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Courts as Managers: *American Tradition Partnership v. Bullock* and Summary Disposition at the Roberts Court

Summary disposition is a procedural innovation—added only belatedly to the Supreme Court’s rules—in which the Court dispenses with a case without briefing or oral argument. It presents a puzzle for students of appellate decisionmaking: how can a case be significant enough to merit the Court’s consideration, but not significant enough to warrant the benefits of adversarial procedure? Commentators have asserted that the Roberts Court is more likely than its predecessors to use summary disposition to resolve cases, but this Essay presents the first systematic look at its use of that procedure. The Essay finds that—contrary to general understanding—the Roberts Court has not used summary disposition more than its predecessors did. Rather, it has used the procedure in different and potentially dangerous ways.

INTRODUCTION

In June 2012, the Supreme Court issued a brief, unsigned order reversing a Montana Supreme Court decision that declined to apply *Citizens United v. FEC*¹ to a state campaign-finance statute.² Commentators described the Court’s refusal to use *American Tradition Partnership v. Bullock* to even consider overturning *Citizens United*³ as “disappointing,”⁴ “a missed opportunity,”⁵ and

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1. 558 U.S. 310 (2010).
 2. *Am. Tradition P’ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (per curiam).
 3. For instance, the Court could have entertained arguments that intervening developments had altered that case’s factual premises.
 4. Press Release, Rep. Nancy Pelosi (June 25, 2012), <http://www.democraticleader.gov/news/press/pelosi-statement-supreme-court-ruling-upholding-citizens-united>.

a “mistake.”⁶ What the decision should not have been was a surprise – not only in its substance, but in its form. *American Tradition Partnership* is entirely consistent with the Roberts Court’s use of summary disposition – the dispensation of a case without briefing or oral argument – to oversee, manage, and shape the output of lower courts.

In the weeks leading up to the decision, Adam Liptak wrote in the *New York Times* that the “main question” would be “*how* the court will reverse the Montana decision.”⁷ But even that question offered little suspense: *American Tradition Partnership* presented a perfect vehicle for summary reversal, especially for the Roberts Court, which has not hesitated to use summary disposition to send signals about its legal commitments and priorities. This Essay offers a brief description of summary disposition, presents data on its use at the Roberts Court, and examines three ways in which that Court has used summary disposition. Although the Court has not, contrary to some commentators’ suggestions, used summary disposition *more* than its predecessors, it has begun to use it *differently*.

Summary disposition is a procedural innovation, added belatedly and briefly to the Supreme Court rules. The Warren and Burger Courts conducted experiments with the tool – the Warren Court by reversing lower courts without explanation, the Burger Court by providing reasons and opportunities for lower courts to handle their own affairs. The Roberts Court, though, has embraced the tool in two novel ways: remanding cases to lower courts without having identified clear error, and reversing complex, fact-bound cases without having called for briefing. In doing so, the Court has increasingly acted in what this Essay describes as a managerial capacity, potentially to cope with an ever-increasing flow of certiorari petitions. But there may be consequences: a form of judicial carelessness in which summary disposition is used not simply to manage and oversee lower courts’ dockets, but – contrary to tradition and reason – to make new law.

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5. Garrett Epps, *Court to Super PACs: Full Speed Ahead*, AM. PROSPECT, June 25, 2012, <http://prospect.org/article/court-super-pacs-full-speed-ahead>.
 6. Press Release, Brennan Ctr. for Justice, NYU Sch. of Law, Supreme Court Lets Unlimited Money Stand, Ignores Extensive Record of Corruption (June 25, 2012), http://www.brennancenter.org/content/resource/supreme_court_lets_unlimited_money_stand_ignores_extensive_record_of_corrup.
 7. Adam Liptak, *Mystery of Citizens United Sequel Is Format, Not Ending*, N.Y. TIMES, June 11, 2012, <http://www.nytimes.com/2012/06/12/us/in-citizens-united-ii-how-justices-rule-may-be-an-issue-itself.html>.

I. SUMMARY DISPOSITION IN THEORY

Supreme Court Rule 16, which governs the Court’s disposition of petitions for writs of certiorari, states that an appropriate order in any case “may be a summary disposition on the merits.”⁸ It does not explain when such an order may be appropriate. It does not explain why the Court might issue one. It does not even explain what summary disposition is: what information it contains, what commands it gives, what precedential value it holds. Such questions are left to the Court to work out in practice. The ambiguous role and amorphous boundaries of summary disposition have led to consternation and criticism, both within the Court⁹ and beyond.¹⁰ But the criticism has not halted the practice. Over the last forty years, the Court has relied on three common, if controversial, forms of summary disposition:

- *Summary orders*, which simultaneously grant certiorari petitions and affirm or reverse the judgment below *without explanation*. These opinions are often issued per curiam (“by the Court,” or unsigned).
- *Summary opinions*, which simultaneously grant certiorari petitions and affirm or reverse the judgment below *with explanation*, usually a brief discussion of the facts and issues involved. These opinions are also generally issued per curiam.

8. SUP. CT. R. 16.1. This provision was codified in 1980. See EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 342 (9th ed. 2007).

