

# RESPONSE

## Explaining SCOTUS Repeaters

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*Why review the same case twice? That’s perhaps the most fundamental question posed by Jason Iuliano and Ya Sheng Lin’s study of what I call “Plenary Repeaters,” or cases that have resulted in multiple full merits rulings in the Supreme Court following certiorari. Drawing on Iuliano and Lin’s research, this response essay argues that a full explanation of Repeaters would recognize both that granting cert in one iteration of a case can increase the odds of a later grant in that case (interdependence) and that some legal issues are posed in only a small number of cases (infrequency). In addition, this essay collects evidence on recent “Summary Repeaters,” or cases that are Repeaters by virtue of summary rulings following certiorari, as well as on the expertise of attorneys who participate in Repeaters at the cert stage. Both Plenary and Summary Repeaters shed light on features of the Court’s constrained power to set its own agenda and so complicate depictions of the Court as a “reactive” institution. The factors that generate Repeaters thus offer avenues for additional research.*

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## INTRODUCTION

It's every academic blogger's dream to prompt an empirical study. Well, maybe not. But it was my dream, and Jason Iuliano and Ya Sheng Lin have made it a reality.

Last year, I wrote a blog post that discussed several possible explanations for what I called “SCOTUS Repeaters,” or cases that the U.S. Supreme Court has reviewed more than once.<sup>1</sup> But while my post and its comment thread adduced a surprising number of Repeaters, I lacked more comprehensive knowledge of how frequently Repeaters occurred.<sup>2</sup>

Now, in their illuminating paper, Iuliano and Lin have taken great strides toward identifying every Repeater that has received plenary consideration as a result of certiorari since 1925, discovering over eighty examples.<sup>3</sup> In addition, the authors helpfully divide the resulting set of cases into three basic categories—procedural, supervisory, and incidental—with each category corresponding to a different explanation for the Court's discretionary decision to exercise full merits review twice in the same case. Thanks to Iuliano and Lin, Repeaters have reached the academic big leagues.

Still, there is more to be done. This response essay explores a fundamental question that Iuliano and Lin raise but don't fully answer:

1. Richard M. Re, *SCOTUS Repeaters*, PRAWFSBLAWG (Jan. 16, 2015), <http://prawfsblawg.blogs.com/prawfsblawg/2015/01/scotus-repeaters.html> [<https://perma.cc/736V-CS7V>].

2. *See id.* and comments (inviting and supplying additional examples of Repeaters).

3. *See* Jason Iuliano & Ya Sheng Lin, *Supreme Court Repeaters*, 69 VAND. L. REV. 1349, 1350, 1355 (2016). The authors, who acknowledge that their method is imperfectly accurate, have overlooked at least one Repeater. *See* *Franchise Tax Bd. of California v. Hyatt*, 136 S. Ct. 1277 (2016); *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488 (2003). In this response, I assume that shortcomings in the authors' data don't significantly undermine their conclusions.

given that most certworthy issues arise in many cases, why does the Court regularly choose to review the very same case more than once?

Answering this question requires consideration of explanatory factors other than the ones that Iuliano and Lin use to define their three Repeater categories. For example, attorney expertise appears to play a role in creating Repeaters. Moreover, a full understanding of Repeaters requires consideration not just of the “Plenary Repeaters” that Iuliano and Lin study but also “Summary Repeaters,” or cases that are Repeaters by virtue of summary review following certiorari, such as summary reversals. Once these additional possible explanations and cases come into view, we will be in a position to deepen, supplement, and refine Iuliano and Lin’s proposed explanations for why Repeaters come about.

The present essay also strives to place Iuliano and Lin’s empirical work in a broader intellectual context. For instance, Repeaters are relevant to normative debates about the Court’s proper role: in many cases, it seems that Repeaters spring from the Court’s efforts to shape its own docket, complicating depictions of the Court as a “reactive” institution.<sup>4</sup>

The point of studying Repeaters isn’t just to improve our understanding of the eighty-or-so interesting cases that Iuliano and Lin identify. Rather, Repeaters are the tip of an analytical iceberg: they show us that something interesting and consequential is happening just beneath the surface of the Court’s certiorari practice.

## I. REPEATER FUNDAMENTALS

Iuliano and Lin define “Repeaters” as cases in which the Supreme Court has issued more than one plenary merits decision—that is, more than one decision after certiorari, full briefing, and oral argument.<sup>5</sup> But there are other ways that a case can repeatedly draw the Supreme Court’s attention and so plausibly qualify as a “Repeater.” For instance, a case can prompt the Court to engage in multiple summary reversals.

Adopting a broader view of what qualifies as a Repeater, the cases that Iuliano and Lin study might be relabeled “Plenary Repeaters,” since they involve multiple rounds of plenary review following certiorari. By contrast, we might use the term “Summary Repeaters” to refer to cases that qualify as Repeaters by virtue of

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4. See *infra* note 79.

5. See Iuliano & Lin, *supra* note 3, at 1352.

summary review following certiorari, particularly summary reversals and GVRs.<sup>6</sup>

In discussing Plenary Repeaters, Iuliano and Lin distinguish between the “initial case” and the “repeat case” that together form a Repeater.<sup>7</sup> However, the essence of a Repeater is that it is a singular case. I will therefore use somewhat different terminology: each Repeater is a single case with an “initial iteration” and a “second iteration.”<sup>8</sup>

So defined, Plenary and Summary Repeaters are distinct from other ways in which the Court undertakes multiple discrete actions in connection with a single case, including:

- Cases that repeatedly reach the Court through its mandatory jurisdiction;
- Cases that involve stays prior to grants of certiorari and plenary review;
- Cases where the Court certifies a question to a state court before issuing judgment;
- Cases where certiorari is granted twice but DIG’d once;<sup>9</sup> and
- Cases that raise and resolve multiple questions presented at the same time.

What makes Plenary and Summary Repeaters unlike the above is the Court’s discretionary decision to grant certiorari in the same case at two separate points in time.

Because both Plenary and Summary Repeaters require grants of Court review, they substantially depend on the law governing the appealability of judgments and the procedural availability of certiorari, or “cert.” The backbone of that legal regime is the “final judgment rule,” which generally prohibits interlocutory appeals within the federal courts.<sup>10</sup>

6. By “summary reversals,” I mean to include orders of summary vacatur and remand. *See infra* note 105. On GVRS, or decisions to grant, vacate, and remand, *see infra* note 29. Notably, the distinction between Plenary and Summary Repeaters leaves room for other kinds of Repeaters as well. For instance, the term “Mandatory Repeater” could refer to cases that repeatedly reach the Court pursuant to its mandatory jurisdiction. Further, some convictions are reviewed on direct and habeas—yielding “Collateral Repeaters.” *Infra* note 106.

7. *See* Iuliano & Lin, *supra* note 3, at 1352–53.

8. Iuliano and Lin show that some cases are reviewed three times. These cases might be termed “Threepeaters.” *See also infra* note 108 (noting a Summary Threepeater).

9. “DIG’d” is short for “dismissed the writ of certiorari as improvidently granted.”

10. On the final judgment rule, *see* 28 U.S.C. §1291 (2012); *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 113 (2009). The Court has jurisdiction to grant certiorari before judgment

Given the final judgment rule (and, more broadly, the laws and practice bearing on cert), we might expect that both Plenary and Summary Repeaters would often spring from cases where a final judgment is issued relatively early in the course of litigation, such as when a claim is denied for want of jurisdiction or some other “threshold” ground. Once those early final judgments are reversed in the Supreme Court, the lower court still has time to confront new, meaty issues that can themselves give rise to certiorari. Iuliano and Lin’s data suggests just that pattern.<sup>11</sup>

Still, the category of Plenary Repeaters turns out to be too capacious to be governed by any single explanatory account. So to explore what causes either Plenary or Summary Repeaters, we need to be a bit finer grained. Iuliano and Lin propose three different kinds of Plenary Repeater, each of which is discussed in some detail below.

