# U.S. Supreme Court and New York Court of Appeals

## Round-Up 2019

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**Tuesday, August 20, 2019**
12:00 p.m. – 2:00 p.m.

**2.0 MCLE Credits**
**2.0 Areas of Professional Practice**

*Sponsored by the Committee on Continuing Legal Education of the New York State Bar Association.*

This program is offered for educational purposes.

The views and opinions of the faculty expressed during this program are those of the presenters and authors of the materials. Further, the statements made by the faculty during this program do not constitute legal advice.

## Program Description

This program will discuss recent noteworthy cases from the 2018-2019 U.S. Supreme Court term and from the New York Court of Appeals, with an emphasis on what New York lawyers need to know for their day-to-day practice.

Sponsored by the Committee on Continuing Legal Education.

## Program Agenda

# U.S. Supreme Court and New York Court of Appeals Round-Up 2019

Tuesday, August 20, 2019 | 12:00 p.m. – 2:00 p.m.
New York State Bar Association | 1 Elk Street | Albany

| | |
|---|---|
| 11:30 a.m. | **Registration** |
| 12:00 p.m. – 12:05 p.m. | **Welcome and Introductions** |
| 12:05 p.m. – 2:00 p.m. | **U.S. Supreme Court and New York Court of Appeals Round-Up 2019**<br><br>Professor Vincent Bonventre \| Albany Law School<br>2.0 MCLE Credits in Areas of Professional Practice |
| 2:00 p.m. | **Adjournment** |

**2.0 MCLE Credits: 2.0 Areas of Professional Practice**

## Accessing the Online Course Materials

The link to access the online course materials is listed below.

Supplemental materials are posted to the online materials link.

**www.nysba.org/2019CourtRoundUp**

All program materials are being distributed online, allowing you more flexibility in storing this information and allowing you to copy and paste relevant portions of the materials for specific use in your practice. WiFi is available at the program location however, we cannot guarantee connection speeds.

# New York State CLE Board

# CLE Rules, Regulations and Guidelines

www.nycourts.gov/Attorneys/CLE

The New York State Bar Association Committee on Continuing Legal Education has been certified by the New York State Continuing Legal Education Board as an Accredited Provider of continuing legal education.

Answers to frequently asked questions are available at the New York State CLE Board's website, including general information about the CLE requirements, prorated credits and carry-over credits.

For more information, please visit www.nycourts.gov/Attorneys/CLE.

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## NYSBA Lawyer Assistance Program

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NYSBA

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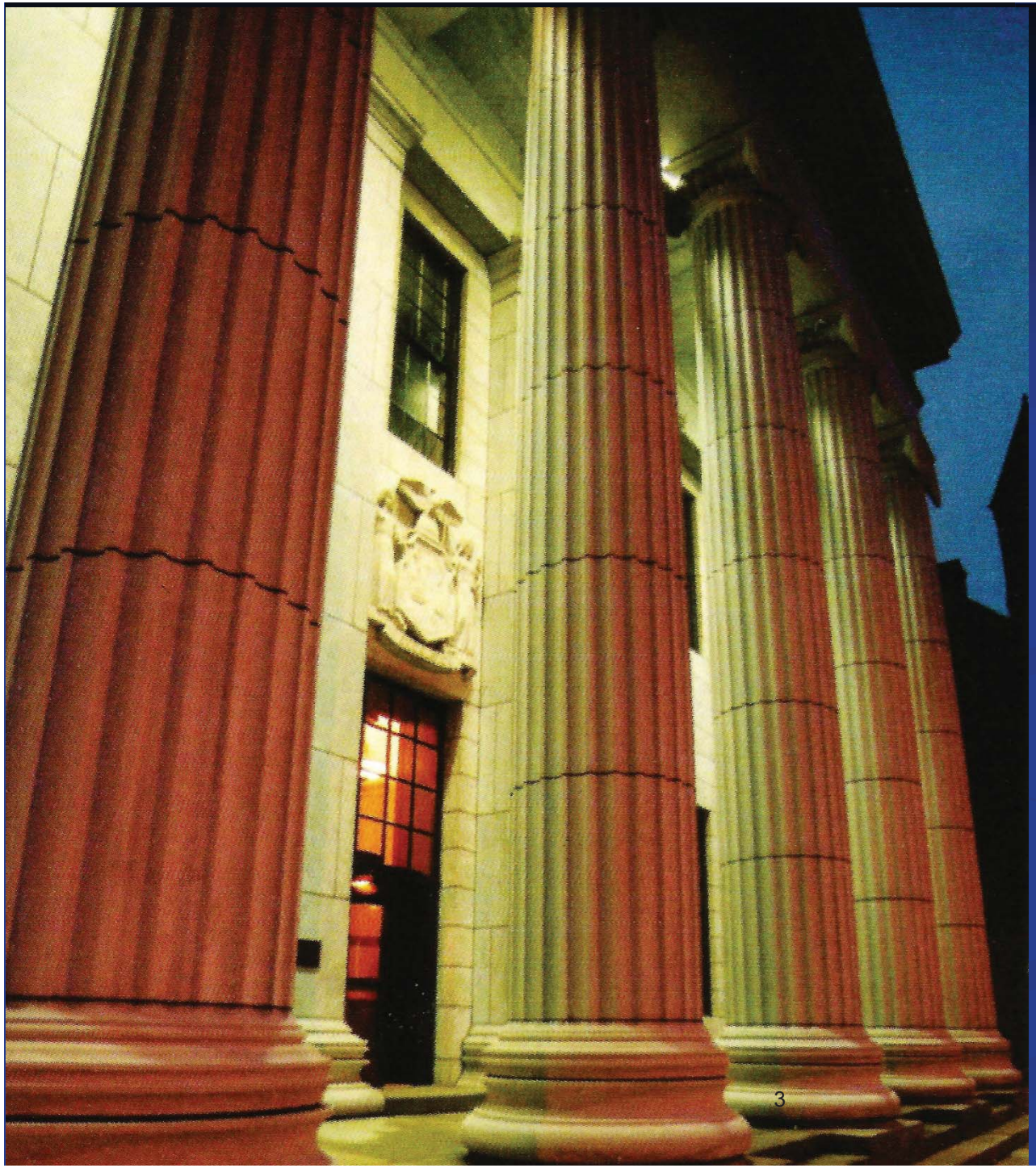
# Table of Contents

# Topic I
# New York Court of Appeals



# COURT OF APPEALS

## *The Tradition of a Great Court*

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

# THE COURT OF APPEALS

## *The Tradition of a Great Court*

*NYSBA CLE*

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*Introduction/Overview*

*First:* ***The DiFiore Court / The Judges***

***Some Recent Observations***

*Then:* ***The Tradition***

***Great Judges***

***Their Decisions and Opinions***

*Concluding Observations*

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# The DiFiore Court

*(Today--Since June 2017)*

**Janet DiFiore**

**Jenny Rivera** **Leslie Stein**

**Eugene Fahey** **Michael Garcia**

**Rowan Wilson** **Paul Feinman**

# Today's DiFiore Court
## Diversity

- 1 African-American Judge (Judge Rowan Wilson)
- 2 Hispanic Judges (Judges Jenny Rivera and Michael Garcia)
- 3 Women (Chief Judge Janet DiFiore and Judges Rivera and Leslie Stein)
- 1 Openly Gay Judge (Judges Paul Feinman)

# Today's DiFiore Court
## Diversity

- 2 Upstaters (Judges Stein [the Capital Region] and Eugene Fahey [Buffalo])
- 2 From New York City (Judges Rivera and Feinman [Also, Judge Garcia was born in the City and Judge Wilson worked there.])
- 2 Who live just north of the City in Westchester County (Chief Judge DiFiore and Judge Garcia)
- 1 Who lives on Long Island (Judge Wilson [Also, Judge Feinman was born there.])

# Today's DiFiore Court
## Diversity

- 3 Who were appellate judges (Judges Stein, Fahey, and Feinman)
- 4 Who had been trial judges (Chief Judge DiFiore and Judges Stein, Fahey, and Feinman)
- 2 From private practice (Judges Garcia and Wilson [Also, Judge Stein had considerable private practice prior to judicial career.])
- 2 Prosecutors who ran prosecutorial offices (Chief Judge DiFiore [Westchester Cnty DA] and Judge Garcia [U.S. Atty for the SDNY])

# Today's DiFiore Court
## Diversity

- 1 Academic (Judge Rivera)
- 6 Different law schools:
  St. John's [DiFiore]
  NYU [Rivera]
  Albany [Stein and Garcia]
  SUNY Buffalo [Fahey]
  Harvard [Wilson])
  Minnesota [Feinman])

# Today's DiFiore Court
## Diversity

- 1 Italian-American (Chief Judge DiFiore)
- 1 Puerto Rican-American (Judge Rivera)
- 2 Jewish-Americans (Judge Stein and Feinman)

***and***

- 1 "65 [now 67] Year Old White Guy" & Irish-American (Judge Fahey)

***even***

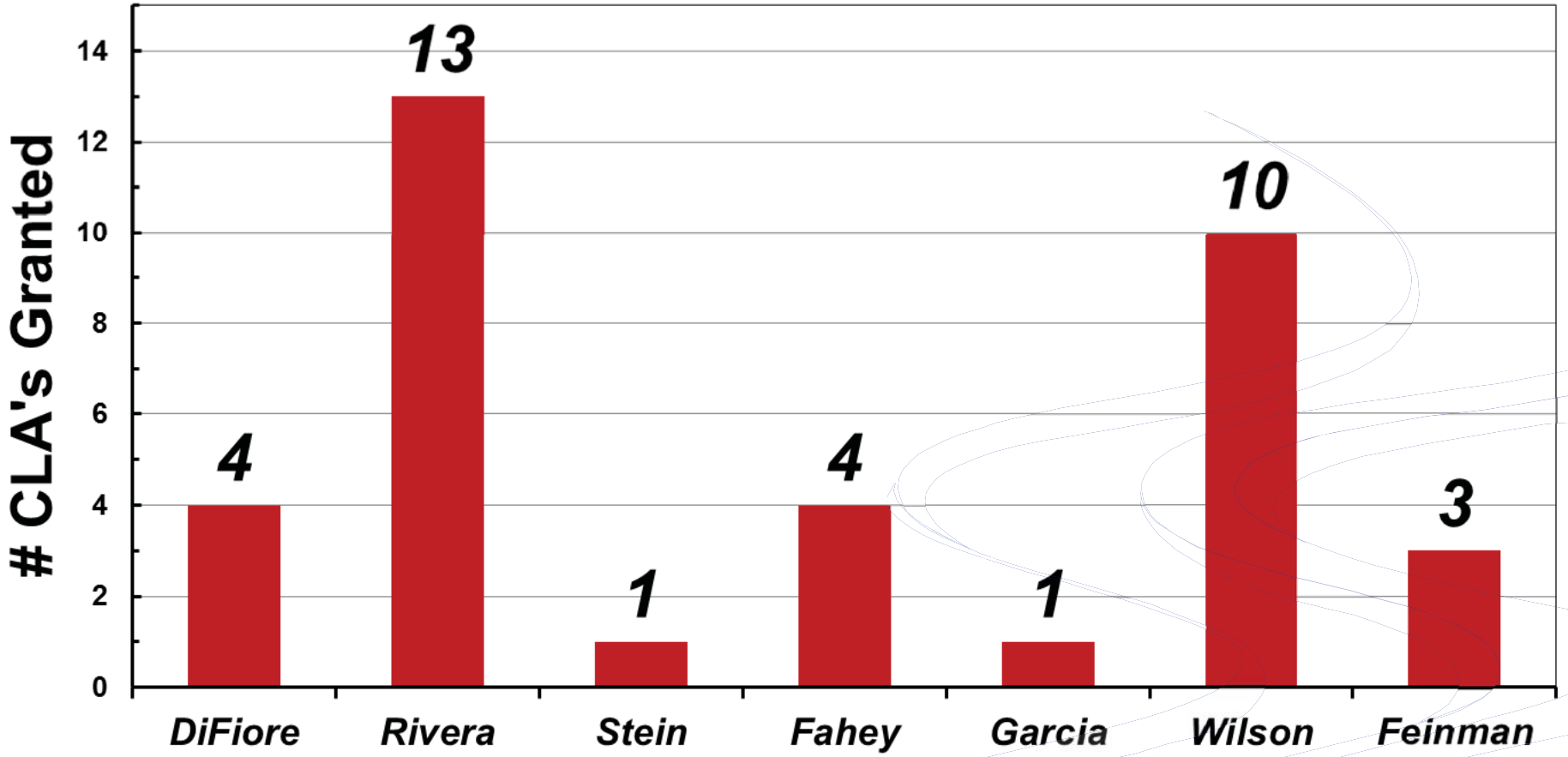
- 1 Republican (Judge Garcia)

[all the rest are Democrats]

# DiFiore Court

## Criminal Appeals Granted by Judge

*2018*



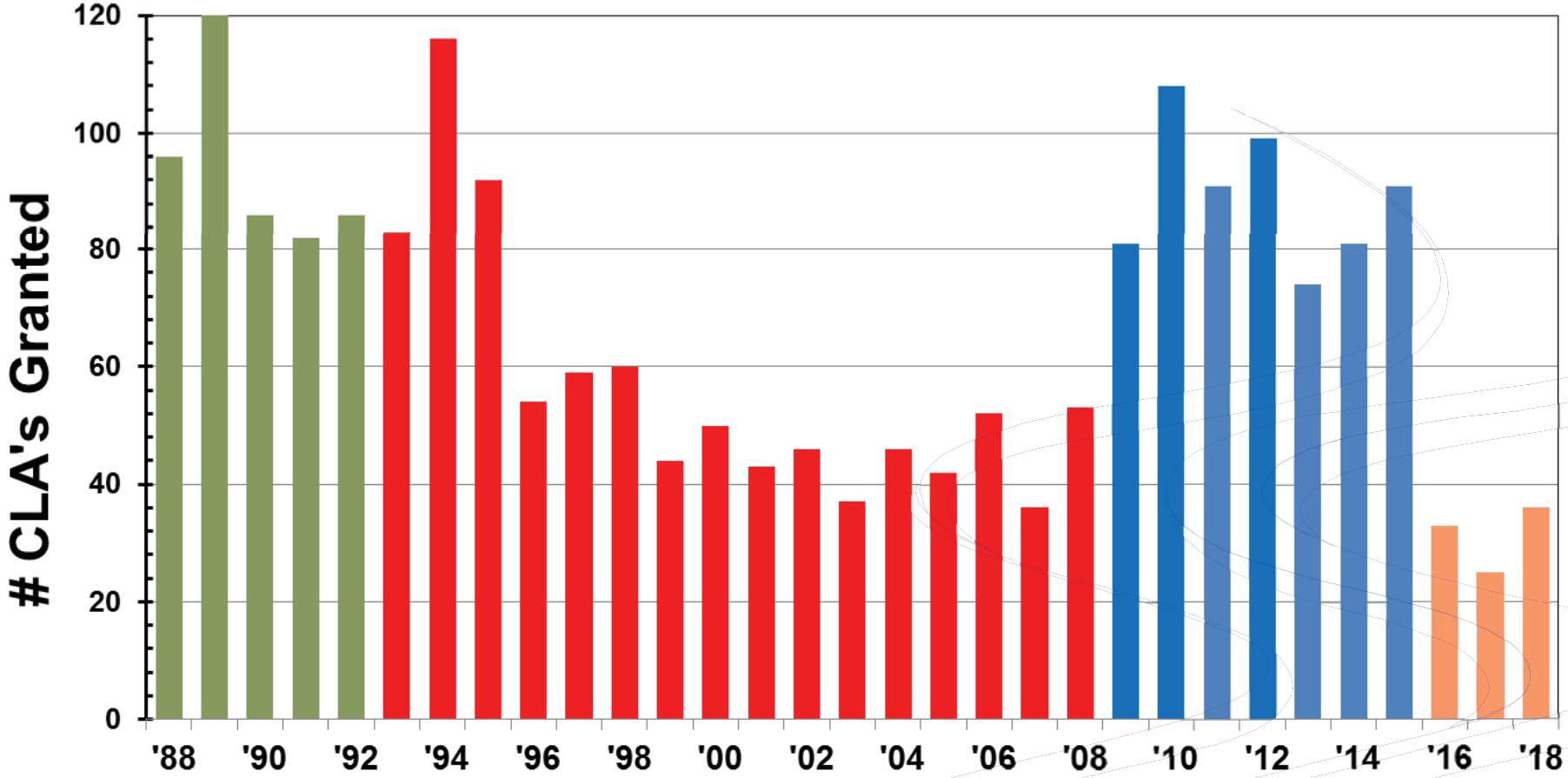

**Judge** *(# CLA's Granted)*

Source: Vincent M. Bonventre, Albany Law School 2/2019

# Court of Appeals

## Criminal Appeals Granted

*Wachtler* vs. *Kaye* vs. *Lippman* vs. *Early DiFiore* Eras



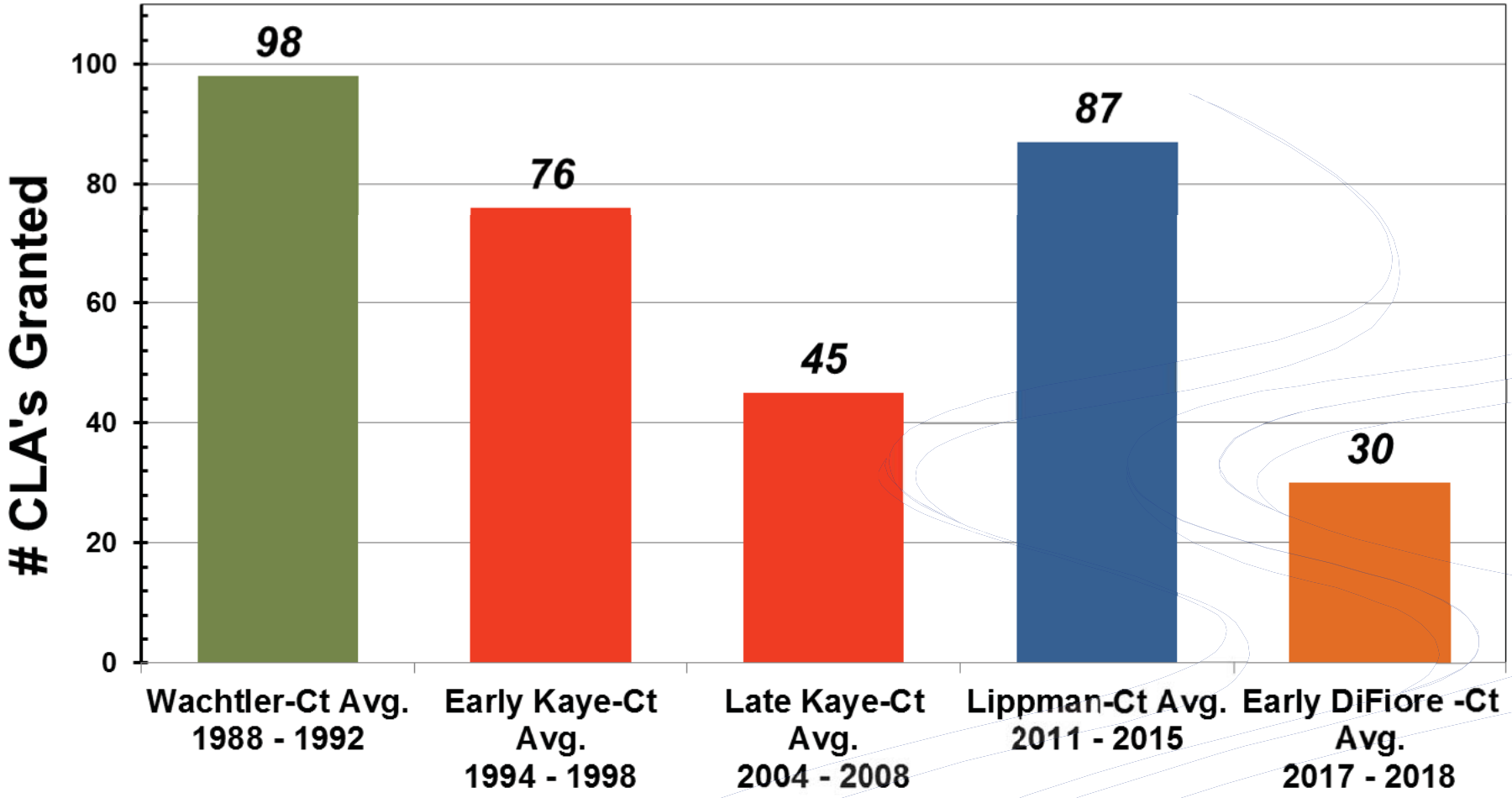

**Year** *(Annual CLA's granted)*

Source: Vincent M. Bonventre, Albany Law School updated 2/2019

# Court of Appeals

## Criminal Appeals Granted

*Wachtler vs. Kaye vs. Lippman vs. Early DiFiore Eras*



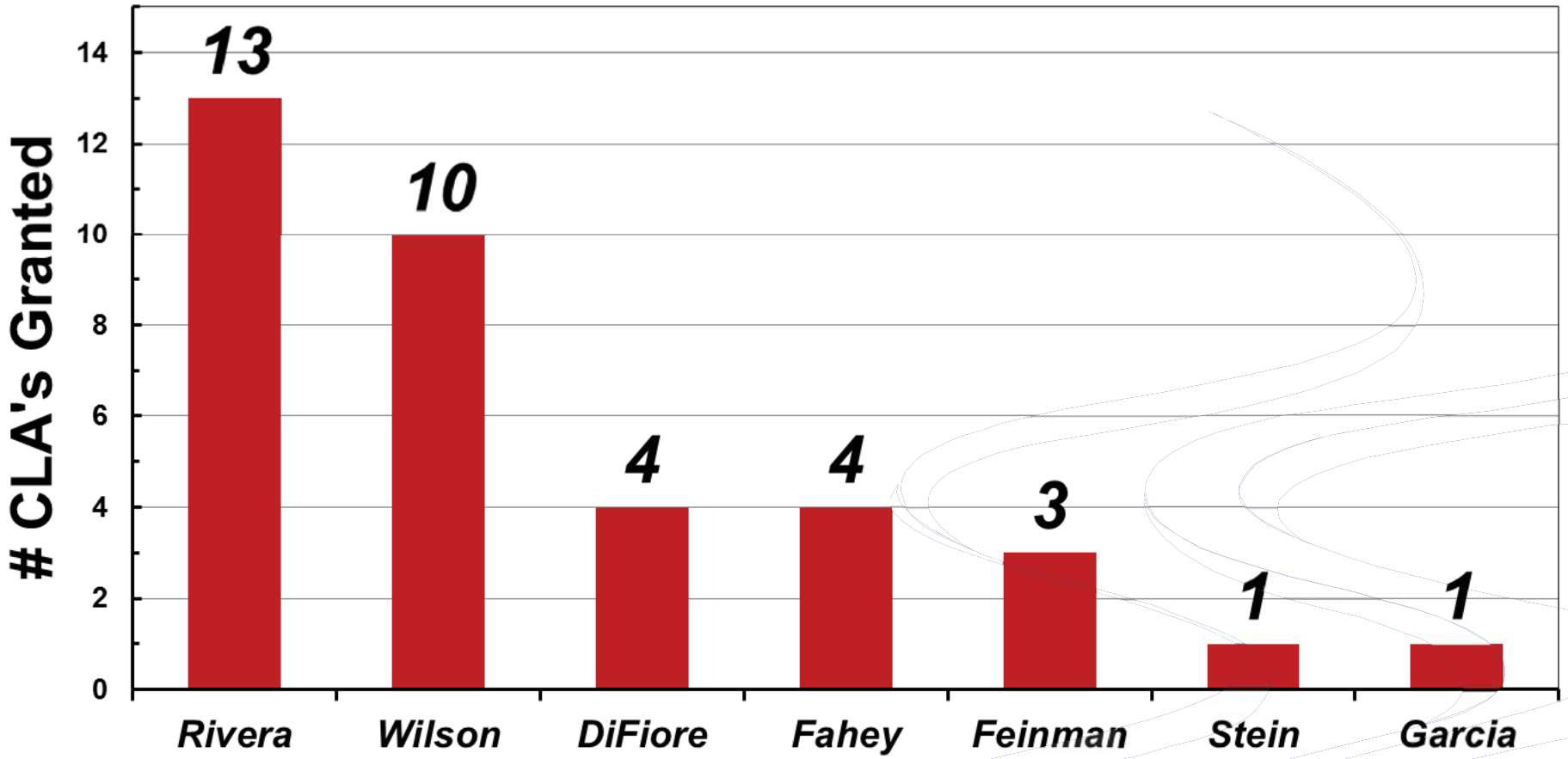

**5 yr. avgs. + Early DiFiore Ct.** *(CLA's granted)*

Source: Vincent M. Bonventre, Albany Law School updated 2/2019

# DiFiore Court

## Criminal Appeals Granted by Judge

*2018*



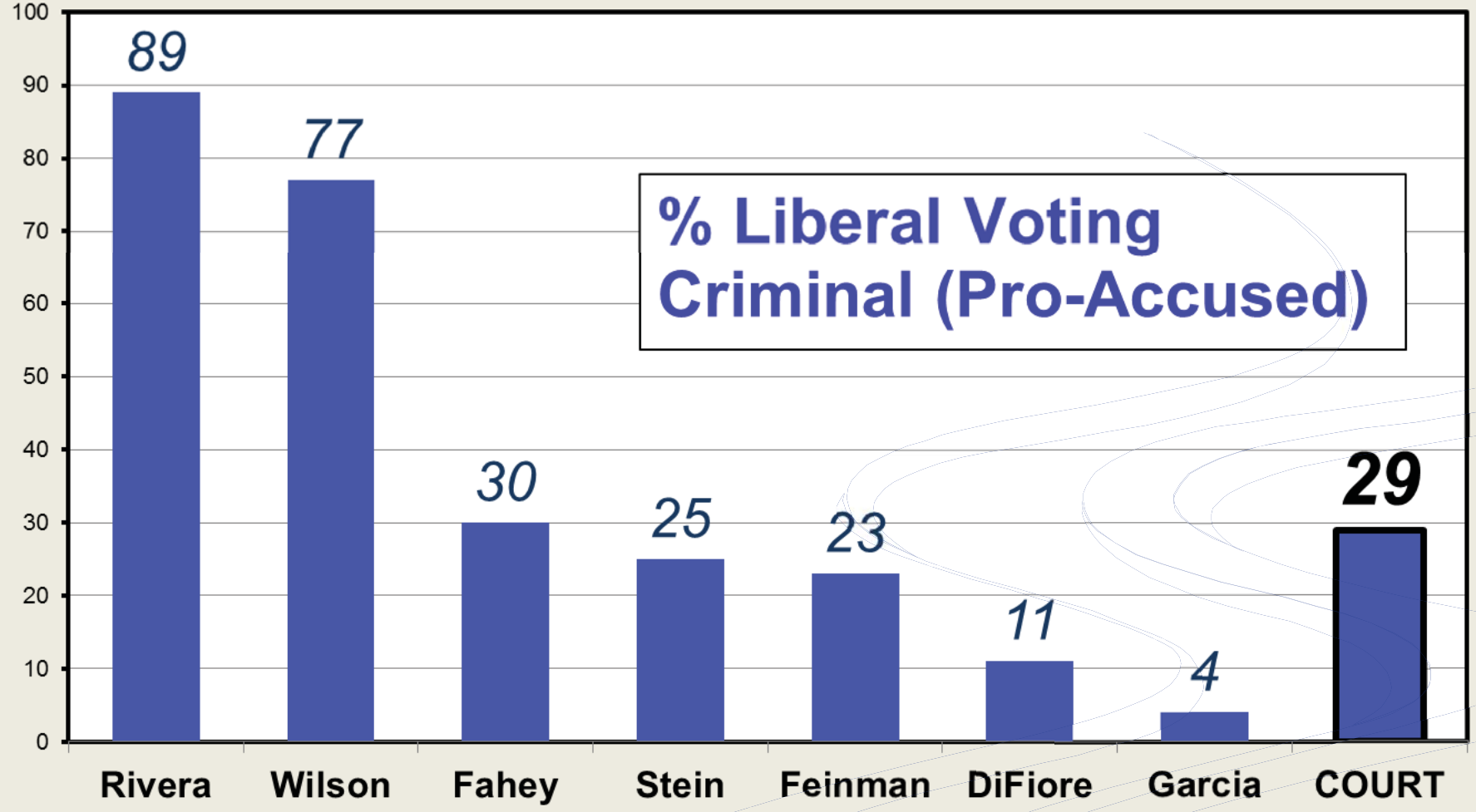

**Judge** *(# CLA's Granted)*



Source: Vincent M. Bonventre, Albany Law School 2/2019

# DiFiore Court

## *2018 Voting Patterns--criminal*




**Judges** *(% Criminal Appeal Liberal Voting [28 div. decisions])*

Source: Vincent M. Bonventre, Albany Law School 3/2019

# DiFiore Court

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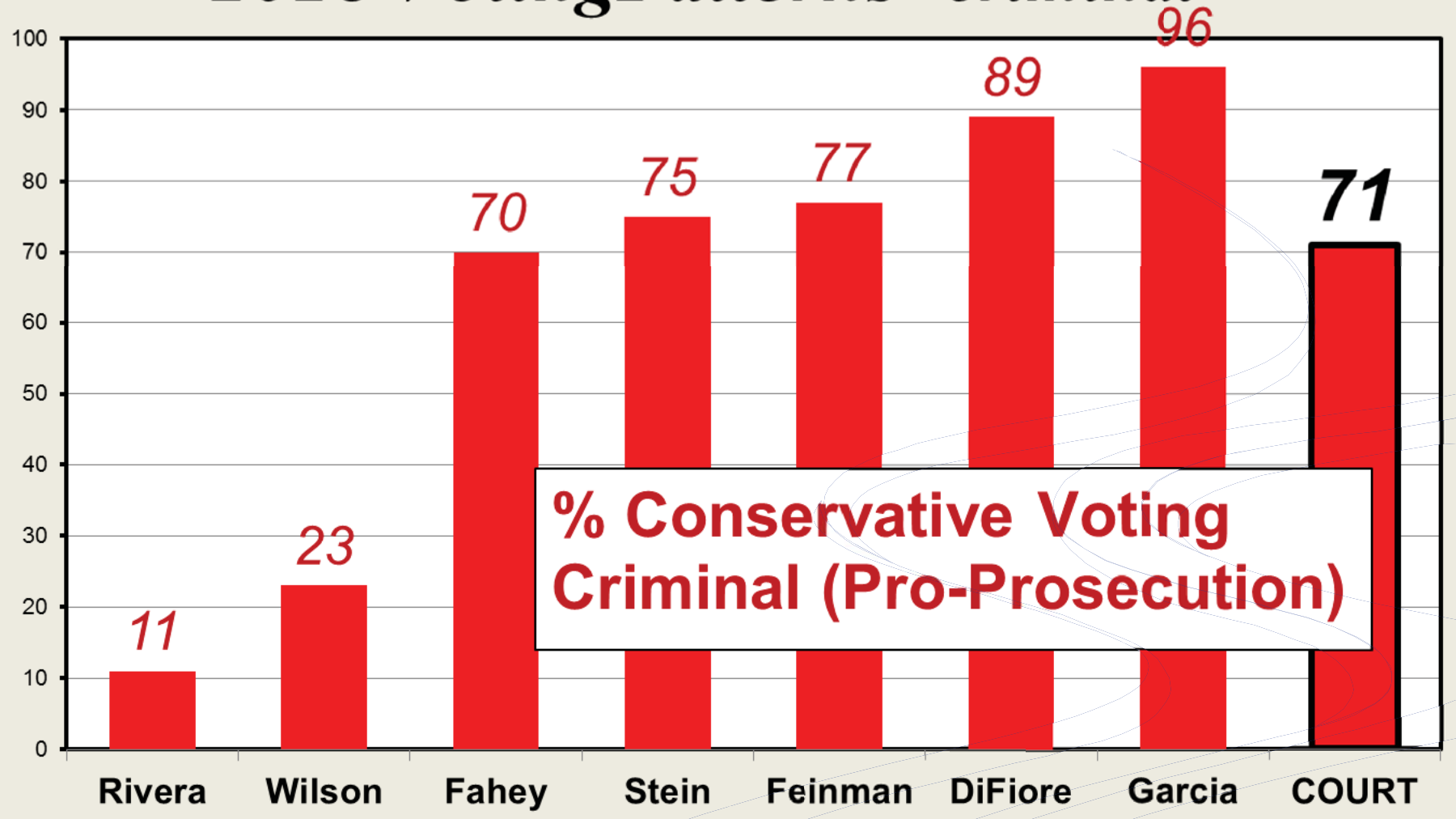




Source: Vincent M. Bonventre, Albany Law School 3/2019

# The Main Issue

"$\Sigma_n$-free and $G$-contractible" only says that, for $\Gamma \leq G \times \Sigma_n$,

$$\mathcal{O}(n)^\Gamma \simeq \begin{cases} * & \Gamma = H \leq G \\ \varnothing & \Gamma \cap \Sigma_n \neq \{e\} \end{cases}$$

Doesn't say what happens if $\Gamma \cap \Sigma_n = \{e\}$ unless $\Gamma = H$.

# CRIM DiFiore Ct 2018

| Date/Case | Ct | PiF | R | S | Fa | G | W | Fe |
|---|---|---|---|---|---|---|---|---|
| 2/13 dangerous knife Edward/McCain | C Mems 6-1 | C | C | (C) entry | C | C | (L) entry | C |
| 2/15 conspir/gang Reyes | L Mem 5-2 | L | L | L | L | (C) | L | C |
| Wiggins speedy trial | L 4-3 | (C) | L | L | (L) | C | L | C |
| 3/22 no justification charge Sanchez | C Mem 5-2 | C | L | C | C | C | (L) | C |
| 3/27 no lesser incl ok Boyd | C Mem 5-2 | C | (L) | C | C | C | L | C |
| no DeBour viol Perez | C Mem 5-2 | C | (L) | C | C | C | L | C |
| 4/3 pro se denied Silburn | C 5-2 | (C) | (L) | C | C | C | (L) | C |
| 4/26 Bacquette cox offender Britton | C Mem 6-1 | C | (L) | C | C | C | C | C |
| 5/1 DeBour Gates | L Mem 6-1 | L | L | L | L | (C) | L | L |

# DiFiore Court

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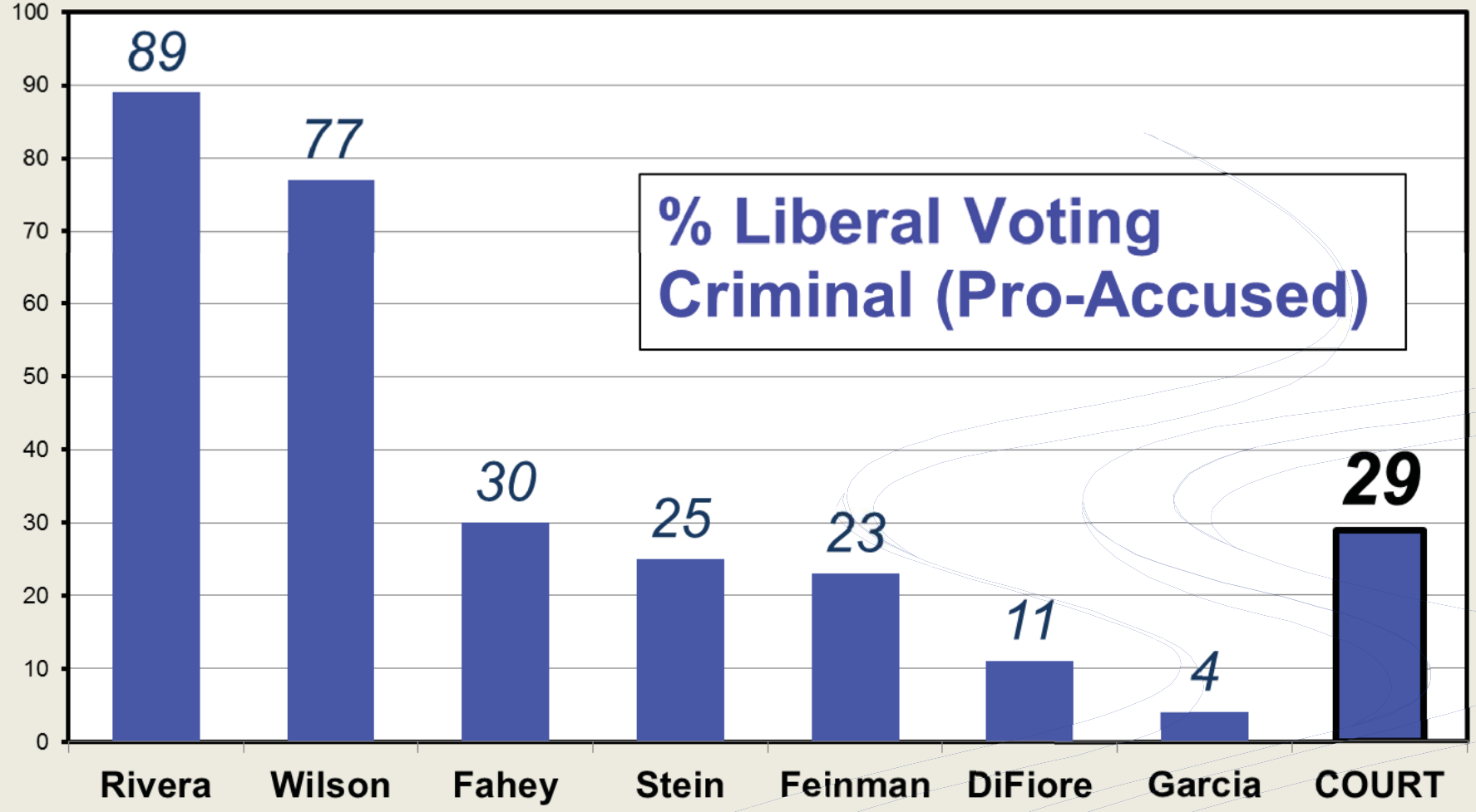
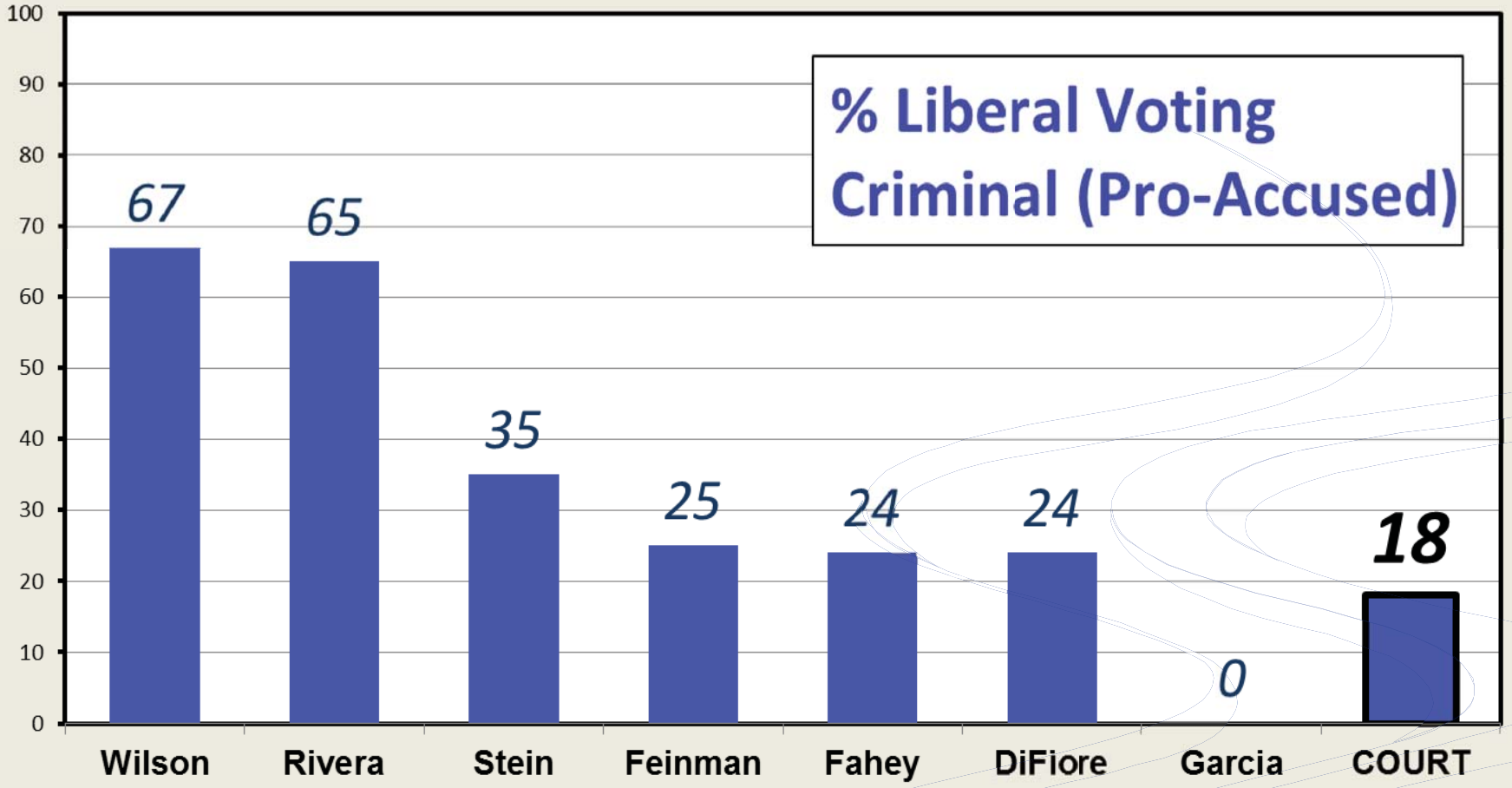



**Judges** *(% Criminal Appeal Liberal Voting [28 div. decisions])*

Source: Vincent M. Bonventre, Albany Law School 3/2019

# DiFiore Court

## *2017 Voting Patterns--criminal*






**Judges** *(% Criminal Appeal Liberal Voting)*

Source: Vincent M. Bonventre, Albany Law School 3/2018

# DiFiore Court

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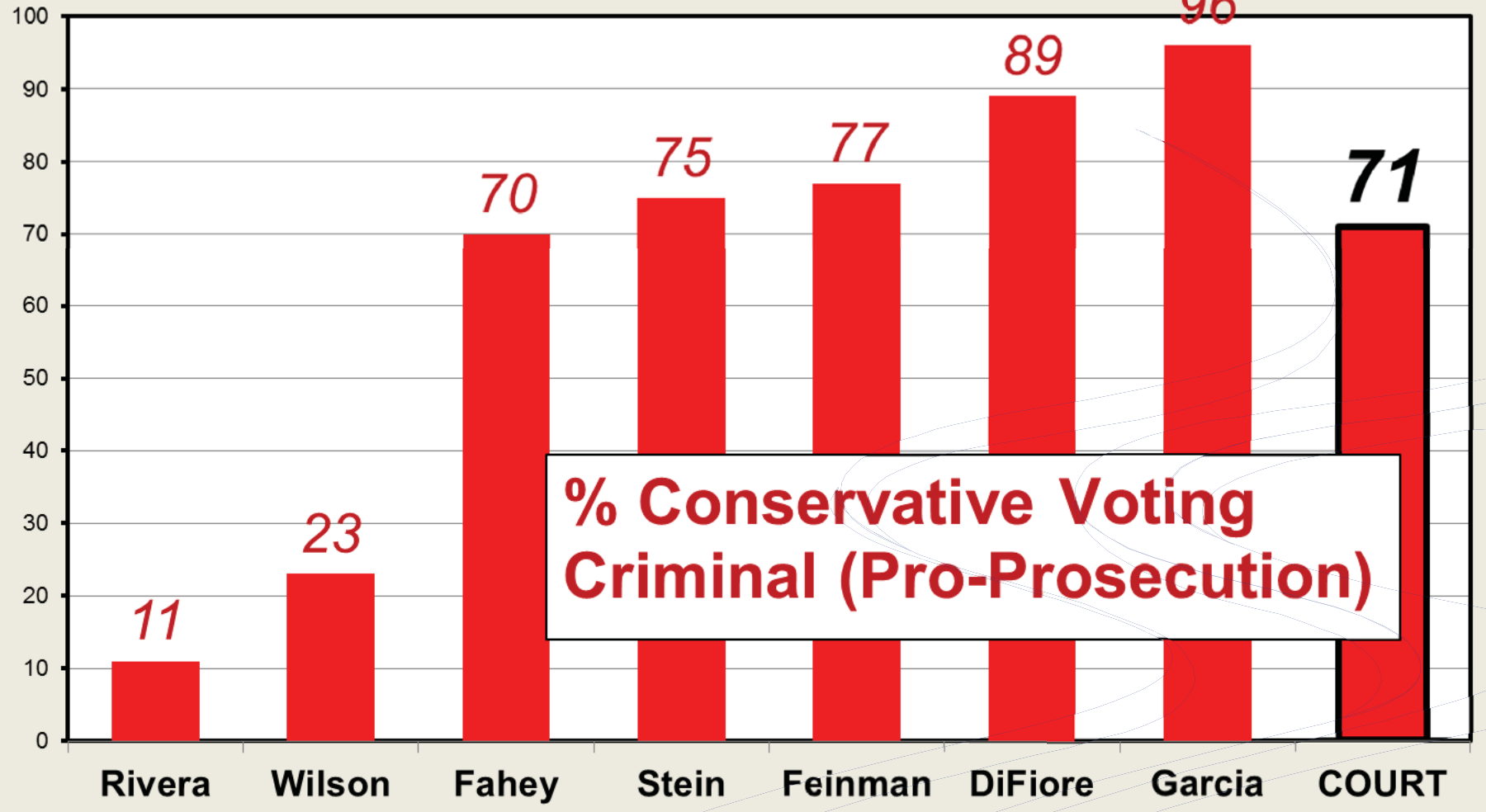


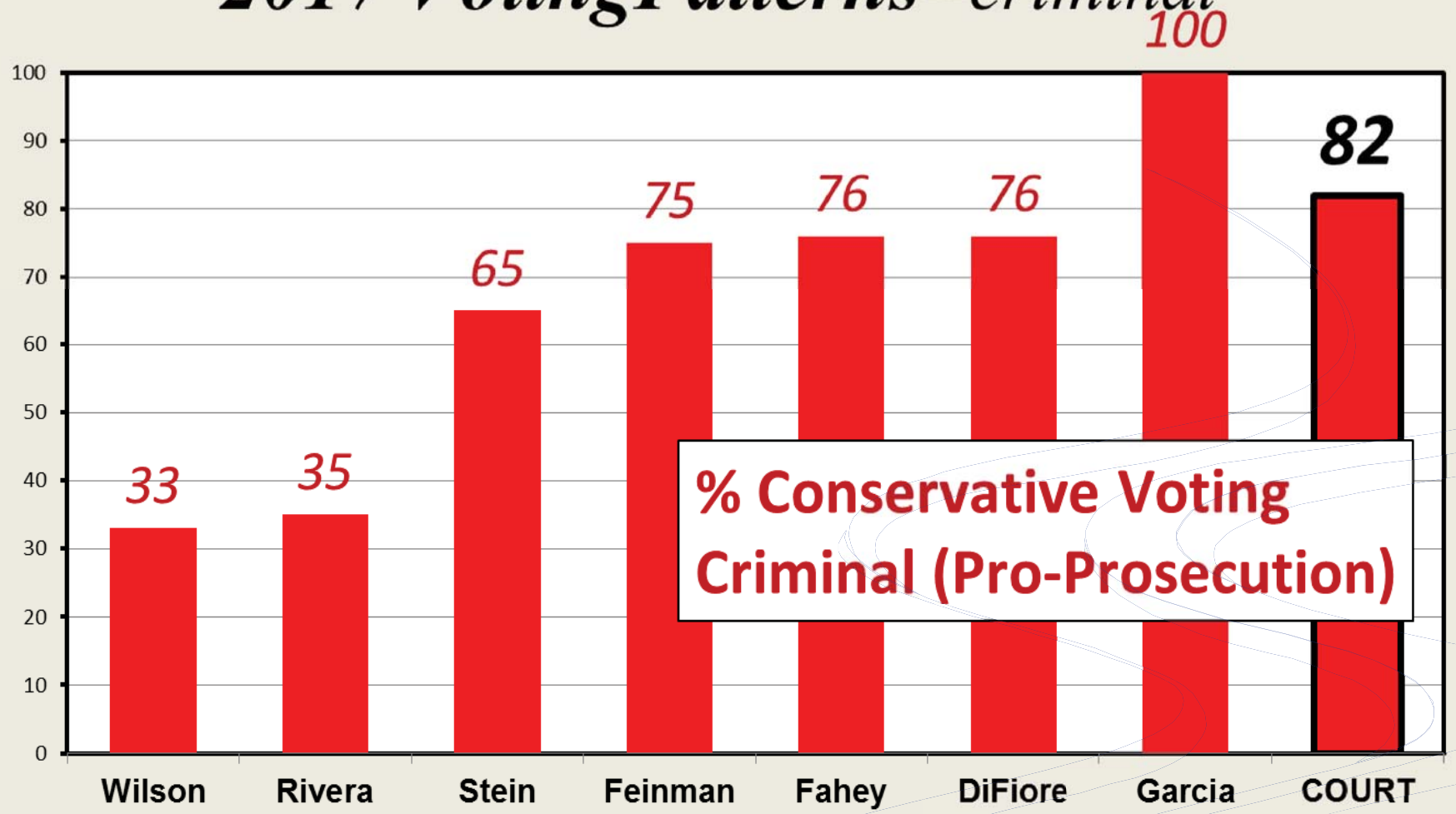

**Judges** *(% Criminal Appeal Conservative Voting [28 Div. Decisions])*



Source: Vincent M. Bonventre, Albany Law School 3/2019

# DiFiore Court

## *2017 VotingPatterns--criminal*






**Judges** *(% Criminal Appeal Conservative Voting)*

Source: Vincent M. Bonventre, Albany Law School 3/2018

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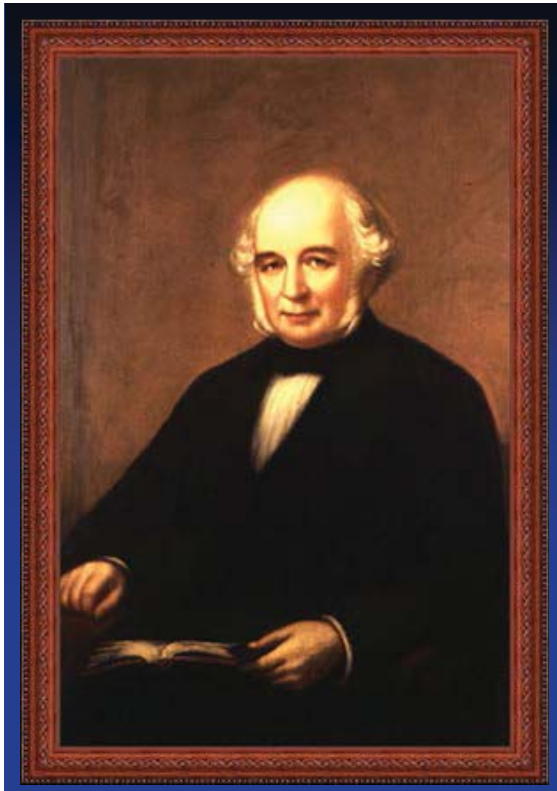
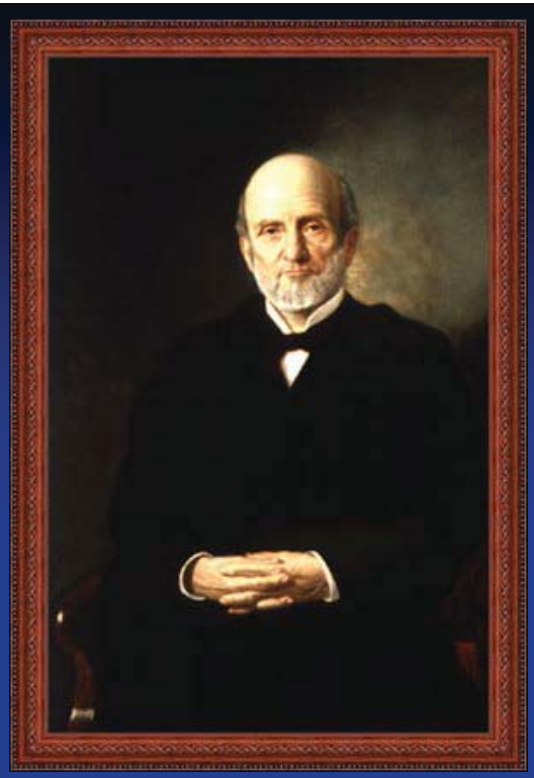


# Hiram Denio

Born: Rome, NY
Court of Appeals 1853-1865
Chief Judge 1856-57, 1862-65

***Lemmon v. People*** (1860)

*[S]laves introduced into the territory of this State [are] free.*

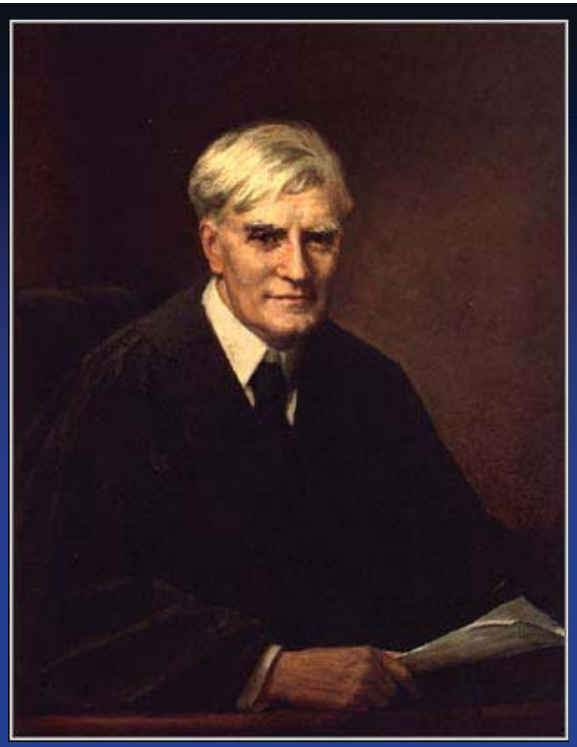


# Robert Earl

Born: Herkimer, NY
Court of Appeals 1870, 1870-75*, 1875-94
Chief Judge 1870, 1892

***Matter of Jacobs*** (1885)
*[O]ne may be deprived of his liberty and his constitutional rights thereto violated without the actual imprisonment or restraint of his person.*

***Riggs v. Palmer*** (1889)
*No one shall be permitted to profit by his own fraud.*



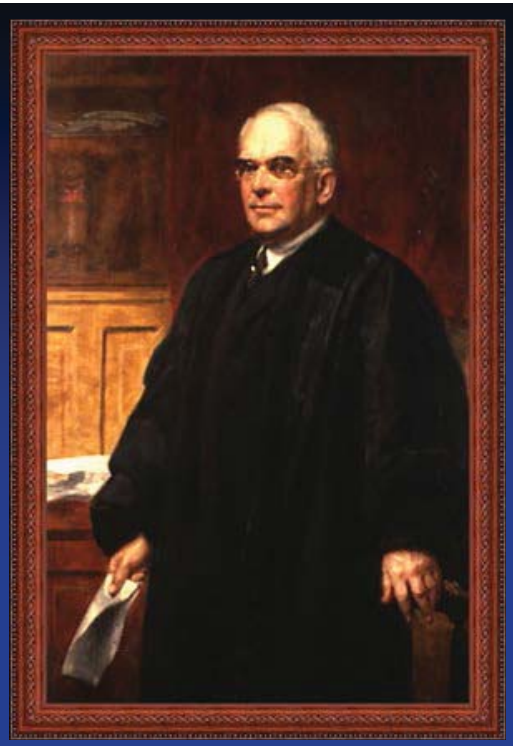
# Benjamin N. Cardozo

Born: New York City, NY
Court of Appeals 1914-32
Chief Judge 1927-32

## *The Nature of the Judicial Process* (1921)

*There is in each of us a stream of tendency…Judges cannot escape that current any more than other mortals.*

*[T]he duty of a judge…must balance all his ingredients…as wisely as he can.*



# Cuthbert W. Pound

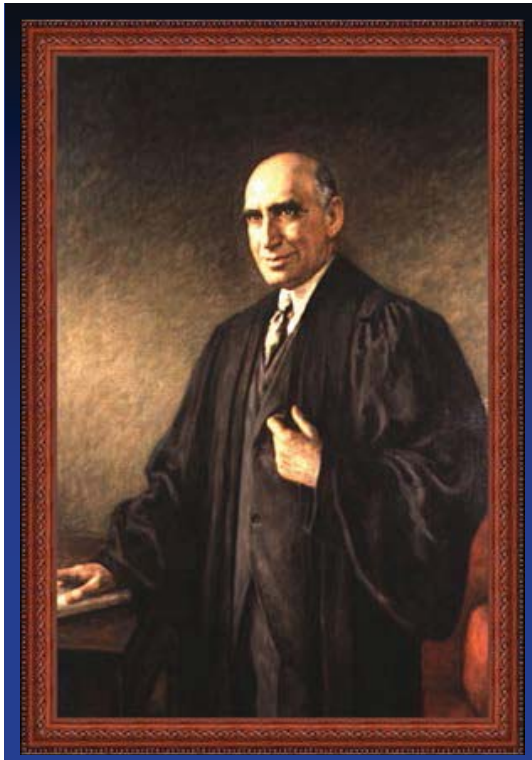
Born: Lockport, NY
Court of Appeals 1915-34
Chief Judge 1932-34

***People v. Gitlow*** (1922) [Dissent]

*[T]he rights of the best of men are secure only as the rights of the vilest and most abhorrent are protected.*

***People v. Nebbia*** (1933)

*[C]onstitutional law is a progressive science.*



# Irving Lehman

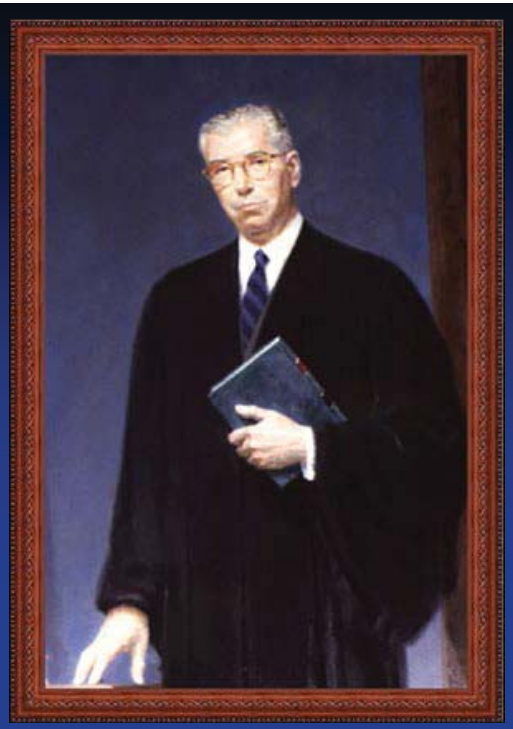
Born: New York City, NY
Court of Appeals 1924-45
Chief Judge 1940-45

## *Addresses on the Judicial Process*

*The thoughtful judge learns soon …that exact justice cannot be done in all cases through the application of general rules.*

## *People v. Barber* (1943)

*This Court is bound to exercise independent judgment.*



# Stanley H. Fuld

Born: New York City, NY
Court of Appeals 1946-73
Chief Judge 1967-73

***People v. Donovan*** (1963)

*[W]e find it unnecessary to consider whether or not the Supreme Court would regard [it]a violation.*

***Dorsey v. Stuyvesant Town Corp.*** (1949)

[Dissent]

The *equal protection clause of the Constitution of New York State is at least as broad in coverage as its Federal counterpart.*

# Lawrence H. Cooke

Born: Monticello, NY
Court of Appeals 1975-84
Chief Judge 1979-84

***People v. Isaacson*** (1978)

*[T]his court would be paying mere lip service to due process if it sanctioned a prosecution [despite] 'reprehensible' police action.*

***People v. Rogers*** (1979)

*[O]nce an attorney has entered the proceeding…a defendant in custody may not be further interrogated in the absence of counsel.*

# Judith S. Kaye

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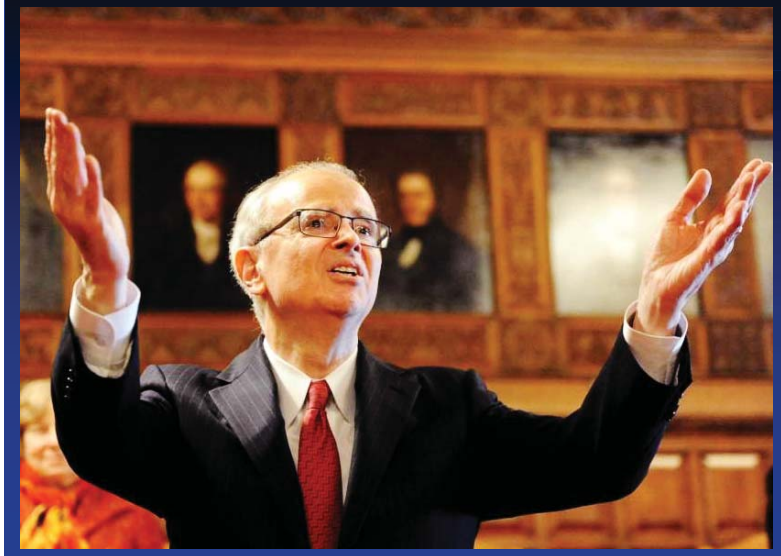
Court of Appeals 1983-2008
Chief Judge 1993-2008

***People v. Scott*** (1992) [Concurrence]

*[H]owever much we might consider ourselves dispensing justice strictly according to formula, at some point the decisions we make must come down to judgments.*

***Hernandez v. Robles*** (2006) [Dissent]

*[F]undamental rights are fundamental rights. They are not defined in terms of who is entitled to exercise them.*



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Chief Judge 2009-15

***People v. Weaver*** (2009)

*One need only consider what the police may learn, practically effortlessly, from planting a single [GPS] device.*

***People v. Thomas*** (2012)

*[N]ot all deception of a suspect is coercive, but in extreme forms it may be.*

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# Concluding Observations
## The DiFiore Court

# Chief Judge Janet M. DiFiore

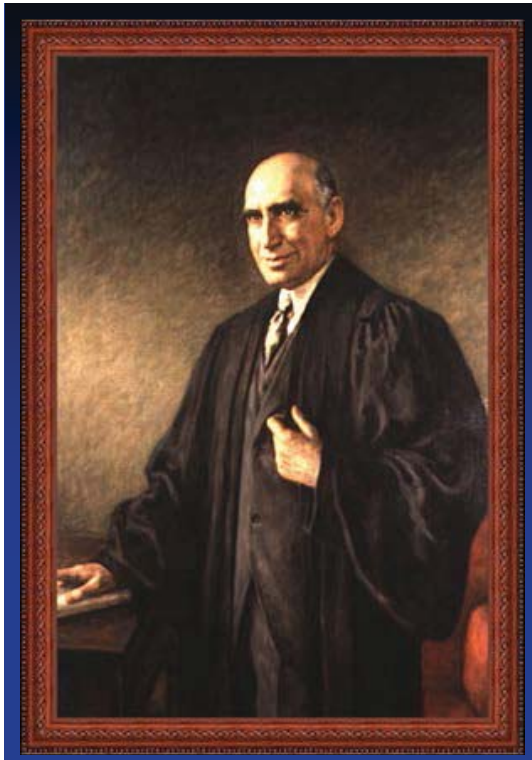
- Appointed 2016, by Andrew Cuomo
- Replaced Jonathan Lippman (by David Paterson)
- From Westchester County
- Former Trial Judge, DA (Westchester County)
- Age: 64 (born Aug. 1955)
- Mandatory age retirement: 2025

# Senior Judge Jenny Rivera

- Appointed 2013, by Andrew Cuomo
- Replaced Carmen Ciparick (by Mario Cuomo)
- From New York City
- Former Law Professor, Law Clerk to then-Judge Sotomayor
- Age: 58 (born Dec. 1960)
- 14 year Term Ends: 2027

# Judge Leslie E. Stein

- Appointed 2015, by Andrew Cuomo
- Replaced Victoria Graffeo (by George Pataki)
- From Albany Area (born in New York City.)
- Former Practitioner, Trial and Appellate Judge, 3rd Dept.
- Age: 62 (born Dec. 1956)
- Mandatory age retirement: 2026



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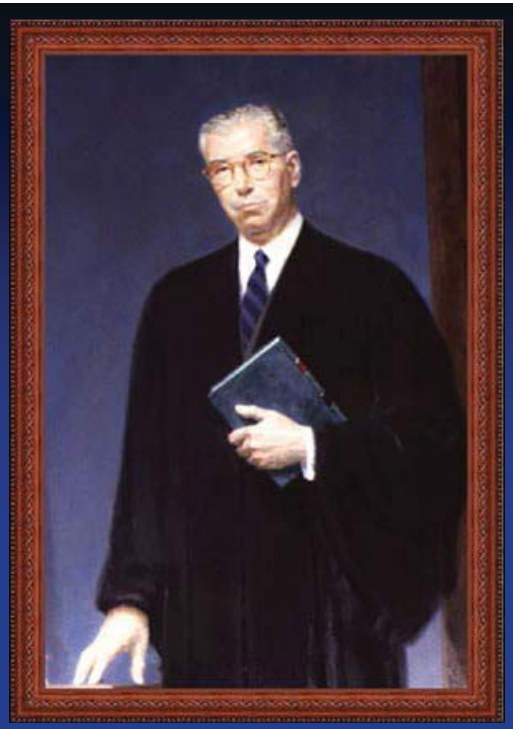

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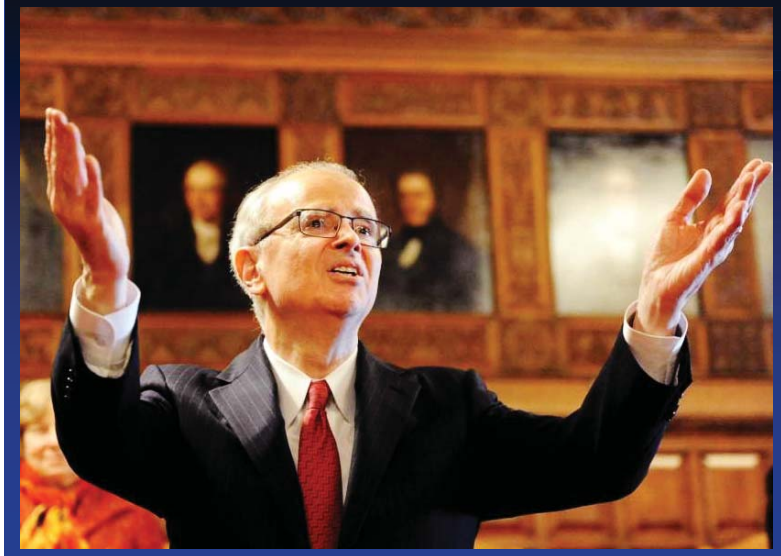

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- Replaced Victoria Graffeo (by George Pataki)
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- Former Practitioner, Trial and Appellate Judge, 3rd Dept.
- Age: 62 (born Dec. 1956)
- Mandatory age retirement: 2026

# Judge Eugene M. Fahey

- Appointed 2015, by Andrew Cuomo
- Replaced Robert Smith (by George Pataki)
- From Buffalo
- Former Practitioner, Trial and Appellate Judge, 4th Dept.
- Age: *almost* 68 (born Sept. 1951)
- Mandatory age retirement: 2021