9. Justice Scalia, on today’s Court, and Justices Marshall and Stevens, on previous Courts, have criticized the Court’s use of summary disposition. Justice Scalia has argued that in certain circumstances it is ultra vires. See, e.g., *Youngblood v. West Virginia*, 547 U.S. 867, 872 (2006) (Scalia, J., dissenting) (decrying the Court’s decision to vacate and remand “*in light of nothing*”); *Price v. United States*, 537 U.S. 1152, 1153 (2003) (Scalia, J., dissenting) (arguing that the Court “ha[s] no *power* to vacate a judgment” not in error). Justice Marshall argued that the practice was unfair to litigants. See, e.g., *Montana v. Hall*, 481 U.S. 400, 405 (1987) (Marshall, J., dissenting) (arguing that summary disposition “deprive[s] the litigants of a fair opportunity to be heard”). Justice Stevens argued that the practice cut against the Court’s traditional standards for granting certiorari. See, e.g., *Florida v. Meyers*, 466 U.S. 380, 385 (1984) (Stevens, J., dissenting) (arguing that summary disposition “pose[s] disturbing questions concerning the Court’s conception of its role”). The Court’s opinions in all of these cases were per curiam.

10. See, e.g., GRESSMAN ET AL., *supra* note 8, at 342 (describing summary disposition as “controversial”); Ernest J. Brown, *The Supreme Court: 1957 Term—Foreword: Process of Law*, 72 HARV. L. REV. 77, 95 (1958) (arguing that the Court should “limit[] the number of [certiorari] selections to the number of cases to which it can give a hearing commending itself as fair and a consideration commending itself as adequate”).

- *Reconsideration orders*, which simultaneously grant certiorari petitions, vacate the judgment below, and remand the case to the lower court for “reconsideration”—an order more commonly known as a “GVR,” for “grant, vacate, and remand.”¹¹ Technically, a GVR does “not amount to a final determination on the merits.”¹² Rather, it merely indicates that the Court believes that, upon reconsideration, there is “‘a reasonable probability’ that the [lower court] would reject a legal premise on which it relied.”¹³

Summary disposition at the Supreme Court presents a puzzle. Appellate courts generally act in two capacities: a lawmaking capacity, in which they “announce, clarify, and harmonize the rules of decision employed by the legal system in which they serve”;¹⁴ and an error-correcting capacity, in which they “determine if prejudicial errors were committed” in applying those rules to facts.¹⁵ But it is well established that the Supreme Court “is not, and has never been, primarily concerned with the correction of errors in lower court decisions.”¹⁶ And summary opinions—although *capable* of making law—are

11. The GVR practice has received considerable academic attention. See, e.g., Arthur D. Hellman, “Granted, Vacated, and Remanded”—*Shedding Light on a Dark Corner of Supreme Court Practice*, 67 JUDICATURE 389 (1984). More recent discussions of the GVR process can be found in Aaron-Andrew P. Bruhl, *The Supreme Court’s Controversial GVRs—and an Alternative*, 107 MICH. L. REV. 711 (2009); Shaun P. Martin, *Gaming the GVR*, 36 ARIZ. ST. L.J. 551 (2004); J. Mitchell Armbruster, Note, *Deciding Not To Decide: The Supreme Court’s Expanding Use of the “GVR” Power Continued in Thomas v. American Home Products, Inc. and Department of the Interior v. South Dakota*, 76 N.C. L. REV. 1387 (1998); and Sena Ku, Comment, *The Supreme Court’s GVR Power: Drawing a Line Between Deference and Control*, 102 NW. U. L. REV. 383 (2008). These pieces are generally critical of the GVR, but none addresses the GVR as one component of a broader trend in the Court’s use of summary disposition.
12. *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964) (per curiam).
13. *Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001) (per curiam) (quoting *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam)).
14. PAUL D. CARRINGTON, DANIEL J. MEADOR & MAURICE ROSENBERG, *JUSTICE ON APPEAL* 3 (1976).
15. ROBERT A. LEFLAR, *INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS* 3 (1976). See generally Arthur D. Hellman, *Error Correction, Lawmaking, and the Supreme Court’s Exercise of Discretionary Review*, 44 U. PITT. L. REV. 795 (1983) (examining Supreme Court decisionmaking through the lens of these two capacities).
16. Chief Justice Fred M. Vinson, *Work of the Federal Courts*, Address Before the American Bar Association (Sept. 7, 1949), in 69 S. Ct. v, vi (1949).

poorly suited to the task, because they are not the products of merits briefing and oral argument.

The best way to understand summary disposition – and, this Essay argues, the way that the Roberts Court *does* understand it – is as a tool to manage and oversee the docket of lower courts. Summary disposition presents concrete advantages for a high court facing a rising tide of petitions from lower courts, as the Supreme Court currently is.¹⁷ By issuing GVRs, the Court can ensure that more lower-court decisions take account of intervening precedent without the Court spending its own time and energy on cases that pose similar issues. By issuing summary opinions, the Court can send signals about its commitments and priorities, even on settled areas of law, by illustrating particularly egregious misapplications. In other words, summary disposition allows the Court, acting in its *managerial* capacity – rather than its lawmaking or its error-correcting capacity – to dispose of more cases with less effort, to correct egregious legal errors when they arise, and to preserve the Court’s limited resources for cases that present novel legal problems.

