Criticism from Below

THE SUPREME COURT'S DECISION TO REVISIT CASES

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ABSTRACT

The Supreme Court sometimes chooses to use its limited time to revisit earlier decisions. In doing so, the justices signal the importance of reasserting, correcting, or reconsidering their arguments. We find that the likelihood of the Supreme Court revisiting a case in a given year increases significantly as the number of circuit courts critical of that opinion increases. These results suggest that an acknowledgment of the important role of the circuit courts influences the decision to revisit cases. Even if the Court merely clarifies or reinforces earlier opinions, criticism in the circuits prompts the Court to take some action. Though the Supreme Court's word is final, barring a constitutional amendment or legislative override in nonconstitutional cases, the mechanism of criticism in the circuits allows reconsideration of many issues already decided by the Court and sheds light on the importance of institutional structures to the maintenance of the rule of law.

The US Supreme Court controls its own docket, and it hears a very small number of cases. Of the thousands of petitions the Court receives each year, it hears fewer than 100. Yet, the justices sometimes choose to use their limited time and resources to revisit prior cases and specific issue areas in which they have already issued a decision. We find that the Court is more likely to revisit cases when multiple circuit courts of appeals have criticized those decisions. These findings provide evidence that the circuit courts have an influential role in prompting the Supreme Court to reconsider issues. This process provides another institutional check on the finality of Supreme Court decisions. Though the Supreme Court's word is conclusive, short of the passage of a constitutional amendment or legislative override in nonconstitutional cases, the mechanism of criticism in the circuit courts of appeals

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encourages reconsideration of many issues already decided by the Court and sheds light on the importance of institutional structures to the maintenance of the rule of law.

The Supreme Court's decision to revisit a case indicates that the Court thinks something within that case needs to be either reconsidered or reasserted. This opinion may arise out of contention within the Court itself or out of confusion in the lower courts about the meaning of the case. When the justices revisit a decision, they are sending a signal about the importance of an issue and the priority of properly expressing their opinion on a matter. As a result, it is vital to understand when and under what circumstances the justices will revisit cases in order to gain some insight into how the Court evaluates ongoing controversies and their legal relevance.

Some work in the literature considers the related question of the Court's decision to overrule previous cases (e.g., Ulmer 1959; Schmidhauser 1962; Danelski 1986; Banks 1991, 1999; Eskridge 1991; Brenner and Spaeth 1995; Spriggs and Hansford 2001), but little work has been done to consider the larger spectrum of cases that the Court revisits. It is important to study when and why the Court overrules cases. At the same time, overruling is only a small subset of revisiting. The Court revisits its prior decisions much more frequently than it overrules those decisions. The justices may reinforce a prior decision or change their earlier interpretation. They may extend a prior decision to cover more cases, or they may restrict it to a smaller set of cases. On occasion, the justices overrule an earlier decision, but it is more likely that they will follow the earlier decision or change it in a less profound way. Understanding the factors that go into the justices' decision to revisit a case can help inform our understanding of the stability of precedent as well as the interaction between the Supreme Court and lower courts.

Revisiting is conceptually but paradoxically linked to the rule of law. On the one hand, revisiting implies that the Supreme Court rejects or qualifies the principle of justice and of the rule of law that like cases should be treated alike. If the Court decides to revisit a case, it signals that it is open to reevaluating established legal principles in general, and continued revisiting in a particular issue area may give the impression that legal doctrine in that area is unsettled. This notion may invite continued disobedience to either the law itself or at least the judiciary's latest interpretation of the law. On the other hand, the Court may also revisit decisions simply to reassert its own earlier doctrine against wayward circuits or to clarify its doctrine for the sake of confused circuits. In other words, the Court may revisit cases in order to strengthen its authority over the lower courts. If, in the Supreme Court's view, a circuit court erroneously limited a Supreme Court precedent to too narrow a set of circumstances, the Supreme Court could use revisiting to ensure that its own precedents are given the respect the Court thinks they deserve. Alternatively, a circuit court that gives a Supreme Court precedent an implausibly broad scope could be reined in by Supreme Court revisiting. In these cases, the Supreme Court's revisiting could be viewed as strengthening the rule of law.

Revisiting would be especially problematic for the rule of law if it simply follows the ideological preferences of the current justices in relation to the ideological preferences

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of the justices on the enacting Court. If, however, the justices decide to revisit cases on the basis of at least in part legal or institutional considerations, this would help resolve the paradoxical relationship between revisiting and the rule of law. Circuit court criticism of earlier Supreme Court decisions may signal to the Supreme Court that its earlier, enacting decision either was such a poor interpretation of the relevant laws or was so insufficiently clear that it would lend itself to a weakening of the rule of law. Even if the Supreme Court is responsive to circuit court criticism in its decisions to revisit cases, there is little danger of the Supreme Court buckling under merely ideological pressure from the lower courts, since the Supreme Court is free to reject circuit criticism and reassert its earlier holding.

We hypothesize that the Court is influenced by legal or institutional factors when it decides to revisit an earlier case, which would mitigate the dangers that revisiting poses to the rule of law. We test the effect of criticism from circuit courts on the likelihood of Supreme Court revisiting, while controlling for ideological changes between the enacting and revisiting Supreme Court. We find that the Court is actually responsive to the criticisms of lower courts. When multiple circuits criticize a decision, that action prompts the Court to consider that something may be wrong with the enacting decision and to think about the issue again. Even if the Court merely clarifies or reinforces its earlier opinion by revisiting the case in a positive manner, dissent in the circuits prompts the Court to take some action and thus strengthens the rule of law. In addition to circuit criticism, we also consider the legal/institutional factors of whether the enacting Court was divided, the legal complexity of the decision, and the possibility that potential litigants are motivated to ask the Supreme Court to revisit a case through the presence of concurring opinions at the time of the enacting decisions.

To test this theory, we examine the issue of revisiting using as our base set of cases the decisions issued by the Supreme Court from the 1986 term through the 2012 term. We find that the Court is more likely to revisit a case when multiple circuit courts criticize the decision. *United States v. Lopez*, 514 U.S. 549 (1995), presents a concrete example of the outcome observed in our findings. The decision in this case marked a substantial shift in the Supreme Court's Commerce Clause and federalism jurisprudence. The Eleventh Circuit issued an opinion critical of *Lopez* in 1996, and the Sixth Circuit criticized the decision in 1998. The Supreme Court revisited *Lopez* positively in both *Jones v. United States*, 526 U.S. 227 (1999), and *United States v. Morrison*, 529 U.S. 598 (2000). In 2004 the Ninth Circuit added its own criticism of *Lopez*. The Supreme Court again positively revisited that enacting decision in the Commerce Clause portion of the decision in *NFIB v. Sebelius*, 132 S.Ct. 2566 (2012). The Court responded to criticism from multiple circuits by repeatedly reasserting the reasoning it presented in *Lopez*. When a few of the circuit courts of appeals made their criticisms known, the Court issued decisions in other cases that confirmed and solidified the reasoning given in the *Lopez* decision. The Court's revisiting behavior does not arise solely in response to criticism from the circuits. Other factors, considered in detail below, come into play when the Court revisits a case. However, criticism from the circuits plays a vital role in this process of revisiting.

