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On the Straight and Narrowly Tailored: The Third Circuit Walks a Fine Line Between the Judiciary and Politics in *Adams v. Governor of Delaware*

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Casebriefs

ON THE STRAIGHT AND NARROWLY TAILORED:
THE THIRD CIRCUIT WALKS A FINE LINE BETWEEN
THE JUDICIARY AND POLITICS IN *ADAMS v.*
GOVERNOR OF DELAWARE

INTRODUCTION

Partisanship is often an unavoidable component of the American judiciary.¹ In some states, governors appoint judges with party affiliations and partisan agendas they hope to solidify with judicial nominees who share their ideologies.² In others, like Pennsylvania, judges run for their positions as party-affiliated candidates like any other politician.³ Delaware’s system, engrained in the state’s constitution, *requires* the governor to appoint judges based on their political affiliation. In theory, this maintains complete partisan balance—or as close to it as possible—throughout Delaware’s judicial system.⁴

In 2019, the U.S. Court of Appeals for the Third Circuit declared this policy unconstitutional because it violated a judicial candidate’s free association rights. The policy prevented an attorney from pursuing a position as a Delaware judge because he did not belong to the required political party.⁵ This Casebrief discusses the Third Circuit’s decision striking down the relevant provisions of the Delaware constitution.

1. See Garrett Epps, *Delaware’s Weird—and Constitutionally Suspect—Approach to Judicial Independence*, ATLANTIC (Mar. 28, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/delawares-weirdand-constitutionally-suspectapproach-to-judicial-independence/608971/> [https://perma.cc/LPA6-S9FS] (arguing “[o]ne of the persistent puzzles of American law is that no one can draw a clear line between law and politics, or law and policy”).

2. For further discussion of states’ judicial appointment processes, see *infra* Part I.

3. See *How Judges Are Elected*, UNIFIED JUD. SYS. PA., <http://www.pacourts.us/learn/how-judges-are-elected> [https://perma.cc/QVX8-TMM6] (last visited Mar. 13, 2020). Only first-time nominees run on a political party’s ticket in Pennsylvania. See *id.* After being elected, they are voted on in retention elections where the judge’s name appears on the ballot without reference to political party. *Id.*

4. See *Adams v. Governor of Del.*, 922 F.3d 166, 170–71 (3d Cir. 2019) (discussing requirements of Delaware constitution as it pertains to appointment of judges to supreme, superior, chancery, family, and common pleas courts).

5. See *id.* at 184–85 (holding would-be judicial candidate’s freedom of association rights were violated by Delaware’s requirement that judiciary be balanced between Democrats and Republicans, when he did not belong to political party being recruited for that position).

We argue that the Third Circuit's opinion in *Adams v. Governor of Delaware*⁶ exposes the inherent flaw in the argument made by the Governor of Delaware: that the state's practices institutionalize partisanship rather than eschew it. Nevertheless, we believe the court failed to comprehensively analyze the portions of Delaware's constitution that require political balance, choosing a shortsighted approach by primarily basing its holding on the political affiliation provision. We also examine the ramifications of the Third Circuit's decision on Delaware's place at the center of the corporate law marketplace, and contend that voluntary adherence to its tradition of bipartisan judicial appointments could help prevent the governor's feared repercussions of the *Adams* decision.

Part I of this Casebrief discusses the long history behind the constitutional provisions at issue in *Adams*. Part II details the challenge brought by James Adams, a Delaware attorney and aspiring judge, whose status as a political Independent precluded him from applying for Delaware judicial vacancies. Part III traces the reasoning that resulted in the Third Circuit declaring Delaware's judicial appointment scheme unconstitutional. Part IV argues that while the court pinpointed the major weaknesses in the governor's arguments, it underanalyzed the state's interests at play and failed to reckon with the potential consequences of its decision. Part V examines the potential impact on Delaware's standing at the center of American corporate law.

I. BACKGROUND

The provisions of the Delaware constitution at issue in *Adams* date back to 1897, when the state's general assembly called a constitutional convention to amend the outdated Constitution of 1831.⁷ Delegates considered changing the judicial selection process, as worries over the injection of politics into what was commonly viewed as an insulated branch of government grew among the Delaware public.⁸ Ultimately, the delegates

6. 922 F.3d 166 (3d Cir. 2019).

7. See WILLIAM W. BOYER & EDWARD C. RATLEDGE, DELAWARE POLITICS AND GOVERNMENT 41 (2009). The Constitution of 1831 was the third governing document of Delaware and was designed to make limited changes to the Constitution of 1792. See *id.* at 40. While "[t]he First State" had adopted a constitution in 1776, the ratification of the U.S. Constitution in 1789 outdated most of the original document's common law protections. See *id.* Delaware designed the Constitution of 1792 to mirror that of the newly formed federal government. See *id.* Despite limited changes in 1831, Delaware's constitution remained largely the same until 1897, when the state's General Assembly determined more sweeping changes were in order. See *id.* at 41.

8. See *Adams*, 922 F.3d at 169 ("[T]he president of the convention[] explained his position that the appointment of judges would enable judges to remain free from political cronyism and partisanship . . ."). Thirty years of Democratic control in Delaware ended in 1897 when the state's "electoral votes were cast for the Republican presidential candidate, William McKinley, in 1896." Joel Edan Friedlander, *Is Delaware's "Other Major Political Party" Really Entitled to Half of Delaware's Judiciary?*, 58 ARIZ. L. REV. 1139, 1147 (2016) (discussing political context of

created a system of gubernatorial appointment requiring confirmation by a majority of the state senate.⁹ The fears of judicial politicization, however, prompted the convention to consider a constitutional provision that would attempt to solidify the judiciary as a “non-partisan” entity—limiting the number of judges on the bench from one political party.¹⁰ In opposition, some noted that sweeping limitations would force the governor to appoint a judge of a particular party with the expectation that the judge would act upon his political inclinations, thus, crystallizing a political judiciary.¹¹ Ultimately, the interests of preserving minority representation and limiting majority suppression carried the day. The convention adopted five provisions designed to balance the political representation—and by extension, the interests—of judges on the Delaware courts.¹² These provisions remained untouched until 1951, when the general assembly modified their language to exclude any non-Republican or non-

1897 in which amendments to Constitution of 1831 were made). Citizens seized the opportunity amidst this political upheaval to demand the state address their concerns over “political corruption and electoral fraud.” *Id.* at 1147. “[T]he conditions which exist in the State of Delaware today are directly traceable to the connivance of political parties, whose selfish actions and non-progressive manifestations are wholly responsible for the state of affairs which exist there today.” *Id.* at 1147–48 (alteration in original) (quoting Joseph T. Walsh & Thomas J. Fitzpatrick Jr., *Judiciary Article IV: Political Balance Requirement*, in *THE DELAWARE CONSTITUTION OF 1897: THE FIRST ONE HUNDRED YEARS* 134, 444–48 (Harvey B. Rubenstein ed., 1997)).

