Supreme Court Repeaters

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A case that receives cert once is special. A case that receives cert twice is truly exceptional. This Article is the first to examine the phenomenon of "Supreme Court Repeaters." Although Repeaters may seem like mere curiosities, they are actually a valuable part of the Supreme Court's docket. Our analysis reveals that the Justices use Repeaters in three ways: (1) to set up important substantive questions that could not be addressed on the first pass, (2) to supervise lower courts, and (3) to address different substantive issues that arise at distinct points in litigation. In this Article, we investigate Supreme Court Repeaters from the last ninety years and present our findings.

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Thanks to Samuel Estreicher, Benjamin Johnson, Daniel Kelly, Madison Kilbride, Richard Re, and Keith Whittington for their valuable comments and discussions relating to this project.

INTRODUCTION

Each year, the Supreme Court receives nearly ten thousand petitions for certiorari.[1] And each year, the Supreme Court grants cert to fewer than one hundred cases.[2] Among these cert-worthy cases, the vast majority make only one appearance before the Court. The Justices hear the parties' arguments, issue their opinions, and send the case on its way—never to review it again. A small number of cases, however, defy the odds and obtain certiorari more than once. This Article is the first to examine what makes these cases so special.[3] Why—when ninety-nine percent of cert petitions fail—do some cases warrant two, or even three, appearances before the Supreme Court? In short, why are there "Supreme Court Repeaters"?[4]

We start our inquiry by identifying every Repeater that has occurred since 1925—the year the modern cert process began. Although they are relatively few in number, Repeaters are a consistent part of the Supreme Court's docket. In fact, they have been present in more than two-thirds of the Court's terms. At first glance, Repeaters may seem like nothing more than curious, but unimportant, features of the Court's docket. In reality, however, they are valuable tools that the Court has employed in some of its most noteworthy decisions. Landmark cases such as *Employment Division v. Smith*,[5] *United States v. Ballard*,[6] *Ashcroft v. ACLU*,[7] and the Scottsboro Boys

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1. *See* Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587, 635 n.269 (2009) (noting that the Court receives "approximately 10,000 filings per year from all federal and state courts, nearly all of which are certiorari petitions").

2. *See* Thomas W. Merrill, *Justice Stevens and the* Chevron *Puzzle*, 106 NW. U. L. REV. 551, 565 (2012) (observing that the Supreme Court decides approximately eighty cases each term).

3. The only prior treatment of this subject is in a brief, but informative, blog post. *See* Richard M. Re, *SCOTUS Repeaters*, PRAWFSBLAWG (Jan. 16, 2015, 2:10 AM), http://prawfsblawg.blogs.com/prawfsblawg/2015/01/scotus-repeaters.html [https://perma.cc/CLN9-UCVC] (coining the term "SCOTUS Repeaters" and discussing several possibilities for why they occur).

4. We follow Richard M. Re in using this term. *See id.*

5. 494 U.S. 872, 879 (1990) (holding "that the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability" (internal quotation marks omitted)); 485 U.S. 660 (1988).

6. 329 U.S. 187 (1946); 322 U.S. 78, 86 (1944) (holding that "the truth or verity of respondents' religious doctrines or beliefs should [not] have been submitted to the jury").

7. 542 U.S. 656 (2004); 535 U.S. 564, 585 (2002) (holding "that [the Child Online Protection Act's] reliance on community standards to identify 'material that is harmful to minors' does not by *itself* render the statute substantially overbroad for purposes of the First Amendment").

Trials[8] are all Supreme Court Repeaters. The significance of these and many other Repeaters illustrates the need for a comprehensive investigation into this phenomenon. In this Article, we seek to fill that gap, and in doing so, we find that there are three types of Repeaters: (1) Procedural, (2) Supervisory, and (3) Incidental.

First, "Procedural Repeaters" arise when a case presents a cert-worthy substantive issue that cannot be decided before a preliminary procedural question is resolved.[9] On its own, the procedural question would likely not obtain a hearing before the Court. However, the Justices take on this question in the initial case in order to clear the path for the substantive claim. The Justices do this with the knowledge that, on the case's second hearing, they will be able to address the underlying substantive issue that is at the heart of the controversy.

Second, "Supervisory Repeaters" facilitate the Court's ability to monitor lower courts.[10] This supervision can occur in two different ways. The first method is known as pure error correction. These are cases in which a lower court clearly misinterprets—or actively disregards—the Supreme Court's remand instructions. When this occurs, Repeaters allow the Justices to step in and fix noncompliant rulings. Through this form of oversight, the Court helps ensure that its decisions are followed.[11] The second method arises when the Supreme Court ruling in the first case is ambiguous. In these Supervisory Repeaters, the Court uses the second case to build upon or clarify its earlier ruling. These cases often involve complex principles that are sensitive to minor changes in the fact patterns. As such, this form of Supervisory Repeater tends to proceed as follows: In the initial case, the Supreme Court sets out a principle. Then, in the repeat case, the Supreme Court clarifies an ambiguous aspect of the

8. Patterson v. Alabama, 294 U.S. 600 (1935); Norris v. Alabama, 294 U.S. 587, 589 (1935) (holding that excluding blacks from serving on a jury is an unconstitutional violation of the Fourteenth Amendment's Equal Protection Clause); Powell v. Alabama, 287 U.S. 45, 61–65 (1932) (requiring states to inform illiterate defendants that they have the right to counsel).

9. *See infra* Part III.A.

10. *See infra* Part III.B.

11. As scholars have found, the threat of reprimand acts as a powerful incentive for lower courts to comply with Supreme Court rulings. *See, e.g.*, Tom S. Clark, *A Principal-Agent Theory of En Banc Review*, 25 J.L. ECON. & ORG. 55, 76 (2008); Susan B. Haire, Stefanie A. Lindquist & Donald R. Songer, *Appellate Court Supervision in the Federal Judiciary: A Hierarchical Perspective*, 37 LAW & SOC'Y REV. 143, 162–64 (2003); Donald R. Songer, Jeffrey A. Segal & Charles M. Cameron, *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court–Circuit Court Interactions*, 38 AM. J. POL. SCI. 673, 690–94 (1994); Matt Spitzer & Eric Talley, *Judicial Auditing*, 29 J. LEGAL STUD. 649, 670 (2000).

principle that the lower court had highlighted on remand. By taking on the repeat case, the Court makes its original intentions clear and helps preempt potential circuit conflicts.

The third and final category is "Incidental Repeaters."[12] Unlike the preceding groups, Incidental Repeaters are not the result of strategic cert grants by the Court. Instead, these cases earn their status as Repeaters because they raise multiple cert-worthy issues at different points in the litigation. The defining characteristic for these Repeaters is that the Court's first review has little bearing on the second review. Although the underlying controversy is the same, the two cert grants are for distinct, substantive questions. For Incidental Repeaters, it is purely an incidental fact of the matter that one case produced two cert-worthy issues.

The analysis of these cases proceeds in three parts. In Part I, we describe our methodology for identifying Supreme Court Repeaters. In Part II, we present descriptive statistics of these cases. This Part includes data on Repeaters' historical trends, common issue areas, and ideological outcomes, among other information. Finally, in Part III, we identify three categories of Repeaters. Through illustrative examples in each of these categories, we argue that Repeaters often serve a valuable purpose on the Court.

I. METHODOLOGY

Repeaters are merits cases that have been granted cert by the Supreme Court on more than one occasion. Importantly, this category does not include any summary orders, decrees, stays, per curiam decisions, or other rulings that make up the Court's "shadow docket."[13] Only those cases for which the Court has received a full briefing, heard an oral argument, and issued a signed opinion are eligible to qualify as Repeaters.[14] In addition, our definition of Repeater excludes cases that arose outside of the cert process, such as those that qualified under the Supreme Court's mandatory jurisdiction.

Unlike normal merits cases, Repeaters have two component parts: an initial case and a repeat case. As their names indicate, "initial case" refers to the first instance in which a continuing line of

12. *See infra* Part III.C.

13. *See* Will Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 3–5 (2015) (describing the "shadow docket").

14. *See id.* at 5 (describing merits cases as those cases that "are at the center of the Court's regular sessions, which generally start at 10 a.m. and feature regular oral arguments as well as the announcement of opinions in a public ceremony").

litigation appears before the Supreme Court, and "repeat case" refers to a subsequent appearance before the Court. Generally, "repeat case" denotes the second of two cases. However, for the small number of cases that received cert more than twice, "repeat case" refers to any iteration after the initial case.[15]

Before discussing the identification process, one final point is worth mentioning. We limited our investigation to Supreme Court cases decided during the 1925 October Term through the 2015 October Term. We start with the 1925 term because it is the year in which the Court began the modern certiorari process.[16] Prior to that time, the Court's discretionary review was much more limited, and a large portion of its docket consisted of cases arising on mandatory jurisdiction.[17]

With Repeaters defined and the timeframe established, the next task was to identify relevant cases. Our first step was to compile a list of all merits cases handed down by the Supreme Court during the aforementioned terms. When possible, we used the bound volumes of the United States Reports to catalogue these opinions. We chose to use the U.S. Reports because they are the authoritative source for Court rulings.[18] At the time of the data collection, the U.S. Reports were available through the 2009 term.[19] For more recent terms, we gathered decisions from the Supreme Court's slip opinions.[20] By the end, we had catalogued approximately twelve thousand cases. With this list in hand, we decided to employ two different but complementary strategies.

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15. For a discussion of Repeaters that received cert more than twice, see *infra* note 27.

16. This change was part of the Judiciary Act of 1925. *See* Act of February 13, 1925, Pub. L. No. 68-415, 43 Stat. 936.

17. *See* Arthur D. Hellman, *Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review*, 44 PITT. L. REV. 795, 797 (1983) (noting that, prior to the Judiciary Act of 1925, "the Court remained obligated to review large numbers of cases simply because the losing party in the court below asserted error, even where the case had no importance to anyone other than the litigants"); Jason Mazzone & Carl Emery Woock, *Federalism as Docket Control*, 94 N.C. L. REV. 7, 27 (2015) (noting that the Judiciary Act of 1925 "relieved pressure on the Supreme Court by rendering a much greater portion of its jurisdiction subject to certiorari").

18. *See Bound Volumes*, SUPREME COURT OF THE UNITED STATES, (July 21, 2016), http://www.supremecourt.gov/opinions/boundvolumes.aspx [https://perma.cc/8ZXC-HJZN] (noting that "[t]he bound volumes of the United States Reports contain the fourth and final generation of the Court's opinions").

19. *See id.* (providing access to the most recent volumes).

20. *See Opinions*, SUPREME COURT OF THE UNITED STATES, (July 21, 2016), http://www.supremecourt.gov/opinions/opinions.aspx [https://perma.cc/AXL7-YBLR].

