REALIGNING THE CONSTITUTIONAL PENDULUM

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I. INTRODUCTION

The United States Constitution—an instrument modeled after state constitutions1—uniquely creates a federal government of limited and enumerated powers, leaving general police power to the individual states.2 This governmental framework, if properly carried out, strikes the appropriate balance of power. With the federal government supervising matters of national concern, states are able to respond effectively and efficiently to local problems.3

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1 Hon. Randy J. Holland, State Constitutions: Purpose and Function, 69 TEMP. L. REV. 989, 995 (1996) (noting that state constitutions set the framework for many of the United States Constitution’s features); see also DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 97 (1988) (“The institutions written into the American Constitution were heavily dependent upon colonial experience and practice, as well as upon the Framers’ experience of having written and lived under eighteen state constitutions between 1776 and 1786.”); THE FEDERALIST No. 1 (Alexander Hamilton) (urging citizens to ratify the new federal Constitution because of its “analogy to [their] own State constitution.”).

2 JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 139 (8th ed. 2010) (indicating that state governments, under the federal Constitution, do not have limited power; rather, they have general “police power” to protect the welfare, safety, health, and morals of their state’s citizens); Holland, supra note 1, at 992 (deeming the federal Constitution’s dual sovereign framework “revolutionary”).

3 See Sean J. Griffith & Hon. Myron T. Steele, On Corporate Law Federalism: Threatening the Thaumatrope, 61 BUS. LAW. 1, 2 (2006) (discussing the advantages states have in responding to problems quickly and efficiently).
What’s more, this system of government suitably promotes state experimentation—a necessary ingredient to economic and social amelioration. In this article, we argue that federal courts, through their broad interpretation of the federal Constitution, have deleteriously altered this power equilibrium. We refer to this equilibrium as the “constitutional pendulum,” and with each broad federal constitutional interpretation, the constitutional pendulum becomes misaligned.

We begin by briefly discussing the key components of the federal constitutional framework and the benefits of state experimentation. We then highlight some of the ways in which states, through their individual constitutions, have benefited from this system of government. Next, we argue that a broad interpretation of certain federal constitutional provisions improperly shifts power to the federal government, thereby stifling state innovation. We posit that more narrowly interpreting the federal Constitution swings the constitutional pendulum back to its rightful place, distributing power appropriately between state and federal government. To illuminate this point, we analyze a recent Third Circuit decision (decided by a divided three judge panel) interpreting (albeit incorrectly) the United States Constitution’s First Amendment right of public access: Delaware Coalition for Open Government, Inc. v. Strine.4

II. A NARROW INTERPRETATION OF THE FEDERAL CONSTITUTION
BEST PROMOTES STATE SOVEREIGNTY AND EXPERIMENTATION

A. Federal Constitutional Framework: “Splitting the Atom of Sovereignty”

There are no greater federal constitutional components than the paramount separation of powers and federalism principles.5 These principles permeate throughout the federal Constitution, creating a system of government with both vertical and horizontal separateness.6 Horizontal separateness (separation of powers)

4 Del. Coal. for Open Gov’t, Inc. v. Strine, 733 F.3d 510 (3d Cir. 2013) (“[T]he public has a right of access under the First Amendment to Delaware’s state-sponsored arbitration program.”).

5 See Laurence H. Tribe, American Constitutional Law 124–30 (3d ed. 2000) (discussing the “pervasive effect” separation of powers and federalism principles have in our constitutional scheme).

6 See id. at 125–26 (providing an overview of the Constitution’s separation of powers and
ensures appropriate checks and balances among the federal government’s three branches: the executive, legislative, and judicial.\(^7\) This article, however, focuses on vertical separateness (federalism)—the division of power between the state and federal governments.\(^8\)

The United States Constitution’s Framers ingeniously “split the atom of sovereignty,” separating state and federal government.\(^9\) In establishing this institutional arrangement, the Constitution’s Framers “rejected the concept of a central government that would act upon and through the States,” deliberately departing from these models to form “a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.”\(^10\) “With respect to both federalism and separation of powers, then, the structure—as revealed by the explicit text and implicit plan or design of the Constitution—is paramount.”\(^11\) The Framers carefully crafted the federal Constitution to vest in the federal government only those \textit{limited and enumerated} powers over matters of national concern, such as providing for the common defense.\(^12\) Ostensibly, the Framers deemed it necessary that the states retain “residual sovereignty”\(^13\) over matters of state and local concern, and even James Madison recognized that the federal government derives its

\(^7\) See Whalen v. United States, 45 U.S. 684, 689 n.4 (1980); Springer v. Philippine Islands, 277 U.S. 189, 201 (1928); see also Tribe, supra note 5, at 124–26 (discussing division of power principles between different branches of the federal government, as well as the division of power between the federal government and the states).

\(^8\) See generally Tribe, supra note 5, at 132–34 (discussing the relationship between Vertical and Horizontal separation of powers).