9. *See Adams*, 922 F.3d at 170 (noting in 1897, Delaware “was the only state in the country in which the governor appointed judges without legislative involvement”). The governor’s unbridled appointment power had been a particular point of contention amongst the Delaware public. *See Friedlander*, *supra* note 8, at 1148 (“Nearly four hundred offices are subject to the appointive power of the Governor, whose proportionate power is greater than that of President” (quoting Walsh & Fitzpatrick, *supra* note 8, at 444–48)).

10. *See Adams*, 922 F.3d at 170 (discussing adoption of article IV, section 3 of the constitution of 1897); *see also Friedlander*, *supra* note 8, at 1148–49 (“The Constitutional Convention rejected the idea of electing judges due to the ‘sense that there was already at that time ‘too much politics’ in the courts and that the election of judges would merely contribute to that unsatisfactory situation.’” (quoting Walsh & Fitzpatrick, *supra* note 8, at 133)).

11. *See Adams*, 922 F.3d at 170 (discussing delegate Andrew Johnson’s comments regarding the political balancing provisions at issue during 1897 convention). Detractors of the new appointment regime were further concerned that the process “could permit the appointment of incompetent judges simply because they belonged to a particular party” or could “deprive the electorate of influence over the judiciary.” *Friedlander*, *supra* note 8, at 1149 (quoting Walsh & Fitzpatrick, *supra* note 8, at 134).

12. *See Adams*, 922 F.3d at 170. The original political balance provisions acted accordingly, stating that “appointments shall be such that no more than three of the said five law judges, in office at the same time, shall have been appointed from the same political party.” *Friedlander*, *supra* note 8, at 1149 (quoting DEL. CONST. art. IV, § 3 (1897)).

Democratic judicial candidate from consideration for vacancies on the supreme court, superior court, and chancery court.¹³

The five political balancing provisions of the Delaware constitution, as read today, can be separated into two groups. The first group comprises the first three provisions of article IV, section 3 and concerns the supreme court, superior court, and chancery court.¹⁴ Each provision within the first group not only limits the number of justices from one major political party on each bench but also requires the remaining justices to be “of the other major political party.”¹⁵ The second group addresses the composition of the Delaware Family Court and Delaware Court of Common Pleas.¹⁶ Notably, in contrast to the first three provisions of article IV, sec-

13. See BOYER & RATLEDGE, *supra* note 7, at 105 (discussing the creating of the Supreme Court of Delaware and amendments to article IV, section 3 of the Delaware constitution). Notably, Delaware was the last state in the country in 1951 to create a state supreme court. Friedlander, *supra* note 8, at 1149.

14. See DEL. CONST. art. IV, § 3. In pertinent part, these provisions provide: Appointments to the office of the State Judiciary shall at all times be subject to all of the following limitations:

First, three of the five Justices of the Supreme Court in office at the same time, shall be of one major political party, and two of said Justices shall be of the other major political party.

Second, at any time when the total number of Judges of the Superior Court shall be an even number not more than one-half of the members of all such offices shall be of the same political party; and at any time when the number of such offices shall be an odd number, then not more than a bare majority of the members of all such offices shall be of the same major political party, the remaining members of such offices shall be of the other major political party.

Third, at any time when the total number of the offices of the Justices of the Supreme Court, the Judges of the Superior Court, the Chancellor and all the Vice-Chancellors shall be an even number, not more than one-half of the members of all such offices shall be of the same major political party; and at any time when the total number of such offices shall be an odd number, then not more than a bare majority of the members of all such offices shall be of the same major political party; the remaining members of the Courts above enumerated shall be of the other major political party.

Id.

15. *Id.* The court in *Adams* referred to these provisions as containing a “major political party component” by requiring justices on the supreme court, superior court, and chancery court to be of one of the two recognized major political parties (i.e., Republican or Democrat). See *Adams*, 922 F.3d at 171.

16. See DEL. CONST. art. IV, § 3. The fourth and fifth provisions read: Appointments to the office of the State Judiciary shall at all times be subject to all of the following limitations: . . .

Fourth, at any time when the total number of Judges of the Family Court shall be an even number, not more than one-half of the Judges shall be of the same political party; and at any time when the total number of Judges shall be an odd number, then not more than a majority of one Judge shall be of the same political party.

Fifth, at any time when the total number of Judges of the Court of Common Pleas shall be an even number, not more than one-half of the Judges

tion 3, these two limit only the number of seats a single political party can hold.¹⁷ The impact of these provisions are as distinct as the language that comprises them. Namely, the bench of the supreme court, superior court, and chancery court must be composed of a balanced number of registered Republicans and Democrats. Justices on the family court and court of common pleas, however, can be registered with any political party.

While the political balance requirement has existed since 1897, the precise constitutional provision at issue in *Adams*—which was “modified to exclude third party and unaffiliated voters from applying to serve as judges”—was enacted only sixty-nine years ago.¹⁸ It requires the supreme court to always be made up of three members of a “major political party,” with the other two members being from “the other major political party.”¹⁹ The rules are designed to ensure that one political party never comprises more than a “bare majority” of any state court.²⁰

Delaware governors rely on “judicial nominating commissions to identify qualified candidates for judicial appointments.”²¹ The commission is made up of twelve members, eleven of whom are appointed by the governor; the twelfth member is appointed by the Delaware Bar Association with the governor’s consent.²² When a judicial vacancy arises, the public is notified that the judiciary seeks candidates from the political party required to maintain the requisite partisan balance on the given

shall be of the same political party; and at any time when the total number of Judges shall be an odd number, then not more than a majority of one Judge shall be of the same political party.

Id.

