

MSNBC's *The ReidOut*

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JOY REID: Plus, a major part of John Roberts's Supreme Court legacy will be the damage done to voting rights in America. Today, he struck another blow.

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REID: In a 6-3 ruling written by Samuel Alito — the most reliably conservative justice — the Supreme Court dealt another violent blow against democracy by upholding two restrictive Arizona voting laws, forbidding the collection of absentee ballots by anyone other than family or caregivers and allowing the tossing of ballots inadvertently cast in the wrong precinct. It's the latest notch in the belt of Chief Justice John Roberts, whose life work really since his days as an influential aide in the Reagan Justice Department has been to destroy the landmark 1965 Voting Rights Act. Today, with help from his conservative allies on the Court, in a decision he previewed by assigning the ruling to arch-conservative Alito in the first place, well, he got closer to that goal. Justice Elena Kagan, in a fierce dissent, slammed the decision, writing: "The majority fears the statute Congress wrote is too 'radical' So the majority writes its own set of rules, limiting Section 2 from multiple directions. What is tragic here is the court has (yet again) rewritten.... in order to weaken--a statute that stands as a monument to America's greatness." Since Roberts has been on the bench, the Court has eviscerated federal preclearance of changes to voting procedures and gutted the intent test, which prohibited states from enacting voting practices with racist intent. Thanks to Roberts, nearly all of the pillars of the Voting Rights Act — Section 5 and now Section 2 — have been defanged leaving the country closer to our Jim Crow past than to our civil rights era. According to Vox, the rulings "endorse phantom fears about 'voter fraud,' a phenomenon that barely exists. And it permits lawmakers to enact voting restrictions intended to combat this imaginary problem." Sadly, the conservative decision shows — shows you just how central the Big Lie has become to Republican orthodoxy. What's far more troubling is what this decision means for future cases before the courts. According to Alito, states can pretty much do whatever they want as long as they don't make it obvious. The only remaining question is what will Congress — and, more specifically, what will Democrats do about it? [INTRODUCES PANEL] Neil, I'll start with you. Did you expect this decision? Because it seemed all of those who were previewing it said the only question was how the DNC, who brought this case originally, would lose, not whether they would lose.

NEAL KATYAL: Yeah. Unfortunately, it was an expected decision although some of the rhetoric and language in the decision goes beyond anything I think I feared. But, you know, I had the privilege of arguing — the constitutionality of the Voting Rights Act in 2010. Chief Justice and others gave me a really hard time at the oral argument, but we won that 8 to 1 back at that time with Justice Thomas being the only dissent. But, then four years later in a case called *Shelby*

County, the Supreme Court struck down that part of the Voting Rights Act, Section 5. And the Court has been on a real hostility to this act and I think Justice Kagan really cataloged it in the dissent. And so, you know, in one sense, it's expected. In another, to have this decision say or suggest that voter fraud is, like, some real problem that states have a lot of leeway to solve, I mean, you can read this ruling a lot of different ways. As a critic, as a citizen, but I think one way we should read it tonight is as one of those southern states that is trying to disenfranchise African-American voters. And what this decision did is give a retort — a rhetoric and How-To book on how to do it, which is why legislation is so important.

REID: Oh, 100 percent. And, you know, maybe, perhaps, coincidentally, election integrity and voter fraud were the reasons for the Jim Crow laws. They said, “oh, no, we’re just doing this to prevent voter fraud.” They did that at the time. Elie, this is what Justice Alito has now said. He's written his own law, which is that there are five factors that courts have to consider whether or not a law is discriminatory. So when courts are faced with time, place and manner cases under the Voting Rights Act, he writes, “any circumstance that has a logical bearing on whether voting is equally open and affords equal opportunity may be considered, nevertheless” — he also provides a non-exhaustive list of — here’s his five factors that should be mentioned; “the size of the burden imposed by a challenged voting rule,” “the degree to which a voting rule departs from what was standard practice when [the Voting Rights Act] was amended in 1982,” “the size of any disparities in a rule’s impact on members of different racial or ethnic groups,” “the opportunities provided by a State's entire system of voting when assessing the burden imposed by a challenged provision,” and “the strength of the state interests served by a challenged voting rule.” He decided essentially that states have an interest in preventing so-called voter fraud and that — as so long as it was just an inconvenience, it’s okay to disenfranchise people. Am I reading that right?