But it also presents disadvantages. Summary orders that dispose of lower-court judgments without explication – although rare today – result in fewer and less intelligible legal principles for litigants and lower courts to consider. Summary opinions risk significant unfairness to litigants, who have not had the opportunity to submit merits briefing on their cases. Perhaps most disturbingly, summary consideration of all kinds may lead to “erroneous or ill-advised decisions,”¹⁸ because the Court, in making its decision, will not have benefited from merits briefing or oral argument. The costs of summary disposition are not insubstantial – especially if used to do more than apply well-established legal principles to new circumstances.

II. SUMMARY DISPOSITION IN PRACTICE: A VIEW FROM THE ROBERTS COURT

The last few years have witnessed intermittent muttering over the use of summary disposition at the Roberts Court. Professor Vikram Amar has observed that the Court is increasingly willing to use summary disposition to

17. See Timothy S. Bishop, Jeffrey W. Sarles & Stephen J. Kane, *Tips on Petitioning for and Opposing Certiorari in the U.S. Supreme Court*, LITIGATION, Winter 2008, at 26, 26 (noting that certiorari petitions “more than doubled” from the mid-1970s to 2006); see also Andrew B. Coan, *Judicial Capacity and the Substance of Constitutional Law*, 122 YALE L.J. 422 (2012) (arguing that judicial capacity helps to explain the substance of certain Supreme Court decisions).

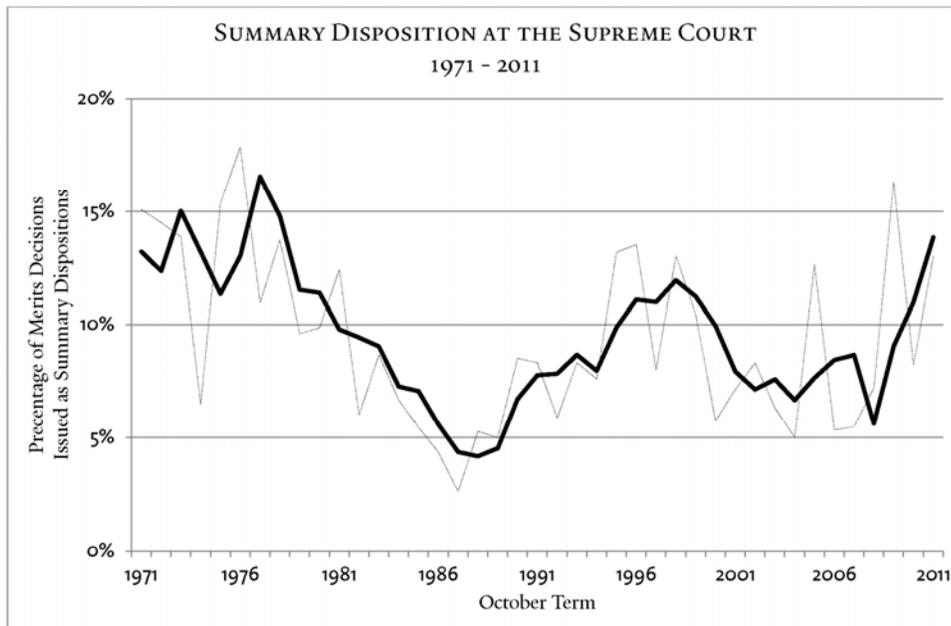
18. *Harris v. Rivera*, 454 U.S. 339, 349 (1981) (Marshall, J., dissenting).

rebuke lower courts, and he has even claimed that the Court has occasionally acted out of “frustration and anger.”¹⁹ Veteran Supreme Court litigator Kevin Russell noted “an unusually large number of summary reversals” in one recent term.²⁰ And Adam Liptak, in the *New York Times*, has called the summary reversal “a favorite tool of the court led by Chief Justice John G. Roberts Jr.”²¹ Professor Ira Robbins has conducted the most thorough examination of summary disposition at the Roberts Court, surveying the Court’s opinions and noting that, “[i]n the first six years of Chief Justice Roberts’s tenure, almost nine percent of the Court’s full opinions were per curiams.”²²

The thrust of those discussions has been the *volume* of summary dispositions: from Liptak to Russell, commentators have expressed concern that the Roberts Court is more likely than its predecessors to consider and decide cases summarily. The data, however, cast doubt on such speculation. The 2009 Term that alarmed Russell, in which the Court ultimately issued fifteen per curiam reversals of lower courts, was an outlier. In the previous three Terms (2006, 2007, and 2008), the Court issued four, four, and six such reversals, respectively, and in the subsequent Term it issued only seven. More broadly, while the *proportion* of per curiam dispositions (measured as a percentage of overall merits dispositions) has risen slightly over the first seven Terms of the Roberts Court—from eight percent in its first year to just under fourteen percent²³—only in 2009 did it approach the levels it reached during the Burger Court, when it topped sixteen percent.²⁴ The Roberts Court has not summarily disposed of cases on the merits more often than its predecessors did.