17. *Id.* Again, in *Adams*, the court considered the latter two provisions of article IV, section 3, as substantively separate from the first three, as the former contain only a “bare majority component” by limiting the overall number of justices from a single political party. *See Adams*, 922 F.3d at 171.

18. *Adams*, 922 F.3d at 170 (discussing the party affiliation requirements that now applied to applicants for the supreme court, superior court, and chancery court); *see also* BOYER & RATLEDGE, *supra* note 7, at 105 (noting the “[u]nique features” of Delaware’s judicial appointment scheme—namely, the political balance and affiliation requirements—were added in a 1951 amendment to the Delaware constitution). The 1951 amendment created Delaware’s first independent court of last resort. *See* BOYER & RATLEDGE, *supra* note 7, at 104. Until that point, no permanent stable of supreme court judges existed; instead, judges “were . . . drawn from other courts—namely the Court of Chancery and the Superior Court.” *Id.* The Delaware legislature created the 1951 amendment in part to resolve that absence from Delaware’s judiciary. *See id.*

19. *See* DEL. CONST. art. IV, § 3.

20. *See Adams*, 922 F.3d at 171; *see also* Epps, *supra* note 1 (detailing institution of “bare majority” rule in order to “placate partisan opponents of the [supreme court]” (first internal quotation marks omitted)).

21. *Adams*, 922 F.3d at 171.

22. *See id.* The commission is “politically balanced and comprised of both lawyers and non-lawyers.” *Id.* In a 2017 executive order, Delaware Governor John Carney affirmed the process by which individuals are named to the nominating commission. *See* Del. Exec. Order No. 7 (Mar. 9, 2017), <https://governor.delaware.gov/executive-orders/eo07/> [<https://perma.cc/PZ4E-JAMM>].

court.²³ The commission provides the governor a list of three recommended candidates, who then must choose from those candidates or ask the commission to generate a new list.²⁴

Outside of Delaware, judges are commonly selected by gubernatorial nomination, elections, or a hybrid process, resulting in “a dizzying assortment of methods . . . depend[ing] on the state, the level of court, and the type of vacancy to be filled.”²⁵ Most states use elections in some form to create or maintain judicial positions.²⁶ Twenty-six states, Delaware included, use gubernatorial appointments for initial terms based on a list provided by a nominating commission.²⁷ Delaware judges are confirmed by the state senate for twelve-year terms, and can be reconfirmed with no limit on the amount of terms they may serve.²⁸

Unlike many other states, Delaware judges never face a retention election.²⁹ For example, Maryland’s governor also nominates judges from a

23. *Adams*, 922 F.3d at 171.

24. *See* Del. Exec. Order No. 7, ¶ 7 (Mar. 9, 2017). If the governor chooses not to nominate a candidate from the commission’s initial list of candidates, they may ask the commission to submit at least three additional candidates within thirty days. *Id.* The governor can request only one supplementary list unless the Delaware State Senate fails to confirm the selected candidate. *Id.* Should that occur, another list is generated. *Id.*

25. *Judicial Selection: Significant Figures*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures> [<https://perma.cc/AKB2-N5DF>] (last visited Apr. 28, 2020) (detailing methods of selecting state court judges used throughout United States, including popular elections, gubernatorial appointments, and hybrid systems where governors nominate judges who are confirmed by portion of state’s legislature).

26. *Id.* (noting thirty-eight states use elections to either nominate or retain judges). In sixteen states, judicial nominees to the highest court are initially selected by the governor and then retain their seats by running unopposed in retention elections. *Id.* In fifteen states, judges gain their seats by running in contested nonpartisan elections, and in seven states, judges face a contested partisan election where candidates run on a politically affiliated ticket. *Id.*

27. *See id.* (finding that in “a total of 26 states and D.C., the governor appoints judges to their first term from a list of candidates provided by a nominating commission”).

28. *See Judicial Selection: An Interactive Map*, BRENNAN CTR. FOR JUST., <http://judicialselectionmap.brennancenter.org/?court=supreme&state=de> [<https://perma.cc/VV2N-7NXJ>] (last visited Apr. 28, 2020) (showing, when selecting the state of Delaware on the website’s interactive map, that when a Delaware judicial seat opens following a complete term, due to the expiration of a term or a current judge’s retirement, “the governor appoints a judicial candidate from a list provided by a judicial nominating commission” which “must be confirmed by a majority vote of the state Senate”).

29. *See id.* (noting, when selecting the state of Delaware on the website’s interactive map, that once a Delaware judge’s initial 12-year term has expired, the judge “may stand for reappointment to additional 12-year terms in the same appointment process,” consisting of gubernatorial nomination followed by a senate confirmation). While uncontested retention elections “provide some insulation from the negative aspects of contested elections,” they are seen as “a breakwater and not an impenetrable seawall,” providing an added level of public scrutiny and accountability not present in non-electoral appointment processes. Larry T. Aspin, *Reten-*

list generated by a nominating commission, but can ignore the commission's recommendations and appoint someone from outside the list.³⁰ Gubernatorial appointees must eventually run in a retention election against outside candidates seeking that position.³¹ New Jersey's appointment process is also similar to Delaware's, but it lacks the mandatory partisan affiliation and political balance requirements at issue in *Adams*.³²

While the U.S. Supreme Court has not yet addressed the constitutionality of those political requirements in the context of *Adams*, it has provided insight into the factors it considers when deciding whether politics is a legitimate element of public employment. The Court decided whether employers can consider political affiliation in civil service hiring and firing decisions, finding that the constitutionality of an employee's selection or dismissal may turn on whether the individual's role is "policymaking" in nature.³³ In *Elrod v. Burns*,³⁴ a plurality of the Court determined that if an employee is a policymaker, "the government's interest in employee loy-

tion Elections and Evaluations: A Response to Current Trends in Contested Judicial Elections?, in *FUTURE TRENDS IN STATE COURTS*, NAT'L CTR. FOR ST. CTS. 104–05 (2007) (analyzing the use of retention elections to ensure judicial integrity).

30. See *Judicial Selection: An Interactive Map*, BRENNAN CTR. FOR JUST., <http://judicialselectionmap.brennancenter.org/?court=Supreme&state=MD> [<https://perma.cc/SFE7-6LRZ>] (last updated Apr. 28, 2020) (noting, when selecting the state of Maryland on the website's interactive map, that Maryland's governor "receives a list of candidates vetted and recommended by the judicial nominating commission but is not required to select a candidate from the list"). While the Governor of Maryland may elect not to nominate a candidate recommended by that state's nominating commission, the list of names submitted to the governor for consideration are made public. See Md. Exec. Order 01.01.2019.05(F)(12) (May 6, 2019) (requiring the commission to "release this list to the public concurrently with submission of its report to the Governor").

