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Controversial GVRs and the "Degradation" of the GVR

Aaron-Andrew P. Bruhl
William & Mary Law School, apbruhl@wm.edu

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The Supreme Court's GVR practice has traditionally been a sleepy backwater of appellate procedure. The GVR (i.e., grant, vacate, remand) is most commonly used when a lower court decision might be affected by a recent Supreme Court case that came down after the lower court ruled (though there are other types too). Over the course of the last few years, there have been several controversial GVRs that have raised the device's profile a bit. Generally these have been cases in which some Justices, usually led by Justice Scalia, dissent from the GVR and charge that the Court is improperly expanding the GVR power. In effect, the dissenters say, the GVR is becoming, in different cases, either a way to make the lower court write a better opinion or a lazy substitute for a summary reversal. These cases reflect, in Scalia's words, "the systematic degradation of [the] traditional requirements for a GVR."

To list some of these cases:

- In *Wellons v. Hall*(2010), the Chief, Scalia, Thomas, and Alito all dissented, arguing that the new development that supposedly necessitated the GVR could not affect the lower court judgment, which (they argued) rested on a separately adequate foundation.

- In *Webster v. Cooper* (2009), the Court GVR'd in light of a decision that pre-dated the lower court's ruling and that the petitioner did not raise before the lower court. Scalia dissents.

- In *Youngblood v. West Virginia* (2006), the Court GVR'd in light of a decades-old case that the lower court did not discuss in its opinion, though it was presented to the lower court. The Supreme Court said that "if this Court is to reach the merits of the case, it would be better" to have the lower court's views on the matter. Scalia, joined by Thomas, said this was a not-so-veiled threat that the lower court had better reconsider or the Court will have to go to the trouble of reversing. Kennedy separately dissents.

Justice Scalia's complaint about the alleged expansion of the GVR is three-pronged: formal, historical, and prudential. He is certainly correct that these are not ordinary GVRs and that they raise some concerns. Nonetheless, here I will register some doubts about his criticisms, though all of this is necessarily tentative and brief.

Regarding the formal issue, he says that the Court has the power to set aside judgments for error, not to void them on suspicion of error or send them back because the opinions are incomplete. That sounds right in the abstract. Yet the Court's practices display some flexibility. The Court often doesn't end a case with its judgment; it might only be reversing on one ground out of several that, on remand, might lead to the reinstatement of the prior judgment. It sometimes vacates decisions that use the wrong standard without itself saying how the case should come out under the correct standard. And of course even the run-of-the-mill GVR vacates a judgment without any finding of error. So once you are doing all of that, the formal arguments get hard to maintain.

On the historical front, the charges of "degradation" of tradition, the attempt to rein in a wooly area of practice, and the more general declinist spirit are pure Scalia. I can't go into detail in a blog post, but, based on my study of GVRs, it seems to me that the history is somewhat more complicated. It might be that today's very standardized GVR practice - in which 98% of GVRs are run-of-the-mill vacaturs in light of a new precedent - doesn't reflect the way things always were. The device might have been more multifarious in the past.

This brings us to the prudential arguments. Is this a good thing for the Court to be doing? A good use of its time? A proper way to treat lower courts? Here I will just say that I am not sure.

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