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

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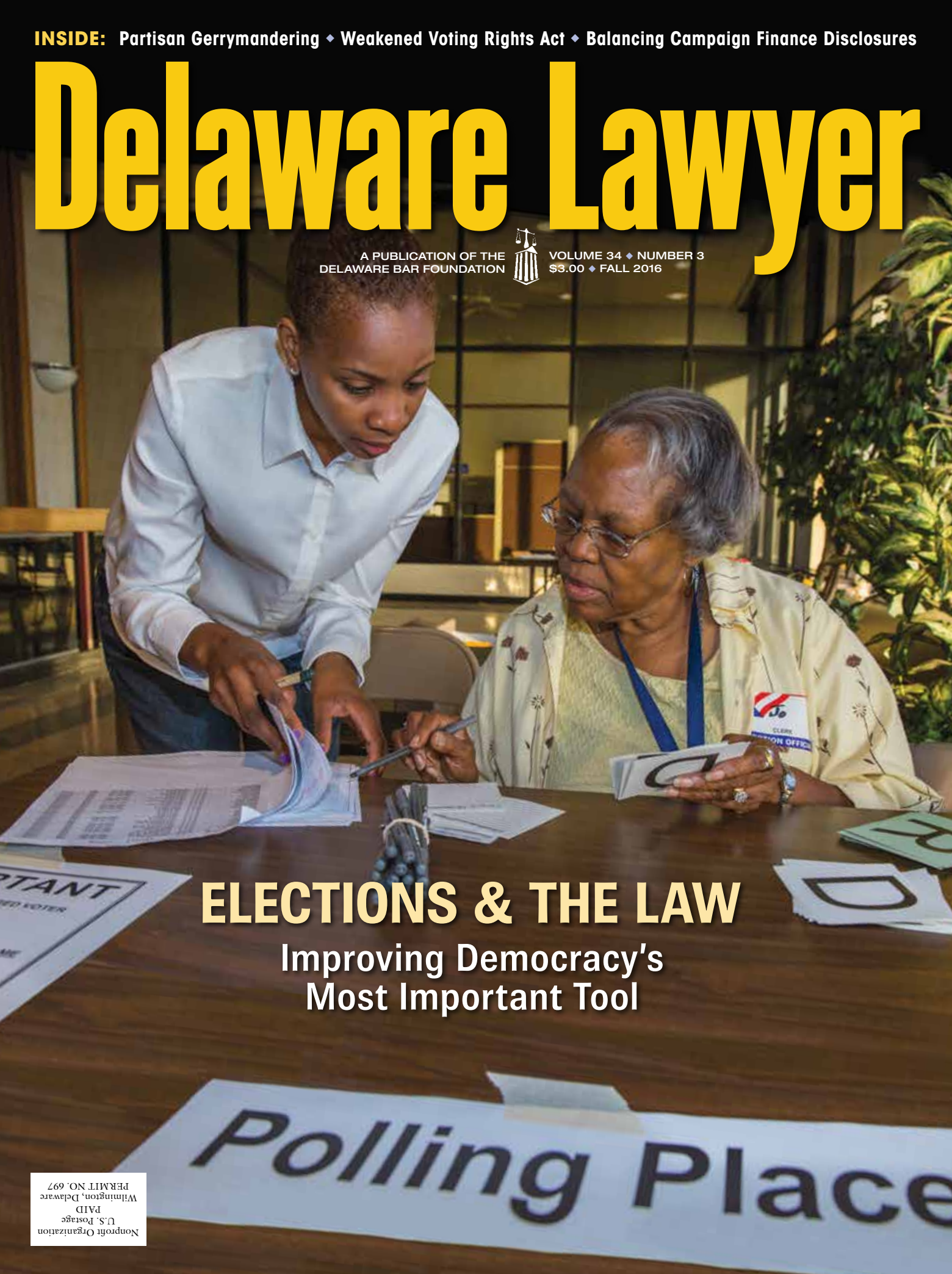

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Chairman: Robert Martinelli
President/Editor: Jonathan Witty
Art Director: Samantha Carol Smith

Subscriptions orders and address changes, call:
Jen Schuele, 302-656-1809

Advertising information, call:
Jessica Stryker, 302-504-1365
jessica.stryker@todaymediacustom.com

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EDITOR'S NOTE

Charles J. Durante

In Delaware elections, where the candidates and their partisans are neighbors, often friends, the ligaments of civic life are in comparatively good condition. In an era when the conduct of elections, the financing of campaigns and the very right to vote are subjects of contention, this State values its tradition of clean elections under bipartisan management.

Yet, like the General Corporation Law or the rules of basketball, the conduct and conditions of our elections must be constantly examined and occasionally updated to enhance participation, prevent manipulation and build on experience.

The Delaware Way shows its best side on Election Day. Yet, improvements can be made in the structure, operation and tallying of elections, as Richard Forsten observes from his years of behind-the-scenes leadership on behalf of Republican officials and candidates.

Voters' options are threatened by partisan gerrymandering, a practice that has evolved into a data-driven neutering of voter's choices, here and nationally, as explained by Claire Snyder-Hall, formerly of Common Cause Delaware.

Campaign finance laws established after the Watergate affair and state-level scandals have been upended by U.S. Supreme Court rulings. Nationally prominent election lawyer Jack Young gives us a tour of the aftermath.

The right to vote is respected in Delaware, but not everywhere. The 2013 decision of the Supreme Court that incinerated a key enforcement provision of the Voting Rights Act was premised on an obscure constitutional argument described in my own article.

Our new governor will almost certainly seek to manage the State in the model set by Pierre S. du Pont IV, for over a decade the towering figure of Delaware's politics, whom each of his four successors has sought to emulate. Pete's lawyerly side is described by Bill Manning, who served as his counsel and chief of staff.

Democracy is not always tidy, but its process should be. The citizenry, especially its lawyers, should be constantly vigilant that our elections are the result of robust debate, full participation, meaningful choices and common-sense rules. The franchise is not to be taken for granted.

Charles J. Durante

Charles J. Durante

heads the tax, estates and trusts department at Connolly Gallagher LLP. He was the prime author of Delaware's campaign finance law enacted in 1990, after which he served as parliamentarian of the Democratic State Committee for 15 years. A graduate of Haverford College and Villanova Law School (J.D. and LL.M.), he is chair of the Board of Editors of *Delaware Lawyer*.

Richard (Shark) Forsten

is partner of Saul Ewing LLP. He graduated as valedictorian from Thomas McKean High School before attending the University of Virginia McIntyre School of Commerce and the University of Virginia School of Law. He is President of the Appoquinimink School District School Board and President of the historic Everett Theatre in Middletown. He serves on the board of Goodwill of Delaware, and on several Delaware Supreme Court committees, including the Rules Committee and the Access to Justice Commission. He is immediate past President of the Delaware State Bar Association.