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19. Vikram David Amar, *The Supreme Court’s First Ruling of the New Term, Cavazos v. Smith: Supreme Court Annoyance, the Ninth Circuit, and Summary Reversals*, VERDICT (Nov. 11, 2011), <http://verdict.justia.com/2011/11/11/the-supreme-courts-first-ruling-of-the-new-term-cavazos-v-smith>.
 20. Kevin Russell, *An Increase in the Court’s Summary Docket*, SCOTUSBLOG (Feb. 16, 2010, 11:13 AM), <http://www.scotusblog.com/2010/02/an-increase-in-the-court%E2%80%99s-summary-docket>.
 21. Liptak, *supra* note 7.
 22. Ira P. Robbins, *Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curiam Opinions*, 86 TUL. L. REV. 1197, 1207 (2012). Professor Robbins’s primary concern is with the anonymity that characterizes these opinions, rather than the process that lies behind them; he argues that the per curiam is at odds with the tradition of individuality that characterizes the American judicial system and contends it should be limited to “situations in which courts use only formulaic, boilerplate language to dispose of the matter before it.” *Id.* at 1241.
 23. This growth is apparent when this proportion is measured as a three-year rolling average. The proportion of per curiam dispositions has actually varied dramatically, ranging from five percent in 2006 to sixteen percent in 2009.
 24. The data in this Essay are drawn from two sources. Longitudinal comparisons, including Figure 1, rely on the Supreme Court Database, a multiuser database created by Professor

Figure 1.²⁵



The Court has, however, summarily disposed of cases in a *different way* from what its predecessors did. The Warren Court became known for an unusually aggressive approach to summary disposition: in sixteen Terms, the Warren Court issued over 250 decisions reversing lower courts with “no more than a citation or two by way of explanation.”²⁶ Some reversals contained no explanation whatsoever.²⁷ The Burger Court, almost certainly in response to

Harold Spaeth, SUP. CT. DATABASE, <http://scdb.wustl.edu/index.php> (last updated Sept. 13, 2012). More detailed data about the Roberts Court, including its use of GVRs, are drawn from an examination of all merits opinions and order lists issued by the Court since the 2005 Term. See *Orders and Journal*, SUP. CT. OF THE U.S., <http://www.supremecourt.gov/orders/orders.aspx> (last visited Dec. 20, 2012) (providing orders and opinions relating to orders dating back to the 2003 Term). I have not provided individual citations for these data points.

25. “Summary disposition” is defined as per curiam opinions issued without briefing or merits arguments (not GVRs). The heavy line represents the three-year rolling average; the light line represents actual data. These data are drawn from SUP. CT. DATABASE, *supra* note 24.
26. Hellman, *supra* note 15, at 822.
27. *Id.* at 824.

criticism of the Warren Court's approach to such cases,²⁸ all but eliminated the summary order from the Court's toolkit and reinstated the Court's practice of remanding cases to lower courts for consideration.²⁹ The Roberts Court has continued to use the Burger Court's tools—the GVR and the summary order—but has, acting in its managerial capacity, expanded the use of those tools to cases that the Burger Court would not have considered appropriate vehicles for summary disposition.

A. GVRs: Remanding in Search of Error

First, the Roberts Court has expanded the use of summary reconsideration orders (or GVRs) for cases that once would not have warranted them, because the underlying opinions neither rely on a recently changed legal premise nor present clear error.

The Court has expanded its use of the GVR in absolute terms as well: in its first seven Terms, the Roberts Court remanded, on average, more than 110 cases per Term to the lower courts “in light of”³⁰ an intervening development—almost twice as often as the Burger Court did in the 1975 to 1979 Terms,³¹ and outnumbering, in most Terms, the number of cases disposed of on the merits. (By contrast, the Burger Court never issued more GVRs than signed opinions, and usually issued fewer than half as many.³²) This volume is explained in part by *United States v. Booker*,³³ which held that the Federal Sentencing Guidelines were not binding on federal courts; the 2005, 2006, and 2007 Terms saw the Court hold—and then remand—hundreds of cases in light of *Booker* and its

28. There is at least a plausible argument that the Warren Court's approach to summary disposition reflected Chief Justice Warren's personal commitment to doing justice *to the parties*: “There are many instances where the Court, without granting plenary review, has summarily reversed, remanded, or taken other direct action to achieve what the justices conceived to be essential justice. . . . The Court [must] be in position to test every case . . . to see if justice has truly been done.” *Retired Chief Justice Warren Attacks, Chief Justice Burger Defends Freund Study Group's Composition and Proposal*, 59 A.B.A. J. 721, 729-30 (1973) (quoting retired Chief Justice Warren).

29. Hellman, *supra* note 15, at 824-25.

30. This is the phrase generally used by the Court to indicate the reason for a GVR. *See, e.g., Oakley v. City of Memphis*, 557 U.S. 930, 930 (2008) (granting, vacating, and remanding “for further consideration in light of *Ricci v. DeStefano*”).

31. Because the Supreme Court Database does not include GVRs, I have adopted the 1975 to 1979 Terms as my point of comparison. Professor Hellman provides a table of figures for these terms in his article. Hellman, *supra* note 15, at 804-05.

