

THE SUPREME COURT’S GVR POWER: DRAWING A LINE BETWEEN DEFERENCE AND CONTROL

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INTRODUCTION

In June 2006, the Supreme Court unexpectedly changed the jurisprudence of an established but obscure Supreme Court practice known as the “GVR,” named for its three components—the grant of a petition for certiorari, vacation of the lower court’s judgment, and remand of the case. The Supreme Court in *Youngblood v. West Virginia* “GVR’d” for reconsideration of a federal constitutional issue raised by the defendant in order to have the “benefit of the views of the full Supreme Court of Appeals of West Virginia.”¹

Although the Court’s GVR in *Youngblood* appears fairly benign, it provoked a vigorous dissent from Justice Scalia, who objected to an unprecedented expansion of the Court’s GVR power.² Whereas the Supreme

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¹ 126 S. Ct. 2188, 2190 (2006). See *infra* Part III.B for a discussion of the constitutional issue in question.

² *Youngblood*, 126 S. Ct. at 2190 (Scalia, J., dissenting). Justice Thomas joined Justice Scalia’s dissent.

Court had previously GVR'd only in light of intervening new law or fact,³ the *Youngblood* Court GVR'd even though there had been no change in the factual or legal context of the case. Justice Scalia noted that the *Youngblood* majority did not even invoke the established standard for GVR'ing, "namely whether there is 'a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration.'"⁴ As such, Justice Scalia pointed out that "the only possibility that the [lower] court will alter its considered judgment is created by this Court's GVR order itself."⁵

In *Youngblood*, the Supreme Court imprudently extended the GVR power to play a more assertive role in lower court decisionmaking processes. In the case, neither the defendant nor the Supreme Court claimed that an intervening change in the law or facts had occurred. Rather, as Justice Scalia noted, the Supreme Court GVR'd simply because a majority of the lower court failed to fully account for the defendant's constitutional argument in its opinion—even though the dissenting opinion fully addressed the constitutional claim.⁶

To understand the full effects of the Supreme Court's GVR in *Youngblood*, this Comment examines how closely the *Youngblood* GVR adhered to the principles and purposes underlying the Supreme Court's GVR practice. The Court has, on a number of occasions, asserted that the GVR is simply a deferential equitable mechanism, exercised to preserve the dignity of lower courts by providing them with the first opportunity to reconsider a judgment in light of an intervening event that has a reasonable probability of affecting the outcome.⁷ GVRs therefore keep in line with the "operational premise of a multitiered judicial system" and "avoid the unseemliness of holding judgments to be in error on the basis of law that did not exist when the judgments were rendered below."⁸ Thus, by GVR'ing in the absence of an intervening event in *Youngblood*, the Supreme Court not only acted outside the traditional bounds of its authority, it also violated the principles that have given rise to the GVR. It is this discord with traditional

³ There has been one prominent exception to the Supreme Court's "in light of" rule. In the past, the Supreme Court also occasionally GVR'd to clarify the Court's jurisdiction under mixed state-federal law questions. See *infra* Part III.A for Justice Scalia's proposed GVR standard.

⁴ *Youngblood*, 126 S. Ct. at 2191–92 (Scalia, J., dissenting) (citing *Lawrence v. Chater*, 516 U.S. 163, 167 (1996)).

⁵ *Id.* at 2192 (Scalia, J., dissenting).

⁶ *Id.* at 2191 (Scalia, J., dissenting) ("But the dissenting judges in the case below discussed petitioner's *Brady* claim at some length (indeed, at greater length than appears in many of the decisions we agree to review), and argued that it was meritorious. Since we sometimes review judgments with no opinion, and often review judgments with opinion only on one side of the issue, it is not clear why we need opinions on *both* sides here." (internal citation omitted)).

⁷ *Chater*, 516 U.S. at 167–68 (1996); *Stutson v. United States*, 516 U.S. 193, 197 (1996); *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944).

⁸ *Chater*, 516 U.S. at 181 (Scalia, J., dissenting).

authority and reasoning that irked Justice Scalia in *Youngblood* and led him to charge the majority with using the GVR to “conscript [lower court] judges to write what is essentially an *amicus* brief on the merits of an issue they have already decided, in order to facilitate our *possible* review of the merits at some later time.”⁹

The GVR is a discretionary practice that has received fairly scant attention from legal scholars. Generally, however, the GVR is characterized as an equitable doctrine that is applied in light of an intervening event—a characterization with which Justice Scalia agrees in *Youngblood*. Indeed, the intervening event requirement may be the only significant aspect of the GVR on which lower courts, scholars, and the Supreme Court (at least, until *Youngblood*) have all agreed. Undeterred by this small area of consensus, GVR scholars have found several ways to study the GVR’s impact. They have addressed broad concerns about the increased use of the GVR, the confusion among lower courts about the meaning of the GVR, and the impact of the GVR practice on judicial workloads and litigative practices.¹⁰ These scholars have generally left unscrutinized, however, questions of why the Court is justified in GVR’ing in particular situations and whether there are limits to the Court’s authority to do so.

Since *Youngblood* disrupts the basic premise of the GVR—that it can only be applied in light of a relevant intervening event—courts and scholars now must reconsider what it is that defines the Supreme Court’s GVR authority. *Youngblood* provides a renewed opportunity not only to clarify the meaning of the GVR and the scope of the GVR power, but also to understand the importance of establishing more certain limits to the Court’s procedural discretion.

This Comment provides specific jurisprudential guidelines about when the GVR should be used. It lays out the Court’s articulated purposes for GVR’ing and asks whether these express purposes are congruent with actual GVR practice. Rather than accepting as true the premise that the Supreme Court’s use of the GVR in each context is within its discretionary power, this Comment asserts that there are limits to the Court’s GVR authority. Specifically, this Comment asserts that the Court should refrain from GVR’ing when doing so would raise prudential concerns. Such concerns arise when the Supreme Court GVR’s in the absence of a relevant change in the law or facts, thus weakening the integrity of three core constitutional principles: (1) federalism, (2) separation of powers, and (3) appellate jurisdiction. GVRs weaken the integrity of these principles when, despite a lack of change in the law or facts, they are used in cases arising out of state courts involving state law, cases involving interpretations by administrative agencies or the Solicitor General, and cases arising from lower courts involving federal law.

⁹ *Youngblood*, 126 S. Ct. at 2191 (Scalia, J., dissenting).

¹⁰ E.g., Shaun P. Martin, *Gaming the GVR*, 36 ARIZ. ST. L.J. 551, 568–86 (2004).

Although a GVR where there has been a change in the relevant law or facts may appear to be constitutionally required, this Comment neither asserts that the GVR is nor aims to convert the GVR into a mandatory doctrine. Rather, this Comment proceeds from the premise that the GVR is a discretionary equitable doctrine created in order to maintain the dignity of lower courts and coordinate government branches when a relevant intervening event occurs. Even in recognizing the Court's discretion, however, this Comment asserts that in order to bring greater clarity to the use of the GVR for the benefit of lower courts and to promote a more economical and effective judicial system, the Supreme Court should adhere to the prudential limits set forth here. Adhering to these limits also conforms to the Court's traditional GVR practice. History shows that the GVR power was designed to be limited in scope, not a broad grant of authority, and that each extension of the GVR (prior to *Youngblood*) was based on thoughtful decision-making by the Court to address equitable concerns. This Comment examines the variety of circumstances under which the Court has traditionally GVR'd and argues that these equitable concerns should also be circumscribed by prudential considerations.

This Comment proceeds in four parts. Part I introduces the GVR and describes its evolution from its federalism-based origins to its contemporary equitable character. In doing so, this Comment examines the possible textual sources of and limitations to the Court's GVR authority. Part II explores the reasons expressed by the Supreme Court for developing the GVR power. By considering these reasons together with the potential sources of the Court's authority, we can better scrutinize the congruity of the Supreme Court's actions with its stated purposes, judge the appropriateness of its goals, and begin defining the proper bounds of the Court's GVR authority.

Part III considers the current "intervening event" GVR jurisprudence and the subsequent impact of *Youngblood*. This Part also reflects on some of the possible "hidden" purposes that might underlie the GVR power and finds that the Supreme Court's GVR in *Youngblood* may be better explained by these implied purposes than by the reasons previously offered by the Court. Part IV examines the current GVR literature and asserts how the boundaries of the GVR power should be delineated.

This Comment ultimately concludes that *Youngblood* exceeds the proper prudential boundaries of the Supreme Court's GVR authority—boundaries shaped by federalism principles, the separation of power doctrine, and the nature of the Court's appellate jurisdiction. In order to preserve the integrity of the Court's GVR authority and avoid prudential missteps, the Supreme Court should GVR only in light of a postjudgment intervening change in the law or factual circumstances.

I. THE DEVELOPMENT OF THE GVR

A. History of the GVR

In 1927, the Supreme Court first exercised its GVR power to allow a state court to decide the effect of intervening state law on a state court judgment.¹¹ Since then, the number of GVR'd cases has risen to a range of forty to one hundred per year,¹² roughly the same number of cases that are granted full plenary review.¹³

Similarly, the Supreme Court's GVR practice has expanded in scope. While the GVR originated in deferential federalism principles that oblige the Supreme Court to give state courts the first opportunity to reconsider their judgments in light of new state law (rather than have the Supreme Court impose judgments on state courts using information that was previously unavailable to the state courts),¹⁴ the GVR has also been justified by "longstanding equitable principles" that allow the Court to GVR in order to preserve the dignity of lower courts.¹⁵ Over time, these equitable principles have supplanted federalism principles as the main driver of GVR jurisprudence.

This expansion of the GVR began soon after the GVR was created. Although the Supreme Court created the GVR to give each of the states an opportunity to reconsider its cases in light of changes it had made to its own body of law, the Court extended the GVR in 1939 to allow each state to decide the effect of intervening Supreme Court decisions on state court judgments.¹⁶ In so doing, the locus of the Supreme Court's reasoning shifted; the extension signaled that deference to state courts no longer relied on having both a state source of intervening law and a state forum from which the case arose. Instead, the Court seemed willing to GVR when only one of these factors was present.

This looser deference further broadened the use of the GVR power: by 1944, the "special deference"¹⁷ accorded to state tribunals was extended to lower federal court judges where intervening state supreme court decisions cast doubt on a lower federal court's decision on a point involving state

¹¹ See *Missouri ex rel. Wabash Ry. Co. v. Pub. Serv. Comm'n*, 273 U.S. 126, 131 (1927).

¹² Arthur D. Hellman, "Granted, Vacated, and Remanded"—*Shedding Light on a Dark Corner of Supreme Court Practice*, 67 JUDICATURE 389, 391 (1984).

¹³ LEE EPSTEIN, JEFFREY SEGAL, HAROLD SPAETH & THOMAS G. WALKER, *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS & DEVELOPMENTS* 72–75 tbls.2-5 & 2-6 (4th ed. 2007).

¹⁴ E.g., *Wabash Ry. Co.*, 273 U.S. at 131.

¹⁵ Martin, *supra* note 10, at 555; see *Lawrence v. Chater*, 516 U.S. 163, 181 (1996) (Scalia, J., dissenting).

¹⁶ *State Tax Comm'n v. Van Cott*, 306 U.S. 511, 515 (1939) (GVR'd in light of the Supreme Court's decision in *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939) to overrule the doctrine of *New York ex rel. Rogers v. Graves*, 299 U.S. 401 (1937)).

¹⁷ *Chater*, 516 U.S. at 179 (Scalia, J., dissenting).

law.¹⁸ The Supreme Court defended the appropriateness of GVR'ing in this context because it allowed lower federal court judges who, like their state court counterparts, are more "familiar with the intricacies and trends of local law and practice" to decide cases.¹⁹ By 1945, the Supreme Court acknowledged that GVR'ing to allow lower courts to reconsider issues in light of a potentially outcome-determinative intervening event was a fairly "customary procedure."²⁰

As the GVR deference doctrine became increasingly independent of federalism rationales, the Supreme Court began to reinterpret the GVR as a discretionary, and mostly equitable, tool in the late 1940s and early 1950s.²¹ With *Amer v. Superior Court of California* in 1948, the Supreme Court began to extend this "special deference"—once reserved for state courts in cases impacted by intervening state law—to state and federal courts in cases impacted by intervening federal decisions of *federal law*.²²

This extension of the deferential principle to lower federal courts on questions of federal law appears, at first glance, to undermine the Supreme Court's role as the final arbiter of federal law. Unlike with state law questions, the Supreme Court has the ultimate authority to decide federal questions of law.²³ Upon further probing, however, it is clear that the Supreme Court's role may not be compromised by the extension of the GVR. The Court's decision to extend the GVR power to lower federal courts deciding a mix of state and federal questions was accompanied by a shift in the deferential focus of the GVR, from one grounded in principles of federalism to one grounded in equity. This equitable focus of the GVR, rather than implying that lower federal courts are better suited to decide federal questions, suggests that lower courts should merely be given an opportunity to reconsider judgments in order to "avoid the unseemliness of holding judgments

¹⁸ *Huddleston v. Dwyer*, 322 U.S. 232, 236–38 (1944).

