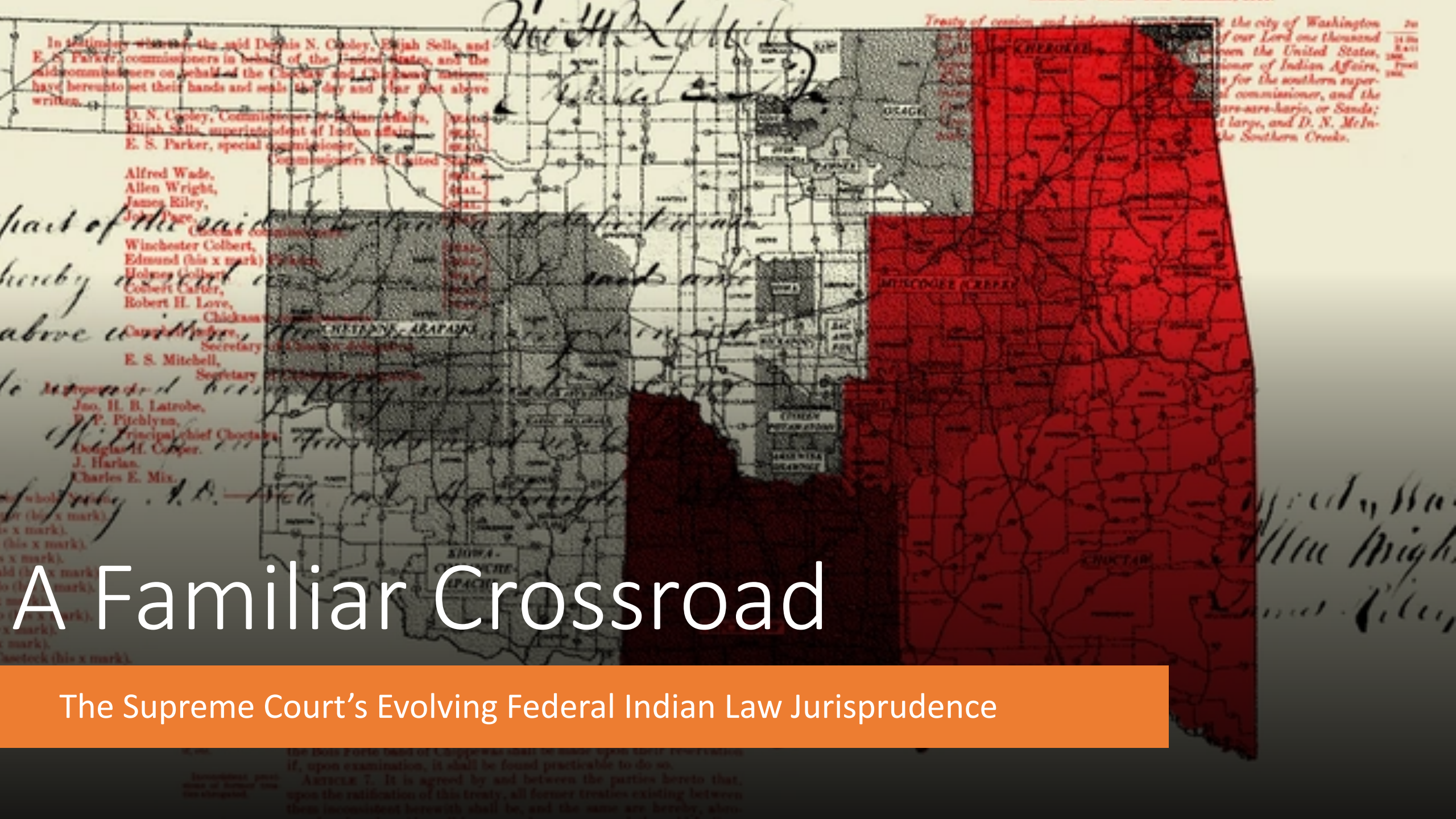


A Familiar Crossroad

The Supreme Court's Evolving Federal Indian Law Jurisprudence

Modern Era (1959-1986)

