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### The Supreme Court's Controversial GVRs – and an Alternative

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# THE SUPREME COURT'S CONTROVERSIAL GVRs—AND AN ALTERNATIVE

Aaron-Andrew P. Bruhl\*

*This Article addresses a relatively neglected portion of the Supreme Court's docket: the "GVR"—that is, the Court's procedure for summarily granting certiorari, vacating the decision below without finding error, and remanding the case for further consideration by the lower court. The purpose of the GVR device is to give the lower court the initial opportunity to consider the possible impact of a new development (such as a recently issued Supreme Court decision) and, if necessary, to revise its ruling in light of the changed circumstances. The Court may issue scores or even hundreds of these orders every year.*

*This Article has two parts, one descriptive and one cautiously prescriptive. First, because we currently lack systematic data on GVRs, the Article begins by collecting and analyzing over a decade of data, with additional data on certain categories of GVRs that are sometimes considered controversial. Second, the Article uses the data to critically examine the GVR device. As we learn more about GVRs, we might come to regard the entire practice—not just a few particular subcategories—as more problematic than previously recognized. This realization might lead us to consider whether there is a different approach that would better serve the interests of litigants, the Supreme Court, and the judicial system as a whole. Accordingly, the Article proposes an alternative to the current GVR practice that attempts to preserve the attractive features of the current practice while reducing the Court's role in overseeing the implementation of changes in law.*

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## INTRODUCTION

This Article addresses the Supreme Court's "GVR" practice—the procedure for summarily *granting* certiorari, *vacating* the decision below without finding error, and *remanding* the case for further consideration by the lower court. The GVR is most commonly used when the ruling below might be affected by one of the Court's recently rendered decisions, which was issued after the lower court ruled. Less frequently, the Court will issue a GVR in light of some other new development, such as the enactment of a new statute or the Solicitor General's concession that the lower court erred.<sup>1</sup> In issuing a GVR, the Court does not determine that the intervening event necessarily changes the outcome in the case, just that it might.<sup>2</sup> Thus, the purpose of the GVR device is to give the lower court the initial opportunity to consider the possible impact of intervening developments and, if necessary, to revise its decision accordingly. The Court's GVR orders are usually only a couple of lines long,<sup>3</sup> and it may issue scores of them—or, in recent years, even hundreds—every year. Yet despite the large number of GVRs issued, the practice has attracted relatively little scrutiny. Over the course of several decades, GVRs have become an accepted and largely uncontroversial part of the Court's business.<sup>4</sup>

1. See generally EUGENE GRESSMAN ET AL., *SUPREME COURT PRACTICE* 345–49 (9th ed. 2007) (discussing the Supreme Court's GVR practice).

2. See *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (explaining that the Court issues a GVR when there is “a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity”); see also *Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001) (rejecting litigant's attempt to read a GVR as a ruling on the merits).

3. Typical language is: “The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to [the relevant lower court] for further consideration in light of [the relevant recent event].”

4. See 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, 7–8 (1983) (tracing the rise of the modern GVR practice in the 1960s and 1970s). Easily the most

Notwithstanding its humble appearance, the GVR responds to a fundamental problem in the administration of justice: how should the judicial system respond when the law changes during the course of the proceedings?<sup>5</sup> Every lawsuit is marked by several important dates: the filing of the suit, the trial court's judgment, the appellate court's decision, the issuance of the appellate court's mandate, the expiration of the period for seeking certiorari, and so forth. The law may change between any of these dates. We can certainly imagine a legal system in which the applicable law was fixed as of, say, the date the complaint is filed. Every court in such a system would apply the law as it stood on that date, ignoring any subsequent changes in the law. That is a conceivable system, but it is not ours. Generally speaking, in our system courts take changes of law into account when they rule.<sup>6</sup> Thus, a federal court of appeals will decide an appeal using new principles of law that postdate the district court's judgment—or return the case to the district court to do so—rather than simply deciding whether the district court correctly applied the former law then available to it.<sup>7</sup>

The GVR shows that our system will let litigants seek the benefit of changes in law that occur even after final action by the courts of appeals (or state high courts). And, perhaps more importantly, the GVR practice reflects an institutional choice: namely, that it is the Supreme Court rather than some other court that will take cognizance of these changes. The Supreme Court is given this duty even though the GVR practice seems to represent, at best, a species of mere error correction, which virtually everyone agrees is not the Court's primary function.<sup>8</sup> (In truth, the GVR practice involves merely preliminary error screening—arguably even less worthwhile for the Court.)

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discussed topic in the limited literature on GVRs is the question of precisely how the lower court should understand them—that is, whether they are completely neutral or instead intimate some view of what should happen on remand. Answering that question was one of Hellman's chief concerns; it is also addressed in Erwin Chemerinsky & Ned Miltenberg, *The Need To Clarify the Meaning of U.S. Supreme Court Remands: The Lessons of Punitive Damages' Cases*, 36 ARIZ. ST. L.J. 513 (2004). Because that issue has already attracted attention, I do not address it here.

5. Cf. Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 YALE L.J. 922 (2006) (discussing the problem of legal change in the context of forfeiture rules applied on direct review of criminal cases).

6. This is a complicated topic that is not easily summarized in a short statement; some of the complications are discussed in Section II.A below.

7. See, e.g., *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 273, 280 (2d Cir. 2005) (relying on a new Supreme Court case to reverse a district court decision that was the culmination of over two decades of litigation). Rather than applying new law itself, a court of appeals can return the case to the district court so that the district court can apply the new law in the first instance—a procedure analogous to the Supreme Court's GVR. See, e.g., *Vicknair v. Formosa Plastics Corp.*, 98 F.3d 837, 839 (5th Cir. 1996). The point is simply that the court of appeals generally is not free to ignore the intervening developments and decide the case based on the law prevailing at the time of the district court's judgment.

8. See, e.g., *Supreme Court Jurisdiction Act of 1978: Hearings on S. 3100 Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 95th Cong. 40 (1978) [hereinafter *Supreme Court Jurisdiction Act Hearings*] (letter from all nine sitting Justices); Arthur D. Hellman, *Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review*, 44 U. PITT. L. REV. 795, 799 (1983) (“[T]he consensus of Congress, the bar, and the judiciary [is] that review for error should play, at best, a minor part in the Court's work . . .”).

This is an opportune moment to think more deeply about GVRs. First, the last several years have seen an unprecedented, massive surge in GVRs, due largely to the need to implement a line of criminal-sentencing decisions that together represent a revolution in the law.<sup>9</sup> That over one thousand GVRs have so far been occasioned by the sentencing decisions should prompt us to consider the GVR's merits and demerits from the perspective of the judicial system as a whole.

A second reason for examining the GVR is the recent decision in *Youngblood v. West Virginia*, which raised the profile of the GVR practice even though *Youngblood* was, if truly a GVR at all, a very unconventional one.<sup>10</sup> As already stated, the usual reason for issuing a GVR is to allow the lower court the initial opportunity to consider an intervening development. In *Youngblood*, the Court provided a short per curiam opinion (itself unusual for a GVR) explaining that the reason for the remand was to allow the court below to address the defendant's facially plausible claim, adequately presented to the lower court yet not discussed in its opinion, that prosecutors had withheld evidence in violation of *Brady v. Maryland*<sup>11</sup>—a case decided over forty years ago. Thus, if the lower court's decision in *Youngblood* was doubtful, it was not because of any intervening event as in the typical GVR. Yet while the Supreme Court was moved enough to take some action (rather than simply denying certiorari, as it does for countless incorrect decisions), it was not moved enough to grant plenary review or even to issue a summary reversal. Instead it GVR'd because “[i]f this Court is to reach the merits of this case, it would be better to have the benefit of the views of the full Supreme Court of Appeals of West Virginia on the *Brady* issue.”<sup>12</sup>

Further raising the profile of this already unusual GVR, three Justices dissented.<sup>13</sup> Justice Scalia, particularly perturbed with his colleagues, deemed *Youngblood* an unjustifiable expansion of existing GVR practice. As he pointed out, the Supreme Court can grant certiorari and conduct a full review of a properly presented issue whether or not it was discussed in the opinion below.<sup>14</sup> There was, he recognized, one advantage in having the

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9. See *infra* text accompanying notes 29, 32–41 (discussing the impact of, inter alia, *United States v. Booker*, 543 U.S. 220 (2005)).

10. 547 U.S. 867 (2006) (per curiam); see also *infra* Section I.A (defining which cases my analysis counts as GVRs). *Youngblood*'s impact might be judged by the fact that the most recent edition of the Low & Jeffries Federal Courts casebook now devotes a substantial section to GVRs, a development apparently inspired by *Youngblood*. PETER W. LOW & JOHN C. JEFFRIES, JR., *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 647–58 (6th ed. 2008).

11. 373 U.S. 83 (1963). A dissent below did address the *Brady* claim at some length and in fact would have reversed the conviction. *State v. Youngblood*, 618 S.E.2d 544, 559–60 (W. Va. 2005) (Davis, J., dissenting).

12. *Youngblood v. West Virginia*, 547 U.S. at 870.

13. *Id.* (Scalia, J., joined by Thomas, J., dissenting); *id.* at 875 (Kennedy, J., dissenting).

14. *Id.* at 872 (Scalia, J., dissenting) (“Since we sometimes review judgments with no opinion, and often review judgments with opinion only on one side of the issue, it is not clear why we need opinions on *both* sides here.”); see also GRESSMAN ET AL., *supra* note 1, at 81, 187–88 (explaining that lower court decisions that do not address the relevant issue, including summary dispositions, can be reviewed).

West Virginia high court revisit the matter: "If the majority suspects that the court below erred, there is a chance that the GVR-in-light-of-nothing will induce [the West Virginia court] to change its mind on remand, sparing us the trouble of correcting the suspected error."<sup>15</sup> In other words, according to Scalia, the GVR was a subtle (or not so subtle) hint that the court below might wish to try again, else the Supreme Court might be roused to actually reverse. Whether *Youngblood* was a veiled threat or merely an invitation to write a more thorough opinion, in either case it may portend a greater willingness to employ the GVR outside of its most familiar bounds.

Although these recent developments provide good reason to examine the GVR process more carefully, anyone who tries to engage in such reflection quickly realizes that there are serious gaps in our knowledge. Even basic descriptive data are scarce; we do not know how many GVRs, and of what categories, the Court has been issuing.<sup>16</sup> In the absence of that information, discussion or criticism of the GVR practice risks becoming unmoored from reality—unable to distinguish what is unprecedented from what is routine, ignorant of the character of the procedure at issue. This Article fills some of the gaps in our knowledge by collecting, analyzing, and presenting data on the Court's GVR practice. Given the paucity of information on the GVR practice, I believe that gathering the data is worthwhile in itself, and my hope is that the data will facilitate future scholarship.

The data also have some normative and policy implications. It may be that run-of-the-mill GVRs are regarded as unproblematic only because we know so little about them. If observers knew that the Court issued some 800 GVRs several years ago, roughly 250 GVRs in the 2006 Term, and about 200 GVRs in the 2007 Term, they might not regard the practice as so uncontroversial. Each GVR represents a decision to devote a slice of the Court's limited capacity to attempting to do justice in an individual case rather than to clarifying and unifying federal law. In this sense, *all* GVRs are controversial GVRs. This realization might lead us to consider whether there is a better way.

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15. *Youngblood v. West Virginia*, 547 U.S. at 873 (Scalia, J., dissenting).

16. The Spaeth ALLCOURTS database contains only those exceptional GVRs accompanied by an opinion. See HAROLD J. SPAETH, THE ORIGINAL SUPREME COURT JUDICIAL DATABASE, 1953–2007 TERMS 56–57 (2008), available at [http://www.cas.sc.edu/poli/juri/allcourt\\_codebook.pdf](http://www.cas.sc.edu/poli/juri/allcourt_codebook.pdf). The statistics published each year by the *Harvard Law Review* contain an entry for cases disposed of by memorandum, but that category seems to be both overinclusive (because it includes some non-GVR summary vacatur) and underinclusive (because it excludes GVRs accompanied by a per curiam opinion); importantly, the statistics do not divide up GVRs by category. See, e.g., *Supreme Court, 2003 Term—The Statistics*, 118 HARV. L. REV. 497, 505 tbl.II(D) (2004). The leading empirical study is that conducted by Arthur Hellman, which is now almost twenty-five years old and which, while characteristically careful and thorough, concerns only the category of GVRs caused by intervening Supreme Court cases. See Hellman, *supra* note 4, at 6 n.6. (Note that Hellman published a similar but shorter account of the GVR practice as "Granted, Vacated, and Remanded"—*Shedding Light on a Dark Corner of Supreme Court Practice*, 67 JUDICATURE 389 (1984). I will cite his longer article.) Sara Benesh's recent work on GVRs as monitoring devices examines only the last several years and, again, does not address the different types of GVRs. Sara C. Benesh, *GVRs and Their Aftermath in the Seventh Circuit and Beyond*, 32 S. ILL. U. L.J. 659, 674 tbl.1 (2008).

The analysis proceeds as follows. Part I provides an overview of the Court's GVR practice. It first provides data on approximately the last decade of GVRs, identifying the number of GVRs by category for each year and providing other measures as well. For purposes of comparison, it also includes data on the GVR practice from the late 1970s. The analysis reveals a contemporary GVR practice that is large, less varied (in terms of categories of GVRs) than in the past, and increasingly dominated by blockbuster cases that generate scores or even hundreds of GVRs. Part I also provides greater detail on certain categories of GVRs that are sometimes considered controversial, including those (like *Youngblood*) that are triggered by pre-existing precedents and those that are triggered by changes in the parties' litigation positions (most prominently, confessions of error by the Solicitor General or the state equivalent). The findings suggest, among other things, that while *Youngblood* is an extreme case, GVRs in light of precedents that were already on the books at the time of the decision below are not especially uncommon. More generally, the analysis shows that when we are confronted with what seems like a novel GVR, it might look less foreign once we appreciate that the GVR practice was not always as uniform as it is today.

Armed with this information on the Court's GVR practice, Part II then takes a more critical view. Although the GVR looks like the best way for the Supreme Court to implement the principle that changes in law should be applied to pending litigation, the case in favor of the GVR errs in assuming that the Supreme Court is the proper institution to be charged with the often substantial task of overseeing changes in law. The GVR practice developed accidentally, in the sense that it grew gradually and incrementally against a background of particular institutional circumstances that existed at the time; no one deliberately decided that the GVR practice in its current form was the best way to deal with the general problem of changed law. Indeed, the current practice is in some regards quite irrational from the point of view of the values that should underlie a sensible multi-tiered judicial system. I therefore put forward an alternative regime under which parts of the current GVR practice would be replaced with new procedures that shift more responsibility to lower courts, such as by extending the period to seek panel rehearing in certain categories of cases. Rather than requiring litigants first to make a trip to the Supreme Court, this alternative directs litigants to seek reconsideration directly from the courts of appeals.

The Article concludes with a discussion of whether the reform should now be implemented.

## I. AN EMPIRICAL OVERVIEW OF THE COURT'S GVR PRACTICE

Because our ability to critically examine the contemporary GVR practice, and even to fully understand it, is seriously hampered by a lack of information, this Part tries to fill some of the gaps in our knowledge. After describing my methodology, I provide an overview of the contemporary GVR practice and how it differs from the GVR practice of thirty years ago.

This Part concludes by presenting additional data on certain categories of GVRs that commentators or members of the Court have sometimes considered problematic despite the overall GVR practice's widespread acceptance.

