Not-So-Risky Business:

The Chamber of Commerce's Quiet Success Before the Roberts Court – An Early Report for 2012-2013

May 1, 2013

While most of the Supreme Court universe has been focused on the landmark civil rights cases on the Court's docket this Term – blockbuster cases addressing affirmative action, voting rights, and marriage equality – the press has paid scant attention to the rest of the Court's docket. Lost in this shuffle is an emerging story about the Supreme Court's business-heavy caseload this Term and the Chamber of Commerce's continued success before the Roberts Court generally. Although often ignored by the American public, these cases involve important issues with potentially far-reaching consequences for workers and consumers nationwide.

This report is the latest in our continuing examination of the Chamber's overall success before the Roberts Court. Since 2010, Constitutional Accountability Center has been tracking the Chamber's Supreme Court activities and releasing related reports each Term. With the Court wrapping up the current Term's arguments last week, now is a good time to check in on the Chamber's track record so far and preview some of the significant issues still to be decided.

The Chamber and the Roberts Court: An Update

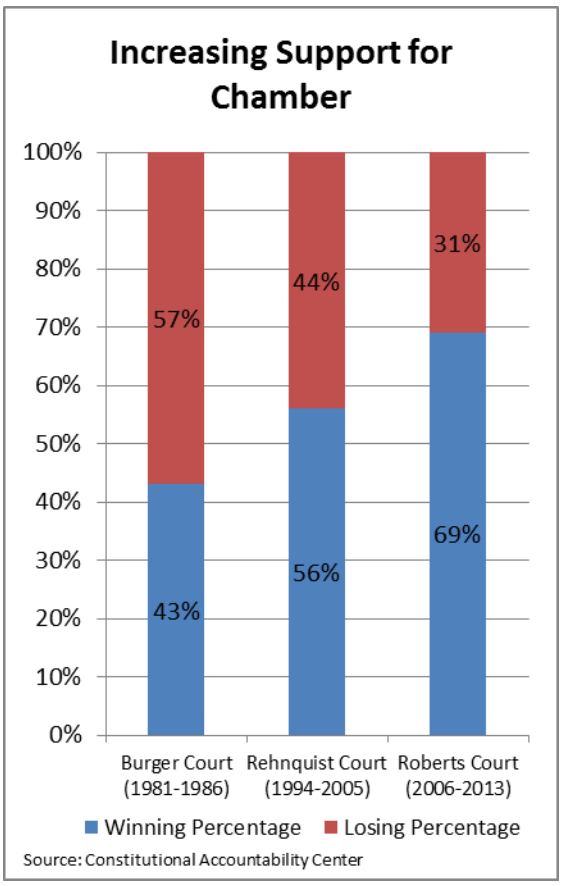
All told, the Chamber of Commerce has filed a whopping 18 *amicus* briefs this Term – just below its record number of 21 in October Term 2010. Overall, the Court will likely decide 76 cases this Term, meaning that the Chamber will have participated in roughly 24% of the Court's decided cases.

This in itself is an important story. For instance, during the final five years of the Burger Court – just before the first member of the current conservative bloc (Justice Antonin Scalia) assumed his seat – the Justices were hearing twice as many cases (between 153 and 160 per Term) as they are now. At the same time, the Chamber was filing in an average of seven cases per Term, or approximately 4% of the Court's cases overall. Therefore, even as the Court is now hearing far fewer cases, the Chamber is participating in a greater number of them. Over the past thirty years, the Chamber's participation rate has increased six-fold, from 4% in the early 1980s to 24% today.

This dramatic increase in participation is a reflection, in part, of the Chamber's success in shaping the Court's docket. As *SCOTUSblog* reported in early April, the Chamber remains "the country's preeminent petition-pusher," as it filed the greatest number of *amicus* briefs at the *cert*. stage of any private organization during *SCOTUSblog*'s three-year study period (running from May

2009 to August 2012).[1] Importantly, the Chamber also has the highest success rate of any of the ten most active organizations during this period – with the Court granting 32% of the Chamber's cases overall. Therefore, the Chamber is not just participating in cases that the Court decides to hear, but it's also aggressively and successfully working to shape the Court's docket.

Finally, and most important, the Chamber continues to win the vast majority of its cases before the Roberts Court. Although many of the Chamber's cases this Term are still pending, it's already off to a strong start, winning six cases so far and losing only one[2] – a record that's consistent with (and somewhat stronger than) the Chamber's overall tally before the Roberts Court to date. Indeed, since John Roberts took over as Chief Justice and Justice Samuel Alito succeeded Justice Sandra Day O'Connor, the Chamber has prevailed in 69% of its cases overall (66 of 95 cases from 2006-2013).



To place this overall success rate in historical perspective, it's useful to compare the Chamber's record before the Roberts Court to two other recent periods of relative stability on the Court – the Burger Court from 1981-1986 (the five Terms before Justice Scalia was confirmed) and the Rehnquist Court from 1994-2005 (the period that preceded the Roberts Court and involved no changes in Court personnel).