31. See Bryan Renbaum, *Del. Cardin: Bill Would End Competitive Elections for Circuit Court Judges*, MARYLANDREPORTER (Jan. 27, 2020), <https://marylandreporter.com/2020/01/17/del-cardin-bill-would-end-competitive-elections-for-circuit-court-judges/> [<https://perma.cc/D3VA-3DVR>] (discussing Maryland's judicial electoral regime where circuit court judges "must face voters in competitive non-partisan elections" where "they are rarely opposed," while appellate court judges run in retention elections and keep their seats so long as a majority of Maryland's citizens vote "yes" on their retention).

32. See *Judicial Selection: An Interactive Map*, BRENNAN CTR. FOR JUST., <http://judicialselectionmap.brennancenter.org/?court=Supreme&state=NJ> [<https://perma.cc/N74P-TAPC>] (last updated Apr. 28, 2020) (demonstrating, by selecting the state of New Jersey on the website's interactive map, that New Jersey judicial candidates must also be approved by the state senate, serving seven-year terms to Delaware's twelve-year terms); see also Colleen O'Dea, *Explainer: How Do Our Judges Make It to the Bench in New Jersey?*, NJSPTLIGHT (June 3, 2014), <https://www.njspotlight.com/2014/06/14-06-02-explainer-how-judges-make-it-to-the-bench-in-new-jersey/> [<https://perma.cc/4HRN-LVS3>] (noting New Jersey governors have "traditionally . . . kept a political balance among judges—nominating one Democrat for each Republican"). For further analysis of New Jersey's unofficial political balancing standard, see *infra* Part IV.

33. See *Adams v. Governor of Del.*, 922 F.3d 166, 177 (3d Cir. 2019) (discussing evolution of policymaking exception in Supreme Court jurisprudence).

34. 427 U.S. 347 (1976).

alty” would allow a dismissal based on political affiliation in the proper circumstances.³⁵ Four years later, the Supreme Court in *Branti v. Finkel*³⁶ “moved away from *Elrod’s* policymaking distinction,” and the Court decided a more appropriate inquiry requires the hiring authority to demonstrate that a specific political affiliation is a necessary consideration for the effective performance of an employee.³⁷ The Third Circuit’s holding in *Adams*—that judges are not policymakers and their employment cannot be conditioned on their personal politics—contradicts other circuit courts of appeals, which may deepen the divide in how the American judiciary as an institution is perceived.³⁸

II. FACTS AND PROCEDURAL HISTORY

Plaintiff, James Adams, was a member of the Delaware State Bar and a registered Independent.³⁹ Adams coveted a position in Delaware’s judiciary, but as an Independent, he could not apply due to Delaware’s constitutional scheme excluding third-party applicants from most judicial appointments.⁴⁰ In the past, Adams tried to apply for positions on the Delaware Family Court in 2009 and the state’s supreme court and superior court in 2014.⁴¹

Returning to active status with the Delaware State Bar in 2017, Adams once again became interested in serving on a Delaware bench.⁴² Around this time, Adams read a scholarly article critically analyzing the state’s po-

35. See *Adams*, 922 F.3d at 177 (noting that whether an employee is classified as “policymaker” should be determined by factfinder after examination “of the employee’s responsibilities to determine whether or not he or she is in a policymaking position”); see also *Burns*, 427 U.S. at 372 (holding patronage dismissals should be limited to policymaking positions).

36. 445 U.S. 507 (1980).

37. *Adams*, 922 F.3d at 177 (arguing judgeships are political in nature but do not fall within the policymaking exception, thus hiring judges based on political affiliation may incur First Amendment scrutiny).

38. See *id.* at 180–81 (acknowledging conclusions by Court of Appeals for Sixth and Seventh Circuits that judges qualify as policymakers for whom political affiliation may be considered as necessary condition for judicial service); see also *Newman v. Voinovich*, 986 F.2d 159, 163 (6th Cir. 1993) (“[J]udges are policymakers because their political beliefs influence and dictate their decisions on important jurisprudential matters.”); *Kurowski v. Krajewski*, 848 F.2d 767, 770 (7th Cir. 1988) (holding a governor, who is entitled to appoint judges with shared policy views, may factor political affiliation into their decision).

39. *Adams*, 922 F.3d at 172. Once a registered Democrat, Adams changed his political affiliation in 2017 after becoming disenchanted with Delaware Democratic Party’s “centrism.” *Id.*

40. See *id.*

41. *Id.* Adams was not chosen for family court commissioner in 2009. *Id.* And as a registered Democrat in 2014, he was not able to apply for a supreme or superior court position that strictly sought Republican candidates. *Id.*

42. *Id.*

litical balancing provisions and the constitutionality thereof.⁴³ This article, coupled with Adams's longtime desire for judicial appointment, led him to sue the governor of Delaware in February 2017.⁴⁴

At the summary judgment stage, the governor argued that Adams lacked standing to challenge the Delaware constitution's provisions because he had not actually applied for an open judicial position in 2017.⁴⁵ Adams, on the other hand, argued that the political balance provisions of the state constitution violate the First Amendment's Freedom of Association clause because they require a candidate to belong to a specific political party.⁴⁶

In ruling on the parties' cross-motions for summary judgment, the United States District Court for the District of Delaware was unpersuaded by the governor's standing argument. It held that Adams had standing to challenge the first three political balancing provisions of article IV of the Delaware constitution because they not only contained requirements limiting one political party to a bare majority of seats but also contained provisions limiting membership to Republicans or Democrats.⁴⁷ While the district court held that Adams lacked Article III standing to challenge the last two provisions, it held he nonetheless had prudential standing to do so.⁴⁸ With regard to Adams's arguments, the district court agreed that *Elrod's* policymaking exception was inapplicable and determined that the provisions of article IV unconstitutionally predicated judicial employment on political affiliation.⁴⁹

III. NARRATIVE ANALYSIS

On review, the Third Circuit first addressed the issues of standing that the governor addressed in his motion for summary judgment. The court determined that Adams had constitutional standing to challenge the first three provisions of article IV, section 3 because they contained a "major political party" component that inhibited his ability to serve on the su-

43. *Id.* Notably, the article questions whether Delaware could "enforce a state law providing that no Independent or member of a minor party shall be appointed to a judgeship." *Id.* (quoting Friedlander, *supra* note 8, at 1154).

