



A BIG YEAR AT THE SUPREME COURT

Brianne J. Gorod

THIS SUPREME COURT TERM will always be remembered as the term in which the Court recognized that the Constitution requires marriage equality. But this term stood out in many respects. It was the term in which a light was shone on how much of the Court’s work is obscured by darkness. It was the term in which a Court with a very conservative record surprisingly produced more “liberal” decisions than conservative ones. It was the term in which the Justices received almost as much attention away from the Court as at it. And it was the term that marked John Roberts’ tenth anniversary as Chief Justice. In short, it was a big year at the Supreme Court.

TRANSPARENCY AT THE COURT

Sometimes the more things change, the more they stay the same. And that’s certainly true when it comes to transparency and the Supreme Court. This was a year when the Court took a few small steps toward greater transparency at the margins, but also underscored just how opaque an institution it really is.

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At the start of the Term, Court watchers welcomed the Supreme Court to the twenty-first century (or at least the late twentieth) when the Court unveiled its new website. Promising “a new look and improved functionality,”¹ this new page provided, among other things, transcripts and audio from the Court’s most recent oral arguments. Unfortunately, one thing it still didn’t provide was all of the briefs filed at the Court. For that, the Court webpage instead provided information about “subscription databases,” “internet sources,” “document retrieval services,” and “depositories of printed Supreme Court briefs” in law libraries around the country. The Court website also identified “self-service at the Supreme Court” as one possible option, though it advised that interested parties should call first to “see if the briefs you are requesting . . . are available.”² (Amazingly, one resource that the Court website did not list was SCOTUSblog, the most significant Supreme Court resource for Court practitioners.³)

But those who hoped the Supreme Court webpage might eventually provide access to the briefs that the Supreme Court Justices use to decide cases are in luck. In his 2014 year-end report (which is available on the Court’s webpage), Chief Justice Roberts announced that e-filing is (slowly) coming to the Supreme Court. Likening the Internet to pneumatic tubes, Roberts first told the story of the advent of those tubes: “[o]n November 10, 1893, the *Washington Post* identified an emerging technology that was reshaping American society: Pneumatics!” And he then told the story of the Court’s belated embrace of those tubes — nearly forty years later.⁴ By this

¹ Press Release, U.S. Supreme Court, Supreme Court’s Website (Oct. 3, 2014), www.supremecourt.gov/publicinfo/press/pressreleases/pr_10-03-14.

² Supreme Court of the United States, Where to Find Briefs (October 2014), www.supremecourt.gov/oral_arguments/briefsource.aspx (last visited July 30, 2015).

³ See, e.g., Brianne J. Gorod, *A Year of Contradictions*, 17 GREEN BAG 2d 405, 416-18 (2014).

⁴ 2014 Year-End Report on the Federal Judiciary 1 (Dec. 31, 2014), www.supremecourt.gov/publicinfo/year-end/2014year-endreport.pdf; see *id.* (“It was not until 1931 that the Marshal of the Court proposed installing a pneumatic tube system in the Courtroom for the benefit of the press.”).

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benchmark, the Court is doing well when it comes to the Internet, even if its use of electronic filing lags well behind that of other federal courts. Roberts promised that “[o]nce the system is implemented, all filings at the Court . . . will be available to the legal community and the public without cost on the Court’s website.” Those eager for this development shouldn’t start refreshing their browsers just yet, however: according to the Chief, this system “*may* be operational as soon as 2016.”⁵

But even as some changes are slowly coming to the Court, this term provided a big reminder of how much of the Court’s work happens behind closed doors. There was, of course, the usual lamenting about the lack of cameras in the courtroom (the issue was brought into particularly stark relief when people started watching dogs reenact oral arguments, thanks to John Oliver⁶), but the Court’s activities at the beginning of the Term underscored that in some ways cameras are the least of its transparency woes.

