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What's future of Voting Rights Act?

Roundup of analysis on Supreme Court decision about the 1965 law.

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Editor's note: *Following are reactions to Tuesday's ruling from the Supreme Court, striking down a portion of the 1965 Voting Rights Act.*

Erwin Chemerinsky, dean, UC Irvine School of Law: The Supreme Court's decision in *Shelby County, Alabama v. Holder* practically eliminates a key protection against voting discrimination in the United States. Section 5 of the Voting Rights Act has been a crucial measure against voting discrimination by preventing jurisdictions with a history of race discrimination from significantly changing their election systems without preclearance from the attorney general or a three-judge court.

The high court struck down Section 4, which defines those jurisdictions which must get preclearance under the act's Section 5. In theory, Congress can reenact Section 4 in a manner that meets the court's objections, but in reality it seems unlikely that this Congress will do that, and the content of a law that would meet judicial scrutiny is uncertain in light of the court's opinion. It is hard to imagine Congress agreeing on a formula for what jurisdictions have to get preclearance before changing their election systems.

For decades, conservatives have railed against judicial activism and called for judicial restraint. Such restraint was absent from this decision. Congress held 12 hearings over an 11-month period and compiled a record of 15,000 pages. It documented pervasive continuing discrimination in the jurisdictions covered by Section 4. For example, the record showed 650 instances of rejections of proposed changes in election systems in covered jurisdictions. There were likely thousands more that never were proposed because of the fear that preclearance would be denied.

Ultimately, as Justice Ruth Bader Ginsburg said in her dissent, this case is about "who decides whether, as currently operative, Section 5 remains justifiable, this court, or a Congress charged with the obligation to enforce the post-Civil War Amendments by appropriate legislation." Under any semblance of judicial restraint, the answer is clear: The court should have upheld this crucial civil rights law.

Tom Campbell, dean, Chapman Law School: The majority opinion was not a surprise. Four years ago, the Supreme Court signaled that it had constitutional problems with treating some states differently from others, on the basis of a record that was then 37 years old. The court invited Congress to update the formula, as it had in the years between 1965 and 1976. Congress did nothing.

The four dissenting justices claimed Congress had looked at the issue with great care in 2006 and made a conscious decision to do nothing. They pointed out that jurisdictions could petition to get out from the special-treatment category, as had California's Merced County.

The majority, however, ruled it wasn't right to make the states or counties petition to be exempted. When making distinctions between states in 2013, relying on voting patterns in 1972 was not an acceptable approach. Congress remains free to update its formula for identifying

states whose voting patterns require special attention; and Congress remains free to apply a uniform approach to inhibit voting discrimination across all 50 states. It just can't single out some states (or, in California, some counties), on the basis of ancient data.

This opinion was a welcome reminder that Congress has to do its job.

Ilya Shapiro, Cato Institute: In striking down Section 4 of the Voting Rights Act, the Supreme Court restored a measure of constitutional order to America. Based on 40-year-old data showing racial disparities in voting that no longer exist, this provision subjected a now-random assortment of states and localities to onerous burdens and unusual federal oversight. Recognizing that the nation has changed, the court aptly ended the extraordinary intrusion in state sovereignty that can no longer be justified by the facts on the ground.

"If Congress had started from scratch," Chief Justice John Roberts wrote for the majority, "it plainly could not have enacted the present coverage formula. It would have been irrational for Congress to distinguish between States in such a fundamental way." And so this law must fall.

Of course, the court really should've gone further, as Justice Clarence Thomas pointed out in a concurring opinion. The court's explanation of Section 4's anachronism applies equally to Section 5. In practice, however, Congress will be hard-pressed to enact any new coverage formula because the pervasive, systemic discrimination in voting that justified such an exceptional intrusion into the normal constitutional order is now gone.

And that's a good thing. [Tuesday's] ruling underlines, belatedly, that Jim Crow is dead.

Adam Winkler, UCLA Law School professor: Chief Justice John Roberts promised in his 2005 confirmation hearings to be an "umpire" who merely called balls and strikes. For 50 years, the Voting Rights Act's preclearance provisions were recognized as lawful, affirmed in eight previous Supreme Court decisions. In baseball terms, Congress had thrown a strike right down the middle of the plate.

Tuesday, the Roberts Court declared that the same pitch was now a ball, way off the plate. The ruling shows that judicial activism - bold rulings striking down laws enacted by elected officials and repeatedly upheld by previous courts - is not just a symptom of liberal jurists. Conservative jurists have become today's judicial activists. Rather than calling balls and strikes, the Roberts Court is fundamentally reshaping the strike zone on issues ranging from abortion rights, campaign finance law, access to the courts and, now, voting rights. We're all activists now.

Ronald Rotunda, Chapman Law School professor: The [Voting Rights Act of 1965] was supposed to last five years, but Congress has repeatedly extended it using the very old coverage formula. Congress reauthorized the law again in 2006 for another quarter century, based on voter turnout from the presidential elections in 1964, 1968 and 1972. The Supreme Court stated that current burdens must be justified by current needs, and the "coverage formula met that test in 1965, but no longer does so."

During the oral argument, Chief Justice Roberts asked Solicitor General Donald Verrilli: "Do you know which state has the worst ratio of white voter turnout to African American voter turnout?" Mr. Verrilli's response: "I do not." Roberts said, "Massachusetts." Then he asked, "Do you know what has the best, where African American turnout actually exceeds white turnout? Mississippi."