SUMMARY REVERSALS IN THE ROBERTS COURT

Edward A. Hartnett†

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INTRODUCTION

One hundred and twenty-five years ago, Congress began the process of giving the Supreme Court the power to set its own agenda by using writs of certiorari to bring cases before it. The power began modestly, but has since grown, through a combination of legislation and judicial action, to encompass nearly the entirety of the Court's docket. I have previously questioned this power, observing that it is in considerable tension both with the classic justification for judicial review and with Hamilton's idea that courts lack will, and that it is barely constrained by law.[1] I do not rehash my doubts about certiorari here, but instead discuss one aspect of certiorari practice: the decision to grant certiorari and decide the merits of the case simultaneously, in one fell swoop, rather than the more usual grant of certiorari, followed by

† Richard J. Hughes Professor for Constitutional and Public Law and Service, Seton Hall University School of Law. A.B. 1982, Harvard College; J.D. 1985, New York University School of Law.

1 Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643 (2000); *see also* Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665 (2012).

three sets of briefs on the merits, oral argument, and a decision several months after certiorari was granted.[2]

Such summary decisions have long been criticized. The *Harvard Law Review*'s annual *Foreword* criticized them in 1958,[3] as did the third edition of Stern and Gressman, published in 1962.[4] In that Foreword, Professor Ernest Brown noted that a court "acting summarily on its own conclusion that it is fully informed without brief or argument might be thought to take on more of a managerial or executive character than is usually associated with judicial tribunals,"[5] and suggested that "the Court could request briefs in cases which might appear at first examination suitable for disposition without argument, and give assurance that no case would be decided on the merits without such request."[6] The fifth edition of Stern and Gressman made a similar suggestion:

> A simple solution to this problem might be found were the Court to develop the practice, in cases where a summary reversal seems appropriate from a reading of the petition and response, of issuing an order to show cause why the judgment below should not be reversed without oral argument.[7]

And Justice Marshall endorsed the same basic idea: "I believe 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

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2 In that same Article, I suggested that certiorari might be better viewed as a species of administrative power rather than adjudicative power. Hartnett, *supra* note 1, at 1726–30; *see also* Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA. L. REV. 1 (2011). On that premise, coupled with the role of the Chief Justice in both setting the preliminary agenda and chairing the conference at which the Court decides which petitions to grant, I believe that this Essay fits within the assigned topic: the administrative role of Chief Justice Roberts.

3 Ernest J. Brown, *Foreword: Process of Law*, 72 HARV. L. REV. 77 (1958).

4 ROBERT L. STERN & EUGENE GRESSMAN, SUPREME COURT PRACTICE 187 (3d ed. 1962).

5 Brown, *supra* note 3, at 94.

6 *Id.* at 94–95. He drew on the Court's practice regarding petitions for rehearing, then governed by Supreme Court Rule 58.3, which provided, "No reply to a petition for rehearing will be received unless requested by the court. No petition for rehearing will be granted in the absence of such a request and an opportunity to submit a reply in response thereto." SUP. CT. R. 58.3, 346 U.S. 945, 1008 (1954) (repealed 1980). The current rule regarding rehearing is similar: Rule 44.3 provides, "The Clerk will not file any response to a petition for rehearing unless the Court requests a response. In the absence of extraordinary circumstances, the Court will not grant a petition for rehearing without first requesting a response." SUP. CT. R. 44.3.

7 ROBERT L. STERN & EUGENE GRESSMAN, SUPREME COURT PRACTICE 365 (5th ed. 1978).

option."[8] The Court, however, has never taken this step, and no current member appears to be interested in doing so.[9]

I will return, at the end of this Essay, to the question of possible reform, but first provide a descriptive analysis of summary reversals in the Roberts Court. By focusing on summary reversals, I leave to one side summary affirmances, which in current practice are limited to the sliver of cases that may be appealed as of right to the Supreme Court.[10] I also do not consider cases in which the Court grants certiorari, vacates the judgment, and remands in light of some intervening development—GVRs—which are themselves subject to ongoing controversy.[11]

Such summary reversals may seem rather infrequent—a handful or two each term, about six dozen so far during the tenure of Chief Justice Roberts—compared to nearly nine hundred cases argued over the same

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8 Montana v. Hall, 481 U.S. 400, 410 (1987).

9 *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 20 (2015) (noting that "summary reversal practice has not ceased, and wholesale criticism is fading").

10 It appears that the most recent grant of certiorari coupled with a summary affirmance occurred in 1979. Moore v. Duckwith, 443 U.S. 713 (1979); *see* SHAPIRO, GELLER, BISHOP, HARTNETT & HIMMELFARB, SUPREME COURT PRACTICE 344–45, 350 (10th ed. 2013). In *Duckwith*, the Court agreed with the petitioner that the court of appeals had applied the wrong legal standard, given the decision in *Jackson v. Virginia*, 443 U.S. 307 (1979), but concluded that it was "clear from the record that under the standard enunciated in *Jackson v. Virginia*, the evidence in support of this conviction was constitutionally adequate." 443 U.S. at 715. *Jackson* was decided after the court of appeals decision in *Duckworth* and less than a week before the Supreme Court acted in *Duckworth*. A denial of certiorari might have been thought inappropriate given the error, and perhaps the alternative of granting, vacating, and remanding in light of *Jackson* might have been thought unnecessary given the clarity of the record. The last time that such a summary affirmance was used to resolve a circuit split appears to be *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 649–50 (1977) (reaffirming "the longstanding rule that a plaintiff in federal court, whether prosecuting a state or federal cause of action, may not appeal from a remittitur order he has accepted," and noting decisions in the courts of appeals that "depart from these unbroken precedents"); *see also* Lines v. Frederick, 400 U.S. 18 (1970) (summarily affirming and resolving a circuit split regarding bankruptcy law).

11 *See, e.g.*, Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRS—And an Alternative*, 107 MICH. L. REV. 711 (2009); *see also* Flowers v. Mississippi, 136 S. Ct. 2157, 2159 (2016) (Alito, J., dissenting) (objecting to the Court's GVR in that case as akin to "an imperious senior partner in a law firm" simply ordering an associate to redo work without pointing out any errors). I treat as summary reversals cases in which the Court vacates rather than reverses, if the Court is correcting a decision of the lower court rather than simply remanding for reconsideration in light of some intervening development. For present purposes, the distinction between vacating and reversing is not significant. *See* THE SUPREME COURT'S STYLE GUIDE § 10.5 (Jack Metzler ed., 2016) [hereinafter STYLE GUIDE] ("The rule of thumb applied by the Office of the Clerk of the Court is easy to state, but may be difficult to apply in particular instances: This Court should reverse if it deems the judgment below to be absolutely wrong, but vacate if the judgment is less than absolutely wrong. Questions in difficult cases should be directed to the Chief Deputy Clerk."). As I read the cases, "absolutely" wrong is not about the clarity or egregiousness of the error, but instead about its completeness, that is, whether or not the error involves merely a step in the analysis such that the court below could get to the same place on remand without the error.

period. But they loom larger when one compares that ratio to another ratio: that of certiorari petitions filed to cases argued. The argued cases were selected from over 80,000 certiorari petitions filed.[12] That is, the odds of having a Supreme Court merits decision handled summarily rather than with full briefing and argument are considerably greater than having a Supreme Court merits decision at all.

I. CLASSIFYING SUMMARY REVERSALS: AREA OF LAW

In sorting the seventy-three summary reversals by area of law, I found that there are five areas with three or more cases. They are:

1) *Booker*[13] and its progeny regarding the federal sentencing guidelines;
2) Federal Arbitration Act;
3) Federal habeas corpus for those in state custody;
4) Qualified immunity;[14]
5) State habeas or similar post-conviction proceeding.

Who won these cases summarily? Those who stereotype the Roberts Court may find some results—certainly not all results—surprising.

Booker. In all three of the summary reversals involving the impact of *Booker* and its progeny on the federal sentencing guidelines, the criminal defendant won.[15] Indeed, in two of the three, there had been a prior GVR.[16]

Federal Arbitration Act. All three of the summary reversals involving the Federal Arbitration Act came from state courts. And in all three, unsurprisingly, the party seeking arbitration won.[17]

Federal habeas. By far the largest number of summary reversals involved federal habeas petitions for those in state custody. There are

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12 The number of certiorari petitions filed and cases argued are drawn from annual reports issued by the Clerk of the Supreme Court and included in the Court's Journal. A very small number of arguments involve cases on an appeal as of right or within the Court's original jurisdiction. The Journal of the Supreme Court of the United States, containing the official minutes of the Court, is available at http://www.supremecourt.gov/orders/journal.aspx.

13 United States v. Booker, 543 U.S. 220 (2005).

14 Some of the qualified immunity cases involved the Fourth Amendment; if they were counted as Fourth Amendment cases as well as qualified immunity cases, there would be more than three Fourth Amendment cases.

15 Nelson v. United States, 555 U.S. 350 (2009) (per curiam); Spears v. United States, 555 U.S. 261 (2009) (per curiam); Moore v. United States, 555 U.S. 1 (2008) (per curiam).