Before turning to Iuliano and Lin’s classification scheme, we should keep three cautionary notes in mind. First, the authors confined their study to Repeaters that post-date the “modern certiorari process” established in 1925.<sup>12</sup> That is an eminently reasonable choice, but it excludes important Repeaters, like the canonical *Martin v. Hunter’s Lessee*.<sup>13</sup> Second, while the authors’ analysis of the last ninety-odd years is undoubtedly useful, the time period that Iuliano and Lin study spans different periods of Court behavior. So we should not necessarily assume that the phenomenon that Iuliano and Lin document is constant over time. Finally, Iuliano and Lin acknowledge that their method of finding Repeaters is imperfect, and their dataset omits at least one recent Repeater.<sup>14</sup> Thus, we should be cautious about inferences that depend on the assembly of a complete dataset.

## II. THE NEED FOR EXPLANATION

The most fundamental question that Plenary Repeaters pose is this: why did the same case prompt the Court’s review at different points in time? In general, the Supreme Court grants plenary review only to resolve important issue of law, such as a circuit split or the

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in federal courts of appeals, but it does so only in extraordinary circumstances. See 28 U.S.C. § 1254 (2012); Sup. Ct. R. 11; see also 28 U.S.C. § 1257 (2012) (review of state courts).

11. See Iuliano & Lin, *supra* note 3, at 1362, 1381. Notably, a number of Repeaters expressly state that the case’s first iteration addressed a “threshold” issue.

12. See *id.* at 1353 & n.16 (noting that the certiorari process was established by the Judiciary Act of 1925).

13. *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816); *Fairfax’s Devisee v. Hunter’s Lessee*, 11 U.S. (7 Cranch) 603 (1813).

14. See *supra* note 3 (noting the *Hyatt* Repeater).

constitutionality of a federal statute.<sup>15</sup> But precisely because they are important, “certworthy” issues can typically be resolved in any number of potential cases. To resolve a circuit split, for instance, any well-presented examples of the split will do. To generate a Plenary Repeater, however, the Court must choose to go back to the very same trough (so to speak).

Iuliano and Lin provide us with some sense of how to answer this fundamental question, but they primarily seek to answer somewhat different issues. We can see this by exploring Iuliano and Lin’s three avowedly blurry-edged and overlapping categories of Plenary Repeaters.<sup>16</sup>

### A. *Incidental Repeaters*

Start with Iuliano and Lin’s discussion of Incidental Repeaters, which the authors define as cases where “both decisions dealt with the same general controversy” but where “this connection was purely an incidental fact of the matter.”<sup>17</sup> In a Repeater of this type, the authors note, the Court “resolved two unrelated, but important, substantive issues” that “could just as easily have been raised by two unrelated cases.”<sup>18</sup> The authors thus appear to view the presence of two certworthy issues at different points in time as explanation enough for Incidental Repeaters.<sup>19</sup>

Yet that form of explanation isn’t entirely satisfying, since it can’t tell us *why* two certworthy issues materialized in those particular cases. And if we could gain insight into that deeper explanatory question, then we might be able to discern non-random factors that both create and shape Repeaters. As we’ll see in Part III, Iuliano and Lin’s data does indeed suggest that non-random forces are at work. The question thus arises: what non-random factors explain why Plenary Repeaters generate more than one certworthy petition?

### B. *Procedural Repeaters*

A similar point pertains to Iuliano and Lin’s category of Procedural Repeaters, which occur “when the Supreme Court disposes of a procedural issue in the initial case and a substantive question in

15. Sup. Ct. R. 10.

16. Iuliano & Lin, *supra* note 3, at 1361 (noting that “these categories should not be thought of as sharp boundaries . . .”).

17. *Id.* at 1380 (describing the *Yates* Repeater).

18. *Id.* at 1378, 1380.

19. *See id.* at 1376; *see also* Re, *supra* note 1.

the repeat case.”<sup>20</sup> When a Repeater’s first iteration is disposed of on procedural grounds, there is no inherent need for the Court to later grant cert again in the same case. So the Court’s regular willingness to do so is remarkable.

This point can be fleshed out for each subcategory of Procedural Repeaters.<sup>21</sup> Citing an explanation raised in my blog post, Iuliano and Lin note that Procedural Repeaters have occurred—among other times—when the Court “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.”<sup>22</sup> That rationale might explain the Court’s motivations for acting as it did, given the options available to it. But why would the Court be so determined to reach the merits in a specific case, rather than in some other suitable vehicle for resolving the same issue?

Ditto for another kind of Procedural Repeater: again citing my blog post, Iuliano and Lin note that the justices sometimes “disposed of an initial case on procedural grounds in order to postpone ruling on the substantive question.”<sup>23</sup> I agree that the Roberts Court in particular has exhibited an emerging practice of postponing major decisions—a topic that I discuss in somewhat more detail below.<sup>24</sup> But deferring a major decision today doesn’t in itself require hearing *the very same case* tomorrow. Indeed, in many instances the Court defers resolution of an issue today only to return to that issue again in a different case.<sup>25</sup> So the existence of Procedural Repeaters raises a question: why did the Court’s desire to defer ultimately prompt it to return to a single case?

### C. Supervisory Repeaters

Finally, the question of “why the same case?” also persists in light of Iuliano and Lin’s discussion of Supervisory Repeaters, which are defined as cases in which “the repeat case serves to reinforce the holding in the initial case.”<sup>26</sup> These cases involve “error correction and clarification”—though the authors insightfully acknowledge that those concepts “are perhaps more appropriately conceived of as two ends of a

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20. Iuliano & Lin, *supra* note 3, at 1362.

21. I discuss two of Iuliano and Lin’s subcategories here and the third in Section IV.A.

22. Iuliano & Lin, *supra* note 3, at 1362 (citing Re, *supra* note 1).

23. *Id.* at 1362 (citing Re, *supra* note 1).

24. *See infra* Part IV.

25. *See infra* text accompanying note 90 (discussing *Shelby County v. Holder*, 133 S. Ct. 2612 (2013)).

26. Iuliano & Lin, *supra* note 3, at 1370.

continuum” and that “most Supervisory Repeaters contain elements of both.”<sup>27</sup>

Insofar as the second iteration of a Supervisory Repeater resolves an open question of law, it raises the same question as an Incidental Repeater: why did the Court choose to clarify an important legal question in a case where it had already done so, as opposed to some other potential vehicle?

Supervisory Repeaters are more distinctive when they involve pure error correction, meaning the enforcement of already clear legal rules. But Iuliano and Lin identify just one case of that type, and it dates back to the 1930s.<sup>28</sup> Today, purely error-correcting Repeaters may occur primarily or exclusively via summary reversals and GVRs—forms of low-cost, summary action that are excluded from Iuliano and Lin’s study of Plenary Repeaters.<sup>29</sup>

To begin exploring the relationship between Summary Repeaters and error correction, I have examined summary reversals during the Roberts Court to see whether they are also Summary Repeaters. The thirteen resulting cases are summarized in Appendix A.<sup>30</sup> As we’ll see in more detail below, Summary Repeaters are a regular event and form a significant part of the Court’s efforts at error correction and authority maintenance.

Still, a familiar question arises: when the Court so rarely engages in error correction at all, what explains the Court’s repeated efforts at error correction in same case? It is time to start considering answers to this question.

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27. *Id.* at 1372.

28. *Id.* at 1373.

29. *Id.* at 1352. For critical discussion of GVR practice, see Alex Hemmer, *Courts As Managers: American Tradition Partnership v. Bullock and Summary Disposition at the Roberts Court*, 122 YALE L.J. ONLINE 209, 219 (2013), <http://yalelawjournal.org/forum/courts-as-managers-american-tradition-partnership-v-bullock-and-summary-disposition-at-the-roberts-court> [<https://perma.cc/M5D8-MQVE>] (arguing that in some recent GVRs the Court has acted “neither in its lawmaking capacity nor—entirely—in its error-correcting capacity, but rather in its managerial capacity”); Sena Ku, Comment, *The Supreme Court’s GVR Power: Drawing A Line Between Deference and Control*, 102 NW. U. L. REV. 383, 406 (2008) (“Rather than merely providing lower courts with an opportunity to change their judgments, the GVR may be viewed as encouraging them to do so.”).

