

IS DELAWARE’S “OTHER MAJOR POLITICAL PARTY” REALLY ENTITLED TO HALF OF DELAWARE’S JUDICIARY?

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Delaware has long been unique in its means of selecting judges. Before the Constitutional Convention of 1897, Delaware’s governor possessed the unilateral power to appoint judges with life tenure. Ever since, Delaware has limited the number of judges registered with a single political party. A bipartisan bargain implemented in 1951 amended the Delaware Constitution in a manner that created the current system, by which every member of the Delaware Supreme Court, Court of Chancery, and Superior Court must belong to one of the two major political parties, with each party entitled to half of the judgeships.

Over the past several decades, the U.S. Supreme Court has developed a body of First Amendment case law bearing on political party affiliation. This Essay is the first to discuss the pertinence of First Amendment precedent to Delaware’s judicial-selection system. I conclude that various lines of First Amendment cases cast great doubt on the constitutionality of categorically disqualifying Independents and members of minor parties from judgeships on Delaware’s major commercial courts.

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INTRODUCTION

Delaware is a blue state. Since 1993, only Democrats have held the offices of governor and lieutenant governor. Democrats have controlled the state Senate since 1975 and the state House of Representatives since 2009.¹ Only Democrats have been elected to hold the office of attorney general since 2007.² Since 2011, Delaware's congressional delegation has been uniformly Democrats.³ Delaware's three votes in the Electoral College have been cast for the Democratic Party presidential nominee every four years since 1992.⁴ Joe Biden, the Vice President of the United States, is a Delaware Democrat.⁵ As of November 1, 2016, 47.5% of Delaware's registered voters were Democrats, 27.1% were Republicans, and 22.7% were unaffiliated with any party.⁶

Delaware Governor Jack Markell has appointed or reappointed every current member of the Delaware Supreme Court, every current member of the Court of Chancery, and 16 of the 21 current members of the Superior Court. Even though Governor Markell has appointed Democrats as judges whenever possible, the current partisan composition of those courts is as follows:

1. Matt Bittle, *A (Mostly) True Blue Tale of Delaware Politics*, DEL. STATE NEWS (Feb. 13, 2016), <http://delawarestatenews.net/government/a-mostly-true-blue-tale-of-delaware-politics/>; see also OFF. OF THE STATE ELECTION COMMISSIONER, DEPT. OF ELECTIONS, STATE OF DEL., ELECTION RESULTS ARCHIVE [hereinafter DEPT. OF ELECTIONS], http://elections.delaware.gov/electionresults/election_archive.shtml (last visited Sept. 19, 2016).

2. See DEPT. OF ELECTIONS, *supra* note 1.

3. *Id.*

4. See *Historical Election Results*, NATL. ARCHIVES AND RECORDS ADMIN., <https://www.archives.gov/federal-register/electoral-college/historical.html> (last visited Nov. 21, 2016).

5. *Joe Biden Biography*, BIOGRAPHY.COM (Aug. 19, 2016), <http://www.biography.com/people/joe-biden-39995>.

6. See *Party Tabulation of Registered Voters Summary Sheet*, OFF. OF THE STATE ELECTION COMMISSIONER, DEPT. OF ELECTIONS, STATE OF DEL. (Nov. 1, 2016, 1:52 AM), http://elections.delaware.gov/reports/e70r2001_20161101.pdf.

Supreme Court:	3 Democrats; 2 Republicans
Court of Chancery:	3 Democrats; 2 Republicans
Superior Court:	10 Democrats; 11 Republicans
Total:	16 Democrats; 15 Republicans ⁷

The partisan makeup of these three Delaware courts reflects limitations on judicial appointments set forth in Article IV, § 3 of the Delaware Constitution:

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.⁸

These limitations on the partisan makeup of the Delaware judiciary are collectively known as the “Political Balance Requirement,”⁹ even though they do not produce partisan balance on the above courts, given the odd number of judgeships on each court.

Examination of the text of the Political Balance Requirement reveals two distinct features. First, no political party may be represented by more than a “bare majority” of members of the Supreme Court, the Superior Court, or the total composition of those two courts plus the Court of Chancery.¹⁰ I refer to these

7. See Celia Cohen, *Jack's Judges*, DEL. GRAPEVINE (Oct. 24, 2016), <http://www.delawaregrapevine.com/jacksjudges.asp>.

8. DEL. CONST. art. IV, § 3.

9. 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, 134–35 (Harvey B. Rubenstein ed., 1997) [hereinafter DELAWARE CONSTITUTION OF 1897].

10. DEL. CONST. art. IV, § 3.

limitations on the number of judges belonging to a single political party as the “Bare-Majority Feature” of the Political Balance Requirement. Second, the remaining members of all three courts must belong to the “other major political party.”¹¹ I refer to this limitation as the “Two-Party Feature” of the Political Balance Requirement. By virtue of the Two-Party Feature, an Independent or a member of a minor party is categorically disqualified from appointment to any of these three courts, and the Republican Party, as the current “other major political party,” is entitled to almost-majority representation on Delaware’s three most prominent courts.¹²

The original Political Balance Requirement dates back to 1897, and it has been reaffirmed by constitutional amendments in 1951, 1961, 1983, and 1994.¹³ There is no public agitation to eliminate any aspect of the Political Balance Requirement. To the contrary, leading Delaware politicians, judges, and lawyers have pointed with pride to the Political Balance Requirement as a key reason why Delaware’s judiciary is held in high esteem. Consider the following representative published statements since the turn of the century:

Delaware’s court system provides a model that largely addresses modern corporate worries about courtroom litigation Delaware’s independent judiciary is essential to securing these values, and its practice of appointing judges and maintaining a balance of power between political parties on its high court has yielded dividends in both the expertise and independence of its judiciary.

– Justice Randy J. Holland¹⁴

11. *Id.*

12. Article IV, § 3 separately provides that the Bare-Majority Feature, but not the Two-Party Feature, is applicable to both the Family Court and the Court of Common Pleas, such that Independents and members of minor parties are not barred from serving on those courts:

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 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.

DEL. CONST. art. IV, § 3. For convenience, this Essay does not refer to the Family Court or the Court of Common Pleas.

13. DELAWARE CONSTITUTION OF 1897, *supra* note 9, at 134–35, n.124.

14. Randy J. Holland, *Delaware’s Business Courts: Litigation Leadership*, 34 J. CORP. L. 771, 771–72 (2009).

In order to ensure that the courts are fair and impartial, the Delaware system goes one step further and requires that the courts be politically balanced.

– President Judge Jan R. Jurden¹⁵

The constitutional requirement of a bipartisan judiciary is unique to Delaware. It mandates that in each court individually and in all Delaware constitutional courts collectively there may not be more than a bare majority of one major political party. This system has served well to provide Delaware with an independent and depoliticized judiciary and has led, in my opinion, to Delaware's international attractiveness as the incorporation domicile of choice.

– Former Chief Justice E. Norman Veasey¹⁶

The Delaware Constitution requires that the courts be balanced politically between the two political parties, and this has served the state well.

– E.N. "Ned" Carpenter, II¹⁷

In considering Delaware's Judiciary in the 20th Century, one observation stands out. The Delaware constitutional system that provides that all judges be appointed by the Governor (with confirmation by the Senate), coupled with the requirement of a bipartisan political balance for judges, has attracted persons of exceptional learning and dedication to the judiciary. Most have served with distinction and, along with an illustrious bar, have made the Delaware judicial system the envy of the country.