16 Nelson v. United States, 552 U.S. 1163 (2008); Moore v. United States, 552 U.S. 1090 (2008).

17 Nitro-Lift Techs., L.L.C. v. Howard, 133 S. Ct. 500 (2012) (per curiam); Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201 (2012) (per curiam); KPMG, L.L.P. v. Cocchi, 132 S. Ct. 23 (2011) (per curiam).

thirty-four such cases. It is not surprising that the warden won the great bulk of these cases, twenty-eight, or more than eighty percent.[18]

It is perhaps surprising that—unlike the *Booker* and arbitration cases—all did not go the same way. Instead, the prisoner seeking habeas corpus won six summary reversals.[19]

Qualified immunity. There were seven summary reversals involving qualified immunity. The government officer relying on that defense won six, more than eighty-five percent.[20] A plaintiff claiming a violation of his constitutional rights did win one summary reversal.[21]

State habeas. At first glance, it may seem somewhat surprising that there are four summary reversals in cases from state courts involving prisoners seeking habeas corpus or some similar state post-conviction remedy. Even more surprising is that the prisoner won three, all of them involving death sentences.[22] The warden won only one.[23]

But these cases are less surprising when one takes into account the impact of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)[24] and its deferential standard of review. Prior to the AEDPA, the Supreme Court could easily deny certiorari to a state court in a state

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18 Johnson v. Lee, 136 S. Ct. 1802 (2016) (per curiam); Kernan v. Hinojosa, 136 S. Ct. 1603 (2016) (per curiam); Woods v. Etherton, 136 S. Ct. 1149 (2016) (per curiam); White v. Wheeler, 136 S. Ct. 456 (2015) (per curiam); Woods v. Donald, 135 S. Ct. 1372 (2015) (per curiam); Glebe v. Frost, 135 S. Ct. 429 (2014) (per curiam); Lopez v. Smith, 135 S. Ct. 1 (2014) (per curiam); Ryan v. Schad, 133 S. Ct. 2548 (2013) (per curiam); Nevada v. Jackson, 133 S. Ct. 1990 (2013) (per curiam); Marshall v. Rodgers, 133 S. Ct. 1446 (2013) (per curiam); Coleman v. Johnson, 132 S. Ct. 2060 (2012) (per curiam); Parker v. Matthews, 132 S. Ct. 2148 (2012) (per curiam); Wetzel v. Lambert, 132 S. Ct. 1195 (2012) (per curiam); Hardy v. Cross, 132 S. Ct. 490 (2011) (per curiam); Bobby v. Dixon, 132 S. Ct. 26 (2011) (per curiam); Cavazos v. Smith, 132 S. Ct. 2 (2011) (per curiam); Bobby v. Mitts, 563 U.S. 395 (2011) (per curiam); Felkner v. Jackson, 562 U.S. 594 (2011) (per curiam); Swarthout v. Cooke, 562 U.S. 216 (2011) (per curiam); Wilson v. Corcoran, 562 U.S. 1 (2010) (per curiam); Thaler v. Haynes, 559 U.S. 43 (2010) (per curiam); Wong v. Belmontes, 558 U.S. 15 (2009) (per curiam); Bobby v. Van Hook, 558 U.S. 4 (2009) (per curiam); Wright v. Van Patten, 552 U.S. 120 (2008) (per curiam); Allen v. Siebert, 552 U.S. 3 (2007) (per curiam); Bradshaw v. Richey, 546 U.S. 74 (2005) (per curiam); Kane v. Garcia Espitia, 546 U.S. 9 (2005) (per curiam); Schriro v. Smith, 546 U.S. 6 (2005) (per curiam).

19 Christeson v. Roper, 135 S. Ct. 891 (2015) (per curiam); Williams v. Johnson, 134 S. Ct. 2659 (2014) (per curiam); Jefferson v. Upton, 560 U.S. 284 (2010) (per curiam); Porter v. McCollum, 558 U.S. 30 (2009) (per curiam); Corcoran v. Levenhagen, 558 U.S. 1 (2009) (per curiam); Dye v. Hofbauer, 546 U.S. 1 (2005) (per curiam).

20 Taylor v. Barkes, 135 S. Ct. 2042 (2015) (per curiam); Mullenix v. Luna, 136 S. Ct. 305 (2015) (per curiam); Carroll v. Carman, 135 S. Ct. 348 (2014) (per curiam); Stanton v. Sims, 134 S. Ct. 3 (2013) (per curiam); Ryburn v. Huff, 132 S. Ct. 987 (2012) (per curiam); Los Angeles Cty. v. Rettele, 550 U.S. 609 (2007) (per curiam).

21 Tolan v. Cotton, 134 S. Ct. 1861 (2014) (per curiam).

22 Wearry v. Cain, 136 S. Ct. 1002 (2016) (per curiam); Hinton v. Alabama, 134 S. Ct. 1081 (2014) (per curiam); Sears v. Upton, 561 U.S. 945 (2010) (per curiam).

23 Maryland v. Kulbicki, 136 S. Ct. 2 (2015) (per curiam).

24 Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 42 U.S.C.).

habeas case, figuring that the issue could be presented to the lower federal courts in a federal habeas petition.[25] But under the AEDPA, it matters immensely whether a collateral attack on a state conviction (particularly involving a claimed *Brady* violation or claimed ineffective assistance of counsel, which can rarely be raised well on direct review) comes to the Supreme Court on review of the state court habeas decision or a federal court habeas decision. That is because the Supreme Court owes no deference to the state court's interpretation of federal law in the former situation, but is (like all federal courts) obligated to give deference to the state court's interpretation of federal law in the latter.[26] Justice Alito has suggested that a state court decision that is sufficiently wrong to call for a summary reversal is also sufficiently wrong to warrant federal habeas relief under the AEDPA.[27] But the Court has never equated the two standards. And, in any event, the Court's standard for summary reversal is self-generated, while the AEDPA standard is required by Congress. If the majority lacks confidence that a state court decision that is sufficiently wrong to call for a summary reversal is also sufficiently wrong to warrant federal habeas relief under the AEDPA, summary reversals of state habeas decisions become more understandable.

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25 *See* Kyles v. Whitley, 498 U.S. 931, 932 (1990) (Stevens, J., concurring) ("[The] Court rarely grants review at this stage of the litigation even when the application for state collateral relief is supported by arguably meritorious federal constitutional claims. Instead, the Court usually deems federal habeas proceedings to be the more appropriate avenues for consideration of federal constitutional claims.").

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> Since AEDPA, however, our consideration of state habeas petitions has become more pressing. Under AEDPA's standard of review, a petitioner who has suffered a violation of a constitutional right will nonetheless fail on federal habeas unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by [this] Court," § 2254(d)(1), or "was based on an unreasonable determination of the facts," § 2254(d)(2).

Lawrence v. Florida, 549 U.S. 327, 343 n.7 (2007) (Ginsburg, J., dissenting) (alteration in original).

27 *Cain*, 136 S. Ct. at 1012 (Alito, J., dissenting) ("By intervening now before AEDPA comes into play, the Court avoids the application of that standard and is able to exercise plenary review. But if the *Brady* claim is as open-and-shut as the Court maintains, AEDPA would not present an obstacle to the granting of habeas relief. On the other hand, if reasonable jurists could disagree about the application of *Brady* to the facts of this case, there is no good reason to dispose of this case summarily.").

II. CLASSIFYING SUMMARY REVERSALS: NATURE OF THE ERROR

One long-noted puzzle of summary reversals is that the Supreme Court has viewed the very point of its discretionary certiorari jurisdiction as enabling it to resolve important legal issues—and avoid being a court for the correction of errors—while summary reversals target lower court decisions that strike the Court as clearly erroneous.[28] Can any patterns be identified in the nature of the error below—beyond that the error seemed clear to the Court?

I find four categories of error. These categories do not capture all summary reversals, but they do capture sixty-one of the seventy-three, or nearly eight-four percent. I make no claim that all would agree with my categorization, and certainly there is room for debate as to which cases belong in each. Moreover, of the uncategorized dozen with a variety of kinds of errors, eight are death penalty cases—and the person sentenced to death won seven of the eight.

Resistance. The first category involves errors that, in some sense, are not really "errors" at all. Instead, these "errors" appear to be instances of resistance by the lower court to the Supreme Court's doctrine. This category shows us some areas where the Roberts Court and lower courts are out-of-sync with each other.

It is especially easy to see such resistance in the three Federal Arbitration Act cases from state courts. Some state courts do not like being told to cede what they view as their jurisdiction to arbitrators, especially if the result strikes them as unfair. An extreme example comes from the West Virginia Supreme Court of Appeals, which called the decisions by the Supreme Court of the United States in the area "tendentious" and "created from whole cloth."[29] Less forthright was the Oklahoma Supreme Court that included a *Michigan v. Long* plain statement asserting that its decision invalidating a noncompetition agreement was based on independent state grounds, even as it *rejected*

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28 Brown, *supra* note 3, at 78 (noting this purpose of the Judges' Bill, pointing to summary reversals, and noting that the Court "now sits also, if not principally, as a Court of Selected Error"). *See* Hartnett, *supra* note 1, at 1660–1704 (tracing the efforts by Chief Justice Taft and others to convince Congress to enact the Judges' Bill and shift many cases from obligatory to discretionary review). In persuading Congress to give it such broad discretion, the Court assured Congress that it would grant certiorari in any case presenting a constitutional question of any real merit or doubt, *id.* at 1699, but the Court has long defaulted on that assurance. *Id.* at 1647.

29 Brown *ex rel.* Brown v. Genesis Healthcare Corp., 724 S.E.2d 250, 278–79 (W. Va. 2011), *vacated*, 132 S. Ct. 1201 (2012). The Supreme Court of the United States noted both characterizations in summarily reversing. Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201, 1203 (2012).

the argument that the Federal Arbitration Act required arbitration of the dispute.[30]

It is also easy to see this in a number of habeas cases, such as a capital case in which the United States Court of Appeals for the Ninth Circuit, in reliance on a decision that the Supreme Court had reversed, and in the teeth of the text of a Federal Rule, failed to issue its mandate after certiorari had been denied.[31] Similarly, a case from the Sixth Circuit involved a jury instruction that was virtually identical to the instruction considered by the Supreme Court in another case,[32] and a case from the Eleventh Circuit involved a statute regarding time limits that the Supreme Court had cited as an example in an earlier decision.[33] Sometimes the Supreme Court's opinion reflects its sense that it is being resisted. For example, in a capital case from the Sixth Circuit, the Court observed that "time and again," it "has instructed that AEDPA, by setting forth necessary predicates before state-court judgments may be set aside, 'erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court.'"[34] It concluded, "as a final matter, this Court again advises the Court of Appeals that the provisions of AEDPA apply with full force even when reviewing a conviction and sentence imposing the death penalty."[35]

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30 "In reaching our decision today, we consider extant federal and state precedent. Nevertheless, our determinations rest squarely within Oklahoma law which provides bona fide, separate, adequate, and independent grounds for our decision. Michigan v. Long, 463 U.S. 1032 (1983)." Howard v. Nitro-Lift Techs., L.L.C., 273 P.3d 20, 23 n.5 (Okla. 2011), *vacated*, 133 S. Ct. 500 (2012). Of course, the decision did not rest on adequate and independent state grounds, because it could not reach the judgment it did without rejecting the merits of the federal claim. Nitro-Lift Techs., L.L.C. v. Howard, 133 S. Ct. 500, 502 (2012).

31 Ryan v. Schad, 133 S. Ct. 2548 (2013) (per curiam). Federal Rule of Appellate Procedure 41(d)(2)(D) states, "The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed." Fed. R. App. P. 41(d)(2)(D).

