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Deciding Not to Decide: The Supreme Court's Expanding Use of the GVR Power Continued in Thomas v. American Home Products, Inc. and Department of the Interior v. South Dakota

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NOTES


In the October 1996 Term, the United States Supreme Court disposed of sixty-one petitions for certiorari by stating that "[t]he petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded . . . for further consideration in light of [the following legal development]." The legal development referred to by the Court is usually an intervening Supreme Court decision, but can include a variety of events such as a state supreme court decision, a new statute or agency interpretation, or a change in position or confession of error by the Solicitor General. This procedure of granting certiorari, vacating the lower court decision,

1. Search of WESTLAW, SCT Database (Oct. 16, 1997) (search for cases containing "granted" within five words of "vacated" within five words of "remanded," with date restriction in "DA" field for before October 1, 1997, and after October 1, 1996).


and remanding for reconsideration is what the Court refers to as a "GVR." The GVR is not a well-understood procedure, and commentators have noted that the mechanics and use of it are a mystery to most attorneys. This confusion seems surprising, however, as GVRs have been issued regularly since use of the procedure rose dramatically in the 1960s.

The overall number of cases presented to the Court for review each year has been steadily rising. Although various procedures have been proposed to diminish this growing burden, no major

7. See, e.g., Stutson, 116 S. Ct. at 602 (using abbreviated term to describe the act of granting certiorari, vacating the judgment, and remanding for further consideration); Hellman, supra note 2, at 5 n.2. Stutson is the first Supreme Court case that actually used the abbreviation “GVR” to describe the practice. Search of WESTLAW, SCT Database (Oct. 17, 1997) (search for cases containing “GVR”). Justice Scalia converted the term into a verb—“GVR’d”—in his dissent in Department of the Interior. 117 S. Ct. at 287 (Scalia, J., dissenting). This usage has not gone unnoticed. See Robert Laurence, Straight Talk: To-the-Point Observations About Eight Recent Cases on the Occasion of the Fiftieth Anniversary of the Arkansas Law Review, 50 ARK. L. REV. 29, 58 (1997) (noting that Justice Scalia “used the creative form ‘GVR’d’ for the past tense of the verb ‘to GVR’ ”).

A GVR is sometimes referred to by commentators as a “summary reconsideration order.” See STERN ET AL., supra note 2, § 5.12(b), at 249; Hellman, supra note 2, at 6. The term “GVR,” rather than “summary reconsideration order,” is used throughout this Note.

8. See Hellman, supra note 2, at 5-6 (“[The GVR] remains a mystery to most of the legal profession.”); see also Laurence, supra note 7, at 57 (“[T]he so-called ‘GVR’—‘grant, vacate and remand’—Supreme Court procedure . . . is esoteric beyond the ken of all but the best Supreme Court proceduralists, among whom I do not count myself.”); Theodore B. Olson & John K. Bush, Two Recent High Court Cases List GVR Criteria: Court Clarifies when Recent Developments Justify Orders that Grant, Vacate, and Remand, NAT'L L.J., July 29, 1996, at B10, B10 (noting that the standard for granting GVRs has remained “something of a mystery”).

9. See Hellman, supra note 2, at 7 n.11 (“Summary reconsideration orders were extremely rare under Chief Justice Vinson (1946-1953) and in the first nine Terms under Chief Justice Warren; no more than a dozen can be found in any one Term. The 1962 Term marked a turning point: there were more than 60 such dispositions.”). Between 1972 and 1982, Professor Hellman notes that the number of GVRs did not drop below 40 in any year, and often exceeded 80. See id.

10. The first issue of each volume of the Harvard Law Review tracks the number of cases of which the Court disposed. For example, in 1987 this number was 4401, and by 1993 it was 6676, a 51.7% increase. See The Supreme Court, 1987 Term, 102 HARV. L. REV. 143, 354 (1988); The Supreme Court, 1993 Term, 108 HARV. L. REV. 139, 376 (1994). While the increase can mostly be attributed to an increase in cases filed in forma pauperis, the overall workload is still rising. See id. But see William J. Brennan, Jr., The National Court of Appeals: Another Dissent, 40 U. CHI. L. REV. 473, 479 (1973) (“I can state categorically that I spent no more time screening the 3,643 cases of the 1971 Term than I did screening half as many in my first term in 1956.”). It is interesting to note that these numbers are in stark contrast to the paltry 87 cases the Court handled between 1790 and 1801 and to the 240 cases decided between 1862 and 1866. See STEPHEN L. WASBY, THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM 146 (2d ed. 1984).

11. See, e.g., SUSAN LOW BLOCH & THOMAS G. KRATENMAKER, SUPREME COURT
changes have occurred in how cases get to the Supreme Court since 1988, when most direct appeals were eliminated. In addition, Supreme Court opinions that address the merits of a case are becoming less frequent, now being handed down at a rate of between seventy to eighty per Term, as opposed to an average of 147 between 1971 and 1988. This increased burden and reduced output suggests that the Court should benefit from methods of disposing of petitions that may merit some action without granting plenary review. Three such methods are to summarily reverse, summarily affirm, or GVR. A GVR, however, differs from the other two methods. While a decision to reverse or affirm a judgment generally marks the end of the controversy, a GVR by nature will always require further proceedings because a lower tribunal will need to reexamine the case in a new light. Therefore, the Supreme Court issues a GVR when it "decides not to decide."

Over the past few years, there have been a number of cases in which the Court has debated when a GVR is appropriate. This


15. See PERRY, supra note 12, at 100.

16. See STERN ET AL., supra note 2, § 5.12(a)-(c), at 247-51. In general, summary reversals are "rare and exceptional." Id. § 5.12(c), at 251. State court decisions can also be subject to summary reversal, but a number of Justices have disapproved of this practice. See id. at 253.


18. In contrast, the question of which cases should have certiorari granted may be called "deciding to decide." See PERRY, supra note 12, at 6 (explaining that before the Court can make a decision, it must decide to review a case).

debate continues in two recent GVR orders issued on the same day. In *Thomas v. American Home Products, Inc.* and *Department of the Interior v. South Dakota,* the Court shed some additional light on the nature and use of the GVR. In *Thomas,* the Court decided to GVR in light of an intervening state supreme court decision that conflicted with the Eleventh Circuit's prior determination of the same issue. In *Department of the Interior,* the Court GVR'd for reconsideration in light of a new statutory interpretation by the Secretary of Interior that caused the Solicitor General to alter the legal position argued in the lower courts.

This Note first discusses the facts and procedural history of *Thomas* and *Department of the Interior.* The Note also considers the concurring and dissenting opinions of the Supreme Court that accompanied both *Thomas* and *Department of the Interior.* Next, the Note outlines the development of the GVR doctrine and then analyzes how *Thomas* and *Department of the Interior* fit within this framework. Finally, the Note offers recommendations based on these developments to practitioners preparing certiorari petitions that may be candidates for GVR treatment.

*Thomas v. American Home Products, Inc.* addressed the appropriateness of a GVR in light of an intervening state supreme court decision. The underlying controversy in *Thomas* was a diversity action regarding personal injury and products liability issues that originated in the Northern District of Georgia. On appeal, the Eleventh Circuit

L.J., Jan. 22, 1996, at A14, A14 (noting a difference in opinion among the Justices over the limits of the power to GVR).

22. See *Thomas,* 117 S. Ct. at 282 (Scalia, J., concurring).
23. See *Department of the Interior,* 117 S. Ct. at 286-87.
24. See infra notes 31-41 and accompanying text.
25. See infra notes 62-75 and accompanying text.
26. See infra notes 42-61 and accompanying text.
27. See infra notes 76-85 and accompanying text.
28. See infra notes 86-200 and accompanying text.
29. See infra notes 201-59 and accompanying text.
30. See infra notes 260-72 and accompanying text.
31. See *Thomas,* 117 S. Ct. at 284 (Rehnquist, C.J., dissenting).
32. See id. (Rehnquist, C.J., dissenting). The plaintiff "was blinded when the contents of a floor drain violently exploded onto his head and face as he was attempting to place a drain cleaner into it." Petition for Writ of Certiorari at 3, *Thomas* (No. 95-1826).
affirmed without issuing an opinion. However, the Georgia Supreme Court thereafter decided *Banks v. I.C.I. Americas, Inc.* (*Banks I*), in which it overruled the case upon which the district court had based its reasoning. Plaintiff's request for a rehearing was denied by the Eleventh Circuit on the grounds that the Georgia Supreme Court decision could not be applied retroactively. Thereafter, the Georgia Supreme Court handed down a follow-up case to *Banks I* which held that *Banks I* should be applied retroactively, making it clear that the Eleventh Circuit had incorrectly predicted the view of the Georgia Supreme Court.

The United States Supreme Court granted certiorari, vacated the judgment, and remanded the case to the Eleventh Circuit "for further consideration in light of" the recent Georgia decision regarding the retroactivity of *Banks I*. The seven-line order of the Court prompted a concurring opinion by Justice Scalia and a dissenting opinion by Chief Justice Rehnquist, who was joined by Justice Breyer.

Justice Scalia’s concurrence began by noting his prior criticism of the Court's “excessive use” of the GVR. Because of this stance, he

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34. See *Thomas*, 39 F.3d at 325.
35. 450 S.E.2d 671 (Ga. 1994) (*Banks I*).
36. See id. at 675; *Thomas*, 117 S. Ct. at 282-83 (Scalia, J., concurring) (discussing the effect of *Banks I*).
37. See *Thomas v. American Home Prods.*, Inc., No. 93-9214 (11th Cir. filed Feb. 9, 1996) (per curiam), available in Petition for Writ of Certiorari app. at 28a, *Thomas* (No. 95-1826); see also *Thomas*, 117 S. Ct. at 283 (Scalia, J., concurring) (discussing the Eleventh Circuit's decision). Prior to this denial of rehearing, the Eleventh Circuit had once already denied rehearing, see *Thomas v. American Home Prods.*, Inc., 58 F.3d 642 (11th Cir.) (decided June 5, 1995) (unpublished table decision), but this denial was recalled in order for the parties "to file briefs ... commenting on the effect of *Banks I*." *Thomas v. American Home Prods.*, Inc., No. 93-9214 (11th Cir. filed June 15, 1995) (per curiam).
38. See *Banks v. I.C.I. Ams.*, Inc., 469 S.E.2d 171, 174 (Ga. 1996) (*Banks II*). This case was decided on April 29, 1996, two-and-one-half months after the Eleventh Circuit denied rehearing. See id. at 171.
39. Under *Erie R.R. v. Tompkins*, 304 U.S. 64 (1934), the federal courts in a diversity action must apply substantive state law. See id. at 78. In areas where state law is controlling and the highest state court has not spoken, the federal courts must determine how the highest state court would decide the issue if reached. See 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4507, at 115-19 (2d ed. 1996).
41. See id. (Scalia, J., concurring); id. at 284 (Rehnquist, C.J., dissenting).
42. Id. at 282 (Scalia, J., concurring). Justice Scalia likely was referring to his recent dissent in *Stutson v. United States*, 116 S. Ct. 611, 612 (1996) (Scalia, J., dissenting) (claiming that the outcome in two cases decided that day "are improper extensions of our
addressed why use of the GVR procedure was correct in this case. His opinion noted that GVR'ing has developed into a practice that the Court referred to as "'customary procedure'" over fifty years ago. Justice Scalia specifically noted that when a federal court of appeals decision regarding state law seems doubtful because of an intervening state supreme court decision, a GVR becomes appropriate because a lower court with more experience in that body of law is more capable of deciding such issues. Based on past practice, Justice Scalia concluded that the GVR was correctly used in this case because it was clear that the Eleventh Circuit had misinterpreted Georgia law.