– Justice Maurice A Hartnett, III¹⁸

I first heard this same sentiment expressed in 1992, at the pre-admission conference for lawyers who had just passed the bar exam, when a member of the Delaware Supreme Court expressed pride in the Delaware judiciary and the Political Balance Requirement. I wondered at the time if the provision was unconstitutional. Over the years, I have continued to wonder, but never researched the issue. Does the First Amendment permit a state to disqualify from appointment to a state judgeship any lawyer who is neither a Democrat nor a Republican? Put differently, can the elected representatives of two major political parties strike a legally binding bargain that sets aside one-half of a state's judiciary for members

15. Devera B. Scott et al., *The Assault on Judicial Independence and the Uniquely Delaware Response*, 114 PENN ST. L. REV. 217, 243 (2009) (co-authored by President Judge Jan R. Jurden).

16. E. Norman Veasey & Christine T. Di Guglielmo, *What Happened in Delaware Corporate Law and Governance from 1992-2004? A Retrospective on Some Key Developments*, 153 U. PA. L. REV. 1399, 1402 (2005) (footnote omitted).

17. E.N. Carpenter, II, *Memories of a Lucky Delaware Lawyer*, 19 DEL. LAW. (FALL) 12, 13 (2001).

18. Maurice A Hartnett, III, *The Delaware Judiciary in the 20th Century*, 17 DEL. LAW. (WINTER) 10, 15 (1999/2000).

of one party and the other half for members of the other party? Can a state Constitution limit the number of state judges belonging to a single political party?

In 2016, the rise of Donald Trump and the ensuing prophecies about the demise or splintering of the Republican Party spurred me to look for answers to these questions. I found no published analyses of the constitutional question and no direct analogue to Delaware's Political Balance Requirement.

The literature about the constitutionality of Delaware's Political Balance Requirement may be limited to the following guarded statement by Justice Holland: "These political balance provisions appear to prevent the appointment of persons belonging to a third political party or having no party affiliation. To date, however, there has been no court challenge to this requirement under the United States Constitution."¹⁹

No other state imposes partisan limits on its judiciary. There are other partisan-balance requirements in American law, but the wording of Delaware's Political Balance Requirement is unusually strict, due to its Two-Party Feature. Other partisan-balance requirements do not prohibit the appointment of Independents.

Consider multi-member federal independent agencies, approximately half of which have partisan-balance requirements.²⁰ "Typical language stipulates that not more than three (out of five) or two (out of three) shall be members of the same political party."²¹ For example, the pertinent statute for the Securities and Exchange Commission ("SEC") provides: "Not more than three of such commissioners shall be members of the same political party, and in making appointments members of different political parties shall be appointed alternately as nearly as may be practicable."²² The two most recent Chairs of the SEC, Mary Jo White and Mary L. Schapiro, are both Independents.²³

One non-Delaware court with a partisan-balance requirement is the top appellate court of the military-justice system, the U.S. Court of Appeals for the Armed Forces. The controlling federal statute provides: "Not more than three of the [five] judges of the court may be appointed from the same political party"²⁴ One commentator writes:

19. RANDY J. HOLLAND, *THE DELAWARE STATE CONSTITUTION: A REFERENCE GUIDE* 149 (G. Alan Tarr ed., Oxford U. Press 2011).

20. Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (And Executive Agencies)*, 98 CORNELL L. REV. 769, 797–98, nn.152–53 (2013).

21. Joshua Kershner, *Political Party Restrictions and the Appointments Clause: The Federal Election Commission's Appointments Process Is Constitutional*, 32 CARDOZO L. REV. 615, 635 (2010); see also Rebecca Lynn Kurowski, *Political-Party Association Restrictions on Officers of the United States are Unconstitutional*, 68 *tbl.1* (2008), http://works.bepress.com/rebecca_kurowski/1 (unpublished manuscript) (quoting pertinent language from 18 statutes, all of which are functionally identical).

22. 15 U.S.C. § 78d(a) (2006).

23. *SEC Historical Summary of Chairmen and Commissioners*, U.S. SEC. & EXCH. COMM'N, <https://www.sec.gov/about/sechistoricalsummary.htm>.

24. 10 U.S.C. § 942(b)(3) (2006).

[This] indefensible provision, which has been in the [Uniform Code of Military Justice] from the beginning . . . is easily circumvented. For example, a candidate may be (or become) a registered Independent, or may be a merely nominal member of one party but enjoy strong political support from legislators of the other party.²⁵

The Supreme Court of New Jersey provides an instructive comparison to Delaware's Political Balance Requirement. For approximately 150 years, there was an "unwritten but strictly adhered to" tradition that the seven-member court consisted of four Democrats and three Republicans or vice versa.²⁶ Since 2000, however, an Independent who "is seen as a Republican" because she "worked in a number of positions within Republican administrations" has served on the Supreme Court of New Jersey.²⁷ In April 2016, Governor Christie nominated a Democrat to the court, thereby giving up on his years-long effort to break with tradition and appoint a fourth Republican to join the "Independent" and two Democrats.²⁸ 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.

Another analogue to Delaware's Political Balance Requirement was the subject of a recent decision by the U.S. Court of Appeals for the Seventh Circuit in *Common Cause Indiana v. Individual Members of the Indiana Election Commission*.²⁹ That panel decision struck down on First Amendment grounds an Indiana statute that established a system for the election of judges to the Marion Superior Court in Marion County, which encompasses Indianapolis.³⁰ Pursuant to the statute, a political party could nominate candidates for no more than half of the eligible seats on the Marion Superior Court.³¹ Even though minor parties and write-in candidates had access to the general election ballot, the Republican and Democratic parties typically each nominated candidates for half of the open seats, and those nominees were all elected, thereby maintaining the Superior Court as half Republicans and half Democrats.³² The Seventh Circuit rejected the State's argument that "partisan balance promotes [a] compelling interest in promoting public confidence in the impartiality of the bench" and held that the statute

25. Eugene R. Fidell, *The Next Judge*, 5 J. NAT'L SECURITY L. & POL'Y 303, 308 (2011).

26. John B. Wefing, *Two Cheers for the Appointment System*, 56 WAYNE L. REV. 583, 597-98 (2010).

27. *Id.* at 598.

28. See Karen Yi, *Christie Nominates Democrat to Supreme Court*, ASBURY PARK PRESS (Apr. 12, 2016, 7:30 AM), <http://www.app.com/story/news/politics/new-jersey/chris-christie/2016/04/11/christie-nominates-democrat-supreme-court/82899000/>.

29. 800 F.3d 913, 928 (7th Cir. 2015).

30. *Id.* at 914.

31. IND. CODE ANN. § 33-33-49-13(b) (West 2006), held unconstitutional by *Common Cause Indiana*, 800 F.3d 913; see also *Common Cause Indiana*, 800 F.3d at 915.

32. *Common Cause Indiana*, 800 F.3d at 915-16.

impermissibly “interferes with the market by restricting each major party’s access to only half of the ballot.”³³

In this Essay, I consider the constitutionality of Delaware’s Political Balance Requirement. I focus on decisions by the U.S. Supreme Court because those decisions are binding on Delaware.³⁴ My principal conclusion is that the Two-Party Feature of the Political Balance Requirement is unconstitutional. I reach no conclusion about the constitutionality of the Bare-Majority Feature of the Political Balance Requirement.

Part I of this Essay discusses the history of the Political Balance Requirement and the history of political balance in Delaware. The progenitor of the Bare-Majority Feature of the Political Balance Requirement was adopted at the constitutional convention of 1897, as one of a host of measures addressing inadequacies of political institutions in late-nineteenth-century Delaware.³⁵ The original version of the Two-Party Feature of the Political Balance Requirement was adopted in 1951, as part of a political bargain that induced Republicans to support a constitutional amendment creating the Delaware Supreme Court.³⁶ Part I also discusses reasons why the Political Balance Requirement has remained in place without controversy.

