



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #7

REQUESTED ACTION: Approval of the report and recommendations of the Committee on Federal Legislative Priorities with respect to the Voting Rights Amendment Act of 2014.

Attached is a report from the Committee on Federal Legislative Priorities recommending Association support for the Voting Rights Amendment Act of 2014. The report sets forth a history of the Voting Rights Act of 1965 and its impact on minority participation in the voting process. The report then analyzes the U.S. Supreme Court's decision in *Shelby County v. Holder*, which held that Section 4 of the Voting Rights Act (setting forth the criteria by which jurisdictions are subject to preclearance) was unconstitutional. Following the Supreme Court's decision, voting advocacy groups urged Congress to address the concerns raised by the Court in finding Section 4 to be unconstitutional. The report observes that it is uncertain whether the Voting Rights Act as currently formulated can continue to protect minority voter participation.

In January 2014, the Voting Rights Amendment Act of 2014 was introduced in Congress. The bill would amend the coverage formula for preclearance, confer jurisdiction on the courts to bail-in states and political subdivisions based on voting practices with discriminatory impact, create new notice and disclosure requirements with respect to voting rights matters, and address other concerns raised by the Court. The report concludes that the bill is necessary to preserve the protection of minority voting rights.

In January 2013, the House approved the report and recommendations of the Special Committee on Voter Participation; increased voter participation is a legislative priority of the Association at both the state and federal levels.

The report will be presented by John P. Nonna, chair of the Committee on Federal Legislative Priorities.

Report and Recommendations regarding the Voting Rights Amendment Act of 2014

Committee on Federal Legislative Priorities

This report will set forth a brief history and explanation of the Voting Rights Act of 1965 (the “VRA”) and provide a detailed analysis of the Voting Rights Amendment Act of 2014 (the “Bill”) currently under consideration in Congress. Section I provides an analysis of the VRA and the various amendments thereto and briefly addresses the impact of the VRA on minority participation in the voting process. Section 2 sets forth an analysis of *Shelby County v. Holder*¹ and its progeny. Section III provides an analysis of the Bill and the changes it would implement to remedy the concerns identified by the Supreme Court in *Shelby County*. Finally, section IV discusses the political considerations which will affect passage of the proposed Bill and provides a brief conclusion.

I. The Voting Rights Act of 1965

In 1965 President Lyndon Johnson signed the VRA into law. This act sought to eliminate discriminatory election procedures in certain states and prevent the adoption of legislation that would serve to further disenfranchise minorities. Section 2 of the VRA prohibits discriminatory voting procedures enacted on the basis of race, color, or language minority status that have a discriminatory purpose or effect. Section 4 of the VRA sets forth criteria pursuant to which certain jurisdictions with a history of discriminatory voting practices would be deemed covered and subject to preclearance. Preclearance, as set forth in Section 5 of the VRA, requires those covered jurisdictions to submit any change in voting procedures to the Attorney General of the United States (the “Attorney General”) or to a three-judge panel of the Federal District Court for the District of Columbia (the “District Court”) prior to enacting such legislation. Although the VRA was initially enacted as temporary legislation meant to expire in 1970, it has been periodically reauthorized by Congress. The VRA was most recently reauthorized in 2006 for a period of 25 years by an overwhelming vote in the House and Senate and signed by President George W. Bush.

a. Section 2: The General Prohibition Against Discriminatory Voting Practices

Section 2 of the VRA, as initially enacted, prohibited discriminatory voting procedures implemented on the basis of race or color. In 1980, the Supreme Court interpreted Section 2 of the VRA as prohibiting only those voting procedures enacted with a discriminatory purpose.² In order to broaden the availability of relief for plaintiff’s litigating under Section 2, Congress amended the VRA in 1982. Through this Amendment, Section 2 of the VRA would prohibit voting laws with a discriminatory purpose but also those with a discriminatory effect regardless of the intent of implementation.

b. Section 4: Covered Jurisdictions

As most recently enacted in 2006, Section 4 sets forth two criteria by which jurisdictions were subject to preclearance. First, the jurisdiction would be subject to preclearance if it had enacted a test or device restricting voter registration as of November 1, 1972. Pursuant to the VRA, such a test or device would include a literacy test, a requirement that the applicant establish good moral character, or solely providing English language ballots in jurisdictions “where members of a single language minority constitute more than five percent of the citizens of voting age.”³ Secondly, the Director of the Census must have established that less than 50% of the voting age population within the area in question was registered to vote as of November 1, 1972. Alternatively, this element would be fulfilled if the Director of the Census could establish that less than 50% of the voting age population participated in the 1972 presidential election. If these two criteria were met, the jurisdiction would be subject to the preclearance requirements of Section 5.

