

Supreme Court Round-Up 2018-19 Term

*The Court
The Cases
&
The Conflicts*



Vincent Martin Bonventre
Albany Law School
NYSBA CLE
August 20, 2019

Supreme Court Round-Up

The 2018-19 Term
NYSBA CLE, August 20, 2019

Agenda

Introduction

The Court

Profiles, Patterns, and Portents

Case Highlights

Decisions, Divisions, and Dissension

Revealing Conflicts

Gloats, Goats, and (show) Boats

Concluding Observations

Supreme Court Round-Up

The 2018-19 Term
NYSBA CLE, August 20, 2019

The Court

Profiles, Patterns, and Portents

The Current Court



THE COURT ELDERS

Octogenarians



Ruth Bader Ginsburg

- 87 (in a few days) years old
- **87, end of current Trump term**
- **91, end of a 2nd term**
- 26/27/31 years on Court
- Clinton Appointee, 1993
- Liberal/Democrat



Stephen G. Breyer

- 81 years old
- **82, end of current Trump term**
- **86, end of a 2nd term**
- 25/26/30 years on Court
- Clinton Appointee, 1994
- Liberal/Democrat

THE COURT SENIORS

Septuagenarians



Clarence Thomas

- 71 years old
- **72, end of current Trump term**
- **76, end of a 2nd term**
- 28/29/33 years on Court
- Bush (41) Appointee, 1991
- Conservative/Republican



Samuel A. Alito

- 69 years old
- **70, end of current Trump term**
- **74, end of a 2nd term**
- 13/14/18 years on Court
- Bush (43) Appointee, 2006
- Conservative/Republican

THE COURT ADULTS

Sexagenarians



John G. Roberts

- 64 years old
- **66 (almost), end of current Trump term**
- **70 (almost), end of a 2nd term**
- 14/15/19 years on Court
- Bush (43) Appointee, 2005
- Conservative/Republican



Sonia Sotomayor

- 65 years old
- **66, end of current Trump term**
- **70, end of a 2nd term**
- 10/11/15 years on Court
- Obama Appointee, 2009
- Liberal/Democrat

THE COURT “Yoothhhs”

Quinquagenarians



Elena Kagan

- 59 years old
- **60, end of current Trump term**
- **64, end of a 2nd term**
- 9/10/14 years on Court
- Obama Appointee, 2010
- Liberal/Democrat



Neil M. Gorsuch

- 52 (almost) years old
- **53, end of current Trump term**
- **57, end of a 2nd term**
- 2/3/7 years on Court
- Trump Appointee, 2017
- Conservative/Republican



Brett Kavanaugh

- 54 years old
- **56 (almost), end of current Trump term**
- **60 (almost), end of a 2nd term**
- 1/2/6 years on Court
- Trump Appointee, 2018
- Conservative/Republican

The January 2016 Court



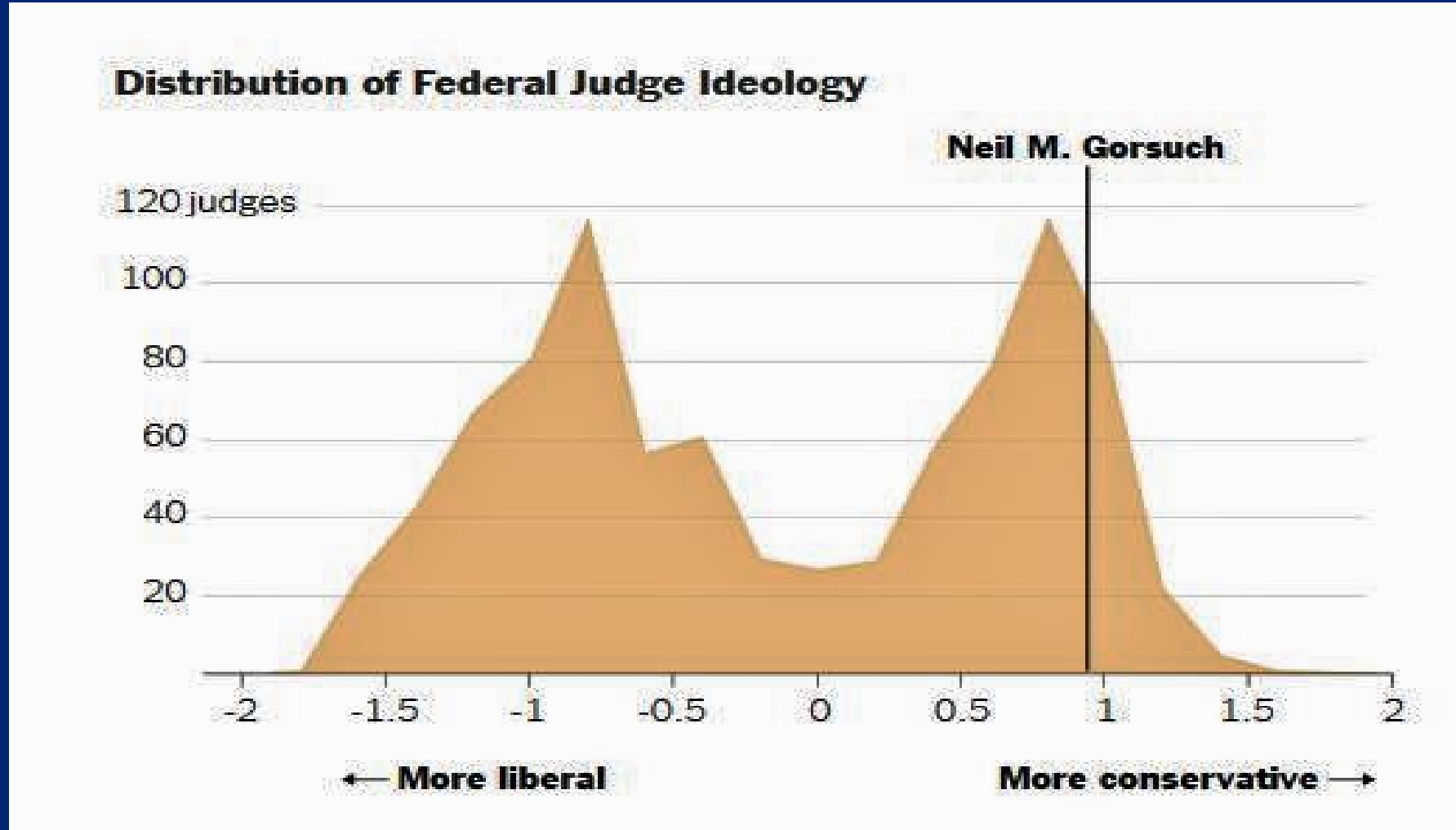
Trump's 1st Appointee



Neil M. Gorsuch

Trump's 1st Appointee

Neil Gorsuch



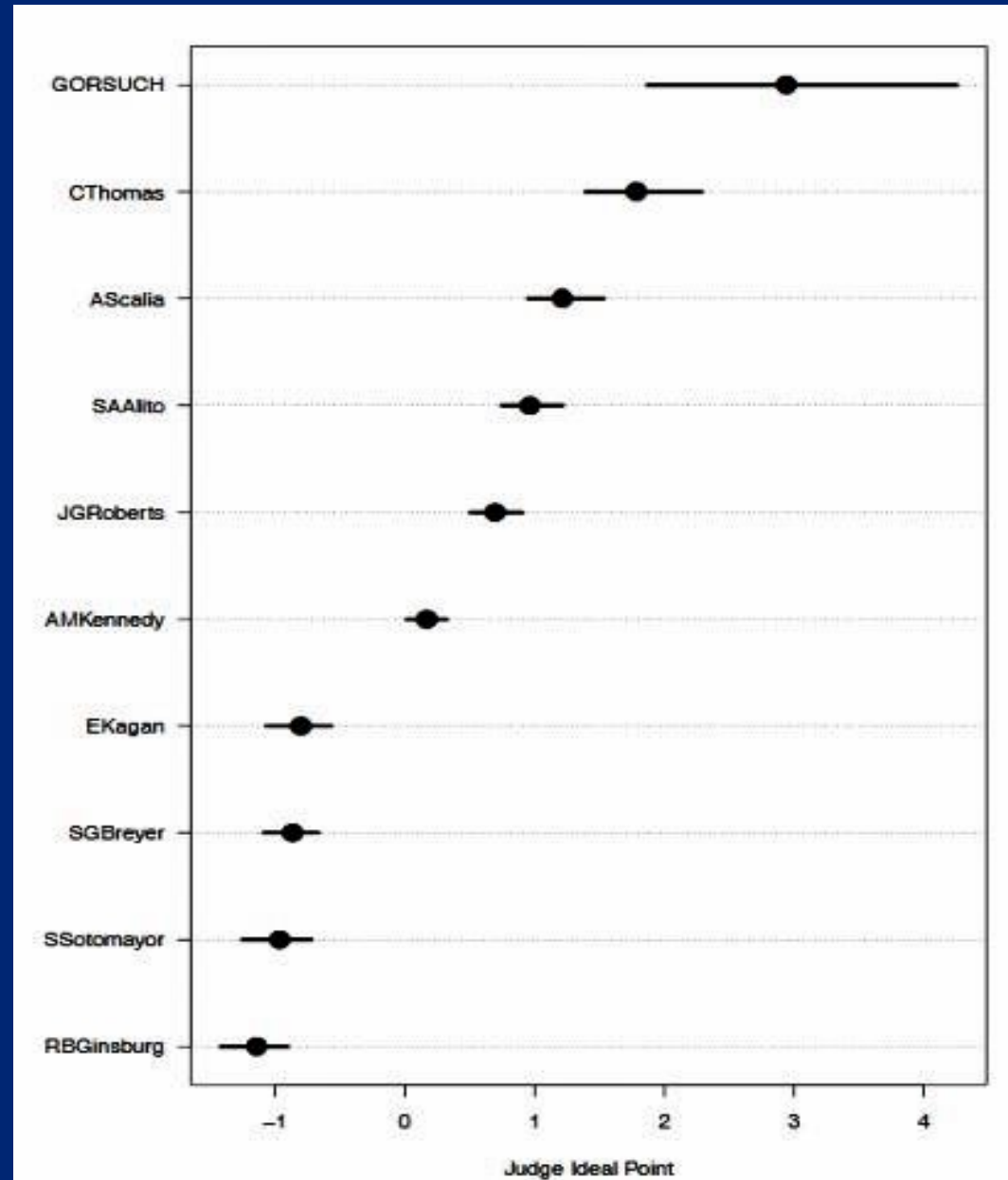
(Source: Adam Bonica [Stanford], et al, U of Chi Coase-Sandor Institute [2016], in NY Times, Feb. 1, 2017.)

Neil Gorsuch



(Source:
*Lee Epstein [Washington Univ.],
et al,
President-Elect Trump and his
Possible Justices [2016])*

Neil Gorsuch

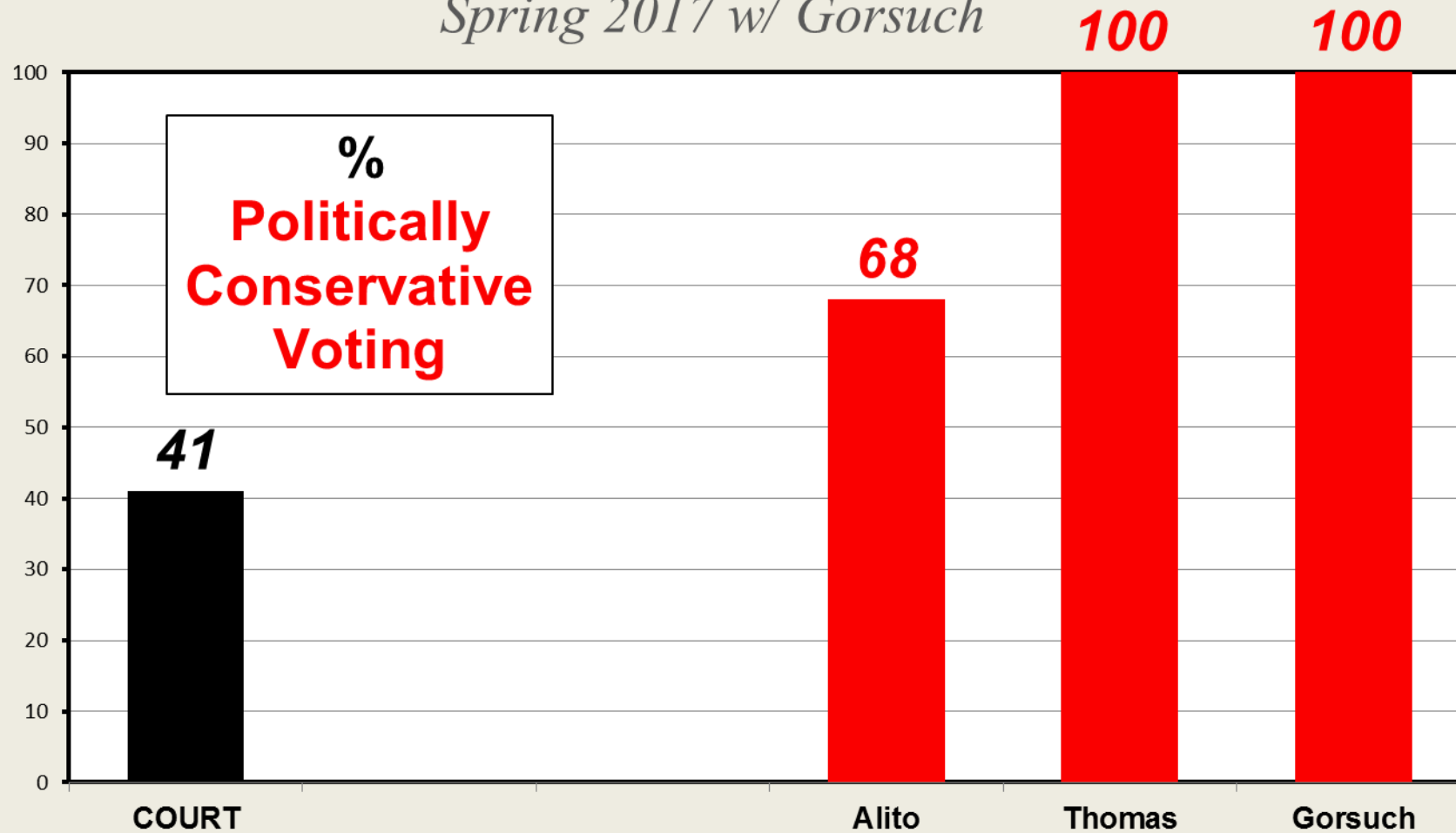


(Source:
Ryan C. Black [Michigan State]
&
Ryan J. Owens [Univ. of Wisc.],
*Estimating the Policy Preferences
of Judge Neil M. Gorsuch* [2017])