Part II discusses U.S. Supreme Court case law and various strands of contemporary First Amendment jurisprudence bearing on political party affiliation. These strands include the unconstitutional condition doctrine and cases involving loyalty oaths, political patronage, ballot access, other restrictions on minor political parties, and judicial elections. I conclude that the Two-Party Feature of the Political Balance Requirement is at odds with U.S. Supreme Court precedent, and, if challenged, would likely not survive heightened scrutiny.

No similar weight of authority bears on the constitutionality of the Bare-Majority Feature of the Political Balance Requirement. First, the First Amendment doctrines that render the Two-Party Feature of dubious constitutionality do not apply with the same force to the Bare-Majority Feature. Second, it is unclear that the logic of *Common Cause Indiana* applies outside of the judicial election context. Third, federal statutes with Bare-Majority Features respecting administrative agencies are abundant and longstanding, and they have not generated pertinent case law or scholarly commentary.

As to the third point, the only First Amendment challenge of which I am aware to a Bare-Majority Feature for an administrative agency was rejected on standing grounds, because it was brought by a minority party with no representation on the agency commission, rather than a major party seeking

33. *Id.* at 920, 923.

34. For the same reason, I also note decisions of the U.S. Court of Appeals for the Third Circuit that are of special significance.

35. See *infra* Section I.

36. See *infra* Section I.

additional representation.³⁷ The scholarly and political debate on federal statutory partisan-balance requirements concern whether they are unconstitutional infringements on presidential power or constitutional expressions of legislative power.³⁸ That debate is inapplicable to Delaware's Political Balance Requirement because the requirement is contained in Delaware's Constitution, not a subordinate state statute. Given the absence of case law or commentary criticizing the Bare-Majority Feature in federal statutes on First Amendment grounds, I express no opinion on whether a First Amendment attack on the Bare-Majority Feature of Delaware's Political Balance Requirement is viable.

I. A BRIEF HISTORY OF THE POLITICAL BALANCE REQUIREMENT AND DELAWARE'S POLITICAL BALANCE

Delaware's Political Balance Requirement owes its existence to unique political conditions and institutions of the late-nineteenth-century, an era of hyper-partisanship, electoral fraud, and the spirit of reform. A period of one-party dominance had come to a close. While Democrats had held the governor's mansion for all but three months since March 1, 1865,³⁹ Delaware's electoral votes were cast for the Republican presidential candidate, William McKinley, in 1896, after five prior presidential elections in which Delaware's electoral votes had been cast for the Democrat candidate.

A news account dated February 14, 1897, from the *Sunday Philadelphia Times Special Edition*, with the headlines "New Era Dawns for Delaware, Old Constitution Framed in 1831 To Be Replaced by a Modern One, Changes Are Badly Needed," discussed concerns about political corruption and electoral fraud arising from Delaware's then-existing laws. For example, Delaware's citizens were required to pay an assessment tax before they could vote; every four years, a new governor had the unilateral power to appoint hundreds of officials, as well as the unilateral power to fill judicial vacancies with judges having life tenure:

[T]he conditions which exist in the State of Delaware today are directly traceable to the connivance of political parties, whose

37. Nat'l Comm. of the Reform Party v. Democratic Nat'l Comm., 168 F.3d 360, 364–65 (9th Cir. 1999).

38. See Kershner, *supra* note 21, at 616; Ronald J. Krotoszynski et al., *Partisan Balance Requirements in the Age of New Formalism*, 90 NOTRE DAME L. REV. 941, 941, 965 (2015); Kurowski, *supra* note 21, 21–22; James B. Raskin, "A Complicated and Indirect Encroachment": Is the Federal Election Commission Unconstitutionally Composed?, 52 ADMIN. L. REV. 609, 611–23 (2000); Matthew A. Samberg, Note, "Established by Law": Saving Statutory Limitations on Presidential Appointments from Unconstitutionality, 85 N.Y.U. L. REV. 1735, 1760 (2010).

39. See *Delaware Past Governors Bios*, NAT'L GOVERNORS ASS'N, https://www.nga.org/cms/home/governors/past-governors-bios/page_delaware.html (last visited Sept. 21, 2016). Joshua M. Marvil, a member of the Republican party, served as Governor for just under three months, from January 15, 1895 until his death on April 8, 1895. *Joshua Hopkins Marvil*, NAT'L GOVERNORS ASS'N, https://www.nga.org/cms/home/governors/past-governors-bios/page_delaware/col2-content/main-content-list/title_marvil_joshua.default.html (last visited Sept. 21, 2016).

selfish actions and non-progressive manifestations are wholly responsible for the state of affairs which exist there today. The desire of one party to perpetuate its power and the other to secure control of the political machinery and the reins of State government, has led to a shameful debauchery of the elective franchise and has culminated in the open barter and sale of votes as though it were no greater crime than to sell an acre of land or a bushel of wheat.

The Republicans justify the use of money at the polls on account of the hardship imposed by the ancient assessment law, while, on the other hand, the Democrats excuse their revolutionary action in throwing out votes and refusing to tabulate returns on the grounds that boodle has been used by the opposite party. And so the matter has gone on until elections have become a farce, the laws have been openly and fragrantly violated and the commissions of crime against the election laws have been as common and as frequent as the crime of larceny or the theft of a farmer's poultry.

Under the old plan the Governor appoints almost every officeholder, from Notary Public up to Chancellor, the highest prerogative in the State. Nearly four hundred offices are subject to the appointive power of the Governor, whose proportionate power is greater than that of President

For instance, all the State Judiciary, including the Superior Court Judges, Chancellor and Judge of the Orphans' Court, as well as the Attorney General, are appointed by the Governor

The Governor is not eligible to a second term under the Old Constitution⁴⁰

The Political Balance Requirement was one of several measures designed to address perceived problems with the power of political parties over elections, the perceived inadequacy of the judiciary to combat election fraud, and the unilateral appointment power of the governor over the judiciary.⁴¹ The Constitutional Convention of 1897 adopted new provisions governing election offenses and the current system of judges being appointed by the governor for 12-year terms subject to Senate confirmation.⁴² The Constitutional Convention rejected the idea of electing judges due to the "sense that there was already at that

40. DELAWARE CONSTITUTION OF 1897, *supra* note 9, at 444–48 (reprinting news account).

41. *Id.* at 130–34.

42. *Id.* at 130–31, 133.

time ‘too much politics’ in the courts and that the election of judges would merely contribute to that unsatisfactory situation.”⁴³

The Political Balance Requirement was adopted based on the “widespread belief that every effort should be made to ensure that the judiciary not be dominated by any political party.”⁴⁴ That belief overrode those critics who argued that a political balance provision: (1) “would create the expectation that judges were bound to help the party for which they were appointed and with whom they were identified”; (2) “could permit the appointment of incompetent judges simply because they belonged to a particular party that required representation on the court”; or (3) “would deprive the electorate of influence over the judiciary in the event one party prevailed for many years, since this domination would not be reflected in the makeup of the judiciary.”⁴⁵

Advocates of the Political Balance Requirement not only carried the day, their legacy has remained in place and been expanded upon. The original Political Balance Requirement was simple in operation. There were only six state judges established by the Constitution of 1897—the Chancellor, a Chief Justice, and four Associate Judges,⁴⁶ and the original political balance provision did not apply to the Chancellor. It stated: “The said 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.”⁴⁷ As the number of state judges increased, the Bare-Majority Feature of the Political Balance Requirement was revised to create both an intra-court balance formula and an overall balance requirement.⁴⁸

What I have referred to as the Two-Party Feature of the Political Balance Requirement—that the minority of judges on each court not belonging to the same political party must belong to the “other major political party”—was adopted in 1951, as part of the same constitutional amendment by which Delaware became the last state in the country to create a separate Supreme Court consisting of justices who only sat on that court.⁴⁹ Opposition to the creation of the Delaware Supreme Court had been “obdurate and continuous” and “based primarily on the

43. *Id.* at 133 (citing *No Elective Judges*, MORNING NEWS, Feb. 10, 1897, at 1, 3).