32 Bobby v. Mitts, 563 U.S. 395 (2011) (per curiam).

33 Allen v. Siebert, 552 U.S. 3 (2007) (per curiam).

34 White v. Wheeler, 136 S. Ct. 456, 460 (2015) (per curiam) (quoting Burt v. Titlow, 134 S. Ct. 10, 16 (2013)); *see* Cavazos v. Smith, 132 S. Ct. 2, 7–8 (2011) (per curiam) ("This Court vacated and remanded this judgment twice before, calling the panel's attention to this Court's opinions highlighting the necessity of deference to state courts in § 2254(d) habeas cases. Each time the panel persisted in its course, reinstating its judgment without seriously confronting the significance of the cases called to its attention. Its refusal to do so necessitates this Court's action today." (citations omitted)).

35 *Wheeler*, 136 S. Ct. at 462 (citing four prior summary reversals of decisions by the United States Court of Appeals for the Sixth Circuit). *See* Rapelje v. Blackston, 136 S. Ct. 388, 389 (2015) (Scalia, J., dissenting) ("The Sixth Circuit seems to have acquired a taste for disregarding AEDPA."); *cf.* Friedman v. City of Highland Park, 136 S. Ct. 447, 449 (2015) (Thomas, J., dissenting) ("The Court's refusal to review a decision that flouts two of our Second Amendment precedents stands in marked contrast to the Court's willingness to summarily reverse courts that disregard our other constitutional decisions.").

Resistance can also be seen in qualified immunity cases, such as a case where the United States Court of Appeals for the Third Circuit denied qualified immunity to police officers who approached the door of a house to do a "knock and talk," but went to a sliding door to the house rather than the front door.[36] In another qualified immunity case, "the Fifth Circuit held that [the defendant officer] violated the clearly established rule that a police officer may not use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others."[37] The Supreme Court noted that it had "repeatedly told courts . . . not to define clearly established law at a high level of generality," and that it had "previously considered—and rejected—almost that exact formulation of the qualified immunity question in the Fourth Amendment context."[38]

But resistance is not limited to these areas of the law. For example, in an ERISA case from the Ninth Circuit, the Court noted that it had previously GVR'd the case and that, on remand, the court of appeals "failed to assess" the complaint in the way it had been instructed to do.[39]

And cases involving resistance can have rather different ideological valence. For example, the Supreme Judicial Court of Massachusetts was summarily reversed for resisting *District of Columbia v. Heller*.[40] By contrast, the Supreme Court of Alabama was summarily reversed for

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36 Carroll v. Carman, 135 S. Ct. 348 (2014) (per curiam).

37 Mullenix v. Luna, 136 S. Ct. 305, 308–09 (2015) (per curiam) (internal quotation marks and citation omitted).

38 *Id.* (internal quotation marks and citation omitted).

39 Amgen Inc. v. Harris, 136 S. Ct. 758, 760 (2016) (per curiam).

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> The court offered three explanations to support its holding that the Second Amendment does not extend to stun guns. First, the court explained that stun guns are not protected because they "were not in common use at the time of the Second Amendment's enactment." This is inconsistent with *Heller*'s clear statement that the Second Amendment "extends . . . to . . . arms . . . that were not in existence at the time of the founding."
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> The court next asked whether stun guns are "dangerous per se at common law and unusual," in an attempt to apply one "important limitation on the right to keep and carry arms." In so doing, the court concluded that stun guns are "unusual" because they are "a thoroughly modern invention." By equating "unusual" with "in common use at the time of the Second Amendment's enactment," the court's second explanation is the same as the first; it is inconsistent with *Heller* for the same reason.
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> Finally, the court used "a contemporary lens" and found "nothing in the record to suggest that [stun guns] are readily adaptable to use in the military." But *Heller* rejected the proposition "that only those weapons useful in warfare are protected."

Caetano v. Massachusetts, 136 S. Ct. 1027, 1027–28 (2016) (per curiam) (alteration in original) (citations omitted); *see also* District of Columbia v. Heller, 554 U.S. 570 (2008).

resistance to the Supreme Court's full faith and credit doctrine, in a case involving the children of a same-sex couple.[41]

Resistance can sometimes even be seen in cases where the lower court favored the government over criminal defendants. For example, in a double jeopardy case from the Illinois Supreme Court, the Supreme Court of the United States summarily reversed because the state court tried to get around the clear and longstanding rule that jeopardy attaches when the jury is sworn[42]—with the Court noting that it could understand what motivated the state court: the serious consequences of the prosecutor's mistake.[43] And in a case involving victim impact testimony, the Court summarily reversed a death sentence because the Oklahoma court had concluded that a 1991 Supreme Court decision that explicitly overruled part of a 1987 Supreme Court decision limiting such testimony also implicitly overruled another part of that 1987 decision.[44]

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> V.L. and E.L. are two women who were in a relationship from approximately 1995 until 2011. Through assisted reproductive technology, E.L. gave birth to a child named S.L. in 2002 and to twins named N.L. and H.L. in 2004. After the children were born, V.L. and E.L. raised them together as joint parents.
>
> V.L. and E.L. eventually decided to give legal status to the relationship between V.L. and the children by having V.L. formally adopt them.

V.L. v. E.L., 136 S. Ct. 1017, 1019 (2016) (per curiam).

42 "There are few if any rules of criminal procedure clearer than the rule that jeopardy attaches when the jury is empaneled and sworn." Martinez v. Illinois, 134 S. Ct. 2070, 2074 (2014) (per curiam) (internal quotation marks omitted).

43 *Id.* at 2077 ("The Illinois Supreme Court's holding is understandable, given the significant consequence of the State's mistake, but it runs directly counter to our precedents and to the protection conferred by the Double Jeopardy Clause.").

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> In *Booth v. Maryland*, 482 U.S. 496 (1987), this Court held that "the Eighth Amendment prohibits a capital sentencing jury from considering victim impact evidence" that does not "relate directly to the circumstances of the crime." *Id.*, at 501–502, 507, n. 10. Four years later, in *Payne v. Tennessee*, 501 U.S. 808 (1991), the Court granted certiorari to reconsider that ban on "'victim impact' evidence relating to the personal characteristics of the victim and the emotional impact of the crimes on the victim's family." *Id.*, at 817. The Court held that *Booth* was wrong to conclude that the Eighth Amendment required such a ban. *Payne*, 501 U.S. at 827. That holding was expressly "limited to" this particular type of victim impact testimony. *Id.*, at 830, n. 2. "*Booth* also held that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment," but no such evidence was presented in *Payne*, so the Court had no occasion to reconsider that aspect of the decision. *Ibid.*

Professor William Baude has suggested that, outside this category of responding to lower court resistance, summary reversals are like "lightning bolts."[45] Maybe so, but I think three other categories can be identified, as can a subcategory of resistance cases.

Resistance to centralization. Within the resistance category, about half of the cases share another feature: what the lower courts seem to be resisting is the centralization of judicial lawmaking (particularly regarding the Constitution) in the Supreme Court of the United States. That is, they are not simply cases where the Supreme Court seems to perceive the lower courts as resisting its precedent, but involve areas of the law where the Supreme Court precedent is trending toward centralizing judicial lawmaking in itself.[46]

This is clearest in some of the habeas cases, where the Supreme Court repeatedly criticizes courts of appeals for relying on their own precedent in concluding that a state court violated a convict's federal constitutional rights and insists that the only precedent that can make law "clearly established" under the AEDPA is precedent from the Supreme Court itself. For example, in one habeas case, the Court stated:

> Because our case law does not clearly establish the legal proposition needed to grant respondent habeas relief, the Ninth Circuit was forced to rely heavily on its own decision in *Sheppard* [*v. Rees*, 909 F.2d 1234 (9th Cir. 1989)]. Of course, AEDPA permits habeas relief only if a state court's decision is "contrary to, or involved an unreasonable application of, clearly established Federal law" as determined by this Court, not by the courts of appeals.[47]

Accordingly, the Court concluded that the Ninth Circuit decision in *Sheppard* was "irrelevant to the question presented by this case."[48] In another, the Court held that the

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> The Oklahoma Court of Criminal Appeals has held that *Payne* "implicitly overruled that portion of *Booth* regarding characterizations of the defendant and opinions of the sentence."

Bosse v. Oklahoma, No. 15-9173, 2016 WL 5888333, at *1 (U.S. Oct. 11, 2016) (per curiam) (abrogating Conover v. State, 933 P.2d 904 (Okla. Crim. App. 1997)).

45 Baude, *supra* note 9, at 2 (cataloging the Roberts Court's summary reversals and suggesting "that they can be grouped into two main categories—a majority that are designed to enforce the Court's supremacy over recalcitrant lower courts, and a minority that are more akin to ad hoc exercises of prerogative, or 'lightning bolts'").

46 *See* Ursula Bentele, *The Not So Great Writ: Constitution Lite for State Prisoners*, 5 U. DENV. CRIM. L. REV. 34, 37 (2015) (criticizing these developments because the result is that "interpretation of the provisions of the Constitution designed to ensure the fairness of criminal convictions and sentences is placed entirely in the hands of the Supreme Court, with the lower federal courts playing virtually no role").

47 Lopez v. Smith, 135 S. Ct. 1, 4 (2014) (per curiam).

48 *Id.*

> Sixth Circuit also erred by consulting its own precedents, rather than those of this Court, in assessing the reasonableness of the Kentucky Supreme Court's decision. . . . As we explained in correcting an identical error by the Sixth Circuit two Terms ago, circuit precedent does not constitute "clearly established Federal law, as determined by the Supreme Court," 28 U.S.C. § 2254(d)(1). It therefore cannot form the basis for habeas relief under AEDPA.[49]

In the habeas cases, the Supreme Court is enforcing a Congressional statute that specifically refers to "clearly established Federal law, as determined by the Supreme Court."[50] But the centralizing theme is also apparent in some of the qualified immunity cases, where Congress has not done anything of the sort. Although the Court holds open the possibility that a robust consensus in the courts of appeals or sufficiently clear precedent in a particular circuit might clearly establish law,[51] in summarily reversing courts of appeals that deny qualified immunity, it repeatedly criticizes their reliance on their own precedent, particularly if other courts have disagreed. For example, in one qualified immunity case, the Supreme Court stated that

> the Third Circuit cited only a single case to support its decision that Carroll was not entitled to qualified immunity—*Estate of Smith v. Marasco*, 318 F.3d 497 (CA3 2003). Assuming for the sake of argument that a controlling circuit precedent could constitute clearly established federal law in these circumstances *Marasco* does not clearly establish that Carroll violated the Carmans' Fourth Amendment rights.[52]

It added, "[t]he Third Circuit's decision is even more perplexing in comparison to the decisions of other federal and state courts, which have rejected the rule the Third Circuit adopted here."[53] Similarly, the

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49 Parker v. Matthews, 132 S. Ct. 2148, 2155 (2012) (per curiam) (citation omitted). *See* Bentele, *supra* note 46, at 38 (observing that the Court "[i]n several of the recent per curiam reversals, [noted] that habeas relief can never be justified by reference to a circuit court's own precedents").