One approach we took involved using Westlaw's "history" function to view the direct history of each of the twelve thousand merits cases. This function provided a graphical depiction of each case's history that allowed us to determine whether a case had appeared before the Supreme Court on more than one occasion. When such a case was indicated, we reviewed the associated Supreme Court opinions to determine whether that case qualified as a Repeater. In theory, this process should have positively identified every Repeater. In practice, however, because Westlaw's history function is not comprehensive, we could not rely solely on this method.

Accordingly, a second approach we took involved comparing each merits case with every other case with which it shared at least one litigant. This method is based on the assumption that, for every Repeater, at least one named party will appear in both the initial case and the repeat case. Although this is not a necessary requirement of Repeaters, we know of only one example that violates this assumption.[21] Accordingly, we are confident that this search methodology—when complemented by our Westlaw history search, a process that is not sensitive to this assumption—has captured nearly every Repeater.

To conduct this analysis, we wrote an Excel macro that extracted every case that shared a party with any other case. The macro identified cases as a match even if the common party's status within the two cases differed. For instance, if "Lopez" were an appellant in one case but an appellee in another case, the script would nonetheless identify both cases as possible Repeaters.[22]

Once we had this list of potential Repeaters, we proceeded to manually examine every case.[23] This process involved reviewing the opinion for each case and assessing whether it was part of the same litigation as any other case that the macro had identified. To make this determination, we focused our review on the case's procedural history. If one case was the successor to another Supreme Court case,

21. *See* Verizon Commc'ns, Inc. v. FCC, 535 U.S. 467 (2002); AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999).

22. Unsurprisingly, this step showed that the vast majority of litigants were involved in only one Supreme Court case. Of the thirteen thousand distinct party names in the database, fewer than three thousand appeared more than once.

23. We limited our comparison to cases involving at least one party that appeared twenty or fewer times. This step was necessary because party names that appeared more frequently became unwieldy to manage and were unlikely to turn up repeated cases. In the end, this decision captured ninety-nine percent of all parties, so we believe this is a defensible decision that best balances time against results.

we coded the initial case and repeat case as part of a Repeater. This method proved to be straightforward. In the vast majority of Repeaters, the Supreme Court explicitly stated that the present controversy was a sequel to previous litigation,[24] and frequently, the Court made this identification in the very first sentence.[25] Having compiled these Repeaters, we were then able to examine their descriptive features. In the next Part, we present those results.

II. FINDINGS

A. Historical Trend

Through our methodology, we identified eighty-four Repeaters.[26] The set includes eighty-four initial cases and eighty-eight repeat cases. The number of repeat cases exceeds the number of initial cases because four Repeaters appeared before the Court more than twice.[27] On average, the repeat case occurred four terms after the initial case. The longest gap was twelve terms;[28] the shortest gap was one term;[29] and the most common frequency was two terms.[30]

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24. *See, e.g.*, Missouri v. Jenkins, 495 U.S. 33, 37 n.1 (1990) ("This litigation has come to us once before . . . ."); Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, 476 U.S. 877, 878 (1986) ("This is the second time this Court has been called upon to address this jurisdictional controversy."); Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 162 (1939) ("This case is another phase of a litigation that has been here before.").

25. *See, e.g.*, Konigsberg v. State Bar of Cal., 366 U.S. 36, 37 (1961) ("This case . . . is a sequel to *Konigsberg v. State Bar of California*."); Ballard v. United States, 329 U.S. 187, 188 (1946) ("This case is here for the second time."); Clark v. Williard, 294 U.S. 211, 212 (1935) ("What is before us is another chapter of a controversy that was here at the last term.").

26. For a complete list of these cases, see Appendix A. An additional thirty-seven cases were reviewed by the Supreme Court more than once. However, because these cases did not receive cert, but rather arose under the Court's mandatory jurisdiction, we excluded them from our dataset.

27. *See* Scheidler v. Nat'l Org. for Women, Inc., 547 U.S. 9 (2006) (previously before the Court at Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393 (2003); Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249 (1994)); Missouri v. Jenkins, 515 U.S. 70 (1995) (previously before the Court at Missouri v. Jenkins, 495 U.S. 33 (1990); Missouri v. Jenkins, 491 U.S. 274 (1989)); Puyallup Tribe, Inc. v. Dep't of Game of Wash., 433 U.S. 165 (1977) (previously before the Court at Dep't of Game of Wash. v. Puyallup Tribe, 414 U.S. 44 (1973); Puyallup Tribe v. Dep't of Game of Wash., 391 U.S. 392 (1968)); Patterson v. Alabama, 294 U.S. 600 (1935) (one of the Scottsboro Boys Trials, the others being Norris v. Alabama, 294 U.S. 587 (1935) and Powell v. Alabama, 287 U.S. 45 (1932)).

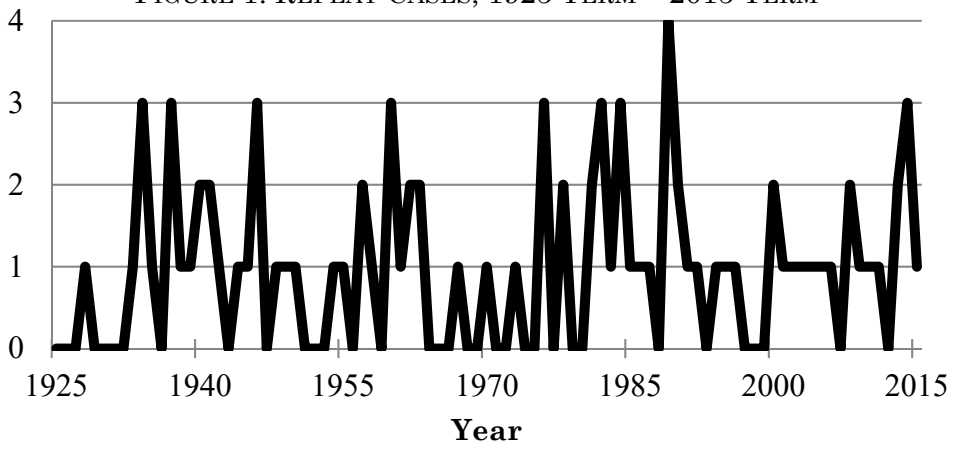
28. This Repeater consisted of *Penry v. Johnson*, 532 U.S. 782 (2001); and *Penry v. Lynaugh*, 492 U.S. 302 (1989).

29. Nine repeat cases were decided the term following their initial cases.

30. Twenty-five repeat cases were decided two years after their initial cases.

Although Repeaters make up a fairly small portion of the Court's caseload, they do have a consistent presence on the docket. Figure 1 shows that, in most years, the Supreme Court grants cert to at least one repeat case. At the high end, the 1989 Term had four repeat cases. Eight other years had three apiece, and a majority of the remaining years had one or two.

FIGURE 1: REPEAT CASES, 1925 TERM – 2015 TERM



As the graph illustrates, the number of Repeaters stayed relatively constant between 1925 and 2015. Despite this, the Court actually hears proportionally more Repeaters today than it heard in the first half of the twentieth century. This result arises because the total number of cases decided by the Supreme Court has declined by more than fifty percent over the last ninety years.[31]

31. *See* Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1225 (2012) (observing that "[s]ince the 2005 Term, the Court has decided an average of 80 cases per Term, far fewer than the roughly 200 cases it heard earlier in the twentieth century"). Scholars have advanced a number of hypotheses for this decline. *See, e.g.*, Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737, 750–93 (2001) (discussing how the elimination of the Court's mandatory jurisdiction, the declining frequency with which the federal government seeks review, the growth of the cert pool, and other factors have served to reduce the Court's caseload); David R. Stras, *The Supreme Court's Declining Plenary Docket: A Membership-Based Explanation*, 27 CONST. COMMENT. 151, 153–61 (2010) (arguing that changes in the Court's membership explain the decline).

B. Issue Areas

Next, we turn to the most common legal issues involved in Repeaters and compare them with the most common legal issues on the Supreme Court's entire docket.[32] For Repeaters, three issue areas—economic activity (23%), civil rights (22%), and criminal procedure (18%)—account for nearly two-thirds of the cases. Judicial power (9%) and First Amendment (8%) round out the top five and bring the cumulative total over eighty percent. Although these issue areas also dominate the Supreme Court's broader docket, there are some differences.[33] The most notable distinction is that civil rights cases are a much larger part of the repeat docket than of the entire docket (22% to 13%). The broader docket makes up this shortfall by outpacing the repeat docket in cases involving federal taxation (7% to 1%). Using a chi-square test, we find that both these differences are statistically significant ($p < .05$). Figure 2 provides additional comparisons for the top ten issue areas in each category.

FIGURE 2: LEGAL ISSUES FOR REPEATERS AND ALL SUPREME COURT CASES

Issue Area	Repeaters	All Supreme Court Cases
Economic Activity	23%	25%
Civil Rights	22%	13%*
Criminal Procedure	18%	18%
Judicial Power	9%	14%
First Amendment	8%	8%
Federalism	4%	4%
Due Process	4%	4%
Attorneys	3%	1%
Federal Taxation	1%	7%*
Other	11%	8%

* $p < .05$

The issue area breakdown suggests that constitutional challenges are a prominent part of Repeaters, and indeed, more than thirty percent involved a constitutional challenge. Figure 3 presents the frequency with which litigants invoked specific constitutional provisions. As the table shows, the Fourteenth Amendment was at issue in more Repeaters (14%) than any other constitutional provision.

32. Data for these figures were drawn from the Supreme Court Database. *See* Harold J. Spaeth et al., *2016 Supreme Court Database, Version 2015 Release 03*, SUPREME COURT DATABASE (April 8, 2016), http://supremecourtdatabase.org [https://perma.cc/HT8D-86A4].

33. *See id.*

The First Amendment played a role in seven percent of these cases, and the Sixth Amendment was involved in five percent of them.

FIGURE 3: CONSTITUTIONAL CHALLENGES IN REPEATERS

Constitutional Provision	**Repeaters**[34]
Art. 1	2%
Art. 4	4%
1st Amend.	7%
4th Amend.	2%
5th Amend.	4%
6th Amend.	5%
11th Amend.	4%
14th Amend.	14%
Other[35]	4%

C. Repeat Victory

Having examined the number of Repeaters over time and the most prominent issue areas, we now shift our attention to case outcomes. The vast majority of Repeaters result in a reversal of the lower court decision. Overall, the proportion is seventy-seven percent reversed to twenty-three percent affirmed.

