

The Supreme Court’s Controversial GVRs

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I. INTRODUCTION

This paper addresses the Supreme Court’s “GVR” practice – 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 GVR is most commonly used when the case 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.¹ In issuing a GVR, the Court does not determine that the intervening event necessarily changes the outcome in the case, just that it might.² 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,³ and it may issue scores or even hundreds of these orders every year. Despite the number of GVRs issued, the practice attracts

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¹ See generally ROBERT L. STERN 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 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).

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

little scrutiny because, over the course of several decades, GVRs have become an accepted and mostly uncontroversial part of the Court’s business.⁴

The relative neglect of the GVR by scholars is unfortunate and unwarranted. Despite its humble appearance, the GVR responds to a fundamental problem in the administration of justice: how should the judicial system respond to changes in the governing law?⁵ 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 frozen on, 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 and apply the law as it stands when they rule.⁶ Thus, a federal court of appeals will decide an appeal using new principles of law that postdate the district court’s judgment rather than simply deciding whether the district court correctly applied the former law then available to it.⁷ The GVR shows that our system has chosen to give effect to 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 give effect to these changes, even though doing so seems to represent a species of mere error correction, which everyone agrees is not the Court’s primary function.⁸

From time to time an unusual GVR will generate some controversy and helpfully draw attention to the GVR procedure itself. One such case was the 2006 GVR in *Youngblood v. West Virginia*.⁹ According to the Court, which provided a short per curiam opinion explaining its

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 HAST. CONST. L.Q. 5, 7-8 (1984) (tracing the rise of the modern GVR practice in the 1960s and 1970s). Easily the most discussed topic in the limited literature on GVRs is the question of their precise meaning – 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, and 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).

⁵ See, e.g., Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 YALE L.J. 922 (2006) (discussing this problem 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 Part III.A *infra*.

⁷ See, e.g., *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266, 273, 280 (2d Cir. 2005) (relying on new Supreme Court case to reverse district court decision that was the culmination of over two decades of litigation). To be sure, the court of appeals does not have to apply the new law *itself*; it can instead 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 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., Arthur D. Hellman, *Error Correction, Lawmaking, and the Supreme Court’s Exercise of Discretionary Review*, 44 U. PITT. L. REV. 795, 799 (1983) (referring to “the consensus of Congress, the bar, and the judiciary that review for error should play, at best, a minor part in the Court’s work”); *Supreme Court Jurisdiction Act of 1978: Hearings on S. 3100 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Judiciary Comm.*, 95th Cong., 2d Sess. 40 (1978) (letter from all nine sitting Justices).

⁹ 547 U.S. 867 (2006) (per curiam).

action (itself unusual for a GVR), the reason for sending the case back for reconsideration was to allow the court below to address the defendant’s facially plausible claim, adequately presented to the lower court yet ignored in its opinion, that prosecutors had withheld evidence in violation of *Brady v. Maryland*¹⁰ – 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. Yet while the 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 summarily reverse. 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.”¹¹

Further raising the profile of this already unusual GVR, three Justices dissented.¹² Justice Scalia, particularly perturbed with his colleagues, deemed this an unjustifiable expansion of existing GVR practice. Scalia was not persuaded that GVR’ing would be “better” in any legitimate sense. 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.¹³ There was, he recognized, one advantage in having the 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.”¹⁴ In other words, 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. The Court was suggesting that it would be “better” for the West Virginia court to revisit the case, Scalia observed, “much as a mob enforcer might suggest it would be ‘better’ to make protection payments.”¹⁵

Youngblood provides an opportunity for us to reflect on the Court’s GVR practice more deeply. Anyone who engages in such reflection quickly realizes, however, that very little is known about the Court’s GVR practice. Even basic descriptive data are scarce, such that we do not know how many GVRs, and of what categories, the Court has been issuing.¹⁶ In the absence

¹⁰ 373 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).

¹¹ 547 U.S. at 870

¹² *Id.* at 870 (Scalia, J., joined by Thomas, J., dissenting); *id.* at 875 (Kennedy, J., dissenting).

¹³ *Id.* at 872 (Scalia, J., dissenting) (“Since we sometimes review judgments with no opinion, and often review judgments with opinions only on one side of the issue, it is not clear why we need opinions on *both* sides here.”); see also STERN, *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).

¹⁴ 547 U.S. at 873 (Scalia, J., dissenting).

¹⁵ *Id.*

¹⁶ The Spaeth ALLCOURTS database contains only those exceptional GVRs accompanied by an opinion. See HAROLD J. SPAETH, DOCUMENTATION: THE ORIGINAL SUPREME COURT JUDICIAL DATABASE, 1953-2006 TERMS 56-57 (2006), available at <http://web.as.uky.edu/polisci/ulmerproject/sctdata.htm>. The statistics published each year by the *Harvard Law Review* contain an entry for cases disposed of by memorandum, but their category seems to be both overinclusive (because it includes some non-GVR summary vacaturs) and underinclusive (because it excludes GVRs accompanied by a per curiam opinion); importantly, the statistics do not divide up GVRs by category. See *Supreme Court, 2003 Term – The Statistics*, 118 HARV. L. REV. 497, 505 tbl. II(D) (2004). The only systematic empirical study is that conducted by Arthur Hellman, which is now over twenty years old and which, while characteristically careful and thorough, concerns only the category of GVRs caused by intervening Supreme Court cases. Hellman, *supra* note 4, at 6 n.6. (Note that Hellman published a substantially similar but shorter and less

of that information, discussion or criticism of the GVR practice risks becoming unmoored from empirical reality – unable to distinguish what is unprecedented from what is routine, ignorant of the true character of the thing at issue. This paper fills some of the gaps in our knowledge by presenting data on the Court’s GVR practice, with emphasis on categories that are sometimes regarded as controversial. Given the paucity of information on the GVR practice, I believe that merely gathering the data is itself valuable. But the data also have some normative and policy implications. It may be that the GVR practice becomes more problematic the more one knows about it. If observers knew that the Court issued over 800 GVRs a few years ago and 250 GVRs last year, they might not regard the practice as uncontroversial. The Court’s GVR practice is an exercise in error correction on a large scale. Any assessment of the Court’s actual functioning as an institution must take into account that this substantial part of the Court’s docket is given over to doing justice in individual cases, which is not the Court’s function. In this sense, *all* GVRs are controversial GVRs. And this realization might lead us to try to do something about it.

The analysis proceeds as follows. Part II provides an overview of the Court’s GVR practice. It includes comprehensive data on approximately the last decade of GVRs, identifying the number of GVRs by category for each year. 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 II also provides greater detail for certain categories of GVRs that are sometimes considered controversial, including those (like *Youngblood*) that are triggered by preexisting precedents and those that are triggered by changes in the parties’ litigation positions (most particularly, confessions of error by the Solicitor General). The findings suggest, among other things, that while *Youngblood* is an extreme case, GVRs in light of cases that had already been decided at the time of the decision below are not especially uncommon.

Armed with this information on the Court’s GVR practice, the analysis in Part III then takes a more critical view. Given our principle that changes in law should be applied to cases that are still pending, it seems that the GVR is the best way for the Supreme Court to implement that commitment. But 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 implementing changes in law. Indeed, our 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 propose that we replace parts of the current GVR practice with new procedures that shift this responsibility to lower courts.

II. AN EMPIRICAL OVERVIEW OF THE COURT’S GVR PRACTICE.

A. Definition and Method.

Before presenting the results, a few notes on methodological matters are in order.

heavily footnoted version of his GVR study as “*Granted, Vacated, and Remanded*” – *Shedding Light on a Dark Corner of Supreme Court Practice*, 67 JUDICATURE 389 (1984). In this paper I will cite his longer article.)

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 might be some room for disagreement. For purposes of this analysis, I understand a GVR to be a summary disposition that, without purporting to find error, returns the case to the court below for reconsideration. This definition influences the data collection in several ways. I include only dispositions at the petition stage (or, for appellate docket cases, jurisdictional statement stage¹⁷); excluded are those very rare cases in which the Court, having set the case for plenary consideration, then vacates and remands in light of an event that occurred after the grant of certiorari or even after argument.¹⁸ The vast majority of GVRs are but a few boilerplate lines, but I also include those non-formulaic GVRs that are accompanied by a short explanatory per curiam opinion (often in response to a dissent). Excluded, however, are summary dispositions that find some error below but that vacate rather than reverse for what might loosely be called technical reasons.¹⁹ Although in these cases the Court might in fact *grant* certiorari, *vacate* the judgment below, and *remand*, these are essentially summary reversals and not GVRs: they lack the key feature of remanding for reconsideration, usually in light of a recent development, without finding error. As a further illustration of this point, my criteria would include cases in which the Court GVRs for consideration of whether a case has become moot but would exclude – for want of the 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.²⁰ (Although cases of the first sort fit my criteria, I did not actually locate any such cases for the decade under study.)

¹⁷ Today, cases reach the Court almost entirely by writ of certiorari, the grant of which is discretionary. A few vestiges of mandatory appellate jurisdiction remain, notably in certain voting rights cases. *See generally* STERN 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 state supreme court decision issued after grant of certiorari); Knox v. United States, 510 U.S. 939 (1993) (vacating and remanding in light of new position taken by Solicitor General in merits brief after grant of certiorari). As a further illustration, consider the somewhat different, but also excluded, case of *Hohn v. United States*, 524 U.S. 236 (1998). The Solicitor General agreed with the petitioner that the Supreme Court had jurisdiction over the case, and he confessed error on the merits. The Court granted certiorari and appointed an amicus to argue that the Court lacked jurisdiction. After argument, the Court issued a full opinion concluding that it had jurisdiction and then vacated and remanded in light of Solicitor General’s confession of error. My study of late 1970s GVRs suggests that reconsideration orders following a grant of certiorari or argument were more common in the past, though I have not attempted to quantify this.