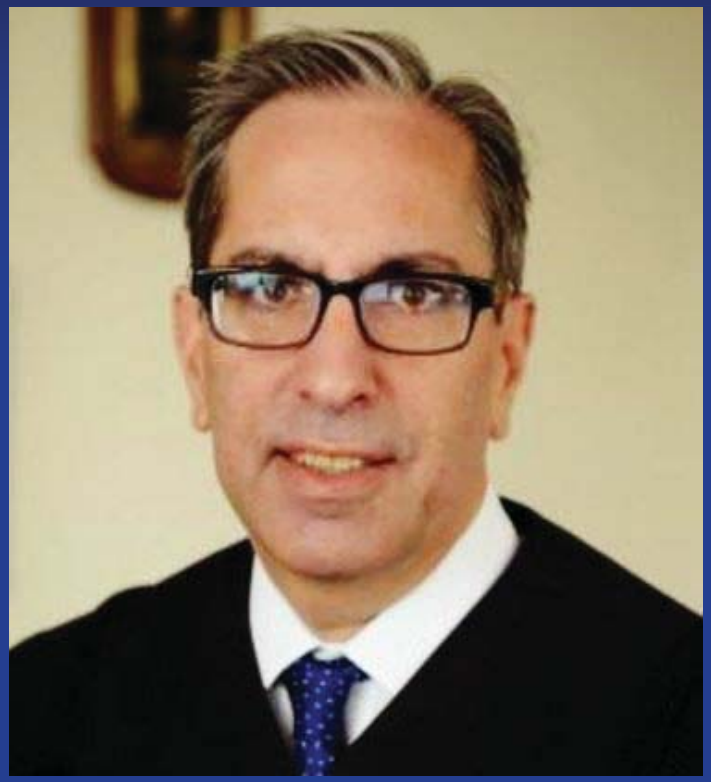
# Judge Michael J. Garcia

- Appointed 2016, by Andrew Cuomo (only Republican nominated)
- Replaced Susan Read (by George Pataki)
- From Westchester County (born in Queens)
- Former Law Clerk to then-Judge Kaye, Practitioner, U.S. Attorney (SDNY)
- Age: 57 (born Oct. 1961)
- 14 year Term Ends: 2030

# Judge Rowan D. Wilson

- Appointed 2017, by Andrew Cuomo
- Replaced Eugene Pigott (by George Pataki)
- From Nassau County, L.I. (born in California)
- Partner, Cravath, Swaine & Moore
- Age: *almost* 59 (born Sept. 1960)
- Mandatory age retirement: 2030

# Judge Paul G. Feinman



- Appointed 2017 by Andrew Cuomo
- To Fill Vacancy of Deceased Abdus-Salaam (by Andrew Cuomo)
- From New York City (born on Long Island)
- Former Trial and Appellate Judge, 1st Dept.
- Age: 59 (born Jan. 1960)
- Mandatory age retirement: 2030

# Judge Rowan Wilson


*With Albany Law School's*
*Court of Appeals Seminar Students*


SARATOGA
Remember
Travers Stakes, This Saturday
BNL
SARATOGA

The

# End

*Thank You!*

# Early DiFiore Court

## Some Notable Decisions

## DiFiore Opinions:

- **People v. Sean John**

  **4[DiFiore]- 3**[Pigott, Abdus-Salaam, Garcia]
  - *Right to confront DNA testing analyst*
- **O'Brien v. Port Authority**

  **4[DiFiore]- 3**[Rivera, Fahey, Wilson]
  - *Rev'd summary judgement for injured worker under Scaffold Law*
- **Kimmel v. State** **4[DiFiore]- 2**[Garcia, Stein]
  - *Atty Fees allowed vs State under EAJA*
- **People v. Wiggins** **4**[Fahey]**- 3[DiFiore**, Garcia, Feinman]
  - *Rev'd AD finding of good faith for 6 year pre-trial detention delay*

# Early DiFiore Court

## Some Notable Decisions

## Rivera Opinions:

- **M/O Jamal S.**
  **4[Pigott]- 3[Rivera, DiFiore, Stein]**
  - *Precinct search of juvenile stopped for bicycle infraction was justified*
- **People v. McCullough**
  **4[Mem] - 3[Rivera, Abdus-Salaam, Fahey]**
  - *Disallowing expert on ID evidence not abuse of discretion*
- **People v. Siverston** **4[Mem] -2[Rivera, Stein]**
  - *Exigency for warrantless entry and search*
- **Myers v. Schneiderman** **5[Per Curiam/ (4 -1[Rivera])**
  - *No right to aid-in-dying/ assisted suicide*

# Early DiFiore Court

## Some Notable Decisions

## Stein Opinions:

- **Aoki v. Aoki, 5[Pigott] - 2[Rivera, Stein]**
  - *Partial releases of testamentary powers of appointment upheld* ***[?]***
- **Highbridge Brdwy v. Schenectady 6[DiFiore] - 1[Stein]**
  - *Annual petitions unnecessary during pendency of initial petition for ten-year business investment exemption* ***[?]***
- **Hain v. Jamison, 7[Stein] – 0**
  - *Proximate cause resulting from loose calf*
- **People v. Valentin 4[Abdus-Salaam] – 3[Rivera, Stein, Wilson]**
  - *Initial aggressor instruction okay*
- **People v. Hardee 4[Mem] – 3[Rivera, Stein, Wilson]**
  - *Reasonableness of protective auto search is mixed question by AD*

# Early DiFiore Court

## Some Notable Decisions

## Fahey Opinions:

- **People v. Anthony Badalamenti**

  **4[Fahey] – 3**[Rivera, Abdus-Salaam, Stein]
  - *Vicarious consent to eavesdrop for abused child*
- **Yaniveth R. v. LTD Realty, 6**[Pigott] **- 1[Fahey]**
  - *Child does not "reside" with grandparent for protection of lead abatement legislation*
- **Kent v. Lefkowitz, 5**[DiFiore] **- 1[Fahey]**
  - *PERB dismissal of improper practice charge upheld*
- **People v. Boone, 5[Fahey] - 2**[Stein, Garcia]
  - *Cross-racial ID charge mandatory if requested*

# Early DiFiore Court

## Some Notable Decisions

## Garcia Opinions:

- **People v. Sean John**

  4[DiFiore] - 3[Pigott, Abdus-Salaam, **Garcia**]

  - *Right to confront DNA testing analyst*
- **People v. Elliott Parrilla, 7[Garcia] – 0**
  - *Strict liability for criminal possession of "gravity" knife [!]*
- **Obey v. NYC, NYCTA, 6[Mem/Entry] - 1[Garcia]**
  - *Sufficient evidence of NYCTA negligence to uphold verdict*
- **Kimmel v. State, 4[DiFiore]- 2[Garcia, Stein]**
  - *Atty Fees allowed vs State under EAJA*
- **B.F. v. Reproductive Medicine, 5[DiFiore]- 1[Garcia]**
  - *SOL runs from "wrongful birth" not act of medical negligence*

# Early DiFiore Court

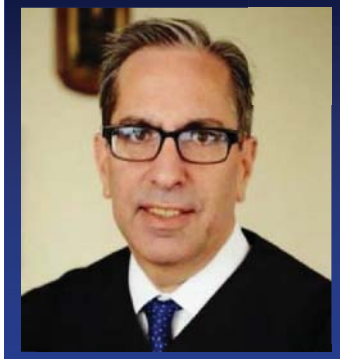
## Some Notable Decisions

## Wilson Opinions:

- **People v. Charles Smith,** 6[Fahey] - 1[**Wilson**]
  - *"Display" firearm for aggravated robbery*
- **Facebook v. NY Cnty. DA,** 5[Stein] - 1[**Wilson**]
  - *Denial to quash warrants not appealable under fed or state law*
- **NYC v. NYS Nurses Assn.,** 5[**Wilson**] - 1[Garcia]
  - *City required to provide Assn. w/ info on nurse discipline*
- **People v. Viruet,** 4[Garcia] - 2[Stein, **Wilson**]
  - *Denial of adverse inference charge harmless error*
- **Chauca v. Abraham,** 6[Garcia] - 1[**Wilson**]
  - *C-L punitive standard/ not automatic under NYC Hum. Rts. Law*

# Early DiFiore Court

## Some Notable Decisions



## Feinman Opinions:

- **Rodriguez v. NYC, 4[Feinman] - 3[DiFiore, Stein, Garcia]**
  - *Partial summary judgement permitted for personal injury plaintiff*

- **Congel v. Maltifano, 5[Fahey] - 2[DiFiore, Feinman]**
  - *"minority discount" applies to evaluate wrongfully dissolving partner's interest [?]*

# Early DiFiore Court

## Some Notable Decisions

## Pigott Opinions:

- **Wally v. NYC HHC**

  **4[Pigott]- 3**[Rivera, Abdus-Salaam, Fahey]

  - *Late notice of claim disallowed*

- **Matter of Brooke S.B.**

  **5**[Abdus-Salaam] **- 1[Pigott] - 0**

  - *Partner of biological mother, has standing for custody or visitation*

- **Turturro v. NYC**

  **6**[Fahey]**- 1[Pigott]**

  - *Municipal liability where speeding auto hit 12 year old on bicycle*

# Early DiFiore Court

## Some Notable Decisions

## Abdus-Salaam

- **Wally v. NYC HHC**
  **4[Pigott] – 3[Abdus-Salaam, Rivera, Fahey]**
  - *Late notice of claim disallowed*
- **Matter of Brooke S.B.**
  **5[Abdus-Salaam] - 1[Pigott] - 0**
  - *Partner of biological mother, has standing for custody or visitation*
- **People v. Bridgeforth**
  **6[Abdus-Salaam] - 1[Garcia] - 0**
  - *Skin color is a Batson classification under NY Law*

# Early DiFiore Court

## Some Notable Decisions

## Unsigned Majority Opinions:

- **Sherman v. NY Thruway Authority**
  **4[Mem] - 3[Rivera, Abdus-Salaam, Fahey]**
  - *Storm still-in-progress defeats slip & fall*
- **People v. McCullough**
  **4[Mem] - 3[Rivera, Abdus-Salaam, Fahey]**
  - *App Div erred in reversing on uncorroborated challenged ID evidence*
- **PM/O Yoga Vida v. Comm'r of Labor**
  **4[Mem] - 2[Fahey, Rivera]**
  - *Non-staff instructors not employees for unemployment contribution*

# Early DiFiore Court

## Some Notable Decisions

## Unsigned Majority Opinions:

- **Pullman v. Silvermann**

  **4[Mem] - 3[Stein, Rivera, Abdus-Salaam]**

  - *Rev'd App Div summary judgement for physician in med. mal. suit*

- **Obey v. NYC, NYC Transit Auth.**

  **6[Mem/Entry] - 1[Garcia]**

  - *Sufficient evidence of NYCTA negligence to uphold verdict*

- **People v. Siverston (twice argued)**

  **4[Mem] - 2[Rivera, Stein]**

  - *Exigency for warrantless entry and search*

- **People v. Hardee** **4[Mem] – 3[Rivera, Stein, Wilson]**

  - *Reasonableness of protective auto search is mixed question by AD*

# Early DiFiore Court

## Some Notable Decisions
## Unsigned & Cryptic:

- **People v. Maldonado**

  **5[Mem] - 1[Rivera (entry)] - 0**

  - *Rev'd App Div & ordered new trial, on ineffective counsel*

*We hold that counsel's overall performance fell below the "meaningful representation" standard and defendant is entitled to a new trial (see People v Berroa, 99 NY3d 134 [2002]; see also People v Baldi, 54 NY2d 134, 147 [1981]).* ???

*Judge Rivera concurs in the result.* ???

# Topic II
# U.S. Supreme Court

# 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

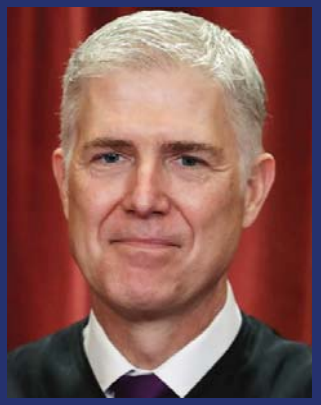
- 65 years old
- **66, end of current Trump term**
- **70, end of a 2nd term**
- 10/11/15 years on Court
- Obama Appointee, 2009
- Liberal/Democrat

# 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

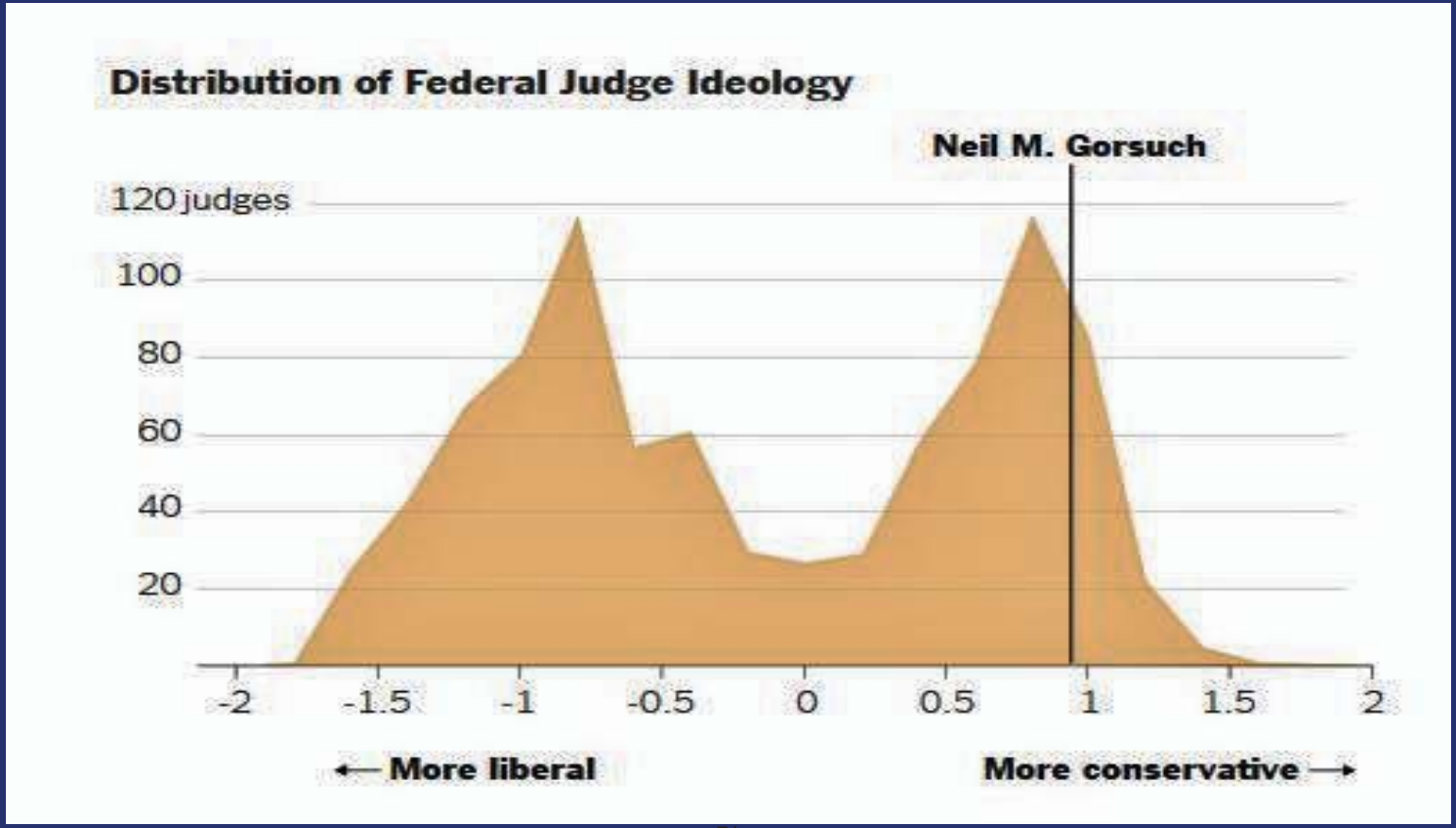
- 54 years old
- **56 (almost), end of current Trump term**
- **60 (almost), end of a 2nd term**
- 1/2/6 years on Court
- Trump Appointee, 2018
- Conservative/Republican

# The January 2016 Court

# Trump's 1st Appointee

# Neil M. Gorsuch

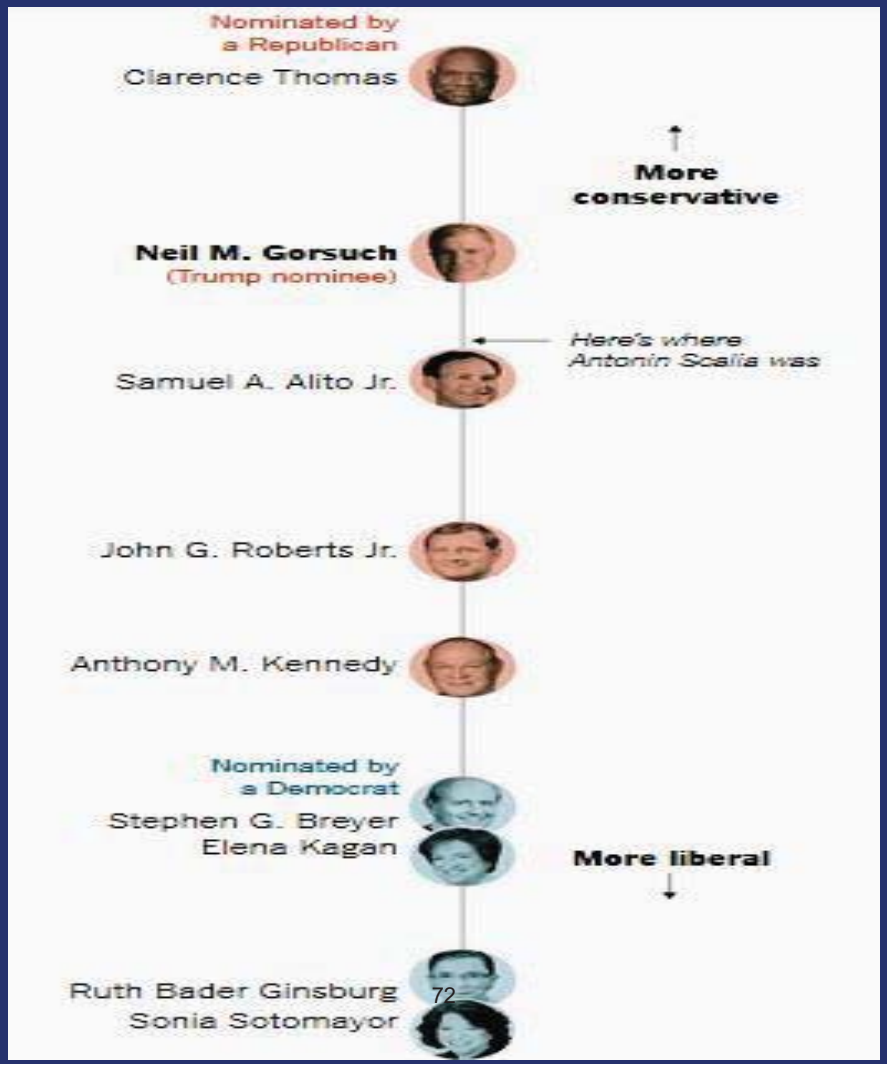
# Trump's 1st Appointee
# Neil Gorsuch





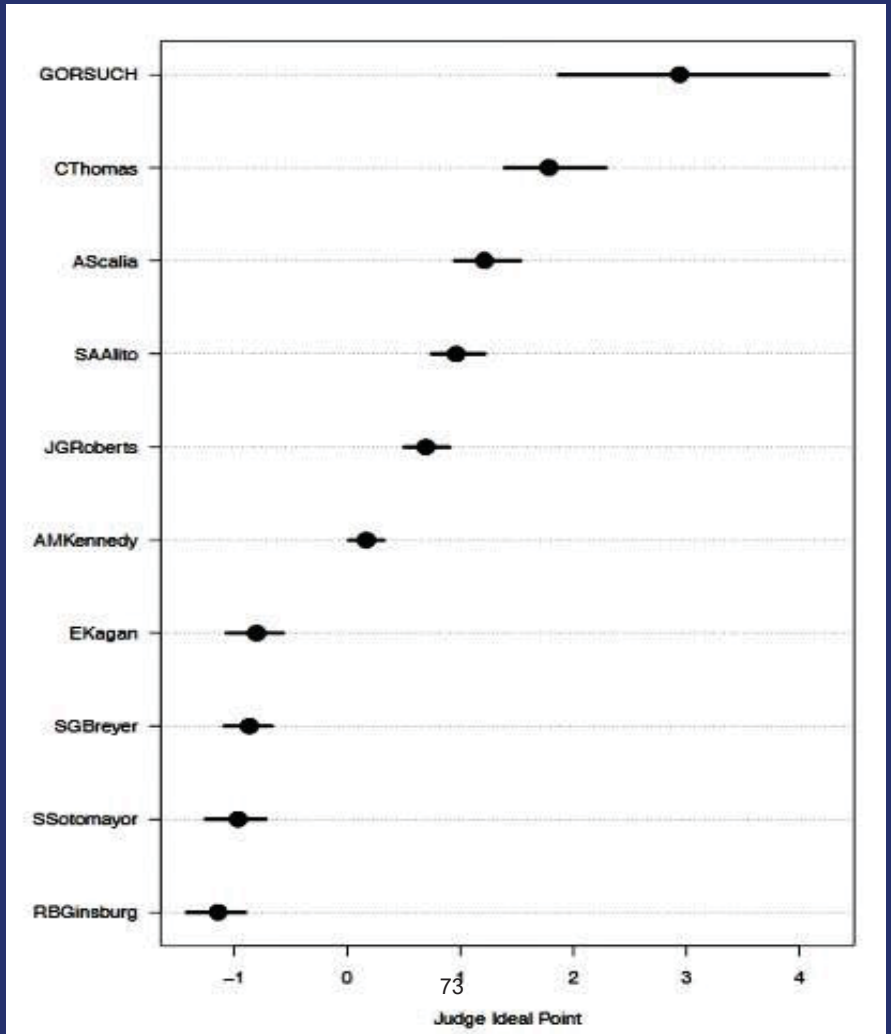

*(Source: Adam Bonica [Stanford], et al, U of Chi Coase-Sandor Institute [2016], in NY Times, Feb. 1, 2017.)*

# Neil Gorsuch




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

# Neil Gorsuch

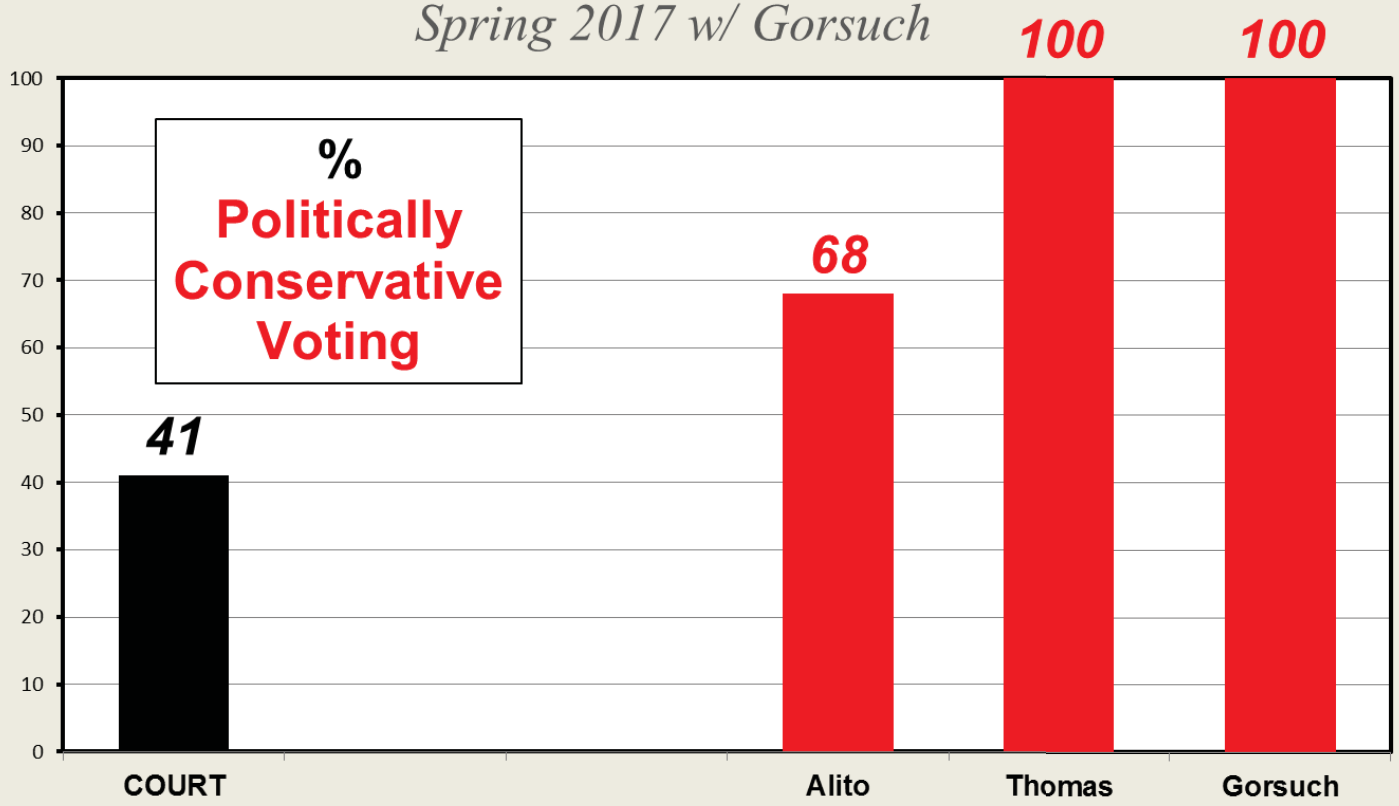



*(Source:*
*Ryan C. Black [Michigan State]*
*&*
*Ryan J. Owens [Univ. of Wisc.],*
*Estimating the Policy Preferences of Judge Neil M. Gorsuch [2017])*

# Supreme Court

## *Ideological Voting Patterns*

*Spring 2017 w/ Gorsuch*



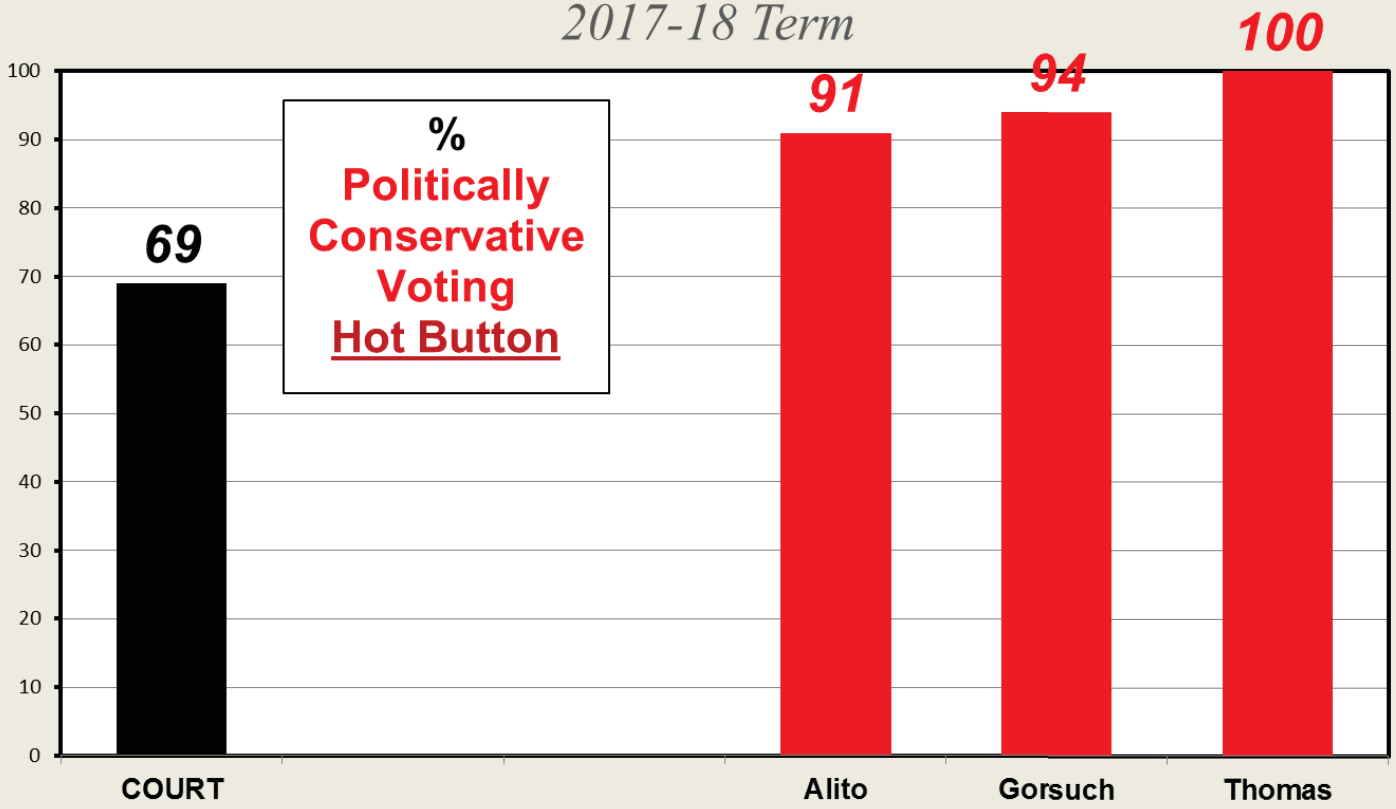

**Justices** *(% votes: politically conservative )*

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)*

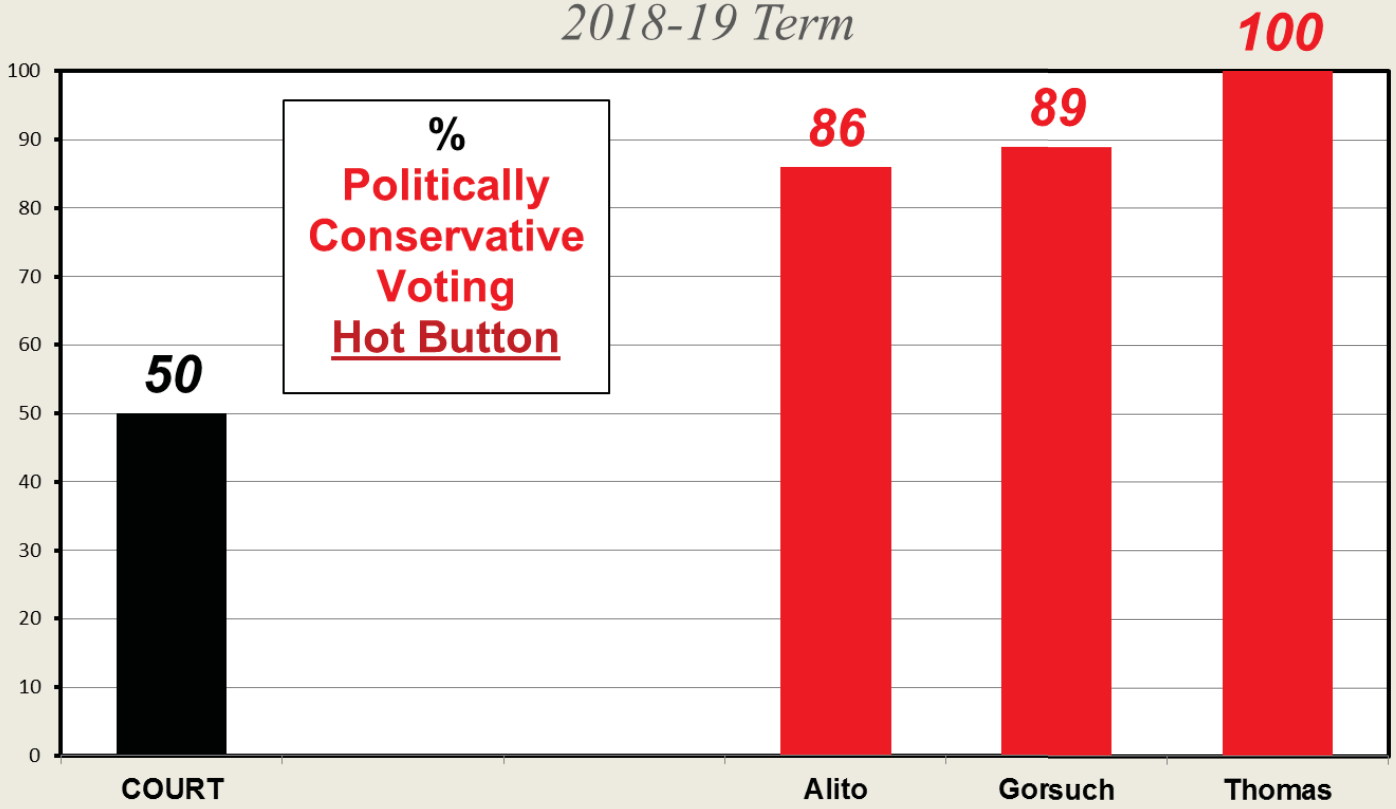


Source: Vincent M. Bonventre, Albany Law School 8/19

# Supreme Court

## *Ideological Voting Patterns--Hot Button*

*2018-19 Term*




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



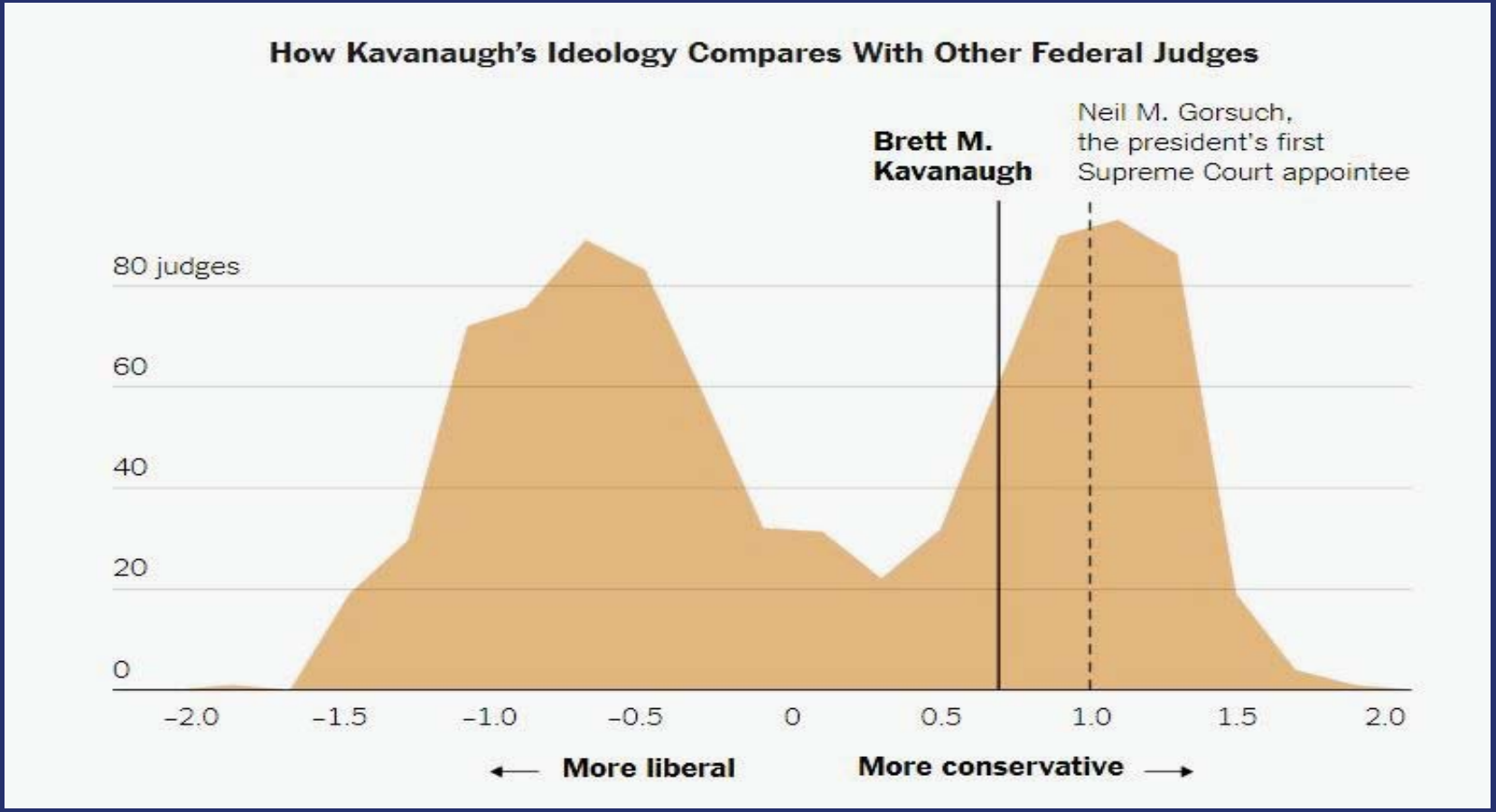
Source: Vincent M. Bonventre, Albany Law School 8/19

# Late Spring 2017 Court

# Trump's 2nd Appointee

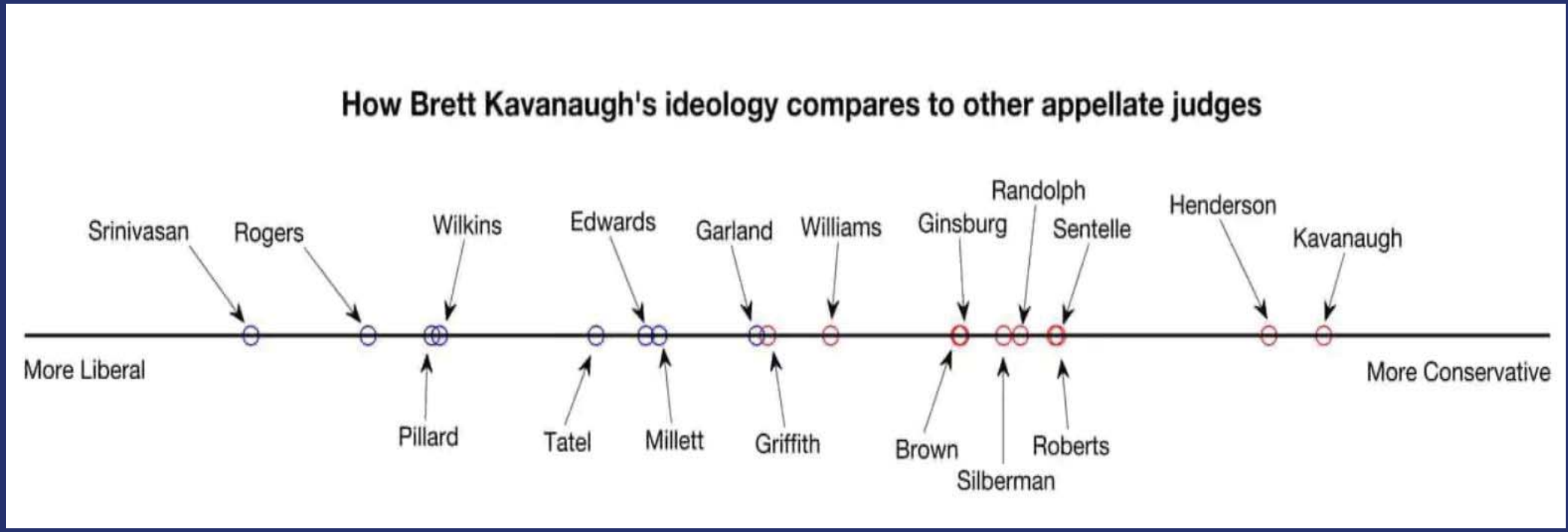
# Brett Kavanaugh

# Brett Kavanaugh



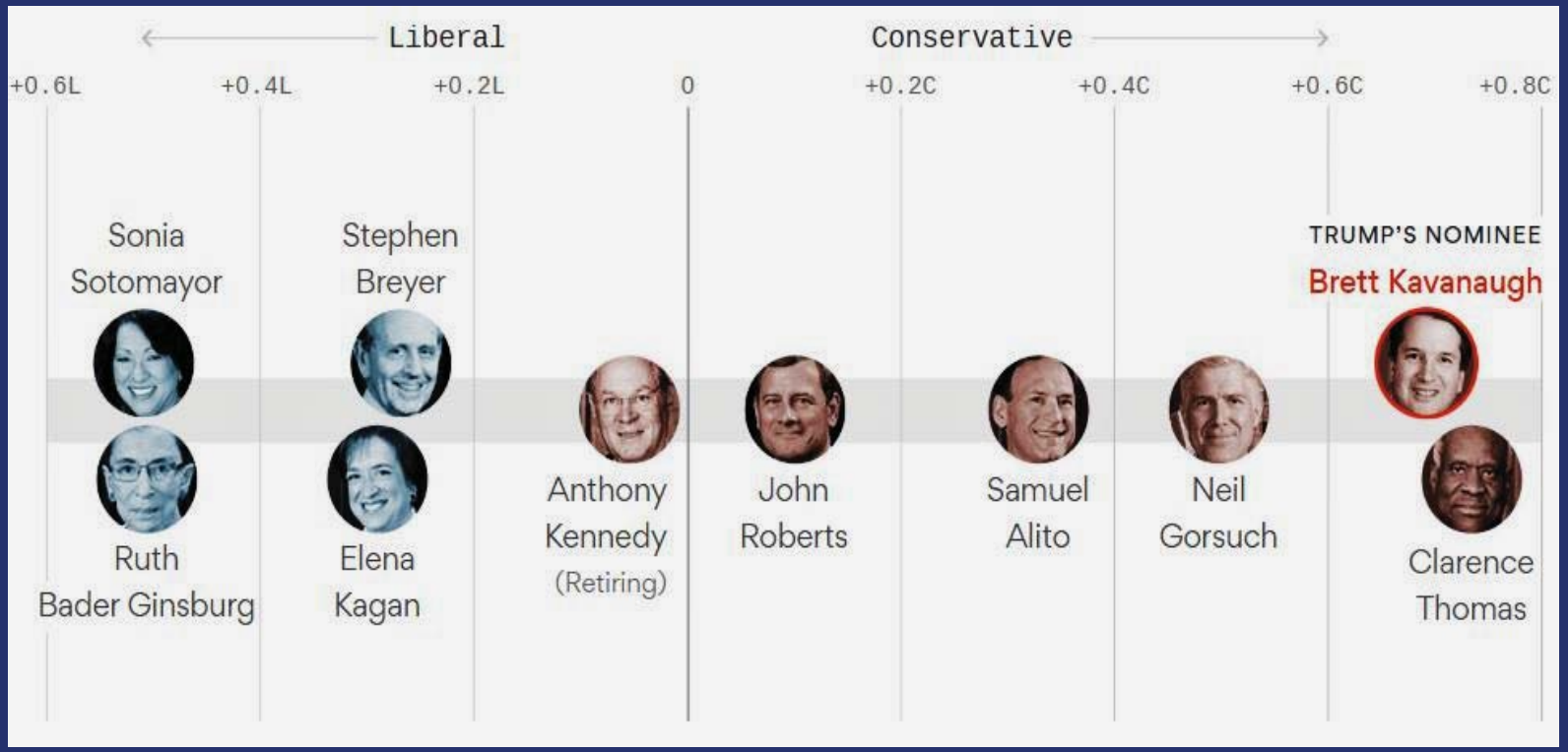

*(Source: Adam Bonica [Stanford], et al, Database on Ideology, Money in Politics, and Elections [2016], reported in Where Kavanaugh, Trump's Nominee, Might Fit on the Supreme Court, NY Times, July 9, 2018.)*

# Brett Kavanaugh




*(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

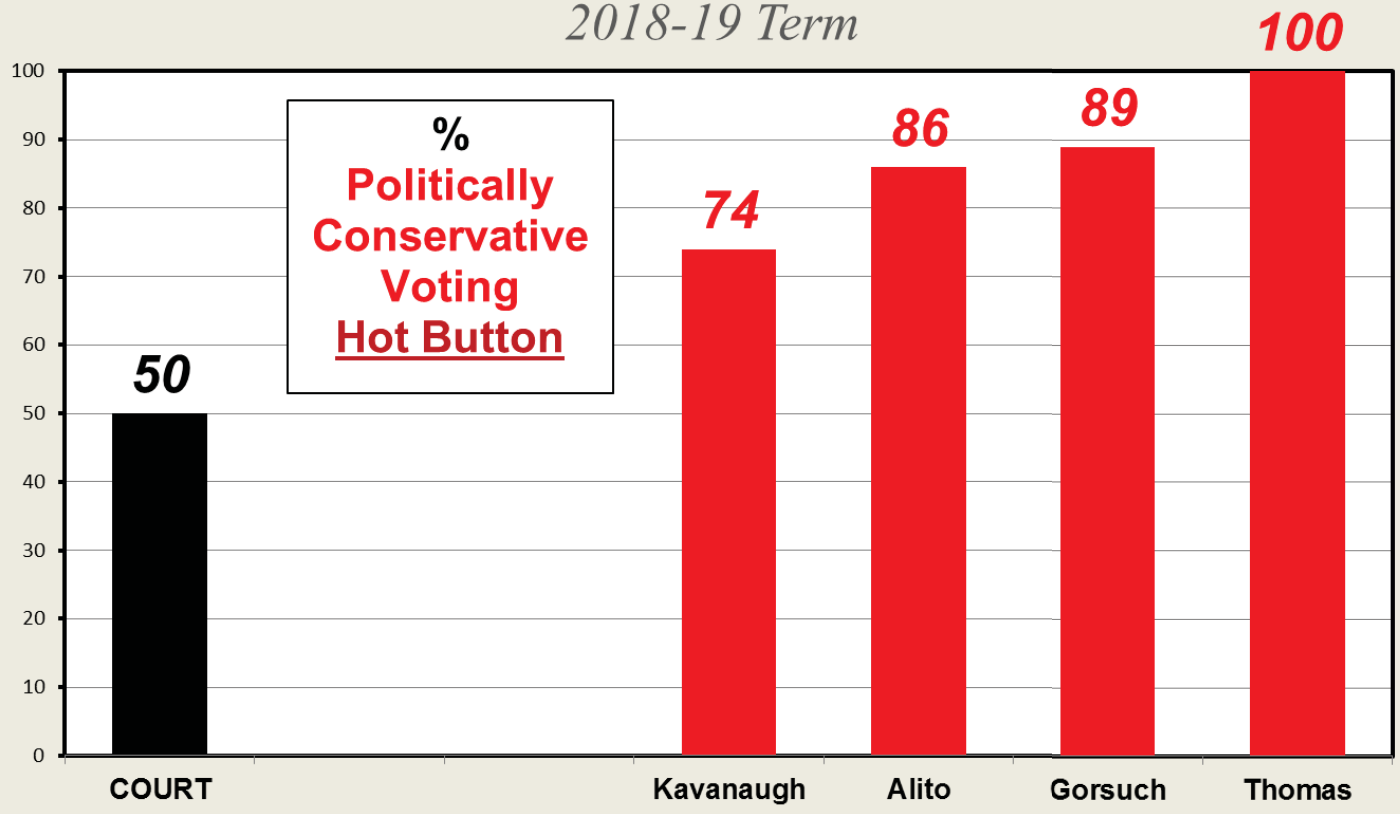



*(Source: Chart in Andrew Witherspoon, Harry Stevens, "Where Brett Kavanaugh sits on the ideological spectrum," Axios, July 10, 2018, based on Epstein [Washington Univ.], et al, "President-Elect Trump and his Possible Justices" [2017] and Epstein [Washington Univ.], et al, "Possible Presidents and their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

# Supreme Court

## *Ideological Voting Patterns--Hot Button*

*2018-19 Term*





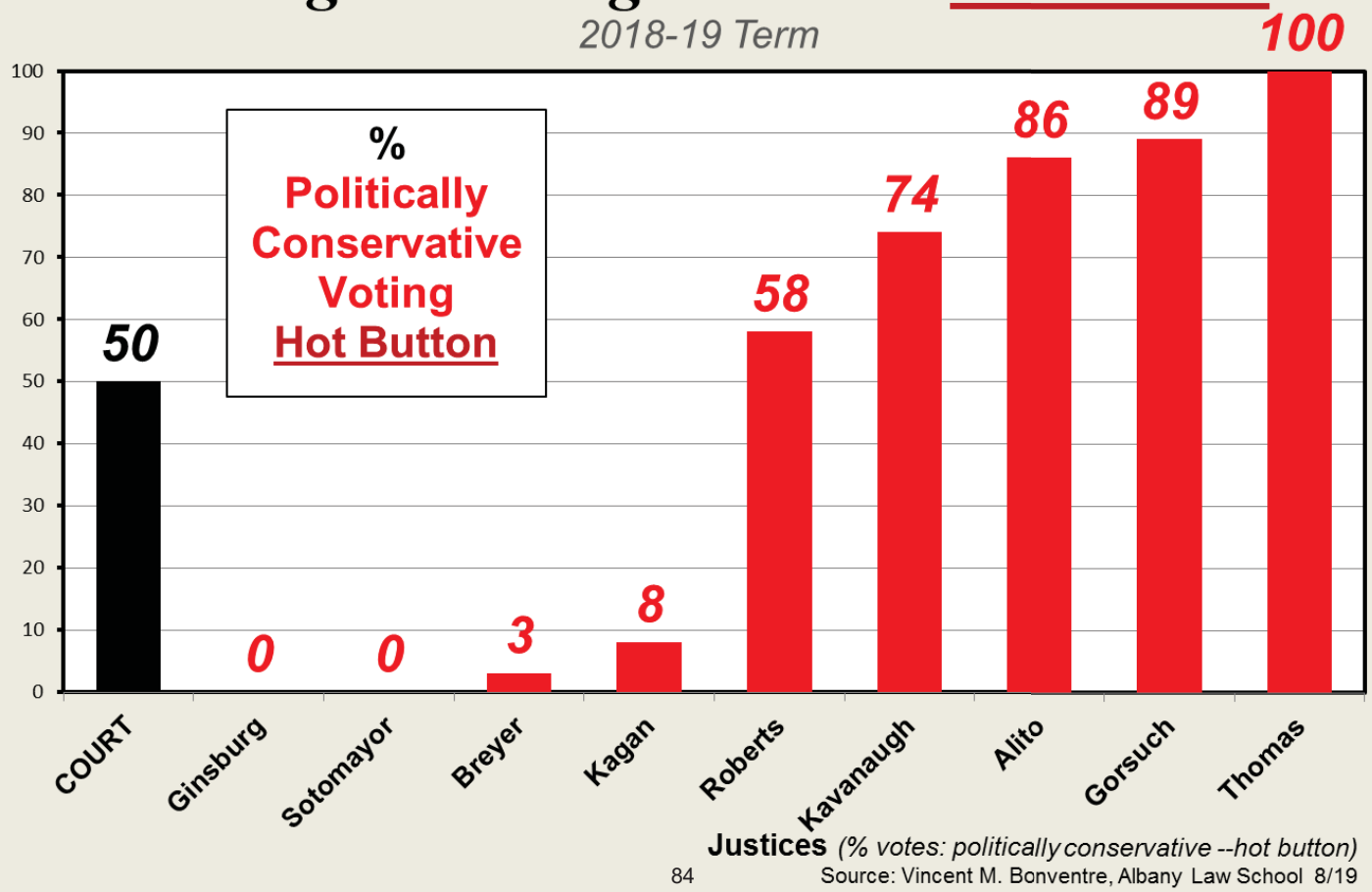

Source: Vincent M. Bonventre, Albany Law School 8/19

# The Current Court

# Supreme Court

## *Ideological Voting Patterns--Hot Button*

2018-19 Term



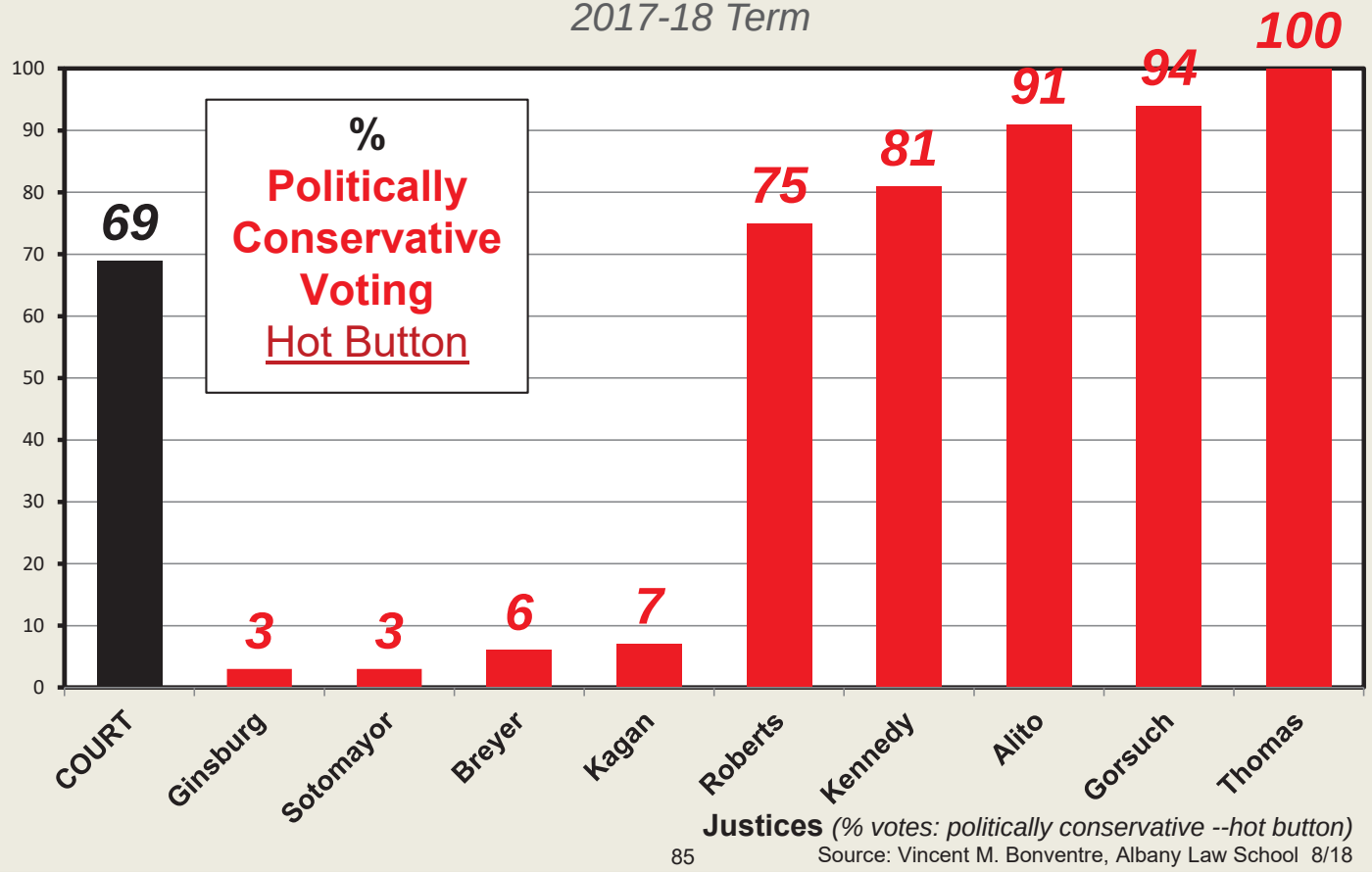



Source: Vincent M. Bonventre, Albany Law School 8/19

# Supreme Court

## *Ideological Voting Patterns--Hot Button*

*2017-18 Term*

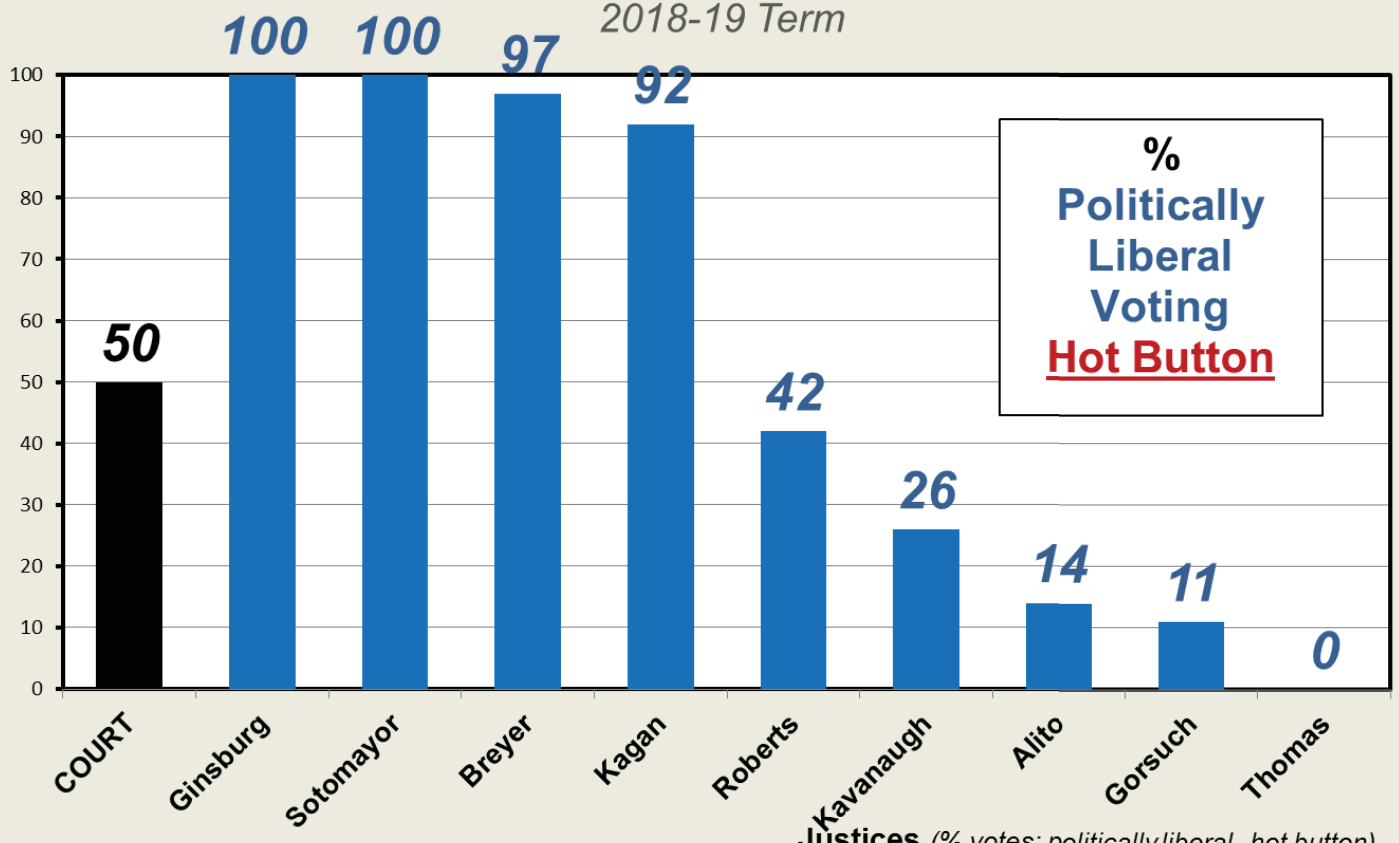



Source: Vincent M. Bonventre, Albany Law School 8/18

# Supreme Court

## *Ideological Voting Patterns--Hot Button*

2018-19 Term

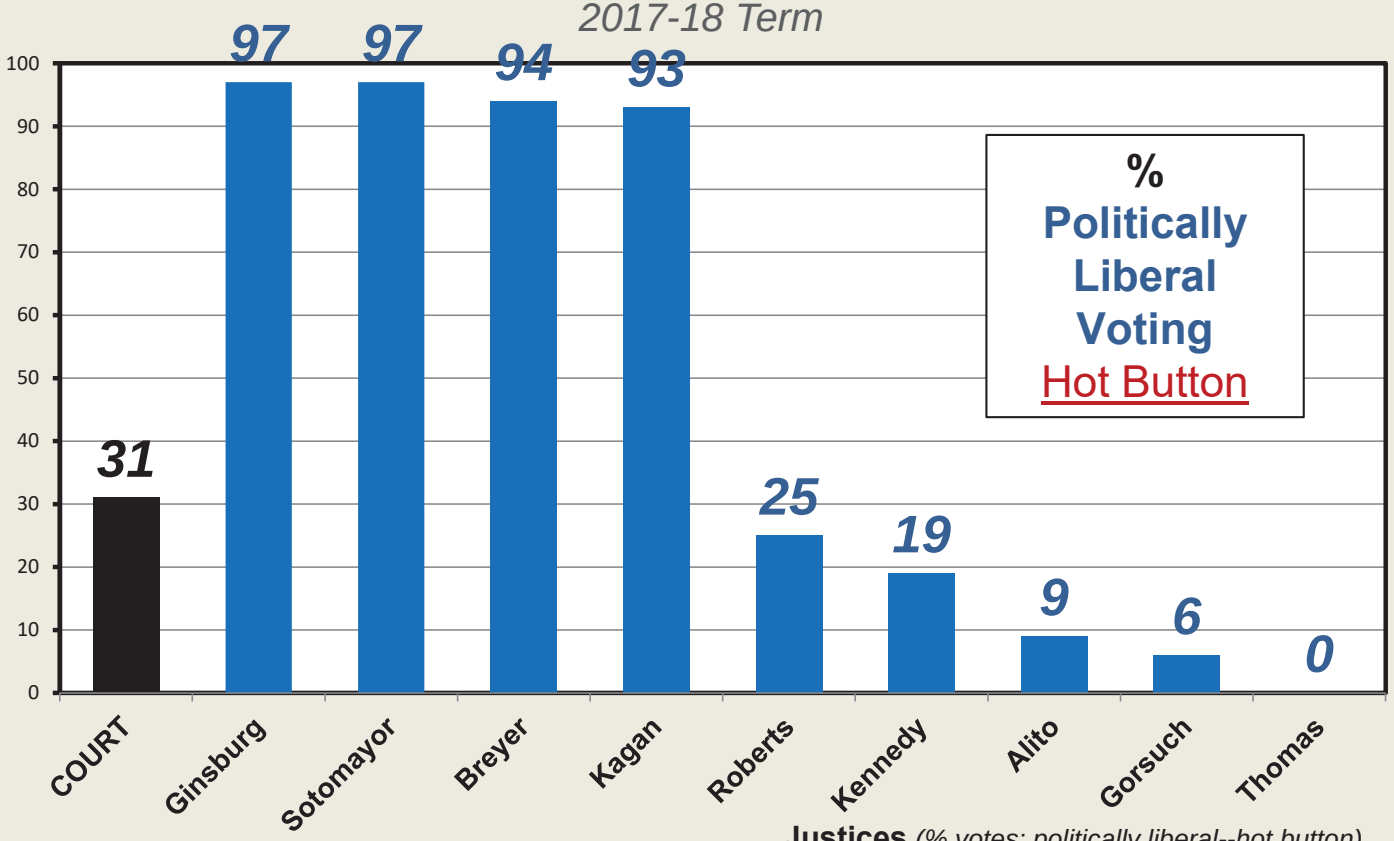



Source: Vincent M. Bonventre, Albany Law School 8/19

# 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

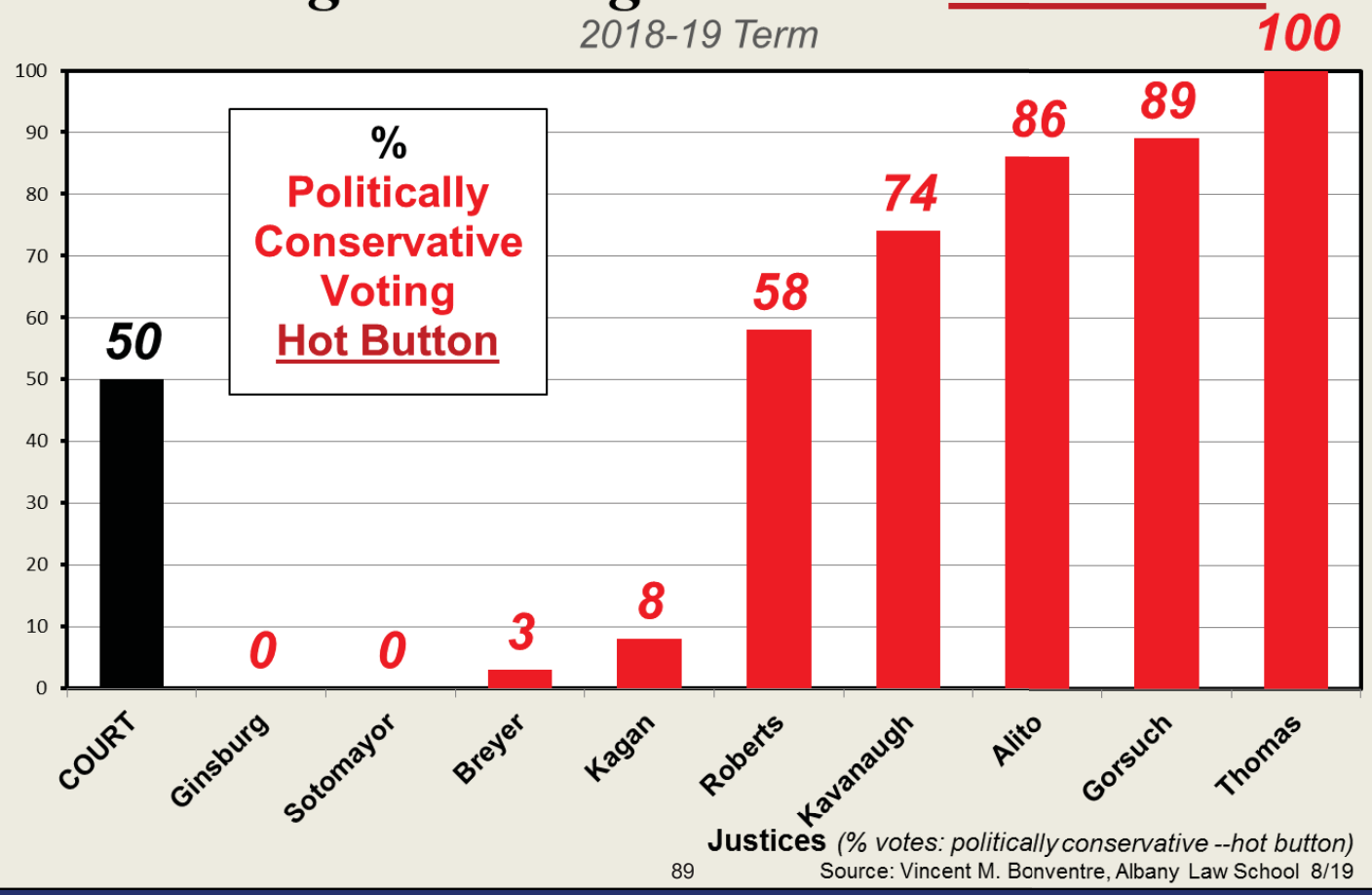
# Trump 2nd Term?