Chief Justice Rehnquist's dissent stressed that the petitioner's argument did not meet any of the Court's guidelines listed in Supreme Court Rule 10, which discusses the considerations involved in a decision to grant certiorari. In short, Rule 10 lists

limited power to vacate without first finding error below").

43. See Thomas, 117 S. Ct. at 282 (Scalia, J., concurring).
44. Id. (Scalia, J., concurring) (quoting State Farm Mut. Auto. Ins. Co. v. Duel, 324 U.S. 154, 161 (1945)).
45. See id. (Scalia, J., concurring) (citing cases).
46. See id. (Scalia, J., concurring). This conclusion did not mean that the final outcome was incorrect, just that the lower court should reconsider its outcome in light of the new Georgia decision. See infra notes 128-29 and accompanying text (discussing that GVRs do not necessarily require a different outcome on remand).
47. The rule is entitled "Considerations Governing Review On Certiorari," and it 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 the decision of 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 this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for 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.

situations in which the Court will consider granting certiorari, including a conflict between decisions of a circuit court of appeals and a state court of last resort.\textsuperscript{49} Although the result of the court of appeals in \textit{Thomas} did conflict with the decision of the Georgia Supreme Court, it did not conflict in terms of Rule 10 because it was decided \textit{before} the Georgia Supreme Court spoke on the issue.\textsuperscript{50} Chief Justice Rehnquist noted that, under Rule 10, \textit{Thomas} did not resolve a conflict between circuits or between a circuit and a state court of last resort, nor did it "‘depart[] from the accepted and usual course of judicial proceedings’ " or meet any other Rule 10 consideration.\textsuperscript{51} Because Rule 10 did not apply, the Chief Justice suggested that certiorari was granted only to amend an incorrect decision of the court of appeals.\textsuperscript{52} However, he argued that granting certiorari was inappropriate because the Supreme Court does not have "a stake in the correctness of discrete state-law decisions by federal courts, nor, in such cases, any ‘‘obligat[ion] to weigh justice among contesting parties.’’ "\textsuperscript{53}

Chief Justice Rehnquist concluded that because the Court would not grant certiorari in order to either reverse or summarily reverse

\textsuperscript{49} See Sup. Ct. R. 10. Other situations noted by Rule 10 include (1) a conflict between circuit courts of appeals on an important matter, (2) a decision of a circuit court of appeals that is “far departed from the accepted and usual course of judicial proceedings,” (3) a decision of a state court of last resort that decides an important federal question and is in conflict with a circuit court of appeal or other state court of last resort decision, (4) a decision of a state court or circuit court of appeal on an important federal question that the Supreme Court has not yet, but should address, and (5) a decision of a state court or a circuit court of appeal on an important federal question that conflicts with Supreme Court decisions. \textit{Id.}

\textsuperscript{50} See Thomas v. American Home Prods., Inc., No. 93-9214 (11th Cir. filed Feb. 9, 1996) (per curiam) (concluding that \textit{Banks I} does not apply retroactively); Banks v. I.C.I. Ams., Inc., 469 S.E.2d 171, 171 (Ga. 1996) (\textit{Banks II}) (holding, on April 29, 1996, that \textit{Banks I} does apply retroactively).


\textsuperscript{52} See id. (Rehnquist, C.J., dissenting).

\textsuperscript{53} Id. (Rehnquist, C.J., dissenting) (quoting Stutsen v. United States, 116 S. Ct. 611, 611 (1996) (Rehnquist, C.J., concurring in No. 94-9323 and dissenting in No. 94-8988) (alteration in original) (quoting 2 Henry F. Pringle, The Life and Times of William Howard Taft 997-98 (1939))). Justice Rehnquist's concern echoes the Court's oft repeated claim that its "function is not ‘to correct every perceived error coming from the lower . . . courts’ but is instead to decide ‘cases of broad significance.’ " \textit{Wasby, supra} note 10, at 21 (quoting Boag v. MacDougall, 454 U.S. 364, 368 (1982) (O'Connor, J., concurring)); \textit{see also Perry, supra} note 12, at 36 (“Time and again my informants—justices and clerks—stated that the Supreme Court was not there to ensure justice.”); Chief Justice Fred M. Vinson, Work of the Federal Courts, Address Before the American Bar Association (Sept. 7, 1949), in 69 S. Ct. at vi, vi (1949) (“The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions.”).
the court of appeals on Georgia law due to the court of appeals having superior knowledge in that field, the Court should not issue a GVR just because such a result seems easy.\textsuperscript{54} He noted that a GVR looked palatable because the Eleventh Circuit had clearly ruled the wrong way on the retroactivity issue and the petitioners' supplemental brief was unopposed.\textsuperscript{55} However, he noted two adverse consequences: (1) that this decision will encourage other parties to file for certiorari in cases with "more dubious" intervening events, and (2) that a GVR such as this one requires a busy court of appeals to do extra work to reassess a state-law case.\textsuperscript{56}

Justice Scalia's concurrence addressed a few of the Chief Justice's concerns. As to the lack of Rule 10 considerations in this case, he noted that Rule 10 is not controlling, but merely indicates why cases are granted plenary consideration, which would not be applicable to a GVR order.\textsuperscript{57} In fact, he noted that most GVRs do not satisfy Rule 10.\textsuperscript{58} As to addressing state-law decisions, Justice Scalia noted that GVR'ing in light of an intervening state supreme court decision is akin to GVR'ing in light of an intervening Supreme

\textsuperscript{54} See Thomas, 117 S. Ct. at 284-85 (Rehnquist, C.J., dissenting).
\textsuperscript{55} See id. at 285 (Rehnquist, C.J., dissenting). The petition for certiorari was filed May 9, 1996, and the respondent filed a brief in opposition afterwards. See Petition for Writ of Certiorari at 1, Thomas (No. 95-1826). The petitioner filed a supplemental brief on June 13, 1996, after Banks II was published, and this brief was unopposed. See Supplemental Brief to Petition for Writ of Certiorari at 1, Thomas (No. 95-1826). If petitioner's claim did not meet any Rule 10 consideration, perhaps the respondent expected that certiorari would be denied. Cf. Timothy S. Bishop, Opposing Certiorari in the U.S. Supreme Court, LITIGATION, Winter 1994, at 31, 32 (advising practitioners that "[i]f there is general agreement that the petition is obviously meritless, talk to your client about whether the time and expense of preparing and printing a brief in opposition is warranted").

\textsuperscript{56} See Thomas, 117 S. Ct. at 285 (Rehnquist, C.J., dissenting). As to the busy workload of the courts of appeals, Chief Justice Rehnquist noted that a "typical active judge of the Court of Appeals for the Eleventh Circuit participates in somewhere between 150 and 200 panel decisions each year." Id. (Rehnquist, C.J., dissenting); see also WASBY, supra note 10, at 43 (noting a 400\% overall increase in the number of cases docketed in the courts of appeals each year between 1960 to 1980). The courts of appeals decided approximately 10,000 cases per year in the 1970s; they currently decide over 25,000. See Hellman, supra note 13, at 404. For a general review of the federal courts' caseload problem, see RICHARD POSNER, FEDERAL COURTS: CHALLENGE AND REFORM 53-86 (1996).

\textsuperscript{57} See Thomas, 117 S. Ct. at 283 (Scalia, J., concurring). Note that Rule 10 does not state that its considerations apply only to cases of plenary review. On its face, the rule attempts to state reasons for granting certiorari and does not differentiate by whether the case will be disposed of summarily. See Sup. Ct. R. 10; supra note 47 (quoting Sup. Ct. R. 10).

\textsuperscript{58} See Thomas, 117 S. Ct. at 283 (Scalia, J., concurring) (citing cases).
Court decision, which the Court does often.\textsuperscript{59} He reasoned that there is "no possible reason" to deny a GVR in the former instance yet grant one in the latter, "unless ... we have less regard for federal courts' application of state law than for their correct application of federal law—an attitude we should certainly not acknowledge."\textsuperscript{60} Addressing Chief Justice Rehnquist's concern about a flood of cases regarding questions of state law, Justice Scalia claimed that such a result would not occur because \textit{Thomas} reflects the current practice of the Court and that petitions raising more "dubious" grounds should simply be denied certiorari.\textsuperscript{61}

In \textit{Department of the Interior v. South Dakota},\textsuperscript{62} the Court examined a separate area of GVR activity, handing down a GVR in light of a new position of the Solicitor General due to a new agency interpretation of a federal statute.\textsuperscript{63} In 1990, the United States Department of the Interior ("the Department"), acting under § 5 of the Indians Reorganizations Act of 1934 ("IRA"),\textsuperscript{64} began an action to acquire ninety-one acres of land in trust for the Lower Brule Tribe of Sioux Indians.\textsuperscript{65} Afterwards, South Dakota brought suit and argued in district court that, inter alia, the IRA was unconstitutional because it was an improper delegation of legislative power.\textsuperscript{66} The district court rejected this challenge, holding that the statute was

\begin{itemize}
  \item \textsuperscript{59} See id. (Scalia, J., concurring).
  \item \textsuperscript{60} Id. (Scalia, J., concurring).
  \item \textsuperscript{61} See id. at 283-84 (Scalia, J., concurring).
  \item \textsuperscript{62} 117 S. Ct. 286 (1996).
  \item \textsuperscript{63} See id. at 286 (Scalia, J., dissenting).
  \item \textsuperscript{64} Indians Reorganizations Act of 1934, ch. 576, § 5, 48 Stat. 984, 985 (codified as amended at 25 U.S.C. § 465 (1994)). The statute states, in relevant part:
    The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands ... within or without existing reservations ... for the purpose of providing land for Indians.
  \item \textsuperscript{65} See id. at 286 (Scalia, J., dissenting).
  \item \textsuperscript{66} See Department of the Interior, No. Civ. 92-3023, available in Petition for a Writ of Certiorari app. B, at 33a; see also Department of the Interior, 69 F.3d at 880 (discussing background history of the case).
\end{itemize}
constitutionally valid and that South Dakota's other challenges to the land acquisition were barred under the Quiet Title Act ("QTA"), which operated to prevent judicial review. On appeal, the Eighth Circuit struck down the statute as an unconstitutional delegation of legislative power. Although the court of appeals did not consider the applicability of the QTA to bar judicial review, it noted that the Department's claim that judicial review was unavailable under the IRA was a factor in evaluating a nondelegation claim.

