CONSTITUTIONAL ACCOUNTABILITY CENTER

CORPORATIONS AND THE SUPREME COURT:

Big Business Powers Ahead with Another Successful Term at the Roberts Court | 2019-2020 Term

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I. Introduction

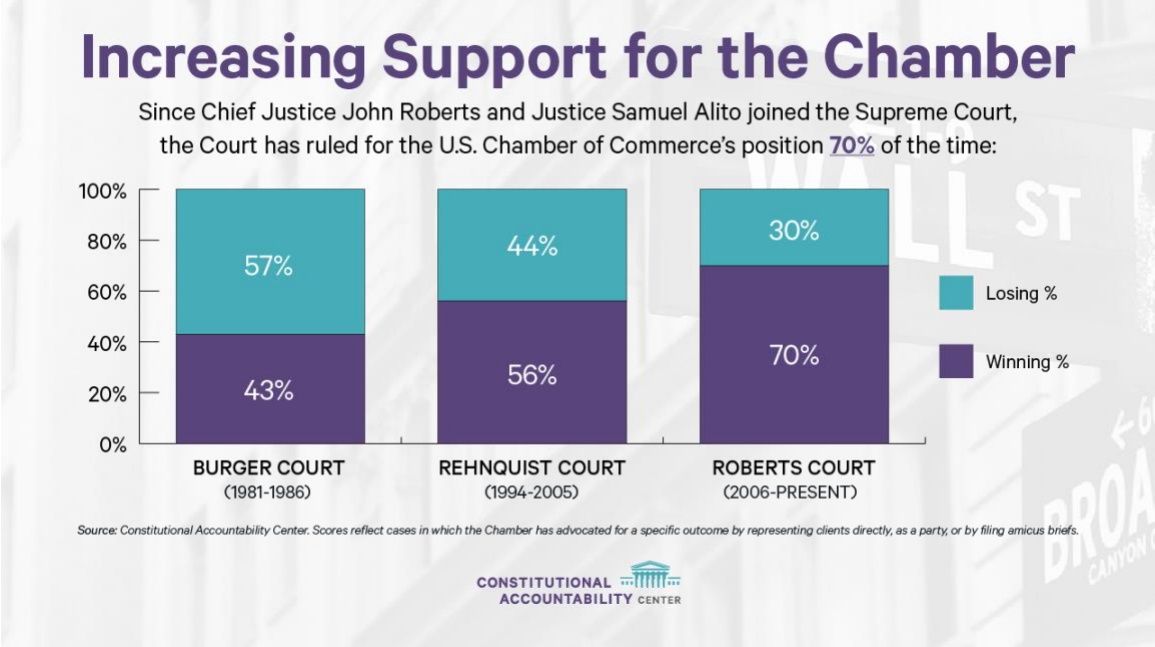
The Supreme Court's 2019-2020 Term, completed this July, saw the Court making major innovations to cope with the coronavirus pandemic—but one thing that did not change was its propensity for decisions benefitting corporate interests. The rate of victory that big business achieved this Term matched its long-term record before the Roberts Court, and these wins included one landmark decision that may seriously hamper effective regulation of harmful business practices. Corporate America's losses, meanwhile, were mainly limited to cases in which it was trying to move the law even further in its favor. Through it all, the Court remained deeply divided in business cases between its two ideological wings, with the conservative Justices giving a disproportionate share of their votes to corporate-backed positions, despite some unusual twists. Overall, this was a typically pro-corporate year at the Roberts Court. And with the Court's moderate-to-liberal bloc reduced to three members after the passing of Justice Ruth Bader Ginsburg—who was the Justice most likely to reject corporate-favored positions in recent years—there is reason to worry that the upcoming Term will be even more damaging for workers, consumers, and the environment.

II. Analysis of the 2019-2020 Term

1. Continuation of the Chamber's Winning Streak

As usual, we tracked corporate America's success this Term by examining cases in which the U.S.

