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## FOREWORD: THE SUPREME COURT'S SHADOW DOCKET

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## FOREWORD: THE SUPREME COURT'S SHADOW DOCKET

**William Baude\***

### ABSTRACT

The 2013 Supreme Court Term provides an occasion to look beyond the Court's merits cases to the Court's shadow docket – a range of orders and summary decisions that defy its normal procedural regularity.

I make two claims: First, many of the orders lack the transparency that we have come to appreciate in its merits cases. Some of those orders merit more explanation,

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and should make us skeptical of proposals to depersonalize the Court.

Second, I address summary reversal orders in particular. As a general matter, the summary reversal has become a regular part of the Supreme Court's practice. But the selection of cases for summary reversal remains a mystery. This mystery makes it difficult to tell whether the Court's selections are fair.

I catalogue the Roberts Court's summary reversals and suggest that they can be grouped into two main categories — a majority that are designed to enforce the Court's supremacy over recalcitrant lower courts, and a minority that are more akin to ad hoc exercises of prerogative, or "lightning bolts." The majority, the supremacy-enforcing ones, could be rendered fairer through identification of areas where lower-court willfulness currently goes unaddressed. We may simply be stuck with the lightning bolts.

## I. BEYOND THE MERITS CASES

We saw another side of the Supreme Court this year. As the Court left town for the summer, observers noted that the term's cases were not as dramatic or far-reaching as in previous years.<sup>1</sup> Indeed, the biggest term-ender, *Burwell v. Hobby Lobby*, was not even a constitutional case.<sup>2</sup> The view that the Term's merits cases were a fizzle rather than a bang provides an occasion to examine the rest of the Court's work.<sup>3</sup>

Outside of the merits cases, the Court issued a number of noteworthy rulings which merit more scrutiny than they have gotten. In important cases, it granted stays and injunctions that were both debatable and mysterious. The Court has not explained their legal basis

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<sup>1</sup> E.g., Adam Liptak, *Compromise at the Supreme Court Veils Its Rifts*, N.Y. TIMES (July 1, 2014) at <http://www.nytimes.com/2014/07/02/us/supreme-court-term-marked-by-unanimous-decisions.html> (“[t]he term lacked huge and profoundly divisive cases like those that ended the last two terms.”). See also Laurence H. Tribe, *It Wasn't a Pivotal Year, but the Wind Blows Conservative*, SLATE (July 1, 2014), [http://www.slate.com/articles/news\\_and\\_politics/the\\_breakfast\\_table/features/2014/scotus\\_roundup/supreme\\_court\\_2014\\_a\\_year\\_of\\_uncertainty.html](http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2014/scotus_roundup/supreme_court_2014_a_year_of_uncertainty.html).

<sup>2</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). By my estimation, the last term of which that was true was OT 2008's culmination in *Ricci v. DeStefano*, 557 U.S. 557 (2009).

<sup>3</sup> Like Fred Schauer did in his 2005 foreword, “I depart from the expectations of the Foreword genre, one in which all Terms are more important than average.” Frederick Schauer, *Foreword: The Court's Agenda - and the Nation's*, 120 HARV. L. REV. 4, 64 (2006).

and it is not even clear to what extent individual Justices agree with those decisions.

It has also continued its long-debated practice of summary reversal of lower-court decisions. Those summary reversals have become more transparent and procedurally regular over time, but this Term's developments should prompt a more careful examination of which cases are selected for summary reversal and why. Why, for example, do pro-government habeas cases so dominate the summary reversal docket? Are there not a similar number of civil rights cases in need of correction in the opposite direction?

This Foreword examines both these aspects of the Court's docket, and argues that they deserve attention and possibly reform. People criticize the Court's merits cases for being political, unprincipled, or opaque. But those criticisms may be targeted at the wrong part of the Court's docket. It is the non-merits work that should most raise questions of consistency and transparency.

That said, I should emphasize that my ultimate normative assessments are modest and tentative. I do not cast my lot with those who think that the Court's work is all politics rather than law, who demand term limits for the Justices, or who think it important that the Court televise its proceedings or publish more of its internal work-product.

My point is just that the Court's non-merits orders do not always live up to the high standards of procedur-

al regularity set by its merits cases, and that it may be possible for its performance to be improved. Even if it cannot be, a better understanding of the orders list should make us skeptical of some efforts to reform the Court's merits processes.

Only a few weeks into the 2014 Term, the orders list remains front-and-center, with high-profile inactivity in the same-sex marriage cases,<sup>4</sup> and divided decisions about stays in a range of cases.<sup>5</sup> As the orders list comes to new prominence, understanding the Court requires us to understand its non-merits work — its shadow docket.

#### A. THIS YEAR'S ORDERS

The orders list is not the hottest topic in Supreme Court scholarship. Every year, various journals publish

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<sup>4</sup> Robert Barnes, *The Supreme Court's Actions Are Monumental, But the Why of Its Reasoning Often Missing*, WASH. POST (Oct. 12, 2014), [http://www.washingtonpost.com/politics/courts\\_law/supreme-courts-actions-are-monumental-but-the-why-of-its-reasoning-often-missing/2014/10/12/ca1ccc9c-4fca-11e4-8c24-487e92bc997b\\_story.html](http://www.washingtonpost.com/politics/courts_law/supreme-courts-actions-are-monumental-but-the-why-of-its-reasoning-often-missing/2014/10/12/ca1ccc9c-4fca-11e4-8c24-487e92bc997b_story.html); Adam Liptak, *Justices Drawing Lines With Terse Orders in Big Cases*, N.Y. TIMES (Oct. 27, 2014), [http://www.nytimes.com/2014/10/28/us/supreme-court-with-terse-orders-has-judges-and-lawyers-reading-tea-leaves.html?\\_r=0](http://www.nytimes.com/2014/10/28/us/supreme-court-with-terse-orders-has-judges-and-lawyers-reading-tea-leaves.html?_r=0).

<sup>5</sup> See, e.g., Order, *Veasey v. Perry*, No. 14A393 (Oct. 18, 2014); Order, *Frank v. Walker*, No. 14A352 (Oct. 9, 2014); Order, *North Carolina v. League of Women Voters*, No. 14A358 (Oct. 8, 2014).

symposia and special issues devoted to the Supreme Court. The vast majority of the pieces published in those fora are about the opinions in the merits cases.<sup>6</sup> The merits cases are at the center of the Court's regular sessions, which generally start at 10 a.m. and feature regular oral arguments as well as the announcement of opinions in a public ceremony.

The orders list issues without ceremony, half an hour earlier. And until two years ago, the orders list was even more overshadowed by the merits activity, because it issued at the same time, but again without ceremony.<sup>7</sup> Now it at least gets a 30-minute head start.

The most frequent orders are those granting or denying certiorari.<sup>8</sup> But they are not the only ones, and the 2013 Term brought a surfeit of others. One of the Court's last merits opinions was its much-discussed *Hobby Lobby*

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<sup>6</sup> See, e.g., John Manning, *Foreword: The Means of Constitutional Power*, 1284 HARV. L. REV. 1 (2014); and each piece in this volume. I should note that the same could be said about my prior work. See William Baude, *Interstate Recognition of Same-Sex Marriage After Windsor*, 8 N.Y.U. J.L. & LIBERTY 150 (2013); William Baude, *Sharing the Necessary and Proper Clause*, 124 HARV. L. REV. F. 39 (2014) (responding to Manning, *supra* this note).

<sup>7</sup> Press Release, Supreme Court, Regularly Scheduled Order Lists (Sept. 24, 2012) [http://www.supremecourt.gov/publicinfo/press/pressreleases/pr\\_09-24-12](http://www.supremecourt.gov/publicinfo/press/pressreleases/pr_09-24-12). There are also irregular orders that issue as needed.

<sup>8</sup> The certiorari process has received some scholarly attention. See, e.g., Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA. L. REV. 1 (2011); Amanda L. Tyler, *Setting the Supreme Court's Agenda: Is There A Place for Certification?*, 78 GEO. WASH. L. REV. 1310 (2010).



decision, which concerned a claim for religious exemption from a federal mandate to provide contraception. A few days later, the orders list contained a related dispute, this time about the procedures required to take advantage of the exemption. That second case, brought by Wheaton College, featured a lengthy dissent by Justice Sotomayor (and joined by two other Justices) which accused the Court of contradicting its own decision in *Hobby Lobby* – “undermin[ing] confidence in this institution” – and, more prosaically, of improperly using the All Writs Act.<sup>9</sup>

The immediate precedent for the ruling was also an orders list episode. In *Little Sisters of the Poor v. Sebelius*, the Court had granted a temporary injunction to another religious institution that had similar procedural objections.<sup>10</sup> Justice Sotomayor herself granted Little Sisters a temporary stay on New Year’s Eve,<sup>11</sup> (just before she led the countdown for the ball-drop in Times Square). A longer stay was granted by the whole Court in late January. In her *Wheaton College* dissent, Justice Sotomayor

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<sup>9</sup> *Wheaton College v. Burwell*, 134 S. Ct. 2806, 2808 (2014).

<sup>10</sup> 134 S. Ct. 1022 (2014).

<sup>11</sup> 134 S. Ct. 893 (2013). Technically, “the disposition of applications to Justices in chambers without opinion are not listed in the Supreme Court’s orders list,” Daniel M. Gonen, *Judging in Chambers: The Powers of A Single Justice of the Supreme Court*, 76 U. CIN. L. REV. 1159, 1226 (2008), but they are part of the non-merits docket.

objected that the “unusual order” in *Little Sisters* was distinguishable, and also seemed skeptical about its merits.<sup>12</sup>

The orders list also featured repeated litigation about whether to temporarily pause lower-court decisions that authorized same-sex marriage. In *Herbert v. Kitchen*, the Supreme Court stayed a federal ruling in Utah while it was on appeal.<sup>13</sup> A stay was granted in another Utah case in late June.<sup>14</sup>

Those orders were controversial but important. In an insightful opinion in one case pending in the Ninth Circuit, Judge Andrew Hurwitz wrote that while his own view of the procedural requirements would not have justified a stay, the Supreme Court’s order in *Kitchen* “virtually instructed courts of appeals to grant stays in the circumstances before us today.”<sup>15</sup> He concluded:

Although the Supreme Court’s terse two-sentence order did not offer a statement of reasons ... and although the Supreme Court’s order in *Herbert* is

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<sup>12</sup> *Wheaton College*, 134 S. Ct. at 2815..