44. *Id.* at 134.

45. *Id.* (citing Richard L. Mumford, *Constitutional Development in the State of Delaware* 347 (1968) (Ph.D. dissertation, University of Delaware)).

46. DEL. CONST. art. IV, § 2 (1897), *reprinted in* DELAWARE CONSTITUTION OF 1897, *supra* note 9, at 351.

47. DEL. CONST. art. IV, § 3 (1897), *reprinted in* DELAWARE CONSTITUTION OF 1897, *supra* note 9, at 352.

48. DELAWARE CONSTITUTION OF 1897, *supra* note 9, at 135.

49. 48 DEL. CODE ONLINE, LAWS. OF DEL. CH. 109 (1951), <http://delcode.delaware.gov/sessionlaws/ga116/chp109.shtml#TopOfPage>; *see also* Henry R. Horsey & William Duffy, *The Supreme Court After 1951: The Separate Supreme Court*, DEL. COURTS, <http://courts.delaware.gov/supreme/history/history3.aspx> (last visited Nov. 15, 2016).

fact that any change contemplated in governmental arrangements in the state is met with deep suspicion by many segments of the population.⁵⁰

Creation of the Delaware Supreme Court required the votes of two-thirds supermajorities in both houses of the General Assembly in two consecutive legislative sessions.⁵¹ The proposed constitutional amendment passed both houses in 1949 without a negative vote, but ran into considerable opposition in 1951.⁵² At the time, political power in Delaware was closely divided between Democrats and Republicans.⁵³ A new Supreme Court would allow a Democrat governor to appoint two powerful new justices. In light of that political dynamic, a provision in the constitutional amendment creating a separate Supreme Court “that led to its success was that no more than two members of the new Supreme Court and no more than a majority of all the statewide constitutional judges be from the same political party.”⁵⁴ Not only was the Bare-Majority Feature expanded in that fashion, the Two-Party Feature was included for the first time. Republicans were persuaded to support the creation of a Delaware Supreme Court without the consequence of granting too much appointment power to Democrats or too much judicial power to non-Republicans.

One critical step in the passage of the constitutional amendment occurred when the then-president of the Delaware State Bar Association, George Burton Pearson, persuaded influential Republican Francis V. du Pont to support the creation of the Delaware Supreme Court.⁵⁵ Du Pont then called another prominent

50. Paul Dolan, *The Supreme Court: 1900 to 1950*, DEL. COURTS, <http://courts.delaware.gov/supreme/history/history1.aspx> (last visited Sept. 23, 2016); see also Maurice A. Hartnett III, *Delaware Courts' Progression*, in DELAWARE SUPREME COURT GOLDEN ANNIVERSARY 1951–2001, at 16–17 (Randy J. Holland & Helen L. Winslow eds., 2001) (discussing arguments against creating a separate Supreme Court).

51. Hartnett, *supra* note 50, at 20.

52. *Id.*

53. In 1948, Delaware voters elected Democrats for governor and U.S. senator, elected a Republican to the House of Representatives, *id.* at 39, and cast their presidential votes as follows: 45.1% for Republican Thomas Dewey; 49.5% for Democrat Harry Truman; 2.4% for Progressive Henry Wallace; 0.6% for Socialist Norman Thomas; and 2.4% for Dixiecrat Strom Thurmond (who received 39 electoral votes and 2.41% of the vote nationwide). *Popular Vote at the Presidential Election 1948*, http://geoelections.free.fr/USA/elec_comtes/1948.htm. In the 1950 election, Republicans were victorious in all of the statewide and New Castle County races, Democrats won all of the Kent County races and all but one of the Sussex County races, and Republicans won 27 out of 45 legislative races. *Voting Statistics: Elections of 1940–1952*, OFF. OF THE STATE ELECTION COMMISSIONER, DEPT. OF ELECTIONS, STATE OF DEL., 27–39, <http://elections.delaware.gov/electionresults/pdfs/1940.pdf>.

54. Hartnett, *supra* note 50, at 19.

55. Horsey & Duffy, *supra* note 49 (citing a 1993 interview with Pearson). The substantive argument that was used to convince Francis V. du Pont to “throw his considerable weight behind the proposal for a separate Supreme Court” was that out-of-state lawyers were troubled by the lack of a separate Supreme Court and were beginning to hesitate in recommending that corporations be incorporated in Delaware. Hartnett, *supra* note 35, at 18–19.

Republican and told him to tell three state senators who had been voting against the court reform bill that du Pont was now convinced it should be passed.⁵⁶

The political bargain inherent in the original Two-Party Feature has endured over the 65 years since 1951. Not only has the language of the Two-Party Feature been updated to keep abreast with changes in the judiciary, there has been an absence of controversy in modern times over the Political Balance Requirement, and its existence has been celebrated by leading figures as a unique, positive attribute of Delaware's judiciary. This phenomenon can be attributed to four principal factors, I believe.

One factor is that, throughout the second half of the twentieth century, Delaware was a bellwether state in which no single party exercised dominant power. Between 1952 and 1996, Delaware's votes in the electoral college were cast in favor of the victor in each presidential election.⁵⁷ During that time, Delaware voters had a strong tradition of ticket-splitting.⁵⁸ In 1992, for example, Delaware voters simultaneously elected outgoing Republican Governor Michael Castle to Congress, elected outgoing Democratic Congressman Tom Carper as Governor, cast a plurality of votes in favor of Bill Clinton for President, and cast 20% of the presidential vote in favor of Independent Ross Perot, mirroring his nationwide vote.⁵⁹ Because neither major party was dominant, it would appear natural for the judiciary to be bipartisan. Only in recent years has Delaware become a reliably blue state.

A second factor has been the importance to Delaware's economy of attracting firms to incorporate in Delaware. That economic interest, coupled with the high visibility of Delaware's courts in resolving corporate disputes, makes it a practical necessity that politicians from both major parties place great weight on the business law expertise of the courts.⁶⁰ Since 1977, Delaware's governors have adopted executive orders creating a bipartisan judicial nominating commission

56. Horsey & Duffy, *supra* note 49 (citing interview with Pearson).

57. See *Historical Election Results*, NATL. ARCHIVES & RECORDS ADMIN, <https://www.archives.gov/federal-register/electoral-college/historical.html> (last visited Sept. 19, 2016).

58. See, e.g., William Robbins, *Reagan May Aid G.O.P. in Mid-Atlantic Region*, N.Y. TIMES (Oct. 25, 1984), <http://www.nytimes.com/1984/10/25/us/reagan-may-aid-gop-in-mid-atlantic-region.html> ("A strong tide that is expected to run here for Mr. Reagan could help Mrs. du Pont, but the 'coattail effect' of a ticket leader has been less of an advantage here than in some states. Delaware, where Democrats outnumber Republicans 3 to 2, has a strong tradition of ticket-splitting.").

59. See *Election Results Archive*, OFF. OF THE STATE ELECTION COMMISSIONER, DEPT. OF ELECTIONS, STATE OF DEL., http://elections.delaware.gov/electionresults/election_archive.shtml (last visited Sept. 19, 2016).