These GVR-like dispositions should not be confused with a dismissal of certiorari as improvidently granted (“DIG”). A DIG might result when, for example, the Court decides that a particular case is a poor vehicle for deciding the question the Court granted certiorari to decide. *See generally* Michael E. Solimine and 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 the judgment. *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).

²⁰ *Compare* United States v. US West, Inc., 516 U.S. 1155 (1996) (granting certiorari, vacating, and remanding “for consideration of the question whether [the case is] moot”), with Teel v. Khurana, 525 U.S. 979 (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))).

The reader should note that there are a few procedural pathways through which a case can become a GVR. Several petitions filed at roughly the same time might present the same or a similar issue. When the Court decides to grant one of the petitions, it will often hold the others until it decides the granted case. After the grant, further petitions presenting the granted question might be filed. Once the Court decides the granted case, it will GVR when there is a reasonable prospect that the decision would affect the outcome in a held case; otherwise, it will deny certiorari.²¹ The majority of GVRs result from petitions that have been “held” by the Court.²² Others, however, result from petitions that were filed after the plenary decision that causes the GVR. I included all of these different routes to the GVR. In Part III, where I suggest reform of the GVR practice, the different routes will become more important.

Finally, I note one last category of GVR that has a rather different character from others: those in which the Court GVRs a state court decision for clarification of whether the decision relies on federal or instead state law. To speak very broadly, the Court has jurisdiction to review decisions based on federal law but lacks jurisdiction to review decisions that rest on state law grounds.²³ Thus, it will often be important to determine the actual basis of an ambiguous state court decision. Although the Court sometimes used to 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 presumption under which there is assumed to be jurisdiction when a state court mixes together state and federal grounds for decision.²⁴ There were no such GVRs in the decade studied.²⁵

The method for locating GVRs was as follows: 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).²⁶ I 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

²¹ See *Lawrence v. Chater*, 516 U.S. 163, 181 (1995) (Scalia, J., dissenting) (discussing “hold” procedure; Hellman, *supra* note 4, at 38-39 (same)).

²² This conclusion is based mostly on my impression from examining many of these cases. I confirmed this with a more systematic examination of the 2006 Term, which showed that . . . [*Note: OT 2006 analysis still to be completed].

²³ 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*].

²⁴ See *Michigan v. Long*, 463 U.S. 1032, 1038-41 (1983). For an 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.

²⁵ The Supreme Court’s disposition in *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70, 78 (2000), came very close to such a GVR, but it is excluded because it was not decided at the certiorari stage – there was merits briefing and oral argument.

²⁶ 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. Non-formulaic GVRs are potentially harder to catch by such a search (though, due to their rarity, they tend to be cited in secondary literature and subsequent non-formulaic 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 non-formulaic 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.

example, “*Krivda*,” a case that is often cited in elucidatory GVRs²⁷). The lists of results, which included many non-GVRs, were then examined and GVRs were identified and classified 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*, which is where the Court’s order lists are published. I am reasonably confident that I have identified all GVRs, though I cannot rule out the possibility of having missed a very few. Finally, I note that the unit of analysis was the case rather than the petition. In other words, when two or more petitions arising from the same lower court case were GVR’d in one consolidated order, that counts as one GVR.²⁸

[*Note: A document containing all of the data that is summarized in the following sections will be put on file with the journal that publishes this article and will be available on my webpage.]

B. The GVR Practice over the Past Decade.

With those preliminaries in mind, let us turn to Table 1, which presents data on the Supreme Court’s GVR practice over roughly the past decade. The data begin with October Term (OT) 1996, which might with some justification be regarded as the beginning of the Court’s current phase of GVR practice.²⁹ Except where otherwise noted, the analysis did not include a thorough examination of the huge number of GVRs stemming from the recent sentencing decisions *United States v. Booker*³⁰ (some 800 GVRs spread over OT 2004 and OT 2005) and *Cunningham v. California*³¹ (roughly 200 GVRs in OT 2006); for the affected years, the detailed analysis is limited to the GVRs that did not involve those cases.³²

²⁷ See *supra* note 24.

²⁸ The *U.S. Reports* hardcopy was treated as authoritative in this regard.

²⁹ In OT 1995, the Court had 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). Dissenters thought these cases signaled an important development. 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 *denouement* should make even the most Pollyannish reformer believe in camel’s noses, wedges, and slippery slopes.”).

³⁰ 543 U.S. 220 (2005).

³¹ 127 S. Ct. 856 (2007).

³² As described above, determining the actual numbers of GVRs requires more than just reporting the number of hits returned by an electronic search; for *Booker* and *Cunningham*, I therefore provide only an approximation based on the database results, as that complete process was not performed.

Table 1: GVRs by Category, OT 1996 - OT 2006

[*Note: Analysis of OT 2006 to be completed. Therefore, except where otherwise noted, discussions of the data in this draft will refer to the analysis through OT 2005.]

	OT 1996	OT 1997	OT 1998	OT 1999	OT 2000	OT 2001	OT 2002	OT 2003	OT 2004	OT 2005	OT 2006
Total GVRs ³³	60	40	47	41	111	57	48	39	60 (+ approx. 755 <i>Booker</i> GVRs)	50 (+ approx. 40 <i>Booker</i> GVRs)	[TBD] (+ approx. 200 <i>Cunningham</i> GVRs)
Cause:											
S. Ct. case (% of total GVRs for term)	49 (82%)	37 (92%)	46 (98%)	40 (98%)	110 (99%)	56 (98%)	46 (96%)	39 (100%)	59 (98%)	44 (88%) ³⁴	
Fed. statute/regs	5	3	3	0	1	0	0	0	0	5	
Federal confession of error	3	0	0	0	0	1	3	0	1	0	
State case	2	0	0	0	0	0	0	0	0	0	
State statute/regs	1	0	0	0	0	0	0	0	0	0	
State confession of error	0	0	0	1	0	0	0	0	0	1	

Averages (excluding *Booker* and *Cunningham*)

Mean GVRs per term: 55.3

Standard deviation: 21.1

Median GVRs per term: 49

³³ The entries in each column do not in every case sum to the total number reported for that year, because the rare GVRs that listed two precipitating events were included in both categories. *See, e.g.,* *Shalala v. Grijalva*, 526 U.S. 1096 (1999) (remanding in light of Supreme Court case, federal statute, and administrative regulations).

³⁴ This percentage would, of course, be substantially higher if the *Booker* GVRs were counted.

Two features of the data jump out immediately. 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. In this sense, the Court's GVR practice is not very diverse.

A second feature that one notices is that the number of GVRs is quite variable. 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*, which must surely be the all-time champ of GVR generation. *Booker* held that the federal sentencing guidelines, if treated as mandatory, can violate a defendant's Sixth Amendment and Due Process rights by allowing a defendant's sentence to turn on facts found by a judge rather than a jury.³⁵ In the remedial portion of the Court's opinion, it held that sentencing courts would henceforth have to treat the Guidelines as merely advisory.³⁶ Needless to say, *Booker* had a huge impact on the federal court system, and so it is not surprising that it would have such an impact on the GVR practice as well. It is difficult to imagine a change in the law that could cause more GVRs than *Booker* did.³⁷

If one were trying to list the characteristics of blockbuster GVR-creating cases, one would expect them to be cases that reverse existing law and that feature issues, which we might loosely dub "procedural," that arise in a great many cases.³⁸ *Booker* of course fits that pattern, as do the runners-up from the years under study, *Cunningham v. California*³⁹ (approximately 200 GVRs) and *Apprendi v. New Jersey*⁴⁰ (51 GVRs) – all of which are part of the same line of cases that amounted to a revolution in the judicial role in criminal sentencing. Decisions involving certain frequently applied immigration and sentencing provisions can also generate numerous GVRs: *Lopez v. Gonzalez*,⁴¹ which concerned whether certain state drug offenses were "aggravated felonies" for purposes of federal law, generated 23 GVRs. Likewise, I note for the sake of completeness that while OT 1996, the first year of the study, includes only the last few GVRs stemming from *Bailey v. United States*,⁴² that case – which involved a 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.

³⁵ *United States v. Booker*, 543 U.S. 220, 226-27 (2005).

³⁶ *Id.* at 245.

³⁷ *But cf.* Suja 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 could be expected to have a major impact. *See Rangel-Reyes v. United States*, 547 U.S. 1200 (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.").

³⁸ *Cf.* Heytens, *supra* note 5, at 929-31 (arguing that pro-defendant criminal procedure rulings are especially likely to create disruptive changes in law).

³⁹ 127 S. Ct. 856 (2007) (invalidating California's determinate sentencing framework).

⁴⁰ 530 U.S. 466 (2000) (invalidating a state sentence enhancement based on judicial factfinding).

⁴¹ 127 S. Ct. 625 (2006). As often happens, the same statutory language was used in the sentencing context and in immigration statutes, *see id.* at 628 & 629 n.3, which tends to increase the impact of the decision.

⁴² 516 U.S. 137 (1995).