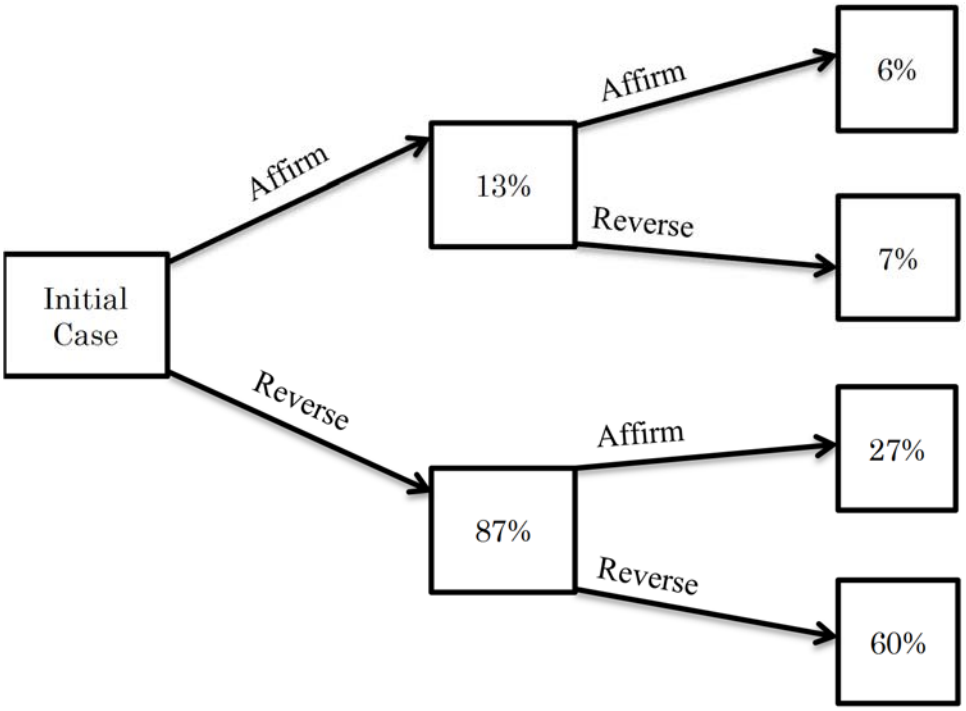
Figure 4 goes one step further and breaks down the frequency with which the Supreme Court affirmed and reversed initial and repeat cases. In the initial case, the Justices reversed the lower court's decision eighty-seven percent of the time and affirmed the decision a mere thirteen percent of the time. Repeat cases were reversed sixty-seven percent of the time and affirmed thirty-three percent of the time.[36] This data indicates that the Supreme Court is more likely to reverse a lower court's ruling during its first review of the Repeater. Additionally, a chi-square test reveals the difference to be statistically significant ($p < .05$).

34 Some Repeaters raised more than one constitutional issue. In those instances, both constitutional provisions are included for purposes of this table.

35 The following constitutional provisions were involved in one case each: Article III, the Eighth Amendment, and the Tenth Amendment.

36. This figure is in line with the Supreme Court's reversal rate for its entire docket (64%).

FIGURE 4: SUPREME COURT DECISIONS FOR REPEATERS



Although this information tells us about initial cases and repeat cases independently, it fails to indicate how the Supreme Court treats Repeaters as a whole. To determine that, we need to know how both the initial case and its associated repeat case were decided. Given that the Supreme Court has two options in both the initial and repeat case (i.e., affirm or reverse), there are four possible permutations for Repeaters.[37] The boxes at the far right of Figure 4 present the frequency with which each of these outcomes occurred.

Starting from the top, the diagram breaks down the outcomes as follows: the Supreme Court (1) affirmed both cases in a Repeater six percent of the time, (2) affirmed the initial case and reversed the repeat case seven percent of the time, (3) reversed the initial case and affirmed the repeat case twenty-seven percent of the time, and (4) reversed both cases sixty percent of the time. As these numbers show, the most common path is two reversals, and the least common path is two affirmances.

37. For the four Repeaters that had more than two cases, we used the original case and the final repeat in this analysis.

One final point worth highlighting is the modest correlation between winning the initial case and winning the repeat case. The Court was somewhat more likely to side with the same party in both cases. Specifically, for a litigant who won the initial case, the likelihood of winning the repeat case was sixty percent.

D. Ideological Direction

Overall, Repeaters are more likely to be decided in a liberal direction than in a conservative one.[38] Specifically, the split was fifty-seven percent liberal and forty-three percent conservative.[39] This distribution is slightly more liberal than the ideological split of the Supreme Court's entire docket—which is fifty-three percent liberal and forty-seven percent conservative.[40]

With respect to Repeaters, we expected that the ideological direction of the decision in the initial case would be predictive of the ideological direction of the decision in the repeat case. After all, the two cases deal with the same controversy and generally bring similar issues. Additionally, given the short time lapse, the composition of the Court is normally the same.

Interestingly, however, this is not the case. We found that there is no ideological relationship between the outcome in the initial case and the outcome in its associated repeat. Forty-nine percent of the time, the cases within a Repeater were decided in different ideological directions. Breaking this down further, twenty-one percent of the time, a conservative repeat followed an initial liberal decision, and twenty-seven percent of the time, a liberal repeat followed an initial conservative decision. The remaining Repeaters (51%) were ideologically consistent: thirty-two percent of the time, both cases yielded liberal decisions, and nineteen percent of the time, both cases yielded conservative decisions. Figure 5 summarizes these results.

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38. To determine the ideological direction of cases, we used the Supreme Court Database ("SCDB"). *See* Spaeth et al., *supra* note 32.

39. The SCDB identifies the ideological direction of each case outcome. *See id.* We used that coding throughout this section.

40. *See id.* The difference, however, is not statistically significant.

FIGURE 5: IDEOLOGICAL DIRECTION OF REPEATERS AT THE SUPREME COURT

	Repeat Case	
Initial Case	Conservative	Liberal
Conservative	19%	27%
Liberal	22%	32%

One point worth noting is that the proportion of liberal decisions was higher in the repeat case (60%) than in the initial case (54%). Given that the decision in the repeat case is normally the more important one—both to the individual litigants and to the broader legal community—this finding suggests that liberals are more likely than conservatives to find success regarding the ultimate resolution of Repeaters.

This, however, is not true in the lower courts. There, Repeaters are more likely to be decided in a conservative manner. Specifically, in the initial case, the lower courts issued a conservative decision fifty-seven percent of the time, and in the repeat cases, that number is fifty-six percent. Figure 6 provides a more fine-grained analysis. Based on the ideological difference in rulings between the lower courts and the Supreme Court, it appears that, in both the initial and repeat cases, the lower courts very often reach results that the Supreme Court deems too conservative. Having explored some broader trends in these cases, we now shift our focus to specific types of Repeaters.

FIGURE 6: IDEOLOGICAL DIRECTION OF REPEATERS AT THE LOWER COURTS

	Repeat Case	
Initial Case	Conservative	Liberal
Conservative	40%	17%
Liberal	16%	27%

III. TYPES OF REPEATERS

Repeaters fall into three categories: (1) Procedural, (2) Supervisory, and (3) Incidental. In this Part, we highlight cases from each of these groups and show why Repeaters are a valuable part of the Supreme Court's docket. Before proceeding, however, we pause to emphasize that these categories should not be thought of as sharp boundaries. Although most Repeaters fall into a single group, some do

straddle the lines.[41] In these instances, we catalogued the cases according to their dominant characteristics. That said, our purpose here is not to vigorously defend the categorization of any individual case. Instead, we are more interested in what the groupings indicate about the Supreme Court's use of Repeaters.

A. Procedural

Procedural Repeaters occur when the Supreme Court disposes of a procedural issue in the initial case and a substantive question in the repeat case.[42] Our review of these cases suggests that the Justices have employed Procedural Repeaters for three distinct reasons. At times, they disposed of an initial case on procedural grounds in order to postpone ruling on the substantive question.[43] The Court could have addressed the substantive issue in its original opinion but for some reason—perhaps due to the political climate—felt it best to delay such a decision. Nonetheless, the Justices know that they will likely have to address the substantive issue by taking up the repeat case or a similarly situated case on a future appeal.

At other times, however, it is clear that the Justices really wanted to tackle the substantive controversy and only granted cert to the initial case in order to clear away a non-certworthy procedural issue.[44] Finally, there were times where the desire to reach a certain substantive question was so strong that the Supreme Court used the initial case to reorient the trajectory of the Repeater so that it raised a specific constitutional issue on a future appeal.[45]

In total, Procedural Repeaters account for twenty-nine percent of all Repeaters. Breaking down the data further, we find that the procedural issues in these initial cases fall into three categories. In thirty-nine percent of the Procedural Repeaters, the Supreme Court

41. For a case that could arguably be classified as either a Procedural Repeater or a Supervisory Repeater, see *Campbell v. United States*, 365 U.S. 85, 98–99 (1961), remanding to the lower court to "supplement the record with new findings"; and *Campbell v. United States*, 373 U.S. 487, 497 (1963), noting that *Campbell I* "demands that this Interview Report, reasonably found to be an accurate copy of a written statement made the day after the robbery by Staula and adopted by him as his own, be producible for impeachment purposes."

42. Substantive laws are "[t]he part of the law that creates, defines, and regulates the rights, duties, and powers of parties." BLACK'S LAW DICTIONARY 1658 (10th ed. 2014). These are in contrast to "procedural laws," which are "[t]he rules that prescribe the steps for having a right or duty judicially enforced . . . ." *Id.*

43. *See* Re, *supra* note 3 (discussing this possibility).

44. *See id.*

45. *See infra* text accompanying notes 72–84.

resolved a jurisdictional issue in the initial case.[46] Thirty-five percent of the time, the Court remanded the initial case because the lower court had failed to make a necessary legal determination.[47] And finally, twenty-six percent of the time, the Supreme Court remanded the initial case so that the lower court could undertake additional fact-finding.[48]

Notwithstanding the Court's specific reason for declining to address the substantive issue, our investigation suggests that repeat cases generally raise more noteworthy and complex questions. There are several factors pointing in this direction. First, the opinions in the initial cases were much shorter than those in the repeat cases. Whereas the repeat cases averaged thirty-six pages, the initial cases came in at a mere nineteen pages.

The second factor suggesting that repeat cases are more important is the amount of scholarly attention that they receive. To measure this, we used Westlaw to determine the number of law review articles that cite to Procedural Repeaters. On average, repeat cases in this category are cited nearly twice as often as initial cases (374 times to 174 times). This is even more impressive given that repeat cases lag several years behind their associated initial cases, thereby giving less time for legal discussion to develop around the case.

Setting aside these aggregate statistics, we now present several cases that are illustrative of the broader set of Procedural Repeaters.