When it comes to transparency, the Justices often point to their written opinions as the best window into what they do and why they do it. According to one article, Justice Sotomayor has “said the court fully explains its reasoning in its rulings, and that’s what really counts. ‘There’s no other public official who is required by the nature of their work to completely explain to the public the basis of their decision.’”⁷ Chief Justice Roberts has said the Supreme Court is “the most transparent branch of government,” pointing out that “[y]ou see the work in public in the Court. Our opinions are out there.”⁸ While the Justices’ opinions do explain at length (often at

⁵ *Id.* at 7 (emphasis added).

⁶ Samantha Grossman, *John Oliver Mocks the Supreme Court’s Camera Ban by Dressing Up Dogs as Justices*, TIME, Oct. 20, 2014, time.com/3524548/john-oliver-supreme-court-camera-ban-cute-dogs/.

⁷ See, e.g., Sam Baker, *Justice Sotomayor No Longer Backs Television Cameras in Supreme Court*, HILL, Feb. 7, 2013, thehill.com/homenews/news/281765-sotomayor-no-longer-backs-cameras-in-supreme-court.

⁸ Josh Blackman, *Chief Justice Roberts: “We Are the Most Transparent Branch of Government.”*, CONCURRING OPINIONS, July 1, 2011, concurringopinions.com/archives/2011/07/chief-justice-roberts-we-are-the-most-transparent-branch-of-government.html.

great length⁹) their decisions in merits cases, this year the Court made clear that a significant number of their decisions are not completely explained, or even explained at all.

Consider the start of the Term. Over the summer, the Court temporarily blocked some lower courts from allowing same-sex marriages while constitutional challenges were pending, but then following the Court's long conference, it decided to let marriages go forward.¹⁰ And *then*, later in the term, the Court decided to hear a marriage equality case after all. And there was no written explanation of any of its decisions. In this one example, Justice Ginsburg may have given a hint as to what was going on, suggesting that the Court didn't want to intervene until a disagreement among the lower courts necessitated its intervention.¹¹ But then the Court didn't wait for a lower court disagreement to develop before it took one of the other big cases of the term, *King v. Burwell* (on the availability of nationwide tax credits under the Affordable Care Act).

Blackman noted that he was unable to “locate[] an official transcript,” and the quotation reflects his “best attempt to accurately type what the Chief said.” *Id.*

⁹ A new study of roughly 25,000 Supreme Court opinions released between 1791 and 2008 found that over time the Justices' opinions have “become longer.” They've also become “easier to understand – and grumpier.” Adam Liptak, *Justices Opinions' Grow in Size, Accessibility and Testiness, Study Finds*, N.Y. TIMES, May 4, 2015, www.nytimes.com/2015/05/05/us/justices-opinions-grow-in-size-accessibility-and-testiness-study-finds.html?_r=1. When it comes to the grumpiness, Justice Scalia's penchant for sarcasm probably doesn't help, see Richard L. Hasen, *The Most Sarcastic Justice*, 18 GREEN BAG 2d 215 (2015), though notably four members of the current Court ranked as less “[f]riendl[y]” than Scalia on this study's “[f]riendliness” ranking (and the two most recent Justices weren't included). Keith Carlson et al., *A Quantitative Analysis of Writing Style on the U.S. Supreme Court*, 93 WASH U. L. REV. ____ (forthcoming 2016).

¹⁰ It took time to figure that out, though, as the orders list distributed to reporters was missing 33 pages, including the denials of the marriage cases. Debra Cassens Weiss, *Missing Pages and Website Difficulties Delayed SCOTUS News on Gay-Marriage Cert Denials*, A.B.A. J., Oct. 7, 2014, www.abajournal.com/news/article/missing_pages_and_website_difficulties_delayed_scotus_news_on_gay_marriage.

¹¹ Emma Margolin, *Notorious R.B.G. Drops Knowledge About Marriage Equality*, MSNBC, Sept. 17, 2014, www.msnbc.com/msnbc/ruth-bader-ginsburg-scotus-marriage-equality.

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What made a split important in one case and not another? Why was it appropriate to stay marriages in the summer, but not the fall? We have lots of questions, but no answers.

