The Supreme Court’s practice of summarily reversing decisions based on the 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 factbound 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, and 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 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 it 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. 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.” Granting certiorari to fix the misapplication of that standard ran counter to the Court’s established norms against reviewing factbound cases to engage in mere error correction.

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1 134 S. Ct. 1861 (2014).
3 *Tolan*, 134 S. Ct. at 1869 (Alito, J., concurring in the judgment).
4 *Id.* at 1868.
Commentators were quick to point out the apparent hypocrisy of Justices Scalia and Alito in taking this position. 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. 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 factbound. For its part, the Tolan majority acknowledged that the Court cannot “correct every perceived error coming from the lower federal courts,” 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.”

The debate among the justices in Tolan and other recent cases 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 factbound cases. The liberal justices have cited the same rules in criticizing summary reversals that favored the state in habeas cases. The Tolan majority’s explanation matches what has become the standard account, that summary reversals are


9 Id.

10 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, Tex., 137 S. Ct. 1277, 1282-83 (2017) (Sotomayor, J., dissenting from the denial of certiorari). Justice Alito defended the Court’s practices as “neutral,” explaining that factbound 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).

reserved for “clearly erroneous” decisions. But even if that is a necessary condition, it could 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. Critics charged that this short-circuited process was prone to error, unfair to litigants, and ultimately inefficient because it would require attorneys to always address the merits of cases in their certiorari papers instead of focusing on the standard criteria of certworthiness. 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. 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. 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.

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

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14 See infra Section I.A.
15 See Baude, supra note 2, at 20-22, 38.
16 See infra Section II.A. As Baude notes, “[P]rocedural 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.” See Baude, supra note 2, at 10.
improperly grant federal habeas and deny qualified immunity.\textsuperscript{18} 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 reversal, while other judges may be overdeterred and go further than the Court itself would have. 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, though 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 \textit{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.\textsuperscript{19} 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.\textsuperscript{20} But the Court does not have room on its plenary docket to take multiple cases on a given issue to provide needed 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 \textit{Bell Atlantic Corp. v. Twombly},\textsuperscript{21} the Supreme Court revised the pleading standard under Federal Rule of Procedure 8(a)(2) to require plaintiffs to offer “enough facts to state a claim to relief that is plausible on its face.”\textsuperscript{22} Two years later, in \textit{Ashcroft v. Iqbal},\textsuperscript{23} the Court elaborated on this new plausibility standard, articulating more clearly a two-step analysis. First, courts should identify and set aside

\begin{itemize}
  \item \textsuperscript{18} See infra section I.B.2.
  \item \textsuperscript{19} See Paul J. Watford, Richard C. Chen & Marco Basile, \textit{Crafting Precedent}, 131 HARV. L. REV. 543, 569 (2017) (reviewing \textsc{Bryan A. Garner et al., The Law of Judicial Precedent} (2016)).
  \item \textsuperscript{20} See infra Section III.A.
  \item \textsuperscript{21} 550 U.S. 544 (2007).
  \item \textsuperscript{22} \textit{Id.} at 570.
  \item \textsuperscript{23} 556 U.S. 662 (2009).
\end{itemize}
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. 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.” In particular, the Court’s only guidance on the concept of plausibility is that it falls somewhere on the spectrum between possibility and probability. 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, and indeed there have been significant areas of divergence in the lower courts. 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, perhaps thinking it has settled the major questions of principle and not wanting to expend the substantial resources that plenary review would require. But by addressing a few cases summarily across a variety of

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24 Id. at 679.
26 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).
28 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 a 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).
29 The Court performed a brief plausibility analysis in Ziglar v. Abbasi, 137 S. Ct. 1843, 1864 (2017), a case that was primarily about the availability of a Bivens remedy.
30 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
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.31

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 longstanding 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.”32 The answer suggested here is that a case can be important but not difficult. A case taken up 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. 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.

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

31 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 accompany notes 62-63. As discussed in Section 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.

32 See Brown, supra note 13, at 94.
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. These dispositions took the form of short, per curiam decisions, sometimes offering only a single sentence stating the result and not always providing even a citation to authority. Cases were summarily affirmed or reversed when they presented issues falling squarely within existing Supreme Court precedent. 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.”

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. 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. 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."\textsuperscript{38}

Scholars first took note of the practice of summary dispositions around this same time. They were most critical of those dispositions that provided no reasoning at all. One line of criticism focused on the importance of reasoning from the standpoint of the rule of law. For example, Professors 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 on “per curiam orders that quite frankly fail to build the bridge between the authorities they cite and the results they decree.”\textsuperscript{39} 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 that ‘law’ must have in a democratic society.”\textsuperscript{40}

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.\textsuperscript{41} 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.\textsuperscript{42} 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.”\textsuperscript{43}

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 Professor 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

\textsuperscript{38} Brown, supra note 13, at 77.