<sup>13</sup> 134 S. Ct. 893 (2014).

<sup>14</sup> *Herbert v. Evans*, No. 14A65, 2014 U.S. LEXIS 4715 (July 18, 2014).

<sup>15</sup> *Latta v. Otter*, No. 14-35420, 2014 U.S. App. LEXIS 16057, at \*15 (9th Cir. May 20, 2014) (order granting stay and expediting briefing).

not in the strictest sense precedential, it provides a clear message — the Court (without noted dissent) decided that district court injunctions against the application of laws forbidding same-sex unions should be stayed at the request of state authorities pending court of appeals review.<sup>16</sup>

But other courts refused to stay their orders until the Supreme Court stepped in once again.<sup>17</sup> None of the Court's orders contained any explanation.

The lack of explanation was compounded when the Court then denied certiorari in all of these cases at the end of the summer. The Court almost never provides explanation for the denial of certiorari, but one would have guessed that the stays were premised on the probability that the Court would take up the issue. So something unusual was going on, but we don't know what. In November, Justice Thomas expressed puzzlement about the issue too — or feigned it? — noting dryly that

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<sup>16</sup> *Id.*

<sup>17</sup> See *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014); *Bostic v. Schaefer*, No. 14-1167 (4th Cir. Aug. 13, 2014); *McQuigg v. Bostic*, 14A196, 2014 WL 4096232 (U.S. Aug. 20, 2014) (motion to stay mandate denied).

the Court had declined to review the marriage cases “for reasons that escape me.”<sup>18</sup>

On the more macabre side, the orders list also features the Court’s routine encounters with the “machinery of death.”<sup>19</sup> The Court regularly receives last-minute filings debating whether a pending execution should be stayed.<sup>20</sup> This year, the results made headlines after Joseph Wood spent nearly two hours seemingly gasping for air before ultimately dying from lethal injection.<sup>21</sup> The execution happened because of a Supreme Court order, which vacated a stay that had been imposed by the Ninth Circuit over internal dissent.<sup>22</sup>

While it is unclear at the time of this writing what precisely happened in the Wood execution, the Supreme Court’s order bestowed a gruesome prescience upon an

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<sup>18</sup> *Maricopa County v. Lopez-Valenzuela*, No. 14A493, 2014 WL 5878739, at \*2 (Nov. 13, 2014) (Thomas, J. respecting the denial of a stay).

<sup>19</sup> The phrase was made famous on the orders list — by Justice Blackmun’s dissent from denial of certiorari in *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (“From this day forward, I no longer shall tinker with the machinery of death.”). The phrase also appears in *Rumbaugh v. McCotter*, 473 U.S. 919, 920 (1985) (Marshall, J., dissenting from denial of certiorari).

<sup>20</sup> See STEPHEN M. SHAPIRO, KENNETH S. GELLER, TIMOTHY S. BISHOP, EDWARD A. HARTNETT, & DAN HIMMELFARB, *SUPREME COURT PRACTICE* 351 n.108 (10th ed. 2013) (describing this process).

<sup>21</sup> Fernando Sanchez & John Schwartz, *A Prolonged Execution in Arizona Leads to a Temporary Halt*, N.Y. TIMES (July 25, 2014) at A16, available at [http://www.nytimes.com/2014/07/25/us/a-prolonged-execution-in-arizona-leads-to-a-temporary-halt.html?\\_r=0](http://www.nytimes.com/2014/07/25/us/a-prolonged-execution-in-arizona-leads-to-a-temporary-halt.html?_r=0).

<sup>22</sup> *Ryan v. Wood*, 189 L. Ed. 2d 873 (2014).

opinion by Chief Judge Kozinski dissenting in the proceedings below. Kozinski had argued that lethal injections were a “misguided effort to mask the brutality of executions” and that firing squads(!) ought to be reinstated instead: “Sure, firing squads can be messy, but if we are willing to carry out executions, we should not shield ourselves from the reality that we are shedding human blood.”<sup>23</sup>

The list could go on. Just for instance: At the start of the term, the Court ordered the parties to show up to argument prepared to discuss a specific, named, amicus brief.<sup>24</sup> During the summer the Court also opened an inquiry into a capital defense lawyer accused of filing a certiorari petition without the authorization of, or over the objection of, his putative client.<sup>25</sup> And just a week before the official end of the 2013 term, the Court issued

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<sup>23</sup> *Wood v. Ryan*, 759 F. 3d 1076, 1103 (9th Cir. 2014) (Kozinski, C.J., dissenting from the denial of hearing en banc). Cf. Robert Cover, *Violence and the Word*, 95 *YALE L.J.* 1601, 1609 (1986) (“The judges deal pain and death”).

<sup>24</sup> *Atl. Marine v. U.S. Dist. Ct.*, 134 S. Ct. 50 (2013) (“Motion of Professor Stephen E. Sachs for leave to participate in oral argument as amicus curiae and for divided argument denied. Parties, however, should be prepared to address at oral argument the arguments raised in the brief of Professor Stephen E. Sachs as amicus curiae in support of neither party.”).

<sup>25</sup> *Ballard v. Pennsylvania*, 134 S. Ct. 2842 (2014) (denying certiorari to the Supreme Court of Pennsylvania); *Ballard v. Pennsylvania*, No. 13-9364, 2014 WL 3891551 (U.S. Aug. 11, 2014).

a divided 5-4 stay authorizing the state of Ohio to reduce the days available for early voting.<sup>26</sup>

#### B. PROCEDURAL REGULARITY

None of these orders is necessarily wrong, but they raise questions of procedural regularity — i.e., of the consistency and transparency of the Court's processes.

The Court's procedural regularity is at its high point when it deals with the merits cases. Observers know in advance what cases the Supreme Court will decide, and they know how and when the parties and others can be heard. We know what the voting rule is; we know that the results of the voting rule will be explained in a reasoned written opinion; and we know that each Justice will either agree with it or explain his or her disagreement.<sup>27</sup>

Indeed, procedural regularity begets substantive legitimacy. The Court is subject to accusations that it is

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<sup>26</sup> *Husted v. Ohio NAACP*, No. 14A336 2014 WL 4809069 (U.S. Sept. 29, 2014).

<sup>27</sup> While there are occasional charges that the Court cuts corners in the end-of-term rush, the opinions are still dozens of pages long and have been in progress for months.

excessively political,<sup>28</sup> but lawyers and the public nonetheless treat its decisions as uniquely conclusive.<sup>29</sup> A sense that its processes are consistent and transparent makes it easier to accept the results of those processes, win or lose.<sup>30</sup>

The Court's procedural regularity may even facilitate its air of mystery. While the Court follows regular processes to produce public and reasoned opinions, its internal deliberations are afforded far more secrecy than the other two branches. It also resists televising even its public proceedings, and individual nominees and Justices regularly refuse to disclose their views on important issues. Perhaps this mystery is tolerated in part because of the Court's regularity; we know that like clockwork the Court will eventually provide us with a lineup and extensive reasoning for both sides of its disputed cases. Indeed, perhaps the Court's authority is enhanced by having this mystery funneled through its regular processes.<sup>31</sup>

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<sup>28</sup> E.g., ERWIN CHEMERINSKY, *THE CASE AGAINST THE SUPREME COURT* (2014); ERIC SEGALL, *SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES* (2012).

<sup>29</sup> Cf. William Baude, *Jurisdiction and Constitutional Crisis*, 64 FLA. L. REV. F. 47 (2012).

<sup>30</sup> See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 106-109 (2d ed. 2006).

<sup>31</sup> Thanks to Josh Chafetz for raising the points in this paragraph. For skepticism about the legitimating value of Supreme Court opinions, see Earl M. Maltz, *The Function of Supreme Court Opinions*, 37 HOUS. L. REV. 1395, 1398 (2000).

But the orders process, by contrast, is sometimes ad hoc or unexplained. For an instance of the ad hoc, consider the device of singling out an amicus brief for specific discussion at oral argument. One can imagine sensible reasons for making this a regular practice. The Court jealously guards oral argument time and rarely allows non-governmental interlopers.<sup>32</sup> As amicus briefs proliferate, the parties may not be ready for probing questions about all of them. So such an order provides a device for the Court to make oral argument more productive without having to allow amicus argument.

Perhaps, then, it should be used more often, and perhaps not just for amici. Surely there are a lot of cases where oral argument would be more productive if the Court instructed the parties to come prepared to discuss specific issues that weren't adequately briefed.<sup>33</sup> And yet it is easy to see how this practice would create complications of its own — how would the Justices decide what issues to list? What would happen when they disagreed? And would the listing practice encourage strategic behavior at the expense of the quasi-spontaneity that makes oral argument valuable? The Court does not

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<sup>32</sup> See SUP. CT. R. 28.7 (“Such a motion will be granted only in the most extraordinary circumstances.”); SUPREME COURT PRACTICE, *supra* note 20, at 781-783.

<sup>33</sup> See Daniel Bussell, *Opinions First – Argument Afterwards*, 61 UCLA L. REV. 1194, 1233 n.118 (2014) (discussing use of such instructions by some appellate courts).



seem to have resolved these concerns in either direction, so the one-off order seems ad hoc.

As for the inexplicable: The lack of explanation for the *Wheaton College* injunction and the same-sex marriage stays was more consequential. On one hand, they seem to have been motivated by a common-sense desire to preserve the status quo. But the Court has rules for these things, and it is not easy to tell how they permitted these orders. For instance, in her *Wheaton College* dissent, Justice Sotomayor pointed out that members of the majority had previously written that an injunction could issue only if the plaintiffs' entitlement to relief was "indisputably clear."<sup>34</sup> The majority seemed to reject this standard by protesting that its "order should not be construed as an expression of the Court's views on the merits,"<sup>35</sup> but did not explain more. The Court issued a four-paragraph unsigned opinion that left the legal standard and its legal basis a mystery.<sup>36</sup>

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<sup>34</sup> *Wheaton College v. Burwell*, 134 S. Ct. 2806, 2810 n.3 (2014) (discussing *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers); & *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)).

<sup>35</sup> *Wheaton College*, 134 S. Ct. at 2807; Justice Scalia concurred only in the result and hence the disclaimer cannot be attributed to him.