¹⁹ *Id.* at 237.

²⁰ *State Farm Mut. Auto. Ins. Co. v. Duel*, 324 U.S. 154, 161 (1945).

²¹ *Martin*, *supra* note 10, at 565–66. Further support for the equity argument can be found in the text of *Chater*, where the Court wrote:

If it appears that the intervening development, such as a confession of error in some, but not all, aspects of the decision below, is part of an unfair or manipulative litigation strategy, or if the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate.

Chater, 516 U.S. at 168 (1996).

²² 334 U.S. 813 (1948) (remanding a case to the California Supreme Court for consideration of intervening case law on the Fourteenth Amendment); *see also* *Henry v. City of Rock Hill*, 375 U.S. 6 (1963) (remanding to the South Carolina Supreme Court for consideration of intervening case law involving the First Amendment); *Goldbaum v. United States*, 348 U.S. 905 (1955) (remanding to the Ninth Circuit for consideration of intervening case law involving evasion of federal income taxes).

²³ *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *cf.* *Smith v. Phillips*, 455 U.S. 209, 221 (1982) ("Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension.").

to be in error” based on information that was previously unavailable.²⁴ Indeed, the Supreme Court’s current GVR practice appears to be more concerned with the equitable impact of intervening events than with federalism-related concerns,²⁵ an observation that is supported by the Court’s extension of the GVR to additional categories of cases in recent years. In addition to cases affected by intervening state statutes or state and lower federal court decisions, these categories now include cases affected by intervening changes in federal statutory law or administrative interpretations thereof,²⁶ changes in the factual circumstances of the case,²⁷ and changes in the Solicitor General’s position (including confessions of error).²⁸ In all, the Supreme Court’s historical GVR practice includes seven distinct categories of intervening events: (1) state decisions, (2) state statutes, (3) Supreme Court decisions, (4) federal statutes, (5) new interpretations by administrative agencies, (6) changed factual circumstances, and (7) confessions of error or new positions taken by the Solicitor General of the United States.

As the Court moved away from federalism-based rationales, the GVR also underwent substantial change in form. Whereas prior vacation and remand orders were entered only after plenary review of the issues, GVR orders since 1950 have simultaneously granted certiorari and ordered reconsideration.²⁹ As a result, modern GVR orders rarely produce signed opinions or generate substantive discussions on the merits of a case.³⁰ Rather, GVR orders for several decades have generally been succinct per curiam opinions that take the standard form: “On petition for writ of certiorari to the [lower court]. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the [lower court] for further consideration in light of [the intervening event].”³¹

Although the Supreme Court has greatly expanded the GVR power over time, the historical development of the GVR reveals that the Court has, nevertheless, carefully constructed that power. Rather than create a broad

²⁴ *Chater*, 516 U.S. at 181 (1996) (Scalia, J., dissenting); *see also* *Stutson v. United States*, 516 U.S. 193, 197 (1996).

²⁵ *Martin*, *supra* note 10, at 565–67.

²⁶ *Dep’t of the Interior v. South Dakota*, 519 U.S. 919 (1996).

²⁷ *E.g.*, *Nat’l Labor Relations Bd. v. Fed. Motor Truck Co.*, 325 U.S. 838 (1945).

²⁸ *E.g.*, *Ramirez v. United States*, 510 U.S. 1103 (1994).

²⁹ *Martin*, *supra* note 10, at 557–58. Increasingly, the Supreme Court began to distinguish between two types of GVRs. The first type, when the Supreme Court vacates judgments and remands only *after* granting plenary review, represents the original way in which the Supreme Court developed the GVR; it is now known simply as the V&R (vacation and remand). The second type represents the modern form of the GVR practice, when the Court grants certiorari, vacates the judgment of the lower court, and remands the case in a combined action. *See id.*

³⁰ *Id.* at 558.

³¹ *See, e.g.*, *Hughes v. California*, 127 S. Ct. 1255 (2007) (GVR for motion to proceed *in forma pauperis*); *Rutherford v. McDonough*, 126 S. Ct. 2915 (2006) (same); *KAPL, Inc. v. Meacham*, 544 U.S. 957 (2005); *Phillips v. Wash. Legal Found.*, 538 U.S. 942 (2003); *McGrath v. Chia*, 538 U.S. 902 (2003); *Willingham v. Loughnan*, 537 U.S. 801 (2002); *Henry v. City of Rock Hill*, 375 U.S. 6 (1963).

GVR power, the Supreme Court has deliberately limited the GVR to a confined set of categories in which a change in the law or factual circumstances of a case has a potentially outcome-determinative effect.³² Indeed, the fact that there are seven distinct circumstances in which the Supreme Court has explicitly recognized the appropriateness of a GVR indicates that the Court has always—at least, prior to *Youngblood*—preferred to add incrementally to its GVR power than to follow an unlimited and undisciplined GVR practice.

B. Sources of the GVR Power and Its Limitations

Although the Supreme Court has stated that the GVR power should be used “sparingly,”³³ it has not recognized any formal limitation to this power. Tradition, therefore, plays perhaps the most significant role in limiting the Court’s GVR authority and defining GVR use for lower court judges and academics.³⁴ Indeed, this reliance on traditional practice was the impetus behind the dissenting opinions of Justices Scalia, Thomas, and Kennedy in *Youngblood*.³⁵

Nevertheless, there are some indications that the Court’s authority may be considerably broader than traditional practice suggests. Although no case has explicitly repudiated limiting constructions on the Court’s GVR power, several cases have suggested that no real authority exists for limiting the court’s GVR jurisdiction.³⁶ For instance, in *Lawrence v. Chater*, the Court stated that “[it] perceiv[e]d no textual basis for [. . .] limit[ing the GVR power],” explicitly or implicitly.³⁷ Similarly, no statute or constitutional provision expressly limits—much less addresses—the GVR power. In fact, the Supreme Court has claimed that its authority arises under the very broad grant of 28 U.S.C. § 2106, which allows

³² For a period of time, the GVR was also used as a tool to allow state courts to clarify whether federal jurisdiction existed under mixed federal-state questions. This policy was supplanted by *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983), which gave the Supreme Court the benefit of the doubt on jurisdictional questions in cases containing mixed state-federal questions.

³³ *Lawrence v. Chater*, 516 U.S. 163, 173 (1996).

³⁴ *Id.* at 178 (Scalia, J., dissenting) (“[The] facially unlimited statutory text [of § 2106] is subject to the implicit limitations imposed by traditional practice . . .”). As discussed in *supra* Part I.A, the Supreme Court has considered seven distinct categories of intervening events in historical GVR practice: (1) state decisions, (2) state statutes, (3) Supreme Court decisions, (4) federal statutes, (5) new interpretations by administrative agencies, (6) changed factual circumstances, and (7) confessions of error or new positions taken by the Solicitor General of the United States.

³⁵ *Youngblood v. West Virginia*, 126 S. Ct. 2188, 2190–91 (Scalia, J., dissenting) (invoking tradition in objecting to the GVR); *id.* at 2193 (Kennedy, J., dissenting) (same).

³⁶ *E.g.*, *Chater*, 516 U.S. at 166; *Thomas v. Am. Home Prods., Inc.*, 519 U.S. 913, 914 (1996) (Scalia, J., concurring) (“We have never regarded Rule 10 [of the Supreme Court], which indicates the general character of reasons for which we will grant *plenary consideration*, as applicable to our practice of GVR’ing.”).

³⁷ 516 U.S. at 166.

[t]he Supreme Court or any other court of appellate jurisdiction [to] affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and [to] remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.³⁸

However, some have suggested that the Supreme Court's Rule 10 limits the Court's GVR authority by requiring GVR'd cases to meet the same criteria as cases normally granted certiorari.³⁹ Rule 10, which governs the factors that can be considered when granting review on a writ of certiorari, permits the Court to consider three factors: (1) whether there is disagreement among the federal circuit courts, among state supreme courts, or between the federal and state courts on an important question of federal law, (2) whether the lower federal courts have "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of [the Supreme] Court's supervisory power," and (3) whether a federal circuit court or state supreme court has decided an important federal question in a way that conflicts with a Supreme Court decision.⁴⁰ None of these conditions, however, seems to control in the Supreme Court's actual GVR practice.⁴¹ The Supreme Court has repeatedly gone beyond its normal certiorari jurisdiction to grant certiorari for cases in which it anticipates GVR'ing.⁴²

³⁸ 28 U.S.C. § 2106 (2007); see *Chater*, 516 U.S. at 166.

³⁹ *Am. Home Prods.*, 519 U.S. at 916 (Rehnquist, C. J., dissenting).

⁴⁰ SUP. CT. R. 10. The text of the rule states:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

- (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
- (b) a state court of last resort has decided an important federal question in a way that conflicts with a decision by another state court of last resort or of a United States court of appeals;
- (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by [the Supreme] Court, or has decided an important federal question in a way that conflicts with relevant decisions of [the Supreme] Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Id.

⁴¹ *Am. Home Prods.*, 519 U.S. at 914–15 (Scalia, J., concurring) (“[W]e have never regarded Rule 10, which indicates the general character of reasons for which we will grant *plenary consideration*, as applicable to our practice of GVR'ing. Indeed, *most* of the cases in which we exercise our power to GVR plainly do not meet the ‘tests’ set forth in Rule 10.” (internal citation omitted)).

⁴² *Id.* Rule 10 states: “Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons A petition for a

II. EXPRESS PURPOSES OF THE GVR

There is nothing ostensibly offensive about a procedural mechanism that allows lower courts to review their own decisions, especially in light of a potentially outcome-altering change in the law or factual circumstances. After all, the Supreme Court makes no specific determinations in GVR'd cases.

The uncertainty over the Court's motives and the perceived inconsistency of its GVR-related decisions, however, gives many lower court judges and scholars some pause. Even prior to *Youngblood*, critics (and even some proponents) of the GVR power condemned the lack of clear reasoning for the GVR. Although legal scholars agree that the GVR is a sign that the Supreme Court believes the law has "advanced or been clarified [in the relevant issue area] in a manner that warrants . . . reconsideration,"⁴³ attorneys, states, and lower federal courts all exhibit considerable confusion over the meaning of the GVR.⁴⁴

The Court's seemingly inconsistent behavior contributes to this confusion. For instance, in *Van Curen v. Jago*, the Supreme Court reviewed the Sixth Circuit's decision to deny relief to an inmate who claimed that the Ohio Adult Parole Authority (OAPA) violated his procedural due process rights when it granted, and then rescinded, parole without holding a hearing.⁴⁵ Upon granting certiorari, the Supreme Court vacated the judgment of the circuit court and remanded for reconsideration in light of an intervening Supreme Court decision that addressed similar due process claims by Nebraskan prisoners.⁴⁶ Although the intervening decision found that the parole revocation procedure in question met constitutional due process standards,⁴⁷ the *Van Curen* reconsideration order seemed to encourage the Sixth Circuit to distinguish the facts of the intervening case and reexamine the inmate's due process claim in a light more favorable to the inmate. Subsequently, on remand, the Sixth Circuit concluded that the inmate's expectation of parole

writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." SUP. CT. R. 10.

⁴³ Laura Clark Fey, Scott D. Kaiser & William F. Northrip, *The Supreme Court Raised Its Voice: Are the Lower Courts Getting the Message? Punitive Damages Trends After State Farm v. Campbell*, 56 BAYLOR L. REV. 807, 815 (2004).

⁴⁴ J. Mitchell Armbruster, *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, 1388 (1998); see *infra* notes 49, 50, 59 and accompanying text; see also *Lords Landing Vill. Condo. Council of Unit Owners v. Cont'l Ins. Co.*, 520 U.S. 893, 898 (1997) (Rehnquist, C.J., dissenting) (calling the majority's opinion "muddled and cryptic," and stating that the Courts of Appeals are "entitled to some clearer guidance").

⁴⁵ 442 U.S. 926 (1979). The Supreme Court later reversed the Sixth Circuit's judgment on remand in *Jago v. Van Curen*, 454 U.S. 14 (1981).

⁴⁶ *Id.* (remanding for reconsideration in light of *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1 (1979)).

⁴⁷ *Greenholtz*, 442 U.S. at 15-16.

was a protectable liberty interest.⁴⁸ In so concluding, the court reversed its initial position and held that the state had violated the inmate's procedural due process rights.⁴⁹

When the case came before the Supreme Court again, the Court summarily reversed the Sixth Circuit, finding that Ohio's parole statute did not create a protectable liberty interest.⁵⁰ After three adjudications before the Sixth Circuit and two before the Supreme Court, the Supreme Court's GVR resulted in the same outcome that would have resulted if they had denied certiorari in the first place.