\textsuperscript{40} Id. at 5.

\textsuperscript{41} See Arthur D. Hellman, Error Correction, Lawmaking, and the Supreme Court’s Exercise of Discretionary Review, 44 U. PITT. L. REV. 795, 817 (1983); Supreme Court Per Curiam Practice, supra note 33, at 713.

\textsuperscript{42} Albert M. Sacks, The Supreme Court, 1953 Term — Foreword, 68 HARV. L. REV. 96, 102 (1954); Supreme Court Per Curiam Practice, supra note 33, 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.”).

\textsuperscript{43} Supreme Court Per Curiam Practice, supra note 33, 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.
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 Court is extending the use of the summary opinion to cases where fuller exposition of views is warranted.44

Sacks went on to detail several such examples.45 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,”46 or reversed decisions that could not be considered “clearly erroneous.”47

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.48 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.49 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.50 However, 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 decisionmaking process. When the Supreme Court reverses on the basis of the certiorari papers alone, it does

44 Sacks, supra note 42, at 99.
45 See id. at 100-03.
46 Supreme Court Per Curiam Practice, supra note 33, 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).
47 Brown, supra note 13, at 87.
48 Hellman, supra note 41, at 824.
49 The Court continues to provide more barebones 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, 136 S. Ct. 305 (2015) (per curiam)).
50 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 Section I.B below, is that the Court is summarily reversing factbound cases that do not warrant discretionary review at all.
so without the benefit of the full adversarial process. Cert petitions and opposition briefs are supposed to be about whether a case warrants discretionary review and not primarily about the case’s merits. Nor is the lower court’s opinion and accompanying record likely to be an “adequate substitute” for receiving the parties’ own contentions. 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.

Second is a concern about fairness to the parties. The Court’s rules then and now instruct attorneys to give in their cert petitions “a direct and concise argument amplifying the reasons relied on for the allowance of the writ.” The rules 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. 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.” 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, and that expectation is defeated when the Court summarily reverses without providing any further opportunity to weigh in.

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, and the leading manual on practice before the Supreme Court makes that suggestion explicitly. 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

51 Brown, supra note 13, at 79-80.
52 Id. at 79.
53 Id. at 80.
54 Id.
58 Brown, supra note 13, at 82.
59 Id. at 81.
60 Shapiro et al., supra note 12, at 357.
having to review substantially longer briefs across many more petitions.\textsuperscript{61}

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.”\textsuperscript{62} 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 decisionmaking process. Despite renewed calls for such a policy, including from within the Court itself,\textsuperscript{63} no such change has taken place.

\textbf{B. Recent Trends}

The practice of summary reversals in the Roberts Court has attracted recent attention.\textsuperscript{64} 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. Put another way, the cases are factbound. This category of factbound error correction represents the most substantial group of summary reversals, as well as the most controversial usage. Outside of this definable subcategory, the Court’s use of summary reversals is more akin to the exercise of an “ad hoc prerogative.”\textsuperscript{65}

Some statistics about the Court’s practices may provide helpful context for the discussion to come.\textsuperscript{66} Consider first how often the Court uses the tool.

\textsuperscript{61} See Brown, supra note 13, at 82.
\textsuperscript{62} Id. at 95.
\textsuperscript{63} 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.”).
\textsuperscript{65} See Baude, supra note 2, at 35 (emphasis and capitalization omitted). For example, in \textit{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 2, at 27-30.
\textsuperscript{66} 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, \textit{Courts as Managers}: American Tradition Partnership v. Bullock and \textit{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
From the beginning of Chief Justice Roberts’s tenure in 2005 through June 2018, the Court summarily reversed eighty-four cases. 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 seven in the last, with a peak of twelve in 2015.

Compared to past Courts, the use of summary reversals in the Roberts’s 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. These were of the extremely bare variety, with “no more than a citation or two by way of explanation.” As noted earlier, the Burger Court shifted from the practice of one-line decisions to providing a couple of pages of reasoning. Hellman’s study found an average of about twenty-three decisions per term from the 1971 through the 1979 terms. 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.

Although the Roberts Court’s practices do not stand out numerically, they have nonetheless attracted attention because of the Court’s apparent focus on 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 2, at 22 n.69; Hartnett, supra note 6, at 593 n.11.