Supreme Court

Ideological Voting Patterns

Spring 2017 w/ Gorsuch

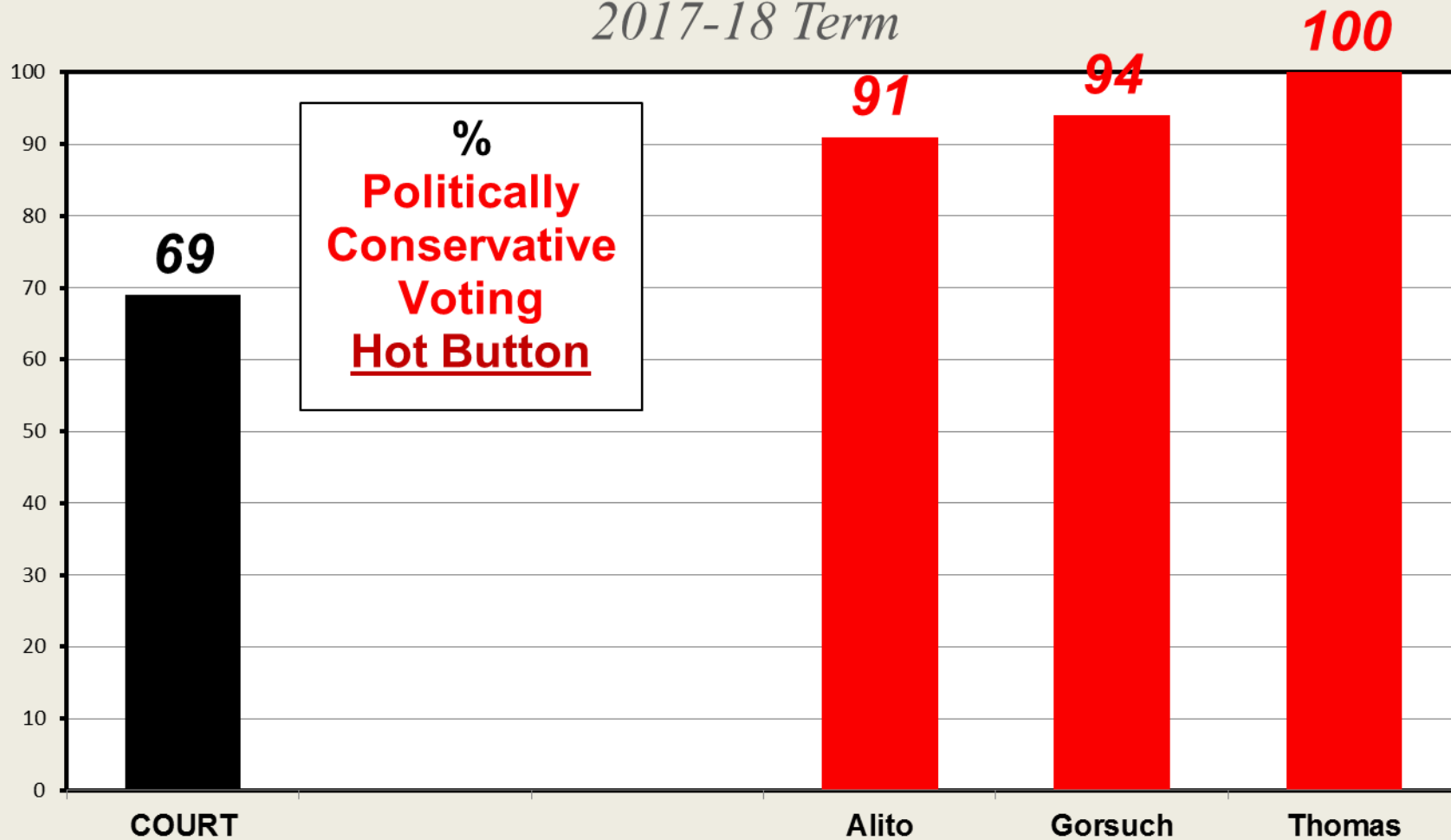


Justices (% votes: politically conservative)
Source: Vincent M. Bonventre, Albany Law School 8/19

Supreme Court

Ideological Voting Patterns--Hot Button

2017-18 Term



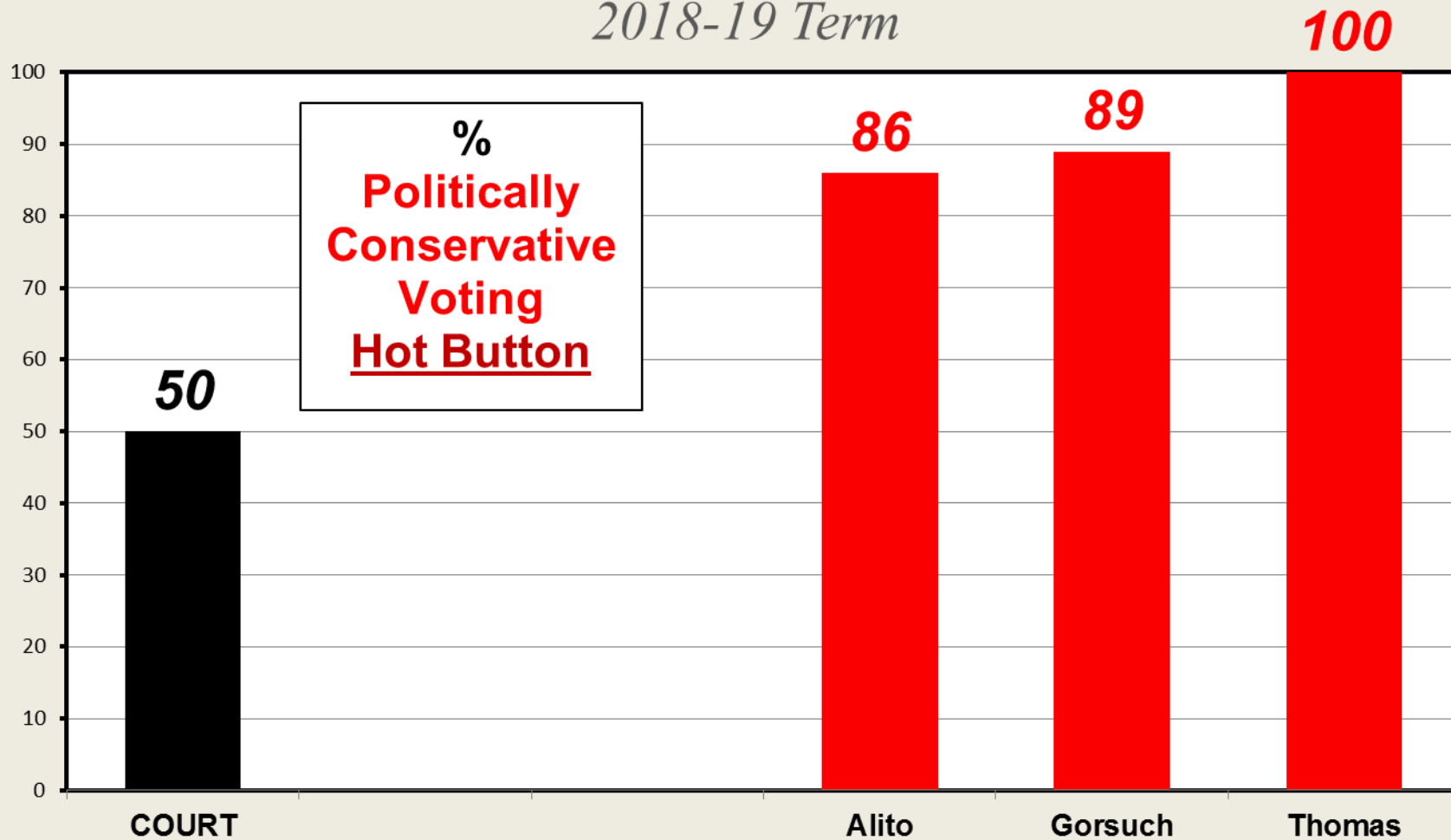
Justices (% votes: politically conservative --hot button)

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Supreme Court

Ideological Voting Patterns--Hot Button

2018-19 Term



Justices (% votes: politically conservative --hot button)

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Late Spring 2017 Court

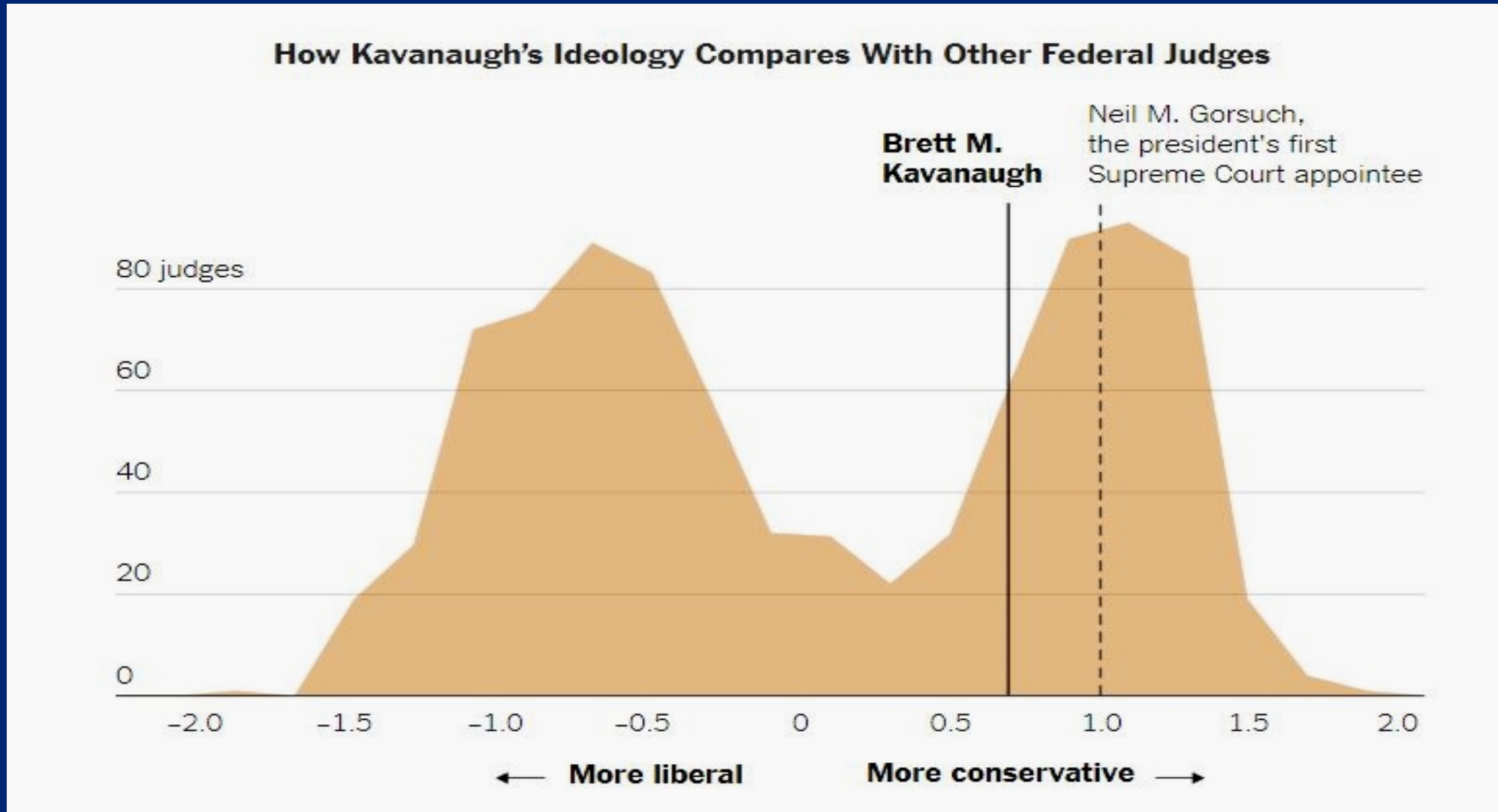


Trump's 2nd Appointee



Brett Kavanaugh

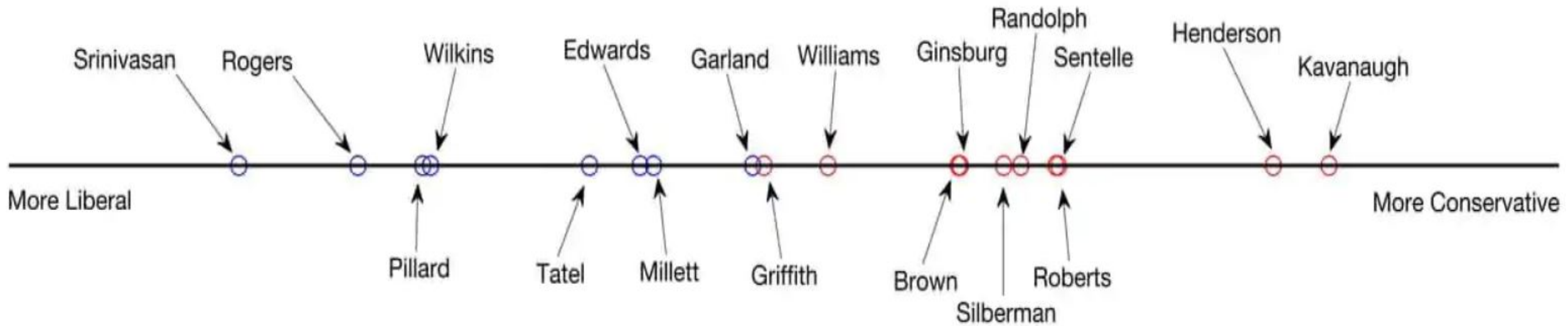
Brett Kavanaugh



(Source: Adam Bonica [Stanford], et al, *Database on Ideology, Money in Politics, and Elections* [2016], reported in *Where Kavanaugh, Trump's Nominee, Might Fit on the Supreme Court*, NY Times, July 9, 2018.)

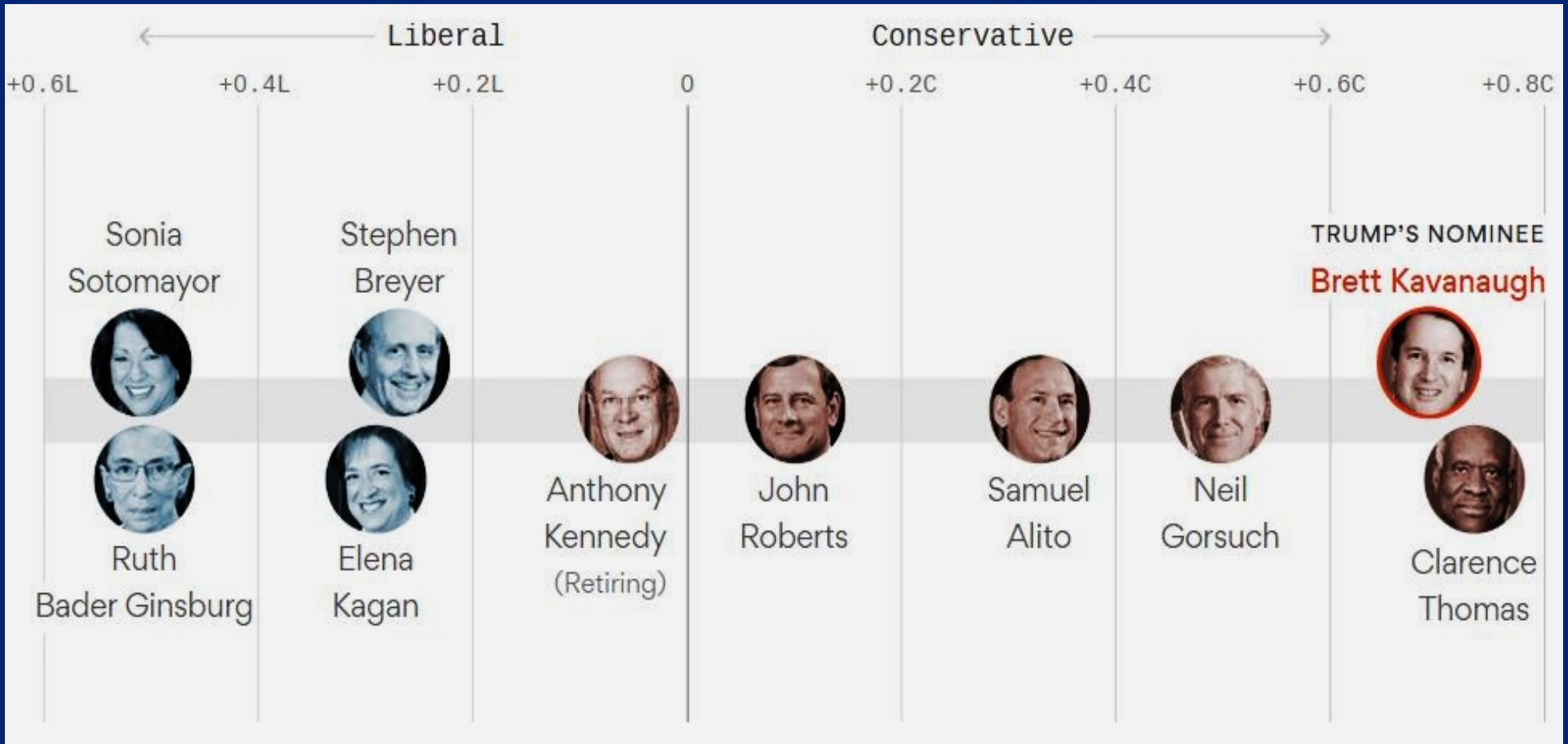
Brett Kavanaugh

How Brett Kavanaugh's ideology compares to other appellate judges



(Source: Chart in Kevin Cope and Joshua Fischman [Univ. of Virginia], "It's hard to find a federal judge more conservative than Brett Kavanaugh," *Washington Post*, Sept. 5, 2018)