32. *Id.*

33. 543 U.S. 220 (2005).

progeny.³⁴ But even the more recent post-*Booker* Terms—2008, 2009, and 2010—saw more than sixty GVRs issued each Term, well above the Burger Court’s average.

It is not the frequency of GVRs that has drawn fire from within the Court, however, but the issuance of such orders in cases that once would not have warranted them. Traditionally, GVRs are issued when an intervening Supreme Court case or other precedential ruling renders a legal premise relied upon in the original holding outdated.³⁵ The practice dates in large part to the Burger Court, which reacted to the Warren Court’s practice of reversing cases outright in light of intervening Supreme Court decisions by simply remanding those cases for reconsideration instead.³⁶ The GVR has always been seen as a procedural innovation (it is not described in the Supreme Court Rules), and generally as one with managerial benefits: by using the GVR, the Court could ensure that new rules were broadly applied to pending cases as well as future ones, maximize the impact of those rules while minimizing time on briefing and argument, and preserve its relationship with the lower courts.³⁷

The Roberts Court, though, has used the GVR differently. Rather than remand cases to lower courts in light of intervening precedential rulings, it has remanded cases to lower courts simply to consider arguments or case law that they *could have* relied on but *did not*. In *Youngblood v. West Virginia*,³⁸ the Court remanded a criminal case to the Supreme Court of Appeals of West Virginia, instructing it to address a constitutional issue that it had simply not considered in its opinion. “If this Court is to reach the merits of this case,” the per curiam opinion stated, “it would be better to have the benefit of the views of the [state court] on the *Brady* issue.”³⁹ Justice Scalia dissented. Noting that there had been no change in the factual or legal context of the case, he castigated the

34. In the 2006 Term, the Supreme Court issued more than 260 GVRs, the vast majority of which remanded cases to the lower courts in light of *Booker* and *Cunningham v. California*, 549 U.S. 270 (2007), which held that the same principle applied to state sentencing guidelines.

35. See Hellman, *supra* note 11, at 390 (explaining that GVRs instruct lower courts to reconsider their rulings “in light of a Supreme Court decision handed down after the lower court’s ruling”); see also *Henry v. City of Rock Hill*, 376 U.S. 776, 776 (1964) (per curiam) (“[Issuance of GVRs] has been our practice in analogous situations where, not certain that the case was free from all obstacles to reversal on an intervening precedent, we remand the case to the state court for reconsideration.”).

36. See Hellman, *supra* note 11, at 391.

37. See *id.* at 392 (describing the GVR as “a polite form of reversal”).

38. 547 U.S. 867 (2006) (per curiam).

39. *Id.* at 870.

Court for eviscerating the remains of its own GVR doctrine and instead “vacat[ing] and remand[ing] *in light of nothing*.”⁴⁰

Since *Youngblood*, the Roberts Court has continued to expand the use of what Justice Scalia calls the “GVR-in-light-of-nothing.”⁴¹ In *Nunez v. United States*,⁴² the Court remanded a case to the Seventh Circuit in light of the government’s confession of error—not because the Department of Justice thought that the Seventh Circuit had *erroneously* ruled in its favor, but because it thought it had *correctly* ruled in its favor, but for the wrong reason (the Department argued the lower court had misconstrued the defendant’s plea agreement). In *Webster v. Cooper*,⁴³ the Court remanded a case to the Fifth Circuit in light of a case that preceded that court’s decision by several months (and that presumably the Fifth Circuit had had ample time to consider). And in *Wellons v. Hall*,⁴⁴ the Court remanded a case to the Eleventh Circuit in light of an intervening Supreme Court decision that implicated only one of the two independent grounds the lower court had found for affirming a defendant’s conviction. In all three cases, Justice Scalia dissented. Because “we suspect that [the case] *may* be wrong,” he wrote in *Webster*, “and do not want to waste *our* time figuring it out, we instruct the Court of Appeals to do the job again, with a particular issue prominently in mind.”⁴⁵

This revolution in the Court’s GVR jurisprudence is not exclusively a product of the Roberts Court,⁴⁶ but the Court under Chief Justice Roberts has continued and expanded it.⁴⁷ Because these cases do not rely on changed premises but merely (potentially) faulty ones, other Courts might not have considered the GVR an appropriate tool to use. And because they do not, in general, present important questions of federal law or involve *clear* error (just potential error), other Courts might not have granted review at all, leaving the lower courts’ decisions untouched. The Roberts Court, however, has expanded

40. *Id.* at 872 (Scalia, J., dissenting).

41. *Id.* at 873.

42. 554 U.S. 911 (2008) (per curiam).

43. 130 S. Ct. 456 (2009) (per curiam).

44. 130 S. Ct. 727 (2010) (per curiam). *Wellons* is one of few GVRs accompanied by an opinion.

45. *Webster*, 130 S. Ct. at 457 (Scalia, J., dissenting) (“We should at least give it a new and honest name—not GVR, but perhaps SRMEOPR: Summary Remand for a More Extensive Opinion than Petitioner Requested. If the acronym is ugly, so is the monster.”).

