4(e), except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution.[73]

In contrast to all other state constitutions providing a right to public information, the Florida Constitution specifically states that the constitutional rights to inspect or copy public records, as well as the right to open meetings, are "self-executing" rights which do not require additional legislation to be implemented.[74] The self-executing/non-self-executing distinction is a critical one. For example, in the realm of treaty enforcement in domestic courts, courts generally find self-executing treaty rights to be automatically enforceable in courts, while non-self-executing treaties require implementing legislation for treaty provisions to be successfully invoked.[75] In essence, by the Florida Constitution providing the right to inspect or copy public records, as well as the right for open meetings to be self-executing, these rights automatically apply even in the scenario of the Florida Legislature repealing its freedom of information law, known as the Sunshine Law.[76]

Finally, the Florida Constitution requires that exemptions to the right to public information be enumerated.[77] The Florida Constitution also places a very high bar for the creation of new exemptions, demanding a two-thirds vote of both the Florida House of Representatives and Florida Senate.[78] In effect, the Florida Constitution creates a presumption that a public record must be produced through a public records request and any exemption must overcome this presumption to be applicable. The Florida Constitution states the following with regard to exemptions:

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[72] *See* FL. CONST. art. I, § 24(b).

[73] *Id.*

[74] *See* FL. CONST. art. I, § 24(c).

[75] *See* David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 146 (1999) ("When courts say that a particular treaty provision is self-executing, they sometimes mean that it is automatically incorporated into domestic law upon ratification of the treaty. Under this interpretation, the statement that a treaty provision is not self-executing means that it has no status as domestic law in the absence of implementing legislation.").

[76] *See* FLA. STAT. ANN. § 119.01 et. seq. (West 2019).

[77] *See* FLA. CONST. art. I, § 24(c).

[78] *Id.*

> This section shall be self-executing. The legislature, however, may provide by general law passed by a two-thirds vote of each house for the exemption of records from the requirements of subsection (a) and the exemption of meetings from the requirements of subsection (b), provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law. The legislature shall enact laws governing the enforcement of this section, including the maintenance, control, destruction, disposal, and disposition of records made public by this section, except that each house of the legislature may adopt rules governing the enforcement of this section in relation to records of the legislative branch. Laws enacted pursuant to this subsection shall contain only exemptions from therequirements of subsections (a) or (b) and provisions governing the enforcement of this section, and shall relate to one subject.[79]

C. Illinois

In contrast to Florida, the Constitution of the state of Illinois contains the most limited right to public records out of the state constitutions that confer a constitutional right to public information. In Illinois, only reports and records involving the "obligation, receipt and use of public funds" are available to the public for inspection.[80] In addition, the text of the Constitution only provides for "inspection" and does not explicitly mention the right to copy records.[81] The Illinois Constitution states the following: "Reports and records of the obligation, receipt and use of public funds of the State, units of local government and school districts are public records available for inspection by the public according to law."[82]

D. Louisiana

The Louisiana Constitution labels the right to public information as a "right to direct participation."[83] The provision specifically confers the right to "examine" public documents.[84] It states, "No person shall be denied the right to observe the deliberations of public bodies and examine public documents, except in cases established by law."[85]

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[79] *Id.*

[80] *See* ILL. CONST. art VIII, § 1(c).

[81] *Id.*

[82] *Id.*

[83] *See* LA. CONST. art. XII, § 3.

[84] *Id.*

[85] *Id.*

E. Montana

The right to public information in the Montana Constitution is listed in the Constitution's "Declaration of Rights."[86] The right is characterized as the public's "right-to-know," and specifically provides a right to "examine" documents.[87] The Montana Constitution also provides a balancing test to weigh the right to examine documents with the right to privacy.[88] The Montana Constitution states: "No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure."[89]

F. New Hampshire

Just like the Montana Constitution, in the New Hampshire Constitution's right to public information is characterized as a "right-to-know."[90] This right is included in the Constitution's Bill of Rights.[91] The Constitution states:

> All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted.[92]

G. North Dakota

North Dakota explicitly requires public records to be "open and accessible for inspection during reasonable office hours."[93] Article XI, Section 6 of the North Dakota Constitution states:

> Unless otherwise provided by law, all records of public or governmental bodies, boards, bureaus, commissions, or agencies of the state or any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be public records, open and accessible for inspection during reasonable office hours.[94]

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[86] *See* MONT. CONST. art. II, § 9.