<sup>36</sup> Richard Re raises the intriguing possibility that "the Court may have implicitly narrowed the scope of the 'indisputably clear' standard, so that—going forward—it will apply only to decisions issued by individual justices acting in chambers. Supporting this possibility, some of the in-chambers opinions emphasize the enormity of allowing a single justice to issue an injunction, so perhaps the Court felt that it could

With respect to the same-sex marriage stays, I have briefly touched on the mystery about granting the stays and then denying certiorari. Even putting that aside, what was the irreparable harm suffered by the state in the absence of a stay, if marriages were provisionally recognized over the summer? Was the theory that the state might have been required to recognize the marriages permanently, even if it had prevailed? Or did the Court as a whole intend to finally endorse the categorical claim that “any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury”<sup>37</sup>? That quotation had appeared in two prior stays entered by single Justices, where it was not dispositive. Its one other appearance was in Justice Scalia’s concurring opinion in a 5-4 dispute earlier in the 2013 term over the propriety of a stay arising out of a new Texas abortion law; in

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apply a lower standard once the application had been referred to the entire Court. If this is right, then the ‘indisputably clear’ standard – whatever its prior force as precedent – is no longer the governing test.” *What Standard of Review Did the Court Apply in Wheaton College*, RE’S JUDICATA (July 5, 2014) at <http://richardresjudicata.wordpress.com/2014/07/05/what-standard-of-review-did-the-court-apply-in-wheaton-college/> (also noting four other possibilities, and observing that “all of this is speculation”).

<sup>37</sup> *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). See *Application to Stay Mandate Pending Appeal at 17-18, McQuigg v. Bostic*, 189 L. Ed. 2d 884 (2014) (No. 14A196).

that case it might have been conceded by the four dissenters, but again it is hard to tell.<sup>38</sup>

The lower courts are apparently having a hard time telling too. Consider the very recent litigation over Wisconsin's voter-identification law in the Seventh Circuit: Two sets of opinions disputed whether the court should grant a stay. A panel of the court specifically pointed to the Supreme Court's same-sex marriage stays as evidence of "the public interest" supporting a stay.<sup>39</sup> The panel did not even mention irreparable injury. The citation of the same-sex marriage stays seemed to operate as a substitute.

An opinion for five judges dissenting from the denial of rehearing en banc pointed out that the panel had ignored irreparable-injury requirement, even though the Supreme Court had elsewhere called it one of the two

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<sup>38</sup> Compare *Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott*, 134 S. Ct. 506 (2013) (Scalia, J., concurring) ("The dissent does not quarrel with that conclusion either."); *with id.* at 507 (Breyer, J., dissenting) (not discussing that passage, but contrasting the "permanent" harms to the plaintiffs with the state's).

<sup>39</sup> *Frank v. Walker*, 769 F. 3d 494 (2014) (per curiam). The stay was subsequently vacated by the Supreme Court "pending the timely filing and disposition of a petition for a writ of certiorari," over the dissent of three Justices and with no explanation. *Frank v. Walker*, 190 L. Ed. 2d (2014).

“most critical” stay factors.<sup>40</sup> As for the same-sex marriage stays, the dissent explained:

The uncertainty, confusion, and long-term harm that would result from allowing thousands of marriages that are valid for a time but might later be wiped away led to the stays in those cases.<sup>41</sup>

But this passage did not cite an explanation by the Court – because there has not been any. Both sides of the en banc dispute were treating Supreme Court orders as quasi-precedential. But it is difficult for lower courts to follow the Supreme Court’s lead without an explanation of where they are being led.

Not only are we often ignorant of the Justices’ *reasoning*, we often do not even know the *votes* of the orders with any certainty. While Justices do sometimes write or note dissents from various orders, they do not always note a dissent from an order with which they disagree. Justice Ginsburg recently told us, “when a stay is de-

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<sup>40</sup> *Id.* (dissent from denial of rehearing en banc, Sept. 30, 2014) at 12 (citing *Nken v. Holder*, 556 U.S. 418, 435-436 (2009)).

<sup>41</sup> *Id.* at 13.

nied, it doesn't mean we are in fact unanimous."<sup>42</sup> And in a recent summary reversal decision, Justice Alito wrote: "The granting of a petition for plenary review is not a decision from which Members of this Court have customarily registered dissents, and I do not do so here."<sup>43</sup> This makes it hard for outside observers to conclude that the failure to dissent necessarily signals agreement with the majority course.

When combined with the minimal explanations for these rulings, the result is a Court in which we know very little about what the individual Justices think about their own procedures. For instance, in the *Wheaton College* episode, the Court first issued a temporary injunction for several days to have the issue fully briefed<sup>44</sup> before issuing the second injunction discussed above. Justice Sotomayor noted a dissent from both orders. Justice Breyer noted a dissent from the first and not the second.

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<sup>42</sup> Mark Sherman, *Justices' silence after votes on executions underscores contrast*, ASSOCIATED PRESS (Aug. 4, 2014), <http://www.bostonglobe.com/news/nation/2014/08/03/justices-silent-over-use-lethal-injection/bxqqmUd8npBt0RNPxIPAYO/story.html>. Cf. Elena Kagan, *Remarks Commemorating Celebration 55: The Women's Leadership Summit*, 32 HARV. J. L. & GENDER 233, 236 (2009) (discussing un-noted dissents from 1876 order denying Belva Lockwood admission to the Supreme Court bar).

<sup>43</sup> *Tolan v. Cotton*, 134 S. Ct. 1861, 1868 (2014) (Alito, J., concurring); *Ohio v. Price*, 360 U.S. 246, 250 (1959) (various opinions). *But see, e.g., Spears v. United States*, 555 U.S. 261, 268 (2009) (noting that "Justice Kennedy would grant the petition for a writ of certiorari and set the case for oral argument" and that "Justice Thomas dissents").

<sup>44</sup> 134 S. Ct. 2898 (2014).

Justices Kagan and Ginsburg noted a dissent from the second and not the first. None of Breyer, Ginsburg, or Kagan wrote anything explaining *why* they treated the orders differently, and given Justice Ginsburg's recent statement, we cannot even tell *whether* all of them did.

### C. AN ASSESSMENT

The previous observations about the Court's procedural irregularity are not meant as an indictment. Nor do I mean to suggest that the Court's orders should all attempt to duplicate the regular process of merits consideration and adjudication. When acting on the orders docket the Court faces important constraints.

First, there is the time constraint. The merits cases proceed at the Court's chosen pace. The only two time pressures are the Court's self-imposed start-of-summer deadline for finishing the Term's work, and the general scarcity of the Court's attention, famously charted by Henry Hart.<sup>45</sup> The orders list, by contrast, often faces stronger time pressure. In some cases the question is part of an ongoing case whose schedule might be de-

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<sup>45</sup> Henry M. Hart, Jr., *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959).

layed. In other cases the very question is whether the Court should pause proceedings in the lower courts, so taking too long to decide is a *de facto* decision. And some cases involve external deadlines in the outside world – elections, executions, fire sales, etc. So it is not objectionable that the Court sometimes trades procedural regularity for speed.<sup>46</sup>

Second, it may not be possible to have a fully prescribed set of procedures for orders. The orders sometimes respond to unexpected or unusual developments in a given case, and the nature of the unexpected is that it is hard to prepare for it in advance. For all the reasons that standards are sometimes preferable to rules, some of the orders ultimately come down to non-codified discretion.

The Court's general taciturnity may reflect responsibility in light of its awareness of these constraints. In the merits cases, the Justices can make thoughtful, well-considered choices. When they can't do that on the orders list, perhaps they at least want to make as few waves as possible, while minimizing the long-term sys-

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<sup>46</sup> See *Nken v. Holder*, 556 U.S. 418, 421 (2009) (“‘No court can make time stand still’ while it considers an appeal, and if a court takes the time it needs, the court’s decision may in some cases come too late for the party seeking review.”) (quoting *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 9 (1942)).

temic consequences of thoughtlessness.<sup>47</sup> Taciturnity helps draw our eyes away from the orders and towards the long, reasoned merits opinions where the Court's confidence may be higher.

All that said, some critical analysis is warranted. For instance, even if there is no change to any of the orders procedures, a comparison might nonetheless make us more skeptical of certain proposals to reform the *merits* procedures.

Reformers sometimes argue that we should have a less ego-driven court — one in which the Justices spend less time guarding their own public image or worrying about personal consistency, and more time as anonymous contributors to the institutional Court.<sup>48</sup> The current practice of the orders list provides a glimpse of what such a reform would look like to the outside world.<sup>49</sup>

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<sup>47</sup> Thanks to Richard Re for emphasizing this point. For a discussion of the Court's ability to avoid the merits, see Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961). For a discussion of its ability to avoid making law even when it reaches the merits, see Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 101 (1996).

<sup>48</sup> Craig S. Lerner & Nelson Lund, *Judicial Duty and the Supreme Court's Cult of Celebrity*, 78 GEO. WASH. L. REV. 1255, 1276-1283 (2010); James Markham, *Against Individually Signed Judicial Opinions*, 56 DUKE L.J. 923 (2006); for a contrary view, see Ira P. Robbins, *Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curiam Opinions*, 86 TUL. L. REV. 1197, 1242 (2012).

<sup>49</sup> Robert Post has also shown that there were stronger norms against publicizing dissents during the Taft Court. Robert Post, *The Supreme Court Opinion As Institution-*



On the basis of that glimpse, I think there is much to be said in favor of individual accountability. As a theoretical matter, it is not necessarily possible for the Court to display perfect consistency across cases, but it is possible to ask “each Justice to develop a principled jurisprudence and to adhere to it consistently.”<sup>50</sup> And as a practical matter, the orders list suggests that when individual personalities, and therefore individual reputations, are taken out of the Court’s practice, the results might not always be as thoughtful.

Indeed, we have confirmation of this practical point from the Justices themselves. When Justice Ginsburg was still Judge Ginsburg she wrote that “[d]isclosure of votes and opinion writers . . . serves to hold the individual judge accountable” and “puts the judge’s conscience and reputation on the line.”<sup>51</sup> Similarly, Justice Scalia has noted the effect of individual accountability on the Justices: “Even if they do not personally write the majority or the dissent, their name will be subscribed to the one view or the other. They cannot, without risk of pub-

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*al Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1309-1328 (2001) (discussing abandoned practice of “silent acquiescence” in merits opinions).

<sup>50</sup> Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 832 (1982).