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The Court's decision in *Sullivan v. Hudson*, 490 U.S. 877 (1989), provides an example of this revisiting behavior in jurisprudence that addresses federal statutes instead of constitutional law. The case regarded recoverable attorneys' fees in litigation over the denial of Social Security disability benefits. Following the Court's decision, there was confusion in the lower courts regarding fees incurred during administrative proceedings held pursuant to a district court's remand order. The case was challenged in the circuits, as the Fifth Circuit chose not to follow the decision fully in two cases in 1991 and the Ninth Circuit questioned the scope of *Sullivan* in 1992. The Supreme Court acknowledged the problems with *Sullivan* and made changes to address the lower courts' concerns in *Shalala v. Schaefer*, 509 U.S. 292 (1993). The lower courts' confusion resulted from a distinction from sentence-four and sentence-six remands under Title II of the Social Security Act. After criticism from the circuits, the Supreme Court took the opportunity in *Shalala* to distinguish between these types of remands and provide guidance for each. Writing for the majority, Justice Scalia acknowledged that *Sullivan* had created problems because the wording was too vague, and he clarified the wording and its effect on claims for attorneys' fees.

The influence of the circuit courts in this process is crucial to understanding the possibility for further review after the Court issues a decision and the importance of institutional mechanisms in upholding the rule of law. Criticism from multiple circuits increases the likelihood of revisiting by the Court. These findings mean that an institutional mechanism of review exists for Supreme Court decisions. If individuals and groups continue to challenge the Court's decisions at a lower level and convince circuit courts to criticize those decisions, the Supreme Court is much likelier to revisit the issue. This approach certainly does not guarantee that the Court will overturn or substantially change its earlier opinions. The vast majority of revisiting is positive, reaffirming the Court's enacting decision. Moreover, these findings illuminate the role that even informal institutional mechanisms have in mitigating threats to the rule of law. Circuit courts, and individuals who appeal their cases to those courts, can criticize the Supreme Court's decisions and prompt the Court to consider issues again without ignoring the enacting decisions of the Court. In turn, this process gives the Court an opportunity to revisit issues so that the justices may reassert or change their decisions.

EXPLAINING THE SUPREME COURT'S REVISITING BEHAVIOR

While there is some discussion in the literature of the Court overruling previous cases, little work has been done to consider the larger spectrum of cases that the Court revisits. The overturning literature has indicated that numerous factors have a relationship to overturning. Banks (1999) concludes that several legal factors have a relationship to overturning, showing that it is important whether or not the enacting Court was divided and that the longer a precedent has existed and people have relied on it, the less likely it is that a later Court will overturn it. Spriggs and Hansford (2001) look at the Supreme Court between 1946 and 1995, and they find strong evidence that ideological differences between the

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overturning and enacting Courts, as well as earlier Supreme Court criticism of a decision, have a relationship with the Court's overturning behavior. They also emphasize the importance of nonideological factors in overturning behavior, suggesting that "the role of legal norms" is important (1107). More recently, Benjamin and Desmarais (2012) have considered a larger spectrum of negative revisiting of earlier Supreme Court precedent. They find that greater ideological breadth in enacting decisions or larger majority coalitions make it less likely that a future Supreme Court will overturn, criticize, or question their earlier, enacting decision. Strategically, this means that individual justices have an incentive to adjust opinions in order to build larger and more diverse Court majorities in order to protect their opinions from a later Court.

Another set of literature related to our study considers the factors that affect Supreme Court decisions to grant certiorari (Caldeira and Wright 1988; Cameron, Segal, and Songer 2000; Black and Owens 2009; Owens 2010; Clark and Kastellec 2013). While our research addresses the Supreme Court's revisiting behavior, we recognize that there is overlap between decisions to grant certiorari and revisiting behavior, since it may be at the agenda-setting stage that many decisions to revisit earlier precedents are actually made. Cameron et al. (2000) argue that lower court behavior can signal to Supreme Court justices whether it is worthwhile to hear a case, since justices would consider the ideological predispositions of lower courts as indicators of where they might eventually come down on an issue. Caldeira and Wright (1988) argue that amicus curiae briefs at the agenda-setting stage have a positive relationship with Supreme Court decisions to grant certiorari—even if the amicus briefs argue against granting certiorari. Black and Owens (2009) argue that the Supreme Court considers legal factors in addition to ideological preference when making certiorari decisions.

This discussion of briefs gives rise to an understanding of how the Court likely learns about criticism from the circuit courts. Criticism and points of contention are most likely brought up in briefs. The lawyers' briefs and amicus briefs both present arguments and bring up relevant information from the decisions of lower courts, and they have been shown to successfully convey information to the justices (Spriggs and Wahlbeck 1997; Collins 2004; Corley 2008). These channels of information likely allow the justices to become aware of criticism from the courts below. In addition, law clerks act as a crucial conduit of information for the justices (Perry 1991). Though the justices will not read all of the potentially relevant details from decisions in the lower courts, their clerks are much likelier to become aware of criticism from below and to convey that information to the justices. Briefs and clerks allow the justices to easily learn about criticism from the circuit courts of appeals, both at the agenda-setting stage and at the merits stage.

We hypothesize that there are a number of factors that result in a higher likelihood that the Court will revisit a particular decision, particularly criticism by the circuit courts of appeals, as well as the presence of concurring opinions in the enacting decision, the complexity of the original case, a close vote in the original case, the ideological distance between the enacting and revisiting Courts, the issue area of each enacting decision, and

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the salience of the issue at the time of the original decision. We argue that there must be something controversial or uncertain about the original decision or its application in practice for the Court to revisit a case. Even if the Court simply affirms what it said before, the process of accepting a follow-up case on appeal indicates that some of the justices think that the finding needs to be restated.

We rely on *Shepard's Citations* to operationalize measures for Supreme Court revisiting as well as circuit court criticism. Among other things, *Shepard's* "indicates how a particular court opinion is legally interpreted by the subsequently decided cases that cite it" (Spriggs and Hansford 2000, 329). As positive political scientists became more interested in the Supreme Court's treatment of precedent and its behavior with respect to overturning its own decisions, *Shepard's Citations* became a natural source for data on treatment of Supreme Court decisions. This turn toward *Shepard's* by political scientists necessitated a verification of the reliability of the *Shepard's* data so that they could be employed in quantitative analysis.

