The Washington Post

The Supreme Court's Voting Rights Act decision: Live updates

By: Aaron Blake – June 25, 2013

With only days to go to release its decisions, the Supreme Court is expected to rule on several major cases, including same-sex marriage, affirmative action and the Voting Rights Act.

Today, the Supreme Court effectively struck down part of the Voting Rights Act. We'll be keeping an eye on all the parsing, reaction and posturing in our live blog below.

Until tomorrow…

We're shutting down our live blog now, but be sure to keep following thePost Politics blog, The Fix and WashingtonPost.com for all the latest on the Supreme Court. And check back in this space Wednesday at 10 a.m., when we'll be live-blogging the Court's big gay marriage decisions.

Holder: Justice Dept. won't back down

Attorney General Eric Holder said Tuesday the Justice Department will continue to aggressively combat voter suppression, even as the biggest arrow in its quiver was removed on Tuesday.

"The Department of Justice will continue to carefully monitor jurisdictions around the country for voting changes that may hamper voting rights," Holder said in remarks after the Supreme Court's decision. "Let me be very clear: We will not hesitate to take swift enforcement action using every legal tool that remains to us against any jurisdiction that seeks to take advantage of the Supreme Court's ruling by hindering eligible citizens' full and free exercise of the franchise."

Holder labeled the decision a "serious and unnecessary setback."

"The Justice Department remains committed to moving forward with the arc of American history," he said.

Biden: We'll work with Congress on VRA

Vice President Biden said in remarks Tuesday that the Obama Administration will work with Congress to try to replace the section of the Voting Rights Act that was struck down today.

Many experts and members of Congress are skeptical that Congress will create a new formula for Section 4, which dictates what areas of the country require preclearance for electoral changes because of past discrimination.
"We're going to work with Congress in this effort, and this administration will do everything in its power to ensure fair and equal practices are maintained," Biden said.

Schumer says Section 5 is dead

Sen. Charles Schumer (D-N.Y.) confirmed what basically every legal scholar has said in the wake of today's decision: Section 5 of the Voting Rights Act is effectively dead — at least unless/until Democrats obtain more power in Washington.

"Make no mistake about it, this is a back door way to gut the Voting Rights Act," Schumer said. "As long as Republicans have a majority in the House and Democrats don't have 60 votes in the Senate, there will be no preclearance."

The court said Congress can pass a new formula for Section 4 of the Voting Rights Act, but gridlock has become Congress's modus operandi in recent years, and Republicans have shown no appetite for working to create a new formula — at least so far.

Texas AG: Voter ID should be law now

Texas Attorney General Greg Abbott (R) says the state's Voter ID law should be instituted immediately now that the Supreme Court has struck down an applicable portion of the Voting Rights Act.

The Justice Department in March 2012 denied the law its preclearance under the Voting Rights Act, leading the state to sue. In August, a federal court struck down the law, saying it imposed "strict, unforgiving burdens" on minority voters.

Now that the formula used to determine who requires preclearance has been struck down, Abbott says the law should move forward.

Texas #VoterID law should go into effect immediately b/c #SCOTUS struck down section 4 of VRA today. #txlege #tcot #txgop
— Greg Abbott (@GregAbbott_TX) June 25, 2013

Eric Holder can no longer deny #VoterID in #Texas after today's #SCOTUS decision. #txlege#tcot#txgop
— Greg Abbott (@GregAbbott_TX) June 25, 2013

Abbott is considered a potential candidate for governor in 2014.

Obama 'deeply disappointed'

President Obama says he is "deeply disappointed" with today's Supreme Court decision and is calling on Congress to act.

Here's the just-released statement from Obama:

“I am deeply disappointed with the Supreme Court’s decision today. For nearly 50 years, the Voting Rights Act – enacted and repeatedly renewed by wide bipartisan majorities in Congress – has helped secure the right to vote for millions of Americans. Today’s decision invalidating one of its core provisions upsets decades of well-established practices that help make sure voting is fair, especially in places where voting discrimination has been historically prevalent.