## Retirements?

# Supreme Court

## *Ideological Voting Patterns--Hot Button*

2018-19 Term

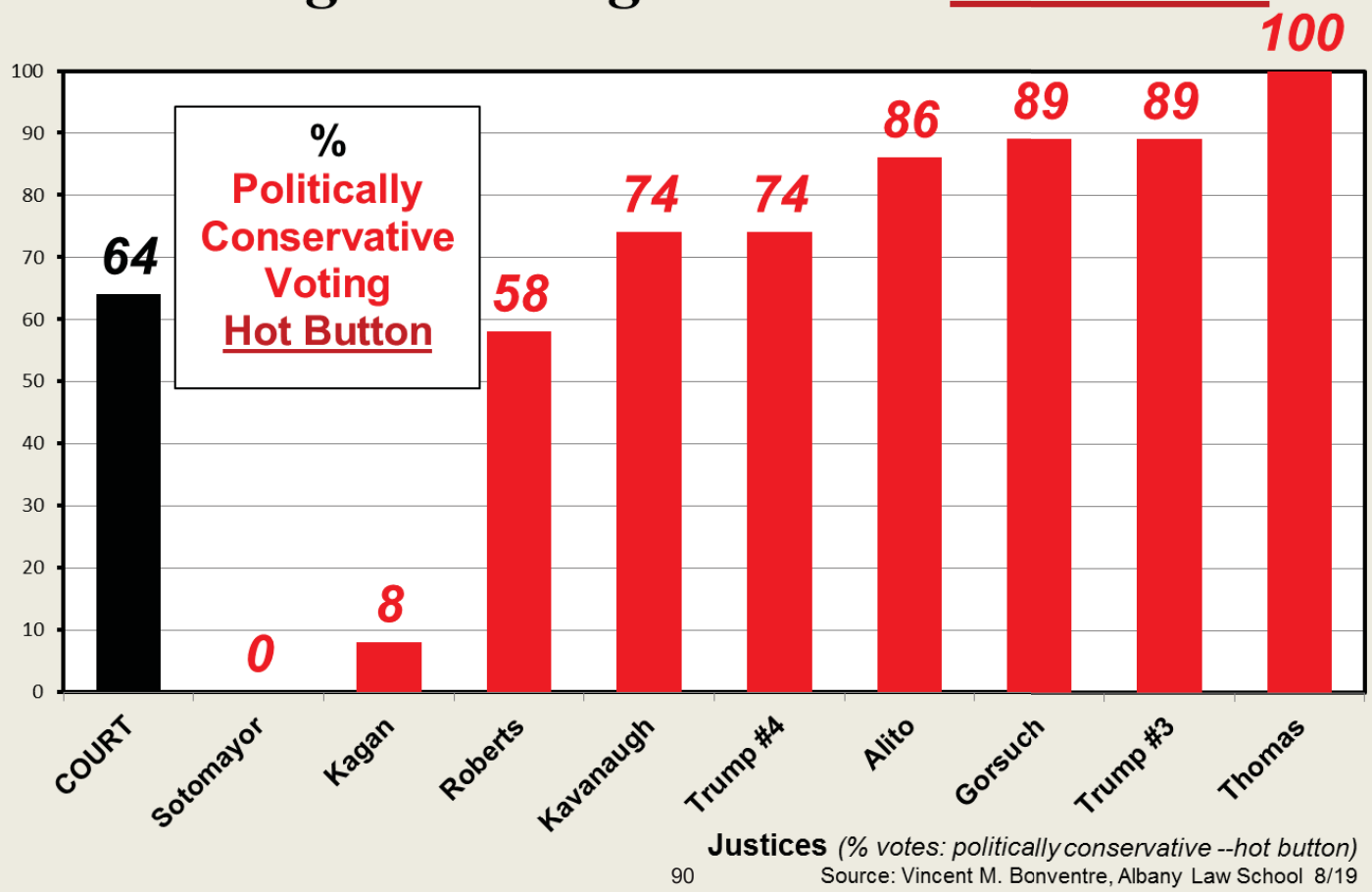





Source: Vincent M. Bonventre, Albany Law School 8/19

# Trump 2nd Term?

## *Ideological Voting Patterns--Hot Button*



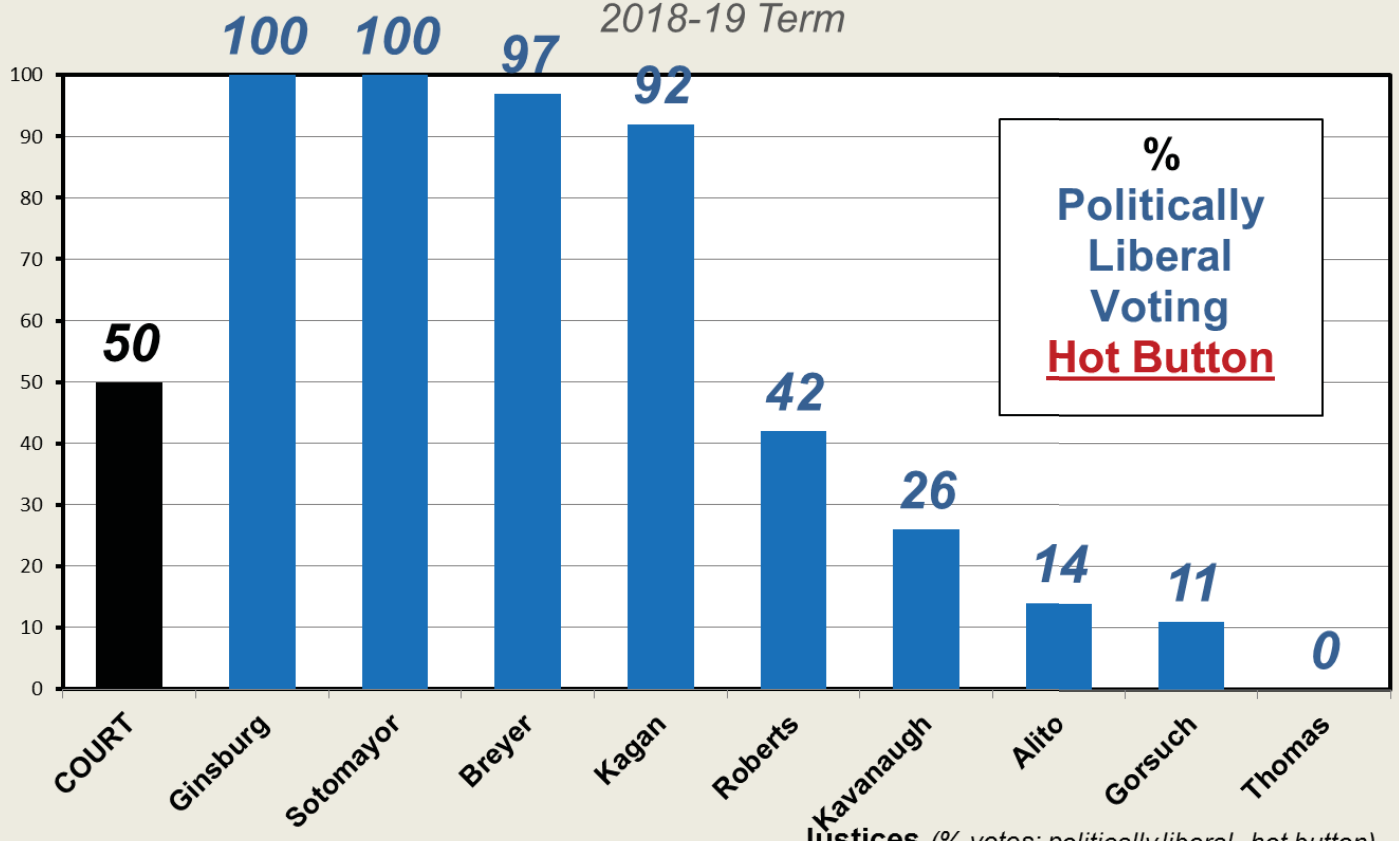



Source: Vincent M. Bonventre, Albany Law School 8/19

# Supreme Court

## *Ideological Voting Patterns--Hot Button*

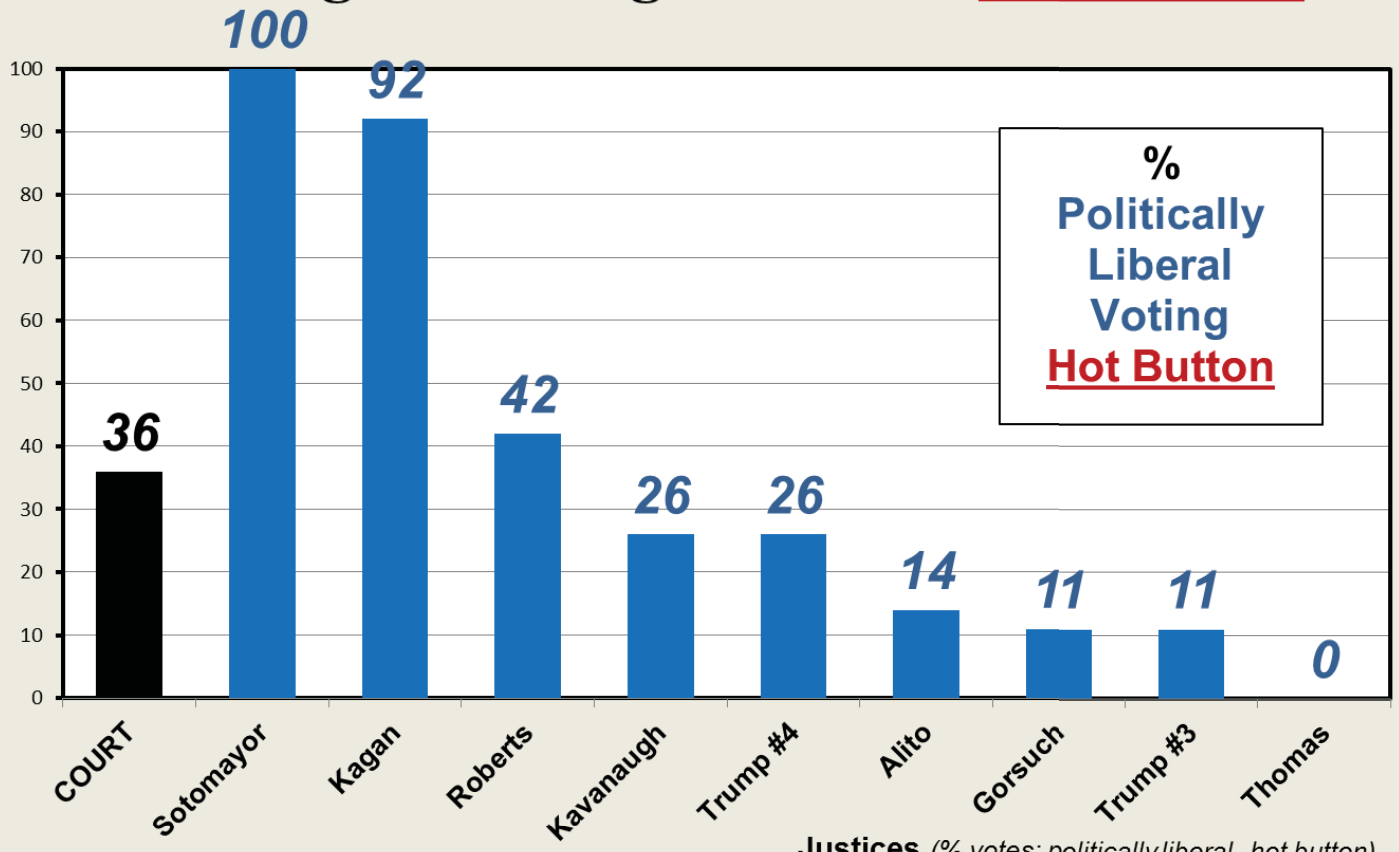
2018-19 Term




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

# Trump 2nd Term?

## *Ideological Voting Patterns--Hot Button*




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

# Supreme Court Round-Up

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

# 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*

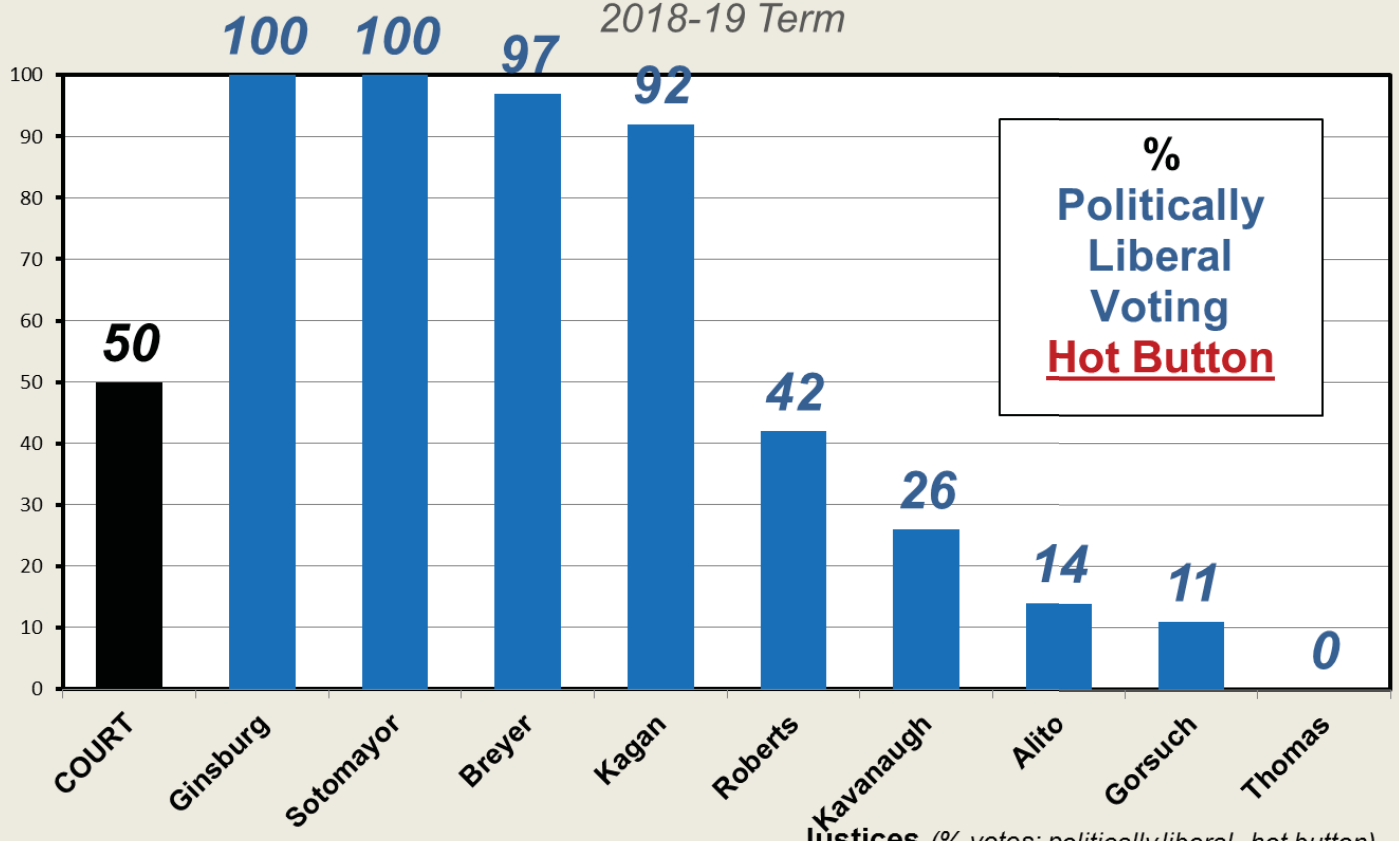
*Additional/Enhanced Sentencing*

- *"Crime of Violence"?*
- *Mandatory Sentencing Facts*

# Supreme Court

## *Ideological Voting Patterns--Hot Button*

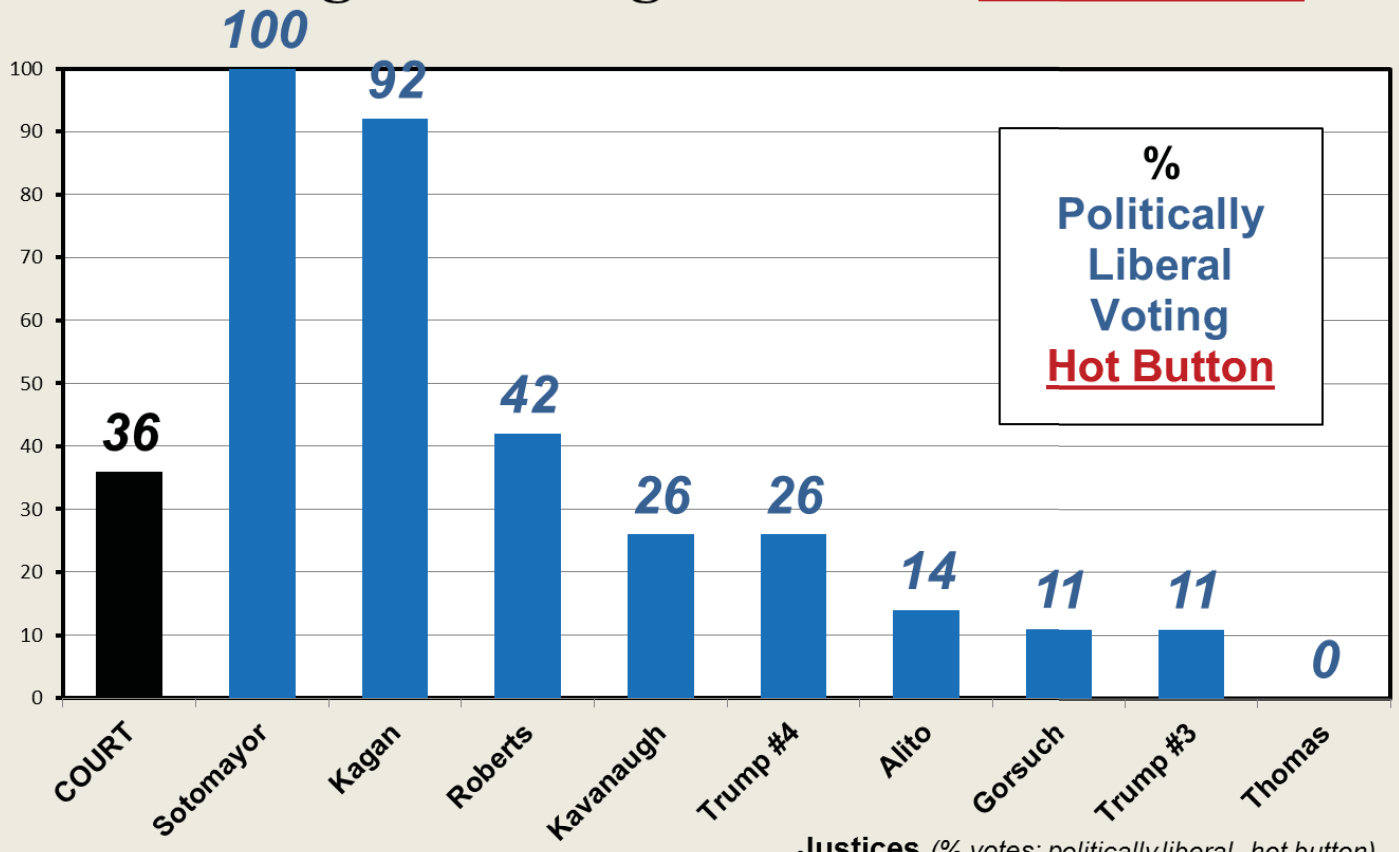
2018-19 Term




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

# Trump 2nd Term?

## *Ideological Voting Patterns--Hot Button*




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

# Supreme Court Round-Up

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

# 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*

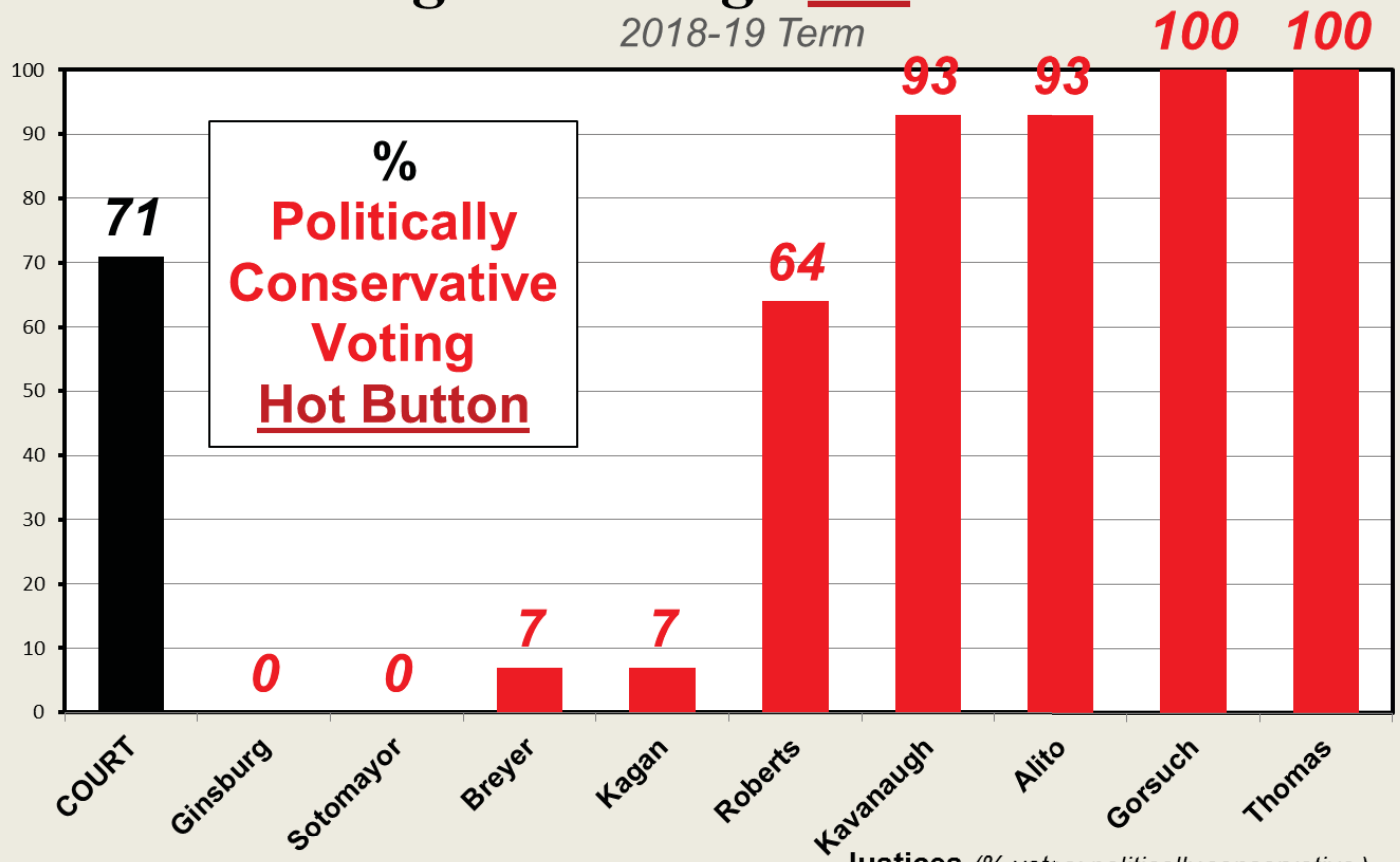
*Additional/Enhanced Sentencing*

- *"Crime of Violence"?*
- *Mandatory Sentencing Facts*

# Supreme Court

## *Ideological Voting--HB Civil Cases*

2018-19 Term



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# Supreme Court

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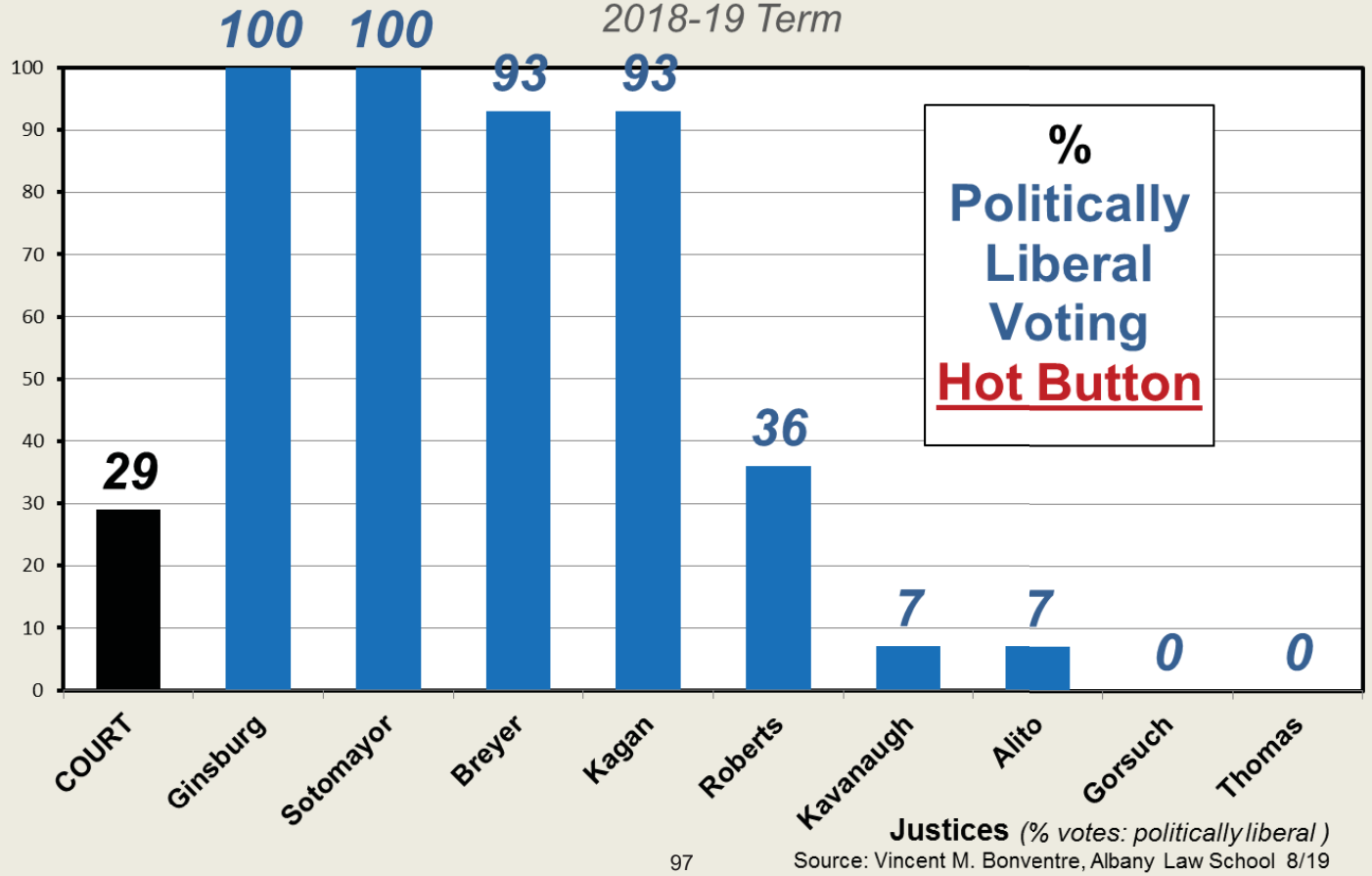
2018-19 Term

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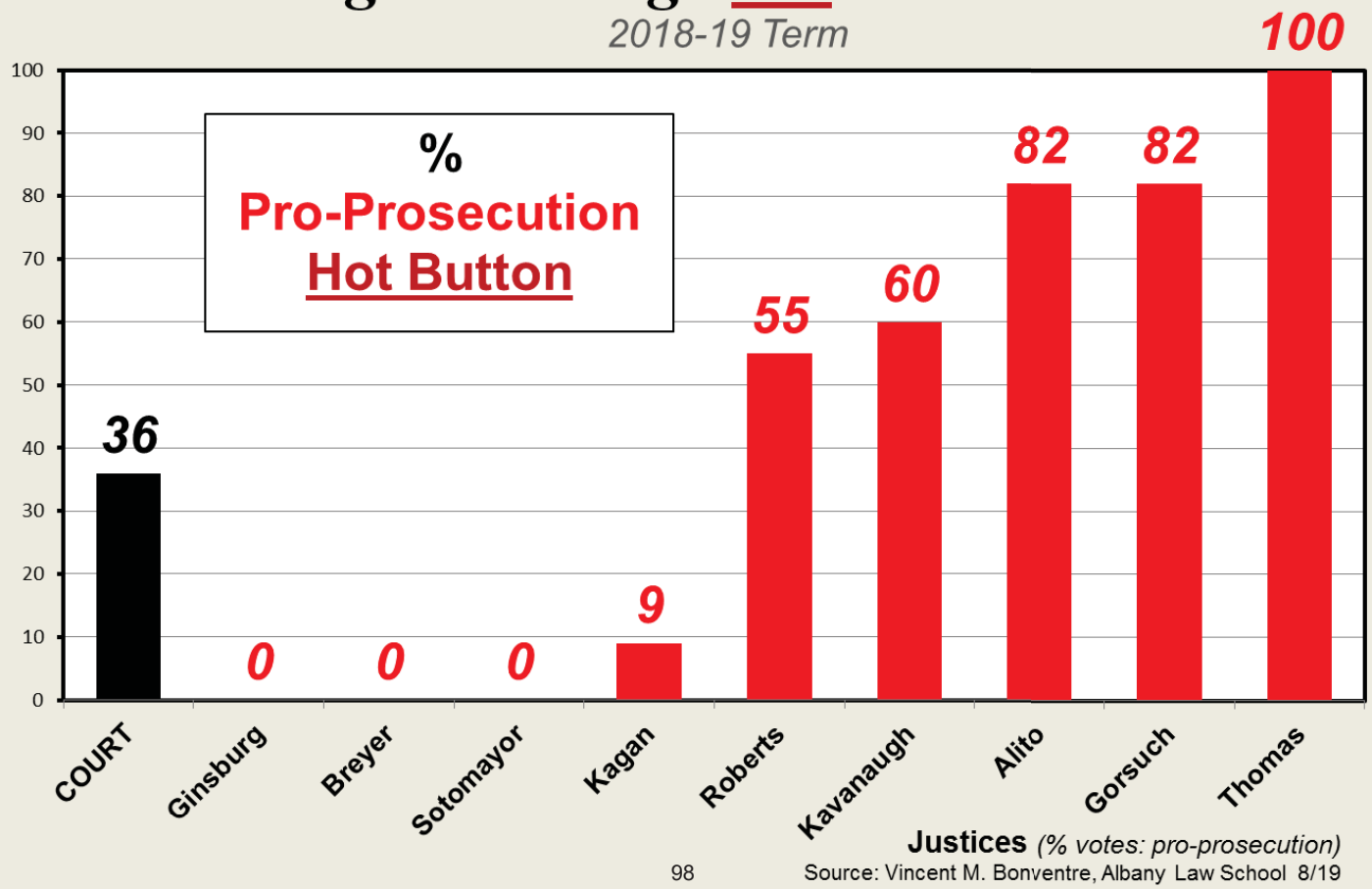
2018-19 Term

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

# Supreme Court

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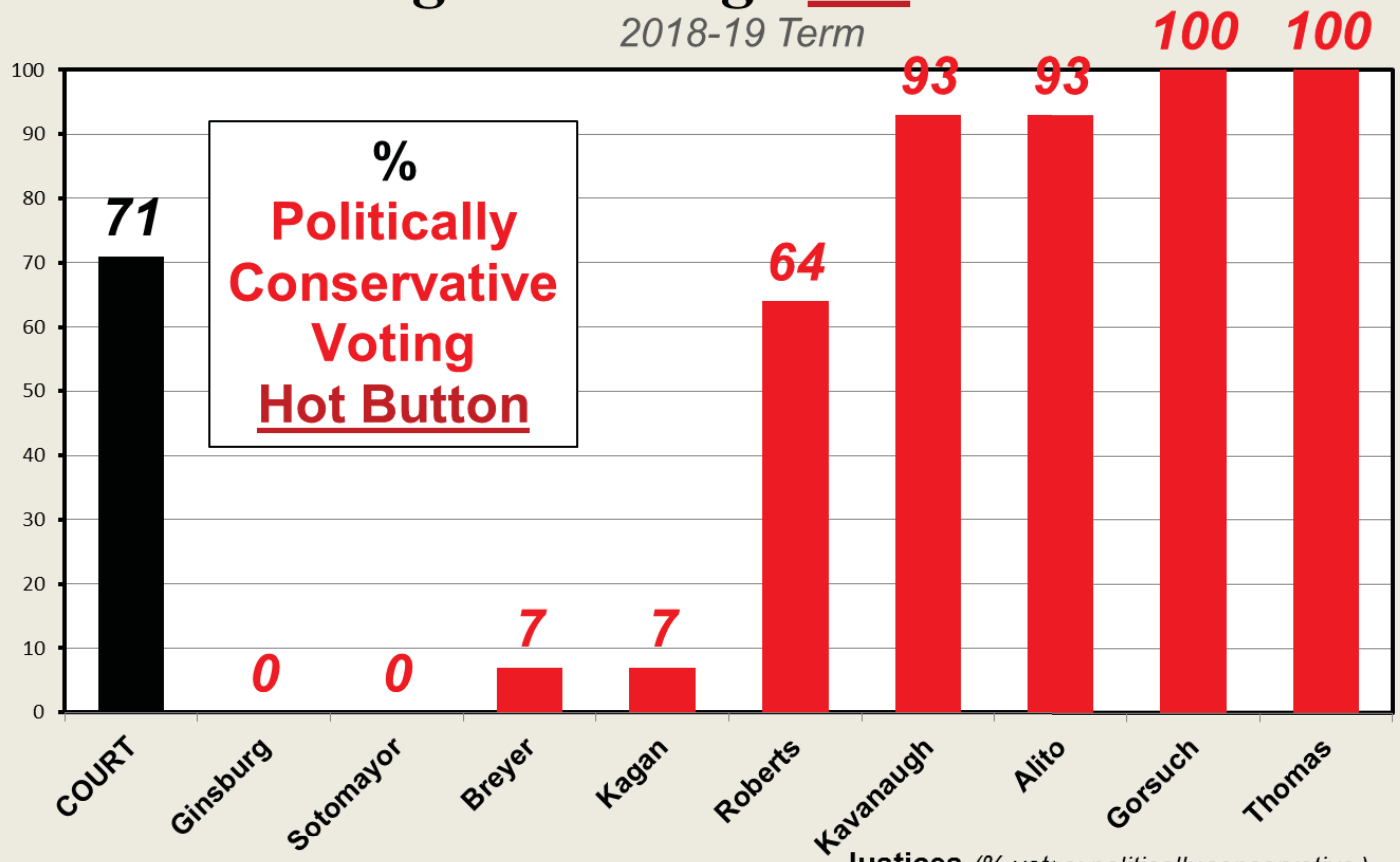
2018-19 Term



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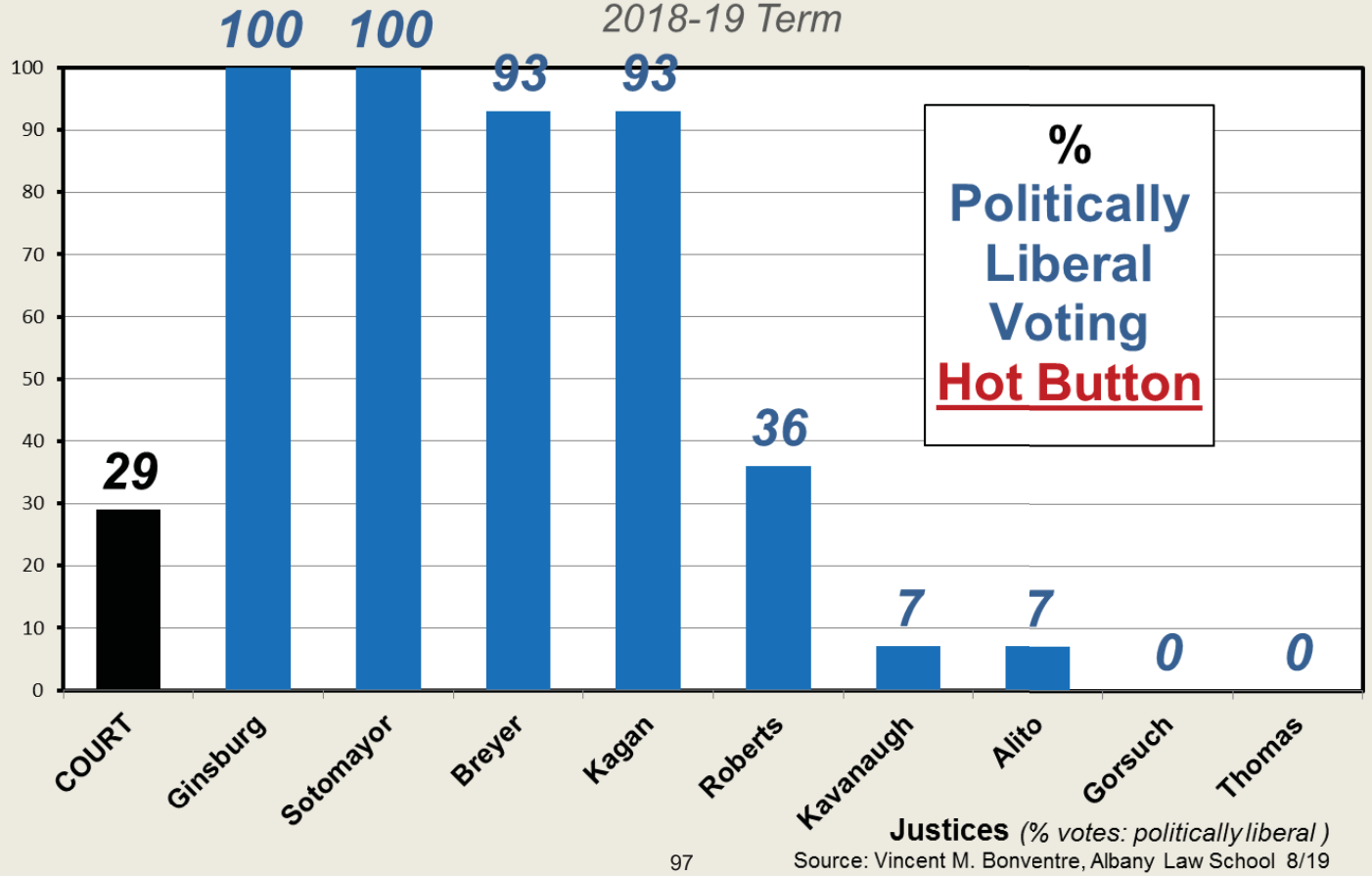
2018-19 Term

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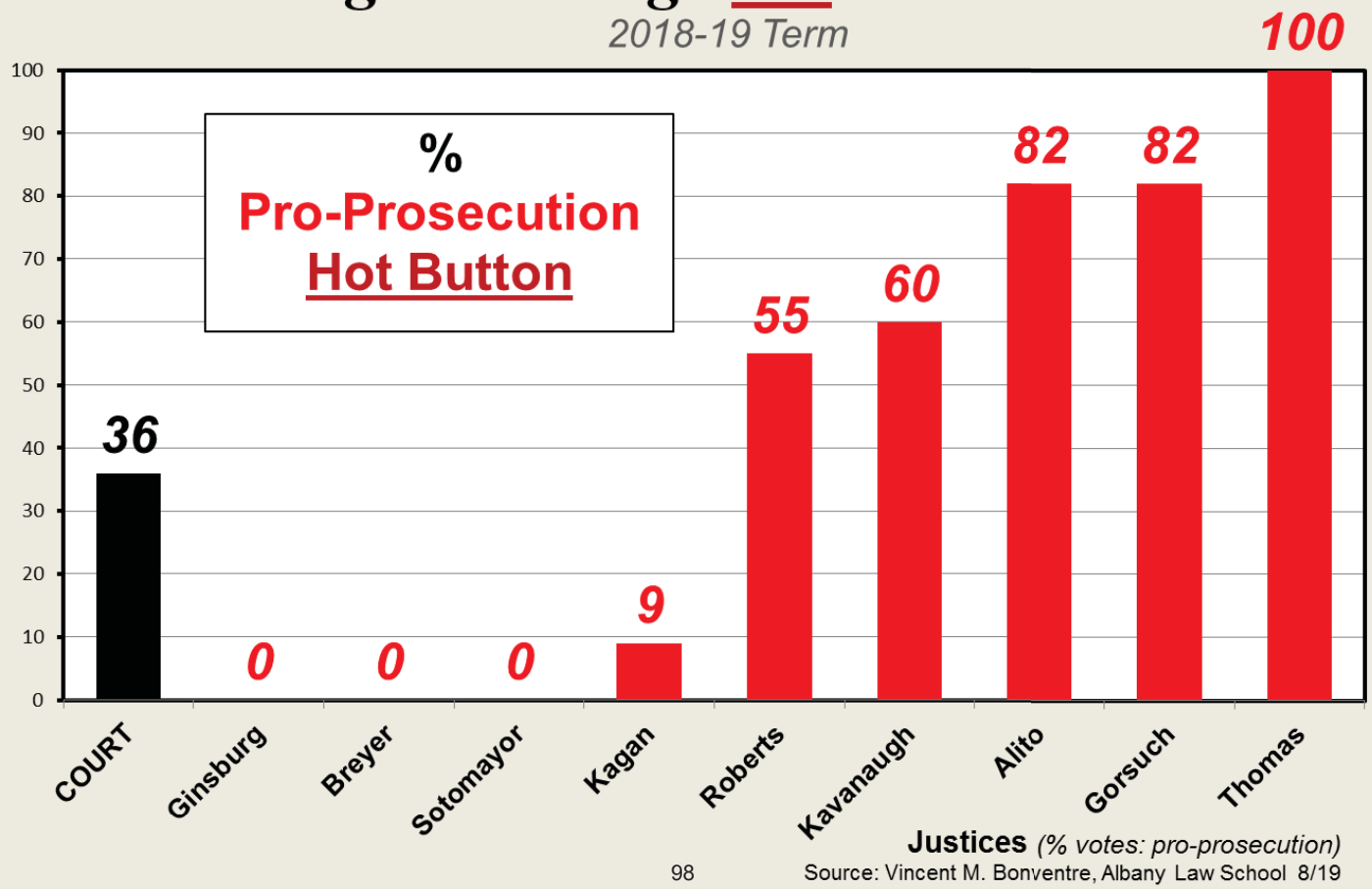
2018-19 Term

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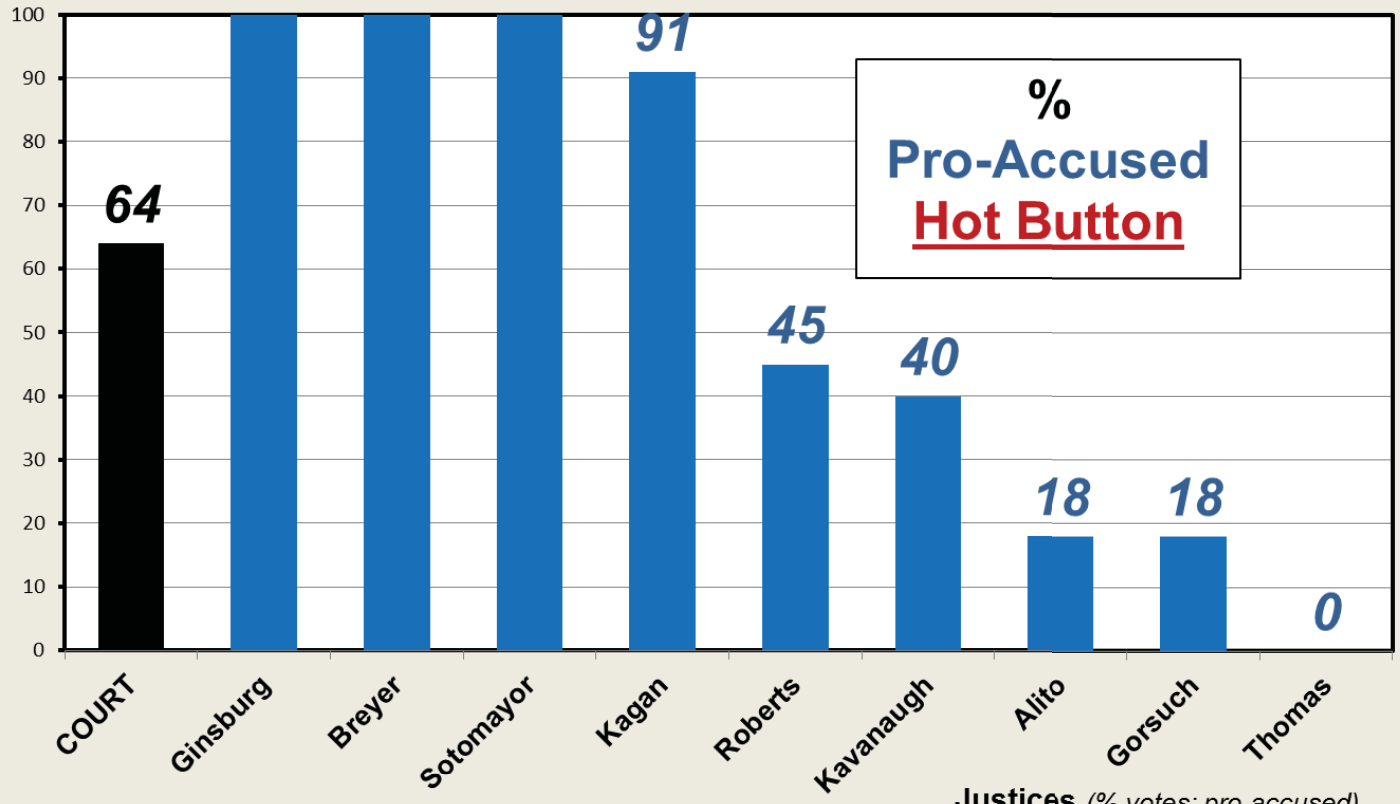


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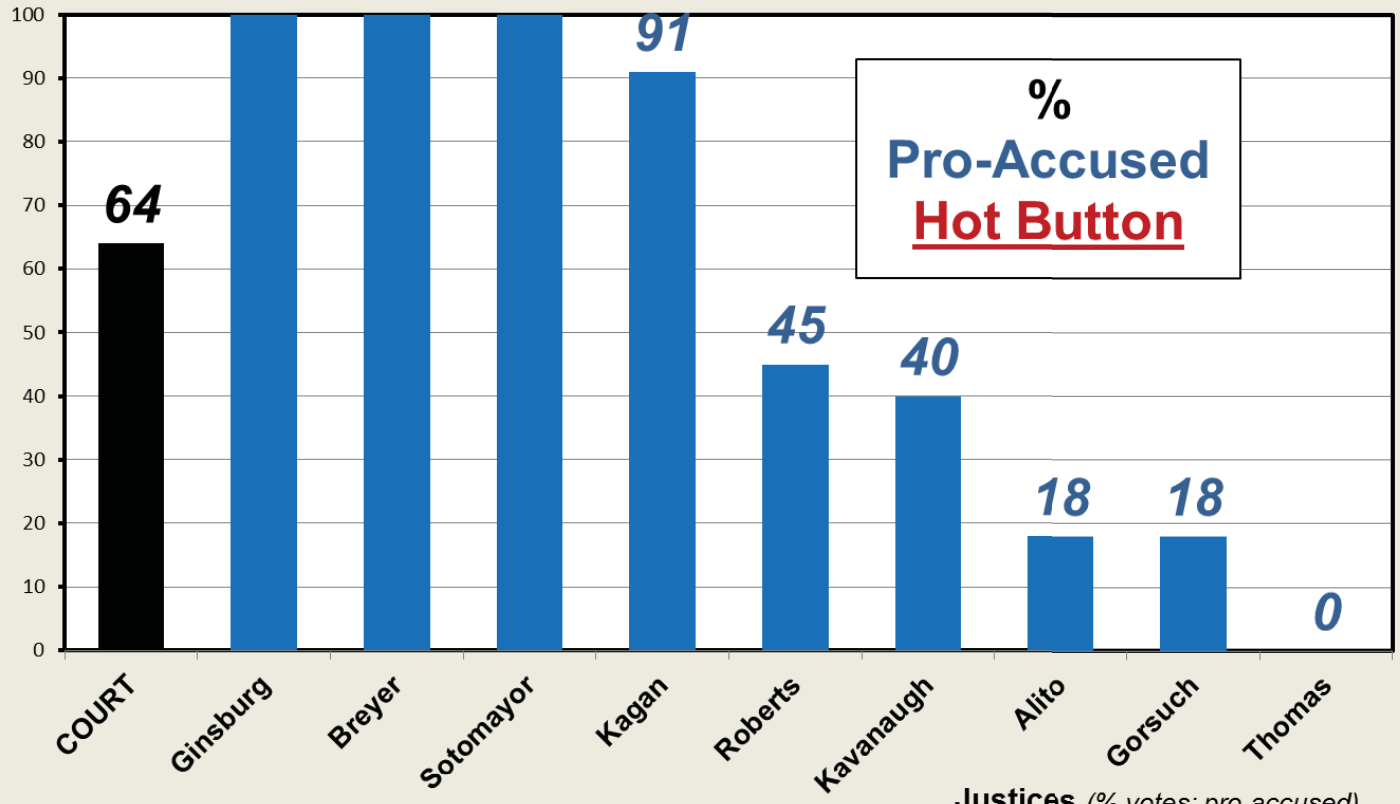


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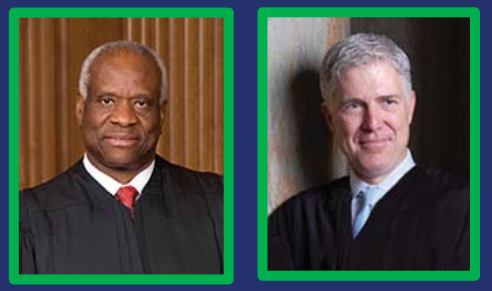
# *American Legion v. Amer. Humanist Assn.*

## 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

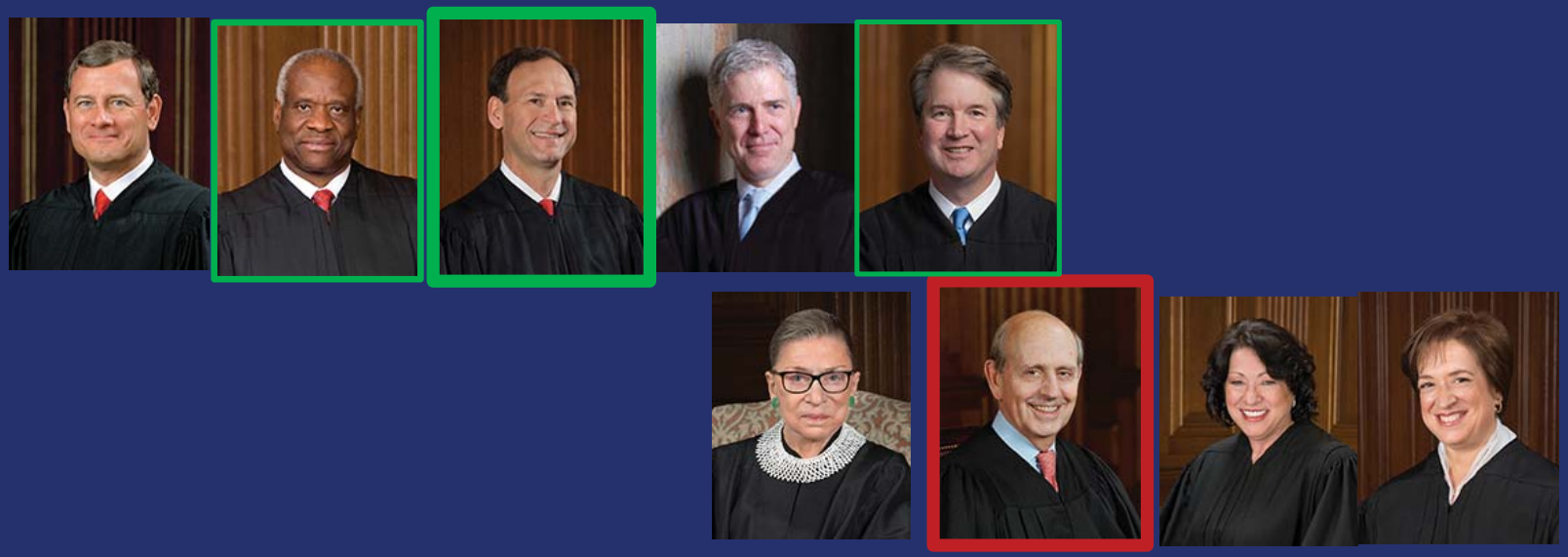
***Vote*: 5 - 4**

**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.

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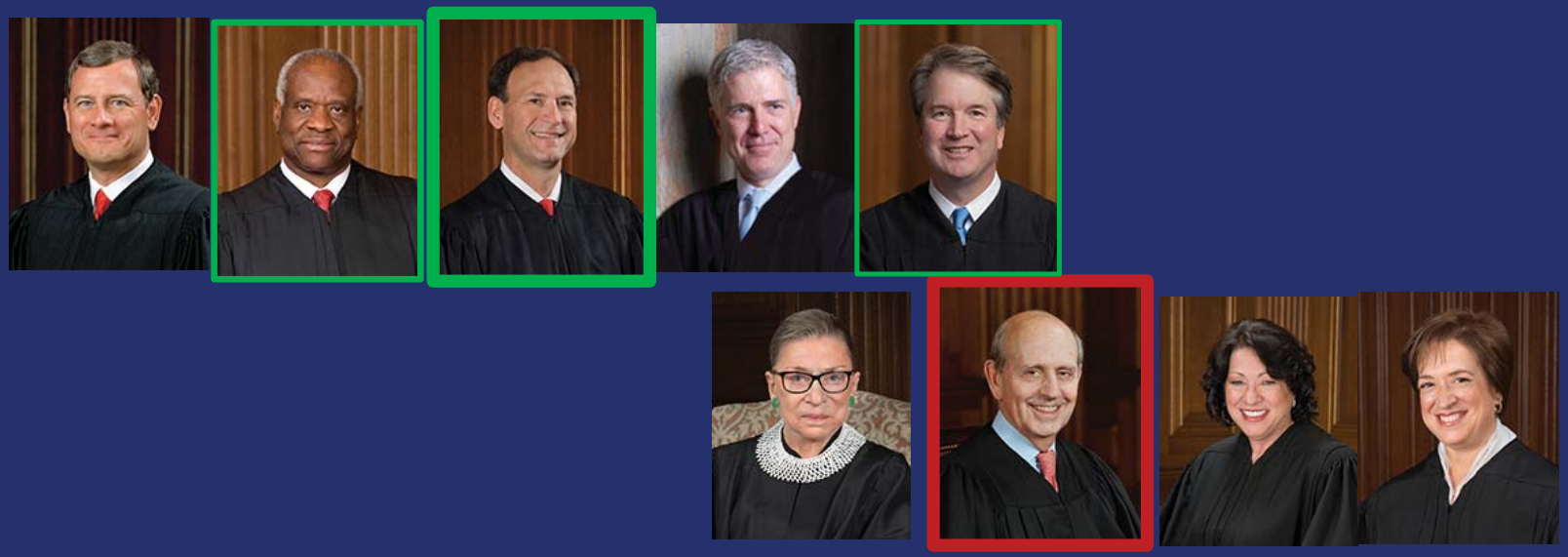

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# Supreme Court

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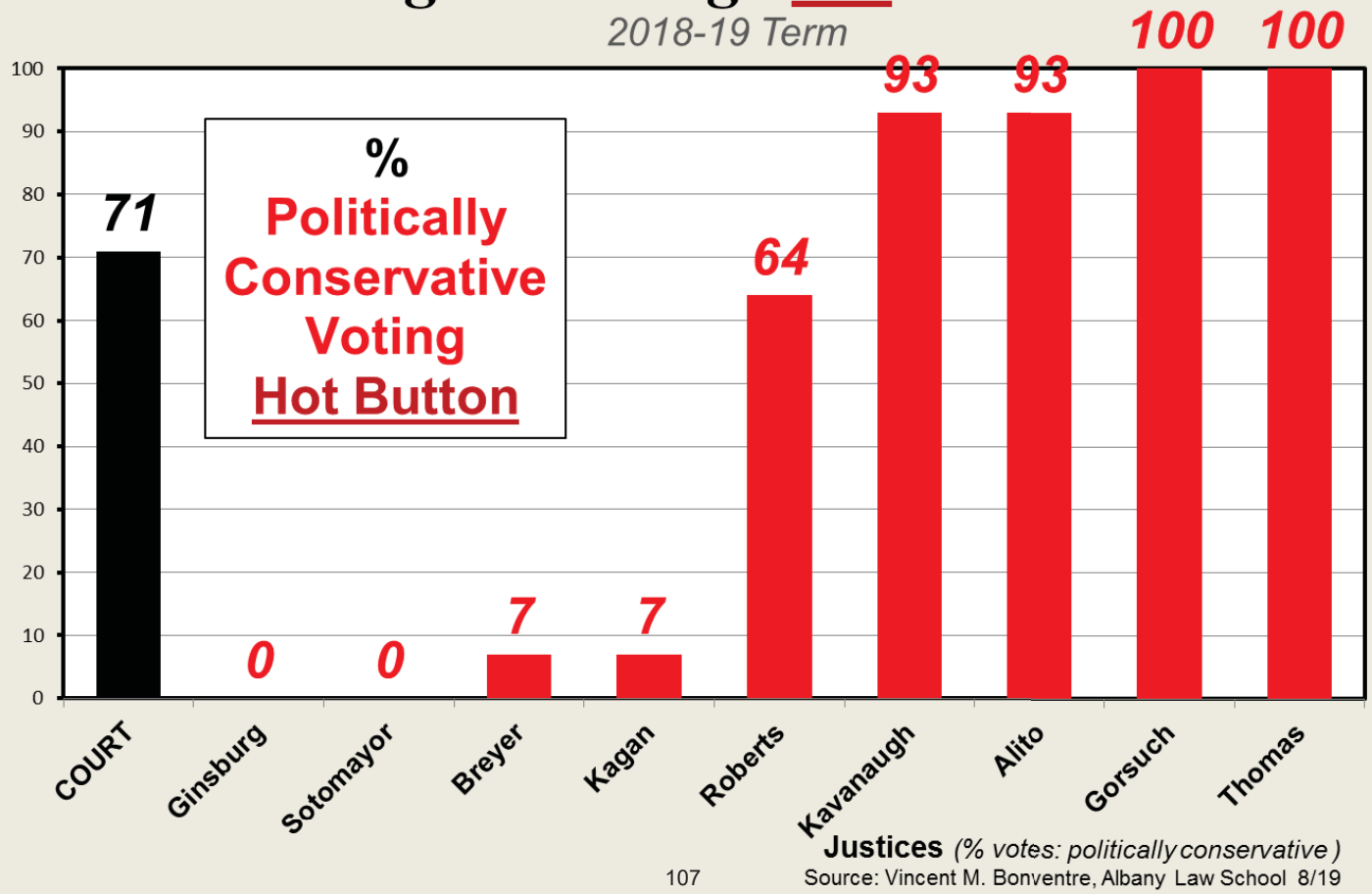
2018-19 Term



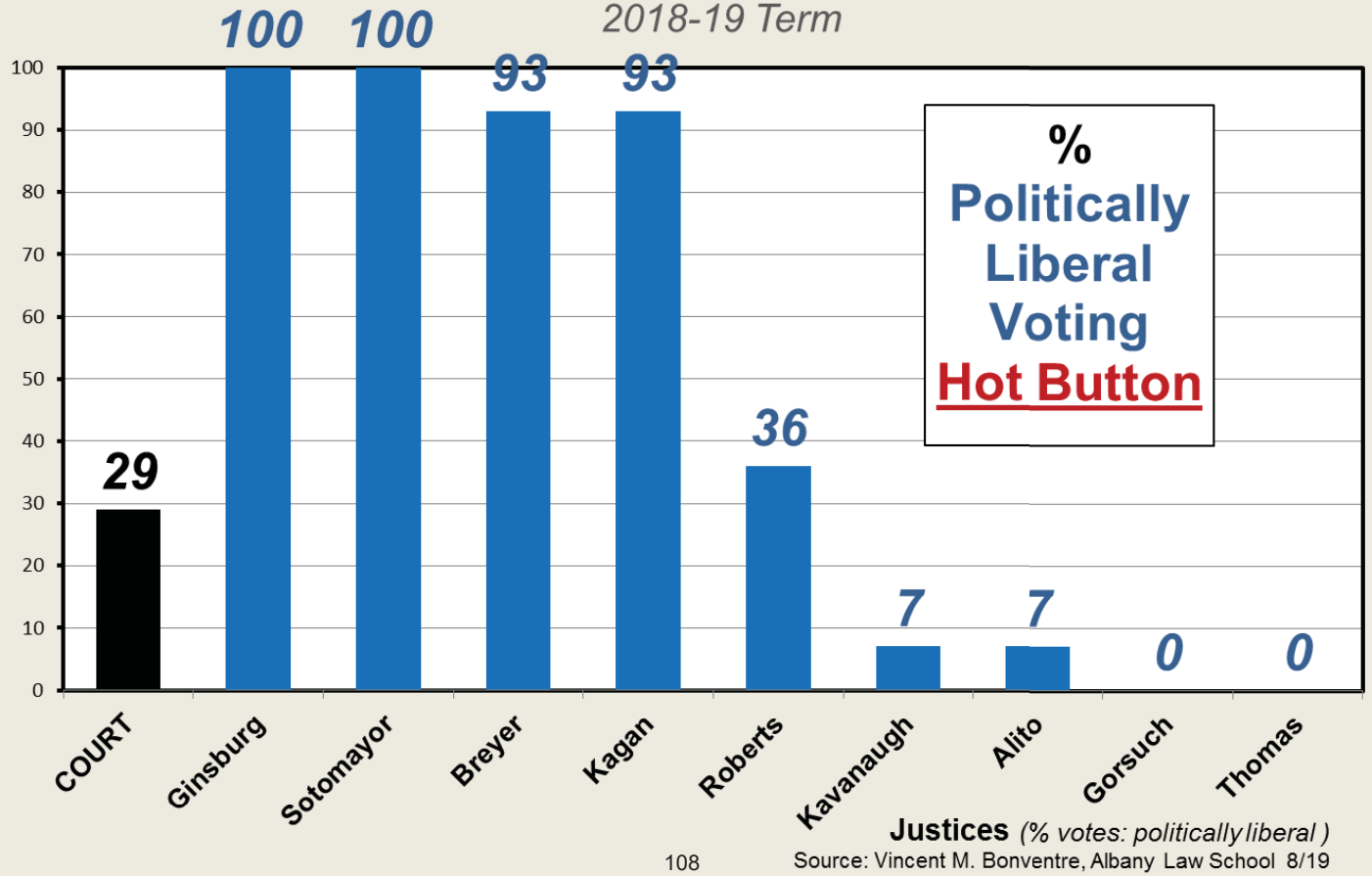



Source: Vincent M. Bonventre, Albany Law School 8/19

# Supreme Court

## *Ideological Voting--HB Civil Cases*

2018-19 Term




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

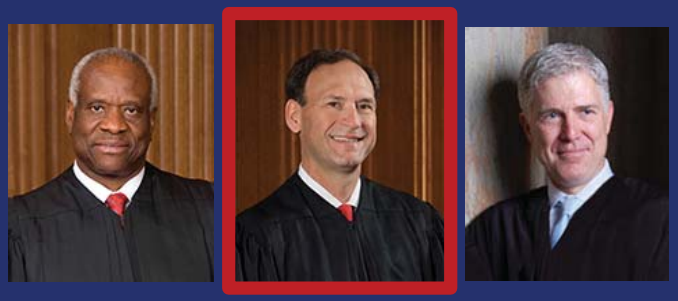
*Vote*: 5 - 4

**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**

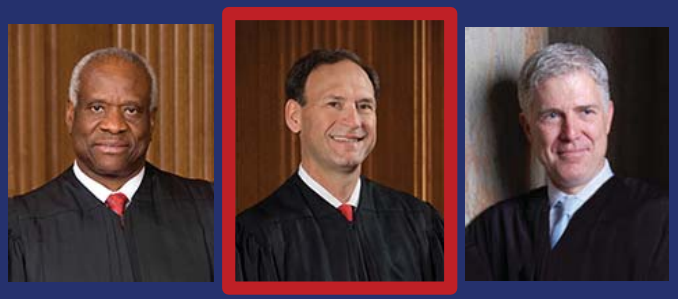


**COURT'S RULING:** The application to stay the execution is granted, pending the certiorari petition, unless the state permits a Buddhist chaplain to accompany the inmate.

# ***White v. Kentucky***

## Intellectual Disability Determination

***Vote*: 6 - 3**

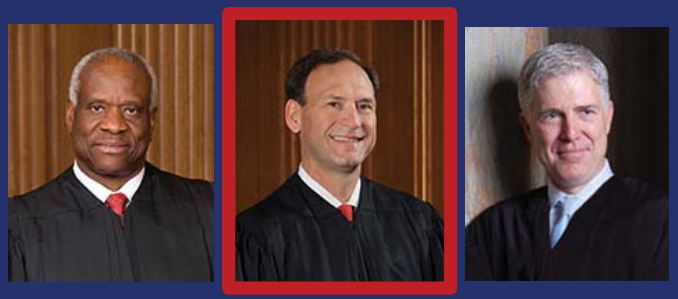


**COURT'S RULING:** Certiorari summarily granted, death penalty vacated, and case remanded to determine inmate's intellectual disability claim.

# ***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

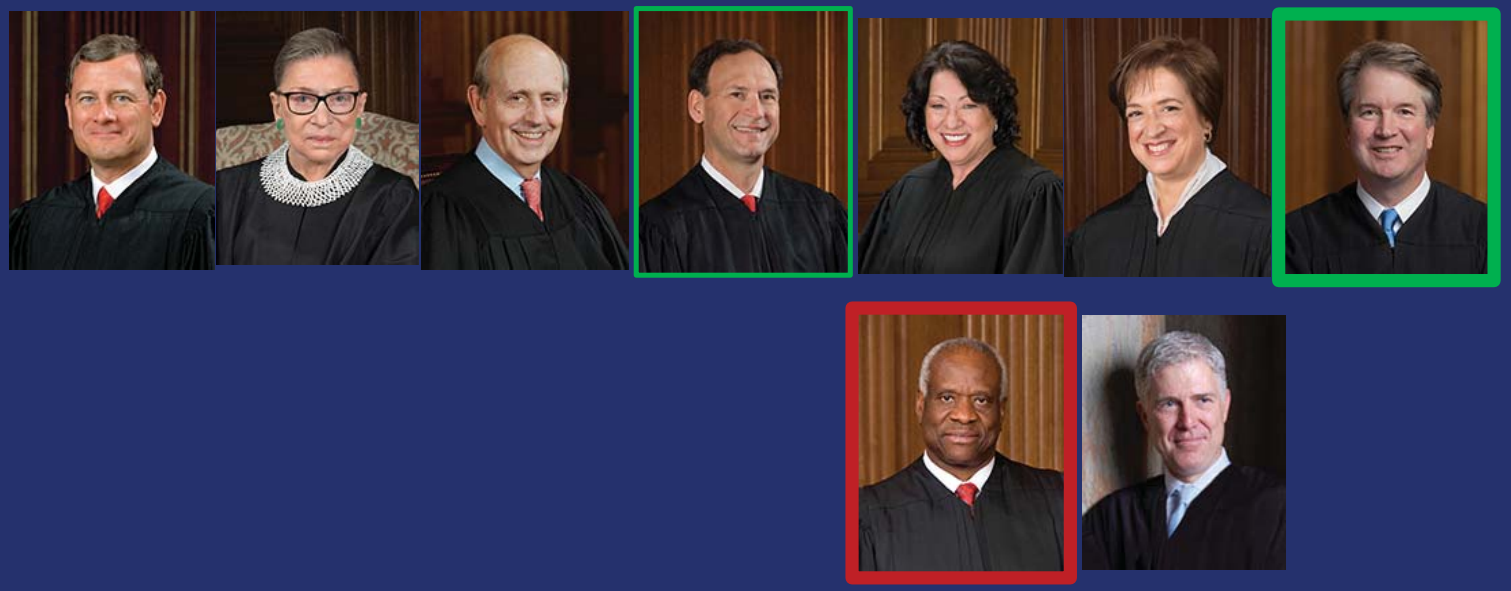
*Vote*: 5 - 3


**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

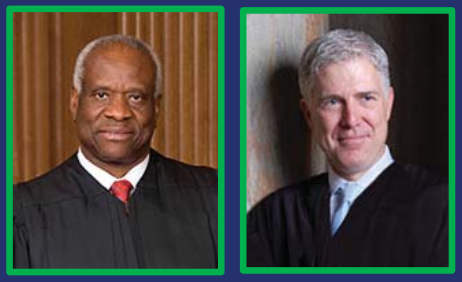
*Vote*: 5 - 4

**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*

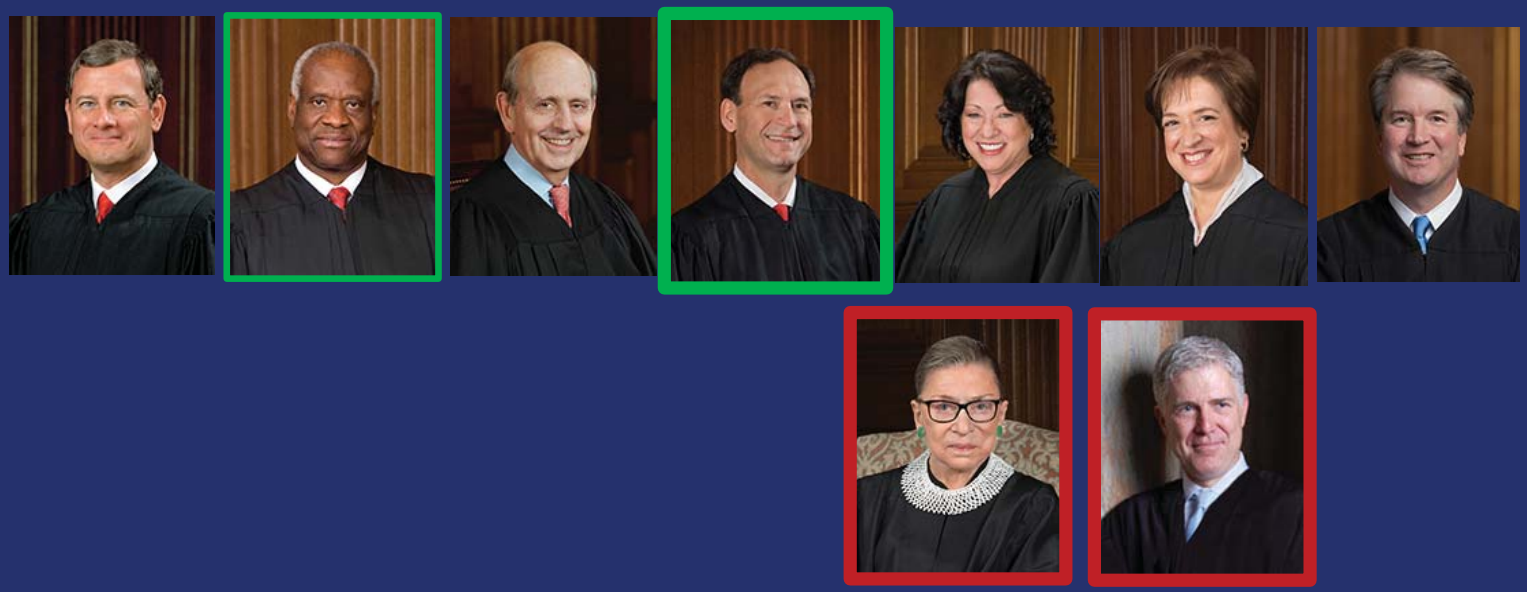


**COURT'S RULING:** The Excesive Fines prohibition in the 8th Amendment applies to the states through the Due Process Clause of the 14th Amendment.

