By The Numbers

Precedent And The Roberts Court In 4 Charts

By **Law360 Staff** | October 7, 2019, 9:32 PM EDT

Under Chief Justice John Roberts, the U.S. Supreme Court has altered or overturned precedent 21 times. (CQ Roll Call via AP)

While U.S. Supreme Court Chief Justice John Roberts has yet to rival some of his predecessors in terms of the total number of legal precedents altered over the course of his tenure, his court has not shied away from taking aim at previous rulings.

Of the 21 cases where an identifiable precedent was overturned or altered during the Roberts court, most were divisive, 5-4 rulings, according to data from Washington University's Supreme Court Database. Most of the split rulings were about hot-button issues, and they were decided by a conservative majority.

Compared to past Supreme Courts, the Roberts court has a higher percentage of closely divided rulings, according to Washington University political science professor James Spriggs.

"About 71% of overulings are 5-4 under Roberts, compared to about 31% under Rehnquist," he said. "That's a function of a court that is deeply divided along clear ideological lines and on most salient issues with big political stakes."

Roughly a third of the precedents at issue in the Roberts court had been on the books for less than 20 years, and in one 2014 decision — Johnson v. U.S. — the Roberts court struck down two of its own rulings issued only a few years before. About 2.2% of the court's rulings since Roberts took over as chief in 2005 have altered past precedent, which is just slightly behind **the rate of his recent predecessors.**

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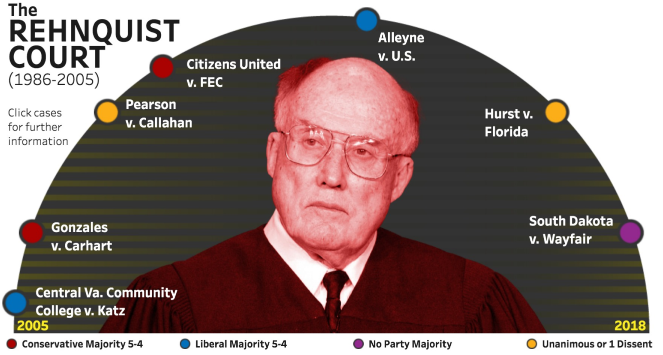
A look at the precedents that the Roberts court has altered or overruled, organized by the chief justices who presided during the earlier rulings, shows how the law has evolved over time and which prior courts the justices have overturned most frequently.

The fact that the Rehnquist court had a stable conservative majority for just shy of two decades has not deterred the Roberts court from striking down or altering eight of its precedents — more than from any other era. Listed here by the names of the decisions that altered them, most of the Rehnquist-era precedents were overturned or amended early in Justice Roberts' tenure.



Central Va. Community College v. Katz

A bankrupt bookstore's supervisor sued to collect debts owed to the store by Central Virginia Community College, but the school claimed it couldn't be sued because of state sovereign immunity. The Supreme Court held that states can't invoke sovereign immunity as a defense in bankruptcy proceedings.

Precedent: Seminole Tribe of Fla. v. Fla., 1996

Source: Supreme Court Database and Law360 data

The court's announcement Friday that it will examine a Louisiana law that would require abortion doctors to hold admitting privileges at local hospitals has court watchers speculating whether 1992's Planned Parenthood v. Casey and the Burger-era Roe v. Wade could be on the chopping block, continuing the direction the court seemed to be taking in 2008's Gonzales v. Carhart.

Justice Anthony Kennedy cast the swing vote for the conservative majority in that 5-4 ruling, which upheld a partial birth abortion ban passed by Congress in 2003, in a move away from the 2000 ruling in Stenberg v. Carhart, which had struck down a Nebraska statute criminalizing partial birth abortions.

Gonzales signaled a rightward shift with the addition of Justice Samuel Alito, who replaced the more moderate Justice Sandra Day O'Connor. Her swing vote in favor of the liberal majority in Casey largely upheld Roe v. Wade.

Justice Ruth Bader Ginsburg, reading her dissent from the bench, called the Gonzales decision alarming and chastised the court for "blur[ring] the line, firmly drawn in Casey, between previability and postviability abortions. And, for the first time since [Roe v. Wade], the Court blesses a prohibition with no exception safeguarding a woman's health," Ginsburg said.

The same conservative Roberts court lineup paved the way for the rise of super PACs in Citizens United v. FEC, a decision written by Justice Kennedy that ruled corporate funding for independent political broadcasts was protected by the First Amendment, overturning Austin v. Michigan Chamber of Commerce and partially overturning McConnell v. FEC.