50 *Parker*, 132 S. Ct. at 2151 (citing 28 U.S.C. § 2254(d)).

51 City and County of San Francisco v. Sheehan, 135 S. Ct. 1765, 1778 (2015) ("[T]o the extent that a 'robust consensus of cases of persuasive authority' could itself clearly establish the federal right respondent alleges, no such consensus exists here." (citation omitted)); Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011) (noting that "absent controlling authority," a "robust consensus of cases of persuasive authority" is necessary (internal quotation marks omitted)); *id.* at 746 (Kennedy, J., concurring) (distinguishing between officers who "perform their functions in a single jurisdiction" and those "with responsibilities in many jurisdictions").

52 Carroll v. Carman, 135 S. Ct. 348, 350–51 (2014) (per curiam) (citation omitted).

53 *Id.* at 351; *see also* Taylor v. Barkes, 135 S. Ct. 2042, 2044–45 (2015) (per curiam) (citing cases from other circuits and noting that "the weight of that authority at the time of Barkes's death suggested that such a right did not exist").

Court criticized the Court of Appeals for the Ninth Circuit for rejecting qualified immunity "despite the fact that federal and state courts nationwide are sharply divided on the question whether an officer with probable cause to arrest a suspect for a misdemeanor may enter a home without a warrant while in hot pursuit of that suspect."[54] Pointing to decisions by California state courts, the Court found it "especially troubling that the Ninth Circuit would conclude that Stanton was plainly incompetent—and subject to personal liability for damages—based on actions that were lawful according to courts in the jurisdiction where he acted."[55]

In both areas, the summary reversals seem to reflect an insistence by the Supreme Court that *it* is the body for making, creating, and developing the law (especially constitutional law)—or at least that it is the only body that can make such law sufficiently clearly established to warrant the remedy of habeas relief or (to a lesser extent) money damages from officers.[56]

"Out to lunch." Apart from resistance, I believe that another category can be identified that I call "out to lunch." Maybe that's not the most respectful name, but I think it captures the idea: the judicial equivalent of standing on the subway platform, reading something on your phone, getting on a train, and realizing after the doors have closed that you've gotten on the wrong train. Perhaps some cases that I view as "out to lunch" are actually clumsy efforts at evasion or defiance; and perhaps some cases that I view as lower court resistance are really just inadvertent slips.[57] In the first category, imagine a judge who gets

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> The Third Circuit nonetheless found this right clearly established by two of its own decisions, both stemming from the same case. Assuming for the sake of argument that a right can be "clearly established" by circuit precedent despite disagreement in the courts of appeals, neither of the Third Circuit decisions relied upon clearly established the right at issue.

Id. at 2045.

54 Stanton v. Sims, 134 S. Ct. 3, 5 (2013) (per curiam).

55 *Id.* at 7.

56 *Cf.* Bosse v. Oklahoma, No. 15-9173, 2016 WL 5888333, at *1 (U.S. Oct. 11, 2016) (per curiam) (stating that it is "this Court's prerogative alone to overrule one of its precedents," and that its "decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality" (citations and internal quotation marks omitted)).

57 For example, I consider *James v. City of Boise*, 351 P.3d 1171 (Idaho 2015), *rev'd per curiam*, 136 S. Ct. 685 (2016), as an example of an inadvertent slip rather than resistance, but others might well disagree. There, the Supreme Court of Idaho said: "Although the Supreme Court may have the authority to limit the discretion of lower federal courts, it does not have the authority to limit the discretion of state courts where such limitation is not contained in the statute," *id.* at 1192, and proceeded to ignore the interpretation of 42 U.S.C. § 1988 by the Supreme Court of the United States. The Supreme Court of the United States reversed, noting that "Section 1988 is a federal statute," and that the "Idaho Supreme Court, like any other state

reversed thinking that he didn't get away with it; in the other, imagine a judge slapping himself in the forehead and saying, "what was I thinking?"

I consider twelve cases to fall within this "out to lunch" category. For example, one court relied on a concession—but from the winning party.[58] Another found that an argument was insufficiently supported because a particular brief was not in the record—but it was.[59] Still another granted federal habeas corpus on the basis of what it saw as a state court error of state law—not federal law.[60]

In a death penalty case, the district court granted habeas corpus on one ground, finding it unnecessary to reach other grounds raised by the petitioner. The court of appeals reversed on this ground and remanded with instructions to deny the writ, without saying a word about the habeas petitioner's other grounds.[61] Another court held that a party who secured an injunction was not a prevailing party.[62] One final example: the North Carolina Court of Appeals held that while attaching a GPS device to a car counts as a search, attaching it to a person does not.[63] North Carolina's brief in opposition did not attempt to defend this conclusion, but instead relied on the bizarre argument that there was no proof that such a GPS tracking device actually provided the government with any information. As the Supreme Court put it, North Carolina "argues that we cannot be sure its program for satellite-based monitoring of sex offenders collects any information. If the very name

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or federal court, is bound by this Court's interpretation of federal law." James v. City of Boise, 136 S. Ct. 685, 686 (2016) (per curiam).

58 Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran v. Elahi, 546 U.S. 450, 453 (2006) (per curiam) (observing that the court of appeals had noted that Elahi appeared to concede a point, but that "any relevant concession would have to have come from the Ministry, not from Elahi, whose position the concession favors").

59 Dye v. Hofbauer, 546 U.S. 1, 3 (2005) (per curiam) ("Contrary to the holding of the Court of Appeals, the District Court record contains the brief petitioner filed in state court, and the brief sets out the federal claim.").

60 Swarthout v. Cooke, 562 U.S. 216 (2011) (per curiam); *see also* Bradshaw v. Richey, 546 U.S. 74, 78 (2005) (per curiam) ("Because the Sixth Circuit disregarded the Ohio Supreme Court's authoritative interpretation of Ohio law, its ruling on sufficiency of the evidence was erroneous.").

61 Corcoran v. Levenhagen, 558 U.S. 1, 2 (2009) (per curiam).

62 Lefemine v. Wideman, 133 S. Ct. 9, 11 (2012) (per curiam).

63 State v. Jones, 750 S.E.2d 883, 886 (N.C. Ct. App. 2013) ("Defendant essentially argues that if affixing a GPS to an individual's vehicle constitutes a search of the individual, then the arguably more intrusive act of affixing an ankle bracelet to an individual must constitute a search of the individual as well. We disagree."), *abrogated by* Grady v. North Carolina, 135 S. Ct. 1368 (2015) (per curiam). In the case that ultimately reached the Supreme Court of the United States, *State v. Grady*, 759 S.E.2d 712 (N.C. Ct. App. 2014), the North Carolina Court of Appeals relied on *Jones*, and the North Carolina Supreme Court dismissed the appeal for lack of a substantial constitutional question. 762 S.E.2d 460 (N.C. 2014), *rev'd*, Grady v. North Carolina, 135 S. Ct. 1368, 1370 (2015).

of the program does not suffice to rebut this contention, the text of the statute surely does."[64]

As I read these cases, they are not just routine disagreements at the margin, or even routine errors to be commonly expected, or even merely clearly wrong decisions. Instead, they are errors that leave one thinking that the judges below just completely missed the boat on this one—that they were out to lunch.

"On us." The third category of error is smaller still, with only three cases. I call this one "on us." These are cases where the Supreme Court of the United States, at least obliquely, suggests that maybe it was in some way responsible for the error, and therefore steps in to correct it. Perhaps the most forthright example of this category is a case where the Supreme Court noted that the error by the court of appeals "was caused in large part by imprecision in our prior cases," and praised the prudence of the court of appeals (while summarily reversing it) for "adhering to its understanding of precedent, yet plainly expressing its doubts," and thereby "facilitated our review."[65]

Perhaps the most glaring example of this category—at least once one reads the court of appeals opinion, not just the summary reversal by the Supreme Court—is a habeas case from the Ninth Circuit. The court of appeals granted habeas relief applying de novo review. The Supreme Court reversed, holding that the deferential standard of AEDPA applied.[66] Because the prisoner had contended all along that he should prevail under the deferential standard of review, and the Supreme Court never discussed how the case should come out under that deferential standard of review, one would have thought that that question would be open on remand. However, the Supreme Court opinion had a clause in the introduction that said that the prisoner was not entitled to habeas relief.[67] The court of appeals found this inexplicable, but viewed itself as bound nevertheless.[68] Judge Kozinski wrote an extraordinary opinion,

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64 *Grady*, 135 S. Ct. at 1371.

65 Eberhart v. United States, 546 U.S. 12, 19–20 (2005) (per curiam).

66 Johnson v. Williams, 133 S. Ct. 1088, 1097 (2013).

67 *Id.* at 1091–92 ("[W]e hold that the federal claim at issue here (a Sixth Amendment jury trial claim) must be presumed to have been adjudicated on the merits by the California courts, that this presumption was not adequately rebutted, that the restrictive standard of review set out in § 2254(d)(2) consequently applies, and that under that standard respondent is not entitled to habeas relief.").