<sup>51</sup> Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 140 (1990).

lic embarrassment, meander back and forth – today providing the fifth vote for a disposition that rests upon one theory of law, and tomorrow providing the fifth vote for a disposition that presumes the opposite.”<sup>52</sup>

And if the Justices are right about the effect of individual accountability in the merits cases, maybe there is something to be said for a little more accountability in the orders too. Even if the orders cannot and should not attempt to imitate full dress merits opinions, maybe they shouldn't always come out naked. For instance, the Court could move toward a norm of more transparency about the votes. It could also provide explanations for some of its more noteworthy actions. For instance, when the Court acts to reverse the decision of a court below, or acts over a Justice's published dissent, it could provide at least a brief explanation of the point of disagreement.<sup>53</sup>

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<sup>52</sup> Antonin Scalia, *The Dissenting Opinion*, 19 SUP. CT. HIST. J. 33, 43 (1994). This is not to say that judges should never change their minds over the course of their career. See Justin Driver, *Judicial Inconsistency As Virtue: The Case of Justice Stevens*, 99 GEO. L.J. 1263, 1270-1274 (2011); accord Scalia, *supra* this note, at 43-44. But they shouldn't "meander" from day to day, or at least ought to explain themselves if they do. *Id.* at 43.

<sup>53</sup> A dissent might also provide occasion for all of the Justices to disclose whether they agree with the majority. Cf. U.S. CONST. art. I, sec. 5, cl. 3, which allows a fifth of a House to require the "yeas and nays . . . on any question" to "be entered on the journal." For more general discussion of such "submajority voting rules," see ADRIAN VERMEULE, *MECHANISMS OF DEMOCRACY* 85-113 (2007).

The need for improvement is not urgent, but it is nagging. It would be far too hasty to say that the orders decisions are thoughtless or the result of unjustified inconsistency. But the Court could do more to reassure us that they are not.

## II. THE SUMMARY REVERSAL DOCKET

One of the more momentous occurrences on the Court's orders list are its summary reversals. These are orders issued in response to petitions for certiorari: Rather than follow the typical course of granting the petition and scheduling the case for briefing and oral argument, the Court will simultaneously grant the petition and decide the case on the merits, dispensing with further procedure. Unlike the merits opinions, they are not announced from the bench by their author (and are generally *per curiam*).

These orders raise different questions of transparency and consistency. Summary reversals have become a regular part of the Court's practice, and the Court generally provides reasoned explanations for its decision to reverse. But the 2013 Term raises questions about why particular cases are selected for the Court's attention in the first place.

#### A. REGULARIZING SUMMARY REVERSALS

The summary reversal has come a long way. Sixty years ago, Professor Albert Sacks's brief foreword for the Harvard Law Review expressed tentative misgivings about the Court's summary reversal practice and suggesting it deserved further study.<sup>54</sup> A few years later, Professor Ernest Brown's own foreword was entirely devoted to criticizing the enterprise of summary reversal on grounds of procedural irregularity.<sup>55</sup> Brown noted that the Court's then-current rules and practices "all militate to foreclose a comprehensive statement of the merits, even in compressed form."<sup>56</sup> Looking at the pattern of recent summary reversals from the Court he also concluded that many of them were not obvious enough to justify reversal, and criticized the Court's failure to explain its rulings.<sup>57</sup> He suggested that the Court reverse only after ordering supplemental merits briefing, and preferably after hearing oral argument.<sup>58</sup>

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<sup>54</sup> Albert M. Sacks, *Foreword*, 68 HARV. L. REV. 96, 103 (1954). This was of course the year of *Brown v. Board of Board of Education*, 347 U.S. 483 (1954), to which Sacks devoted just over three of his seven pages. Some of the Court's summary reversals were desegregation cases, but by no means all.

<sup>55</sup> Ernest J. Brown, *Foreword: Process of Law*, 72 HARV. L. REV. 77 (1957).

<sup>56</sup> *Id.* at 80.

<sup>57</sup> *Id.* at 82, 90. Many of the decisions were tax cases.

<sup>58</sup> *Id.* at 94-95.

In his own Harvard Law Review foreword two years later, Henry Hart called Brown's piece "devastating."<sup>59</sup> The leading Supreme Court practice treatise picked up on the criticisms too and repeatedly advocated that the Court curtail the procedure of summary reversal.<sup>60</sup>

Yet the summary reversal practice has not ceased, and wholesale criticism is fading. The current edition of Supreme Court Practice collects dissenting opinions that criticize summary reversal; nearly all of them are by Justices who are no longer on the Court.<sup>61</sup> Indeed, the current edition of the treatise now concedes that "there appears to be agreement that summary disposition is appropriate to correct clearly erroneous decisions of lower courts."<sup>62</sup>

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<sup>59</sup> Hart, *supra* note 45, at 88.

<sup>60</sup> See the succession of criticisms in Robert L. Stern & Eugene Gressman, SUPREME COURT PRACTICE 185-189 (2nd ed. 1962); Robert L. Stern & Eugene Gressman, SUPREME COURT PRACTICE 222-224 (4th ed. 1969); Robert L. Stern & Eugene Gressman, SUPREME COURT PRACTICE 363-367 (5th ed. 1978) and Robert L. Stern, Eugene Gressman & Stephen M. Shapiro, SUPREME COURT PRACTICE 280-287 (6th ed. 1986), culminating eventually in SUPREME COURT PRACTICE, *supra* note 20, at 350-357.

<sup>61</sup> Of the dozens of citations in SUPREME COURT PRACTICE, *supra* note 20, at 350-357, the three dissenting opinions written by current Justices are *Presley v. Georgia*, 558 U.S. 209, 216 (2010) (Thomas, J., dissenting); *Spears v. United States*, 555 U.S. 261, 268 (2008) (Roberts, C.J., dissenting); *Watts v. United States*, 519 U.S. 148, 172 (2007) (Kennedy, J., dissenting). None of the three notes anything more than that the particular case at issue didn't seem clear cut to that dissenter.

<sup>62</sup> SUPREME COURT PRACTICE, *supra* note 20, at 352.

Instead, the Court has worked to regularize it, and the modern practice is not subject to the same objections as the old one. The summary reversal is no longer completely unexpected. The Supreme Court's rules now explicitly discuss the possibility of "summary disposition on the merits."<sup>63</sup> The leading Supreme Court treatise warns advocates at length about the possibility that the Court will summarily reverse based on the certiorari papers.<sup>64</sup> The sheer practice of summarily reversing a handful of cases every year creates a tradition that makes the practice not unexpected.

And the old practice had been of one-line opinions without reasoning—"of opinions that do not opine and of per curiam orders that quite frankly fail to build the bridge between the authorities they cite and the results they decree."<sup>65</sup> Yet the Court now summarily reverses in written opinions that explain their reasoning. These ex-

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<sup>63</sup> SUP. CT. R. 16.1 ("After considering the documents distributed under Rule 15, the Court will enter an appropriate order. The order may be a summary disposition on the merits."). The rule was adopted in 1980. SUPREME COURT PRACTICE, *supra* note 20, at 343.

<sup>64</sup> SUPREME COURT PRACTICE, *supra* note 20, at 357 ("A respondent concerned over the possibility of a summary disposition is well advised to concisely demonstrate that the decision below is correctly decided, in addition to explaining why the case is not 'certworthy.'").

<sup>65</sup> Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 3 (1957).

planations guide the litigants and enable the Court's reasoning to be judged.

This is not to say that the practice of summary reversal is now free from controversy, or even that it should be. Even now, for instance, there are procedural wrinkles: It remains quite obscure how many votes are actually needed to summarily reverse.<sup>66</sup> And the Court sometimes summarily reverses without ever receiving the record from the lower court.<sup>67</sup>

Scholars also continue to criticize individual summary reversals or small classes of them as unjustified given the specifics of the case.<sup>68</sup> But even taking these criticisms at face value, the controversies have focused on a relatively small portion of the Court's summary reversal docket.

The 2013 Term suggests that it may be time to look at the entirety of the cases selected for summary reversal.

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<sup>66</sup> SUPREME COURT PRACTICE suggests that "[F]ive Justices" may "decid[e] a case summarily over four dissents that certiorari be denied." *Supra* note 20, at 343. But a rule or convention "may prevent five Justices from deciding a case summarily if the Court is unanimous that certiorari should be granted but four believe that the cause should be fully briefed and argued." *Id.* at 344.

<sup>67</sup> SUPREME COURT PRACTICE, *supra* note 20, at 350-351. For a recent example, see *Stanton v. Sims*, 134 S. Ct. 3 (Nov. 4, 2013), whose docket is available at <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-1217.htm>.

<sup>68</sup> Alex Hemmer, *Courts As Managers: American Tradition Partnership v. Bullock and Summary Disposition at the Roberts Court*, 122 YALE L.J. ONLINE 209, 219-223 (2013); Pamela S. Karlan, *Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 38 (2012).

## B. SUMMARY REVERSALS IN THE 2013 TERM

In the 2013 Term there were five summary reversals.<sup>69</sup> The number is fairly typical. I read through all of the summary reversals in the nine full terms of the Roberts Court so far and tallied 56 — an average of 6.2 per year.<sup>70</sup> Compared to the thousands of petitions for certiorari presented each year, and even the seventy-some merits cases per year, these represent a very select group.

But how are they selected? Two different decisions cast new light on a separate question. Even assuming that a particular decision meets the substantive criteria for error, when should the Court summarily reverse it?

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<sup>69</sup> They are *Williams v. Johnson*, 134 S. Ct. 2659 (July 1, 2014); *Martinez v. Illinois*, 134 S. Ct. 2070 (May 27, 2014), *Tolan v. Cotton*, 134 S. Ct. 1861 (May 5, 2014), *Hinton v. Alabama*, 134 S. Ct. 1081 (Feb. 24, 2014), and *Stanton v. Sims*, 134 S. Ct. 3 (Nov. 4, 2013). I do not include in this total the more numerous “GVR” orders in which the Court grants, vacates, and remands a petition for reconsideration in light of new precedent, since those orders are a docket-management device, not an adjudication on the merits. See generally Arthur D. Hellman, *The Supreme Court’s Second Thoughts: Remands for Reconsideration and Denials of Review in Cases Held for Plenary Decisions*, 11 HASTINGS CONST. L.Q. 5 (1983). But I do include summary-reversal-like decisions which vacate rather than reverse after identifying an error in the decision below, e.g., *Williams*, *supra*, and *Tolan*, *supra*. *Ford Motor Co. v. United States*, 134 S. Ct. 510 (Dec. 2, 2013) (not listed) was an edge case that is closer to a GVR.

<sup>70</sup> Appendix A.