William E. Manning

is a Wilmington native and graduate of University of Delaware and University of Louisville's Brandeis School of Law. During his association with Pete du Pont, as Counsel to the Governor beginning in 1979, followed by three years as Chief of Staff beginning in 1981, personal income taxes were reduced dramatically, banks were attracted to Delaware, constitutional spending and taxing restrictions were enacted, the State's budget was brought under control, and the Judicial Nominating Commission was established. Mr. Manning is now Co-Managing Partner of Saul Ewing LLP's Wilmington office, with a practice divided between corporate and commercial litigation and the firm's Higher Education Practice Group, of which he is Co-chair.

Claire Snyder-Hall

recently completed two years as program director of the Delaware chapter of Common Cause, a nonpartisan 625,000-member grassroots organization dedicated to upholding the core values of American democracy. Before moving to Delaware, she was an associate professor at George Mason University, where she taught political theory and published widely on democratic theory and related topics. She has been active in the civic engagement world for almost 25 years. She is a *cum laude* graduate of Smith College and holds a Ph.D. from Rutgers University.

John Hardin Young

is a member of the bar in Virginia and District of Columbia and practices extensively in election law. He represents clients in electoral dispute resolution, electoral processes and recounts in federal and state litigation across the United States, as well as in other areas of administrative and regulatory law for the Washington firm of Sandler Reiff Lamb Rosenstein & Birkenstock, P.C., A resident of Rehoboth Beach, he received his J.D. from the University of Virginia and B.C.L. from Exeter College of Oxford University.

Richard A. Forsten

Make Delaware's Election Law and Process Even Better

Though relatively well-functioning, the State's election system is still in need of improvement on numerous fronts.

Author's Note: As I write this article, it is still more than two months before the General Election and I am told that this will not see print until after Election Day. Hopefully, by the time you read this, we will know who our next President, Governor and other elected officials will be, but you never know.

When I was approached about writing an article on election law for *Delaware Lawyer*, I asked if there was anything in particular that the magazine might want me to write about. I was told to "focus on some things you might like to see changed," and so that is what I've done.

Before focusing on things that I might change, though, I will observe that in my view our elections run pretty smoothly here in Delaware when compared to other parts of the country. We have no hanging chads and very few recount issues. We have modest lines at polling places, have avoided lawsuits to keep polls open, and have otherwise generally avoided uncertainty and challenges to the election process. We have, in short, avoided the extreme partisanship, rancor and controversy that often dog other states.

No system is perfect, though, and there is always room for improvement. Because space is limited, I have concentrated on three issues: (1) "open" primaries, (2) checker/challengers at polling places, and (3) the post-election process. I then conclude with some brief observations about other areas that we may want to look at further, including clearer residency definitions and campaign finance reforms.

You may or may not agree with all my suggestions – such is the nature of politics – but there is always room for discussion and self-examination; and all it will take is one exceptionally bad set of circumstances to expose potential flaws and problems that we have otherwise avoided so far here in Delaware.

"Open" Versus "Closed" Primaries

With the advent of the internet, 300 cable channels and a 24/7 news cycle, we live in an age of hyper-polarization between the major political parties. Both parties are more ideologically aligned and more extreme than they were 20 years ago, and certainly more than they were 30 and 40 years ago. The constant rancor between

the parties, fueled by a media which needs new stories for every news cycle, has, in turn, led to many citizens' dissatisfaction with the political process and a significant decrease in the number of voters who identify with either party.

As those "in the middle" drop out of the political parties, those left in the political parties have, in turn, tended to nominate more extreme, less moderate candidates. Of course, those involved in the process who view themselves as liberal or conservative probably see no problem with this, but "moderate" voters are becoming increasingly disenchanted with the choices they have.

Currently, Delaware's primaries are "closed," meaning that only registered Republicans can vote in a Republican primary and only registered Democrats can vote in a Democratic primary. While such a system may have worked fine back in the day, recent elections have seen more extreme candidates win their respective party's primaries, leaving those "in the middle" with two more extreme choices, rather than more moderate candidates acceptable to the broader electorate.

An "open" primary might yield more moderate candidates in both parties, who would be more acceptable to the electorate as a whole and better able to build consensus and govern if elected, thereby benefitting all citizens.

When mainstream voters are faced with two major candidates, neither of whom they particularly care for and both of whom are more extreme in one direction or the other than the electorate would like, it becomes too easy for the general public to become disillusioned with the political process and their government.

"Open" primaries should, in theory, help government because they should lead to a government more reflective of the population as a whole and a government better able to forge compromise, rather than a government made up of more extreme individuals who can't or won't compromise.

If the candidates for office are more moderate and less extreme, this should also benefit the legislative process. For example, ask yourself this: in a choice between two policies, where one has 51 percent support in the legislature and the other has 80 percent support, which policy is more likely to have broader support in the population as a whole?

An "open" primary might yield more moderate candidates in both parties, who would be more acceptable to the electorate as a whole and better able to build consensus and govern if elected.

While we ultimately live in a country where majority rules, there is also a thing called the tyranny of the majority, and I would submit that a policy choice supported by 80 percent is usually preferable to a choice supported by only 51 percent. Public preferences and positions evolve over time – rushing them through on a bare majority may only lead to resistance and backlash.

Now, some will say "too bad," and that "if independent voters don't like it, they should register for a party and get more involved." I would submit that such an answer is a bit too glib and, in the long term, not in the best interest of the electorate, particularly when, say, only 15 or 20 percent of the registered party voters turn out to vote in a primary.

In a multi-candidate field, less than 50 percent of those voting can decide the primary, and thus, if 20 percent of a party votes, and 30 percent of the vote is enough to win, then 6 percent of the party membership will have decided the candidate. That 6 percent may, in turn, represent only 2-3 percent of the total number of registered voters.

Imagine the two parties each going through a multi-candidate primary that leads to an extremely conservative candidate and an extremely liberal candidate. One of those two is going to win the general election – but, is such a victory truly representative of a majority of voters? The choice before the voters in such a general election may be clear, but it may also be the case that a majority prefers neither candidate and instead would prefer a more moderate candidate.

If candidate nominations are decided by a fraction of party members who are only, in turn, a fraction of the electorate, one wonders if the electorate is best served by "closed" primaries and whether the general electorate doesn't have a right to be disillusioned by the process.

Twenty years ago, and even 10 years ago, I would never have thought of "open" primaries as something I might support, let alone write in favor of. But the growing extremism in both parties has convinced me that the current system doesn't represent the will of the people as a whole. When a majority of voters would prefer to vote "none of the above" in a general election, something is wrong with the nominating process.

The Vital Role of Checker/Challengers

Election Day is a busy day. There are a lot of moving parts. One of the most important parts, I would submit, is that of "checker/challengers." The checker/challengers are not the Department of Elections poll workers who are in charge of each polling place; rather, checker/challengers are volunteers from each party who, by law, are allowed into the polling place and are entitled to observe the conduct of the election.

Checker/challengers derive their name from the two primary roles they perform: (1) they have their own list of voters and so they "check" to make sure that when someone comes into a polling place they are on the voting list (poll workers do that as well, but checker/challengers are a backup in that regard), and (2) they can "challenge" any person whom they feel is not eligible to vote, for example, on the basis that the potential voter is not who they claim to be, or that the potential voter is no longer eligible to vote (perhaps they moved shortly before the election), or that the potential voter simply isn't on the voter list.