### A. Definition and Method

There is a threshold definitional issue as to how capacious the term "GVR" might be. Everyone would include the formulaic orders that remand for reconsideration in light of a recent Supreme Court case. But as one moves beyond that undisputed core of the concept, there is some room for disagreement. For purposes of this analysis, I understand a GVR to be a summary disposition that, without purporting to find any error, returns the case to the court below for further consideration in light of some matter. Perhaps the best way to elaborate on that definition is to explain what it includes and excludes. To begin with, I include only dispositions at the petition stage (or, for appellate docket cases, the jurisdictional-statement stage<sup>17</sup>); excluded are those very rare cases in which the Court, having previously set the case for plenary consideration, then vacates and remands in light of an event that occurred after the grant of certiorari or after oral argument.<sup>18</sup> Also excluded are dispositions that would commonly be described as summary reversals even though, for what might loosely be called technical reasons, the Court actually vacated rather than outright reversed.<sup>19</sup> The vast majority of GVRs are but a few boilerplate lines, but I also include nonformulaic GVRs that are accompanied by a short explanatory per curiam opinion (often in response to a dissent). As a further illustration of my criteria, I would include cases in which the Court GVRs for consideration of whether a case has become moot but would exclude—for want of the

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17. Today, cases reach the Court almost entirely by writ of certiorari, which is discretionary. A few vestiges of mandatory appellate jurisdiction remain, notably in certain voting rights cases. See generally GRESSMAN ET AL., *supra* note 1, at 89–117, 146–47 (describing extent of remaining appellate jurisdiction).

18. See, e.g., *Arizona v. Gant*, 540 U.S. 963 (2003) (vacating and remanding in light of a state supreme court decision issued after a grant of certiorari); *U.S. Dep't of State v. Legal Assistance for Vietnamese Asylum Seekers, Inc.*, 519 U.S. 1 (1996) (vacating and remanding after oral argument in light of new legislation); *Knox v. United States*, 510 U.S. 939 (1993) (vacating and remanding in light of a new position taken by Solicitor General in merits brief after a grant of certiorari). Also excluded, though a closer call, is the unusual situation presented by *Hohn v. United States*, 524 U.S. 236 (1998), where the Court decided, after oral argument on a jurisdictional question, that it had jurisdiction and then vacated and remanded in light of the Solicitor General's confession of error on the merits. GVR-like dispositions such as those described above should not be confused with the dismissal of certiorari as improvidently granted ("DIG"). A DIG might result when, for example, the Court later decides that a particular case is a poor vehicle for deciding the question the Court granted certiorari to decide. See generally Michael E. Solimine & Rafael Gely, *The Supreme Court and the DIG: An Empirical and Institutional Analysis*, 2005 WIS. L. REV. 1421.

19. Suppose, for example, that the Supreme Court determines that the court below erred by using an improper standard. The Supreme Court will often vacate and direct the court below to apply the proper standard to the facts, rather than the Court itself applying the correct standard and affirming or reversing. See, e.g., *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 457–58 (2006) (per curiam); *California v. Roy*, 519 U.S. 2, 4–6 (1996) (per curiam).



reconsideration feature—cases in which the Court determines the case actually *is* moot, vacates the decision below, and remands with instructions to dismiss the case.<sup>20</sup>

The tables below categorize GVRs by their cause, that is, the event in light of which the lower court should reconsider its prior decision: a Supreme Court ruling, a new state statute, and so on. I note here one category that has a rather different character from others but is nonetheless traditionally considered a GVR. I refer to those situations in which the Court remands a state court decision for clarification of whether the decision relies on federal or state law. To speak very broadly, the Court has jurisdiction to review state court decisions that are based on federal law but lacks jurisdiction to review decisions that rest on state-law grounds.<sup>21</sup> Thus, it will often be important to determine the actual basis of an ambiguous state court decision. Although in the past the Court might GVR in such circumstances in order to obtain a clarified decision from the state court, such elucidatory GVRs have virtually disappeared from contemporary practice, because the Court now follows a rule under which there is presumed to be jurisdiction when a state court mixes together state and federal grounds for decision.<sup>22</sup> My criteria include these GVRs, though one has to go back a number of years to find any.<sup>23</sup>

The method for locating GVRs combined electronic and paper sources: I began with searches of the Lexis electronic database using terms that should appear in any GVR (such as “vacate(d)” and “remand(ed)” in proximity).<sup>24</sup> I

20. Compare *United States v. US West, Inc.*, 516 U.S. 1155, 1156 (1996) (granting certiorari, vacating, and remanding “for consideration of the question whether [the case] is moot”), with *Teel v. Khurana*, 525 U.S. 979, 979–80 (1998) (granting certiorari, vacating, and remanding “with instructions to dismiss the case as moot” (citing *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950))). Although cases of the first sort fit my criteria, I did not actually locate any such cases from the last decade.

21. See generally RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 483–541 (5th ed. 2003) [hereinafter HART & WECHSLER].

22. See *Michigan v. Long*, 463 U.S. 1032, 1038–41 (1983). For a pre-*Michigan v. Long* example of a now-disfavored remand for clarification, see *Montana v. Jackson*, 460 U.S. 1030 (1983) (citing *California v. Krivda*, 409 U.S. 33 (1972)). One assumes that, *Michigan v. Long* notwithstanding, the Court often simply denies certiorari in otherwise promising cases when the grounds of the decision below are murky.

23. The Supreme Court’s disposition in *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70, 78 (2000), came very close to being such a GVR, but it is excluded because it was not decided at the certiorari stage—there was merits briefing and oral argument.

24. The database was the Lexis Supreme Court Lawyers’ Edition database. The following search was run for various years: vacat! /p remand! /p (reconsider! or consider! or “in light of”) and date(geq (10/01/[year]) and leq (9/30/[following year])). This search should return all formulaic GVRs, which are the overwhelming majority. Nonformulaic GVRs are potentially harder to catch with such a search (though, due to their rarity, they tend to be cited in secondary literature and subsequent nonformulaic GVRs, which makes them easier to find through those means). A benefit of this particular database is that it includes Lexis-supplied annotations, such as the “decision” and “outcome” fields, which provide further assurance that nonformulaic GVRs would be captured. Note that “grant” was not a search term because it would omit cases on the appellate docket. As the search terms indicate, the Supreme Court term was treated as running from October 1 through the following September 30. For OT 2006, I used the Westlaw Supreme Court Cases (SCT) database rather than Lexis, as the Lexis search for this year inexplicably excludes several months of GVRs.

ran additional targeted searches as well (such as “GVR”) and also conducted searches aimed at terms likely to appear in certain categories of GVRs (for example, “*Krivda*,” a case that was often cited in elucidatory GVRs<sup>25</sup>). The lists of results, which included many false positives, were then examined, and GVRs were identified according to the definitional criteria discussed above. To further ensure completeness of the database results, I examined the back of each relevant volume of the *U.S. Reports*, where the Court’s orders lists are published.<sup>26</sup> I am reasonably confident that I have identified all GVRs, though I cannot rule out the possibility of having missed a few. Finally, I note that when two or more petitions arising from the same lower court case were GVR’d in one consolidated order, that was counted as one GVR.<sup>27</sup>

The GVR lists and data that are summarized in this Article are on file with the *Michigan Law Review* and are available from the author.

### B. *The GVR Practice over the Past Decade*

Table 1 presents data on the Supreme Court’s GVR practice, broken down by category, over roughly the past decade. The “nonstandard” GVRs to which the table refers are those caused by something other than a Supreme Court case (such as a new federal statute, a confession of error, etc.). The data begin with October Term (“OT”) 1996, which we might with some justification regard as the beginning of the Court’s current phase of GVR practice.<sup>28</sup> Because certain Supreme Court cases trigger many GVRs, for some years I separately report the contribution of especially prolific cases (those generating 50+ GVRs) rather than just providing a total figure. (Further discussion of leading GVR-triggering cases will be provided below.)

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25. See *supra* note 22.

26. When the final hardbound copy of the *U.S. Reports* was not yet available, the soft-cover preliminary print was used instead. Some GVRs accompanied by short per curiams—which I include in my count—are not printed in the back of the books in the orders lists but are instead printed in the front of the book with the argued cases. The *U.S. Reports* version of the orders list often contains helpful cross-references to those summary dispositions printed in the front of the book, which assists in locating them.

27. An example is the single GVR order in *Republic of Austria v. Whiteman* and *Republic of Poland v. Garb*, 542 U.S. 901 (2004), two petitions that arose from the same Second Circuit judgment. In this case, Lexis includes two separate entries, but the *U.S. Reports* hardcopy contains just one consolidated order, and I count it as one GVR. On rare occasions, one will find in the *U.S. Reports* a single order treating different petitions from different lower court cases. See, e.g., 544 U.S. 901 (2005) (issuing GVRs on six different lower court decisions in light of *Roper v. Simmons*). I count each of these separately rather than as one GVR.

28. In the previous term, OT 1995, the Court issued two GVRs with accompanying opinions that described the Court’s standards for issuing GVRs in quite expansive terms. See *Lawrence v. Chater*, 516 U.S. 163 (1996); *Stutson v. United States*, 516 U.S. 193 (1996). The dissenters thought these cases signaled an important change. See *Lawrence*, 516 U.S. at 189–90 (Scalia, J., dissenting) (“What is more momentous than the Court’s judgments in the particular cases before us—each of which extends our prior practice just a little bit—is its expansive expression of the authority that supports those judgments. . . . Comparing the modest origins of the Court’s no-fault V&R policy with today’s expansive *dénouement* should make even the most Pollyannish reformer believe in camel’s noses, wedges, and slippery slopes.”).

Except where otherwise noted, the analysis does not include a thorough examination of the huge number of GVRs stemming from the recent sentencing decisions *United States v. Booker*<sup>29</sup> (nearly 800 GVRs spread over OT 2004–OT 2006) and *Cunningham v. California*<sup>30</sup> (roughly 200 GVRs in OT 2006); for those cases I provide only an approximate figure.<sup>31</sup>

TABLE 1  
GVRs BY CATEGORY, OT 1996–OT 2006

	OT 1996	OT 1997	OT 1998	OT 1999	OT 2000	OT 2001	OT 2002	OT 2003	OT 2004	OT 2005	OT 2006
Total GVRs	60	39	45	38 + 1 Apprendi GVR	61 + 50 Apprendi GVRs	57	48	37	58 + approx. 740 Booker GVRs	50 + 37 Booker GVRs	66 + 1 Booker GVR + approx. 200 Cunningham GVRs
Number of nonstandard GVRs (percent)*	11 (18%)	3 (8%)	3 (7%)	1 (3%)	1 (<1%)	1 (2%)	3 (6%)	0 (0%)	1 (<1%)	6 (7%)	3 (approx. 1%)
<i>Nonstandard GVRs by type:</i>											
Federal statute/regulation	5	3	2	0	1	0	0	0	0	5	0
Federal confession of error	3	0	0	0	0	1	3	0	1	0	1
State case	2	0	0	0	0	0	0	0	0	0	0
State statute/regulation	1	0	0	0	0	0	0	0	0	0	0
State confession of error	0	0	0	1	0	0	0	0	0	1	0
Other/miscellaneous	0	0	1	0	0	0	0	0	0	0	2

\*In a few cases, GVR orders listed a Supreme Court case and something else as precipitating events. See, e.g., *Shalala v. Grijalva*, 526 U.S. 1096 (1999) (remanding in light of Supreme Court case and federal statute/regulations). These were included in the count of nonstandard GVRs. There were two such GVRs in OT 1998 and one in OT 2002.

Two features of the data jump out immediately, one regarding type and the other regarding frequency. First, the GVR practice is dominated by GVRs caused by Supreme Court cases. In the years studied, they represent the large bulk of GVRs, nearly 100% in many years. Nonstandard GVRs (those caused by anything else) are correspondingly rare. In this sense, the Court's recent GVR practice is not very diverse.

29. 543 U.S. 220 (2005).

30. 549 U.S. 270 (2007).

31. As described above, counting GVRs requires sifting through the computer results, checking the *U.S. Reports*, and accounting for consolidations. For *Booker* and *Cunningham*, I provide only approximations for OT 2004 and OT 2006, respectively, because I did not perform this process with the same rigor due to the large numbers involved.

A second feature that one notices is that the number of GVRs varies substantially from year to year. This is probably because the majority of the Court's decisions do not lead to any GVRs, while a few major cases generate large totals. This fact is on display most dramatically in the case of *United States v. Booker*. *Booker* held that the federal sentencing guidelines, if treated as mandatory, can violate a defendant's Sixth Amendment and Due Process rights by allowing the sentence to turn on facts found by a judge rather than a jury.<sup>32</sup> In the remedial portion of the Court's opinion, it held that sentencing courts would henceforth have to treat the Guidelines as merely advisory.<sup>33</sup> Needless to say, *Booker* had a broad impact across the federal courts—it potentially called into doubt a substantial proportion of their daily business—and so it is not surprising that it would have a substantial impact on the GVR practice as well.<sup>34</sup> It is difficult to imagine a change in the law that could cause more GVRs than *Booker* did.<sup>35</sup>

If one were trying to describe the nature of blockbuster GVR-creating cases, one would expect them to be cases that upset existing law on questions that routinely arise. *Booker* of course fits that pattern, as do the runners-up from the years under study, *Cunningham v. California*<sup>36</sup> (approximately 200 GVRs) and *Apprendi v. New Jersey*<sup>37</sup> (51 GVRs). Indeed, all are part of the same line of cases that revolutionized the judicial role in criminal sentencing. (Also part of that same line of cases are the 2007 sentencing decisions in *Gall v. United States*<sup>38</sup> and *Kimbrough v. United States*;<sup>39</sup> it is too early to fully measure their impact in connection with this study, but both seem likely to surpass *Apprendi* in terms of GVRs.)

32. 543 U.S. at 226–27.

33. *Id.* at 245.

34. Given the number of pending cases potentially affected by *Booker*, some readers might conclude that the number of GVRs it generated was actually surprisingly modest. Part of the explanation is that some courts held potentially affected cases while *Booker* was pending, so that subsequent GVRs were not necessary. See *infra* note 118 (describing Second Circuit's approach). See generally *infra* text accompanying notes 133–134 (discussing whether courts should hold cases in abeyance when a potentially relevant Supreme Court case is pending). The differing ways various courts handled the period between *Blakely v. Washington*, 542 U.S. 296 (2003), and *Booker* is an interesting topic in its own right and one I plan to explore in future research.

35. *But cf.* Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139 (2007). If the Court were ever to overrule its holding in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), that the Due Process and Sixth Amendment rules behind the *Apprendi/Booker* line of sentencing cases do not apply to proof of a prior conviction, that would have a major impact. See *Rangel-Reyes v. United States*, 547 U.S. 1200, 1201–02 (2006) (Stevens, J., respecting denial of certiorari) (stating view that *Almendarez-Torres* was incorrect but observing that “countless judges in countless cases have relied on *Almendarez-Torres* in making sentencing determinations. The doctrine of *stare decisis* provides a sufficient basis for the denial of certiorari in these cases.”).

36. 549 U.S. 270 (2007) (invalidating California's determinate-sentencing framework).

37. 530 U.S. 466 (2000) (invalidating a state sentence enhancement that was based on judicial fact-finding).

38. 128 S. Ct. 586 (2007) (holding that a sentence falling below the Guidelines range must be reviewed on appeal under a deferential abuse-of-discretion standard).

39. 128 S. Ct. 558 (2007) (permitting a sentencing judge to reject the Guidelines' differential treatment of crack vs. powder cocaine in selecting an appropriate sentence).

Decisions involving certain frequently applied immigration provisions can also generate numerous GVRs: *Lopez v. Gonzalez*,<sup>40</sup> which concerned whether certain state drug offenses were “aggravated felonies” for purposes of federal immigration law, generated 23 GVRs. I note for the sake of completeness that while the first year of this study, OT 1996, includes only the last few GVRs stemming from *Bailey v. United States*,<sup>41</sup> that case—which involved a common federal sentencing provision regarding “use” of a firearm—generated a total of 47 GVRs, mostly in OT 1995. All of these decisions were victories by criminal defendants or similarly situated persons against the government on issues that arise in many cases. Because such cases tend to cause particularly disruptive changes in law,<sup>42</sup> it is not surprising that they would also generate numerous GVRs.

After the cases just mentioned, there is a substantial drop off, but several other cases from the years under study generated about a dozen GVRs each:

- *Zadvydas v. Davis* (time limits on detention of removable aliens),<sup>43</sup>
- *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.* (patent law doctrine of equivalents),<sup>44</sup>
- *Crawford v. Washington* (Confrontation Clause limits on introduction of out-of-court testimonial evidence),<sup>45</sup>
- *Davis v. Washington* (application of *Crawford* to 911 calls and victims’ statements to police),<sup>46</sup>
- *Artuz v. Bennett* (tolling provisions of Antiterrorism and Effective Death Penalty Act),<sup>47</sup>
- *State Farm Mutual Automobile Insurance Co. v. Campbell* (Due Process limits on punitive damages),<sup>48</sup> and
- *Burlington Northern & Santa Fe Railway Co. v. White* (standard for retaliation claims under Title VII).<sup>49</sup>

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40. 549 U.S. 47 (2006). As often happens, the same language appeared in both immigration statutes and in criminal provisions, *see id.* at 50–51 & 52 n.3, which tends to increase the impact of the decision.