\(^9\) U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring); see also The Federalist Papers: Introduction, UNIV. OF GRONINGEN http://www.let.rug.nl/usa/documents/1786-1800/the-federalist-papers/introduction.php (last visited Aug. 18, 2014) (“To the authors of The Federalist Papers, whatever their differences, the lesson was clear: Survival as a respected nation required the transfer of important, though limited, powers to the central government. They believed that this could be done without destroying the identity or autonomy of the separate states”).

\(^10\) Tribe, supra note 5, at 129 (quoting Prinz v. United States, 521 U.S. 898, 920 (1997)); see also Holland, supra note 1, at 992 (“The Congress of the United States would not be a confederation of states, in which separate sovereigns are represented by appointed delegates, but would be a body elected directly by the people.”).

\(^11\) Tribe, supra note 5, at 130.

\(^12\) The Federalist Papers: Introduction, supra note 9.

power from the citizens of the several states. Moreover, James Madison, in *The Federalist* No. 45, emphasized the importance of having a federal government with limited power and the resulting benefits of state, as opposed to federal, experimentation:

The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

The operations of the federal government will be most extensive and important in times of war and danger; those of the State governments, in times of peace and security. As the former periods will probably bear a small proportion to the latter, the State governments will here enjoy another advantage over the federal government. The more adequate, indeed, the federal powers may be rendered to the national defense, the less frequent will be those scenes of danger which might favor their ascendancy over the governments of the particular States.

Through this constitutional framework, states, which derive their power from their individual constitutions, are able to enact laws and amend their respective constitutions to respond to their

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14 *The Federalist* No. 45 (James Madison) ("Without the intervention of the State legislatures, the President of the United States cannot be elected at all. They must in all cases have a great share in his appointment, and will, perhaps, in most cases, of themselves determine it. The Senate will be elected absolutely and exclusively by the State legislatures. Even the House of Representatives, though drawn immediately from the people, will be chosen very much under the influence of that class of men, whose influence over the people obtains for themselves an election into the State legislatures. Thus, each of the principal branches of the Federal government will owe its existence more or less to the favor of the State governments, and must consequently feel a dependence, which is much more likely to beget a disposition too obsequious than too overbearing towards them."); see also Seminole Tribe of Fl. v. Florida, 517 U.S. 44, 151 (1996) (Souter, J., dissenting) ("[T]he Federalists could succeed only by emphasizing that the supreme power resides in the PEOPLE, as the fountain of government.").


16 Nowak & Rotunda, supra note 2, at 139 (indicating that a state's constitution, as opposed to the federal Constitution, is the source of the state's power).
citizens’ particular issues, needs and desires. This concept is underscored by the well known maxim: what’s good for some is not always good for others. As discussed below, there are numerous benefits to state experimentation and, as detailed in subsection (c), states have undeniably benefited from (and attempted to benefit from, if not for federal intervention) this institutional scheme.

B. Benefits of State Experimentation

Justice Louis D. Brandeis famously opined: “It is one of the happy incidents of the federal system, that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”

Brandeis’ view concerning state experimentation illuminates our position that a narrow interpretation of the federal Constitution encourages creative state policies, which, in turn, leads to optimal nationwide productivity and public policy.

Allowing states to serve as political “laboratories” is beneficial for a myriad of reasons. First, state governments are in the most advantageous position to understand which policies are (presumably) best for their individual constituents. Unlike the national government, smaller state institutions are more capable of quickly adapting to changes in economic climate and are best able to implement policies to advance the unique social values held by their respective citizens. In like manner, state constitutions, in contrast to the federal Constitution, are more easily rewritten and amended to reflect political and social ideals of the time. Indeed,
“piecemeal diffusion of new policies . . . facilitates gradualism and, therefore, feedback and institutional learning.”24 This point is best evidenced by the fact that many national policies—such as health care reform—are modeled after state initiatives.25 Just as national policies are modeled after state initiatives, so too are other state practices.26 By extension, this gradual, experimental, approach to policy making ensures that the inevitable political falters will occur “without risk to the rest of the country.”27 Our nation’s founders clearly contemplated this increased national risk and used horizontal separateness to quell these dangers.28 States and the federal government can therefore remold their policies by looking to the success and failures emerging from state initiatives.29

Another often ignored benefit to Brandesian experimentation is increased political and judicial transparency and accountability.30 As we recently witnessed in the federal government’s recent shutdown, failed federal reform inescapably leads to self interested political finger pointing.31 Unlike federal politicians, state lawmakers are more closely connected to their constituents and, therefore, more exposed to their supporters, critics, and other state coordinators.32 This transparency leaves little room for elected state

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26 See Beaton, supra note 20, at 1671–72 (indicating that successful state initiatives can be replicated by the national government or by other states).

27 New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); Beaton, supra note 20, at 1671–72 (“The small-scale efforts that accompany widespread state experimentation will allow the transaction’s inevitable stumbles to occur ‘without risk to the rest of the country’.”) (quoting New State Ice Co., 285 U.S. at 311 (Brandeis, J., dissenting)).

