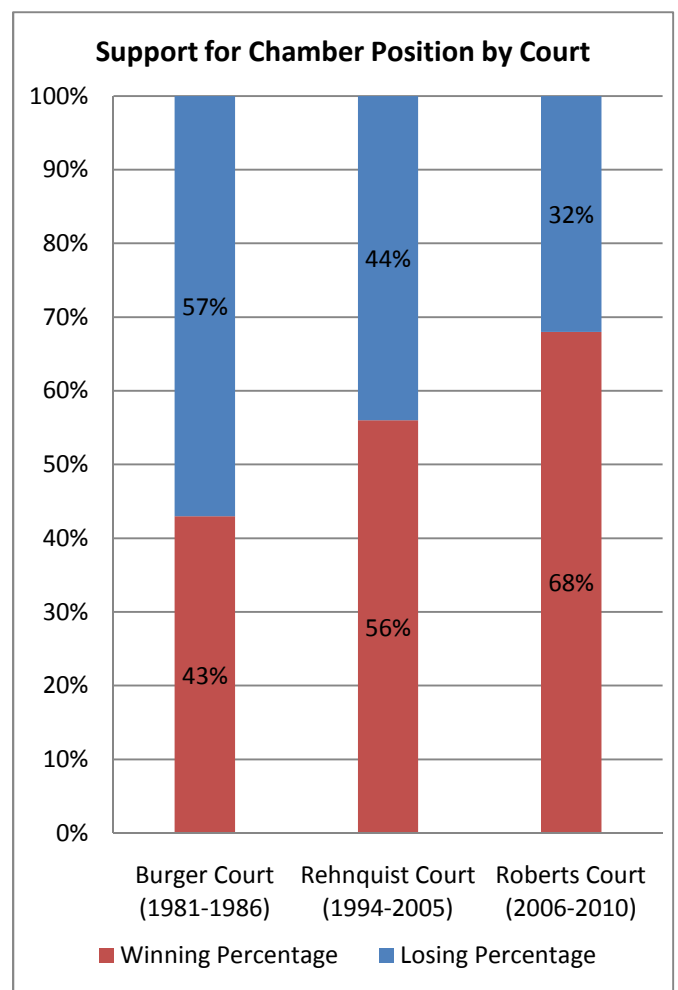




Open for Business: Tracking the Chamber of Commerce's Supreme Court Success Rate from the Burger Court through the Rehnquist Court and into the Roberts Court

The Supreme Court's 5-4 decision this past January in *Citizens United v. Federal Election Commission* has focused a national spotlight on the rulings of the Roberts Court in cases involving the interests of big business. As we explain in [A Capitalist Joker: The Strange Origins, Disturbing Past and Uncertain Future of Corporate Personhood in American Law](#), the Court's divided opinion in *Citizens United* is a sharp departure from constitutional text and history and represents the capstone of a sustained effort by corporate interests to give corporations the same constitutionally protected rights as individuals.

To test empirically the question of whether the Supreme Court is siding more frequently with corporate interests and dividing more sharply along ideological lines in these cases, Constitutional Accountability Center has now looked at three periods of relative stability on the Court, examining cases in which the United States Chamber of Commerce – which touts itself as “the voice of business” – participated as either a party, or, more often, as an *amicus curiae*, a “friend of the court.” In our first study, [The Roberts Court and Corporations: The Numbers Tell the Story](#), we examined five Terms of the Roberts Court, beginning when Justice Samuel Alito joined the Court in early 2006. We found not only that the Chamber won 68% of the cases in which it had participated during this period, but also that its success was drawn largely along ideological lines: a cohesive, five-Justice conservative majority voted for the Chamber 74% of the time, over 30 points more often than had the Court's moderate/liberal bloc. As a follow up, [A Tale of Two Courts: Comparing Corporate Rulings by the Roberts and Burger Courts](#) examined the last five Terms of the Burger Court, from the time Justice Sandra Day O'Connor joined the Court in 1981 until the first member of the Court's current conservative majority, Justice Antonin Scalia, joined the Court in 1986. Here, we discovered a very different picture: the Chamber lost more cases than it won, and there was no similar ideological division in cases in which the Chamber had participated.