46. The Court has issued GVRs based on the government’s confession of error since at least 1981, a habit that has drawn fire from Justice Scalia, Chief Justice Rehnquist, and others. See, e.g., *Mariscal v. United States*, 449 U.S. 405, 406 (1981) (Rehnquist, J., dissenting).

47. Indeed, unlike Chief Justice Rehnquist, who often joined Justice Scalia in dissent, Chief Justice Roberts has not yet dissented from a GVR.

the use of the GVR, a procedural innovation, to increase its influence over the lower courts, both federal and state. It has, in other words, acted neither in its lawmaking capacity nor—entirely—in its error-correcting capacity, but rather in its managerial capacity. In remanding in search of error, the Roberts Court has signaled a new era of management and oversight within the judicial system.

B. Summary Opinions: Correcting Errors Without Knowing the Facts

Second, the Roberts Court has embraced the use of summary disposition in cases that present contested questions of fact. Such cases are presumably not ripe for the Supreme Court’s discretionary review at all: Rule 10 states that “[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.”⁴⁸ And although summary disposition is arguably appropriate when used to correct clearly erroneous lower-court decisions, the Court has traditionally denied review to cases that present only perceived errors of fact.⁴⁹

In the first case of the 2011 Term, Justice Ginsburg argued that this principle militated against plenary review of *Cavazos v. Smith*.⁵⁰ In that case, the Court reversed the Ninth Circuit’s grant of federal habeas relief to a California woman accused of assaulting her grandson. Justice Ginsburg dissented. Describing the case as “notably fact-bound,” she argued that the Court should have denied the certiorari petition altogether, pursuant to its traditional practice.⁵¹ And even if review had been appropriate, she argued, summary disposition would not have been: “The fact-intensive character of the cases calls for . . . the adversarial presentation that full briefing and argument afford.”⁵² But the Court was unconvinced—perhaps, as Justice Ginsburg noted

48. SUP. CT. R. 10.

49. See, e.g., *United States v. Johnston*, 268 U.S. 220, 227 (1925) (“We do not grant a certiorari to review evidence and discuss specific facts.”); see also *Kyles v. Whitley*, 514 U.S. 419, 456–60 (1995) (Scalia, J., dissenting) (reviewing the Court’s history of certiorari grants in fact-bound cases and concluding that they are “precisely the type of case in which we are most inclined to deny certiorari”).

50. 132 S. Ct. 2 (2011) (per curiam).

51. *Id.* at 12 (Ginsburg, J., dissenting) (citing *Kyles*, 514 U.S. at 460 (Scalia, J., dissenting)).

52. *Id.*

(in line with Professor Amar's speculation⁵³), because the majority was intent on "teach[ing] the Ninth Circuit a lesson."⁵⁴

The Roberts Court has been aided in its habit of reversing fact-bound cases by a federal statute that seems to envision – and invite – just such intervention: the provision of the Antiterrorism and Effective Death Penalty Act (AEDPA)⁵⁵ that precludes federal courts from overturning state-court criminal convictions unless the lower court's decision was contrary to "clearly established Federal law" or the result of an "unreasonable determination of the facts."⁵⁶ AEDPA authorizes the Court to overturn defendant-friendly appellate judgments in particularly fact-sensitive cases by establishing a heightened presumption that the state trial court, not the federal appellate court, correctly adjudicated those facts. Indeed, roughly half of the Roberts Court's summary reversals have issued in criminal cases in which the defendant below had raised a federal habeas claim; in almost all of these cases, the defendant lost at the Court.⁵⁷

Still, the Supreme Court is hardly *required* by AEDPA to grant these cases. Indeed, the traditional presumption is that the Court *will not* grant petitions for writs of certiorari in which appellate courts upend fact-bound trial-court decisions, despite the traditional degree of deference that trial courts' findings of fact are owed.⁵⁸ Such cases certainly do not present important questions of federal law, other than the application of AEDPA, and if they present errors, those errors consist only of "the misapplication of a properly stated rule of

53. Amar, *supra* note 19 ("[T]he ruling revealed some interesting things about how the Supreme Court reacts when it is frustrated over what it considers disobedience by lower courts – in particular, perhaps, the . . . Ninth Circuit.").

54. Cavazos, 132 S. Ct. at 12 (Ginsburg, J., dissenting). There is a cottage industry of speculation about the Ninth Circuit's reversal rate at the Supreme Court. See, e.g., Marybeth Herald, *Reversed, Vacated, and Split: The Supreme Court, the Ninth Circuit, and the Congress*, 77 OR. L. REV. 405 (1998); Richard A. Posner, *Is the Ninth Circuit Too Large? A Statistical Study of Judicial Quality*, 29 J. LEGAL STUD. 711 (2000); Kevin M. Scott, *Supreme Court Reversals of the Ninth Circuit*, 48 ARIZ. L. REV. 341 (2006).

55. Antiterrorism and Effective Death Penalty Act of 1996, § 104, Pub. L. No. 104-132, 110 Stat. 1214, 1218-19 (codified at 28 U.S.C. § 2254 (2006)).

56. 28 U.S.C. § 2254(d).