[87] *Id.*

[88] *Id.*

[89] *See* MONT. CONST. art. II, § 9.

[90] *See* N.H. CONST. art. 8.

[91] *Id.*

[92] *Id.*

[93] *See* N.D. CONST. art. XI, § 6.

[94] *Id.*

III. ARGUMENTS FOR A CONSTITUTIONAL RIGHT TO PUBLIC INFORMATION

Given the fact that several states have a right to public information enumerated in their constitution, the adoption of a federal constitutional amendment is not outlandish. In states that have adopted a constitutional right to public information, a number of cases have highlighted the importance of implementing this right to protect open and transparent government. There are multiple salient … constitutions. These cases and the courts' decisions are discussed below. There are multiple salient arguments supporting the inclusion of a specific constitutional right to public information in the United States Constitution as well as each of the state constitutions.

A. A Federal Constitutional Amendment and State Constitutional Amendments Protecting the Right to Public Information Would Assist Investigations and Promote Public Safety

Perhaps one of the most convincing arguments to support both a federal constitutional amendment and state constitutional amendments to establish a constitutional right to public information is that such a right would promote justice by assisting with investigations. Consider the following hypothetical scenario, which could occur in the wake of the *McBurney* decision. A private investigator who lives in Iowa is investigating a suspicious fatality in the state of Virginia, which restricts access to the privileges of its FOIA laws to state citizens. Someone has committed a murder. The private investigator is hired by a family member of the decedent, who also lives outside of the state of Virginia, to investigate the fatality. The family member would like the investigator to request copies of the applicable law enforcement agency's police report, the law enforcement agency's file that is not work-product, and any and all 911 calls concerning the incident. However, due to Virginia's FOIA laws restricting access to out-of-state residents, that investigator has encountered a major roadblock in her independent investigation, which may yield justice as well as promote the safety of the public.

There are other pathways for that private investigator to proceed. That investigator could call another investigator in Virginia to submit a FOIA request.[95] Or, that investigator might contact a law firm in Virginia to submit the request.[96] Despite these alternate avenues, public records laws should not make it difficult for out-of-state private investigators, particularly those investigating potential crimes, to obtain the documents necessary to complete an impartial, independent investigation. A federal constitutional amendment would essentially overrule these negative ramifications of *McBurney* and allow any individuals to avail themselves of a state's public records law.

[95] *See* VA. CODE ANN. § 2.2-3704 (2019).

[96] *Id.*

A federal constitutional amendment and state constitutional amendments would promote public safety. When crimes are committed, they affect society as a whole.[97] There are a number of examples of investigators and the media utilizing public information to help solve cases. For instance, in March 2019 the CBS News program "48 Hours" aired an episode investigating a suspicious incident in Moncks Corner, South Carolina, that occurred in 2008.[98] In this incident, a woman was found dead alongside railroad tracks and her daughter was found drowned in a nearby pond.[99] Because of the "48 Hours" investigation, the Berkeley County Sheriff's Office in South Carolina is reopening the case.[100] I believe a constitutional right to public information will assist in investigations like this one, making it easier for crimes to be solved by providing the public easier access to public information. This right would help further the goal of public safety for all.