41. 516 U.S. 137 (1995).

42. *See Heytens, supra* note 5, at 929–31 (arguing that pro-defendant criminal procedure rulings are especially likely to create disruptive changes in law because, *inter alia*, they apply to many substantive offenses, and convicted defendants have broader appeal rights than does the government).

43. 533 U.S. 678 (2001).

44. 535 U.S. 722 (2002).

45. 541 U.S. 36 (2004).

46. 547 U.S. 813 (2006).

47. 531 U.S. 4 (2000).

48. 538 U.S. 408 (2003).

49. 548 U.S. 53 (2006).

Even if one excludes the *Booker* and *Cunningham* years as aberrations, one still sees a great deal of fluctuation from year to year. Indeed, even if one additionally excludes OT 2000, with its dozens of *Apprendi* GVRs, and looks just at the “typical” years that lack a major GVR-causing case, the difference between 40 GVRs and 60 GVRs per term is still quite substantial. Certainly one does not see that much volatility in the Court’s plenary docket, which changes much less from one term to the next.<sup>50</sup> Further, at some point it becomes questionable to refer to the years affected by a blockbuster as aberrant deviations from a more stable pattern. Indeed, OT 2007, while not part of this study, will be yet another big “aberrational” year, with roughly 200 GVRs, again mainly due to sentencing guidelines cases.<sup>51</sup> These big booms should arguably now be regarded as part of the pattern itself.

Another feature of the data that is worth noting is the extreme rarity of GVRs in light of changes in *state* law. One would expect that the activities of fifty state legislatures and judiciaries would suffice to generate many intervening changes of state law that could trigger GVRs, whether in cases from the state courts or in federal court cases that rely on interpretations of state law.<sup>52</sup> It is hard to say why there are so few such GVRs. True, as to diversity cases, a few members of the Court have expressed the view that GVR’ing is a poor use of the Court’s time, but that position has come only in *dissents*.<sup>53</sup> Notably, Justice Scalia, a critic of expansive uses of the GVR, defends the practice of GVR’ing in diversity cases.<sup>54</sup> Thus, as far as the Court’s official public doctrine is concerned, it is open to such petitions. Further, in cases that present federal questions, there does not appear to be any argument for refusing to GVR when changes in state law affect the resolution of the federal issues, and yet one again finds precious few such GVRs. Whatever the cause, the paucity of GVRs in light of changed state law is ironic, given that some accounts trace the origins of the Court’s GVR practice to precisely such scenarios.<sup>55</sup>

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50. See LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS* 72–75 (4th ed. 2007) (providing data on the plenary calendar). Of course, small changes in the plenary docket each term can add up to a noticeable effect over time.

51. See *supra* notes 38–39 and accompanying text (discussing the impact of *Gall v. United States*, 128 S. Ct. 586 (2007), and *Kimbrough v. United States*, 128 S. Ct. 558 (2007)).

52. The Supreme Court can review state court judgments that, loosely speaking, depend on questions of federal law. 28 U.S.C. § 1257 (2000). Changes in state law can nonetheless lead to GVRs in these cases because federal law outcomes often depend on questions of state law (such as when state law is challenged as invalid under federal law). Cases originating in federal court that are potential candidates for a GVR in light of changed state law include federal question cases that involve matters of state law (such as, again, a suit claiming that state law is invalid under federal law) and ordinary diversity cases.

53. *Lords Landing Vill. Condo. Council of Unit Owners v. Cont’l Ins. Co.*, 520 U.S. 893, 898 (1997) (Rehnquist, C.J., joined by Breyer, J., dissenting); *Thomas v. Am. Home Prods., Inc.*, 519 U.S. 913, 916–17 (1996) (Rehnquist, C.J., joined by Breyer, J., dissenting).

54. *Thomas*, 519 U.S. at 913 (Scalia, J., concurring).

55. This is Justice Scalia’s view of the GVR’s origins:

[O]ur practice of *granting* certiorari, *vacating* the judgment below, and *remanding* for further proceedings in light of intervening developments apparently began when we first set aside the

Finally, I note that GVR orders with recorded dissents were rare, averaging under one per term.<sup>56</sup>

### C. Comparison to Late-1970s GVR Practice

To judge whether the GVR practice has changed over time, we can compare the data above to figures from the 1975–79 Terms.<sup>57</sup> Table 2 below provides data on GVRs for OT 1975–OT 1979 using the same definitions and methods employed for OT 1996–OT 2006. Note that it includes entries for two types of GVRs not found in the more recent data—remands to consider mootness and remands for clarification of whether a judgment is based on independent state grounds.<sup>58</sup>

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judgments of state supreme courts to allow those courts to consider the impact of state statutes enacted after their judgments had been entered. By 1945, the practice of vacating state judgments in light of supervening events had become so commonplace that we could describe it as “[a] customary procedure.” “Similarly, where a federal court of appeals’ decision on a point of state law had been cast in doubt by an intervening state supreme court decision, it became our practice to vacate and remand so that the question could be decided by judges ‘familiar with the intricacies and trends of local law and practice.’”

*Thomas*, 519 U.S. at 913–14 (Scalia, J., concurring) (second alteration in original) (citations omitted); see also *Lawrence v. Chater*, 516 U.S. 163, 179–80 (1996) (Scalia, J., dissenting) (presenting a more detailed version of this history). Chief Justice Rehnquist questioned this account of the GVR’s state-law origins, pointing out that some of the early GVRs cited by Justice Scalia were not actually GVRs, either because they came to the court under mandatory non-certiorari jurisdiction or because certiorari had already been granted. *Lawrence*, 516 U.S. at 176 (Rehnquist, C.J., dissenting).

56. It is very likely that Justices sometimes vote against a GVR without noting their dissent in the published order. *Lawrence*, 516 U.S. at 192 (Scalia, J., dissenting) (stating that he would not necessarily record his dissents from objectionable GVRs); cf. GRESSMAN ET AL., *supra* note 1, at 330–34 (noting that recording a dissent from a denial of certiorari is rare). It is sometimes said that the Court follows a Rule of Six, under which a summary disposition requires six votes rather than five. GRESSMAN ET AL., *supra* note 1, at 343, 572 n.41b (describing, and questioning, the vitality and scope of the Rule of Six). Nonetheless, there have been some instances in which a case was GVR’d over the dissents of four Justices. *E.g.*, *Price v. United States*, 537 U.S. 1152 (2003); *Ehrlich v. City of Culver City*, 512 U.S. 1231 (1994); *Alvarado v. United States*, 497 U.S. 543 (1990). See generally J. Mitchell Armbruster, Note, *Deciding Not to Decide: The Supreme Court’s Expanding Use of the “GVR” Power Continued in Thomas v. American Home Products, Inc. and Department of the Interior v. South Dakota*, 76 N.C. L. REV. 1387, 1399–1400 (1998) (discussing whether the Rule of Six applies).

57. I chose these terms for purposes of comparison primarily because they are the terms Hellman studied in his investigation of the GVR process, which was part of his larger project examining the Court’s business in the late 1970s. The figures I report are my own, however, as Hellman had somewhat different interests and used a different method. Most importantly, he examined only GVRs triggered by Supreme Court cases, not the other categories. Hellman, *supra* note 4, at 6 n.6. He also excluded nonformulaic GVRs that are accompanied by a short per curiam. *Id.* at 11 n.33. Further, his GVR study did not provide term-by-term figures but rather gave a total for the five-year period. *Id.* at 11. He did provide such a yearly breakdown in another article, although those figures appear to use the petition as the unit of analysis and thus disregard consolidations (and, again, do not provide figures for the various types of GVRs beyond those triggered by Supreme Court cases). See Hellman, *supra* note 8, at 803–06. This is not meant to be a criticism of Hellman’s methods; there are a number of reasonable approaches that one can take, and the considerations motivating the research will lead to different choices.

58. See *supra* notes 20–23 and accompanying text (discussing these categories). My study of the late 1970s suggests that reconsideration orders that occur based on some new event that occurs after a case is granted and set for argument—which my criteria exclude—were more common than in more recent years. Also more common in the past—but included—are GVRs accompanied by brief per curiams, typically printed in the front of the book.

TABLE 2  
GVRs BY CATEGORY, OT 1975–OT 1979

	OT 1975	OT 1976	OT 1977	OT 1978	OT 1979
Total GVRs	56	91	50	68	87
Number of nonstandard GVRs (percent)*	13 (23%)	22 (24%)	10 (20%)	5 (7%)	7 (8%)
<i>Nonstandard GVRs by type:</i>					
Federal statute/regulation	2	4	2	0	0
Federal confession of error	5	7	3	3	4
State case	0	1	0	0	0
State statute/regulation	3	1	0	0	0
State confession of error	0	0	0	0	0
Possible mootness	1	5	2	0	1
Clarification of state/federal grounds	2	1	2	1	2
Other/miscellaneous	0	3	1	1	0

\*As before, GVR orders that listed a Supreme Court case and something else as precipitating events were included in the count of nonstandard GVRs. There were three such GVRs in OT 1975, two in OT 1976, and one in OT 1978.

Although one sees some impressive totals in these years, they obviously lack huge spikes of the sort encountered in some recent terms. One could posit several possible explanations for this difference. First, pro-defendant criminal procedure and sentencing rulings tend to generate the biggest booms, and the late-1970s Burger Court was not a Court inclined to expand defendants' rights through blockbuster rulings.<sup>59</sup> Today's Court, while generally conservative, includes at least two conservatives who are willing, on originalist grounds, to join some of the Court's more liberal members in some major pro-defendant rulings.<sup>60</sup> Second, even holding the content of the substantive decisions constant, the propensity to generate GVRs depends on the interaction of numerous background variables. For instance, the GVR is to some degree parasitic on the retroactivity doctrine holding that new Supreme Court rulings apply to all cases still pending on appeal: if a new ruling lacks any effect on pending cases except for the very case in which it is announced, then there is no need to GVR in other cases. The retroactivity doctrine has had a troubled history and has been firmly settled in favor of

59. The story of the Burger Court's treatment of criminal procedure is a complex one. In some areas, Warren Court precedents were severely narrowed, but in other areas the rights of the accused actually expanded; in many areas, things stayed largely the same. For nuanced accounts, see Yale Kamisar, *The Warren Court (Was It Really So Defense-Minded?)*, *The Burger Court (Is It Really So Prosecution-Oriented?)*, and *Police Investigatory Practices*, in *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 62* (Vincent Blasi ed., 1983), and Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 *MICH. L. REV.* 2466 (1996).

60. See Rachel E. Barkow, *Originalists, Politics, and Criminal Law in the Rehnquist Court*, 74 *GEO. WASH. L. REV.* 1043 (2006) (describing recent pro-defendant rulings, especially regarding jury rights, as the result of a partnership between Justices Scalia and Thomas and the Court's more liberal wing).



retroactive application to all pending cases only rather recently.<sup>61</sup> Had this doctrine been settled earlier—rather than applied in an ad hoc, case-by-case way—we probably would have seen more GVRs accompanying major decisions in the past. Similarly, additional restrictions on the availability of collateral relief in the criminal context may amplify the importance today of seeking certiorari at the conclusion of direct review proceedings rather than relying on collateral review.<sup>62</sup> Finally, it may be that the bar is more aware of the GVR procedure today.

Looking beyond the GVR totals, the data do reveal a few other notable differences. Although GVRs based on changes in state law were, as today, rare, the Court's GVR practice was more diverse in the late 1970s than it is now. GVRs caused by recent Supreme Court decisions were significantly less dominant.<sup>63</sup> Part of the explanation is that two types of GVRs—for clarification of whether the judgment rests on federal or state grounds and for consideration of possible mootness—have today fallen into disuse. In the case of the clarification GVR, the ready explanation is that in 1983 the Court stated a policy strongly disfavoring this particular type of GVR.<sup>64</sup> In the case of the latter, the explanation is not apparent. One also sees more GVRs in light of confessions of error in this earlier period, but it is difficult to say whether this reflects a change in the practices of the Court or instead in the tendencies of the Solicitors General. (I discuss confessions of error in more detail in Section I.D.2 below, providing data for the last thirty years.) My overall impression from reviewing the late-1970s GVRs is that the GVR was once a more multifarious and less formulaic device that it is today. In that regard, cases like *Youngblood v. West Virginia*<sup>65</sup> represent not so much untidy innovations as a return to the past.<sup>66</sup> It is to cases like *Youngblood* that we now direct our attention.

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61. See *infra* notes 102–104 and accompanying text (discussing clarification of contemporary retroactivity doctrines in *Harper v. Va. Dep't of Taxation*, 509 U.S. 86 (1993), and *Griffith v. Kentucky*, 479 U.S. 314 (1987)). One might have expected that a case like *Miranda v. Arizona*, 384 U.S. 436 (1966), would generate a huge number of GVRs, but it did not. The Court simply denied certiorari in scores of pending cases, foreshadowing its conclusion that *Miranda* would apply prospectively only. See *Desist v. United States*, 394 U.S. 244, 255 (1969) (Douglas, J., dissenting) (citing *Johnson v. New Jersey*, 384 U.S. 719 (1966)).

62. One notable development in this regard is the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 28 U.S.C.), which restricted the availability of habeas and § 2255 relief in several ways. See generally Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381 (1996) (discussing the impact of the 1996 statute).

63. Using a chi-square test and treating OT 1975–OT 1979 as one group and OT 1996–OT 2006 as another group, there was a statistically significant difference between the two groups as to the proportion of GVRs that were caused by Supreme Court cases ( $p < .01$ ).

64. See *supra* notes 21–22 and accompanying text (discussing *Michigan v. Long* and its presumption that ambiguous rulings lack an independent state-law basis).

65. 547 U.S. 867 (2006).

66. See, e.g., *Solimine v. United States*, 429 U.S. 990 (1976) (vacating and remanding for further consideration in light of an argument not considered below).

### D. Controversial Categories

The following pages will examine in more detail certain categories of GVRs that commentators or members of the Court have sometimes considered problematic, the overall GVR practice's widespread acceptance notwithstanding.

#### 1. Antecedent-Event GVRs

The first controversial category is the type of GVR involved in *Youngblood*. In this type of GVR, the event causing the GVR did not actually intervene—it was already on the books when the lower court ruled. In contradistinction to the familiar *intervening*-event GVR, we can call this an *antecedent*-event GVR. In many antecedent-event scenarios, the antecedent event, such as a new Supreme Court decision or new legislation, precedes the lower court decision by only a short period, such that the lower court may have simply missed the new development. *Youngblood* is an extreme example, however, because the GVR-causing case was decades old.

Our view of the propriety of antecedent-event GVRs might depend on whether they are unusual, isolated occurrences or are instead more routine.<sup>67</sup> We know that the antecedent-event GVR is not literally unprecedented, for the Court itself has pointed out that they have occurred.<sup>68</sup> But how common are they?

In the decade under study (OT 1996–OT 2006), and, again, excluding examination of the hundreds of *Booker* and *Cunningham* GVRs, I found twenty-four instances in which the Supreme Court issued a GVR in light of an event that had preceded the decision below.<sup>69</sup> This represents some four percent of the total number of (non-*Booker/Cunningham*) GVRs in the decade under study, which most observers would find surprisingly high.<sup>70</sup> The

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67. See, e.g., Sena Ku, Comment, *The Supreme Court's GVR Power: Drawing a Line Between Deference and Control*, 102 Nw. U. L. REV. 383, 385 (2008) (criticizing *Youngblood* because it “disrupts the basic premise of the GVR—that it can only be applied in light of a relevant intervening event”).