44. *Id.*

45. *Id.* at 172–73.

46. *Id.*

47. *Id.* Therefore, the district court found Adams's application to the supreme court, superior court, or chancery court would have been futile because he was not part of either major political party required. *Id.*

48. *Id.* Adams did not have Article III standing to challenge the last two political balancing provisions because they only contained a "bare majority" provision and did not require applicants to be a member of either major political party; therefore, his application would not have been futile. *Id.*

49. *Id.* The court noted that the district court not only relied on Third Circuit and Supreme Court case law, but also on the Delaware Judge's Code of Judicial Conduct—all of which "emphasiz[ed] that a judge's job is to apply, rather than create, the law." *Id.* For further discussion of the *Elrod* and *Branti* standard, see *supra* Part II.

preme court, superior court, or chancery court.⁵⁰ The Third Circuit agreed with the district court that Adams did not have constitutional standing to challenge the latter two provisions of article IV, section 3, those pertaining to the family court and court of common pleas.⁵¹ However, the district court erroneously found Adams's prudential standing on these two provisions conferred jurisdiction below.⁵² As a result, the court had jurisdiction to hear his challenges only to the first three constitutional provisions.⁵³

Next, the Third Circuit analyzed whether the policymaking exception applied to the first three provisions of article IV, section 3 of the Delaware constitution. Informed by the Supreme Court's decisions in *Elrod* and *Branti*, the Third Circuit held that a judicial officer is not a "policymaker" under the exception.⁵⁴ "The purpose of the policymaking exception," the court noted, "is to ensure that elected officials may put in place loyal employees who will not undercut or obstruct the new administration."⁵⁵ According to the court, "[j]udges simply do not fit this description."⁵⁶ While the governor argued that Delaware judges are de facto policymakers, the

50. *Adams*, 922 F.3d at 174. The "threshold issue" of constitutional standing is "an essential component of subject matter jurisdiction" and therefore requires a plaintiff to show "that he has: '(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.'" *Id.* at 173 (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)). The district court also concluded Adams had constitutional standing to challenge these provisions even though he had not applied for positions on these courts. *Id.* at 174 (noting "it would have been futile" for Adams to apply for these positions as an Independent). The Third Circuit agreed with the district court's futility analysis, and the governor did not contest Adams's constitutional standing for the first three provisions of article IV, section 3. *See id.* at 175.

51. *Id.* at 175 (recognizing that Adams's application to family court or court of common pleas would not necessarily have been futile because they contain only "a ceiling for members of the same political party").

52. *See id.* at 175. The court admonished that prudential and constitutional standing are not interchangeable. *Id.* Rather, prudential standing "is a 'judicially self-imposed limit[] on the exercise of federal jurisdiction.'" *Id.* (alteration in original) (quoting *Davis v. City of Philadelphia*, 821 F.3d 484, 487 (3d Cir. 2016)).

53. *Id.* The court also concluded that it saw "no reason to ignore Adams's challenge to Article IV, Section 3 on prudential grounds." *Id.* at 176.

54. *Id.* at 178. The court noted that, based on its own precedent, the "key factor" is whether an employee in that position "has meaningful input into decisionmaking concerning the nature and scope of a major program." *Id.* (quoting *Galli v. New Jersey Meadowlands Comm'n*, 490 F.3d 265, 271 (3d Cir. 2007)). Informed by this test, the court had previously applied the political exception to a number of positions including an assistant district attorney and city solicitor. *See id.* (first citing *Mummau v. Ranck*, 687 F.2d 9, 10 (3d Cir. 1982); then citing *Ness v. Marshall*, 660 F.2d 517, 520-22 (3d Cir. 1981)).

55. *Id.* (citing *Elrod v. Burns*, 427 U.S. 347, 367 (1976)).

56. *Id.* The court observed that notions of judicial independence can be found in the American Bar Associations Model Code of Judicial Conduct, the Delaware Code of Judicial Conduct, the Supreme Court of Delaware's decisions, and in article IV, section 3 of the Delaware constitution. *See id.* ("Article IV, Section 3 itself illustrates that political loyalty is not an appropriate job requirement for Dela-

Third Circuit believed that “[t]o the extent that Delaware judges create policy, they do so by deciding individual cases and controversies before them, not by creating partisan agendas.”⁵⁷

Having dismissed the governor’s first argument, the Third Circuit considered whether the three constitutional provisions at issue were necessary to maintain political balance within the Delaware judiciary. According to the court, such political balance provisions “could be constitutional if they are ‘narrowly tailored to further vital government interests.’”⁵⁸ However, the court held that systematically denying any member of a political party other than the Republican or Democratic parties service on the supreme court, superior court, or chancery court cannot be narrowly tailored to achieve a state’s interest in politically balancing its judiciary.⁵⁹ The Third Circuit recognized Supreme Court precedent validating political balancing in state employment but distinguished these cases as primarily dealing with state policymakers.⁶⁰

The court did not find that the supposed benefits of political balance sufficiently justified article IV.⁶¹ Despite the evident popularity of the Delaware constitution’s political balance provisions, the governor could not show that the current constitutional scheme was the “least restrictive means of achieving political balance.”⁶²

Finally, the court assessed whether the major political party requirement was severable from the other sections of the Delaware constitution. The court held that “there is no question that the bare majority component is capable of standing alone . . . [b]ut . . . we do not think the two components were intended to operate separately.”⁶³ Therefore, the court declared any provision of article IV, section 3 containing a major political party component unconstitutional.⁶⁴

ware judges. Delaware has chosen to considerably limit the Governor’s ability to nominate judges on the basis of political expediency.”).

57. *Id.* at 179. To the extent the Sixth and Seventh Circuits disagreed with its conclusion, the court argued that these circuits “conflate[d] an appointing authority’s ability to consider the political beliefs and ideologies of state employees with that authority’s ability to condition employment on party loyalty.” *Id.* at 181.

58. *Id.* at 181–82 (quoting *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 74 (1990)).