Spriggs and Hansford published an analysis of the reliability of *Shepard's Citations* in 2000. Their study supports the overall reliability of *Shepard's* for use in quantitative political science.[1] They do warn future researchers of several problems, none of which is fatal to our project.[2] Our article utilizes a treatment that Spriggs and Hansford do not analyze: "not followed by." We interpret "not followed by" literally and treat it as implicit circuit criticism that the Supreme Court could take notice of.

We consider that the Court has revisited a prior decision when the majority opinion in a subsequent case follows, criticizes, limits, questions, or overrules the earlier case. If the Court follows a previous case, it is either applying that finding under a different set of circumstances or repeating what it said before. However, we might wonder why the Court would do so when lower federal courts should be well suited to the task of applying the Court's particular decisions to a variety of circumstances. In these cases, something appar-

1. A conference paper from 2003 questions the use of *Shepard's* in looking at "compliance" at the state supreme court level (McClurg and Comparato 2003). That study's measure, "compliance," is far more nuanced than our general interest in Supreme Court "revisiting" or even "criticism" expressed at the circuit level. In fact, these authors find that "for scholars interested in measuring *only* the treatment of legal principle," which we are, "*Shepard's* is the best measure as it has the highest percent correct and is capable of identifying irrelevance" (27).

2. The most relevant warning to our study is to be careful with the "questioned by" and "limited by" codes. With these codes, *Shepard's* sometimes includes cases in which "it turns out that in the citing case the Court merely acknowledges that Congress has overridden the cited case" (Spriggs and Hansford 2000, 338). We decided to include these codes for three reasons. First, these categories include cases in which statutory override is not an issue. Second, there is no way to disentangle statutory override from other kinds of questioning or limiting without carefully reading all the relevant opinions. Finally, and most importantly, we still think "questioned" and "limited" would have value as circuit criticism even when there is a purported statutory override, since these categories are distinguished from the category of "superseded by" and "abrogated as stated in," which would indicate a clearer and more explicit statutory override. Even with the possibility of statutory override, cases coded as "questioned" and "limited" may still be valuable signaling devices to the Supreme Court since there is some doubt involved.

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ently causes the Court to think it is necessary to follow up and apply the ruling of a previous case. When the Court treats a prior decision negatively, some circumstances have caused the Court to reconsider its precedent and issue a decision that somehow changes the scope or impact of that original case.

One key factor that we theorize will lead the Court to revisit a prior decision is criticism from the circuit courts of appeals. The Supreme Court depends on lower courts for the application and enforcement of its decisions. There is a significant amount of literature exploring if lower courts actually do this and why (Johnson 1987; Songer, Segal, and Cameron 1994; Hochschild 2000; Benesh and Reddick 2002; Klein and Hume 2003; Corley 2009; Westerland et al. 2010; Kastellec 2011; Hansford, Spriggs, and Stenger 2013). In general, lower courts tend to follow higher courts, though ideological distance and other factors such as a nonmajority opinion from the higher court can make it more likely that a circuit court will disobey the Supreme Court. Hansford et al. (2013) have studied reverse effects within the principal-agent model, and they found that lower court applications of Supreme Court precedent in particular cases (using circuit court citations of Supreme Court enacting decisions) can help show the Supreme Court if its original decision is having its intended effect. They use Supreme Court negative treatment (what we call negative revisiting) as their dependent variable. For our purposes, it is enough for us to assume that the Supreme Court reasonably expects that lower courts will generally obey its precedents and that the Court takes notice when lower courts criticize its decisions. We aim to build on Hansford et al.'s work on interaction between the Supreme Court and the circuit courts by looking at the effect of circuit court criticism on both positive and negative Supreme Court revisiting.

In many cases, the district courts can apply Supreme Court decisions. However, when disputes continue, the circuit courts will become involved in determining exactly how to apply and interpret an opinion of the Supreme Court. Occasionally, the circuit courts use such cases as opportunities to criticize the Court's decision or to attempt to limit its scope. We hypothesize that the Supreme Court is more likely to revisit cases after criticism by the circuit courts, either to clarify a point of concern, to reassess the merits of its earlier decision, or to reassert the authority of the Court. If circuit courts have chosen to criticize the Supreme Court, we expect that the Supreme Court will often respond in some way.

DATA

Our set of base cases that we test for revisiting consists of the 2,685 decisions issued by the Supreme Court from the 1986 term through the 2012 term.[3] This period of time represents the seven natural courts during William Rehnquist's tenure as chief justice, as well as

3. In both our original model and robustness checks, we decided to exclude *Saucier v. Katz*, 533 U.S. 194 (2001), as an extreme outlier. There were more than 60 instances of circuit criticism, but nearly all of the criticism seemed to occur after the Supreme Court's negative treatment of the enacting decision.

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the four natural courts under Chief Justice John Roberts. Treating only the cases from the Rehnquist and Roberts Courts allows us to work from a base of cases with relatively small ideological shifts, though we control for the ideological shifts that do occur. We evaluate whether the Court has revisited a case through the 2012 term and whether the circuit courts of appeals have criticized a particular decision from the time in which the decision was issued through the 2013 term.

Our dependent variable represents the probability that the Supreme Court will revisit a particular case in a given term. Using *Shepard's Citations*, we measure the number of times in which the Court follows, criticizes, limits, questions, or overrules a previous decision. Of the 2,685 cases included in this study, 979 were revisited by future decisions of the Court according to our definition.[4] We count a case as "revisited" only if the majority opinion contains the positive or negative treatment.

The first circuit criticism variable that we employ is a continuous variable measuring how many times any circuit court of appeals has issued an opinion critical of a particular Supreme Court decision.[5] Again, we use *Shepard's Citations* to determine when a circuit court has issued an opinion that treats an earlier Supreme Court decision negatively or critically. If a circuit court "criticizes," "questions," "limits," or "does not follow" a particular decision of the Supreme Court, we classify that circuit court decision as critical. We do not consider "distinguished by" to be criticism in the circuit courts or revisiting at the Supreme Court in cases in which no justice in the majority thinks the case is anything other than clearly distinct from the earlier precedent. In other words, we take them at their word that the case is clearly distinct from the precedent. Theoretically, we exclude "distinguished by" since we do not assume that it is merely sophistry on the Court's part to employ such distinctions where they are warranted. Excluding "distinguished by" also helps us exclude cases that involve purely specious claims with respect to precedent. Spriggs and Hansford (2000, 336) found that "distinguished by" represented the least reliable form of negative *Shepard's* treatment, which we think provides empirical support for our decision to exclude "distinguished by" as an example of revisiting. Moreover, a random sample of 100 cases within our set revealed that there is not enough variation if we were to include the "distinguished" treatment, since 82 of those 100 cases were later distinguished by circuit courts of appeals. Because so many cases are distinguished at some point by the circuit courts, it is difficult to imagine that this treatment would be a useful signal to the Supreme Court.