“As a nation, we’ve made a great deal of progress towards guaranteeing every American the right to vote. But, as the Supreme Court recognized, voting discrimination still exists. And while today’s decision is a setback, it doesn’t represent the end of our efforts to end voting discrimination. I am calling on Congress to pass legislation to ensure every American has equal access to the polls. My Administration will continue to do everything in its power to ensure a fair and equal voting process. “

DNC’s Brazille: ‘It’s an injustice’

The Democratic National Committee is asking supporters to submit their names to help them fight against the Supreme Court’s Voting Rights Act decision and future GOP attempts “to limit voting access.”

In an e-mail to supporters, DNC vice chairwoman Donna Brazille asks people to submit their contact information to join the fight.

“Today’s ruling by the Supreme Court striking down parts of this important law is more than a disappointment — it’s an injustice,” Brazille writes. “But we can’t let it discourage us or force us out of this fight.”

The e-mail, notably, doesn’t ask for contributions.

‘It’s Congress’s fault’

The Post is including in this live blog reaction from several noted Supreme Court scholars. This comes from Suzanna Sherry, a constitutional law professor at Vanderbilt University:

The landmark Voting Rights Act has three separate sections that are relevant to today’s decision in *Shelby v. Holder*. Section 2 prohibits discrimination in voting. Section 5 requires “covered” jurisdictions to obtain preclearance from the Attorney General or a federal court before making any change, however small, to their electoral systems. And Section 4 sets out the formula that determines which jurisdictions are covered by Section 5 and, thus, have to get preclearance.

Early commentary on *Shelby v. Holder* accurately reports that it struck down only the coverage formula of Section 4, not the preclearance requirement of Section 5. (Section 2 was not challenged.) Most commentators also suggest that today’s decision is the death knell for Section 5. As Justice Ginsburg writes in dissent, “without the formula, Section 5 is immobilized.” That may well be true, but we should not blame the Supreme Court. If Section 5 becomes a nullity, it’s Congress’s fault.

In 2005, when Congress renewed the Voting Rights Act for 25 years, it continued to use the same coverage formula that it had enacted in 1982, which itself was based on

electoral data from the late 1960s and early 1970s. But as the court notes in *Shelby*, "history did not end in 1965." The jurisdictions that were covered in the 1970s – justifiably, based on their then-recent history – have made great strides since then. Indeed, African-American voter registration and turnout is now greater in most of the covered states than in many of the uncovered states.

A rational, functional Congress would have taken that history into account. A rational, functional Congress would have amended the formula so that it targeted the states with the most evidence of voter discrimination, not those with the least. Congress had the 2004 electoral data when it acted in 2005, and it knew that the states covered by the 1982 formula had better records than uncovered states. But it chose not to amend the formula, and now the beneficiaries of the Voting Rights Act will pay the price.

Even now, Congress can act to reinvigorate Section 4 and save Section 5 by adopting a new coverage formula. But just as in 2005, doing so would take courage and thoughtfulness that seems to be lacking in Congress. Cowardice and political polarization are likely to keep Congress from acting, because it would require answering hard questions, such as how*should* we decide which states are engaging in discrimination? And whose constituents are going to be saddled with additional burdens every time there is a proposed electoral change?

Making those difficult decisions is Congress's job, not the court's. The court has merely insisted that Congress's decision be based on current conditions rather than on outdated ones. We should not blame the Court when Congress fails.

'Congressional inaction power grab'

The Post is including in this live blog reaction from several noted Supreme Court scholars. This comes from Michael McDonald, an associate professor and election law expert at George Mason University:

In *Shelby*, the Supreme Court made an important decision regarding Section 4 of the Voting Rights Act that fundamentally changes the legal architecture to protect minority voting rights found in Section 5. Others will discuss the ramifications on minority communities, which will fall particularly heavy on local communities that do not have ample resources to litigate future changes to local voting procedures under the legal remedies offered under the still-preserved Section 2. I will discuss how this decision illustrates a new way that the Supreme Court in these ideologically polarized times is becoming an equal to the legislative branch in policy-making — particularly in the area of elections.