In contrast, courts that have determinedly reinstated their original judgments after a Supreme Court GVR have also been summarily reversed by the Court. One well-known example is *Henry v. City of Rock Hill*, a case that was adjudicated during the height of the civil rights movement.⁵¹ In *Henry*, a group of African-Americans peacefully assembled on a public sidewalk to protest the city's segregation policies.⁵² During the course of singing patriotic and religious songs, police officers arrested and charged the group with breaching the peace.⁵³ After the state supreme court upheld the convictions,⁵⁴ the protestors appealed to the United States Supreme Court.⁵⁵ The Supreme Court vacated the judgment and remanded the case to the state court for reconsideration in light of a similar intervening Supreme Court case involving African-American student protestors.⁵⁶ In the intervening case, the Court had found that the protestors' convictions were racially motivated and thus violated the Fourteenth Amendment's equal protection guarantee.⁵⁷

Upon remand, however, the state supreme court found that the intervening decision was not controlling and reinstated its prior judgment.⁵⁸ The

⁴⁸ Van Curen v. Jago, 641 F.2d 411, 413 (6th Cir. 1981) (referring to the understanding of both the OAPA, in granting parole to Van Curen, and Van Curen, in being notified of the parole).

⁴⁹ *Id.* at 417.

⁵⁰ *Jago*, 454 U.S. at 17.

⁵¹ 376 U.S. 776 (1964).

⁵² *City of Rock Hill v. Henry*, 128 S.E.2d 775, 775 (S.C. 1962).

⁵³ *Id.*

⁵⁴ *Id.* at 776.

⁵⁵ *Henry v. City of Rock Hill*, 375 U.S. 6 (1963) (per curiam).

⁵⁶ *Id.* (GVR'ing in light of *Edwards v. South Carolina*, 372 U.S. 229 (1963)). In *Edwards v. South Carolina*, 187 African-American students peacefully assembled in front of the South Carolina State House. 372 U.S. at 230. When threatened with arrest if they would not disperse within fifteen minutes, they remained at the site to listen to a "religious harangue" delivered by one of the protest leaders and sang patriotic and religious songs. *Id.* at 233. The students were arrested and convicted of breach of the peace, which the State Supreme Court said "is not susceptible of exact definition." *Id.* at 234. The Supreme Court held that South Carolina infringed upon the students' free speech and free assembly rights, guaranteed by the First Amendment and protected from state action by the Fourteenth Amendment. *Id.* at 235.

⁵⁷ *Edwards*, 372 U.S. at 238.

⁵⁸ *City of Rock Hill v. Henry*, 135 S.E.2d 718, 719 (S.C. 1963).

Supreme Court again granted certiorari, but this time, it reversed the lower court's judgment outright.⁵⁹ Acknowledging that its final opinion may seem dissonant with the initial GVR order, the Court attempted to divest the GVR order of any underlying meaning. It explained that a reconsideration order is justified any time it is uncertain whether a case is "free from *all* obstacles to reversal on [the] intervening precedent."⁶⁰ The Court undermined this attempt to neutralize the GVR order, however, when it also asserted that the intervening decision should be regarded as "sufficiently analogous," seemingly for no reason other than the fact that the Court had cited it.⁶¹ If we were to extend this implication—that citations to intervening law are inherently analogous and significant—to other cases in which the Court uses the same language,⁶² then it appears that the Court GVR's not just to test the applicability of the intervening law, but also to nudge a lower court to change aspects of its decision after the Court has engaged with the issues and made a preliminary determination as to the "correctness" of the lower court's decision.

Despite these mixed messages, the Supreme Court has provided a few textual clues about the purpose of this procedural device in cases that discuss the Court's GVR authority.⁶³ The rationale the Court has most often articulated is that the GVR is simply a deferential mechanism that allows lower courts to have the first opportunity to determine the relevance of new law to the case at hand.⁶⁴ The GVR thus preserves "the dignity of the [lower court] by enabling it to consider potentially relevant decisions and arguments that were not previously before it."⁶⁵ While this argument is strongly supported by the federalism roots of the GVR practice,⁶⁶ the extension of the deference doctrine to cases arising from lower federal courts⁶⁷

⁵⁹ *Henry v. City of Rock Hill*, 376 U.S. 776, 778 (1964).

⁶⁰ *Id.* at 776 (emphasis added). This liberal standard was later narrowed in *Lawrence v. Chater*, 516 U.S. 163 (1996).

⁶¹ *Id.* at 777.

⁶² See *supra* text accompanying note 31 for the form language of the GVR.

⁶³ See *Henry*, 376 U.S. at 776–77 (asserting that, despite the fact that the state supreme court determined that the GVR order did not cite to a "controlling" intervening case, the "order did, however, indicate that we found [the intervening case] sufficiently analogous and, perhaps, decisive to compel re-examination of the case"); *Chater*, 516 U.S. at 167 (discussing the virtues of the GVR "in an appropriate case," which consist mainly of conserving scarce judicial resources and flagging particular issues; noting, however, that the GVR is "potentially appropriate" where "intervening developments, or recent developments that [the Supreme Court has] reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation").

⁶⁴ See *supra* note 7 and accompanying text.

⁶⁵ *Stutson v. United States*, 516 U.S. 193, 197 (1996).

⁶⁶ See *supra* Part I; *Chater*, 516 U.S. at 179–80 (Scalia, J., dissenting) (discussing the federalism roots of the GVR).

⁶⁷ *E.g.*, *Chater*, 516 U.S. 163.

suggests that federalism alone does not fully justify the Supreme Court's GVR authority. Equitable reasons must play a significant role.

A second reason proffered by the Court for the GVR is the conservation of scarce judicial resources that would otherwise be expended in plenary review.⁶⁸ Indeed, the practical role the GVR plays in managing the Supreme Court's burgeoning certiorari docket⁶⁹ and restricting the docket to questions of constitutional or federal significance is vital to preserving the Court's role as a court of last resort.⁷⁰ Ironically, this concern for judicial economy at the Supreme Court imposes heavy costs below. By vacating the lower court's judgment and remanding the case, the Supreme Court adds significantly to the workload of lower courts.⁷¹ Moreover, since the Supreme Court also retains the ability to rehear the case on appeal, the GVR may ultimately create layers of unnecessary litigation for the parties involved.

Despite these articulated reasons, the nature of the GVR allows it to be more than a simple deferential or docket control mechanism—a thesis evidenced in lower court responses, such as those described above in *Van Curen*, that attempt to analyze the Supreme Court's motives. Given the Court's tendency to favor judicial economy,⁷² it is perhaps not surprising that a lower court will interpret a GVR as encoding a Supreme Court judgment, rather than as a mere opportunity to reexamine a case in light of an intervening event.⁷³ If the GVR were simply a tool to promote deference,

⁶⁸ *Id.* at 167.

⁶⁹ *See id.* at 175–76 (Stevens, J., concurring) (noting that the Court's ability to remand cases to lower federal courts is a virtue of its discretionary authority to manage its certiorari docket).

⁷⁰ *Id.* at 176–77 (Rehnquist, J., concurring) (stating that the Supreme Court should not be “obligated to weigh justice among contesting parties”; parties should have fully resolved their claims after two levels of adjudication so that the role of the Supreme Court can be simply to provide “the last word on every important issue under the Constitution and the statutes of the United States” (quoting HENRY F. PRINGLE, 2 THE LIFE AND TIMES OF WILLIAM HOWARD TAFT 997–98 (1939))).

⁷¹ *Lords Landing Vill. Condo. Council of Unit Owners v. Cont'l Ins. Co.*, 520 U.S. 893, 898 (1997) (Rehnquist, C.J., dissenting) (“If this Court has . . . concluded that the Court of Appeals’ refusal to alter its opinion in light of *Sheets* was wrong, it should either set the case for argument or summarily reverse. True, this would require the investment of still more time and effort in a case that is in the federal courts only by reason of diversity of citizenship . . . , but it would have the virtue of explicitly telling the Court of Appeals how to dispose of the case. The Court’s decision to grant, vacate, and remand in the light of *Sheets*, on the contrary, is muddled and cryptic. Surely the judges of the Court of Appeals are, in fairness, entitled to some clearer guidance from this Court than what they are now given.” (citation omitted)).

⁷² For example, the Supreme Court is loathe to grant certiorari or address constitutional questions unless it is important to the national interest or otherwise necessary. *See* SUP. CT. R. 10; *supra* text accompanying note 40.

⁷³ *See, e.g., Sharpe v. United States*, 712 F.2d 65, 67 (4th Cir. 1983) (Russell, J., dissenting) (“Once again, I think the majority has mistaken gentleness in instruction for indefiniteness in command. The Supreme Court was seeking to be gentle with us but there is, I submit, no mistaking what they expected us to do.”); *but see, e.g., Arnold Tours, Inc. v. Camp*, 428 F.2d 359, 361 (1st Cir. 1970) (“Had [the Supreme Court] intended so substantial a change in the law it would not only have written a quite different

expediency, or docket control, the Supreme Court would be more likely to GVR in cases from state courts that are affected by intervening state law and more inclined to deny review or summarily adjudicate cases from federal courts; nevertheless, a review of recent GVR'd cases demonstrates no such biases in favor of cases affected by intervening state law or against those affected by intervening federal law.⁷⁴ This lack of congruence between the Supreme Court's express reasons for GVR'ing and its actual practice suggest that the Court uses the GVR for other, unarticulated purposes. With uncertain responses by lower courts and a less than coherent articulation of the function and purpose of the GVR power by the Supreme Court, a question arises: what does the Supreme Court really hope to accomplish by GVR'ing?

III. A LIMITED OR UNLIMITED AUTHORITY?

Although the Supreme Court has articulated a willingness to GVR in order to maintain respect for the lower courts and to rein in its expanding certiorari docket,⁷⁵ neither of these reasons requires an intervening event to justify a GVR order. If equitable and economical reasons such as deference and docket control were truly the main justifications for GVR'ing (as past decisions explicitly suggest⁷⁶), the Supreme Court should be able to GVR in any case regardless of whether an intervening event has occurred. Indeed, *Youngblood* implicitly asserts this.⁷⁷ Nevertheless, even if the Court's expressed reasons do not inherently require an intervening event limitation, the Court's historical adherence to it suggests that more substance underlies the GVR. The best way to discover the content of this substance may be to work backwards, beginning with the intervening event requirement.

This Part compares the traditional intervening event justification with the *Youngblood* doctrine. In attempting to reconcile them, we find that the Supreme Court may sometimes GVR for reasons it is less willing to admit: to assert more control over the holding of the case before it, to explore the scope of the intervening decision, or to avoid directly addressing issues that

opinion in [the intervening decision]; it would have reversed us out of hand [rather than merely GVR'ing].").

⁷⁴ In order to gauge the Supreme Court's tendencies with respect to state and federal intervening law, I searched through the majority of cases that the Supreme Court had GVR'd in 2005 and 2006; the results indicated that the majority of cases were actually GVR'd in light of intervening *federal* law. Nevertheless, the conclusions that can be drawn from this study are limited by two factors. First, it is not clear whether the proportion of cases GVR'd in light of intervening federal law is greater or less than the proportion of cases GVR'd in light of intervening state law with respect to the number of cases in which intervening federal or state law is respectively involved. Second, it is not clear whether the results are indicative of long-term trends.

⁷⁵ See *supra* Part II.

⁷⁶ See *supra* notes 63–70 and accompanying text.

⁷⁷ See *Youngblood v. West Virginia*, 126 S. Ct. 2188, 2190 (per curiam).

would complicate the legal question before the court because of political concerns.

A. *The Intervening Event Justification*

Despite the variety of circumstances in which the Supreme Court has GVR'd, the Court, in nearly every discussion of its GVR authority, has cited an intervening event as the premise for initiating a reexamination of a case.⁷⁸ The Court made the centrality of the intervening event factor clear in *Chater*, where it recognized that:

[Internal differences among the Justices] should not overshadow the substantial level of agreement shared by all Members of this Court. . . . [A]ll are agreed that a *wide range of intervening developments*, including confessions of error, may justify a GVR order. . . . [A]ll are [also] agreed that our GVR power should be exercised sparingly. This Court should not just GVR a case 'because it finds the opinion, though arguably correct, incomplete and unworkmanlike; or because it observes that there has been a postjudgment change in the personnel of the [lower court], and wishes to give the new [judges] a shot at the case.'⁷⁹

Despite the lack of constitutional or statutory restrictions on the Court's discretionary power,⁸⁰ the Supreme Court has offered two different standards for determining the appropriateness of a reconsideration order, both of which were set forth in *Chater*. The first and current standard, identified by the majority in *Chater*, consists of a two-part test that finds a GVR to be appropriate when: (1) an intervening development raises a reasonable probability that the lower court decision "rests upon a premise that the lower court would reject if given the opportunity for further consideration,"⁸¹ and (2) the equities of the case suggest that it would be fair to GVR.⁸² In his dissent, however, Justice Scalia rejected this standard and proposed an alternative.⁸³ According to Justice Scalia, the Supreme Court has the authority to GVR when: "(1) [an] intervening fact has arisen that has a legal bearing upon the decision, (2) [in] a context not governed by *Michigan v. Long*,⁸⁴ clarification of the opinion below is needed to assure

⁷⁸ See *Lawrence v. Chater*, 516 U.S. 163, 173 (1995) ("[A]ll are agreed that a wide range of intervening developments, including confessions of error, may justify a GVR order.").

⁷⁹ *Id.* (citing *id.* at 189 (Scalia, J., dissenting)) (emphasis added).

⁸⁰ See *supra* Part I.B.

⁸¹ *Chater*, 516 U.S. at 167.