4. Among the 964 cases that have been revisited by the Supreme Court, the mean number of revisits is 2.24, the median is 1, and the range runs from 1 to 54. The mean time between the term of the enacting decision and the term of the first revisit is 6.2 years. The median is 4 years, and the time frame ranges from 0 to 27 years. The mean time between the first revisit and the second revisit, in cases with two or more revisits, is 4.53 years. The median is 3 years, and the time frame ranges from 1 to 22 years.

5. We exclude circuit criticism that appears only in dissenting or concurring opinions.

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Table 1 shows the frequency of the treatments in our data set. Of the 2,689 cases included in this study, 237 were criticized, limited, not followed, or questioned by circuit courts of appeals.[6] With this variable, we try to capture the impact of each additional critical circuit decision on the Supreme Court's decision to revisit an earlier case.

The other circuit criticism variable examines the number of distinct circuit courts that criticize enacting decisions of the Supreme Court. Even if a particular circuit criticizes an enacting decision multiple times, we count that circuit only once. This variable tries to capture the impact that each additional circuit has on revisiting once that court decides to criticize earlier decisions of the Supreme Court. We consider this measure of the impact of multiple circuits more useful than considering the impact of multiple circuits when there is a circuit split, which is an essential measure to consider when thinking about the Supreme Court's decision to grant cert for the enacting case.[7] The approach we employ operates more precisely than simply capturing a circuit split would, as lower courts often criticize an enacting decision while still following it in the application of the law. Therefore, we capture critical treatments (not just critical outcomes), in addition to formal circuit splits. In our data set, 237 Supreme Court decisions were later criticized by circuit courts of appeals.[8] Of those 237 cases, all but three were also followed by circuit courts

6. *Shepard's* defines "criticized by" as an opinion in which "the citing opinion disagrees with the reasoning/result of the [enacting] case, . . . although the citing court may not have the authority to materially affect its precedential value." "Limited by" is defined as a "citing opinion [that] restricts the application of the [enacting] case, . . . finding its reasoning applies only in specific, limited circumstances." Circuit decisions that "expressed a lack of harmony with the decision of the [Supreme Court]" are coded by *Shepard's* as "not followed by." Finally, "questioned by" applies to cases in which "the citing opinion questions the continuing validity or precedential value of the [enacting] case . . . because of intervening circumstances, including judicial or legislative overruling" (alphabetical list of *Shepard's* editorial phrases, https://web.lexis.com/help/research/shepeditorialmappings.htm).

7. All four of the circuit court treatments are negative, but they register different types of criticism against the Supreme Court's decisions. Our primary measure of the number of critical circuit court opinions treats them equally. In order to check the strength of our model, we ran a test assigning each type of treatment a weighted score, based on the severity of the negative treatment. This takes into account the possibility that the Court would react more strongly to direct criticism than it would to mere questioning. "Criticized by" treatments receive 3 points, "limited by" and "not followed by" treatments each get 2 points, and "questioned by" treatments take a value of only 1 point. We also assigned weighted values to the variable that considers the numbers of critical circuits, where each critical circuit is given a maximum value of 3 if it ever issued direct criticism of the enacting decision, a value of 2 if it ever limited or did not follow an enacting decision while never directly criticizing an enacting decision, or a value of 1 if the particular circuit court only "questioned" the enacting decision without ever limiting, not following, or criticizing the enacting decision. The weighted number of critical circuit courts of appeals retains its statistically significant effect in this test.

8. Among the 238 cases that have been criticized by the circuit courts, the mean number of discrete critical opinions is 2.24, the median is 1, and the range runs from 1 critical opinion to 46. The mean time from the issuing term of the Supreme Court's enacting opinion to the year of the first criticism is 7.16 years. The median is 3 years, and the time frame ranges from 1 year to 24 years. The mean time from a first case of circuit criticism to a second is 3.28 years. The median is 2 years, and the time frame ranges from 0 to 17 years.

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Table 1. Types of Criticism from the Circuit Courts of Appeals

Critical Treatment	Number of Treatments in Circuit Courts
Criticize	200
Not follow	16
Limit	11
Question	318

Note.—The total number of treatments exceeds the total number of cases of circuit criticism because some cases contain multiple treatments.

of appeals. Table 2 shows the frequency with which multiple circuits criticized Supreme Court decisions during this period.

While scholars have begun using empirical methods to analyze the effect of circuit judge or court prestige on appellate and Supreme Court decision making (Klein and Morrisroe 1999; Bhattacharya and Smyth 2001; Lindquist and Klein 2006; McCurdy and Thompson 2011), the theoretical complexity of aggregating this sort of measure for multiple circuits over a relatively large span of time prevents us from employing such a measure when our basic unit of observation is case-year, which means that we look at each enacting case at the Supreme Court level in every year starting with the issuing term of the original opinion. We also employ quadratic terms for this variable in order to test for possible nonlinear effects.

Another variable addresses close votes and is operationalized as a measure of the number of dissenting votes. This variable is related to the approaches taken in the overturning literature (e.g., Banks 1991, 1999; Spriggs and Hansford 2001). Using the US Supreme

Table 2. Frequency of Criticism from Circuit Courts of Appeals

Number of Critical Circuits	Frequency
0	2,440
1	180
2	36
3	8
4	5
5	2
6	6
7	1
8	2
9	2
11	1
12	1

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Court Database, we count the number of dissenting votes rather than subtracting the number of votes in the minority from the number of votes in the majority. This provides a more accurate measure of the division of the Court than a simple evaluation of the number of votes for the majority. Theoretically, we assume that the justices would be more likely to be signaled by dissenting votes rather than knowledge about a close vote on an enacting case when there were abstentions present. In order to measure the effect that the type of the enacting decision has on the Court's decision to revisit a case, we employ dichotomous variables from the Supreme Court Database that indicate whether or not the enacting Court struck down either a federal or state statute.

We also control for the ideological distance between the enacting and revisiting Supreme Courts, as well as whether the issue before the Court in a particular case was salient. For ideology we employ the Martin Quinn scores for the median justice on the Court in each term (Martin, Quinn, and Epstein 2004; Epstein et al. 2007). To measure salience, we utilize the Epstein and Segal (2000) measurement of issue salience. Their measurement simply indicates "whether the *New York Times* carried a front-page story about the case" the day after the decision was handed down (72). In addition, the case had to be the "lead case in the story" and must have been "orally argued and decided with an opinion" (73). We assume that justices would be more likely to revisit salient cases both because they are more likely to be thinking about the enacting case on an ongoing basis and because they might want to placate public opinion by revisiting a case.