68. E.g., *Lawrence v. Chater*, 516 U.S. 163, 169 (1996) (“In *Robinson v. Story*, 469 U.S. 1081 (1984), we GVR’d for further consideration in light of a Supreme Court decision rendered almost three months *before* the summary affirmation by the Court of Appeals that was the subject of the petition for certiorari.”); see also *infra* text accompanying notes 75–82 (discussing *Stutson v. United States*, 516 U.S. 193 (1996)).

69. Further, I discovered over a dozen instances in which the GVR-causing event preceded the denial of a petition for rehearing below or some other final action below (such as a motion to recall the mandate or a denial of discretionary review by a state high court). There are certainly more instances that could be found by examining the lower court docket sheets for every case that is GVR’d; the number just given mostly reflects information readily available in the Lexis case reports and Shepard’s report, which sometimes fail to reflect events such as denials of rehearing or motions to recall the mandate. I therefore focus instead on the cases in which the GVR-causing event preceded the decision itself, both because I can provide that information more definitively and because it is sufficient to establish the point.

70. Cf. Ku, *supra* note 67, at 399 n.91 (stating incorrectly that “the practice of the Court (with the exception of *Youngblood*) has been to reserve GVR orders for cases involving an intervening event”).

large majority were formulaic GVRs that looked like any other; they did not announce themselves as aberrant. In the vast majority of the cases, the relevant event was a Supreme Court decision, though a handful involved other events.

Eleven of these twenty-four antecedent-event GVRs came in OT 2000; the other years each had between zero and three such GVRs. The cause of the unusual spike in OT 2000 was *Apprendi v. New Jersey*, which invalidated a state sentence enhancement supported by judicial fact-finding rather than a jury verdict.<sup>71</sup> Ten of the eleven antecedent-event GVRs from OT 2000 involved *Apprendi*. Thus, about twenty percent of the fifty-one cases the Supreme Court GVR'd in light of *Apprendi* were antecedent-event GVRs. Given the routinized quality of many sentencing appeals, it is perhaps understandable that courts would be slow to absorb a new development.

For about two-thirds of the twenty-four antecedent-event GVRs during the decade (including all the *Apprendi*-based antecedent-event GVRs), the GVR-causing event preceded the lower court decision by a rather short period, from a few days to around a month. For most of this group of cases, the lower court decision does not advert to the relevant event and, so far as one can readily discern, the event was not brought to the court's attention.<sup>72</sup> In these cases it seems likely that the lower court simply did not know about the relevant event. (It is understandable how this could happen; for one thing, the substantive work on a case might conclude well before the final issuance date.) From a certain type of formalistic perspective, one might contend that remanding for consideration of some event is inappropriate when the event preceded the decision below: decisions are just as incorrect when they are rendered in ignorance of the governing law as when they misapply it, so the choice should be reversal or nothing. While that bright-line objection to antecedent-event GVRs might have some appeal, one does not find recorded dissents in this type of case. Even Justices Scalia and Thomas, the chief critics of loose use of the GVR, seem to employ a more pragmatic approach under which a GVR is permissible (though not necessarily laudable) where the court below had no reasonable opportunity to consider a recent event.<sup>73</sup> Thus, these GVRs—in which the relevant event preceded the

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71. 530 U.S. 466 (2000).

72. This conclusion is based on examining lower court briefs and docket sheets where they are available in electronic databases, which is not in all cases. Some inferences are involved here. For example, if the docket sheet shows that the briefing and oral argument (if any) were completed before the relevant event occurred and does not reflect a later filing of supplemental authority, we can be reasonably confident that the parties did not bring the matter to the court's attention.

73. In *Lawrence v. Chater*, one paragraph of Scalia's dissent describes the Court's practice of GVR'ing in light of new Supreme Court decisions and observes that the Court has recently "indulged in the practice of vacating and remanding in light of a decision of ours that preceded the judgment in question, but by so little time that the lower court might have been unaware of it." 516 U.S. at 180–81 (Scalia, J., dissenting). He concludes the paragraph by describing "these" GVRs—presumably all of the ones described in that paragraph, including the antecedent-event ones—as "appropriate." *Id.* at 181. Further, he did not dissent from the GVR in *Lords Landing*, a case in which an antecedent event was brought to the court of appeals' attention in a motion to recall the

decision below by only a short time and in which it was not argued to the lower court—can be regarded as uncontroversial if not exactly typical. For practical purposes, they are very much akin to the quotidian intervening-event GVRs.

Other antecedent-event GVRs, however, are harder to assimilate. In some cases, the GVR-causing event occurred many months, or even a few years, before the court below ruled, and yet the event went unmentioned in the decision below.<sup>74</sup> In such cases, it is hard to say that the court below did not have an *opportunity* to apply the relevant change in law, whether or not the parties briefed it. This type of scenario triggered a controversy a bit over a decade ago in *Stutson v. United States*.<sup>75</sup> Due to his attorney's error, criminal defendant Stutson's notice of appeal arrived a day late and in the wrong court (in the court of appeals rather than in the district court).<sup>76</sup> The district court refused to excuse the untimely filing and denied Stutson's motion for a retroactive extension.<sup>77</sup> The Eleventh Circuit summarily affirmed this procedural ruling without opinion in September 1994, thus depriving Stutson of any review of the merits of his appeal.<sup>78</sup> A year and a half *earlier*, in March 1993, the Supreme Court had held in *Pioneer Investment Services*, a case arising under the Federal Rules of Bankruptcy Procedure, that certain types

mandate. *Lords Landing Vill. Condo. Council of Unit Owners v. Cont'l Ins. Co.*, 520 U.S. 893, 895 (1997).

74. Consider the following cases:

- *United States v. Mejia*, 121 F.3d 722 (11th Cir. July 23, 1997), *vacated and remanded*, 523 U.S. 1056 (1998) (GVR'ing in light of a statute enacted Sept. 30, 1996, about ten months before the Eleventh Circuit decision);
- *United States v. Hodgkiss*, 116 F.3d 116 (5th Cir. Jun 10, 1997), *vacated and remanded*, 522 U.S. 1012 (1997) (GVR'ing in light of a Supreme Court case decided Dec. 6, 1995, about eighteen months before the Fifth Circuit decision);
- *Grijalva v. Shalala*, 152 F.3d 1115 (9th Cir. Aug. 12, 1998), *vacated and remanded*, 526 U.S. 1096 (1999) (GVR'ing in light of, *inter alia*, a statute enacted Aug. 5, 1997, about one year before Ninth Circuit decision);
- *United States v. Price*, 31 F. App'x 158 (5th Cir. Dec. 18, 2001), *vacated and remanded*, 537 U.S. 1152 (2003) (GVR'ing in light of a confession of error and Supreme Court case decided May 27, 1997, about four and a half years before the Fifth Circuit decision); and
- *Walker v. True*, 401 F.3d 574 (4th Cir. March 25, 2005), *vacated and remanded*, 546 U.S. 1086 (2006) (GVR'ing in light of a Supreme Court case decided Feb. 24, 2004, about thirteen months before the Fourth Circuit decision).

While I have not conducted any systematic investigation of timing issues with regard to the late 1970s cases, I note that in *Davis v. Kentucky*, 433 U.S. 905 (1977), the Supreme Court GVR'd in light of two cases, one very recent and one *seven years old*. In *Davis*, as in *Grijalva* and *Price* above, it is conceivable that the Court would not have GVR'd if the stale antecedent event were the only basis for GVR'ing.

75. 516 U.S. 193 (1996) (per curiam).

76. See FED. R. APP. P. 4(b)(1)(A) ("In a criminal case, a defendant's notice of appeal must be filed in the district court within 10 days [of the entry of the judgment of conviction]").

77. See *id.* 4(b)(4) (permitting the district court to grant extensions even after the deadline has passed). The current version of the rule allows extensions for "excusable neglect or good cause," but the version in effect at the time referred only to "excusable neglect." FED. R. APP. P. 4(b)(4) advisory committee note on 1998 amendments.

78. *United States v. Stutson*, 36 F.3d 94 (11th Cir. 1994).

of attorney errors could constitute “excusable neglect” that would permit a litigant to avoid a forfeiture caused by missing a filing deadline.<sup>79</sup> The Eleventh Circuit’s one-word affirmance obviously did not mention *Pioneer*, though the parties’ briefs had discussed whether *Pioneer* applied in this context (Stutson arguing that it did, the government that it did not).<sup>80</sup> Stutson petitioned for certiorari. In its response to the petition, the government took the view that the *Pioneer* standard should govern—a reversal of the position it had argued to the Eleventh Circuit.<sup>81</sup> The Supreme Court GVR’d “for further consideration in light of *Pioneer*.”<sup>82</sup> In *Stutson* and in another GVR issued the same day, the Court said it would GVR if it appeared that the lower court “may not have considered” an event, expressly rejecting a rule that would limit its GVR power to cases in which the lower court had no *opportunity* to consider the event.<sup>83</sup> (In the case of an unreasoned summary order like that in *Stutson*, it seems that the Court’s standard would always be satisfied, because one cannot know what the lower court actually considered.) Chief Justice Rehnquist and Justices Scalia and Thomas dissented.<sup>84</sup>

Perhaps farthest of all from the run-of-the-mill GVRs are the handful of cases in which the court below not only had plenty of time to consider the event, and not only was apprised of the event by the parties, but actually discussed the event that would later cause the GVR.<sup>85</sup> Even under the broad

79. *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380 (1993).

80. *Stutson*, 516 U.S. at 194–95.

81. *Id.* The government’s response to the petition for certiorari suggested that the Court GVR for further consideration in light of *Pioneer*. Brief for the United States, *Stutson*, 516 U.S. 193 (No. 94-8988).

82. *Stutson*, 516 U.S. at 197–98.

83. *Id.* at 194; *see also* Lawrence v. Chater, 516 U.S. 163, 169 (1996) (rejecting Justice Scalia’s “opportunity” rule as “too restrictive”); *id.* at 167 (referring to “intervening developments, or recent developments that we have reason to believe the court below did not fully consider”).

84. *Lawrence*, 516 U.S. at 176 (Rehnquist, C.J., dissenting); *id.* at 177 (Scalia, J., joined by Thomas, J., dissenting). As Justice Scalia said in his dissent:

We do not know in this case whether the Eleventh Circuit even *agreed* with the Government’s position that has now been repudiated; for all we know, the court *applied Pioneer* and found against petitioner under that standard. The judgment is declared invalid because the Eleventh Circuit *might* (or might not) have relied on a standard (non-*Pioneer*) that *might* (or might not) be wrong, that *might* (or might not) have affected the outcome, and that the Eleventh Circuit *might* (or might not) abandon (whether or not it is wrong) because the Government has now abandoned it.

*Id.* at 185.

85. In the following cases, the lower court’s decision discussed the case that later caused the GVR:

- *United States v. Valensia*, 222 F.3d 1173, 1182 (9th Cir. 2000) (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000)), *vacated and remanded*, 532 U.S. 901 (2001) (GVR’ing in light of *Apprendi*);
- *In re Coleman*, Nos. C1-96-216, C0-96-1521, 1997 Minn. App. LEXIS 1090, at \*14 (Minn. Ct. App. Sept. 23, 1997) (citing *Kansas v. Hendricks*, 521 U.S. 346 (1997)), *vacated and remanded*, 524 U.S. 924 (1998) (GVR’ing in light of *Hendricks*); and

view of the GVR power adopted by the Court majority, these remands for consideration of some event seem incongruous inasmuch as the court below already *did* consider the matter. It is hard to know what to make of such a disposition. Does the decision to GVR reveal the Supreme Court's view that the court below must have considered the matter wrongly—that is, erred? If so, then these GVRs somewhat recall the Warren Court's unhappy practice of occasionally summarily reversing with a bare citation to a case that the court below had already discussed or distinguished.<sup>86</sup> For these GVRs, it seems that the appropriate action would be either a decision on the merits (most likely summary reversal rather than plenary consideration) or a denial of certiorari. Yet despite their unusual character, these GVRs were, with one exception, issued without recorded dissent.<sup>87</sup>

## 2. Confession-of-Error GVRs

The Solicitor General (or the state equivalent) will sometimes admit, when responding to a petition for certiorari, that the judgment below is in error.<sup>88</sup> At one time, the Court's usual practice was to conduct its own independent review of the record to satisfy itself that the judgment was indeed erroneous and then to order an appropriate disposition, such as a new trial.<sup>89</sup> For the last few decades, however, the Court has instead GVR'd so that the court below can consider the confession of error and what (if anything) to

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- *In re Schweninger*, No. C1-96-362, 1997 Minn. App. LEXIS 1110, at \*8 (Minn. Ct. App. Oct. 7, 1997) (citing *Kansas v. Hendricks*, 521 U.S. 346 (1997)), *vacated and remanded*, 525 U.S. 802 (1998) (GVR'ing in light of *Hendricks*).

Also, in *Lords Landing*, the order denying the motion to recall the mandate mentioned the state case that would later trigger the GVR, though the order was arguably ambiguous regarding whether the Fourth Circuit considered the recent case distinguishable or instead thought that the court lacked the power to recall the mandate. *Lords Landing Vill. Condo. Council of Unit Owners v. Cont'l Ins. Co.*, 520 U.S. 893, 896–97 (1997); *id.* at 898 & n. (Rehnquist, C.J., dissenting).

86. Hellman, *supra* note 8, at 823 (noting over thirty examples of such “disturbing” summary reversals).

87. The exception was *Lords Landing*, in which a recent state case that repudiated the basis for the Fourth Circuit's decision in a diversity suit was overlooked by all sides until a motion to recall the mandate. 520 U.S. at 895. Chief Justice Rehnquist, joined by Justice Breyer, dissented in part because they thought the court of appeals deserved better guidance than to be told to consider a case that it had already fully considered (or so the dissenters believed). *Id.* at 897–98 (Rehnquist, C.J., dissenting). It is certainly possible that some Justices did dissent in other cases but did not note their dissents. See *Lawrence*, 516 U.S. at 192 (Scalia, J., dissenting) (stating that he would not necessarily record his dissents from objectionable GVRs).

88. See generally David M. Rosenzweig, Note, *Confession of Error in the Supreme Court by the Solicitor General*, 82 GEO. L.J. 2079 (1994). Not all such confessions occur at the certiorari stage, though nearly all do. The analysis in this Article considers only confessions at the certiorari stage. See *supra* Section I.A.

89. See, e.g., *Penner v. United States*, 399 U.S. 522, 522 (1970) (vacating and remanding with instructions to dismiss the indictment “[o]n the basis of a confession of error by the Solicitor General and of an independent review of the record”); *Baxa v. United States*, 381 U.S. 353, 353 (1965) (vacating and remanding for new trial “[o]n consideration of the confession of error by the Solicitor General and upon examination of the entire record”).

do about it.<sup>90</sup> All members of the Court now appear comfortable with, or at least resigned to the practice of, GVR'ing when the government concedes error in the bottom-line judgment.<sup>91</sup> More controversial is the more recent practice of the Court deciding to GVR in cases where the government does not admit error in the *judgment* but instead only in the *reasoning* below; indeed, the Court might GVR even when the government contends that the judgment is correct and requests that certiorari be denied. Several members of the current Court, as well as some former Justices, have objected to GVR'ing when the government concedes an error only in reasoning.<sup>92</sup>

Although I refer to all of these GVRs generically as “confession-of-error GVRs,” the GVR orders themselves use varying terminology, most often employing more neutral language to the effect that the case is being GVR'd “in light of the position asserted” by the Solicitor General.<sup>93</sup> The Court's choice of one verbal formulation rather than another does not appear, at least not consistently, to be meaningful. That is, the different formulations do not seem to correspond to either the judgment/rationale distinction or to differences in what the government's brief requests that the Court do.<sup>94</sup>

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90. One can still find the occasional extraordinary case where the Court acts on the merits in response to a confession of error rather than GVR'ing. See, e.g., *Bailes v. United States*, 503 U.S. 1001, 1001 (1992) (remanding “with instructions to vacate with prejudice that aspect of the District Court's award that represents the ‘doubling’ of damages as suggested by the Solicitor General”). As they are not GVRs, such cases are not considered here.