Behind the cases just mentioned, there is a substantial drop off, but several other cases from the years under study generated ten to twelve GVRs:

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

Even if one treats the *Booker* and *Cunningham* years as aberrant, 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 is substantial. Certainly one does not see that type of volatility in the Court’s plenary docket, which changes much less substantially from one term to the next.⁵⁰ 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 is shaping up to be another big year, with well over 100 GVRs already issued, again mainly due to sentencing guidelines cases.⁵¹) These big booms now have to 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 a greater number of intervening changes of state law that would trigger GVRs, whether in cases from the state courts or in federal diversity suits. The paucity of such cases in contemporary practice is somewhat ironic, given that some accounts trace the origins of the Court’s GVR practice to cases from state courts and federal diversity cases.⁵²

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).

⁵⁰ See LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM* 74-75 (4th ed. 2007) (providing data on plenary calendar). Of course, small changes in the plenary docket each term can add up to a noticeable effect over time.

⁵¹ The major GVR-producers are *Gall v. United States*, 552 U.S. _ (2007); and *Kimbrough v. United States*, 552 U.S. _ (2007).

⁵² This is Justice Scalia’s view:

[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 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.

Finally, I note that GVR orders with recorded dissents were extraordinarily rare, averaging less than one per term. The maximum number of Justices dissenting from any given GVR during the period was three.⁵³

C. Comparison to Late-1970s GVR Practice.

To judge whether the size and composition of the GVR practice has changed over time, we can compare the figures above to figures from the 1975-79 terms.⁵⁴ Table 2 below provides data on totals and types of GVRs for those terms using the same definitions and methods employed for the more recent terms.⁵⁵ Note that it includes entries for two types of GVRs not found in the more recent data – remands to consider mootness and for clarification of whether a judgment is based on independent state grounds⁵⁶ – as well as a category for miscellaneous GVRs that do not neatly fall into any category.

Thomas v. Am. Home Prods., 519 U.S. 913, 913 (Scalia, J., concurring) (citations and some internal quotation marks omitted); *see also* Lawrence v. Chater, 516 U.S. 163, 179-80 (1996) (Scalia, J., dissenting) (presenting more detailed version of this history). Justice Rehnquist questioned this account, 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).

⁵³ It is likely that Justices sometimes dissent from certain GVRs without noting their dissents. *See Lawrence*, 516 U.S. at 192 (Scalia, J., dissenting) (stating that he would not necessarily record his dissents from objectionable GVRs); *cf.* STERN ET AL., *supra* note 1, at 330-34 (noting that dissents from denials of certiorari are usually not recorded). There is some uncertainty whether the Rule of Six – the Court’s usual rule that summary dispositions require the votes of six Justice – applies to GVRs. There have been at least a few instances in which a case was GVR’d over the dissents of four Justices. *See, e.g.*, Alvarado v. United States, 497 U.S. 543 (1990) (GVR over dissent of four Justices). *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 Dep’t of the Interior v. South Dakota*, 76 N.C. L. REV. 1387, 1399-1400 (1998) (discussing whether the Rule of Six applies).

⁵⁴ I chose these terms for purposes of comparison primarily because they are the terms Hellman studied in his investigation of the GVR process. 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. *See Hellman, supra* note 4, at 6 n.6. He also excluded the fairly unusual non-formulaic GVRs that were accompanied by a short explanation. *See 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, though 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 work; there are a number of reasonable approaches that one can take, and the considerations motivating the research will lead to different choices.

⁵⁵ As before, I treat a GVR order that consolidates multiple petitions as one case. I note, however, that in this earlier period the Court – or at least the Reporter of Decisions – seemed somewhat more aggressive in consolidating orders, such that in some instances petitions originating from the same lower court and raising similar issues are treated together even though they stem from different judgments below. *See, e.g.*, Davis v. Georgia, 446 U.S. 961 (1980) (GVR’ing six Georgia death penalty judgments). If such cases were counted separately, the total for OT 1979 would increase by a dozen; the other terms would remain about the same.

⁵⁶ *See supra* notes 20, 23-25 and accompanying text.

Data are preliminary. Please do not cite without permission.

Table 2: GVRs by category, OT 1975 - OT 1979

	OT 1975	OT 1976	OT 1977	OT 1978	OT 1979
Total GVRs ⁵⁷	55	89	51	64	75
Cause:					
S. Ct. case (% of total GVRs for term)	45 (82%)	69 (78%)	41 (80%)	60 (94%)	68 (91%)
Fed. statute/regs	2	4	2	0	0
Federal confession of error	5	7	3	3	4
State case	0	1	0	0	0
State statute/regs	3	1	0	0	0
State confession of error	0	0	0	0	0
Possible mootness	1	5	3	0	1
Clarification of state/federal grounds	2	1	2	1	2
Miscellaneous	0	3	1	0	0

Averages

Mean GVRs per term: 66.8

Standard deviation: 15.4

Median GVRs per term: 64

These years lack any huge spikes of the sort encountered in recent years. Perhaps that is not surprising, given that pro-defendant criminal procedure and sentencing rulings tend to generate the biggest booms and that this was not a Court inclined to expand defendants' rights;⁵⁸ today's Court, while generally conservative, does have at least two conservatives who are willing, on originalist grounds, to join the Court's more liberal members in some pro-defendant

⁵⁷ As above, the sum of category types in each column does not always equal the total number reported for that year. See *supra* note 33.

⁵⁸ 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); Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466 (1996).

rulings.⁵⁹ Leaving aside the absence of cases like *Apprendi* and *Booker*, the overall number of GVRs was not significantly different in the earlier period than it is today.

Looking beyond the GVR totals, the data do reveal a few notable differences. Perhaps most interestingly, in the late 1970s the Court's GVR practice was more diverse than it is today. GVRs caused by recent Supreme Court decisions were significantly less dominant.⁶⁰ Part of the explanation is that two types of GVRs – for clarification and for consideration of possible mootness – have fallen into disuse. In the case of the former, the ready explanation is that in 1983 the Court stated a policy strongly disfavoring these GVRs.⁶¹ In the case of the latter, the explanation is less 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 Solicitor General. I discuss confessions of error in more detail in Part II.E below, providing data for the last twenty years.

D. Antecedent-Event GVRs.

Here we turn to examining in more detail certain categories of GVRs that are more controversial than the norm. First 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 usual *intervening*-event GVR, we can call this an *antecedent*-event GVR. *Youngblood* itself is an extreme example, because the GVR-causing case was decades old.

Our view of these GVRs might depend on whether they are unusual, isolated instances or are instead more routine.⁶² We already know that an antecedent-event GVR is not literally unprecedented because the Court itself has pointed out that they have occurred.⁶³ But how common are they?

In the decade under study, I found 24 instances (aside from *Youngblood*) in which the Supreme Court issued a GVR in light of an event that had preceded the decision below.⁶⁴ This

⁵⁹ 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 as regards jury rights, as result of partnership between Justices Scalia and Thomas and the Court's liberal wing).

⁶⁰ Using a chi-square test and treating the earlier years as one group and the later years as another group, there was a statistically significant difference across the groups as to the proportion of GVRs that were caused by Supreme Court cases ($p < .01$).

⁶¹ See *supra* _ (discussing *Michigan v. Long*).

⁶² 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”).

⁶³ See, 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 affirmance by the Court of Appeals that was the subject of the petition for certiorari.”); see also *infra* Part II.D (discussing *Stutson v. United States*, another antecedent-event GVR).

⁶⁴ 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 such cases that could be found by examining the lower court

represents some 4% of the total number of (non-*Booker/Cunningham*) GVRs in the decade under study. In the vast majority of the cases, the relevant event was a Supreme Court decision, though a handful involved other events.

Eleven of these 24 antecedent-event GVRs came in OT 2000; the other years each had between 0 and 3 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.⁶⁵ Ten of the 11 antecedent-event GVRs from that term involved *Apprendi*. Thus, just over 20% of the 51 cases the Supreme Court GVR'd in light of *Apprendi* were antecedent-event GVRs. With the benefit of hindsight, we now see *Apprendi* as a monumentally important case and a step towards *Booker*, the earthshaking decision that rendered the federal sentencing guidelines merely advisory. But given the entrenched and routinized quality of many sentencing appeals, it is understandable that courts would be slow to pick up on a new development.

For about two-thirds of the 24 antecedent-event GVRs during the decade, the GVR-causing event decision 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.⁶⁶ In these cases it seems likely that the lower court simply did not know about the relevant event. From a certain type of formalistic perspective, these GVRs would be regarded as problematic, different in degree but not in kind from *Youngblood*. On this view, remanding for consideration of some event is inappropriate when the event preceded the decision below: the decision below was either correct or incorrect, and decisions are just as incorrect when they are ignorant of governing law as when they misapply it.⁶⁷ While that bright-line objection to antecedent-event GVRs might have some appeal, there seems to be little support for this view on the Court. 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 where the court below had no reasonable opportunity to consider a recent event.⁶⁸ Thus, these GVRs – in which the relevant event

docket sheets for every case that is GVR'd; the number just given reflects only information readily available in the Lexis case reports and Sheppard's report, which sometimes fail to reflect events such as denial 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, as I can provide that information more definitively and it is in any event sufficient to establish the point.

⁶⁵ 530 U.S. 466 (2000).

⁶⁶ 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) was 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.

⁶⁷ Cf. *The Supreme Court, 1960 Term*, 75 HARV. L. REV. 40, 95 (1961) [hereinafter *1960 Term*] (criticizing a GVR that seems to have been based on the court of appeals erring on an established point of law).

⁶⁸ In *Lawrence*, 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." He then concludes the paragraph by describing "these" GVRs – presumably all of the ones described in that paragraph, including the antecedent-event ones – as "appropriate." 516 U.S. at 180-81 (Scalia, J., dissenting). Further, he did not dissent from the GVR in *Lords Landing*, a case in which an antecedent event was

preceded 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 quite typical. They are easily absorbed into the quotidian intervening-event GVR practice.