Chamber of Commerce participated by filing an *amicus* brief. And as usual, the Chamber fared extremely well before the Court this Term, prevailing in 10 out of the 15 argued cases in which it filed a brief favoring one side or the other.[1] This 67% win rate is consistent with the Chamber's long-term average: since Chief Justice John Roberts and Justice Samuel Alito joined the Court, the Chamber has prevailed in 70% of its cases. And as we have explained, the Chamber's extraordinary success rate before the Roberts Court is a sharp break from the past. The Chamber prevailed only 56% of the time under Chief Justice William Rehnquist during a period of stable Court membership between 1994 and 2005, and only 43% of the time under Chief Justice Warren Burger during a stable period between 1981 and 1986.



2. A Business Docket Primed for Corporate Success

Impressive as it is, the Chamber's high victory rate actually understates its success before the Roberts Court. While the Chamber lost a third of its cases this year, none of those losses caused the Supreme Court to reverse a victory for corporate interests in the lower courts. Instead, the Chamber's losses all came in cases where the Supreme Court was reviewing a lower-court win for consumers, workers, or

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[1] The Chamber filed 17 briefs on the merits last Term, but two of those briefs did not support either of the parties, instead presenting argument on a specific issue raised by the case. In both of these cases, the Court did not resolve the issue that the Chamber's brief addressed—leaving the 15 cases that we scored as either a win or loss for the Chamber. In *Kansas v. Garcia*, the Court held that federal immigration law did not preempt a state criminal statute used to convict non-citizens of obtaining work authorization with fraudulent documents. The Chamber, which generally favors federal preemption of state regulation, devoted its brief to challenging a doctrine under which the Court often presumes that state law is not preempted. But because the Court reached its conclusion without relying on that presumption, it did not address the Chamber's arguments. *In Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC*, the Chamber's brief discussed the legal consequences that should follow when a federal official holds office in violation of the Appointments Clause, but the Court did not reach that issue because it concluded that there was no Appointments Clause violation.

the government—and where the Chamber simply failed to get that win reversed. In other words, when the Supreme Court reviewed decisions that favored individuals or government over big business, the Chamber and its allies succeed most of the time (though not all of the time) in persuading the Court to reverse those decisions. But when the Supreme Court reviewed decisions favoring big business, not once did individuals or the government persuade the Court to reverse those pro-corporate wins.

This was not a fluke. Amazingly, *it has been more than four years since the Supreme Court reversed a lower-court decision favoring corporate interests*, although the Court has decided more than 70 Chamber cases during that period.[2] So while big business does not always succeed in persuading the Court to push the law further in its favor by erasing adverse decisions from the courts of appeals, it has lately succeeded 100% of the time in preventing the Court from reversing pro-corporate decisions. As a result, even though the Chamber and its allies lose some cases each year, the Court's jurisprudence overwhelmingly moves in their favor: not only do they win 70% of their cases before the Supreme Court, but their victories have a more profound impact than their losses.

Corporate America's full success before the Roberts Court, therefore, comes not only from how the Court resolves cases on the merits, but also from which cases the Court accepts for review. This Term, for example, 73% of the Court's business docket comprised cases in which the lower court ruled against corporate interests.[3] The previous year, that number was 91%. By filling its docket with cases that present opportunities to erase victories for consumers, workers, or the government—while minimizing opportunities to reverse corporate victories—the Supreme Court has been able to move the law in the Chamber's preferred direction to a degree that even its high win rate does not fully reveal.

3. Significant Pro-Corporate Precedents

This Term, as usual, the dominant success of the Chamber's positions before the Court translated into concrete changes in the law benefitting corporate interests at the expense of civil rights, consumer protection, environmental safeguards, and employee benefits.

The Chamber's most significant victory this Term was *Seila Law v. Consumer Financial Protection Bureau*, a decision deeply harmful to consumers vulnerable to financial exploitation. Split 5-4 along ideological lines, with Chief Justice Roberts authoring the majority opinion, *Seila Law* struck down a key component of Congress's response to the 2008 financial crisis. Having recognized that a major cause of that crisis was the government's failure to enforce the nation's consumer financial protection laws, Congress assigned that mission to a new agency, the CFPB, which Congress created as an independent agency to shield it from the kind of industry-fueled political pressure that has stymied enforcement in the past. But based on a spurious interpretation of the Constitution, the Court struck down Congress's design and stripped political independence from the CFPB's director, making him or her fireable at will by the president.