91. See *Lawrence*, 516 U.S. at 183 (Scalia, J., dissenting) (objecting to the practice but recognizing that it “is by now well entrenched”). There was some initial opposition to this switch. See *Mariscal v. United States*, 449 U.S. 405, 407 (1981) (Rehnquist, J., dissenting) (“I harbor serious doubt that our adversary system of justice is well served by . . . routinely vacating judgments which the Solicitor General questions without any independent examination of the merits on our own.”); *id.* at 406 (noting that Justice White dissents “essentially for the reasons stated by Justice Rehnquist”).

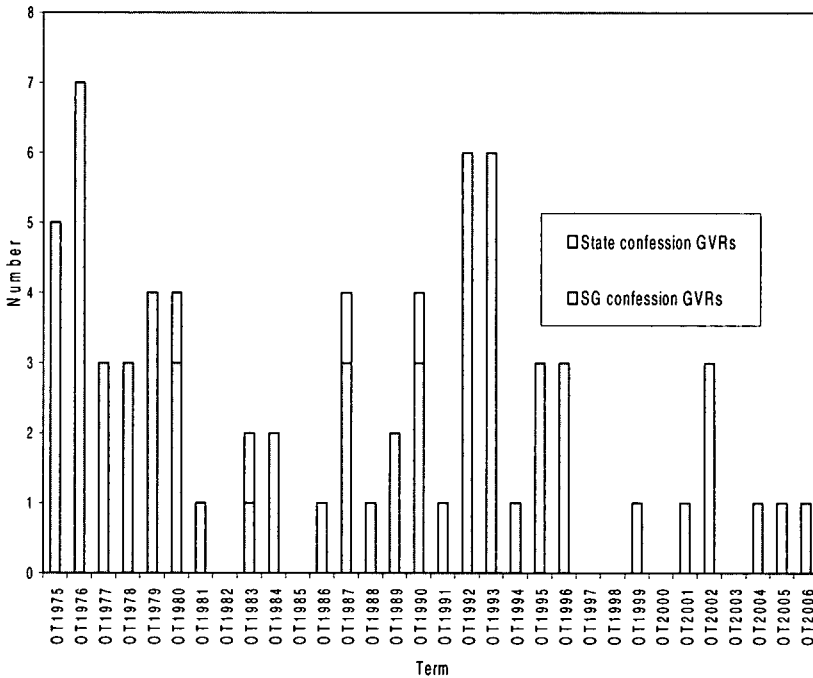
92. E.g., *Price v. United States*, 537 U.S. 1152, 1152–53 (2003) (Scalia, J., joined by Rehnquist, C.J. and Thomas, J., dissenting) (“Five Members of this Court have previously expressed their disapproval of vacating and remanding a Court of Appeals decision favorable to the Government in response to the Government's acknowledgment of error, not in the *judgment* below, but merely in the *reasoning* on which the lower court relied.”); *Lawrence*, 516 U.S. at 183 (Scalia, J., joined by Thomas, J., dissenting) (calling this “a mistaken practice”); *Alvarado v. United States*, 497 U.S. 543, 545 (1990) (Rehnquist, C.J., joined by O'Connor, Scalia, and Kennedy, JJ., dissenting) (objecting to this extension of GVR practice). Chief Justice Roberts apparently shares these objections, as he joined Justice Scalia's dissent to that effect in the recent case of *Nunez v. United States*, 128 S. Ct. 2990 (2008) (Scalia, J., joined by Roberts, C.J. and Thomas, J., dissenting).

93. E.g., *Hohn v. United States*, 537 U.S. 801, 801 (2002); *accord Petty v. United States*, 481 U.S. 1034, 1035 (1987).

94. For example, one might guess that a GVR referring to a “confession of error”—a rather strong formulation—would correspond to the Solicitor General's admission that a judgment should be vacated, but that is not so. Compare *Rosales v. Bureau of Immig. & Customs Enforcement*, 545 U.S. 1101 (2005) (referring to “confession of error”), with Brief for the Respondent in Opposition, *Rosales*, 545 U.S. 1101 (No. 04-8465) (admitting the court below erred in refusing jurisdiction but urging denial of certiorari because petitioner's claim fails on the merits). Similarly, the more neutral “position” language is found both in cases where Solicitors General agree that the judgment should be vacated and those in which they oppose certiorari. Compare *Hohn v. United States*, 537 U.S. 801 (2002) (GVR'ing and using “position” language), with Brief for the United States, *Hohn*, 537 U.S. 801 (No. 01-1340) (requesting a GVR because the court of appeals wrongly dismissed the case as moot). See also *Alvarado*, 497 U.S. at 544 (using “position” language where the government urged denial of certiorari because the judgment was correct).

Figure 1 below shows the number of GVRs stemming from confessions of error by the U.S. Solicitor General's office ("SG") and state equivalents for each term beginning with OT 1975. Covering this longer period allows us to see data from several different presidential administrations.

FIGURE 1  
 CONFESSION-OF-ERROR GVRs, OT 1975–OT 2006



Instead of tracking confession GVRs by the court term during which they were issued, we can also present the data in a way that lets us visualize the pattern of confessions within and across the terms of various Solicitors General.<sup>95</sup> A particular GVR issued by the Court during the term of Solicitor General X might stem from a confession made several months earlier by his predecessor, Solicitor General Y. Figure 2 illustrates the pattern of confession-of-error GVRs by Solicitor General and date of the filing making the confession, beginning in the Carter administration. Each dot represents the filing of a brief that leads to a confession-of-error GVR.

95. A confession GVR will usually state in the body of the order that the case is being remanded "in light of the position asserted by the Solicitor General in his brief filed on [date]" (or some similar formulation). I matched up that date with the dates of service for various Solicitors General. When the GVR order did not provide a date, I obtained the needed information by obtaining the brief or docket sheet. Information on terms of service of Solicitors General can be found in EPSTEIN ET AL., *supra* note 50, at 686–87.



FIGURE 2  
CONFESSION-OF-ERROR GVRs BY DATE OF CONFESSION, 1977–2006

A	McCree (Carter)					Lee (Reagan)				Fried (Reagan)
...	...	...	...	...	...	.	..			
1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	

Fried (Reagan)	A	Starr (Bush)					A	Days (Clinton)			
..	.	.	..	.	.	...	..	..	..	..	
1987	1988	1989	1990	1991	1992	1993	1994	1995	1996		

Dellinger (Clinton)	Waxman (Clinton)				A	Olson (Bush)				Clement (Bush)	
					.	.	.		.	.	
1997	1998	1999	2000	2001	2002	2003	2004	2005	2006		

Note: The years in this figure are calendar years, not court terms. Each dot indicates the filing of a brief confessing error. "A" denotes an interim during which the office's duties were temporarily discharged by an Acting Solicitor General, often a career civil servant. (Dellinger was Acting Solicitor General for his entire term. When a Solicitor General's tenure was preceded by a time serving as Acting Solicitor General, such as with Clement, the initial acting period is not separately indicated.)

I hasten to add that it is difficult to attribute the pattern shown in Figures 1 and 2 solely to different Solicitors General having different propensities to confess error. A confession-of-error GVR is the result of an interaction between the Solicitor General and the Court (and, we should not forget, the litigants who decide to petition for certiorari in the first place). The Solicitor General has only imperfect control over how the Court responds to his litigating positions. Given that the Court can GVR even when the Solicitor General, in the course of *opposing* a grant of certiorari, admits that there was some mistake in (only) the *rationale* below, the Solicitor General might sometimes be surprised indeed to learn that, against his will, he "confessed" error.<sup>96</sup> Further, while the Court no longer routinely engages in its own

96. See, e.g., *Price*, 537 U.S. at 1156–57 (Scalia, J., dissenting) (noting that the Court GVR'd even though the government insisted judgment was correct); *Diaz-Albertini v. United States*, 498 U.S. 1061, 1061 (1991) (Rehnquist, C.J., dissenting) (noting that the Court GVR'd largely based on the Solicitor General's position in a related case, despite the Solicitor General's view that the instant case was distinguishable and should be denied); *Alvarado*, 497 U.S. at 544 (GVR'ing where the government urged denial of certiorari because the judgment was correct); see also *id.* at 546 (Rehnquist, C.J., dissenting) ("A confession of error is at least a deliberate decision on the part of the Government to concede that a Court of Appeals *judgment* in favor of the Government was wrong. . . . If we are now to vacate judgments on the basis of what are essentially observations in the Government's brief about the 'approach' of the Court of Appeals in a particular case, I fear we may find the Government's future briefs in opposition much less explicit and frank than they have been in the past."). Another notable case is *England v. Dretke*, in which the Court GVR'd based on the state's purported acknowledgment of error; the state then filed a petition for rehearing in which it argued that it had not admitted any error and urged (unsuccessfully) that the GVR order be vacated. 546 U.S. 1136 (2006), *reh'g denied*, 547 U.S. 1052 (2006).

review of the merits whenever the government concedes error, occasionally the Court will still reject the government's suggestion to GVR.<sup>97</sup>

## II. REEXAMINING THE GVR FROM AN INSTITUTIONAL PERSPECTIVE

Now that we have a better sense of the nature of the contemporary GVR practice, we are in a position to evaluate it. The immediately preceding sections focused on a few specific categories of GVRs that are regarded as controversial in some way, but the practice as a whole, when examined at all, has mostly been regarded as unproblematic.<sup>98</sup> In my view, the GVR has been accepted too unthinkingly.

The GVR practice as a whole warrants scrutiny because it is an expenditure of the Court's resources on the job of doing justice in individual cases—that is, making sure that all litigants with pending cases obtain the benefit of a new rule. Doing justice and correcting error are, needless to say, important goals of a judicial system, but few if any observers today—and the Justices themselves probably least of all—believe that ensuring justice in individual cases should be a priority of the Supreme Court in particular.<sup>99</sup> Indeed, the late Chief Justice Rehnquist, in dissents joined by Justice Breyer, expressed the view that GVR'ing in light of an intervening *state court decision* is inappropriate precisely because correcting error in diversity cases is a poor use of the Court's resources.<sup>100</sup> Rehnquist may have been correct, but of course it is also true that virtually nobody believes that merely correcting errors *even of federal law* should be one of the Court's primary duties either. And yet the Court's GVR practice looks like an exercise in error correction on a large—in certain years, massive—scale. Perhaps worse, the GVR practice involves merely *potential* error and

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97. In the recent case of *Greenlaw v. United States*, the Solicitor General admitted “error in the judgment” below and urged a GVR, but the Supreme Court nonetheless granted certiorari and appointed an amicus to defend the judgment. *Greenlaw v. United States*, 128 S. Ct. 976 (2008); *Greenlaw v. United States*, 128 S. Ct. 829 (2008); Brief for the United States at 12, *Greenlaw*, 128 S. Ct. 829 (No. 07-330). At other times, the Court has denied certiorari despite the government's openness to a GVR. Compare *Lopez-Elias v. Reno*, 531 U.S. 1069 (2001) (denying certiorari), with Brief for the Respondent at 18, *Lopez-Elias*, 531 U.S. 1069 (No. 00-164) (suggesting a GVR or, in the alternative, denial of certiorari).

98. For an exception, see Shaun P. Martin, *Gaming the GVR*, 36 ARIZ. ST. L.J. 551 (2004), offering a critique of the GVR practice, largely on grounds that it increases transaction costs and creates incentives for delay.

99. See, e.g., *Supreme Court Jurisdiction Act Hearings*, *supra* note 8, at 40 (letter from all nine Justices stating that the Court's primary duty is to settle important questions of federal law); Hellman, *supra* note 8, at 799 (“[T]he consensus of Congress, the bar, and the judiciary [is] that review for error should play, at best, a minor part in the Court's work . . .”). This is certainly not to deny that there is room for reasonable debate regarding whether, at the margins, the Court should engage in slightly greater error correction. See, e.g., Carolyn Dineen King, *Challenges to Judicial Independence and the Rule of Law: A Perspective from the Circuit Courts*, 90 MARQ. L. REV. 765, 786 (2007) (suggesting that somewhat greater emphasis on error correction would be valuable in upholding the rule of law).

100. E.g., *Lords Landing Vill. Condo. Council of Unit Owners v. Cont'l Ins. Co.*, 520 U.S. 893, 898 (1997) (Rehnquist, C.J., dissenting); *Thomas v. Am. Home Prods., Inc.*, 519 U.S. 913, 916–17 (1996) (Rehnquist, C.J., dissenting).

possible correction, because the Court does not identify error and does not actually reverse; instead, it simply notes the need for reconsideration. In this sense, *all* GVRs are controversial GVRs.

How could this rather deviant practice come to be regarded as familiar and largely unproblematic? As Section II.A will explain, the GVR's acceptance flows in part from an important choice our system has made about how broadly to give effect to changes in governing law. The mistake, however, is to assume that the Supreme Court is the proper entity to be tasked with the duty of implementing our principle. That is, our design options include not just *whether* new law should be applied in certain cases, but *who* should apply it. Accordingly, Section II.B discusses a reform that would provide a different answer to the "who" question.

### A. Questioning the Too-Easy Case for the GVR

One can imagine a range of possible approaches to dealing with legal change. One conceivable legal system would have judges ignore changes in law and instead apply the law as it stood on some fixed date in the past (say, the date the case was filed).<sup>101</sup> A very different but also imaginable legal system would always apply new law, even if it meant reopening a case that had been litigated to conclusion under the old law. After all, should not litigants be treated evenhandedly despite the mere accidents of the calendar? Yet at some point those concerns about equality must give way to the value of finality. Although justice will sometimes demand reopening old cases, especially when the judgment has ongoing effects, surely we cannot relitigate decades-old cases whenever the Supreme Court overrules a precedent that had been decisive.

Deciding the extent to which changed law should be given effect is a difficult problem. Nonetheless, to simplify somewhat, one proposition our system has accepted is that newly changed law should apply, at minimum,<sup>102</sup> to all cases that are not yet final when the new rule is announced.<sup>103</sup> A case

101. See Martin, *supra* note 98, at 588–92 (discussing such a reform); *The Supreme Court, 1960 Term*, 75 HARV. L. REV. 80, 97 (1961) (suggesting such a reform).

102. In some circumstances, changed law is available even after a case becomes final, as in collateral proceedings challenging criminal convictions. See generally HART & WECHSLER, *supra* note 21, at 1325–35 (discussing *Teague v. Lane*, 489 U.S. 288 (1989), and exceptions thereto). When the discussion in this Article refers to changes in law, I do not have in mind the technical concept of "new rules" in the *Teague* sense. I mean simply any change in the applicable rules.

103. See, e.g., *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 95–97 (1993) (new rulings in civil cases); *Griffith v. Kentucky*, 479 U.S. 314, 320–28 (1987) (new criminal procedure rulings). The new law applies in theory to all pending cases, but it should be noted that in practice there may be obstacles to obtaining the benefit of a change in law. For example, even in a criminal case on direct review, a defendant raising a claim not presented to the trial court faces the unfavorable prospect of the plain-error standard of review, even though he failed to present the claim at trial only because it was foreclosed by precedent at that time. See *Johnson v. United States*, 520 U.S. 461 (1997); *United States v. Recio*, 371 F.3d 1093, 1100 (9th Cir. 2004) (citing *Johnson* and explaining that "the four-part plain error test . . . applies on direct appeal even where an intervening change in the law is the source of the error"); cf. *Crawford v. Falcon Drilling Co.*, 131 F.3d 1120, 1123, 1125 (5th Cir. 1997) (applying a similar standard to new argument in civil appeal where the law changed after district court proceedings). In plain-error review, an appellate court may in its discretion

does not become “final” until the denial of certiorari or the expiration of the period for filing a petition.<sup>104</sup> Often, there will be numerous related petitions for certiorari already pending when new law is announced. And as long as the period for filing has not yet run out, we can expect additional petitions to be filed by litigants who would benefit from the new rule. All of these cases are to be governed by the new law.

In practice, how is that to be done? The Supreme Court surely would not (and could not, based on current and foreseeable capacity) give all of the pending cases argument and plenary consideration, but a more realistic approach would be to summarily reverse those decisions that are now incorrect under the new law, perhaps with a bare citation to the intervening precedent. This was indeed sometimes done during the Warren era.<sup>105</sup> But today, with the much greater press of petitions, it seems unduly burdensome for the Court to give all of the relevant petitions even the amount of consideration needed to summarily decide the merits.