ELIE MYSTAL: Yeah, to drop out some of the legal jargon here, Alito's standard is basically as long as you don't say the n-word when you are taking away people's votes, it is fine. That is the essential takeaway from his opinions. These laws in Arizona that he just held up with the help of John Roberts, as you explained, his lifetime commitment to destroying this act, these laws were racist by empirical definition. That's not me having a conjecture. It was empirically shown that these laws had a disparate impact on black, brown, and native voters in Arizona. The plaintiffs, the state of Arizona admitted these laws had a disparate impact and admitted that's why they were there. Like, let's be clear. The — Arizona said the reason why they wanted these laws was to help them win elections by depressing the vote, right? And then the Supreme Court — in Alito's opinion, the Supreme — he says that — for one of the laws that allowed them to discard ballots cast in the wrong precinct, Alito said that one percent of African-Americans and one percent of Native Americans and one percent of Hispanic Americans cast their votes in the wrong precinct while only .5 percent of white Americans cast their vote in the wrong precinct. But that racism just wasn't enough — wasn't enough racism to trigger the Voting Rights Act. I — it must be nice to have a job where you can tell other people how much racism is real. But that's — that's the decision. That's the upshot here. As long as you don't make it completely obvious that you're doing something with bigotry in your heart — as if that was easy to prove — then Alito is going to let you do it.

REID: I mean, and honestly, before — in case anyone thinks this is hyperbole, Neil, in theory, according to Alito's theory, if in 1982 there were laws in place and you had to pass a literacy test and read a complicated passage from Shakespeare to vote, he then could argue, “well, that's not racist because, you know, if you -- if a white or a black person or anybody can read this complicated passage from Shakespeare, they can vote.” I mean, it's the same if — if bubbles in [sic] a bar of soap, guess how many bubbles are in this bar of soap? If that had been in place in '82 and you can't show it's a substantial difference to say, you know, “guess the bubbles in the soap,” he could just — those laws never said black in them. They never said race in them. They never said any race in them, they just said tell us how many bubbles are in the soap and then they just so happened to only asked the black people to guess the bubbles. In this case in Arizona, you know, the fact that you're voting in the wrong precinct, precincts were being moved but only the black and brown precincts were being moved. So what he — you're basically saying, “you can do guess the bubbles in a bar of soap as long as you don't say black,” right?

KATYAL: Exactly, Joy. I love how you followed up on Elie's great point. And, you know, there's two different ways of proving discrimination in the law. One is called disparate treatment, that is, you're intentionally going after someone because of their race and the other is a disparate impact in which, you know, you're looking at statistics and other things. And, of course, in a modern era, almost everyone — not everyone — but almost everyone avoids the use of terms like what Elie referred to before and in state legislatures or even the President does. When I was arguing the Muslim ban, his lawyer's defense was, “well it doesn't say it discriminates against Muslims in the text of the order.” Of course not. Cause modern discrimination hides itself through patterns and practices and data and things like that. And so, the question in this case is whether that would be enough. And Elie, you're absolutely right that the test that's being proposed now to legitimize Arizona's laws would legitimize a whole host of things which is why I think the conversation has to move nationally to how we get these Voting Rights Acts passed. You know, back when I argued that voting rights case in 2010, it had just been reauthorized in the Congress in the House by 421-3 and in the Senate 98-0. That was, you know, hose — those votes underscore this is the most American thing we could imagine, the right to vote. And how could it be derived? How could the Supreme Court be writing these? It's time for Congress to act.

REID: Well, of course, Neil, because racism no longer exists. According to John Roberts, racism is over because Obama was President. Therefore, you know, 1 out of 320 million people who is black was elected President, poof, racism is gone. And by the way, so you think we're just bringing up hyperbole again, Florida actually enacted a poll tax. If you serve prison time, to come back, you have to pay a poll tax. And that's now legal, according to Justice Alito. Perfect. We've gone backwards. Elie Mystal, Neil Katyal. Thank you very much.