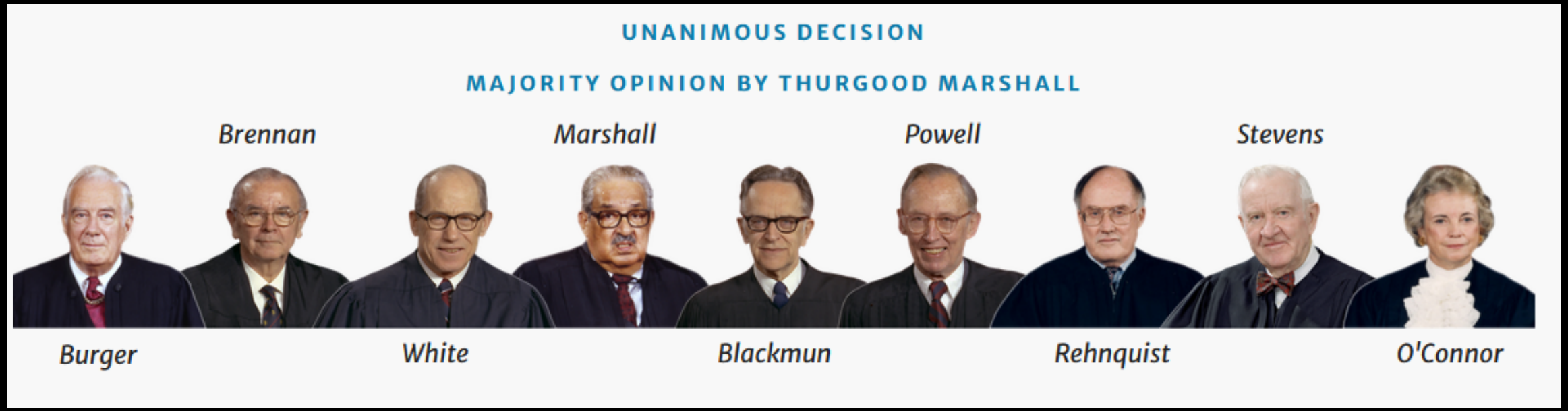
UNANIMOUS DECISION FOR WILLIAMS

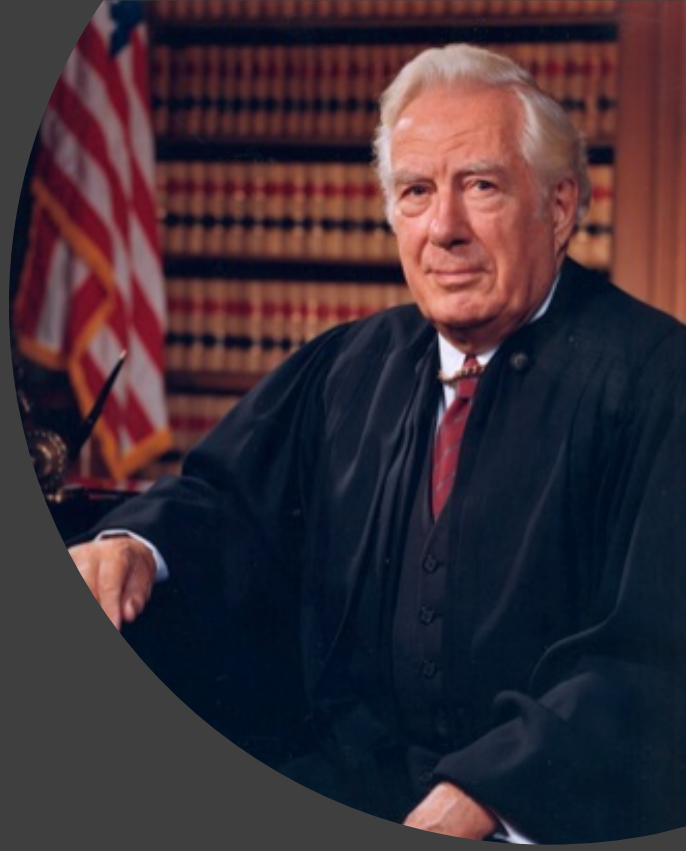
MAJORITY OPINION BY HUGO L. BLACK

The jurisdiction of state courts does not extend to Indian reservations unless Congress specifically permits.

"Despite bitter criticism and the defiance of Georgia which refused to obey this Court's mandate in *Worcester* the board principles of that decision came to be accepted as law."

Modern Era (1959-1986)





Post-Modern Era (1987-2020?)

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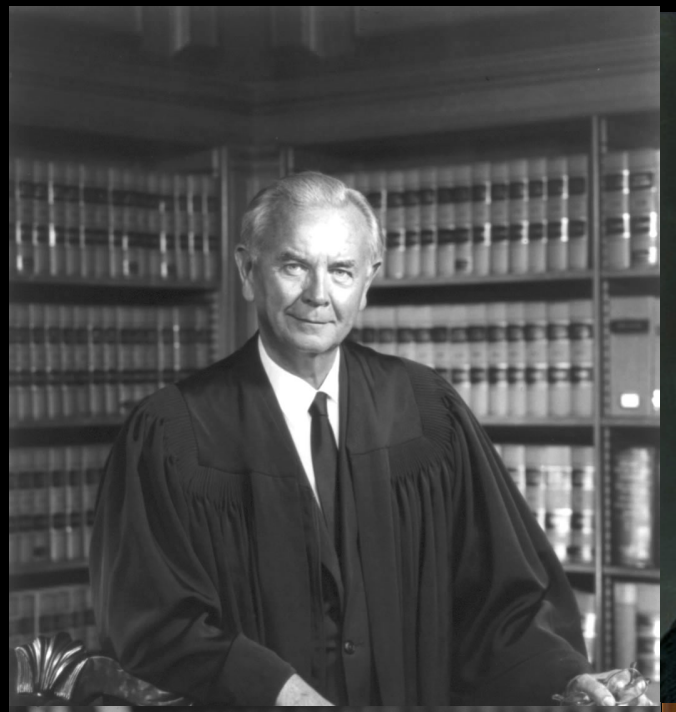
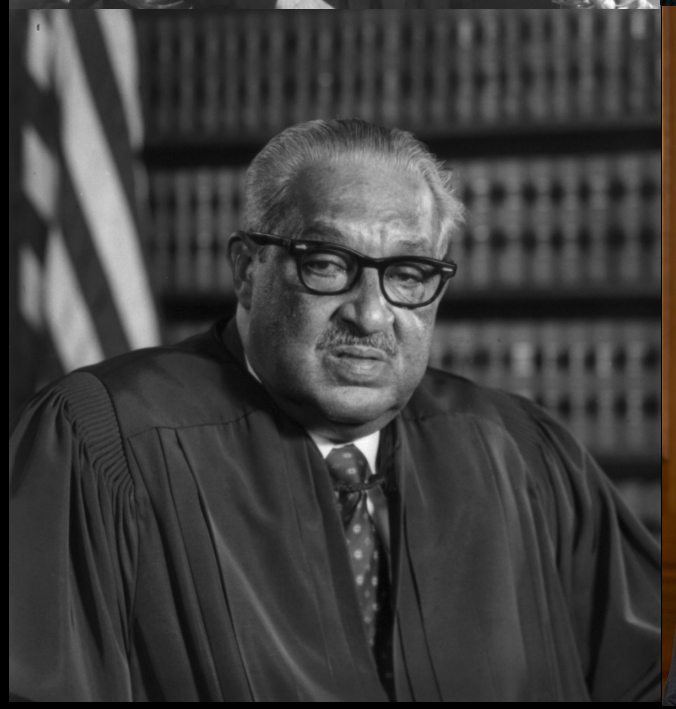
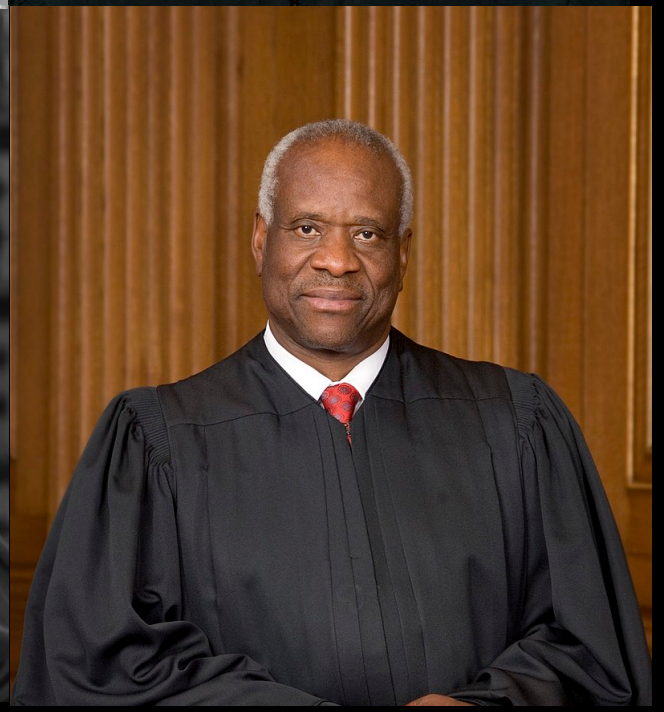
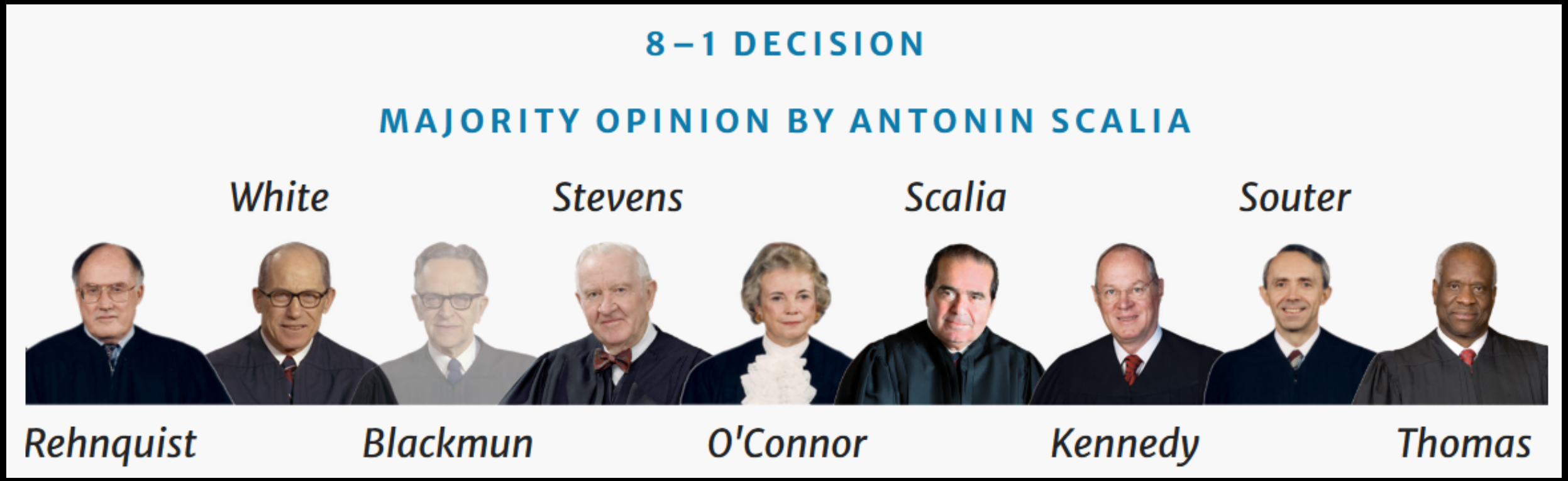