If a potential voter is "challenged," then the two head poll workers (one from each party) at the polling place will rule on the challenge and either allow the potential voter to vote or not. In all my years of being a checker/challenger, I've only ever challenged three potential voters, two of whom left the polling place (because they were at the wrong place) and the other of whom was allowed to vote.

Checker/challengers play a vital role in the election process. They allow each party to monitor the conduct of the election, thereby increasing public confidence. They also play another important role on behalf of their parties – checker/challengers can, during the course of Election Day, provide their respective parties with lists of who has and has not voted, thereby allowing the parties to contact those who have not yet voted and help increase voter turnout.

I provide the foregoing background because, sadly, things have changed over the years. As a bright-eyed, bushy-tailed lad, when I first came back to Delaware from law school, and began volunteering as a checker/challenger on election day, there was a certain collaborative spirit in the air, and election workers and checker/challengers would all work together and cooperate.

As the years have gone by, however, and our politics have become more corrosive (blame what you like for that, although I chiefly blame two things – the Internet and the way the media now "reports" on politics in a much more partisan fashion), that spirit of collaboration no longer exists like it once did.

More and more, poll workers seem to regard checker/challengers as a nuisance or hindrance, at best. In some instances poll workers have required checker/challengers to sit in a location where it is difficult to see or hear what is going on, and they often will not speak clearly or loudly enough so that the checker/challengers are able to determine who it is that is about to vote and, possibly (although rarely), make a timely challenge.

My own sense is that things began to deteriorate beginning around the 2000 general election. During that election, reports from checker/challengers in the City of Wilmington included observations such as the following:

- "The elections staff erupts in applause and cheers for first-time Democrat voters (and invite[s] the voters to come back in two years) but not for the three or four first-time GOP voters."
- "Clerk suggests to a voter that she 'can just go down the line and vote Democratic' . . . the clerk also said, 'You can vote for as many Democrats as you like.'"
- "Loud music was played through the day which interfered with our ability to hear the names of the voters called out."
- A poll worker "is very hard to hear when calling out names. I ask her repeatedly to restate names, as does the Dem challenger . . . on one occasion when I do so a clerk . . . gets extremely upset at us, shouting incoherently that we've got 'attitudes' and [are] 'disrespecting' the inspector."
- "Non-voting people enter the polling place quite often, though I don't see anyone voting. However, the non-voting people continually chat with the elections officials."
- "When a man subsequently appeared confused about who was running and who he should vote for, the election official took him over to the wall where a sample ballot was posted, pointed to the Bush name, and indicated that if Bush were elected President, the man wouldn't get his voting rights back. The individual was then sent into the booth to vote."

As the years have gone by and our politics have become more corrosive, the spirit of collaboration no longer exists like it once did.

In 2004, the Republican Party emailed various Republican attorneys seeking checker/challengers to volunteer time on election day in the City of Wilmington. This email found its way to the Democratic Party, which promptly issued a press release claiming the Republican Party was trying to suppress the vote – yet it can hardly be said to be suppressing the vote when one is simply doing what is expressly provided for in state law, and the other political party is doing the exact same thing (i.e., using checker/challengers). Such rhetoric only serves to exacerbate an already deteriorating situation at the polls.

More recently, in several instances over the last few elections, poll workers have denied checker/challengers entrance to polling places – and only intervention from the Department of Elections led to the checker/challengers being admitted. As a result of the delay, many ballots were cast without checker/challengers present. Moreover, there continues to be sporadic reports from throughout the state of partisan behavior by election officials.

The foregoing stories are, fortunately, limited; but they are indicative of the larger problem. Of all things, polling places should be run on a strictly non-partisan basis. Checker/challengers help ensure that non-partisanship through monitoring and observing the process.

We need to return to a more cooperative spirit in the polling place itself. The candidates and the folks *outside* the polling place can engage in all the politics they want, but first and foremost, *inside* the polling place, the election process itself must be above reproach, and checker/challengers play an important role in that regard – we should respect that role rather than denigrate it.

The Department of Elections must do everything it can to educate its poll workers on this topic and to help restore the spirit of bipartisanship and collaboration that once existed. The parties, for their part, must also ensure that their checker/challengers are well trained and respectful of the poll works and the process.

The Post-Election Process Is Clear As Mud

Once Election Day is done, it's time to count the votes and determine who has

been elected by the voters. For the vast majority of elections, the races are over once the vote totals are announced; but, every now and then, there is an extremely close election. Extremely close. The candidate in second place will, of course, want a recount (the candidate in first place would obviously prefer no recount). What happens? Who does what?

Sadly, in this regard, the Delaware Election Laws are a jumble of different, contradictory and confusing concepts. One may bring an election "contest" in Superior Court for "malconduct" of election officers, or where there is alleged bribery, illegal votes or candidate ineligibility, 15 Del. C. §5941. For elections to the State House and Senate, contests are heard by the legislative body itself, 15 Del. C. §5901 – a widely-criticized concept and a process fraught with potential for abuse, given that the political party with the majority is most likely to rule in its own candidate's favor.[1] Notices of any such contest must be given at least 20 days "before the meeting of the General Assembly," *Id.*

In addition, election results in each county are "certified" by a Board of Canvass for each county, *Del. Const.*, Art. V, §6, and the Board of Canvass for each county consists of two Superior Court judges – usually one Democrat and one Republican, although that is not constitutionally required. The Board of Canvass has the authority to order a recount of the votes, 15 *Del. C.* §5702(b), but no statutory review or appeal process is provided for alleged errors the Board of Canvass might make.

Indeed, in 1942, the Delaware Supreme Court held that there is no right of appeal from the Board of Canvass; although, in the same case, Court did hold that it may issue a writ of mandamus to the Board.[2] Later, in 2015, the Court recognized that it may also review a Board of Canvass decision under the limited review available by writ of certiorari.[3] The Supreme Court has also held that the Board of Canvass has no authority to review allegedly illegal actions by poll workers, but such actions may be considered by the Superior Court in an election contest under Title 15, Chapter 59.[4]

So, in a very close state senate race, where it appears that polling workers allowed ineligible voters to vote and counted absentee ballots they should not have counted, and the Board of Canvass refuses to conduct a recount (or allegedly makes mistakes in the recount), what should the losing candidate do? What should the winning candidate do? Suppose the General Assembly calls a special session less than 20 days after the election?

Confused? Arguably one could or should proceed under all three alternatives (that is, seek a writ from the Supreme Court for the Board's alleged wrongful actions, file an action in Superior Court regarding the election workers' alleged wrongful actions, and notify the State Senate of the challenge to the results) or otherwise risk being in the wrong place at the wrong time.

In the compressed timeframes and high-pressure atmosphere of a closely-contested election, with the election results hanging in the balance, surely a clearer, more logical process can be put in place.