59. *See id.* at 182.

60. *See id.* The Governor chiefly relied on *Elrod v. Burns*, 427 U.S. 347, (1976), as well as *LoFrisco v. Schaffer*, 341 F. Supp 743 (D. Conn. 1972), *aff’d*, 409 U.S. 972 (1972), and *Hechinger v. Martin*, 411 F. Supp 650 (D. D.C. 1976), *aff’d*, 429 U.S. 1030 (1977), in which the Supreme Court approved of two state statutes that attempted to achieve political balance in Connecticut’s boards of education and in D.C.’s city council. *See Adams*, 922 F.3d at 182.

61. *See id.* at 183 (noting governor had described benefits of political balance to State of Delaware and its apparent popularity in Delaware judiciary).

62. *Id.*

63. *Id.*

64. *Id.*

Concurring with the majority decision, Judge McKee highlighted the impact of the court's decision on the future of the Delaware judiciary.⁶⁵ Specifically, Judge McKee noted that Delaware's political affiliation requirements "[p]aradoxically . . . institutionaliz[e] the role of political affiliation rather than negate[] it."⁶⁶ Despite this paradox and the court's invalidation of the constitutional provisions behind it, Judge McKee expressed confidence that Delaware's "political and legal culture that will ensure the continuation of the bipartisan excellence of Delaware's judiciary."⁶⁷ Indeed, Judge McKee suggested that Delaware can nevertheless achieve its "laudatory objectives" of political balance in the absence of constitutional provisions requiring such.⁶⁸

IV. CRITICAL ANALYSIS

In order to justify the constitutional provisions mandating the balanced representation of Republicans and Democrats on its highest courts, Delaware must demonstrate that the law is "narrowly tailored" to promote a "vital state interest".⁶⁹ It is this determination, and the emphasis placed by the Third Circuit on the former inquiry while neglecting the latter, that is our focus. This Casebrief does not purport to be a comprehensive analysis of the Third Circuit's opinion and does not attempt to answer the multicircuit question of whether judges fall under the "policymaker" exception.⁷⁰ Rather, this Casebrief offers a narrower critique of the political balance provision: without legally mandated political balance, can a state maintain its claimed desire for judicial bipartisanship, or are partisan politics bound to influence a judiciary without any such constitutional protection?

The appointment practices used by one of Delaware's neighbors suggest it is possible to maintain judicial bipartisanship through a voluntary appointment process rather than a compulsory one. New Jersey does not have constitutionally mandated political balance, but its governors have "strictly adhered to' [a] tradition that the seven-member [state supreme]

65. *See id.* at 185 (McKee, J., joined by Restrepo & Fuentes, JJ., concurring) (writing separately "to add the perspective of someone who has served as a state court judge in a jurisdiction that selects judges in general elections preceded by partisan political campaigning").

66. *Id.* at 185 (McKee, J., concurring).

67. *See id.* at 187 (McKee, J., concurring).

68. *See id.* (McKee, J., concurring) (reiterating court's holding and suggesting amendments may cure "constitutional infirmities").

69. *See id.* at 183 (articulating judicial standard by which rules that "impinge[] an employee's First Amendment association rights" are reviewed by courts).

70. *See id.* at 181 (concluding that judges are not policymakers within meaning of "policymaking exception because affiliation with a particular political party is not a requirement for the effective performance of the judicial role"). For further examination of the policymaking exception, which allows a judicial candidate's political affiliation to be considered without violating the First Amendment, see *supra* Parts II, III.

court consist[] of four Democrats and three Republicans or vice versa.”⁷¹ After a seat opened in 2016, the New Jersey’s supreme court consisted of two Democrats, three Republicans, and an Independent who was considered a Republican by virtue of her work in Republican administrations.⁷² When then-governor Chris Christie attempted to nominate another Republican to serve as the seventh member of the court, he ultimately acquiesced to political pressure from the state senate and nominated a Democrat to the bench, thus, maintaining New Jersey’s unwritten practice of judicial political balance.⁷³ Not only is this an instructive example about how judicial bipartisanship can survive absent a constitutional provision, but it demonstrates the ability to preserve balanced courts while allowing registered Independents to serve.⁷⁴

The Third Circuit held that Delaware’s claimed interest did not justify the unduly restrictive and broadly construed constitutional provisions.⁷⁵ In arriving at this conclusion, the court pinpointed one major weakness in the governor’s argument: “Even assuming judicial political balance is a vital Delaware interest, the Governor must also show that the goals of political balance could not be realized without the restrictive nature of Article

71. Friedlander, *supra* note 8, at 1145 (quoting John B. Wefing, *Two Cheers for the Appointment System*, 56 WAYNE L. REV. 583, 597–98 (2010)). James Adams brought the challenge to Delaware’s constitution that is the subject of this Casebrief after reading Friedlander’s work. *See Adams*, 922 F.3d at 172. Friedlander acknowledges the reputation and quality of Delaware’s judiciary, but appeals to the state’s legal community not to allow “good results [to] blind [them] to the dubious constitutionality of categorically disqualifying Independents and members of minor parties.” Friedlander, *supra* note 8, at 1164.

72. Friedlander, *supra* note 8, at 1145 (“New Jersey’s example instructs that a bipartisan judiciary can be maintained over time by political will alone, without the legal compulsion of a statutory partisan balance requirement.”).

73. *See id.* (citing Karen Yi, *Christie Nominates Democrat to Supreme Court*, ASBURY PARK PRESS, <https://www.app.com/story/news/politics/new-jersey/chris-christie/2016/04/11/christie-nominates-democrat-supreme-court/82899000/> [https://perma.cc/B3JS-7BXH] (last updated Apr. 12, 2016, 7:30 AM)). After Governor Christie’s initial attempt to nominate a Republican failed, Christie compromised with the state senate’s Democratic leader, who “assured Christie that if he found a Democrat he was comfortable with, [the senator] would afford the nominee a fair hearing and an up or down vote.” *See Yi, supra*.

74. Admittedly, New Jersey is not a perfect analog. New Jersey’s state senate was controlled by Democrats, who could vote to reject any judicial nominee, creating a natural political tension with the Republican, Christie. *See Yi, supra* note 73 (discussing the “bitter standoff between Democrats and Christie over the high court vacancy”). Delaware has been an even more reliably “blue” state than New Jersey, and it seems unlikely Delaware governors would face much opposition to their judicial appointees from a state senate that has been controlled by Democrats since 1975. *See Friedlander, supra* note 8, at 1140 (detailing makeup of Delaware’s politics and noting it has had Democratic governors since 1993, and a Democratic-controlled state senate since 1975).