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46. *See, e.g.*, Bond v. United States, 134 S. Ct. 2077, 2093 (2014) (finding that the Convention on Chemical Weapons "does not require the Federal Government to reach into the kitchen cupboard, or to treat a local assault with a chemical irritant as the deployment of a chemical weapon"); Bond v. United States, 564 U.S. 211, 226 (2011) (holding that "[t]here is no basis in precedent or principle to deny petitioner's standing to raise her [Tenth Amendment] claims"); Nat'l Broad. Co. v. United States, 319 U.S. 190, 226–27 (1943) (holding that the Federal Communication Commission's order does not violate the First Amendment); Nat'l Broad. Co. v. United States, 316 U.S. 447, 449 (1942) (finding that the district court has jurisdiction to review an order by the Federal Communications Commission).

47. *See, e.g.*, Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602, 608–10 (1951) (finding the statute unconstitutional under the Commerce Clause); Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 104–05 (1944) (vacating the lower court's determination as to a statute's constitutionality and remanding for the lower court to first determine whether the statute applies to the petitioner).

48. *See, e.g.*, Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 534 (1979) (affirming the Court of Appeals's holding that, "at the time of *Brown I* the Dayton Board was intentionally operating a dual school system in violation of the Equal Protection Clause" (internal quotation marks omitted)); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 419 (1977) (remanding "to the District Court for the making of more specific findings and, if necessary, the taking of additional evidence").

The first example we discuss is *Horne v. Department of Agriculture*.[49] This pair of cases is illustrative of those Procedural Repeaters in which the Justices resolve a less important jurisdictional issue in the initial case in order to reach a more important constitutional question in the repeat case.

The controversy in this Repeater centered on a provision of the National Raisin Reserve that required farmers to withhold a portion (often close to half) of their raisin crop from the market.[50] Marvin Horne, a raisin grower, refused to comply with the regulation and was fined more than $650,000.[51] Horne disputed the fine and filed suit, alleging that the National Raisin Reserve requirement was an unconstitutional taking of private property under the Fifth Amendment.

As the case worked its way through the courts, the constitutional challenge initially failed. Specifically, the district court granted summary judgment against Horne,[52] and the Ninth Circuit Court of Appeals held that Horne lacked standing to even bring the claim.[53] The Ninth Circuit's decision turned on a nuanced distinction between raisin farmers and raisin handlers that had little application beyond the immediate case.

Despite this procedural question's relative unimportance, the Justices granted cert, and in *Horne (I)*, a unanimous Court held that the Ninth Circuit had erred; Horne did have standing to sue.[54] Although the Justices certainly wanted to tackle the more interesting and more important constitutional takings question, they were bound by their longstanding custom of reviewing only those issues on which there is a developed record at the court of appeals.[55] Accordingly, the Justices declined to rule on the constitutional claim, instead, remanding the case to the Ninth Circuit for a decision on the merits.[56]

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49. Horne v. Dep't of Agric., 135 S. Ct. 2419 (2015); Horne v. Dep't of Agric., 133 S. Ct. 2053 (2013).

50. *Horne*, 133 S. Ct. at 2056.

51. *Id.*

52. Horne v. U.S. Dep't of Agric., No. CV–F–08–1549 LJO SMS, 2009 WL 4895362, at *28 (E.D. Cal. Dec. 11, 2009).

53. Horne v. U.S. Dep't of Agric., 673 F.3d 1071, 1080 (9th Cir. 2011) (holding that the Court of Appeals "lack[s] jurisdiction to address the merits of the Hornes' takings claim").

54. *Horne*, 133 S. Ct. at 2064 (ruling that "[t]he Ninth Circuit has jurisdiction to decide whether the USDA's imposition of fines and civil penalties on petitioners . . . violated the Fifth Amendment).

55. *See* SUP. CT. R. 11.

56. *Horne,* 133 S. Ct. at 2064.

On its second review, the Ninth Circuit tackled the substantive issue and held that the National Raisin Reserve requirement did not amount to an unconstitutional taking.[57] Marvin Horne appealed the judgment, and a little more than a year after its decision in *Horne (I)*, the Supreme Court granted cert. Following the Ninth Circuit's ruling, the Justices were able to take on the interesting constitutional question that had likely driven their cert grant in the initial case.

The Court did not waste the opportunity, issuing a seminal Takings Clause decision, which held that both personal property and real property receive the same level of protection under the Fifth Amendment.[58] Relying upon this principle, the Court reversed the Ninth Circuit and ruled that the National Raisin Reserve requirement was an unconstitutional taking.[59]

As noted, *Horne* is representative of those Repeaters in which the Supreme Court clears away a preliminary jurisdictional issue in order to set up an important substantive issue in a repeat case. Some Procedural Repeaters, however, exhibit a different pattern. Occasionally, the Supreme Court focuses on procedural questions not to set up, but rather to avoid reaching the underlying constitutional question. Generally, these Repeaters raise constitutional issues that are salient to the American people. Rather than risk a public backlash, the Supreme Court buys itself time by focusing on a minor procedural question. The Justices know they will have to eventually resolve the dispute—either when this case returns or when a similarly situated case arises—but this procedural maneuver provides them several more years to consider the constitutional issue and to gauge public sentiment to determine how the decision will affect the Court's legitimacy.

Fisher v. Texas is a recent example of this kind of Procedural Repeater.[60] In *Fisher (I)*, the Supreme Court was presented with the question of whether the University of Texas's affirmative action

57. Horne v. U.S. Dep't of Agric., 750 F.3d 1128, 1139–40 (9th Cir. 2014) (finding that there was not an unconstitutional taking because "the Takings Clause affords less protection to personal than to real property").

58. Horne v. Dep't of Agric., 135 S. Ct. 2419, 2426 (2015) ("Nothing in the text or history of the Takings Clause, or our precedents, suggests that the rule is any different when it comes to appropriation of personal property. The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home.").

59. *Id.* at 2431 ("Raisins are not like oysters: they are private property—the fruit of the growers' labor—not 'public things subject to the absolute control of the state' . . . . Any physical taking of them for public use must be accompanied by just compensation.").

60. *See* Fisher v. Univ. of Tex., 136 S. Ct. 2198 (2016); Fisher v. Univ. of Tex., 133 S. Ct. 2411 (2013).

program violated the Equal Protection Clause. At the initial conference, Justice Kennedy, the swing vote on this issue, appeared ready to side with the conservative bloc and rule against the University of Texas.[61]

After reading a draft of Justice Sotomayor's dissent, however, Kennedy wavered.[62] He was worried that Sotomayor's dissent would draw substantial negative attention to the Court.[63] To allow time to assess the public's opinion, Kennedy postponed the decision by facilitating a compromise. Rather than rule on the constitutionality of affirmative action, the majority (which now included two members of the Court's liberal wing) opted to vacate the Fifth Circuit's decision and remand the case.[64] The official reason for the remand was to enable the lower courts to determine whether the University of Texas had met the heavy burden imposed by strict scrutiny.[65] Given the Fifth Circuit's decision, however, this was both an unnecessary and surprising step.[66] It was clear that the Justices' motivating purpose was to set aside the issue for the time being.[67] This maneuver was, as the Justices knew, only a short-term solution.

Three years later, *Fisher* was back before the Court.[68] In its second iteration, the Repeater presented the same central question: Was the University of Texas's affirmative action program unconstitutional? Following oral arguments, legal scholars predicted a loss for the university.[69] They knew, though, that it would all come

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61. *See* JOAN BISKUPIC, BREAKING IN: THE RISE OF SONIA SOTOMAYOR AND THE POLITICS OF JUSTICE 200–01 (2014) ("Two days [after oral arguments], the justices took a preliminary vote . . . . [I]t initially looked like a 5–3 lineup. The five conservatives, including Justice Kennedy, wanted to rule against the Texas policy and limit the ability of other universities to use the kinds of admissions programs upheld in *Grutter v. Bolinger*. The three liberals were ready to dissent.").

62. *See id.* at 205–09 (discussing the negotiations in *Fisher (I)*).

63. *See id.*

64. *See Fisher*, 133 S. Ct. at 2418–20.

65. *See id.*

66. *See* Amy Howe, *Finally! The* Fisher *Decision in Plain English*, SCOTUSBLOG (June 24, 2013, 1:06 PM), http://www.scotusblog.com/2013/06/finally-the-fisher-decision-in-plain-english [https://perma.cc/B7CU-E4WY] ("Given how long it took the Court to decide this case (nearly nine months), the seven-to-one vote came as somewhat of a surprise.").

67. *See id.* (observing that "for now, and probably much to their relief, affirmative action is off the Justices' plate").

68. *See* Fisher v. Univ. of Tex., 136 S. Ct. 2198 (2016).

69. Lyle Denniston, *Argument Analysis: Now, Three Options on College Affirmative Action*, SCOTUSBLOG (Dec. 9, 2015, 2:47 PM), http://www.scotusblog.com/2015/12/argument-analysis-now-three-options-on-college-affirmative-action [https://perma.cc/GBX4-L2PF] (arguing that "[t]he case . . . now comes down to three options: kill affirmative action nationwide as an experiment that can't be made to work, kill just the way it is done at the Texas flagship

down to a single vote. Justice Kennedy had a decision to make. He could side with the conservative bloc and vote against affirmative action as he had on previous occasions.[70] Doing this, however, would mean placing the Court at the center of a heated controversy, one that was likely to be even more volatile than if the Court had struck down affirmative action in *Fisher (I)*.

In the preceding months, Justice Scalia had passed away and racial tensions had reached a fever pitch. These factors, coupled with Justice Kagan's decision to recuse herself from the case, meant that if the Court made a sweeping constitutional change, it would be doing so in a racially charged environment without a full complement of Justices. Justice Kennedy was certainly aware of the attacks the Supreme Court would be forced to endure in such a situation. Given this state of affairs, it is almost certain that a desire to preserve the Court's institutional legitimacy weighed heavily in Kennedy's decision to side with the liberal Justices and uphold affirmative action.[71] Thus, *Fisher v. Texas* provides a clear example of a Repeater in which procedural issues were used to delay a decision that had the potential to place the Court at the center of a significant controversy.

There is one final type of Procedural Repeater we will examine. In these cases, the Justices use procedural maneuvers to reorient the dispute so that, by the case's second pass, it raises the constitutional question that they wanted to hear all along. Consider, for instance, the landmark decision *Employment Division v. Smith*.[72] This case is famous for upending free exercise doctrine by holding that neutral laws of general applicability do not violate the First Amendment.[73]

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university because it can't be defended, or give the university one more chance to prove the need for its policy"); Garrett Eps, *Is Affirmative Action Finished?*, THE ATLANTIC (Dec. 10, 2015), http://www.theatlantic.com/politics/archive/2015/12/when-can-race-be-a-college-admissions-factor/419808 [https://perma.cc/8VZG-8LQY] (noting that it "seems unlikely" that Kennedy would side with the liberal Justices in upholding affirmative action).

70. *See* Grutter v. Bollinger, 539 U.S. 306, 387–91 (2003) (Kennedy, J., dissenting); Gratz v. Bollinger, 539 U.S. 244 (2003).

