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ARTICLES

The Supreme Court's Second Thoughts: Remands for Reconsideration and Denials of Review in Cases Held for Plenary Decisions*

By Arthur D. Hellman**

Introduction

The most puzzling mode of disposition in the Supreme Court's repertory is the summary order vacating the judgment below and remanding the case to the lower court "for further consideration in light of" a Supreme Court decision handed down after the lower court's ruling. In the 1982 Term the Court issued sixty-nine orders of this kind; thus, apart from cases in which review was denied altogether, only plenary opinions and appeals dismissed for want of a substantial federal question were more numerous.1 Yet the significance of this form of disposition—known within the Court as the "GVR"2—remains a mys-

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1. Comprehensive data for the 1982 Term have not been published; thus, except as otherwise noted, the figures in this Article are based on my own computations. For a statistical breakdown of the Court's dispositions in the 1975 through 1979 Terms, see Hellman, Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review, 44 U. Pitt. L. Rev. 795, 803-09 & Table I (1983). In some Terms, reconsideration orders have actually outnumbered dismissals for want of a substantial federal question. See id. (1976 Term).

2. The abbreviation derives from the fact that, except in cases coming to the Court on appeal, the disposition reads, "The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to [the court below] for further consideration in light of [the cited case]." See, e.g., Ledbetter v. Benham, 103 S. Ct. 3565 (1983). The full form of the order is more elaborate. See, e.g., Baldwin v. State, 405 So. 2d 698 (Ala. 1981) (quoting Supreme Court's mandate).
tery to most of the legal profession. For example, some judges assume that a summary reconsideration order means no more than what it says: the lower court must reconsider its prior ruling, but is free to reach the same result once again after the remand.³ Others think that the GVR is a reversal in all but name.⁴ The Supreme Court has given few clues to what it means by these orders, and little guidance is to be found in the secondary literature.⁵

In this Article I shall examine the nature and significance of the summary reconsideration order.⁶ After briefly tracing the history of this form of disposition and what the Court has said about it, I shall present an analysis based on an empirical study of the reconsideration orders issued in recent Terms, the responses of lower courts, and the subsequent actions of the Supreme Court. That analysis, in turn, will lead to an examination of the cases in which the Court deferred disposition pending the announcement of a plenary decision, but then denied review rather than remanding.⁷ Thereafter, I shall venture a few suggestions for changes in the Court’s practices that might reduce some

³. See, e.g., Sharpe v. United States, 712 F.2d 65, 65 n.1 (4th Cir. 1983) (“Had the Supreme Court felt that a reversal was in order, it could and would have said so.”), cert. granted, 104 S. Ct. 3531 (1984).

⁴. See, e.g., Sharpe v. United States, 712 F.2d at 67 (Russell, J., dissenting) (“The Supreme Court was seeking to be gentle with us but there is . . . no mistaking what they expected us to do. The Supreme Court thought [the intervening decision] both relevant and dispositive . . .”).

⁵. The most comprehensive analysis of which I am aware is contained in a student work published more than 20 years ago, which is well before the Court began to make extensive use of this mode of disposition. See The Supreme Court, 1960 Term, 75 Harv. L. Rev. 40, 92-99 (1961). The leading treatise on Supreme Court practice deals with the matter in a single sentence accompanied by a brief footnote. See R. Stern & E. Grisman, Supreme Court Practice 363 & n.34 (5th ed. 1978). For a more extended discussion, see Hellman, The Business of the Supreme Court Under the Judiciary Act of 1925: The Plenary Docket in the 1970’s, 91 Harv. L. Rev. 1709, 1720-21 (1978) (suggesting a tentative hypothesis and calling for further research). See also Hellman, supra note 1, at 836-47 (a preliminary version of this study).

⁶. The vast majority of the Court’s reconsideration orders are based upon plenary decisions; however, occasionally the Court remands a case for reconsideration in light of an opinion handed down without oral argument. See, e.g., Lane v. Smith, 457 U.S. 1102 (1982) (citing Fletcher v. Weir, 455 U.S. 607 (1982)). There is no reason to distinguish between these two kinds of orders, and in this Article I shall not do so.

From time to time, the Court vacates a judgment and remands the case to the lower court for further consideration in light of something other than an intervening Supreme Court decision. See, e.g., Bureau of Economic Analysis v. Long, 454 U.S. 934 (1981) (intervening legislation); Alabama v. Ritter, 454 U.S. 885 (1981) (intervening state court decision); Dupris v. United States, 446 U.S. 980 (1980) (intervening events that may have mooted the controversy). Dispositions such as these clearly are not on the merits and thus are excluded from this study.

⁷. For sake of simplicity, cases in which the Court defers disposition pending a plenary decision are referred to as “held” cases.
of the ambiguities inherent in the present approach. Finally, I shall assess the significance of the reconsideration order from the broader perspective of the Court's functions in the American judicial system.

I. The Lessons of History

As an initial matter, one probably would not regard a summary reconsideration order as a disposition "on the merits" in any sense. Clearly it does not—of itself—settle the dispute for the parties, and as for precedential value, what guidance could anyone find in an order at once so cryptic and so inconclusive? History, however, may suggest another view. During the sixteen-year tenure of Chief Justice Warren, more than one hundred cases were reversed outright on the authority of a Supreme Court decision issued subsequent to the lower court's ruling. In the decade that began in 1971, only a handful of such dispositions can be found. During the same period, the volume of summary reconsideration orders increased far beyond what it had been in earlier years.

The trends that began in the early 1970's have continued to the present day. To be sure, the number of GVR cases in any one Term has varied greatly, from a low of forty-two in 1977 to a high of ninety-five in 1980. But the reason the range is so wide is that the volume depends in part on the nature and scope of the Court's plenary decisions and in part on the extent to which other cases brought to the

8. See The Supreme Court, 1960 Term, supra note 5, at 98-99; see also Hellman, supra note 5, at 1720.
9. See Hellman, supra note 1, at 822-24. A few of these dispositions were accompanied by brief opinions or memoranda.
10. There were four decisions without opinions (none after the 1972 Term) and about half a dozen with brief opinions.
11. Summary reconsideration orders were extremely rare under Chief Justice Vinson (1946-1953) and in the first nine Terms under Chief Justice Warren; no more than a dozen can be found in any one Term. The 1962 Term marked a turning point: there were more than 60 such dispositions. However, nearly two-thirds of these were based on Gideon v. Wainwright, 372 U.S. 335 (1963), or Douglas v. California, 372 U.S. 353 (1963). In the remaining Terms of the 1960's, the number of reconsideration orders never went above 50 and in one Term it dipped as low as 11. During the last decade, the number has frequently exceeded 80 and has never gone below 40.
12. The total for the 1981 Term was 70. (These figures do not take account of consolidations. Cf. infra note 34.)
13. In particular, decisions that mark a clear departure from the law as it was perceived by the lower courts will often generate large numbers of reconsideration orders. Thus, eight cases were remanded in the wake of Monell v. New York City Dep't of Social Servs., 436 U.S. 658 (1978), which overruled Monroe v. Pape, 365 U.S. 167 (1961), in relevant part and held that municipalities and other political subdivisions could be sued under 42 U.S.C. § 1983. Six cases were sent back for reconsideration in light of Bifulco v. United States, 447
Court happen to involve issues identical or similar to those adjudicated on the plenary docket.\textsuperscript{14} Even when the volume was at its lowest, there was no resurgence of the summary reversal on the authority of an intervening decision.

Looking at these developments in isolation, one might well infer that the Court has changed the form but not the substance of its dispositions: in the interest of comity, the lower court is invited to reverse itself, rather than being told that the Supreme Court has already performed the deed, but the invitation is one that is not expected to be refused. In short, the reconsideration order might be regarded as a polite form of reversal, but a reversal nevertheless.

One difficulty with this analysis is that during the 1960's the Court issued reconsideration orders as well as reversals that relied on intervening plenary decisions.\textsuperscript{15} Moreover, with rare exceptions, plenary decisions that generated summary reversals did not generate reconsideration orders, and vice versa.\textsuperscript{16} Thus, at least in the past, the Court has not treated the two forms of disposition as functionally equivalent—though the distinction between them appears to have been grounded in the nature of the intervening decision rather than in the relationship between that decision and the case targeted for summary action.\textsuperscript{17} Be that as it may, the fact remains that the Court no longer reverses summarily on the authority of an intervening precedent, even

\begin{itemize}
\item U.S. 381 (1980), which rejected an interpretation of federal criminal law that had been espoused by four circuits.
\item 14. Thus, Greenholtz v. Inmates of Neb. Penal & Correctional Complex, 442 U.S. 1 (1979), which involved a widely litigated issue of prisoners' rights, generated nine remand orders. More recently, six cases were remanded for reconsideration in light of Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156 (1981), a plenary decision in which the Court addressed the recurring question of the duty of care owed by shipowners toward longshoremen. Six other cases that had been held pending the disposition of Scindia were denied review. \textit{See infra} notes 79-82 and accompanying text.
\item 15. \textit{See supra} note 11.
\item 16. For example, Gideon v. Wainwright, 372 U.S. 335 (1963), gave rise to more than 20 reconsideration orders in the 1962 Term, but no reversals. In the following Term, Reynolds v. Sims, 377 U.S. 533 (1964), and the other reapportionment cases were followed by a series of reversals (and a few affirmances), but no remands for reconsideration.
\item 17. What is not at all clear is the principle or principles that underlay the distinction. For example, one might think that Gideon v. Wainwright, 372 U.S. 335 (1963), which overruled a long-standing precedent and established a per se rule, would have generated outright reversals of decisions that presumably relied on the prior law. On the other hand, Reynolds v. Sims, 377 U.S. 533 (1964), appeared to leave open the possibility that "divergences from a strict population standard" in legislative apportionment could be justified by "legitimate considerations incident to the effectuation of a rational state policy," \textit{id.} at 579; thus, reapportionment cases would appear to have been prime candidates for reconsideration orders. Yet in each instance the Court followed the opposite pattern from what these hypotheses would suggest.
\end{itemize}
though, as will be seen, there are substantial numbers of cases in which such action would be justified. The conclusion that follows from all this is that some of the reconsideration orders may be tantamount to reversals, but it cannot be assumed that all of them are. History thus gives no clear answer to the question of the precedential value of this form of disposition.

The Court itself has given little guidance on the subject. One tantalizing clue, however, is furnished by the unusual statement that accompanied a 1955 order remanding nine criminal tax cases that had been held pending a group of plenary decisions in which the Court addressed the "net worth" approach to proving tax evasion. Instead of simply issuing an order of remand, the Court added: "We have not considered the merits of these cases, nor have we determined their relation to our recent opinions, . . . believing that re-examination by the Courts of Appeals is desirable even in those cases remotely involving the principles laid down in the [plenary] decisions." The inference may be drawn that in the ordinary GVR case the Court does "consider the merits," and perhaps makes a preliminary determination that the judgment below is inconsistent with the intervening decision. But the quoted statement is itself ambiguous, and any significance it may have is further reduced by the fact that it was issued at a time when reconsideration orders were still quite uncommon.