75. *See id.* at 182 (stating court “need not dwell long on whether Delaware possesses a ‘vital state interest’ in a politically balanced judiciary, because Delaware’s practice of excluding Independents and third-party voters from judicial employment is not narrowly tailored to that interest”).

IV, Section 3, and this he has failed to do.”⁷⁶ Thus, the court identified an inescapable flaw in the governor’s argument: political balance provisions are not necessary to further the state’s interest in maintaining a bipartisan judiciary. Even assuming judicial political balance is in fact a “vital state interest,” states do not need laws to achieve that goal.⁷⁷ The governor failed to recognize that “Delaware has institutionalized the role of political affiliation” through its constitutional traditions, rather than in its constitutional language.⁷⁸ In his concurrence, Judge McKee argued these customs are “so firmly woven into the fabric of Delaware’s legal tradition . . . that [they] will almost certainly endure in the absence of” constitutional protection.⁷⁹ Therefore, it follows that the constitutional provisions locking in mandatory judicial bipartisanship are not truly necessary to protect a vital state interest.

Instead of tackling this larger philosophical point, the Third Circuit chose the path of least resistance and identified the lack of a narrowly tailored rule as the fundamental deficiency in Delaware’s argument. Focusing solely on this inquiry allowed the court to strike down the constitutional provision while avoiding a conclusion as to whether judicial bipartisanship is a “vital interest.” Notably, Judge McKee believed that question “may be decided in a future case.”⁸⁰ Although Judge McKee described Delaware’s “interest in achieving a judicial system that is as fair in fact as it is in appearance” as “laudatory,” his fellow judges did not indicate whether Delaware’s interest in a balanced judiciary would sway them in situations where the means are more narrowly tailored.⁸¹

Bipartisanship for bipartisanship’s sake seems unlikely to withstand constitutional scrutiny, but the court indicated that “judicial impartiality,” if achieved through a narrower law without sweeping limitations on courts’ political makeup, may pass muster.⁸² If Delaware amended its constitu-

76. *Id.* at 183.

77. *See* Friedlander, *supra* note 8, at 1151–52. Friedlander describes a number of reasons that Delaware’s political balance provisions have lasted besides that they have been constitutionally mandated. *See id.* These factors include: (1) the fact that no one political party has dominated Delaware in the twentieth century; (2) the state’s importance to U.S. corporate law, incentivizing politicians to resolve corporate disputes practically; and (3) the lack of judicial retention elections. *See id.*

78. *See id.* at 185 (McKee, J., concurring) (discussing the governor’s argument that constitutional protections were necessary to politically balanced judiciaries). For further discussion of Judge McKee’s concurrence, see *supra* Part III. *See also* Devera B. Scott et al., *The Assault on Judicial Independence and the Uniquely Delaware Response*, 114 PENN ST. L. REV. 217, 244 (2009) (noting that Delaware’s “great pains [in] ensur[ing] a balanced and independent judiciary” creates a public perception of “Delaware courts as fair arbiters of justice”).

79. *Adams*, 922 F.3d at 185 (McKee, J., concurring).

80. *Id.* at 187 (McKee, J., concurring).

81. *See id.* at 187 (McKee, J., concurring). For further discussion of Judge McKee’s concurrence, joined by Judges Restrepo and Fuentes, see *supra* note 65.

82. *See id.* at 183 (voicing concerns about “conflating party balance with judicial impartiality”); *see also* Epps, *supra* note 1 (“The bare-majority rule means only

tion to allow Independents to become judges, but maintained the requirement that members of a major political party could comprise no more than half-plus-one of a given court, the court leaves open the question of whether such a provision would be sufficiently narrow.⁸³ By failing to address this question in *Adams*, the court invites a future challenge on this basis if Delaware alters, rather than abandons, its judicial appointment practices.

The Third Circuit also failed to discuss a significant point raised by Judge McKee in his concurrence. Not only do “[s]cholars and academics routinely refer to Delaware’s courts as the preeminent forum for litigation, particularly for cases involving business disputes,” but “[m]embers of the Delaware bench credit the political balancing requirement for at least part of this success.”⁸⁴ Maintaining the Delaware judiciary’s sterling reputation in the business community is a concern among those who support Delaware’s current constitutional provisions, a motivation left underanalyzed by Judge McKee’s Third Circuit colleagues.⁸⁵ The status of Delaware’s judiciary as a desirable home for corporate litigation—and by proxy, the state of Delaware’s place itself as a desirable home for corporations—is important subtext of Adams’s challenge. This principle underlies the significance of the case to Delaware’s legal and economic environments.

VI. IMPACT

Judge McKee expressed confidence that Delaware’s bipartisan judicial tradition would continue, even absent a constitutional requirement man-

that members of a given party can be considered for some seats and not for others—a less-serious invasion of free association.”).

83. Some believe that allowing mandatory judicial political balance is constitutionally palatable, so long as it is not accompanied by the political affiliation provision struck down in *Adams*. See Epps, *supra* note 1. Nevertheless, the political balance requirement also functions as a failsafe should a challenge like Adams’s succeed, which would allow Delaware to functionally continue its judicial appointment practices in the tradition it has enjoyed since 1951. The Third Circuit agreed, holding that because the two provisions were designed to operate together, neither could withstand Adams’s suit. See *Adams*, 922 F.3d at 184 (“Only with the (unconstitutional) major political party component does the [political balance] provision fulfil its purpose of preventing single party dominance while ensuring bipartisan representation.”). The political balance requirement may not be as flagrantly violative of the Freedom of Association clause, but its existence still allows one to be disqualified from a judicial appointment based on political affiliation. See *id.* at 173.

84. *Adams*, 922 F.3d at 186 (McKee, J., concurring).