Brett Kavanaugh

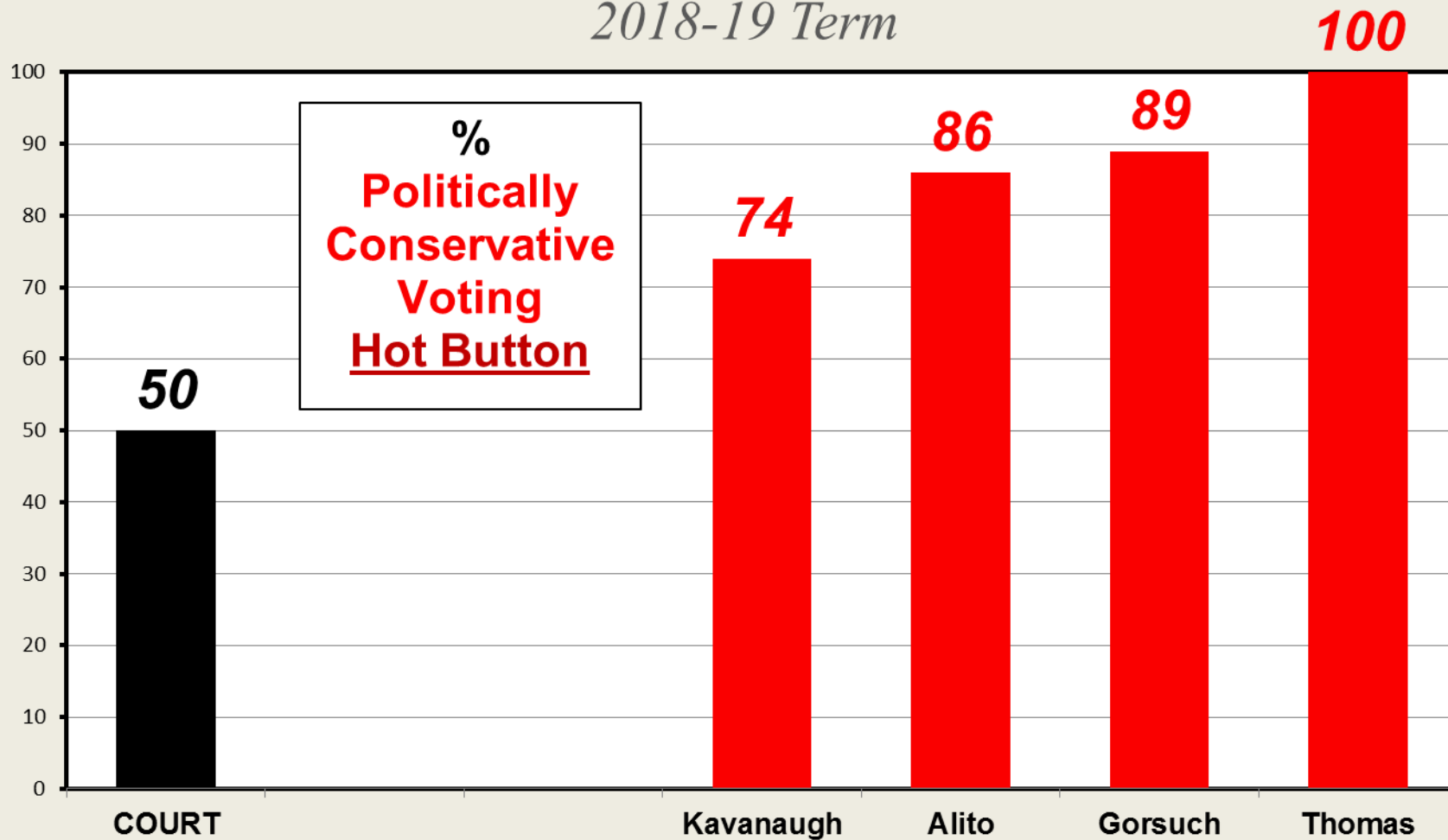


(Source: Chart in Andrew Witherspoon, Harry Stevens, "Where Brett Kavanaugh sits on the ideological spectrum," Axios, July 10, 2018, based on Epstein [Washington Univ.], et al, "President-Elect Trump and his Possible Justices" [2017] and Epstein [Washington Univ.], et al, "Possible Presidents and their Possible Justices" [2016].)

Supreme Court

Ideological Voting Patterns--Hot Button

2018-19 Term



Justices (% votes: politically conservative --hot button)

Source: Vincent M. Bonventre, Albany Law School 8/19

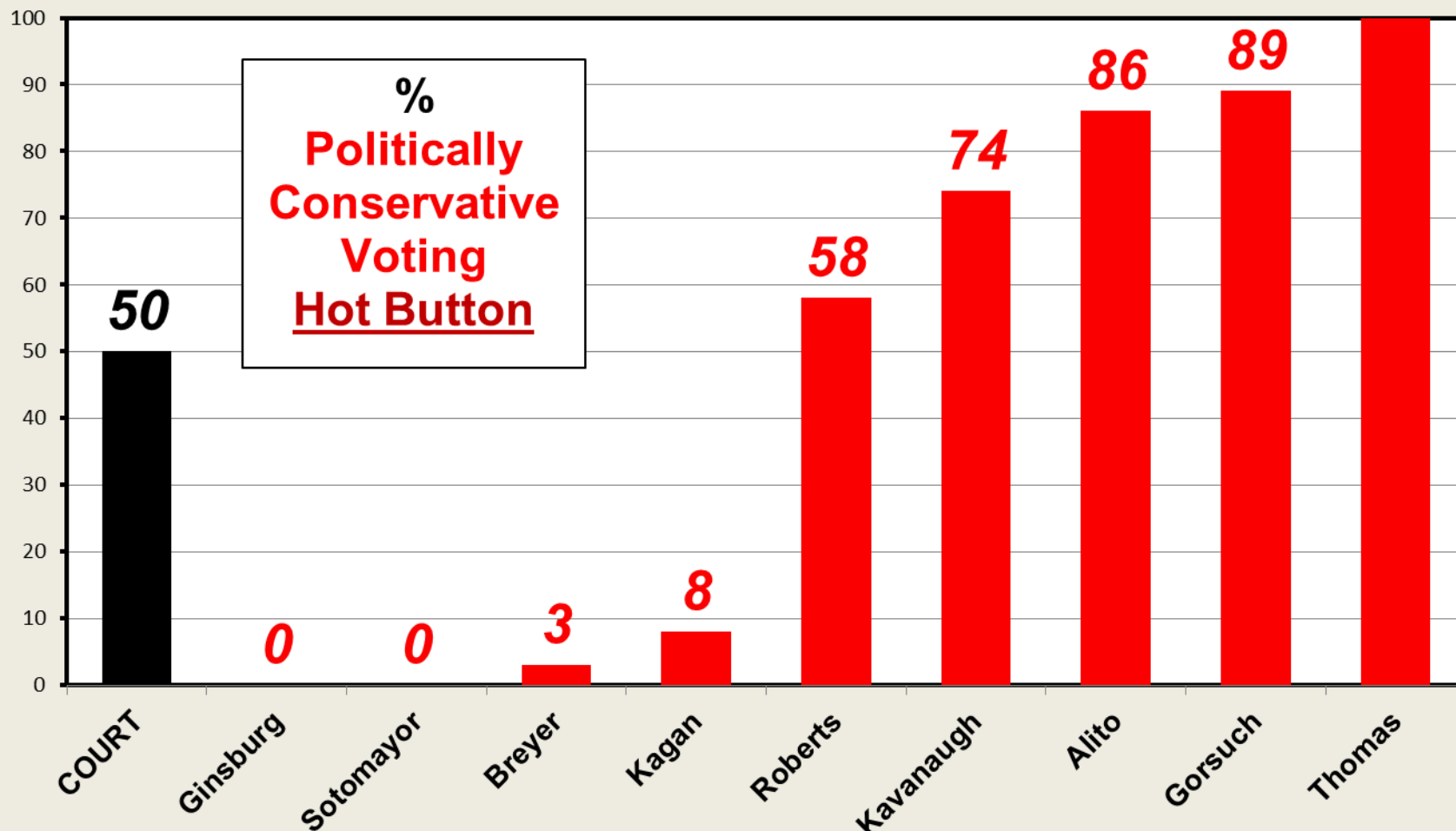
The Current Court



Supreme Court

Ideological Voting Patterns--Hot Button

2018-19 Term



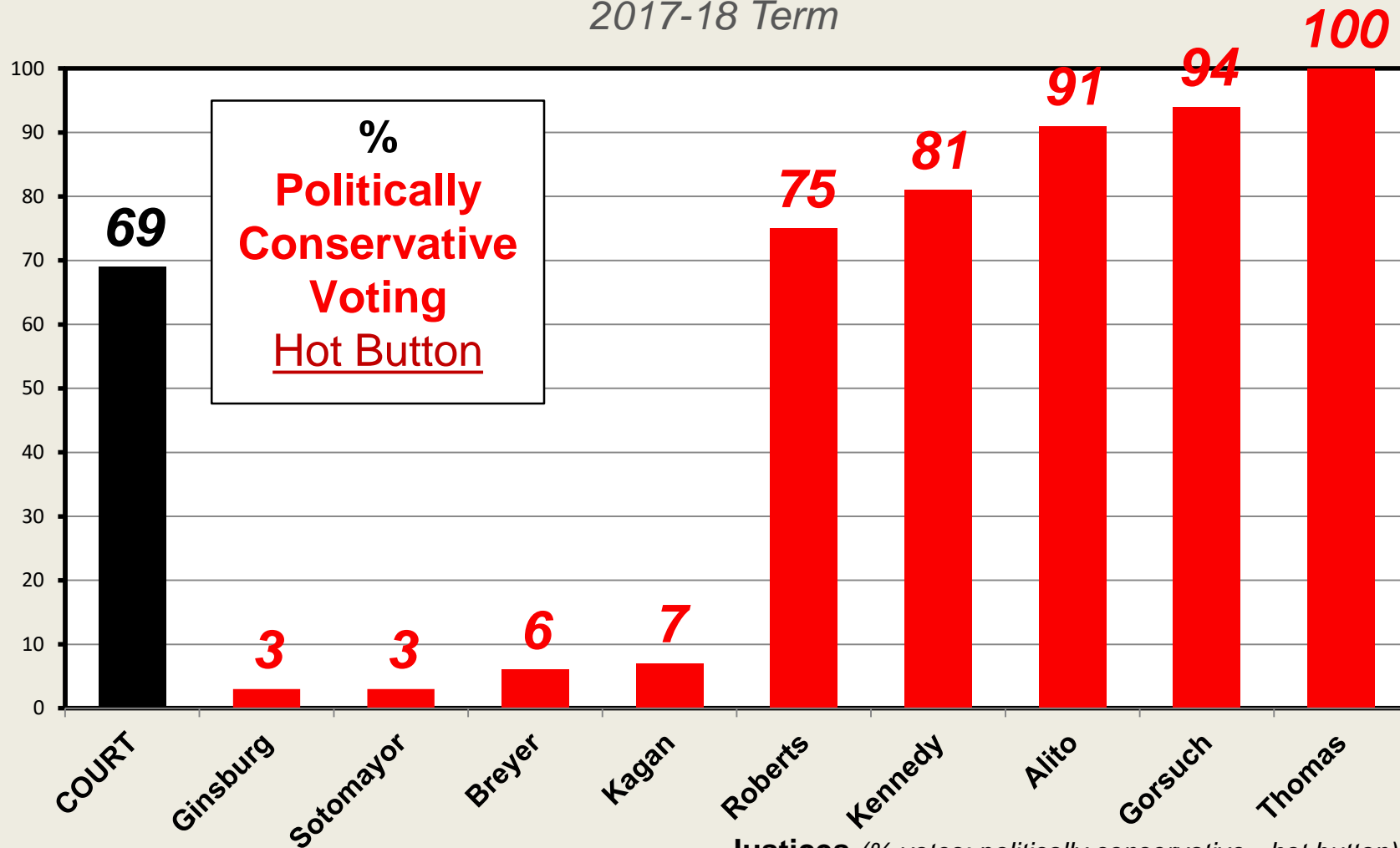
Justices (% votes: politically conservative --hot button)

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Supreme Court

Ideological Voting Patterns--Hot Button

2017-18 Term



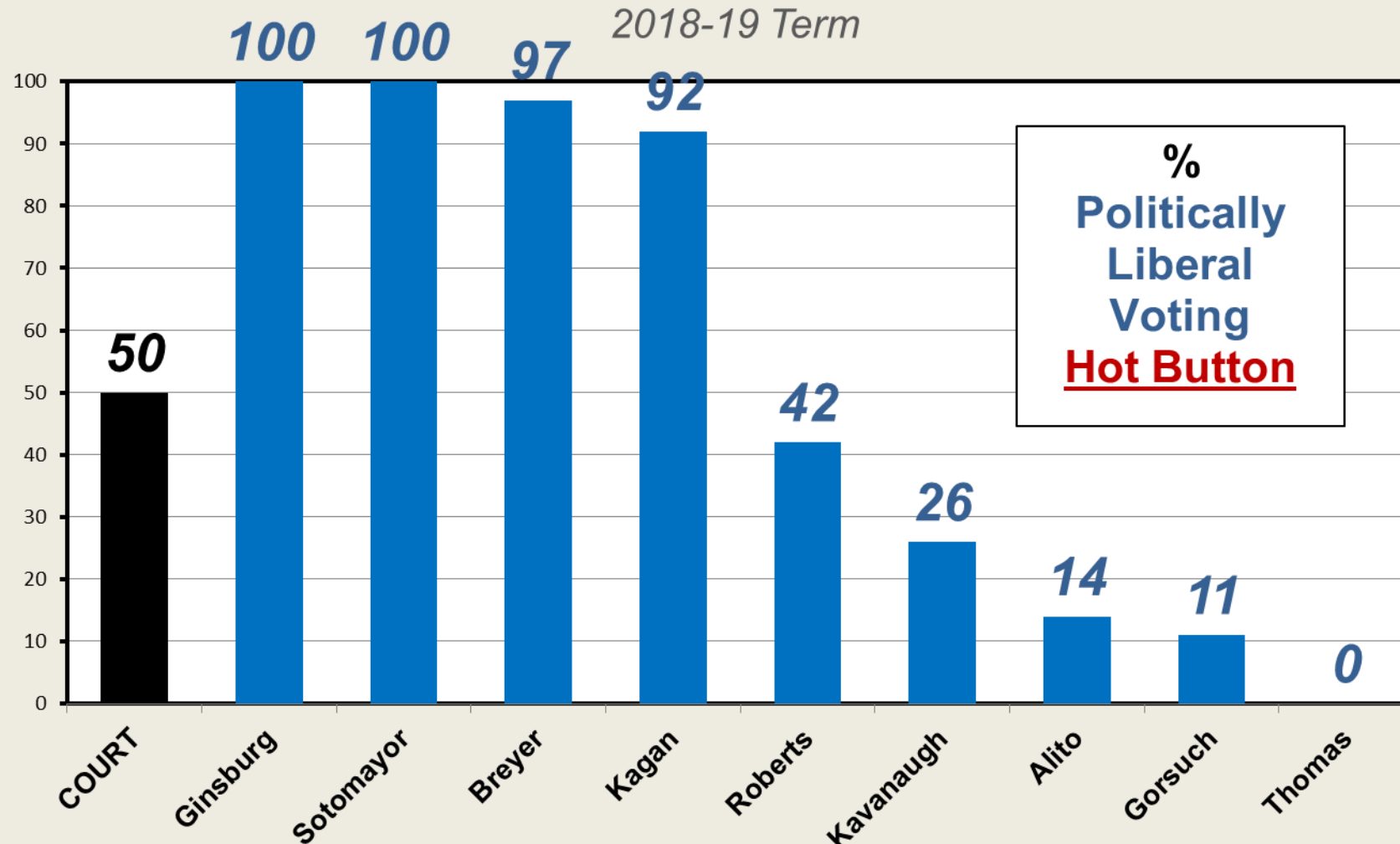
Justices (% votes: politically conservative --hot button)

