



# A YEAR OF CONTRADICTIONS

*Brianne J. Gorod*

**S**UPREME COURT TERMS ARE OFTEN most remembered for the big cases of the year. But over time, how the Court is perceived is a function not just of the doctrine it produces, but also the manner in which it produces it. When it comes to that latter measure, October Term 2013 was, in many respects, a year of contradictions.

On one metric, it was a year of consensus at the Court; on others, it was a year of bitter contention. There were laughs at the Court, but those laughs often masked serious truths. It was a year in which everyone learned that the Court's final opinions are not actually so final. And it was a year in which an institution that previously won a Peabody journalism award for its coverage of the Court was denied formal recognition as a journalistic entity that covers the Court.

## "AN APPARENT BUT SPECIOUS UNANIMITY"

**E**veryone likes a story that runs counter to the conventional wisdom. So perhaps one of this year's major headlines about the Court was inevitable: in an age of increasing partisan polarization, some Court watchers observed that there was a surprising degree of consensus at the Court this year. One headline even heralded the

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Court's "powerful new consensus."<sup>1</sup> Sure, there were sharply divided decisions on issues like campaign finance, contraceptives, and religion, but unanimous decisions were on the rise, even on controversial topics such as presidential power. Or so the stories went.

Of course, there wasn't consensus about whether there was consensus. Most obviously (and most substantively), some commentators quite rightly pointed out that unanimity of result isn't the same as unanimity of reasoning. There was real and meaningful disagreement in some of the term's big "unanimous" decisions, such as *N.L.R.B. v. Noel Canning* (the case about the constitutionality of President Obama's recess appointments),<sup>2</sup> *Bond v. U.S.* (the case about the scope of Congress's power to enact legislation to implement treaties, or, if you prefer the daytime talk show method of describing Supreme Court cases, the case about the woman whose best friend cheated with her husband and got pregnant),<sup>3</sup> and *McCullen v. Coakley* (the case about the constitutionality of a Massachusetts law which created a buffer zone around abortion clinics).<sup>4</sup> The disagreement between the two camps in *Canning* was so great that one post-decision analysis initially called Justice Scalia's concurrence in the case a "dissent."<sup>5</sup> And Justice Scalia himself preemptively pushed back against claims that *McCullen* was unanimous, writing in his concurrence that he declined to participate "in the assembling of an apparent but specious unanimity."<sup>6</sup> Indeed, this is why some "unanimous" decisions produced multiple opinions. *Bond* was unanimous as to result, but produced four different opinions!

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<sup>1</sup> Neal K. Katyal, *The Court's Powerful New Consensus*, N.Y. Times, June 27, 2014, at A29.

<sup>2</sup> 134 S. Ct. 2550 (2014).

<sup>3</sup> 134 S. Ct. 2077 (2014).

<sup>4</sup> 134 S. Ct. 2518 (2014).

<sup>5</sup> Eric Posner, *Justice Breyer Makes Justice Scalia Very, Very Angry Over Recess Appointments*, Slate (June 26, 2014), [www.slate.com/articles/news\\_and\\_politics/the\\_breakfast\\_table/features/2014/scotus\\_roundup/scotus\\_end\\_of\\_term\\_the\\_recess\\_appointment\\_ruling\\_is\\_not\\_really\\_much\\_of\\_a.html](http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2014/scotus_roundup/scotus_end_of_term_the_recess_appointment_ruling_is_not_really_much_of_a.html). It was a reasonable mistake to make. How often do Justices read blistering *concurrences* from the bench?

<sup>6</sup> 134 S. Ct. at 2548 (Scalia, J., concurring in the judgment).

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In fact, the sheer number of opinions produced in some of this year's cases belies the claim that it was a year of "powerful consensus" at the Court. Indeed, one can't help but feel the Court had returned to the days before John Marshall was Chief Justice when the justices sometimes delivered seriatim opinions. *Michigan v. Bay Mills Indian Community* (a case about whether tribal sovereign immunity barred a suit by Michigan to prevent the tribe from operating a gaming facility on non-Indian lands),<sup>7</sup> for example, produced five different opinions. (*Bay Mills* also supplied one of the more interesting line-ups of the Term, with Justice Kagan delivering an opinion joined by Roberts, Kennedy, Breyer, and Sotomayor.) *Schuette v. Coalition To Defend Affirmative Action* (the case about the constitutionality of an amendment to Michigan's constitution that prohibits state universities from considering race in their admissions process)<sup>8</sup> produced four different opinions even though only eight justices participated in the case.

