

## SUMMARY DISPOSITIONS AS PRECEDENT

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### ABSTRACT

*The Supreme Court's practice of summarily reversing decisions based on certiorari filings, without the benefit of merits briefing or oral argument, has recently come under increasing scrutiny. The practice is difficult to square with the Court's stated criteria for granting certiorari and its norms against reviewing fact-bound cases to engage in mere error correction. Nonetheless, there is growing acceptance that the practice is likely to continue in some form, and the conversation has shifted to asking when the use of summary dispositions should be considered proper. Commentators have had no trouble identifying the Court's tendencies: summary dispositions are most commonly used to rebuke the lower courts for attempting to resist Supreme Court doctrine, particularly in federal habeas and qualified immunity cases. But the Court's failure to actually adopt this rationale creates legitimacy and rule-of-law concerns. Furthermore, it is unclear whether such rebuke is likely to be effective in achieving the Court's apparent goal of harmonization.*

*This Article proposes a novel, more constructive approach to summary dispositions that takes advantage of their unique attributes: they can be put to good use filling in the contours of general legal standards. It is well understood that standards acquire meaning only by application to a series of cases, but the Court does*

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*not have space on its plenary docket to take multiple cases in the same area to perform that function. Summary dispositions, including both affirmances and reversals, provide a mechanism for doing so in an efficient manner. This proposal is consistent with the standard criteria for granting certiorari, because the purpose would not be to correct the error in an individual case, but rather to provide more broadly useful precedential guidance about the meaning of the standard at issue. After describing this new purpose, the Article shows how existing practices should be revised to fulfill it more effectively. In particular, it develops a set of principled criteria for selecting cases to resolve by summary disposition, and calls for a more balanced approach that may be more effective in harmonizing lower-court decisions than the Court's current emphasis on rebuking resistance.*

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## INTRODUCTION

In 2014, the Supreme Court summarily vacated a lower-court decision that granted qualified immunity to a police officer sued for excessive force. The case, *Tolan v. Cotton*, was noteworthy because the Court had last ruled against a police officer's qualified immunity defense over a decade earlier.<sup>1</sup> Justice Alito, joined by Justice Scalia, concurred in the judgment. While generally agreeing with the majority's analysis on the merits, Alito expressed concern that the Court's standards for granting certiorari were being distorted—this was an “utterly routine” case in which the lower court “invoked the correct standard.”<sup>2</sup> Granting certiorari to fix the misapplication of that standard ran counter to the Court's established norms against reviewing fact-bound cases to engage in mere error correction.<sup>3</sup>

Commentators were quick to point out the apparent hypocrisy of Justices Scalia and Alito in taking this position.<sup>4</sup> They had not spoken up, after all, about summary reversals in which the Court had engaged in mere error correction to the benefit of defendant officers. Indeed, summary reversals have been far more commonly used to reach results the conservative Justices generally support, favoring government officials in qualified immunity cases and the state in federal habeas cases.<sup>5</sup> Two years before *Tolan*, the same two Justices had complained because the Court denied certiorari in a habeas case in which the state had lost and that they themselves described as fact bound.<sup>6</sup> For its part, the *Tolan* majority acknowledged that the Court cannot “correct every perceived error coming

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1. 134 S. Ct. 1861 (2014) (per curiam); William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 23 & n.72 (2015).

2. *Tolan*, 134 S. Ct. at 1869 (Alito, J., concurring in the judgment).

3. *Id.* at 1868.

4. See, e.g., Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1241-42 (2015).

5. See Baude, *supra* note 1, at 39; Edward A. Hartnett, *Summary Reversals in the Roberts Court*, 38 CARDOZO L. REV. 591, 597-99 (2016).

6. See *Cash v. Maxwell*, 565 U.S. 1138, 1147 (2012) (Scalia, J., dissenting from denial of certiorari).

from the lower federal courts,”<sup>7</sup> but justified its decision to do so in this case “because the opinion below reflects a clear misapprehension of summary judgment standards in light of our precedents.”<sup>8</sup>

The debate among the Justices in *Tolan* and other recent cases<sup>9</sup> demonstrates that a more principled approach to summary dispositions is needed. Justice Alito was correct to say that the Court’s own rules and norms disfavor granting review to correct errors in fact-bound cases. The liberal Justices have cited the same rules in criticizing summary reversals that favored the state in habeas cases.<sup>10</sup> The *Tolan* majority’s explanation matches what has become the standard account, that summary reversals are reserved for “clearly erroneous” decisions.<sup>11</sup> But even if that is a necessary condition, it can hardly be a sufficient one, as many other cases could be similarly characterized but would not be deemed important enough for the Court’s attention.

Summary reversals and other types of summary dispositions are not a new phenomenon. Around the mid-twentieth century, commentators took note of the Court’s “increasingly frequent practice” of granting certiorari and immediately reversing the decision below in a short, per curiam opinion without receiving further briefing or allowing for oral argument.<sup>12</sup> Critics charged that this short-circuited process was prone to error, unfair to litigants, and ultimately inefficient because it would require attorneys to

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7. *Tolan*, 134 S. Ct. at 1868 (quoting *Boag v. MacDougall*, 454 U.S. 364, 366 (1982) (O’Connor, J., concurring)).

8. *Id.*

9. Most recently, Justice Sotomayor, joined by Justice Ginsburg, squared off against Justice Alito, joined by Justice Thomas, in a debate over the Court’s asymmetrical summary reversal practices. Justice Sotomayor wrote, “We have not hesitated to summarily reverse courts for wrongly denying officers the protection of qualified immunity in cases involving the use of force. But we rarely intervene where courts wrongly afford officers the benefit of qualified immunity in these same cases.” *Salazar-Limon v. City of Houston*, 137 S. Ct. 1277, 1282-83 (2017) (Sotomayor, J., dissenting from the denial of certiorari) (citations omitted). Justice Alito defended the Court’s practices as “neutral,” explaining that fact-bound cases are rarely reviewed but that summary reversals may be appropriate “if the lower court conspicuously failed to apply a governing legal rule.” *Id.* at 1278 (Alito, J., concurring in the denial of certiorari).

10. *See, e.g., Cavazos v. Smith*, 565 U.S. 1, 11 (2011) (Ginsburg, J., dissenting).

11. STEPHEN M. SHAPIRO ET AL., *SUPREME COURT PRACTICE* 352 (10th ed. 2013).

12. Ernest J. Brown, *The Supreme Court, 1957 Term—Foreword: Process of Law*, 72 HARV. L. REV. 77, 77 (1958).

always address the merits of cases in their certiorari papers instead of focusing on the standard criteria of “certworthiness.”<sup>13</sup>

The Court’s more recent practice remains vulnerable to these criticisms, but the focus of the conversation has shifted. There is growing acceptance that summary reversals are a part of what the Court does, and criticisms now emphasize the lack of stated criteria for when the Court will use this tool.<sup>14</sup> When the Court departs in an ad hoc manner from its established practices, it opens itself up to criticism on rule-of-law and legitimacy grounds because it has placed no constraint on its future practices.<sup>15</sup> Those concerns are exacerbated because the Court’s selective usage is not random, but reflects a targeting of certain types of cases. That gives rise to the “cynical interpretation” that the Court is correcting the errors it dislikes and ignoring the ones it does not mind, thereby carrying out a substantive agenda that should be more openly acknowledged and subjected to debate.<sup>16</sup>

Although the Court itself has not adopted any consistent justification apart from the presence of clear error, commentators generally agree that summary reversals are most commonly used to rebuke lower courts for having resisted the Court’s precedents, and in particular when those courts improperly grant federal habeas or deny qualified immunity.<sup>17</sup> Until the Court actually adopts this rationale, however, the rule-of-law and legitimacy concerns will remain. Furthermore, it is not clear that the approach of rebuking lower courts is likely to be effective in achieving the Court’s apparent goals. Some judges who have strong views about the law in these areas will not be deterred by the threat of summary

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13. See *infra* Part I.A.

14. See Baude, *supra* note 1, at 20-22, 38.

15. See *infra* Part II.A. As Baude notes, “procedural regularity begets substantive legitimacy.... A sense that [the Court’s] processes are consistent and transparent makes it easier to accept the results of those processes, win or lose.” Baude, *supra* note 1, at 10.

16. Baude, *supra* note 1, at 39. Elsewhere, Baude elaborates on this possible explanation: “Alito and Scalia think there are different costs to the different kinds of errors. Put crudely, they like police officers and don’t like prisoners, so they care more about correcting windfalls for prisoners than for the police.” Will Baude, *Tolan v. Cotton—When Should the Supreme Court Interfere in ‘Factbound’ Cases?*, WASH. POST: VOLOKH CONSPIRACY (May 7, 2014, 9:40 AM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/05/07/tolan-v-cotton-when-should-the-supreme-court-interfere-in-factbound-cases> [<https://perma.cc/5QJ9-65AC>].

17. See *infra* Part II.A.

reversal, while other judges may be overdeterred and go further than the Court itself would have.<sup>18</sup> The result will be deeper inconsistency and dysfunction rather than the harmony the Court seeks.

This Article proposes a novel, more constructive justification and a set of principled criteria for the use of summary dispositions. It is not an effort to justify existing practice, although some past instances would be considered proper under the proposed criteria. Rather, the justification is based on the nature of summary dispositions and how they could be put to effective use. Further, the logic of the proposal suggests that it should not be limited to reversals: summary *affirmances* have the same potential to serve a useful purpose.

My proposal is that summary dispositions be used to help fill in the contours of general legal standards. It is well understood that standards, as opposed to rules, acquire meaning through their application to a series of cases.<sup>19</sup> That is certainly true with respect to the reasonableness inquiries contained in the habeas and qualified immunity standards. Such standards are ubiquitous, and necessarily so, in every area of the law.<sup>20</sup> But the Court does not have room on its plenary docket to take multiple cases on a given issue to provide the necessary calibration. Summary dispositions provide a mechanism for doing so in a more resource-efficient manner. Thus, summary dispositions need not be seen as a problematic practice to be reined in; rather, they can be harnessed to play a constructive role in the development of the law.

A brief example will help to illustrate the proposal. In *Bell Atlantic Corp. v. Twombly*, the Supreme Court revised the pleading standard under Federal Rule of Civil Procedure 8(a)(2) to require plaintiffs to offer “enough facts to state a claim to relief that is plausible on its face.”<sup>21</sup> Two years later, in *Ashcroft v. Iqbal*, the Court elaborated on this new plausibility standard, articulating

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18. Hartnett, *supra* note 5, at 597, 605-06.

19. See Paul J. Watford, Richard C. Chen & Marco Basile, *Crafting Precedent*, 131 HARV. L. REV. 543, 569 (2017) (reviewing BRYANA. GARNER ET AL., *THE LAW OF JUDICIAL PRECEDENT* (2016)).

20. See *infra* Part III.A.

21. 550 U.S. 544, 570 (2007).

more clearly a two-step analysis.<sup>22</sup> First, courts should identify and set aside legal conclusions that are not entitled to be presumed true, and second, they should assess whether the properly pled factual allegations plausibly state an entitlement to relief.<sup>23</sup> Together, the two cases established a new doctrinal framework for assessing the adequacy of a complaint.

But much uncertainty about this doctrinal test remains because “we still lack a concrete understanding of what [it] means in practical terms.”<sup>24</sup> In particular, the Court’s only guidance on the concept of plausibility is that it falls somewhere on the spectrum between possibility and probability.<sup>25</sup> Of course, as a general legal standard, the term cannot be defined much more precisely in the abstract. Thus, commentators immediately predicted that the new regime would lead to confusion and inconsistency,<sup>26</sup> and indeed there are significant areas of divergence in the lower courts.<sup>27</sup> I suggest that this is an area of law in which the Court could use summary dispositions to offer meaningful guidance. The Court has not reviewed a pleading case since *Iqbal*,<sup>28</sup> perhaps thinking it has settled the major questions of principle and not wanting to expend

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22. 556 U.S. 662, 679 (2009).

23. *Id.*

24. A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 12 (2009).

25. *Iqbal*, 556 U.S. at 678. There is also considerable uncertainty about the first step, namely how to identify allegations that are too conclusory. See Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 841 (2010).

26. See, e.g., Spencer, *supra* note 24, at 10-11.

27. One level of disagreement concerns to what extent *Twombly* and *Iqbal* actually changed the standard. Because the Court itself gave conflicting signals, lower courts were unsure of how much higher a bar plausibility was intended to impose. See *id.* at 7-8; see also Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2128 (2015) (citing examples of confusion). Another level of disagreement concerns how much the bar may shift depending on the nature of the claims at issue. Although it is clear that the new standard applies to all substantive areas, some courts apply it more flexibly than others, requiring more or less factual detail depending on the complexity of the cases. See Nicholas Tymoczko, Note, *Between the Possible and the Probable: Defining the Plausibility Standard After Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal*, 94 MINN. L. REV. 505, 523-25 (2009). Still other inconsistencies exist. See, e.g., Colleen McNamara, Note, *Iqbal as Judicial Rorschach Test: An Empirical Study of District Court Interpretations of Ashcroft v. Iqbal*, 105 NW. U. L. REV. 401, 417 (2011) (distinguishing between what the author calls the “checklist approach” and the “common sense gloss” used by lower courts).

28. The Court performed a brief plausibility analysis in *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1863-64 (2017), a case that was primarily about the availability of a *Bivens* remedy.



the substantial resources that plenary review would require.<sup>29</sup> But by addressing a few cases summarily across a variety of substantive domains, the Court could help flesh out the contours of the plausibility standard and enable lower courts to apply it in a more consistent manner.

Using summary dispositions for the purpose proposed here avoids one of the main critiques of the practice, namely that it is prone to error. The risk of error is reduced because the Court would not be using summary dispositions to resolve novel legal issues. Rather, their use would be limited to cases in which the relevant doctrinal test—such as the plausibility pleading standard—has previously been established, but additional illustrations are needed to provide guidance on how that test actually operates. And because resolving such cases depends primarily on the exercise of calibration and judgment, rather than any complex legal analysis, the Court should feel relatively comfortable using summary procedures.<sup>30</sup>

Moreover, the proposed justification would be consistent with the standard criteria for granting certiorari, because the purpose would not be to correct the error in an individual case, but rather to provide more broadly useful precedential guidance about the meaning of the standard at issue. Relatedly, the proposed approach provides an answer to a long-standing puzzle about summary dispositions. Early critics of the practice flagged the incongruity of saying that a case is important enough to warrant the exercise of discretionary jurisdiction, but not important enough to require “more than summary consideration.”<sup>31</sup> The answer suggested here is that a case can be important but not complex.<sup>32</sup> A case taken up

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29. David Noll identifies several outstanding questions that remain after *Iqbal*, such as whether a district court may allow discovery while a motion to dismiss is pending. See David L. Noll, *The Indeterminacy of Iqbal*, 99 GEO. L.J. 117, 141 (2010). At least some of the questions he identifies would warrant plenary review because they would involve more than merely offering additional illustrations of the plausibility analysis.

30. As described below, there have been repeated calls for the Court to at least offer parties a chance to file supplemental briefs on the merits before issuing a summary reversal. See *infra* text accompanying notes 67-68. As discussed in Part IV.B, I agree that such a reform would provide a valuable safeguard against error and would not negate the efficiency gains to be realized from using summary procedures.

31. See Brown, *supra* note 12, at 94.

32. As explained in Part III.A below, I do not mean to suggest that such cases are easy, only that courts can make the required judgment calls about the application of law to fact without the full adversarial process.

to illustrate the operation of a general legal standard will typically be a straightforward one, and its significance as an individual precedent may be relatively minor.<sup>33</sup> But considered alongside other summary dispositions addressing the same issue, the cases in the aggregate play an important role in developing the law around the standard in question.<sup>34</sup>

This Article proceeds as follows. Part I provides further background on summary dispositions, from their origins up through current usage in the Roberts Court. Part II explains existing practice and critiques it on two grounds. First, after acknowledging that a desire to rebuke lower courts appears to explain current usage, I argue that the Court's failure to expressly adopt criteria still gives rise to rule-of-law and legitimacy concerns. Second, even assuming the Court adopted the prevailing explanation as a governing rationale, I argue that the approach of rebuke is unlikely to be effective in harmonizing lower-court decisions in the areas the Court deems problematic.

Part III lays out the novel justification that summary dispositions be used to help calibrate the meaning of general legal standards. Part IV addresses how the Court's practices should be revised to serve that function most effectively. I explain why summary affirmances, as well as reversals, can fulfill that purpose and develop a set of principled criteria for when intervention by summary disposition is appropriate. Furthermore, I argue that a more balanced approach than the Court currently uses would not only advance my proposed justification, but also more effectively promote the harmonization the Court seeks.