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.⁶⁹ In such cases it is hard to say that the court below did not have an *opportunity* to apply the relevant change in law – it just missed the relevant case, perhaps because the parties did not brief it. Similarly awkward would be cases in which we know that the court below had an opportunity to consider the event – whenever it occurred – because the parties in some fashion brought it to the court’s attention.⁷⁰ If the court below did not discuss a matter that the Supreme Court thinks it should have considered, this begins to look more like a finding of error, which a paradigmatic GVR avowedly is not.

It is this type of scenario that triggered a controversy a bit over a decade ago in *Stutson v. United States*.⁷¹ 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).⁷² The district court refused to excuse the untimely filing, denying Stutson’s motion for a retroactive extension.⁷³ 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.⁷⁴ A year and a half *earlier*, in March 1993, the United States Supreme Court had held in *Pioneer Investment Services*, a case arising under the Federal Rules of Bankruptcy Procedure, that certain types of attorney errors could constitute “excusable neglect” that would permit a litigant to avoid

brought to the court of appeals’ attention in a motion to recall the mandate. *Lords Landing Vill. Condo. Council v. Cont’l Ins. Co.*, 520 U.S. 893, 895 (1997).

⁶⁹ Consider the following cases:

- *United States v. Mejia*, 121 F.3d 722 (11th Cir. July 23, 1997) (table), *vacated*, 523 U.S. 1056 (1998) (GVR’ing in light of statute enacted Sept. 30, 1996, about ten months before Eleventh Circuit decision);
- *United States v. Hodgkiss*, 116 F.3d 116 (5th Cir. Jun 10, 1997), *vacated*, 522 U.S. 1012 (1997) (GVR’ing in light of Supreme Court case decided Dec. 6, 1995, about eighteen months before Fifth Circuit decision);
- *Grijalva v. Shalala*, 152 F.3d 1115 (9th Cir. Aug. 12, 1998), *vacated*, 526 U.S. 1096 (1997) (GVR’ing in light of, *inter alia*, statute enacted Aug. 5, 1997, about one year before Ninth Circuit decision);
- *United States v. Price*, 31 Fed. Appx. 158 (Fifth Cir. Dec. 18, 2001), *vacated*, 537 U.S. 1152 (2003) (GVR’ing in light of 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*, 546 U.S. 1086 (2006) (GVR’ing in light of Supreme Court case decided Feb. 24, 2004, about 13 months before Fourth Circuit decision).

While I have not conducted any systematic investigation of older 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 where the only basis for GVR’ing.

⁷⁰ Because briefs are not rarely readily available, especially for older cases, it is hard to know how often this occurs.

⁷¹ 516 U.S. 193 (1996) (*per curiam*).

⁷² *See* Fed. R. App. Proc. 4(b) (“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]”).

⁷³ *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 shown,” but the version in effect at the time referred only to “excusable neglect.” *Id.* Adv. Cmte. Note – 1998 amendment.

⁷⁴ *United States v. Stutson*, 36 F.3d 94 (11th Cir. 1994) (table).

a forfeiture caused by missing a filing deadline.⁷⁵ The Eleventh Circuit’s one-word affirmation 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).⁷⁶ 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 argued to the Eleventh Circuit.⁷⁷ The Court GVR’d “for further consideration in light of [*Pioneer*].”⁷⁸ In *Stutson* and another GVR issued the same day, the Court expressly rejected a rule that its power to GVR be limited to cases where the lower court had no real *opportunity* to consider an event; it was sufficient that “it appear[ed] that the lower court may not have considered [the event].”⁷⁹ (In the case of an unreasoned summary order like that in *Stutson*, it seems this standard would always be satisfied, because one cannot know what the lower court actually considered.) Chief Justice Rehnquist and Justices Scalia and Thomas dissented.⁸⁰

Perhaps farthest of all from the run-of-the-mill GVR are the handful of cases in which the court below not only had plenty of time to consider the event, not only was apprised of the event by the parties, but actually discussed the event that would later cause the GVR.⁸¹ Even under the broad 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. The decision to GVR thus would seem to reveal the Supreme Court’s view that the court below considered the matter wrongly – that is, misunderstood it, erred. These GVRs somewhat recall the Warren Court’s unhappy practice of occasionally summarily reversing with a bare citation to

⁷⁵ *Pioneer Investment Servs. v. Brunswick Assocs. Ltd. Ptnp.*, 507 U.S. 380 (1993).

⁷⁶ 516 U.S. at 194-95.

⁷⁷ *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 v. United States*, No. 94-8988 (filed June 30, 1995).

⁷⁸ *Id.* at 197-98.

⁷⁹ *Id.* at 194; *see also Lawrence*, 516 U.S. at 169 (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”).

⁸⁰ *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, *id.* at 185:

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.

⁸¹ 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*, 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, *14 (Minn. Ct. App. Sept. 23, 1997) (citing *Kansas v. Hendricks*, 521 U.S. 346 (1997)), *vacated*, 524 U.S. 924 (1998) (GVR’ing in light of *Hendricks*); and
- *In re Schwening*, No. C1-96-362, 1997 Minn. App. LEXIS 1110, *8 (Minn. Ct. App. Oct. 7, 1997), (citing *Kansas v. Hendricks*, 521 U.S. 346 (1997)), *vacated*, 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 thought the recent case distinguishable or instead thought the court lacked the power to recall the mandate. *See Lords Landing Vill. Condo. Council v. Cont’l Ins. Co.*, 520 U.S. 893, 896-97 (1997); *id.* at 898 & n.* (Rehnquist, C.J., dissenting).

a case that the court below had discussed or distinguished.⁸² For these GVRs, it seems that the appropriate action would be a decision on the merits (which might be a summary reversal) or denial of certiorari. Yet despite their unusual character, these GVRs were, with one exception, issued without recorded dissent.⁸³

E. 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 was in error.⁸⁴ At one time, the Court's 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.⁸⁵ 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 do about it.⁸⁶ 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.⁸⁷ 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 government may contend that the judgment is correct and request that certiorari be denied. Several member of the current Court, as well as some former Justices, have objected to GVR'ing in such circumstances.⁸⁸

⁸² See Hellman, *supra* note 8, at 823 (noting over thirty examples of such “disturbing” summary reversals).

⁸³ 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 on 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, the dissenters believed, it had already fully considered. *Id.* at 897-98 & n.* (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).

⁸⁴ 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 paper considers only confessions at the certiorari stage. See *supra* Part II.A.

⁸⁵ See, e.g., *Penner v. United States*, 399 U.S. 522 (1970) (“On the basis of a confession of error by the Solicitor General and of an independent review of the record,” vacating and remanding with instructions to dismiss the indictment); *Baxa v. United States*, 381 U.S. 353 (1965) (“On consideration of the confession of error by the Solicitor General and upon examination of the entire record,” vacating and remanding for new trial).

⁸⁶ 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 (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.

⁸⁷ See *Lawrence v. Chater*, 516 U.S. 163, 183 (1996) (Scalia, J., joined by Thomas, 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”).

⁸⁸ *Price v. United States*, 537 U.S. 1152, 1152-1153 (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 v. Chater*, 516 U.S. 163, 183 (1996) (Scalia, J., joined by Thomas, J., dissenting) (calling this “a mistaken practice”); *Alvarado v.*

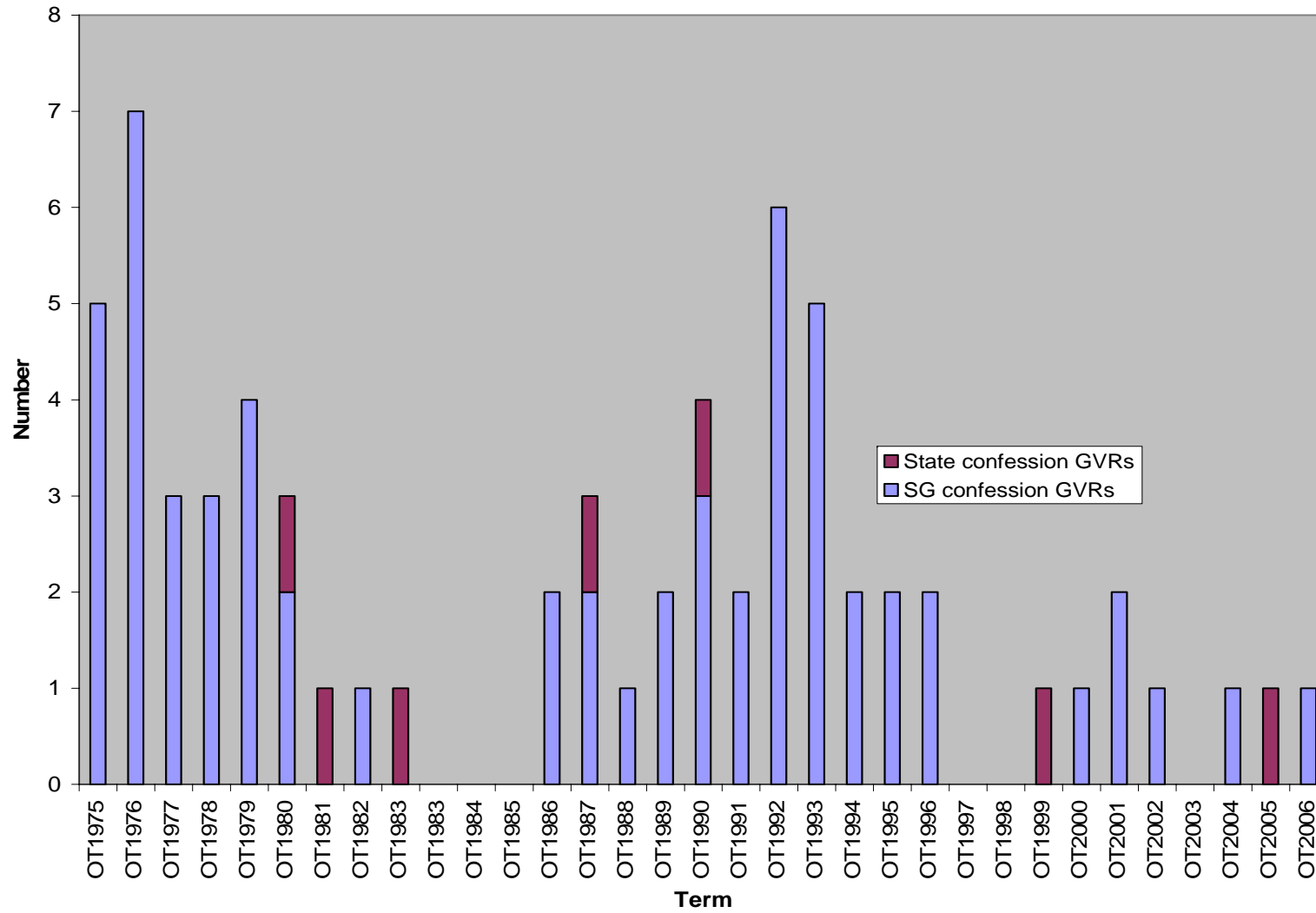
Although I refer to all of these GVRs generically as “confession-of-error GVRs,” the GVR orders themselves use varying terminology, most often employing (at least in recent decades) more neutral language that the case is being GVR’d “in light of the position asserted” by the Solicitor General. The Court’s 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 requests that the Court do.⁸⁹