And the marriage mystery wasn't the only one at the start of the Term. In November, the Court issued a number of orders affecting different aspects of the 2014 elections. The Court offered no explanation for why it allowed some laws to be implemented and not others. Law professors tried to fill the gaps,¹² suggesting one very good retort to the Chief Justice's suggestion that law review articles aren't of much interest to people other than the academics who write them,¹³ but that's hardly the same thing as the Court itself explaining why it took the actions that it did.

All of this mystery prompted one prominent law professor to write an op-ed lamenting the Court's "[s]ecret [d]ecisions." As he explained, there's generally no explanation for the Court's decisions about "which cases to hear, procedural matters in pending cases, and whether to grant a stay or injunction that pauses legal proceedings temporarily."¹⁴ Those unexplained decisions can often be just as im-

¹² Richard L. Hasen, Symposium, *Reining in the Purcell Principle*, 42 FLA. ST. U. L. REV. ____ (forthcoming 2015).

¹³ American Constitution Society, *Law Prof. Ifill Challenges Chief Justice Roberts' Take on Academic Scholarship*, ACSBLOG, July 5, 2011, www.acslaw.org/acsblog/law-prof-ifill-challenges-chief-justice-roberts%E2%80%99take-on-academic-scholarship. The Chief Justice's full comment was that if you "[p]ick up a copy of any law review that you see," "the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th Century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar." *Id.* In fact, no such article existed until Orin Kerr decided to write one this year. As Kerr said, "[s]omeone had to do it." Tony Mauro, *A Response to Chief Justice Roberts' Put-Down of Law Reviews*, LEGAL TIMES (ONLINE), Apr. 6, 2015. If you're curious to know what influence Kant had, the short answer is none, *id.*, but Kerr's longer answer will be published in this journal. But perhaps the best response to the Chief's comment this year was Richard Re's, noting that the Chief "regularly cites law review articles in his judicial opinions." Richard Re, *The Chief Justice Reads Law Reviews*, PRAWFSBLAWG, Mar. 16, 2015, prawfsblawg.blogspot.com/prawfsblawg/2015/03/the-chief-justice-reads-law-reviews.html.

¹⁴ William Baude, *The Supreme Court's Secret Decisions*, N.Y. TIMES, Feb. 3, 2015, www.nytimes.com/2015/02/03/opinion/the-supreme-courts-secret-decisions.

portant, and just as consequential, as the decisions that it does explain.

So while the Court's decision to post all briefs on its website is certainly an important step toward greater transparency, a much larger step toward transparency would be for the Court to start publishing explanations for so many of its decisions that currently go unexplained.

IS IT NOW THE *BREYER* COURT?

It seems every year at the Court there's one theme that overtakes stories about the Court at the end of the Term. Last year, it was the idea that there was a new era of unanimity and consensus at the Court. I disagreed with that suggestion at the time,¹⁵ and this Term has borne out my skepticism, as things seemed more contentious than ever at the Court this year. Reporting on oral argument in *Glossip v. Gross* (holding that death row inmates were unlikely to establish that Oklahoma's lethal injection protocol violates the Eighth Amendment), one veteran Supreme Court reporter described the evident "bad blood between the justices" at oral argument.¹⁶ Another veteran reporter noted that the same day as that argument, the Court issued its decision in *Williams-Yulee* (holding that Florida may prohibit the personal solicitation of campaign funds by candidates for judicial office), a case that "generated six overlapping opinions,

html?_r=0; Brianne Gorod, *Cut by the Supreme Court*, SLATE, Sept. 28, 2014, www.slate.com/articles/news_and_politics/jurisprudence/2014/09/supreme_court_denied_cert_to_these_cases_overtime_pay_juvenile_life_sentences.html.

¹⁵ Gorod, *supra* note 3, at 405-09.