The Court's most extended discussion of the meaning of the GVR is found in Henry v. City of Rock Hill, a 1964 case that previously had been remanded to a state court for reconsideration in light of an inter-

18. See infra text accompanying notes 35-40. In one curious case, the Court remanded "for further consideration in light of" a Supreme Court decision that the lower court had considered and distinguished. See May v. State, 618 S.W.2d 333 (Tex. Crim. App.) (noting capital defendant's claim that jurors were improperly excused in violation of Adams v. Texas, 448 U.S. 38 (1980), but holding that errors were waived by failure to object), vacated, 449 U.S. 959 (1981) (directing further consideration in light of Adams). Perhaps the Supreme Court meant, by its remand order, to reject only the Texas court's holding on the waiver issue. We shall never know; on remand, the Texas court found it unnecessary to consider the Adams issue because the governor had commuted the death sentence. See May v. State, 632 S.W.2d 751 (Tex. Crim. App. 1982). During the tenure of Chief Justice Warren, a case of this kind almost certainly would have been reversed outright. See Hellman, supra note 1, at 823-24.


22. 376 U.S. 776 (1964) (per curiam).
vening decision. On remand, the state court held that the intervening decision was not controlling and reaffirmed its previous ruling. Review was again sought, and again the Court disposed of the case summarily; but this time the judgment was reversed outright. The Court explained that a case will be remanded for reconsideration in the light of a recent decision when the Justices are "not certain that the case [is] free from all obstacles to reversal on [the] intervening precedent." Such orders, the Court stated, do "not amount to a final determination on the merits"; but they do "indicate that we [find the intervening precedent] sufficiently analogous and, perhaps, decisive to compel re-examination of the case." The Court then held that the decision cited in its remand order did control the result in Henry and required reversal.

At the least, the Court's language casts serious doubt on any idea that a remand for reconsideration "in light of" an intervening precedent is no more than a neutral suggestion that the court below study the cited decision for whatever illumination it may shed on the correctness of its initial judgment. Rather, the Court appears to be saying that such orders are issued when the Justices have found enough similarity between the case before them and the intervening decision to indicate, as a prima facie matter, that the judgment below is in error, but that because of other aspects of the case, the Court is not prepared to reverse outright. The cautionary circumstances may involve facts directly bearing on the issue adjudicated in the cited case, or they may relate to alternate grounds that might support the judgment below even if the lower court erred in its conclusion on the common issue. In any event, the Court's account suggests that a reconsideration order, when read together with the opinion below, may provide lawyers and lower courts with some guidance about the scope or application of the ruling laid down in the cited case. To that extent, the remand order does have precedential value.

A similar conclusion is suggested by the brief discussion in a dissenting opinion in the 1978 Term. In Trustees of Keene State College v.

26. Id. at 776 (emphasis added).
27. Id. at 777 (emphasis added).
28. Id. at 777-78.
29. For example, compare United States v. Jacobs, 429 U.S. 909, 909-10 (1976) (Stevens, J., concurring), with id. at 910 (Marshall, J., dissenting). See also Hellman, supra note 5, at 1720-21; The Supreme Court, 1960 Term, supra note 5, at 93-94.
Sweeney, Justice Stevens, joined by three colleagues, emphasized that when the Court issues a reconsideration order, it "is acting on the merits"; once again, however, the opinion stopped short of saying that such an order is a disposition on the merits. A case should not be remanded for reconsideration, Justice Stevens stated, "unless the intervening decision has shed new light on the law which, if it had been available at the time of the [lower court's] decision, might have led to a different result."

II. An Empirical Study

To shed further light on this form of disposition, I examined all of the cases—a total of 289—in which reconsideration orders were issued during the five Terms 1975 through 1979. Several patterns emerged. First, there were at least fifty cases in which the Court clearly would have been justified in reversing outright. In some of them, the lower court had come out on the wrong side of an intercircuit conflict resolved by the intervening precedent. In others, the decision below

31. Id. at 25-26 (Stevens, J., dissenting) (emphasis added).
32. Id. at 26 (emphasis added).
33. This figure does not include the rare cases in which a summary reconsideration directive was accompanied by a brief explanatory memorandum. See, e.g., Anders v. Floyd, 440 U.S. 445 (1979). Nor does it include the cases—also rare—in which reconsideration orders were issued after oral argument. These were generally cases that were argued in tandem with cases disposed of in full opinions. See, e.g., Richmond Unified School Dist. v. Berg, 434 U.S. 158 (1977). See also infra notes 97-99 and accompanying text.
34. I selected this period in order to have a good chance of tracing all post-remand proceedings in a substantial number of cases.
Here and in the remainder of this Article (unless otherwise stated), two or more cases (i.e., docket numbers) arising out of a single judgment and disposed of in a single order will be counted as one case. See, e.g., Armistead v. Associated Gen. Contractors of Cal., 448 U.S. 908 (1980) (five docket numbers; one case).
relied on a lower court ruling that the Supreme Court had reversed or substantially modified or on a Supreme Court decision that the Jus-

932 (1976), *vacating* 502 F.2d 1238 (5th Cir. 1974) (overruled by Hancock v. Train, 426 U.S. 167 (1976)).


For the most part, these overrulings were not explicit; the term represents my own evaluation of the precedential effect of the cited case on the remanded decision.

36. For example, in Allen v. Monger, 583 F.2d 438 (9th Cir. 1978), the Ninth Circuit adopted the rationale of Huff v. Secretary of the Navy, 575 F.2d 907 (D.C. Cir. 1978), in striking down regulations that restricted military personnel in the circulation of petitions addressed to members of Congress. The Supreme Court granted certiorari in Huff and after plenary consideration reversed the D.C. Circuit’s decision. Secretary of the Navy v. Huff, 444 U.S. 453 (1980). The Court then vacated the judgment in Allen and remanded for reconsideration in light of Huff. Brown v. Allen, 444 U.S. 1063 (1980). (Upon remand, the Ninth Circuit in turn remanded the case to the district court. Allen v. Monger, 619 F.2d 839 (9th Cir. 1980) (mem.). No further proceedings can be traced; presumably the district court dismissed the complaint. See infra note 42 and accompanying text.)


tices had overruled. To these can be added about ninety cases in which the judgment of the court below was only slightly less vulnerable: the facts appeared to vary in a way that arguably justified a result different from the one reached by the intervening decision, but the rationale certainly seemed inconsistent.


I have been quite conservative in my characterizations; thus, many of the cases in this group might well be viewed as no less doomed to reversal than those described in the text accompanying notes 35 through 37. See also Cates v. United States, 626 F.2d 399, 400 (5th Cir. 1980) (post-remand opinion) (although plenary decision construed different section of crimi-
Study of the post-remand outcomes in the cases I have described confirms these characterizations. There were ninety-one cases in which the later proceedings could be traced. In only about fifteen of them did the lower court adhere to its original disposition; and usually the court did so, not by distinguishing the intervening decision, but by holding that alternate grounds supported the initial result even though the holding on the common issue could no longer stand.

A few cases were remanded to the trial court without any expression of views by the court whose judgment had been vacated. In all of the other cases, reconsideration led to a reversal or substantial modification of the earlier decision. It should be noted, moreover, that the cases in which

39. See, e.g., United States v. Santora, 600 F.2d 1317 (9th Cir. 1979) (holding, after reconsideration in light of Dalia v. United States, 441 U.S. 238 (1979), that break-in and bugging were valid, but reversing convictions because insufficiency of wiretap application affidavits required exclusion of evidence); Muzquiz v. City of San Antonio, 586 F.2d 1317 (9th Cir. 1979) (holding, after reconsideration in light of Dalia v. United States, 441 U.S. 238 (1979), that break-in and bugging were valid, but reversing convictions because insufficiency of wiretap application affidavits required exclusion of evidence); Muzquiz v. City of San Antonio, 586 F.2d 1317 (9th Cir. 1979) (holding, after reconsideration in light of Dalia v. United States, 441 U.S. 238 (1979), that break-in and bugging were valid, but reversing convictions because insufficiency of wiretap application affidavits required exclusion of evidence).

40. See, e.g., Thurston v. Dekle, 578 F.2d 1167 (5th Cir. 1978); State v. Hardy, 578 S.W.2d 361 (Mo. Ct. App. 1979).

41. See, e.g., Escobar v. S.S. Washington Trader, 640 F.2d 1063 (9th Cir. 1981); United States v. Humphries, 636 F.2d 1172 (9th Cir. 1981); United States v. Sellers, 628 F.2d 1085 (8th Cir. 1980); Fusco v. Perini N. River Assocs., 622 F.2d 1111 (2d Cir. 1980); Collins v. Rumsfeld, 559 F.2d 1178 (9th Cir. 1977); United States v. Cabral,
post-remand dispositions were not published were generally the ones in which the initial ruling was most clearly vitiating by the new precedent. In all likelihood nothing was published because the outcome seemed so inevitable.

Given the history of the reconsideration order, it is hardly surprising that so many of the cases receiving this form of disposition would turn out to have been prime targets for reversal. But the study also found about a dozen cases in which the decision of the court below appears to have been so clearly in harmony with the intervening precedent that one wonders why the Court vacated the judgment at all, rather than simply denying review. One possible explanation is that the Court was following a policy of remanding all cases in which the petitioner had raised issues similar to those adjudicated in a recent plenary decision, without looking very closely to determine whether the lower court's ruling conflicted with the intervening precedent. If this were so, of course, it would reduce to near zero the precedential value of the reconsideration order.

To test this hypothesis, I examined all of the cases in the last three Terms of the study in which the certiorari petition or jurisdictional statement was held for an unusually long period of time before review.


43. See supra note 9 and accompanying text.


In another group of cases, the vacated decision was probably inconsistent with the intervening precedent, but the court below had itself remanded for further proceedings; as a result, the Supreme Court's remand order left the case in essentially the same posture that it would have been in if the Justices had simply denied review. See infra note 115 and accompanying text.

45. Other aspects of the Court's work during this period are described in Hellman, The Supreme Court, the National Law, and the Selection of Cases for the Plenary Docket, 44 U. Pitt. L. Rev. 521 (1983). See also Hellman, supra note 1.
was denied.\textsuperscript{46} If a case involved an issue similar to one adjudicated in a very recent plenary decision, I assumed that the application had been held to await the disposition in the argued case.\textsuperscript{47} More than one hundred cases fit this pattern.\textsuperscript{48}

Comparison of these cases with those that were remanded leaves no doubt that the Court was making at least some distinctions in its handling of applications for review that had been held pending the decision of an argued case. In particular, when the lower court's judgment appeared on the surface to be consistent with the new precedent, the Court almost invariably denied review rather than remanding.\textsuperscript{49}

\textsuperscript{46} For present purposes, summary affirmances and dismissals in appeal cases are treated as denials of review.

\textsuperscript{47} Justice Brennan has informed us that this is the Court's practice. Brennan, The National Court of Appeals: Another Dissent, 40 U. Chi. L. Rev. 473, 477-78 (1973).

\textsuperscript{48} This figure can be only an approximation. In cases where the delay in disposition was minimal, or the similarity of issues attenuated, I could surmise that the application for review had been held to await the plenary decision, but could not be confident that this was so. See also infra note 65.


For more recent examples, compare United States v. Sher, 657 F.2d 28 (3d Cir. 1981), cert. denied, 458 U.S. 1121 (1982), with Williams v. United States, 458 U.S. 279 (1982); com-
Reconsideration orders may have been issued in the remaining cases as the result of carelessness or error, or perhaps the Justices saw unresolved difficulties in the rulings below that have escaped me. In any event, the totality of the evidence discussed thus far continues to support the view that a reconsideration order, if not tantamount to reversal, does indicate a strong leaning in that direction.