We also take into account case complexity, issue area, and the number of concurring opinions in each enacting decision. The complexity measure is based on a factor analysis of the number of legal issues raised by a case and the number of legal provisions involved (Wahlbeck, Spriggs, and Maltzman 1998; Spriggs and Hansford 2001). The issue area variable is drawn from the Supreme Court Database, which categorizes cases into 14 possible issue areas.[9] The concurrence variable is a count of the number of concurring opinions that accompany each enacting decision. We derived this variable from the justices-centered Supreme Court Database.[10] The Court may revisit complex cases and cases that address particular issue areas, such as criminal procedure and civil rights, more frequently. In addition, the presence of concurring opinions provides different reasoning from the Court's majority opinion, and such concurrences may invite litigants to bring issues back before the Court since concurrences "lower the credibility of a precedent" (Spriggs and Hansford 2001, 1105). These variables allow our analysis to take account of various legal factors that may be highly relevant to the Court's revisiting behavior.

9. The results of the analysis presented here are based on the use of the "issue area" variable from the Supreme Court Database. We also achieved significance for the number of circuit courts at the $p < .05$ level using the "issue" variable, which classifies cases according to 278 categories that are more specific than the "issue area" categories. This test confirms the robustness of our results, whether one wants to control for the impact of broad issue areas or very specific issues.

10. We added together the number of justices who authored discrete concurring opinions for each enacting decision.

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Finally, we control for the possibility that the Supreme Court may revisit recurring legal issues because a given enacting case is simply a relevant precedent to a larger pool of possible cases. In order to rule out this possibility, we consider the number of times enacting decisions are cited in the circuit courts of appeals. Because our unit of analysis is the case-year, we employ the average annual citation rate for each case and make it cumulative for each observational year after the original enacting case. We also achieved substantively similar results when using the static, total number of citations in our case-year analysis rather than the cumulative citation figures.

RESULTS AND ANALYSIS

We utilize a multilevel mixed-effects logistic regression in a survival model. Specifically, we use the approach employed by Carter and Sigorino (2010) and Hall and Ura (2015), analyzing the data using a logistic regression with cubic polynomial time variables to account for potential duration dependence. This approach allows us to account for the different ages of the enacting decisions, as our data set spans more than 25 years. The model assumes that each case can "die" multiple times. In the context of our theory, this means that each original decision of the Supreme Court can be revisited on multiple future occasions. This method of analysis means that the resultant probability of revisiting refers to the probability that a case will be revisited in a particular year as opposed to the probability that the case will ever be revisited. The model takes account of two possible outcomes, revisiting or no revisiting, in each year for each enacting decision. Because we incorporate the potential for duration dependence, our model adjusts the probability of revisiting by taking account of the age of each enacting decision.

In table 3 we present the results of our regression. The following variables are statistically significant, with a *p*-value less than .05: the number of critical circuit courts of appeals, the number of concurring opinions in the enacting decision, the complexity of the enacting decision, the ideological distance between the enacting court and the revisiting court, the number of dissenting votes, the salience of the case, whether the enacting decision struck down a state law, and the case's cumulative average annual citation score.

Our results strongly support our theory that criticism from the circuit courts has a substantial impact on the probability of the Court revisiting a case in any given year. These findings illuminate how we should understand the interaction between criticism in the circuits and revisiting at the Supreme Court. An institutional mechanism appears to be at play here. When the circuits speak together, the Supreme Court is more likely to hear them and respond. With only 44 cases in our time frame having been negatively revisited, as opposed to 954 cases that were positively revisited, it is reasonable to say that the Court is not consistently agreeing with criticism from the circuits.[11] But the Court is at least responding to the criticism more consistently when multiple circuits speak together.

11. Moreover, 34 of the 44 cases that were negatively revisited by a later Supreme Court were also revisited positively by the Supreme Court. Within those 34 cases that the Supreme Court negatively

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Table 3. Impact on Probability of a Revisit

	Coefficient
Number of critical circuit court opinions	.02
	(.05)
Number of critical circuit courts	.62*
	(.13)
Number of critical circuit courts^2	−.16*
	(.05)
Number of critical circuit courts^3	.01*
	(.00)
Number of concurring opinions in enacting decision	.14*
	(.04)
Complexity of enacting decision	.07*
	(.03)
Ideological distance between SC terms	.28*
	(.14)
Number of dissenting votes in enacting decision	.11*
	(.02)
Salience of enacting decision	.32*
	(.09)
Enacting decision struck down a federal law	.20
	(.21)
Enacting decision struck down a state law	−.35*
	(.17)
Cumulative citations in circuit courts	<.01*
	(.00)
Constant	−3.50
	(.13)
Observations	41,514

Note.—Fixed effects of issue area variable: civil rights: −.31* (.10); First Amendment: −.32* (.13); due process: −.28 (.17); privacy: −.16 (.21); attorneys: −.39 (.27); unions: −.70* (.26); economic activity: −.38* (.10); judicial power: −.45* (.11); federalism: −.04 (.13); federal taxation: −1.20* (.34); miscellaneous: −.75 (.51). Standard errors are in parentheses.

* $p < .05$.

However, the results show that the number of circuits issuing opinions critical of a Supreme Court decision has a nonlinear effect. As shown in figure 1, the impact is highest when two circuit courts issue critical opinions. After that, the effect slowly begins to decline. By the time six circuits have issued critical opinions, the probability of the Court revisiting a case drops below the probability of revisiting when no circuits have criticized a decision. Finally, at the point at which nine circuits have issued critical opinions, the probability of the Court revisiting a case begins to increase again. There are very few observations in our data that extend beyond this point. As we show in table 2, there are only

and positively revisited, there are 110 instances of positive revisiting and only 42 instances of negative revisiting. Among all 44 cases that are negatively revisited, there are 110 instances of positive revisiting and only 54 instances of negative revisiting.