¹⁶ James Hohmann, *Q&A with Washington Post Supreme Court Reporter Robert Barnes*, WASH. POST., June 10, 2015, www.washingtonpost.com/news/powerpost/wp/2015/06/10/qa-with-washington-post-supreme-court-reporter-robert-barnes/. The contentiousness continued the day the Court handed down its opinion in the case as four Justices read opinions from the bench: Justice Alito read for the majority, Justices Sotomayor and Breyer both read dissents, and Justice Scalia read from his opinion responding to Breyer's dissent. Amy Howe, *Justices Again Spurn Lethal Injection Challenge: In Plain English*, SCOTUSBLOG, June 29, 2015, www.scotusblog.com/2015/06/justices-again-spurn-lethal-injection-challenge-in-plain-english/.

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some of them laced with venom and scorn,” prompting him to observe that “[t]he Supreme Court seems to be in a foul mood.”¹⁷ Justice Sotomayor even commented this year on how the Justices “can be nasty to each other,” though she said she and her colleagues nonetheless retain respect for each other.¹⁸ The year even seemed less funny overall, and for anyone nervous about taking my word for that (especially after reading this article), the numbers bear that out – only 129 laughs at the Court this year compared to 159 last year.¹⁹

This year’s theme was the Court’s “[s]urprising [m]ove [l]eftward,” as the *New York Times* put it. And there was certainly some evidence to support that claim, as the *Times* demonstrated by looking at the percentage of so-called liberal victories over time. While the “court’s leftward movement is modest,” the *Times* noted, “recent numbers do seem suggestive of a shift.”²⁰ Indeed, this term it was not Kennedy who held the title for the Justice most often in the majority in divided cases (as is most often the case); it was Justice Breyer!²¹

Some of the most significant progressive victories are likely the most familiar: the Court preserved a key provision of the Affordable Care Act in *King v. Burwell*; it recognized that the Constitution requires marriage equality nationwide in *Obergefell v. Hodges*; and it held that the Fair Housing Act allows claims against policies that have a disparate impact on the basis of race in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.* But there were other significant progressive wins, as well: it upheld

¹⁷ Liptak, *supra* note 9.

¹⁸ Jacob Gershman, *Justice Sonia Sotomayor: ‘If You’ve Read Our Decisions, You Know We Can Be Nasty’*, WALL ST. J.L. BLOG, May 12, 2105, blogs.wsj.com/law/2015/05/12/justice-sonia-sotomayor-if-youve-read-our-decisions-you-know-we-can-be-nasty/.

¹⁹ *Compare* twitter.com/SCOTUSHUMOR/status/593781581493510146, with twitter.com/SCOTUSHUMOR/status/461563362162532352.

²⁰ Alicia Parlapiano et al., *The Roberts Court’s Surprising Move Leftward*, N.Y. TIMES, June 29, 2015, www.nytimes.com/interactive/2015/06/23/upshot/the-roberts-courts-surprising-move-leftward.html?_r=0&abt=0002&abg=1.

²¹ SCOTUSblog, Stat Pack for October Term 2014, at 21, June 30, 2015, sblog.s3.amazonaws.com/wp-content/uploads/2015/07/SB_Stat_Pack_OT14.pdf.

the constitutionality of independent redistricting commissions in *Arizona State Legislature v. Arizona Independent Redistricting Commission*; it upheld an important campaign finance restriction in judicial elections in *Williams-Yulee*; and it recognized that the Fourth Amendment imposes limits on the ability of police to prolong traffic stops in *Rodriguez v. United States*.

Some Court watchers rightly pointed out that some of the progressive wins were more defensive than offensive. In other words, in cases like *King* and *Inclusive Communities*, progressives didn't gain ground; they just didn't lose it. And if anything, it was a sign of how conservative the Court is that it was even hearing these cases. After all, the Justices get almost unfettered control over what cases they hear,²² and it's more than a little difficult (especially in the absence of any explanation) to understand why they were hearing cases like *King* and *Inclusive Communities* given the lack of division in the lower courts.

There's certainly something to that argument, but progressives also shouldn't be too quick to snatch defeat from the jaws of victory. After all, some of the wins were true and important wins. Just ask the gay and lesbian couples planning their weddings in Mississippi, or the women who are now able to continue working throughout their pregnancies (*UPS v. Young*), or the potential employees who can no longer be discriminated against because employers don't want to accommodate their religious beliefs (*EEOC v. Abercrombie & Fitch Stores, Inc.*).