The October 2017 cases are cited in the preceding footnote. The cases for the other two cited terms can be found in Hartnett, supra note 6, at 619-21.

See Hellman, supra note 41, at 822 (counting about 250 decisions over sixteen years).

Id. at 827.

particular areas of law. Of the eighty-four summary reversals from the 2005 to 2017 terms, forty have come in federal habeas cases. Qualified immunity is a somewhat distant second at ten. The Supreme Court has also summarily reversed multiple cases involving sentencing challenges under United States v. Booker, the Federal Arbitration Act, and state habeas law.

Furthermore, the Court’s interest in reversing federal habeas and qualified immunity cases is asymmetrical. Of the forty federal habeas cases, thirty-three were reversed in favor of the state; and of the ten qualified immunity cases, eight were reversed in favor of the government official. Hartnett finds it “surprising” that the habeas petitioner prevailed as often as they did, 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 and did not address the merits of the habeas claim. By contrast, in the majority of the cases in which the state prevailed, the Court reversed on the merits of the habeas.

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73 Hartnett’s study found thirty-four federal habeas cases. See Hartnett, supra note 6, at 594-95. As reflected in note 67, supra, six of the new cases I found involved federal habeas.

74 Hartnett found seven summary reversals in the qualified immunity category. Id. at 595. As reflected in note 67, supra, I found three additional such cases.


76 9 U.S.C. § 1 et seq.

77 Hartnett, supra note 6, at 594-95.

78 Hartnett’s numbers were twenty-eight and six. Id. at 595. Five of the federal habeas cases cited in note 67, supra, were reversed in favor of the state. Only Tharpe v. Sellers, 138 S. Ct. 545 (2018) (per curiam), came out the other way. Two of the three qualified immunity cases cited in note 67, supra, were reversed in favor of the government official. Only Sause v. Bauer, 138 S. Ct. 2561 (2018) (per curiam), came out the other way.

79 Hartnett, supra note 6, at 595.

80 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 (2014) (per curiam) (correcting an unintended statement from an earlier Court opinion in the same case. See supra note 65); 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); 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 adequately raise a claim 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 v. Sellers, 138 S. Ct. 545, 546 (2018) (per curiam), the Court’s decision was also far removed from the merits, holding only the circuit court had denied the habeas petitioner’s certificate of appealability application on an invalid ground.

81 The one exception was Porter v. McCollum, 558 U.S. 30 (2009), which I discuss at length in Section IV.C below.
claim; only a handful involved process defects.82

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 an unreasonable application of, clearly established Federal law.”83 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.” 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.84 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.85 The Court then concludes that the state court or defendant official could not be said to have acted unreasonably under these general principles.86

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 cert 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.87

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82 For the full list of cases Hartnett identifies, see Hartnett, supra note 6, at 595 n.18. The cases I would describe as involving some process 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); [others].


86 White, 137 S. Ct. at 552; Parker, 567 U.S. at 47-48.

87 Cf. Ray, supra note 72, 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
With no satisfying answer having been given by the Court itself, the next Part turns to explanations from commentators (as well as justices writing separately) and a critique of current practice.

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. Section 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 goals 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 decisionmaking process, and efficiency. 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.” As William Baude puts it, “wholesale criticism is fading,” and the “Court has worked to regularize” the practice. 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.”

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 not explained and may not be fully...
thought through.”92 Others, including most recently Alex Hemmer, connect this to a larger puzzle raised by the selection process: “how can a case be significant enough to merit the Court’s consideration, but not significant enough to warrant the benefits of adversarial procedure?”93

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 decisionmaking should be constrained by principles stated in advance.94 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.95 By placing no constraint on its future use of summary reversals, the Court undermines both of these values.96

Not only has the Court failed to identify such constraints, but its use of summary reversals for error correction purposes directly contradicts its stated

92 Id. at 38. In White v. Pauly, 137 S. Ct. 548 (2017) (per curiam), the Court offered a brief explanation for why it has taken a particular interest in qualified immunity cases. First, qualified immunity is “important to ‘society as a whole.’” Id. (quoting 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.

93 Hemmer, supra note 66, at 209 (italics 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 13, at 94.

94 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”).


96 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 would disagree that some effort to base decisions on principle is desirable. See id. (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”).
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. Given that the rule contemplates exceptions, the Court’s occasional intervention for truly unusual circumstances would not be objectionable. But the lack of an express justification is more troubling because the Court in fact regularly intervenes 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. 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. 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.

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” or “rebellion” 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. Taking on a substantial number of these cases, even if only to correct errors, is considered important to reinforcing the Court’s supremacy. 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.

