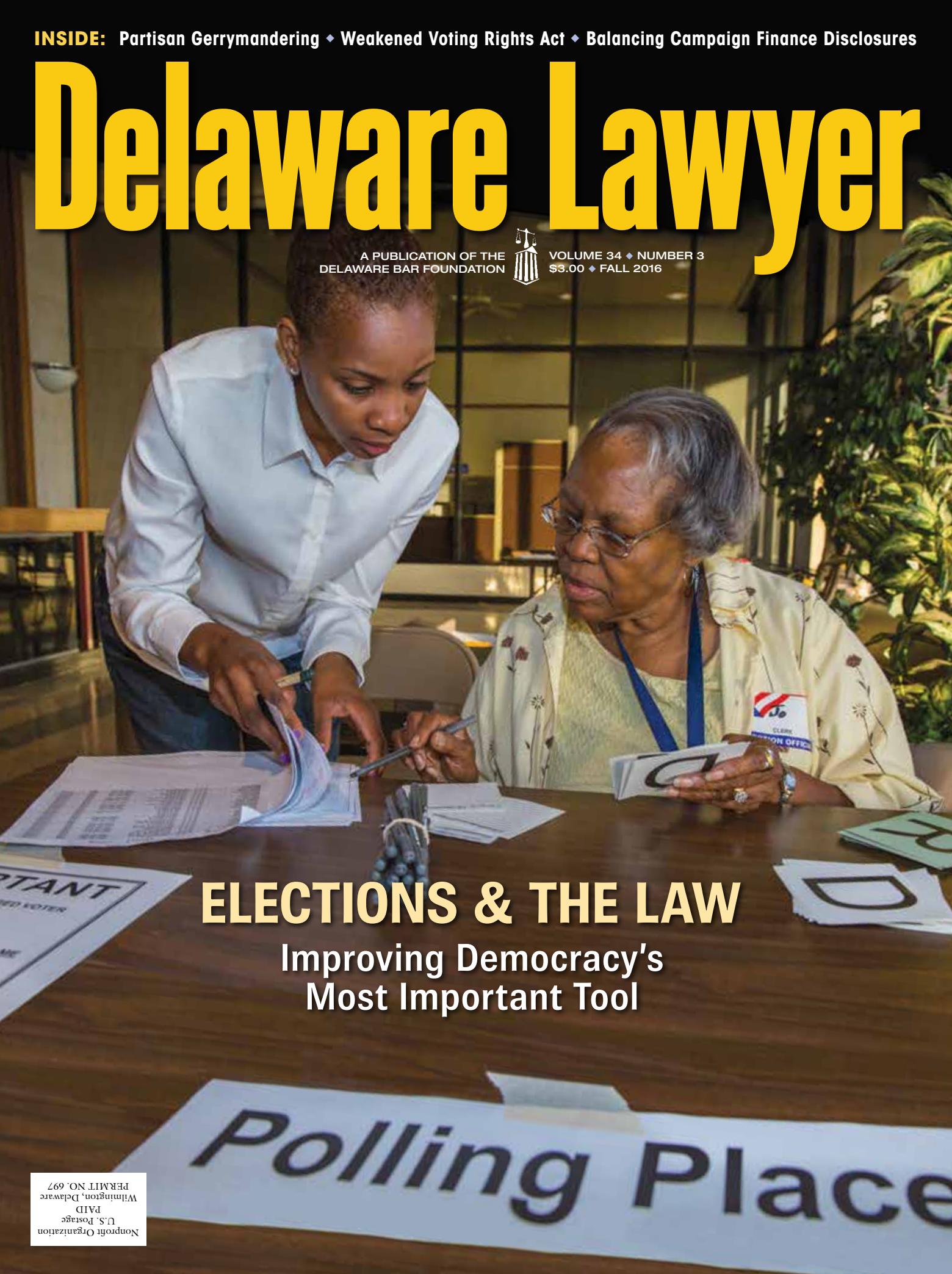
INSIDE: Partisan Gerrymandering ◆ Weakened Voting Rights Act ◆ Balancing Campaign Finance Disclosures

Delaware Lawyer

A PUBLICATION OF THE DELAWARE BAR FOUNDATION

VOLUME 34 ◆ NUMBER 3
$3.00 ◆ FALL 2016



ELECTIONS & THE LAW

Improving Democracy's Most Important Tool

Nonprofit Organization
U.S. Postage
PAID
Wilmington, Delaware
PERMIT NO. 697

Charles J. Durante

Diluting the Voting Rights Act

How the Supreme Court's conservative majority upended precedent and ignored Congressional intent to empower vote-suppression.