And while *King* and *Inclusive Communities* may have been defensive wins, the Court's opinion in each contained powerful messages that progressives can champion. In *King*, the Court showed exactly how courts should interpret statutes – looking to their text, their structure, and their history. And Roberts and Kennedy seemed to make clear that they have no appetite for additional challenges to the Af-

²² They not only get control over which cases to hear, they also can encourage parties to bring certain cases to the Court, as one prominent Court watcher recently noted. Adam Liptak, *With Subtle Signals, Supreme Court Justices Request the Cases They Want To Hear*, N.Y. TIMES, July 6, 2015, www.nytimes.com/2015/07/07/us/supreme-court-sends-signals-to-request-cases-they-want-to-hear.html?_r=1.

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fordable Care Act, stating explicitly that it's not their role to undo what Congress has done. In *Inclusive Communities*, the Court made clear that "[m]uch progress remains to be made in our Nation's continuing struggle against racial isolation," and emphasized the importance of the Fair Housing Act in that struggle.²³ Those are important points, and it's particularly important that Justice Kennedy, who's often the deciding vote in close cases, was the one making them.

After all, while Justice Breyer may have been the Justice in the majority the most this year, it's difficult to deny that in many respects it remains the Kennedy Court. And that means that while this was a good year for progressives, it's way too soon to say the Court is moving to the left. It remains a very conservative Court, but one in which progressives can sometimes win.

CELEBRITIES ON AND OFF THE BENCH

The public may not get a good view of the Justices, but we're nonetheless living in an age of the "Celebrity Justice."²⁴ Justice Ginsburg's visage appears on T-shirts under the "Notorious RBG" moniker;²⁵ she's going to be the subject of a biopic next year;²⁶ and one recent article described her as "look[ing] as rock star as Prince."²⁷ Justice Scalia is the subject of a play called "The Originalist";²⁸ he and Ginsburg both are central to a new opera;²⁹ and there's

²³ 135 S. Ct. 2507, 2525 (2015).

²⁴ Richard L. Hasen, Essay, *Celebrity Justice: Supreme Court Edition* (May 30, 2015), papers.ssrn.com/sol3/papers.cfm?abstract_id=2611729.

²⁵ Notorious R.B.G., notoriousrbg.spreadshirt.com/ (last visited Aug. 3, 2015).

²⁶ Nate Jones, *Notorious Natalie Portman Is Playing Notorious R.B.G.*, VULTURE, May 8, 2015, www.vulture.com/2015/05/natalie-portman-is-playing-ruth-bader-ginsburg.html.

²⁷ Helena Andrews, *Ruth Bader Ginsburg Presides over Opera Singer Alyson Cambridge's Wedding*, WASH. POST, June 1, 2015, www.washingtonpost.com/blogs/reliable-source/wp/2015/06/01/ruth-bader-ginsburg-presides-over-opera-singer-alyson-cambridges-wedding/.

²⁸ Charles Isherwood, Review, *'The Originalist,' About Scalia, Opens in Washington*, N.Y. TIMES, Mar. 27, 2015, www.nytimes.com/2015/03/28/theater/review-the

apparently interest in the fact that Justice Scalia is a *Seinfeld* fan (perhaps people heard him yelling “Serenity Now!” toward the end of the term).³⁰

It’s no wonder then that there’s now a website dedicated to tracking the Justices’ public events,³¹ and this was a year in which many of the Justices made as much news for their statements off the bench as on it. Sometimes the comments were serious. Justice Ginsburg, for example, noted the existence of a “real racial problem” in the United States and deplored that the Court is no longer part of the solution to that problem. The Court “was ‘once a leader in the world’” in addressing racial discrimination, she observed, and “[w]hat’s amazing is how things have changed.”³² Justice Scalia, spoke often about his views on the Constitution and the proper approach to interpreting it. To one group, he bombastically declared that while some of his colleagues may “agonize” about their decisions, he doesn’t “agonize at all. I look at the text, I look at the history of the text. That’s the answer. It’s not my call.”³³

Justice Sotomayor spoke about the lack of professional diversity

originalist-about-scalia-opens-in-washington.html?_r=0.