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97 *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.
98 See supra note 78.
100 Hartnett, supra note 6, at 597.
101 Baude, supra note 2, at 39.
102 See id. at 31-32.
103 *Id.*
104 Hartnett, *supra* note 6, at 613 (“[S]ummary reversal sends a corrective message, particularly in the face of resistance, that reversal after plenary consideration does not.”).
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 AEDPA,\textsuperscript{105} and that they need continual reminders “not to define clearly established law at a high level of generality” in qualified immunity cases.\textsuperscript{106} 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.”\textsuperscript{107} In another, after summarizing and quoting from the Ninth Circuit’s reasoning, the Supreme Court declared in a one-word sentence, “No.”\textsuperscript{108}

Similarly, dissenting justices have referred to summary reversals as “a bitter medicine”\textsuperscript{109} needed only when the lower court has attempted to “defy”\textsuperscript{110} 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 to correct the error in a qualified immunity case that the defendant officer won below.\textsuperscript{111} 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.”\textsuperscript{112}

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.\textsuperscript{113}

Hemmer provides a theoretical grounding for the practice, arguing that it

\begin{itemize}
\item \textsuperscript{105} 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))).
\item \textsuperscript{106} Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) (per curiam) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011)).
\item \textsuperscript{107} Parker v. Matthews, 567 U.S. 37, 38 (2012) (per curiam).
\item \textsuperscript{108} Glebe v. Frost, 135 S. Ct. 429, 431 (2014) (per curiam).
\item \textsuperscript{110} Pavan v. Smith, 137 S. Ct. 2075, 2079 (2017) (Gorsuch, J., dissenting).
\item \textsuperscript{111} Tolan v. Cotton, 134 S. Ct. 1861, 1868-69 (2014) (Alito, J., concurring in the judgment). Justice Alito was joined by Justice Scalia.
\item \textsuperscript{112} Cash v. Maxwell, 132 S. Ct. 611, 616 (2012) (Scalia, J., dissenting from denial of certiorari). Justice Scalia was joined by Justice Alito.
\item \textsuperscript{113} Baude, supra note 2, at 27.
\end{itemize}
is not merely an expression of frustration, but rather an exercise of the Court’s “managerial” authority.\textsuperscript{114} Summary reversals allow the Court to “send signals about its commitments and priorities, even on settled areas of law, by illustrating particularly egregious misapplications.”\textsuperscript{115} 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.”\textsuperscript{116} Together, these tools show the court “acting in its managerial capacity — rather than its lawmaking or its error-correcting capacity — to dispose of more cases with less effort, to correct egregious legal errors when they arise, and to preserve the Court’s limited resources for cases that present novel legal problems.”\textsuperscript{117}

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 decisionmaking 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 cert petitioners would have an incentive to search for evidence of systematic error in the lower courts to encourage the Court to summarily reverse a factbound case. As one possibility, Baude cites research suggesting that lower courts have systematically erred in their application of the Speedy Trial Act.\textsuperscript{118} 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

\begin{footnotes}{\footnotesize
114 Hemmer, supra note 66, at 210.
115 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, \textit{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.
116 Hemmer, supra note 66, at 213.
117 Id.
118 See Baude, supra note 2, at 39 (citing Shon Hopwood, \textit{The Not So Speedy Trial Act}, 89 WASH. L. REV. 709, 744-45 (2014)).
}\end{footnotes}
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, there is a separate question of whether the Court’s method of rebuking lower courts is likely to be effective in achieving the Court’s apparent ends. I turn to that issue in the next Section.

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 it 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 decisionmakers. 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.

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.119 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. Some may even embrace the idea of active resistance. The recently deceased Judge Reinhardt, who was described as “the last great liberal lion” of the federal courts,120 famously

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119 See Re, supra note 115, at 936-45 (describing different models for understanding the scope of the Supreme Court’s authority).

scoffed at the idea that reversal by the Supreme Court should be a badge of dishonor.⁴¹ He had his own understanding of what the Constitution requires, and although he was obligated to follow Court precedent, he did not feel bound to anticipate the Court’s next move to the right.⁴² 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.

For judges like 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. 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. But one 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.⁴³ And even those who would not go so far as to embrace the idea of resistance may consider themselves ethically bound to focus solely on legal considerations and ignore the threat of personal stigma from being summarily reversed as irrelevant.