Post-Modern Era (1987-2020?)



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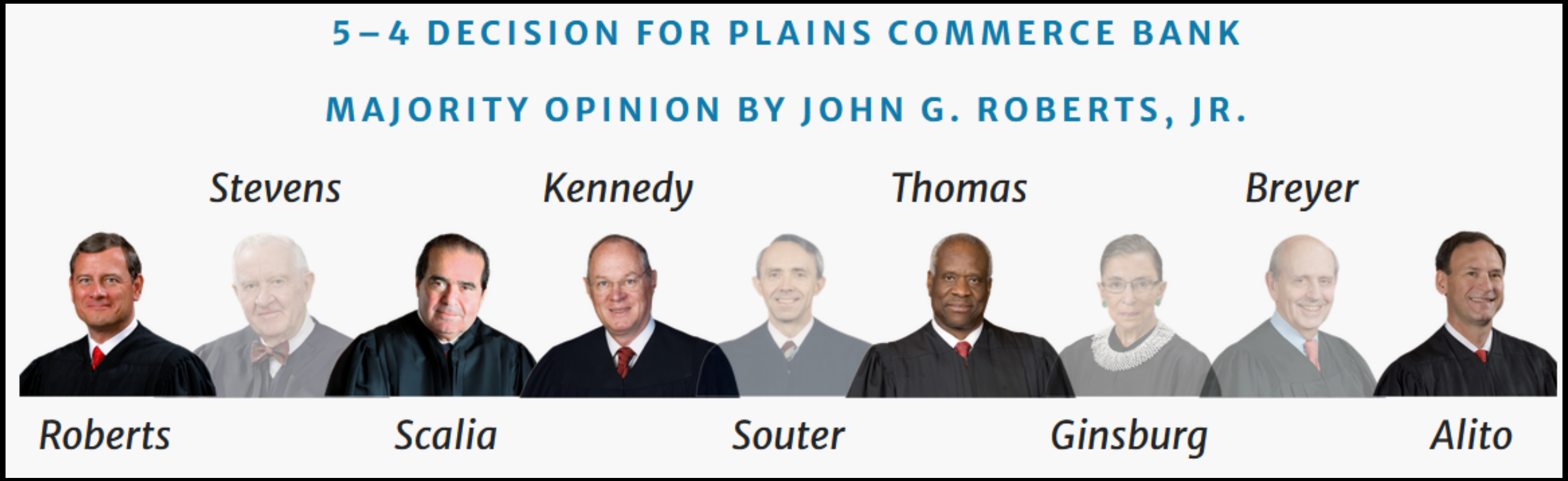
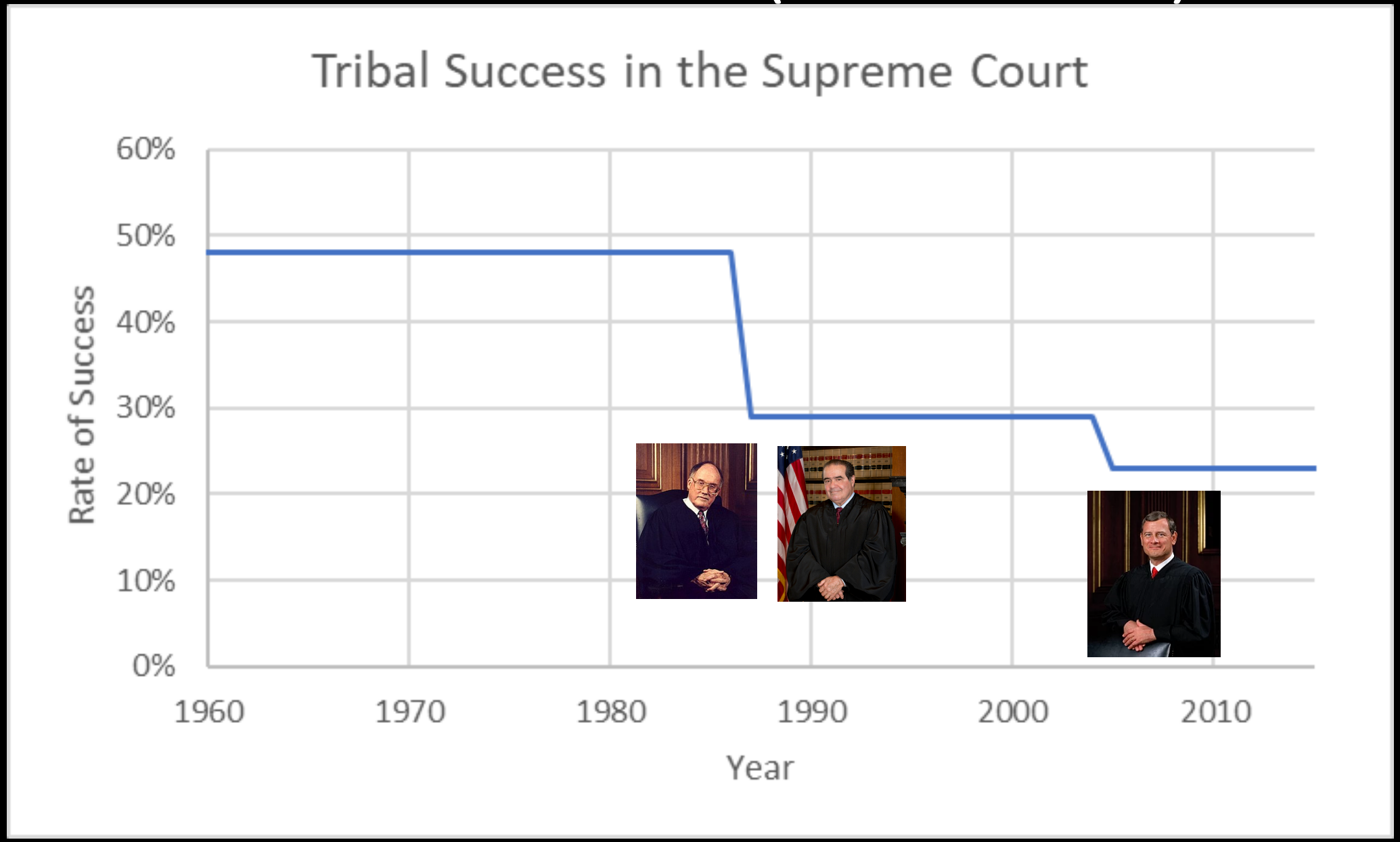


Post-Modern Era (1987-2020?)



Post-Modern Era (1987-2020?)

The "new rules of judicial subjectivism:"

1. Retreat from the established canons of construction;

2. Nineteenth-century allotment policy as the touchstone for Congressional intent; and

3. Fabrication of a "balancing of interests" test that allows the justices to "reach outcomes consistent with their own notions of how much tribal autonomy there ought to be."

David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996)

Scalia the textualist

“[O]pinions in [federal Indian law] have not posited an original state of affairs that can subsequently be altered only by explicit legislation, but have rather sought to discern what the current state of affairs ought to be by taking into account all legislation, and the congressional “expectations” that it reflects, to the present day.”

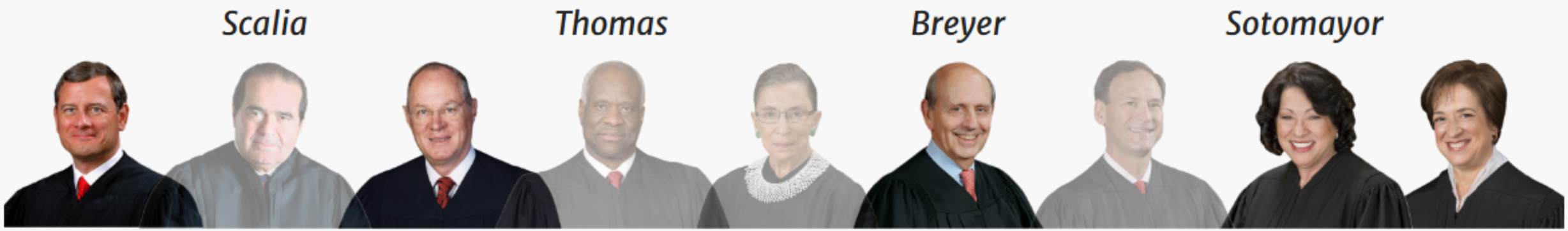
Sonia Sotomayor (2009-Present)

Post-Modern Era (1987-2020?)