⁸² *Id.* at 167–68 ("Whether a GVR order is ultimately appropriate depends further on the equities of the case: If it appears that the intervening development, such as a confession of error in some, but not all, aspects of the decision below, is part of an unfair or manipulative litigation strategy, or if the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate.").

⁸³ *Id.* at 191–92 (Scalia, J., dissenting).

⁸⁴ 463 U.S. 1032, 1040–43 (1983) (holding that in situations where state court decisions appear to rest primarily on federal law, the Supreme Court would infer that it had jurisdiction to review those de-

[the Supreme Court's] jurisdiction, or (3) [the] respondent or appellee confesses error in the judgment below."⁸⁵

At first glance, the difference between these standards may seem negligible because both, first and foremost, require intervening factors. The opinions in *Chater* make clear, however, that the majority's "reasonable probability" standard and the dissent's "legal bearing" standard are to be construed differently. Whereas the majority believed that intervening developments only are required to present a reasonable probability of affecting the outcome,⁸⁶ the dissent proposed to GVR only where the intervening fact actually has a legal bearing upon the decision.⁸⁷ The dissent's standard thus requires a level of certainty that is not mandated by the majority's standard.

The standards also differ in the extent to which they each consider equitable factors. The majority fully embraces an equitable doctrine:

Whether a GVR order is ultimately appropriate depends [upon] the equities of the case: If it appears that the intervening development, such as a confession of error in some, but not all, aspects of the decision below, is part of an unfair or manipulative litigation strategy, or if the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate.⁸⁸

The dissent, however, considers equitable factors only to the extent that it appears that the government—whom Justice Scalia calls “the most frequent, and hence the most calculating, of our litigants”—is attempting to manipulate the outcome by changing positions.⁸⁹ Thus, the dissent's standard is substantially narrower not only than the majority's standard, but also narrower than the Supreme Court's actual GVR practice.⁹⁰ Despite these differences, both standards proposed by the opinions in *Chater* fall neatly into the intervening event doctrine of GVR jurisprudence.⁹¹ Further support for

cisions unless the state court had explicitly shown that it had based its decision on independent and adequate state grounds).

⁸⁵ *Chater*, 516 U.S. at 191–92 (Scalia, J., dissenting).

⁸⁶ *Id.* at 171–72 (majority opinion).

⁸⁷ *Id.* at 191–92 (Scalia, J., dissenting).

⁸⁸ *Id.* at 167–68 (1995) (majority opinion).

⁸⁹ *Id.* at 187 (Scalia, J., dissenting). Justice Scalia is particularly concerned about the government's ability to alter its position at the certiorari stage: “[S]urely a decent concern for those litigating against the Government and for our lower court judges should induce us to disregard, for *Chevron* purposes, a litigating position first expressed at the certiorari stage . . . If we accord deference in [those] circumstances[,] we can expect the Government to take full advantage of the opportunity to wash out, on certiorari, disadvantageous positions it has embraced below; and we can expect it to focus less of its energy upon getting its position ‘right’ in the Courts of Appeals.” *Id.*

⁹⁰ *Id.* at 169 (majority opinion) (“While a large proportion of this Court's GVR orders fall within these categories, we find that, especially as the dissent construes them, they are too narrow to account for the full extent of our actual practice.”).

⁹¹ A third possible but uncommon reading of *Chater* is that the Supreme Court can GVR without limitation. *Id.* at 166 (stating that there is no “textual basis for . . . limit[ing]” the Supreme Court's GVR

recognizing an intervening event standard lies in the fact that both academics and practitioners have similarly interpreted the GVR to require an intervening event, despite their general confusion over the meaning of the GVR.⁹²

B. Problems with the Youngblood Doctrine

The Supreme Court's decision in *Youngblood v. West Virginia* adds to the considerable confusion surrounding the GVR by contradicting the universal understanding that lower courts, academics, and practitioners have constructed over decades of GVR practice: that the Supreme Court GVR's when an intervening event creates a reasonable probability that the lower court will change its holding.⁹³ In the case, Youngblood was convicted on two counts of sexual assault, two counts of brandishing a firearm, and one count of indecent exposure based on the testimony of three women who claimed that Youngblood had held them captive and forced them, at gunpoint, to perform sexual acts on him.⁹⁴ A few months after his conviction, Youngblood moved to set aside the verdict based on a private detective's discovery of evidence that corroborated his consensual-sex defense at trial.⁹⁵ The detective further discovered that the state law enforcement officer investigating the case had been aware of the evidence during the original investigation, yet had failed to disclose it.⁹⁶ Youngblood argued that the

power in any case that "is properly before [the Court] in [its] appellate capacity"). Even accepting that the Supreme Court might have unlimited discretionary authority to GVR, the practice of the Court (with the exception of *Youngblood*) has been to reserve GVR orders for cases involving an intervening event. Thus, the intervening event justification deserves special attention.

⁹² See, e.g., 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). Although the authors claim to have written the article as "a plea for the Supreme Court to clarify the meaning of a GVR order," *id.* at 515, the authors assume that each GVR'd case involves, at least, an intervening decision: "[T]he Supreme Court should clearly and explicitly state that GVR orders are not decisions on the merits and that such orders imply no judgments about whether the prior decision actually is in need of substantial revision or reversal." *Id.* at 526. As such, the authors are concerned primarily with the standard under which the Court should issue a GVR order: "[The Court] should order a GVR in such a case only if there is good reason to believe that a lower court's decision needs to be revised in light of the Supreme Court's new ruling." *Id.* at 516. See also ROBERT L. STERN, EUGENE GRESSMAN, STEPHEN M. SHAPIRO & KENNETH S. GELLER, *SUPREME COURT PRACTICE* 319 (2002) ("It seems fairly clear that the Court does not treat the summary reconsideration order as the functional equivalent of the summary reversal order and the lower court is being told simply to reconsider the entire case in light of the intervening precedent—which may or may not compel a different result.").

⁹³ See Martin, *supra* note 10, at 564, 567; see also *Chater*, 516 U.S. at 167 ("Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate.").

⁹⁴ *Youngblood v. West Virginia*, 126 S. Ct. 2188, 2189 (2006) (per curiam).

⁹⁵ *Id.*

⁹⁶ *Id.*

suppression of this evidence violated the “[s]tate’s federal constitutional obligation to disclose evidence favorable to the defense” under *Brady v. Maryland*.⁹⁷

In hearing Youngblood’s claims, the trial court found that the evidence was not exculpatory and refused to grant him a new trial.⁹⁸ A majority of the Supreme Court of Appeals of West Virginia affirmed the trial court’s conviction without discussing the constitutional *Brady* claim.⁹⁹ The dissent, however, concluded that the evidence was material and that Youngblood’s constitutional rights had been violated.¹⁰⁰ When the case came before the Supreme Court, the Court GVR’d for reconsideration of the *Brady* issue in order to have the “benefit of the views of the full Supreme Court of Appeals of West Virginia.”¹⁰¹ On May 10, 2007, the West Virginia court again reviewed Youngblood’s claim and found that the suppression of the evidence in question violated his constitutional rights.¹⁰² As a result of this reconsidered holding, the court reversed Youngblood’s conviction and remanded the case for a new trial.¹⁰³

As stated previously, *Youngblood* not only aggravates the lack of clarity already surrounding the GVR, but it also defies the only point on which courts and scholars have achieved near-universal understanding—that the GVR is used when an intervening event affects the law underlying the case or, because of new factual revelations, changes the way in which the law should be applied. The schism between this traditional understanding of the GVR and the GVR as applied in *Youngblood* suggests that, under its newly expanded authority, the Supreme Court is unconstrained by both prior discussions of the GVR authority and traditional practice. *Youngblood* does not merely unsettle the postjudgment intervening event jurisprudence; it creates a scenario in which the GVR authority conflicts with the express purposes of the GVR¹⁰⁴ and ignores the prudential considerations that gave rise to an intervening event requirement in the first place.¹⁰⁵ *Youngblood* lowers the bar so much that the Supreme Court no longer needs a legal justification to GVR;¹⁰⁶ the Court may GVR merely because it desires a different outcome in the lower courts.¹⁰⁷

⁹⁷ *Id.* (relying on *Brady v. Maryland*, 373 U.S. 83, 83 (1963)).

⁹⁸ *Id.*

⁹⁹ *State v. Youngblood*, 618 S.E.2d 544, 557 (W. Va. 2005).

¹⁰⁰ *Id.* at 560–61 (Davis, J., dissenting).

¹⁰¹ *Youngblood*, 126 S. Ct. at 2190.

¹⁰² *State v. Youngblood*, No. 31765, 2007 W. Va. LEXIS 23, at *26 (W. Va. May 10, 2007).

¹⁰³ *Id.* at *43.

¹⁰⁴ *See supra* Part II.

¹⁰⁵ *See infra* Part III.B.2.

¹⁰⁶ That is, the Court no longer needs a change in the law or a change in the facts such that the law should have been applied differently.

¹⁰⁷ Note the warning in Justice Scalia’s dissent in *Youngblood*: “It is noteworthy that, to justify its GVR order, the Court does not invoke even the flabby standard adopted in [*Chater*], namely whether

1. *Undermining the Purposes of the GVR.*—One of the most fundamental problems with the *Youngblood* GVR doctrine is the dissonance it creates with the deferential principles on which the GVR was founded. While *Youngblood* preserves the Supreme Court's intention to provide lower courts with the first opportunity to reconsider a judgment, it erases the requirement that the Supreme Court have a concrete legal reason for GVR'ing. In *Youngblood*, the Supreme Court GVR'd simply because it wanted more information—a reason that the Court explicitly repudiated in *Chater*¹⁰⁸ and in *Stutson*¹⁰⁹—even though there was no reasonable probability that the judgment of the lower court would change.¹¹⁰ The *Youngblood* doctrine thus undermines the “special deference” to lower courts that the Supreme Court has traditionally invoked as justification for the GVR power. By eliminating such constraints upon its GVR power, the Supreme Court has awarded itself the power to vacate judgments and remand cases to lower courts without plenary review, restricted only by its own sense of self-discipline.

Youngblood also fails to serve the Supreme Court's express intention to better control its docket through the GVR power. Because a GVR order could give litigants additional opportunities to be heard, lowering the bar to reconsideration would only further encourage litigants to appeal to the Supreme Court whenever a lower court's opinion seems unclear or incomplete. Without the incentive of a GVR order, litigants would be more likely to appeal only when the circumstances surrounding the case conform more closely to the certiorari-granting guidelines set forth in Rule 10.¹¹¹ For the lower courts, the elimination of the intervening event requirement may even result in more desultory and sloppier analyses because it would matter less if they got it “right” the first time. By effectively eliminating the intervening event requirement, the Supreme Court therefore not only encourages more certiorari petitions, it also encourages petitioners to seek certiorari solely to correct factual errors or misapplications of law.¹¹² The impact of

there is ‘a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration.’ That is because (there being no relevant intervening event to create such a probability) the only *possibility* that the West Virginia court will alter its considered judgment *is created by this Court's GVR order itself.*” *Youngblood v. West Virginia*, 126 S. Ct. 2188, 2191–92 (2006) (Scalia, J., dissenting).

¹⁰⁸ See *supra* note 79 and accompanying text.

¹⁰⁹ See *Stutson v. United States*, 516 U.S. 193, 197 (1996) (“Judicial efficiency and finality are important values, and our GVR power should not be exercised for [m]ere convenience.” (citation omitted)).

¹¹⁰ See *Youngblood*, 126 S. Ct. at 2192 (Scalia, J., dissenting) (asserting that the majority treats lower courts like “agents” of the Supreme Court and not as “independently authorized” and “constitutionally distinct tribunals”).

¹¹¹ See *supra* Part I.B.

¹¹² Correcting for “erroneous factual findings or the misapplication of a properly stated rule of law” is something for which the Supreme Court has rarely granted certiorari and is reluctant to do. SUP. CT. R. 10; see also *Gonzales v. Crosby*, 545 U.S. 524, 544 n.7 (2005) (Stevens, J., dissenting) (“A petition

this broadened GVR power would thus expand the Court's certiorari docket and would almost certainly expand the workloads of lower courts on the receiving end of GVR orders.¹¹³

The heightened standard that *Youngblood* appears to impose on lower court opinions presents a final complication. By GVR'ing to obtain the "views of the *full* Supreme Court of Appeals of West Virginia,"¹¹⁴ the Supreme Court indicated that the lower court's majority opinion did not meet some vague but requisite level of thoroughness. Given this language, *Youngblood* effectively requires lower courts to address all potential issues on which the case might be decided, even if a court has grounded its judgment on other independent issues or would otherwise view some issues as trivial.