It is all the more striking, therefore, that among the remanded cases in which there was at least a surface inconsistency between the vacated judgment and the cited decision, the study found more than sixty in which the lower court, upon reconsideration, adhered to its original judgment. Sometimes the court conceded that the decision cited by the Supreme Court was squarely on point, reversed its ruling on the issue the Justices had addressed, and went on to find that its earlier judgment could be upheld on some other ground. More often,


50. The courts to which the cases were remanded appear to have shared the view that such action was unnecessary. As far as published materials reveal, reconsideration generally led to the reinstatement of essentially the same judgments. See, e.g., Kurek v. Pleasure Driveway & Park Dist., 583 F.2d 378 (7th Cir. 1978); People v. Velasquez, 28 Cal. 3d 461, 622 P.2d 952, 171 Cal. Rptr. 507 (1980); McShan v. State, 155 Ga. App. 518, 271 S.E.2d 659 (1980).

In addition, there were a few cases in which review was denied even though the lower court's ruling seemed, on the surface, to warrant reconsideration at least as much as some of the cases in which reconsideration orders were issued. See, e.g., Blamey v. Brown, 270 N.W.2d 884 (Minn. 1978), cert. denied, 444 U.S. 1070 (1980), discussed infra notes 64-74. For a more recent (and bizarre) example, compare Matter of Greene, 54 N.Y.2d 118, 429 N.E.2d 390, 444 N.Y.S.2d 883 (1981), cert. denied, 455 U.S. 1035 (1982) (review denied over dissents of four Justices who would vacate for reconsideration in light of intervening decision in In re R.M.J., 455 U.S. 191 (1982)), with Alessi v. Committee on Professional Standards, 88 A.D.2d 1089, 451 N.Y.S.2d 456 (1982) (memorandum decision based on New York Court of Appeals decision in Greene), vacated, 460 U.S. 1077 (1983) (remanded for reconsideration in light of R.M.J.). See also United States v. Brown, 602 F.2d 909 (9th Cir. 1979), cert. denied, 446 U.S. 966 (1980), discussed infra note 76. In the vast majority of the cases, however, there was no reason not to deny review, since the lower court's ruling appeared clearly consistent with the new precedent. For further discussion, see infra text accompanying notes 66-96.

the court determined that the rule set forth in the intervening decision did not apply,\textsuperscript{52} or that if it did apply, the facts were sufficiently distinguishable to justify a different result from that of the cited case.\textsuperscript{53}

\textit{intervening Supreme Court decision), appeal dismissed, 444 U.S. 1061 (1980). See also supra note 39. In some cases, e.g., People v. Graham, 76 A.D.2d 228, 431 N.Y.S.2d 209 (1980) (\textit{Graham II}), vacated, 458 U.S. 1101 (1982), the court did not actually reverse its prior ruling on the common issue, but in effect conceded \textit{arguendo} that it was in error.

For more recent examples of this pattern, see Waggoner v. Northwest Excavating, Inc., 685 F.2d 1224 (9th Cir. 1982) (addressing “hot cargo” defense that court had previously held could not be considered, but rejecting it on the merits), \textit{cert. denied}, 459 U.S. 1109 (1983); People v. Graham, 90 A.D.2d 198, 457 N.Y.S.2d 962 (1982) (\textit{Graham III}) (harmless error; dissipation of taint), \textit{cert. denied}, 104 S. Ct. 246 (1983); State v. Williams, 6 Ohio St. 3d 281, 290, 452 N.E.2d 1323, 1333-34 (harmless error), \textit{cert. denied}, 104 S. Ct. 554 (1983).

52. \textit{See, e.g.,} Reeves, Inc. v. Kelley, 603 F.2d 736 (8th Cir. 1979) (case controlled by earlier precedent rather than by intervening decision), \textit{aff’d sub nom.} Reeves, Inc. v. Stake, 447 U.S. 429 (1980); United States v. McCrane, 547 F.2d 204 (3d Cir. 1976) (alternative holding); Chateau X, Inc. v. State, 302 N.C. 321, 330, 275 S.E.2d 443, 449 (1981) (“our laws do not share the constitutional infirmities of [the law struck down in the plenary decision], and the principles enunciated in [the plenary decision] do not control”).


The frequency with which lower courts reinstated their pre-remand decisions could be explained in either of two ways: the courts may have disregarded the law laid down by the Supreme Court, or the Court may have issued reconsideration orders in a substantial number of controversies that were not necessarily controlled by the intervening precedent. The best evidence on this point lies in the subsequent history of the cases in which the lower courts adhered to their prior determinations. Most of the litigants who had obtained the remand orders in the first round of proceedings sought Supreme Court review once again, but very few of them succeeded in overturning the reinstated judgments. Only twelve cases out of more than fifty received plenary consideration,\(^4\) and only six of those were reversed.\(^5\) Two decisions were reversed or vacated summarily.\(^6\) For the most part, the Court simply denied certiorari, usually without any notation of dissent.\(^7\)

The data thus support the second of the suggested hypotheses: while the Court does not automatically direct reconsideration of all cases that have been set aside to await the announcement of a plenary decision,\(^8\) the criteria for this mode of disposition are not exacting. Specifically, a general similarity of issues and a surface inconsistency in results will usually suffice to persuade the Justices to remand a case rather than deny review. The courts that have been directed to reconsider their prior decisions are therefore correct in thinking that a re-

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\(^5\) The discussion in this section of the text is limited to cases in which the lower court adhered to its prior determination notwithstanding at least a surface incompatibility with the intervening precedent.


Technically, \textit{Chakrabarty} was not an affirmance of the case previously remanded by the Court, but of a companion case. \textit{See} 447 U.S. at 306-07.

\(^7\) Dissents were filed in only 14 cases; five of the dissents were routine death penalty statements by Justices Brennan and Marshall. \textit{See, e.g.,} Baker v. Georgia, 450 U.S. 936 (1981).

\(^8\) \textit{See supra} note 49 and accompanying text; \textit{infra} text accompanying notes 66-96. For a brief discussion of the process by which the Court makes the antecedent determination to hold a case for an impending plenary decision, see \textit{infra} note 127.
mand order "should not be read as implying that [the cited authority] necessarily mandates reversal. [Rather,] the Court has merely 'flagged' [the remanded case] as one upon which the intervening decision may have some bearing . . . ."\textsuperscript{59}

By the same token, the findings of the study suggest that courts and lawyers should exercise great caution in using reconsideration orders as a source of precedential guidance in other disputes. A number of courts have indeed taken this position, declining to read these dispositions as deciding anything beyond what was adjudicated in the authority cited.\textsuperscript{60} However, not all courts have been so circumspect. For example, at least two cases have interpreted reconsideration orders as equivalent to holdings that the cited decisions were to be applied retroactively.\textsuperscript{61} Some courts have read such dispositions as indicating that a rule announced in a plenary decision interpreting one statute also applied to the different statute involved in the remanded case.\textsuperscript{62} In other


\textsuperscript{60} \textit{See}, e.g., Weir v. Fletcher, 658 F.2d 1126, 1131 n.9 (6th Cir. 1981), rev'd, 455 U.S. 603 (1982); United States v. Calandrella, 605 F.2d 236, 252 (6th Cir.), cert. denied, 444 U.S. 991 (1979); United States v. Gooch, 603 F.2d 122, 126 (10th Cir. 1979). \textit{See also Virgin Islands v. Rasool, 657 F.2d 582, 592 & n.7 (3d Cir. 1981) (acknowledging reconsideration order, but declining to read it as holding that vacated judgment was inconsistent with decision cited).}

\textsuperscript{61} \textit{See} Todd Shipyards Corp. v. Secretary of Labor, 586 F.2d 683, 688-89 (9th Cir. 1978); People v. Minjares, 24 Cal. 3d 410, 421 n.6, 591 P.2d 514, 520, 153 Cal. Rptr. 224, 228, cert. denied, 444 U.S. 887 (1979). \textit{See also} United States v. Scaife, 708 F.2d 1540, 1544 (10th Cir. 1983) ("That \textit{Edwards} [v. Arizona, 451 U.S. 477 (1981)] is to be given retrospective application is made all the more clear by the Supreme Court's remand, within a week after handing down \textit{Edwards}, of six cases for reconsideration in light of that opinion."); Poulin v. Gunn, 589 F.2d 1024 (9th Cir. 1978). \textit{But see} United States v. Calandrella, 605 F.2d 236, 252 (6th Cir.) (remand order did not necessarily indicate that Court intended that intervening decision should be applied retroactively; Court might have remanded only to permit lower court to consider issue of retroactivity), cert. denied, 444 U.S. 991 (1979). \textit{See infra} notes 117-25 and accompanying text.

\textsuperscript{62} \textit{See}, e.g., United States v. East Tex. Motor Freight Sys., Inc., 564 F.2d 179, 185 (5th Cir. 1977) (reconsideration order gives "fairly strong indication" that principles set forth in Title VII case are to be applied to claims under 42 U.S.C. § 1971); United States v. Trzcinski, 553 F.2d 851, 855 n.4 (3d Cir. 1976) (relying on plenary decision interpreting bank robbery statute to construe law proscribing possession of stolen government property; finding it "significant" that Court vacated a government property case for reconsideration in light of the bank robbery decision); Saint Elizabeth Hosp. v. Califano, 441 F. Supp. 158, 159-60 (E.D. Ky. 1977) (interpreting remand order as precluding general federal question jurisdiction over Medicare suits; plenary decision had rejected district court jurisdiction under Administrative Procedure Act in Social Security cases).
cases, too, reconsideration orders have been treated as holdings on the merits having at least some precedential value.63

III. Denial of Review in Held Cases

While the findings of the study tend to support a narrow view of the precedential significance of the GVR, they have very different implications for the meaning of a limited but important class of certiorari denials. Specifically, the study suggests that when the Court denies review rather than issuing a reconsideration order in a case obviously held pending the announcement of a plenary decision, its action—contrary to the usual rule64—can be deemed to have at least some precedential significance.65

In Blarney v. Brown,66 for example, the Minnesota Supreme Court upheld the state's exercise of personal jurisdiction over the operator of a tavern located just outside the state's borders. The defendant sought review by the United States Supreme Court. The Court held the petition for more than a year, then denied review in an order included on the first list issued after the announcement of the plenary decision in World-Wide Volkswagen Corp. v. Woodson.67 Three years later, the Minnesota court overruled Blarney, holding that it was "plainly contrary to constitutional principles authoritatively declared by the United States Supreme Court" in World-Wide Volkswagen and a companion

63. See, e.g., Rasimas v. Michigan Dep't of Mental Health, 714 F.2d 614, 621 (6th Cir. 1983), cert. denied, 104 S. Ct. 2151 (1984); United States v. Mahoney, 712 F.2d 956, 959 (5th Cir. 1983) (“By remanding [a court of appeals case] for reconsideration in light of the fourth amendment standards announced in [the intervening decision], the Court perforce instructed that state law did not control the case and that the admissibility of evidence depends on the legality of the search and seizure under federal law.”); Weir v. Fletcher, 658 F.2d 1126, 1136-37 (6th Cir. 1981) (Engel, J., dissenting), rev'd, 455 U.S. 603 (1982); Aware Woman Clinic, Inc. v. City of Cocoa Beach, 629 F.2d 1146, 1148-49 & n.2 (5th Cir. 1980); Ratcliff v. Estelle, 597 F.2d 474, 477 (5th Cir. 1979); Penk v. Oregon State Bd. of Higher Educ., 99 F.R.D. 508, 509 (D. Or. 1982) (reconsideration order in case involving similar issue indicates that analysis in district court's prior opinion "is no longer valid"). Cf. McDonald v. Johnson & Johnson, 722 F.2d 1370, 1374 n. 4 (8th Cir. 1983), discussed infra note 96.