In sum, Delaware's post-election laws are not clear. Moreover, they are antiquated. The constitutional provisions regarding the composition of the Board of Canvass were adopted in 1897 as part of the then-new state Constitution. The contest election provisions of Title 15, Section 5941 were first adopted in 1883. The language regarding the General Assembly hearing contests for it members appears in the Delaware Code of 1852.

It is time to set forth one streamlined process that is clear so that all concerned can know with certainty the process to be followed.

There's Always More to Be Done

The foregoing thoughts and suggestions are just three areas where I believe Delaware's Election Laws can and should be improved. Some involve policy questions (open versus closed primaries), some don't necessarily require legislative action (conduct at polling places), but some do call for legislative action (post-election procedures and process).

> Above all, we want a system that produces winning candidates that are as reflective of the general electorate as possible.

There are still many more areas where clarity and revision ought to be considered, including: (1) better definitions and tests for what constitutes "residency," which is a very murky and ambiguous concept; (2) clarifying certain aspects of candidate filing requirements (what is mandatory and strictly required versus what is only "directory" and may be forgiven); (3) revising certain aspects of campaign finance requirements (which could be the basis for an entirely separate article); (4) moving the date of the primary to earlier than the second Tuesday in September (I suggest something in April or May); and (5) resolving whether political ads and mailings may be done anonymously or not.[5]

While there are improvements and changes that ought to be made, the good news is that we in Delaware have a relatively well-functioning election system. We have avoided many of the issues that have confounded other states, and, by and large, our system is much less partisan than elsewhere.

Having said that, we cannot and should not be complacent. There is always room to do better and make improvements. No matter one's political persuasion, we are all united in the desire for as robust and non-partisan an election system as possible.

Above all, we want to know that when the votes are counted, we have correctly identified the winning candidates free from suspicion of illegality, and, perhaps more importantly, we want a system that produces winning candidates that are as reflective of the general electorate as possible.

My musings above are entirely my own, but I hope they lead to further discussion, debate and, ideally, modifications and changes – I invite you all to take part in such debates because our electoral system, like our government generally, is only as strong and as good as the time and effort we invest in it. ◆

NOTES

1. For a further description and discussion of this process generally, see "Ballot Battles, The History of Disputed Elections in the United States," by Edward B. Foley (Oxford Univ. Press, 2016).

2. See *State ex re. Walker v. Harrington*, 27 A.2d 67, 75 (Del. 1942) ("acts of the Superior Court, sitting as a Board of Canvass, are not subject to review by the Supreme Court on appeal or by writ of error . . . [a] writ of mandamus will issue, however, 'where there is a clear and specific legal right to be enforced, or a duty which ought to be and can be performed, and where there is no other specific and adequate legal remedy.'") (citations omitted).

3. See *Gunn v. McKenna*, 116 A.2d 419, 426 (Del. 2015); later, in I/M of Gunn, 122 A.2d 1292 (Del. 2015), the Court denied Gunn's subsequent petition for a writ of certiorari as untimely – although there is no statute of limitations applicable to petitions for writs of certiorari, Delaware Courts traditionally apply a 30-day period and will only allow petitions filed after 30 days under exceptional circumstances.

4. See *State ex re. Mitchell v. Wolcott*, 83 A.2d 762, 766-67 (Del. 1951).

5. In a 1995 U.S. Supreme Court decision, *McIntyre v. Ohio*, 514 U.S. 334 (1995), the Court upheld the right to engage in anonymous political speech and held that an Ohio statute forbidding the distribution of anonymous political pamphlets violated the First Amendment. Later that year, the Delaware Attorney General opined that the "paid for" identification required by the Delaware Code was therefore likely unconstitutional. See 1995 WL 794524. For years thereafter the Department of Elections website contained a disclaimer that the "paid for by" requirement of Delaware law was likely unconstitutional and would not be enforced. In 2000, an anonymous group sought a declaratory judgment from the Court of Chancery that the disclosure language was, indeed, unconstitutional, but the Court found no justiciable controversy and refused to consider the matter based on the Attorney General's 1995 opinion regarding McIntyre, as well as a subsequent 1999 Delaware Attorney General opinion confirming the validity of the earlier 1995 opinion. See *Anonymous v. State*, 2000 WL 739252 (Del.Ch.). At some point in the past few years, though, the unenforceability language on the website was removed and the Department now takes the view the identification requirement is enforceable. In 2015, the Delaware Attorney changed course and opined that the disclaimer language was likely constitutional and would apply to any political communication involving someone running for public office. 2015 WL 5442372. At this point, then, there is still an unanswered question of whether one may engage in anonymous political speech or not in Delaware. One wonders what Publius would think.

John Hardin Young

Campaign Finance Disclosure and the First Amendment

Legislators and the courts search for balance between regulation, transparency and free speech.

Campaigns for political office are expensive. Money is raised and donated from an array of sources and spent in a variety of ways to influence elections. While some money is given directly to candidates' campaigns, a significant amount is also spent independently from candidates' campaigns while still seeking to influence voters to vote for a particular candidate or issue.

Campaign financial regulation and disclosure are at the intricate intersection of politics and the First Amendment. Enacted largely after the Watergate scandals in the 1972 election, regulation and disclosure laws are intended to prevent corruption of the political process and encourage political accountability.

Their proponents assert that disclosure of who is making large donations – within limits set by Congress and state legislatures (and upheld by the courts) – prevents the "buying" of offices or political favors. Supporters also argue that disclosure allows voters to know who contributors are supporting, both before the election, when the voters are in the position to decide, and after the election, when the candidate is in a position to "reward" contributors.

While some consider campaign finance disclosure laws to be necessary, particularly as the amount of money in politics continues to rise, others have questioned the necessity of the disclosure laws and at times, even their constitutionality under the First Amendment.

In its landmark 1976 case, *Buckley v. Valeo*,[1] the U.S. Supreme Court struck down limitations on expenditures, while upholding limitations on contributions as not impinging on free speech. The Court also upheld disclosure requirements for both expenditures and contributions, stating, "exposing large contributions and expenditures to the light of publicity" could "discourage those who would use money for improper purposes either before or after the election."[2]

The Court recognized that regulation would burden certain rights – an issue which runs throughout the campaign First Amendment cases – but that the government had a substantial interest in disclosure, declaring, "[D]isclosure requirements certainly in most applications appear to be the least restrictive

means of curbing the evils of campaign ignorance and corruption that Congress found to exist."[3]

The Bipartisan Campaign Reform Act of 2002 ("BCRA" or the "McCain-Feingold Act"),[4] in attempting to address "soft money" (corporate and labor general treasury funds) also required soft money to be disclosed to the Federal Election Commission and for the FEC to put all campaign finance reports online for access by various stakeholders such as the public, advocacy groups, press and researchers.