²⁹ Emily Heil, ‘*Scalia/Ginsburg*’ Opera Draws VIPs of the Legal World, WASH. POST, July 20, 2015, www.washingtonpost.com/blogs/reliable-source/wp/2015/07/20/scaliaginsburg-opera-draws-vips-of-the-legal-world/.

³⁰ Daniel D’Addario, *Why People Love Reading About Supreme Court Justices’ Favorite Movies*, TIME, Oct. 29, 2014, time.com/3545781/ruth-bader-ginsburg-klingshoffer-scalia-duck-dynasty/.

³¹ Welcome to SCOTUS Map., www.scotusmap.com/scotus_events (last visited Aug. 3, 2015).

³² Marcia Coyle, *Ginsburg on Rulings, Race*, NAT’L L.J., Aug. 25, 2014, at 1.

³³ Valerie Richardson, *Scalia Defends Keeping God[-]d, Religion in Public Square*, WASH. TIMES, Oct. 1, 2014, www.washingtontimes.com/news/2014/oct/1/justice-antonin-scalia-defends-keeping-god-religio/. In another talk, Justice Scalia made clear how little anxiety he has about the job: “In response to one question about the pressure he is under, Scalia joked that he doesn’t feel any. ‘What can they do to me?’ Scalia said. ‘It’s even better than academic tenure – I get life tenure!’” Jordan Steffen, *U.S. Supreme Court Justice Scalia Talks State, Church During Speech*, DENVER POST, Oct. 1, 2014, www.denverpost.com/news/ci_26641187/u-s-supreme-court-justice-scalia-give-lectures.

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among the Justices, noting that “diversity on the Court should mean diversity of professional experience, and that we are sorely missing. . . . Those deficits, I think, hurt the perception of the court. It makes people feel that we are not truly representing the views of the entire profession or the views of the country.”³⁴ (This was a very different call for diversity on the bench than Justice Scalia’s in his marriage dissent, lamenting the lack of Protestants and the predominance of individuals from the country’s coasts: “Not a single Southwesterner or even, to tell the truth, a genuine Westerner (California does not count).”³⁵)

Sometimes the Justices’ statements received significant attention because they seemed to hint (at least potentially) at how that Justice would decide a pending case. For example, when Scalia told a group that his “rule for [interpreting statutes] is “garbage in, garbage out[]” . . . ‘If they’ve given me a stupid statute, I am bound by oath to produce a stupid result,’”³⁶ some wondered if he had in mind the Affordable Care Act. Likewise, after the Court discussed at oral argument whether Congress could respond if the Court invalidated the tax credits at issue in the ACA case, Kennedy sparked speculation among Court watchers everywhere when he noted at a congressional hearing that gridlock on Capitol Hill shouldn’t affect the Court’s decisions in pending cases: “Some people say that [the existence of gridlock on Capitol Hill] should affect the way we interpret

³⁴ *Sotomayor Sounds Off: How the Lack of Professional Diversity Is Hurting the High Court*, METROPOLITAN CORP. COUNS., June 3, 2015, www.metrocorp.counsel.com/articles/32523/sotomayor-sounds-how-lack-professional-diversity-hurting-high-court.

³⁵ 135 S. Ct. 2584, at 2629 (Scalia, J., dissenting). Apparently, Scalia’s emphasis on strict interpretation and literalism doesn’t extend to geographical claims; some might call *that* “interpretive jiggery-pokery.” *King v. Burwell*, 135 S. Ct. 2480, 2500 (2015) (Scalia, J., dissenting). Or perhaps Scalia was actually missing Westerner Sandra Day O’Connor – a surprising turn of events given that he purportedly “alienated” her while they served together. TINSLEY E. YARBROUGH, *THE REHNQUIST COURT AND THE CONSTITUTION* 43 (2000).