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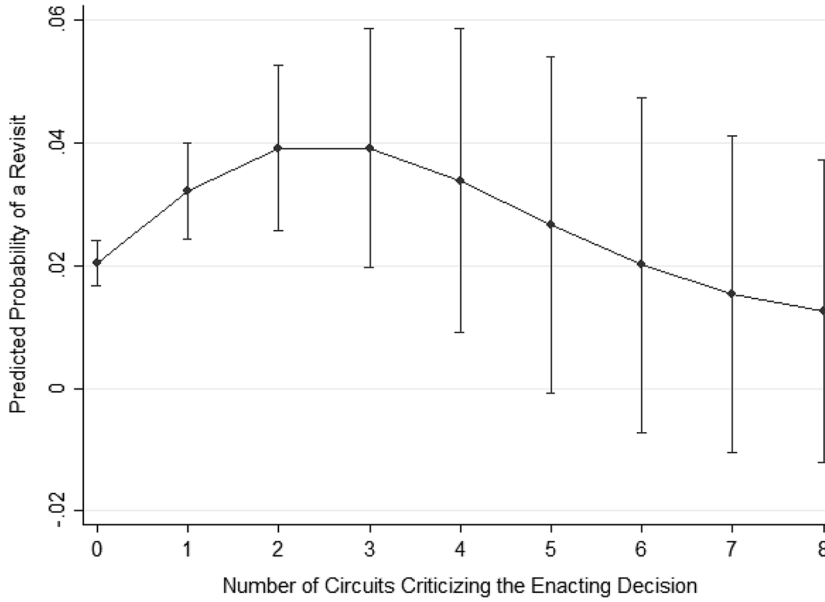


Figure 1. Impact of multiple critical circuits on the probability of revisiting. Other variables are held at their means.

20 enacting decisions in our time period that were eventually criticized by at least four separate circuit courts.

Conceptually, these results make sense. When a few of the circuits have notified the Court of their objections to a case, the Court is more likely to respond. As detailed above, the Court is much more likely to reassert its original opinion than to change it. Nevertheless, the justices pay attention to criticism from multiple circuits.

At the same time, if the Court firmly states its position on an issue and many of the circuits disagree, it makes sense that the Court would not continue to reassert itself. This is particularly likely because the circuits often criticize an opinion while following it. That is to say, the lower court judges apply the enacting decision as ordered by the Supreme Court, but they register their criticism of that decision in the process. In order to test this possibility, we included a control variable for instances of the Court revisiting a given enacting decision prior to a given year in our data set. The results from this test are presented in table 4. The number of critical circuit courts variable and its quadratic terms remain statistically significant.[12] The positive coefficient on this new variable indicates that the Supreme Court is actually more likely to revisit cases after an initial revisit, and this effect

12. The complexity of a case, the ideological distance between the enacting Supreme Court and the potential revisiting Supreme Court, and if the enacting decision struck down a state statute are no longer statistically significant when we control for prior revisiting, which is itself significant.

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Table 4. Impact on Probability of a Revisit When Controlling for Prior Revisiting

	Coefficient
Number of critical circuit court opinions	.01
	(.05)
Number of critical circuit courts	.52*
	(.13)
Number of critical circuit courts^2	−.13*
	(.05)
Number of critical circuit courts^3	.01*
	(.00)
Number of concurring opinions in enacting decision	.13*
	(.04)
Complexity of enacting decision	.06
	(.03)
Ideological distance between SC terms	.27
	(.14)
Number of dissenting votes in enacting decision	.10*
	(.02)
Salience of enacting decision	.27*
	(.09)
Enacting decision struck down a federal law	.13
	(.21)
Enacting decision struck down a state law	−.32
	(.17)
Cumulative citations in circuit courts	<.01*
	(.00)
Prior revisits	.68*
	(.08)
Constant	−3.48
	(.13)
Observations	41,149

Note.—Fixed effects of issue area variable: civil rights: −.26* (.10); First Amendment: −.30* (.13); due process: −.24 (.17); privacy −.16 (.21); attorneys: −.35 (.27); unions −.60* (.26); economic activity: −.33* (.10); judicial power: −.40* (.12); federalism: .04 (.13); federal taxation: −1.10* (.34); miscellaneous: −.68 (.51). Standard errors are in parentheses.

* $p < .05$.

is seen in figure 2. A close survey of the individual cases shows that this is not a factor at least with respect to enacting cases that were treated critically by at least four circuit courts. In fact, among the set of 20 enacting cases that were criticized by four or more circuit courts, there are three distinct reasons that help explain why additional criticism is not correlated with increasing odds of Supreme Court revisiting.

First, eight of the 20 cases were overruled or partially overruled by the Supreme Court. This is, as Spriggs and Hansford (2001, 1092) show, itself a rare event with an average of only three overruled cases per term. In those cases, the most extreme version of Supreme Court negative treatment was predictably followed by criticism in the circuit courts. Of course, the Supreme Court had no reason to reassert itself against the circuits since

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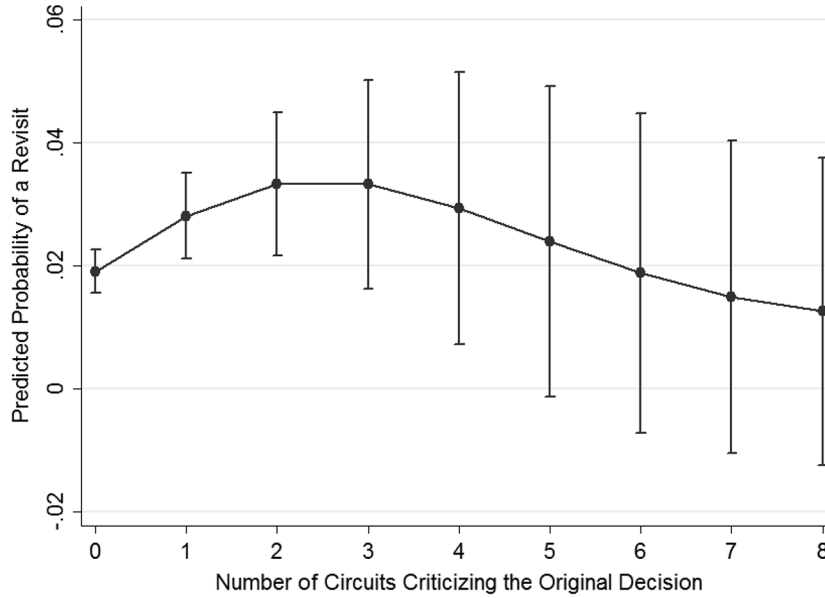


Figure 2. Impact of multiple critical circuits on the probability of revisiting (controlling for prior revisiting). Other variables are held at their means.

it would have agreed with their criticism. We also ran a test excluding case-year observations following the first negative revisit by the Supreme Court in order to check the robustness of our findings regarding the effect of circuit criticism on the Supreme Court's decision to revisit a case. This model eliminates the risk that our first model is capturing too much noise by including circuit criticisms that come after a first Supreme Court negative revisit, as any kind of criticism by the Supreme Court of an earlier enacting decision may embolden the circuits to register further criticism against the enacting decision. In that case, the causal arrow between circuit criticism and Supreme Court revisiting would almost certainly be reversed. We present the results of this test in table 5. All of the variables that are significant in our primary model remain significant in this model. The results display a nonlinear effect, shown in figure 3, which is substantially similar to the effect observed in the primary model and displayed in figure 1. The similarity between figure 1 and figure 3 appears to show that the same forces are at work. Two or three critical circuits lead to a higher probability of revisiting, as they signal to the Court that something about the original decision is in question in the courts below, whether the circuits are concerned about the substance of the enacting decision or how it applies to different kinds of cases. Meanwhile, as the number of total critical circuits increases, it slowly begins to reduce the probability of revisiting, eventually lowering it below the probability of revisiting when there are no critical circuits. Figure 1 and figure 3 both capture all instances of enacting decisions that have no revisits. Figure 1 includes the possibility for observations after neg-