At the same time that summary reversals are failing to dissuade one group of judges, a different group is likely to be overdeterred by the threat of being summarily reversed. Several different groups of judges could fall into this category. One group may take the view, noted above, that lower court judges should anticipate the general direction of the Court’s decisions. Another group may be generally in agreement with the Court’s jurisprudence in these areas, or else hold neutral or weak views. Still another group may believe that being summarily reversed harms their reputations.⁴⁴ 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

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⁴² 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.
⁴³ See Baude, supra note 2, at 41-47 (listing judges who have been summarily reversed three or more times and the issues involved).
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 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. 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 an unreasonable
application of, clearly established Federal law,” that instruction is hardly self-
defining. 125 The same is true when the Court bases qualified immunity on

whether there has been a violation of “clearly established statutory or constitutional rights of which a reasonable person would have known.”

The question of reasonableness is the quintessential legal standard. In applying a standard, as opposed to a determinate rule, the decisionmaker must exercise substantial discretion to weigh all the relevant circumstances in determining what the law requires. 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, and although there may be disagreement about whether the system as a whole needs more of one or the other form of directive, even those who tend to prefer rules agree that standards are in some circumstances inevitable.

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’s impossible to provide specific rules to guide all the behavior that is governed by the negligence standard.”

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, and although the Supreme Court is not formally a common law court, it often functions like one in its development of constitutional or federal statutory law. As a high-level standard gets applied to new facts, its once vague meaning becomes more precise. Each individual case

128 See id. at 62-69; see generally Louis Kaplow, Rules vs. Standards: An Economic Analysis, 42 DUKE L.J. 557 (1992) (analyzing the tradeoffs from an economic perspective).
129 For example, Sullivan’s Foreword for the 1991 Term shows how the justices split on this question of form, most prominently Justice Scalia on the side of rules and Justice Stevens on the side of standards. See Sullivan, supra note 127, at 83-95.
130 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. 2, § 19, at 127 (Ernest Barker ed. & trans., 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 . . . .”).
132 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”).
134 Hellman makes this point, though he does so as a concession while criticizing
becomes a precedent to which later courts can analogize the facts before them. The body of cases as a whole enables practitioners to develop a “good working sense of the law.” Indeed, it may be possible for the courts to articulate more precise, rule-like directives for particular contexts that fall within the general standard.

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.

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 such cases present. 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 picture. 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. The risk of errors of that sort can never be avoided entirely,

summary reversals, not as a way to argue that they should be used for this purpose. See Hellman, supra note 41, 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.”).

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

GARNER, supra note 131, at 81.

See Scalia, supra note 130, at 1183; see also Pierre J. Schlag, Rules and Standards, 33 U.C.L.A. L. Rev. 379, 415 (1985) (explaining how the reasonable person standard could be translated into more precise rules for specific contexts like “automobile accidents, professional services, recreational activities, and so on”).

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

See Hellman, supra note 41, at 833; Supreme Court Per Curiam Practice, supra note 33, at 709.

See, e.g., Cavazos v. Smith, 565 U.S. 1, 16-17 (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.”).
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 Sections 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 cert grant but not important enough to require plenary review. The answer is that the case can be important but not difficult. The issues presented in such a case should typically be straightforward for the reasons just discussed. At the same time, 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 aggregate. 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.”141 The suggestion that factbound opinions cannot effectively guide future reasoning has intuitive appeal.142 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


142 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.
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. This value is clearest for factually similar cases, 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. Further, that the later case is not on all fours with the earlier one does not mean that guidance cannot be extrapolated. To be sure, the later court has discretion in deciding whether the similarities are sufficient to require the same result or the differences warrant the opposite conclusion. But the earlier court’s decision provides a valuable starting point for the analysis.

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.

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. 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.

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.” 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.

See Richard B. Cappalli, The Common Law’s Case Against Non-Precedential Opinions, 76 S. CAL. L. REV. 755, 778 (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 or exception has expanded, despite its verbal stability, by sweeping in the new complex of facts.”).

See id. at 787 (“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.”).

See GARNER ET AL., supra note 131, at 92; see also id. at 73 (noting that the “later court always gets the last word”).

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

Cass R. Sunstein, On Analogical Reasoning, 106 HARV. L. REV. 741, 777 (1992). 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.

GARNER ET AL., supra note 131, at 105.

Sunstein, supra note 147, at 745.

Id. at 746.
Furthermore, setting aside the potential for analogizing, in the longer run a group of factbound 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. 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, 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.

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. 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. 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.