60. See, e.g., William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Venture of Providing Justice*, 48 BUS. LAW. 351, 354 (1992) ("Over 50% of the country's major public corporations have chosen to incorporate in Delaware, and the judges of the Court of Chancery and the Delaware Supreme Court are well aware of the national importance their decisions hold.").

charged with identifying the “best qualified persons available at the time for the particular judicial vacancy at issue.”⁶¹ Because no political party holds a monopoly on business law expertise, one beneficial effect of the Political Balance Requirement is to allow a governor of one party to draw on the expertise of a candidate belonging to the other major party without generating partisan political repercussions.

A third factor favoring the maintenance of the Political Balance Requirement is the absence of any outlet for direct voter input over judicial selection, including the absence of retention elections. States in which judges are appointed using a merit-selection system subject to future retention elections have seen partisan political fights over judicial decisions.⁶² Delaware’s pure appointment system reduces the incentive for politicians or voters to exploit any popular dissatisfaction with judicial decisions of local concern and seek to enhance the judicial power of one party.

Fourth, the Political Balance Requirement is difficult to dislodge, creating little incentive to take up the fight. Amending the Delaware Constitution requires two-thirds votes of the members elected to each House over two consecutive legislative sessions.⁶³ Any effort to eliminate the Political Balance Requirement would meet partisan opposition, and Democratic Party legislators lack the votes to amend the Constitution unilaterally. Absent the implosion of a major party, it is extremely difficult to imagine how a partisan vote could amend or eliminate the Political Balance Requirement.

The political conditions of 1897 and 1951 are far removed from contemporary concerns, but the Constitutional Convention of 1897 and the need for a constitutional amendment creating the Delaware Supreme Court in 1951 created a political reality respecting the partisan composition of the judiciary that has never been questioned, despite the recent dominance of the Democratic Party. The absence of political controversy over maintenance of the Political Balance Requirement should not be interpreted to mean that the current method by which Delaware selects its judges is enduring or stable. As discussed below, the Two-Party Feature of the Political Balance Requirement is vulnerable to attack as unconstitutional under contemporary First Amendment jurisprudence.

61. Jack Markell, *Exec. Order Four—Preservation of Delaware’s Independent Judiciary and Continuance of the Judicial Nominating Commission*, STATE OF DELAWARE: THE OFFICIAL WEBSITE OF THE FIRST STATE ¶ 9 (Mar. 26, 2009), http://governor.delaware.gov/orders/exec_order_04.shtml.

62. See, e.g., Brad Cooper, *Dumping Judges at the Polls Emerges as a High-Stakes Political Drama*, KAN. CITY STAR (Dec. 29, 2014, 6:00 AM), <http://www.kansascity.com/news/politics-government/article5146323.html> (“Once considered boring and sedate, elections over retaining judges are now becoming hotly contested battles stemming from controversial court decisions over same-sex marriage, abortion, school choice, crime and taxes.”).

63. DEL. CONST. art. XVI, § 1.

II. LESSONS FROM FIRST AMENDMENT JURISPRUDENCE

The Two-Party Feature of Delaware's Political Balance Requirement imposes a qualification on being appointed to the Delaware Supreme Court, the Delaware Court of Chancery, or the Delaware Superior Court. To be appointed, a candidate for the judiciary must be a registered member of one of the two major political parties. Depending on the preexisting partisan makeup of the judiciary, the Bare-Majority Feature of the Political Balance Requirement may require that a candidate for a particular judgeship belong to a particular major political party. These qualifications on appointment to the Delaware judiciary implicate the First Amendment, because the decision to register or not register as a member of a particular political party is a protected form of political speech, and because state laws that restrict a political party's ability to gather political support are subject to First Amendment scrutiny.

A. The Two-Party Feature as an Unconstitutional Condition to Obtain Government Employment

Generally speaking, the government may not offer a benefit on the condition that the recipient perform or forego an activity that is constitutionally protected from government interference. This limit on the government's power to subvert First Amendment rights is known as the "unconstitutional conditions doctrine."⁶⁴

The dissenting opinion by Justice Stevens in *United States v. American Library Ass'n* provides a helpful introduction to this area of the law as applied to government hiring:

Our cases holding that government employment may not be conditioned on the surrender of rights protected by the First Amendment illustrate the point. It has long been settled that "Congress could not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.'" *Wieman v. Updegraff*, 344 U.S. 183, 191–192 (1952). Neither discharges, as in *Elrod v. Burns*, 427 U.S. 347, 350–351 (1976), nor refusals to hire or promote, as in *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 66–67 (1990), are immune from First Amendment scrutiny. Our precedents firmly rejecting "Justice Holmes' famous dictum, that a policeman 'may have a constitutional right to talk politics, but he has no constitutional right to be a policeman,'" *Board of Comm'rs, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668, 674 (1996), draw no distinction between the penalty of discharge from one's job and the withholding of the

64. See generally KATHLEEN M. SULLIVAN & NOAH FELDMAN, *FIRST AMENDMENT LAW* 377–93, 478 (5th ed. 2013). For a recent discussion of the doctrine in the context of political parties, see Michael R. DiMino, Sr., *It's My Party and I'll Do What I Want To: Political Parties, Unconstitutional Conditions, and the Freedom of Association*, 12 *FIRST AMEND. L. REV.* 65, 103 (2013).

benefit of a new job. The abridgment of First Amendment rights is equally unconstitutional in either context. See *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (“Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege”).⁶⁵

One way to think about the constitutionality of the Two-Party Feature of the Political Balance Requirement is to ponder the reach of the above-quoted dictum that “Congress could not enact a regulation providing that no Republican . . . shall be appointed to federal office.” May Delaware enforce a state law providing that no Independent or member of a minor party shall be appointed to a judgeship?

In the Cold War years following the 1951 constitutional amendment imposing the Two-Party Feature of Delaware’s Political Balance Requirement, the then-common practice of conditioning government employment and government benefits on loyalty oaths gave rise to important U.S. Supreme Court precedents.⁶⁶ Two cases are particularly germane because they focus on political party membership and public employment.

Wieman v. Updegraff, cited by Justice Stevens above, struck down on due process grounds an Oklahoma statute requiring state employees to take an oath stating in part that they were not affiliated with any political party determined by the U.S. government to be “a communist front or subversive organization.”⁶⁷ The Court held that the oath offended due process because “the fact of association alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly.”⁶⁸

That precedent was extended in *Keyishian v. Board of Regents of the University of the State of New York*,⁶⁹ which arose out of faculty member challenges to state statutes that required the dismissal of faculty who refused to sign certificates stating that they were not members of the Communist Party. The Court invalidated the statutes “insofar as they proscribe mere knowing membership without any showing of specific intent to further the unlawful aims of the Communist Party of the United States or of the State of New York.”⁷⁰ “[M]ere Party membership, even with knowledge of the Party’s unlawful goals, cannot suffice to justify criminal punishment; nor may it warrant a finding of moral unfitness justifying disbarment.”⁷¹ As stated in a subsequent case: “Employment may not be conditioned on an oath denying past, or abjuring future, associational

65. *United States v. Am. Library Ass’n*, 539 U.S. 194, 227 (2003) (Stevens, J. dissenting) (emphasis added) (parallel citations omitted).

66. SULLIVAN & FELDMAN, *supra* note 64, at 377, 478–81.

67. 344 U.S. 183, 186 (1952).

68. *Id.* at 191.

69. 385 U.S. 589, 592 (1967).

70. *Id.* at 609–10.