Figure 1 below shows the number of GVRs stemming from confessions of error by the U.S. Solicitor General’s office and state equivalents for each term beginning with OT 1975.

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).

⁸⁹ 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. Bur. of Immig. & Customs Enf.*, 545 U.S. 1101 (2005) (referring to “confession of error”), *with* Brief for the Respondent in Opposition (filed May 4, 2005) (admitting court below erred in refusing jurisdiction but urging denial of certiorari because petitioner’s claim fails on the merits). Similarly, the “position” language is found both in cases where the Solicitor General agrees that the judgment should be vacated and those in which it opposes certiorari. *Compare* *Hohn v. United States*, 537 U.S. 801 (2002) (GVR’ing and using “position” language), *with* Brief for the United States (filed June 12, 2002) (requesting GVR because court of appeals wrongly dismissed case as moot); *see also* *Alvarado v. United States*, 497 U.S. 543, 544 (1990) (using “position” language where government urged denial of certiorari because judgment was correct).

Figure 1: Confession-of-Error GVRs, OT 1975 - OT 2006



We can also look at the data in a way that organizes GVRs not by the court term during which they were issued but instead according to which Solicitor General (or Acting Solicitor General) filed the brief confessing the error.⁹⁰ For example, *Billy-Eko v. United States* is a confession-of-error GVR issued on June 21, 1993, when Drew Days was Solicitor General, but it stemmed from a confession of error made in the brief filed by Acting Solicitor General Bryson in May 1993, shortly before Days took office.⁹¹ Figure 2 illustrates the pattern of confession-of-error GVRs by Solicitor General:

[*Note: Figure 2 under construction – As one can surmise from Figure 1, Figure 2 will show that some Solicitors General account for more GVRs than do others. The tall bars on the left mostly correspond to the term of SG McCree (Carter), and the spike in the middle is mostly attributable to SG Days (Clinton first term). Although to some extent it appears that Republican SGs trigger fewer confession GVRs than do Democrats, that is not universally true – SG Starr (GHW Bush) triggered more than did the Clinton second-term SGs (Dellinger and Waxman).]

I hasten to add that it is difficult to attribute the pattern above 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 he “confessed” error!⁹² Further, while the Court no

⁹⁰ The method was as follows. A confession GVR will usually state in the body of the order that the case is being remanded “in light of the position asserted in the Solicitor General in his brief filed on [date]” (or some similar formulation). I then matched up that date with the dates of service for various Solicitors General or Acting Solicitors General. When the GVR 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 __, at 686-87.

⁹¹ 509 U.S. 901 (1993).

⁹² See, e.g. *Price v. United States*, 537 U.S. 1152, 1156 (2003) (Scalia, J., dissenting) (noting that Court GVR’d even though government insisted judgment was correct); *Diaz-Albertini v. United States*, 498 U.S. 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 this case was distinguishable and should be denied); *Alvarado*, 497 U.S. at 544 (GVR’ing where government urged denial of certiorari because judgment was correct); see also *id.* at 545 (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.”). An additional 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 that the GVR be vacated. 546 U.S. 1136, *rehearing denied*, 547 U.S. 1052 (2006).

longer routinely engages in its own review of the merits whenever the government concedes error, occasionally the Court will still reject the government’s suggestion to GVR.⁹³

Nonetheless, with those important caveats in mind, it does seem that the identity of the Solicitor General has some effect. Solicitors General Days, Dellinger, Waxman, and Olson all faced a Court composed of the same Justices, and yet their GVR records are not the same. The contrast between Days and Waxman – both of whom served under President Clinton – is especially striking. It is perhaps worth noting that one of Days’s confessions came in the child pornography case of *Knox v. United States*, in which, after a grant of certiorari, Days confessed error by taking a narrow view of the statutory prohibition, reversing the G.H.W. Bush Administration’s decision to defend the conviction.⁹⁴ In the resulting firestorm of protest, the confession of error was denounced and rejected by Congress and even President Clinton himself; “all hell broke loose,” as Days put it.⁹⁵ It is at least conceivable that Days’s successors regarded him as overly magnanimous and not a model to be emulated as regards confessions of error.⁹⁶

F. GVRs Based on “Protective” Petitions.

In a recent article, Professor Shaun Martin has criticized the GVR practice primarily on the grounds that it creates incentives for litigants to delay final adjudication and increase the cost of the litigation process.⁹⁷ One of his more intriguing arguments is that litigants will file longshot “protective” petitions for certiorari in order to “extend[] for a substantial period of time (often over a year) the period during which a relevant intervening event might occur and thereby snatch victory from the jaws of defeat.”⁹⁸ If a relevant event occurs while the petition is pending, the litigant can file a supplemental petition seeking a GVR based on the new development⁹⁹; if nothing relevant occurs, then the petition will be denied in the ordinary course. In effect, the litigant pays the cost of filing a petition in order to purchase the potential for a later change in law. This would be an important hidden effect of the GVR practice. The Court knows that the potential for a GVR leads to petitions that expressly seek holds or GVRs – and it is

⁹³ In the recently granted 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); Brief of the United States (filed Nov. 13, 2007). It appears that the Court will sometimes deny certiorari despite a confession. Compare *Lopez-Elias v. Reno*, 531 U.S. 1069 (2001) (denying certiorari), with Brief for the Respondent (filed Dec. 2000) (suggesting GVR or, in the alternative, denial of certiorari).

⁹⁴ See *supra* _.

⁹⁵ Drew S. Days, III, *When the President Says “No”: A Few Thoughts on Executive Power and the Tradition of Solicitor General Independence*, 3 J. APP. PRAC. & PROCESS 509, 515 (2001); see Joan Biskupic, *Politics Still Plays a Role in Solicitor General’s Office*, WASH. POST, Feb. 22, 1994, at A1 (reporting that the Senate passed unanimous resolution condemning the new interpretation); Stuart Taylor, Jr., *Demagoging Kidporn: Justice Gets Bad Rap*, LEGAL TIMES, Nov. 29, 1993, at 26 (quoting Clinton’s letter agreeing with the Senate’s interpretation of the statute).

⁹⁶ Cf. Neal Devins, *Politics and Principle: An Alternative Take on Seth P. Waxman’s Defending Congress*, 81 N.C. L. REV. 2061, 2066-67 (2003) (speculating that Waxman took a more aggressive position in a later indecency case because of the controversy over *Knox*).

⁹⁷ Shaun P. Martin, *Gaming the GVR*, 36 ARIZ. ST. L.J. 551, 552 (2004).

⁹⁸ *Id.* at 571.

⁹⁹ See Sup. Ct. R. 15(8) (permitting filing of supplemental briefs based on new developments while a petition for certiorari is pending).

willing to bear those costs. But Martin’s hypothesis suggests that the Court’s accounting may be overlooking some of the costs by ignoring the risk that it is inducing protective petitions.

Is this activity actually occurring? Although Martin’s argument has logical force, there are also some grounds for doubt. It would be the unusually well-counseled litigant who would be aware of the possibility of a GVR based on a supplemental petition. But the attorney who knows enough to pursue this course may well be a frequent Supreme Court litigator who needs to maintain credibility with the Court and who would therefore be reluctant to file a petition with no real prospect of being granted.¹⁰⁰

It would be desirable to move beyond logic and intuition to the empirical reality.¹⁰¹ Unfortunately, it is difficult to test for the presence of protective petitions because, by hypothesis, they look like any other non-meritorious petition. We can, however, look for GVRs that are based on events that occur after the filing of the petition and that are brought to the Court’s attention through a supplemental filing. These are at least *potentially* examples of protective petitions. If there are very few such GVRs, that would tend to suggest that protective petitions are not very common and are not a serious problem.¹⁰²

Accordingly, I examined all of the (non-*Cunningham*) GVRs from the most recent year under study, OT 2006.¹⁰³ I examined the date of the event causing each GVR and compared this to information on the Supreme Court’s docket sheet showing the date of filing of the certiorari petition and any supplemental brief. [*Note: Analysis to be completed. My expectation is that there will be few if any GVRs that stem from protective petitions.]