57. The Court has faced accusations before that it uses summary disposition more often to defeat claims by convicted criminals than to sustain them. See, e.g., *Florida v. Meyers*, 466 U.S. 380, 386 (1984) (Stevens, J., dissenting) (noting that, in three Terms, the Court had not once used summary disposition to protect "the constitutional rights of persons accused or convicted of crimes").

58. See *Kyles v. Whitley*, 514 U.S. 419, 456 (1995) (Scalia, J., dissenting) ("[W]hen the petitioner claims only that a concededly correct view of the law was incorrectly applied to the facts, certiorari should generally . . . be denied.").

law.”⁵⁹ The Roberts Court, however, not only has granted the certiorari petitions in these cases, but has proceeded to summarily adjudicate them. In doing so, as Justice Ginsburg noted in dissent, the Court seems to be treating them as vehicles—“lesson[s]” to the federal judiciary about the Court’s own commitments and priorities.⁶⁰ One recent study found that AEDPA has reduced the habeas grant rate in noncapital cases to less than one percent.⁶¹ Evidently, the courts are listening.⁶²

C. Summary Opinions: Making Law Without Hearing the Arguments

Finally, in some instances the Roberts Court has used summary disposition in cases that present contested questions of law. Although such cases are presumably ripe for Supreme Court review, at least if they present “important question[s] of federal law,”⁶³ they are presumably *not* appropriate candidates for summary disposition. Indeed, Justices from a variety of ideological backgrounds have agreed that summary disposition is improper when “employed to change or extend the law in significant respects.”⁶⁴ Because these cases are perhaps most likely to benefit from the “adversarial presentation that full briefing and argument afford,”⁶⁵ they are well-suited to plenary review.

But the Justices arguing against summary disposition in these cases have done so in dissent. No Court has entirely resisted the temptation to dispose of cases that seem to present questions *similar* to those the Court has previously considered—and the Roberts Court has continued, if not exacerbated, that trend. For instance, the Court in *Presley v. Georgia*⁶⁶ considered whether the Sixth Amendment right to a public trial extended to the *voir dire*. Seven

59. SUP. CT. R. 10.

60. *Cavazos v. Smith*, 132 S. Ct. 2, 12 (2011) (Ginsburg, J., dissenting).

61. Nancy J. King, *Non-Capital Habeas Cases After Appellate Review: An Empirical Analysis*, 24 FED. SENT’G REP. 308, 317 (2012).

62. Some have even acknowledged as much. See *Vance v. Rumsfeld*, Nos. 10-1687, 10-2442, 2012 WL 4516500, at *13 (7th Cir. Nov. 7, 2012) (en banc) (Wood, J., concurring in the judgment) (noting the use of summary reversals in the habeas corpus context and concluding that “the Court does not hesitate to step in and correct lower courts that have strayed beyond the boundaries it has established”).

63. SUP. CT. R. 10.

64. *Hutto v. Davis*, 454 U.S. 370, 387 (1982) (Brennan, J., dissenting); cf. *Bunkley v. Florida*, 538 U.S. 835, 842 (2003) (Rehnquist, C.J., dissenting) (arguing that summary disposition is improper when it “makes new law”).

65. *Cavazos*, 132 S. Ct. at 8-9 (Ginsburg, J., dissenting).

66. 130 S. Ct. 721 (2010) (per curiam).

Justices concluded, in a per curiam opinion, that the question was “well settled” under previous cases that addressed whether the First Amendment guarantees a similar right to the public.⁶⁷ Justice Thomas, joined by Justice Scalia, dissented on the merits and the method: “Today the Court summarily disposes of two important questions it left unanswered 25 years ago I respectfully dissent from the Court’s summary disposition of these important questions.”⁶⁸

Presley is not alone. In *Spears v. United States*,⁶⁹ a divided Court summarily reversed the Eighth Circuit’s rejection of the district court’s decision declining to adopt the sentencing ratio set forth in the Federal Sentencing Guidelines for the possession of crack and powder cocaine. And in *Wilkins v. Gaddy*,⁷⁰ a unanimous Court overturned not just one Fourth Circuit case, but the fifteen-year line of 42 U.S.C. § 1983 circuit precedent on which it was based, without the benefit of merits briefing or oral argument.⁷¹ Cases such as *Wilkins* perhaps fall into the category of cases described by Justice Marshall in the 1980s, in which “the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error.”⁷² But these cases are still troubling, not only because they upset reliance interests (as the Court did in *Wilkins*), but because they risk “rendering erroneous or ill-advised decisions that may confuse the lower courts.”⁷³

67. *Id.* at 724.

68. *Id.* at 725 (Thomas, J., dissenting). Justice Thomas also noted that the Second Circuit had struggled with the question presented in *Presley*, and that judges on the en banc panel had reached at least three different conclusions. *Id.* at 727 (citing *Ayala v. Speckard*, 131 F.3d 62 (2d Cir. 1997) (en banc)).

69. 555 U.S. 261 (2009) (per curiam). The *Spears* Court splintered, with five votes to summarily reverse; one vote, Justice Kennedy’s, to grant oral argument; and Chief Justice Roberts, joined by Justices Thomas and Alito, dissenting. The dissent noted that two other courts of appeals had agreed with the Eighth Circuit, and argued that “[t]his is not the stuff of summary reversal.” *Id.* at 269 (Roberts, C.J., dissenting).