In a 2009 case affectionately called NAMUDNO, the Supreme Court laid down a gauntlet to Congress, effectively demanding that Congress fix the Voting Rights Act to more narrowly target its regulations upon places that are acting in a discriminatory manner. Democrats and Republicans can't agree on much of anything these days, so it is not surprising that Congress did not address the problems singled out by the Supreme Court with the Section 4 formula that identifies states and localities covered by special protections found in Section 5 of the Voting Rights Act. The Supreme Court holds out that if Congress went back to work and updated Section 4, a new coverage formula could be constitutional.

Congressional action on a hot button issue like voting rights? Good luck on that. Without congressional action, the Section 5 minority voting protections are dramatically stripped away.

This is not the only decision handed down by the Supreme Court at its end of this term where the Supreme Court is teeing up congressional inaction as a rational for overturning federal law. In the Arizona case decided last week, the court appeared to overturn the state's requirement that registered voters show proof of citizenship before voting. However, the Supreme Court actually told Arizona to first ask theU.S. Election Assistance Commission to change the federal voter registration form to include the new Arizona proof-of-citizenship requirement. If the EAC doesn't make a decision on Arizona's request, then Arizona can ask the courts again for relief.

The EAC currently has no sitting commissioners. Not one. Considering the logjam on appointments in the Senate, the Senate seems unlikely to act any time soon on filling these appointments. The EAC will not be able to make a ruling on Arizona's request because there are no commissioners to make a ruling. Meaning: the Supreme Court has given itself the power to make another important decision on voting in this country with the excuse being congressional inaction.

As the political parties move farther apart ideologically the Supreme Court has found a way to step into gulf to make policy. With a 5-4 conservative-liberal split on the Court on these important decisions, these new policies are not moderate, they are conservative. With more such decisions in the offering, the stakes have been thus been elevated of who controls the Supreme Court majority, paving the way for future nomination battles of epic proportions.

Ginsburg's dissent: A 'catch-22'

Justice Ginsburg read her dissent in *Shelby County v. Holder* from the bench — as she did Monday in affirmative action and Title VII cases.

In today's dissent, she pushed back on the majority's argument that the Section 4 formula used to enforce Section 5 of the Voting Rights Act is no longer viable because of the changes in voter turnout and registration in the areas covered. The demand for more proof of current discrimination, she said, is a "catch 22."

"In the Court's view, the very success of Section 5 of the Voting Rights Act demands its dormancy," she wrote. "If the statute was working, there would be less evidence of discrimination, so opponents might argue that Congress should not be allowed to renew the statute. In contrast, if the statute was not working, there would be plenty of evidence of discrimination, but scant reason to renew a failed regulatory regime."

The fact that the Department of Justice continues to block many proposed changes from the covered areas is evidence, she argued, that preclearance in these jurisdictions is still necessary. Moreover, she said, deference should be given to Congress, which reauthorized the current formula in 2006.

'A win for fairness,' Republican says

One of the first Republican lawmakers to respond to the Supreme Court decision on the Voting Rights Act is Rep. Jeff Duncan (R-S.C.), who sent out the following statement:

"Today's Supreme Court's ruling invalidating the preclearance requirements contained within the Voting Rights Act is a win for fairness, South Carolina, and the rule of law. The preclearance requirement forced South Carolina to spend millions of dollars to defend a photo identification requirement for voting that had already been ruled constitutional by the US Supreme Court. The court's ruling will hopefully end the practice of treating states differently and recognizes that we live in 2013, not the 1960's."

Everything you need to know

The Fix's Sean Sullivan has a fantastic primer on today's ruling, what the arguments were, what it means, who is affected, etc.

It's well worth a click.

'Jim Crow is dead'

The Post is including in this live blog reaction from several noted Supreme Court scholars. This comes from Ilya Shapiro, senior fellow in constitutional studies at the libertarian 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 in 2006," Chief Justice 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 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. Today's ruling underlines, belatedly, that Jim Crow is dead.