71. *Id.* at 607 (citations omitted).

activities within constitutional protection; such protected activities include membership in organizations having illegal purposes unless one knows of the purpose and shares a specific intent to promote the illegal purpose.”⁷²

The Two-Party Feature of the Political Balance Requirement, which requires all judges in Delaware’s major courts to belong to one of the two “major parties,” does not coexist well with the Supreme Court precedents protecting the public employment of members of the Communist Party. If Communist Party membership is not itself a permissible disqualification for public employment or admittance to the bar, how can a lawyer who registers as an Independent or with any minority party (whether the Libertarian Party or the Socialist Workers Party) be categorically disqualified for appointment as a Delaware judge?

It is no answer to say that any applicant for judgeship can simply choose to register as a Republican or Democrat. “[L]oss of a job opportunity for failure to compromise one’s convictions states a constitutional claim.”⁷³ “Conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so.”⁷⁴ The question is whether “party affiliation is an appropriate requirement for the position involved.”⁷⁵ “Absent some reasonably appropriate requirement, government may not make public employment subject to the express condition of political beliefs or prescribed expression.”⁷⁶

The quotes in the above paragraphs are from First Amendment cases concerning political patronage. In their different formulations, they set a standard for when political affiliation can permissibly bear on an employment decision. An ultimate issue in this line of cases is what categories of government employees are protected by First Amendment scrutiny.

The patronage cases distinguish between employment decisions affecting “low-level public employees” and those concerning “certain high-level employees.”⁷⁷ In the leading case of *Elrod v. Burns*,⁷⁸ “five Justices found common ground in the proposition that subjecting a non-confidential, non-policymaking public employee to penalty for exercising rights of political association was tantamount to an unconstitutional condition”⁷⁹ Six justices later agreed “it would undermine, rather than promote, the effective performance of an assistant public defender’s office to make his tenure dependent on his allegiance to the dominant political party.”⁸⁰ Seven justices subsequently extended the same protection from partisan retribution to independent contractors of public

72. *Cole v. Richardson*, 405 U.S. 676, 680 (1972).

73. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 77 (1990).

74. *Id.* at 78.

75. *Id.* at 64.

76. *O’Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 717 (1996).

77. *Rutan*, 497 U.S. at 65, 74.

78. 427 U.S. 347 (1976).

79. *O’Hare Truck Serv.*, 518 U.S. at 718.

80. *Branti v. Finkel*, 445 U.S. 507, 519–20 (1980).

services.⁸¹ This past term, six of eight justices joined an opinion that began by stating: “The First Amendment generally prohibits government officials from dismissing or demoting an employee because of the employee’s engagement in constitutionally protected political activity.”⁸²

No U.S. Supreme Court majority opinion has ruled on whether appellate judges or trial judges are entitled to First Amendment employment protection. There are two opinions, however, in which Supreme Court justices identified certain types of judges who could be deemed political actors subject to hiring or discharge for partisan political reasons.

The majority opinion by Justice Stevens in *Branti v. Finkel* deems it “obvious” that any laws respecting the partisan makeup of “election judges” (i.e., election inspectors)⁸³ are constitutional:

Under some circumstances, a position may be appropriately considered political even though it is neither confidential nor policymaking in character. As one obvious example, *if a State’s election laws require that precincts be supervised by two election judges of different parties, a Republican judge could be legitimately discharged solely for changing his party registration.* That conclusion . . . would simply rest on the fact that party membership was essential to the discharge of the employee’s governmental responsibilities.⁸⁴

In a dissenting opinion a decade later in *Rutan v. Republican Party of Illinois*, Justice Scalia observed that it is the historical norm for presidents to screen candidates for federal judicial appointment based on their political affiliation:

[B]ut if there is any category of jobs for whose performance party affiliation is not an appropriate requirement, it is the job of being a judge, where partisanship is not only unneeded but positively undesirable. *It is, however, rare that a federal administration of one party will appoint a judge from another party. And it has always been rare.* See *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803).⁸⁵

No justice disagreed with either of the above-highlighted observations.

81. *O’Hare Truck Serv.*, 518 U.S. at 714–15.

82. *Heffernan v. City of Patterson*, 136 S. Ct. 1412, 1416 (2016).

83. See, e.g., Nathan Templey, *Here’s What You Need to Know to Vote on Tuesday*, GOTHAMIST (Apr. 18, 2016, 10:28 AM), http://gothamist.com/2016/04/18/primary_voting_guide_2016.php (“As difficult as this sounds, the city Board of Elections actually stations judges at offices in each of the boroughs on Primary Day to do exactly this [issue a court order stating you should be allowed to vote in a certain party’s primary].”).

84. *Branti*, 445 U.S. at 518 (emphasis added).

85. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 92–93 (1990) (Scalia, J., dissenting) (emphasis added).

The patronage cases provide a framework for thinking about the permissibility of regulating the partisan makeup of a state judiciary. If appellate or trial judges are the equivalent of low-level employees, then they must be hired without regard to political affiliation. Those states that use independent judicial nominating commissions to screen judicial candidates based on merit implicitly adopt this model.⁸⁶ Delaware's use of a judicial nominating commission does not fit within this model, because the commission's work is subordinated to the partisan limits of the Political Balance Requirement.

If appellate or trial judges are the equivalent of high-level policymaking employees, then partisanship may factor into the hiring decision, and no First Amendment right may be invoked by a candidate who is not nominated for a judgeship. This model may not protect the Two-Party Feature or the Bare-Majority Feature of Delaware's Political Balance Requirement. Those features operate as independent restrictions on the governor's ability to nominate judges based on their party affiliation. The First Amendment claim is that state law disqualifies a category of candidates based solely on their political affiliation. No Independents are ever allowed to apply, and on certain occasions no Republicans or no Democrats may apply.

An alternative means of classifying appellate or trial judges is to think of them as analogous to the election judges referenced in *Branti v. Finkel*, whereby the partisan makeup of each court is essential to the fulfillment of its responsibilities. This argument has been made on behalf of the Political Balance Requirement regarding the six Federal Election Commission ("FEC") commissioners, of whom no more than three can be of the same political party.⁸⁷ One scholar writes: "Congress intended the agency to enforce campaign finance laws in a non-partisan manner, not to affect the results of elections. Additionally, the political party restrictions shield the agency from the appearance of impropriety, furthering the goal of partisan impartiality."⁸⁸

Election judges and FEC commissioners are not easily analogized to the members of the Delaware Supreme Court, Court of Chancery, or Superior Court. Of those three courts, only the Delaware Supreme Court is a collective body. The adjudication of civil and criminal appeals is categorically different than functioning as a partisan representative for promulgating election-related regulations or resolving real-time disputes at a polling place. The appellate process is not designed to reflect the partisan views of the appellate judges. Otherwise, a three-two partisan majority would have license to rule routinely in a partisan fashion.

86. See generally *Judicial Merit Selection: Current Status*, AMERICAN JUDICATURE SOCIETY (2011), http://www.judicialselection.us/uploads/Documents/Judicial_Merit_Charts_0FC20225ECC2.pdf (identifying features of judicial nominating commissions in each state that uses them); Sandra Day O'Connor, *The Essentials and Expendables of the Missouri Plan*, 74 MO. L. REV. 479 (2009) (discussing history, features, and rationale of Missouri's merit selection plan).

87. 52 U.S.C. § 30106(a)(1) (2006).

88. Kershner, *supra* note 21, at 619 (footnotes omitted).

On the Court of Chancery, each member of the court acts individually to find the facts, determine the law, and select a remedy. Given that individualized approach to case disposition, it is difficult to conceive how the partisan makeup of the remainder of the court renders the partisan affiliation of a particular candidate for a particular vacancy a “reasonably appropriate requirement” for the job.⁸⁹

Any claimed importance for the partisan makeup of the Superior Court is undercut by the right to a jury trial in a Superior Court action, as well as by the absence of collective decision-making. The Superior Court is a court of general jurisdiction, and neither civil plaintiffs nor criminal defendants have a right to a near-50% probability of drawing a Democrat or Republican judge in a given case.