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> But for the one sentence in the introduction, it would be fully consistent with the Court's opinion for us to address on remand the merits of Williams's claim under AEDPA's deferential standard of review . . . .
>
> Notably, the conclusion to the Court's opinion omits any suggestion that our consideration of this question should be foreclosed.

which concluded, "I hope I'm wrong, but can see no other way to read the Court's actions. Deference to the judicial hierarchy leaves room for no other course of action on our part. But I take comfort in knowing that, if we are wrong, we can be summarily reversed."[69] The Supreme Court obliged, saying nothing about its prior opinion, but making clear that the lower courts were to adjudicate the claim under the deferential standard of the AEDPA, not treat it as already decided without analysis.[70]

"Not *that* far." Finally, and somewhat related to the "on us" category, is the "not *that* far" category. Here, the point is to make clear that a Supreme Court precedent should not be taken too far. I mention this with some hesitancy,[71] because I identify only two such cases, both of them involving the pleading standard under the Federal Rules of Civil Procedure. One was decided shortly after *Bell Atlantic Corp. v. Twombly*,[72] and the Supreme Court summarily reinstated a dismissed complaint, explaining that the decision below "departs in so stark a manner from the pleading standard mandated by the Federal Rules of Civil Procedure that we grant review."[73] The other held that a complaint need not specify the legal theory supporting the claim asserted; the Court noted, "Our decisions in *Bell Atlantic Corp. v. Twombly*, and *Ashcroft v. Iqbal*, are not in point, for they concern the factual allegations a complaint must contain to survive a motion to dismiss."[74]

Capital cases. There are twelve cases in which the lower court error cannot, as I see it, be classified as falling into any of the categories discussed above (resistance, out to lunch, on us, or not *that* far).[75] Significantly, eight of the twelve are capital cases, and in all but one, the

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Williams v. Johnson, 720 F.3d 1212, 1212–13 (9th Cir. 2013) (Reinhardt, J., concurring), *vacated*, 134 S. Ct. 2659 (2014). "We are . . . required to assume that the Court meant what it said in the introduction to its opinion, in which it appears to have denied Williams's habeas claim . . . ." *Id.* at 1213.

69 *Id.* at 1214 (Kozinski, J., concurring).

70 *Williams*, 134 S. Ct. at 2659.

71 And I do so in part because of prompting along these lines by a member of the audience at the symposium.

72 550 U.S. 544 (2007).

73 Erickson v. Pardus, 551 U.S. 89, 90 (2007) (per curiam).

74 Johnson v. City of Shelby, 135 S. Ct. 346, 347 (2014) (per curiam) (citations omitted).

75 Lynch v. Arizona, 136 S. Ct. 1818 (2016); Wearry v. Cain, 136 S. Ct. 1002 (2016); Maryland v. Kulbicki, 136 S. Ct. 2 (2015) (per curiam); Christeson v. Roper, 135 S. Ct. 891 (2015) (per curiam); Tolan v. Cotton, 134 S. Ct. 1861 (2014) (per curiam); Hinton v. Alabama, 134 S. Ct. 1081 (2014) (per curiam); Hardy v. Cross, 132 S. Ct. 490 (2011) (per curiam); Sears v. Upton, 561 U.S. 945 (2010) (per curiam); Jefferson v. Upton, 560 U.S. 284 (2010) (per curiam); Porter v. McCollum, 558 U.S. 30 (2009) (per curiam); Purcell v. Gonzalez, 549 U.S. 1 (2006) (per curiam); Schriro v. Smith, 546 U.S. 6 (2005) (per curiam).

person under sentence of death won.[76] To be sure, persons under a sentence of death lost other cases summarily. Indeed, of the twenty-two summary reversals in capital cases,[77] the warden won thirteen.[78] But in all but one of the cases in which the warden won (as well as two in which the convict won), the error of the lower court can be seen as falling into one of the categories of error described above.

This suggests that to the extent summary reversals are (to use Baude's phrase) "lightning bolts," rather than falling into identifiable categories of errors, they are lightning bolts used predominantly for the benefit of those sentenced to death. They are best understood as reflecting the continuing influence of the idea that death is different.[79] Put somewhat differently, if capital cases were treated as a category, there would be only four "lightning bolts."[80]

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76 *Lynch*, 136 S. Ct. 1818; *Cain*, 136 S. Ct. 1002; *Roper*, 135 S. Ct. 891; *Hinton*, 134 S. Ct. 1081; *Sears*, 561 U.S. 945; *Jefferson*, 560 U.S. 284; *Porter*, 558 U.S. 30. The case that went the other way was *Schriro*, 546 U.S. 6.

77 Bosse v. Oklahoma, No. 15-9173, 2016 WL 5888333 (U.S. Oct. 11, 2016) (per curiam); *Lynch*, 136 S. Ct. 1818; *Cain*, 136 S. Ct. 1002; White v. Wheeler, 136 S. Ct. 456 (2015) (per curiam); *Roper*, 135 S. Ct. 891; *Hinton*, 134 S. Ct. 1081; Ryan v. Schad, 133 S. Ct. 2548 (2013) (per curiam); Parker v. Matthews, 132 S. Ct. 2148 (2012) (per curiam); Wetzel v. Lambert, 132 S. Ct. 1195 (2012) (per curiam); Bobby v. Dixon, 132 S. Ct. 26 (2011) (per curiam); Bobby v. Mitts, 563 U.S. 395 (2011) (per curiam); Wilson v. Corcoran, 562 U.S. 1 (2010) (per curiam); *Sears*, 561 U.S. 945; *Jefferson*, 560 U.S. 284; Thaler v. Haynes, 559 U.S. 43 (2010) (per curiam); *Porter*, 558 U.S. 30; Wong v. Belmontes, 558 U.S. 15 (2009) (per curiam); Bobby v. Van Hook, 558 U.S. 4 (2009) (per curiam); Corcoran v. Levenhagen, 558 U.S. 1 (2009) (per curiam); Allen v. Siebert, 552 U.S. 3 (2007) (per curiam); Bradshaw v. Richey, 546 U.S. 74 (2005) (per curiam); *Schriro*, 546 U.S. 6.

78 *Wheeler*, 136 S. Ct. 456; *Schad*, 133 S. Ct. 2548; *Matthews*, 132 S. Ct. 2148; *Lambert*, 132 S. Ct. 1195; *Dixon*, 132 S. Ct. 26; *Mitts*, 563 U.S. 395; *Wilson*, 562 U.S. 1; *Haynes*, 559 U.S. 43; *Belmontes*, 558 U.S. 15; *Van Hook*, 558 U.S. 4; *Allen*, 552 U.S. 3; *Richey*, 546 U.S. 74; *Schriro*, 546 U.S. 6.

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> This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

80 Two of those four could be shoehorned, without too much difficulty, into the other categories. *Hardy v. Cross*, 132 S. Ct. 490 (2011) (per curiam), is an AEDPA case that some might view as akin to other AEDPA cases involving resistance to centralization. *Tolan v. Cotton*, 134 S. Ct. 1861 (2014) (per curiam), is a qualified immunity case in which the Supreme Court ruled for the plaintiff, concluding that the court of appeals did not (as required by the procedural posture of the case) view the evidence in the light most favorable to the plaintiff. It could be placed in the "not *that* far" category, counterbalancing the Court's many qualified immunity rulings for defendants. I have resisted the temptation to re-jigger my classification of each opinion after the tallying in order to make more cases fit. A third of the four, *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), came before the Court on an application to stay an interlocutory injunction regarding an impending election. Rather than simply issue the stay, the

III. THE ADMINISTRATIVE FUNCTIONS OF SUMMARY REVERSALS

Evaluating summary reversals from an administrative perspective helps explain the categories we find, as well as the function and endurance of summary reversals.

Resistance. An administrator needs to check resistance to his authority. Thus, instances where lower courts appear to be resisting Supreme Court precedents lead the Court to respond. And areas where the resistance seems to be persistent, such as federal habeas and qualified immunity, lead to greater response.[81]

Resistance to centralization. Where the lower courts are resisting decisions that centralize judicial lawmaking in the Supreme Court, still more is at stake. In such instances, the lower courts are not simply resisting particular legal doctrines that they may find wrongheaded, and are not simply resisting the Court authority. They are resisting that Court's authority concerning its authority. From an administrative perspective, that kind of meta-resistance is particularly intolerable.

"Out to lunch." An administrator needs to engage in some kind of quality control and make sure inferiors aren't shirking. At the same time, an administrator cannot correct every mistake. Cars will have defects: a loose panel causing a squeak here; a bad line of code causing voice recognition to misunderstand commands there. But if an administrator sees a car roll off the assembly line missing a door, something has to be done. Similarly, ordinary, run-of-the-mill judicial error can be ignored as inherent in the lot of humanity, but not errors that are the judicial equivalent of a missing door.

By summarily correcting these kinds of errors, an administrator lets both the underlings and the customers know that he is watching. Failing to respond risks sending the opposite signal.

"On us." A wise administrator takes responsibility when he has led his charges astray, thereby showing that he holds himself as well as others accountable. From an administrative perspective, summary reversals in the "on us" category serve this purpose.

"Not *that* far." Similarly, an administrator wants those he supervises to be responsive to his instructions, but runs the risk that his instructions will be taken to extremes by an overeager lieutenant who

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Court treated the application as a petition for certiorari, granted certiorari, and summarily vacated the interlocutory injunction—producing the same effect in the case as a stay, given the imminence of the election.

81 *Cf.* Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921 (2016) (discussing how in some circumstances an administrator might also choose to signal that he was open to changing an existing policy and implicitly invite some departures from that policy before settling on a new policy).

overshoots the mark. A summary reversal can serve as a counterpoint to forestall or check such exaggerated reactions.

General functions. Beyond these particular functions in specific categories, summary reversals more generally can serve two other functions that Chief Justice Roberts as an administrator might especially appreciate: they provide a means to 1) decide additional cases without the time consumed by full briefing and argument; and 2) get greater consensus.

The Supreme Court in recent years has been deciding far fewer cases than was long considered the norm, a number that itself was considerably lower than the Court routinely decided a century ago.[82] By deciding cases summarily, the Court decides additional cases, but need not read a set of merits briefs, prepare for oral argument, or sit through oral argument.

In addition, while summary reversals are certainly not always unanimous, the rate of public dissent and separate opinions is considerably lower in summary reversals than in cases decided after full briefing and argument.[83]

Moreover, because summary reversals are issued as per curiam opinions, with no formal indication of who joins the opinion, it is possible that justices can acquiesce in summary reversals without indicating a public dissent (or a public concurrence)—just as they can regarding grants of certiorari or decisions on applications for stays. For example, in one death penalty case, the Court summarily reversed, and ruled in favor of the state prisoner, in a federal habeas case presenting an issue of ineffective assistance of counsel regarding the presentation of mitigating evidence.[84] There was no public dissent and no separate opinions, even though Justices Scalia and Thomas have been quite critical of the Court's Eighth Amendment jurisprudence, particularly regarding mitigating evidence.[85] Perhaps both were fully comfortable

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82 The Roberts Court has never heard argument in more than one hundred cases in a term. Thirty years ago, one hundred fifty was considered the norm; one hundred years ago, the average was three hundred thirty, and the Solicitor General estimated that the Court could decide between four and five hundred cases of public gravity. Hartnett, *supra* note 1, at 1646.