30. Emulating one aspect of Iuliano and Lin’s method, I compiled this list in part by checking the WestLaw case history for summary reversal collected in William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 3, 5 (2015) (providing a dataset that starts with the first full term of the Roberts Court and ends in mid-2014). More recent summary reversals were found on the Court’s webpage, as of October 1, 2016. Again, however, reliance on WestLaw is imperfectly accurate. Moreover, this approach cannot capture, for example, Summary Repeaters that involve one GVR and one plenary ruling.

## III. POSSIBLE EXPLANATIONS

As we've seen, the basic question posed by Repeaters is this: when there are so many cert-eligible cases available, why does the Court choose to review a single case more than once? In general, there are two kinds of answer. First, the Court's two decisions to grant cert might not be independent of one another. For instance, the fact of having granted cert once might make a case more familiar to the Justices and therefore more eye-catching on a second pass. Second, the Court might believe that it can resolve certain kinds of questions in only a relatively limited number of cases, thereby increasing the odds that it would twice choose to review some of those hard-to-find issues in the same case.

*A. Interdependence*

Why would the fact that cert had previously been granted in a particular case increase the odds of having cert granted in that same case again? There are several possibilities.

First and most importantly, the fact of a prior grant means that the Court already has substantial experience with the case. The Court's first line of review is carried out by clerks. As thousands of cert petitions arrive at the Court every year, the clerks review the submissions and draft memoranda recommending whether or not to grant.<sup>31</sup> So when a Repeater's second iteration comes knocking, there is already a memo on the case, as well as related records reflecting not just the decision to grant cert but also the ultimate disposition of the case. This extensive background experience allows both clerks and justices to more efficiently and confidently conclude that second iterations lack vehicle defects and other shortcomings. So judicial economy, epistemic confidence, and simple convenience all favor Repeaters. This point is likely to be especially powerful in cases posing fact-intensive or complex questions—perhaps including some of the capital case Repeaters discussed below.

More speculatively, the fact of a prior grant could be linked to a felt sense that the Repeater petition poses unfinished Court business or the second act in a single judicial project. Sometimes, the first iteration of a Repeater includes an ambiguity, reservation, or issue for remand that is later presented in a subsequent cert petition.<sup>32</sup> At other times, a

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31. See generally David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947 (2007) (book review).

32. See, e.g., cases discussed in Parts III & IV.

Repeater's first iteration relates to a distinctive factual controversy that the justices may want to address conclusively.<sup>33</sup> So when considering whether to review a Repeater's second iteration, the Justices (or clerks who have internalized their principals' point of view) may feel that they have already embarked on a protracted course of action and so seek to stay that course. Procedural Repeaters may often fit this bill: granting certiorari to clear away a threshold issue might increase the odds that the Court would grant review in a second iteration.<sup>34</sup>

The justices' interaction with the first iteration of a Repeater might even leave them feeling unusually responsible, institutionally and perhaps even personally, for the ultimate disposition achieved in that case. In my post, for example, I pointed out a recent summary decision in which the Court apparently engaged in pure fact-bound error correction—a rarity—because the mistake below was traceable to an error that the Court itself had committed in a prior iteration of the case.<sup>35</sup>

A Repeater's various iterations may also be interdependent in that the first iteration might create unusual opportunities for lower court insubordination, thereby justifying a second iteration. The Court's second pass might thus be justified not only in terms of error correction but also as a means of maintaining the Court's own authority over disobedient lower courts. Iuliano and Lin raise essentially this point when they suggest that the Court sometimes performs error correction when a lower court defies a Repeater's first iteration.<sup>36</sup> But while Iuliano and Lin focus on Plenary Repeaters, pure error correction or supervision is more likely to involve Summary Repeaters.

Consider *Cavazos v. Smith*, in which the Court GVR'd twice before finally summarily reversing.<sup>37</sup> At the end of its summary reversal, the Court chastised the lower court for “persist[ing] in its course, reinstating its judgment without seriously confronting the significance of the cases called to its attention.”<sup>38</sup> *Cavazos* further asserted that the lower court's “refusal to do so necessitates this Court's

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33. See, e.g., *infra* text accompanying note 59 (discussing the controversial Scottsboro Boys litigation).

34. The *Horne* Repeater seems a good example. See *infra* note 54.

35. See Re, *supra* note 1 (citing *Williams v. Johnson*, 134 S. Ct. 2659 (2014)).

36. Iuliano & Lin, *supra* note 3, at 1370.

37. See *Cavazos v. Smith*, 132 S. Ct. 2 (2011) (summary reversal); *Patrick v. Smith*, 550 U.S. 915 (2007) (vacating and remanding in light of *Carey v. Musladin*, 549 U.S. 70 (2006)); *Patrick v. Smith*, 558 U.S. 1143 (2010) (vacating and remanding in light of *McDaniel v. Brown*, 558 U.S. 120 (2010) (per curiam)).

38. *Cavazos*, 132 S. Ct. at 7–8.

action today.”<sup>39</sup> In other words, the *Cavazos* Summary Repeater expressly explained and justified itself in terms of both authority maintenance and interdependence.

Or consider the recent Summary Repeater *Amgen v. Harris*.<sup>40</sup> After GVR’ing in light of a plenary decision, the Court later summarily reversed. Notably, the summary reversal opened by noting that the Court was “consider[ing] for the second time” a particular determination by the lower court.<sup>41</sup> In other words, the Court drew a kind of equivalence between its GVR and its summary reversal. Even some plenary decisions have intimated that review became necessary when the lower court failed to take the hint of a prior GVR.<sup>42</sup>

*Cavazos* and *Amgen* illustrate that the Court sometimes uses its GVR power not just to allow for lower court reconsideration in light of new Court decisions<sup>43</sup> but also to identify error and suggest the proper result. When that effort at error-correction fails, the Court may shift to the stronger medicine of summary reversal or plenary review—creating a Repeater.

The Court’s muscular use of GVRs may help to explain why some justices have recently endeavored to emphasize that specific GVR orders do not represent suggestions on how to resolve the case on remand. For instance, Justices Clarence Thomas and Samuel Alito appended a paragraph-long disclaimer to a large number of recent GVRs.<sup>44</sup> Those disclaimers could indicate a new normal in GVR practice, whereby disclaimer-free GVRs may be widely understood as a mode of signaling desired outcomes.<sup>45</sup>

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39. *Id.* For a similar summary reversal also involving a prior GVR in light of in light of *Carey*, 549 U.S. 70, see *Wright v. Van Patten*, 552 U.S. 120 (2008).

40. 136 S. Ct. 758 (2016) (summary reversal); *Amgen Inc. v. Harris*, 134 S. Ct. 2870 (2014) (GVR in light of Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459 (2014)).

41. *Amgen*, 136 S. Ct. 758.

42. See, e.g., *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308 (2013) (noting prior GVR); *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289, 1296 (2012) (same).

43. Traditionally, GVRs are understood as “the lower court . . . being told merely to reconsider the entire case in light of the intervening precedent.” STEPHEN M. SHAPIRO ET AL., *SUPREME COURT PRACTICE* 350 (10th ed. 2013).

44. E.g., *Bonds v. Alabama*, 136 S. Ct. 2444 (2016) (Thomas, J., concurring in the decision to GVR) (emphasizing that the Court had not adjudicated the merits of the case and noting that “[o]n remand, courts should understand that the Court’s disposition of this petition does not reflect any view regarding petitioner’s entitlement to relief”). The GVRs were in light of *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

45. For more on Supreme Court signals, see Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO L.J. 921 (2016).

So while lightning may not strike twice, Repeaters do—and there’s good reason to think that the first strike makes the second more likely.

### *B. Infrequency*

The Court might seem to have access to a wide range of vehicles for resolving any given legal issue. But for certain kinds of issues, the number of potential vehicles is actually quite small. Thus, the surprising prevalence of Repeaters may stem in large part from the infrequency with which certain issues appear before the Court.