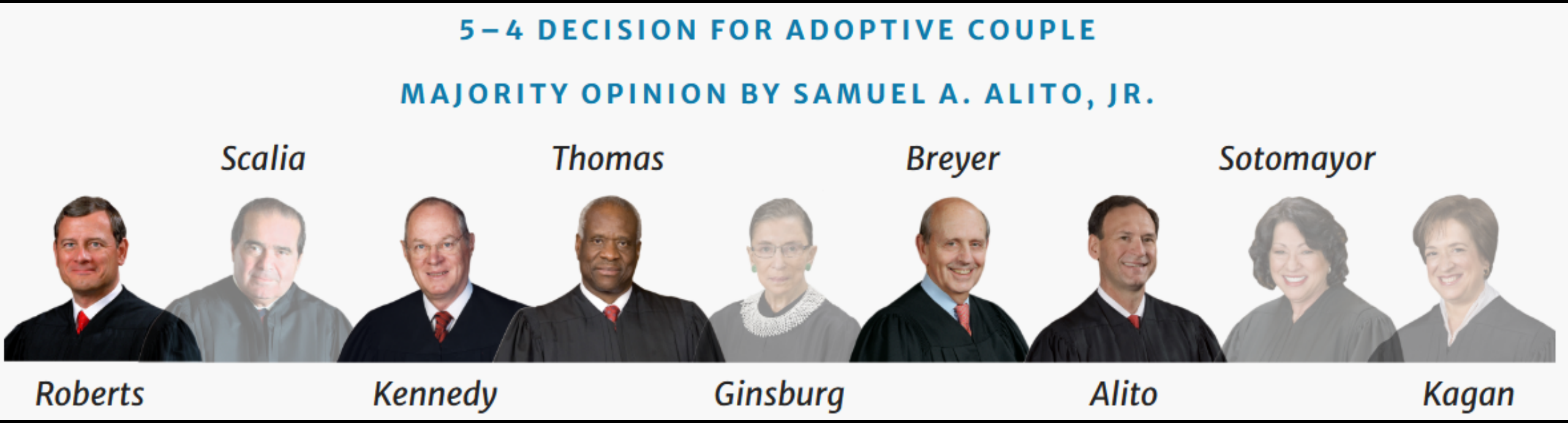
5–4 DECISION FOR BAY MILLS INDIAN COMMUNITY

MAJORITY OPINION BY ELENA KAGAN

Indian Tribes have sovereign immunity that bars the state of Michigan from suing in federal court.



Post-Modern Era (1987-2020?)



“This case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee. Because Baby Girl is classified in this way, the South Carolina Supreme Court held that certain provisions of the federal Indian Child Welfare Act of 1978 required her to be taken, at the age of 27 months, from the only parents she had ever known . . . .”

Neil Gorsuch
(2017-Present)

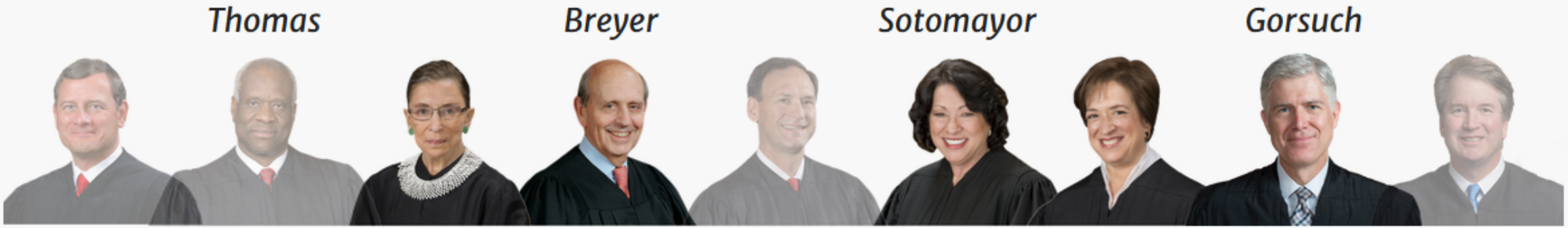
Antonin Scalia
(1986-2016)

Reason for Hope (2018-2019?)

5–4 DECISION FOR COUGER DEN

PLURALITY OPINION BY STEPHEN G. BREYER

The "right to travel" provision of the Yakama Treaty of 1855 preempts the state's fuel tax as applied to Cougar Den's importation of fuel by public highway for sale within the reservation.



Reason for Hope (2018-2019?)

- McGirt v. Oklahoma, 591 U.S. ___ (2020)
- *Herrera v. Wyoming*, 587 U.S. ___ (2019)
- *Washington State Dep't of Licensing v. Cougar Den, Inc.*, 586 U.S. ___ (2019)
- *Upper Skagit Indian Tribe v. Lundgren,* 138 S.Ct. 1649 (2018)

Cougar Den

“Really, this case just tells an old and familiar story. The State of Washington includes millions of acres that the Yakamas ceded to the United States under significant pressure. In return, the government supplied a handful of modest promises. The State is now dissatisfied with the consequences of one of those promises. It is a new day, and now it wants more. But today and to its credit, the Court holds the parties to the terms of their deal. It is the least we can do.”

