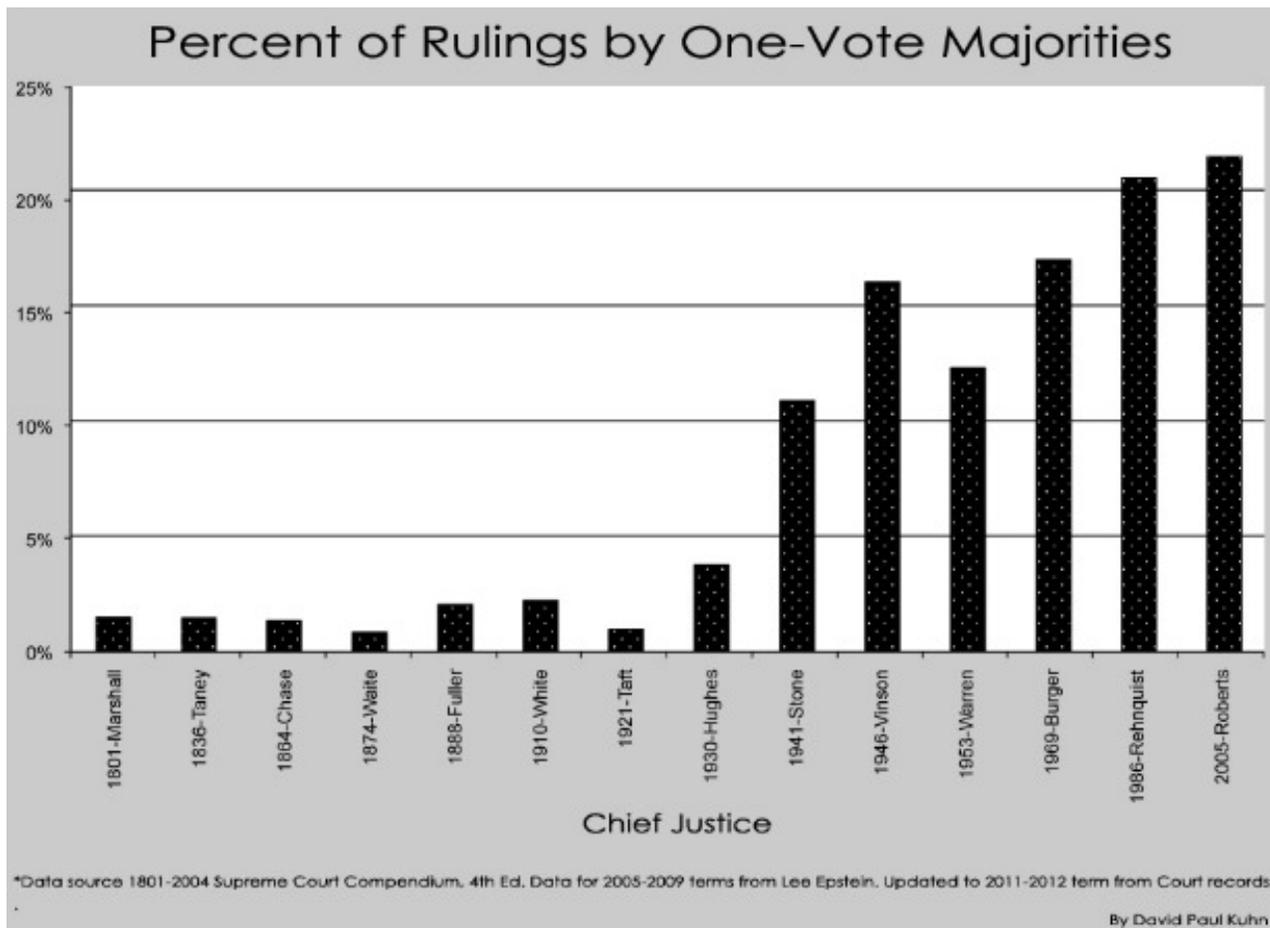


# The Incredible Polarization and Politicization of the Supreme Court

By David Paul Kuhn

John Roberts said he wanted a less polarized court. But the ACA ruling is just the latest in a string of 5-4 decisions on contentious issues, and the problem is getting worse.



It still came down to one vote.

Had [Chief Justice John Roberts](#) sided with his fellow conservatives, as he often does, the definitive legislation of Barack Obama's presidency, progressives' century-long fight for universal health care, would have been thrown out. We are inured to this irony: Many of the Court's rulings that have the

greatest influence on American life are increasingly decided by the narrowest possible margin.

It wasn't always this way. From 1801 to 1940, less than 2 percent of the Supreme Court's total rulings were resolved by 5-to-4 decisions. Since then, more than 16 percent of the Court's rulings have been decided by "minimum-winning coalitions." In the two most recent Courts, more than a fifth of all rulings were decided by 5-to-4 votes.

Scholars consider these narrow decisions the most political. Research indicates that 5-to-4 rulings are the most likely to be overturned by later Courts. They carry the same legal authority as more unanimous opinions -- but not the same moral authority. In this vein, the one branch of government designed to be above partisanship echoes the rise in hyperpartisanship seen throughout Washington.