B. The Supremacy Clause of the United States Constitution Would Affirm the Right to Public Information in Cases of Conflicting Federal and State Laws, and State Constitutions Would Take Precedence in Cases Involving State Law

Under the Supremacy Clause of the United States Constitution, the Constitution, federal law, and treaties constitute the "supreme law of the land."[101] In the case of a conflict between the United States Constitution and federal law, the Constitution takes precedence; in the case of a conflict between a state constitution and a state law, the state constitution takes precedence.[102]

A limited constitutional right to privacy has been recognized in United States Supreme Court jurisprudence. In *Griswold v. Connecticut*, the United States Supreme Court struck down a Connecticut law outlawing the utilization of contraception.[103] The Supreme Court stated:

> We deal with a right of privacy older than the Bill of Rights – older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not

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[97] An example of one crime that affects society as a whole is the crime of rape. *See* Adrien Katherine Wing & Sylke Merchan, *Rape, Ethnicity, and Culture: Spirit Injury form Bosnia to Black America*, 25 COLUM. HUM. RTS. L. REV. 1 (1993) ("Rape, which is pervasive in Bosnia, constitutes an injury not only to the individual victim but to the society as a whole").

[98] *See Case Reopened into Mysterious Deaths of S.C. Woman and Daughter after "48 Hours" Investigation*, CBS NEWS (Aug. 3, 2019), https://www.cbsnews.com/news/case-reopened-into-mysterious-deaths-of-s-c-woman-kadie-major-and-daughter-after-48-hours-investigation/.

[99] *Id.*

[100] *Id.*

[101] *See* U.S. CONST. art. VI, cl. 2.

[102] *Id.*

[103] *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

> causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[104]

While the Supreme Court has recognized a federal constitutional limited right to privacy, the nature, extent, and limits of this right remains unclear.[105] However, with the lack of a constitutional right to public information, it is plausible argument that the right to privacy, where there is a recognized right, would trump access to public records since there is no recognized constitutional right to public records.

Similarly, such an interpretation can also occur at the state level. The right to privacy is enumerated within a number of state constitutions.[106] Within the states which have specifically enumerated a right to privacy within their respective state constitutions, such state constitutional provisions could potentially be interpreted to supersede a state FOIA law in the event of a conflict.

The *Pengra v. State* case decided by the Supreme Court of Montana is an insightful example of the right to privacy conflicting with the right to public information.[107] Montana recognizes both a state constitutional right to public information[108] as well as a right to privacy.[109] The tragic underlying facts of the *Pengra* case involve the brutal rape and death of a woman by a state prison probationer.[110] A suit by the surviving spouse against the state of Montana settled, and the surviving spouse sought to seal the settlement agreement.[111] Several newspapers in Montana intervened in order to obtain the details of the settlement amount.[112] The newspapers opposed the surviving spouse's motion to seal the settlement agreement, and the trial court denied the motion.[113]

The surviving spouse argued that he and his daughter's state constitutional right to privacy protected the terms of the agreement, and that this constitutional

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[104] *Id.* at 486.

[105] *See e.g.*, Judge Harold R. Demoss Jr. & Michael Coblenz, *An Unenumerated Right: Two Views on the Right to Privacy*, 40 TEX. TECH L. REV. 249 (2008).

[106] *See* Ken Gormley & Rhonda G. Hartman, *Privacy and the States*, 65 TEMP. L. REV. 1279, 1282–83 (1992).

[107] *See* Pengra v. State, 14 P.3d 499 (Mont. 2000).

[108] *See* MONT. CONST. art. II, § 9.

[109] *See* MONT. CONST. art. II, § 10.

[110] *See Pengra*, 14 P.3d at 500.