Another approach would be simply to deny certiorari in all of these cases even though, in principle, the new law applies to them.<sup>106</sup> This would mean that many wrong decisions (newly wrong, that is) would stand uncorrected. And while we do not generally believe it is the Supreme Court's role to correct errors, letting this type of error stand is unusually discomfiting: part of our usual tolerance for letting errors go uncorrected by the Supreme Court is that litigants have already had at least two other courts hear their claims; at some point, we say that they have gotten all the consideration they are due.<sup>107</sup> When the law has changed since the last ruling, however, the litigants have not had *any* court hear their claims under the correct law, which might be considered a more troubling scenario. In addition, when the change in law comes from a Supreme Court decision, it seems extraordinarily inequitable that other litigants should be treated less favorably than the

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correct an error that is now obvious, but only if (inter alia) the error “seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.” *Johnson*, 520 U.S. at 469–70 (internal quotation marks omitted).

The situation is more complicated as concerns the application of new statutory law. There is no general bar on new statutes applying to pending cases, but traditional concerns about statutory retroactivity mean that statutes are not always construed to apply to all the cases they might permissibly reach. See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 273–74 (1994).

104. *Griffith*, 479 U.S. at 321 n.6. In rare cases, the Supreme Court will GVR even after certiorari has been denied, typically in response to a petition for rehearing. See *infra* note 147.

105. Hellman, *supra* note 8, at 822–23 (reporting that the Warren Court issued over 100 summary reversals based on intervening precedent).

106. This option would not have been available in eras in which much of the Court's docket was nondiscretionary. Cf. *Lawrence v. Chater*, 516 U.S. 163, 176 (1996) (Rehnquist, C.J., concurring and dissenting) (noting that some very early GVRs were not actually GVRs, because they came to the Court under mandatory non-certiorari jurisdiction).

107. *Id.* at 176–77 (“[W]e would do well to bear in mind the admonition of Chief Justice William Howard Taft . . . [Litigants] have had all they have a right to claim, Taft said, when they have had two courts in which to have adjudicated their controversy.” (quoting 2 HENRY F. PRINGLE, *THE LIFE AND TIMES OF WILLIAM HOWARD TAFT* 997–98 (1939)) (internal quotation marks omitted)).

one lucky litigant whose case the Court plucked from the pile and used to generate the new rule.<sup>108</sup>

Given the alternatives just described, the GVR becomes an attractive solution to dealing with changes in law. The error and unfairness associated with universal denial of certiorari are largely eliminated. And this is accomplished without the burden to the Court of sifting through every petition to decide the merits of each case under the new law (whether case or statute or other new development); all that is needed is the relatively cursory inquiry whether the case is potentially affected by the new rule. If the new rule is relevant enough that it might prove controlling, that is sufficient to direct the court below to reconsider.

While the case for the GVR sounds sensible enough, it is important to recognize that an important mistake has been made, a logical step skipped. Given our general principle that new law should apply to all pending cases, the GVR looks like the best way for the Supreme Court to implement that commitment. But that does not mean it is the best way for the judicial system as a whole to handle changes in law. The Court may be the wrong institution for the job. True, it will be said that other courts lack adequate procedural tools for implementing changes in law. Without the GVR, litigants would be left with the (at best) highly uncertain prospects of relief through devices such as Federal Rule of Civil Procedure 60, recall of the appellate mandate, or (for criminal defendants) habeas.<sup>109</sup> I agree that none of those devices can today measure up to the task of implementing changed law. But the key point is that those devices too could be changed to make them more effective—if we were convinced that the Supreme Court is the wrong institution to handle this chore.

To provide a concrete illustration of the need for a better way, consider the Eleventh Circuit case of *Richardson v. Reno*. The court of appeals held that recent changes to the immigration statutes deprived the court of jurisdiction over an alien's habeas petition.<sup>110</sup> A few months later, the Supreme

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108. *United States v. Johnson*, 457 U.S. 537, 556 n.16 (1982) (“[I]nequity . . . results when the Court chooses which of many similarly situated defendants should be the chance beneficiary of a [new] rule.” (emphasis omitted)).

109. At present, each of these routes is unsatisfactory or uncertain to give effect to a latter-day change in law. Rule 60(b)(5) is much less useful than its text might suggest; it permits the district court to provide relief from the prospective effects of judgments that are no longer equitable and allows the district court to vacate a judgment that was based on the preclusive effect of another judgment that later became invalid, but the rule does not provide a remedy “merely because a case relied on as precedent by the court in rendering the present judgment has since been reversed.” 11 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2863, at 335 (2d ed. 1995). Recalling the appellate court's mandate is an extraordinary procedure; it might occasionally be used to bring a recent decision into conformity with new precedent, especially where the erroneous decision has a continuing prospective effect, but it appears that most courts would not, as a matter of routine, resort to this power to amend past decisions that conflict with new Supreme Court precedents. *See, e.g., Richardson v. Reno*, 175 F.3d 898, 899 (11th Cir. 1999) (refusing to recall the mandate in light of a Supreme Court decision that cast doubt on its recent ruling); 16 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3938, at 729–31 (2d ed. 1996) (surveying cases). Habeas, in addition to applying only to criminal cases, is slow and presents many hurdles to relief.

110. *Richardson v. Reno*, 162 F.3d 1338, 1378–79 (11th Cir. 1998).

Court issued a decision involving one of the provisions relied upon by the court of appeals.<sup>111</sup> The alien then asked the court of appeals to recall its mandate due to an alleged conflict with the Supreme Court decision. The Eleventh Circuit refused to do so, stating that it could recall the mandate only in extraordinary circumstances.<sup>112</sup> It added that it would, however, “welcome” the chance to reconsider its decision *if* the Supreme Court should GVR.<sup>113</sup> The Supreme Court then did in fact GVR for further consideration in light of its recent decision.<sup>114</sup>

Leaving aside the question whether the court of appeals was correct in thinking that it could not have recalled its mandate as a matter of current law,<sup>115</sup> does the series of events in *Richardson* represent the way a rationally designed procedural system would go about implementing a change in law? The court of appeals, well familiar with the case sitting right in front of it, could simply fix the problem (if any) caused by the new Supreme Court case. Instead, the court of appeals requires the litigants to go through the considerable delay and expense of filing a petition for certiorari<sup>116</sup> and possibly engaging new counsel;<sup>117</sup> at the same time, it puts the Supreme Court through the effort of reviewing another case, and without the benefit of another court's prior views on the effect of the changed law. There seems to be no good reason for all of this—just the court of appeals' (perhaps mistaken) view that this is just how things have to be done.

If *Richardson* is deemed insufficiently troubling, multiply it hundreds of times over. *Booker* might never be equaled in terms of the volume of GVRs it generated, but disruptive changes in the law will happen again. Important changes in law will inevitably cause some substantial administrative challenges, but it seems doubtful that directing a deluge of petitions for certiorari at the Supreme Court whenever such a change occurs is the optimal response. Indeed, seeming to sense this, some courts took it upon

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111. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482–83 (1999) (construing 8 U.S.C. § 1252(g) (2006)).

112. *Richardson v. Reno*, 175 F.3d 898, 899 (11th Cir. 1999).

113. *Id.*

114. *Richardson v. Reno*, 526 U.S. 1142 (1999). On remand, the court of appeals modified its analysis, though the bottom line remained the same. *Richardson v. Reno*, 180 F.3d 1311, 1314–15 (11th Cir. 1999).

115. The court cited *Calderon v. Thompson*, 523 U.S. 538 (1998), as its authority for the proposition that the Supreme Court “narrowly has restricted the circumstances in which a court of appeals can recall a mandate.” *Richardson*, 175 F.3d at 899. *Calderon* was a bizarre case in which the Ninth Circuit belatedly recalled its mandate right before an execution on the grounds that two judges would have asked for rehearing en banc but had overlooked the relevant papers. 523 U.S. at 550–51. On the question whether a change in law can justify recall of the mandate under current law, see *supra* note 109.

116. See, e.g., SUP. CT. R. 33(1)(a), (f) (requiring parties to file forty copies in booklet format); *id.* 33(1)(b) (requiring a petition appendix to be typeset rather than photocopied). In *Richardson* itself, a petition had already been filed, 175 F.3d at 899, but in other cases that will not yet have happened. The larger point is that there should be no need to go to the Supreme Court in these types of cases.

117. See SUP. CT. R. 9(1) (generally requiring those filing documents with the Court to be members of the Court's bar).

themselves to alter their normal procedures in order to try to reduce the number of GVRs that would be needed to implement *Booker*.<sup>118</sup> They may have been on to something.

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The remainder of this Article will describe an alternative regime for implementing changes in law. The alternative seeks to accommodate the legitimate reasons for the GVR while accomplishing the task in a way that is probably more efficient for litigants, more consonant with the nature of our multi-level judicial system, more transparent and regularized, and less burdensome to the Supreme Court.

Given that one aim of the reform (though only one) is to ease the Court's workload, I should point out that I recognize that some readers will not regard that goal as a matter of urgent concern. After all, today's Court is deciding very few cases on the merits by historical standards.<sup>119</sup> From a certain point of view, this is a lazy Court that hardly needs to be relieved of even more duties. While there will be no convincing those who want to take a punitive attitude toward the Court and its workload, I would simply say this: If we accept that the Court's role is to act as the final arbiter of important questions of federal law (perhaps supplemented with a role in upholding the supremacy of federal law in state proceedings), anything that takes time away from that function—as the GVR practice and its reverberations do, to some hard-to-quantify degree<sup>120</sup>—should be viewed with some concern. I do not say that all of the Court's other activities besides its primary role should be eliminated, and the proposal discussed below will not wholly eliminate GVRs. But such activities should be scrutinized to determine whether they are a good use of the Court's limited resources and whether there might be a better way to achieve the ends of the GVR.<sup>121</sup> To put matters more concretely, we now have the Supreme Court (in particular, the clerks) spending time trying to remedy possible errors in scores or even *hundreds* of run-of-the-mill cases a year. It is hard to imagine a reasonable account of the

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118. See, e.g., *United States v. Morgan*, 386 F.3d 376, 382 n.4 (2d Cir. 2004) (noting Second Circuit's decision to reject *Blakely*-based challenges to federal sentences but hold the mandates pending the Supreme Court's decision in *Booker*).

119. See EPSTEIN ET AL., *supra* note 50, at 74–75 (providing data on the declining number of grants of certiorari); GRESSMAN ET AL., *supra* note 1, at 60–64 (summarizing the decline in the number of decisions issued by the Court).

120. It is difficult to say how much time is spent on GVRs, in part because one cannot confine oneself to examining only the actual number of GVRs that are issued or even the number of petitions that were candidates for GVRs. The possibility of a future change in law may induce litigants to engage in certain behavior—seeking extensions of time, filing protective petitions for certiorari in the hope that some event will occur, etc.—that they might not otherwise pursue. It will not always be obvious that this behavior is caused by the potential for a GVR, which means that these costs are hidden. See Martin, *supra* note 98, at 570–73.

121. An old expression of the need to protect the Court's limited capacity—but one still much worth citing—is Henry M. Hart, Jr., *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 95–100 (1959).

Court's function that would deem this appropriate, at least when there is a good alternative.

### *B. A Better Way? Reforming the GVR Practice in Part*

The reform discussed here will be explained primarily in reference to GVRs caused by Supreme Court cases, which account for the vast majority of all GVRs (though the application to other types will be addressed later<sup>122</sup>). We can divide this type of GVR into several subcategories based on when the petition for certiorari is filed. This categorization will determine whether the type of GVR at issue should be eliminated and replaced with something else.

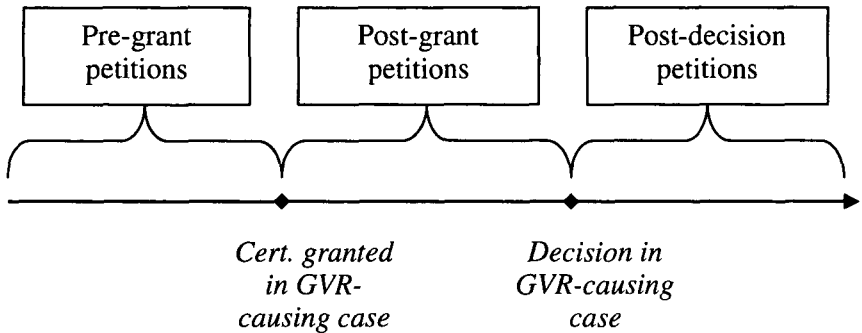
For purposes of explication, it will be useful to introduce some terminology to describe the different scenarios. As the diagram below indicates, we can characterize petitions according to when they are filed in comparison to the progress of the GVR-triggering plenary decision that raises similar issues. "Pre-grant petitions" are petitions filed before the Supreme Court has granted certiorari in the case that will later trigger the GVR. For example, when there is a circuit split on an important issue, numerous litigants might file petitions vying to have their case reviewed. (Others might file petitions not because they particularly expect their petition to be granted plenary review but precisely because they wish to keep their case available for a possible GVR, with the hope that the Court will grant another, more suitable petition raising their issue.) The Court picks the case that provides the best vehicle for resolving the issue and holds the rest. Next, we can define a "post-grant petition" as a petition filed after a grant of certiorari in the case that will later trigger the GVR but before the decision in that case. Some of these petitioners will expressly seek a hold and, depending on the outcome of the plenary case, a GVR. Last, we can define a "post-decision petition" as one that is filed after the relevant GVR-causing plenary decision is issued. Many of these petitions will be directly aimed at securing a GVR, although in other cases the petitioner, especially if poorly counseled, might not even realize that the Supreme Court has just issued a decision that affects the petition. The category into which a petition falls is determined in large part by the speed with which the case has moved through the legal system.

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122. See *infra* Section II.B.4.



FIGURE 3  
CLASSIFICATION OF CERT. PETITIONS ACCORDING TO TIME OF FILING



I believe that GVRs stemming from pre-grant petitions are the only type that should be preserved. I estimate that the total number of GVRs could be cut by at least half, probably substantially more.<sup>123</sup> The discussion below addresses the considerations applicable to each type.

### 1. Post-Decision Petitions

Consider first the post-decision petitions. Here the case for reform is the easiest to appreciate. Suppose a new Supreme Court case has been decided two months after the lower court has ruled, and the new case calls the lower court's ruling into question. Our system has decided that the benefits of giving this new law effect outweigh the resulting harms to the values of finality and repose, and so the only question is which court will implement the change in law. Today, it is the Supreme Court to which the litigant initially turns. But do we really need a trip to the Supreme Court for this? I argue that we do not, and therefore I propose that the Court not issue GVRs in such cases. Instead of filing a petition for certiorari in such a case, parties would rely on the lower courts—either the courts of appeals or the district courts. (The reforms discussed here are, obviously, aimed at cases that come to the Supreme Court from the federal courts, which account for the great

123. An examination of GVRs caused by Supreme Court cases in OT 2004 through OT 2006 shows that an average of around a third of GVRs are pre-grant petitions, though there is substantial variability. In particular, the results are as follows: OT 2004—30% pre-grant, 53% post-grant, 17% post-decision; OT 2005—27% pre-grant, 50% post-grant, 23% post-decision; OT 2006—45% pre-grant, 42% post-grant, 13% post-decision. I chose these years both because I wanted information on the Court's current practices and because electronic docket-sheets are routinely available for the last several years. As before, these calculations exclude *Booker* and *Cunningham* GVRs. My sense, though this is not supported by a thorough analysis, is that the profile of at least some blockbuster GVR-creating cases systematically differs from the figures reported above such that pre-grant petitions represent a smaller share of the GVRs attributable to such cases. If so, that would increase the proportion of GVRs that could be eliminated.

majority of GVRs in most years. It would be desirable for state courts to implement similar reforms.)

In cases where the court of appeals' decision did not end the litigation (i.e., because it ordered a remand), and then a relevant Supreme Court decision was announced, the district court should be responsible for implementing (its best understanding of) the new Supreme Court decision, even if in conflict with the mandate from the court of appeals.<sup>124</sup> For example, if the court of appeals ordered new proceedings to be conducted under standard *X*, and then the Supreme Court issued a decision stating that standard *Y* was proper, the district court should apply *Y*. To some extent this matches what is already the better practice,<sup>125</sup> but to the extent there is doubt about the district court's power to deviate from the mandate in this scenario, that doubt should be dispelled. (This could be done in many ways; one would be for the Supreme Court to endorse this view of the law at the same time it announces its new policy against GVR'ing post-decision petitions.)