# ***Gamble v. U.S.***

## Double Jeopardy

***Vote*: 7 – 2(1+1)**

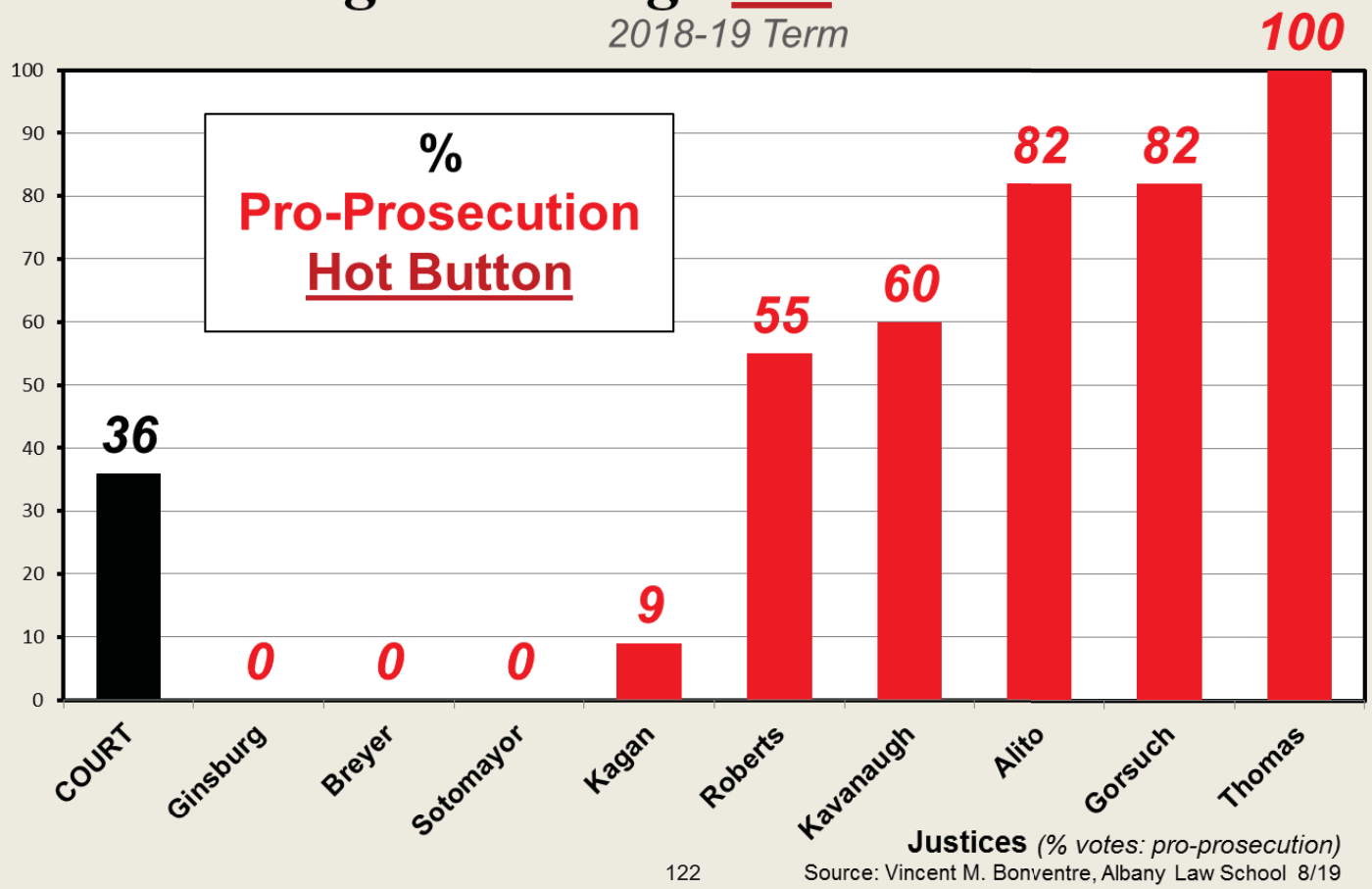


**COURT'S RULING:** The dual sovereignty of federal and state governments means that federal and state crimes, and thus the prosecutions of them, are separate—not double—jeopardy.

# Supreme Court

## *Ideological Voting--HB Criminal Cases*

2018-19 Term



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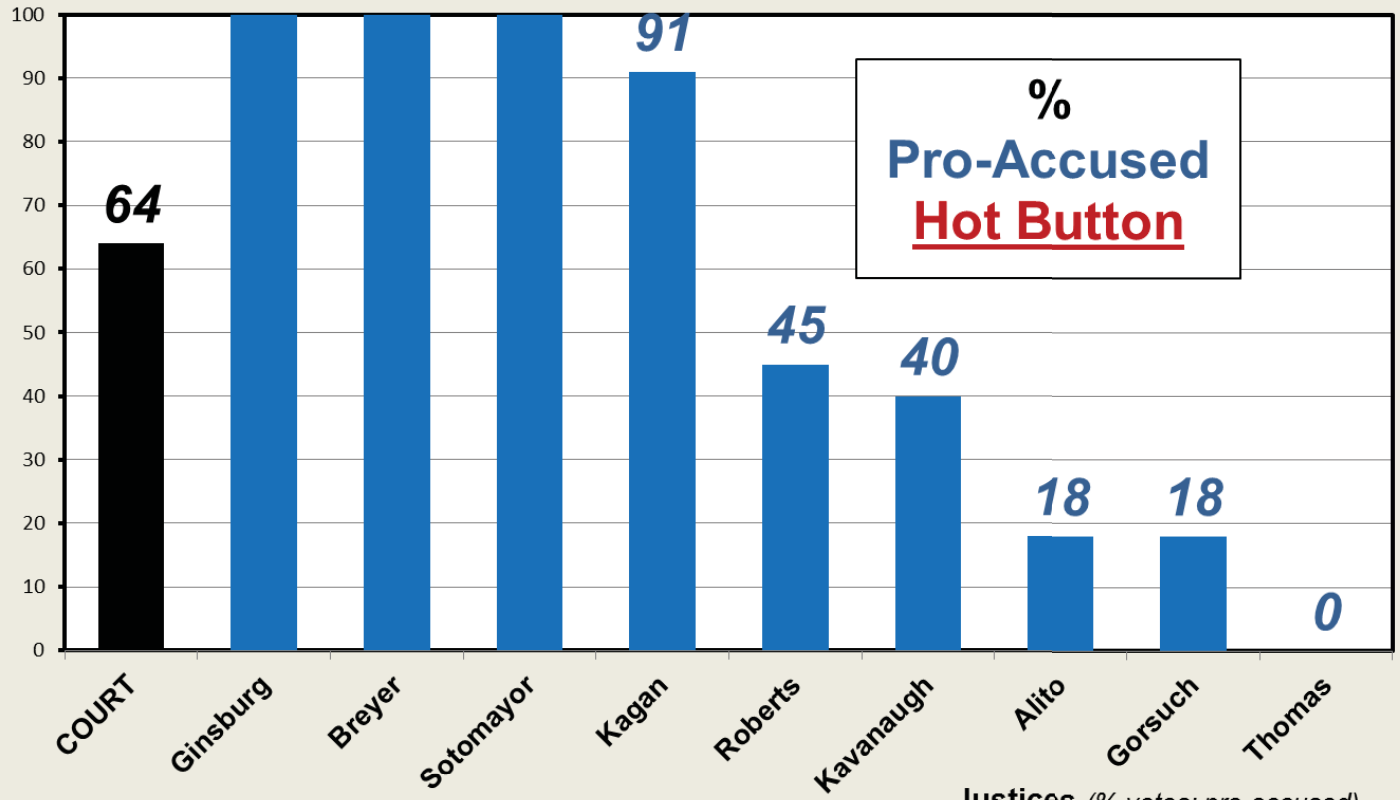


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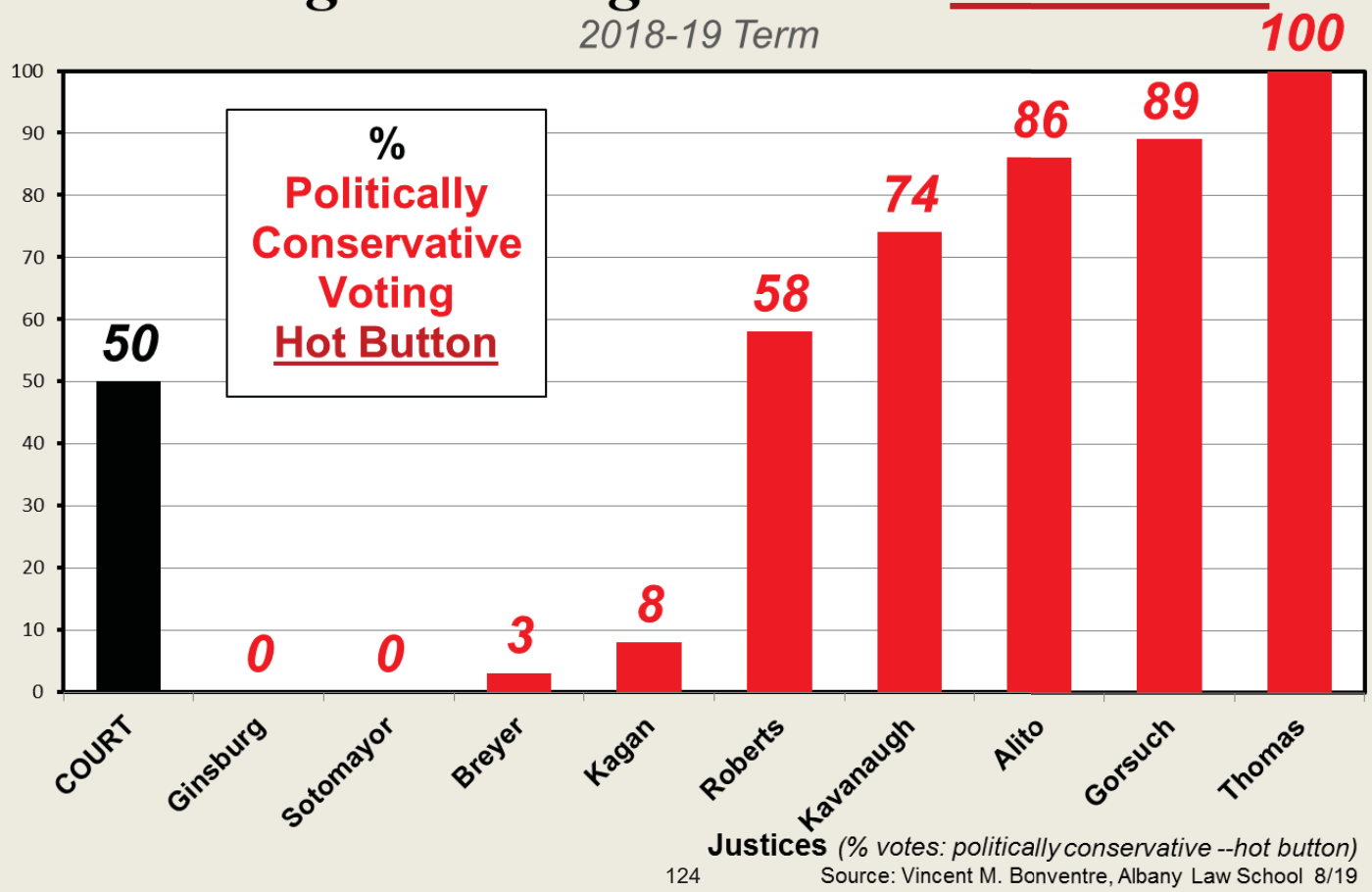




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# Supreme Court

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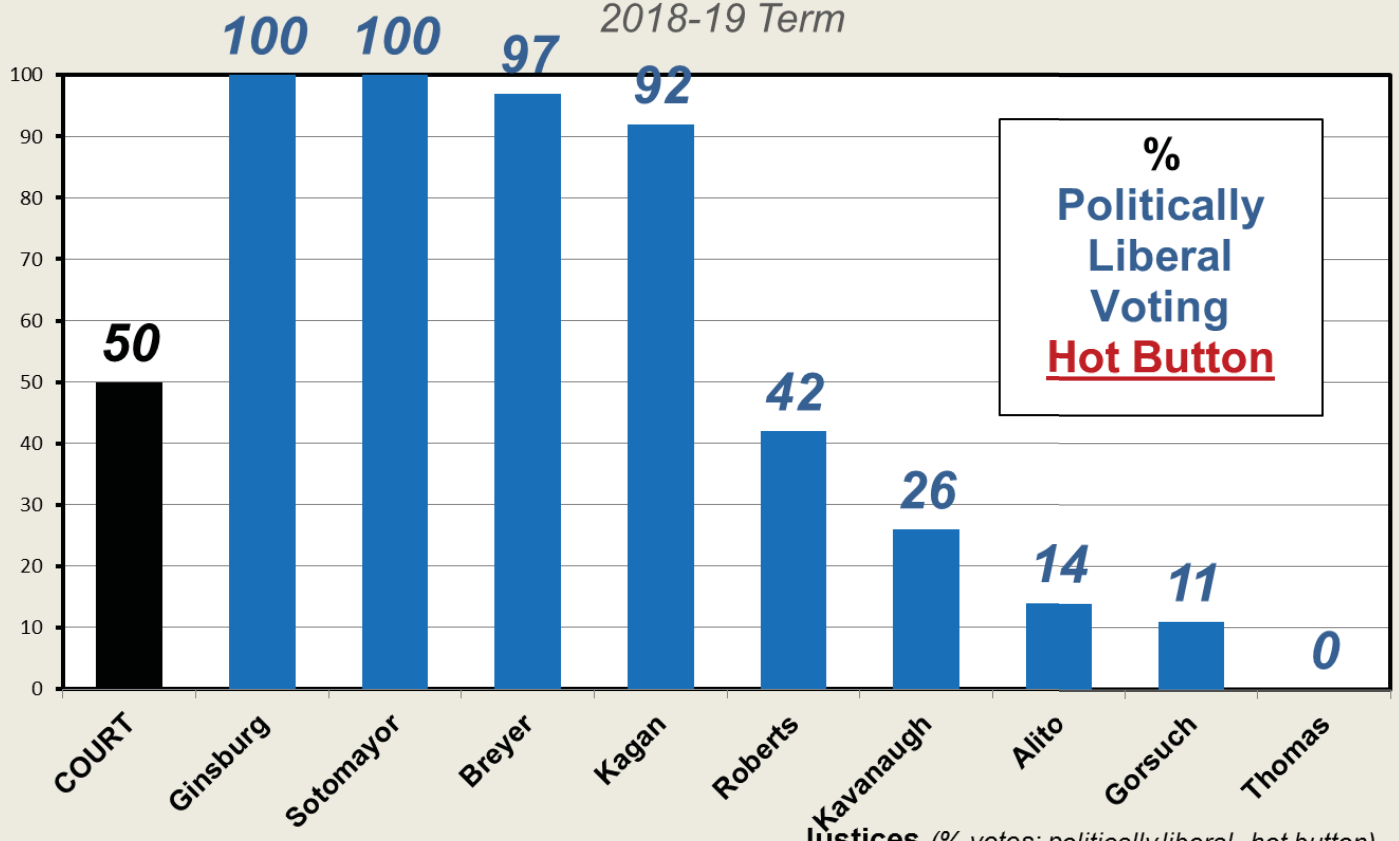



**Justices** *(% votes: politically liberal--hot button)*

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

# Supreme Court Round-Up

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

# 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

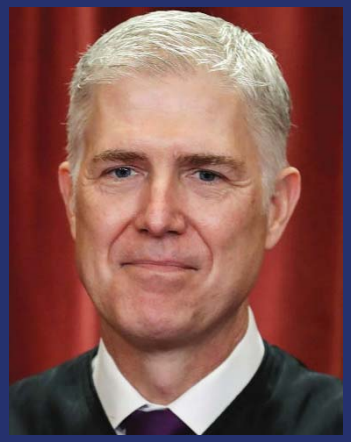
***June Med. Servs. V. Gee***—has opposed all abortion restrictions

***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



***Gorsuch***

***v.***

***Kavanaugh***

# Trump Appointees at Odds

***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

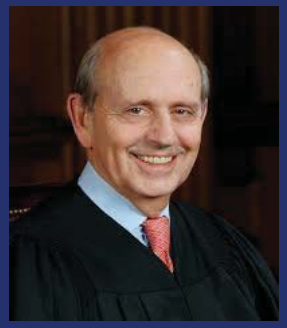
***U.S. v. Davis***—Gorsuch wrote majority invalidating "crime of violence;" Kavanaugh wrote dissent

# Concluding Observations

# RETIREMENTS?

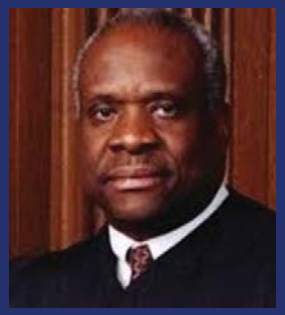
**Ruth Bader Ginsburg**

- 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



**Stephen G. Breyer**

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



**Clarence Thomas**

- 71 years old
- **72, end of current Trump term**
- **76, end of a 2nd term**
- 28/29/33 years on Court

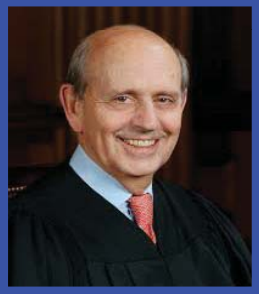
# RECENT RETIREMENTS

*(since 1990)*

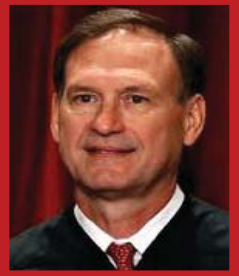
| | YEAR | TIME | AGE |
|---|---|---|---|
| William J. Brennan, Jr. | (1990) | 33 | 84 |
| Thurgood Marshall | (1991) | 23 | 83 |
| Byron White | (1993) | 30 | 76 |
| Harry Blackmun | (1994) | 23 | 86 |
| Sandra Day O'Connor | (2006) | 24 | 76 |
| David Souter | (2009) | 18 | 70 |
| John Paul Stevens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

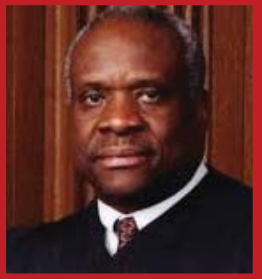
# For Now …











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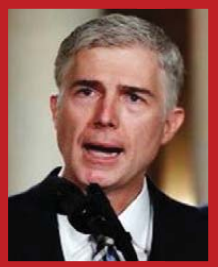

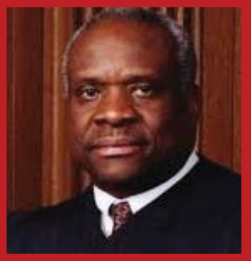

# The
# End
*Thank You!*

# Topic III -
# Additional Information Regarding the U.S. Supreme Court

# CENTER OF ORDER: CHIEF JUSTICE JOHN ROBERTS AND THE COMING STRUGGLE FOR A RESPECTED SUPREME COURT

*Benjamin Pomerance*

*"Judges are like umpires. Umpires don't make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. . . . Mr. Chairman, I come before the committee with no agenda. I have no platform."*

*– John Roberts, opening statement to the United States Senate Committee on the Judiciary, September 2005.*[1]

## I. INTRODUCTION

In the summer of 2018, the long-awaited news that most liberals dreaded and most conservatives hungered for finally arrived.[2] Justice Anthony Kennedy announced that he would retire at the end of the United States Supreme Court's term, divorcing the Court from the eighty-one-year-old jurist who had spent more than a decade as the most unpredictable voter on the federal judiciary's highest

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[1] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109 Cong. 55–56 (2005) (statement of John G. Roberts, Jr.) [hereinafter *Roberts Confirmation Hearing*].

[2] *See* Robert Barnes, *Justice Kennedy, The Pivotal Swing Vote on the Supreme Court, Announces His Retirement*, WASH. POST (June 27, 2018), https://www.washingtonpost.com/politics/courts_law/justice-kennedy-the-pivotal-swing-vote-on-the-supreme-court-announces-retirement/2018/06/27/a40a8c64-5932-11e7-a204-ad706461fa4f_story.html?noredirect=on&utmterm=.03244bdd3a31.

bench.[3] Some commentators rejoiced, while others wept and gnashed their rhetorical teeth.[4] In their eulogizing of Kennedy's career, both sides engaged in wide-ranging hyperbole.[5] Conservative and liberal observers alike acted as if Kennedy had morphed many years ago from a reliable conservative into a flaming liberal.[6] Both camps praised and mourned President Trump's nomination of Judge Brett Kavanaugh of the United States Court of Appeals for the District of Columbia Circuit, a man with deep ties to Republican power brokers from Kenneth Starr to Alberto Gonzales to George W. Bush, as a return to conservative rulings after a long period of far-left judicial outcomes.[7]

The reality, of course, was far more nuanced than many of these

[3] *See* Lydia Wheeler, *Kennedy Announces Retirement from Supreme Court*, HILL (June 27, 2018), http://thehill.com/regulation/court-battles/393357-kennedy-announces-retirement-from-supreme-court.

[4] *See, e.g.*, Chris Cillizza, *Anthony Kennedy's Retirement Just Confirmed Every Republican's Dream Scenario for Trump*, CNN (June 27, 2018), https://www.cnn.com/2018/06/27/politics/kennedy-retirement-donald-trump/index.html; Ezra Klein, *Democrats Sat Out the 2014 Midterms and Lost the Supreme Court for a Generation*, VOX (June 27, 2018), https://www.vox.com/policy-and-politics/2018/6/26/17506054/anthony-kennedy-retirement-supreme-courtl; Mark Joseph Stern, *The Sad Delusion of Anthony Kennedy Conspiracy Theories*, SLATE (July 2, 2018), https://slate.com/news-and-politics/2018/07/anthony-kennedy-conspiracy-theories-are-a-liberal-delusion.html.

[5] *See, e.g.*, William Cummings, *The Bubble: Kennedy Ensured Legacy by Retiring Before Midterms, Conservatives Say*, USA TODAY (June 29, 2018), https://www.usatoday.com/story/news/politics/onpolitics/2018/06/29/media-reactions-anthony-kennedy-retirement/746687002/; Filipa Ioannou, *Liberals Freak Out Over Supreme Court Justice Anthony Kennedy's Retirement*, S.F. CHRON. (June 27, 2018), https://www.sfgate.com/politics/article/twitter-reaction-anthony-kennedy-retirement-trump-13031093.php.

[6] *See* Ioannou, *supra* note 5; s*ee also Anthony Kennedy's Retirement Comes at a Worrying Time*, ECONOMIST (June 30, 2018), https://www.economist.com/leaders/2018/06/30/anthony-kennedys-retirement-comes-at-a-worrying-time ("President Donald Trump now has the opportunity to appoint a second Supreme Court Justice and with it to cement a 5-4 conservative, one might even say Republican, majority . . . ."); Richard Fausset, et al., *Elated v. Scared: Americans Are Divided on Justice Kennedy's Retirement*, N.Y. TIMES (June 28, 2018), https://www.nytimes.com/2018/06/28/us/democrats-republicans-anthony-kennedy.html ("Justice Kennedy, a centrist swing vote, is likely to be replaced by a reliable conservative, tipping the institution decidedly rightward."); George Will, *For the First Time, Conservatives Might Thank God for Kennedy*, NAT'L REV. (June 28, 2018), https://www.nationalreview.com/2018/06/anthony-kennedy-retirement-conservatives-get-gift/ ("As the swing vote, Kennedy has frequently infuriated many conservatives.").

[7] *See, e.g.*, William Cummings, *It's the Constitution, Not Brett Kavanaugh Liberals Don't Like, Conservatives Say*, USA TODAY (July 11, 2018), https://www.usatoday.com/story/news/politics/onpolitics/2018/07/10/brett-kavanaugh-supreme-court-media-reaction-bubble/772188002/; Amy Davidson Sorkin, *What Brett Kavanaugh Must Be Asked About Torture, Guantánamo, and Mass Surveillance*, NEW YORKER (July 24, 2018), https://www.newyorker.com/news/daily-comment/what-brett-kavanaugh-must-be-asked-about-torture-guantanamo-and-mass-surveillance; Abigail Simon, *The Era of the Swing Justice Is Over. Here's How Democrats May Adapt*, TIME (Aug. 13, 2018), http://time.com/5363918/supreme-court-brett-kavanaugh-conservative-bloc/.

feverishly partisan outcries indicated.[8] For the bulk of his career—perhaps more often than the conservative commentators who reviled him and the liberal observers who recently lionized him were willing to admit—Kennedy remained a politically conservative voter on an increasingly politically conservative Court, typically joining the likes of Antonin Scalia, Clarence Thomas, and Samuel Alito on such issues as the right to bear firearms, labor issues, voting rights, the extent of executive power, the right to privacy (and lack thereof), the unfettered spending of corporations in political campaigns, the Affordable Care Act (or "Obamacare"), and the degree of authority that law enforcement could lawfully exercise over civilians.[9] He voted to stop the vote recounts in *Bush v. Gore*,[10] effectively handing the presidency to George W. Bush, and to uphold the Trump administration's travel ban.[11] No one could rationally cast a jurist with such a record as a political liberal, or even a left-leaning centrist.[12]

On the occasions when Kennedy did break with his conservative brethren, however, the impact tended to be seismic.[13] He shocked conservatives who thought that a devout Roman Catholic justice

[8] *See* Ben Shapiro, *Get a Grip, Liberals. Justice Kennedy's Retirement Won't Be as Tragic as You Think*, SACRAMENTO BEE (June 28, 2018), https://www.sacbee.com/opinion/ca lifornia-forum/article214014009.html.

[9] *See* Andrew Cohen, *Anthony Kennedy Was No Moderate*, NEW REPUBLIC (June 27, 2018), https://newrepublic.com/article/149449/anthony-kennedy-no-moderate; Joe Fox et al., *In His Final Term, Justice Kennedy Handed Conservatives Many Victories*, WASH. POST (June 27, 2018), https://www.washingtonpost.com/graphics/2018/politics/supreme-court-2017-term/?utm_term=.41a42b60c1e5; Ariane de Vogue, *Anthony Kennedy Didn't Save the Liberals*, CNN (June 27, 2018), https://www.cnn.com/2018/06/27/politics/anthony-kennedy-didnt-save-the-liberals/index.html.

[10] *See* Bush v. Gore, 531 U.S. 98, 110 (2000); Emily Cochrane, *The Major Cases Where Justice Kennedy Left His Mark*, N.Y. TIMES (June 27, 2018), https://www.nytimes.com/2018/06/27/us/politics/justice-kennedy-cases.html.

[11] *See* Cohen, *supra* note 9; Adam Liptak, *In Influence if Not in Title, This Has Been the Kennedy Court*, N.Y. TIMES (June 27, 2018), https://www.nytimes.com/2018/06/27/us/politics/anthony-kennedy-career.html.

[12] *See* Cohen, *supra* note 9; Jack Goldsmith, *The Shape of the Post-Kennedy Court*, WKLY. STANDARD (July 2, 2018), https://www.weeklystandard.com/jack-goldsmith/the-post-kennedy-supreme-court-isnt-likely-to-be-as-conservative-as-liberals-fear; Stephanie Mencimer, *Anthony Kennedy Is Not the Supreme Court's Swing Justice Anymore*, MOTHER JONES (June 27, 2018), https://www.motherjones.com/politics/2018/06/anthony-kennedy-is-not-the-supreme-courts-swing-justice-anymore/; de Vogue, *supra* note 9.

[13] *See* Erwin Chemerinsky, *Justice Kennedy Will Be Best Remembered for the Times He Disappointed Conservatives*, SACRAMENTO BEE (July 30, 2018), https://www.sacbee.com/opinion/california-forum/article215781395.html; Colin Dwyer, *A Brief History of Anthony Kennedy's Swing Vote—And the Landmark Cases It Swayed*, NAT'L PUB. RADIO (June 27, 2018), https://www.npr.org/2018/06/27/623943443/a-brief-history-of-anthony-kennedys-swing-vote-and-the-landmark-cases-it-swayed.

would never permit states to provide abortions, upholding the Court's forever-controversial holding in *Roe v. Wade*[14] and establishing that states could not impose an "undue burden" on a woman's right to obtain an abortion prior to the viability of the fetus.[15] He joined the Court's liberal wing in limiting the application of the death penalty, holding that capital punishment for the crime of rape, and for individuals who were minors at the time they committed their crimes or had severely limited mental capacities, violated the Eighth Amendment's prohibition against cruel and unusual punishment.[16] After several years of rebuffing affirmative action as a violation of the Equal Protection Clause, he unexpectedly changed course in 2016, authoring the majority opinion in a case holding that the use of race as one of many factors in a state university's admission process was a narrowly tailored method to achieve the compelling state interest in maintaining a diverse student body.[17] Perhaps most notably of all, he cultivated the Court's body of recent caselaw striking down statutes that discriminated against individuals on the basis of their sexual orientation.[18] The Justice, who had previously spent many years working as a professor under the guidance and mentorship of Gordon Schaber, a gay man who served as Dean of the McGeorge School of Law for more than three decades,[19] wrote the controlling

[14] Roe v. Wade, 410 U.S. 113 (1973).

[15] *See* Planned Parenthood v. Casey, 505 U.S. 833, 843, 901 (1992); Anne Jelliff, Comment, *Catholic Values, Human Dignity, and the Moral Law in the United States Supreme Court: Justice Anthony Kennedy's Approach to the Constitution*, 76 ALB. L. REV. 335, 351 (2013). Ironically, the three justices who developed the controlling plurality in this case that upheld *Roe v. Wade* were all appointed by politically conservative presidents. Sandra Day O'Connor and Kennedy were both appointed by Ronald Reagan, and David Souter was appointed by George H.W. Bush. *See Supreme Court Nominations: Present-1789*, U.S. SENATE, https://www.senate.gov/pagelayout/reference/nominations/Nominations.htm (last visited Dec. 27, 2018).

[16] *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 446–47 (2008); Roper v. Simmons, 543 U.S. 551, 578–79 (2005); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986)).

[17] *See* Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198, 2213–14 (2016) (citing Grutter v. Bollinger, 539 U.S. 306, 340 (2003)); *see also* Ronald Turner, *Justice Kennedy's Surprising Vote and Opinion in Fisher v. University of Texas at Austin*, WAKE FOREST L. REV. ONLINE (Oct. 31, 2016), http://wakeforestlawreview.com/2016/10/justice-kennedys-surprising-vote-and -opinion-in-fisher-v-university-of-texas-at-austin/ (explaining that, prior to this decision, Kennedy had never voted in favor of a race-conscious affirmative action program).

[18] *See* Chemerinsky, *supra* note 13; German Lopez, *Anthony Kennedy's Retirement Is Devastating for LGBTQ Rights*, VOX (June 27, 2018), https://www.vox.com/identities/2018/6/27/17510902/anthony-kennedy-retirement-lgbtq-gay-marriage-supreme-court.

[19] *See* Massimo Calabresi, *What Will Justice Kennedy Do?*, TIME (June 7, 2012), http://swampland.time.com/2012/06/07/what-will-kennedy-do/; Sheryl Gay Stolberg, *Justice Anthony Kennedy's Tolerance Is Seen in His Sacramento Roots*, N.Y. TIMES (June 21, 2015), https://www.nytimes.com/2015/06/22/us/kennedys-gay-rights-rulings-seen-in-his-sacramento-roots.html; *see also* Benjamin Pomerance, *What Might Have Been: 25 Years of Robert Bork on*

opinions in cases that overturned laws criminalizing intimate relations among same-sex partners, invalidated portions of the Defense of Marriage Act that denied marital benefits to legally married same-sex couples, and struck down state statutes that restricted marriage to heterosexuals.[20] With each of these decisions, many conservative commentators recoiled as if they had been shot.[21]

Through this brief summation of Kennedy's jurisprudence, one can see this justice for what he truly was: a jurist who generally remained true to the hopes of the Reagan-era conservatives who brought him to federal judicial power but who was unafraid of crossing partisan lines on occasion in challenging and highly publicized decisions.[22] In a time when the Court features perhaps the most politically entrenched battle lines in the institution's history, this was enough to pass for rampant volatility, earning Kennedy the sobriquet of "swing voter" and sending attorneys into an utter frenzy with their attempts to tailor their arguments to match his supposed preferences.[23] With the decisions of virtually every other justice on the Court viewed as a foregone conclusion—four predictable politically liberal votes and four predictable politically conservative votes—Kennedy gained a reputation as the only justice who might actually change his mind after hearing the arguments presented by all parties involved, even though he was still far more likely than not to vote with the Court's conservative wing.[24]

*the United States Supreme Court*, 1 BELMONT L. REV. 221, 231–32 (2014) (noting Schaber's influence upon Kennedy).

[20] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2607–08 (2015); United States v. Windsor, 570 U.S. 744, 775 (2013); Lawrence v. Texas, 539 U.S. 558, 578 (2003).

[21] *See, e.g.*, Chemerinsky, *supra* note 13; Rowland Evans & Robert Novak, *Justice Kennedy's Flip*, WASH. POST (Sept. 4, 1992), https://www.washingtonpost.com/archive/opinions/1992/09/04/justice-kennedys-flip/17eb4e0b-72f6-4678-b5bb-7a3e8f79b395/?utm_term=.34577 f83b152; Ben Jacobs, *'This Decision Will Not Stand': Republicans Seek Common Cause Against Same-Sex Marriage*, GUARDIAN (July 4, 2015), https://www.theguardian.com/us-news/2015/jul/04/republicans-against-same-sex-marriage.

[22] *See* Goldsmith, *supra* note 12; Liptak, *supra* note 11; Shapiro, *supra* note 8.

[23] Andrew Cohen, *This Is Kennedy's Court—The Rest of the Justices Just Sit on It*, ATLANTIC (May 29, 2013), https://www.theatlantic.com/national/archive/2013/05/this-is-kenne dys-court-the-rest-of-the-justices-just-sit-on-it/276309/; David Cole, *This Isn't the Roberts Court—It's the Kennedy Court*, NATION (Sept. 24, 2015), https://www.thenation.com/article/thi s-isnt-the-roberts-court-its-the-kennedy-court/; Liptak, *supra* note 11; Katie Reilly, *How Anthony Kennedy's Swing Vote Made Him 'the Decider'*, TIME (June 27, 2018), http://time.com/5323863/justice-anthony-kennedy-retirement-time-cover/.

[24] *See* Hadley Arkes, *The Kennedy Court*, FIRST THINGS (Jan. 2007), https://www.firstthings.com/article/2007/01/001-the-kennedy-court; Erwin Chemerinsky, *It's Kennedy's Court, But for How Long?*, OMAHA WORLD-HERALD (June 28, 2017), https://www.omaha.com/opinion/erwi n-chemerinsky-it-s-kennedy-s-court-but-for-how/article_5ad66a44-d32d-5d02-be72-f39184630fbe.html; David Cole, *Justice Kennedy's Surprisingly Open Mind*, DENVER POST

Based on this, one can see that the Court's trajectory may change far less after Kennedy's departure than one might initially expect. For the past several years, conservative justices have comprised a majority of the Court's membership.[25] This will likely not change following the confirmation of Brett Kavanaugh to the Court's bench.[26] The lone large remaining question, then, is how politically conservative this new justice will prove to be—and how the rest of the Court reacts to the newcomer in their midst.

It is the second half of this question that concerns the rest of this article. History offers many examples of Supreme Court justices whose viewpoints shifted in response to the apparent extremism of their colleagues. John Paul Stevens, for instance, joined the Court with the applause of political conservatives who noted that he had opposed affirmative action and voted in favor of the death penalty during his tenure on the United States Court of Appeals for the Seventh Circuit.[27] By the time he retired from the Court in 2010, however, Stevens was widely recognized as the leader of the Court's liberal wing, stating publicly that while he had remained a judicial conservative, he could not join the hard-line positions staked out by the likes of Thomas, Scalia, and former Chief Justice William Rehnquist.[28] Similarly, Republicans declared that New Hampshire conservative, David Souter, was a "home run" nomination to further their ideologies, with the National Organization for Women offering a counter-statement arguing that Souter was "[a]lmost Neanderthal" and that confirming him would end freedom for women in this country.[29] Both sides were shocked when Souter sparred with Scalia

(June 28, 2016), https://www.denverpost.com/2016/06/28/justice-kennedys-surprisi ngly-open-mind/.

[25] *See* Garrett Epps, *The Post-Kennedy Supreme Court Is Already Here*, ATLANTIC (June 30, 2018), https://www.theatlantic.com/ideas/archive/2018/06/the-post-kennedy-supreme-court -is-already-here/564176/.

[26] *See* Joan Biskupic, *A Sense of Inevitability for Kavanaugh, Who Can Transform the Court for Decades*, CNN (Sept. 4, 2018), https://www.cnn.com/2018/09/04/politics/a-sense-of-inevitability-for-kavanaugh/index.html.

[27] *See* Richard A. Epstein, *The Stevens Legacy: Mixed Verdict*, FORBES (Apr. 10, 2010), https://www.forbes.com/2010/04/10/john-paul-stevens-supreme-court-law-opinions-columnists-richard-a-epstein.html#3c697c1e3745; David G. Savage, *John Paul Stevens' Unexpectedly Liberal Legacy*, L.A. TIMES (Apr. 9, 2010), http://articles.latimes.com/2010/apr/09/nation/la-na-stevens-legacy10-2010apr10.

[28] *See* Jess Bravin, *Stevens Evolved from Court Loner to Liberal Wing's Leader*, WALL ST. J. (June 30, 2010), https://www.wsj.com/articles/SB10001424052748703374104575337264290709470.

[29] Richard Lacayo, *Evaluating Souter: A Strange Judicial Trip, Leaning Left*, TIME (May 2, 2009), http://content.time.com/time/nation/article/0,8599,1895455,00.html; David Skinner, *A Souter They Should Have Spurned*, WKLY. STANDARD (July 25, 2005), https://www.weeklystan

and Thomas regarding theories of constitutional interpretation and authored opinions that affirmed *Roe v. Wade*, argued that the Court lacked the authority to terminate the recount of a presidential election's results in *Bush v. Gore*, deferred to the legislature about limiting political campaign contributions, and solidified the separation between religion and government.[30] Comparable shifts occurred with Sandra Day O'Connor, nominated by Reagan but unwilling to fully adopt the sweeping rulings of some of her conservative colleagues on the Court; with Harry Blackmun, a Midwestern conservative who eventually grew frustrated with Chief Justice Warren Burger's viewpoints and wound up writing the Court's majority opinion upholding a woman's constitutional right to an abortion; with William Brennan, an Eisenhower nominee who later received Eisenhower's condemnation for persuading more conservative justices to join him in opinions opposing the death penalty and expanding individual liberties; and with many other "surprising" justices.[31]

Given this legacy, it is worth examining whether a similar change in voting behavior appears probable with any of the members of the current Court. If Trump's nominee to the Court fulfills popular expectations of uniformly voting in favor of politically conservative causes, a fellow member of the Court's conservative wing could decide that the Court's right wing has moved too far to the extreme right and break ranks.[32] Perhaps this justice would slide as far into the

dard.com/david-skinner/a-souter-they-shouldve-spurned.

[30] *See* RONALD D. FLOWERS, THAT GODLESS COURT?: SUPREME COURT DECISIONS ON CHURCH-STATE RELATIONSHIPS 170 (2d ed. 2005); William N. Eskridge, Jr., *Should the Supreme Court Read the Federalist but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301, 1309 (1998); Lacayo, *supra* note 29; Alex Spillius, *David Souter Profile: The Supreme Court's Surprise Reliable Liberal*, TELEGRAPH (May 2, 2009), https://www.telegraph.co.uk/news/worldnews/barackobama/5258956/David-Souter-profile-the-Supreme-Courts-surprise-reliable-liberal.html.

[31] *See* Adam Haslett, *Unintended Consequences*, NATION (May 26, 2005), https://www.thenation.com/article/unintended-consequences/; Ruth Marcus & Al Kamen, *Liberal Justice Brennan Quits Supreme Court, Giving Bush Chance to Buttress Conservatives*, WASH. POST (July 21, 1990), https://www.washingtonpost.com/archive/politics/1990/07/21/liberal-justice-brennan-quits-supreme-courtgiving-bush-chance-to-buttress-conservatives/ade1ee4d-f7fe-4b60-ad0c-532c11ce4ce8/?utm_term=.73632a56a35a; Stuart Taylor, Jr., *How O'Connor and the Court Have Drifted Leftward*, ATLANTIC (July 2005), https://www.theatlantic.com/magazine/archive/2005/07/how-oconnor-and-the-court-have-drifted-leftward/304146/; Lexington's Notebook, *Why Republican Judges Drift to the Left*, ECONOMIST (Apr. 14, 2010), https://www.economist.com/lexingtons-notebook/2010/04/14/why-republican-judges-drift-to-the-left.

[32] Indeed, this is what seemed to occur at varying levels with Stevens, O'Connor, Souter, and Brennan, all of whom indicated during their careers that they were not shifting to the left, but the Court as a whole was shifting to a more extreme pole of the political right. *See* Marcus & Kamen, *supra* note 31; Savage, *supra* note 27; Spillius, *supra* note 30; Taylor, *supra* note 31.

liberal camp as Brennan and Stevens ultimately moved; perhaps they would depart from their conservative colleagues in more measured ways on only certain categories of cases, akin to the movements of O'Connor and Kennedy.[33] Either result would be viewed by some political conservatives as a judicial disaster and by some political liberals as a victory.[34]

In reviewing the membership of the Court's conservative wing, however, the likelihood for a leftward shift appears to be scant. Certainly, Thomas's intimations about needing to carry on the jurisprudential legacy of Scalia after the latter's death in 2016 do not indicate that the most politically conservative justice on the Court plans to change positions anytime soon.[35] Neil Gorsuch, Scalia's replacement, has provided similar verbal burnt offerings to his predecessor and, with only a couple of exceptions, has voted in lockstep with Thomas since joining the Court.[36] Alito proved to be even more politically conservative than Scalia on certain issues, particularly freedom of expression and other individual liberties, and seems poised to replace Thomas as the leader of the conservative wing after Thomas departs from the Court.[37]

Yet one name remains among the Court's conservatives, and it is this name that is by far the most intriguing on the list. In 2005, when the Senate confirmed John Roberts as the youngest Chief Justice in 100 years, political conservatives rejoiced at the thought of a lifetime with a justice straight out of central casting leading the Court.[38]

[33] *See* Taylor, *supra* note 31.

[34] One can see such reactions in the responses by politically conservative commentators toward Kennedy himself. *See, e.g.*, Bryan Fischer, *A Justice Who Will Live in Infamy*, AM. FAM. ASS'N (June 29, 2018), https://www.afa.net/the-stand/culture/2018/06/a-justice-who-will-live-in-infamy/; *Good Riddance, Justice Kennedy*, NAT'L REV. (June 28, 2018), https://www.nationalreview.com/2018/06/anthony-kennedy-retirement-good-riddance-rulings-aggrandized-power-of-court/.

[35] *See* Justice Clarence Thomas, *A Tribute to Justice Antonin Scalia*, 126 YALE L.J. 1600, 1600 (2017); Ryan Lovelace, *Justice Thomas Scolds Supreme Court While Honoring Scalia*, WASH. EXAMINER (Nov. 17, 2016), https://www.washingtonexaminer.com/justice-thomas-scolds-supreme-court-while-honoring-scalia.

[36] *See* Benjamin Pomerance, *Inside A House Divided: Recent Alliances on the United States Supreme Court*, 81 ALB. L. REV. 361, 421–22 (2018); Adam Feldman, *Empirical SCOTUS: How Gorsuch's First Year Compares*, SCOTUS BLOG (Apr. 11, 2018), http://www.scotusblog.com/2018/04/empirical-scotus-how-gorsuchs-first-year-compares/.

[37] *See, e.g.*, Brianne J. Gorod, *Sam Alito: The Court's Most Consistent Conservative*, 126 YALE L.J. F. 362, 362 (2017).

[38] *See* Todd S. Purdum et al., *Court Nominee's Life Is Rooted in Faith and Respect for Law*, N.Y. TIMES (July 21, 2005), https://www.nytimes.com/2005/07/21/politics/court-nominees-life-is-rooted-in-faith-and-respect-for-law.html?mtrref=www.google.com&gwh=88056166FCAB456982C815428B232C1F&gwt=pa; *John G. Roberts, Jr.*, OYEZ, https://www.oyez.org/justices/john_g_roberts_jr (last visited Dec. 29, 2018).

Staunchly conservative in his legal leanings, yet accepted as a brilliant legal mind even by his opponents on the political left, Roberts appeared to be both a guaranteed conservative vote and a man beyond reproach.[39]

Yet, subsequent years have tempered the conservative enthusiasm regarding the Chief Justice.[40] The most resounding divergence occurred when Roberts cast the deciding vote that upheld the Affordable Care Act,[41] leading political conservatives from coast to coast to brand him a traitor.[42] One such public castigation surfaced on July 18, 2012, on the now-infamous Twitter account of a reality television star named Donald Trump: "Congratulations to John Roberts for making Americans hate the Supreme Court because of his BS."[43] In more recent Court terms, Roberts has departed from his colleagues on the conservative wing with greater frequency, parting ways on issues ranging from the rights of same-sex couples to the extent to which law enforcement can engage in warrantless surveillance to staying the execution of a mentally ill death row inmate.[44] Furthermore, the relationship between Roberts and Trump continues to be strained, with the President repeatedly criticizing the Chief Justice and with Roberts only thinly veiling his disdain for some of Trump's policies.[45]

If such a trend continues, one could genuinely see the Chief Justice filling Kennedy's shoes as the Court's ideological center.[46] Like

[39] *See* Purdum et al., *supra* note 38.

[40] *See, e.g.*, Olive Roeder, *Is Chief Justice Roberts a Secret Liberal?*, FIVETHIRTYEIGHT (Nov. 27, 2017), https://fivethirtyeight.com/features/is-chief-justice-roberts-a-secret-liberal/.

[41] *See id.*

[42] *See, e.g.*, W. James Antle III, *John Roberts's Betrayal*, AM. CONSERVATIVE (June 28, 2012), https://www.theamericanconservative.com/articles/john-robertss-betrayal/; Kristen A. Lee, *Wrath of Cons: Chief Justice John Roberts Bashed as 'Traitor' After Casting Key Vote to Uphold Health Care Law*, N.Y. DAILY NEWS (June 28, 2012), http://www.nydailynews.com/news/national/wrath-cons-chief-justice-john-roberts-bashed-traitor-casting-key-vote-uphold-health-care-law-article-1.1104064.

[43] Joan Biskupic, *John Roberts Played the Long Game. He Just Won*, CNN (June 29, 2018), https://www.cnn.com/2018/06/29/politics/john-roberts-long-game-supreme-court/index.html.

[44] *See, e.g.*, Pavan v. Smith, 137 S. Ct. 2075, 2078–79 (2017); Riley v. California, 134 S. Ct. 2473, 2494–95 (2014); Linda Greenhouse, *The Chief Justice, Searching for Middle Ground*, N.Y. TIMES (Feb. 1, 2018), https://www.nytimes.com/2018/02/01/opinion/chief-justice-roberts-middle.html.

[45] *See* Joan Biskupic, *Why Chief Justice John Roberts Spoke Out*, CNN (Nov. 22, 2018), https://www.cnn.com/2018/11/21/politics/trump-roberts-judges-judiciary/index.html; David Jackson, *New Issue in Trump-Cruz Battle: John Roberts*, USA TODAY (Jan. 17, 2016), https://www.usatoday.com/story/news/politics/onpolitics/2016/01/17/donald-trump-ted-cruz-john-roberts-supreme-court-obamacare/78931780/.

[46] *See* Lara Bazelon, *Will John Roberts Save the Supreme Court from Donald Trump?*, SLATE (Nov. 21, 2016), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/11/will_jo

Kennedy, Roberts would be recognized as a typically politically conservative justice who, at times, would be willing to cross over to the politically liberal camp, even in highly publicized cases.[47] Of course, this does not mean that Roberts is likely to become a carbon copy of Kennedy, even though the justices often voted on the same side of divided cases.[48] Yet it does mean that on this infamously partisan Court, at least one vote would consistently remain something other than inevitable, causing advocates to tailor their arguments in an effort to win the Chief Justice's favor.[49] The unique powers that the Chief Justice holds, including the ability to assign the writing of the Court's opinion of any case in which the Chief Justice votes with the Court's majority, makes the prospect of a center-shifting Roberts all the more tantalizing.[50]

This article explores this prospect through three lenses that go beyond the often-examined content of Roberts's judicial opinions. First, Part I reviews the life experiences of Chief Justice Roberts, studying key factors that pushed him toward the federal judiciary's unique cocktail of law and politics. Secondly, Part II focuses on the Chief Justice's judicial mentors, examining the profound impact of the men who taught Roberts the craft of judging. Lastly, Part III analyzes Roberts's spoken and written statements about the role of the Supreme Court in the judicial, political, and social landscape of the United States. From these discussions, the article reaches a conclusion that Roberts will indeed become the current Court's closest approximation of a "swing vote," but will adopt this role with noticeably different concerns than the issues that motivated Kennedy. Overall, Kennedy's decisions that broke ranks with the politically conservative justices were seen as unpredictable and

hn_roberts_save_the_supreme_court_from_donald_trump.html; Yuval Levin, *The Roberts Court*, NAT'L REV. (July 1, 2018), https://www.nationalreview.com/corner/the-roberts-c ourt/.

[47] *See* Ted Nugent, *Turncoat Roberts*, WASH. TIMES (July 5, 2012), https://www.washington times.com/news/2012/jul/5/turncoat-roberts/.

[48] *See* Michael A. McCall & Madhavi M. McCall, *Quantifying the Contours of Power: Chief Justice Roberts & Justice Kennedy in Criminal Justice Cases*, 37 PACE L. REV. 115, 170 (2016) ("[Roberts and Kennedy] vote together with respect to judgment at a very high rate; indeed, the Chief Justice has been Justice Kennedy's most common voting ally during the first decade of the Roberts Court era."); Pomerance, *supra* note 36, at 409–11 (noting that Roberts and Kennedy voted together on eighty-eight percent of divided civil cases and seventy-three percent of divided criminal cases during the October 2016 Supreme Court term).

[49] *See* Brent Kendall, *Chief Justice Roberts Moves to Man in the Middle on the Supreme Court*, WALL ST. J. (July 2, 2018), https://www.wsj.com/articles/chief-justice-roberts-moves-to-man-in-the-middle-on-the-supreme-court-1530569142.

[50] *See* McCall & McCall, *supra* note 48, at 171 (noting Roberts's ability to use his role as Chief Justice to strategically assign opinions in a manner that reflects his vision of the Court).

issues-based, largely devoid of objectives beyond the issues in the case itself.[51] For Roberts, crossing political lines will likely become something else: an act of survival, a last recourse of clinging to the rapidly departing dignity of an institution that he holds dear.

## II. THE MAKING OF A CHIEF JUSTICE: JOHN ROBERTS AND THE ROAD HE TRAVELED

In the half-century before his confirmation to the Chief Justice's seat, John Roberts seemingly lived the type of clean-cut, carefully choreographed, all-American life that characterized family television programs of the Eisenhower era.[52] The son of a steel plant manager and his wife, Roberts was raised in a staunch Roman Catholic family in Indiana, the only boy among the family's four children.[53] From elementary school onward, he excelled scholastically, enough so that his parents enrolled him in a noted all-boys boarding school to enhance his prospects of future success.[54] In addition to graduating at the top of his class, he won the regional wrestling championship, was named captain of the varsity football team, participated enthusiastically in drama and choir, and won election to the student council.[55]

In the last of these extracurricular activities, Roberts revealed some of his earliest predilections toward orderly and dignified governance.[56] He served as the enforcer of the school's dress code, preventing sloppiness among his fellow students.[57] He devoted

[51] *See, e.g.*, Chemerinsky, *supra* note 24; Cole, *supra* note 24; Richard Wolf, *From Guns to Gay Rights, Anthony Kennedy Was the Supreme Court's Swing Vote*, USA TODAY (June 27, 2018), https://www.usatoday.com/story/news/politics/2018/06/27/justice-anthony-kennedy-supreme-courts-most-important-member/545973001/.

[52] *See* Purdum et al., *supra* note 38.

[53] *Id.*

[54] *Id.* In his admissions letter to that boarding school, the thirteen-year-old Roberts unambiguously declared his goals: "I won't be content to get a good job by getting a good education, I want to get the best job by getting the best education." Tim Jones et al., *John Roberts' Rule: Reach for the Top*, CHI. TRIB. (July 24, 2005), http://articles.chicagotribune.com/2005-07-24/news/0507240376_1_john-roberts-hogan-hartson-new-liberalism/2.

[55] JEFFREY TOOBIN, THE OATH: THE OBAMA WHITE HOUSE AND THE SUPREME COURT 8 (2012); P.J. Huffstutter, *Tiny, Insular Town Was Home*, L.A. TIMES (July 21, 2005), http://articles.latimes.com/2005/jul/21/nation/na-profile21; Jones et al., *supra* note 54; *Judge Roberts Biography*, BIOGRAPHY, https://www.biography.com/people/john-roberts-20681147 (last visited Dec. 29, 2018).

[56] *See, e.g.*, Daniel Klaidman, *How Chief Justice John Roberts Will Handle Obamacare*, NEWSWEEK (Sept. 10, 2012), https://www.newsweek.com/how-chief-justice-john-roberts-will-handle-obamacare-64631.

[57] *Id.*

significant attention to opposing the school's attempt to introduce bunk beds, declaring that single beds had greater historical value and more aesthetic appeal in a dormitory.[58] Even more adamant were his statements in the school newspaper against the notion of boys and girls ever mingling in a scholastic setting.[59] "[T]he presence of the opposite sex in the classroom will be confining rather than catholicizing," he proclaimed.[60] "I would prefer to discuss Shakespeare's double entendre and the latus rectum of conic sections without a blonde giggling and blushing behind me."[61]

When he earned admission into Harvard College, the future Chief Justice no doubt had to endure the indignity of blondes sharing the classroom with him.[62] Still, the feared "confining" effect of such a prospect did not appear to slow his steady advance.[63] In just three years, with a summer spent working at an Indiana steel mill to raise money for his tuition payments, Roberts graduated from Harvard *summa cum laude*, earning the school's coveted Bowdoin Prize for writing that year's "best essay in the English language" with an examination of the philosophies of Daniel Webster.[64]

Initially, Roberts had intended to become a professor of European history.[65] His senior thesis, critiquing the British Liberal Party for engaging in personality-based combat among the likes of Winston Churchill and Lloyd George, rather than focusing their collective attention on broader policy issues, certainly indicated that Roberts intended to move in a professorial direction.[66] Instead, for reasons

[58] Toby Harnden, *The Private Thoughts of Chief Justice Roberts*, TELEGRAPH (Sept. 25, 2005), https://www.telegraph.co.uk/news/worldnews/northamerica/usa/1499187/The-private-thoughts-of-Chief-Justice-Roberts.html.

[59] *See Roberts Started on Path to Success at Young Age*, WASH. TIMES (Aug. 16, 2005), https://www.washingtontimes.com/news/2005/aug/16/20050816-122951-1663r/.

[60] *Id.*

[61] *Id.*

[62] *See* Colleen Walsh, *Hard-Earned Gains for Women at Harvard*, HARV. GAZETTE (Apr. 26, 2012), https://news.harvard.edu/gazette/story/2012/04/hard-earned-gains-for-women-at-harvard/; *Roberts Started on Path to Success at Young Age*, *supra* note 59.

[63] *See* Brad Snyder, *The Judicial Genealogy (and Mythology) of John Roberts: Clerkships from Gray to Brandeis to Friendly to Roberts*, 71 OHIO ST. L.J. 1149, 1217 (2010).

[64] *See* Maki Becker, *'So Much Smarter Than Us.' School Staff Remember Bush's Top Court Pick as Supremely Talented*, N.Y. DAILY NEWS (July 24, 2005), http://www.nydailynews.com/archives/news/smarter-school-staff-remember-bush-top-court-pick-supremely-talented-article-1.639114; Peter Edidin, *Judge Roberts, Meet Daniel Webster*, N.Y. TIMES (July 31, 2005), https://www.nytimes.com/2005/07/31/weekinreview/judge-roberts-meet-daniel-webster.html; Snyder, *supra* note 63, at 1167, 1217.

[65] *See* Snyder, *supra* note 63, at 1216.

[66] *See* Matthew Continetti, *John Roberts's Other Papers,* WKLY. STANDARD (Aug. 8, 2015), https://www.weeklystandard.com/matthew-continetti/john-robertss-other-papers.

that are still not entirely clear, he decided to pursue a doctor of jurisprudence degree, enrolling in Harvard Law School and quickly establishing a reputation as both a congenial genius and an unyielding workaholic.[67] With the exception of frequent pilgrimages to Baskin-Robbins in Harvard Square to indulge in sundaes with chocolate chip ice cream and marshmallow fluff, the future Chief Justice had few noticeable vices during his law school years.[68] He was, in the words of one commentator, "a genteel, almost old-fashioned conservative who opened doors for women and stayed out of the ideological wars that were roiling the faculty."[69] Even the famously straight-laced future Supreme Court Justice David Souter engaged in sword fights and other hijinks during his days as a Harvard student, but such public displays of tomfoolery were not for Roberts.[70] Instead, his unbroken zeal for his studies led him to the second-highest position on the *Harvard Law Review*.[71] Yet the unrelenting schedule also took its toll.[72] Shortly after his law school graduation in 1979, he checked himself into a hospital, where he was treated for exhaustion.[73]

His stellar academic record at Harvard earned Roberts clerkships with two of the most influential jurists in the federal judiciary: Henry Friendly and William Rehnquist.[74] Halfway through the second of

[67] *See* Klaidman, *supra* note 56. Even here, a concern for an image of dignity and decorum may have played a role in Roberts's decision, as the future Chief Justice allegedly selected Harvard Law School rather than Stanford because his Stanford interviewer wore sandals and no tie, while his Harvard interviewer was, in Roberts's mind, properly attired. Adam M. Guren, *Alum Picked as Court Nominee*, HARV. CRIMSON (July 22, 2005), https://www.thecrimson.com/article/2005/7/22/alum-picked-as-court-nominee-john/.

[68] *See* Klaidman, *supra* note 56; Michael Levenson, *Supreme Court Justices Reminisce About Their Harvard Days*, BOS. GLOBE (Oct. 26, 2017), https://www.bostonglobe.com/metro/2017/10/26/supreme-court-justices-reminisce-about-their-harvard-days/cWGQdZMh3cs45xp2ozGuvI/story.html.

[69] Klaidman, *supra* note 56.

[70] *See e.g.*, Becker, *supra* note 64; Jeffrey Toobin, *No More Mr. Nice Guy*, NEW YORKER (May 18, 2009), https://www.newyorker.com/magazine/2009/05/25/no-more-mr-nice-guy/amp ("You couldn't think of a guy who was a straighter arrow."); Nina Totenberg, *Harvard at 200: Justices Look Back on Their Law School Days — And Beyond*, NAT'L PUB. RADIO (Oct. 31, 2017), https://www.npr.org/2017/10/31/561041265/justices-look-back-on-their-law-school-days-and-beyond-at-harvards-200th.

[71] Purdum et al., *supra* note 38. According to attorney Stephen Galebach, Roberts's position as the *Harvard Law Review*'s managing editor illustrated key facets of the future Chief Justice's persona: "Managing editor is the one who just makes sure everything is done to a high level of quality. It's the ultimate position of not injecting your own views, but allowing other people to reach high levels of scholarship." *Id.*

[72] *See* Klaidman, *supra* note 56.

[73] *Id.*

[74] *See* Klaidman, *supra* note 56; Snyder, *supra* note 63, at 1151.

these clerkships came the first presidential inauguration of Ronald Reagan, which Roberts attended as Rehnquist's guest.[75] At that ceremony, the President spoke words that Roberts later cited as one of the most important influences upon his entire career.[76] "He said, 'I do not believe in a fate that will befall us no matter what we do; I do believe in a fate that will fall on us if we do nothing,'" Roberts stated at the Reagan Presidential Library in 2006.[77] "And that is what Ronald Reagan was and is and remains today to me: a call to action."[78]

Spurred by Reagan's declarations, and aided by a call from Rehnquist to Reagan's first Attorney General, William French Smith, the twenty-six-year-old Roberts landed a job in the Justice Department.[79] Here, as in college, he quickly attained popularity for his legal acumen and his wit.[80] "He may've been double Harvard with honors," remembered Kenneth Starr, then serving as Smith's chief of staff, "but he came across as a son of the heartland."[81] He also caught Starr's attention for his ability to sidestep most instances of partisan bickering within the federal government, preferring to view all issues "through an analytical lens more than an ideological lens."[82]

Early in his Justice Department tenure, Smith assigned Roberts to prepare Sandra Day O'Connor for her upcoming confirmation hearings before the Senate Judiciary Committee.[83] His ability to anticipate the Senators' toughest questions impressed Smith enough that he gave Roberts an even more daunting task: writing a brief supporting legislation that would expressly strip the Supreme Court from appellate jurisdiction over abortion, prayer in public schools, bussing, and other controversial topics.[84] Ted Olson, the head of Smith's Office of Legal Counsel, had already advised that such a law would be unconstitutional, despite the fact that many high-ranking Republicans were strongly advocating for the passage of this

[75] Roger Parloff, *On History's Stage: Chief Justice John Roberts Jr.*, FORTUNE (Jan. 3, 2011), http://fortune.com/2011/01/03/on-historys-stage-chief-justice-john-roberts-jr/.

[76] *See id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *See* John M. Broder & Carolyn Marshall, *In Reagan's White House, A Clever, Sometimes Cocky John Roberts*, N.Y. TIMES (July 27, 2005), https://www.nytimes.com/2005/07/27/politics/politicsspecial1/in-reagans-white-house-a-clever-sometimes-cocky.html.

[81] Parloff, *supra* note 75.

[82] *See id.*

[83] *Id.*

[84] *See id.*

legislation.[85] In an abundance of caution, Smith wanted someone who was willing to rhetorically oppose the highly esteemed Olson with arguments in favor of the constitutionality of this sweeping measure.[86] Roberts proved to be up to the task, providing his Justice Department superiors with a memorandum that surgically picked apart every argument that Olson had offered.[87] Whether he actually believed that such legislation would have been productive for the nation remains unknown.[88] His ability to impress seasoned government lawyers with an argument in favor of a difficult legal position, however, was now unquestioned.[89]

While Smith ultimately sided with Olsen's opinion that this legislation would be controversial, the craftsmanship exhibited by the young Justice Department attorney from Indiana was widely noticed throughout the Reagan administration.[90] On the strength of this work, White House Counsel, Fred Fielding, recruited Roberts to join his office in November of 1982.[91] In this role, he gained Reagan's respect and confidence rather quickly, sometimes even flying on Air Force One with the President.[92] Such closeness to the Chief Executive seemed to leave an indelible mark of gratitude upon the man who would become the Chief Justice.[93] While Roberts is famously quick to praise many people, from family members to former professors to legal colleagues, Reagan seems to occupy an especially lofty place in Roberts' pantheon.[94] To the Chief Justice, Reagan was not just the "Great Communicator" of speechmaking brilliance, but "a great communicator because he communicated great ideas with the sincerity of a deep-felt and abiding belief in those ideas . . . ."[95]

In the White House, Roberts returned to a role that he had held since his boarding school days, serving as a kind of gatekeeper of the

[85] *See id.*
[86] *See id.*
[87] *See id.*
[88] *See id.*
[89] *See id.* ("Roberts' resulting memorandum awed Starr and Olson with its scholarship, craftsmanship, and the persuasiveness of its writing.").
[90] *See id.*; R. Jeffrey Smith et al., *Documents Show Roberts Influence in Reagan Era*, WASH. POST (July 27, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/07/26/AR2005072602070.html.
[91] *See* Parloff, *supra* note 75.
[92] *See id.*; Broder & Marshall, *supra* note 80.
[93] *See* Parloff, *supra* note 75.
[94] *See id.*
[95] *See id.*

institution's reputation.[96] His decisions regarding preserving public respect of the presidency came without any apparent preference toward either major political party.[97] When fundamentalist Christian leader Bob Jones, an outspoken Reagan supporter, started seeking political and financial favors from the White House, Roberts declared that the White House should tell Jones to "go soak his head."[98] When a fourteen-year-old girl scout tried to sell cookies to the President, Roberts commenced a lengthy ethical investigation, sincerely calling the Girl Scout a "little huckster" before finally giving his approval for Reagan to purchase a box.[99]

He seemed to reserve his strongest repudiation for Michael Jackson.[100] When asked for his advice about whether Reagan should present "[T]he King of Pop" with a special White House award, Roberts recoiled in horror.[101] In no uncertain terms, he declared that the superstar singer was not a human being with whom President Reagan—or any President—should ever associate.[102] Any links between Jackson and the White House, according to Roberts, risked undermining the credibility of the Oval Office and, perhaps, jeopardizing the future morals of the entire nation.[103]

> If one wants the youth of America and the world sashaying around in garish sequined costumes, hair dripping with pomade, body shot full of female hormones to prevent voice change, mono-gloved, well, then, I suppose "Michael," as he is affectionately known in the trade, is in fact a good example.[104]

His ultimate conclusion: "Quite apart from the problem of appearing to endorse Jackson's androgynous life style, a presidential award would be perceived as a shallow effort by the President to share in the constant publicity surrounding Jackson."[105]

[96] *See* Harnden, *supra* note 58.
[97] *See id.*
[98] *See id.*
[99] *See id.*
[100] *See* Dana Milbank, *Young Roberts to King of Pop: Request Denied*, WASH. POST (Aug. 16, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/08/15/AR2005081501387.html?noredirect=on.
[101] *See id.*
[102] *See id.*
[103] *See* Dana Milbank, *Roberts's Rules of Decorum*, WASH. POST (Aug. 20, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/08/19/AR2005081901801.html.
[104] *Id.*
[105] *Id.*

On many of the larger political issues of the 1980s, however, Roberts continued to maintain a publicly moderate stance.[106] Unlike many of his fellow legal travelers in the Reagan administration, he did not play a high-profile role within the Federalist Society for Law and Public Policy Studies, known as the organization of conservative and libertarian scholars seeking to reform the American legal system in accordance with supposedly "originalist" or "textualist" constitutional interpretations.[107] Nor was he especially outspoken about many of the other legal and political causes that seemed to stimulate most of the other high-ranking lawyers of the so-called "Reagan revolution."[108] Even when the Judiciary Committee waded through tens of thousands of documents prior to Roberts' confirmation hearings, no one could find anything that conclusively disclosed Roberts' personal feelings regarding hot-button issues like abortion, affirmative action, and the powers of law enforcement officers.[109] It was as if Roberts had meticulously prepared for such extreme scrutiny, ensuring that he would never write or say anything about a social or political matter that could eventually stand between him and a federal judgeship.[110] Indeed, some commentators believe that the ever-farsighted Roberts had done exactly that, ensuring that his confirmation hearings were only the finale of a couple of decades of preparation.[111]

[106] *See* Klaidman, *supra* note 56.