[111] *Id.*

[112] *Id.*

[113] *Id.* at 501.

right superseded the Montana statute[114] requiring that settlement amounts in claims against the state be made available for public inspection.[115]

In essence, the *Pengra* case presented a direct conflict between the constitutional right to public information and the constitutional right to privacy.[116] In analyzing the question of whether disclosure of the settlement amount violates a plaintiffs right to privacy, the *Pengra* court noted that an affidavit filed by the surviving spouse's psychologist was not filed with the trial court until weeks following the decision.[117] This affidavit generally concluded that the surviving spouse's child would suffer adverse effects due to publicity from the case.[118]

The *Pengra* court found that even if the psychologist's affidavit had been filed in a timely manner, the affidavit still didn't include specific factual assertions of how the child would suffer from disclosure of the settlement amount.[119] In addition, the court in *Pengra* emphasized the conduct of the surviving spouse during the litigation—he did not take steps in the underlying litigation against the state of Montana to keep it private.[120] The *Pengra* court appeared to reason from this point that the surviving spouse's conduct constitute a waiver of his right to privacy through the doctrine of waiver.[121]

As a public policy matter, the *Pengra* court found that there were compelling reasons to hold that settlement amounts in cases against the state of Montana be disclosed. The *Pengra* court remarked:

> Disclosure of such agreements provides an irreplaceable opportunity for taxpayers to assess the seriousness of unlawful and negligent activities of their public institutions. The taxpayers are entitled to know how much they pay for such actions or inactions. And without muzzling the entire legislative process and all those involved in obtaining the appropriation to pay the claim, it appears that whatever privacy right the settling party has

[114] *See* MONT. CODE ANN. § 2-9-303 (2019) ("All terms, conditions and details of the governmental portion of a compromise or settlement agreement entered into or approved pursuant to subsection (1) are public records available for public inspection unless a right of individual privacy clearly exceeds the merits of public disclosure.").

[115] *See* Pengra v. State, 14 P.3d 499, 501–502 (Mont. 2000).

[116] *Id.* at 502.

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.* ("The claim that the Pengras have a subjective expectation of privacy in the settlement amount is, moreover, discredited by the surrounding circumstances of this case. Pengra took no steps to keep private his lawsuit against the State, and in fact requested a jury trial in the District Court. Pengra's counsel admitted at oral argument before this Court that if the settlement amount had not been sufficient, his client would have gone forward with the public jury trial of this case.")

[121] *See* Kelly v. Lovejoy, 565 P.2d 321, 324 (Mont. 1977) ("Waiver is generally defined as a voluntary and intentional relinquishment of a known right, claim or privilege.").

> will be compromised, anyway, when the legislature appropriates the funds to pay the settlement.[122]

Thus, the *Pengra* court held that the public's right to know the settlement amounts outweighed the surviving spouse and daughter's right to privacy.[123]

Montana's constitutional right to public information in the *Pengra* case highlights the importance of enumerating rights within state constitutions. Assuming arguendo that Montana did not include a state constitutional right to public information, but had in its constitution a specific enumerated right to privacy, the constitutional right to privacy would directly trump Montana's statute allowing public disclosure of settlement amounts in actions against the state of Montana. Therefore, the Montana Supreme Court in *Pengra* would have reached a different outcome. In states without a constitutional right to public information, it is possible that the constitutional right to privacy would trump the statutory provisions of public records and FOI laws. Such a scenario emphasizes the urgency to enshrine a constitutional right to public information.

C. A Constitutional Right to Public Information Would Affirm it as a "Fundamental Right" Subject to Strict Scrutiny Analysis

A constitutional right to public information at both the federal and state levels would solidify the right as fundamental, subjecting cases analyzed by the Supreme Court of the United States to strict scrutiny. Fundamental rights are those rights generally given the utmost degree of protection from government infringement.[124] Fundamental rights include the right to free speech,[125] the right

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[122] *See* Pengra v. State, 14 P.3d 499, 503 (Mont. 2000).

[123] *Id.*

[124] *See* Stephanie L. Grauerholz, Comment, *Colorado's Amendment 2 Defeated: The Emergence of a Fundamental Right to Participate in the Political Process*, 44 DEPAUL L. REV. 841, 861 (1995) ("Fundamental rights are rights which the Court determine as 'having a value so essential to individual liberty in society' that they permit the Court to review acts of other government branches. The test for determining whether a particular right is fundamental is whether the right is 'explicitly or implicitly guaranteed by the Constitution.'").