65. Usually there will be little difficulty in identifying a case as one that has been held to await the announcement of a pending plenary decision; the delay in disposition and the similarity of issues will not readily admit of any other conclusion. See supra notes 47-48 and accompanying text. Of course, the more attenuated these characteristics become, the more imprudent it would be to attach significance to the denial of review, even under the analysis suggested here.

66. 270 N.W.2d 884 (Minn. 1978), cert. denied, 444 U.S. 1070 (1980).

case handed down on the same day. The Minnesota court made no mention of the fact that the Supreme Court had denied review in Blarney immediately after the decision in World-Wide Volkswagen. Yet the Supreme Court's contemporaneous practices, as described in the preceding pages, suggest that if the Justices had had any doubts about whether Blarney was consistent with World-Wide Volkswagen, they would have vacated the judgment rather than deny review.

It is true that the denial of certiorari ordinarily has no precedential value. It is also true that the rationale of the Blarney decision, with its broad view of the "foreseeability" criterion and its emphasis on the interests of the forum state, is not easily reconciled with the Supreme Court's opinion in World-Wide Volkswagen. But the Supreme Court reviews judgments, not opinions. And in the circumstances that obtained, it is difficult to avoid the conclusion that the Court did "consider the merits of" the Blarney ruling and saw not even the modest degree of inconsistency that is generally sufficient to persuade the Court to remand rather than deny review.

69. It may be argued that the denial of certiorari in Blarney rested on the ground that the state court's judgment was not final within the meaning of 28 U.S.C. § 1257 (1976). However, the case appears to fall precisely within the scope of the rule applied in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 485 (1975), and Shaffer v. Heitner, 433 U.S. 186, 195-96 n.12 (1977), to sustain jurisdiction over state court judgments that were technically nonfinal. Indeed, World-Wide Volkswagen itself came to the Court in the same procedural posture as Blarney, yet the Court did not even allude to a possible jurisdictional defect.
70. See supra note 64.
71. In Blarney, the Minnesota court relied in part on the fact that it was foreseeable to the defendant that serving alcoholic beverages to an intoxicated person could lead to consequences in Minnesota. 270 N.W.2d at 888. In World-Wide Volkswagen, the Supreme Court rejected that type of foreseeability; rather, the question was whether "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." 444 U.S. at 297 (emphasis added). The Minnesota court also gave weight to the "strong" interest of the state in providing a forum, 270 N.W.2d at 888, while the United States Supreme Court held that that interest could be outweighed by considerations of "interstate federalism" that the Minnesota court never mentioned. See 444 U.S. at 294.
72. See Black v. Cutter Laboratories, 351 U.S. 292, 297 (1956); see also Warren v. Mississippi, 444 U.S. 956, 957 (1979) (White, J., joined by Brennan and Stewart, JJ., dissenting from denial of certiorari) ("[C]ertiorari is sometimes denied when a judgment can be defended on a ground not relied on by the court below.").
73. See supra text accompanying notes 20-21.
74. This conclusion is not as implausible as it might seem at first glance. While the Supreme Court in World-Wide Volkswagen did say that a nondomiciliary can be sued only when it "purposefully avails itself of the privilege of conducting activities within the forum State," 444 U.S. at 297 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)), the Court left open the possibility that "purposeful activity" could be defined in a way that would encompass the conduct of the tavern owner in Blarney. In particular, the Court distinguished be-
strengthened by the fact that on the same day that it denied certiorari in *Blarney*, the Court vacated the judgment in a Colorado case raising similar issues.\(^{75}\) At the least, it is questionable whether the Minnesota court should have been so willing to overturn one of its own precedents when the United States Supreme Court had so conspicuously refused to disturb that precedent.\(^{76}\)

It may seem paradoxical, and even perverse, to attribute precedential significance to some denials of certiorari while minimizing the precedential value of orders in which the Court vacates the judgment below. But the paradox disappears if, as the findings of this study suggest, the Court ordinarily issues reconsideration orders whenever the lower court’s ruling is even arguably vitiated by the intervening decision and denies review only when the judgment is perceived as clearly in accord with the plenary opinion.

There is, however, one aspect of this analysis that deserves further explication. The evidence set forth thus far demonstrates that the Court remands for reconsideration a substantial number of cases that between situations where the sale in the forum state is an “isolated occurrence” and those where it arises “from . . . efforts . . . to serve, directly or indirectly, the market for [the defendant’s] product in other States.” *World-Wide Volkswagen*, 444 U.S. at 297 (emphasis added). The Court also emphasized that the plaintiffs’ claim in *World-Wide Volkswagen* arose out of “the fortuitous circumstance that a single Audi automobile, sold in New York to New York residents, happened to suffer an accident while passing through Oklahoma.” *Id.* at 295. In *Blarney*, on the other hand, the defendant’s connection with the forum state was neither isolated nor fortuitous. The defendant owned a tavern just across the state line from Minnesota, only 15 miles from the state’s major metropolitan area. The tavern was able to stay open six hours later each night than similar establishments in Minnesota. Further, although the record did not show the specific percentage of the tavern’s business that was attributable to Minnesotans, the defendant did not deny that he did business with residents of the forum state. *Blarney*, 270 N.W.2d at 888. Under these circumstances, the Supreme Court might well have concluded that the criterion of “purposeful activity” was satisfied. *Accord*, R. CASAD, JURISDICTION IN CIVIL ACTIONS \[7.02\][b][ii] (1983) (The Supreme Court, after *World-Wide Volkswagen*, probably would uphold jurisdiction in cases like *Blarney*, where the defendant was aware that a significant number of his customers would drive into the forum state after leaving a tavern near the border).

\(^{75}\) Eschmann Bros. & Walsh, Ltd. v. V. Mueller & Co., 444 U.S. 1063 (1980). In the same order list, the Court agreed to review another decision of the Minnesota Supreme Court, this one involving a constitutional challenge to the application of Minnesota law to a case arising out of a Wisconsin accident. See *Allstate Ins. Co. v. Hague*, 444 U.S. 1070 (1980), granting cert. to 289 N.W.2d 43 (Minn. 1979). A choice-of-law issue also had been adjudicated in *Blarney*, but the petitioner had not raised it in the Supreme Court, nor (apparently) had he couched it as a federal question in the state courts.

\(^{76}\) In the same vein, compare United States v. Brown, 602 F.2d 909 (9th Cir. 1979), cert. denied, 446 U.S. 966 (1980) (review denied one week after decision in Busic v. United States, 446 U.S. 398 (1980)), with United States v. Diogenes, 638 F.2d 125 (9th Cir. 1981) (apparently repudiating *Brown* on the authority of *Busic*; no reference to fact that review was denied in *Brown* after Supreme Court decision in *Busic*).
prove to be consistent with its newly announced decisions. But does that necessarily mean that the Court never denies review in held cases that are \textit{not} consistent? In theory, no. The GVR category could be under- as well as over-inclusive. Upon reflection, however, this possibility seems quite remote. It is difficult to believe that the Court, having put a case aside to await a pending decision, would then allow the judgment to stand in the face of a perceived inconsistency with the new precedent. The supposition is rendered even more implausible by the fact that the Court has issued reconsideration orders in cases where distinctions that would readily have justified the denial of review were evident either in the lower court’s opinion or in the opinion of the Supreme Court itself.\textsuperscript{77} Nor is it easy to discern what other criteria might have guided the Justices in determining which of the held cases were to be remanded and which denied review.

Further scrutiny of the empirical data supports this analysis. In the overwhelming majority of the held/denied cases in the study,\textsuperscript{78} the lower court’s judgment was clearly in accord with the intervening decision.\textsuperscript{79} And while perhaps twenty percent of the cases appear, at first glance, to present inconsistencies of one sort or another, closer examination generally reveals circumstances that adequately explain why review was denied. Sometimes there was a procedural barrier to the Court’s consideration of the common issue.\textsuperscript{80} More often, the facts or

\textsuperscript{77} See, e.g., Johnson v. Uncle Ben’s, Inc., 628 F.2d 419 (5th Cir. 1980) (discriminatory impact case under Title VII), \textit{vacated}, 451 U.S. 902 (1981) (remanded for reconsideration in light of Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248 (1981), a discriminatory treatment case, notwithstanding Court’s emphasis in \textit{Burdine}, 450 U.S. at 252 n.5, that discriminatory impact cases differ in factual issues and character of evidence presented); Jesse W. v. Superior Court, 20 Cal. 3d 893, 576 P.2d 963, 145 Cal. Rptr. 1 (juvenile court may review advisory determination by referee without violating Double Jeopardy Clause, but may not hold de novo hearing), \textit{vacated sub nom.} California v. Jesse W., 439 U.S. 922 (1978) (remanded for reconsideration in light of Swisher v. Brady, 438 U.S. 204 (1978), even though Court, in holding that Double Jeopardy Clause does not prohibit state officials from taking exceptions to proposed findings by juvenile master, emphasized that the juveniles in the case before it were “subjected to only one proceeding,” \textit{id.} at 218.).

As previously discussed, the Court has even issued reconsideration orders in cases that on the surface appeared to be clearly consistent with the intervening decision. \textit{See supra} notes 44-50 and accompanying text.

\textsuperscript{78} As noted earlier, empirical data on certiorari denials are available only for the three Terms 1977 through 1979. \textit{See supra} note 45 and accompanying text.

\textsuperscript{79} \textit{See}, e.g., cases cited \textit{supra} note 49. \textit{See also} Melanson v. Caribou Reefers, Ltd., 667 F.2d 213 (1st Cir. 1981) (explaining why Raymond v. I/S Caribia, 626 F.2d 203 (1st Cir. 1980), \textit{cert. denied}, 451 U.S. 969 (1981), is consistent with Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156 (1981)).

\textsuperscript{80} \textit{See}, e.g., State v. Atkins, 360 So. 2d 1341 (La. 1978), \textit{cert. denied}, 441 U.S. 927 (1979) (case apparently held pending decision in Burch v. Louisiana, 441 U.S. 130 (1979); although petitioner raised federal claim identical to one sustained in \textit{Burch}, Court denied
the legal setting differed in a way that justified a result superficially opposed to that of the plenary opinion. Of the hundred or so cases in

review, "it appearing that the judgment below rested on independent and adequate state grounds.").