## I. SUMMARY DISPOSITIONS PAST AND PRESENT

### A. *Historical Practices and Perspectives*

The Supreme Court's use of summary dispositions goes back to the late nineteenth century.<sup>35</sup> These dispositions took the form of

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33. See *infra* Part III.A.

34. See *infra* Part III.A.

35. Note, *Supreme Court Per Curiam Practice: A Critique*, 69 HARV. L. REV. 707, 708 (1956).

short, *per curiam* decisions, sometimes offering only a single sentence stating the result and not always providing even a citation to authority.<sup>36</sup> Cases were summarily affirmed or reversed when they presented issues falling squarely within existing Supreme Court precedent.<sup>37</sup> The Court also summarily dismissed appeals from state court decisions for lack of a substantial federal question, on the ground that the purported federal issue was so “clearly foreclosed ... that there cease[d] to be a true federal question except in form.”<sup>38</sup>

From 1891, when Congress created the writ of certiorari, to 1988, when Congress eliminated most forms of mandatory jurisdiction, the Supreme Court’s mandatory docket was substantial.<sup>39</sup> That fact suggests that summary dispositions may have been necessary to manage the Court’s workload. But the Court’s reliance on summary dispositions was not limited to its mandatory docket.<sup>40</sup> Beginning around the 1950s, the Court engaged in the “increasingly frequent practice of granting certiorari and simultaneously reversing the decision of a federal court of appeals or a state supreme court without briefs or arguments upon the merits.”<sup>41</sup>

Scholars first took note of the practice of summary dispositions around this same time.<sup>42</sup> They were most critical of those dispositions that provided no reasoning at all.<sup>43</sup> One line of criticism focused on the importance of reasoning from the standpoint of the rule of law. For example, Alexander Bickel and Harry Wellington described a trend in which the Court merely announced “results accompanied by little or no effort to support them in reason,” relying

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36. *See id.* at 707.

37. *See id.* at 708.

38. *Id.* at 708-09. Of course, dismissals for lack of a substantial federal question and summary affirmances achieve the same result and may take the same shortened form. Commentators seeking to explain why the Court preferred the former for appeals from state courts and the latter for appeals from federal district courts suggested that “the Court may be reluctant to dismiss appeals from federal district courts because doubt might be cast on the jurisdiction of the district court and hence on the Court’s own jurisdiction to hear the merits of the appeal.” *Id.* at 713.

39. *See SHAPIRO ET AL.*, *supra* note 11, at 75-76.

40. Note, *supra* note 35, at 708.

41. Brown, *supra* note 12, at 77.

42. Albert M. Sacks, *The Supreme Court, 1953 Term—Foreward*, 68 HARV. L. REV. 96, 99 (1954); *see* Note, *supra* note 35, at 707.

43. Note, *supra* note 35, at 707, 723.

on “per curiam orders that quite frankly fail to build the bridge between the authorities they cite and the results they decree.”<sup>44</sup> After quoting an example of one such case, the authors concluded that the “decision does not attempt to gain reasoned acceptance for the result, and thus does not make law in the sense which the term ‘law’ must have in a democratic society.”<sup>45</sup>

Summary dispositions with no reasoning also produced confusion, both for the parties involved and for future litigants and courts seeking to apply the cases as precedent. The Supreme Court took the view that its summary dispositions were entitled to precedential weight.<sup>46</sup> When the decision was an affirmance, future readers could at least look to the opinion below for guidance, even though that would not reliably indicate the actual grounds for the Court’s decision.<sup>47</sup> Summary reversals with little or no reasoning provided an even greater challenge because “there is no opinion of a court below to look to for guidance.”<sup>48</sup>

Some commentators during this time period acknowledged that summary dispositions could be appropriate, but questioned the Court’s willingness to use them in particular instances. As Albert Sacks explained:

The summary opinion is one of various processes whereby the Court seeks to assure that time and effort of the Justices are allocated in relation to the importance and complexity of what is to be decided. As such, the summary opinion has obvious utility in the efficient functioning of the Court, and there can be no question of its propriety. There remains, however, the problem of its appropriate use, and, more specifically, whether the

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44. Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 3 (1957).

45. *Id.* at 5.

46. See Arthur D. Hellman, *Error Correction, Lawmaking, and the Supreme Court’s Exercise of Discretionary Review*, 44 U. PITT. L. REV. 795, 817 (1983); Note, *supra* note 35, at 713.

47. Sacks, *supra* note 42, at 102; Note, *supra* note 35, at 715 (“Although the Illinois court might well have read more carefully the opinion of the court which was affirmed, reliance on such opinions is not always prudent because the affirmance does not indicate adoption of the opinion below.”).

48. Note, *supra* note 35, at 718. Compounding the difficulty, the Court in such cases would sometimes cite a precedent with “easily distinguishable” facts or reasoning that did “not seem readily applicable.” *Id.* at 715.

Court is extending the use of the summary opinion to cases where fuller exposition of views is warranted.<sup>49</sup>

Sacks went on to detail several such examples.<sup>50</sup> Other commentators provided examples of their own, in which the Court used summary dispositions “to extend a prior doctrine, rather than reaffirm its settled nature,”<sup>51</sup> or reversed decisions that could not be considered “clearly erroneous.”<sup>52</sup>

The practice of issuing dispositions with no reasoning whatsoever peaked with the Warren Court and receded in the 1970s during the early years of the Burger Court.<sup>53</sup> Since that time, the Supreme Court has tended to provide at least a couple of pages of reasoning in decisions that address the merits of cases.<sup>54</sup> Thus, the concerns about the complete absence of reasoning are no longer applicable. Complaints about the Court’s choice to act summarily still arise, though they seem to be less frequent.<sup>55</sup> However, early critics also raised a series of objections grounded in the concerns of procedural regularity, and these remain relevant today.

First is a concern about the quality of the decision-making process. When the Supreme Court reverses on the basis of the certiorari papers alone, it does so without the benefit of the full

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49. Sacks, *supra* note 42, at 99.

50. *See id.* at 100-03.

51. Note, *supra* note 35, at 709. The author of this piece goes on to describe the example of two flag salute cases in which the Court summarily rejected challenges on religious liberty grounds based on a precedent that had “upheld compulsory military training at a state university” against similar objections. *Id.* The author concludes that the question could not have been insubstantial, given “that within three years a full opinion reaffirming the per curiams was necessary, and indeed the matter was not finally put to rest until further examination in a full opinion resulted in a reversal of the Court’s former position.” *Id.* at 710 (footnotes omitted).

52. Brown, *supra* note 12, at 87.

53. Hellman, *supra* note 46, at 824.

54. The Court continues to provide more bare-bones statements in particular types of orders, such as for denials of certiorari, GVRs (grant, vacate, and remand orders), and jurisdictional dismissals. *See, e.g.,* Piper v. Middaugh, 136 S. Ct. 2408 (2016) (per curiam) (granting the petition, vacating the judgment, and remanding “for further consideration in light of *Mullenix v. Luna*”).

55. *See, e.g.,* Pavan v. Smith, 137 S. Ct. 2075, 2079 (2017) (Gorsuch, J., dissenting) (suggesting that summary reversal was not warranted because existing precedent did not speak clearly to the disputed issue). The more common complaint, as discussed in Part I.B below, is that the Court is summarily reversing fact-bound cases that do not warrant discretionary review at all.

adversarial process.<sup>56</sup> Certiorari petitions and opposition briefs are supposed to be about whether a case warrants discretionary review and not primarily about the case's merits.<sup>57</sup> Nor is the lower court's opinion and accompanying record likely to be an "adequate substitute" for receiving the parties' own contentions.<sup>58</sup> And although it may turn out, in any given case, that further briefing or oral argument proves unhelpful, the Court typically cannot know whether that will be true in advance.<sup>59</sup>

Second is a concern about fairness to the parties. The Court's rules both then and now instruct attorneys to give in their certiorari petitions a "direct and concise argument amplifying the reasons relied on for the allowance of the writ."<sup>60</sup> The rules both then and now further indicate that discretionary review will be granted only for "compelling reasons," which tend to involve conflicting decisions among the lower courts and not mere errors of analysis.<sup>61</sup> As of 1995, the rules have specifically cautioned that a "petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."<sup>62</sup> Given these express instructions, the "reasonable expectation" of parties and their counsel is that they should reserve arguments on the merits to focus their briefing on "certworthiness," but that expectation is defeated when the Court summarily reverses without providing any further opportunity to weigh in.<sup>63</sup>

Third is a concern about efficiency, which follows from the second: if parties understand that the Court will sometimes reverse on the basis of certiorari papers alone, then they will spend more time in their petitions and oppositions on the merits of the case. Commentators in the 1950s observed that savvy attorneys were already doing just that,<sup>64</sup> and the leading manual on practice before the Supreme

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56. See Brown, *supra* note 12, at 79-81.

57. See *id.* at 79.

58. *Id.* at 80.

59. See *id.*

60. SUP. CT. R. 14(1)(h); SUP. CT. R. 23(1)(h) (1954) (repealed 1967).

61. SUP. CT. R. 10. Earlier versions of the rules refer to "special and important reasons." SUP. CT. R. 19(1) (1954).

62. SUP. CT. R. 10 (1995).

63. Brown, *supra* note 12, at 82.

64. See *id.* at 81.

Court makes that suggestion explicitly.<sup>65</sup> To the extent that many or most of the briefs at the certiorari stage are now addressing the merits of cases, then the practice of summary reversals may create a net loss for efficiency. Whatever the Court saves in time from avoiding oral argument in a handful of cases each term, it loses more by having to review substantially longer briefs across many more petitions.<sup>66</sup>

Scholars proposed a simple fix to address all of these concerns. The Court could “request briefs in cases which might appear at first examination suitable for disposition without argument, and give assurance that no case would be decided on the merits without such request.”<sup>67</sup> Adopting such a practice would ensure that parties have a fair opportunity to address the merits, reduce any need to cram those arguments into the certiorari papers, and improve the quality of the Court’s decision-making process. Despite renewed calls for such a policy, including from within the Court itself,<sup>68</sup> no such change has taken place.

### *B. Recent Trends*

The practice of summary reversals in the Roberts Court has attracted recent attention.<sup>69</sup> The focus here and in most commentary is on the category of cases engaged in error correction. These are the cases the Supreme Court reverses because they are simply wrong, even though they present no novel legal question in need of resolving.<sup>70</sup> Put another way, the cases are fact bound. This category of fact-bound error correction represents the most substantial group

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65. See SHAPIRO ET AL., *supra* note 11, at 357.

66. See Brown, *supra* note 12, at 82.

67. *Id.* at 95.

68. See *Montana v. Hall*, 481 U.S. 400, 410 (1987) (Marshall, J., dissenting) (“[W]hen the Court contemplates a summary disposition it should, at the very least, invite the parties to file supplemental briefs on the merits, at their option.” (emphasis omitted)).

69. Even writers in the popular media have taken note. See, e.g., Adam Liptak, *Mystery of Citizens United Sequel Is Format, Not Ending*, N.Y. TIMES (June 11, 2012), <https://www.nytimes.com/2012/06/12/us/in-citizens-united-ii-how-justices-rule-may-be-an-issue-itself.html> [<https://perma.cc/72VM-YA28>] (describing the summary reversal as “a favorite tool of the court led by Chief Justice John G. Roberts Jr.” and noting that “[s]uch rulings have been the subject of criticism from practitioners and the legal academy”).

70. Hellman, *supra* note 46, at 828.

of summary reversals, as well as the most controversial usage.<sup>71</sup> Outside of this definable subcategory, the Court's use of summary reversals is more akin to the exercise of an "ad hoc prerogative."<sup>72</sup>

Some statistics about the Court's practices may provide helpful context for the discussion to come.<sup>73</sup> Consider first how often the Court uses the tool. From the beginning of Chief Justice Roberts's tenure in 2005 through June 2019, the Court summarily reversed eighty-eight cases.<sup>74</sup> That works out to an average of a little over six cases per term. There is no discernible upward trend, as the numbers were nine in the first term and four in the last, with a peak of twelve in 2015.<sup>75</sup>

71. *Id.* at 823-24.

72. See Baude, *supra* note 1, at 35. For example, in *Williams v. Johnson*, 134 S. Ct. 2659 (2014) (per curiam), the Court summarily reversed to correct a problem it had created through a stray statement in an earlier opinion in the same case. See Baude, *supra* note 1, at 27-30.

73. I am excluding for present purposes the similar practice of summary orders that "simultaneously grant certiorari petitions, vacate the judgment below, and remand the case to the lower court for 'reconsideration.'" Alex Hemmer, *Courts as Managers: American Tradition Partnership v. Bullock and Summary Disposition at the Roberts Court*, 122 YALE L.J. ONLINE 209, 212 (2013). These so-called "grant, vacate, and remand," or "GVR," orders are "most commonly used when the ruling below might be affected by one of the Court's recently rendered decisions, which was issued after the lower court ruled." Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs—and an Alternative*, 107 MICH. L. REV. 711, 712 (2009). However, like Baude and Hartnett, I count as summary reversals any cases in which the Court actually corrects some aspect of the lower court's decision, rather than merely pointing out some intervening or overlooked precedent, even if the ultimate disposition involves vacating rather than reversing. See Baude, *supra* note 1, at 22 n.69; Hartnett, *supra* note 5, at 593 n.11.

74. I used as my starting point the seventy-three cases Hartnett identifies through May 2016. See Hartnett, *supra* note 5, at 619-21. I then counted fifteen additional ones through the end of June 2019. From the October 2018 term: *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780 (2019) (per curiam) (abortion); *Moore v. Texas*, 139 S. Ct. 666 (2019) (per curiam) (state habeas); *Shoop v. Hill*, 139 S. Ct. 504 (2019) (per curiam) (federal habeas); *City of Escondido v. Emmons*, 139 S. Ct. 500 (2019) (per curiam) (qualified immunity). From the October 2017 term: *Sause v. Bauer*, 138 S. Ct. 2561 (2018) (per curiam) (qualified immunity); *Sexton v. Beaudreaux*, 138 S. Ct. 2555 (2018) (per curiam) (federal habeas); *Kisela v. Hughes*, 138 S. Ct. 1148 (2018) (per curiam) (qualified immunity); *CNH Indus. N.V. v. Reese*, 138 S. Ct. 761 (2018) (per curiam) (interpretation of collective bargaining agreements); *Tharpe v. Sellers*, 138 S. Ct. 545 (2018) (per curiam) (federal habeas); *Dunn v. Madison*, 138 S. Ct. 9 (2017) (per curiam) (federal habeas); *Kernan v. Cuero*, 138 S. Ct. 4 (2017) (per curiam) (federal habeas). And from the October 2016 term: *Pavan v. Smith*, 137 S. Ct. 2075 (2017) (per curiam) (same-sex marriage rights); *Jenkins v. Hutton*, 137 S. Ct. 1769 (2017) (per curiam) (federal habeas); *Virginia v. LeBlanc*, 137 S. Ct. 1726 (2017) (per curiam) (federal habeas); and *White v. Pauly*, 137 S. Ct. 548 (2017) (per curiam) (qualified immunity).

75. The October 2018 cases are cited in the preceding footnote. The cases for the other two cited terms can be found in Hartnett, *supra* note 5, at 619-21.



Compared to past Courts, the use of summary reversals in the Roberts Court does not stand out from a quantitative perspective. Arthur Hellman's review of the Warren Court's practices found an average of about fifteen summary reversals per term, over the course of sixteen terms.<sup>76</sup> These were of the extremely bare variety, with "no more than a citation or two by way of explanation."<sup>77</sup> As noted earlier, the Burger Court shifted from the practice of one-line decisions to providing a couple of pages of reasoning.<sup>78</sup> Hellman's study showed an average of about twenty-three decisions per term from the 1971 term through the 1979 term.<sup>79</sup> One study of the Rehnquist Court's use of per curiam decisions (which presumably included all summarily decided cases but would not have been limited to them) found an average of six per term.<sup>80</sup>

Although the Roberts Court's practices do not stand out numerically, they have nonetheless attracted attention because of the Court's apparent focus on particular areas of law. Of the eighty-eight summary reversals from the 2005 to 2018 terms, forty-one have come in federal habeas cases.<sup>81</sup> Qualified immunity is a somewhat distant second at eleven.<sup>82</sup> The Supreme Court has also summarily reversed multiple cases involving sentencing challenges, the Federal Arbitration Act, and state habeas law.<sup>83</sup>

Furthermore, the Court's interest in reversing federal habeas and qualified immunity cases is asymmetrical. Of the forty-one federal habeas cases, thirty-four were reversed in favor of the state; and of the eleven qualified immunity cases, nine were reversed in favor of the government official.<sup>84</sup> Hartnett finds it "surprising" that the

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76. See Hellman, *supra* note 46, at 822 (counting about 250 decisions over sixteen years).