28 See discussion supra Part II(A).

29 New State Ice Co., 285 U.S. at 311 (Brandeis, J., dissenting) (“There must be power in the states and the nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs.”); see also Beaton, supra note 20, at 1697 (noting that states and the national government, based on state initiatives, can reshape their social and economic practices to meet the changing needs of the polity); Charles F. Sabel & William H. Simon, Destabilization Rights: How Public Law Litigation Succeeds, 117 HARV. L. REV. 1015, 1072 (2004).


31 See Beaton, supra note 20, at 1706.

32 See id.
officials to hide from pundits and, in turn, creates a personal incentive to advance presumably valuable social and economic initiatives.\textsuperscript{33}

States may also achieve political transparency and accountability through the distribution of political power set forth in their individual constitutions.\textsuperscript{34} For example, a state’s constitution may provide less executive and more legislative power.\textsuperscript{35} In like manner, many states constitutionally embrace accountability in the judicial arena.\textsuperscript{36} Unlike federal judges, most state judges do not possess life tenure,\textsuperscript{37} making them more accountable to their state’s citizens for legally incorrect rulings.\textsuperscript{38} While we recognize there are some perceived benefits to judicial life tenure, a politically balanced group of state judges with limited terms (as is the case in Delaware’s judicial system)\textsuperscript{39} most effectively engenders legally correct rulings while still protecting the minority from the tyranny of the majority.

C. State Constitutional Jurisprudence

Despite decades of political power shifting away from the states in favor of the federal government, states, through their individual constitutions, have utilized the advantages of state experimentation discussed above.

i. Models of State Constitutional Analysis

Before exploring some of the ways in which states have benefited

\textsuperscript{33} See id. at 1704–06 (arguing that elected state officials, as opposed to a federal bureaucrat, are preferable in order to drive meaningful innovation).

\textsuperscript{34} Holland, supra note 13, at 379.

\textsuperscript{35} See e.g., id. (indicating that Delaware’s initial constitution provided greater legislative and less executive power).


\textsuperscript{37} See id. (“All told, life tenure for federal judges may well have become a detriment to American political life. It is time to give serious thought to a constitutional amendment limiting judicial tenure to a non-renewable fixed term of years.”); Fact Sheet on Judicial Selection Methods in the States, A.B.A., http://www.americanbar.org/content/dam/aba/migrated/leadership/fact_sheet.authcheckdam.pdf (last visited Sept. 15, 2014) (discussing the states’ varying approaches to the election and retention of state judges).

\textsuperscript{38} See Lazarus, supra note 36.

from constitutional experimentation, it is important to note the four basic models of state constitutional analysis: (1) the primacy model; (2) the interstitial model; (3) the dual sovereignty model; and (4) the lockstep model. Under the primacy model, state constitutions are viewed as the “fundamental law” and serve as independent sources of rights. Courts applying the interstitial model view federal doctrines as the source of minimum rights and ask whether state constitutional provisions supplement or amplify federal rights. Courts adopting the dual sovereignty model examine both the federal Constitution and state constitutions even if a decision rests solely on state law grounds. Finally, under the lockstep method, state courts mechanically adopt the United States Supreme Court’s holdings interpreting the federal Constitution.

Further to these analytical models, many state courts consider the list of nonexclusive factors articulated in Justice Hand’s concurrence in Hunt v. State to determine whether a state constitutional provision is substantively identical to a corollary federal constitutional provision. The Hunt factors provide courts with “a framework to determine whether a state constitutional provision affords an independent basis to reach a different result than what could be obtained under federal law.” These factors include: (1) textual language, (2) legislative history, (3) preexisting state law, (4) structural differences, (5) matters of particular state interest or local concern, (6) state traditions, and (7) public attitudes.

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40 Holland, supra note 1, at 1004 (discussing the four models of state constitutional analysis).
41 Id. (citing Robert F. Utter, Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds, 63 TEX. L. REV. 1025, 1028–29 (1985)).
42 Holland, supra note 1, at 1004 (citing Utter, supra note 41, at 1028–29).
43 Holland, supra note 1, at 1004 (citing Utter, supra note 41, at 1047–50).
47 Id. at 662.
(1) Textual Language—A state constitution’s language may itself provide a basis for reaching a result different from that which could be obtained under federal law. Textual language can be relevant in either of two contexts. First, distinctive provisions of our State charter may recognize rights not identified in the federal constitution . . . . Second, the phrasing of a particular provision in our charter may be so significantly different from the language used to address the same subject in the federal Constitution that we can feel free to interpret our provision on an independent basis . . . .
Apart from the lockstep model, which if strictly adhered to does not offer much in the way of state flexibility, the first three methods empower state governments to respond to state specific issues and provide their citizens greater rights than the federal Constitution demands. This flexibility, however, does not go unchecked.

ii. Two Major Checks on the States’ General Police Power

There are certainly instances when states can and have usurped their inherent police power to the detriment of the nation. There are, in essence, two major federal constitutional checks on state experimentation. First, states can only reach as far as their geographical borders allow them. This limitation prevents states from “experimenting” with persons, business entities, and investors

(2) Legislative History—Whether or not the textual language of a given provision is different from that found in the federal Constitution, legislative history may reveal an intention that will support reading the provision independently of federal law.