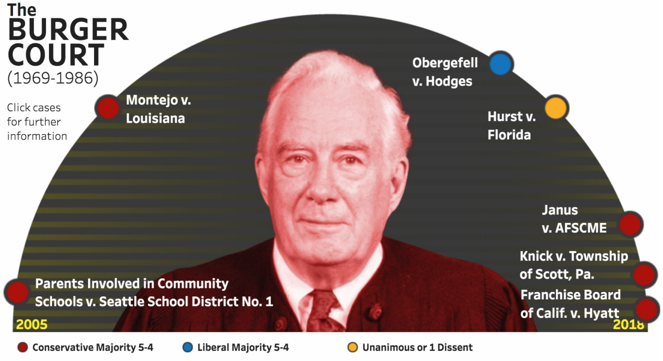
Austin v. Michigan held in 1990 that political speech could be banned based on the speaker's corporate identity, and in 2003, McConnell v. FEC upheld the McCain-Feingold Act, which banned unrestricted corporate and union donations made directly to political parties.

The Roberts court has seen one of the strangest mix of votes — with no clear political majority — in South Dakota v. Wayfair, which overturned the Rehnquist court's 1992 Quill Corp. v. North Dakota, as well as National Bellas v. Department of Revenue of Illinois, a 1967 Warren-era ruling.

South Dakota v. Wayfair, which held that states could charge tax on purchases made from out-of-state sellers, even if the seller doesn't have a physical presence in the state, is one of only four times Roberts didn't vote in the majority in a precedent-altering opinion. Justice Ginsburg joined Justices Kennedy, Alito, Clarence Thomas and Neil Gorsuch in the majority, while Roberts sided with the liberals, Justices Stephen G. Breyer, Sonia Sotomayor and Elena Kagan.

The unusual lineup showed the justices wrestling with "confronting the complexities of defining physical presence in the Cyber Age," as Justice Kennedy wrote in the court's opinion.

Justice Roberts, dissenting, accused the court of "compounding its past error by trying to fix it in a totally different era ... I would let Congress decide whether to depart from the physical-presence rule that has governed this area for half a century."



Parents Involved in Community Schools v. Seattle School District No. 1

Parents sued the Seattle School District arguing that a racial tiebreaker system to decide which students would be admitted to the popular schools violated the equal protection clause and the Civil Rights Act. The Supreme Court held the district's racial tiebreaker plan was unconstitutional under the equal protection clause.

Precedent: Swann v. Charlotte-Mecklenburg, 1971

Source: Supreme Court Database and Law360 data

The Roberts court overturned or altered seven decisions from the Burger court, a few of which focused on hot-button issues that may continue to consume the court in future terms.

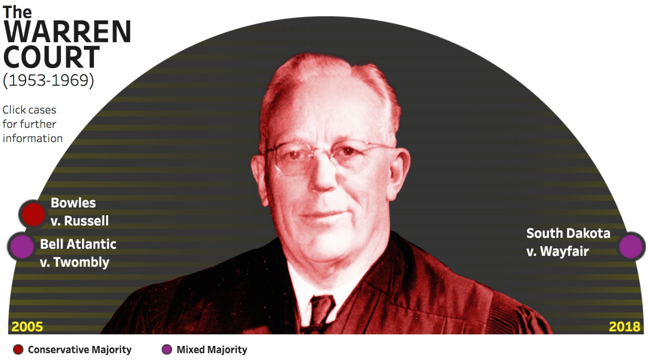
The two most recent precedent-altering decisions, Franchise Board v. Hyatt, and Knick v. Scott, raised hackles among the court's liberals about the conservative majority's approach to precedent. Both took aim at Burger court rulings.

The affirmative action case Parents Involved v. Seattle School District No. 1, which found the school district's plan of "racial tiebreakers" unconstitutional, featured a rare 4-1-4 split, and Roberts, who wrote the plurality ruling, famously declared that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race."

But Burger court precedent was also the subject of a rare win for Roberts court liberals. In the same-sex marriage case Obergefell v. Hodges, in which Justice Kennedy sided with the liberal minority to give it one of only three wins during Roberts' tenure, the court shook up a Burger court's decision that same-sex marriage was not a federal question.

"The right to marry is a fundamental right inherent in the liberty of the person, and under the due process and equal protection clauses of the Fourteenth Amendment couples of the same sex may not be deprived of that right and that liberty," Kennedy wrote.