81. Compare Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (holding that state court violated First Amendment by excluding public and press from criminal trial; court had made no findings to support closure), with Merola v. Bell, 47 N.Y.2d 985, 393 N.E.2d 1038, 419 N.Y.S.2d 965 (1979) (affirming order excluding press and public from pretrial suppression hearing; court below had explained in detail why closure was necessary to protect defendant's rights), cert. denied, 448 U.S. 910 (1980) (three Justices dissenting); compare Busic v. United States, 446 U.S. 398 (1980) (holding that statute authorizing enhanced penalties for defendant who uses or carries a firearm while committing a federal felony may not be applied to defendant who uses a firearm in the course of a felony prescribed by a statute that itself authorizes enhancement if a dangerous weapon is used), with West v. United States, 609 F.2d 274 (6th Cir. 1979) (holding that enhancement statute may be applied to defendant convicted under law that prohibits bank robbery by assaulting and killing but does not specify means employed), cert. denied, 446 U.S. 966 (1980); compare Payton v. New York, 445 U.S. 573, 583 (1980) (holding that without warrant, police may not enter private residence to make routine felony arrest; noting that the Court had "no occasion to consider" what kinds of "exigent circumstances" might justify warrantless entry for purpose of arrest), with United States v. Gaulney, 581 F.2d 1137, 1146-48 (5th Cir. 1978) (holding that warrantless entry into apartment to arrest defendant was justified by exigent circumstances), cert. denied, 446 U.S. 907 (1980), and State v. Jones, 274 N.W.2d 273 (Iowa 1979) (same), cert. denied, 446 U.S. 907 (1980); compare Vance v. Bradley, 440 U.S. 93, 96 n.10 (1979) (rejecting plaintiffs' claim that mandatory retirement statute denied equal protection by discriminating on basis of job classification, but noting that plaintiffs abandoned claim of discrimination on basis of age), with Gault v. Garrison, 569 F.2d 993 (7th Cir. 1977) (holding that trial court erred in rejecting claim that school board's mandatory retirement policy violated Equal Protection Clause), cert. denied, 440 U.S. 945 (1979); compare Arkansas v. Sanders, 442 U.S. 753, 762, 764 n.11 (1979) (holding that conviction had been properly reversed on Fourth Amendment grounds where officers had suitcase exclusively within their control at time of search; state did not argue that luggage had been searched incident to arrest), with People v. De Santis, 46 N.Y.2d 82, 385 N.E.2d 577, 412 N.Y.S.2d 838 (1978) (affirming conviction where police had not gained exclusive control of unlocked suitcase and search had close nexus to time and place of arrest), cert. denied, 443 U.S. 912 (1979).

the three Terms that I studied, there were no more than half a dozen like *Blamey*, in which doubt remained that the lower court's ruling could be reconciled with the new precedent. These cases are troublesome, but I am reluctant to conclude that the Court, after recognizing the relevance of an impending decision, would decline to disturb a judgment that was not only inconsistent on the surface but also lacking in any distinguishing features. The more plausible inference—especially in view of the low threshold for reconsideration orders—is that the Justices did see distinctions, albeit more subtle ones, between the lower court rulings and the new precedents.

In any event, I do not suggest that the denial of review in a held case should be regarded as tantamount to affirmance. Rather, courts and lawyers should examine the relevant decisions carefully and take into account the full context of the Court's actions. For example, where procedural barriers would prevent the Court from considering an issue, it would be foolish to assume that the denial of review constitutes any kind of statement on the merits. On the other hand, such a conclusion need not be foreclosed by the circumstance that the lower court relied on a rationale repudiated by the intervening decision if the facts stated in the lower court's opinion provide grounds for reconciling the judgment with the new precedent. The Court's actions in related

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83. For example, in *Quern v. Jordan*, 440 U.S. 332, 334 (1979), the Court noted an "apparent conflict" between the decision below and the Third Circuit’s decision in *Fanty v. Pennsylvania Dep’t of Pub. Welfare*, 551 F.2d 2 (3d Cir. 1977), *cert. denied* sub nom. *Randle v. Beal*, 440 U.S. 957 (1979). Nevertheless, two weeks after affirming the Seventh Circuit’s decision in *Jordan*, the Court denied review in *Fanty*. While it is difficult to reconcile the Court’s actions in the two cases, there is at least a possibility that the Justices shared the view of the concurring judge in the Third Circuit that there was no case or controversy. *See Jordan*, 440 U.S. at 334 n.2.

84. A good illustration is *United States v. Sorrell*, 562 F.2d 227 (3d Cir. 1977), *cert. denied*, 436 U.S. 949 (1978), in which the Court denied review shortly after the plenary decision in *United States v. Mauro*, 436 U.S. 340 (1978), *reversing* 544 F.2d 588 (2d Cir. 1976). In *Mauro*, the Second Circuit held that a writ of habeas corpus *ad prosequendum* is a
cases may also provide clues.85

The importance of context is dramatically illustrated by a pair of orders issued on the same day in February, 1983. In Ostrofe v. H.S. Crocker Co.,86 the Ninth Circuit held that an employee discharged for

"detainer" within the meaning of the Interstate Agreement on Detainers, thus entitling the defendant to certain procedural rights. In Sorrell, the Third Circuit not only reached the same result, but also stated that Mauro was "substantially identic" to the case before it. Sorrell, 562 F.2d at 231. Nevertheless, the reversal in Mauro did not compel reversal in Sorrell because of a distinction drawn by the Supreme Court in the plenary opinion. Although the Court, rejecting the position adopted by both circuits, held that a writ of habeas corpus \textit{ad prossequendum} does not itself trigger the protections of the Detainer Agreement, 436 U.S. at 361, the Court also held that the lodging of a detainer followed by the issuance of a writ does require compliance with the Agreement. \textit{Id.} at 361-62. In Sorrell, the Government had lodged a document labelled a "detainer" with the warden who had custody of the defendant. See 562 F.2d at 230 n.6. Indeed, the dissenting opinion in Sorrell insisted that the majority's discussion of the definitional issue was dictum, because "in both cases [Sorrell and its companion case] detainers in the customary form had been lodged by the United States Marshal before the writs of habeas corpus were served." United States v. Thompson, 562 F.2d 232, 237 n.5 (3d Cir. 1977) (Weis, J., dissenting), \textit{cert. denied}, 436 U.S. 949 (1978). (Sorrell and Thompson were decided together in the Third Circuit and were presented to the Supreme Court in a single certiorari petition.) See generally Brown v. Mitchell, 598 F.2d 835, 838 (4th Cir. 1979), \textit{cert. denied}, 449 U.S. 1123 (1981).

85. For example, at first glance it is difficult to understand why the Court, having held United States v. Sink, 586 F.2d 1041 (5th Cir. 1978), \textit{cert. denied}, 443 U.S. 912 (1979), to await the decision in Arkansas v. Sanders, 442 U.S. 753 (1979), would then deny review. The Fifth Circuit apparently conceded that the search in Sink would have been impermissible even under United States v. Chadwick, 433 U.S. 1 (1977). See 586 F.2d at 1048 n.8. Sanders not only reaffirmed Chadwick but arguably took its holding one step further. See United States v. Ross, 456 U.S. 798 (1982) (repudiating rationale but not the narrow holding of Sanders). The probable explanation is that the Fifth Circuit had upheld the admission of the evidence on the authority of circuit precedent denying retroactive effect to Chadwick, see 586 F.2d at 1048 n.8, and the Supreme Court was not yet ready to address the retroactivity issue. See United States v. Johnson, 457 U.S. 537 (1982) (establishing new rule for retroactivity of Fourth Amendment decisions).

This interpretation is not inconsistent with the issuance of a reconsideration order in Robbins v. California, 443 U.S. 903 (1979)—another case held to await Sanders—since the California courts apparently assumed that the Chadwick decision was to be applied retroactively. See People v. Minjares, 79 Cal. App. 3d 923, 145 Cal. Rptr. 164 (1978) (distinguishing Chadwick), rev'd, 24 Cal. 3d 410, 591 F.2d 514, 153 Cal. Rptr. 224 (1979) (explicitly holding that Chadwick was to be applied retroactively), \textit{cert. denied}, 444 U.S. 887 (1979). In other words, the Court may have taken the position that courts that were applying Chadwick retroactively should be given the opportunity to reconsider their Chadwick cases in light of the gloss furnished by Sanders, but that where the court below had applied pre-Chadwick law (and presumably would continue to do so), there would be no point in requiring reconsideration because Sanders would not affect the result.

It is also possible that review was denied in Sink on the ground that the Fifth Circuit was wrong in assuming that the case fell within the scope of Chadwick: in Sink, the court found that the officers had probable cause to search the defendant's automobile, 586 F.2d at 1048, whereas probable cause to search the vehicle was lacking in both Chadwick and Sanders. See United States v. Ross, 456 U.S. 798, 817 (1982).

86. 670 F.2d 1378 (9th Cir. 1982), \textit{vacated}, 460 U.S. 1007 (1983).
refusing to participate in his employer's alleged antitrust violations had standing to bring a treble damages action under the Clayton Act. A few months later, the Seventh Circuit, in *Bichan v. Chemetron Corp.*, explicitly rejected the Ninth Circuit's rationale and denied standing on virtually identical facts. Certiorari was sought in both cases, and both were held to await the decision in *Associated General Contractors*, a plenary case addressing the issue of antitrust standing in a very different factual context. A week after the plenary decision was handed down, the Supreme Court vacated the Ninth Circuit's judgment in *Ostrofe* and denied certiorari in *Bichan*. Here, even more than in *Blamey*, the conclusion seems inescapable that the Court considered the merits of the lower court ruling in *Bichan* and concluded that it was harmonious with the new precedent.

Admittedly, it seems equally clear that the reconsideration order in *Ostrofe* rested on a determination that the Ninth Circuit's judgment was *not* consistent with the intervening decision. But that is true only because of the simultaneous denial of review in *Bichan*. Were it not for that action, the Ninth Circuit would easily have been able to distinguish *Associated General Contractors* and reinstate its prior ruling. The factual contexts of the two cases were quite different, and the Supreme Court, repudiating the possibility of "a black-letter rule that will dictate the result in every case," itself had emphasized that each situation must be analyzed in light of an array of factors set forth in its opinion. Moreover, in another case remanded for reconsideration in light of *Associated General Contractors*, the Fifth Circuit had no difficulty in adhering to its previous decision rejecting a challenge to an antitrust plaintiff's standing in yet a different context. Thus, ironic though it

88. 681 F.2d at 519.
90. In *Associated General Contractors*, the plaintiffs were labor unions which asserted that the defendant, a multiemployer association, had violated the antitrust laws by coercing certain third parties to enter into business relationships with nonunion firms. The Court held that the unions were not persons injured by reason of a violation of the antitrust laws and thus lacked standing to sue. *Id.* at 545-46.
93. This conclusion is strengthened by the fact that Justice Blackmun filed a notation in *Bichan* stating that he would have vacated the judgment and remanded the case for reconsideration in light of *Associated General Contractors*. *Bichan*, 460 U.S. at 1016.
may seem, an action "on the merits" that ordinarily would have been quite ambiguous took on an unmistakable meaning only by reason of a denial of review that ordinarily would have had no meaning at all.\(^\text{96}\)

\(^{96}\) No meaning, that is, except that "fewer than four members of the Court thought [certiorari] should be granted." Maryland v. Baltimore Radio Show, 338 U.S. 912, 919 (1950) (opinion of Frankfurter, J., respecting the denial of certiorari). \(^{\text{CF}}\) McDonald v. Johnson & Johnson, 722 F.2d 1370, 1374 n. 4 (8th Cir. 1983) (suggesting that the Associated General Contractors test "is further illuminated by the Supreme Court's actions" in vacating judgments in Ostrofe and Mitsui but denying review in Bichan; no mention of fact that lower court in Mitsui, after remand, adhered to prior decision), petition for cert. filed, 52 U.S.L.W. 3792 (U.S. Apr. 10, 1984) (No. 83-1659).