67. See id., available in Petition for a Writ of Certiorari app. B, at 51a. The district court reasoned that §5 was not an unconstitutional delegation of legislative power because the IRA "clearly delineates the general policy to be applied and the bounds of that delegated authority." Id. (citing Mistretta v. United States, 488 U.S. 361, 372-73 (1986)). The Supreme Court has used similar language to test the constitutionality of statutes that delegate responsibilities to an agency. See, e.g., Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 219 (1989) ("It is 'constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.") (quoting American Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946)).


69. See Department of the Interior, No. Civ. 92-3023, available in Petition for a Writ of Certiorari app. B, at 51a. The other claims were that the agency violated internal rules of procedure and allowed the Assistant Secretary of the Interior to act outside the scope of his delegated authority, that the approval of the acquisition was arbitrary and capricious, and that other relevant statutes were not complied with. See id., available in Petition for a Writ of Certiorari app. B, at 46a. Once the district court found that QTA barred a challenge to the acquisition of land pursuant to the IRA and further held that §5 of the IRA was constitutional, it granted the Department's motion to dismiss the case. See id., available in Petition for a Writ of Certiorari app. B, at 51a.

70. See Department of the Interior, 69 F.3d at 880. The United States Supreme Court has not found a federal statute to be an unconstitutional delegation of legislative power for over 60 years, since A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 508 (1935) (holding 15 U.S.C. § 709 (1933) unconstitutional due to lack of specificity), and Panama Refining Co. v. Ryan, 293 U.S. 388, 432-33 (1935) (striking down 15 U.S.C. § 703 because it was too broad and lacked restrictions). See Department of the Interior, 69 F.3d at 881. Therefore, in more colorful terms, the Eighth Circuit holding "upset the legal apple cart." Laurence, supra note 7, at 57. The Eighth Circuit recognized this fact, but it also noted that §5 of the IRA was originally passed by the same Congress that enacted the broad statutes struck down in Schechter Poultry and Panama Refining. See Department of the Interior, 69 F.3d at 881. For a full discussion of the Eighth Circuit decision, see Jessica Roff, Note, South Dakota v. United States Department of Interior: Another Broken Promise to the United States Indians, 49 ADMIN. L. REV. 453 (1997).

71. See Department of the Interior, 69 F.3d at 881-82 ("[W]hen the Secretary argued to the district court that his actions under [§5 of the IRA] may not be judicially reviewed because the statute commits them entirely to agency discretion, he implicitly acknowledged that this delegation issue requires a particularly close look."). This refers to the Department's claim that the APA barred review, not the district court's conclusion that
Throughout the litigation, the Department contended that
decisions to acquire land under § 5 of the IRA were not reviewable
under the Administrative Procedure Act ("APA").\(^7\) However, after
the Eighth Circuit’s decision, the Department decided that such
decisions were subject to judicial review under the APA before title
was acquired, and it promulgated a new regulation to this effect.\(^7\)
Based on this new regulation, the Office of Solicitor General, as
representative for the Department, changed its position on
reviewability.\(^7\) On petition for certiorari, and upon the request of
the Solicitor General, the Court issued a GVR order, with further
directions for the Eighth Circuit to remand the matter to the
Secretary of Interior “for reconsideration of his administrative
decision” to acquire the land.\(^7\) Justice Scalia filed a dissenting
opinion in which Justices O’Connor and Thomas joined.\(^7\)

Justice Scalia stated that use of the GVR mechanism in this

the QTA barred review. See id. at 880. Examining the language of § 5, the Eighth Circuit
thought it so broad that “it would permit the Secretary to purchase the Empire State
Building in trust for a tribal chieftain as a wedding present.” Id. at 882. Therefore, under
such a broad interpretation, the court of appeals found the statute to be invalid under a
number of “nondelegation criteria,” such as the failure to provide an intelligible principle
to guide decisionmaking. See id. at 884-85.

\(^7\) See Department of the Interior, 117 S. Ct. at 286 (Scalia, J., dissenting); see also
Administrative Procedure Act, 5 U.S.C. § 701(a)(2) (1994) (requiring, in conjunction with
5 U.S.C. § 706, that agency actions be subject to judicial review unless “committed to
agency discretion by law”).

\(^7\) The regulation states in part:

(b) Following completion of the Title Examination ... the Secretary shall
publish in the Federal Register, or in a newspaper ... a notice of his/her decision
to take land into trust under this part. The notice will state that a final agency
determination ... has been made and that the Secretary shall acquire title in the
name of the United States no sooner than 30 days after the notice is published.
Title Examination Rule, 25 C.F.R. § 151.12(b) (1996). The Department described the
regulation as follows:

This rule establishes a 30-day waiting period after final administrative decisions
to acquire land into trust under the [IRA] and other federal statutes. The
Department is establishing this waiting period so that parties seeking review of
final decisions by the Interior Board of Indian Appeals ... will have notice of
administrative decisions to take land into trust before title is actually
transferred. This notice allows interested parties to seek judicial ... review
under the Administrative Procedure Act and applicable regulations.

61 Fed. Reg. 18,082, 18,082 (1996). The Department specifically noted that the regulation
was being adopted in response to the Eighth Circuit decision. See id.

\(^7\) See Petition for a Writ of Certiorari at 23-27, Department of the Interior (No. 95-
1956).

\(^7\) Department of the Interior, 117 S. Ct. at 286 (1996). Other Indian tribes filed
amicus curiae briefs requesting that the Court grant certiorari, but they did not request a
GVR. See Reply Brief for the Petitioners at 8-9, Department of the Interior (No. 95-
1956).

\(^7\) See Department of the Interior, 117 S. Ct. at 286 (Scalia, J., dissenting).
situation was "unprecedented and inexplicable." He first noted that the Court previously had GVR'd cases when the Solicitor General had asserted a new position after prevailing below. However, Justice Scalia claimed that a GVR had never before been granted when the Government had changed its position after losing below—thereby allowing the Government to litigate on the most desirable but perhaps less plausible theory first, and then come back to relitigate on a new theory if it lost.

Justice Scalia found the decision all the more confusing because the Government's change in position could not alter the acquisitions at issue in the case. Since the Department's acquisition was already final before the litigation began, he noted that judicial review was unavailable. Further, he asserted that because the Department's decision to allow judicial review was "discretionary," it could not affect the constitutionality of the statute.

Finally, Justice Scalia noted that a GVR was inappropriate here because the new regulation would apply only to "all pending and future trust acquisitions." He reasoned that the Government's request for a GVR could not be reconciled with its position that review is unavailable after acquisition of land under QTA. Asserting that the Court lacked the authority to GVR in order to "construct the necessary conditions for judicial review,"

77. Id. at 287 (Scalia, J., dissenting).
79. See id. (Scalia, J., dissenting).
80. See id. (Scalia, J., dissenting).
81. See id. at 287-88 (Scalia, J., dissenting). Justice Scalia referred to this regulation as "discretionary," but the regulation allowing for judicial review does not contain any such language. See Title Examination Rule, 25 CFR § 151.12(b) (1997). In fact, the regulation provides that notice "shall" be published in the Federal Register so that judicial review under the APA is possible. See id. Therefore, Justice Scalia may mean that the decision to provide notice is not compelled by § 5 of the IRA and that, as a result, provision of such notice cannot affect the constitutionality of the IRA. Of course, another view may be that § 5 does require notice and that therefore the new regulation would not be discretionary and could affect the constitutionality of the statute. Because the Court did GVR, it suggests that the Court thought the new regulation may have made a difference. Cf. Gomez v. Fierro, 117 S. Ct. 285, 285-86 (1997) (GVR'ing in light of new state statute about a method of carrying out the death penalty after the court of appeals held that use of the gas chamber for carrying out the death penalty is unconstitutional).
83. See id. (Scalia, J., dissenting).
84. Id. (Scalia, J., dissenting).
Scalia concluded by saying he would have granted certiorari because a federal statute had been held unconstitutional.\footnote{85}{See id. (Scalia, J., dissenting). It perhaps would have been more precise for Justice Scalia to say he would have granted certiorari \textit{and} scheduled the case for oral argument, since a GVR by definition requires that certiorari be granted. For the later history of \textit{Department of the Interior} on remand, see infra notes 248-50 and accompanying text.}

The Supreme Court's authority to GVR and to otherwise summarily dispose of a case is confirmed by statute at 28 U.S.C. § 2106, which recognizes the power to "affirm, modify, vacate, set aside or reverse any judgment, decree, or order... and may remand... or require... such further proceedings to be had as may be just under the circumstances."\footnote{86}{28 U.S.C. § 2106 (1994).} The Court has recently noted that, on its face, § 2106 appears to give broad authority to remand any case properly before it.\footnote{87}{See \textit{Lawrence v. Chater}, 116 S. Ct. 604, 606 (1996) (GVR'ing in light of new interpretation of Social Security Act by Social Security Administration).} On the other hand, at least two current Justices believe that the prior practice of the Court should place implicit limits on GVR use,\footnote{88}{See \textit{Stutson v. United States}, 116 S. Ct. 611, 612 (1996) (Scalia, J., dissenting).} and Chief Justice Rehnquist has pointed to Rule 10 as another limitation.\footnote{89}{See \textit{Thomas}, 117 S. Ct. at 284 (Rehnquist, C.J., dissenting).} If we assume that the Court has a broad power to GVR, it is useful to examine the circumstances that normally precipitate such an order, as well as recent developments in GVR use, in order to predict which cases are appropriate for GVR treatment.

When deciding to summarily dispose of a certiorari petition, one Supreme Court Justice has divulged that a convention exists that six Justices, instead of a simple majority of five, must vote in favor of it.\footnote{90}{See \textit{Perry}, \textit{supra} note 12, at 100. Professor Perry's interviews with Justices and law clerks were confidential, so it is impossible to tell which Justice revealed this practice. \textit{See id.} at 18. Stern suggests that this rule is based on an "informal understanding." \textit{See STERN ET AL., supra} note 2, § 5.12, at 247. However, because some GVRs are five-to-four decisions, any "rule of six" may not be so strong. \textit{See infra} note 94.} This type of rule, which deviates from the simple majority needed for deciding typical cases,\footnote{91}{See \textit{William C. Louthan, The United States Supreme Court: Lawmaking in the Third Branch of Government} 78 (1991) (noting that the Court has always decided cases by a majority vote); \textit{Bernard Schwartz, Decision: How to Decide} (1990) (summarizing the Supreme Court's conventional practice of requiring six votes to grant certiorari).} is similar to the better-known requirement...
that only four Justices are needed to grant certiorari. The "rule of six" for summary disposition may have influenced the outcome of Department of the Interior because three Justices, the maximum number possible, dissented. Presumably, if four Justices did not want to GVR the petition, oral argument would have been scheduled followed by a decision on the merits. Therefore, to the extent that this "rule of six" exists, it would suggest that a GVR will not be handed down by a closely divided Court.

Although the intervening events that precipitate a GVR can be organized into several categories, the most common type of GVR is one granted because of an intervening Supreme Court decision. In fact, in the 1996 Term, eighty percent of GVR orders fit in this category. These GVRs often occur when the Court waits to decide a petition for certiorari in order to dispose of it in light of an upcoming plenary Supreme Court decision. For example, in the

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THE SUPREME COURT DECIDES CASES 6 (1996) (noting Justice Brennan's statement that "five votes can do anything around here").