77. *Id.*

78. See *id.* at 825.

79. *Id.* at 826-27.

80. See Laura Krugman Ray, *The Road to Bush v. Gore: The History of the Supreme Court's Use of the Per Curiam Opinion*, 79 NEB. L. REV. 517, 561-62 (2000).

81. Hartnett's study found thirty-four federal habeas cases. See Hartnett, *supra* note 5, at 594-95. As reflected in note 74, *supra*, seven of the new cases I found involved federal habeas.

82. Hartnett found seven summary reversals in the qualified immunity category. Hartnett, *supra* note 5, at 595. As reflected in note 74, *supra*, I found four additional such cases.

83. Hartnett, *supra* note 5, at 594-95; see 9 U.S.C. §§ 1-307 (2012); *United States v. Booker*, 543 U.S. 220, 226-27 (2005).

84. Hartnett's numbers were twenty-eight and six. Hartnett, *supra* note 5, at 595. Six of

habeas petitioners prevailed as often as they did,<sup>85</sup> but it is worth noting that all but one of the cases he identified involved some defect or oversight in the lower court's process<sup>86</sup> and did not address the merits of the habeas claim.<sup>87</sup> By contrast, in the majority of the cases in which the state prevailed, the Court reversed on the merits of the habeas claim, and only a handful involved procedural defects.<sup>88</sup>

The two areas of federal habeas and qualified immunity share a key feature. Review in both areas is supposed to be deferential—to state courts for habeas and to government officials for qualified immunity. The federal habeas standard instructs courts not to grant a habeas petition unless the state court's decision is “contrary to, or involved an unreasonable application of, clearly established Federal

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the federal habeas cases cited in note 74, *supra*, were reversed in favor of the state. Only *Tharpe v. Sellers* came out the other way. 138 S. Ct. 545 (2018) (per curiam). Three of the four qualified immunity cases cited in note 74, *supra*, were reversed in favor of the government official. Only *Sause v. Bauer* came out the other way. 138 S. Ct. 2561 (2018) (per curiam).

85. Hartnett, *supra* note 5, at 595.

86. The five cases on Hartnett's list were as follows: *Christeson v. Roper*, 135 S. Ct. 891, 894-95 (2015) (per curiam) (holding that the lower courts misapplied the “interests of justice” standard in denying the habeas petitioner's request for substitute counsel); *Williams v. Johnson*, 134 S. Ct. 2659, 2659 (2014) (per curiam) (correcting an unintended statement from an earlier Court opinion in the same case); *Jefferson v. Upton*, 560 U.S. 284, 285 (2010) (per curiam) (holding that the court of appeals erred by presuming the correctness of the state court's factual findings without considering all the “potentially applicable exceptions” to that rule); *Corcoran v. Levenhagen*, 558 U.S. 1, 2 (2009) (per curiam) (holding that the court of appeals erred by remanding “with instructions to deny the writ” without giving the district court the opportunity to consider claims it had previously treated as moot because it granted relief on other grounds); and *Dye v. Hofbauer*, 546 U.S. 1, 3-4 (2005) (per curiam) (holding that the court of appeals erred when it concluded that the habeas petitioner had failed to raise a claim adequately by looking at the state court opinion and not the brief that had been filed there). A sixth case came from my set of post-May 2016 summary reversals. In *Tharpe*, the Court's decision was also far removed from the merits, holding only that the circuit court had denied the habeas petitioner's certificate of appealability application on an invalid ground. 138 S. Ct. at 546.

87. The one exception was *Porter v. McCollum*, which I discuss at length in Part IV.C below. 558 U.S. 30 (2009) (per curiam).

88. For the full list of cases Hartnett identifies, see Hartnett, *supra* note 5, at 595 n.18. The cases I would describe as involving some procedural error include: *Kernan v. Hinojosa*, 136 S. Ct. 1603, 1604 (2016) (per curiam) (holding that the California Supreme Court's summary denial of a habeas petition was on the merits and therefore warranted deferential review); *Wetzel v. Lambert*, 565 U.S. 520, 525 (2012) (per curiam) (reversing and remanding because the court of appeals failed to address every ground supporting the state court's decision); *Allen v. Siebert*, 552 U.S. 3, 7 (2007) (holding that the federal habeas petition was untimely).

law.”<sup>89</sup> Similarly, government officials are entitled to qualified immunity unless their conduct violates “clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>90</sup> Thus, in both areas the federal court’s basic task is to identify clearly established principles from governing precedent and determine whether they were reasonably applied.

With these similarities in mind, it is easy to see the standard formula in the Court’s summary reversal decisions. When the lower court has relied on purportedly analogous precedent, the Court shows that the cited cases are readily distinguishable and cannot support the principle that the lower court claimed was clearly established.<sup>91</sup> When the lower court has cited (or is left with) only general principles, the Court reiterates that such high-level statements will only rarely suffice.<sup>92</sup> The Court then concludes that the state court or defendant official could not be said to have acted unreasonably under these general principles.<sup>93</sup>

The patterns are readily discernible, but they provoke a natural question: Why these cases and not others? As noted in the Introduction, the explanation that the lower-court decisions at issue involved clear error seems insufficient. Many certiorari petitions every year presumably identify serious errors in the decisions below. And if some summary reversals are drawing dissents from one or more Justices, it seems unlikely that the cases selected for such treatment could have involved the most egregious errors in the pool.<sup>94</sup>

With the Court itself providing no satisfactory answer, the next Part turns to explanations from commentators (as well as Justices writing separately) and a critique of current practice.

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89. 28 U.S.C. § 2254(d)(1) (2012).

90. *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam).

91. *See, e.g., id.* at 308-09 (qualified immunity example); *Glebe v. Frost*, 135 S. Ct. 429, 431 (2014) (per curiam) (habeas example).

92. *See, e.g., White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam) (qualified immunity example); *Parker v. Matthews*, 567 U.S. 37, 49 (2012) (per curiam) (habeas example).

93. *Pauly*, 137 S. Ct. at 552; *Parker*, 567 U.S. at 47-48.

94. *Cf. Ray*, *supra* note 80, at 546 (noting that use of the “per curiam label gives the opinion an unearned aura of inevitability that may strengthen the majority’s position against the counterarguments raised by the dissent”).

## II. EXPLAINING AND CRITIQUING CURRENT PRACTICE

This Part begins by explaining why the absence of stated criteria for the Court's use of summary reversals undermines the rule of law and the Court's legitimacy. The rationale supplied by commentators—that summary reversals are designed to rebuke lower courts for resisting the Supreme Court's commands—helps to explain current practice, but cannot fully address these concerns unless the Court itself adopts the rationale. Part II.B further contends that, even setting aside rule-of-law and legitimacy concerns, the practice of rebuking lower courts for their purported resistance may not be effective in achieving the Court's apparent goal of harmonization.

### A. *The Problem of Agenda Selection*

Commentators and dissenting Justices continue to critique the practice of summary reversals from the standpoints of fairness, quality of the decision-making process, and efficiency.<sup>95</sup> At the same time, there is a sense of resigned acceptance that the practice will continue in some form. The leading treatise on Supreme Court practice, for example, says that “there appears to be agreement that summary disposition is appropriate to correct clearly erroneous decisions of lower courts.”<sup>96</sup> As William Baude puts it, “[W]holesale criticism is fading” and “the Court has worked to regularize” the practice.<sup>97</sup> Further, as noted above, the objection to one-line opinions from the earlier era no longer applies, because the Court now at least provides “written opinions [sufficient to] ... guide the litigants and enable the Court's reasoning to be judged.”<sup>98</sup>

As the practice of summary reversals has become regularized, a new line of critique has emerged questioning the basis on which the Court is choosing to deploy this tool. Baude describes this as an issue of “agenda selection,” noting that “the Court's criteria here are

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95. See SHAPIRO ET AL., *supra* note 11, at 354-57 (citing dissenting opinions and providing the authors' own views).

96. *Id.* at 352.

97. Baude, *supra* note 1, at 20.

98. *Id.* at 21.

not explained and may not be fully thought through.”<sup>99</sup> Others, including most recently Alex Hemmer, connect this to a larger puzzle raised by the selection process: “[H]ow can a case be significant enough to merit the Court’s consideration, but not significant enough to warrant the benefits of adversarial procedure?”<sup>100</sup>

The absence of any stated criteria, apart from the presence of clear error, undermines the rule of law as well as the Court’s legitimacy. A full discussion of these complex concepts is not necessary to make a couple of straightforward points. First, a core concept of the rule of law is that the government’s decision-making should be constrained by principles stated in advance.<sup>101</sup> Second, the Supreme Court’s institutional legitimacy depends at least in part on the public’s perception that it is making decisions based on legal—rather than political—grounds.<sup>102</sup> By placing no constraint on its future use of summary reversals, the Court undermines both of these values.<sup>103</sup>

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99. *Id.* at 38. In *White v. Pauly*, the Court offered a brief explanation for why it has taken a particular interest in qualified immunity cases. 137 S. Ct. 548, 551 (2017) (per curiam). First, “qualified immunity is important to ‘society as a whole.’” *Id.* (quoting *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015)). Second, “as ‘an immunity from suit,’ qualified immunity ‘is effectively lost if a case is erroneously permitted to go to trial.’” *Id.* (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). These justifications do not withstand serious scrutiny. As Baude explains, the former point could be made about “nearly any alleged error in public law,” while the latter point could be made about “every defense appealable under the collateral order doctrine.” William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 87 (2018). These features of qualified immunity do nothing to explain why it “deserves a special place on the Supreme Court’s agenda.” *Id.*

100. Hemmer, *supra* note 73, at 209 (emphasis omitted). Brown made a similar point earlier: “[I]f the Court exercises its discretionary jurisdiction to deal with issues of national significance, almost by definition those issues warrant, if they do not require, more than summary consideration.” Brown, *supra* note 12, at 94.

101. See Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307, 1313 (2001) (“At a minimum, therefore, the rule of law requires fairly generalized rule through law [and] a substantial amount of legal predictability (through generally applicable, published, and largely prospective laws).”); see also Richard H. Fallon, Jr., “*The Rule of Law*” *As a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 3 (1997) (describing a familiar understanding of the rule of law as requiring that the law’s meaning “be fixed and publicly known in advance of application, so that those applying the law, as much as those to whom it is applied, can be bound by it”).

102. See Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1839-40 (2009).

103. Of course, it has long been understood that purportedly neutral criteria do not entirely remove discretion or obviate the need for value judgments. See Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 991-92 (1978). But few

Not only has the Court failed to identify such constraints, but its use of summary reversals for error-correction purposes directly contradicts its stated criteria for granting discretionary review. As noted earlier, the Court's own rules indicate that "compelling reasons" are required and the need to correct error will rarely suffice.<sup>104</sup> Given that the rule contemplates exceptions, the Court's occasional intervention for truly unusual circumstances would not be as objectionable. But the lack of an express justification is more troubling because the Court does in fact regularly intervene in unremarkable cases, and its interventions are not random, but follow a clear pattern.

Without coming out and saying what it is doing, the Court has targeted federal habeas and qualified immunity cases for special attention, and it intervenes in a one-sided manner.<sup>105</sup> This unexplained focus gives rise to the "cynical interpretation" that a majority of Justices care enough to intervene only when the lower court incorrectly rules against the state or government official, but not when it incorrectly rules the other way.<sup>106</sup> Such a selective use of error correction exacerbates concerns about the rule of law and legitimacy, suggesting that the Court is manipulating certiorari procedures to carry out a veiled substantive agenda that should be openly acknowledged and subjected to debate.<sup>107</sup>

Commentators and individual Justices writing separately have filled the gap with a rationale that seems adequate to explain current practice. The most common reason for summary reversals appears to be a desire to rebuke the lower courts. This occurs in areas in which the Supreme Court has perceived "resistance"<sup>108</sup> or

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would disagree that some effort to base decisions on principle is desirable. *See id.* at 1001 (acknowledging disagreement over "how attainable [neutral] principles are and whether they should give way to other ends of judicial decision," but suggesting that no "critic denies that at least one thing for which courts should strive is principled justification").

104. SUP. CT. R. 10. The rules also contemplate the possibility of summary disposition, though again without any criteria to govern its use. *See* SUP. CT. R. 16.1.

105. *See supra* note 84 and accompanying text.

106. Baude, *supra* note 1, at 39.

107. *Id.*; *see also* Robert M. Yablon, *Justice Sotomayor and the Supreme Court's Certiorari Process*, 123 YALE L.J. F. 551, 562 (2014), <http://yalelawjournal.org/forum/justice-sotomayor-and-the-supreme-courts-certiorari-process> [<https://perma.cc/S8AD-B382>] (describing "the current Court's disdain for error correction [as] selective" and noting its willingness to "summarily revers[e] decisions favorable to criminal defendants and habeas petitioners").

108. Hartnett, *supra* note 5, at 597.

“rebellion”<sup>109</sup> by the lower courts. Federal habeas and qualified immunity constitute the largest groups of cases of that type, but similar concerns may underlie the Court’s summary reversals in arbitration and sentencing cases.<sup>110</sup> Taking on a substantial number of these cases, even if only to correct errors, is considered important to reinforcing the Court’s supremacy.<sup>111</sup> Moreover, because the goal in such cases is to send a message of disapproval, the lack of full plenary consideration actually strengthens that message by implying that the correct result was obvious.<sup>112</sup>

The Court’s language in some of its summary reversals supports this explanation. For example, it has expressed frustration that lower courts repeatedly fail to apply a sufficiently deferential standard under the Antiterrorism and Effective Death Penalty Act (AEDPA),<sup>113</sup> and that they need continual reminders “not to define clearly established law at a high level of generality” in qualified immunity cases.<sup>114</sup> In one instance, the Court opened its opinion by describing the Sixth Circuit’s decision to set aside two murder convictions as “based on the flimsiest of rationales.”<sup>115</sup> In another, after summarizing and quoting from the Ninth Circuit’s reasoning, the Supreme Court declared in a one-word sentence, “No.”<sup>116</sup>

Similarly, dissenting Justices have referred to summary reversals as a “bitter medicine”<sup>117</sup> needed only when the lower court has attempted “to defy”<sup>118</sup> precedent in explaining why a particular case did not warrant such treatment. Justices Scalia and Alito have been the most explicit in laying out their rationales when voting to summarily reverse. Summary reversal was not appropriate merely

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109. Baude, *supra* note 1, at 39.

110. *See id.* at 31-32.

111. *See id.*

112. *See* Hartnett, *supra* note 5, at 613 (“[S]ummary reversal sends a corrective message, particularly in the face of resistance, that reversal after plenary consideration does not.”).

113. *See, e.g.,* White v. Wheeler, 136 S. Ct. 456, 460 (2015) (per curiam) (“This Court, time and again, has instructed that AEDPA ... ‘erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court.’” (quoting Burt v. Titlow, 571 U.S. 12, 19 (2013))).

114. Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) (per curiam) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011)).

115. Parker v. Matthews, 567 U.S. 37, 38 (2012) (per curiam).

116. Glebe v. Frost, 135 S. Ct. 429, 431 (2014) (per curiam).

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

118. Pavan v. Smith, 137 S. Ct. 2075, 2079 (2017) (Gorsuch, J., dissenting).

to correct the error in a qualified immunity case that the defendant officer won below.<sup>119</sup> But the Court may need “to perform the unaccustomed task of reviewing utterly fact-bound decisions that present no disputed issues of law” to prevent “federal judges [who] like to second-guess state courts” from evading “Congress’s abridgment of their habeas power.”<sup>120</sup> Baude summarizes the apparent theory as follows:

Their idea seems to be that summary reversals are warranted in areas of law where there is an unusual epidemic of lower-court judges willfully refusing to apply the Supreme Court’s interpretations of the law. And implicit in their votes is an assertion—true, or not—that there is an epidemic of pro-habeas willfulness in habeas cases, but not of pro-officer willfulness in civil rights suits.<sup>121</sup>

Hemmer provides a theoretical grounding for the practice, arguing that it is not merely an expression of frustration, but rather an exercise of the Court’s “managerial” authority.<sup>122</sup> Summary reversals allow the Court to “send signals about its commitments and priorities, even on settled areas of law, by illustrating particularly egregious misapplications.”<sup>123</sup> He considers summary reversals alongside so-called GVRs (grant, vacate, and remand orders), which enable the Court to “ensure that more lower-court decisions take account of intervening precedent without the Court spending its own time and energy on cases that pose similar issues.”<sup>124</sup> Together, these tools show the Court “acting in its *managerial* capacity—rather than its lawmaking or its error-correcting capacity—to

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119. *Tolan v. Cotton*, 134 S. Ct. 1861, 1868-69 (2014) (Alito, J., concurring in the judgment). Justice Alito was joined by Justice Scalia. *Id.* at 1868.

