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The Remand Power and the Supreme Court's Role

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"Reversed and remanded." Or "vacated and remanded." These familiar words, often found at the end of an appellate decision, emphasize that an appellate court's conclusion that the lower court erred generally does not end the litigation. The power to remand for further proceedings rather than wrap up a case is useful for appellate courts because they may lack the institutional competence to bring the case to a final resolution (as when new factual findings are necessary) or lack an interest in the fact-specific work of applying a newly announced legal standard to the particular circumstances at hand. The modern Supreme Court has carried the power to remand rather far, vacating and remanding in some cases in which it is unclear whether the lower court erred in any respect. Some of the Justices have sought to narrow the circumstances in which the Court can remand, relying heavily on claims about the nature of Article III "appellate jurisdiction" and the "traditional" practices of appellate courts. When they have responded at all, the defenders of a broad conception of the remand power have not effectively countered the critics' claims. There is a risk that the remand power will therefore be narrowed unnecessarily and without a full defense.

This Article takes a broad look at the remand power, examining it in its theoretical, constitutional, statutory, historical, and prudential dimensions. Contrary to the critics' contentions, the history is not one in which traditional limitations on appellate jurisdiction have lately been degraded. Rather, the history is more interesting in that it contains two separate appellate traditions: a rigid approach from the common law and a flexible approach from equity. Modern federal appellate procedure is a hybrid of the two, but Congress and the courts have chosen the flexible, equitable approach when it comes to appellate courts' remedial powers. The most important constraints on the power to remand therefore come not from supposed rigidities in the Constitution or traditional practice but instead from prudential considerations. The prudent exercise of an appellate court's remedial discretion depends on the court's role in the judicial system.

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Debates over the remand power therefore implicate deep conflicts over the Supreme Court's sometimes competing functions of doing justice, developing the law, and supervising a bureaucracy.

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INTRODUCTION

When an appellate court reverses a decision of a lower court, the question of the proper appellate remedy then arises. Sometimes the appellate court puts an end to the case by entering the appropriate judgment itself or by telling the lower court how to dispose of the case.[1] More commonly, though, at least in modern federal practice, the appellate court will remand the case—that is, send it back to the lower court—in a more open-ended way, for whatever further proceedings the lower court deems proper.[2] In what is perhaps the most famous remand in the Supreme Court's history, the Court's remedial decision in *Brown v. Board of Education* did not decree the immediate desegregation of public schools but instead remanded to the lower courts for them to apply *Brown*'s principle in light of varied local conditions so as to bring about desegregation "with all deliberate speed."[3]

Whether to remand at all, and how much instruction to give the lower court, obviously can affect the resolution of the specific dispute at hand, and

1 *E.g.*, Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 149–54 (2000) (clarifying standard for judgment as a matter of law under Federal Rule of Civil Procedure 50, applying the standard to the facts, and reversing without remanding); Agostini v. Felton, 521 U.S. 203, 240 (1997) (remanding with instructions that the district court vacate its injunction); Haynes v. United States, 390 U.S. 85, 101 (1968) (reversing the defendant's conviction rather than remanding for further proceedings because any remand "must inevitably result in the reversal of petitioner's conviction"); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 362 (1816) (reversing state supreme court and affirming state trial court).

2 *See, e.g.*, Zivotofsky *ex rel.* Zivotofsky v. Clinton, 566 U.S. 189, 201 (2012); Tuggle v. Netherland, 516 U.S. 10, 14 (1995) (per curiam); Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 213 (1958).

3 Brown v. Bd. of Educ., 349 U.S. 294, 299–301 (1955).

some remedial decisions, like the one in *Brown*, have serious social consequences. But practices regarding appellate remedies also have systemic effects on the operation, and ultimately the character, of the whole judiciary. Remands distribute judicial work and delegate the authority and responsibility to apply the law. A general practice of open-ended remands allows an appellate court to focus on pure questions of law rather than the messy details of law application and case resolution. The modern Supreme Court's heavy reliance on remands both reveals and facilitates its self-conception as a law-declaring court.

The Supreme Court's power to remand cases is confirmed by a federal statute of extraordinary breadth. It authorizes federal appellate courts to affirm, reverse, vacate, or modify a judgment or to remand for further proceedings with no apparent limitation except that the chosen remedy "be just under the circumstances."[4] Using this authority, the Court remands in a wide range of circumstances. Most of these remands are uncontroversial, for they simply require the lower court to do the work of applying newly clarified law to the case at hand, but certain types of remands have attracted criticism on the grounds that they overstep the proper appellate role.[5] The remands that attract criticism tend to involve cases in which the Court vacates and remands without identifying error in the ultimate judgment under review or, sometimes, even identifying a material error in the reasoning of the decision under review. More specifically, the controversial remands can be organized into two categories, which we could call *law-shepherding remands* and *justice-ensuring remands*. As we will see, the two categories are quite different and are subject to criticism and defense on different grounds.

An example of a law-shepherding remand is a case in which the Supreme Court requires the lower court to reach a different ground of decision—to decide the case on the basis of one issue instead of another—in circumstances in which there is no mandatory sequence of decision and without finding the lower court's initial ground to be incorrect.[6] A striking example of such a remand for resequencing is *Beer v. United States*, the lawsuit brought by federal judges complaining that Congress's failure to grant cost-of-living increases amounted to a cut in pay in violation of Article III's Compensation Clause.[7] The U.S. Court of Appeals for the Federal Circuit turned away the judges' suit based on circuit precedent that had previously rejected the same argument.[8] The Supreme Court then summarily vacated and remanded for the Federal Circuit to consider an alternative ground for dismissing the case, namely that the judges' lawsuit was barred by issue preclu-

4 28 U.S.C. § 2106 (2018).

5 *See infra* note 16.

6 *See infra* Section III.C (describing several variations on law-shepherding remands).

7 361 F. App'x 150 (Fed. Cir. 2010), *vacated*, 564 U.S. 1050, 1050 (2011). Under the Compensation Clause, federal judges are to receive "a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1.

8 *Beer*, 361 F. App'x at 151.

sion based on their participation in prior litigation.[9] "The Court considers it important that there be a decision on the [preclusion] question," the terse order read, "rather than that an answer be deemed unnecessary in light of [the Federal Circuit's] prior precedent on the [constitutional] merits."[10] Justice Scalia dissented based on his view that the Court "[has] no power to set aside the duly recorded judgments of lower courts unless we find them to be in error, or unless they are cast in doubt by a factor arising after they were rendered."[11]

A few things are clear about *Beer*, but other aspects of the case are obscure. Clearly the Supreme Court had jurisdiction. It could have addressed preclusion, as the issue had been pressed by the government in the lower court. It is also clear that the Court's decision did not conclude that the Federal Circuit's ruling on the Compensation Clause was wrong on the merits. And, though this is perhaps a bit less certain, the Federal Circuit did not err by relying on circuit precedent rather than addressing preclusion, a nonjurisdictional issue.[12] One thing that is obscure, by contrast, is the Court's reasoning, as the order was only a few sentences long and cited no authorities. Also unclear is the Court's motive for the remand, though it looks like the Court hoped to delay and perhaps avert a clash with Congress over judicial salaries.

As *Beer* reveals, law-shepherding remands are hard to classify into familiar (if troubled) categories of activism and restraint. The decision in *Beer* was not activist in the sense of unduly reaching or hastening the resolution of weighty questions. But it was not passive either, at least not in the sense of taking the cases as they come. Instead, and as it does with other procedural tools and doctrines at its disposal,[13] the Court is using remands to maximize its control over the timing and circumstances of the judiciary's exercise of its law-declaring function. That is the sense in which the remand in *Beer*, and other cases like it, shepherd the development of the law.

Justice-ensuring remands are different, though they too have attracted some criticism. These remands typically do not involve weighty questions of law but rather involve the suspicion that an injustice has occurred—but the Court asks the lower court to take another look rather than sorting out what happened itself. A recurring type of justice-seeking remand involves what we could call the "potentially overlooked argument." These are cases in which the Court suspects that the lower court overlooked a point that had the potential to change the result, but in which the Court does not decide whether the point really was overlooked, whether the potentially overlooked

9 *Beer*, 564 U.S. at 1050.

10 *Id.*

11 *Id.* (Scalia, J., dissenting) (citing Webster v. Cooper, 558 U.S. 1039, 1041–42 (2009) (Scalia, J., dissenting)). Justice Breyer was recorded as favoring granting certiorari, but he did not write an opinion. *Id.* at 1050.

12 These conclusions are elaborated upon later, in subsection III.C.1. In particular, as I explain, the Federal Circuit did not violate the doctrine of constitutional avoidance.

13 *See infra* text accompanying note 47 (citing other examples).

point actually is meritorious, or whether it would change the ultimate outcome if meritorious.[14] Another genre of the justice-ensuring remand stems from the Court's practice, typically in federal criminal prosecutions, of remanding for further consideration when the government concedes error in some aspect of a lower-court decision upholding a conviction but does not concede the ultimate invalidity of the conviction.[15]

Several Justices have campaigned to put an end to law-shepherding remands and, even more consistently, to justice-ensuring remands. These Justices—who are mostly found among the Court's conservatives—question the wisdom of the Court's actions and sometimes deny that the Court even has the power to vacate and remand in circumstances like those above.[16] The remand skeptics' arguments rely primarily on the contention that the Supreme Court's exercise of appellate jurisdiction under Article III of the U.S. Constitution and the governing statutes is constrained by historical understandings of appellate action, which, the skeptics believe, limit the Court's power to vacate and remand without finding error in the judgment under review.[17] Depending on the type of case at issue, the remand skeptics would have the Court either deny review altogether or, if it is going to grant review, figure out the merits itself.[18]

When questions about appellate remedies arise, as they do in the disputes at issue here, courts and commentators are ill-equipped to answer them. While appellate dispositions are literally the stuff of everyday practice, the law governing them is, perhaps because of that familiarity, little contemplated. And although the remand skeptics rely in large part on claims about historical practice, neither the skeptics nor the Justices who hold a more

14 *See infra* subsection III.B.1.

15 *See infra* subsection III.B.2.

16 *See, e.g.*, Nunez v. United States, 554 U.S. 911, 912 (2008) (Scalia, J., dissenting) ("In my view we have no power to set aside (vacate) another court's judgment unless we find it to be in error." (citing Mariscal v. United States, 449 U.S. 405, 407 (1981) (Rehnquist, J., dissenting))); Price v. United States, 537 U.S. 1152, 1153 (2003) (Scalia, J., dissenting) (stating that "in general, we have no *power* to vacate a judgment that has not been shown to be (or been conceded to be) in error"). The Court's leading remand skeptic was Justice Scalia. Since Scalia's death, Justice Alito appears to have assumed the mantle of leading skeptic, usually with support from the Chief Justice and Justice Thomas and sometimes others. *See, e.g.*, Myers v. United States, 139 S. Ct. 1540, 1541 (2019) (Roberts, C.J., joined by Thomas, Alito & Kavanaugh, JJ., dissenting); White v. Kentucky, 139 S. Ct. 532, 532 (2019) (Alito, J., joined by Thomas & Gorsuch, JJ., dissenting); Elonis v. United States, 135 S. Ct. 2001, 2013 (2015) (Alito, J., concurring in part and dissenting in part); Machado v. Holder, 559 U.S. 966, 966 (2010) (Roberts, C.J., joined by Scalia, Thomas & Alito, JJ., dissenting); Wellons v. Hall, 558 U.S. 220, 228 (2010) (Alito, J., joined by Roberts, C.J., dissenting). Justice Gorsuch does not share all of his conservative colleagues' doubts, particularly when it comes to confessions of error. *See infra* note 327.

17 *See* U.S. CONST. art. III, § 2, cl. 2 (conferring on the Supreme Court only "appellate Jurisdiction" in most cases); *see, e.g.*, Lawrence v. Chater, 516 U.S. 163, 178 (1996) (Scalia, J., dissenting) (referring to "implicit limitations imposed by traditional practice and by the nature of the appellate system created by the Constitution and laws of the United States").

18 *E.g.*, Tatum v. Arizona, 137 S. Ct. 11, 13 & n.† (2016) (Alito, J., dissenting).

expansive conception of the power to remand have dug into the background of the relevant statutes or ventured very far back into history to see what the early practices actually reveal.

For those who like their scholarship without suspense, the key conclusion of this Article is that the skeptics are wrong about the extent of the remand power. There are in fact few relevant limits on appellate remedies found in Article III, federal statutes, or historical practice. It would be a shame if the Court unnecessarily divests itself of a useful tool based on the skeptics' mistaken understanding. At the same time, the paucity of hard legal constraints on remands does not mean that all exercises of remedial discretion are equally sound. To the contrary, prudence and wise administration suggest some guidelines for the exercise of appellate courts' broad powers, albeit guidelines that necessarily depend on (sometimes contested) visions of various courts' functions.

The Article unfolds as follows. Part I shows why the choice of appellate dispositions is important by setting forth the systemic effects of remands and explaining why the modern Supreme Court and courts of appeals are drawn toward extensive use of open-ended remands.

Part II examines the law of appellate remedies, remands in particular. Federal appellate practice is constrained first by the Constitution, which distinguishes between original and appellate jurisdiction.[19] It is also governed by statutes, the most important of which regarding remedial authority is 28 U.S.C. § 2106, which, as noted, sweepingly authorizes all federal appellate courts to affirm, reverse, vacate, or remand for further proceedings, as justice and the circumstances may require.[20] Federal appellate remedies are also informed by traditional practice and by several established principles or maxims such as that an appellate court "reviews judgments rather than opinions."[21] Contrary to the remand skeptics' claims that traditional practice or original understandings limit § 2106's broad grant of discretion, the history of appellate remedies is not a history in which formerly tight restrictions on appellate courts have lately come to be disregarded. Rather, and more interestingly, appellate procedure once contained two competing strands—one rigid and legalistic, the other flexible and equitable. Although federal appellate procedure as a whole is now a hybrid, what the skeptics seem not to realize is that the federal courts and Congress have long embraced the equitable tradition when it comes to appellate remedies in particular.[22]

If Part II is correct, appellate remedial decisions are not much constrained by firm rules—but that does not mean remedial decisions are not constrained at all. There are still important prudential and judicial-administrative concerns that inform the exercise of judicial discretion, and those are taken up in Part III, which considers how different categories of cases should

19 U.S. CONST. art. III, § 2, cl. 2.

20 28 U.S.C. § 2106 (2018); *see infra* Section II.A (discussing this statute and its background).

21 *See infra* Section II.D.

22 *See infra* subsection II.B.2.

be handled. The discretionary calculations necessarily depend on some vision of the respective roles of the Supreme Court and lower courts and of the judicial role more broadly. Disagreements over the Court's place resist easy resolution, and so judgments about the propriety of certain remands are contestable. Still, I can say that the remands that the skeptics have protested most consistently, namely the justice-ensuring remands, should be the *easiest* to justify, especially if one is a fan of judicial restraint. Some law-shepherding remands, by contrast, are hard to justify unless one adopts a particularly expansive view of the motives on which the Court may permissibly act.

I. The Importance and Appeal of Remands

The parties to a case care about whether an appellate court wraps up their case on its own, remands it with detailed instructions, or issues a more open-ended remand for further proceedings. The appellate court's choice in that regard will affect the timeline and expense of the proceedings and may determine the ultimate outcome.[23] Less obvious is that the appellate court's choice of disposition—not in any single case but in terms of patterns across many cases—also holds significance for the overall operation of a judicial system. This Part of the Article describes those systemic effects of remands (Section A). It then explains why remands are attractive to the modern Supreme Court and, to a lesser but perhaps increasing extent, the federal courts of appeals (Sections B and C). The attractiveness and importance of remands intensifies the need to discern the proper scope of the remand power.

A. Systemic Role of Remands

Remands have system-wide importance in at least the following seven interrelated ways.

First, appellate dispositions affect the distribution of authority within a judicial system. A remand can be thought of as a delegation of decision-making authority from a higher court to a lower court. Some remands are necessary because the further proceedings will involve factfinding, which is a special competency of trial courts. But other remands delegate legal decisions, as when an appellate court announces the proper legal standard but leaves it to the lower court to apply the standard. Applying the new standard fills in the legal meaning of the standard and thus amounts to interstitial lawmaking.[24] The less precise the standard, the greater the lawmaking in applying it.

Second, and relatedly, remands also affect the timing of lawmaking. When a case is remanded without resolving the important legal issues and then appealed again later, the remand will have delayed the appellate court's

23 *Cf.* Christina L. Boyd, *The Hierarchical Influence of Courts of Appeals on District Courts*, 44 J. Legal Stud. 113, 129 (2015) (showing that specific remand instructions are associated with a greater likelihood of a changed result on remand).

24 *See* Louis L. Jaffe, Judicial Control of Administrative Action 553–54 (1965).

resolution of the issues by a year or more.[25] (Delaying an authoritative decision could well be the goal, of course.) And if the case settles on remand, the legal issues will not have been resolved at all.

Third, remands can lighten the burden of correcting errors. Generally speaking, it is easier to identify a potentially significant mistake in a decision than to resolve an entire case and give the correct judgment. Consider, as an example, a situation in which a lower court uses the wrong legal standard but in which it is not obvious what the right answer would be using the correct standard. Remands allow the appellate court to take the relatively easier path of correcting the standard and leaving its application for the court below. The cost of error correction is further reduced when a remand is ordered summarily, without oral argument and full briefing of the merits.

A fourth systemic aspect of remands is that remands provide a ready method for appellate courts to supervise the decision-making *process* of lower courts. Legislatures, rule-makers, and appellate courts may impose certain decision-making procedures—duties to state reasons, or decision-making sequences, for example[26]—because those procedures generally promote accuracy or other values. The failure of a court to abide by the required procedures in a particular case need not generate an incorrect judgment. Rather than digging into the merits and affirming or reversing, or just denying review, a reviewing court might vacate and remand in order to reinforce the procedural rules and deter future deviations.

Fifth, the use of remands can allow a reviewing court to shape its lawmaking agenda. To elaborate: Suppose a lower court is faced with two potential grounds for decision, *A* and *B*, either of which is independently sufficient to decide the case. The lower court decides the case on the basis of reason *A*, and the losing party petitions the Supreme Court for certiorari. Suppose that the Supreme Court finds the case worthy of review but wishes to decide the case on the basis of ground *B* rather than ground *A*. (Issue *A* might involve a contentious social or political matter that the Court is unprepared to touch, for example.) In such circumstances, the Court might vacate and remand, without finding any error below, merely to direct the lower court to address ground *B*.[27]

A sixth systemic effect of remands, which is related to some of the items already listed, is that the use of remands allows an appellate court to focus its energies on one aspect of a case. More specifically, a remand allows an

25 *E.g.*, Evola v. United States, 375 U.S. 32, 33 n.* (1963) (Clark, J., concurring in part and dissenting in part) (dissenting from decision to remand because "[t]he remand will merely delay a final decision which could be made on the record now before the Court and the identical record will no doubt return here").

26 *See, e.g.*, *infra* subsections III.A.3, III.B.1, III.C.1 (discussing such requirements and remands that enforce them).

27 *See infra* Section III.C (citing examples).

appellate court to exercise the institutional role of unifying the law while leaving the rest of the case to the lower court.[28]

Seventh, an appellate court can use remands as a way to expand and accelerate the impact of its merits rulings. When the U.S. Supreme Court decides a case, there are often many other cases, recently decided by the lower courts, that present the same or related issues. The Court's usual practice today is not to sort through all of the pending cases and affirm or reverse on the merits, nor does the Court simply deny certiorari. Rather, the Court's usual practice is to grant certiorari, summarily vacate all of the potentially affected cases, and remand them for the courts below to determine whether the new decision changes the outcome.[29] That is, the Court *GVR*s them (for "grants, vacates, and remands").[30] The GVR expands the number of decisions affected by the few decisions on the Court's merits docket.[31]

The discussion above shows that appellate courts' use of remands can substantially shape the character of a judicial system. As the next Section explains, the modern Supreme Court uses remands in ways that facilitate its role as an "Olympian Court"—that is, a law-declaring court far removed from the ordinary judicial tasks of dispute resolution.[32]

B. Remands' Attractions for Olympian, Agenda-Setting Courts

Some of the features of remands listed above are especially attractive to courts with discretionary jurisdiction and institutional roles that emphasize law-clarifying, law-making, and system administration rather than the "mere" adjudication of particular disputes. The Supreme Court is such a court. Its

28 *See* R.R. Comm'n of Cal. v. L.A. Ry. Corp., 280 U.S. 145, 166 (1929) (Brandeis, J., dissenting).

29 *See* Lawrence v. Chater, 516 U.S. 163, 166 (1996) (per curiam).

30 For descriptions of the Court's GVR practice, its development, and its extent, see generally STEPHEN M. SHAPIRO, KENNETH S. GELLER, TIMOTHY S. BISHOP, EDWARD A. HARTNETT & DAN HILMMELFARB, SUPREME COURT PRACTICE § 5.12.B (11th ed. 2019); Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs—and an Alternative*, 107 MICH. L. REV. 711 (2009); Arthur D. Hellman, *"Granted, Vacated, and Remanded"—Shedding Light on a Dark Corner of Supreme Court Practice*, 67 JUDICATURE 389 (1984); Stephen L. Wasby, Case Consolidation and GVRs in the Supreme Court, Presentation to the New England Political Science Association (Apr. 26, 2019) (on file with author).

31 *See* Sara C. Benesh, *GVRs and Their Aftermath in the Seventh Circuit and Beyond*, 32 S. ILL. U. L.J. 659, 661 (2008); Alex Hemmer, *Courts as Managers:* American Tradition Partnership v. Bullock *and Summary Disposition at the Roberts Court*, 122 YALE L.J. ONLINE 209, 213, 217 (2013); Ali S. Masood, Benjamin J. Kassow & Donald R. Songer, *The Aggregate Dynamics of Lower Court Responses to the US Supreme Court*, 7 J.L. & CTS. 159, 159–60 (2019). Another way to expand the number of affected cases is to consolidate them and decide several cases through one opinion, but the Supreme Court consolidates cases less often than it used to. Wasby links the decline in consolidation and the growth in GVRs. Wasby, *supra* note 30.

32 For scholars using this terminology, see, for example, Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 433; Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, 63 WASH. & LEE L. REV. 271, 273 (2006).

jurisdiction is now almost entirely discretionary.[33] It chooses to exercise its discretion in ways that give itself a small docket devoted mostly to settling conflicts in the lower courts and addressing questions of great national significance.[34] Moreover, it aggressively uses the tools at its disposal to shape when and how questions come before it.[35] This Section describes how such a court would find, and the Supreme Court has found, particular utility in several different kinds of remands.

1. Remands That Aid the Making and Shepherding of the Law

Start with "remands for resequencing." *Beer*, discussed in the Introduction, was an example of a case that could have been decided for the same party based on two different grounds that had different stakes.[36] To choose another, very common example, courts deciding a government official's qualified-immunity defense may rule in favor of the official either (1) by determining that there is no violation under current law, (2) by deciding only that the law was at least not *clearly established* against the officer's conduct at the time of the conduct, or (3) by deciding that there was a violation under current law *but* the violation was not clear at the time of the conduct.[37] The prospective impact of the different options differs substantially. In particular, the first and third options establish the law going forward (though different law is established in each case), while the second option leaves the law unsettled and officers immune from damages until the law is clarified.[38]

In situations in which there are multiple potential grounds of decision, one could imagine a reviewing court with a keen interest in shepherding the development of the law vacating and remanding not because it finds error but because it prefers that the lower court rely on different grounds. To stick with the qualified-immunity example, the Court might vacate a decision that the law was not clearly established in order to obtain the lower court's ruling on the constitutional question itself, thus teeing up that question for the Court's consideration. Conversely, the Court might vacate a decision finding a violation but no clearly established law, with the idea that vacating the constitutional ruling could forestall a circuit split and thus push an issue off the Court's agenda. Similar opportunities for shaping the development of the law—bringing issues forward, pushing them back—present themselves in many contexts.[39]

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33 Only a few vestiges of mandatory appellate jurisdiction remain, most notably in certain voting-rights cases. SHAPIRO ET AL., *supra* note 30, §§ 2.1, 7.1.

34 *See generally id.* § 5 (describing the considerations that support a grant of certiorari).

35 *See infra* note 47 and accompanying text.

36 *See supra* text accompanying notes 7–12.

37 Pearson v. Callahan, 555 U.S. 223, 236–43 (2009).

38 The Supreme Court has recognized that the prospective effect of a ruling of type 3 is significant enough to give the officer a stake in petitioning for certiorari, even though the judgment was in the officer's favor. Camreta v. Greene, 563 U.S. 692, 704–09 (2011).

39 *See infra* subsection III.C.1 (citing examples).

Another category of remands also helps the Court control the pace and circumstances of its law-declaring work. These are cases in which the Court deems a lower court's interpretation of a statute wrong but declines to announce the correct interpretation, let alone determine whether the judgment is supportable on the correct interpretation. In *Elonis v. United States*, for example, the majority determined that mere negligence was not a sufficient mental state to support a conviction under a federal criminal statute.[40] But the majority did not determine what mental state was required—in particular, whether recklessness sufficed—much less determine whether the conviction could be affirmed under whatever the proper standard turned out to be.[41] It instead left all that for the lower court to sort out on remand.[42] *Elonis* and other similar cases presented questions of law and did not require any further development of the record.[43] *Marbury v. Madison* tells us that it is the judiciary's duty "to say what the law is."[44] As Justice Alito quipped in his separate opinion in *Elonis*, here the Court used its power only to say what the law *isn't*.[45]

This sort of minimalism at first seems at odds with Olympianism, but in fact they are compatible. The Court's justification for leaving so much undecided in *Elonis* was that avoiding the tough question would better position the Court to correctly determine, in a future case, what mental state the statute really did require.[46] Given that the Court now decides few cases on the merits, the Court needs to make sure that all of its decisions are the best they can be.

That last point can be generalized. The Court's use of law-shepherding remands is hard to fit into standard debates over minimalism, restraint, and activism. The Court's remands often blend those impulses together. We might regard *Elonis*, for instance, as a case in which the Court chose minimalism in the case at hand but did so in the service of setting itself up for optimal law-declaration in a later case involving the same statute. In this regard, the extensive use of remands is of a piece with other devices—such as limited grants of certiorari, rephrasings of the question presented, or the injection of new issues—that scholars have identified as methods the Court uses to maximize control over its lawmaking function.[47]

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40 135 S. Ct. 2001, 2013 (2015).

41 *Id.*

42 *See id.*

43 *See infra* subsection III.C.3 (discussing similar cases).

44 5 U.S. (1 Cranch) 137, 177 (1803).

45 *See Elonis*, 135 S. Ct. at 2013 (Alito, J., concurring in part and dissenting in part) (quoting *Marbury* and criticizing the Court for failing to establish what mental state was required under the statute at issue).

46 *Id.* at 2013 (majority opinion).