92. See BLOCH & KRATTENMAKER, supra note 11, at 337 (discussing the "Rule of Four").
94. However, there are cases when a "rule of six" must have been disregarded since four Justices dissented to a GVR. See Alvarado v. United States, 497 U.S. 543, 545 (1990) (Rehnquist, C.J., dissenting) (joined by three other Justices); Board of Trustees v. Sweeney, 439 U.S. 24, 25 (1978) (Stevens, J., dissenting) (joined by three other Justices); Oregon State Penitentiary v. Hammer, 434 U.S. 945, 945 (1977) (Stevens, J., dissenting) (joined by three other Justices).
95. See supra notes 3-6 and accompanying text.
97. Forty-nine of 61 GVRs fit this category. Search of WESTLAW, SCT Database (Oct. 16, 1997) (search for cases containing "granted" within five words of "vacated" within five words of "remanded," with date restriction in "DA" field for before October 1, 1997, and after October 1, 1996).
98. See STERN ET AL., supra note 2, § 5.9, at 243-44 (describing the practice of holding cases); Hellman, supra note 2, at 21-29 (discussing "held cases"). In the 1996 Term, the Court issued GVRs based on 31 Supreme Court decisions that were decided during the 1995 and 1996 Terms. Search of WESTLAW, SCT Database (Oct. 16, 1997) (search for cases containing "granted" within five words of "vacated" within five words of
1995 Term, the Court held about twenty petitions raising issues similar to those in BMW of North America, Inc. v. Gore, and it subsequently issued GVRs in six of those cases after BMW was handed down.

The recent GVR issued in O'Leary v. Mack illustrates a typical use of the GVR in light of an intervening Supreme Court decision. The Seventh Circuit construed the Religious Freedom and Restoration Act ("RFRA") as allowing a statutory cause of action for substantial burdens imposed on the free exercise of religion as a separate right from the right protected by the First Amendment. Thereafter, en banc rehearing was denied on January 8, 1997, and a petition for certiorari was filed on April 7, 1997. Around the same time, the Supreme Court was deciding City of Boerne v. Flores. In Flores, which was argued before the Court on February 19, 1997, and decided on June 25, 1997, the Court held that RFRA was unconstitutional. Therefore, the Seventh Circuit's holding in O'Leary was no longer supportable, and when the Court convened for the 1997 Term, one of its first orders was to GVR the O'Leary case for further reconsideration in light of Flores. A GVR would appear appropriate in this case because it was clear that Flores invalidated the reasoning of the Seventh Circuit in O'Leary, and it also would waste time to hear oral argument and issue a plenary opinion when the issues involved were already decided. In fact,
perhaps O'Leary would have become the case announcing the holding of Flores if it had been the first one to reach the Court; or if it had been decided later, the Seventh Circuit would have had Flores to guide its reasoning.\textsuperscript{111} The opportunity to prevent one party from receiving the correct ruling solely due to an "accident of timing" made the case a ready one for GVR treatment.\textsuperscript{112}

Although GVRs in light of recent Supreme Court decisions are the most common type, they also can be granted in light of intervening state supreme court decisions,\textsuperscript{113} federal or state statutes,\textsuperscript{114} or either a change in the legal position or a confession of error by the Solicitor General.\textsuperscript{115} These types of GVRs encompass a smaller portion of GVR practice,\textsuperscript{116} but the format is the same: the Court states that it is remanding "in light of" the intervening legal event.\textsuperscript{117} These areas are where the appropriateness of a GVR is less settled and where debate is more likely to emerge, as in Thomas and Department of the Interior.

The general considerations involved in a decision to GVR were first discussed in Henry v. City of Rock Hill.\textsuperscript{118} In Henry, the Court

\[\text{(noting the "fierce competition" for a slot on the Court's plenary docket).}\]

\textsuperscript{111} See Hellman, supra note 2, at 31 & n.100 ("That is, if the case had moved more slowly through the lower courts, it would be decided under the new rule without the need for Supreme Court intervention; if the case had moved more quickly, it might have been the one selected for plenary review.").

\textsuperscript{112} Id.


\textsuperscript{115} See, e.g., Department of the Interior, 117 S. Ct. at 286; Schmidt v. Espy, 513 U.S. 801, 801 (1994); Mariscal v. United States, 449 U.S. 405, 405 (1981) (per curiam). Obviously, the Solicitor General is always a party to a GVR of this type. It may seem strange at first to define one category of GVR solely by the presence of the Solicitor General as a party; however it must be remembered that the Solicitor General appears before the Court more often than any other litigant. See BLOCH & KRATTERMAKER, supra note 11, at 520.

\textsuperscript{116} The 1996 Term GVR orders break down as follows: forty-nine in light of a Supreme Court decision, six in light of a new federal statute, three in light of a new position of the Solicitor General, two in light of a state supreme court decision, and one in light of a new state statute. Search of WESTLAW, SCT Database (Oct. 16, 1997) (search for cases containing "granted" within five words of "vacated" within five words of "remanded," with date restriction in "DA" field for before October 1, 1997, and after October 1, 1996).

\textsuperscript{117} See, e.g., Thomas, 117 S. Ct. at 282 ("The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded . . . for further consideration in light of Banks v. L.C.I. Americas, Inc." (citing 469 S.E.2d 171 (Ga. 1996))).

\textsuperscript{118} 376 U.S. 776 (1964) (per curiam). The Court did not use the term "GVR" but noted that it had granted certiorari, vacated the judgment, and remanded for further
initially GVR'd a prior proceeding to the South Carolina Supreme Court in order to consider it in light of Edwards v. South Carolina,\textsuperscript{119} an intervening United States Supreme Court decision.\textsuperscript{120} On remand, the South Carolina court reaffirmed its earlier decision by distancing Edwards.\textsuperscript{121} The South Carolina court also expressed confusion over why the Supreme Court had remanded the case at all.\textsuperscript{122}

When faced with a petition for certiorari in Henry the second time around, the Court decided to summarily reverse.\textsuperscript{123} The Court's per curiam opinion noted that, despite the South Carolina Supreme Court's confusion, that court had correctly concluded that the earlier remand "did not amount to a final determination on the merits."\textsuperscript{124} However, the Court also noted that its order indicated that "Edwards sufficiently ... and, perhaps, decisive[ly] ... compell[ed] re-examination of the case."\textsuperscript{125} The Court further noted that this practice had been used in similar situations when the Court was "not certain that the case was free from all obstacles to reversal on an intervening precedent."\textsuperscript{126} Confirming its earlier uncertainties, the Court rejected the state supreme court's distinction and summarily reversed.\textsuperscript{127}

Henry revealed a general rule for GVRs: The Court will GVR when it feels that an intervening event necessitates review of a case because it might compel, but does not necessarily require, a different outcome.\textsuperscript{128} In this way, Henry made clear that a GVR is not the same as a summary reversal order.\textsuperscript{129} Henry also confirmed that a

\textsuperscript{119} See id. at 776. In fact, the Court never used the term "GVR" in an opinion until Stutson v. United States, 116 S. Ct. 600, 602 (1996), which was decided nine months before Thomas and Department of the Interior.

\textsuperscript{120} See Henry v. City of Rock Hill, 375 U.S. 6, 6 (1963).


\textsuperscript{122} See id. at 718 ("[W]e have endeavored to carry out the mandate of the United States Supreme Court and find that the light, if any, shed upon [the] instant case by the Edwards case is not readily or easily discernible.").

\textsuperscript{123} See Henry, 376 U.S. at 778. Generally, the Court prefers to avoid summary reversals of state court decisions. See STERN ET AL., supra note 2, § 5.12(c)(5), at 253. It seems that in this case, any doubts the Court had were cleared up after the GVR. When a state court decision is (or becomes, as in Henry) clearly erroneous, it is a better candidate for summary reversal. See id.

\textsuperscript{124} Henry, 376 U.S. at 777.

\textsuperscript{125} Id.

\textsuperscript{126} Id. at 776.

\textsuperscript{127} See id. at 778.

\textsuperscript{128} See id. at 776.

\textsuperscript{129} However, judges and commentators have at times argued that a GVR really
GVR is appropriate in light of an intervening United States Supreme Court decision.\textsuperscript{130}

The extent to which the Court considers the merits of a case that it opts to GVR is not always clear. Justice Stevens shed some light on this question in his dissent to \textit{Board of Trustees v. Sweeney},\textsuperscript{131} in which he noted that a decision to grant, vacate, and remand requires the court to "act[ ] on the merits."\textsuperscript{132} In \textit{Sweeney}, the Court GVR'd because it appeared that the First Circuit had imposed a heavier burden on an employer in an employment discrimination action than the Court recently had held was correct.\textsuperscript{133} However, Justice Stevens asserted that the intervening decision which the Court requested the court of appeals to consider did not help in any way and would not affect the reasoning of the opinion.\textsuperscript{134} Finding the distinction the Court drew to be illusory, he concluded that there was "no legitimate basis for concluding that the Court of Appeals erred."\textsuperscript{135} But in any event, all the Justices apparently agreed that a GVR is appropriate only when the intervening decision might have some effect on the final outcome.\textsuperscript{136} To this extent Justice Stevens seems correct in noting that the Court must at least consider the merits of a claim to decide if a GVR is appropriate, if only in cursory fashion.\textsuperscript{137
The rationale for issuing a GVR in light of a state court decision—the situation in *Thomas*—arose from a case in which a GVR was not issued. In the 1944 case of *Huddleston v. Dwyer*, the Court decided to vacate and remand a court of appeals decision because of an intervening state supreme court decision. *Huddleston* arose from a dispute over defaulted municipal paving bonds. After the bondholders had prevailed in district court, the Tenth Circuit affirmed and subsequently denied the bond issuer’s petition for rehearing. Following the Tenth Circuit’s decision, however, the Supreme Court of Oklahoma overruled some of the authorities on which the Tenth Circuit had relied. The bond issuer petitioned the Tenth Circuit for a rehearing, bringing to the court’s attention the intervening Oklahoma case, but the Tenth Circuit again denied the petition.

The Supreme Court granted certiorari and then vacated and remanded the case to the Tenth Circuit in light of the intervening effect—but it is unclear that the Court was always doing so. Cf. First Nat’l City Bank v. Banco Nacional de Cuba, 400 U.S. 1019, 1019 (1971) (GVR’ing in light of new view taken by the Department of State, and stating that “the Court is expressing no views on the merits of the case”). However, it appears that the use of the word “merits” here only implied that the Court was not deciding the outcome of this case, to dispel thoughts that the Court was implying otherwise by its action. See supra note 129.