But perhaps the most interesting manifestation of the lack of consensus at the Court this year was the sharp rhetoric in many of the opinions, including in some of the "unanimous" cases. In *Canning*, for example, Justice Scalia accused the majority of "judicial adventurism" and "freewheeling interpretation" (odd attacks on an opinion that engaged in fairly conventional methods of constitutional interpretation). And at the end of the opinion Justice Scalia went even further, explaining that he could "conceive of no *sane* constitutional theory" that would support the majority's conclusion.<sup>9</sup>

And Justice Scalia was hardly the only justice with a sharp tongue this Term. Justice Kagan took the conservative justices to task in her dissent in *Harris v. Quinn* (the case about whether the First Amendment prohibited the collection of an agency fee from home health care providers who didn't want to join the union). Justice Kagan wrote: "It is not altogether easy to understand why the majority thinks what it thinks: Today's opinion takes the tack of throwing

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<sup>7</sup> 134 S. Ct. 2024 (2014).

<sup>8</sup> 134 S. Ct. 1623 (2014).

<sup>9</sup> *Canning*, 134 S. Ct. at 2600, 2617 (Scalia, J., concurring in the judgment) (emphasis added).

everything against the wall in the hope that something might stick. A vain hope, as it turns out.”<sup>10</sup> She also faulted the conservatives for repeatedly calling into question the vitality of *Abood v. Detroit Board of Education*,<sup>11</sup> a decades-old precedent: “Readers of today’s decision will know that *Abood* does not rank on the majority’s top-ten list of favorite precedents – and that the majority could not restrain itself from saying (and saying and saying) so.”<sup>12</sup>

And in *Abramski v. United States* (the case about how a federal fire-arms law applies to a person who buys a gun on someone else’s behalf while falsely claiming that he’s buying it for himself), Justice Kagan hit Justice Scalia where it hurts – questioning his rhetorical skill. In that case, the majority concluded that someone who sends someone else to purchase a gun is the purchaser in all but the most formal of senses. Justice Scalia didn’t think much of this argument, retorting that it “certainly distinguishes that individual from the intended subsequent donee or purchaser; so would the fact that he has orange hair.”<sup>13</sup> Justice Kagan accused Justice Scalia of engaging in “wit gone wrong” (quite the charge to level against the justice often called the Court’s funniest) because “[w]hether the purchaser has orange hair, we can all agree, is immaterial to the statutory scheme.”<sup>14</sup>

And the biting back-and-forth wasn’t limited to justices on opposite sides of the ideological divide. In *Bond* (one of those “unanimous” opinions), Justice Scalia sharply criticized Chief Justice Roberts for declining to use *Bond* as a vehicle to overrule *Missouri v. Holland*,<sup>15</sup> which held that Congress has the power to enact laws to implement validly enacted treaties: “We have here a supposedly ‘narrow’ opinion which, in order to be ‘narrow,’ sets forth interpretive principles never before imagined that will bedevil our jurisprudence (and proliferate litigation) for years to come. . . . All this to leave in place an

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<sup>10</sup> 134 S. Ct. 2618, 2648 (2014) (Kagan, J., dissenting).

<sup>11</sup> 431 U.S. 209 (1977).

<sup>12</sup> *Harris*, 134 S. Ct. at 2652-53.

<sup>13</sup> 134 S. Ct. 2259, 2279 (2014) (Scalia, J., dissenting).

<sup>14</sup> *Id.* at 2271 n.9.

<sup>15</sup> 252 U.S. 416 (1920).