III. REEXAMINING THE GVR FROM AN INSTITUTIONAL PERSPECTIVE.

So far we have focused on specific categories of GVRs that are regarded as controversial in some way. But I want to suggest as well that there is a sense in which, once one sees what is happening, all GVRs warrant scrutiny.

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 because correcting error in diversity cases is a poor use of the Court’s resources.¹⁰⁴ They might be correct. But it is

¹⁰⁰ Cf. KEVIN T. MCGUIRE, *THE SUPREME COURT BAR* 175-78 (1993) (discussing the importance of credibility for repeat Supreme Court litigators); Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. _ (2008) (discussing the increasing concentration of the Supreme Court bar).

¹⁰¹ Martin writes that “there is substantial evidence that such petitions not only are indeed filed, but are also occasionally successful,” but he supports this with a citation to only one GVR, from 1997. Martin, *supra* note 97, at 572.

¹⁰² Admittedly, this is not an ironclad inference. Even if the Court never GVR’d in such a case, it is possible there could still be hundreds of protective petitions filed. But one would question why litigants and attorneys would persist in a strategy that did not work.

¹⁰³ I chose OT 2006 because I wanted information on the Court’s current practices and also because electronic docket sheets are only routinely available for the last several years.

¹⁰⁴ See *Thomas v. Am. Home Prods., Inc.*, 519 U.S. 913, 916-17 (1996) (Rehnquist, C.J., dissenting); *Lords Landing Vill. Condo. Council v. Cont’l Ins. Co.*, 520 U.S. 893, 898 (1997) (Rehnquist, C.J., dissenting).

also true that virtually nobody believes that merely correcting errors *of federal law* should be one of the Court’s priorities either.¹⁰⁵ And yet, the Court’s GVR practice is an exercise in error correction on a large – in certain years, massive – scale. Perhaps worse still, the GVR practice involves merely *potential* error and *possible* correction, because the Court does not identify error and does not actually reverse. Any assessment of the Court’s actual functioning as an institution must take into account that this substantial part of the Court’s docket – and not just its trifling handful of summary reversals each year – is given over to doing justice in individual cases. In this sense, *all* GVRs are controversial GVRs.

How could this aberrant practice come to be regarded as familiar and unproblematic? In part (though only in part, as we will see), its acceptance flows from an important choice our system has made about how broadly to give effect to changes in governing law. The key mistake is to assume that the Supreme Court is the proper entity to be tasked with the duty of implementing our choice.

A. 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).¹⁰⁶ One unattractive consequence of such a rule would be that judges could not apply the newly prevailing “correct” law but would instead be compelled to use rejected, discredited former law. 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, and isn’t the new law necessarily “better” in some way? Yet at some point those concerns about equality must give way to the value of finality. We surely cannot relitigate a decades-old case because, last year, the Supreme Court overruled the precedent that had been decisive.

Deciding the extent to which changed law should be given effect is a difficult problem that involves balancing multiple values and does not admit of a single answer that applies across all contexts and in all factual scenarios. Nonetheless, to simplify somewhat, one proposition our system has accepted is that newly changed law should apply, at minimum,¹⁰⁷ to all cases that are

¹⁰⁵ See, e.g., Hellman, *supra* note 8, at 799, (referring to “the consensus of Congress, the bar, and the judiciary that review for error should play, at best, a minor part in the Court’s work”); *Supreme Court Jurisdiction Act of 1978: Hearings on S. 3100 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Judiciary Comm.*, 95th Cong., 2d Sess. 40 (1978) (letter from all nine sitting Justices emphasizing Court’s primary duty is to settle important questions of federal law). 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).

¹⁰⁶ See Martin, *supra* note 97, at 588-92 (discussing such a reform); *1960 Term*, *supra* note 67, at 97 (suggesting such a reform).

¹⁰⁷ In some circumstances, changed law is available even after a case becomes final, such as through collateral proceedings challenging criminal convictions. See generally HART & WECHSLER, *supra* note 23, at 1325-35. (discussing *Teague v. Lane*, 489 U.S. 288 (1989) and exceptions thereto). When the discussion in this paper refers

not yet final when the new rule is announced.¹⁰⁸ Thus, when the Supreme Court announces a change in law, that new law applies to all cases that remain open, even those that the court of appeals has already decided under the old law. In some cases, there will be petitions for certiorari pending when the new law is announced. In other cases, petitions can be expected to be filed by litigants who lost in the court of appeals but for whom the period for filing a petition has not yet run out. Because none of these cases have yet become “final” – that occurs only with the denial of certiorari or the expiration of the period for filing a petition¹⁰⁹ – all of them should be governed by the new decision.

In practice, how is that to be done? The Supreme Court surely would not (and, as a matter of capacity, could not) give all of the pending cases argument and plenary consideration, but one 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.¹¹⁰ 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 reverse. (One does, after all, have to decide whether a pending petition really is controlled by the new precedent, that there are no other obstacles to reversal, etc.)

A second approach would be simply to deny certiorari in all of these cases even though, in theory, the new law applies to them. This would mean that many wrong decisions would stand. And while we do not generally believe it is the Supreme Court’s role to correct errors,

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.

¹⁰⁸ See, e.g., *Harper v. Virginia Dept. 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., Inc.*, 131 F.3d 1120, 1123, 1125 (5th Cir. 1997) (applying similar standard to new objection in civil appeal where law changed after district court proceedings). In plain-error review, an appellate court may in its discretion 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 a bit more complicated as concerns the application of new statutory law. There is no 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).

¹⁰⁹ See *Griffith*, 479 U.S. at 321 n.6 (“By ‘final,’ we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.”). In rare cases, the Supreme Court will GVR even after certiorari has been denied, typically in response to a petition for rehearing. See note 133 *infra*.

¹¹⁰ For example, the disposition in *Mazes v. Ohio*, 388 U.S. 453 (1967) (per curiam), provides in full: “The petition for a writ of certiorari is granted and the judgment of the Supreme Court of Ohio is reversed. *Redrup v. State of New York*, 386 U.S. 767.” The Ohio Supreme Court rendered its *Mazes* decision in 1966, and *Redrup* was decided in 1967. See generally *Hellman*, *supra* note 8, at 822-23 (reporting that the Warren Court issued over 100 such summary reversals based on intervening precedent).

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.¹¹¹ When the law has changed, 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 some litigants should be treated less favorably than the one lucky litigant whose case the Court plucked from the pile and used to generate the new decision.¹¹²

The GVR, then, is an attractive solution. The error and unfairness occasioned by universal denial of certiorari is largely eliminated. Yet these aims are 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 above all sounds sensible enough, 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 there are no adequate procedural tools for implementing the change elsewhere. If the Supreme Court abdicated its role of implementing legal change through the GVR, petitioners would be left with the (at best) highly uncertain prospects of later relief through devices such as Federal Rule of Civil Procedure 60, recall of the appellate mandate, or (for criminal defendants) habeas.¹¹³ None of those devices can measure up to the task, but the key point is that those devices too could be changed to make

¹¹¹ See *Lawrence v. Chater*, 516 U.S. 163, 177 (1996) (Rehnquist, C.J., concurring and dissenting) (“We 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 H. PRINGLE, *THE LIFE AND TIMES OF WILLIAM HOWARD TAFT* 997-998 (1939))).

¹¹² See *United States v. Johnson*, 457 U.S. 537, 556 n.16 (discussing the “inequity that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary” of a new rule (emphasis omitted)).

¹¹³ 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* 2D § 2863. 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 mandate has a continuing effect, but it appears that most courts would not, as a matter of routine, resort to this power to amend decisions that conflict with new Supreme Court decisions. See, e.g., *Richardson v. Reno*, 175 F.3d 898, 899 (11th Cir. 1999) (refusing to recall mandate in light of Supreme Court decision that cast doubt on recent ruling); see also 16 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* 2D § 3938 nn. 43 & 46 and accompanying text (surveying cases). Habeas, in addition to applying only to criminal cases, presents many hurdles to relief, including procedural default and the general bar on application of “new rules.” See *supra* note 107.

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.¹¹⁴ A few months later, the Supreme Court issued a decision involving one of the provisions relied upon by the court of appeals.¹¹⁵ 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 do so only in extraordinary circumstances.¹¹⁶ It added that it would, however, “welcome” the chance to reconsider its decision if the Supreme Court should GVR.¹¹⁷ The Supreme Court then did in fact GVR for further consideration in light of its recent decision.¹¹⁸

Leaving aside the interesting question whether the court of appeals could properly have recalled its mandate as a matter of current law,¹¹⁹ is the GVR in this case 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 trouble and expense of filing a petition for certiorari¹²⁰ and perhaps engaging new counsel¹²¹; at the same time, it puts the Supreme Court through the effort of reviewing another case without the benefit of another court’s prior views. And there seems to be no good reason for this – just the court of appeals’ view (perhaps mistaken) view that this is just how things are done.

* * *

The remainder of this paper will propose an alternative regime for implementing changes in law. The proposal accommodates the legitimate reasons for the GVR practice in a way that is more efficient, more consonant with the nature of our multi-level judicial system, and less burdensome to the Supreme Court.

¹¹⁴ 162 F.3d 1338 (11th Cir. 1998).