120. *Cash v. Maxwell*, 565 U.S. 1138, 1147 (2012) (Scalia, J., dissenting from denial of certiorari) (emphasis omitted). Justice Scalia was joined by Justice Alito. *Id.* at 1141.

121. Baude, *supra* note 1, at 27.

122. Hemmer, *supra* note 73, at 210.

123. *Id.* at 213. Richard Re has written more generally about the Supreme Court’s use of nonprecedential signals, in which the Justices may “indicate some aspect of how lower courts should decide cases” through “summary orders, statements during oral argument, separate opinions, and dicta in majority opinions.” Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 942 (2016). He identifies pros (“promot[ing] efficiency and uniformity”) and cons (“the challenge of reliably identifying signals”) to the Court’s use of signals and lower courts’ reliance on them. *Id.* at 944.

124. Hemmer, *supra* note 73, at 213.



dispose of more cases with less effort, to correct egregious legal errors when they arise, and to preserve the Court's limited resources for cases that present novel legal problems."<sup>125</sup>

As the above summary indicates, observations from scholars and the Justices themselves can largely explain what the Court is doing and why. But the rule-of-law and legitimacy concerns identified above will persist until the Court actually adopts this explanation in a majority opinion. If the need to police resistance is the basis on which error-correcting summary reversals are justified, that principle should be explicitly adopted so that it can constrain decision-making going forward.

Explicit adoption would also encourage more open debate over the Court's chosen criteria as well as permit scrutiny of whether the Court is properly following them. In particular, future research may help to uncover whether lower courts are in fact erring more systematically in federal habeas and qualified immunity cases, and thus provide a basis to critique or reaffirm the Court's current focus. Likewise, future certiorari petitioners would have an incentive to search for evidence of systematic error in the lower courts to encourage the Court to summarily reverse a fact-bound case. As one possibility, Baude cites research suggesting that lower courts have systematically erred in their application of the Speedy Trial Act.<sup>126</sup> To the extent the Court is presented with such petitions and accompanying research in the future, its willingness to apply the stated principle faithfully would go a long way toward addressing the rule-of-law and legitimacy concerns. But the key point for present purposes is that the Court must articulate this or some other principle to begin moving in the right direction.

Setting aside the rule-of-law and legitimacy concerns, whether the Court's method of rebuking lower courts is likely to be effective in achieving the Court's apparent ends is a separate question. I turn to that issue in the next Section.

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125. *Id.*

126. See Baude, *supra* note 1, at 39 (citing Shon Hopwood, *The Not So Speedy Trial Act*, 89 WASH. L. REV. 709, 744-45 (2014)).

### B. *The Limits of Rebuke*

The language in the Court's summary reversals in habeas and qualified immunity cases reflects apparent frustration that the message the Court has been trying to send has not gotten through. This Section questions whether continuing efforts to rebuke lower courts are likely to promote the harmonization the Court seeks.

The Court's goal in these cases is to ensure that lower courts are consistently applying the articulated legal standards with appropriate deference to other decision makers.<sup>127</sup> The challenge facing the Court is that these standards require the exercise of case-by-case discretion, and in the absence of Supreme Court precedent that is directly on point, lower-court judges have flexibility to reach results that differ from what the Court itself might have decided.<sup>128</sup>

The question is whether fear of summary reversal is likely to change the behavior of judges, and the answer is more complicated than it might initially appear. Consider first what the lower-court judge's role is supposed to entail. There is no doubt that lower-court judges are obligated to follow squarely applicable Supreme Court precedent. The more controversial and unsettled question is whether they are obligated to anticipate the direction in which the Court is headed, or whether they should instead continue to apply their own best understanding of the law.<sup>129</sup> For example, if the Court has read Fourth Amendment rights narrowly in several contexts, should a lower-court judge who has a more robust vision of the Fourth Amendment (with at least some case law and history to support it) nonetheless follow the Court's lead in a context it has not previously addressed?

For those judges that believe they are obligated to apply their own best judgment, reversal is just a part of doing business.<sup>130</sup> Some

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127. See *supra* notes 113-16 and accompanying text.

128. See Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 575-76 (1987).

129. See *Re*, *supra* note 123, at 936-45 (describing different models for understanding the scope of the Supreme Court's authority); see also Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 390 (2007) ("While it is widely accepted that judges have a duty to follow the precedents of a superior court, the claim that lower courts should also conform to the policy preferences of the Supreme Court, even when not expressed in binding decisional law, is quite distinct and open to serious question.")

130. See Kim, *supra* note 129, at 402-03 (questioning whether fear of reversal is a major factor in motivating compliance with Supreme Court precedent).

may even embrace the idea of active resistance. The recently deceased Judge Reinhardt, who was described as “[t]he last great liberal lion” of the federal courts,<sup>131</sup> famously scoffed at the idea that reversal by the Supreme Court should be a badge of dishonor.<sup>132</sup> He had his own understanding of what the Constitution requires, and although he was obligated to follow Supreme Court precedent, he did not feel bound to anticipate the Court’s next move to the right.<sup>133</sup> And with the fact-specific inquiries required by habeas and qualified immunity cases, lower-court judges will often have flexibility to distinguish Supreme Court precedent with which they disagree.<sup>134</sup>

For judges such as Reinhardt, it is difficult to imagine that the fear of summary reversal influences the calculation. If they believe the Supreme Court is headed in the wrong direction and they are obligated to make their own best judgments about the law, then reversal by the Court is simply an indication of disagreement.<sup>135</sup> Of course, most lower-court judges are not willing to speak as openly as Judge Reinhardt about their resistance impulses, so it is difficult to say how many hold similar attitudes.<sup>136</sup> But one relevant data point is that several judges have been summarily reversed on multiple occasions in the same categories of cases, suggesting that the first one or two may not have deterred them.<sup>137</sup> And even those who would not go so far as to embrace the idea of resistance may

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131. Garrett Epps, *In Prop. 8 Ruling, a Liberal Lion Coos*, AM. PROSPECT (Feb. 7, 2012), <http://prospect.org/article/prop-8-ruling-liberal-lion-coos> [https://perma.cc/S8RX-5E6J].

132. See Andrew Manuel Crespo, *In Memoriam: Judge Stephen Reinhardt*, 131 HARV. L. REV. 2101, 2102 (2018).

133. Andrew Crespo, a former Reinhardt clerk, describes Judge Reinhardt as being willing to resist the direction in which Supreme Court doctrine was predictably headed, but not willing to defy the Court once it had squarely addressed an issue. See *id.*

134. See Toby J. Heytens, *Doctrine Formulation and Distrust*, 83 NOTRE DAME L. REV. 2045, 2088 (2008) (noting the “great deal of leeway” judges have in applying such standards); see also Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 819 (1994) (“Considerable anecdotal evidence suggests that when judges care deeply about a particular legal issue but disagree with existing precedent, they often attempt to subvert the doctrine and free themselves from its fetters by stretching to distinguish the holdings of the higher court.”).

135. See Kim, *supra* note 129, at 433; Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 14-15 (1993).

136. For a discussion of lower-court resistance in other contexts, see Re, *supra* note 123, at 960-66.

137. See Baude, *supra* note 1, at 41-47 (listing judges who have been summarily reversed three or more times and the issues involved).

consider themselves ethically bound to focus solely on legal considerations and ignore the threat of personal stigma from being summarily reversed as irrelevant.<sup>138</sup>

At the same time that summary reversals are failing to dissuade one group of judges, a different set is likely to be overdeterred by the threat of being summarily reversed. Notably, lower-court judges have begun to acknowledge this threat as an explicit consideration.<sup>139</sup> The motivating factors for such judges may vary. One group may take the view, noted above, that lower-court judges should anticipate the general direction of the Court's decisions.<sup>140</sup> Another group may be generally in agreement with the Court's jurisprudence in these areas, or else hold neutral or weak views.<sup>141</sup> Still another group may believe that being summarily reversed harms their reputations.<sup>142</sup> These groups are not mutually exclusive. But for all of them, it will be difficult not to take the path of least resistance and deny habeas relief or grant qualified immunity at every opportunity.

It may be that a majority of the Court believes the bar in these cases should be so high that overdeterrence is not a serious concern. But if five Justices believe that at least some cases warrant granting habeas relief and denying qualified immunity, then there is a risk that the current approach to summary reversals will skew results too far in the other direction. Moreover, the combined effect of some judges resisting and others being overdeterred is to exacerbate the inconsistencies in lower-court decisions and create an overall sense of dysfunction. The question is whether any strategy other than rebuke is likely to be more effective.

The next Part proposes a new approach to summary dispositions that indeed has the potential to reduce inconsistency in federal

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138. See Kim, *supra* note 129, at 402-04 (arguing that judges are most influenced by "legal preferences" rather than either fear of reversal or political preferences).

139. See, e.g., *Morrow v. Meachum*, 917 F.3d 870, 876 (5th Cir. 2019) (citing the threat of summary reversal as a reason to "think twice before denying qualified immunity").

140. See Re, *supra* note 123, at 940-42.

141. See Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2159 (1998) ("Judges are more likely to obey legal doctrine when such doctrine supports the partisan or ideological policy preferences of the court majority.").

142. See Aaron L. Nielson & Christopher J. Walker, *Strategic Immunity*, 66 EMORY L.J. 55, 89-90 (2016) (citing evidence of the perceived reputational harm of being reversed in general).

habeas and qualified immunity decisions, though the proposal is designed with a broader purpose than merely improving those particular areas of law.

### III. A NEW APPROACH TO SUMMARY DISPOSITIONS

In this Part, I provide a novel normative justification for the use of summary dispositions. It is not my goal to justify existing practice, although some instances would indeed be proper under my theory. My goal rather is to contend that the nature of summary dispositions makes them well suited to a particular purpose, and then in Part IV to suggest how practices could be reshaped to serve that purpose most effectively.

This Part proposes that the Supreme Court use summary dispositions as a means of developing the meaning of high-level legal standards. Many doctrinal tests, whether imposed by statute or developed by the Supreme Court, cannot be meaningfully understood until they have been applied to specific facts in a series of cases.<sup>143</sup> But the Court does not have room on its docket to grant plenary review of numerous cases on the same subject merely to refine the contours of an otherwise clearly stated standard. Summary dispositions can be useful for precisely that purpose.

The first Section below lays out the proposal in greater detail. The second Section elaborates on the proposal's benefits by explaining how even short, *per curiam* opinions can have precedential value and then addresses the particular value the proposal has for the federal habeas and qualified immunity contexts. The final Section considers the proposal's costs.

#### A. A New Purpose

When Congress instructs federal courts not to grant a habeas petition unless the state court's decision is "contrary to, or involved an unreasonable application of, clearly established Federal law," that instruction is hardly self-defining.<sup>144</sup> The same is true when the Court bases qualified immunity on whether there has been a

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143. See *infra* notes 151-54 and accompanying text.

144. 28 U.S.C. § 2254(d)(1) (2012).

violation of “clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>145</sup>

The question of reasonableness is the quintessential legal standard. In applying a standard, as opposed to a determinate rule, the decision maker must exercise substantial discretion to weigh all the relevant circumstances in determining what the law requires.<sup>146</sup> Standards are a necessary feature of any legal system because it is impossible to prescribe rights and obligations for every conceivable circumstance. The tradeoffs between rules and standards are well known,<sup>147</sup> and although there may be disagreement about whether the system as a whole needs more of one or the other form of directive,<sup>148</sup> even those who tend to prefer rules agree that standards are, in some circumstances, inevitable.<sup>149</sup> To use a common example, determining liability for negligence requires asking the high-level question of what a reasonably prudent person would have done, because it is “impossible to provide specific rules to guide all the behavior that is governed by the negligence standard.”<sup>150</sup>

The formulation of such high-level standards does not, however, mean that no further guidance can be provided. It is a familiar feature of common law systems that the law’s content develops over the course of a series of cases,<sup>151</sup> and although the Supreme Court is not formally a common law court, it often functions like one in its

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145. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

146. Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58-59 (1992).

147. *See id.* at 62-69. *See generally* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992) (analyzing the tradeoffs from an economic perspective).

148. For example, Sullivan shows how the Justices split on this question of form in the 1991 Term, most prominently Justice Scalia on the side of rules and Justice Stevens on the side of standards. *See Sullivan, supra* note 146, at 83-95.

149. *See, e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1182 (1989) (acknowledging the need for standards “in those matters on which law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact pronouncement” (quoting ARISTOTLE, *POLITICS* bk. III, ch. xi, § 19, at 127 (Ernest Barker ed. & trans., Oxford 1946))); *see also id.* at 1187 (“We will have totality of the circumstances tests and balancing modes of analysis with us forever.... All I urge is that those modes of analysis be avoided where possible.”).

150. BRYAN A. GARNER ET AL., *THE LAW OF JUDICIAL PRECEDENT* 81 (2016).

151. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 23 (1921) (describing the common law method as “inductive,” in which courts draw “generalizations from particulars”).

development of constitutional or federal statutory law.<sup>152</sup> As a high-level standard gets applied to new facts, its once vague meaning becomes more precise.<sup>153</sup> Each individual case becomes a precedent to which later courts can analogize the facts before them.<sup>154</sup> The body of cases as a whole enables practitioners to develop a “good working sense of the law.”<sup>155</sup> Indeed, it may be possible for the courts to articulate more precise, rule-like directives for particular contexts that fall within the general standard.<sup>156</sup>

Of course, the Court can sometimes perform this function through its plenary docket. But it cannot regularly devote time to this task when other areas of the law—perhaps where there is no governing legal standard or there exist conflicting approaches among the circuits—are in more urgent need of attention. Summary dispositions allow the Court to perform this function without expending the resources needed to review merits briefs and hold oral argument.<sup>157</sup>

Notably, the use of summary dispositions for this purpose avoids one of the most significant objections to the practice. That is, critics have objected most strenuously to summary reversals that resolve complex legal questions or otherwise revise the law, primarily because of the greater risk of error that such cases present.<sup>158</sup> Such risks are reduced when summary dispositions are used to define the contours of a previously established legal standard. The risk of creating bad law is minimal because the core principles should already be clear and the new case merely helps fill out the larger

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152. See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996).

153. Hellman makes this point, though he does so as a concession while criticizing summary reversals, not as a way to argue that they be used for this purpose. See Hellman, *supra* note 46, at 831 (“[E]ven if a case does no more than apply a well-settled rule to a particular set of facts, the decision, together with others, will help in delineating the contours of the rule.”).

154. See Watford, Chen & Basile, *supra* note 19, at 569.

155. GARNER ET AL., *supra* note 150, at 81.

156. See Scalia, *supra* note 149, at 1183; see also Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 415 (1985) (explaining how the reasonable person standard could be translated into more precise rules for specific contexts such as “automobile accidents, professional services, recreational activities, and so on”).

157. In emphasizing efficiency, my proposal is consistent with Hemmer’s understanding of summary reversals as an exercise of managerial authority. See Hemmer, *supra* note 73, at 210. But as noted above, I am offering a new normative justification for when this authority should be used.

158. See Hellman, *supra* note 46, at 833; Note, *supra* note 35, at 709.

picture. Further, under Richard Re's model for interpreting Supreme Court signals, summary dispositions could be treated as less authoritative than "conventional precedent."<sup>159</sup> Although the Supreme Court itself has not taken this view, it could do so and thereby create lower stakes for each individual case. Such an approach would give the Court a freer hand to refine its thinking in future cases while still providing lower courts with some guidance to draw on in the meantime.

That still leaves the risk of reaching the wrong result in the case at hand. Dissenting Justices in summarily reversed cases have sometimes noted that the fact-intensive nature of the issues warrants a fuller review of the record than the Court conducted.<sup>160</sup> The risk of errors of that sort can never be avoided entirely, and their possibility provides a reason for the Court to exercise caution and restraint in using this tool. I offer further thoughts on the issue of the risk of error in Parts IV.B and IV.C below.

Related to the previous point, my proposal provides an answer to the puzzle highlighted by Hemmer regarding how a case can be worthy of a certiorari grant but not important enough to require plenary review.<sup>161</sup> The answer is that the case can be important but not complex. The issues presented in such a case should typically be straightforward for the reasons just discussed. This is not to say that the cases I have in mind will be easy; they will require thoughtful deliberation and calibrated judgment. But compared with cases presenting thorny legal questions, cases requiring judgment calls on the application of law to fact can be resolved without the same level of adversarial process.

As for their importance, summary dispositions used in the way I propose serve the valuable purpose of clarifying the contours of key legal standards. Each individual case may be relatively insignificant from the standpoint of developing the law, but multiple cases elaborating the same doctrinal tests serve that function in the

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159. See Re, *supra* note 123, at 943.