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. In Kisela, three police officers responded to a 911 call about a woman acting erratically while

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151 See supra notes 48-49 and accompanying text.
152 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 barebones variety pulled randomly from a list of recent cases, see Polidur v. Barr, 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).
153 See Cappalli, supra note 143, at 793 (suggesting that circuit courts dealing with settled law should nonetheless write short opinions, rather than resorting to unpublished dispositions).
155 In Section IV.C below, I explain why borderline cases are more useful than outliers in illustrating the operation of a legal standard.
holding a knife.156 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.157 Standing on the other side of a chain-link fence, they twice ordered Hughes to drop the knife.158 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.159 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.”160

Kisela was a factbound case in that its holding depended on the particular combination of several circumstances. 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.161 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.

The Kisela decision was handed down on April 2, 2018, and in less than a year it has already been cited 237 times.162 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. Fourteen of the citations are given four bars on Westlaw’s depth of treatment scale, which means the case “examined” Kisela, while another sixty citations are given three bars, which means the court “discussed” Kisela.163

It is not the sheer length of the Kisela discussion, which is how Westlaw determines its depth of treatment rating,164 that matters. Again, cases may quote at length from Kisela simply because it provided a recent statement of

156 Kisela, 138 S. Ct. at 1150.
157 Id. at 1151.
158 Id.
159 Id.
160 Id. at 1153
161 Id.
162 Westlaw “citing references” search on February 24, 2019.
163 See WestlawNext, How to Check Citations 4, http://lscontent.westlaw.com/images/content/wlncitations10.pdf. Four bars means “an extended discussion of the cited case, usually more than a printed page of text,” while three bars means “a substantial discussion of the cited case, usually more than a paragraph but less than a printed page.” Id.
164 See id.
the relevant principles. 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 seventy-four decisions with three or four bars on the depth of treatment scale to see how many of them engaged with the facts of Kisela. Of the fourteen four-bar cases, I would characterize six as having done so: two found Kisela distinguishable and denied qualified immunity, while the other four granted qualified immunity. Not surprisingly, most of the sixty-three-bar citations did not engage with the facts of Kisela, but four did: three found Kisela distinguishable and denied qualified immunity, while one granted qualified immunity.

What insights can be gleaned from this single example? First, that there were ten 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 factbound 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, 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.”

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. The court 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 the

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. 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.

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 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. Thus, the court found Kisela to be distinguishable and denied the defendant’s qualified immunity claim.

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. 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. In short, Kisela had precedential value, and it stands to reason that the same could be said for many similarly factbound 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 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

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171 See id. at *11.
173 Id. at *9.
175 See id. at 677.
constitutes an unreasonable application of clearly established law, and
whether an official’s conduct violates clearly established rights of which a
reasonable person would have known. 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.” 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.

Since AEDPA, the Court has reviewed dozens of habeas cases as part of
its plenary and summary dockets. The same is true for qualified immunity
cases over the past couple of decades. 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 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. This is the key limitation I

\[177\] Id. at 688.
\[179\] Id. at 392.
\[181\] See Baude, supra note 92, at 82 (counting thirty cases since the Court decided Harlow v. Fitzgerald, 457 U.S. 800 (1982)).
\[182\] See, e.g., Dunn v. Madison, 138 S. Ct. 9, 12 (2017) (“We express no view on the merits of the underlying question outside of the AEDPA context.”); Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) (“We address only the qualified immunity question, not whether there was a Fourth Amendment violation in the first place . . . .”).
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.\textsuperscript{183} 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 court interpretations of their own case law in any event.\textsuperscript{184} 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.\textsuperscript{185} 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.

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.\textsuperscript{186} As for qualified immunity cases, the Court always has the option to address the underlying constitutional issue, under the two-prong test.\textsuperscript{187} It has acknowledged the benefits of doing so, namely that it “promotes the development of constitutional precedent.”\textsuperscript{188} 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.\textsuperscript{189} Moreover, the Court has previously suggested that the factbound nature of a case is a reason not to address the

\textsuperscript{183} See, e.g., Reinhardt, supra note 5, at 1221-22; see also John C. Jeffries, Jr., Reversing the Order of Battle in Constitutional Torts, 2009 SUP. CT. REV. 115, 120 (2009) (“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.”).

\textsuperscript{184} See, e.g., Mullenix, 136 S. Ct. at 311-12.


\textsuperscript{186} For this to be possible, litigants also must 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).

\textsuperscript{187} Following Pearson v. Callahan, 555 U.S. 223 (2009), 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.” Id. at 232.

\textsuperscript{188} Id. at 236.

\textsuperscript{189} Id. at 236-37.
first prong. Others have noted how this suggestion creates a Catch-22 for civil rights plaintiffs, as courts are told not to create precedent in factbound cases but are also required to deny relief for lack of factually similar precedent. I argued in the prior Section that factbound 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 factbound cases.