BCRA also created a new form of campaign spending called "electioneering communications," which includes broadcast, cable and satellite communications that are made within 60 days before a general election and 30 days before a primary and reference a clearly identified federal candidate.[5] Under BCRA, corporations were prohibited from making "electioneering communications," and entities engaging in "electioneering communications"[6] had to identify their communications – to "stand by their ads" – and disclose their donors. Also, however, an entity was given the option of either creating a segregated bank account for the expenditures, or reporting all donors who gave $1,000 or more in the calendar year.[7]

BCRA was upheld by the Supreme Court in *McConnell v. FEC*.[8] The Court specifically upheld the disclosure and "electioneering" requirements. The "electioneering communications" rule, however, became severely limited in the 2007 Supreme Court decision, *FEC v. Wisconsin Right to Life*,[9] when the Court found that corporations and labor unions could engage in "electioneering communications" as long as they were not the "functional equivalent of express advocacy" (such as communications urging the "election" or "defeat" of a clearly identified candidate).

In *Citizens United v. FEC*[10] in 2010, the Supreme Court unleashed corporations and unions from previous prohibitions on their use of general treasury funds to make independent expenditures. Nonetheless, the Court again upheld BCRA's disclosure and disclaimer requirements, saying:

> The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.[11]

"The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way."

An important underpinning of *Citizens United* was the impact of effective disclosure of independent expenditures. Due to internal political gridlock, the Federal Election Commission, charged with creating the disclosure rules, has been unable to effectively promulgate compensative rules.

Two years later, the Court applied *Citizens United* to hold unconstitutional a century-old Montana law prohibiting corporate contributions to political parties and candidates in *American Tradition Partnership v. Bullock*.[12]

In 2014, the Supreme Court, in *McCutcheon v. FEC*,[13] further expanded the range of campaign spending by striking down the aggregate contribution limits whereby an individual was limited by not only the total amount permitted for an individual candidate, but also by the total amount that could be given to all candidates. In *McCutcheon*, the Court found no permissible justification for the aggregate limit under the First Amendment.

The Court once again reaffirmed its belief that disclosure "minimizes the potential for abuse of the campaign finance system."[14] The Court also found that modern technology and the Internet were particularly transparent means of communicating political information, including campaign finance reports and information.

Delaware Strong Families and the Continued Need for Disclosure

Delaware Strong Families (DSF) is a non-profit entity that received tax-exempt recognition under § 501(c) (3) of the Internal Revenue Code and, as such, is not permitted to engage in partisan "political campaigns on behalf of or in opposition to any candidate for public office."[15] In 2012, DSF circulated voter guides in Delaware that listed all federal and state candidates with their positions on several issues of importance to DSF (such as defining marriage as the union of one man and women and prohibiting abortion coverage in the state health exchange under the federal health care law). DSF did not disclose its donors.

In 2012 legislation, Delaware revised its Election Disclosure Act (the "Act") to require anyone who makes independent expenditures or an electioneering communications exceeding $500 during an election period to file a report with the State Election Commissioner."[16] The Act applies to communications relating to a clearly identified candidate and distributed within 30 days before a primary and 60 days before a general election.[17]

This definition of "electioneering communication" is very similar to the definition upheld under BCRA in *McConnell v. FEC*. An entity engaged in "electioneering communications" is required to file a third-party advertising report with the name and address of each person who contributed in excess of $100 during the election period.[18] As a result, disclosure is not limited to those individuals who contributed ("earmarked") to funding DSF's voter guides but to all donors.

The U. S. District Court for Delaware, in Delaware *Strong Families v. Biden*, found the Act unconstitutionally broad in 2015. Judge Sue L. Robinson granted a preliminary injunction against the en-

forcement of the Act because it reached "neutral communications" by "neutral communicators."[19] The District Court relied on DSF's status as a § 501(c)(3) organization to determine that it was a "neutral communicator."[20] DSF also asserted that disclosure of its donors would expose them to intimidation and harassment in violation of their rights to protected First Amendment speech.

The Court of Appeals for the Third Circuit reversed the district court. The appellate court found that the concept of a "neutral communicator" in this situation "finds no support in the case law."[21] The Court concluded that it is the conduct of the organization, not its status that triggers the Act's reporting requirements. In making this finding, the appellate court relied on the Supreme Court's precedent under similar BCRA sections to find that the Delaware Act survives constitutional scrutiny. The Court said:

> By selecting issues on which to focus, a voter guide that mentions candidates by name and is distributed close to an election is, at a minimum issue advocacy. Thus, the disclosure requirements can properly apply to DSF's Voter Guide, which falls under the Act's definition of "electioneering communication" by, among other things, mentioning candidates by name close to an election. . . As long as the Act survives exacting scrutiny, disclosure of DSF donors is constitutionally permissible.[22]

"Exacting scrutiny" requires a substantial relationship between the needs for disclosure and a "sufficiently important "governmental interest."[23] Exacting scrutiny does not ask for a "least-restrictive alternative analysis," which is left to the more demanding "strict scrutiny," and applied to content-based restrictions.[24]

In the case of "electioneering communications," courts have found a sufficiently important government interest to be enough to uphold disclosure laws. As stated in the first modern disclosure case, *Buckley*: "[D]isclosure provides the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office."[25] This rationale has been endorsed by each subsequent Supreme Court case involving disclosure, including Citizens United.

"First Amendment rights are all too often sacrificed for the sake of transparency in the federal and state elections. 'Sunlight,' this Court has noted, is 'the best of disinfectants' in election."

The appellate court also found that the low monetary threshold in the Act was "rationally related" to a Delaware state interest. As a political note, the appellate court also observed that Delaware is a small state in which campaigns rely heavily on direct mail and inexpensive robo-calling. The court further found that the type of media covered by the Act was justified. Like BCRA on the federal level, Delaware's electioneering communications rule covered "any broadcast, cable, or satellite communication." It did not cover news stories, commentary, or editorials unless the facility distributing it was controlled by a political party, committee or candidate.[26]

The Act, however, went further than BCRA by including "television, radio, newspaper or other periodical, sign, Internet, mail or telephone"; however, the Act excluded membership communication and news-related communications as long as they are not distributed by a party, candidate or political committee."[27]

In addition to arguing that the Act was unconstitutional as applied to it, DSF asserted that disclosure under the Act should be limited to those individuals who "earmarked" their contributions for publication and distribution of the voter guide (that is limited to funding to its "electioneering communications"). The Court explained that an earmarking rule had been promulgated by the FEC, only to be later vacated. The Court declared that nothing in the most recent Supreme Court case, *Citizens United*, relied on earmarking as a requirement to upholding BCRA's disclosure rules.

DSF sought a writ of certiorari to the Supreme Court. On June 28, 2016, the Supreme Court denied the writ. Justices Alito and Thomas would have granted the writ. In his dissent to the denial of the writ of certiorari, Justice Thomas said:

> First Amendment rights are all too often sacrificed for the sake of transparency in the federal and state elections. 'Sunlight,' this Court has noted is 'the best of disinfectants' in election. But that is not so when 'sunlight' chills speech by exposing anonymous donors to harassment and threats of reprisals.[28]

Justice Thomas has a long history of raising a concern for the welfare of anonymous donors and appears to believe in a stronger role for the Court's "exacting scrutiny" standard than did the Court of Appeals in this case, or for that matter the Supreme Court itself. Justice Thomas would apply "exacting scrutiny" to find that the voter guides are neutral and thus not within a permissible ambit of regulation. By not applying it to strike the Act, Justice Thomas finds that "exacting scrutiny means no scrutiny at all."[29]

Campaign finance regulation has become a major feature of American politics. Along with attempts to control money in politics have come requirements for greater disclosure of campaign donors and campaign-related expenses. While courts have struck down limits on campaign funding, notably permitting certain actions such as corporate and labor unions to continue to make independent expenditures, courts have found a sufficiently important governmental interest to uphold disclosure laws.