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139. See id. at 237-38.
140. See id. at 233. Dwyer and others were the owners of bonds issued by the city of Poteau, Oklahoma. See id.
141. See id. In a prior proceeding, the Tenth Circuit held that the bondholders were entitled to their money and directed the district court to proceed in mandamus to compel payment if necessary. See Dwyer v. Le Flore County, 97 F.2d 823, 826 (10th Cir. 1938). After the debts were not paid, the *Huddleston* case was filed to compel payment. See *Huddleston*, 322 U.S. at 234. The district court directed the county commissioners to pay the debt in ten installments with interest. See id.
142. See *Huddleston v. Dwyer*, 137 F.2d 383, 386 (10th Cir. 1943), vacated and remanded, 322 U.S. 232 (1944). The county commissioners claimed that a county had no power to collect taxes to pay assessments due in an earlier year, under Oklahoma law. See id. at 385. The Court of Appeals rejected this argument after reviews of Oklahoma case law, which although unclear, did not seem to prohibit the collection method. See id. at 385-86.
143. See id. at 383.
144. See *Wilson v. City of Hollis*, 142 P.2d 633, 640 (Okla. 1943). *Wilson* held that a tax levy could be instituted only in the year the assessment is due. See id. at 638. The court said that such debts could be paid under the procedures provided in the state constitution and state statutes. See id. at 640. In reaching this result, the Oklahoma Supreme Court partially overruled three of its prior cases. See id. In *Huddleston*, the Tenth Circuit had looked to two of those decisions to find that the power to institute a levy was broader. See *Huddleston*, 137 F.2d at 385-86.
145. See *Huddleston*, 322 U.S. at 235.
146. 321 U.S. 759 (1944).
events. In a per curiam opinion, the Court noted that "a judgment of a federal court ruled by state law and correctly applying that law as authoritatively declared by the state courts ... must be reversed on appellate review if in the meantime the state courts have disapproved of their former rulings and adopted different ones." The Court also noted that the doubt arising from an intervening decision should properly be decided by those judges "who are familiar with the intricacies and trends of local law and practice."

Although Huddleston appears identical to Thomas at first glance, the two cases are procedurally different because in Huddleston (1) certiorari had been granted prior to the vacate and remand order instead of simultaneously, and (2) oral argument was heard. Despite these differences, Huddleston has since been cited, both by Justice Scalia and in a per curiam opinion of the Court, to support the use of the GVR in light of an intervening state development.

Although the Court disposed of Huddleston after oral argument, it appears that it could have been GVR'd because the intervening event compelling reconsideration had already occurred before the petition for certiorari was filed. The Court's decision not to GVR may have been due in part to its smaller caseload, which may have allowed time for the Court to hear oral arguments to determine if remand was appropriate. Another reason a GVR may not have been used was because GVR orders at that time were rare.
However, the final result in *Huddleston* was the same as a GVR—a remand to the lower court to consider an intervening state court decision.

A GVR in light of a new position taken by the Solicitor General—the situation in *Department of the Interior*—is another area of GVR use. In the 1981 case of *Mariscal v. United States*, the Court considered a petition for certiorari to the Ninth Circuit, which had affirmed the petitioner’s convictions for multiple counts of interstate transportation of property obtained by fraud and mail fraud. The Ninth Circuit did not actually consider the mail fraud issues on appeal, but instead invoked the concurrent sentencing doctrine to affirm the trial court. The Court GVR’d based on the Solicitor General’s admission in his petition opposing certiorari that the convictions below for mail fraud were not valid, and it ordered the Ninth Circuit to reconsider “the applicability of the ‘concurrent sentence’ doctrine to a conviction conceded by the United States to be erroneous.”

Then-Justice Rehnquist dissented in *Mariscal*, arguing that the Court should not “mechanically accept” the Solicitor General’s confession of error in a case in which the Government prevailed, but should instead either examine the merits before accepting that position or deny review altogether. He believed that the adversary system was hampered by routine acceptance and cautioned that “[w]ith the increasing caseloads of all federal courts, there is a natural temptation to ‘pass the buck’ to some other court if that is...

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158. See *Department of the Interior*, 117 S. Ct. at 287 (Scalia, J., dissenting) (“This Court has in recent years occasionally entered a ‘GVR’ in light of a position newly taken by the Solicitor General.”). The Solicitor General has the job of coordinating and controlling the appeal of cases involving the federal government that reach the Supreme Court. See *Louthan*, supra note 91, at 112-13.


160. See id. at 405.


162. See *Mariscal*, 449 U.S. at 405 (citing Memorandum in Opposition at 4-5, *Mariscal* (No. 80-5618)).

163. Id. at 405-06.

164. See id. at 406-07 (Rehnquist, J., dissenting). Justice White dissented without opinion, “essentially for the reasons stated by Justice Rehnquist in his dissenting opinion.” Id. at 406 (White, J., dissenting). Justice Rehnquist noted a “certain irony” in his dissent because the Solicitor General at the time of *Mariscal* had been a judge on the Sixth Circuit and had written an opinion that Justice Rehnquist affirmed in a majority opinion for the Court. See id. (Rehnquist, J., dissenting); United States v. Maze, 414 U.S. 395, 396 (1974). The *Maze* case affirmed the reversals of criminal convictions for mail fraud. See *Maze*, 414 U.S. at 396.
possible."\(^{165}\)

It is not clear if Mariscal broke new ground because even Justice Rehnquist noted in his dissent that it was a "routine practice" to vacate judgments that the Solicitor General claimed were incorrect.\(^{166}\) In cases prior to Mariscal, the Court had GVR'd in light of a confession of error by the Solicitor General in which the Court did not appear to independently review the merits.\(^{167}\) So, although Mariscal may not have been the first instance of a GVR granted in light of a new position taken by the Solicitor General, it certainly highlighted the existence of the practice and revealed some disagreement in the Court over its use.\(^{168}\)

The Mariscal type of GVR has been extended to cases in which the Solicitor General, although confessing error below, argued that the outcome below was nevertheless correct. In Alvarado v. United States,\(^{169}\) the Court GVR'd because it noted the Government's suggestion that an error had occurred below, although the Government asserted that the error would not affect the outcome of the case.\(^{170}\) The Court did not find it novel to GVR "in a case where

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\(^{165}\) Mariscal, 449 U.S. at 407 (Rehnquist, J., dissenting). Justice Rehnquist noted that "Congress . . . has not to my knowledge moved the Office of the Solicitor General from the Executive Branch of the Federal Government to the Judicial Branch." Id. (Rehnquist, J., dissenting).

\(^{166}\) Id. (Rehnquist, J., dissenting).

\(^{167}\) See, e.g., Gordon v. United States, 345 U.S. 968, 968 (1953) (per curiam) (GVR'ing "in the light of the Government's confession of error," and not mentioning independent review on the merits). In the 1960s some GVRs occurred in which the Court claimed to GVR in light of the Solicitor General's position and also in light of the record, which suggests independent review was pursued. See Millan-Garcia v. Immigration & Naturalization Serv., 382 U.S. 69, 69 (1965); Rogers v. United States, 378 U.S. 549, 549 (1964) (per curiam); Grabina v. United States, 369 U.S. 426, 426 (1962) (per curiam).

\(^{168}\) Perhaps Mariscal denotes the point when now-Chief Justice Rehnquist's concern over the practice grew strong enough to merit a written dissent. See Mariscal, 449 U.S. at 406-07 (Rehnquist, J., dissenting). There are some hints that he disapproved of the practice prior to Mariscal. See Corley v. United States, 444 U.S. 806, 806 (1979) (Rehnquist, J., dissenting) (dissenting without opinion to GVR'ing in light of new view of Solicitor General); Rubin v. United States, 439 U.S. 810, 810 (1978) (Rehnquist, J., dissenting) (dissenting without opinion to GVR'ing in light of change of position by Solicitor General); Jackson v. United States, 434 U.S. 947, 947 (1977) (Rehnquist, J., dissenting) (dissenting without opinion to GVR'ing in light of new position of Solicitor General).

\(^{169}\) 497 U.S. 543 (1990) (per curiam).

\(^{170}\) See id. at 544. Alvarado dealt with petitioner's claim that the Government had used peremptory challenges in order to remove black jurors. See id. at 543. In affirming petitioner's criminal convictions, the court of appeals held that because the chosen jury represented a "fair cross section of the community," it did not need to pursue petitioner's claims that jurors had been stricken on purely racial grounds. Id. at 544. The Solicitor General agreed that this holding was incorrect, but argued that certiorari should be denied because the petitioner had not made a prima facie case of discrimination and
error is conceded but it is suggested that there is another ground on which the decision below could be affirmed if the case were brought here. In dissent, Chief Justice Rehnquist asserted that Alvarado was novel because it extended the practice of GVR’ing in light of a confession of error “to new lengths.” He argued that the decision would render “the Government’s future briefs in opposition much less explicit and frank than they have been in the past.” Such a result would be undesirable because the Court “depend[s] heavily on the Government in deciding whether to grant certiorari in cases in which the Government is a party.” Based on Chief Justice Rehnquist’s arguments, it seems possible that when similar cases arise in the future, the Solicitor General will simply not point out the error below because such candor could reduce the Government’s chances of success. In at least one case since Alvarado, however, the Solicitor General has declined to take such an approach.

In Diaz-Albertini v. United States, the Court continued down the path of Alvarado when it GVR’d in light of the Government’s asserted position in a different case, even though the Government...
distinguished the position taken in the other case and argued that
certiorari should be denied. The Chief Justice again dissented,
asserting that a GVR should not be granted when the Government
does not suggest that error occurred in the court below.

In January 1996, the Court issued a pair of GVR orders that
further explained its use of the GVR. In Stutson v. United States, the Court GVR'd in light of a new position asserted by the Solicitor
General. The Court said a GVR is appropriate "in light of
potentially pertinent matters which it appears that the lower court
may not have considered." While the Court endorsed then-Justice
Rehnquist's reasoning in Mariscal v. United States that the Court
should not "mechanically accept" any suggestion of the
Solicitor General, it found that the circumstances of the case raised
"a reasonable probability that the Court of Appeals will reach a
different conclusion." Therefore, a GVR was deemed
appropriate.

General distinguished Chappell and argued that the particular circumstances of
petitioner's case did not make it unfair to bar a collateral attack under the same statute.
See id. at 1062-63 (Rehnquist, C.J., dissenting).

178. See Diaz-Albertini, 498 U.S. at 1062 (Rehnquist, C.J., dissenting). The petitioner
in this case requested only a GVR instead of plenary review and pointed out the
Government's position in Chappell. See id. (Rehnquist, C.J., dissenting). This request
appears to have been a good litigation strategy. See infra notes 260-72 and accompanying
text (recommending that Supreme Court practitioners attempt to characterize their case
as one typically GVR'd in order to elicit similar treatment for their own case).

179. See Diaz-Albertini, 498 U.S. at 1063 (Rehnquist, C.J., dissenting). Chief Justice
Rehnquist noted that if the majority did not think the court of appeals decided correctly,
it should have "said so expressly, rather than leaving it to judges who are just as busy as
we are to do what can best be described as read tea leaves." Id. (Rehnquist, C.J.,
dissenting).


181. See id. at 602. The merits dealt with a prisoner's failure to receive appellate
review of his conviction for cocaine possession because his notice of appeal arrived one
day past the deadline and arrived at the court of appeals instead of at the district court.
See id. In the lower courts, the Government argued that this neglect precluded the
appeal. See id. In response to the petition for certiorari, the Solicitor General changed
the position of the Government and concluded that the delay could be "excusable
neglect." See id.