83 *See* Kedar S. Bhatia, *Stat Pack for October Term 2015*, SCOTUSBLOG (June 29, 2016), http://www.scotusblog.com/wp-content/uploads/2016/06/SB_stat_pack_OT15.pdf (observing that in the 2015 Term, the overall rate of unanimous decisions without separate opinions was eight percent, and the highest rate of such unanimity seen since the 2008 Term was fourteen percent in the 2013 Term). By contrast, the data collected for this Essay shows a rate of such unanimous decisions without separate opinions in summary reversals in the Roberts Court of sixty-three percent (forty-six of seventy-three).

84 Porter v. McCollum, 558 U.S. 30 (2009) (per curiam).

85 *See, e.g.*, Graham v. Collins, 506 U.S. 461, 496–97 (1993) (Thomas, J., concurring) ("*Penry* reintroduces the very risks that we had sought to eliminate through the simple directive that States in all events provide rational standards for capital sentencing. For 20 years, we have

with the per curiam opinion. But it is not clear that either of those Justices would have affirmatively joined, without at least offering some separate explanation, an opinion that relied on *Penry v. Lynaugh*,[86] yet they did not publicly dissent or separately concur. In another capital case, Justices Scalia, Thomas, and Alito dissented from a stay of execution,[87] but when the Court summarily reversed, only Justices Alito and Thomas dissented (and only from the summary disposition).[88] Again, perhaps there is some reason Justice Scalia was in full agreement with the summary reversal despite voting to deny the stay of execution, but acquiescence also seems plausible here.

Precisely because the Court does not indicate who joins a per curiam opinion, these suggestions are speculative. But it is possible that this aspect of summary reversals may be a small remnant of the old tradition of acquiescence that held one hundred years ago, long gone in signed opinions.[89] The abandonment of this broader tradition is underscored by the 1970 change to the United States Reports (one year into the Chief Justiceship of Warren Burger) formally indicating who joins a signed majority opinion.[90]

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acknowledged the relationship between undirected jury discretion and the danger of discriminatory sentencing—a danger we have held to be inconsistent with the Eighth Amendment. When a single holding does so much violence to so many of this Court's settled precedents in an area of fundamental constitutional law, it cannot command the force of stare decisis. In my view, *Penry* should be overruled."); Walton v. Arizona, 497 U.S. 639, 672 (1990) (Scalia, J., concurring in part and concurring in the judgment) ("Despite the fact that I think *Woodson* and *Lockett* find no proper basis in the Constitution, they have some claim to my adherence because of the doctrine of stare decisis. I do not reject that claim lightly, but I must reject it here."), *overruled on other grounds by* Ring v. Arizona, 536 U.S. 584 (2002).

86 *See Porter*, 558 U.S. at 41 (citing Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (relying on Lockett v. Ohio, 438 U.S. 586 (1978)).

87 Christeson v. Roper, 135 S. Ct. 433 (2014).

88 Christeson v. Roper, 135 S. Ct. 891, 897 (2015) (Alito, J., dissenting) (per curiam).

89 A norm of acquiescence persisted into the days of the Taft Court. Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1344 (2001) ("What is fascinating about these various [internal Court] communications is that they do not so much express a 'norm of consensus,' as a norm of acquiescence." (footnote omitted)). "The norm of acquiescence seems to have vanished . . . . Indeed, under current practice, a Justice who is inclined to suppress a dissent cannot simply acquiesce silently, but instead is described as formally 'joining' the Opinion of the Court." Edward A. Hartnett, *Ties in the Supreme Court of the United States*, 44 WM. & MARY L. REV. 643, 663–64 (2002); *id.* at 664 n.89 ("There are two remnants of silent acquiescence. First, Justices rarely make public note of disagreement with a decision to grant or deny certiorari. Second, when the court issues an opinion per curiam, the Justices who constitute the majority are not separately listed."). *But see* STYLE GUIDE, *supra* note 11, § 12.3 (noting "a longstanding presumption that Justices whose positions are not otherwise explained have joined the majority in full").

90 Rory K. Little, *Reading Justice Brennan: Is There a "Right" to Dissent?*, 50 HASTINGS L.J. 683, 696 n.52 (1999) ("[P]rior to the 1970 Term, the official U.S. reports did not list who 'joined' in the majority opinion."). As for Chief Justice Roberts himself, he has only publicly dissented twice from a summary reversal, and only once with an opinion. See Sears v. Upton,

Some might object that the claimed efficiency of deciding additional cases without full briefing and argument is illusory. Counsel have learned of the risk of summary reversal and therefore include more argument about the merits at the certiorari stage than they otherwise would.[91] As a result, certiorari stage briefs are longer, more detailed, and more merits-focused than they would have to be to enable the Court to decide no more than whether certiorari should be granted.

Perhaps so, but notice who bears the relevant costs. The costs of reading merits briefs, preparing for oral argument, and attending oral argument (or at least the latter two) are borne by the justices themselves. The costs of preparing longer briefs at the certiorari stage is borne by counsel and their clients, and the cost of reading those certiorari stage briefs is borne by the justices' clerks. Justices do not read the vast majority of certiorari stage briefs, and can easily decide to deny certiorari based on only a law clerk's recommendation.[92] Plausible candidates for summary reversal are likely to be relatively easy for a justice to spot from a clerk's memo. Thus even if lawyers and their clients, as well as law clerks, might save time if there were no summary reversals, it is far from clear that justices would save time.

Others might object that—apart from this possible (and questionable) saving of justices' time—all of the other administrative functions of summary reversals noted above would be served by simply granting certiorari in the ordinary course and reversing after full briefing and argument. At least in these days when the Court does not always fill the oral argument slots on its calendar, why not, it might be

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561 U.S. 945 (2010) (Roberts, C.J., noting that he would deny the petition for certiorari); Spears v. United States, 555 U.S. 261, 268 (2009) (Roberts, C.J., dissenting). Thus the summary reversal practice in the Roberts Court is overwhelmingly one he accepts.

91 *See* SUP. CT. R. 16.1 (noting the possibility of "a summary disposition on the merits"); SHAPIRO, GELLER, BISHOP, HARTNETT & HIMMELFARB, *supra* note 10, at 356 (noting that "respondent's counsel who reasonably fears that the decision below may be in jeopardy may feel compelled to add a substantial argument on the merits to the opposing brief" and that "if respondent's counsel thinks there is any possibility of summary reversal, he or she cannot safely file the ordinary brief in opposition that does not elaborate the principal arguments on the merits. Since counsel often cannot be sure about this, the result is likely to be much longer briefs in opposition in many cases."); Baude, *supra* note 9, at 20 (noting that "summary reversal is no longer completely unexpected" and "the Court has worked to regularize it").

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> The fact is, of course, that the Justices do not read all the petitions or even a significant fraction of them. They do not have the time. And several members have publicly acknowledged just that. They read at most the memoranda prepared by the clerks and rarely the briefs themselves at the jurisdictional stage.

Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1523–24 (2008) (footnotes omitted); Hartnett, *supra* note 1, at 1647 n.16.

asked,[93] fill those slots with the cases that would otherwise be summarily reversed? The answer may be that some administrative functions of summary reversals would be served less well by full briefing and argument.

This is particularly true of summary reversals responding to lower court resistance. Compared to typical administrators, and even compared to some states' highest courts and Chief Justices, the Supreme Court and Chief Justice of the United States have remarkably few tools to control hierarchical inferiors. A typical administrator can fire, reassign, discipline, or change the salary of those below him in order to exercise control. But the Supreme Court and Chief Justice of the United States cannot fire, discipline, or change the salaries of other judges, and the Chief Justice has a rather limited and constrained power to temporarily assign federal judges to other courts.

Lower federal court judges have the same life tenure as the justices themselves. Their salaries are set by Congress, and constitutionally protected from diminution, just as the justices' salaries are.[94] Their discipline is handled by Congress (via impeachment) and by the judicial council of each circuit.[95] Their general assignments are set by the way Congress defines their particular office and corresponding court—a district judge of a particular district, or a circuit judge of a particular circuit.[96] At most, there is a limited ability of the Chief Justice to make a temporary assignment from one circuit to another when the receiving circuit requests,[97] and the sending circuit consents.[98] No one is

93 Indeed, a member of the audience at the symposium did ask.

94 U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

95 28 U.S.C. § 354 (2012). The judicial council may refer a complaint to the Judicial Conference, and in certain circumstances must certify a matter to the Judicial Conference. *Id.* The Chief Justice does not choose the members of the Judicial Conference, although he presides at it and, if a member is unable to attend, may summon a replacement. 28 U.S.C. § 331. *Cf.* N.J. CONST. art. VI, § 6, para. 4 ("The Judges of the Superior Court shall also be subject to removal from office by the Supreme Court for such causes and in such manner as shall be provided by law.").

96 *See, e.g.*, 28 U.S.C. § 44 (appointment and number of circuit judges); 28 U.S.C. § 133 (appointment and number of district judges).

97 28 U.S.C. § 291(a) ("The Chief Justice of the United States may, in the public interest, designate and assign temporarily any circuit judge to act as circuit judge in another circuit upon request by the chief judge or circuit justice of such circuit."); 28 U.S.C. § 292(d) ("The Chief Justice of the United States may designate and assign temporarily a district judge of one circuit for service in another circuit, either in a district court or court of appeals, upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises.").

appointed to be a generic federal judge, subject to assignment to any court anywhere in the country at the will of the Supreme Court or the Chief Justice.[99]

The Supreme Court and the Chief Justice of the United States have no power at all to fire, reassign, discipline, or change the salary of any state judge. State law governs all of those matters.

As a result, the Supreme Court's only tool is its appellate jurisdiction: it can reverse judgments.[100] Seen from this perspective, summary reversal sends a corrective message, particularly in the face of resistance, that reversal after plenary consideration does not.