The harassment and threats of reprisal, feared by Justice Thomas, do not appear on the record of recent campaign cases challenging disclosure. It is clear that when *NAACP v. Alabama*

ex. rel Patterson[30] was decided in 1958, disclosure of member lists could lead to violence. If these types of threats exist today they must be made part of the record upon which to judge the statute as applied. There does not appear to be a record of threats related to DSF's distribution of its voter guides.

In the analysis of whether disclosure laws should be upheld, the difficult task is reconciling the entity's status as an organization under §501(c)(3) with the requirements of the campaign laws, which require disclosure when an "electioneering communication" is made. The IRS prohibits all § 501(c)(3) organizations "from directly or indirectly participating in, or intervening in, any political campaign on behalf of (or in opposition to) any candidate for elective public office."[31]

Violations may result in loss of the entity's tax-exempt status and the correspondent ability of donors to take a tax deduction. Certain activities will not trigger the IRS prohibition. For example, the rule is not violated by the issuance of non-partisan voter education guides, voter registration or get-out the vote drives.

Activities which would violate the IRS rule include "voter registration activities with evidence of bias that (a) would favor one candidate over another; (b) oppose a candidate in some manner; or (c) have the effect of favoring a candidate or group of candidates. . . ."[32]

The net effect is that an organization must be careful in drafting neutral questions if it is to publish a voter guide. The questions must also be broad enough to cover the major issues of interest to the electorate and not so bias as to portray a particular outcome.

Reporting requirements under the Act are triggered by a communication close to the election referring to a "clearly identified candidate." The Court of Appeals upheld the Act based on its regulation of an organization's "conduct," as opposed to whether a 501(c)(3) organization's status prohibited it from participating in a political campaign. By doing so, the court opened the door for entities' complete donor lists being subject to disclosure.

The tax laws and the electioneering communication statute in this area intersect in a murky area of politics and tax policy. Under tax laws, once an entity decides to enter the partisan political arena it loses its ability to use tax-deductible contributions for political messaging. Under the Third Circuit's decision, once a 501(c)(3) entity engages in electioneering communications, it is subject to campaign finance disclosure rules even in light of free speech and tax exempt objections.

Under tax laws, once an entity decides to enter the partisan political arena it loses its ability to use tax-deductible contributions for political messaging.

A middle position would be to require that a tax-exempt entity engaged in electioneering communications place the funds collected and used in accounts segregated from the tax-deductible funds, and only the donors who earmark funds for the electioneering communication (i.e., the voter guides) be reported on the appropriate disclosure form.

Justice Kennedy has observed that the disclosure envisioned in *Citizens United* has not occurred.[33] Trust in politics and political institutions are at an all-time low. The post-Watergate hope was that campaign finance and disclosure would instill new trust in the political process and institutions. Nothing has appeared further from that goal. The FEC, charged with administering the nation's campaign finance and disclosure laws, is in political gridlock. Congress is in no better of a position. Tax policy is inconsistent. General campaign finance and disclosure reform is not on the horizon. ◆

NOTES

1. 424 U.S. 1 (1976).
2. *Id.* at 67.
3. *Id.*at 68.
4. Pub.L. No. 107-155, 116 Stat. 81 (2002) codified in 52 U.S.C. §§ 30101-30146 (BCRA).
5. BCRA § 201, 52 U.S.C. § 301014(f)(3)(A).
6. 52 U.S.C. §30118(b)(2) (formerly 2 U.S.C. § 441b(b)(2)).
7. BCRA § 201, 52 U.S.C. § 301014(f)(2)(E), (F).
8. 540 U.S. 93, 155, 231. (2003), *overruled in part by* Citizens United v. FEC, 558 U.S. 310 (2010).
9. 551 U.S. 449 (2007).
10. 558 U.S. 310 (2010).
11. *Id.* at 370-71.
12. 132 S. Ct. 2490 , 183 L. Ed. 2d 448 (2012).
13. *McCutcheon v. FEC*, 134 S.Ct. 1434 (2014).
14. *Id.* at 1459-60.
15. 26 C.F.R. §1.501(3)-1(b)(3)(ii).
16. 15 Del. C. § 8031(a).
17. *See* 15 Del. C. §§ 8031(d), 8002(10).
18. *See* 15 Del. C. §§ 8031.
19. *Delaware Strong Families v. Biden*, 34 F. Supp. 3d 381, 395 (D. Del. 2014), *rev'd sub nom. Delaware Strong Families v. Attorney Gen. of Delaware*, 793 F.3d 304 (3d Cir. 2015), *cert. denied sub nom. Delaware Strong Families v. Denn*, 136 S. Ct. 2376 (2016).
20. *Del. Strong Families*, 34 F. Supp. 3d at 395.
21. *Delaware Strong Families v. Attorney Gen. of Delaware*, 793 F.3d 304, 308 (3d Cir. 2015), cert. denied sub nom. *Delaware Strong Families v. Denn*, 136 S. Ct. 2376 (2016).
22. 793 F.3d 304, 309 (3d Cir. 2015) (citations omitted).
23. *Citizens United*, 558 U.S. at 366-67, quoting *Buckley*, 424 U.S. at 66.
24. *Delaware Strong Families*, 793 F.3d at n.4.
25. *Buckley*, 424 U.S. at 66-67.
26. 52 U.S.C. § 30104(f)(3)(A)(i).
27. 15 Del. C. §§ 8002(7), (10)(b)(2-4)
28. *Delaware Strong Families v. Denn*, 136 S. Ct. 2376 (2016) (Thomas, J. dissent).
29. *Id.*
30. 357 U.S. 449, 462-63 (1958).
31. IRS "The Restriction of Political Campaign Intervention by Section 501(c) (3) Tax-Exempt Organizations" https://www.irs.gov/charities-non-profits/charitable-organizations/the-restriction-of-political-campaign-intervention-by-section-501-c-3-tax-exempt-organizations.
32. *Id.*
33. Marcia Coyle, *Justice Anthony Kennedy Loathes the Term 'Swing Vote'* The Nat'l L. J., Oct. 27, 2015.

Claire Snyder-Hall

How Partisan Gerrymandering Kills Democracy

Both parties draw district lines to protect and enhance their political power at the expense of voters.

Americans faced many important choices this November, but here in Delaware and in much of the country, partisan officeholders have conspired to limit our options by drawing congressional and legislative districts designed to stifle political competition.

Only one major party candidate was on the ballot in 56 percent of our General Assembly races, largely thanks to partisan gerrymandering. Delaware, like other states in which legislators draw districts, has fewer competitive elections than those in which an independent commission draws the lines.[1] Because the Delaware Code gives the legislature, rather than an impartial body such as a citizens' commission or a panel of judges, authority to adjust district lines, we have a perverse situation in which elected officials choose their voters rather than voters choosing their representatives.