47 *See* Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1704–13 (2000) (describing the growth of discretion in the Supreme Court's case-selection practices); Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 683–711 (2012) (cataloguing devices that the Court uses to control its agenda and ensure it has the final

2. Remands That Ease the Tasks of Error Correction and Supervision

Despite the predominance of its law-declaring function, the Supreme Court is not prepared to abandon error correction altogether.[48] And in addition to occasionally correcting an egregious error, the Court tries more generally to keep up professional standards in the lower courts it supervises.[49] Several distinct categories of remands can be understood as an Olympian court's attempts to handle these needful subsidiary tasks in a relatively painless way.

Consider in this regard the scenario of the "apparently overlooked argument." That is a decision that appears, based on the opinion below, to have overlooked one of the losing party's facially plausible contentions. It would be time-consuming for the Court to figure out whether the overlooked contention actually has merit and would materially affect the outcome—and not worth a certiorari court's time to do so—but it is easy enough to vacate and remand for the lower court to address the matter (or clarify that it already did). Some of the remands that have attracted the ire of the Court's conservatives fit this pattern of requiring a second look in order to address the suspicion of error.[50]

Remands can serve as a modest check on the lower courts' use of summary, unreasoned orders.[51] One-line appellate affirmances may be appropriate when there is nothing useful to say, and so the Court is not about to require busy lower courts to write a full opinion in every case. But unreasoned affirmances can also raise red flags when a case contained a colorable claim of error. An occasional remand for explanation of a facially questionable order requires less of the Court's time than trying to figure out just what was decided and occasionally reversing for error.

A desire to do justice, but without spending too much time doing it, can also explain the modern Court's handling of confessions of error. The Court will vacate and remand in light of the government's concession that the lower court erred in some aspect of its ruling, without making its own independent determination that there really was error or that the purported error affected the judgment.[52] There are a number of reasons for this practice, but at least

say on important matters); *see also* Benjamin B. Johnson, Lawless? The Hidden History of Supreme Court Agenda-Setting (unpublished manuscript) (on file with author) (criticizing the practice of limited grants of certiorari and, more generally, Supreme Court review that encompasses less than the whole case).

48 Witness the small but meaningful number of summary reversals each year. Edward A. Hartnett, *Summary Reversals in the Roberts Court*, 38 CARDOZO L. REV. 591, 591–96 (2016).

49 *See, e.g.*, SUP. CT. R. 10(a) (citing a lower court's serious "depart[ure] from the accepted and usual course of judicial proceedings" as a ground for granting certiorari).

50 *See infra* subsection III.B.1.

51 The federal courts issue unreasoned decisions—typically affirmances—in thousands of cases every year. *See* ADMIN. OFF. OF THE U.S. CTS., JUDICIAL BUSINESS OF THE U.S. COURTS tbl.B-12 (2017), http://www.uscourts.gov/statistics/table/b-12/judicial-business/2017/09/30 (reporting nearly 3000 unreasoned decisions on the merits for the twelve-month period ending Sept. 2017).

52 *See infra* subsection III.B.2.

one of them is likely that summarily vacating and remanding in such cases is both less laborious than scrutinizing the merits and more palatable than denying certiorari and thereby countenancing a criminal conviction that even the prosecutor now doubts.

Olympianism is facilitated even by the ordinary and largely uncontroversial GVR, which the Court uses to clear out pending cases that may be affected by one of the Court's newly announced argued cases.[53] These GVRs have the benefits of functionally expanding the Court's small argument docket and reducing inequity among litigants, while serving the practical imperative of sparing the Court the chore of applying its new ruling to the diverse circumstances presented by other pending cases.[54]

Given the Court's Olympian trajectory, we can expect decisions like those categories described in this Part to persist and expand, at least unless the remand skeptics persuade another colleague that some of the categories above are illegal. All of this heightens the importance of understanding the proper scope of the remand power.

C. Remands in the Courts of Appeals

Remands are also attractive to the federal courts of appeals. As a formal matter, they have mandatory jurisdiction over final judgments and cannot set their own agenda.[55] Nonetheless, as other scholars have observed, the federal courts of appeals have taken on some features of a certiorari court.[56] In the vast majority of cases, they do not entertain oral argument; they issue short, nonprecedential dispositions rather than published opinions.[57] Perhaps all of that is necessary in light of heavy caseloads, but it means that they treat their appellate law-declaring function as a resource to be deployed deliberately in a self-selected slice of cases—not unlike the way the Supreme Court chooses when and how to deploy its.

There is reason to believe that the courts of appeals are emulating the Supreme Court's practice of remanding cases that turn on matters of law that they could wrap up themselves.[58] They remand cases involving such matters as whether a complaint states a legally sufficient claim,[59] whether a plaintiff's

53 *See supra* text accompanying notes 29–31 (describing the GVR practice and its benefits).

54 *Id.*

55 *See, e.g.*, 28 U.S.C. §§ 1291–92 (2018).

56 *E.g.*, William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 293 (1996).

57 *See* ADMIN. OFF. OF THE U.S. CTS., JUDICIAL BUSINESS OF THE U.S. COURTS tbls.B-10 & B-12 (2017), http://www.uscourts.gov/statistics-reports/judicial-business-2017-tables.

58 *See* Ray v. Maclaren, 655 F. App'x 301, 310 (6th Cir. 2016) (citing examples); *see also* Mason v. Lafayette City-Par. Consol. Gov't, 806 F.3d 268, 285 (5th Cir. 2015) (Higginbotham, J., dissenting) (criticizing the majority for failing to resolve legal issue of qualified immunity).

59 *E.g.*, Adkisson v. Jacobs Eng'g Grp., Inc., 790 F.3d 641, 649 (6th Cir. 2015).

evidence is sufficient to withstand summary judgment,[60] and whether a statute is constitutional.[61] Following the Court's example, they determine that the district court interpreted a statute incorrectly, refrain from giving the correct interpretation, and remand for the district court to do so in the first instance.[62]

In one striking recent case, the court of appeals vacated and remanded so that the district court could "consider in the first instance" a U.S. Supreme Court case that was soon to be decided and could "conduct a more detailed analysis of" the other, separate claim in the case.[63] As to the first ground for remand, the case was still at the pleadings stage, so the court of appeals could decide the case as a matter of law once the Supreme Court's forthcoming decision came down.[64] As to the second ground, the court of appeals did not identify any error or indicate how the district court's opinion was inadequately detailed.[65] This all sounds like a disposition that the Supreme Court might make, but that does not mean it is equally appropriate for a court of appeals. Appellate dispositions outside of the Supreme Court have a lower profile, but the sheer volume of cases decided in intermediate appellate courts demands a better understanding of the legal and prudential concerns that govern their remands to trial courts.

II. The Law and History of Remands

The Constitution gives Congress the powers to regulate the Supreme Court's appellate jurisdiction, to create the lower federal courts, and to prescribe the procedures used in the federal courts.[66] When it comes to the specific topic of how appellate courts dispose of cases, Congress has legislated on the subject through 28 U.S.C. § 2106. That statute provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct

60 *E.g.*, Jerri v. Harran, 625 F. App'x 574, 578–79 (3d Cir. 2015); Giraldes v. Roche, 357 F. App'x 885, 886 (9th Cir. 2009) (mem.).

61 *E.g.*, Sanchez v. United States, 247 F. App'x 194, 196–97 (11th Cir. 2007) (per curiam).

62 *See, e.g.*, Vaughn v. Phx. House N.Y. Inc., 722 F. App'x 4, 6 (2d Cir. 2018); United States v. Houston, 792 F.3d 663, 669 (6th Cir. 2015). The Sixth Circuit in *Houston* explained its decision by pointing out that the Supreme Court had done the same thing under similar circumstances. *Id.* at 665.

63 Common Cause v. Kemp, 714 F. App'x 990, 991 (11th Cir. 2018) (per curiam).

64 *See id.*

65 *See id.* The court of appeals also noted that the plaintiffs could seek a preliminary injunction on remand while awaiting the Supreme Court's decision. *Id.* at 991 n.1. But that cannot justify a remand, as the plaintiffs could seek a preliminary injunction without the court of appeals remanding the case. Fed. R. App. P. 8(a); Fed. R. Civ. P. 62(g).

66 U.S. Const. art. I, § 8, cls. 9, 18; *id.* art. III, § 1, cl. 1; *id.* art. III, § 2, cl. 2; Sibbach v. Wilson & Co., 312 U.S. 1, 9–10 (1941); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 21–22, 43 (1825).

> the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.[67]

On its face, § 2106 thus confers an awesomely broad discretion to vacate and remand with no limit except the standard of justice.[68]

Is the statute as broad as it seems? What limits inhere in it, or impinge on it from Article III? The remand skeptics contend that "[t]his facially unlimited statutory text is subject to the implicit limitations imposed by traditional practice and by the nature of the appellate system created by the Constitution and laws of the United States."[69] Further, their understanding of the relevant history is a lapsarian one in which there was once an era of properly restrained appellate remedies, from which the Court has recently strayed. Thus Justice Scalia wrote of the "systematic *degradation* of our traditional requirements for a GVR."[70]

Neither the remand skeptics nor the majorities from which they are dissenting have done the homework necessary to determine what § 2106 was trying to accomplish, what the "traditional practice" was, or what Article III has to say about remands. Conducting that work is the task taken up here. The story begins with the history of § 2106 and the background against which it was enacted. I then consider potential constitutional limits that stem from the nature of "appellate" power, other sources, or policy. The short of it is that the statute really is broad and that it reflects a constitutionally permissible embrace of one of two competing strands of traditional practice.

A. Section 2106 and Its Predecessors

To fully understand § 2106's meaning, we need to understand where it came from and what problems statutes like it were meant to solve. We might read the statute differently depending on whether it was meant to unshackle appellate courts or instead to rein in their perceived abuses. The history shows that the statute's purpose was the former, not the latter. As one court of appeals put it, "[Section 2106] is an outgrowth of a long line of Federal statutes, similar in conception and purpose to numerous state laws, intended

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67 28 U.S.C. § 2106 (2018).

68 *See* Haynes v. United States, 390 U.S. 85, 101 (1968) (describing the statute as giving the Court "plenary authority . . . to make such disposition of the case 'as may be just under the circumstances'" (citing Yates v. United States, 354 U.S. 298, 327–31 (1957))); Grosso v. United States, 390 U.S. 62, 71 (1968). Although not this Article's focus, it is worth noting that § 2106 has been cited as authority for appellate instructions reassigning a remanded case to a different judge. *See* United States v. Robin, 553 F.2d 8, 9 (2d Cir. 1977) (per curiam); *cf.* Liteky v. United States, 510 U.S. 540, 554 (1994) (identifying recusal statutes as well).

69 Lawrence v. Chater, 516 U.S. 163, 178 (1996) (Scalia, J., dissenting); *see also id.* at 189–90 ("When the Constitution divides our jurisdiction into 'original Jurisdiction' and 'appellate Jurisdiction,' I think it conveys, with respect to the latter, the traditional accoutrements of appellate power.").

70 Wellons v. Hall, 558 U.S. 220, 228 (2010) (Scalia, J., dissenting) (emphasis added).

to liberate our appellate courts from the English common law rules restricting their authority."[71]

1. The Rigidity of Appellate Dispositions at Common Law

As § 2106 shows, today's federal appellate courts enjoy a wide range of options for disposing of a case.[72] But appellate courts did not always enjoy this degree of flexibility. At common law, appellate dispositions were tightly constrained. Consider some examples.

Imagine a case in which the trial court had entered judgment against a dead man's estate and against the estate's executor for any balance the estate's funds could not satisfy.[73] Suppose the appellate court determined that the judgment was erroneous as a matter of law because the judgment should have been issued only against the estate, not the executor too.[74] A modern court would probably modify the judgment to limit it to the estate or perhaps remand with an instruction that the lower court enter a suitably modified judgment. Not so for the 1818 Pennsylvania Supreme Court. "It is to be regretted," the court wrote, "that we have it not in our power to enter the proper judgment. . . . [In these circumstances,] *we can only reverse the judgment.*"[75] Modifying the judgment to correct it was beyond the appellate court's power.[76] Nor did it occur to the appellate court to remand with directions to the trial court to enter a suitably modified judgment. Its failure to give such instructions perhaps reflects the fact that proceedings instituted by a writ of error—the usual vehicle for obtaining review of cases at common law—were historically regarded as a new case rather than merely another step in one proceeding.[77] This traditional understanding of the writ of error, Roscoe Pound wrote,

> made it seem that the error proceeding had been disposed of if a judgment was affirmed or reversed and what happened in another court in another proceeding [i.e., in the trial court after reversal] was no concern of the reviewing court until another separate proceeding [i.e., another writ of error in the same litigation] was brought up.[78]

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71 Austin v. United States, 382 F.2d 129, 140 (D.C. Cir. 1967) (citing Ballew v. United States, 160 U.S. 187, 198–99 (1895)).

72 *See supra* notes 1–3 and accompanying text; *see also* Michael A. Berch, *We've Only Just Begun: The Impact of Remand Orders from Higher to Lower Courts on American Jurisprudence*, 36 ARIZ. ST. L.J. 493, 497–98 (2004) (describing the range of dispositions available to an appellate court).

73 Swearingen v. Pendleton, 4 Serg. & Rawle 389, 389–95 (Pa. 1818).

74 *Id.* at 395–96.

75 *Id.* at 396 (emphasis added).

76 *Id.* at 396–97.

77 For a few cases and authorities describing writs of error in this way, see, e.g., Meyer & Lange v. United States, 4 Ct. Cust. 422, 428 (Ct. Cust. App. 1913); Spotts v. Spotts, 55 S.W.2d 977, 980 (Mo. 1932); Rush v. Halcyon Steamboat Co., 68 N.C. 72, 75 (1873); *see also* 1 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 214 (3d ed. 1922).

78 ROSCOE POUND, APPELLATE PROCEDURE IN CIVIL CASES 249 (1941).

A related restriction on appellate power at common law held that a court could not reverse only part of what it considered a single judgment while affirming the residue.[79] Thus, for instance, when a plaintiff recovered a judgment against several defendants for tort or breach of contract, but it turned out that the judgment was legally defective against one of the defendants, such as due to death on appeal or legal incapacity, the appellate court could not reverse as to the one and affirm as to the others.[80] A judgment instead stood or fell as a whole.

Another recurring problem concerned cases in which the trial court erroneously failed to grant a directed verdict in the defendant's favor. A modern observer would expect the appellate court to grant judgment for the defendant or, equivalently, order the trial court to do so. But according to the common law, the appellate court could not give judgment to the defendant who should have won the directed verdict. The court could only order a new trial.[81]

Similar restrictions on appellate remedies applied in criminal cases. Consider a case in which the statute of conviction provided one mode of punishment but the trial court imposed a different punishment. At common law, the appellate court could not affirm the conviction while modifying the judgment to impose the legally correct penalty nor order the lower court to do so; it could only reverse the erroneous judgment, including the underlying conviction.[82]

It bears emphasis that the strictures described above concerned cases at common law reviewed by writ of error. This was before the merger of law and equity, and the two systems had distinctive appellate procedures that differed in the scope of review and, crucial here, the available remedies for error. The writ of error limited the reviewing court to errors of law (not fact)

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79 Penhallow v. Doane's Adm'rs, 3 U.S. (3 Dall.) 54, 107–08 (1795) (opinion of Iredell, J.); Richards v. Walton, 12 Johns. 434, 434 (N.Y. Sup. Ct. 1815) (per curiam); Riggs v. Tyson, 1 N.J.L. 34, 34 (1790) (per curiam). Courts would affirm in part and reverse in part if they could discern distinct or severable judgments rather than one. *See* Dixon v. Pierce, 1 Root 138, 138 (Conn. Super. Ct. 1789); POUND, *supra* note 78, at 239–42.

80 *See, e.g.*, Gaylord v. Payne, 4 Conn. 190, 196 (1822); *Richards*, 12 Johns. at 434. *But see* Wilford v. Grant, 1 Kirby 114, 116 (Conn. Super. Ct. 1786) (per curiam) (acknowledging that "[t]he common-law rules of England are indeed against a reversal in part only, in a case like this," but departing from the English rule). Oliver Ellsworth was a judge on the Connecticut Superior Court at the time of *Wilford v. Grant*. He would later be the principal draftsman of the Judiciary Act of 1789. WILLIAM GARROTT BROWN, THE LIFE OF OLIVER ELLSWORTH 108, 184–86 (1905); 2 HENRY FLANDERS, THE LIVES AND TIMES OF THE CHIEF JUSTICES OF THE SUPREME COURT OF THE UNITED STATES 119, 159 (Philadelphia, T. & J.W. Johnson & Co. 1881).

81 Slocum v. N.Y. Life Ins. Co., 228 U.S. 364, 375–81 (1913); *see also, e.g.*, Bothwell v. Bos. Elevated Ry. Co., 102 N.E. 665, 667 (Mass. 1913) (describing practice at common law in Massachusetts).

82 Ballew v. United States, 160 U.S. 187, 198 (1895); Jackson v. Commonwealth, 2 Binn. 79, 79 (Pa. 1809) (per curiam); R v. Bourne (1837) 112 Eng. Rep. 393, 393 (KB).

appearing in the record[83] and, as shown above, gave the court limited remedial options. Review in equity (and admiralty), by contrast, used the method of the appeal, which was derived from civil (i.e., Continental) law. The appeal empowered the appellate court to reexamine the facts, indeed to retry the case, and to shape a decree that did justice between the parties.[84] The difference between the cramped writ of error and the capacious appeal can be explained in part by the institution of the jury in cases at law. Jury factfinding hampered review of the facts and limited appellate courts' ability to enter correct judgments on their own.[85]

Unsatisfied with the way the restrictions of old-fashioned common-law procedure tended to multiply the need for new trials, state legislatures engaged in significant liberalization of appellate remedies during the nineteenth and early twentieth centuries. Consider the situation in Pennsylvania, one of the jurisdictions whose appellate courts had taken the view that they could not modify a criminal judgment to provide the proper sentence.[86] The state legislature enacted a statute in 1836 that allowed an appellate court to "modify" judgments, and thereafter the state appellate courts exercised that authority to impose proper sentences when the trial court had imposed an illegal form of punishment.[87] And in civil cases at law, the Pennsylvania courts were, by virtue of other modernizing legislation, "happily" freed to do such things as affirm liability, set aside improper damages, and remand for a new determination on damages.[88] Other states enacted legislation that similarly liberalized appellate dispositions.[89]

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83 Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 327 (1796) (opinion of Ellsworth, C.J.); HOLDSWORTH, *supra* note 77, at 223–24. As one can easily imagine, the line between questions of law and questions of fact is often blurry; it was also subject to drift over time. POUND, *supra* note 78, at 218–22.

84 *See Wiscart*, 3 U.S. at 327; *Penhallow*, 3 U.S. at 107–08 (opinion of Iredell, J.); Lester B. Orfield, *Appellate Procedure in Equity Cases: A Guide for Appeals at Law*, 90 U. PA. L. REV. 563, 563–64 (1942). *See generally* 3 WILLIAM BLACKSTONE, COMMENTARIES *402–11 (discussing writs of error at law and appeals in equity); POUND, *supra* note 78, at 106–320 (discussing procedural differences between appeal and writ of error); Mary Sarah Bilder, *The Origin of the Appeal in America*, 48 HASTINGS L.J. 913, 923–42 (1997) (discussing the two modes' cultural roots). Both modes of review were matters of right rather than of judicial discretion. Limited forms of review could also be had through discretionary supervisory writs, such as mandamus. *See infra* Section II.G.

85 Edson R. Sunderland, *The Proper Function of an Appellate Court*, 5 IND. L.J. 483, 486–88 (1930).

86 *See supra* notes 75–77 and accompanying text.

87 *See* Daniels v. Commonwealth, 7 Pa. 371, 375–76 (1847) (striking out "hard labour" provision in criminal sentence and then affirming as modified). Parliament enacted a statute allowing appellate modification of illegal sentences in 1848. Crown Cases Act 1848, 11 & 12 Vict. c. 78, § 5 (Eng.); *see also* Holloway v. R (1851) 169 Eng. Rep. 508, 511 (QB) (describing the effect of the statute).

88 Durante v. Alba, 109 A. 796, 798 (Pa. 1920).

89 *See* Ballew v. United States, 160 U.S. 187, 198 (1895); *see, e.g.*, Mims v. State, 5 N.W. 369, 370–71 (Minn. 1880) (explaining that "[w]hatever may have been the rule at common law," recent legislation allowed the court to affirm a conviction while modifying the sen-

Legislatures also overturned the common-law rule that an appellate court could respond to the trial court's erroneous denial of a motion for a directed verdict only by awarding a new trial, not by entering judgment for the moving party. In Massachusetts, the 1909 statute conferring the authority was aptly titled "[a]n [a]ct to provide for expediting the final determination of causes."[90] Similar legislation was enacted elsewhere, and it was generally upheld by state courts against constitutional challenges.[91]

Reform came from within the state courts too. Like some other jurisdictions, Pennsylvania had at one time observed a curious distinction between the permissible disposition of a writ of error brought by the trial plaintiff and a writ of error brought by the trial defendant. Namely, it was said that upon reversal on a writ of error brought by the trial *plaintiff*, the appellate court should enter the judgment the lower court should have entered, but when the reversal occurred in error proceedings initiated by the trial *defendant*, the judgment below was simply wiped out rather than, say, a correct judgment being entered for the defendant.[92] In the early decades of the nineteenth century, the Pennsylvania Supreme Court repudiated this rule because it was "not well founded" in reason and impeded the court's duty to "do speedy justice to the parties."[93]

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tence); Ricketson v. Richardson, 26 Cal. 149, 154–55 (1864) (describing the effect of the state procedure code on civil appellate remedies); *see also* Comment, *The Power of an Appellate Court to Dispose of a Case Without Remanding*, 38 YALE L.J. 971, 971 (1929) (citing developments in several states). The Field Code provided for appeals rather than writs of error and authorized appellate courts to "reverse, affirm, *or modify*" the judgment under review. COMM'RS ON PRAC. & PLEADINGS, THE CODE OF CIVIL PROCEDURE OF THE STATE OF NEW YORK 21, 495 (Albany, Weed, Parsons & Co. 1850) (emphasis added); *see also* An Act to Regulate Proceedings in Civil Cases in the Courts of Justice of this State § 345, 1851 Cal. Stat. 51, 105–06 (1851) (similar provision adopted in California).

90 An Act to Provide for Expediting the Final Determination of Causes, ch. 236, 1909 Mass. Acts 174, 174.

91 *See* Bothwell v. Bos. Elevated Ry. Co., 102 N.E. 665, 667–69 (Mass. 1913) (upholding Massachusetts statute); *see also id.* at 669 n.1 (citing cases from other jurisdictions). The U.S. Supreme Court initially held that a similar Pennsylvania statute violated the Seventh Amendment, but the Court later changed course. Balt. & Carolina Line, Inc. v. Redman, 295 U.S. 654, 661 (1935) (overruling Slocum v. N.Y. Life Ins. Co., 228 U.S. 364 (1913)). *See generally* Renée Lettow Lerner, *The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial*, 22 WM. & MARY BILL RTS. J. 811, 870–78 (2014) (discussing *Slocum* and responses to it).

92 Stephens v. Cowan, 6 Watts 511, 513–14 (Pa. 1837); *see also* Smith v. Times Pub. Co., 36 A. 296, 307 (Pa. 1897) (Williams, J., concurring) (explaining this former feature of Pennsylvania common law); Parker v. Harris (1673) 91 Eng. Rep. 230, 230 (KB) (making this distinction). It may be that this supposed rule developed from inadvertent overgeneralization and never should have developed in the first place. *See* Pollitt v. Forrest (1847) 116 Eng. Rep. 732, 734–35 (QB). The rule's spread may have been aided by its inclusion in Bacon's widely used abridgment. 2 MATTHEW BACON & HENRY GWILLIM, A NEW ABRIDGMENT OF THE LAW 503 (London, A. Strahan 5th ed. 1798).

93 *Stephens*, 6 Watts at 514 (emphasis omitted). Similarly, in *Daniels v. Commonwealth*, in which the Pennsylvania court recognized authority to modify a criminal sentence as expressly conferred in the 1836 statute, the court intimated that the court itself may have

2. Federal Appellate Remedies from the Judiciary Act to § 2106

With the alternative to the modern regime of flexibility in appellate dispositions more fully in view, let us return to the story of how § 2106 came to be. The section of the Judiciary Act of 1789 that dealt with appellate remedies provided that "when a judgment or decree shall be reversed," the circuit courts and Supreme Court "shall proceed to render such judgment or pass such decree as the [lower court] should have rendered or passed," except when the amount of damages or proper equitable decree were uncertain, in which case the Supreme Court could not enter judgment but "shall remand the cause for a final decision."[94]

Both the intent of the Judiciary Act and the Court's interpretations of it aimed to throw off some of the old common-law strictures. As the discussion

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reached the same conclusion shortly before the statute's enactment. 7 Pa. 371, 375 (1847) (citing Drew v. Commonwealth, 1 Whart. 279, 281 (Pa. 1835)). The courts of New Jersey likewise rejected the logic of the purported distinction between writs of error brought by plaintiffs and defendants. *See* Norcross v. Boulton, 16 N.J.L. 310, 316 (1838).

94 Judiciary Act of 1789, ch. 20, § 24, 1 Stat. 73, 85:

> [W]hen a judgment or decree shall be reversed in a circuit court, such court shall proceed to render such judgment or pass such decree as the district court should have rendered or passed; and the Supreme Court shall do the same on reversals therein, except where the reversal is in favour of the plaintiff, or petitioner in the original suit, and the damages to be assessed, or matter to be decreed, are uncertain, in which case they shall remand the cause for a final decision. And the Supreme Court shall not issue execution in causes that are removed before them by writs of error, but shall send a special mandate to the circuit court to award execution thereupon.

Section 25, which governed Supreme Court review of state decisions, provided:

> [T]he proceeding upon the reversal shall also be the same, except that the Supreme Court, instead of remanding the cause for a final decision as before provided, may at their discretion, *if the cause shall have been once remanded before*, proceed to a final decision of the same, and award execution.

Id. § 25, 1 Stat. at 86 (emphasis added). The limitation reflected in the italicized language was eliminated in 1867. Act of Feb. 5, 1867, ch. 28, § 2, 14 Stat. 385, 387; *see* Tyler v. Magwire, 84 U.S. (17 Wall.) 253, 273 (1872).

This is a good place for two observations on the terminology used in the Judiciary Act:

First, the Act refers both to judgments and to decrees, which correspond to the typical disposition of cases in law and in equity respectively. 1 A. C. FREEMAN, A TREATISE OF THE LAW OF JUDGMENTS § 12, at 23–24 (Edward W. Tuttle ed., 5th ed. rev. 1925). For the sake of brevity, I will follow the typical modern practice of using the term "judgment" to embrace both.