While there are certainly disputes on the Court about the propriety of summary reversal in any given case, the justices seem to share a general understanding that the lower court error must be especially clear. In his only opinion dissenting from a summary reversal, Chief Justice Roberts argued that the error was not "so apparent as to warrant the bitter medicine of summary reversal."[101] Other opinions make a similar point about the standard, explaining that the lower court's "holding departs in so stark a manner . . . that we grant review,"[102] or "we intervene here because the opinion below reflects a clear misapprehension of summary judgment standards in light of our precedents,"[103] or it was "plain from the face of the . . . opinion that it failed to apply the correct prejudice inquiry we have established."[104] In other cases, the Court observed that the lower court decision is "as inexplicable as it is unexplained" and has "no basis,"[105] or that it was contrary to "clear precedents" that are "so well settled . . . that this Court may proceed by summary disposition."[106] In defending its action in a

98 28 U.S.C. § 295 ("No designation and assignment of a circuit or district judge in active service shall be made without the consent of the chief judge or judicial council of the circuit from which the judge is to be designated and assigned.").

99 Chief Justice Taft proposed but never achieved a corps of judges (eighteen at the time) who could be assigned to any court in the country. Hartnett, *supra* note 1, at 1702; *cf.* N.J. CONST. art. VI, § 7, para. 2 ("The Chief Justice of the Supreme Court shall assign Judges of the Superior Court to the Divisions and Parts of the Superior Court, and may from time to time transfer Judges from one assignment to another, as need appears. Assignments to the Appellate Division shall be for terms fixed by rules of the Supreme Court.").

100 28 U.S.C. §§ 1253–1254, 1257. It may also issue prerogative writs when "necessary or appropriate in aid of [its] jurisdiction[] and agreeable to the usages and principles of law." 28 U.S.C. § 1651. *See generally* SHAPIRO, GELLER, BISHOP, HARTNETT & HIMMELFARB, *supra* note 10, at 657–85.

101 Spears v. United States, 555 U.S. 261, 268 (2009) (Roberts, C.J., dissenting).

102 Erickson v. Pardus, 551 U.S. 89, 90 (2007) (per curiam).

103 Tolan v. Cotton, 134 S. Ct. 1861, 1868 (2014) (per curiam).

104 Sears v. Upton, 561 U.S. 945, 946 (2010) (per curiam); *see also* CSX Transp., Inc. v. Hensley, 556 U.S. 838, 840 (2009) (per curiam) ("The ruling of the Tennessee Court of Appeals, and the refusal of the trial court to give an instruction, were clear error.").

105 Felkner v. Jackson, 562 U.S. 594, 598 (2011) (per curiam).

106 Presley v. Georgia, 558 U.S. 209, 209–13 (2010) (per curiam).

fact-intensive case, the Court explained that it "has not shied away from summarily deciding fact-intensive cases where, as here, lower courts have egregiously misapplied settled law."[107] More than once, it bemoans that it has made the same point "time and again."[108] One commentator contends that these opinions "are written in a tone more appropriate to scold a naughty child."[109]

Treating these cases to full briefing and argument threatens to undermine the corrective message by suggesting that they—like most cases the Court selects to decide—present difficult and close issues that have divided the lower courts.

A similar, if weaker, dilution of the message could affect "on us" and "not *that* far" cases if given plenary treatment. By contrast, the summary reversal in these cases can serve to underscore the Court's acceptance of responsibility.

These administrative functions may also help explain why the Court has declined to adopt the reform that has been suggested for decades: that the Court invite briefs when it is contemplating summary reversal. Such a reform would threaten not only to increase the costs imposed on the justices, but also to undermine the power of the message sent by summary reversal.

Another suggested but resisted reform is to require a supermajority if not unanimity for a summary reversal.[110] Indeed, it was once thought that six of nine were required for a summary reversal. If that were ever true, it is no longer, because summary reversals are entered over four dissents.[111] It does appear, however, that a summary reversal will not be entered over the dissent of four who call for full briefing and argument. That is, if as many as four dissent on the merits, or as many as four would deny certiorari (or some combination thereof), five may summarily reverse.[112] But if four call for full briefing and argument, it seems that they can insist on it. There does not appear to be a case in which four who wanted full briefing and argument were refused; such a

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107 Wearry v. Cain, 136 S. Ct. 1002, 1007 (2016) (per curiam).

108 White v. Wheeler, 136 S. Ct. 456, 460 (2015) (per curiam); Lopez v. Smith, 135 S. Ct. 1, 2 (2014) (per curiam).

109 Bentele, *supra* note 46, at 36.

110 For a recent statement of this position, see *id.* at 51 ("Summary reversal seems particularly questionable when . . . several justices of the Supreme Court dissent from the disposition. If indeed the practice is meant for cases in which the law and facts are undisputed and the decision below is clearly wrong, even one dissenting opinion, much less three, would suggest that, at the very least, full briefing and argument is in order.").

111 *See* SHAPIRO, GELLER, BISHOP, HARTNETT & HIMMELFARB, *supra* note 10, at 343–44.

112 *See, e.g.*, Sears v. Upton, 561 U.S. 945 (2010) (per curiam) (two would deny certiorari; two dissent on the merits); Holland v. Jackson, 542 U.S. 649 (2004) (per curiam) (four would deny certiorari).

refusal would seem to be inconsistent with the Rule of Four.[113] Moreover, the power to so insist seems implicit in the votes of the four dissenting justices in a campaign finance case that followed *Citizens United v. Federal Election Commission*.[114] There, Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, wrote,

> Were the matter up to me, I would vote to grant the petition for certiorari in order to reconsider *Citizens United* or, at least, its application in this case. But given the Court's per curiam disposition, I do not see a significant possibility of reconsideration. Consequently, I vote instead to deny the petition.[115]

If the votes of four to grant certiorari would not have resulted in full briefing and argument—because the votes of five to summarily reverse would have prevented full briefing and argument—there would be no reason to "vote instead" to deny the petition.[116]

Refusal to adopt this suggested reform serves several administrative functions. It increases the Court's flexibility because, as the supermajority requirements in the Senate make clear, supermajority requirements limit an institution's range of action. In this regard, declining to adopt the suggested supermajority reform is akin to the Court's longstanding refusal to reform its certiorari practice more generally by adopting more constraining criteria for granting certiorari.[117] It also allows individual justices greater flexibility, because at the certiorari stage, a justice can vote to deny certiorari (or simply

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113 "As long as we adhere to the Rule of Four, four Justices have the power to require that a case be briefed, argued, and considered at a postargument conference." New York v. Uplinger, 467 U.S. 246, 250 (1984) (Stevens, J., concurring).

114 Citizens United v. FEC, 558 U.S. 310 (2010).

115 Am. Tradition P'ship, Inc. v. Bullock, 132 S. Ct. 2490, 2492 (2012) (Breyer, J., dissenting). A parallel can be found in cases where certiorari is denied over four dissents, and the four dissenters believe that summarily reversal is appropriate, but do not insist on the case being decided on the merits. *See, e.g.*, J-R Distribs., Inc. v. Washington, 418 U.S. 949, 953 n.1 (1974) (Brennan, J., dissenting) ("Although four of us would grant and reverse, the Justices who join this opinion do not insist that the case be decided on the merits."). In both instances, four justices conclude that the other five are sufficiently unlikely to be swayed that they do not insist on full briefing and argument. *See* SHAPIRO, GELLER, BISHOP, HARTNETT & HIMMELFARB, *supra* note 10, at 326 ("There have been cases in which certiorari has been denied even though four Justices dissented. But in each such case, the dissenters (or some of them) stated that they did not insist on oral argument, although they would grant certiorari and vacate the judgment below. Such situations are explainable by the perception of the four dissenters that the other five Justices are so committed to affirming the decision below that a grant of certiorari would not likely change the result." (citations omitted)).

116 The other possibility—possible if one is willing to indulge the assumption that the Court itself has not decided what would happen if five voted to summarily reverse and four insisted on full briefing and argument—is that the point of "vote instead" by the four was to avoid having to face that decision.

117 Hartnett, *supra* note 1, at 1718–26.

dissent from the summary disposition), even if a majority votes to summarily reverse—thus avoiding taking any position on the merits. By contrast, if certiorari is granted and the case given full briefing and argument, it is highly unusual (and controversial) for a justice to decline to reach the merits on the ground that certiorari was improvidently granted—absent majority agreement to dismiss as improvidently granted.[118]

Indeed, summary reversal gives the Court as a whole the flexibility to reverse a lower court for failure to follow the Court's precedent without having to confront whether that precedent should be overruled. In *Bosse*, the Court insisted that lower courts "remain[] bound by *Booth*'s prohibition on characterizations and opinions from a victim's family members about the crime, the defendant, and the appropriate sentence unless this Court reconsiders that ban."[119] The per curiam opinion said nothing about whether this aspect of *Booth* should be overruled, and Justices Thomas and Alito joined the opinion on the express understanding that "this Court says nothing about whether *Booth* was correctly decided or whether *Payne* swept away its analytical foundations."[120] By contrast, in the three cases cited by *Bosse* for the

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118 "Generally . . . the Court's view has been that an individual Justice's subsequent vote to dismiss certiorari as improvidently granted, which amounts to a refusal to vote on the merits, would undermine the whole philosophy of the Rule of Four." SHAPIRO, GELLER, BISHOP, HARTNETT & HIMMELFARB, *supra* note 10, at 327 (internal quotation marks omitted). Justice Frankfurter had taken the opposite position. *See* Rogers v. Missouri Pac. R.R., 352 U.S. 521, 528 (1957) (Frankfurter, J., dissenting) ("Not four, not eight, Justices can require another to decide a case that he regards as not properly before the Court. The failure of a Justice to persuade his colleagues does not require him to yield to their views, if he has a deep conviction that the issue is sufficiently important."). Justice Harlan agreed with Justice Frankfurter that "the Court should not have heard any of these four cases," but nevertheless thought it his "duty to consider them on their merits," because he could not "reconcile voting to dismiss the writs as 'improvidently granted' with the Court's 'rule of four.'" *Id.* at 559 (Harlan, J., concurring and dissenting). Indeed, even a five-to-four vote to dismiss as improvidently granted has been controversial. *See id.* at 560 ("While in the nature of things litigants must assume the risk of 'improvidently granted' dismissals because of factors not fully apprehended when the petition for certiorari was under consideration, short of that it seems to me that the Court would stultify its own rule if it were permissible for a writ of certiorari to be annulled by the later vote of five objecting Justices."); *cf. Uplinger*, 467 U.S. at 250 (Stevens, J., concurring) ("It might be suggested that the case must be decided unless there has been an intervening development that justifies a dismissal. I am now persuaded, however, that there is always an important intervening development that may be decisive. The Members of the Court have always considered a case more carefully after full briefing and argument on the merits than they could at the time of the certiorari conference . . . ." (citation omitted)); *id.* at 251 (arguing that the force of the Rule of Four "is largely spent once the case has been heard. At that point, a more fully informed majority of the Court must decide whether some countervailing principle outweighs the interest in judicial economy in deciding the case.").