71. Peter Jacobs, *Justice Kennedy has Emerged as the Unlikely Hero of Affirmative Action*, BUS. INSIDER (June 23, 2016, 11:04 AM), http://www.businessinsider.com/justice-kennedy-upholds-affirmative-action-2016-6 [https://perma.cc/RKT4-V7WZ] (observing that "the conservative justices most likely persuaded themselves that Justice Kennedy will hold firm rather than seek another temperature-lowering compromise—and that the ensuing heat would be an institutional price worth paying" and commenting that "[i]t seems they were wrong" (internal quotation marks omitted)).

72. 494 U.S. 872 (1990).

73. *Id.* at 879 (concluding that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that

With that decision, the Court sparked a large controversy that ultimately led Congress to step in and legislatively overturn the case.

Given this history, it is unsurprising that *Smith* has become a staple in constitutional law casebooks and courses everywhere. The case has also had a notable impact beyond the classroom, having been cited in 1,700 court opinions and discussed in nearly five thousand law review articles.[74] Constitutional law scholar Michael McConnell went so far as to call *Smith* "the most important development in the law of religious freedom in decades."[75] Regardless of one's thoughts on the merits of the case, it is undeniably a seminal case of the Twentieth Century. However, despite the case's prominence, there is something not widely known about it: *Smith* is a Repeater.

In *Smith (I)*, the majority's desire to rework the free exercise's compelling interest test was already evident.[76] Here, the Justices were presented with the question of whether a state may deny unemployment compensation benefits to an individual who was fired because his job requirements conflicted with his religious practices.[77] This case was, as Justice Brennan wrote, a "virtual clone of precedent"—namely *Sherbert v. Verner* and *Thomas v. Review Board*.[78]

There was only one distinguishing factor. Whereas the employees in *Sherbert* and *Thomas* had been fired for engaging in religious activities that were legal, Smith had been fired for engaging in a religious activity that was illegal (smoking peyote). Normally, this difference would be sufficient to merit review.[79] However, the Supreme Court of Oregon's ruling in the case made this particular distinction irrelevant to any federal constitutional analysis. Specifically, the justices on the state supreme court held that the Oregon legislature had not sought to advance an interest in the enforcement of its drug laws when it passed the unemployment compensation statute. Therefore, the courts could not impute such intent to the legislature

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the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)" (internal quotation marks omitted)).

74. To determine these figures, we conducted a Westlaw search for "494 U.S. 872" in all state and federal cases and in law reviews.

75. Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990).

76. 485 U.S. 660 (1988).

77. *See id.* at 662–66.

78. *Id.* at 679 (Brennan, J., dissenting).

79. *See id.* at 676 (Brennan, J., dissenting) ("Such an interest in criminal law enforcement would present a novel issue if it were in fact an interest that Oregon had sought to advance in its unemployment compensation statute.").

when evaluating whether the state had a compelling interest sufficient to overcome the burden on Smith's religious expression.

This left the Justices on the U.S. Supreme Court with two options. They could either dispose of this case by mechanically applying precedent, or they could attempt to mold the case into one they would prefer to hear. The majority chose the latter option. In doing so, the Justices deliberately "misconstrued" the lower court's opinion.[80] Despite a lack of ambiguity in the Oregon Supreme Court's opinion, the majority maintained that it was "not entirely clear . . . whether the state court believed that it was constrained by *Sherbert* and *Thomas* to disregard the State's law enforcement interest."[81] In light of this alleged confusion, the majority remanded the case and instructed the lower court to determine whether the religious use of peyote had violated state law.[82]

The Justices may have found the lower court's opinion unclear, but their own actions were completely transparent. The majority was reorienting the case so that it would present a novel constitutional issue. Despite the Oregon Supreme Court's findings, the Court was determined to use this case to remake its free exercise jurisprudence. As Justice Brennan wrote in dissent:

> [T]his Court today strains the state court's opinion to transform the straightforward question that is presented into a question of first impression that is not . . . .
>
> Inevitably, each Term this Court discovers only after painstaking briefing and oral argument that some cases do not squarely present the issues that the Court sought to resolve. There is always the temptation to trivialize the defect and decide the novel case that we thought we had undertaken rather than the virtual clone of precedent that we actually undertook. Here, however, the Court's belated effort to recoup sunk costs is not worth the price. Today's foray into the realm of the hypothetical will surely cost us the respect of the State Supreme Court whose words we misconstrue. That price is particularly exorbitant where, as here, the state court is most likely to respond to our efforts by merely reiterating what it has already stated with unmistakable clarity.[83]

Brennan's prediction was prescient. On remand, the Oregon Supreme Court released a short, per curiam opinion that simply reaffirmed its initial decision.[84] This disposition, however, was

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80. *See id.* at 679 (Brennan, J., dissenting).

81. *Id.* at 666.

82. *See id.* at 669 (observing that "[t]he state court appears to have assumed, without specifically deciding, that respondents' conduct was unlawful").

83. *Id.* at 675–79 (Brennan, J., dissenting).

84. *See* Smith v. Emp't Div., 763 P.2d 146, 148 (1988) (concluding "that the Oregon statute against possession of controlled substances . . . makes no exception for the sacramental use of peyote, but that outright prohibition of good faith religious use of peyote by adult members of the

sufficient to give the Supreme Court another crack at the case. And, as we noted before, the Justices took maximal advantage of the opportunity by using *Smith (II)* as a platform to completely remake the meaning of the Free Exercise Clause.

As these examples show, the Supreme Court uses Procedural Repeaters in several different ways. Most times, as in *Horne*, the Court disposes of a legitimate, although minor, procedural question on the first pass. Other times, however, the court uses the procedural disposition to delay a decision on the merits (*Fisher*) or to restructure the initial case (*Smith*).

B. Supervisory

Supervisory Repeaters account for twenty-seven percent of all Repeaters. This group is bound together by the following characteristic: the repeat case serves to reinforce the holding in the initial case. Sometimes, because the initial decision did not clearly resolve an issue in dispute, this reinforcement is necessary. In these instances, the repeat cases serve to clarify unsettled rules of law—a central part of the Court's lawmaking function.[85]

Supervisory Repeaters, however, also encompass those cases that involve pure error correction. On these occasions, "the governing legal rules are assumed to be clear, and the only issues are whether the factual findings of the tribunal below are supportable under the appropriate standard of review, whether the law was correctly applied to the facts, and whether the procedures followed were improper or unfair."[86] When engaged in error correction, the Court does not clarify an ambiguous decision so much as reprimand the lower court for failing to properly apply an unambiguous holding from the initial case.

Because cases involving error correction are concerned only with the proper application of settled laws and procedures, they generally have little precedential value or importance to anyone

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Native American Church would violate the First Amendment . . . . We therefore reaffirm our holding that the First Amendment entitles petitioners to unemployment compensation").

85. *See* Hellman, *supra* note 17, at 796 (noting that "[i]n its lawmaking role . . . the function of the appellate court is 'to announce, clarify, and harmonize the rules of decision employed by the legal system in which [it] serve[s].' " (quoting PAUL D. CARRINGTON, DANIEL JOHN MEADOR & MAURICE ROSENBERG, JUSTICE ON APPEAL 2–3 (1976))).

86. *Id.*; *see* David P. Leonard, *The Correctness Function of Appellate Decision-Making: Judicial Obligation in an Era of Fragmentation*, 17 LOY. L.A. L. REV. 299, 302 (1984) (explaining that error correction requires the appellate court "to determine, by whatever test is applicable to that particular kind of case, that the trial court correctly decided the questions that were presented in the case").

beyond the immediate parties. For this reason, many Justices have argued against granting cert to such cases.[87] Justice Breyer, for instance, wrote, "The United States Supreme Court is not a court of error correction."[88] Likewise, Justice Scalia observed that "it's not the job of the Supreme Court of the United States to correct the states . . . . Error correction—unless it's a capital case—is not what we do."[89] Further embodying this sentiment is Rule 10 of the Supreme Court's rules of procedure, which states, "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."[90]

Despite this rule of procedure and the Justices' opinions regarding the practice, many of the Supervisory Repeaters do involve error correction. There is, however, an explanation for this anomaly. Unlike normal cases, Repeaters offer the Supreme Court an opportunity to engage in a more direct and powerful form of supervision.

In cases that appear only once, error correction's purpose is one of general oversight. It allows the Justices to ensure that lower courts

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87. *See* Christopher R. Drahozal, *Error Correction and the Supreme Court's Arbitration Docket*, 29 OHIO ST. J. ON DISP. RESOL. 1, 5–6 (2014) (discussing the opposition of many Supreme Court Justices to error-correction cases); William Howard Taft, *The Jurisdiction of the Supreme Court Under the Act of February 13, 1925*, 35 YALE L.J. 1, 2 (1925) ("The function of the Supreme Court is conceived to be, not the remedying of a particular litigant's wrong, but the consideration of cases whose decision involves principles, the application of which are of wide public or governmental interest."); Chief Justice Frederick M. Vinson, Work of the Federal Courts, Address Before the American Bar Association (Sept. 7, 1949), *in* 69 S. CT. v, vi (1949) ("The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions."). *But see* Sonia Sotomayor, *Justice John Paul Stevens: Teaching by Example*, 44 LOY. L.A. L. REV. 819, 819 (2011):

> It is often said that the U.S. Supreme Court is not a court of error correction. But that is not entirely true, and Justice Stevens had a particular instinct for identifying those errors that warranted further review even absent a circuit split, a large amount in controversy, or the involvement of a public figure.

88. Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View from the Supreme Court*, 8 J. APP. PRAC. & PROCESS 91, 92 (2006).

89. *U.S. Supreme Court Justice Antonin Scalia Addresses ABA Midyear Meeting in New Orleans*, AM. BAR ASS'N (Sept. 29, 2011, 2:51 PM) http://www.americanbar.org/news/abanews/aba-news archives/2013/08/u_s_supreme_courtj.html [https://perma.cc/3ZUZ-FJPF] (quoting Supreme Court Justice Antonin Scalia); *see also* Cavazos v. Smith, 132 S. Ct. 2, 12 (2011) (Ginsburg, J., dissenting) (noting that when a case is "fact-bound" and "the Court of Appeals unquestionably stated the correct rule of law," the Supreme Court is "*most* inclined to deny certiorari" (quoting Kyles v. Whitley, 514 U.S. 419, 460 (1995) (Scalia, J., dissenting))).

90. SUP. CT. R. 10; *see also* Drahozal, *supra* note 87, at 1–2 (noting that "a common ground for arguing against the grant of certiorari is that the case is 'factbound'—i.e., that it involves the application of settled law to the (possibly unusual) facts of the case" (footnote omitted)).

have complied with the broad body of existing precedent. But in Repeaters, error correction's purpose is one of specific oversight. It allows the Supreme Court to uphold the integrity of individual decisions. To some degree, both forms of error correction are necessary to ensure that lower courts "obey the law" and "thereby promot[e] the perception of legitimacy."[91] However, Repeaters that involve error correction are more important in maintaining judicial legitimacy because they prevent lower courts from blatantly disregarding or misreading clear directions from the Supreme Court.