Second, some prior versions of sections 24 and 25 of the Act referred to "sending back" rather than "remanding." 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 85 & n.1, 87 nn.4–5 (Maeva Marcus ed., 1992). So far as I can tell, the change lacks substantive significance. Early cases sometimes spoke of "remitting" cases (or the record) to the lower court. *E.g.*, Maley v. Shattuck, 7 U.S. (3 Cranch) 458, 472 (1806). That too seems to be a difference in phrasing without a difference in meaning. *See* United States v. Nine Cases of Silk Hats, 58 U.S. (17 How.) 97, 97 (1854) (using the terms interchangeably); Drummond's Adm'rs v. Magruder & Co.'s Trs., 13 U.S. (9 Cranch) 122, 125 (1815) (same); *Remit*, BLACK'S LAW DICTIONARY (10th ed. 2014).

above indicates, there had been disagreement about whether an appellate court, upon finding error, could merely reverse or should go on to fix the proper judgment on its own, so far as possible.[95] The Judiciary Act settled that debate in favor of the latter position, except where further proceedings were needed to sort out factual details.[96] And although the Act does not refer to modifications of judgments or partial reversals, the appellate court's duty to enter the proper judgment in cases of reversal would seem to be the functional equivalent. In any event, the Supreme Court in its early decades used a wide variety of appellate dispositions, including partial reversals, modifications of judgments, dismissals, and remands for further proceedings with or without specific instructions.[97]

And all of that was in cases at law. As already noted, appellate courts hearing cases in equity and admiralty traditionally had much broader authority and responsibility to do justice as the circumstances required.[98] And so

95 *See supra* text accompanying notes 73–82; *see also* POUND, *supra* note 78, at 247–49 (remarking upon appellate courts' reluctance to enter their own judgments).

96 *See* Ins. Cos. v. Boykin, 79 U.S. (12 Wall.) 433, 439 (1870) (contending that "[t]he provisions of [the Judiciary Act of 1789] show that the lawyers who framed it were familiar with the doubts which seemed at that time to beset the courts in England as to the precise judgment to be rendered in a court of errors on reversing a judgment, and they in plain language prescribed" that the appellate court should render the judgment supported by the record). It appears that the Judiciary Act was drawn a bit too narrowly, for section 24 referred to remand only when the reversal in the Supreme Court was in favor of the plaintiff. Judiciary Act of 1789, ch. 20, § 24, 1 Stat. 73, 85; *supra* note 94. Consider a case in which the jury finds for the plaintiff but the Supreme Court determines that some of plaintiff's evidence should have been excluded. The existing judgment for plaintiff should not stand, but the plaintiff might still be able to win a new trial. The Judiciary Act's language would not appear to authorize remand. Yet in *Covington v. Comstock*, which fit the hypothetical just described, the Court reversed and remanded for further proceedings to be had "according to law and justice" and specifically noted that the plaintiff "may move to amend" the pleadings to make the evidence admissible. 39 U.S. (14 Pet.) 43, 44 (1840). The Court did not say whether the amendment should be granted. *Id.*

97 *See, e.g.*, Evans v. Gee, 39 U.S. (14 Pet.) 1, 3 (1840) (dismissing writ of error for want of jurisdiction and remanding to lower court with "directions to proceed therein according to law and justice"); Deneale v. Archer, 33 U.S. (8 Pet.) 528, 531 (1834) (reversing judgment and remanding with directions to enter judgment for defendant); Bank of Ky. v. Ashley, 27 U.S. (2 Pet.) 327, 329 (1829) (affirming judgment after plaintiffs agreed to remit erroneous fraction of judgment); Columbian Ins. Co. v. Catlett, 25 U.S. (12 Wheat.) 383, 397, 407–08 (1827) (affirming judgment in part and reversing in part); Mollan v. Torrance, 22 U.S. (9 Wheat.) 537, 540 (1824) (reversing judgment for defendant and remanding for the parties to amend their jurisdictional pleadings); M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 437 (1819) (reversing and rendering judgment for defendant); Harden v. Fisher, 14 U.S. (1 Wheat.) 300, 303–04 (1816) (reversing judgment for plaintiff and remanding with directions to award new trial); Doe v. McFarland, 13 U.S. (9 Cranch) 151, 153 (1815) (reversing judgment for defendant, remanding for new trial, and directing that erroneously excluded evidence be admitted); Knox v. Summers, 7 U.S. (3 Cranch) 496, 498 (1806) (reversing judgment for defendant and remanding for defendant to answer and for further proceedings); Dunlop & Co. v. Ball, 6 U.S. (2 Cranch) 180, 185 (1804) (remanding with directions for new trial free of improper jury instruction).

98 *See supra* note 84 and accompanying text.

the Supreme Court in such cases might enter detailed decrees of its own, remand with very specific instructions for the lower court to enter particular decrees, or remand to allow the parties to amend the pleadings.[99] The Court exercised this flexibility even during the brief early period when the Court reviewed all cases by writ of error, the typical common-law vehicle for review, rather than the appeal traditionally associated with equity and admiralty.[100] Even though proceeding on writ of error, the Court held very early on that it was free to modify an admiralty decree rather than simply affirming or reversing it.[101]

In 1872, Congress enacted a statute addressing appellate dispositions in more detail than it had in the original Judiciary Act. The 1872 Act, in language generally similar to current law, provided that federal appellate courts "may affirm, modify, or reverse the judgment, decree, or order brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the inferior court as the justice of the case may require."[102] This language differed from that of the Judiciary Act in a few notable ways. First, it expressly provided for modification of judgments. Second, it stated no general preference as between disposing of the case in the appellate court or remanding for further proceedings, instead conferring discretion on the appellate court to choose. Given the practice of the federal appellate courts over the preceding decades, which involved a great range of appellate dispositions,[103] the 1872 statute has to be considered a restatement of existing practice more than an innovation.

The 1872 enactment was soon codified in the Revised Statutes,[104] as was language providing the Supreme Court with similar authority in disposing of

99 *E.g.*, Levy v. Arredondo, 37 U.S. (12 Pet.) 218, 219–20 (1838) (reversing and remanding with instructions to require the introduction of certain documents, allow amendments, and other proceedings as law and justice may require); Harrison v. Nixon, 34 U.S. (9 Pet.) 483, 505, 540 (1835) (reversing and remanding for new pleadings, joinder of parties, and further proceedings as law and justice require); Herbert v. Wren, 11 U.S. (7 Cranch) 370, 382 (1813) (reversing and remanding with instructions to reform the decree as stated in the Court's opinion); Hills v. Ross, 3 U.S. (3 Dall.) 331, 332 (1796) (ordering entry of modified decree).

100 Sections 22 and 25 of the Judiciary Act of 1789 provided for Supreme Court review by writ of error. *See* Judiciary Act of 1789, ch. 20, §§ 22, 25, 1 Stat. 73, 84–87. Congress provided for appeals in admiralty cases in 1803. Act of March 3, 1803, ch. 40, 2 Stat. 244.

101 Penhallow v. Doane's Adm'rs, 3 U.S. (3 Dall.) 54, 107–08 (1795) (opinion of Iredell, J.); *id.* at 120 (opinion of Cushing, J.); *id.* (order of the Court). The significance of Congress employing the writ of error in the Judiciary Act was that it prevented the Court from reviewing the facts, as appellate courts otherwise could do in an admiralty or equity appeal.

102 Act of June 1, 1872, ch. 255, § 2, 17 Stat. 196, 197.

103 *Supra* notes 97–101 and accompanying text.

104 13 Rev. Stat. § 701 (1875) (codifying the 1872 statute with respect to the Supreme Court's authority over lower federal courts); *see also id.* § 636 (codifying similar authority for circuit courts). Today's federal courts of appeals did not exist in 1872. When they were created in 1891, they were regarded as possessing the same broad remand authority as

cases from the state courts.[105] When the U.S. Code was devised, the authority was carried forward into the initial edition.[106]

Section 2106 as it reads today dates from the 1948 revision of Title 28. Section 2106 combines three sections from the previous version of the U.S. Code.[107] Of the three source provisions, the most direct ancestor is § 876 of the former U.S. Code, which provided that the Supreme Court may "affirm, modify, or reverse any judgment, decree, or order of a district court . . . lawfully brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the inferior court, as the justice of the case may require."[108] A comparison of § 2106 with its pre-1948 sources shows that § 2106 expressly gave the courts of appeals the same remand authority enjoyed by the Supreme Court (which had been the understanding already)[109] and added "vacate [or] set aside" to the list of

possessed by the Supreme Court. *See* Ballew v. United States, 160 U.S. 187, 201–02 (1895) (so construing Act of March 3, 1891, ch. 517, § 11, 26 Stat. 826).

105 13 Rev. Stat. § 709 (1875) (providing that the Supreme Court may "re-affirm, reverse, modify, or affirm the judgment or decree of [the state court], and may, at their discretion, award execution, or remand the same to the court from which it was removed by the writ"). Remanding for further proceedings consistent with the Court's opinion was especially appropriate in cases from state courts, as there might be remaining state issues that bore on the proper disposition of the case. Thus, in *Maguire v. Tyler*, the Court initially ordered the state supreme court to affirm the state trial court's decree but on reconsideration modified its judgment so as to remand to the state supreme court for further consistent proceedings, which latter disposition was "more in accordance with the usual practice of the court in such cases." 75 U.S. (8 Wall.) 650, 672 (1869); *cf.* Stanley v. Schwalby, 162 U.S. 255, 282 (1896) (referring to "the usual practice, by which, upon reversing a judgment of the highest court of a State, the case is remanded generally for further proceedings not inconsistent with the opinion of this court" but departing from that practice by directing a specific judgment).

106 28 U.S.C. § 876 (1926). In that initial 1925–26 edition of the U.S. Code, § 876 was written so as to apply only to Supreme Court review of "a district court in prizo causes." *Id.* That was odd, because the primary source statute, section 701 of the Revised Statutes, referred to appeals in prize cases as well as other cases from the district courts and circuit courts. 13 Rev. Stat. § 701 (1875). The revisers of the U.S. Code evidently realized that the restriction to prize cases was a mistake in codification, and that restriction was dropped in a later edition. *See* 28 U.S.C. § 876 (Supp. I 1935) (deleting the reference to "in prize cases").

107 H.R. REP. NO. 80-308, app. at 173–74 (1947) (Reviser's Note referring to 28 U.S.C. §§ 344, 876, 877 (1940)).

108 28 U.S.C. § 876 (1940). Section 344 of the 1940 edition provided appellate jurisdiction over state decisions and permitted the Court to "reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the [state] court." *Id.* § 344. The jurisdiction-providing portion of § 344 migrated to a different part of the Code. 28 U.S.C. § 1257 (2018). Section 877 of the 1940 edition provided that the Supreme Court and federal courts of appeals should remand cases to district courts for further proceedings. *See* Lutcher & Moore Lumber Co. v. Knight, 217 U.S. 257, 267–68 (1910) (explaining that remands should usually go to the trial court rather than the court of appeals "to avoid circuity").

109 *Supra* note 104.

permissible appellate dispositions.[110] As far appellate remedies go, the 1948 revision was meant to restate existing law and practice rather than make substantive changes.[111]

* * *

Let us now pause to take stock. History gave us two very different appellate procedures, one from law and the other from equity. Our current federal appellate procedure is a hybrid that borrows certain aspects of each. Although the common law's writ of error was nominally abolished almost a century ago,[112] the scope of review in modern federal appellate courts nonetheless largely follows the common law tradition by focusing on the search for errors of law, with deferential review of the facts even in cases not gov-

110 *Compare* 28 U.S.C. § 2106 (2018), *with* 28 U.S.C. § 876 (1940).

111 *See* H.R. REP. NO. 80-308, app. at 173–74 (1947). The addition of "vacate" to the statute's list of dispositions may reflect the fact that appellate courts in the first half of the twentieth century were coming to refer to vacating a judgment as an appellate remedy distinct from reversal. In prior usage, courts would speak of vacating *their own* prior judgments, and appellate courts might vacate lower courts' *orders*, but reversal was the usual term used with regard to upsetting lower-court judgments. Thus, the Supreme Court used to speak of reversing in situations where vacatur would be used today, such as when it finds that the lower court lacked jurisdiction. *Compare* United States v. Hamburg-Amerikanische PacketFahrt-Actien Gesellschaft, 239 U.S. 466, 478 (1916) (*reversing* and remanding with directions to dismiss a case that had become moot), *and* ALFRED CONKLING, A TREATISE ON THE ORGANIZATION, JURISDICTION AND PRACTICE OF THE COURTS OF THE UNITED STATES 676 (Albany, Weed, Parsons & Co. 4th ed. 1864) (stating that the Supreme Court "reverse[s]" when the lower court lacks jurisdiction), *with* SEC v. Long Island Lighting Co., 325 U.S. 833, 833 (1945) (per curiam) (*vacating* and remanding in light of mootness); *see also* Gulf, C. & S.F.R. Co. v. Dennis, 224 U.S. 503, 509 (1912) (using the terms interchangeably). When used in the context of judgments, "set aside" is roughly synonymous with other terms on the list, particularly vacate. *Set Aside*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see also* Checkosky v. SEC, 23 F.3d 452, 491 (D.C. Cir. 1994) (opinion of Randolph, J.) (stating, in a case concerning the remedial provision of the Administrative Procedure Act, that "[s]etting aside means vacating"). The meaning of "vacate" and "set aside" have become implicated in current debates over universal remedies against government action, specifically whether the Administrative Procedure Act's provision calling on a reviewing court to "set aside" unlawful agency action means that an unlawful regulation is nullified as to all parties or only as to those challenging it. *Compare* Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. (forthcoming 2020) (all parties), *with* Memorandum from the Attorney General, U.S. Dep't of Justice, Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions 7 (Sept. 13, 2018), https://www.justice.gov/opa/press-release/file/1093881/download (challengers only). Those particular complexities of remedial scope do not beset judicial review of an agency adjudication or, as here, appellate review of lower courts' judgments.

112 Act of Jan. 31, 1928, ch. 14, 45 Stat. 54 (1928). Reformers like Field had long advocated such simplification. *See* FIRST REPORT OF THE COMMISSIONERS ON PRACTICE AND PLEADINGS: CODE OF PROCEDURE 213–14 (Albany, Charles Van Benthuysen 1848) (urging unification of legal and equitable appellate procedure, under the name "appeal," in light of elimination of the state court of chancery).

erned by the Seventh Amendment.[113] In another nod to the writ of error, appellate courts display extreme suspicion of the introduction of new facts not in the record and the consideration of objections not lodged below.[114] And review is mostly limited to final judgments, which again reflects the traditional approach of the common law rather than equity.[115]

In the respects that matter for present purposes, however, the courts and Congress have embraced the spirit of the equitable appeal.[116] In particular, appellate remedies are meant to be flexible, as is evidenced by § 2106's open-ended conferral of discretion to dispose of cases "as may be just under the circumstances."[117]

Federal practice under this statute tends to confirm the permissibility of a broad understanding of the appellate remedial power. Nonetheless, the following section more directly addresses what the Constitution may say about the remand power. As we will see, the nature of Article III "appellate Jurisdiction" imposes few pertinent limitations.

B. Article III and the Limits of "Appellate Jurisdiction"

Section 2106 is authorized by the Exceptions and Regulations Clause, Congress's power to create the lower federal courts, and Congress's power to do everything necessary and proper to carry the courts' powers into effect.[118] Congress's power to regulate the Supreme Court's appellate jurisdiction is often discussed in tandem with the more-remarked-upon power to make exceptions to it, but the power to regulate is important in its own right.[119]

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113 *See, e.g.*, FED. R. CIV. P. 52(a)(6) (providing that judge-made findings are reviewed only for clear error); *see also* Sunderland, *supra* note 85, at 503 (criticizing modern restrictions on review in equity cases as "a reversal of the immemorial theory of the equity appeal").

114 *See* Joan Steinman, *Appellate Courts as First Responders: The Constitutionality and Propriety of Appellate Courts' Resolving Issues in the First Instance*, 87 NOTRE DAME L. REV. 1521, 1526–27, 1526 n.11 (2012).

115 *See* Carleton M. Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539, 541–48 (1932) (contrasting the two systems' approaches to finality).

116 *Cf.* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 912 (1987) (contending that post-merger federal trial-court procedure largely adopted the equity rules).

117 28 U.S.C. § 2106 (2018); *cf.* Ricketson v. Richardson, 26 Cal. 149, 155 (1864) (remarking of a state statute allowing the appellate court to make a proper disposition of the case that "the new code of procedure has adopted the equity practice" rather than the common law practice). One can contrast the open-ended, discretionary language of § 2106 with the textually more confined remedial provision in the roughly contemporaneous Administrative Procedure Act, which provides that "[t]he reviewing court *shall* . . . hold unlawful and set aside" agency action. 5 U.S.C. § 706 (2018) (emphasis added). *But cf.* Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291, 315–45 (2003) (arguing that § 706 should be read in light of the preexisting tradition of remedial discretion).

118 U.S. CONST. art. I, § 8, cls. 9, 18; *id.* art. III, § 1, cl. 1; *id.* art. III, § 2, cl. 2.

119 *See* Ira Mickenberg, *Abusing the Exceptions and Regulations Clause: Legislative Attempts to Divest the Supreme Court of Appellate Jurisdiction*, 32 AM. U. L. REV. 497, 509 (1983) (defining

Whether review uses the vehicle of the writ of error, certiorari, or appeal; whether it is mandatory or discretionary; how long a party has to seek review; whether interlocutory orders are reviewable; whether review is limited to errors of law—Congress may adjust any of these, at least within reasonable bounds and as long as other constitutional requirements are respected.[120] So too with the mode of disposing of cases.[121]

Congressional authority to regulate and effectuate must, however, be subject to some outer limit imposed by the nature of the objects being regulated.[122] The nature of Article III judicial power, and how it differs from executive and legislative power, naturally has received a great deal of attention from courts and commentators, inasmuch as distinguishing the three great powers of government is central to the separation of powers.[123] The meaning of Article III "appellate Jurisdiction," and how it differs from "original Jurisdiction," attracts less attention today. Perhaps that is because the modern federal trial and appellate courts are so sharply differentiated from each other that neither one risks being confused for the other. But the distinction between original and appellate jurisdiction, and the set of concerns

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"regulations" and contrasting it with "exceptions"); Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 170 (1960) (providing definitions of "regulations" from Founding-era dictionaries); *see also* David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 B.Y.U. L. REV. 75, 94–132 (emphasizing the role of the Necessary and Proper Clause, along with its requirement that legislation carry into effect (rather than diminish) the judicial power); James E. Pfander & Daniel D. Birk, *Article III and the Scottish Judiciary*, 124 HARV. L. REV. 1613, 1671–84 (2011) (uncovering the Exceptions and Regulations Clause's likely roots in the Scottish judiciary).

120 *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1755, at 626–27 (New York, Da Capo Press 1970) (1833) (stating that "appellate jurisdiction may be exercised in a variety of forms, and indeed in any form, which the legislature may choose to prescribe" and "where the object is to revise a judicial proceeding, the mode is wholly immaterial; and a writ of habeas corpus, or mandamus, a writ of error, or an appeal, may be used, as the legislature may prescribe"); *cf.* The "Francis Wright," 105 U.S. 381, 384–87 (1881) (upholding constitutionality of a statute that limited review in admiralty cases to errors of law). As for the scope of review, the Seventh Amendment limits review of the facts, but even in jury cases that still leaves a range of permissible options—from no review of the facts on the one end to whether evidence was "legally" sufficient in amount at the other.

121 *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 21–22 (1825) (affirming congressional power to regulate enforcement of federal judgments).

122 *Cf.* Lawrence v. Chater, 516 U.S. 163, 190 (1996) (Scalia, J., dissenting) ("There doubtless is room for some innovation [in the meaning of 'appellate Jurisdiction'] . . . but the innovation cannot be limitless without altering the nature of the power conferred."). Although the remand skeptics have not put it in these terms, one might suppose they are advancing a narrow interpretation of § 2106 in order to avoid constitutional doubts. As the rest of this Part shows, I do not think there are serious constitutional difficulties here. But if five or more Justices do come to harbor such doubts (or are already declining to remand some cases for that reason), they should clearly so state such that Congress can, if it wishes, consider the objection and reemphasize § 2106's meaning.

123 *E.g.*, INS v. Chadha, 462 U.S. 919, 945–46, 952 (1983).

that motivated the Framers to use it, does bear on the proper scope of the power to remand and therefore must be considered here.

1. The Framing of Appellate Jurisdiction

At the time of the Constitution's drafting and later during the state ratifying conventions, the federal judicial power was a matter of tremendous concern and a source of many objections. To begin with, and as we all know, delegates in Philadelphia disagreed over whether inferior federal courts were needed at all.[124] That disagreement was famously resolved through the Madisonian compromise, which authorized Congress to create inferior courts but did not require them.[125]

More pertinently for our purposes, the Constitution recognizes the distinction between "original Jurisdiction" and "appellate Jurisdiction," describing cases in which the Supreme Court could exercise them.[126] As the Supreme Court recently noted, the Constitution does not say anything more to define or distinguish the two kinds of jurisdiction.[127] Alexander Hamilton, writing of the Constitution's use of "appellate Jurisdiction," wrote that "[t]he expression, taken in the abstract, denotes nothing more than the power of one tribunal to review the proceedings of another, either as to the law or fact, or both."[128] The Constitution uses the term "appellate" as a nontechnical umbrella concept, not a demand that the Supreme Court's review take the form of the equitable appeal.[129] Indeed, under the 1789 Judiciary Act, the Supreme Court's only mode of review was by writ of error, with no "appeals" at all.[130]

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124 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 119–25 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS].

125 *See* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in *such inferior Courts as the Congress may from time to time ordain and establish*." (emphasis added)); 1 FARRAND'S RECORDS, *supra* note 124, at 124–25.

126 U.S. CONST. art. III, § 2, cl. 2. The Constitution does not say what kind of jurisdiction should be exercised by any "inferior" federal courts Congress might choose to create.

127 *See* Ortiz v. United States, 138 S. Ct. 2165, 2173 (2018) (noting the "Constitution's failure to say anything more about appellate jurisdiction").

128 THE FEDERALIST NO. 81, at 489 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

129 WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES 216 (Philadelphia, H.C. Carey & I. Lea 1825). Contrast the Iowa Constitution, which does not use "appellate" in this umbrella sense but instead provides, in more technical language, that "[t]he Supreme Court shall have appellate jurisdiction only in cases in chancery, and shall constitute a Court for the correction of errors at law." IOWA CONST. art. V, § 4; *see* Sherwood v. Sherwood, 44 Iowa 192, 193–94 (1876) (holding that this language in the state constitution required de novo review of the facts in Supreme Court in equity cases tried on written evidence); *see also* Styles v. Tyler, 30 A. 165, 168, 171–72 (Conn. 1894) (holding that the state supreme court could not review questions of fact found by a trial judge because the state constitution denominated the court a "supreme court of errors").

130 Judiciary Act of 1789, ch. 20, §§ 22, 25, 1 Stat. 73, 84–87; *see also infra* note 136. Today, of course, the Court exercises review almost exclusively through the discretionary writ of certiorari, which was originally a prerogative writ rather than an ordinary mode of review. *See Ex parte* Republic of Peru, 318 U.S. 578, 585 n.4 (1943) (explaining that "the

The allocation of jurisdiction across courts was a matter of keen concern, as many worried about the burden of litigating in a distant national capital, where the high court would presumably be located.[131] The concern about inconvenient and distant justice was addressed in the Constitution, to some degree, through (1) limits on the Supreme Court's original jurisdiction and (2) the Exceptions Clause, which allowed Congress to exclude many cases, especially small ones, from the Supreme Court's appellate jurisdiction.[132]

Antifederalists were not satisfied. A lingering criticism, pressed hard by those opposing the Constitution's ratification, was the Supreme Court's arguable power to upset local jury verdicts through the Constitution's grant of "appellate Jurisdiction, both as to Law *and Fact*."[133] As usual, supporters of the Constitution dismissed the concerns as overblown.[134] But the complaints were serious enough to require the response of the Seventh Amendment, which curtailed appellate review of jury findings in cases at law.[135] Roughly

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great purpose of the [Judiciary Act of 1925] was to curtail the Court's obligatory jurisdiction by substituting, for the appeal as of right, discretionary review by certiorari in many classes of cases").

131 *See* JAMES E. PFANDER, ONE SUPREME COURT: SUPREMACY, INFERIORITY, AND THE JUDICIAL POWER OF THE UNITED STATES 92–99 (2009) (describing these concerns); *see also* Akhil Reed Amar, Marbury*, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 469–78 (1989) (presenting a "geographic" account of limits on the Supreme Court's jurisdiction). As supporters of the Constitution would point out, the Supreme Court would not necessarily have to sit in the capital. Congress could instead require it to hold court in locations throughout the country. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 535–36 (Jonathan Elliot ed. 2d ed., 1836) (remarks of J. Madison) [hereinafter ELLIOT'S DEBATES].

132 *See, e.g.*, THE FEDERALIST NO. 81, *supra* note 128, at 487–88 (Alexander Hamilton) (noting limitations on the Supreme Court's original jurisdiction). The reader may observe here that I am rejecting the view that the Exceptions Clause was meant only to allow Congress to move excepted categories of appellate cases to the Court's original jurisdiction. That view is incorrect for the reasons explained in the sources in the previous footnote. *See supra* note 131.

133 U.S. CONST. art. III, § 2, cl. 2 (emphasis added); *see* BRUTUS NO. 14, *in* 2 THE COMPLETE ANTI-FEDERALIST 432 (Herbert J. Storing ed., 1981) (complaining about the risk to jury trial); 3 ELLIOT'S DEBATES, *supra* note 131, at 540–41 (remarks of P. Henry) (same); *see also* United States v. Wonson, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (Story, J.) (explaining that the risk to jury rights was "one of the most powerful objections urged against" the Constitution); 3 STORY, *supra* note 120, § 1757, at 628 (observing that this provision "was a subject of no small alarm" and that objections to this provision were "seized hold of by the enemies of the constitution"). Another, somewhat related Antifederalist objection was that the Court combined both law and equity, a departure from the English model. BRUTUS NO. 13, *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra*, at 428.

134 *See* THE FEDERALIST NO. 81, *supra* note 128 (Alexander Hamilton); 3 ELLIOT'S DEBATES, *supra* note 131, at 534–35 (remarks of James Madison).

135 *See* U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

simultaneously with sending out the proposed constitutional amendments for ratification, the framers of the Judiciary Act addressed the concern about appellate retrial by restricting the Supreme Court's appellate review, in all cases—whether law or equity, whether from the states or the inferior federal courts—to questions of law only.[136]

Although appellate power, especially appellate power over jury verdicts, was a topic of keen interest in the Founding era, it bears noting that none of the Founding-era worries involved appellate courts imposing on lower courts through remands.

2. The Expansive Meaning of Appellate Jurisdiction in Early Interpretations and Practice

The canonical judicial gloss on the distinction between original and appellate jurisdiction comes from Chief Justice Marshall in *Marbury v. Madison*.[137] "It is the essential criterion of appellate jurisdiction," he explains, "that it revises and corrects the proceedings in a cause already instituted, and does not create that cause."[138] Using that criterion, the Court held that a mandamus action ordering the Secretary of State to deliver a commission was not "appellate" in the constitutional sense, in circumstances in which the petition was presented in the first instance to the Supreme Court.[139]

Other early cases and commentators used similar definitions of appellate jurisdiction. Justice Story, in his treatise on constitutional law, borrowed from and elaborated on Marshall's language.[140] Justice Field, near the end of the nineteenth century, used essentially the same definition as his prede-

136 WILFRED J. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789, at 19–21, 23 (Wythe Holt & L.H. LaRue eds., 1989). This was done by providing, in section 22 of the Act, for review by the writ of error in all cases and expressly prohibiting reversal on writ of error for errors of fact. Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 84; *supra* notes 83–84, 94. Section 22 also imposed an amount-in-controversy requirement on appeals.