After a half-century of vitality, the Voting Rights Act of 1965 was eviscerated, based on a doctrine that was not taught to us in law school.

In *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), five U. S. Supreme Court justices joined an opinion that held the most powerful tool to enforce the Voting Rights Act to be unconstitutional because it treated some states differently than others.

The Act's strongest enforcement provision, known as preclearance, required some jurisdictions to obtain approval from the Justice Department or a court before they could change voting laws or election procedures. Because preclearance applied only to some jurisdictions, the 5-4 majority held, it could only be justified under "exceptional circumstances." Citing, with scant explanation, a principle of "equal sovereignty," the Court applied elevated scrutiny to preclearance because of its "disparate geographic coverage" and struck it down.

In the decade-long whirlwind of the Roberts-Scalia-Alito court, perhaps no decision more frontally capsized Constitutional precedent and will prove more difficult to undo than *Shelby County*. In an era when the ability to vote is under attack, the decision unleashed a torrent of vote-suppression statutes, most emanating from the states that made the Voting Rights Act necessary. In Delaware, whose prominence derives in part from being treated differently, the decision causes bewilderment.

The Fifteenth Amendment was enacted in the aftermath of the Civil War, the central geographic disparity in the nation's history, to prohibit the denial of the vote because of race. The second of its two sentences invited the Voting Rights Act: "The Congress shall have power to enforce this article by appropriate legislation."

After Reconstruction ended with the compact that resolved the 1876 Presidential election, the Fifteenth Amendment was ignored in the former Confederacy, as it descended into apartheid enforced by terrorism, while the Northern majority in Congress lost the will to win the peace. A prototype Voting Rights Act, drafted in 1890 by Sen. Henry Cabot Lodge (R-Mass.) died in the House of Representatives after passing the Senate. Sixty-five years of Congressional inaction followed.

"When you pay $1.50 for a poll tax, in Dallas County, I believe you disenfranchise 10 Negroes," a delegate urged the Alabama Constitutional Convention of 1901. "Give us this $1.50 for educational purposes and for the disenfranchisement of a vicious and useless class."[1]

Next door, the Mississippi constitution required that any voter "be able to read any section of the constitution of this State; or

he shall be able to understand the same when read to him, or give a reasonable interpretation thereof."[2]

Poll taxes, property requirements and arbitrarily administered "literacy" tests essentially eliminated black voter participation in the South by 1910.

In 1965, after protests met with beatings and murders that motivated President Johnson to a national televised address where he concluded, "We shall overcome," Congress passed the Voting Rights Act. Its basic provision, Section 2 of the Act,[3] restated the Fifteenth Amendment, with additional sinews: "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color."

Like Sen. Lodge's bill, the law, surgically designed by a team that included future judge Harold Greene and solicitor general Archibald Cox, focused on the states with the most notorious record of denying the vote in Section 5 of the Act. First, literacy tests, "character" requirements and other vote-suppression devices were suspended in those jurisdictions. Second, to avoid the inefficiency of after-the-fact litigation against assaults on voting rights, those jurisdictions were also subjected to preclearance, whereby any changes affecting the vote had to be cleared in advance with a three-judge district court in Washington, D.C., or the attorney general.

The states that were subject to Section 5 were defined in Section 4 of the Act: those where fewer than 50 percent of all adults had voted in 1964 – seven states and parts of four others.

Promptly challenged, the law was upheld by the Supreme Court, 8-1, in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). Among other salvos, South Carolina argued that the law could not properly target specific states. The Court, though, held:

> Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution. ... After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims. ... In acceptable legislative fashion, Congress chose to limit its attention to the geographic areas where immediate action seemed necessary. The doctrine of the equality of States, invoked by South Carolina, does not bar this approach, for that doctrine applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared.

Sensitive to the disparate treatment, and hoping that behavior in those states would change, Congress directed that the preclearance provisions would sunset after five years unless reauthorized.