¹¹⁵ *Reno v. Am.-Arab Anti-Discrim. Cmte.*, 525 U.S. 471, 482-83 (1999) (construing 8 U.S.C. § 1252(g)).

¹¹⁶ 175 F.3d 898, 899 (11th Cir. 1999).

¹¹⁷ *Id.* The court noted that the alien had filed a petition for certiorari. *Id.*

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

¹¹⁹ 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.” 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 note 113 *supra*.

¹²⁰ See, e.g., Sup. Ct. R. 33(1)(a), (f) (requiring parties to file 40 copies in booklet format); Sup. Ct. R. 33(1)(b) (requiring petition appendix to be typeset rather than photocopied). As noted, in *Richardson* itself, a petition had already been filed, 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.

¹²¹ See Sup. Ct. R. 9(1) (generally requiring those filing documents with the Court to be members of the Court’s bar).

Given my aim of easing 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 the standards of modern history.¹²² From a certain point of view, this is a lazy Court that hardly needs to be relieved of even more duties. It is possible that the proposal will just lead to more leisure time rather than cause the Court to expend more and better effort on higher priorities. 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 does – should be viewed with some concern. I do not say that all other activities 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 put matters more concretely, the Supreme Court is now correcting potential errors in scores or even *hundreds* of cases a year. It is hard to imagine a reasonable account of the Court’s function that would deem this appropriate, at least when there is a readily available alternative.

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

The reform discussed here is primarily targeted at GVRs caused by Supreme Court cases, which account for the vast majority of all GVRs (though the application to other types will be addressed later¹²³). We can divide this type of GVR into several sub-categories based on when the petition for certiorari is filed in relation to key dates in the progress of the plenary decision that generates the GVR. This categorization will determine whether GVRs should be eliminated and, if so, whether they should be replaced with something else.

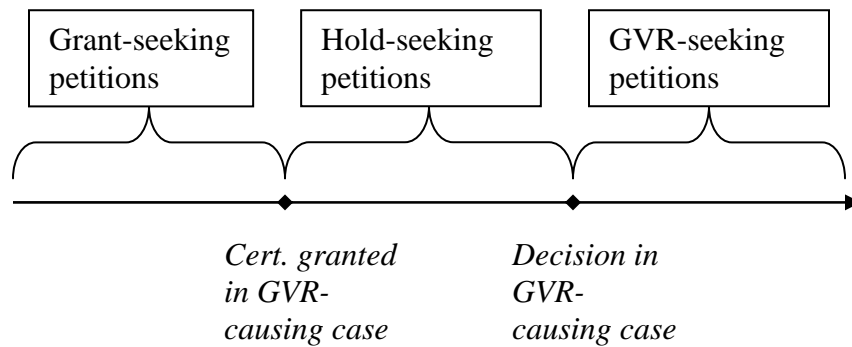
For purposes of explication, it will be useful to introduce some terminology to describe the different scenarios. As the diagram below indicates, “grant-seeking petitions” are simply ordinary certiorari petitions that seek plenary review. For example, after the Court’s decision in *Blakely* invalidating a state sentencing regime, numerous federal criminal defendants filed petitions vying to have their case reviewed to see if *Blakely* applies to the federal sentencing guidelines. The Court picks the case or cases that would provide the best vehicle for resolving the issue – in this example, *Booker* and its companion case *Fanfan* – and holds the rest. Next, we can define a “hold-seeking petition” as a petition filed after a grant of certiorari in a relevant case and before the decision in that case. For example, if a defendant filed his petition after the Court granted certiorari in *Booker* but before the decision, that would be a hold-seeking petition. (Not all of these petitioners are subjectively seeking a hold, but the terminology is useful.) Last, we can define a “GVR-seeking petition” as one that is filed after the relevant GVR-causing plenary decision. For example, if the same criminal defendant filed a petition after the Supreme Court’s *Booker* decision and sought to have *Booker* applied to his case, that would be a GVR-

¹²² See STERN ET AL, *supra* note 1, at 60-64 (summarizing decline in number of decisions issued by the Court); EPSTEIN ET AL., *supra* note __, at 74-75 (providing data on declining number of cert grants).

¹²³ See *infra* Part III.B.4.

seeking petition. (Again, not every such petition filed in this period is, subjectively, actually seeking a GVR; the petitioner, especially a poorly counseled one, might not even realize that the Supreme Court has just issued a decision that affects the petition.) The period during which a petition is filed is determined in large part by the speed with which the case has moved through the legal system.

Figure 3: Classification of cert. petitions according to time of filing



Each of the three types of petitions generates GVRs with some regularity, though not equally so. An analysis of all OT 2006 GVRs caused by Supreme Court cases shows that ___% fall into the grant-seeking category, ___% into the hold-seeking category, and ___% into the GVR-seeking category. [*Note: Analysis is underway.]

1. *GVR-seeking petitions.*

Consider first the GVR-seeking petitions. I propose that the Court not issue GVRs in such cases and that it announce a policy to that effect (perhaps in a short opinion accompanying the denial of such a petition for certiorari). Instead of filing a petition for certiorari in such a case, parties would rely on the lower courts to implement the changed law.

In cases where the court of appeals' decision did not end the litigation because it ordered a remand, and then a relevant Supreme Court decision was announced, the district court would 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. 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 would apply Y. To some extent this matches what is already the better practice,¹²⁴ but to the extent there is doubt about the

¹²⁴ See 18B WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4478.3 n.24 (2d ed.) (citing cases for proposition that district court can depart from appellate court mandate when there has been a change in controlling law). *But see* Crane Co. v. Am. Standard, Inc., 603 F.2d 244, 248-249 & n. 8 (2d Cir. 1979) (suggesting contrary view). There may be hard cases about how much a district court could depart from a remand mandate that was limited in scope.

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 when it announces its new policy against GVR-seeking 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.) Under current law, the period for petitioning for rehearing is in most cases fourteen days,¹²⁵ much shorter than the usual ninety days for petitioning for certiorari.¹²⁶ Thus, when a change in law occurs, say, sixty days after the court of appeals rules, implementing the change in law is currently the Supreme Court's problem. We would change this by 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 an intervening Supreme Court decision that, according to that party, alters the outcome of the case. The ninety-day period 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. 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.¹²⁷

(The reform discussed here is, obviously, aimed at cases that come to the Supreme Court from the federal courts of appeals; it would be desirable for state courts to do something similar.)

A consequence of this proposal is that some work is shifted to the courts of appeals, but this is altogether sensible. 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. There is little reason for this bifurcation. A premise a multi-level judicial system is that courts other than the high court should ordinarily be the first to apply new law or facts – that is part of the justification for having

For example, if the court of appeals remanded solely for a redetermination of an award of attorneys' fees, could the district court hold a entire new trial on the merits based on an intervening Supreme Court decision that was inconsistent with 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 district court's decision to deny attorneys' fees altogether based on intervening Supreme Court precedent when court of appeals had remanded for reconsideration of *amount* of fees).

The ability of 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 sub-category of cases.

¹²⁵ Fed. R. App. P. 40(a)(1). The period is 45 days in civil cases to which the federal government is a party. *Id.*

¹²⁶ 28 U.S.C. § 2101(c); Sup. Ct. R. 13(1).

¹²⁷ *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).

GVRs rather than asking the Supreme Court to dispose of all the pending petitions on the merits.¹²⁸ But just as it makes sense for the lower court to be the first to apply the new law after a GVR, it makes sense for it to undertake the initial screening. It would seem a poor use of judicial resources to have the Supreme Court decide in the first instance – even in a *prima facie*, non-binding way – how a new case might apply to dozens of different scenarios presented by different pending cases. (This is especially so since, under current understandings, the Supreme Court’s screening does not really convey meaning about the actual scope of the new precedent.¹²⁹) And this is not even to mention the waste and expense of going up to the Supreme Court and back again.

An additional benefit of this reform is that it might encourage the courts of appeals to pay more attention to what cases the Supreme Court is considering. The time from a grant of certiorari to the Supreme Court’s decision of the case is roughly 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 almost always mean that the relevant grant of certiorari came before the court of appeals’ decision. 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 be wise for the court of appeals to hold the case in abeyance until that decision comes down. Indeed, they often do just that. But they might not be doing so at the optimal level because, under current law, an improvidently issued decision that turns out to conflict with the forthcoming Supreme Court decision is someone else’s problem to fix. If the court of appeals knew that dealing with the forthcoming decision was going to be its problem, because it could expect a petition for panel rehearing, that would tend to internalize the costs and benefits of waiting. This should encourage the court of appeals to inform itself of what cases are on the Supreme Court’s calendar and to consider whether to delay its action in anticipation of them. It might also give litigants’ greater incentives to bring such matters to the court of appeals’ attention.

A number of objections to this reform could of course be raised. One objection would be that litigants might burden the court of appeals with meritless petitions based on Supreme Court rulings with no real bearing on the issues. One response is that the rule would be to some degree self-enforcing 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 petition for rehearing contain a certification to the effect that counsel believes a recent Supreme Court case requires a different outcome. This would be analogous to the 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.¹³⁰ Language similar to Rule 11¹³¹ could be added, if one wished to drive the point

¹²⁸ See *Lawrence v. Chater*, 516 U.S. 163, 181 (1995) (Scalia, J., dissenting) (stating that GVRs “preserve the operational premise of a multitiered judicial system (viz., that lower courts will have the first opportunity to apply the governing law to the facts)”).