¹ *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

² *Mobile v. Bolden*, 446 U.S. 55 (1980).

³ *Section 4 of the Voting Rights Act: The Formula for Coverage under Section 4 of the Voting Rights Act*, U.S. Dep’t of Justice, Civil Rights Division, available at http://www.justice.gov/crt/about/vot/misc/sec_4.php#formula.

Section 4 of the Voting Rights Act included a bail-out provision by which any covered jurisdiction could divest itself of Section 5 preclearance requirements. To bail-out, a covered jurisdiction would seek a declaratory judgment from a three-judge panel in the District Court. In order to prevail, the jurisdiction was required to establish that during the past 10 years

[n]o test or device had been used within the jurisdiction for the purpose or with the effect of voting discrimination; [a]ll changes affecting voting within the jurisdiction had been reviewed under Section 5 prior to their implementation; [n]o change affecting voting within the jurisdiction had been the subject of an objection by the Attorney General or the denial of a Section 5 declaratory judgment from the District Court; [t]here had been no adverse judgments in lawsuits alleging voting discrimination within the jurisdiction; [t]here had been no consent decrees or agreements that resulted in the abandonment of a discriminatory voting practice within the jurisdiction; [t]here were no pending lawsuits that allege voting discrimination within the jurisdiction; Federal examiners had not been assigned to the jurisdiction; [and t]here had been no violations of the Constitution or federal, state, or local laws with respect to voting discrimination within the jurisdiction unless it establishes that any such violations were trivial, were promptly corrected, and were not repeated.⁴

Under the VRA, the covered jurisdiction bore the burden of proof in demonstrating the factors enumerated above. Furthermore, the jurisdiction would be required to demonstrate its efforts to remove any procedures deterring voter participation and equal access to the electoral process as well as its efforts to expand minority voter participation. These requirements were to be established as to each of the political subdivisions within the covered jurisdiction. Upon bailing out, the jurisdiction would be subject to a ten year probationary or recapture period during which the District Court could reopen proceedings upon evidence of conduct that would have precluded the jurisdiction from bailing out initially.

c. Section 5: Preclearance

Through Section 5 of the VRA, Congress required covered jurisdictions to obtain preclearance for any proposed change to their election laws. Covered jurisdictions would be able to enact these changes upon obtaining administrative preclearance from the Attorney General or through judicial preclearance by seeking a declaratory judgment from a three-judge panel of the District Court. Preclearance requires that the jurisdiction demonstrate that the proposed change was neither enacted with a discriminatory purpose or results in a discriminatory impact. If the jurisdiction failed to meet this burden, preclearance was denied and the proposed change was rejected.

d. Section 3: The Bail-In Provision

Section 3 of the VRA sets forth a bail-in provision through which jurisdictions not covered by the criteria set forth in Section 4 may, nevertheless, become subject to certain limited preclearance requirements. Section 3 permits federal courts to bail in jurisdictions that have violated the Fourteenth or Fifteenth Amendments through the implementation of intentionally discriminatory voting practices. A jurisdiction bailed in pursuant to Section 3 is subject to preclearance requirements for a period of time mandated by the adjudicating court. The court may further determine that the jurisdiction is only required to preclear certain voting practices, as opposed to Section 5 preclearance, which requires covered jurisdictions to preclear changes to all voting practices or procedures.⁵

⁴ *Id.*

⁵ Travis Crum, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 Yale L.J. 1992 (2010).

e. Amendments to and Reauthorizations of the Voting Rights Act of 1965

Since 1965, Congress has amended the VRA five separate times in 1970, 1975, 1982, 1992, and 2006, incrementally expanding its protections.

In 1970 and 1975, Congress amended the criteria pursuant to which jurisdictions would be subject to preclearance. The 1970 amendment provided that jurisdictions would be subject to preclearance based on voter registration and the use of certain discriminatory voting practices as of 1968. The 1975 amendment provided a new triggering date in 1972 and set forth new protections for language minority groups.