Source: Vincent M. Bonventre, Albany Law School 8/18

Supreme Court

Ideological Voting Patterns--Hot Button

2018-19 Term



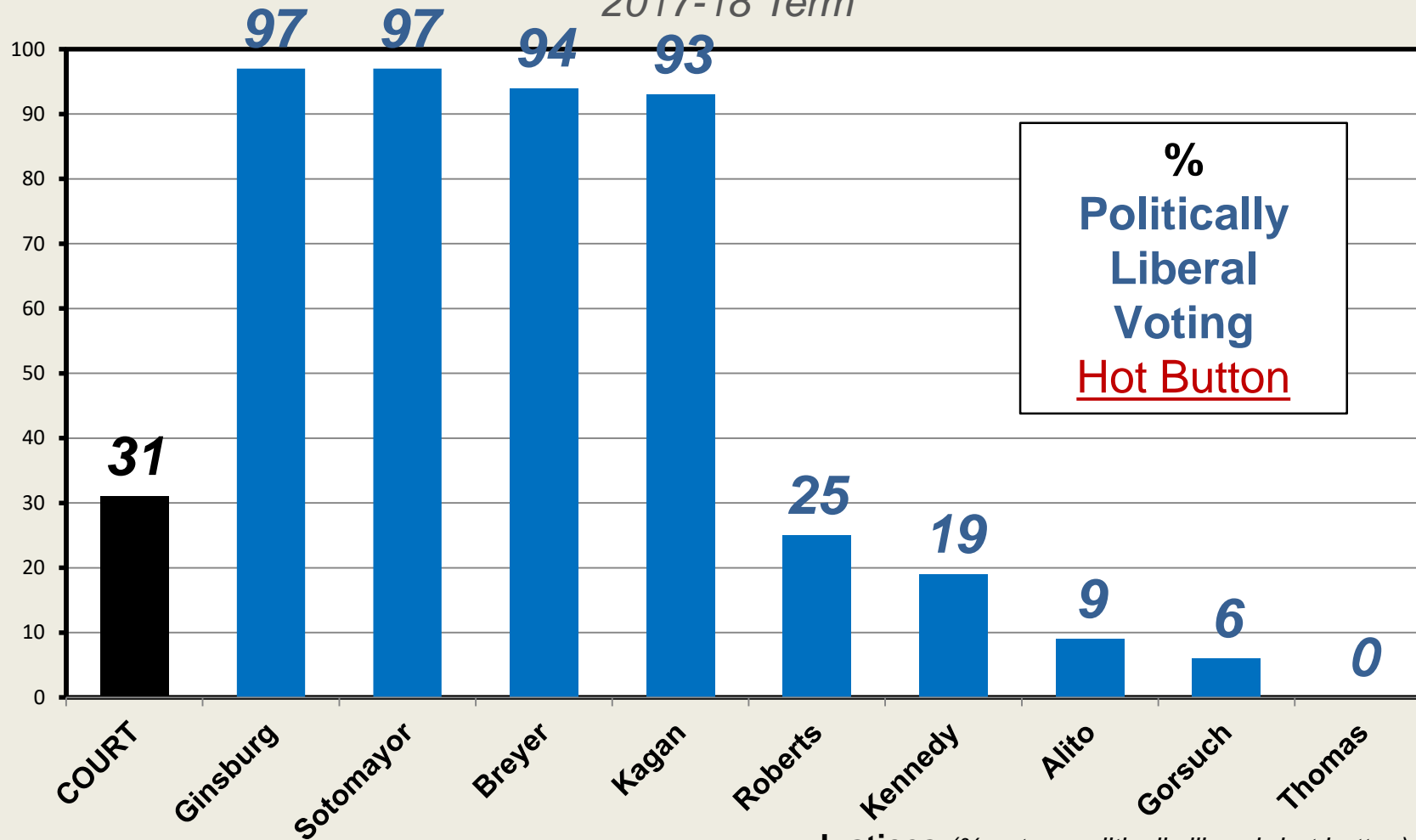
Justices (% votes: politically liberal--hot button)

Source: Vincent M. Bonventre, Albany Law School 8/19

Supreme Court

Ideological Voting Patterns--Hot Button

2017-18 Term



Justices (% votes: politically liberal--hot button)

Source: Vincent M. Bonventre, Albany Law School 8/18

Trump 2nd Term?

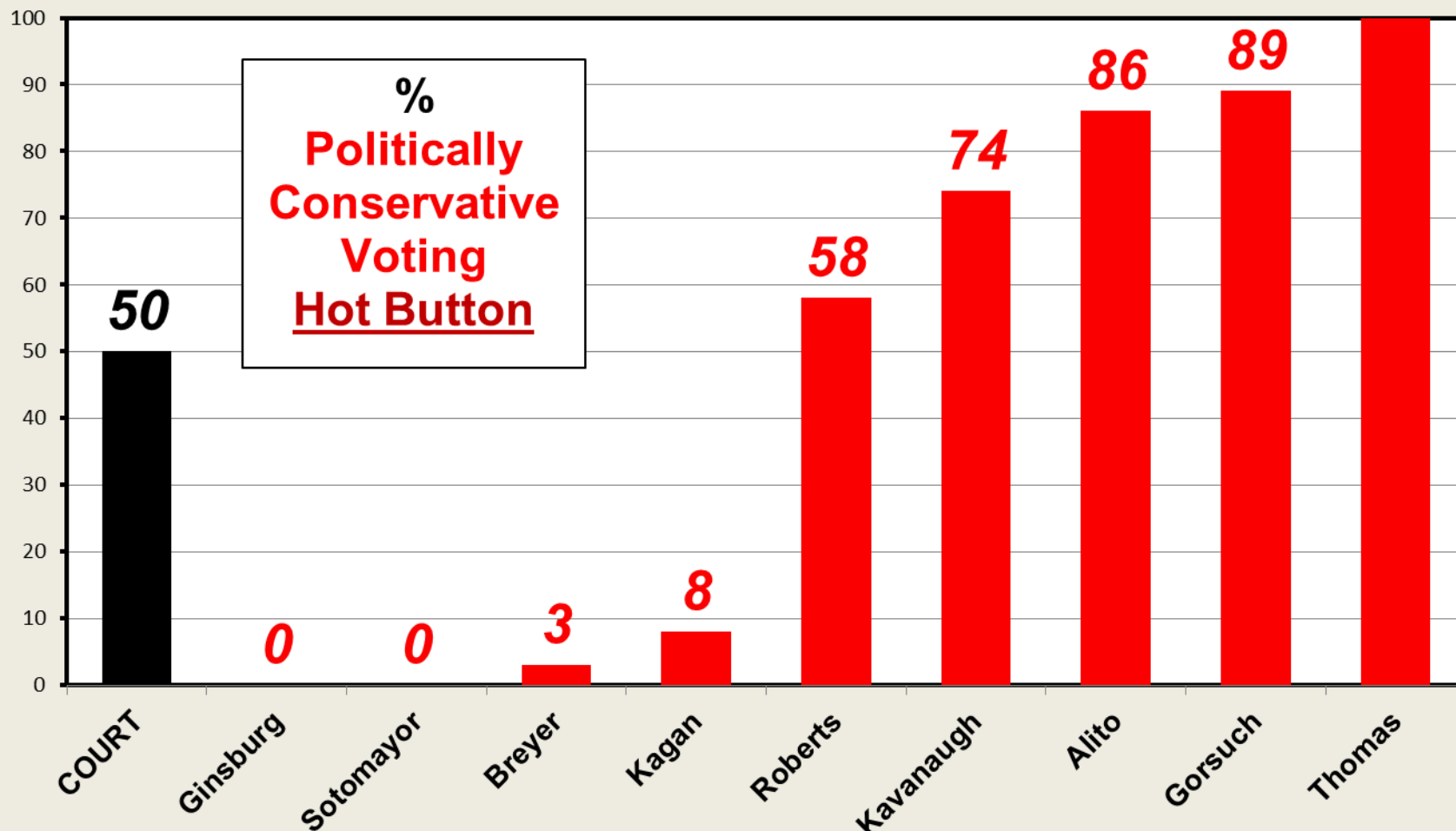
Retirements?



Supreme Court

Ideological Voting Patterns--Hot Button

2018-19 Term

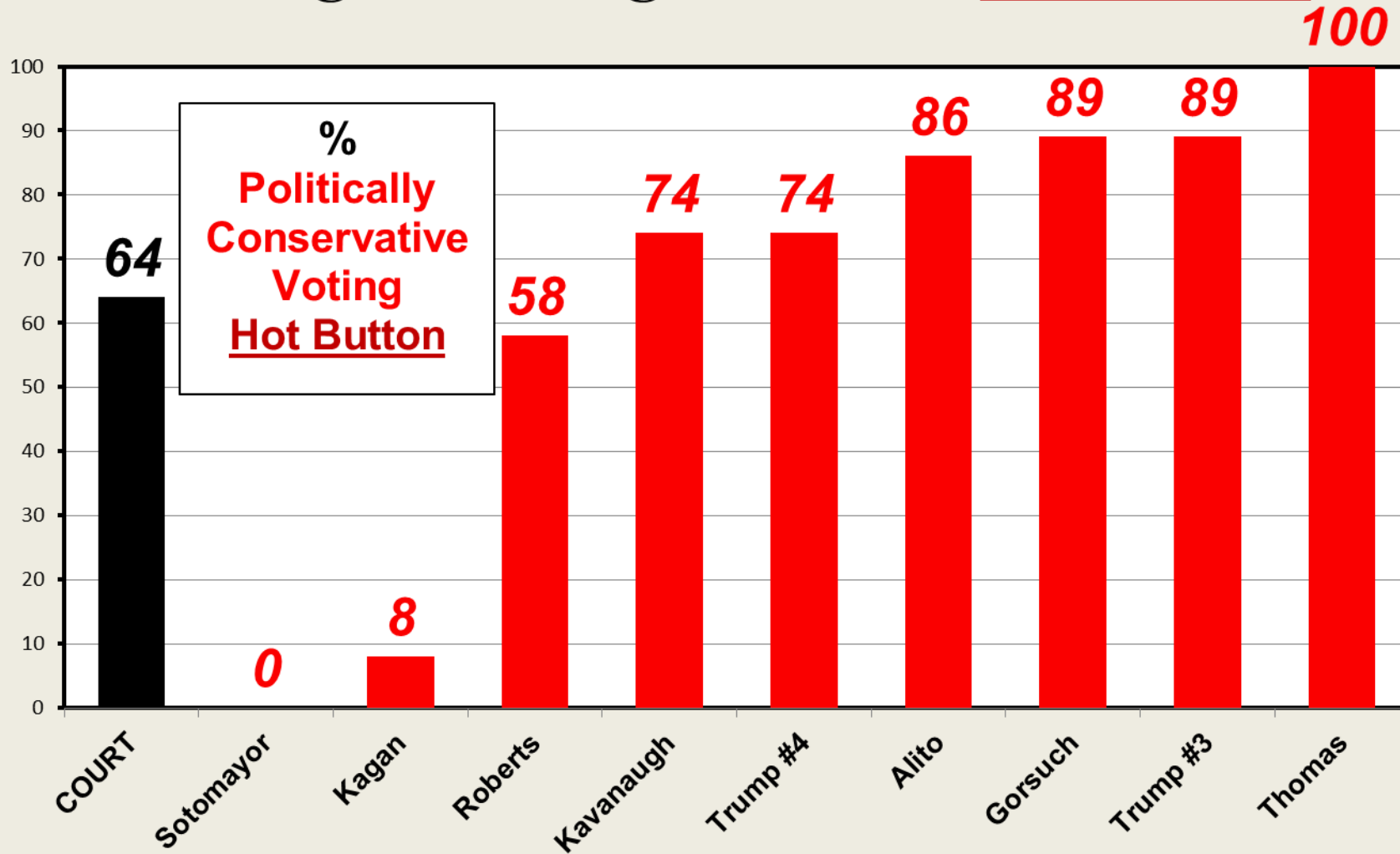


Justices (% votes: politically conservative --hot button)

Source: Vincent M. Bonventre, Albany Law School 8/19

Trump 2nd Term?

Ideological Voting Patterns--Hot Button



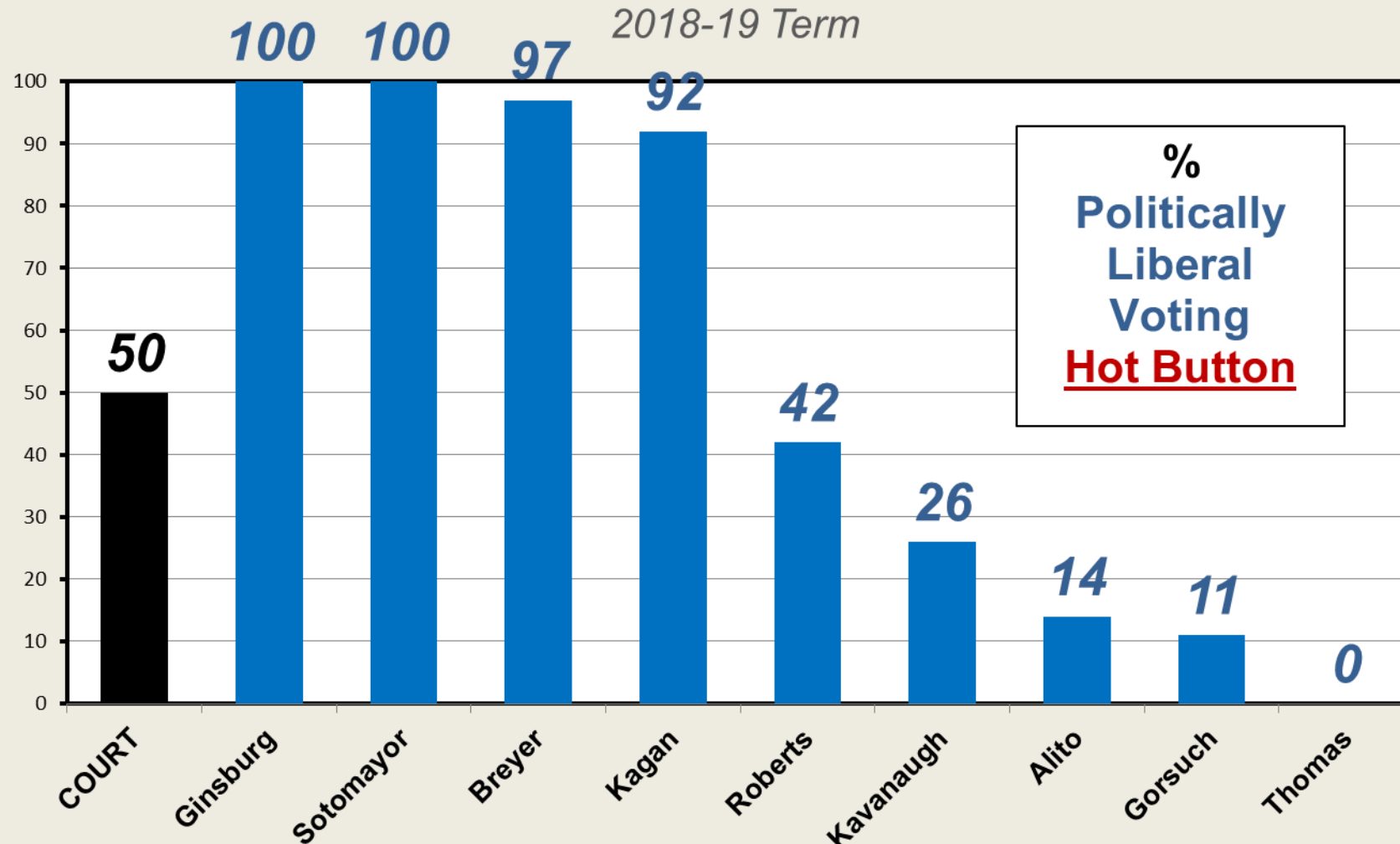
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Supreme Court