While this Article was in the final stages of preparation, the Ninth Circuit issued its opinion on remand in Ostrofe. Ostrofe v. H.S. Crocker Co., 740 F.2d 739 (9th Cir. 1984). By a 2-1 vote, the court adhered to its previous decision. Rejecting the interpretation set forth in the text above, the court asserted that "the Supreme Court meant us to reconsider our decision in light of Associated General Contractors and nothing more." \(^{\text{Id.}}\) at 748. The court acknowledged "at least a superficial conflict [with the plenary decision] counseling reexamination," but stated that "[i]f the result of that reexamination been clear, the Court would have simply reversed" rather than vacating and remanding. \(^{\text{Id.}}\) at 747-48. In a footnote, the court cited an earlier version of this Article as having "suggested that the Court has abandoned the practice of issuing summary reversals in light of intervening precedent." \(^{\text{Id.}}\) at 748 n.2 (citing Hellman, "Granted, Vacated, and Remanded-- Shedding Light on a Dark Corner of Supreme Court Practice, 67 JUDICATURE 389, 392 (1984)). The opinion continued: "The Court itself, however, has announced no such change of policy. Even if cases that previously would have been summarily reversed now are remanded, we could not conclude that this is such a case. It would be all but impossible to distinguish between cases in which only reconsideration was intended and those in which reversal was thought proper. Consequently, our duty is to read the intervening Supreme Court decision fairly and determine whether it requires a different result." \(^{\text{Id.}}\)

As shown in Part II of this Article, the Ninth Circuit is correct in stating that a remand for reconsideration is not tantamount to reversal. However, the court is on shakier ground in arguing that the issuance of a remand order rather than a reversal means that the Supreme Court could not have regarded Ostrofe I as plainly inconsistent with Associated General Contractors. Strong evidence leaves no doubt that the Court issues reconsideration orders in numerous cases where the lower court's judgment could not possibly have been seen as harmonious with the new precedent. See supra notes 35-37 and accompanying text. Indeed, the authority cited by the Ninth Circuit in support of its statement—R. Stern & E. Gressman, supra note 5, at 363 nn. 30-32—actually undermines the proposition: although the treatise was published in 1978, the authors list no cases after 1966 in which the Supreme Court summarily reversed a judgment "clearly controlled by one or more of its own recent decisions."

This analysis, of course, does not necessarily vitiate the Ninth Circuit's ultimate conclusion about the precedential effect of Associated General Contractors on Ostrofe; as the opinion states, the lower court's task after a GVR is "to read the intervening . . . decision fairly and determine whether it requires a different result." See supra note 59 and accompanying text. But in Ostrofe the plenary decision was not the only source of guidance for carrying out that task. The defendant argued (as I have done in this Article) that whatever ambiguity might have attached to the GVR if it had stood alone, the simultaneous denial of review in Bichan gave a clear indication that the Supreme Court agreed with the position of the Seventh Circuit and disagreed with that of the Ninth.

The Ninth Circuit rejected this interpretation. Citing the brief in opposition to Bichan's certiorari petition, the court argued that "[t]he more plausible explanation" for the denial of
IV. The Justices’ Dilemma

The wide spectrum of interpretations in the lower courts reflects, in a way, the difficulties that these cases pose for the Supreme Court. When a newly filed certiorari petition or jurisdictional statement appears to raise an issue similar to one that is being accorded plenary consideration, the Justices face something of a dilemma.

review in Bichan is that the Justices were not ready to resolve the intercircuit conflict over the narrow issue of antitrust standing for the terminated employee. 740 F.2d at 748.

One difficulty with this analysis is that if the Court wished to allow the intercircuit conflict to “percolate” further, see infra note 120, one would have expected the Justices to deny certiorari in Ostrofe as well as Bichan. Thus, in the 1983 Term the Court denied review in two cases reaching opposite results on an important and recurring question of en banc procedure in the courts of appeals. Compare Arnold v. Eastern Air Lines, Inc., 712 F.2d 899 (4th Cir. 1983), cert. denied, 104 S. Ct. 703 (1984), with Clark v. American Broadcasting Companies, 684 F.2d 1208, 1226 (6th Cir. 1982) (vacating order granting rehearing en banc), mandamus denied, 104 S. Ct. 538 (1983).

It is also striking that on the same day it denied certiorari in Bichan and vacated the judgment in Ostrofe, the Court denied review in all of the cases—a total of eight—that had been held to await the plenary decision in Connecticut v. Johnson, 460 U.S. 73 (1983). The Court had granted certiorari in Johnson to resolve a conflict over the question whether a jury instruction that violates the rule of Sandstrom v. Montana, 442 U.S. 510 (1979), can be harmless error. Some of the held cases had found the Sandstrom error to be harmless beyond a reasonable doubt. See, e.g., Tweety v. Mitchell, 682 F.2d 461 (4th Cir. 1982), cert. denied, 460 U.S. 1013 (1983). Others had rejected a harmless error rationale. See, e.g., Mason v. Balkcom, 669 F.2d 222 (5th Cir. Unit B 1982), cert. denied, 460 U.S. 1016 (1983). But Johnson failed to resolve the issue because the Court divided equally. See Johnson, 460 U.S. at 90 (Burger, C.J., dissenting). Thus, when it was plain that the plenary decision could not assist in the resolution of the common issue (and, presumably, when none of the held cases appeared to be good vehicles for addressing the question), the Court was willing to allow the conflict to continue. The failure to deny review in Ostrofe as well as Bichan suggests that on the question of an employee’s antitrust standing the Court did think the plenary decision would prove dispositive.

The Ninth Circuit’s interpretation of the Bichan order is also undercut by the nature and scope of the plenary opinion in Associated General Contractors. As noted earlier, the Court refers to “the infinite variety of claims that may arise,” 459 U.S. at 536, and disavows the possibility of a black letter rule that will decide all questions of antitrust standing. Rather, the Court instructs lower courts to consider a variety of “factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances.” Id. at 537. The opinion then undertakes a lengthy analysis of the various factors as applied in the context of a labor union’s suit against a multiemployer bargaining association.

This approach—the description of the issue as well as the method of adjudicating the particular case—casts doubt on the view that the Court had decided to leave for another day the authoritative resolution of the question presented by Ostrofe and Bichan. The more plausible inference is that the very thing the Court did not want to do was to take a series of cases to decide, one at a time, “the infinite variety” of antitrust standing issues; rather, the Court hoped, through the Associated General Contractors opinion, to provide a framework that would enable the lower courts to decide these issues without further Supreme Court guidance. But on the question of antitrust standing for the terminated employee, the Court did not need to rest on the plenary opinion alone. By vacating the judgment in Ostrofe and
On the one hand, to grant plenary review would be to allocate a scarce position on the plenary docket to a case that would probably add little or nothing to the precedential guidance available from the case already taken. A generation ago, that prospect might not have troubled the Court; the Justices appear to have been somewhat more willing than they are today to hear oral argument in several cases raising essentially the same issue.\(^9\) And the practice does have the advantage of allowing the Court to consider the operation of a legal rule in a variety of factual contexts.\(^9\) But with the fierce competition for places on the plenary docket today, the procedure is now more difficult to justify, and the Court has largely abandoned it.\(^9\)

On the other hand, to allow the judgment in the later-filed case to stand without regard to the impending plenary decision might be to deprive at least one litigant of the benefit of a new rule of law solely by reason of an accident of timing.\(^10\) While that outcome would engender little if any harm from the standpoint of the Court's role as lawmaker, it arguably would be inconsistent with the obligation of judges to do justice in the cases before them.\(^10\) Moreover, even after the plenary decision has come down, extensive study may be required denying review in Bichan, the Court—without the need for further plenary review—could give a clear indication of how that particular kind of claim ought to be resolved. Compare Immigration and Naturalization Serv. v. Chadha, 103 S. Ct. 2764 (1983) (plenary decision holding, on broad grounds, that the legislative veto is unconstitutional), with Process Gas Consumers Group v. Consumers Energy Council of America, 103 S. Ct. 3556 (1983) (summarily affirming decision striking down legislative veto in very different context).\(^9\)


98. See Hellman, supra note 1, at 856 n.325.


On occasion, the Court grants review in two cases arising out of separate proceedings but involving related issues and consolidates them for oral argument. The Court is then able to consider the operation of a legal rule in discrete factual contexts without giving up an additional place on the plenary docket. The drawback is that the parties on one or both sides have only 15 minutes in which to present their arguments. See, e.g., 51 U.S.L.W. 3789 (U.S. Apr. 25, 1983) (four counsel given one hour for argument in consolidated cases 81-2386 and 81-2408). And the procedure—which is rare to begin with—generally is invoked only when the second case arrives at the Court closely on the heels of the first.\(^10\) That is, if the case had moved more slowly through the lower courts, it would be decided under the new rule without the need for Supreme Court intervention; if the case had moved more quickly, it might have been the one selected for plenary review. See United States v. Johnson, 457 U.S. 537, 556 n.16 (1982) ("[p]otential for unequal treatment is inherent" in process of giving plenary consideration to only one of several pending cases raising the same issue).

to determine which of several possible dispositions is most appropriate for the later-received case.  

Given these constraints, it is understandable that the Justices would adopt the practice of holding the new case until the plenary decision is announced and then, unless the judgment below seems clearly in harmony with the new precedent, remanding for further consideration by the lower court. The discussion in the preceding pages, however, suggests that the Court has created unnecessary problems both for the lower courts and for itself by the overuse of the reconsideration order. The point is further illustrated by juxtaposing the histories of two cases in which GVR's were issued.

In *Van Curen v. Jago*, the petitioner asserted that the rescission of his parole without a hearing violated the Due Process Clause. The court of appeals denied relief, but the Supreme Court vacated its judgment and remanded for reconsideration in light of an intervening decision that had addressed a related claim by Nebraska prisoners. Upon remand (and after an intervening remand to the district court), the court of appeals reversed its initial position and held that the prisoner's constitutional rights had indeed been violated. Now it was the warden who sought review in the Supreme Court. Again the Court granted certiorari, and again it acted summarily, but this time the judgment of the court of appeals was reversed outright. Thus, after the case had gone to the Supreme Court twice and to the court of appeals three times, the warden prevailed, as he had done in the first court of appeals

102. The alternative dispositions include denial of review, remand for reconsideration, summary disposition on the merits, or grant of plenary review.

103. A limited sampling suggests that the Court applies very liberal criteria in deciding which new cases will be set aside. See infra note 127.

104. On at least one occasion, the Court failed to follow this practice in its handling of two certiorari petitions raising virtually identical issues. In Washington Gas Light Co. v. Thomas, 598 F.2d 617 (1979) (unpublished order), the Fourth Circuit reversed a workmen's compensation award, relying on its earlier decision in Pettus v. American Airlines, 587 F.2d 627 (4th Cir. 1978). Petitions in both cases were pending before the Supreme Court as the 1979 Term opened. On the first day of the Term the Court denied review in *Pettus*; two Justices dissented. 444 U.S. 883 (1979). A few weeks later the Court granted review in *Thomas*, 444 U.S. 962 (1979), and, after argument, it reversed the judgment. 448 U.S. 261 (1980). The Solicitor General had urged the Court to grant review in *Pettus* and hold *Thomas* pending its disposition. Brief for the Federal Respondent at 4, *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980). The probable explanation for the Court's seemingly anomalous treatment of the two cases is that the Justices decided that the *Pettus* petition was not timely filed.


decision. And the judges of the Sixth Circuit were left to wonder why their efforts to apply the governing principles came closer to the mark when they did not have the benefit of the intervening decision than when they did.\textsuperscript{108}

The sequence of events in \textit{Arnold Tours, Inc. v. Camp}\textsuperscript{109} was very different. The court of appeals initially held that an organization of travel agents lacked standing to challenge a regulation issued by the Comptroller of the Currency. The Supreme Court vacated that judgment\textsuperscript{110} and remanded for reconsideration in light of an intervening decision that had upheld the standing of data processing companies to challenge a similar regulation. On remand, the court of appeals adhered to its prior determination, stating,

Clearly the Court did not feel that the mere fact that [the plain-
tiffs] were in competition with the defendant bank gave them standing. Had it intended so substantial a change in the law it would not only have written a quite different opinion in [the inter-
vening decision]; it would have reversed us out of hand.\textsuperscript{111}

\textsuperscript{108} A similar sense of frustration was no doubt felt by the judges of the Seventh Circuit in the wake of two Supreme Court rulings in a habeas corpus case involving a state criminal defendant's challenge to the admissibility of a confession. The court of appeals (having previously remanded for an evidentiary hearing in the district court) initially held that the defendant had waived his right to have counsel present during custodial interrogation. White \textit{v. Finkbeiner}, 611 F.2d 186 (7th Cir. 1979) (\textit{White II}). On the defendant's certiorari petition, the Supreme Court vacated the judgment and remanded for reconsideration in light of Edwards \textit{v. Arizona}, 451 U.S. 477 (1981), a plenary decision that took a narrow view of the circumstances in which an accused can validly waive his Fifth Amendment right to counsel. White \textit{v. Finkbeiner}, 451 U.S. 1013 (1981). The Seventh Circuit, concluding that "[t]he facts of this case are almost identical to those of Edwards," held that the confession was inadmissible. White \textit{v. Finkbeiner}, 687 F.2d 885, 887 (7th Cir. 1982) (\textit{White III}). Nothing in the Seventh Circuit's opinion suggests that either the prosecutor or the court thought it relevant that White's conviction had become final in 1976, five years before Edwards was announced. See \textit{White II}, 611 F.2d at 188.