Beyond its damaging impact on the CFPB—which is now subject to the whims of presidents whose industry affinities may make them hostile to consumer protection—*Seila Law* more broadly restricts

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[2] By our reckoning, the last time the Supreme Court reversed a lower-court victory for corporate interests in a Chamber case was the January 2016 decision in *Montanile v. Board of Trustees of National Elevator Industry Health Benefit Plan*. And notably, a commentator described that decision at the time as "a strong candidate for this year's award for 'case that breaks the least new ground.'" Ronald Mann, *Opinion analysis: Justices reaffirm limitations on ERISA plan's right to recover medical-reimbursement costs*, SCOTUSBlog.com (Jan. 20, 2016).

[3] Out of the 15 cases in which the Chamber favored one party or the other, the Chamber supported the petitioner—the party seeking review of a lower-court decision—in 11 of those cases.

the elected branches' ability to design federal agencies in the manner best suited to accomplish their missions. And it may threaten the future of other independent regulators, whose work promotes the public's safety and well-being, by opening the door to similar litigation challenging their independence. With this decision, the Court retreated from nearly a century of precedent supporting agency independence—and handed a victory to the CFPB's detractors that they have been unable to achieve in the political process.

In other Chamber victories this Term, the Court made it harder for victims of racial discrimination to prevail under a Reconstruction-era civil rights law (*Comcast v. National Association of African-American Owned Media*), restricted the circumstances in which victims of fraudulent debt-collection tactics can challenge those tactics (*Rotkiske v. Klemm*), limited the ability of employees to sue to protect their retirement plans (*Thole v. U.S. Bank*), and permitted the construction of natural gas pipelines through National Park Service lands (*U.S. Forest Service v. Cowpasture River Preservation Association*).

To be sure, the Court also dealt the Chamber important losses. In *Liu v. SEC*, the Court rejected the Chamber's position that courts may never order the disgorgement of ill-gotten profits in enforcement actions brought by the Securities and Exchange Commission. And in *Maui v. Hawaii Wildlife Fund*, the Court rejected the Chamber's position that polluters can escape Clean Water Act liability as long as they discharge pollution into navigable waters indirectly. But even in these cases, the Court handed partial wins to the Chamber by staking out a middle ground that gave industry some of what it asked for, cutting back on the scope of lower-court rulings against industry. In neither case did the Court stake out bold new ground in favor of financial regulation or the environment.

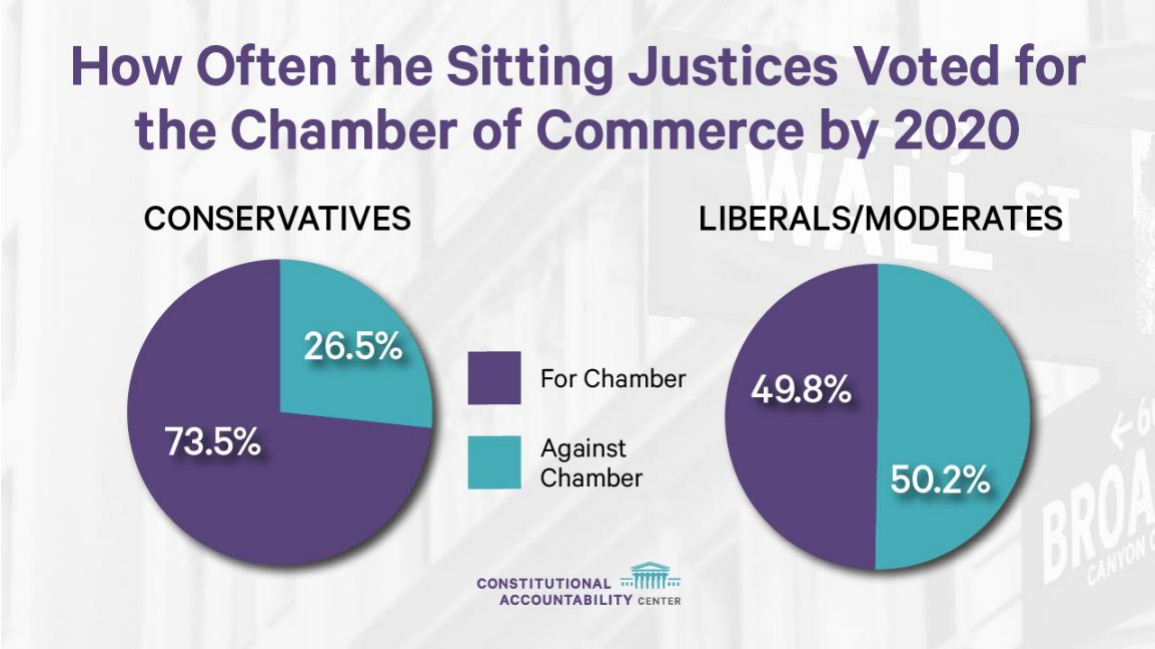
4. Persistence of the Ideological Divide