137 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 175 (1803).

138 *Id.* In modern American English, "to revise" usually means to change, especially with aim of improving or correcting. When Marshall said "revise," he probably meant "review." Marshall and his contemporaries frequently referred to "revising" judgments when today we would use "review." *E.g.*, *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 201 (1830) (writing that the Supreme Court "could not revise this judgment; could not reverse or affirm it"); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 415 (1821) (referring to whether a state case may be "removed before judgment, [or] revised after judgment"). Consider also the "Council of Revision" included in the Virginia Plan at the Convention; the Council could veto legislation and in that way review its acceptability, but it did not directly change the legislation. 3 FARRAND'S RECORDS, *supra* note 124, at 21 (May 29, 1787).

139 *Marbury*, 5 U.S. at 175–76.

140 3 STORY, *supra* note 120, § 1755, at 626–27 ("The essential criterion of appellate jurisdiction is, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. In reference to judicial tribunals, an appellate jurisdiction, therefore, necessarily implies, that the subject matter has been already instituted in, and acted upon, by some other court, whose judgment or proceedings are to be revised." (footnote omitted)); RAWLE, *supra* note 129, at 216 (stating that the Court in its appellate juris-

cessors: "The term 'appellate' in the Constitution is not used in a restricted sense, but in the broadest sense, as embracing the power to review and correct the proceedings of subordinate tribunals brought before [the Supreme Court] for examination in the modes provided by law."[141] These authors addressed themselves to Article III's use of the term "appellate Jurisdiction," but the same basic idea appears in sources directed at state practice and appellate practice more generally.[142]

From early on, the notion of "appellate Jurisdiction" in the Article III sense has been construed broadly to encompass actions that might be classified as "original" for other purposes. Thus, the Supreme Court in *Ex parte Bollman* ruled that a habeas corpus proceeding that was considered "original" for purposes of statutory jurisdiction—as it had to be, because the Court lacked *statutory appellate jurisdiction* over criminal cases—was nonetheless "appellate" for Article III purposes.[143] The case was appellate because "[i]t is the revision of a decision of an inferior court, by which a citizen has been committed to jail."[144] The Court reaffirmed this reasoning decades later, upholding its authority to issue habeas relief through such an "original" writ even after Congress had expressly *stripped* the Court's statutory appellate jurisdiction.[145] Likewise, and despite *Marbury*'s holding that mandamus to the Secretary of State was not constitutionally "appellate," the Court held that mandamus to a lower court does qualify as "appellate" in the Article III sense.[146] Moreover, a mandamus proceeding was considered "appellate" even though the writ would typically order the lower court simply to undertake some action, or refrain from exercising jurisdiction, rather than engaging in a more familiarly appellate function of reviewing the merits of the lower court's decision to find and correct error.[147]

One other instance, much less celebrated than *Marbury*, in which the Supreme Court did express concerns about overstepping the bounds of

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diction "may revise and correct the proceedings in a cause instituted in an inferior tribunal, but cannot create a cause").

141 Virginia v. Rives, 100 U.S. 313, 327 (1879) (Field, J., concurring in the judgment).

142 *E.g.*, BYRON K. ELLIOTT & WILLIAM F. ELLIOTT, A TREATISE ON APPELLATE PROCEDURE AND TRIAL PRACTICE INCIDENT TO APPEALS 15 (Indianapolis, The Bowen-Merrill Co. 1892) ("Appellate jurisdiction is the authority of a superior tribunal to review, reverse, correct, or affirm the decisions of an inferior judicial tribunal in cases where such decisions are brought before the superior court pursuant to law.").

143 *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 100–01 (1807).

144 *Id.* at 101.

145 *Ex parte* Yerger, 75 U.S. (8 Wall.) 85, 98 (1868); *see also* Felker v. Turpin, 518 U.S. 651, 654 (1996) (reaffirming this point).

146 *See Ex parte* Crane, 30 U.S. (5 Pet.) 190, 193–94 (1831) (Marshall, C.J.).

147 *Id.* It was commonly said that mandamus could compel the exercise of discretion, but did not evaluate how the discretion was exercised. *E.g.*, JAMES L. HIGH, A TREATISE ON EXTRAORDINARY LEGAL REMEDIES, EMBRACING MANDAMUS, QUO WARRANTO, AND PROHIBITION §§ 149, 152 (Chicago, Callaghan & Co. 1874); *Ex parte* Newman, 81 U.S. (14 Wall.) 152, 165–67, 169–70 (1871). Today, courts acknowledge that mandamus addresses the merits of the lower court's decision, though it is still said that the error must be clear rather than debatable. *E.g.*, Cheney v. U.S. Dist. Ct. for D.C., 542 U.S. 367, 380–81 (2004).

appellate jurisdiction involved the old practice, introduced in 1802, of certification upon division in the circuit court.[148] Under the certification procedure, an equally divided circuit court—which was typically staffed by a district judge and a Justice riding circuit—could send the point on which they divided to the Supreme Court for decision. The Supreme Court disclaimed any jurisdiction to decide certificates that amounted to an entire case, such as certificates that posed multiple questions, some of which would arise or not depending on how antecedent certified questions were decided, and the Court did so on the ground that such would constitute an exercise of original rather than appellate jurisdiction.[149] Perhaps more notable than the concern about overstepping, however, is the fact that this procedure allowed interlocutory review of discrete points of law and, in practice, empowered Justices to select questions for review through the artifice of feigned division on circuit.[150]

Although there must be some limits on what an appellate court can do with a case that is properly before it, the nature of "appellate Jurisdiction" does not preclude courts from taking up brand new issues on appeal.[151] Thus, although the usual practice of appellate courts is to eschew new legal claims or objections not presented to the court below, there are certainly many exceptions to that general rule.[152] A common scenario involves criminal defendants who fail to object in the district court to an obviously incorrectly calculated sentence.[153] The courts of appeals are the most frequent correctors of previously neglected errors, but the Supreme Court too corrects errors presented, or noticed *sua sponte*, for the first time in the proceedings before it, and it does so in both criminal and civil cases.[154]

A court exercising "appellate Jurisdiction" may even allow a civil plaintiff to add new affirmative claims for relief. Early admiralty cases were lenient in allowing amendments to add new counts. In *The Marianna Flora*,[155] the Supreme Court addressed a case in which the circuit court allowed an

148 *See generally* Jonathan R. Nash & Michael G. Collins, *The Certificate of Division and the Early Supreme Court*, 94 S. CAL. L. REV. (forthcoming 2021).

149 *See* Balt. & Ohio R.R. Co. v. Interstate Com. Comm'n, 215 U.S. 216, 221–24 (1909); White v. Turk, 37 U.S. (12 Pet.) 238, 239 (1838).

150 *See* Nash & Collins, *supra* note 148.

151 *See* Steinman, *supra* note 114, at 1549–57 (summarizing the Supreme Court's practices in this regard).

152 *See* Singleton v. Wulff, 428 U.S. 106, 120–21 (1976); FED. R. CIV. P. 51(d)(2); FED. R. CRIM. P. 52(b). *See generally* Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 VAND. L. REV. 1023 (1987) (describing the general rule, its justifications, and its exceptions).

153 *E.g.*, Rosales-Mireles v. United States, 138 S. Ct. 1897, 1904–07 (2018).

154 *E.g.*, Hicks v. United States, 137 S. Ct. 2000, 2000 (2017) (Gorsuch, J., concurring); Carlson v. Green, 446 U.S. 14, 17 n.2 (1980); Vachon v. New Hampshire, 414 U.S. 478, 479 (1974) (per curiam); United Brotherhood of Carpenters & Joiners of Am. v. United States, 330 U.S. 395, 411–12 (1947); Weems v. United States, 217 U.S. 349, 362 (1910); Wiborg v. United States, 163 U.S. 632, 658 (1896).

155 24 U.S. (11 Wheat.) 1, 4 (1826).

amendment to add a count of hostile aggression to go with the original count of piratical aggression. Justice Story, for the Court, saw no problem:

> An objection, which is preliminary in its nature, has been taken to the admissibility of this new count to the libel, filed in the Circuit Court, upon the ground, that . . . to allow this amendment would be to institute an original, and not an appellate inquiry in the Circuit Court. But the objection itself is founded on a mistaken view of the rights and authorities of appellate Courts of admiralty. . . . It has been the constant habit of the Circuit Courts, to allow amendments of this nature in cases where public justice, and the substantial merits, required them; and this practice has not only been incidentally sanctioned in this Court; but on various occasions in the exercise of its own final appellate jurisdiction, it has remanded causes to the Circuit Court, with directions to allow new counts to be filed.[156]

Lest one think such cases are artifacts of ancient admiralty and chancery practice, the modern Supreme Court has likewise expanded cases to encompass affirmative claims newly raised before it or never raised by any party at all. Most commonly, this has happened in cases in which the Court intentionally dodged a sensitive constitutional question by remanding for consideration of an alternative ground for decision, such as a statutory claim or a narrower version of the constitutional claim.[157] Section 2106 has been cited as authority for this practice.[158] A remand to allow the plaintiff to assert new claims or seek new forms of relief has also been granted when the law or circumstances change while a case is on appeal.[159]

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156 *Id.* at 38; *see also* Harrison v. Nixon, 34 U.S. 483, 540 (1835) (remanding with directions to allow amendment to the pleadings and joinder of additional parties in equity case); ERASTUS C. BENEDICT, THE AMERICAN ADMIRALTY, ITS JURISDICTION AND PRACTICE, WITH PRACTICAL FORMS AND DIRECTIONS 286 (2d ed. 1870) (stating that new allegations are permitted in an admiralty appeal, as long as "the new allegations be confined to the original subject of controversy"). *But cf.* 2 BENJAMIN VAUGHAN ABBOTT, A TREATISE UPON THE UNITED STATES COURTS AND THEIR PRACTICE 242 (New York, Ward & Peloubet, 3d ed. 1877) (stating that the power to allow amendments on appeal in admiralty should not be "carried so far . . . as to allow a substantially new cause of action to be exhibited, as this would be, in effect, for the court to take an original jurisdiction of the new demand").

157 *E.g.*, Wood v. Georgia, 450 U.S. 261, 264–65, 273–74 (1981) (remanding for state court to consider a different, narrower constitutional claim that had not previously been presented); Simpson v. Georgia, 450 U.S. 972, 972 (1981) (similar); *see also* Nat'l Advert. Co. v. City of Rolling Meadows, 789 F.2d 571, 574–75 (7th Cir. 1986) (exercising its discretion to consider an arguably unpreserved statutory claim that could moot a related constitutional claim). *But see* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 7–8 (1993) (refusing to consider potential nonconstitutional ground for decision that had not been raised below). *See generally* Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1027–35 (1994) (discussing *Zobrest* and the Court's inconsistent application of the "last resort" rule).

158 *Wood*, 450 U.S. at 266 n.5 ("Even if one considers that the conflict-of-interest question was not technically raised below, there is ample support for a remand required in the interests of justice." (citing 28 U.S.C. § 2106)).

159 *E.g.*, Youakim v. Miller, 425 U.S. 231, 233–36 (1976) (per curiam) (remanding for district court to consider a statutory claim that had not previously been presented but was

In all of the cases of appellate expansion described in the preceding several paragraphs, the new claim arose from the same incident as the original claim—the same pirate attack, the same denial of welfare benefits, and the like. For that reason, the claims would form the same constitutional "case" for purposes of the doctrine of supplemental subject-matter jurisdiction.[160] A different hypothetical case, say in which a slip-and-fall case is remanded for litigation of an unrelated copyright infringement, would fall outside that boundary. Although supplemental subject-matter jurisdiction and appellate expansion involve the limits of different phrases in Article III—"case" and "appellate Jurisdiction," respectively—the substance of the doctrines may be similar. If so, the Constitution allows the Supreme Court to add new claims if and only if the claims form part of the same "case" for purposes of subject-matter jurisdiction. The argument of this Article does not require me to defend that symmetry, but there are at least some similarities between the purposes of the two doctrines.

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The discussion above does not consider every facet of appellate jurisdiction, but it does allow some conclusions relevant to the power to remand. Specifically, the constitutional limits are minimal. As the early commentators explained, appellate jurisdiction may not "create" a case but may only review it.[161] But beyond that, "appellate Jurisdiction" does not limit the dispositions at an appellate court's disposal. Certainly, the term does not limit the court to affirming in whole or reversing entirely so that the proceedings may start again. A court exercising "appellate Jurisdiction" can instead modify judgments, reverse in part, or vacate for reconsideration. It may wrap up a case itself, but it also may require proceedings on remand with or without specific guidance. This has long been the practice of federal courts, and Congress has authorized and encouraged this flexibility.

C. Structural Constitutional Analysis

One should also consider whether the broader structural principles of the Constitution impose constraints on the remand power. The answer is, essentially, no.

Unlike some other situations that call on us to interpret "judicial" power, there is no separation-of-powers problem with appellate remands. We are not faced with a situation in which Congress or the Executive attempts to reduce judicial authority or independence by, to pick some leading exam-

supported by a recent administrative directive); Bryan v. Austin, 354 U.S. 933, 933 (1957) (per curiam).

160 *See* United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725 (1966) (defining the boundaries of an Article III case in terms of claims arising from a "common nucleus of operative fact").

161 *Supra* notes 137–42 and accompanying text.

ples, stripping the courts of jurisdiction,[162] directing the courts to reach particular outcomes,[163] stripping final judgments of their force,[164] or assigning "judicial" duties to non–Article III actors.[165]

Nor is this a situation involving the expansion of judicial power vis-à-vis the other branches. Worries about judicial overreach may arise when, for example, the courts review the discretionary judgments of the President,[166] scrutinize internal congressional affairs,[167] supervise the executive's enforcement decisions by adjudicating citizen suits,[168] or craft their own jurisdictional policy.[169] Appellate remedies can raise tough separation-of-powers questions when courts review agency action,[170] but here we are concerned with appellate review of lower courts.

Probably the closest thing to a separation-of-powers problem involves a potential risk of advisory opinions. In particular, the risk arises in situations in which the Supreme Court vacates and remands with instructions for the lower court to reach a different ground of decision, such as a statutory ground rather than a constitutional ground.[171] Although it is true that the Court is asking the lower court to reach a ground of decision that was not strictly necessary, this is not a demand for an advisory opinion. There is a concrete case in need of decision on *some* ground or another, and the higher court is telling the lower court which ground or grounds to use. Including alternative holdings in the same opinion does not create an advisory opinion.[172]

The real problem with remands to reach a different ground, if it is a problem, is not that they solicit an advisory opinion but that they interfere

162 *E.g.*, *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 518–19 (1868); *cf.* Louise Weinberg, *Our* Marbury, 89 VA. L. REV. 1235, 1374–81 (2003) (discussing the risk that Congress could overwhelm the Court by "packing" its original jurisdiction).

163 *E.g.*, United States v. Klein, 80 U.S. (13 Wall.) 128, 148 (1871).

164 *E.g.*, Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 213 (1995); *see also* Hayburn's Case, 2 U.S. (2 Dall.) 409, 410 n.* (1792) (reporting circuit opinions objecting to pensions statute because it assigned judges' nonjudicial functions and subjected their decisions to review by executive officials).

165 *E.g.*, Stern v. Marshall, 564 U.S. 462, 469 (2011); *Hayburn's Case*, 2 U.S. at 409.

166 *E.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165–66 (1803) (describing questions of executive discretion that the courts may not review).

167 *E.g.*, Nixon v. United States, 506 U.S. 224, 234–36 (1993) (explaining that judicial regulation of the Senate's impeachment trial would compromise impeachment's ability to check the judiciary).

168 *E.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 577 (1992).

169 *See generally* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984) (criticizing abstention doctrines on separation-of-powers grounds).

170 *See, e.g.*, Levin, *supra* note 117, at 363–73 (discussing separation of powers and the controversial remedy of remanding to an agency without vacating).

171 *See infra* Section III.C.

172 *See, e.g.*, Harris v. Reed, 489 U.S. 255, 264 n.10 (1989); *cf.* RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. o (AM. L. INST. 1982) (describing circumstances under which alternative holdings have preclusive effect).

with the lower court's discretion over the grounds of its decision. That is something, but it is not a matter of constitutional dimension. It is rather a matter of intramural adjustment that should consider the roles of the two courts and the values that are served by the higher court's interference. These matters are taken up below, in the discussion of the prudential considerations that apply to particular classes of remands.[173]

D. Judgments and Opinions

In criticizing remands that do not identify error in the judgment, the remand skeptics sometimes invoke the principle that appellate courts "review judgments rather than opinions."[174] That principle is correct, if properly understood, but the remand skeptics are misusing it.

We can start with the important distinction between judgments and opinions. Courts resolve disputes by entering judgments, such as "Defendant is liable to Plaintiff for $5000." An appellate court enters its own judgment affirming or reversing (or vacating or modifying or the like).[175] Courts may write an opinion explaining the judgment or otherwise state their reasons.[176] If a reviewing court disagrees with the lower court's reasons but agrees with the judgment for other reasons, the reviewing court affirms the judgment, though it may write its own opinion setting forth what it regards as the correct reasons.[177] A faulty opinion explaining a correct judgment does not justify reversal.[178] In that sense, it is correct to say that "our power is to correct wrong judgments, not to revise opinions."[179]

The principle that appellate courts "review judgments, not opinions" has its core application in cases involving the jurisdictional doctrine of adequate

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173 *See infra* Section III.D.

174 *See, e.g.*, Webster v. Cooper, 558 U.S. 1039, 1042 (2009) (Scalia, J., dissenting).

175 *See generally* Jon O. Newman, *Decretal Language: Last Words of an Appellate Opinion*, 70 BROOK. L. REV. 727 (2005) (discussing proper language for end of appellate opinions).

176 Courts are not required, as a general matter, to provide reasons. *See* Tex. & Pac. Ry. Co. v. Hill, 237 U.S. 208, 213, 215 (1915) (rejecting contention that the appellate court's failure to write an opinion when affirming was itself a ground for reversal); *see, e.g.*, 5TH CIR. R. 47.6 (authorizing one-line "affirmed" disposition in certain circumstances); *see also infra* subsection III.A.3 (discussing circumstances in which explanation is required, such as to permit effective review). In distinguishing judgments from opinions, I am following American usage, which differs from that of many other English-derived systems. I am also including decrees within judgments, though traditionally decrees and judgments corresponded to resolutions in equity and law respectively. *Supra* note 94.

177 *See* M'Clung v. Silliman, 19 U.S. 598, 603 (1821); *see, e.g.*, Smith v. City of Jackson, 544 U.S. 228, 232 (2005) (establishing that a federal statute recognizes disparate-impact liability, and thus disagreeing with the lower court's ruling that no such theory existed, but affirming the judgment because the plaintiffs could not prevail on their disparate-impact claim).

178 *See* Robert W. Calvert, *Appellate Court Judgments or Strange Things Happen on the Way to Judgment*, 6 TEX. TECH L. REV. 915, 919–24 (1975).

179 Herb v. Pitcairn, 324 U.S. 117, 126 (1945).

and independent state grounds.[180] According to that doctrine, the Supreme Court may not review a state court's decision merely to correct erroneous statements about federal law (i.e., to revise the opinion) when the state court's judgment would remain the same due to a separate, state-law basis of support.[181] A state court's erroneous view of the interpretation of a federal statute is irrelevant, for example, if the federal statutory claim is independently barred by the plaintiff's failure to follow state-law procedural rules for presenting it.[182] In that sense, the Court's only concern is potential error in the judgment.

Yet the review-judgments-not-opinions principle cannot mean that the Court may set aside a judgment only after determining that the judgment is incorrect. Such a proposition is unsupportable given that one of the central uses of vacatur is to wipe the slate clean of a judgment that, on remand, may yet be shown to be correct. As the Supreme Court's own style manual says, vacatur rather than reversal is the proper disposition "if the judgment is less than absolutely wrong."[183] Here, "absolutely" means something like "irremediably" rather than "egregiously." That is, the Court vacates when the court below might still reach the same decision after correcting some mistake in its prior analysis.[184] Section 2106, notably, refers to "vacate" and "set aside" as well as "reverse." Indeed, even most Supreme Court reversals leave the ultimate disposition of the case open by remanding for further proceedings rather than by entering judgment for the petitioner or remanding with precise instructions.[185] These relatively unguided remands have been going on for a long time.[186]

E. Dignity and Fault

Relatedly, remand skeptics have sometimes expressed their criticisms by invoking the "dignity" of the lower courts.[187] Justice Scalia even suggested

180 *See id.* at 125; *see also, e.g.*, Murdock v. Memphis, 87 U.S. (20 Wall.) 590, 635–36 (1874).

181 *See Herb*, 324 U.S. at 125–26.

182 *See id.* at 126.

183 THE SUPREME COURT'S STYLE GUIDE § 10.5 (Jack Metzler ed., 2016).

184 *See* Hartnett, *supra* note 48, at 593 n.11. This is not the only occasion in which vacatur rather than reversal is appropriate. Vacatur is also particularly appropriate when the lower court lacked jurisdiction. *See, e.g.*, Upton v. United States, 199 F.2d 366, 366 (4th Cir. 1952) (per curiam).

185 *Supra* note 2 and accompanying text.

186 *See, e.g.*, Mut. Life Ins. Co. v. Hill, 193 U.S. 551, 553–54 (1904); *Ex parte* Medway, 90 U.S. (23 Wall.) 504, 506–07 (1875); Glass v. The Sloop Betsey, 3 U.S. (3 Dall.) 6, 16 (1794).

187 *See, e.g.*, Myers v. United States, 139 S. Ct. 1540, 1541 (2019) (Roberts, C.J., dissenting) (criticizing the Court for failing to show "courtesy" by vacating without identifying error); Jefferson v. Upton, 560 U.S. 284, 301 (2010) (Scalia, J., dissenting) (calling it "unfair" to the lower court to vacate based on a new argument); Wellons v. Hall, 558 U.S. 220, 228 (2010) (Scalia, J., dissenting) ("It disrespects the judges of the courts of appeals, who are appointed and confirmed as we are, to vacate and send back their authorized judgments for inconsequential imperfection of opinion—as though we were schoolmasters

that a "self-respecting" lower court would feel honor-bound to respond to what he regarded as an unnecessary GVR by summarily reissuing its prior opinion.[188] Now, the nature of appellate review is that superior courts evaluate the work of their inferiors and sometimes find it wanting, sometimes even concluding that the lower court committed "clear error" or an "abuse of discretion." So, the hit to the lower courts' self-esteem from being found to have erred cannot be the issue. The affront to dignity comes not from setting aside a judgment, in the skeptics' view, but apparently from doing so *without* finding that any mistake has been made. That is, the problem is the absence of *fault* on the lower court's part.[189]

The view that setting aside a judgment requires some fault on the lower court's part has some historical foundation to it. The writ of error has roots, more than 700 years ago, in an accusatory, quasi-criminal action against the trial judge for his wrongful judgment,[190] and this conception, though now a curiosity, led to some long-lingering limitations on the scope of review in actions at common law.[191] For example, if some matter was not presented to the judge for decision, he could not be blamed for that; nor could he be faulted for the idiosyncratic factual findings of a properly instructed jury (though the jurors themselves could be fined or jailed for rendering a false verdict). Such matters were therefore not grounds for reversal on writ of error.[192] In equity, by contrast, the goal on appeal was not to convict the trial judge of error but to issue the right decree according to the justice of the case.[193]

As noted already, our present system of appellate review partakes of both the legal and equitable traditions, but the ancient notion that appellate review is a hunt for judicial wrongdoing has been cast aside. Everyday practice furnishes plenty of examples of reversing or vacating a judgment in the absence of any fault in the lower court's judgment *or* opinion. Appellate courts reverse on the basis of new case law or positive law that did not exist at the time of the lower court's ruling, notwithstanding that the judgment was correct when rendered.[194] And of course the garden-variety GVR, in which

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grading their homework."); Sena Ku, Comment, *The Supreme Court's GVR Power: Drawing a Line Between Deference and Control*, 102 NW. U. L. REV. 383, 386, 405–06 (2008) (referring to the GVR's connection to the "dignity of lower courts").

188 *See Wellons*, 558 U.S. at 228 (Scalia, J., dissenting).

189 *See, e.g.*, Lawrence v. Chater, 516 U.S. 163, 178–79 (1996) (Scalia, J., dissenting) (referring to "no-fault" vacatur and remand).

190 *See* HOLDSWORTH, *supra* note 77, at 214; Sunderland, *supra* note 85, at 484.

191 *See* Sunderland, *supra* note 85, at 494–97.

192 HOLDSWORTH, *supra* note 77, at 213–15; Sunderland, *supra* note 85, at 484–86, 489, 494–97.

193 *See* Sunderland, *supra* note 85, at 488.

194 *E.g.*, Hamm v. City of Rock Hill, 379 U.S. 306, 313–17 (1964) (new statute); Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538, 543 (1941) ("Intervening and conflicting decisions will . . . cause the reversal of judgments which were correct when entered."); United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801) (new treaty).

the appellate court vacates and remands in light of an event (like a new case or statute) that came along *after* the lower court's decision, cannot be based on fault.[195] As the Court explained in one case involving an intervening development, "[t]his court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but to make such disposition of the case as justice may at this time require."[196] A GVR assumes that the judgment was correct when rendered, and it allows the possibility that the judgment may be correct even after the new development.[197] A GVR does not even mean that a subsequent opinion in the GVR'd case would be defective if it failed to mention the new development, which may after all turn out not to be irrelevant in the lower court's estimation. In such a circumstance, the old opinion could simply be reinstated.[198]

Other examples of faultless vacatur abound. An appellate court may vacate a judgment when the case has become moot while on appeal.[199] And when an appellant takes an appeal to the wrong court and the time for appeal has expired, the appellate court may in its discretion vacate the judgment to allow entry of a fresh judgment from which a timely appeal may be taken to the correct court.[200] In these cases, the reviewing court most certainly does not find any error in the decision below, as it lacks jurisdiction even to review the merits.

In sum, "fault" may have been the only mindset available to a common-law court in late medieval England. But it is not the right mindset for an appellate court empowered to dispose of a case as justice may require. Section 2106 emphasizes that the federal courts are the latter, and daily practice confirms it.

F. External Limits on Appellate Dispositions

Moving beyond Article III and the structural Constitution, § 2106 is also subject to external limitations from the Bill of Rights and statutes. Several provisions in the Constitution address judicial procedure, especially in criminal cases. An appellate court's ability to order a new trial in a criminal case is subject to the protections of the Double Jeopardy Clause, for example.[201]

195 *See supra* notes 29–31 and accompanying text (describing the GVR practice).

196 Watts, Watts & Co. v. Unione Austriaca Di Navigazione, 248 U.S. 9, 21 (1918).

197 *See* Lawrence v. Chater, 516 U.S. 163, 167 (1996) (per curiam) (stating the standard as whether there is a "reasonable probability" that the new law would influence the lower court and "may" change the judgment).