³⁶ Howard Fischer, *Scalia Critiques Fast and Loose Constitutional Interpretations*, ARIZ. DAILY STAR, May 12, 2015, tucson.com/news/local/govt-and-politics/scalia-critiques-fast-and-loose-constitutional-interpretations/article_2da66d2b-1221-520a-813d-f6670599c7fe.html.

the statutes. That seems to me a wrong proposition. We have to assume that we have three fully functioning branches of the government.”³⁷ And Ginsburg fed speculation that the Court was going to rule in favor of marriage equality when she purportedly emphasized the word “Constitution” when referring to the “powers vested in her by the Constitution of the United States” while officiating at a same-sex wedding.³⁸ But perhaps that last example simply underscores that by the end of the Court’s term, Court watchers are so desperate to know what the Court is doing, they will read into anything.

Finally, not all of the Justices’ comments were serious. For example, at one event Justice Sotomayor revealed that “after years of turning down dance invitations,” she decided she wanted to learn to dance. “I have a trait my colleagues will find very strange,” she quipped, explaining that she “‘can follow’ the men she danced with.” To that, Justice Alito quickly responded, “I think we are going to start dancing in the conference room’ where the justices vote on cases.”³⁹

In short, it was not only a busy year at the Court for the Justices, but a busy year away from the Court. And while lots of apparent Court trends may be ephemeral or overblown, the trend of the Celebrity Justice seems much more likely to stay.

³⁷ Mark Joseph Stern, *No, Justice Kennedy Did Not Just Suggest He’ll Rule Against Obamacare*, SLATE, Mar. 23, 2015, www.slate.com/blogs/the_slatest/2015/03/23/justice_kennedy_did_not_just_suggest_he_will_rule_against_obamacare.html.

³⁸ Maureen Dowd, *Presiding at Same-Sex Wedding, Ruth Bader Ginsburg Emphasizes the Word ‘Constitution,’* N.Y. TIMES, May 18, 2015, www.nytimes.com/politics/first-draft/2015/05/18/presiding-at-same-sex-wedding-ruth-bader-ginsburg-emphasizes-a-key-word/.

³⁹ Tony Mauro, *Three Justices Swap Stories at Yale Law School*, LEGAL INTELLIGENCER, Oct. 29, 2014, at 4. That wasn’t Alito’s only quip at that panel: “Asked what books he has been reading recently, Alito said without missing a beat that at his bedside, he keeps two books that he reads daily – ‘My Grandfather’s Son’ and ‘My Beloved World,’ the memoirs of his fellow panelists Thomas and Sotomayor, respectively.” *Id.*

HAPPY ANNIVERSARY, MR. CHIEF JUSTICE

This was a big year at the Court by any measure, but it was a particularly big year for Chief Justice Roberts who marked his tenth term on the Supreme Court. A lot has already been written (including by me⁴⁰) about Roberts' first decade on the high court, and when it comes to the Chief Justice's performance in his first decade, there's no lack of heated disagreement. But there's one thing that most people, whether they like the Chief or not, do agree on: he has a way with words.

Consider, for example, his opinion in *Williams-Yulee v. Florida Bar*. Court watchers were all surprised when this important campaign finance case produced a 5-4 decision with the Chief Justice joining the Court's more liberal members (an alignment that at this point is almost rarer than cameras getting snuck into the courtroom). But in his opinion for the Court, the Chief Justice made clear why the Court's decision was the right one – and why his vote should have surprised no one. The Chief's often said that he wants the justices to be seen as different than politicians,⁴¹ and whether all of his votes are consistent with that goal, this one clearly was. As he explained, "Judges are not politicians, even when they come to the bench by way of the ballot." Later on, he used some levity to make a serious point about why solicitation by a candidate is different than solicitation by a candidate's campaign committee: "The identity of the solicitor matters, as anyone who has encountered a Girl Scout selling cookies outside a grocery store can attest."⁴²

Williams-Yulee wasn't the only opinion in which he tried to make a larger point about the role of the judiciary. As discussed earlier, he made the same point in *King v. Burwell*, and he also made it in the much lower-profile *Department of Homeland Security v. MacLean* (hold-

⁴⁰ Constitutional Accountability Ctr., Roberts at Ten, theusconstitution.org/Roberts-at10 (last visited Aug. 3, 2015).