[107] *See id.*; *It Depends on What 'Member' Means*, N.Y. TIMES (July 26, 2005), https://www.nytimes.com/2005/07/26/opinion/it-depends-on-what-member-means.html; *Our Background*, FEDERALIST SOC'Y, https://fedsoc.org/our-background (last visited Dec. 4, 2018). During Roberts's confirmation hearings, the White House denied that Roberts ever served in any capacity with the Federalist Society, but a Washington Post article noted that Roberts was listed in a leadership directory as a member of the steering committee for the Federalist Society's Washington chapter. *See It Depends on What 'Member' Means*, *supra*.

[108] Klaidman, *supra* note 56 ("Roberts was on the ground floor of the Reagan legal revolution—but he didn't seem to have the ideological zeal of many of his colleagues, the so-called movement lawyers."). This does not, however, mean that Roberts was completely mute on politically conservative stances during this time in his career. *See* Smith et al., *supra* note 90 ("Roberts argued for restrictions on the rights of prisoners to litigate their grievances; depicted as 'judicial activism' a lower court's order requiring a sign-language interpreter for a hearing-impaired public school student who had already been given a hearing aid and tutors; and argued for wider latitude for prosecutors and police to question suspects out of the presence of their attorneys.").

[109] *See* Ellen Goodman, *Who Is John Roberts?*, N.Y. TIMES (Sept. 7, 2005), https://www.nytimes.com/2005/09/07/opinion/who-is-john-roberts.html ("We've spent months poring over 60,000 pages from the National Archives and reams of personal profiles for clues about how John Roberts would rule on the highest court in the land. And all we got from this paper trail is a handful of confetti.").

[110] *See* Parloff, *supra* note 75.

[111] David Bernstein, *A Thought About Chief Justice Roberts*, VOLOKH CONSPIRACY (June 30,

In 1986, Roberts left the White House and joined the appellate unit at the law firm now known as Hogan Lovells.[112] While his years with the Justice Department and the White House evidently left a significant impression upon him, it was his time with Hogan Lovells that truly introduced Roberts to the nation's legal community.[113] As an advocate before the Supreme Court, Roberts displayed a level of mastery that was applauded by his clients, his bosses, and even the notoriously hard-to-impress justices of the Court.[114] Just as he had successfully predicted the Senators' questions when preparing O'Connor for her confirmation hearing, he possessed an uncanny knack for anticipating the justices' toughest queries, never breaking a sweat in the famously pressure-packed atmosphere of an oral argument for the Court.[115] All questions received thorough but concise responses, delivered in plain language with easily understood analogies and the occasional joke, the same brilliant yet affable manner that had distinguished Roberts since his law school years.[116] For these performances, Tom Goldstein, one of the nation's preeminent Supreme Court advocates and the founder of the highly regarded SCOTUS blog, anointed Roberts as "the best Supreme Court advocate of his generation."[117] Other commentators with similarly high levels of expertise provided equivalently high praise for Roberts' work.[118]

Roberts' apparent ease at the Court's lectern hid an excruciatingly rigorous manner of preparation.[119] In the privacy of his office or his home, he would write on a legal pad hundreds of questions that one

2012), http://volokh.com/2012/06/30/a-thought-about-chief-justice-roberts/ ("When Roberts was nominated to the Supreme Court, one especially remarkable biographical detail came to light: every one of his friends interviewed by the media, conservative, liberal, and otherwise, swore they had never heard him express any opinion in private conversation on any controversial Supreme Court cases."); Klaidman, *supra* note 56 ("One former colleague says Roberts was ever mindful that high appointments in the executive branch or to the courts were a serious possibility. He didn't want to jeopardize those chances by stepping on a political land mine.").

[112] *See* Purdum et al., *supra* note 38.

[113] *See id.*; Michael Grunwald, *Roberts Cultivated an Audience with Justices for Years*, WASH. POST (Sept. 11, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/09/10/AR2005091000807.html?noredirect=on.

[114] *See* Grunwald, *supra* note 113; Parloff, *supra* note 75.

[115] *See* Grunwald, *supra* note 113; Parloff, *supra* note 75.

[116] *See* Charles Lane, *Nominee Excelled as an Advocate Before Court*, WASH. POST (July 24, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/07/23/AR2005072300881.html; Purdum et al., *supra* note 38.

[117] Parloff, *supra* note 75.

[118] *See* Grunwald, *supra* note 113; Klaidman, *supra* note 56; Lane, *supra* note 116; Purdum et al., *supra* note 38.

[119] *See* Lane, *supra* note 116; Parloff, *supra* note 75.

of the justices might pose.[120] Then he would write all of the questions on flash cards, shuffle the deck, and test himself by pulling random cards at various moments throughout every day leading up to the oral argument.[121] By doing so, he readied himself to answer any question that could possibly be asked in any order that it was asked, ensuring that he was able to transition quickly from one line of reasoning to another.[122] His work did not end there, either. Every possible contingency received his personal scrutiny, including bringing cold medicine to every oral argument in case he happened to develop a sniffle or a cough immediately prior to his appearance before the Court.[123]

During a speech in 2004, Roberts compared his preparations for oral arguments with the work of the stonemasons who build cathedrals in medieval times.[124] Just as a mason would spend months carving the details of gargoyles that could not even be seen from the cathedral floor, Roberts explained, a successful Supreme Court advocate needed to "prepare, analyze, and rehearse answers to hundreds of questions, questions that in all likelihood will actually never be asked by the Court."[125] Stonemasons approached their craft with such reverence because they believed that "they were carving for the eye of God."[126] Roberts insisted that Supreme Court advocates needed to perform their work with similar veneration for a larger purpose.[127] "[An advocate before the Court] must appreciate that what happens here, in mundane case after mundane case, is extraordinary—the vindication of the rule of law," Roberts said, "and that he as the advocate plays a critical role in the process."[128]

At Hogan & Hartson, Roberts played this critical role with his customary blend of tremendous legal talent and extraordinary personal caution.[129] E. Barrett Prettyman, Jr., the head of the Supreme Court practice group during Roberts's tenure with the law firm, later recalled that Roberts always came to the firm's cafeteria clad formally in coat and tie, even after "business casual" became the

[120] *See* Parloff, *supra* note 75.
[121] *See id.*
[122] *See id.*
[123] *See* Klaidman, *supra* note 56.
[124] *See* Parloff, *supra* note 75.
[125] *Id.*
[126] *Id.*
[127] *See id.*
[128] *Id.*
[129] *See* Lane, *supra* note 116; Grunwald, *supra* note 113; Toobin, *supra* note 70; Purdum et al., *supra* note 38.

office's customary manner of dress.[130] "He has a private side to him, which he watches carefully," Prettyman told one reporter.[131] "He's a fellow who has carefully seemed totally outward in everything but who's—I don't want to say 'guarded'—he doesn't just say anything that happens to occur to him."[132] Reflecting upon this combination of skillful professional advocacy and wise personal non-commitment, Prettyman noted that Roberts was "the only person I've ever seen who was actually headed toward [the position of a federal appellate judgeship], and acted accordingly, before he ever got into serious consideration."[133]

The next step toward achieving that "serious consideration" for the federal judiciary came in October 1989, when Kenneth Starr—formerly serving as the Solicitor General for President George H.W. Bush—asked Roberts to return to government service as his principal deputy.[134] Roberts accepted, resuming the close relationship between the former Reagan administration companions.[135] Starr would later describe Roberts as his "very closest, most trusted advisor," noting that the future Chief Justice was "involved personally in substantially every single case of moment."[136] Not surprisingly, this meant that most of Roberts' nineteen appearances representing the federal government before the Supreme Court reflected typical Bush-era viewpoints such as limiting the exercise of affirmative action programs, supporting the use of the death penalty, opposing abortion, and preventing defense attorneys from excluding evidence as inadmissible in criminal trials.[137] Of course, it is difficult to discern whether Roberts personally espoused these viewpoints, or whether he simply was zealously representing the interests of a client—the President—who supported these measures.[138] While Roberts almost

[130] *See* Parloff, *supra* note 75.

[131] *Id.*

[132] *Id.*

[133] *Id.* The bond that formed between Prettyman and Roberts is all the more notable given that Prettyman describes himself as the political opposite of Roberts. *See id.*; *see also* Toobin, *supra* note 70 ("John's a very, very conservative fellow, and I'm the opposite, but that was never a problem for us . . . .").

[134] *See* Parloff, *supra* note 75.

[135] *See id.*

[136] Parloff, *supra* note 75. Ironically, Starr would later appear bitter over the fact that his old friend had been selected for a Supreme Court seat that Starr believed he should have received. *See* Ron Elving, *Ken Starr's Memoir 'Contempt' Looks at the Rocky Road to Clinton Impeachment*, NAT'L PUB. RADIO (Sept. 10, 2018), https://www.npr.org/2018/09/10/643124271/ken-starr-s-new-memoir-on-the-rocky-road-to-impeachment.

[137] *See* Parloff, *supra* note 75.

[138] *See id.*

certainly had an opportunity to offer his opinions on all of these cases to both Bush and Starr, the American public still does not know whether Roberts' personal views in each of these cases—or any of these cases—ultimately proved to be the stance that Bush and Starr ordered him to take.[139] True to form, Roberts never has revealed the full content of these back-office deliberations, leaving his exact position in each of these cases known only to him and his closest associates.[140]

Then, in 1992, Bush nominated Roberts for a seat on the United States Court of Appeals for the District of Columbia Circuit.[141] If Roberts had indeed carefully crafted his life in the law to position himself for a federal judgeship, the nomination likely felt like a coronation, given that the D.C. Circuit often serves as a stepping stone for talented jurists en route to the Supreme Court.[142] Yet a heavy obstacle awaited him: a Senate controlled by the Democrats, most of whom had no interest in confirming anyone appointed by a Republican president with a presidential election only a few months away.[143] For the first time in his carefully choreographed life, Roberts found that he was unable to dodge the professional impact of political pressures. Believing that Attorney General William Barr was not pushing hard enough for his confirmation, and angry that merit alone would not lead him to a position that he believed he had earned, he allowed a rare look beneath the surface of the veneer that

[139] *See id.* (finding that Roberts, as Starr's deputy, was zealously representing a client when he made these arguments and did not necessary personally espouse all of the positions for which he argued). At the same time, however, one could argue that Roberts had shirked his legal and ethical duties to the United States if he had argued for any positions that he considered to be repugnant to the interests of justice. *See* Lincoln Caplan, *The Supreme Court's Advocacy Gap*, THE NEW YORKER (Jan. 6, 2015), https://www.newyorker.com/news/news-desk/supreme-court-advocacy-gap ("As an S.G. once explained, 'The Solicitor General is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. My client's chief business is not to achieve victory, but to establish justice.'").

[140] *See* Jo Becker, *Work on Rights Illuminate Roberts's Views*, WASH. POST (Sept. 8, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/09/07/AR2005090702394.html.

[141] *See* David Stout & Elisabeth Bumiller, *President's Choice of Roberts Ends a Day of Speculation*, N.Y. TIMES (July 19, 2005), https://www.nytimes.com/2005/07/19/politics/politicsspecial1/presidents-choice-of-roberts-ends-a-day-of.html.

[142] *See* Brad Plumer, *The D.C. Circuit Is the Court at the Center of the Filibuster Fight. Here's Why It Matters.*, WASH. POST (Nov. 21, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/11/21/the-d-c-circuit-court-was-at-the-center-of-the-filibuster-fight-heres-why-it-matters/?utm_term=.b8ccb67e410b.

[143] *See* Jonathan H. Adler, *Senator Biden's History of Stalling Judicial Nominees*, NAT'L REVIEW (Feb. 27, 2016), https://www.nationalreview.com/bench-memos/biden-blocked-more-roberts/; Toobin, *supra* note 70.

he had spent an entire career polishing.[144] "It was the only time I ever saw John really upset and wear his frustration so openly," one Justice Department colleague told *Newsweek* in 2012.[145] In the end, though, the Bush Justice Department affirmed Roberts' worst fears, telling him that they could not overspend their end-of-term political capital by fighting the Democrats too vehemently for his confirmation.[146]

After Bill Clinton's inauguration, with his hopes for the D.C. Circuit judgeship now plainly out of reach, Roberts returned to the appellate practice group at Hogan Lovells.[147] By the time Roberts moved on to the federal judiciary, he had increased his number of oral arguments before the Supreme Court to an impressive total of thirty-nine.[148] Yet the most momentous event during his second stint in private practice occurred when he re-connected with attorney Jane Sullivan, whom Roberts had first met in 1991 during a social gathering at a Delaware beach.[149] Like Roberts, Sullivan was born into an Irish Catholic family of relatively modest means, amassed an impressive academic record in college and law school, and clerked for a federal appellate judge.[150] These commonalities blossomed into a courtship, and then a wedding of the two forty-one-year-old attorneys in July 1996.[151] Four years later, the couple adopted two infant children, Josie and Jack.[152] Plenty of colleagues viewed both marriage and fatherhood as crucial milestones in Roberts' life lessons that aspects of his existence could be spontaneous and unstructured without proving to be personally and professionally disastrous.[153]

A year after Roberts became a father, he became a candidate for the D.C. Circuit Court of Appeals for a second time, courtesy of a

[144] *See* Klaidman, *supra* note 56.

[145] *Id.*

[146] *See id*; Neil A. Lewis, *The 1992 Campaign; Selection of Conservative Judges Insures a President's Legacy*, N.Y. TIMES (July 1, 1992), https://www.nytimes.com/1992/07/01/us/the-1992-campaign-selection-of-conservative-judges-insures-a-president-s-legacy.html.

[147] *See* Parloff, *supra* note 75.

[148] Caplan, *supra* note 139. Roberts was well-compensated for this work, making more than a million dollars annually for his Supreme Court advocacy during this period. Toobin, *supra* note 70.

[149] Klaidman, *supra* note 56; Parloff, *supra* note 75.

[150] *See* Klaidman, *supra* note 56; Niall O'Dowd, *Jane Sullivan Robert's Rules for Success*, IRISH AM. (Aug./Sept. 2009), https://irishamerica.com/2009/08/jane-sullivan-roberts-rules-for-success/; Parloff, *supra* note 75.

[151] *See Weddings; Jane Sullivan, John Roberts Jr.*, N.Y. TIMES (July 28, 1996), https://www.nytimes.com/1996/07/28/style/weddings-jane-sullivan-john-roberts-jr.html.

[152] Parloff, *supra* note 75.

[153] *See* Klaidman, *supra* note 56.

nomination by newly inaugurated President George W. Bush.[154] Again, though, a Senate embroiled with various behind-the-scenes political machinations confronted him.[155] Two more years of waiting ensued.[156] Finally, in May 2003, he received the confirmation for which he had thirsted.[157] His voting record during his brief tenure on this court proved to be solid but unspectacular, devoid of any glaring errors but also lacking any landmark majority opinions or dissents.[158]

Still, the totality of Roberts' career convinced the Bush White House that Roberts belonged in an even loftier judicial post.[159] When O'Connor announced her intention to retire from the Court in July 2005, Bush nominated Roberts to replace her.[160] Then, when Rehnquist passed away on September 3 of that year, Bush announced that he was nominating Roberts to fill Rehnquist's shoes as Chief Justice instead.[161]

[154] *See* Klaidman, *supra* note 56; Parloff, *supra* note 75; Adam J. White, *Judging Roberts*, WLY. STANDARD (Nov. 23, 2015), https://www.weeklystandard.com/adam-j-white/judging-roberts. Roberts's efforts on Bush's behalf in the recount litigation during the contested presidential election of 2000 likely solidified Roberts's place on Bush's radar for this appointment. *See* Toobin, *supra* note 70.

[155] *See* Klaidman, *supra* note 56; Parloff, *supra* note 75; Toobin, *supra* note 70.

[156] *See* Parloff, *supra* note 75; Toobin, *supra* note 70.

[157] *See* Parloff, *supra* note 75. At his confirmation hearings for this judgeship, Roberts addressed the question of whether he was an "originalist," a "textualist," or a disciple of any other school of jurisprudential philosophy with the following response: "I don't have an overarching, guiding way of reading the Constitution. I think different approaches are appropriate in different types of constitutional provisions." White, *supra* note 154. Some commentators have said that this incremental, case-by-case approach is the manner in which Roberts has lived his entire life, avoiding doctrinal labels and political battles and seeking instead ways to build consensus with an eye toward addressing the issue at hand. *See* Purdum et al., *supra* note 38.

[158] *See* R. Jeffrey Smith & Jo Becker, *Record of Accomplishment—and Some Contradictions*, WASH. POST (July 20, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/07/19/AR2005071902065.html ("Roberts's short time on the bench, coupled with the relative paucity of his writings, has left critics and potential supporters with little by which to judge how he will vote on the Supreme Court."). Notably, the future Chief Justice, who later praised the importance of achieving consensus among the justices of the Court, wrote all but four of his forty-three D.C. Circuit majority opinions for unanimous panels. Laura Krugman Ray, *The Style of a Skeptic: The Opinions of Chief Justice Roberts*, 83 IND. L.J. 997, 998–99 (2008). Roberts wrote only two dissents during his D.C. Circuit tenure, one of which focused solely on a brief procedural matter and never addressed the merits of the case. *See* United States v. Jackson, 415 F.3d 88, 101 (D.C. Cir. 2005) (Roberts, *J.*, dissenting); AFL-CIO v. Chao, 409 F.3d 337, 391 (D.C. Cir. 2005) (Roberts, *J.* dissenting); Ray, *supra* at 998–99.

[159] *See* Parloff, *supra* note 75; Stout & Bumiller, *supra* note 141.

[160] *See* Parloff, *supra* note 75.

[161] *See id.*; Peter Baker, *Bush Nominates Roberts as Chief Justice*, WASH. POST (Sept. 6, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/09/05/AR2005090500173.html.

At his confirmation hearing, Roberts displayed the same quick-hitting but eternally disarming nature that had impressed so many Supreme Court justices during his oral arguments.[162] He said nothing during the hearing that was particularly earth-shattering or illuminating, following the intentionally evasive "judges don't make law" rhetoric that every Supreme Court nominee since Robert Bork has been carefully coached to follow.[163] Yet, with responses that were eloquent without becoming overly high-minded, deferential without sounding worshipful, and humorous without acting flippant, he succeeded in charming Senators on all sides of the political aisle, including politicians who appeared dead-set against Roberts' confirmation when the hearing began.[164] A confirmation to become the Court's "first among equals" by a 78 to 22 margin was the result of a performance that both liberal and political commentators still consider to be a masterpiece.[165]

[162] *See* Parloff, *supra* note 75; *see also* Klaidman, *supra* note 56 ("[Roberts] put on a virtuoso performance at his confirmation hearing, dazzling senators with his encyclopedic knowledge of constitutional law and Supreme Court precedents while casting himself as an avatar of judicial modesty."); Toobin, *supra* note 70 ("[Roberts] charmed the Senate Judiciary Committee at his confirmation hearing").

[163] *See* Linda Greenhouse, *An Opening Performance Worthy of an Experienced Lawyer*, N.Y. TIMES (Sept. 13, 2005), https://www.nytimes.com/2005/09/13/politics/politicsspecial1/an-opening-performance-worthy-of-an-experienced.html; *see also* Chris Good, *Elena Kagan and the 'Vapid and Hollow Charade'*, ATLANTIC (May 11, 2010), https://www.theatlantic.com/politics/archive/2010/05/elena-kagan-and-the-vapid-and-hollow-charade/56547/ (quoting future Supreme Court Justice Elena Kagan as stating that the Senate confirmation hearings had devolved into an unimaginative parody since the Senate's rejection of Robert Bork); Clyde Haberman, *Want to Know Where Supreme Court Nominees Stand? Don't Bother Asking*, N.Y. TIMES (Mar. 19, 2017), https://www.nytimes.com/2017/03/19/us/supreme-court-bork-hearings.html (discussing how Supreme Court nominees tackle the confirmation process, characterizing it as a linguistictype of dodge ball); Dahlia Lithwick, *Airless. Insular. Clubby. Smug.*, SLATE (Mar. 29, 2017), https://slate.com/news-and-politics/2017/03/the-grossness-of-neil-gorsuchs-hearings-made-the-democrats-filibuster-possible.html (asserting that Supreme Court nominees are now coached not to reveal their true viewpoints on controversial issues after Robert Bork's candid responses at his confirmation hearings led to his rejection by the Senate).

[164] *See* Klaidman, *supra* note 56; Parloff, *supra* note 75. Even during the Senate's confirmation hearings for Samuel Alito in 2006, many senators still were heavily quoting remarks that Roberts made during his confirmation hearings. Dahlia Lithwick, *Alito Goes a Long Way: But He's Still No John Roberts*, SLATE (Jan. 9, 2006), http://www.slate.com/articles/news_and_politics/jurisprudence/features/2006/confirmation_report/alito_goes_a_long_way_but_hes_still_no_john_roberts.html. Then again, this bipartisan acclaim for Roberts was exactly what some observers predicted prior to the hearings. *See, e.g.*, Smith & Becker, *supra* note 158 ("[Roberts's] strong relationships on both sides of the Beltway's partisan divide could help smooth his Senate confirmation, enabling him to convince conservatives that he won't be the next David H. Souter without worrying Democrats that he will be the next Antonin Scalia.").

[165] *See* Charles Babington & Peter Baker, *Roberts Confirmed as 17th Chief Justice*, WASH. POST (Sept. 30, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/09/29/AR2005092900859.html; Parloff, *supra* note 75.

Roberts's voting record during his years on the Court has been well-scrutinized by many commentators.[166] Beyond his actual casework, however, three additional aspects of his Supreme Court tenure merit a mention in this section, as they seem to once again affirm some fundamental truths about Roberts's character and tendencies. First on this list is the debacle that surrounded a typically bland occasion: the Chief Justice's administration of the oath of office to an incoming President of the United States.[167] In the days leading up to Barack Obama's inauguration, Roberts decided that he would abandon the traditional cue card bearing the presidential oath, instead opting to memorize the thirty-five-word statement.[168] He walked around his house reciting the oath as if he were preparing for another oral argument before the Court, repeating the words so many times that his wife quipped that even "the dog thinks it's the [P]resident."[169]

At the inauguration, however, the normally-unflappable Roberts encountered something unexpected.[170] During the administration of the oath, "Roberts had initially misplaced the word 'faithfully,' perhaps rattled after Obama Jumped the gun a bit in reciting the first words back."[171] With his memory suddenly cloudy, the Chief Justice proceeded to forget some of the words of the oath and say some of the other words out of order.[172] Following the ceremony, rumors ran rampant about Roberts's supposed political motivations in botching the oath, and a number of constitutional lawyers

[166] *See, e.g.*, Jack M. Beerman, *Chevron at the Roberts Court: Still Failing After All These Years*, 83 FORDHAM L. REV. 731, 731–33 (2014); Kiel Brennan-Marquez, *The Philosophy and Jurisprudence of Chief Justice Roberts*, 2014 UTAH L. REV. 137, 138 (2014); Ronald K. L. Collins, *Exceptional Freedom: The Roberts Court, the First Amendment, and the New Absolutism*, 76 ALB. L. REV. 409, 413, 438 (2013); Brianne J. Gorod, *The First Decade of the Roberts Court: Good for Business Interests, Bad for Legal Accountability*, 67 CASE W. RES. 721, 721–22 (2017); Thomas R. Hensley et al., *The First-Term Performance of Chief Justice John Roberts*, 43 IDAHO L. REV. 625, 631 (2007); Klaidman, *supra* note 56; Pomerance, *supra* note 36, at 410–11; Christopher E. Smith, *The Changing Supreme Court and Prisoners' Rights*, 44 IND. L. REV. 853, 881 (2011); Geoffrey R. Stone, *Citizens United and Conservative Judicial Activism*, U. ILL. L. REV. 485, 487 (2012); Keith E. Whittington, *The Least Active Supreme Court in History? The Roberts Court and the Exercise of Judicial Review*, 89 NOTRE DAME L. REV. 2219, 2220, 2245, 2246 fig.4, 2247 fig.5 (2014).

[167] Toobin, *supra* note 70.

[168] *Id.*

[169] TOOBIN, *supra* note 55, at 9.

[170] Ewen MacAskill, *Obama Retakes Oath of Office After Inauguration Stumble*, GUARDIAN (Jan. 22, 2009), https://www.theguardian.com/world/2009/jan/22/obama-inauguration-second-swearing-in-ceremony.

[171] Carolyn Lochhead, *Obama Retakes Oath to Err on Side of Law*, S.F. CHRON. (Jan. 22, 2009), https://www.sfgate.com/politics/amp/Obama-retakes-oath-to-err-on-side-of-law-3253825.php.

[172] *See* Toobin, *supra* note 70.

recommended that Obama re-take the oath "just to be safe."[173] In the end, in "an abundance of caution," the Obama administration asked Roberts to come to the White House and hold a private swearing-in ceremony with the President, using the correct words of the oath this time.[174] Still, Roberts insisted on reciting the oath from memory even during this second take, doggedly refusing to give in to the imperfection of reading the oath from a cue card.[175]

A second incident involving Roberts and Obama occurred during Obama's State of the Union Address in January 2010.[176] During his speech, with Roberts and many of the Associate Justices of the Court in the audience, Obama chastised the Supreme Court's decision in *Citizens United v. Federal Election Commission*,[177] condemning the Court's majority opinion regarding removing campaign finance barriers.[178] As the cameras swept over the group of justices sitting in the first two rows, Justice Alito scowled, shook his head, and seemed to mouth the words "not true."[179]

Roberts did not say anything at the time.[180] Later, though, the Chief Justice devoted a significant portion of an appearance at the University of Alabama to his opinions about Obama's conduct.[181] Responding to a question from a student, Roberts stated that the State of the Union Address had "degenerated [in]to a political pep rally."[182] "I have no problem with [criticism of the Court]," Roberts declared.[183] "On the other hand, . . . there is the issue of the setting, the circumstances and the decorum," Roberts uttered. Roberts further stated, "[t]he image of having the members of one branch of government standing up, literally surrounding the Supreme Court,

[173] Carolyn Lochhead, *Experts Say Obama Should Retake The Oath*, S.F. CHRON. (Jan. 21, 2009), http://www.sfgate.com/politics/amp/Experts-say-Obama-should-retake-the-oath-3253884.php.

[174] Scott Horsley & Robert Siegel, *Obama Retakes Oath of Office*, NAT'L PUB. RADIO (Jan. 21, 2009), https://www.npr.org/templates/story/story.php?storyId=99681708.

[175] TOOBIN, *supra* note 55, at 15.

[176] Associated Press, *Chief Justice Found State of the Union Scene 'Troubling'*, WASH. POST (Mar. 10, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/03/09/AR2010030903672.html [hereinafter "*State of Union Scene Troubling*"].

[177] Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2009).

[178] Adam Liptak, *Supreme Court Gets a Rare Rebuke, in Front of a Nation*, N.Y. TIMES (Jan. 28, 2010), https://www.nytimes.com/2010/01/29/us/politics/29scotus.html.

[179] *Id.*

[180] *See* Liptak, *supra* note 178; Associated Press, *supra* note 176.

[181] *See* Associated Press, *supra* note 176.

[182] *Id.*

[183] David G. Savage, *Chief Justice Unsettled by Obama's Criticism of Supreme Court*, L.A. TIMES (Mar. 10, 2010), http://articles.latimes.com/2010/mar/10/nation/la-na-roberts-speech10-2010mar10.

cheering and hollering . . . while the [C]ourt—according to the requirements of protocol—has to sit there expressionless, I think is very troubling."[184]

Lastly, it is worthwhile to note Roberts' stance on a recurring ritual that plenty of Supreme Court justices have treated with glibness, if not outright disdain.[185] On most of the days when the Court holds oral arguments, the proceedings begin with the ceremonial admission of attorneys to the Supreme Court Bar.[186] Only a small number of the attorneys who participate in these ceremonies ever actually practice before the Supreme Court, leading many of the justices to view these proceedings as a waste of time.[187] Roberts, however, takes great pains to welcome each attorney to the Supreme Court Bar, offering personal attention to every lawyer and conducting the rite with the utmost formality and gravity.[188] "He projects qualities that fit his formal role as Chief Justice of the United States," wrote journalist and Court commentator Lincoln Caplan.[189] "His manner conveys the sense that, while his work is primarily at the Court, the job calls for him to go about it with a sense of duty to the nation outside the cloistered courtroom, made tangible in the far-flung states the lawyers represent."[190]

Yet this devotion to the minute details of this ceremonial function should not surprise anyone who considers the experiences and lessons that has brought the Chief Justice to this point in his life.[191] From student council in boarding school to the most visible seat on the loftiest tribunal in the federal judiciary, Roberts has consistently displayed a burning desire to do precisely the right thing at all times.[192] No task is too minuscule, no detail is too insignificant, no moment is too pedestrian to risk a lack of rigorous preparation.[193] He

[184] Linda Feldmann, *Chief Justice John Roberts and Obama White House: A Tit for Tat*, CHRISTIAN SCI. MONITOR (Mar. 10, 2010), https://www.csmonitor.com/USA/Politics/2010/0310/Chief-Justice-John-Roberts-and-Obama-White-House-a-tit-for-tat.

[185] *See* Toobin, *supra* note 70.

[186] *See* Lincoln Caplan, *John Roberts's Court*, NEW YORKER (June 29, 2015), https://www.newyorker.com/news/news-desk/the-chief-justice/amp; Toobin, *supra* note 70.

[187] *See* Toobin, *supra* note 70 ("[Former Chief Justice William] Rehnquist barely tolerated the practice, rushing through it and mumbling the names, and several colleagues (notably [Justice David] Souter) display an ostentatious boredom that verges on rudeness.").

[188] *See* Caplan, *supra* note 186; Toobin, *supra* note 70.

[189] Caplan, *supra* note 186.

[190] *Id.*

[191] *See, e.g.*, Jones, et al., *supra* note 54; Parloff, *supra* note 75; Purdum et al., *supra* note 38.

[192] *See, e.g.*, Jones, et al., *supra* note 54; Purdum et al., *supra* note 38; TOOBIN, *supra* note 55.

[193] *See, e.g.*, Klaidman, *supra* note 56; Lane, *supra* note 116; Purdum et al., *supra* note 38.

has managed every assignment with brilliantly orchestrated craftsmanship, an ability to anticipate every argument and to develop a counter-argument of his own, and has managed his personal life with the same intensity and constant care.[194] Obtaining and maintaining decorum is essential.[195] Establishing and preserving the reputation and the legacy of any institution that he represents is an objective of paramount importance.[196] An extraordinary command of the law, therefore, is only part of the identity of this Chief Justice's identity.[197] Ensuring that the general public holds a high level of respect, if not outright reverence for the Court, also ranks high on the list of daily goals.[198]

## III. THOSE WHO WALKED BEFORE HIM: THREE KEYSTONE MENTORS OF CHIEF JUSTICE ROBERTS

For centuries, intergenerational mentorship has stood as a bulwark of the legal profession.[199] It is therefore unsurprising that during modern-day confirmation hearings, interviews, roundtables, and other public forums, jurists are often quizzed about prior judges who have served as mentors to them.[200] A mentor's guidance, after

[194] *See, e.g.*, Lane, *supra* note 116; Parloff, *supra* note 75; Purdum et al., *supra* note 38.

[195] *See, e.g.*, Grunwuld, *supra* note 113; Huffstutter, *supra* note 55; Parloff, *supra* note 75; Purdum et al., *supra* note 38; Toobin, *supra* note 70.

[196] Even the best man at Roberts's wedding, Paul Mogin, remarked that the Chief Justice has never been a man willing to do anything that seems to violate a deeply rooted sense of decorum. Purdum et al., *supra* note 38. "I think institutions have been important to him in his life, like Harvard, the Catholic Church, and the Supreme Court," Mogin said to The New York Times after George W. Bush nominated Roberts to the Supreme Court. *Id.* "He's not likely to be anybody to do anything too radical." *Id.*

[197] *See* Grunwuld, *supra* note 113.

[198] *See* Jeffrey Rosen, *Roberts's Rules*, ATLANTIC (Jan. 2007), https://www.theatlantic.com/magazine/archive/2007/01/robertss-rules/305559/ (discussing the importance of the Supreme Court as an institution).

[199] *See, e.g.*, Ari Kaplan, *Mentoring in the Legal Profession Has Had to Adapt to a Changing World*, AM. BAR ASS'N J. (May 18, 2018), http://www.abajournal.com/news/article/mentoring_in_the_legal_profession_has_had_to_adapt_to_a_changing_world/; *Section Mentoring Program*, N.Y. ST. B. ASS'N, http://www.nysba.org/LELSMentorProgram.aspx; Parloff, *supra* note 75.

[200] *See, e.g.*, Courtney Douglas, *Justice Ruth Bader Ginsburg Speaks on the Court, the State of Women's Rights, and a Meaningful Life*, STANFORD DAILY (Feb. 7, 2017), https://www.stanforddaily.com/2017/02/07/justice-ruth-bader-ginsburg-speaks-on-the-court-the-state-of-womens-rights-and-a-meaningful-life/; David Gialanella, *Alito Recalls Garth as 'Epitome of Dedication'*, N.J. L.J. (Sept. 27, 2016), https://www.law.com/njlawjournal/almID/1202768638909/Alito-Recalls-Garth-as-Epitome-of-Dedication&curindex=5/; David D. Kirkpatrick, *Judge's Mentor: Part Guide, Part Foil*, N.Y. TIMES (June 21, 2009), https://www.nytimes.com/2009/06/22/us/politics/22mentors.html.

all, can leave an indelible imprint upon the mindset of a mentee.[201] A mentor whom a mentee viewed as a judicial paragon will almost certainly influence that individual's viewpoints and processes when he or she gains the opportunity to play the judicial role.[202]

During his decades of public life, Roberts has paid homage to several prior judicial leaders.[203] He has praised the writings of Robert Jackson, a sentiment that seems to be virtually unanimous among judges and judicial commentators alike.[204] Roberts has stressed the importance of collegiality among the bench, likely admiring the record of Justice William Brennan and Chief Justice John Marshall, stating that he admired their ability to build consensus across political party lines even in the midst of extremely divisive issues.[205] He has discussed his admiration of Felix Frankfurter, another opinion that is widely shared among many Court historians and many members of the judicial branch.[206] Yet the justices who appear to have the greatest influence over the Chief Justice are John Marshall Harlan, the so-called "Great Dissenter" of the Warren Court; Henry Friendly, the famed Second Circuit judge for whom Roberts clerked immediately after the end of Roberts's law school days; and William Rehnquist, Roberts's former boss who spent plenty of time as a "Great Dissenter" as well before leading the

[201] *See* William E. Nelson, et al., *The Liberal Tradition of the Supreme Court Clerkship: Its Rise, Fall, and Reincarnation?*, 62 VAND. L. REV. 1749, 1751, 1755–1756 (2009) (discussing the powerful imprint that many judges leave on the ideologies, habits, and future career trajectories of their clerks).

[202] Brad Snyder, *The Judicial Genealogy (and Mythology) of John Roberts: Clerkships from Gray to Brandeis to Friendly to Roberts*, 71 OHIO ST. L.J. 1149, 1156 (2010) ("Many clerks, if they enjoyed their clerkships, spread the gospel of their judges as wise men or women and the judiciary as a place of intellectual seriousness.").

[203] *See* John Q. Barrett, *John Roberts and Justice Jackson*, JACKSON LIST (July 28, 2005), http://thejacksonlist.com/wp-content/uploads/2014/02/20050728-Jackson-List-John-Roberts.pdf.

[204] *See id*.

[205] *See* Joan Biskupic, *John Roberts Touts Collegiality, but Supreme Court's Record Suggests Otherwise*, CNN (Oct. 17, 2018), https://www-m.cnn.com/2018/10/17/politics/john-roberts-division/index.html?r=https%3A%2F%2Fwww.google.com%2F; Dan Eggen, *Roberts' Health-Care Decision Stuns Many but in Line with His Outlook*, WASH. POST (June 28, 2012), https://www.washingtonpost.com/politics/robertss-health-care-decision-stuns-many-but-in-line-with-his-outlook/2012/06/28/gJQAFdv19V_story.html?utm_term=.36edc046810b; John Fox, *William Joseph Brennan, Jr.*, THIRTEEN: MEDIA WITH IMPACT, https://www.thirteen.org/wnet/supremecourt/rights/robes_brennan.html; Norman Leahy, *The Virginian Who Shaped the Supreme Court into a Constitutional Powerhouse* (Oct. 11, 2018), https://www.washingtonpost.com/blogs/all-opinions-are-local/wp/2018/10/11/the-virginian-who-shaped-the-supreme-court-into-a-constitutional-powerhouse/?utm_term=.04d979f32523.

[206] *See* Mary Brigid McManamon, *Felix Frankfurter: The Architect of "Our Federalism"*, 27 GA. L. REV. 697, 701–02 (1993); Purdum et al., *supra* note 38.

Court's shift toward the political right.[207] To gain a better understanding of how the Chief Justice views the American legal system and his proper role within it, it is instructive to study the mindset of these noted jurists as well.

### *A. John Marshall Harlan*

True to his historical reputation, John Marshall Harlan II indeed left behind a legacy of dissenting opinions from his years on the Supreme Court.[208] Of the 613 opinions that he authored during his Supreme Court tenure, nearly half of them—296, to be exact—were dissents.[209] Between 1963 and 1967, Harlan averaged sixty-two dissenting votes per term.[210] These were the years in which the Warren Court fired on all cylinders, blazing new judicial trails in the realms of civil rights and civil liberties.[211] At first glance, seeing Harlan on the outspokenly losing side of so many Warren Court decisions makes one wonder whether the Justice simply stood on the wrong side of history. In reality, however, the reasons for Harlan's abundant dissents are considerably less barefaced than a quick look at his voting record might indicate.[212]

A willingness to pen controversial dissenting opinions ran in the Harlan family.[213] Harlan's grandfather, the first John Marshall Harlan, famously authored the stinging dissent in *Plessy v. Ferguson*,[214] vehemently arguing that the Court did have the power

[207] *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55, 161, 162, 202, 250, 259, 292 (2005).

[208] TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT viii (1992).

[209] *Id.*

[210] *Id.*

[211] *See id.*

[212] *See* Lesley Oelsner, *Harlan Dies at 72; On Court 16 Years*, N.Y. TIMES (Dec. 30, 1971), https://www.nytimes.com/1971/12/30/archives/harlan-dies-at-72-on-court-16-years-conservative-justice-quit-last.html.

[213] *See* Gilbert King, *The Great Dissenter and His Half-Brother*, SMITHSONIAN (Dec. 20, 2011), https://www.smithsonianmag.com/history/the-great-dissenter-and-his-half-brother-10214325/. Ironically, this same historical obscurity afflicted the second John Marshall Harlan for a surprisingly long period of time as well. *See* YARBROUGH, *supra* note 208, at viii; *see also* Henry J. Abraham, *John Marshall Harlan: A Justice Neglected*, 41 VA. L. REV. 871, 871 (1955) (arguing that the judicial contributions of the first John Marshall Harlan had been overlooked by historians for far too long); James F. Simon, *Foreword: The New York Law School Centennial Conference in Honor of Justice John Marshall Harlan*, 36 N.Y.L. SCH. L. REV. 1, 2 (1991) ("It is remarkable, given Justice Harlan's accomplishments, that so little study has been devoted to his life and work.").

[214] *See* Plessy v. Ferguson, 163 U.S. 537, 552 (1896).

to strike down segregationist policies in public schools.[215] More than a half century later, of course, Harlan's position finally received vindication when the Warren Court issued its unanimous opinion in *Brown v. Board of Education*,[216] a statement that in many ways mirrored the dissent over which Harlan had labored in 1896.[217] With such a guidepost in his own family's heritage, the younger Harlan could see that a dissenting opinion in a Supreme Court decision was not necessarily a crushing loss, but rather a potential first draft for a history that was still yet to be written.[218]

Ironically, it was *Brown v. Board of Education* that created one of the greatest headaches of John Marshall Harlan II's career.[219] After graduating from Princeton, receiving a Rhodes Scholarship, earning the Legion of Merit and the Croix de Guerre during his military service in World War II, gaining a reputation as a highly skilled litigator at one of the largest law firms on Wall Street, and serving briefly on the United States Court of Appeals for the Second Circuit, Harlan was forced to endure what was then seen as an insult and an indignity: appearing before the Senate's Judiciary Committee to answer questions about his judicial philosophies after President Eisenhower nominated him to the Supreme Court.[220] Many senators, particularly senators from southern states, were concerned that the new nominee would join Warren, Brennan, Thurgood Marshall, and William O. Douglas in routinely overturning state statutes regarding matters such as racial segregation.[221] While confirmation hearings are commonplace today, such a demand was rare at this time.[222] Even after quizzing Harlan, some senators were not convinced that

[215] *See id.* at 556 (Harlan, J., dissenting). In his dissent, Harlan penned a sentence that became a guidepost of future generations of civil rights leaders, stating, "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Id.* at 559.

[216] *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[217] *Compare id.* at 495 ("We have now announced that such segregation [on the basis of race] is a denial of the equal protection of the laws."), *with Plessy*, 163 U.S. at 559 ("[T]here is in this country no superior, dominant, ruling class of citizens . . . all citizens are equal before the law.").

[218] *See* King, *supra* note 213; Oelsner, *supra* note 212; Frederic Rodgers, *"Our Constitution Is Color Blind": Justice John Marshall Harlan and the Plessy v. Ferguson Dissent*, 43 AM. B. ASS'N JUDGES' J. 15 (2004).

[219] *See, e.g.*, *John M. Harlan II*, OYEZ, https://www.oyez.org/justices/john_m_harlan2 (last visited Dec. 12, 2018).

[220] *See* YARBROUGH, *supra* note 208, at 11, 12, 61, 80, 82; Simon, *supra* note 213, at 1, 2; *John Marshall Harlan II*, *supra* note 219; Oelsner, *supra* note 212.

[221] *See* Oelsner, *supra* note 212.

[222] *See* Carolyn Shapiro, *Putting Supreme Court Confirmation Hearings in Context*, SCOTUS (Aug. 28, 2018), http://www.scotusblog.com/2018/08/putting-supreme-court-confirmati on-hearings-in-context/.

Eisenhower had chosen correctly.[223] Eleven senators, nine of whom represented southern states, voted against Harlan's confirmation.[224]

Many of the Southern lawmakers who were skeptical about his nomination believed that their concerns were vindicated when Harlan voted several times to invalidate state and local laws and policies concerning racial segregation, including overturning the statewide prohibition of interracial marriages in *Loving v. Virginia*[225] and compelling the integration of Arkansas's public schools in *Cooper v. Aaron*.[226] Others grew upset with Harlan for voting with the Court's majority in *Engel v. Vitale*,[227] declaring that a state could not force students in public schools to recite a prayer.[228] His view that the Constitution protected an individual's right to privacy—a stance upon which the Court's majority would eventually build in applying constitutional protections to a woman's right to receive an abortion in *Roe v. Wade*—also drew criticism from lawmakers who considered such a stance to be a radical departure from the Framers' intentions.[229]

Harlan did not disguise the fact that he disliked strict "textualism," the philosophy holding that a Supreme Court justice could never look beyond the text of the Constitution itself when rendering an

[223] *See* Oelsner, *supra* note 212.

[224] *See id.*

[225] *See* Loving v. Virginia, 388 U.S. 1, 2, 12 (1967).

[226] *See* Cooper v. Aaron, 358 U.S. 1, 4, 14–15 (1958); *see also* Heart of Atlanta Motel v. United States, 379 U.S. 241, 242, 243, 244 (1964) (voting to strike down a policy of racial segregation inside hotels); Katzenbach v. McClung, 379 U.S. 294, 295 (1964) (voting to strike down a policy of racial segregation inside restaurants); McLaughlin v. Florida, 379 U.S. 184, 197 (1964) (Harlan, J., concurring) (voting to overturn part of the state's anti-miscegenation laws as a violation of the Equal Protection Clause of the Fourteenth Amendment). According to Harlan, a government-imposed classification scheme based on race could withstand an Equal Protection Clause challenge only if the state's purported interest in maintaining this classification plan was "of the most weighty and substantial kind." Hunter v. Erickson, 393 U.S. 385, 393 (1969) (Harlan, J., concurring) (citing *Mclaughlin*, 379 U.S. at 192. While plenty of critics have argued that the justices of the Warren Court, including Harlan, engaged in judicial activism by overturning state laws and policies so frequently in these racial segregation cases, a legitimate counter-argument exists that the Warren Court actually showed significant deference to Congress's desire to protect and improve inclusivity within American society. *See* Rebecca E. Zietlow, *The Judicial Restraint of the Warren Court (and Why It Matters)*, 69 OHIO ST. L.J. 255, 270–71, 292, 293–94 (2008).

[227] *See* Engel v. Vitale, 370 U.S. 421, 422 (1962).

[228] *See id.* at 424; Charles C. Haynes, *50 Years Later, How School-Prayer Ruling Changed America*, FREEDOM F. INST. (July 29, 2012), https://www.freedomforuminstitute.org/2012/07/29/50-years-later-how-school-prayer-ruling-changed-america/.

[229] *See* Griswold v. Connecticut, 381 U.S. 479, 500 (1965) (Harlan, J., concurring); Scott Lemieux, *Reading Between the Rights*, AM. PROSPECT (June 9, 2011), http://prospect.org/article/reading-between-rights.

opinion.[230] However, Harlan steadily refused to go as far as Warren, Douglas, Marshall, and Brennan in making the needs of contemporary society the centerpiece of many judicial holdings.[231] "The Constitution is not a panacea for every blot upon the public welfare," he declared, "nor should this Court . . . be thought of as a general haven of reform movements."[232] To Harlan, the Supreme Court was not "a legitimate engine of political reform."[233] Rather, it was the people's popularly elected representatives in the legislative and executive branches who needed to step in when the nation confronted social ills that needed to be cured.[234] In his concurring opinion in *Griswold v. Connecticut*, the clearly frustrated Justice expressed a desire for a Supreme Court that exercised "continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms."[235] He referred to this principle as "judicial self-restraint," a term that plenty of judges, legislators, and scholars have echoed in subsequent years.[236]

It was this yearning for "judicial self-restraint" that stood at the core of Harlan's frequent departures from the opinions of his Warren Court brethren.[237] Deference to Congress and the President was not a concept espoused often by Warren, Douglas, Marshall, or

[230] *See* O.W. Wollensak, *Hugo Lafayette Black and John Marshall Harlan: Two Faces of Constitutional Law—with Some Notes on the Teaching of Thayer's Subject*, 9 S.U.L.L. REV. 1, 6–7 (1982) (contrasting Hugo Black's strict interpretations of constitutional text with Harlan's willingness to introduce some considerations of contemporary societal issues into his jurisprudence).

[231] Oelsner, *supra* note 212.

[232] Reynolds v. Sims, 377 U.S. 533, 624–25 (1964) (Harlan, J., dissenting).

[233] Charles Fried, *The Conservatism of Justice Harlan*, 36 N.Y.L. SCH. L. REV. 33, 43 (1991).

[234] *See id.* at 44. "Those observers of the Court who see it primarily as the last refuge for the correction of all inequality or injustice, no matter what its nature or source, will no doubt applaud this decision and its break with the past," Harlan wrote in his dissent. Baker v. Carr, 369 U.S. 186, 339–40 (1962) (Harlan, J., dissenting). "Those who consider that continuing national respect for the Court's authority depends in large measure upon its wise exercise of self-restraint and discipline in constitutional adjudication, will view this decision with deep concern." *Id.* at 340.

[235] *See* Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring) (citing Adamson v. California, 332 U.S. 46, 59 (1947) (Frankfurter, J., concurring)).

[236] *See Griswold*, 381 U.S. at 501; *see also* Stephen M. Dane, *'Ordered Liberty' and Self-Restraint: The Judicial Philosophy of the Second Justice Harlan*, 51 U. CIN. L. REV. 545, 547 (1982) (discussing both the evolution of Harlan's beliefs in judicial self-restraint and the influence of his opinions upon subsequent jurists).

[237] *See* YARBROUGH, *supra* note 208, at ix; Dane, *supra* note 236, at 562; Oelsner, *supra* note 212.

Brennan.[238] To these justices, the Court had both the authority and the obligation to overturn a statute, regulation, or policy producing a result that was, in their view, unmistakably distasteful to bedrock principles of American society.[239] Harlan, on the other hand, feared that such sweeping opinions would result in "a substantial transfer of legislative power to the courts."[240] In considering the impact of such a transfer of power, Harlan concluded that "[a] function more ill-suited to judges can hardly be imagined."[241] If laws were essentially written or re-written by judges rather than by the representatives elected by the people, Harlan argued, then one of the core values of the nation's republican form of government—the concept of governance by people—would be lost.[242] This, to Harlan, would generally be a fate worse than permitting a law with potentially detrimental societal effects to stand.[243]

Readers can witness Harlan fighting with this concept—both among his colleagues on the Court and within himself—in his multiple dissents.[244] For instance, in the now-famous case of

[238] *See* Philip B. Kurland, *Foreword: 'Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government'*, 78 HARV. L. REV. 143, 143 (1964) ("[T]he Justices [of the Warren Court] have wrought more fundamental changes in the political and legal structure of the United States than during any similar span of time since the Marshall Court had the unique opportunity to express itself on a *tabula rasa*."); Alpheus Thomas Mason, *Understanding the Warren Court: Judicial Self-Restraint and Judicial Duty*, 81 POL. SCI. Q. 523, 529 (1966); J. Skelly Wright, *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint?*, 54 CORNELL L. REV. 1, 2 (1968).

[239] *See, e.g.*, ARCHIBALD COX, THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM 114 (1968); Keenan D. Kmiec, *The Origin and Current Meanings of 'Judicial Activism'*, 92 CALIF. L. REV. 1441, 1447 (2004); Ronald J. Krotoszynski, *A Remembrance of Things Past? Reflections on the Warren Court and the Struggle for Civil Rights*, 59 WASH. & LEE L. REV. 1055, 1072 (2002); David Luban, *The Warren Court and the Concept of a Right*, 45 HARV. CIV. RTS. CIV. LIBERTIES. L. REV. 7, 10 (1999); Mason, *supra* note 238 at 551. For William O. Douglas, one of the justices on the Warren Court who is most frequently criticized for displaying "activist" tendencies, the concept of the Court as an agent of necessary social change may have been first revealed to him by then-Chief Justice Charles Evans Hughes. Melvin I. Urofsky, *William O. Douglas as a Common Law Judge*, 41 DUKE L.J. 133, 137–38 (1991). Hughes told Douglas, "[a]t the constitutional level where we work, ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections." *Id.* Douglas later stated that this conversation with Hughes helped eliminate Douglas's prior beliefs that the text of Constitution by itself could answer all questions before the Court. *See id.* at 138.

[240] John M. Harlan, *Thoughts at a Dedication: Keeping the Judicial Function in Balance*, 49 AM. BAR ASSN. J. 943, 944 (1963).

[241] *Id.*

[242] *See id.*

[243] *See id.*

[244] *See, e.g.*, Harper v. Va. Bd. of Elections, 383 U.S. 663, 680–81 (1966) (Harlan, J., dissenting) (arguing that the Court should have left to the States or the federal political process to decide matters of state poll taxes); Henry v. Mississippi, 379 U.S. 443, 457 (1965) (Harlan,

*Miranda v. Arizona*,[245] Harlan argued that the criminal suspect's rights were not violated by the police.[246] Pre-questioning warnings from police officers that anything the suspect said might be used against him or her in a court of law and advice that the suspect had the right to remain silent and the right to retain counsel were not constitutionally necessary in Harlan's view.[247] Nothing in the text of the Constitution, or in any other governing statute, required the police to inform a suspect about these specific rights prior to an interrogation.[248] Legislative history surrounding the Fifth Amendment likewise did not indicate that the Fifth Amendment required the police to deliver such a substantial informational statement to a suspect before questioning could begin.[249] Pointing to ongoing studies about the conduct of law enforcement by federal and state legislatures, as well as private sector entities, Harlan argued that the Court's majority in *Miranda* could actually damage sustainable reform efforts by interfering prematurely in an area where only Congress and the state legislatures should rightfully tread.[250] "Of course[,] legislative reform is rarely speedy or unanimous, though this Court has been more patient in the past," Harlan wrote.[251] "But the legislative reforms[,] when they come[,] would have the vast advantage of empirical data and comprehensive study, they would allow experimentation and use of solutions not open to the courts, and they would restore the initiative in criminal law reform to those forums where it truly belongs."[252]

J., dissenting) (stating that the Court's decision overstepped federalism principles); Reynolds v. Sims, 377 U.S. 533, 589, 590–91 (1964) (Harlan, J., dissenting) (protesting against the Court's opinion because state election matters should be decided by state legislatures); Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 583 (1963) (Harlan, J., dissenting) (noting that the Court failed to respect legitimate state authority); Baker v. Carr, 369 U.S. 186, 330 (1962) (Harlan, J., dissenting) (stating that the Court should not interfere in matters of state concern); Mapp v. Ohio, 367 U.S. 643, 672 (1961) (Harlan, J., dissenting) (finding that the Court abandoned the notions of judicial restraint and *stare decisis* in its decision); Burton v. Wilmington Parking Auth., 365 U.S. 715, 729–30 (1961) (Harlan, J., dissenting) (arguing that the Court overstepped constitutional boundaries and should have remanded the case for clarification regarding the basis for the state's decision); Griffin v. Illinois, 351 U.S. 12, 39 (1956) (Harlan, J., dissenting) (finding that since the State had not infringed the Fourteenth Amendment, the Court should not have interfered in the affairs of the State).

[245] Miranda v. Arizona, 384 U.S. 436 (1966).

[246] *See id.* at 518–19 (Harlan, J., dissenting).

[247] *See id.* at 504, 510.

[248] *See id.* at 505, 511, 512, 513–14.

[249] *See id.* at 510–11.

[250] *See id.* at 523–24.

[251] *Id.* at 524

[252] *Id.*

Still, Harlan was willing to engage freely in a form of lawmaking from the bench in at least one specific set of circumstances. In *Welsh v. United States*,[253] a case concerning the constitutional rights of conscientious objectors during wartime, the Court had to consider whether a statute allowing a citizen to conscientiously object to service in war due to "religious training and belief" applied to someone who was religiously agnostic.[254] On its face, Harlan wrote, the statute rejected such an application as an individual who did not believe in any religion inherently could not object to war on the basis of "religious training and belief."[255] To Harlan, such a law violated the First Amendment's protections of religious freedom by ignoring non-religious viewpoints about war that were nonetheless sincerely held.[256] At this point, Harlan could have concluded that the offending statute simply needed to be overturned.[257]

Instead, Harlan decided to take a noticeably different course of action.[258] Since granting exemptions to military service for conscientious objectors was a "longstanding tradition in this country" based on constitutionally entrenched principles of free exercise of religion, Harlan ultimately engaged in the type of behavior that he appeared to repudiate in *Miranda*.[259] "When a policy has roots so deeply embedded in history," Harlan wrote:

> [T]here is a compelling reason for a court to hazard the necessary statutory repairs if they can be made within the administrative framework of the statute and without impairing other legislative goals, even though they entail, not simply eliminating an offending section, but rather building upon it."[260]

[253] Welsh v. United States, 398 U.S. 333 (1970).

[254] *Id.* at 335.

[255] *Id.* at 345–48, 352–54 (Harlan, J., concurring) ("Unless we are to assume an Alice-in-Wonderland world where words have no meaning, I think it fair to say that Congress' choice of language cannot fail to convey to the discerning reader the very policy choice that the prevailing opinion today completely obliterates.").

[256] *See id.* at 356–57.

[257] *See id.* at 361.

[258] *See id.* at 354, 365 ("When the plain thrust of a legislative enactment can only be circumvented by distortion to avert an inevitable constitutional collision, it is only by exalting form over substance that one can justify this veering off the path that has been plainly marked by the statute. Such a course betrays extreme skepticism as to constitutionality, and, in this instance, reflects a groping to preserve the conscientious objector exemption at all cost.").

[259] *Id.* at 365–66; *see* Miranda v. Arizona, 384 U.S. 436, 505 (1966) (Harlan, J., dissenting).

[260] *Welsh*, 398 U.S. at 366 (Harlan, J., concurring).

In doing so, the Justice who so often pledged to leave lawmaking to the legislators, demonstrated an unexpected willingness to essentially add language to an existing law.[261]

A fine line exists between what Harlan did in *Welsh* and what Harlan adamantly declined to do in *Miranda*, perhaps a line that is too fine to be applied with absolute consistency in all cases. As a basic rule, Harlan indicates that the Supreme Court does not necessarily violate judicial self-restraint by adding an appendage to a statute when confronted with a choice of stretching the statute's interpretation or striking down the law entirely.[262] Statutory preservation, therefore, appears to be a paramount goal of Harlan's views on the Court's role, even when the Court must read new language into an existing law to preserve that statute's existence.[263] Thus, in *Welsh*, the Court can rightfully extend the reach of a statute that expressly focuses on a conscientious objector's religious beliefs to encompass an objector with no professed religious beliefs whatsoever, rather than striking down the law entirely.[264] On the other hand, Harlan states in *Miranda* that the Court should not go to such lengths in a situation where the existing law does not require any judicial assistance to pass constitutional muster, even if that law results in a policy that may potentially inflict societal harm.[265] In this manner, Harlan defines the Court's role as a sort of protector of the politically elected branches of government, taking every possible step to preserve their work as a representation of the will of the people, even when that preservation requires certain repairs by the Court to ensure that the law satisfies the Constitution's commands.[266]

Professor Timothy O'Neill draws parallels between Harlan's form of judicial self-restraint and Roberts's unexpected break from the Court's politically conservative wing in upholding the constitutionality of "Obamacare."[267] One of the central issues in this

[261] *See id.* at 366–67 ("Thus I am prepared to accept the prevailing opinion's conscientious objector test, not as a reflection of congressional statutory intent but as patchwork of judicial making that cures the defect of underinclusion in [the actual text of the statute] and can be administered by local boards in the usual course of business.").

[262] *See id.* at 354, 366–67 ("It is, of course, desirable to salvage by construction legislative enactments whenever there is good reason to believe that Congress did not intend to legislate consequences that are unconstitutional.").

[263] *See id.* at 354.

[264] *See id.* at 366–67.

[265] *See* Miranda v. Arizona, 384 U.S. 436, 505 (1966) (Harlan, J., dissenting).

[266] *See Welsh*, 398 U.S. at 354, 366 (Harlan, J., concurring).

[267] *See* Timothy P. O'Neill, *Harlan on My Mind: Chief Justice Roberts and the Affordable*

case focused on whether to characterize the Affordable Care Act's "shared responsibility payment" for taxpayers who did not comply with the law's requirements as a "penalty," a term that the Affordable Care Act itself used, or as a "tax," the viewpoint urged by the Obama administration's legal team in its briefs and oral arguments.[268] Interpreting the "shared responsibility payment" as a "penalty" would likely lead to the law's demise, while interpreting this provision as a "tax" imposed under the broad power granted to Congress by Article I of the Constitution to levy taxes would permit the law to be upheld.[269]

As Professor O'Neill points out, Roberts's response to this question seemed to mirror Harlan's framework of judicial self-restraint.[270] "[I]t is well established that if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so," Roberts wrote.[271] Later, in applying this concept to the case before him, Roberts concluded: "The Government asks us to interpret the mandate as imposing a tax, if it would otherwise violate the Constitution. Granting the Act the full measure of deference owed to federal statutes, it can be so read."[272] Even though the mandate looked like a penalty, and even bore the statutory label of a penalty, Roberts held that the Court needed to defer to the government's insistence that the shared responsibility payment was a tax.[273] None of the other politically conservative justices on the Court agreed, castigating Roberts for engaging in the very type of judicial activism that the Chief Justice claimed to be taking great pains to avoid.[274]

*Care Act*, 3 CALIF. L. REV. CIR. 170, 180 (2012).

[268] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 562–63 (2012).

[269] *See id.* at 563.

[270] O'Neill, *supra* note 267, at 182 ("To save the statute, Roberts merely re-characterized a 'penalty' as a 'tax.'").

[271] *Sebelius*, 567 U.S. at 562. To reinforce this point of view, Roberts quoted the 180year-old words of Justice Joseph Story: "'No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the [C]onstitution.'" *Id.* (quoting Parsons v. Bedford, 28 U.S. 433, 448–49 (1830)). Roberts also quoted Justice Oliver Wendell Holmes to reinforce the same point: "[T]he rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act." *Sebelius*, 567 U.S. at 562 (quoting Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J., concurring)).

[272] *Sebelius*, 567 U.S. at 563.

[273] *See id.* at 564, 565, 566, 574 ("Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness.").

[274] *See id.* at 706–07 (Scalia, J.; Kennedy, J.; Thomas, J.; Alito, J., dissenting jointly).

One can witness a seemingly similar type of approach in Roberts's recent majority opinion upholding the Trump Administration's "travel ban."[275] Throughout much of his opinion, Roberts discussed how presidents from George Washington to George W. Bush "have frequently used [executive] power to espouse the principles of religious freedom and tolerance on which this Nation was founded."[276] His early paragraphs seem to indicate distaste for the statements that President Trump has made regarding immigrants in general and Muslims in particular.[277] In the end, however, the Chief Justice conceded that the travel ban falls within the broad scope of power afforded to the President under Article II of the Constitution.[278] Noting that the ban covers only nations that Congress and prior presidential administrations have already declared to pose risks to domestic security, and pointing out that the Constitution does offer the President wide latitude in defending the national security interests of the United States, Roberts determined that the ban was constitutional.[279] As with the Affordable Care Act, Roberts found a way to make a policy enacted by one of the popularly elected branches of government withstand constitutional scrutiny, restraining himself from striking down a policy that he appeared to personally dislike.[280]

Of course, a review of Roberts's record on the Court does not demonstrate absolute adherence to this restrained approach. In cases concerning freedom of speech and expression, for instance, Roberts has been extremely unrestrained, voting to overturn several existing laws, including statutes limiting contributions by

[275] *See* Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).

[276] *Id.* at 2418.

[277] *See id.* at 2417.

[278] *See id.* at 2423.

[279] *See id.* at 2421, 2422, 2423 (quoting Holder v. Humanitarian Law Project, 561 U.S. 1, 33–34 (2010)).

[280] *See Trump*, 138 S. Ct. at 2418 ("Yet it cannot be denied that the Federal Government and the Presidents who have carried its laws into effect have—from the Nation's earliest days—performed unevenly in living up to those inspiring words [advocating for acceptance of all religious faiths]."); *Id.* at 2423 ("We express no view on the soundness of the policy. We simply hold today that plaintiffs have not demonstrated a likelihood of success on the merits of their constitutional claim."); Ruth Marcus, *Even the Supreme Court Is Alarmed About Trump*, WASH. POST (June 26, 2018), https://www.washingtonpost.com/opinions/even-the-supreme-court-knows-trump-is-freaking-out-the-world/2018/06/26/19a6dbf8-7976-11e8-93cc-6d3beccdd7a3_story.html; Mark Sherman, *Trump Travel Ban Upheld; Supreme Court Rejects Discrimination Claim*, CHI. SUNTIMES (June 26, 2018), https://chicago.suntimes.com/immigration/supreme-court-travel-ban-immigration/ ("Roberts was careful not to endorse either Trump's statements about immigration in general or Muslims in particular, including his campaign call for 'a complete and total shutdown of Muslims entering the United States.'").

corporations and unions in political campaigns,[281] preventing the sale of violent video games to children,[282] lying publicly about receiving the Congressional Medal of Honor,[283] banning the sale of prescriber data by companies for marketing purposes,[284] prohibiting the registration of trademarks that may "disparage" people, institutions, beliefs, or national symbols,[285] making and selling videos depicting extreme cruelty toward animals,[286] and protesting at military funerals.[287] It is difficult to believe that the Court could not salvage any of these statutes by adding language that could bolster their constitutionality, just as Harlan did in *Welsh*. Thus, it appears that Roberts is not entirely bound by the judicial self-restraint that Harlan espoused.

Indeed, the most closely shared trait between Harlan and Roberts may be something far more engrained in their personalities than a philosophy of restraint. Norman Dorsen, one of Harlan's former clerks, wrote that Harlan's praise for judicial self-restraint arose from the Justice's adamant desire for an orderly and carefully maintained structure of power within the government.[288] By fiercely preserving the historic division of authority, Harlan could ensure that no branch of government ever gained too much power, preventing all three branches from unilaterally upsetting the applecart of the nation's historic system.[289] According to Dorsen, Harlan displayed a "deep, almost visceral, desire to keep things in balance."[290] As this article has already demonstrated, observers can—and have—noted that the same mannerisms are a central trait of Chief Justice Roberts.

[281] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 392–93 (2010) (Roberts, C.J., concurring).

[282] *See* Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 805, 820–21 (2011) (Alito, J. concurring) (joined by Roberts in his concurring opinion).

[283] *See* United States v. Alvarez, 567 U.S. 709, 729–30 (2012).

[284] *See* Sorrell v. IMS Health, Inc., 564 U.S. 552, 580 (2011).

[285] *See* Matal v. Tam, 137 S. Ct. 1744, 1764–65 (2017).

[286] *See* United States v. Stevens, 559 U.S. 460, 464–65, 482 (2010).

[287] *See* Snyder v. Phelps, 562 U.S. 443, 447, 460–61 (2011).

[288] *See* Norman Dorsen, *John Marshall Harlan, Civil Liberties, and the Warren Court*, 36 N.Y.L. SCH. L. REV. 81, 100, 105 (1991) (discussing that Harlan's desire to maintain balance with the Court's judicial decisions, and that the ultimate goal of these decisions it to ensure the smooth functioning of institutions).

[289] *See id.* at 101, 105.

[290] *Id.* at 100.

### *B. Henry Friendly*

The extremely close ties between Roberts and William Rehnquist have received more scrutiny than any other relationship that Roberts maintained during his legal career.[291] As a consequence, many observers neglect to remember the closeness between Roberts and another judicial mentor: Judge Henry Friendly, a man who may hold the honor of being the finest American judge never to sit upon the United States Supreme Court.[292] Before Roberts went to Washington to work for Rehnquist, he earned a clerkship with Friendly, a position that was both revered for its prestige and feared for the unconventional demands and high standards of the judge.[293] Roberts had just recently graduated from Harvard Law School when he reported for his first day of work in Friendly's chambers.[294] Consequently, he entered Friendly's orbit as a highly impressionable burgeoning lawyer, easily influenced by the teachings of a judge whom many fellow jurists and plenty of legal scholars already revered as perhaps the finest judicial craftsperson in the United States.[295] Therefore, it is worth taking a look at what those teachings from the judge to his newly graduated mentee may have been.

As strong as Roberts's academic performance at Harvard had been, Friendly's scholastic achievements during law school had reached even greater Olympian heights.[296] Rumors abound that Friendly maintained the highest grade point average in the history of Harvard Law School, although Friendly himself never authoritatively affirmed or denied the truth of this statement.[297] What is

[291] Adam Liptak & Todd S. Purdum, *As Clerk for Rehnquist, Nominee Stood Out for Conservative Rigor* (July 31, 2005), https://www.nytimes.com/2005/07/31/politics/politicsspecial1/as-clerk-for-rehnquist-nominee-stood-out-for.html.

[292] *See* Akhil Reed Amar, *Heller, HLR, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 181 (2008); Aaron P. Brecher, *Some Kind of Judge: Henry Friendly and the Law of Federal Courts*, 112 MICH. L. REV. 1179, 1179 (2014) (book notice); *see also* David M. Dorsen, *Judges Henry J. Friendly and Benjamin Cardozo: A Tale of Two Precedents*, 31 PACE L. REV. 599, 602 (2011) (discussing that Friendly was one of the great judges of the United States Court of Appeals, and coupled with Learned Hand he was one of the greatest federal judges not to be appointed to the Supreme Court).

[293] *See* Amar, *supra* note 292, at 181; Snyder, *supra* note 202, at 1209, 1215–16.

[294] *See* Purdum et al., *supra* note 38.

[295] *See* Snyder, *supra* note 202, at 1215–16, 1231–35 (discussing both Roberts's impressionable age at the time of his clerkship with Friendly and the degree to which Roberts still venerates Friendly's approach to the craft of judging).

[296] *See* Dorsen, *supra* note 292, at 602.