(3) Preexisting State Law—Previously established bodies of state law may also suggest distinctive state constitutional rights. State law is often responsive to concerns long before they are addressed by constitutional claims. Such preexisting law can help to define the scope of the constitutional right later established.

(4) Structural Differences—Differences in structure between the federal and state constitutions might also provide a basis for rejecting the constraints of federal doctrine at the state level. The United States Constitution is a grant of enumerated powers to the federal government. Our State Constitution, on the other hand, serves only to limit the sovereign power which inheres directly in the people and indirectly in their elected representatives. Hence, the explicit affirmation of fundamental rights in our Constitution can be seen as a guarantee of those rights and not as a restriction upon them.

(5) Matters of Particular State Interest or Local Concern—A state constitution may also be employed to address matters of peculiar state interest or local concern. When particular questions are local in character and do not appear to require a uniform national policy, they are ripe for decision under state law. Moreover, some matters are uniquely appropriate for independent state action.

(6) State Traditions—A state’s history and traditions may also provide a basis for the independent application of its constitution.

(7) Public Attitudes—Distinctive attitudes of a state’s citizenry may also furnish grounds to expand constitutional rights under state charters. While we have never cited this criterion in our decisions, courts in other jurisdictions have pointed to public attitudes as a relevant factor in their deliberations.

Id. (alterations in original).


50 Note that federalism, in itself, is intended to hinder tyranny and abuse from the federal and state governments. See Holland, supra note 1, at 994.

51 See id. at 998–99.
that do not avail themselves of their state’s benefits.\textsuperscript{52} Second, the Thirteenth and Fourteenth Amendments to the United States Constitution (and the Bill of Rights applied to the states pursuant to the Fourteenth Amendment) set the “floor” of basic rights and benefits that states must afford their citizens.\textsuperscript{53} As we argue in greater detail below, federal courts, through their broad interpretation of the Fourteenth Amendment, have raised this “floor of basic rights and benefits” so high that the constitutional pendulum is seriously misaligned and state innovation exorbitantly stunted.

By way of analogy, we direct your attention to the doctrine of the implied warranty of habitability. Much like the federal Constitution’s grant of minimum rights, the implied warranty of habitability ensures that an individual leasing or renting a residential property will be guaranteed the basic living essentials: namely, heat, water, plumbing, and shelter. Certainly, local towns and communities, much like individual states in our state constitutional experimentation analysis, are able to provide their residents greater rights, guarantees, and amenities. One local town might deem it in their residents’ best interest to require that homes be built with driveways, sidewalks, and back yards. A neighboring township may impose pet restrictions on its residents and mandate that only single family row homes be built in certain zones. While a third locale only requires that properties include the basic living essentials required by law. This system promotes the fundamental freedom of choice—an individual may opt for the bare minimum, or splurge for the Beverly Hills mansion. Increasing the implied warranty of habitability’s requirements, much like raising the constitutional “floor of basic rights and benefits,” erodes this paramount freedom and gives locales less opportunity to explore different avenues to meet social needs and desires.

iii. State Constitutional Provisions Affording Greater Protections

In the face of dwindling state autonomy, several states have renounced the lockstep constitutional method, opting instead to pave their own path for the betterment of their citizens.\textsuperscript{54} For

\textsuperscript{52} See id.
\textsuperscript{53} See id. at 997–99.
\textsuperscript{54} See, e.g., Dorsey v. State, 761 A.2d 807, 814 (Del. 2000) (“The Declaration of Rights in the Delaware Constitution is not a mirror image of the federal Bill of Rights. Consequently,
example, the State of New York, through its constitution, saw fit to provide its citizens with greater speech rights than that afforded by the United States Constitution’s First Amendment.55 In holding that the New York Constitution provides broader speech protections, the New York State Court of Appeals in Immuno AG v. Moor-Jankowski announced: “the Federal Constitution fix[es] only the minimum standards applicable throughout the Nation” and keeps unchanged “the traditional role of State courts in applying privileges, including the opinion privilege.”56 In like manner, states such as Ohio57, Kentucky,58 Georgia,59 Washington,60 Iowa,61 and Delaware62 (to name a few), through their constitutions, recognize greater rights in the form of civil liberties and privacy.

Indeed, over forty state constitutions, Texas being the most

Delaware judges cannot faithfully discharge their responsibilities of their office by simply holding that the Declaration of Rights in Article I of the Delaware Constitution is necessarily in ‘lock step’ with the United States Supreme Court’s construction of the federal Bill of Rights.” (internal footnotes omitted).