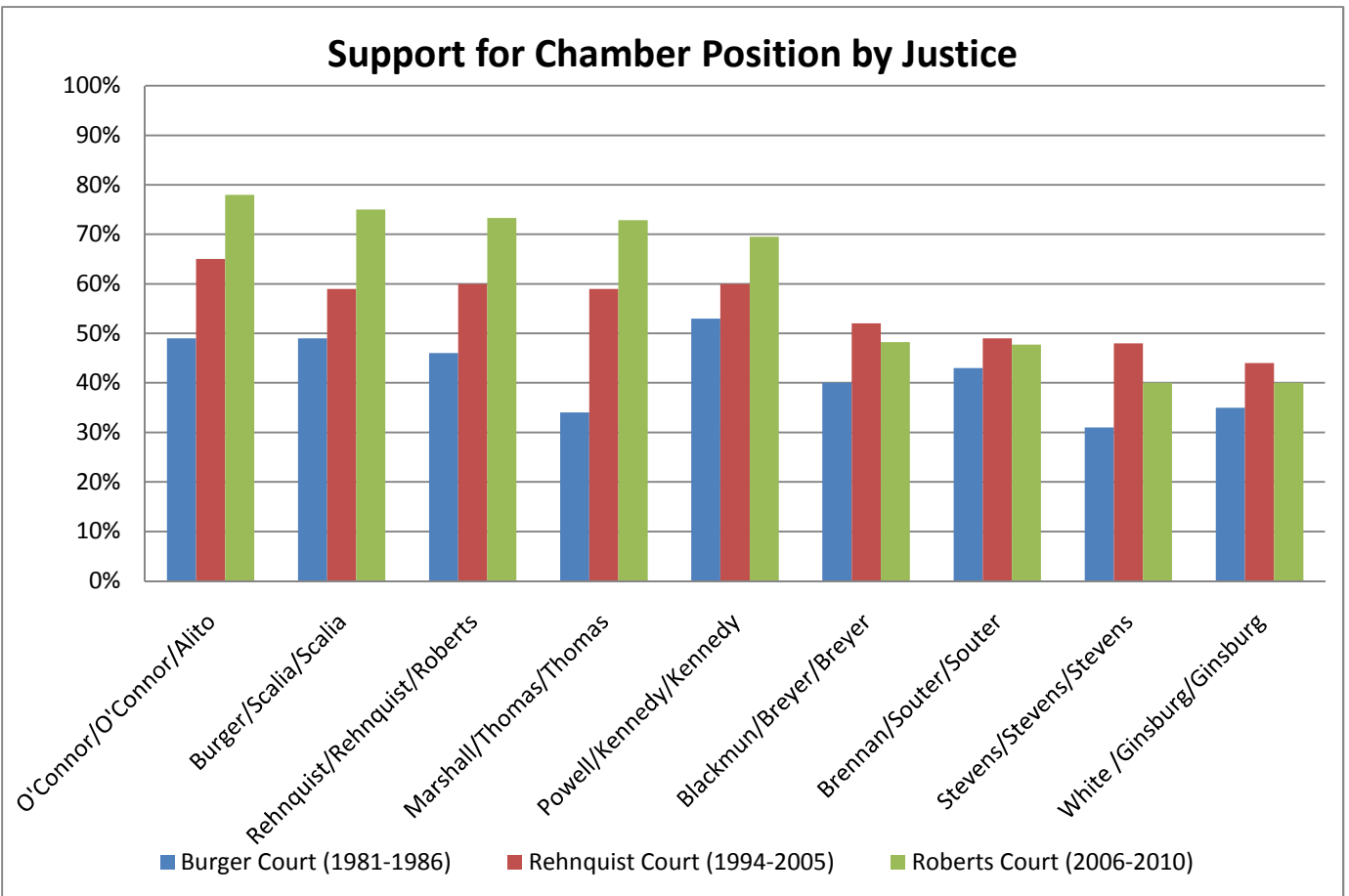
Now, in this third study, we fill in most of the gap between our Burger Court and Roberts Court studies, examining the last eleven Terms of the Rehnquist Court, from the beginning of the October 1994 Term until the end of the October 2004 Term (June 2005), a stable period with no changes in Court