[125] *Id.* at 861.

to vote,[126] the right to freedom of the press,[127] the right to procedural due process of law,[128] and the right to freedom of religion.[129]

In states with a constitutional right to public information, state courts have held that the right is a fundamental one. As the Justice Nelson of the Supreme Court of Montana remarked in a concurring opinion in *Yellowstone County v. Billings Gazette*, "the right-to-know guarantees of Article II, Section 9, of the Montana Constitution, are among the most important guarantees that Montanans enjoy. As this right is contained in the Constitution's Declaration of Rights, it is a fundamental right."[130] Appellate courts in Florida[131] as well as Louisiana[132] have also affirmed the right to public information as a fundamental right.

In the event of a state action infringing upon a fundamental right, the action would be subject to strict scrutiny analysis. Under strict scrutiny analysis, governmental action which infringes upon a fundamental constitutional right must necessarily relate to a compelling state interest.[133] Strict scrutiny is the highest standard of constitutional review,[134] and is much more difficult for the

[126] *Id.* at 862.

[127] *See* Robert J. Cordy, *The Interdependent Relationship of a Free Press and an Independent Judiciary in a Constitutional Democracy*, 60 B.C. L. REV. E-SUPPLEMENT I.-1, *1 (2019) ("In the Declaration of Rights to the Massachusetts Constitution of 1780 (the oldest written constitution in the world still in effect), John Adams identifies two rights as 'essential' to the security of freedom and the preservation of all other rights—a free press and access to an independent judiciary. These important rights are broadly recognized as fundamental to human rights and to a constitutional democracy, both in the United States Constitution and internationally.").

[128] *See e.g.*, Ben F.C. Wallace, Note, *Charting Procedural Due Process and the Fundamental Right to Vote*, 77 OHIO ST. L. J. 647 (2016).

[129] Grauerholz, *supra* note 124, at 861.

[130] *See* Yellowstone Cty v. Billings Gazette, 143 P.3d 135, 142–143 (Mont. 2006) (Nelson, J., concurring).

[131] *See* Rhea v. Dist. Bd. of Trs. of Santa Fe Coll., 109 So.3d 851, 855 (Fla. Dist. Ct. App. 2013) ("A citizen's access to public records is a fundamental constitutional right in Florida.").

[132] *See* Times Picayune Publ'g Corp. v. Bd. of Supervisors, 845 So.2d 599, 605 (La. Ct. App. 1 Cir. 2003) ("It is well-settled that the public's right of access to public records is a fundamental right guaranteed by both the Louisiana Constitution and the Public Records Law set forth in La. R.S. 44:1 *et seq.*").

[133] *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007) ("To satisfy strict scrutiny, the government must demonstrate a compelling interest, and it must further show that a challenged statute or regulation is either necessary, narrowly drawn, or narrowly tailored to protect that interest.").

[134] *See* Kristapor Vartanian, *Equal Protection*, 10 GEO. J. GENDER & L. 227, 230 (2009) ("Strict scrutiny is the most rigorous form of judicial review.").

state to satisfy as opposed to the "intermediate scrutiny"[135] and "rational basis" tests.[136]

If the right to public information became a constitutional right at both the federal and state levels, the right would be afforded the highest degree of protection in constitutional analysis, as it would be considered a fundamental right. This degree of protection would ensure public records laws would be fully interpreted with a presumption toward disclosure,[137] and any governmental action which would potentially limit disclosure would be required to be "necessary" and also relate to a "compelling governmental purpose."

D. A Constitutional Right to Public Information Would Help Shift Policy and Court Analyses in Favor of Public Disclosure

Finally, a constitutional right to public information at both the federal and state levels would operate to help shift the policy analyses of courts toward public disclosure. Inevitably, public records laws sometimes come into conflict with asserted exemption and privacy claims. In several cases at the state level, particularly cases in Montana and Florida, a leading citing factor in court decisions to uphold the letter and spirit of public records laws in favor of this closure is the presence of a state constitution.