2. *Prudential Conflicts*.—In addition to the apparent lack of congruity between the *Youngblood* GVR and the purported purposes of the GVR, the *Youngblood* GVR doctrine creates potential prudential problems. These problems are particularly evident in three specific types of circumstances: (1) where, in cases arising from state courts, there is no new intervening state law, (2) where, in cases involving agency interpretations or positions taken by the Solicitor General, there has been no interpretive change or confession of error, and (3) where, in cases arising from lower courts, there has been no change in the federal law or the facts since the lower court's judgment. The problems created by a GVR in each of these three situations concern the integrity of three constitutional concepts: federalism, separation of powers, and appellate jurisdiction, respectively.¹¹⁵

The Supreme Court's federalism concerns are nowhere more apparent than in the origins of the GVR. As discussed in Part I.A of this Comment, the Supreme Court created the GVR power as a response to new relevant state law in cases arising out of state courts. Rather than hear the appeal, the Supreme Court GVR'd so that state courts could have the first opportunity to reconsider their judgments. Doing so not only avoids the "unseemliness" of holding a lower court's judgment to be in error when the relevant

for certiorari seeking review of a denial of a [certificate of appealability] has an objectively low chance of being granted. Such a decision is not thought to present a good vehicle for resolving legal issues, and error correction is a disfavored basis for granting review, particularly in noncapital cases.").

¹¹³ See, e.g., *Thomas v. Am. Home Prods., Inc.*, 519 U.S. 913, 918 (1996) (Rehnquist, C.J., dissenting) (dissenting from grant of GVR based in part on the resulting workload created for the court of appeals) ("[R]equiring the Court of Appeals to delve into the facts and law of the case again, months after it denied rehearing, is not without cost. The typical active judge of the Court of Appeals for the Eleventh Circuit participates in somewhere between 150 and 200 panel decisions each year. For us to require a busy court to once more revisit the merits of this state-law dispute gives these petitioners more of the time and resources of the federal judicial system than they deserve.").

¹¹⁴ *Youngblood*, 126 S. Ct. at 2190 (emphasis added).

¹¹⁵ Again, as I stated in the Introduction, none of these constitutional principles are actually *violated* by a GVR.

law did not exist at the time of the judgment,¹¹⁶ but also demonstrates the Court's respect for the federal-state relationship within the American "multi-tiered judicial system."¹¹⁷ GVR'ing in the event of intervening state law thus addresses valid federalism concerns where a reasonable probability exists that a lower state court would have ruled differently if given the opportunity to reconsider the case under the new state law.

The prudential problems created by the *Youngblood* GVR doctrine are particularly evident in cases involving agency interpretations of federal statutes and changes in the Solicitor General's position. In one such case, *Department of the Interior v. South Dakota*,¹¹⁸ the United States Department of the Interior initiated an action to acquire ninety-one acres of land in trust for a Native American tribe under the 1934 Indian Reorganization Act (IRA).¹¹⁹ South Dakota challenged the constitutional validity of the Act in federal court, claiming that the IRA violated the Administrative Procedure Act (APA)¹²⁰ and improperly delegated legislative power to the Secretary of the Interior by allowing him to acquire land without sufficient congressional guidance.¹²¹ Throughout the litigation in the lower courts, the Department of the Interior asserted that IRA land acquisitions were not judicially reviewable under the APA. The district court upheld this interpretation¹²² and the constitutionality of the Secretary of the Interior's authority under the IRA, but the Eighth Circuit reversed on the constitutional question.¹²³ Following the Eighth Circuit's decision, however, the Secretary changed his interpretation and came to the conclusion that the IRA did, in fact, allow judicial review over land acquisitions.¹²⁴ The Solicitor General accordingly altered the government's legal position.¹²⁵ Upon receiving the petition for certiorari, the Supreme Court GVR'd for reconsideration in light of the Secretary's new statutory interpretation.¹²⁶

¹¹⁶ *Lawrence v. Chater*, 516 U.S. 163, 181 (1996) (Scalia, J., dissenting).

¹¹⁷ *Id.*

¹¹⁸ 519 U.S. 919 (1996) (mem.).

¹¹⁹ *Id.* at 920 (Scalia, J., dissenting) (describing the facts of the case). The Indian Reorganization Act is codified at 25 U.S.C. § 465 (2000) (originally enacted as Indians Reorganizations Act of 1934, ch. 576, § 5, 48 Stat. 984, 985). The statute states, in relevant part: "The Secretary of the Interior is authorized, in his discretion, to acquire . . . any interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians." *Id.*

¹²⁰ 5 U.S.C. § 706 (2000).

¹²¹ *Dep't of the Interior*, 519 U.S. at 920 (Scalia, J., dissenting).

¹²² *Id.* (describing the lower court's decision that APA review was unavailable on the basis of the Quiet Title Act, 28 U.S.C. § 2409(a) (2000), rather than on the basis of section 701(a)(2) of the APA as the Department of the Interior had argued).

¹²³ *South Dakota v. Dep't of the Interior*, 69 F.3d 878, 881–82 (8th Cir. 1995) (arguing that the language "providing land for Indians" under the IRA does not constitute a "policy" from which it is possible to ascertain whether congressional intent has been followed).

¹²⁴ *Dep't of the Interior*, 519 U.S. at 920–21 (Scalia, J., dissenting).

¹²⁵ *Id.*

¹²⁶ *Id.* at 919–20 (majority opinion).

Although the ability of agency administrators and government officials to effect administrative reinterpretations or changes in position may facilitate executive branch attempts to manipulate judicial outcomes,¹²⁷ eliminating the intervening event requirement could create more serious consequences by permitting the Supreme Court to infringe on executive and legislative authority. For instance, if the Supreme Court had GVR'd absent an interpretive change in *Department of the Interior*, the GVR would have conflicted with what appears to be a congressional grant to the Secretary to determine his discretionary authority under the statutes. Such separation of powers concerns are mitigated when the GVR is employed in the context of an intervening event; it is the action of the administrative agency or government official in introducing a new interpretation or position that compels the reconsideration order. In those cases, the Supreme Court GVR's in order to allow lower courts to maintain consistency with the agency's interpretation or the Solicitor General's position.

In addition to weakening the Court's respect for federalism and separation of powers principles, *Youngblood* may affect the integrity of the Supreme Court's appellate power. Article III, Section 2 of the Constitution limits the Supreme Court's appellate jurisdiction to issues of "both . . . Law and fact, with such exceptions, and under such regulations as the Congress shall make."¹²⁸ As such, intervening law or factual circumstances that are reasonably likely to alter the outcome can be viewed as transforming a case into a "new" case that the lower court has not had a proper opportunity to hear. Because Article III's grant of appellate jurisdiction prohibits the Supreme Court from hearing certain cases and controversies for the first time, such intervening events compel the Supreme Court to GVR in order to preserve the truly appellate nature of the Court's jurisdiction. Where intervening law or facts do not introduce a reasonable likelihood of change in the outcome of a case, the Supreme Court has no reason to GVR because the case before it is essentially the same as the case the lower court heard. In this situation, the Supreme Court has several options that are more appropriate than a GVR: deny certiorari, grant summary judgment on the merits, or grant review. If the Court chooses to grant review, it can then decide whether to remand the case (with or without vacation of the judgment) or to decide it on the merits. GVR'ing where there is no intervening event, while not constitutionally impermissible, is nevertheless inappropriate because it weakens the appellate nature of the Supreme Court's jurisdiction. Moreover, the Court imposes on its own judicial interest in the finality of judgments without even having the justification that "a reasonable probability" of change exists.

¹²⁷ See *id.* at 922 (Scalia, J., dissenting) ("[I]t is inconceivable that this reviewability-at-the-pleasure-of-the-Secretary could affect the constitutionality of the IRA in anyone's view."); see also *supra* note 89 and accompanying text.

¹²⁸ U.S. CONST. art. III, § 2.

Finally, *Youngblood* also represents a novel and problematic proposition: that the Supreme Court can GVR where it suspects that the lower court did not fully consider alternative grounds for deciding the case. This is revealing because it suggests that the Supreme Court has conflated the GVR with a regular remand order that would follow plenary review.¹²⁹ Such remand orders, in contrast to GVR orders, have not explicitly adopted a “reasonable probability” standard. Thus, the fact that the *Youngblood* language is more consistent with regular remand orders, wherein the Supreme Court remands cases for proceedings “consistent with” or “not inconsistent with” the court’s opinion,¹³⁰ suggests that the Supreme Court’s GVR in *Youngblood* is more akin to mere error-correction—an activity the Court has said it is loathe to do.¹³¹

C. Hidden Purposes of the GVR

In neglecting the intervening event requirement in *Youngblood*, the Supreme Court implicitly acknowledged that it GVR’s for reasons other than deference and docket control. Indeed, many cases prior to *Youngblood*, although all involving intervening events, have hinted that the Supreme Court may have other reasons for GVR’ing. In this sense, these cases can be viewed as precursors to *Youngblood*. Putting aside the Supreme Court’s explicit justifications for its GVR authority,¹³² the GVR may be explained by several other motives.

1. *To Create Alternate Outcomes and Broader Impacts.*—In vacating a judgment, the GVR provides a lower court with a chance to *change* its judgment in light of a relevant intervening event. In these circumstances, however, one observes what some courts, as well as some scholars, have viewed as a troubling aspect of the GVR: the ease with which it can be abused.¹³³ Rather than respecting the dignity of the lower courts,¹³⁴ the

¹²⁹ E.g., *Gonzales v. Raich*, 545 U.S. 1 (2005) (vacating the Ninth Circuit’s judgment and remanding the case for proceedings consistent with the Court’s opinion).

¹³⁰ The Supreme Court in *Youngblood* states, “We, therefore, grant the petition for certiorari, vacate the judgment of the State Supreme Court, and remand the case for further proceedings not inconsistent with this opinion.” *Youngblood v. West Virginia*, 126 S. Ct. 2188, 2190 (2006). Compare this instruction with Professor Michael A. Berch’s observation that when an appellate court reverses a lower court and remands the case without entering a judgment, it calls for the lower court to adopt proceedings “consistent with” or “not inconsistent with” the appellate court’s opinion. Michael A. Berch, *We’ve Only Just Begun: The Impact of Remand Orders from Higher to Lower Courts on American Jurisprudence*, 36 ARIZ. ST. L.J. 493, 497 (2004).

¹³¹ See *supra* Part I.A; *supra* text accompanying note 40; see also cases cited *supra* note 112. Remand orders that follow plenary review seem to take the form of pre-1950 GVRs. For this type of remand, the Supreme Court does not appear to have adopted the “reasonable probability” standard applied to modern-day GVRs.

¹³² See *supra* Part II.

¹³³ Cf. Armbruster, *supra* note 44, at 1412, 1421 nn.256 & 258.

¹³⁴ See *Stutson v. United States*, 516 U.S. 193, 197 (1996).

GVR may signal distrust in the lower courts' abilities to make correct judgments. Rather than merely providing lower courts with an opportunity to change their judgments, the GVR may be viewed as encouraging them to do so.

One such example of this implicit signaling can be seen in *Arnold Tours, Inc. v. Camp*.¹³⁵ In *Arnold Tours*, several travel agencies challenged a regulation promulgated by the Comptroller of the Currency that permitted national banks to provide travel services to their customers.¹³⁶ Upon review, the First Circuit held that the travel agencies lacked standing to challenge the regulation.¹³⁷ After granting certiorari, the Supreme Court GVR'd in light of its own intervening decisions upholding the standing of data processing companies that challenged a similar regulation.¹³⁸ On remand, however, the First Circuit reaffirmed its previous ruling.¹³⁹ In doing so, the court stated:

Clearly the [Supreme] Court did not feel that the mere fact that [the travel agencies] were in competition with the defendant bank gave them standing. *Had it intended so substantial a change* in the law it would not only have *written a quite different opinion* in [the intervening decision]; *it would have reversed us out of hand*.¹⁴⁰

The travel agencies sought certiorari again, and the Supreme Court made its original intention much clearer in a brief opinion that summarily reversed the First Circuit.¹⁴¹

In addition to providing a lower court with the opportunity to change its judgment, the Supreme Court can GVR to compel a lower court to broaden or narrow the scope of its ruling, or alternatively, to compel it to find a different basis for the ruling altogether. While this might appear to send the lower court on a fishing expedition for the "right" holding, the Supreme Court's citation to an intervening decision would provide some guidance.¹⁴² For instance, in *Van Curen*, the Supreme Court reversed the Sixth

¹³⁵ 408 F.2d 1147 (1st Cir. 1969) (summarized in Hellman, *supra* note 12, at 399).

¹³⁶ *Id.* at 1149.

¹³⁷ *Id.* at 1150–51. The Supreme Court ruled that ordinary competitors lacked standing to "complain of a party's lack of legal authority to engage in his business" unless they could demonstrate that they had a "statutory aid to standing." *Id.* at 1149–50 (citing Supreme Court precedent). The Court found that the only statute relevant to standing was 12 U.S.C. § 24(7), which did not indicate an intention to protect travel agencies from competition. *Id.* at 1150 (citing Supreme Court precedent).

¹³⁸ *Arnold Tours, Inc. v. Camp*, 397 U.S. 315, 315 (1970) (GVR'ing in light of *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970), and *Barlow v. Collins*, 397 U.S. 159 (1970)).

¹³⁹ *Arnold Tours, Inc. v. Camp*, 428 F.2d 359, 361 (1st Cir. 1970).

¹⁴⁰ *Id.* (emphasis added).