One possible source of infrequency has to do with the pool of available advocates.<sup>46</sup> Perhaps it takes a measure of expertise to generate a case that is worth the Court’s attention not once but twice. Or perhaps the Court is predisposed to grant review over knotty issues only (or especially) when presented with a case litigated by a member of the Supreme Court bar—those dazzling veteran litigators who repeatedly find their way to One First Street and even receive public praise from justices. But it is doubtful that a purely attorney-oriented account can provide anything like a complete explanation for Repeaters: the Justices’ avowed preference for expert litigants is far from absolute, and even the best advocate can’t spin certworthy gold from straw. Moreover, elite attorneys frequently join cases, including on a pro bono basis, after cert is granted—making their presence at the cert stage somewhat less valuable.

As a first step toward systematically exploring counsels’ role in creating Repeaters, Appendix B identifies the attorneys listed on the covers of petitions for cert, and briefs in opposition to cert, for the last ten Plenary Repeaters in Iuliano and Lin’s dataset, as well as a recent Repeater omitted from their dataset. Attorneys with at least five prior arguments before the Court are conventionally deemed “expert” Court practitioners.<sup>47</sup> Applying that criterion, Appendix B reflects that all but

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46. See Re, *supra* note 1.

47. See, e.g., Kedar S. Bhatia, *Top Supreme Court Advocates of the Twenty-First Century*, 1 J. LEGAL METRICS 561, 562–63 (2013). Obviously, this convention reflects a crude and incomplete measure of expertise. Some leading studies use an additional criterion, finding expertise when an attorney “is affiliated with a law firm or other comparable organization with attorneys who have, in the aggregate, argued at least ten times before the Court.” Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1502 (2008); see also Jeffrey L. Fisher, *A Clinic’s Place in the Supreme Court Bar*, 65 STAN. L. REV. 137, 149 (2013). Because the focus here is on the decision to grant cert, I do not look to the individual who argues the case or her organization; rather, I adopt an in-between approach. That is, I effectively ask whether the Court can tell that any individual “expert” is working on the specific case at issue at the time that cert is granted.

one of the eleven recent Repeaters involved an expert practitioner at the cert stage, with many involving multiple experts.<sup>48</sup> The Appendix further indicates eighteen filings by government parties, with ten involving at least one expert and eight not, as well as twenty-six by private parties, including fifteen with at least one expert and eleven not.<sup>49</sup> Of special note, nine out of fourteen private-party petitioners were represented by an expert.<sup>50</sup> Still, most of the identified Repeaters also involved attorneys, including private-party petitioners, with more limited or even no prior argument experience before the Court. Future research might explore more Repeaters, other criteria for expertise, and the trial attorneys who generated these cases in the first place.

Another partial explanation is that certain certworthy issues may spring from anomalous rulings by a single lower court operating within a single case. Once a lower court starts issuing atypical rulings in a given matter, it might continue doing so and thereby generate unusual opportunities for repeated higher-court review. This option places the spotlight on lower court judges, who frequently exert limited control over the Court's agenda by creating circuit splits, issuing sweeping decisions, or simply by defying settled law.<sup>51</sup> Iuliano and Lin indirectly suggest as much when they argue that some Supervisory Repeaters represent efforts to enforce the Court's authority over lower courts.<sup>52</sup> Additional research might explore the history of lower court defiance and, relatedly, the Court's efforts at enforcing its authority.

Other factors that can help to explain infrequency have to do with yet another institutional actor: litigants themselves. In many situations, only plaintiffs with unusually strong personal convictions will actually pursue litigation concerning important legal questions. The reasons why otherwise viable plaintiffs don't or can't sue include the financial, psychological, and opportunity costs of litigation, fear of

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48. The one case without detected expert involvement is *Graham Cty. Soil and Water Conservation Dist. v. United States ex rel. Wilson*. See Case ten, Appendix B. And even that case involved a government petitioner represented by counsel with multiple prior Supreme Court arguments.

49. As a loose comparison, Andrew Crespo reports that about thirty-eight percent of private civil arguments in the Roberts Court are given by experts. See Andrew Manuel Crespo, *Regaining Perspective: Constitutional Criminal Adjudication in the U.S. Supreme Court*, 100 MINN. L. REV. 1985, 2010 (2016).

50. Expertise is arguably most revealing for private-party petitioners, because government petitioners may automatically receive extra attention and because briefs in opposition to certiorari may attempt to discourage a grant by underrepresenting their expertise. See *Comments On "Is The Cert Process Fully Adversarial?"*, RE'S JUDICATA (May 21, 2014), <https://richardresjudicata.wordpress.com/2014/05/21/comments-on-is-the-cert-process-fully-adversarial/> [<https://perma.cc/59M8-DSQ9>].

51. See Re, *supra* note 45, at 959.

52. Iuliano & Lin, *supra* note 3, at 1372.

retaliation or social disapprobation, general distrust of the legal system, and even simple aversion to litigiousness.

Moreover, litigants generally need access to counsel, and often sophisticated counsel, to raise complex issues in the trial courts—which often occurs well before members of the Supreme Court bar get involved. When interest groups bring “test cases” or “impact litigation,” they typically do so only with a few carefully chosen plaintiffs.<sup>53</sup> Some of these factors may help to explain, for example, why the anomalous National Raisin Reserve had persisted for over eighty years without generating a serious challenge—until determined plaintiffs attracted elite attorneys and prevailed in *Horne*, yielding a recent Repeater.<sup>54</sup>

Or consider the recent Repeater *Zivotofsky*.<sup>55</sup> The federal statute at issue implicated U.S. passports for all persons born in Jerusalem, yet only a single case well posed the question of whether to enforce the statute in the face of executive non-compliance. Why? Because the relevant claim required an unusual litigation interest. There had to be someone who not only had standing but also was willing to bring suit.<sup>56</sup> In addition, the litigant had to either link up with sophisticated counsel or be found by sophisticated counsel with their own independent motivation for seeking implementation of the law. So, only a single case offered the opportunity to resolve a legal issue implicating thousands of people, the operability of a federal statute, and major issues of foreign policy. Little surprise that the Court chose to hear that particular case twice.

Finally, consider the role of the media and public opinion. When a particular controversy is perceived to be highly important, the Court might feel obligated to see it through, even if doing so takes several attempts.

For an example that implicates publicity—as well as several of the other factors described above—consider the Scottsboro Boys Repeater.<sup>57</sup> The gist of the case was that black youths were wrongfully convicted of rape in the Deep South. Iuliano and Lin view this case as

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53. See Cynthia Godsoe, *Perfect Plaintiffs*, 125 YALE L.J. F. 136 (2015); Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 NOTRE DAME L. REV. 221, 238 (1999).

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

55. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015); *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012).

56. See Jack Goldsmith, *Zivotofsky II As Precedent in the Executive Branch*, 129 HARV. L. REV. 112, 133 (2015).

57. *Patterson v. Alabama*, 294 U.S. 600 (1935); *Powell v. Alabama*, 287 U.S. 45 (1932).

an Incidental Repeater because it raised “two unrelated, but extremely important issues.”<sup>58</sup>

But the two iterations of the Scottsboro Boys case were tightly linked by facts: both iterations stemmed from a single effort at racial oppression and so were united in the public’s consciousness. The Scottsboro Boys litigation was a “cause célèbre” because it so disturbingly showcased blatantly racist criminal justice in the Deep South.<sup>59</sup> The resulting publicity generated special lawyerly attention and vice versa: talented attorneys were drawn to the buzz and controversy surrounding the litigation, but they also endeavored to enhance the case’s salience while using the resulting publicity to pursue relief.<sup>60</sup>

Ultimately, the second iteration of the Scottsboro Boys case was an “appealing” vehicle for the Court, as Michael Klarman has noted, for at least two reasons: it involved extraordinary facts, including an “embarrassing lie” ultimately documented by defense counsel; and it pertained to a case of actual innocence that “had long been established before the bar of public opinion.”<sup>61</sup> So the facts of the case, the actions of the lawyers, and the case’s publicity all interacted to generate an uncommonly, even uniquely, certworthy vehicle. And, in addition to exhibiting infrequency, the two iterations of the Scottsboro Boys cases may evidence interdependence: once the Court had become involved, it may have felt responsible to see the case through.