A more significant change would be required in situations in which the judgment of the court of appeals would otherwise bring the litigation to a close. This would typically be the case when the court of appeals affirms a final judgment or if the court of appeals were to reverse and render judgment for the appellant without remanding. In such cases we would not rely on the district court to implement changes in law that arise after the court of appeals acts. The difficulty today in relying on the courts of appeals, however, is that under current law the period for petitioning the court of appeals for rehearing is in most cases fourteen days,<sup>126</sup> much shorter than the usual ninety days for petitioning the Supreme Court for certiorari.<sup>127</sup> Thus, when a change in law occurs, say, sixty days after the court of appeals rules—i.e., after the period for seeking rehearing from the court of appeals—implementing the change in law becomes the Supreme Court's problem

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124. The potential for the district court to implement a change in law notwithstanding the court of appeals' mandate led Hellman to propose that the Court deny certiorari rather than GVR in cases in which the court of appeals has remanded for further proceedings. See Hellman, *supra* note 4, at 34–35. Thus, my proposal is not new as regards this particular subcategory of cases.

125. See 18B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4478.3, at 746 n.24 (2d ed. 2002) (citing cases for the proposition that a district court can depart from the appellate court mandate when there has been a change in controlling law). *But see* Crane Co. v. Am. Standard, Inc., 603 F.2d 244, 248–49 & n.8 (2d Cir. 1979) (suggesting contrary view). There may be hard cases concerning how much a district court could depart from a remand mandate that was limited in scope. For example, if the court of appeals remanded solely for a redetermination of an award of attorneys' fees, could the district court hold an entire new trial on the merits based on an intervening Supreme Court decision that undermined the prior resolution of the underlying case? In such a circumstance, one might think it better to seek a modification of the mandate from the court of appeals rather than have the district court expend so much effort based on its own view of the impact of the Supreme Court decision. These hard cases already arise today, given the prevailing practice, so this difficulty is not really an objection to my proposal. *Cf.* Morrow v. Dillard, 580 F.2d 1284, 1297 (5th Cir. 1978) (approving a district court's decision to deny attorneys' fees altogether based on intervening Supreme Court precedent when the court of appeals had remanded only for reconsideration of amount of fees).

126. FED. R. APP. P. 40(a)(1). The period is forty-five days in civil cases to which the federal government is a party. *Id.*

127. 28 U.S.C. § 2101(c) (2000); SUP. CT. R. 13(1).

under the current GVR practice. This consequence of the differing deadlines is unattractive: As long as we are going to allow litigants recourse to *some court* to trigger application of the new law, there is precious little reason to burden the litigants with the expense of seeking certiorari, especially when it requires the Supreme Court to familiarize itself with another case in order to engage in what is at best error correction. The court of appeals is instead the proper court.

This responsibility and power could be shifted to the courts of appeals in a couple of different ways. One possibility would be amending the Federal Rules of Appellate Procedure—in particular Rule 40, which governs petitions for panel rehearing—by adding a new section providing that a party may, for a period of ninety days after the court of appeals' decision, file a petition for panel rehearing based on a new event of the type that would generate a GVR—most relevantly for present purposes, an intervening Supreme Court decision.<sup>128</sup> The ninety-day period, which mirrors the usual period for seeking certiorari, would apply only to petitions based on such grounds; petitions based on other grounds for panel rehearing would still have to be filed within the usual period. And this special rehearing period would only need to apply to cases in which there is no remand to the district court, because (as stated above) in remanded cases the district court will be charged with applying the new law. To accommodate the lengthened period for filing the petition for rehearing, the issuance of the appellate court's mandate would be delayed; this would not require an amendment to the rules, as they already tie issuance of the mandate to the expiration of the period for filing for rehearing.<sup>129</sup>

One problem with extending the rehearing period is that it would delay the finality of many cases unnecessarily, just for the sake of the relatively few cases in which a change in governing law will soon occur. Perhaps it is unwise to structure the rules around accommodating unusual cases. A more modest alternative to a general extension of the rehearing period would be for the courts of appeals to make themselves more receptive to out-of-time petitions for rehearing or motions to recall the mandate. They currently have

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128. Below I discuss whether the mere grant of certiorari in a related case should justify filing such a petition. See *infra* Section II.B.3.

The proposal takes existing rules regarding appellate forfeiture as it finds them and leaves them unchanged. Some courts would deny a petition for rehearing that raises a new issue on appeal, even when the new issue is based on a new Supreme Court case decided during the rehearing period. Compare *United States v. Levy*, 379 F.3d 1241, 1242 (11th Cir. 2004) (denying petition for panel rehearing based on Supreme Court case released the day after panel decision), with *United States v. Levy*, 391 F.3d 1327, 1335 (11th Cir. 2004) (Tjoflat, J., dissenting from denial of rehearing en banc) (criticizing Eleventh Circuit forfeiture rule and citing contrary cases from other circuits). (It is important to note that even these strict courts distinguish between *new issues* and *intervening authority that relates to an existing issue*, forbidding the former but not the latter from being raised after the initial brief. See *United States v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000).) Nor does the proposal seek to change existing rules that call for narrow plain-error review for issues not presented to the trial court, even when there has been a change of law that intervened since the trial. See *supra* note 103. All of these rules might be subject to criticism on the ground that they unfairly restrict the retroactive effect of new law, but that is separate from the goal here.

129. See FED. R. APP. P. 41(b) (providing that the appellate court's mandate issues seven days after the denial of a petition for rehearing or the expiration of the period for filing for rehearing).

the power to entertain such requests, but it is discretion exercised only in extraordinary cases.<sup>130</sup> This power should instead be exercised as a matter of course in that category of cases in which a Supreme Court decision rendered during the period for petitioning for certiorari affects the outcome of the case—that is, cases that could otherwise generate GVRs. This is not a radically new procedure as much as it is a shift in appellate courts' presumptions and attitudes toward their existing powers.<sup>131</sup> This new receptivity could be brought about through a formal appellate rule providing for recall of the mandate and consideration of otherwise untimely rehearing petitions in such circumstances, though a few well-chosen words from the Supreme Court might suffice.

Whatever the exact mechanism chosen, we would preserve the litigants' ability to seek certiorari after the court of appeals issues its order on reconsideration (just as today litigants can seek certiorari if they are disappointed with the court of appeals' decision after a GVR).<sup>132</sup> But such petitions would be governed by the normal certiorari standards (i.e., strong presumption of denial; mere error below is insufficient).

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Having discussed the mechanics of the reform, we should now consider its effects.

A benefit of this reform is that it might further encourage the courts of appeals to manage their dockets with an eye toward what issues the Supreme Court is considering. The average time between a grant of certiorari and the Supreme Court's decision is on the order of nine months, depending on the time of year. Therefore, when a relevant Supreme Court decision comes down within the period for seeking certiorari (usually ninety days), that will virtually always mean that the relevant grant of certiorari came before the court of appeals issued the decision affected by the new Supreme Court precedent, often well before. When the Supreme Court has granted certiorari on an issue that is relevant to a case pending in the court of appeals, it would often (though certainly not always) be wise for the court of appeals to hold the case in abeyance until the Supreme Court decision

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130. 16A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3986, at 726–27 (3d ed. 1999) (“It has generally been supposed that the court of appeals has power to recall its mandate and to grant an out-of-time petition for rehearing. Despite some doubts, it is now clear that the power exists but that it is to be used sparingly.” (footnotes omitted)).

131. In other words, we want more cases in the spirit of *United States v. Skandier*, 125 F.3d 178, 182–83 (3d Cir. 1997) (recalling the mandate and granting rehearing based on a Supreme Court decision issued approximately one month after the circuit court's prior ruling), and fewer in the spirit of *United States v. Fraser*, 407 F.3d 9, 10–11 (1st Cir. 2005) (refusing to recall the mandate in light of a Supreme Court case issued approximately two months after the circuit court's prior ruling), and *Richardson v. Reno*, 175 F.3d 898, 899 (11th Cir. 1999) (same).

132. See *infra* note 145.

comes down. Indeed, the lower courts sometimes do just that,<sup>133</sup> which likely averts the need for many post-decision GVRs down the road. But the courts of appeals might not be doing so at the optimal level. Courts of appeals face administrative incentives to clear their dockets rather than maintain long-pending cases.<sup>134</sup> Such pressures, while understandable, might not be optimal from a system-wide perspective. The incentives are also misaligned because, under current procedures, an improvidently issued decision that turns out to conflict with the forthcoming Supreme Court decision imposes burdens on the Supreme Court—burdens that might not be part of the lower court's calculus. Assigning primary responsibility to the lower courts would tend to internalize the costs and benefits of waiting. To be clear, I do not believe that waiting would always be proper; delays will turn out to be needless in hindsight when the Supreme Court's new decision turns out to agree with preexisting circuit law, and in some cases the equities will counsel expedition. The point is just that the calculations would change somewhat. In this way, my proposal might preemptively reduce, though not eliminate, the need for ex post fixes.

Once one begins taking an ex ante perspective and thinking about incentives, one has to consider the role of the litigants too. One can easily imagine a court of appeals, when faced with a petition for rehearing or motion to recall the mandate predicated on a Supreme Court decision issued a few months after its ruling, invoking a type of forfeiture or waiver argument: the party seeking the benefit of the new law knew or should have known that the case was pending in the Supreme Court and should have spoken up earlier if it wished to delay resolution of the appeal.<sup>135</sup> That litigants might neglect to discover pertinent information, or even opportunistically fail to reveal it, is indeed a problem that should bother us.<sup>136</sup> The Supreme Court, however, does not appear to enforce such a forfeiture rule when granting GVRs.<sup>137</sup> (If it did, there would be far fewer GVRs based on post-decision and post-grant petitions.) To the extent that we are attempting to leave unaffected the current scope of the GVR power while simply shifting the task

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133. *E.g.*, *Fisher v. Primstaller*, 215 F. App'x 430, 431 (6th Cir. 2007) ("After [appellant] brought the present appeal, the Supreme Court granted certiorari in *Jones v. Bock*, and we held his appeal in abeyance pending the disposition of that case." (citation omitted)).

134. The Administrative Office regularly issues statistics showing, inter alia, the number of pending cases and median time required for termination of appeals in each circuit. JAMES C. DUFF, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2007 ANNUAL REPORT OF THE DIRECTOR app. at 85, 107 (2008), available at <http://www.uscourts.gov/judbus2007/JudicialBusinesspdfversion.pdf>. Chief judges naturally would want to keep their circuit from looking bad.

135. *See Boston & Me. Corp. v. Town of Hampton*, 7 F.3d 281, 283 (1st Cir. 1993) (denying a motion to recall the mandate in light of a new state supreme court case and noting that the movant could have sought a stay of the First Circuit proceedings pending the state decision).

136. *Cf. Martin*, *supra* note 98, at 576–84 (arguing that the GVR practice creates incentives for litigants to conceal potentially dispositive future developments).

137. To be sure, the Court says that it can consider the equities of the case and could withhold a GVR in cases of manipulative litigation strategies, *Lawrence v. Chater*, 516 U.S. 163, 167–68 (1996), but the mere failure of a litigant to tell the lower court about a case pending in the Supreme Court does not seem to strike the Court as manipulative.

away from the Supreme Court, that argues in favor of the courts of appeals not employing such a forfeiture rule either. Further, even leaving that aside, it is better for the ultimate responsibility to lie with the court of appeals. It knows which of the possibly many issues in a case will be crucial to its decision, and it is not difficult for it to maintain a centralized list of the relatively few issues on which the Supreme Court has granted certiorari.<sup>138</sup>

In sum, we may be able to reduce the number of court of appeals' decisions that are soon rendered obsolete by new Supreme Court rulings, and such decisions that do issue should be dealt with in the court of appeals through some type of rehearing procedure, rather than by GVR.

There might be a number of objections to this general approach of replacing some GVRs with appellate rehearings. Let us consider the objections and the responses that can be made to them.

One objection is that the courts of appeals are themselves extremely busy and should not be saddled with additional work. To this there are two answers. First, even to the extent that we are simply redistributing work from the Supreme Court to the courts of appeals, one could argue that the Supreme Court's time is nonetheless the scarcer national resource. Second, though, we are *not* just talking about redistribution but instead about the possibility of system-wide gains. As noted, the proposed procedures might lead to fewer cases that need to be fixed. But even if that does not happen, it is not as if the courts of appeals are not required, today, to deal with implementing changes of law. They are, *after* the Supreme Court issues the GVR. That is, under the current GVR regime, the Supreme Court undertakes the initial effort of screening cases and determining whether there is a reasonable prospect that the intervening decision will affect the outcome, and, if so, it GVRs so that the court below can undertake to decide if the new precedent really is determinative, typically after further briefing. In essence, my alternative cuts out the middleman and avoids this partly duplicative bifurcation of effort. Little value is lost by removing the Supreme Court from the job because, under current understandings, the Supreme Court's screening does not really convey meaning about the actual scope of the new precedent.<sup>139</sup> And the Supreme Court gains from not having to familiarize itself with another case. This is not even to mention the gains to litigants from what one could call one-stop shopping.

Another objection would be that litigants might burden the court of appeals with meritless rehearing petitions or motions to recall the mandate predicated on Supreme Court rulings with no real bearing on the issues. One response is that the new procedures would be to some degree self-enforcing

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138. Indeed, it is my understanding that at least some courts of appeals try to do that, to varying degrees.

139. See *Lawrence*, 516 U.S. at 167 (explaining that the Court GVRs when there is "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity"); see also *Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001) (rejecting litigant's attempt to read a GVR as a ruling on the merits). For example, the Court's decision to GVR a habeas case in light of a new criminal procedure precedent does not mean that the new ruling applies on collateral review. See *Hellman*, *supra* note 4, at 33 n.108, 36 n.121.

in that such petitions would just be denied. Attorneys' concern for their reputation and credibility may curb meritless petitions too. To these incentives could be added a requirement that the papers contain a certification to the effect that counsel believes a recent Supreme Court case requires a different outcome. This would be analogous to the current requirement that petitions for rehearing en banc contain a certification that the panel decision conflicts with Supreme Court or circuit precedent or involves a question of exceptional importance.<sup>140</sup> Language similar to Rule 11 could be added, if one wished to drive the point home.<sup>141</sup> But perhaps the broadest response is just to say that there is nothing particularly unique about the risk of meritless filings here. Litigants can burden the courts with meritless contentions in various and sundry ways (useless appeals, improbable legal theories, baseless requests for sanctions, petty discovery disputes, and so on).

A further objection would be that the rehearing procedures are too complicated to be worthwhile. I certainly agree that the complexity of a new procedure is relevant and could overwhelm the benefits of adopting what is otherwise a better system. I do not believe, however, that this reform is unduly complicated, at least compared to the alternative. The standards for when and how changes in law can be taken advantage of through GVRs currently take the form of obscure unwritten rules of Supreme Court history and practice. Depending on how the reform is implemented, we might replace these with formal, written rules of appellate procedure, which would increase transparency. Even without a formal amendment to the appellate rules, keeping the proceedings in the courts of appeals rather than in the Supreme Court is an inherent decrease in complexity.

Attacking from the opposite direction, it might also be objected that the availability of this new rehearing procedure would make it too *easy* to take advantage of changes in the law. No doubt many litigants and attorneys are ignorant of the potential for a GVR, it being somewhat esoteric knowledge. And even if one is aware of the possibility, it is relatively more expensive to file a petition for certiorari, especially so if one engages the assistance of a new attorney more familiar with the Court's procedures.<sup>142</sup> That is, the new petition for panel rehearing might be used more often, thus doing more damage to the values of finality and repose than does the GVR practice. I can understand this worry, but on reflection isn't this criticism just "a fear of too much justice"?<sup>143</sup> Our system has decided that changes in law apply to still-pending cases. If in practice that principle applies today mostly for the

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140. FED. R. APP. P. 35(b).