182. Id.


(quoting Mariscal, 449 U.S. at 406 (Rehnquist, J., dissenting))).

185. Id. at 602-03.

186. See id. at 603. The Court noted that, in addition to the change in position by the
Government, six courts of appeals had reached a different outcome and the court of
appeals in this case had only summarily affirmed the result of the district court. See id. at
602.
In *Lawrence v. Chater*, the Court again GVR'd in light of a new position advanced by the Solicitor General that was based on a new interpretation of the Social Security Act by the Social Security Administration. First, the Court stated that the court of appeals could decide on remand whether to defer to the new agency interpretation of the statute. This result echoed the Court's approach in *Henry v. City of Rock Hill* by noting that if an "intervening development" makes it reasonably probable that the court below might alter its judgment, a GVR is appropriate. Second, the Court reaffirmed that GVRs are appropriate in light of a number of intervening events. Third, from a practical standpoint, the Court noted that GVRs save courts valuable time by (1) helping the court below by identifying an issue it may not have fully considered, and (2) eventually providing the Supreme Court with the insight of the lower court on that issue if the case comes back up.

Additionally, perhaps as a warning to overeager litigants, the Court noted that it considers the equities of a case when deciding to GVR. The Court warned that if the intervening event advanced 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

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188. See *id.* at 605, 610.
189. See *id.* at 610. The Court implied that deference to a new agency interpretation of a statute may be compelled by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and [the Court consistently follows] the principle of deference to administrative interpretations." (footnote omitted)). See *Lawrence*, 116 S. Ct. at 608.
190. 376 U.S. 776 (1964) (per curiam).
191. See *Lawrence*, 116 S. Ct. at 607; *Henry*, 376 U.S. at 776.
193. See *id.* at 606-07.
194. See *id.* at 607.
is inappropriate." And lastly, the Court noted that a GVR is a "cautious and deferential alternative to summary reversal." Therefore, to summarize, it was apparent prior to October 1996 that GVRs could be granted when an intervening development might change the outcome of a lower court decision, but did not require such a reversal. A GVR did not compel a final determination or outcome, but it required the Court to examine the merits at least enough to believe that the intervening development may affect the outcome of the case. GVRs could be granted in light of Supreme Court decisions or state supreme court decisions, federal or state statutes or regulations, or changes in the position of the Solicitor General based on factors such as a confession of error below or elsewhere. And perhaps to assuage a fear of litigants abusing the power of the GVR, the Court in Lawrence warned parties not to manipulate its use.

*Thomas* and *Department of the Interior* raise a number of issues regarding the use of GVRs. Because both cases addressed GVRs in situations that are less common and that have provided the greatest source of conflict in the Court, they serve to illuminate the expanding, yet contested, boundaries of GVR use. In terms of significance, *Thomas* reveals a dispute in the Court regarding authority under Rule 10 to GVR and the concomitant problem of whether the Court should GVR in order to correct errors. *Department of the Interior* serves to illustrate that GVR dissents

195. *Id.* This consideration possibly addresses Justice Scalia's concern that the Solicitor General, as one of the "most calculating" litigants before the Court, will attempt to get GVRs by endorsing new positions. *See id.* at 616-17 (Scalia, J., dissenting). The Court also noted that its flexible GVR approach is similar to the standard used for applications for stays or other summary remedies, which are granted without a judgment on the merits under the All Writs Act, 28 U.S.C. § 1651 (1994). *See Lawrence*, 116 S. Ct. at 607. However, the Court noted that "the standard that we apply in deciding whether to GVR is somewhat more liberal than the All Writs Act standard, under which relief is granted only upon a showing that a grant of certiorari and eventual reversal are probable." *Id.* This comparison agrees with the definition of GVR given in *Henry* that a GVR is granted when reversal is possible, but not compelled by the intervening development. *See supra* notes 118-30 and accompanying text (discussing *Henry*).


197. *See supra* notes 125-28 and accompanying text.

198. *See supra* notes 131-37 and accompanying text.

199. *See supra* notes 3-6, 192 and accompanying text.


201. GVRs in light of intervening Supreme Court decisions are the most common type. *See Stutson v. United States*, 116 S. Ct. 611, 613 (1996) (Scalia, J., dissenting). The most recent GVRs that have caused debate, such as *Thomas* and *Department of the Interior*, are not of that type.

suggest areas of law that the Court might consider in the future, but it also raises concerns that a GVR order may be unclear in its scope and that it may be subject to unfair manipulation by the parties. Finally, both cases yield some practical suggestions for Supreme Court practitioners.

Justice Scalia argued in *Thomas* that Rule 10 does not apply in deciding whether to GVR, which suggests that a separate branch of reasoning has developed in deciding to issue a GVR as opposed to a general grant of certiorari. Although commentators have said that the considerations for granting certiorari under Rule 10 are purposely ambiguous, it is fairly clear that the decision to grant a GVR in light of a state event or of a change in position of the Solicitor General does not fit into that framework. These intervening events do not fit within any of the Rule 10 factors, although they do fall within the wide authority of the Court to remand under 28 U.S.C. § 2106. Therefore, *Thomas* supports the proposition that certain cases that would not otherwise be deemed worthy of certiorari under Rule 10 may yet be given consideration by the Court in the form of a GVR.

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203. See infra notes 234-40 and accompanying text.
204. See infra notes 226-33, 241-50 and accompanying text.
205. See infra notes 251-59 and accompanying text.
206. See infra notes 260-72 and accompanying text.
207. See *Thomas*, 117 S. Ct. at 283 (Scalia, J., concurring).
208. One recent case used *Thomas* as a guide in deciding to GVR and did not utilize Rule 10. See Lords Landing Village Condominium Council of Unit Owners v. Continental Ins. Co., 117 S. Ct. 1731, 1732 (1997) (per curiam) (GVR'ing in a situation "virtually identical" to *Thomas* on the basis that an intervening development which the court below may not have considered raised a reasonable probability that the outcome below was incorrect).
209. See BLOCH & KRATENMAKER, supra note 11, at 326 ("Rule 10 purports to describe the various factors that predominantly influence the Court's decision whether or not to grant a writ of certiorari, but this appears to be at best a checklist of certain relevant variables."); PERRY, supra note 12, at 34 ("One can be assured that the ambiguity of Rule 10 is not some unfortunate oversight by the justices."); STERN ET AL., supra note 2, § 4.2, at 165 (referring to the "restated generalizations" contained in Rule 10 as "more precisely drawn" than before).
210. See SUP. CT. R. 10; supra note 47 (quoting Rule 10).
212. In fact, Professor Perry has noted that diversity cases (as *Thomas*) are in a class that the Court repeatedly has referred to as frivolous and therefore not worthy of a grant of certiorari. See PERRY, supra note 12, at 223-24 (stating that one Justice’s example of a diversity case headed for denial was “[w]hen the Court of Appeals didn’t appear to
This consideration does raise a question as to why the Court is choosing to GVR at all in cases concerning state law. For federal questions GVR’d in light of an intervening Supreme Court decision or a change in federal law, Rule 10 does suggest that certiorari can be granted if the case involves an “important federal question.” But when the Court GVRs because of intervening state events, the action appears to be only a correction of error, which observers and Justices have noted time and again is not a function of the Supreme Court. Without any language of Rule 10 on which to rely, the issuance of GVRs in cases such as Thomas illustrate the observation that “[t]ry as they might, [the Justices] cannot always resist acting as a court of last resort.” Simply put, despite claims that it is not the Supreme Court’s function to correct errors, it may be hard for the Court to look the other way when an error can easily be corrected by a GVR.

understand the law of Arkansas. But that is clearly not the job of the . . . Court. It is the responsibility of the Supreme Court of the State of Arkansas”).

213. SUP. Ct. R. 10. Of course, many GVRs issued in light of a Supreme Court decision arguably do not present an important federal question. See Thomas, 117 S. Ct. at 283 (Scalia, J., concurring). Because a GVR does not reveal anything more than the Court’s belief that an intervening event might affect the outcome, it seems a stretch to argue that an important federal question is always being addressed.

214. See PERRY, supra note 12, at 100 (noting that the Justices claim the Court is not meant to ensure justice); WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 269 (1987) (“We are stretched quite thin trying to do what we ought to do—in the words of Chief Justice Taft, pronouncing ‘the last word on every important issue under the Constitution and the statutes of the United States’—without trying to reach out and correct errors . . . .” (quoting 2 HENRY F. PRINGLE, THE LIFE AND TIMES OF WILLIAM HOWARD TAFT: A BIOGRAPHY 998 (1939))); see also note 53 (discussing Chief Justice Rehnquist’s view that the role of the Court is not to correct errors). Chief Justice Rehnquist reiterated his view on this issue in his dissent to Thomas. See Thomas, 117 S. Ct. at 284 (Rehnquist, C.J., dissenting).

215. PERRY, supra note 12, at 265. Professor Perry quotes one former Supreme Court clerk as referring to such summary behavior as “‘the Zorro-concept—where they strike like lightning [sic] to do justice.’” Id. at 100 (quoting an anonymous former Supreme Court clerk).

216. Cf. Stutson v. United States, 116 S. Ct. 600, 602 (1996) (GVR’ing in light of a change in position by the Government, and noting that “the petitioner is in jail having, through no fault of his own, . . . no plenary consideration of his appeal”). The injustice of such a result seemed to be a factor that made a GVR appropriate. It may seem plausible that a similar injustice in the civil context could be corrected below through the application of Federal Rule of Civil Procedure 60(b)(6), which provides: “On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons . . . or (6) any other reason justifying relief from the operation of the judgment.” FED. R. CIV. P. 60(b)(6). Lower federal courts, however, are generally in agreement that Rule 60(b)(6) does not allow relief based on a change in the law after a final judgment or order is entered. See Jean F. Rydstrom, Annotation, Construction and Application of Rule 60(b)(6) of Federal Rules of Civil Procedure Authorizing Relief from Final Judgment or Order for “Any Other
Considering the Court's heavy workload, it is reasonable to suggest that correction of error should occupy as little time as possible. In one respect, the brevity of a typical GVR order, which usually lacks the concurrences or dissents of cases such as Thomas and Department of the Interior, and the fact that the Court need not reach a decision on the merits in order to GVR, suggest the simplicity of the procedure. Therefore, a GVR may be appropriate in those instances in which the Court cannot resist a temptation to do justice despite its burgeoning docket.

Although Chief Justice Rehnquist is clearly correct that GVRs give courts of appeals extra work, their job does include error correction. But on the other hand, it is arguable that the small amount of time needed to decide to GVR could still be used more wisely on other matters.