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ill-considered *ipse dixit* . . . .” Elsewhere, he mocked the Chief Justice’s conclusion that the statute was ambiguous: “Imagine what future courts can do with that judge-empowering principle: Whatever has improbably broad, deeply serious, and apparently unnecessary consequences . . . is *ambiguous!*”<sup>16</sup>

And in *McCullen* (yet another of those “unanimous” opinions), Justice Scalia criticized the Chief Justice’s analysis, accusing it of “[g]oing from bad to worse” when it concluded that there was no evidence that “abortion-facility escorts have actually spoken in favor of abortion . . . while acting within the scope of their employment.” According to Justice Scalia, “[h]ere is a brave new First Amendment test . . . . For this Court to suggest such a test is astonishing.”<sup>17</sup> The Chief Justice apparently didn’t take too kindly to Justice Scalia’s strident language: “Justice Scalia can decry this analysis as ‘astonishing’ only by quoting a sentence that is explicitly limited to as-applied challenges and treating it as relevant to facial challenges.”<sup>18</sup>

Was there more sharp rhetoric this year than in other years? It’s tough to say, but it certainly doesn’t seem like there was less. Maybe all that much-touted agreement left some justices with negative energy to burn. Or maybe those commentators who proclaimed this a year of great consensus at the Court should look not just at the votes, but at what the justices are saying – and how they’re saying it.

### NOT ALWAYS SERIOUS BUSINESS

Of course, it wasn’t all sharp comments and serious decision-making at the Court this year. As always, many of the oral arguments featured moments of levity, or at least laughter (not always the same thing).<sup>19</sup> Indeed, at one point the justices got so carried

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<sup>16</sup> 134 S. Ct. at 2102, 2096 (Scalia, J., concurring in the judgment).

<sup>17</sup> 134 S. Ct. at 2548 (Scalia, J., concurring in the judgment).

<sup>18</sup> *Id.* at 2534 n.4.

<sup>19</sup> Most of the laughs at oral argument are produced by the justices, but attorneys sometimes get in on the act, too. It’s rare, though, for attorneys to go for humor in their briefing. This year featured a notable exception, as the Cato Institute filed a brief with satirist P.J. O’Rourke in *Susan B. Anthony List v. Driehaus*, 134 S. Ct.

away with their kidding around that Solicitor General Don Verrilli felt compelled to remind them that the matter at hand (the scope of the statute implementing the chemical weapons treaty) was “serious business.”<sup>20</sup> In fact, laughter at the Supreme Court is itself sometimes “serious business,” or at least says something serious about what the justices actually think.

This year, argument in two of the year’s biggest cases, *Burwell v. Hobby Lobby Stores, Inc.* and *Conestoga Wood Specialties Corp. v. Burwell* (the cases that addressed the validity of the contraceptive coverage mandate of the Affordable Care Act),<sup>21</sup> produced a number of laughs. Although the questions they presented about the ACA were narrower than the ones that came before the Court a couple of years ago, that year’s landmark ruling wasn’t far from anyone’s mind (except possibly Justice Kennedy’s). At one point in the argument, Solicitor General Verrilli assented to Justice Kennedy’s suggestion that part of the government’s compelling interest was protecting the “operational integrity of the whole Act,” at which point Justice Kennedy queried whether the “constitutionality of the whole Act has to be examined before we accept your view.” Verrilli’s response: “Well, I think it has been examined, Your Honor, is my recollection.” At another point Paul Clement, arguing for the plaintiffs, used the term “penalty” to describe the payment they would have to make if they didn’t offer insurance. Justice Sotomayor responded, “It’s not called a penalty. It’s called a tax.” Before she could finish her point, the Chief Justice intervened: “She’s right about that.” Ba-da-bum. And with the prior ACA lawsuits on everyone’s mind – and other ACA suits on the horizon – it was perhaps not surprising that Justice Sotomayor’s suggestion that the attorneys might be picking their

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2334 (2014) (the case about whether plaintiffs can bring a preenforcement challenge to a state law that prohibits “false statements” during a political campaign), that attempted to use humor to underscore that the First Amendment protects, in its words, “the serious business of making politics funny.” Br. 2. This was a genuinely unanimous decision, but it’s unclear from the opinion whether the Justices unanimously found the Cato brief funny.

<sup>20</sup> Transcript of Oral Argument (“Tr.”) at 37, *Bond*, 134 S. Ct. 2077.

<sup>21</sup> 134 S. Ct. 2751 (2014).