Partisan gerrymandering is a bipartisan affliction. In Delaware, the Democrats are currently the culprits; in 2011 they used their majority in Dover to fashion districts that herd Republican voters into relatively few districts, minimize competition and protect incumbents. Republicans have pulled the same maneuver to solidify their control and marginalize the opposition in states where they've gained a majority in the legislature.

Author David Daley has documented how a Republican party project called Redmap "poured money into an unprecedented effort to control governorships and state legislative bodies in 2010 and to then redraw congressional districts so that the party could turn the House into a firewall against the Democrats."[2] As a result of this Republican dominance of the reapportionment process, the GOP maintained control of the U.S. House, even as the Democrats won the Presidency – and more votes were cast in 2012 for Democratic House candidates.[3]

As it decreases political competition, partisan gerrymandering can also short-circuit majority rule. For example, polls indicate that roughly four out of every five Americans want to overturn the Supreme Court's *Citizens United* decision[4] and nearly three out of four believe the minimum wage should be raised to at least $10 an hour.[5] Congress has failed to act on those and other popular proposals; a majority of House members feel little pressure because their districts have been carefully

drawn to insulate them from their constituents.

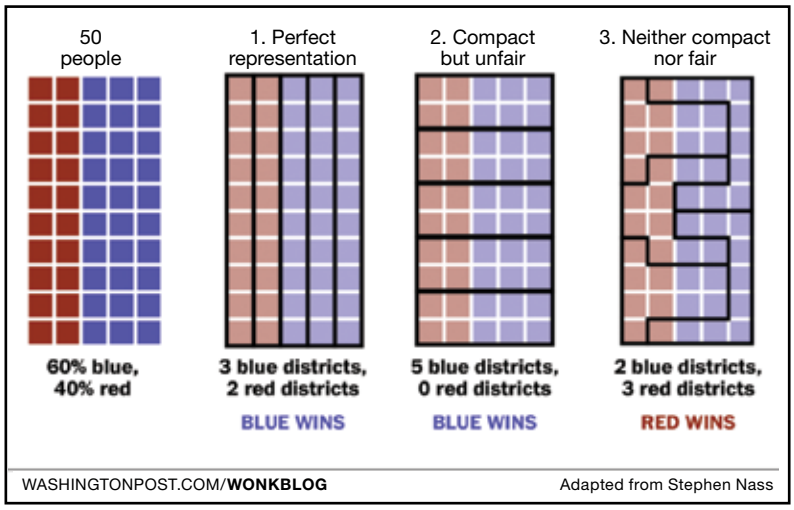
Such schemes upset our system of checks and balances, and citizen groups all over the country are taking action to rebalance the scales. Common Cause has filed a federal lawsuit that directly challenges the foundation of partisan gerrymandering, beginning with the state of North Carolina.

Common Cause v. Rucho could be a watershed moment in the fight against gerrymandering.[6] While judges have weighed in on racial gerrymandering and set constraints for such factors as equal population in drawing voting maps, the courts have largely avoided determining if partisan gerrymandering is legal.

The lawsuit filed by Common Cause seeks to resolve that lingering question, arguing that manipulation of voting maps for partisan gain is unconstitutional, a clear violation of the First Amendment, the Equal Protection Clause of the 14th Amendment and Article I, sections 2 and 4. This case matters to Delaware because federal law mandates that any appeal of redistricting cases goes directly to the U.S. Supreme Court, which could set nationwide precedent.

Leaders in the North Carolina General Assembly, which was ordered to redraw the state's congressional map following a ruling that the previous map they drew was an illegal racial gerrymander, admitted to drawing new districts to maintain a 10-3 Republican advantage. The Common Cause lawsuit argues that the North Carolina General Assembly violated citizens' First Amendment rights by favoring some voters based on their political preferences and by failing to govern impartially when drawing districts.

Common Cause also argues that the General Assembly violated the 14th Amendment Equal Protection Clause by making it more difficult for Democratic voters to elect the candidate of their choice, which cannot survive the strict scrutiny that should be applied to it. The complaint adds that the North Carolina General Assembly basically selected Members of Congress in violation of Article I, section 2 of the Constitution, which allows only the "people of the several states" to do so.



Finally, it argues that the General Assembly overstepped its power under Article I, section 4 of the Constitution, which limits the state's power to drafting procedural rules that establish the "Times, Places and Manner" of U.S. House elections. The trial has not yet started.

In Delaware, we don't have to worry about Congressional gerrymandering because we only have one U.S. House seat and U.S. senators always represent the entire state. We do, however, need to consider the redistricting process as it affects the General Assembly.

Currently, the Delaware Code empowers the General Assembly to redraw state representative and senatorial district lines every 10 years, after the Census,[7] with only a few guidelines:

> In determining the boundaries of the several representative and senatorial districts within the State, the General Assembly shall use the following criteria. Each district shall, insofar as is possible:
> (1) Be formed of contiguous territory;
> (2) Be nearly equal in population;
> (3) Be bounded by major roads, streams or other natural boundaries; and
> (4) Not be created so as to unduly favor any person or political party.

In 2011 then-Majority Leader Pete Schwartzkopf led redistricting efforts. While the fourth criterion prohibits the use of redistricting to advance party interests or protect incumbents, Delaware Republicans say the Democrats did exactly that during the 2011 redistricting.

"In the State House of Representatives, Republicans hold only 15 of 41 seats, or less than 37 percent of the total," state GOP Chairman John Sigler observed. "But of the six incumbents with current home locations that would place them into a proposed representative district with another incumbent, four, or 67 percent, are Republicans. Additionally, all four Republican incumbents were drawn into districts with another Republican."

Sigler argued that the maps were crafted to eliminate strong 2010 Republican House challengers,[8] adding, "Nowhere in this plan will incumbents of different parties face one another. If fairness and equality are the aim of this process, then this process has failed."[9]

Political commentator Celia Cohen discerned political payback in the drawing of district lines:

> From the legislator's perspective, redistricting is the art of self-preservation. It is like cannibals deciding who among them should be eaten. This mostly explains the reason the line-drawing has always happened behind closed doors. It is not pretty when the cutlery comes out. By the time the new maps are made public, the legislators are disinclined to make many changes. What the voters see is what they get…. [Sen. Anthony J.] DeLuca … was running the Senate during the 2011 redistricting. Although he was all innocence, it somehow turned out that the senators whose new districts placed them in peril for reelection seemed to be the same senators who did not vote for him for pro tem.[10]

In addition to criticizing partisan power, Cohen observed that in a democratic society, governmental decisions should reflect the will of the people, so the public needs to have an opportunity to influence the redistricting process in a meaningful way. While Rep. Schwartzkopf said the 2011 process would allow time for public comment, everyday citizens reportedly had a hard time accessing necessary information

and were allowed a scant hour to testify, while legislators remained free to ignore public input.[11]

Finally, the redistricting process in 2011 also allowed for "prison gerrymandering" – a procedure that counts prisoners as residents of the district in which the prison resides, rather than continuing to consider them members of the communities where they lived prior to prison. Consequently, districts with prisons end up getting more representation – and thus more power – than they otherwise would. This practice has recently been ruled unconstitutional in federal cases in Florida and Rhode Island.