[297] *See* A. Raymond Randolph, *Administrative Law and the Legacy of Henry J. Friendly*, 74 N.Y.U. L. REV. 1, 2 (1999); Snyder, *supra* note 202, at 1170 n.106 (citing that Friendly states that he likely did not have the highest grade at Harvard, because they changed the grading

unquestioned is the fact that the brilliance of this student from Elmira, New York, caught the eye of at least one of his professors at Harvard, the future United States Supreme Court Justice Felix Frankfurter.[298] It was Frankfurter who helped Friendly obtain a coveted clerkship with Justice Louis Brandeis, an experience that proved to be both intellectually illuminating and constantly combative for Friendly, who often found himself at odds with Brandeis over the justice's self-assurance even while he admired his intellect.[299]

Much to Brandeis's annoyance, Friendly turned down Brandeis's recommendation to pursue a career as a professor at Harvard Law School.[300] Instead, Friendly decided to enter private practice, obtaining a job at a law firm in New York City.[301] There, he quickly made friends with an older colleague who became arguably more of a mentor to him than Brandeis ever was: John Marshall Harlan II.[302] The two remained lifelong acquaintances, with Friendly frequently praising Harlan's views on judicial self-restraint and, after Harlan's confirmation to the Supreme Court, touting him as the finest justice on the bench.[303]

In private practice, Friendly developed a reputation as an expert in many business law specialties, particularly railroad reorganizations.[304] Simultaneously, he became an executive with Pan American World Airways, serving as the company's vice-president and general counsel while still handling cases as a partner of the law firm in New York.[305] This was lucrative work, and Friendly relished the challenge of gaining success in both the legal and financial worlds at the same time.[306] By 1954, however, burnout

system, but he also did not want to contradict individuals who stated this record).

[298] *See* Randolph, *supra* note 297, at 2.

[299] *See* Dorsen, *supra* note 292, at 602; Snyder, *supra* note 202, at 1183–89.

[300] *See* Snyder, *supra* note 202, at 1189–90.

[301] *See id.* at 1191.

[302] *See id.* at 1193.

[303] *See* Henry J. Friendly, *Mr. Justice Harlan, as Seen by a Friend and Judge of an Inferior Court*, 85 HARV. L. REV. 382, 383–84 (1971). Like Friendly, Harlan's views on the proper role of a judge were heavily guided by the teachings of Felix Frankfurter. *See* Charles Nesson, *The Harlan-Frankfurter Connection: An Aspect of Justice Harlan's Judicial Education*, 36 N.Y. L. SCH. L. REV. 179, 179 (1991).

[304] Michael Norman, *Henry J. Friendly, Federal Judge in Court of Appeals, Is Dead at 82*, N.Y. TIMES, (Mar. 12, 1986), https://www.nytimes.com/1986/03/12/obituaries/henry-j-friendly-federal-judge-in-court-of-appeals-is-dead-at-82.html.

[305] *See id.*; *see also* Randolph, *supra* note 297, at 2–3 (stating that Friendly a partner at a private firm while also serving as general counsel for Pan American World Airways).

[306] *See* Snyder, *supra* note 202, at 1198–99 ("Friendly excelled as a top New York regulatory

unmistakably set in after eight years of maintaining these two strenuous careers.[307] Seeking a change of pace, Friendly looked to his friends Frankfurter and Harlan, and wondered aloud to both of them whether he could obtain and maintain a judgeship on a federal appellate court.[308]

At the time, Friendly favored politically conservative viewpoints, but was not politically active.[309] When Harlan was elevated from the Second Circuit to the Supreme Court, Friendly found himself eyeing the vacancy that Harlan left behind, but realized that he had little idea how to even become considered for such a politically charged appointment.[310] Frankfurter tried to help, introducing Friendly to Second Circuit judicial titan Learned Hand and gaining a recommendation letter from Hand on Friendly's behalf, but the effort ultimately proved to be futile.[311] Friendly did not get the job, and did not even appear to receive serious consideration for the judgeship, despite Frankfurter and Hand's best efforts.[312]

Three years later, Judge Jerome Frank's death created another Second Circuit vacancy; Friendly, again, did not prevail.[313] Nonetheless, subsequent to Judge Harold Medina's retirement, Hand went straight to the top, writing directly to President Eisenhower with a recommendation for Friendly's appointment, only the second time in Hand's storied career that he had written to the White House with such a recommendation.[314] Evidently, the President listened, appointing the fifty-five-year-old Friendly to the Second Circuit on March 10, 1959.[315]

Friendly remained an active judge on the Second Circuit until his death by suicide on March 11, 1986.[316] Between 1971 and 1973, he served as the appellate court's Chief Judge.[317] During his time on the bench, he authored opinions that were venerated for their clarity and their level of scholarship in areas of the law ranging from contract law to criminal procedure, and from administrative law to the proper

litigator and corporate counsel.").

[307] *See id.* at 1199.

[308] *See id.*

[309] *See id.*

[310] *See id.* at 1199–1200.

[311] *See id.* at 1200.

[312] *See id.*

[313] *Id.*

[314] *Id.*

[315] *Id.* at 1201.

[316] *See* Norman, *supra* note 304.

[317] *See id.*

jurisdiction of the federal courts.[318] Decades after his death, judges, attorneys, and law professors still recite his holdings in gospel-like tones, a signal of the enduring bipartisan respect that he was able to gain despite entering the judicial realm relatively late in his life.[319]

Much like Brandeis, Friendly strenuously sought to avoid declaring a law unconstitutional unless such a decision legitimately could not be avoided.[320] Much like Harlan, Friendly took great pains to avoid overturning precedent, seeking to preserve existing statutes and governing caselaw whenever possible.[321] Like both of these justices, Friendly became famous for writing rigorously logical opinions, not easily quotable by advocates looking for an easy sound bite but airtight overall in their command of the application of the law to the controversy at hand.[322] A commitment to incremental moves, not sweeping decisions, stood at the core of his jurisprudential approach.[323]

Friendly echoed these same principles in the multiple legal commentaries that he authored after his Second Circuit confirmation. He criticized the Warren Court for what he perceived as an unnecessary and legally indefensible expansion of habeas corpus rights and procedural due process requirements.[324] He also

[318] *See id.*; Randolph, *supra* note 297, at 2–3; Snyder, *supra* note 202, at 1234–35; *see also* Robert Gordon, *Friendly Fire: How John Roberts Differs from His Hero and His Mentor*, SLATE (Aug. 11, 2005), http://www.slate.com/articles/news_and_politics/jurisprudence/2005/08/friendly_fire.html ("Comparing any judge to Henry Friendly is like comparing any basketball player to Michael Jordan.").

[319] *See* DAVID M. DORSEN, HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA 353–57 (2012) (quoting lofty praise from notable jurists from Antonin Scalia to John Paul Stevens, Warren Burger to Felix Frankfurter, Richard Posner to Lewis Powell, and many more—including, of course, John Roberts). Interestingly, though, while Friendly's legacy is celebrated among legal practitioners and academics today, his name is virtually unknown to the general public, a fact perhaps largely due to the fact that he never served on the United States Supreme Court. *Id.* at 353.

[320] Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, *in* BENCHMARKS 196, 209–11 (1967) (stating that judges should strive to interpret a statute as constitutional unless the law's unconstitutionality is blatant).

[321] *See id.* at 228–29.

[322] *See* Pierre N. Leval, *Judicial Opinions as Literature*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 206, 209 (Peter Brooks & Paul Gewirtz eds., 1996) ("I offer as a counterexample Henry Friendly. I clerked for [Friendly]. Not a quotable judge. Not a maker of aphorisms. In his near thirty years on the bench, during which he delivered authoritative guidance on virtually every subject that came under his scrutiny, I doubt that anyone can find an instance of a rhetorical device used to make an issue seem simpler, or a solution more satisfactory, than in fact it was.").

[323] *See id.* at 209–10; Norman, *supra* note 304.

[324] *See* Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1273, 1276–77 (1975); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 143 (1970).

critiqued *Brown v. Board of Education* as a decision devoid of clear logic, blaming the Court for hastily yielding to societal pressures without properly crafting an opinion that would stand the test of time.[325] Like Harlan, he condemned the Warren Court's decision in *Miranda v. Arizona*, echoing Harlan's warnings that the Court had engaged in unnecessary activism by forcing the police to make declarations to suspects that the Constitution did not in any way require.[326] All of these analyses were written in the same terse tone that Friendly commonly directed toward attorneys and judges whom he felt were attempting to overstep their boundaries.[327]

By the time Roberts began his clerkship, Friendly had taken senior status on the Second Circuit, a post designed to give long-serving judges a reduced workload while permitting them to maintain their judgeships.[328] Despite this purportedly semi-retired status, Friendly continued to maintain a substantial workload, handling more than 125 cases every year.[329] He also had developed a reputation as a brutally tough, yet extraordinarily rewarding coach for the recent graduates who became his clerks.[330] Even during his years in senior status, Friendly wrote all of his own opinions, refusing to delegate this work to clerks for fear that such a maneuver would be unfair to the clerks and disingenuous to the public.[331] This meant that Friendly's clerks served more like colleagues than subordinates, expected to engage in daunting battles of wits with the judge about some of the thorniest legal conundrums imaginable.[332] A lack of preparedness by any clerk to debate Friendly on any given day was unacceptable.[333] At the same time, if Friendly conceded that a clerk

[325] *See* Henry J. Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. MIAMI L. REV. 21, 29, 30–31 (1978). To be clear, Friendly did not condemn the racial integration achieved as a result of *Brown v. Board of Education*, focusing his criticism solely on what he deemed to be legally muddied and intellectually dishonest methods used by the Warren Court to reach their desired outcome. *See id.* at 31–32.

[326] *See* HENRY J. FRIENDLY, *A Postscript on Miranda*, *in* BENCHMARKS 266, 269, 271–72 (1967); Norman, *supra* note 304.

[327] *See* Snyder, *supra* note 202, at 1209; Bruce A. Ackerman, *In Memoriam: Henry J. Friendly*, 99 HARV. L. REV. 1709, 1714 (1986) ("It was common knowledge that [Friendly] did not suffer fools gladly.").

[328] *See* Norman, *supra* note 304; Snyder, *supra* note 202, at 1215.

[329] *See* Norman, *supra* note 304.

[330] *See* Snyder, *supra* note 202, at 1215–16 ("But [Harvard Law] Review editors knew about Friendly's demanding reputation and unusual clerkship model—not requiring bench memos and forcing clerks to think on their feet.").

[331] *See id.* at 1210 ("Friendly's scholarly pride would not have permitted him to delegate opinion-writing to clerks.").

[332] *See id.* at 1210–11, 1212.

[333] *See id.*

had outdueled him on a legal matter, the judge was known to spend hours redrafting his work until that clerk was satisfied with the soundness of the opinion.[334] The overall experience was, to quote a phrase later infamously used by Judge Robert Bork, "an intellectual feast," despite the long hours and constant pressures that it entailed.[335]

Perhaps unsurprisingly, a bond formed quickly between the no-nonsense judge and his new clerk.[336] Roberts's unquenchable desire never to be caught unprepared and his ability to anticipate probing questions before they were asked resonated with Friendly, as did the future Chief Justice's dedication to scrutinizing even the most mundane questions of law.[337] While his time with Friendly did not encompass any cases that are recognized as historically earth-shattering, Roberts did work with the judge on drafting opinions in three cases that the Supreme Court later considered, siding with Friendly's analysis every time.[338] While these cases focused on Social Security benefits, antitrust law, and the Commodities Exchange Act, and not on any boldfaced federal constitutional principles, the opinions that Friendly issued demonstrate the type of painstakingly methodical legal analysis that Roberts has said he aspires to achieve as an "umpire" on the Supreme Court.[339]

Roberts had worked for Friendly only a short time before Friendly sent letters of recommendation to Harry Blackmun, William Rehnquist, and other Supreme Court justices, declaring that he was "completely certain, even at this early date, that he will rank among my very best clerks."[340] Without a doubt, such a strong recommendation from such a noted talent evaluator played a leading role in Roberts gaining his clerkship with Rehnquist.[341] Even after beginning this lofty clerkship, however, Roberts continued to write to

[334] *See id.* at 1213–14.

[335] *See id.* at 1213; Kent Greenfield, *Robert Bork: All Brain, No Heart* (Dec. 20, 2012), http://prospect.org/article/robert-bork-all-brain-no-heart; Nat Hentoff, *What Robert Bork Never Understood*, WASH. POST (Oct. 11, 1987), https://www.washingtonpost.com/archive/opinions/1987/10/11/what-robert-bork-never-understood/9643ad2e-1b30-4217-9f61-490022f8d747/?utm_term=.88b605282e8d;

[336] *See* Snyder, *supra* note 202, at 1219, 1221.

[337] *See id.* at 1218, 1219.

[338] *See id.* at 1220–21.

[339] *See id.* at 1220–21, 1234.

[340] *Id.* at 1219–20.

[341] *See id.* at 1219–20 ("Friendly wrote the letters [of recommendation] on July 25, 1979 because Rehnquist had already contacted Roberts about an interview. Friendly was leaving for vacation until the end of August and wanted Rehnquist and other Justices to know his high opinion of Roberts.").

Friendly on a regular basis, penning letters that demonstrated that he was still closely following the opinions flowing from Friendly's chambers.[342] At times, the letters from Roberts also reflected a certain degree of nostalgia for his clerkship with Friendly, a period that appeared to be considerably more collegial than his early months of clerking for Rehnquist.[343]

In his subsequent career, Roberts has paid tribute to Friendly's legal legacy on plenty of occasions.[344] At the Justice Department, for example, Roberts heavily quoted Friendly's writings regarding the rightful limits of habeas corpus, declaring to one of his supervisors that the judge "would never have forgiven me if I remained mute" on the topic.[345] Yet Roberts then took Friendly's statements to an even greater extreme, arguing that the Constitution offered no guarantee of habeas corpus in federal courts, a position that Friendly had never advocated.[346] When Roberts sent Friendly a copy of some Justice Department proposals that invoked Friendly's words in defense of this stance, Friendly responded with skepticism, writing to Roberts that although he generally approved of the efforts to halt the expansion of habeas corpus, the extent of the Justice Department's proposed limitations "goes too far."[347]

Despite this disagreement, Roberts and Friendly remained close correspondents, particularly after Roberts moved from the Justice Department to his role in the White House Counsel's Office.[348] When Chief Justice Warren Burger pressured the White House to develop a new "intercircuit tribunal" to take some pressure off of a Supreme Court that Burger deemed to be overworked, Roberts and Friendly exchanged several letters about their mutual opinion about the drawbacks to such a move.[349] "Our only hope is that Congress will continue to do what it does best—nothing," Roberts stated in one letter about the Reagan administration's fight against this

[342] *See id.* at 1223.

[343] *See id.*

[344] *See, e.g.*, *Roberts Confirmation Hearing*, *supra* note 1, at 202–03 ("[Friendly] had such a total commitment to excellence in his craft at every stage of the process, just a total devotion to the rule of law . . . . He was an absolute genius. . . . To this day, lawyers will say, when they get into an area of the law and they pick up one of his opinions, that you can look at it and it's like having a guide to the whole area of the law."); Caplan, *supra* note 186; Gordon, *supra* note 318.

[345] Gordon, *supra* note 318.

[346] *See id.*

[347] *See id.*

[348] *See* Snyder, *supra* note 63, at 1226–27.

[349] *See id.* at 1227.

proposal.[350] In response, Friendly shared with Roberts a letter that he had written to Robert Kastenmeier, a Democrat from Wisconsin who served in the House of Representatives, opposing the creation of the new court.[351] Ultimately, both men were pleased when this idea withered on the political vine.[352]

After Friendly's death in 1986, Roberts continued to return to the words of his earliest judicial mentor, although perhaps not quite as often as before.[353] During his service on the D.C. Circuit, Roberts wrote forty-nine opinions.[354] Six of these opinions directly quoted Friendly, a conspicuously high number of quotations from the writings of a judge whose opinions did not represent binding precedent upon the D.C. Circuit.[355] Still, some questions remain about the intellectual integrity of at least one of these quotations.[356] Just as Friendly himself had told Roberts that he had stretched the extent of Friendly's viewpoints in his Justice Department writings about habeas corpus, D.C. Circuit Judge Merrick Garland informed Roberts that he had taken one of Friendly's quotations out of context about the utility of congressional committee reports.[357] At issue was the question of whether companies overcharging Amtrak could be held liable by the government even though Amtrak technically was not a government entity.[358] In his majority opinion, Roberts said that Amtrak could not be held liable, dismissing a congressional committee report that held otherwise by quoting part of an essay by Friendly.[359] Garland pointed out in his dissent that the essay that Roberts quoted actually opposed Roberts's ultimate conclusion about the irrelevance of congressional committee reports, noting that the full quotation from Friendly read:

> If an intent clearly expressed in committee reports is within the permissible limits of the language and no construction manifestly more reasonable suggests itself, a court does pretty well to read the statute to mean what the few legislators

[350] *Id.*
[351] *See id.*
[352] *See id.*
[353] *See id.* at 1228, 1230.
[354] Gordon, *supra* note 318.
[355] *Id.*
[356] *See id.*
[357] *See id.*
[358] *See id.*
[359] *See id.*

having the greatest concern with it said it meant to them.[360]

As ever, Friendly had urged the judiciary to show deference to the workings of the popularly elected legislators, a principle that Roberts did not follow in this opinion.[361]

During his confirmation hearings for the Supreme Court, Roberts again returned to Friendly's commentaries about judges and judging.[362] When asked about Friendly's influence, Roberts responded that the judge possessed "total devotion to the rule of law and the confidence that if you just worked hard enough at it, you'd come up with the right answers."[363] This statement, of course, can receive one of two possible readings. One can interpret Roberts's words as a conventional recognition of Friendly's commitment to the type of judicial self-restraint that Harlan promoted, forcing a judge to work rigorously to find the right answer without overstepping the rightful limits of the judicial branch and to defer to the popularly elected branches even when the judge believed their choices to be wrong.[364] Yet one can also view Roberts's comments about his former boss as a remark of judicial realism, a knowing wink that a judge who works hard enough can find a convincing rationale for the answer that the judge wishes to reach.[365] After all, Friendly could exhibit "remarkable creativity in circumventing precedent and formulating new rules in multiple areas," from admiralty law to federal civil procedure, all while giving the impression that he was preserving age-old principles of law that needed to remain undisturbed.[366] It is unclear which of these interpretations, if either, Roberts meant by his words, although one can imagine that he intended to reaffirm his ever-popular purported commitment to serving as an "umpire" and deferring to the legislature whenever possible.[367]

[360] *Id.*

[361] *See id.*

[362] *See Roberts Confirmation Hearing*, *supra* note 1, at 202.

[363] *Id.*

[364] *See supra* Part II.A.

[365] *See* Wilson Huhn, *Realism Over Formalism and the Presumption of Constitutionality: Chief Justice Roberts' Opinion Upholding the Individual Mandate*, 11 AKRON L. REV. 17, 17 (2013) (stating that Roberts showed his true hand as a judicial realist and a political realist in his opinion upholding the individual mandate of the Affordable Care Act).

[366] DORSEN, *supra* note 319 (publisher's description).

[367] *See* Snyder, *supra* note 63, at 1230 ("Roberts's description of the D.C. Circuit during his Supreme Court nomination hearings contained the same sort of judge-as-umpire idealization as his description of Friendly."). This modern-day judge-as-umpire idealization, of course, was not limited to Roberts's statements, nor is it limited to Supreme Court hopefuls on one particular side of the political aisle. *See, e.g.*, *Confirmation Hearing on the Nomination of Hon.*

Roberts also pointed out during his confirmation hearings that "editorialists of the day couldn't decide whether [Friendly] was a liberal or a conservative."[368] This desire to remove the judicial branch in general, and the Supreme Court in particular, from political partisanship, remains a theme to which the Chief Justice often pays tribute.[369] Often, Roberts has expressed concerns about the increasingly voluminous reports indicating that the Supreme Court is more deeply mired in partisan politics than at any other point in recent memory, showing that public perception of the Court is currently the exact opposite of public perception of Friendly's judicial career.[370] For a Chief Justice who both admires Friendly's legacy and is concerned about his own place in history, such widely distributed reports about the politicization of the Court are likely highly troubling.

Finally, Roberts described Friendly as a man who possessed "the essential humility to appreciate that he was a judge, and that this decision should be made by this agency or this decision by that legislature."[371] Perhaps in tribute to Friendly's famously boundless curiosity about the intricacies of the law, he later stated to the Senate Judiciary Committee that "judges have to have the modesty to be open in the decisional process to the considered views of their colleagues on the bench."[372] With these two statements, Roberts seemed to paint a picture of what he felt the ideal Supreme Court should be: a place of earnest and open discussion among equals about difficult legal matters, with each justice humble enough to concede

*Sonia Sotomayor, to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 59 (2009) ("The task of a judge is not to make law, it is to apply the law.").

[368] David S. Broder, *Roberts's Sterling Showing*, WASH. POST (Sept. 18, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/09/17/AR2005091700990.html.

[369] *See, e.g.*, Robert Barnes, *Does Chief Justice Roberts Fear Gobbledygook? Or Is That Just Baloney?*, WASH. POST (Oct. 22, 2017), https://www.washingtonpost.com/politics/courts_law/does-chief-justice-roberts-fear-gobbledygook-or-is-that-just-baloney/2017/10/22/966c137c-b5ab-11e7-9e58-e6288544af98_story.html?utm_term=.0cbe6bcd388a; Biskupic, *supra* note 43; Levin, *supra* note 46; Richard Wolf, *Chief Justice John Roberts' Supreme Court at 10, Defying Labels*, USA TODAY (Sept. 28, 2015), https://www.usatoday.com/story/news/politics/2015/09/28/supreme-court-john-roberts-conservative-liberal/72399618/.

[370] *See* Helen J. Knowles et al., *The U.S. Supreme Court in the Obama Years*, *in* THE OBAMA PRESIDENCY AND THE POLITICS OF CHANGE 89–92 (Edward Ashbee & John Dumbrell eds., 2017); Eric Hamilton, Note, *Politicizing the Supreme Court*, 65 STAN. L. REV. ONLINE 35, 35 (2012); Henry Gass, *John Roberts's Mission Impossible for the Supreme Court*, CHRISTIAN SCI. MONITOR (Nov. 16, 2016), https://www.csmonitor.com/USA/Justice/2016/1116/John-Roberts-s-mission-impossible-for-the-Supreme-Court.

[371] *Roberts Confirmation Hearing*, *supra* note 1, at 202.

[372] *See id.* at 55–56.

when he or she was wrong about a given point and with the Court as a whole modest enough to defer to the popularly elected branches whenever possible.[373] One could easily draw a line between that idealized description of the Court at work and the atmosphere that Friendly appeared to cultivate in his chambers during Roberts's clerkship.

Of course, Roberts may have been simply utilizing convenient words from a judge with bipartisan appeal to satiate the Senate Judiciary Committee.[374] His prior invocations of Friendly's writings to advance points that were not exactly what Friendly had intended demonstrates that Roberts is not immune to the temptation of utilizing Friendly's statements in such a manner, just as virtually any advocate will try to stretch useful language from famous sources to advance their objectives. Still, a review of Roberts's work with Friendly demonstrates a high level of genuine respect for Friendly's views on the American legal system and, perhaps, even a degree of sentimentality for the non-partisan intellectual rigor of his clerkship with Friendly. One can only wonder whether Roberts would indeed like to reprise this atmosphere within the hallowed halls of the Supreme Court. At the very least, one can sense that the Chief Justice would not turn down any opportunity to gain the type of reputation of respect for the integrity of himself and his Court that Friendly managed to cultivate during his judicial career.

### *C. William Rehnquist*

In completing his questionnaire for the Senate Judiciary Committee, Roberts offered a revealing look at the impact of his two high-profile judicial clerkships.[375] "Judge Henry J. Friendly is justly remembered as one of the Nation's truly outstanding federal appellate judges," Roberts wrote.[376] "The clerkship on the Supreme Court for then-Associate Justice Rehnquist the following year was an intensive immersion in the federal appellate process at the highest

[373] *See* Damien Schiff, *Nothing New Under the Sun: The Minimalism of Chief Justice Roberts and the Supreme Court's Recent Environmental Law Jurisprudence*, 15 MO. ENVTL. L. & POL'Y REV. 1, 1, 10, 13 (2007); E.J. Dionne, *Roberts' Rule: Judicial Humility*, SEATTLE TIMES (June 21, 2006), http://old.seattletimes.com/html/opinion/2003074363_dionne21.html.

[374] *See* Dahlia Lithwick, *Confirmation Report*, SLATE (Sept. 13, 2005), http://www.slate.com/articles/news_and_politics/jurisprudence/features/2005/confirmation_report/john_roberts_is_so_humble.html.

[375] *See* Snyder, *supra* note 63, at 1232.

[376] *Id.*

level."[377] As Professor Brad Snyder observed, the contrast in Roberts's depictions of these clerkships is striking.[378] "The first description praises Friendly the judge," Snyder pointed out.[379] "[T]he second praises the Court as an institution."[380]

Nevertheless, it is Rehnquist, not Friendly, who seems to be most often cited as Roberts's judicial mentor.[381] Given that Rehnquist advanced Roberts's political contacts far more than Friendly possibly could have, and considering that Rehnquist's close ties within the Reagan administration undoubtedly launched Roberts's career in the highest echelons of the federal government, this close link is unsurprising.[382] With this in mind, it is crucial to explore the impact of Rehnquist upon the future Chief Justice whom Rehnquist, after a period of clerkship "hazing," ultimately sought to groom as a protégé.[383]

The Court that Roberts came to as Rehnquist's clerk was a far different Court than the judicial body over which Roberts presides today.[384] At this point in his career, Rehnquist was still the Court's "Lone Ranger," a politically conservative dissenter fighting steadily against a politically liberal majority.[385] Unlike Friendly, who remained mercurial regarding his political views, Rehnquist was an unabashed Reagan-esque Republican who made no efforts to conceal his political stances.[386] To Rehnquist, the Warren Court had engaged in a litany of excesses, inserting the federal government in the middle of controversies that should have been left to the individual states and permitting the Court to resolve social issues that were truly the

[377] *Id.*

[378] *See id.*

[379] *Id.*

[380] *Id.*

[381] *See, e.g.*, Sean Alfano, *Rehnquist and Roberts Shared Bond*, CBS (Sept. 4, 2005), https://www.cbsnews.com/news/rehnquist-and-roberts-shared-bond/; Ari Berman, *Inside John Roberts' Decades-Long Crusade Against the Voting Rights Act*, POLITICO (Aug. 10, 2015), https://www.politico.com/magazine/story/2015/08/john-roberts-voting-rights-act-121222; Klaidman, *supra* note 56; Adam Liptak & Todd S. Purdum, *As Clerk for Rehnquist, Nominee Stood Out for Conservative Rigor*, N.Y. TIMES (July 31, 2005), https://www.nytimes.com/2005/07/31/politics/politicsspecial1/as-clerk-for-rehnquist-nominee-stood-out-for.html?mtrref=www.google.com&gwh=63B0958244EFF74F8CF5DA4FAEC3D9C0&gwt=pay.

[382] *See* Snyder, *supra* note 63, at 1225–26.

[383] *See infra* notes 444–52 and accompanying text.

[384] *See* Nina Totenberg, *Rehnquist: From Lone Dissenter to Consensus Builder*, NAT'L PUB. RADIO (Sept. 4, 2005), https://www.npr.org/templates/story/story.php?storyId=4832353.

[385] *Id.* Rehnquist embraced his "Lone Ranger" image, a fact underscored by his delight when his clerks presented him with a small Lone Ranger doll for his chambers. *Id.*

[386] *See* Dahlia Lithwick, *History's Justice: What Rehnquist Didn't Do*, SLATE (Sept. 4, 2005), https://slate.com/news-and-politics/2005/09/what-rehnquist-didn-t-do.html.

domain of the legislative and executive branches.[387] If the only way to fight this legacy was to author a lone dissent that acidly rebuked every other justice on the Court, then Rehnquist was willing to do so, even at the risk of alienating even his conservative-leaning colleagues on the bench.[388] Building consensus among the nine justices seemed far less important to Rehnquist than being right and, hopefully, later being vindicated by history.[389]

His work prior to joining the Court demonstrated that Rehnquist's approach to judging should have been unsurprising to all who knew him. Born into a politically conservative family in Shorewood, Wisconsin, Rehnquist's ascent to the top of conservative politics began after he returned from overseas service in the Army Air Force during World War II.[390] He earned his bachelor's, master's, and law degrees from Stanford, graduating at the top of his law school class despite extremely tough competition from a soon-to-be-famous classmate: Sandra Day O'Connor.[391] The two future Supreme Court justices became good friends, even dating briefly during their Stanford Law days, and remained close even during their battles on the Court over some of the nation's most divisive issues.[392]

Immediately following his law school graduation, Rehnquist clerked for Justice Robert Jackson, the jurist whom Roberts (and many others) cited as the finest writer in the history of the Supreme Court.[393] Given that Rehnquist was far more politically conservative

[387] *See* David G. Savage, *The Rehnquist Court: Bill Rehnquist Was Once Considered an Extremist. Now His Views Almost Always Become the Law of the Land*, L.A. TIMES (Sept. 29, 1991), http://articles.latimes.com/1991-09-29/magazine/tm-4832_1_rehnquist-court.

[388] *See id.*

[389] *See* Jeffrey Rosen, *Roberts's Rules*, ATLANTIC (Jan.-Feb. 2007), https://www.theatlantic.com/magazine/archive/2007/01/robertss-rules/305559/ ("Rehnquist cared somewhat about building consensus, but not all that much.").

[390] *See* Savage, *supra* note 387.

[391] *See id.*

[392] *See id.*; Michael Brice-Saddler, *William Proposed. Sandra Said No. The Reunited on the Supreme Court*, WASH. POST (Oct. 31, 2018), https://www.washingtonpost.com/history/2018/10/31/william-proposed-sandra-said-no-they-reunited-supreme-court/?utm_term=.315f1bfa2882. Rehnquist's opinions during his collegiate years were in many ways identical to the opinions that he held for the rest of his life. *See* Savage, *supra* note 387 ("[Classmates] were struck by his unwavering conservatism. His views seemed to have been 'flash frozen' when he was an undergraduate, they say, and have not shifted or evolved since.").

[393] Charles Lane, *Chief Justice William H. Rehnquist Dies*, WASH. POST (Sept. 4, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/09/03/AR2005090301911.html; *see also* Bryan A. Garner, *Celebrating the Powerful Eloquence of Justice Robert Jackson*, AM. B. ASS'N J. (Oct. 2016), http://www.abajournal.com/magazine/article/powerful_eloquence_justice_robert_jackson ("Doubtless because Jackson was so unusually eloquent, a majority of the current justices name him as their favorite writer ever to serve on the [C]ourt."). Rehnquist himself spoke publicly about his admiration for Jackson's writing. *See* William H. Rehnquist,

than Jackson, a significant level of intellectual jousting between the justice and the clerk was inevitable.[394] Rehnquist bemoaned Jackson's "tendency to go off half-cocked" and claiming that Jackson's opinions "[didn't] seem to go anywhere."[395] This belief underscored a relationship between Jackson and Rehnquist that one fellow clerk characterized as "rocky."[396] Still, while the two men never were close friends, Rehnquist and Jackson did exchange several cordial letters after Rehnquist's clerkship ended, including one note in which Rehnquist lavished praise upon Jackson for voting to permit the execution of convicted spies Julius and Ethel Rosenberg.[397]

One of those sparring matches between Jackson and Rehnquist would come back to haunt Rehnquist during his Supreme Court confirmation hearings: a memo urging Jackson to affirm the precedent in *Plessy v. Ferguson* of permitting states to maintain "separate but equal" public schools in which students were racially segregated.[398] "I realize that this is an unpopular and unhumanitarian position, for which I have been excoriated by 'liberal' colleagues," Rehnquist wrote, "but I think *Plessy v. Ferguson* was right and should be re-affirmed."[399] Of course, plenty of judges and legal scholars, including Judge Friendly, have criticized the Warren Court's work in *Brown v. Board of Education*, but few have done so with the definitiveness about the righteousness of *Plessy v. Ferguson* that echoed throughout Rehnquist's memo–a declaration that Rehnquist wrote two years before *Brown* was decided.[400] Adding to

*Who Writes Decisions of the Supreme Court?*, U.S. NEWS & WORLD REP. (Dec. 9, 2008), https://www.usnews.com/opinion/articles/2008/12/09/william-rehnquist-writes-in-1957-on-supreme-court-law-clerks-influence.

394 *See* Snyder, *supra* note 63, at 1152 n.9; Savage, *supra* note 387.

395 Adam Liptak, *New Look at an Old Memo Casts More Doubt on Rehnquist*, N.Y. TIMES (Mar. 19, 2012), https://www.nytimes.com/2012/03/20/us/new-look-at-an-old-memo-casts-more-doubt-on-rehnquist.html?mtrref=www.google.com&gwh=0A2A37EFFB1CD12F3766812663AA936B&gwt=pay.

396 *See* Brad Snyder & John Q. Barrett, *Rehnquist's Missing Letter: A Former Law Clerk's 1955 Thoughts on Justice Jackson and* Brown, 53 B.C. L. REV. 631, 635–36 (2012).

397 Savage, *supra* note 387. In this letter, Rehnquist asked Jackson why "the highest court of the nation must behave like a bunch of old women every time they encounter the death penalty." Snyder, *supra* note 396, at 643–44.

398 *See* MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW 19–20 (2005).

399 *Id.* at 19.

400 *Compare* TUSHNET, *supra* note 398, at 19 ("I realize that this is an unpopular and unhumanitarian position . . . but I think *Plessy v. Ferguson* was right and should be re-affirmed."), *with* Friendly, *supra* note 325, at 29 ("There seems to be general agreement that while *Brown* was a good . . . decision, the decision was not, for whatever reasons, embodied in a good opinion.").

the drama was the quickness with which Rehnquist disavowed the memorandum when quizzed about it during his confirmation hearings.[401] To the Senators, Rehnquist claimed that the memo actually was meant to characterize Jackson's initial views regarding the desegregation of public schools, a stance that Jackson later changed after Warren convinced him to vote with the Court's majority.[402] However, substantial historical research from multiple commentators demonstrates that this statement actually was false, and that Rehnquist's memorandum genuinely represented Rehnquist's own views about the desirability of upholding *Plessy v. Ferguson*.[403]

Following his clerkship, Rehnquist entered into private practice in Arizona.[404] There, he became active in state politics, where his service included working as the head of "ballot security" for the state's Republican Party between 1960 and 1964.[405] In this role, Republican poll watchers became infamous for questioning whether many minority voters were literate enough to be able to cast a ballot for the candidate of their choice.[406] He also testified against a City of Phoenix ordinance that banned racial discrimination in public accommodations.[407] After the measure passed unanimously, Rehnquist continued his campaign against it, writing a letter to a Phoenix newspaper that called the ordinance "a mistake," as it wrongfully infringed upon the liberties of business owners and would leave the "unwanted customer and the disliked proprietor . . . glowering at one another across the lunch counter."[408] "It is, I believe, impossible to justify the sacrifice of even a portion of historic

[401] *See* Adam Liptak, *The Memo that Rehnquist Wrote and Had to Disown*, N.Y. TIMES (Sept. 11, 2005), https://www.nytimes.com/2005/09/11/weekinreview/the-memo-that-rehnquist-wrote-and-had-to-disown.html?mtrref=www.google.com&gwh=CCAB4F786BEC657A68A71606037BB0D4&gwt=pay.

[402] *See id.*

[403] *See* TUSHNET, *supra* note 398, at 20; Josh Israel, *New Research Suggests William Rehnquist Lied About Explosive Memo Backing Racial Segregation*, THINK PROGRESS (Mar. 20, 2012), https://thinkprogress.org/new-research-suggests-william-rehnquist-lied-about-explosive-memo-backing-racial-segregation-43beab2a20af/; Liptak, *supra* note 401; Jeffrey Rosen, *Rehnquist's Choice*, NEW YORKER (Jan. 11, 1999), https://www.newyorker.com/magazine/1999/01/11/rehnquists-choice.

[404] JOHN A. JENKINS, THE PARTISAN: THE LIFE OF WILLIAM REHNQUIST 59, 60 (2012).

[405] *See* JENKINS, *supra* note 404, at 70; Robert Lindsey, *Rehnquist in Arizona: A Militant Conservative in '60s Politics*, N.Y. TIMES (Aug. 4, 1986), https://www.nytimes.com/1986/08/04/us/rehnquist-in-arizona-a-militant-conservative-in-60-s-politics.html.

[406] *See id.*

[407] *See* JENKINS, *supra* note 404, at 69.

[408] *Id.* at 69–70.

individual freedom for a purpose such as this," he concluded.[409]

Living and working in Arizona gave Rehnquist the perfect opportunity to become acquainted with Senator Barry Goldwater, the leader of a new conservative wing within the Republican Party.[410] During Goldwater's 1964 presidential campaign, Rehnquist served as both a speechwriter and a strategist for the Goldwater camp, where his work included convincing Goldwater to vote against the Civil Rights Act of 1964 in the Senate.[411] While Goldwater's presidential bid ultimately failed, Rehnquist spoke warmly about Goldwater's influence on shaping and affirming Rehnquist's legal and political views.[412]

Four years after Goldwater's presidential loss, Rehnquist struck political gold in the form of Phoenix attorney Richard G. Kleindienst, one of the directors of Richard Nixon's successful campaign for the White House.[413] When Nixon rewarded Kleindienst with a highly desirable assignment in the Justice Department, Kleindienst quickly

[409] *Id.* at 70.

[410] *See id.* at 60–61.

[411] *See id.* at 73 ("With his usual certitude, Rehnquist had persuaded Goldwater that the Act, the most important equal-rights law since Reconstruction, offended the Constitution. When the erratic Goldwater started speaking out on the issue, his comments were almost a word-for-word replay of Rehnquist's jihad years earlier against the forced integration of lunch counters."). Initially, Goldwater was uncertain that Rehnquist's views about the Civil Rights Act were legally accurate, so he consulted another member of his inner circle: Yale Law School Professor Robert Bork, who would later be nominated to the Supreme Court by Reagan and rejected by the Senate. *See* Louis Menand, *He Knew He Was Right: The Tragedy of Barry Goldwater*, NEW YORKER (Mar. 26, 2001), https://www.newyorker.com/magazine/2001/03/26/he-knew-he-was-right; Nina Totenberg, *Robert Bork's Supreme Court Nomination 'Changed Everything, Maybe Forever'*, NAT'L PUB. RADIO (Dec. 19, 2012), https://www.npr.org/sections/itsallpolitics/2012/12/19/167645600/robert-borks-supreme-court-nomination-changed-everything-maybe-forever. Bork responded with a seventy-five-page affirmation of Rehnquist's views about the unconstitutionality of the Act. *See* Menand, *supra*. Based on the analysis of Rehnquist and Bork, Goldwater reluctantly opposed the Act. *See id.*

[412] *See, e.g.*, Michael Bobelian, *Examining Rehnquist's Legacy*, FORBES (July 29, 2013), https://www.forbes.com/sites/michaelbobelian/2013/07/29/examining-rehnquists-legacy/#4113a7c15846; Joe Conason, *Supreme Injustice*, SALON (Oct. 29, 2004), https://www.salon.com/2004/10/29/injustice/. These are just two of many sources that link Rehnquist's stances with Goldwater's influence. However, some commentators question whether it was actually Rehnquist who used his persuasive skills to push Goldwater to the far-right pole of the political spectrum on issues such as civil rights. *See* Menand, *supra* note 411; David G. Savage, *Chief Justice, 80, Led Court on a Conservative Path*, L.A. TIMES (Sept. 4, 2005), http://articles.latimes.com/print/2005/sep/04/nation/na-rehnquist4. To Rehnquist, Goldwater and his political disciples epitomized the backlash that Rehnquist desired against the type of "Ivy League" scholarship on constitutional interpretation about which Rehnquist was constantly suspicious. *See* Richard A. Epstein, *Sidebars on Rehnquist and Roberts*, L.A. TIMES (Sept. 11, 2005), http://articles.latimes.com/2005/sep/11/opinion/op-courtexcerpts11.

[413] *See* JENKINS, *supra* note 404, at 76.

asked if Rehnquist could join him in Washington.[414] Although Rehnquist was still largely unknown among Washington insiders, Kleindienst's recommendation was enough to get Rehnquist an interview, which the future Chief Justice promptly aced.[415]

In his new role as assistant attorney general in charge of the Office of Legal Counsel, Rehnquist "became an apostle of government authority."[416] In one speech, he compared student protestors to the "original barbarians" who ultimately sacked the Roman Empire.[417] When the police rounded up antiwar protestors on the streets of Washington in May 1971, Rehnquist said that their arrests were justified under a "doctrine" of "qualified martial law."[418] "If force or the threat of force is required in order to enforce the law," he declared, "we must not shirk from its employment."[419] This mindset became the bedrock of his arguments when defending everything from the invasion of Cambodia without the authorization of Congress, to wiretapping the phone lines of American citizens whom the Nixon administration considered to pose potential threats to national security.[420] In one memo to the White House Counsel, Rehnquist even proposed a constitutional amendment that would substantially limit the rights of accused persons in criminal cases.[421] When this notion went nowhere, Rehnquist expressed his frustrations to his journal, writing that "[c]onservatives are those who worship dead radicals."[422]

During his time in the White House, Nixon struggled with appointments to the Supreme Court.[423] Two of his nominees, Clement F. Haynsworth, Jr., and G. Harrold Carswell, were rejected by the Senate before the eventual approval of Harry Blackmun.[424]

[414] *See id.*

[415] *See id.* at 77.

[416] Saundra Saperstein & George Lardner, Jr., *Rehnquist: Nixon's Long Shot for a 'Law and Order' Court*, WASH. POST (July 7, 1986), https://www.washingtonpost.com/archive/politics/1986/07/07/rehnquist-nixons-long-shot-for-a-law-and-order-court/7bf11b49-997e-45ec-8e75-68dea1fc14b6/?utm_term=.782fa2c27e96.

[417] *Id.*

[418] *Id.*

[419] *Id.*

[420] *See id.*

[421] Michael O'Donnell, *Raw Judicial Power: On William Rehnquist*, NATION (Oct. 3, 2012), https://www.thenation.com/article/raw-judicial-power-william-rehnquist/.

[422] *See id.*

[423] *See* Benjamin Pomerance, *Justices Denied: The Peculiar History of Rejected United States Supreme Court Nominees*, 80 ALB. L. REV. 627, 706–20 (2017).

[424] *See id.* at 713, 719–20; RANDALL BENNETT WOODS, QUEST FOR IDENTITY: AMERICA SINCE 1945 323 (2005).

When Justices Hugo Black and John Marshall Harlan II retired from the Court, Nixon found himself staring at two more vacancies.[425] After a vetting process led by Rehnquist and his Justice Department colleagues failed to uncover any candidates who were both acceptable to Nixon and willing to accept the job, Nixon announced the nomination of a "stealth candidate": Rehnquist himself.[426] The President then told his Attorney General to "be sure to emphasize to all the southerners that Rehnquist is a reactionary bastard, which I hope to Christ he is."[427] After a five-day battle in the Senate during which Rehnquist attempted to distance himself from many of his prior statements opposing civil rights reforms, the Senate finally confirmed him by a sixty-eight to twenty-six margin.[428]

During his tenure on the Court, Rehnquist would issue more than sixty lone dissents, with twenty-four of those solo opinions coming during his first five years on the Court.[429] From the outset, his voting record was predictable, favoring the prosecution in criminal cases and siding with the government over individuals in civil disputes.[430] Unlike Harlan and Friendly, Rehnquist did not demonstrate a consistently high regard for precedent.[431] Nor did Rehnquist echo the

[425] *See* DAVID L. HUDSON, JR., THE REHNQUIST COURT: UNDERSTANDING ITS IMPACT AND LEGACY 5 (2007).

[426] *See id*. at 6–7. Initially, Rehnquist failed to impress Nixon, who referred to Rehnquist as a "clown." O'Donnell, *supra* note 421. Yet just as Rehnquist won over the Nixon insiders who interviewed him for the Justice Department, the future Chief Justice eventually swayed Nixon's opinions, too. *See id.* "William Rehnquist has been outstanding in every intellectual endeavor he has undertaken," the President declared in his announcement of Rehnquist's nomination to the Court. HUDSON, *supra* note 425, at 7. "He is, in effect, the President's lawyer's lawyer." *Id.*

[427] O'Donnell, *supra* note 421.

[428] *See* HUDSON, *supra* note 425, at 8–10. During the hearings, Rehnquist testified that he had been wrong in opposing the integration of public accommodations in Phoenix and swore that he never fully believed in the statements he made in his memorandum to Justice Jackson opposing the reversal of *Plessy v. Ferguson*. *Id.* at 8–9; Liptak, *supra* note 401.

[429] *See* HUDSON, *supra* note 425, at 15; John Cloud, *William Rehnquist: 1924-2005*, TIME (Sept. 4, 2005), http://content.time.com/time/nation/article/0,8599,1101296,00.html.

[430] *See* HUDSON, *supra* note 425, at 123 ("[R]ehnquist became a U.S. Supreme Court justice with the mind-set that the Warren Court had gone too far in many of its criminal law rulings. For much of his 33 years on the Court Rehnquist voted against criminal defendants."); Bobelian, *supra* note 412; O'Donnell, *supra* note 421; David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 294 (1976) ("Conflicts between an individual and the government should, whenever possible, be resolved against the individual.").

[431] *See* Owen Fiss & Charles Krauthammer, *The Rehnquist Court*, NEW REPUBLIC, Mar. 10, 1982, at 15, 20 ("He repudiates precedents; he shows no deference to the legislative branch; and he is unable to ground state autonomy in any textual provision of the Constitution."). *See also* Dorsen, *supra* note 292, at 102–03 ("There are therefore many instances where Harlan vigorously protested the overruling of precedent."); Snyder, *supra* 71, 1206 ("Friendly . . . believed that precedent was a constant as central as any.").

desire of Harlan and Friendly to avoid reaching constitutional questions whenever possible.[432] Instead, Rehnquist used opinions that were pithy and relatively short to doggedly advance a handful of key policy positions: preventing the federal government from infringing upon the rights and powers of state governments, stopping individual plaintiffs from suing state governments, safeguarding the ability of government actors to do virtually anything that they deemed necessary to protect the people against suspected criminal threats, and ensuring that the behavior of individual radicals did not undermine the well-oiled machine of day-to-day governance.[433]

Roberts's clerkship for Rehnquist represented Roberts's first prolonged exposure to this type of judging, as well as his first look at a jurist for whom political alliances played a significant role.[434] In terms of personality, Friendly and Rehnquist also were quite different.[435] Friendly lived first and foremost for the law, a workaholic who enjoyed the constant intellectual repartee with his clerks but ultimately reserved the task of drafting and re-drafting judicial opinions exclusively for himself.[436] Rehnquist was a hard worker, too, but he carefully refused to let anything, even serving on the Supreme Court, overrule opportunities to spend time with his family.[437] Efficiency was one of the keystone attributes that he prized in himself and demanded from his clerks.[438] Permitting clerks to play a role in drafting his opinions saved time, and thus was something that Rehnquist frequently allowed.[439] When a discussion with his clerks over the intricacies of the law seemed to be lasting for too long,

[432] *See* Fiss & Krauthammer, *supra* note 431, at 16.

[433] *See* Bobelian, *supra* note 412; Cloud, *supra* note 429; Fiss & Krauthammer, *supra* note 431, at 15; Charles Lane, *The Rehnquist Legacy: 33 Years Turning Back the Court*, WASH. POST (Sept. 5, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/09/04/AR2005090401251.html; O'Donnell, *supra* note 421; Shapiro, *supra* note 430, at 294; Epstein, *supra* note 412. *See e.g.*, Arizona v. Evans, 514 U.S. 1, 3–4, 6 (1995) (delivered the opinion of the Court, Chief Justice Rehnquist wrote that evidence seized in reliance on an erroneous police record need not be suppressed).

[434] *See* Snyder, *supra* note 63, at 1225.

[435] *See id.*

[436] *Id.* at 1214, 1225.

[437] Herman Obermayer, *The William Rehnquist You Didn't Know*, AM. B. ASS'N J. (Mar. 2010), http://www.abajournal.com/magazine/article/the_william_rehnquist_you_didnt_know; Snyder, *supra* note 63, at 1225 ("Rehnquist viewed the law as a job that yielded to family time."); *see also* JENKINS, *supra* note 404, at 149 ("Such insouciance as to his own significance allowed Rehnquist to keep old-school banker's hours: 9 to 3 most workdays, and made time for things that interested him more: reading, writing, stamp collecting, getting out 'into the hinterlands.'").

[438] Snyder, *supra* note 63, at 1224.

[439] *See id.*

Rehnquist would terminate the dialogue by saying, "[w]ell, I'm just not going to do it," signaling that the debate had ended.[440] He also enjoyed practical jokes and fervently engaged in small-stakes gambling, pursuits that did not seem to be particularly high on Friendly's list of preferred activities.[441]

While Friendly wanted his clerks to scrutinize every microscopic detail of every case, Rehnquist strictly enforced a policy under which his clerks had to prepare their first drafts within ten days after receiving an assignment.[442] This was a significant change for Roberts, far different from the detailed analyses that he had employed while studying at Harvard and during his clerkship in Friendly's chambers.[443] Later, Roberts recalled writing one draft for Rehnquist that the justice wanted to scrap, with the exception of the topic sentence in each paragraph.[444] Roberts objected politely, and Rehnquist offered a compromise: keep only the topic sentences in the body of the document, but preserve the rest of the verbiage by placing it in the footnotes.[445] When Roberts did as Rehnquist instructed, the judge responded by saying, "[w]ell, all right. Now take out the footnotes."[446]

Still, Roberts adapted to his new environment quickly.[447] In fact, he discovered that he liked the political environment of Washington and, according to Professor Brad Snyder, "thrived in the Court's highly politicized atmosphere."[448] Rather than requiring bench memos from his clerks, Rehnquist would discuss cases with them during long walks around the Supreme Court building, an experience that Roberts grew to enjoy.[449] Despite the fact that the Court had recently been shocked by the publication of *The Brethren*, an exposé of the Court's inner workings by Bob Woodward and Scott Armstrong, Roberts was pleased to see that Rehnquist was still surprisingly

[440] *Id.* at 1225. Roberts recalled hearing this phrase from Rehnquist more than once. *Id.* "That meant that was the end of it, no matter how much you were going to try to persuade him," Roberts remembered "[i]t wasn't going to happen." *Id.*

[441] *See* Charles Lane, *A Man of Many Hobbies and Little Fuss*, WASH. POST (Sept. 5, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/09/04/AR2005090401007.html; Obermayer, *supra* note 437.

[442] Snyder, *supra* note 63, at 1210, 1224.

[443] *Id.* at 1210–11, 1218, 1224.

[444] *Id.* at 1224.

[445] *Id.*

[446] *Id.*

[447] *Id.* at 1223.

[448] *Id.* at 1225.

[449] *See* Liptak & Purdum, *supra* note 381.

candid with his clerks about the mistakes that he felt the Court's majority was making and the directions in which he wanted to guide the Court's decisions.[450] While the work during his clerkship with Rehnquist was relentlessly hard, and largely unspectacular, Roberts still managed to distinguish himself as a star among stars, later remembered by his colleagues as the clerk who was most likely to become a Supreme Court justice someday.[451] Rehnquist was impressed, too, viewing Roberts as a rising star in the conservative legal movement and helping him make contacts throughout the Reagan administration that Roberts would need to advance in his career.[452]

Yet Rehnquist's most powerful years on the Court were yet to come. Six years later, after Rehnquist succeeded Warren Burger as the Chief Justice of the Court, Roberts watched from afar as Rehnquist skillfully steered the judicial ship rightward, using his leadership role to mold the Court to his own preferences.[453] During the 1990s and the early 2000s, while Roberts transitioned from private practice back into the government sphere, he observed the Rehnquist Court invalidate forty-one federal laws, deciding cases that limited Congress's powers to regulate interstate commerce, protected states from lawsuits brought by individual citizens, and prevented the federal government from using state resources for the federal government's advantage.[454] In making these decisions, Rehnquist continued familiar trends of restricting federal attempts to legislate civil rights reform and expanding the powers of law enforcement in criminal investigations.[455] As attorney and journalist Michael O'Donnell pointed out, Rehnquist "voted against every affirmative action program that came before the Court in his lifetime, as well as every major case on gay rights," and "found teeth in the First Amendment only in cases where laws limited commercial speech, imposed campaign finance restrictions[,] or limited religious

[450] Snyder, *supra* note 63, at 1153 n.18, 1215, 1223.

[451] Liptak & Purdum, *supra* note 381 (quoting one clerkship colleague listing Roberts and future law professor Stephen L. Carter as the two Rehnquist clerks from that year who were most likely to become future Supreme Court justices).

[452] *See* Snyder, *supra* note 63, at 1223, 1226.

[453] *See* Thomas R. Marshall, *Introduction: Evaluating the Rehnquist Court's Legacy*, 89 JUDICATURE 104, 105 (2005).

[454] *See* O'Donnell, *supra* note 421. The Rehnquist Court also overruled more than thirty prior Court decisions. *See* Marshall, *supra* note 453, at 104.

[455] *See* Bobelian, *supra* note 412; O'Donnell, *supra* note 421; *see also* Shapiro, *supra* note 430, at 318–20 (discussing then-Justice Rehnquist's legal reasoning in his early decisions, essentially foretelling these trends).

expression."[456] Thanks to the leadership of Rehnquist and the judicial appointments made by Reagan and George H.W. Bush, Rehnquist eventually transitioned from being the Court's "Lone Ranger" to serving as the leader of a politically conservative revolution.[457]

On occasion, however, the typically predictable politically conservative justice could deliver a surprise.[458] Like Harlan and Friendly, Rehnquist repeatedly expressed his distaste for the Warren Court's holding in *Miranda v. Arizona*.[459] Yet when the opportunity to torpedo *Miranda* arose in the case of *Dickerson v. United States*,[460] Rehnquist unexpectedly declined to do so, breaking ranks with his politically conservative colleagues Antonin Scalia and Clarence Thomas in the process.[461] According to Rehnquist's majority opinion, Congress could not enact a statute that overruled *Miranda*, as the *Miranda* decision represented "a constitutional rule" that Congress could not simply eviscerate.[462] Additionally, Rehnquist wrote that the *Miranda* warnings had "become part of our national culture" and were now "embedded in routine police practice" without causing any measurable detriments to prosecutors.[463] Some commentators theorized that Rehnquist issued this decision out of concern that his reputation as Chief Justice and the power of the Court would be ruined if he had abolished the *Miranda* warnings.[464]

[456] O'Donnell, *supra* note 421 (noting Rehnquist's surprising reaffirmation of *Miranda*).

[457] *See* HUDSON, *supra* note 425, at 144; Cass R. Sunstein, *The Rehnquist Revolution*, NEW REPUBLIC (Dec. 27, 2004), https://newrepublic.com/article/64247/the-rehnquist-revolution. Still, some commentators argue that seemingly conservative Court appointees who eventually shifted to the political left undermined the conservative revolution that Rehnquist sought. *See, e.g.*, Richard E. Morgan, *The Failure of the Rehnquist Court*, CLAREMONT INST. (June 5, 2006), https://www.claremont.org/crb/article/the-failure-of-the-rehnquist-court/.

[458] *See, e.g.*, O'Donnell, *supra* note 421.

[459] *See* Jan Crawford Greenburg, *High Court Upholds Miranda Warnings*, CHI. TRIB. (June 27, 2000), https://www.chicagotribune.com/news/ct-xpm-2000-06-27-0006270175-story.html (noting that Rehnquist was a longtime critic of the Court's holding in *Miranda*).

[460] Dickerson v. United States, 530 U.S. 428 (2000).

[461] *See id.* at 444.

[462] *Id.*

[463] *See id.* at 443 (citing Mitchell v. United States, 526 U.S. 314, 331–32 (1999) (Scalia, J., dissenting).

[464] *See, e.g.*, George M. Dery III, *The "Illegitimate Exercise of Raw Judicial Power:" The Supreme Court's Turf Battle in* Dickerson v. United States, 40 BRANDEIS L.J. 47, 48 (2001); Mitch Reid, Note, United States v. Dickerson*: Uncovering Miranda's Once Hidden and Esoteric Constitutionality*, 38 HOUS. L. REV. 1343, 1378–79 (2001) ("The simplest answer is that to hold otherwise, the Court would have overturned a simple, yet comforting legal procedure embraced by most Americans. . . . Considering Miranda's popularity, imagine the enormity of the public backlash the Court would have received if it overturned such a distinguished decision."); Linda Greenhouse, *The Supreme Court: The Precedent; Justices Reaffirm Miranda Rule, 7-2; A Part*

A different type of surprise from Rehnquist awaited when the Court considered whether the Florida Supreme Court had erred in ordering a recount of ballots in the 2000 presidential election.[465] Rehnquist, who had argued for decades that the federal government needed to stop interfering in the affairs of the states, reversed course in his decision in *Bush v. Gore*, declaring that the recount was unconstitutional and ordering Florida to cease the recount immediately.[466] Unlike Justices David Souter and Stephen Breyer, who agreed that the Florida Supreme Court had acted unconstitutionally but argued that a constitutional recount could be provided, Rehnquist refused to seek an opportunity to preserve the decision of the state's highest court.[467] The fact that this decision by a politically conservative Chief Justice and his politically conservative colleagues brought to power a politically conservative president, George W. Bush, damaged the Court's public reputation, with repercussions arguably still felt today.[468]

Rehnquist's most important legacy upon the Court may have come not from his work as a jurist, but from his efforts as an administrator.[469] Burger, his predecessor, was a notoriously slow

*of 'Culture'*, N.Y. TIMES (June 27, 2000), https://www.nyti mes.com/2000/06/27/us/supreme-court-precedent-justices-reaffirm-miranda-rule-7-2-part-culture.html ("Miranda v. Arizona was a hallmark of the Warren Court, and Chief Justice Rehnquist, despite his record as an early and tenacious critic of the decision, evidently did not want its repudiation to be an imprint of his own tenure."); Jeffrey Rosen, *Rehnquist the Great?*, ATLANTIC (Apr. 2005), https://www.th eatlantic.com/magazine/archive/2005/04/rehnqui st-the-great/303820/.

[465] *See* Bush v. Gore, 531 U.S. 98, 103 (2000).

[466] *See id.* at 111, 122 (Rehnquist, C.J., concurring); O'Donnell, *supra* note 421 (describing Rehnquist's customary insistence that the Court respect the rights of the individual states).

[467] *Compare Bush*, 531 U.S. at 122 (Rehnquist, C.J., concurring) (concluding that a recount ordered by the Florida Supreme Court could not have been accomplished in the time remaining before the safe harbor deadline), *with id.* at 134–35 (Souter, J., dissenting) (arguing that Court should have allowed Florida to try to remedy the Equal Protection violation by setting uniform standards and proceeding with the recount); *and id.* at 144, 145–46 (Breyer, J., dissenting) (lamenting that the Court should never have taken the case, and arguing that the more appropriate remedy to the Equal Protection violation would have been to remand the case with instructions to recount all undercounted ballots according to a uniform standard).

[468] *See, e.g.*, Erwin Chemerinsky, Bush v. Gore *Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093, 1093–94 (2001); Michael Herz, *The Supreme Court in Real Time: Haste, Waste, and* Bush v. Gore, 35 AKRON L. REV. 185, 193–94 (2002); Louis Michael Seidman, *What's So Bad About* Bush v. Gore*? An Essay on Our Unsettled Election*, 47 WAYNE L. REV. 953, 1005 (2001); Jamie Raskin, Bush v. Gore*'s Ironic Legal Legacy*, L.A. TIMES (Dec. 13, 2015), www.latimes.com/opinio n/op-ed/la-oe-1213-raskin-bush-v-gore-anniversary-20151213-story.html; Andrew Rosenthal, *O'Connor Regrets* Bush v. Gore, N.Y. TIMES (Apr. 29, 2013), https://takingnote.blogs.nytimes.co m/2013/04/29/oconnor-regrets-bush-v-gore/; Jeffrey Toobin, *Precedent and Prologue*, NEW YORKER (Dec. 6, 2010), https://www.newyorker.com/magazine/2 010/12/06/precedent-and-prolo gue.

[469] *See e.g.*, HUDSON, *supra* note 425, at 143 ("Not only was Rehnquist an efficient and fair

worker and an infamously ineffectual leader.[470] Often, he would order cases to be re-argued because he simply could not make up his mind about a controversial point of law.[471] Justices were not held accountable for slow or haphazard workmanship, leading to a decline in the Court's overall prestige.[472] None of this sat well with Rehnquist, who could not stomach the inefficiency that Burger had permitted for so long.[473] During Rehnquist's years as Chief Justice, he orchestrated the Court with the same desire for timeliness and brevity that he had demonstrated during Roberts's clerkship.[474] Firmly, he ensured that the Court issued opinions in a timely manner.[475] Justices who were not keeping up with the workload were gently, but authoritatively prodded to do so.[476] At oral arguments, advocates learned to keep their presentations succinct, as Rehnquist

boss, but he guided the federal judicial system with a firm and steady hand. Many legal experts say that Rehnquist was one of the greatest judicial administrators."); Jon Kyl, *Tribute to Chief Justice William H. Rehnquist*, 115 YALE L.J. 1857, 1859 (2006); Bobelian, *supra* note 412 ("[Rehnquist's strengths were] first-rate organizational skills essential for the smooth operation of the Court, likeability among his colleagues, and a conservatism that lacked the venom that so characterize Scalia's dissents. Even his ideological foes, Justices William Brennan and Thurgood Marshall, considered him a great chief justice."); Eric A. Posner, *Overruled: How Conservative Was Chief Justice Rehnquist?*, NEW REPUBLIC (Oct. 2, 2012), https://newrepublic.com/article/107540/the-partisan-life-of-chief-justice-william-rehnquist-john-jenkins ("Many people who dislike Rehnquist's opinions nonetheless give him high marks for his administration of the Court, noting that he was fair, even-handed, and efficient in running conferences, assigning opinions, and managing oral argument."). For the purposes of this article, perhaps the most interesting tribute to Rehnquist's abilities as an administrator and a leader of the Court comes from John Roberts. John G. Roberts, Jr., Chief Justice of the U.S., William H. Rehnquist: A Remembrance (Oct. 24, 2006), *in* 31 VT. L. REV. 431, 431 (2007).

[470] *See* O'Donnell, *supra* note 421.

[471] *See id.*; *see also* Thomas Healy, *A Supreme Legacy*, NATION (June 23, 2016), https://www.thenation.com/article/a-supreme-legacy/ ("Burger, in spite of being chief justice, was a notoriously weak leader: He often waited to cast his vote until he saw which way his colleagues were leaning, then joined the majority so that he could decide which justice would write the opinion.").

[472] *See* Joel K. Goldstein, *Leading the Court: Studies in Influence as Chief Justice*, 40 STETSON L. REV. 717, 736 (2011) ("Burger forfeited his roles of task and social leader by occasional inept and obtuse conduct. . . . Burger did not distinguish himself as a jurist or command the respect of his colleagues."); Joseph F. Kobylka, *Leadership on the Supreme Court of the United States: Chief Justice Burger and the Establishment Clause*, 42 WESTERN POL. Q. 545, 545–46 (1989); O'Donnell, *supra* note 421.

[473] *See* Linda Greenhouse, *A Court Choice Well Schooled in Chief Justice Job's Pitfalls*, N.Y. TIMES (Sept. 6, 2005), https://www.nytimes.com/2005/09/06/politics/politicsspecial1/a-court-choice-well-schooled-in-chief-justice.html. Ironically, however, Rehnquist also provided some seemingly lofty public praise for Burger's leadership of the Court, calling the former Chief Justice "the greatest judicial administrator of our time." Sandra Day O'Connor, *A Tribute to Warren E. Burger*, 22 WM. MITCHELL L. REV. 7, 7–8 (1996).

[474] *See* Rosen, *supra* note 464; Snyder, *supra* note 63, at 1224.

[475] *See* Rosen, *supra* note 464. This absolute insistence on punctuality permeated every facet of Rehnquist's life. *See* Obermayer, *supra* note 437.

[476] *See* O'Donnell, *supra* note 421; Rosen, *supra* note 464.

would consistently cut off any attorney mid-sentence as soon as the allotted time expired.[477] In this manner, he restored order to a court that was in significant need of a stalwart guide.[478]

In dedicating a courtyard at Stanford Law School named in Rehnquist's honor, Roberts stated that historians "will talk about the effect of [Rehnquist's] presence on the court in strengthening the concept of federalism in the Constitution, in giving meaning to the concept of separation of powers[,] and refining our notions of criminal law and procedures."[479] Then, in a surprising turn, Roberts added that "Rehnquist's approach in his opinions and his approach at oral argument focused on the more concrete building blocks of the law [—] the language of a statute or a constitutional provision and the court's precedence in the particular area."[480] Given the number of federal statutes and precedential opinions that Rehnquist overturned during his tenure on the Court, such a statement seems strained at best.[481]

Easier to digest are Roberts's comments comparing Rehnquist with another politically minded Chief Justice who provided the Court with much-needed strong leadership: John Marshall.[482] "Unassuming, unpretentious . . . and also very direct and straight forward not only in their dealings with people but in their jurisprudence," Roberts said about both Marshall and Rehnquist.[483] Of the shared qualities in their writings, he added: "An opinion by John Marshall, although written, you know, centuries ago, is pretty easy to read today. The same with opinions by Chief Justice Rehnquist. It's straight forward, common sense, every day English and with tremendous persuasive force to it."[484] From this, one can glean several attributes that are unquestionably important to Roberts himself, including humility, clarity, and the ability to develop a legacy that endures for decades,

[477] *See* Joan Biskupic, *The Quirks of the Highest Order*, WASH. POST, May 3, 1999, at A23; O'Donnell, *supra* note 421.

[478] *See* HUDSON, *supra* note 425, at 143; Bobelian, *supra* note 412; O'Donnell, *supra* note 421; Posner, *supra* note 469; Rosen, *supra* note 464.

[479] Adam Gorlick, *Chief Justice Roberts Dedicates Stanford Law School's Rehnquist Courtyard*, STAN. (Oct. 23, 2009), https://news.stanford.edu/pr/2009/pr-chief-roberts-dedication-102309.html.

[480] *Id.*

[481] *See* Marshall, *supra* note 453, at 104; O'Donnell, *supra* note 421.

[482] *See John Roberts, Chief Justice, Supreme Court of the U.S., On the Similarities Between Chief Justices John Marshall and William Rehnquist*, THIRTEEN (Dec. 2006), https://www.thirteen.org/wnet/supremecourt/bonus/john3.html [hereinafter *On the Similarities*].

[483] *Id.*

[484] *Id.*

if not centuries.

After Rehnquist's funeral, at which Roberts joined other Rehnquist clerks in carrying their former boss's coffin into the Great Hall of the Supreme Court, Roberts wrote a short elegy to Rehnquist in the *Harvard Law Review*.[485] Most of the text is the boilerplate stuff of tributes, but Roberts does pay particular attention to Rehnquist's decision one year to skip the State of the Union address because it conflicted with a painting class that he was taking.[486] "The Chief Justice simply made the straightforward calculation that he would get more out of the class than the speech," Roberts noted.[487] Given Roberts's statements questioning whether Supreme Court justices should continue to attend the State of the Union, one cannot wonder if the current Chief Justice admired his predecessor's decision to avoid this event.[488]

What is most intriguing about Roberts's opinions regarding Rehnquist, however, is what the current Chief Justice has not done and has not said. During his confirmation hearings, Roberts spoke more about his ties to Friendly than his ties to Rehnquist.[489] This may have been a shrewd political move by a candidate who recognized the extent of Rehnquist's unpopularity among many members of the Senate, or it may have been an implicit recognition that Roberts, in his purest moments, aspires to walk in the shoes of Friendly rather than Rehnquist.[490] Since then, Roberts has spoken glowingly about Rehnquist, but has done so with rather vague references and broad strokes rather than singling out certain opinions as particular triumphs.[491] Again, this could be yet another

[485] John G. Roberts, Jr., *In Memoriam: William H. Rehnquist*, 119 HARV. L. REV. 1, 1 (2005).

[486] *Id.* at 2.

[487] *Id.*

[488] *See supra* notes 181–84 and accompanying text.

[489] *See* Daniel Breen, *Avoiding "Wild Blue Yonders": The Prudentialism of Henry J. Friendly and John Roberts*, 52 S.D. L. REV. 73, 127, 129–30 (2007); *see also* Snyder, *supra* note 63, at 1151 ("To Bush Administration officials, friends, and law clerks, Roberts identified Friendly, not Rehnquist, as his judicial role model.").

[490] *See* Gordon, *supra* note 318 ("Since his nomination to the Supreme Court, John Roberts' supporters have tried to cloak him in the robes of the judge for whom he first clerked: the legendary Henry Friendly of the U.S. Court of Appeals for the 2nd Circuit."); Lithwick, *supra* note 386; Snyder, *supra* note 63, at 1240–41 ("Before the Senate Judiciary Committee, Roberts invoked Friendly as a rhetorical strategy to get confirmed and to project an image of fairness and impartiality. . . . Roberts cloaks himself as a Friendly disciple, then Roberts pursues the same conservative legal goals that he worked for as a Justice Department lawyer.").