198 *E.g.*, United States v. Kochekian, 977 F.2d 905, 906 (4th Cir. 1992) (per curiam); Castlewood Int'l Corp. v. Miller, 626 F.2d 1200, 1201 (5th Cir. 1980) (per curiam).

199 *E.g.*, Walling v. James V. Reuter, Inc., 321 U.S. 671, 677–78 (1944); *see also* United States v. Munsingwear, Inc., 340 U.S. 36, 40–41 (1950) (citing "supervisory power over the judgments of the lower federal courts" and 28 U.S.C. § 2106 as authority for vacating a judgment that has become moot on appeal).

200 *See infra* subsection III.A.4.

201 U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb[.]"); *see* Burks v. United States, 437 U.S. 1, 17–18 (1978).

Similarly, a court of appeals hearing a criminal defendant's appeal of a manslaughter conviction surely could not deem the homicide premeditated and therefore enter a conviction for murder without indictment or trial, as that would violate the guarantees of the Fifth and Sixth Amendments. In civil cases, the Seventh Amendment prevents both trial and appellate courts from increasing a jury's assessment of damages.[202]

Courts' use of § 2106 also has to respect limitations imposed by other statutes and even procedural rules. Thus, for instance, a court of appeals may not order a new trial when the party seeking it failed to file a post-verdict motion with the district court, as Rule 50 requires.[203] The Federal Rules wisely require that litigants present new-trial motions to the district court, which is in the best position to take the first crack at them,[204] and appellate courts should reinforce that requirement. Similarly, § 2106 does not license an appellate court to ignore statutory or rules-based deadlines for seeking reconsideration, introducing new evidence, and the like.[205] (To be clear, deadlines may be subject to exceptions for equitable reasons or extraordinary circumstances; the point is just that § 2106 does not give the appellate court license to ignore such strictures.)[206] There is no contention that the kinds of remands targeted by the skeptics violate any such external limit.

G. The Supervisory Power as an Additional Source of Authority

The discussion so far has focused on the broad authority to remand granted by § 2106 and the absence of relevant constraints on that authority imposed by traditional understandings of appellate power. An alternative lens through which to view the matter, and an additional source of support for at least some remands, comes from consideration of appellate courts'

202 *See* U.S. CONST. amend. VII; Dimick v. Schiedt, 293 U.S. 474, 485–88 (1935).

203 *See* Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc., 546 U.S. 394, 402 n.4 (2006) (stating that "the broad grant of authority to the courts of appeals in § 2106 must be exercised consistent with the requirements of the Federal Rules of Civil Procedure as interpreted by this Court"); *see also* Greenlaw v. United States, 554 U.S. 237, 248–49 (2008) (stating that § 2106 may not be used to overcome the requirement that the government file a cross-appeal if it wishes to obtain a harsher criminal sentence); United States v. Arrington, 763 F.3d 17, 25–27 (D.C. Cir. 2014) (refusing to allow § 2106 to be used to circumvent statutory limitations on successive resentencing motions).

204 *See* FED. R. CIV. P. 59; FED. R. APP. P. 4(a).

205 The Supreme Court held, under a predecessor to § 2106, that the power to remand for such proceedings as justice requires did not permit an appellate court to remand for the trial court to receive newly discovered evidence after the trial court's judicial term had expired. (Under then-prevailing practice, the lower court itself could not reopen the case after the expiration of the term.) Realty Acceptance Corp. v. Montgomery, 284 U.S. 547, 550–51 (1932). *But see* Powell v. U.S. Bureau of Prisons, 927 F.2d 1239, 1243 (D.C. Cir. 1991) (citing § 2106 and "extraordinary circumstances" and remanding for consideration of new evidence despite apparent violation of the time period in Federal Rule of Civil Procedure 60(b)(2)).

206 *See, e.g.*, Holland v. Florida, 560 U.S. 631, 645–47 (2010) (holding that habeas limitations period was subject to equitable tolling).

"supervisory power" over the courts below them. This supervisory power takes two distinct forms, and each form of supervisory power supports, in different ways, a reviewing court's authority to remand without finding error.

1. Supervisory Power as a Power to Impose Rules for Fashioning Opinions

Modern discussions of supervisory power usually involve the Supreme Court's practice, admittedly a bit controversial, of creating, outside of the Rules Enabling Act process, what amount to general rules of evidence, practice, and procedure that bind inferior federal courts.[207] Thus, in *McNabb v. United States*, the Supreme Court reversed a federal conviction secured with the aid of a confession given after a long interrogation, not because admission of the confession violated the Constitution or a federal statute, but because the Court had the "duty of establishing and maintaining civilized standards of procedure and evidence."[208] In another case, similarly relying on its "power of supervision over the administration of justice in the federal courts," the Court disapproved a federal district court's practice of excluding daily wage laborers from the jury venire, even though the litigant complaining of the practice had not shown any violation of existing law or any prejudice to his case.[209] The Court has been obscure about the source of this power, but it has held that the courts of appeals also have it.[210]

Moving closer to the topic at hand, courts have sometimes invoked their supervisory power to require lower courts to provide reasoning in circumstances not required under the Federal Rules or to decide otherwise-unnecessary issues.[211] Thus the Third Circuit required district courts to explain the grounds for grants of directed verdicts.[212] More boldly, and in an effort to avoid excessive remands and subsequent appeals, the Eleventh Circuit required the district courts in the circuit "to resolve all claims for relief raised in a petition for writ of habeas corpus . . . regardless whether habeas relief is

207 For discussions of this sort of supervisory power, see Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324 (2006); Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433 (1984); and Robert J. Pushaw, Jr., *The Inherent Powers of the Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 779–82, 864–66 (2001). The Rules Enabling Act is codified as amended at 28 U.S.C. § 2072 (2018).

208 318 U.S. 332, 340 (1943).

209 Thiel v. S. Pac. Co., 328 U.S. 217, 225 (1946).

210 *See* Cupp v. Naughten, 414 U.S. 141, 146 (1973); *see also* Thomas v. Arn, 474 U.S. 140, 146 (1985) ("It cannot be doubted that the courts of appeals have supervisory powers that permit, at the least, the promulgation of procedural rules governing the management of litigation.").

211 *See* Jeffrey C. Dobbins, *The Inherent and Supervisory Power*, 54 GA. L. REV. 411, 445–48 (2020) (describing appellate courts' use of supervisory authority to regulate lower-court procedures, the record on appeal, and the like).

212 Sowell v. Butcher & Singer, Inc., 926 F.2d 289, 295 (3d Cir. 1991).

granted or denied."[213] Such rules of completeness in adjudication shift the burdens of adjudication across time and courts. Fewer remands are needed under such a rule, though at the expense of more complicated initial decisions in the lower court. If appellate courts may promulgate such requirements as general rules applicable to all courts below them in all cases, it seems that they should be able to use the more targeted adjudicative tool of vacating and remanding for further explanation in order to facilitate decision of a particular case—a description that fits some types of remands.[214] Such case-specific intervention seems especially reasonable to the extent the objection to the creation of supervisory rules is that prospective, generally applicable guidelines are better (or may only be) made through the congressionally designed Rules Enabling Act process.

When it comes to the decision-making procedures of the *state* courts, the Supreme Court has held that it lacks this form of prospective-rulemaking-for-good-practice type of supervisory authority.[215] That is, the Court can require their compliance with the Constitution and other federal law, but it cannot prescribe rules of good practice that are not legally required.[216] The other version of supervisory authority, described next, is not so restricted, however.

2. Supervisory Writs as an Alternative to Remands After Judgment

The other version of supervisory power that supports the power to remand is the ancient practice of superior courts superintending the conduct of inferior judges through the use of supervisory or prerogative writs, such as mandamus and prohibition.[217] As Blackstone writes of the writ of mandamus,

> [I]t issues to the judges of any inferior court, commanding them to do justice according to the powers of their office, whenever the same is delayed. For it is the peculiar business of the court of king's bench, to superintend all other inferior tribunals, and therein to inforce the due exercise of those judicial or ministerial powers, with which the crown or legislature have invested them: and this, *not only by restraining their excesses, but also by quickening their negligence, and obviating their denial of justice.*[218]

Though they rarely use this power today, the Supreme Court and federal courts of appeals have the authority to issue writs of mandamus and other supervisory writs to the courts below them. For the Supreme Court, this may be an inherent power that requires no congressional authorization, but in

213 Clisby v. Jones, 960 F.2d 925, 936, 938 (11th Cir. 1992) (en banc). The court vacates and remands to enforce this rule. *Id.* at 938.

214 *Infra* subsections III.A.3, III.B.1.

215 *See* Dickerson v. United States, 530 U.S. 428, 438–39 (2000).

216 *Id.*

217 *See* PFANDER, *supra* note 131, at 25–44, 59–80 (describing this form of supervisory power).

218 3 BLACKSTONE, *supra* note 84, at *110–11 (emphasis added).

any event, Congress had authorized mandamus and other supervisory writs for all federal appellate courts through the All Writs Act.[219]

To be clear, the contention is not that the writ of mandamus, *eo nomine*, routinely is or ought to be used for any of the purposes described in this Article. What the practice of the day chooses to call things—mandamus, interlocutory appeal, certiorari, whatever—depends on congressional choice and historical accident.[220] What we can learn from historic mandamus practice is whether certain kinds of control of lower courts are proper exercises of authority *in substance*. Today, much of the activity that formerly would have required a supervisory writ can be accomplished through more ordinary channels of review.[221] The historic writ practice nonetheless illuminates traditional understandings of what kinds of things appellate courts may do besides merely affirming or reversing for error.

One traditional office of the writ of mandamus is to command an inferior court to discharge its duties—to "quicken[ ] [the court's] negligence," as Blackstone put it. More specifically, mandamus will lie to compel a judge to take up a case, to reach a final judgment, or to take other steps necessary to

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219 28 U.S.C. § 1651 (2018) ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."); *e.g.*, La Buy v. Howes Leather Co., 352 U.S. 249, 254–55, 259–60 (1957) (referring to courts of appeals' "supervisory control" over the district courts and citing All Writs Act). Section 1651 does not on its face distinguish between the Supreme Court and other federal courts. By virtue of its constitutional "supremacy," the Supreme Court arguably has the power to supervise the lower courts even without congressional authorization and, much more controversially, even despite attempted congressional limitations on appellate jurisdiction. *Compare* PFANDER, *supra* note 131, at 76–78 (presenting an expansive account of the Court's supervisory power), *with* Edward A. Hartnett, *Not the King's Bench*, 20 CONST. COMMENT. 283, 308 (2003) (taking a contrary view on the Court's inherent supervisory power). All of the cases discussed in this Article come within the Supreme Court's statutory appellate jurisdiction, so there is no need to take a position on whether the Court's "supreme" status prohibits congressional interference. Regarding the power of the Supreme Court to issue mandamus to *state* courts, that power now appears settled in the affirmative. *See* Gen. Atomic Co. v. Felter, 436 U.S. 493, 497–98 (1978) (per curiam). The power had once been doubted, at least where other means of redress were available. *See In re* Blake, 175 U.S. 114, 118–19 (1899); *see also* PFANDER, *supra* note 131, at 86–89 (defending the Court's supervisory power over state courts in at least some categories of cases); Daniel D. Birk, *The Common-Law Exceptions Clause: Congressional Control of Supreme Court Appellate Jurisdiction in Light of British Precedent*, 63 VILL. L. REV. 189, 237 (2018) (presenting still broader view of irrepealable supervisory authority).

220 As Justice Field explained, appellate jurisdiction may "be called into exercise in various ways." *Virginia v. Rives*, 100 U.S. 313, 327 (1880) (Field, J., concurring in judgment). The mode of review—whether by appeal, error, mandamus, prohibition, or otherwise—"rest[s] entirely in the discretion of Congress." *Id.*; *see also* Degge v. Hitchcock, 229 U.S. 162, 170–71 (1913) (describing the historical evolution of the writ of certiorari).

221 *See* PFANDER, *supra* note 131, at 92 (observing that the Supreme Court has relaxed its finality rules to "produce interventions strikingly similar to those that the Court might undertake through the supervisory writs of mandamus and prohibition in relationship to lower federal courts").

allow appellate review of the merits.[222] A particularly instructive early case is *Ex parte Crane*, in which Chief Justice Marshall wrote for the majority.[223] *Crane* and other cases like it hold that an appellate court may issue mandamus to require the trial judge to sign a properly presented bill of exceptions and thereby clear the way for ordinary appellate review.[224]

Crane becomes especially illuminating when one considers the role of the bill of exceptions in the practice of its era. In that age, the formal court record failed to include much of what happened in court. "A bill of exceptions," Marshall explained in *Crane*, "is a mode of placing the law of the case on a record, which is to be brought before this court by a writ of error."[225] More specifically, a bill of exceptions sets forth the trial court's allegedly erroneous rulings together with the evidence or other matter necessary to provide the context for the ruling.[226] For example, if an appeal asserted that the jury was instructed erroneously, the absence of a bill of exceptions would render the appellate court unable to determine what jury instructions the appealing party requested, whether there was evidence to support the instructions, and so on.[227]

Because the bill of exceptions sets out the court's legal rulings, it is functionally similar to modern documents like a trial court's findings of fact and

222 *See Ex parte* United States, 287 U.S. 241, 245–49 (1932) (issuing mandamus to compel district judge to issue an arrest warrant after the grand jury returned an indictment, without which warrant the trial could not occur); Ins. Co. v. Comstock, 83 U.S. (16 Wall.) 258, 270 (1872) ("Repeated decisions of this court have established the rule that this court has power to issue a mandamus, in the exercise of its appellate jurisdiction, and that the writ will lie in a proper case to direct a subordinate Federal court to decide a pending cause."); FORREST G. FERRIS & FORREST G. FERRIS, JR., THE LAW OF EXTRAORDINARY LEGAL REMEDIES § 300, at 404 (1926) (stating that mandamus is available when an inferior court "refuses to entertain jurisdiction . . . or where, having obtained jurisdiction, refuses to proceed in the exercise thereof to a determination of the merits"); HIGH, *supra* note 147, §§ 147–50, at 123–25 (describing use of mandamus to set an inferior court into motion). Some authorities would call this a writ of procedendo, or mandamus in the nature of procedendo. *E.g.*, Livingston v. Dorgenois, 11 U.S. (7 Cranch) 577, 579–80, 589 (1813); HIGH, *supra*, § 148, at 124. Procedendo is alive and well in some places, *e.g.*, State *ex rel.* Sponaugle v. Hein, 87 N.E.3d 722, 727 (Ohio Ct. App. 2017), *aff'd*, 108 N.E.3d 1089 (Ohio 2018), but the term is archaic as far as federal practice goes, having been subsumed under mandamus.

223 30 U.S. (5 Pet.) 190, 191 (1831).

224 *Id.* at 192; *see also In re* Chateaugay Ore & Iron Co., 128 U.S. 544, 557 (1888) (issuing writ of mandamus to compel trial judge to sign bill of exceptions); *Ex parte* Bradstreet, 32 U.S. (7 Pet.) 634, 647–50 (1833) (issuing mandamus where judge refused to make up the record and judgment); HIGH, *supra* note 147, § 201, at 158 (discussing use of mandamus to compel a judge to sign the bill of exceptions).

225 30 U.S. (5 Pet.) at 194.

226 *See* 3 ROGER FOSTER, A TREATISE ON FEDERAL PRACTICE, CIVIL AND CRIMINAL § 479, at 2484–502 (6th ed. 1921); HOLDSWORTH, *supra* note 77, at 223–24. The bill of exceptions is no longer used, as the trial record is today more capacious, but trial counsel still must ensure that the record shows any errors they may wish to raise on appeal. *See* FED. R. CIV. P. 46 advisory committee's notes to 1937 amendment.

227 *See* FOSTER, *supra* note 226, at 2485.

conclusions of law or its oral ruling (captured on the court reporter's transcript) on evidentiary objections. Such documents are helpful, and sometimes essential, to reviewing the trial court's judgment. A trial court's failure to produce a ruling or to provide sufficient explanations for its rulings therefore remains a recognized, though rarely relied upon, ground for an appellate court to issue mandamus when an ordinary appeal is unavailable.[228] When there is an appealable judgment, such that mandamus is unnecessary for purposes of jurisdiction, but the judgment cannot be properly evaluated for want of explanation, vacatur and remand is routine.[229] As noted above, procedural vehicles are fluid, their labels even more so; what matters is the substance of what the reviewing court is doing, here requiring explanation in order to permit subsequent review for error.

The actions of the trial judge in *Crane* are similar to an appellate court not addressing the issues in the case sufficiently to allow meaningful further review. In requiring further explanation, the modern Supreme Court, as in old cases like *Crane*, is not correcting an error on the merits but facilitating review by superintending the decision-making process.

H. The Remand of Horribles

The foregoing analysis describes a broad authority to remand. Justice Scalia and other remand skeptics have sought to erect fences around the power to remand, lest the Court slide down a slippery slope toward seemingly absurd and arbitrary dispositions. Consider this invocation of a parade of horribles:

> [The majority] acknowledges, to begin with, no constitutional limitation on our power to vacate lower court orders properly brought before us. This presumably means that the constitutional grant of "appellate Jurisdiction" . . . empowers the Court to vacate a state supreme court judgment, and remand the case, because it finds the opinion, though arguably correct, incomplete and unworkmanlike; or because it observes that there has been a postjudgment change in the personnel of the state supreme court, and wishes to give the new state justices a shot at the case. I think that is not so.[230]

This worry deserves a response.

To begin, remanding for trivial reasons such as sloppy Bluebooking would not serve the interests of justice, which is the standard (not *rule*, to be

228 *E.g.*, SBRMCOA, LLC v. Bayside Resort, Inc., 596 F. App'x 83, 86–88 (3d Cir. 2014); Clyma v. Sunoco, Inc., 594 F.3d 777, 782–83 (10th Cir. 2010); *In re* Sharon Steel Corp., 918 F.2d 434, 436–38 (3d Cir. 1990); *cf.* Payne v. Britten, 749 F.3d 697, 700 (8th Cir. 2014) (treating the district court's failure to rule on the defendants' qualified-immunity defense as equivalent to a denial of the defense, asserting interlocutory appellate jurisdiction over the denial, and remanding for a ruling).

229 *See infra* subsection III.A.3.

230 Lawrence v. Chater, 516 U.S. 163, 190 (1996) (Scalia, J., dissenting) (citation omitted). The majority replied that it agreed it "should not" GVR for reasons like those Scalia listed. *Id.* at 173–74 (per curiam).

sure) that § 2106 prescribes. And even if § 2106 itself contained no such limit, judicial discretion is exercised illegally when it is exercised arbitrarily; that is why we can understand the phrase "abuse of discretion." Now, it is true that no other court can reverse the Supreme Court for using its powers unjustly or arbitrarily. But that is true in every context, yet it does not mean the Court is not subject to any standards of conduct.

Justice Scalia's reference to remanding in light of changing membership on the state supreme court is evidently meant to hint at improper political motivations. As before, arbitrary acts are unlawful, and it would be improper for the Supreme Court to remand for partisan reasons. But it is not clear to me that a remand would be improper if it is motivated by the state's interest in resolving a case as it sees fit (assuming the new resolution is within the law). After all, the federal courts vacate and remand in light of new positions of federal agencies and the Solicitor General, some of which are brought about by changes in administration. Anyway, even if the Supreme Court denies certiorari, state-law principles of finality might well allow the newly constituted state court to recall its mandate or otherwise reconsider the very case at hand.[231]

Beyond pointing to hypothetical remands that are supposed to look absurd, the more general target of the skeptics' ire is the Court's failure to embrace discretion-narrowing *rules* to govern its power to remand. Thus, Justice Scalia, joined by Justice Thomas, complained that "the Court commits to no standard that will control [its power to vacate and remand], other than *that cloak for all excesses, 'the equities.*"[232] This criticism is ill-founded given that Congress has embraced the equitable approach to appellate remedies in § 2106, and "just[ice] under the circumstances" is the standard—not rule—Congress has set out.[233]

To say that the Court is guided by an equitable standard is not to deny that the Court can err. And certainly, jurists can reasonably disagree over where the equities lie in close cases. The final part of the Article therefore turns to the matter of applying § 2106's equitable standard to various categories of remands and developing some guidelines for the exercise of discretion.

III. Application of Legal Constraints and Prudential Guidelines to Particular Categories of Remands

Informed by the analysis above, this Part considers several categories of remands. It starts with remands that have generally not attracted controversy. It then moves on to the kinds of justice-ensuring remands that have

231 *Cf.* Sargent v. Columbia Forest Prod., Inc., 75 F.3d 86, 89–91 (2d Cir. 1996) (recalling mandate after denial of certiorari in light of change in controlling state law).

232 *Lawrence*, 516 U.S. at 190 (Scalia, J., dissenting) (emphasis added); *see also* Youngblood v. West Virginia, 547 U.S. 867, 873 (2006) (Scalia, J., dissenting) (criticizing the Court's "flabby standard" for remanding).

233 28 U.S.C. § 2106 (2018).

attracted criticism but which, on the proper view of the remand power, are *not* in fact problematic. Last, it considers some law-shepherding remands that do pose real difficulties. As will become clear, whether a particular category of remand is problematic depends in part on one's conception of the modern Supreme Court's role. Those who embrace a narrower, dispute-focused conception should bless fewer categories of remands than those who accept the legitimacy of the Court's own apparent preference for a more managerial, law-shepherding function.

A. Remands That Have Properly Escaped Criticism

This Section describes several categories of remands that have for the most part not attracted challenges. Despite that, these categories are worth studying, if only briefly. First, there is value in establishing prudential guidelines for how appellate courts should exercise their power in these cases, especially if some courts are not using their discretion wisely.[234] Second, the uncontroversial remands provide leverage for evaluating remands that have provoked criticism.

1. Remands for Application of the Correct Standard or for Consideration of Unreached Alternative Grounds

Two common ways in which a lower court can err without necessarily reaching the wrong judgment are (1) to use the wrong standard and (2) to err on one ground of decision when other, unreached grounds could support the same outcome. No one denies, as a general matter, the appellate court's power to remand in such cases, either for application of the correct standard or for consideration of alternative grounds that may still be available.[235] The modern Supreme Court remands for such reasons "all the time."[236]

Still, sound practice dictates some guidelines for the decision whether or not to remand for consideration of the correct standard or alternative grounds. The right approach to any particular case depends on a number of factors, starting with the nature of the remaining judicial inquiry. If an alternative ground for the judgment involves as-yet-unresolved factual disputes, then remand is necessary.[237] For example, the success of an as-yet-unexam-

234 *See* Steinman, *supra* note 114, at 1562 (explaining that because appellate courts can decide issues not presented in the lower courts, "the most pressing questions" concern the circumstances under which they should exercise their discretion to do so).

235 *See, e.g.*, Wilson v. Seiter, 501 U.S. 294, 305–06 (1991) (Scalia, J. for the Court) (vacating and remanding "[o]ut of an abundance of caution" where the lower court "conceivably" would have reached a different outcome under the correct standard).

236 Transcript of Oral Argument at 37, Rodriguez v. FDIC, 140 S. Ct. 713 (2020) (No. 18-1269), 2019 WL 6530435 (quoting Gorsuch, J.).

237 *E.g.*, Buzynski v. Luckenbach S.S. Co., 277 U.S. 226, 228–29 (1928) (reversing ruling that defendant was immune from liability as a matter of law and remanding for determination of whether defendant was in fact negligent); Montano v. Texas, 867 F.3d 540, 546–47 (5th Cir. 2017) (reversing procedural dismissal and remanding for consideration of the

ined limitations defense could require discovery into exactly when the claim accrued, whether the defendant had taken steps to conceal the claim from the plaintiff, or other matters.[238] Similarly, an appellate court should usually remand when a potentially dispositive issue is one that calls on the trial judge to exercise discretion in light of the circumstances of the case.[239]

The reviewing court has greater leeway when the remaining issues involve only matters of law. Whether the complaint fails to state a claim, for example, can almost certainly be decided by the appellate court without any remand.[240] Still, that the appellate court *may* decide questions of law does not mean that it *must*.[241] The decision whether to decide a question of law or instead remand should turn on a number of additional factors.

One factor that should bear on the choice between deciding and remanding is which appellate court has the case. A supreme court may have institutional functions beyond achieving the correct and economical resolution of particular cases. As long ago as 1929, Justice Brandeis explained that "[i]n order to give adequate consideration to the adjudication of great issues of government, [the Supreme Court] must, so far as possible, lessen the burden incident to the disposition of cases which come here for review."[242] Following that admonition, today the Court's usual practice upon finding error on the question on which it granted certiorari is to remand to the lower court for that court to sort out any remaining issues in the case.[243] Remanding saves the Court time and also avoids the risk of making erroneous law—which is a particular risk when the other issues were not the main focus of the appellate litigation.[244] The case for remanding is particularly strong

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merits where the record did not contain the facts relevant to the merits); *see* 9 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 52.12 (3d ed. 2015).

238 *E.g.*, United States v. Grimmett, 150 F.3d 958, 962 (8th Cir. 1998); Mann v. A.H. Robins Co., 741 F.2d 79, 82 (5th Cir. 1984).

239 *See* MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 136 (2007); Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379, 387 (2008).

240 *E.g.*, Johnson v. Weber, 549 F. App'x 597, 598 (8th Cir. 2014); Wong v. Bell, 642 F.2d 359, 361–62 (9th Cir. 1981).

241 *See* REYNOLDS ROBERTSON & FRANCIS R. KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES § 389, at 786 (1936) (explaining that the Court may decide other issues in a case from the lower federal courts or may remand); *see also* Cole v. Ralph, 252 U.S. 286, 290 (1920) (recognizing this choice).

242 R.R. Comm'n of Cal. v. L.A. Ry. Corp., 280 U.S. 145, 166 (1929) (Brandeis, J., dissenting).

243 *See, e.g.*, Hicks v. United States, 137 S. Ct. 2000, 2000 (2017) (mem.) (Gorsuch, J., concurring). In what has become an oft-stated formulation, the Court often declines to address other issues by stating that "we are a court of review, not of first view." Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005). *See, e.g.*, Manuel v. City of Joliet, 137 S. Ct. 911, 922 (2017). *But see* Levin v. Miss. River Fuel Corp., 386 U.S. 162, 170 (1967) (observing that "this point is so clear that we see no occasion for remanding the issue to the Court of Appeals for its consideration of the point" and that "[e]ffective judicial administration requires that we dispose of the matter here").

244 *See* F. Andrew Hessick, *The Cost of Remands*, 44 ARIZ. ST. L.J. 1025, 1029–30 (2013) (explaining how remands can avoid the entrenchment of error).

when the alternative grounds involve state law, a matter on which the Court has no special insight or responsibility.[245]

Unlike the Supreme Court, the courts of appeals have mandatory jurisdiction to hear every case lawfully brought before them.[246] The interest in the efficient resolution of disputes therefore weighs in favor of *deciding* rather than *remanding* for applying of the correct standard or consideration of alternative legal grounds far more often than it does in the Supreme Court.[247] My sense is that the federal courts of appeals may not be striking the balance correctly, too often choosing to remand because they mistakenly take the Supreme Court's practices as a model for their own conduct.[248]

2. Intervening Events: The Ordinary GVR

The modern Supreme Court's dominant practice for dealing with petitions for certiorari in which the law has changed after the decision below, as when the Court has just issued a relevant decision, is to GVR: to grant certiorari, vacate the judgment, and remand for the court below to take the first crack at applying the new law.[249]

The Court's intervening-event GVR practice has not attracted much controversy at the level of principle. And indeed, as explained earlier, the practice has some real virtues from the perspectives of judicial economy and fairness to litigants.[250] Even Justice Scalia endorsed these GVRs, though with

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245 *See R.R. Comm'n of Calif.*, 280 U.S. at 164 n.1 (Brandeis, J., dissenting) (citing examples of remands in cases involving state law); *see also* Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 625–28 (1875) (interpreting the jurisdictional statutes to allow the Court to review only the federal issues in a case from state court).