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plaintiffs rather than the other way around produced some laughter: “And how much of the business has to be dedicated to religion? . . . Just assume not a business like yours – you picked great plaintiffs . . . .”<sup>22</sup>

The contraceptive coverage cases weren’t the only ones where a laughter-producing comment may have reflected a more serious truth, or at least a justice’s belief about the truth. In *Unite Here Local 355 v. Mulhall* (the case addressing whether the Labor Management Relations Act prohibits unions and employers from setting the ground rules for organizing), Chief Justice Roberts asked the government’s lawyer about the coerciveness of card checks and began to describe a situation in which a “union organizer comes up to you and says, well, here’s a card. . . . And there’s a bunch of your fellow workers gathered around as you fill out the card.” As the attorney began to respond, Justice Scalia cut him off to elaborate – “And he’s a big guy”<sup>23</sup> – perhaps suggesting that Justice Scalia had some preconceived notions about union organizers. Sometimes a joke is just a joke, but given the Court’s decision this year in *Quinn*, sometimes a joke may be more.

The same might be said of some other laugh lines, as well. In one argument, for example, Justice Kagan got laughs at Congress’s expense when she observed “that’s a very legally sophisticated Congress you’re asking us to imagine.” And the laughs didn’t end there: there were more when the attorney tried to insist that “actually Congress, at least at this time, was very sophisticated.”<sup>24</sup> In another argument, a similar question from Justice Scalia also produced laughs: “Sometimes, Congress doesn’t do it right, you know?”<sup>25</sup> If there’s anything that’s better than a joke about Congress, it’s a joke about lawyers. The Chief Justice produced laughs when he pointed out that a company’s “technological model is based solely on circumventing legal prohibitions that you don’t want to comply with, which is fine . . .

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<sup>22</sup> Tr. at 55-56, 23-24, 18-19, *Hobby Lobby*, 134 S. Ct. 2751.

<sup>23</sup> Tr. at 23-24, *Unite Here Local 355 v. Mulhall*, 134 S. Ct. 594 (2013) (per curiam).

<sup>24</sup> Tr. at 15, *CTS Corp. v. Waldburger*, 134 S. Ct. 2175 (2014).

<sup>25</sup> Tr. at 46, *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014).

lawyers do that.”<sup>26</sup> Statements like these surely say something about how Congress and the bar are perceived, even if they’re also surely classics at the Court.

And, of course, sometimes even questions that start out serious don’t end that way. The best examples are elaborate hypotheticals, a Supreme Court perennial especially on a Supreme Court with Justice Breyer. In one case, for example, Justice Breyer analogized the pollution problem at issue to an “overgrazing problem in State A . . . caused because cows come in from State B and sheep come in from State C.” Importantly, Justice Breyer clarified that “[t]he cow men and the sheep men are in different States. They’re not friends.”<sup>27</sup> In another case, there were poisonous ice cream sundaes: “Suppose that Bailey’s sells ice cream sundaes, and the defendant has said the chocolate sauce in Bailey’s ice cream sundaes is poisonous. Now, the chocolate sauce does not compete with the defendant because he’s an ice cream parlor, but nonetheless he is directly affected by the statement that he is suing about. . . . But shouldn’t at least that supplier of chocolate sauce have the standing to bring the claim against the ice cream parlor that competes with Bailey?”<sup>28</sup>

Always designed to elucidate, some hypotheticals do a better job of that than others, as the justices sometimes frankly acknowledged at oral argument. Twenty-some transcript pages after he introduced the Bailey’s hypothetical, Justice Breyer said, “I’m sort of sorry I used that hypothetical” (though he maintained that it illustrated the point). Justice Scalia quickly agreed, “I am too because I’m sick of it.”<sup>29</sup> During another argument, after Justice Breyer asked a lengthy

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<sup>26</sup> Tr. at 41, *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014).

<sup>27</sup> Tr. at 57, *E.P.A. v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014).

<sup>28</sup> Tr. at 8, *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014). It was a year for discussion of dangerous sweets at the Court. At the *Bond* oral argument, Justice Alito asked the Solicitor General if it would “shock” him to be told that a few days before the argument he and his wife “distributed toxic chemicals to a great number of children.” Tr. at 37. Justice Alito went on to explain that they had handed out chocolate bars on Halloween and “[c]hocolate is poison to dogs, so it’s a toxic chemical under the chemical weapons [statute].” *Id.*

<sup>29</sup> Tr. at 29, *Lexmark Int’l*, 134 S. Ct. 1377.