¹⁴¹ *Arnold Tours, Inc. v. Camp*, 400 U.S. 45, 47 (1970) (per curiam); *see also* *Henry v. City of Rock Hill*, 376 U.S. 776 (1964), discussed in *supra* Part II.

¹⁴² As discussed previously, the Supreme Court makes the intentional choice to cite a decision, having already determined that the intervening decision is "sufficiently analogous" to the case at bar. *See supra* Part II; *supra* note 61 and accompanying text.

Circuit's reconsidered opinion, ultimately upholding the Sixth Circuit's initial determination.¹⁴³ Nevertheless, although the outcome remained the same between the Sixth Circuit's original ruling and its final decision, the content of the holding changed from a one word opinion that "affirmed" the district court's ruling to a more comprehensive discussion of the inmate's due process claim.¹⁴⁴ Given the lack of change in the outcome, it is conceivable that the *Van Curen* GVR was a ploy to compel the Sixth Circuit to reconstruct the precedential significance of the case by elaborating on the question whether inmates have a protectable interest in parole—the issue presented by the intervening Supreme Court decision.¹⁴⁵

These cases suggest that the Supreme Court's decision to GVR may itself be an important signal that the Court believes that some change—whether in the outcome or the scope of the ruling—is warranted. In this context, the GVR is comparable to the per curiam opinions issued by the Supreme Court following *Brown v. Board of Education*.¹⁴⁶ Both the GVR and the post-*Brown* per curiams are economical, yet can have (and have had) significant impacts on the scope of the intervening decision and *Brown*, respectively. Indeed, several post-*Brown* decisions drew deliberate analogies between the textually narrow holding in *Brown*¹⁴⁷ and other desegregation cases without much elaboration. For example, in *Gayle v. Browder*,¹⁴⁸ the Supreme Court effectively overturned both Alabama and City of Montgomery bus segregation laws in a one sentence decision that affirmed the opinion of the lower court while citing *Brown*.¹⁴⁹ The Court used a similar technique in *Mayor of Baltimore City v. Dawson*, where it affirmed the lower court's judgment that racial segregation at public beaches and bathhouses was unconstitutional, but without an explicit reference to *Brown*.¹⁵⁰ In both of these examples, the Supreme Court used the one sentence per curiam to pithily broaden the scope of *Brown*'s holding.

The GVR—though more economical—may have even broader impact than the typical per curiam. For example, in a companion case to *Dawson*, the Supreme Court GVR'd with directions to the lower court to "enter a de-

¹⁴³ *Jago v. Van Curen*, 454 U.S. 14, 21–22 (1981). For an outline of the procedural history, see *supra* Part II.

¹⁴⁴ Compare *Van Curen v. Jago*, 578 F.2d 1382 (6th Cir. 1978), with *Van Curen v. Jago*, 641 F.2d 411 (6th Cir. 1981).

¹⁴⁵ *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1 (1979).

¹⁴⁶ 347 U.S. 483 (1954); see *infra* notes 149, 151.

¹⁴⁷ Based on the text of the Supreme Court opinion, *Brown*'s holding could be construed as limited to public education. *Id.* at 495 ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place.").

¹⁴⁸ 352 U.S. 903 (1956).

¹⁴⁹ The per curiam opinion simply stated: "The motion to affirm is granted and the judgment is affirmed." *Id.* (citing *Brown*, 347 U.S. 483; *City of Baltimore v. Dawson*, 350 U.S. 877 (1955) (per curiam); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (per curiam)).

¹⁵⁰ *Dawson*, 350 U.S. 877.

cree for petitioners in conformity with [*Dawson*].”¹⁵¹ This order, in contrast with the Court’s approach in *Dawson* and *Browder*, suggests that a simple affirmation may not be enough where the Supreme Court finds the lower court’s holding to be too narrow. In the case, *Holmes v. City of Atlanta*, the City of Atlanta prohibited African-Americans from using whites-only public recreational facilities.¹⁵² Several African-American residents brought suit, requesting both an injunction against the city and a declaratory judgment that the city ordinances were unconstitutional.¹⁵³ Although the district court enjoined the city from denying the residents access to the recreational facilities,¹⁵⁴ which the court of appeals later affirmed,¹⁵⁵ the residents protested that the injunction did not sufficiently remedy their injury, and they reasserted their request for a declaratory judgment.¹⁵⁶ The Supreme Court, by GVR’ing in light of *Dawson* (in which the petitioners requested and the Supreme Court provided both injunctive and declaratory relief), was presumably able to compel the lower court to extend not only the ruling of *Dawson*, but also the remedy.¹⁵⁷

As *Holmes* illustrates, the GVR is more than a mere deferential mechanism; it is also a signal that the Supreme Court may prefer changes to the outcome or the scope of the holding, but, for reasons of its own, avoids making these changes directly. Otherwise, the Supreme Court would simply reverse and not bother remanding at all. Like the post-*Brown* per curiam opinions, the GVR instructs lower courts to consider “relevant” intervening decisions. However, unlike the pattern demonstrated in the per curiam opinions discussed above—or the typical per curiam, for that matter—the Court, by GVR’ing, does not directly change the holding by reversing or affirming the lower court. Instead, the GVR is a more subtle tool. Because GVR’d cases are not explicit judgments, they are less likely to attract public controversy or attention. Ironically, this is why the GVR may be a more powerful tool than the typical per curiam, in which the Supreme Court actually decides the case.

¹⁵¹ *Holmes*, 350 U.S. 879.

¹⁵² *Holmes v. City of Atlanta*, 124 F.Supp. 290, 291 (N.D. Ga. 1954).

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 293–94.

¹⁵⁵ *Holmes v. City of Atlanta*, 223 F.2d 93, 95 (5th Cir. 1955).

¹⁵⁶ *Id.* at 94.

¹⁵⁷ The Supreme Court may also have used the GVR to affect the reach of particular remedies in the GVR’d punitive damages cases following *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), in which the Court determined that the punitive damage award was so “grossly excessive” that it violated the Fourteenth Amendment’s due process guarantee. *Id.* at 417; see, e.g., Chemerinsky & Miltenberg, *supra* note 92, at 314 (stating that the GVRs “broadened the application of [State Farm] . . . by applying the same rules for determining the amount and basis for a punitive damages award to cases involving personal injuries”) (citing Press Release, Am. Ins. Ass’n, U.S. Supreme Court Remands, Instructs Lower Courts to Use New Punitive Damages Standards in Personal Injury Cases (May 20, 2003)).

The use of the GVR as an implicit reversal begs the question of why the Supreme Court would bother to remand these cases at all. One answer may lie in the Court's belief that lower courts are more likely to respect the outcomes of cases that they themselves decide. By purporting to give lower courts greater autonomy and direct involvement in constructing the holdings of GVR'd cases, the GVR gives lower courts a semblance (or, some might say, pretense) of control. The Supreme Court thus has reason to be confident that the GVR will compel the lower court to change its original holding. A study conducted by Arthur Hellman examined all GVR'd cases in the 1975–1979 Supreme Court terms and found that a significant number of them (over fifty cases out of nearly three hundred) merited outright reversal based on intervening precedent.¹⁵⁸ Of the ninety-one cases in which Hellman could trace later proceedings, the lower courts upheld their original determinations in only about fifteen cases, remanded directly to the trial court without further elaboration in a handful, and reversed or substantially modified the holding in the remainder.¹⁵⁹ Of the nearly two hundred unpublished cases, Hellman hypothesized that “nothing was published because the outcome[s] seemed so inevitable” and that they were “generally the ones in which the initial ruling was most clearly vitiated by the new precedent.”¹⁶⁰

To this end, the GVR can be viewed as a training instrument to make state and lower federal courts more accountable, efficient, and “accurate” in deciding points of law—at least, according to the Supreme Court.¹⁶¹ Advocates of this perspective should be concerned, however, about the inefficiencies created by the GVR itself. By vacating the judgment of the lower court, the Supreme Court is not only giving the lower court a fresh chance to decide the case; it also destroys the precedential and preclusive value of the lower court's previous opinion.¹⁶² If the Supreme Court merely wanted to better understand the lower court's judgment, it could have chosen to remand the case without vacating the judgment of the lower court.

The GVR order, therefore, is more than a disinterested suggestion to the lower court.¹⁶³ Although a summary reversal or affirmation might be more efficient in communicating this “suggestion” than a GVR, the Supreme Court's caution reflects some of the lessons that can be derived from

¹⁵⁸ See Hellman, *supra* note 12, at 393.

¹⁵⁹ *Id.* at 394.

¹⁶⁰ *Id.*

¹⁶¹ See *Lawrence v. Chater*, 516 U.S. 163, 168 (1996) (“[T]he GVR order can improve the fairness and accuracy of judicial outcomes . . .”).

¹⁶² This is not completely unique to the GVR; the destruction of the lower court opinion's precedential value would also occur to a large extent with a reversal.

¹⁶³ See Arthur D. Hellman, *The Supreme Court's Second Thoughts: Remands for Reconsideration and Denials of Review in Cases Held for Plenary Decisions*, 11 HASTINGS CONST. L.Q. 5, 39 (1984) (discussing how, in some respects, the GVR appears to look like an error-correction mechanism).

its per curiam experiences.¹⁶⁴ In light of the Court's assertion in *Henry* that intervening decisions are "sufficiently analogous,"¹⁶⁵ as well as the results of Arthur Hellman's study,¹⁶⁶ the Court seems to use the GVR to signal that aspects of the judgment below are in error.¹⁶⁷

2. *Laboratories of Democracy*.—In addition to encouraging different outcomes, the GVR allows the Supreme Court to mitigate uncertainties on specific issues by having lower courts flesh them out. One decision can prompt multiple GVR orders to courts in multiple jurisdictions, thus enabling lower court "experimentation" that results in different holdings. Each new reconsidered opinion by a lower court would then provide the Supreme Court with more information to determine the full scope and precedential significance of the intervening decision under a variety of factual circumstances. Therefore, by citing the intervening decision, the Court not only indicates that the intervening decision is applicable to the case before it, it also suggests that the Court is open to "apply[ing] the intervening decision more broadly [or narrowly] than is immediately discernible."¹⁶⁸

This use of the GVR may be particularly helpful to the Supreme Court on issues that generate considerable public controversy. One contemporary example of this may be seen in the GVR'd cases following *United States v. Booker*, a consolidated case that questioned the constitutionality of the mandatory sentencing structure applied to cocaine violations under the Federal Sentencing Guidelines.¹⁶⁹ Following *Booker*, the Supreme Court GVR'd eighty-five times within twelve days.¹⁷⁰ The volume and rapid-fire

¹⁶⁴ One lesson, for instance, may be that lower courts are more likely to respect the ultimate outcome of the case when they have direct involvement in constructing its holding. Another lesson may be that there would be less public outcry if the Supreme Court relegated controversial cases to local judges.

¹⁶⁵ *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964) (finding it appropriate to "add . . . words of explanation" because on remand the state supreme court found the intervening decision cited in the Supreme Court's GVR order not to be controlling; the Court stated that the GVR order did "indicate that [the Supreme Court] found [the intervening decision to be] sufficiently analogous and, perhaps, decisive to compel re-examination of the case").

¹⁶⁶ Hellman, *supra* note 12, at 393–94.

¹⁶⁷ Hellman, *supra* note 163, at 39; *see* *Trs. of Keene State Coll. v. Sweeney*, 439 U.S. 24, 25–29 (1978) (Stevens, J., dissenting) ("[T]here is no legitimate basis for concluding that the Court of Appeals erred in this case.").

¹⁶⁸ Armbruster, *supra* note 44, at 1416.

¹⁶⁹ 543 U.S. 220 (2005). *Booker* was actually a consolidation of two cases. In the first case, the trial judge increased the defendant's mandatory sentence by over eight years because he found that the defendant had possessed more drugs than the jury had convicted him of possessing. *Id.* at 227. In the second case, the trial judge made findings that would have added an additional 110 to 157 months to the defendant's sentence under the Guidelines' enhancement provisions, but declined to apply them. *Id.* at 228–29. Upon review, the Supreme Court held that the mandatory Sentencing Guidelines violated the Sixth Amendment because they required a judge to enhance sentences based on "facts or circumstances not found by a jury or admitted in a plea agreement." *Id.* at 229–44, 257–58 (quoting Brief for Sen. Orrin G. Hatch et al. as Amici Curiae in Support of Petitioner at 22, *Booker*, 543 U.S. 220 (Nos. 04-104 & 04-105)).

¹⁷⁰ The Court ultimately issued 142 GVRs over the following eleven months.

speed of the Supreme Court's use of the GVR suggest that the Supreme Court had been "holding" many of these cases prior to deciding *Booker*.¹⁷¹ The advantages of holding here are obvious; in holding, the Supreme Court has the ability to sift through related cases on the Court's certiorari docket—an ability that inures to the benefit of the Court. Having the opportunity to examine cases on the certiorari docket without the pressure of having to address the first one that concerns a particular issue, the Court can select and decide a case whose facts are conducive to the outcome it desires and GVR the remaining "held" cases. In this context, the GVRs suggest that the Supreme Court has indicated a particular result by citing the intervening decision (here, *Booker*), but has decided to leave it to the various lower courts to interpret the meaning of the intervening decision with respect to the individual facts of each GVR'd case.