Ideological Voting Patterns--Hot Button

2018-19 Term

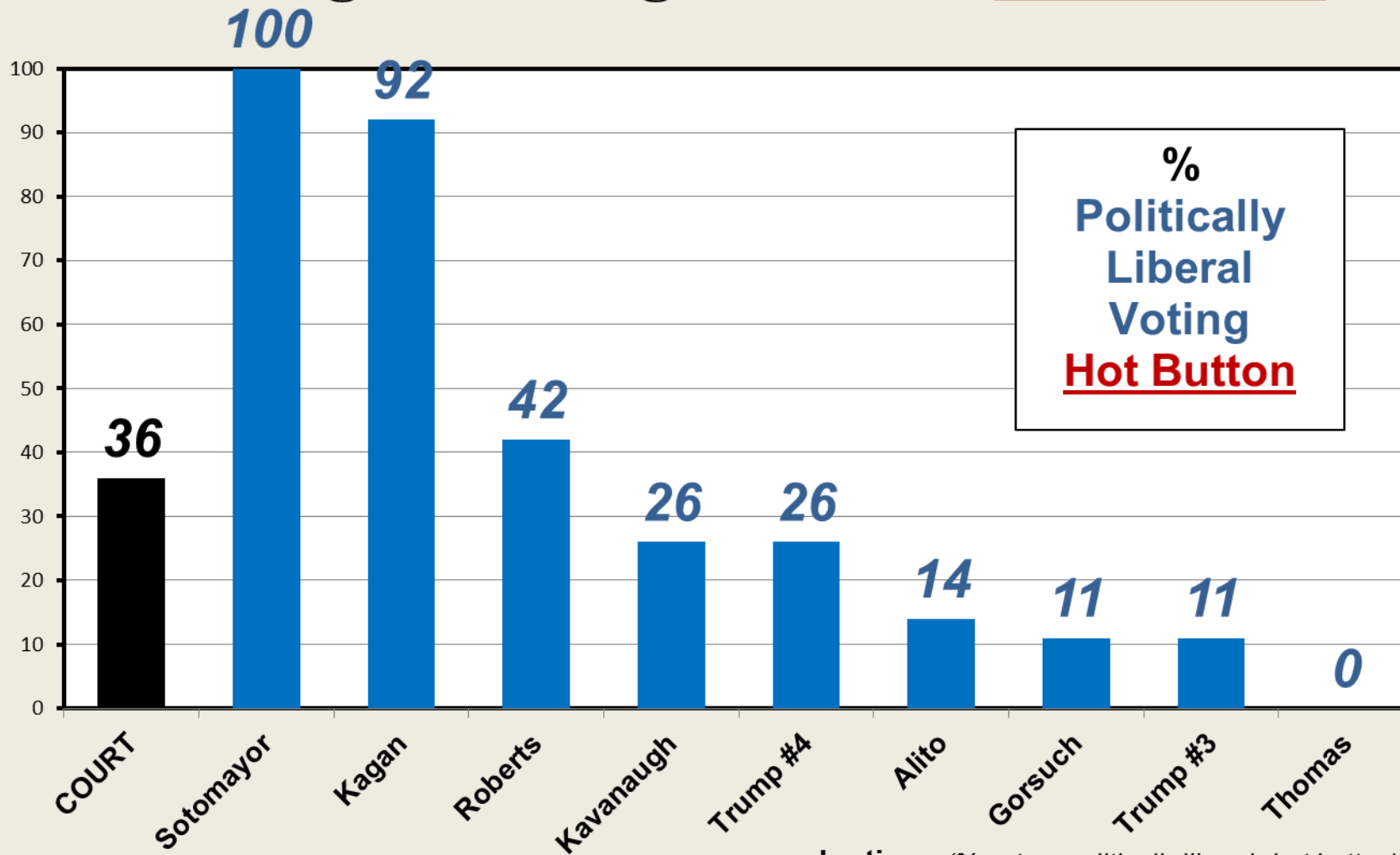


Justices (% votes: politically liberal--hot button)

Source: Vincent M. Bonventre, Albany Law School 8/19

Trump 2nd Term?

Ideological Voting Patterns--Hot Button



Justices (% votes: politically liberal--hot button)

Source: Vincent M. Bonventre, Albany Law School 8/19

Supreme Court Round-Up

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The Case Highlights
Decisions, Divisions, and Dissension

2018 –19 Term Case Highlights--Civil

The 40 Foot Cross

The Citizenship Question

Louisiana's Abortion Law

Partisan Gerrymandering

Immigration Detention

Class Arbitration

Municipal Takings

2018 –19 Term Case Highlights--*Criminal*

Death Penalty

Cruel and Unusual Methods

Chaplain Accompaniment

Intellectual Disability

Race-Based Jury Selection

Mens Rea

Excessive Fines

Double Jeopardy

Additional/Enhanced Sentencing

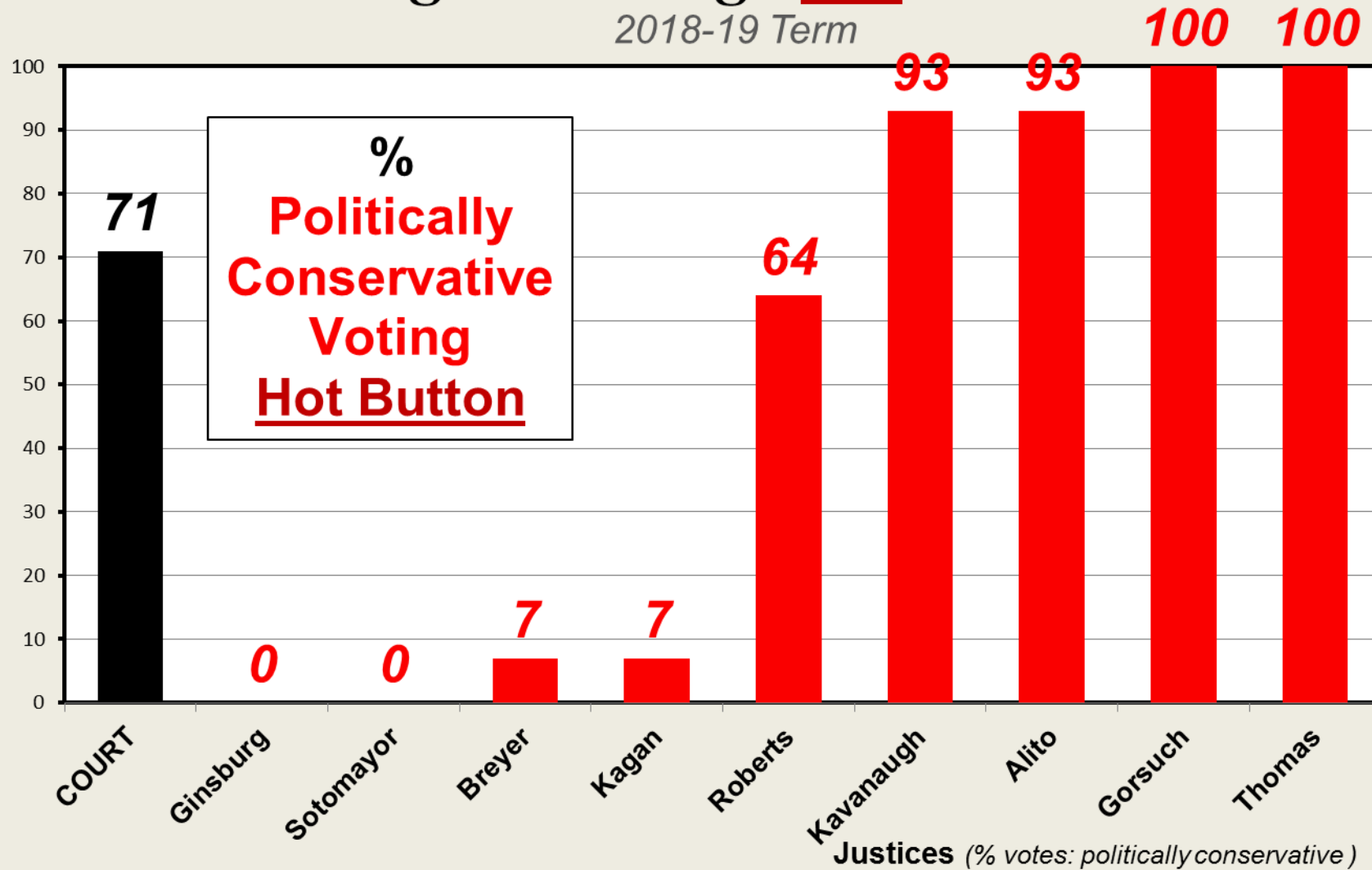
“Crime of Violence”?

Mandatory Sentencing Facts

Supreme Court

Ideological Voting--HB Civil Cases

2018-19 Term

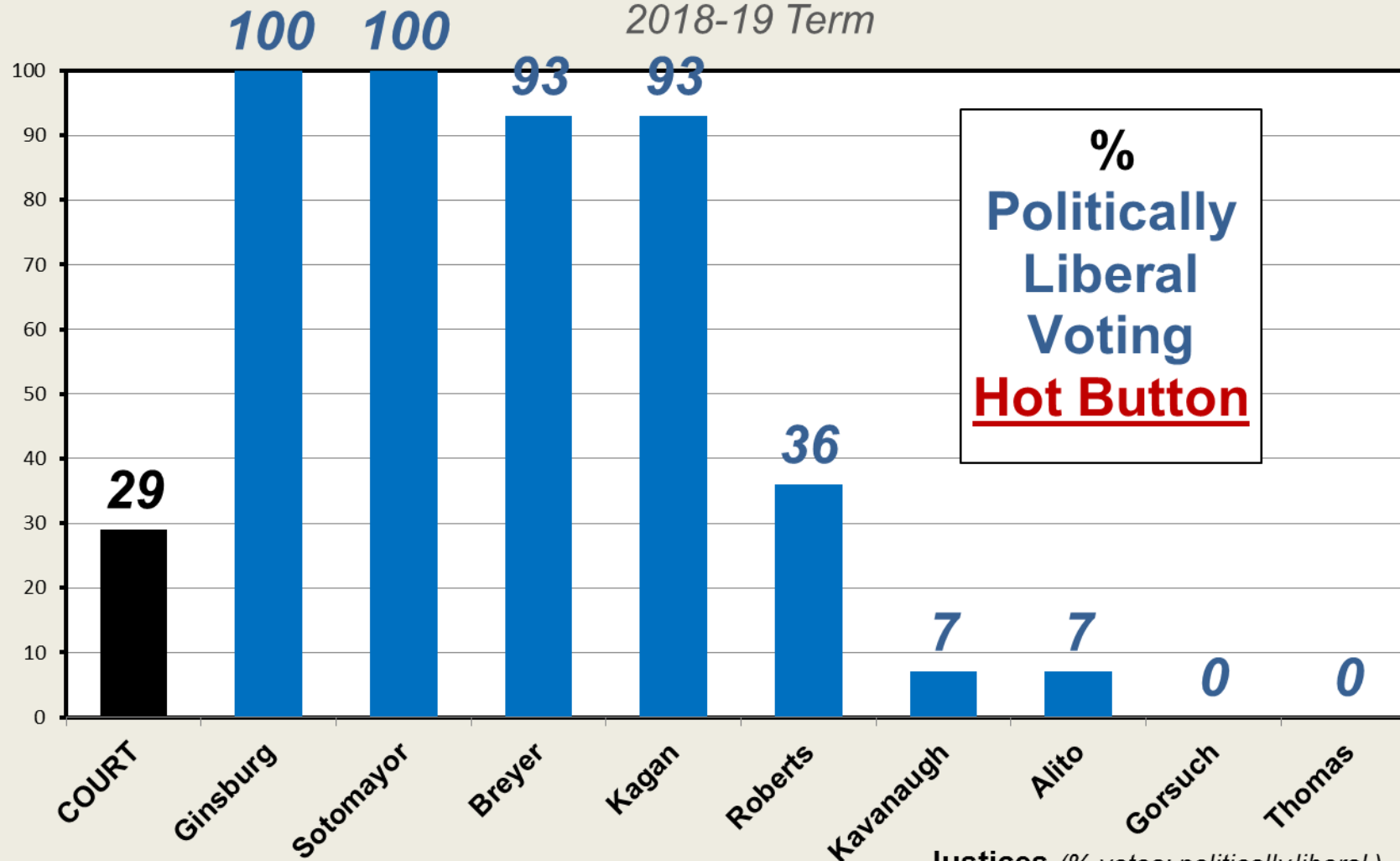


Source: Vincent M. Bonventre, Albany Law School 8/19

Supreme Court

Ideological Voting--HB Civil Cases

2018-19 Term



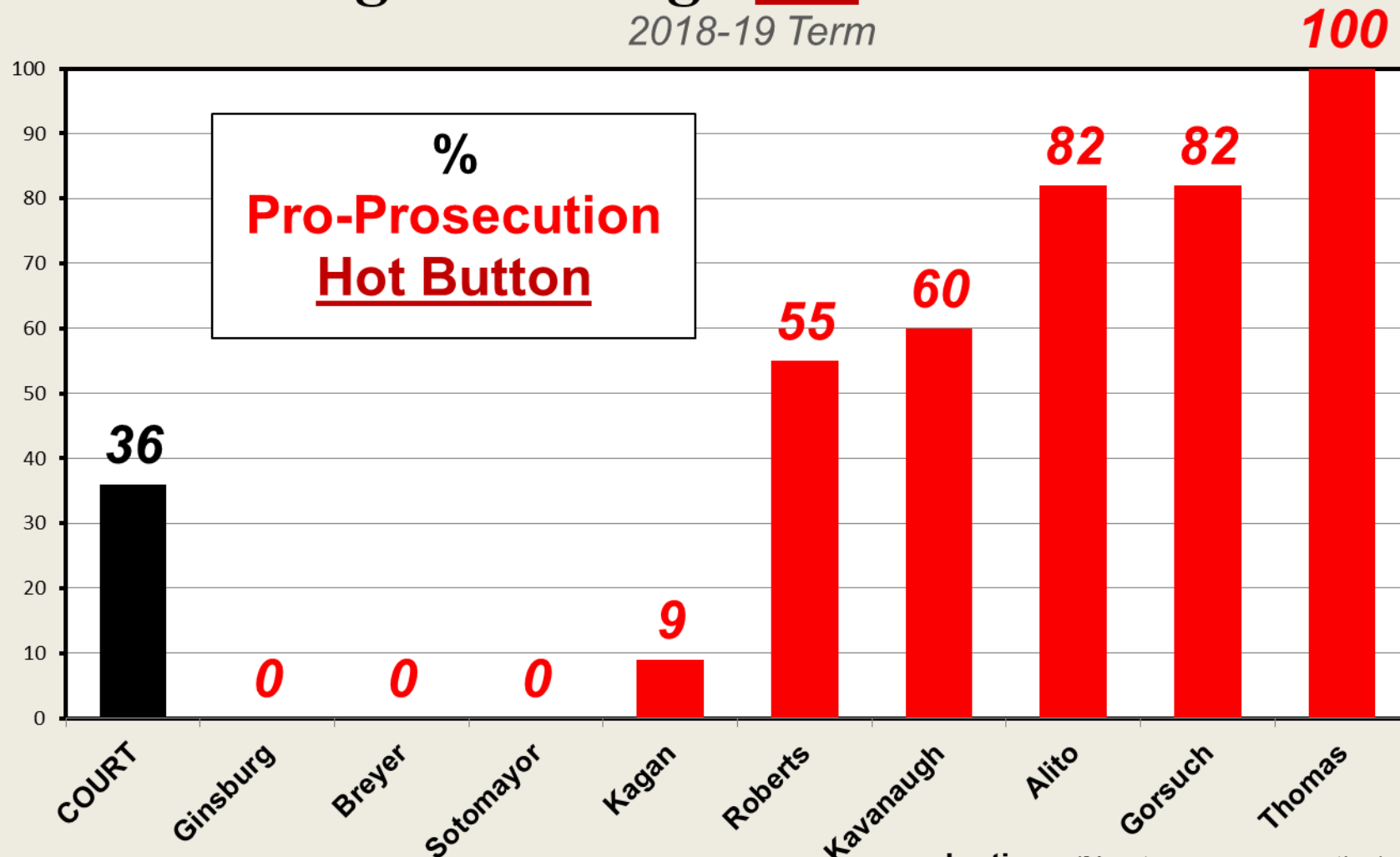
Justices (% votes: politically liberal)