[491] *See* Roberts, *supra* note 485, at 1–2; Gorlick, *supra* note 479 (praising Rehnquist for the clarity of his writing, for returning to bedrock American legal principles regarding federalism and separation of powers, for improving the way that the Court approaches criminal cases, and for focusing on the exact text of the law and precedential caselaw in his opinions and during

example of Roberts's diplomatic skills, or it could be a sign that while Roberts understands what Rehnquist did and why he did it, the Chief Justice's lodestar in the judicial process is the self-restraint promoted by Harlan and carried forward by Friendly.[492]

Without a doubt, Roberts is well-aware of his predecessor's reputation.[493] By studying Rehnquist's career, Roberts can see the impact of the overt partisanship that he has gone to great lengths to avoid—or at least give the public perception that he is trying to avoid—from his high school years onward.[494] He can also see the reputational differences that two decisions made upon Rehnquist's career.[495] In *Dickerson v. United States*, Rehnquist upheld precedent and was largely praised for preserving the *Miranda* rights.[496] In *Bush v. Gore*, Rehnquist went against his own tendencies by permitting the Court to immediately terminate a state's decision to hold an electoral recount, and both his own legacy and the reputation

oral arguments); *On the Similarities, supra* note 482. While all of this praise is lofty, none of it focuses on the impact of a particular decision that Rehnquist rendered, nor is clear precisely how Roberts believes Rehnquist altered the American views of federalism, separation of powers, and criminal procedure. *See, e.g.*, Gorlick, *supra* note 479; *On the Similarities, supra* note 482; Roberts, *supra* note 485, at 1–2. As noted previously, while Roberts praised Friendly as "one of this Nation's truly outstanding federal appellate judges" in his Supreme Court questionnaire, Roberts's description of his clerkship with Rehnquist was far more nebulous, stating only that this clerkship represented "an intensive immersion in the federal appellate process at the highest level" and offering no specific praise for Rehnquist himself. Snyder, *supra* note 63, at 1232. Interestingly, one of the few Rehnquist opinions that Roberts has publicly discussed in depth is *Dickerson v. United States*, the case in which Rehnquist broke ranks with other politically conservative justices on the Court to uphold the *Miranda* warnings. Breen, *supra* note 489, at 128. Notably, Roberts spoke approvingly of this decision during his confirmation hearings. *Id.*

[492] *See* Breen, *supra* note 489, at 129 ("Modesty and humility, those cardinal prudentialist virtues that appear so often in Friendly's writings, loomed large in Roberts's testimony before the committee, and there is no reason to question the sincerity of these professions."). Other commentators, however, are less convinced about the genuineness of Roberts's true devotion to judicial self-restraint. *See* Michael Dorf, *Making a Murderer Postscript: The Perversion of Henry Friendly's Innocence Concern*, DORF ON LAW (Dec. 14, 2017), http://www.dorfonlaw.org/2017/12/making-murderer-postscript-perversion.html ("Roberts is fond of quoting (though not always abiding by) Friendly's aphorism that if it is not necessary to decide an issue to decide a case it is necessary not to decide the issue."); Gordon, *supra* note 318; Snyder, *supra* note 63, at 1240.

[493] *See infra* Part III (discussing Robert's examination of the biographies of his predecessors in the Chief Justice's seat, including Rehnquist, and how he is well-aware of his predecessors' historical reputations).

[494] *See supra* Part I (discussing at length Roberts's uncanny ability to remain largely non-partisan throughout his pre-Supreme Court life); *see, e.g.*, Bobelian *supra* note 412; O'Donnell, *supra* note 421; Totenberg, *supra* note 384.

[495] *See* Breen, *supra* note 489, at 128; Laura S. Fitzgerald, *Suspecting the States: Supreme Court Review of State-Court State-Law Judgements*, 101 MICH. L. REV. 80, 146–47 (2002); Greenhouse *supra* note 464; Herz, *supra* note 468, at 193–94; Raskin *supra* note 468.

[496] *See* Greenhouse, *supra* note 464.

of his Court suffered as a consequence.[497] Considering Roberts's concern about the public standing of himself and his Court, one can reasonably hypothesize that the differing outcomes in *Dickerson* and *Bush* have influenced his Roberts's own jurisprudence and his own leadership of the Court.[498]

It is an interesting thought experiment to ponder what would have happened if Roberts had clerked only for Friendly, and never proceeded to his Supreme Court clerkship with Rehnquist. Friendly, after all, was skeptical of spending too much time working as a government lawyer, and encouraged his protégés not to do so.[499] Perhaps Roberts would have traveled from his clerkship with Friendly into a lengthy stint as a private practitioner or as a professor of law, continuing to engage in the intellectual debates that he had enjoyed so much in Friendly's chambers.[500] Possibly, he would have ascended to an appellate judgeship much later in his life, a career trajectory not unlike Friendly's own path.[501] Or, perhaps, the ever-savvy Roberts—just as politically interested as Rehnquist, but far more diplomatically suave about when and where to play his cards—would have cultivated his political contacts even without Rehnquist's help, winding up on the Supreme Court's bench anyway.[502] The same can be said for the impact of these two jurists upon Roberts's jurisprudence. If Roberts's had clerked only for Friendly, perhaps he would have evolved into the largely apolitical disciple of judicial self-restraint in the mold of Harlan and Friendly, two judicial titans whom he often praises for this philosophy of judging.[503] Or, perhaps, the necessity of gaining political contacts to advance in today's federal judiciary ultimately would have gotten the best of him, ultimately leading him down the path of far less-restrained judging that Rehnquist undeniably followed.[504]

[497] *See supra* note 465–68 and accompanying text.

[498] *See* Breen, *supra* note 489, at 128; *infra* Part III.

[499] Snyder, *supra* note 63, at 1225 ("Friendly's standard advice to his former clerks—not to spend too much time in the public sector before gaining litigation and corporate experience in private practice—reflected his pre-judicial career in big law firms.").

[500] *See id.*

[501] *See id.* at 1198–1201.

[502] *See* Rosen, *supra* note 403 (showing that while Roberts cultivated lasting alliances on both sides of the political aisle and acted in a diplomatic manner that rarely showed his political hand, Rehnquist spoke, wrote, and performed in a brash style that left no doubt about his preferred viewpoints and often alienated people with whom he came in contact).

[503] *See supra* Part II.A & Part II.B.

[504] *See* Bobelian, *supra* note 412; Lane, *supra* note 441; Fiss & Krauthammer, *supra* note 431, at 20; O'Donnell, *supra* note 421; Savage, *supra* note 412. *See also* Snyder, *supra* note 63, at 1225 ("Roberts, however, was more of a political animal than Friendly . . . .").

## IV. THE PICTURE ON HISTORY'S MANTLE: CHIEF JUSTICE ROBERTS'S UNDERSTANDABLE CONCERNS ABOUT THE LEGACY OF HIS COURT

The current Chief Justice regards the vast majority of his predecessors as failures.[505] His examination of the records of most Chief Justices not named Marshall or Rehnquist consistently ends in a determination that these highly esteemed jurists were ultimately unable to fulfill their obligations to the nation properly.[506] Most of them, according to Roberts, did not even understand the proper nature of their job on the Court.[507] These are footsteps in which Roberts unquestionably does not want to follow.[508]

In discussing the dividing line between success and failure as a Chief Justice, Roberts has delineated between the mindset of a dogmatic academic and a collegial leader.[509] The academic may offer legally sound principles of law every time, according to Roberts, but likely will not inspire other justices on the Court to work closely with him.[510] On the other hand, the collegial leader will be willing to engage in friendly compromises with the other justices to gain a majority of votes—or, even better, to achieve a unanimous decision.[511] According to Roberts, the Court is at its strongest when it manages to speak to the public without the rancor of a single dissenting voice.[512] "I think that every justice should be worried about the Court acting as a Court and functioning as a Court, and they should all be worried, when they're writing separately, about the effect on the Court as an institution," Roberts told longtime legal journalist Jeffrey Rosen in 2006.[513] A decade later, legal journalist Mark Joseph Stern observed that Roberts's views on this topic had not changed, with the Chief Justice strongly preferring to broker a compromise than to write a dissent that picks apart the arguments advanced by his colleagues.[514]

[505] *See* Rosen, *supra* note 403.
[506] *See id.*
[507] *See id.*
[508] *See id.*; Barnes, *supra* note 369; Biskupic, *supra* note 45; Gass, *supra* note 370; Wolf, *supra* note 369. *See also* Kendall, *supra* note 49 ("The chief is the sole justice whose role, by tradition, goes beyond casting votes and writing opinions and extends to serving as the custodian of the court's role and reputation.").
[509] *See* Kendall, *supra* note 49; Rosen, *supra* note 403.
[510] *See* Rosen, *supra* note 403.
[511] *See id.*
[512] *See id.*; Gass, *supra* note 370.
[513] Rosen, *supra* note 403.
[514] *See* Mark Joseph Stern, *The Chief Justice's Biggest Decision*, SLATE (Feb. 26, 2016),

Ironically, the ability to achieve unanimity was, in many instances, a hallmark for Earl Warren, the man who likely heads the list of the least favorite Chief Justices of most political conservatives.[515] It was Warren, for instance, who took a Court that was deeply divided over questions of the judiciary's role in enforcing racial integration in public schools and cultivated a unanimous opinion in *Brown v. Board of Education*.[516] Unsurprisingly, Roberts does not praise Warren, but rather offers applause for John Marshall's ability to engage in similar behavior, sharing his Madeira wine with his fellow justices during conversations designed to build rapport and reach consensus.[517] During the three decades that Marshall served as the Chief Justice, Roberts notes,

> there weren't a lot of concurring opinions. There weren't a lot of dissents. And nowadays, you take a look at some of our opinions and you wonder if we're reverting back to the English model, where everybody has to have their say. It's more being concerned with the jurisprudence of the individual rather

www.slate.com/articles/news_and_politics/jurisprudence/2016/02/john_roberts_can_either_moderate_his_views_or_let_himself_drift_into_irrelevance.html ("The [C]hief [J]ustice of the United States does not like to dissent. He also is not very good at it. Unlike many of his colleagues—who seem to take intellectual pleasure in ripping apart a majority opinion—John Roberts loathes writing in the minority."). This desire for public-facing consensus as a means of improving confidence in the judiciary finds origins in the traditions of civil law, where published court opinions do not include dissents. *See* Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 3 (2010) ("In civil-law systems, the nameless, stylized judgment, and the disallowance of dissent are thought to foster the public's perception of the law as dependably stable and secure.").

[515] *See* C. TRUETT BAKER, CHURCH-STATE COOPERATION WITHOUT DOMINATION: A NEW PARADIGM FOR CHURCH-STATE RELATIONS 163 (2010) ("Chief Justice Warren was a gifted consensus builder and favored common sense and fairness over appeal to precedence."); Henry Gass, *In Contraception Case, Supreme Court Tried Something Different—And It Worked*, CHRISTIAN SCI. MONITOR (May 17, 2016), https://www.csmonitor.com/USA/Justice/2016/0517/In-contraception-case-Supreme-Court-tried-something-different-and-it-worked ("Consensus-building was one of the defining characteristics of the court under Chief Justice Earl Warren in the 1950s and '60s.").

[516] *See* Josh Ashenmiller, *Warren, Earl (1891-1974)*, *in* ENCYCLOPEDIA OF ACTIVISM AND SOCIAL JUSTICE 1449 (Gary L. Anderson & Kathryn Herr eds., 2007); THE SUPREME COURT IN CONFERENCE (1940–1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 11 (Del Dickson, ed. 2001) ("It was only after the Justices all informally agreed on what to do [in *Brown*] that Warren called for a vote, knowing in advance that he had secured a unanimous mandate to end state-sponsored racial segregation in public schools."); Stephen Ellmann, *The Rule of Law and the Achievement of Unanimity in* Brown, 49 N.Y.L. SCH. L. REV. 741, 750–60 (2005). *See generally* S. Sidney Ulmer, *Earl Warren and the* Brown *Decision*, 33 J. POL. 689 (1971) (discussing Warren's persistence in obtaining unanimity in *Brown* and the mood of collegiality that this unanimous decision helped to establish among the justices on the Warren Court).

[517] *See* Rosen, *supra* note 403.

than working toward a jurisprudence of the Court.[518]

To Roberts, Marshall deserves high praise for putting aside his background in partisan politics for the sake of consensus building after joining the Court.[519] "Marshall could easily have got on the Court and said, 'I'm the last hope of the [Federalist Party]—we're out of Congress, we're out of the White House—and I'm going to pursue that agenda here,'" Roberts said.[520]

> And he would have not only damaged the Court but could have smothered it in the cradle. But instead he said, "No, this is my home now, this is the Court, and we're going to operate as a Court, and that's important to me," and as a result he made the Court the institution that it has become.[521]

Similar words are rarely spoken about Rehnquist.[522] Roberts has acknowledged that his former boss was undeniably stubborn and that speaking with a unified voice was not "a feature that Rehnquist stressed much."[523] In this sense, while Roberts has said that he considers Rehnquist to be among the few successful Chief Justices, he does not seek to follow in the "[m]y way or the highway" customs of his predecessor.[524]

Of course, Roberts has issued dissents in a significant number of cases during his Supreme Court tenure.[525] One of those cases, the

[518] *Id.*

[519] *See id.*

[520] *Id.*

[521] *Id.* Interestingly, though, at least one commentary argues that a high degree of consensus among the justices in controversial cases does not significantly impact public opinion about the Court's legitimacy. *See* Michael F. Salamone, *Judicial Consensus and Public Opinion: Conditional Response to Supreme Court Majority Size*, 67 POL. RES. Q. 320, 332 (2013).

[522] *See, e.g.*, Fiss & Krauthammer, *supra* note 431, at 15; Lane, *supra* note 433; Anthony Lewis, *Abroad at Home; The Court: Rehnquist*, N.Y. TIMES (June 23, 1986), https://www.nytimes.com/1986/06/23/opinion/abroad-at-home-the-court-rehnquist.html (referring to Rehnquist as a lone wolf among the federal judiciary, charting his own course and not backing down even if it offended other politically conservative individuals).

[523] *See* Rosen, *supra* note 403.

[524] *See id.*

[525] *See* Vincent Martin Bonventre, *Roberts' Goat (Part 4: Patterns in Criminal Cases)*, N.Y. CT. WATCHER (Oct. 25, 2011), http://www.newyorkcourtwatcher.com/2011/10/roberts-goat-part-4-patterns-in.html; Daniel Fisher, *It's Dueling Conservatives as Roberts Lashes Out at Scalia in Dissent*, FORBES (May 21, 2013), https://www.forbes.com/sites/danielfisher/2013/05/21/roberts-lashes-out-at-scalia-in-dissent-over-agency-powers/#4c1378176b9d; Adam Liptak, *Chief Justice John Roberts Amasses a Conservative Record, and Wrath from the Right*, N.Y. TIMES (Sept. 28, 2015), https://www.nytimes.com/2015/09/29/us/politics/chief-justice-john-robe

2015 decision in which the Court's majority cleared the pathway for legalized same-sex marriage nationwide, even spurred Roberts to read portions of his dissent from the bench, revealing his dislike for the majority's holding in full public view.[526] In language that was reminiscent of plenty of Rehnquist's opinions, Roberts declared that the Court had permitted the federal government to run roughshod over decisions about marriage that were more appropriately left to the state legislatures; in language that rang of Harlan and Friendly, he proclaimed that the Court's majority had violated basic precepts of judicial self-restraint by imposing their judgments upon an area that should have been left to the people's elected representatives.[527] Other dissenting opinions, in which Roberts focused on such matters as the ability of law enforcement officers to engage in warrantless searches, the rights of a bank to force a credit card holder into arbitration rather than facing a lawsuit in open court, the protections of a state against a lawsuit commenced by a state agency, and the disqualification of a judge who decided a case in favor of the coal company that spent millions of dollars in that judge's re-election campaign, contain similar language criticizing the Court's majority for abandoning principles of judicial self-restraint and illegitimately interfering in affairs that rightfully belonged in legislative and executive hands.[528]

Still, Roberts does dissent less frequently than most of his colleagues, and often appears linguistically uncomfortable in those occasions when he feels that he must part ways with the Court's majority.[529] In recent terms, observers of the Court have noticed that Roberts seems to be increasingly active in searching for a "middle ground" on a Court that most commentators consider to be starkly partisan, with most divided cases ending up with the Court's politically liberal justices all taking one side and the Court's politically conservative justices all adopting the opposing position.[530]

rts-amasses-conservative-record-and-the-rights-ire.html; Toobin, *supra* note 70.

[526] *See* Amber Phillips, *John Roberts's Full-Throated Gay Marriage Dissent: Constitution 'Had Nothing to Do with It'*, WASH. POST (June 26, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/06/26/john-robertss-full-throated-gay-marriage-dissent-constitution-had-nothing-to-do-with-it/?noredirect=on&utm_term=.34a4b9c9eb93.

[527] *See id.*

[528] *See, e.g.*, Va. Office for Prot. & Advocacy v. Stewart, 563 U.S. 247, 266–76 (2011) (Roberts, C.J., dissenting); Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 890–902 (2009) (Roberts, C.J., dissenting); Vaden v. Discover Bank, 556 U.S. 49, 72–80 (2009) (Roberts, C.J., dissenting); Georgia v. Randolph, 547 U.S. 103, 127–49 (2006) (Roberts, C.J., dissenting).

[529] *See* Stern, *supra* note 514.

[530] *See, e.g.*, Joan Biskupic, *How John Roberts Will Manage the Supreme Court's*

Plenty of commentators view Roberts as part of this problem in this political polarization, not as part of some future solution, as shown by the plethora of reports indicating that Kennedy's retirement extinguished the last hope for any form of bipartisanship on the Roberts Court.[531] For a Chief Justice who "doesn't want to go down in history as just another political activist," the public perceptions that a post-Kennedy Court will become strictly divided along political lines are likely quite concerning.[532] With the vote to confirm Brett Kavanaugh to the Court splitting almost exclusively along party membership in the Senate, one can reasonably infer that Roberts's fears about the Court's public reputation for partisan voting in pivotal cases are stronger than ever.[533]

In yet another nod to judicial self-restraint, Roberts has said that the Court should strive to decide cases on the narrowest possible grounds.[534] Doing so increases the opportunities for consensus-building among the justices, according to Roberts, and reduces the chances for judicial overreach into areas that are better left to the popularly elected branches of government.[535] "I think that's a good thing when you're talking about the development of the law—that

*Conservative Majority*, CNN (Oct. 9, 2018), https://www.cnn.com/2018/10/08/politics/supreme-court-conservative-majority-john-roberts-brett-kavanaugh/index.html; Julie Hirschfield Davis, *With Kennedy Gone, Roberts Will Be the Supreme Court's Swing Vote*, N.Y. TIMES (June 28, 2018), https://www.nytimes.com/2018/06/28/us/politics/anthony-kennedy-chief-justice-roberts.html; Greenhouse, *supra* note 44; Ryan J. Owens, *Now It Really Is the Roberts Court*, WKLY. STANDARD (June 27, 2018), https://www.weeklystandard.com/ryan-j-owens/scot us-kennedys-retirement-leaves-john-roberts-in-the-swing-seat; Pomerance, *supra* note 36, at 419, 432; Roeder, *supra* note 40.

[531] *See supra* notes 4–7 and accompanying text.

[532] *See* Wolf, *supra* note 369.

[533] *See* Lawrence Baum & Neal Devins, *The Hidden Silver Lining if Kavanaugh Is Confirmed*, WASH. POST (Oct. 5, 2018), https://www.washingtonpost.com/opinions/the-hidden-silver-lining-if-kavanaugh-is-confirmed/2018/10/05/fc2d7fb6-c8ce-11e8-b2b5-79270f9cce17_story.html?utm_term=.c4245d322d70; Brent Kendall & Jess Bravin, *Brett Kavanaugh Confirmation Battle Tests Supreme Court's Chief Justice*, WALL ST. J. (Oct. 7, 2018), https://www.wsj.com/articles/brett-kavanaugh-confirmation-battle-tests-supreme-court s-chief-justice-1538947753; Jonathan Tamari, *After Brett Kavanaugh Confirmation Fight, Worry Over a Supreme Court Stain*, PHILA. INQUIRER (Oct. 6, 2018), http://www2.philly.com/philly/news/politics/brett-kavanaugh-confirmation-vote-supreme-court-stain-20181006.html ("If there's one thing that Republicans and Democrats agreed on Saturday [after the Senate voted to confirm Kavanaugh], it was that after the rancor over Judge Brett Kavanaugh's nomination, the court was in danger of being tainted, and diminished, by the divisive political fight.").

[534] *See Chief Justice Says His Goal Is More Consensus on Court*, N.Y TIMES (May 22, 2006), https://www.nytimes.com/2006/05/22/washington/22justice.html; Dionne, *supra* note 373.

[535] *See* Dionne, *supra* note 373; *see also* Stern, *supra* note 514 ("There are plenty of reasons why Roberts, a staunch conservative at heart, might scuttle to the left. . . . [I]n a case that might otherwise go 5-4 against him, Roberts could choose to join the majority and shape the decision, assigning the opinion to himself and writing it as narrowly as possible.").

you proceed as cautiously as possible," he told journalist Richard Wolf in 2015.[536] Nine years earlier, he had offered similar remarks to Jeffrey Rosen: "In most cases, I think the narrower the better, because people will be less concerned about it."[537] In his role as the moderator of the private conferences that the justices convene for every case, Roberts said that he attempts to frame the central issues for each dispute as narrowly as he can, trying to encourage his colleagues to avoid issuing sweeping constitutional decisions.[538] The jury is still out on the question of whether Roberts has actually succeeded in doing so.[539] In plenty of cases, including opinions that Roberts himself authored on matters ranging from freedom of expression to affirmative action, the Roberts Court has gone beyond the narrowest possible grounds in rendering their decisions.[540]

Roberts also has shown concern about the lack of dignity with which his Court is perceived.[541] This concern has included expressions of bipartisan disdain for political leaders whom he believes are trying to sully the Court's public image. Obama's critique of the Court's decision in *Citizens United* during the State of the Union address undeniably outraged Roberts.[542] Trump's actions

[536] Wolf, *supra* note 369.

[537] *See* Rosen, *supra* note 403.

[538] *See id.*; Dionne, *supra* note 373; White, *supra* note 154; Wolf, *supra* note 369. More than a decade before becoming Chief Justice, Roberts asserted that the Court "compels the other branches of government to do a better job in carrying out their responsibilities under the Constitution" by exercising judicial self-restraint and not extending the Court's power into areas where it does not belong. John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1229 (1993).

[539] *See, e.g.*, Sheldon Whitehouse, *Conservative Judicial Activism: The Politicization of the Supreme Court Under Chief Justice Roberts*, 9 HARV. L. & POL'Y REV. 195, 197–203 (2015) (arguing that Roberts and the other political conservatives on the Roberts Court consistently abandon judicial self-restraint, as well as originalism, deference to the legislative branch, federalism, respect for precedent, and other principles to which they verbally pledge adherence); White, *supra* note 154. Interestingly, on at least one occasion, Roberts received criticism from another politically conservative justice who believed that Roberts had taken notions of judicial self-restraint too far. *See* FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 498 n.7 (2007) (Scalia, J., concurring) ("[T]his faux judicial restraint is judicial obfuscation.").

[540] *See* Jeffrey Rosen, *Roberts Versus Roberts*, NEW REPUBLIC (Mar. 2, 2010), https://newrepublic.com/article/73200/roberts-versus-roberts; Hayden Rooke-Ley, *Chief Justice Deftly Plays a Judicial Shell Game*, REGISTER-GUARD (July 20, 2015), https://www.registerguard.com/rg/opinion/33259492-78/chief-justice-deftly-plays-a-judicial-shell-game.html.csp; Whitehouse, *supra* note 539, at 197–203; *supra* notes 281–87 and accompanying text.

[541] *See, e.g.*, Biskupic, *supra* note 530; Lawrence Friedman, *John Roberts Has Tough Job of Keeping Faith in Supreme Court*, HILL (Oct. 26, 2017), https://thehill.com/opinion/judiciary/357392-john-roberts-has-task-of-keeping-americas-faith-in-supreme-court; Kendall, *supra* note 49; Rosen, *supra* note 403.

[542] *See supra* notes 181–84 and accompanying text.

after becoming President did not sit well with Roberts, either.[543]

In perhaps his most candid expression to date about his concerns over the Roberts Court's legacy, Roberts spoke from the bench in 2017 about the unfeasibility of the Court interjecting itself in political gerrymandering disputes.[544] "We will have to decide in every case whether the Democrats win or the Republicans win," Roberts stated during oral arguments.[545] "So it's going to be a problem here across the board. . . . And that is going to cause very serious harm to the status and integrity of the decisions of this Court in the eyes of the country."[546] Plenty of editorialists condemned this declaration, arguing that a Chief Justice should not shrink in the face of difficult legal questions simply to save the Court's reputation.[547] For Roberts, though, it was a moment of unabashed honesty about his apparent hopes for the Court's future.[548] Knowing the public opinion valley in which the Court's reputation currently sits and comprehending the heights to which he hopes to restore it, the Chief Justice recognizes that there is a steep hill to climb.[549]

From his earliest collegiate days, Roberts has been a devoted student of history.[550] Today, his studies show him that it is far too easy for a Chief Justice of the Supreme Court to fail to discharge his duties satisfactorily.[551] To a significant extent, his visions for the Court's future seem to be built on a yearning for the historians of future generations to look back upon the Roberts Court and declare

[543] *See supra* notes 275–77 and accompanying text.

[544] Barnes, *supra* note 369.

[545] Linda Greenhouse, *Will Politics Tarnish the Supreme Court's Legitimacy?*, N.Y. TIMES (Oct. 26, 2017), https://www.nytimes.com/2017/10/26/opinion/politics-supreme-court-legitimacy.html.

[546] *Id.*

[547] *See, e.g.*, Adam Liptak, *A Case for Math, Not 'Gobbledygook,' in Judging Partisan Voting Maps*, N.Y. TIMES (Jan. 15, 2018), https://www.nytimes.com/2018/01/15/us/politics/gerrymandering-math.html; Jennifer Rubin, *John Roberts, You Are Chief Justice, Not Chief of PR*, WASH. POST (Oct. 4, 2017), https://www.washingtonpost.com/blogs/right-turn/wp/2017/10/04/jo hn-roberts-you-are-chief-justice-not-chief-of-pr/?utm_term=.cbb2893dd21f; Jacqueline Thomsen, *Sociology Group Fires Back at Roberts for 'Gobbledygook' Comment*, HILL (Oct. 11, 2017), https://thehill.com/blogs/blog-briefing-room/news/354876-sociologists-fires-back-at-roberts-for-calling-sociology.

[548] *See* Biskupic, *supra* note 530; Kendall, *supra* note 49; Rosen, *supra* note 403.

[549] *See* Biskupic, *supra* note 530; Kendall, *supra* note 49; Klaidman, *supra* note 56; Rosen, *supra* note 403; Stern, *supra* note 514; White, *supra* note 154; Wolf, *supra* note 369. *See also* Levin, *supra* note 46 ("If the Chief Justice is looking to keep the role of the Court under control and protect its reputation—which is a fundamentally political aim—and is willing at times to bend his constitutional and legal interpretations to that cause, he would be in effect politicizing the Court's work in the effort to limit the appearance of politicization.").

[550] *See supra* notes 64–66 and accompanying text.

[551] *See supra* notes 505–10 and accompanying text.

that the man who had found success in so many areas during his life managed to conquer another herculean task: turning political polarization into collegial consensus and public suspicion into widespread respect.

## V. CONCLUDING THOUGHTS: CHIEF JUSTICE ROBERTS AT THE COURT'S CENTER

It is impossible to predict with absolute precision the future of the post-Kennedy Supreme Court. Kennedy has played his role as the Court's swing vote for so long that it is practically impossible to imagine the Court without him serving in this largely unpredictable manner. In reality, dedicated Court watchers may not even need to try, as the Court of the immediate future may prove to be surprisingly similar to the Court during Kennedy's most influential years of service.

As discussed at the outset of this article, Kennedy was a far more reliable politically conservative voter than many recent commentaries indicate.[552] His votes that broke ranks with the politically conservative wing of the Court were highly publicized and historically significant, but ultimately were the exception, not the norm, of his judicial tendencies.[553] On many matters that political conservatives typically promote, from recognizing a constitutionally protected individual right to keep and bear firearms to determining that limits on corporate spending in politically campaigns violated the First Amendment to expanding the authority of employers over workers, consumers, and labor unions, Kennedy constantly voted in lockstep with his politically conservative colleagues.[554] Notably, Kennedy did not side with the Court's liberal wing on a single decision during his final term on the bench.[555] During the previous term, Kennedy and Roberts voted the same way in eighty-eight percent of the Court's divided civil cases and seventy-three percent of the Court's divided criminal cases.[556] Thus, even if Roberts served as

[552] *See supra* notes 8–12 and accompanying text.

[553] *See supra* notes 8–18, 24, and accompanying text.

[554] *See supra* notes 8–11 and accompanying text.

[555] *See* Brent Kendall, *End of Supreme Court Term Finds Conservatives in Command: A New-Look Court That Included Justice Neil Gorsuch Gave the Right Victories in Cases Touching on Abortion, Union Dues, Election Law and Trump's Travel Ban*, WALL ST. J. (June 28, 2018), https://www.wsj.com/articles/end-of-supreme-court-term-finds-conservatives-in-command-1530224804.

[556] Pomerance, *supra* note 36, at 432.

a predictable Rehnquist-style conservative for the remainder of his career, it seems unlikely that the Court would lurch significantly further to the right following the departure of Kennedy, given how closely aligned Kennedy and Roberts have been during recent terms.

Furthermore, the notion of Roberts living out the rest of his tenure as the second coming of Rehnquist seems more farfetched than many people on both sides of the political aisle presently believe. Undoubtedly, Roberts admires Rehnquist, holding him in high esteem as one of the few Chief Justices whose contributions to the Court were historically successful.[557] His clerkship with Rehnquist likely influenced the style with which Roberts writes his judicial opinions, and his close observations of Rehnquist's efficient and effective administration of the Court probably still plays a guiding role in the leadership decisions that Roberts makes as the Court's "first among equals."[558] Quite possibly, Rehnquist's unyielding stances on issues such as affirmative action and rights for individuals with a non-heterosexual sexual orientation left an impact on Roberts, too, given that Roberts has drawn hard lines regarding these issues as well and couched these firm stances in terms of exercising judicial self-restraint—even though Roberts has displayed a willingness to overturn statutes and abandon precedent on plenty of occasions.[559] In terms of overall outcomes, Roberts typically votes the same way that a modern political conservative would be expected to vote, just as Rehnquist did.[560]

Yet the comparisons between Roberts and Rehnquist seem to end there. Roberts has acknowledged that Rehnquist was far too doctrinaire to accomplish an objective that Roberts deems vital to achieving success as a Chief Justice: building consensus among the justices so the Court speaks with a unified voice.[561] While Rehnquist never seemed particularly worried about the number of dissents and concurring opinions that the Court issued in any given case, Roberts appears to be extremely concerned about this topic.[562] While

[557] Rosen, *supra* note 403.

[558] *See* MARK C. MILLER, JUDICIAL POLITICS IN THE UNITED STATES (2015); *supra* Part II.C.

[559] *See supra* Part II(c); *supra* notes 526–28, 538–40 and accompanying text.

[560] *See, e.g.*, Biskupic, *supra* note 530 ("The instincts of Roberts, who rose in Washington as he served Republican administrations, have always rested with the right wing."); Liptak, *supra* note 547.

[561] *See* Rosen, *supra* note 403.

[562] *Compare* Biskupic, *supra* note 530 ("Roberts has demonstrated an investment in the reputation of the court, and of his own. . . . [He] loathes public criticism that casts the justices as politicians on the bench."); Rosen, *supra* note 403 ("Roberts said he intended to use his power to achieve a broad a consensus as possible."); and Kendall, *supra* note 49 ("[Roberts], however,

Rehnquist never appeared to be particularly impacted by what the columnists wrote or what the public whispered about his Court, Roberts seems to be quite affected by the citizenry's negative perceptions of the Court and aspires to change them, even expressing his concerns about the Court's reputation from the bench during oral arguments.[563] Looking at the personalities of these two men, this distinction is unsurprising. Rehnquist savored the maverick's role as the Court's "Lone Ranger," vigorously taking lonely roads of dissent against the Court's political liberals without fear of public repercussions.[564] Roberts, on the other hand, has carefully cultivated his public image since his prep school days, avoiding excesses, controversies, political battles, and any other activities that might make him appear to be anything other than a genuinely middle-of-the-road "umpire," amiable to all but sternly safeguarding the decorum of his own actions and the actions of any entity with which he is involved.[565]

Having studied all of his predecessors in some depth, Roberts has concluded that the litmus test of a Chief Justice's success centers on collegiality and unanimity—attributes that plenty of commentaries claim that the Roberts Court is lacking.[566] If Roberts genuinely wishes to improve public perception of the Court and establish his own legacy as one of the rare successful Chief Justices, he will likely sense that pursuing politically conservative agenda items with a Rehnquist-like stubbornness is not the way to do so.[567] Likewise, Roberts will likely grasp that he will not improve the historical reputation of himself or his Court by aligning himself solidly with Clarence Thomas, Samuel Alito, Neil Gorsuch, or any hardline political conservative justice whom President Trump appoints to the Court. For the bulk of his life, Roberts has been a man who has

also has shown an affinity in many circumstances for narrow, incremental rulings that pick up more votes, and legal observers say his strong sense of stewardship means he won't want the court to be seen as a partisan body that decides all the nation's big legal issues on 5-4 votes."), *with* Fiss & Krauthammer, *supra* note 431, at 16 ("[N]o Justice on the present Court has shown a willingness to follow Rehnquist in his rejection of the incorporation doctrine."); and Lewis, *supra* note 522 ("In his years on the Court Justice Rehnquist has single-mindedly pursued a vision very different from the broad consensus . . . .").

[563] *See* Biskupic, *supra* note 530; Kendall, *supra* note 49; Rosen, *supra* note 403; Rosen, *supra* note 464; *supra* notes 544–46 and accompanying text.

[564] *See supra* notes 384–89 and accompanying text.

[565] *See supra* Part I.

[566] *See supra* notes 509–14, 531–33 and accompanying text.

[567] Already, Roberts seems to have acknowledged this fact to at least a limited extent. *See* Rosen, *supra* note 403.

avoided the extremes.[568] If cultivating a solid historical reputation as a strong leader of the Court and an evenhanded arbiter of justice truly is his objective—and there is no reason to doubt that it is — then Roberts would be wise to continue avoiding a consistent allegiance with the far right reaches of the Court's politically conservative wing. Chief Justice Marshall, after all, did not succumb to pressures to espouse exclusively the Federalist Party's causes, despite pressure from within his party to do so.[569]

Instead, Roberts would be best suited to follow the lead of his earlier judicial mentor, Judge Friendly, and carry on the legacy of judicial self-restraint about which Harlan wrote so ardently.[570] Within this framework, Roberts will find plenty of ammunition for deciding cases on narrow grounds rather than jumping to constitutional questions, another objective to which he has paid homage.[571] He will find ample justification for preventing the Court from intruding upon matters that he believes should remain the domain of the popularly elected branches, and abundant rationales for ensuring that the federal government does not trample upon the legal rights of the states. Perhaps most importantly of all, it will provide a realistic legal foundation for Roberts's decisions, and the holdings of the Court, that avoids the political partisanship in which so much of the Court's recent work, including, but certainly not limited to the partisan confirmation battles over the appointment of Brett Kavanaugh, has been entangled.[572] If Roberts holds tightly and honestly to Harlan and Friendly's principles of judicial self-restraint without wading into more politicized waters, plenty of people still may disagree with the ultimate outcomes of his decisions, but it will become significantly more difficult for observers to denounce the legitimacy of the thought process that led to these results.[573]

[568] *See supra* Part I; *supra* notes 534–38 and accompanying text.

[569] Rosen, *supra* note 403.

[570] *See supra* Part II.A; *supra* Part II.B.

[571] *See supra* notes 534–38 and accompanying text.

[572] *See, e.g.*, Broder, *supra* note 368 (featuring Roberts's admiration about the fact that editorialists could not discern whether Judge Friendly was a liberal jurist or a conservative jurist); *see also* Tessa Barenson, *How this Brutal Confirmation Process Could Shape Brett Kavanaugh as a Supreme Court Justice*, TIME (Oct. 2, 2018), http://time.com/5409739/brett-kavanaugh-supreme-court-justice-process (describing the uncertainty surrounding whether Kavanaugh will subscribe to partisan politics on the Court).

[573] *See, e.g.*, DORSEN, *supra* note 319, at 354, 356 (discussing praise for Friendly's judicial impact and historical importance from Lewis Powell, Felix Frankfurter, John Paul Stevens, Antonin Scalia, Roberts, and other notable jurists); Broder, *supra* note 368 (describing the legacy of Friendly's impartiality); Oelsner, *supra* note 212 (praising the courage of Harlan to adhere to his principles of judicial self-restraint at a time when his colleagues on the Court and

Take, for instance, *Roe v. Wade*, the case that many observers consider to be most endangered by Kennedy's retirement.[574] In surveying the landscape of a challenge to *Roe*, Roberts will confront the same type of choice that Rehnquist faced when presented with the opportunity to overrule *Miranda*.[575] Roberts has acknowledged that Rehnquist opted to preserve the precedent of the *Miranda* warnings not because he suddenly changed his mind and decided that the warnings were a crucial component of the criminal justice system, but rather because he realized that overturning the established principles of *Miranda* could irreparably harm his reputation and the legitimacy of the Court—an unexpected move for Rehnquist to make, and one for which he was mostly praised.[576] Conversely, Roberts witnessed the public blows that Rehnquist and the Court sustained after *Bush v. Gore* ended in a decision split along partisan lines with Rehnquist abandoning the deference to states' rights that he had preached from the bench for a couple of decades.[577] If given the opportunity to overrule *Roe*, Roberts will have a decision to make: to follow Rehnquist's adherence to precedent in *Dickerson* or to follow Rehnquist's judicially active approach in *Bush v. Gore*. For a Chief Justice concerned about his long-term legacy, the answer of which path to follow seems obvious, even if that pathway is not the trail that most political conservatives want him to take.

Roberts may have already demonstrated a propensity to make this type of choice in his decisions to defer to the judgment of the executive and legislative branches in upholding the Affordable Care Act.[578] He may have even learned from the public furor that ensued in 2015 after he proclaimed his dissent in open court against the Court

the public sentiment commonly did not favor these ideals); O'Neill, *supra* note 267, at 178–79 (noting that esteemed jurists on both sides of the political aisle, from Ruth Bader Ginsburg and David Souter to Roberts and Samuel Alito, have cited Harlan as one of the justices whom they most admire).

[574] *See, e.g.*, Fausset et al., *supra* note 6; Ioannou, *supra* note 5; Dylan Matthews, *Brett Kavanaugh Likely Gives the Supreme Court the Votes to Overturn Roe. Here's How They'd Do It*, VOX (Oct. 5, 2018), https://www.vox.com/policy-and-politics/2018/7/10/17551644/brett-kavanaugh-roe-wade-abortion-trump; Mark Joseph Stern, *Hello, Justice Kavanaugh. Farewell, Roe*, SLATE (Sept. 3, 2018), https://slate.com/news-and-politics/2018/09/can-democrats-stop-brett-kavanaugh-from-overturning-roe-v-wade.html.

[575] *See supra* notes 458–64 and accompanying text.

[576] *See* Breen, *supra* note 489, at 128; Rosen, *supra* note 403.

[577] *See supra* notes 465–68 and accompanying text.

[578] *See* Caplan, *supra* note 186; Klaidman, *supra* note 56; O'Neill, *supra* note 267, at 180; Avik Roy, *The Inside Story on How Roberts Changed His Supreme Court Vote on Obamacare*, FORBES (July 1, 2012), https://www.forbes.com/sites/theapothecary/2012/07/01/the-supreme-courts-john-roberts-changed-his-obamacare-vote-in-may/#4765928d701d.

majority's protections of same-sex marriage.[579] Two years later, the Court considered the constitutionality of a state law that prevented parents of matching gender from being listed on their child's birth certificate.[580] Rather than repeat his denunciations from 2015, Roberts stunned the nation by voting with the Court's majority, declaring that the state statute unlawfully discriminated against same-sex couples under the precedent that the Court set two years earlier—the same precedent to which Roberts had strenuously objected in 2015.[581] By voting in this manner, Roberts distanced himself from Thomas, Alito, and Gorsuch, all of whom essentially echoed the language that Roberts had previously read from the bench in dissent and all of whom were probably flabbergasted that the Chief Justice did not join them.[582] Roberts is, after all, an individual who has achieved lofty success by rarely making a publicly repudiated mistake once.[583] Certainly, he is careful never to make the same legacy-damaging mistake twice.[584]

Roberts has also seized recent opportunities to show that he holds practitioners of the legal profession to a high standard.[585] After one widely reported dispute earlier in his tenure as Chief Justice, he received public criticism for finding that no conflict of interest existed when a judge presided over a case involving a litigant who had

[579] *See* Ruth Marcus, *No Backlash, Mr. Chief Justice*, BURLINGTON FREE PRESS (July 1, 2015), https://www.burlingtonfreepress.com/story/opinion/2015/07/01/ruth-marcus-backlash-mr-chief-justice/29572119; Phillips, *supra* note 526; Brian Resnick et al., *Why Four Justices Were Against the Supreme Court's Huge Gay-Marriage Decision*, ATLANTIC (June 26, 2015), https://www.theatlantic.com/politics/archive/2015/06/why-four-justices-were-against-the-supreme-courts-huge-gay-marriage-decision/445932/.

[580] *See* Pavan v. Smith, 137 S. Ct. 2075, 2076 (2017).

[581] *See id.*; Robert Barnes, *A Supreme Court Mystery: Has Roberts Embraced Same-Sex Marriage Ruling?*, WASH. POST (July 16, 2017), https://www.washingtonpost.com/politics/courts_law/a-supreme-court-mystery-has-roberts-embraced-same-sex-marriage-ruling/2017/07/16/33cd522a-68d1-11e7-8eb5-cbccc2e7bfbf_story.html?noredirect=on&utm_term=.8cfb37777396.

[582] *See Pavan,* 137 S. Ct. at 2079 (Gorsuch, J., dissenting); Barnes, *supra* note 581; Tim Holbrook, *Will Chief Justice Roberts Save Same-Sex Marriage?*, CNN (June 29, 2017), https://www.cnn.com/2017/06/28/opinions/roberts-same-sex-marriage-opinion-holbrook/index.html.

[583] *See generally supra* Part I (describing Roberts's extraordinarily careful cultivation and maintenance of his own reputation from high school through the present day).

[584] To be clear, this statement does not suggest that Roberts made a judicial or legal mistake in either of these rulings regarding same-sex marriage. Rather, it simply points out that Roberts learned from the criticism that he received in 2015 after he used the bully pulpit to denounce same-sex marriage by reading passages of his dissent aloud from the bench. In *Pavan*, Roberts took a far quieter stance, joining the *per curiam* majority opinion and distancing himself from the angry dissent written by Gorsuch and joined by Thomas and Alito. *See Pavan*, 137 S. Ct. at 2076, 2079.

[585] *See* Lee v. United States, 137 S. Ct. 1958, 1968–69 (2017) (internal citations omitted); Buck v. Davis, 137 S. Ct. 759, 775, 777, 779–80 (2017) (internal citations omitted).

contributed millions of dollars to that judge's election campaign.[586] While Roberts has never renounced his position in this case, he has subsequently written detailed opinions describing the ethical obligations of the legal profession, although these decisions have focused on the standards governing lawyers rather than judges. For instance, in 2017, Roberts overturned criminal convictions in *Buck v. Davis* and *Lee v. United States* on the grounds that the defendant's attorney provided ineffective assistance of counsel, giving Roberts an opportunity to write in detail about the sacred trust that lawyers held with their clients and about the need to preserve the reputation of the legal profession overall.[587] In both of these decisions, Roberts broke ranks with Thomas and Alito.[588] Both of these opinions were better received by commentators than Roberts's previous vote of confidence for the judge who had failed to recuse himself from the case involving his campaign donor.[589]

[586] Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 873–74, 890–902 (2009) (Roberts, C.J., dissenting); *see* Jeffrey W. Stempel, *Playing Forty Questions: Responding to Justice Roberts's Concerns in* Caperton *and Some Tentative Answers About Operationalizing Judicial Recusal and Due Process*, 39 SW. L. REV. 1, 7–8 (2009); *Honest Justice*, N.Y TIMES (June 8, 2009), https://www.nytimes.com/2009/06/09/opinion/09tue1.html ("Chief Justice Roberts is fond of likening a judge's role to that of a baseball umpire. It is hard to imagine that professional baseball or its fans would trust the fairness of an umpire who accepted $3 million from one of the teams."); Edward A. Fallone, *Justice Roberts Has a Little List*, MARQ. L. SCH. FAC. BLOG (June 10, 2009), https://law.marquette.edu/facultyblog/2009/06/10/justice-roberts-has-a-little-list/ ("By demanding that the judicial remedy be clear and manageable before the Court should undertake to recognize the existence of a constitutional right, Chief Justice Roberts would transform judicial restraint into judicial timidity."); *The Supreme Court Raises the Bar for Judges*, L.A. TIMES (June 9, 2009), http://articles.latimes.com/2009/jun/09/opinion/ed-scotus9 ("[Roberts was] wrong to bewail a decision that will force judges, including members of his own court, to take apparent conflicts of interest more seriously."). The dispute was one of the most publicly scrutinized matters to appear before the Court in recent memory, inspiring a novel by John Grisham and attracting an abundance of media attention even before the Court rendered its decision. *See* Adam Liptak, *U.S. Supreme Court Is Asked to Fix Troubled West Virginia Justice System,* N.Y. TIMES (Oct. 11, 2008), https://www.nytimes.com/2008/10/12/washington/12scotus.html; Lawrence Messina, *Legal Groups Blast W. Va. Justice in Massey Case,* CHARLESTON DAILY MAIL (Aug. 5, 2008), http://archive.li/dYYfS; James Sample, *Justice for Sale,* WALL ST. J. (Mar. 22, 2008), https://www.wsj.com/articles/SB120614 225489456227. Additional questions about Roberts's commitment to preserving the appearance of judicial impartiality on the Court arose two years after *Caperton*, when Roberts's year-end report about the state of the federal judiciary defended the fact that the Supreme Court is not bound to follow the Code of Judicial Conduct. JOHN G. ROBERTS, JR., 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 2–5 (2011), http://www.supremecourt.gov/publicinfo/year-end/2011yearendreport.pdf.

[587] *See Lee*, 137 S. Ct. at 1962, 1968–69; *Buck*, 137 S. Ct. at 776–80.

[588] *Lee*, 137 S. Ct. at 1969–75 (Thomas, J., dissenting); *Buck*, 137 S. Ct. at 780–87 (Thomas, J., dissenting).

[589] *See, e.g.*, Matt Ford, *'Some Toxins Can Be Deadly in Small Doses'*, ATLANTIC (Feb. 22, 2017), https://www.theatlantic.com/politics/archive/2017/02/supreme-court-duane-buck/517542/; Adam Liptak, *Justices Side with Immigrant Who Got Bad Legal Advice*, N.Y. TIMES (June

Again, none of this means that Roberts will someday reverse course on every issue when the reputation of himself and the legacy of the Roberts Court appears to be under attack. Nor does this mean that Roberts will ever evolve into anything other than a predictable politically conservative voter in the majority of the cases that come before the Court. Still, the evidence reviewed in this article strongly suggests that Roberts is willing to vote at times for positions with which the other members of the Court's politically conservative wing do not agree with and to depart from stances that Roberts considers to be too extreme. Even more importantly, the above discussions offer a possible framework of when and why Roberts will swing to a different side of the political spectrum. If there is a way to pursue consensus so the Court can speak with the most united voice possible, then Roberts will seek that result. If there is a threat to the public image and the historical legacy of the Roberts Court, then the Chief Justice will strive to extinguish that threat. If there is a position on a challenging issue that comes across as extreme, then Roberts will likely seek a path to a narrower result — perhaps by using powers of persuasion and compromise in conference, perhaps by issuing a concurring opinion that tempers the Court's holding, or perhaps by building a majority coalition that may require crossing party lines. If there is a way to exemplify restraint, modesty, decorum, and freedom from political polarization in the Court's final decision, then this appears to be the road that Roberts will be apt to take.[590]

23, 2017), https://www.nytimes.com/2017/06/23/us/politics/scotus-immigrant-jae-lee-lawyer.html; Mark Joseph Stern, *Supreme Court Rules in Favor of Black Man Whose Lawyer Called Racist "Expert" to the Stand*, SLATE (Feb. 22, 2017), http://www.slate.com/blogs/the_slatest/2017/02/22/supreme_court_buck_v_davis_decision_ineffective_assistance_of_counsel.html.

[590] This is not necessarily an easy road to take in terms of immediate public reaction, with criticism coming from both political liberals and political conservatives. However, it can prove to be a valuable role in terms of historical legacy, as the eventual improvement of John Marshall Harlan's reputation demonstrates. *See* Oelsner, *supra* note 212; O'Neill, *supra* note 267, at 178–79. Already, some commentators have painted Roberts as a judicial martyr, crucified on crosses built by both hard-liner political liberals and hard-liner political conservatives. *See, e.g.*, Robert Barnes, *John Roberts Will Swear in Another President. Maybe One Day He'll See a Friendly Face*, WASH. POST, (Jan. 19, 2017), https://www.washingtonpost.com/politics/courts_law/john-roberts-will-swear-in-another-president-maybe-one-day-hell-see-a-friendly-face/2017/01/19/97ad2ef8-de59-11e6-918c-99ede3c8cafa_story.html?utm_term=.8c2afc03a067; Noah Feldman, *The Lonely Road Ahead for Principled John Roberts*, CHI. TRIB. (Sept. 21, 2015), http://www.chicagotribune.com/news/sns-wp-blm-news-bc-scotus-roberts-comment21-20150921-story.html; Linda Greenhouse, *A Chief Justice Without a Friend*, N.Y. TIMES (Oct. 1, 2015), https://www.nytimes.com/2015/10/01/opinion/a-chief-justice-without-a-friend.html; David G. Savage, *Chief Justice Roberts' Record Isn't Conservative Enough for Some Activists*, L.A. TIMES (Sept. 25, 2015), http://www.latimes.com/nation/la-na-roberts-conservative-backlash-20150924-story.html. This emerging narrative of Roberts as a defender of judicial restraint and righteousness against excesses for both liberal

In the end, Roberts may well fulfill his promise to become the "umpire" of the Court. Yet no two umpires maintain identical strike zones, and the savvy baseball player knows the unique tendencies of the person behind home plate for that particular game.[591] Similarly, the wise Supreme Court advocate knows how to appeal to the primary concerns of a particular justice, especially if that justice is the newest "swing voter" of the Court.[592] Roberts has offered hints of how he tends to decide the controversies that come before him, clues that are crucial for advocates to analyze in the post-Kennedy era. Supreme Court decisions in the period following Kennedy's retirement will not abruptly become foregone conclusions. Instead, there seems to be a new "swing voter" on the bench, one who just might prove to be even more influential than his predecessor in trying to maintain order on this starkly divided Court.

and conservative extremes paints the type of "taking the high road" picture that Roberts sought for himself in high school, college, and every stage of his career. *See supra* Part I.

[591] *See* Cork Gaines, *What an MLB Strike Zone Really Looks Like and Why Players Are Always So Mad About It*, BUS. INSIDER (Sept. 17, 2014), https://www.businessinsider.com/mlb-strike-zone-2014-9.

[592] *See* Ilya Shapiro, *Justice Kennedy: The Once and Future Swing Vote*, MEDIUM (Nov. 13, 2016), https://www.cato.org/publications/commentary/justice-kennedy-once-future-swing-vote (describing the painstaking preparations of Supreme Court advocates tailoring their arguments to appeal to Justice Kennedy).

# New York Court Watcher

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FRIDAY, OCTOBER 7, 2011

## Roberts' Goat--What Gets It? (Intro: The Chief Justice's Dissents)

What gets John Roberts' goat? What does the Chief Justice feel strongly about?

In the last few posts, we explored "Lippman's Goat--What gets It." (See **Lippman's Goat--What Gets It? (Part 3: Civil Cases)**, Sept. 21. 2011, and the preceding 2 posts in the series. See also **Justice Alito's Goat--What Gets It? (Part 4: One Last Thing)**, March 7, 2010, and the 3 preceding posts in that series.)

Looking at the 15 dissenting opinions written by Jonathan Lippman over the course of the last year, we got a good idea of the kinds of issues New York's Chief Judge feels strongly about. Strongly enough, that is, to author a dissent. As stated in one of those posts:

> *Strongly enough, that is, to spend the time, effort, and collegial capital to explain in a written opinion why the majority of the court is wrong. Strongly enough, that is, that the majority's position, the court's decision, gets the judge's goat.*

Yes--and for that reason not surprisingly--those dissenting opinions were particularly revealing about the state's top judge.

Well, what about the *nation's* top judge? What can we glean from Chief Justice Roberts' dissenting opinions? That is, from the disagreements he has expressed publicly with the decisions of his Court--the positions he has taken in opposition to those adopted by a majority of his colleagues on the United States Supreme Court?

Since we looked at 15 dissenting opinions by Lippman, let's look at the same number by Roberts. Lippman authored his 15 over the course of the 1 year we examined; Roberts authored his 15 over the past 3 years--from the start of the 2008-09 term, through the end of the last term, 2010-11. But instead of looking at just 1 year for each of them, let's look at an equal number of dissents in the hope of getting an equal level of insight.

So, what do Roberts' dissents tell us?

Before we describe the cases themselves in any detail, let's just take a quick peek at the bottom line of Roberts' dissents. In short, stripped of the legal arguments, the policy considerations, the jurisprudential underpinnings, etc., etc., what were the decisions that

- Coglianese_Adam
- Compelling Interest
- Confirmation hearings
- Constitutional Law
- Contraceptive Coverage
- Cooke Symposium
- Cooke_Lawrence
- Criminal Law
- CrimLvApps (NYCOA)
- Cruel and Unusual
- Crummey_Peter
- Cuomo_Andrew
- Cuomo_Mario
- Danforth_George
- Death Penalty
- DeBour
- Dianne Renwick
- Dicker_Fred
- DiFiore_Janet
- Discrimination
- Dissents
- Diversity
- DNA
- DOMA
- Dominguez_Ramon
- Double Jeopardy
- Durham_Christine
- Employment Law
- Environmental Law
- Equal Protection
- Executive Order
- Exonerations
- Fahey_Eugene
- Father's Day
- FBI
- Federalism
- Feinman_Paul
- FISA Court
- Free Exercise of Religion
- Free Speech
- Freedom of the Press
- Fuld_Stanley
- Fundamental Rights
- Funeral Protests
- Garcia_Michael
- Garland_Merrick
- Gay Rights
- Gender Equality
- Gerrymandering


Roberts opposed? I.e., the decisions that bothered him enough that he felt compelled to write a dissent?

Here's a list of what he dissented against:

- against a ***sentence reduction to redress the 100-1 disparity*** in punishments for crack cocaine and cocaine powder offenses
- against a ***trial judge's rejection*** of the sentencing guidelines which had set ***the 100-1 disparity*** for crack cocaine offenses
- against the Virginia Supreme Court's ***restrictions on police stopping drivers*** based on anonymous tips
- against the Pennsylvania Supreme Court's ***restrictions on police arresting individuals in "bad neighborhoods"***
- against the ***reconsideration***, by a military appeals court, of the ***court martial convictions of an immigrant*** serving in the U.S. Navy
- against ***vacating*** an ***immigrant's deportation*** and ordering ***reconsideration*** based on incompetent counsel
- against ***upholding a criminal contempt order*** punishing a ***domestic violence convict*** who violated an order of protection
- against ***upholding a firearms conviction*** of a convicted ***domestic assailant***
- against ***upholding a restitution order*** requiring an ***assault convict*** to compensate his victim
- against ***compensation*** for railroad ***employees injured*** on the job
- against a federal suit by a state agency to ***protect the rights of the mentally disabled***
- against a ***credit card holder's right to sue*** a law-violating bank in court instead of being forced into arbitration
- against ***removal of a judge*** from a case involving a company that contributed ***3 million dollars to get him elected***
- against a multi-state commission's ***claims*** against a member state ***for failing to complete*** the agreed upon and funded ***radioactive waste facility***
- against a bi-state water district and a power company's ***right to participate in a dispute between 2 states over river water***

OK, there are Roberts' 15. A bare bones list of what he opposed.

Of course he had legal arguments supporting his positions. But, of course, so too did the majority of his Court with whom he disagreed.

So what is there in these cases, about these cases--the outcomes, the implications, the consequences, the ramifications--that he chose the legal arguments he did that supported the positions that he took? That he chose to go public with the differences he had with the majority of his Court and to expend the time and energy and collegial capital to author a dissenting opinion? That he felt strongly about?

Well, connect the dots!

Other than the last 2 listed dissents that may be quite technical, there certainly seems to be a pattern or two here. Indeed, upon closer


- The Nature of Cardozo's Process: Testing it in Schloendorff and MacPherson
- Judicial Activism and Restraint: Scalia's Originalism and Jackson's Pragmatism
- "The Least Dangerous Branch"
- The Chief Justices' Marriage to Stare Decisis

**INTERNATIONAL LAW STUDIES**

- The Trial of Saddam Hussein
- International Law Studies (ILS) Staff, 2017-2018
- The Asian Infrastructure Investment Bank
- Animal Law: Evolution and the Need for International Protection
- Supervised Release and Illegal Immigration: An Empty Gesture?

- Ginsburg_Ruth Bader
- Goats
- Gorsuch_Neil
- GPS
- Graffeo_Victoria
- Great Women_Great Chiefs
- Guest Post
- Guns
- Hancock_Stewart
- Holmes_Oliver W
- Honest Services Law
- IA SupCt
- Immigration
- International Law
- Internet Commerce
- Interrogations
- Interstate Commerce Power
- Intro to NYCW
- Jackson_Robert
- Jasen_Matthew
- Jefferson_Thomas
- Jerkens_H. Allen
- Jewish Seat (NY COA)
- Jones_Theodore
- Journalist Privilege
- Joyce_Sister Maureen
- Judicial Activism
- Judicial Decisionmaking
- Judicial Experience
- Judicial Federalism
- Judicial Output
- Judicial Restraint
- Judicial Review
- Judicial Selection
- Juvenile Justice
- Kagan_Elena
- Kavanaugh_Brett
- Kaye_Judith
- Kennedy_Anthony
- Korematsu decision
- Lehman_Irving
- Lethal Injection
- Levine_Howard
- Lippman_Jonathan
- Literalism
- Madison_James
- Malone_Bernard
- Marshall_Margaret


investigation and reflection, even the last 2 would likely reveal something about Roberts.

But connecting the other 13 dissents, it's difficult not to see some common denominators. There are patterns that can hardly be missed. Who is he siding with in his dissents? Who not? And when does he seem to switch sides?

We'll discuss more about that in the next post or two. We'll look a bit more closely at the cases. Just a bit more detail--not so much that it gets too legalistic, tedious, boring, and, most importantly for our purpose here, out of focus. Then we'll outline some of the fairly evident patterns.

Just one final point to close. What gets Chief Justice Roberts' goat? Not at all the same as what gets Chief Judge Lippman's.

Labels: Dissents, Goats, Lippman_Jonathan, Roberts_John

Newer Post Home Older Post

# New York Court Watcher

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SATURDAY, OCTOBER 13, 2012

## Roberts in the Middle: The Chief Justice as Moderate (Part 1--Intro)

Everyone now knows what he did with Obamacare:
Agreed with the conservatives that the federal government had exceeded its interstate commerce power.
But sided with the liberals that the law could--and should--be viewed as valid under the taxing power.

He gave each side a victory:
A huge legal victory for conservatives by restraining the commerce power, which they dread.
A huge political one for the liberals by upholding the law, albeit on a very questionable legal basis.

This was not the first time Chief Justice John Roberts departed, at least partially, from the conservative wing of his Court.

To be sure, Roberts has been a fairly consistent member of that wing. But since his appointment in 2005, he has sometimes joined the liberal Justices and taken issue with the conservatives. Sometimes he has voted with the conservative Justices, but taken a less conservative position. Sometimes he has split the difference between the Court's two wings.

Roberts hasn't done this too frequently. Not regularly. But not rarely either.

This moderating aspect of Roberts' jurisprudence, this occasional splitting of differences and even siding with the liberals, is one characteristic of his voting and opinions that has emerged over the years. It is one of the reasons why Roberts' vote and opinion in the Obamacare case were not nearly as surprising as much of the reaction would suggest.

Now before getting carried away, the point here is not to suggest that the Chief Justice has exhibited liberal leanings. Or even that his voting shows him to be a centrist.

Nor does his record suggest that he has replaced Justice Kennedy as the Court's swing vote. Or even that he is becoming less conservative.

But.... A close review of Roberts' record does show that he will occasionally side with the liberals. That he sometimes does reject the

- Coglianese_Adam
- Compelling Interest
- Confirmation hearings
- Constitutional Law
- Contraceptive Coverage
- Cooke Symposium
- Cooke_Lawrence
- Criminal Law
- CrimLvApps (NYCOA)
- Cruel and Unusual
- Crummey_Peter
- Cuomo_Andrew
- Cuomo_Mario
- Danforth_George
- Death Penalty
- DeBour
- Dianne Renwick
- Dicker_Fred
- DiFiore_Janet
- Discrimination
- Dissents
- Diversity
- DNA
- DOMA
- Dominguez_Ramon
- Double Jeopardy
- Durham_Christine
- Employment Law
- Environmental Law
- Equal Protection
- Executive Order
- Exonerations
- Fahey_Eugene
- Father's Day
- FBI
- Federalism
- Feinman_Paul
- FISA Court
- Free Exercise of Religion
- Free Speech
- Freedom of the Press
- Fuld_Stanley
- Fundamental Rights
- Funeral Protests
- Garcia_Michael
- Garland_Merrick
- Gay Rights
- Gender Equality
- Gerrymandering


hard-line conservative position. And that he sometimes does take a middle view between the Court's opposing ideological camps.

More than that, Roberts has done so in some ideologically charged cases. Not necessarily in the most highly partisan-charged cases. *[We have examined that in previous posts.]* But he has done so in cases that do have well delineated ideologically and politically opposed positions.

So, the sometimes-moderate Roberts--the Roberts-in-the-Middle--has emerged in cases dealing with some ideologically and politically charged issues. Issues involving immigration, the right to counsel in criminal cases, sentencing juvenile criminals, the death penalty, strip searches, prosecuting corporate executives, and suing businesses for retaliation and for equal employment rights.

We will look at several examples in the next couple of posts. They will follow shortly.

Labels: Obamacare, Roberts_John

Newer Post Home Older Post


- The Nature of Cardozo's Process: Testing it in Schloendorff and MacPherson
- Judicial Activism and Restraint: Scalia's Originalism and Jackson's Pragmatism
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# New York Court Watcher

Research & Commentary on the Supreme Court, the New York Court of Appeals, More





TUESDAY, OCTOBER 16, 2012

## [more of] Roberts in the Middle: The Chief Justice as Moderate (Part 2--In the Majority)


Clearly, some were very upset with Chief Justice Roberts' deciding vote to uphold Obamacare.
*[The photo on the left is from Republic Magazine: The Voice of the Patriot Movement. See "John Roberts, Constitutional Traitor: Chief Justice Approves Obamacare Tax Mandate," June 28, 2012.]*

As noted in the last post, the Obamacare case was not the first one in which Roberts departed from the other conservative Justices on his Court. In some cases he actually sided with the liberals. In some, he voted with the conservatives, but adopted a less hard-line position. In some, he endorsed a middle ground which literally split the difference between the Court's two ideological wings.

More than that, some of these cases were ideologically significant and politically charged. The Chief Justice's vote and position in each of them was less conservative than that of the most conservative Justices. And collectively, his votes and positions evinced more moderation--*at least in these cases*--than either the conservative or liberal poles of his Court.

Let's look at a few examples. Let's start with some cases in which Roberts was part of the majority.

**Arizona's Immigration Law**


Three of the Court's conservative Justices--Scalia, Thomas, and Alito--voted to uphold all (or in Alito's case, most) of the provisions of the Arizona law. According to them, the additional restrictions and criminal

- Coglianese_Adam
- Compelling Interest
- Confirmation hearings
- Constitutional Law
- Contraceptive Coverage
- Cooke Symposium
- Cooke_Lawrence
- Criminal Law
- CrimLvApps (NYCOA)
- Cruel and Unusual
- Crummey_Peter
- Cuomo_Andrew
- Cuomo_Mario
- Danforth_George
- Death Penalty
- DeBour
- Dianne Renwick
- Dicker_Fred
- DiFiore_Janet
- Discrimination
- Dissents
- Diversity
- DNA
- DOMA
- Dominguez_Ramon
- Double Jeopardy
- Durham_Christine
- Employment Law
- Environmental Law
- Equal Protection
- Executive Order
- Exonerations
- Fahey_Eugene
- Father's Day
- FBI
- Federalism
- Feinman_Paul
- FISA Court
- Free Exercise of Religion
- Free Speech
- Freedom of the Press
- Fuld_Stanley
- Fundamental Rights
- Funeral Protests
- Garcia_Michael
- Garland_Merrick
- Gay Rights
- Gender Equality
- Gerrymandering


penalties imposed on illegal immigrants were within the power of the states to police activities within their borders.

The liberal Justices (together with Justice Kennedy) voted to invalidate every challenged provision of the law, but one. They argued that federal immigration law comprehensively regulated the treatment of illegal immigrants and, therefore, preempted any state interference.

Roberts joined the liberals, plus Kennedy, thereby giving them a majority. (*Arizona v. U.S.*, 2012 [the same week as the Obamacare decision].)

**Worker Anti-Retaliation Protection**


The Court's most conservative Justices--Scalia and Thomas--voted to dismiss a claim of retaliatory discharge brought by a worker who was fired after he complained that employees were being shortchanged on work-time. The two argued that the Fair Labor Standards Act only protected workers who filed formal complaints, either with a government agency or in court.

The liberal Justices (as well as Kennedy and Alito) took the position that oral complaints sufficed. That a worker's person-to-person complaints to his supervisor and to company managers were adequate to trigger the law's protections against retaliation.

Roberts joined the Court's 4 liberals, plus Kennedy and Alito, in rejecting the view of Scalia and Thomas. (*Kasten v. Saint-Gobain*, 2011.)

**Honest Services Law**


Justices Scalia and Thomas (together with Justice Kennedy) argued that the entire so-called "Honest Services" law should be invalidated. In a prosecution of former Enron officials, the federal government charged violations of the law for dishonestly serving personal interests at the expense of the company and the individuals the officials were hired to serve. Scalia, Thomas, and Kennedy argued that the law was unconstitutionally vague.

The liberal Justices (together with Justice Alito) took the position that, although the law was vague, it was at least clear, and therefore valid, to


- The Nature of Cardozo's Process: Testing it in Schloendorff and MacPherson
- Judicial Activism and Restraint: Scalia's Originalism and Jackson's Pragmatism
- "The Least Dangerous Branch"
- The Chief Justices' Marriage to Stare Decisis

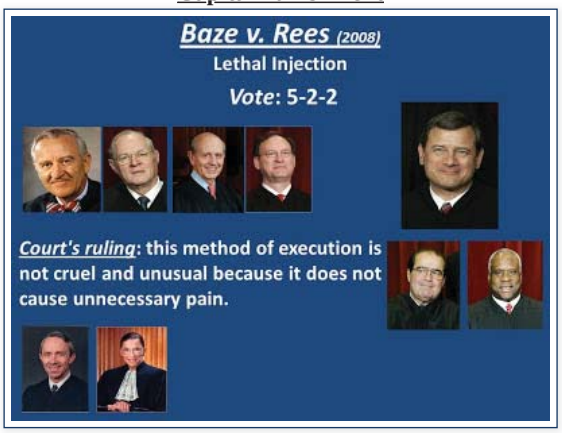

**INTERNATIONAL LAW STUDIES**


- The Trial of Saddam Hussein
- International Law Studies (ILS) Staff, 2017-2018
- The Asian Infrastructure Investment Bank
- Animal Law: Evolution and the Need for International Protection
- Supervised Release and Illegal Immigration: An Empty Gesture?