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question that involved holding up his hands and pointing out where different colored electrodes would go, counsel asked if he could answer the question in a “more roundabout way.” Justice Breyer acknowledged that the question was “asked in a pretty roundabout way.”<sup>30</sup>

But the hypothetical that perhaps best captures many of the jokes told at the Supreme Court this year was one Justice Alito offered: it involved a truckload of rotten tomatoes.<sup>31</sup>

### NEITHER FINAL NOR INFALLIBLE

There are a lot of reasons why it’s nice to be a Supreme Court justice (the fact that people will laugh when you make a bad joke is only one), but a new one was the subject of significant attention this year: the power to quietly erase any mistakes you might make, even years after they happen. (What academic wouldn’t like the chance to correct that pesky mistake that made its way into print?) As Richard Lazarus revealed in an article in the *Harvard Law Review*,<sup>32</sup> the Supreme Court continues to revise its opinions years after they are issued, occasionally in ways that are substantive and significant.<sup>33</sup>

It was a propitious term for Lazarus to be working on this study because mistakes were big at the Supreme Court this year – or if not big, at least much-discussed. The first was Justice Scalia’s misstatement in *E.P.A. v. EME Homer City Generation, L.P.* (the case that upheld the EPA’s Transport Rule, which set limits on pollutant emissions in upwind states that contribute to keeping downwind states from meeting federal air standards).<sup>34</sup> Justice Scalia disagreed with the majority’s decision to uphold the rule and attacked the EPA for once

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<sup>30</sup> Tr. at 31, *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120 (2014).

<sup>31</sup> Tr. at 19, *Roberts v. U.S.*, 134 S. Ct. 1854 (2014).

<sup>32</sup> Richard J. Lazarus, *The (Non)Finality of Supreme Court Opinions*, 128 Harv. L. Rev. \_\_\_ (forthcoming 2014).

<sup>33</sup> Fortunately, there’s an easy way to find out when the Supreme Court makes these changes. @SCOTUS\_servo sends out tweets when edits are made to Supreme Court opinions.

<sup>34</sup> 134 S. Ct. 1584 (2014).

again asking for authority to weigh costs against benefits in crafting the rule. The only problem, as most Court watchers will know, is that the case Scalia cited (one he authored) didn't actually involve the EPA seeking to use cost-benefit analysis; rather, the rule's challengers argued for cost-benefit analysis. After the mistake received lots of attention, the opinion was changed with no fanfare (or even public notice) from the Court.

This quiet change was quickly followed by another. In her dissent in *Town of Greece, N.Y. v. Galloway* (the case about the constitutionality of prayer preceding a town hall meeting), Justice Kagan concluded by recounting a 1790 exchange between George Washington and one of the lay officials of a Jewish congregation in Newport, Rhode Island. In describing this exchange, Justice Kagan threw in as an aside that Newport, Rhode Island was “the home of the first community of American Jews.”<sup>35</sup> It was an innocuous, unnecessary factoid. It also just happened to be wrong. The first community of American Jews was in New Amsterdam. Justice Kagan cited nothing for the fact and, according to one source, the confusion may have resulted from the fact that Newport is home to the country's oldest standing synagogue where Justice Kagan happened to give a talk the previous year.<sup>36</sup>

Justice Scalia's mistake was the more embarrassing – there's no reason why a justice should know the first community of American Jews, but it's something else to make a fundamental mistake about a case when you authored the opinion for the Court (admittedly, quite a while ago) – but in some respects Justice Kagan's is the more important because it's representative of a far more pervasive problem at the Court: the justices' frequent use of facts and empirical claims without citing any evidence, to say nothing of evidence that has been subject to rigorous testing, adversarial or otherwise.

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<sup>35</sup> 134 S. Ct. 1811, 1853 (2014) (Kagan, J., dissenting).

<sup>36</sup> Yair Rosenberg, *Elena Kagan's Very Jewish Dissent – and Mistake*, The Scroll (May 5, 2014), [www.tabletmag.com/scroll/171604/elena-kagans-very-jewish-dissent-and-mistake](http://www.tabletmag.com/scroll/171604/elena-kagans-very-jewish-dissent-and-mistake).

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As I've written elsewhere,<sup>37</sup> it's one of the great myths of our purportedly adversarial system that appellate courts, including the Supreme Court, rely on facts developed through adversarial testing in the lower courts. In fact, they frequently don't. And it's difficult to have great confidence in the quality of empirical claims that are often subject to no testing at all – when, for example, a justice cites something he saw on-line or simply something she remembers hearing when she was traveling. In Justice Kagan's case, of course, the fact was just adding a little color and, frankly, was pretty minor as errors go (not to understate the significance of New Amsterdam to the history of American Jewry). But often the Court relies (sometimes implicitly) on facts that are much more important and much more contested.