160. See, e.g., *Cavazos v. Smith*, 565 U.S. 1, 16-17 (2011) (Ginsburg, J., dissenting) ("But even if granting review qualified as a proper exercise of our discretionary authority, I would resist summary reversal of the Court of Appeals' decision. The fact-intensive character of the case calls for attentive review of the record, including a trial transcript that runs over 1,500 pages. Careful inspection of the record would be aided by the adversarial presentation that full briefing and argument afford.").

161. See Hemmer, *supra* note 73, at 221.



aggregate.<sup>162</sup> Indeed, there is no way for the Court to flesh out the meaning of high-level standards but through elaboration in multiple cases.

### *B. Benefits*

In this Section, I elaborate on the benefits of the proposal, first explaining more generally why even short, per curiam decisions have precedential value and then exploring the particular potential value they hold in the contexts of federal habeas and qualified immunity.

#### *1. The Precedential Value of Summary Dispositions Generally*

Discussions of summary dispositions sometimes suggest that they hold minimal value as precedent. For example, Gerard Magliocca describes that value as “close to zero,” because “that’s what happens to short opinions that are long on facts and short on analysis.”<sup>163</sup> The suggestion that fact-bound opinions cannot effectively guide future reasoning has intuitive appeal.<sup>164</sup> Certainly they have less of an impact than new pronouncements of high-level principles that may apply to a broad range of cases. But it would be an overstatement to suggest that summary dispositions cannot contribute meaningfully to the development of the law.

A decision about how a standard applies to a given set of facts can be immediately useful by serving as a source to which later cases can analogize.<sup>165</sup> This value is clearest for factually similar cases,

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162. See *supra* notes 151-55 and accompanying text.

163. Gerard Magliocca, *Summary Reversals in the Supreme Court*, CONCURRING OPINIONS (June 11, 2012), <https://concurringopinions.com/archives/2012/06/summary-reversals-in-the-supreme-court.html> [<https://perma.cc/TKY6-EP49>].

164. The Supreme Court has made the same observation in the context of explaining why courts should sometimes skip the first step in qualified immunity analysis, whether there has been a constitutional violation, and go straight to the second step, whether the official violated a clearly established right of which a reasonable person would have known. See *Pearson v. Callahan*, 555 U.S. 223, 237 (2009) (“[T]here are cases in which the constitutional question is so factbound that the decision provides little guidance for future cases.”). I discuss *Pearson* in the next Section.

165. See Richard B. Cappalli, *The Common Law’s Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755, 768 (2003) (“Even if resolution of the new case is easy, the new decision has precedential value because the rule has been applied to a fact variation. The general rule

and some factual scenarios may recur so often that it will be possible to develop useful, targeted rules for a subcategory of the cases governed by the general standard.<sup>166</sup> Further, that the later case is not factually identical to the earlier one does not mean that guidance cannot be extrapolated. To be sure, the later court has discretion in deciding either that the similarities are sufficient to require the same result, or that the differences warrant the opposite conclusion.<sup>167</sup> But the earlier court's decision provides a valuable starting point for the analysis.<sup>168</sup> Cass Sunstein defends reasoning by analogy against charges of indeterminacy, emphasizing that some discipline is possible because analogies serve as "fixed points" in the process.<sup>169</sup>

Nor is the possibility of analogical reasoning limited to cases that are substantially similar on the facts. When a court confronts a case "for which no direct precedent exists," it does not simply start from scratch, but rather seeks guidance in analogous cases.<sup>170</sup> The goal in such reasoning is to further "principled consistency," recognizing that the two superficially dissimilar cases share a deeper commonality that requires the law to treat them the same.<sup>171</sup> Sunstein suggests that analogical reasoning, as a form of "bottom-up" thinking, allows ideas to be "developed from the details, rather than imposed ... from above."<sup>172</sup> I would add only that, even when a general legal standard has already been imposed, it is through concrete cases and analogical reasoning that the meaning of that standard develops.

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or exception has expanded, despite its verbal stability, by sweeping in the new complex of facts.").

166. *See id.* at 786 ("Over time, when case volume is large, a host of quite determinate rules of law are generated from the same starting-point standard being applied in the same genre of cases.").

167. *See* GARNER ET AL., *supra* note 150, at 92; *see also id.* at 73 (noting that the "later court always gets the last word").

168. *See* Martha Dragich Pearson, *Citation of Unpublished Opinions as Precedent*, 55 HASTINGS L.J. 1235, 1258-59 (2004).

169. Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 777 (1993). Sunstein's elaboration of the value of analogies dovetails with my broader argument about the need to illustrate high-level legal standards: "Without analogies, relevant principles often cannot be described in advance except at an uninformatively high and crude level of generality." *Id.* at 775.

170. GARNER ET AL., *supra* note 150, at 105.

171. Sunstein, *supra* note 169, at 746.

172. *Id.*

Furthermore, setting aside the potential for analogizing, in the longer run, a group of fact-bound decisions can provide a broader sense of how the standard should be calibrated, and such calibration is useful even to courts considering factually dissimilar cases.<sup>173</sup> In other words, seeing a range of cases that have been judged reasonable and unreasonable provides a general sense of where the line is. Certainly the Supreme Court's habeas and qualified immunity jurisprudence has demonstrated the high bar needed for a state court's decision or government official's conduct to be deemed unreasonable,<sup>174</sup> and understanding where the bar is helps to guide analysis even when factual analogizing is not possible. Conversely, the lack of calibration for the plausibility pleading standard means lower courts may diverge substantially on where to draw that line.<sup>175</sup>

Finally, to the extent the skepticism about precedential value concerns the shortness of summary dispositions, that objection seems unwarranted based on the actual product the Court typically produces. Under current practices, per curiam summary dispositions generally consist of several pages laying out the relevant factual circumstances, the governing legal standard, and a concise rationale.<sup>176</sup> They do not resemble, as a point of contrast, the unpublished memorandum dispositions that some circuit courts issue, with no factual summary and a conclusory assertion of the result.<sup>177</sup> When the legal standard is clear and only its application is unsettled, a short opinion suffices to resolve the case and provide some guidance to future litigants.<sup>178</sup>

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173. See GARNER ET AL., *supra* note 150, at 105-06, 113.

174. See *supra* notes 84-93 and accompanying text.

175. See *supra* notes 21-27 and accompanying text.

176. See *supra* notes 53-54 and accompanying text.

177. See Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315, 360-64 (2011) (describing the extent to which different circuits rely on unpublished dispositions). Under current rules, such dispositions may be cited but are not treated as precedential. See *id.* at 361. For an example of the most bare-bones variety, pulled randomly from a list of recent cases, see *Polidur v. Barr*, No. 17-71436, 2019 WL 764424, at \*1 (9th Cir. Feb. 21, 2019) (deciding the appeal in six textual sentences, including one on jurisdiction and one on the standard of review).

178. See Cappalli, *supra* note 165, at 793 (suggesting that circuit courts dealing with settled law should nonetheless write short opinions, rather than resorting to unpublished dispositions).

As evidence of the precedential value I have argued for, it may be useful to examine how lower courts have actually used a recent summary disposition by the Supreme Court. Consider *Kisela v. Hughes*, which I have chosen because it is a recent case that drew a dissent and is therefore likely to provide more useful guidance than a more obvious case.<sup>179</sup> In *Kisela*, three police officers responded to a 911 call about a woman acting erratically while holding a knife.<sup>180</sup> They found Amy Hughes with a kitchen knife and observed her take several steps toward another woman, Sharon Chadwick, who they would later learn was Hughes's roommate.<sup>181</sup> Standing on the other side of a chain-link fence, the police officers twice ordered Hughes to drop the knife.<sup>182</sup> When she failed to comply or otherwise acknowledge the officers' commands, one of the officers, Andrew Kisela, fired four shots, striking Hughes and causing non-life-threatening injuries.<sup>183</sup> The Court held that Kisela was entitled to qualified immunity, concluding that "[t]his is far from an obvious case in which any competent officer would have known that shooting Hughes to protect Chadwick would violate the Fourth Amendment."<sup>184</sup>

*Kisela* was a fact-bound case in that its holding depended on the particular combination of several circumstances.<sup>185</sup> In support of its conclusion, the Court emphasized that "Kisela had mere seconds to assess the potential danger to Chadwick," that Hughes had just been observed acting erratically while holding a large knife, and that "Hughes had moved to within a few feet of Chadwick" while failing to acknowledge orders to drop her knife.<sup>186</sup> But despite this fact-intensive reasoning, the Court's opinion is valuable in helping lower courts make the difficult judgment about where the line is for an officer who has used deadly force to still be entitled to qualified immunity.

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179. 138 S. Ct. 1148 (2018) (per curiam). Justice Sotomayor dissented, joined by Justice Ginsburg. *Id.* at 1155 (Sotomayor, J., dissenting). In Part IV.C below, I explain why borderline cases are more useful than outliers in illustrating the operation of a legal standard.

180. *Id.* at 1150.

181. *Id.* at 1151.

182. *Id.*

183. *Id.*

184. *Id.* at 1153.

185. *Id.*

186. *Id.*

The *Kisela* decision was handed down on April 2, 2018, and in roughly a year and a half it has already been cited at least 517 times.<sup>187</sup> Of course, many of these citations are for basic principles that happened to be restated by *Kisela* but could just as easily have been found in many other qualified immunity cases. Twenty-eight of the citations are given four bars on Westlaw's depth of treatment scale, which means the case "examined" *Kisela*, while another 122 citations are given three bars, which means the court "discussed" *Kisela*.<sup>188</sup>

It is not the sheer length of the *Kisela* discussion, which is how Westlaw determines its depth of treatment rating,<sup>189</sup> that matters. Again, cases may quote at length from *Kisela* simply because it provided a recent statement of the relevant principles.<sup>190</sup> What matters to the present discussion is how many cases were meaningfully guided by *Kisela*. In particular, did the lower courts engage with the facts of *Kisela* to help with interpreting the facts they were confronting? Those that did can be more fairly characterized as having been guided by *Kisela* and thus having benefited from its availability as precedent.

I reviewed the 150 decisions available as of November 10, 2019, with three or four bars on the depth of treatment scale to see how many of them engaged with the facts of *Kisela*.<sup>191</sup> Of the twenty-eight four-bar cases,<sup>192</sup> I would characterize eleven as having done so: four found *Kisela* distinguishable and denied qualified immunity,<sup>193</sup> while the other seven granted qualified immunity.<sup>194</sup>

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187. *Kisela v. Hughes* *Citing References*, THOMSON REUTERS, <https://1.next.westlaw.com> [<https://perma.cc/K7KS-8ENU>] [hereinafter *Citing References*] (login to Westlaw; search "*Kisela v. Hughes*, 138 S. Ct. 1148 (2018)"; click on tab labeled "*Citing References*"; on left side click on the filter titled "Cases").

188. See Thomson Westlaw, KeyCite on Thomson Reuters Westlaw, THOMSON REUTERS 1, 3 <https://lscontent.westlaw.com/images/content/KeyCite%20on%20Westlaw.pdf> [<https://perma.cc/KQ3A-7HXA>]. Four bars means an "[e]xtended discussion of the cited case or administrative decision; usually more than a printed page of text," while three bars means a "[s]ubstantial discussion of the cited case or administrative decision; usually more than a paragraph but less than a printed page." *Id.*

189. See *id.*

190. See *Kisela*, 138 S. Ct. at 1152-53.

191. See *Citing References*, *supra* note 187.

192. See *id.*

193. *Kelley v. O'Malley*, No. 18-3283, 2019 WL 4667544, at \*3 (3d Cir. Sept. 24, 2019); *Cole v. Carson*, 935 F.3d 444, 454-55 (5th Cir. 2019); *Gardner v. New Jersey State Police*, No. 15-08982, 2018 WL 5342715, at \*12 (D.N.J. Oct. 29, 2018); *Ramirez v. Fonseca*, 331 F. Supp. 3d

Not surprisingly, most of the 122 three-bar citations did not engage with the facts of *Kisela*, but five did: four found *Kisela* distinguishable and denied qualified immunity,<sup>195</sup> while one granted qualified immunity.<sup>196</sup>

What insights can be gleaned from this single example? First, that there were sixteen cases in a short period of time engaging with the facts of *Kisela* is at least some evidence that lower courts find precedential value even in fact-bound summary dispositions. Also of note is the range of ways in which those courts relied on *Kisela*. For example, because the extent of the threat is the central inquiry,<sup>197</sup> *Kisela* would be most directly controlling in any case involving a weapon-wielding victim that made threatening moves. The closest such case of the group involved a victim who held a “garden spade with a pointed metal head” and “advanced towards [the defendant] in an aggressive manner.”<sup>198</sup>

In other cases, the threat was less obvious, and the court had to make a judgment about whether the totality of the circumstances, some of which matched and others of which differed from *Kisela*, justified reaching the same result. For example, the plaintiff-victim in one case did not wield the knife, but possessed it in his pocket.<sup>199</sup> The court in that case relied on *Kisela* in granting qualified immunity, emphasizing that the plaintiff had not only ignored the officer’s commands but did the opposite in moving his hands toward

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667, 674-77 (W.D. Tex. 2018).

194. *Ventura v. Rutledge*, 398 F. Supp. 3d 682, 696-97 (E.D. Cal. 2019); *Lambert v. Town of Merrimack*, No. 17-cv-404-AJ, 2019 WL 1333309, at \*5 (D.N.H. Mar. 25, 2019); *Reyes v. Galpin*, No. 3:18cv831 (JBA), 2019 WL 959680, at \*4 (D. Conn. Feb. 27, 2019); *Cortosluna v. Leon*, No. 17-CV-05133-JSC, 2018 WL 6727824, at \*11 (N.D. Cal. Dec. 21, 2018); *Woods v. City & County of San Francisco*, No. 3:15-CV-05666-WHO, 2018 WL 4896766, at \*9 (N.D. Cal. Oct. 9, 2018); *Kelley v. O'Malley*, 328 F. Supp. 3d 447, 457 (W.D. Pa. 2018) (mem.); *Brunette v. City of Burlington*, No. 2:15-cv-00061, 2018 WL 4146598, at \*26-27 (D. Vt. Aug. 30, 2018).

195. *Estate of Casillas v. City of Fresno*, No. 1:16-CV-1042 AWI-SAB, 2019 WL 2869079, at \*27 (E.D. Cal. July 3, 2019); *Williams v. Goodfriend*, 347 F. Supp. 3d 169, 181 (W.D.N.Y. 2018); *Gibbs v. City of Bridgeport*, No. 3:16-CV-635 (JAM), 2018 WL 4119588, at \*11 (D. Conn. Aug. 29, 2018); *Osterhout v. Timms*, No. 17-CIV-099-RAW, 2018 WL 1915931, at \*5 (E.D. Okla. Apr. 23, 2018).

196. *Laniado v. County of Ocean*, No. 3:18-CV-1513-BRM-TJB, 2018 WL 6171820, at \*8 (D.N.J. Nov. 26, 2018).

197. *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam).

198. *Brunette*, 2018 WL 4146598, at \*26.

199. See *Cortosluna*, 2018 WL 6727824, at \*9.

the knife.<sup>200</sup> Similarly, the victim in a second case held a knife by his side but did not move toward anyone in a way that could be perceived as threatening.<sup>201</sup> The court nonetheless relied on *Kisela* to grant qualified immunity to the officers because the victim, like Hughes, “had been behaving erratically” and disobeyed an order to drop his knife, and unlike Hughes, was believed to have stabbed someone earlier.<sup>202</sup>

When the differences were more significant than the similarities, the courts distinguished the facts of *Kisela* and reached the opposite result. For example, the plaintiff in one such case was carrying a box cutter and ignored police commands to drop it, but was alleged to have been running away at the moment he was shot.<sup>203</sup> Thus, the court found *Kisela* to be distinguishable and denied the defendant’s qualified immunity claim.<sup>204</sup>

For present purposes, what matters is not whether these cases were rightly decided or even whether *Kisela* was necessary to their analysis. The point instead is simply that having *Kisela* available as precedent gave the lower courts a useful starting point. Certainly they were better off than they would have been with only the high-level governing principles to direct them.<sup>205</sup> And although they might have reached the same result guided by other case law with less comparable facts, their discussions of *Kisela* helped to ground their reasoning in a more concrete understanding of when deadly force is warranted in this recurring scenario.<sup>206</sup> In short, *Kisela* had precedential value, and it stands to reason that the same could be said for many similarly fact-bound summary dispositions.

## 2. *The Potential Value for Federal Habeas and Qualified Immunity Cases*

The preceding discussion highlighted potential benefits of the proposed approach that would apply to any area of law in which the

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200. *See id.* at \*11.

201. *Woods v. City & County of San Francisco*, No. 3:15-cv-05666-WHO, 2018 WL 4896766, at \*7 (N.D. Cal. Oct. 9, 2018).