The wide gap between the conservative and more liberal Justices in their voting patterns on business questions remained stark this Term, despite some interesting twists.

As we have explained, the Chamber's increased success rate before the Supreme Court is not the only

notable change to have occurred under Chief Justice Roberts—another distinctive feature of his tenure has been the emergence of a deep polarization on business issues dividing the two ideological wings of the Court. To date, the five sitting Justices on the Court's conservative wing have given the Chamber more than 73% of their total votes during the Roberts era, while the four more liberal Justices have given only 50%. The most pro-corporate Justice, Neil Gorsuch, has voted for the Chamber's position a stunning 80% of the time since joining the bench, while, at the other end of the spectrum, Justice Ginsburg voted for the Chamber only 53% of the time during that same period, and only 46% of the time under the Roberts Court overall.

The most recent Term saw this divide continue, with voting rates in favor of the Chamber's position ranging from Justice Thomas (at 73%) to Justices Kagan and Sotomayor (both at 47%), with the other Justices in between those poles.

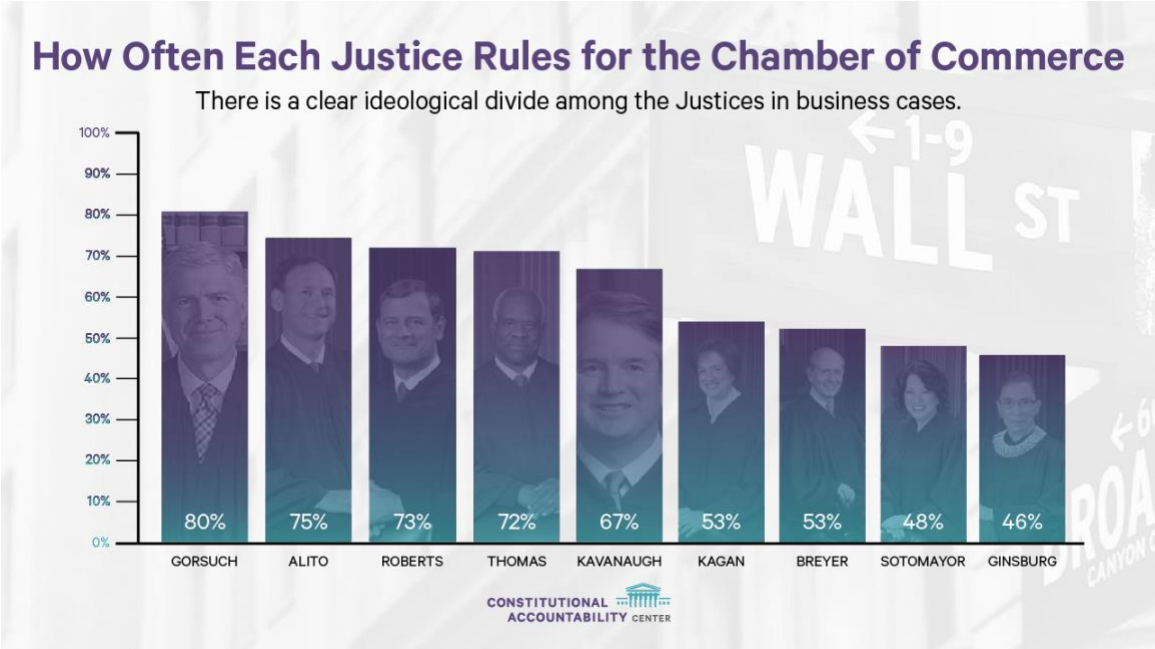


There were, however, some unusual cases this Term in which conservative Justices dissented from a Chamber win—something that in recent years has become virtually unheard of. (As we have noted, one mark of the pro-Chamber tilt among the Court's conservatives is that when business interests prevail before the Court, the conservative Justices almost never dissent.) The results in these atypical cases slightly narrowed the statistical gulf between the conservative and more liberal Justices this Term.

What explains these results, it seems, is that in each case the Chamber ended up on the wrong side of an issue important to particular conservative Justices. For example, in *Atlantic Richfield Co. v. Christian*, which addressed the legal options available to those whose land is polluted by hazardous waste, Justices Gorsuch and Thomas showed their strong interest in landowners' rights, whereas the Chamber favored the predictability of a federal management scheme that limited the legal options available to landowners. In *Maine Community Health Options v. United States*, Justice Alito voted against the Affordable Care Act and access to the courts, whereas the Chamber backed the health insurance companies that sought compensatory payments under the Act. Most notably, in *Department of Homeland Security v. Regents of the University of California*, which concerned the Deferred Action for Childhood Arrivals (DACA) program, the ideological breakdown normally seen in divided Chamber decisions was inverted: business and progressive interests were aligned against the Trump