The foregoing possibilities are interesting in their own right, but they can also shed light on the broader institutional dynamics and personal psychologies operating at the Court. As researchers continue to explore the many obscure and conflicting influences on decision-making at One First Street, Repeaters should be part of the conversation.

### C. Three Patterns

In general, when will these sorts of litigant and counsel constraints most frequently curtail the range of vehicles available to the Court? Three patterns come to mind.

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58. Iuliano & Lin, *supra* note 3, at 1376.

59. Charles W. Wolfram, *Scottsboro Boys in 1991: The Promise of Adequate Criminal Representation Through the Years*, 1 CORNELL J.L. & PUB. POL’Y 61, 61 (1992).

60. See JAMES A. MILLER, REMEMBERING SCOTTSBORO: THE LEGACY OF AN INFAMOUS TRIAL ch. 1 (2009).

61. Michael J. Klarman, *Scottsboro*, 93 MARQ. L. REV. 379, 408 (2009) (internal quotation marks and citation omitted).

First, issues of constitutional structure may be especially likely to pose justiciability hurdles that exclude many litigants who would otherwise like to bring litigation over important questions.<sup>62</sup> So only the right kind of party, with sophisticated counsel, is likely to be able to raise structural issues. That general description seems to fit *Zivotofsky*, discussed above, as well as *Bond*, a recent Repeater posing issues of federalism and the separation of powers.<sup>63</sup>

Second are civil rights cases. While civil rights issues often implicate large numbers of people with standing, various factors discourage claims. Potential claimants might have limited means, and they may also face risks of reprisal or adverse social pressure. Moreover, civil rights attorneys often strategically focus their resources on one or more lead cases, with especially compelling plaintiffs or facts. These considerations may help to explain Iuliano and Lin's finding that civil rights cases make up a disproportionate share of the Court Repeater docket over time.<sup>64</sup>

Third and finally, consider issues pertaining to capital punishment. The pool of capital cases at any given moment in time is significant but still relatively finite, and many capital cases are unattractive vehicles in light of various forms of poor lawyering. Further, capital cases tend to be litigated for long periods of time, thus giving rise to greater opportunities for repeating. Again, Iuliano and Lin's data is suggestive: since 1990, Iuliano and Lin report twenty-seven Plenary Repeaters.<sup>65</sup> On inspection, five of them turn out to be capital cases.<sup>66</sup> Moreover, a large fraction of Summary Repeaters involve capital punishment.<sup>67</sup>

Other patterns may prove to be discernible as well, particularly in connection with the business cases that give rise to Repeaters. But the three basic patterns outlined above shed light on most of the recent Plenary Repeaters.

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62. See Goldsmith, *supra* note 56; see also *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2617 (2014) (Scalia, J., concurring in judgment) ("It is not every day that we encounter a proper case or controversy requiring interpretation of the Constitution's structural provisions. . . . We should therefore take every opportunity to affirm the primacy of the Constitution's enduring principles. . . .").

63. *Bond v. United States*, 134 S. Ct. 2077 (2014); *Bond v. United States*, 564 U.S. 211 (2011).

64. Iuliano & Lin, *supra* note 3, at 1357. Again, I assume that shortcomings in the authors' data collection do not undermine their findings. See *supra* note 3.

65. See *id.* at 1385–86.

66. The five are the *McCleskey*, *Sawyer*, *Cone*, *Miller-El*, and *Penry* Plenary Repeaters. See *id.*

67. Consider the *Smith*, *Belmontes*, *Corcoran*, *Haynes*, and *Schad* Summary Repeaters. See Appendix A.

So we can fruitfully divvy up the Repeater data into categories besides the ones that Iuliano and Lin propose. And doing so has the ability to reveal that the Court's certiorari practice is affected by a much wider range of factors than just the motivations and goals of the justices themselves. In addition, the Supreme Court bar, lower courts, litigants, and the civil rights bar all play a role in constructing the options from which the Court chooses. Further, background principles of law—like the final judgment rule, standing principles, and capital procedure—substantially influence the way that the Court goes about declaring what the law is. We need additional research to illuminate these interconnected influences—which might not only explain Repeaters but also reveal broader features of the Court's certiorari practices.

#### IV. STRATEGIC DEFERRALS

Repeaters shed light not just on the Court's constrained discretion during the certiorari process but also on its willingness to reach the merits after granting cert. This is the level of explanation that Iuliano and Lin most attend to. In the Sections below, I discuss two Repeaters that Iuliano and Lin view as good illustrations of the Court's strategic behavior. These cases suggest ways of integrating Repeaters into broader thinking about strategic deferrals by the Court.

##### A. Employment Division v. Smith

Iuliano and Lin's most provocative claim about SCOTUS strategy pertains to *Employment Division v. Smith*.<sup>68</sup> When discussing Procedural Repeaters, Iuliano and Lin describe a possible subcategory—namely, cases in which “[j]ustices 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.”<sup>69</sup> This scenario—what I will call a “Reorientation Repeater”—is very interesting, but I am not convinced that *Smith* fits the bill. Instead, *Smith* seems to pose different, though still significant, questions regarding the judicial role.

To simplify somewhat, the first iteration of *Smith* posed an important free exercise question relating to the denial of employment benefits for an apparent violation of state law—namely, peyote use. The Court remanded so that the state court below could confirm that the

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68. *Emp't Div., Dep't. of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990); *Emp't Div., Dept. of Human Res. of Or. v. Smith*, 485 U.S. 660 (1988).

69. See Iuliano & Lin, *supra* note 3, at 1367.

claimants had violated state narcotics laws.<sup>70</sup> Once the lower court clarified that the claimants had indeed violated state law, the case returned to the Court in its second iteration, yielding a major ruling concerning free exercise rights.<sup>71</sup>

In arguing that *Smith I* reoriented the dispute, Iuliano and Lin quote the views of the *Smith I* dissenters, who felt that the key issue was whether the state legislature had desired to advance its law enforcement interests when it enacted the unemployment compensation statute.<sup>72</sup> However, that was not the issue that the *Smith I* majority remanded. For the *Smith I* majority, the key unresolved question of state law was whether state law prohibited the religious use of peyote at the center of the case.<sup>73</sup>

Moreover, the suggestion that *Smith* was a Reorientation Repeater overlooks that the Court itself had changed between *Smith I* and *Smith II*. In *Smith*'s first iteration, the just-confirmed Justice Anthony Kennedy had taken no part in the Court's decision, leaving an eight-justice court that might have worried about splitting four-four on an important question.<sup>74</sup> But when *Smith II* came around, Kennedy wasn't just part of the case; he cast the deciding vote.<sup>75</sup> Moreover, Justice Sandra Day O'Connor, who had been part of the five-justice majority in *Smith I*, emphatically rejected the majority opinion in *Smith II*.<sup>76</sup> So it seems quite plausible that *Smith I* represented an effort by a majority (including O'Connor) to defer decision on the important free exercise claim presented until the Court could overcome a four-four split.

For these reasons, *Smith* is most plausibly viewed not as a Reorientation Repeater but rather as a "Deferral Repeater," or a Repeater resulting from a first iteration's postponement of decision.<sup>77</sup> Supporting that conclusion, some state-law uncertainty persisted even

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70. See *Smith*, 485 U.S. 660.

71. See *Smith*, 494 U.S. 872.

72. See Iuliano & Lin, *supra* note 3, at 1368–69 (quoting *Smith*, 485 U.S. at 675–79 (Brennan, J., dissenting)).

73. See *Smith*, 485 U.S. at 673 (“[I]n the absence of a definitive ruling by the Oregon Supreme Court we are unwilling to disregard the possibility that the State’s legislation regulating the use of controlled substances may be construed to permit peyotism or that the State’s Constitution may be interpreted to protect the practice”); see also *Smith*, 494 U.S. at 876 (“On remand, the Oregon Supreme Court held that respondents’ religiously inspired use of peyote fell within the prohibition of the Oregon statute, which ‘makes no exception for the sacramental use’ of the drug.”).