Source: Vincent M. Bonventre, Albany Law School 8/19

Supreme Court

Ideological Voting--HB Criminal Cases

2018-19 Term



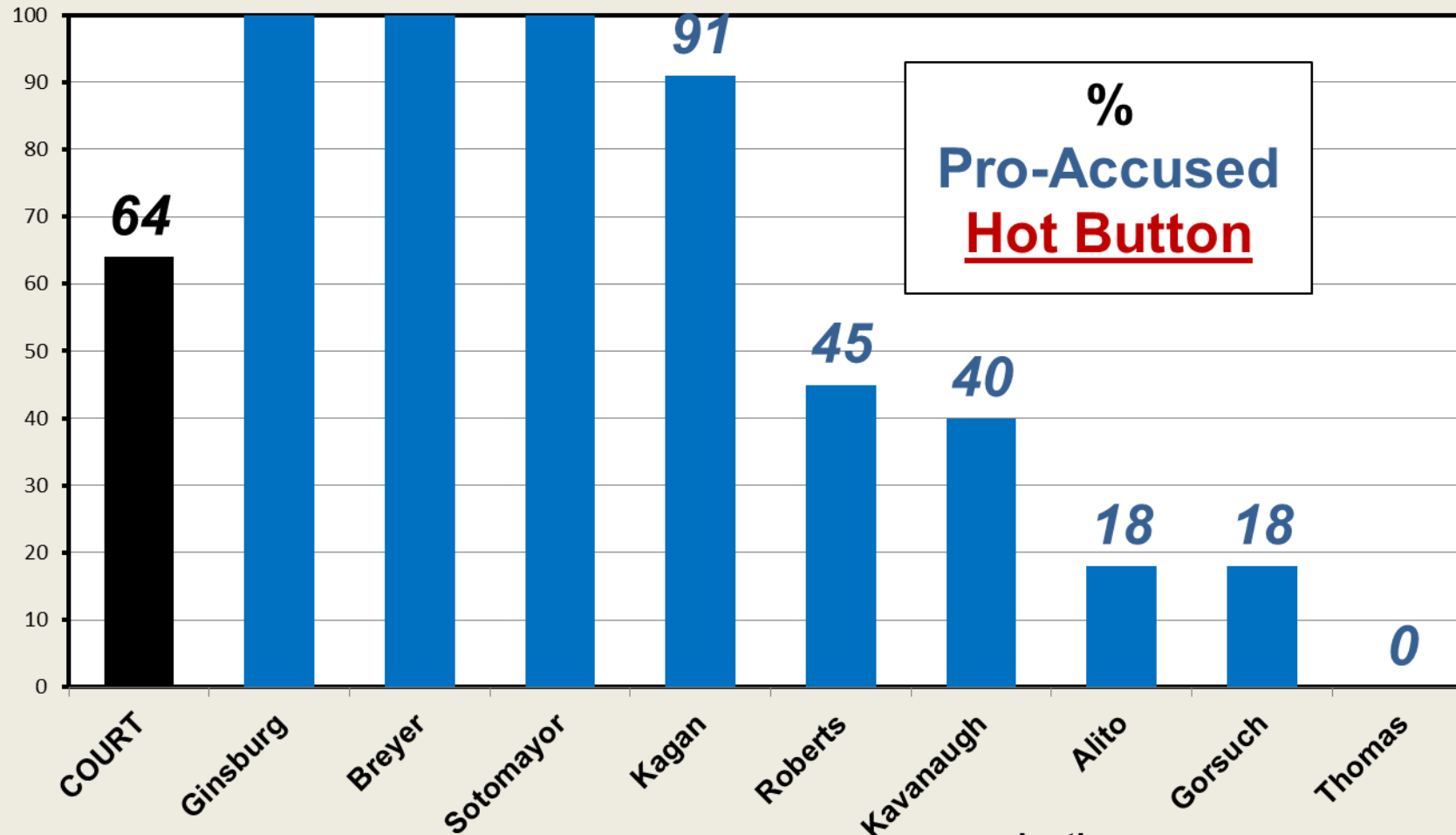
Justices (% votes: pro-prosecution)

Source: Vincent M. Bonventre, Albany Law School 8/19

Supreme Court

Ideological Voting--HB Criminal Cases

100 100 100 2018-19 Term



Justices (% votes: pro-accused)

Source: Vincent M. Bonventre, Albany Law School 8/19

American Legion v. Amer. Humanist Assn.

The 40 Foot Cross

Vote: 7(5+1+1) - 2



COURT'S RULING: The 1918 cross, on a World War I memorial park, has taken on a secular meaning and thus does not violate Non-Establishment.

Dept. of Commerce v. New York

The Citizenship Question

Vote: 5 - 4(3+1)

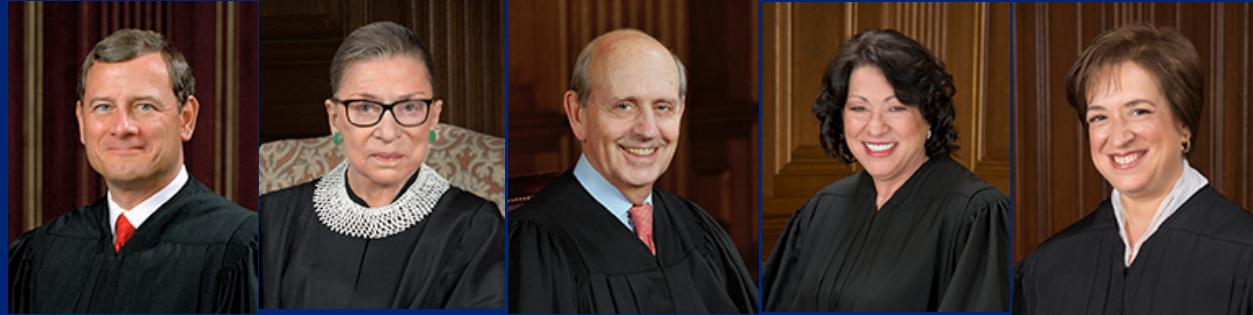


COURT'S RULING: Although the Enumeration Clause(s) permit a citizenship question in the census, the administration's proffered reason is contrary to the evidence.

June Med. Servs. v. Gee

The Louisiana Abortion Law

Vote: 5 - 4



COURT'S RULING: The application to stay the law--limiting abortion providers to physicians with nearby hospital privileges—is granted.

Rucho v. Common Cause

Partisan Gerrymandering

Vote: 5 - 4

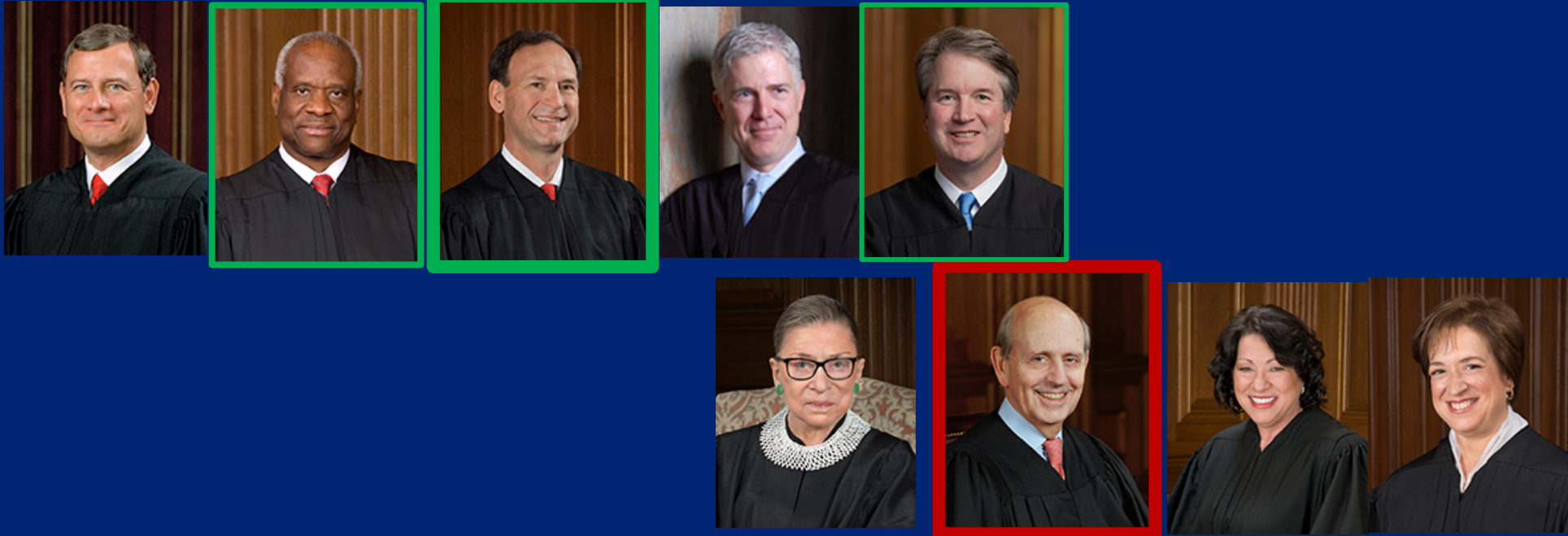


COURT'S RULING: Partisan gerrymandering is nonjusticiable because 1) explicitly left to the states and 2) there is no limiting, precise standard.

Nielsen v. Preap

Mandatory Immigrant Detention

Vote: 5 - 4



COURT'S RULING: Mandatory detention of noncitizens, post-release from criminal custody, w/o bail or a hearing, need not actually take place “when released.”

Lamps Plus, Inc. v. Varela

Mandatory Sole (versus class) Arbitration

Vote: 5 - 4



COURT'S RULING: Mandatory arbitration agreements require sole arbitration, unless class arbitration is explicitly provided for.

Knick v. Town of Scott, PA

Municipal Takings

Vote: 5 - 4

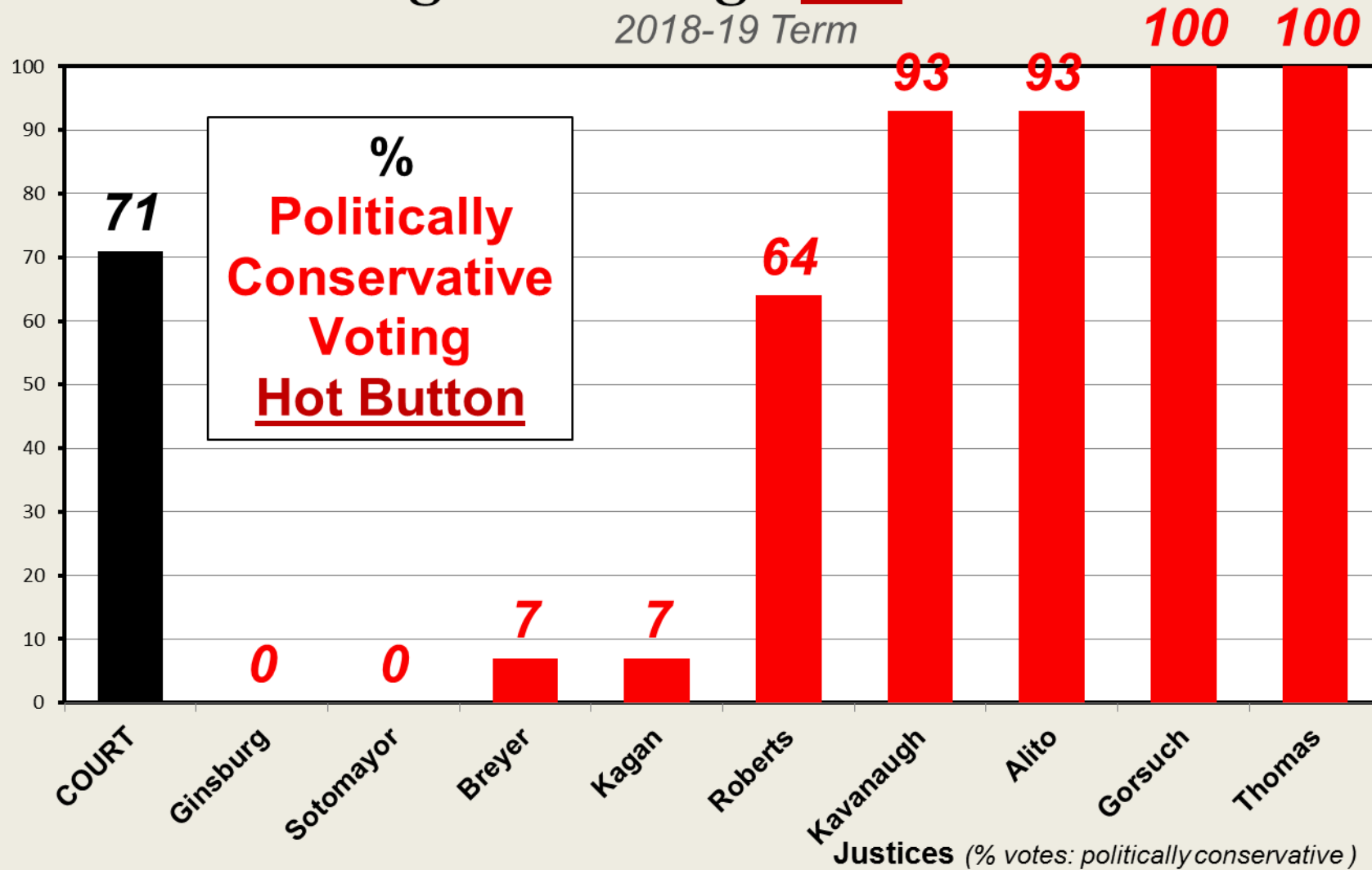


COURT'S RULING: Challenges to municipal takings of private property need not first exhaust state litigation to seek compensation.