administration's attempt to end the program, and the Court's more liberal Justices (joined by Chief Justice Roberts) sided with the Chamber in voting to preserve DACA.

While notable, these cases only mildly tempered the Court' ideological divide this Term. The conservative Justices favored the Chamber's position 65% of the time, while the moderate-to-liberal Justices did so 49% of the time. Although that divide was less pronounced than the previous year (conservatives at 77.5%, moderate-to-liberals at 46.5%), it remained considerable.



III. Next Term: Looking Forward

The Supreme Court's new Term will begin on October 5, 2020, with the Court's moderate-to-liberal wing reduced to three Justices. Already scheduled for argument this fall are numerous cases in which corporate interests are aiming to reduce regulation of their activities or escape liability for their wrongdoing.

Among the cases already on the docket are disputes about the ability of state courts to resolve claims against manufacturers whose products cause injuries within those states (*Ford Motor Co. v. Montana Eighth Judicial District Court*), whether corporations are immune from liability under a federal statute for aiding and abetting child slavery and other human rights violations occurring overseas (*Nestlé USA, Inc. v. Doe I; Cargill, Inc. v. Doe I*), whether federal law preempts state efforts to regulate abusive prescription drug reimbursement practices (*Rutledge v. Pharmaceutical Care Management Association*), and whether the Federal Trade Commission can obtain monetary restitution for victims of unfair or deceptive commercial activities (*AMG Capital Management, LLC v. Federal Trade Commission*). Also up for consideration are efforts to use arbitration agreements to block injured parties from the courts (*Henry Schein, Inc. v. Archer and White Sales, Inc.*), as well as efforts to resist the enforcement of IRS reporting and recordkeeping requirements (*CIC Services, LLC v. IRS*). Other cases will address whether monied interests can use the First Amendment to evade consumer

protection laws that regulate automated phone calls (*Facebook, Inc. v. Duguid*) or state laws meant to reduce partisan influence on the court system (*Carney v. Adams*). And in a follow-up to *Seila Law*, the Court is being asked to invalidate the actions of another important federal regulator that, like the CFPB, was designed by Congress to be an independent agency led by a single director (*Collins v. Mnuchin*).

In the vast majority of these cases, the Chamber is urging the Supreme Court to reverse lower-court rulings that favored individuals or the government over corporate interests. If history is any guide, the Roberts Court will be only too willing to comply, further shaping the law to benefit big business.