74. See *Smith*, 485 U.S. at 674 (noting that Justice Kennedy took no part).

75. See *Smith*, 494 U.S. 872.

76. See *Smith*, 494 U.S. at 891 (O’Connor, J., concurring in the judgment) (“In my view, today’s holding dramatically departs from well-settled First Amendment jurisprudence . . .”).

77. See also *supra* text accompanying note 24.

in *Smith II*—but the by-then fully staffed Court was no longer interested in postponement.<sup>78</sup>

*Smith*'s legitimacy may depend on what kind of Repeater it is. If the *Smith* Court really did try to reorient the case, as Iuliano and Lin contend, then it would represent a fairly aggressive form of agenda control by the Court, contrary to traditional norms of judicial passivity. For example, Justice Ginsburg has commented: “The Court is a reactive institution. You react to the controversies that [are] brought to the Court.”<sup>79</sup> That image of passivity is at best a simplification. But to the extent that it reflects a normative ideal or value, Reorientation Repeaters would seem strongly contrary to it.

If viewed as a Reorientation Repeater, *Smith* might be compared with *Citizens United v. FEC*, which ruled on an arguably waived facial challenge.<sup>80</sup> The majority suggested that such a waiver might be ineffective, but Justice Stevens's dissent contended that the Court's willingness to overlook the waiver transgressed important principles of judicial restraint.<sup>81</sup> As Stevens put it: “Essentially, five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law.”<sup>82</sup> For Iuliano and Lin, a similar description would apply to *Smith*'s first iteration.

By comparison, viewing *Smith* as a Deferral Repeater would pose a different set of questions regarding the judicial role. To some extent, judicial deferral or “avoidance” is a basic component of judicial restraint.<sup>83</sup> But *Smith* did not avoid a four-four split simply by issuing a definitive affirmance by an equally divided Court—a form of avoidance that the Court recently exhibited in the wake of Justice Scalia's death.<sup>84</sup> Instead, *Smith* kept the very same case alive, thereby

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78. See *Smith*, 494 U.S. at 892 (“Respondents contend that, because the Oregon Supreme Court declined to decide whether the Oregon Constitution prohibits criminal prosecution for the religious use of peyote . . . any ruling on the federal constitutional question would be premature.”)

79. Justice Ginsburg on *DOMA and Roe v. Wade*, CONSTITUTION DAILY (Sept. 9, 2012), <http://blog.constitutioncenter.org/2013/09/video-justice-ginsburg-on-doma-and-roe-v-wade/> [<https://perma.cc/ZXT9-P64X>]; see also *A Conversation with Justice Ruth Bader Ginsburg*, 53 U. KAN. L. REV. 957, 968 (2005) (“Justice Ginsburg: Remember that a court is a reactive institution. Unlike the legislature, we don't make our own agenda. . . . We take what people bring to us.”).

80. *Citizens United v. FEC*, 558 U.S. 310 (2010).

81. See *id.* at 330, 397.

82. *Id.* at 398.

83. *E.g.*, *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 157 (1984) (collecting sources).

84. See, *e.g.*, *United States v. Texas*, 136 S. Ct. 2271 (June 23, 2016) (mem); *Friedrichs v. California Teachers Association*, 136 S. Ct. 1083 (Mar. 29, 2016) (mem). Notably, the affirmation by the equally divided Court in *Texas* did keep the case alive, since it had been heard in an interlocutory posture.

allowing for its dramatic resolution at a later date. And to the extent that *Smith* presented an uncommon opportunity to reach those issues, the Court's efforts at keeping that specific case alive could be viewed as a form of self-empowerment. What's more, the deferral in *Smith* may suggest that the justices have a custom of endeavoring to preserve the Court's later ability to decisively establish broadly applicable law.

### B. *Fisher v. University of Texas*

Iuliano and Lin also discuss *Fisher v. University of Texas at Austin*.<sup>85</sup> But the best explanation for the *Fisher* Repeater is both more and less interesting than the authors suggest.

*Fisher's* first iteration was expected to limit affirmative action in higher education. Instead, the Court issued a near-unanimous remand for the lower court to apply a somewhat more stringent standard of review on the merits.<sup>86</sup> When the lower court again ruled in favor of the University of Texas's affirmative action program, the Court again granted certiorari and—surprisingly—affirmed. Iuliano and Lin argue that the outcome in *Fisher II* stemmed from Justice Kennedy's aversion to exposing the Court to public criticism.<sup>87</sup>

It's easy to see why Iuliano and Lin contend that the Court remanded in *Fisher I* so as to defer a controversial decision.<sup>88</sup> Shortly after *Fisher I*, I wrote that it represented an application of the “doctrine of one last chance,” whereby “recent Supreme Court majorities have tended to engage in avoidance just once before issuing disruptive decisions.”<sup>89</sup> Sometimes, as in *Shelby County v. Holder*, the Court ultimately follows through when it again considers issuing the disruptive decision.<sup>90</sup> But part of the “one last chance” doctrine's appeal is that it creates time for the Court to change its mind or its composition.<sup>91</sup> *Fisher* illustrates that a decision deferred under the “one last chance” doctrine might never come to pass at all.

Yet *Fisher* ultimately proved more complicated than either my original “one last chance” story or Iuliano and Lin's deferral narrative. The key question, as with Repeaters generally, is: why review the same case twice? Part of the answer may be that *Fisher* was, in effect, the

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

86. *Fisher*, 133 S. Ct. 2411.

87. See Iuliano & Lin, *supra* note 3, at 1367.

88. See *id.* at 1366.

89. See Richard M. Re, *The Doctrine of One Last Chance*, 17 GREEN BAG 2D 173, 173 (2014).

90. See *id.* at 175 (discussing *Shelby County v. Holder*, 133 S. Ct. 2612 (2013)).

91. See *id.* at 179–80.

only vehicle available. Consistent with the analysis outlined above,<sup>92</sup> *Fisher* was a rarity because it was an impact case brought by an ideologically motivated plaintiff seeking to bring a controversial constitutional claim. Indeed, the Supreme Court database codes *Fisher* as a civil rights case.<sup>93</sup> So *Fisher* nicely fits the explanatory framework outlined above in Section III.C.

But why did the Court choose to issue a merits decision in *Fisher II* at all? Having deferred decision in *Fisher I*, there was no obvious need to grant review in the case again. If the decision below had gotten it right, or even plausibly right, then the Court could have simply left that ruling undisturbed. Just about a year earlier, after all, the Court had initially declined certiorari in cases concerning the constitutional right to same-sex marriage, even though numerous circuit courts had invalidated state heterosexual-marriage only laws.<sup>94</sup> Compared with that discretionary denial of review, denying cert in *Fisher II* would have been unremarkable—and easy.

Similar possibilities for avoidance were available even after the Court had granted review in *Fisher II*. For instance, the Court could have dismissed the writ as improvidently granted—as it had recently done in *First American Financial v. Edwards*, apparently to avoid immediate resolution of a trying question during an equally trying term.<sup>95</sup> (*First American* may have been a “one last chance” decision, with the Court not following through on the disruptive decision in *Spokeo v. Robbins*, possibly because of Justice Scalia’s death.<sup>96</sup>) Or the Court could have once again kept the *Fisher* case alive while postponing resolution. Indeed, Kennedy commented at oral argument that the first remand hadn’t succeeded in clarifying the record, since the Fifth Circuit didn’t return the case to the trial court.<sup>97</sup> So, why not remand again?

Given all these ways of avoiding a merits decision, the *Fisher* majority must have wanted to resolve the case the way that they did. So, assuming that Kennedy really was leaning the other way in *Fisher I*, his thinking must have evolved into the position that he ultimately expressed in his *Fisher II* majority opinion. That straightforward explanation contrasts with Iuliano and Lin’s suggestion that Kennedy

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92. See *supra* Part III.