56 Immuno AG, 567 N.E.2d at 1277.


58 See, e.g., Campbell v. Sundquist, 926 S.W.2d 250, 259 (Tenn. Ct. App. 1996) (“[T]here is no reason to assume that there is a complete congruency between the Federal and Tennessee rights to privacy.”) (quoting Davis v. Davis, 842 S.W.2d 588, 600 (Tenn. 1992)); Jeffrey M. Shaman, The Right of Privacy in State Constitutional Law, 31 RUTGERS L. REV. 971, 988 (2006) (indicating that the Kentucky Constitution recognized a right of intimate association when no such right existed under the Federal Constitution).

59 Powell v. State, 510 S.E.2d 18, 21 (Ga. 1998); Shaman, supra note 58, at 988 (“Georgia was proud to boast that its 1905 decision in Pavesich v. New England Life Insurance Co. made it the first court of last resort to recognize the right of privacy.”) (citing Pavesich v. New England Life Ins. Co., 50 S.E. 68 (Ga. 1905)).


61 Brett F. Roberts, Judicial Federalism, Equal Protection, and the Legacy of Raging Association of Central Iowa, 95 IOWA L. REV. 1731, 1734 (2010) (citing Racing Ass’n of Central Iowa v. Fitzgerald, 675 N.W.2d 1, 16 (Iowa 2004)).

62 See E. Lake Methodist Episcopal Church, Inc. v. Trustees of Peninsula-Delaware Annual Conference of United Methodist Episcopal Church, Inc., 731 A.2d 798, 805 n.2 (Del. 1999) (interpreting the Free Exercise Clause of the United States First Amendment through the lens of the Delaware Constitution); see also Bryan v. State, 571 A.2d 170, 177 (Del. 1990) (deciding that a defendant’s right to his attorney on independent state grounds under the Delaware Constitution, as opposed to the federal Constitution).
publicized, include “right to keep and bear arms” provisions. Delaware’s constitution, for example, reflects its General Assembly’s stated purpose to “explicitly protect[] the traditional right to keep and bear arms.” In a recent decision in which the Delaware Supreme Court certified a question of Delaware law from the United States Court of Appeals for the Third Circuit, the Delaware Supreme Court reaffirmed that Delaware’s constitution affords its citizens greater rights than the United States Constitution in regard to the right to keep and bear arms. In so concluding, the court noted that although Delaware’s right to keep and bear arms provision shares a similar historical context with the United States Constitution’s Second Amendment, the interpretation of the Delaware provision “is not dependent upon federal interpretations of the Second Amendment . . . . On its face, the Delaware provision is intentionally broader than the Second Amendment.” Ultimately, the Delaware Supreme Court held that “the Delaware Constitution is an independent source for recognizing and protecting the right to keep and bear arms.”

Each of the states discussed above, and all the other states that provide greater rights to their citizens, do so in large part because of public policy concerns unique to that particular state and not to the nation at large. Looking at the historical underpinnings of Delaware’s right to a jury trial best evidences this proposition. When the Federal Bill of Rights were being drafted, Delaware’s delegates (specifically, John Vining), among others, urged the United States Congress to include English’s common law right regarding jury trials: that each criminal conviction be supported by a unanimous twelve juror vote. This proposal was met with opposition and was not included in the Bill of Rights. Consistent with Delaware’s strong public policy favoring criminal defendants’ right to a fair trial, Delaware included this requirement (among many other constitutional mandates affording its citizens greater

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67 Id. at 665 (emphasis added).
68 Id. (emphasis added).
69 Holland, supra note 13, at 385–87.
70 Id.
protections) in its constitution. Delaware’s public policy in this regard, however, is unique to Delaware, and some states may not deem (and have not deemed) it desirable to afford those protections to their citizens. This is one of the paramount benefits of our nation’s constitutional framework—the fundamental right afforded to each state and their citizens to choose the public policies that seem best for them, subject only to limited federal intervention. As discussed below, in the context of the United States Constitution’s First Amendment right of public access, this fundamental freedom of choice benefit has been seriously threatened.

III. BROAD INTERPRETATIONS OF THE UNITED STATES CONSTITUTION HAVE STIFLED STATE INNOVATION AND AUTONOMY: viewed in light of the First Amendment Right of Public Access

A. Delaware’s Commercial Arbitration Program

Delaware’s unparalleled preeminence in American business entity law is attributable, in large part, to its efficient, productive, and predictable responsiveness to investors’ and the business community’s demands. This responsiveness, among other reasons, is why a majority of United States publicly traded companies choose Delaware as their state of incorporation (or formation). As Chief Justice Rehnquist put it: “The Delaware State court system has established its national preeminence in the field of corporation law due in large measure to its Court of Chancery.”

71 See id. (indicating that Delaware affords criminal defendants, inter alia, a right to be indicted by grand jury and the right to an attorney before waiving any constitutional rights); Williams v. Florida, 399 U.S. 78, 93–96 (1970); Claudio v. State, 589 A.2d 1278, 1290–91 (Del. 1991).