Although we have discussed error correction and clarification as if they were distinct actions, they are perhaps more appropriately conceived of as two ends of a continuum. Indeed, most Supervisory Repeaters contain elements of both. In the remainder of this Section, we discuss three cases that are representative of the Supervisory Repeaters in our dataset.

The first example is *United States v. Creek Nation*.[92] This case involved a dispute over the federal government's taking of land from the Creek Nation Indian tribe.[93] Both parties agreed that compensation was required but disagreed over how it should be calculated.[94] Creek Nation maintained that the value of the property should be calculated as of the date of the suit in 1926.[95] The Supreme Court, however, sided with the United States, finding that the value should be calculated as of the date of the taking, which it deemed to be the day on which "the change of ownership [was] consummated by the issue of patents."[96] The Justices instructed the district court to ascertain the dates on which these patents were issued and then to determine the exact amount owed to Creek Nation.[97]

On remand, the district court set the date of the taking at February 13, 1891, contrary to the Supreme Court's instructions. This

91. David Frisch, *Contractual Choice of Law and the Prudential Foundations of Appellate Review*, 56 VAND. L. REV. 57, 75 (2003); *see* Chad M. Oldfather, *Error Correction*, 85 IND. L.J. 49, 51 (2010) (noting that error correction "merely considers whether the trial court erred in its determination of what legal standard applies to the dispute before it, in its application of a legal standard to the facts of the case before it, or even, in some situations, in its determination of the facts in the case before it").

92. 295 U.S. 103 (1935).

93. *Id.* at 105.

94. *Id.* at 107 (noting that "the parties were agreed that the lands in the strip were unceded Creek lands; and that as to such of them as were disposed of under the act of 1891 the Creek tribe is 'entitled to compensation' ").

95. *Id.*

96. *Id.* at 111.

97. *Id.* at 111–12.

date was not the day on which the patents were issued but instead was the date of passage of a congressional act that allowed for the land in question to be parceled and sold to settlers.[98] By selecting this date, the lower court evidenced a clear misunderstanding of the *Creek Nation (I)* opinion. Accordingly, in *Creek Nation (II)*, the Supreme Court overruled the lower court's determination and chastised it for having "misinterpreted" the initial ruling.[99] In correcting this error, the Court quoted at length from its previous opinion and reaffirmed that the "act of 1891 did not dispose of the lands."[100] The Court remanded and once again instructed the district court to determine the date on which the "change of ownership [was] consummated by the issue of patents."[101]

This Repeater is one of the clearest examples of error correction in our dataset. In *Creek Nation (II)*, the Supreme Court issued a unanimous, three-page opinion that did nothing more than order the district court to comply with *Creek Nation (I)*. Unlike *Creek Nation (I)*, *Creek Nation (II)* neither added to the body of law nor created any meaningful precedent. Its disposition was only relevant to the immediate parties to the case. Nonetheless, the Repeater played an important supervisory function by signaling to lower courts that they must follow Supreme Court decisions or risk being admonished for failing to do so.

The second Supervisory Repeater we will discuss is *Penry v. Lynaugh*[102] and *Penry v. Johnson*.[103] This Repeater falls along the middle of the continuum between error correction and clarification. In *Penry (I)*, the Court took up the question of whether executing a mentally retarded individual would violate the Eighth Amendment's ban on cruel and unusual punishment.[104] The majority held that, although the punishment was not categorically unconstitutional, the jury must be instructed that it can consider the defendant's mental retardation as a mitigating factor.[105] Because the jury was not given

98. *See* Creek Nation v. United States, 302 U.S. 620, 621–22 (1938).

99. *Id.* at 622.

100. *Id.*

101. *Id.* (quoting *Creek Nation*, 295 U.S. at 111).

102. 492 U.S. 302 (1989).

103. 532 U.S. 782 (2001).

104. 492 U.S. at 307.

105. *Id.* at 328:

> [I]n the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty, we conclude that the jury was

the appropriate instruction, the Court overturned the death penalty conviction.[106]

On retrial, the defendant was again convicted of murder and sentenced to death.[107] The case was appealed, and the Texas Court of Criminal Appeals affirmed the conviction, holding that the jury was given sufficient opportunity to consider the defendant's mental retardation as a mitigating circumstance.[108] On appeal, the United States District Court for the Southern District of Texas rejected Penry's claim that the jury instructions were constitutionally inadequate, and the Fifth Circuit Court of Appeals, after full briefing and argument, denied a certificate of appealability.[109]

Despite the Fifth Circuit's unwillingness to take up the question, the Supreme Court granted cert to *Penry* once again.[110] Ultimately, this repeat case ended in a 6-3 split, with the Court overturning Penry's conviction a second time. Writing for the majority, Justice O'Connor concluded that the trial court did not go far enough in amending its jury instructions.[111] She held that the lower court ignored the mandate in *Penry (I)* by introducing "supplemental instruction[s] [that] had no practical effect [and] were not meaningfully different from the ones [ ] found constitutionally inadequate in *Penry I*."[112] Framing this as a case of pure error correction, the majority went on to argue that the lower court's ruling was "objectively unreasonable"[113] and to reprimand the judge for having "clearly misapprehended [the] prior decision."[114]

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not provided with a vehicle for expressing its "reasoned moral response" to that evidence in rendering its sentencing decision.

106. *Id.* at 340.

107. 532 U.S. at 786.

108. Penry v. Texas, 903 S.W.2d 715, 766–67 (Tex. Crim. App. 1995).

109. 532 U.S. at 791–92.

110. *Id.* at 786.

111. *Id.* at 804:

> The three special issues submitted to the jury were identical to the ones we found constitutionally inadequate as applied in *Penry I*. Although the supplemental instruction made mention of mitigating evidence, the mechanism it purported to create for the jurors to give effect to that evidence was ineffective and illogical. . . . Any realistic assessment of the manner in which the supplemental instruction operated would therefore lead to the same conclusion we reached in *Penry I* . . . .

112. *Id.* at 798.

113. *Id.* at 803–04. The Court observed that "it would have been both logically and ethically impossible for a juror to follow both sets of instructions" contained in the trial court's modified jury instructions. *Id.* at 799.

114. *Id.* at 797.

The three Justices in the dissent, however, had a very different view of the situation. They did not see this as an example of error correction but rather as an instance of reinterpretation or expansion of existing precedent. Specifically, the dissent argued that the trial court had complied with the Supreme Court's ruling in *Penry (I)*.[115] These Justices emphasized that "[i]n contrast to the first sentencing . . . the [trial] court instructed the jury at length that it could consider Penry's proffered evidence [regarding mental retardation] as mitigating evidence and that it could give mitigating effect to that evidence."[116] This instruction, they maintained, was sufficient to meet the standard set forth in *Penry (I)*.

This Repeater is an example of a case that blurs the line between error correction and clarification. The majority thought they were doing nothing more than correcting an obvious error. The dissent and the lower courts, however, felt that the repeat case modified or extended the decision in *Penry (I)*.

The final Supervisory Repeater we will look at is *Ticonic National Bank v. Sprague*.[117] This case dealt with how debts should be distributed following a bank insolvency. In the initial case, the Court granted cert to determine whether a secured creditor is entitled to interest for "any period subsequent to the insolvency of the bank, when the assets on which he has a lien are sufficient to pay the principal and interest but the total assets of the bank are not sufficient to pay in full all creditors' claims as of the date of insolvency."[118] The respondent, Lottie F. Sprague, maintained that she was entitled to interest payments for the period following insolvency, and the Supreme Court agreed.[119] The Court then directed the district court to carry out its judgment by executing the district court's initial decree allowing for interest payment.

Back in the district court, Sprague petitioned the judge to award attorney's fees. On this issue, the district judge ruled that he had "no authority to grant the petition" because the district court "had

115. *Id.* at 804–10 (Thomas, J., concurring in part and dissenting in part).

116. *Id.* at 806.

117. Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939); Ticonic Nat'l Bank v. Sprague, 303 U.S. 406 (1938).

118. 303 U.S. at 407.

119. *Id.* at 413:

> As the obligation to pay interest is not destroyed by the insolvency . . . we are of the opinion that a secured creditor of a national bank in receivership may enforce his lien against his security, where it is sufficient to cover both principal and interest, until his claim for both is satisfied.

no further function to perform other than to carry out the mandate of the Supreme Court when received."[120] In other words, the judge believed that the scope of the Supreme Court's decision had foreclosed Sprague's ability to submit a petition for attorney's fees.[121] On appeal, the First Circuit agreed, and the Supreme Court granted cert.[122]

In *Sprague (II)*, the Court explained that its initial ruling should not be read to foreclose claims, such as attorney's fees, that arise under equitable jurisdiction.[123] Instead, *Sprague (I)* only settled the statutory claims surrounding payments from an insolvent bank. In this Repeater, the Supreme Court used the repeat case to clarify an ambiguous element of the decision in the initial case. As these examples illustrate, the key feature of a Supervisory Repeater is that the repeat case works to reinforce the holding in the initial case.

C. Incidental

Every so often, a case with two different cert-worthy issues comes along. On these occasions, the initial case and the repeat case raise distinct substantive questions. Unlike in the previous types, for this category, the Supreme Court's decision in the first case does not act to clear the way for the second case nor does the second case serve to refine or clarify issues addressed in the first. Instead, the initial case and repeat case raise different substantive issues, and both could have garnered cert independent of their repeat status. These cases are what we call "Incidental Repeaters," and they account for forty-four percent of the Repeaters in the dataset.

The Scottsboro Boys Trials are an excellent example of an Incidental Repeater because they raise two unrelated, but extremely important issues. The Scottsboro Trials are criminal cases from the 1930s in which nine black men were falsely accused of raping two white women on a train in Alabama.[124] Despite overwhelming evidence of their innocence, all nine were convicted in one-day trials,

120. Sprague v. Picher, 23 F. Supp. 59, 59 (D. Me. 1938).

121. *Id.* at 60 ("This court's authority and discretion in the case ceased when it was removed to the appellate court, and now it can only follow the directions of that court as required by the Supreme Court.").

122. 307 U.S. 164.

123. *Id.* at 168–69.

124. *See Scottsboro: An American Tragedy*, PBS, http://www.pbs.org/wgbh/amex/scottsboro/timeline (last visited June 18, 2016) [https://perma.cc/T3WV-H5VD] (providing a timeline of events surrounding the trial).

and all but one were sentenced to death.[125] During these trials, there were a number of glaring procedural issues. In an effort to remedy some of these problems, the Supreme Court granted cert to three different cases involving the Scottsboro Boys.