Interestingly, the Chamber actually lost more cases than it won in the late Burger Court – amassing only a 43% success rate overall (15 of 35 from 1981-1986). The Chamber's success rate then increased during the stable Rehnquist Court to 56% (45 of 80 from 1994-2005). And, finally, as mentioned above, it increased yet again during the Roberts Court to 69%. Therefore, during this 30-year period, the Chamber's overall success rate has consistently improved – reaching its peak only in recent years.

The Chamber, the Roberts Court, and Closely Decided Cases: An Update

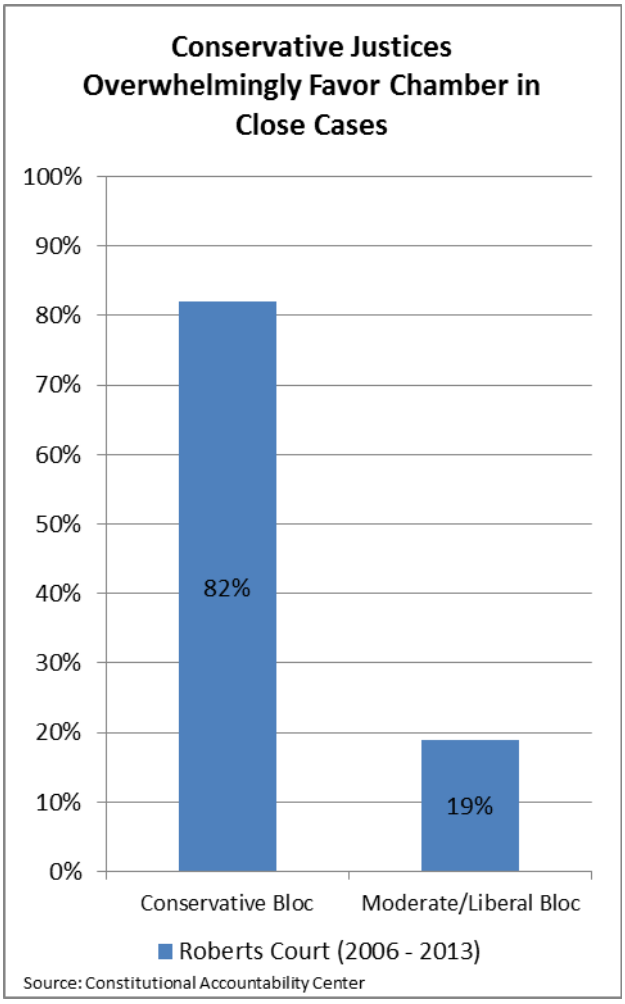
Importantly, the Chamber won all three of its cases decided so far this Term in which the Court divided five-to-four – *Comcast Corp. v. Behrend*, *Genesis HealthCare Corp. v. Symczyk*, and *Kiobel v.*

[1] Adam Chandler, *Cert.-Stage Amicus "All Stars": Where Are They Now?*, SCOTUSblog (Apr. 4, 2013), http://www.scotusblog.com/2013/04/cert-stage-amicus-all-stars-where-are-they-now/.

[2] The Chamber's six wins were in *Comcast Corp. v. Behrend*, *Gabelli v. SEC*, *Genesis HealthCare Corp. v. Symczyk*, *Kiobel v. Royal Dutch Petroleum Co.*, *Standard Fire Insurance Co. v. Knowles*, and *U.S. Airways v. McCutchen*. Its single loss was in *Amgen v. Connecticut Retirement Plans and Trust Funds*. Additionally, we followed the Chamber in scoring *Decker v. Northwest Environmental Defense Center* as neither a win nor a loss – even though the Chamber filed an *amicus* brief on behalf of the prevailing party in the case – because the Chamber only addressed an ancillary issue in its brief.

Royal Dutch Petroleum Co.[3] All told, since early 2006, the Chamber has won 79% of close cases decided by the Roberts Court (22 of 28) – that is, cases decided with a five-Justice majority. And, in these close cases, when a Justice's vote matters the most, support for the Chamber's position from the Court's conservative bloc has been overwhelming.

On average, the Roberts Court's conservatives have supported the Chamber's position in close cases 82% of the time, compared to just 19% for the moderate/liberal bloc.[4] As a point of reference, during the last eleven years of the Rehnquist Court (from 1994 to 2005), the Chamber succeeded in 64% of close cases (9 of 14), with a much narrower ideological divide of 68% to 31%.



Furthermore, it's also significant that under Chief Justice Roberts, the number of closely divided decisions has increased as a percentage of total Chamber cases. The Roberts Court has seen 29% of its Chamber cases (28 of 95) closely decided, an 11-point jump from the stable Rehnquist Court (18%, 14 of 80). Thus, not only has the Roberts Court been more greatly divided ideologically in close Chamber cases than the Rehnquist Court, but it has also sharply divided more often.

To get a better sense of the dynamics often at play in these closely divided cases, it's useful to consider one of this Term's cases in greater detail – *Comcast Corp. v. Behrend*. Decided on the same morning as the DOMA argument (in *United States v. Windsor*), *Behrend* merits a closer look than it's received so far from most commentators.