The loyalty oath cases and the political patronage cases afford no justification for the Two-Party Feature’s categorical disqualification of Independents or members of minor parties from serving as appellate or trial judges. The Two-Party Feature acts as an unconstitutional condition on the exercise of a judicial candidate’s First Amendment rights. Because the loyalty oath cases and the political-patronage cases are designed to protect dissenters and political opponents of the dominant party, as well as the politically unaffiliated,⁹⁰ they do not speak directly to the Bare-Majority Feature, which operates as a situational disqualification of members of the dominant political party from applying for certain individual judicial vacancies.

B. The Two-Party Feature as a Partisan Lockup that Impermissibly Burdens Minor Political Parties

All political parties have First Amendment rights. In the leading case of *Williams v. Rhodes*,⁹¹ the U.S. Supreme Court struck down Ohio election laws that “made it virtually impossible for a new political party, even though it has hundreds of thousands of members, or an old party which has a very small number of members,” to have their candidates placed on the state presidential ballot.⁹²

Writing for the Court, Justice Black rejected the argument that the State’s interest in “attempting to see that the election winner be the choice of a majority of its voters” could justify laws that tend to give the Republican and Democrat parties “a complete monopoly.”⁹³

Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms. New parties struggling for their place must have the time and

89. *O’Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 717 (1996).

90. A divided panel of the Third Circuit has so held. *See Galli v. N.J. Meadowlands Comm’n*, 490 F.3d 265, 276 (3d Cir. 2007) (“We hold that the First Amendment protects politically neutral or apolitical government employees from political patronage discrimination.”). *Cf. id.* at 293 (Baylson, J., dissenting) (“The majority has steered this court into new territory by the expansion of current law to protect the politically unaffiliated . . .”).

91. 393 U.S. 23 (1968).

92. *Id.* at 24.

93. *Id.* at 32.

opportunity to organize in order to meet reasonable requirements for ballot position, just as the old parties have had in the past.⁹⁴

The Court has recognized that the goal of a new political party “is typically to gain control of the machinery of state government by electing its candidates to public office.”⁹⁵ In the context of ballot access rules in a general election, a party’s interest in competing against a dominant party is “well enough protected so long as all candidates have an adequate opportunity to appear on the general election ballot.”⁹⁶

In addition to ballot access cases, the Court has also considered the First Amendment claims of minor parties in the context of challenges to state laws governing primary elections. The reasoning in these decisions is helpful in considering a First Amendment claim that a minor party could bring to challenge the Two-Party Feature of the Political Balance Requirement.

In *Timmons v. Twin Cities Area New Party*, a minor party challenged Minnesota’s ban on fusion candidacies, by which a candidate appears on the ballot as the candidate of more than one party.⁹⁷ Writing for a majority in upholding the prohibition, Justice Rehnquist reasoned in part that states have a “strong interest in the stability of their political systems,” and that while a state cannot “completely insulate the two party system from minor parties’ or independent candidates’ competition and influence,” or “justify unreasonably exclusionary restrictions,” states can “enact reasonable election regulations that may, in practice, favor the traditional two party system.”⁹⁸

Timmons was deemed significant at the time because it was the first case to hold “that a state has a legitimate interest in favoring the Democratic-Republican duopoly.”⁹⁹ In the words of other scholars, the *Timmons* Court misunderstood how political parties “provide the perfect vehicle for deeply anticompetitive impulses,” as the parties can “alter the rules of engagement to protect established powers from the risk of successful challenge.”¹⁰⁰

Subsequently, in *Clingman v. Beaver*,¹⁰¹ the Libertarian Party of Oklahoma (“LPO”) unsuccessfully challenged Oklahoma’s semi-closed primary system, by which a political party could invite only its own party members and voters registered as Independents to vote in the party’s primary. A majority of the Court agreed that “Oklahoma’s semi-closed primary system does not severely

94. *Id.*

95. *Storer v. Brown*, 415 U.S. 724, 745 (1974).

96. *N.Y. State Bd. of Elections v. López Torres*, 552 U.S. 196, 207 (2008).

97. 520 U.S. 351, 351 (1997).

98. *Id.* at 366–67.

99. Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States To Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331, 332 (1997).

100. Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 646, 668 (1998).

101. 544 U.S. 581, 581 (2005).

burden the associational rights of the state's citizenry."¹⁰² Strict judicial scrutiny was not applied because strict scrutiny "is appropriate only if the burden [on associational rights] is severe."¹⁰³

Four members of the Court observed that the semi-closed primary system upheld in *Clingman* imposed little burden on the LPO and was unlike other laws struck down by the Court. For example, Oklahoma was not seeking to "disqualify the LPO from public benefits or privileges."¹⁰⁴ Moreover, the LPO was "free to . . . engage in the same electoral activities as every other political party in Oklahoma."¹⁰⁵

A two-member concurrence agreed that the semi-closed primary system imposed "only a modest and politically neutral burden on associational rights," as it "does not impose a significant obstacle to participation in the LPO's primary, nor does it indicate partisan self-dealing or a lockup of the political process that would warrant heightened judicial scrutiny."¹⁰⁶ While the particular law in question was "justified by the State's legitimate regulatory interests," the concurrence noted that a minor party "may have a significant interest in augmenting its voice in the political process by associating with sympathetic members of the major parties."¹⁰⁷ The three-member dissent criticized the majority and two prior decisions of the Court (including *Timmons*) as "misguided" in "attach[ing] overriding importance to the interest in preserving the two-party system."¹⁰⁸

The fractured opinions in *Clingman* each cast a dark shadow over the Two-Party Feature of Delaware's Political Balance Requirement. The Two-Party Feature is not a reasonable election regulation that just happens to favor the two major parties. It is a product of partisan self-dealing between Democrats and Republicans in 1951 by which they continue to share control over the state judiciary to the exclusion of Independents or members of minor parties. Maintenance of the Two-Party Feature ensures some level of institutional support for both incumbent major parties, because lawyers know that membership and participation in either major party is a path to the judiciary.

From the perspective of a minor party, the Two-Party Feature is a burden on building political support. The minor party's members can only be appointed to the judiciary if the party reaches the exalted status of one of the two "major

102. *Id.* at 593.

103. *Id.* at 592.

104. *Id.* at 587 (citing *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589 (1967)).

105. *Id.* The U.S. Court of Appeals for the Third Circuit subsequently rejected unaffiliated voters' challenge to New Jersey's closed primary election system, holding that "the burden, if any, imposed" on First Amendment rights was "outweighed and constitutionally justified by the interests identified by New Jersey in this case." *Balsam v. Sec'y of the State of N. J.*, 607 F. App'x 177, 183 (3d Cir. 2015).

106. *Clingman*, 544 U.S. at 604 (O'Connor, J., concurring).

107. *Id.* at 598–99, 601.

108. *Id.* at 620 (Stevens, J., dissenting).

political part[ies]” in the state.¹⁰⁹ Even if the minor party joins a coalition with other parties and that coalition leads to electoral success in races for governor or the state senate, the minor party is deprived of the public benefit or privilege of a potential judicial appointment for any of its members. For any minor or new political party that aims to make its influence felt on the state judiciary, the Two-Party Feature of the Political Balance Requirement operates as a high hurdle.

Whether viewed as a partisan lockup or as a burden on gathering political support, the Two-Party Feature would likely face heightened judicial scrutiny. That scrutiny would not be satisfied with reference to its origin as a means to garner partisan support for a constitutional amendment in 1949 and 1951.