The 1932 case of *Powell v. Alabama* was the first in this series.[126] In *Powell*, the Court held that, with respect to capital crimes, the Fourteenth Amendment requires states to inform illiterate defendants that they have the right to counsel.[127] Additionally, the Court ruled that, if the defendants cannot afford a lawyer, the state must appoint one and allow sufficient time to prepare a defense.[128]

Given its status as the first case in which the Court used the Due Process Clause to overturn a state criminal conviction, *Powell* is a notable decision. By requiring states to provide counsel to indigent criminal defendants, *Powell* signaled that the Supreme Court had begun the long process of chipping away at structural inequalities in the criminal justice system. Unfortunately, this ruling was not enough to save the Scottsboro Boys from the false allegations.

On retrial, despite the assistance of counsel, the defendants were found guilty again. Their convictions, however, were delivered by an all-white jury from which blacks had been systematically excluded. The defendants argued that such exclusion was unconstitutional, and the Supreme Court granted cert on this issue in both *Norris v. Alabama*[129] and *Patterson v. Alabama*.[130] In unanimous decisions, the Court held that, by preventing blacks from serving as jurors, Alabama had violated the Equal Protection Clause of the Fourteenth Amendment.[131]

This line of cases is representative of Incidental Repeaters. There is no real connection between the substantive issues decided in

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125. *See* Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 148 (1987) (noting the existence of "testimony from one of the 'victims' that the attack never occurred").

126. 287 U.S. 45 (1932).

127. *Id.* at 61–65.

128. *Id.* at 71–73 (observing how lack of effective counsel is, in certain circumstances, "little short of judicial murder").

129. 294 U.S. 587 (1935).

130. 294 U.S. 600 (1935).

131. *Norris*, 294 U.S. at 589:

> Whenever by any action of a state . . . all persons of the African race are excluded, solely because of their race or color, from serving as grand [or petit] jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States.

(citation omitted).

the initial case (*Powell*) and those decided in the repeat cases (*Norris* and *Patterson*). Certainly, the general controversy is the same. This point is, after all, a requirement of all Repeaters. However, the two substantive issues are distinct. Unlike in the other types of Repeaters, the Court is neither clearing away some sort of procedural issue in order to reach a substantive question nor using the repeat cases to enforce or clarify a ruling that it had made in the initial case. Incidental Repeaters are unique in that they involve substantive issues that could just as easily have been raised by two unrelated cases. Before concluding, we turn our attention to two other Incidental Repeaters.

In *Hewitt v. Helms*, an inmate (Helms) asserted that the prison violated his due process rights when it confined him to administrative segregation.[132] The Third Circuit Court of Appeals sided with Helms, ruling that his confinement was both a procedural and a substantive violation of due process. On appeal, the Supreme Court in *Helms (I)* determined that there was no Fourteenth Amendment procedural violation[133] but left intact the lower court's ruling as to the substantive violation.[134]

Following this decision, Helms filed a § 1988 claim for attorneys' fees.[135] Normally, this would be a straightforward case, but because Helms had been released from prison before the district court could order injunctive relief, it was unclear whether he qualified as a "prevailing party" under the terms of the statute. On review, the Third Circuit held that Helms's legal victory was sufficient to meet the definition of "prevailing party."[136] In *Helms (II)*, however, the Supreme Court disagreed, holding that § 1988 required actual relief on the merits—not merely a favorable judicial decision.[137]

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132. 459 U.S. 460, 462 (1983) ("[Helms] claim[s] that petitioners' actions confining him to administrative segregation within the prison violated his rights under the Due Process Clause of the Fourteenth Amendment . . . .").

133. *See id.* at 477 ("[W]e are satisfied that respondent received all the process that was due after being confined to administrative segregation.").

134. Hewitt v. Helms, 482 U.S. 755, 764–65 (1987) (Marshall, J., dissenting) ("On remand from this Court, the Court of Appeals noted that its substantive due process holding concerning the use of anonymous informant evidence was unaffected by our decision . . . .").

135. *See id.* at 759.

136. *See id.* ("The Court of Appeals . . . conclud[ed] that its prior holding that Helms' constitutional rights were violated was 'a form of judicial relief which serves to affirm the plaintiff's assertion that the defendants' actions were unconstitutional and which will serve as a standard of conduct to guide prison officials in the future.' " (quoting Helms v. Hewitt, 780 F.2d 367, 370 (3d Cir. 1986))).

137. *See id.* at 760 (concluding that "a plaintiff [must] receive at least some relief on the merits of his claim before he can be said to prevail").

In the *Hewitt v. Helms* Repeater, the Supreme Court tackled two different, but important, substantive issues. In *Helms (I)*, the Court engaged in constitutional interpretation—determining that the prison's administrative segregation procedures had not violated Helms' due process rights—and, in *Helms (II)*, the Court engaged in statutory interpretation—holding that Helms was not a "prevailing party" entitled to attorneys' fees under § 1988.[138] Both of these matters were independently cert-worthy, and the Court's judgment in the second case was not tied to its decision in the first case.

Yates v. United States is the final Incidental Repeater that we examine.[139] In *Yates (I)*, fourteen Communist Party officials were charged with violating the Smith Act—a statute that made it illegal for anyone to "organize" a society that advocates for the overthrow of the government.[140] The dispute in *Yates (I)* was over the meaning of the word "organize." The government argued for a broad definition,[141] claiming that the term includes any activities that advance an organization's goals.[142] The Court, however, adopted a narrow reading, concluding that "organize" means only to take part in the establishment of a new organization.[143] Under this reading, activities that carry on the mission of an already existing organization do not qualify.[144]

In *Yates (II)*, the named defendant appealed charges of contempt.[145] At trial, Yates had refused to answer eleven questions regarding the membership of other individuals in the Communist

138. A similar repeat pair is *Jean v. Nelson*, 472 U.S. 846, 854–55 (1985), holding that the Court of Appeals should not have addressed the Fifth Amendment claim "because the current statutes and regulations provide petitioners with . . . all they seek to obtain by virtue of their constitutional argument"; and *Comm'r, INS v. Jean*, 496 U.S. 154, 165–66 (1990), finding that respondents do not need to prove petitioners' position in fee litigation itself was not "substantially justified" in order to be awarded attorneys' fees.

139. *See* Yates v. United States, 355 U.S. 66 (1957); Yates v. United States, 354 U.S. 298 (1957).

140. *See* 354 U.S. at 303 (noting that the Smith Act makes it unlawful for anyone to "organize[ ] or help[ ] or attempt[ ] to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any (government in the United States) by force or violence").

141. *See id.* at 307 ("The Government urges that 'organize' should be given a broad meaning since acceptance of the term in its narrow sense would require attributing to Congress the intent that this provision of the statute should not apply to the Communist Party as it then existed.").

142. *See id.* (observing that the government argues that " 'organizing' is a continuing process that does not end until the entity is dissolved").

143. *See id.* at 310 (concluding "that the word refers only to acts entering into the creation of a new organization, and not to acts thereafter performed in carrying on its activities").

144. *See id.*

145. *See* Yates v. United States, 355 U.S. 66, 67–68 (1957).

Party.[146] For her actions, the district court held Yates in contempt eleven times.[147] The Supreme Court granted cert on the question of "whether the finding of a separate contempt for each refusal constitutes an improper multiplication of contempts."[148] In reviewing this issue, the Court reasoned that it would be unjust to allow the prosecution to rack up multiple charges merely by asking a witness variations of a single question.[149] Based on this analysis, the Court concluded that only one count of contempt was justified.[150]

Here, again, in the *Yates* Repeater, the Court resolved two unrelated, but important, substantive issues. Neither the decision in *Yates (I)* regarding the Smith Act nor the decision in *Yates (II)* regarding the contempt charges had any legal relation to each other. Although both decisions dealt with the same general controversy, this connection was purely an incidental fact of the matter. Accordingly, *Yates* is an Incidental Repeater.

CONCLUSION

This Article represents the first systematic analysis of Supreme Court Repeaters. In conducting this investigation, we made three contributions. First, we identified every Repeater that occurred since the beginning of the modern cert era in 1925. Second, we compared Repeaters to normal Supreme Court cases along a variety of dimensions. We found that, although there are many similarities between both groups, Repeaters do have several distinguishing features. Third, we argued that there are three core types of Repeaters—Procedural, Supervisory, and Incidental. Respectively, these different Repeaters allow the Justices (1) to set up important substantive questions that were initially blocked by procedural hurdles, (2) to supervise lower court decisions, and (3) to address distinct substantive issues that arose at different points in the litigation.

146. *See id.* at 69 (noting that "petitioner refused to answer 11 questions which in one way or another called for her to identify nine other persons as Communists").

147. *See id.*

148. *Id.* at 68.

149. *See id.* at 73 (holding that "the prosecution cannot multiply contempts by repeated questioning on the same subject of inquiry within which a recalcitrant witness already has refused answers").

150. *See id.* at 74 ("We agree with petitioner that only one contempt is shown on the facts of this case.").

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APPENDIX A: LIST OF SUPREME COURT REPEATERS

#	Repeat Case	Initial Case	Type*
1	FTC v. Klesner, 280 U.S. 19 (1929)	FTC v. Klesner, 274 U.S. 145 (1927)	I
2	Pagel v. Pagel, 291 U.S. 473 (1934)	Pagel v. MacLean, 283 U.S. 266 (1931)	P
3	Clark v. Williard, 294 U.S. 211 (1935)	Clark v. Williard, 292 U.S. 112 (1934)	S
4	Patterson v. Alabama, 294 U.S. 600 (1935); Norris v. Alabama, 294 U.S. 587 (1935)	Powell v. Alabama, 287 U.S. 45 (1932)	I
5	McCandless v. Furlaud, 296 U.S. 140 (1935)	McCandless v. Furlaud, 293 U.S. 67 (1934)	P
6	Minn. Tea Co. v. Helvering, 302 U.S. 609 (1938)	Helvering v. Minn. Tea Co., 296 U.S. 378 (1935)	I
7	Creek Nation v. United States, 302 U.S. 620 (1938)	United States v. Creek Nation, 295 U.S. 103 (1935)	S
8	United States v. Shoshone Tribe, 304 U.S. 111 (1938)	Shoshone Tribe v. United States, 299 U.S. 476 (1937)	I
9	Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939)	Ticonic Nat'l Bank v. Sprague, 303 U.S. 406 (1938)	S
10	Nardone v. United States, 308 U.S. 338 (1939)	Nardone v. United States, 302 U.S. 379 (1937)	I
11	Schriber-Schroth Co. v. Cleveland Tr. Co., 311 U.S. 211 (1940)	Schriber-Schroth Co. v. Cleveland Tr. Co., 305 U.S. 47 (1938)	S
12	Palmer v. Conn. Ry. & Lighting Co., 311 U.S. 544 (1941)	Conn. Ry. & Lighting Co. v. Palmer, 305 U.S. 493 (1939)	S

* "P" denotes Procedural Repeater, "S" denotes Supervisory Repeater, and "I" denotes Incidental Repeater.