In 1982, Congress again reauthorized the VRA, amending Section 2 to prohibit any election law with a discriminatory impact as well as those enacted with a discriminatory purpose. This broadened the availability of relief for plaintiffs seeking redress from discriminatory voting laws as the Supreme Court interpreted Section 2 as prohibiting only those voting laws enacted with a discriminatory purpose. Pursuant to this ruling, voting laws enacted without a discriminatory purpose but resulting in a discriminatory effect would not abrogate Section 2 of the VRA.⁶ The amendment of Section 2 preserved the availability of plaintiffs seeking redress for voting legislation resulting in a discriminatory effect regardless of the intent of implementation.

Although the reauthorization of the VRA in 1992 received some opposition in Congress, it was nevertheless passed and signed into law by President George H. W. Bush, further expanding the protection of language minorities.

In 2006, the VRA was again reauthorized by Congress and signed into law by President George W. Bush. Pursuant to the Supreme Court's ruling in *City of Boerne v. Flores*,⁷ Congress was required to demonstrate that the provisions within the VRA were "congruent and proportional" to the prevention of discriminatory voting practices. Under this standard, Congress was required to demonstrate the VRA's success while establishing its continued necessity. Through extensive Congressional testimony providing evidence on minority voter registration, turnout, and elected representation in both covered and non-covered jurisdictions, the prevalence of voting discrimination in covered jurisdictions, the percentage of successful Section 2 litigation within covered and non-covered jurisdiction, and the interaction between covered jurisdictions and the Department of Justice (the "DOJ") throughout the preclearance process, near unanimous support for reauthorization was achieved.

f. Impact of the Voting Rights Act of 1965

The dramatic remedial effect of the VRA became apparent shortly after its enactment. In 1965, approximately 250,000 African American citizens registered to vote as a direct result of the suspension of literacy tests and the appointment of federal observers made possible through the VRA.⁸ From 1965 to 1967 the percentage of minorities registered to vote in covered jurisdictions increased from less than 30% to over 50%.⁹ The election of African Americans and minorities to public office reflects a similar trend between 1965 and 1985.¹⁰ The reauthorization of the VRA through 2006 further promoted the continued participation of African Americans, minorities, and language minorities in the electoral process.

II. *Shelby County v. Holder*

a. *Shelby County v. Holder*, 811 F. Supp. 2d 424 (D.D.C. 2011).

In 2010, Shelby County, Alabama ("Shelby County") brought suit in the District Court challenging the constitutionality of Sections 4 and 5 of the VRA. Shelby County argued that Sections 4 and 5 were

⁶ *Mobile v. Bolden* 446 U.S. 55 (1980).

⁷ *Boerne v. Flores*, 521 U.S. 507 (1997).

⁸ Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. Rev. 689 (2006).

⁹ *Id.*

¹⁰ *Id.*

anachronistic and failed to distinguish between covered and non-covered jurisdictions, and that the preclearance process violated state sovereignty. In opposition to Shelby County’s submissions, the DOJ set forth evidence demonstrating the continued necessity for preclearance and that minority voting rights throughout the country remained under threat.

Through its submissions, the DOJ urged the court to defer to Congress, which overwhelmingly supported the 2006 reauthorization of the VRA, acknowledging the importance of maintaining and reauthorizing Sections 4 and 5 thereto. Ultimately, the District Court held that the “preeminent constitutional role of Congress under the Fifteenth Amendment to determine the legislation needed to enforce it, and the caution required of the federal courts when undertaking the ‘grave’ and ‘delicate’ responsibility of judging the constitutionality of such legislation—particularly where the right to vote and racial discrimination intersect,” would preclude it from overturning Congress’s “carefully considered judgment” with respect to the reauthorization of the VRA.¹¹ The District Court considered the 15,000-page legislative record that informed Congress’ decision to reauthorize Sections 4 and 5 of the VRA as sufficiently convincing to deny Shelby County’s motion for summary judgment and to grant the motion for summary judgment filed by the DOJ. The District Court reasoned that, “[d]espite the effectiveness of Section 5 in deterring unconstitutional voting discrimination since 1965, Congress in 2006 found that voting discrimination by covered jurisdictions had continued into the 21st century, and that the protections of Section 5 were still [required] to safeguard racial and language minority voters.”¹²

b. *Shelby County v. Holder*, 679 F.3d 848 (D.C. Cir. 2012).