In Montana, in early 2014, several media organizations sought records relating to the termination of a director of food services for the Missoula County Public Schools.[138] According to the Supreme Court, there was an investigation into whether this individual "had engaged in fraudulent or illegal financial transactions."[139] The individual asserted that the documents in her employment file were not public records.[140]

Analyzing whether the personnel file records were public records, the Montana Supreme Court cited the Montana Constitution's right-to-know provision.[141] In determining whether public documents were protected from

[135] *Id.* at 234 ("Intermediate scrutiny, sometimes referred to as quasi-suspect or heightened scrutiny, is used to evaluate classifications affecting members of quasi-suspect classes . . . to withstand intermediate scrutiny, a quasi-suspect classification 'must serve important governmental objectives and must be substantially related to achievement of those objectives'.").

[136] *Id.* at 235 ("Rational basis review is the most deferential standard applied by courts in equal protection analysis . . . To pass rational basis review, a statute must be rationally related to a legitimate governmental purpose.").

[137] *See* Yellowstone Cty. v. Billings Gazette, 143 P.3d 135, 143 (Mont. 2006) (Nelson, J., concurring) ("In interpreting this provision [constitutional right-to-know provision], we have held that there is a constitutional presumption that all documents of every kind in the hands of public officials are amenable to inspection.").

[138] *See* Missoula Cty. Pub. Schs. v. Bitterroot Star, 345 P.3d 1035 (Mont. 2015).

[139] *Id.* at 1037.

[140] *Id.*

[141] *Id.* at 1037–1038.

disclosure, the court looked to the Montana Constitution.[142] The Montana Constitution forbids disclosure only "in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure."[143] Looking at whether individual privacy outweighed public disclosure, the Montana Supreme Court noted that "documents are not shielded from public disclosure simply because they are in a public official's personnel file when that official occupies a position of trust."[144] Because the director of food services is a position "involving the public trust," the Montana Supreme Court upheld the trial court's order that documents concerning public funds be released to the public.[145]

Florida's vigorous state constitutional protections for open public records have been cited in several cases in recent years.[146] These cases provide further support for a federal constitutional right to public information. In *Chandler v. City of Sanford*, the plaintiff requested an original copy of an email sent by a city employee to George Zimmerman, a neighborhood watch volunteer.[147] The emails were produced, but Zimmerman's email address was redacted.[148] The city contended it was under a directive of the State Attorney not to release any original records.[149] It also claimed and that the original copy had been turned over to the State Attorney as part of the State Attorney's investigation.[150]

The Florida District Court of Appeals for the Fifth District held that the trial court erred when it dismissed the plaintiff's petition asserting violations of the Florida Public Records Law.[151] The court of appeals remarked that "a governmental agency may not avoid a public records request by transferring custody of its records to another agency."[152] The court of appeals also stated that the "constitutional right of public access to government records is 'virtually unfettered' save for certain constitutional and statutory exemptions."[153]

In another Florida case, *Board of Trustees, Jacksonville Police & Fire Pension Fund v. Lee*, the Florida Supreme Court cited to the "letter and spirit of the constitutional right to inspect or copy public records."[154] In *Lee*, the Florida Supreme Court held that when a government agency violates the Florida Public

[142] *Id.*

[143] MONT. CONST. art. II, § 9. (West, Westlaw through 2019).

[144] *Missoula Cty. Pub. Schs.*, 345 P.3d at 1038.

[145] *Id.*

[146] *See* O'Boyle v. Town of Gulf Stream, 257 So. 3d 1036, 1040 (Fla. Dist. Ct. App. 2018); Bd. of Trs. v. Lee, 189 So. 3d 120, 122 (Fla. 2016), Chandler v. City of Sanford, 121 So.3d 657 (Fla. Dist. Ct. App. 2013).