202. *Id.* at \*9.

203. *See Ramirez v. Fonseca*, 331 F. Supp. 3d 667, 675-76 (W.D. Tex. 2018).

204. *See id.* at 677.

205. *See supra* note 153 and accompanying text.

206. *See supra* notes 170-73 and accompanying text.

Court has articulated high-level legal standards. I turn now to the two areas in which the Court has used summary reversals most often, federal habeas and qualified immunity. These areas share a common feature that is worth describing in further detail. My discussion of this feature initially reveals a limitation on my proposal, but also highlights an opportunity for using summary dispositions to create additional precedential value.

The common feature is that both federal habeas and qualified immunity often present two layers of potential vagueness. The tests for when they apply are themselves high-level standards: whether a state court's decision constitutes an unreasonable application of clearly established law<sup>207</sup> (in the case of federal habeas), and whether an official's conduct violates clearly established rights of which a reasonable person would have known<sup>208</sup> (in the case of qualified immunity). But the embedded issue—the underlying law or right in question—may itself require asking a vague question. For example, many habeas claims involve Sixth Amendment challenges to the effectiveness of counsel. The governing doctrinal test there, under *Strickland v. Washington*, is whether counsel's performance "fell below an objective standard of reasonableness."<sup>209</sup> Likewise, many qualified immunity cases involve claims of excessive force under the Fourth Amendment. The governing doctrinal test there, under *Graham v. Connor*, is again an objective reasonableness standard.<sup>210</sup>

Since AEDPA, the Court has reviewed dozens of habeas cases as part of its plenary and summary dockets.<sup>211</sup> The same is true for qualified immunity cases over the past couple of decades.<sup>212</sup> So the need for more precedential guidance on the outer layer standard alone is probably minimal. But what each new case does potentially add is greater clarity surrounding the interaction of the two levels of analysis. For example, when the Court decides that the lower

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207. 28 U.S.C. § 2254(d)(1) (2012).

208. *E.g.*, *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam).

209. 466 U.S. 668, 688 (1984).

210. 490 U.S. 386, 392 (1989).

211. See Justin F. Marceau, *Challenging the Habeas Process Rather than the Result*, 69 WASH. & LEE L. REV. 85, 99 (2012) (counting 115 habeas decisions after AEDPA through 2012).

212. See Baude, *supra* note 99, at 82 (counting thirty cases since the Court decided *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)).



federal court erred in granting habeas relief on an ineffective assistance claim, that case serves as a useful model for what it means for the state court to unreasonably apply the *Strickland* standard. Likewise, when the Court decides that the lower federal court erred in denying qualified immunity in an excessive force case, that decision serves as a useful model for determining when an officer acts unreasonably under the *Graham* standard.

All of that said, it is useful to remember that summary dispositions in habeas and qualified immunity cases cannot by themselves establish the full contours of the underlying legal standards. That is because when the Court concludes that habeas relief is not warranted or qualified immunity should be granted, it need not decide how the embedded issue would be resolved in the absence of the outer layer of reasonableness.<sup>213</sup> This is the key limitation I alluded to at the outset of this Section on the precedential value of summary dispositions in these types of cases.

Critics of the Court's jurisprudence in these areas often bemoan the fact that it allows constitutional violations to go unchecked.<sup>214</sup> AEDPA requires clearly established law to come from the Supreme Court, and though it is unclear whether circuit precedent counts for purposes of qualified immunity, the Court often overrides lower courts' interpretations of their own case law in any event.<sup>215</sup> The problem is that the Supreme Court does not take enough cases in these areas to establish much clear law, leaving only the very general standards to govern.<sup>216</sup> That means that state courts and government officials are able to violate the Constitution without consequence so long as they do not unreasonably apply those vague principles.

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213. See, e.g., *Dunn v. Madison*, 138 S. Ct. 9, 12 (2017) (per curiam) ("We express no view on the merits of the underlying question outside of the AEDPA context."); *Mullenix*, 136 S. Ct. at 308 ("We address only the qualified immunity question, not whether there was a Fourth Amendment violation in the first place.").

214. See, e.g., Reinhardt, *supra* note 4, at 1221-22; see also John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 120 ("For rights that depend on vindication through damages actions, the repeated invocation of qualified immunity will reduce the meaning of the Constitution to the lowest plausible conception of its content.").

215. See, e.g., *Mullenix*, 136 S. Ct. at 311-12.

216. See Stephen I. Vladeck, *AEDPA, Saucier, and the Stronger Case for Rights-First Constitutional Adjudication*, 32 SEATTLE U. L. REV. 595, 598-600 (2009).

With a shift in practices, the Court can take advantage of the efficiency of summary dispositions to have an impact in these areas. As to the criminal procedure issues that arise in habeas cases, the Court can resolve the underlying questions by taking more cases on direct review.<sup>217</sup> As for qualified immunity cases, the Court always has the option to address the underlying constitutional issue, under the two-prong test.<sup>218</sup> It has acknowledged the benefits of doing so, namely that it “promotes the development of constitutional precedent.”<sup>219</sup> But it has also noted the costs of expending “scarce judicial resources on difficult questions that have no effect on the outcome of the case,” when it would be simpler to hold that the right at issue is not clearly established.<sup>220</sup> Moreover, the Court has previously suggested that the fact-bound nature of a case is a reason not to address the first prong.<sup>221</sup> Others have noted how this suggestion creates a catch-22 for civil rights plaintiffs, as courts are told not to create precedent in fact-bound cases, but are also required to deny relief for lack of factually similar precedent.<sup>222</sup> I argued in the previous Section that fact-bound summary dispositions have more precedential value than might first appear. I add here only that, to the extent the Court is convinced of that value, summary dispositions provide an efficient mechanism that enables the Court to resolve more such fact-bound cases.<sup>223</sup>

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217. For this to be possible, litigants must also seek direct review of state court decisions rather than pursuing federal habeas petitions first and reaching the Supreme Court only via that channel. A relatively recent study finds that direct appeals by state prisoners are “grossly underrepresented.” See Giovanna Shay & Christopher Lasch, *Initiating a New Constitutional Dialogue: The Increased Importance Under AEDPA of Seeking Certiorari from Judgments of State Courts*, 50 WM. & MARY L. REV. 211, 216 (2008).

218. Following *Pearson v. Callahan*, courts are no longer required to address the first prong, “whether the facts that a plaintiff has alleged ... make out a violation of a constitutional right,” but can instead opt to proceed straight to the second prong, “whether the right at issue was ‘clearly established’ at the time of defendant’s alleged misconduct.” 555 U.S. 223, 232, 236 (2009) (citations omitted).

219. *Id.* at 236.

220. *Id.* at 236-37.

221. *See supra* note 164.

222. Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887, 1905 (2018).

223. Karen Blum makes a similar call, though directed at lower courts, for addressing the first prong in the qualified immunity analysis even in fact-bound cases:

If cases with factual similarity in particular contexts are needed to make out clearly established law to overcome the second prong of qualified immunity, then courts should not shy away from decisions holding specific fact-bound conduct

In sum, taking these suggested steps would have a twofold impact. First, it would add clarity to general legal standards that critics have long complained are lacking in definition.<sup>224</sup> Second, clarity in the underlying legal standards would in turn increase the availability of clearly established law for habeas and qualified immunity cases, thereby reducing the concern that constitutional violations are going unchecked.<sup>225</sup> In this way, the challenge posed by the unique structure of these doctrines also creates an opportunity for increased usage of summary dispositions to provide this additional value.

This proposal may seem unrealistic given the current composition of the Court. The more conservative Justices who constitute a majority of the Court may believe that state courts and government officials are already subject to overly intrusive oversight.<sup>226</sup> I would reiterate here that my proposal is agnostic as to the substance of the rights at issue and focuses solely on the need for more clarity. At least in the qualified immunity context, it is recognized that greater clarity should operate to the benefit of government officials as well as potential plaintiffs.<sup>227</sup> Still, some Justices may take the view that clarity is undesirable because maintaining legal grey areas ensures a greater degree of deference to the original decision makers.<sup>228</sup>

While I have no direct answer to that viewpoint, I think at least one thing can be said for the proposal that would appeal to any audience. By creating more clearly established law, the Court may find that the quality of the overall system's administration of justice

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unconstitutional. At the very least, holdings rendered in fact-bound cases may serve to shrink the "gray areas."

*Id.* at 1904 (footnote omitted).

224. *See supra* notes 146-49 and accompanying text.

225. *See supra* notes 211-16 and accompanying text.

226. *See Reinhardt, supra* note 4, at 1250 (describing the Court's approach in these areas as reflecting "a strictly conservative and often extreme ideology that elevates the interests of state courts and local officials above those" of individuals and their constitutional rights).

227. The Supreme Court acknowledged this in a case that predated the Court's temporary experiment with mandating the two-step order. *See County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998) ("[I]f the policy of avoidance were always followed in favor of ruling on qualified immunity whenever there was no clearly settled constitutional rule of primary conduct, standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals.").

228. *See Reinhardt, supra* note 4, at 1231 (describing and questioning the Supreme Court's apparent "confidence in the ability of state courts to assess federal constitutional claims," resulting in "total deference").

improves. It is likely that lower-court judges push the envelope with existing precedent in part because they are frustrated by the lack of clearly established law to govern constitutional violations they see as obvious. If the Court offered more precedent in the key areas, those same judges might be willing to tether their decisions more closely to the Court's. Decisions across the system would then be more consistent and the Court could spend less time worrying that the lower courts were resisting its commands.

### C. Costs

Having laid out the benefits of the proposal, I turn now to potential objections about its costs. One major cost I have already considered is the risk of error, which I argued in Part III.A is at least reduced under my proposal, but not entirely avoidable. I return to this question below in Parts IV.B, on the desirability of procedural reforms, and IV.C, on the issue of selecting cases.

A second objection that I anticipate concerns whether the proposed approach to summary dispositions is a good use of the Court's resources. That objection could take one of several forms. Although these objections have force, they do not negate the value of the proposal. Instead, the specifics of the proposal can be adjusted to take these concerns into account.

One way to put the objection would be to say that the need for clarity is not that great. For example, Justice Scalia suggested that some degree of variation in the lower courts is entirely appropriate.<sup>229</sup> He made this point in the context of arguing for a general preference for rules over standards.<sup>230</sup> Once the Court has done as much as it can to fashion precise rules in an area, it need not review numerous cases applying the same standard merely to assess whether, for example, "in *this* particular fact situation, pattern 3,445, the search and seizure was reasonable" under the Fourth Amendment.<sup>231</sup> The Court can tolerate some degree of variation in how courts decide those issues, just as the system "tolerate[s] a fair degree of diversity in what juries determine to be negligence."<sup>232</sup>

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229. Scalia, *supra* note 149, at 1186.

230. *See id.* at 1188.

231. *Id.* at 1186.

232. *Id.*

My response to this potential objection is to agree that perfect uniformity is not the end goal.<sup>233</sup> Rather, the goal is sufficient guidance for lower courts to understand the core of how standards framed at a high level of generality should operate. For standards that have been announced relatively recently, the Court may need to weigh in more frequently. But even for more established standards with extensive case law on point, some periodic refreshing of the law through consideration of new fact patterns would be helpful. Justice Scalia would presumably agree, as he went on to acknowledge that the Court “should take one case now and then, perhaps, just to establish the margins of tolerable diversity.”<sup>234</sup> If he had considered the possibility of using summary dispositions for this purpose, he may even have been willing to review a little more than “one case now and then.”<sup>235</sup>

A second version of the objection is that the Court cannot afford the time needed to monitor the development of the law across a broad range of legal standards. The Court may be willing to pay closer attention to certain areas in which it perceives lower courts to have been rebelling, but it does not have time to engage in more systematic oversight of this sort.<sup>236</sup> My response to this objection is twofold. First, if the Court continues to correct some errors but is unwilling to perform this oversight function more systematically, such unwillingness would reinforce the critique noted earlier that the Court’s ad hoc practices are of questionable legitimacy.<sup>237</sup> Second, although deploying summary dispositions for the suggested purpose may lead to their more frequent use, my proposal does not require the Court to pay equal attention to all areas of the law. The Court can and should take into account the importance of the legal standard at issue in deciding whether providing more guidance is worth the effort. Its continued prioritization of areas such as federal habeas and qualified immunity would be entirely proper, given how often they arise in the lower courts.<sup>238</sup>

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233. See Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1579-1606 (2008) (identifying and critiquing the rationales for uniformity in the federal courts).

234. Scalia, *supra* note 149, at 1186.

235. *Id.*

236. See *supra* note 160 (providing an example of the detailed record review sometimes necessary even in summary dispositions).

237. See *supra* notes 14-16 and accompanying text.

238. See *supra* notes 74-75, 81-82 and accompanying text.

A third and final version of the objection is that, in the ordinary course of things, lower courts are supposed to flesh out the meaning of the law after the Court has established a new doctrinal test.<sup>239</sup> Here, again, my response is to agree and make clear that nothing in my proposal requires the Court to act immediately after its initial articulation. After announcing a new test, the Court should allow issues to percolate in the lower courts, which may experiment with different understandings and, in the course of applying the test, produce useful data on the full range of factual contexts that may arise.<sup>240</sup> Only after sufficient experience has been accumulated should the Court weigh in again. To the extent the Court needs to adjust or refine the doctrinal principles, the Court may need to consider some additional cases on plenary review.<sup>241</sup> But at a certain point, the Court will have settled the major questions, and the remaining work will be to flesh out how the standard operates across a range of cases.<sup>242</sup> This is where summary dispositions can be put to good use.

#### IV. REVISING THE PRACTICE OF SUMMARY DISPOSITIONS

This Part considers how the Court's practices may be revised to better serve the new purpose for summary dispositions proposed in Part III. The first Section suggests that summary affirmances can be just as valuable as summary reversals in illustrating the meaning of legal standards, and that use of affirmances may in fact offer a number of advantages. The second Section supports adopting other commentators' proposed procedural reform: permitting supplemental briefs when the Court is considering summary action.

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239. See, e.g., *Maslenjak v. United States*, 137 S. Ct. 1918, 1931 (2017) (Gorsuch, J., concurring in part and concurring in the judgment) (criticizing the majority for prematurely offering "operational" guidance because "the crucible of adversarial testing on which we usually depend, along with the experience of our thoughtful colleagues on the district and circuit benches, could yield insights (or reveal pitfalls) we cannot muster guided only by our own lights").

240. See Watford, Chen & Basile, *supra* note 19, at 577, 579.

241. See, e.g., *supra* notes 21-25 and accompanying text (discussing how the Court in *Ashcroft v. Iqbal* refined the plausible pleading doctrine first announced in *Bell Atlantic Corp. v. Twombly*).

242. See *supra* notes 153-56 and accompanying text.

The third Section proposes new criteria the Court should use in selecting cases for summary treatment. As noted above, the new justification proposed in the previous Part is not intended to match existing practice. There are examples of cases in which the Court appeared to be trying to calibrate the meaning of legal standards, and I explore some of them below. But on the whole, the best explanation of existing practice is the one commentators identified—that the Court is attempting to rebuke lower courts for resisting its commands.<sup>243</sup> The proposed criteria better align the case selection process with the new suggested purpose.

The fourth Section argues that, in the areas in which the Court decides to intervene, it should take a more balanced approach, replacing the one-sidedness that currently characterizes its habeas and qualified immunity summary reversals. The fifth and final Section discusses practical questions about how my proposal could be implemented, including barriers based on the Court's current ideological composition.

#### A. *Summary Affirmances*

Summary affirmances were more commonly used during the era in which the Supreme Court's mandatory docket was larger.<sup>244</sup> It makes sense that when the Court was obligated to consider a case but had no quarrel with the lower court's reasoning, a simple statement of affirmance was sufficient. As for the Court's discretionary docket, the last time the Court summarily affirmed a case after granting certiorari was 1979.<sup>245</sup> Again, it makes sense that would be rare, since granting certiorari means the case is important in some respect and thus would typically warrant full procedures and a thorough opinion.<sup>246</sup> Although exceptions to that rule have been made for summary reversals, the apparent justification—that the lower court needs to be rebuked—would of course not apply to cases that were correctly decided below.

If the purpose of summary dispositions is to illustrate the meaning of legal standards, however, an affirmance can serve that

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243. See *supra* Part II.A.

244. See Hellman, *supra* note 46, at 812-13.

245. See Hartnett, *supra* note 5, at 593 n.10.

246. See SUP. CT. R. 10.

goal as effectively as a reversal. The Court's task is to model the appropriate use of the standard in question and add content to flesh out its meaning. It can perform those functions whether it agrees or disagrees with the lower court's reasoning.