Supreme Court

Ideological Voting--HB Civil Cases

2018-19 Term

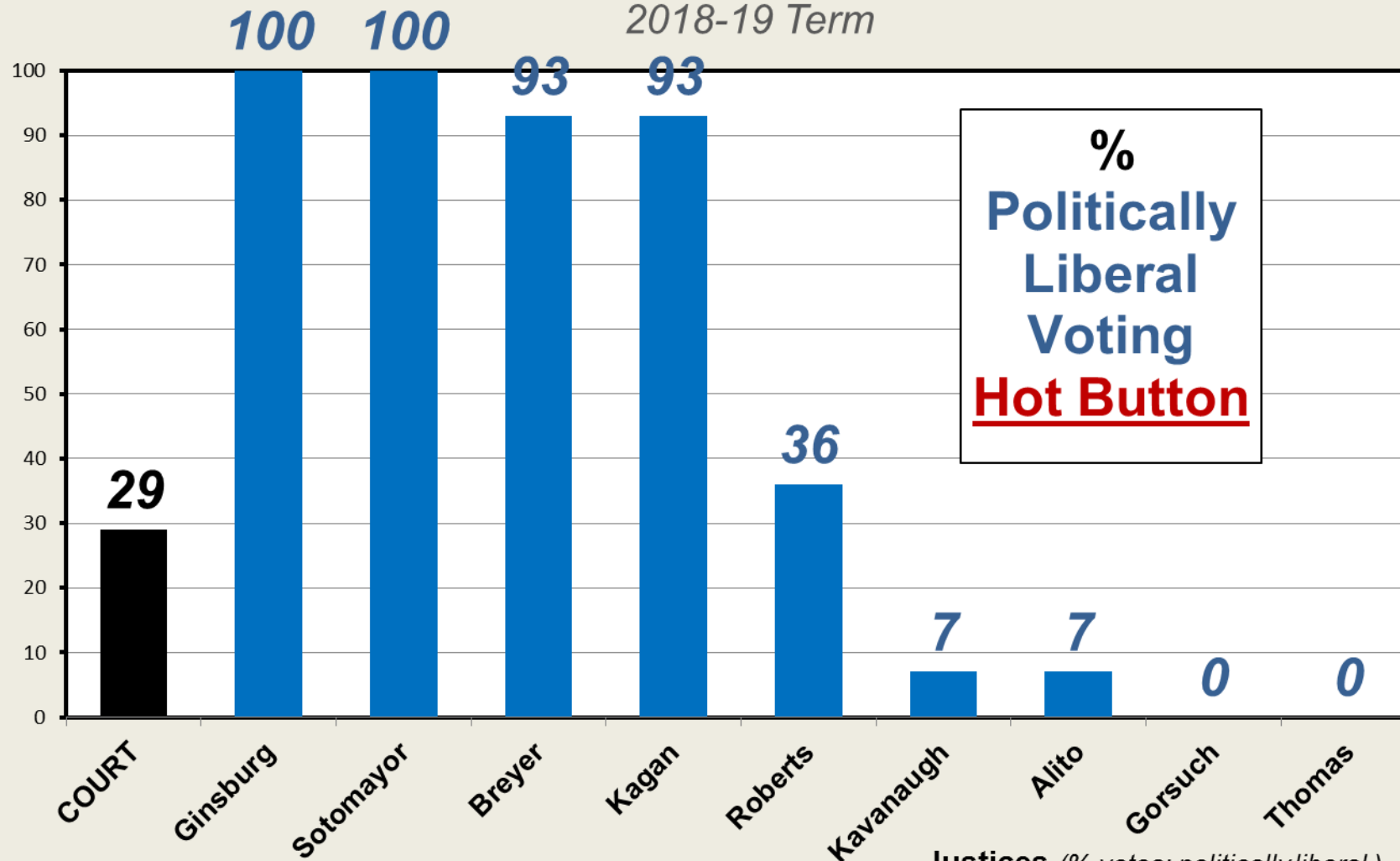


Source: Vincent M. Bonventre, Albany Law School 8/19

Supreme Court

Ideological Voting--HB Civil Cases

2018-19 Term



Justices (% votes: politically liberal)

Source: Vincent M. Bonventre, Albany Law School 8/19

Bucklew v. Precythe

Lethal Injection, as Applied

Vote: 5 - 4



COURT'S RULING: An execution method that causes pain to a particular inmate is not “categorically” cruel and unusual.

Dunn v. Price

Lethal Injection Protocol

Vote: 5 - 4



COURT'S RULING: The stay of execution is vacated because the inmate took too long to file his claim, despite the stay granted by both lower courts and despite the state's failure to rebut.

Dunn v. Ray

Muslim Chaplain Accompaniment

Vote: 5 - 4

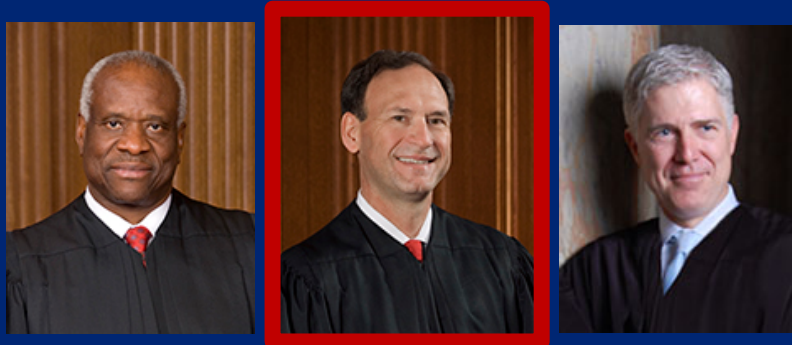


COURT'S RULING: The stay of execution is vacated, because the inmate took too long to request the chaplain, despite the stay granted by the court below based on the state's refusal.

Murphy v. Collier

Buddhist Chaplain Accompaniment

Vote: 6 - 3



COURT'S RULING: The application to stay the execution is granted, pending the certiorari petition, unless the state permits a Buddhist chaplain to accompany the inmate.

White v. Kentucky

Intellectual Disability Determination

Vote: 6 - 3



COURT'S RULING: Certiorari summarily granted, death penalty vacated, and case remanded to determine inmate's intellectual disability claim.

Moore v. Texas

Intellectual Disability Determination

Vote: 6 - 3

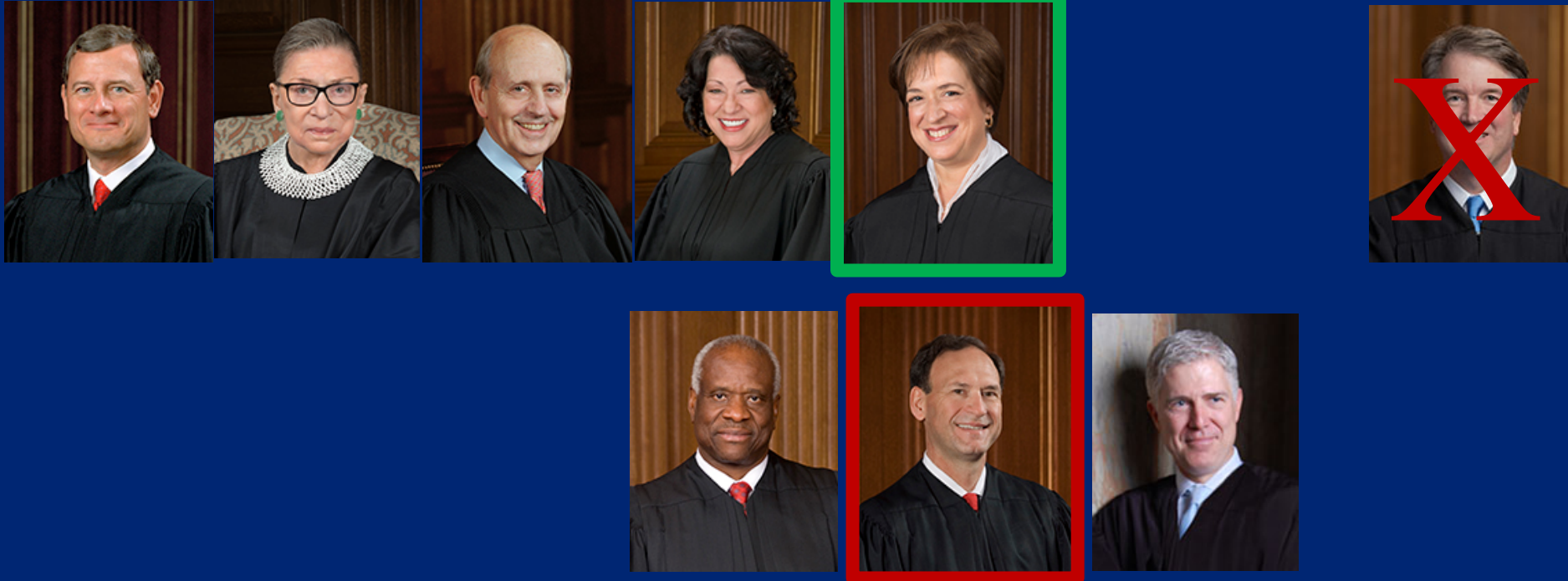


COURT'S RULING: Judgment below that inmate did not suffer intellectual disability reversed and case remanded (again) to apply the appropriate modern standards.

Madison v. Alabama

Intellectual Disability Determination

Vote: 5 - 3



COURT'S RULING: The 8th Amendment prohibits the execution of one who lacks a “rational understanding” of the reasons for his execution, whether due to psychosis or dementia.

Flowers v. Mississippi

Race-Based Peremptory Challenges

Vote: 7 - 2



COURT'S RULING: The “relentless” use of peremptory challenges to strike all black jurors, throughout the 6 trials and retrials, by the same prosecutor, violated *Batson*.

Rehaif v. U.S.

Mens Rea

Vote: 7 - 2



COURT'S RULING: Criminal offense for “knowingly” possessing “any firearm” by a person “illegally or unlawfully in the U.S.” requires scienter for each element, including illegal status.

U.S. v. Davis

“Crime of Violence”

Vote: 5 - 4



COURT'S RULING: Provision for enhanced sentence where a firearm was used in a “crime of violence,” categorically applied, is unconstitutionally vague.

U.S. v. Haymond

Mandatory Sentencing Facts

Vote: 5 - 4

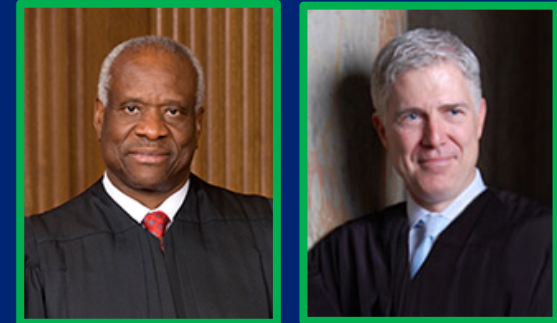


COURT'S RULING: Evidence of criminal conduct that revokes supervised release and triggers a mandatory minimum sentence must be proven to a jury beyond a reasonable doubt.

Timbs v. Indiana

Excessive Fines

Vote: 9(7 + 1 + 1) - 0



COURT'S RULING: The Excessive Fines prohibition in the 8th Amendment applies to the states through the Due Process Clause of the 14th Amendment.

Gamble v. U.S.

Double Jeopardy

Vote: 7 – 2(1+1)

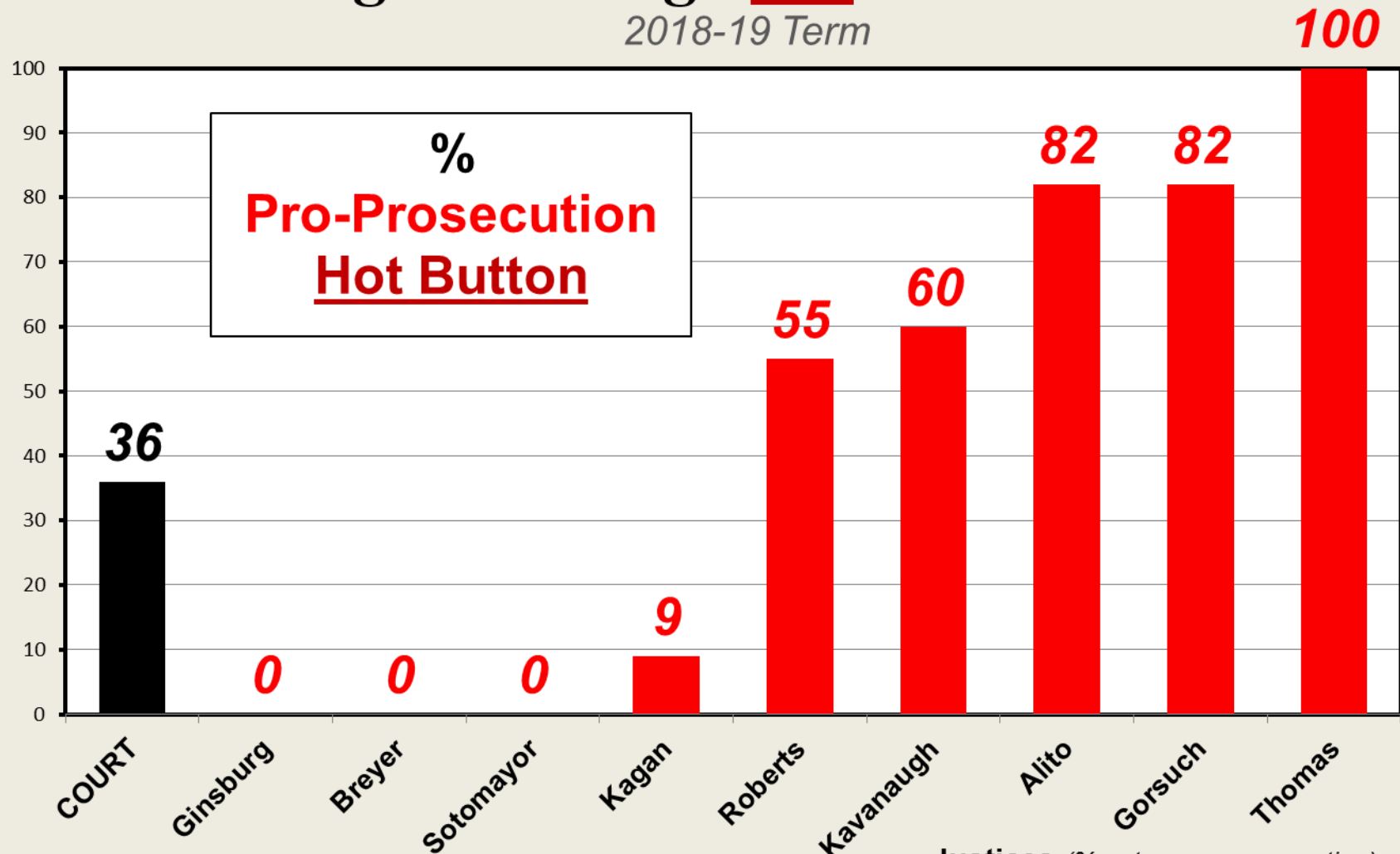


COURT'S RULING: The dual sovereignty of federal and state governments means that federal and state crimes, and thus the prosecutions of them, are separate—not double—jeopardy.