membership. There are two major findings from this latest study. First, the Chamber’s win percentage during these eleven Terms – 56% – was smack in the middle of the Chamber’s 43% win percentage during the last five years of the Burger Court and its 68% win percentage during the first five years of the Roberts Court. In effect, this means that the Chamber’s overall success before the Supreme Court has been a linear progression upwards over the last 30 years. Second, and more remarkably, this study documents that the sharp ideological divide that characterizes the Roberts Court in business cases really did not exist before the changes in the Court’s composition in 2005.

The Chamber and the Rehnquist Court from 1994 - 2005

In our study of the Rehnquist Court from the October 1994 Term through the October 2004 Term, the Chamber prevailed in 45 of the 80 cases we scored, a win rate of 56%. As noted above, this represents a significant increase in the Chamber’s success rate compared to the Burger Court-era, when the Chamber prevailed less than half the time (43%). But it is still a far cry from the success the Chamber has enjoyed so far in the Roberts Court, where it has prevailed more than two-thirds of the time (68%).

Looking at the votes of individual justices, the shift towards the Chamber looks even more pronounced. Indeed, Justice Kennedy, the member of the Court’s conservative majority who voted for the Chamber the least in our Roberts Court study (69%), voted for the Chamber more frequently than *any* justice during our Rehnquist Court study, where Justice O’Connor voted for the Chamber the most (65%). Justice O’Connor’s successor, Justice Alito, topped all members of the Court during the Roberts Court study, voting in favor of the Chamber 78% of the time.



The methodology of our study of the Rehnquist Court is available at: <http://theconstitution.org/blog.history/wp-content/uploads/2010/12/Rehnquist-Chamber-Study-METHODOLOGY-12-17-10.pdf>

The Emergence of a Stark Ideological Divide on the Roberts Court

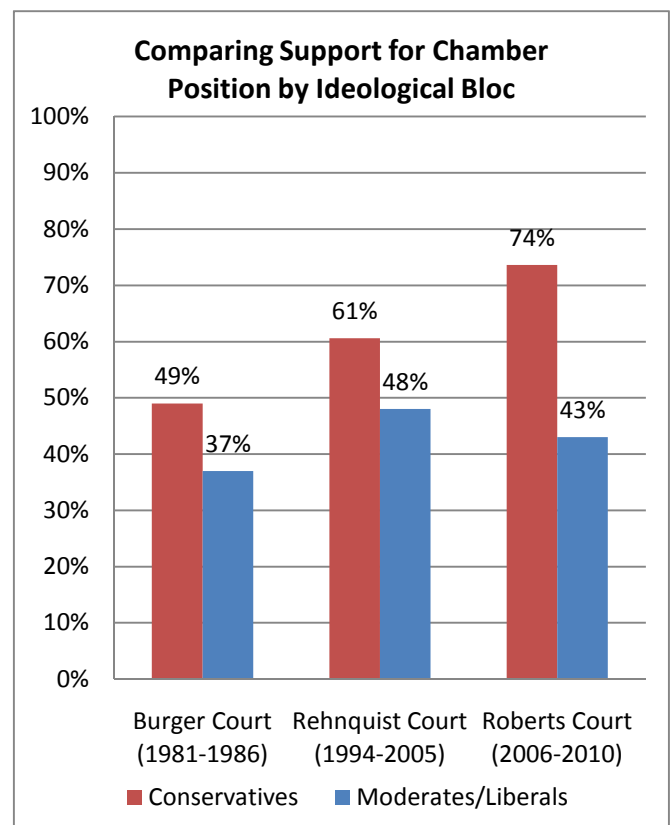
Even more striking than the straight-line increase in the Chamber’s win percentage over our three studies is the emergence in the Roberts Court of a stark ideological divide, something that was barely discernable during the Rehnquist and Burger Court study periods.