On May 18, 2012, the U.S. Court of Appeals for the District of Columbia affirmed the District Court ruling by a vote of two to one. As with the District Court’s opinion, the Court of Appeals found that “Congress drew reasonable conclusions from the extensive evidence it gathered and acted [appropriately] pursuant to the Fourteenth and Fifteenth Amendments.”¹³ The Court of Appeals summarized the extensive record before Congress, which included:

626 Attorney General objections that blocked discriminatory voting changes; 653 successful [S]ection 2 cases; over 800 proposed voting changes withdrawn or modified in response to [more information requests]; tens of thousands of observers sent to covered jurisdictions; 105 successful [S]ection 5 enforcement actions; 25 unsuccessful judicial preclearance actions; and [other evidence of] [S]ection 5’s strong deterrent effect.¹⁴

Based on this record and the “magnitude and persistence of discrimination in covered jurisdictions,” Congress concluded that “case-by-case litigation—slow, costly, and lacking [S]ection 5’s prophylactic effect—would be ineffective to protect the rights of minority voters.”¹⁵ Accordingly, the Court of Appeals deferred “to the considered judgment of the People’s elected representatives.”¹⁶ Because the legislative record before Congress was “by no means unambiguous” and the conclusions it drew from that record were eminently reasonable, the Court of Appeals affirmed the District Court’s ruling upholding the constitutionality of Sections 4 and 5 of the VRA.

c. *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

On June 25, 2013, however, the United States Supreme Court reversed the District of Columbia Circuit Court of Appeals and ruled that Section 4 of the VRA, which sets forth the criteria by which jurisdictions are subject to preclearance, was unconstitutional and exceeded Congress’ powers to enforce civil rights under the Fourteenth and Fifteenth Amendments. In the majority opinion, Chief Justice Roberts, joined by Justices Scalia, Kennedy, Thomas, and Alito, held that the coverage formula was anachronistic and that there was no evidence that the covered jurisdictions posed greater threats to minority voting rights than any other

¹¹ *Shelby County v. Holder*, 811 F. Supp. 2d 424, 508 (D.D.C. 2011.)

¹² *Id.*

¹³ *Shelby County v. Holder*, 679 F.3d 848, 884 (D.C. Cir. 2012).

¹⁴ H.R. Rep. No. 109-478, at 24.

¹⁵ *Id.* at 57.

¹⁶ H.R. Rep. No. 109-478, at 24.

non-covered jurisdiction.¹⁷ The disparate treatment of states without sufficient justification convinced the Court that Section 4 violated the principle of the equal sovereignty of states. According to the Court, Congress’ “failure to act” in updating the coverage formula left it “no choice” but to declare the coverage formula, set forth within Section 4(b), unconstitutional. Nevertheless, the Court concluded that its opinion “in no way affects the permanent, nation-wide ban on racial discrimination” and that it issues “no holding on [Section] 5 itself, only on the coverage formula” set forth within Section 4.¹⁸

In the dissenting opinion, Justice Ginsburg, joined by Justices Sotomayor, Kagan, and Breyer, found that the vast Congressional record of discrimination with respect to voting rights in covered jurisdictions was sufficiently persuasive to justify the coverage formula’s application to certain states. Moreover, the dissent argued that the majority’s portrayal of the VRA as “static” and “unchanged since 1965” was inaccurate.

Congress designed the VRA to be a dynamic statute, capable of adjusting to changing conditions. True, many covered jurisdictions have not been able to bail out due to recent acts of noncompliance with the VRA, but that truth reinforces the congressional judgment that these jurisdictions were rightfully subject to preclearance, and ought to remain under that regime.¹⁹

The dissenting opinion further noted that Congress approached the 2006 reauthorization of the VRA with “great care and seriousness.”²⁰

Moreover, the dissent feared that the majority’s “unprecedented extension of the equal sovereignty principle outside its proper domain—the admission of new States [to the Union]—is capable of much mischief,” as “[f]ederal statutes that treat States disparately are hardly novelties.”²¹ Finally, the dissent forcefully chastised the majority for failing to explain why Congress lacks the power to subject Shelby County to preclearance. According to the dissent,

the VRA’s [application of the] preclearance requirement [to Shelby County] is hardly contestable . . . Although circumstances in Alabama have changed, serious concerns remain. Between 1982 and 2005, Alabama had one of the highest rates of successful [Section] 2 suits, second only to its VRA-covered neighbor Mississippi. In other words, even while subject to the restraining effect of [Section] 5, Alabama was found to have ‘deni[ed] or abridge[d]’ voting rights ‘on account of race or color’ more frequently than nearly all other States in the Union. This fact prompted [Judge Williams, the dissenting judge in the District of Columbia Court of Appeals decision,] to concede that ‘a more narrowly tailored coverage formula’ capturing Alabama and a handful of other jurisdictions with an established track record of racial discrimination in voting ‘might be defensible.’ That is an understatement. Alabama’s sorry history of [Section] 2 violations alone provides sufficient justification for Congress’ determination in 2006 that the State should remain subject to [Section] 5’s preclearance requirement.²²

Therefore, the dissent reasoned that Alabama’s recent history of discrimination “forcefully demonstrates that the [Section] 5 preclearance requirement is constitutional as applied to Alabama and its political subdivisions.” The Court reasoned that this conclusion should have sufficed to resolve the case. The dissenting opinion concluded that the majority “egregiously” erred by “overriding Congress’ decision.”