When the time for reauthorization arrived in 1970, Sen. Hugh Scott (R-Pa.) fought successfully for a stronger bill than the Nixon administration wanted. The legislation banned literacy tests nationwide, reduced residency requirements for presidential election to 30 days, and continued preclearance for another five years.

In 1975, the law was reauthorized for another seven years, with new protections – authored by Rep. Barbara Jordan (D-Tex) and Sens. Philip Hart (D-Mich.), Birch Bayh (D-Ind.) and Scott – for language minorities constituting more than five percent of voting-age population. This change swept Texas, Brooklyn, the Bronx and counties in Arizona, California, Colorado and Florida into preclearance.

A changed lineup on the Supreme Court weakened the Act in 1980, holding that discriminatory intent must be established to prove a violation. Discriminatory effect was held insufficient. *Mobile v. Bolden*, 446 U.S. 55. One-third of Mobile's population was black, but never had the birthplace of Hank Aaron and Willie McCovey seen a person of color on the city council or school board, since both were elected at large. Although a six-day trial yielded a district court finding that the arrangement abridged the vote of Mobile's blacks by diluting its effect, Potter Stewart wrote, in a plurality opinion for the Supreme Court's 6-3 holding, "Action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose."

The ruling poured sand into the law's gears. The Department of Justice filed 60 voter dilution cases in 1979, but only 10 in 1980. Not only did preclearance face sunset, but the vitality of the law's basic principle in Section 2 also was at stake as deliberations over reauthorization began in 1982.

Supporters wanted legislation to overrule the decision, while the Reagan Justice Department girded for opposition. "An effects test would eventually lead to a quota system in all areas, since only when effects are mathematically proportionate would the test be satisfied," wrote a 26-year-old special assistant to the attorney general, one John G. Roberts, to his boss, Kenneth Starr. "I do not believe this to be the aim of our civil rights laws, or the intent of Congress or the Framers, and therefore do not embrace the effects test."

In a Justice Department feverishly opposed to extending the Voting Rights Act, Roberts undertook leadership on the issue, writing op-eds for the signatures of Attorney General William French Smith and other superiors.[4] "John seemed like he always had it in for the Voting Right Act," said J. Gerald Hebert, a career Justice Department lawyer who was deputy director of litigation in the Civil Rights Division. "I remember him being a zealot when it came to having fundamental suspicions about the Voting Rights Act's utility."[5]

Sen. Charles Mathias (R-Md.) and Reps. Don Edwards (D-Cal.) and Henry Hyde (R-Ill.) steered another coalition that reversed *Mobile* and reauthorized the Act for 25 more years. Advising fellow Republicans to "erase the lingering image of our party as the cadre of the elite, the wealthy, the insensitive," Sen. Robert Dole (R-Kan.) brokered the ultimate deal, circumnavigating Judiciary Committee Chairman Strom Thurmond (R-N.C.) and senior Justice Department officials, with language that adopted the effects test, while clarifying that strict proportional representation was not required.

When sunset again approached in 2006, Reps. James Sensenbrenner (R-Wis.) and Melvin Watt (D-N.C.) cooperated to secure passage. "You go and fight off the people who want to do away with the Voting Rights Act and I'll go and fight off the people who want to dramatically change the Voting Rights Act," Watt told Sensen-

brenner, who worked to enact legislation that reenacted the law for another 25 years, before a less sympathetic Lamar Smith (R-Tex.) was scheduled to succeed him House Judiciary chairman.[6] As in previous reauthorization votes, the final roll call was one-sided. The bill passed 390-33 in the House, 98-0 in the Senate.

"South Carolinians, you have come a long way," said Sen. Lindsey Graham R-S.C.). "But we, just like every other part of this country, still have a long way to go."

Preclearance transformed voter registration. By 1968, just three years after enactment, 60 percent of black eligible blacks in Mississippi and Alabama were registered. Over the longer term, federal review caused hundreds of objectionable election proposals to be modified or withdrawn. From 1965 through 2012, the Justice Department challenged 28 voting schemes per year. As with an effective vaccine, though, the greatest effect of preclearance was to prevent attempts at disenfranchisement. Over 99 percent of election proposals were approved.