74 William H. Rehnquist, The Prominence of the Delaware Court of Chancery in the State-
Citing the need to “preserve Delaware’s pre-eminence in offering cost-effective options for resolving” business disputes, Delaware’s General Assembly enacted legislation that authorizes the Court of Chancery (or someone the Court of Chancery appoints) to arbitrate complex business disputes. These arbitrations are “considered confidential and not of public record, until such time, if any, as the proceedings are the subject of an appeal.” The standards set forth in the Federal Arbitration Act govern whether, and to what extent, a party to the arbitration may appeal to the Delaware Supreme Court. Specifically, appeals are limited to claims of fraud, misconduct, corruption, and an arbitrator’s abuse of power. The Court of Chancery also adopted rules governing these arbitrations, which provide, *inter alia*, that the court will arbitrate such disputes within ninety days of the court’s receipt of the arbitration petition. Most notably, this expeditious arbitration program is available only to certain sophisticated parties, who *voluntarily* select this avenue of dispute resolution, and where the amount in controversy is at

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77 Id.

78 Id.


80 Del. Ch. R. 94(4)(c) (2014). Because of this expeditious process, Delaware’s arbitration program has been termed the “rocket docket.” Kevin F. Brady & Francis G.X. Pileggi, Recent Key Delaware Corporate and Commercial Decisions, 6 N.Y.U. J. L. & BUS. 421, 455 (2010).

81 Del. Code. Ann. tit. 10, § 347(a) reads:

Without limiting the jurisdiction of any court of this State, the Court of Chancery shall have the power to mediate business disputes when:

1. The parties have consented to the mediation by the Court of Chancery by agreement or by stipulation;
2. At least 1 party is a business entity as defined in § 346 of this title;
3. At least 1 party is a business entity formed or organized under the laws of this State or having its principal place of business in this State;
4. No party is a consumer, as that term is defined in § 2731 of Title 6, with respect to the business dispute; and
5. In the case of disputes involving solely a claim for monetary damages, the amount in controversy is no less than $1,000,000 or such greater amount as the Court of Chancery determines by rule.

Id.

82 Id. § 349(a) (“The Court of Chancery shall have the power to arbitrate business disputes when the parties request a member of the Court of Chancery, or such other person as may be authorized under rules of the Court, to arbitrate a dispute. For a dispute to be eligible for arbitration under this section, the eligibility criteria set forth in § 347(a) and (b) of this title must be satisfied, except that the parties must have consented to arbitration rather than mediation.”).
least $1,000,000. Delaware’s General Assembly established this unique arbitration program in accordance with the United States Supreme Court’s First Amendment right of public access jurisprudence. “In doing so, it made an important policy judgment that the [United States] Constitution allows it to make: it weighed the benefits and drawbacks of public access, and chose confidentiality over access.”

In the face of the United States Supreme Court’s First Amendment jurisprudence, and despite the numerous benefits Delaware’s arbitration program affords United States business entities and investors, a divided panel of the Third Circuit recently deemed Delaware’s arbitration program unconstitutional. As we discuss below, the Third Circuit’s decision was plainly wrong and demanded reversal.

B. The United States Supreme Court’s First Amendment Right of Public Access Jurisprudence

In the Federal Constitution’s First Amendment right of public access arena, the United States Supreme Court appropriately set the constitutional “floor of rights and benefits.” In Richmond Newspapers v. Virginia, a plurality of the United States Supreme Court limited the public access right to proceedings for which there was an “unbroken, uncontradicted history” of openness reflected in “accepted practice[s] . . . root[ed] in our English common law heritage.”

In that case, the Court confronted the “narrow question . . . [of] whether the right of the public and press to attend criminal trials is guaranteed under the United States Constitution.” The Court found such an “unbroken, uncontradicted history” of openness in criminal trials, emphasizing that these are proceedings “at which
guilt or innocence [is] decided.”89 Focusing on criminal defendants’ right to a fair trial, Justice Brennan emphasized: “Open trials play a fundamental role in furthering the efforts of our judicial system to assure the criminal defendant a fair and accurate adjudication of guilt or innocence.”90 In like manner, the United States Supreme Court in Globe Newspaper Co. v. Superior Court held that “a right of access to criminal trials in particular is properly afforded protection by the First Amendment.”91 Public access in these proceedings, according to the Court, serves “an essential component in our structure of self-government.”92 The Globe Newspaper Court also noted “that a presumption of openness inheres in the very nature of a criminal trial under our system of justice.”93 Consistent with the Richmond Newspaper and Globe Newspaper holdings, the United States Supreme Court has extended the right of access to voir dire examination of potential jurors in criminal cases94 and criminal preliminary hearings.95

The United States Supreme Court has asserted that (1) the “unbroken, uncontradicted history”96 of public criminal trials and (2) the “particularly significant”97 importance of public access to criminal proceedings, “together serve to explain why a right of access to criminal trials in particular is properly afforded protection by the First Amendment.”98 Although the Supreme Court has recognized that “[t]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow,”99 because of the Supreme Court’s reliance on these “two