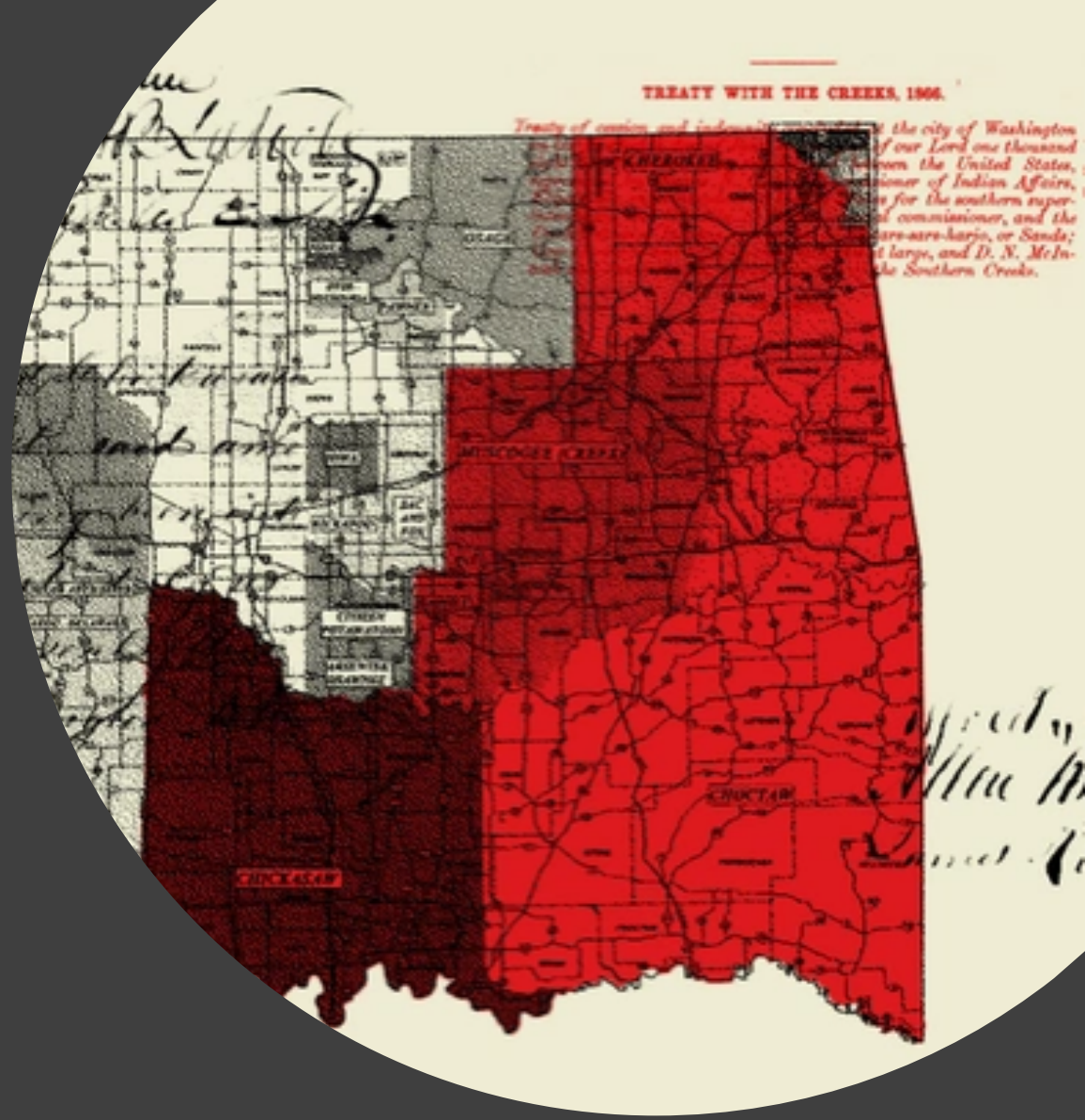
Post-Modern Era (1987-2020?)

Even the Rehnquist court would occasionally "recite[] and sometimes act[] upon foundation principles," where "non-Indian interests [were] not seriously threatened."

David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996)

McGirt v. Oklahoma

Oklahoma: A decision for McGirt would "reincarnate Indian Territory in the form of "Indian country" under 18 U.S.C. § 1151(a), *cleaving* the State in half . . . That revolutionary result would shock the 1.8 million residents of eastern Oklahoma [and] would plunge eastern Oklahoma into civil, criminal, and regulatory turmoil."

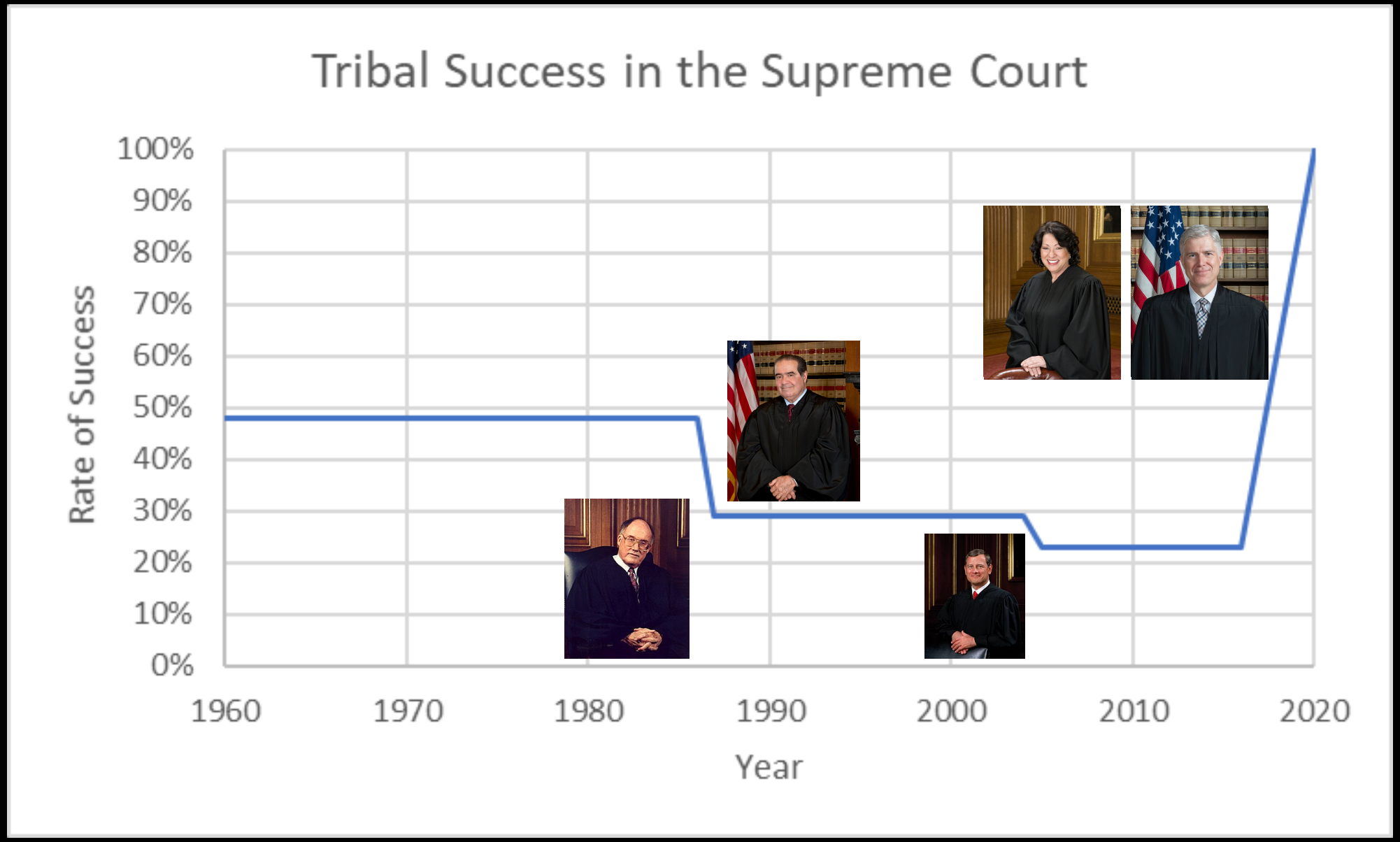


McGirt v. Oklahoma

McGirt v. Oklahoma

“[M]any of the arguments before us today follow a sadly familiar pattern. Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye. We reject that thinking. If Congress wishes to withdraw its promises, it must say so. Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.”