[147] *Chandler*, 121 So.3d at 658.

[148] *Id.* at 659.

[149] *Id.*

[150] *Id.*

[151] *Id.* at 660.

[152] *Id.*

[153] Chandler v. City of Sanford, 121 So.3d 660 (Fla. Dist. Ct. App. 2013).

[154] Bd. of Trs. v. Lee, 189 So. 3d 120, 122 (Fla. 2016).

Records Act, the Act does not require a plaintiff to prove the government agency acted unreasonably or in bad faith in order to recover attorney fees.[155] Thus, the *Lee* decision makes it easier for plaintiffs to recover attorney's fees for violations of the Public Records Act and the possibility of attorney fee awards deters governmental agencies from violating the law.

Finally, in *O'Boyle v. Town of Gulf Stream,* the Florida District Court of Appeals for the Fourth District cited the Florida Constitution in holding that a town mayor's text messages on a private cell phone may be subject to disclosure under the Florida Public Records Act.[156] The *O'Boyle* court noted that the purpose of the right to public information provision in the Florida Constitution as well as the provisions of Florida's Public Records Law "[are] to ensure that citizens may review (and criticize) government actions."[157] This purpose was specifically cited by the court as a policy reason to support the holding "that electronic information stored on privately-owned devices may be subject to disclosure under the Public Records Act."[158]

Appellate courts have also cited to state constitutional provisions in Louisiana,[159] New Hampshire,[160] and North Dakota[161] to support the disclosure of public records.

All of these cases demonstrate that, in close decisions, courts are more likely to favor public disclosure if there is a constitutional amendment to cite to support disclosure.

IV. A PROPOSED DRAFT OF A FEDERAL/STATE CONSTITUTIONAL AMENDMENT ENSURING THE RIGHT TO PUBLIC INFORMATION

light of the strong arguments supporting a constitutional right to public information, this Article analyzes one remaining question: how should federal and state constitutional amendments be drafted? One aspect to examine is whether the right should encompass the right as a right of the people and be a fundamental right. For example, as the Florida Supreme Court quoted in the *Lee* decision, "the right of access to public records . . . [is] a cornerstone of our

[155] *Id.* at 120.

[156] O'Boyle v. Town of Gulf Stream, 257 So. 3d 1036, 1040 (Fla. Dist. Ct. App. 2018).

[157] *Id.* at 1042.

[158] *Id.*

[159] *See* Times Picayune Publ'g Corp. v. Bd. of Supervisors, 845 So. 2d 599, 610 (La. Ct. App. 1 Cir. 2003) (holding that the amount of a settlement in a dental malpractice and products liability lawsuit against the state of Louisiana is subject to disclosure under the Louisiana Public Records Act).

[160] *See* Lambert v. Belknap Cty. Convention, 949 A.2d 709, 709–710 (N.H. 2008) (holding that records requested of the candidates who applied for a vacancy to a county sheriff's office were subject to disclosure under the New Hampshire Right-to-Know Law).

[161] *See* Hovet v. Hebron Pub. Sch. Dist., 419 N.W.2d 189, 191 (N.D. 1988) (holding that the personnel file of a public school teacher was a public record subject to disclosure under the North Dakota open-records law).

political culture."[162] Arguably, the right to public information is necessary, vital, and a foundation of democracy.

I propose a draft of a constitutional amendment could state the following:

The right to public information, being a necessary and vital part of democracy, shall be a fundamental right of the people. The right of the people to inspect and/or copy records of government, and to be provided notice of and attend public meetings of government, shall not unreasonably be restricted.

Such an amendment affirms the right to public information as a fundamental right of the people. It also incorporates the right to inspect or copy public records, and accounts for open meetings as well. This amendment ensures that not only documents and records are encompassed by the amendment, but also the right of people to receive notice and to attend public meetings of government. Finally, this amendment provides that this right shall not be "unreasonably" restricted, and implicitly allows for exemptions involving other constitutional rights (i.e. the right to privacy) to remain applicable in appropriate situations.