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Table 5. Impact on Probability of a Revisit with the Exclusion of Observations after the First Year of a Negative Revisit by the Supreme Court

	Coefficient
Number of critical circuit court opinions	.02
	(.05)
Number of critical circuit courts	.66*
	(.14)
Number of critical circuit courts^2	−.18*
	(.06)
Number of critical circuit courts^3	.01*
	(.001)
Number of concurring opinions in enacting decision	.14*
	(.04)
Complexity of enacting decision	.07*
	(.03)
Ideological distance between SC terms	.29*
	(.14)
Number of dissenting votes in enacting decision	.11*
	(.02)
Salience of enacting decision	.34*
	(.09)
Enacting decision struck down a federal law	.20
	(.21)
Enacting decision struck down a state law	−.38*
	(.18)
Cumulative citations in circuit courts	<.01*
	(.00)
Constant	−3.52
	(.13)
Observations	41,149

Note.—Fixed effects of issue area variable: civil rights: −.31* (.10); First Amendment: −.32* (.13); due process: −.27 (.17); privacy −.15 (.21); attorneys: −.37 (.27); unions −.69* (.26); economic activity: −.37* (.10); judicial power: −.43* (.12); federalism: .06 (.13); federal taxation: −1.18* (.34); miscellaneous: −.73 (.51). Standard errors are in parentheses.

* $p < .05$.

ative revisits, but most of the enacting decisions affecting that figure have zero revisits, just as in figure 3. Figure 1 represents a data set that includes all of the cases and years that are included in figure 3, plus additional years for the few cases in which negative revisiting has occurred. Together they show that the Court is simply less likely to revisit a case at all when the number of critical circuits is between four and nine.

The second category of enacting cases with more than three critical circuit courts includes those that were overridden or partially overridden by a congressional statute. There are eight of these cases.[13] It is no surprise that circuit courts of appeals would treat congres-

13. We included *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), in our group of cases with many critical circuit courts and statutory override, even

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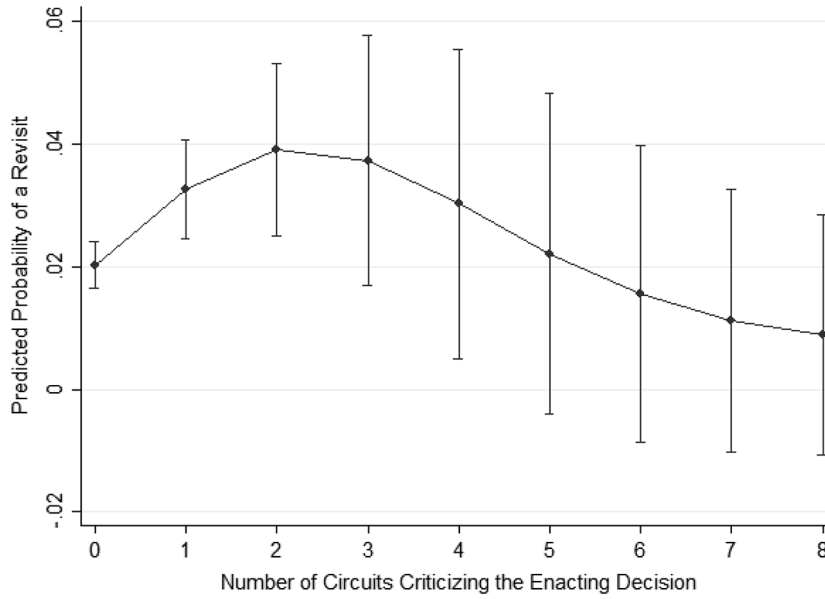


Figure 3. Impact of multiple critical circuits on the probability of revisiting (excluding observations after a negative revisit). Other variables are held at their means.

sionally overridden enacting decisions critically. Just as predictably, the Supreme Court has less reason to revisit cases in which Congress has decided to intervene, though it may respond to Congress with a new case that attempts to narrow the application of the congressional override (Christiansen and Eskridge 2014, 1442). Christiansen and Eskridge show that Congress was particularly likely to override Supreme Court decisions in the 1980s and 1990s, though Congress has overridden Court decisions much less frequently since that time. They attribute this to Congress's changing political agenda, which used to overlap considerably with topics that were often the subject of congressional override such as civil rights and workplace rules (1351). All of the enacting cases in our set with more than three critical circuit courts and that were subject to congressional override occurred in the late 1980s and early 1990s, which corresponds to Christiansen and Eskridge's findings.

The third set of these cases suggests the possibility that our results are capturing the unwillingness of the Court to become repeatedly involved in some particularly complex or messy issues, or at least the unwillingness of the Court to confess to having effectively

though it attempted to correct the Court's interpretation of constitutional law by making it clear what Congress's intentions toward burdens on religious believers as a result of generally applicable law would be in the future. The Religious Freedom Restoration Act's effect on *Employment Division v. Smith* is substantially the same on future Supreme Court revisiting and critical circuit court behavior as conventional statutory overrides.

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overturned an earlier precedent. Another possibility in this set of cases is that the Court recognizes some of the problems with its own earlier precedent and wants to leave the circuit courts as free as possible to circumvent problems presented by the earlier precedent. The remaining four of the 20 cases fit in this category. In *United States v. Salerno*, 481 U.S. 739 (1987), the Court held that facial challenges to congressional acts could be successful only if challengers showed that the act would be invalid under all circumstances rather than some set of circumstances. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), one of the dissenting opinions alleged that the Court had abandoned the *Salerno* standard, instead allowing facial challenges if the act would be void under a given set of circumstances rather than all circumstances. The majority opinion was silent on *Salerno.* Between 1995 and 2005, five separate courts of appeals treated *Salerno* critically in eight cases by citing its apparent contradiction with *Planned Parenthood v. Casey.* The Supreme Court waited until 2008 to revisit its enacting decision, and in that case it meekly asserted, "While some Members of the Court have criticized the *Salerno* formulation, all agree that a facial challenge must fail where the statute has a 'plainly legitimate sweep'" (*Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 [2008], citing *Washington v. Glucksberg*, 521 U.S. 702 [1997]). Even when the Court finally did revisit the case, it refrained from settling the question.