- Ginsburg_Ruth Bader
- Goats
- Gorsuch_Neil
- GPS
- Graffeo_Victoria
- Great Women_Great Chiefs
- Guest Post
- Guns
- Hancock_Stewart
- Holmes_Oliver W
- Honest Services Law
- IA SupCt
- Immigration
- International Law
- Internet Commerce
- Interrogations
- Interstate Commerce Power
- Intro to NYCW
- Jackson_Robert
- Jasen_Matthew
- Jefferson_Thomas
- Jerkens_H. Allen
- Jewish Seat (NY COA)
- Jones_Theodore
- Journalist Privilege
- Joyce_Sister Maureen
- Judicial Activism
- Judicial Decisionmaking
- Judicial Experience
- Judicial Federalism
- Judicial Output
- Judicial Restraint
- Judicial Review
- Judicial Selection
- Juvenile Justice
- Kagan_Elena
- Kavanaugh_Brett
- Kaye_Judith
- Kennedy_Anthony
- Korematsu decision
- Lehman_Irving
- Lethal Injection
- Levine_Howard
- Lippman_Jonathan
- Literalism
- Madison_James
- Malone_Bernard
- Marshall_Margaret


the extent that it necessarily prohibited bribery and kickbacks.
Roberts joined the liberals, plus Alito, in rejecting the view of Scalia, Thomas, and Kennedy. (*Skilling v. U.S.*, 2010.)

**Capital Punishment**




The question before the Court was whether execution by lethal injection violated the Constitutional prohibition of cruel and unusual punishment. Liberal Justices Souter and Ginsburg argued that, because death by lethal injection may involve the avoidable risk of severe pain, it should be disallowed unless proven otherwise.
Conservative Justices Scalia and Thomas took a very different position. To them, only "burning at the stake, disemboweling, drawing and quartering, beheading, and the like" were "cruel and unusual" within the meaning of the 8th Amendment. Hence, in their view, lethal injection was perfectly permissible and the question was not even close.
Chief Justice Roberts agreed with neither of those positions. In an opinion announcing the decision of the Court, Roberts upheld the validity of lethal injection, but he did so for reasons midway between those of the most liberal and most conservative members of his Court. Joined by Justices Kennedy and Alito (with Justices Stevens and Breyer voting for the decision but in separate concurring opinions), Roberts defined the appropriate test as whether a particular punishment unnecessarily entails a substantial, or objectively intolerable, risk of serious pain. If so, the punishment is unconstitutionally "cruel and unusual." Because there was no such showing about the method of lethal injection at issue, Roberts said that it passed constitutional muster. (*Baze v. Rees*, 2008.)

**Civil Rights at the Workplace**


The Civil Rights Act of 1964, § 1981, prohibits racial discrimination in contracts, including those involving employment. This case involved the firing of a Black employee. He claimed that he was fired because he had complained to his managers that another Black employee had been fired on the basis of race.
Conservative Justices Scalia and Thomas argued that such retaliation against a worker was not prohibited by the civil rights law. Retaliation

- Marshall_Thurgood
- Martin_Trayvon
- Mayberger_Robert
- McGregor
- Mens Rea
- Minors/Children
- Miranda
- Mullarkey_Mary
- Muslim Travel Ban
- Napravnik_Rosie
- Nomination
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- NY Court of Appeals
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- NY Ct Workload
- O'Connor_Sandra Day
- Obama and SupCt
- Obamacare
- Open Fields
- Original Intent
- Pataki_George
- Pellucidly Clear
- Pigott_Eugene
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- Privacy Rights
- Proposition 8
- Prosecutorial Ethics
- Racial Discrimination
- Read_Susan
- Reasonable Doubt
- Recess Appointments
- Rehnquist_William
- Religion and the Law
- Right to Counsel
- Right to Die
- Right to Silence
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- Roberts Court
- Roberts_John
- Rogers_Chase
- Russia Investigation
- Same-Sex Marriage
- Saratoga Highlights


for complaining about racial discrimination, they said, was not the same thing as racial discrimination itself.

Liberal Justices Stevens, Souter, Ginsburg, and Breyer--in an opinion by the latter--took exactly the opposite position. While acknowledging that the civil rights statute does not explicitly mention retaliation, that opinion explained that the purpose of the law, to insure that Blacks enjoy the same legal rights as others, would be seriously undermined if retaliation for complaining about discrimination were permitted. Moreover, this is just what the Court has previously held for an analogous, similarly interpreted civil rights law, § 1982. The Chief Justice, rejecting the hard-line position of Scalia and Thomas, joined the liberals (as did Justices Kennedy and Alito) to form the majority and to make Breyer's opinion the decision of the Court. (*CBOCS West Inc. v. Humphries*, 2008.)

As I mentioned in the preceding post, none of this is too suggest that Chief Justice Roberts is something other than an ideological conservative. And a strong one at that. But it undoubtedly does show that he is not uncompromising, rigid, or extreme. Certainly he is not as hard right-wing as other conservatives on his Court.

Nor is the point here to say that Roberts' record is better or worse, wiser or more foolish than that of those other more conservative Justices. *[Yes, I do happen to think it is better and wiser.]* The point is that Roberts' record certainly does suggest some moderation, and it does so in some cases with significant ideological division.

In this post, we looked at a few cases in which the Chief Justice either joined or wrote the majority opinion. In the next, we'll look at a few in which he joined or wrote a separate concurrence.

Labels: Death Penalty, Discrimination, Employment Law, Honest Services Law, Immigration, Roberts_John, Scalia_Antonin, Thomas_Clarence

Newer Post Home Older Post

# New York Court Watcher

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MONDAY, OCTOBER 22, 2012

## [final of] Roberts in the Middle: The Chief Justice as Moderate (Part 3--Concurring Opinions)

*Source: reason.com "Chief Justice John Roberts Splits the Baby, " by Ed Krayewski 6/29/12*

Rejecting a hard-line view, whether conservative or liberal, the Chief Justice has sometimes authored or joined a separate concurring opinion. *[The photo on the left is from "**Chief Justice John Roberts Splits the Baby**, " by Ed Krayewski, on reason.com, 6/29/12.]*

In the last post, we looked at a few cases where Roberts was in the majority, endorsing a position more moderate than that taken by other conservative Justices, or by liberals on the Court. Let's take a look now at some cases where he similarly took a more moderate position, but did so by clarifying, emphasizing, or distinguishing his own view in a concurring opinion. That is, where his position--what some might call "split[ting] the baby"--was distinct from that of both the majority and the dissent.

As in those cases discussed in the last post, these cases, with the CJ in a separate concurrence, find him rejecting the dissenting opinion. But they also show him expressing a view that is less rigid, less ideological, and more subtle than that taken by the majority.

As in the last post, let's look at 5 such cases.

**Strip Searches**


Three of the Court's conservative Justices--the 2 most (Scalia and Thomas) and 1 more moderately so (Kennedy)--took the position that someone arrested and taken to jail for processing and awaiting an initial



- Coglianese_Adam
- Compelling Interest
- Confirmation hearings
- Constitutional Law
- Contraceptive Coverage
- Cooke Symposium
- Cooke_Lawrence
- Criminal Law
- CrimLvApps (NYCOA)
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- Danforth_George
- Death Penalty
- DeBour
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- Dicker_Fred
- DiFiore_Janet
- Discrimination
- Dissents
- Diversity
- DNA
- DOMA
- Dominguez_Ramon
- Double Jeopardy
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- Employment Law
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- Exonerations
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- Fundamental Rights
- Funeral Protests
- Garcia_Michael
- Garland_Merrick
- Gay Rights
- Gender Equality
- Gerrymandering


appearance before a judge can be strip searched for jail-security reasons. This is so regardless of the crime. And regardless of the lack of any suspicion that the person might be dangerous or might possess contraband.

*[Here, the person was arrested pursuant to a warrant, for an unpaid fine, for a minor traffic offense. Oh, and he actually had already paid the fine. So he was ultimately released. But not until he was strip searched twice!]*

The Court's 4 liberals argued that the strip search was entirely unreasonable and, hence, unconstitutional. The supposed offense was minor, and the arrestee was not suspected of being dangerous or of possessing anything dangerous or illegal.

The Chief Justice (as well as Alito, who wrote his own separate concurrence) voted with the conservatives, thereby giving them the majority. But Roberts wrote a short concurring opinion. He emphasized that the Court's ruling was qualified. It depended on particular facts. As he noted, there was apparently no alternative in this case to placing the arrestee in the general jail population. Moreover, the narrow issue before the Court, as argued by the arrestee's lawyer, was whether suspicionless strip searches were illegal "*no matter what the circumstances*."

Roberts concluded his brief concurrence by underscoring the "possibility of exceptions" to the Court's "general" rule--as he put it--"to ensure that we 'not embarrass the future.'"

**Violent Video Games/1st Amendment**


A collection of conservative and liberal Justices formed the majority to invalidate a California law banning the sale or rental of violent video games to persons under the age of 17. That majority ruled that video games were protected speech under the 1st Amendment, and that there was no real proof that violent video games harmed children or made them more aggressive.

In dissent, a mixed duo (conservative Thomas and liberal Breyer) argued that the law was perfectly permissible. Thomas argued that free speech was not intended to protect the choices of children, but of their parents and other adults. Breyer argued that the violent materials defined by the law are outside 1st Amendment protection--i.e., material "utterly without redeeming social" value--and that studies did show the harm of such games to minors.

The Chief Justice joined Justice Alito's concurring opinion. For them, there was merit to both the majority and dissenting views. But also flaws.

Ultimately, Roberts joined Alito to say that it is constitutional to restrict some choices by children and to allow their parents to make the choices for them. That there is in fact good reason to be concerned about the effects of violent video games on children. But that California was insufficiently clear about which video games actually fell within the prohibition. If the law were clearer, it would pass constitutional muster.


- The Nature of Cardozo's Process: Testing it in Schloendorff and MacPherson
- Judicial Activism and Restraint: Scalia's Originalism and Jackson's Pragmatism
- "The Least Dangerous Branch"
- The Chief Justices' Marriage to Stare Decisis

**INTERNATIONAL LAW STUDIES**

- The Trial of Saddam Hussein
- International Law Studies (ILS) Staff, 2017-2018
- The Asian Infrastructure Investment Bank
- Animal Law: Evolution and the Need for International Protection
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**Cruel & Unusual Punishment for Minors**


The liberal Justices plus Kennedy formed a majority. They ruled that life imprisonment, without the possibility of parole, is unconstitutional for a non-homicidal crime committed by a juvenile. It is cruel and unusual because it permits no consideration of the immaturity of children or of their potential for growth and rehabilitation.

The conservative dissenters (Scalia, Thomas, and Alito) argued that such a sentence is entirely constitutional. According to them, the "cruel and unusual" prohibition is very narrow and, except in capital cases, virtually all discretion about sentencing is left to legislators and sentencing judges.

Chief Justice Roberts voted with the majority to invalidate the sentence. But he took a narrower view. He rejected the majority's absolute rule as contrary to the Court's precedents, and because it eliminated the possibility that life without parole might well be appropriate for more serious crimes.

He also rejected the dissenter's view that such a sentence was acceptable in this case. For Roberts, the offender's youth and immaturity, the nature of the crime (a non-homicidal, non-domicil, armed burglary), and the "extraordinarily severe punishment imposed"--together rendered the sentence unconstitutionally excessive.

**Church and State**


In this very divisive case, about a seemingly very minor matter, Justice Kennedy authored the opinion for a very splintered Court. In short, in order to avoid possible church and state problems, Congress enacted a law transferring a parcel of federal property upon which stood a Christian cross--and which was situated within national park land--to private ownership.

The Court upheld the law. Kennedy said that the government was not endorsing Christianity. It was merely accommodating the public's acknowledgement of religion's role in society.

The Court's most conservative Justices, Scalia and Thomas, voted with Kennedy, but had their own reasons for the outcome. They insisted that

- Marshall_Thurgood
- Martin_Trayvon
- Mayberger_Robert
- McGregor
- Mens Rea
- Minors/Children
- Miranda
- Mullarkey_Mary
- Muslim Travel Ban
- Napravnik_Rosie
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- O'Connor_Sandra Day
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- Pigott_Eugene
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- Presidential Powers
- Privacy Rights
- Proposition 8
- Prosecutorial Ethics
- Racial Discrimination
- Read_Susan
- Reasonable Doubt
- Recess Appointments
- Rehnquist_William
- Religion and the Law
- Right to Counsel
- Right to Die
- Right to Silence
- Rivera_Jenny
- Roberts Court
- Roberts_John
- Rogers_Chase
- Russia Investigation
- Same-Sex Marriage
- Saratoga Highlights


the courts should not even be involved, because there was no "actual or imminent injury" suffered in the case.

All 4 liberal Justices voted to enforce the order of the federal trial court that had found the government in violation of the Establishment Clause. In the view of that court, adopted by these 4, both the cross on government property and the government's efforts to save the cross by transferring the land “convey[] a message of endorsement of religion” to “a reasonable observer.” To the liberal dissenters, that is clearly prohibited by the 1st Amendment.

The Chief Justice voted for the outcome reached by Kennedy, but he explained his own reason in a separate single paragraph. For him, there was no need for the lengthy and competing expositions of Kennedy, of Scalia and Thomas, or of the dissenters. The case could be decided very simply.

It was agreed in Court that the government could constitutionally have taken the cross down, sold the land, and then given the cross to the buyer who would raise the cross again. As Roberts himself put it: "I do not see how it can make a difference for the Government to skip that empty ritual and do what Congress told it to do—sell the land with the cross on it. 'The Constitution deals with substance, not shadows.'"

**Right to Counsel**


The Court's 4 liberals and Justice Kennedy formed a majority to hold that the accused's right to counsel was violated in this case. In their view, the accused's attorney was unconstitutionally ineffective because he failed to advise his client that a guilty plea would risk deportation. Indeed, the government did commence deportation proceedings when the accused plead guilty to a drug offense.

To the Court's most conservative Justices, Scalia and Thomas, there was no right to counsel problem at all. Although the lawyer gave misinformation about deportation, the accused was only entitled to an effective attorney on strictly criminal law matters--not immigration.

The Chief Justice joined Justice Alito to adopt a middle position. They agreed with the liberals that the accused's right to effective counsel was violated. But they also agreed to some extent with the dissenters. To Roberts and Alito, the critical fact was that the lawyer did give immigration advice, that the advice was wrong, and that there were serious consequences. In their view, a criminal lawyer should not be expected to give immigration advice, but if he does, it should be correct.

So there it is. Between the preceding post and this one, 5 majorities and 5 concurrences where the Chief Justice eschewed a hard-line position taken by other conservatives on the Court. Where he either joined the liberal Justices, or he took a position midway between that taken by the opposing ideological wings of his Court.

It bears repeating--actually re-repeating--that none of this proves that

- Scalia and Thomas
- Scalia_Antonin
- Search and Seizure
- Sears_Leah Ward
- Second Amendment
- Section 1983
- Self-incrimination
- Sex Discrimination
- Simons_Richard
- Smith_Malcolm
- Smith_Robert
- Sotomayor_Sonia
- Souter_David
- Souter's possible replacements
- Standing
- State Constitutional Commentary
- State Constitutional Law
- State Courts
- Statutory Interpretation
- Stein_Leslie
- Stevens_John Paul
- Stevens' possible replacements
- Stop and Frisk
- Strict Scrutiny
- Strip Searches
- SupCt
- SupCt (2011-12)
- SupCt (2012-13)
- SupCt Highlights (2007-08)
- SupCt Highlights (2008-09)
- SupCt Highlights (2009-10)
- SupCt Highlights (2010-11)
- SupCt Highlights (2013-14)
- SupCt Highlights (2014-15)
- SupCt Highlights (2017-18)
- SupCt Nominations
- SupCt Workload
- SupCt: Crim Law
- SupCt: Discrimination
- Technology
- Ternus_Marsha
- Textualism
- Thomas_Clarence
- Titone_Vito


Chief Justice Roberts has become a liberal. Or even that he is not, or no longer, a conservative. Or even that he is a consistent moderate or centrist. No, not at all. *[See e.g., Part 6: Focus on Chief Justice Roberts. (Supreme Court: How Partisan? Ideological? Activist? --with graphs!, May 18, 2012.]*

But it does show that Roberts is not nearly as ideologically extreme as other conservatives on the Court. (Nor--need it even be said--as ideologically liberal as some liberals on the Court.) It does show that there is some give in his usual, normally predictable, largely conservative leanings. It does show that in some ideologically-charged cases, Roberts' voting for the most ideologically conservative outcome is hardly preordained. At least not nearly so as it is with other members of his Court.

We saw evidence of this in the Obamacare decision. We saw it in the 10 cases reviewed in this series of posts. We will almost certainly see it again. To what extent? We shall see, and we'll discuss it on **New York Court Watcher**.

Labels: Cruel and Unusual, Free Speech, Immigration, Minors/Children, Religion and the Law, Right to Counsel, Roberts_John, Search and Seizure, Strip Searches, Video Games

Newer Post Home Older Post

# New York Court Watcher

Research & Commentary on the Supreme Court, the New York Court of Appeals, More





SUNDAY, FEBRUARY 22, 2009

## Supreme Court: Ginsburg's Place Among Her Colleagues--A Voting Profile (Part I)

With Justice Ruth Bader Ginsburg battling cancer for the second time in several years, thoughts naturally go to the possibility of her leaving the Court. More than that, what would the Court be losing if she left? What has her record been? How has she sided on the issues? Which Justices has she been aligned with? Which Justices has she opposed? How frequently has she been on the winning side? How often has she taken issue with the majority? In short, how has she been voting, and where does it place her within the Court?

A series of posts on the **New York Court Watcher** has been examining the record of the Court and of the individual Justices in the "defining decisions" of the Court's last term--i.e., Fall '07 to Spring '08. As explained previously, these are 15 particularly revealing decisions from last term. (For a discussion of these decisions, see Supreme Court's 2007-08 Term: The Defining Decisions (Intro), September 11, 2008, as well as GRAPH-ic Total Recap - Supreme Court's 2007-08 Term: The Defining Decisions (Discrimination+Cultural Issues+Law & Order+Political Process), Nov. 26, 2008, and the several preceding posts in that series which are cited therein.)

In this post, the first of 2 parts (or maybe 3), we'll look at Ginsburg's record in these "defining decisions." Her record is pretty clear. Where she stands on the issues and where she fits within the Court is pretty straightforward.

First, on the 15 "defining decisions" as a whole, the following graph depicts her "liberal/conservative" voting record, and her position within the Court's ideological spectrum. Specifically, it depicts the frequency--in terms of percentage of the 15 cases--in which Ginsburg and each of her colleagues voted for the liberal and conservative positions respectively.

**GRAPH 1: Justice Ginsburg**

**Discrimination + Cultural Issues + Law & Order + Political Process Decisions**

*(click to enlarge)*

- Coglianese_Adam
- Compelling Interest
- Confirmation hearings
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- Cooke_Lawrence
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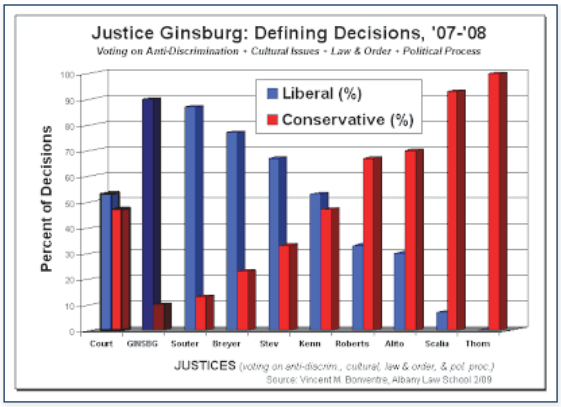
- FISA Court
- Free Exercise of Religion
- Free Speech
- Freedom of the Press
- Fuld_Stanley
- Fundamental Rights
- Funeral Protests
- Garcia_Michael
- Garland_Merrick
- Gay Rights
- Gender Equality
- Gerrymandering

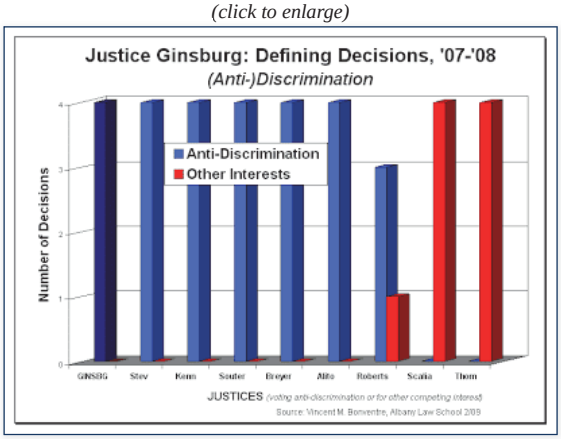




As is plain from Graph 1, Ginsburg's voting record is considerably more liberal than that of the Court as a whole (i.e., the Court's decisional record) and, in fact, considerably more liberal than the records of most of her colleagues. Justice David Souter's voting was the closest to hers, followed by Justices Stephen Breyer and John Paul Stevens. Together, those 4 comprise the Court's liberal wing. Ginsburg's record places her well within that wing and, indeed, at its most liberal end. Viewed from a different perspective, her record is the diametrical opposite of that of Justices Clarence Thomas and Antonin Scalia, who are at the most conservative end of the Court's ideological spectrum. (For more discussion on the records of all the Justices in the "defining decisions" as a whole, see GRAPH-ic Total Recap - Supreme Court's 2007-08 Term: The Defining Decisions (Discrimination+Cultural Issues+Law & Order+Political Process), Nov. 26, 2008.)

Not surprisingly--almost, necessarily--Ginsburg's record in each of the 4 different categories within the "defining decisions" is also quite liberal. The first category, anti-discrimination cases (i.e., cases in which the Court resolved a claim of some form of illegal discrimination), there were 4 decisions. The following graph depicts how Ginsburg and each of her colleagues voted. Specifically, it depicts the number of cases, out of the 4, in which Ginsburg and each of her colleagues took the liberal and conservative positions, respectively (i.e., voted in favor or against the party complaining of discrimination.)

**GRAPH 2: Justice Ginsburg**
**(Anti-)Discrimination Decisions**

*(click to enlarge)*




As shown in Graph 2, Ginsburg sided with the discrimination claimant in all of the 4 cases. She was joined by most of her colleagues. Her anti-discrimination voting record does, however, distinguish her most strikingly from Thomas and Scalia. While she always voted to sustain the discrimination claim, they never did. (For more discussion on these anti-discrimination cases and the Justices' voting, see Supreme Court's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**INTERNATIONAL LAW STUDIES**


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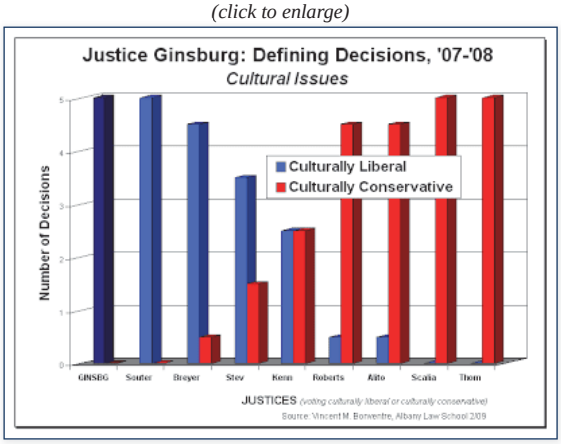
- Hancock_Stewart
- Holmes_Oliver W
- Honest Services Law
- IA SupCt
- Immigration
- International Law
- Internet Commerce
- Interrogations
- Interstate Commerce Power
- Intro to NYCW
- Jackson_Robert
- Jasen_Matthew
- Jefferson_Thomas
- Jerkens_H. Allen
- Jewish Seat (NY COA)
- Jones_Theodore
- Journalist Privilege
- Joyce_Sister Maureen
- Judicial Activism
- Judicial Decisionmaking
- Judicial Experience
- Judicial Federalism
- Judicial Output
- Judicial Restraint
- Judicial Review
- Judicial Selection
- Juvenile Justice
- Kagan_Elena
- Kavanaugh_Brett
- Kaye_Judith
- Kennedy_Anthony
- Korematsu decision
- Lehman_Irving
- Lethal Injection
- Levine_Howard
- Lippman_Jonathan
- Literalism
- Madison_James
- Malone_Bernard
- Marshall_Margaret


2007-08 Term: The Defining Decisions (Part 1: Discrimination), September 16, 2008.)

In the "cultural issues" cases, Ginsburg's record was similarly 100% liberal. Whether guns, the death penalty, Gitmo detainees or the other issues which the Court confronted in these 5 "defining decisions," Ginsburg took the position favored by political liberals each time.

**GRAPH 3: Justice Ginsburg**
**Cultural Issues Decisions**

*(click to enlarge)*

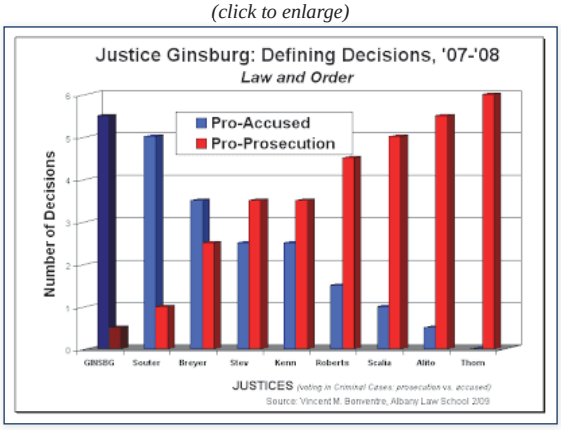



While Souter voted with Ginsburg every time, and Breyer nearly so, her diametrical opposites again were Thomas and Scalia. She and they took the opposing positions in each of the 5 cases. Her position on these "cultural issues" was also opposed by Chief Justice John Roberts and Justice Samuel Alito to virtually the same extent. (For a fuller discussion on these "cultural issues" cases and the Justices' voting, see Supreme Court's 2007-08 Term: The Defining Decisions (Part 2: Cultural Issues), Sept. 20, 2008.)

In the "law and "order" cases, Ginsburg again had the Court's most liberal voting record. There were 6 cases in this category: 1 was also an anti-discrimination case (race-based jury selection), 2 were also "cultural issues" cases (death penalty cases), and 3 were exclusive to law and order.

**GRAPH 4: Justice Ginsburg**
**Law & Order Decisions**

*(click to enlarge)*




As depicted in Graph 4, Ginsburg sided with the accused, voting for the position more favorable to the rights of the accused, more frequently than any of her colleagues. She did so in every case but one. And in that case, she actually took issue with the position adopted by the Court and, in a separate concurring opinion, argued for one that was less pro-

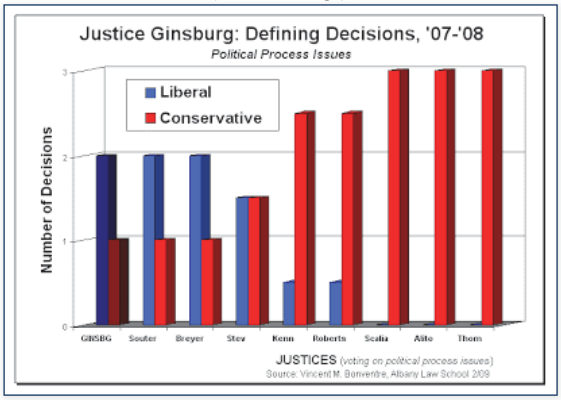
- Marshall_Thurgood
- Martin_Trayvon
- Mayberger_Robert
- McGregor
- Mens Rea
- Minors/Children
- Miranda
- Mullarkey_Mary
- Muslim Travel Ban
- Napravnik_Rosie
- Nomination
- Non-Establishment of Religion
- NY Commission on Judicial Nomination
- NY Court of Appeals
- NY Court of Appeals (2012-13)
- NY Ct Workload
- O'Connor_Sandra Day
- Obama and SupCt
- Obamacare
- Open Fields
- Original Intent
- Pataki_George
- Pellucidly Clear
- Pigott_Eugene
- Plain Touch
- Powell_Lewis
- Presidential Power
- Presidential Powers
- Privacy Rights
- Proposition 8
- Prosecutorial Ethics
- Racial Discrimination
- Read_Susan
- Reasonable Doubt
- Recess Appointments
- Rehnquist_William
- Religion and the Law
- Right to Counsel
- Right to Die
- Right to Silence
- Rivera_Jenny
- Roberts Court
- Roberts_John
- Rogers_Chase
- Russia Investigation
- Same-Sex Marriage
- Saratoga Highlights


prosecution. Souter's voting record was, again, most similar to hers. Thomas's 100% pro-prosecution record was at the Court's opposite extreme from Ginsburg's. Alito's, Scalia's, and Roberts's records, though slightly less pro-prosecution than Thomas's, were also at the opposite end of the Court's spectrum from Ginsburg. (For more discussion of these "law and order" cases and the Justices' voting, see *Supreme Court's 2007-08 Term: The Defining Decisions (Part 3: Law & Order [nifty graph included!]), Oct. 14, 2008*.)

In the 3 "political process" cases (campaign spending, judicial selection, and voter ID), Ginsburg shared the Court's most liberal record with Souter and Breyer. In 2 of those cases (campaign spending and voter ID), she voted for the politically liberal position.

**GRAPH 5: Justice Ginsburg**
**Political Process Decisions**

*(click to enlarge)*

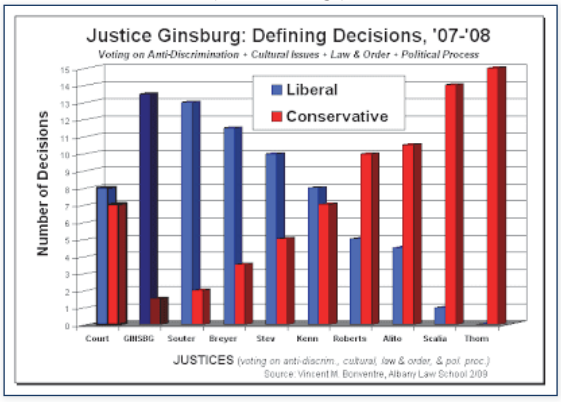



As shown in Graph 5, Ginsburg's record contrasted most sharply with that of Thomas, Alito and Scalia. She voted the opposite of them in 2 of the 3 cases. They had taken the politically conservative position in all 3 cases. (For more discussion on the "political process" cases and the Justices' voting, see Supreme Court's 2007-08 Term: The Defining Decisions (Part 4: Political Process), Nov. 8, 2008.)

Now let's add up all the cases--all the "defining decisions." Here's how Ginsburg's cumulative voting record in the 15 cases looks, and how her record contrasts with that of her colleagues and the Court's decisional record.

**GRAPH 6: Justice Ginsburg's Record**
**Voting Record in 15 "Defining Decisions"**

*(click to enlarge)*




Again--hopefully the repetition has not become *ad nauseam*--Ginsburg's voting record is the most liberal on the Court. It is not as liberal as Thomas's or Scalia's are conservative. But like those two, her record

- Scalia and Thomas
- Scalia_Antonin
- Search and Seizure
- Sears_Leah Ward
- Second Amendment
- Section 1983
- Self-incrimination
- Sex Discrimination
- Simons_Richard
- Smith_Malcolm
- Smith_Robert
- Sotomayor_Sonia
- Souter_David
- Souter's possible replacements
- Standing
- State Constitutional Commentary
- State Constitutional Law
- State Courts
- Statutory Interpretation
- Stein_Leslie
- Stevens_John Paul
- Stevens' possible replacements
- Stop and Frisk
- Strict Scrutiny
- Strip Searches
- SupCt
- SupCt (2011-12)
- SupCt (2012-13)
- SupCt Highlights (2007-08)
- SupCt Highlights (2008-09)
- SupCt Highlights (2009-10)
- SupCt Highlights (2010-11)
- SupCt Highlights (2013-14)
- SupCt Highlights (2014-15)
- SupCt Highlights (2017-18)
- SupCt Nominations
- SupCt Workload
- SupCt: Crim Law
- SupCt: Discrimination
- Technology
- Ternus_Marsha
- Textualism
- Thomas_Clarence
- Titone_Vito


places her at one end of the Court's ideological spectrum. As her voting in the 15 "defining decisions" cases strongly suggests--both in total and in the 4 individual categories of cases--she has simply been the most consistent liberal on the Court.

If Ginsburg's medical condition should cause her to leave the Court [Every decent human being, of course, hopes that she recuperates fully and does well for a long long time.], it will have lost its most reliable liberal vote. It's most consistent vote on the opposite side of the Court's political spectrum from Thomas and Scalia--as well as their frequent allies, Roberts and Alito. The vote most often taking issue with the Court's generally politically conservative jurisprudence.

Presumably, if President Obama had to replace Ginsburg, he would choose an appointee with liberal *bona fides*. He's not going to appoint a conservative. Anything is possible, but that is most unlikely. On the other hand, there is no guarantee that his appointee would remain a liberal on the Court. Presidents have been known to be mightily disappointed--even fooled. (See Bush 41 appointing Souter.)

So nothing is a sure bet. But one thing is pretty sure. Ginsburg has a track record. It's liberal. There is no indication she is changing. Indeed, there is every indication that her voting is pretty liberal across the board and can be counted on to be so in most "hot button," controversial, ideologically and politically charged cases. That may be a good or bad thing depending on the beholder's own ideological and political perspective. But as long as Ginsburg remains on the Court, it is a pretty clear and reliable thing.

In the next post, we'll look at Ginsburg's voting alignments among the Justices and her frequency in the Court's majority and dissent.

Labels: Ginsburg_Ruth Bader

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# New York Court Watcher

Research & Commentary on the Supreme Court, the New York Court of Appeals, More





SUNDAY, APRIL 27, 2014

## (Part 8--Ginsburg's Voting) The Supremes' Record in Racial Discrimination Cases: Decisional & Voting Figures for the Roberts Court

*This past week, in Schuette v. Coalition to Defend Affirmative Action, the Court upheld Michigan's recently adopted ban on affirmative action--i.e. race conscious decisions--in state university admissions. The vote was 6-2. (Justice Kagan did not participate.) Not surprisingly, all 5 Republican Justices supported the ban . Not a single one of them thought there was a problem with the voters of a state outlawing admissions programs that had sought, for compelling reasons (the only ones constitutionally allowed), to increase the college enrollment of racial minorities. Not one. Straight party line.*

*Among the Democratic Justices, Breyer wrote separately to agree with the Republicans, but on narrower grounds specific to this particular case. Justice Sotomayor dissented in a lengthy opinion joined by Justice Ginsburg.*

*For now, let's continue with our look at voting records compiled even before the Schuette decision.*

Justice Ruth Bader Ginsburg's voting record in cases involving issues of racial discrimination?

A victim of gender discrimination early in her career. The nation's foremost litigant to eliminate gender discrimination. Appointed to the Court by Democratic President Bill Clinton. A predictably liberal vote on ideologically charged issued--e.g., civil rights, rights of the accused, campaign finance, etc.

So what about Ginsburg's voting on racial discrimination issues? Even before examining her record, what would be expected? Anything like Scalia's or Thomas's records? Or the polar opposite?

Of course it's just what would be expected. (I.e., the polar opposite of Scalia's and Thomas's record, for those who might not follow the Court.) And perhaps even more so.

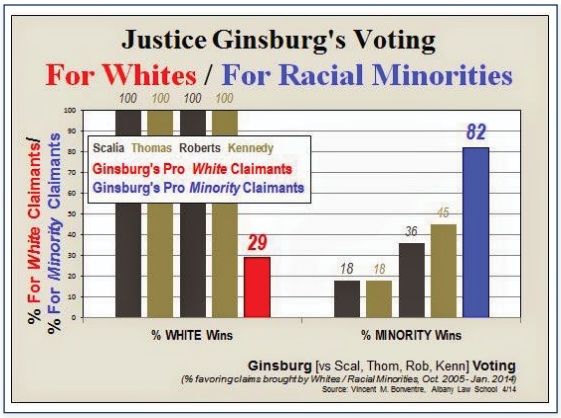
Let's see.

*(click graphs to enlarge)*

GRAPH 1



- Coglianese_Adam
- Compelling Interest
- Confirmation hearings
- Constitutional Law
- Contraceptive Coverage
- Cooke Symposium
- Cooke_Lawrence
- Criminal Law
- CrimLvApps (NYCOA)
- Cruel and Unusual
- Crummey_Peter
- Cuomo_Andrew
- Cuomo_Mario
- Danforth_George
- Death Penalty
- DeBour
- Dianne Renwick
- Dicker_Fred
- DiFiore_Janet
- Discrimination
- Dissents
- Diversity
- DNA
- DOMA
- Dominguez_Ramon
- Double Jeopardy
- Durham_Christine
- Employment Law
- Environmental Law
- Equal Protection
- Executive Order
- Exonerations
- Fahey_Eugene
- Father's Day
- FBI
- Federalism
- Feinman_Paul
- FISA Court
- Free Exercise of Religion
- Free Speech
- Freedom of the Press
- Fuld_Stanley
- Fundamental Rights
- Funeral Protests
- Garcia_Michael
- Garland_Merrick
- Gay Rights
- Gender Equality
- Gerrymandering

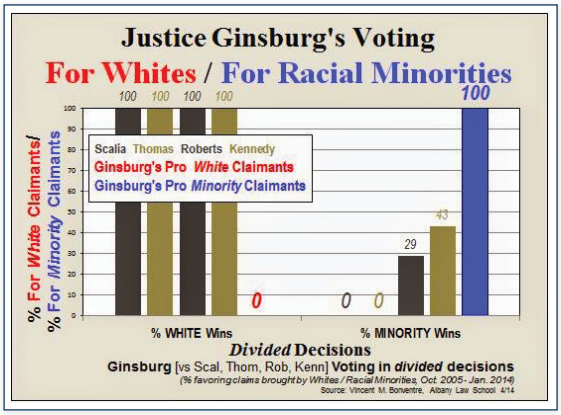




As depicted in graph 1, Justice Ginsburg voted to uphold complaints brought by Whites much less frequently than did the Republican Justices we've looked at previously in this series--i.e., Chief Justice Roberts, and Justices Scalia, Kennedy, and Thomas. She supported White claimants in 2 out of 7 cases, or 29% of the time. That compared to 7 out of 7 cases, or 100% of the time, for each of the Republican Justices.

As for the complaints brought by Racial Minorities, she voted to uphold them much more frequently than did the Republican Justices. Her record: 9 out of 11 cases, or 82% of the time she supported the Racial Minority claimants. That compared to 2 out of 11 cases (18%) for Scalia and Thomas, 4 out of 11 for Roberts (36%), and 5 out of 11 (45%) for Kennedy.

But let's now focus on those closer, divided cases. What was Ginsburg's record in those cases where the arguments on both sides were strong, and a Justice would certainly have good reason to vote either way? Here it is.

GRAPH 2




Ah, in those closer cases, Ginsburg voted against the complaint every time it was brought by Whites. She voted to uphold the complaint every time it was brought by Racial Minorities. Exactly the opposite of Scalia and Thomas.

So where Whites complained about the Voting Rights Act or affirmative action or redistricting or some similarly race-related matter, she voted against the complaint. On the other hand, where Racial Minorities complained about employment discrimination or retaliation or mandatory arbitration or redistricting or other race-related matters, she voted to uphold the complaint.

Where Ginsburg saw no merit in the complaints brought by Whites in any close case, Scalia and Thomas saw merit every time. And where


- The Nature of Cardozo's Process: Testing it in Schloendorff and MacPherson
- Judicial Activism and Restraint: Scalia's Originalism and Jackson's Pragmatism
- "The Least Dangerous Branch"
- The Chief Justices' Marriage to Stare Decisis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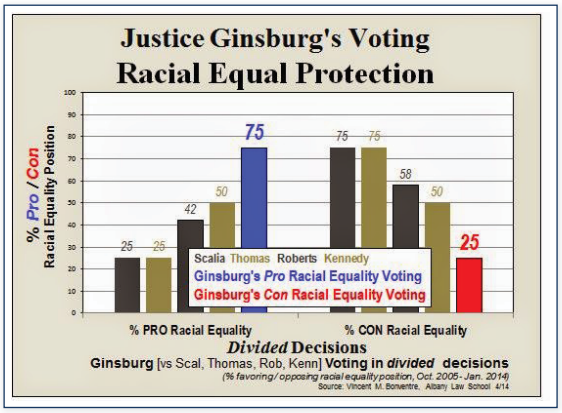
Ginsburg did see merit in complaints brought by Racial Minorities in every close case, Scalia and Thomas never saw any.
(As we've seen previously, Roberts and Kennedy, like Scalia and Thomas, supported all the complaints brought by Whites in these cases. But unlike them, Roberts and Kennedy did see merit in some complaints brought by Racial Minorities.)

What about Justice Ginsburg's record on issues of equal treatment? I.e., on treating the races equally or the same, or promoting measures intended to do that. Let's see.

GRAPH 3



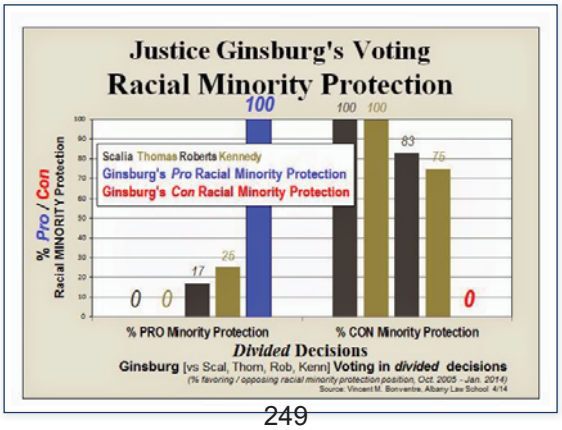

In those closer, divided cases involving issues of equal treatment of the races, or measures prohibiting unequal or different treatment--regardless of whether the complaint was brought by Whites or Racial Minorities--Ginsburg's record is more pro-equality than any of the Republican Justices we've previously examined. It is much more so than that of Scalia or Thomas.

Stated otherwise, in cases involving dissimilar treatment on the basis of race, or violations of equal treatment or of measures designed to insure equal treatment--without any regard for the race of the victim or the beneficiary--Ginsburg voted for the equality position (75%) more frequently than Roberts (42%) and Kennedy (50%). And much more frequently than Scalia and Thomas (both 25%).

The flip side, of course, is that Ginsburg ***in***frequently voted against the equality position (25%). Scalia and Thomas voted against the position supporting equality most of the time (75% for both), and Roberts (58%) and Kennedy (50%) did so about half the time.

Finally, what about Ginsburg's record on supporting Racial Minorities--i.e., voting in favor of positions that would protect Racial Minorities or promoted their equal treatment or favored preferential treatment for them? Take a look.

GRAPH 4



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- Martin_Trayvon
- Mayberger_Robert
- McGregor
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- Rivera_Jenny
- Roberts Court
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- Rogers_Chase
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- Saratoga Highlights


In every single case--more accurately, every single one of the closer, divided cases--Justice Ginsburg voted for that position favoring Racial Minorities. Regardless of whether the complaint was brought by Whites or Racial Minorities, regardless of whether the complaint was about a victim or a beneficiary, regardless of whether the complaint was about discriminatory or preferential treatment--regardless of anything else at issue in the case--Ginsburg supported the position that would benefit Racial Minorities.

Again, to place her record in context, while she voted in every one of these cases in favor of Racial Minorities (100%), Scalia and Thomas never did (0%). Roberts (17%) and Kennedy (25%) rarely did.

It takes no genius to see that Ginsburg's record evinces an overriding sympathy for the victims of historic racial discrimination. A heightened sensitivity to their persisting disadvantaged status and disfavor at the hands of the majority.

She, unlike her Republican, more conservative colleagues, is much more supportive of programs and policies intended to ameliorate the continued plight of Racial Minorities. To be sure, that includes her support of programs and policies that treat the races differently, providing favoritism and preferential treatment for Racial Minorities. I.e., what opponents would pejoratively label "reverse discrimination."

The common thread in Ginsburg's voting in these cases would seem to be that constitutional equal protection and civil rights laws do not necessarily mandate race blindness or neutrality, or perfectly equal treatment. Rather, that they primarily mandate the protection of Racial Minorities, the victims of historic discrimination.

That constitutional equal protection and civil rights laws were intended to protect them. To ameliorate their plight. To insure that they are treated as well as the White majority. Not to provide additional ammunition for the White majority against programs and policies intended for the benefit of Racial Minorities.

That common thread that seems pretty clearly to tie together Ginsburg's votes is a far cry from that which characterizes the records of the Republican Justices. Not only Scalia and Thomas, but Roberts and Kennedy as well.

Next in this series: Justice Breyer, the other Clinton appointee.

Labels: Discrimination, Ginsburg_Ruth Bader, Kennedy_Anthony, Racial Discrimination, Roberts Court, Roberts_John, Scalia_Antonin, SupCt: Discrimination, Thomas_Clarence

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# New York Court Watcher

Research & Commentary on the Supreme Court, the New York Court of Appeals, More





SUNDAY, FEBRUARY 28, 2010

## Justice Alito's Goat--What Gets It? (Part 3: Connecting the Dots)

*Haiti*

[Just to be clear: No, I'm not there. Just keeping it in mind. And while I'm at it, Chile, Indonesia, New Orleans, and wherever there is suffering that demands assistance and reminding.]

**********

So let's put it together. Justice Samuel Alito's dissents. In the last 2 posts on **New York Court Watcher**, we discussed the value of dissenting opinions in providing insights about the author, and we looked at the last 10 dissents that Alito has written. *(See Justice Alito's Goat--What Gets It? (Part 1), Feb. 16, 2010; (Part 2: His Dissents), Feb. 22, 2010.)*

President Obama's State of the Union criticism of a Supreme Court decision got Alito's goat. Some of the Court's decisions have evoked criticism by Alito himself. They provoked him into writing dissenting opinions. Like Obama's remarks, they got his goat.

Here's a recap of those last 10 dissenting opinions of Alito that we looked at in the last post. They're out of chronological order and reorganized into some general subject matters. Connect the dots.

**Death Sentence**

**Alito** dissented when the Court ordered an evidentiary hearing to explore the misconduct between the jury and judge at the trial which resulted in the defendant's conviction and sentence to death. (*Wellons v. Hall* [2010].)

**Alito** dissented when the Court ordered a federal trial court to consider whether a death sentence was affected by the prosecution's unconstitutionally concealing mitigating evidence from the jury. (*Cone v. Bell* [2009].)

**Police Search**

**Alito** dissented when the Court ruled that a traffic stop did not automatically allow the police to search an automobile; there had to be some connection between the stop and the search, or some reason to suspect danger. (*AZ v. Gant* [2009].)

**Alito** dissented in 2 subsequent cases where the Court ordered the courts below to determine whether there was any connection between the offenses for which the defendants were arrested and the searches of their automobiles. (*Grooms v. U.S.* [2009] and *Megginson v. U.S.* [2009].)

VIN BONVENTRE

Vincent Martin Bonventre is a frequent lecturer and widely quoted commentator on courts, judges, and public law. (**More**.)

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- Confirmation hearings
- Constitutional Law
- Contraceptive Coverage
- Cooke Symposium
- Cooke_Lawrence
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- Cuomo_Andrew
- Cuomo_Mario
- Danforth_George
- Death Penalty
- DeBour
- Dianne Renwick
- Dicker_Fred
- DiFiore_Janet
- Discrimination
- Dissents
- Diversity
- DNA
- DOMA
- Dominguez_Ramon
- Double Jeopardy
- Durham_Christine
- Employment Law
- Environmental Law
- Equal Protection
- Executive Order
- Exonerations
- Fahey_Eugene
- Father's Day
- FBI
- Federalism
- Feinman_Paul
- FISA Court
- Free Exercise of Religion
- Free Speech
- Freedom of the Press
- Fuld_Stanley
- Fundamental Rights
- Funeral Protests
- Garcia_Michael
- Garland_Merrick
- Gay Rights
- Gender Equality
- Gerrymandering


**Confession**
**Alito** dissented when the Court ruled that a confession obtained in the course of an unconstitutional detention--29 hours before presentment to a judge--was invalid and thus could not be used against the defendant. (*Corley v. U.S.* [2009].)

**Double Jeopardy**
**Alito** dissented when the Court ruled that a defendant could not be reprosecuted on the "hung jury" charges if the not-guilty verdicts necessarily meant not-guilty on those charges as well. (*Yeager v. U.S.* [2009].)

**Immigration**
**Alito** dissented when the Court stopped the deportation of a citizen of Cameroon, who claimed that he would be persecuted and tortured in his home country, until his request for asylum could be judicially evaluated. (*Nken v. Holder* [2009].)

**Business**
**Alito** dissented when the Court held that an employer who deliberately violated the rights of an injured worker was subject to punitive damages. (*Atlantic Sounding v. Townsend* [2009].)
**Alito** dissented when the Court ruled that a drug company was still liable under a state's law for failing to give warning about known risks, even if its label complied with FDA regulation. (*Wyeth v. Levine* [2009].)

Soooooooo, in his dissenting opinions **Alito argued for**:
**death sentences despite** jury-judge misconduct that might have resulted in an unfair trial, and despite the unconstitutional hiding of mitigating evidence by the prosecution;
**automobile searches despite** no connection to the offense, and no reason to believe that evidence or weapons would be found;
**confessions despite** being obtained through unconstitutional detention;
**reprosecution despite** the jury having already decided not-guilty on an essential element of the crime charged;
**deportation despite** a request for asylum, based on persecution and torture, even before the opportunity for judicial review;
**an employer despite** it's deliberate refusal to meet its legal obligations to an injured worker;
**a drug company despite** its failure to provide warnings about known risks in violation of state law.

Well that's it. Again, connect the dots.

Yes, Alito surely had reasons to take the positions he did in each of those 10 cases in which he authored dissents. Yes, there were arguments to be made against the Court's rulings in each of the cases. Yes, reasonable people could disagree in good faith in each of the cases.

To be sure, that is the very nature of most of the cases that get to the Supreme Court. They're tough. They're close. We might want to think otherwise in any particular case. We might convince ourselves that only one result makes any sense, is at all fair, can honestly be reached. But most cases that make it to the Supreme Court can probably be decided either way--as a matter of law, or policy, or equity, or any other acceptable basis. But....

BUT the choices made in these close cases are revealing. Precisely


- The Nature of Cardozo's Process: Testing it in Schloendorff and MacPherson
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- "The Least Dangerous Branch"
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- Ginsburg_Ruth Bader
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- Gorsuch_Neil
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- Great Women_Great Chiefs
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- Literalism
- Madison_James
- Malone_Bernard
- Marshall_Margaret


because they are close. Precisely because choices must be made. And oftentimes the choices made are of a kind. They reveal a pattern. They give insights into the person making the choices.

With dissenting opinions, the revelations and insights are heightened. Not only are choices made about how to vote in a particular case, but as we discussed previously, with a dissenting opinion a choice has been made to publicly disagree with a majority of one's colleagues, with the ruling of one's court. And to expend one's time and resources and collegial capital in the process. All to make a personal statement that the majority is so wrong and the issue is so important that I simply cannot go along or even reach a compromise.

So what about Alito's choices? His choices expressed in the dissenting opinions he wrote? Let's restate them once more. Bluntly.

That the Court should disregard the possibility of an unfair trial in one death penalty case, and the prosecution's unconstitutional concealment of mitigating evidence in another. That the Constitution permits police searches of automobiles anytime an automobile is stopped for any traffic infraction or for any other offense. That the Court should permit the prosecution to use a confession obtained unconstitutionally. That the government can reprosecute any "hung jury" charge, regardless of any related acquittals, without violating double jeopardy protection. That a foreign citizen should be deported before his claim for asylum has been judicially reviewed. That an employer that willfully violates its injured employees rights does not have to pay punitive damages. That a drug company that fails to warn consumers about its product's risks should not have to worry about state warning laws, as long as it has an FDA approved label.

Death sentences, searches, reprosecution, deportation, employer over injured worker, drug company over state law. Those were Alito's choices. And Supreme Court decisions that made a different choice generated an Alito dissent. Those decisions, those different choices, got Alito's goat.

Before closing, just consider this. What didn't get Alito's goat? What didn't he dissent against? What didn't he go public to protest?

Well, he didn't dissent against any discrimination. Not of any sort; not in any context. He didn't dissent against any violation of the rights of the accused. Not against an illegal search or seizure, or the ineffective assistance of counsel, or prosecutorial misconduct, or an unfair trial, or an illegal interrogation, or any other fundamental protection for criminal suspects or accuseds. He didn't dissent against any worker mistreatment. He didn't dissent against any corporate malfeasance. He didn't dissent against the inequitable treatment of immigrants.

Indeed, he didn't dissent against any injustice or inequity. Not one decision of the Supreme Court called for any such dissent? Well, none that got his goat.

As I said previously, I won't express an opinion. I don't think I have to. I certainly have an opinion, and it undoubtedly is apparent without my being explicit. Much more importantly, Alito's choices, his dissents, what gets his goat and what does not, express more than enough.

Connect the dots. The picture thus drawn is as stark as it is unflattering.

- Marshall_Thurgood
- Martin_Trayvon
- Mayberger_Robert
- McGregor
- Mens Rea
- Minors/Children
- Miranda
- Mullarkey_Mary
- Muslim Travel Ban
- Napravnik_Rosie
- Nomination
- Non-Establishment of Religion
- NY Commission on Judicial Nomination
- NY Court of Appeals
- NY Court of Appeals (2012-13)
- NY Ct Workload
- O'Connor_Sandra Day
- Obama and SupCt
- Obamacare
- Open Fields
- Original Intent
- Pataki_George
- Pellucidly Clear
- Pigott_Eugene
- Plain Touch
- Powell_Lewis
- Presidential Power
- Presidential Powers
- Privacy Rights
- Proposition 8
- Prosecutorial Ethics
- Racial Discrimination
- Read_Susan
- Reasonable Doubt
- Recess Appointments
- Rehnquist_William
- Religion and the Law
- Right to Counsel
- Right to Die
- Right to Silence
- Rivera_Jenny
- Roberts Court
- Roberts_John
- Rogers_Chase
- Russia Investigation
- Same-Sex Marriage
- Saratoga Highlights


*[Ok, yes, that's opinion. So let me add that I did originally support Alito's nomination. But I find him to be quite disappointing.]*

Labels: Alito_Samuel, Dissents, Goats

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# New York Court Watcher

Research & Commentary on the Supreme Court, the New York Court of Appeals, More





FRIDAY, JUNE 1, 2012

## Part 8: Focus on Justice Sotomayor. (Supreme Court: How Partisan? Ideological? Activist? --with graphs!)

Justice Sonia Sotomayor.
Appointed by President Obama.
Her votes on guns? Gays? God?
Immigrants? Campaign finance?
Just guess!
And you'd probably guess right.

We looked at Sotomayor's record when she was nominated and being confirmed for the Supreme Court. We looked at her voting and her opinions as a federal appeals judge.

Republicans were insisting she was unsuitable, and even a racist, because of her "wise Latina" comment.
Democrats were insisting she was a "moderate" without an ideological bent.
She was insisting that her role as a Justice would simply be to "apply the law" and not to make law or policy.

Of course, what both the Republicans and the Democrats were saying was pure nonsense.
And what she was saying was at least as preposterous.

We discussed all of that on **New York Court Watcher** in a series of posts. Among other things, we examined Sotomayor's record on the 2d Circuit Court of Appeals. It was pretty revealing. Indeed, it was pretty plain for anyone willing to take a look.

And for anyone who bothered to take a look--or simply to read the discussions and look at the graphs on **New York Court Watcher**!--there would be no surprise with what Sotomayor's record on the Supreme Court would be.

Her record was one of a political, ideological liberal, and, of course, she voted to make law and policy just as every appellate judge does.

*[For the examinations of Sotomayor's record on the 2d Circuit, see Sotomayor--Let's Put the Cards on the Table (The Good, The Bad, & The Ugly [Opinions]), June 23, 2009; (Some Common Threads in Her Opinions), June 5, 2009; (Versus Her Colleagues), June 3, 2009; (Ideological Patterns in Her Opinions), June 2, 2009; (First, Some Prefatory Comments), May 28, 2009.) See also Sotomayor--Let's Put the Cards on the Table (SS on the 2d Amendment), Aug. 4, 2009.*

VIN BONVENTRE

Vincent Martin Bonventre is a frequent lecturer and widely quoted commentator on courts, judges, and public law. (**More**.)

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- Crummey_Peter
- Cuomo_Andrew
- Cuomo_Mario
- Danforth_George
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- DeBour
- Dianne Renwick
- Dicker_Fred
- DiFiore_Janet
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- Dissents
- Diversity
- DNA
- DOMA
- Dominguez_Ramon
- Double Jeopardy
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- Fahey_Eugene
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- Free Speech
- Freedom of the Press
- Fuld_Stanley
- Fundamental Rights
- Funeral Protests
- Garcia_Michael
- Garland_Merrick
- Gay Rights
- Gender Equality
- Gerrymandering


*For discussions of her confirmation hearings, see **Sotomayor--Let's Put the Cards on the Table (Judiciary Committee Appoves the Dreadful Success)**, July 30, 2009: **(More on the Dreadful Success: SS on Judging)**, July 20, 2009; **(A Dreadful Success at the Hearings)**, July 19, 2009.]*

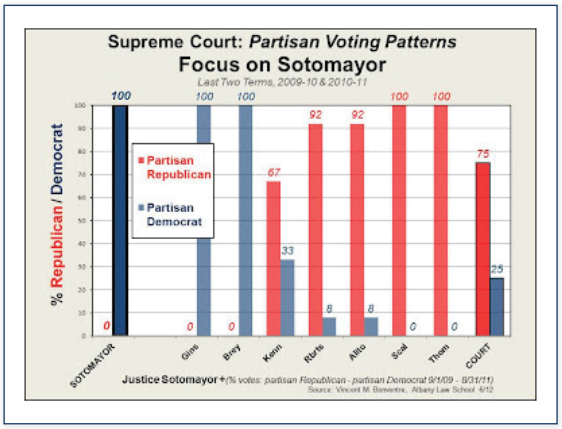
So let's look at Sotomayor's record at the Supreme Court. Just as we have for the other members of the Court we've already focused on in this series.

As I've previously suggested: no surprise.

Here's what her record looks like in those highly partisan-charged cases.

*(click to enlarge)*

GRAPH 1



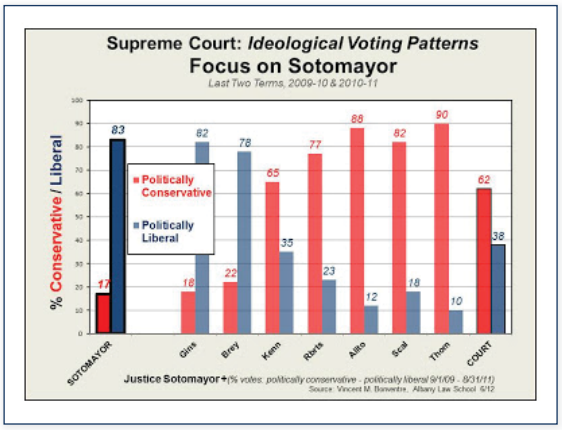

100% partisan. Sotomayor voted in every one of the highly partisan cases like a ***liberal Democratic politician***.

So, for example, ***against*** gun ownership being a fundamental right, ***against*** the display of a Christian cross on government land, ***against*** state enforcement of immigration restrictions, ***for*** federal and state restrictions on campaign finance, and ***for*** state enforcement of equal rights for gays and lesbians. Yes, as perfectly partisan as the records of liberal Justices Ginsburg and Breyer, and conservative Justices Scalia and Thomas.

Sotomayor's overall record in the generally ideologically-laden cases? Take a look.

*(click to enlarge)*

GRAPH 2




83% voting like a ***political liberal***. As ideologically slanted as the records of liberal Justice Ginsburg and conservative Justice Scalia. In fact, although Thomas's and Alito's voting may be THE the most ideologically lopsided on the Court, their records are just slightly more


- The Nature of Cardozo's Process: Testing it in Schloendorff and MacPherson
- Judicial Activism and Restraint: Scalia's Originalism and Jackson's Pragmatism
- "The Least Dangerous Branch"
- The Chief Justices' Marriage to Stare Decisis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conservative than hers is liberal.

Sotomayor did vote with the conservatives in a few cases. For example, she voted with them to invalidate a state law that interfered with the marketing of prescription drug records, and to approve a method for calculating good time credit that is less favorable to inmates than an alternative method would be.

On the other hand, she overwhelmingly joined her liberal colleagues to vote for the ***politically liberal*** side of issues. On occasion, she voted for the politically liberal position despite some of her liberal colleagues' voting the other way.

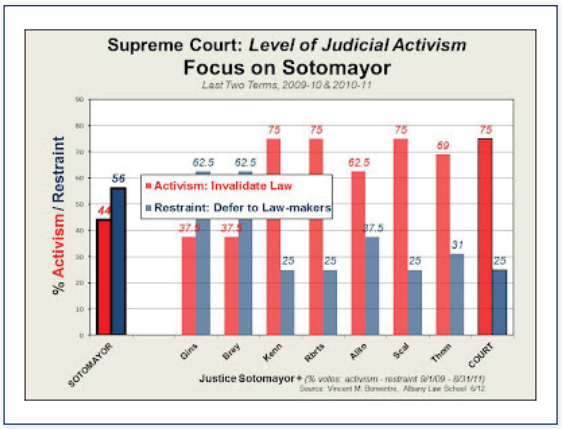
In one such case, she dissented, alone with Justice Stevens, against the Court's *per curiam* approval of a warrantless entry of a home based on a claimed emergency. In another, she dissented, alone with Justice Breyer, against the Court's expanded restrictions on whistleblower lawsuits.

Overall, she has been a reliable, ***politically liberal*** vote on the Court.

What about activism versus restraint?

*(click to enlarge)*

GRAPH 3




Like the other liberal Justices, Sotomayor's voting was more restrained than activist. Before drawing any general conclusions about liberals being judicial restraintists and conservatives judicial activists, however, we must consider the nature of the laws at issue.

As noted earlier in this series, most of the laws at issue were ones that ***political liberals*** would favor. They were laws that ***politically liberal judges*** would prefer to uphold. Hence, the restraintist voting records of the liberal Justices seem merely to comport with the **ideological** preferences of those Justices. Not any preference for judicial restraint *per se*. And vice-versa for the conservative Justices.

Accordingly, Sotomayor--whose record unmistakably places her on the ***politically liberal*** end of the Court's spectrum--voted to ***uphold*** several state laws easing consumer litigation, to ***uphold*** federal and state laws restricting campaign spending, and to ***uphold*** a federal law used to fight corruption in business. She voted to ***invalidate*** a state law aiding religious schools, to ***invalidate*** a federal law accommodating a Christian cross on public land, to ***invalidate*** a state law enforcing immigration restrictions, and to ***invalidate*** a state law allowing life-sentences for juveniles.

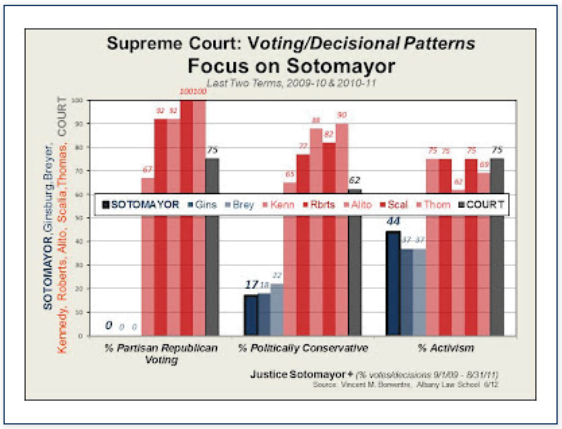
She strayed from the liberal Justices in one case. She voted with the conservatives to ***invalidate*** a state law that restricted the collection

of drug prescription data by marketers.

Now for the cumulative (and definitely crowded at this point) graphs.

*(click to enlarge)*

GRAPH 4

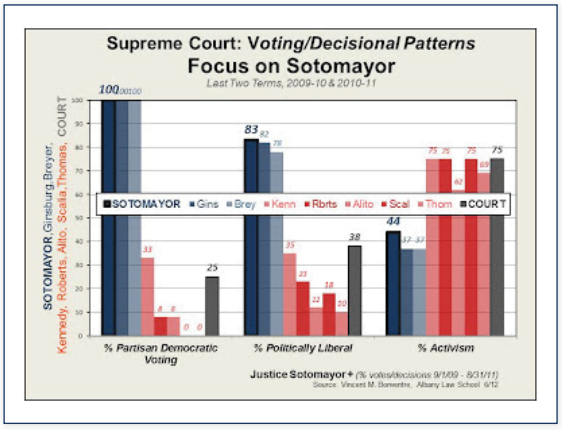



0% Republican and 17% conservative voting. No Justice's record is less like a Republican ***politician*** or an ***ideological*** conservative than Sotomayor's. As for activism, her 44% record made her much less activist than any of the conservative Justices--i.e., she voted to invalidate fewer laws than they did.

Flipping the partisan and ideological figures:

*(click to enlarge)*

GRAPH 5




100% voting like a ***Democratic politician*** and 83% overall like a ***political liberal***. Sotomayor's record in the highly charged cases is utterly partisan, and in the cases generally is highly ideological.

Indeed, to sum up Sotomayor's voting record:
Partisan: utterly--no one on the Court is more so.
Ideological: extremely--no one on the Court is more so.
Activist: restrained when dealing with politically liberal laws, but activist when dealing with politically conservative ones.

Next post: focus on Justice Kagan.

*[For posts on New York Court Watcher focusing on the other Justices mentioned in this one, see Supreme Court: How Partisan? Ideological? Activist? (Part 1: Focus on Scalia) --with graphs!, May 1, 2012; Part 2: Focus on Justice Kennedy, May 3, 2012; Part 3: Focus on Justice Thomas, May 6, 2012; Part 4: Focus on Justice Ginsburg, May 10, 2012; Part 5: Focus on Justice Breyer, May 14, 2012; Part 6: Focus on Chief Justice Roberts, May 18, 2012; Part 7: Focus on Justice Alito,*

- Scalia and Thomas
- Scalia_Antonin
- Search and Seizure
- Sears_Leah Ward
- Second Amendment
- Section 1983
- Self-incrimination
- Sex Discrimination
- Simons_Richard
- Smith_Malcolm
- Smith_Robert
- Sotomayor_Sonia
- Souter_David
- Souter's possible replacements
- Standing
- State Constitutional Commentary
- State Constitutional Law
- State Courts
- Statutory Interpretation
- Stein_Leslie
- Stevens_John Paul
- Stevens' possible replacements
- Stop and Frisk
- Strict Scrutiny
- Strip Searches
- SupCt
- SupCt (2011-12)
- SupCt (2012-13)
- SupCt Highlights (2007-08)
- SupCt Highlights (2008-09)
- SupCt Highlights (2009-10)
- SupCt Highlights (2010-11)
- SupCt Highlights (2013-14)
- SupCt Highlights (2014-15)
- SupCt Highlights (2017-18)
- SupCt Nominations
- SupCt Workload
- SupCt: Crim Law
- SupCt: Discrimination
- Technology
- Ternus_Marsha
- Textualism
- Thomas_Clarence
- Titone_Vito


*May 25, 2012.*

*As stated in previous posts, this series is based on my research over the last several weeks. The pool of cases on which my findings are based is explained at the end of each of 3 previous posts on New York Court Watcher. See Supreme Court: How Partisan? Ideological? Activist? (Part 1: Focus on Scalia) --with graphs!, May 1, 2012; Part 2: Focus on Justice Kennedy, May 3, 2012; Part 3: Focus on Justice Thomas, May 6, 2012]*

Labels: Judicial Activism, Judicial Decisionmaking, Judicial Restraint, Sotomayor_Sonia, SupCt Highlights (2009-10), SupCt Highlights (2010-11)

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# Faculty Biography

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**Vincent Martin Bonventre** is the Justice Robert H. Jackson Distinguished Professor at Albany Law School. He received his PhD in Government, specializing in public law, at University of Virginia; a JD from Brooklyn Law School; and a BS from Union College.

Dr. Bonventre teaches, comments and advises on courts, judges, and various areas of public law. Those areas include the judicial process, the Supreme Court and the New York Court of Appeals, criminal law, and civil liberties. He has authored numerous works and lectures regularly on those subjects.

Prior to joining the Albany Law School faculty in 1990, he was a law clerk to Judges Matthew J. Jasen and Stewart F. Hancock, Jr. of New York's highest court, the Court of Appeals. Between those clerkships, he was selected by Chief Justice Warren Burger to serve as a Supreme Court Judicial Fellow. Previously, he served two tours in the U.S. Army—one in military intelligence and one as trial counsel in the JAG Corps.

Dr. Bonventre is the author of *New York Court Watcher*, a blog devoted to research and commentary on the U.S. Supreme Court and the New York Court of Appeals. He is also the founder and Editor of *State Constitutional Commentary*, an annual publication of the Albany Law Review devoted to American state constitutional law, and he is the founder and Director of the *Center for Judicial Process*.

Notes Pages


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