Yet, Newton's Third Law of Motion had not been repealed. Action led to reaction. Those determined to prevent blacks from voting moved beyond traditional blunderbuss to more calibrated devices. A second generation of voting barriers was developed: racial gerrymandering, at-large voting, annexation of majority-white suburbs, voter-identification requirements, dual registration systems, canceling elections, changing polling places, arbitrary voter purges.

"The Voting Rights Act did not suddenly put an end to racial discrimination in southern politics. To a considerable degree, the locus of conflict shifted from the right to vote to the value of the vote," writes historian Alexander Keyssar.[7]

Opponents of the Act kept losing in Congress, so they looked to the courts. Preclearance had 40 years of constitutional support, but Hugo Black had left a pebble in the shoe. The 83-year-old Alabaman, the sole dissenter in the 1966 *Katzenbach* case, objected to the different treatment of some states. "This is reminiscent of old Reconstruction days, when soldiers controlled the South and when those States were compelled to make reports to military commanders of what they did," wrote Black, dissenting from Earl Warren's robust valedictory endorsement of expansive enforcement of the Act in *Allen v. Board of Elections* 393 U.S. 544 (1969). An outlier in that era, Black's view gained currency 40 years later, when John Roberts had become Chief Justice.

> In its solicitude for Confederate states' dignity, a Court that would frequently invoke original intent ignored the origin of the Fifteenth Amendment, the basis for the Voting Rights Act.

In 2009, the Supreme Court held that a Texas utility district was eligible to pursue relief from preclearance under a six-part test in Section 4, by which jurisdictions can end federal oversight. The Court then gratuitously added, "The Act's preclearance requirements and its coverage formula raise serious constitutional questions." *Northwest Austin Municipal Utility District No. 1 v. Holder*, 557 U.S. 193 (2009).

Veteran court-watcher Jeffrey Rosen reported that the five-member conservative bloc nearly struck down the Act, but retreated when the four liberals threatened a blistering dissent accusing the majority of misconstruing landmark precedent.[8]

Four years later, the Roberts Court shed the umpire's mask. An Alabama town had annexed three white suburbs (but not an adjoining black suburb) and reapportioned to eliminate its sole majority-black district, created 20 years earlier to comply with a consent decree. In upholding the challenge of the Justice Department, David Tatel of the D.C. Circuit anticipated the skepticism of the Supreme Court, noting the need for judicial restraint, the voluminous record before Congress in 2006, showing continued disenfranchisement devices, and the town's transparent attempt to eliminate its sole black council member.

At oral argument, though, judicial restraint was absent. "The Marshall Plan was very good too, but times change," said Justice Anthony Kennedy, who objected to the "reverse engineering" in Section 4. "If Congress is going to single out separate states by name, it should do it by name."

"Is it the government's submission that the citizens in the South are more racist than citizens in the North?" Roberts baited Solicitor General Donald Verrilli.

Even the overwhelming Congressional support for the Act was recast as a defect. "Now, I don't think that's attributable to the fact that it is so much clearer now that we need this. I think it is attributable, very likely attributable, to a phenomenon that is called perpetuation of racial entitlement," said Justice Antonin Scalia, evoking a chorus of gasps. "It's been written about. Whenever a society adopts racial entitlements, it is very difficult to get out of them through the normal political processes."

The Court buried the Act, not by finding preclearance to be unconstitutional – a view advanced only in Justice Clarence Thomas' concurrence – but by holding that the formula to determine who is subject to preclearance was fatally flawed because it was based on 1964 voting data. Because "voter turnout and registration rates now approach parity," the problem is solved, the Court held, blind to vote-dilution schemes still rampant a half-century later. "A departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets."

To explain "equal sovereignty," Roberts' opinion reached for the postage meter. It cited four antediluvian cases for the concept without explaining their relevance or the meaning of the phrase. Two cases disallowed conditions Congress placed in admitting new states[9] (although Congress has imposed conditions – requiring English usage, prohibiting polygamy, regulating commerce with Native Americans – on most states, without serious question that it may do so.)[10] A third held that Texas did not cease to be a state when it purported to

secede.[11] The fourth stated that, like the original 13 states, each other state owned the lands beneath its navigable inland waters "as an inseparable attribute of the equal sovereignty guaranteed to it upon admission."[12] So the newer states owned their riverbed, like the original 13. The pertinence to federal civil rights legislation? Your guess is as good as any.