1. *Tolan v. Cotton*

Consider *Tolan v. Cotton*, a civil rights lawsuit for the wrongful use of deadly force. The Fifth Circuit had granted summary judgment to the defendant officers, and the Supreme Court summarily ruled that the Fifth Circuit had incorrectly applied the summary judgment standard, remanding the case for reconsideration under the proper standard.<sup>71</sup> The decision was somewhat noteworthy on its own because it marked the first time in ten years that the Court had ruled against a police officer in a qualified immunity case,<sup>72</sup> though the decision did not even conclusively deny qualified immunity, because the issue was left for remand.

What was more noteworthy was Justice Alito's concurrence in the judgment (joined by Justice Scalia):

The granting of a petition for plenary review is not a decision from which Members of this Court

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<sup>71</sup> 134 S. Ct. 1861 (May 5, 2014).

<sup>72</sup> Ten years and a few months earlier, the Court had denied qualified immunity in *Groh v. Ramirez*, 540 U.S. 551 (2004), and two years before that it had denied qualified immunity in *Hope v. Pelzer*, 536 U.S. 730 (2002). Before *Hope*, the most recent one I have found is *Malley v. Briggs*, 475 U.S. 335 (1986).

have customarily registered dissents, and I do not do so here. I note, however, that the granting of review in this case sets a precedent that, if followed in other cases, will very substantially alter the Court's practice. See, *e.g.*, this Court's Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"); S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, *Supreme Court Practice* § 5.12(c)(3), p. 352 (10th ed. 2013) ("[E]rror correction ... is outside the mainstream of the Court's functions and ... not among the 'compelling reasons' ... that govern the grant of certiorari").

In my experience, a substantial percentage of the civil appeals heard each year by the courts of appeals present the question whether the evidence in the summary judgment record is just enough or not quite enough to support a grant of summary judgment. The present case falls into that very large category. There is no confusion in the courts of appeals about the standard to be applied in ruling on a summary judgment motion, and the Court of Appeals invoked the correct standard here. See 713 F.3d 299, 304 (C.A.5 2013). Thus, the only issue is whether the relevant evi-

dence, viewed in the light most favorable to the nonmoving party, is sufficient to support a judgment for that party. In the courts of appeals, cases presenting this question are utterly routine. There is no question that this case is important for the parties, but the same is true for a great many other cases that fall into the same category.

On the merits of the case, while I do not necessarily agree in all respects with the Court's characterization of the evidence, I agree that there are genuine issues of material fact and that this is a case in which summary judgment should not have been granted.

I therefore concur in the judgment.<sup>73</sup>

Justice Alito's concurrence was thus a critique of the Court's criteria for summary reversal. The fact that a decision is indeed wrong is not an adequate reason for summary reversal without something bigger at stake.

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<sup>73</sup> *Tolan v. Cotton*, 134 S. Ct. 1861, 1868-69 (2014) (Alito, J., concurring in judgment).

And remember that the Court's summary reversal opinions usually explain only why a decision is wrong, not why the case merited the Court's attention.

Justice Alito's opinion is more notable when contrasted with a different opinion joined by the same two Justices and issued two years earlier. In *Cash v. Maxwell*, Justice Scalia wrote a dissent from the denial of certiorari that was joined by Justice Alito. Cash featured an alleged misapplication of the federal habeas standard, rather than of the summary judgment standard, but it was seemingly subject to the same observation that it should not be plucked out of the heap for summary reversal.

Not so, Justice Scalia explained:

It is a regrettable reality that some federal judges like to second-guess state courts. The only way this Court can ensure observance of Congress's abridgement of their habeas power is to perform the unaccustomed task of reviewing utterly fact-bound decisions that present no disputed issues of law. We have often not shrunk from that task,

which we have found particularly needful with regard to decisions of the Ninth Circuit.<sup>74</sup>

Justice Scalia later made a similar observation of lower-court disregard in a merits opinion for the Court,<sup>75</sup> even if the Court did not explicitly endorse Justice Scalia's views about the selection of cases for summary reversal.

Continuing the connection, shortly after *Tolan*, Justices Alito and Scalia again noted a dissent from denial of certiorari in a habeas case, citing the *Tolan* concurrence.<sup>76</sup> The apparent implication was that the Court was being inconsistent in its summary reversal criteria, engaging in "error correction" in *Tolan*, but then being unwilling to do the same thing in a habeas case.

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<sup>74</sup> *Cash v. Maxwell*, 132 S. Ct. 611, 616 (2012) (Scalia, J., dissenting from denial of certiorari) (citing eight prior reversals); *see also* *Allen v. Lawhorn*, 131 S. Ct. 562 (2010) (Scalia, J., dissenting from denial of certiorari).

<sup>75</sup> *E.g.*, *White v. Woodall*, 134 S. Ct. 1697, 1701 (2014) (Scalia, J., for the Court) (Court below "disregarded the limitations of 28 U.S.C. § 2254(d) — a provision of law that some federal judges find too confining, but that all federal judges must obey."). For an earlier admonition, *see* *Harrington v. Richter*, 131 S. Ct. 770, 780 (2011) (Kennedy, J., for the Court). ("[C]onfidence in the writ [of habeas corpus] and the law it vindicates undermined, if there is judicial disregard for the sound and established principles that inform its proper issuance. That judicial disregard is inherent in the opinion of the Court of Appeals for the Ninth Circuit here under review.")

<sup>76</sup> *Beard v. Aguilar*, 134 S. Ct. 1869 (2014).

This would not be the first time that Justice Alito played such a game of tit-for-tat. In *Arizona v. Gant*, the Supreme Court overruled a prior criminal procedure precedent over Justice Alito's strong dissent.<sup>77</sup> Later that term, in *Montejo v. Louisiana*, Justice Alito joined an opinion that overruled a different criminal procedure precedent.<sup>78</sup> He wrote a concurrence criticizing as inconsistent those dissenters who had joined *Gant*, suggesting that while he believed in precedent he did not believe in unilateral disarmament.<sup>79</sup>

In any event, taking all of their opinions together, Justices Alito and Scalia appear to be gesturing toward an account of when the Court ought to summarily reverse erroneous yet "factbound" cases. Their idea seems to be that summary reversals are warranted in areas of law where there is an unusual epidemic of lower-court judges willfully refusing to apply the Supreme Court's interpretations of the law. And implicit in their votes is an assertion—true, or not—that there is an epidemic of pro-habeas willfulness in habeas cases, but not of pro-officer willfulness in civil rights suits.

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<sup>77</sup> 556 U.S. 332 (2009).

<sup>78</sup> 556 U.S. 778 (2009).

<sup>79</sup> *Id.* at 779-801. On the unilateral disarmament problem, see generally Joseph Isenbergh, *Activists Vote Twice*, 70 U. CHI. L. REV. 159 (2003).

## 2. *Williams v. Johnson*

The Court's final opinion of the term was another summary reversal that was pure ad hoc error correction. The case was *Williams v. Johnson*, a habeas case that had been before the Court once before.<sup>80</sup> In the previous round the Ninth Circuit had reversed a California state court conviction on habeas.<sup>81</sup> While AEDPA normally precludes de novo review of state convictions, the Ninth Circuit had found that AEDPA's standard did not apply, and that without deference the conviction was unlawful. (The constitutional question was whether the trial judge had improperly dismissed a juror because he seemed sympathetic to the defense.)

In that previous round of review, the Supreme Court reversed the Ninth Circuit in a 16-page opinion for the Court, written by Justice Alito and joined by every Justice except Scalia, who concurred in the judgment.<sup>82</sup> The opinion held that the Ninth Circuit had been wrong to

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<sup>80</sup> 134 S. Ct. 2659 (July 1, 2014). As with many of the other orders I mention here, I previously wrote several blog posts about *Williams* as it was happening. One of those posts was cited in the briefing. Reply Brief for Petitioner at 1. *Williams v. Johnson*, 134 S. Ct. 2659 (2014) (No. 13-9085).

<sup>81</sup> *Williams v. Cavazos*, 646 F.3d 626 (9th Cir. 2011).

<sup>82</sup> *Johnson v. Williams*, 133 S. Ct. 1088 (2013).

review the conviction de novo, and that AEDPA applied. It did not discuss the underlying merits of the case, which would normally allow the Ninth Circuit to reconsider the case under the proper standard – except for one sentence in the introduction of the opinion, which summarized the holding thus:

Applying this rule in the present case, we hold that the federal claim at issue here (a Sixth Amendment jury trial claim) must be presumed to have been adjudicated on the merits by the California courts, that this presumption was not adequately rebutted, that the restrictive standard of review set out in §2254(d)(2) consequently applies, and that *under that standard respondent is not entitled to habeas relief*.<sup>83</sup>

The rest of the opinion went on to explain why the claim should be presumed to be adjudicated on the merits, why the presumption was not rebutted, and why the restrictive standard of review applied. It never again ex-

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<sup>83</sup> *Id.* at 1092 (emphasis added).



plained why, or even mentioned that, the respondent should lose under that standard.

That produced a puzzle. Ms. Williams filed a rehearing petition to clarify the issue, which was summarily denied as almost all rehearing petitions are.<sup>84</sup> When the Ninth Circuit panel got the case back it issued a per curiam opinion “taking note of the denial of a petition for rehearing on April 15, 2013,” and affirming the district court’s denial of the habeas petition.<sup>85</sup> The two active judges on the case, Judge Reinhardt and Chief Judge Kozinski, each wrote separate opinions explaining that they felt bound by the unexplained clause of the Court’s opinion but hoped to be reversed by the Court.<sup>86</sup>

Happily, the Court obliged. After considering Ms. Williams cert. petition over the latter part of the Term, the Court started its summer break with a one paragraph order implying that the clause should not be followed:

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<sup>84</sup> 133 S. Ct. 1858 (2013).

<sup>85</sup> *Williams v. Johnson*, 720 F.3d 1212 (9th Cir. 2013).

<sup>86</sup> *Id.* at 1214 (Reinhardt, J., concurring) (“uncomfortable as I am with that result . . .”); *id.* (Kozinski, C.J., concurring) (“I hope I’m wrong . . . I take comfort in knowing that, if we are wrong, we can be summarily reversed.”).

The motion for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. The judgment of the United States Court of Appeals for the Ninth Circuit is vacated, and the case is remanded for consideration of petitioner's Sixth Amendment claim under the standard set forth in 28 U. S. C. § 2254(d).<sup>87</sup>

While that decision can only be described as a very narrow form of fact-bound error correction, no Justice publicized a dissent. Of course, we do not know whether that means the decision was in fact unanimous.<sup>88</sup> But there are justifications for the summary reversal in *Williams* that even Justices Scalia and Alito might have been able to agree with.