¹⁷ Justice Thomas, writing in a separate concurrence, added that he considered the federal preclearance regime under Section 5, in addition to Section 4’s coverage formula, to be unconstitutional.

¹⁸ *Shelby County v. Holder*, 133 S. Ct. 2612, 2631 (2013).

¹⁹ *Id.* at 2644.

²⁰ *Id.*

²¹ *Id.* at 2649.

²² *Id.* at 2645.

III. The Voting Rights Amendments Act of 2014

Following the Supreme Court's decision in *Shelby County v. Holder*, voting advocacy groups including the Lawyers Committee for Civil Rights Under Law, the NAACP Legal Defense Fund, and the Brennan Center for Justice at New York University School of Law, pressed Congress to cure the problem that the Supreme Court majority perceived within the coverage formula of Section 4. The House Judiciary Committee held hearings on potential remedies. On January 16, 2014, Representatives James Sensenbrenner (R-WI) and John Conyers (D-MI) as well as Senator Patrick Leahy (D-VT) introduced the Voting Rights Amendment Act of 2014 with the bi-partisan support of 14 Democrats and eight Republicans, spanning 17 states. The Bill would amend the coverage formula for preclearance, confer jurisdiction on the courts to bail-in States and political subdivisions based on voting practices with discriminatory impact, create new notice and disclosure requirements regarding voting-related matters, and include other significant provisions that remedy the constitutional concerns identified by the Supreme Court.

a. Updating the Preclearance Coverage Formula of Section 4

In response to the Supreme Court's majority opinion in *Shelby County v. Holder*, the Bill sets forth two updated alternative formulas by which states and political subdivisions (i.e., counties municipalities, and school districts) would be made subject to the preclearance requirements of Section 5. States would be subject to preclearance if the State and its political subdivisions have committed five or more voting rights violations during the previous 15 years, at least one of which was committed by the State itself. Pursuant to these criteria, the states of Texas, Georgia, Louisiana and Mississippi would currently be covered. A political subdivision would be subject to preclearance if it has committed three or more voting rights violations during the previous 15 calendar years or one or more voting rights violations have occurred in the subdivision during the previous fifteen years and the subdivision has suffered from persistently low minority voter participation during that period of time. The Bill would further provide for a rolling triggering date pursuant to which States and political subdivisions would be evaluated each year in order to ensure that only those jurisdictions with a recent history of racial discrimination are subject to preclearance.²³

Pursuant to the Bill, a voting rights violation would include the following:

1. In a final judgment, a federal court has determined that a denial or abridgement of the right of any citizen to vote on account of race, color, or membership in a language minority group in violation of the Fourteenth or Fifteenth Amendment has occurred anywhere within the state or the political subdivision;
2. In a final judgment, a federal court has determined that a voting qualification, prerequisite to voting, or a standard, practice, or procedure with respect to voting was imposed or applied or would

²³ *Voting Rights Amendment Act of 2014*, Fact Sheet, Lawyer's Committee for Civil Rights Under Law, available at <http://www.lawyerscommittee.org/>.

have been so in a manner that resulted in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color in contravention of the guarantees set forth and in violation of Section 2 of the Bill;

3. In a final judgment, a federal court has denied the request of the State or a subdivision for a declaratory judgment under Section 3 or Section 5 and thereby prevented a voting qualification or prerequisite from being enforced anywhere within the State or subdivision; or
4. The Attorney General has interposed an objection under Section 3(c) or Section 5 and the objection has not been overturned by a final judgment of a court or withdrawn, and thereby prevented a voting qualification or prerequisite from being enforced anywhere within the State or subdivision.