The opinion elided explanation of the equal sovereignty principle because there is none. "The equal sovereignty principle is not cleanly derived from any source that is widely recognized by courts or commentators as a valid basis for constitutional rules," writes Leah Litman in an exhaustive dismemberment of the purported axiom. "The principle is not articulated in the constitutional text, its historical roots are thin, and it potentially undermines other principles of structure that are embodied in the Constitution at a similar level of generality, such as federalism and nationalism."[13]

In its solicitude for Confederate states' dignity, a Court that would frequently invoke original intent ignored the origin of the Fifteenth Amendment, the basis for the Voting Rights Act. "To remember what actually happened between 1861 and 1870 is to remember a shattered nation reconstructed on new foundations, where the terms of readmission of the conquered South were based, fundamentally, not on principles of equal sovereignty, but on military conquest, surrender, and occupation," writes Joseph Fishkin of University of Texas Law School. "Here, state 'equal dignity' is colliding with congressional power not under the Commerce Clause but under the Reconstruction Amendments themselves. The subject matter of the conflict is the very heart of the Reconstruction Power: the federal enforcement of minority rights."[14]

This is why, Justice Ruth Bader Ginsberg wrote in her withering dissent, when Congress exercises its authority under the Civil Rights Amendments "to protect all persons within the Nation from violations of their rights by the States ... Congress may use 'all means which are appropriate, which are plainly adapted'[15] to the constitutional ends declared by these Amendments. So when Congress acts to enforce the right to vote free from racial discrimination, we ask not whether Congress has chosen the means most wise, but whether Congress has rationally selected means appropriate to a legitimate end," citing John Marshall's seminal holding on legislative power.

Delaware may hope that "equal sovereignty" will return to obscurity in the post-Scalia court. Federal law forbids states from operating sports gambling, except states that conducted such schemes between 1976 and 1990. 28 U. S. C. §3704. This means that Delaware's three-week 1976 experiment in running a football pool now permits it to sponsor sports gaming, while its neighbors cannot. The Third Circuit ignored any discussion of equal sovereignty in its en banc dismissal of New Jersey's challenges to this law, allowing Delaware to take bets on ball games, while the Garden State cannot.[16]

After Richard Nixon's election, demographers Ben Wattenberg and Richard Scammon argued that most Americans are culturally conservative but not racist. A sense of fairness, they said, was at the foundation of the Real Majority.[17] Their thesis was illustrated as three generations of deeply conservative legislators fought to preserve and extend the Voting Rights Act. Their and others' work was upended by five strategically-placed zealots who, 50 years later, embraced South Carolina's claim that state's rights are more important than civil rights. ◆

NOTES

1. Ari Berman, Give Us The Ballot (2015), p. 17.
2. Miss. Const. (1890) § 244.
3. Now found at 52 U.S.C. 10301.
4. http://www.nytimes.com/1982/03/27/opinion/the-voting-rights-act.html.
5. Berman, p. 152.
6. Berman, p. 235.
7. Alexander Keyssar, The Right To Vote (2000), p. 265.
8. Jeffrey Rosen, *Roberts v. Roberts*, The New Republic, March 2, 2010.
9. *Pollard's Lessee v. Hagan*, 44 U.S. 212 (1845); *Coyle v. Smith*, 221 U.S. 559 (1911).
10. Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 16 Am. J. Legal. Hist. 119 (2004).
11. *Texas v. White*, 74 U.S. 700 (1868).
12. *United States v. Louisiana*, 363 U.S. 1 (1960).
13. Leah Litman, *Inventing Equal Sovereignty*, 114 Mich. L. Rev. 1207 (2016).
14. Joseph Fishkin, *The Dignity of the South*, 123 Yale L.J. Online 175 (2013).
15. *McCulloch v. Maryland*, 4 Wheat. 316 (1819).
16. *NCAA v. Governor of New Jersey*, 832 F.3d 389 (2016).
17. Richard M. Scammon and Ben Wattenberg, The Real Majority: An Extraordinary Examination Of The American Electorate (1970).