¹²⁹ See *Lawrence v. Chater*, 516 U.S. 163,167 (1996) (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 ruling does not mean that the new ruling applies on collateral review. See *Hellman*, *supra* note 4, at 33 n.108, 36 n.121.

¹³⁰ Fed. R. App. P. 36(b).

home. But perhaps the broadest response is just to say that there is nothing 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, petty discovery disputes), and there is no reason to think the system cannot deal with this particular occasion for such behavior any worse than it deals with all the others.

Along somewhat related lines, it might also be objected that the availability of this 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 expensive to file a petition for certiorari,¹³² especially so if one engages the assistance of a new attorney more familiar with the Court's procedures. That is, the new petition for panel rehearing might be used more often – too much. I do not think this objection well taken. Our system has decided that changes in law apply to still-pending cases. If in practice that principle applies today only for the benefit of the well-counseled and well-heeled, shouldn't honoring the principle in a less hypocritical fashion be a *positive* development?

Finally, it could be objected that courts would be too resistant to changing their minds, reluctant to have their efforts in the original opinion thrown away. As suggested above, perhaps courts of appeals would issue fewer improvident decisions under my proposal. But leaving that hope aside, there is 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 is slight, but the threat is always there. So while this objection might have some truth to it, it applies to the current practice as well.

2. *Grant-seeking petitions.*

In the case of a petition that is filed before a grant in a relevantly similar case, I do not think that eliminating GVRs and replacing them with petitions for rehearing is feasible or appropriate. These are simply ordinary petitions seeking plenary review. In this situation, the petitioner is not trying to seek the benefit of a recent or forthcoming change in the law; rather, he or she is trying to *make* the change in law. Thus it makes no sense to direct them to the court of appeals instead of allowing them to petition for certiorari. The Supreme Court should maintain its current practice of selecting the petition that presents the best vehicle for resolving a question and holding other petitions filed around the same time in anticipation of a potential future GVR.

3. *Hold-seeking petitions.*

This is the most difficult category. On the one hand, like GVR-seeking petitions, these are petitions induced by some action by the Court, and it would ease the Court's workload to remit the petitioners to the court of appeals instead. On the other hand, it would be difficult to

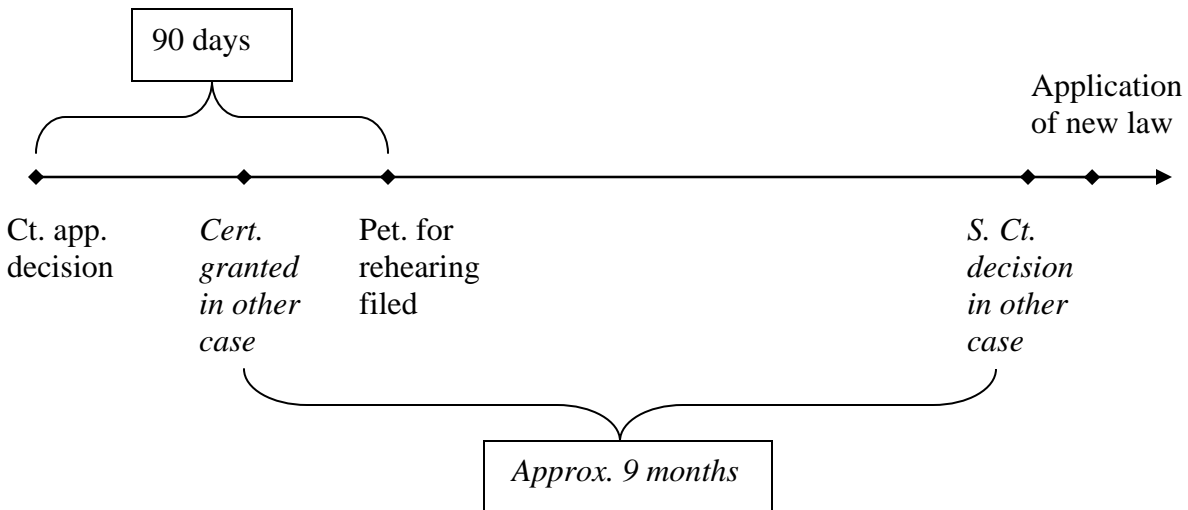
¹³¹ Fed. R. Civ. P. 11 (providing for sanctions for documents that lack legal or factual support or are submitted for improper purposes, such as to delay).

¹³² See *supra* note 120.

devise a system for the court of appeals to handle this category of cases. Presumably the way to do so would be to allow a party to file a petition for panel rehearing, along the lines described above, if the Supreme Court granted certiorari, within ninety days of the court of appeals' decision, in a case that might affect the result reached by the court of appeals. 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 petition for rehearing until the Supreme Court decision came down. Then, perhaps after affording an opportunity for briefing on the impact of the new decision, it would reconsider its prior ruling.

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

Figure 4: Delay in Finality for Hold-Seeking 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 ninety-day period; we have only the prospect that there might be a change months down the road. At some point a case must become final, and perhaps this delay is simply too much. Some might deem it intolerable to let cases linger this long. Further, the upside of waiting for the Supreme Court's decision is modest, given that in many cases the Court's decision will only 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 is right, that calls into question the Court's current practice of GVR'ing in such situations. For if asking the court of appeals to keep cases on hold in order to implement possible future changes of law in this type of case is unappealing or even absurd, it is even *worse* for the Supreme Court to try to do this.

The delay in finality is the same; the petition for rehearing is simply replaced by a petition for certiorari. (If anything, the delay would be a little worse, 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 doing this, it seems the lower court should.

While my main goal in advancing this proposal for reform has been to maintain the substantive outcomes of the current practice while switching the responsible institution, this scenario might require a broader rethinking of current practice. In this scenario, the chief value of examining the reform might be that it leads us to realize that the current, familiar practice is hard to justify. Withholding application of changes in law in these cases would be technically consistent with the principle that only pending cases need 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.¹³³ In any event, either the Supreme Court’s GVRs in these types of cases should be stopped and replaced by the rehearing procedures, or they 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?

A strong case could be made that the Supreme Court should not GVR in such cases and that no extended rehearing procedures should be available. If the problem is that counsel failed to bring some existing authority to the lower court’s attention and discovered it only after the ordinary fourteen-day period for panel rehearing has run, it is unclear why the Supreme Court should vacate the lower court’s judgment based on counsel’s neglect. Nor does there appear to be any sound reason to create a special lengthened period for rehearing when, again, the problem is counsel’s neglect.¹³⁴ If, in contrast, the authority was presented to the court below but the

¹³³ 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 of them were GVRs in light of *Booker* in which certiorari had initially been denied soon before or very soon after *Blakely* was decided. That the Court has not 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.

¹³⁴ In times past, it might be perfectly reasonable for an attorney not to learn about a controlling authority quickly. But today it is harder to excuse delay. Lexis and Westlaw both have features that provide notification of new cases that cite 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 any delay. It is just that we should not build our routine procedures around it.

court failed to consider it, that is the stuff of ordinary petitions for rehearing, and no special rules are needed.¹³⁵ When these usual measures fail, the result might be a wrong decision. In an egregious case in which the court below fails to mention authority that is clearly determinative of the result, the Supreme Court might summarily reverse. But it seems less appropriate to order the court below to reconsider in light of a matter that was adequately pressed upon it and that it deemed, for whatever reason, unworthy of discussing. (Even on a rather strong understanding of the requirements of reasoned decisionmaking, 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 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. One consideration in favor of allowing 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, it can obviously be hard to tell what legal rules it employed. A litigant who files a petition for panel rehearing on the suspicion that some matter has been overlooked will find little elucidation in a one-word order denying rehearing. Although it is absolutely true that the Supreme Court can review an unreasoned disposition,¹³⁶ either through plenary consideration or summary reversal, it is also clearly true that such dispositions tend to frustrate its ability to do so. 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 because of the ambiguity of their grounds.¹³⁷ 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 3,000 such dispositions for 1994, in 2007 there were under 1,000 such dispositions despite an increase in total merits decisions.¹³⁸

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 by new statutes/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 Court and back to the lower court. This is not to say that 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.

¹³⁵ 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).

¹³⁶ See *supra* note 13.

¹³⁷ 516 U.S. at 170.

¹³⁸ Figures are can be found in Table S-3 of the annual reports compiled by the Administrative Office of the United States Courts, which are available at <http://www.uscourts.gov/judbususc/judbus.html>.

The special rehearing procedures for new Supreme Court decisions issued within ninety days of the court of appeals' judgment can and should apply to new statutory law as well. If those changes in law are going to be cognizable, there is no good reason to require a trip to the Supreme Court to do so. When a new enactment comes while a petition is already pending, it seems that the Court should continue its current practice of issuing GVRs. One reason not to do so would be in order to discourage protective petitions for certiorari, but, as shown earlier, that does not seem to be a significant problem.¹³⁹

IV. CONCLUSION

Arthur Hellman recognized over twenty years ago, in his study of the GVR practice, that the GVR did not fit neatly alongside the Court's purpose 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.¹⁴⁰

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.

Given recent blockbuster GVR years, one wonders if the Court might be feeling a little too in touch these days. It is an insufficient answer to say that if the Court felt unduly burdened by the demands of its GVR practice, it could simply stop it. That is technically true, but it is difficult to imagine that the Court could do such a thing, given the GVRs many attractions, without there being an adequate replacement on hand. While it might take action at the margins, it is essentially trapped.

I have advanced a proposal 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, I believe that the data presented here will at least give us a sounder foundation for thinking about the GVR and how, if at all, to change it.

¹³⁹ See *supra* Part II.F.

¹⁴⁰ Hellman, *supra* note 4, at 40.