Further, the use of summary affirmances may afford a number of advantages. For one thing, summary affirmances will typically be easier to write, as the Court can track the lower court's reasoning.<sup>247</sup> Another advantage is that both the likelihood of error and fairness concerns may be reduced. The likelihood of error is reduced because, if the Court agrees with the lower court, that generally means a larger number of judges will have endorsed the same conclusion than in the case of a summary reversal.<sup>248</sup> At the same time, any concern about fairness to the litigants with the truncated process is minimal because the actual result for them is no different than if the certiorari petition had just been denied. Finally, by not limiting itself to summary reversals, the Court will have more options for useful cases to serve the goal of illustration than if it had to find lower-court cases that were wrong.

It is difficult to say how the behavior of litigants might change if the possibility of summary affirmance were on the table. Repeat players such as state governments might refrain from filing certiorari petitions in borderline cases for fear of setting unfavorable Supreme Court precedent.<sup>249</sup> Then the Court would have to select more of its cases for summary treatment—reversal or affirmance—just from the pool of petitions filed by civil rights plaintiffs or habeas petitioners. But that concern is speculative, and the point for now is that summary affirmances offer a useful option for the Court to consider if it sees value in the approach proposed here.

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247. See, e.g., *Fausner v. Comm'r of Internal Revenue*, 413 U.S. 838, 839 (1973) (per curiam) (referencing the lower court's reasoning in a short summary affirmance).

248. This is only generally rather than always true, because the actual vote count for summary dispositions may vary. A nine-to-zero summary reversal could have more judges reaching the same conclusion than a five-to-four summary affirmance.

249. See Andrew Hessick, *The Impact of Government Appellate Strategies on the Development of Criminal Law*, 93 MARQ. L. REV. 477, 479-82 (2009) (describing how the government, as a repeat player, may behave more strategically in deciding when to appeal cases and to petition for certiorari).



### *B. Procedural Reforms*

As noted earlier, critics of the use of summary dispositions have long been suggesting a simple procedural reform: that the Court invite supplemental briefing before handing down its opinion.<sup>250</sup> Such a measure guards against the risk of error from a truncated procedure and reduces concerns about fairness to the litigants, since they at least have an opportunity to weigh in before receiving a decision.<sup>251</sup> Furthermore, if assured of having this opportunity, litigants would no longer need to provide the lengthy discussion of the merits of their cases that they currently feel obligated to include in the certiorari papers.<sup>252</sup>

The benefits of this simple step seem clear, and the costs of a little extra time to receive and review supplemental briefing seem minimal. The natural next question, though, is that once you allow for supplemental briefing, why not just grant oral argument as well? After all, holding oral argument is just another hour of the Court's time.<sup>253</sup> Put another way, is there any efficiency still to be gained from a summary approach? Certainly time is saved in writing only a short, per curiam opinion, but nothing is stopping the Court from writing such short opinions even for cases that have been argued.<sup>254</sup> The efficiency question is particularly important for my proposal because it contemplates a likely increase in the Court's summary disposition usage.

Even with the extra step of supplemental briefing, there is efficiency to be gained by the use of summary procedures. First, the costs associated with oral argument are not just the hour for the argument itself, but all the time spent preparing for it.<sup>255</sup> Even in a case that seems relatively clear and for which oral argument is

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250. See *supra* notes 67-68 and accompanying text.

251. See *supra* Part I.A.

252. See *supra* notes 64-65 and accompanying text.

253. See SUP. CT. R. 28 ("Unless the Court directs otherwise, each side is allowed one-half hour for argument.").

254. See generally SUP. CT. R. 1-48 (containing no length requirements for opinions).

255. *Supreme Court Procedures*, U.S. COURTS, <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> [<https://perma.cc/JGZ9-65JQ>] ("The Justices tend to view oral arguments not as a forum for the lawyers to rehash the merits of the case ... but for answering any questions that the Justices may have developed while reading their briefs.").

unlikely to make a difference,<sup>256</sup> it seems likely that the Justices would want to come prepared with thoughtful questions and a thorough knowledge of the record.<sup>257</sup> In a summary proceeding, the Court should still perform the necessary vetting of the case, but need do so only a single time while reviewing the proposed disposition.

Second, it is important to note that inviting supplemental briefing does not commit the Court to granting certiorari. The Court could, after receiving the briefs, determine that the case is more complex than it initially believed and decide not to follow through with producing an opinion.<sup>258</sup> By contrast, the only mechanism for ordering oral argument under the current rules is granting certiorari,<sup>259</sup> and regardless of the existing rules it would not make sense to require the parties to appear for argument when certiorari was still uncertain. Further, although nothing prevents the Court from dismissing a case even after having granted certiorari, presumably a concern about wasted effort would make that a rare occurrence.<sup>260</sup> Thus, a system in which the Court invites supplemental briefing for potential summary dispositions would still be substantially more efficient than one that simply merged all such cases onto the plenary docket.

Given the above considerations, I would endorse the longstanding proposal for the Court to allow supplemental briefing before issuing a summary disposition. A separate, harder question is whether I

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256. Anecdotal views on whether oral argument matters are mixed. See Warren D. Wolfson, *Oral Argument: Does It Matter?*, 35 IND. L. REV. 451, 452 (2002). The question is difficult to study empirically, though at least one study suggests that oral argument quality influences the Justices' votes. See Timothy R. Johnson et al., *Oral Advocacy Before the Supreme Court: Does It Affect the Justices' Decisions?*, 85 WASH. U. L. REV. 457, 495-502 (2007). Regardless of the value of oral argument generally, the point here is that oral argument is especially unlikely to make a difference in a case that the Justices were considering handling summarily. See *id.*

257. See *Supreme Court Procedures*, *supra* note 255 (“[L]awyers for each party have a half hour to make their best legal case to the Justices. Most of this time, however, is spent answering the Justices’ questions.”).

258. See SUP. CT. R. 15 (“Any party may file a supplemental brief at any time while a petition for a writ of certiorari is *pending*.” (emphasis added)); SUP. CT. R. 16 (“After considering the documents distributed *under Rule 15*, the Court will enter an appropriate order” for “disposition of a petition for” a writ of certiorari. (emphasis added)).

259. SUP. CT. R. 16.

260. See, e.g., *Gibson v. Fla. Bar*, 502 U.S. 104, 104 (1991) (per curiam) (dismissing the case, without further explanation, by stating that certiorari was “improvidently granted”).

would condition my proposal on the Court's adoption of this procedural reform. My tentative view is that I would not. As I elaborate in the next Section, I believe it is possible that some cases taken up solely for the purpose of illustrating a previously articulated legal standard may be straightforward enough that the Court can resolve them on the certiorari papers alone. Further, the Court can and should factor in the complexity of a case in deciding whether to use summary procedures.<sup>261</sup>

I describe my view as tentative because I could be persuaded otherwise based on further experience with and information about the Court's summary disposition practices. And in any event, I hope this Section convinces those who are otherwise sympathetic to my proposal, but are primarily concerned about the risk of error, that a system that permits supplemental briefing could strike the right balance—reducing the risk of error while still adding enough efficiency to justify maintaining a separate summary docket.

### *C. Selecting Cases for Summary Disposition*

Selecting cases for summary disposition to fulfill the purpose proposed here breaks down into three questions: first, whether the area of law merits more precedential guidance from the Court; second, whether the case at hand would be useful for providing such guidance; and third, whether the use of summary procedure is appropriate. Some of these points have been mentioned already, but I develop them in a more detailed and structured form here.

The first question of whether the Court's attention is warranted turns on the need for further clarity in the area of law. Of course, any legal standard by definition has some degree of vagueness, so there is always value in offering up at least a couple of illustrative cases.<sup>262</sup> But in deciding how much oversight to provide, the Court should take into account whether there is substantial divergence in how the lower courts are applying the standard in question. Once the Court has laid down adequate guideposts, further efforts may bring diminishing returns, but continued monitoring is still

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261. See *infra* Part IV.C.

262. See, e.g., Clermont & Yeazell, *supra* note 25, at 840-42, 844-46 (discussing the confusion surrounding the Court's announcement of a new pleading standard, and the need for further clarification).

valuable, as the factual circumstances governed by the particular standard may evolve.<sup>263</sup>

An additional factor in assessing the need for the Court's attention is how important the issue is. As acknowledged earlier, the Court cannot realistically monitor the development of every legal standard with the same degree of care, so prioritization is inevitable.<sup>264</sup> The Court should consider importance in terms of what rights are at stake as well as how frequently the matter arises. From both of those standpoints, it is entirely appropriate for habeas and qualified immunity cases to receive frequent attention. Both involve the protection of fundamental constitutional rights, and both make up a substantial portion of the federal docket.<sup>265</sup>

A final factor for the threshold question is whether the issue is ripe for the Court's further consideration. After a standard is initially articulated, it is entirely appropriate for the Court to allow the lower courts to apply it in the first instance. During this time, the lower courts have the opportunity to confront a variety of cases featuring different factual contexts, to experiment with different understandings of the standard's meaning, and to uncover problems with the Court's formulation. When the Court intervenes again after a period of ripening, it will have the benefit of a perspective informed by the lower courts' experiences.<sup>266</sup>

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263. See, e.g., *Riley v. California*, 134 S. Ct. 2473, 2483-84 (2014) (citing *Chimel v. California*, 395 U.S. 752, 762-63 (1969)) (explaining that *Chimel* "laid the groundwork for most of the existing search incident to arrest doctrine," but that this "case[] require[s] us to decide how the ... doctrine applies to modern cell phones, which are ... based on technology nearly inconceivable just a few decades ago, when *Chimel* ... [was] decided").

264. See *supra* Part III.C.

265. See *supra* Part I.B.

266. This is sometimes described as "percolation," and some commentators have questioned whether percolation is as useful as advertised. See David Hausman & Spencer E. Amdur, *Nationwide Injunctions and Nationwide Harm*, 131 HARV. L. REV. F. 49, 52-53, 53 nn.26-27 (2017), [https://harvardlawreview.org/wp-content/uploads/2017/12/vol131\\_Amdur\\_Hausman.pdf](https://harvardlawreview.org/wp-content/uploads/2017/12/vol131_Amdur_Hausman.pdf) [<https://perma.cc/6FM6-TQEJ>]. There is reason to be uncertain about the value of percolation in the sense of having lower courts articulate competing viewpoints. See *id.* But the value of having more insight into the range of factual contexts to be governed by the standard in question seems difficult to deny. See Aaron-Andrew P. Bruhl, *Following Lower-Court Precedent*, 81 U. CHI. L. REV. 851, 875 (2014) (describing a more "modest" version of the percolation argument based on the value of seeing a rule "applied many times in many distinct factual contexts"); cf. Richard C. Chen, *Precedent and Dialogue in Investment Treaty Arbitration*, 60 HARV. INT'L L.J. 47, 80 (2019) (making a similar point in the context of investment treaty arbitral precedent).

Once it is determined that the area of law warrants the Court's attention, the next question is whether the case at hand is well suited for providing useful precedential guidance. Perhaps counter-intuitively, the suggestion on this point is that the Court should take more borderline cases rather than ones involving egregious errors. Of course, if egregious errors are so common as to suggest confusion among the lower courts, the Court should step in to clarify, but rare outliers, no matter how extreme, should typically not be taken up, since the goal is not to correct the errors of individual cases.<sup>267</sup>

The Court's current practice assumes that correcting clear errors is precisely what summary reversals are for.<sup>268</sup> That approach makes sense when the goal is to rebuke egregious decisions, but not when the goal is to provide more broadly useful precedential guidance. Consider a spectrum of cases ranging from clearly reasonable on one end to clearly unreasonable on the other. To use qualified immunity as the example, if the government official's conduct is so clearly reasonable that most courts would have granted immunity, there is little precedential value in summarily reversing the case to make that point. By contrast, summarily affirming or reversing a case that presents a close call provides guidance to lower courts on where to draw the line in future cases.

Finally, having decided that a given case can provide useful guidance, the Court must determine whether summary procedure is appropriate. Two main factors bear on this question. The first follows directly from the basic proposal I laid out in the prior Part: the Court should decide a case summarily only when it is illustrating the operation of the standard in question, rather than seeking to adjust or refine it.<sup>269</sup> For the latter purposes, plenary review is appropriate so that the Court can give fuller consideration to and a more robust explanation of the issues. To go back to the example used in the Introduction, *Iqbal* was properly decided on plenary review because it further refined the principles first articulated in *Twombly*.<sup>270</sup> But future cases that merely illustrate the operation of

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267. See *supra* Part III (stating that the goal is to establish “the meaning of high-level legal standards”).

268. See *supra* Part II.A.

269. See *supra* Part III.A.

270. See *supra* notes 21-23 and accompanying text.

the plausibility standard may properly be decided by summary disposition.<sup>271</sup>

The line between illustration and adjustment or refinement is admittedly blurry; even cases that merely illustrate an existing standard are making new law.<sup>272</sup> The key to the distinction I am drawing is how generally applicable that new law is. When a decision revises the terms of a given standard, that of course affects the full range of cases to which the standard applies, and plenary review is therefore appropriate. The same is true when a case does not alter the standard's express terms, but applies it in a way that clarifies those terms for the benefit of all or many future cases.<sup>273</sup> A closer call would be when a decision is fact-intensive but produces a holding that affects a subcategory of future cases.<sup>274</sup> Depending on the importance and size of that subcategory, plenary review may still be warranted.

The use of summary procedures is most clearly appropriate for cases that are so fact bound that any principle that can be derived from them is quite narrow. As discussed in Part III.B.1, the primary value of such cases is to provide sources for factual analogizing by future courts. In combination with other fact-bound summary dispositions, such illustrations help to flesh out and calibrate the meaning of the otherwise abstract standard in question.<sup>275</sup>

A second factor to examine in deciding whether summary procedure is appropriate is the complexity of the record. This is intended to address the legitimate concern of mistake,<sup>276</sup> and when the risk is serious, the Court can either grant plenary review or simply deny certiorari. That said, the risk of mistake should not be overstated.<sup>277</sup> Many cases—particularly in habeas—will have

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271. See *supra* notes 24-28 and accompanying text.

272. This point follows from my own argument earlier that every application of law to fact creates some precedential value. See *supra* Part III.B.1.

273. See Hellman, *supra* note 46, at 831.

274. A good example of this would be *Scott v. Harris*, 550 U.S. 372 (2007). There the Court conducted a fact-intensive analysis under the general excessive force standard, but concluded with a general principle for the subcategory of cases involving high-speed car chases. See *id.* at 383-85, 386.

275. See *supra* Part III.B.1.

276. See *supra* notes 158-59 and accompanying text.

277. As noted earlier, the risk of mistake concerning the legal issues is reduced by the fact that the Court would be limiting its use of summary dispositions to cases in which the principles are established. See *supra* notes 158-60 and accompanying text.

lengthy records, but not every issue requires an equally deep factual inquiry. When the relevant issue requires only the exercise of judgment about a relatively clear set of facts, the Court need not refrain from summary resolution merely because the full record is long and complex.

A final example will help to illustrate both of the factors just identified. *Porter v. McCollum* was a rare case in which the Court not only summarily reversed in favor of a habeas petitioner, but held that he was entitled to relief.<sup>278</sup> The Court granted relief based on the petitioner's claim of ineffective assistance of counsel.<sup>279</sup> Regarding the attorney's performance, the Court emphasized that he "did not even take the first step of interviewing witnesses or requesting records," and "he ignored pertinent avenues for investigation of which he should have been aware."<sup>280</sup> As for prejudice, the Court held that the state court had unreasonably concluded that the defendant had failed to establish a sufficient probability of a different result "to undermine confidence in [the] outcome."<sup>281</sup>

Beginning with the illustration versus adjustment distinction, *Porter* was a truly fact-bound case that did not substantially affect the general doctrine.<sup>282</sup> Instead, it illustrated in the circumstances of a concrete case what deficient performance looks like.<sup>283</sup> The lines quoted above about counsel's failure to interview witnesses and pursue avenues for investigation may serve as useful guideposts for future courts, but their applicability depends on whether the factual circumstances of a future case are analogous.<sup>284</sup> Likewise, the Court's prejudice analysis did not establish any generally applicable principles, but merely illustrated how significant the undiscovered information must be to sustain a *Strickland* claim over a state court's contrary conclusion.<sup>285</sup> The Court's reasoning was closely

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278. 558 U.S. 30, 42-44 (2009) (per curiam). As summarized earlier, most of the summary reversals that were decided for the habeas petitioner merely corrected procedural errors in the lower court's decisions. See *supra* notes 85-88 and accompanying text.

279. *Porter*, 558 U.S. at 44.

280. *Id.* at 39-40. Because the state court did not analyze this prong and based its conclusion solely on prejudice, the Court did not have to defer to the state court's reasoning as AEDPA would otherwise have required. See *id.* at 37-39.