3 Although the party for which the Chamber filed a brief (Royal Dutch Petroleum) prevailed unanimously in *Kiobel*, we nevertheless scored the case a five-to-four victory for the Chamber. The reason for this is simple: Justice Breyer's opinion in *Kiobel*, which was joined by his three moderate-to-liberal colleagues (Justices Ginsburg, Kagan, and Sotomayor), rejected the primary legal argument advanced by the Chamber – that the Court should apply the defendant-friendly presumption against extraterritoriality to the human rights claims at issue in the case. Instead, even while joining the conservative majority in dismissing Kiobel's human rights claims, Justice Breyer articulated and then applied a flexible, multi-factor test that's more likely to welcome new human rights claims under the Alien Tort Statute in future cases – precisely the type of test that the Chamber argued forcefully against in its *Kiobel* brief.

4 The conservative bloc includes Chief Justice Roberts, as well as Justices Alito, Kennedy, Scalia, and Thomas. The moderate/liberal bloc includes the remaining Justices – Justices Breyer, Ginsburg, Kagan, and Sotomayor.

Comcast Corp. v. Behrend – A Key Victory for the Chamber (and Comcast)

Behrend was a class action lawsuit brought by Comcast customers who alleged that the company had committed various antitrust violations in the Philadelphia market, leading to higher prices for Comcast's services. In a five-to-four ruling along ideological lines – with Justice Scalia writing the majority opinion – the Court held that the customers' class action had been improperly certified because their proposed damages model – offered by an expert witness – did not establish a clear enough link between class-wide damages and the customers' underlying antitrust theory.

The most interesting feature of *Behrend* – apart from its bare ideological outcome – may be the spirited dissent jointly authored by Justices Breyer and Ginsburg (and, in a rare move, read, in part, from the bench). The dissent accused the Court's conservatives of "[a]bandoning the question we instructed the parties to brief" and "reach[ing] out to decide a case hardly fit for our consideration" – one that was "infect[ed] by our misguided reformulation of the question presented." These moves "left respondents [the class of customers] without an unclouded opportunity to air the issue the Court . . . decide[d] against them."

From there, as the dissent explains, the conservative majority then took it upon itself to probe the adequacy of the plaintiff class's proposed damages model – "resolving a complex and fact-intensive question without the benefit of full briefing" and relying "on its own version of the facts, a version inconsistent with factual findings made by the District Court and affirmed by the Court of Appeals." Therefore, the dissent concluded that, in ruling in Comcast's favor, the conservative majority "depart[ed] from our ordinary practice, risk[ed] inaccurate judicial decisionmaking, and [wa]s unfair to respondents and the courts below."

In the end, *Behrend* is a useful example of the lengths to which the Roberts Court's conservative majority sometimes goes to rule in a business-friendly way in closely divided cases.

Is The Worst Still Yet To Come?

In the run-up to the marriage equality arguments in March, the Roberts Court heard a trio of Chamber cases, each hugely important to the business community – *Mutual Pharmaceutical Co. v. Bartlett*, *Horne v. Department of Agriculture*, and *Oxford Health Plans LLC v. Sutter*. These cases were a helpful reminder of the key decisions still yet to come this Term – as *ten* of the Chamber's cases are still pending before the Court. While many of these cases are obscure and (at times) technical, the stakes involved are often enormous.

Take the three cases mentioned above, for instance, none of which received much attention from the national media. In *Bartlett*, the Court will decide whether an individual harmed by a generic drug's side-effects – in this specific case, causing burns over more than half of Karen Bartlett's body – can recover damages from the drug's manufacturer under state law or whether federal law closes the courthouse doors to injured patients (like Ms. Bartlett). In *Horne*, the Court will consider whether to make it easier for businesses (in this specific case, a group of raisin growers) to use the Takings Clause

to challenge monetary fines imposed by the federal government when enforcing a well-established regulatory regime. Finally, in *Sutter*, the Court will determine whether to make it even harder for individual claimants to join together in class arbitration and, in the process, attempt to hold large companies accountable for their alleged misdeeds.

And those were just the cases on the docket for the Court's March sitting. In the Court's recently completed April sitting, it heard two more Chamber cases – *American Trucking Associations, Inc. v. City of Los Angeles* and *University of Texas Southwestern Medical Center v. Nassar*. Although largely ignored by the press, the former is a key challenge to a "Clean Trucks" program designed to decrease the environmental impact of one of the largest ports in the country, and the latter is an attempt to make it harder for employees – even those alleging retaliation after complaining about blatant discrimination – to win Title VII claims. Finally, many other important cases argued earlier in the Term are also still pending, including *Koontz v. St. Johns River Water Management District* (an aggressive attempt to use the Takings Clause to undermine state environmental protections) and *American Express Co. v. Italian Colors Restaurant* (yet another attempt by a large company to use an arbitration agreement to block collective efforts to hold it accountable for its alleged misconduct).

Needless to say, the remaining months of the Court's Term will be extremely important for the Chamber. And, apart from the cases still pending this Term, it is apparent that the Chamber will continue to focus on shaping the Court's future docket, as well. Therefore, future Terms should prove to be just as busy as this one for the Chamber.