C. The Analogy of Speech Restrictions in Judicial Elections

As noted above, leading Delaware judges have argued that the Political Balance Requirement has enhanced Delaware’s judiciary in the following respects: it has “yielded dividends in both the expertise and independence of its judiciary,”¹¹⁰ “ensure[d] that the courts are fair and impartial,”¹¹¹ “provide[d] Delaware with an independent and depoliticized judiciary,”¹¹² and “attracted persons of exceptional learning and dedication to the judiciary.”¹¹³

Similar arguments have been made on behalf of state laws that restrict the political speech of candidates in judicial elections. On two occasions, the U.S. Supreme Court has ruled on whether provisions of state codes of judicial conduct regulating the speech of judicial candidates comport with the First Amendment.¹¹⁴ As discussed below, in both cases the Court applied strict scrutiny to the restrictions in question. The Court’s analyses of state laws that aim to enhance the impartiality or integrity of the judiciary by restricting the political speech of candidates in judicial elections shed light on how a federal court might analyze a state law that aims to enhance the judiciary by regulating its partisan composition.

In *Republican Party of Minnesota v. White*, the Court considered the constitutionality of a Canon of the Minnesota Code of Judicial Conduct that prohibited a judicial candidate from “announc[ing] his or her views on disputed legal and political issues.”¹¹⁵ Justice Scalia’s opinion for a majority of the Court classified the prohibition as addressing “speech about the qualifications of candidates for judicial office,” which is “at the core of our First Amendment freedoms.”¹¹⁶ The restriction was subjected to strict scrutiny, which can only be

109. DEL. CONST. art. IV, § 3.

110. Holland, *supra* note 14, at 772.

111. Scott et al., *supra* note 15, at 243.

112. Veasey & Di Guglielmo, *supra* note 16, at 1403.

113. Hartnett, *supra* note 18, at 15.

114. *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1662, 1665 (2015); *Republican Party of Minn. v. White*, 536 U.S. 765, 765, 788 (2002).

115. 536 U.S. at 768 (quoting MINN. CODE OF JUDICIAL CONDUCT, Canon 5(A)(3)(d)(i) (2000)).

116. *Id.* at 774 (quoting *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 861, 863 (8th Cir. 2002)).

satisfied if the restriction is narrowly tailored and serves a compelling state interest.¹¹⁷

Justice Scalia reasoned that the prohibition was not tailored to serve impartiality or the appearance of impartiality in the sense of a lack of bias for or against either party to a judicial proceeding, “inasmuch as it does not restrict speech for or against particular *parties*, but rather speech for or against particular *issues*.”¹¹⁸ Justice Scalia further reasoned that impartiality in the sense of a lack of preconception in favor of or against a particular legal view is not a compelling state interest, because such lack of predisposition “has never been thought a necessary component of equal justice.”¹¹⁹ The majority also rejected the notion that the prohibition was adopted to guarantee impartiality in the sense of open-mindedness, because the prohibition was “woefully underinclusive” by only restricting speech about legal issues during an election campaign, but not before or after.¹²⁰

This mode of analysis suggests how problematic it would be to justify the Two-Party Feature as a narrowly tailored restriction to promote a compelling state interest. How does requiring that a candidate for a particular judicial vacancy be registered with one of two major political parties enhance or ensure the “expertise,” “independence,” or “impartiality” of the judiciary? How does foreclosing Independents serve any of those objectives? Why is it not sufficient that the governor and the state senate are accountable for each judicial appointment, that the appointments are for 12-year terms, and that all nominees have been vetted by a bipartisan judicial nominating commission?

In 2015, in *Williams-Yulee v. Florida Bar*, the U.S. Supreme Court upheld a disciplinary sanction for a judicial candidate’s violation of a Canon of the Florida Code of Judicial Conduct prohibiting the personal solicitation of campaign funds.¹²¹ Writing for a majority, Chief Justice Roberts described the prohibition as “one of the rare cases in which a speech restriction withstands strict scrutiny.”¹²² There was no dispute over “the State’s compelling interest in judicial integrity,” and Chief Justice Roberts wrote that “Florida has reasonably determined that personal appeals for money by a judicial candidate inherently create an appearance of impropriety that may cause the public to lose confidence in the integrity of the judiciary.”¹²³ Justice Ginsburg would not have applied strict scrutiny to the restriction of speech in judicial elections,¹²⁴ while the four dissenters (Justices

117. *Id.* at 775.

118. *Id.* at 775–76 (emphasis added).

119. *Id.* at 777.

120. *Id.* at 780.

121. 135 S. Ct. 1656, 1682 (2015).

122. *Id.* at 1666.

123. *Id.* at 1668, 1671.

124. *See id.* at 1673 (Ginsburg, J., concurring).

Scalia, Kennedy, Thomas, and Alito) would have found that the restriction in question was not narrowly tailored.¹²⁵

Williams-Yulee v. Florida Bar illustrates the rarity of a narrowly tailored restriction on judicial candidate speech that serves the compelling state interest in judicial integrity. At issue in the Two-Party Feature is a categorical disqualification of a class of candidates for the judiciary. The categorical disqualification of Independents and members of minor parties does not itself serve the goal of judicial integrity. Nor is it apparent how the requirement that a court be almost half Democrat and almost half Republican is narrowly tailored to meet the objective of judicial integrity.

The cases respecting judicial candidate speech apply only by analogy. The existence of judicial elections implies a judicial candidate's right to speak that can only be restricted by a narrowly tailored restriction that serves a compelling interest. In *Common Cause Indiana v. Individual Members of the Indiana Election Commission*, the State's decision to establish a system for the election of judges was found to imply a right of voters to "have the opportunity to cast a meaningful vote in that election" that could not be restricted by a partisan-balance requirement.¹²⁶ The judicial election cases do not apply directly to restrictions on a governor's appointment power. Nevertheless, for purposes of a strict scrutiny analysis of the claimed benefits of the Political Balance Requirement, the judicial election cases are instructive.

CONCLUSION

The framers of the U.S. Constitution and the various state constitutions have reached disparate conclusions over time about what means of selecting judges promote an independent and effective judiciary. Federal judges are appointed for life tenure upon being nominated by the President and confirmed by the Senate. Judges in most states stand for election. Other states utilize judicial nominating commissions to aid the appointment process.

Delaware is an outlier. Dissatisfaction with Delaware's unique approach of unilateral appointment of judges by the Governor for life tenure gave way in 1897 to a system of appointment for 12-year terms with the concurrence of the Senate, coupled with a unique restriction on the number of judges from any single political party. A bipartisan bargain implemented in 1951 created the current unique system by which every judge must belong to one of the two major political parties, with the less powerful of the two parties ensured that almost one-half of the judiciary will consist of members of that party.

Over the subsequent 65 years, the U.S. Supreme Court and the lower federal courts have created casebooks full of new First Amendment doctrines and

125. See *id.* at 1676 (Scalia, J. & Thomas, J., dissenting) (“[W]ildly disproportionate”); *id.* at 1685 (Kennedy, J., dissenting) (“[N]owhere close to being narrowly tailored”); *id.* (Alito, J., dissenting) (“[A]s narrowly tailored as a burlap bag”).

126. 800 F.3d 913, 927 (7th Cir. 2015).

precedents. As explained for the first time in this Essay, some of those First Amendment doctrines and cases cast great doubt on the constitutionality of the Two-Party Feature of the Political Balance Requirement.

Delaware is justly proud of its judiciary. A prudent reluctance to tamper with a system that has yielded good results should not blind lawyers, judges, politicians, and voters to the dubious constitutionality of categorically disqualifying Independents and members of minor parties from the Delaware judiciary. Recognition of this constitutional issue implies the need for an open discussion about the wisdom of maintaining the Political Balance Requirement in its current form.