The state then filed a certiorari petition arguing that the court of appeals had misapplied Edwards and that the rationale of Stone \textit{v. Powell}, 428 U.S. 465 (1976), should be extended to bar federal habeas corpus in Fifth Amendment cases like White's. No issue of retroactivity was raised. However, a year later, with the petition in \textit{White} still pending, the Supreme Court granted review in another habeas case in which the state argued that Edwards should not be given retroactive effect. After oral argument, the Court agreed with the state's contention and held that Edwards was "not to be applied in collateral review of final convictions." Solem \textit{v. Stumes}, 104 S. Ct. 1338, 1345 (1984). The Court then remanded \textit{White} for reconsideration in light of the holding of nonretroactivity. Fairman \textit{v. White}, 104 S. Ct. 1433 (1984). Thus, three years after being told to reconsider \textit{White} in light of Edwards, the Seventh Circuit was instructed to decide the case under pre-Edwards principles—presumably the same ones that the court applied in its initial decision. See \textit{infra} notes 117-125 and accompanying text.

\textsuperscript{109} 408 F.2d 1147 (1st Cir. 1969), \textit{vacated}, 397 U.S. 315 (1970).


\textsuperscript{111} Arnold Tours, Inc. \textit{v. Camp}, 428 F.2d 359, 361 (1st Cir. 1970).
Certiorari was again sought, and this time the Supreme Court did reverse "out of hand"—i.e., summarily—in a brief opinion relying on the intervening decision cited in the earlier order.112

It is true that at the time the court of appeals was deciding the case on remand, the Supreme Court had not abandoned the practice of reversing summarily and without opinion on the authority of an intervening precedent. Nevertheless, as the Van Curen case demonstrates, the Court's use of the GVR continues to cause confusion in the lower courts, uncertainty among lawyers, and delay for litigants. Nothing will eliminate the problems completely, but four changes in the way the Court handles these cases might put an end to at least some of the ambiguities inherent in the present practice.

First, the Court might distinguish between cases that merely warrant reconsideration and those that are doomed to reversal, limiting remand orders to the former and reversing outright in the latter.113 This approach would leave no doubt of the tentative nature of the reconsideration orders, without precluding the lower courts in any of the cases from addressing issues not governed by the intervening decision.114

Second, when the court below has itself remanded for further proceedings, it will sometimes make sense for the Supreme Court to deny review rather than issue its own remand order, even when the lower court's judgment rests on a rule of law repudiated by the intervening

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113. I have criticized the practice of reversing summarily without opinion, see Hellman, supra note 1, at 824, but I think that reversal on the authority of an intervening decision is justified as long as the new precedent indisputably vitiates the judgment brought for review. See Comment, Per Curiam Decisions of the Supreme Court: 1957 Term, 26 U. CHI. L. REV. 279, 285 (1959). See also infra note 126 and accompanying text.
114. See, e.g., Quern v. Jordan, 440 U.S. 332, 347 n.18 (1979); Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 168 (1939) ("While a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues."). Of course, there may be some difficulty in determining what matters are "within [the] compass" of a reversal that simply cites one or two cases, but the Supreme Court could make clear that such dispositions are to be construed as narrowly as dismissals for want of a substantial federal question. Cf. Mandel v. Bradley, 432 U.S. 173, 176 (1977) (precedential effect of summary dismissals limited to "precise issues presented and necessarily decided"). The lower courts would thus have as much leeway in considering other issues as they would if the dispositions were in the form of remands for reconsideration. Nor would this approach replicate the confusion engendered today by the Court's summary dismissals. See Hellman, supra note 1, at 817. For one thing, a reversal is less likely to be ambiguous than an affirmance. More important, the Court would cite the cases that require the overturning of the decision below; in contrast, summary dismissals ordinarily are issued with no explanation whatever.
decision. After all, if the decision is relevant, the trial court presumably will take account of it whether or not a higher tribunal directs it to do so.

Third, the Court should confront and clarify the relationship between reconsideration orders and the doctrines of retroactivity. This practice would merit consideration in any case where the judgment below contemplated further proceedings, even if it was final on the issue presented for review. About 25% of the cases in the remand study were nonfinal in this sense. See, e.g., Leigh v. McGuire, 613 F.2d 380 (2d Cir. 1979) (reversing district court's ruling that action under 42 U.S.C. § 1983 was time-barred; holding that as a matter of federal law, the statute of limitations was tolled during the pendency of related state court proceedings; remanding case to district court), vacated, 446 U.S. 962 (1980) (for reconsideration in light of intervening Supreme Court decision holding that state rules of tolling apply to § 1983 actions), on remand, 507 F. Supp. 458 (S.D.N.Y. 1981) (holding, after second remand from court of appeals, that statute of limitations was not tolled and action was time-barred); General Dynamics Corp. v. Marshall, 572 F.2d 1211 (8th Cir. 1978) (vacating district court's judgment and suggesting that district court remand case to agency), vacated, 441 U.S. 919 (1979), on remand, 607 F.2d 234 (8th Cir. 1979) (instructing district court to remand case to agency); Lokey v. Richardson, 527 F.2d 949 (9th Cir. 1975) (reversing district court's grant of summary judgment), vacated, 427 U.S. 902 (1976), on remand, 600 F.2d 1265 (9th Cir. 1979) (reversing district court's dismissal of complaint), cert. denied, 449 U.S. 884 (1980). Among more recent cases, see Scott v. Plante, 641 F.2d 117 (3d Cir. 1981) (remanding case for new appeals, that statute of limitations was not tolled and action was time-barred); General Dynamics Corp. v. Marshall, 572 F.2d 1211 (8th Cir. 1978) (vacating district court's judgment and suggesting that district court remand case to agency), vacated, 441 U.S. 919 (1979), on remand, 607 F.2d 234 (8th Cir. 1979) (instructing district court to remand case to agency); Lokey v. Richardson, 527 F.2d 949 (9th Cir. 1975) (reversing district court's grant of summary judgment), vacated, 427 U.S. 902 (1976), on remand, 600 F.2d 1265 (9th Cir. 1979) (reversing district court's dismissal of complaint), cert. denied, 449 U.S. 884 (1980). Among more recent cases, see Scott v. Plante, 641 F.2d 117 (3d Cir. 1981) (remanding case for new trial), vacated, 458 U.S. 1101 (1982), on remand, 691 F.2d 634 (1982) (remanding case for new trial in light of Supreme Court decision as well as prior court of appeals decision).

Of course, the approach suggested in the text would work only as long as it remains clear that the denial of certiorari imports no view of the merits. See supra notes 64, 72, & 96. It would be particularly important to emphasize that the nonfinal nature of the judgment below may itself be a good reason for denying review. See, e.g., Huch v. United States, 439 U.S. 1007 (1978) (Rehnquist, J., dissenting from denial of certiorari); compare City of Los Angeles v. Lyons, 449 U.S. 934 (1980) (denying certiorari, over three dissents, to court of appeals decision that reversed district court's judgment for defendants and remanded for further proceedings), with City of Los Angeles v. Lyons, 103 S. Ct. 1660 (1983) (on plenary review, reversing court of appeals decision affirming grant of preliminary injunction; Court based judgment on same issue previously denied review).

In at least one case, the court of appeals whose judgment was vacated had itself suggested that the district court defer further proceedings on remand until the Supreme Court decided the two cases that ultimately provided the basis for the Supreme Court's remand order. The cases were then awaiting argument in the Supreme Court. See Benfield v. Bounds, 540 F.2d 670, 675 (4th Cir. 1976), vacated sub nom. Jones v. Carroll, 429 U.S. 1033 (1977).

116. Although there is some authority to the contrary, see, e.g., Crane Co. v. American Standard, Inc., 603 F.2d 244, 248 (2d Cir. 1979), the more sensible view is that a lower court is not bound to follow as the mandate of an appellate court if the mandate rests on a rule of law repudiated by higher authority after the appellate court's decision. See, e.g., Delano v. Kitch, 663 F.2d 990, 996 (10th Cir. 1981); Page v. St. Louis Southwestern Ry. Co., 349 F.2d 820, 821 (5th Cir. 1965); Crane Co. v. American Standard, Inc., 439 F. Supp. 945, 949 (S.D.N.Y. 1977) (citing cases), rev'd, 603 F.2d 244 (2d Cir. 1979). Certainly the Supreme Court could make clear, in an appropriate case, that it takes the latter position.

117. Compare United States v. Schleis, 582 F.2d 1166, 1173 n.6 (8th Cir. 1978) ("If the Supreme Court had not intended [the decision cited in the GVR] to be applied retroactively, there would have been no reason for remanding the case to this Court."); with United States
does not mean that the Court must invariably decide, immediately upon handing down a plenary decision, whether and to what extent the decision will be given retroactive effect. That question may be difficult and divisive, and the Court may want more time to think about it and to obtain the views of the lower courts. Nor need the Court establish a single rule governing all GVR's. Rather, what is needed is a set of guidelines that will tell the lower courts whether or not retroactivity is an issue requiring consideration. In particular, as long as the Court takes the position, as apparently it does, that an unadorned GVR embodies no view on the matter of retroactivity, the Court should say so. The courts to which the orders are directed would then know

v. Calandrella, 605 F.2d 236, 252 (6th Cir.), cert. denied, 444 U.S. 991 (1979), discussed supra note 61. Cf. Shipley v. California, 395 U.S. 818, 821 (1969) (White, J., dissenting from summary reversal) ("I fear that the summary dispositions in these cases [two summary reversals and five denials of review in cases held pending the decision in Chimel v. California, 395 U.S. 752 (1969)], which strain so hard to avoid deciding the retroactivity of Chimel, will only magnify the confusion . . . ").

118. The Court, however, may choose to do so. See infra note 124.


120. See infra note 124.

121. That this is the Court's position may be inferred from the decision in Solem v. Stumes, 104 S. Ct. 1338, 1345 (1984), in which the Court held that the rule of Edwards v. Arizona, 451 U.S. 477 (1981), should "not . . . be applied in collateral review of final convictions." See supra note 108. Neither the majority nor the dissent made any mention of the fact that immediately following the decision in Edwards, the Court had directed the Seventh Circuit to reconsider, in light of that holding, a habeas corpus case in which the avenues of direct review had long since been exhausted. See White v. Finkbeiner, 611 F.2d 186 (7th Cir. 1979), vacated, 451 U.S. 1013 (1981), discussed supra note 108. In contrast, when a plenary decision repudiates a proposition apparently established by summary affirmances, the Court usually makes some mention of those decisions. See, e.g., Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 498-500 (1981) (noting limited precedential value of summary affirmances).