The Roberts Court has decided more cases by a 5-to-4 ruling (about 21.5 percent) than any Court before it, though only by a narrow margin. The previous Court, led by William Rehnquist, decided 20.5 percent of its cases by this minimum coalition. That rate, however, represents roughly twice the share of 5-to-4 rulings in the [Stone Court](#), during World War II. And the Stone Court had more than three times the rate of 5-to-4 decisions of any Court prior.

Roberts noticed the trend early in his term. "I do think the rule of law is threatened by a steady term after term after term focus on 5-4 decisions," Roberts [told \*The New Republic's\* Jeffrey Rosen in 2006](#). "I think the Court is ripe for a similar refocus on functioning as an institution, because if it doesn't, it's going to lose its credibility and legitimacy as an institution."

That worry may have shaped Roberts' health-care ruling. The ruling will likely temper, for now, charges that the Court has become a predictably political institution. Thursday's decision marked an unusual respite from this predictably ideological Court. Anthony Kennedy is the traditional swing vote. But Kennedy sided with three more conservative members on Thursday. In the minority opinion, he wrote that the law is "invalid in its entirety." No Supreme Court had struck down presidential legislation this significant since the mid 1930s. So it was Roberts, the conservative chief justice who Senator Obama voted against, who saved, for now, the signature law of Obama's presidency. It was a strikingly non-ideological moment for ideological Washington.

Yet concerns about the Court's apolitical credibility are hardly alleviated. At least two-thirds of the 5-4 rulings during the Roberts Court have split along ideological lines. Roberts has agreed with the three most conservative justices -- Samuel Alito, Clarence Thomas and Antonin Scalia -- in at least eight in 10 non-unanimous rulings, according to calculations by *SCOTUSblog*.

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Roberts has also presided over the two most polarized Court years in American history. In 2006 and 2008, about one in three rulings were decided by a 5-to-4 vote. In the last three years, the Roberts Court decided slightly less than a fifth of its cases by a one-vote majority. Notably, that's still a few percentage points above the share of 5-to-4 rulings during Burger and Vinson Courts. The Supreme Court will consider controversial laws next term, including the use of affirmative

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action. If past is prologue, major rulings will remain politicized.

This is also the most conservative Court since the New Deal. In a widely cited 2009 study, conservative judge and scholar Richard Posner, as well as his colleague at the University of Chicago law school William Landes, ranked the ideology of 43

Supreme Court justices from 1937 to 2006. Four of the five most conservative judges served on the Court that year. None of the five most liberal judges did. Ruth Bader Ginsburg was the only current judge to rank among the 10 most liberal justices.

Posner and Landes also found that the more ideologically polarized the Court was, meaning the greater its range from right to left, the greater the number of cases decided by one vote. It found, critically, that ideology "matters more in the Supreme Court than in the court of appeals."

There have not only been more ideologically sorted rulings in recent decades. The most significant laws are increasingly decided by the same one-vote margin that undermines the very "supreme" authority of the Court. The 1966 *Miranda* decision, which defined police suspects' rights, was an early signal that 5-to-4 rulings were going to shape this nation like never before. The 2000 *Bush v. Gore* was decided along the same narrow margin.

In the Roberts Court, 5-to-4 majorities have allowed unlimited corporate and union campaign spending, upheld an individual's right to gun ownership, limited an employee's ability to file a pay discrimination, decided states cannot impose mandatory life sentences on juvenile murderers without the possibility of parole, and limited class-action suits as well as decided the constitutionality of the health-care law.

This polarization has not gone unnoticed. The judiciary remains the most trusted branch of government. Sixty-three percent of Americans said in autumn 2011 that they have a "great deal" or a "fair amount" of faith in it. Yet that is the lowest share to express trust in the judicial branch since 1976, when Gallup first asked the question.

And the Supreme Court is especially sullied. Prior to Thursday's decision, about three in four Americans agreed that "personal or political views influence" current Court decisions, according to a recent *New York Times*/CBS News Poll. Yet the public has not seen the Court as apolitical since, at least, it became more politically ordered. In 1946, a narrow plurality, four in 10 Americans, told Gallup that they "agree" that "the Supreme Court decides many questions largely on the basis of politics."

This year's term saw roughly as many 5-to-4 rulings as 1946. But then it was not the norm. In 1941, for the first time, at least a tenth of the Court's opinions were decided by this narrow margin. The rate of these minimum majority decisions has not fallen below 15 percent since 1991. Some modern Court years are more partisan than others. But the upward trend remains steady since the mid-twentieth century.

So liberals celebrate a rare 5-to-4 decision that went their way on the Roberts Court. Conservatives rue the ruling. Polarization, however, endures. The four liberal justices lined up as predicted. Three of the four most conservative justices also fell in line on the greatest issue before the Court. All the

conservative judges agreed on other aspects of the ruling. The swing vote was a surprise on the headline decision. But the Supreme Court remains generally sorted along partisan lines. And it's not news. Rather, it's old news. That's how accustomed to polarization we've become. Or how cynical.

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