93. See Harold J. Spaeth, et al., *2016 Supreme Court Database, Version 2016 Release 01* (August 13, 2016).

94. See Josh Blackman & Howard M. Wasserman, *The Process of Marriage Equality*, 43 HASTINGS CONST. L.Q. 243, 282 (2016).

95. See *First Am. Fin. Corp. v. Edwards*, 132 S. Ct. 2536 (2012) (DIG’ing the case).

96. See *Spokeo, Inc. v. Robbins*, 136 S. Ct. 1540 (2016).

97. See Transcript of *Fisher v. Univ. of Tex. at Austin*, No. 14–981, 136 S. Ct. 2198 (2016), at 19–20.

was reluctant to vote for “a sweeping constitutional change . . . in a racially charged environment without a full complement of Justices.”<sup>98</sup> Quite apart from any concerns about “the Court’s institutional legitimacy,”<sup>99</sup> Kennedy’s views appear to have changed, as some commentators have suggested.<sup>100</sup>

Moreover, *Fisher* illustrates how Iuliano and Lin’s three Repeater categories can blur.<sup>101</sup> The authors describe *Fisher* as a Procedural Repeater,<sup>102</sup> but the remand in *Fisher I* pertained to the standard of review on the merits and did not involve any of the many procedural issues that were raised in the case, such as standing.<sup>103</sup> *Fisher* could alternatively be coded as a Supervisory Repeater, since “the initial decision did not clearly resolve an issue in dispute,” and the second iteration clarified that issue.<sup>104</sup> Put more generally, Procedural Repeaters that involve deferral are a lot like Supervisory Repeaters that clarify a prior ruling. In both contexts, the Court is pacing itself, including by creating room for input from lower courts.

So the *Fisher* Repeater—like *Smith*, discussed above—can be placed among a large and heterogeneous category of deferral decisions—a category that includes not just many Procedural Repeaters but also Supervisory Repeaters, as well as many “one last chance” cases that aren’t Repeaters at all. In all these situations, the Court may be restrained, but it is also far from the “reactive” institution that Justice Ginsburg and others have described (or idealized). So when commentators strive to understand and evaluate the Court’s complex pattern of strategic deferrals, Repeaters should play a significant role.

## CONCLUSION

Repeaters offer a window into the Court’s broader decision-making practices, not just as the cert stage but at the merits stage as well. Aided by Iuliano and Lin’s research, scholars should integrate Repeaters into broader discussion of how SCOTUS behaves. Repeaters are particularly useful in helping to illuminate the Court’s constrained

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98. See Iuliano & Lin, *supra* note 3, at 1367.

99. See *id.*

100. See, e.g., Joan Biskupic, *Justice Kennedy’s Evolution on Race*, CNN.COM (Aug. 6, 2016, 8:10 AM), <http://www.cnn.com/2016/08/06/politics/anthony-kennedy-scotus-race-voting/> [<https://perma.cc/59WB-8MPG>].

101. Again, the authors themselves acknowledge that some cases do “straddle the lines,” though they single out *Fisher* as an exemplar Procedural Repeater. Iuliano & Lin, *supra* note 3, at 1361–62, 1365.

102. *Id.* at 1365.

103. See *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013).

104. Iuliano & Lin, *supra* note 3, at 1370.

ability to control its own docket. To show as much, this response essay has explored Summary Repeaters, the makeup and behavior of attorneys who bring Repeaters, and the reasons why the Court sometimes defers major rulings. But there is still more work to be done.

APPENDIX A:  
RECENT SUMMARY REVERSALS THAT ARE ALSO REPEATERS

This table was assembled by checking the Westlaw history of the summary reversals listed in the Appendix to Will Baude’s *Shadow Docket*,<sup>105</sup> as well as subsequent summary reversals listed on the Supreme Court website, as of October 1, 2016. To be included, a case had to have a summary reversal as well as at least one plenary merits ruling, additional summary reversal, or GVR. The table does not indicate orders to certify questions to state courts or the resulting state court decisions. Many thanks to Elizabeth Arias for assistance in compiling the information in this table.

	First Iteration	Second Iteration	Third Iteration
1	<i>Amgen Inc. v. Harris</i> , 134 S. Ct. 2870 (2014)  (GVR)	<i>Amgen Inc. v. Harris</i> , 136 S.Ct. 758 (2016)  (Summary Reversal)	
2	<i>Johnson v. Williams</i> , 133 S. Ct. 1088 (2013)  (Plenary Decision)	<i>Williams v. Johnson</i> , 134 S. Ct. 2659 (2014)  (Summary Reversal)	
3	<i>Ryan v. Schad</i> , 131 S. Ct. 2092 (2011)  (GVR) <sup>106</sup>	<i>Ryan v. Schad</i> , 133 S. Ct. 2548 (2013)  (Summary Reversal)	
4	<i>Patrick v. Smith</i> , 550 U.S. 915 (2007)  (GVR)	<i>Patrick v. Smith</i> , 558 U.S. 1143 (2010)  (GVR)	<i>Cavazos v. Smith</i> , 132 S. Ct. 2 (2011)  (Summary Reversal)
5	<i>Corcoran v. Levenhagen</i> , 558 U.S. 1 (2009)  (Summary Reversal)	<i>Wilson v. Corcoran</i> , 562 U.S. 1 (2010)  (Summary Reversal)	
6	<i>Thaler v. Haynes</i> , 559 U.S. 43 (2010)  (Summary Reversal)	<i>Haynes v. Thaler</i> , 133 S. Ct. 2764 (2013)  (GVR)	

105. See Baude, *supra* note 30. Like Baude, I count summary orders of vacatur as summary reversals. See *id.* at 22 n.69; see also *supra* note 6.

106. The direct appeal had also reached the Court. See *Schad v. Arizona*, 501 U.S. 624 (1991). When the Court reviews a criminal conviction on direct and habeas, the two resulting cases—and, in this context, they are two cases—could be called a “Collateral Repeater.”

	First Iteration	Second Iteration	Third Iteration
7	<i>Brown v. Belmontes</i> , 544 U.S. 945 (2005)  (GVR)	<i>Ayers v. Belmontes</i> , 549 U.S. 7 (2006)  (Plenary Decision)	<i>Wong v. Belmontes</i> , 558 U.S. 15 (2009)  (Summary Reversal)
8	<i>Nelson v. US</i> , 552 U.S. 1163 (2008)  (GVR)	<i>Nelson v. US</i> , 555 U.S. 350 (2009)  (Summary Reversal)	
9	<i>Spears v. US</i> , 552 U.S. 1090 (2008)  (GVR)	<i>Spears v. US</i> , 555 U.S. 261 (2009)  (Summary Reversal)	
10	<i>Moore v. US</i> , 552 U.S. 1090 (2008)  (GVR)	<i>Moore v. US</i> , 555 U.S. 1 (2008)  (Summary Reversal)	
11	<i>Schmidt v. Van Patten</i> , 549 U.S. 1163 (2007)  (GVR)	<i>Wright v. Van Patten</i> , 552 U.S. 120 (2008)  (Summary Reversal)	
12	<i>Iran v. Elhai</i> , 546 U.S. 450 (2006)  (Summary Reversal)	<i>Iran v. Elhai</i> , 556 U.S. 366 (2009)  (Merits Decision)	
13	<i>Stewart v. Smith</i> , 536 U.S. 856 (2002)  (Summary Reversal)	<i>Schriro v. Smith</i> , 546 U.S. 6 (2005)  (Summary Reversal)	

APPENDIX B:  
CERT STAGE COUNSEL IN RECENT PLENARY REPEATERS

Cases are drawn from Iuliano and Lin's Appendix, as well as a recent case omitted from their dataset.<sup>107</sup> Counsel information is taken from petitions for cert and briefs in opposition. Attorney experience is determined by searching for the attorneys on Westlaw, Oyez.com, and, where possible, firm websites. Thanks to Elizabeth Arias for assistance in compiling this information.