In *Tolan*, Justice Alito observed that a "very large category" of petitions to the Courts alleged a similar kind of error. Thus, the summary reversal in that case would "very substantially alter the Court's practice" if repeated.

By contrast, in *Williams* the claimed error was inherently a rare one. It was a claim bound up with the fact that the case had been to the Court once before. The

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<sup>87</sup> *Williams v. Johnson*, 134 S. Ct. 2659 (2014) (per curiam).

<sup>88</sup> See *supra* nn.42-43 and accompanying text.

claim, effectively, was that either (1) the Court had made a mistake by including that language in its opinion, or (2) the court of appeals had made a mistake in thinking that language was binding. (The third possibility, of course, was that the Court had meant to include the language and meant it to be binding; that possibility would have resulted in a denial of the claim.)

Asserted errors on remand from the Court's own cases are a much smaller category, by sheer force of the Court's small docket. And it makes sense for the Court to take a special interest in them. Indeed, Justice Souter had written that "this Court has a special interest in ensuring that courts on remand follow the letter and spirit of our mandates."<sup>89</sup> Moreover, since the Court's opinion was what introduced the confusion, the Court may have seen itself as responsible for correcting it.

### C. ASSESSING THE SUMMARY REVERSAL DOCKET

The Court does not tell us why it picks cases for summary reversal. Some incomplete guidance is given by the Court's rules. Summary reversal is technically a

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<sup>89</sup> *Planned Parenthood v. Casey*, 510 U.S. 1309, 1311 (1994) (Souter, J., in chambers) (citing *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255-256 (1895)).

form of certiorari and the Court's own Rule 10 lists three general criteria for certiorari. Several of the criteria involve splits between federal and state courts and are not generally applicable to the cases that come up for summary reversal. Two others may encapsulate many summary reversals – that a lower court has decided a case in conflict with Supreme Court precedent, or that a federal court has done something so irregular as to warrant the Court's "supervisory power." But even then, Rule 10 also notes that these criteria are "neither controlling nor fully measuring the Court's discretion."<sup>90</sup> And in any event, it is not pellucid how those criteria shake out.

Supreme Court Practice just gives up, opining that "[i]t is difficult to perceive any trend in the behavior of the Roberts' Court in this realm."<sup>91</sup> In order to see whether this is so, I compiled a list of all of the summary reversals issued in the first nine terms of the Roberts Court, with the subject matter and identity of the prevailing party.<sup>92</sup> In fact, I think some patterns can be discerned, though I am not sure that they can be completely explained or defended.

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<sup>90</sup> SUP CT. R. 10.

<sup>91</sup> SUPREME COURT PRACTICE, *supra* note 20, at 351 n.108.

<sup>92</sup> See generally Appendix A.

### 1. *Summary Reversal as a Tool of Hierarchy*

First consider Rule 10's criterion that "a state court or a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court."<sup>93</sup> Many of the Court's summary reversals appear to be designed to ensure that lower courts follow Supreme Court precedents.

The implicit theory of Justices Alito and Scalia's opinions in *Tolan* and *Cash* is one example. Recall that their basic idea is that the Court summarily reverses an unusual number of state-on-top habeas cases because the lower courts are engaged in a campaign to nullify the Court's interpretation of AEDPA. Observers have also supplied the same interpretation of the Court's practice.<sup>94</sup>

Other examples have been hinted at in recent scholarship. For instance, in a recent article Professor Alison Siegler argues that the "federal courts of appeals have rebelled against every Supreme Court mandate that weakens the United States Sentencing Guide-

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<sup>93</sup> SUP. CT. R. 10 (c).

<sup>94</sup> Recent Case, 126 HARV. L. REV. 860, 866 (2013) (Court's conduct "increasingly resembles a concerted campaign against the circuit"); James J. Duane, *Sherlock Holmes and the Mystery of the Pointless Remand*, 18 BERKELEY J. CRIM. L. 154, 169-70 (2013).

lines.”<sup>95</sup> Siegler also notes several reversals and summary reversals by the Court on sentencing issues that suggest that the Court is aware of and has stopped such rebellions in the past. Providing evidence of further intransigence in the lower courts, she urges the Court to “step in . . . and stop this latest rebellion.”<sup>96</sup>

Similarly, Professor Christopher Drahozal notes a “relatively large number of summary reversals in arbitration cases” from the Supreme Court that engage in fact-specific error correction.<sup>97</sup> He attributes this in part to “ongoing resistance to the Court’s arbitration decisions in the lower courts.”<sup>98</sup>

Looking at the entire body of Roberts Court’s summary reversals seems to confirm these examples. Of the 56 summary reversals, there were sixteen state-on-top summary reversals in AEDPA cases — the highest number of cases in any specific category. And there were several other categories that recurred at least three times (i.e. at least 5% of the total). Two of these categories are the ones named by Siegler and Drahozal: *Booker* sentencing cases, which featured three summary rever-

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<sup>95</sup> Alison Siegler, *Rebellion: The Courts of Appeals’ Latest Anti-Booker Backlash*, 82 U. CHI. L. REV. (forthcoming 2015), at 1, available at <http://ssrn.com/abstract=2484762>.

<sup>96</sup> *Id.* at 15.

<sup>97</sup> Christopher R. Drahozal, *Error Correction and the Supreme Court’s Arbitration Docket*, 29 OHIO ST. J. ON DISP. RESOL. 1, 2 (2014).

<sup>98</sup> *Id.*

sals in a single term, and arbitration cases, which featured three pro-arbitration summary reversals over the Roberts Court's tenure.

There are two other three-peating categories: pro-government summary reversals in Fourth Amendment cases brought under the federal civil rights statute, 42 U.S.C. § 1983 (of which there are three), and state-on-top summary reversals in habeas cases that *do not* involve AEDPA (of which there are six). I am not aware of similar allegations that the lower courts have been resistant to the Supreme Court's mandates in these areas, but the Court's repeated interest in them might well suggest that it believes there is such resistance.

In addition to the areas where the Court returns to the same issue repeatedly, there are several other summary reversals that appear to be designed to enforce the Supreme Court's supremacy in a more case-specific sense. One such example was *Williams v. Johnson*, mentioned above. Two other summary reversals, like *Williams*, had been to the Court at least once before.

In another decision, *Eberhart v. United States*, the lower court was praised for having ruled the other way. It had followed outdated Supreme Court precedent because the Court instructs lower courts that only the Court has the power to recognize when its prior precedents have become outdated. And in *Western Tradition Partnership v. Montana*, the Court summarily reversed the Montana Supreme Court's attempt to distinguish the

controversial and recent decision in *Citizens United v. FEC*. Those cases are probably hierarchy-maintenance as well. Together, all of these cases add up to well more than half (35/56) of the Roberts Court's summary reversal docket.

In the same spirit, it is also possible that judicial reputation affects the summary reversal docket. Consider Justice Scalia's comment that the Court had to police the Ninth Circuit with special care.<sup>99</sup> Indeed, the Ninth Circuit is by far the most frequent entrant on the summary reversal docket, appearing 18 times and making up almost a third of the docket. The next most frequently target of summary reversal is the Sixth, appearing six times. More than half (10) of the Ninth Circuit cases were state-on-top petitions in habeas cases. Every single one of the Sixth Circuit cases was as well.

There is some information at a more granular level too.<sup>100</sup> The Ninth Circuit has 29 full-time judges, but two judges appear on the summary reversal docket over and over and over again. They are Judge Stephen Reinhardt, appearing ten times, and Judge Kim Wardlaw, appear-

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<sup>99</sup> *Cash v. Maxwell*, 132 S. Ct. 611 (2012) (Scalia, J., dissenting from denial of certiorari).

<sup>100</sup> *See generally* Appendix B.



ing seven. No other judge joined a summarily reversed panel more than three times.<sup>101</sup>

Judge Reinhardt's presence is probably no surprise to careful court-watchers: Seventeen years ago, Judge Reinhardt was quoted as saying of the Supreme Court that "they can't catch em all," and as reporting that he believes that he is the subject of special scrutiny from the Court—and understandably, given that quote.<sup>102</sup> My table suggests that neither Judge Reinhardt nor the Court have changed. Judge Wardlaw's relationship with the Court has not yet been the subject of such extensive public commentary.

There are also three judges whose names appear repeatedly in another column — the column of those who dissent from decisions that are then summarily reversed. They are Judge O'Scannlain, whose dissents presaged three summary reversals in the Ninth Circuit, and Judge Siler, who dissented in four of the six sum-

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<sup>101</sup> The other judges appearing exactly three times are Judge Merritt from the Sixth Circuit, Judges Pregerson and Schroeder from the Ninth Circuit, Judges Wilson and Tjoflat from the Eleventh Circuit, and maybe Judges Bauer and Williams from the Seventh Circuit, depending on whether one double-counts *Corcoran*, a single case that was summarily reversed twice by the Court in two separate trips. *Id.*

<sup>102</sup> Matt Rees, *The Judge the Supreme Court Loves to Overturn*, THE WEEKLY STANDARD (May 5, 1997), <http://www.theweeklystandard.com/content/public/articles/000/000/001/414ilyss.asp>. See also M. Todd Henderson, *Justifying Jones*, 77 U. CHI. L. REV. 1027, 1029 n.15 (2010) (calculating Judge Reinhardt's reversal rate).

many reversals in the Sixth Circuit. No other dissenter appears more than once.<sup>103</sup>

I do not mean to make too much of these particular names. For instance, the fact that Judge Reinhardt's name appears frequently does not mean he is a bad judge. Maybe other judges make the same rulings as he does, but are given more of the benefit of the doubt. Just as the Supreme Court has been said to be "infallible because it is final" and not the other way around,<sup>104</sup> perhaps Judge Reinhardt seems wayward because he is frequently reversed, rather than being frequently reversed because he is wayward. And of course that is putting aside the bigger question about whether lower court judges may or should defy the Supreme Court when they disagree with it.

More generally, to put these names in context one would also want to normalize by size and perhaps type of docket and many other factors.<sup>105</sup> But a focus on the orders list could still add an important nuance to the study of which lower-court judges are in repeated dialogue with the Court; even if other judges appear before

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<sup>103</sup> See Appendix B. Out of economy, I did not include subsequent non-panel dissents, such as decisions respecting the denial of en banc review.