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. 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. 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. 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 has been argued that greater clarity should operate to the benefit of government officials as well as potential plaintiffs. Still, some justices may take the view that clarity is undesirable because maintaining legal grey areas ensures

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190 See supra note 142.
192 Karen Blum makes a similar call, though directed at lower courts, for addressing the first prong in the qualified immunity analysis even in factbound 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 unconstitutional. At the very least, holdings rendered in fact-bound cases may serve to shrink the "gray areas."”

Id. at 1904.
193 See Reinhardt, supra note 5, 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).
194 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.”).
a greater degree of deference to the original decisionmakers.

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 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 Section III.A is at least reduced under my proposal but not entirely avoidable. I return to this question below in Sections 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 has suggested that some degree of variation in the lower courts is entirely appropriate. He made this point in the context of arguing for a general preference for rules over standards. 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. The Court can tolerate some degree of variation in how courts decide those issues, just as the system “tolerat[es] a fair degree of diversity in what juries determine to be negligence.”

My response to this potential objection is to agree that perfect uniformity is not the end goal. The goal rather is sufficient guidance for lower courts to

195 Scalia, supra note 130, at 1186.
196 Id.
197 Id.
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.” 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.”

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. It 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. 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, that would reinforce the critique noted earlier that its ad hoc practices are of questionable legitimacy. 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 the importance of the legal standard at issue into account in deciding whether providing more guidance is worth the effort. Its continued prioritization of areas like federal habeas and qualified immunity would be entirely proper, given how often they arise in the lower courts.

A 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. 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. Only after sufficient experience has been accumulated should the Court weigh in again. Some additional cases may need to be considered on plenary

198 Id. at 1186.
199 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”).
200 See Watford, Chen & Basile, supra note 19, at 579.
review to the extent the Court needs to adjust or refine the doctrinal principles. 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. That 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 the procedural reform proposed by others of permitting supplemental briefs when summary action is being considered.

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. 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 commonly used during the era in which the Supreme Court’s mandatory docket was larger.\(^201\) 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 cert was 1979.\(^202\) Again, it makes sense that would be rare, since granting cert means the case is important in some respect and thus

\(^{201}\) See Hellman, supra note 41, at 812-16.

\(^{202}\) See Hartnett, supra note 6, at 593 n.10.
would typically warrant full procedures and a thorough opinion. 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 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. 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.203 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 cert 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 cert petitions in borderline cases for fear of setting unfavorable Supreme Court precedent. 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.

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.204 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

203 This is only generally rather than always true because the actual vote count for summary dispositions may vary. A 9-0 summary reversal would have more judges reaching the same conclusion than a 5-4 summary affirmance.

204 See supra notes 61-63 and accompanying text.
to weigh in before receiving a decision. Furthermore, if assured of having this opportunity, litigants would no longer need to provide the lengthy discussion of the merits of cases in the certiorari papers that they currently feel obligated to include.

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.\footnote{See SUP. CT. R. 28 (“Unless the Court directs otherwise, each side is allowed one-half hour for argument.”).} 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. 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, I think 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. Even in a case that seems relatively clear and for which oral argument is unlikely to make a difference,\footnote{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) (quoting the views of different judges). The question is difficult to study empirically, though at least one study finds 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.} it seems likely that the justices would want to come prepared with thoughtful questions and a thorough knowledge of the record. 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. By contrast, the only mechanism for ordering oral argument under the current rules is granting certiorari,\footnote{SUP. CT. R. 16.} and regardless of the existing rules it would not make much sense to require the parties to appear for argument if cert was still uncertain. Further, although nothing prevents the Court from dismissing a case even after having granted cert, presumably a concern about wasted effort would
make that a rare occurrence. 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 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. And the Court should be factoring in the complexity of a case in deciding whether to use summary procedures.

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. 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 valuable, as the factual circumstances governed by the particular standard may evolve.

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. 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.

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.208

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 counterintuitively, 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.

The Court’s current practice assumes that correcting clear errors is precisely what summary reversals are for. 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 it, 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

208 This is sometimes described as “percolation,” and some commentators have questioned whether percolation is as useful as advertised. See Spencer E. Amdur & David Hausman, Response, Nationwide Injunctions and Nationwide Harm, 131 HARV. L. REV. F. 49, 52-53 (2017), https://harvardlawreview.org/2017/12/nationwide-injunctions-nationwide-harm/. There is reason to be uncertain about the value of percolation in the sense of having lower courts articulate competing viewpoints. 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. 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).
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. 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. But future cases that merely illustrate the operation of the plausibility standard may properly be decided by summary disposition.