However, a finding of discriminatory impact resulting from the implementation of photo identification requirements would not be included within the number of voting rights violations calculated to determine preclearance for states or political subdivisions. Similarly, Section 5 objections by the Attorney General to photo identification requirements resulting in a discriminatory impact would not be considered when evaluating preclearance criteria. However, this exemption would not apply to court findings of or Attorney General objections to photo identification requirements implemented with a racially discriminatory purpose.²⁴

b. Updating the Bail-in Provision of Section 3

The Bill provides that a court can “bail-in” a State or a political subdivision “for court ordered preclearance based upon a judicial finding that a voting practice has a racially discriminatory [purpose] or result.”²⁵ However, a court finding of discriminatory impact resulting from photo identification requirements would not constitute a basis for which a state or political subdivision could be subject to court ordered preclearance.²⁶ However, this exemption would not apply to court findings of photo identification requirements implemented with racially discriminatory intent.²⁷

c. Expansion of the Federal Observer Coverage

The Bill extends the Attorney General’s authority to appoint federal observers in jurisdictions subject to preclearance.²⁸ Furthermore, the Bill expands this authority by authorizing the Attorney General to assign observers where necessary to enforce the language minority provisions of the VRA.²⁹

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

d. Preliminary Injunctive Relief

Section 6 of the Bill clarifies the standard set forth for obtaining preliminary injunction with respect to changes in voting procedures. The Bill applies preliminary injunctive relief to all provisions of the VRA and specifies that such relief should be implemented where “voting practices are likely to be discriminatory during the pendency of a lawsuit,”³⁰ and where “the hardship imposed upon the defendant by the relief will be less than the hardship imposed on the plaintiff if the relief were not granted.”³¹

e. Notice Requirements

Finally, the Bill sets forth an additional requirement by which all jurisdictions must provide public notice of “certain voting changes no later than 30 days after the change is enacted,” but at least 180 days before a federal election.³² “Jurisdictions that fail to comply with this notice provision may be subject to court injunctions against their new procedures.”³³

IV. Conclusion

In the wake of the Supreme Court’s ruling in *Shelby County*, it remains uncertain whether the VRA can continue to protect minority voter participation or whether the Court’s ruling, leaving only Section 2 intact, effectively eviscerated the VRA. Indeed, the prevalence of voting rights restrictions enacted by several southern states in the months since *Shelby County* demonstrates how significant the distinctions are between Section 2 and Section 5 of the VRA. Section 2, for example, “does not extend to bizarrely shaped districts or districts whose minority populations are overly heterogeneous or below 50% in size,” whereas Section 5 applies to each of these district.³⁴ Moreover, “a mere statistical disparity between minorities and whites does not violate Section 2, but it typically does suffice for preclearance to be denied.”³⁵ These issues, among others, raise deep concerns about the effectiveness of the VRA in its present form. The Bill, which restores some of the powers to the VRA that *Shelby County* eliminated, is necessary to preserve the protection of minority voting rights.

Furthermore, Chief Justice Roberts expressly left open the possibility for an amended and updated Voting Rights Act, encouraging Congress to “draft another formula based on current conditions.”³⁶ The Bill, proposed by Representatives Sensenbrenner and Conyers as well as Senator Leahy, provides a compromise approach with the greatest likelihood of passing both the House of Representatives and the Senate. Although voting advocacy groups are not thrilled with the exclusion of photo identification laws resulting in discriminatory impact from the new coverage formula, this exclusion is likely to help garner support among the Republican majority in the House. Moreover, this exclusion will not apply where such laws are implemented with racially discriminatory intent.

The Bill further sets forth a new coverage formula pursuant to the majority’s holding in *Shelby County* through which Section 4 will provide an updated approach measuring violations that have occurred only within the previous 15 years. Furthermore, the Bill establishes a rolling trigger by which states will be evaluated each year, eliminating the issue of stale triggering dates identified by the Supreme Court. Although the Bill does not restore the VRA to its former potency, its attempt to bridge the gap between liberal proponents and conservative

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ Nicholas O. Stephanopoulos, *The South After Shelby County*, Public Law and Legal Theory Working Paper No. 451 (Oct. 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336749.

³⁵ *Id.*

³⁶ *Shelby County*, at 2631.

opponents makes it an ideal, bi-partisan solution to ensure that voter discrimination, an issue that threatens Republicans and Democrats alike, does not continue unchallenged.

Based on the foregoing, the Committee on Federal Legislative Priorities approves this report and recommends approval of the report by the New York State Bar Association's Executive Committee and/or the House of Delegates.

The Committee acknowledges the work of John Nonna and the assistance given by his colleagues, Caroline Billet and Zach Novetsky, in preparing this report.

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