The Supreme Court similarly refrained from revisiting a habeas corpus case, *Harris v. Reed*, 489 U.S. 255 (1989), after it initially followed its enacting case five times in the same term in which the case was enacted. Two years later, the Court distinguished *Harris* from *Coleman v. Thompson*, 501 U.S. 722 (1991), to the dismay of the dissenting justices who alleged a contradiction between the two cases. Four circuit courts of appeals treated *Harris* critically between 1991 and 1997, pointing to a possible disjunction between *Harris* and *Coleman*. When the Supreme Court finally revisited the case in 2016 (a year we do not include in our data), it followed both earlier cases without drawing attention to a possible disconnect. In its treatment of *Harris*, the Court either has been unwilling to admit to overruling its earlier decision or has been unwilling to settle the apparent disconnect between the two cases by setting new standards that might have unforeseen consequences in a complicated area of law. Likewise, the Court's decision in *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989), which dealt with due process liberties for prison inmates, was later distinguished (and explicitly not overruled) by *Sandin v. Conner*, 515 U.S. 472 (1995). Six circuit courts subsequently treated *Thompson* critically, with some courts treating *Thompson* as having been effectively overruled while others expressed uncertainty as to the status of *Thompson*. The Court has refrained from revisiting this case, though it has cited *Thompson* as if it were still good law.

The final case of this set of four, *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), was another instance of the Court's unwillingness to settle confusion resulting from two apparently contradictory lines of cases. In *Almendarez-Torres*, the Court held that it was acceptable for grand jury indictments not to include possible aggravating factors that would lead to a harsher sentence if convicted. Two years later, in *Apprendi v. New*

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Jersey, 530 U.S. 466 (2000), the Court held that aggravating factors apart from, possibly, a prior conviction must be shared with a jury prior to conviction. The Court treated *Almendarez*, since it dealt with prior convictions and a grand jury, as an exception to the general rule. Eight circuit courts (seven in our data set ending in the 2013 term) in 19 cases subsequently drew attention to the problem of reconciling the two Supreme Court cases. While *Almendarez* has been criticized by several concurring opinions since *Apprendi*, the Court majority has never revisited the earlier precedent to clear up the confusion. Taken as a whole, these four cases are an example of the Supreme Court's occasional unwillingness to step in and clarify certain areas of law, even after numerous treatments by circuit courts of appeals. This, combined with the lack of Supreme Court revisiting following its own decision to overturn cases or a congressional override, corresponds to our nonlinear finding that shows a decrease in the odds of revisiting a case once more than three circuit courts of appeals have criticized an enacting decision.

These results reemphasize the importance of the number of critical circuit courts to the Supreme Court's decision to revisit a case. The results also reinforce the institutional role of the circuit courts. Even though the number of critical opinions from the circuit courts is not statistically significant, the number of critical circuit courts remains strongly significant. Whether we examine the probability of any revisit or the probability of a revisit before the first negative revisit, the Supreme Court is more likely to revisit a case if multiple circuit courts of appeals have registered their objections.

DISCUSSION AND CONCLUSIONS

As we hypothesized, our results show that legal and institutional factors, particularly criticism from the circuit courts of appeals, the legal complexity of the original case, the closeness of the vote at the time of the enacting case, the number of concurring opinions, and whether the subject matter is a naturally recurring legal issue (captured by our circuit citation variable), affect the probability that the Court will revisit a case in a particular term. This finding lends support to the notion that revisiting has a generally healthy though complex relationship to the rule of law. Our evidence shows that the Supreme Court takes notice of circuit court criticisms in its institutional and independent capacity. This finding indicates that, if the Supreme Court issued an unwise, controversial, or simply unclear enacting decision, there are institutional mechanisms in place that give the Court the chance to revisit the earlier case. This effect would strengthen the rule of law because an institutional mechanism, not just the personal preferences of the justices, can lead them to reconsider unwise and unclear decisions.

Criticism from the circuits may prompt both positive and negative reactions from the Court. The fact that revisiting can lead to an impression that one case could be decided differently from the next might undermine the rule of law, but since legal or institutional factors have some effect on the justices' decision to revisit, this danger of caprice is reduced. In any case, the justices "follow" the enacting decision in the vast majority of cases that

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they revisit, which itself shows that radical change from one case to the next within our time span was an infrequent occurrence. While further research must be done to consider the possibility that the circuit courts are merely standing in as ideological signals when they criticize Supreme Court decisions, the overwhelming percentage of positive revisiting suggests that the interaction between the circuit courts of appeals and the Supreme Court, when it comes to revisiting cases, is not simply an example of the Supreme Court responding to ideological signals.[14] Finally, the Supreme Court's responsiveness to circuit criticism, combined with the overwhelming number of reaffirmations of earlier decisions, shows that the Supreme Court is capable of enhancing the rule of law by reining in circuit courts that criticize the Supreme Court's earlier opinions.

This analysis represents the first cut into a new area of inquiry, the revisiting behavior of the Supreme Court. In a future paper we plan to address more factors in the relationship between criticism of the Court's decisions and revisiting. We would like to incorporate data from nonmajority criticism in concurring and dissenting opinions at the circuit level, as well as data from state supreme courts in order to determine if the effect of state supreme courts is similar to that of circuit courts of appeals. In addition, we plan to examine in more detail other key factors found to have a statistically significant relationship with revisiting, including the presence of concurring opinions in the enacting case and the ideological distance between the enacting Court and later Court terms.

The findings of our study provide significant insight into the circumstances under which the Supreme Court revisits earlier cases. The decision to revisit a case acts as a strong signal. The Court will either reaffirm that case or alter the scope or substance of the decision. In either event, revisiting generally acts as an indication of something the justices consider to be important and points to issues that are legally or publicly controversial. Given their limited time and their relatively small docket, the justices likely have a reason for wanting to revisit cases. We find that criticism from the circuit courts of appeals, among other factors, increases the chances that the Court will revisit a prior case. These findings provide the first empirical contribution to an improved understanding of when the Court decides to revisit cases and why it may choose to do so.

14. It is a complex task requiring its own, separate analysis to aggregate the ideological distances across time and across circuits in a sensible way, especially since it is not clear a priori whether ideological proximity or distance between the Supreme Court and the criticizing courts should be more likely to provoke an instance of revisiting. Even if this were clear, would such a measure be additive? Or would it involve taking an average of the ideological distance between the potential revisiting Court in a given year and the various circuit courts that had criticized the Court between the time of the enacting decision and the year of every potential revisiting decision? There are significant methodological problems with both of these approaches. This is a fascinating issue that merits examination in a model in which case-year is not the basic unit of analysis.

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