The line between illustration and adjustment or refinement is admittedly blurry; even cases that merely illustrate an existing standard are making new law. 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. A closer call would be when a decision is fact-intensive but produces a holding that affects a subcategory of future cases. 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 factbound that any principle that can be derived from them is quite narrow. As discussed in Section III.B.1, the primary value of such cases is to provide bases for factual analogizing by future courts. And in combination with other factbound summary dispositions, such illustrations help to flesh out and calibrate the meaning of the otherwise abstract standard in question.

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, and when the risk is serious, the Court can either grant plenary review or simply deny cert. That said, the risk of mistake should not be overstated. Many cases — particularly in habeas — will

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

210 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, see id. at 383-84, but concluded with a general principle for the subcategory of cases involving high-speed car chases, see id. at 386.

211 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
have 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 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. The Court granted relief based on the petitioner’s claim of ineffective assistance of counsel. 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.” 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.”

Beginning with the illustration/adjustment distinction, Porter was a truly factbound case that did not substantially affect the general doctrine. Instead, it illustrated in the circumstances of a concrete case what deficient performance looks like. 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. 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. The Court’s reasoning was closely tailored to this defendant’s specific crime and four mitigating factors described in detail.

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. 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. 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. That basic weighing would not have benefited from a closer review of the record. Even the prejudice prong of the Strickland test, 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.

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. The Court 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.

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.

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217 Id. at 40.
218 Id.
220 See id. at 16-17 (Ginsburg, J., dissenting).
221 As noted in the preceding Section, if the procedural reform of inviting supplemental briefs were adopted, that would provide a further safeguard against error.
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 has been 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.\textsuperscript{222} 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.

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. 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. 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. 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.”\textsuperscript{223} While this may lead lower courts to grant immunity that should have been denied, it could just as well as 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

\textsuperscript{222} See supra text accompanying notes 78-82.
\textsuperscript{223} See Baude, supra note 92, at 83.
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 Section 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. With a more balanced approach, judges who previously 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. 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.²²⁴

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 decisionmaking 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,²²⁵ 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.²²⁶ If

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²²⁴ 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 99, at 563 (footnotes omitted).

²²⁵ See supra text accompanying notes 193.

²²⁶ 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 17.
that is correct, recall that the 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. Justice Sotomayor in particular has used such dissents to call attention to problematic cases in these areas.\textsuperscript{227} Although she did not get the needed votes, that may have been because the other justices saw the cases as factbound 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.

\textit{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. 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.

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 the specific areas of habeas and qualified immunity that liberals are more likely to favor. Given the Court’s current composition, I have tried to highlight at various points why the proposal could have appeal even to conservative justices.\textsuperscript{228} But 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 Section II.A as the Court’s veiled substantive agenda is possible only because some or all of the liberal justices

\textsuperscript{227} For a summary of Justice Sotomayor’s dissents from the denial of certiorari, see Yablon, \textit{supra} note 99, at 555-60.

\textsuperscript{228} In particular, see \textit{supra} Sections III.B.2 and IV.D.
When summary reversals are unanimous or nearly so, that reinforces the idea that rebuke is appropriate. If the decisions instead came down on a 5-4 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. Any threat of stigma 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. They may also have concerns from an institutional standpoint about lower court judges disregarding Supreme Court precedent. What we do 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, and in one instance the two justices specifically called out the Court’s lopsided use of summary reversals in the qualified immunity context. 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.

In any event, my suggestion is that, to the extent the four liberal justices

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230 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 manner 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 apparently resisting lower courts.

231 It is entirely possible that more such cases exist, but were not worth flagging given the lack of votes on their side.


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.\textsuperscript{234} 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 party lines. Moreover, the conservative majority would have to weigh the benefits of error correction against the costs of exacerbating concerns about politicized decisionmaking.\textsuperscript{235} The possibility of a new approach would then be ripe for consideration.

\textbf{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 an unfortunate phenomenon that needs to be accounted for. Rather, they stand to play a valuable, constructive role in the development of the law.

\textsuperscript{234} 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, \textit{No Vote-Trading Here}, N.Y. TIMES, May 15, 2010, https://www.nytimes.com/2010/05/16/weekinreview/16liptak.html. 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, \textit{The Inside Story of How John Roberts Negotiated to Save Obamacare}, CNN.com, March 25, 2019, https://www.cnn.com/2019/03/21/politics/john-roberts-obamacare-the-chief/index.html. In any event, the suggestion here should be less controversial because the liberal justices would be attempting to force more principled decisionmaking rather than extracting a return favor.

\textsuperscript{235} 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, \textit{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.