The Chief Justice's view that the Supreme Court cannot be troubled with diversity cases such as Thomas suggests that state law cases are not held in high regard by federal courts. However, it

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217. See Hellman, supra note 13, at 404.
218. See generally Wasby, supra note 10, at 157 ("[S]ummary dispositions do provide the justices an additional option for cases for which the Court does not have time for full-dress treatment but on which they wish to act.").
219. The courts of appeals are required to hear all cases that are properly brought before them. See id. at 44; see also 28 U.S.C. § 1291 (1994) ("The courts of appeals ... shall have jurisdiction of appeals from all final decisions of the district courts . . . .").
220. However, it is not clear that much time could be saved by simply denying certiorari instead of GVR'ing. Currently, the job of reviewing certiorari petitions is completed mostly by the Supreme Court's law clerks. See Bloch & Krattenmaker, supra note 11, at 335-36. Many of the Justices have combined their clerks into a "cert pool" that produces memos on which the Justices rely in making their decisions to grant certiorari. See id. at 336. Petitions that at least one Justice thinks merit discussion in the Court's weekly conference are put on the "discuss list," and all other petitions for that week are automatically denied. See id. In conference, the cases on the discuss list are voted on separately. See id. at 337. However, sources agree that because the Court's certiorari workload is so demanding, "discussions at this stage are usually quite perfunctory; most justices, when their time comes, simply announce their vote." Id.
221. Diversity cases in the federal courts of appeals tend to rely on prior federal decisions in diversity cases rather than state court decisions. See William M. Landes & Richard A. Posner, Legal Change, Judicial Behavior, and the Diversity Jurisdiction, 9 J. LEGAL STUD. 367, 374-75 (1980); cf. Lords Landing Village Condominium Council of Unit Owners v. Continental Ins. Co., 117 S. Ct. 1731, 1733 (1997) (Rehnquist, C.J., dissenting) (noting that scheduling a state law case for argument "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").
might be better to say that state law cases are not the type of cases the Supreme Court has the expertise to decide.\textsuperscript{222} One proposal would be to make the courts of appeals the highest tribunal for state law questions in the federal courts.\textsuperscript{223} Another suggestion has been made that applicable state law could be "frozen" at some point in time to prevent remands years later based on wavering state precedents.\textsuperscript{224} These proposals do not mean that state law cases are less important, just that the Supreme Court is not the appropriate forum for their adjudication.\textsuperscript{225} However, as long as the Supreme Court has the discretion to review such decisions, a GVR can be an appropriate mechanism to do so with a minimum of effort.

In addition to being expeditious in diversity cases involving state law, GVRs also may suggest the Court's future direction in an area of the law. For example, when the Court GVRs in light of its own prior decision, it implies that the intervening decision may be applicable to the case before it.\textsuperscript{226} But more importantly, it may imply that the Court is willing to apply the intervening decision more broadly than is immediately discernible. \textit{Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati}\textsuperscript{227} appears to be a recent example

\textsuperscript{222} See \textit{Huddleston v. Dwyer}, 322 U.S. 232, 237 (1944) (noting that remand is appropriate because the lower courts are better versed in applicable state law).

\textsuperscript{223} Cf. \textit{POSNER}, supra note 56, at 210-21 (discussing the effect of limiting diversity jurisdiction in all federal courts). For example, under the current state of the law, if Georgia's intervening decision on retroactivity that affected \textit{Thomas}, see supra note 38 and accompanying text, had been handed down after a petition for certiorari to the Supreme Court had been denied, the petitioners in \textit{Thomas} would have had no recourse because the judgment of the court of appeals would have been final. \textit{See} \textit{Federated Dep't Stores, Inc. v. Moitie}, 452 U.S. 394, 398 (1981) (noting that under the doctrine of res judicata, a final judgment on the merits prevents relitigation, even if the judgment "rested on a legal principle subsequently overruled in another case"). Likewise, if a statute were passed that made state law decisions such as \textit{Thomas} unreviewable by the Supreme Court, its enactment would effectively make the decision of the court of appeals final on questions of state law and bar efforts to appeal to the Supreme Court. Regardless, including jurisdictional and procedural issues, the Court does not address many diversity cases. \textit{See} \textit{POSNER}, supra note 56, at 210 & n.23 (noting that diversity cases with full opinions comprised only 1.25\% of the Court's full opinions from the 1989 through 1993 Terms).

\textsuperscript{224} See \textit{The Supreme Court, 1960 Term}, supra note 2, at 97.

\textsuperscript{225} When federal courts apply state law, they must first look to the state court decisions of that state. \textit{See} \textit{Erie R.R. v. Tompkins}, 304 U.S. 64, 78 (1934) (holding that federal courts in a diversity action must apply substantive state law); \textit{supra} note 39 (discussing application of \textit{Erie}). As a result, it is unlikely that state courts are yearning for Supreme Court precedents on questions of state law in order to resolve their cases.

\textsuperscript{226} \textit{See}, e.g., \textit{Bowden v. Francis}, 470 U.S. 1079, 1079 (1985) (mem.) (GVR'ing in light of \textit{Ake v. Oklahoma}, 470 U.S. 68 (1985), with three Justices dissenting because they thought \textit{Ake} was not applicable).

\textsuperscript{227} 116 S. Ct. 2519 (1996) (mem.).
of this phenomenon. *Equality Foundation* was GVR'd for further consideration in light of *Romer v. Evans*, which struck down a Colorado constitutional amendment that prevented enactment of local ordinances protecting homosexuals. Although *Equality Foundation* involved a similar denial of such protections, the provision at issue was a city charter instead of a state constitutional amendment. Justice Scalia dissented to this GVR because he did not see how *Romer*, in which a state constitutional amendment denied a locality the freedom to choose, could apply in a case where a locality exercised this freedom. Though Justice Scalia said that *Romer* "cannot possibly be thought to have embraced" this situation, the fact that the Court GVR'd the case indicates that the scope of *Romer* is not yet settled.

In addition to signaling the broader scope of an intervening Supreme Court decision, dissents from GVRs may "herald the appearance on the horizon of a possible reexamination" of an area of law. For example, the three Justices who dissented in *Department of the Interior* noted that they would have granted full review because a federal statute had been held unconstitutional. Because the legal

230. See *Equality Foundation*, 116 S. Ct. at 2519 (Scalia, J., dissenting).
231. See id. (Scalia, J., dissenting).
232. Id. (Scalia, J., dissenting).
233. In fact, on remand the Sixth Circuit again upheld the constitutionality of the local ordinance, reasoning that a study of *Romer* "supplied no rationale for subjecting a purely local measure of modest scope ... to any equal protection assessment other than the traditional 'rational relationship' test." *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 298-99 (6th Cir. 1997). The Sixth Circuit decided that the ordinance met that test because its objectives varied from those of the state constitutional amendment in *Romer*. See id. at 300-01.

*Board of Trustees v. Sweeney*, 439 U.S. 24 (1978), is another example of the Court GVR'ing in light of a case that the dissent claimed shed no light on the lower court's judgment. See id. at 27-29 (Stevens, J., dissenting); see also supra notes 131-37 and accompanying text (discussing *Sweeney*). By granting a GVR in *Sweeney*, the Court suggested that its holding in the intervening decision was applicable to the facts before it, but the four Justices dissenting from the GVR order did not agree with such a potentially broader application. See *Sweeney*, 439 U.S. at 25. As in *Equality Foundation*, the court of appeals in *Sweeney* affirmed its earlier outcome on remand. See *Sweeney* v. Board of Trustees, 604 F.2d 106, 108-09 (1st Cir. 1979), cert. denied, 444 U.S. 1045 (1980).

234. Brennan, supra note 10, at 480. Justice Brennan was referring to dissents from denial of certiorari in this statement, but the wisdom of his observation appears equally applicable to GVR dissents.
dispute in Department of the Interior dealt with the nondelegation doctrine, the case suggests that at least three Justices are inclined to think that the nondelegation area merits re-examination. Currently, large delegations of legislative power to agencies by Congress are routinely upheld. Although some have claimed that this area of the law is dead, there have been proposals for revival of a stronger nondelegation doctrine that would require more specificity and definition in statutes that delegate to agencies. The Court did not choose to examine this area, but the dissent in Department of the Interior may signal future activity.

One danger of a GVR is that its ramifications may be unclear to the lower court on remand. For example, in one case a lower court interpreted a GVR in light of an intervening Supreme Court decision to mean that the intervening decision was to apply retroactively, but the Court later made it clear that it never decided that


237. See, e.g., Loving v. United States, 116 S. Ct. 1737, 1751 (1996) (upholding a statute that authorizes the President to list aggravating factors to support the death penalty for court-martial prosecutions); Mistretta v. United States, 488 U.S. 361, 412 (1989) (upholding a statute that allows an agency to create criminal sentencing guidelines).


239. See, e.g., ERNEST GELLHORN & RONALD M. LEVIN, ADMINISTRATIVE LAW AND PROCESS IN A NUTSHELL 18-21 (4th ed. 1997) (discussing proposals to revive the nondelegation doctrine); DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 13-19 (1993) (arguing that delegation "undercuts democracy, undoes the Constitution's most comprehensive protection of liberty, and ultimately makes government less effective in achieving the popular purposes of regulating statutes").

240. See Roff, supra note 70, at 476 (noting that the Court "did not address any of the actual issues raised by the [Eighth Circuit decision] or the nondelegation doctrine debate").

question.\textsuperscript{242} Similarly, \textit{Department of the Interior} seems to have created confusion regarding the availability of judicial review over the action to acquire title.\textsuperscript{243} Justice Scalia argued that if judicial review over the action was truly unavailable under the Quiet Title Act ("QTA"),\textsuperscript{244} the Court had no authority to GVR in order to create the necessary conditions for judicial review.\textsuperscript{245} This argument succeeds only if judicial review definitely was unavailable.\textsuperscript{246} Nevertheless, because the Court \textit{did} GVR, the question arises as to how it gained the power to do so. The Court did not address possible answers to this question.\textsuperscript{247} The net result is that it is uncertain what the Court decided, if anything, about the availability of judicial review under QTA.