Gerrymandering *continued from page 20*

a website to disseminate necessary information to the public, convene four public meetings across the state, and subject the process to the Freedom of Information Act.

Because the bill empowers party leadership in the General Assembly to appoint commission members, the process would not be as independent as it could be, however. And though bipartisan support would be needed for any decision, Republicans opposed the provision giving them fewer commission members. Finally, while the bill would require a waiting period before registered lobbyists or retired elected officials could serve, it still allows them to do so.

S.B. 48 passed the Senate on a straight party-line vote, and we applaud Senate Democrats for their willingness to give up party power for the sake of establishing a more impartial and democratic process. Unfortunately, however, the bill died in the House Administration Committee.

Sen. Blevins introduced another independent redistricting reform bill (S.B. 270) in 2014, including several features suggested by Common Cause Delaware. Specifically, she added language prohibiting any contact between commission members and the legislators who appointed them and any commission discussion of redistricting outside of public view. Unfortunately, the bill was introduced late and never moved out of committee.

While Common Cause Delaware supported both these attempts to render our state's redistricting process more independent, the organization would like to see an even stronger bill in 2017. Common Cause Delaware favors:

1. Placing all power for drawing lines in the hands of an independent commission.
2. Permitting an independent body, such as the Office of Public Integrity, to choose commission members from a pool of applicants.
3. Barring applicants from serving in elected or party office within three years before or after appointment to the commission and barring those who have changed partisan registration within three years of their application.
4. A commission of nine members, with no more than three from any one party (ensuring at least three Independents or minor party members).
5. Clear and common rules for drawing districts (contiguous, equal populations, communities of interest, respect existing municipal and county lines) that would expressly prohibit the use of partisan registration and voting history or the residences of existing officeholders, when drawing the maps.
6. A minimum 30-day period for public review and comment before the final map is drawn and voted on by the commission.
7. A ban on communication between legislators (or their staff) and commissioners and a requirement that all meetings of commission members be open to public view and covered by public disclosure laws.

More than 200 years of gerrymandering is enough! While it is too late for Delaware to be the first state to end gerrymandering, it is vitally important that we further democracy by changing the redistricting process before the 2020 census. ◆

NOTES

1. Dan Vicuna and Keshia Morris, "Gerrymandering and Voter Choices" (forthcoming).
2. Dan Daly, *Ratf**cked: The True Story Behind the Secret Plan to Steal America's Democracy* (New York: Liveright, 2016). Quotation from Julian E. Zelizer, "The Power That Gerrymandering Has Brought to Republicans," *The Washington Post*, June 17, 2016 https://www.washingtonpost.com/opinions/the-power-that-gerrymandering-has-brought-to-republicans/2016/06/17/045264ae-2903-11e6-ae4a-3cdd5fc74204_story.html.
3. http://history.house.gov/Institution/Election-Statistics/Election-Statistics.
4. "Americans' Views on Money in Politics," *The New York Times*, June 2, 2015 http://www.nytimes.com/interactive/2015/06/02/us/politics/money-in-politics-poll.html.
5. Ariel Edwards-Levy, "Raising the Minimum Wage is a Really, Really Popular Idea," *The Huffington Post*, April 14, 2016 http://www.huffingtonpost.com/entry/minimum-wage-poll_us_570ead92e4b08a2d32b8e671.
6. Case 1:16-CV-1026 https://www.scribd.com/document/320306076/Common-Cause-v-Rucho.
7. See chapter 8, subchapter 1 of the Delaware Code: http://delcode.delaware.gov/title29/c008/sc01/index.shtml.
8. Delaware State House Minority Caucus, "Redistricting Plan and Process Criticized at Hearing," (May 26, 2011) http://www.delawarestatehouse.com/pdfs/052711_Redistricting_Plan_and_Process_Criticized4.pdf.
9. Quoted in Kara Nuzback, "Citizens say redistricting map too political," *The Cape Gazette*, May 31, 2011 http://www.capegazette.com/article/citizens-say-redistricting-map-too-political/12389.
10. Celia Cohen, "An Open and Shut Debate," Delaware Grapevine (Aug. 6, 2013) http://delawaregrapevine.com/8-13redistrict.asp.
11. Nuzback, *op. cit.*