89 Id. at 566, 573. The U.S. Supreme Court has noted that the public has consistently had a public right of access to criminal trials both in the United States and in England “at the time when our organic laws were adopted.” Id. at 569; see also Globe Newspaper Co. v. Superior Court for the County of Norfolk, 457 U.S. 596, 605 (1982) (quoting Richmond Newspapers, 448 U.S. at 569).
90 Richmond Newspapers, 448 U.S. at 593 (Brennan, J., concurring in judgment) (emphasis added).
91 Globe Newspaper Co., 457 U.S. at 605 (emphasis in original).
92 Id. at 606.
93 Id. at 610 (quoting Richmond Newspapers, 448 U.S. at 573 (plurality opinion)) (emphasis added).
98 Id. at 605 (emphasis in original).
complementary considerations [of] . . . experience and logic,”100 “neither Richmond Newspapers nor the Court’s decision[s] . . . [interpreting it should] carry any implications outside the context of criminal trials.”101

The Supreme Court’s limitation on the First Amendment right of public access recognizes that “[t]he Constitution . . . is neither a Freedom of Information Act nor an Official Secrets Act.”102 In the same vein, the United States Supreme Court has admonished that, “because the stretch of this [right] . . . is theoretically endless . . . it must be invoked with discrimination and temperance.”103 The Supreme Court cautions that, without such discrimination and temperance, courts would be involved in “legislative task[s] which the Constitution has left to the political process,”104 and “hundreds of judges would . . . be at large to fashion ad hoc standards, in individual cases, according to their own ideas of what seems ‘desirable’ or ‘expedient.’”105

C. Circuit Court Decisions

It is apparent from reviewing lower federal court decisions that the First Amendment right of public access has not been “invoked with discrimination and temperance.”106 Much like the Third Circuit’s decision in Delaware Coalition for Open Government, Inc.107 (discussed below), several circuit courts have erroneously interpreted the Supreme Court’s right of public access jurisprudence, stretching the “experience and logic” considerations

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100 Press-Enterprise II, 478 U.S. at 8–9.
102 Houchins v. KQED, Inc., 438 U.S. 1, 15 (1978) (plurality opinion) (quoting Potter Stewart, Or of the Press, 26 Hastings L.J. 631, 636 (1975)); see also McBury v. Young, 133 S. Ct. 1709, 1718 (2013) (“This Court has repeatedly made clear that there is no constitutional right to obtain all the information [in the government’s possession].”); see also Zemel, 381 U.S. at 17 (“The right to speak and publish does not carry with it the unrestrained right to gather information.”).
104 Houchins, 438 U.S. at 12 (plurality opinion).
105 Id. at 14.
106 Richmond Newspapers, 448 U.S. at 588.
107 Delaware Coal. for Open Gov’t, Inc. v. Strine, 733 F.3d 510 (3d Cir. 2013).
beyond recognition. For example, the Second Circuit has expanded this right of public access to state administrative proceedings, noting that “[t]he public’s right of access to an adjudicatory proceeding does not depend on which branch of government houses that proceeding.”\(^{108}\) The Ninth Circuit interprets the First Amendment to “protect[] the right to witness executions in their entirety”\(^{109}\) and even to guarantee public access rights to government run wild horse gathers.\(^{110}\) Similarly, preliminary injunction proceedings,\(^{111}\) hearings in class actions,\(^{112}\) civil trials,\(^{113}\) “township planning commission meetings, search warrant affidavits . . . deportation hearings, forms filed by counsel under the Criminal Justice Act, federal administrative fact-finding hearings [and] state driver’s license revocation hearings . . . have all been held subject to a First Amendment right of public access.”\(^{114}\)

These decisions evidence a drastic departure from the United States Supreme Court’s “experience and logic” jurisprudential standard. Notwithstanding the Supreme Court’s admonition and constitutional interpretation, these federal courts nakedly embark on the “political task” of determining, in their view, “what is ‘good,’ ‘desirable,’ or ‘expedient’” as opposed to “what is constitutionally commanded by the First Amendment.”\(^{115}\)

\(^{108}\) New York Civil Liberties Union v. New York City Transit Auth., 684 F.3d 286, 290 (2d Cir. 2011).

\(^{109}\) Associated Press v. Otter, 682 F.3d 821, 825 (9th Cir. 2012).


\(^{111}\) Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1061 (3d Cir. 1984).

\(^{112}\) See generally Newman v. Gradieck, 696 F.2d 796 (11th Cir. 1983) (appealing the district court’s denial of an advertising company’s petition to copy judicial records and gain access to hearings in a class action regarding the constitutionality of overcrowded Alabama prisons).

\(^{113}\) See generally Westmoreland v. CBS, Inc., 752 F.2d 16 (2d Cir. 1984) (deciding whether a cable news network has the right to televise a federal trial and the public the right to view such a trial).