119 Bosse v. Oklahoma, No. 15-9173, 2016 WL 5888333, at *2 (U.S. Oct. 11, 2016) (per curiam).

120 *Id.* at *2 (Thomas, J., concurring).

proposition that lower courts are bound by its precedents until it chooses to overrule them, the Court gave the case plenary consideration and ultimately concluded that the earlier precedent should be overruled.[121]

Finally, allowing five justices to summarily reverse (unless the other four insist on full briefing and argument) respects the Rule of Four— the only surviving promise the Court made to Congress when it sought and obtained broad power to set its own agenda[122]—while also underscoring a fundamental point about the Supreme Court. While those with mythic views of the Court may not like to focus on the point, at the end of the day, it is an institution controlled by the majority, albeit with a much lower denominator than in other such institutions.[123]

CONCLUSION

The Supreme Court's practice of summary reversals continues despite longstanding criticism. Most of the summary reversals by the Roberts Court are in a small number of areas of law, and a few types of errors account for a large majority of summary reversals by the Roberts Court. Analyzing the administrative functions served by summary reversals suggests why the practice persists and why commonly suggested reforms are not adopted. While the Court may perceive these administrative functions as sufficiently valuable to warrant the practice

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121 United States v. Hatter, 532 U.S. 557 (2001); State Oil Co. v. Khan, 522 U.S. 3 (1997); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989). One might wonder how the principle that lower courts cannot anticipate the overruling of Supreme Court precedent could be enforced: if the lower court *correctly* anticipated that the Supreme Court would overrule its prior precedent and entered judgment accordingly, the Supreme Court would affirm rather than reverse that lower court judgment. After all, if, at the end of the day, the lower court's judgment is correct, it should be affirmed. Summary reversal provides an answer: simply reverse the lower court judgment for failure to follow the prior precedent without addressing whether the prior precedent should be overruled.

122 Hartnett, *supra* note 1, at 1647 (noting that among the assurances made to Congress, only the Rule of Four has survived).

123 As Jeremy Waldron has explained,

> defenders of judicial review prefer not to talk about the use of simple majority voting among the Justices on issues of rights. They want to be able to condemn majority voting on rights as a characteristic of legislatures. If pressed, they will acknowledge that, of course, judges decide issues by, say, 5-4 or 6-3 majorities on the Supreme Court. But I have never, ever heard a defender of judicial review introduce this into discussion himself or herself, let alone undertake to explain why it is a good idea.

Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1392–93 & n. 119 (2006) (noting that if the defense of majority voting on courts is that "majority voting by a group of adjudicators arithmetically enhances the competence of the group beyond the average competence of its members," then "it will have to compete with a similar case that can be made for the much larger voting bodies in legislatures").

of summary reversals, others need not share that perception. But at least to me, criticizing summary reversals while accepting the broader certiorari practice seems like swallowing the camel while straining at the gnat.[124]

124 *Matthew* 23:24.

TABLE OF SUMMARY REVERSALS

OT	petitioner	respondent	number	winner	type	death	court	separate views	code
2005	Eberhart	US	04-9949	Defendant	Criminal		CA7		On Us
2005	Salinas	US	05-8400	Defendant	Criminal		CA5		OTL
2005	Iran	Elahi	04-1095	Sovereign	FSIA		CA9		OTL
2005	Dye	Hofbauer	04-8384	Prisoner	Habeas		CA6		OTL
2005	Schriro	Smith	04-1475	Warden	Habeas	Death	CA9		
2005	Bradshaw	Richey	05-101	Warden	AEDPA	Death	CA6		OTL
2005	Kane	Garcia	04-1538	Warden	AEDPA		CA9		R/C
2005	Gonzalez	Thomas	05-552	AG	Immigration		CA9		R
2005	Ash	Tyson	05-379	Plaintiff	Race Discrim.		CA11		OTL
2006	Purcell	Gonzalez	06-532	Officers	Election		CA9	St	
2006	Erickson	Pardus	06-7317	Plaintiff	Pleading		CA10	Sc; Th	NTF
2006	LA	Rettele	06-605	Officers	QI/4th		CA9	So; St & G	R/C
2007	Allen	Siebert	06-1680	Warden	AEDPA	Death	CA11	St & G	R
2007	Wright	Van Patten	07-212	Warden	AEDPA		CA7	St	R/C
2008	Spears	US	08-5721	Defendant	Booker		CA8	R & Al; K, Th	On Us
2008	Moore	US	07-10689	Defendant	Booker		CA8		R
2008	Nelson	US	08-5657	Defendant	Booker		CA4	Br & Al	R
2008	CSX	Hensley	08-1034	Defendant	FELA		TN	St & G	R
2009	Michigan	Fisher	09-91	Officer/St	4th Amend		MI	St & Sot	OTL
2009	Wilkins	Gaddy	08-10914	Prisoner	8th Amend		CA4	Th & Sc	R
2009	Corcoran	Levenhagen	08-10495	Prisoner	Habeas	Death	CA7		OTL
2009	Wong	Belmontes	08-1263	Warden	Habeas	Death	CA9	St	R
2009	Bobby	Van Hook	09-144	Warden	Habeas	Death	CA6	Al	R
2009	Jefferson	Upton	09-8852	Prisoner	Habeas	Death	CA11	Th & Sc	
2009	Thaler	Haynes	09-273	Warden	AEDPA	Death	CA5		R/C

2009	Porter	McCollum	08-10537	Prisoner	AEDPA	Death	CA11		
2009	Presley	Georgia	09-5270	Defendant	Public Trial		GA	Th & Sc	R
2009	Sears	Upton	09-8854	Prisoner	State Habeas	Death	GA	R & Al; Sc & Th	
2010	Wilson	Corcoran	10-91	Warden	Habeas	Death	CA7		OTL
2010	Swarthout	Cooke	10-333	Warden	Habeas		CA9	G	OTL
2010	Felkner	Jackson	10-797	Warden	AEDPA		CA9		R
2010	Bobby	Mitts	10-1000	Warden	AEDPA	Death	CA6		R/C
2011	KPMG	Cocchi	10-1521	Pro-Arb	FAA		FL		R
2011	Marmet	Brown	11-391	Pro-Arb	FAA		WV		R
2011	Am. Trad.	Bullock	11-1179	Speaker	Free Speech		MT	Br, G, Sot, Ka	R
2011	Wetzel	Lambert	11-38	Warden	AEDPA	Death	CA3	Br, G, Ka	R
2011	Cavazos	Smith	10-1115	Warden	AEDPA		CA9	G, Br, Sot	R/C
2011	Bobby	Dixon	10-1540	Warden	AEDPA	Death	CA6		R/C
2011	Coleman	Johnson	11-1053	Warden	AEDPA		CA3		R/C
2011	Parker	Matthews	11-845	Warden	AEDPA	Death	CA6		R/C
2011	Hardy	Cross	11-74	Warden	AEDPA		CA7		
2011	Ryburn	Huff	11-208	Officer	QI/4th		CA9		R/C
2012	Nitro-Lift	Howard	11-1377	Pro-Arb	FAA		OK		R
2012	Lefemine	Wideman	12-168	Plaintiff	Free Speech		CA4		OTL
2012	Ryan	Schad	12-1084	Warden	AEDPA	Death	CA9		R
2012	Marshall	Rodgers	12-382	Warden	AEDPA		CA9		R/C
2012	Nevada	Jackson	12-694	Warden	AEDPA		CA9		R/C
2013	Martinez	Illinois	13-5967	Defendant	Double Jeopardy		IL		R
2013	Williams	Johnson	13-9085	Prisoner	Habeas		CA9		On Us
2013	Stanton	Sims	12-1217	Officer	QI/4th		CA9		R/C
2013	Tolan	Cotton	13-551	Plaintiff	QI/4th		CA5	Al & Sc	
2013	Hinton	Alabama	13-6440	Prisoner	State Habeas	Death	AL		
2014	Johnson	Shelby	13-1318	Employee	1983 Pleading		CA5		NTF
2014	Grady	N. Carolina	14-593	Defendant	4th Amend		NC		OTL

2014	Christeson	Roper	14-6873	Prisoner	Habeas	Death	CA8	Al & Th	
2014	Lopez	Smith	13-946	Warden	AEDPA		CA9		R/C
2014	Woods	Donald	14-618	Warden	AEDPA		CA6		R/C
2014	Glebe	Frost	14-95	Warden	AEDPA		CA9		R/C
2014	Carroll	Carman	14-212	Officers	QI/4th		CA3		R/C
2014	Taylor	Barkes	14-939	Officers	QI		CA3		R/C
2015	James	Boise	15-493	Plaintiff	1983		Idaho		OTL
2015	Caetano	Mass.	14-10078	Defendant	2d Amendment		MA	Th & Al	R
2015	Lynch	Arizona	15-8366	Prisoner	Criminal	Death	AZ	Th & Al	
2015	Amgen	Harris	15-278	Defendant	ERISA		CA9		R
2015	V.L.	E.L.	15-648	Adoptive Mother	FFC		AL		R
2015	Johnson	Lee	15-789	Warden	Habeas		CA9		R
2015	White	Wheeler	14-1372	Warden	AEDPA	Death	CA6		R/C
2015	Woods	Etherton	15-723	Warden	AEDPA		CA6		R/C
2015	Kernan	Hinojosa	15-833	Warden	AEDPA		CA9	G & So	R/C
2015	Mullenix	Luna	14-1143	Officer	QI		CA5	So; Sc	R/C
2015	Wearry	Cain	14-10008	Prisoner	State Habeas	Death	LA	Al & Th	
2015	Maryland	Kulbicki	14-848	State	State Habeas		MD		
2016	Bosse	Oklahoma	15-9173	Defendant	Criminal	Death	OK	Th & Al	R