246 *Supra* text accompanying notes 33–34, 55.

247 *See* Hudson United Bank v. LiTenda Mortg. Corp., 142 F.3d 151, 159 (3d Cir. 1998); Otto v. Variable Annuity Life Ins. Co., 814 F.2d 1127, 1138 & n.11 (7th Cir. 1986). If the alternative grounds of decision are not adequately presented in the briefs, the court of appeals could ask for additional briefing on the point.

248 *See, e.g.*, United States v. Houston, 792 F.3d 663, 669 (6th Cir. 2015) (stating that, "[l]ike the Supreme Court, we are a court of review, not first view" and remanding in circumstances similar to those in which the Supreme Court remanded); Mason v. Lafayette City-Par. Consol. Gov't, 806 F.3d 268, 285 (5th Cir. 2015) (Higginbotham, J., dissenting) (criticizing majority for failing to resolve legal issue of qualified immunity); Story v. Kindt, 26 F.3d 402, 407–08 (3d Cir. 1994) (Cowen, J., dissenting) (criticizing majority for remanding a legal issue and observing that "we adjudicate appeals presented to us as a matter of right by the appellants who are entitled to a decision").

249 *See* Lawrence v. Chater, 516 U.S. 163, 166–69 (1996) (per curiam); *supra* notes 29–31 and accompanying text.

250 *See supra* text accompanying notes 28–30. As I have argued in prior work, there are other ways for the legal system to accommodate the need to implement new decisional law besides the current GVR practice. Among other things, the courts of appeals could make more use of their power to grant late motions for rehearing when the law changes during the period in which litigants could petition for certiorari. In that way, many GVRs could be eliminated. Bruhl, *supra* note 30, at 735–54; *see also* Shaun P. Martin, *Gaming the GVR*, 36 ARIZ. ST. L.J. 551, 568–97 (2004) (criticizing the GVR practice largely on efficiency grounds).

some complaints about the Court's imprecise standards governing their use.[251] Certainly, any particular GVR might be questioned on the ground that it unduly burdens the lower court by asking it to reconsider in light of a new precedent that is clearly inapposite or inconsequential. But no Justice objects to the general idea of remanding in light of intervening cases or enactments.[252]

Federal courts of appeals also sometimes use dispositions equivalent to the GVR.[253] That is a permissible disposition in principle, but, as with the previous category of cases, the balance of considerations should generally tilt toward the courts of appeals deciding questions of law, even ones triggered by new developments, rather than remanding for the district court to do so in the first instance.[254]

A few features of the intervening-event GVR should bear on how other types of remands are evaluated. A GVR does not indicate any error in the judgment below. Rather, the Supreme Court's standard for GVR'ing is that there is a "reasonable probability" that the intervening development would influence the lower court and "may" change the judgment.[255] Accordingly, a healthy proportion of GVR'd judgments are, *wholly appropriately*, reinstated on remand.[256] Moreover, a GVR does not even necessarily indicate that the prior analysis has become invalid, for the new decision may turn out to be irrelevant.[257]

3. Remand for Clarification of Jurisdiction or Otherwise to Permit Meaningful Review

An appellate court may remand to seek clarification of the basis for the decision below. The need for clarification is especially pressing when a lack of clarity makes it uncertain whether the appellate court has jurisdiction. For

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251 *See, e.g.*, *Lawrence*, 516 U.S. at 181 (Scalia, J., dissenting) (embracing intervening-event GVRs as "appropriate"); *see also* Youngblood v. West Virginia, 547 U.S. 867, 873, (2006) (Scalia, J., dissenting) (criticizing the Court's "flabby standard" for remanding).

252 A practice that has drawn criticism is GVR'ing in light of a case that *preceded* the lower court's decision. *See, e.g.*, White v. Kentucky, 139 S. Ct. 532, 532 (2019) (Alito, J., dissenting); Webster v. Cooper, 558 U.S. 1039, 1040 (2009) (Scalia, J., dissenting). These GVRs are functionally equivalent to remands for consideration of a matter that the lower court appears to have overlooked. The GVR skeptics do not like these either, but their objections are not well-founded, as I explain below. *See infra* subsection III.B.1.

253 *See, e.g.*, Schrubb v. Jager, 688 F. App'x 417, 418 (9th Cir. 2017) (mem.); Millipore Corp. v. Travelers Indem. Co., 115 F.3d 21, 34 (1st Cir. 1997).

254 In Texas, the intermediate appellate courts are not allowed to remand for the trial court to consider a new development, but the state supreme court may do so. *Blair v. Fletcher*, 849 S.W.2d 344, 345–46 (Tex. 1993) (per curiam).

255 *Lawrence*, 516 U.S. at 167 (1996) (per curiam).

256 Sara C. Benesh, Jennifer K. Jacobson, Amanda Schaefer & Nicole Simmons, *Supreme Court GVRs and Lower-Court Reactions*, 35 JUST. SYS. J. 162, 170 tbl.3, 173 (2014); Hellman, *supra* note 30, at 394–95.

257 *E.g.*, United States v. Kochekian, 977 F.2d 905, 906 (4th Cir. 1992) (per curiam); Castlewood Int'l Corp. v. Miller, 626 F.2d 1200, 1201 (5th Cir. 1980) (per curiam).

example, because the Supreme Court has jurisdiction to review cases from state courts only when they were decided on federal grounds,[258] the Court has sometimes vacated and remanded cases to state courts for clarification of an ambiguous decision.[259] That practice fell out of favor because it burdened state courts and delayed the proceedings.[260] But the Court's turn away from such remands did not reflect a lack of power to order them, and these remands have not completely disappeared.[261]

The federal courts of appeals also use remands to verify their jurisdiction.[262] One common circumstance for a remand (sometimes described as a "limited remand") occurs in appeals of denials of government officials' assertions of the defense of qualified immunity.[263] A district court's denial of a dispositive motion would ordinarily be an unappealable interlocutory order, but for qualified-immunity decisions, the Supreme Court has authorized immediate appeals under the "collateral order" doctrine.[264] There is a limitation, however, in that the appellate court may consider only the *legal* questions raised by the denied immunity defense.[265] As this limitation has been construed by some courts of appeals, the secure exercise of their limited interlocutory jurisdiction requires that the district court state its view of the operative facts so that the court of appeals can apply its legal judgment to the given facts—and if the district court fails to set out its view of the facts, the court of appeals will vacate and remand for it to do so.[266]

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258 28 U.S.C. § 1257 (2018).

259 *E.g.*, Minnesota v. Nat'l Tea Co., 309 U.S. 551, 551 (1940).

260 Michigan v. Long, 463 U.S. 1032, 1039–41 (1983).

261 *E.g.*, Cap. Cities Media, Inc. v. Toole, 466 U.S. 378, 378–79 (1984) (per curiam) (vacating and remanding for clarification of state supreme court decision rendered without opinion). In one stage of the 2000 election litigation, the Supreme Court remanded to the Florida Supreme Court for clarification, citing *Minnesota v. National Tea Co.* as authority. Bush v. Palm Beach Cty. Canvassing Bd., 531 U.S. 70, 78 (2000) (per curiam). Nonetheless, rather than viewing the remand as inquiring into the state-or-federal nature of the decision, one could instead classify this remand as a remand for consideration of an overlooked matter—namely, the safe-harbor provision in 3 U.S.C. § 5—or just as a remand intended to prod the state court into giving a different answer.

262 *E.g.*, Cuellar Lopez v. Gonzales, 427 F.3d 492, 495 (7th Cir. 2005) (remanding for clarification of the agency's basis for denial of relief where one potential ground of decision was reviewable and the other was precluded from review by statute); United States v. D.L. Kaufman, Inc., 175 F.3d 970, 973 (Fed. Cir. 1999) (remanding for clarification where the appellate court's jurisdiction depended on the basis for the district court's transfer order).

263 *E.g.*, White v. Balderama, 153 F.3d 237, 242 (5th Cir. 1998). In a "limited remand," the court of appeals is said to "retain" jurisdiction over the case while the case is returned to the district court for a specified task. *Id.*; United States v. Castro, 908 F.2d 85, 91 (6th Cir. 1990). Perhaps it would be more technically correct for the appellate court to say that the panel will automatically *reacquire* jurisdiction after the task is completed. *See* Newman, *supra* note 175, at 734–35. In any event, the point is to get the case before the same panel quickly without the need for a new notice of appeal and filing fee.

264 Mitchell v. Forsyth, 472 U.S. 511, 528 (1985).

265 Johnson v. Jones, 515 U.S. 304, 318–19 (1995).

266 *E.g.*, *White*, 153 F.3d at 240–42.

Even in the absence of jurisdictional doubts, remand may be necessary to facilitate meaningful review of the merits. Remand for clarification is especially appropriate when a lower court neglects to make factual findings or fails to explain the reasons for a debatable discretionary decision.[267] As the Supreme Court explained in one such case:

> We have frequently said that in the exercise of our appellate jurisdiction we have power not only to correct errors in the judgment under review but to make such disposition of the case as justice requires. In determining what justice does require, we have considered changes, either in fact or law, supervening since the judgment was entered; and in such cases we have set aside the judgment and remanded the cause so that the state court might be free to act. We think that the fundamental principle involved in such action applies as well to cases where the record before us does not adequately show the facts underlying the decision of the state court of the federal question . . . .[268]

In addition to being supported by a substantial body of precedent, remands for clarification of the grounds of decision make good sense. Review should not be thwarted by a court's failure to explain its decision clearly, a matter over which the parties have little control.[269] This is not to say that remand is the only approach; as an alternative, reviewing courts might adopt presumptions about the basis of ambiguous decisions.[270] But remand for clarification is generally permissible and often preferable to generalizations or guesses.[271]

Clarificatory remands teach some broader lessons. These decisions set aside the judgment of a lower court without identifying error in the judgment. The point, rather, is that the reviewing court is not sure whether there is error or even if it has authority to look for error. One could try to say that the lower court's failure to spell out the grounds of decision is itself error.

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267 *E.g.*, Willing v. Binenstock, 302 U.S. 272, 277 (1937) (reversing and remanding where the "[t]he facts are not sufficiently disclosed by the record to enable us to dispose of" an issue); Villa v. Van Schaick, 299 U.S. 152, 155–56 (1936) (per curiam) (remanding for clarification of the state court's understanding of the facts, as they might bear on the resolution of the federal issue in the case); Dainese v. Cooke, 91 U.S. 580, 584 (1875) (remanding where "the summary and irregular manner in which the case was tried below leaves this court in great doubt as to what was tried, and on what evidence the cases were heard"); Fres-co Sys. USA, Inc. v. Hawkins, 690 F. App'x 72, 80 (3d Cir. 2017) (remanding where the district court failed to address three of four prongs of the preliminary injunction analysis).

268 *Villa*, 299 U.S. at 155 (emphasis added).

269 A losing party can ask the lower court for clarification or reconsideration—and arguably should be required to do so in certain cases. But sometimes, such requests will be unsuccessful or futile, and in other cases the absence of elaboration may not reveal itself as problematic until the appellate court identifies an issue that had not been the focus of the proceedings below.

270 *See, e.g.*, Michigan v. Long, 463 U.S. 1032, 1039–41 (1983) (establishing presumption that a state-court decision blending state and federal grounds does not rest on independent state grounds).

271 *See* Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379, 386 (2008).

That would admittedly be true in those circumstances in which the law requires an explanation.[272] But, generally speaking, a court has discretion over whether to explain and how much to explain, there being no general rule that all judicial decisions must be fully explained.[273] When the lower court's decision not to write is faultless, there is nothing to punish, and so this kind of remand once again shows that the lower court's fault or faultlessness does not control the reviewing court's power to vacate and remand.

4. Remand for Entry of a New Judgment to Reset the Time to Appeal

Another form of vacatur and remand that has not attracted controversy—though perhaps only because it has become rare—occurs when an appeal is taken to the wrong court. That often happened in the days when the jurisdictional statutes provided for three-judge district courts and direct appeals to the Supreme Court in many cases. The arrangement spawned uncertainty over when the three-judge court was required and whether appellate jurisdiction over particular decisions properly vested in the Supreme Court or the court of appeals.[274] It inevitably happened that some cases were filed in the Supreme Court, with the time for appeal having run out once this reasonable mistake was recognized. The Court took the view that it could—despite lacking jurisdiction over the merits—vacate and remand so that the lower court could enter a fresh judgment from which a timely appeal to the court of appeals could be taken.[275] Note that the lower court may have been faultless in all of this, yet it finds its decision wiped out, albeit with the expectation that the same judgment will simply be reinstated.

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272 *E.g.*, FED. R. CIV. P. 11(c)(6), 52(a)(1), 56(a), 65(d); *see, e.g.*, Schmidt v. Lessard, 414 U.S. 473, 475–76 (1974) (per curiam).

273 *See* Rita v. United States, 551 U.S. 338, 356 (2007) ("The law leaves much, in this respect, to the judge's own professional judgment."); Tex. & Pac. Ry. Co. v. Hill, 237 U.S. 208, 213, 215 (1915) (rejecting contention that the appellate court's failure to write an opinion when affirming was itself a ground for reversal). *See generally* Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 GEO. L.J. 121, 175–80 (2005) (discussing the duty to elaborate reasons as an aspect of adjudicative duty). Professor Richard Re has raised the interesting question whether lower courts have a duty to ease the Supreme Court's review. *See* Richard Re, *Should Lower Courts Facilitate Supreme Court Review?*, RE'S JUDICATA (Oct. 16, 2014), https://richardresjudicata.wordpress.com/2014/10/16/should-lower-courts-facilitate-supreme-court-review. As he explains, "if there is a general duty to facilitate review, then an obscure decision could in itself be viewed as a kind of error warranting reversal." *Id.*

274 *See* 17A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & VIKRAM DAVID AMAR, FEDERAL PRACTICE AND PROCEDURE § 4234, at 196 (3d ed. 2007) ("[T]he rules on appellate review of orders by or about three-judge courts were so complex as to be virtually beyond belief.").

275 *E.g.*, Franklin v. Lawrimore, 516 U.S. 801, 801 (1995); Bd. of Regents of the Univ. Tex. Sys. v. New Left Educ. Project, 404 U.S. 541, 545 (1972); Phillips v. United States, 312 U.S. 246, 254 (1941); *see also* United States v. Belt, 319 U.S. 521, 522–23 (1943) (employing the same procedure in a case involving an appeal from the District Court for the District of Columbia that was improperly filed in the Supreme Court).

It may well be that this practice is ripe for joining the controversial remands about to be discussed in Section B. The generous spirit embodied in these remands is certainly in some tension with recent cases in which the Supreme Court has taken a harsh line on extending appellate deadlines.[276] Yet so far as I am aware, the Court has not renounced this power to restart the clock, and it has used this procedure since the new, harsh cases were decided.[277] That this remedy is rarely invoked likely reflects the fact that appellate pathways have become clearer with the near-elimination of the three-judge district court and similar jurisdictional quirks. In the prior world, however, these remands released some appellants caught in traps for the unwary and thereby served the interests of justice, which is the standard under § 2106.[278]

B. Justice-Ensuring Remands: Two Categories That Are Controversial But Should Not Be

This Section and Section C turn to remands that have attracted criticism as being unwise and even unlawful. The two categories of remands described in this Section can be described as justice ensuring; more specifically, they involve potentially overlooked arguments and confessions of error. These remands do not, *pace* the skeptics, present difficult questions of appellate power. And notwithstanding the skeptics' lapsarian account, these remands in fact have strong pedigrees. Moreover, these dispositions are appropriate even on a rather narrow understanding of the Court's role, one that eschews active agenda-setting and strategic law-declaration. The remands in this section instead serve the interests of justice in the case at hand, which is what § 2106 authorizes appellate courts to do.[279] To the extent that these remands in the interests of justice are problematic, it is because similar justice cannot be ensured in every case. Some rough guidelines can help channel discretion, but some amount of arbitrariness is going to pervade the work of a Court with almost entirely discretionary jurisdiction.

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276 *E.g.*, Bowles v. Russell, 551 U.S. 205, 213 (2007) (holding that an appellant's failure to comply with the time period for filing an appeal set out in 28 U.S.C. § 2107 deprives the court of appeals of jurisdiction).

277 Dallas Cnty. v. Tex. Democratic Party, 565 U.S. 801, 801 (2011); *see* SHAPIRO ET AL., *supra* note 30, § 7.5 (describing the procedure without expressing doubts about its validity); *see also* Hashim M. Mooppan, *A Possible Lifeline for Jurisdictionally Untimely Federal Appeals*, A.B.A. SEC. LITIG. APP. PRAC., Winter 2015, at 2, 3–4 (arguing that the federal courts of appeals have at least as much authority as the Supreme Court in this regard). In addition to § 2106, indirect legislative support for these remands comes from 28 U.S.C. § 1631, which directs federal courts of appeals to transfer appeals filed in a court without jurisdiction to a federal court that has jurisdiction.

278 28 U.S.C. § 2106 (2018).

279 *Id.*

1. Remands Where the Lower Court May Have Overlooked a Dispositive Issue

Suppose a lower court rules against a party but fails in its opinion to mention a potentially dispositive point in that party's favor that the party had properly presented. The losing party appeals, relying in part on the point the lower court did not mention. A few options are available to the reviewing court.[280] For an appellate court with discretionary jurisdiction, like the Supreme Court, it can simply deny review without delving into the merits, as it does every year in thousands of cases of possible error. Or the appellate court may affirm or reverse the judgment on the merits after considering the previously unmentioned ground, at least if the record is developed enough to allow a ruling as a matter of law.[281] The option of interest here is whether and when the reviewing court may, and sometimes should, *remand* for *the lower court* to address the unmentioned but potentially dispositive issue without first deciding whether the issue was overlooked rather than silently rejected and whether the issue would ultimately make a difference.

Although this type of remand has attracted some dissents and scholarly criticism of late,[282] it is well within an appellate court's power. It is clear that the reviewing court could decide the merits of an unmentioned dispositive legal issue regardless of whether the lower court overlooked it or instead silently rejected it.[283] The option of remand should be available as an alternative to consideration on the merits.

Why do the skeptics disagree? Justice Scalia and other remand skeptics claim that the Supreme Court may not, or at least should not, vacate and remand based on a mere "suspicion" of error,[284] but that claim does not hold up when one examines other common practices. As the discussion so far has shown, many of the Supreme Court's reversals and vacaturs do not entail any conclusion that the judgment below was incorrect.[285] The same judgment could result on remand. Indeed, even the same ground of decision could be resolved in the same direction on remand, as when the Court rejects the lower court's test but remands for application of the correct test. None of

280 For the scenario in which a party has *not* preserved an error below but raises it for the first time on appeal, see *infra* text accompanying note 304.

281 *E.g.*, Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 567–68 (1931); Willingham v. United States, 104 F.3d 374 (Fed. Cir. 1996) (table), 1996 WL 671196; Simons v. Sw. Petro-Chem, Inc., 28 F.3d 1029, 1030 (10th Cir. 1994); *see* Lawrence v. Chater, 516 U.S. 163, 186 (1996) (Scalia, J., dissenting) (observing that the Court may review unreasoned summary dispositions).

282 *E.g.*, White v. Kentucky, 139 S. Ct. 532, 532 (2019) (Alito, J., dissenting); Wellons v. Hall, 558 U.S. 220, 228 (2010) (Alito, J., dissenting); Webster v. Cooper, 558 U.S. 1039, 1042 (2009) (Scalia, J., dissenting); Youngblood v. West Virginia, 547 U.S. 867, 870–75 (2006) (Scalia, J., dissenting); *id.* at 875 (Kennedy, J., dissenting); Ku, *supra* note 187, at 399–405; *cf.* Hemmer, *supra* note 31, at 218–19 (describing cases like *Youngblood* as reflecting "managerial" activity rather than either lawmaking or traditional error correction).

283 *See supra* note 276 and accompanying text.

284 *Lawrence*, 516 U.S. at 190 (Scalia, J., dissenting).

285 *See supra* Section III.A.

that is controversial. Furthermore, ordinary intervening-event GVRs involve only "suspicion" of error—or less, like the "reasonable possibility" that the lower court would change its mind.[286] So it is wrong to think that the Court must identify error in the judgment or even the resolution of a particular point before vacating and remanding. And again, § 2106 authorizes appellate courts to remand for "such further proceedings as may be just under the circumstances,"[287] not merely to affirm or reverse.

What's more, and despite the fireworks in a few recent cases, the practice of remanding for consideration of an apparently neglected issue has a long history. In *Maryland Casualty Co. v. Jones*, decided in 1929, the Supreme Court remanded for the court of appeals to consider objections that went unmentioned in its opinion affirming a plaintiff's victory at trial.[288] The court of appeals had discussed only the defendant's argument that the district judge's findings lacked sufficient evidence; the court of appeals did not mention the defendant's points of error relating to the district judge's evidentiary rulings during the case and his decision to refer some matters to a special master.[289] The Supreme Court acknowledged the possibility, urged by the plaintiff, that the court of appeals had deemed the defendant's other points waived due to insufficient presentation in the appellate briefing.[290] But the Court refused to look at the defendant's brief from the court of appeals (as it was not part of the official record, as the record was understood at the time) and noted that the court of appeals did not refer to waiver.[291] In light of the court of appeals' "unexplained" failure to consider the points of error, the Supreme Court "remanded to [the court of appeals], with instructions to consider the several assignments of error relating to the rulings of the trial court in the progress of the trial, and—unless they have been waived—take further proceedings in regard thereto."[292]

The case just mentioned involved remand to a federal court of appeals, but federalism worries do not prevent similar remands to state courts. The Supreme Court's 1957 decision in *Blackburn v. Alabama* looks like a forerunner of 2006's *Youngblood v. West Virginia*, though none of the opinions in

286 *See Lawrence*, 516 U.S. at 167 (1996) (per curiam) (setting forth the "reasonable probability" standard for intervening-event GVR).

287 28 U.S.C. § 2106 (2018).

288 279 U.S. 792, 796–97 (1929).

289 *Id.* at 794–95.

290 *Id.* at 796.

291 *Id.*

292 *Id.* at 796–97. A more recent example of a case that might fit into the "overlooked ground" category of remands is *Dennison Manufacturing Co. v. Panduit Corp.*, 475 U.S. 809 (1986) (per curiam). In that case, the court of appeals did not mention Federal Rule of Civil Procedure 52(a) or its "clear error" standard of review for factual findings. *Id.* at 811. It was not clear whether that was because the court had overlooked it, had implicitly applied it, or had determined that the standard did not apply, so the Supreme Court vacated and remanded "for further consideration in light of Rule 52(a)." *Id.*

Youngblood cited it.[293] In *Blackburn*, it did not appear from the state court's opinion that it addressed the criminal defendant's Due Process claim relating to his allegedly involuntary confession.[294] The Supreme Court therefore decided to "vacate the judgment of the [Alabama] Court of Appeals and remand the cause to that court in order that it may pass upon this claim."[295] On remand, the state court reaffirmed its earlier ruling; the Supreme Court then reversed on the merits.[296]

Turning to the practices of the federal courts of appeals, one finds that they routinely remand, without finding error on the merits, when the district court has overlooked an important matter. This happens, for example, when the district court neglects to mention a potentially dispositive issue in reaching its decision.[297] It also happens when the district court fails to address a pending motion before ruling against the moving party on grounds that could have been cured by the pending motion.[298]

The supervisory power provides additional support for remands to consider overlooked grounds, at least for cases within the federal hierarchy.[299] The Supreme Court and the courts of appeals have the authority to "require [courts below them] to follow procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or

293 Blackburn v. Alabama, 354 U.S. 393, 393 (1957) (per curiam); Youngblood v. West Virginia, 547 U.S. 867 (2006).

294 *Blackburn*, 354 U.S. at 393. The state court had cited Alabama cases, *American Jurisprudence*, and the *Corpus Juris Secundum*, but no federal cases. *Blackburn v. State*, 88 So. 2d 199, 203–05 (Ala. Ct. App. 1954).

295 *Blackburn*, 354 U.S. at 393. The Court cited *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940), which involved a remand to determine whether a state-court decision relied on an independent state ground of decision. *See supra* subsection III.A.3. That was not the situation in *Blackburn*, as a ruling denying relief on state grounds could not support the affirmance of the conviction if the federal objection were successful. There was no contention in the state courts that the defendant had failed to preserve the federal objection. *Blackburn*, 354 U.S. at 393.

296 Blackburn v. Alabama, 361 U.S. 199, 205, 211 (1960) (reversing Blackburn v. State, 109 So. 2d 736 (Ala. Ct. App. 1958)).

297 *E.g.*, Norfolk S. Ry. Co. v. Basell USA Inc., 512 F.3d 86, 91, 97 (3d Cir. 2008) (remanding where district court's summary-judgment ruling failed to address a party's argument that the other party had repudiated the contract); *cf.* Pieschacon Quijano v. U.S. Att'y Gen., 460 F. App'x 884, 887–88 (11th Cir. 2012) (remanding to Board of Immigration Appeals where the Board failed to consider immigrant's ineffective-assistance claim and court could not rule out prejudice). *But cf.* Simons v. Sw. Petro-Chem, Inc., 28 F.3d 1029, 1030 (10th Cir. 1994) ("The district court's failure [to address a potentially dispositive matter when ruling on summary judgment] does not require a remand, however, because the record is sufficient to permit us to resolve the issue as a matter of law.").

298 *E.g.*, Ellison v. Ford Motor Co., 847 F.2d 297, 300–01 (6th Cir. 1988) (remanding where the district court granted a dispositive motion against the plaintiff without addressing the plaintiff's pending motion to amend his complaint); Espey v. Wainwright, 734 F.2d 748, 749–50 (11th Cir. 1984) (remanding case where the district court dismissed a habeas petition as unexhausted without addressing the petitioner's motion to withdraw the unexhausted claim).

299 *Supra* Section II.G (discussing the supervisory power).

by the Constitution."[300] Using this authority, appellate courts could require the courts under them to expressly address all issues in a case on pain of vacatur and remand.[301] Certainly an occasional remand for elaboration is preferable, from the perspective of the lower courts, than imposing a general rule that mandates comprehensive opinions in every case.[302]

Probably the best argument against remanding for consideration of apparently overlooked issues relies on an evidentiary presumption. It is true that the lower court must *consider* all potentially dispositive issues, the argument would go, but we should presume, because of the "presumption of regularity," that the lower court did so.[303] That is, reviewing courts should not treat the absence of mention as an absence of consideration. Rather, the presumption is that the lower court considered the issue and rejected it but did not expressly say so in its decision.[304]

Although there may be something to entertaining a general presumption of regularity in appellate proceedings, it can be no more than that. Courts are busy, and judges are human, and oversights occur. It is perfectly conceivable that a court could overlook a meritorious point, and the conceivable starts to look altogether plausible when the court does address other, less facially meritorious points. As a matter of the expressive function of appellate review, it is probably better to assume that the lower court simply overlooked an issue than to assume that it considered it but did not realize that it was much more compelling than the arguments that it did expressly reject—or, worse, that the lower court tried to hide the compelling issue.