Comparing the Burger Court to the Rehnquist Court, there was a 13-point increase in the Chamber’s win percentage, but no discernable increase in the ideological split among the Justices – the Chamber won more votes across the Court’s ideological spectrum.

A completely different picture emerges when comparing the Rehnquist Court to the Roberts Court: the Chamber’s win percentage goes up 12 points, but the ideological split explodes. On the Roberts Court, the difference between the average level of Chamber support among the conservative bloc (74%) and the moderate/liberal bloc (43%) is 31 points. This difference during Rehnquist Court was only 13 points (61% to 48%), and to the degree one can identify ideological “blocs” on the more ideologically-diverse Burger Court it was just 12 points (49% to 37%).¹

The gap between the most pro-Chamber and least pro-Chamber Justices on the Court has also widened considerably. On the Rehnquist Court, the difference between Justice O’Connor, the most favorable to Chamber positions (65%), and Justice Ginsburg, the least favorable (44%), was 21 points. This gap on the Roberts Court has widened to 38 points, with Justice Alito ruling in the Chamber’s favor 78% of the time and Justices Ginsburg and Stevens ruling in favor of the Chamber just 40% of the time. As the chart to the right documents, the level of Chamber support from the Court’s conservative bloc has increased in an almost linear fashion over time, while the Court’s moderate/liberal bloc has fluctuated within a relatively narrow range.

The ideological divide on the Roberts Court is also apparent when one looks at the most closely divided opinions, defined as cases decided by a five justice majority. Comparing the Rehnquist Court to the



¹ We identify the “conservative” bloc on the Burger Court as including Chief Justice Burger and Justices O’Connor, Rehnquist, and Powell, and the “moderate/liberal” bloc as including Justices Marshall, Blackmun, Brennan, Stevens, and White.

Roberts Court, the number of close cases as a percentage of total cases rose, as did the Chamber's success rate in close cases. During the Rehnquist Court, just 18% (14 of 80) of the cases in our study were closely divided, while during the Roberts Court the percentage of these close cases has nearly doubled to 32% (19 of 60). The Chamber's level of success in close cases has risen 10 points, from 64% (9 of 14) during the Rehnquist Court to 74% (14 of 19) during the Roberts Court. Even more striking, the conservative bloc's average level of support for the Chamber position in close cases has risen from 68% during the Rehnquist Court to 85% on the Roberts Court. Meanwhile, the moderate/liberal bloc's average level of support for the Chamber has decreased from 31% to 15%. The result is that the gap between the level of Chamber support from the conservative and liberal/moderate blocs in close cases has now become a chasm, nearly doubling from 37 points to a whopping 70 points in the Roberts Court.

This increased ideological division is likely related to the Supreme Court's power to shape its own docket. The Court has broad discretion to choose the cases it decides, and only four votes are required to land a case on the Court's docket. The Court can increase the Chamber's win rate in several different ways. It can be on the lookout for cases in which corporations are the victims of egregiously wrong court of appeals rulings and the result will be a high win percentage for the Chamber and a great many unanimous and narrow rulings. That seems to be part of what was going on in the Rehnquist Court, as even the Court's most liberal members saw a significant bump in their voting for the Chamber's position. Alternatively, the Court can choose to hear more cases like *Citizens United*, which produce sweeping victories for the Chamber and sharp divisions along ideological lines. That seems, at least in part, to explain what has been happening during the first five years of the Roberts Court.

Conclusion

In an interview shortly after being confirmed as Chief Justice, John Roberts told Jeffrey Rosen that he believed the success of a Chief Justice could be measured by his ability to get his brethren to speak in one voice, in unanimous or nearly unanimous opinions.² But in Chamber cases so far, the Court under Chief Justice Roberts' leadership has trended in the exact opposite direction: during his tenure, a Court that had previously spoken in one voice in many business cases became much more sharply divided along ideological lines. This may be great news for the Chamber, which has won some sweeping victories in the Roberts Court, including *Citizens United*, but it is bad for the Court as an institution and for the nation as a whole.

² Jeffrey Rosen, *Roberts's Rules*, THE ATLANTIC, January/February 2007.