141. FED. R. CIV. P. 11 (providing for sanctions for documents that lack legal or factual support or are submitted for improper purposes, such as delay).

142. See *supra* notes 116–117.

143. *McCleskey v. Kemp*, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

benefit of those fortunate enough to be well-counseled,<sup>144</sup> shouldn't honoring the principle in a less hypocritical fashion be a *positive* development?

Finally, it could be objected that courts of appeals would be too resistant to changing their minds when asked to reconsider their freshly issued rulings in light of new precedent. As suggested above, perhaps under this alternative regime courts of appeals would issue fewer decisions that immediately need revising, instead holding their decisions when the Supreme Court is considering a relevant issue. But leaving that aside, under current practice there is basically the same temptation simply to reinstate the prior decision when a case comes back to a court of appeals on a GVR. In either case, the risk of further Supreme Court review after the court of appeals reconsiders is slight, but the threat is always there.<sup>145</sup> So while this objection might have some truth to it, it applies to the current practice as well.

## 2. *Pre-Grant Petitions*

Next consider the case in which a petition for certiorari is filed and then there is a grant of certiorari in a relevantly similar case. In this case, I do not think that eliminating GVRs and replacing them with petitions for rehearing is feasible or desirable. Here we do not have a situation where some event has occurred and the only question is which court should deal with it. On the contrary, when the litigant files the petition with the Supreme Court, there is as yet no event to which to direct the lower court's attention. Accordingly, the Supreme Court should maintain its current practice of selecting the petition that presents the best vehicle for resolving a question and holding any other pending petitions in anticipation of a potential future GVR. Having these extra petitions around can be of value to the Court. In conjunction with the briefing and argument in the plenary case, they give the Court a fuller sense of the different factual circumstances in which a legal issue can arise. And they can serve as backups in case the Court needs for some reason to dismiss the granted case.

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144. The well-counseled are not always the same as the well-heeled. Many federal public defender offices have extraordinary expertise in dealing with such matters on behalf of their indigent clients.

145. The reform suggested here would preserve the parties' ability to petition for certiorari if dissatisfied with the court of appeals' decision on whether to change its earlier ruling. If rehearing is granted, the period for petitioning runs from entry of the new judgment. SUP. CT. R. 13.3. If rehearing is denied, the period runs from the date of the denial if the request for rehearing is "timely filed . . . or if the lower court *appropriately entertains an untimely petition* for rehearing." *Id.* (emphasis added). If the proposed reform were implemented by amending the appellate rules to extend the period for filing rehearing petitions, then those rehearing petitions would be timely filed. If instead the reform were implemented by instructing the courts of appeals to consider out-of-time rehearing petitions in the case of intervening developments, then that should be considered "appropriate" such that the certiorari clock runs from the denial of the out-of-time petition.



### 3. *Post-Grant Petitions*

Post-grant petitions are a large category, and thus the reform proposal has much more to offer if it deals with this class of cases. This category also presents special problems.

The relatively easy subcategory here is the group of cases in which the court of appeals orders a remand and the Supreme Court then grants certiorari on a relevant question. As above with post-decision petitions, there is no need for either GVRs or special rehearing procedures in such a case; the district court will be free to depart from the appellate court's mandate if the Supreme Court changes the law.<sup>146</sup>

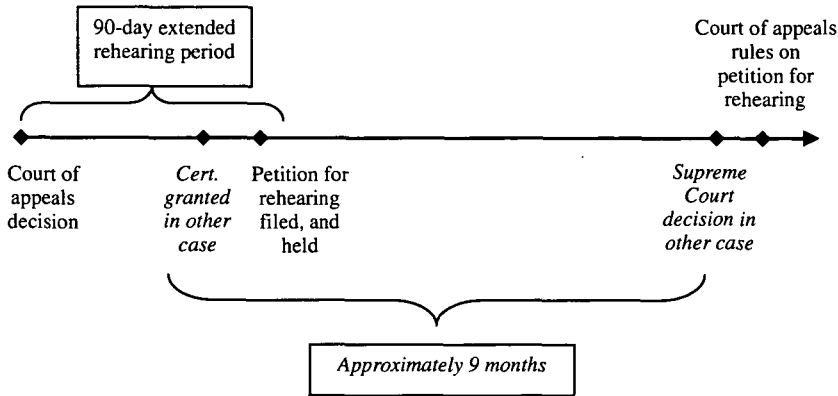
Much more difficult are the cases in which the judgment of the court of appeals would otherwise conclude the litigation. On the one hand, many of the same reasons for reform discussed earlier apply here. Similar to the post-decision scenario, some concrete event has occurred (here, the grant of certiorari in a related case) that augurs at least the potential for a change in law. This change is going to apply to cases in which the period for seeking certiorari has not yet run out, so the question is which court is responsible. Rather than having the grant of certiorari trigger numerous hold-seeking petitions for certiorari, which are expensive for the litigants and the Supreme Court alike, it would make more sense to direct these litigants to the courts of appeals. A party could file a petition for panel rehearing (or an out-of-time petition and a motion to recall the mandate, depending on the details of implementation). The court of appeals would, after an initial threshold inquiry regarding whether there was a reasonable prospect that the forthcoming decision would matter, hold the case until the Supreme Court decision came down. Then, perhaps after affording an opportunity for briefing on the impact of the new decision, it would see if its prior ruling remains valid. As before, the "middle man" will have been cut out.

On the other hand, some readers will likely respond that this seems like a long, drawn-out process. They are quite right. In this scenario, the finality of the court of appeals' decision is delayed by many months, as the figure below illustrates.

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146. See *supra* notes 124–125 and accompanying text.

FIGURE 4  
 DELAY IN FINALITY FOR POST-GRANT SCENARIO



Is this long delay in achieving finality justifiable? One could make a strong case that it is not. In this scenario, there has been no change in the law within the usual ninety-day period for seeking certiorari; we have only the prospect that there might be a change months down the road, once the Supreme Court issues its decision. At some point a case must become final, and perhaps this delay is simply too much. Further, the upside of waiting for the Supreme Court's decision is modest, given that in many cases the Court's eventual decision will just confirm that the court of appeals was right.

Given considerations like those just mentioned, I predict that many people would think it a poor idea to use the extended rehearing procedures in this case. But if that objection is right, it also calls into question the Court's current practice of GVR'ing in such situations. The delay in finality is the same; the petition for rehearing in the court of appeals is simply replaced by a petition for certiorari. (If anything, the delay is a little worse under current practice, since there would be some time between the GVR and when the court of appeals takes up the case again.) In addition, there is the additional expense to the litigants of having to go to the Supreme Court and back again. Finally, there is the burden on the Court. Thus, if anyone should be responsible for implementing the change in law, it seems the lower court should.

Of course, maybe nobody should be doing it. While my main goal in advancing the rehearing proposal has been to show that we can maintain the substantive outcomes of the current practice while switching the responsible institution, this particular scenario might require a broader rethinking of current practice. The chief value of examining the reform, as applied to this category of cases, might be that it leads us to realize that the current, familiar practice is hard to justify. If we decided to stop treating these cases as eligible for the application of new law, that would be technically (though perhaps not in spirit) consistent with the principle that only pending cases need to be decided under changed law—the case would no longer be

pending if the Court denied certiorari in due course before the new decision was announced.<sup>147</sup> In any event, I do propose this: either the Supreme Court's practice of issuing GVRs in this type of case should be stopped and replaced by the rehearing procedures, or the practice should simply be stopped.

#### 4. *Special Cases*

Before concluding, we should address two special situations, the antecedent-event GVR and GVRs caused by something other than a Supreme Court case.

*Antecedent-event GVRs.* As things currently stand, the Supreme Court is willing to GVR based on an event that preceded the lower court's decision. Should this practice continue? Should it be replaced with extended rehearing procedures?

The extended rehearing procedures seem inappropriate here. If the relevant authority was presented to the court below but the court failed to consider it, that is the stuff of ordinary petitions for rehearing, and no special rules are needed.<sup>148</sup> Nor does there appear to be any sound reason to create a special lengthened period for rehearing when the problem is counsel's failure to bring existing authority to the lower court's attention.<sup>149</sup> In these cases the answer is a Supreme Court GVR or nothing.

A strong case could be made in favor of no remedy—that is, that the Supreme Court should not GVR in such cases. Denying relief is most easily justified when counsel failed to bring some existing authority to the lower court's attention within the ordinary fourteen-day period for panel rehearing; in such a case, it is altogether unclear why the Supreme Court should vacate the lower court's judgment based on counsel's neglect. When the blame lies with the lower court's sloppiness, the case for withholding the GVR is less certain, but it is still strong. To be sure, in an egregious case where the omitted authority is clearly determinative of the result, the Supreme Court might summarily reverse. Such might have been the proper

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147. The view that denial of certiorari automatically puts an end to any possibility of accommodating changes in law is, admittedly, in tension with the fact that the Court does on rare occasions GVR in response to a petition for rehearing based on a new case decided shortly after certiorari was denied. During the period of the study, I found about a dozen such GVRs, all *Booker* GVRs in which certiorari had initially been denied soon before or very soon after *Blakely* was decided. That the Court has not in recent years been GVR'ing on rehearing outside of this exceptional context perhaps reflects the Court's realization that, at some point, cases have to be let go.

148. See FED. R. APP. P. 40(a)(2) (providing for petitions for panel rehearing when the court overlooks or misapprehends points of law or fact).

149. In times past, it might have been perfectly reasonable for an attorney not to learn about a new controlling authority quickly. But today it is harder to excuse delay. Lexis and Westlaw both have features that provide automatic notification of new cases that cite specified prior cases or fit other user-defined criteria; in addition, there are listservs, blogs, court websites, etc. None of this is to suggest that a lower court could not in its discretion permit a late petition for rehearing or other remedy when there are unusual circumstances excusing counsel's failure. It is just that we should not build our routine procedures around it.

course in *Youngblood*.<sup>150</sup> But when the outcome is not clearly wrong, it seems problematic to order the court below to reconsider in light of a matter that was pressed upon it but that it deemed unworthy of discussing. (Even on a rather strong understanding of the requirements of reasoned decision-making, surely the courts are not required to discuss and distinguish every authority presented to them.) Harder still to justify is an order requiring the lower court to reconsider in light of a matter that it had discussed and distinguished. To GVR when the court below had no opportunity to consider the correct rules is one thing, but to GVR just for possible error is something that the Court cannot possibly do in every case.

While I believe a rule against antecedent-event GVRs would be defensible for the reasons just given, it is a difficult call. Because special rehearing procedures will not be available, here we actually face the cost of possibly erroneous decisions going uncorrected. To that extent, GVRs like *Youngblood* have, surprisingly, a *better* claim on the Court's attention than do the more routine noncontroversial GVRs. Another consideration in favor of such GVRs is that they can serve as a check on unreasoned dispositions in the lower courts. If the court below affirms in a one-word order, obviously it can be hard to tell what legal rules it employed. When the litigant files a petition for panel rehearing on the suspicion that the court overlooked some important matter, he or she will find little elucidation in the one-word order denying rehearing that is the likely response. Although it is absolutely true that the Supreme Court can review an unreasoned disposition,<sup>151</sup> it is also clearly true that such dispositions tend to frustrate its review. Indeed, in *Lawrence v. Chater*, the Court said that the prevalence of summary dispositions argued for a more robust GVR practice, so that such decisions would not escape review due to the ambiguity of their grounds.<sup>152</sup> In this regard, it may be worth noting, however, that the use of unreasoned summary decisions has been in decline in the years since *Lawrence*; where *Lawrence* cited slightly over 3000 such dispositions for 1994, in 2007 there were under 1000 such dispositions, despite an increase in total merits decisions.<sup>153</sup>

*GVRs caused by events other than Supreme Court cases.* Without attempting to go through how the principles underlying this proposal would apply to all of the different types of GVRs that exist, I will offer a few comments about the two types that occur with any frequency: GVRs caused by confessions of error and those caused by new statutes or regulations.

Confession-of-error GVRs would be unaffected. The government's change in position does not come until the Solicitor General responds to a petition for certiorari, so there is no way to avoid the trip to the Supreme

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150. On remand, the West Virginia Supreme Court of Appeals changed course and reversed *Youngblood*'s conviction. *State v. Youngblood*, 650 S.E.2d 119 (W. Va. 2007).

151. See *supra* note 14.

152. 516 U.S. 163, 170 (1996).

153. Figures can be found in Table S-3 of the annual reports compiled by the Administrative Office of the U.S. Courts, which are available at <http://www.uscourts.gov/judbususc/judbus.html>.

Court and back to the lower court. This is not to say that the Court's current practice could not be criticized on various grounds—for instance, one could question whether the Court should GVR based on the government's admission that the reasoning below was incorrect even as it defends the judgment and opposes certiorari—but these criticisms do not relate to whether some other institution should be handling these cases.

The special rehearing or mandate-recall procedures can easily apply to changes in statutory and regulatory law. If those changes in law are going to be cognizable, there is no good reason to require a trip to the Supreme Court to make them so. But if a petition for certiorari is already pending when a new enactment comes into effect, it seems that the Court should continue its current practice of issuing GVRs.

#### CONCLUSION: WEIGHING THE ALTERNATIVES

The foregoing pages have described the current GVR practice and presented a potential reform. The time has come for a reckoning of the pluses and minuses. In light of our newly improved understanding of the GVR practice and its alternatives, is reform appropriate?

I recognize that a reformer bears a burden. Whatever their faults, existing practices might have virtues that are hard to see—until one meddles with them. Showing that the status quo is suboptimal is obviously insufficient, given that the reform will almost certainly have its own drawbacks, some of which might be unforeseen. All of this counsels humility. Nonetheless, my sense is that the reform discussed here, while not perfect, is better than the status quo in terms of various more or less neutral criteria that are widely recognized as proper measures of a procedural system: expense to litigants, judicial workload and division of labor, transparency, regularity, and so on. The difference is large enough, in my estimation, to warrant incurring the costs of transitioning to the new regime.

I concede, however, that one cannot wring out all controversial value choices. For example, it is possible that the need to deal with GVRs tends to act, to some small degree, as a brake on adventurous Supreme Court decisions that seriously disrupt the law. (Notably, however, the brake did not stop *Booker*.) Eliminating the Court's duty of dealing with GVRs would reduce the cost, at least to the Court, of legal innovation.<sup>154</sup> Whether the Court should be more or less willing to upset settled law is, in large part, a question of basic values that is not easily resolved by technocratic considerations.

Relatedly, it might be contended that the Supreme Court's GVR duties are not the extraneous and incongruous hangers-on that I have made them

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154. Cf. Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1730–31 (2000) (arguing that the discretionary certiorari policy frees the Supreme Court from dealing with the consequences of its decisions expanding the reach of federal law); John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 90 (1999) (arguing that the doctrine of qualified immunity facilitates the growth of constitutional law by reducing the cost of innovation).

out to be. Arthur Hellman recognized over twenty years ago, in his study of the GVR practice, that the GVR did not fit neatly within the Court's role as supreme interpreter and unifier of federal law. But he found some comfort in that fact:

[The GVR practice] remind[s] us that, notwithstanding its unique role as the final expositor of the national law, the Supreme Court remains a court—a tribunal that operates within the judicial system and derives its authority to announce legal rules from a grant of jurisdiction over individual cases and controversies. . . .

. . . In an imperfect and limited way, the GVR practice prevents the Court from becoming, even more than it already is, a remote lawgiver largely cut off from the traditional processes of common-law adjudication.<sup>155</sup>

That is, by requiring the Court to confront whether its new decisions might apply to diverse factual circumstances, the GVR practice keeps the Court in touch with its common law roots. My approach, it could be said, would lead to a Court that is even more cut off from the traditions of case-by-case elaboration of legal rules. My sense, however, is that the ship has already sailed, and that the future holds only more Olympianism.

I have advanced a reform that would largely preserve the commendable features of the GVR practice while reducing the Court's role in overseeing the implementation of changes in law. Whether or not readers find that proposal compelling, the defenders of the status quo will at least have to produce a reasoned defense of the GVR practice, rather than taking it as a given. And quite apart from what, if anything, we do about the GVR practice, I believe that the data presented here will give us a sounder foundation for understanding the Court's business.

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155. Hellman, *supra* note 4, at 40.