85. See Brief for Petitioner at 32, *Carney v. Adams*, 140 S. Ct. 602 (2019) (No. 19-309) (discussing the importance of Delaware judges’ influence in crafting important business law doctrines). Governor Carney emphasized that “fiduciary-duty law, cited by courts around the world” and “Delaware’s internationally emulated business judgment rule . . . [are] product[s] of judge-made common law.” *Id.* Carney’s brief argued that the Delaware “judiciary’s reputation—particularly in corporate law—has made this small State a beacon for business and business litigation all over the country.” *Id.* at 38.

dating it.⁸⁶ Delaware's former governors appear to be less certain. In their amicus brief written in support of Governor Carney, five former governors—three Democrats and two Republicans—seem resigned to the fact that future governors will no longer appoint judges of the opposing political party if the practice is not required by the state constitution.⁸⁷

The decline of judicial bipartisanship itself would be most consequential for Delaware's position at the center of corporate law. The state openly touts its reputation as a distinguished forum for business litigation.⁸⁸ If the Third Circuit's decision is upheld, and the political balance provisions remain unconstitutional, there may be a significant impact on Delaware's place and reputation in the corporate law community.⁸⁹ Delaware is the legal home of "more than one million companies—including two-thirds of the Fortune 500"—which would be directly impacted by any upheaval to the state's judicial appointments framework.⁹⁰

Proponents of Delaware's regime warn that partisan balancing schemes for other varieties of public servants may be collateral damage in the event the provision is rejected.⁹¹ Other agencies, like "election, redistricting, and judicial nominating commissions," may have their processes

86. See *Adams*, 922 F.3d at 187 (McKee, J., concurring).

87. See Brief for Former Governors of Delaware as Amicus Curiae Supporting Petitioner at 8, *Carney v. Adams*, 140 S. Ct. 602 (2019) (No. 19-309) (acknowledging that "cross-party appointments in the wake of the ruling below will dwindle, if not disappear").

88. See *Why Businesses Choose Delaware*, DEL. CORP. L., <https://corplaw.delaware.gov/why-businesses-choose-delaware/> [<https://perma.cc/R5WH-D5K6>] (last visited July 26, 2020) (claiming "through a bipartisan, merit-based selection process, the Court of Chancery is flexible, responsive, focused, and efficient"). Delaware even publishes literature designed to promote the state as a preeminent legal forum for corporations. See, e.g., LEWIS S. BLACK, *WHY CORPORATIONS CHOOSE DELAWARE 1* (2007) (stating "Delaware courts and, in particular, Delaware's highly-respected corporations court, the Court of Chancery" have created judicial "prestige" and "cachet").

89. See Brief for Former Governors of Delaware as Amicus Curiae Supporting Petitioner, *supra* note 87, at 9 (discussing the impact on American corporate legal jurisprudence, based substantially on Delaware cases). Not only do Delaware's former governors think upholding the Third Circuit may "cause[] long-term corporate planners to take their business elsewhere," but they also believe that "entities may choose to incorporate in different jurisdictions throughout the country, thereby irreparably fragmenting the nation's currently unified corporate law." *Id.*

90. Brief for the Chamber of Commerce for the United States of America as Amicus Curiae Supporting Petitioner at 3, *Carney v. Adams*, 140 S. Ct. 602 (2019) (No. 19-309) (discussing why the longstanding political balance provisions have resulted in Delaware's place at center of American corporate law).

91. See Brief the Campaign Legal Center as Amicus Curiae Supporting Petitioner at 3, *Carney v. Adams*, 140 S. Ct. 602 (2019) (No. 19-309) (advocating for a narrow holding, should the partisan balancing provision be held unconstitutional, because striking it down "could jeopardize the political equilibria holding together countless agencies, commissions, and panels outside of Delaware—equilibria that voters, through their elected representatives, have expressly authorized").

upended as well.⁹² While the Third Circuit did not indicate a desire to apply its holding to administrative or quasi-judicial entities, it did discuss political balancing statutes in other contexts.⁹³

In the short term, Governor Carney could blunt any potential ramifications by proactively announcing his intention to continue adhering to Delaware's political balance and affiliation provisions, even without a constitutional mandate. While it seems likely the people of Delaware would want to keep the "First State's" place as the home of American corporate jurisprudence, it is possible this action would put the governor at odds with an overwhelmingly Democratic electorate who might want more judges from their own party.⁹⁴ Alternately, Adams—who bemoaned the Delaware Democratic party's move to the "center" as his reason for registering as an Independent—is potentially correct about his characterization of Delaware Democrats. And as centrists, Delaware Democrats would likely support the status quo if it results in maintaining Delaware's judicial reputation, even if it came at the expense of a more politically progressive judiciary.⁹⁵

The Third Circuit's holding rests primarily on the basis that the "major political party component" is unconstitutional standing alone, and because it is not severable, the entire provision must also be struck down. Thus, it seems likely that Delaware would seek to amend its constitution to maintain the political balance component. Such a revision would allow it to mandate an appointment process that adopts New Jersey's unwritten rule allowing Independents to serve as judges while considering them members of the party they "lean" closest to.⁹⁶ In the meantime, Delaware may be faced with the loss of a judicial appointment tradition that has

92. *See id.* at 4 (warning that an "overly broad ruling that the First Amendment prohibits *any* partisan considerations in filling offices that are independent from the appointing authority would jeopardize nearly 150 years of practice at the federal and state levels, threaten a range of governmental entities, and undermine legislatures' efforts to shape democratic institutions as they see fit").

93. *See Adams v. Governor of Del.*, 922 F.3d 166, 182 (3d Cir. 2019) ("[T]he Supreme Court affirmed two district court decisions approving political balancing statutes governing elections for a state's boards of education and the District of Columbia's city council, respectively.").

94. *See Delaware Governor Results: John Carney Wins*, N.Y. TIMES (Aug. 1, 2017, 11:24 AM), <https://www.nytimes.com/elections/2016/results/delaware-governor-carney-bonini> [<https://perma.cc/3KWM-FQXM>]. Carney was elected in 2016 with 58.3% of the vote, beating his Republican opponent by nineteen points. *See id.*

95. *See Adams*, 922 F.3d at 172 (noting Adams's frustration "with the centrism of the Democratic Party in Delaware").

96. For further discussion of New Jersey's longstanding, though unofficial, tradition of maintaining a partisan balance on its supreme court, see *supra* Parts I, IV. For further discussion of the potential constitutional issues that may accompany political balance provisions by themselves, see *supra* note 83 and accompanying text.

endured since 1897, forcing it to serve as an untested battleground for the often unspoken, but ever-present, tension between the judiciary and politics.

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