\(^{114}\) Motion of Law Firms, infra note 84, at 9 (citing Whiteland Woods, L.P. v. Township of W. Whiteland, 193 F.3d 177, 180–81 (3d Cir. 1999) (discussing township planning commission meetings); In re Search Warrant for Secretarial Area Outside Office of Gunn, 855 F.2d 569, 573 (9th Cir. 1988) (discussing search warrant affidavits); Detroit Free Press v. Ashcroft, 303 F.3d 681, 700 (6th Cir. 2002) (discussing deportation hearings); United States v. Suarez, 880 F.2d 626, 631 (2d Cir. 1989) (discussing Criminal Justice Act forms); Soc’y of Prof’l Journalists v. Sec’y of Labor, 616 F. Supp. 569, 577 (D. Utah 1985) (discussing federal administrative fact-finding hearing), vacated as moot, 832 F.2d 1180 (10th Cir. 1987); Freitas v. Admin. Dir. of Courts, 92 F.3d 993, 996–99 (Haw. 2004) (discussing driver’s license revocation hearings)).

\(^{115}\) Houchins v. KQED, Inc., 438 U.S. 1, 13 (1978) (plurality opinion).
D. The Third Circuit’s Decision in Delaware Coalition for Open Government, Inc.

In Delaware Coalition for Open Government, Inc. the Third Circuit was confronted with the issue of “whether the public has a right of access under the First Amendment to Delaware’s state-sponsored arbitration program.”\textsuperscript{116} Superficially applying the experience and logic standard,\textsuperscript{117} a divided three judge panel of the Third Circuit extended the First Amendment right of access to Delaware’s arbitration program.\textsuperscript{118} In so holding, this divided three judge panel deemed it sufficient that the proceedings are “conducted before active judges in a courthouse, because they result in a binding order of the Chancery Court, and because they allow only a limited right of appeal.”\textsuperscript{119} This holding, however, ignores Supreme Court precedent—specifically, that there is no “unbroken, uncontradicted history”\textsuperscript{120} of openness in arbitration proceedings, and access to arbitrations in no way “plays a significant positive role in the functioning of the particular process in question.”\textsuperscript{121} On the contrary, even the Third Circuit recognized that “[t]he history of arbitration . . . reveals a mixed record of openness. Although proceedings labeled arbitrations have sometimes been accessible to the public, they have often been closed, especially in the twentieth century.”\textsuperscript{122}

E. The Circuit Courts Have Stifled State Innovation and Misaligned the Constitutional Pendulum

Many of the federal circuit courts, including the Third Circuit, have overly broadened the United States Constitution’s First Amendment’s right of public access. In so doing, these courts have stifled state innovation and misaligned the constitutional pendulum. The divided Third Circuit decision invalidating Delaware’s arbitration program—a program that revolutionizes American business entity law—underscores this point. Most

\textsuperscript{116} Delaware Coal. for Open Gov’t, Inc. v. Strine, 733 F.3d 510, 512 (3d Cir. 2013).
\textsuperscript{117} Motion of Law Firms, supra note 84, at 11.
\textsuperscript{118} Delaware Coal. for Open Gov’t, 733 F.3d at 521.
\textsuperscript{119} Id. at 518.
\textsuperscript{120} Richmond Newspapers v. Virginia, 448 U.S. 555, 573 (1980).
\textsuperscript{121} Press-Enterprise Co. v. Superior Court of California (Press-Enterprise II), 478 U.S. 1, 8 (1986).
\textsuperscript{122} Delaware Coal. for Open Gov’t, 733 F.3d at 518 (emphasis added).
unfortunately, the United States Supreme Court denied the petition for writ of certiorari filed in Delaware Coalition for Open Government. This denial means that the flawed circuit court decision and the inimical consequences flowing from this decision live to see another day. Despite the United States Supreme Court’s denial in Delaware Coalition for Open Government, we urge the Court to timely restore the appropriate balance in this area of constitutional jurisprudence.

We must note that we are not arguing that providing greater public access to adjudicative proceedings has no positive virtue. We are simply asserting that this decision to provide such rights should be left to the states through the political process. This decision should not be made by federal judges injecting their own beliefs about “what is ‘good,’ ‘desirable,’ or ‘expedient.’”123

IV. CONCLUSION

Delaware’s General Assembly endeavored to maintain its global preeminence in the business community when it enacted Delaware’s commercial arbitration legislation. Despite this legislation’s consistency with United States Supreme Court constitutional jurisprudence, the divided Third Circuit Court of Appeals invalidated this law on First Amendment grounds. This decision is just one of many examples where federal courts have broadly and erroneously interpreted the United States Constitution at the expense of state experimentation. Moving forward, we implore federal courts to narrowly interpret the federal Constitution, realign the constitutional pendulum to its rightful place, and recognize the benefits that flow from state experimentation.

123 Houchins v. KQED, Inc., 438 U.S. 1, 13 (1978) (plurality opinion).