⁴¹ Leslie Reed, *Chief Justice Roberts' Visit Draws 500*, UNL TODAY, Sept. 19, 2014, news.unl.edu/newsrooms/unltoday/article/chief-justice-roberts-visit-draws-500/.

⁴² 135 S. Ct. 1656, 1662, 1669 (2015).

ing that the federal whistleblower law applied to an air marshal who publicly disclosed that the TSA had decided to cut costs by eliminating air marshals from certain flights). The Chief made explicit that the government’s concerns about applying whistleblower protections in this circumstance weren’t his problem: “Although Congress and the President each has the power to address the Government’s concerns, neither has done so. It is not our role to do so for them.”⁴³

In other cases, the Chief let his more pragmatic side shine. For example, in *McFadden v. United States* (holding that the federal drug laws require the government to establish that the defendant knew he was dealing with a regulated substance), the Chief provided a “pop quiz” for “any reader who doubts the point [that a defendant’s knowledge of a drug’s identity does not mean he knows it is a controlled substance]: Two drugs – dextromethorphan and hydrocodone – are both used as cough suppressants. They are also both used as recreational drugs. Which one is a controlled substance?”⁴⁴ And in *Bullard v. Blue Hills Bank* (holding that a debtor cannot immediately appeal a bankruptcy court order denying confirmation of a debtor’s proposed repayment plan), the Chief explained why such an order is not “final” and thus does not trigger appellate review: “An order denying confirmation does rule out the specific arrangement of relief embodied in a particular plan. But that alone does not make the denial final any more than, say, a car buyer’s declining to pay the sticker price is viewed as a ‘final’ purchasing decision by either the buyer or seller. ‘It ain’t over till it’s over.’”⁴⁵

⁴³ 135 S. Ct. 913, 924 (2015).

⁴⁴ 135 S. Ct. 2298, 2307-08 (2015) (Roberts, C.J., concurring in part and concurring in the judgment). According to the Chief’s opinion, “[t]he answer is hydrocodone.” *Id.* at 2308 n.*.

⁴⁵ 135 S. Ct. 1686, 1693 (2015). The Chief’s opinion in that case also contained an oblique reference to the popular children’s game *Chutes and Ladders*. See *id.* (“As Bullard’s case shows, each climb up the appellate ladder and slide down the chute can take more than a year. Avoiding such delays and inefficiencies is precisely the reason for a rule of finality.”). But the top two references to popular children’s items this Term have to go to Justice Kagan. See *Kimble v. Marvel Entmt., LLC*, 135 S. Ct. 2401, 2415 (2015) (“What we can decide, we can undecide. But *stare decisis* teaches that we should exercise that authority sparingly. Cf. S. Lee and S.

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That last line may have had special resonance for the Chief Justice this year as lots of people said that this Term would be a defining one for his ultimate legacy. After all, as important as this Term and its cases will be to Roberts' legacy, it's also certainly true that the story of Roberts' tenure as Chief Justice "ain't over till it's over." And it's unlikely to be over for quite some time.

CONCLUSION

This was a big year at the Court, but the subjects of this Essay are all stories-in-progress. And for many of them, much of the story remains to be written. What happens next year and in the years to come will do a lot to define the reputation of not only the Court, but also the Justices that currently sit on it.



Ditko, *Amazing Fantasy* No. 15: "Spider-Man," p. 13 (1962) ('[I]n this world, with great power there must also come – great responsibility'); *Yates v. United States*, 135 S. Ct. 1074, 1091 (2015) (Kagan, J., dissenting) ("A fish is, of course, a discrete thing that possesses physical form. See generally Dr. Seuss, *One Fish Two Fish Red Fish Blue Fish* (1960).").