For example, this year, in *Navarette v. California* (the case about whether a traffic stop based on an anonymous 911 tip was constitutional), the whole case turned on whether a 911 call reporting a single episode of hazardous driving created a "reasonable suspicion" of ongoing drunk driving. In dissent, Justice Scalia asked "[w]hat proportion of the hundreds of thousands – perhaps millions – of careless, reckless, or intentional traffic violations committed each day is attributable to drunken drivers?" He said "0.1 percent," although he acknowledged that he "ha[d] no basis for that except [his] own guesswork."<sup>38</sup> I don't know if he's right about his guesswork, but he's right that the question is an important one, and it's one to which the majority offered no answer.

And sometimes the Court offers answers to highly consequential empirical claims without even trying to provide evidentiary support. In *McCutcheon v. FEC* (the case about the constitutionality of aggregate contribution limits), for example, Chief Justice Roberts wrote that "[s]pending large sums of money in connection with elections . . . does not give rise to . . . *quid pro quo* corruption."<sup>39</sup> That's no

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<sup>37</sup> Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 Duke L.J. 1 (2011).

<sup>38</sup> 134 S. Ct. 1683, 1695 (2014) (Scalia, J., dissenting).

<sup>39</sup> 134 S. Ct. 1434, 1450 (2014).

less an empirical claim than Justice Kagan's claim about the oldest community of American Jews, even if it's one that would occasion more debate. And like Justice Kagan, the Chief Justice provided no evidence to support the claim. In his dissent, Justice Breyer suggested that the Court should send the case back to the district court for an evidentiary hearing, but the Court's majority dismissed that suggestion in a footnote.

My point here isn't to weigh in on the merits of the Chief Justice's claim about spending or Justice Scalia's about driving. It's simply that this year's focus on mistakes at the Court may have missed the forest for the trees. Instead of focusing on the mistakes that don't matter, it may be time to focus on why mistakes that do matter may be happening all the time.

## COVERING THE COURT

The Supreme Court is a Rules Institution, constantly playing hard to get.<sup>40</sup> It adamantly refuses to allow cameras into its courtroom, so unless you're a member of the Supreme Court bar, you have to brave incredibly long lines (or pay someone to brave them for you<sup>41</sup>) to get into the Court to see oral argument in the Court's most popular cases.<sup>42</sup> It only rarely explains why it decides the cases that it does, meaning that if you're interested in one of the thousands of cases that the Court decides *not* to hear each year, you can only guess why your case didn't make the cut. And as a general rule, the

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<sup>40</sup> *All the Rules: Time-tested Secrets for Capturing the Heart of Mr. Right* is a book that provides single women with a set of rules they should follow to land "Mr. Right," one of the most important of which is to play "hard to get." ELLEN FEIN & SHERRIE SCHNEIDER, *ALL THE RULES: TIME-TESTED SECRETS FOR CAPTURING THE HEART OF MR. RIGHT* 6 (2007).

<sup>41</sup> Sarah Kliff, *Supreme Court and the Business of Waiting in Line*, Wash. Post. (Mar. 25, 2012), [www.washingtonpost.com/blogs/wonkblog/post/the-business-of-waiting-in-line/2012/03/25/gIQAhFjkZS\\_blog.html](http://www.washingtonpost.com/blogs/wonkblog/post/the-business-of-waiting-in-line/2012/03/25/gIQAhFjkZS_blog.html).

<sup>42</sup> This past Term there was an exception to that general rule, albeit an unintentional one from the Court's perspective, when the group 99Rise somehow smuggled a camera into the courtroom and posted the video on YouTube.

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justices don't talk about the cases that come before them,<sup>43</sup> letting their words in the *U.S. Reports* speak for themselves. What this means is that the Supreme Court is a black box for many, and what journalists say about the Supreme Court is often as important in defining what the Court does as what the Court itself says is. After all, most people don't thumb through the *U.S. Reports* to understand the Court's decisions (though if you're reading this journal, there's a good chance you're an exception).