Just as the GVR allows for greater refinement of the law in different jurisdictions, it may be a soothsayer of change. Evidence of this prescience can be found in *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*,¹⁷² where the Supreme Court GVR'd "for further consideration in light of *Romer v. Evans*."¹⁷³ Both *Romer*¹⁷⁴ and *Equality Foundation* involved statutory provisions that were passed in referenda and prohibited governmental entities from providing special protection against discrimination for homosexuals. The statutory provisions at issue in *Romer* and *Equality Foundation*, however, applied on different geographic scales. In *Romer*, the Supreme Court ruled on an amendment to a state constitution;¹⁷⁵ in *Equality Foundation*, the case before the Supreme Court involved an amendment to a city charter.¹⁷⁶ The Court's reconsideration order in *Equality Foundation* thus presented the question whether the *Romer* holding could be extended to municipalities as well.

On remand in the Sixth Circuit, the *Equality Foundation* court upheld the charter amendment under the same rational basis test used to strike down the constitutional amendment in *Romer*.¹⁷⁷ In denying the second pe-

¹⁷¹ "Holding" refers to a strategy wherein the Supreme Court "fails" to take action on certain cases until it has given plenary consideration to another case involving similar issues. See Hellman, *supra* note 163, at 21 (discussing the precedential significance of cases "obviously held pending the announcement of a plenary decision"). Upon ruling on the case, the Court may consider whether to take summary action or to remand the "held" cases.

¹⁷² 518 U.S. 1001 (1996).

¹⁷³ Armbruster, *supra* note 44, at 1417 (citing *Equality Found. of Greater Cincinnati*, 518 U.S. 1001).

¹⁷⁴ *Romer v. Evans*, 517 U.S. 620 (1996).

¹⁷⁵ *Id.* at 623.

¹⁷⁶ *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261, 263 (6th Cir. 1995).

¹⁷⁷ *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 300 (6th Cir. 1997). Whereas the Supreme Court in *Romer* found that the Colorado constitutional amendment was not rationally related to a valid state interest, the court of appeals in *Equality Foundation* found that the charter amendment was rationally related to the city's legitimate interest in conserving the "substantial

tion for certiorari, Justice Stevens, joined by Justices Souter and Ginsburg, wrote a separate opinion, stating:

As I have pointed out on more than one occasion, the denial of a petition for a writ of certiorari is not a ruling on the merits. Sometimes such an order reflects nothing more than a conclusion that a particular case may not constitute an appropriate forum in which to decide a significant issue.¹⁷⁸

Such opinions are highly unusual, if only because members of the Court rarely justify their decision to deny certiorari.¹⁷⁹ By writing the opinion, Justice Stevens indicated that the “significant issue” presented by the case merited further examination. The issue would not be properly addressed in the case, however, because of other factors—e.g., less than four justices wanted to grant certiorari (here, only three signed onto the opinion),¹⁸⁰ or the facts of the case were not best suited for the outcome or for the type of holding the justices wanted, considering the composition of the court or the disposition of other issues in the case. By including the opinion, Justice Stevens implicitly was inviting future litigants with similar issues to petition the Court. This window into the exercise of a related discretionary Court practice—the granting of certiorari—reveals that while the GVR allows the Supreme Court to explore (indirectly) the impact of an intervening event, whether the Court believes a GVR is appropriate is ultimately constrained by the particulars of the case before it.

Dissents to GVR orders, while also rare, may shed additional light on areas that merit further inquiry.¹⁸¹ One such dissent appeared in *Equality Foundation*, where Justice Scalia distinguished between state constitutional amendments and local ordinances, which represent the democratic desires of “the lowest electoral subunit.”¹⁸² Following the GVR, the Sixth Circuit

public costs that accrue from the investigation and adjudication of sexual orientation discrimination complaints.” *Id.* The court distinguished these costs from the costs that were imposed on the state government in *Romer* by noting that here, the City of Cincinnati would have to shoulder the entire burden of the public costs because of the lack of “coextensive protection . . . under federal or state law.” *Id.*

¹⁷⁸ *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 525 U.S. 943, 943 (1998) (Stevens, J., dissenting) (footnote omitted).

¹⁷⁹ For instance, in both the 2005 and 2006 terms, only five of the thousands of cases receiving a denial of certiorari in each term included opinions. *See* Supreme Court—Opinions, <http://www.supremecourt.gov/opinions/opinions.html> (last visited Sept. 28, 2007).

¹⁸⁰ The Supreme Court follows the “rule of four,” which is an unwritten discretionary practice in which at least four justices must agree to hear a case before granting a writ of certiorari. *See* Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1647 (2000). *See generally* David M. O’Brien, *Join-3 Votes, the Rule of Four, the Cert. Pool, and the Supreme Court’s Shrinking Plenary Docket*, 13 J.L. & POL. 779 (1997); John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1 (1983).

¹⁸¹ Armbruster, *supra* note 44, at 1417. For example, in *Equality Foundation*, Justice Scalia presented new potential questions for future litigation, thus indicating that the Court’s GVR has not settled the scope of the intervening case (here, *Romer*). *See id.* (citing *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 518 U.S. 1001 (1996) (Scalia, J., dissenting)).

¹⁸² *Equality Found.*, 518 U.S. at 1001–02 (1996) (Scalia, J., dissenting).

picked up and elaborated upon this distinction while reaffirming its original holding. Arguing that “*Romer* should not be construed to forbid local electorates the authority . . . to instruct their elected [municipal representatives] to withhold special rights, privileges, and protections from homosexuals,” the court found that “[s]uch a reading would disenfranchise the voters of their most fundamental right . . . to vote to override or preempt any policy . . . contemplated by their subordinate civil servants to bestow special rights [or] protections . . . upon a group of people who [are not]. . . constitutionally entitled to any special favorable legal status.”¹⁸³ By indicating that the scope of the intervening decision has not been fully determined, such dissents can feed potential lines of inquiry to lower courts receiving the reconsideration order.

3. *Avoidance*.—Finally, because of the ambiguity surrounding the GVR, the GVR allows the Supreme Court to defer or avoid making a decision. For example, the GVR can be a discretionary instrument by which the Court can narrow judicial review to avoid complicated separation of powers questions. Indeed, while most of this discussion has revolved around intervening judicial decisions and legislative statutes, a more recent branch of the “intervening event” jurisprudence considers intervening decisions by administrative agencies¹⁸⁴ and changes in the Solicitor General’s position.¹⁸⁵ By deferring to agency interpretations of administrative regulations and statutes and to the Solicitor General in substantiating the government’s position on legal issues, the Supreme Court avoids conflicts with both congressional intent (in delegating power to administrative agencies) and executive power (in cases involving the Solicitor General), respectively.¹⁸⁶

This deference to coordinate branches of government is evident in *Lawrence v. Chater*, where the Supreme Court GVR’d in light of a new statutory interpretation of the Social Security Act by the Commissioner of Social Security.¹⁸⁷ In *Chater*, a minor asserted a right to Social Security benefits under a provision of the Social Security Act¹⁸⁸ that bestows survivors’ benefits upon unmarried dependent minor children of a deceased individual.¹⁸⁹ The Social Security Administration’s Appeals Council denied

¹⁸³ Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 298 (6th Cir. 1997).

¹⁸⁴ See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (requiring courts to defer in favor of an agency’s reasonable interpretation when the statute is ambiguous).

¹⁸⁵ E.g., *Schmidt v. Espy*, 513 U.S. 801 (1994) (GVR’ing following a change in the Solicitor General’s position, which was later acknowledged in *Lawrence v. Chater*, 516 U.S. 163, 167 (1996), to be due to an administrative reinterpretation of a federal statute); *Wells v. United States*, 511 U.S. 1050 (1994) (GVR’ing following what the Court later acknowledged was a confession of error by the Solicitor General in *Chater*).

¹⁸⁶ See *supra* Part III.A.

¹⁸⁷ 516 U.S. 163, 165 (1996) (per curiam).

¹⁸⁸ 42 U.S.C. § 402(d)(1)(C) (2000).

¹⁸⁹ *Chater*, 516 U.S. at 163 (1996).

benefits to the minor pursuant to its finding that the minor was not a “child” of the deceased under the Social Security Act.¹⁹⁰ The Fourth Circuit affirmed the Social Security Administration’s determination on appeal.¹⁹¹ During certiorari review at the Supreme Court, the Commissioner (Chater) and the Social Security Administration reversed their former position and reinterpreted the Act in favor of the petitioner.¹⁹² Even though the dissent raised strong objections to the timing of the reinterpretation,¹⁹³ the majority’s decision to GVR demonstrates the Court’s aversion to infringing even remotely on the authority of coordinate branches and its inclination to err on the side of caution.¹⁹⁴

Alternatively, the GVR can shield the Supreme Court when it wants to avoid adjudicating politically sensitive issues or when it disagrees with a lower court decision but is uncomfortable issuing a contrary ruling. By remanding, the Supreme Court allows the lower court to resolve the legal issues presented, and creating a result that would otherwise be binding across a broader geographic scale. Because holdings of lower courts are territorially limited, other jurisdictions would be free to decide the same legal issues differently in subsequent cases. Nevertheless, concrete support for the existence of these tactics is difficult to establish without an explicit admission by the Supreme Court of its intentions.

¹⁹⁰ In order to determine whether the minor was a “child” of the deceased, the Social Security Act allowed the Commissioner of Social Security to “apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which [the] insured individual . . . was domiciled at the time of his death.” *Id.* at 164 (citing 42 U.S.C. § 416(h)(2)(A) (1988)). Knowing that she would not be able to satisfy the state’s intestacy laws, which required certain proofs of paternity, the minor asserted a claim against the Social Security Administration, claiming that the state’s proof-of-paternity requirements were unconstitutional. *Id.* at 165.

¹⁹¹ *Id.* (discussing *Lawrence ex rel. Lawrence v. Shalala*, 47 F.3d 1165 (4th Cir. 1995) (unpublished table decision)).

¹⁹² *Id.*

¹⁹³ *Id.* at 186–87 (Scalia, J., dissenting) (“Respondent is an agency head, whose view on the legal point in question is in some circumstances entitled to deference But even if we allow deference to an agency view first expressed in pending litigation . . . , surely a decent concern for those litigating against the Government and for our lower court judges should induce us to disregard, for *Chevron* purposes, a litigating position *first expressed at the certiorari stage.*” (citations omitted)); *id.* at 185 (Scalia, J., dissenting) (“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* [a different standard] 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 . . . 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. This seems to me beyond all reason.”).

¹⁹⁴ *See id.* at 164–75 (majority opinion). Other prudential considerations not addressed here concern situations in which the Supreme Court may GVR with instructions to dismiss where it has found the case nonjusticiable for reasons of ripeness, mootness, or lack of standing; *cf.* Christian Stegmaier, *Trouble In The Forest: Citing Lack Of Ripeness, The United States Supreme Court Vacates Sixth Circuit Decision In Ohio Forestry Ass’n v. Sierra Club*, 7 S.C. ENVTL. L.J. 277, 277 (1998).

Despite this Comment's protests, it is not inconceivable that the Supreme Court would continue to expand the equitable doctrine of GVR jurisprudence by adopting a non-intervening event category to supplement the "intervening event" doctrine. The *Youngblood* Court, however, declined to provide a coherent reason for doing so. Instead, we are left with the evisceration of the "intervening event" doctrine in favor of an "any-time-the-Supreme-Court-would-like-the-lower-court-to-reconsider" doctrine, which is essentially an empty standard.

Moreover, while some may support the use of the GVR as a purely equitable tool, rather than as one whose use is limited to situations dictated by prudential considerations, this use raises other concerns—notably, those of consistency and judicial economy. If the Supreme Court fails to GVR consistently across similar cases, the Court not only creates inconsistent results, but also subjects similarly situated petitioners to unequal treatment. For example, if two similar cases receive different treatment—that is, one receives a GVR order (despite the absence of an intervening event) and the other is summarily dismissed or denied certiorari, then the Court creates potential procedural due process concerns.

Trying to maintain consistency in the face of a purely equitable GVR doctrine would also be a drain on Supreme Court resources. Justice Scalia expounded on this problem in his *Chater* dissent, where he stated:

I do not see how it can promote equal treatment to announce a practice that we cannot possibly pursue in every case. If we were to plumb the "equities" and ponder the "errors" for all the petitions that come before us . . . [,] we would have no time left for the cases we grant to consider on the merits.¹⁹⁵

In order to avoid these potential problems, the Court's discretionary GVR authority needs some limits.

IV. WHAT THE SUPREME COURT SHOULD DO

The Supreme Court's current use of the GVR allows it both to disguise its intentions and to benefit from the lack of clear limits on and reasoning for its GVR authority. The variety of motives that the Supreme Court may have for GVR'ing contributes to the confusion that lower courts experience when they receive reconsideration orders.¹⁹⁶ Nevertheless, the standard that the Supreme Court had adopted prior to *Youngblood* is telling of the Court's expectations. By GVR'ing only where "intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation,"¹⁹⁷ the Supreme Court essentially is stat-

¹⁹⁵ *Chater*, 516 U.S. at 191 (Scalia, J., dissenting).