The analysis in the text is also supported by the fact that when the Court decided to give retroactive effect to the Fourth Amendment holding of Payton v. New York, 445 U.S. 573 (1980), the majority noted, but did not rely on, the reconsideration orders issued in the wake of Payton. See United States v. Johnson, 457 U.S. 537, 556 n.16 (1982).

122. A case now before the Court appears to present an excellent vehicle for clarifying the law on this point. In State v. Shea, 421 So. 2d 200, 210 (La. 1982), cert. granted, 104 S. Ct. 2167 (1984), the state court held that Edwards v. Arizona, 451 U.S. 477 (1981), was not to be applied retroactively to a defendant whose conviction was on direct appeal at the time Edwards was announced. The court acknowledged that "[s]hortly after Edwards was decided, the Supreme Court granted certiorari in a number of cases which were apparently pending on direct review in that Court, vacated the judgments and remanded for further consideration in light of Edwards." 421 So. 2d at 210 n.7. Nevertheless, the majority insisted, without further elaboration, that "[t]his action does not mean that the Supreme Court
that if an issue of nonretroactivity plausibly can be raised, that issue should be addressed and decided before the vacated judgment is reversed on the authority of the intervening decision. On the other hand, in those instances where the Court is ready to resolve the retroactivity issue without delay, it should announce its decision and remand only those cases that fall within the scope of the holding.

Finally, in questionable cases the Court might ask the litigants to submit memoranda discussing the import of the intervening decision and recommending an appropriate disposition. If the parties' responses persuade the Court that the new precedent has no bearing on the later-filed case, the Justices could deny review without any concern that an injustice was being done. Or, if the case is certworthy in its own right, they could grant review immediately. In either situation, the suggested procedure would help to minimize the number of separate decisions will ultimately decide to give full retroactive effect to Edwards." Id. The dissent argued that the reconsideration orders "clearly indicate that Edwards is not to be applied prospectively only." Id. at 212 (Calogero, J., dissenting).

123. Unfortunately, because of the ever-changing contours of the retroactivity doctrines, it will not always be easy to ascertain whether a nonretroactivity argument is within the realm of plausibility. For example, seven cases were remanded for reconsideration in light of Edwards v. Arizona, 451 U.S. 477 (1981), see supra note 122; in none of them did the lower courts, on remand, so much as mention the possibility that Edwards might not be applied retroactively. See also People v. Paintman, 412 Mich. 518, 531, 315 N.W.2d 418, 422-23 ("[I]t is unnecessary to analyze the question of retroactivity under traditional standards" because Edwards did not announce new law), cert. denied, 456 U.S. 995 (1982). Nevertheless, the issue is very much an open one. See supra notes 121-22. The task of the lower courts is also made more difficult by the Supreme Court's apparent view that courts may be required to address questions of retroactivity even when not raised by the parties. See supra note 108.

As a matter of logic, retroactivity might be regarded as a threshold issue; however, it need not be so in practice. Thus, if the lower court, on remand, finds that the intervening decision can readily be distinguished on some other ground, it may be able to avoid a difficult retroactivity question. Cf. Relford v. Commandant, 401 U.S. 355 (1971) (holding that case does not come within rule established by earlier decision; pretermitting question of retroactivity of that decision).


125. Thus, if the Court had been prepared to apply Edwards v. Arizona, 451 U.S. 477 (1981), to cases pending on direct appeal but not in collateral review of final convictions, it would have denied certiorari in White v. Finkbeiner, 611 F.2d 186 (7th Cir. 1979), vacated, 451 U.S. 1013 (1981), and vacated the judgments only in the six state court cases that were then before it.

If the Court wishes to change its current policy, it could announce that a remand for reconsideration does embody a holding in favor of retroactivity unless the order explicitly directs the lower court to address the issue. Of course, under such a regime the holding on retroactivity would be limited to the procedural posture of the particular case.
required before the matter is finally resolved.126 And if, after reviewing the parties' submissions, the Court chooses to issue a reconsideration order, the litigants and the lower court could be confident that the directive meant just what it said.

Conclusion

In retrospect, it becomes apparent that the proper subject of inquiry is not the reconsideration order as such, but rather the Court's handling of cases that have been set aside because they appear to involve an issue similar to one slated for plenary adjudication.127 This study shows that once the plenary decision is handed down, the Court reexamines the held cases. If the Court determines that the lower court's ruling is consistent with the intervening decision, it will simply

126. Sometimes the Supreme Court would benefit from hearing the views of the court below on the effect of the intervening precedent, but this will not always be true, especially where the issue does not depend on particular facts or where the question has been thoroughly ventilated in other courts. See, e.g., United States v. Ross, 454 U.S. 891 (1981), granting cert. to 655 F.2d 1159 (D.C. Cir. 1981) (agreeing to review decision rendered before issuance of arguably dispositive Supreme Court ruling; asking parties to brief question whether that ruling should be reconsidered). Cf. Shea v. Louisiana, 104 S. Ct. 2167 (1984), granting cert. to 421 So. 2d 200 (La. 1982) (agreeing to review case apparently held to await decision in Solem v. Stumes, 104 S. Ct. 1338 (1984), discussed supra notes 108 & 121).

127. Of course, the Court's initial decision to hold a case rather than dispose of it immediately also involves an exercise of judgment. See, e.g., Borman's, Inc. v. Allied Supermarkets, Inc., 104 S. Ct. 263, denying cert. to 706 F.2d 187 (6th Cir. 1983) (denying review in case that presented issue superficially similar to one under consideration in NLRB v. Bildisco & Bildisco, 459 U.S. 1145 (1983), granting cert. to In re Bildisco, 682 F.2d 72 (3d Cir. 1982)).

Complete analysis of the process by which those determinations are made is beyond the scope of this Article. However, for whatever the information is worth, Borman's is one of only two cases of its kind that I was able to identify on the first three order lists of the 1983 Term. (The other case is Case v. United States, 104 S. Ct. 94, denying cert. to United States v. Hensel, 699 F.2d 18 (1st Cir. 1983) (presenting issue similar to one scheduled for adjudication in Oliver v. United States, 459 U.S. 1168 (1983), granting cert. to 686 F.2d 356 (6th Cir. 1982)); see Hensel, 699 F.2d at 31-33.) Earlier I had flagged more than 20 certiorari petitions as likely to be set aside pending the decision of an argued case; as of October 30, 1983, all of the others remained on the Court's docket without action having been taken.

While I would not want to draw conclusions from this casual survey, it may well be that the initial determination to hold a case is made with a bare minimum of study, and that all cases "even . . . remotely involving" issues scheduled for plenary consideration, see supra note 21 and accompanying text, ordinarily are set aside. Certainly that approach would make a good deal of sense. The relevance of the plenary decision will often depend on how—and how broadly—the Court resolves the various issues presented. At the time the new case is filed, there may be no way of knowing what the result of the plenary decision will be, or which of several possible grounds ultimately will command a majority.

The Court must make a similar determination whenever a prisoner under sentence of death seeks a stay of execution pending the decision of a plenary case raising allegedly similar issues. Compare Autry v. Estelle, 104 S. Ct. 24 (White, Circuit Justice, 1983) (granting stay), with Maggio v. Williams, 104 S. Ct. 311 (1983) (per curiam) (denying stay).
deny certiorari. But if there is even a surface inconsistency between the holding below and the new precedent, the Court will generally remand for reconsideration by the lower court.

Seen in this light, the process begins to look very much like a species of review for error. Although denial of review is not, in theory, an affirmation, and a remand for reconsideration is not tantamount to reversal, the determination to invoke one mode of disposition rather than the other is governed by the same basic criterion that underlies the exercise of review for error: the correctness of the judgment below—here judged by reference to the intervening Supreme Court decision.

At first blush, it may seem anomalous to find the United States Supreme Court engaging in something akin to review for error, and on a rather large scale at that: more than 100 cases in the 1981 Term alone, if we count (as we must) all held cases, whether the ultimate disposition be one of remand or denial of review. In recent years there has been widespread agreement that review for error should play at best a minor part in the Court's work, and that the Court should consider, in the words of the Justices, only cases "of... general public importance or concern."

By the same token, analysis of the Court's docket has focused primarily on the Court's role as the final expositor of the national law. It does not follow, however, that the GVR practice is an anomaly, much less that it is a dispensable vestige of an earlier era. The question is put into sharp focus by Justice Stevens' recent proposal for a new court that would screen all applications for Supreme Court review and deny all but the very few that clearly warrant the Court's attention. Justice Stevens assumes, quite plausibly, that if the selection process were vested in a separate tribunal, the Justices' docket would be limited to questions "sufficiently important for decision on a national level," and would exclude cases that involve merely the possibility of error in the court below. And it can be argued that the proposal does no more than to take to its logical extreme the view of the Court's function that has already been endorsed by all of the Justices.

128. The number of cases held for a pending decision and then denied review varies just as greatly from Term to Term as the number in which remand orders are issued, and for the same reasons. See supra notes 13-14 and accompanying text. Thus, in the 1980 Term there were at least 60 held/denied cases, but in the following Term the number dropped to about 40.

129. Hellman, supra note 1, at 799-800 (quoting letter signed by all nine sitting Justices).

130. Hellman, supra note 45.


132. Id.
Suppose, then, that Justice Stevens' plan were to be adopted. What would happen to the cases that are now set aside by the Justices pending the announcement of a plenary decision? The new court could of course deny review in all such cases, but for reasons given earlier this would be unfair to at least some of the litigants. At the same time, it is difficult to see how another tribunal could make the kinds of judgments that the Supreme Court now makes in deciding which superficially similar cases should be remanded and which should not.

Yet even if the new court could somehow develop an understanding that would enable it to dispose of the potential GVR cases in a manner that the Justices would find acceptable, that would not be the end of the matter. These cases remind us that, notwithstanding its unique role as the final expositor of the national law, the Supreme Court remains a court—a tribunal that operates within the judicial system and derives its authority to announce legal rules from a grant of jurisdiction over individual cases and controversies. For logistical and other reasons, the Court will never be able to consider the merits of the lower courts' judgments in any substantial proportion of the cases in which review is sought. Nor, except in a sporadic way, can the Court undertake the task of defining the contours of legal rules on a case-by-case basis in the tradition of the common law. But by holding cases pending the announcement of a plenary decision and then remanding for reconsideration or denying review, the Court gains an immediate opportunity to consider the consequences and implications of its plenary opinions. And if after a remand a lower court adheres to its prior ruling, the Justices are again forced to confront questions about the meaning and scope of one of their precedents as applied in a particular factual context.

From this perspective, it can be seen that the opportunity to determine which of the held cases should be remanded and which should be denied review has an importance for the Court that goes beyond considerations of justice for the litigants or clarity in the national law. In an imperfect and limited way, the GVR practice prevents the Court from becoming, even more than it already is, a remote lawgiver largely cut off from the traditional processes of common-law adjudication. There is room for improvement in the way the practice is carried out, but the Court would be ill-advised to abandon it altogether. This arrangement will not satisfy those who like neat demarcations in the allocation of responsibilities, but a certain untidiness is unavoidable when

133. See supra notes 100-01 and accompanying text.
134. See Hellman, supra note 45, at 630-33; Hellman, supra note 1, at 871.
large scale national governance is superimposed on a legal system deeply rooted in the common-law tradition.