70. 130 S. Ct. 1175 (2010) (per curiam).

71. *See id.* at 1178 (holding that “the Fourth Circuit has strayed from the clear holding of this Court” in *Hudson v. McMillian*, 503 U.S. 1 (1992)). The Fourth Circuit had held in *Riley v. Dorton*, 115 F.3d 1159 (4th Cir.), *cert. denied*, 522 U.S. 1030 (1997), that prisoners filing suit under § 1983 and alleging excessive force cannot prevail if their injuries are de minimis; over 300 district-court opinions cited *Riley* in the fifteen years between that case and the Court’s rejection of the Fourth Circuit position in *Wilkins*. The Fifth Circuit has arguably adopted a similar requirement. *See Wilkins*, 130 S. Ct. at 1179 n.2.

72. *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting).

73. *Harris v. Rivera*, 454 U.S. 339, 349 (1981) (Marshall, J., dissenting).

The Roberts Court, which in some instances has embraced the use of procedural tools to manage and oversee the lower courts, has almost certainly not *consciously* extended summary disposition to cases that present contested questions of law. But cases like *Presley*, *Spears*, and *Wilkins* illustrate one consequence of a court increasingly comfortable acting in its managerial capacity: the risk of carelessness. A Court comfortable with issuing GVRs and summary opinions in cases it might otherwise have declined to review may also be more likely to issue summary opinions where they are simply inappropriate, because they “make new law.”⁷⁴ This critique is not altogether new; in 1982, Justice Stevens accused the Court of mismanaging its discretionary docket, “encourag[ing]” rather than “resist[ing] . . . the rising administrative tide,” by issuing an “ever-increasing” stream of per curiam opinions.⁷⁵ But it has surely never seemed more apt than today, when the Court does more than ever to curate the docket of lower courts.

CONCLUSION

The risk of judicial carelessness is certainly controllable. Justice Marshall once argued that, “when the Court contemplates a summary disposition it should, at the very least, invite the parties to file supplemental briefs on the merits, at their option.”⁷⁶ Alternatively, a mandatory practice of demanding the full record from lower courts in fact-sensitive cases—which the Court does not always do—would reduce some risk of erroneous adjudication. The Court could adopt a more potent rule similar to the one adopted by the federal appellate courts,⁷⁷ and simply limit its use of summary disposition to cases in which all Justices, or at least a “supermajority” (e.g., seven of nine), agree that it is warranted.⁷⁸ This approach might reduce the likelihood that the Court would overturn highly fact-sensitive decisions of lower courts, as in *Cavazos*; it would almost certainly reduce the likelihood, though, that the Court would actually create new law.

74. *Bunkley v. Florida*, 538 U.S. 835 (2003) (Rehnquist, C.J., dissenting).

75. *Bd. of Educ. v. McCluskey*, 458 U.S. 966, 972 (1982) (Stevens, J., dissenting).

76. See, e.g., *Montana v. Hall*, 481 U.S. 400, 410 (1987) (Marshall, J., dissenting).

77. See FED. R. APP. P. 34(a)(2) (“Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record *unanimously agrees* that oral argument is unnecessary” (emphasis added)).

78. At some point, it was generally understood that summary reversal required at least six votes. See GRESSMAN ET AL., *supra* note 8, at 343. That internal operating rule is evidently no longer in effect.

This proposal, in turn, casts new light on *American Tradition Partnership*, in which summary reversal commanded only the votes of five Justices. What of the case? The case was not fact-bound, like *Cavazos*, nor—as even the Court's critics would admit—legally contested. But *American Tradition Partnership* is, all the same, entirely consistent with the Roberts Court's use of summary disposition. The case provides a perfect example of the Court's willingness to grant and adjudicate cases that—although they present already-settled questions of federal law—send signals to lower courts about the Court's own commitments and priorities. The majority, at least, surely saw the case as one in which “the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error.”⁷⁹ But the dissent certainly saw the law as anything but settled and stable. “Considerable experience . . . since the Court's decision in *Citizens United*,” wrote Justice Breyer, “casts grave doubt on the Court's supposition that independent expenditures do not corrupt or appear to do so.”⁸⁰

Arguably, it is exactly this—the opportunity for a minority on the Court to demonstrate that the law is less settled than a majority believes—that a supermajority rule would protect. A supermajority rule would probably not have prevented the Court from *ultimately* overturning the decision of the Montana Supreme Court: Justice Kennedy's vote did not appear to be in doubt. But it would have continued a conversation over a question that a full third of the Court thought was *not* yet settled. It would, moreover, have required the Justices in the majority to check their understanding of the law against the best arguments of the bar and the bench to the contrary. The purpose of this Essay is not to argue against summary disposition, for the benefits of a managerial approach are clear. But the risk of error is equally clear—and the benefits of debate, especially in cases important enough to warrant review, are not insignificant. If the Court is to continue to act in its managerial capacity, it should consider how it uses the tools at its disposal.

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79. *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting).

80. *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (Breyer, J., dissenting).

COURTS AS MANAGERS

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