The current political environment is highly polarized and, with the 2020 presidential election approaching, partisanship will likely remain high.[163] However, a democratic and a transparent government are ideals that both liberals and conservatives support.[164] For example, a bipartisan group of lawmakers expressed concern in a March 5, 2019 letter to the Honorable David Benhardt, Acting Secretary of the U.S. Department of Interior ("DOI"), over a proposed rule change by the DOI concerning the Department's procedures for compliance with Freedom of Information Act ("FOIA") requests.[165] The legislators wrote, "The proposed rule appears to restrict public access to DOI's records and delay the processing of FOIA requests in violation of the letter and spirit of FOIA."[166] Two of the letter's four authors, the late Congressman Elijah Cummings[167] and Senator Pat Leahy,[168] are considered ardent liberals. The other two signatories

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[162] Bd. of Trs. v. Lee, 189 So. 3d 120, 124 (Fla. 2016).

[163] *See* Jeroen van Baar & Oriel Feldman Hall, *The Psychological Roots of Political Polarization*, PSYCHOLOGY TODAY (Oct. 9, 2019), https://www.psychologytoday.com/us/blog/social-learners/201910/the-psychological-roots-political-polarization.

[164] Letter from United States Representative Elijah Cummings, United States Senator Patrick Leahy, United States Senator Charles E. Grassley, and United States Senator John Cornyn, to the Honorable David Bernhardt, Acting Secretary of the United States Department of Interior (March 5, 2019) (on file with House Committee on Oversight and Reform).

[165] *Id.*

[166] *Id.*

[167] *See* Griffin Connolly, *Rep. Elijah Cummings fondly remembered by Democrats, Republicans*, ROLL CALL (Oct. 17, 2019, 9:35 AM), https://www.rollcall.com/news/congress/rep-elijah-cummings-fondly-remembered-hill-democrats-republicans.

[168] *See* Candy Crowley, *Senators' Friendship Strong On and Off Capitol Hill*, CNN POLITICS (Feb. 26, 2010, 6:15 PM), https://www.cnn.com/2010/POLITICS/02/26/leahy.lugar/index.html.

of the letter, Texas Senator John Cornyn[169] and Iowa Senator Chuck Grassley,[170] are notable conservatives.

This letter demonstrates that, despite a partisan political environment, both liberal and conservative leaders can join together on behalf of open, transparent government and work together to enshrine a constitutional right to public information and to promote democracy.

CONCLUSION

Moving forward in a partisan climate, it will certainly be challenging to enact a federal constitutional amendment, as well as state constitutional amendments, protecting the right to public information. As President Thomas Jefferson wrote in an 1825 letter to Edward Livingston, "Time and changes in the condition and constitution of society may require occasional and corresponding modifications [of the United States Constitution]."[171] Access to open public records can help uncover and deter governmental misconduct, malfeasance, and misfeasance, and can promote more ethical and honest behavior. The time to enact a federal constitutional amendment and state constitutional amendments to enshrine the right to public information is now. Such an amendment will provide more openness and transparency in government and make government more accessible to the people.

[169] *See* Andrea Drusch, *Conservatives Worried About Dems in Texas Decide to Leave Cornyn Alone*, FORT WORTH STAR-TELEGRAM (Mar. 22, 2019, 1:23 PM), https://www.star-telegram.com/news/politics-government/election/article228280099.html.

[170] *See* William Petroski, *Sen. Chuck Grassley: Conservatives Should 'Stand Up' on College Campuses*, DES MOINES REGISTER (Oct. 24, 2018, 2:57 PM), https://www.desmoinesregister.com/story/news/politics/2018/10/24/iowa-senator-chuck-grassley-republican-westside-conservative-club-urbandale-religion-free-speech/1751672002/.

[171] Letter from Thomas Jefferson, to Edward Livingston (Mar. 25, 1825) (on file with the National Archives).