<sup>104</sup> *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

<sup>105</sup> Judith Resnik, *Reading Reinhardt: The Work of Constructing Legal Virtue (Exempla Iustitiae)*, 120 *YALE L.J.* 539, 564-565 (2010).

the Court with similar regularity,<sup>106</sup> some judges may be treated by the Court in unusually summary fashion. And for present purposes, this sheds at least some light on the patterns in the Supreme Court's summary reversal docket.

## 2. *Summary Reversal as Ad Hoc Prerogative*

What about the other cases? I have listed the subject matter and the victor in the appendix, but I find it hard to generalize them apart from the category "other." Many of them are one-off summary reversals vindicating a criminal defendant, in areas such as double-jeopardy (*Martinez v. Illinois*), public-trial (*Presley v. Georgia*), or Brady (*Youngblood v. West Virginia*). Interestingly, each of those examples has been criticized by observers as not meeting the traditional summary reversal criteria.<sup>107</sup> Several of the remaining decisions also contain published dissents, and it is possible that such dis-

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<sup>106</sup> *Id.* at 561-563 (noting that "Judge Reinhardt is one of is one of several judges who are repeat players before the Supreme Court, and many have similarly high numbers of cases reviewed during the brief period").

<sup>107</sup> See Hemmer, *supra* note 68, at 217-218, 220-221 (criticizing *Youngblood* and *Presley*); Richard Re, *Did the Martinez Sum Rev Apply or Change the Law?*, RE'S JUDICATA (June 6, 2014), at <http://richardresjudicata.wordpress.com/2014/06/06/did-the-martinez-sum-rev-apply-or-change-the-law/> (criticizing *Martinez*).

sents help ensure a case gets singled out for special attention. Perhaps the Court is particularly likely to intervene when it thinks the correct answer was staring the lower court in the face.<sup>108</sup> But many of the summary reversals do not contain dissents, and most dissents do not become summary reversals.

Even once one crosses off the Ninth Circuit cases, the habeas cases and other categories mentioned above, and the cases with dissents, there still remain more than a dozen summary reversals that don't fit into any obvious pattern.

So what more can one say about this residual category? One might say that these reversals are in the *spirit* of Rule 10's criterion that a "United States court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power."<sup>109</sup> They are not all in keeping with its letter, since many of them feature state courts, not a "United States court of appeals." But the general idea may simply be that sometimes a court has done something wrong in an unusual way that defies generalization.

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<sup>108</sup> Thanks to Justin Driver for this point.

<sup>109</sup> SUP. CT. R. 10 (a).

These kinds of summary reversals might express the need for a safety valve from general rules. Professor John Harrison has noted that the executive's pardon power is one example of this prerogative. "By and large," he writes, "governments do good through rules and not outside them."<sup>110</sup> And yet "no rule or set of rules captures practical wisdom."<sup>111</sup> Pardons attempt to supply occasional wisdom or mercy while leaving the rest of the system intact:

They should be like lightning bolts, relatively rare and in principle hard to predict because their incidence, although chosen on a reasoned basis, cannot be accounted for in advance by the imperfect approximations of reality on which legal rules are based.<sup>112</sup>

The function of the prerogative need not be limited to the executive branch. The same function has been attributed to equity, though by the sixteenth century equi-

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<sup>110</sup> John Harrison, *Pardon as Prerogative*, 13 FED. SENT'G REP. 147 (2001).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

ty was no longer a series of lightning bolts,<sup>113</sup> and scholars who advocate equity as a safety valve do not necessarily intend for it to be rare.<sup>114</sup>

Perhaps this portion of the Court's summary reversal docket operates like Harrison's prerogative. A pardon, of course, is a decision to depart from the law, while a summary reversal is a decision to enforce it. But the decision to *pick* a case for summary reversal is a discretionary certiorari decision. Those decisions are rare and hard to predict, but we hope they are made on a reasoned basis nonetheless.

### 3. *Questions of Agenda Selection*

Both of these visions, and especially their combination, raise questions of procedural regularity, but they are not the questions usually raised by summary reversal critics. The point is not that the parties lack adequate notice of the Court's practices. Nor is the point that the individual summary reversals are unjustified or insuffi-

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<sup>113</sup> See, e.g., PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 125-126 (2008).

<sup>114</sup> Kenneth Ayotte, Ezra Friedman, and Henry E. Smith, *A Safety Valve Model of Equity as Anti-Opportunism*, (unpublished draft Mar. 30, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2245098](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2245098). Thanks to Sam Bray for these points.

ciently clear. Rather, the point is that agenda selection is important, but the Court's criteria here are not explained and may not be fully thought through.

Think of the other miscellaneous orders discussed in Part I, where we do not know why the Court is doing what it's doing, and do not even know whether the Court agrees on a single view or rationale. Summary reversals are more transparent in an important sense: they tell us why the lower court was wrong. But nonetheless, they do not tell us why this lower-court error was singled out for judicial attention.

The Court does not reverse every error, or even every clear error, that comes through the door. Maybe it could: At oral argument last month, Justice Scalia jokingly suggested that "I guess it's an abuse of discretion whenever we fail to correct a clear error of law on a petition for certiorari. Right?"<sup>115</sup> But Justice Scalia was offering the suggestion sarcastically — it was supposed to be the *absurdum* in a *reductio ad absurdum*.<sup>116</sup>

If the Court does not reverse every error, then we return to the question of which classes of error are selected for judicial attention. If I am right that a majority

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<sup>115</sup> Transcript of Oral Argument at 20, *Dart Cherokee v Owens*, 134 S. Ct. 1788.,

<sup>116</sup> *Id.* ("I thought we just had the power to say we don't feel like taking it.") (Scalia, J.).

of the summary reversal decisions are designed to enforce the Court's supremacy, then this opens up new grounds for investigation and debate.

It has been observed that "the current Court's disdain for error correction is selective" and seems to work largely to the detriment of "criminal defendants and habeas petitioners."<sup>117</sup> The current selection of cases gives rise to at least two possible interpretations. One is that the Court spends its resources on "error correction" when it perceives a rebellion in the lower courts, and it is unaware of any comparable rebellions in the other "direction."<sup>118</sup> The more cynical interpretation is that the Court ignores classes of error that it doesn't mind or doesn't care about.

Further research and identification of these cases – both by scholars and by lower court judges – could either change this practice or illuminate the Court's true criteria. For instance, are Justices Alito and Scalia correct in their implicit suggestion that lower courts willfully resist the Court's AEDPA precedents but not its civil rights precedents? And in what other areas might lower court willfulness currently be going undetected or un-

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<sup>117</sup> Robert M. Yablon, *Justice Sotomayor and the Supreme Court's Certiorari Process*, 123 *YALE L.J. FORUM* 551, 562 (2014).

<sup>118</sup> *Id.* at 563 (suggesting that lower courts be reminded that that "errors in criminal cases can run in both directions").



addressed? If one could systematically identify classes of cases where the lower courts are repeatedly defying the Supreme Court's views of the law, then the Court may either pick up the mantle or reveal that its cases are selected for some other reason.<sup>119</sup>

That leaves the "lightning bolts." Here, I am less optimistic that reform is possible, and less pessimistic that it is necessary. If every individual summary reversal is in fact an example of clear error it is hard to criticize them individually. In the moment, it is hard to stand on a general and abstract principle of regularity when there is a real manifest error to be corrected. And systematically, they may be the best that we can do.

The ideal Supreme Court would bear little resemblance to Zeus. But a narrow outlet for judicial prerogative — limited to reversing real and clear errors by the lower courts — may simply be the best practical accommodation of rules and discretion. Our best hope is that the Court exercises that prerogative thoughtfully and wisely.

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<sup>119</sup> For an example of scholarship attempting this, see Shon Hopwood, *The Not So Speedy Trial Act*, 89 WASH. L. REV. 709, 744-45 (2014) (advocating summary reversal on certain speedy trial act issues).

## CONCLUSION

There is a frequent mixed review of the Supreme Court that goes something like this: Most of the time, in its low-profile cases, the Court behaves in a professional, organized, and lawyerly manner. It is just in the hot-button, high-stakes, sharply divided cases that law runs out and politics and personal preferences take over. The Court is at its most orderly and lawyerly when it is less divided and out of the media spotlight.<sup>120</sup>

I'm not sure I agree with that assessment of the hot-button cases, but let us put that aside for another day. The orders list suggests that if there is a problem at the Supreme Court, it may be the opposite of the usual narrative. It is on technical procedural and administrative questions when the spotlight is off that the Court's decisions seem to deviate from its otherwise high standards of transparency and legal craft.

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<sup>120</sup> For versions of this account (each with their own nuances, of course) see, e.g., Geoffrey Stone, *The Behavior of Supreme Court Justices When Their Behavior Counts The Most*, AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY (2013), [http://www.acslaw.org/sites/default/files/Stone\\_-\\_Behavior\\_of\\_Justices.pdf](http://www.acslaw.org/sites/default/files/Stone_-_Behavior_of_Justices.pdf). Senator Barack Obama, *Remarks on the Confirmation of Judge John Roberts*, <http://obamaspeeches.com/031-Confirmation-of-Judge-John-Roberts-Obama-Speech.htm>.