Although there should not be a conclusive presumption that unmentioned issues were actually considered and rejected, there is certainly room for reasonable debate about what happened in particular cases. In *Youngblood*, the dissenting justices in the state supreme court addressed the issue

300 Cupp v. Naughten, 414 U.S. 141, 146 (1973).

301 *Supra* text accompanying note 213 (discussing the Eleventh Circuit's *Clisby* rule).

302 *See* OHIO APP. R. 12, 1992 staff note (explaining reasons for abrogating former rule that required the intermediate appellate court to discuss every assignment of error, even if ruling on some made others irrelevant). *Compare* Northcross v. Bd. of Educ., 412 U.S. 427, 428–29 (1973) (per curiam) (remanding for explanation of summary decision), *with* TEX. R. APP. P. 47.1 (requiring the courts of appeals to decide cases with a reasoned, if brief, opinion).

303 *See generally* 5 C.J.S. *Appeal and Error* §§ 914, 916 (2020) (describing presumption of regularity in appellate review).

304 *See, e.g.*, Rheinstrom v. Steiner, 69 N.E. 745, 745 (Ohio 1904); *see also* Bakersfield Abstract Co. v. Buckley, 100 F.2d 530, 532 (9th Cir. 1938) (affirming on the basis of the presumption where the record did not contain facts on the disputed question). Relatedly, one could put the onus on the losing party to seek rehearing or clarification of an incomplete opinion. That might be a good *prudential* ground on which to disfavor GVR'ing in a world in which courts were willing to respond to such requests by confirming that they really did consider the issue and so stating in the order denying rehearing. *E.g.*, United States v. Burhoe, 875 F.3d 55, 57–58 (1st Cir. 2017). But federal courts of appeals rarely respond to petitions with more than a one-word denial, and I suspect that embarrassment and motivated reasoning prevents judges and their clerks from admitting that their prior opinions sometimes miss things.

that went unmentioned in the majority opinion,[305] which would ordinarily suggest that the majority perceived the issue and (silently) rejected it. In fact, however, the dissent in the state high court was filed two weeks *after* the majority opinion.[306] Given the timing, perhaps the majority overlooked the relevant issue or at least failed to perceive its significance. In *Wellons v. Hall*, there was a legitimate dispute over whether the lower court had actually decided an issue through a terse alternative holding or instead had neglected it.[307] Perhaps the Supreme Court majority should have read the lower court's decision more charitably. But that does not affect the broader point about the power to remand to ensure consideration of an issue.

Obviously, the Supreme Court cannot ensure error-free proceedings in every case, or even an appreciable percentage of them, and so efforts to do so in some cases risk arbitrariness. That, of course, is a complaint against error correction generally, not just in overlooked-argument cases. Nonetheless, as Edward Hartnett writes with regard to the Court's summary reversals, occasional error-correction sends a valuable signal to both the public and the lower courts.[308] To let stand cases in which the lower court made a boneheaded error—was "out to lunch," as he puts it—sends a bad signal.[309] Occasional check-ups for potential error—in the form of apparently overlooked grounds—are valuable for the same reason.

The proper way to respond to potentially overlooked arguments generally differs across courts. A court of appeals generally should resolve the whole case when the record allows it, rather than multiplying effort through a remand. For the Supreme Court, by contrast, actually resolving an unmentioned issue on the merits is usually a poor use of its discretionary jurisdiction, as few questions are important enough for plenary consideration, and few errors are clear enough to merit summary reversal on the merits. Flagging potential errors and remanding to the lower courts therefore makes good sense.

The case for remanding rather than denying certiorari is much weaker when the reason that the lower court's decision does not mention a point is that the party failed to press it.[310] Even here, though, there is no strictly jurisdictional barrier to the Supreme Court GVR'ing to a lower federal court to consider a new point of error. Under the plain error doctrine, appellate courts may take cognizance of obvious errors that create injustice even when

305 Youngblood v. West Virginia, 547 U.S. 867, 869 (2006) (per curiam).

306 State v. Youngblood, 618 S.E.2d 544, 544 (W. Va. 2005) (Davis, J., dissenting) (indicating dissent filed on July 8, 2005, versus June 24, 2005 date for majority opinion). The state court often issues majority opinions with some members of the court reserving the right to file separate opinions later. *See id.* at 557 (notation below majority opinion).

307 558 U.S. 220, 228–29 (2010) (Alito, J., dissenting).

308 Hartnett, *supra* note 48, at 608.

309 *Id.*

310 *See, e.g.*, Jefferson v. Upton, 560 U.S. 284, 296–304 (2010) (Scalia, J., dissenting) (dissenting from GVR where, as he describes it, the petitioner raised the issue that supplied the basis for the Court's GVR in neither his appellate brief nor petition for certiorari).

they were not raised below or even raised at all.[311] The sound prudential objection to the Supreme Court remanding for consideration of unpreserved errors with any sort of frequency is that such a practice stretches judicial capacity, may erode litigants' incentives to press points below, may unfairly surprise the opposing party, and may lead to wasted efforts.[312] Nonetheless, there are rare circumstances in which remand is appropriate even for unpreserved potential errors.[313]

2. Remands in Light of Confessions of Error

At the appellate level, sometimes the government abandons an argument that it used to obtain a victory below or otherwise admits that the lower courts have made some error in the government's favor.[314] When such a confession occurs at the Supreme Court, the Court often vacates the judgment—without itself assessing the merits—and remands for further consideration in light of the government's new position.[315] Some Justices have criticized the Court's practice of vacating without an independent assessment of the merits, but they are resigned to this practice's entrenched status, at least when the government has conceded error in the judgment.[316] What several Justices even more vigorously resist, however, is vacating and remand-

311 *See* United States v. Olano, 507 U.S. 725, 731–37 (1993); SUP. CT. R. 24.1(a); SHAPIRO ET AL., *supra* note 30, § 6.26. The Supreme Court's authority to correct unpreserved errors is more sparingly exercised in cases from state courts. *Id.* § 3.21.

312 Wasted efforts could result if the lower court, on remand, refused to consider the new issue because of procedural forfeiture. *See* Adams v. Alabama, 136 S. Ct. 1796, 1797 (2016) (Thomas, J., concurring) (observing that the Court's GVR "does not, for example, address whether an adequate and independent state ground bars relief, [or] whether petitioner forfeited or waived any entitlement to relief"); Aaron-Andrew P. Bruhl, *Deciding When to Decide: How Appellate Procedure Distributes the Costs of Legal Change*, 96 CORNELL L. REV. 203, 231–32 (2011) (describing how some lower courts respond to GVRs by deeming issues forfeited).

313 In *Webster v. Cooper*, 558 U.S. 1039, 1039–40 (2009), the Supreme Court remanded for reconsideration in light of a case that had preceded the lower court's decision by only a couple of months. A review of the court filings shows no indication that the *pro se* petitioner brought the new case's existence to the attention of the court of appeals. *Id.* at 1041 (Scalia, J., dissenting). In these circumstances, it seems appropriate for the Court to use its discretion to return the case to the court of appeals for that court to decide if it was required to, or wished to, consider the effect of the new decision.

314 *See generally* David M. Rosenzweig, Note, *Confession of Error in the Supreme Court by the Solicitor General*, 82 GEO. L.J. 2079 (1994) (describing this practice).

315 *See generally* Michael T. Morley, *Avoiding Adversarial Adjudication*, 41 FLA. STATE U. L. REV. 291, 304–12 (2014) (discussing the Court's past and present approaches to responding to confessions of error).

316 *See* Lawrence v. Chater, 516 U.S. 163, 183 (1996) (Scalia, J., dissenting) (endorsing criticisms of vacating in light of a confession of error but deeming the practice "entrenched").

ing when the government confesses some mistake in the opinion below but does not concede that the *judgment* of conviction was wrong.[317]

The remand skeptics present GVRs in light of a confession of error as a new, decadent development contradicted by prior practice,[318] but they have mistaken or overlooked the relevant history. Though not cited by Justices on either side, there are old cases—going back at least to the late nineteenth century—in which the Supreme Court vacated and remanded for further proceedings in light of a confession of error without, so far as it appears, making any independent determination of the merits.[319] What the skeptics have relied upon to criticize confession GVRs are cases addressing whether the Court should adopt a position *on the merits* (for example, about the correct interpretation of a statute) based solely on a litigant's confession of error.[320] But adopting a position about the meaning of the law without an independent examination of the merits is not close to the same thing as vacating for whatever further consideration is appropriate in light of the government's changed position.[321]

When the government concedes that the judgment itself is incorrect, vacatur and remand should be easy. Section 2106 empowers federal appellate courts to order dispositions in the interests of justice, and vacating and remanding in light of the government's confession of an erroneous judgment is a good way both to keep the judiciary's hands clean and to help the

317 *E.g.*, Hicks v. United States, 137 S. Ct. 2000, 2001–02 (2017) (Roberts, C.J., dissenting); Nunez v. United States, 554 U.S. 911, 912 (2008) (Scalia, J., dissenting); Alvarado v. United States, 497 U.S. 543, 545 (1990) (Rehnquist, C.J., dissenting); *see also* John M. Murray, Note, *Why the Supreme Court Should Stop GVR'ing the Solicitor General's Rationale-Confessions-of-Error*, 62 CASE W. RSRV. L. REV. 879, 882–83 (2012). Some objections to these GVRs may be rooted in prudential concerns, but others rely on a purported lack of power. *E.g.*, Price v. United States, 537 U.S. 1152, 1153 (2003) (Scalia, J., dissenting) (contending the Court lacks power to vacate a judgment when the government concedes error in reasoning but not the judgment).

318 *See Lawrence*, 516 U.S. at 182 (Scalia, J., dissenting) ("We have also announced no-fault GVR's, however, when there has been no intervening development other than the Solicitor General's confession of error in the judgment. That is a relatively new practice.").

319 *E.g.*, De Baca v. United States, 189 U.S. 505, 505 (1903) (per curiam); Ballin v. Magone, 140 U.S. 670, 670 (1891); *see* Morley, *supra* note 315, at 304–06. In these old cases, the Court actually "reverses" rather than "vacates," but that is because the terminology had not yet shifted. *See supra* note 111. There is no indication that the Court independently reviewed the merits.

320 *E.g.*, *Lawrence*, 516 U.S. at 182 (Scalia, J., dissenting) (quoting Young v. United States, 315 U.S. 257, 258–59 (1942)). Similarly, Justice Rehnquist omitted the third option of vacating without considering the merits when he wrote that "we are bound by our oaths either to examine independently the merits of a question presented for review on certiorari, or in the exercise of our discretion to deny certiorari." Mariscal v. United States, 449 U.S. 405, 407 (1981) (Rehnquist, J., dissenting).

321 To illustrate the distinction: in *Nunez v. United States*, which was before the Seventh Circuit after a GVR, to which several Justices objected, *Nunez*, 554 U.S. at 911 (Scalia, J., dissenting), the court of appeals allowed the government to surrender the benefit of the defendant's appeal waiver but independently assessed the government's position on the merits of the appeal. 546 F.3d 450, 451–53 (7th Cir. 2008).

executive discharge its *own* responsibility, especially when it is acting as prosecutor, to do justice rather than to cling to a favorable judgment at all costs.[322] The government could ask the courts below to modify a sentence or vacate a conviction based on a confession of error,[323] so the Supreme Court should be similarly free to facilitate the justice-seeking process by remanding when a confession of error happens on its doorstep.

GVR'ing in light of a confession of error is also supported by unquestioned practices in adjacent domains. Everyone seems to accept that an appellate court may vacate and remand for consideration of mootness without affirmatively finding that a case is moot.[324] Further, part of the reason an appellate court vacates a decision when a case becomes moot on appeal—namely that the mootness prevents the appellate process from running its course and thereby leaves a potentially erroneous decision in place[325]—militates in favor of wiping out and redoing a judgment that even the winning party now concedes was flawed.[326]

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322 *See* AM. BAR ASS'N, CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, §§ 3-1.2(b), 3-1.4 (4th ed. 2017) (describing the special duties of candor and evenhandedness that apply to prosecutors); Drew S. Days, III, *The Solicitor General and the American Legal Ideal*, 49 SMU L. REV. 73, 82 (1995) (observing that the Solicitor General "is expected to forfeit victories in the interest of the greater good of justice" (emphasis omitted)). When the government's interpretation of a statute or regulation itself merits some degree of deference, remanding in light of a change in the government's position is similar to remanding in light of other intervening legal changes, such as new Supreme Court cases. *See* Lawrence v. Chater, 516 U.S. 163, 174 (1996) (per curiam) (remanding in light of reasonable probability that an agency's new interpretation of a statute would influence the decision below); *supra* subsection III.A.2 (discussing intervening-event GVRs). Deference to prosecutor's interpretations of the law is not the rule in criminal cases, which are the focus of this section.

323 *E.g.*, United States v. Castano, 217 F.3d 889, 889 (5th Cir. 2000) (per curiam) (granting rehearing and vacating in light of government's confession of error); United States v. Flick, No. 98-137, 2016 WL 80669, at *2 (W.D. Pa. Jan. 7, 2016) (granting uncontested motion under 28 U.S.C. § 2255 to vacate conviction); *see also* Rinaldi v. United States, 434 U.S. 22, 30, 32 (1977) (per curiam) (finding an abuse of discretion when the lower court refused to allow the government to dismiss charges after obtaining a conviction in violation of Department of Justice policy).

324 *E.g.*, Struck v. Sec'y of Def., 409 U.S. 1071, 1071 (1972); *see* Stuart Minor Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEX. L. REV. 269, 324 n.198 (1999).

325 *See* U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 22–27 (1994); United States v. Hamburg-Amerikanische PacketFahrt-Actien Gesellschaft, 239 U.S. 466, 477–78 (1916).

326 Another alternative is proceeding with the litigation and appointing an amicus to argue the position that the government has abandoned. There are genuine questions about whether that course is wise and even whether it is consistent with Article III's "case or controversy" requirement. *See* Brian P. Goldman, Note, *Should the Supreme Court Stop Inviting Amici Curiae to Defend Abandoned Lower Court Decisions?*, 63 STAN. L. REV. 907, 939–71 (2011). I need not take a position on the legality of that course of action in order to endorse the legality of vacatur as an alternative.

The case is somewhat more complicated when the government concedes error in some aspect of the reasoning below but does not confess error in the ultimate judgment, but even here, the Court may properly remand without an independent assessment of the merits of the judgment. Remanding in this circumstance is not much different from the familiar case of remanding for consideration of alternative grounds of decision. In criminal cases reviewed on the merits, there is often a potential alternative route to upholding the conviction, such as when the Court determines that there was error but leaves undecided whether the error was harmless or when the Court rejects one interpretation of a statute but allows that the facts might support a conviction on the correct interpretation. The potential existence of such grounds for affirmance does not prevent vacatur and remand.[327] In other words, the skeptics' red line between conceding error in the judgment and in the reasoning does not hold up.

Regarding the wisdom of GVR'ing, as opposed to power to do so, the Court is in a good position to decide whether remanding in particular cases or categories of cases creates good incentives and has good effects. As Chief Justice Rehnquist sensibly observed in a case in which the court GVR'd in light of the government's critical description of the lower court's reasoning despite the government's request that certiorari be denied, "I fear we may find the Government's future briefs in opposition much less explicit and frank than they have been in the past."[328] And the Court could, as it has often warned, refuse to GVR if it perceives manipulation on the government's part.[329] Remanding in response to manipulation would not serve the interests of justice.

C. Law-Shepherding Remands: Categories That Do Raise Hard Questions

Section B showed that two categories of GVRs about which the skeptics have complained are, in the main, not problematic after all. But there are some GVRs and other remands that really are questionable. I equivocate with the term "questionable" because the propriety of these remands depends on the Court's proper role, which is contested. These remands seem to spring from the Court's desire to act as law-declarer and, much more, to manage the judicial system so as to make its lawmaking function as effective and convenient as possible rather than allowing it to happen accidentally as the cases come. Some remands in this category have attracted

327 *See* Hicks v. United States, 137 S. Ct. 2000, 2000 (2017) (Gorsuch, J., concurring); *see also* subsection III.A.1 (addressing remands for consideration of alternative grounds). *Hicks* was a case in which the government conceded that a criminal sentence was based on a mistake of law but asked the Court to remand for the lower court to see if the judgment merited reversal under the plain-error standard for unpreserved errors. The government did not concede that the judgment was faulty. 137 S. Ct. at 2000 (Gorsuch, J., concurring). Justice Gorsuch's concurrence in the remand is notable because some of his conservative colleagues dissented. *Id.* at 2001 (Roberts, C.J., joined by Thomas, J., dissenting).

328 Alvarado v. United States, 497 U.S. 543, 546 (1990) (Rehnquist, C.J., dissenting).

329 Lawrence v. Chater, 516 U.S. 163, 168, 175 (1996) (per curiam).

attention, and others have not—but none of them has attracted the level of dissent seen in the cases described in Section B above. Perhaps that is because all members of the modern Supreme Court, of whatever political persuasion, accept the vision of the Court's role that tends to validate these sorts of remands. Nonetheless, if there is any basis for skepticism about the exercise of the remand power, it should be directed here.

1. Remanding for Resequencing

A case may be susceptible of being decided on several different grounds, such as lack of jurisdiction, lack of a cause of action, failure of proof, or failure to comply with procedural rules. Ordinarily, it is up to the court to choose whatever available ground of decision seems best and also whether it should issue alternative holdings rather than only one.[330] In some domains, however, there are mandatory or at least preferred decision-making sequences that push certain grounds of decision to the front or back of the queue.[331] When there is a proper decision-making sequence, a court could resolve a particular question correctly yet have erred in choosing to resolve that question at all. Sub-subsection (a) below concerns appellate remands to repair such sequencing errors. Sub-subsection (b) then considers the more questionable matter of remanding for resequencing when there is no sequencing error.

a. When There Is a Legally Required or Preferred Sequence

The most familiar example of mandatory sequencing involves subject-matter jurisdiction. A federal court is supposed to consider subject-matter jurisdiction before the merits and must assure itself of its jurisdiction even if the parties do not contest it.[332] It is therefore wrong for a lower court to assume jurisdiction that is in fact doubtful, even if the merits decision goes against the plaintiff and is correct as far as the merits go. A proper response for an appellate court is to vacate and remand for determination of jurisdiction.[333] Doing so not only fosters compliance with the sequencing rule but also ensures a proper resolution of the particular case, as the preclusive effects of a merits loss differ from the consequences of a jurisdictional loss.[334]

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330 *See* Peter B. Rutledge, *Decisional Sequencing*, 62 ALA. L. REV. 1, 21 (2010); *see, e.g.*, Am. Acad. of Pain Mgmt. v. Joseph, No. 98-15357, 1998 WL 709459, at *2 (E.D. Cal. Sept. 30, 1998).

331 *See* Rutledge, *supra* note 330, at 10–11 (discussing sequencing rules for jurisdictional grounds of decision).

332 Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 93–95 (1998); *see also* Alan M. Trammell, *Jurisdictional Sequencing*, 47 GA. L. REV. 1099, 1101 (2013).

333 *E.g.*, Alyshah v. United States, 241 F. App'x 665, 668 & n.3 (11th Cir. 2007). Alternatively, if the lack of jurisdiction is clear on the record, the appellate court could modify the dismissal so that it is without prejudice rather than remanding. *E.g.*, Buison, Inc. v. Yaga, Inc., No. 95-40025, 1995 WL 581553 (5th Cir. Aug, 24, 1995) (per curiam).

334 A dismissal on jurisdictional grounds does not extinguish the claim; it can be brought again and succeed in a court of proper jurisdiction. Hitt v. City of Pasadena, 561

A more interesting occasion for resequencing, because the sequencing requirement is not as clear and strict, concerns the doctrine of avoiding the unnecessary decision of constitutional questions.[335] One aspect of this policy is a preference for deciding a case on statutory grounds rather than constitutional grounds, at least where the constitutional questions are difficult or unsettled.[336] And if a court can interpret a statute in a way that avoids putting the statute into arguable conflict with the Constitution, it should do so rather than run headlong into an unnecessary constitutional ruling.[337]

The preference for relying on statutory grounds applies to a single court's handling of a case, but the remands at issue here involve the doctrine's application across courts. For example, suppose that a plaintiff raises parallel statutory and constitutional claims and that a lower court rules in the plaintiff's favor on the constitutional claim without addressing the statutory claim. May the Supreme Court, without finding the constitutional ruling to be wrong on its merits, vacate and remand with directions to decide the statutory claim first and, if that claim succeeds and affords complete relief, to refrain from deciding the constitutional claim at all?

The answer should be *yes*. The Supreme Court has vacated and remanded in such circumstances, though not very often.[338] The Court appears to take the view that the lower court commits error in failing to use avoidance and that this failure alone permits remand for consideration of the statutory ground.[339] Remanding in such circumstances is similar to the uncontested power to remand when the lower court uses an incorrect legal standard, without regard to whether the judgment was ultimately wrong.[340]

Going even farther, however, the Court has sometimes raised *sua sponte* a new nonconstitutional ground, not presented to the lower court, and then

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F.2d 606, 608–09 (5th Cir. 1977); 18A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4436, at 149–79 (3d ed. 2017).

335 *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring) (listing several avoidance doctrines).

336 *Id.* at 347.

337 *See, e.g.*, Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 588 (1988).

338 *See, e.g.*, Communist Party v. Subversive Activities Control Bd., 351 U.S. 115, 122–25 (1956); Alma Motor Co. v. Timken-Detroit Axle Co., 329 U.S. 129, 132, 142 (1946). There is less need for this maneuver today. The Court's jurisdiction is now almost entirely discretionary, so it can avoid taking a stand on constitutional questions by denying certiorari. Under the mandatory appellate jurisdiction that used to be common in constitutional cases, the Supreme Court had to confront the merits. *See supra* note 33.

339 *See Alma Motor Co.*, 329 U.S. at 137 (stating that the rule of avoidance "should guide the lower courts as well as this one" and that "the structure of the problems before the Circuit Court of Appeals required the application of the rule to this case"). If the record is adequately developed, nothing prevents the Court from first considering the merits of the statutory ground and then, only if necessary, deciding the constitutional question. The Court could, along the way, chastise the lower court for failing to engage in avoidance.

340 *Supra* subsection III.A.1.

remanded for the lower court to take the first crack at resolving it.[341] Long-standing practice shows that an appellate court has the authority to decide new issues on appeal or even raise and decide new issues *sua sponte*, at least as long as the issues arise from the same set of events as the original case.[342] If a new issue may be taken up on the Court's own motion, one can construct a strong argument that the Court may assign the work of resolving the new issue to the lower court in the first instance. For one thing, the Court has a limited docket that may not be well used on the merits of the new ground. That is especially true if state law is involved. And if the nonconstitutional ground cannot resolve the case, the Supreme Court will at least have the benefit of the lower court's ruling on both grounds, a ruling to which it owes no deference but from which it may derive some bit of enlightenment. At its worst, ordering a remand looks like giving the lower court some busy work so that the Court can postpone confronting the constitutional question. Given the high stakes of a Supreme Court ruling on a constitutional question, that is not necessarily a bad motive.[343] And, unlike some avoidance devices, like abstention or dismissal on questionable justiciability grounds, remanding for consideration of a statutory ground does not deprive the plaintiffs of adjudication on the merits by a federal court. Finally, this sort of remand will not happen often, given that the Supreme Court today has the option of simply denying certiorari in almost every case.

b. When a Different Ground of Decision Is Attractive for Other Reasons

A different and more problematic use of authority occurs when the Supreme Court remands for resequencing not because the lower court has

341 *See, e.g.*, Escambia Cnty. v. McMillan, 466 U.S. 48, 51–52 (1984) (per curiam) (vacating and remanding where parties had not briefed and appellate court had not ruled on statutory issues); Wood v. Georgia, 450 U.S. 261, 264–65, 273–74 (1981) (remanding for state court to consider a different, narrower constitutional claim that had not previously been presented). In *Paschall v. Christie-Stewart, Inc.*, 414 U.S. 100, 102 (1973) (per curiam), the Court remanded to a state court for consideration of a possible state ground of decision that had not been discussed by the state court or presented in the appellant's jurisdictional statement. The majority suggested that the Court's resolution of the federal constitutional question in the case would otherwise be "advisory." *Id.* at 101–02. That could not be correct, else the Court would routinely be required to hunt for unraised state grounds on pain of exceeding its jurisdiction. As the dissent convincingly explained, "[w]hen a decision [below] rests only on a constitutional determination, a review of that determination is dispositive of the correctness of the decision and is thus not advisory." *Id.* at 104 (Douglas, J., dissenting); *see also* 16B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4021, at 402–03 (3d ed. 2012) (discussing *Paschall* and stating that "the policy of avoiding constitutional questions does not seem strong enough to justify such rigid control of state decisional processes").

342 *See supra* text accompanying notes 151–159, 310.

343 *Cf.* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 117–56, 169–98 (2d ed. 1986) (discussing the "passive virtues" and various ways the Supreme Court can avoid and delay decision).

violated some sequencing rule or even sequencing preference, but because the Court would prefer, for its own reasons, that the lower court had relied on a different ground. The Court's reasons may include its desires to shepherd the development of the law and to maximize control over its lawmaking agenda.[344]

A few examples will illustrate. *Beer v. United States*, mentioned in the Introduction, was the suit brought by federal judges complaining that Congress's failure to grant cost-of-living increases was a violation of the Compensation Clause.[345] When *Beer* reached the Federal Circuit, the court relied on circuit precedent to reject the judges' claim, the same claim having failed in a different lawsuit a decade before.[346] When the judges petitioned for certiorari, the Supreme Court vacated and remanded for the Federal Circuit to consider an alternative ground for decision that the government, as defendant, had also urged, namely that the *Beer* lawsuit was barred by issue preclusion (collateral estoppel).[347] "The Court considers it important that there be a decision on the [preclusion] question," the Court's brief order read, "rather than that an answer be deemed unnecessary in light of [the Federal Circuit's] prior precedent on the merits."[348] Justice Scalia dissented and reiterated his view that "we have no power to set aside the duly recorded judgments of lower courts unless we find them to be in error, or unless they are cast in doubt by a factor arising after they were rendered."[349]

Notice a few things about *Beer*. First, the Court did not determine that the Federal Circuit's decision on the merits of the Compensation Clause claim reached the wrong outcome. Second, the Supreme Court clearly had jurisdiction to address the Compensation Clause question; it was the sole basis for the lower court's decision, and the petitioners presented that issue to the Court in their petition.[350] The mere possibility that the same outcome could later be reached based on a different ground on remand does not prevent the Court from ruling on the issue that was actually decided. Third, the Court's order did not contend that the Federal Circuit had erred by not addressing the (rather tricky) preclusion question before or in addition to the constitutional merits. That is, *Beer* does not belong in the category of

344 *Cf.* Richard M. Re, *Explaining SCOTUS Repeaters*, 69 VAND. L. REV. EN BANC 297, 318–19 (2016) (discussing examples of "strategic deferral," in which the Court forestalls momentous decisions, at least temporarily).