Even so, the Secretary of the Interior seems to have interpreted the GVR order broadly. On remand, the Secretary claimed that

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\item \textsuperscript{242} See \textit{Solem}, 465 U.S. at 643 (holding that \textit{Edwards should} not be applied retroactively). Thus, the Seventh Circuit had assumed \textit{Edwards} should have retroactive effect although the Court had not so held. See supra note 241. Maybe the Court thought that the Seventh Circuit would consider the retroactivity issue before deciding the effect of \textit{Edwards}. See generally \textit{Hellman}, supra note 2, at 32-33 & n.108 (discussing \textit{White} and the problems created by GVRs).
\item \textsuperscript{243} See \textit{Department of the Interior}, 117 S. Ct. at 286 (Scalia, J., dissenting).
\item \textsuperscript{244} 28 U.S.C. § 2409a (1994).
\item \textsuperscript{245} See \textit{Department of the Interior}, 117 S. Ct. at 288 (Scalia, J., dissenting).
\item \textsuperscript{246} See id. (Scalia, J., dissenting). If judicial review was available under QTA after acquisition of title, the Court would have power to remand regardless of the view of the Department of Interior on that issue at the time. If judicial review was not available, then the federal courts could not review the action.
\item \textsuperscript{247} One possibility is that the Court’s GVR implied that judicial review after acquisition of title must be available because otherwise a GVR would not have been possible. Although the district court ruled that the QTA barred judicial review, the Eighth Circuit asserted in a footnote that “[w]e doubt whether the Quiet Title Act precludes APA review of agency action by which the United States \textit{acquires} title.” South Dakota v. United States Department of the Interior, 69 F.3d 878, 881 n.1 (8th Cir. 1995), \textit{vacated and remanded}, 117 S. Ct. 286 (1996). In other words, the Court could dispose of the case only if it had the power to hear it, and because the Court disposed of it, it must have had that power. Although one would not expect the Court to decide the issue in such a manner, it is hard to see how the Court could have GVR’d otherwise. Cf. \textit{The Supreme Court, 1960 Term}, supra note 2, at 96 (noting that the grounds of a vacate and remand order were unclear, but that “it seems unlikely that the Court would announce... a rule in so cryptic a manner, despite the implications of the dissenting opinion”).
\end{itemize}

A second possibility is that the Court did not decide the issue of judicial review at all. The court of appeals noted the existence of judicial review as a factor to consider under nondelegation principles, see \textit{Department of the Interior}, 69 F.3d at 881, but it did not rule on whether judicial review of the claims was barred because it found the statute unconstitutional, see id. at 885. Therefore, on appeal, the only issue before the Court was the constitutionality of the statute. Consequently, all the Court did was remand the case back to the lowest level, the Secretary of the Interior, so that she could reconsider her decision in light of the new regulation, but nevertheless remaining free to do as she saw fit.
Department of the Interior "reopened the decision of the Secretary to acquire the land in trust."\textsuperscript{248} Furthermore, the Secretary claimed that the remand "operate[d] to take the land out of trust so that judicial review under the APA may be available when the Secretary makes a decision to accept or reject an application concerning the same parcels of land."\textsuperscript{249} In this light, it appears that the Secretary felt compelled to reconsider the administrative decision to take the land in trust as a result of Department of the Interior, which means that she assumed the GVR validated judicial review.\textsuperscript{250}

Perhaps the Court only remanded for reconsideration in light of the new regulation, but the Secretary was wrong in believing that the remand compelled her to take the land out of trust and later subject the land to new proceedings subject to judicial review. Under this view, the Secretary's decision to take the land out of trust was not mandatory, but discretionary. Therefore, although the Secretary believed a new administrative decision was required, it was not, because the Supreme Court never addressed the availability of judicial review after acquisition of title. But at the very least, analyzing this issue in Department of the Interior illustrates that it can be difficult to determine what a GVR order has actually decided.

Because byzantine explanations of GVR orders are troubling, Department of the Interior also raises the concern, noted by Justice Scalia, that the Government will now take advantage of its ability to obtain a GVR by simply changing its position in light of an unfavorable decision.\textsuperscript{251} Hopefully the Court will heed its own admonition in Lawrence that "an unfair or manipulative litigation strategy" will make a GVR inappropriate.\textsuperscript{252} This advice should especially be considered when the Solicitor General is a party. The Office of the Solicitor General is held in high regard by the Court,\textsuperscript{253} which makes it more likely to be able to subtly manipulate the

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  \item \textsuperscript{248} Notice, 62 Fed. Reg. 26,551, 26,551 (1997).
  \item \textsuperscript{249} Id. at 26,552.
  \item \textsuperscript{250} However, the Court could only compel the Secretary's actions on remand if the acquired land was subject to judicial review. The Secretary's actions appear to substantiate Justice Scalia's concern that the Court was "construct[ing] the necessary conditions for judicial review" when it had no power to do so. Department of the Interior, 117 S. Ct. at 288 (Scalia, J., dissenting).
  \item \textsuperscript{251} See id. at 287 (Scalia, J., dissenting).
  \item \textsuperscript{252} Lawrence v. Chater, 116 S. Ct. 604, 607 (1996).
  \item \textsuperscript{253} See Perry, supra note 12, at 113, 128-33; see also Mariscal v. United States, 449 U.S. 405, 406 (1981) (Rehnquist, J., dissenting) (noting that the Office of the Solicitor General has "earned over the years a reputation for ability and expertise in presenting the Government's claims to this Court").
\end{itemize}
outcome of a petition for certiorari. Justice Scalia has expressed that the practice of GVR'ing when the Government loses below invites manipulation. While it is possible that cases like Department of the Interior will arise even when manipulation does not occur, manipulation seems less likely to occur in cases in which the Government prevails below. Although the Solicitor General has a vested interest in maintaining his special status with the Court, the temptation to suggest a GVR in order to vacate an unwanted outcome may prove to be irresistible. But for now, Department of the Interior appears to reject the view that a line be set to limit GVRs when the Government is a party to situations in which the Government prevailed below.

Insofar as Thomas and Department of the Interior demonstrate the Court’s liberal use of the GVR, Supreme Court practitioners should be sure to request a GVR as an alternate ground for granting certiorari if some intervening event has occurred that comports with a familiar GVR category. This request should certainly be made if the Court is already holding a case for plenary decision on a similar matter, because most GVRs occur in this fashion. As Chief Justice

254. The Solicitor General’s success rate of 70% in requesting a grant of certiorari, see WASBY, supra note 10, at 105-07, is much greater than the overall success rate of about five percent, see PERRY, supra note 12, at 37, which at least suggests some experience in crafting successful certiorari petitions.

255. See Department of the Interior, 117 S. Ct. at 287 (Scalia, J., dissenting).

256. Cf. David M. Rosenzweig, Note, Confession of Error in the Supreme Court by the Solicitor General, 82 GEO. L.J. 2079, 2096 (1994) (noting that some cases demonstrate the “Government’s willingness to sacrifice victory in the immediate case to avoid a ruling on the merits of some issue”). While Rosenzweig notes that the potential for manipulation exists, it is logical that the Government would be much more willing to “sacrifice” a loss than a win.

257. See WASBY, supra note 10, at 106 (“Foremost is the need to protect the [Solicitor General’s] reputation and thus to increase the chance of winning later cases.”).

258. See Rosenzweig, supra note 256, at 2111 (noting that strategic confessions of error to avoid an important but unwanted decision can happen, but that the threat of damaging the Solicitor General’s position in the long run might discourage such abuse).

259. David Gossett suggests that the risk of manipulative positions is mitigated when the Government endorses a general agency policy as opposed to a position taken in an individual case. See David M. Gossett, Comment, Chevron, Take Two: Deference to Revised Agency Interpretations of Statutes, 64 U. CHI. L. REV. 681, 692 n.50 (1997) (“General positions are less worrisome, since there is a reduced fear of bias.”). This observation suggests another possible line that could be drawn to limit manipulation of the GVR.

260. The familiar categories are an intervening Supreme Court or state court decision, a new statute, a new position taken by the Government or agency, or a confession of error by the Government in the brief in opposition for certiorari in either the present case or in another case. See supra notes 3-6 and accompanying text.

261. See supra note 96 and accompanying text. However, this request can also be
Rehnquist pointed out in *Thomas*, it is unclear at what point "dubious" connections between the case at hand and the intervening event will be too great to GVR, but cases that at least appear related at first glance will likely meet the GVR test.

*Thomas* affirms that intervening state supreme court decisions present grounds for a GVR. Practitioners should therefore be cognizant of whether a state court decision that can have an effect on a client's case has been issued after a federal court judgment such that the federal court did not have the opportunity to consider the effect of the state decision. Therefore, if a state supreme court has heard arguments on issues relevant to a federal court case but has not yet issued a decision, it may make sense for the losing party in a federal forum to apply for certiorari to keep the case alive, claiming that the federal court misapplied state law, in addition to any other grounds for appeal. Then, one may file a supplemental brief after the state supreme court decision is issued or file a petition for reconsideration of the decision to deny certiorari, based on the intervening decision.

When presenting a petition obviously not meeting any of the Rule 10 considerations, it may be wise to note that a GVR does not fit in the normal boundaries of Rule 10, pointing to Justice Scalia's made in light of other intervening events like those listed *supra* in note 260.


263. Cf. Hellman, *supra* note 2, at 15 (suggesting that the Court follows a policy of GVR'ing "all cases in which the petitioner had raised issues similar to those adjudicated in a recent plenary decision, without looking very closely to determine whether the lower court's ruling conflicted with the intervening precedent").

264. See *Thomas*, 117 S. Ct. at 282 (Scalia, J., concurring).

265. Once a judgment is final, later decisions do not affect it. See *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) (noting that under the doctrine of res judicata, a final judgment on the merits prevents relitigation, even if the judgment "rested on a legal principle subsequently overruled in another case"). To keep a case alive, a practitioner can file a petition for certiorari, which generally must be done within 90 days of the entry of judgment. See *Sup. Cr. R*. 13.

266. For example, in *Thomas*, the original petition for certiorari claimed that Georgia law had been misapplied, in addition to claims of violations of the Fifth and Fourteenth Amendments. See *Petition for Writ of Certiorari at 3, Thomas* (No. 95-1826). Of course, the Supreme Court rarely grants certiorari simply to correct "erroneous factual findings or the misapplication of a properly stated rule of law," *Sup. Cr. R*. 10, but *Thomas* suggests that the Court may still intervene in order to do justice. See *supra* notes 213-20 and accompanying text. Those considering the soundness of such a strategy should consider whether the expense of filing is justifiable, although petitioners filing in forma pauperis do not have to pay any fees. See *Perry, supra* note 12, at 102.

267. In *Thomas*, the petitioner's supplemental brief was the first to point out the relevant intervening decision. See *Thomas*, 117 S. Ct. at 285 (Rehnquist, C.J., dissenting). In regards to the procedure for rehearing of an order denying certiorari, see *Sup. Cr. R*. 44.
observation in *Thomas* that Rule 10 is not controlling and that the test for a GVR should be whether there has been an intervening event that compels reconsideration. The broad language of 28 U.S.C. § 2106 can also be used as support for the power to GVR. Because the Court often cites older GVRs as precedent for the appropriateness of more recent ones, a practitioner should also cite to cases that presented a similar procedure pattern to the Court and received a GVR. The Court’s willingness to GVR in a case similar to *Thomas* later in the 1996 Term, citing *Thomas* approvingly for the authority to do so, confirms that the considerations for GVR’ing are truly a separate inquiry from the regular practice of granting certiorari.

In conclusion, *Thomas* and *Department of the Interior* shed some light on when GVRs may be granted outside of the normal practice of remanding for consideration of recent plenary decisions. They demonstrate that GVRs can reach cases that do not consider important federal questions, and they demonstrate a conflict over what the proper role of the Court should be, if any, in being the final arbiter of justice. Although a GVR represents a case the Court has “decided not to decide,” it also says something about what issues the Court thinks need to be decided. Notwithstanding any problems, such as a potential for manipulation or unclear holdings, that are raised by GVRs, “the GVR practice prevents the Court from becoming, even more than it already is, a remote lawgiver cut off from the traditional processes of common-law adjudication.”

J. MITCHELL ARMBRUSTER

268. *See id.* at 283 (Scalia, J., concurring).


270. Likewise, perhaps a party opposing certiorari could dig through old petitions that were denied and that presented a similar situation to the Court. However, such a strategy is frustrated by the fact that denial of certiorari is not supposed to have any precedential effect. *See Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 366 n.1 (1973); LOUTHAN, *supra* note 91, at 82.


272. *See id.* (noting that “[t]his case fits within the category of cases in which we have held it is proper to issue a GVR order”).