¹⁹⁶ See *supra* Parts II & III.C.

¹⁹⁷ *Chater*, 516 U.S. at 167–68.

ing that it expects the lower court to change an element of the outcome, whether it is the ruling itself or the reasoning underlying it. When a lower court fails to make the expected changes, the Supreme Court may be apt to scrutinize the reconsidered opinion more closely, as it did in *Henry*.¹⁹⁸

Therefore, while the GVR practice is a nominally deferential practice, it also provides a powerful disguise for the Supreme Court's motives in situations when the Court desires to affect the outcome of a case, to change the scope of a prior holding, or to avoid making a decision.¹⁹⁹ With such varied possible motives, the need to reign in the Supreme Court's GVR authority is all the more compelling. Although the form language of a GVR order makes it difficult to discern the reason behind it (and thus whether the Supreme Court might be abusing its GVR authority), it is clear that the Supreme Court has overstepped certain prudential bounds in *Youngblood*.²⁰⁰ This further solidifies the need for greater clarity in and a more disciplined use of the GVR.

The current literature on the GVR power broadly addresses concerns about the increased use of the GVR and the confusion about them among lower courts, rather than suggesting meaningful and refined jurisprudential guidelines for the GVR power.²⁰¹ Recommendations have ranged from prohibiting the GVR altogether,²⁰² to clarifying the meaning of the GVR for lower courts,²⁰³ to calling for more self-discipline from the Supreme Court.²⁰⁴ Some recommendations have focused on defining the equitable boundaries of the GVR in order to minimize the extent to which litigants can manipulate it to achieve desired outcomes.²⁰⁵ None of these recommendations, however, considers the full diversity of circumstances in which the GVR is used; rather, they treat the GVR as a relatively homogenous practice.

¹⁹⁸ *Henry v. City of Rock Hill*, 376 U.S. 776 (1964). For a discussion of the case, see *supra* Part II.

¹⁹⁹ See *supra* Part III.C.

²⁰⁰ See *supra* Part III.B.2.

²⁰¹ See generally Armbruster, *supra* note 44; Berch, *supra* note 130; Chemerinsky & Miltenberg, *supra* note 92; Hellman, *supra* note 163; Hellman, *supra* note 12; Martin, *supra* note 10.

²⁰² Martin, *supra* note 10, at 586–88.

²⁰³ One such recommendation calls for the Supreme Court to clarify which cases “merely warrant reconsideration” as opposed to reversal by remanding only in the former case and reversing in the latter. Hellman, *supra* note 163, at 34.

²⁰⁴ Hellman, *supra* note 12, at 399. Such discipline might be achieved by connecting the GVR to the normal system of granting certiorari. Hellman, *supra* note 163, at 37–38. In other words, the Supreme Court should refrain from granting certiorari and deny any kind of review where the case does not satisfy Rule 10.

²⁰⁵ See Martin, *supra* note 10, at 552. For example, one of these desired outcomes may be to prolong litigation in order to benefit from anticipated legal or factual developments or to create litigative burdens on the opposing side. *Id.* at 571–72. In these situations, the literature recommends creating objective standards with respect to whether litigants should disclose knowledge of potential intervening events to the Supreme Court, *id.* at 595–97, and denying GVR relief on a case-by-case basis when there is evidence of manipulation, *id.* at 592.

Youngblood forces us to take a more discriminating look at the Court's discretionary GVR authority and question its bounds. It reveals that we cannot rely on the Supreme Court to simply limit its own GVR authority under the current, ambiguous discretionary standards. Indeed, despite Justice Scalia's explicit challenge to the majority in *Youngblood* to limit the GVR authority or explain the Court's expansion of it, the majority provides no such explanation.

Therefore, although *Youngblood* might be construed to be broadly consistent with an equitable doctrine,²⁰⁶ it oversteps the prudential boundaries carefully and deliberately placed by the Supreme Court over decades of GVR practice. By decimating the postjudgment "intervening event" requirement of GVR jurisprudence, the Supreme Court has created significant conflicts with principles of federalism, the separation of powers doctrine, and the Court's proper appellate jurisdiction.

Consequently, the GVR should only be used to avoid problems associated with: (1) federalism issues created by intervening state statutes and state supreme court decisions, (2) separation of powers issues created by the intervening interpretations of certain administrative agencies or the Solicitor General's change of position, and (3) jurisdictional issues in cases arising from federal courts involving intervening changes to the federal law or the factual circumstances of the case. Each of these categories is addressed in turn below. In suggesting that the Court limit the GVR to these cases—all of which involve intervening events—this Comment does not propose that the Court strictly adhere to Rule 10 and only GVR when a case can be granted certiorari in its own right.²⁰⁷ To do so would be unfair to petitioners who can benefit from changes warranted by an intervening event. Nevertheless, greater clarity in the scope and nature of the Supreme Court's GVR power is necessary. The appropriate scope of the GVR authority should be drawn from existing prudential constraints in conjunction with equitable considerations. Justifying the GVR on equitable considerations alone, exemplified by *Youngblood*, would lead to greater confusion by lower courts, create greater inefficiencies in the judicial system,²⁰⁸ and weaken the integrity of federalism, separation of powers, and appellate jurisdiction principles.

As discussed above, intervening state law—whether it consists of a decision by the state supreme court or an act of the state legislature—touches upon valid federalism concerns where there is a reasonable probability that

²⁰⁶ Arguably, the Supreme Court's desire for more information in order to make the best decision may fit within the boundaries of an equitable doctrine.

²⁰⁷ Justice Stevens may suggest just that, however. See John Paul Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177, 182 (1982) (proposing a new court that would screen all applications for Supreme Court review and deny all but "the very few" that clearly warrant the Court's attention).

²⁰⁸ These inefficiencies include an expanding Supreme Court certiorari docket and a greater workload for lower courts. See *supra* notes 68–71.

the lower court would have ruled differently if given the opportunity to reconsider the case under the new law.²⁰⁹ Therefore, intervening state events clearly should receive GVR deference; indeed, this was the original justification for the GVR power. However, federalism concerns are only sufficient to compel a GVR in cases from state courts and do not apply to other categories of cases, such as those from federal courts or dealing with administrative reinterpretations.

Other considerations also compel deference. One such consideration is the separation of powers doctrine, discussed in Part III.B.2, which calls for the Supreme Court to accord special deference in cases involving intervening administrative reinterpretations of federal statutes or changes in the Solicitor General's legal position. Although the Supreme Court generally has the last word on points of federal law, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* sets forth the Supreme Court's intention to defer to an eligible agency's reasonable construction of a statutory scheme where the statute is ambiguous.²¹⁰ In a recent decision, the Supreme Court buttressed its decision to support statutory interpretations of *Chevron*-eligible administrative agencies even where the interpretations might conflict with Supreme Court precedent.²¹¹ Along the same lines, confessions of error by the Solicitor General compel special deference under the separation of powers doctrine. While such deference might contribute to manipulation concerns,²¹² these concerns are unlikely to have a significant effect on GVR practice given both the general reluctance of the government to admit error and the relatively small number of certiorari petitions that expressly request or potentially merit a GVR order.²¹³

Finally, consideration for the integrity of the Supreme Court's appellate jurisdiction should also justify a GVR order. Although there is no constitutional conflict in the Court's exercise of its GVR authority, some cases are, arguably, more "properly" within the Court's appellate capacity than others.²¹⁴ Article III, Section 2 of the Constitution limits the Supreme Court's appellate jurisdiction to issues of "both Law and fact, with such ex-

²⁰⁹ See *supra* Part III.B.2.

²¹⁰ 467 U.S. 837, 844 (1984) (requiring courts to defer in favor of an agency's reasonable interpretation where the statute is ambiguous).

²¹¹ *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83 (2005). See generally Kathryn Watts, *Adapting to Administrative Law's Erie Doctrine*, 101 NW. U. L. REV. 998 (2007). However, certain exceptions apply. For instance, if an agency rule is arbitrary and capricious, the Supreme Court can overrule the agency's interpretation outright. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983); 5 U.S.C.A. § 706 (2006 West) (codifying scope of review).

²¹² See *supra* note 89 and accompanying text.

²¹³ Martin, *supra* note 10, at 568–69.

²¹⁴ *Thomas v. Am. Home Prods., Inc.*, 519 U.S. 913, 915 (1996) (Scalia, J., concurring); see *supra* Part III.B.2.

ceptions, and under such regulations as the Congress shall make.”²¹⁵ Therefore, a case in which intervening federal law or factual circumstances would significantly impact the judgment of the case (e.g., by creating a reasonable expectation that the lower court would change its ruling) would prompt a GVR order. In the absence of relevant intervening law or facts, the Supreme Court has no reason to GVR because the case is essentially the same as that which was heard in the lower court. In contrast, GVR’ing in the absence of a significant intervening factor—or any intervening factor at all—appears inconsistent with the nature of the Court’s appellate jurisdiction.²¹⁶

These rules limiting the Court’s GVR authority would clarify that the GVR jurisprudence is driven by prudential principles and not only by the broad and unconstrained equitable principles that would underlie a *Youngblood* GVR doctrine. These rules would also restrict the Supreme Court’s ability to coerce or intimidate lower courts into altering their judgments when there is no relevant intervening factor. Finally, these rules would ensure that the Supreme Court bases its GVR decisions on real and enduring legal principles and not on arbitrary or inconsistent desires.

CONCLUSION

The Supreme Court has claimed that its discretionary GVR authority arises under the broad grant of 28 U.S.C. § 2106,²¹⁷ and as such, the Court has found no textual basis for limiting its GVR power in cases properly before the Court in its appellate capacity. Even so, *Youngblood* represents a novel step in GVR jurisprudence, upsetting the traditional notion that a postjudgment intervening event is required for the Supreme Court to GVR. Given *Youngblood* and the Court’s historical GVR practice, the question arises as to whether there are any limits on the Supreme Court’s authority. This Comment finds that the answer should be yes.

Youngblood’s changes to the GVR authority present potential insights into the existing jurisprudence and provide a new opportunity to question its scope. Although the origins of the GVR derive from federalism-related principles, the GVR has evolved into an equitable practice that appears to be more strictly concerned with the impact of intervening events. Conse-

²¹⁵ U.S. CONST. art. III, § 2.

²¹⁶ See *Cohens v. Virginia*, 19 U.S. 264, 404 (1821) (“We have no more right to decline the exercise of a jurisdiction which is given, then to usurp that which is not given. The one or the other would be treason to the [C]onstitution.”). In addition to being inconsistent with the Court’s appellate jurisdiction, GVR’ing in the absence of a relevant intervening change is inconsistent with the notion that courts are adjudicative institutions. Rather than allowing a case to stay “alive” when there is no legal reason for the court to reconsider it, courts should respect the decisions made by other courts. However, an exception may be warranted if there is clear error.

²¹⁷ Section 2106 allows the Supreme Court to “affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and [to] remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.” 28 U.S.C § 2106 (2000).

quently, lower courts have demonstrated considerable confusion over the scope of the equitable GVR doctrine and the meaning of the GVR. This confusion has been heightened by the Supreme Court's inconsistent behavior. Despite these mixed signals, the Supreme Court has expressed that the GVR is both a deferential mechanism that allows lower courts to take the first crack at determining the relevance of new law and a means for conserving judicial resources. The nature of the GVR, however, also allows the Court to exercise its authority in imprudent ways, such as to change or alter the holding of the case, to broaden or narrow the significance of the intervening factor, to benefit from lower court experimentation, or to otherwise avoid sensitive constitutional or political issues.

Given the ease with which the GVR allows the Court to overextend its appellate jurisdiction, this Comment asserts that the Supreme Court's GVR authority is grounded in more than a purely equitable doctrine that compels the Court to give lower courts a deferential "first look" at cases affected by postjudgment intervening factors. Rather, the GVR authority is pieced together by the Court's goal of preserving the integrity of three separate principles: federalism (applied to cases arising out of state courts involving intervening state law), separation of powers (applied to cases involving new interpretations by administrative agencies or the Solicitor General), and the Court's appellate jurisdiction (applied to cases arising from lower federal courts involving intervening federal law or facts). These principles are in keeping with the expressed deferential and conservational purposes for GVR'ing.

The absence of an intervening event in *Youngblood* is in tension with these principles. *Youngblood* does not merely unsettle the intervening event requirement, it creates a slippery slope towards a limitless equitable doctrine. It demands nothing of the Supreme Court's discretion; the Supreme Court GVR's merely to "benefit" from more discussion by the lower court.

Consequently, *Youngblood* is a misstep in the GVR jurisprudence. Although it can broadly be construed as following in the deferential equitable footsteps of the Supreme Court's current GVR doctrine (because it "allows" the lower court to reexamine a case rather than reversing it altogether), *Youngblood* steps beyond the prudential limits constructed by decades of GVR jurisprudence. In the end, the Supreme Court should adhere to the limits of a postjudgment intervening event requirement and GVR only where it is necessary to preserve the integrity of lower court decisions under federalism concerns, separation of powers principles, and other considerations derived from the Court's appellate jurisdiction.