Supreme Court

Ideological Voting--HB Criminal Cases

2018-19 Term



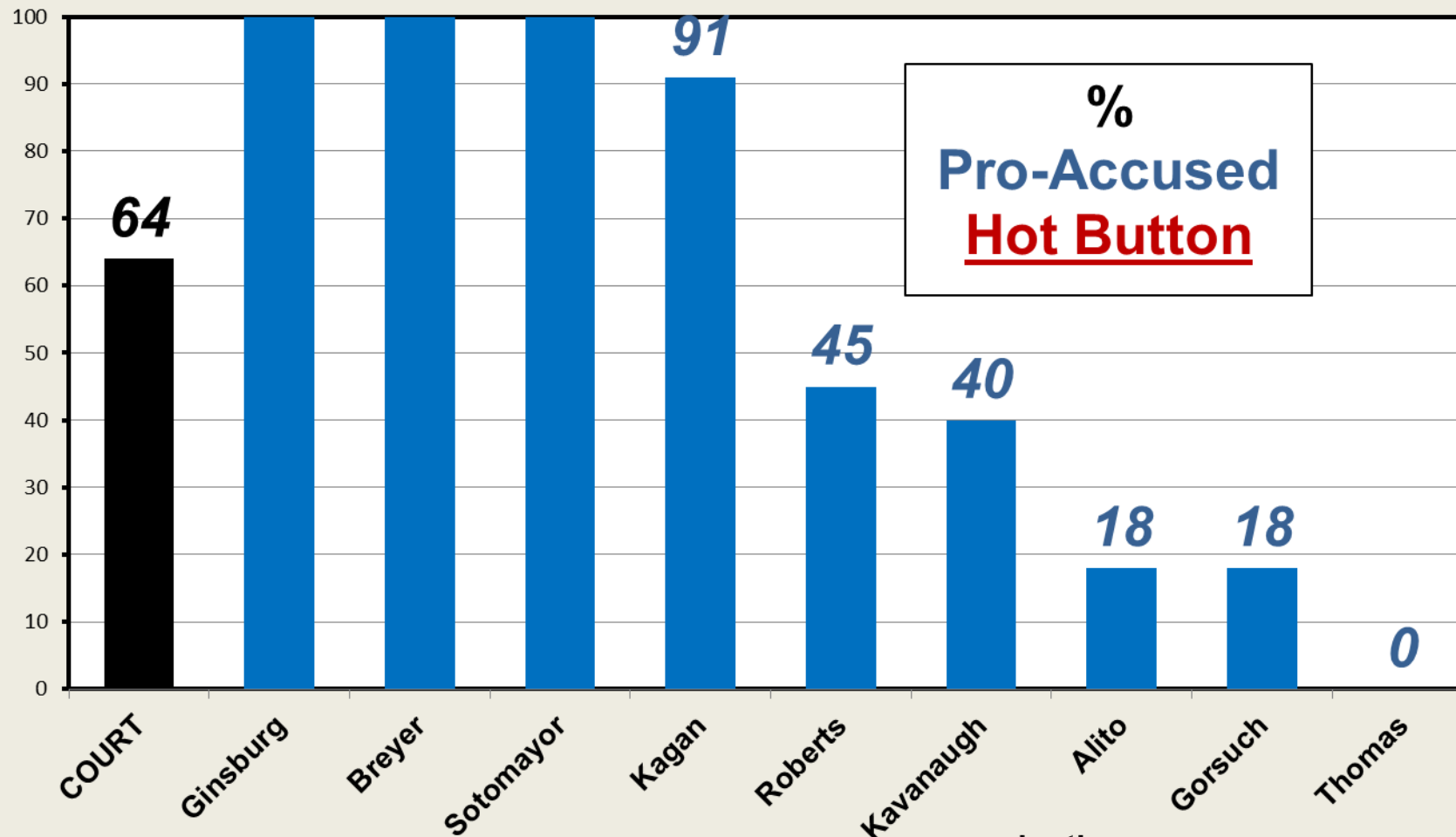
Justices (% votes: pro-prosecution)

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Supreme Court

Ideological Voting--HB Criminal Cases

100 100 100 2018-19 Term



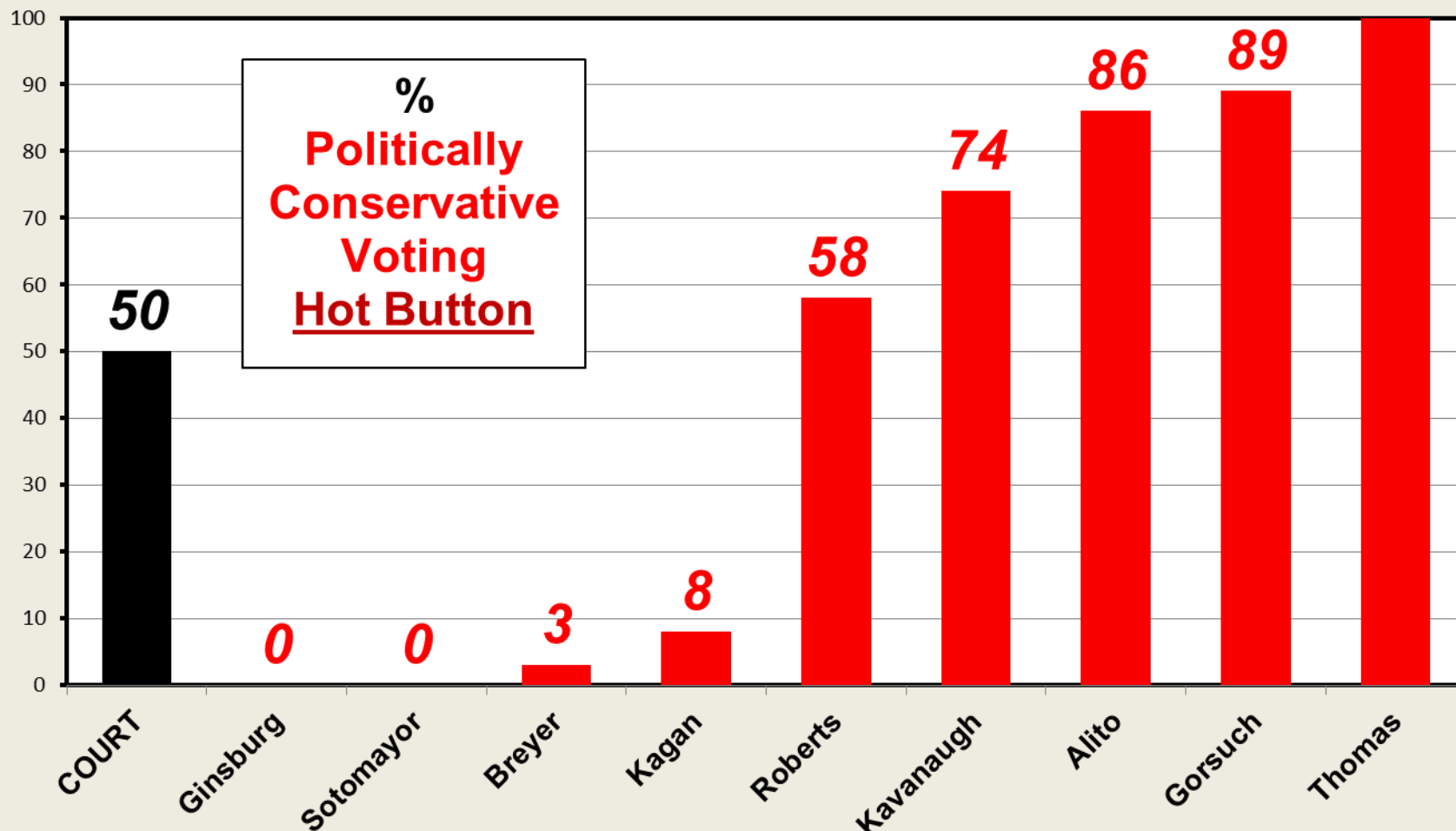
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Supreme Court

Ideological Voting Patterns--Hot Button

2018-19 Term



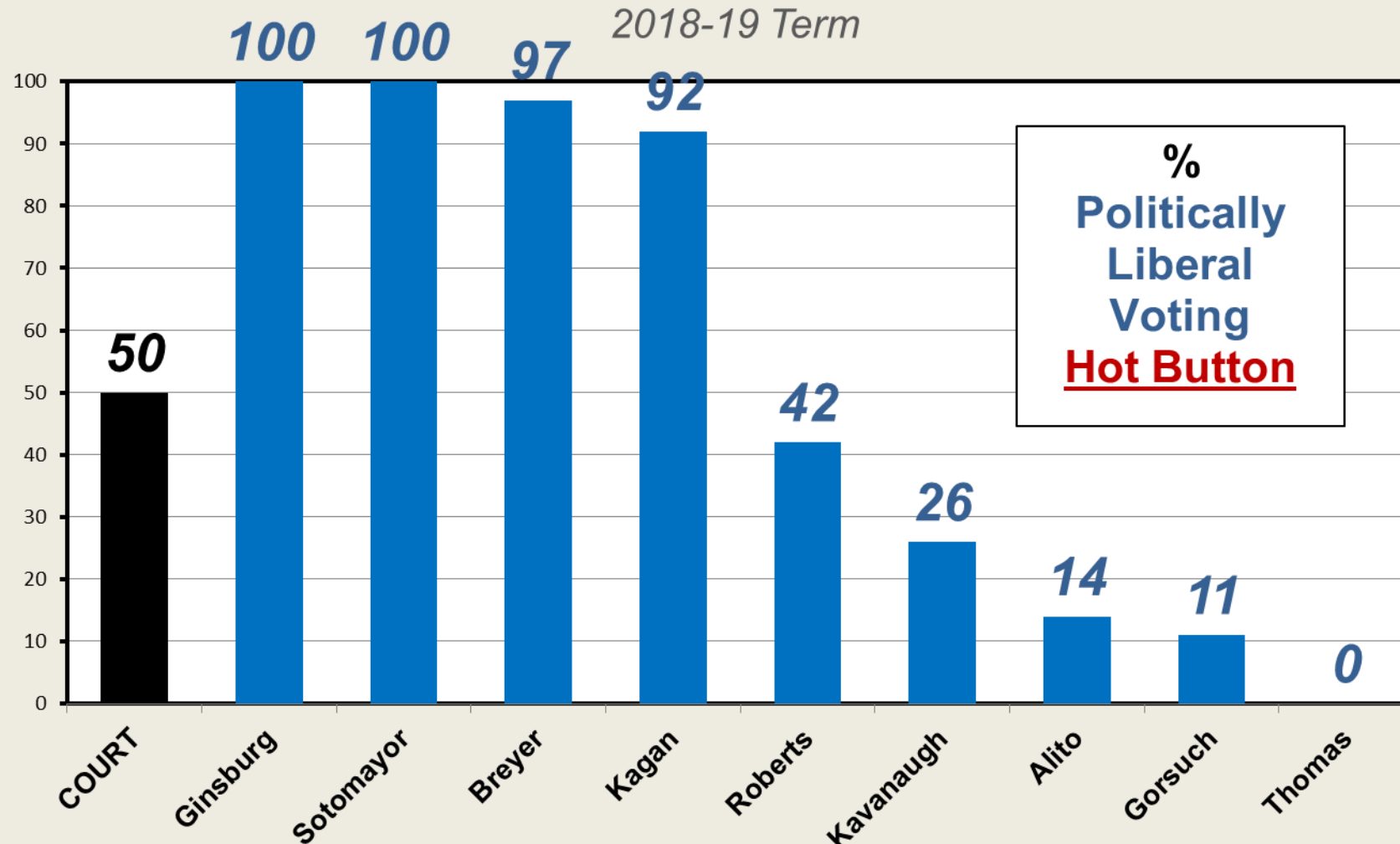
Justices (% votes: politically conservative --hot button)

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Supreme Court

Ideological Voting Patterns--Hot Button

2018-19 Term



Justices (% votes: politically liberal--hot button)

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Revealing Conflicts

Gloats, Goats, and (show) Boats **Highlights**



Roberts versus The Conservatives

Dept. of Commerce v. NY—the citizenship question

June Med. Servs. V. Gee—Louisiana abortion restrictions

Death Penalty cases—intellectual disability

—Buddhist Chaplain

Garza v. Idaho—ineffective counsel



Thomas's Resolute Positions

Record: 100% Conservative on Hot Button Issues

American Legion v. Amer. Humanist Assn.

—the Establishment Clause does not
apply to the states

Nielsen v. Preap—the Court has no jurisdiction over
immigrant detention.

Bucklew v. Precythe—“cruel and unusual” only if
deliberately designed to inflict pain

Flowers v. Mississippi—no *Batson*



Ginsburg: Adamantly Liberal

Record: 100% Liberal on Hot Button Issues

American Legion v. Amer. Humanist Assn.

—no Christian symbols

Death Penalty cases—reliably opposed

Gamble v. U.S.—separate state sovereignty is a mere
“metaphysical subtlety”



Breyer: Resolutely Opposed to Death Penalty

Death Penalty cases—vehement dissents in support of every “cruel and unusual” methods claimant



Alito versus Other Bush 43 Appointee

Dept. of Commerce v. NY—citizenship question is a
policy issue

June Med. Servs. V. Gee—opposed staying the Louisiana
abortion restrictions

Death Penalty cases—dissented to oppose every
intellectual disability claim

Rehaif v. U.S.—dissented against mens rea requirement



Sotomayor: Unalterably Liberal

Record: 100% Liberal on Hot Button Issues

American Legion v. Amer. Humanist Assn.

—extremely strict separation of
church & state

June Med. Servs. V. Gee—has opposed all abortion
restrictions

Death Penalty cases—favored death penalty defendant in
every case and order

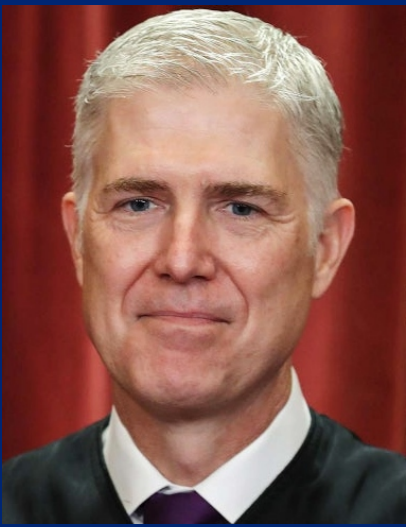


Kagan: Rare Vehement Disagreements

Rucho v. Common Cause—ardent opposition to partisan gerrymandering

Dunn v. Ray—forceful opposition to denial of Muslim Chaplain for death penalty inmate

Trump Appointees at Odds



Gorsuch

v.

Kavanaugh



Dept. of Commerce v. NY—Kavanaugh w/ Roberts on citizenship question; Gorsuch w/ Thomas dissent

Flowers v. Mississippi—Kavanaugh majority finding Batson violation; Gorsuch joined Thomas dissent

Moore V. Texas—Kavanaugh joined majority remanding for new intellectual disability determination; Gorsuch joined Alito dissent

Murphy v. Collier—Kavanaugh joined majority ordering Buddhist chaplain for death penalty inmate; Gorsuch joined Alito dissent

U.S. v. Davis—Gorsuch wrote majority invalidating “crime of violence;” Kavanaugh wrote dissent

Concluding Observations

RETIREMENTS?



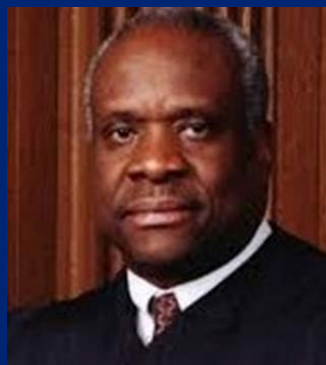
Ruth Bader Ginsburg

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- **91, end of a 2nd term**
- 26/27/31 years on Court



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Clarence Thomas

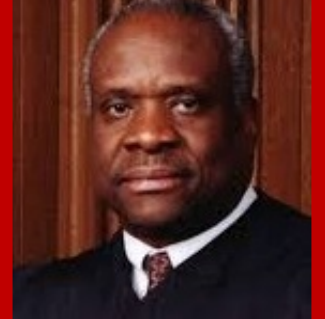
- 71 years old
- **72, end of current Trump term**
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- 28/29/33 years on Court

RECENT RETIREMENTS

(since 1990)

	YEAR	TIME	AGE
William J. Brennan, Jr.	(1990)	33	84
Thurgood Marshall	(1991)	23	83
Byron White	(1993)	30	76
Harry Blackmun	(1994)	23	86
Sandra Day O'Connor	(2006)	24	76
David Souter	(2009)	18	70
John Paul Stevens	(2010)	34	90
<u>Anthony Kennedy</u>	<u>(2018)</u>	<u>30</u>	<u>82</u>
	Avg.	27	81
	Median	24-30	82-83

For Now ...



But Trump 2nd Term?



finally...

It's Travers Weekend!!!

The 2004 Travers?



Al Bello/Getty Images

Birdstone

(but that's actually him winning the Belmont Stakes)



AP/Mark Lennihan

The
End

Thank You!