345 361 F. App'x 150, 150–51 (Fed. Cir. 2010), *vacated*, 564 U.S. 1050 (2011). U.S. CONST. art. III, § 1; Beer v. United States, 564 U.S. 1050 (2011).

346 Beer v. United States, 361 F. App'x 150, 151–52 (Fed. Cir. 2010) (following Williams v. United States, 240 F.3d 1019 (Fed. Cir. 2001)), *vacated*, 564 U.S. 1050 (2011).

347 Brief for United States in Opposition at 12, *Beer*, 564 U.S. 1050 (No. 09-1395), 2010 WL 2937727, at *15–16; *Beer*, 564 U.S. at 1050.

348 *Beer*, 564 U.S. at 1050.

349 *Id.* (Scalia, J., dissenting). Justice Breyer was recorded as favoring granting certiorari, but his vote was not explained and was probably not rooted in objections like Scalia's. *See id.* (majority opinion).

350 Petition for Writ of Certiorari at i, *Beer*, 564 U.S. 1050 (No. 09-1395), 2010 WL 1973598.

cases that are remanded because the lower court failed to follow a sequencing rule, namely the avoidance doctrine. The doctrine of avoidance is about avoiding reaching the merits of unsettled constitutional questions. But the Federal Circuit had already reached and resolved the constitutional question in a decade-old precedent.[351] The Federal Circuit therefore confronted a difficult question of preclusion and an easy merits ruling that was dictated by circuit precedent.[352] Nor is preclusion jurisdictional.[353] Under the circumstances, it was perfectly appropriate for the Federal Circuit to take the easy decisional pathway of deciding the case on the basis of the constitutional question.

What appears to have happened in *Beer* was that the Court wanted to dodge or delay an awkward confrontation over judicial salaries. A constitutional ruling in favor of the judges might look like self-dealing and might anger Congress, which had, after all, decided to withhold raises. A ruling against the judges would certainly upset that constituency, which grumbles about salaries nonstop (which is not to say unjustifiably).[354] Admittedly, it would be unfortunate if the Court ruled in the judges' favor on the Compensation Clause only to find out on remand that the defendant's alternative ground for dismissal rendered the exercise unnecessary. But nothing prevented the Supreme Court from adding preclusion to the questions presented to it; adding a new question, often a threshold one, is a familiar practice.[355] That way the Court could have engaged in avoidance by examining preclusion and taking up the constitutional question only if the suit passed the threshold defense. By instead remanding, the Court offloaded that effort while still signaling interest in the constitutional question, plus it produced some further delay, during which Congress might be spurred to relent. As it happened, the Federal Circuit on remand found that preclusion was inapplicable (due to lack of notice to class members in the first case) but that circuit precedent still blocked the judges' case on the constitutional mer-

351 *See* Williams v. United States, 240 F.3d 1019, 1040 (Fed. Cir. 2001).

352 In its decision on remand, in which it addressed preclusion as the Supreme Court had directed, the Federal Circuit spent several pages addressing preclusion but needed only a few sentences to invoke its governing precedent on the Compensation Clause. Beer v. United States, 671 F.3d 1299, 1305–09 (Fed. Cir.), *reh'g en banc granted and vacated*, 468 F. App'x 995, 995 (Fed. Cir. 2012).

353 Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 293 (2005); *see also* Hernandez v. Mesa, 137 S. Ct. 2003, 2006–08 (2017) (per curiam) (remanding for the court of appeals to consider the nonjurisdictional issue of the availability of a *Bivens* remedy for a cross-border shooting).

354 *E.g.*, JOHN G. ROBERTS, JR., 2008 YEAR-END REPORT ON THE FEDERAL JUDICIARY 7 (2008) ("I suspect many are tired of hearing it, and I know I am tired of saying it, but I must make this plea again—Congress must provide judicial compensation that keeps pace with inflation.").

355 SHAPIRO ET AL., *supra* note 30, § 6.25.h (describing the Court's practice of reformulating, adding, and deleting a petitioner's question(s) presented).

its.[356] The Federal Circuit then went en banc to overturn that precedent, giving the judges a victory.[357] The Supreme Court denied certiorari.[358]

The Court's desire to shepherd the law by directing different grounds of decision is not limited to constitutional decisions. In *Barr v. Matteo,* a federal official accused of libeling a subordinate had defended the suit in the district court, unsuccessfully, by raising defenses of both qualified privilege and absolute immunity.[359] But his brief in the court of appeals relied only on absolute immunity, and, in accordance with a perfectly ordinary and sensible court rule, the court of appeals therefore deemed him to have waived any reliance on qualified privilege.[360] The petition for certiorari presented only a question about absolute immunity.[361] The Supreme Court nonetheless stated that "[c]ourts should avoid passing on questions of public law even short of constitutionality that are not immediately pressing," and so it vacated and remanded for consideration of the defense of qualified privilege.[362] It is worth noting that the Court could have gotten all the avoidance it wanted by simply denying certiorari. Its goal seemed, instead, to be to control how the law developed and when it would need to get involved.[363] Justice Douglas would have denied certiorari and called the Court's action "an unwarranted exercise of our supervisory powers."[364]

What should we make of these exercises of power to set aside judgments so that they might be decided on different grounds, without any finding of error in the chosen ground or even error in the lower court's decision to choose that ground for decision? Based on what has been said above, the law allows the Court to vacate and remand without any finding of error, so long as doing so serves the ends of justice.[365] To determine whether the Court is acting justly in the circumstances, one has to consider the Court's role. The decisions just described would be bizarre if we expected the Court to passively await and then resolve particular disputes as they come and in the form in which they come. But our Supreme Court is a law-declaring apex court with almost entirely discretionary jurisdiction, a circumstance brought about through the actions of the Court and Congress alike. A fuller assessment of the propriety of these remand decisions will follow at the conclusion of this Part, but for the moment, it is enough to recognize that the assessment

356 *Beer*, 671 F.3d at 1309.

357 Beer v. United States, 696 F.3d 1174, 1176 (Fed. Cir. 2012) (en banc).

358 United States v. Beer, 569 U.S. 947, 947 (2013).

359 355 U.S. 171, 171–72 (1957) (per curiam).

360 *Id.*

361 *Id.* at 171.

362 *Id.* at 172–73 (quoting Eccles v. Peoples Bank, 333 U.S. 426, 432 (1948)).

363 On remand, the court of appeals found that the applicability of qualified privilege turned on questions of fact requiring trial. Barr v. Matteo, 256 F.2d 890, 891 (D.C. Cir. 1958), *rev'd* 360 U.S. 564 (1959). The Supreme Court reversed and held that the official was entitled to absolute immunity as a matter of law. 360 U.S. at 574–76.

364 *Barr*, 355 U.S. at 174 (Douglas, J., dissenting).

365 28 U.S.C. § 2106 (2018); *supra* Section II.E, subsections III.A.2–4.

depends in large part on whether one accepts that vision of the Court's role in our polity.[366]

2. Remanding to Determine Cert-worthiness

Another, slightly different way to use remands to control the agenda involves remanding in order to decide whether a case is important enough to warrant a grant of certiorari. Thus, in *Taylor v. McKeithen*, the court of appeals' unreasoned decision made it unclear whether the court's decision implicated "an important federal question" regarding remedies for racial gerrymandering or instead whether "its actual ground of decision was of more limited importance."[367] By "more limited importance," the Court probably meant, "not important enough to justify a grant of certiorari, whether or not correct." Though acknowledging that courts have great discretion regarding how much reasoning to provide, the Court vacated and remanded for an explanation of which ground of decision had been used below.[368] As the dissent pointed out, "[w]hile an opinion from the Court of Appeals fully explaining the reason for its reversal of the District Court would undoubtedly be of assistance to our exercise of certiorari jurisdiction here, it is by no means essential."[369] This case is not like those, described earlier, in which clarification is necessary to establish appellate jurisdiction or set out factual findings.[370] The Court's remand here should be understood not as a way to permit review but rather as a way to decide *whether* the case merited the Court's review.

As before, the Court's actions cannot be properly evaluated without considering its role. It is an apex court with discretionary jurisdiction devoted largely to declaring the law and overseeing a judicial hierarchy. Assuming the propriety of that state of affairs, it only makes sense that the Court may utilize its statutory authorities, including § 2106, so as to determine whether a case merits a valuable spot on its docket. And an occasional remand for further explication is preferable, certainly to the lower courts, than a blanket prohibition on summary decisions.

3. Remands That Do Not State the Proper Standard

When a decision under review has used an incorrect legal standard, which court should have the job of applying the correct standard to the facts of the case? Today's appellate courts, and especially the Supreme Court, typi-

366 *Cf.* Louis H. Pollak, *The Supreme Court and the States: Reflections on* Boynton v. Virginia, 49 CALIF. L. REV. 15, 17 (1961) ("Judicial authority to select the most apt of several possible avenues of decision is a sensitive and a powerful weapon. Utilized with sophistication, it complements the Supreme Court's broad discretion as to which cases the Court will entertain, and in what sequence.").

367 407 U.S. 191, 194 & n.4 (1972) (per curiam).

368 *Id.* at 195 n.4.

369 *Id.* at 195 (Rehnquist, J., dissenting).

370 *Supra* subsection III.A.3.

cally take the approach of announcing error in the lower court's standard and then remanding for application of the right standard.[371] That makes perfect sense when the new standard would require additional factual findings or similar further proceedings.[372] Even when no new findings are required, a court like the U.S. Supreme Court has little institutional interest in case-specific applications of legal standards.[373] To be sure, appellate judges sometimes disagree over whether a particular case is best handled through remand or not.[374] But the general authority of the appellate court to choose to remand for application of the correct law is, rightly, uncontroversial.

Nonetheless, some of the Supreme Court's recent decisions are pushing the boundaries of how little the Court can decide and how much it can leave to be sorted out on remand. These are cases involving purely legal questions in which the Court does not even say what the correct standard is, only that the court below got the standard wrong. As an example, consider *Elonis v. United States*, in which the Court reversed a conviction for making threats over Facebook, ruling that the relevant criminal statute was not satisfied by a mental state of mere negligence.[375] It would be perfectly ordinary (though not required) for the Court to remand for the lower court to *apply* the correct standard and see whether the conviction could stand. But the Court refused to say what the correct statutory standard is, in particular whether recklessness sufficed for a conviction.[376] Notably, the Court did not contend that the trial record was inadequately developed—nor could it, as this was a legal question of how to interpret the statute.[377] The Court's refusal to announce the proper interpretation led Justice Alito to quip that the Court,

371 *See* Pullman-Standard v. Swint, 456 U.S. 273, 292 (1982) ("[W]here findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue."); Humphrey v. Humphrey, 434 F.3d 243, 247 (4th Cir. 2006) ("Generally, when a trial court applies the incorrect burden of proof in a civil case, appellate courts remand the case for a determination under the appropriate standard.").

372 *See* Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 714 (1986).

373 SUP. CT. R. 10 ("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."); *see also* Wasby, *supra* note 30 (observing decline in consolidated cases).

374 In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986), the Court remanded for the lower court to apply what the Court declared to be the correct standard. Justice Rehnquist chided the Court for "failing to apply its newly announced rule to the facts of this case. Instead of thus illustrating how the rule works, it contents itself with abstractions and paraphrases of abstractions, so that its opinion sounds much like a treatise about cooking by someone who has never cooked before and has no intention of starting now." *Id.* at 269 (Rehnquist, J., dissenting).

375 135 S. Ct. 2001, 2004, 2006, 2013 (2015); *supra* text accompanying notes 40–43.

376 *Elonis*, 135 S. Ct. at 2013.

377 *Id.*

in an inversion of *Marbury*, was showing that "[i]t is emphatically the prerogative of this Court to say only what the law is not."[378]

Similarly, in *Bank of America Corp. v. City of Miami*, the Court determined that foreseeability did not satisfy the standard of proximate causation under the Fair Housing Act (FHA), but it declined to say what the statute did require.[379] The Court explained that "[t]he lower courts should define, in the first instance, the contours of proximate cause under the FHA and decide how that standard applies . . . ."[380] As the dissent accurately pointed out, the case came to the Court on a motion to dismiss, so the case involved a pure question of law on which "the Court of Appeals has no advantage over us."[381]

The dissenters' main criticism of the Court's refusal to establish the correct interpretation of the statutes in the cases above is that the Court's action leaves lower courts and litigants without authoritative guidance on the statute's meaning.[382] That criticism makes sense in light of the contemporary Supreme Court's role in the legal system. The Court's self-conception, arguably blessed by Congress in the 1925 Judges' Bill and later legislation, is that its role is to use its discretionary jurisdiction to articulate and unify federal law.[383] Given that role, minimalism can be problematic.[384] These remands are therefore, at first glance, surprising for an Olympian court.

Crucially, however, the "minimalist" majorities in the cases under discussion are not abjuring the Court's lawmaking role or seeking to turn the Court into a merely dispute-resolving body. Ratcheting down the minimalist motto of "one case at a time," the decisions above did not even resolve the particular disputes at hand! The decisions instead left the resolution to the lower courts, requiring them to decide the correct standard and whether the original judgments could be sustained under that standard, whatever it turned out to be.[385] The Court's stated justification for its failure even to establish

378 *Id.* (Alito, J., concurring in part and dissenting in part); *see* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

379 137 S. Ct. 1296, 1306 (2017).

380 *Id.*

381 *Id.* at 1311 (Thomas, J., concurring in part and dissenting in part).

382 *E.g.*, *Elonis*, 135 S. Ct. at 2013–14 (Alito, J., concurring in part and dissenting in part).

383 *See, e.g.*, Hartnett, *supra* note 47, at 1660–1713 (discussing the 1925 legislation and subsequent legislation that increased the Court's discretion over its docket); *see also Elonis*, 135 S. Ct. at 2028 (Thomas, J., dissenting) ("Our job is to decide questions, not create them.").

384 *See generally* Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1 (2009) (arguing that the Supreme Court should issue broad decisions that govern many cases in the lower courts); Frederick Schauer, *Abandoning the Guidance Function:* Morse v. Frederick, 2007 SUP. CT. REV. 205 (criticizing the issuance of narrow decisions on idiosyncratic facts).

385 *See* Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296, 1306 ("The lower courts should define, in the first instance, the contours of proximate cause under the FHA and decide how that standard applies to [this case]."). On remand in *Elonis*, the court of appeals reaffirmed the conviction after concluding that the error in instructing the jury on

the correct standard in these cases did not appeal to minimalism as a guiding principle. Instead it said that further percolation in the lower courts, with the benefit of the Court's new (modest) guidance, "would help ensure that we decide [the question of the statute's meaning] correctly" if and when the time for decision comes.[386] So it seems that all sides favor law declaration, but it is just a matter of when and how best to do it.

4. Face-Saving (or Institution-Preserving) Remands

The cases described above involve the Court issuing an opinion that falls far short of resolving the whole dispute. Such tentative opinions might reflect various motivations, such as a desire to conserve effort, avoid error, or avoid deadlock. Another category of cases, which partially overlaps with the one above, involves the Court's remanding for reasons that might be described as saving face.

One example is *Spokeo v. Robins*.[387] The case concerned whether Spokeo's publication of inaccurate information about a consumer, which violated the Fair Credit Reporting Act, sufficed to give the consumer Article III standing to sue. More precisely, the question on which the Court granted review was whether the mere violation of the plaintiff's statutory right, without a further showing of harm (such as lost job interviews), was sufficient to confer standing.[388] This was an extremely important question. The case attracted dozens of amicus briefs and was regarded as a potential blockbuster.[389] Instead, it fizzled. The Court did not make any major ruling on standing, nor did it issue a narrow opinion that at least applied to the plaintiff's particular facts, but instead, in an opinion that won the assent of six of the eight participating Justices, vacated because the court below had produced an "incomplete" standing analysis by "fail[ing] to fully appreciate the distinction between concreteness and particularization."[390] The Court therefore remanded for the Ninth Circuit to consider whether the plaintiff's alleged injury was "concrete" as well as particularized.[391]

Intervening between the oral argument in *Spokeo* and the decision's announcement came the death of Justice Scalia, a hawk on standing. It is plausible that his absence prevented the formation of a five-Justice conservative majority that would have issued a broad opinion taking a hard line on

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the mental state was harmless. United States v. Elonis, 841 F.3d 589, 592 (3d Cir. 2016), *cert. denied*, 138 S. Ct. 67 (2017).

386 *Elonis*, 135 S. Ct. at 2013; *see also Bank of Am. Corp.*, 137 S. Ct. at 1306 (stating that the Court "lack[s] the benefit of" the lower courts' views on how to apply the principles it just announced).

387 Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016).

388 Brief for Petitioner at i, *Spokeo*, 136 S. Ct. 1540 (No. 13-1339), 2015 WL 4148655.

389 *See, e.g.*, Amy Howe, *Argument Preview: Justices to Tackle Key Standing Question*, SCOTUSBLOG (Nov. 1, 2015, 5:39 PM), https://www.scotusblog.com/2015/11/argument-preview-justices-to-tackle-key-standing-question/.

390 *Spokeo*, 136 S. Ct. at 1544, 1550.

391 *Id.*

standing in cases involving statutory rights. It is also plausible that the absence of a big statement simply reflected the fact that the case was genuinely hard, and the Court did not know how to answer. Indeed, the question of standing for bare violations of statutory rights was so difficult that a fully staffed Court had, a few years before, dismissed as improvidently granted (DIG) another case that presented the same issue.[392] The speculation at the time was that Court may have been unable to come up with a workable approach to this vexing problem.[393] That history of a DIG on the same question a few years earlier might have made it embarrassing for the Court to DIG again in *Spokeo*. Thus, the inconclusive opinion.

The same eight-member Court issued an even stranger decision in another closely watched case the same day. In *Zubik v. Burwell*, which concerned religious objections to the Affordable Care Act's "contraception mandate," the Court vacated and remanded for the lower courts to consider what to do in light of the "clarified views" expressed by the parties in supplemental briefing filed after oral argument.[394] At first blush, this might look like a remand for further consideration in light of a new factual development or a party's confession of error—and the Court's brief per curiam opinion in *Zubik* cited such cases.[395] What complicates that explanation is that the parties' "clarified views" came in response to the Court's request for supplemental briefing that sought the parties' views on a sort of compromise that the Court, acting as *amiable compositeur*, had interposed on its own initiative.[396] (And you thought it was trial judges who had abandoned the role of passive adjudicator in order to "manage" cases toward settlement.)[397]

In assessing cases like these, it is well to keep in mind the alternative dispositions available, for there are many. Big cases can, obviously, be decided by a closely divided Court over vehement dissents, as many big cases are. If a short-handed Court is split 4–4, the Court can and does affirm without opinion, thus leaving the legal question open for future resolution in a different case.[398] If a case poses unanticipated challenges, the Court can dismiss as improvidently granted, leaving the case in the same position as the thousands that are denied review every year. Issuing a decision vacating and remanding for further proceedings is therefore a choice, not an inevitability.

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392 *Id.* at 1546 (citing First Am. Fin. Corp. v. Edwards, 567 U.S. 756, 757 (2012) (per curiam)).

393 *See, e.g.*, William Baude, *Standing in the Shadow of Congress*, 2016 SUP. CT. REV. 197, 211–12; Kevin Russell, First American Financial v. Edwards: *Surprising End to a Potentially Important Case*, SCOTUSBLOG (June 28, 2012, 5:09 PM), https://www.scotusblog.com/2012/06/first-american-financial-v-edwards-surprising-end-to-a-potentially-important-case/.

394 136 S. Ct. 1557, 1559–61 (2016) (per curiam).

395 *Id.* at 1560.

396 *Id.* at 1559–60. *See generally* JACKSON H. RALSTON, INTERNATIONAL ARBITRATION FROM ATHENS TO LOCARNO 179–80 (Graham H. Stuart ed., 1929) (describing the tradition of kings and other prominent persons serving as *amiables compositeurs* who propose a fair solution to the parties, as opposed to announcing a judgment according to law).

397 *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376–77 (1982).

398 *See, e.g.*, Neil v. Biggers, 409 U.S. 188, 191–92 (1972).

Is it, then, a *good* choice, a prudent one that serves the ends of justice? The Court has said that "[the] GVR power should not be exercised for mere convenience,"[399] and dispositions aimed at avoiding the embarrassment of DIG'ing or evenly dividing look self-serving. Other dispositions look more appropriately system-regarding, such as when a DIG or 4–4 deadlock would leave in place an intolerable circuit split but in which a vanishingly narrow opinion at least resolves something or advances the system toward some ultimate resolution. But even the decisions that look merely "convenient" or selfish might look better when one considers the Supreme Court's role in the judicial and, frankly, political system. "Saving face" can more favorably be described as preserving the Court's institutional capital and credibility. There is value in such an effort, perhaps especially in a time of extreme, pervasive partisan division. Or at least an anxious Chief Justice and some institutionally minded colleagues might reasonably so think.[400]

D. Summary: The Remand Power and the Court's Role

A common theme has emerged, namely that judgments about the Supreme Court's exercise of its power to remand depend on one's understanding of the Court's proper role. The contemporary Supreme Court is, as others have described it, an "Olympian" court that is far removed from the mundane business of resolving the disputes that come before it.[401] If we regard the Court's function as settling the law on many of the most sensitive questions of the day,[402] the criteria for the prudent exercise of the Court's powers should consider ends beyond deciding the case at hand. That is not to say that there are no limits—the exercise of discretion in the interest of justice is not nothing, plus there are always in the background the limitations of jurisdiction and justiciability—but it is to say that the bindings are loose.

One possible way to draw the line on the remand power would be to distinguish between, on the one hand, dispositions that advance the just resolution *of a particular case* and, on the other hand, those dispositions that serve more systemic interests or that advance the Court's broader goals. After all, § 2106 refers to disposing of a "cause" (i.e., case) "as may be just under the circumstances," and the relevant just disposition could naturally be read to refer to justice for the particular parties to the cause being disposed of. Using this dividing line, remands in Section B—those that call for a ruling on an apparently overlooked ground or for consideration of confessions of error—pass the test of doing justice to the parties at hand. But the more

399 Stutson v. United States, 516 U.S. 193, 197 (1996) (per curiam) (quotation marks and alteration omitted).

400 *Cf.* Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks 'Obama Judge,'* N.Y. TIMES, Nov. 22, 2018, at A1 (reporting the Chief Justice's public statement that "[w]e do not have Obama judges or Trump judges, Bush judges or Clinton judges").

401 *Supra* note 32.

402 For a powerful statement of the view that we should *not* accept that vision, see Hartnett, *supra* note 47, at 1726–37. Since Hartnett's article, the Court has moved, if anything, farther from the traditional vision of "mere" dispute resolution.

programmatic remands of the sort in Section C—those that seek to avoid a controversial or embarrassing decision, those that mess with a lower court's discretionary sequencing of decision, and the like—would not meet the standard.

Yet I do not think the proposed line between ensuring justice in the case and managing the Supreme Court's broader concerns would find much favor on the Court. Although the Court must have a case on which to operate, its main role is not case resolution. Cases, to today's Court, are means to the ends of law unification, lawmaking, and superintendence. Those goals obviously influence the Court's discretionary selection of cases, and they likewise influence the content of the law the Court announces. (On that last point, both formalists and functionalist agree, for example, that the Court's decisions should be fashioned with a mind toward how they will be administered by lower courts.)[403] So it is hard to see why the Justices would find appealing a version of the remand power that is directed more toward the nitty-gritty of retail-level dispute resolution.

The statements in the last paragraph are meant to be descriptions, not endorsements. Needless to say, there is no consensus about what the Court's role should be, and I am not attempting to create one here.[404] But *if* one accepts something like the Court's current role, the line between justice in the case and broader goals will not hold up. At least within the constellation of current institutional arrangements, the remands in Section C fit comfortably within the Court's toolbox.

It is worth reiterating that other courts, with other roles, should exercise their discretion differently. This is true notwithstanding the fact that § 2106 on its face refers to all federal appellate courts without differentiation. That a particular type of disposition is appropriate for the Supreme Court does not mean it is appropriate for the courts of appeals, with their mandatory jurisdiction and relatively greater dispute-resolution function. Those courts should more often strive to wrap up cases on their own when possible and have less justification for shepherding the law. And so, it would be a mistake for them to take the Supreme Court as their model in this respect.

CONCLUSION

The starting point for this exploration was the skepticism expressed by some Justices about the Court's practice of vacating and remanding in certain categories of cases, in particular those in which the Court does not iden-

403 *See, e.g.*, Hertz Corp. v. Friend, 559 U.S. 77, 94–95 (2010) (Breyer, J., for a unanimous Court) (relying on administrative simplicity as support for the Court's interpretation); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179–80 (1989) (favoring the establishment of broadly applicable, clear rules for reasons of restraint and predictability).

404 *See* Sanford Levinson, *Assessing the Supreme Court's Current Caseload: A Question of Law or Politics?*, 119 YALE L.J. ONLINE 99, 102 (2010) (explaining that "there is today no widely shared view—let alone anything that could be called a 'consensus'—as to what the Court's role has been or should be in our twenty-first century world").

tify error below. Evaluating their skepticism required an excavation of a largely forgotten history of appellate remedies. That history reveals two different traditions, one legal and one equitable, and shows that the federal courts, with the encouragement of Congress, have long embraced the flexibility of the latter tradition when it comes to appellate remedies.[405] An appellate court of equity would shape its remedial decrees so as to do justice, a concept well expressed by the current federal statute on appellate remedies, which empowers appellate courts to affirm, reverse, vacate, or remand for "such further proceedings to be had as may be just under the circumstances."[406] And the exercise of that power to vacate and remand does not require a finding of error in the judgment or even the analysis below.[407] The short of it is that the skeptics are wrong about the scope of the remand power—certainly when it comes to the remands in Sections III.A–B and, given the vision of the Court's role shared by all Justices, probably when it comes to the more questionable remands of Section III.C as well.

That does not mean anything goes, but it does mean that the exercise of the remand power is limited by sound discretion more than by strict rules. The proper exercise of discretion depends in part on a court's role, and its habitual discretionary choices in turn serve to reveal a court's self-conception. The Supreme Court's docket is today almost entirely discretionary, both in terms of the cases and the questions it chooses to decide, and the Court is widely understood to make its choices with an eye toward optimizing its law-unifying and law-making functions.[408] The power to choose an appropriate appellate remedy, including the power to send a case back for further proceedings, seems like it should respond primarily to case-specific concerns of dispute resolution. Yet we see that the remand power is another, heretofore underappreciated, means through which the modern Court actively manages the development of the law rather than passively adjudicating cases as they come.

405 *Supra* Section II.A.
406 28 U.S.C. § 2106 (2018).
407 *Supra* Sections II.D, III.A.
408 *Supra* Section I.B.