281. *Id.* at 44 (quoting *Strickland v. Washington*, 466 U.S. 668, 693-94 (1984)).

282. See *id.* at 39.

283. *Id.* at 41.

284. *Id.* at 39-40.

285. *Id.* at 43-44.

tailored to this defendant's specific crime and four mitigating factors described in detail.<sup>286</sup>

Turning to the issue of complexity, a death penalty record is always lengthy, and an ineffective assistance claim may often be factually complex. But *Porter* shows how a claim could be resolved summarily despite such concerns.<sup>287</sup> The key point is that when the facts are relatively clear, the Court's main task is to judge their significance, and that is not something for which more detailed attention to the underlying record will add value.<sup>288</sup> On counsel's deficiency, the Court needed only to weigh his complete lack of investigation against the proffered explanation—that the petitioner had been “fatalistic [and] uncooperative”—to determine that counsel's performance was objectively unreasonable.<sup>289</sup> That basic weighing would not have benefited from a closer review of the record. Even the prejudice prong of the *Strickland* test,<sup>290</sup> at least in this case, could be analyzed without a comprehensive record review. The Court needed only a basic picture of the various “aggravating and mitigating circumstances” to be able to assess whether there was a reasonable probability that the new evidence would have led to a different sentence.<sup>291</sup>

In short, this was not a case in which the Court needed to examine the underlying evidence for itself to assess conflicting testimony or competing inferences at a micro level. A *Strickland* case involving, for example, disputed assertions about what the attorney reasonably should have found might be harder to resolve through a summary procedure. Likewise, the dissent in *Cavazos v. Smith* made a compelling objection that summary resolution was improper for a sufficiency-of-the-evidence claim in which each key piece of evidence needed close inspection.<sup>292</sup> In such a case the Court

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286. *See id.* at 41-42. As to the mitigating circumstances, the Court cited: “(1) Porter's heroic military service in two of the most critical—and horrific—battles of the Korean War, (2) his struggles to regain normality upon his return from war, (3) his childhood history of physical abuse, and (4) his brain abnormality, difficulty reading and writing, and limited schooling.” *Id.* at 41. A future court applying *Porter* could not extrapolate a general rule from this reasoning, but would have to analogize a new set of facts to these.

287. *See id.* at 40.

288. *See supra* notes 165-69 and accompanying text.

289. *Porter*, 558 U.S. at 40.

290. *See id.* at 38.

291. *Id.* at 40.

292. *See* 565 U.S. 1, 9, 16-17 (2011) (Ginsburg, J., dissenting).



should be cautious about using summary dispositions because the truncated process increases the risk of error. But when the analysis requires only an exercise of judgment about the implications of a fairly clear set of facts, summary procedure is appropriate.<sup>293</sup>

To conclude this Section, I would not claim that the foregoing criteria can be mechanically applied to generate determinate results. They reflect, after all, a standards-driven inquiry. But I do contend that they would represent an improvement on the status quo of ad hoc usage. Any expressly adopted criteria would help in providing for a more disciplined and transparent analysis, and the particular criteria proposed here, by advancing the normatively attractive purpose described in the prior Part, offer a principled path forward.

#### *D. A More Balanced Approach*

The preceding Section offered criteria for how the Supreme Court should select cases for summary disposition with the end goal of providing useful precedential guidance. I argue in this Section that, within a particular area that the Court has decided needs more clarity, it should take a balanced approach. That means taking cases that illustrate both boundaries—granting *and* denying habeas relief, granting *and* denying qualified immunity, and so on. Balance does not necessarily mean precisely equal numbers, but some attention to both sides is important.

The Court's current practice is lopsided. In the two areas in which it uses summary reversals most frequently, the Court has reversed many more habeas cases in which the state lost below and many more qualified immunity cases in which the government official lost below than vice versa.<sup>294</sup> Such an approach makes sense if the goal is to quell a rebellion in which the lower courts are systematically erring in one direction. But for the more constructive program proposed here, summary dispositions should aim to provide guidance on the full contours of the standard in question.<sup>295</sup>

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293. As noted in the preceding Section, if the procedural reform of inviting supplemental briefs were adopted, that would provide a further safeguard against error. *See supra* Part IV.B.

294. *See supra* text accompanying notes 84-88.

295. *See supra* Part III.A.

At first glance, it might seem that a lopsided approach is entirely appropriate even if the purpose is to provide guidance rather than to rebuke noncompliance. Assuming the Court has concluded that the lower courts are systematically erring in one direction, it may believe that focusing on improper habeas grants and qualified immunity denials will help reinforce the line of separation. It is true that having plentiful models of such cases to draw on will help lower courts rule correctly when they confront analogous cases.<sup>296</sup> The problem, though, is that when lower courts encounter a case that resembles a certain precedent but also has factual distinctions, they lack guidance on whether those distinctive facts suffice to move the case to the other side of the line.<sup>297</sup> If, however, the Court actually provided some examples of when habeas should be granted or qualified immunity denied, the lower courts could more effectively interpret those distinctive facts by comparing them to these models.<sup>298</sup> In short, the line of separation becomes discernible only when there are illustrations on both sides of it.

As Baude explains, because the Court has focused almost exclusively on demonstrating when qualified immunity should have been granted, lower courts lack a “roadmap to the denial of immunity.”<sup>299</sup> While this may lead lower courts to grant immunity that should have been denied, it could just as well lead them to deny immunity that should have been granted. The same could be said of habeas. The lack of a roadmap does not mean courts will not try to find appropriate cases in which to deny immunity or grant habeas; it just means they will have no models from the Court to guide them.

Apart from advancing my proposed purpose, a more balanced approach may also help to promote the broader harmonization that the Court has sought to achieve by rebuking lower-court resistance. As described in Part II.B, the effect of the current approach is likely to be dysfunction, as some judges are overdeterred by the threat of summary reversal while others actively resist the Court’s precedents.<sup>300</sup> With a more balanced approach, judges who previously

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296. See *supra* note 165 and accompanying text.

297. See Baude, *supra* note 1, at 14.

298. See *id.*

299. See Baude, *supra* note 99, at 83.

300. See *supra* notes 129-42 and accompanying text.

feared summary reversal could make their best judgments about cases rather than skewing their decisions based on that fear. As for judges who were unconcerned about summary reversals and held their own strong views about the law, the impulse to resist may similarly be weakened.<sup>301</sup> Even if the Court has not altered the substance of the doctrines more to the liking of such judges, they may be willing to tether their decisions more closely to the Court's once it actually lays down markers on the currently neglected side.<sup>302</sup>

Although any predictions about how lower courts would respond to this altered approach are necessarily speculative, it is at least possible that the overall quality of decision-making in habeas and qualified immunity cases would improve. As with a point made earlier concerning the need for more decisions shaping the scope of constitutional rights,<sup>303</sup> I offer this as a reason even the currently conservative Court members could find value in a balanced approach.

As noted at the outset of this Section, more balance does not have to mean perfect symmetry. It may be true that lower courts at present are erring more often on the sides of granting habeas and denying qualified immunity.<sup>304</sup> If that is correct, recall that the

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301. Cf. Bruhl, *supra* note 266, at 883 (arguing in a different context that “some degree of lower-court buy-in” helps to increase “judicial compliance”).

302. Robert Yablon makes a similar argument for balance in habeas and criminal procedure cases, but on different grounds and not specifically in regard to summary reversals. He writes:

Over time, such guidance might help to curb instances in which legal institutions and legal professionals fall short of expectations and might boost public confidence in the legal process as well as the Court's own institutional standing. If the Court too often allows structural flaws and individual malfeasance to go uncorrected, such problems may fester and multiply, undermining the public's faith in the Court and in the justice system as a whole.

Yablon, *supra* note 107, at 563 (footnotes omitted).

303. See *supra* Part III.B.2.

304. Baude expresses the intuition that the frequency of error may actually be comparable in these areas:

Ultimately this is an empirical question, but I think mistaken grants of summary judgment are probably at least as common as mistaken grants of habeas. If the court is going to spend time reviewing individual habeas cases to ensure that the Ninth Circuit is following the habeas statute, it seems reasonable for it to also spend time reviewing individual civil rights cases to ensure that other circuits are following the summary judgment standard.

Baude, *supra* note 16.

Court does not have to find a case to reverse, but has the option to use a summary affirmance to illustrate a proper habeas grant and qualified immunity denial. Moreover, for evidence that there are in fact cases that could have been summarily reversed in the other direction, looking at dissents from the denial of certiorari may be a helpful place to start.<sup>305</sup> Justice Sotomayor in particular has used such dissents to call attention to problematic cases in these areas.<sup>306</sup> Although she did not get the needed votes, that may have been because the other Justices saw the cases as fact bound, and not because they believed the cases were correctly decided. Shifting to a perspective in which summary dispositions are used to add precedential guidance may have led some of them to vote differently.

### *E. Implementation and Ideology*

The clearest way to implement the proposed approach would be an amendment to the Supreme Court Rules articulating when summary dispositions may be used. Short of that, endorsement of the proposed criteria in a majority opinion would also provide valuable constraint on future practice. Following either course, the Court would retain significant discretion on when it uses the tool, just as it retains wide discretion on whether to grant certiorari.<sup>307</sup> That is by design, because the Court needs flexibility in determining where to allocate its resources in developing the law. But even if it is not possible to predict individual cases where the Court will intervene by summary disposition, the value of establishing criteria is that, when the Court does opt to do so, the choice will not seem ad hoc but have a basis in principle, and the Court's practices overall will have a degree of coherence.<sup>308</sup>

In terms of potential barriers, the proposal made in this Article is ideologically neutral, since the central goal is to increase clarity in the application of legal standards regardless of their content. But it is true that implementing the proposal could result in changes in

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305. See Yablon, *supra* note 107, at 552.

306. For a summary of Justice Sotomayor's dissents from the denial of certiorari, see *id.* at 555-60.

307. SUP. CT. R. 10.

308. See *supra* notes 98-103 and accompanying text.

the specific areas of habeas and qualified immunity that liberals are more likely to favor.<sup>309</sup> Given the Court's current composition, I have tried to highlight at various points why the proposal could have appeal even to conservative Justices.<sup>310</sup> Still, the immediate prospects for the proposal may seem dim.

It should not be overlooked, however, that the liberal Justices could play a significant role in expediting any potential reforms, whether the one I have proposed or any other. What I described in Part II.A as the Court's veiled substantive agenda is possible only because some or all of the liberal Justices join most of the per curiam opinions.<sup>311</sup> When summary reversals are unanimous or nearly so, that reinforces the idea that rebuke is appropriate.<sup>312</sup> If the decisions instead came down on a five-to-four vote, any such message would be substantially diluted. The implication would be simple disagreement about the law, perhaps driven by the Court's ideology, rather than willful or egregious error by the lower court.<sup>313</sup> Any threat of stigma<sup>314</sup> would in turn be removed, freeing lower-court judges to make their best judgments about cases.

When the liberal Justices join a summary reversal, it is safe to assume they agree on the merits of that particular case.<sup>315</sup> They may also have concerns from an institutional standpoint about lower-court judges disregarding Supreme Court precedent.<sup>316</sup> What we do

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309. *See supra* note 226.

310. In particular, see *supra* Parts III.B.2 and IV.D.

311. Out of the thirty-four habeas cases reversed in favor of the state, only the following five came with any dissent: *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2561 (2018) (registering a dissent by Justice Breyer without an opinion); *Kernan v. Hinojosa*, 136 S. Ct. 1603, 1606 (2016) (Sotomayor, J., dissenting) (joined by Justice Ginsburg); *Wetzel v. Lambert*, 565 U.S. 520, 526 (2012) (Breyer, J., dissenting) (joined by Justices Ginsburg and Kagan); *Cavazos v. Smith*, 565 U.S. 1, 9 (2011) (Ginsburg, J., dissenting) (joined by Justices Breyer and Sotomayor); *Allen v. Siebert*, 552 U.S. 3, 8 (2007) (Stevens, J., dissenting) (joined by Justice Ginsburg). Out of the nine qualified immunity cases reversed in favor of the government official, the following two came with a dissent: *Kisela v. Hughes*, 138 S. Ct. 1148, 1155 (2018) (Sotomayor, J., dissenting) (joined by Justice Ginsburg); and *Mullenix v. Luna*, 136 S. Ct. 305, 313 (2015) (Sotomayor, J., dissenting).

312. *See supra* note 94 and accompanying text.

313. *See supra* notes 108-12 and accompanying text.

314. *See supra* note 142.

315. *See supra* notes 5-8 and accompanying text.

316. Of course, they may take this view regardless of whether they agree with the precedent being applied. In other words, they might as an original matter have taken a different approach in developing habeas and qualified immunity jurisprudence, as well as the underlying constitutional rights, but still feel obligated to enforce the Court's mandate on

not know is how many cases they would reverse in the other direction if the liberal bloc held a majority. As noted in the prior Section, Justice Sotomayor, sometimes joined by Justice Ginsburg, has flagged some such cases in dissents from the denial of certiorari,<sup>317</sup> and in one instance the two Justices specifically called out the Court's lopsided use of summary reversals in the qualified immunity context.<sup>318</sup> We do not know whether Justices Breyer and Kagan are similarly troubled by the pattern, but Justice Kagan at least has joined two dissents from the denial of certiorari in habeas cases that called for summarily reversing against the state.<sup>319</sup>

In any event, my suggestion is that, to the extent the four liberal Justices agree that some summary dispositions going against the state or government official are warranted, they can do more than dissent from the denial of certiorari in those cases. They should instead decline to join any summary reversals in the opposite direction until their conservative counterparts show an interest in greater balance.<sup>320</sup> Adopting this stance would significantly weaken the Court's efforts to police through rebuke because the vote in future such cases would be close and along ideological lines. Moreover, the conservative majority would have to weigh the benefits of error correction against the costs of exacerbating

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apparently resisting lower courts. *See supra* notes 132-35 and accompanying text.

317. *See supra* Part IV.D. It is entirely possible that more such cases exist, but were not worth flagging given the lack of votes on their side.

318. *See Salazar-Limon v. City of Houston*, 137 S. Ct. 1277, 1282-83 (2017) (Sotomayor, J., dissenting from the denial of certiorari).

319. *See Lance v. Sellers*, 139 S. Ct. 511, 511-12 (2019) (Sotomayor, J., dissenting from the denial of certiorari) (joined by Justices Ginsburg and Kagan); *Jordan v. Fisher*, 135 S. Ct. 2647, 2648 (2015) (Sotomayor, J., dissenting from the denial of certiorari) (joined by Justices Ginsburg and Kagan).

320. Admittedly, this sort of strategic posturing is not something that fits comfortably within the judicial role. For example, the Justices have not historically engaged in vote trading the way legislators do. *See Adam Liptak, No Vote-Trading Here*, N.Y. TIMES (May 15, 2010), <https://www.nytimes.com/2010/05/16/weekinreview/16liptak.html> [<https://perma.cc/XW2H-MSDP>]. Apparently even that is not entirely off-limits, as a recent report describes how the Justices negotiated a compromise in the 2012 Affordable Care Act case. *See Joan Biskupic, The Inside Story of How John Roberts Negotiated to Save Obamacare*, CNN POL. (Mar. 25, 2019), <https://www.cnn.com/2019/03/21/politics/john-roberts-obamacare-the-chief/index.html> [<https://perma.cc/NW5P-6FLQ>]. In any event, the suggestion here should be less controversial because the liberal Justices would be attempting to force more principled decision-making rather than extracting a return favor.

concerns about politicized decision-making.<sup>321</sup> The possibility of a new approach would then be ripe for consideration.

### CONCLUSION

The Court's use of summary dispositions encountered skepticism almost from the time it began. The major question surrounding them today is when they can be properly used. Although commentators have been able to identify the Court's tendencies, the Court's failure to adopt any governing criteria raises rule-of-law and legitimacy concerns. Further, if its goal is to rebuke lower courts to enforce better compliance with its decisions, there are reasons to doubt such an approach is likely to be effective.

This Article suggests a different justification by showing how summary dispositions are an ideal mechanism for developing precedential guidance about the meaning of high-level legal standards. And it derives principled criteria from that novel justification to help the Court select the right cases for summary disposition. The perhaps unexpected conclusion is that summary dispositions are not just unfortunate phenomena that need to be accounted for. Rather, they stand to play a valuable and constructive role in the development of the law.

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321. Chief Justice Roberts has long been described as sensitive about public perceptions of the Court, and that sensitivity has only increased in light of recent events, including Justice Kennedy's retirement, the contentious confirmation hearings for Justice Kavanaugh, and attacks by President Trump on the federal judiciary. See Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks "Obama Judge,"* N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html> [<https://perma.cc/U3UC-ZCRF>].