The decision to engage in prison gerrymandering directly ignored a statute, 29 Del. C. § 804A, passed by the General Assembly in 2010. Or, to be more specific, Rep. Schwartzkopf argued that following the new law would take too much time and would cost $70,000, so he sponsored legislation, 78 Del. Laws, c. 24 that postponed the effective date of the prohibition against prison gerrymandering.

> Allowing incumbent politicians in the majority party to draw electoral lines creates the appearance of impropriety, and the appearance of impropriety by elected officials erodes public trust.

Needless to say, Democratic leaders deny using redistricting to help their party, which would ostensibly violate the Delaware Code and Constitution. However, whatever the reality – we cannot know what went on behind closed doors – allowing incumbent politicians in the majority party to draw electoral lines creates the appearance of impropriety. And the appearance of impropriety by elected officials erodes public trust.

To get the First State on the right track, in 2013 Senate President Pro Tempore Patricia Blevins introduced S.B. 48 that would make the redistricting process more independent and democratic. Her plan would delegate redistricting authority to an 11-person commission, appointed by leadership in both parties, and while the majority party would have more members, decisions would require bipartisan support. The bill would prohibit sitting legislators, registered lobbyists (working within a year), and people who served in elective office within two years from membership on the commission. S.B. 48 also would establish

See **Gerrymandering** *continued on page 26*

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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.*

want you to help me keep him quiet."

It turned out that Pete had made recent remarks on one of his favorite subjects – judicial activism. Justice Quillen admonished that respect for our courts is a delicate asset, critical to the success of our judicial system, and it didn't help things if respected political leaders kept fanning political flames about judicial activism – whether it was fair comment or not.

Well, there is another side to that debate and I, not about to referee a difference of opinion among Titans, arranged for a discussion between the two. Neither persuaded the other, but their great friendship continued (is this a great State or what?). I last saw the two together at a hockey game not too long before Justice Quillen passed away. Pete and Delaware lost a good friend.

I tell that last anecdote because it represents to me one of Pete's most fetching – and important – character traits. As Governor, he had the wonderful ability to confront firmly those with whom he disagreed, but with humor and the offer of friendship. More often than not, resolution was found. A leader of the Legislature's Loyal Opposition once said to me, "I don't care where he is standing, but I want to be next to him. It's safe there." All of Delaware found that to be true.

Pete has retired from practice and now has complete freedom to hold onto his Bar Association dues. ◆

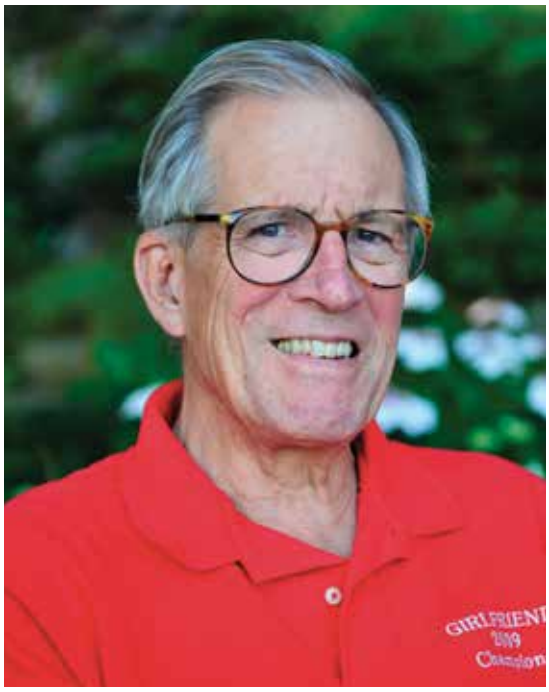
Top: *Pete du Pont in the late 1960s with sons Eleuthère and Ben.*
Center: *The former governor marks a recent birthday.*
Bottom: *On the trail with granddaughter Janie.*

Photos courtesy of the du Pont family.

William E. Manning

OF COUNSEL: Pete du Pont, the Lawyer

To be honest, Pete du Pont was not supposed to be a lawyer. With an engineering degree from Princeton, Pete was headed for the family business, where he was expected to do great things. All was right with the world.



But, as we have come gratefully to realize, Pete was different. Family lore has it that Big Pete (Pierre Samuel III) was not pleased when Pete declared he would attend law school. His choice of school – Harvard (OMG!) – didn't help.

Nevertheless, young du Ponts are expected to chart their own course and off to Harvard he went. After his degree, Pete served in the Naval Reserve as a Seabee, keeping a lonely airfield in Maine free of snow and ice while our nation slept peacefully.

Pete's first client? The family business, where he served in the law department for seven years while the itch for public service grew. Never experiencing defeat, Pete served in the State legislature (1968-1970), in Congress (1970-1976) and as Governor (1976-1984). We won't talk about the 1988 Presidential bid, because… well…I don't want to. Huge loss for the nation.

For many of us, our contributions to the law are limited to our efforts on behalf of clients, Bar committees and occasional *pro bono* work. Lawyer Pete, on the other hand, had the opportunity to write a little larger. One of his first initiatives as Governor was to change the rather clubby way in which our judges were chosen.

As if awaiting the blessing of the Elders, Pete's predecessors had relied heavily on the review of judicial candidates by the Bar Association's Committee on Judicial Appointments. Bothered that it had no lay members and was not accountable to any elected official, Pete created the Judicial Nominating Commission and appointed its first members. The JNC's first chair was Pete's lifelong friend and a legendary lawyer, Ned Carpenter.

In watching the early work of the JNC, it became clear to me that Pete intended to broaden the field of candidates by gender, race and religion. That he did. I am pleased that Pete's successors have continued its use and the JNC is now part of our landscape.

Pete's reliance on the JNC chafed a bit with leaders of our profession. I remember sitting in uncomfortably while the Bar Association's Committee would visit Pete to announce its recommendations. Ever the gentleman, Pete patiently listened, thanked his guests and then made clear, without exactly saying so, that the Committee's advice was irrelevant. Our guests had to take it from him; after all, he was Governor, by golly. I wasn't too sure, though, about me.

My other recollections of Pete's take on the legal profession, gained while serving as his legal counsel and then chief of staff, range from the trivial to the important. For example, I recall his annual grousing when it came time to renew his Bar Association membership. "Manning, why should I do this? The dues are too high!" "Governor, please just do it. You get me in enough hot water as it is."

Speaking of hot water, I will never forget the morning Bill Quillen – one of Delaware's most revered jurists and a wonderful man who left us too soon – dropped in unannounced (his Supreme Court office was only one floor below). Mind you, I was all of 34 and felt like a batboy chatting with Babe Ruth. Nervously, I inquired how I might be of service and His Honor's response was, as always, pointed: "I

See **Of Counsel: Pete du Pont** *continued on page 27*

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