This is why one of the biggest stories about the Court this year was rightly about the people who cover the Court. And it was one on which almost everyone associated with the Supreme Court agreed, except for the handful of people whose views actually mattered. That issue was whether SCOTUSblog, a website that provides comprehensive coverage of the Court and its work, should receive a press credential to facilitate that coverage of the Court. In determining who should receive press credentials, the Supreme Court defers to the Senate Press Gallery's decisions about who qualifies as a journalist, and the Senate Press Gallery denied SCOTUSblog's application for a press pass, purportedly on the ground that the blog isn't "editorially independent" of the law firm of its publisher (and frequent Supreme Court advocate), Tom Goldstein.<sup>44</sup> (This wasn't the only time this year that the Supreme Court decided to let the Senate make its decisions for it. In *Canning*, it said it would defer to the fact that the Senate said it was in session when it held *pro forma* sessions that prevented a recess of sufficient duration to permit recess appointments. Only an institution that says it's in session when,

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<sup>43</sup> But there are exceptions. Even as Justice Scalia has recognized that the Court will likely hear a case involving NSA surveillance, he's also indicated that such surveillance is probably unproblematic because the text of the Fourth Amendment doesn't extend to "conversations." See, e.g., Erin Fuchs, *Scalia Comes To Brooklyn, Drops Huge Hint About NSA Surveillance and the Supreme Court*, Business Insider (Mar. 22, 2014), [www.businessinsider.com/antonin-scalia-talks-nsa-spying-at-brooklyn-law-2014-3](http://www.businessinsider.com/antonin-scalia-talks-nsa-spying-at-brooklyn-law-2014-3).

<sup>44</sup> Letter from Siobhan Hughes, Wall Street Journal, Chairwoman, Standing Committee of Correspondents, to Thomas C. Goldstein, SCOTUSblog (June 23, 2014), [sblog.s3.amazonaws.com/wp-content/uploads/2014/06/Untitled.pdf](http://sblog.s3.amazonaws.com/wp-content/uploads/2014/06/Untitled.pdf).

in its words, “no business [will be] transacted,” could also say that SCOTUSblog is not a part of the Supreme Court press.<sup>45</sup>)

It’s a surprising decision only because anyone who has anything to do with the Court (and thousands of people who do not, yet are interested enough to follow SCOTUSblog’s live feed on decision days) recognizes that SCOTUSblog is the place to go to find information about the Court. Indeed, it is often the place that people who work *at* the Court go to find information about what is happening at the Court.<sup>46</sup> And the reason is simple: SCOTUSblog provides a depth and breadth of coverage that no other journalist has the space to provide.

For every single merits case, SCOTUSblog provides detailed analysis of the case before and after argument. For the biggest cases of the year, it hosts symposia with detailed analysis from contributors of differing perspectives, as well as “plain English” discussion of the cases. For many years, it has compiled detailed statistics on the Term, providing informative snapshots of almost every aspect of the Court’s work. (Unsurprisingly, this journal’s Term in Review pieces have often looked to the statistics provided by SCOTUSblog.) And unlike almost every other media outlet that covers the Court, it also pays substantial attention to the cases the Court doesn’t decide, highlighting the cases each week that the Court is most likely to grant and reporting on which cases it did, in fact, grant. It even offers up courtroom sketches, providing people with glimpses into the courtroom that the Court itself denies.

It’s difficult to do justice to SCOTUSblog’s role in providing valuable coverage of the Court. Perhaps the best way to illustrate the point is just to note the source I used more than any other in writing this Essay: SCOTUSblog.

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<sup>45</sup> *Canning*, 134 S. Ct. at 2573-77.

<sup>46</sup> Justice Kagan is surely just one of those people. Ilya Somin, *Video Interview with Elena Kagan* (July 9, 2013), [www.volokh.com/2013/07/09/video-interview-with-elena-kagan/](http://www.volokh.com/2013/07/09/video-interview-with-elena-kagan/).

CONCLUSION

Many of the subjects of this Essay – from a bit of judicial snark to an innocuous mistake in an opinion – can be quite funny in isolation. But over time how the justices interact and the quality of their decisionmaking is, in the Solicitor General’s words, “serious business.” Looking ahead to next year, which will be the tenth term with John Roberts as Chief, there’s no denying that such topics will help to define both his legacy and the legacy of his Court.

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