Underline: Counsel of Record, if listed

**Bold**: At least one listed attorney determined to have had five or more SCOTUS oral arguments at the time of filing

*Italics*: Government Party

Case Name	First Petitioner Attorney	First Respondent Attorney	Second Petitioner Attorney	Second Respondent Attorney
1 Fisher v. University of Texas	<u>Bert W. Rein</u> , William S. Consovoy, Thomas R. McCarthy, Claire J. Evans	<i>Greg Abbott, Daniel T. Hodge, <u>Jonathan F. Mitchell</u>, Joseph D. Hughes, James C. Ho</i>	<u>Bert W. Rein</u> , William S. Consovoy, Thomas R. McCarthy, Claire J. Evans, Brendan J. Morrissey, Paul M. Terrill, J. Michael Connolly	<i>Patricia C. Ohlendorf, Douglas Laycock, James C. Ho, Andrew P. LeGrand, Gregory <u>G. Garre</u>, Maureen E. Mahoney, J. Scott Ballenger, Elana Nightingale Dawson, Lori Alvino McGill</i>
2 Franchise Tax Board of California v. Hyatt	<i>Bill Lockyer, Manuel M. Medeiros, Timothy G. Laddish, Wm. Dean Freeman, Felix E. Leatherwood</i>	Mark A. Hutchison, Donald J. Kula, <u>H. Bartow Farr, III</u> , Peter C. Bernhard,	<i>Scott W. DePeel, Pat Lundvall, Debbie Leonard, McDonald, <u>Paul D. Clement</u>, George W. Hicks, Jr., C. Harker Rhodes IV,</i>	Aaron M. Panner, Peter C. Bernhard, <u>H. Bartow Farr, III</u> , Donald J. Kula, Mark A. Hutchison
3 Horne v. Department of Agriculture	Brian C. Leighton, <u>Michael W. McConnell</u> , Aditya Bamzai	<i><u>Donald B. Verrilli, Jr.</u>, Stuart F. Delery, Michael S. Raab, Joshua Waldman</i>	Brian C. Leighton, <u>Michael W. McConnell</u> , John C. O'Quinn, Stephen S. Schwartz, Devin A. DeBacker	<i><u>Donald B. Verrilli, Jr.</u>, Joyce R. Branda, Michael S. Raab, Joshua Waldman</i>

107. See *supra* note 3 (discussing the *Hyatt* Repeater).

Case Name	First Petitioner Attorney	First Respondent Attorney	Second Petitioner Attorney	Second Respondent Attorney
4 Zivotofsky v. Clinton; Zivotofsky v. Kerry	<u>Nathan Lewin</u> , Alyza D. Lewin	<u>Neal Kumar Katyal</u> , Tony West, Douglas N. Letter, Lewis S. Yelin	<u>Nathan Lewin</u> , Alyza D. Lewin	<u>Mary E. McLeod</u> , <u>Donald B. Verrilli, Jr.</u> , Stuart F. Delery, Douglas N. Letter, Dana Kaersvang
5 CSX Transportation, Inc. v. Alabama Dep't of Revenue; Alabama Dep't of Revenue v. CSX Transportation, Inc.	Gary Feinerman, Tacy F. Flint, Ellen M. Fitzsimmons, Joel W. Pangborn, <u>Carter G. Phillips</u> , James W. McBride	<u>Margaret Johnson McNeill</u>	<u>Mark Griffin</u> , Margaret Johnson McNeill, Keith Maddox, Luther Strange, <u>John C. Neiman, Jr.</u> , Andrew L. Brasher	Ellen M. Fitzsimmons, Joel W. Pangborn, <u>James W. McBride</u> , Stephen D. Goodwin, Peter J. Shutz
6 Erica P. John Fund, Inc. v. Halliburton Co.; Halliburton Co. v. Erica P. John Fund, Inc.	Neil Rothstein, E. Lawrence Vincent, <u>David Boies</u> , Caryl L. Boies, Carl E. Goldfarb	Robb L. Voyles, Jessica B. Pulliam, Donald E. Godwin, David D. Sterling, <u>Aaron M. Streett</u> , R. Alan York	Evan A. Young, Wm. Bradford Reynolds, David D. Sterling, <u>Aaron M. Streett</u> , Benjamin A. Geslison	Lewis Kahn, Neil Rothstein, E. Lawrence Vincent, <u>David Boies</u> , Carl E. Goldfarb
7 Bond v. United States	<u>Paul D. Clement</u> , Ashley C. Parrish, Candice Chiu	<u>Neal Kumar Katyal</u> , Lanny A. Brewer, Kirby A. Heller	Ashley C. Parrish, Adam M. Conrad, Robert E. Goldman, <u>Paul D. Clement</u> , Erin E. Murphy	<u>Donald B. Verrilli, Jr.</u> , Lisa O. Monaco, Virginia M. Vander Jagt
8 FCC v. Fox Television Stations, Inc.	<u>Matthew B. Berry</u> , Joseph R. Palmore, Daniel M. Armstrong, Jacob M. Lewis, Nandan M. Joshi, <u>Paul D. Clement</u> , Jefery S. Bucholtz, Thomas G. Hungar, Eric D. Miller, Thomas M. Bondy	Susan Weiner, <u>Miguel A. Estrada</u> , Andrew S. Tulumello, Matthew D. McGill Ellen S. Agress, Maureen A. O'Connell, <u>Carter G. Phillips</u> , R. Clark Wadlow, Jennifer Tatel, David S. Petron, Jonathan H. Anshell, Robert Corn-Revere, Ronald G. London, Amber L. Husbands, David M. Shapiro, Susanna M. Lowy, <u>Seth P. Waxman</u>	<u>Austin C. Schlick</u> , Peter Karanjia, Jacob M. Lewis, Nandan M. Joshi, <u>Neal Kumar Katyal</u> , Tony West, Malcolm L. Stewart, Joseph R. Palmore, Thomas M. Bondy, Anne Murphy	Ellen S. Agress, Maureen A. O'Connell, <u>Carter G. Phillips</u> , Mark D. Schneider, James P. Young, David S. Petron, Ryan C. Morris

Case Name	First Petitioner Attorney	First Respondent Attorney	Second Petitioner Attorney	Second Respondent Attorney
9 Marshall v. Marshall; Stern v. Marshall	Philip W. Boesch, Jr., Howard K. Stern, <u>Kent L. Richland</u> , Dana Gardner Adelstein	Thomas C. Goldstein, <u>G. Eric Brunstad, Jr.</u> , Rheba Rutkowski, Renee M. Dailey	Philip W. Boesch, Jr., Bruce S. Ross, Vivian L. Thoreen, <u>Kent L. Richland</u> , Alan Diamond, Edward L. Xanders	Don Jackson, <u>G. Eric Brunstad, Jr.</u> , Collin O'Connor Udell, Matthew J. Delude, Joshua W. B. Richards, Kate O'Keffe
10 Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson	<i>Roy Cooper, <u>Christopher G. Browning, Jr.</u>, Jill B. Hickey, Ben O. Bridgers</i>	<u>Mark Hurt</u> , Brian S. McCoy	<i>Roy Cooper, <u>Christopher G. Browning, Jr.</u>, Zeyland G. McKinney, Jr., Sean F. Perrin</i>	<u>Mark T. Hurt</u>
11 Bell v. Cone; Cone v. Bell <sup>108</sup>	<i>Michael E. Moore, Amy L. Tarkington, <u>Jennifer L. Smith</u></i>	Robert L. Hutton, Paul R. Bottei	<u>Paul R. Bottei</u> , Pamela S. Karlan, Jeffery L. Fisher, <u>Thomas C. Goldstein</u> , Patricia A. Millett, Amy Howe, Kevin K. Russell	<i>Robert E. Cooper, Jr., Michael E. Moore, <u>Jennifer L. Smith</u></i>

108. *Bell* is actually a Summary Threepeater, since it involved a summary reversal in addition to the plenary rulings that Iuliano and Lin identify. See *Bell v. Cone*, 543 U.S. 447 (2005) (summary reversal).