Post-Modern Era (1987-2020?)



McGirt v. Oklahoma

- Today, the Court holds that Oklahoma lacked jurisdiction to prosecute McGirt—on the improbable ground that, unbeknownst to anyone for the past century, a huge swathe of Oklahoma is actually a Creek Indian reservation
- Not only does the Court discover a Creek reservation that spans three million acres and includes most of the city of Tulsa, but the Court's reasoning portends that there are four more such reservations in Oklahoma.
- The rediscovered reservations encompass the entire eastern half of the State—19 million acres that are home to 1.8 million people, only 10%-15% of whom are Indians
- Across this vast area, the State's ability to prosecute serious crimes will be hobbled and decades of past convictions could well be thrown out.
- On top of that, the Court has profoundly destabilized the governance of eastern Oklahoma. The decision today creates significant uncertainty for the State's continuing authority over any area that touches Indian affairs, ranging from zoning and taxation to family and environmental law.

A Return to First Principles? (2020)

5–4 DECISION FOR COUGER DEN

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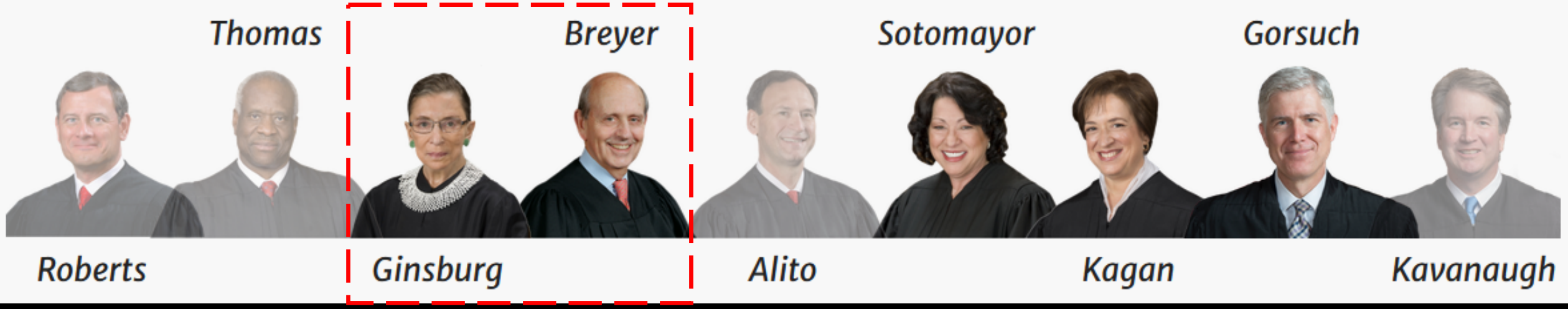


The Washington Post

Prices may vary in areas outside metropolitan Washington. SU V1 V2 V3 V4

Partly sunny, cool 67/50 • Tomorrow: Mostly sunny 68/49 B6 | *Democracy Dies in Darkness* | SATURDAY, SEPTEMBER 19, 2020 · $2

RUTH BADER GINSBURG 1933-2020

A pioneer devoted to equality

Court vacancy galvanizes both sides in already chaotic election

BY PHILIP RUCKER, MATT VISER, SEAN SULLIVAN AND JOSH DAWSEY

An already chaotic and corrosive presidential campaign was jolted anew Friday night by the death of Justice Ruth Bader Ginsburg, as a sudden vacancy on the Supreme Court just 46 days before the election immediately galvanized both political parties.

The impending fight for the Supreme Court thrusts issues of civil rights, abortion rights and health care to the forefront of a campaign that had been centered on the coronavirus pandemic, the economy and race relations, and it could boost voter enthusiasm and turnout numbers.

Democratic and Republican leaders assembled for all-out political war. Despite Ginsburg's dying wish that her successor not be determined until after the election, White House officials said President Trump is preparing to nominate a replacement in the coming days. And Senate Majority Leader Mitch McConnell (R-Ky.) said that nominee would receive a vote in the Republican-controlled Senate — a departure from McConnell's refusal to consider a nominee chosen by President Barack Obama before the 2016 election.

"President Trump's nominee will receive a vote on the floor of the United States Senate," McConnell said in a statement.

Democratic presidential nominee Joe Biden warned the Senate not to hold an election-year confirmation vote to fill Ginsburg's seat.

"Tonight and in the coming days we should focus on the loss of the justice and her enduring legacy. But there is no doubt — let me be clear — that the voters should pick the president and the president should pick the justice for the Senate to consider," he told reporters in a hastily arranged appearance late Friday.

NIKKI KAHN/THE WASHINGTON

Justice Ruth Bader Ginsburg, pictured in 2013, when she marked 20 years on the Supreme Court, was nominated by President Bill Clinton. After joining Sandra Day O'Connor on the high court before she retired in 2006, another landmark moment came in 2011, when the court for the first time opened its term with three female justices.

Justice's death sets off political fight over her replacement, court's future

BY ROBERT BARNES

A conservative replacement for liberal icon Justice Ruth Bader Ginsburg, who died Friday night at age 87, could shift the Supreme Court's majority markedly to the right for generations, and transform its jurisprudence on issues such as gun rights, affirmative action and the right to abortion established in *Roe v. Wade*.

More immediately, Ginsburg's death for now leaves the court with only eight members to confront potentially history-shaping issues resulting from one of the dential elections.