**APPENDIX A: SUMMARY REVERSALS IN THE ROBERTS  
COURT**

Name	Date	Subject	Successful Petitioner	Lower Court	Lower Court Majority (author is bold)	Dissent
Williams v. Johnson*	July 1, 2014	Habeas	Prisoner	9th Cir.	Kozinski, Reinhardt, Whyte	
Martinez v. Illinois	May 27, 2014	Double Jeopardy	Defendant	Ill. Sup. Ct.	<b>Freeman</b> , Kilbride, Thomas, Garmann, Karmeier, Theis	<b>Burke</b>
Tolan v. Cotton	May 5, 2014	S. 1983 (4th Am./QI)	Plaintiff	5th Cir.	<b>Barksdale</b> , Jones, Southwick	
Hinton v. Alabama	Feb. 24, 2014	Strickland	Prisoner	Ala. Ct. Crim. App.	<b>Kellum</b> , Windom, Welch, Burke, Joiner	
Stanton v. Sims	Nov. 4, 2013	S. 1983 (4th Am./QI)	Officer	9th Cir.	<b>Reinhardt</b> , Silverman, Wardlaw	
Ryan v. Schad	June 24, 2013	Habeas (Procedure)	State	9th Cir.	Reinhardt, Schroeder,	<b>Graber</b>
Nevada v. Jackson	June 3, 2013	Habeas (AEDPA)	State	9th Cir.	<b>Reinhardt</b> , Murguia	<b>Goodwin</b>
Marshall v. Rodgers	April 1, 2013	Habeas (AEDPA)	State	9th Cir.	<b>Zouhary</b> , W. Fletcher, Reinhardt	
Nitro-lift Tech. v. Howard	Nov. 26, 2012	Arbitration	Employer	Okla. Sup. Ct.	<b>Watt</b> , Colbert, Reif, Kauger, Winchester, Edmondson, Taylor, Combs,	

					Gurich	
Lefemine v. Wideman	Nov. 5, 2012	Att'y Fees/ Civil Rights	Plaintiff	4th Cir.	Wynn, Duncan, Diaz	
American Tradition Partnership v. Bullock	June 25, 2012	Cam- paign Finance	Speaker	Mont. Sup. Ct.	McGrath, Morris, Cotter, Wheat, and Rice	Baker, Nelson
Parker v. Matthews	June 11, 2012	Habeas (AEDPA)	State	6th Cir.	Clay, Moore	Siler
Coleman v. Johnson	May 29, 2012	Habeas (AEDPA)	State	3rd Cir.	Nygaard, McKee	Chagares
Marmet Health Care Center v. Brown	Feb. 21, 2012	Arbitra- tion	Employer	W.Va. Sup. Ct.	Ketchum, Workman, McHugh, Gaujot	
Wetzel v. Lambert	Feb. 21, 2012	Habeas (AEDPA)	State	3rd Cir.	Barry, Har- diman, Staple- ton	
Ryburn v. Huff	Jan. 23, 2012	S.1983 (4th Am./QI)	Officer	9th Cir.	Marbley, Kozinski	Rawlinson
Hardy v. Cross	Dec. 12, 2011	Habeas (AEDPA)	State	7th Cir.	Williams, Kanne, Rovner	
Bobby v. Dixon	Nov. 7, 2011	Habeas (AEDPA)	State	6th Cir.	Merritt, Cole	Siler
KPMG v. Cocchi	Nov. 7, 2011	Arbitra- tion	Auditor (pro- arbitration)	Fla. 4th DCA	Warner, Polen, Farmer	
Cavazos v. Smith	Oct. 31, 2011	Habeas (AEDPA)	State	9th Cir.	Pregerson, Canby, Reed	

United States v. Juvenile Male**	June 27, 2011 & June 7, 2010	Mootness	United States	9th Cir.	<b>Reinhardt</b> , Tashima, McKeown	
Bobby v. Mitts	May 2, 2011	Habeas (AEDPA)	State	6th Cir.	<b>Merritt</b> , Martin	<b>Siler</b>
Felkner v. Jackson	March 21, 2011	Habeas (AEDPA)	State	9th Cir.	Schroeder, Rawlinson, Collins	
Swarthout v. Cooke*** (Cooke v. Solis)	Jan. 24, 2011	Habeas (Due Process)	State	9th Cir.	<b>Reinhardt</b> , Wardlaw, M. Smith	
Swarthout v. Cooke*** (Clay v. Kane)	Jan. 24, 2011	Habeas (Due Process)	State	9th Cir.	Pregerson, Wardlaw, Leighton	
Wilson v. Corcoran*	Nov. 8, 2010	Habeas (Misc.)	State	7th Cir.	<b>Bauer</b> , Williams, Sykes	
Jefferson v. Upton	May 24, 2010	Strickland	Prisoner	11th Cir.	<b>Marcus</b> , Tjoflat	<b>Carnes</b>
Thaler v. Haynes	Feb. 22, 2010	Habeas (AEDPA)	State	5th Cir.	<b>Dennis</b> , Jolly, Clement	
Wilkins v. Gaddy	Feb. 22, 2010	S.1983 (8th Am.)	Plaintiff	4th Cir.	Motz, Shedd, Hamilton	
Wellons v. Hall	Jan. 19, 2010	Habeas (Due Process)	Prisoner	11th Cir.	<b>Wilson</b> , Tjoflat, Black	
Presley v. Georgia	Jan. 19, 2010	Public Trial	Prisoner/Defendant	Ga. Sup. Ct.	<b>Hines</b> , Carley, Thompson, Benham, Melton	<b>Sears</b> , Hunstein
McDaniel v. Brown	Jan. 11, 2010	Habeas (AEDPA)	State	9th Cir.	<b>Wardlaw</b> , Hawkins	<b>O'Scannlain</b>

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Michigan v. Fisher	Dec. 7, 2009	4th Am.	State	Mich. Ct. App.	Talbot, Cavanagh, Zahra	
Porter v. McCollum	Nov. 30, 2009	Habeas (Strickland)	Prisoner/Defendant	11th Cir.	Carnes, Wilson, Pryor	
Wong v. Belmontes*	Nov. 16, 2009	Habeas (Strickland)	State	9th Cir.	<b>Reinhardt, Paez</b>	<b>O'Scannlain</b>
Bobby v. Van Hook	Nov. 9, 2009	Habeas (Strickland)	State	6th Cir.	<b>Merritt, Martin, Moore</b>	
Corcoran v. Levenhagen	Oct. 20, 2009	Habeas (Procedure)	Prisoner	7th Cir.	<b>Bauer, Sykes</b>	<b>Williams</b>
Sears v. Upton	June 29, 2010	Habeas (Strickland)	Prisoner	Ga. Trial Ct.	<b>Girardeau</b>	
CSX Transportation v. Hensley	June 1, 2009	FELA	Railroad	Ct. App. Tenn (ED)	<b>Susano, Lee, Ogle</b>	
Nelson v. United States	Jan. 26, 2009	Booker	Prisoner	4th Cir.	Niemeyer, Duncan, Hamilton	
Spears v. United States	Jan. 21, 2009	Booker	Prisoner	8th Cir.	<b>Riley, Loken, Wollman, Murphy, Melloy, Smith, Colloton, Gruender, Benton, Shepherd</b>	<b>Bye, Lay</b>
Moore v. United States	Oct. 14, 2008	Booker	Prisoner	8th Cir.	<b>Loken, Smith, Gruender</b>	
Wright v. Van Patten	Jan. 7, 2008	Habeas (AEDPA)	State	7th Cir.	Evans, Williams	<b>Coffey</b>
Allen v.	Nov. 5,	Habeas	State	11th Cir.	<b>Barkett,</b>	

Siebert	2007	(AEDPA)			Tjoflat, Wilson	
Erickson v. Pardus	June 4, 2007	S.1983 (8th Am.)	Plaintiff/Prisoner	10th Cir.	<b>Anderson</b> , O'Brien, Porfilio	
Los Angeles v. Rettele	May 21, 2007	S. 1983 (4th Am.)	State	9th Cir.	Pregerson, Thomas	<b>Cowen</b>
Youngblood v. West Virginia	June 19, 2006	Brady	Prisoner	W.Va. Sup. Ct.	Benjamin, Albright, Maynard	<b>Davis</b> , <b>Starcher</b>
Whitman v. DOT	June 5, 2006	Jurisdiction/Precclusion	Plaintiff/Employee	9th Cir.	<b>Wardlaw</b> , Kleinfeld, Hall	
Salinas v. United States	April 24, 2006	Sentencing	Prisoner	5th Cir.	Davis, Jones, Garza	
Gonzales v. Thomas	April 17, 2006	Immigration Procedure	United States	9th Cir.	<b>Wardlaw</b> , Schroeder, Reinhardt, Hawkins, Silverman, Graber, Paez	<b>Rymer</b> , O'Scannlain, Kleinfeld, Bea
Ash v. Tyson	Feb. 21, 2006	Employment	Plaintiff/Employee	11th Cir.	Dubina, Carnes, Marcus	
Iran v. Elahi	Feb. 21, 2006	Foreign Immunity	Iran/United States	9th Cir.	<b>B. Fletcher</b> , Wardlaw, Fisher	
Bradshaw v. Richey	Nov. 28, 2005	Habeas (AEDPA)	State	6th Cir.	<b>Cole</b> , Daughtrey	<b>Siler</b>
Eberhart v. United States****	Oct. 31, 2005	Jurisdiction	Prisoner	7th Cir.	<b>Flaum</b> , Bauer, Posner	
Kane v. Espitia	Oct. 31, 2005	Habeas (AEDPA)	State	9th Cir.	Canby, Hansen, Rawlinson	
Schriro v. Smith	Oct. 17, 2005	Habeas (Misc.)	State	9th Cir.	<b>Reinhardt</b> , Thompson,	

					Ferguson	
Dye v. Hofbauer	Oct. 11, 2005	Habeas (Misc.)	Prisoner	6th Cir.	<b>Daughtrey,</b> Boggs, Economus	

\*Case had previously been decided by Court.

\*\*Case was certified to a state court and Court issued two opinions.

\*\*\*Two lower court opinions reversed in a single case.

\*\*\*\*Lower court was praised for ruling correctly.

In general, I compiled this list by looking at every opinion on the Supreme Court’s opinions list for the relevant terms labeled “per curiam” and then reading it to see whether it was a summary reversal and if so what the issues were and who won. Per curiam decisions that were not before the Court on certiorari—for instance mandatory appeals, and applications for a stay—were omitted from the list.



**APPENDIX B: LOWER COURT JUDGES AND THE SUMMARY  
REVERSAL DOCKET**

Judge	Circuit	Reviewed Opinions
Stephen Reinhardt	9th Cir.	10
Kim Wardlaw	9th Cir.	7
Gilbert Merritt	6th Cir.	3
William Bauer	7th Cir.	3*
Ann Williams	7th Cir.	3* (and a dissent)
Harry Pregerson	9th Cir.	3
Mary Schroeder	9th Cir.	3
Gerald Tjoflat	11th Cir.	3
Charles Wilson	11th Cir.	3
Eugene Siler	6th Cir.	4 (dissents)
Diarmud O'Scannlain	9th Cir.	3 (dissents)

\*Assuming one counts *Wilson v. Corcoran* and *Corcoran v. Levenhagen* as two separate summary reversals.

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401. Gary Becker, François Ewald, and Bernard Harcourt, “Becker on Ewald on Foucault on Becker” American Neoliberalism and Michel Foucault’s 1979 *Birth of Biopolitics* Lectures, September 2012
402. M. Todd Henderson, Voice versus Exit in Health Care Policy, October 2012
403. Aziz Z. Huq, Enforcing (but Not Defending) “Unconstitutional” Laws, October 2012
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