Kennedy — swinging the other way — also cast the decisive vote to seal a conservative majority in the divisive union fee ruling Janus v. AFSCME, a 5-4 decision authored by Justice Alito limiting the ability of government worker unions to require fee payments from nonmembers to cover collective bargaining costs. Justice Kagan described the ruling as a "six-year crusade" to reverse the Burger court's Abood v. Detroit Board of Education.



Bell Atlantic v. Twombly

William Twombly led a class action against Bell Atlantic and other telecommunications companies alleging the companies violated Section 1 of the Sherman Antitrust Act by conspiring to end competition. The Supreme Court held that a plaintiff claiming a Section 1 violation must also allege facts suggesting a conspiratorial agreement, laying out a "plausibility standard" for Section 1 suits.

Precedent: Conley v. Gibson, 1957

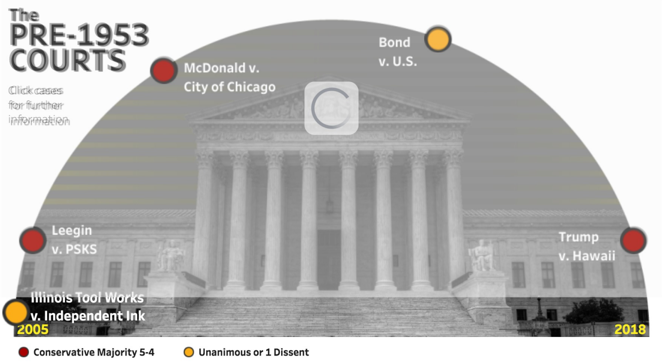
Source: Supreme Court Database and Law360 data

The Roberts court has altered or overturned just four precedents from the Warren court, which had a liberal majority. And yet, one of the most significant cases of Roberts' tenure which overturned precedent from that era, Bell Atlantic v. Twombly, was not a close majority.

Twombly struck down the 1957 Conley v. Gibson, which held that a complaint shouldn't be dismissed for failure to state a claim unless the plaintiff could prove "no set of facts" would entitle him or her to relief.

The ruling radically ramped up pleading requirements. Two years later, in Ashcroft v. Iqbal, the court expanded Twombly's pleading standards to cover all civil cases in federal courts. The two cases are sometimes referred to as "Twiqbal", and together they dramatically changed litigation practice, handing defendants a new weapon to challenge lawsuits early on.

"After puzzling the profession for 50 years, this famous observation has earned its retirement," Justice David Souter wrote in Twombly's 7-2 majority opinion.



Illinois Tool Works v. Independent Ink

Independent Ink alleged that Illinois Tool Works' license constituted a tying arrangement in violation of the Sherman Act. The Supreme Court held that the burden was on the party claiming an antitrust violation to show that the defendant had the power to raise prices above market rates.

Precedent: International Salt Co. v. U.S., 1947

Source: Supreme Court Database and Law360 data

Recent blockbuster cases that rattled precedents laid down before the start of the Warren court come in many different forms, but a few represented a dramatic shift from past practice.

Antitrust questions have received the eagle eye from the Roberts court, ranking high on the list of areas in which precedent has been altered or overturned. In the 2006 decision Illinois Tool Works Inc. v. Independent Ink Inc. a unanimous bench overturned the Vinson court's 1947 ruling in International Salt Company v. U.S., holding that the mere fact a "tying" product is patented doesn't support a presumption of market power.

The court built on Illinois Tool Works again a year later in Leegin Leather Products v. PSKS, and the rulings led to the U.S. Department of Justice and Federal Trade Commission releasing updated antitrust guidelines for the licensing of intellectual property in 2017.

Another reversal grappled with a decision that has long been regarded as a shameful part of the court's past. In Trump v. Hawaii, which upheld President Donald Trump's controversial travel ban, Chief Justice John Roberts also took aim at Korematsu v. U.S., a 1944 ruling that upheld the internment of Japanese Americans during World War II.

"Korematsu was gravely wrong the day it was decided, has been overruled in the court of history, and — to be clear — has no place in law under the Constitution," Justice Roberts wrote in the 5-4 ruling for the conservative majority.

But Justice Sonia Sotomayor, reading her dissent from the bench, wondered if precedent had in fact been overturned.

"In blindly accepting the government's misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the court redeploys the same dangerous logic underlying Korematsu and merely replaces one 'gravely wrong' decision with another," Sotomayor said.

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