The court has already refereed a number of battles between Republicans and Democrats regarding voting rights. A majority of six conservative justices could potentially decide a host of other issues raised by the election itself. The court's ruling in *Bush v. Gore* in 2000 essentially decided the presidential election for George W. Bush

With Ginsburg's death, the court now has five conservative justices nominated by Repu can presidents and three nominated by Dem Justice John

As McConnell pledges t for a nominee, Senate

BY SEUNG MIN KIM

Senate Majority Leader Mit McConnell, who has made cial confirmations a hall his legacy, is now conf extremely fraug Court fight that pledge to le hind ami and a Se

NATION'S 2ND FEMAL JUSTICE DIES AT 87

Her principled stanc made her a liberal ic

BY ROBERT BARNE AND MICHAEL A. FLE

Supreme Court Justi Bader Ginsburg, the woman to serve on court and a legal p gender equality w opinions as a justic hero to the left, di her home in Wa was 87.

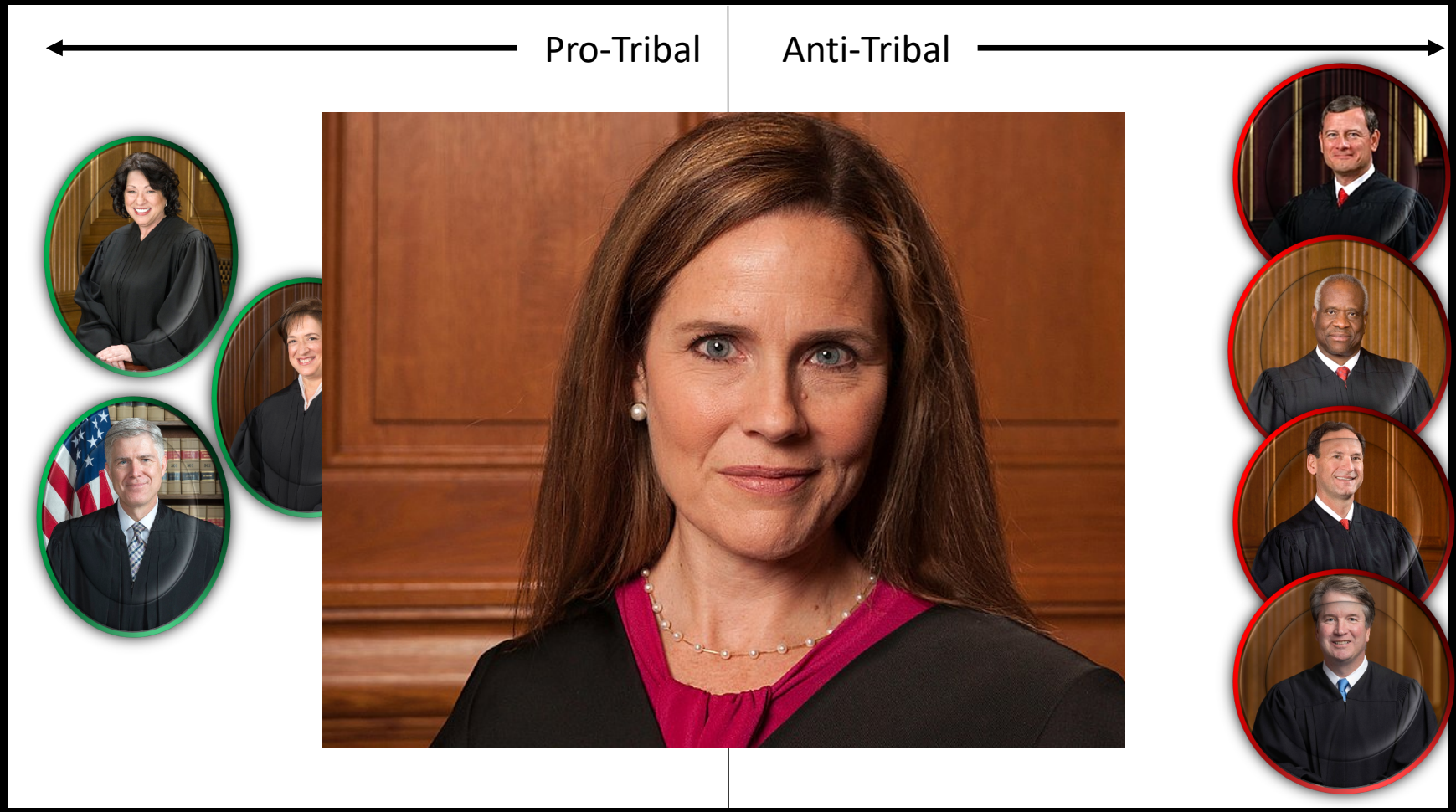
The death w a statement by Court. She h treated for p

Born Brooklyn celled ac the top a time calle ma

Ruth Bader Ginsburg (1933-2020)

Amy Coney Barret (2020-Present)

Familiar Uncertainty (2020-??)



What Kind of Textualist Will She Be?

“[I]t was the content of Justice Scalia's reasoning that shaped me. His judicial philosophy was straightforward: A judge must apply the law as written, not as the judge wishes it were . . . .”

”[C]ourts are not designed to solve every problem or right every wrong in our public life. The policy decisions and value judgments of government must be made by the political branches elected by and accountable to the People. The public should not expect courts to do so, and courts should not try.

What Kind of Textualist Will She Be?

"Given the paucity of nineteenth century cases applying the canon, twentieth century courts perhaps overstated the case when they described the canon as 'well-settled law . . . .'"

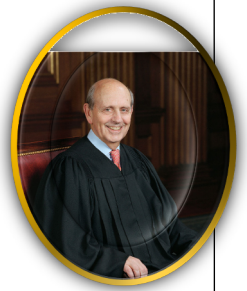
Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109 (2010)

"That is not to say that federal courts have been wrong to apply the Indian canon to statutes."

"Frickey has made powerful arguments as to why the . . . the canon can be understood as an outgrowth of the 'sovereign -to-sovereign, structural relationship' between Indian nations and the United States."

A Familiar Crossroad (2020-??)

Pro-Tribal



Anti-Tribal

A Familiar Crossroad (2020-??)