#	Repeat Case	Initial Case	Type*
13	Puerto Rico v. Russell & Co., 315 U.S. 610 (1942)	Puerto Rico v. Russell & Co., 288 U.S. 476 (1933)	P
14	Puerto Rico v. Rubert Hermanos, Inc., 315 U.S. 637 (1942)	Puerto Rico v. Rubert Hermanos, Inc., 309 U.S. 543 (1940)	I
15	Va. Elec. & Power Co. v. NLRB, 319 U.S. 533 (1943)	NLRB v. Va. Elec. & Power Co., 314 U.S. 469 (1941)	P
16	Tiller v. Atl. Coast Line R. Co., 323 U.S. 574 (1945)	Tiller v. Atl. Coast Line R. Co., 318 U.S. 54 (1943)	S
17	Ashcraft v. Tennessee, 327 U.S. 274 (1946)	Ashcraft v. Tennessee, 322 U.S. 143 (1944)	S
18	Ballard v. United States, 329 U.S. 187 (1946)	United States v. Ballard, 322 U.S. 78 (1944)	I
19	Clark v. Allen, 331 U.S. 503 (1947)	Markham v. Allen, 326 U.S. 490 (1946)	P
20	SEC v. Chenery Corp., 332 U.S. 194 (1947)	SEC v. Chenery Corp., 318 U.S. 80 (1943)	S
21	McComb v. Jacksonville Paper Co., 336 U.S. 187 (1949)	Walling v. Jacksonville Paper Co., 317 U.S. 564 (1943)	I
22	Cole v. Arkansas, 338 U.S. 345 (1949)	Cole v. Arkansas, 333 U.S. 196 (1948)	S
23	NLRB v. Pittsburgh S.S. Co., 340 U.S. 498 (1951)	NLRB v. Pittsburgh S.S. Co., 337 U.S. 656 (1949)	I
24	Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602 (1951)	Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101 (1944)	P
25	Shaughnessy v. United States *ex rel.* Accardi, 349 U.S. 280 (1955)	United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954)	P
26	Remmer v. United States, 350 U.S. 377 (1956)	Remmer v. United States, 347 U.S. 227 (1954)	P
27	Yates v. United States, 355 U.S. 66 (1957)	Yates v. United States, 354 U.S. 298 (1957)	I

#	Repeat Case	Initial Case	Type*
28	FTC v. Standard Oil Co., 355 U.S. 396 (1958)	Standard Oil Co. v. FTC, 340 U.S. 231 (1951)	S
29	San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959)	San Diego Bldg. Trades Council v. Garmon, 353 U.S. 26 (1957)	S
30	Konigsberg v. State Bar of Cal., 366 U.S. 36 (1961)	Konigsberg v. State Bar of Cal., 353 U.S. 252 (1957)	S
31	Irvin v. Dowd, 366 U.S. 717 (1961)	Irvin v. Dowd, 359 U.S. 394 (1959)	P
32	Communist Party of U.S. v. Subversive Activities Control Bd., 367 U.S. 1 (1961)	Communist Party of U.S. v. Subversive Activities Control Bd., 351 U.S. 115 (1956)	P
33	FTC v. Henry Broch & Co., 368 U.S. 360 (1962)	FTC v. Henry Broch & Co., 363 U.S. 166 (1960)	S
34	Shotwell Mfg. Co. v. United States, 371 U.S. 341 (1963)	United States v. Shotwell Mfg. Co., 355 U.S. 233 (1957)	P
35	Campbell v. United States, 373 U.S. 487 (1963)	Campbell v. United States, 365 U.S. 85 (1961)	P
36	Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 (1964)	Clay v. Sun Ins. Office, Ltd., 363 U.S. 207 (1960)	P
37	Aro Mfg. Co. v. Convertible Top Replacement Co., 377 U.S. 476 (1964)	Aro Mfg. Co. v. Convertible Top Replacement Co., 365 U.S. 336 (1961)	P
38	SEC v. New England Elec. Sys., 390 U.S. 207 (1968)	SEC v. New England Elec. Sys., 384 U.S. 176 (1966)	S
39	Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971)	Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969)	I
40	U.S. Steel Corp. v. Fortner Enters., Inc., 429 U.S. 610 (1977)	Fortner Enters., Inc. v. U.S. Steel Corp., 394 U.S. 495 (1969)	P
41	Puyallup Tribe, Inc. v. Dep't of Game of Wash., 433 U.S. 165 (1977); Dep't of Game of Wash. v. Puyallup Tribe, 414 U.S. 44 (1973)	Puyallup Tribe v. Dep't of Game of Wash., 391 U.S. 392 (1968)	S

#	Repeat Case	Initial Case	Type*
42	Milliken v. Bradley, 433 U.S. 267 (1977)	Milliken v. Bradley, 418 U.S. 717 (1974)	S
43	Quern v. Jordan, 440 U.S. 332 (1979)	Edelman v. Jordan, 415 U.S. 651 (1974)	I
44	Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979)	Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977)	P
45	United States v. MacDonald, 456 U.S. 1 (1982)	United States v. MacDonald, 435 U.S. 850 (1978)	I
46	Toll v. Moreno, 458 U.S. 1 (1982)	Elkins v. Moreno, 435 U.S. 647 (1978)	P
47	Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87 (1983)	Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519 (1978)	I
48	United States v. Mitchell, 463 U.S. 206 (1983)	United States v. Mitchell, 445 U.S. 535 (1980)	I
49	Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984)	Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981)	I
50	Nix v. Williams, 467 U.S. 431 (1984)	Brewer v. Williams, 430 U.S. 387 (1977)	I
51	County of Oneida v. Oneida Indian Nation of N. Y., 470 U.S. 226 (1985)	Oneida Indian Nation of N. Y. v. County of Oneida, 414 U.S. 661 (1974)	I
52	Bennett v. New Jersey, 470 U.S. 632 (1985)	Bell v. New Jersey, 461 U.S. 773 (1983)	I
53	NLRB v. Int'l Longshoremen's Ass'n, 473 U.S. 61 (1985)	NLRB v. Int'l Longshoremen's Ass'n, 447 U.S. 490 (1980)	I
54	Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, 476 U.S. 877 (1986)	Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C., 467 U.S. 138 (1984)	S
55	Hewitt v. Helms, 482 U.S. 755 (1987)	Hewitt v. Helms, 459 U.S. 460 (1983)	I
56	Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988)	Edward J. DeBartolo Corp. v. NLRB, 463 U.S. 147 (1983)	I

#	Repeat Case	Initial Case	Type*
57	Golden State Transit Corp. v. Los Angeles, 493 U.S. 103 (1989)	Golden State Transit Corp. v. Los Angeles, 475 U.S. 608 (1986)	I
58	Emp't Div., Dep't of Human Res. of Ore. v. Smith, 494 U.S. 872 (1990)	Emp't Div., Dep't of Human Res. of Ore. v. Smith, 485 U.S. 660 (1988)	P
59	Commissioner, INS v. Jean, 496 U.S. 154 (1990)	Jean v. Nelson, 472 U.S. 846 (1985)	I
60	McCleskey v. Zant, 499 U.S. 467 (1991)	McCleskey v. Kemp, 481 U.S. 279 (1987)	I
61	Yates v. Evatt, 500 U.S. 391 (1991)	Yates v. Aiken, 484 U.S. 211 (1988)	I
62	Sawyer v. Whitley, 505 U.S. 333 (1992)	Sawyer v. Smith, 497 U.S. 227 (1990)	I
63	Reves v. Ernst & Young, 507 U.S. 170 (1993)	Reves v. Ernst & Young, 494 U.S. 56 (1990)	I
64	Missouri v. Jenkins, 515 U.S. 70 (1995); Missouri v. Jenkins, 495 U.S. 33 (1990)	Missouri v. Jenkins *ex rel.* Agyei, 491 U.S. 274 (1989)	I
65	Shaw v. Hunt, 517 U.S. 899 (1996)	Shaw v. Reno, 509 U.S. 630 (1993)	P
66	Metro. Stevedore Co. v. Rambo, 521 U.S. 121 (1997)	Metro. Stevedore Co. v. Rambo, 515 U.S. 291 (1995)	S
67	Penry v. Johnson, 532 U.S. 782 (2001)	Penry v. Lynaugh, 492 U.S. 302 (1989)	S
68	Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431 (2001)	Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n, 518 U.S. 604 (1996)	I
69	Verizon Commc'ns, Inc. v. FCC, 535 U.S. 467 (2002)	AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999)	I
70	Ashcroft v. ACLU, 542 U.S. 656 (2004)	Ashcroft v. ACLU, 535 U.S. 564 (2002)	I

#	Repeat Case	Initial Case	Type*
71	Miller-El v. Dretke, 545 U.S. 231 (2005)	Miller-El v. Cockrell, 537 U.S. 322 (2003)	P
72	Scheidler v. Nat'l Org. for Women, Inc., 547 U.S. 9 (2006); Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393 (2003)	Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249 (1994)	S
73	Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad., 551 U.S. 291 (2007)	Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288 (2001)	I
74	United States v. Navajo Nation, 556 U.S. 287 (2009)	United States v. Navajo Nation, 537 U.S. 488 (2003)	I
75	Cone v. Bell, 556 U.S. 449 (2009)	Bell v. Cone, 535 U.S. 685 (2002)	I
76	Graham Cty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 559 U.S. 280 (2010)	Graham Cty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 545 U.S. 409 (2005)	I
77	Stern v. Marshall, 564 U.S. 462 (2011)	Marshall v. Marshall, 547 U.S. 293 (2006)	P
78	FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307 (2012)	FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009)	I
79	Bond v. United States, 134 S. Ct. 2077 (2014)	Bond v. United States, 564 U.S. 211 (2011)	P
80	Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398 (2014)	Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804 (2011)	S
81	Ala. Dep't of Revenue v. CSX Transp., Inc., 135 S. Ct. 1136 (2015)	CSX Transp., Inc. v. Ala. Dep't of Revenue, 562 U.S. 277 (2010)	S
82	Zivotofsky v. Kerry, 135 S. Ct. 2076 (2015)	Zivotofsky v. Clinton, 132 S. Ct. 1421 (2012)	P
83	Horne v. Dep't of Agric., 135 S. Ct. 2419 (2015)	Horne v. Dep't of Agric., 133 S. Ct. 2053 (2013)	P
84	Fisher v. Univ. of Tex., 136 S. Ct. 2198 (2016)	Fisher v. Univ. of Tex., 133 S. Ct. 2411 (2013)	P